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 an offence to do to a free man.

—Thomas Macaulay to Zachary Macaulay, Calcutta, 12 October 1836

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 the India Penal Code (IPC), the first criminal code enacted in the British Empire. Influenced by Jeremy Bentham’s theories of ‘scientific’ legislation and ‘universal’ jurisprudence, Macaulay’s code eliminated the common law and offered a modern presentation and progressive rationalisation of English criminal laws. The IPC remains an impressive example of comprehensive law reform, despite retrograde changes introduced in the 1860 enacted version which continued with later colonial amendments, adoptions elsewhere in British South Asia and after independence. At the same time Macaulay’s reforms are criticised by post-colonial and nationalist historians (the term Macaulayite is still in use to denigrate anglicised Indians). Despite its technical legal qualities, the IPC was a product of Macaulay’s cultural milieu and privileged position, its belated imposition after the 1857-8 Mutiny an attempt to make the law, and by extension British colonial rule, more effective and legitimate. It was also crafted within a broader context of the contentious shift from slavery to indentured labour in the planter colonies.

Macaulay’s IPC is examined here from the perspective of labour transitions in the 19th century British Empire. Macaulay embraced utilitarianism as he collaborated with James Mill on the Charter Act, becoming in India the very image of a utilitarian ‘enlightened despotic legislator,’ but his concerns about colonial labour exploitation had deeper roots in his abolitionist Clapham Sect background (his father Zachary was a close associate of William Wilberforce and James Stephen and had been Governor of Sierra Leone). A clause in the India Charter Act prohibiting practices of slavery was opposed by orientalists such as Wellington, but seemed to be vindicated by the imperial slavery legislation passed shortly after. Macaulay had nonetheless criticised the imperial abolition measures as compromised

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and insufficient yet faced constraints in drafting his own provisions in India. His draft code prompted wide-ranging objections from commercial interests, European residents, evangelicals and orientalists. Indigenous slavery persisted in the autonomous Princely States and potential obstacles to the rapid growth of an Empire-wide trade in indentured labour from India were avoided. Recent scholarship would suggest that these failures may have reflected an ambivalence rooted in his fraught relationship with Zachary, the inherent cultural biases and waning activism of the British abolitionists, and the more impersonal factors would include contradictions in colonial policies and pressure from the East India Company poised to expand trade in indentured labour with the demise of slave labour. I argue that the limitations and frustration of Macaulay’s labour-related provisions are a neglected aspect of larger narratives about imperial abolition and its aftermath. The experience also illustrates the limits of progressive law reform initiatives within the context of imperial economic imperatives, which involved continuing planter interests, and the political impulses of colonial rule, which became increasingly complex from the 1830’s.

The aim of this study is to situate the IPC within the wider historiographies of the British Empire in relation to labour transitions and law reform in the 19th century. It begins with a brief survey of these historiographies, focusing on slavery and indentured labour, the English law reform context and influences on Macaulay’s codification project. An overview of Macaulay’s IPC draft 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, illustrated with examples from the South Pacific.


The recent historical interest in matters such as imperial administrative networks, the modernization of colonial governance and identity formation has opened new avenues of scholarship, revealed complexities and added nuance to the positive and negative generalisations that characterise the older historiographies about the British Empire. Critical approaches to empire saw many historians in late 20th century turn to previously-neglected local experiences, social and cultural histories from below, specific national narratives, and the recovery of subordinated and diverse voices. More recent interest in comparative colonial histories and global networks marks renewed interest in context and a shift away from post-colonial paradigms premised on progressive teleologies of nationalism. At the same time this new interest is not a retreat to the older whiggish narratives that celebrate the achievements of Empire and the enlightened British imperial burden. Nor is it a displacement of history from ‘below’ by history from ‘above’ or a reversion to attempts to discern universal truths from comparative history.3 Recent work on imperial legal networks and comparative colonial legal histories exemplify these recent trends in imperial historiographies. Scholarship on matters such as colonial judges and their relations with colonial governments, criminal law controversies and reform, property law and development recognise both particular local circumstances and the importance of broader networks, that developments were not simply the product of directives from London but were informed by local struggles and ideas circulating between geographically distant places, facilitated by inter-colonial migration of legal personnel.4

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4 See for example John McLaren, Devigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800–1900 (Toronto: University of Toronto Press, 2011); Martin J. Weiner, An Empire on Trial: Race, Murder and Justice under British Rule, 1870-1935 (Cambridge: Cambridge University Press, 2009); Bridget Brereton, Law, Justice and Empire: The Colonial Career of John Gorrie, 1829-1892 (Kingston:
a) Changing British Political and Economic Contexts

I begin by attempting to locate the place of the IPC in the context of broader imperial political and economic challenges in the mid 19th century. Law played a prominent role in transformations in colonial governance and labour economies of the period.

Many of the political and administrative challenges in the second quarter of the nineteenth century were latent in the second British Empire that emerged in the wake of the American revolution. These reflected unresolved tensions between formal constitutional claims about the rule of law and British liberties on one hand and the pressures of imperial sovereignty and economic interests on the other. Chris Bayly has surveyed liberal and utilitarian-inspired administrative reforms sparked by renewed colonial crises and repressive responses that contradicted formal claims about enlightened British government, constitutionalism and legality (as well as the persisting problems of imperial financing). The largely European settler colonies, beginning with the Canadas, enjoyed increasing responsible and self-government while India became the main laboratory for many of the other innovations in imperial administration. Bayly also notes that reforms 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.

Law reforms played a central role in the modernisation and rationalisation of colonial administration. Law is prominent in the reforms promoted by Lords Durham and Sydenham in the wake of the 1837-8 Canadian rebellions. Despite the experience and controversy of repressive responses to the Irish rebellion (1798-1800) and the Canadian rebellions, similar forms of summary military justice continued to be deployed elsewhere, notably India (1857-8) and Jamaica (1865-66). R.W. Kostal’s recent study of Governor Eyre’s controversial response to the Jamaican insurrection notes how arbitrary responses not only highlighted contradictions between the exigencies of sovereignty and formal claims about the rule of law in colonial settings but also prompted intense debate about the legitimacy of imperial rule amongst the Victorian political classes in London. Nasser Hussain’s recent study of 19th century British India also focuses on 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.” As Fitzjames Stephen recognized in that setting 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.”

The place of law in British India and its relation to the rest of the Empire is my particular interest here and here 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. 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.

As I have argued elsewhere, the IPC was not simply about the more efficient administration of criminal justice, it was a reform that aimed to modernise British colonial rule and a manifestation of concerns about the effectiveness and legitimacy of that rule. As we shall see, while drafted well before the 1857-8 Mutiny, it was belatedly implemented in its wake. The crisis made codification a legislative priority. The IPC was not simply a utilitarian inspired mapping and re-ordering of the criminal law to make the basis rules of public interest and order widely-known and the routine administration of justice predictable. Beyond effective crime control it also aimed to displace more arbitrary forms of discretionary authority with a more credible rule of law based authority. It was a project to enhance the effectiveness of the rule of law in diverse frontier settings and engender greater compliance to British rule. As we shall see, such matters were pressing those colonies in crisis and crisis in turn lent urgency to such ambitious legislative projects. The IPC was the first British criminal code but it was by no means an isolated response and reformers operated within a global network.

Before moving on to a closer look at the IPC another important imperial context needs introduction: the highly charged matter of imperial abolition of slavery and the colonial labour transitions that followed. The historiography on abolition in the British Empire is extensive, from the imperial measures that ended the slave trade in 1808 (focusing on Africa and the efforts of Wilberforce, the elder James Stephen and Zachary Macaulay), the renewal of the abolitionist movement in the 1820’s, led and popularized domestically by religious non conformists who were also active in missionary work overseas, the precipitating crisis of the 1831 slave insurrection in Jamaica, and the passage of the 1833 imperial legislation that fully abolished slavery and introduced the temporary transitional apprenticeships for the West Indies. Legislatively, these efforts were tied up with the struggles against the Tory oligarchy (entrenched from the time of the French Revolution and led by Wellington), the Whig victory and passage of the Reform Act, 1832. The abolitionist push for the 1833 Act was led by MP Thomas Buxton, supported by Thomas Macaulay and Henry Brougham (although after the

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8 Hussain, n 4, 3–4
9 *ibid.*, at 4, quoted from J.F. Stephen’s *Minute on the Administration of Justice in British India*.
passage of the Reform Act, the latter two were preoccupied with other reform initiatives, Macaulay with James Mill at work on the India bill, Brougham preoccupied with setting up his Criminal Law Commission). Edward Stanley engineered the government’s compromises with planter interests and James Stephen of the Colonial Office closely supervised the colonial transition. Traditional interpretations emphasize political reform that empowered middle class perspectives and the growing popular support for the principled moral arguments against slavery, while the political economy interpretations introduced by Eric Williams emphasize the declining important of slavery as industrial capitalism matures. 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.

In terms of the transition following abolition in 1833-4, much of the literature has continued to focus 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 appeared that antislavery measures were not a legislative priority and in May and July 1833 when he opposed the first compromise proposal drafted by Howick and then Stanley’s successful bill), and he battled Wellington over a clause in the India Charter bill 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.

The more substantial and lasting labour transition was the rapid development of an imperial system of indentured labour, much of it involving the recruitment and transportation of workers from India. Indentured labour soon became the main form of labour in the British West Indies sugar plantations, replacing slavery and the ending in 1838 of the special magistrate supervised apprenticeships of freed slaves. An immense Indian diaspora throughout the planter colonies of the British Empire commenced, involving 1.3 million migrant workers from the mid 1830’s to the early 20th century, beginning with Mauritius but rapidly expanding from 1838 with plantations in Demerara, British Guiana (where 340,000 migrants from India eventually arrived), Trinidad (where 145,00 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. The Anti Slavery Society criticised the emerging system as a new form of slavery but moral activism was distracted by concerns about slavery outside British jurisdictions and declining interest

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13 Thomas Macaulay had been directly involved with the renewal of abolitionist movement in the 1820’s, assisting his father Zachary with editing the Anti Slavery Reporter while 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.


15 See Thomas to Zachary Macaulay, 13, 22, 27 July 1833 and 20 September 1833, in Pinney, n.1 vol.2 269-79, 307

and cynicism about conditions in former slave colonies. As we shall see in part three, the exploitation of contracted workers was made possible by the elaboration of criminal sanctions in colonial Master and Servant laws and through the powers of magistrates originally appointed to supervise the apprenticeships. James Stephen, who earlier battled planter-dominated colonial governments over amelioration measures for slaves and the administration of the apprenticeships, attempted to be vigilant in the supervision of indenture contracts and the colonial government in India attempted to regulate abuses by planter agents in the recruitment and transportation of workers. 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. The indenture system continued to expand as the main source of plantation labour until the early 20th century.

The huge trade in indentured labour from India also suggests a failure in Macaulay’s own law reforms in India. Imperial abolition did not appear to override local powers outside East India Company controlled areas or treaties and indigenous slavery practices persisted until the late 19th century in the autonomous Princely States. And where Macaulay had clear jurisdiction and relatively unconstrained local legislative influence in British India, potential obstacles to the rapid development in imperial trade in indentured labour were minimised. His penal code seemed ineffective in curbing both old and new forms of labour exploitation.

b) Law Reform in the Metropole

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, despite its central place in 19th century law reform debates there. Codes were developed in other British jurisdictions and Macauly’s IPC was the first of these. It was the basis for codes enacted in British colonies throughout South Asia and an important reference point for Robert Wright’s draft Jamaica Code (1877), a model for those enacted elsewhere in the West Indies and beyond. Notwithstanding the Law Commission’s recent effort (1968–2008), Fitzjames Stephen’s Draft English Code, a cautious effort that reflected accommodation with the common law, was the closest England itself came to codification. The bill died with the fall of the government in 1880, but Stephen’s draft became the main external reference for the first wave of British self-governing jurisdiction codes beginning with Canada. The IPC was not only the first but also came closest of all the nineteenth-century criminal codes to a practical implementation of Bentham’s ideas. A concise, lucid and comprehensive code that aimed to minimise discretion, differences in legal status, and concession to local circumstances. It As K.J.M. Smith observes, the IPC and its antecedents are an important episode in the development of English criminal jurisprudence and 19th century intellectual history.

Bentham coined the term ‘codification,’ to describe his radical break from the common law and ambitious legislative 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

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17 See Ibid as well as the chapters by Banton, Turner, and Anderson in Hay and Craven, eds., n 16.
18 See part 3 below for Stephen and later 19th century codifications throughout the Empire.
19 Smith, n 2, 145
Bengal. India soon became a colonial laboratory for these ideas, the reorganisation of colonial government there providing the opportunity for Macaulay to assume the ideal utilitarian role of an ‘enlightened despotic legislator.’ Soon after Bentham’s death in 1832, his utilitarian colleague James Mill reconstituted imperial authority in India and Macaulay assisted with the drafting of the India Charter Act bill and introduced it in Parliament. Soon after its passage (and the imperial abolition act) Macaulay 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. While it was hoped that the colonial example would inspire codification in the metropole, rationalising reform beyond Peel’s consolidations stalled. The bar and bench defenders of the common law in the metropole portrayed codification as alien to English legal tradition but their dismissal of the codification as foreign, or the work of philosophical radical interlopers versed in the common law, neglects its prominence in nineteenth-century English criminal law reform debates. It is also myopic, ignoring codes enacted in other British common law jurisdictions.

Bentham’s science of legislation and universal jurisprudence developed from his critique of Blackstone’s Commentaries. His break from his former teacher began with his 1776 Fragment on Government and continued throughout his long life. He acknowledged Blackstone’s achievement in technical arrangement and lending rational order to English law. But he concluded that the Commentaries were ultimately ‘an elegant palliative to the inherently chronic confusion of the common law’. The common law, Blackstone’s preoccupation, 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. Blackstone’s modern ordering of the common law was futile and the common law should be eliminated.

Bentham’s science of legislation, set out in Introduction to the Principles of Morals and Legislation and elsewhere, called for legislative reformulation of all laws, informed by

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25 Quoted in Smith, Lawyers, Legislators and Theorists, n 22, 11; see also discussion at 9–12; R Cross, ‘Blackstone v Bentham’ (1976) 92 The Law Quarterly Review 516. While introducing a continental and Enlightenment era sensibility to the common law, Blackstone did not transform its inherent inductive approach. The common law as a ‘gothic castle’ is a metaphor favoured by a number of contributors to forthcoming collection on the 19th century legal treatise, and Blackstone’s project was to renovate and modernize it. I play with this metaphor in my chapter, suggesting that Bentham regarded the common law castle as a ‘tear down,’ to be replaced by a Georgian villa with modern conveniences (see B Wright, ‘Renovate or Rebuild’ Treatises, Digests and Criminal Law Codification,’ in A. Fernandez and M. Dubber eds., Law Books in Action: Essays on the Anglo-American Legal Treatise Oxford: Hart Publishing, 2012, 181-201).

the rational principles of utility thought to have universal application. Unlike the treatise, there would be no looking back, reference to obscure archaic purposes, or attempt to marry traditional with modern policy objectives. His *pannomion*, composed of penal, constitutional and civil codes, aimed for nothing less than the comprehensive regulation of social relationships and sovereign power.\(^\text{27}\) The criminal code occupied much of Bentham’s attention, in contrast to the relatively minor place of criminal law in the *Commentaries*, its neglect in much of the later 19\(^{\text{th}}\) century treatise literature, and indeed its portrayal as hardly counting as law at all in historical narratives celebrating the genius of the common law.\(^\text{28}\) Criminal law entails vital matters of public policy, liberty and individual happiness. It regulates key relations between the state and citizens. It 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, modern rational justification and could not be entrusted to the courts.

Bentham’s taxonomy of criminal harms, prohibitions and penalties took the rationalising spirit of the Enlightenment much further than Blackstone. He sought to map out and categorise the entirety of the criminal law, all offences, forms of liability and defences set out leaving no *terra incognita*, 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.\(^\text{29}\) And while his criminal institutional proposals were well known, the transformations in the administration of English criminal law in the 1820s and 30\(^{\text{s}}\) were influenced by complex factors, more a matter of reform consensus between leading Tories and Whigs than Bentham’s advocacy.\(^\text{30}\) As for reforms to the substantive criminal law, consolidation (collection and update of all statutes), digests (organised presentation of the law) and yet more comprehensive rationalisations falling short of Bentham’s call were debated. Peel’s consolidations of 1827–31, which repealed or modernised hundreds of statutes and scaled back the death penalty from over 200 to a dozen offences, was a modest rather than transformative advance. It was nonetheless an important one, relatively neglected by scholars compared to the new police, professionalisation of the criminal trial and the rise of the penitentiary.

The fall of Wellington’s government opened the door to the possibility of wider criminal law reform under Henry Brougham. 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 intervention against legislative change.\(^\text{31}\) Brougham’s criminal law commissioners, appointed in 1833 with a mandate to produce a digest of criminal statutes,

\(^{27}\) See Smith, ‘Lawyers, Legislators and Theorists’ n 22, 20, 28–29; Farmer, n 22, 423.

\(^{28}\) See, eg SFC Milsom, *Historical Foundations of the Common Law* 2nd edn (London, Butterworths, 1981) 403, who states, “Nothing worth-while was created…The criminal law became segregated as one of the dirty jobs of society.”

\(^{29}\) 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 struggled with the tension between inductive and deductive logics and the challenges of crafting specific provisions that accounted for particular circumstances. See note 38 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 22, 120–55.


\(^{31}\) 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 22, 56–63, 361, 364.
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. 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 in a select committee. 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 were condemned to follow a similar pattern and the project proved more promising in colonial contexts.

India became a utilitarian laboratory where Macaulay went the furthest of all the law reformers in exploring the possibilities of Bentham’s scientific legislation and universal jurisprudence. As we shall see, while it became the most Benthamite code enacted, giving form and practical content to Bentham’s ideas, and making them work in the context of a specific time and place, proved difficult. Macaulay confronted the challenges with a Baconian pragmatism, relying in significant part on a synthesis of existing English criminal laws.

Most early commentary dismissed the IPC as the work of a philosophical radical non-lawyer (Macaulay trained as a barrister and knew Peel’s consolidations well). 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…’ although he acknowledged elsewhere, ‘[t]o compare the Indian penal code with English criminal law was like comparing Cosmos with Chaos’. Much more recently Eric Stokes fully illuminated Bentham’s considerable influence. Yet there were unresolved issues in his codifying ideas (tensions between inductive and deductive logics, between the abstract and the situational) and his precise impact remains difficult to determine. Macaulay wrote a biography of Bacon while working on the code, and was likely inspired by Bacon in his pragmatic, practical resolution of the drafting challenges. Here he may have been influenced by Robert Peel, who quoted widely from Bacon to undercut opposition to his consolidation bills.

c) Macaulay and Reform

Macaulay’s assumption of the role and very image of the utilitarian enlightened despotic legislator, becoming perhaps the most effective utilitarian reformer of his generation, was surprising. He assisted his father’s work in the abolitionist movement and contributed to liberal criticism of the ruling Tory oligarchy, practicing briefly as a barrister 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

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32 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 20, 404–5; M Lobban, ‘How Benthamatic Was the Criminal Law Commission?’ (2000) 18 Law and History Review 427.

33 See Smith, Lawyers, Legislators and Theorists, n 22, 136–8; Smith, Stephen, n 22, 75–76.

34 Smith, n 2, 153, puts it similarly, referring to ‘a fusion of utilitarian clarity and rigour with Burkean pragmatism’. This section and part 2 that follows, derive from my more detailed examinations in ‘Macaulay’s Indian Penal Code’ n 12


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

37 See Stokes, n 2.

38 See Wright, ‘Renovate or Rebuild,’ n 25. Like Bentham, Macaulay did not resolve the tensions between the universal and the situational. Aspiring to craft universal laws, Macaulay was obliged to take time and place into account, as even Bentham acknowledged was necessary. 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.
criticisms of their ideas in the late 1820’s and early 1830s in the Edinburgh and Westminster Reviews, warning of the threat radical utilitarian legislative reform posed to British liberties. He was suspicious of the utilitarians’ reductionist view of human nature and radical public policy proposals, emphasizing that British experience favoured gradualism. 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.39

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 East India Company and Indian public affairs. He became closely acquainted with James Mill at this time and collaborated closely with him on the reorganisation of India’s colonial government. In opening debate on the India Charter Act bill, Macaulay declared, ‘[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’.40 After arriving in India as legal representative on the Governor-General of India’s new Legislative Council, he wrote, ‘I have immense reforms in hand… such as would make old Bentham jump in his grave…’.41 His Press Act (1835) ended press licensing and prior restraint, the Black Act (1836) ended special privileges of European residents in the civil courts, and his education reforms widened accessibility and modernised curriculum, 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 Brougham’s commissioners grappled with the continuing chaotic state of English law.42

Such were the contradictions of 19th century British liberalism. They were more easily overlooked in an overseas setting, where the executive powers of colonial government gave Macaulay wide latitude to experiment with a dramatic reconstituting of legal authority in what was deemed, under utilitarian premises and imperial policy, to be the general public good. Macaulay rationalised that while India’s government was not free, the colony would at least benefit from an impartial and enlightened despotism until that time.

Stokes suggests that Macaulay’s ambivalence about utilitarian political and moral theories did not extend to Bentham’s legal theory.43 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, to put into effect developments that would result in freedom and independence at an uncertain future point.44 A recent biography by Robert Sullivan explores privileged position and hypocrisies of British liberals and explores the implicit but fraught psychological conflicts between Macaulay, suggesting that authoritarianism was implicit in liberal conceptions of Empire.45 Catherine Hall analysis of

39 H Butterfield, The Whig Interpretation of History, 1931 repr London, Bell, 1950
40 10 July 1833, Parliamentary Debates 3rd Series vol 19
41 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 (Bentham’s auto-ikon was more likely to cackle from its perch at University College London).
43 “He rejected the Utilitarian idea of the general renovation of society by means of an abstract universal theory… Instead he adhered to expediency and pragmatism, which he dignified with the authority of Bacon’s inductive method…Macaulay accepted Bentham’s jurisprudence but not the general political theory…” Stokes, n 2, 191-2.
44 Clive, n 2, 467-73. See also Pinney, “Introduction” vii-xi. 112-15. Jennifer Pitts challenges the assumption that Bentham was imperialist despite his ‘dead legislative of India’remark, attributing it to Elie Héley’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
Macaulay’s influential *History of England* explores similar themes, in particular, the ways metropole and colonial periphery were portrayed and included or excluded from an emerging enlightened assimilating British identity. Macaulay famously insulated himself from the cultures of India, which he found disconcerting, but was also aloof from European expatriate community. He returned from his sojourn exhausted, depressed (the loss of his father and the company of his sisters) and on the margins of the London Whig political elite. Hall 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 or the British settler colonies moving to self-governing Dominion status.

There are dangers in assuming a consistency in perspective, in this case between the enthusiastic activist, energetically pursuing the possibilities of reform in the laboratory of India, and the disappointed Macaulay entering middle age, jaded and in crisis perhaps, with a consequent shift in preoccupations and pursuit of popularising 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 and agency as suggested by Sullivan in particular. Macaulay the law reformer of the 1830’s should not be conflated with Macaulay the historian of the 1840’s.

There were larger forces at work around Macaulay’s projects. That Macaulay fell short of Bentham’s ideals is unsurprising for modern legal theorists, given the insights of the legal realists about the limits of legislation and persistent judicial tendencies around statutory interpretation and assertion of common law powers. Unlike Bentham, Macaulay devised working provisions and the IPC remains the groundbreaking British code, the most Benthamite in nature and ambition, and many of its qualities remain as progressive law reform aims in the twenty-first century. At the same time it must be recognised that Macaulay’s reform did not occur in a vacuum. A product of a particular time and place, cultural and intellectual context, Macaulay’s premises were informed by the limits of his experience, outlook and an intellectual milieu of European Enlightenment rationalism and British liberalism. Nor was the IPC a disinterested initiative, utilitarian and liberal conceits aside. It was a British imperial policy innovation that responded to concerns about effective colonial governance and challenges to British sovereignty. The metropole’s political classes were increasingly concerned about the legitimacy of British colonial rule, its conformity to constitutional claims, and the legal bases for the exercise of British power. In this respect it is telling that the delayed enactment of the IPC was sparked by the crisis of the Mutiny. As we shall see in part three, the IPC became a legislative priority because restoring the semblance of legality, in a manner that would enhance the effectiveness of the rule of law and minimise future resort to arbitrary emergency measures or military intervention, became a political

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46 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 2.


48 Macaulay sought to shift law-making from the courts to the legislature and limit judges to simple application of the law, but even Bentham realised that the discretionary powers of judges could not be eliminated (see notes 29 and 38 above). As the modern legal realists emphasize, legislation is coloured by local and particular influences when adopted and applied in varying settings. Novel situations, developments and new issues cannot be fully anticipated. Experience shows that the systematic updating required for comprehensive codes is seldom a legislative priority, and amendment is achieved through ad hoc reactive legislation or by judicial invention, judges unable to resist overlaying legislation with constructions and inconsistent statutory interpretation. For examples of judicial constructions and continuing deference to English common law developments in modern IPC jurisdictions see M. Sornorajah, “The Interpretation of the Penal Codes” [1991] 3 The Malayan Law Journal, cxxix.

49 See chapters in Chan, Wright and Yeo, n 2. This assessment of the durable qualities of many aspects of the IPC is shared by Smith, n 2.
priority. Colonial crises prompted ambitious law reforms and legal practices that better conformed to British constitutional claims and would engender, it was hoped, greater compliance to British rule. In a similar fashion crises led to the Jamaica draft and prefaced the codes of the 1890s.

2. The India Penal Code

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. The main 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, including the criticisms and 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 concluding part of this section.

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. 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.

50 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 to India. He testified in 1848, “I may state a fact already generally known when I say that Mr. Macaulay is justly entitled to be called the author of the Indian Penal Code.” Notes on the Report of the Indian Law Commissioners on the Indian Penal Code (London, 1848) vi.


52 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.

53 See Wing Cheong, Wright and Yeo, n 2.
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. The provisions are accompanied by Examples illustrating their application to hypothetical cases. Explanatory Notes, which disappeared from the enacted version of the IPC, criticise existing English laws and discuss the conceptual features of key provisions. Macaulay’s debt to Bentham is more discernable in conception (drafting principles) and presentation rather than in doctrinal details. The latter derive from existing laws, modernised but not reinvented, falling short of Bentham’s call to legislate anew.

a) Overview of Provisions:

The IPC is a comprehensive presentation of criminal law, a full taxonomy that precludes the common law, and very different in form from existing British legislation. Macaulay fully embraced Bentham’s extension of logic of classification in the natural sciences to law, aiming 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.54

Accompanying the radical Benthamite inspired departure in form from existing English laws were Macaulay’s illustrative Examples, designed as authoritative precedents set by legislators rather than judges, aiming to exhibit a provision’s entire meaning and range of application as well as minimise the possibilities of judicial discretion. Bentham contemplated the device and Edward Livingston’s draft Louisiana penal code included illustrations,55 but the technique was rejected by the English Commissioners (Fourth Report, 1839) and in Wright’s Jamaica draft.56 Clive notes that drafting the IPC honed Macaulay’s expressive skills as a writer and historian, drawing parallels between the challenges faced by legislators and historians of capturing both the particular and the general. 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.57

Macaulay’s Notes, which did not accompany the enacted IPC, constitute a succinct treatise on English criminal law in the 1830s.58 Incisive critique of existing English laws dominates the text and Macaulay takes obvious delight in pointing out common-law absurdities. But the basic doctrinal ideas build from a background he knew best, Peel’s English consolidations, peppered with occasional explicit reference to the 1810 French Code penal and the 1826 draft Louisiana code.59 The combination of critique and concise

54 See Stokes, n 2, 230. As Stephen, (History, vol 3, note 35, 302–3) put it, ‘The Penal Code was the first specimen of an entirely new and original method of legislative expression … In the first place the leading idea to be laid down is stated in the most explicit and pointed form which can be devised. Then such expressions in it as are not regarded as sufficiently explicit are made the subject of definite explanations. This is followed by equally definite exceptions…’

55 Stokes, n 2, 230.

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

57 Clive, n 2, 461–62. 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’ n 25, 191

58 I argue (Wright, Ibid., 192) they warrant recognition as one of the most interesting and critical examples of the 19th century treatise.

59 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
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 legislative method.60 It is a revealing departure, suggesting the significant place of existing laws as Macaulay’s starting point and primary reference.

The substantive provisions are a departure from Bentham’s injunction to reformulate and legislate the criminal law entirely anew, reflecting strands of liberalism other than utilitarianism. The Notes suggest they derived mostly from what Macaulay was familiar with, English laws reworked, simplified and modernised according to more general liberal sensibilities. Offences are accompanied, where relevant, by specified exemptions (the Macaulayan term for defences). 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) and negligence for endangering offences or where public duties were specified. Offences are accompanied, where relevant, by specified exemptions (defences). The IPC as originally drafted rejected the English doctrines of constructive liability and attempts to infer mental state from the act, including the arcane notion of malicious aforesaid.

The arcane English laws of murder and theft are thoroughly reconstituted. Political offences reflect a libertarian orientation, reflected in Macaulay’s narrow definition of treason, effective abolition of seditious libel. 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. Values reflecting Macaulay’s Clapham sect background are more apparent in his doctrinal innovations around the exploitation of vulnerable groups (women, children and labourers) as well as his expansion of liability for endangering and intangible harms. The replacement of the common law offence of blasphemy anticipates modern cultural denigration measures and compromises the Benthamite aspiration of universal jurisprudence in concession to particular time and place. Macaulay recognized cultural pluralism but sought to prevent proselytizers from exploiting religious tolerance to intentionally insult what others hold sacred, noting, “[t]here is perhaps no country in which the Government has so much to apprehend from religious excitement among the people.”61 Macaulay’s scheme of punishment reflected his Clapham sect humanitarian reformism as well as a utilitarian logic of deterrence, certainty and proportionality: capital punishment is limited to two offences (treason narrowly defined and premeditated murder --Peel’s dramatic reduction was to a dozen offences) and corporal punishment is abolished.62

b) The Labour Related Provisions

The main elements of the IPC concerned with labour exploitation include Macaulay’s strict limiting of exceptions (defence) for masters’ liability for offences, wrongful restraint provisions in offences to the body, and his limiting of penal sanctions for breaches of contract. Macaulay’s provisions here, as they related to slavery and indentured labour, were modest compared to his other doctrinal innovations, and probably coloured by his assumptions about the enforcement of imperial abolition. They nonetheless caused unease


60 Stokes, n 2, 229–30 notes that Livingston, following Bentham, had attempted to weave rationales into provisions with unwieldy results.

61 BPP, note 50, Note J.

62 For a further discussion of the substantive provisions and cross-references to the Notes, see Wright, n 12 (see also Smith, n 2 from 158).
amongst British officials in India and the East India Company, and the issues became matters of protracted debate in subsequent related legislation and reviews of the IPC.

The IPC deals with slavery by way of restricting defences based on property rights and refusing exceptions from liability and punishment for masters committing any offence against slaves. In Note B Macaulay expressed his opinion that the practical effect of this would be the abolition of slavery in British India. Reliance on the 1833 imperial act may have led him to be overly-sanguine about need for explicit declaration against slavery or the sale of persons in the draft. While expressing the view that the law, as the Commissioners proposed to frame it, would effect great practical change he doubted whether separate legislation specifically abolishing slavery would have similar practical effect, although he conceded that more 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 slavery and the sale of persons. The provisions did not make existing slavery an offence or abolish its practice but punished any transaction 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 utilitarian abolitionist activists and conservative orientalists who argued that Indian practices were mild and that more aggressive measures would incite revolt by landowners and allies. As a result, slavery continued in India until the late 19th century, decades after imperial abolition.

In addition to assaults and similar physical offences against the body, for which masters were fully liable, the provisions most pertinent to labour exploitation were 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 the enslaving or carrying away of adults within British India, but added with 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.

63 Self defence and defence of property were dramatically reconstituted as a “private defence” —Cheah Wui Ling, “Private Defence” in Chan, Wright and Yeo, n 2, 185.

64 “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 50, 83

65 Ibid, 85

66 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)

67 These arguments were originally articulated by Wellington during the Lords debate on the 1833 Charter bill. See Dhagamwar, n 51 and n 96 below.

68 Note M “On Offences Against the Body,” BPP, n 50, 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 includes persons “being in charge of any vessel, [who]
The legislation Macaulay referred to was Act V 1837, soon supplemented by Act XXII and yet further legislation passed in 1839, consolidated under the 1844 Indian Emigration Act. 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. It 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). Provisions were added to enable 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.69

However, this Indian regulation of the growing trade in indentured labour, combined with imperial supervision from the Colonial Office constitutes only half the picture. External protective supervision was contradicted by the wide reliance on penal sanctions in contracts of employment, expanded in the master and servant laws in India and planter colonies just as criminalised master and servant laws were curbed and abolished in the metropole. 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.”70 Yet he backed away from recognizing full equality of status in contracts of employment, and the Government in 1837-8 had even contemplated passing legislation to make it a criminal offence for domestic servant to leave their masters without notice.71 The Commissioners expressed concern about the physical and financial vulnerability of masters and duplicity of servants, illustrated by case of European women and children journeying long distances 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 considerable pressure to extend criminal sanctions to all menial servants, but Macaulay’s provisions were only slightly modified and expanded modified in the enacted 1860 version.72

Expressions of freedom of contract were largely rhetorical as Michael Anderson notes. Apart from the restrictions on slavery, ameliorative factory legislation, and supervised recruitment system for plantations, the late 19th century Indian colonial state relied heavily on punitive elements of master and servant laws in both plantations and industries, retaining criminalization a half century longer than in England. The Workmans Breach of Contract Act, 1859, designed to give employers closer control over labourers who abscended or refused work after being given advances, accompanied the punitive provisions set out in the IPC. Employers who deliberately broke a contract were only liable for civil damages but labourer who persisted in a breach despite a magistrate’s order could be punished with fines or imprisonment of up to three months with hard labour. And in practice it was almost

69 See Dhagamwar, n 51, 105; Mangru n 16.
70 Note P On the Chapter of the Criminal Breach of Contracts of Service,” BPP, n 50, 115
71 Dhagamwar, n 51, 106
72 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.
impossible for servants to bring civil actions but easy for employers to complain to nearest magistrate for police assistance in to deal with labourers. 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.

As we shall see in the next section, local master and servant laws in other colonies extended wide disciplinary control over indentured labourers, supported by the powers of the local magistracy. While recruitment and transportation in the indenture trade was regulated and supervised, and some British appointed senior judges and governors confronted the local administration of justice and colonial legislatures, the criminal controls around labour contracts were highly effective in facilitating the exploitation of the migrant workers.

* John Stuart Mill praised the IPC in the Westminster Review echoed Macaulay’s hope that his code would inspire stalled English efforts (or as Kolsky puts it, “that modernity in the colony would ‘re-act’ upon the metropole”), but his IPC encountered what Smith describes as “the great dead weight power of governmental and administrative inertia…” Utilitarian reform was compromised by military and commercial pressures and orientalism persisted in British colonial policy. Evangelicals objected to Macaulay’s replacement of blasphemy by a modern cultural denigration offence, and condemned him as ‘churchwarden to the idol.’ Macaulay’s Benthamite inspired abolition of common law was denigrated by the bar and bench in both the metropole and colony. Subsequent legal appointees criticised or dismissed the draft. Perhaps most significantly, 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 culminated in the Ilbert bill controversy and the ‘white mutiny.”

The 1857–58 crisis restored the code as a legislative priority, as Stephen noted, “[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 unmistakeable…” Despite criticism of Governor-General ‘clemency’ Canning, the revolt and its suppression underscored how resort 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, a crisis of

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73 Ibid, 431
74 Ibid, 454
75 (1838) 31 Westminster Review 395; Kolsky n 10, 633.
76 Smith, n 2, 160. See also, Smith, Stephen, n 22, 126–31; Stephen, History vol 3, n 35, 299–300; Stokes, n 2, 262; Dhagamwar, n 51, from n 77.
77 On Ilbert and ‘the white mutiny’ see n 79 below. Auckland wrote to Hobhouse in summer of 1838, detailing objections from the bar and bench in Madras and missionaries, who drafted a memorial against provisions prohibiting interference with religious freedom. Auckland delayed wider circulation of the IPC to judicial and administrative branches until late 1839 and Macaulay’s successor Amos neglected the law commission was preoccupied with maintaining direct influence on council and was critical of divergences from the work of Brougham’s English Law Commission. On the reception of Macaulay’s draft, from his successor Andrew Amos to the Reports of the Indian Law Commissioners (1846, 1847), Drinkwater Bethune’s critique and alternative proposal, the House of Lords Select Committee recommendations (1852), and final revisions by Barnes Peacock see Dhagamwar, n 51, 77-85; Clive, n 2, 463
78 Quoted in Setalvad, n 51, 124.
colonial legitimacy that would soon again be replayed during the Eyre controversy in Jamaica. Such responses undermined the legitimacy of British rule and associated formal claims of constitutionalism and the rule of law. Enactment helped to address such concerns and would, it was hoped, minimise future need to resort to emergency military expedients to restore public order and uphold imperial rule. Revisions to Macaulay’s original draft were finalised in 1858, and the IPC was enacted in October 1860, with retrograde amendments that eased the Benthamite tone of Macaulay’s draft marked a partial return to prevailing English doctrines, as well as reflecting European resistance to the idea of equal legal status with indigenous subjects. In the metropole the IPC tended to be dismissed, regarded as suitable only for backward overseas colonies where it was necessary ‘to keep things simple for the native population and magistrates of limited ability’. Such was the depth of the hostility of the established English bar and bench, the self appointed guardians of the common law and English legal culture, that the Law Times obituary for Macaulay 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. All hope of Macaulay as a lawyer, and also as a philosopher was over as soon as his code was seen.

3. Criminal Law and Labour Legacies

Although utilitarian hopes that the IPC would inspire stalled criminal law reform efforts in the metropole were to be disappointed, Macaulay’s codification had rather more impact on reform elsewhere in the Empire. The IPC was followed by Robert Wright’s Jamaica code, and codes enacted in Canada (1892), New Zealand (1893) and Queensland (1899). Fitzjames Stephen, son of James Stephen, who had been an Indian law commissioner after enactment, did draft modest English criminal code, and his 1880 Draft English Code bill came closest to domestic success. Macaulay’s law reform legacy was a mixed one, but most significantly for our purposes here, the IPC and related legislation did little to constrain the exploitation of labour in India or the emergence of an imperial system involving indentured workers from India.

a) Criminal Law Reform in England and the Empire:

Macaulay’s successors in India were prominent figures in later nineteenth-century English legal theory circles, from Andrew Amos through to Henry Maine and Fitzjames Stephen. In England it had become obvious that Bentham’s injunction to reformulate criminal law entirely anew was no longer feasible and reform proponents of codification proceeded with much more caution. Professional and judicial resistance to ambitious legislative reform solidified and defences of the common law became more aggressive. The utilitarian critique was deflected by procedural reforms and appeals, scholars such as Maine

79 The IPC did not take effect until 1862, further delayed until passage of criminal procedure legislation that retreated from Macaulay’s aim of equal status. The procedures clarified that Europeans residents were not obliged to appear before Indian judges and magistrates and the jurisdictional autonomy of the Princely states. Henry Maine, Stephen’s immediate predecessor as law member of council (1862–69) objected to the code’s Benthamite hue, claiming ‘nobody cares about criminal law except theorists and habitual criminals’ (quoted in Smith, Stephen, n 23, 127). Stephen added more procedural changes and an evidence act in 1872, while Courtney Ilbert’s attempt to restore Macaulay’s aim of uniform criminal jurisdiction sparked the 1883) ‘white mutiny’; see Kolsky, n 10, 673–82.


81 7 January 1860, 184.

82 Smith, Lawyers, Legislators and Theorists and Stephen, n 22 map these connections. For a more detailed examination of later criminal law reform and codification efforts and their relationship to the treatise see Wright, n 25.
and Maitland enhanced the modern legitimacy Blackstone lent to the common law, and
treatises prompted more sophisticated criminal law. The legal positivists, figures such as John
Austin, sought to render Bentham’s legacy more palatable, finding common cause with the
more conservative legal scholars as law emerged as an academic discipline accompanying
modern professional legal education.

Fitzjames Stephen, who praised but helped tame the IPC, led domestic codification
efforts in the latter half of the 19th century. Bentham’s injunction to reformulate criminal law
anew was abandoned in favour of proceeding from existing laws in a treatise-inspired
synthesis, a rationalisation that was only loosely utilitarian and reflected Stephen’s
conservative political and social inclinations. No philosophical radical, wary of conceptual
abstraction though interested in speculative jurisprudence and the work of Austin and Maine,
had a much more positive view of the common law and judicial discretion than Macaulay
and Bentham. Stephen’s Draft English Code preceded by his treatise A General View of the
Criminal Law of England (1863) and A Digest of the Criminal Law (1877), important steps to
what was in Benthamite and Macaulayan terms a cautious codification of indictable offences
that left defences and the principles of liability to the common law. His 1878 draft English
code derived largely from his Digest was taken up by the government and a commission
converted it into a bill, introduced in 1880. The bill died with the fall of the government on
the Irish question, the closest England and Wales ever came to codification despite
subsequent efforts, including the most recent one by the Law Commission (1968-2008).83

The Macaulay and Stephen codes are very different, the former aspiring to break
decisively from the common law, the latter seeking accommodation with it. The prospects of
codification were better in other British jurisdictions, including those that enjoyed increasing
responsibility and self-government and where Stephen’s code became a primary external
reference.84

In India retrograde changes to the IPC continued apace after enactment, and in most
cases, after adoptions elsewhere in British India and independence as well.85 The Colonial
Office had promoted the IPC for other colonial settings,86 and it was adopted in Ceylon and
the Straits Settlements and some African colonies, and inspired William Badgley’s 1850
proposed code for the Province of Canada.87 The 1865 Jamaican uprising and Governor
Eyre’s controversial response prompted the Colonial Office to commission Robert Wright to
revise the IPC for other colonial settings.88 The Jamaica Code, 1877 was not enacted,

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83 See Smith, Stephen, n 22, esp. 44–72. On the most recent efforts see Chris 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, n 2, 337; ‘RIP: The Criminal Code (1968-

Journal of Legal Studies 307; Friedland, ‘Codification in the Commonwealth: Earlier Efforts’ (1990) 2 Criminal Law Forum 145; Barry
Wright, ‘Criminal Law Codification and Imperial Projects: The Self Governing Jurisdiction Codes of the 1890’s’ (2008) 12 Legal History
19.

85 See n 79 above. On the continuing changes to the code in IPC based jurisdictions, the low legislative priority of systematic updating and
ad hoc reactive legislative amendments, inconsistent judicial interpretation and added common law inspired constructions and complexities,
see Chan, Wright and Yeo, n 2

86 See Colonial Office circulars, eg ‘Some Considerations Preliminary to the Preparation of a Penal Code for the Crown Colonies’ and Sir
Henry Taylor’s treatise (later appended to Wright’s Jamaica draft), ‘Subjects Affecting Colonies Generally, Confidential Print,’ 20 May
1870, National Archives (UK) CO 885/3/19.

87 See G Blaine Baker, ‘Strategic Benthamism: Rehabilitating United Canada’s Bar through Criminal Law Codification, 1847-54’, J Phillips,
R McMurtry and J Saywell (eds), Essays in the History of Canadian Law Vol. 10: A Tribute to Peter N. Oliver (Toronto, ON, Osgoode
Society, 2008) 257.

88 See Kostal, n 4, Friedland, ‘R.S. Wright’ n 84. Influenced by the English Law Commissioners, Wright’s code differed from the IPC in
attempting to defined liability standards in a general part and abandoning Macaulay’s use of examples. For the differences between Stephen
and Wright see Smith, Lawyers, Legislators and Theorists, n 22, 151-52.
although versions were adopted elsewhere in the West Indies and further afield. The conditions were favourable for codification in self-governing jurisdictions emerging from colonial status. 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 (e.g., 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, prefacing the larger challenge faced by the Dominion of Canada in 1867). Consolations had simplified the accumulated layers of law and codification appealed as a logical next step, a complete, succinct and portable compendium of criminal law attractive to a bar and bench more distant from the culture of the common law, faced with formidable practical challenges accessing 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.

Codification was associated with constraint on state powers and self-government, giving it a constitutional momentum lacking in England itself. While these jurisdictions were unreceptive to imposed codes written by imperial administrators promoted by the Colonial Office, Stephen’s Draft English Code was not burdened with such colonialis baggage. His modest, pragmatic approach was loose enough in conception to combine easily with local consolidations and local developments could be accommodated. 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 big legislative projects.

b) The Criminal Regulation of Indentured Labour

The 1833 imperial India Charter and Abolition of Slavery Acts and Macaulay’s refusal of exceptions for masters’ liability for offences and subsequent addition of slave trading offences in the IPC did not end slavery in India which persisted in residual form to the late 19th century. The larger problem of labour exploitation was the growth of the trade in indentured labour from India. As we have seen, the modest provisions in the IPC on unlawful restraint anticipated the colonial government’s regulations of the emerging system of recruitment and trade in separate legislation in 1837. Macaulay’s retention of limited penal sanctions in employment contracts opposed in principle but seen as necessary for conditions in India, was the very same pretext embraced by the local legislatures in the planter colonies.

The perceived labour requirements for reliable and economically viable plantation production

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90 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 representative legislative institutions and colonial courts were first established, empowered to amend these laws as conditions required, subject to imperial supervision (Colonial Office review of legislation and possible disallowance, appeals for the Judicial Committee of the Privy Council after 1833, imperial legislation).


92 See, generally, Brown ibid; Brown and Wright, n 12, Wright, n 84. On England see Smith, Stephen, n 22, 83-84; Farmer, n 22, 423-24.

93 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, inspired by Zanardelli’s 1889 Italian Code, resembles the Macaulay and Wright codes—see Wright, ibid.

94 For Canada, see Brown and Wright, n 12. New Zealand’s project started in 1883 during resistance to Maori land confiscations and indefinite detentions and a draft was completed before Canada’s, but legislative difficulties delayed enactment to 1893. Queensland’s code was prefaced by a general strike, emergence of the Labor Party and perceived threats to federation; see Wright, ibid.

95 See Dhaganwar, n 51, 118-22, 161-79, 208-9
justified elaborated criminal sanctions in the form of master and servant laws that historically governed contracts of employment, effectively enforced by local magistrates. The expansion and refinement of criminalisation was geared to the control and discipline of migrant workers. ⁹⁶

Despite Macaulay’s involvement with the 1837 indentured labour legislation, the provisions of his IPC draft were poorly coordinated and at odds with it. He failed to anticipate the reciprocal legal regimes that emerged around indentured labour, an outside supervisory regime over the trade in indentured labour that attempted to ameliorate, and was in constant tension with, local measures of labour control. This was closely reminiscent of the patterns that played out in colonial slavery and imperial supervision in the 1820’s and 30’s that Macaulay and fellow abolitionists had struggled against.

During the 1820’s and early 30’s the Colonial Office had focused on regulating conditions of slavery and largely neglected colonial master and servant laws adopted or modelled on English laws from the 18 th and early 19 th centuries. The apprenticeship scheme for freed slaves that operated for four years in the West Indies introduced special magistrates to supervise labour conditions. The local master and servant laws were combined with the powers of the special magistrates and developed into a new system of ‘voluntary servitude’ for indentured labourers. The system was premised on ensuring stable labour costs and preventing withdrawal or disruption of labour services.

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. While the special magistrates initially appointed by London may have been often been at odds with plantation owners during the apprenticeship period 1834-8, they became increasingly beholden to local elites in the years following. 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). ⁹⁷

As noted in part one, James Stephen, who earlier battled planter-dominated colonial governments over amelioration measures for slaves and the administration of the apprenticeships, attempted to be vigilant in the supervision of the emerging indenture system. Fraud in employment contacts, particularly the contract terms and transportation arrangements was his primary concern, and as we have seen, the trade, recruitment and transportation of workers was regulated by the colonial government in India. Imperial supervision became more sporadic after the late 1840’s as direct engagement by the Colonial and India Offices came to be coordinated by the Colonial Land and Emigration Commission which acted 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 20 th century.

c) An Illustrative Example: Chief Justice Gorrie and Indentured Labour in the Pacific

The tensions between local colonial labour measures and external restraints on planter exploitation were manifested in numerous British colonial settings in the mid and late 19 th century, reflected in numerous clashes between governors and or judges appointed by the imperial government and local elites. John McLaren’s recent study of colonial judicial controversies includes several examples of such conflicts involving indentured labour,

⁹⁶ See Mohapatra, n16, 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

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

Gorrie’s tenure in Fiji nicely illustrates the tensions between planter labour practices and external supervision. As Bridget Brereton’s biography notes, the British anti-slavery movement was a powerful influence on the young Gorrie, instilling the conviction that persons of all racial backgrounds should enjoyed legal equality throughout the Empire and that ex slaves and indentured workers needed special protection from European settler elites through the agency of colonial oversight and the courts. His beliefs were reinforced by his involvement as a 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 in Jamaica. In 1870 Gorrie was appointed judge in Mauritius, accompanying the reforming governor Arthur Gordon, and together they clashed with planters there by taking action against abuses of indentured Indian labourers and energetically pushing through property and labour reforms. Gordon was sent to Fiji in 1875, again accompanied by Gorrie as the new Chief Justice. In Fiji they not only contended with local planter interests but strode into conflicts going back over 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 a series of Australian trials, 1869-72, involving charges of slaving, kidnapping and murder, publicised the violence accompanying the trade. The Queensland government issued regulations requiring the presence of a government agent on recruiting ships connected to the colony but further regulation was hindered by the fact that the islanders did not fall under colonial jurisdiction. The imperial Pacific Island Protection Act, 1872 and the creation of Western Pacific High Commission, 1877 established a more elaborate system for the regulation of recruitment and the prosecution of crimes committed by recruiters. 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. However, the imperial legislation empowered but did not require colonial courts to act and

98 McLaren, n 4, especially ch.10. McLaren provides numerous Australian example of judicial tensions with local elites and Colonial Office interventions, including Jeffrey Bent, who went from controversy in New South Wales to conflicts with the plantocracy in Granada, Francis Forbes, former Chief Justice of Newfoundland who became the first Chief Justice of New South Wales, John Walpole Willis who was removed from King’s Bench in Upper Canada, was briefly on the bench in British Guiana before landing on the New South Wales Supreme Court, and Benjamin Boothby of the South Australia Supreme Court. Francis Hincks a colonial politician who had headed government in the province of Canada, had been appointed by London as governor of British Guiana and formed close alliance with planter interests. He questioned the validity of the colonial laws.

99 See Brereton, n 4.

100 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 faltered 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 4, Hall n 3, 23-7
prosecutions outside of Queensland proved difficult. The creation of a high commissioner to
with jurisdiction over all British subjects in the western pacific and to make regulations and
issue licences authority was created by imperial order in council in 1875. Gordon who arrived
as Governor for Fiji from Mauritius was appointed to the post in 1877. Gorrie, Fiji’s new
Chief Justice, became Chief Judicial Commissioner, also serving as Acting High
Commissioner and when Gordon was on leave in UK, and diligently pursued injustices and
extended the authority of the Commission. 102

However, prosecutions outside of Queensland continued to prove difficult and
expansion of production in the late 1870’s with new disease resistant sugar cane varieties and
the availability of new lands for cultivation, had led to increases in recruitment. The
Queensland government accepted increasing responsibility for the prosecution its residents.
Another series of kidnapping and murder trials in 1884-85 led to a Queensland Royal
Commission, which resulted in new local regulations governing indentured labour within the
colony and the aim of gradual ending of the trade in indentured labour by 1890. 103 Some
interests during the Australian federation discussions contemplated inclusion of Fiji itself as
well as New Zealand, reflecting lingering resentments about British imperial intervention. In
Fiji Gorrie drafted protective ordinances for the Fiji legislative council to regulate the transfer
of land to Europeans, preserve native cultures and limit the exploitation of native labour, and
also introduced procedures for the expedient resolution of labour disputes. 104 Local sources
of labour were increasingly protected as local plantation demands for labour grew and India
became the primary source. 60,000 indentured labourers brought from India between 1879
and 1920. As Weiner summarises the situation, by the beginning of the 20th century the
Colonial Office and the colonial government in India regarded labour relations in Fiji as more
troubled than in the West Indies, representing the indenture system at its worst:

In a sense, the 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, at least against Europeans, but far less effectively by
imported Indians. 105

Conclusions:

Macaulay’s IPC was much more than a criminal law reform concerned with the more
efficient regulation of crime and effective administration of justice. It was about modern
public ordering and governance, reflecting a range of pressing imperial policy concerns,
including labour relations, the particular focus of this study. Macaulay’s project sought to
reconstitute British colonial rule according to utilitarian legal and political theories, and in
greater conformity to formal claims about the rule of law and the other attributes of British
constitutionalism. It was also drafted in the midst of the early phases of the transition from

102 Weiner, Ibid, 42, 52-3, 80

103 Weiner, Ibid, 55. Planters and many Queenslanders resented representations of the Kanakas as the new slaves in the Australian and
British press but the 1884 Alfred Vittery murder case was caused considerable embarrassment, prompting the Griffith government to
appoint a Royal Commission to enquire into labour traffic while also representing the political constraints it faced to the imperial
government. The 1885 Commission Report revealed continuing wide-ranging illegalities and recommended colonial legislation to better
regulate recruitment and employment on plantations and a gradual end of the labour trade within 5 years.

104 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 4, chs 4&5

105 Weiner, n4, 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). His confrontation with plantation owners over 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 4, chs 7&8; McLaren, n 4, 268-72
slavery to indentured labour in the planter colonies of the Empire, a new system in which migrant Indian workers played a dominant role.

Assessed as law reform in its own terms, Macaulay’s code is groundbreaking and progressive. His ambitious 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), remains an impressive technical achievement.

Assessed historically in broader political and economic context, as well as consequences and experience, Macaulay’s law reform legacy is rather more problematic. The IPC was the product of a particular time and place, cultural and intellectual context. Macaulay’s premises were informed by the limits of his experiences and outlook, the intellectual milieu of British liberalism and European Enlightenment rationalism. And despite utilitarian and liberal conceits, the IPC was not a disinterested reform but drafted and implemented within a political context of imperial interests concerned about effective colonial governance, crises and challenges to its sovereignty. The IPC was a quasi-constitutional projection of British authority. While promotion of the rule of law and the reduction of archaic forms of discretionary authority and status differences represent an advance, the aim of making the law more effective and legitimate in culturally diverse frontier settings was also about sovereignty. The IPC was designed to make the law more effective and legitimate in a culturally diverse frontier setting thereby better regulating relations between the colonisers and the colonised. Despite Macaulay’s vague aim of a free India at a distant point in the future, the adoption of the IPC by authoritarian legislative decree, denial of indigenous diversity, and common obligations of citizenship as defined by an external power while colonial difference persisted, reflect the limits of assimilative liberal ideals and contradictions between sovereignty and liberal rationalities. The importance of the 1857 Mutiny in making enactment of the IPC a legislative priority and the persistence of differences in legal status highlighted by the Ilbert bill controversy, reveal these political dimensions. The persistence of indigenous slavery and the growth of indentured labour, despite Macaulay’s concern about these issues, reveal the limitations of Macaulay’s reforms.

Yet it is also reductionist to dismiss the IPC as essentially an exercise in power. The enduring qualities of Macaulay’s codification as comprehensive and progressive law reform and his liberal commitment to free and dignified labour cannot be cynically dismissed. In retrospect Macaulay could have done more to anticipate and head off the developing new colonial system of labour exploitation, and his loss of interest in IPC after his return from Indian facilitated the retrograde changes made to his draft. But he cannot be blamed for these failures. Rather, the experience illustrates the limits of progressive, liberal aims of criminal law reform with the context of imperial economic imperatives and the political impulses of colonial rule.