PUBLISHED VERSION

Greg Taylor
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Journal of Commonwealth Criminal Law, 2012; 1:51-68

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Originally Published at: https://archive.org/details/Journal-of-Commonwealth-Criminal-Law

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28 August, 2017

http://hdl.handle.net/2440/107135

MACAULAY'S IPC – A SUCCESS AT HOME, OVERLOOKED ABROAD

GREG TAYLOR[*]

ABSTRACT

Macaulay's Penal Code has been a remarkable success. It has endured in India and several other countries in the region for over a century and a half. But it has had few imitators. Unlike Sir Samuel Griffith's Criminal Code for Queensland, for example, it has not spread around the world. This paper looks at three opportunities to use the Code as a resource for further law reform that were allowed to pass by – in New South Wales, Tasmania and Germany. In each of these jurisdictions, attention was drawn to the Code, but there was no follow-up. The principal explanation for the lack of enthusiasm for borrowing from this most successful Code is that Macaulay's drafting style was far ahead of his time. But, despite the lack of detailed borrowing from the Indian Penal Code, the fact that codification had been successful in India did give some confidence to those proposing codes elsewhere.

I. INTRODUCTION

It is well known how successful Macaulay's Penal Code, as revised by Peacock, has been in its home jurisdiction of India and Pakistan, and in its own region. It must however be noted that its success is merely part of, and indeed pales beside, the stupendous achievement of twentieth and twenty-first century India in maintaining and enhancing another of its inheritances from British rule – the rule of law – within a country of such great diversity and, in parts, deprivation. Drafted by Thomas Babington (Lord) Macaulay from 1835 to 1837, during his time as law member of the Governor-General's Council, and enacted in 1860, in the wake of the Indian Mutiny, with some revisions by (Sir) Barnes Peacock,[1] the Indian Penal Code has survived over a century and a half of enormous change on almost all imaginable fronts. But how successful and influential was the

[*] Associate Professor, Law School, Monash University. The author wishes to thank Ian Leader-Elliott for suggesting this topic, Prof. Thomas Vormbaum (see n.36, *post*), Dr Stefan Petrow (see n.27, *post*) and Dr Rüdiger Hitz for assistance in finding one of the sources cited. The usual *caveat* applies.

[1] The story is told in brief in R. Cross, "The Making of English Criminal Law: (5) Macaulay" [1978] Criminal Law Review 519, and in more detail in B. Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles", in W.C. Chan, B. Wright, S. Yeo (eds), *Codification, Macaulay and the Indian Penal Code: the Legacies and Modern Challenges of Criminal Law Reform* (Ashgate 2011), ch. 2.

Macaulay Code as a model in the broader British Empire, and even beyond? The answer is, unfortunately: not much at all.

Macaulay certainly hoped that his Code would be influential in the common-law world, not merely the law of India.[2] By 1911 it was being said by a well-read Welsh solicitor in the "Law Quarterly Review" that the Indian Penal Code was "too well known to call for anything more than a mere reference";[3] however, the sincerest form of flattery has not often been bestowed upon it. It has never been mined for ideas to any significant extent, in any other jurisdiction, despite there having been plenty of opportunities to do so and plenty of ideas in it available for mining. In New South Wales in the 1870s, Tasmania in the 1920s, and even in Germany in the 1860s, in the decade following the enactment of the Indian Penal Code, the day might have been seized and some inspiration obtained from the Indian Penal Code.

These jurisdictions have been selected for analysis in this paper because, in each of them, influential people – Judges, academics or even the drafters of Codes themselves – were aware of the Code and could have used it, but chose not to do so to any perceptible extent. There were many topics – picking one almost at random, presumed consent to medical procedures in case of incapacity – which, as we shall see, had been very well thought through by Macaulay. His solution to that and other puzzles in the criminal law deserved at least to be considered for imitation, but remains to this day entirely unemulated in any other jurisdiction.

This article will outline the occasions on which something might have been done, and then consider why it was not.

II. MISSED OPPORTUNITIES

A. The Law Reform Commission of New South Wales and the proposed consolidation

The major reform of the criminal law in New South Wales in the nineteenth century was the *Criminal Law Amendment Act* 1883, which merits seven of the twenty-nine chapters in Woods' *History of the Criminal Law in New South Wales*.[4] The Act's genesis goes back to a pamphleteering campaign by assorted would-be law reformers (mostly concerned with the civil law) in the late 1860s, followed by

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2 T. Pinney (ed.), *Selected Letters of Thomas Babington Macaulay* (Cambridge University Press 1982), 154 ff.

3 H.I. Randall, "The Resurrection of our Criminal Code" (1911) 27 Law Quarterly Review 209, 212. Randall's obituary may be found in the *The Times* (London, November 9, 1964), 12.

4 G.D. Woods *History of the Criminal Law in New South Wales: The Colonial Period, 1788-1900* (Federation Press 2002).

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the establishment of the Law Reform Commission in 1870. That Commission produced a draft Bill (and little more, as it was found impractical to have a part-time commission), which, after much travail which it is not necessary to recount here, was eventually enacted as the *Criminal Law Amendment Act* 1883 (N.S.W.).[5]

The Law Reform Commission was chaired by Sir Alfred Stephen, then towards the end of his term as Chief Justice of New South Wales, which had commenced in 1844 and was to conclude in 1873. His cousin was Sir James Fitzjames Stephen, who at the same time as the Commission's deliberations was in India as the law member of the Viceroy's Council, the position previously occupied by Macaulay himself. On his return Sir J.F. Stephen famously pronounced that English criminal law stood in relation to the Macaulay Code "like *Cosmos* [to] *Chaos*".[6]

But his cousin, engaged in the work of consolidation rather than codification in New South Wales, did not trouble himself with a glance at the Macaulay Code when he began to draft his consolidating Act. It was not mentioned in the Commission's official report; although the Commissioners stated that they had looked at "some other codes, colonial and foreign",[7] these appear to have been largely other Australian statutes. Their draft statute indicated in marginal notes the sources from which its various provisions were taken, and the Indian Penal Code was not among them. Nor did Stephen C.J. mention it in two long letters to the *Sydney Morning Herald*[8] in January 1875 when he had had a fair opportunity to acquaint himself with his cousin's assessment of the Indian Penal Code, even though he did find room for the information that the Prussian and French Codes had been imposed from above rather than democratically. As he continued to lobby for his Bill to be enacted, he published a pamphlet

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5 In addition to Woods, *ibid.*, the story is told in J.M. Bennett, *Sir Alfred Stephen: Third Chief Justice of New South Wales 1844-1873* (Federation Press 2009), 363-75; J.M. Bennett, "Historical Trends in Australian Law Reform" (1970) 9 University of Western Australia Law Review 211, 213.

6 Quoted in, for example, K.J.M. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge University Press 1988), 74. His turn of phrase must slightly puzzle those without Greek: Κοσμος has a variety of meanings in Greek, in addition to the one it has come to have in English, and one of them is "order". With this meaning, a form of the word occurs in Book 21 of the Odyssey, where the following lines, which might also be applied to Macaulay's Code, may be found: "τάφος δ᾽ ἔλε πάντας ἰδόντας, ὡς εὐκόσμως στῆσε: πάρος δ' οὐ πώ ποτ' ὀπώπει" ("amazement seized all observers that he had made order so well: never before had he seen such").

7 Legislative Assembly, *New South Wales Parliamentary Papers*, vol. II, 1870-71, 117, 119. It is necessary to recall here that "code" was used in a looser sense in the nineteenth century, and included what we should call merely a consolidation.

8 *Sydney Morning Herald* (Sydney, January 19, 1875), 7; *Sydney Morning Herald* (Sydney, January 27, 1875), 5.

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in the following year on it, but again showed not the slightest awareness of the Indian Penal Code.[9]

Certainly other people in New South Wales knew of the Indian Penal Code. On March 12, 1873, the *Sydney Morning Herald*[10] published an article copied from the *Examiner* which, as well as quoting the "cosmos to chaos" statement, went on to opine that the "Indian Penal Code is a great advance from the Code Napoleon; its definitions are very much better, and the method of illustrative instances introduced by Lord Macaulay is an addition to the art of drafting".

Even more remarkably, the *Sydney Morning Herald* of July 30, 1874,[11] contained a contribution by (Sir) Lyttelton Bayley, formerly the Attorney-General for New South Wales and by then a Judge of the High Court of Bombay. It had been written, the newspaper tells us, in September 1870, and then sent to the Law Reform Commission; this was well before the Commission handed in its draft Bill in March of the following year. Why this four-year-old news was considered worthy of publication is not apparent; it may be an echo of the visit of David Dudley Field to New South Wales in the previous year; but obviously someone wished to keep the project of law reform before the public eye.

Bayley A.-G., later to be author of the missive from Bombay, has gone down in the history of New South Wales largely because he was appointed Attorney-General only two months after his arrival in the colony, a fact which caused great *Angst* in the local legal community – the competition between local and imported candidates for office, usually but not always judicial, was a recurring theme in all the Australian colonies in the nineteenth century. Daniel Deniehy was moved as a result to write the once-famous satire *How I Became Attorney-General of New Barataria*, clearly targeted at Bayley A.-G. but also at the entire system which allowed such "johnnies-come-lately" to be appointed.

At any rate, Bayley J.'s assessment of the Indian Penal Code under which he was then working was very positive, and deserves to be rescued from oblivion for that reason alone. It makes the lack of any official reference to the Code in the ongoing discussions even more puzzling.

> "Although lawyers did not quite profess to understand or like it at first, it has worked its way, and is now received with general approbation: and certainly to have the whole criminal law (except certain local and other special laws) in 511 sections,

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[9] *Introduction to the Law Reform Commissioners' Report and Criminal Law Consolidation and Amendment Bill* (Government Printer, Sydney 1876).

[10] "The Codification of the Law", *Sydney Morning Herald* (Sydney, March 12, 1873), 6.

[11] L. Bailey, "Law Reform Commission", *Sydney Morning Herald* (Sydney, July 30, 1874), 5.

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> in the clear terse English of Macaulay, and without the technical jargon of English criminal law is an enormous gain.
>
> "I arrived in Bombay in January 1861, and therefore saw the practical working of the old system during eleven months. I prosecuted and defended a great number of prisoners, until I was made Her Majesty's Advocate-General in March 1866, when, as I thus became the confidential legal adviser to the government, they refused to allow me to appear on behalf of prisoners; after which I prosecuted for [the] government all the important cases. Since I have been on the Bench (*i.e.* since April 1869), I have presided at two criminal sessions, and I can say without the slightest hesitation, and with a perfect recollection of the practice of the criminal Courts in New South Wales, that our present system in India is a vast improvement on all the old ones I have seen since I was called to the Bar in 1850.
>
> "[…]
>
> "The present Code has been amended in one or two slight instances, but it has worked so well that no serious amendment is contemplated.
>
> "It is based much on the French penal code in arrangement."

Mr Justice Bayley concluded by making a series of recommendations to the Commission, of which the ninth was: "Consult the Indian Penal Code and Jeremy Bentham, the French and other Codes of Europe and the United States, if Macaulay's Code is not approved of". Against this background, Sir Alfred Stephen's snubbing of the Indian Penal Code – for it virtually amounts to that – is even more remarkable.

Only in 1881, towards the end of the travails of Sir Alfred Stephen's consolidating Bill for New South Wales drafted in 1871, was any attention paid to India by legislators in office in New South Wales. In the Legislative Council, Thomas Holt, who was not legally trained but took a deep interest in the criminal law and had been a magistrate, suggested the adoption of Macaulay's Code and quoted a number of statements in praise of it – including, pointedly and perhaps rather tactlessly, those by Sir J.F. Stephen. He had found a copy of the Code in the Parliamentary Library, and suggested that "this excellent code prepared by so eminent an authority"[12] should be printed and distributed to members. Then they would see at once that it was greatly superior to the mere codification then before the House. There was, furthermore, no need to copy English legislation, as the precedent of the introduction of the Torrens system showed.[13]

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12 New South Wales Parliamentary Debates, Legislative Council, July 27, 1881, 308.

13 In 1858, Robert Torrens instituted a central land registry for South Australia, replacing existing common law deeds of land. This was later enshrined in the *Real Property Act* 1886 (S.A.), and ultimately extended to all of Australia, and many other

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Holt's motion to throw out the consolidating Bill failed by one vote to twenty-six.[14] As well as the fact that the Indian Penal Code was unknown to most if not all members, much time and effort had been invested, not least by Sir Alfred Stephen, in the Bill then before the House, and it was an uphill battle to suggest scrapping it and starting again.

Sir Alfred Stephen, for his part, had long refused to include in his Bill a positive definition of murder such as might appear in a proper code as distinct from a consolidation of statute law; at around the same time, however, he gave way on this point alone.[15] In re-drafting what was to become section 9 of the *Criminal Law Amendment Act* 1883, he belatedly referred to the Indian Penal Code, and indeed quoted its definition of murder, alongside several other existing or proposed codes, in his *Criminal Law Manual*,[16] published as a commentary on the new law.

The Indian Penal Code was not mentioned anywhere else in that publication, and there was no sign that Sir Alfred Stephen had read any other provisions of Macaulay's remarkable Code, or taken any inspiration at all from it. The definitions of murder in India and New South Wales, moreover, did not obviously owe anything much to each other.

Sir Alfred Stephen's response to suggestions for a full-scale code was to point out that his task was consolidation and importation of the latest English reforms, not codification or comparative law, and that he had enough trouble with the former task without taking on the added burden of the latter.[17] This response could certainly not be dismissed out of hand, given the immense effort that was required to get a simple consolidation through, in a democratically governed polity like New South Wales, as distinct from India. But it is nevertheless a shame that nothing at all, beyond the reference to the definition of murder, was made of Macaulay's remarkable production. It was a wasted opportunity to make far greater improvements – whether or not going so far as codification.

B. Tasmania

By the start of the 1920s, criminal codes, properly so called, had been enacted in two Australian States (Queensland and Western Australia) and ultimately unsuccessful attempts at codification had been made in

jurisdictions (*e.g.* seven Canadian provinces, New Zealand, Malaysia and Singapore). See further J.E. Hogg, *The Australian Torrens System* (Clowes 1905).

14 *Sydney Morning Herald* (Sydney, July 28, 1881), 2.

15 Woods (n.4), 297, 310 ff., 319-321.

16 (Government Printer, Sydney 1883), 10, 203 ff.

17 Woods (n.4), 345.

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two others (South Australia[18] and Victoria[19]). Neither of the two sets of unsuccessful drafters referred to the Indian Penal Code to any extent, and there appears to be no reference to it in the histories of Sir Samuel Griffith's Code for Queensland[20] nor in any newspaper in Western Australia over the period during which that State adopted the Queensland Code.[21] Thus the visitor to the Victorian Public Record Office alights from the train at the station named Macaulay and walks to it from there along Macaulay Road, but will look in vain for traces of its namesake's Indian Penal Code inside the archives themselves.

In Tasmania, however, the younger Andrew Inglis (later Mr Justice) Clark certainly was aware of and admired the Macaulay codification. In two newspaper articles published at Hobart and Launceston on March 15, 1924,[22] just a few weeks after his principal contribution to drafting the Code had been made and it was before Parliament,[23] he stated (in identical words in both pieces) that the Indian Penal Code "has worked admirably. No greater praise could be bestowed on it, and as has been truly said, 'it is one of the noblest monuments of Macaulay's genius'."[24]

However, there is no record of the Indian Penal Code's having been used in the drafting – there are much more obvious and closer candidates for that honour.[25] The Library of the Supreme Court of Tasmania has never possessed a copy of it,[26] although it is conceivable that Clark himself owned one or borrowed one from somewhere else. Stefan Petrow, the historian of the Tasmanian

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18 G. Taylor, "Dr Pennefather's Criminal Code for South Australia" (2002) 31 Common Law World Review 62.

19 G. Taylor, "The Victorian Criminal Code" (2004) 23 ***University of Queensland Law Journal*** 170.

20 Such as Robin O'Regan, "Sir Samuel Griffith's Criminal Code" (1990) 7 Australian Bar Review 141.

21 A digital search was conducted on the Trove Newspapers database: <http://trove.nla.gov.au/newspaper> accessed May 20, 2012. Neither the author, nor Ian Leader-Elliott, knows of any such reference.

22 "Criminal Codes – Codifications, Ancient and Modern – Historical Notes – The Development of Ages", *The Mercury* (Hobart, March 15, 1924), 9; "Codification of Criminal Law – An Historical Sketch", *The Examiner* (Launceston, March 15, 1924), 3.

23 S. Petrow, "Modernising the Law: Norman Kirkwood Ewing (1870-1928) and the Tasmanian Criminal Code 1924" (1995) 18 University of Queensland Law Journal 287, 300 ff.

24 The quotation is from J. Bryce, *The Ancient Roman Empire and the British Empire in India* (Oxford University Press 1914), 118.

25 Note, however, the qualification that much of the Tasmanian Code comes from England rather than Queensland: R. O'Regan, *New Essays on the Australian Criminal Codes* (Law Book 1988), 119.

26 E-mail from Dorothy Shea of the Library to the author (October 24, 2011).

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Criminal Code, has found nothing in the materials suggesting any Indian influence.[27]

Puzzlingly, though, in May 1925 the President of the Southern Tasmanian Law Society, one F. Lodge, stated to a meeting of that Society:

> "Macaulay's Code was doubtless based on the French Penal Code, but it covered not only crimes and punishments, but also procedure. It had been in operation for more than sixty years, and, so far as he knew, had met with acceptance. On it the Queensland Code was based, and on the Queensland Code was based the Tasmanian recent Code, with some amendments, which was now on its trial in certain respects."

At least, that is what the report in the newspaper[28] says he said.

If it is a true report, it contains at least three statements unrelated to the Tasmanian Code which are wrong or at least very debateable. Nevertheless it would be one thing to err about the sources on which Macaulay drew, for example; it would be another thing to err about the enactment of a Code on one's own doorstep only a year earlier. Could Macaulay's Code have had more influence in Hobart than the archival sources reveal?

Its text gives no grounds for any such hypothesis. Perhaps our speaker meant only that the possibility of a successful codification in the common law's realm was demonstrated by Macaulay's Code. This is something that could be known and of use even in the absence of a copy of the Indian Penal Code itself. Even if this is all Mr Lodge meant – and the suspicion must be that it was – it is still a feather in the cap of the Code: while Macaulay may not have influenced the drafting in detail, his achievement showed that the whole enterprise was not pointless. But as far as direct influence of the one on the wording of the other is concerned, there is nothing to report. Macaulay could have provided a number of suggestions of detail as well as reassurance about the whole project. But the opportunity was, again, wasted.

C. Germany

The current Criminal Code of Germany may be traced back to that of the North German Confederation, a Code which came into force in 1870, only ten years after Macaulay's Code, and from there back to the Prussian Code of 1851, fourteen years after Macaulay's draft had been handed in to the Governor-General.

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[27] See n.23, *ante*. Dr Petrow has undertaken a re-examination of the materials, at the author's request.

[28] "Southern Law Society – Civil Law Procedure – President's Recommendations", *The Mercury* (Hobart, May 23, 1925), 3.

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That Macaulay's Code was not drawn on by the drafters of either German code is perhaps unsurprising, given that the barriers of language and distance which were much greater in those days. Those barriers did not, however, prevent Macaulay's Code from coming to the attention of two front-rank German professors of criminal law: once in 1839, only a couple of years after it had been submitted to the Governor-General, and during a period when many of the smaller German states were considering or had just enacted their own codes; and again in 1937, when it was almost a century old, and Germany was ruled by the Nazis.

In 1839, Carl Joseph Anton Mittermaier published an article[29] in which he reviewed several new codifications or drafts, including Macaulay's Code, to which he devoted several pages. Mittermaier was a major figure in German criminal law of the nineteenth century. He has been rightly called the "most significant and best internationally known German criminal law academic of his time" and "the founder of modern German comparative criminal law studies".[30] He had worked fast: 1839 was only the second year after Macaulay's Code had been handed to the Governor-General, and over twenty years before it was finally enacted.

It cannot be said that Mittermaier's analysis was particularly profound. Much of what he wrote consisted in translations or paraphrases of the introduction to the Code or its provisions. At one point, in discussing provocation, he appears to confuse murder and manslaughter. He did however approve of the Code in general.

> "The whole production, which contains a complete systematic Code, is a work which shows the great practical spirit and intelligence of the commissioners, and the attached notes will be read by every jurist with the greatest interest."[31]

He did not, however, approve of the illustrations, as they might lead to "too much prolixity and would not achieve their goal, as isolated illustrations in a Code can easily mislead a Judge".[32]

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[29] „Über den neuesten Zustand der Strafgesetzgebung mit besonderer Rücksicht auf das neue Strafgesetzbuch für das Großherzogthum Weimar, sowie die Entwürfe von Strafgesetzen für England, für Indien, für Nordamerika, für das Großherzogthum Baden, für das Großherzogthum Hessen, für den Kanton Bern und Kanton Thurgau" ("On the latest state of the criminal law with special reference to the new Penal Code of the Grand Duchy of Weimar, as well as the draft criminal codes for England, India, North America, Grand Duchy of Baden, the Grand Duchy of Hesse, the canton of Bern and the canton of Thurgau") [1839] Archiv des Criminal-Rechts (neue Folge) 325.

[30] A. Koch, "C.J.A. Mittermaier and the Nineteenth Century Debate about Juries and Mixed Courts" (2001) 72 Revue internationale de droit pénal 347, 347 ff.

[31] Mittermaier (n.29), 329 (all translations from the German by the author).

[32] *ibid.*, 337 ff. Mittermaier also promised a further article on this topic (what he meant by the same topic being not entirely clear), which was to appear

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Returning to this theme in a later article, he stated that the illustrations showed that "the area of criminal liability is too widely drawn and it is necessary to counteract this over-broad application by inserting limitations, exceptions or additions".[33] He does not seem to have grasped that the illustrations in Macaulay's Code were not meant to be of that nature, but merely illustrations.

The importance of Mittermaier's article to this analysis is not so much those views, nor the wider context in which Mittermaier wrote – the debate on the desirability of codification was not quite over at this time, a debate which is known to English-language audiences through Savigny's famous work of 1814, *Of the Vocation of Our Age for Legislation and Jurisprudence* – but rather the fact that the Indian Penal Code was drawn to the attention of the German scholarly public so early. Mittermaier, moreover, lived until 1867, the eve of the enactment of the North German Confederation's codification of 1870, which is still the starting point for today's German Criminal Code. He was certainly active when the Prussian Criminal Code of 1851 was enacted, and this was an important source for the all-German Code of the 1870s. But there does not seem to have been any thought of mining the Indian Penal Code for ideas rather than just reviewing it.

One who reads the modern German Criminal Code might imagine some influence from Macaulay's technique of providing illustrations. Thus § 243 I of the Code, for example, lists a number of "especially grave cases" of theft: theft by breaking in, from religious buildings, professionally, and so on. However, this technique of exemplification applies mostly in sentencing, and rarely if ever serves the function of clarifying the definition of the offence. A German writer on legislative technique of 1908 named Adolf Wach, who favoured the use of examples, provided a rather generously drawn list of examples to be found in the German Criminal Code in a contribution to a fifteen-volume work dedicated to comparative criminal law and meant to form the basis of a reform that never happened. Some of the other authors of that work certainly had access to the Indian Penal Code, but Adolf Wach did not mention it at all.[34] Thus even

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shortly in Tübingen's *Deutsche Vierteljahrsschrift*. The index to the journal of that name (published in nearby Stuttgart) reveals nothing under his name or on the topic in question.

[33] C.J.A. Mittermaier, „Beiträge zu der Lehre von Ehrenkränkung und Verleumdung" ("Contributions to the theory of defamation and slander") (1862) 6 Gerichtszeitung für das Königreich Sachsen 349, 354; see also (1863) 14 Allgemeine österreichische Gerichts-Zeitung 73, 74.

[34] A. Wach, „Legislative Technik" in K. von Birkmeyer *et al.* (eds), *Vergleichende Darstellung des deutschen und ausländischen Strafrechts: Vorarbeiten zur deutschen Strafrechtsreform* (*A Comparative Illustration of German and International Criminal Law: Preliminary work on German Criminal Law Reform*) (Otto Liebmann 1908),

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the very moderate use of this technique in German criminal law, it may confidently be said, cannot be traced back to Macaulay.

The materials and debates on the German criminal codes of the nineteenth century are voluminous, and even if a full search for some evidence of Macaulay were possible, it would probably never be found. However, further strong circumstantial evidence of the lack of influence of the Indian Penal Code on Germany is provided by the second article mentioned in opening, that of Professor Gustav Radbruch. Radbruch had written widely on, and was an expert in, the history of the criminal law, and had moreover taken a leading role in the efforts to reform the German Criminal Code in the early 1920s. Published in 1937,[35] the article nowhere suggests that there had been any Indian influence on Germany. Rather, it reads like a report of a re-discovery of something long unknown. Radbruch would almost certainly have mentioned any such influence expressly, had he known of it.[36]

Radbruch is best known, in the English-language world today, for his post-War piece, "Five Minutes of Legal Philosophy",[37] setting out propositions of natural law theory; in Germany, the "Radbruch formula" is applied to this very day to determine whether statutes infringe the rules of natural law and are accordingly invalid.[38] Radbruch was both a professor at Heidelberg and a politician, having become, in the 1920s, Social Democrat Minister of Justice. Although he was not Jewish, his political background led to his dismissal as a professor by the Nazis within a few months of their takeover.

Being only fifty-four years old when dismissed, he did not turn his back on scholarship. He was fortunate enough to receive an

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vol. AT IV, 37-45. The extent to which the Indian Penal Code was referred to in the whole work may be judged by the index, which contains several dozen references to it outside Wach's chapter – although, almost always, the references are to individual provisions rather than overall style. A striking example of them is in vol. BT V, 128, fn.2, where even Macaulay's notes are referred to. A modern assessment of Wach's work may be found in D. Matthies, *Exemplifikationen und Regelbeispiele: eine Untersuchung zum 100-jährigen Beitrag von Adolf Wach zur „legislativen Technik"* (*Illustrations and examples of aggravating factors: a survey for the 100th anniversary of Adolf Wach's article on "legislative technique"*) (de Gruyter 2009), 108-132. On the place of the fifteen-volume work in German criminal law history, see K.-D. Godau-Schüttke, „Die gescheiterten Reformen des Straf- und Strafprozeßrechts in der Weimarer Republik" ("The failed reforms of criminal law and procedure in the Weimar Republic") [1999] Juristische Rundschau 55.

35 G. Radbruch, „Das indische Strafgesetzbuch" ("The Indian Penal Code") (1937) 51 Schweizerische Zeitschrift für Strafrecht 142.

36 The author has raised this with Prof. Thomas Vormbaum, the leading historian of criminal law in Germany, who agrees with this assessment.

37 Reprinted in, for example, J. Feinberg, H. Groß, *Philosophy of Law* (3rd edn, Wadsworth 1980), 109 ff.

38 G. Taylor, "Retrospective Criminal Punishment under the German and Australian Constitutions" (2000) 23 University of New South Wales Law Journal 196, 214.

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invitation, immediately after his dismissal, to join the editorial board of the *Swiss Journal of Criminal Law*, and in 1935-36 enjoyed a year at University College, Oxford.[39] It was that same journal that published his piece on the Indian Penal Code – the German journals then being closed to him[40] – and it was doubtless during his year at Oxford that he came to know the Indian Penal Code. A footnote in his article refers to his indebtedness to one Sir Benjamin Lindsay, an Ulsterman who held a variety of judicial or quasi-judicial posts in India from 1894 to 1928 before becoming reader in Indian Law at the University of Oxford from 1930 to 1936.[41] Thus Radbruch's general statements about the success of the Code – it "has so well passed all the tests of practice, that even today, after almost a century, it remains in force and in esteem"[42] – may be regarded as first-hand hearsay supplied by a most well-informed source.

In addition to looking at the Code itself, Radbruch provides a brief biography of Macaulay, noting especially that "his maiden speech dealt with the removal of such legal disabilities as still applied to the Jews".[43] Radbruch also spends much time on the illustrations, and calls Macaulay's decision to make them "nothing law which would not be law without them"[44] "characteristic of the tendency of English legal thought and of English thinking as a whole never to seal up definitively all possible escape routes".[45] His discussion shows that he had understood the purpose of the illustrations more fully than Mittermaier.

Radbruch reserves special praise for Macaulay's provisions on consent, especially to medical operations, and private defence. Radbruch also shows that he was aware of the difference between the Macaulay Code of 1834 and the Peacock revision of 1860 by praising the former's provision about selection of offences in cases of doubt (cl. 61) over the latter's (s.72).[46] He praises also the sober provisions

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39 G. Radbruch, *Der innere Weg: Aufriß meines Lebens* (*The inner path: outline of my life*) (originally published 1951, Vandenhoeck & Ruprecht 1961), 137; A. Kaufmann, *Gustav Radbruch: Rechtsdenker, Philosoph, Sozialdemokrat* (Piper 1987), 138.

40 Kaufmann (n.39), 137 – with the unexplained exception of the *Archiv für Rechts- und Sozialphilosophie*.

41 Lindsay died on September 2, 1939 – the day after Germany invaded Poland, and that before Britain declared war on her. There was therefore little space in the newspapers to record his life and deeds; but they may be found summarised in J.F. Riddick, *Who Was Who in British India* (Greenwood 1998), 216. That source in turn seems to be based on *The Times* (London, September 5, 1939), 11.

42 Radbruch, „Das indische Strafgesetzbuch" (n.35), 142.

43 *ibid.*, 143.

44 From Macaulay's letter to the Governor-General, published with the Indian Penal Code: *A Penal Code prepared by the Indian Law Commissioners* (Bengal Military Orphan Press 1837), 7.

45 Radbruch, „Das indische Strafgesetzbuch" (n.35), 147.

46 *ibid.*, 147-149.

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on abortion, which he sees as free from prejudice[47] – this was a major theme in Germany between the wars, because of the influence of feminism and the nascent study of human sexuality under men such as Magnus Hirschfeld. Radbruch concludes:

> "Of the particular circumstances of the Asian country in which it applies there is little to be seen in [the Code]. But it has proved itself over a long period of application. In view of such a fact, perhaps one might put a modest question mark next to the doctrine of the nationalist determination of all law? Must we not, with Sir James Fitzjames Stephen, recognise 'that the commonalities between men are greater than their differences'? And with Leopold von Ranke must we not recognise 'how important it is that a properly developed law is made free of particularity which might hinder its application to other nations, as happened with Roman law'?"[48]

Whatever the precise merits of the opening proposition – one which may also reflect the view of Sir Benjamin Lindsay – Macaulay's Code and its history certainly do show that at least some parts of the criminal law, as one more recent scholar has put it, are "(or should be) in substance ***universal***, so that the adoption of similar penal codes by different peoples is only natural".[49]

In its time and place, however, the passage quoted has a more obvious target. It is an obvious shot at the Nazis, one of whose ambitions was to replace the German Civil Code, in particular, by a code that would be less imbued with Roman notions and more German. It shows, too, that Radbruch would hardly have been averse to recording or even guessing at any influence of the Indian Penal Code on German law. But there was nothing to say.

III. WHY?

An American writer ignorant (one assumes) of Radbruch's assessment just quoted has, in essence, agreed with it: in Professor Kadish's view, Macaulay's "instances of deference [to Indian views and customs] were marginal and did not greatly affect the overall structure of the Code; they represented the kind of accommodation to local conditions that sound local government of the times saw as

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47 *ibid.*, 151.

48 *ibid.*, 151 ff. The quotation from Sir J.F. Stephen is merely re-translated into English here, with no attempt made to find the original. Radbruch does not cite his source.

49 L. Sebba, "The Creation and Evolution of Criminal Law in Colonial and Post-colonial Societies" (1999) 3 Crime, History and Societies 71, 86 (emphasis in original).

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transitionally necessary".[50] This only raises the question more acutely why such a wonderful resource has not been better used.

No doubt some felt that the Indian Code was not suitable for export. Sir Rupert Cross suggests that Macaulay's Code could not have succeeded in England as there was no desire there, in contradistinction to India, to throw the existing law overboard. In other words, Macaulay was actually an innovative legislator, an office uncalled for in countries where mere codification was all that was desired. There is certainly a lot in this view. However, the point is somewhat contradicted by the assertion that, while Macaulay's language bore "about as much resemblance to the contemporary English statutory jargon as Urdu", to quote the perhaps unfortunate comparison of Sir Rupert Cross, Macaulay's Code was in essence "an improved version of the English law of the 1830s".[51] While the Code was certainly a great improvement linguistically, his Code is still recognisably an outgrowth of English legal thought.

An improved version of the English law of the 1830s would have fitted the bill admirably in many other places – in the 1830s. Another reason for the general neglect of the Code is, no doubt, that by its enactment in 1860 it was already twenty-two years old, and, in the following year, was to be overtaken by the series of English consolidations which formed the basis of much of Australian legislation in the 1860s and beyond – they were taken as the model by New South Wales in the 1870s. The simple lapse of time between drafting and enactment meant that the Code was already "behind the eight ball" when enacted. This was especially so in England, where a renewed effort at codification under Sir J.F. Stephen in the late 1870s, over forty years after the Macaulay Code had first appeared, had the local consolidating enactments of the 1860s ready to hand. The effort was unsuccessful in England, but it formed the basis of the Codes of Canada and New Zealand[52] – without any Macaulian input. There is also the practical problem that a copy of the Code might not have been widely available in most jurisdictions: in New South Wales, Holt's unsuccessful proposal was to make a special printing of it from what was probably the only copy in the colony at that time.

The Code's age when it was enacted may also be a part of the explanation for the keenness of the Colonial Office to eliminate the

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[50] S.H. Kadish, "Codifiers of the Criminal Law: Wechsler's Predecessors" (1978) 78 Columbia Law Review 1098, 1111.

[51] Cross (n.1), 523. On Macaulay's excellent English style, see M.L. Friedland, "Codification in the Commonwealth: Earlier Efforts" (1990) 2 Criminal Law Forum 145, 147.

[52] D.H. Brown, *Genesis of the Canadian Criminal Code of 1892* (University of Toronto Press, 1989); S. White, "Making of the New Zealand *Criminal Code Act* 1893: A Sketch" (1986) 16 Victoria University of Wellington Law Review 353.

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Indian Penal Code from the African colonies in the 1920s. Professor Friedland wondered whether this might be due additionally to "a bias by the white population, shared by the Colonial Office, in favour of an 'English' code".[53] There is at least one record of a settler community in east Africa protesting that one should not place "white men under laws intended for a coloured population despotically governed",[54] although the Colonial Office did not take such objections seriously, and they were likely the product of ignorance. Had the protesters been informed of the identity of the drafter of the Indian Penal Code, some of their concern might have dissipated.[55] However, if we do not assume that for which we have no evidence – namely, that these people were bigots and fools – it may be that their concern was not so much with the colour of the skin of the drafter, but rather with the degree of political freedom permitted to the subjects of any proposed code. There were also a number of topics – the avoidance of religious strife, for example – which were pressing in India, but hardly so in east Africa. These settlers had no desire to be "despotically governed" or to have solutions for non-problems thrust upon them, which might have restricted their freedom of speech. Again it should also not be forgotten that Griffith C.J.'s Code was sixty years younger than Macaulay's, and that fact alone made the Griffith Code more attractive to those with a slightly higher level of knowledge on the topic.

But in fact that merely shifts the question. Why did Griffith C.J. not stoop to borrowing at least something from his illustrious predecessor in the role of codifier? In addition to the question of its age by the time he started his own work, another commentator suggests that "perhaps he himself wanted to rise to the level of fame of those codifiers of the past, so famous in the world of the common law, without taking advantage of their efforts".[56]

In Germany it was probably felt – to the extent that the Macaulay-cum-Peacock Code reached that country after its enactment – that it was an interesting curiosity, but scarcely suitable for imitation. Nevertheless, Germans too could have learnt much from it. The lack of a full-scale general part containing definitions of intention and negligence, for example, may make the Indian Penal Code appear somewhat unelaborated nowadays, but it is scarcely behind the rather terse

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53 M.L. Friedland, "R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981) 1 Oxford Journal of Legal Studies 307, 339.

54 H.F. Morris, "A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935" [1974] Journal of African Law 6, 13.

55 Friedland, "Codification in the Commonwealth" (n.51), 157.

56 A. Cadoppi (tr. K.A. Cullinane J.), "The Zanardelli Code and Codification in the Countries of the Common Law" (2000) 7 James Cook University Law Review 116, 138.

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German Criminal Code of 1871 in this respect.[57] If anything, Macaulay is ahead of the Germans in some fields: he takes more trouble and shows considerably more insight in areas such as self-defence.

Even the modern German Criminal Code, like the Prussian code of 1851, contains no definition of intention.[58] Nor, admittedly, does Macaulay, but some of his provisions show an extraordinarily sophisticated delineation between intention, foresight and knowledge, as applied to various elements of criminal offences, which are a good substitute for a formal definition section;[59] and some of the topics he does deal with in his general sections, such as presumed consent in cases in which a person is unable to give consent,[60] remain, to this day, uncodified defences in Germany. There was much in Macaulay's Code from which an attentive German in the 1860s might have learnt, and there is even today some material from which Germans might still profit.

It is also worthy of note that one of the best-informed and earliest commentators on the Indian Penal Code was moved to remark, "The framers of the Code do not seem to have troubled themselves much about the rival theories of punishment, respecting which German jurists and philosophers have written so copiously".[61] But, by pointing out that a variety of purposes were pursued by the various punishments in the Code, our commentator also indicates that adherents of all schools would have found something for themselves in it. That commentator also points out that the Indian Penal Code contained no defence of withdrawal from attempt[62] – but that is scarcely enough to condemn it to the outer darkness.

However, the Indian Penal Code, for all its merits, was a somewhat out-of-the-way source for Germans, surrounded as they were by a rich home-grown and local European crop of codes and academic commentary on them. Furthermore, the Indian Penal Code was not always even readily accessible to them in either English or German (the first translation into German appears to be that of 1954).[63] Whether or not one had easy access to the text of the Indian Penal Code in a language one understood, however, one further characteristic of that Code might have militated against its adoption in all jurisdictions: Macaulay's clear language and use of illustrations.

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57 *Cf.* S. Yeo, B. Wright, "Revitalising Macaulay's Indian Penal Code" in Chan, Wright, Yeo (eds) (n.1), 10-13.

58 G. Taylor, "Concepts of Intention in German Criminal Law" (2004) 24 Oxford Journal of Legal Studies 99, 101.

59 Clause 182 of the draft of 1837; s.188 of the Indian Penal Code of 1860.

60 Section 92 of the present Indian Penal Code.

61 W. Stokes, *Anglo-Indian Codes* (Clarendon 1887), Vol. I, 26.

62 *ibid.*, 67.

63 G. Dahm, *Das indische (pakistanische) Strafgesetzbuch* (De Gruyter 1954).

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Today, these features of his Code are seen as striking, ahead of their time and innovatory: only since 1987 has s.15AD of Australia's *Acts Interpretation Act* 1901 provided for examples to be given in statutes. It has recently been amended and now states that "the example may extend the operation of the provision". But examples were not an accepted drafting technique in the nineteenth century. This is seen in Professor Mittermaier's dislike of the illustrations (*ante*). Likewise, the English codification commissioners rejected them on the grounds (which now seem rather specious) that they were either redundant, if the drafting was clear enough, or, if not, a sign that it was defective and required clarification.[64] Innovative drafting techniques were not in favour in other areas of the law either in the nineteenth century. Thus, when a bankruptcy Bill was received by the Commons from the Lords in 1849 with each clause prefaced by a rationale for its enactment, the rationales were removed.[65]

The illustrations lend a certain air of naivety to the Code which did not appeal to the contemporary European mind: no code has appears to have ever followed suit. That impression is not dispelled by the clear, natural English of the Code to which Sir Rupert Cross drew our attention earlier: the language of the Code must have seemed somewhat *infra dig.*[66] to those used to more pompous statutory language. Mr Justice Lyttleton Bayley of Bombay drew the attention of the public of New South Wales with approval to the absence of the "technical jargon of English criminal law"[67] from Macaulay's Code; for many at the time he wrote, such facility of expression would have made the Code seem inferior rather than superior.

Now, of course, Mr Justice Bayley's view reminds us that the people of the nineteenth century were no more of one mind on all issues than are we today. Nor were they any more liable to indulge in shallow thought than we are. But they did draw distinctions that are, at least, out of fashion today, and the illustrations and linguistic style of the Code make it appear to be (as it indeed was) intended for a simple state of society, one in which criminal law had often to be practised by those with little training in it, and read by persons whose literacy was limited.[68] For the Establishment, these features were a

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[64] K.J.M. Smith, "Macaulay's 'Utilitarian' Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law Making" in W.M. Gordon, T.D. Fergus (eds), *Legal History in the Making: Proceedings of the Ninth British Legal History Conference, Glasgow 1989* (Hambledon 1991), 155, fn.50.

[65] V.M. Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt and Company Winding-Up in Nineteenth-Century England* (Clarendon 1995), 69.

[66] Beneath their dignity.

[67] Bailey (n.11).

[68] *Cf.* B. Wright, "Criminal Law Codification and Imperial Projects: the Self-Governing Jurisdiction Codes of the 1890s" (2008) 12 Legal History 19, 25.

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sign that the Code was not suited for use by more sophisticated or, as might have been said at the time, civilised societies. They made it too easy to dismiss the Code with a glance, and by attracting the attention of the reader they obscured the many remarkable insights in it. In this respect, Macaulay was his own worst enemy.

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