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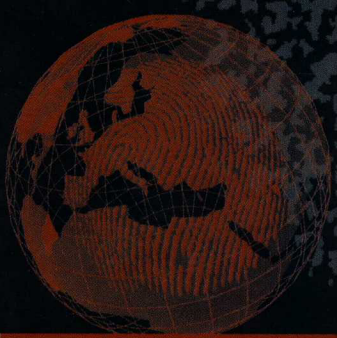
Codification, Macaulay and the Indian Penal Code

The Legacies and Modern Challenges of Criminal Law Reform



Edited by
Wing-Cheong Chan, Barry Wright
and Stanley Yeo

International and Comparative Criminal Justice

Codification, Macaulay and the Indian Penal Code

The Legacies and Modern Challenges of Criminal Law Reform

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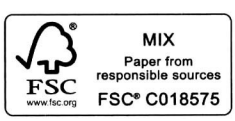

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CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE

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Preface

The Indian Penal Code 1860 (IPC), which was largely the work of Thomas Babington Macaulay, was the first codification of criminal law in the British Empire and is the longest serving criminal code in the common law world. It was informed by the ideas of utilitarian reformers, notably Jeremy Bentham, who advocated a wide range of reforms to English criminal law and its administration in the early nineteenth century. Macaulay embraced Bentham's 'science of legislation' and his aspiration for 'universal jurisprudence' after Macaulay developed a close association with James Mill during the passage of the India Charter Act 1833. Although the IPC was followed in the nineteenth century by the draft Jamaica and English codes, and codes implemented in Canada (1892), New Zealand (1893) and Queensland (1899), Macaulay's effort, drafted in 1837, came closest to Bentham's ambitious conception of comprehensive codification – one that was designed to displace the common law entirely and characterised by the principles of lucidity and accessibility of provisions, and consistency of expression and application.

Following its enactment, the IPC was adopted in other British colonies in South Asia. In the twentieth century, and particularly since national independence, the IPC and its offshoots have diverged to a degree by way of local legislative amendments and inconsistent judicial development of doctrines influenced by the decisions in other common law jurisdictions.

To mark the 150th anniversary of this significant achievement in criminal law reform, a three-day symposium was organised by the editors of this book and held from 9 to 11 June 2010 at the National University of Singapore. The relevance of the IPC to Singapore is that it was introduced into that country by the nineteenth century British colonial administrators. The Code remains as that nation's principal criminal law statute.

For the symposium, 16 experts were assigned topics to work on and were instructed to produce papers with the 'Key Issues' below in mind. They were also provided with Barry Wright's essay 'Macaulay's Indian Penal Code: Historical Context and Originating Principles' (Chapter 2 in this volume) and were asked to reflect on it when writing their papers. The experts comprised six academic law staff of the National University of Singapore and ten specially invited international researchers from Australia, Canada, England, India and Malaysia.

KEY ISSUES

The IPC was intended by Macaulay and his fellow Code framers to be regularly revised by legislative amendment whenever gaps or ambiguities were found. Unfortunately, this did not occur, with the result that the courts have largely had to undertake this task, sometimes with unsatisfactory outcomes. This was in part due to the failure of the courts to recognise or follow the drafting philosophy that underpins the IPC. Many courts have instead been influenced by English common law developments or have followed the decisions of other jurisdictions in an inconsistent fashion. Legislative amendments have tended to be *ad hoc* and reactive, responding to local circumstances and pressing policy challenges rather than involving systematic attempts to combine local needs with attention to Macaulay's general codifying principles.

How might the IPC look today if the original Code framers, maintaining their basic principles and philosophical stance, undertook a major revision? In addressing that question, let us imagine that they would examine the 150 years of judicial interpretations of the IPC and would study recent common law and criminal code developments from other comparable jurisdictions such as Australia, Canada and England. No doubt they would be prepared to move away from their original philosophical stance if there were sufficiently strong public policy reasons (evinced, for example, by the wide acceptance of a particular criminal law principle by the current criminal laws of major jurisdictions). But we can suppose that any such departures would likely be minimised and that new provisions would be crafted with the same care and rigour as those drafted originally, and made compatible with the rest of the modernised code.

At the same time we recognise that the philosophical stance and basic principles of the original IPC framers are the product of a particular time, culture and policy context. The originating aspiration of 'universal' and 'scientific' legislation warrants some scholarly scepticism. Nonetheless, the attributes of comprehensiveness, accessibility and consistency remain as progressive aims for law reform in the twenty-first century.

ABOUT THIS BOOK

We wish to emphasise that this is no mere collection of conference papers on related themes. The book comprises a selection of the symposium papers, carefully revised after the symposium, focusing on the challenges of comprehensive law reform. The papers were edited before the symposium and the event was actively used as an opportunity to further integrate the contributions, refine common themes and develop appropriate cross-references. The result is a book that stands as a coherent scholarly examination of the IPC and its legacy, one that promises to hold wide international appeal.

The chapters of this book have been classified into four parts. Part I sketches general themes, issues and the historical context which form the backdrop for the rest of the book. In line with the idea of 'revitalising' the IPC by having a modern and workable set of general principles of criminal responsibility, Part II comprises chapters dealing with principles of culpability (offence elements and extensions of liability), while Part III contains chapters on principles of exculpation (defences). In Part IV the discussion goes beyond the IPC to consider recent efforts at criminal law codification in Australia and England, and reflects on the challenges to such codification and criminal law reform in general.

The content of this book is therefore unique, comprising not only a description of the general principles found in the IPC but also a consideration of modern views and developments on those principles and related doctrinal issues, along with proposals for reforming the IPC in the light of those views and developments, and within the spirit of Macaulay's original draft Code. While the matters examined in this book are directly applicable to South Asian jurisdictions, they are also directly relevant to criminal law reform debates in the wider common law world (for example, Australia, Canada, England and New Zealand). Efforts at codifying criminal law are ongoing, as is the law reform of its general principles.

All told, we believe that this book will serve as a helpful and reliable source of authority for legal academics, judges, legal practitioners and criminal law reformers. Additionally, it promises to have wider scholarly appeal, being of interest to legal theorists, historians and policy specialists. In particular, we trust that this book will reveal the genius of Macaulay as a law reformer and remove altogether the stain on his legacy occasioned by the following unfair criticism from some quarters:

> [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. All hope of Macaulay as a lawyer, and also as a philosopher was over as soon as his code was seen.[1]

We wish to acknowledge the generous financing of the symposium by the Singapore Ministry of Education's Academic Research Fund Tier 1 (WBS No R-241-000-059-112) and Connie Yew, Wendy Wee, Lim Yu Hui and Jonathan Kao who helped to make the symposium a success. We would also like to thank Pam Bertram for her excellent editing of this book.

Wing-Cheong Chan
Barry Wright
Stanley Yeo

1 May 2011

1 Obituary, *Law Times*, 7 January 1860, p. 184.

List of Abbreviations of Law Reports Cited

The country of origin of the report is England unless otherwise stated.

A & E	Adolphus and Ellis' Reports
A Crim R	Australian Criminal Reports (Australia)
AC	Law Reports, Appeal Cases
AIR All	All India Reporter, Allahabad (India)
AIR Bom	All India Reporter, Bombay (India)
AIR Cal	All India Reporter, Calcutta (India)
AIR Lah	All India Reporter, Lahore (India)
AIR MP	All India Reporter, Madhya Pradesh (India)
AIR Nag	All India Reporter, Nagpur (India)
AIR Ori	All India Reporter, Orissa (India)
AIR Pat	All India Reporter, Patna (India)
AIR PC	All India Reporter, Privy Council (India)
AIR Rang	All India Reporter, Rangoon (India)
AIR SC	All India Reporter, Supreme Court (India)
All ER Rep	All England Reports Reprint
All ER	All England Reports
B & C	Barnewall and Cresswell's King's Bench Reports
BHC (CrC)	Bombay High Court Reports (Criminal Cases) (India)
BLR	Bombay Law Reporter (India)
Bom CR	Bombay Criminal Cases (India)
C & P	Carrington and Payne's Nisi Prius Reports
Car & K	Carrington and Kirwan's Nisi Prius Reports
CCC	Canadian Criminal Cases (Canada)
CCC (2d)	Canadian Criminal Cases (Second Series) (Canada)
CCC (3d)	Canadian Criminal Cases (Third Series) (Canada)
Cl & F	Clark and Finnelly's House of Lords Reports
CLR	Commonwealth Law Reports (Australia)
Co Rep	Coke's King's Bench Reports
Cox CC	Cox's Criminal Cases
CR (3rd)	Criminal Reports (Third Series) (Canada)
CR (4th)	Criminal Reports (Fourth Series) (Canada)
CR (6th)	Criminal Reports (Sixth Series) (Canada)
Cr App R	Criminal Appeal Reports
Cri LJ	Criminal Law Journal (India)
Crim LR	Criminal Law Review
D & B	Dearsly and Bell's Crown Cases Reserved
Dears	Dearsly's Crown Cases Reserved
Den	Denison's Crown Cases Reserved

E & B	Ellis and Blackburn's Queen's Bench Reports
East	East's Term Reports, King's Bench
EHRR	European Human Rights Reports
El & El	Ellis and Ellis' Queen's Bench Reports
ER	English Reports
EWCA Crim	England and Wales Court of Appeal (Criminal Division)
EWHC Admin	England and Wales High Court (Administrative Division)
F & F	Foster and Finlason's Nisi Prius Reports
F.2d	Federal Reporter (Second Series) (USA)
Fam	Law Reports, Family Division
FCA	Federal Court of Australia (Australia)
HCA	High Court of Australia (Australia)
ILR All	Indian Law Reports, Allahabad (India)
ILR Bom	Indian Law Reports, Bombay (India)
ILR Cal	Indian Law Reports, Calcutta (India)
ILR Mad	Indian Law Reports, Madras (India)
IR	Irish Reports (Ireland)
JC	Justiciary Cases (Scotland)
JP	Justice of the Peace
KB	Law Reports, King's Bench
L & C	Leigh and Cave's Crown Cases Reserved
Leach	Leach's Cases in Crown Law
Lewin	Lewin's Crown Cases on the Northern Circuit
LR CCR	Law Reports, Crown Cases Reserved
LR HL	Law Reports, House of Lords
LR QB	Law Reports, Queen's Bench
LSCA	Lesotho Court of Appeal (Lesotho)
LTR	Law Times Reports
M & W	Meeson and Welsby's Exchequer Reports
Man R (2d)	Manitoba Reports (Second Series) (Canada)
MHC	Madras High Court Reports (India)
MLJ	Malayan Law Journal (Malaysia and Singapore)
Moore (KB)	Moore's King's Bench Reports
NI	Northern Ireland Law Reports (Northern Ireland)
NLR	New Law Reports (Ceylon)
NSWCCA	New South Wales Court of Criminal Appeal (Australia)
NSWLR	New South Wales Law Reports (Australia)
NSWSC	New South Wales Supreme Court (Australia)
NZLR	New Zealand Law Reports (New Zealand)
OR (3d)	Ontario Reports (Third Series) (Canada)
PLD	All Pakistan Legal Decisions (Pakistan)
Plowden	Plowden's Reports
QB	Law Reports, Queen's Bench
QBD	Law Reports, Queen's Bench Division
QCA	Queensland Court of Appeal (Australia)
QR	Queensland Reports (Australia)
Raj.L.W.	Rajasthan Law Weekly (India)

RTR	Road Traffic Reports
SA	South African Law Reports (South Africa)
SASR	South Australian State Reports (Australia)
SCC	Supreme Court Cases (India)
SCC	Supreme Court of Canada (Canada)
SCR	Supreme Court Reports (Canada)
SE.2d	Southeastern Reporter (Second Series) (USA)
SGCA	Singapore Court of Appeal (Singapore)
SGDC	Singapore District Court (Singapore)
SGHC	Singapore High Court (Singapore)
SGMC	Singapore Magistrate's Court (Singapore)
SLR(R)	Singapore Law Reports (Reissue) (Singapore)
SLT	Scots Law Times (Scotland)
SR (NSW)	New South Wales State Reports (Australia)
St Tri	Howell's State Trials
Tas R	Tasmanian Reports (Australia)
UKHL	United Kingdom House of Lords
UNTS	United Nations Treaty Series (United Nations)
US	United States Supreme Court Reports (USA)
VR	Victorian Reports (Australia)
WASCA	Western Australia Supreme Court (Australia)
WLR	Weekly Law Reports
WWR	Western Weekly Reports (Canada)

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PART I
Background and Overview

The opening chapter of this work sets out some of the major themes and issues raised in the chapters that follow. In 'Revitalising Macaulay's Indian Penal Code', Stanley Yeo and Barry Wright make the case for saying that, while the Indian Penal Code (IPC) has served India and several other jurisdictions for 150 years, it has become antiquated in some respects and encumbered with random judicial modification and legislative amendment. These developments run contrary to the originating legislative principles, regarded by Thomas Macaulay, the principal drafter of the Code, as the hallmarks of a good criminal code. These principles remain relevant and sound ones today. A General Part is required to restore precise, comprehensible and accessible criminal provisions and to advance future legislative reform. The chapter concludes by outlining a strategy for implementation and a call for legislatures to fully support this much-needed exercise.

Chapter 2 takes the reader back to the time when the IPC was drafted in order to deepen our understanding of the influences and thinking behind the Code. In 'Macaulay's Indian Penal Code: Historical Context and Originating Principles', Barry Wright examines the significant impact of nineteenth-century English criminal law reform debates, the policy context and the main features of what became the first British jurisdiction criminal code. It represented a revolutionary Benthamite break in the conception, form and presentation of the criminal law, and although most of the substantive doctrines derived from existing English laws, they reflected liberal and utilitarian rationalising sensibilities. The chapter concludes by contending that while the Code was imposed as a means to make the law, and by extension British rule, more effective and legitimate, Macaulay's achievement of comprehensive, lucid and consistent provisions remains a progressive example of legislative reform.

Chapter 1
Revitalising Macaulay's Indian Penal Code[1]

Stanley Yeo and Barry Wright

The year 2010 marked the 150th anniversary of the Indian Penal Code 1860 (IPC), making it the longest serving criminal code in the common law world. Soon after its inception, the IPC received high praise for its clear articulation and thinking concerning criminal responsibility. For example, the English jurist and codifier James Fitzjames Stephen was led to proclaim that:

> The Indian Penal Code is to the English criminal law what a manufactured article ready for use is to the materials out of which it is made. It is to the French Penal Code and, I may add, to the north German Code of 1871, what a finished picture is to a sketch. It is far simpler, and much better expressed, than Livingston's Code for Louisiana; and its practical success has been complete.[2]

Stephen's lavish praise was entirely warranted given the overly complex, confusing and cumbersome state that English criminal law was in at the time. It was also warranted because Thomas Macaulay, the principal framer of the IPC, had done a superb job of drawing on leading ideas from early nineteenth-century English criminal law reform debates, notably Jeremy Bentham's advocacy of codification. He also drew from existing rationalisations of criminal law such as Robert Peel's English consolidations, the 1810 French Penal Code by Jean-Etienne-Marie Portalis and the 1826 draft Code of Louisiana by Edward Livingston.

However, Stephen's observations were made over 125 years ago and even the best codes are bound to lose many of their attributes if they remain unaltered or details are randomly modified over such an extended period of time. To use Stephen's metaphor, as a manufactured article, the IPC has not even been serviced, let alone remodelled, since leaving the codifier's desk. As a result, the IPC struggles to remain the principal repository of the foundational principles of criminal responsibility in India and other jurisdictions like Malaysia, Nigeria, Pakistan, Singapore, Sri Lanka and the Sudan which have adopted it, having had hardly any influence on the development of subsequent penal legislation. A proper recognition of the IPC as the primary penal legislation would require all other penal legislation to make the Code a pivotal source of reference. Additionally, the IPC has left many unintended problems of interpretation for the courts which have had the unenviable task of finding ways, not always successful, of applying the nineteenth-century attitudes and approaches embodied in the Code to social and moral situations in the twentieth and twenty-first centuries.

In this introductory chapter, we propose that the best solution to this unfortunate state of affairs is to enact a General Part which will significantly revitalise the IPC and restore many of its original technical attributes. A realistic strategy for drafting and enacting such a Part is suggested, and we

1 Parts of this chapter have previously appeared in an article by S. Yeo, 'Revitalising the Penal Code with a General Part' (2004) *Singapore Journal of Legal Studies* 1.

2 Cited in G.O. Trevelyan, *The Life and Letters of Lord Macaulay* (London: Longmans, Green & Co., 1923) 303.