Macaulay, the India Penal Code and Labour in the British Empire

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In a few months-I hope in a few weeks,-we shall send up the Penal Code to Government. We have got rid of the punishment of death, except in the case of aggravated treason and wilful murder. We shall also get rid indirectly of everything that can properly be called slavery in India. There will remain civil claims on particular people for particular services, which claims may be enforced by civil action; but no person will be entitled, on the plea of being the master of another, to do anything to that other which it would be an offence to do to a free man.¹

Thomas Macaulay, a leading parliamentary contributor to the 1832 Reform Act, the 1833 India Charter Act, and the imperial abolition of slavery (1833-4), left Westminster in 1834 to take up appointment to the Governor General of India’s Legislative Council where he initiated education reforms, curbed press censorship and the special European privileges in civil proceedings, and drafted his most ambitious law reform, the India Penal Code (IPC). Completed in 1837 and enacted in 1860, the IPC was the first criminal code in the British Empire. Influenced by Jeremy Bentham’s theories of ‘scientific’ legislation and ‘universal’ jurisprudence, Macaulay’s code eliminated the common law, rationalised English criminal legislation and offered a comprehensive, modern presentation of the criminal law. It remains an impressive law reform. At the same time Macaulay’s reforms are much criticised by post-colonial and nationalist historians (the term Macaulayite is still in use to denigrate anglicised Indians) as a manifestation of imperialism under the guise of liberal reform.

How, then, is the IPC to be assessed? From the point of view of technical legal scholarship, Macaulay’s code is a groundbreaking, ambitious and generally progressive reform, a huge advance on existing English laws and in some respects, criminal laws in many common law jurisdictions to this day. It remains the case despite retrograde changes introduced in the 1860 enacted version which continued with later colonial amendments, adoptions elsewhere in British South Asia and after independence.² Such positive legal assessment stands in some contrast to the vicious attacks on Macaulay and the dismissal of the IPC by leading members of the 19th century English bar and bench who saw themselves as the guardians of the common law.³ And it can arguably be sustained despite 20th century


² See 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 (Hambledon, 1991), 145; Smith’s positive assessment is largely echoed by the editors and contributors in Wing-Cheong Chan, Barry Wright and Stanley Yeo eds., Codification, Macaulay and the Indian Penal Code: the Legacies and Modern Challenges of Reform (Ashgate, 2011).

³ Legal theorists in the late 19th century were more divided. As we shall see, Fitzjames Stephen praised the IPC and drew upon his experience with it to draft his proposed English criminal code (see JF Stephen, A History of the Criminal Law of England vol.3, London: Macmillan, 1883, 300 and discussion at notes 81-84 below). His immediate predecessor as law member of India’s Legislative Council, Henry Maine, objected to the code’s Benthamite hue, claiming ‘nobody cares about criminal law except theorists and habitual criminals’ (quoted in K.J.M. Smith, James Fitzjames Stephen: Portrait of a Victorian Rationalist Cambridge University Press, 1988, 127

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experience, and the scholarly scepticism of modern legal realists, concerning persistent judicial tendencies and the limits of legislation. That said, the ambitious legislative aims articulated by Macaulay and Bentham came out of a time of great Enlightenment-inspired optimism about the possibilities of rational reform which failed, in hindsight, to engage with the modern complexities of power. Macaulay’s legacy is certainly more problematic for historians who are inclined to examine the IPC and his other reforms in broader context. The IPC was a product of a particular time and place, a reflection of Macaulay’s privileged position, particular intellectual and cultural milieu, and the limits of his experience. Nor was the IPC a disinterested initiative, utilitarian and liberal conceits aside. It was imposed by the colonisers on the colonised and its belated enactment came after the 1857 Mutiny made it a legislative priority. The IPC involved more than the efficient local administration of criminal justice. It reflected new thinking about colonial governance. It was an attempt to reconstitute authority by making the law, and by extension colonial rule, more effective and legitimate in the face of mounting challenges to British sovereignty. From the 1830’s in particular, colonial crises and arbitrary responses to them also caused increasing concern amongst the metropole’s political classes in terms of the integrity of constitutional claims and legal bases of British power. Yet it is reductionist to dismiss the IPC as essentially an exercise in power. The complexity of colonial issues, imperial politics, policies, the merits of progressive reform initiatives, as well as the contradictions between these matters, tend to be dismissed or resolved within simplified narratives of orchestrated domination and exploitation.

This paper attempts to illustrate and come to grips with these law reform complexities, advances and contradictions by examining Macaulay’s IPC within the context of one of the key colonial issues of the 1830’s, and a cause with which Macaulay was intensely engaged, that of abolition. In particular, it explores the relationship between Macaulay’s IPC and labour transitions in the 19th century British Empire and how the frustration and limitations of Macaulay’s reforms contributed to India’s important role in the shift from slavery to indentured labour in the planter colonies. In this manner the paper also seeks to clarify the place of Macaulay’s law reforms within the larger narratives about imperial abolition and its aftermath.

I argue that the drafting and experience of the labour-related provisions in Macaulay’s IPC serve as an illustration of the limits of progressive law reforms in the face of larger political and economic forces. Colonial government reform and the abolition of colonial slavery were important policy aims in the struggles against the Tory oligarchy in the late 1820’s. The India Charter and Abolition Acts accompanied the Reform Act as key legislative achievements of the new Whig governments in the early 1830’s and Macaulay played an active or leading role in them. The colonial initiatives reflected his ‘Clapham sect’ humanitarian reform background (his father Zachary, along with William Wilberforce and James Stephen were the leading abolitionists of the previous generation) and a conversion to utilitarianism as he collaborated with James Mill on the India legislation. A clause in the Charter Act prohibiting practices of slavery had been opposed by orientalists such as Wellington, but seemed vindicated by the imperial slavery legislation passed shortly after. Macaulay was not entirely satisfied with the imperial abolition measures but soon faced his own constraints when he was appointed to the new Legislative Council of India, despite his assumption of the role and powers of a utilitarian ‘enlightened despotic legislator.’ Indigenous slavery persisted in the autonomous Princely States and too little was done to deal

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with the rapidly emerging issue of a new Empire-wide trade in indentured labour from India to plantations in British Guiana, Trinidad, Jamaica, Mauritius, Assam, Ceylon, the Straits Settlements, and Fiji, a diaspora of 1.3 million persons. Why did such a committed abolitionist, who acquired sweeping legislative powers in India, fall so short? What were the shortcomings of his IPC draft that failed to adequately address the powers and prerogatives of masters and the recruitment activities and transportation of labourers that had become evident by the time the IPC was drafted? Such failures might be attributed to liberal hypocrisy in the exercise of power, Macaulay’s psychological ambivalence about labour exploitation rooted in a fraught relationship with his father, and the waning activism of the British abolitionists. All might have been factors but perhaps more than anything the labour failures demonstrate the limits of ambitious progressive law reforms in the face of larger forces, in this case imperial economic imperatives (continuing planter interests and commercial exploitation of new trade in indentured labour associated with the demise of slave labour), and the political impulses of colonial rule, which became increasingly complex from the 1830’s.

The paper begins by situating the IPC within the wider historiographies of the British Empire as they relate to 19th century labour transitions and the law and places Macaulay within the debates about abolition and criminal law reform of his time. It then moves on to an overview of Macaulay’s criminal code, summarises its main features and focuses on the labour related provisions. The paper closes with a brief survey of the development of the imperial trade in indentured labour from India, with a detailed illustration provided by the case of Fiji.

1. The Contexts of the India Penal Code

The study of Empire has been revitalised by recent historical interest in matters such as global networks and connections, imperial administrative reform and the modernisation of colonial governance, the influence of colony and metropole on the formation of identity, and comparative colonial histories. This has opened up new avenues of scholarship and a interest in complexities that tended to be neglected in the older historiographies and their positive and negative generalisations about the British Empire. Many late 20th century historians turned to previously-neglected local experiences, social and cultural histories from below, specific national narratives, and the recovery of subordinated and diverse voices. While these matters continue to be an important focus of research, the more recent scholarship on imperial networks marks a new interest in context, larger narratives and comparative experiences neglected in past colonial histories, as well as scepticism about the teleologies of nationalism. It does not represent (with some exceptions) a nostalgic return to Empire, a retreat to the older whiggish narratives that celebrate enlightened imperial achievements and the civilising British imperial burden, or a displacement of history from ‘below’ by history from ‘above.’ Law, rather neglected in older historiographies, is part of this new scholarly interest, as reflected in the recent proliferation of scholarship on imperial legal networks and comparative colonial legal histories. The place of law in relation to issues such as colonial governance and development is explored in new narratives that account for particular local circumstances and struggles, the complexities of legal policies and directives from the

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metropole, and the role of legal ideas and practices circulating between geographically distant places, facilitated by inter-colonial migration of legal personnel.\(^6\)

In the broadest terms, Macaulay’s IPC can be framed within the legal, political and administrative challenges faced in the British colonial sphere in the second quarter of the nineteenth century. These were latent in the new imperial formation (or second British Empire) that emerged in the wake of the American Revolution, and the unresolved tensions between formal constitutional claims about the rule of law and British liberties on one hand and imperial impulses of sovereignty and economic interest. Liberal and utilitarian-inspired administrative reforms were sparked by new colonial crises and repressive responses that contradicted formal claims about enlightened British government, constitutionalism and legality.\(^7\) The largely European settler colonies, beginning with the Canadas, enjoyed increasing responsible and self-government, while South Asia and India in particular were the sites for many of the other innovations in imperial administration. As Bayly notes, reforms typically associated with the rise of the modern state, often inspired by utilitarianism and promoted through departments such as the Colonial and India Offices, mirrored reforms, and were often more marked, than domestic reform initiatives in the metropole.\(^8\)

In this vein Elizabeth Kolsky has called for further scholarship on criminal law reform in India, on the legal and political contexts that made codification such a key element of Macaulay’s vision of colonial governance, and on the relevance of codification in India to contemporary debates in England.\(^9\) She notes, “[d]espite these connections, there is a dearth of scholarship on the history of codification and empire and even fewer “intertwined” histories that place codification in European metropoles and colonial locales in a unitary field of analysis.”\(^10\)

Law reforms appear to have played an important role in the modernisation and rationalisation of colonial administration, informed by reform debates in the metropole and sparked by colonial crises and repressive responses such as resort to armed intervention and

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\(^6\) See for example John McLaren, Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800–1900 (University of Toronto Press and Federation Press, 2011); Martin J. Weiner, An Empire on Trial: Race, Murder and Justice under British Rule, 1870–1935 (Cambridge University Press, 2009) and many other recent legal historical publications.

\(^7\) See Bayly, Imperial Meridian: The British Empire and the World, 1780–1830 (Longman, 1989). Bayley writes (237–8), “Viewed in the longer term, though, the 1830s and 1840s still seem to represent a watershed in the style of government both in the colonies and Britain, though it would be naïve to see this simply as a watershed between the ancien régime and liberalism. The decline of what some Canadians called ‘Pitt’s system’ and what with justice could also be called ‘the Wellesley system’ was a long process marked by savage breaks such as the Canadian rebellion of 1837, the Great Famine in Ireland or the Indian Mutiny of 1857” See also, J.G.A. Pocock, The Discovery of Islands: Essays in British History (Cambridge University Press, 2005) 114–63.

\(^8\) Bayly’s research focuses on South Asia, and utilitarian-inspired modern informational orders that included surveys, assessments, and mapping that helped to regularise revenue collection, facilitated trade, and with transformative epistemological and conceptual dimensions that helped to promote wider allegiance, compliant identity, and public order. He also notes the development of uniform administrative, legal, and educational structures that attempted to curb special categories of subjects who claimed superior status, or alternatively were condemned to inferior status under the law -see Bayly, ‘Returning the British to South Asian History: The Limits of Colonial Hegemony’ (1994) 17(2) South Asia, 1; The Birth of the Modern World, 1780–1914, above n 5, at 247–8.


\(^10\) Kolsky, ibid, 632; See also Radhika Singha, A Despotism of Law: Crime and Justice in Early Colonial India (Delhi: Oxford University Press, 1998)
military justice. Some evidence of this is seen after the 1798-1800 Irish rebellion (criminal justice and policing) and much more after the demise of the Tory oligarchy in the 1830s, notably the 1837-8 Canadian rebellions (the initiatives of Durham and Sydenham), as well as in the wake of colonial crises such as India (1857-8) and Jamaica (1865-66). Nasser Hussain’s study of 19th century British India examines the relationship between the rhetoric of British constitutionalism and emergency, noting that, [t]he ideological justification for the British presence in India drew heavily on a much-vaunted traditions of ancient British liberty and lawfulness ... Government by rules became the basis for the conceptualization of the “moral legitimacy” of British colonial rule.”11 As Fitzjames Stephen recognized in that setting in the mid 19th century, “[t]he establishment of a system of law which regulates the most important parts of the daily life of the people, constitutes in itself a moral conquest more striking, more durable, and far more solid, than the physical conquest which renders it possible.”12 Similarly, Kostal demonstrates how the Governor Eyre controversy powerfully highlighted the contradictions between the exigencies of sovereignty and colonial rule and formal British constitutional and legal claims, prompting intense debate about the legitimacy of imperial rule amongst the Victorian political classes in London.13

As we shall see, Macaulay’s code was belatedly enacted after the 1857 Mutiny, Robert Wright was recruited to draft the Jamaica criminal code after Morant Bay, and crises elsewhere in the British Empire helped to make ambitious law reforms such as codification a legislative priority. The IPC was the first criminal code in British common law jurisdictions but it was by no means an isolated response. In this context the IPC can be understood as involving more than the more efficient administration of criminal justice. The law reform initiative was an attempt to modernise British colonial rule and manifested concerns about the effectiveness and legitimacy of that rule. Macaulay’s code sought to engender greater compliance to British rule by making the criminal law widely-known and consistently administered in a diverse and challenging frontier setting. His emphasis on equal legal status and pervasive, consistently administered, routine criminal measures aimed to entrench a more credible rule of law based authority. Effective criminal law meant more effective authority. Reliance on arbitrary forms of discretionary authority and exceptional responses to public order challenges would be reduced as would the troubling contradictions between the practices of British power and colonial rule and the formal constitutional and legal claims that accompanied them.

The intellectual background and activism of early 19th century English liberalism that imagined such law reform, and the particular strands of humanitarianism and utilitarianism reform that shaped Macaulay’s outlook, are also important contexts of the IPC. Humanitarian reform influences were transmitted by way of Macaulay’s privileged south London, activist, Anglican ‘Clapham sect’ background and his family’s close involvement with the abolitionist cause. Macaulay came to utilitarianism later, as he became established as a leading MP in the new Whig Government. As we shall see shortly, Jeremy Bentham’s ideas about criminal law reform and its important role in the modern polity were a primary influence on the way Macaulay conceptualised criminal law and drafted the IPC.

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12 ibid., at 4, quoted from J.F. Stephen’s Minute on the Administration of Justice in British India.

The older scholarship on abolition in the British Empire places emphasis on individual agency and the impact of ideas: Enlightened moral objections to slavery received increasing political attention and popular support, and parliamentary reform empowered such perspectives, leading to the legislated end to colonial practices in 1833. The abolitionist movement led by William Wilberforce, the elder James Stephen and Zachary Macaulay achieved the end of British slave trade in 1808 and its renewal in the 1820’s formed an important part of the wider struggles against the Tory oligarchy, as the issue was popularised domestically by religious non-conformists also active in missionary work overseas. The precipitating crisis of the 1831 slave insurrection in Jamaica, the Whig parliamentary victory at Westminster and passage of the 1832 Reform Act, enabled MP Thomas Buxton, supported by Thomas Macaulay and Henry Brougham, to push effectively for full abolition of slavery by way of imperial legislation. Edward Stanley engineered the government’s compromises with planter interests and James Stephen of the Colonial Office closely supervised the colonial transition. The revisionist interpretations of abolition led by Eric Williams are informed by political economy or Marxist analyses, and emphasise the declining important of slave production, to the development of a mature industrial capitalism in Britain and to the aspiration of a free trading self-financing Empire. In recent years more nuanced accounts have emerged, re-examining humanitarian reform in the context of the reciprocal influences of colony and metropole in identity formation, the development of engaged popular public opinion, as well as more rigorous studies of overseas and domestic labour transitions.14

In terms of the transition following abolition in 1833-4, the abolition literature focuses on the British West Indies, in particular the compromises with planter interests that gave rise to the temporary transitional apprenticeships for freed slaves, and the problems of supervision and administration of the apprenticeships. Macaulay had offered his resignation from the Commons on three occasions over the abolition issue (April 1831, when it seemed initially that new antislavery measures might not be a legislative priority, and in May and July 1833 when he opposed the first compromise proposal drafted by Howick and then based on his reservations about Stanley’s successful bill). He also battled Wellington over a clause in the India Charter bill, opposed by the latter, that explicitly prohibited indigenous practices of slavery. Macaulay agreed to compromise in the end and supported the imperial abolition act, but like James Stephen, he remained suspicious of planter cooperation, seeing the compulsory apprenticeships as an unworkable scheme that continued the oppression of freed slaves.15

The longer term labour transition in the planter colonies, one that implicates Macaulay’s law reforms in India, was the rapid development of an imperial network of indentured labour, much of it involving the recruitment and transportation of workers from India. It quickly replaced slavery and the temporary supervised apprenticeships of freed


15 See Thomas to Zachary Macaulay, 13, 22, 27 July 1833 and 20 September 1833, in Pinney, n.1 vol.2 269-79, 307. Thomas assisted his father Zachary to renew of the abolitionist movement in the 1820’s by editing the Anti Slavery Reporter. James Stephen junior at the Colonial Office provided his father with reports for the studies Slavery in the British West Indies Delineated, published in 1824 and 1830
slaves in the British West Indies sugar plantations, and 1.3 million migrant Indian workers eventually migrated to the planter colonies throughout of the British Empire from the mid 1830’s to the early 20th century. Use of Indian indentured labour began in Mauritius and expanded in 1838 to plantations in Demerara, British Guiana (where 340,000 migrants from India eventually arrived), Trinidad (where 145,000 migrated), Jamaica (where 40,000 migrated) as well as large numbers indentured to tea plantations in Assam and Ceylon, rubber plantations in the Straits Settlements, and sugar plantations in Fiji.\(^1\)

The Anti Slavery Society criticised the emerging system as a new form of slavery but moral activism focused on continuing practices of slavery outside British jurisdictions and there was a declining interest and cynicism about conditions in former slave colonies by mid century. Nor does it appear that Macaulay himself was able to sustain much abolitionist fervour in India itself. Indigenous slavery practices persisted until the late 19th century in the autonomous Princely States and there seemed little appetite to enforce imperial legislation over local treaty arrangements or outside East India Company controlled areas. Moreover, the rapidly expanding trade in indentured labour from India suggests failure in Macaulay’s own law reforms in relation to the new form of plantation labour. As we shall see, the exploitation of indentured workers was made possible by the elaboration of criminal sanctions in colonial Master and Servant laws, enforced through the sweeping powers of appointed local special magistrates, whose office had been originally created to supervise the 1834-8 West Indies apprenticeships. James Stephen, who earlier battled planter-dominated colonial governments over amelioration measures for slaves and the administration of the apprenticeships, attempted vigilant Colonial Office supervision of indenture contracts. Imperial supervision became more sporadic after the late 1840’s and direct engagement with the issues by the Colonial and India Offices was sidetracked by the creation of the Colonial Land and Emigration Commission which acted as arbiter between interests in India and the planter colonies. And in British India where Thomas Macaulay had relatively unconstrained local legislative influence, potential obstacles to the rapid development in imperial trade in indentured labour appear to be minimised. While there was some attempt by Macaulay and successors the colonial government in India to regulate abuses by planter agents in the recruitment and transportation of workers, the indenture system continued to expand relatively unhindered until the early 20th century.\(^2\) In short, the IPC and related reforms were ineffective in curbing both old and new forms of labour exploitation.

* Early 19th century law reform efforts in the metropole itself are another important context of the IPC. Utilitarian reform ideas, and in particular Jeremy Bentham’s contributions to the criminal law reform debates, had a most direct influence on Macaulay’s approach to crafting a criminal code. The period of the 1820s and 1830s saw wide ranging reforms to English criminal law and its administration but criminal law codification was never realised domestically. Macaulay’s IPC, later adopted in other British South Asian colonies, was the first of several criminal codes developed in the 19th century British Empire. It was also an important reference point for two later rather less bold codifications: Robert Wright’s Draft Jamaica Code (1877), a model for those enacted elsewhere in the West Indies and beyond,\(^1\)

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\(^{2}\) See Northrup and Mangru, ibid, and chapters by Banton, Turner, and Anderson in Hay and Craven, ibid.
and Fitzjames Stephen’s Draft English Code (1878-1880), the main external reference for a wave of British self-governing jurisdiction codes at the end of the century (Canada, 1892, New Zealand, 1893 and Queensland, 1899).\footnote{Stephen’s code was the closest England and Wales came to codification (a bill, based on Stephen’s draft died with the fall of the government in 1880), although efforts have continued, most recently the Law Commission’s failed effort from 1968–2008. Unlike the IPC, the Draft English Code is a narrow, cautious legislative rationalisation that reflected accommodation with the common law. See discussion at notes 83-4 below.} The IPC was not only the first but also came closest of all these criminal codes to a practical implementation of Bentham’s ideas of concise, lucid, comprehensive and rationally integrated legislation that aimed to minimise discretion, differences in legal status, and concession to local circumstances. And as K.J.M. Smith observes, Macaulay’s code, its antecedents and reception, are an important episode in the development of English criminal jurisprudence and 19th century intellectual history.\footnote{Smith, n 2, 145}

Bentham coined the term ‘codification,’ to describe his radical break from the common law and an ambitious legislative reform agenda based on his ‘science of legislation.’ All existing criminal laws were to be replaced by comprehensive provisions set out in rational, consistent and accessible form, anchored in the principles of utility, and amenable to efficient administration and minimal judicial discretion. Such a code held out the promise of a ‘universal jurisprudence,’ applicable, as Bentham put it, to places as diverse as England and Bengal.\footnote{‘View of a Complete Code of Laws,’ ‘On the influence of time and place in matters of legislation’, Bentham’s Works, J Bowring (ed), The Works Of Jeremy Bentham (11 vols) (Edinburgh, 1838–43, repr New York, NY, Russell & Russell, 1962) vol 1; vol 3. Bentham’s prescient comment about India appears in vol 10. See also An Introduction to the Principles of Morals and Legislation (1789) JH Burns and HLA Hart (eds), (London, Athlone, 1977).} Indeed India became a colonial laboratory for these ideas as Macaulay seized the opportunity provided by the reorganisation of its colonial government to assume the idealised utilitarian role of an ‘enlightened despotic legislator.’ Soon after Bentham’s death in 1832, his utilitarian colleague James Mill reconstituted imperial authority in India, assisted by Macaulay who saw the India Charter Act bill through Parliament and then was appointed to the Governor-General of India’s new Legislative Council. Macaulay’s sweeping law reforms in India culminated with the drafting of the IPC in 1837. It was hoped that the colonial example would inspire codification in the metropole but rationalising reform had stalled beyond Peel’s Criminal Law Consolations (1827-31). The bar and bench defenders of the common law portrayed codification as alien to English legal traditions and culture, a foreign innovation or the work of philosophical radical interlopers unversed in English law, possibly appropriate for colonial backwaters but not the birthplace of the common law. Such dismissal neglects the prominence of codification in nineteenth-century English criminal law reform debates.\footnote{On the centrality of codification to reform see KJM Smith, Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence, 1800–1957 (Oxford, Clarendon Press, 1998); Smith, Stephen, n 3; also, L Farmer, ‘Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833–45’ (2000) 18 Law and History Review 397–400, M Lobban, The Common Law and English Jurisprudence, 1760–1850 (Oxford, Clarendon Press, 1991). As Farmer points out, the failure of codification is also portrayed as one of the peculiarities of the English, a divergence from what Max Weber called formal legal rationality, the typical legal forms associated with modern authority.} It is also myopic, given successful codes enacted in other British common law jurisdictions led by Macaulay’s effort.

Many of the formative theoretical debates that informed early 19th century law reform efforts originated with the attempts by William Blackstone and Jeremy Bentham to bring modern rational order to English common law. Both projects entailed taxonomies of law,
inspired by the Enlightenment and the enticing possibility of approaching the law as a science. Blackstone’s Commentaries were essentially an attempt to ‘renovate’ the common law by way of a treatise style synthesis. The common law edifice was a ‘tear-down’ in Bentham’s view and his aim was a complete rebuilding of the law by way of codification. His science of legislation and universal jurisprudence was developed out of critique of his former teacher which began with his 1776 Fragment on Government and continued throughout his long life. He acknowledged Blackstone’s technical achievement in his attempt to lend rational order to English law but concluded that his efforts were in essence, as Smith puts it, an elegant palliative to the inherently chronic confusion of the common law. The common law was beyond the reach of rational reform, its arcane nature and needless complexities the invariable result of random cases and self-serving judges. Blackstone’s defence of judicial power, based on the incredible claim that judges exercised little discretion around common-law rules, and his neglect and suspicion of legislation, were nonsense. The common law should not be modernised, it should be eliminated.

Bentham’s project, set out in Introduction to the Principles of Morals and Legislation and elsewhere, called for the legislative reformulation of all laws, informed by the principles of utility and modern public policy objectives that looked forward rather than back, as the common law did in its attempt to reconcile past practices and obscure archaic purposes with present challenges. Legislation would be organised into penal, constitutional and civil codes, a pannomion that aimed for nothing less than the comprehensive regulation of social relationships and sovereign power. The criminal code occupied much of Bentham’s attention, in contrast to the relatively minor place of criminal law in the Commentaries and its neglect in much of the later 19th century common law scholarship. For Bentham criminal law entails vital matters of public policy, liberty and individual happiness. It regulates key relations between the state and citizens and is the most commonplace reflection of the exercise of state power in repressive forms, reflecting its monopoly over the legitimate use of violence. Punishment entails the deliberate infliction of harm. Such matters demanded clearer articulation, rational justification and could not be entrusted to the courts. Bentham’s taxonomy of criminal harms, prohibitions and penalties sought to map out and categorise the entirety of the criminal law, all offences, forms of liability and defences set out in provisions expressed so clearly that an average person would understand it, an average judge unable to claim not to. Yet Bentham never completed a working criminal code.


26 Outlines for codes and unfinished drafts are scattered though Bentham’s unpublished work and offers to draft went to American (approaching Aaron Burr, President Madison and most state governors), French and Russian law-makers. Bentham’s legislative ideals proved elusive. As he elaborated his science of legislation, he
The transformations in the administration of English criminal law in the 1820s and 30’s were influenced by complex factors, more a matter of reform consensus between leading Tories and Whigs than Bentham’s reform advocacy.27 Substantive criminal law in the form of consolidation (collection and update of all statutes), digests (organised presentation of the law) and yet more comprehensive codifying rationalisations were debated. Peel’s Consolidations are relatively neglected by scholars compared to the new police, professionalization of the criminal trial and the rise of the penitentiary. Yet they repealed or modernised hundreds of statutes, introduced new indictable and summary offence distinctions that led to the eventual demise of the old categories of felony and misdemeanours, and scaled back the death penalty from over 200 to a dozen offences, paving the way for the wide use of the penitentiary and the demise of conditional pardons and transportation. The fall of Wellington’s government opened the door to the possibility of wider criminal law reform under Henry Brougham but he was unable to match Peel’s political and legislative skills and Lord Chief Justice Ellenborough’s defence of judicial powers had set the stage for more aggressive professional resistance against sweeping legislative change.28 Brougham’s Criminal Law Commissioners, appointed in 1833 with a mandate to produce a digest of criminal statutes, another of common law and to consider combining both, were divided over the scope of contemplated reform and indulged in esoteric doctrinal and definitional debates.29 A series of reports resulted in a combined digest in 1845, followed by more modest reports on indictable offences, but the 1853 bill based on the latter collapsed in the face of judicial criticism.30 Few remnants of the Commissioners’ work are found in Charles Greaves’s 1861 consolidation, an update of Peel. Codification was not abandoned, but subsequent efforts such as Fitzjames Stephen’s Draft English Code encountered similar resistance from the guardians of the common law and the project proved more promising in colonial settings.31

India became a utilitarian laboratory where Macaulay went the furthest of his generation of law reformers to explore the possibilities of Bentham’s scientific legislation and universal jurisprudence and give form and practical content to Bentham’s ideas. Macaulay’s

struggled with the tension between inductive and deductive logics and the challenges of crafting specific provisions that accounted for particular circumstances. See note 37 below on Macaulay’s pragmatic response. On Bentham and the persistence of inductive reasoning in adversarial processes and judicial applications of the law; see Lobban, n 21, 120–55.


28 James Mackintosh’s 1819 committee that paved the way for Peel’s consolidations avoided the judges, and Peel deftly evoked Bacon to head them off when introducing his bills, but they were routinely consulted on subsequent criminal law reforms; see Smith, Lawyers, Legislators and Theorists n 21, 56–63, 361, 364.

29 John Austin, still Benthamite, quit in frustration in 1836. Andrew Amos followed Macaulay in India, thought the IPC went too far, and rejoined the commission. Henry Belleden Ker was active throughout and more interested in technical legislative drafting than legal theory; see Farmer, n 21, 404–5; M Lobban, ‘How Benthamatic Was the Criminal Law Commission?’ (2000) 18 Law and History Review 427.

30 See Smith, Lawyers, Legislators and Theorists, n 21, 136–38; Smith, Stephen, n 3 75–76.

31 See notes 85-93 below
assumption of the role and very image of the utilitarian enlightened despotic legislator was surprising. The 1820’s was taken up with assisting his father’s abolitionist work, contributing to liberal criticism of the ruling Tory oligarchy, and qualifying as a barrister. He practiced briefly before his election as a Whig MP, becoming a leading proponent of Parliamentary reform. He had not been part of the tight circle of Bentham and Mill disciples, and indeed published criticisms of their ideas in the late 1820’s and early 1830’s in the Edinburgh and Westminster Reviews, noting that British experience favoured gradual measured reform. He warned of the potential threat ambitious utilitarian reform and radical public policy posed to British liberties and expressed scepticism about their reductionist view of human nature. These were themes he developed further in the 1840’s as he turned to writing and historical scholarship, the ‘Whig theory of history’ as Herbert Butterfield famously described it.  

Macaulay’s contributions to the Whig’s parliamentary victory and passage of the Reform Act were rewarded with appointment as Secretary of the Government’s Board of Control charged with supervising British interests in India and the East India Company. He became closely acquainted with James Mill at this time and collaborated closely with him on the reorganisation of India’s colonial government, distracting him from playing a leading role with the imperial abolition act. Macaulay revealed his embrace of utilitarianism when he introduced the India Charter Act bill, declaring “[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.” Such were the contradictions of 19th century British liberalism, more easily overlooked in an overseas setting, where the executive powers of colonial government gave Macaulay latitude to experiment with a radical law reform agenda impossible to contemplate at Westminster.

Eric Stokes suggests that Macaulay’s general ambivalence about utilitarian political and moral theories did not extend to the particulars of Bentham’s legal theory. John Clive’s magisterial biography focuses on this period of Macaulay’s career and argues that Macaulay participated in the politics of utilitarian absolutism as a means to an end; he fully recognised that while India was not free, the colony would benefit from disinterested enlightened measures that would set into motion developments that would lead to soundly enlightened independence in the future. More recent work deepens the earlier general critiques of the ‘Whig theory of history’ and further deconstruct Macaulay’s legacy as carefully cultivated by the Trevelyan family. A recent biography by Robert Sullivan highlights the hypocrisies, duplicity, privileged paternalism, the false promises and failures of 19th century British liberals as epitomised by Macaulay. Sullivan suggests these contradictions are part of the modern landscape of the ethics of power and the grander conceptions of progress. They are implicated in moral relativism and ambitions other failures that arguably paved the way for totalitarian excesses and even genocide in the 20th century (much is read into Macaulay’s off-


33 Stokes, n 4, 191-2.

35 Clive, n 4, 467-73. See also Pinney, n 1, “Introduction” vii-xi; 112-15. Jennifer Pitts challenges the assumption that Bentham was imperialist, attributing it to Elie Helevy’s influential portrayal of Bentham as a deeply authoritarian thinker, noting that he expressed consistent skepticism of European imperialist ventures and called for self rule—see J. Pitts, ‘Legislator of the World? A Rereading of Bentham on Colonies’ (2003) 31 Political Theory 200
handed comments about Ireland). Sullivan points out that despite Macaulay’s rhetoric and activism he proved to be ambivalent about slavery and subjugation. The place of fraught psychological conflicts between Macaulay and his father Zachary are explored to explain this ambivalence and the implicit authoritarianism implicit in his conception of Empire and imperial issues.36 Catherine Hall’s analysis of Macaulay’s influential History of England raises broadly similar themes, focusing on the ways metropole and colonial periphery were portrayed and included or excluded from an emerging assimilating British identity. Macaulay famously insulated himself from the cultures of India, which he found disconcerting. She suggests that Macaulay’s found India alien and experienced it as disconcerting, eventually portraying it in his History as a purely commercial venture that would never be absorbed in the manner of the Scotland (Ireland’s prospects less promising), or the British settler colonies moving to self-governing Dominion status.37 But Macaulay was also aloof from the European expatriate community during his sojourn in India. He returned exhausted, faced family issues (the death of his father and the company of his sisters) and found himself on the margins of London’s new political elites.38

Macaulay the law reformer of the 1830’s should not be conflated with Macaulay the historian of the 1840’s and 50’s and there are dangers in assuming a consistency in perspective. The enthusiastic and energetic legislative activist, pursuing the promising possibilities of legislative reform, free from the complexities and frustrating compromises around reform that characterised his experience with the legislative politics at Westminster in the first half of the 1830’s, was rather different from a jaded, depressed, middle aged Macaulay who returned to England to dedicate his energies to history (combining facts and imagination as all historians do from the perspective of their experiences and location). There are yet more dangers in attributing the sweeping consequences of Macaulay’s ideas, agency and reforms suggested by Sullivan. Yet there is little doubt of the shortcomings of Macaulay’s Indian law reforms on the matter of labour exploitation.

2. The India Penal Code

Macaulay arrived in India in 1835 as legal representative on the Governor-General of India’s new Legislative Council, and assumed the very role of the imagined utilitarian enlightened despotic legislator, raring to begin legislative experimentation in the colonial laboratory set up by James Mill. Macaulay wrote, ‘I have immense reforms in hand… such as would make old Bentham jump in his grave…’39 His Press Act (1835) ended press licensing and censorship by prior restraint, the Black Act (1836) ended special privileges of European residents in the civil courts, and his education reforms widened accessibility, modernised curriculum, and emphasised English language training with the aim of training a meritocratic Indian civil service. But the IPC, which he largely authored, was by far his biggest project. As he started, he wrote to Mill expressing the hope it would inspire codification at home as


37 Catherine Hall, ‘At Home with History: Macaulay and the History of England’ in C. Hall and S.O. Rose eds, At Home with the Empire: Metropolitan Culture and the Imperial World (Cambridge: CUP, 2006), 32

38 Macaulay returned to a senior appointment as Secretary of State for War and Colonies where James Stephen had become Permanent Under Secretary. It came with an onerous file on the aftermath of the Canadian rebellions and Lord Durham’s report on colonial responsible and self-government. He retreated from active political life to pursue his interests in history and literature –see Clive, n 4.

39 Macaulay to Thomas Flower Ellis, 3 June 1835 in Thomas Pinney (ed), The Selected Letters of Thomas Babington Macaulay vol 3 January 1834 – August 1841 (London, Cambridge University Press, 1982) 146 (or perhaps Bentham’s auto-ikon would cackle from its perch at University College London).
Brougham’s commissioners grappled with the continuing chaotic state of English law.⁴⁰ Of the British codes drafted in the 19th century, Macaulay’s effort went furthest in following Bentham’s ideas and giving them practical content.

Much of the early commentary dismissed the IPC as the work of a philosophical radical non-lawyer, despite the fact that Macaulay trained as a barrister and closely followed the work on Peel’s Consolidations. The more sympathetic assessments tended to downplay Bentham’s influence, Stephen describing it as ‘the criminal law of England freed from all technicalities and superfluities…’⁴¹ although he acknowledged elsewhere, ‘[t]o compare the Indian penal code with English criminal law was like comparing Cosmos with Chaos’.⁴² Much more recently Eric Stokes fully illuminated Bentham’s considerable influence.⁴³ While the IPC became the most Benthamite code enacted, Bentham’s precise impact remains difficult to determine. Giving form and practical content to Bentham’s ideas, and making them work in the context of a specific time and place proved difficult. There remained unresolved tensions between inductive and deductive logics and between the abstract and the situational. Macaulay confronted the challenges with a Baconian pragmatism, relying on a synthesis of existing English criminal laws rather than following Bentham’s call to legislate entirely anew. He wrote a biography of Bacon during this time and those ideas also informed his approach to legislative drafting.⁴⁴

A law commission headed by Macaulay to examine a uniform system of law (envisaged by s 53 of the Charter Act and Mill’s December 1834 despatch on its implementation) was created by the India Legislative Council in May 1835, and its mandate to codify the criminal law was approved the following month. A full draft, largely authored by Macaulay, was presented to Governor General Auckland in May 1837 and formally submitted along with Commissioners’ final report to council on 14 October 1837.⁴⁵ The main


⁴² Social Science Association, ‘Mr Fitzjames Stephen on Codification’ (1872–73) 54 Law Times 44 at 45.

⁴³ See Stokes, n 4.

⁴⁴ Smith, n 2, 153, puts it similarly, referring to “a fusion of utilitarian clarity and rigour with Burkean pragmatism.” Stokes (n 4, 191) refers to the influence of Bacon’s inductive method and Clive (n 4, 461) notes the close relationship between Macaulay’s legislative drafting and his historical and literary scholarship (see also n 53 below). The Bacon biography was written during what spare time he had while confronting the drafting challenges posed by the IPC and he may have been inspired in part by Robert Peel, who quoted widely from Bacon to undercut opposition to his consolidation bills. Bacon’s ideas have more affinity with the 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. See note 26 above on the tensions between inductive and deductive logics that persisted in Bentham’s work. Despite Bentham’s call for a universal jurisprudence he also acknowledged that time and place had to be taken into account. So when facing the challenge of drafting a real working code it was not surprising that Macaulay struggled with these tensions between inductive and deductive logics and the universal and the situational

⁴⁵ See British Parliamentary Papers (BPP), ‘Copy of the Penal Code Prepared by the Indian Law Commissioners and published by Command of the Governor-General of India in Council’ vol 41, 1837–80, 463–587 (paper no 673 Return of the House of Commons, 30 July 1838). Macaulay’s fellow commissioners succumbed to the heat and illness, although commissioner John Macleod did the most to keep the draft in official view after Macaulay’s return from India. He testified in 1848, “I may state a fact already generally known when I say that
features of the code are surveyed here along with a more detailed analysis of the labour related provisions. The events that eventually resulted in its enactment in 1860 (which included a long period of inaction and criticism of the draft, the endorsements of the Indian Law Commissioners, 1846-8, the selection of Macaulay’s draft over a rival proposal from Drinkwater Bethune, and the recommendations and revisions of the Commission in the 1850’s led by Sir Barnes Peacock) are very briefly examined in the next section on the legacies of the IPC.

Macaulay rejected mere consolidation, arguing for a comprehensive code to replace the existing patchwork of Muslim and Hindu laws overlaid with received English criminal laws and East Indian Company regulations, and a singular standard of justice for all.47 His 4 June 1835 Minute to Council presented his law commission’s codifying principles (paraphrased here):

- 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 the least infliction of suffering, and allow for the ascertaining of truth at minimal 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 within it.
- Uniformity is the chief end; special definitions, procedures or other exceptions to account for different races or sects not included without clear and strong reasons.

These codifying principles of comprehensiveness, accessibility and consistency are a practical rendition of Bentham’s legislative aspirations, and indeed, Macaulay’s presentation of law in the resulting draft is a radical break from existing English laws. The substantive doctrines are less so.

a) Overview of Provisions:

The IPC presents a comprehensive statement of criminal law that, as Fitzjames Stephen put it, “…was the first specimen of an entirely new and original method of legislative

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47 Applicable criminal laws included Muslim (Bengal, Madras and other parts of the north, east and south) and Hindu laws (Bombay), overlaid with East India Company regulations, while European residents were governed by received English laws, on the basis of the 1773 Regulating Act which established a Supreme Court in Calcutta and confirmed English criminal law in effect in 1726 was binding on all Calcutta residents and European residents throughout India, amended in 1828 with adoption of Peel’s first consolidations.

48 This paraphrasing is adopted from B Wright, ‘Macaulay’s Indian Penal Code: Historical Context and Originating Principles’ in Wing-Cheong Chan, Barry Wright and Stanley Yeo eds, Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform (Ashgate, 2011), 19 at 22-3.
expression…” Macaulay fully embraced Bentham’s extension of logic of classification in the natural sciences to law, attempting a full taxonomy that precludes the common law and aims for a systematic and exhaustive statement of criminal harms and attendant prohibitions, liability standards and penalties (maximums) expressed precisely and consistently. Following Bentham’s principles of ‘nomography’, Macaulay devised concise, direct legal expression, characterised by simplicity, clarity, economy and lack of technicality, within a rationally organised and self-contained legislative whole. The provisions are accompanied by Examples that illustrate their application and explanatory Notes.

Accompanying the radical Benthamite inspired departure in form were Macaulay’s illustrative Examples, designed to exhibit a provision’s entire meaning and range of application by way of hypothetical cases. They aimed to minimise the possibilities of judicial discretion, serving in effect as authoritative precedents set by legislators rather than judges. Bentham contemplated the device, but the technique was rejected by the English Commissioners (Fourth Report, 1839) and in Wright’s Jamaica draft. Examples were generated out of subjecting draft definitions to hypothetical exceptions; if doubts or uncertainties were raised, they were accommodated in revisions to sharpen expression, logical distinctions, comprehensibility and perspicuity.

Macaulay’s Notes, which did not accompany the enacted IPC, discuss the conceptual features of key provisions and criticise existing English laws. They resemble a treatise on English criminal law in the 1830’s but critique dominates, as Macaulay takes obvious delight in pointing out common-law absurdities. Nonetheless, the key doctrinal principles set out reflect English common law and Peel’s consolidations as his starting point, although there is also occasional explicit reference to the 1810 French Code penal and the 1826 draft Louisiana code. The combination of critique and concise explanation reflects Macaulay’s historical sensibilities and skills at theoretical and technical synthesis, but Stokes observes that the separate appearance of the rationales for the laws was a departure from Bentham’s

49 Stephen, n 2, 302–3

50 See Stokes, ibid, 230.

51 Edward Livingston’s draft Louisiana penal code included illustrations –see Stokes, n 4, 230.

52 On the basis that complete expression of a provision rendered illustration unnecessary, see Smith, Lawyers., Legislators and Theorists, n 21, 151-2

53 See Clive (n 4, 461–62) who notes this honed Macaulay’s expressive skills, drawing parallels between the challenges faced by legislators and historians of capturing both the particular and the general. Macaulay’s method here is analogous to the approach to synthesis in the modern treatise, although the objective is prescriptive rather than descriptive, and his approach results in more economical expression of the law than the more unwieldy, typical treatise formulations --see Wright, ‘Renovate or Rebuild?: Treatises, Digests and Criminal Law Codification,’ in Fernadez and Dubber, n 22, 181 at 191

54 The Notes do not make precise attributions; there are oblique references to Peel, more to Bentham, and about a dozen to the French and Louisiana codes. The 1810 French code derived from the revolutionary 1791 codification, inflected with utilitarianism by Jean-Etienne-Marie Portalis. Edward Livingston’s Louisiana draft was influenced by Bentham and Portalis. Early or ante bellum codification in the US is seen by some as an extension of the Revolution, a means of breaking from the continuing influence of English legal tradition, see, eg CM Cook, The American Codification Movement: A Study of Antebellum Legal Reform (New York, NY, Greenwood, 1981) In the post bellum period David Dudley Field became the most prominent 19th-century American codifier, his 1881 New York State Code best known outside the US; see Sanford Kadish, ‘Codifiers of the Criminal Law: Wechsler’s Predecessors’ (1978) 78 Columbia Law Review 1098; ‘The Model Penal Code’s Historical Antecedents’ (1988) 19 Rutgers Law Journal 521.
legislative method. It is a revealing departure, suggesting the significant place of existing laws as Macaulay’s starting point and primary reference.

The substantive provisions themselves clearly depart from Bentham’s radical injunction to reformulate the criminal law entirely anew according to the principles of utility. As Notes suggest, they derived mostly from what Macaulay was familiar with, English laws reworked, simplified and modernised according to more general liberal sensibilities. Most are progressive for the time, indeed a number of the original provisions remain more advanced than current criminal laws in most common-law jurisdictions. Principles of liability are not defined in a general part but there is consistent attention to fault requirements and terms, emphasis on subjective standards, with occasional use of lesser standards of rashness (the Macaulayan term for recklessness) for endangering offences and negligence where public duties are specified. The IPC as originally drafted rejected the English doctrines of constructive liability and attempts to infer mental state from the act, including the notion of malice aforethought. Abetment is found in Chapter IV. Offences are accompanied by specific exceptions (which Macaulay preferred this term to defences) applicable to individual clauses or a limited class of provisions. Chapter III contains General Exceptions applicable to all the penal clauses in the code. As we shall see shortly, there were no exceptions from liability based on any rights of men or masters, and this accompanied the wrongful restraint provisions set in offences affecting the human body to deal with concerns about labour exploitation.

The arcane English laws of murder and theft are thoroughly reconstituted (see Chapter XVIII offences affecting the human body and Chapter XIX offences against property) and political offences (Chapter V) reflect a libertarian orientation, as manifested in Macaulay’s narrow definition of treason, and effective abolition of seditious libel (Chapters XVII and XXV related to the press and defamation, although inciting disaffection remains an offence). He develops new forms of criminal liability for abuse of state and official powers, matters largely left to parliamentary privilege or unaddressed in English criminal law (Chapters VIII and IX). There are also modern extensions of liability for endangering and intangible harms (Chapter XIV). The replacement of the common law offence of blasphemy (Chapter XV) was a concession to the complexities of India but also anticipates modern pluralistic cultural denigration measures, making it an offence to prevent proselytizers from intentionally insulting what others hold sacred. Macaulay noted, “[t]here is perhaps no country in which the Government has so much to apprehend from religious excitement among the people.” Matters of consent and sexual offences reflect the Victorian assumptions of Macaulay’s time but were nonetheless generally an advance on existing English laws. Macaulay’s Clapham sect values, and other influences that have little to do with Bentham, are manifested in his

55 Stokes, n 4, 229–30 notes that Livingston, following Bentham, had attempted to weave rationales into provisions with unwieldy results.

56 For detailed discussion of IPC provisions on questions of liability and defences see the chapters in Chan, Wright and Yeo, n 48. For innovations in murder and theft offences see Smith, n 2 and for discussion of criminal responsibility for harm and protection of property see discussion immediately below.

58 BPP, n 49, Note J.

59 For a critical view of the shortcomings of these provisions see Dhagamwar, n 50. The treatment of homosexuality illustrates the diverse directions the IPC has developed. In India, Macaulay’s original criminalisation has been recently repealed (Naz Foundation v Government of NCT 2010 CrimLJ, 94) whereas in many other IPC jurisdictions the sanctions have been increased. On consent see S. Yeo, ‘Constructing Consent under the Penal Code’ in D. Neo, H.W. Tang and M. Hor (eds), Lives in the Law (Singapore: National University of Singapore Faculty of Law and Academy Publishing, 2007), 179.
doctrinal innovations concerning the exploitation of vulnerable groups such as women and children. Two striking doctrinal innovations suggest influences that appear to have little to do with Bentham.

The chapter on harm affecting the human body (Chapter XVII, which became chapter 16 in the enacted code) is examined at length by Ian Leader-Elliott, who demonstrates that Macaulay’s understanding of culpability for unlawful homicide and lesser harm-causing offences has more affinity with Adam Smith’s moral principles than Bentham’s ideas. His departure from prevailing English laws in determining criminal responsibility, with a focus on fault rather than results and account for the comparative fault of the victim, survived the significant amendments to the enacted provisions. They caused later difficulties and tensions around the administration of criminal justice in India but anticipate principles advocated in late 20th century criminal law reform.\(^{60}\)

Another striking doctrinal innovation is Macaulay’s reconstitution of self-defence and defence of property as ‘private defence’ (the other chapter III general exceptions are familiar matters related to incapacity and offences committed under perceived legal obligation and consent of the victim). It also illustrates how the code entailed objectives that went well beyond efficient criminal justice. This particular doctrinal innovation attempts to encourage, as Macaulay puts it in Note B, “a manly spirit among the people,” a people “too little disposed to help themselves.” The defence sought to strike a balance between encouraging compliance with public authority and inculcating the values, and robust protection, of private interests and property. As Cheah Wui Ling argues, it bears little relation to modern rights based conceptions of self-defence. Instead, private defence reflects British perceptions of Indian passivity and toleration for lawlessness, an attempt to encourage crime prevention (more effective British rule) and character formation (the idealised attributes of British subjects).\(^{61}\)

Macaulay’s scheme of punishment reflected a combination of Clapham sect humanitarianism as well as the cooler utilitarian logic of deterrence, emphasizing certainty and proportionality: capital punishment is limited to two offences (treason narrowly defined and premeditated murder --Peel’s dramatic reduction was from over 200 to a dozen offences) and corporal punishment is abolished.\(^{62}\)

b) The Labour Related Provisions:

The IPC provisions that concern labour, and the exploitation of slaves and indentured labourers in particular, include Macaulay’s strict limiting of exceptions (defence) for masters’ liability for offences, his wrongful restraint provisions, and the preservation of penal sanctions for breaches of contract. The full liability of masters and wrongful restraint provisions were modest advances compared to his other doctrinal innovations. The former may have been influenced by his assumptions about the enforcement of imperial abolition and as we shall see, the latter was cross referenced to separate legislation. The retention of criminal liability for breach of contract is a more perplexing shortcoming from the point of view of the dignity of labour. Macaulay’s labour provisions nonetheless caused unease amongst British officials in India and the East India Company, and became matters of protracted debate in subsequent related legislation and reviews of the IPC.

The IPC deals with slavery by way of Macaulay’s restriction of defences based on property or other colour of right. As noted earlier he combined defence of property and self

\(^{60}\)Ian Leader-Elliott, ‘Macaulay’s Penal Code, Adam Smith and the Jurisprudence of Resentment’ (2012)

\(^{61}\)Cheah Wui Ling, ‘Private Defence’ in Chan, Wright and Yeo, n 48, 185

\(^{62}\)BPP, n 45, Note A
as ‘private defence.’ Macaulay also explicitly refused general exceptions from liability and punishment for masters committing any offence against slaves. In Note B he expressed his view that the effect of these modest reforms would be the practical abolition of slavery in British India. He also expressed doubt whether separate legislation specifically abolishing slavery would have similar practical effect. Reliance on the 1833 imperial abolition act may have led him to be overly-sanguine about need for explicit declaration against slavery or the sale of persons in the draft but he did concede that further specific penal provisions might prove necessary:

Our belief is that even if slavery were expressly abolished, it might, and would, in some parts of India still continue to exist in practice. We trust, therefore, that his Lordship in Council will not consider the measure which we now recommend as of itself sufficient to accomplish the benevolent ends of the British Legislature, and to relieve the Indian Government from its obligation to watch over the interests of the slave population.

Indeed, in 1860 the enacted IPC added five sections dealing with slave trading and the sale of persons. However, these provisions did not make existing slavery an offence or abolish its practice, but simply punished transactions in slaves. The laws here were the result of compromises that reflected tensions between the central and provincial governments, as well as continuing differences between missionary abolitionists and those favouring orientalist policies. The latter argued that Indian practices were mild and that more aggressive measures would incite revolt by landowners and allies. Slavery continued in India until the late 19th century, decades after imperial abolition.

Masters were therefore fully liable for assaults and other physical offences against the body. The IPC also include relatively extensive provisions related to wrongful restraint, confinement, abduction, sale and kidnapping (chapter XVIII, clauses 254-362). In Note M Macaulay suggested that these clauses were sufficient to deal with reducing persons to servitude or carrying away of adults within British India, but added with specific reference to clauses 354 and 358:

We also propose to enhance the punishment of kidnapping in cases in which it is committed with the intention …of reducing that person to slavery…We have placed under this head a provision for punishing persons who export labourers by sea from the Company’s territories, in contravention of the Act recently passed by the Government on that subject.

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63 “We recommend that no act falling under the definition of an offence should be exempted from punishment because it is committed by a master against a slave” see Note B “On the Chapter of General Exceptions,” BPP, n 49, 83

64 Ibid, 85

65 Sections 370, 371 offence to import, ex-port, remove, buy, sell, hire or otherwise dispose of a person as a slave; sections 372, 373, an offence to deal with minors in a same manner for any unlawful or immoral purpose; section 374 an offence to unlawfully compel a person to labour against his will (Act XLV, 1860)

66 These arguments were originally articulated by Wellington during the Lords debate on the 1833 Charter bill. See Dhagamwar, n 46 and n 95 below.

67 Note M “On Offences Against the Body,” BPP, n 45, 107-8. Clause 354 included as kidnapping offence, “whoever conveys beyond the limits of the territories of the East India Company or takes on board of any vessel with intention of conveying any person without the free and intelligent consent of that person, or of some person legally authorised to consent on behalf of such person, or with such consent, but knowing such consent has been obtained by deception or concealment as to the place of destination or the future treatment of that person is said to kidnap that person from the territories of East India Company.” Clause 358 extends liability for unlawful
The legislation Macaulay referred to was Act V 1837. This separate legislation was designed to regulate the rapid expansion of recruitment and emigration of Indian labourers by agents acting on behalf of planters in Mauritius and the West Indies. After Macaulay’s departure the provisions were supplemented by Act XXII and yet further legislation passed in 1839, consolidated under the 1844 Indian Emigration Act. These laws, which came into effect well before the IPC itself was enacted, entailed much debate and negotiation with commercial interests as the indentured labour trade exploded. They stipulated the conditions under which labourers could be shipped from the territories of the East India Company, required recruiting agents to register contracts of service with government agents, and set out terms for such contracts (five years, renewable for the same term and plantation owner responsible for return passage). Later provisions enabled government agents to board ships and check conditions on them, confiscate ships and punish operators who smuggled or contained concealed labourer. Extra territorial powers were added to protect British subjects from India to ensure due performance of the contract.  

However, this local regulation of the growing trade in indentured labour and Colonial Office supervision of practices beyond India briefly noted in part one, constitutes only half the picture. The aims of protective supervision were undermined by the wide reliance on penal sanctions in contracts of employment in India and elsewhere in the Empire. Indeed criminalised master and servant laws in India and the planter colonies expanded just as such laws were curbed and abolished in the metropole itself. The retention of such penal sanctions in the IPC contradicts the progressive rhetoric and otherwise largely progressive character of Macaulay’s reforms.

In Note P Macaulay declared, “[w]e agree with the great body of jurists in thinking that in general a mere breach of contract ought not to be an offence, but only subject of a civil action.” Yet he backed away from this advance in the IPC itself and any recognition of full equality of status in contracts of employment proved rhetorical. In fact the Legislative Council of which he was a member had, during sessions in 1837-8, even debated extending existing Indian master and servant laws to make it an offence for domestic servants to leave their masters without notice. Macaulay’s Law Commissioners did not go that far but expressed a range of concerns about the physical and financial vulnerability of masters and duplicity of servants, and in particular, servants who provided transportation and the vulnerability of European women and children on long journeys through dangerous lands. Thus baggage carriers and seamen whose insubordination could produce fatal consequences could be subject to criminal punishment for breach of contract (clauses 463, 464). As the IPC was reviewed there was renewed pressure to extend criminal sanctions to all menial servants and punitive sanctions for other breaches of service contracts were included in the enacted 1860 version.

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68 See Dhagamwar, n 46, 105; Mangru n 16.

69 Note P On the Chapter of the Criminal Breach of Contracts of Service,” BPP, n 45, 115

70 Dhagamwar, n 46,106

71 Michael Anderson, 'India, 1858-1930: The Illusion of Free Labor’ in Hay and Craven, n 16, 422 at 429-30. Sections 490, 491 and 492 related to service during voyages generally and failure to attend to needs of helpless persons. A new provision introduced punishment for breach of contract to serve at a distant place that the servant was conveyed at the master’s expense. This section 492 related to the indentured labour system to protect masters who paid migration costs.
Michael Anderson notes how expressions of freedom of contract were largely rhetorical and contradicted by these repressive laws in late 19th-century India. Employers who deliberately broke a contract were only liable for civil damages and in practice it was almost impossible for servants to bring civil actions. It was relatively easy for employers to deal with employee breaches by way of complaint with the nearest magistrate or request for police assistance. They investigated the allegations and labourers who persisted in a breach in defiance of a magistrate’s order could be punished with fines or imprisonment of up to three months with hard labour. The Workmans Breach of Contract Act, 1859, designed to give employers closer control over labourers who absconded or refused work after being given advances, elaborated the punitive provisions set out in the IPC itself. Despite the restrictions on slavery and the supervised recruitment system for plantations noted earlier, and some ameliorative factory legislation referred to by Anderson, the colonial state relied heavily on punitive elements of master and servant laws in both plantations and industries in India, retaining criminalization over a half century longer than in England.72 As Anderson puts it: Penal contracts were enforced against a colonized population with minimal political influence, whose members were viewed through racial categories. The juridical image of Indian unskilled labour emphasized recalcitrance, irresponsibility, and laziness—the qualities derived from class-race stereotypes. These descriptive characteristics justified and made sense of the penal prescription …the Indian worker was understood to be dependent, illiterate, and unable to fully grasp his or her legal obligations. Such a person could not be a fully free actor and, hence, could not enjoy full legal capacity.73

In other colonial settings, as we will see in the next part, similar master and servant laws supported by the wide powers of the magistracy extended wide disciplinary control over migrant indentured labourers from India. While there was some regulation of the recruitment and transportation of indentured labourers by India’s colonial government, outside supervision by the India and Colonial Offices, and some colonial judges and governors attempted to defy colonial planter elites, local legal regimes governing labour contracts proved to be a highly effective means of exploiting the migrant workers.

3. The Legacies of the India Penal Code

Macaulay’s 1837 draft encountered what Smith describes as “…the great dead weight power of governmental and administrative inertia…”74 In brief, many of the subsequent legal appointees to the India Legislative Council (from Andrew Amos through to Henry Maine) tended to criticise or dismiss the code and Macaulay’s effort was denigrated by the bar and bench in both the metropole and colony. On the colonial policy front, utilitarian reform agendas were compromised by the persistence of orientalism, by pressing military and commercial pressures in India, and even by missionaries incensed by Macaulay’s replacement of blasphemy with provisions that revealed him as ‘churchwarden to the idol.’ And European residents in India objected to Macaulay’s dismantling of legal privileges and the code’s emphasis on equal legal status under the criminal law, a conflict that persisted for decades and culminated in the Ilbert bill controversy in 1883.

72 Ibid, 431
73 Ibid, 454
It was the 1857–58 crisis that restored the IPC as a legislative priority. As Fitzjames Stephen put it, “[t]hen came the Mutiny which in its essence was the breakdown of the old system…The effect of the Mutiny on the Statute Book was unmistakable.”\textsuperscript{75} Despite criticism of Governor-General ‘clemency’ Canning, the revolt and its suppression underscored how colonial resorts to martial law and the courts martial of civilians had become increasingly controversial for the English political classes from the time of the Irish and Canadian rebellions. The legitimacy of colonial rule was undermined by repressive responses that so obviously contradicted the formal claims of British constitutionalism and the rule of law, matters that soon again came into controversy with Governor Eyre’s response to the 1865 insurrection in Jamaica.\textsuperscript{76} Enactment helped to address such concerns and would, it was hoped, minimise future need to resort to emergency military expedients to uphold public order and British rule.

Revisions to Macaulay’s draft by Peacock’s Commission were finalised in 1858, and the IPC was enacted in October 1860, with amendments that eased the Benthamite tone of Macaulay’s draft and marked some restoration of more familiar English doctrines as well as significant doctrinal developments since Macaulay’s time.\textsuperscript{77} European resistance to the idea of equal legal status with indigenous subjects delayed the IPC coming into effect until 1862 when new criminal procedures clarified that European residents were not obliged to appear before Indian judges and magistrates. Courtney Ilbert’s attempt to restore Macaulay’s aim of uniform criminal jurisdiction for all British subjects in India sparked the so-called ‘white mutiny’ in 1883.\textsuperscript{78}

In London John Stuart Mill had praised Macaulay’s draft in the Westminster Review and echoed Macaulay’s hope that his code would inspire stalled English efforts to codify.\textsuperscript{79} But it was dismissed by the established English bar and bench, and as Parker describes the attitude, the IPC came to be regarded as suitable only for backward overseas colonies where it was necessary, as Parker describes the attitude, “...to keep things simple for the native population and magistrates of limited ability.”\textsuperscript{80} Such was the depth of the hostility from the self-appointed guardians of the common law and English legal culture, that the Law Times obituary for Macaulay in 1860 read:

“[H]is code is … wholly worthless … [with] scarcely a definition that will stand the examination of a lawyer or layman for an instant, and scarcely a description or provision through which a coach and horses may not be driven.

\textsuperscript{75} Quoted in Setalvad, n 46, 124.

\textsuperscript{76} See Kostal, n 13.

\textsuperscript{77} The insanity defence, developed from M’Naghten Rules is an example of the latter—see G Ferguson, ‘Insanity’ in Chan, Wright and Yeo eds, n 48, 238–40. Henry Maine, law member of Council (1862–69) still objected to the code’s Benthamite hue, suggesting “...nobody cares about criminal law except theorists and habitual criminals.” (quoted in Smith, Stephen, n 3, 127)

\textsuperscript{78} The IPC did not take effect until 1862, further delayed until passage of criminal procedure legislation confirmed special European status, marking perhaps the biggest retreat from Macaulay’s objectives, and the jurisdictional autonomy of the Princely states. Maine’s successor Fitzjames Stephen added more procedural changes and an evidence act in 1872. On the 1883 crisis see Kolsky, n 9.

\textsuperscript{79} (1838) 31 Westminster Review 395.

All hope of Macaulay as a lawyer, and also as a philosopher was over as soon as his code was seen.**81

a) The Law Reform Legacies:

The later 19th century English proponents of codification proceeded with much more caution as conservative professional resistance to ambitious legislative reform and defences of the common law solidified. The utilitarian critique was further deflected by procedural reforms and appeals, new treatise literature that prompted more sophisticated legal doctrine, and the scholarship of figures such as Henry Maine which enhanced the modern legitimacy Blackstone had lent to the common law. The legal positivists such as John Austin sought to render Bentham’s legacy more palatable and found common cause with the more conservative legal scholars as law emerged as an academic discipline along with modern professional legal education.**82

Fitzjames Stephen, who had a rather more positive view of the IPC than Maine, his immediate predecessor in India, returned to England and lead codification efforts there. While Macaulay aspired to break decisively from the common law Stephen sought accommodation with it. Bentham’s injunction to reformulate criminal law anew was openly abandoned in favour of proceeding from a synthesis of existing laws in a rationalised form that was only loosely utilitarian and reflected Stephen’s conservative sensibilities. Wary of conceptual abstraction, he had a much more positive view of the common law and judicial discretion than Macaulay and Bentham.**83 Stephen’s treatise *A General View of the Criminal Law of England* (1863), written before India, and *A Digest of the Criminal Law* (1877), written after, were important steps to a modest and narrow codification of indictable offences that left defences and the principles of liability to the common law. His 1878 Draft English Code, derived directly from his *Digest*, was taken up by the government and a royal commission converted it into a bill, introduced in 1880. The bill died with the fall of the government, the closest England and Wales ever came to codification despite subsequent efforts, including the recent work of the Law Commission (1968-2008).**84

The prospects of codification were better in other British jurisdictions.**85 The Colonial Office had actively promoted the IPC for other colonial settings and it was similarly adopted elsewhere in South Asian and some African colonies, and Macaulay’s draft had earlier

**81 7 January 1860, 184.

**82 See Wright, n 53. Many of Macaulay’s successors in India were prominent figures in later nineteenth-century English legal theory circles and Smith, *Lawyers, Legislators and Theorists*, n 21 and *Stephen*, n 3 maps these connections.

**83 See Smith, *Stephen*, ibid

**84 Stephen’s caution did not satisfy the defenders of the common law, Lord Chief Justice Cockburn declaring, disingenuously, that the proposal was inconsistent with the idea of codification and that no code was better than a half-baked one. Momentum was lost with Cockburn’s hostile intervention, Home and Lord Chancellor’s Office reservations about introducing large reforms as the bar contended with new procedures under the Judicature Acts, and government distractions with political issues such as the Irish question –see Smith, ibid, 44-72, 78-82; Smith, *Lawyers, Legislators and Theorists* n 21, 143-50. On recent efforts see C Clarkson, ‘Recent Law Reform and Codification of the General Principles of Criminal Law in England and Wales: A Tale of Woe’ in Chan, Wright and Yeo eds, n 48, 337; ‘RIP: The Criminal Code (1968-2008)’ Editorial [2009] *Crim.L.R.* 1

inspired William Badgley’s 1850 proposed code for the Province of Canada. The Jamaican crisis prompted the Colonial Office to commission Robert Wright to draft a code in 1877, versions of which were adopted elsewhere in the West Indies and further afield. In the longer term the IPC had little influence beyond the Straits Settlements and the other colonies of British South Asia, and was replaced by other codes in the few Africa colonies where it had been enacted under Colonial Office direction. As Taylor observes, the assumption was that a code drafted in 1837 had become dated was prevalent in the late 19th century, and this is clearly articulated in the later 19th century and early 20th century Colonial Office model code projects. In India, mostly retrograde changes to the IPC continued in the later colonial period and are also found in adoptions elsewhere and in amendments after independence. Conditions were relatively favourable for codification in the increasingly autonomous self-governing British jurisdictions where Stephen’s code, rather than the IPC, became a primary external reference. The complexities of received English criminal laws and subsequent local amendments were compounded by the emergence of new colonies out of the territories of older ones (eg, Upper Canada from Quebec, New Brunswick from Nova Scotia, Victoria and Queensland from New South Wales) and by colonial union (Upper and Lower Canada, 1840, prefaces the larger challenge faced by the Dominion of Canada in 1867). Consolidations had simplified the accumulated layers of law but further rationalisation in the form of a succinct complete compendium was appealing in settings where the bar and bench

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87 See ML Friedland, ‘R.S. Wright’s Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law’ (1981) 1 Oxford Journal of Legal Studies 307. Although never enacted in Jamaica itself, Wright’s code displaced the IPC as a model code promoted by the Colonial Office. Influenced more by Brougham’s English Law Commissioners than the IPC, the Jamaica code was less radical a departure. Wright rejected Macaulay’s use of examples but he did set out a general part to define liability standards (see Smith, Lawyers, Legislators and Theorists, n 3, 151-2). After an attempt by Fitzjames Stephen’s son Henry to draft a new model code for the Colonial Office, Samuel Griffith’s 1899 Queensland Code, introduced to Lagos by Griffith’s colleague William MacGregor, became a primary influence on Albert Ehrhardt’s 1925 Colonial Office model code. This was adopted widely in numerous African colonies, including those where the IPC had been enacted—see RS O’Regan, ‘Sir Samuel Griffith’s Criminal Code’ (1991) 7 Australian Bar Review 141; ‘The Migration of the Griffith Code’ in O’Regan ed., New Essays on the Australian Criminal Codes (Law Book, 1988), 103.

88 The IPC is the basis for criminal codes in Pakistan, Mauritius, Sri Lanka, Malaysia and Singapore. In some IPC jurisdictions retrograde changes include retreats on Macaulay’s liberal approach to political offences with the addition of sweeping national security and emergency measures, theocratic retreats on religious pluralism, and the expansion of capital punishments and reintroduction of corporal punishments. On technical legal retreats, both legislative and judicial, see the chapters in Chan, Wright and Yeo, n 48.

89 Calvin’s Case (1608) 77 ER 377 and imperial instructions governed informal reception. English criminal laws tended to be formally received as the foundation of a jurisdiction’s criminal laws when legislative institutions and colonial courts were first established, empowered to amend these laws as local conditions required, subject to imperial supervision (Colonial Office review of legislation and possible disallowance by Westminster, appeals for the Judicial Committee of the Privy Council after 1833, supervening imperial legislation).
faced real practical challenges of access to sources of law. Receptiveness to codification was also enhanced by local struggles for responsible government and criminal law reform, informed by experiences of abuse of executive powers in colonial government and the administration of justice. Reformers associated codes with constraint on state powers and self-government, providing a constitutional momentum lacking in England itself. While these jurisdictions were unreceptive to imposed codes written by imperial administrators, Stephen’s Draft English Code was not burdened with such colonialist baggage, and it was the most up to date synthesis of doctrines familiar to all. His modest, pragmatic approach was loose enough in conception to combine easily with local consolidations and local developments could be more readily accommodated than in a more ambitious comprehensive code. Stephen unsurprisingly became the primary external reference for the Canadian (1892), New Zealand (1893) and Queensland (1899) codes. As was the case with the IPC’s enactment and the drafting of the Jamaica Code, crisis lent urgency to these projects and helped to make them a legislative priority. English common law culture of hostility towards codification appears to have had more professional traction in some British settings than in others, but in Canada and New Zealand at least, Stephen’s accommodation with the common law was widely regarded as a satisfactory compromise. Ironically, the features of the IPC that impress today, such as Macaulay’s lucid and concise expression and use of illustrations, worked against its wider adoption, as Greg Taylor suggests, because of the assumption that such an approach is inappropriate in developed settings with a mature bar and bench.

Macaulay’s general criminal law reform legacy was therefore a mixed one. For legal scholars, apart from the vicious attacks on Macaulay and dismissal of the IPC by the 19th century guardians of the common law, his IPC remains an impressive technical law reform. Yet, as noted earlier, the IPC was also the product of Macaulay’s time and place and privileged position and was about more than efficient criminal justice. It was an early

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92 See Wright ibid. Stephen’s renderings of the common law were usually adopted, while most statutory-based provisions derived from local consolidations. His narrow conception of codification and retention of common law characterise the Canadian and New Zealand codes, and while most of Samuel Griffith’s external references are to Stephen, his more comprehensive approach was inspired by Zanardelli’s 1889 Italian Code (see Alberto Cadoppi (KA Cullinane trans) ‘The Zanardelli Code and Codification in the Countries of the Common Law’ (2000) 7 *James Cook University Law Review*, 116). The 1889 Italian Code and Field’s 1881 New York State Code were the source of a small handful of substantive provisions (far fewer than Stephen).


94 See assessments in Smith, n 2 and Chan, Wright and Yeo, n 48.
modernising initiative in British colonial policy, one that was made a legislative priority because of the Mutiny. The IPC was an attempt to reconstitute authority by making British law, and by extension, British colonial rule more effective and legitimate. But in addition to these political dimensions to the IPC, there were economic forces at work within the Empire. Macaulay’s law reforms were also implicated matters of labour exploitation in the planter colonies. They did little to constrain the exploitation of labour in India or the emergence of an imperial indentured labour system heavily dependent on workers from India. How was it that such a committed and publicly active abolitionist, who also expressed concerns about succeeding forms to labour exploitation and the dignity of labour, and who wielded enormous legislative powers in India during the time that the labour transitions were well underway, proved to fall so short?

b) The Labour Legacies: Regulation and Discipline of Indentured Labour by Criminal Law

As we have seen, the India Charter and Abolition of Slavery Acts of 1833 and Macaulay’s refusal of exceptions for masters’ liability for offences and subsequent addition of slave trading provisions in the IPC did not end slavery in India which persisted in residual form to the late 19th century. Slave exploitation in other British colonies was replaced by a new form of labour, indentured workers largely recruited from India. As we have also seen, unlawful restraint provisions in the IPC were coordinated with separate colonial legislation, first enacted in 1837, to regulate practices around the emerging trade in Indian labour. Macaulay’s retention of penal sanctions in employment contracts, opposed in principle but seen as necessary for certain employee breaches in the conditions of India, was perhaps the most telling aspect of the IPC in terms of characterising the new labour regime that replaced slavery. Macaulay’s colonial exception was similar to pretexts used by legislators in planter colonies to expand criminalisation for the regulation and discipline of indentured labour.

From their perspective, continuing reliable and economically viable plantation production justified elaborated criminal sanctions in master and servant laws. The local development of the received laws that historically governed contracts of employment was supported by new powers of enforcement and discretion over the lives of workers exercised by local magistrates.

The expansion and refinement of the legal means to regulate migrant workers brought up familiar issues. An external legal regime, consisting of India and Colonial Office supervision and the Indian indentured labour trade regulations and unlawful restraint provisions in the IPC, was in constant tension with internal colonial legal regimes and local practices of labour discipline. This was reminiscent of the patterns seen with colonial slavery and imperial supervision in the 1820’s and 30’s that Macaulay and fellow abolitionists had struggled with. Given his familiarity with those dynamics and issues, and awareness of the rapidly expanding trade in indentured labour, it is surprising that Macaulay failed to anticipate the new fraught reciprocal relationship that was to develop between the internal and external legal regimes. Moreover, criminalised master and servant laws and the powers of magistrates were elaborated in colonial settings just as master and servant laws were being moderated and repealed in the metropole itself. His retention of penal sanctions for breach of employee contract, justified by colonial conditions, was a fatal flaw. On the other hand abolitionists, as well as the British Government and the Colonial Office had been preoccupied with ameliorating the conditions of slavery and neglected colonial master and servant laws adopted or modelled on English laws from the 18th and early 19th centuries. In the new system of labour exploitation, the supervised discretionary powers of slave owners was displaced by

95 See Dhagamwar, n 46, 118-22, 161-79, 208-9 for further discussion of continued slavery practices.

96 See Mohapatra, in Hay and Craven, n 16, 455; see also, M. Turner, ‘The British Caribbean, 1823-1838: The Transition from Slave to Free Legal Status’ in Hay and Craven, n 16, 303
a much more legalized form of labour control building on colonial master and servant laws and new magisterial powers.

Special magistrates were first appointed in the West Indies under the imperial abolition legislation to supervise the temporary transitional apprenticeships for freed slaves from 1834-8. The magistrates continued in place to supervise local labour conditions after apprenticeships ended. While those initially appointed by London may have been at odds with plantation owners during the apprenticeship period, they were gradually co-opted by the local plantocracies and became increasingly beholden to local elites.

Recruited by agents and transported with promise of free return, workers typically arrived on five year renewable contracts which specified pay rates and working hours. Once on plantation they were regulated by a pass system to control movement from plantations and through local master and servant laws were subject to fines and imprisonment for a wide range of workplace violations. The magistrate supervised local work conditions and discipline and exercised wide policing powers (surveillance of workers, the pass system and powers of detention without trial). Thus local master and servant laws combined with magisterial powers developed into a new system of ‘voluntary servitude’ for indentured labourers from India, premised on ensuring cheap, stable, and compliant work force. The internal legal regimes were a powerful repressive means of preventing labour disruption, instability or withdrawal.

The colonial government in India attempted to regulate the recruitment of workers and the activities of planter agents, and while this may have curbed worse excesses, we have also seen that wide repressive powers over contract labour were tolerated and developed in India itself. As for imperial supervision. Macaulay’s colleague James Stephen, long experienced with battling planter-dominated colonial governments over slavery amelioration measures and the administration of the apprenticeships, attempted vigilant supervision of the emerging indenture system, and was particularly concerned about contract terms and transportation arrangements. However, imperial supervision by way of direct engagement by the Colonial and India Offices became more sporadic after the late 1840’s and the Colonial Land and Emigration Commission assumed the role as arbiter between interests in India and the planter colonies. Penal sanctions were expanded in relatively unconstrained manner in colonial master and servant laws from the 1850’s and the indenture system continued to expand as the main source of plantation labour until the early 20th century.

c) Indentured Labour in the Pacific: The Example of Fiji:

There are numerous examples of tensions between the local indentured labour measures of and attempts to curb planter exploitation, between recalcitrant colonial local elites and imperial supervision or governors and judges appointed by London. John McLaren’s recent study of colonial judicial controversies includes several examples of such conflicts involving indentured labour, notably the Beaumont-Hincks imbroglio in British Guiana in the 1860’s and a series of clashes between itinerant judge John Gorrie and planter establishments in Mauritius, Fiji and Trinidad between 1870 and 1892. The struggles of

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97 This generally describes the regime in operation in British Guiana, Trinidad and Jamaica. There were variations and differences between planter colonies.

98 See Mangru, n 16, 18; also Mohopatra, in Hay and Craven, n 16, 460; Banton, in Hay and Craven, n 16, 322

99 McLaren, n 6, especially ch.10. Francis Hincks a Canadian colonial politician was appointed by London as governor of British Guiana and soon formed a close alliance with planter interests but clashed with Joseph Beaumont (appointed Chief Justice in 1863) when the latter sought greater control over the local administration of justice and combated the partiality of magistrates when disciplining workers, the unjust application of master and servant laws and questioned the validity of the colonial laws.
indentured labour in the British planter colonies involve narratives well beyond the scope of a
study focused on the labour dimensions of Macaulay’s India law reforms, but a very brief
look at Gorrie’s tenure in Fiji serves as a good illustration of the tensions between planter
labour practices and external supervision. The case of Fiji is not only an example of some of
the longer term consequences of Macaulay’s reforms. Chief Justice Gorrie and Governor
Arthur Gordon represent the successor generation of liberal colonial reformers to Macaulay.
Their initiatives, while on a smaller scale, reflect similar aspirations, shortcomings and
disjunctions between theory and practice.

As Bridget Brereton’s biography of Gorrie notes, the British antislavery movement
was an important formative influence. His beliefs that all races should enjoyed legal equality
throughout the Empire, and that former slaves and indentured workers needed protection
from local European settler elites through colonial oversight and the courts were reinforced
by his work as a young lawyer collecting evidence from witnesses for the British Jamaica
Committee and the 1866 Royal Commission review of Governor Eyre’s repressive measures
following the 1865 rebellion at Morant Bay.100 Gorrie was appointed a judge in Mauritius in
1870, and together with Governor Arthur Gordon, pushed through property and labour
reforms and clashed with local planters in legal actions for abuses against indentured Indian
labourers. Gordon was sent on to Fiji in 1875 accompanied by Gorrie as the new Chief
Justice. In Fiji they not only contended with local planter interests but strode into conflicts
going back a decade involving the larger south west Pacific labour trade and sugar plantation
interests in Queensland.

The Queensland plantations recruited over 50,000 Melanesian islanders as labourers
and the abuses and violence accompanying the trade were publicised by a series of trials in
Australia involving charges of slaving, kidnapping and murder.101 This led to Queensland
regulations requiring the presence of a government agent on recruiting ships connected to the
colony but further measures were limited by problems of jurisdiction. The imperial Pacific
Island Protection Act, 1872 and the creation of Western Pacific High Commission in 1875
with jurisdiction over all British subjects established more comprehensive regional authority
for the regulation of recruitment and the prosecution of crimes committed by recruiters.102

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100 See Bridget Brereton, Law, Justice and Empire: The Colonial Career of John Gorrie, 1829-1892 (Kingston:
University of the West Indies Press, 1997. The Committee, originally formed by abolitionists, originally led by
Charles Buxton, son of Thomas Buxton, sought review of Eyre’s official account and eventually recommended
Eyre’s prosecution as John Stuart Mill, supported by leading figures in the liberal intelligentsia, took over
leadership (Fitzjames Stephen provided one of several legal opinions). As initial government support for him
faltering in the face of the Jamaica Committee’s agitation Thomas Carlyle led the Eyre Defence Committee
which mobilized reactionary public opinion to pressure the Liberal government and the Colonial Office for
stronger government in the face of excesses against Europeans in insurrections such as India in 1857 and
Jamaica in 1865—see Kostal, n 13, Hall n 5, 23-7

101 See generally, Weiner, n 6, 42-94. See also Deryk Scarr ed., A Cruize in A Queensland Labour Vessel to the
South Seas (W.E. Giles, Canberra ANU Press, 1968) and Reid Mortensen, ‘Slaving in Australian Courts:
Blackbirding Cases, 1869-71’ (2000) 4 Journal of South Pacific Law, 1. A prosecution against officers of the
recruiting ship Daphne were initiated in 1869 by Captain George Palmer, formerly if the West African slave
trade patrol and dubbed the ‘Wilberforce of the Pacific.’ A kidnapping case against the captain of the Jason was
more successful with a conviction upheld in 1871 and in 1872 a massacre of 70 islanders in Fiji aboard the Carl
resulted in murder convictions in Sydney.

102 The legislation required a license from the Governor or senior British consular officer for all vessels engaged
in labour traffic and recruiting agents were to accompany voyages. Enlisting any Pacific natives against their
will and fraudulent representations were made offences, and the Supreme Courts of any of the Australasian
colonies were empowered to try any British subject for offences committed in any area of the Pacific not under a
civilised jurisdiction. Courts were authorised to compel attendance of witnesses and hear native evidence. The
Gordon was appointed High Commissioner in 1877, along with Gorrie as Chief Judicial Commissioner and Acting High Commissioner in Gordon’s absence.

Australians involved with the recruitment and exploitation of indentured labour resisted the authority of the imperial commission and eventually the Queensland government undertook to end reliance on the indentured labour trade by 1890. In Fiji itself Gorrie drafted protective ordinances for the Fiji legislative council to regulate the transfer of land to Europeans (primarily Australian planters), protect native cultures and limit the exploitation of native labour. He also introduced procedures for the expedient resolution of labour disputes and curbed the powers of local magistrates in labour disputes involving Islanders. Local sources of labour were increasingly protected as local plantation demands for labour grew. Planters turned to India and 60,000 indentured labourers brought to Fiji between 1879 and 1920. By the early 20th century the Colonial Office and the colonial government in India regarded labour relations in Fiji as more troubled than in the West Indies. Fiji came to represent the indenture system at its worst, as Weiner puts it:

[T]he price for Gordon’s experiment in indigenous protection within a self-supporting Empire was paid by these Indians, whose labour enabled Fiji to succeed economically while allowing Fijians to keep their land and a good deal of their culture. Within this experiment, the protection of the law could be called upon by Fijians...but far less effectively by imported Indians.

Progressive local reforms resulted in measures that had less than benign practical results when larger forces came into play, frustrating the larger objectives of equal legal status and the protection of plantation workers from exploitation. The reform legacies and their implications for labour were similar to those of Macaulay.

Conclusions:

Macaulay’s IPC was a manifestation of the most advanced utilitarian ideas articulated during the early 19th century law reform debates but his reform involved more than the

imperial legislation empowered colonial courts but prosecutions outside of Queensland proved difficult and in response a high commission with powers to make regulations, issue licences, and prosecute all British subjects in the region was created by imperial order in council in 1875—see Weiner, Ibid, 42, 52-3, 80

Recruitment to Queensland plantations expanded with the development of disease resistant sugar cane varieties and new lands made available for cultivation and the colonial government there assumed increasing responsibility for the prosecution its residents. Planters and many Queenslanders resented representations of the Kanakas as the new slaves in the Australian and British press. Another series of kidnapping and murder trials (1884-85), and in particular the embarrassment caused by Alfred Vittery murder case, led to a Queensland Royal Commission to make further enquiry into the Pacific labour trade and to better articulate the political constraints it faced to the imperial government. The 1885 Commission Report revealed continuing wide-ranging illegalities, and recommended new local regulations around recruitment and governing conditions of indentured labour within the colony with the aim of ending the indentured labour trade within 5 years. Resentment about British imperial intervention continued, and Australian planter interests extended to Fiji itself, expressed in attempts to include Fiji as well as New Zealand in the Australian federation discussion in the 1890’s. –see Weiner, Ibid, 55

Summary proceedings without jury were intended to overcome the obstacles faced by labourers in bringing forward cases of workplace abuse. The procedures led to a flurry of appeals to the JCPC by planter interests. For details see Brereton, n 100, chs 4&5

Weiner, n 6, 94. Gorrie was posted in 1883 to Antigua and the Leeward Islands where plantations were in decline, and then became Chief Justice in Trinidad in 1886 (jurisdiction over Tobago was added in 1889). Conflict with plantation owners over his attempts to improve access of indenture labourers to the courts and his views about their rights and the obligations of employers led to an attempt to remove him from the bench and he died in 1892 while on leave see Brereton, n 100, chs 7&8; McLaren, n 6, 268-72
efficient regulation of crime and the effective routine administration of justice. It was also about reconstituting British colonial rule, to make it more effective and legitimate in accordance with British constitutional claims. These themes inform my focus on labour issues here, an exploration of the place of Macaulay and the IPC within the larger narratives of British abolition and transition to indentured labour in the planter colonies of the Empire. The code was crafted by a prominent abolitionist in the midst of the rapid development of a new system of indentured labour sourced primarily from India, one that resulted in the migration of over 1.3 million Indian workers whose circumstances and working conditions were legally regulated, but whose experience of exploitation represented only a most limited advance from what slaves faced at the time of the 1833 Abolition Act. Little was done in the IPC to end slavery in India, or to seize the opportunity to implement more robust measures to protect the dignity of labour through the more effective regulation of the emerging trade in indentured labour and the elimination of repressive master and servant laws in employment contracts.

Assessed broadly as law reform in its own terms, Macaulay’s code remains an impressive achievement, a huge advance on existing English criminal laws, with enduring technical qualities. Macaulay’s aim of according formal equal legal status to all subjects under modernised laws, and the priority he placed on comprehensiveness, consistency, and accessibility (notwithstanding the elusiveness of Bentham’s aims of scientific, universal, and comprehensive legislation), continues to impress to this day, despite the many retrograde changes made to the draft from the time of enactment and modern appreciation of the practical limitations of such ambitious legislative aims. Assessed historically in broader cultural, political and economic contexts and consequences, Macaulay’s law reform legacy is rather more problematic. The IPC was the product of a particular time and place, a reflection of Macaulay’s particular intellectual milieu and the limits of his experience. Despite liberal utilitarian conceits about disinterested progressive reform, the IPC was an experiment conducted in the colonial laboratory of India, its results implemented by legislative decree, and it cannot be divorced from a political context of British concerns about sovereignty. It aimed for more effective and legitimate colonial governance by way of the routine regulation of acts involving public order, personal harms and property, and of repressive responses that better conformed to British constitutional claims. While promotion of the rule of law and the reduction of archaic forms of discretionary authority and status differences represent a formal advance, it was an external power that defined the common obligations of citizenship, substantive differences persisted between the colonisers and the colonised, and limited recognition of indigenous diversity tended to reflect local British interests. These political themes are reflected in matters like the ‘private defence’ provisions, the importance of the 1857 Mutiny in making the IPC a legislative priority, and continuing tensions around status and the privileged position of the European community brought to the fore by the Ilbert bill controversy. They also suggest the limits of assimilative liberal ideals and contradictions between sovereignty and liberal rationalities.

Macaulay’s 1836 letter to his father, quoted at the outset, boasted that his India reforms would result in real progress on the central abolitionist causes of slavery and capital punishment without the compromises experienced at Westminster. Yet the persistence of indigenous slavery, the criminalisation of employee breach of contract justified by colonial circumstances and the rapid growth of the imperial indentured labour trade highlight important shortcomings in Macaulay’s reforms. How do we understand Macaulay’s failure to protect the dignity of labour, his criticism of imperial abolition as inadequate for the West Indies yet complacency when it came to the Indian worker? Did Macaulay exemplify the hypocrisy and the dangerously ambitious utilitarian agendas of liberal reformers in power, a disturbing glimpse into an emerging modern political ethos that would lead to 20th century
excesses, as Sullivan suggests? Or was he an example, as Hall suggests, of the cultural blindness of humanitarian reformers, whose concern about exploitation was more rhetorical than real and reflected the formation of privileged paternalistic identity? I suggest here that attention needs to be drawn to more basic forces of political economy. At the same time I argue that dismissal of the IPC as essentially an exercise in power, or condemnation of Macaulay’s reforms out of hand, leave important complexities and contradictions unaddressed. The advances found in Macaulay’s IPC should not be dismissed while the failures of his reforms illustrate the limits of progressive, liberal aims of criminal law reform in the face of larger forces involving colonial economic imperatives and the political impulses of colonial rule.