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ARTICLE

Colonial Syncretism in Penal Code Definitions of Property Crimes

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Abstract

This article explains the historical origins of key provisions on theft, criminal misappropriation of property, and criminal breach of trust in the Indian Penal Code 1860. Still in force in many jurisdictions, these provisions originated from three strands of jurisprudence prevalent in colonial India: English ideas of larceny, modified Islamic ideas of theft and embezzlement, and Jeremy Bentham's ideas on codification. These ideas interwove to produce a syncretic scheme of property crimes. Even today, this scheme accommodates different views as to whether theft should be distinguished from adjacent crimes in terms of *actus reus*. As the Singaporean case of *Ho Man Yuk* (2019) reveals, this flexibility allows the colonial-era Penal Code to be used to punish new forms of property appropriation, but at the cost of contested convictions and potentially unfair sentencing. Moving forward, the question is whether these issues are worth confronting, or whether Penal Code jurisdictions are better off overhauling the law, creating a general crime of property appropriation resembling theft in the United Kingdom Theft Act 1968. This modern dilemma is potentially unresolvable. It is rooted in the intellectual interplays occasioned by British colonial rule.

Introduction

In 2014, Ho Man Yuk discovered a lucrative computer glitch at Singapore's Marina Bay Sands (MBS) hotel and casino. As a member of MBS's loyalty programme, she was entitled to obtain one hundred casino credits by swiping her membership card at any MBS computer kiosk. These digital credits were not directly exchangeable for cash. Instead, they could be used to place bets at slot machines that normally took real money. Each credit was worth one dollar when used this way, meaning MBS members were effectively entitled to place $100 worth of bets for free, pocketing any winnings. When trying to redeem her credits, however, Ho Man Yuk saw error messages at a kiosk, stating that the credit redemption service was temporarily unavailable. She soon realised that, despite seeing those messages, she was actually receiving one hundred credits every time she swiped her membership card. Excited, she enlisted the help of two other gamblers to swipe her card 10,293 times over seven days. This extraordinary operation yielded 1,029,300 credits that, in turn, produced over $875,000

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in cash winnings. Shortly afterwards, the police, summoned by MBS, arrested Ho Man Yuk and her card-swiping friends.[1]

Lawyers in England and Wales would probably say that Ho Man Yuk and her friends had committed theft. Since 1968, the Theft Act has defined theft as a general crime of appropriating property dishonestly, merging and replacing older, overlapping crimes of larceny and embezzlement.[2] By this definition, it generally does not matter how any property is stolen. As long as they do not use violence or threats, the defining features of robbery and blackmail, most offenders are equally guilty of theft for picking people's pockets and for appropriating property in subtler ways. The main exception is where property is obtained by means that constitute fraud, as fraud remains a separate crime under the Fraud Act 2006.[3] Other common law jurisdictions have implemented similar reforms.[4] Scholars have criticised these reforms on the basis that the 'vanishing' *actus reus* of theft is pushing criminal law towards protecting 'diffuse, diverse, and undefinable' interests in trade secrets and other resources not comparable to movable property.[5] Wide and abstract definitions of theft are 'flattening the moral landscape of theft law', argues Stuart Green: they conflate qualitatively different conduct, obstructing fair punishment and risking overcriminalisation.[6] In this way, inquiries into the general scope of theft have overtaken older debates about the distinction between larceny – the older, narrower version of theft – and related crimes against property.

In Singapore, however, older debates persist, and the moral landscape of theft law is changing in a different way. Under the Penal Code, a person is only guilty of theft if they 'move' property dishonestly, with intent to take it out of another person's possession without consent.[7] Ho Man Yuk and her friends did not do this: casino staff willingly handed over the cash winnings. So, what exactly was their crime? It was not criminal breach of trust since they did not misappropriate entrusted property.[8] Neither was it cheating, the Penal Code equivalent of fraud, since they did not deceive anyone.[9] Probably realising this, the prosecutors brought charges of criminal misappropriation of property (CMP), a crime with the vague *actus reus* of misappropriating or converting movable property. The Penal Code is silent as to what constitutes misappropriation or conversion in this context.[10] At trial, the judge also seemed to agree that CMP was the only viable charge: he convicted the defendants without considering other options.[11]

Dissatisfied with this outcome – which the High Court affirmed on appeal – Ho Man Yuk filed a criminal reference at the Court of Appeal, Singapore's highest court.[12] She argued that CMP could only be committed by persons who, having innocently obtained possession of property, *subsequently* misappropriated the property dishonestly. Being 'dishonest from the outset', Ho Man Yuk claimed she was not guilty of any crime, and that there was a gap in the law which only the Parliament of Singapore was authorised to fill. In response, the Court of Appeal decided there was no such gap since the framers of the Indian Penal Code 1860, the progenitor of Singapore's Penal Code, did not intend to restrict the scope of CMP in the alleged way. Basing its decision on the legislative history

[1] *Public Prosecutor v Ho Man Yuk and others* [2017] SGDC 23 (Singapore).

[2] Theft Act 1968 (United Kingdom), s 1.

[3] Fraud Act 2006 (United Kingdom), ss 1-4.

[4] See eg the Criminal Code 2002 of the Australian Capital Territory and the Crimes Act 1958 of Victoria, Australia, cited in Alex Steel, 'Taking Possession: The Defining Element of Theft?' (2008) 32 Melbourne University Law Review 1030, 1031-1032.

[5] David Ormerod & Karl Laird, *Smith, Hogan and Ormerod's Criminal Law* (16th edn, Oxford University Press 2021) 931.

[6] Stuart P Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press 2012) 31, 270-272.

[7] Penal Code 1871, 2020 Rev Ed (Singapore), s 378.

[8] ibid s 405.

[9] ibid s 415.

[10] ibid s 403.

[11] *Ho Man Yuk* [2017] SGDC 23 (Singapore).

[12] *Shaikh Farid v Public Prosecutor and other appeals* [2017] 5 SLR 1081 (Singapore); *Ho Man Yuk v Public Prosecutor* [2019] 1 SLR 567 (Singapore).

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of the Penal Code, the Court of Appeal confirmed Ho Man Yuk's conviction in 2019, five years after her casino escapade.[13]

Ho Man Yuk has thus exposed the fraught legacy of historical ideas about theft and other crimes against property. Two centuries ago, legislators in India defined theft narrowly while codifying cognate crimes to punish what they regarded as theft-adjacent conduct. Now, judges in Singapore have decided that one of those cognate crimes – CMP – includes conduct that other modern jurisdictions consider theft. As a result, Ho Man Yuk and her friends received sentences calibrated against the statutory maximum of two years' imprisonment for CMP instead of three years for theft.[14] These penalties date all the way back to the original draft Indian Penal Code, reflecting the framers' view that theft was a more serious crime than CMP.[15] Is this still true? Are the likes of Ho Man Yuk really less culpable than thieves? More generally, how did we get here? What explains the contested scope of CMP and competing distinctions between theft, theft-adjacent crimes, and non-criminal conduct? These questions are all connected, and they all suggest that the history of the Penal Code scheme of property crimes is more complex and topical than previously recognised. Indeed, this subject has not caught the attention of scholars who have explored the history of property crimes and (separately) penal codification in the common law world.[16]

This article shows that the Penal Code scheme of property crimes originated from three strands of jurisprudence prevalent in the mid-nineteenth century. First, there was, in England, a long tradition of extending the medieval felony of larceny to punish increasingly diverse forms of property appropriation – a tradition that paved the way for the Theft Act 1968. This tradition influenced some lawmakers in India, though English law was not widely enforced there. Next, there was, in India, a contrasting tradition of punishing either as theft or embezzlement certain conduct that English law would have lumped together as larceny. This disaggregative approach adapted Islamic legal ideas as Britain claimed the authority to enforce the Islamic laws of the Mughal Empire. Finally, the utilitarian philosophy of Jeremy Bentham inspired law reformers in India to develop criminal codes containing novel schemes of property crimes. Like the adapted Islamic laws, these codes posited definitional distinctions between theft and embezzlement (and other crimes). Enacted in 1827, the Elphinstone Code of Bombay was the first project of this kind. Then came the Indian Penal Code, famously designed to replace all of India's myriad systems of criminal law. But, despite this lofty goal, the draft Indian Penal Code was revised by more conservative lawyers – lawyers more minded to preserve English and colonial-Islamic legal concepts – before being enacted in 1860.

So, in its final form, the Penal Code scheme of property crimes applied English, colonial-Islamic, and Benthamic ideas. Aggregative and disaggregative approaches to defining theft were layered over one another, as we shall see. The resulting scheme is syncretic, flexible, and liable to create difficulties of the kind that arose in *Ho Man Yuk* – issues of contested convictions and potentially unfair sentencing. Moving forward, the question is whether these issues are worth confronting, or whether

[13] *Ho Man Yuk* [2019] 1 SLR 567 (Singapore) [1], [32], [73]-[119].

[14] *Ho Man Yuk* [2017] SGDC 23 (Singapore) [120]-[131].

[15] Thomas Babington Macaulay et al, *A Penal Code Prepared by the Indian Law Commissioners and Published by Command of the Governor General of India in Council* (Pelham Richardson 1838) 48-52.

[16] On the history of property crimes, see Lindsay Farmer, *Making the Modern Criminal Law* (Oxford University Press 2016) 201-233; Keith Smith, 'Protecting Property from Dishonesty and Harm: Larceny and Malicious Damage' in William Cornish et al (eds), *The Oxford History of the Laws of England, Volume XI: 1820–1914* (Oxford University Press 2010); George P Fletcher, *Rethinking Criminal Law* (Little, Brown & Co 1978). On penal codification, see Barry Wright, 'Macaulay's Indian Penal Code: Historical Context and Originating Principles' in Wing-Cheong Chan, Barry Wright & Stanley Yeo (eds), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate 2011); Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners' (2000) 18(2) Law and History Review 397; Michael Lobban, *The Common Law and English Jurisprudence, 1760–1850* (Clarendon Press 1995) 185-221; Keith John Michael Smith, 'Macaulay's Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law Making' in William M Gordon & TD Fergus (eds), *Legal History in the Making: Proceedings of the Ninth British Legal History Conference, Glasgow, 1989* (Hambledon Press 1991).

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Singapore and other former British colonies that still use variants of the Penal Code are better off creating a general crime of property appropriation – emulating the United Kingdom (UK) Theft Act, even at the risk of diminishing the *actus reus* of theft. This modern dilemma is potentially unresolvable. It is rooted in the intellectual interplays occasioned by British colonial rule.

Larceny in England

Until the nineteenth century, the English law of property crimes revolved closely around larceny, the felony of dishonestly taking people's property without consent. This was because criminal law was regarded as a system for keeping the king's peace, not for righting private wrongs, and the king's peace was not generally thought to be breached when people agreed to part with their property. So, by this logic, it was not criminal for any trustee or bailee, having obtained possession of another person's property by lawful means, to misappropriate it after the fact. Other dishonest acts attracted some degree of criminal punishment, to be sure. For example, legislation from 1541 and 1757 made it a misdemeanour for anyone to obtain title to money, goods, or other property under 'false pretences', such as by presenting counterfeit documents.[17] Generally, however, the early modern English criminal law aimed to protect not owners but possessors of property. In most cases, dishonest appropriators who did not interfere with anyone's possession of property faced at most civil liability.[18]

Pressured by property owners, judges manipulated the concept of possession to justify subsuming certain contentious conduct under the category of larceny. Notably, servants were not considered to have obtained possession of property that their masters entrusted to them. So, they were punishable for larceny for embezzling such property. Similarly, guests at inns were not said to possess eating utensils provided to them by innkeepers. So, it was larceny for them to keep the utensils for themselves.[19] Also, in a slightly different vein, carriers of goods were guilty of larceny if they 'broke bulk' – if they broke open packages they were hired to carry and appropriated the goods inside. The legal basis for this rule was contested. But a leading theory was that, as bailees of the packages they carried, carriers possessed only the packages and not their contents.[20] Finally, it was larceny to procure horses on the pretext of hiring them, only to ride off and sell them for money. Known as 'larceny by a trick', this doctrine applied the logic that fraudulent contracts for hire transferred physical control but not legal possession of property. By this logic, any misappropriation of fraudulently hired property was legally equivalent to a dishonest act of dispossession.[21]

The scope of larceny was also extended by legislative fiat. Specifically, statutes 'deemed' various forms of embezzlement to be felonies, typically without giving any justification. This practice seems to have emerged in 1529, when the English Parliament sought to clarify the law on 'Servants imbezling their Masters' Goods'.[22] At the time, judges had already developed the general rule that such acts were felonious. However, uncertainty persisted in cases where servants embezzled goods they had received on their masters' behalf – goods delivered by third parties. Those cases raised controversy because, considering that the masters had never laid hands on the goods, it was difficult to say that they possessed the goods and their servants dispossessed them. Accordingly, the Statute of 1529 clarified that, in all cases involving masters and servants, any act of embezzling goods worth forty shillings or more would 'be deemed and adjudged Felony': offenders would 'be punished, as other Felons be punished for Felonies committed, by the Course of the Common Law'.[23] Crucially, this

[17] Counterfeit Letters Act 1541, 33 Hen VIII c 1; Obtaining Money by False Pretences Act 1757, 30 Geo II c 24.

[18] John Baker, *An Introduction to English Legal History* (5th edn, Oxford University Press 2019) 575-576.

[19] John Baker, *The Oxford History of the Laws of England, Volume VI: 1483-1558* (Oxford University Press 2003) 566-570.

[20] Ian Williams, 'The Carrier's Case (1473)' in Philip Handler, Henry Mares & Ian Williams (eds), *Landmark Cases in Criminal Law* (Hart 2017) 9-28.

[21] Graham Ferris, 'The Origins of "Larceny by a Trick" and "Constructive Possession"' (1998) Criminal Law Review 175-188.

[22] Embezzlement Act 1529, 21 Hen VIII c 7.

[23] ibid s 1.

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statute did not use the word 'larceny'. Instead, it used the word 'felony', which jurists interpreted to mean larceny. The statute was thus interpreted as expanding the old felony of larceny – creating a subcategory of 'larceny by servant' – and not as creating a new felony of embezzlement.[24]

More statutes deeming acts of embezzlement to be felonious were enacted over time. Like the Statute of 1529, they addressed social contexts in which people routinely handled other people's property. For example, the Bank of England Act 1741 caused employees of the Bank who 'imbeziled' its bonds, deeds, and other instruments to be 'deemed guilty of Felony'.[25] Similarly, the Embezzlement Act 1799 stipulated – again, without using the word 'larceny' – that all clerks embezzling their employers' property were 'deemed to have feloniously stolen the same'.[26] In response, WO Russell, the barrister and future chief justice of Bengal, argued that 'the effect of [the Embezzlement Act 1799] is to constitute the offence described in it a larceny'.[27] Other commentators expressed similar views, reinforcing the orthodox position that larceny encompassed an increasingly wide range of dishonest acts.[28]

Intellectual tensions emerged in the early nineteenth century, however. This was not least because some newer statutes started abandoning the 'deeming' mechanism in favour of punishing certain forms of embezzlement more leniently – as misdemeanours. The earliest statute to take this approach seems to be the Embezzlement of Public Stores Act 1800, which penalised occupiers of private premises who could not explain why military supplies were found on their premises.[29] Ten years later, the Embezzlement by Collectors Act 1810 made it a misdemeanour for tax collectors and other public officers to use public monies for 'any Purpose whatever except for Publick Services'.[30]

The newer embezzlement statutes were not inherently problematic. Rather, they clashed with older statutes because it was unclear what justified the selective exclusion of embezzlement from the law of larceny. If some forms of embezzlement were, as felonies, legally equivalent to larceny, but others were merely misdemeanours, then was there any logic in the law? In 1834, royal commissioners were directed to compile a digest of English criminal law, and to propose reforms. They reported that larceny and embezzlement were, 'according to the existing law, in numerous instances, confounded with each other, and comprehended within the original offence of larceny and the constructive extensions of that offence'. The royal commissioners also argued that the felony of larceny by a trick was not easily distinguishable from the misdemeanour of obtaining property by false pretences.[31]

This pattern of inconsistent criminalisation continued throughout the nineteenth and early twentieth centuries. Significantly, the Punishment of Frauds Act 1857 made it a misdemeanour for private trustees to embezzle or 'fraudulently convert' trust property to their own use. Fraudulent conversions by company directors and persons with powers of attorney were also defined as misdemeanours. However, similar acts by carriers and other bailees were defined as larceny as the Punishment of Frauds Act abolished the 'breaking bulk' rule, imposing liability for larceny even when bailees did

[24]William Blackstone, *Commentaries on the Laws of England, volume 4* (7th edn, Clarendon Press 1775) 231; William Eden, *Principles of Penal Law* (B White 1771) 255–257; Edward Hyde East, *A Treatise on the Pleas of the Crown* (Butterworth 1803) vol 2, 574.

[25]Bank of England Act 1741, 15 Geo II c 13.

[26]Embezzlement Act 1799, 39 Geo III c 85. See also the Embezzlement Act 1588, 31 Eliz I c 4; Postage Act 1765, 5 Geo III c 25.

[27]William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* (Butterworth 1819) vol 2, 1230.

[28]John Frederick Archbold, *A Summary of the Law Relating to Pleading and Evidence in Criminal Cases* (R Pheney, S Sweet, and R Millikin 1822) 156; Joseph Chitty, *A Practical Treatise on the Criminal Law* (2nd edn, Samuel Brooke 1826) 962.

[29]Embezzlement of Public Stores Act 1800, 39 & 40 Geo III c 84.

[30]Embezzlement by Collectors Act 1810, 50 Geo III c 90. See also the Embezzlement by Bankers Act 1812, 52 Geo III c 63; Larceny Act 1827, 7 & 8 Geo IV c 29.

[31]Thomas Starkie, *First Report from His Majesty's Commissioners on Criminal Law* (1834) 26 House of Commons Papers 537, 34.

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not break bulk.[32] Later, the Larceny Act 1861 provided that it was felony to steal horses, cattle, or sheep, but only a misdemeanour to steal dogs or fish.[33] Then, in 1873, the Court for Crown Cases Reserved held that it was larceny for any receiver of mistakenly delivered property to keep the property dishonestly;[34] and, similarly, the Larceny Act 1916 stated that it was larceny for any finder of lost property to keep the property despite believing that, with reasonable effort, its owner could be found.[35] Case law articulating the latter rule, known as 'larceny by finding', dated to 1848, but the Larceny Act 1916 dispelled lingering doubts about the legitimacy of the rule.[36]

Again, the legal boundaries of larceny were stretched and blurred by judicial innovation and legislative fiat. No consistent logic supported these manoeuvres. So, many offenders received arbitrary punishment owing to extant distinctions between felonies and misdemeanours. The medieval rule that all felons' goods and chattels (but not real property) were forfeit to the Crown was only abolished in 1870, and different procedures for prosecuting felons and misdemeanants remained in force until 1967.[37] In that context, mounting dissatisfaction with the law culminated in sweeping reform under the Theft Act 1968, as scholars have long observed.[38]

Theft in Early Colonial India

The history of the English law of larceny provides important context for understanding the origins of the Indian Penal Code definitions of property crimes. This is because the Indian Penal Code was drafted, revised, and prepared for enactment between 1835 and 1860 – a time when colonial authorities in India administered overlapping systems of criminal law, including English law, adaptations of Islamic law, and various colonial legislation. In this legally plural environment, judges and legislators developed different approaches for defining and categorising property crimes, creating eclectic laws that the Penal Code would later supersede in form but not entirely in substance.

It is well known that, before the Penal Code came into force in January 1862, European British subjects (British subjects of European descent) committing crimes in British India were only triable under English law. Meanwhile, other laws were enforced against other offenders. In Bengal, the richest of the East India Company's three Indian Presidencies, Islamic law was enforced against most people until 1832 and only Muslim people thereafter.[39] In this system, which also survived until the Penal Code came into force, colonial judges considered the opinions of Indian *muftis*, also known as Islamic law officers, in most cases that raised questions of Islamic law.[40] These law officers' opinions were not legally binding. But, as we shall see, they influenced the outcome of many cases.[41] By operating this system of criminal adjudication, the British Crown and East India Company sought to legitimise their claim to have inherited the authority to govern Bengal from the Mughal Empire and its vassal princedoms. Mughal princes enforced Islamic criminal law in the region before Britain usurped their power from the mid-eighteenth century.

[32] Punishment of Frauds Act 1857, 20 & 21 Vic c 54.

[33] Larceny Act 1861, 24 & 25 Vic c 96.

[34] *R v Middleton* (1873) LR 2 CCR 38.

[35] Larceny Act 1916, 6 & 7 Geo V c 50.

[36] *R v Thurborn* (1848) 169 ER 293, cited in Fletcher, (n 16) 106-107.

[37] Krista J Kesselring, 'Felons' Effects and the Effects of Felony in Nineteenth-Century England' (2010) 28 Law and History Review 111; Criminal Law Act 1967, c 58.

[38] See for example John Cyril Smith, *The Law of Theft* (Butterworths 1968) 1-3; Williams (n 20) 28.

[39] George Claus Rankin, *Background to Indian Law* (Cambridge University Press 1946) 161-184; Regulation VI of 1832, in Richard Clarke (ed), *The Regulations of the Government of Fort William in Bengal* (J & H Cox 1854) vol 2.

[40] Ramesh Chandra Srivastava, *Development of the Judicial System in India Under the East India Company, 1833-1858* (Lucknow Publishing House 1971) 53-56.

[41] From 1832, colonial judges were authorised to replace Islamic law officers with juries or panels of 'native assessors': Brian Wright, 'Islamic Law for the Colonists' (2019) 58(3) Islamic Studies 377; James Jaffe, *Ironies of Colonial Governance: Law, Custom and Justice in Colonial India* (Cambridge University Press 2015) 155-182.

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From their law officers, colonial judges learnt the Islamic tradition of classifying most property crimes into two categories: *hudud* (singular: *hadd*), meaning acts that warranted mandatory punishment, and *tazir*, acts warranting discretionary punishment. In this taxonomy, theft (*sariqa*) was a *hadd* crime. It was always punishable by the amputation of the thief's right hand, at least according to the Hanafi school of thought dominant in India. Some colonial lawyers used the term 'larceny' to denote this crime, comparing it to the English felony, but 'theft' was the preferred translation in colonial law reports.[42] Separately, embezzlement (*khianat*), also translated by colonial writers as 'breach of trust', 'fraud', or the 'violation of an engagement', was a lesser, *tazir* crime for which offenders could be sentenced to flogging, imprisonment, or other moderate punishment, but never amputation.[43]

Islamic jurists regarded this sentencing regime as divine and immutable. So, to avoid subjecting undeserving offenders to amputation, they developed complex rules for distinguishing theft from embezzlement.[44] The early modern Islamic idea of theft was narrower than the English idea of larceny, though both covered similar ground. Notably, there was no Islamic equivalent of larceny by servant. Servants appropriating property their masters had entrusted to them were guilty of the *tazir* crime of embezzlement, not the *hadd* crime of theft. Also, only the stealing of property 'protected' in recognised ways could constitute theft. Property was not 'protected' if it was stored in a place that the offender was allowed to enter, such as their place of residence. By this logic, it was not *hadd* but *tazir* for friends or relatives living together to steal from one another.[45] In England, that would have been larceny.

Obviously, colonial legislators in Bengal did not feel obliged to preserve every element of Islamic law. In adapting Islamic law, they modified the sentences for theft, embezzlement, and other crimes, thus eroding the boundaries between *hudud* and *tazir*. In the 1790s, presidency regulations abolished judicial mutilation, replacing mandatory amputation with fixed terms of seven years' imprisonment with hard labour.[46] Then, in 1803, another regulation stated that any defendant whose charge was reduced at trial in accordance with Islamic law could receive any sentence lighter than the fixed sentence for the original charge. So, if a person originally charged with theft was, in accordance with Islamic law, subsequently convicted of embezzlement, then they could receive any sentence lighter than seven years' imprisonment with hard labour.[47]

Other presidency regulations blurred the *hudud-tazir* dichotomy by prescribing lopsided penalties for some forms of theft and embezzlement. Some minor acts of theft (involving goods of low value) were made punishable by only two years' imprisonment, whereas some acts of embezzlement by public officeholders, particularly native Indian servants of the East India Company, were made to attract seven years' imprisonment.[48] These untidy regulations reflected the Company's complex ambitions in India. Far from wanting only to accrue legitimacy by enforcing (or being seen to enforce) old Mughal laws, the Company was also keen to cultivate new ideas of the rule of law – ideas

[42]Charles Hamilton, *The Hedaya, or Guide: Commentary on the Mussulman Laws* (T Bensley 1791) 8, 75-76, 83-84; William Hay Macnaghten (ed), *Reports of Cases Determined in the Court of Nizamut Adawlut* (Baptist Mission Press 1834) vols 1-4; Court of Nizamut Adawlut (ed), *Reports of Cases Determined in the Court of Nizamut Adawlut* (Thacker, Spink & Co 1859) vols 1-8 (hereafter 'Nizamut Adawlut Reports').

[43]Horace Hayman Wilson, *A Glossary of Judicial and Revenue Terms and of Useful Words Occurring in Official Documents Relating to the Administration of the Government of British India* (WH Allen & Co 1855) 285; *Goolab Rai* (1825), in Macnaghten (n 42) vol 2, 376.

[44]Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press 2009) 13-16.

[45]Hisham M Ramadan, 'Larceny Offenses in Islamic Law' (2006) 6 Michigan State Law Review 1609, 1620.

[46]Regulation IX of 1793, s 51, in Richard Clarke (ed), *The Regulations of the Government of Fort William in Bengal* (J & H Cox 1854) vol 1.

[47]Regulation LIII of 1803, ss 2, 5, in Clarke (n 46).

[48]Regulation XII of 1818, s 3, and Regulation II of 1813, s 2 in Clarke (n 39). See also the regulations documented in Francis Lestock Beaufort, *A Digest of the Criminal Law of the Presidency of Fort William* (Thacker, Spink & Co 1860) vol 2, 872.

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that advanced its quest to monopolise violence. Among other things, this meant making laws that displaced local customs and imposed new standards of inter-personal conduct.[49] Another motive was pure financial gain, as the Company used local intermediaries to exercise its *diwani* right (granted by the Mughal Emperor, Shah Alam II) to collect tax revenue in Bengal.[50] Since tax monies claimed by the Company often passed through many hands, and (as in many colonial contexts) divisions of race, language, and religion rendered trust a rare commodity, laws imposing harsh penalties served to deter potential embezzlers. In most cases where presidency regulations defined crimes of embezzling public money, the legislative impulse was probably more political and pragmatic than jurisprudential.

Whatever their cause, the regulations that punished embezzlement more heavily than theft weakened the intellectual foundations of Bengal's putatively Islamic criminal legal system. Nevertheless, colonial judges in Bengal decided many cases by applying the Islamic definitions of theft and embezzlement, as articulated by Islamic law officers. Judges typically fell back on general Islamic rules in cases where special regulations did not apply, such as where accused embezzlers were not public officeholders. In 1842, for example, a steward (*sarbarahkar*) of a private estate, Ram Raja Bose, embezzled money from the estate. The money was public property because the colonial government had distrained the estate for an unpaid debt. Consequently, prosecutors charged Bose under a regulation penalising acts of embezzlement by '*khazanchies* [treasurers], *tehsildars* [revenue officers], and other native officers intrusted with the charge of public money'. However, a court in Bakerganj (in modern-day Bangladesh) acquitted Bose. Later, the Sudder Nizamut Adawlut – the East India Company's court of criminal reference and appeal for Bengal – upheld the acquittal on the grounds that stewards serving private estates were not 'native officers' within the meaning of the regulation invoked by the prosecution. The Sudder court decided that the prosecution should have charged Bose 'under the general regulations' implementing Islamic law and not under special regulations punishing particular kinds of embezzlers.[51]

In many cases, therefore, the Sudder court applied Islamic law. The Sudder court heard many appeals because litigants and judges often based their claims and decisions on English ideas – illegitimately, in the view of competing stakeholders.[52] In 1832, for example, an indigo planter instructed his clerk, Bykanth Lahoree, to deposit a 500-rupee banknote at a post office, giving him another thirty rupees in coins to cover expenses. After keeping the coins and banknote for himself, Lahoree was charged with theft. At trial, Islamic law officers recommended a conviction for 'fraud and embezzlement' – a *tazir* crime – but the judge decided that the taking of the banknote was 'a clear case of larceny or theft in a servant (and would be so held under the English law)'. Lahoree appealed. At the Sudder court, other Islamic law officers reaffirmed that the evidence disclosed only *tazir*. Now, their opinion held sway. The Sudder Court overturned the trial judge's decision, convicted Lahoree of embezzlement, and sentenced him to two years' imprisonment.[53]

In another case from 1853, Jyogopal Banerjea, an assistant to a police inspector (*darogah*) in Barasat, a district near Calcutta, received 145 rupees to purchase grain for the inspector's family. The inspector later prosecuted Banerjea for misappropriating this money. The trial court convicted him, sentencing him to three years' imprisonment with labour and 'irons' (shackles). On appeal, however,

[49] Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford University Press 1998).

[50] On the East India Company's practices of taxation and 'revenue farming', see eg Robert Travers, *Empires of Complaints: Mughal Law and the Making of British India, 1765-1793* (Cambridge University Press 2022).

[51] *Ram Raja Bose* (1844) 6 Nizamut Adawlut Reports (n 42) 42. See also *Rajkishen Chuckerbutty* (1832) in Macnaghten (n 42) vol 4; *Kasheenath Dass* (1851) 1(1) Nizamut Adawlut Reports (n 42) 476-479.

[52] By my count, eighty reported decisions of the Sudder Nizamut Adawlut, dating to 1805-44 and 1849-58, involved charges of theft, embezzlement, fraud, or breach of trust. Of these cases, thirty involved disputes about the proper framing of charges, including the proper interpretation of Islamic law: Macnaghten (ed) (n 42) vols 1-4; Nizamut Adawlut Reports (n 42) vols 1-8.

[53] *Bykanth Lahoree* (1832) in Macnaghten (n 42) vol 4, 152.

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the Sudder court accepted its Islamic law officers' advice that 'the circumstances of the case amount rather to embezzlement, as there was no furtive taking of the money'. The Sudder court convicted Banerjea of embezzlement, though, for unknown reasons, the sentence issued by the trial court was not reduced.[54]

In other cases, English ideas had greater success. In 1850, a clerk, Bykuntnath Roy, took money from his workplace, the treasury of a courthouse in Rangpur. Roy was 'entrusted with the treasury key… for the purposes of disbursing or locking up money'. One day, he withdrew over 2,200 rupees from the treasury, and, 'accompanied by his mistress and a servant, absconded in palanquins'. At trial, the judge convicted Roy of theft even though the Islamic law officers advised that his crime was embezzlement. The Sudder court agreed with the trial judge, observing that, although Roy had 'got possession of the keys of the treasury', he did not possess the money in the treasury. Alluding to the English idea of larceny, the Sudder court decided that Roy's act of 'taking and conveying away the goods of another and converting them to his own use, constitutes theft'.[55]

Similarly, the Sudder court snubbed Islamic opinion in 1854. A servant at a private estate, Ramkrist Sircar, had removed goods worth almost 9,000 rupees from the estate treasury, the keys to which were under his care. In this case, Islamic law officers advised that Sircar was guilty of embezzlement. But, rejecting this opinion, the Sudder court agreed with the trial judge that Sircar was guilty of theft since the stolen property was 'only in [his] custody… possession of it had not been relinquished by his master', the owner of the estate. Here, the Sudder court clearly applied the English doctrine of larceny by servant.[56]

In short, English and Islamic ideas of property crimes shaped the jurisprudence of the Bengal courts in the early to mid-nineteenth century. Like in England, taxonomic difficulties abounded in Bengal. The law was neither clear nor consistent. But, unlike in England, where various forms of embezzlement were being criminalised piecemeal and selectively deemed equivalent to larceny, there was, in Bengal, a general legal category of embezzlement, defined specifically in contradistinction to the category of theft. The situation was likely quite similar in the Madras Presidency, where colonial courts also administered Islamic law as adapted and implemented under presidency regulations.[57] This early colonial tradition of keeping theft conceptually distinct from embezzlement would have a long reach as later reform initiatives unfolded.

Benthamic and Anglocentric Legislation

Apart from presidency regulations implementing Islamic law, two influential colonial statutes caused plural ideas of property crimes to interact in India before 1860. First, the Elphinstone Code of 1827 introduced a novel scheme of property crimes in the Bombay Presidency, drawing inspiration from Bentham's writings on codification. Next, the Breaches of Trust Act 1850 tried to replicate, everywhere in India, the English approach of deeming certain forms of embezzlement to be felonious and therefore equivalent to larceny. Like the regulations implementing Islamic law, these statutes were ultimately displaced by the Indian Penal Code, but not before contributing to the Code's plural and syncretic intellectual milieu.

Whereas Bengal was conquered from Muslim princes, the Bombay Presidency grew out of the island territory of Bombay, ceded by Portugal in 1661.[58] So, instead of enforcing Islamic law in a general way, colonial authorities in Bombay enforced Islamic law against Muslim people, Hindu law

[54] *Jyogopal Banerjea* (1854) 4(1) Nizamut Adawlut Reports (n 42) 174. See also *Chumelee* (1812) in Macnaghten (ed) (n 42) vol 1, 233; *Bungsee Dhara* (1855) 5(1) Nizamut Adawlut Reports (n 42) 616-618.

[55] *Bykuntnath Roy* (1852) 2(1) Nizamut Adawlut Reports (n 42) 112.

[56] *Ramkrist Sircar* (1854) 4(1) Nizamut Adawlut Reports (n 42) 776. See also *Waris Alee* (1854) and *Urno* (1854) in the same volume at pp 12 and 212.

[57] Rankin (n 39) 183-184.

[58] Philip Lawson, *The East India Company: A History* (Longman 2001) 46-49.

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against Hindu people, and English law against Christians and Parsis (Zoroastrians).[59] This plural legal system lasted until the governor of Bombay, Mountstuart Elphinstone, led a project to reform the Presidency's laws in the 1820s. Influenced by Bentham's utilitarian philosophy, especially his idea that all law should be rational and codified, Elphinstone caused a number of regulations, which collectively came to be called the Elphinstone Code, to be enacted in 1827.[60] Most of these regulations were written by GW Anderson, a lawyer and official of the East India Company. Anderson would later help to draft the Indian Penal Code as a member of the Indian Law Commission chaired by TB Macaulay.[61]

As part of the Elphinstone Code, Regulation XIV of 1827 defined a number of crimes against persons, property, and the state. Notably, robbery was defined as any act of 'forcibly or secretly taking away property so as to deprive the owner thereof'.[62] Force and secrecy were disjunctive elements. So, a secret but non-forcible taking of property could still constitute robbery, though it would only constitute larceny under English law and theft under the colonial-Islamic laws of Bengal (and Madras). That said, Regulation XIV defined acts of theft as 'robberies which, from the smallness of the amount stolen, the want of care used in securing the property, the absence of cause for personal fear, or other such reasons, may be considered trivial in their nature and consequences'. Theft was thus defined with reference to robbery – as a less serious form of robbery.[63] Finally, the Regulation defined the 'appropriation of property by breach of trust' as any person's act of 'fraudulently removing or keeping from its owner property so intrusted to his [the offender's] charge or disposal… without employing either the force or secrecy which would constitute robbery'.[64] The 'appropriation of property by breach of trust' was thus defined in juxtaposition to both robbery and theft. Although the word 'embezzlement' was not used, the reference to 'intrusted' property likened this crime to embezzlement in England and Bengal, at least to some degree.

Regulation XIV was certainly convoluted and idiosyncratic. It hardly advanced Elphinstone's goal of making rational law for everyone in Bombay. But Bombay's laws of property crimes were later made even more convoluted by JED Bethune, the Law Member of the Council of the Governor General of India. In 1849, Bethune drafted an India-wide bill for punishing various forms of property appropriation. Later enacted as the Breaches of Trust Act, this bill was designed mainly to replicate English reforms on embezzlement. As we have seen, statutes punishing embezzlers proliferated in England during the early nineteenth century. In India, Bethune wanted to ensure that local laws kept pace, mainly because European British subjects were supposed to be governed by English law. According to Bethune, English criminal law was last received in India in 1828 by an Act of the Parliament at Westminster. The Embezzlement Act 1832, which, in England, deemed all embezzlers of public money to be guilty of felony, was therefore yet to be received. Bethune aimed to close this gap.[65]

At the same time, Bethune's bill went further than English law, specifically by criminalising the embezzlement of private trust property by private trustees. In England, it was only in 1857 that this form of embezzlement was criminalised, as we have seen – it was made a misdemeanour. In 1849, it was still unclear if Westminster would take this step. As Chantal Stebbings has shown, critics

[59]Rankin (n 57) 185.

[60]Kenneth Ballhatchet, *Social Policy and Social Change in Western India, 1817-1830* (Oxford University Press 1957) 135-149; Eric Stokes, *The English Utilitarians and India* (Clarendon Press 1959) 148-150.

[61]GC Rankin, 'The Indian Penal Code' (1944) 60 Law Quarterly Review 37, 40; Katherine Prior, 'Anderson, Sir George William (1791-1857)' (ODNB 2004) <https://doi.org/10.1093/ref:odnb/472> accessed 14 Nov 2024.

[62]Regulation XIV of 1827 (Bombay) in *Papers Relating to East India Affairs, viz. Regulations passed by the Governments of Bengal, Fort St. George, and Bombay, in the year 1827* (1827) 23 House of Commons Papers 201 (hereafter 'Regulation XIV') cl 36 at 198.

[63]ibid cl 39 at 199.

[64]ibid cl 40 at 199.

[65]Criminal Law (India) Act 1828, 9 Geo IV c 74; Embezzlement Act 1832, 2 Will IV c 4; Minute by Bethune, 17 Mar 1849, India Office Records IOR/P/207/58, British Library, London, United Kingdom.

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feared that, in cases where trust funds were lost, such a move would tar honest trustees who had made bad investments with the same brush as dishonest trustees who intended to defraud beneficiaries.[66] Similar concerns arose in India. For example, the chief justice of Bombay, William Yardley, argued that 'if breaches of trust were put on a par, in point of turpitude, with theft and robbery the effect would be rather to diminish the horror for the latter than to increase the detestation for the former'.[67] Despite these concerns, Bethune insisted that he saw 'no reason why the [criminal] law should not be made applicable to private trustees'.[68] Like many reformers in England, Bethune believed careful drafting could mitigate any risk of overcriminalisation. Indeed, Bethune worded his bill to punish only trustees who breached trusts with intent to enrich themselves – not trustees who were negligent or misled by others. 'A man rarely is a rogue without intending to gain anything by it himself', argued Bethune.[69] In 1850, this argument prevailed in India as the Governor General's Council passed Bethune's bill as the Breaches of Trust Act. Seven years later, Westminster would use a similar formulation of *mens rea* (the intent to enrich oneself) to define the English misdemeanour of embezzlement by private trustees.[70]

Be that as it may, the Breaches of Trust Act proved difficult to enforce fairly. This was because it used the English mechanism of 'deeming' forms of embezzlement to be felonies, and – crucially – it targeted everyone in India, not just European British subjects. By doing all this, the Act effectively created a parallel regime for punishing conduct that existing presidency laws, including Bombay's Regulation XIV, already punished in different ways, using different concepts and categories. Since the new Act and older presidency laws specified different penalties for similar conduct, judges were pressured to consider how all these laws would co-exist and how they should be used – in what circumstances and under what constraints.

In 1854, for example, a cartman, Shivlal Wulud Chintamun, ran away with 125 rupees' worth of dried fruits and other goods he was hired to carry from Khandesh to Hyderabad. At trial, Shivlal was convicted under Section VIII of the Breaches of Trust Act, which stated that anyone who 'embezzled' property held 'in trusts for any other person' was 'deemed to have feloniously stolen the same'. On appeal, the judges of the Sudder Foujdaree Adawlut (Criminal Court of Justice) of Bombay said in obiter that Shivlal 'should have been tried' under Regulation XIV for appropriating property by breach of trust. This was because 'Section VIII of the [India-wide Breaches of Trust Act] appears… to apply more to persons made trustees who embezzle, than to persons employed as carriers who run away with the property they have to carry, and whose offence is very clearly provided for in [Bombay's Regulation XIV].' The Sudder judges offered this dictum only as a suggestion for future prosecutions. In their main judgment, they upheld the trial court's decision to convict Shivlal under the India-wide Breaches of Trust Act.[71]

The outcome of *Shivlal* was likely influenced by the Sudder judges' realisation that, although Section VIII of the Breaches of Trust Act was not designed to punish dishonest carriers of goods, its wording was very similar to the breach of trust provision in Bombay's Regulation XIV. The latter provision, being a Benthamic law not drafted upon the common law assumption that carriers breaking bulk were guilty of larceny, *was* designed to punish carriers for breach of trust. So, by allowing the similarly worded Section VIII of the Breaches of Trust Act to also be used against carriers, the Sudder judges showed their willingness to fold the Anglocentric Breaches of Trust Act into the existing laws

[66] Chantal Stebbings, *The Private Trustee in Victorian England* (Cambridge University Press 2009) 177-183.

[67] Minute by William Yardley, 2 May 1849, IOR/P/207/58. See also Minute by Lawrence Peel, Arthur Buller, and James Colville, 2 May 1849, IOR/P/207/58.

[68] Minute by Bethune, 17 Mar 1849, IOR/P/207/58.

[69] Minute by Bethune, 22 Mar 1850, IOR/P/207/58.

[70] Punishment of Frauds Act 1857, 20 & 21 Vic c 54, s 1.

[71] *Shivlal Wulud Chintamun* (1854) in James Morris (ed), *Cases Disposed of by the Sudder Foujdaree Adawlut of Bombay* (Bombay Education Society Press 1854) vol 2, 28. See also *Loba Wulud Sheka* (1854) in the same volume at 241.

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of Bombay. But, by suggesting that, in every case where different charges could be brought, the prosecution should choose the charge that best suited the facts of the case, the Sudder judges expressed their discomfort with rival taxonomies of property crimes. Generally, the judges in Bombay seemed reluctant to compare the Breaches of Trust Act with Regulation XIV lest they uncovered even more discrepancies. In many cases, they simply ignored the India-wide Act when prosecutors chose to bring charges under the Bombay Regulation.[72]

Meanwhile, the Breaches of Trust Act had even messier implications in Bengal. Unforeseen by Bethune, the problem was that it was difficult for Bengal to assimilate the mechanism 'deeming' forms of embezzlement to be felonies. There was, in the first place, no such thing as 'felonious stealing' in Bengal's colonial-Islamic scheme of theft and embezzlement. So, judges in Bengal enforcing the Breaches of Trust Act against Indian defendants had no choice but to interpret 'felonious stealing' as theft, the closest Bengali equivalent to the English felony of larceny. Worse still, the English 'deeming' mechanism ran up against the fact that theft and embezzlement occupied opposite sides of the *hudud-tazir* dichotomy. In the 1850s, judges in Bengal still regarded theft and embezzlement as distinct categories under Islamic law – though, as we have seen, they had at times conflated Islamic theft with English larceny. In this context, how could any form of embezzlement be, as a general rule, deemed theft?

To square the circle, the Sudder Nizamut Adawlut in Calcutta interpreted the 'deeming' provisions in the Breaches of Trust Act to mean only that, if proven guilty of embezzlement, offenders were liable to receive the same punishment as thieves.[73] In this interpretation, evidence of embezzlement was still required, and embezzlement was still to be defined in accordance with the regulations of Bengal. In other words, the Breaches of Trust Act did not enable embezzlers in Bengal to be convicted on charges of theft. Neither did the Act enable thieves to be convicted on charges of embezzlement. A Sudder judgment of 1858 noted that 'acts [of theft] remain, as they always have been, thefts'.[74] In the Sudder court's view, the Breaches of Trust Act had changed only how theft and embezzlement were punished in Bengal – not how they were defined.

To be sure, judges in Bengal were, by way of exercising their power to accept or reject the opinions of Islamic law officers, authorised to substitute charges of theft for charges of embezzlement and vice versa.[75] However, it was unclear if this power existed in cases where Islamic law officers were not consulted, including cases where charges were brought under secular legislation – that is, presidency regulations or India-wide statutes not designed to implement Islamic law.[76] So, to prevent factually guilty people from getting acquitted on grounds of faulty indictments, the Sudder court in Calcutta issued, in 1851, a circular order directing magistrates to add 'a separate count for theft' when committing anyone for trial for embezzlement under the Breaches of Trust Act. In their words, the Sudder judges hoped to maintain 'the nice distinction between theft and embezzlement' while 'preventing the miscarriage of justice'.[77]

It seems clear that the Sudder judges issued this circular because they would not abandon the colonial-Islamic idea of theft and embezzlement. The judges' conciliatory interpretation of the 'deeming' mechanism – balancing local legal niceties with English and India-wide ideas of substantive justice – is yet another example of the intellectual syncretism undergirding the criminal laws of mid-nineteenth-century India. Lawmakers navigating plural legal traditions produced untidy results.

[72]For example, *Moosa Mehmoodjee* (1854); *Shamdas Valadas* (1855); *Sumboo bin Ruttonshett* (1857) in Morris (n 71).

[73]*Usgur and Sirdar Khan* (1853) 3(1) Nizamut Adawlut Reports (n 42) 137-140.

[74]*Sagor Mull Marwaree* (1853) 8 Nizamut Adawlut Reports (n 42) 475.

[75]Regulation IX of 1793 s 53, in Clarke (n 46).

[76]It seems that this uncertainty caused trials to collapse in cases like *Ram Raja Bose*. See above, discussion accompanying fn 51.

[77]*Sagor Mull Marwaree* (1853) 8 Nizamut Adawlut Reports 475 (n 42) 478.

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Rival approaches to defining property crimes persisted in legislation and case law, apparently destined to get deeply entangled. The same was true of the Indian Penal Code, the culmination of this complex process of intellectual compromise and cross-pollination.

The Road to Codification

The Indian Penal Code was drafted and revised amid all the developments explored in this article so far. The historical record of the draft Code is admittedly patchy. Some papers which might explain why certain provisions were amended between 1837 and 1860 have not been found and perhaps have not survived.[78] Even so, there is enough evidence to show that the enacted provisions on property crimes were the result of different stakeholders – drafters and commentators – supporting different taxonomies and finally reaching an awkward middle ground.

The starting point was the original framers' famously critical opinion of India's existing laws. On completing the draft Code in 1837, TB Macaulay and his fellow Indian Law Commissioners wrote in a letter to the Governor General of India, the Earl of Auckland, that 'the system of penal law which we propose is not a digest of any existing system… no existing system has furnished us even with a groundwork.'[79] Of the Islamic or 'Mahomedan' law enforced in Bengal and Madras, the Commissioners lamented that colonial regulations had 'distorted [it] to such an extent as to deprive it of all title to the religious veneration of Mahomedans'; yet, the distorted Mahomedan law 'retains enough of its original peculiarities to perplex and encumber the administration of justice.' Separately, the Commissioners applauded Bombay's Regulation XIV for extracting, as a rare specimen of codified law, 'the great advantage which [must] arise from placing the whole law in a written form before those who are to administer, and those who are to obey it.' But, the Commissioners argued, Regulation XIV prescribed arbitrary penalties not commensurate with offenders' moral culpability. For example, theft carried up to six months' imprisonment, yet all conspiracies to 'impoverish' people carried up to ten years' imprisonment. So, conspiracies to commit theft were, absurdly, 'liable to twenty times the punishment of… actual theft'. Finally, English criminal law struck the Commissioners as 'a very artificial and complicated system… which even in [England] is generally considered as requiring extensive reform.' In India, they argued, English law was a 'foreign system' decidedly unsuited to local needs.[80]

In relation specifically to crimes against property, the Commissioners criticised English law for employing contrived conceptions of possession. Under the doctrine of 'breaking bulk', the owner of a 'hamper of wine', having entrusted the hamper to a carrier, did not possess the hamper. But, the Commissioners noted, 'if the person in trust [i.e. the carrier] opens the hamper and takes out a bottle, the possession [of the bottle], according to the English law books, forthwith flies back to the distant owner', making the carrier guilty of larceny for dispossessing the owner. In the Commissioners' view, such logic – so pervasive in English law – flouted 'the general sense of mankind as to what [should] constitute possession'.[81] This failing of English law was precisely why India deserved a better system of law – a system that 'mankind' or lay people could more readily understand. Here, Bentham's influence on the Commissioners is clearly discernible. For Bentham, the 'technical arrangement' of English common law – its opaque logic, jargon, and arbitrary categories – obscured its frequent violation of the principle of utility, including its failure to punish wrongdoers proportionately.

[78] On revisions to the draft Indian Penal Code, see generally Wright (n 16). In *Ho Man Yuk* [2019] 1 SLR 567, 593-594, the Singapore Court of Appeal observed that no one seems to have found any copy of a key report on the draft Code, which the Indian Law Commission led by Barnes Peacock prepared in 1856.

[79] Macaulay (n 15), i.

[80] ibid ii-iv.

[81] ibid 119-120.

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A better system of law would, instead, feature what Bentham called a 'natural arrangement' – accessible concepts and categories under which the disutility of bad laws would be more visible and fixable.[82]

In this spirit, the Indian Law Commissioners developed a taxonomy of property crimes using a naturalistic conception of possession. In the draft Code of 1837, they stated, firstly, that 'property is not said to be in the possession of any party other than a person': a human being. So, governments and corporations could not possess property: only their human agents could.[83] Next, the Commissioners defined three crimes – *theft, criminal breach of trust*, and *criminal misappropriation of property not in possession* –all on the same premise that possession required either physical control or at least spatial proximity. The owner of a watch possessed the watch if it was 'in his hand' or 'lying on a table in his room', but not if he had 'lost [it] on a journey'. Likewise, the host of a dinner party retained possession of his silver forks if he let his guests use them, but not if he 'deposited them with a pawnbroker'. The Commissioners gave these examples in an explanatory note appended to the draft Code.[84]

The Code itself made it clear that configurations of possession determined what crime was committed. First, *theft* was committed when an offender, 'intending to take fraudulently any thing which is property, and which is not attached to the earth, out of the possession of any person, without that person's consent, moves that thing in order to [achieve] such taking'.[85] So, theft was a crime against property possessed by victims. Next, *criminal breach of trust* (CBT) was committed when an offender, 'being entrusted with the keeping of any property', handled the property fraudulently.[86] So, CBT was a crime against property already possessed by the offenders themselves. Finally, *criminal misappropriation of property not in possession* was self-explanatory. It was committed when an offender 'fraudulently takes into his possession any property which is in no person's possession' – for example, lost property.[87]

Since the Commissioners believed this scheme was intuitive, they decided that the question of who possessed what property was a factual question courts could answer 'without any direction' from the Code. The Commissioners acknowledged that 'much uncertainty will remain' because the 'indistinctness [of definitions] has its origin in the nature of things, and in the imperfection of language'. 'This we cannot prevent,' they said.[88] But, to prevent uncertainties from producing 'practical evil', they added a clause stating that, whenever it was unclear what crime was committed, the offender would receive 'whatever punishment is common to the penal provisions between which the doubt lies'.[89] In other words, the offender would be punished as if they had committed the less or least serious crime. For theft, the draft Code prescribed up to three years' imprisonment with hard labour; for CBT, up to three years with or without hard labour; and, for criminal misappropriation of property not in possession, up to two years with or without hard labour.[90] So, if it was unclear who possessed a thing and therefore unclear which of these three crimes was committed by an offender stealing the

[82]Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government* (JH Burns & HLA Hart (eds), Athlone Press 1977) 407-419. For a discussion of Bentham's theory of natural and technical arrangements of law, see Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford University Press 2006) 52-53.

[83]Macaulay (n 15) cl 19.

[84]ibid 119.

[85]ibid cl 363.

[86]ibid cl 386. More precisely, according to the draft Code, CBT was committed by anyone who, 'intending fraudulently to cause wrongful loss or risk of wrongful loss to any party for whom he is in trust, disobeys any direction of law prescribing the mode in which such trust is to be discharged, or violates any legal contract express or implied which he has made touching the discharge of such trust with any party from whom such trust was derived'.

[87]Macaulay (n 15) cl 383.

[88]ibid 119-121; JM Macleod, *Notes on the Report of the Indian Law Commissioners* (W Clowes & Sons 1848) 46.

[89]Macaulay (n 15), cl 61.

[90]ibid cls 364, 384, 387.

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thing, then the offender was only liable to receive up to two years' imprisonment with or without hard labour.

It is remarkable that, despite trying not to base the draft Penal Code on existing systems of law, Macaulay and his colleagues ended up replicating, in important ways, how existing presidency laws defined property crimes. Like Bombay's Regulation XIV and Bengal's colonial-Islamic regulations, the draft Penal Code defined theft alongside and in contradistinction to theft-like crimes. Like those systems, the draft Code avoided the English approach of selectively lumping a variety of dishonest acts together in a single category of larceny – preferring, instead, to flank a narrow category of theft with doctrinally coequal categories bearing such labels as 'embezzlement', 'breach of trust', and 'appropriation of property'. The labels and their theoretical premises differed from system to system. But, specifically in terms of punishing conduct not as theft but rather as crimes adjacent to theft, all these systems shared a common taxonomic paradigm: a disaggregative paradigm. In that sense, there was a clear if ironic (and coincidental) continuity between the draft Penal Code and the laws it was so painstakingly designed to replace.

This taxonomic continuity was almost certainly a reason why parts of the draft Code drew less criticism from judges of the East India Company's Sudder courts, who enforced presidency laws, than from judges of the Supreme Courts at Calcutta, Bombay, and Madras, who enforced English law against European British subjects and other defendants. For example, a key implication of the CBT clause in the draft Penal Code was that it would punish dishonest breaches of private trusts. As we have seen, such conduct first became punishable throughout British India under the Breaches of Trust Act 1850, which came into force while the Penal Code was still under revision. Like the Breaches of Trust Bill, the draft Penal Code's CBT clause drew criticism in the 1840s – criticism grounded in fears of overcriminalisation, levelled by Anglocentric jurists who baulked at the prospect of India overtaking England in making crimes out of civil wrongs. In this vein, Henry Seton, a judge of the Supreme Court at Calcutta argued that the draft CBT clause would have a tyrannical effect akin to how, in Tudor England, the Star Chamber imposed criminal penalties on private trustees by way of giving beneficiaries equitable remedies.[91] Tellingly, by contrast, Sudder judges from Bombay, Madras, and the North-Western Provinces of Bengal expressly supported the CBT clause, and no Sudder judge objected to it.[92] This was almost certainly because private trustees who were subject to presidency laws were already punishable under those laws. The criminality of dishonest breaches of private trusts was simply a corollary of how the presidency laws defined property crimes. As we have seen, Sudder judges struggled to interpret the Breaches of Trust Act in the 1850s, not because they were reluctant to punish private trustees, but rather because the Act obliged them to disentangle colliding taxonomies.

On account of strong support from Sudder judges, the draft Penal Code scheme of property crimes was kept largely intact. However, targeted amendments were made, evidently to answer Anglocentric criticism. Notably, the Chief Justice of the Supreme Court at Calcutta, Lawrence Peel, criticised the scheme for its 'needless multiplication of criminal offences', attributable to Macaulay's Law Commission's 'defective definition of the Law of theft'. In other words, Peel believed that, instead of inventing CBT and 'criminal misappropriation of property not in possession', Macaulay's team could have defined theft in a better way – more widely, like how English law defined larceny.[93] For Peel, the draft scheme was problematic not least because the distinction between theft and 'criminal misappropriation' was potentially arbitrary. For example, a rich merchant might entrust his butler with the keys to his treasure chest, but not specifically with other things in his house. If the merchant died with no heirs in the house, then, by the draft Code's naturalistic definition of possession, the

[91] Indian Law Commission, *Copies of the Special Reports of the Indian Law Commissioners* (1847) 43 House of Commons Papers 14, 94-95.

[92] ibid 95; AD Campbell, *Notes on the Penal Code Proposed for India, etc.* (JB Pharaoh 1850) 34.

[93] Lawrence Peel, *Observations by Sir Lawrence Peel, Knight, Chief Justice of the Supreme Court at Fort William on the Indian Penal Code and the Notes to it and on the Reports thereon* (Military Orphan Press 1848) 9, 26.

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butler would possess the treasure chest. But no one would possess the other things until the merchant's heirs physically claimed them. Meanwhile, the nature of the crime committed by a person stealing from the house would depend entirely – arbitrarily – on what the person stole. In an extreme case, Peel argued, 'the same successful sweep of the hand of a thief snatching up a heap of valuable things there would make him as to part a thief, as to other part[s] a criminal misappropriator'.[94] In England, the crime would just be larceny.

The revisions prompted by Peel's criticism and similar feedback were twofold. First, the Code was shorn of all explicit references to Macaulay's and his colleagues' naturalistic idea of possession. The clause restricting possession to natural persons was removed, making it possible for corporations and other legal persons to possess and be dispossessed of property.[95] The crime of 'criminal misappropriation of property not in possession' was also reframed as 'criminal misappropriation of property' (CMP). 'Not in possession' was removed, and CMP was defined as committed simply when a person 'dishonestly misappropriates or converts any moveable property'.[96] The enacted Code was therefore silent on whether CMP presupposed any particular pattern of possession or dispossession. Indeed, several 'illustrations' (aids to interpretation) were added to the CMP provision, depicting offenders committing CMP by appropriating property they had borrowed or mistakenly taken from other people – property the offenders already possessed at the time of appropriation.[97] These revisions blurred but did not completely erase the original, possession-based distinction between CMP, CBT, and theft.

Secondly, the penalties set by the original framers were amended in ways that further conflated the three crimes. The same penalty – up to three years' imprisonment with or without hard labour – was prescribed for unaggravated cases of both theft and CBT, as well as for aggravated cases of CMP where offenders knowingly appropriated the property of deceased persons. At the same time, up to seven years' imprisonment was prescribed for CBT by any 'carrier, wharfinger, or warehouse keeper', CBT or theft by any clerk or servant in respect of their employer's property, and CMP by any clerk or servant knowingly appropriating their deceased employer's property.[98] In this way, the English approach of selectively equating embezzlement with larceny was, to an extent, indirectly incorporated into the Indian Penal Code. Despite being kept formally distinct, charges of theft, CBT, and CMP were made practically interchangeable for some – but only some – factual matrices.

This was a messy outcome. Again, it is best understood as a compromise forged by colonial lawmakers contesting the boundaries of theft and bringing their plural ideas to bear. Different moral ideas about what constituted fair punishment were a big part of the story, to be sure. But the subtler cause of messiness was a distinctly colonial clash of taxonomies – a clash between common law, non-common law, and anti-common law categories and paradigms, all of which differed just enough to generate debate, but not enough to make reform impossible.

Old Taxonomies Made New

We return to *Ho Man Yuk*, the Singaporean case that illustrates the lasting implications of the messy origins of the Penal Code scheme of property crimes. Recall that *Ho Man Yuk* concerned the disputed legality of the defendants' dishonest act of winning money at a casino by placing bets with casino credits they had no right to use – credits they had obtained by exploiting a computer glitch. To be clear, computer technology played only an oblique role in this dispute: *Ho Man Yuk* does not necessarily expose the challenges of defining property crimes in our digital age in which people can steal things by means previously unimaginable. This is because the prosecutors, fearing that the

[94] ibid 28-30.
[95] Indian Penal Code, Act 45 of 1860, s 28. Compare with Macaulay (n 15) cl 19.
[96] Indian Penal Code, Act 45 of 1860, s 403.
[97] ibid illustrations (a) and (b) to s 403.
[98] ibid ss 379, 381, 406-408.

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casino credits would not count as stealable property, built their case around the cash winnings – the money, not the credits. For this reason, a dispute would probably have arisen even if the defendants had obtained the credits by more primitive means, such as by finding credit-loaded smart cards or physical casino chips misplaced by fellow gamblers. As far as the trial judge was concerned, the credits were not legally important: they were 'simply the means by which the Monies [were] dishonestly appropriated'.[99]

What *Ho Man Yuk* does expose is the inherent instability of the Penal Code distinction between theft and theft-adjacent crimes. Recall that, after a long process of trial and appeal, the defendants were finally convicted of CMP. We can now see that it is doubtful whether this would have been possible if CMP had retained its original formulation, criminal misappropriation of property *not in possession*. Casino employees clearly possessed the money that the defendants falsely claimed as legitimate winnings. The money changed hands as a result of the defendants' dishonesty. So, if the original framers of the Penal Code had had their way – if their contemporaries had not distorted their Benthamic scheme of property crimes – the defendants' conduct might have fallen through the gaps between CMP, CBT, and theft. If, alternatively, the criminal law of India and by extension Singapore had evolved along more English lines, culminating in something like the UK Theft Act 1968, then there might have been no such thing as CMP, and *Ho Man Yuk* might have been resolved as a case of theft. But, as it happened, the Indian Penal Code was enacted with an *amended* CMP provision. Now, many years later, the coincidentally wide wording of that provision has enabled it to be used as if it laid down a general crime of property appropriation – a crime with a vestigial *actus reus* element closely resembling the *actus reus* of theft in the UK Theft Act.

The implications are a modern reformer's nightmare. On the one hand, it is not totally satisfactory to let things stand. In Singapore as in India (and likely other Penal Code jurisdictions), unaggravated theft still carries up to three years' imprisonment, one year more than unaggravated CMP.[100] So, leaving these provisions unamended would mean accepting that offenders like Ho Man Yuk deserve lower sentences than thieves. It would mean accepting that it is worse to take people's property without consent than to use less direct means to make people dispossess themselves. This proposition may have its attractions. But is it sustainable in a statutory context in which even CBT – a crime not defined by any interference with possession – is punished as heavily as theft?[101] Is it really worse to misappropriate entrusted property than to obtain possession of property by dishonest means not amounting to physically interfering with possession? If the defendants in *Ho Man Yuk* had obtained money 'by deceiving any person', such as a casino croupier, then they would have committed cheating, and even cheating carries the same penalty as unaggravated theft in Singapore and India alike.[102] In England and Wales, some kinds of fraud are punished even more heavily than theft.[103]

On the other hand, simply making theft and CMP carry the same penalty would create an even bigger problem. Since CMP is strictly easier to prove, giving it the same penalty as theft might disincentivise prosecutors from ever bringing charges of theft. In that world, theft (and perhaps even CBT and cheating) might continue to exist only on paper, serving no purpose but to vindicate the old criticism that the Penal Code contains a 'needless multiplication of criminal offences'.[104] This eventuality is not far-fetched. On the contrary, a similar problem has long plagued the Code provisions on murder. In India and elsewhere, the Code has always defined murder in four different ways

[99] *Ho Man Yuk* [2017] SGDC 23, [14], [45].

[100] Penal Code 1871, 2020 Rev Ed (Singapore), ss 379, 403; Bharatiya Nyaya Sanhita (Indian Justice Code), Act 45 of 2023, ss 303, 314, replacing the Indian Penal Code, Act 45 of 1860, ss 379, 403. The Bharatiya Nyaya Sanhita has formally replaced the Penal Code in India, but many of its provisions are substantially the same.

[101] See above discussion accompanying fn 98.

[102] Penal Code 1871, 2020 Rev Ed (Singapore) s 417; Bharatiya Nyaya Sanhita 2023, ss 303, 318.

[103] Fraud Act 2006, ss 1, 6, 7, 9, 11. Compare with the Theft Act 1968, s 7.

[104] Peel (n 93) 26. See above, discussing accompanying fn 93.

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using different formulations of *mens rea*, some of which are easier to prove than others. But identical penalties have been and generally still are attached to all variants of murder.[105] As a result, prosecutors are incentivised in most cases to use the only variant that does not demand any proof of intention to kill or foresight of death – the variant (numbered section 300(c) in Singapore and Malaysia) that defines murder simply with reference to the defendant's intention to cause bodily injury. The case law on this form of murder is disproportionately extensive, as scholars are well aware.[106] Lay people generally regard murder as killing with intent, and that is indeed also a form of murder in the Penal Code – but, in practice, many convictions for murder are grounded in proof of much lesser *mens rea*. So, this notorious quirk in the Penal Code scheme of murder is a cautionary tale for would-be proponents of equalising the penalties for theft and CMP. Reformers are reminded that the criminal law is shaped not only by formal definitions of crimes – statutory provisions imbuing words like 'theft' and 'murder' with legal meaning – but also by the prosecutorial incentives these definitions create.

Naturally, another option is substantial reform along the lines of the UK Theft Act. That would mean abandoning the current definitions of theft, CMP, and CBT, and replacing them all with a general crime of property appropriation. In *that* world, the historical oddities of the Penal Code scheme of property crimes might finally be erased, and Penal Code jurisdictions might reap similar rewards and face similar challenges as England and Wales and other post-larceny jurisdictions. Would that be a better world for defendants, property owners, and lawyers invested in the enforcement of clear and rational laws? The strengths of Theft Act-like definitions of theft are at least debatable. The idea that thieves are people who take things without consent has an intuitive appeal. The old (medieval and early modern) definition of larceny used to satisfy this intuition, and the Penal Code definition of theft still does.

Indeed, the Penal Code has preserved an intuitive idea of theft while also being flexible enough, thanks to its imbricated definitions of theft and CMP, to do a passable job of resolving novel cases like *Ho Man Yuk*. As we have seen, this flexibility comes at the cost of lengthy appeals (more of which might arise) and some discrepancies in how heavily different acts of dispossession are punished. But, if the dearth of scholarship on this subject is any indication, perhaps lawyers in Penal Code jurisdictions are willing to pay this price. It is certainly a way to avoid, to quote Stuart Green again, the 'flattening' effect of eliminating distinctions of *actus reus* in legal definitions of property crimes.[107] Separately, there is also the risk that history might repeat itself. If proposed, an Indian or Singaporean Theft Act might assimilate plural ideas and – just like the Penal Code – end up more convoluted than intended. Politically, at least, it might be difficult to argue in any former British colony that the wholesale adoption of modern English law is the best way to fix problems inherent in an extant colonial Code.

Ultimately, there may be no perfect solution: there may only be the lesson that the Penal Code is simultaneously pliable and resistant to change. As a complex statute with many moving parts, the Code is and always has been capable of assimilating and supporting different ideas of criminal justice. These very qualities give the Code staying power amid intellectual change and contestation. Why abandon the Code or even parts of it if major compromises can be made through minor tweaks? The Code scheme of property crimes started life as a hotchpotch of rudimentary measures aimed at avoiding certain perceived injustices. Things are arguably no different now, as judges in *Ho Man Yuk* have all but created a general crime of property appropriation without disturbing the narrower crime

[105] Bharatiya Nyaya Sanhita 2023, ss 101, 103; Penal Code 1936, Act 574 (Malaysia), ss 300, 302; Penal Code 1871, 2020 Rev Ed (Singapore), ss 300, 302. Note, however, that Singapore reformed the penalties for three of four forms of murder in 2012, repealing the mandatory death penalty that used to apply: Penal Code (Amendment) Act 2012 (Singapore).

[106] See, among other works, Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Singapore* (LexisNexis 2022) 203-205; Chan Wing Cheong, 'What's Wrong with Section 300(c) Murder?' (2005) Singapore Journal of Legal Studies 462.

[107] See above discussion accompanying fn 6.

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of theft. This subtle judicial manoeuvre may have short-circuited more comprehensive statutory reform, for better or worse. Only time will tell.

Conclusion

The Penal Code provisions on property crimes are rooted in centuries-old taxonomic debates. Embodied in them is an old, unresolved tension between wider (more abstract or aggregative) and narrower (more specific or disaggregative) conceptions of larceny or theft. These conceptions co-evolved with conceptions of theft-adjacent crimes, and they pervaded legal practice in India in the formative years of the draft Indian Penal Code. The Code provisions are thus living legacies of colonial legal syncretism – a kind of legal pluralism in which ideas from different legal traditions were brought together by colonialism and layered over one another.

The process of this syncretic layering was historically contingent. As this article has shown, the Code provisions on property crimes were not consciously designed so much as cobbled together by many lawyers who, for one reason or another, happened to have similar or different taxonomic ideas. As a result, it is not always possible to say, as a matter of historical fact, what the Code framers – who, again, were legion – intended any provision to mean or what scenarios they intended it to cover. In some cases, there was no consensus: there were only crude compromises that bore and still bear elements of English, Benthamic, and colonial-Islamic legal thought. By revising some provisions but not others, while retaining the general structure of the draft Indian Penal Code, did the legislators who succeeded Macaulay and his colleagues express the same intentions as them? In some cases, this question is practically unanswerable.

The appellate judges in *Ho Man Yuk* did not identify this problem. Indeed, they did not even consider whether the framers intended for CMP to capture cases where offenders interfere with possession. Instead, the judges simply analogised *Ho Man Yuk* to paradigmatic and expressly codified cases of CMP, where offenders misappropriate property after obtaining possession innocently – for example, after innocently finding lost property. After examining the history of the Penal Code, the judges decided that the framers must have intended for CMP to also capture cases where finders are 'dishonest from the outset', including cases where they 'actively seek opportunities to appropriate items which others misplace or lose'.[108] Though probably sound, this reasoning missed the point that the defendants in *Ho Man Yuk* did not find lost property: they caused their victim (the casino) to lose its property. Had the judges approached the issue differently, focusing on questions of *actus reus* instead of *mens rea*, they might have realised that it is impossible to say exactly where the framers intended to draw the lines between CMP, theft, and non-criminal conduct. The judges might have realised that there is a limit to how much history can help resolve modern disputes about the Penal Code definitions of property crimes – indeed, perhaps disputes about any part of the Penal Code.

By simplifying history, the judges in *Ho Man Yuk* made themselves part of it. The point of this article has not been to argue whether any interpretation of the Penal Code is right or wrong. Neither has it been to advocate any particular avenue of reform: difficulties lie in every direction. Rather, this article has aimed to track the surprising twists and turns in the long history of Penal Code definitions of property crimes. It has identified many continuities surrounding the contested role of *actus reus* in this area of criminal law. Should the criminal law respond differently to different modes of property appropriation? From colonial India to modern Singapore, judges and legislators have engaged this question directly and indirectly. From the nineteenth century to the twenty-first, they have found different ways to straddle embracing and eschewing aggregative definitions of theft – citing, as justification, reasons of justice, clarity, and history. Seen as a whole, these interpretive manoeuvres are

[108] *Ho Man Yuk* [2019] 1 SLR 567, [72].

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remarkably consistent. They suggest that, in common law jurisdictions, aggregative and disaggregative conceptions of theft can co-exist, and old and new legal paradigms are not mutually exclusive. In the syncretic world of the Penal Code, old and new are intertwined, and historical contingencies can produce future possibilities.

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