

Mapping Colonial Rule of Law in the Contemporary Commonwealth

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Project Description:

Law was always central to the colonial project, as whatever the claimed or proven objectives of colonisation; law was required to achieve the aim.¹ As a project, colonisation required law to establish order in a form that was intelligible to the colonisers and adapted or adaptable to its core aim of expropriation;² what Benton refers to as ‘the politics of legal ordering’.³

Across the Commonwealth, the contemporary tenor of law, constitutionalism and the rule of law in virtually all commonwealth countries are strongly influenced by the legacy of colonial rule.⁴ British colonial political and legal arrangements have shaped and, to varying extents, continues to influence understandings and application of law. Colonial legacy shaped the construction of law, contemporary law making and administration of justice not only in the past, but this has endured in fundamental ways across Commonwealth countries in the post-colonial era.

One important example of a feature of colonial rule of law is the disallowance of legislation. This exercise of executive power constituted one of the active measures of imperial control, and authority over the colonised.⁵ This power has not only endured the in the post-colonial era, but is flourishing in many Commonwealth jurisdictions.

¹ Tomlins, Christopher ‘Law’s Empire: Chartering English Colonies on the American Mainland in the Seventeenth Century,’ in Diane Kirkby and Catharine Coleborne (eds) *Law, History, Colonialism: The Reach of Empire*, (Manchester University Press, Manchester 2001) 26-45, 38; Kris Manjapra *Colonialism in Global Perspective* (Oxford University Press, Oxford 2020) 53-54.

² Kris Manjapra *Colonialism in Global Perspective* (Oxford University Press, Oxford 2020) 53-54.

³ Lauren Benton *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*. Cambridge, UK: Cambridge University Press, 2002. Benton 2002, p. 253

⁴ Hakeem O. Yusuf and Tanzil Chowdhury ‘The Persistence of Colonial Constitutionalism in British Overseas Territories’ *Global Constitutionalism* (2019) 8 (1): 157-190.

⁵ David Fieldhouse *The West and the Third World* (Blackwell Publishing Oxford 1999) 77-78.

Another feature of colonial law that has endured across the Commonwealth is the Peace, Order and Good Government power (POGG). The POGG power has been a considerably versatile power in Commonwealth constitutionalism. With its origins in the royal prerogative of the British monarch, the POGG power is a common feature of Commonwealth constitutions. The power has played a significant role in colonial and post-colonial constitutionalism in Commonwealth jurisdictions and continues to wax strong in the Constitutions and in some cases, legislation, of Commonwealth countries. Indeed, there is a fairly-well established legislative, constitutional and judicial notion that the POGG power is a critical mechanism for moderating contending jurisdictional claims in federal states. The POGG power has remained entrenched in both constitutionally sophisticated, advanced democratic Commonwealth countries from Canada to Australia and from Nigeria to India.⁶

The provenance and implications of the colonial origins of the two foregoing examples in the postcolonial commonwealth remains an under researched theme. This research project seeks to fill some of this gap through a comparative study that maps and interrogates the nature of such powers and their application in the contemporary commonwealth. It will examine to what extent contemporary national constitutions and legislative arrangements have adopted, adapted and/or continue to recognise colonial rule-originated concepts. It will question the continued relevance and justification or otherwise, of such concepts in an age of liberal democracy, human rights and representative governance.

Some of the questions that the research could examine are:

1. Is there any affinity between contemporary and imperial practice of disallowance from a conceptual and practice experience?
2. What, if any, is the system or policy design of the disallowance of legislation in contemporary practice?
3. How does it compare with the imperial application of disallowance?

About the Supervisors:

Professor Hakeem Yusuf's research expertise is in global law with specific focus on transitional justice and the rule of law; human rights; colonial constitutional legal history. He has published award winning research on (post) colonial constitutionalism (<https://www.osgoodesociety.ca/about-us/fellowships-and-awards/>). Hakeem has, or is currently advised the governments of two commonwealth jurisdictions (Nigeria and Gibraltar) on constitutional law matters.

⁶ Hakeem O. Yusuf *Colonial and Post-Colonial Constitutionalism in the Commonwealth Peace, Order and Good Government* (Routledge Abingdon 2014).

Professor Simon Lee has expertise in jurisprudence and his research focuses among others, on law, ethics, politics and history.