

## Article

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# Historicising “Law” as a Language of Progress and Its Anomalies: The Case of Penal Law Reforms in Colonial India

**Abstract:** This paper dispels the myth of liberal Enlightenment in relation to penal law reforms in colonial India by advancing two sets of argument. First, the liberal project of codification on the basis of universalist notion of utilitarianism never broke with cultural hierarchy inbuilt in the very act of colonisation. In this paper, I specifically look into the emerging phenomenon of evolutionary science in the nineteenth century – social Darwinism – to explain the dominant normative, as opposed to realist, justification of such racial hierarchy in colonial discourses since the nineteenth century. Second, using Dipesh Chakrabarty’s theoretical framework, I provincialise the penal law reform project in colonial India through the examination of literature in the field, and substantiate how the notion of utilitarian universality remained vague and unpromising in face of instrumental needs on ground – both in the colony and in the metropolis. Taken together, these propositions dispel the myth of the liberal project of penal law reforms in colonial India based on this universalist position and underscore the fallacies of the transition narrative of modernity itself.

**Keywords:** utilitarianism, liberal universalism, historiography, colonial legislation, penal law reforms

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## I. INTRODUCTION

In 1494, Spain and Portugal signed the Treaty of Tordesillas, under which these two Catholic European powers decided to regulate the distribution of the countries newly discovered or to be discovered without papal assistance or

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interference. The Treaty of Saragossa, concluded in 1529 between Charles V of Spain and John III of Portugal, elaborated the provision restricting papal dispensation. With these treaties, the practice of papal grants vanished; instead, sovereignty over newly discovered territory was acquired by a symbolic act performed in the territory, e.g. the erection of a cross or of a monument bearing the arms of the conquering sovereign.<sup>1</sup> Under such circumstances, Francisco de Vitoria – a professor of theology at the University of Salamanca – gave his famous lectures on “The Indians Recently Discovered” and on “The Law of War Made by the Spaniards on the Barbarians” (by Barbarians he basically meant American Indians) in 1532. For centuries, these lectures had influenced the development of international law, as they, on the one hand, brought Spanish colonisation of American Indians under legal regulations, and on the other hand, justified the very act of colonisation using the same legal language.

His justifications for Spanish colonisation of the American Indians depended, among many other factors, on the fact that the aborigines were little short of unintelligent, and therefore, unfit to found or administer a lawful State up to the standard required by human and civil claims. Proofs were abundant in his support: they were not capable of controlling their family affairs; they were without any literature or arts; and most importantly, they had *neither proper laws nor magistrates*.<sup>2</sup>

As a consequence of such “lack”, according to Vitoria, it was natural that for a greater interest of the Indians, “the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit”.<sup>3</sup> Vitoria’s doctrinal position on Spaniard–Indian relations had profound influence on successive scholars of international law. In Vitoria’s writing, as Anghie observes, “particular cultural practices of the Spanish assume the guise of universality as a result of appearing to derive from the sphere of natural law.”<sup>4</sup> These “universal norms,” constructed by sophisticated use of natural law techniques, are then put as a “standard” on the basis of which peoples outside Europe were not only assigned an inferior image of “barbarian” or “uncivilised” in the succeeding centuries but also programmed to follow the direction to an enlightened universalist “future.”

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1 Yasuaki Onuma, “When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilisational Perspective” (2000) 2 J. Hist. Int’L. L. 53–54.

2 Francisco de Vitoria, *De Indis Reflection Prior*, trans. by J. P. Bates (Washington, DC: Oceana Press, 1917 [1532]) at 161.

3 *Ibid.*

4 Antony Anghie, “Francisco De Vitoria and the Colonial Origins of International Law” (1996) 5:3 S. & L.S. 326.

It is within this general context of the colonial use of “law” as a language of civilisation and progress that this paper attempts to dispel this myth of liberal Enlightenment in relation to the penal law reforms project in colonial India. Such a project was initiated ostensibly under the influence of utilitarianism that was enjoying primacy in nineteenth century England. The popularity of utilitarian ideology in the nineteenth century had its source in the ever increasing influence of the writings of Jeremy Bentham, who advocated the reform of archaic common law based criminal justice system in England. Bentham’s work towards the reform of English the criminal law was taken up subsequently by James Mill, who looked beyond the metropolis and thought of applying this idea in colonial India in a bid to modernise the Indian legal system through wholesale transformation based on this universalist notion of utilitarianism. While serving British East India Company in London, Mill began to draft a systematic utilitarian program of law for India with the objective of devising “a code that was not derivative from the laws of any creed or country, but which sprang from the universal science of jurisprudence.”<sup>5</sup>

In this paper, I challenge this liberal-universalist proposition by first arguing that this liberal project of codification on the basis of universalist notion of utilitarianism never broke with cultural hierarchy inbuilt in the very act of colonisation. Although this issue has already been discussed in existing literature through the optics of “colonial difference” and “race,” in this paper I specifically look into the emerging phenomenon of evolutionary science in the late nineteenth century – social Darwinism – to explain the dominant normative, as opposed to realist, justification of such racial hierarchy in colonial discourses. Secondly, using Dipesh Chakrabarty’s theoretical framework, I provincialise the penal law reform project in colonial India through the examination of literature in the field, and substantiate how the notion of utilitarian universality remained vague and unpromising in face of instrumental needs on ground – both in the colony and in the metropolis. Taken together, these propositions dispel the myth of the liberal project of penal law reforms in colonial India based on this universalist position and underscore the fallacies embedded in the transition narrative of modernity itself.

To this end, in Section II of this article, I demonstrate, through a critical examination of James Mill’s account of the native legal order, how the pre-colonial indigenous legal systems of India were nullified by the colonial reformers as a “lack,” as something short of civilisation. This invented lack not only constructed the colonial “other” as backward and in need of guidance but also justified the necessity of the reform project. In Section III, I underscore

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5 Kartik K. Raman, “Utilitarianism and the Criminal Law in Colonial India: A Study of the Practical Limits of Utilitarian Jurisprudence” (1994) 28:4 *Mod. Asian Stud.* 756.

the inherent limitations of the liberal project that being informed by social Darwinism always stood in relation to racial hierarchy and could never broke with that – a fact that substantiates the anomalies embedded in the project of codification. And finally, in Section IV, using Dipesh Chakrabarty's framework of Provincialising Europe, I provincialise the transition narrative in relation to the penal law reform project in colonial India – a narrative that sees legal reforms primarily in the light of the modernist move.

## II. PERCEIVING LAW AS A LANGUAGE OF PROGRESS

The existence of “law” essentially in European sense continued to be perceived as an insignia of civilisation beyond the naturalist legal order of Vitoria's time. As a matter of fact, this phenomenon was a dominant thought in the writings of the nineteenth century positivist lawyers. For example, William Hall held the view that international law consisted in “certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.”<sup>6</sup> This legal conscience is an indication of civilisation which, according to Hall, non-Europeans essentially lacked. Other legal scholars too followed suit. Thomas Lawrence, for instance, in one place claimed that the race of savages is not fit for the application of legal technicalities.<sup>7</sup> Henry Wheaton, too, confirms that the international legal system consists of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among civilised nations; therefore, the Mohammedan and Pagan nations of Asia and Africa in their interaction with the Europeans renounce their “peculiar” usages and adopt those of Christendom.<sup>8</sup>

Thus, the whole concept of law is ethnicised through the dichotomy of civilised Europe and uncivilised non-Europe. The uncivilised non-Europe is outside the realm of “law,” for such rules are meant for regulating the mutual interaction among the civilised European nations. As Anghie notes:

only the practice of European states was decisive and could create international law. Only European law counted as law. Non-European states were excluded from the realm of law,

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<sup>6</sup> William E. Hall, *A Treatise on International Law*, 8th ed. (Oxford: Clarendon Press, 1924) at 1.

<sup>7</sup> Thomas J. Lawrence, *The Principles of International Law* (London: Macmillan and Co., 1895) at 58.

<sup>8</sup> *Ibid.* at 18.

now identified as being the exclusive preserve of European states, as a result of which the former were deprived of membership and the ability to assert any rights cognizable as legal.<sup>9</sup>

Therefore, it is no surprise that the very act of colonisation of India by the British, which came to be depicted as a mission to civilise the colonial “other,” always focused on the nullification of the indigenous legal order and transplanting a “modern” legal system as a part of the broader liberal project of civilisation, progress, and development. Henry Maine, for example, declared that India was *empty of laws* before the British came: “Nobody who has inquired into the matter can doubt that, before the British Government began to legislate, India was, regard being to its moral and material needs, a country singularly empty of law.”<sup>10</sup>

Similarly, James Mill depicts traditional Hindu law as a system that adheres to the imperfections of the state of law of a rude and ignorant people. One such imperfection is that they do not preserve their maxims of justice and rules of judicial procedure distinct from other subjects.<sup>11</sup> The tendency of this rude conjunction of dissimilar subjects, according to Mill, is not only to confound the important distinction between the obligations to be enforced by the magistrate and those to be left to the suggestions of self-interest and the sanctions of morality, but also to “extend coercion, and the authority of the magistrate, over the greater part of human life, and to leave men no liberty even in their private and ordinary transactions.”<sup>12</sup> Likewise, Mill finds problematic the classification of laws as used in the Institutes of Manu, the most celebrated original compendium Hindu law.<sup>13</sup> “As the human mind, in a rude state, has not the power to make a good distribution of a complicated subject, so it is little aware of its

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<sup>9</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 54.

<sup>10</sup> Maine’s “Minute on Codification in India,” dated July 17, 1879, at the NAI, Home (Legislative) August 1879, 217–20, cited in Elizabeth Kolsky, “Codification and the Rule of Colonial Difference: Criminal Procedure in British India” (2005) 23 L. & Hist. Rev. 652.

<sup>11</sup> Thus,

[t]he doctrines and ceremonies of religion; the rules and practice of education; the institutions, duties, and customs of domestic life; the maxims of private morality, and even of domestic economy; the rules of government, of war, and of negotiation; all form essential parts of the Hindu codes of law, and are treated in the same style, and laid down with the same authority, as the rules for the distribution of justice.

See, James Mill, *The History of India in 8 volumes*, 4th ed. vol. II (London: James Madden & Co., 1840 [1817]) at 223–24.

<sup>12</sup> *Ibid.* at 224.

<sup>13</sup> In the Code of Manu, the titles, as they are there denominated, or divisions, of law, are eighteen, laid down in the following order: 1. Debt, on loans for consumption; 2. Deposits and loans for use; 3. Sale without ownership; 4. Concerns among partners; 5. Subtraction of what

importance; little aware that this is the ground-work of all accurate thought.”<sup>14</sup> For Mill, the Hindu law is indicative of that fact, for it would be difficult to conceive a “more rude and defective attempt at the classification of laws” than the classification in the Code of Manu.<sup>15</sup>

On this score, a pertinent reference might be made to Foucault’s take on now-famous classification of animals in “certain Chinese encyclopedia.” Foucault asserts that while most people would regard this classification of animals to be ludicrous, this presents us an opportunity to recognise the limitations of our own classification system by which we would not think of this alternative.<sup>16</sup> In his words, “the thing that, by means of the fable, is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*.”<sup>17</sup> While the people in power merely presume that their own presently accepted classification scheme presents an objective reality, they actually exclude numerous alternative classification schemes.<sup>18</sup> A particular classification scheme is thus a cultural code of interpretation, what Foucault usually calls a “discursive formation” – a set of deep rules for ordering that is embedded in our own cultural language. Thus, Foucault’s historical, philosophical, and epistemological analyses explain the backdrop, against which Mill was criticising the Manu classifications in ancient Hindu law, by connecting with the utilisation of discourses of those who wield power in society, and through which the social order receives its classification.

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has been given; 6. Non-payment of wages or hire; 7. Non-performance of agreements; 8. Rescission of sale and purchase; 9. Disputes between master and servant; 10. Contests on boundaries; 11 and 12. Assault and slander; 13. Larceny; 14. Robbery and other violence; 15. Adultery; 16. Altercation between man and wife and their several duties; 17. The law of inheritance; 18. Gaming with dice and with living creatures. *The Laws of Manu*, Ch. VIII.

<sup>14</sup> Mill (1840 [1817]), *supra* note 11 at 224.

<sup>15</sup> *Ibid.* at 226.

<sup>16</sup> “Animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies.” See, M. Foucault, *The Order of Things – An Archaeology of the Human Sciences* (London: Routledge, 1989 [1966]) at xvi.

<sup>17</sup> *Ibid.*

<sup>18</sup> In *The Order of Things: Archaeology of Knowledge*, while talking about “justice,” he states that the legal system itself makes it impossible, by setting up a social power structure where a supposedly neutral judge pronounces supposedly neutral judgments in a setting of organised superiority and subservience. He argues that revolutionary groups cannot establish a more acceptable justice unless they move away from justice system itself, otherwise they re-institute the unjust bourgeois concept of justice. See, M. Foucault, *The Order of Things – Archaeology of Knowledge*, trans. A. M. Sheridan Smith (London: Routledge, 2002 [1969]) at 62–70.

Yet, so far as Hindu criminal law is concerned, Mill finds it in conformity with the universal features of the criminal codes of barbaric people – severity and retaliation.<sup>19</sup> He regrets that the Hindu criminal law falls short of the standard of proportionality to the extent that hardly any nation is distinguished for more sanguinary laws.<sup>20</sup> To his support, Mill finds evidence in the Institutes of Menu to demonstrate how extraordinary a degree the spirit of retaliation moulds the penal legislation of the Hindus.<sup>21</sup>

From these examples, Mill also predictably traces the classification of the people and the privileges of the castes among the Hindus in the realm of law. While inequality as to penal measures for crimes committed *against* persons of higher rank is difficult to avoid even in advanced civilisations, as Mill notes, it is rare, even among the rudest people, to find the principle of unequal punishments for offences committed *by* individuals of the different ranks.<sup>22</sup> Mill succinctly presents the system of unequal punishment based on the caste of the offender in the following words: “Among the Hindus, whatever be the crime committed, if it is by a Brahmen, the punishment is in general comparatively slight if by a man of the military class, it is more severe; if by a man of the mercantile and agricultural class, it is still increased; if by a Sudra, it is violent and cruel.”<sup>23</sup> Such peculiar system of punishment not only deviates from the Enlightenment principle of equality but also frustrates utilitarian purposes lacking uniformity and consistency – ideas for which Mill was advocating.

Hindu procedural law equally attracts Mill’s criticism. While he finds some of the rules for evidence reasonable and good, he terms others as indicative of a state of “ignorance” and “barbarism.”<sup>24</sup> What invites his most harsh condemnation is the Hindu law rule of exclusion of evidence<sup>25</sup> that according to Mill marks

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<sup>19</sup> Mill (1840 [1817]), *supra* note 11 at 253.

<sup>20</sup> *Ibid.* at 254.

<sup>21</sup> Halhed’s Code of Gentoo Laws, ch. xvi. sec.1, cited in Mill (1840 [1817]), *supra* note 12 at 256.

<sup>22</sup> Mill (1840 [1817]), *supra* note 11 at 259–60.

<sup>23</sup> *Ibid.* at 260.

<sup>24</sup> *Ibid.* at 271.

<sup>25</sup> Mill quotes from the Code of Manu a long list of persons who are excluded as witness under this rule:

Those must not be admitted who have a pecuniary interest; nor familiar friends; nor menial servants; nor enemies; nor men formerly perjured; nor persons grievously diseased; nor those, who have committed heinous offences. The king cannot be made a witness, nor cooks and the like mean artificers; nor public dancers and singers; nor a priest of deep learning in Scripture; nor a student of the Vedas; nor an anchorite secluded from all worldly connexions; nor one wholly dependent; nor one of bad fame; nor one who follows a cruel occupation; nor one who acts openly against the law; nor a decrepit old man; nor a child; nor a wretch of

“the age of false refinement, which is that of semi-barbarism, intermediate between the age of true wisdom, and that of primeval ignorance.”<sup>26</sup> However, in his note to the 4th Edition of Mill’s *History of India*, Horace Wilson contends that the imperfections of the Hindu law have been pertinaciously selected by Mill, and despite the blemishes, general character of Hindu law of evidence has received commendation from high authority. Wilson quotes the Chief Justice of Madras, Sir Thomas Strange, to his support:

With some trifling exceptions, the Hindu doctrine of evidence is, for the most part, distinguished nearly as much as our own, by the excellent sense that determines the competency, and designates the choice of witnesses, with the manner of examining, and the credit to be given to them, as well as by the solemn earnestness, with which the obligation of truth is urged and inculcated; insomuch that less cannot be said of this part of their law, than that it will be read by every English lawyer with a mixture of admiration and delight, as it may be studied by him to advantage.<sup>27</sup>

Nevertheless, given that the qualities desirable in a legal system may all be summed up under two comprehensive titles – completeness<sup>28</sup> (which refers to matter) and exactness<sup>29</sup> (which refers to form), in his final analysis, Mill finds the Hindu system of law far short of these qualities. Thus he concludes:

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the lowest mixed class; nor one who has lost the organs of sense; nor one extremely grieved; nor one intoxicated; nor a madman; nor one tormented with hunger or thirst; nor one oppressed by fatigue; nor one excited by lust; nor one inflamed by wrath; nor one who has been convicted of theft.

In addition, women were held incompetent to give evidence, unless in the case of evidence for others of the same sex. Servants, too, mechanics, and those of the lowest class, are allowed to give evidence for individuals of the same description. See, *Laws of Manu*, ch. viii. 64–8, cited in *ibid.* at 272–73.

**26** Mill (1840 [1817]), *supra* note 11 at 274.

**27** Thomas Strange, *Elements of Hindu Law* at 309, cited by Horace Hayman Wilson, commentary to the 4th edition of *Mill’s History of India*, vol. II, footnote 1 at 274.

**28** According to Mill:

A body of laws may be said to be complete when it includes every thing which it ought to include; that is, when all those rights, the existence of which is calculated to improve the state of society, are created; and all those acts, the hurtfulness of which to the society is so great as to outweigh the cost, in all its senses, necessary for preventing them, are constituted offences.

See Mill (1840 [1817]), *supra* note 11 at 282.

**29** For Mill, the exactness of a body of laws is conformed: 1. when it constitutes nothing a right, and nothing an offence, except those things precisely which are necessary to render it complete; 2. when it contains no extraneous matter whatsoever; 3. when the aggregate of the powers and privileges which ought to be constituted rights, the aggregate of the acts which ought to be



The laws of the Hindus ... are such as could not originate in any other than one of the weakest conditions of the human intellect; and, of all the forms of law known to the human species, they exhibit one of the least capable of producing the benefits which it is the end and the only good consequence of law, to ensure.<sup>30</sup>

So far as the Mohamedan law, as introduced into India by the Mughals, is concerned, Mill finds that “defective” albeit not to the extent of the Hindu law. As a matter of fact, in some areas of law such as the law of evidence, he is of the opinion that the Mohamedan law is even preferable to those of English laws.<sup>31</sup> In other areas, however, Mohamedan law falls short. For example, penal provisions are exceedingly scanty, disproportionate to other branches of non-penal laws.<sup>32</sup> The most atrocious part of the Mohamedan system of punishment, according to Mill, is the provision that prescribes mutilation, by cutting off the hand, or the foot, as a remedy for all higher degrees of the offence. “This savours strongly of a barbarous state of society; and in this the Mohamedan and Hindu systems resemble one another.”<sup>33</sup>

Another area, in which the Mohamedan law indicates the work of an immature state of the human mind, in Mill’s view, is the failure to frame rules dealing with a class of cases rather than dealing with them individually. Mill traces that it is not the generic differences, but the individual differences, upon which a great proportion of the rules are founded in Mohamedan law, as if “they were to make one law to prohibit the stealing of a sheep; another to prohibit the stealing of a cow; a third, the stealing of a horse; though all the cases should be treated as equally criminal, and all subjected to the same penalty.”<sup>34</sup> Given that it is the dictate of logic as well as a good talent for expediting business that all such cases as could be comprehended under one description, and were to be dealt with in one way, should be included in one comprehensive law, Mill argues that the systematic failure of Mohamedan law to do so has not only deprived it of being less voluminous and hence less obscure but also made it more difficult to administer.<sup>35</sup>

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constituted offences, are divided and subdivided into those very parcels or classes, which beyond all others best adapt themselves to the means of securing the one, and preventing the other; 4. when it defines those classes, that is, rights and offences, with the greatest possible clearness and certainty; 5. when it represses crimes with the smallest possible expense of punishment; and 6. when it prescribes the best possible form of a judicatory, and lays down the best possible rules for the judicial functions. See, *ibid.* at 28283.

**30** James Mill, *The History of British India in 6 Volumes*, 3rd ed., vol. II (London: Baldwin, Cradock, and Joy, 1826 [1817]) at 197.

**31** *Ibid.* at 203.

**32** See, *ibid.* at 199–200.

**33** *Ibid.* at 200.

**34** *Ibid.*

**35** *Ibid.* at 200–01.

Regarding procedural law, Mill holds that whereas in the European system, the steps of procedure are multiplied to a great number and regulated by a correspondent multiplicity of rules, the Mohamedan and the Hindu systems keep the mode of procedure simple, and not much regulated by any positive rules, the Judge being left to conduct the judicial inquiry, in the mode which appears to him most conducive to its end.<sup>36</sup> However, what is provocative here is Mill's reasoning for such simplification of procedure in the Indian system:

In India, as the state of manners and opinions permitted them to receive bribes, they had no occasion to look out for any other means of drawing as much money as possible from the suitors; and, therefore, they allowed the course of inquiry to fall into the straight, the shortest, and easiest channel. In England, the state of manners and opinions rendered it very inconvenient, and in some measure dangerous, to receive bribes. The judges were, therefore, induced to look out for other means of rendering their business profitable to themselves. The state of manners and opinions allowed them to take fees upon each of the different judicial operations. It was, therefore, an obvious expedient, to multiply these operations to excess; to render them as numerous, and not only as numerous, but as *ensnaring* as possible.<sup>37</sup>

Mill is not alone here. In his narrative of the phenomenon of Indian society and the administration of justice, Abbe J. A. Dubois, a missionary in the Mysore, claims that the authority of Hindu princes along with the vile emissaries in several provinces was despotic and devoid of any other norms apart from arbitrary will.<sup>38</sup> Although the tribunals were mandated with the collection of the taxes, they used to take cognisance of all affairs – civil and criminal – within its bounds and determine upon all causes. Having failed to trace there either a shadow of public right or a code of laws by which those who administer justice may be guided, Dubois regrets that “there was nothing in India that resembles a court of justice.”<sup>39</sup> Much later, Thomas Macaulay, speaking in the House of Commons in 1833 reiterated that previous forms of political experience in India offered no guide for British rule. Britain's strange position in India meant that the “light of political science and of history are withdrawn: we are walking in darkness: we do not distinctly see whither we are going.”<sup>40</sup>

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<sup>36</sup> *Ibid.* at 201.

<sup>37</sup> *Ibid.* at 202.

<sup>38</sup> Abbe J. A. Dubois, *Description of the Character, Manners, and Customs of the People of India* (London: Longmans, Green & Co. 1817) at 494, cited by Horace Hayman Wilson, commentary to the 4th edition of *Mill's History of India*, vol. II, footnote 1 at 288.

<sup>39</sup> *Ibid.*

<sup>40</sup> “Government of India”, 10 July 1833, in Lady Trevelyan, ed., *The Works of Lord Macaulay* vol. VIII (London: Longmans, Green & Co., 1875) at 120.

This invented “lack” of various kinds in the realm of law and politics coupled with the despotism of the Mughals provided the liberals in India with the rationale for codification of laws that they thought would “bring order to subcontinental chaos by replacing the arbitrary and personal will of the Oriental despot with the rational and reliable objectivity of a universal law.”<sup>41</sup> Mill, for example, argued that when words were not written, they were seldom exactly remembered, and when a definition had constantly varying words, for the purposes of law that was not a definition at all.<sup>42</sup> Although in one sense Hindu laws were written in that under Hindu jurisprudence the “Divine Being” dictated all their laws which are found in their sacred books, Mill asserts that such books left a wide range of areas in the field of law untouched, wherein the absence were filled with either custom or the momentary will of the judge.<sup>43</sup> Even those few legal provisions collected from these books were in their expressions vague and indeterminate to the highest degree; they commonly admit of any one of several meanings, which were very frequently contradicted and opposed by one another.<sup>44</sup> In contrast, despite the fact that the nations of modern Europe allowed a great proportion of their laws to continue in the unwritten form, the uncertainty adhering to all unwritten laws is to some degree circumscribed and limited by the written forms of judicial decisions. Although the degree of certainty engendered by precedents is by no means equivalent to that of codified laws, Indian legal system was entirely deprived of it. In the words of Mill:

Among [the Hindus] the strength of the human mind has never been sufficient to recommend effectually the preservation, by writing, of the memory of judicial decisions. It has never been sufficient to create such a public regard for uniformity, as to constitute a material motive to a judge. And as Kings, and their great deputies, exercised the principal functions of judicature, they were too powerful to be restrained by a regard to what others had done before them. What judicature would pronounce was, therefore, almost always uncertain; almost always arbitrary.<sup>45</sup>

This offered a justification for wholesale codification of the colonial law within the broad framework of utilitarian ideology.

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<sup>41</sup> Kolsky (2005), *supra* note 10 at 652.

<sup>42</sup> Mill (1840 [1817]), *supra* note 11 at 285.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.* at 286. Kolsky, however, contends that the discourse on the mismanaged administration of justice in India frequently ended up with this gloomy image of pre-colonial turmoil in order to justify “new forms of colonial intervention and to disguise the Company’s own failures of justice,” and the same language of chaos that depicted the tyranny of the common law in England was “slightly reoriented to condemn the lawlessness of the Oriental despot in India.” See Kolsky (2005), *supra* note 10 at 652.

Orientalists perceived this project in light of the liberal notion of “progress.” James Stephen, for example, characterising India’s legal system as governed by the whim and caprice of innumerable rulers and a mass of village communities, found legitimate the destruction of indigenous Indian legal system; this is the price India needs to pay for establishing the Rule of Law.<sup>46</sup> In line with the liberal notion of evolutionary progress, he predicted that native laws and customs not directly repealed would inevitably be obsolete by the social revolution caused by the “new regime of peace, law, order, unrestricted competition for wealth, knowledge, honours, and education.”<sup>47</sup>

As a matter of fact, the image of “lack” and “backwardness” of the native institutions was equally shared by the early protagonists of Indian nationalism, who believed in gradual progress from this situation; of course, Europe and the European civilisation was the essential model for them to follow. This reveals a “transition narrative” – to take Chakrabarty’s term – of law and legal institutions in India that essentially starts from Europe. With insightful commentary on the works of Rammohun Roy and Bankimchandra Chattopadhyay – two of India’s most prominent nationalist intellectuals of the nineteenth century – Chakrabarty exposes that for them the British rule was “a necessary period of tutelage” that Indians had to undergo in order to prepare precisely for what the British denied but extolled as the end of all history: citizenship and the nation-state.<sup>48</sup> This dominance of “Europe” as the subject of all histories, according to Chakrabarty, is a part of a much profound theoretical condition under which historical knowledge is produced in the third world. This transition narrative underwrote and was in turn underpinned by many private and public rituals of modern individualism such as novels, autobiographies, biographies that expressed the modern self, or modern industry, technology, medicine, a quasi-bourgeois *legal system* supported by the state that nationalism was to take over and make its own. For Chakrabarty, to think about this narrative was to think in terms of these institutions “at the apex of which sat the modern state, and to think about the modern or the nation-state was to think a history whose theoretical subject was Europe.”<sup>49</sup>

It is this liberal ideology of evolutionary “progress” that nullified the indigenous legal system and justified the codification project premised upon the

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<sup>46</sup> See, K. Lipstein, “The Reception of Western Law in India” (1957) 9 Int’l. Soc. Sci. Bull. 87, 88, 91. See also, K. J. M. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge: Cambridge University Press, 1988).

<sup>47</sup> *Ibid.*, Smith (1988), *supra* note 46 at 134–35.

<sup>48</sup> *Ibid.* at 33.

<sup>49</sup> *Ibid.* at 34.

universal notion of utilitarianism. Yet, this project of liberal universalism had its own anomalies which soon became evident with the transplantation of this idea in colonies. Penal law reform in colonial India is an archetypical example in this regard, to which we turn now.

### III. SOCIAL DARWINISM AND THE ANOMALIES OF LIBERAL “PROGRESS”

The liberal project of rule of law, designed within the framework and vocabulary of Enlightenment, never broke with the idea of the distinctive pejorative character of the colonised. Elizabeth Kolsky, in her historical narrative of the codification of Indian penal laws by Thomas Macaulay, relies on Partha Chatterjee’s notion of “colonial difference” for her theoretical framework. Chatterjee argues that the British colonisation of India, on the one hand, had the promise of eradication of difference “by bringing colonized people forward into the fold of progress and history,” on the other hand, it had to rely on the difference for its own survival, for “once colonized ‘others’ became modern subjects, colonial control would have lost its ideological foothold.” Hence, the colonial power had to continue to underscore the difference between the coloniser and the colonised despite its promises of universal ideas and institutions.<sup>50</sup> However, in this article I contextualise Kolsky and Chatterjee by using the evolutionary notion of social Darwinism as a normative justification for such racial hierarchy in colonial administration beginning from the nineteenth century.

The liberal-universalist vision of spreading Enlightenment values through an assimilationist approach towards the native “other” had to encounter a powerful force, the science of human evolution, that shook its very foundation during the nineteenth century. Although Darwin’s evolutionary theory appeared first in *The Origin of Species* in 1859, the discipline dealing with its implications in human social life, which came to be known as social Darwinism, owes much to other early European and American scholars’ works than to Darwin’s own version of social Darwinism published in *The Descent of Man* in 1871.<sup>51</sup> Not all

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**50** Kolsky (2005), *supra* note 10 at 636. See also, Elizabeth Kolsky, *Colonial Justice in British India: White Violence and Rule of Law* (Cambridge: Cambridge University Press, 2011); Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton, NJ: Princeton University Press, 1993).

**51** For an account of social Darwinism, see, M. Hawkins, *Social Darwinism in European and American Thought, 1860–1945* (Cambridge: Cambridge University Press, 1997) at 61–122;

the social Darwinist propositions, despite being treated under this genre, were the same: while Darwin himself reaffirmed the Enlightenment faith in the unity of humankind by acknowledging that all human beings had a common origin and certain groups progressed better than others in the evolutionary process, some of his followers claimed the opposite advancing the Counter-Enlightenment.<sup>52</sup>

Thus, different approaches emerged within the rubric of social Darwinism to explain the human evolutionary process, which can be broadly divided into two main streams: monogenic and polygenic. The monogenic version conceives of human races as emanating from a common origin which despite possessing different ranks in the civilisational process would ultimately survive as the superior whole through the evolutionary continuum. On the other hand, the polygenic version of social Darwinism perceives human races as fundamentally distinct species, whose hierarchical positions are fixed in the evolutionary process, in that the superior must be preserved from any inter-mixing with the inferior.<sup>53</sup> However, as a whole, social Darwinism having the persuasive force of “science” offered an opportunity to explain the viability of the merger of different social groups within one political unit or their strict segregation on the basis of ethnic features.

The early social Darwinists of the nineteenth century explained human evolution in a way that reinforced the Enlightenment philosophy that aimed at progression towards a common universal spirit. In general, they relied on the common origin of all human races despite the difference in the level of their progress resulting from the natural selection of some hereditary traits. In this connection, it was argued that in the struggle for survival the lower races would ultimately submit to the higher races in the form of assimilation or complete

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P. Dickens, *Social Darwinism* (Buckingham: Open University Press, 2000) at 7–25. Referring to Herbert Spencer as the pioneer of social Darwinism, Greene argues that the historical context of Darwin’s work in particular and the interaction between science and society in general tend to emphasise the links between Darwin and Spencer consisting of a network of shared assumptions and viewpoints about God, Nature, society, and history, which rendered Spencer a “Darwinian before Darwin.” See, J. C. Greene, *Science, Ideology and World View* (Oakland, CA: University of California Press, 1981) at 134, 140. For a Spencerian account of social evolution, see generally, J. D. Y. Peel, ed., *Herbert Spencer on Social Evolution – Selected Writings* (Chicago: University of Chicago Press, 1972).

<sup>52</sup> *Ibid.*, Dickens (2000), *supra* note 51 at 16–17; Hawkins (1997), *supra* note 51 at 14–15; Adam Kuper, *Culture: The Anthropologists’ Account* (Cambridge, MA: Harvard University Press, 1999) at 11. <sup>53</sup> Dickens notes that in the 1860s, there was intense debate in Britain between the monogenists, who argued that there was a common ancestor for all human races, and the polygenists, who held the view that different races are indeed separate species. See, *ibid.*, Dickens (2000), *supra* note 51 at 14.

elimination to advance the evolutionary process. For example, Charles Brace asserted that races were varieties of a common origin, not species, and argued that present racial differences were a consequence of the interaction between environmental conditions, natural selection, inheritance, and variations.<sup>54</sup> He argued further that this interaction would initially result in the elimination of the weaker, but the stronger would survive and pass their advantageous traits to their descendants until a new type is formed.<sup>55</sup> In this way, Mike Hawkins notes, Brace's Darwinism envisaged a new and a more perfect race in the future through racial inter-mixture.<sup>56</sup> Likewise, German philosopher Friedrich Buchner claimed in *Man in the Past, Present and Future* (1869) that humans had evolved from an ape-like ancestor through the struggle for existence; the backward races who survived this struggle would only be able to stand up to civilised races by adopting the culture of the latter.<sup>57</sup>

Social Darwinism within this monogenic framework of evolution actually goes beyond being a mere parallel of natural evolutionary process. As Dickens persuasively presents, while describing social evolution, the social Darwinist scholars indicated “progress occurring through evolution, direction to social change, and teleology, an end which is built into social change itself.”<sup>58</sup> Given that this monogenic understanding of evolution was informed by the Enlightenment philosophies, unsurprisingly all of these concepts of progress, direction, and teleology in fact related to the realisation of a civilised society in the Western European sense. Thus, “progress” is exemplified by modernisation; a modern society is a fully developed one that relies on modern political, educational, and legal systems as well as includes a value system supportive of economic growth in contrast to the traditional societies that largely depend on clan-based or autocratic system of government as well as pre-Newtonian science and technology.<sup>59</sup> The same is true for the concepts of “direction” and “end.”<sup>60</sup>

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54 Charles Loring Brace, “Letter to *The Washington Independent* (September 12, 1861)” in Emma Brace Donaldson, ed., *The Life of Charles Loring Brace Chiefly Told in His Own Letters*, (London: Sampson, Low, Marston and Co., 1894) at 390.

55 *Ibid.* at 375.

56 *Supra* note 55, Hawkins (1997), *supra* note 51 at 64.

57 Friedrich Carl Christian Ludwig Buchner, *Man in the Past, Present and Future*, trans. by William Sweetland Dallas (London: Asher and Co., 1872) at 151, 156, 157.

58 *Supra* note 55, Dickens (2001), *supra* note 51 at 31–44.

59 *Ibid.* at 32.

60 For example, Fukuyama famously claimed that liberal capitalism indicates “the end of the history” by giving every individual a sense of recognition and worth while simultaneously providing with high levels of material well-being. See generally, Francis Fukuyama, “The End of History?” (1989) 16 *Nat'l. Int.* 3–18. Other writers, such as Kerr and Aron, saw the end in the

It is, therefore, the vision of a “culture” through which the “progress” would be maintained and thereby, the “end” would be realised. Given that the “high culture” that would lead to the liberal “progress” is the selected cultural traits in the social evolutionary process, everything else is arguably destined to submit to this high culture. Seen in this way, social Darwinism within this liberal monogenic framework of evolution actually goes beyond being a mere parallel of natural evolutionary process.

The theory of evolutionary progress strongly influenced liberal colonialism, in that the differences among races and their socio-cultural attributes came to explain the difficulties of governing subject peoples. For example, in France the very idea of assimilation in French colonial thoughts fell prey to this new idea.<sup>61</sup> Commander Edmond Ferry, for instance, argued that the Sudanese, who manifested the primitive state’s most significant characteristics, could reach the fortunes of civilisation through different stages, instead of outright assimilation; the role of France in this evolutionary struggle was to aid the natives “in this long and difficult climb toward the good and the beautiful.”<sup>62</sup> Jules Harmand’s comparison of French colonial policies in Indochina with those of the British in India even led him to conclude that both India and Indochina were “possessions,” not “colonies.” While “colonies,” according to him, were regions which were susceptible to colonisation and where the Europeans find similar conditions to those of his country of origin, “possessions” only allowed the Europeans to assume the role of a director, of a “protector of the native races” without shouldering the expenses of governing them, something the British were successfully doing unlike the French.<sup>63</sup> Against this backdrop, a new colonial policy – association – appeared on the scene to replace, at least theoretically, the longstanding liberal assimilationist approach.

As a principle, the idea of association emphasised the need for considering local needs; instead of universalism and centralisation, it focused on the variation in colonial practice depending on geographic and ethnic composition as well as the level of socio-cultural development of colonies. This shifts from the idea of assimilation to that of association in a sense meant breaking with the Enlightenment philosophy of “equality.” As Rene Maunier explained in the

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convergence of different forms of industrialisations. See, *supra* note 55, Dickens (2000), *supra* note 51 at 35–41.

**61** Raymond F. Betts, *Assimilation and Association in French Colonial Theory 1890–1914* (New York: Columbia University Press, 1961) at 59.

**62** Edmond Ferry, *La France en Afrique* (Paris: Armand Colin, 1905) at 228, 232, quoted in *ibid.* at 82–83.

**63** Jules Harmand, “Preface” in Sir John Strachey, *L’Inde*, trans. by Jules Harmand (Paris: Bibliotheque generale de geographi, 1892) at xxi, cited in Betts (1961), *supra* note 61 at 53–54.



French context, the partnership between the metropolis and the colony went through three sequential phases: expression of the idea and spirit of humanitarianism that is followed by those of equality, and finally those of fraternity; association developed in the first phase wherein “there is no equality, but there is humanity and moderation. [T]here is collaboration and cooperation, but of superior and inferior.”<sup>64</sup>

Thus, “association” prescribed the “progress” of the colonies within the framework of native institutions, but it was to be done with an underlying notion of inequality between them. To quote Betts:

Germinated in the fertile soil of the Enlightenment, as were so many humanitarian ideas, and fed by the stream of thought emanating from the Quaker, association then implied mutual trust and friendly cooperation, but of two differently developed peoples whose relationship was described as one of teacher – or of “governor” in the sense of protector – and pupil.<sup>65</sup>

In this way, the liberal monogenic version of social Darwinism allowed the liberals to think of a hierarchical world order wherein some nations “progressed” more than others; the differences among races and their socio-cultural attributes then came to explain the difficulties of governing subject peoples.<sup>66</sup> Thus, in place of an “equality” driven approach, a hierarchical system guided the process of native “progress”. The process of criminal law reform in colonial India under the British rule substantiates this fact.

In the process of developing a uniform penal jurisdiction in India through codification of penal laws, we see an inherent tension while reconciling the Enlightenment notion of equality before law with the racial superiority of the British, in that equality in this case had the risky potential of subjecting the non-official British merchants to the *mofussil* courts which were often presided over by Indian judges. It is to be noted that until 1793, Europeans in the *mofussil* could not be tried in the local courts in either civil or criminal matters. Although a European could sue an Indian in a *mofussil* court, an Indian had to take a grievance against a European to the Supreme Court at Calcutta. Given the financial costs and added procedural complications involved, in most cases native Indians in the interior used to refrain from pursuing this track, which thereby left them vulnerable to European violence and exploitation.<sup>67</sup>

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<sup>64</sup> Rene Maunier, *The Sociology of Colonies*, vol. I, ed. and trans. by E. O. Lorimer (London: Routledge and Kegan Paul, 1949) at 297.

<sup>65</sup> Betts (1961), *supra* note 61 at 108. Endnotes in original omitted.

<sup>66</sup> *Ibid.* at 59.

<sup>67</sup> Kolsky (2005), *supra* note 10 at 641.

When Macaulay introduced a bill into the Legislative Council in February 1836 that proposed to divest Europeans in the *mofussil* of their exclusive appeal to the Supreme Court in civil matters, the bill excited unprecedented controversy and protest, primarily at Calcutta where “raucous meetings and hateful articles gave voice to a vicious sense of racial entitlement and privilege, an ominous harbinger of conflicts to come.”<sup>68</sup> Often, such claims for racial superiority took refuge to the “constitutional rights” of any British man to be governed by the common law in any part of the British Empire. Besides, the characterisation of Indian law officers as corrupt and the “wild and menacing visions of Indian society” as a whole provided justification against the efforts to bring the British under the jurisdiction of local courts.<sup>69</sup> When Macaulay’s bill was passed on May 9, 1836, it was even proposed that “Mr. Macaulay ought to be lynched at the very least.”<sup>70</sup>

Thus, on the one hand, the narrative of the criminal law reform in colonial India characterises law as a part of civilising mission fuelled by the Enlightenment ideology of equality, but on the other hand, exposes that there cannot be any equality between the civilised Europeans and the racially inferior native Indians in the realm of law, which in itself was a device to civilise the latter.

Therefore, the critics of equality between the superior and inferior races had to come up with a revised version of equality. As Kolsky notes, the notion of “equal justice” as a relative rather than an absolute principle undergirded many of the claims about the “rights” of the Englishman in India.<sup>71</sup> Opponents of legal uniformity held that through historical struggle, Englishmen had earned as their birthright an impartial and advanced administration of justice. In contrast, they suggested that Indians, beaten down by long subjection to corrupt Oriental despotisms, stagnated in historical time and were therefore accustomed to lower standards of justice.

According to this relative equality argument, “Indians would not be “equally” oppressed as Europeans would be by a mediocre legal system.”<sup>72</sup> For Charles Jackson, the new Chief Justice of the Calcutta Supreme Court following the events of the Sepoy Revolution of 1857, the way out remained in raising “the Native to the position of the British subject, and not to reduce the British subject to the level of the Native.”<sup>73</sup>

**68** The Legislative Consultations of February 1, 1836, No. 20 (IOR P/206/81), cited in *ibid.* at 653.

**69** Kolsky (2005), *supra* note 10 at 655.

**70** Quoted during the Legislative Proceedings of March 9, 1883, by Council Member Hunter, cited in Kolsky (2005), *supra* note 10 at 657.

**71** Kolsky (2005), *supra* note 10 at 667.

**72** *Ibid.*

**73** The debates of July, August, and September 1859, in *Legislative Council Proceedings*, vol. 5 (1859), quoted in *ibid.* at 671.

While this narrative reveals anomalies embedded in the utilitarian project in relation to penal law reforms, and in this connection, demystifies the notion of liberal universalism itself, we are left with the question of how to deal with Eurocentrism that dominates the way in which we understand law as a language of progress. The following section addresses this issue.

#### IV. “PROVINCIALISING” THE PENAL LAW REFORM IN COLONIAL INDIA

Referring to the emergence of rational inquiry procedure (replacing the old tests of Barbarian law based on crude, archaic, irrational systems) as a mode of truth-establishment in criminal justice system in the twelfth century medieval Europe, Foucault writes, people believe that the new rational inquiry procedure came into being as a historical process of the progress of rationality. Contending this conventional wisdom, Foucault asserts that instead of being the progress of rationality, the introduction of the inquiry procedure was rather necessitated by a whole political transformation, a new political structure in the Middle Ages. For him, it would be a mistake to see the inquiry as “the natural result of reason acting upon itself, developing itself, making its own progress, or to see it as the effect of a knowledge, of a subject of knowledge engaged in self-transformation.” Rather, he sees this transition as “primarily a governmental process, an administrative technique, a management method – in other words, it was a particular way of exercising power.”<sup>74</sup> Thus, he continues, no history constructed in terms of a progress of reason, of a refinement of knowledge, can account for the acquisition of the rationality of the inquiry procedure in criminal justice administration in medieval Europe.<sup>75</sup>

Very much in that line, in the context of the transition narrative of modernity in colonial India and in the process of inversion of the themes of “failure,” “lack,” and “inadequacy,” Chakrabarty contends that if one result of European imperialism in India was to introduce modernism in the form of law, state, nationalism, and so on, these themes have existed – in contestation, alliance, and miscegenation – with other narratives of the self and community that do not look to this modernist form as the ultimate construction of sociality.<sup>76</sup> He

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<sup>74</sup> Michel Foucault, “Truth and Juridical Forms” in James D. Faubion, ed., *Essential Works of Foucault 1954–1984*, vol. 3, trans. by Robert Hurley et al. (London: Penguin Books, 2002 [2000]) at 48.

<sup>75</sup> *Ibid.*

<sup>76</sup> Dipesh Chakrabarty, *Provincializing Europe – Postcolonial Thought and Historical Difference* (Princeton, NJ: Princeton University Press, 2000) at 37.

concur with Spivak that colonial Indian history is replete with instances in which “Indians arrogated subjecthood to themselves precisely by mobilizing, within the context of modern institutions and sometimes on behalf of the modernizing project of nationalism, devices of collective memory that were both antihistorical and nonmodern.”<sup>77</sup> It is in this context that Chakrabarty articulates the project of provincialising Europe – a project that tends to document how and through what historical process “the Enlightenment reason,” which was not always self-evident to everyone, has been made to look obvious far beyond the ground where it originated.<sup>78</sup>

Chakrabarty asserts that the tendency to identify reason and rational argumentation – the symbols of “progressiveness” – as a modernist weapon against “premodern” superstition ends up overdrawing the boundary between the modern and the premodern.<sup>79</sup> In this set up, “reason” becomes elitist when “unreason” and “superstition” are assigned the position of backwardness, for then we see our “superstitious” contemporaries as examples of an “earlier type,” as human embodiments of the principle of anachronism. Historical evidence, he continues, is produced by human capacity to experience something contemporaneous with us as a relic of another time or place, and therefore,

the person gifted with historical consciousness sees these objects as things that once belonged to their historical context and now exist in the observer’s time as a ‘bit’ of that past. A particular past thus becomes objectified in the observer’s time. If such an object continues to have effects on the present, then the historically minded person sees that as the effect of the past.<sup>80</sup>

He thus concludes:

If historical or anthropological consciousness is seen as the work of a rational outlook, it can only “objectify” – and thus deny – the *lived* relations the observing subject already has with that which he or she identifies as belonging to a historical or ethnographic time and space separate from the ones he or she occupies as the analyst. In other words, the method does not allow the investigating subject to recognize himself or herself as also the figure he or she is investigating. It stops the subject from seeing his or her own present as discontinuous with itself.<sup>81</sup>

For Chakrabarty, this is the desire on the part of the subject of political modernity not only to create the past as amenable to objectification but also to be at

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<sup>77</sup> *Ibid.* at 39.

<sup>78</sup> *Ibid.* at 43.

<sup>79</sup> *Ibid.* at 237–38.

<sup>80</sup> *Ibid.* at 238–39.

<sup>81</sup> *Ibid.* at 239.

the same time free of “history” to construct the “true present” by reducing the past to a nullity: “It is a kind of a zero point in history – the pastless time, for example, of a *tabula rasa*, the *terra nullius*, or the blueprint.”<sup>82</sup>

According to Chakrabarty, there are, thus, two kinds of relationship to the past: one is historicism, meaning the idea of the historical process of things that one needs to know to get a sense of how those things turned into what they are. Historicism also opens up the potential for manipulation, in that once one knows the causal structures that operate in history, one may also gain a certain mastery of them.<sup>83</sup> On the other hand, Chakrabarty calls the other relationship to the past “decisionist,” by which he means a disposition that allows the critic to be guided by her own values to choose “the most desirable, sane, and wise future for humanity, and looks to the past as a warehouse of resources on which to draw as needed.”<sup>84</sup> For him, to critique historicism in all its varieties is to learn to think the “present” as irreducibly not-one as opposed to a position that tend to think of history as a “developmental process in which that which is possible becomes actual by tending to a *future* that is singular.”<sup>85</sup>

Yet, Chakrabarty continues, one needs to carefully distinguish the future that “will be” (which he calls, History 1) from the futurity that already “is” in human actions at every moment (which he calls, History 2). History 1, in which inhere the Enlightenment universals, demands the shared commitment of modernists desirous of social justice and its attendant institutions; “[i]t is through this commitment that is already built into our lives that our jousting with European thought begins.”<sup>86</sup> It is in this connection that Chakrabarty’s project of Provincialising Europe arises, but that does so in relation to History 2s, *i.e.* futures that already *are* there, the futurity that humans cannot avoid aligning themselves with; they are “plural and do not illustrate any idea of the whole or one. They are what make it impossible to sum up a present through any totalizing principle.”<sup>87</sup> Within this framework, Chakrabarty explains provincialising Europe in historical thought as a “struggle to hold in a state of permanent tension a dialogue between two contradictory points of view”: while on the one side there is an indispensable and universal narrative of capital (History 1), without which there cannot be any political modernity, on the other there remains a thought about “diverse ways of being human, the infinite

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<sup>82</sup> *Ibid.* at 244.

<sup>83</sup> *Ibid.* at 247.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* at 249. Emphasis added.

<sup>86</sup> *Ibid.* at 250.

<sup>87</sup> *Ibid.* at 251.

incommensurabilities through which we struggle – perennially, precariously, but unavoidably – to ‘world the earth’ in order to live within our different senses of ontic belonging.”<sup>88</sup> These are the struggles, Chakrabarty concludes, when the History 2s in practice always tend to “modify and interrupt the totalizing universalist thrusts of History 1.”<sup>89</sup>

Seen through the theoretical framework of Chakrabarty, literature on criminal law reform projects in colonial India substantiate the fallacy of the liberal-universalist agenda that was translated into utilitarianism. For example, Jon Wilson, challenging Eric Stoke’s proposition that codification in colonial India resulted from the influence of the nineteenth century universalist utilitarian thoughts, contends that the question of codification as a governance technique arose when political actors doubted their ability to construct viable forms of rule on the basis of existing intellectual and institutional traditions alone. As the networks that sustained “old regime” politics fragmented in the late eighteenth and the early nineteenth century, he continues, “political actors in many different places adopted new textual techniques and developed new concepts of sovereignty to define and govern social conduct in a more anxious world.”<sup>90</sup> In other words, codification is an outcome of political actors’ sense of rupture with the past, rather than a continuous tradition of thought (in this particular case, utilitarian ideology), which is claimed to be transported from one place to another.

Within this framework, Wilson explains that the East India Company’s British officials essentially encountered ruptures in that they had no precedent. Likewise, Indian intellectuals often articulated a sense that colonial rule intruded new forms of thinking and acting into existing forms of thought and action and thereby presented the British officials as “strangers” to the prevailing Mughal administrative traditions, while some British officers, such as Thomas Munro, termed the British rule itself as the “domination of strangers.”<sup>91</sup> Wilson argues that in the early nineteenth century this sense of rupture with the past engendered a new form of liberal governance in which new concepts of “State” and “society” emerged. On the other hand, the British officials began to see the colonial state as an actor with the capacity to intervene upon the actions of Indians, whose conduct was determined by the autonomous economic, cultural, or religious regularities of social life.<sup>92</sup> Realisation of this capacity of the modern

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<sup>88</sup> *Ibid.* at 254.

<sup>89</sup> *Ibid.*

<sup>90</sup> Jon E. Wilson, “Anxieties of Distance: Codification in Early Colonial Bengal” (2007) 4:1 *Mod. Intell. His.* 23.

<sup>91</sup> *Ibid.* at 8.

<sup>92</sup> *Ibid.*

State was also rationalised by the proposition that social practice could only be governed if it was codified in the form of abstract rules.<sup>93</sup>

In short, the common factor that created the impetus for codification simultaneously in both the colony and the metropolis was the desire to define the law in authoritative, textual rules in face of mistrust of and distance from the complex practices of obscure judicial reasoning and customary adjudication.<sup>94</sup> Now, in both the contexts, if administrators cannot rely on customary practices, they are left with the legislative power of the State. Thus, in contrast to the late eighteenth century, in the early nineteenth century officials began to explicitly reframe the Company's relationship with "law." When Macaulay was leading the Charter Bill through the House of Commons, he was arguing that a "Code is almost the only blessing ... which absolute governments are better fitted to confer on a nation than popular governments."<sup>95</sup>

Similarly, explaining the limits of utilitarianism in colonial India, Raman argues that facing the complexities of implementing utilitarian project of law on a very different legal landscape from that of Britain, the utilitarians were compelled to redefine their universalist project. They felt that "indigenous tradition, an amalgamation of the legal culture existing in India since pre-British times, should provide the context underlying the British project of criminal law in India."<sup>96</sup> With a view to legitimising British rule within an Indian idiom, he continues, they insisted upon the incorporation and adaptation of the existing legal structures while considering penal reform, and thereby used the indigenous covering to mitigate what might otherwise seem an alien and threatening institution.<sup>97</sup> Consequently, the reform programs attempting to revise the criminal law relied upon the past. Thus, Macaulay's Draft Penal Code of 1837, despite its alleged novelty and intervention in the past, not only acknowledged that "technical terms and nice distinctions borrowed from the Mahomaden Law are still retained," but also retained indigenous names for various facets of the Company's judiciary.<sup>98</sup>

As a matter of fact, Raman asserts, Bentham himself was in favour of "tempering change" by developing it within an Indian context. As his *Essay on the Influence of Time and Place in Matters of Legislation* reveals, Bentham advocated

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<sup>93</sup> *Ibid.* at 9.

<sup>94</sup> *Ibid.* at 20.

<sup>95</sup> Thomas Macaulay, "Government of India", 10 July 1833, *Works*, vol. 8 at 142, quoted in *ibid.* at 21.

<sup>96</sup> Raman (1994), *supra* note 5 at 740.

<sup>97</sup> *Ibid.* at 740–41.

<sup>98</sup> Statement of the Indian Law Commission to Lord Auckland on 14 October 1837, in *Parliamentary Papers* 41 (1837–38), cited in *ibid.* at 767.

taking into account “the circumstances of the government, religion, and manners of the people to whom the new system of laws would apply.” Therefore, he held the view that laws transplanted wholesale from Britain to India would have made the law “weak” and “improper” and they would not allow the people of India, who are “attached to their own laws, born under them, [having] been used to them,” to endure new ones.<sup>99</sup> Thus, Bentham preferred a *Criminal Code*, but within an Indian idiom, for only that could serve the utilitarian purpose.

Being among the Benthamites, Raman argues, Macaulay formulated the *Penal Code* in such a way that reconciled traditional legal thoughts with the universalist utilitarian ideas. Despite some obvious deviations from indigenous criminal jurisprudence, “Macaulay could not undertake the project without giving strong deference to indigenous legal culture and the religious behaviour of Indians,” very much in line with the policy set by his superiors.<sup>100</sup> “In spite of pretensions of establishing a scientific jurisprudence, abstract, universal, and secular in outlook, and antipathetic to the more conservative insistence that the foundations of the penal law continue to be tradition-based,” Raman concludes, the utilitarians had to choose to support the symbolic expressions of Indian legal culture “to overcome the economic, political, and social limitations in establishing themselves in the criminal judiciary.”<sup>101</sup>

While both Wilson and Raman depict codification in colonial India as a product of rupture and practical imperative, rather than an influence of utilitarianism as a universal notion exported to India from the colonial metropolis, David Skuy argues that the Indian *Penal Code*, instead of representing Britain’s attempt to modernise India’s primitive criminal justice system, reflected Britain’s attempt to modernise its own primitive criminal justice system.<sup>102</sup> Skuy questions the conventional wisdom that Macaulay and his fellow law reformers believed, against the backdrop of the 1857 Rebellion and the need to pacify the native people, that India required a criminal code because judges did not have a uniform set of rules and legal principles upon which to base their decisions; Hindu and Muslim law simply lacked the necessary ingredients of a modern legal system; and India needed British law as a part of the modernisation process.<sup>103</sup> In contrast, Skuy notes, the then English criminal law itself was

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**99** Jeremy Bentham, *Essay on the Influence of Time and Place in Matters of Legislation* (London: Stevenson & Company, 1789) at 177, 184.

**100** Raman (1994), *supra* note 5 at 777.

**101** *Ibid.* at 790.

**102** David Skuy, “Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India’s Legal System in the Nineteenth Century” (1998) 32:3 *Mod. Asian Stud.* 517.

**103** *Ibid.* at 532.



not modern. For Sir Samuel Romilly and James Mackintosh, the pioneers of Victorian criminal law reform, England had a destructive, vicious, harsh, and inefficient body of law in place. Especially they attacked the “Bloody Code”, which referred to more than 200 statutes that punished virtually every criminal act with death.<sup>104</sup> As a matter of fact, records of London’s Central Criminal Court, also known as Old Bailey, reveal that between 1800 and 1899, this court alone passed 300 death sentences for animal theft, 125 for shop lifting, 29 for mail theft, and 17 for pocket-picking.<sup>105</sup> In 1801, Thomas Burrell (aged 11) and John Weskett (aged 10) were given the death penalty for stealing six yards of printed cotton worth 12 shillings.<sup>106</sup> In another case of 1804, John Scape, alias, Edwin, a 21-year-old man, was given the death penalty for stealing a silk handkerchief worth 4 shillings.<sup>107</sup> It was during the endeavour to reduce the number of capital statutes that Bentham and Mill conceived and articulated their legislative techniques; and it was during this period that many of the Indian *Penal Code*’s procedural and substantive elements were developed.<sup>108</sup> Skuy’s thesis thus follows that:

[t]o appreciate the significance of the Indian Penal Code, we must first understand that the Code reflected the needs and ideas appropriate to England’s criminal justice system, not India’s...[T]he Code’s substantive and procedural provisions were motivated by shortcomings in England. The Indian Penal Code represents the transplanting of English law in India, not because Indian law was primitive, but because English law needed reform. Once the Indian Penal Code is placed within its proper historical perspective, it becomes quite clear that India was rarely a factor in determining the Code’s form or content.<sup>109</sup>

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**104** *Ibid.* at 525.

**105** Records available at *Old Bailey Proceedings Online*, online: <[www.oldbaileyonline.org](http://www.oldbaileyonline.org)> (last accessed 22 April 2014).

**106** *Old Bailey Proceedings Online*, online: <[www.oldbaileyonline.org](http://www.oldbaileyonline.org)>, version 7.0 (last accessed 6 March 2014), April 1801, trial of Thomas Burrell John Westkett (t18010415-90).

**107** *Old Bailey Proceedings Online*, online: <[www.oldbaileyonline.org](http://www.oldbaileyonline.org)>, version 7.0 (last accessed 6 March 2014), September 1805, trial of John Scape, alias Edwin (t18050918-36).

**108** *Ibid.*

**109** *Ibid.* at 538. Skuy demonstrates that Indian law reform mirrored developments in England in a variety of ways:

court reforms in the 1820s and 1830s in India occurred while the Peel Acts were passed; Macaulay wrote a criminal code for India while a Royal Commission wrote one for England; Macaulay submitted his Code to Parliament the same year Parliament passed the 1837 Acts; the Indian Law Commission reviewed Macaulay’s Code in 1847–48 just as the second Royal Commission finished its draft criminal code; and a few months before the Indian Penal Code became law, the British Parliament passed the 1861 Acts. In substantive and procedural terms, the Indian Penal Code reflected developments in English law.

See, *ibid.* at 553.

Each of these authors dispels the myth of the universalist normative pull of utilitarianism in the penal law reforms project in colonial India by adopting an instrumental approach to explain what exactly happened to this liberal agenda in actual operation on ground. For Wilson, codification project was necessitated not by the utilitarian urge, rather by the rupture that the British colonial power had to address once they took over administration. On the other hand, Raman related the failure of utilitarian project to the ground reality that the colonial administration had to compromise utilitarian universalism with local needs for the sake of convenience as well as the long-term goal of stability. For Skuy, the instrumental purpose of codification was germinated in the messy situation of criminal law in the metropolis, not in the “primitive” state of law and legal institutions in the colony as Mill and fellow utilitarians in London claimed to justify their project.

Yet, despite this apparent shared ground, if juxtaposed, their approaches raise interesting issues so far as historiography in general is concerned. Raman’s take is markedly different from that of Skuy in that Raman, unlike Skuy, assigns an agency to the native while offering a historical account. Whereas for Skuy, codification in colonial India was precipitated by the urge for penal law reform in the metropolis without any active consideration of local needs, Raman exposes limitations of the utilitarian project through an account of constant interactions, negotiations, and ensuing compromise with local needs. In Raman’s narrative, thus, the native is offered an agency who took an active part in reconfiguration of the utilitarian project on ground, engendering a compromised universality. As a matter of fact, his explicit reference to Bentham’s *Essay on the Influence of Time and Place in Matters of Legislation* in support of such compromise between the universal and the local implicitly legitimises the utilitarian project, of course with its limitations that turned visible once tested on ground, as something localised with certain adjustments.

Wilson’s account perhaps gives rise to the most interesting issue in this context. His thesis that codification is an outcome of political actors’ sense of rupture with the past (in that they had no precedent), rather than a continuous tradition of utilitarian ideology, essentially perceives a “lack” – a vacuum – that necessitated codification in the form of abstract rules to govern the autonomous economic, cultural, or religious regularities of social life in the colony. With the logic that – if the administrators cannot rely on prevalent customs of backward nature in their understanding, they will rely on the legislative power of the State – he in a sense reinforces the notion of “lack” from the point of view of the colonial administration that Mill repeatedly had recourse to with a view to justifying the utilitarian project in the first place. While Mill conceived of this “lack” in the sense of evolutionary progress and as a matter of teleology, for

Wilson this rupture is of pragmatic character in essence. Yet, speaking purely from the colonial administration's point of view, in Wilson's concept of rupture leading to codification is embedded an urge for a "continuity" – a linear storytelling in which the building blocks of evolutionary progress are tightly connected. Perceiving "law" in this sense as a tool for addressing this rupture of history, therefore, is not radically different from either Mill's proposition or what Chakrabarty terms as History 1.

## V. CONCLUSIONS

The legal history of a colonised people is essentially characterised by the dichotomy of progress and primitiveness; centre and periphery; law and lawlessness; and thus, civilised and savage/barbarian. It is this gap in civilisational sense that portrayed the colonial people as the primitive "other" in need of "parental" guidance – an image that often reflected back on the dynamic process of the reconstruction of the self-image in the metropolis. It is therefore no surprise that since the early period of colonisation, the official response towards crimes never conformed to the official facts regarding crimes. Although in the colonial law making process in Bengal from 1790s to 1820s empiricist rationality can be traced in the scientific forms of collection, collation, and analysis of facts regarding crimes, the actual law making overlooked these facts and rather relied on the colonial perception of the "other."<sup>110</sup> Highlighting the disjunction between crimes and enacted norms to the facts of crime, Malik argues that "the discourse in law making was rational-modern on the surface, but below the surface it was essentially a process of assertion and reassertion of the superior-inferior dichotomy between the worlds of the colonizers and the colonized," and the relevance of the "facts" in this "world of perception" – to take his term – remained only to justify the *a priori* perceptions while any "contrary evidence" was readily ignored.<sup>111</sup>

Although this pattern dates back even to the Vitorian moment of colonisation of American Indians, beginning from the latter part of the nineteenth century, as we have seen, the science of evolution in the form of social Darwinism came to provide a scientific-normative basis for engendering a

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**110** Shahdeen Malik, "Perceiving Crimes and Criminals: Erratic Law Making in the Early 19th Century Bengal" (2002) 6:1&2 B'desh. J. L. 59–61. Changes made in penal laws of this early period were later modified, enlarged, systematised, and enacted as the *Penal Code* in 1860.

**111** *Ibid.* at 61.

regime of liberal exceptionalism and racial hierarchy that eventually provided justification for deviation from the universalist notion of utilitarianism in the context of penal law reforms in colonial India. This, coupled with the failure of utilitarianism in actual practice on ground to live up to its liberal promise, dispels the myth of the liberal project of penal law reforms in colonial India based on a universalist position and underscores the fallacies of the transition narrative of modernity itself.

Yet, European legal innovation and progress continue to dominate current debates on comparative law, and Europe remains the subject of all historical knowledge as produced in the postcolonial world. Conversely, postcolonial legal scholarship simultaneously endeavours to address this long standing issue of Eurocentrism by devising different approaches to offer counter-narratives: while some postcolonial critics rely on the genealogy of fundamental concepts of liberal transition narrative such as “civilisation” and “progress,” others focus on tracing the subaltern voice and thereby offering agency to the native.<sup>112</sup> Along the line of this critical historical scheme, in this article, I unpacked the notion of liberal “progress” and provincialised the conventional narrative of penal law reforms in colonial India with a view to dismantling the liberal-universalist myth. In one form or the other, these approaches have the common element of resistance directed towards the hegemonic notion that assumes European experience as the core of universal value system. And it is only through this resistance that the fundamental tenets of postcolonial legal order can be critically scrutinised and thereby revitalised.

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**112** For a survey of these approaches in relation to international law, see, Martti Koskenniemi, “Histories of International Law: Dealing with Eurocentrism” Inaugural Lecture delivered on 16 November 2011 on the occasion of accepting the Treaty of Utrecht Chair at Utrecht University.