Chapter 3. Jeremy Bentham and Legislation in the Colonies

This chapter is built around three important themes. The first theme is on the uniquely British institution of the Common Law; the second is Bentham's positivist critique of Common Law and the third looks at Bentham's contribution in terms of a codification and systematization of the law. An important argument that this chapter makes is that Benthamite utilitarianism promotes certain ideas like utility, security and expectations while at the same time devaluing concepts like liberty, justice and rights, which form an important component of contemporary liberalism. The chapter further argues that the Benthamite utilitarian legacy imparted to India has resulted in an overriding of individual rights.

'Mill will be the living executive – I shall be the dead legislative of British India'
Jeremy Bentham

I. The Dialectic of Difference/Pluralism and Similarity/Uniformity.
Having considered the conservatism of Burke and its implications for a colony like India, it is now time to turn to Jeremy Bentham and the impact that his utilitarian thought had on India, especially through his writings on legislation. The second and the third chapters of this study are linked in the sense that they are constituted by focusing on two thinkers, Edmund Burke and Jeremy Bentham who, as has been mentioned a number of times earlier, are marked by their opposition to the natural rights tradition. Further, their writings are inextricably linked with the sites of the Empire, with Bentham exhibiting a concern akin to Burke of siding and sympathizing with the underdog and the oppressed (see Boralevi 1984: chapter 4). That is as far as the similarities are concerned.

There is one important shift that needs to be taken into account in a consideration of the attitudes exhibited towards India by Burke on the one hand and prominent utilitarians on the other. Burke's attitude of respect bordering on reverence for India's ancientness, while being in line with his conservatism, also has parallels with the kind of
uncritical glorification and valorization of India’s past that was found among the Orientalists. In sharp contrast to such a reverential attitude, stand utilitarian attitudes particularly those held by someone like James Mill, who could find absolutely no virtue in Indian society whatsoever. These two attitudes entailed differing colonial policies. On the one hand, the attitude associated with Burke with its respect and reverence for India entailed a patronizing protection. There was, on the other hand, often a sneering and impatient contempt towards the country and its oddities. It needs to be added that this was an attitude held less by Bentham and more often by those associated with Benthamite utilitarian principles like James Mill, Macaulay and James Fitzjames Stephens (see Pitts, 2003). It entailed a forward movement of modernization that would rid Indian society of the antiquities thought to be holding back its development. J. Majeed (1990) argues that the ‘radical rhetoric’ of the Utilitarians was to come into conflict with the ‘revitalized conservatism’ of the early 19th century emerging from the opposition to the French Revolution. This ‘revitalized conservatism’ was of course most forcefully and passionately articulated by Edmund Burke.

The first conservative attitude that has been identified with Edmund Burke and which has close links with the veneration that the Orientalists reserved for India can be found as a critical element in contemporary multiculturalism (Rudolph and Rudolph, 2001: 56). The Indian political set up unselfconsciously incorporated the multicultural model long before the self conscious and rather exaggerated multicultural claims that were made in the west with increasing frequency in the last quarter of the 20th century. Such a multicultural attitude is found in the rather conservative thrust on groups found in the Indian rights discourse and in multiculturalism itself as a set of political ideas. Multiculturalism is concerned with maintaining and guaranteeing the viability of a minority group which is threatened by the majority and the mainstream culture that is often defined by the majority. In the often well meaning attempt to protect and preserve the viability of the minority group, the culture of the minority is simplistically and naively understood. This leads to a conservative rendering of culture. The conservative thrust in multiculturalism stems from its emphasis on the preservation and protection of the culture of the minority group, without being able to understand the dynamics of
cultural change. In sharp contrast to the ‘revitalized conservatism’ inspired by Edmund Burke, was the ‘radical rhetoric’ of the Utilitarians with its impatient modernizing, progressive, thrust along with its self-confident reliance upon legislation as an instrument to forge society in a desired shape.

It is the dialectic formed by these opposing trends, one Burkean and thereby, conservative, particularizing, and emphasizing difference; the other utilitarian, universalizing, with an emphasis on similarity and further premised upon rationalization, progress and forward movement, that has formed and given distinct shape to the Indian rights discourse. The dialectic being referred to here is captured effectively by the Rudolphs when they observe that modern India has provided the setting for the contest between what they term ‘legal pluralism’ and ‘legal universalism’. They further explain that legal pluralism recognized and legitimized the personal law of India’s religious communities. On the other hand, legal universalism ‘engenders calls for a uniform civil code’. The Rudolphs further, attempt to understand the contest between the ‘particularistic Orientalists and the universalistic Utilitarians during the East India Company era’. The ramifications of the contest between ‘revitalized conservatism’ and the ‘radical rhetoric’ of Utilitarianism did not remain confined to India. There were ‘new political idioms’ emerging in the late 18th and early 19th century in Britain and it is the task of Majeed’s (1990) paper to understand ‘how this was closely involved with the complexities of British imperial experience in India’.

This study argues that the dialectic of difference/pluralism and similarity/uniformity arises from the first two vertices of the triangular theoretical framework of this study. The first Burkean perspective, viewed India in terms of settled, well established communities that had come under danger with the onset of British rule. It contributed to ‘legal particularism’, its emphasis on difference/pluralism and its concomitant advocacy of personal laws for India’s religious communities. Bentham’s utilitarianism and its influence are especially seen in the creation of a penal code, and a code of criminal and civil procedure in India. This particular codification can be

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1 For a brief discussion on the shallowness of the understanding of culture and its theoretical impoverishment in liberal political theory see chapter 2 pp. 23-25. See also David Scott, 2003.
considered as the crowning glory of utilitarian thought in India and Bentham’s influence, to say the least, is profound (see Stokes 1959).

Benthamite utilitarianism contributed to the second part of the dialectic, similarity/uniformity with its stress on universality. Interestingly, the great wave of codification of law that took place in the 19th century under the influence of the utilitarians left out the personal laws of religious communities. In this manner, the particularities of criminal law were swept away by means of the Penal Code of 1860. A series of civil law acts passed between 1865 and 1872 were based on British civil law. They however, exempted the realm of personal law – marriage, divorce, succession, adoption, property, and definition of family (Rudolph and Rudolph 2001: 52).

The argument here is that the codification of law took place differently with different implications depending on the kinds of law that were being brought under the ambit of codification. The codification of the personal laws of religious communities was to stress the aspect of ‘legal pluralism’ and hence difference. The creation of a penal code pertaining to criminal law stressed the aspect of ‘legal universalism’ and hence similarity/uniformity. The dialectic of difference/pluralism and similarity/uniformity was to be played out in different domains; with difference/pluralism finding a home in the private/personal domain, and similarity/uniformity being lodged in the public domain (see Metcalf 1995).

Apart from the different domains in which this dialectic was found, there were also different historical periods in which one of the two was emphasized over the other. In the latter part of the 18th century and until the early 19th century, the idea of difference/pluralism prevailed. This is the effect of the ‘revitalized conservatism’ that J. Majeed has referred to. However, from 1828 there was a succession of utilitarian reform minded British officials beginning with Lord William Bentinck. This led to the prevailing of universality, thereby overturning the theme of group pluralism and group difference that had been hitherto dominant. After the 1857 Mutiny there was a great deal of wariness about encroaching upon and influencing the sphere of the natives and from this year, difference/pluralism again prevailed and this was best captured by Queen Victoria’s proclamation of 1858. Regarding Victoria’s proclamation, the Rudolphs observe that her (Victoria’s) ‘retreat from the utilitarians’ efforts to rationalize Indian administration and
to codify Indian law left Indian society with a viable group life, but stood in tension with an incompatible universalizing discourse’ (Rudolph and Rudolph 2001: 43).

Even in the post independence period of India’s history one aspect or the other has prevailed. Thus, in the Nehruvian era immediately after independence, it was the idea of universality that was to prevail. There was a liberal progressive concern animating the idea behind universalism. However, in the decade of the 1980s and 1990s, the idea of legal universalism was to be vociferously backed by the rise of Hindu tva. This was a difference denying, homogenizing discourse that sought to do away with legal pluralism once and for all. The reason for this was a deep seated antipathy towards the minorities.

To reiterate, it was the Burkean perspective which gave rise to difference and ‘legal pluralism’, while Benthamite utilitarianism gave rise to ‘legal universalism’. The Rudolphs have further made the distinction between legal pluralism and legal universalism in the following manner:

Speaking analytically, legal pluralism posits corporate groups as the basic units, the building blocks, of a multi-cultural society and state. Particular legal rights and obligations attach to collective identities such as Hindu, Muslim, Christian, Sikh, Jain, Buddhist, and Parsi, and to sampradays (sects) and quoms (communities) such as Dadupanthis, Kabirpanthis, Sunnis, Shi’as etc. Legal universalism treats individuals as the basic unit of society and the state and imagines homogeneous citizens with uniform legal rights and obligations (Rudolph and Rudolph 2001: 37).²

However, to make the shift from Burke to Bentham, a shift that will bring in the differences between the two thinkers, a brief discussion of English Common Law will be in order. The chapter will therefore begin with a discussion of Common Law, a remarkably British institution, characterized by its conservatism and its reliance on past accumulated traditions that serve as a repository of customs, beliefs and manners. These are drawn upon in the adjudication of cases, especially when confronted with new

² The Rudolphs have also used another term which is ‘cultural federalism’. This term is used to ‘suggest that India has dealt with diversity in ways that recognize legal identities on the basis of cultural as well as territorial boundaries.’ The Rudolphs also cite the example of the Ottoman millet system as representing cultural diversity (see Rudolph and Rudolph 2001: 38).
circumstances. It should not come as a surprise, after having considered the reinforcement of conservatism through Burke, in the previous chapter, that he was a great contributor to and admirer of this typically British institution. The chapter will then proceed to a discussion of Bentham’s critique of Common Law and his own positivist conception of law. It will finally go on to look at the effects that Bentham’s utilitarian thought has had on legislation in India.

II. The Common Law.

The Common Law is a remarkably British institution. Its development has been decisively shaped by its historical origins which date back to the time when English society was emerging from feudalism and the modern state was beginning to take shape. The system of common law did not remain confined to England but today forms an important and indeed central aspect of the legal systems of all Anglophone societies.3

The period of the late 16th and early 17th centuries is the period when a distinctive common law jurisprudence theory begins to develop. Among the important figures to give a decisive shape to Common law, the name of Edward Coke is important. Common Law also needs to be distinguished from earlier notions of the law of England that were influenced by the natural law tradition (Postema 1986: p. 3, footnote 1). The political context in which Common law was emerging is characterized by the rise of absolutism and a significant centralization of powers in the hands of the state, both in England and on the Continent. With the state becoming increasingly powerful, the law began to be viewed as an instrument which could fashion society according to the wishes of the state. In many ways Common Law represents a reassertion of a society that has been intruded upon by an absolutist state. It embodies an opposition to absolutism and rationalism and upholds the medieval idea that law is not something made either by King or Parliament or judges, but is the expression of a deeper reality within society that is merely discovered and publicly declared by them.

3 Sandra Fullerton Joireman (2002) has made a distinction between British Common Law in existence in the various British colonies and the system of continental civil law in existence in other European colonies. By means of a number of statistical devices she compares the effectiveness of the two systems in a number of African colonies. She concludes that the British common law instituted in erstwhile British colonies has been on the whole more effective as compared to the French or continental civil law.
Common law, rather than resting on determinate principles, is actually a repository of many of the values, norms, customs and mores that a society has accumulated during the course of its history. It rests then on regular use and acceptance by members of society and it is in their active participation in the life of the community that the numerous and diverse constituents of the common law are accumulated (Postema 1986: 4-5). It is a rich storehouse of all that a society has found useful in its historical experience. Its principles, rather than being discovered by rational thought as in the case of natural law, are to be discerned through active participation in the life of the community.

In the regular use over historical time Common law acquires its familiar and reliable quality (Postema 1986: 5). History assumes a certain importance in an understanding of the common law. Postema points out that history as it is conceived here is 'traditional' rather than 'objective'. Further time needs to be understood as 'not an empty place holder of events, or an unseen driving force. It is, rather, a rich tapestry of acts, words, thoughts, and sentiments of a people with whom one identifies, members of a "partnership" across time' (Postema, 1986).

To the richness and diversity of Common law can be contrasted the stark and inflexible principles postulated by the natural law. Natural law is thus based on a certain number of objective principles that have always been in existence and are thus pre-given and await discovery by man's rationality. In contrast, the Common law is something existing within society that is actively created through the efforts of human beings. It is subjective in the sense that it is created through the lived experience of the community and hence is not natural, pre-given or objective. As it is internal to society and the manner in which society functions it can be discerned by being placed within and actively participating in the life of the community. It is thus inextricably linked with society and

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4 This understanding of time in Common Law as a predominantly pre-modern institution needs to be contrasted to the notion of an empty homogeneous time as it is found in Benedict Anderson's (1991) book *Imagined Communities*. It is the perception of time as an empty homogeneous time that can be filled with events and happenings that creates the modern possibility of imagining a community like the nation into existence. A further contrast that needs to be noted between the Common Law as a predominantly pre-modern institution with the more modern elements of the nation as understood and the imagination of which is explained in Anderson's book is the notion of community. The very idea of community associated with the Common Law is a pre-modern, pre-industrial kind of collectivity in the nature of a gemmeinschaft.
this is one reason why Common law represented an assertion from within society against an overbearing and obtruding state in an era dominated by absolutism.

Two major works, Blackstone’s *Commentaries* and Matthew Hale’s *A History of the Common Law* are considered to be classics which bring out the gradual process of evolution through which the Common Law acquires its familiar form. Blackstone through his work is able to bring out how a portion of the law was not to be understood by tracing it back to a priori first principles, but by locating it within the living body of law and the manner in which it has developed historically (Postema 1986: 13). The reasonableness that has been mentioned as being an important component of the Common law does not involve some external notion of reason against which the common law is to be tested. Rather it involves an idea of a contextual rationality that arises from within the tradition that has given rise to the Common Law.

Postema further points out two important implications of Common Law theory and practice. There is first a vigorous resistance to ‘regimentation’ that would attempt to structure Common Law according to first principles. Such regimentation according to first principles would distort Common Law, to ‘represent as static what is essentially dynamic and constantly shifting’. Postema notes that organic metaphors prevail in the writings of Common Lawyers while mechanical metaphors are found in the positivist critics of Common Law from Hobbes to Bentham (Postema, 1986: 10).

The second implication that Postema notes is the greater degree of flexibility that Common Law facilitates in adjudication. Such flexibility creates the possibility of small incremental additions and continual improvements in the common law. Above all there is a reliance on past experiences as a rich repository that needs to be conserved for the good of the members of society, thereby ensuring some degree of continuity and bonding not just between living members of a society but across generations. All these are distinctively Burkean themes. Indeed, the idea of continuity found in the Common Law within a generation and across them is best captured in a line written by Burke in the *Reflections on the Revolution in France* where he talks about a partnership ‘between those who are living, those who are dead, and those who are to be born’.

There was an interesting reciprocal relationship between politics and jurisprudence in the 17th century. Common Law theory shaped political discourse with
the social and political issues of the times also influencing jurisprudence. Postema observes that the influence of Common Law theory on political and social discourse did not end with the passing of the seventeenth century. Through the period of Whig dominance in the early- to mid-eighteenth century, ancient constitutionalism was common ground for the old Tory party which had abandoned divine right theory and the establishment Whigs who had sought to bury their earlier contractarian doctrines in the less revolutionary Common Law doctrine.

One of the basic strategies of classical Common Law theory for conserving the institution was to challenge the competence of natural reason to sit in judgment over it. It argued for the fundamental authority of the Common Law. Moreover, any demand for a demonstration of the reasonableness of the law and legal authority by individual subjects as a condition of compliance; or any attempt by the King or Parliament to advance claims to make or alter the laws would be opposed as a threat to the established traditional order. Postema observes that this is a familiar conservative strategy that was exploited by Edmund Burke and his nineteenth century disciples (Postema 1986: p. 61, footnote, 40). Individual reason must of necessity defer to the past-accumulated wisdom of previous generations subsumed within the Common Law and in front of which individual reason is limited. Individual reason must rely on the insights found in the Common Law. Hence there is no possibility of individual natural reason sitting in judgment over the Common Law (Postema 1986: 64). Coke insisted that ‘No man (out of his private reason) ought to be wiser than the Law, which is the perfection of reason’ (quoted in ibid.: 65).

The traditionalism at the core of the Common Law theory rests on a particular and incompletely articulated conception of community, a Gemeinschaftlich, traditional conception of society, in which the law is considered the repository of tradition and a vital primary bond that holds the community together (see endnote 2). The experience of living in and drawing upon the common resources of a community’s common stock of knowledge and values found in the Common Law is for the good of the individual and again Burke in his Reflections on the Revolution in France points out in his characteristic manner: ‘We are afraid to put men to live and trade each on his own private stock of reason because we suspect that this stock in each man is small, and that the individuals
would do better to avail themselves of the general bank and capital of nations, and of ages' (quoted in ibid).

With Burke's conservatism there is a revival of the notion of prejudice, something that the Enlightenment had thoroughly discredited. Prejudice in Burke is not meant to be understood as blind prejudice that is irrational and hence prevents one from seeing the truth. Rather it is an intuition; it is opinion, albeit half-baked; and a certain attitude held by an individual, all of which have developed as the result of participation in a community. It provides the basis or pre-condition for the subsequent acquisition of knowledge. On this understanding, custom or precedent are the juridical equivalents of prejudice.

The theory of Common Law does not provide the possibility of a radical challenge or wholesale transformation of a tradition. Reason, to reiterate is internal to the tradition. Challenges to aspects of the tradition can only arise from within it and such a challenge can only make minor piecemeal adjustments to certain parts of the tradition (ibid.: 76).

III. Bentham's Positivist Critique of the Common Law

In the seventeenth century, which can be considered as the birth and infancy of the modern era, there were two major contenders on the field of British legal theory. These rival theories were Common Law theory and legal positivism (Postema 1986: 39).

Bentham believed in the creation of a rational and scientific system of legislation. The very fact that he was arguing for a systematization of legislation along rational and scientific lines brings out the sharp contrast with the Common Law, which as noted earlier, was marked by its rich and often bewildering diversity of customs, habits, rituals, mores and traditions that had been accumulated throughout the historical experience of the community. Through his critique of and significant opposition to the Common Law, Bentham sought to 'shift the paradigm of law away from the customary rules and practices of Common Law to the sharper lines of statute law and its idealization, the code' (ibid.: 312). Bentham's immediate focus was criminal jurisprudence which in the

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5 This understanding of prejudice as a possibility of knowledge can be compared and found similar in some ways to the understanding of prejudice, the ideas related to tradition and all its associated conservatism, found in the hermeneutics of Gadamer (see Georgina Warnke).
England of the eighteenth century had come in for a great deal of criticism for the harshness of its verdicts and its generally confused nature.

Bentham was concerned to create a system of jurisprudence that was based on scientific and rational lines, thereby lending to the law a certainty that he felt was missing from the Common Law. Of particular interest with regard to Bentham’s ideas and which, in many ways set them apart, was his deep distrust of the principle of natural law. There is further to be noted in Bentham a relegation of the concept of justice and a privileging instead of the concept of utility. This is a move which went against the popular prevailing view that gave pride of place to justice rather than utility. Bentham believed that justice was more highly regarded than utility because the demands of justice are clearer and more easily determinable (Postema 1986: 149).

A central theme to be found in all Bentham’s writings on jurisprudence is the conflict between the demand for stability and certainty of law and the need for flexibility in adjudication (ibid.: 147). Thus, in accordance with this need to balance flexibility with stability, Bentham complains that the language of justice and rights is inflexible as against the more ‘yielding’ language of utility. As there was no possibility of introducing flexibility into the principle of natural rights, Bentham in a critique of the French Declaration of the Rights of Man felt that instead of talking of rights one should talk of expectations (ibid.: 154).

Despite the fact that he favoured the idea of utility over justice, Bentham did not believe that there would be an inevitable clash between the two (ibid.: 151). How does Bentham reconcile these two seemingly opposed and contradictory principles, one of which he privileges over the other? He does this by differentiating between ‘original utility’ and ‘expectation utility’ and by claiming that the principle of justice contributes to utility understood in the second sense i.e. derived from expectation (ibid.: 152). The idea of expectations plays a very central role in Bentham’s arguments. Postema explains that expectation utilities or utilities derived from expectations ‘are those which have their origins in beliefs regarding the likely behaviour of persons, private or official, in virtue of established practices, habits, customs, or the general rules (and in some cases the absence of them) which govern their behaviour’ (ibid). As against such expectation utilities,
original utilities include all utilities which do not depend on such beliefs. Postema proceeds to explain that justice entails a following and observance of established rules, practices and patterns of behaviour which rest for their ultimate authority not on their intrinsic merit or utility, but on the expectations they engender and protect. Justice and utility are not in danger of any deep conflict or clash because justice understood properly is reducible to utility.

In addition to the relatively marginal or insignificant role that justice plays in Bentham's ideas, along with the central role that expectations play, one needs to take into consideration two further concepts. These are security and liberty. Security for Bentham again plays a very central role and is linked to expectations in the sense that security can only come about when there is an assurance of secure expectations. Security is such an important idea in Bentham's scheme that it becomes the principal object of the laws. Further, liberty does not figure too centrally, having only a subordinate role to play with respect to security.

Interestingly, in Bentham's thought concepts such as justice, liberty and rights are not central. Relatively less familiar concepts like expectations and security figure more prominently, along with the more familiar concept of utility, which of course forms the centerpiece of all of Bentham's thought. Contrast this to the centrality that has been accorded to the idea of justice in Rawlsian liberalism with its self-conscious and overtly stated movement away from utilitarianism (Rawls 1971). Note, further, the centrality accorded to a concept like liberty in a more ambiguous utilitarianism like the one represented by John Stuart Mill.

The argument here is that central concepts of contemporary mainstream liberalism like 'justice' and 'liberty' have traditionally gained less of a centrality in a stream of

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6 The best explanation of the distinction between original and expectation utilities has been made by Postema when he refers to some of the earlier writings of Bentham:

In his earliest writings Bentham illustrates the distinction by drawing examples from the criminal law and law of property. If a law is justified, he asserts in the Comment, it must be seen to serve utility, "either original, or derived from expectation." So, for example, a law prohibiting assault is grounded on original utility. "For whether a man expects to be safe from beating does or does not, beating is at all events a pain to him." The disutility with which the law concerns itself in no way depends on the beliefs or expectations of the victim or others. In contrast, the disutility caused by theft can only be explained by reference to the expectations of the owner, the expectation to retain possession indefinitely. (Postema, 1986: 169)
liberal thought like utilitarianism and have found a more comfortable and hospitable environment when there has been a movement away from utilitarianism. This movement away from utilitarianism and in the direction, often of contractarian thought, a movement that has in many ways characterized one of the important trends of contemporary liberalism has, to reiterate, been able to accord a centrality to ideas like justice, liberty and rights.\footnote{On the significance of this movement see Alan Ryan (ed.) The Idea of Freedom, Clarendon Press, Oxford, 1987.}

Postema commenting on the 'increasingly heavy load' that the two concepts of 'security' and 'utility' play in Bentham's developing theory feels that from 'the late 1770s and early 1780s onwards, security is the primary focus of his utilitarian theory of law, and the first deputy of his sovereign principle of utility' (Postema 1986: 168). In fact, while talking about the concept of security Postema wants to take issue with the widely assumed view that in Bentham's idea the function of law is social control and discipline, an understanding that has probably been popularized by Bentham's well known ideas relating to the panopticon.

One way of bring out Bentham's differences with the Common Law tradition is by looking at his attitude towards judicial precedents established in past cases or 'stare decisis'. Bentham felt that such judicial precedents should be strictly adhered to. However, he again takes issue with Blackstone and the Common Law tradition when he questions the latter's insistence on judges being bound to the principles implicit in previous decisions. According to Bentham the attitude of the followers of the Common Law tradition attributes a misplaced wisdom to previous generations which he finds completely unwarranted. The idea of the wisdom of our ancestors is a 'fallacy' that Bentham dismisses. He refers to this idea as 'An absurdity so glaring carries in itself its own refutation; and all that we can do is, to trace the causes which have contributed to give to this fallacy such an ascendancy in matters of legislation'. Bentham argues that with respect to individuals living at the same time and in the same situation, the older person of course possesses more experience than the younger one. However, when it comes to generations the reverse of this is true as the previous generations have accumulated less experience than subsequent ones. Bentham goes on to argue: 'In giving
the name of old or elder to the earlier generation of the two, the misrepresentation is not
less gross, nor the falsity of it less incontestable, than if the name of *old man* or *old
woman* were given to the infant in its cradle’ (Bentham 1973: 234).

He does not accept the common law idea that there should be a certain pattern or
uniformity that links contemporary judicial decisions to past ones as if they were
necessarily following the earlier decisions in a kind of logical sequence. The only reason
that Bentham feels that legal precedents should be followed is not out of a sense of
deerence to previous generations with their supposed repository of profound wisdom,
but for the simple reason that the precedents have been established. Whether they are
reasonable or not is not relevant (Postema 1986: 195-96).

It is again the doctrine of expectations that is behind Bentham’s insistence on the
strict adherence to precedents (ibid.: 196). To reiterate, the idea of expectations plays a
very important part in Bentham’s theory of adjudication. A further is the importance that
Bentham attributes to a separation and clear demarcation between judicial and legislative
functions and his opposition to any activity on the part of the judiciary in creating laws.

Bentham was outraged by the chaotic nature of law in 18th century England. Not
only was it chaotic but it was also barbaric and inconsistent. Both Bentham and
Blackstone were highly critical, especially of the criminal law. Despite this similarity, the
sources of their concern regarding the state of criminal law were different. The reason for
the present chaotic state of affairs according to Blackstone was the abuse and
irresponsible exercise of parliamentary sovereignty. Blackstone further felt that such
excesses on the part of the law were a threat to the integrity of Common Law and thereby
the legal system as a whole. Bentham however, saw the primitive, contradictory and
myopic character of parliamentary legislation arising from the immaturity of the art and
science of legislation. He therefore turned his considerable intellectual resources to this
field, the purpose of which was to develop the science of legislation on rational and
scientific grounds (Postema 1986: 266).

The focus of Bentham’s attack was the extremely confusing nature of Common
Law with its complexities being inaccessible to the vast majority of the people. Bentham
attempted to ‘demythologize’ the Common Law, to pluck off the mask of mystery that it
had on. The Common Law owing to its muddled nature had clearly become something of
a field that could be manipulated by a select few who had a vested interest in keeping it in this muddled form.

Given Bentham’s relentless emphasis on the rationality and determinateness of the law, it is easy to see that one major reason why he was critical of Common Law was that its convoluted and Byzantine rules obscured and clouded an individual’s rationality and his ability to freely and independently use this faculty. It may also be worthwhile recalling that proponents of the Common Law insisted that it was futile to judge the rules of Common Law on the basis of an external rationality. They stressed a contextual rationality that had its basis inside the tradition of Common Law. This was an easy slide into the defence of all sorts of irrational monstrosities and conservative tendencies (Postema 1986: 319). In Bentham’s insistence on demythologizing the law, in plucking off the mask of mystery, one can see Bentham as the real child of the Enlightenment, anxious to bring to bear the light of rationality on outmoded, devious and unnecessarily byzantine institutions such as the Common Law (see Hart 1982: chapter 1).

Where an effective legal system requires laws that are clear, determinate, precise, unequivocal and unambiguous, Common Law provides laws that are indeterminate, lacking any precision and thus giving rise to the possibility of confusion and manipulation at the hands of an unscrupulous and corrupt elite which makes the cumbersome task of the interpretation of the laws its specialization (Postema 1986: 294). Bentham’s dismissal of Common Law as being a mere fiction, ‘a thing merely imaginary’ and the principles and propositions of Common Law as being indeterminate, lacking clarity and further being metaphysical are a clear reflection of his positivism which demands the ‘criteria of validity be defined solely in terms of empirical facts, regardless of its utilitarian merits’. Further this is the ‘product of his radically empiricist-nominalist ontology and epistemology’ (ibid.: 296).

Bentham’s critique of Common Law represented a movement forward and improvement in the law. In Bentham, jurisprudence draws directly from political theory (Postema 1986: 301). The attack on the Common Law was not a detached philosophical attack on the part of Bentham. He was not merely attacking a system of jurisprudence but also a framework of ideas and principles and a political ideology that were dominant in the first half of the 18th century in Britain (ibid. 311). He understood that law was
historically relative, that different systems of law were required according to the differing stages of historical development. Thus, the system of customary law was a vast improvement over the previous condition of barbarism (Postema 1986: 309). Customary law functioned well in the conditions of a society that was less developed and not so advanced. Such societies are characterized by their lack of complexity and homogeneity. As close, well knit, homogenous and well integrated societies governed effectively by customary law broke down and there developed in their place more advanced societies, there also arose the need for a more advanced improved system of jurisprudence.

Continuing with the theme of improvement, another 19th century jurist Sir Henry Maine saw himself bringing about an improvement in English jurisprudence by means of the critical remarks that he made about utilitarian jurists in his famous work Ancient Law. Maine was opposed to the ideas associated with utilitarian jurists like Bentham and Austin who would explain the law in wholly abstract terms, whereas Maine was known for his insistence on understanding the law in the context in which it arose. Bentham and Austin have been known to explain the law completely in terms of concepts such as 'sovereign' and 'command'.

Maine, on the other hand, emphasized the specificities and the historical context from which the law arose. It is important at this stage to make a brief passing reference to Maine to bring out at least three aspects. The first is how he believed that the views contained in his book Ancient Law, which were critical of abstract utilitarian principles, constituted an improvement in English jurisprudence. Secondly, his opposition not just to the indiscriminate application of abstract utilitarian principles to India, but also his opposition to the common law tradition. Thirdly, a theme that will be taken up subsequently, his carrying forward of the utilitarian legacy in India, inspite of the fact that 'in an Indian context Maine had at least as much fear of the common law as he did of utilitarianism'. Thus, Maine was not concerned so much with saving India from the indiscriminate application of utilitarian thought, as he was concerned with saving India from the dangers of the common law. In spite of his opposition to both the common law and the abstractness of utilitarianism, he saw in the idea of utility 'much to undermine a belief in the common law and provide a suitable substitute' (Cocks 1988: 83-84).
Common Law did not just dominate Britain but also spread and influenced the numerous overseas colonies of the British Empire. Postema argues that Bentham’s critique of the Common Law was not merely a challenge issued to what he perceived to be a defunct system of jurisprudence. It was also a challenge to a ruling political ideology. If the influence of Common Law is not confined to Britain but extended also to the overseas colonies (see Joireman 2001), then Bentham’s critique of the Common Law can also be construed as a challenge to the British Empire. This opposition to the Empire can be found in the rather gloomy advice he issued as a kind of foreboding in some of his writings such as ‘Emancipate your colonies’ and ‘Rid Yourselves of Ultramaria’ (see Pitts 2003).

In a consideration of Common Law and Bentham’s numerous objections to it, the idea of law rests on a particular conception of community and how the law serves to create and maintain a certain bonding within that community. It is a view which sees law as ‘endogenous, the matrix of social life and continuous with it’ (Postema 1986: 314). Bentham rejected such an idea of the Common Law with its associated understanding of community. Such an understanding according to Bentham was descriptively false and politically objectionable. It was false descriptively speaking because such conditions of well knit and integrated communities no longer existed with such entities having undergone the process of dissolution under the influence of modernity. Such a view was also politically objectionable as it presented a deceptively simple picture that obscured and concealed the hidden and vested power structures within it.

In place of such an authoritarian tradition bound view of community Bentham proposed an alternative conception of a community of individuals ‘bound by loyalty to clear public rules, rather than common goals and shared traditions’ (Postema 1986: 314). The contrast brought out here between two different conceptions of community, the one authoritarian and the other liberating and emancipatory, is striking and is in many ways a shift or transformation that is captured by Ferdinand Tonnies and his binary concepts of Gemmeinschaft and Gesselschaft. On Bentham’s account, the law rather than being endogenous as in the Common Law, is exogenous, ‘an external framework of rules fixed and public, which makes social life possible’ (Postema 1986: 314).
Bentham was extremely influential when it came to matters of codification and legislation. His influence has led one commentator to describe him as the 'legislator of the world' (Pitts 2003). He was also extremely radical when one considers the vehemence with which he opposed the Common Law. If Bentham was influential as a political thinker, especially as he stood in relation to the colonies as the motivating force behind the codification of native law systems, then it would be difficult to accept the argument that the system of Common Law also extended to the British colonies. In matters of law, jurisprudence and legislation it could have been either Bentham the utilitarian who was influential, or it could have been the system of Common Law to which he was so vehemently opposed that was influential. How do we account for the influence of both in the colonies, especially in a colony like India?

The answer may be found in the way that the British structured, politically organised and ruled over India. One of the most important ways in which this was done was by creating spheres demarcating 'difference' and 'similarity' (Metcalf 1995). Along with these spheres demarcating difference and similarity, is to be found the institutionalization of two further spheres. These are the private and the public spheres. The dialectic of 'similarity' and 'difference' that has been pointed out by Metcalf was to find a home in each of these two spheres. Thus 'similarity' found a place in an assimilative public domain and the private sphere became the repository of difference. The clue to Bentham's influence and the influence of British Common Law coexisting at the same time lies in the differential logics of these two spheres. Bentham and his critique of Common Law with its culmination in an alternative system of modern utilitarian-positivist jurisprudence was to influence one sphere, while the ideas of Common Law and its associated conception of community were to influence another sphere.

The contest that has been referred to earlier in this chapter between a 'revitalized conservatism' and the 'radical rhetoric' of utilitarianism was resolved in this particular manner, with neither of the two winning out in the ultimate analysis. What happened was that one side to the conflict, the conservatives, declared their dominance in the domain of the private sphere where 'legal particularism' prevailed, while the other side, the 'radical rhetoric' of the utilitarians declared its supremacy in the public domain, where 'legal universalism' prevailed as a result. There is then an overlapping taking place between
opposing Whig and Utilitarian philosophies in India. This happens in spite of the fact that these two philosophies were in conflict in England (see Kugle 2001: 277).


Bentham believed that the inability of the system of common law to provide determinate standards of judgment was its biggest weakness and limitation. He felt that the whole system itself needed to be discarded, and replaced with another one that was totally different (Postema 1986: 216). In this call for discarding of common law, Bentham was obviously very much inspired by Voltaire who had once counseled: ‘If you want good laws, burn those that you have and make new ones’ (ibid. 217). Bentham’s legislative proposals sound extremely radical, especially in the light of the conservative and progressive positions on the law in the 18th century that have been considered in the previous section. Bentham was opposed to the blind defence of and obedience to conservative constructions of tradition. He was also opposed to anarchic and revolutionary upheavals and his anxiety at such revolutionary upheavals can be seen in his Anarchic Fallacies that he wrote in response to the French Declaration of the Rights of Man (see Hart 1982; Waldron 1987).

One of the most important aspects of Bentham’s proposals for legislation is codification which gives to laws regularity, precision and order. In fact there is a remarkable confidence that is obvious in all his calls for codification. Even a critic of Bentham and his utilitarianism like the Victorian jurist Henry Maine had great hopes for utilitarianism in India, which ‘accorded much more nicely than the common law with his thoughts about codification’. Even though there was much that separated Maine from Benthamite utilitarianism, he (Maine) still felt that utilitarianism had two advantages. These were, first, its demand that the law be stated in clear terms which could be understood beyond the limited circles of the legal profession, and second, that it fulfilled the requirements of a legal system that would reflect contractual rather than status values (Cocks 1988: 83). Further, Maine felt that codification was an ‘instrument for replacing the obscurities of the common law with clear statements of legal principle which could be criticized by both the layman and the lawyer’ (ibid.: 89).

The confidence with which Bentham called for codification, which was premised on his theory of jurisprudence, bordered on a kind of omniscient arrogance. This
confidence in his positivistic conception of the law is similar to the overwhelming confidence that characterized modern science in its earlier days with its supreme confidence in modernity and rationality. An insight into Bentham’s supreme confidence, reflective of the naivete of the project of modernity and the Enlightenment in its period of ascendance, of which Bentham was very much a child, can be had from the following quotation:

In a map of the law executed upon such a plan there are no terrae incognitae, no blank spaces: nothing is at least omitted, nothing unprovided for: the vast and hitherto shapeless expanse of jurisprudence is collected and condensed into a compact sphere which the eye at a moment’s warning can traverse in all imaginable directions (quoted in Postema 1986: 424).

Bentham rather foolishly saw himself in very grandiose terms when it came to the law and its codification which he felt was nothing short of a revolution on the lines of Newtonian mechanics. He also boasted that he had systematized the laws and in this manner rendered a service to the laws akin to Bacon’s contribution to the natural sciences. He was also to be compared to a Martin Luther of the laws as his emphasis on codification had, in a very Reformation like manner, transformed the relationship of man and the laws into a direct one without the need for priestly intermediaries to interpret the convoluted and unreformed Common Law. To gauge Bentham’s enthusiasm for the codification of the laws, which according to Postema, reflects the enthusiasm of one who had found the philosopher’s stone, here is another quotation from Bentham:

I acknowledge that it is not possible to foresee them (discrete events) individually, but they may be foreseen in their species;... With a good method, we go before events, instead of following them; we govern them instead of being their sport. A narrow-minded and timid legislature waits till particular evils have arisen, before it prepares a remedy; an enlightened legislature foresees and prevents them by general precautions (quoted in Postema 1986: 432).

A further important aspect of Bentham’s jurisprudence is his distinction between civil and penal law (ibid.: 177). Bentham was to get into the metaphysical intricacies regarding the boundaries between civil and penal jurisprudence and the boundaries
between the private and the public (Hart 1982: 106).\footnote{As a result of this metaphysical dilemma, Bentham had to delay the publication of his An Introduction to the Principles of Morals and Legislation by nine years. He explained that when this work was completed he found himself 'unexpectedly entangled in a corner of the metaphysical maze'. The question that led him into this metaphysical maze concerned the distinction between the civil and the penal branch of jurisprudence, and between a civil code of law and a penal code. Hart explains that for Bentham 'penal' is a much wider term than 'criminal' as it covers all cases where the law imposes obligations or duties and provides sanctions for them. It includes not only crimes but what are recognized as civil offences or civil wrongs such as torts, breaches of contract, and breaches of trust (see Hart 1982: 106).} This particular aspect and its consideration bring in the problems of family and personal laws and how they are to be codified, especially in relation to criminal laws.

It is in Bentham's work Of the Laws in General that there is a growing awareness that the function of the law, which defines the civil law as distinct from the penal, also renders this distinction fundamental to the structure of a complete code of laws (Postema 1986: 179; see also Hart 1982: chapter 5). Bentham's research into the logic of the will and into the notion of a complete and integral law led him to the conclusion that the distinction between penal and civil law is not best represented as a distinction between two irreducibly distinct kinds of law, but as a distinction between two different parts of the same law. To this observation Postema adds that Bentham after thinking hard over this problem came to a solution that is very similar to Blackstone's. Blackstone has divided his Commentaries and the subject matter of the Common Law into rights (private and public) and wrongs (also private and public) (see Postema 1986: 180, footnote 46).

For Bentham the labels 'civil' and 'penal' do not designate different kinds of law, but they embrace different essential tasks performed by the law. Thus, the civil part of the law performs the definitional, distributional, and ultimately constitutive tasks; while the penal part performs the regulative task (ibid.: 181). Postema adds that there exists an intimate connection between the two parts or the two codes of the law as they interpenetrate each other and would be incomplete without each other (ibid).

While trying to understand the effects and implications of codification, one needs to understand also the ways in which Bentham understood custom. It is Postema's belief that Bentham's account of custom and customary rules is in fact very sophisticated. Bentham talks about the customs of both individuals and groups, and in both cases he feels that such talk of custom involves a regularity of behaviour, a series of actions in which it is possible to find a similarity (ibid.: 220). Bentham talks about two different.
classes of customs according to the parties involved. Custom *in pays* is a regularity in the behaviour of the people, be it society as a whole or a certain section of it. Custom *in foro* is judicial custom. While the former could conceivably include almost any kind of social behaviour or integrated course of action, the latter is limited by Bentham to either adjudicative decisions, particular commands to parties pursuant to such decisions, or actions in execution of them (Postema 1986: 220).

Bentham’s discussion of custom also tries to look at both individual and group customs and he treats the custom of the group or community as being at par with individual customs. The important thing about group customs is that they involve more than ‘mere habitual coincidence of behaviour. They involve an interpersonal, interactional element’ (ibid.: 222). In addition group customs are often obligatory, they are imperative, often imposed upon members of the group.

Bentham makes a further distinction between rules and laws. Rules according to Bentham have a subjective private dimension to them, while laws have a public external dimension. They are widely publicized and made known to people at large. While laws have a concrete, easily accessible, and discernible face, rules have a more subjective dimension and are of a more inferential nature. Bentham makes ‘an account of customary rules which accounts for the ontological status, and their prescriptive force, and explains how they are transformed into rules of law’ (ibid.: 229). This account departs significantly and intentionally from the conception of custom in Common Law theory.

Postema comments that the conception of customs, builds on the foundation laid earlier by Hume and raises a question that Hume missed out: ‘what is the relationship between the general normative proposition formulating the practice of a group and the actual behaviour of the members of the group engaging in the practice?’ Bentham’s particular attitude towards groups and the manner in which they are conceptualized is advantageous to groups in the sense that it takes cognizance of their existence. While Bentham’s views regarding codification certainly did take cognizance of the group, the task of codification of law was made extremely difficult by the existence of customs. In this regard Janaki Nair notes that ‘the relation between law and custom remained a troublesome one, and dogged British efforts at producing a uniform code’ (Nair 1996: 29).
In a consideration of the effects that Bentham’s ideas of codification had on the legal system in India, it is important to realize that such Benthamite ideas regarding codification were actually operationalized by Macaulay, as law member to the new Law Council of India from 1834. Bentham was thus to exert a posthumous influence on India after his death in 1832 (See the quotation at the beginning of this chapter). While Macaulay’s time in office represents the height of the Benthamite influence on India, this influence was being exerted even before Macaulay’s arrival on the scene: ‘there was a body of official opinion actively thinking along the lines he was to pursue’ (Stokes, 1959: 205). Eric Stokes further comments that Macaulay’s arrival as law member to the New Legislative Council of India ‘appeared to herald a golden age of reform that would entirely eclipse Bentinck’s previous achievement’. Macaulay was to expound upon the virtues of codification in his parliamentary speech of 10 July 1833, a speech in which the influence of Bentham’s *Essay on the Influence of Time and Place in Matters of Legislation* is very obvious (Stokes 1959: 205).

However, Stokes goes into the question of why the expectations with regard to codification remained ‘unfulfilled’ and why the ‘tangible results remained comparatively so meagre’ (Stokes, 1959: 190). One of the most obvious explanations for this was the simple fact that the task of codification was a gargantuan one. Thus, Janaki Nair notes that the colonial legal systems could rarely achieve the kind of dominance that they aspired to. There was then a ‘quest for, rather than an attainment of certainty, consistency and uniformity’ (Nair 1996: 25). The colonial attempts at codification inspired by Bentham’s ideas of systematization and consistency remained then a half-baked affair. Success was most easily achieved, as will be seen in the next few pages, in codifying the penal law, which proved to be the easiest to bring under a code. Following the penal law, the code of criminal and civil procedure was also completed. All this took an extremely long time, much longer than Macaulay must have thought it would take at the beginning of the task. However, there were certain aspects of Hindu and Muslim personal law that could not be brought within and subsumed under a common code. This inability to craft a uniform civil code continues to plague the post-colonial Indian state (Nair 1996: 25), the issue having become one of the most contentious issues in the politics of the country,
having been continually relegated and put off by successive Congress governments in the years immediately after independence.

Macaulay, while obviously greatly influenced by Bentham, did not accept wholesale the arguments of the Utilitarians. He launched a frontal attack on James Mill and the Utilitarian philosophy of politics in the 'Edinburgh Review', while at the same time acknowledging his respect for Bentham's contribution to jurisprudence. Macaulay's political thinking represents the assimilation of the Utilitarian science to the Whig outlook. He was opposed to the Utilitarian ideal of a general renovation or overhauling of society by means of an abstract universal theory. He was opposed to deducing small points of detail from such an overarching and universal theory. His approach was a more pragmatic and expedient one, for which he relied on Bacon's inductive method (Stokes 1959: 192). Macaulay while accepting Bentham's jurisprudence did not accept the political theory behind it. He was opposed, in a very Whig like manner, to a vast expansion of the state's power and centralization of powers. While he accepted the idea that the law should be efficient and determinate, he was opposed to viewing the law as an instrument in the hands of the state that could be used to bring about and effect radical and wide-ranging change in society (ibid.: 192).

Macaulay was to subsequently take over as the director of the Law Commission. The Law Commission had been appointed with the purpose of establishing a comprehensive and wide ranging code of laws, common as far as possible to the whole people of India. Almost all of Macaulay's proposals were opposed by Thoby Prinsep a fully fledged member of Council on the grounds that such proposals were part of a design to undermine and subvert the whole Cornwallis system (Stokes 1959: 197).

As mentioned earlier the task of codification was not an easy one. Bentham considered that the order of composition of the pannomium (the comprehensive code) should logically be the codes of substantive law – the penal, the civil, and the constitutional – and then codes of adjective law, which would include the code of judicial procedure. In practice Bentham was to admit that the penal code was the easiest to compose, followed by the code of judicial procedure, together with that portion of the

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9 On the dispute between the Philosophical Whigs and the Philosophical Radicals, See Collini, Winch and Burrow (1983).
constitutional code which dealt with the organization of the judicial establishment. These were universal in their nature and could be framed without any reference to the particularities prevalent in a country. Bentham could never provide anything more than the most sketchy outline of the civil law.

There was, of course, significant opposition that was to emerge against Macaulay's efforts. Prinsep, especially was one critic of Macaulay, and a rather conservative one who felt that drafting a completely new code of penal law was going beyond the terms of reference of the Law Commission. Inspite of such opposition, Macaulay stood by the Benthamite principle calling for a radical and complete overhaul of the law. In this regard the criminal law was easiest to change completely without causing too much of a shock to native custom and prejudice (Stokes 1959: 223).

Owing to a variety of reasons, other than the sheer complexity and impossibility of the task of codification, there was a considerable delay in the work of the Law Commission. Misgivings to this effect had been expressed by Prinsep at the very outset of the task in 1835 and even Macaulay with his initial enthusiasm and optimism had to admit this. Stokes is able to capture the half completed enterprise of codification well in the following lines:

Of all the springtide hopes of 1835 the draft of the Penal Code was the sole durable monument. The Code had to wait for more than twenty years before it was enacted in 1860 as the general criminal law of India. Despite modifications it retained the cast Macaulay had given it. The cast was Bentham's, a code of law drawn not from existing practice or from foreign law systems, but created ex nihilo by the disinterested philosophic intelligence. In no other of the Indian codes did this idea prevail. When the task of law reform was undertaken afresh after the Mutiny, Bentham's universality of outlook was abandoned. In 1861 all attempt to win the heights of a completely codified law system was given with the express abandonment of the objective of codifying the Hindu and Muslim substantive civil law; and Bentham's authority served only to achieve a majestic but incomplete series of codes which were for the most part little more than rationalized digests of English law and practice (Stokes 1959: 225).
Stokes observes that the age of reform came to an end in the year 1838 and that with the departure of Bentinck in 1835 there were few reform triumphs that could be registered. Macaulay himself left India in 1838 after seeing his draft Penal Code go to press. In fact, one of the political developments that increasingly occupied the government’s mind and which kept it away from questions of reform was the Afghan question, the year 1838 marking the beginning of the Indian Government’s launching of war and diplomatic activity in the region that would last for twenty years. As a result of such attention diverting activities, the question of law reform ‘languished until after the Mutiny’. However, Stokes observes that it was the Benthamite age of reform that had itself come to a natural end:

Bentham himself had died in 1832; and even more decisive was the death of James Mill in 1836. Utilitarianism as a rigid creed and programme was extinguished. Its clarity and simplicity had been the products of the eighteenth century Enlightenment, but this intellectual self-confidence was denied to the hazier, more troubled mind of the Victorian period. The younger Mill, upon whom fell the Utilitarian mantle, was the foremost to separate himself from his father’s rigid doctrine. In 1837 he was anxious to rid his attitude of the reproach of sectarianism and to form a broad front of all shades of radical opinion (Stokes 1959: 241).

J.S. Mill’s utilitarianism was a less orthodox, more eclectic variety of utilitarianism (see Zastoupil 1994: chapter 6; Warnock 2003). This new ‘eclecticism’ that the younger Mill represented, according to Stokes meant ‘that its practical objectives were more uncertain than of old’ (Stokes 1959: 242). There was no longer the supreme confidence in the ability of political institutions to mould human nature and J.S. Mill gave greater priority to education above ‘tinkering with political institutions as the great instrument of progress’ (ibid.: 242). Stokes further observes: ‘The diffusion and dilution of the Benthamite spirit meant for India that there could be no return to the extravagant hopes of the Bentinck period, when it seemed to Bentham as if the golden age of British India was lying before him’ (ibid.: 242).

In spite of this break in the reforming and codifying zeal initiated by Bentham, ideas relating to codification were to be renewed and revived. This was especially so in
the year 1853 when Parliament considered the renewal of the East India Company’s charter. There was a general feeling that the work of the 1833 Charter Act had been left unfinished. There was a renewed demand that the remaining tasks of the by now defunct Law Commission be taken up once again. Charles Trevelyan was one figure who believed that in the field of codified law, India needed firstly a penal code, with civil and criminal procedure codes applicable to all classes and races; secondly that there was a requirement for a common body of civil law, except in cases which should be extremely limited where it might be impossible to reconcile such a common civil code with Hindu and Muslim law; finally he felt that a digest of such Hindu and Muslim laws that could not be brought under a common civil code needed to be maintained. Stokes has pointed out that these proposals adhered fairly closely to the original utilitarian programme (Stokes 1959: 254).

The revived or Second Law Commission set up as a result of the Charter Act of 1853, while containing many of the figures of the earlier age of reform, came out with a report that was much more conservative in comparison to its predecessor. The report of the Second Law Commission did spell out the need for a codified body of civil law. However, the commission also felt that the basis of such a codified body should be simplified English law and that certain adjustments and modifications may have to be made for Indian circumstances. Stokes notes that Macaulay would have ‘fiercely resisted this anglicist approach’. In this more cautious manner adopted by the Second Law Commission ‘the over-confident Benthamism of 1833’ was abandoned. Also abandoned was the aim of codifying those parts of Hindu and Muslim law which would have to be retained as exceptions to the general body of substantive civil law (Stokes 1959: 258).

It is ironical that the draft Code of Civil Procedure prepared by Frederick Millet for the First Law Commission in 1835 and which had so impatiently and almost contemptuously been put aside by Macaulay on the plea that a better draft could be produced by the Law Commission, was again brought back 18 years later in Dalhousie’s time. Millet’s draft was a digest of the Bengal Regulations. His work was to be used when Dalhousie appointed two special commissioners for revising the Code of Civil Procedure. All these efforts culminated in its becoming law as Act VIII of 1859. The most famous of the Indian codes was the Penal Code enacted in 1860, which was
essentially Macaulay's draft that had been initially published in 1837. Macaulay after seeing his draft Penal code finally assuming the form of law expressed great satisfaction that his efforts in this direction were not wasted and that they did finally bear fruit.

Codification of the law remains one of the outstanding and lasting legacies of the Utilitarians in India. Much of Indian law with the exception of religious personal laws was codified and the sheer volume of work that this entailed is a testimony to the perseverance with which the task was undertaken. The end product of codification, while definitely not as grand in scale as Bentham had envisioned, leaving out as it did Hindu and Muslim personal law, was nevertheless inspired by the man. Stokes notes:

At the head of the body of Indian codified law stands the trinity of the three principal codes – the Penal Code, the Code of Civil, and the Code of Criminal Procedure – all of which were enacted between 1859 and 1861. They had long been meditated, but it took the Mutiny to end the twenty years of delay and hesitation and to prompt the Indian Legislature to act with decision and energy (Stokes 1959; 258).

What were the effects of Bentham's emphasis on codification of laws especially on legal systems in the colonies? The net effect of such codification was to create a certain fixity and rigidity within native systems of law above which the British superimposed their own modern system of jurisprudence. This imparting of rigidity and rendering of native systems of law as inflexible would serve to 'reify' such law and thereby make them a source of much oppression for individuals who were governed by such law. Further, the effects of such rigidity and 'reification' were to lead to oppression especially in the domain of private laws that pertained to the civil realm of the law. As a result of the negative effects of codification being especially felt in the personal domain it was obviously women who were to suffer the most oppression (see Nair 1996: 41 see also Sangari 1995).

Interestingly, Nivedita Menon has cast doubts on the ability of the law to pursue justice. She further questions whether justice can be conceptualized in universal terms. More pertinently, for this study, Menon argues that rights are not universal and based on a generally accepted moral order. On the contrary rights come into being within specific sets of shared norms of justice and equality. It is in particular the fixity and certitude of
the law which Menon feels eliminates the emancipatory potential of rights (Menon 1999: 262-63). Menon’s argument is that the operation of the legal discourse since the British institutionalization of a modern legal system resulted in the creation of a fixity and rigidity that ‘halt the play of meaning and contexts which give rise to rights’. The very understanding of law changed fundamentally with the British conquest with legality replacing authority. With the emphasis in the new system on legal precedents, judgments did not entail a mere end to a dispute, as in the earlier medieval system, but became a source for law (Menon 1999: 273).

Rudolph and Rudolph have noted that the great wave of codification of laws indeed left the realm of personal law intact, yet even here the reformation of the personal laws ‘led towards uniformity within each compartment’. The assertion that there was only one Hindu and Muslim personal law was an act of homogenization. They have noted in this regard that the personal laws of lower and upper caste Hindus are different. Similarly, the passing of the Shari’at Act in 1937 was to damage the numerous other personal laws of Muslim communities that constituted minorities within Indian Islam. These were the Khojas and Cutchi Memons of Gujarat and the Muslims of North West Frontier Province, all of whom followed Hindu laws of inheritance, and the Malai Muslims, who followed matriarchal laws of inheritance. The anomaly of Muslim personal law can be gauged from the fact that it purports to bring under one umbrella law a number of disparate groups but belonging to different Islamic sects. Thus, there are the Hanafis, the Shafis, the Shiite, non-Sunni schools of Islamic law such as the Ismailis, or even the unorthodox Ahmadiyas (Rudolph and Rudolph 2001: 52, Derrett 1968: 513).

The important point to note here is that while the system of personal laws for religious communities was meant to guarantee and protect the much vaunted idea of ‘difference’, it was at the very same time eliminating differences that existed within minority groups. This brings in the tricky question of ‘minorities within minorities’ and how provisions for minority protection could actually be harming these smaller minority groups that are part of a larger group that has been extended provisions for minority protection (Eisenberg and Spinner-Halev 2005).

The argument being made here is one that has been made in a more rudimentary form in an earlier chapter regarding the distinction between the private and the public
domains and which is being extended and developed in this chapter. The codification of laws under the influence of Bentham was to have the most far reaching effects in the sphere of civil law and most significantly in the areas of family law and property law. One can begin to see the connection between the argument made in the earlier chapter. The distinction between the private and the public spheres and the reinforcement of conservative tendencies in the private under the influence of Burke is further bolstered by the effects of codification under the inspiration of Bentham. In this manner the effects of the first two vertices of the triangular theoretical framework explained earlier can be seen. There was a dialectic of difference/pluralism and similarity/uniformity operating. The net effect of this dialectic was to constitute the country, especially northern India into large blocks of religious communities. The continuation and viability of these large groups was guaranteed by means of their separate and distinct personal laws. However, the idea that such a visualization of the country was guaranteeing and promoting difference is deceptive as these larger blocks were strangling the smaller minority groups within them.

Indeed the effects of codification could be pernicious. The effects were felt differently in different sections of society. Janaki Nair observes that the effects of codification held 'contradictory promises' for Indian women. On the one hand it offered an escape from oppressive social practices, while on the other it imposed a Brahmanic code that cut into certain customary privileges. Nair is very clear that the overall effect of codification imposed a certain homogenization, in line with the demand for uniformity that codification entailed. This homogenization was nothing but a 'Brahmanisation of Indian law at the expense of customary law'. She further argues that 'an invidious distinction' was created and retained between the spheres of 'personal' and 'public' law and that this distinction operated to the disadvantage of women's rights within the family (Nair 1996: 41). The effects of codification were felt differently in different sections of society. In the realm of Hindu law, the net effect was to impose a high cultural Brahmanism that pretended to be and based its legitimacy on the claim of being an antique universal tradition.

The pernicious effects of codification were also experienced in the case of Muslim law which as a result of being overlaid by the effects of codification and
regulation became, according to Scott Alan Kugle, a ‘reified and static entity captured in a paradox’ (Kugle 2001: 258). The paradox that Kugle refers to here is Anglo-Muhammadan law. Kugle is concerned to show the manner in which Islamic law was transformed into something that could be barely recognizable. Referring to Anglo-Muhammadan law as a ‘hybrid and oxymoronic term, Kugle goes on to observe that the term encapsulates the Orientalized limitations imposed on Islamic law and its gradual buttressing by Anglo legal concepts (Kugle 2001: 266).

Kugle further argues that the process of codification and systematization led to the introduction of Orientalist presumptions and utilitarian ideals that had the effect of making the Muslim law remotely resemble what South Asian Muslims had earlier implemented as Muslim law. The process of codification was closely bound up with the needs, requirements and administrative convenience of the modern colonial state. The requirements of such a centralizing colonial state ‘ultimately separated Anglo-Muhammadan law from Islamic fiqh or even eighteenth century English common law’ (Kugle 2001: 259). The process that led to this reification of Islamic law, according to Kugle, was the division that was created between substantive and procedural law. Thus, the British system imposed a formal rationality upon Islamic law that was to mark a shift from substantial rationality to a formal rationality. The indigenous codes provided the substance of the law, and the British state provided the procedure which administered this substance. Kugle argues that the ‘procedure through which the shari`ah was implemented subtly enframed and reshaped the content of Islamic jurisprudence’. He further argues quite forcefully that ‘A system of law cannot be divided between substance and procedure and retain its former character and use’ (Kugle 2001: 280).

It is especially with regard to the Islamic legal device, the fatwa, that Kugle has a number of interesting observations to make. The word fatwa of course has now become widely known in the West especially since the infamous fatwa that was decreed by Ayatollah Khomeini ordering Muslims to kill the British novelist Salman Rushdie for the offensive and blasphemous remarks that he made against the Prophet and Islam in his novel The Satanic Verses. He argues that the British system of jurisprudence ‘shackled fatawa on the structure of case law’, and that once this happened ‘the fatwa lost its creative function’. The fatwa as it developed in Anglo-Muhammadan law was very different from the fatwa in classical fiqh or Mughal jurisprudence according to Kugle. The Anglo-Muhammadan fatwa determines guilt or innocence in a particularly rigid manner and this is done in a specific case and according to a fixed standard codified in legal hand-books. Earlier the fatwa had never been applied in this particularly rigid manner to a specific case. The fatwa or ‘counseling’ in pre-British times was an extension of the law. It was also non binding, could be sought from a number of jurists, and it was also detached from specific cases (see Kugle 2001: 285-86).
Apart from the divorce that was created between procedural and substantive law, a separation that Kugle has argued led to the complete transformation of Islamic law into something at times even beyond recognition, Kugle also observes the enforcement of a dichotomy between public and private spheres. This split, Kugle argues, was enforced through “Islamic law” and this was a dichotomy that had not been previously prevalent.

Two major legal interventions of the British were in prosecuting theft and regulating *awqaf* (plural of *waqf*) grants. These provide excellent examples (one from criminal cases and one from civil cases) of how the public/private dichotomy was injected into the substance of Islamic law and how the British incorporated fiqh into an Anglo-Muhammadan system (Kugle 2001: 291).

The idea put forward was then of an individual living in an abstract society, the poles of which were mediated by a centralized state. Such a state was assigned the role of patrolling religious or social institutions which were defined as public. The novelty of this distinction between the private and the public spheres could be seen in the case of *Abul Fata v. Russumoy Dhur Chowdhury* in which the British Magistrates overrode the opinion of the famous Muslim Justice Amir Ali. Justice Amir Ali argued that family *waqf* grants were valid as charitable institutions. This opinion he backed up with a long tradition of medieval decisions and by *hadith* (sayings of the Prophet) which recorded that the best charity is supporting one’s family and dependents in need. The opinion was rejected by the British Magistrates on the ground that Justice Amir Ali was returning to the original texts in order to extract a new law. While such a method of resorting to original texts was of course the traditional method in which *fiqh* had developed, it was illegitimate procedure in Colonial courts which relied on their body of codified law. Here again can be seen the separation between procedural law and substantive law with the procedural law of the British given pre-eminence over the substantive law of the shariah. More significantly, the British magistrates presumed the existence of a private and public distinction, a distinction that the institution of the *waqf* contradicted very clearly (see Kugle 2001: 287, footnote 92).

The British tried to portray themselves as the successors of Mughal rule. But such portrayal was more symbolic. In actual terms there were a number of changes that were
brought into the system of governance. One of these was law, with the British frequently criticizing the way the Mughals administered justice according to the Shariah. Kugle has the following observations to make with regard to the changes that the British made to the Mughal system and their own introduction of new concepts:

A British notion of "natural law" or "humanity" replaced Mughal custom as the vehicle through which shari'ah was administered. "Humanity" assumed that people acted principally as individuals, rather than as religious or corporate groups; "natural law" presupposed the existence of society in an abstract sense, which can be disciplined into efficiency and productivity.

(Kugle 2001: 288)

Citing Marshall Hodgeson's modern classic The Venture of Islam Kugle points out how intervening groups based on personal contacts, such as had existed, now stood to relative impotence. They were replaced by functional groups that were different from the earlier groups based on personal contacts. The state was to now deal directly with the individual, a mode of interaction between the state and the individual that had been unprecedented in large territorial societies.

The British propensity, in line with the Orientalist and Burkean understanding of Indian society, was to view it as constructed of discrete almost mutually exclusive groups. However, with the emphasis, now placed by the British on crime affecting the larger public interest, the state came into direct contact with the individual subject, cutting through identities and claims which came in the way. This created the possibility of conflict. This is in contrast to the early years of company rule when 'the law was expounded with a Burkean rhetoric of reconciliation with the "laws and customs of the people"' (Singha 2000: ix).

However, inspite of the change in the nature of the laws, especially as the criminal laws changed and 'extended colonial magistracy into the household, a countervailing set of regulations defined a boundary against intervention'. As a result of such a defining of a boundary against intervention, a distinction was created between matters of personal right that were to be dealt with in the civil courts through the religious laws of the concerned parties, and matters of public interest that were placed under magisterial authority (Singha 2000: 121).
In spite of the judicial system giving rise to a direct and unmediated relationship between state and individual, the Utilitarians were inclined to give some degree of importance to the group. Firstly, there is in Utilitarian political thinking a tendency to emphasize the collectivity more than the individuals who form a part of that collectivity. Second, when it comes to customary law, Bentham took cognizance of the group and the element of intersubjectivity and interaction within the group. The conception of customs in Bentham, builds on the foundation laid earlier by Hume and raises a question that Hume missed out: ‘what is the relationship between the general normative proposition formulating the practice of a group and the actual behaviour of the members of the group engaging in the practice?’ (Postema 1986: 229). The point here is Bentham’s particular attitude towards the group and the manner in which it is conceptualized. Such an attitude is advantageous to the group in the sense that it takes cognizance of the existence of the group. Such an approach was conducive to the continued flourishing of the group. Third, Bentham was greatly opposed to ideas like natural rights and natural law, which are premised upon a certain strong assertive individualism. This is another reason for the greater emphasis that is to be found on the group in Bentham’s writings in particular.

To sum up some of the important points in this rather extended debate. The British created a system of jurisprudence that was premised on the state interacting with the individual directly, with such interaction not being mediated by an intermediate social group as is usually the case in large ‘agrarianate’ societies. However, at the same time the British, under the influence of Orientalist scholars, continued to view Indian society not as being constituted by individuals but by discrete groups conceptualized as rigidly bounded entities that were also mutually exclusive. The British system of jurisprudence also created a hitherto unknown dichotomy between a private and a public domain and presumed that all people who entered the public domain did so as private citizens. Under this framework, crime and the need for maintaining law and order, in accordance with the British insistence on upholding the ‘rule of law’, were matters of public interest and hence the duty of the state.

Kugle has argued that with the growing influence of Anglo-Muhammadan jurisprudence all the elements of overtly Islamic practice were eliminated from the realm of public law (Kugle 2001: 301). However, crime was generally not considered under the
system of Islamic jurisprudence to be a matter of violating public order. Crime was only to be punished if the victim's family came forward with a complaint and focused too excessively on the consequences of the criminal act and on claims made by the injured party for retribution or compensation, instead of focusing on the harm that it had done to the public interest (Singha 2000: 53). In case the injured party did not come forward with a complaint, the state would not take cognizance of the crime.

We find that the effects of codification and the creation of a legal system as a whole had a number of ambivalent and contradictory tendencies when it comes to a creation of the group. In spite of the creation of a modern system of jurisprudence, premised upon individual rights that guaranteed protection against the state, this apparently emancipatory and strongly individualistic element coexisted with some degree of group affirmation. This was to be found in the recognition that was accorded to groups and specifically religious groups with their own personal laws. The British tried to codify these personal laws, but the efforts went in vain and the issue of personal laws, that is, whether they should be continued or dissolved in favour of an inclusive and more comprehensive Uniform Civil Code remains one of the most contentious issues for a multicultural India.

*Bentham on Natural Law and Rights.*

Law for Bentham was an artifice, a human creation rather than something natural and pre-given according to the understanding of natural law theory. Bentham thus has a very clear view about the nature of law. It is a command or imperation that issues from a sovereign and the legitimacy of the law or its validity flows from the source from which it emanates. 'We are come now then to a law. A law is a command. It is a species of command. Thus much we must conceive of it on all occasions, to conceive clearly. Every thing that is not a command therefore is not a law'. Bentham provides here a very precise and unambiguous definition of what constitutes a law. Any command that does not issue from the sovereign or which is not a body that has been delegated the power to issue such a command in the form of legislation is not accepted as valid. Bentham further lays
down: ‘But a command is an act of a being that is endued with mind. It is an act of the mind. And a law is a command’ (Bentham 1973: 149).

Bentham also differentiates between a law and a custom: ‘A custom therefore is not a law. For a custom is an assemblage of acts in some respect or other uniform; or else it is the uniformity there is between those acts. *But a law is a command* (Bentham 1973: 150). However, every command is not necessarily a law, and this brings in the importance of the source of laws:

41. A law then is a command. Nor yet is everything that is a command a law. Commands there are that in common speech do not go by the name of laws. If then a command is not a law; it is on account of one or other of three particulars, in which the sort of command that is a law is understood to differ from those that are not. These are, its source, its substance, and (or) its formalities.

42. By the source of a law, I mean the person or body of persons whose command it is.

43. A body of persons, styled commonly for shortness sake, a body, is an assemblage of persons acting in a body. An assemblage of persons are said to act in a body, when every act they do is first willed by the greater number of them, the wills of the lesser number being ineffective.

44. By the substance of a law, I mean the sign or assemblage of signs, viz: the words expressing the command, and the act or assemblage of acts that is the object of it.

45. By the formalities of a law, I mean those transactions or other circumstances extrinsic to the law itself, on which depends, whether it shall be taken to have issued from that source, from which in itself it purports to have issued (Bentham 1973: 155).

Not only is the proper source for the emanation of the law important, as to its validity and legitimacy, but the following of proper procedures or the right recipe in the framing of the law, is also considered to be important. Bentham throughout his career and in his reflections and theorization of laws was concerned with one central issue. This was what constituted a single, complete, integral law. He sought in the concepts of
completeness and individuality of laws a key to the nature and structure of law. It is this methodological point that distinguishes Bentham’s positivist conception of law from its Common Law and Natural Law rivals (Postema 1986: 428).

The idea of a law and what makes the law legitimate is intimately linked to Bentham’s idea of sovereignty. His conception of sovereignty is not the conventional view which visualizes sovereignty as being absolute and indivisible. In fact, he discusses specific instances in which sovereignty is divided and delegated as in federations (see Hart 1982: chapter 9). Most of Bentham’s discussions on sovereignty can be found in his Fragment on Government. His doctrine of sovereignty was further extended and deepened through his other work Of the Laws in General. This is done by Bentham’s extension of the scope of possible exceptions to the doctrine of unlimited sovereign power. He not only drew attention to federative arrangements among sovereignties e.g., the Netherlands, but also to constitutional arrangements dividing power within a single state and even substantive limitations, e.g., on legislation interfering with religious practices (ibid.: 250-51).

It is precisely in this idea of a limited sovereignty in Bentham’s writings that one can locate the possibility of a flourishing of groups, group life and in general what is referred to as ‘groupness’. It was the idea of absolute sovereignty, conceived by Austin, and with which Bentham disagreed, that was targeted by thinkers like the English pluralists. The English pluralists felt that this particular idea along with its associated ‘concession theory of groups’ that saw groups as existing at the behest of the sovereign state led to the systematic devaluation of sub-groups within the state. It therefore had harmful consequences for the continued flourishing and existence of groups (see chapter 1).

It is this idea, and along with it, the relatively lesser emphasis in utilitarian thought as a whole towards the individual and the emphasis instead, on the greater cumulative utility of the social collective that is being used here to understand the influence that utilitarian thought has had on the study of groups. The conclusion being drawn is that utilitarian thought encouraged the flourishing and continued existence of the groups and this happened often at the expense of the individual, whose interests could be overridden in favour of the group. To reiterate, the idea of India being constituted of
groups, that were internally homogeneous, externally bounded and mutually exclusive in
terms of individual membership was an idea that arose from Burkean thought and
Orientalist influences on India.

Utilitarian rhetoric, in spite of being radical in terms of its commitment to reform
and opposed to the conservatism that Burkean thought gave rise to, did not, indeed could
not, undo the particular idea of Indian groups that had gained ground from the end of the
18th century. The reason why utilitarian thought could not undo this particular idea of
Indian groups arises from the attitude towards the group and the ambivalence towards the
individual within utilitarian thought.

It would be worthwhile recalling the complaint with regard to utilitarianism that
John Rawls makes, which is that it does not take seriously the separateness of the
individual. A further point related to groups may be added here. This is that while
Bentham may have rejected the idea of a traditional gemmeinschaft like community
attached to the idea of Common Law, however, the idea of community returns in his own
limited notion of sovereignty and the ‘habits’ and ‘dispositions’ on the part of people to
obey the laws. Obedience to the legitimate laws issued by the sovereign are not given by
people on an individual basis, but depend on what Postema calls an ‘interactional’ model
of obedience that exists in a community, with individuals obeying laws only when there
are others doing so as well. This element of Bentham’s theory that Postema has described
as an ‘interactional’ model of obedience to laws offered in community brings in the
essentially intersubjective, community or group aspect of Bentham’s theory of
sovereignty. To compound this particular utilitarian attitude that is on the whole
unfavourable to the flourishing and vitality of the individual is the relatively lesser
emphasis to be found in utilitarian thought on rights, which are often the best device to
protect individuals. Recall the argument that this chapter makes which is that utilitarian
thought has a tendency to devalue central concepts of contemporary liberal theory like
justice, liberty and rights.

Bentham On Rights.

Bentham tended to dismiss extra-legal rights (moral rights, natural rights) as ‘nonsense
upon stilts’. Thus a right could not exist apart from the law, it was only the law which
created the right, and therefore there could be no such thing as a natural right. Bentham makes the point rather emphatically when he says: 'Rights are the fruits of law and of the law alone; there are no rights without law – no rights contrary to law – no rights anterior to the law' (Hart 1982: 82). At times Bentham seems to be making the suggestion that to talk of a right without the law is a contradiction in terms. It is like talking about a 'round square', 'a son that never had a father', 'a species of cold heat', 'a sort of dry moisture' or a 'kind of resplendent darkness'. However there are also times when Bentham talks about rights without the law as being not a contradiction in terms, but as something that is according to Hart, 'criterionlessness' (ibid.).

In a spirit completely opposed to the present day emphasis on rights, Bentham was opposed to using the language of rights in the task of creating and running political institutions. Similar to the manner in which Bentham relegates other central concepts of liberalism, like justice and promotes over them more explicitly utilitarian ideas like security and expectations, he does exactly the same in the case of such a central concept like rights. 11

The influence that Bentham had on a colony like India can be seen in the codification of the legal system. The Benthamite utilitarian influence bequeathed to India a strain of liberalism in which less of a centrality was accorded to a rights based conception. Thus, the liberalism that was to prove influential in the creation of a liberal polity in India was one that did not accord centrality to ideas and concepts like rights, liberty and justice. Further, the utilitarian legacy imparted to India, was one strongly coloured by an authoritarian streak (see Stokes 1959). 12

It is then, the under-privileging of an assertive rights based conception of liberalism along with the authoritarian streak prevalent in utilitarianism that has imparted

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11 Hanna Pitkin (1990) argues that Bentham was extremely ambiguous when it came to the use of terms. She argues that central concepts in his thought like 'pleasure', 'pain', 'interest' and 'calculation' keep shrinking and expanding to suit the argument that Bentham is making. She believes that it is this ambiguity with regard to central concepts as against the simplicity that is claimed on behalf of utilitarianism that accounts for its longevity in terms of relevance.

12 The question of the authoritarianism inherent within utilitarianism and the particular utilitarian legacy that was imparted to India has been dealt with in some detail by Eric Stokes in his study *The English Utilitarians and India*. On this point see especially chapter 4, 'The Utilitarian Legacy' and the discussion on James Fitzjames Stephen's understanding of utilitarianism, with his reliance on the authoritarianism of Hobbes and his criticism of John Stuart Mill for having reneged on the utilitarian principles espoused by Jeremy Bentham and James Mill.
to the rights discourse in India some of the anomalies that this study goes into. One of the
most glaring, to reiterate, is the tendency of the rights discourse to swing decisively in
favour of the group, thereby overriding the rights of the individual. In such a situation
two aspects need to be kept in mind. These are, to repeat, the relatively less emphasis on
a rights based individualism and, second the inherent authoritarianism of the utilitarian
legacy bequeathed to India, which it is argued, makes the group into an oppressive entity.

There are a number of contributory factors leading to such a situation of
overriding emphasis upon the group. The first of these is the conservative understanding
of community used in colonial constructions of the country. This has imparted a
significant communitarian element to the rights discourse. In such a colonial construction
of the country that has constituted it as discrete often mutually exclusive groups,
individuals have been considered to belong to these groups as members. Further, their
interaction with the state has been made possible not on a direct individual basis with the
state, but on the basis of their belonging to these groups. This is the kind of indirect rule

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13 For an important account how communities were constructed during the colonial period see Gyanendra
Pandey’s important work, The Construction of Communalism in Colonial North India, Oxford University
Press, Delhi, 1990. Pandey comments upon how the effects of colonial historiography and sociology were
not able to efface the signs of the local community and its history. He notes that the community by which he
means ‘Indian society beyond the confines of the state’ was able to survive and demand ‘recognition as
a dynamic deliberative and far from insignificant force in colonial India’ (Pandey 1990: 109). Pandey is
also of the firm view that colonialism was not the first major crisis that Indian society had weathered.
Further he argues that Indian society was not one that responded to this moment of crisis passively. Having
rejected the idea that Indian society outside the bounds of the state was essentially passive he proceeds to
comment upon the ‘top-heavy’ nature of the post-colonial state that had acquired its present form as a result
of capitalism’s ‘homogenizing and hegemonizing’ urge to transform the rest of the world in its own image.
Commenting upon the colonial state’s massively disruptive transformatory agenda he notes: ‘No previous
ruling power had sought to appropriate all that was political in the life of the people in quite the same way
as the colonial state’ (ibid.: 110). The really important point that Pandey is making is that the colonial state
was bent upon re-creating and transforming Indian society in its own image that ‘if it had its way, would
leave to the local community nothing but its existence as a geographical, anthropological, to some extent
economic, entity, by assimilating to the colonial state structure every trace of political initiative’. However,
there was a determined resistance to this effort on the part of the Indian state by native society. This
resistance took place ‘at every level, and the assertion of an identity as an autonomous, political, cultural, in
a word whole, community’. Pandey obviously attributes a significant degree of agentiality to the local
communities whose histories he feels are ‘the real alternative to colonialist historiography in the 19th
century’. What stands out in this idea of community are the events that either ‘threatened or affirmed the
community’. Pandey’s account of the construction of the community as a rallying point of resistance
against the transformatory intrusions of the top-heavy colonial state is interesting. He of course feels that
the colonial state in its ‘homogenizing and hegemonizing’ attempts to recreate Indian society failed.
However he seems to attribute an excessive degree of emphasis on the transformatory character and agenda
of the colonial state. There was of course this particular component, but lying in uneasy coexistence with it
was the urge to preserve or conserve Indian society. It is this latter urge that led to the construction of
groups that were conservative entities, that were essentially static and lacking dynamism.

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that characterized colonial British rule in India and has been described by Sandria Freitag as a 'representational mode of governance' (see Freitag 1990; see also Hodgeson 1977).

Bentham's most direct denunciation of the idea of natural rights is found in his essay 'Anarchical Fallacies'. A reading of this essay further reveals that his opposition to the idea of natural rights stemmed from their making overarching truth claims, claims that were made in the abstract. Bentham felt that the very fallacy of a claim lay in its making such large, overambitious and abstract truth claims as something being natural and hence self evident. Before proceeding any further with an analysis of this particular writing of Bentham's, it is important to point out that both of the words in the title of the piece in question 'Anarchical Fallacies' are worth further consideration.

Taking the second word in the title, 'Fallacies', first. The word is a reference to the falsehood and untruth that will inevitably creep into any assertion that is foolish enough to make such grand claims. The word 'anarchical' is a reference to the violent social unrest that is bound to ensue once the denial of these grand, over-ambitious and rather foolish claims are made the basis for insurrection.

Here Bentham's aversion to a violent insurrection or a revolutionary overthrow of the political order is obvious. Similar to Burke, there is in Bentham an opposition to sudden revolutionary changes in the political system. However, the source of their

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14 Marshall Hodgeson in his classic study *The Venture of Islam* has looked at how 'agrarianate' land empires like the Mughal, (one of the three empires that he looks at in the third volume, *The Gunpowder Empires and Modern Times*, the other two being the Safavid and the Ottoman Empires) are ordered not on the basis of the state interacting with its subjects on an individual basis but on the basis of these individuals being a part of different groups. Thus, the indirect rule of the British or the 'representational mode of governance' was a carry over of a largely Mughal 'agrarianate' system. This happened in spite of the fact that the British under the influence of the utilitarians created a modern legal system. The legal system designed by the British was of course individualistic in its orientation, but there were significant elements of native law that were codified by the British and this explains, how aspects of an agrarianate system of ordering the polity that was premised not upon any direct individual state interaction continued in the case of the British Empire. The Millet system is the best and most well known of such forms of indirect state individual interaction with groups or 'milles' mediating in this indirect interaction (see Karpat 1985; Shaw and Shaw 1977).

15 There is also another commonality that is to be noted between Burke and Bentham and this similarity stems interestingly enough from Aristotle. Postema points out the unusual aspects of Bentham's ideas in the 19th century, which are firstly, its elements of the codification movement, while at the same time rejecting the natural law theory upon which it was grounded and secondly, the elements of the theory of equity (Postema 1986: 407). The first aspect regarding the element of codification is something that is dealt with throughout this chapter. Regarding the second aspect, Bentham gave institutional expression to an essentially standard Aristotelian view of the role of equity, in which equitable correction does not always involve a complete revision of the general law in question. Even the best and most general rules may lead to unjust results in a few isolated cases. This will call for slight and careful adjustments whenever the rule
respective oppositions is different. For Burke it is a conservative reliance on the traditions, customs, manners and mores of a society that are subsumed and included in the rather disorderly, but nonetheless important, institution of the Common Law. For Bentham the source of this opposition lies in the fact that such a sudden revolutionary overthrow undermines the security of expectations that reside in proper well formulated legislation.

At the very beginning of his 'Anarchical Fallacies', Bentham observes that the 'Declaration of the Rights of Man' is notable as it 'assumes for its subject-matter a field of disquisition as unbounded in point of extent as it is important in its nature' (Waldron 1987: 46). It is then in the very nature of the 'Declarations of the Rights of Man' with its unlimited and unbounded claims that the source of 'fallacy' and falsehood arises. Thus Bentham argues:

The more abstract – that is, the more extensive the proposition, the more liable it is to involve a fallacy. Of fallacies, one of the most natural modifications is that which is called begging the question – the abuse of making the abstract proposition resorted to for proof, a lever for introducing, in the company of other propositions that are nothing to the purpose, the very proposition which is admitted to stand in need of proof (Waldron 1987: 47)

Bentham's critique of the principles of the Declaration, for being so unbounded, too abstract, and hence liable to give rise to fallacies, should be familiar in more contemporary times in the numerous critiques of claims to universalism and universal rationality (see Pagden 2003; Waldron 1987). While Bentham, was of course very much opposed to the unbounded and abstract claims that were found in the Declarations, his ideas are very different from latter day contextualist notions that question universalist yields such an undesirable outcome. Burke has clearly identified the Aristotelian dictum that lies at the heart of Bentham's theory of adjudication: 'As no legislators can regard the minima of equity, a law may in some instances be a just subject of censure without being at all an object of repeal' (Burke in 'Tract on the Popery Laws', quoted in Postema 1986: 408). The principle of equity requires then small minor adjustments to some of the negative unjust outcomes of otherwise solid well formulated laws. Rather than the baby of the law being thrown out with the bathwater of negative unjust outcomes in few instances, what are needed are minor adjustments here and there. Bentham was a vociferous critic of the institution of English Common Law and differs significantly from Burke as a supporter and upholder of the institution of the Common Law. On the question of law and the minor adjustments that need to be made to the law, Bentham and Burke perhaps come closest in their ideas. This meeting ground between the two thinkers is facilitated by a common Aristotelian understanding.
claims. Such objections lie at the heart of the contemporary debates over rights, especially human rights, the universalist claims of which are often rejected.

Bentham was very particular about the manner in which legislation was drafted. There had to be a certain precision with regard to the usage of words. As opposed to such precision in the use of words, the 'Declaration of the Rights of Man' was notable for its, 'perpetual vein of nonsense, flowing from a perpetual abuse of words, - words having a variety of meanings, where words with single meanings were equally at hand - the same used in a variety of meanings in the same page'. The careless, clumsy manner in which the words were used was, according to Bentham, to have calamitous effects as it was this very, 'same inaccuracy, the same inattention in the penning of this cluster of truths on which the fate of nations was to hang'.

Bentham believed that in a proper scientific manner of legislation there was a particular way in which language should be used. The particularly florid style of prose of the 'Declaration of the Rights of Man' which gave one the impression 'as if it had been an oriental tale, or an allegory for a magazine' was simply the wrong way of drafting legislation. In his insistence to the point of obsession on accuracy, the scientificity of Bentham's ideas on legislation and the positivism that underlay them are obvious. As one who considered himself a specialist in the realm of legislation in the manner of a scientific specialist, indeed the foremost, he declaimed with a definite ring of authority and a certain ominous note warning of calamity, should this go unheeded:

In a play or a novel, an improper word is but a word: and the impropriety, whether noticed or not, is attended with no consequences. In a body of laws - especially of laws given as constitutional and fundamental ones - an improper word may be a national calamity: - and civil war may be the consequence of it. Out of one foolish word may start a thousand daggers. (Waldron 1987:49).

Bentham after ridiculing the French declaration for its prose and farcical claims, proceeds to tear it apart article by article. He mentions somewhere at the beginning that the 'criticism is verbal', but then he queries 'what else can it be?' The point of Bentham's positivist critique is to show that the words used in the French Declaration were nothing but a play of words. He argued that they ended up meaning nothing and that their
question begging propositions with their ‘abuse of making the abstract proposition resorted to for proof’ were mere tautologies.

Apart from the famous dismissal to the effect that the idea of natural rights is ‘rhetorical nonsense – nonsense upon stilts’, the language that advocates of natural rights use is denounced as ‘terrorist violence’ obviously because it stirs up insurrection against existing governments on the plea that the rights of some people have been trampled upon and hence there is a justification and rationale in rising up against the government. Natural rights and the whole insurrectionary logic that they entail are thus premised on a misplaced perception of a grave and inviolable injustice having been done to people, namely an overriding of natural rights. Bentham sees this defense of natural rights as arising from a mischievous intention.

The intention behind such a move cannot be anything but tyrannical according to Bentham. When something so intangible as natural rights are held up as a basis for ordering society, or as Bentham would have it, creating chaos in society, all that has to be done to invoke their authority is by claiming that they are natural and imprescriptible, ‘proof against all the powers of the laws – pregnant with occasions summoning the members of the community to rise up in resistance against the laws’ (Waldron 1987: 54). Bentham queries ‘What then, was their object in declaring the existence of imprescriptible rights, and without specifying a single one by any such mark as it could be known by?’ Bentham is clear about the answer and it is the interest in maintaining society in a situation of perpetual insurrection ‘a spirit of insurrection against all governments – against the governments of all other nations instantly, - against the government of their own nation – against the government they themselves were pretending to establish...’ Bentham then goes onto question ‘What is the real source of these imprescriptible rights – these unrepealable laws?’ and he offers the answer with great certainty when he claims that the source is nothing but, ‘Power turned blind by looking from its own height: self-conceit and tyranny exalted into insanity’. He then comes to the question of who made these rights and he observes that they were made ‘Not by a God – they allow of none; but by their goddess, Nature’ (Waldron 1987: 54-55).
It might seem apparent from some of Bentham’s remarks that his ideas on laws and the excessive importance that he bestows upon them, rule out altogether the possibility of any form of civil disobedience to laws that might be considered to be bad or tyrannical. Such forms of civil disobedience might be in danger of being dismissed by Bentham as springing from an insurrectionary logic. Bentham might also be considered so self-confident in the ability of his science of legislation to craft good laws, that the possibility of tyrannical laws never entered his head. However, Hart has noted: ‘Even in his most panic-stricken moments Bentham remained conscious, as he had been from his earliest writings of the evils that governments use laws to do, and of the need to keep alive the sense that disobedience to laws might in particular circumstances be well justified’. As Hart further notes that in ‘Anarchical Fallacies’ Bentham emphasized that even in England which was a country where one could find the laws in a state of near complete perfection, there should be no indiscriminate obedience to the law. However, what Bentham was opposed to was the hasty conclusion arrived at by many that a law could be disobeyed or disregarded as it resulted in evil. The step from the recognition of the evil that a law may have produced to actually disobeying the law was one that could only be taken after a ‘careful calculation and comparison of the consequences of obedience and disobedience’ (Hart 1982: 80-81).

While Bentham was generally critical of the concept of rights, he did not completely dismiss them and accepted the idea of legal rights, that is those rights that had been created by law. Here again the preeminent significance that is attached to the law in Bentham’s thought should be obvious. Thus, rights that are created by law are considered by Bentham to be legitimate. He thus accepts the legitimacy of such rights and does not completely dismiss the idea of rights per se. The general tenor of scepticism with which rights are considered by Bentham, even though he affirms the validity and existence of legally created rights can be found in the following lines that Bentham wrote:

When you employ such a word as a ‘right’, a cloud and that of black hue overshadows the whole field. To any such word as ‘right’ no conception can be attached but through the medium of a law or something to which the force of law is given. Lay out of the question the idea of law and all that you
have by the use of the word ‘right’ is a sound to dispute about. (quoted in Hart 1982: 83)

This acceptance of legal rights does not constitute a very strong affirmation of the idea of rights. (For a more extended discussion on the affirmation of rights see chapter 4). This can be seen from the fact that in Bentham’s thought, rights do not have an independent importance of their own but their legitimacy derives from the fact that they have been created by the law. Secondly, this devaluation of rights can also be seen from the fact that there is a class of non-legal rights that derive their legitimacy not from the law but from moral sanction and which Bentham would apparently dismiss. Hart believes that Bentham’s ideas and his reluctance to accept non-legal rights do not however prevent him from accepting the validity of rights that are created by human beings and which have the backing and sanction of morality. This kind of expansive reading of Bentham to accept as rights not just legal ones but also non-legal moral rights is facilitated by the sentence in Bentham quoted above and which reads: ‘To any such word as ‘right’ no conception can be attached but through the medium of a law or something to which the force of law is given’ (emphasis added). Hart thus argues that there is ‘no reason why his (Bentham’s) analysis of legal rights as arising from the presence or the absence of legal obligation should not be applied mutatis mutandis to conventional morality’ (Hart 1982: 84).

However, the point that Hart makes subsequently is why Bentham could not have justified non-legal rights on a simple appeal to utilitarianism. In other words why couldn’t he just have accepted ‘a simple utilitarian theory of non-legal rights as something consistent with his adoption of an unqualified utilitarianism according to which it is “the happiness of the greatest number that is the measure of right and wrong”’ (Hart 1982: 85). In this manner rights could be derived from Bentham’s principle of utility and he would have been able to avoid the idea that rights were universal and natural. Obviously Bentham could have taken recourse to the principle of maximizing utility to provide a justification of non-legal rights.

Hart argues that both Bentham, who rejected the idea of non-legal rights altogether, and John Stuart Mill who accepted moral rights, some of which were universal and essential components of justice, did not take recourse to such a simple
direct utilitarian theory of rights. Hart has offered two reasons for this refusal or reluctance on the part of both Bentham and Mill to take recourse to this simple direct utilitarian principle of grounding non-legal rights in utility maximization. One of these reasons is that the content of the rights entitlements would fluctuate with changing circumstances and would thereby be unable to provide the certainty of action to the rights holder and others associated with the exercise of the right. The other more important reason that Hart provides for this reluctance on the part of Bentham and Mill is that ‘it would have broken the connection between the concept of rights on the one hand and coercive obligations on the other which, whatever its precise form, appeared to both Bentham and Mill to be a central feature of the notion of rights’ (Hart 1982: 86).

The problem with these two explanations is that they attribute too much importance to the concept of rights in the writings of a utilitarian like Bentham. In fact Bentham’s utilitarianism consciously devalued the idea of rights. Hart’s explanation attributes a misplaced importance to the whole idea of rights in Bentham. The question of why Bentham did not take recourse to such an obvious alternative that would have been able to maintain the pre-eminence that he attached to utility maximization, while at the same time keeping non-legal rights subordinate to the principle of utility, is a reflection, according to the argument being offered here, of the extent to which Bentham did not attach significant importance to rights.

V. A Concluding Note and Summing Up.

To bring this chapter to some kind of conclusion it is useful to end on the note of rights. Many writers observing the Indian situation especially regarding the whole question of individual rights and rights for groups have argued in favour of an individualistic rights based ethic which ensures that group rights do not frequently ride roughshod over individual rights. Both Bentham and Burke had a significant effect on the construction of groups and the imparting to such groups of a conservative bias (Burke); and the codification of native systems of law (Bentham). This study has argued that as a result of the influence of these two thinkers, the rights discourse has been preponderantly weighted in favour of the group.
The task of the next chapter will be to move the study towards the third vertex of the theoretical framework adopted by this study, namely contractarianism. There is an important difference when it comes to this third vertex. The first two vertices have had a significant influence on the institutionalization of the rights discourse in India. The first two theoretical vertices are characterized by the significant influence that they have had on the rights discourse. The third vertex, on the other hand, is notable for the significantly lesser influence that it has had. The movement towards the third vertex is thus an attempt to search for the possibilities and advantages to be had from a theoretical stream within liberalism that is significantly more hospitable to ideas like equality, justice and rights that are central conceptual components of contemporary liberalism. On the other hand, such concepts are not looked upon with too much favour in Benthamite utilitarianism, which favours other concepts like utility, security and expectations. Rights and justice are certainly two ideas back on the agenda of contemporary political theory precisely because of the movement towards contractarianism and away from utilitarianism that has been taking place within liberalism (Ryan 1987). The design of this study with its triangular theoretical framework and its third vertex being constituted by contractarianism has been created precisely with this movement in mind.

There is one important and relevant concluding observation that can be made about the effects of codification. It has already been observed that one of the ambitious ideas of British reformers in the field of jurisprudence was to enact a comprehensive code that encompassed the whole of the country. The contemporary crisis and controversy over a uniform civil code and the contentious and emotively charged issue of personal laws can be understood in the light of some of the extended discussions on codification and its effects that have been dealt with in this chapter. The sharpest division that brings out the fact that codification was not so all encompassing is the present division between a uniform civil code and the separate codes envisaged for different religious groups (see Rudolph and Rudolph 2001). A movement towards a more individualist oriented contractarian framework would create the possibility of introducing a uniform civil code premised upon the idea of uniform citizenship and thereby facilitating a movement beyond the various personal codes in existence. However, this would immediately bring
in the question of difference as multiculturalists would argue that such a movement would be a denial of difference.

It is important to view the contentious issue of a uniform civil code more as a historical process. The continued existence of religious personal laws can also be seen as a historical unwillingness on the part of a reluctant post-colonial state to effect changes in this regard. The controversy over personal laws stems also from the inability and failure of Macaulay and subsequent British administrators to frame a Code of Civil Procedure. The task of codification, it has already been observed, was a gargantuan one. Indeed, it could be considered almost impossible, such was the volume of the work that it involved. Stokes has observed that the task of codification was simply impossible in the short span of time that Macaulay was present in India. He observes that in 1835 Macaulay was ‘still sanguine although more guarded in his forecast of the labours of the Law Commission’. He had anticipated that the Penal Code would be ready for submission to the Government in the winter of 1836-37; that the Code of Criminal Procedure would be completed during the course of 1837; and that by the beginning of 1838 the Law Commission would be in a position to begin framing the Code of Civil Procedure. Stokes further observes that there was an element of obstinacy in Macaulay’s attitude. He was postponing the question of civil procedure to a date when he knew that he would probably no longer be in India.

This goes to show that Macaulay and the British were unable to bring to completion the task of framing the Code of Civil Procedure. Stokes observes with regard to Macaulay’s disappointment: ‘That grandiose conception of a pyramid of codes, which had inspired him in 1833, had faded into the future he could not control. The scheme of judicial organization and procedure, about which he had been so hopeful in June 1835, was by 1836 tacitly admitted to be impossible of achievement during the years that remained to him in India’ (Stokes 1959: 213). By the end of 1836, the most that the Law Commission could hope to achieve during his period in office was the preparation of the Penal Code.

The task of codification of the civil law remains unfinished even today. One of the important factors contributing to the inability to actually bring about the codification of the civil law was of course the logistical dimension, the fact that the task was made impossible by the sheer volume of detail that had to be taken into account. The other
factor leading to the inability was a more political and less technical one. This was the need to protect diversity. Such a sentiment is summed up in the following quotation from Macaulay:

We do not mean that all the people of India should live under the same law; far from it... We know how desirable that object is; but we also know that is unattainable. We know that respect must be paid to feelings generated by differences of religion, of nation, and of caste. Much, I am persuaded, may be done to assimilate the different systems of law without wounding those feelings. But, whether we assimilate those systems or not, let us ascertain them; let us digest them. We propose no rash innovation; we wish to give no shock to the prejudices of any part of our subjects. Our principle is simply this; uniformity where you can have it; diversity where you must have it; but in all cases certainty. (emphasis added; Quoted in Stokes 1959: 220).

The important point to note here is that the imperative of 'uniformity where you can have it' and 'diversity where you must have it' has prevented the possibility of a uniform civil code from being enacted. The uniform civil code has become one of the most contentious issues in the last two decades in the politics of the country with the juggernaut of the Hindutva movement being able to steamroll the minorities and especially the Muslims with the fuel provided by the issue of the non-applicability of the uniform civil code so far. However, the issue of a uniform civil code and its non-applicability can also be understood not just in terms of the imperative of protecting diversity. It can also be understood in terms of the inability to draft a blueprint of what a possible future code is to look like and hence in terms of a lack of political will. This explains why the issue remains one that has been raised only at the rhetorical level without any actual substantive debate. The Uniform Civil Code needs to be seen more as a historical process that may have been set in motion but which has been stalled as a result of unforeseen political exigencies. The future prospects of a uniform civil code presently appear on the bleaker side owing to the emphasis on difference that predominates and it is difficult today to speak about such a code in the confident tones that liberals assumed in earlier decades (see Derrett 1968).