THE CODIFICATION ENTERPRISE: PRINCIPLED LAW REFORM AND THE INDIAN PENAL CODE

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The Indian Penal Code was enacted in 1860 and came into force in 1862, in what was then the territories of British India, as an essential constituent of colonial governance. Additionally, it was also adopted, and continues to apply, in a number of other Commonwealth jurisdictions. Its influence is also discerned even in those jurisdictions that did not fully adopt it. The IPC was the creation of Thomas Babington Macaulay, an adherent of the Benthamite "science of legislation", owing its inspiration to utilitarian jurisprudence. Despite its nineteenth-century origin, however, the IPC continues to exert a considerable influence. The "codification enterprise" has much to learn from both its successes as well as its failures. In particular, its core values of comprehensibility, accessibility, precision and certainty, democracy (in the Benthamite context of law-making by the legislature, rather than judges) and completeness, have withstood the test of time and serves as a model for law reform.

Introduction

1 The Indian Penal Code represents the first "codification enterprise" in its ambitious attempt to codify the criminal law throughout the British Empire; it is certainly the longest serving (and continuously surviving) criminal code in the common law world. Its impact has been monumental. Quite apart from the fact that it is still the definitive statement of the criminal law in India, Pakistan, Bangladesh and Sri Lanka, it was directly applied to numerous jurisdictions in Africa (Nigeria and other states in East and West Africa) and Asia (including modern Malaysia, Singapore and Brunei). In terms of its indirect impact, moreover, it has influenced codification in Canada and Australia and its impact is also discernible in the US Model Penal Code. Remarkably, while it was never "repatriated", English law reform has always been drawn to the Code.

2 During the 1870s, Sir James Fitzjames Stephen drew up a "model" draft code for England and Wales and although there were divergences, his clear inspiration was that of the Indian Penal Code. It is through Stephen's draft English Code that the Indian Penal Code's indirect influence in other parts of the British Empire and Commonwealth can be discerned. While never adopted (for a variety of reasons), Stephen's

draft code was in its turn influential in Canada, Australia and New Zealand—

> "Stephen's draft English Code of 1878 came close to success when it was referred to a Royal Commission and presented in a modified form as a Bill at Westminster in 1880. It died with the fall of the government, although the draft English Code lived on as the primary influence, combined with local consolidations in the Canadian and New Zealand Codes of 1892 and 1893 respectively."[1]

Evolution

3 The piecemeal acquisition of territory in the Indian sub-continent and the fact that the British East India Company's rule co-existed with that of the native rulers, as well as with that of the remnants of the Mogul empire, meant that by the 1830s there was a confusing mixture of laws, customs and practices. While, in theory, the English common law applied in what came to be regarded as "British India", the actual practice was very different.[2] Moreover, the British attempt at consolidation of the imperial power in India necessitated a centralized unity of administrative control allied with uniformity of the laws and judicial systems in all parts of British India—including the "native" courts and the proto-Syriah courts administering Islamic Law (as it was understood throughout the Mogul Empire).[3] By the 1830s, the Governor-General had become the sole authority for promulgating laws for all persons (even though Muslim law remained exempt) and all the courts of justice (apart from the courts administering Islamic Law). In

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[1] Chan, Wright, Yeo (eds), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (2011, Ashgate, Farnham) at 11. See also Ferguson, "From Jeremy Bentham to Anne McLellan: Lessons on Criminal Law Codification", in Stuart, Delisle and Manson (eds), *Towards a Clear and Just Criminal Law: A Criminal Law Reports Forum* (1999, Carswell, Toronto), 192. As far as Australia (where criminal law is a state, not a Federal, matter) is concerned, the codes in Western Australia, Queensland, Tasmania and the Northern Territory can trace their descent through Stephen's English Code.

[2] Further reference may be made to Stokes, *The English Utilitarians and India* (1989, Oxford University Press, Delhi), Part III, "Law and Government", at 140–149.

[3] In many ways, this prefigured the "modern" concept of "governing through crime", extensively described by Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (2007, Oxford University Press, Oxford).

an attempt to introduce some degree of rationality, the first Indian Law Commission of 1834 was constituted under the British Charter Act of 1833 as an investigation into the jurisdiction, powers and rules that were applied by courts that had often been hastily established and cursorily manned.[4]

4 This first Commission was headed by Thomas Babbington Macaulay, whose status was that of the "Law Member" of the Governor-General Council and who assumed a short time later the chairmanship of the first Law Commission. He left for India in 1834, empowered by Parliament to draft a criminal code for British India.[5] From his various letters and reports, it is clear that Macaulay was an *apparatchik* of the Empire, in his belief that India's only salvation lay in her wholesale Anglicization.[6] There were eventually to be four pre-independence Law Commissions: 1834, 1853, 1861 and 1870—the first and the last worked in India while the second and the third had their entire sittings in England. Needless to say, no Indians were employed.[7]

5 Within a relatively short period of time, by modern standards, the first draft was complete and Macaulay's Penal Code was submitted to the Governor-General of India in Council in 1837.[8] It was then circulated to the judges and law advisors of the Crown. In 1845, another commission was appointed to review the Code. This commission submitted its report in two parts; one in 1846 and the

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[4] It is an interesting reflection that a similar impulse led to the first investigation into the nature of the law that was applied in the Channel Islands: *First Report of the Commissioners Appointed to Inquire into the State of the Criminal Law in the Channel Island (Jersey)*, (1847, HMSO, London).

[5] Over a period of time, Macaulay's Code came to be applied to all constituent parts of pre-Independence India.

[6] Details of Macaulay's letters and reports are found in: Indian Law Institute, *Essays on the Indian Penal Code: Published on the Centenary of the Indian Penal Code* (1962, Tripathi, Bombay), Introduction, at 33. See also Trevelyn, *The Life and Letters of Lord Macaulay* (1923, Longmans, Green and Co, London).

[7] It is an obvious point (but nevertheless worth repeating) that the term "Indian" in the context of early colonial rule often referred to employment in India and not to ethnicity; an "Indian" civil servant or an "Indian" Law Commissioner was certainly not ethnically Indian.

[8] The speed at which this was accomplished is especially noteworthy bearing in mind that Macaulay remained in India for no more than three and a half years: see Stokes, *supra*, note 2, at 190.

other in 1847. There was initial opposition by the "old guard" led by Sir H Compton (Chief Justice, Supreme Court at Bombay, who observed (in the terms common to opponents of codification)—

> "[In] drafting a Penal Code which sought to be substituted for all the systems which then prevailed, what the Law Commissioners had done was not intended by Parliament; Parliament did not think it expedient to change the whole penal jurisdiction of British India. According to Sir H. Compton [and others], the existing penal laws could be modified by additions and alterations, the utility or the need of which had been evinced by experience."[9]

6 This was further revised by the Law members of the Governor-General's Council and then submitted to the Supreme Court in Calcutta on 30 May 1851. This was then remitted to the Court of Directors of the East India Company. At that point, the course of events was overtaken by the Indian Mutiny of 1857. One direct consequence of this was that in 1858 Parliament withdrew the rights and privileges of the East India Company, leading to direct British rule.[10] The first reading of the Indian Penal Code occurred on 28 December 1858. After completion of the legislative process, it was then passed to the Legislative Council of India and received the assent of the Governor-General on 6 October 1860 and came onto the Statute Book as the Indian Penal Code (45 of 1860).[11] It finally came into force on 1 January 1862.

7 It should be noted that although revisions and modifications took place throughout this process, Macaulay's original draft remained

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[9] Indian Law Institute, *supra*, note 45, at 37–38.

[10] See, among others, Harris, *The Indian Mutiny* (2001, Wordsworth Editions, Ware); Hibbert, *The Great Mutiny: India 185*7 (1980, Allen Lane, London).

[11] For the historical details, reference may be made to the Law Commission of India: www.lawcommissionofindia.nic.in (last viewed 25 August 2016). The four pre-Independence Law Commissions (of 1834, 1853, 1861 and 1879), later including Sir James Fitzjames himself, were responsible for an array of legislation based to a greater or lesser degree on English law that continues to apply in the Indian sub-continent and also, in the manner of the Penal Code, applied in other parts of the Empire and Commonwealth. These include the Evidence Act, the Codes of Civil and Criminal Procedure and the Contracts Act. The Contracts Act, in particular, demonstrates the manner in which basic principles of the English common law (the principles of offer, acceptance and consideration) were accepted but modified by other reforms (including the "new" principle that past consideration was good consideration).

mostly intact—in itself a remarkable achievement for any draftsman and justification for history's description of the Code as the Macaulay's Code.

The misnomer of codification

8 The term "codification" suffers from the misapprehension that Macaulay's Code was "merely" a codifying of the existing English common law. Macaulay did not "merely" transmute the common law into a piece of legislation. Instead, the codification enterprise of the first Law Commission under his controlling chairmanship was an entire *reformulation* of what the criminal law *ought t*o be and a rejection of everything that was considered to be defective with the existing common law. The framers of the Code were, in effect, engaging in an extremely ambitious enterprise, that of eliminating all the myriad inconsistencies and centuries-old illogicalities of the English criminal law—

> "[The drafters] were not merely codifying English law even though English law was largely in their minds . . . [L]ater judges *assumed* that the code was following English law. In the late Victorian era it was easy to make such an assumption; it was a period when Englishmen thought that the English and their institutions had reached the highest perfection and it but natural that the rest of the world and particularly the non-European part of it desired to copy them."[12]

And again—

> "The English law and its procedure were found so defective that it could be reformed only by being entirely taken to pieces and reconstructed."[13]

9 The early decisions based on the Code clearly recognize that the Code principles were a new creation. In cases such as *Goranchand* and *Govinda*[14] (dealing with the new categorization of unlawful killings as either murder or culpable homicide not amounting to murder), the judges made clear their understanding that the draftsmen of the Code had not undertaken merely to codify the existing common law (using the conventional distinction between murder and manslaughter). Further, their refusal to countenance the citation of English cases

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[12] Indian Law Institute, *Essays on the Indian Penal Code: Published on the Centenary of the Indian Penal Code* (1962, Tripathi, Bombay), Introduction, at iv (emphasis added).
[13] *Ibid*, at 37.
[14] (1866) 5 WR (Cr) 45 and (1868) ILR 1 Bom 342, respectively.

demonstrated an understanding that Macaulay and his fellow Commissioners deserved high praise for their reform of the uncertainties and ambiguities for an offence that involved capital punishment.

10 This was something recognized by his contemporaries. As Stephen put it—

> "The Indian Penal Code is to the English criminal law what a manufactured article ready for use is to the materials of which it is made."[15]

11 As Eric Stokes has pointed out, "Macaulay had broken completely with any attempt at a code which was a mere consolidation of existing law".[16] Even further, Macaulay and his fellow Commissioners were willing to be inspired and to openly acknowledge a wide range of disparate influences, including the civil law systems—something of particular resonance to Jersey—

> "We have also compared our work with the most celebrated systems of Western jurisprudence . . . We have derived much valuable assistance from the French Code and from the decisions of the French Courts of Justice on questions touching the construction of that Code. We have derived assistance still more valuable from the Code of Louisiana."[17,18]

12 It should be noted, however, that later judges (and commentators) appeared to forget this cardinal principle. The mistaken belief that the Indian Penal Code *must* have followed the principles of the English common law has led to many difficulties—not just in India but also in the other jurisdictions that have adopted the Code. In particular, there has been an insidious trend to incorporate later decisions of the English courts and even later English legislation, forcibly shoe-horning these into the Code structure and thus freshly creating those very inconsistencies and illogicalities that Macaulay had intended to avoid.

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[15] James Fitzjames Stephen, in Trevelyn, *The Life and Letters of Lord Macaulay* (1923, Longmans, Green and Co, London) at 303.

[16] Stokes, *supra*, note 2, at 223.

[17] Indian Law Institute, *supra*, note 8, at 37.

[18] There is strong evidence that, in the manner in which offences were structured and the primacy accorded to public offences (rather than offences against the person), Macaulay was much influenced by the French *Code Penal*; see Stokes, *supra*, note 2, at 228.

13 A case in point was the English decision in *DPP* v *Beard*.[19] The House of Lords decision led to the legislation which replaced the original Penal Code provisions on intoxication.[20] That this was not an "improvement" can be discerned in the continuing debate in these jurisdictions regarding the overlap between insanity and "unsoundness of mind" and the uneasy fit with the other Code defences. It is submitted that the process of "common law infiltration" was aided by the fact that for a considerable period of time, the Privy Council constituted the highest court of appeal for many of the jurisdictions where the Code had been applied; the temptation for the judges sitting in London to apply common law was not always resisted.

The science of legislation

14 Macaulay was a man of his time and influenced by contemporary political thought—notably by the utilitarian principles of Jeremy Bentham, as mediated through the work of John Stuart Mill.[21] To Bentham and the jurists of the early 19th century, India represented the ideal "laboratory" to test out their theories of law (with the ultimate goal at achieving "their" version of law reform in the mother-country), but "it was left to Macaulay to make the matter one of practical politics".[22]

15 As David Skuy puts it—

> "The Indian Penal Code did not represent Britain's attempt to modernize India's primitive criminal justice system; but rather reflected Britain's attempt to modernize its *own* primitive criminal justice system."[23]

16 While Macaulay had initially expressed strong criticism of Mill and the Utilitarian philosophy of law and politics, it is clear that he later "acknowledged his respect for Bentham's contribution to

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[19] [1920] AC 479 (HL).

[20] Sections 85 and 86 of the Penal Codes of both Malaysia and Singapore.

[21] Mill had been influential in the early scrutiny of the administration of law in India. Further, in evidence given to the Select Committee of 1832 regarding the administration of English law in India, "Mill had rehearsed the chief tenets of Bentham's doctrine of jurisprudence." Stokes, *supra*, note 2, at 184.

[22] *Ibid*, at 219.

[23] Skuy, *Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System of the Nineteenth Century* (1998) 32 (3) *Modern Asian Studies*, at 513, 517(Cambridge University Press), emphasis added.

jurisprudence"; Mill had in fact canvassed Macaulay's appointment.[24] Specifically, Macaulay was in thrall to the central Benthamite emphasis on "the science of legislation" set against the caprice of judicial law-making.[25] To Macaulay—

> "a good code should have the qualities of precision and comprehensibility and should reflect *legislative* rather than *judicial* law-making . . ."[26]

17 This is something that the modern Law Commission of England and Wales harks back to—

> "[S]ince the criminal law is arguably the most direct expression of the relationship between a State and its citizens, it is right as a matter of constitutional principle that the relationship should be clearly stated in a criminal code, the terms of which have been deliberated upon by a democratically elected *legislature*."[27]

18 One final point needs to be made regarding the Penal Code as it evolved under Macaulay's direction. This is the direct debt owed to Bentham's rational humanitarianism and his campaigns against cruel punishment (including the use of the pillory, flogging and any further extension of the crimes subject to capital punishment). Macaulay fully subscribed to the Utilitarian principle that people (even convicted criminals) were to be treated as rational human beings. As evidence of this, it should be noted that flogging found no place in the original draft, despite the fact that it was commonplace in contemporary England. In fact, it was only in 1864 (almost 30 years after Macaulay accomplished his task and three years after the Code came into effect) that flogging was returned as a punishment in India.[28]

The continued endurance of the Indian Penal Code

19 Amongst the many reasons for the endurance of the Indian Penal Code, and not merely in the jurisdiction in which it first applied, was Macaulay's adherence to Bentham's principles of conciseness and simplicity—the "science of legislation"—and a foretaste of much that is wrong with the modern codification enterprise

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[24] Stokes, *supra*, note 2, at 191.
[25] See further, Trevelyn, *supra*, note 12.
[26] Chan, Wright, Yeo, *supra*, note 1, at 4 (emphasis added).
[27] Law Commission of England and Wales, *Criminal Law: A Criminal Code for England and Wales* (1989, Vol 1, Law Comm No 177, HMSO, London), para 2.2 (emphasis added).
[28] Skuy, *supra*, note 22, at 552 (Cambridge University Press).

> "I would resist the very beginning of an evil which has tainted the legislation of every great society. I am firmly convinced that the style of laws is of scarcely less importance than their substance. When we are laying down the rules according to which millions are, at their peril, to shape their actions, we are surely bound to put those rules into such a form that it shall not require any painful effort of attention or any extraordinary quickness of intellect to comprehend them."[29]

20 The Indian Penal Code is remarkable in its drafting, compared not just with comparable legislation of the 19th century but also with that of the 21st century.[30] In particular, "Macaulay had introduced . . . the ordinary, pellucid and exact English of his country's philosophical tradition".[31]

21 Ironically, it is to Macaulay's inherent distrust of "judicial law-making" that we owe the endurance of the Indian Penal Code. The only way to avoid, or at the very least, to minimize judicial discretion (and avoid common law "infiltration") was to aim for clarity and precision. It was only in this way that it was possible to displace the common law entirely—

> "There are two things which a legislator should always have in view while he is framing laws: the one is that they should be as far as possible precise; the other that they be easily understood . . . [A] loosely worded law is no law, and to whatever extent a legislature uses vague expressions, to that extent it abdicates its functions, and resigns the power of making laws to the Courts of Justice."[32]

22 These sentiments, expressed in 1838, are just as true today and serve as a criticism of well-meaning attempts at modern legislation and modern attempts at codification. They also go a fair way towards explaining why the draft Criminal Code for England and Wales remains only in draft form. Macaulay's Code also sets the benchmark standards for the modern codification enterprise, whether in Jersey or elsewhere. It should be conceded, however, that in one particular

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[29] Macaulay, *Minute*, 11 May 1835; quoted in Stokes, *supra*, note 2, at 199.
[30] Comparison could be made, for instance with the tortuous definition of the defence of "lack of control" defence relating to voluntary manslaughter, contained in ss 54 and 55 of the Coroners and Justice Act 2009 (UK).
[31] Stokes, *supra*, note 2, at .230.
[32] Macaulay, Macleod, Anderson and Millet, *A Penal Code Prepared by the Indian Law Commissioners* (1838, Pelham Richardson, London; reprinted by Lawbook Exchange Ltd. 2002), at v.

aspect Macaulay and his fellow law commissioners had an advantage not open to modern reformers. A modern code needs to secure the consent of a democratically elected legislature (another reason for the failure of the draft Criminal Code to make it to the statute books) and to be accepted by the general population to which it will apply. Colonial government in India did not have any need to satisfy this essential requirement—

> "[The] fact that only India ended up with a criminal code illustrates that imperial powers were often able to do in their colonies what they were unable to do at home."[33]

23 The Indian Penal Code may have been the crowning jewel of imperial law but it was one that was imposed on the diverse populations of British India with scant regard to the issues of democracy and consent. The views of Sir James Fitzjames Stephen were representative as an indication that "the destruction of indigenous law was legitimate" and would usher in "the new regime of peace, law, order, unrestricted competition for wealth, knowledge, honours and education."[34]

24 Nevertheless, the Code worked its legislative magic; it constituted an essential unifying force and was largely responsible for the imposition of the Rule of Law in a part of the Empire that had been largely governed with caprice and serving avarice. Arguably, it also restored "the moral legitimacy of British rule".[35]

The structure of the Code

25 Andrew Ashworth, in describing the "contours of criminal liability" sets out the view that criminal law typically encompasses three primary concerns: range, scope and conditions[36]—

> *Range*: the types of activity (conduct) that should (ought) to be criminalized, and encompassing the whole range of offences.
>
> *Scope*: the extent to which the law will criminalize inchoate offences (principally conspiracies, attempts and incitements).

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[33] Skuy, *supra*, note 26, at 514.

[34] *James Fitzjames Stephen: Portrait of a Victorian Rationalist*, quoted in Skuy, *ibid*, at 514.

[35] Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles", Chapter 2 in Chan, Wright, Yeo (eds), *supra*, note 1, at 20.

[36] Ashworth, *Principles of Criminal Law* (6th ed, 2009, Oxford University Press, Oxford),at 5–7.

Conditions: the constituent fault elements (including "strict liability') and accompanying defences.

26 It is this "interplay between the *range* of offences, the *scope* of liability, and the *conditions* of liability"[37] that confers essential legitimacy to the system of criminal justice.

27 Macaulay's grand ambition was to create a Code that dealt, in one all-encompassing document, with *all* these concerns. The test of time has demonstrated that he succeeded but it also raises the question of whether it is ever possible to reach the same achievement in the 21st century and whether the modern codification enterprise is doomed to failure—as perhaps demonstrated by the failure of the Law Commission's Draft Criminal Code for England and Wales.

28 The vast structure of the Indian Penal Code was one mechanism to further restrict the judicial law-making that Macaulay so distrusted and to further strengthen the Code. The starting point was to set out the various offences, organized in a rational order. At the same time, this structure, together with the sheer detailed exposition of offences (briefly indicated here), serves as a daunting model of what it meant to create a Code that has lasted for over 150 years. It would be difficult to imagine any modern code attempting the breath and range of ambition that Macaulay achieved[38]—

Part I (following a brief Preamble): Dealing with the extent of operation of the Code, as well as exemptions and including extra-territorial offences.

Part II: General Explanations, including definitions and the explanation of certain terms pertaining to mental states such as "dishonestly, fraudulently and voluntarily"; it should be noted that apart from these there was no "General Part" setting out other *mens rea* terms such as "intention".

Part III: Punishments—needless to say, it is this part of the Code where a number of major amendments have been made. This part does not prescribe the specific punishment for each specific offence but explains certain basic principles such as commutation of death sentences, life imprisonment and solitary confinement.

Part IV: General Exceptions—it should be noted that the exceptions (defences) were far greater in number, and to a more

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[37] *Ibid*, at 7.

[38] This summary below is taken from the current form of the Code: Ratanlal and Dhirajlal, *The Indian Penal Code* (31st ed, 2006, New Delhi, Wadhwa and Co).

refined degree, than any that had existed in contemporary English law. It is also remarkable that the definition of certain defences took a form that that was only achieved in English law in modern times. An instance of this is s 95: "Act causing slight harm", dealing with the common law principle of *de minimis non curat lex*. Another case in point is the definition of consent, that would survive any modern scrutiny.

Part V: Abetment and conspiracy—the 15 detailed sections in this Part dealing with abetment represent an achievement of draftsmanship in themselves; two further offences on conspiracy were added later in 1911.

Part VI: Offences against the State.

Part VII: Offences relating to the Armed Forces.

Part VIII: Offences against public tranquility.

Part IX: Offences relating to civil servants (a later Part IXA was added specifically for offences related to elections).

Part X: Contempt of the lawful authority of public servants.

Part XI: Offences of false evidence and offences against public justice (this Part alone comprises 38 separate sections).

Part XII: Offences relating to coin and government stamps.

Part XIII: Offences relating to weights and measures.

Part XIV: Offences affecting public health, safety, convenience, decency and morals; the fact that some of these offences appear anachronistic should be set against the provisions of the remaining English Offences Against the Person Act 1861.

Part XV: Offences relating to religion.

Part XVI: Offences affecting the human body—including homicide, the various forms of assault, sexual offences, kidnapping and false imprisonment, and compulsory labour.

Part XVII: Offences against property (84 separate sections).

Part XVIII: Offences relating to documents and property marks.

Part XIX: Criminal breach of contracts of service.

Part XX: Offences relating to marriage. A new Part XX-A (dealing with cruelty by the husband or his relatives) was later added.

Part XXI: Defamation.

Part XXII: Criminal intimidation, insult and annoyance.

Part XIII: Attempts.

29 For almost all the offences set out above, the Code begins with the definition of the offence, followed by *Illustrations*, i.e. set-piece examples, demonstrating the manner in which the offence is be understood and applied. These are an integral part of the Code, although in the event of any ambiguity, it is the offence definition that prevails.

30 For instance, s 299 (dealing with culpable homicide not amounting to murder) is followed by three *Illustrations*, which deal with the ambit of the section and explain a number of corollary principles, including the principle of transferred malice. These are then followed by three further *Explanations*, dealing with issues such as acceleration of death, some matters of causation, including causing death in the womb. A similar structure accompanies s 300 (culpable homicide amounting to murder, with the added refinement that there are four "degrees" of murder and five "exceptions" (what English law recognizes as specific defences). It was in this way also, that the Code attempted the task of making the criminal law accessible; the dry legislative definition was offset by "examples" taken from ordinary life.

31 The distinctions drawn between murder and culpable homicide not amounting to murder rank, in themselves alone, as one of Macaulay's greatest achievements, in his fine-tuning of the elements that mark out the requisite blameworthiness for each offence respectively. It is submitted that some of the difficulties that have arisen (both in India as well as in the other Code jurisdictions) have been due to the confusion caused by trying to find approximations of these offences (and defences) in English law and to cite the decisions of English courts.[39]

A modern evaluation: towards future reform

32 In Andrew Ashworth's critique of the proliferation (coupled with inconsistencies) of criminal legislation in England and Wales,[40] he provided an exposition of the four "core" interlinking principles that would constitute "a principled" criminal law—

> Criminal law should only be used to censure persons for substantial wrongdoing.

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[39] Further reference may be made, for instance, to Yeo, Morgan, Chan (eds), *Criminal Law in Malaysia and Singapore* (2nd ed, 2012, Lexis-Nexis, Singapore).

[40] Ashworth, "Is the Criminal Law a Lost Cause?" (2000) 116 *Law Quarterly Review* 225.

> Criminal laws should be enforced in a manner that is respectful of equal treatment and proportionality.
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> Persons accused of substantial wrongdoing ought to be afforded the protections of due process (in minimum form as declared in the European Convention on Human Rights).
>
> Maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing.

33 As a commentator has pointed out—

> "With these themes, Macaulay and all committed codifiers after him would no doubt have little with which to disagree. Principled law-making is not just about consistency, compatibility and comprehension."[41]

34 In particular, the modern Code jurisdictions have constantly struggled with the problems of reconciling the Penal Code with the Bill of Rights that exist in their Constitutions. This is especially the case with issues such as freedom of expression and sexual equality. In relation to homosexuality, for instance, s 377 criminalizes sexual activity "against the order of nature". The ruling by the Delhi High Court in July 2009, that this violated the constitutional guarantee of equality in the Constitution, was overturned by the Supreme Court in December 2013.[42]

35 No one would suggest that the Code does not require reform. In their attempts to deal with the defects of the common law, it could be argued that Macaulay and his fellow reformers were responsible for other ambiguities.[43]

36 The Benthamite ideals of "scientific" law reform and law-making have, perhaps, been rendered obsolete in the 21st century, particularly under the imperative of human rights ideology. But judged against almost any standards of law reform in the common law world (and beyond) Macaulay's Code has, it is submitted, stood the test of time.

37 The Indian Penal Code, when first implemented, was well ahead of its time, thanks largely to the legislative genius of Macaulay. But like

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[41] Findlay, "Principled Law Reform: Could Macaulay Survive the Age of Governing through Crime", Chapter 15 in Chan, Wright and Yeo (eds), *supra*, note 1, at 368.

[42] *Suresh Kumar Koushal v NAZ Foundation*, Civil Appeal No 10972, 2013.

[43] A reflection of this may perhaps be discerned by the efforts of the law Commission of England and Wales to avoid using the conventional terms of *actus reus* and *mens rea*.

all things which are not regularly maintained and improved, the Code has become a pale shadow of its former self. Ambiguities, gaps and inconsistencies found in its provisions have been left to the courts to handle. This has also been the common experience of all the jurisdictions that have adopted the Indian Penal Code.[44]

38 Macaulay himself was well aware that a Penal Code, like democracy, required eternal vigilance—in this case, of constant review. There was a clear understanding that his Code was far, far more than a mere technical document and that (as part of Benthamite jurisprudence), it ought to reflect a number of values.

39 To this end, and in conclusion, five related core values may be used as test of continued efficacy (also useful as a benchmark for any modern code).[45]

> *Comprehensibility*: The law should be easily understood by ordinary people who may become subject to its offences and punishments.
>
> *Accessibility*: Law is much more readily accessible if embodied in a code than if it is buried in the wisdom of precedent, which is the preserve of legal experts.
>
> *Precision and certainty*: The language and expression used should be as clear and as precise as possible.
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> *Democracy*: The power to make penal laws should lie with a democratically elected legislature; one that does not abdicate its responsibility for law-making, either directly (by not enacting essential legislation) or indirectly (though enacting legislation that is open-ended and dependent on the vagaries of judicial interpretation.
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> *Completeness*: As comprehensive and exhaustive as possible, taking into consideration contemporary relevance and modernity.

40 This, it is submitted, is the ultimate challenge of the modern codification enterprise.

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[44] Chan, Wright and Yeo (eds), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (2011, Ashgate, Farnham), at 16.

[45] These are adapted from Yeo, Morgan and Chan, *Criminal Law in Malaysia and Singapore* (2nd ed, 2012, Lexis-Nexis, Singapore), at 14–16.

Criminal Law, Evidence, Legal Education and International and Comparative Law.