1-2011

Codification, Macaulay and the Indian Penal Code [Book review]

Siyuan CHEN
Singapore Management University, siyuanchen@smu.edu.sg

Published in Singapore Journal of Legal Studies, 2011, pp. 581-584.

Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform BY WING-CHEONG CHAN, BARRY WRIGHT AND STANLEY YEO, eds. [Surrey: Ashgate Publishing Limited, 2011. xi + 379 pp. Hardcover: £75.00]

As noted (at vii) by the contributors to this book, the *Indian Penal Code* 1860 (Central Act 45 of 1860) ("IPC"), largely the work of Thomas Macaulay, "was the first codification of criminal law in the British Empire and is the longest serving code in the common law world." Upon its enactment, the influential IPC was adopted in various British colonies, such as Singapore. The continuing use of legislation of such pedigree, however, brings about several problems. Any legislative inertia to update the statute from time to time will put the judiciary in a dilemma, whenever the latter is asked to either resolve newfound ambiguities and loopholes in the provisions, or interpret provisions in the context of evolving social norms. Lacking a democratic mandate, different judges will also have different conceptions of how much judicial activism can and should be accommodated. All of this results in an inevitable situation of inconsistent judicial interpretation of the provisions, with the contradictions in logic and approach becoming accentuated over time. And when the legislature finally overcomes this inertia, yet only introduces changes that are *ad hoc* and reactive in nature, this actually induces more fissures in the entire scheme of things. The combined effect of the aforementioned problems is that society as a whole suffers when the law becomes too uncertain, perhaps most so in the realm of criminal law, which can also sometimes be unduly affected by its symbolic and cathartic functions. The responsibility to remedy these uncertainties then falls chiefly upon the shoulders of those involved in law reform—yet how often do we see works that function categorically as tools for law reform?

Codification, Macaulay and the Indian Penal Code is the refined product of a symposium marking the 150th anniversary of the IPC, wherein more than a dozen criminal law experts from Singapore, Australia, Canada, England, India, and Malaysia were invited to present papers based on the principal question of "How might the IPC look today if the original Code framers, maintaining their philosophical stance, undertook a major revision?" (at 14). The symposium papers were then consolidated into this book and the 15 chapters segregated into four parts: (I) general themes and the historical context of the IPC; (II) principles of culpability; (III) principles of exculpation; and (IV) the challenges of criminal law codification. The editors of *Codification, Macaulay and the Indian Penal Code* maintain that the book is not a mere collection of loosely connected essays. Instead, they claim (at viii) that the book comprises "not only a description of the general principles found in the IPC but also a consideration of modern views and developments [around the world] on those principles and related doctrinal issues, along with proposals for reforming the IPC in the light of those views and developments, and within the spirit of Macaulay's original draft Code." Indeed, it is noteworthy that the entire endeavour appears to have been motivated by three beliefs shared by most of the contributors. The first is that any interpretive exercise concerning the IPC—long neglected legislatively in many jurisdictions—should preferably be rooted in a keen understanding of the historical context and original spirit and philosophy of the legislation. This serves as a check against any arbitrary importation of common law developments, which is something that has occurred not just in Singapore but also in other IPC jurisdictions. The second is that the IPC is long overdue for "major remedial surgery rather than a band-aid revision exercise", and accordingly, the IPC should be re-codified, "produced locally and reflecting more accurately our identity as a nation of Indians, Malaysians, Nigerians, Pakistanis, Sri Lankans, Singaporeans or Sudanese as the case

may be, and our common values as a people living in the twenty-first century" (at 16-17). The third and final belief is that although the IPC was written so long ago, Macaulay was a brilliant law reformer and given that his legacy (in the form of the IPC) has been unfairly criticised over the years, his genius should now be properly recognised and also seen in the right perspective, since many of his original ideas were modified by the time the IPC came to fruition.

One can see where the editors and contributors of *Codification, Macaulay and the Indian Penal Code* are coming from and it is difficult not to appreciate such an endeavour, particularly in an era where comparative discourse, theory, and the rights of the individual are gaining more traction with a wider spectrum of exponents of the law. The appraisal of the endeavour, however, necessitates a close perusal of the contents. To that end, I intend to describe, summarily, the key contents of each chapter of the book. I will leave it to the reader to decide if the contents (albeit presented in summary form here) comport well with the purported aims of the book and sufficiently engage the usual IPC controversies that most who have studied criminal law will be aware of. At the same time, the reader can determine if all the different proposals put forth ultimately cohere conceptually and philosophically. I believe this is the most helpful and fairest way in presenting a work of this nature and purpose.

In Chapter 1, Professors Stanley Yeo and Barry Wright explain the main rationales for revitalising the IPC and the best approaches to take. Notably, they opine (at 10) that the "best method" of revising an antiquated code is to produce a "General Part", which contains the "foundational principles of criminal responsibility which are generally applicable to all offences, including those found outside the Code." They find that such an approach has worked well in Australia, Canada, and England, and propose an implementation strategy as to how the General Part can be included by law reformers. In Chapter 2, Professor Wright sketches out the historical context in which the IPC was conceived. He argues (at 52-53) that while "Macaulay had been critical of the political theories of Bentham and Mill, expressing a libertarian Whig suspicion of utilitarian 'enlightened despotism'… he embraced utilitarian legal theory to become the most successful utilitarian legislator of his generation"; furthermore, "Macaulay, like Bentham, aimed to have legislators fully exploit the modern public policy potential of the law and strictly limit judicial powers in the application of law."

In Chapter 3 (which is the start of Part II), Professor Neil Morgan points out that the core values underpinning the IPC (*i.e.* comprehensibility, accessibility, precision and certainty, and democracy) are a testament to the IPC's longevity. However, he also says (at 59) that "the homicide provisions as enacted were very different from Macaulay's original draft and … out of line with the general structure of the IPC", and that in Singapore and Malaysia "there has been excessive and confusing reference … to the common law doctrine of *mens rea*, often at the expense of the structure of the Code itself." He recommends that the four main fault elements (intention, knowledge, rashness, and negligence) in Macaulay's draft be retained but together with any other type of fault elements, they should all be properly defined in the Code. In Chapter 4, Professor Bob Sullivan deals with the conduct element of offences. He suggests that while Macaulay aspired to draft offences that contain all the elements to be proved without reference to other provisions, this does not work in all cases. Hence, he proposes some provisions relating to the conduct element that will apply to all IPC offences, including a general provision on causation, while maintaining that nothing needs to be changed with regard to the IPC's philosophy towards omissions liability.

In Chapter 5, Professor Kumaralingam Amirthalingam considers the topic of mistake. His analysis is prefaced by the observation that mistake may not theoretically exist as a defence in

the IPC. Nevertheless, he identifies three main issues relating to mistake, *viz*., the burden of proof, the requisite standard of reasonableness, and whether mistake of law can be an excuse. In doing so, he disambiguates the relationship between mistake and strict liability. He concludes with a proposed reformulation of the mistake defence. In Chapter 6, Professor Chan Wing-Cheong tackles abetment, conspiracy, and attempt. Based on his reading, the modern additions made to Macaulay's draft Code transformed the simplicity and coherence in his proposals. As such, he argues for a reversion to the fundamental ideas implicit in Macaulay's Code, via new provisions pertaining to the fault element for abetment and abetment to commit acts which are impossible, the abolition of the offences of criminal conspiracy and attempt to commit murder and culpable homicide, and reform of s. 511 of the IPC. In Chapter 7, Professor Michael Hor handles vicarious liability, noting at the outset (at 155) that Macaulay had originally conceptualised joint criminal enterprise with "elegant simplicity", but his drafts never made it to the final cut. To his mind, if the confederate neither committed the secondary offence nor abetted it, he can only be liable for the secondary offence if he knew that it was a likely consequence thereof. However, this proposal was set aside in favour of two other sets of provisions that complicated matters, although it should be noted (as Professor Hor did) that two recent seminal Singapore Court of Appeal decisions (*Lee Chez Kee v. PP* [2008] 3 S.L.R.(R.) 447 and *Daniel Vijay s/o Katherasan v. PP* [2010] 4 S.L.R. 1119) have attempted to resolve the longstanding controversies in joint criminal enterprise.

Part III of the book, namely Chapters 8-12, addresses some of the general and specific exceptions (defences) in the IPC. On private defence, Professor Cheah Wui Ling argues (at 186) that "instead of a [modern] rights-based rationale, the Code's private defence provisions were shaped by nineteenth-century British ruling interests, reflecting paternalistic and transformative 'law and order' objectives." Yet, cases interpreting the IPC affirm both philosophies (see *e.g.*, the requirements on imminence and proportionality versus the automatic disqualification of aggressors). Hence, she proposes a reformulation of the defence using the rights paradigm. On duress and necessity, the two defences that Macaulay had difficulty formulating, Professor Stanley Yeo argues that the former only requires some tweaking to bring it up to date, whereas the latter needs to be reconstructed. He advocates (at 229) the "minimisation of judicial discretion in interpreting and applying the conditions" of the modified defences. On insanity—termed "unsoundness of mind" in the IPC—Professor Gerry Ferguson painstakingly takes us through the precursors to s. 84, contending (at 242) that determining the circumstances that "exempt a person from criminal liability on the basis of insanity is a legal and moral question, not a medical question." After navigating through the related concept of automatism, he proposes a reformulation of the defence that factors in volitional impairment. On intoxication, Professor Gerry Ferguson proposes a provision for voluntary intoxication, despite Macaulay rejecting its inclusion in the IPC. For involuntary intoxication, he recommends restoring Macaulay's original three circumstances that constitute the defence, as this is more consistent with a lessened inhibitions standard. Finally, on provocation, Professor Ian Leader-Elliott posits that the most ideal conception of the defence requires proof that the offender was responding to a reasonable perception of serious wrongdoing by the victim, and substitutes the requirement of loss of self-control with extreme emotional disturbance resulting from the provocation.

Part IV of the book presents a couple of interesting case studies, with Professors Matthew Goode, Chris Clarkson, and Mark Findlay commenting on the challenges of codification and criminal law reform generally, as well as in Australia and England and Wales specifically. The decent workability of the Australian Model Criminal Code is contrasted with the efforts in

England and Wales, described (at 362) as a "patchwork of scattered reforms". A theory is also offered as to why Macaulay's work remains laudable today but modern codification projects have struggled to replicate similar success. All in all, *Codification, Macaulay and the Indian Penal Code* is requisite literature for those interested in re-evaluating criminal law that is based on the IPC. The ball has now moved out of the court of academia.

CHEN SIYUAN
Assistant Professor
School of Law, Singapore Management University