The rule of law and racial difference in the British Empire

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Abstract:

This chapter begins by discussing the history and some modern conceptions of the doctrine of rule of law (RoL) before turning its attention to the development and deployment of the doctrine within the British Empire. Firstly, we examine how the British legal experiments in the colonial setting impacted the modern British idea of RoL as put forward by theorists such as A.V. Dicey. Secondly, we analyse the ways in which the doctrine of RoL was used to establish and legitimise British colonial rule. In the second half, the chapter argues that RoL and the rule of empire are inherently incompatible. Far from instilling equality between the coloniser and the colonised, RoL in the British Empire was predicated upon regimes of colonial and racial difference that advantaged the ruling race. Contrary to widespread belief, the creation of this racial difference was not the work of a few corrupt officers, nor was it a mere side-effect of the colonial legal order, rather the British claim to follow RoL in the colony actively worked to instil, preserve, and obfuscate inequalities based on race.

1. Introduction

The concept of the rule of law (RoL), and its utility, remain hotly debated in public law. The only thing that scholars agree on is the fact that there is no universal definition of the concept. Imagined positively, RoL is depicted as an aspirational ideal, one that is often linked to ideas of justice, equality, and from the 20thC onward – democracy. When viewed negatively, the same RoL 'is seen as an ideological mask of

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oppression',[2] that is, a tool that helps to facilitate the oppressive and unequal nature of the law while allowing the latter to conceal this inequality. In fact, to call RoL 'ideological' is to admit that the concept helps to hide and supress the activities that happen in its name.[3]

The rule of law is often studied alongside the two other key constitutional principles in the United Kingdom (UK) – the separation of powers and parliamentary sovereignty. The historic development of the doctrine in the UK including the influential works of A.V. Dicey, the distinction between formal and substantive ideas of RoL, and the contributions of scholars such as Joseph Raz, Richard Dworkin and Tom Bingham, are all well traversed grounds. What scholars in the genre have ignored however, is the centrality of the RoL doctrine to Britain's colonial project in centuries past, and the ways in which ideas of law, and indeed, RoL, have long been used to shore up the moral legitimacy of British colonialism while hiding its exploitative nature.

In this chapter we will examine the history of the doctrine of RoL and its relation to the British Empire through three inter-related concerns. Firstly, as it developed in the heyday of the Empire, how was the modern British idea of RoL as put forward by theorists such as Dicey impacted by British attempts to rule far and distant lands? Secondly, how was the doctrine itself used to establish and legitimise British colonial rule? And thirdly, considering the policy of colonial and racial difference that was inherent to the process of colonisation, could RoL ever be fully established in the Empire?

2. A short history of the rule of law

The earliest conceptions of RoL can be traced back to Greek civilization, where as early as the 5thC BCE there was an idea of democracy and equality before the law.[4] However, this was a limited equality, and women, children and enslaved people were excluded from its domain. Central to this imagination of RoL was its opposition to the

[2] Peerenboom, R. (2004) 'Varieties of rule of law: An introduction and provisional conclusion', in R. Peerenboom (ed), *Asian Discourses on Rule of Law: Theories and Implementation of rule of law in twelve Asian countries, France and the US*, London: RoutledgeCurzon, 1-53, 1.
[3] McBride, K. (2016) *Mr Mothercountry: The Man who made the Rule of Law*, Oxford: Oxford University Press, 12.
[4] For a discussion of the classical European origins of the rule of law see Tamanaha, B.Z. (2004) *On the Rule of Law: History, Politics, Theory,* Cambridge: Cambridge University Press, Ch 1.

rule of the despot (that is, rule of a single ruthless human being), and this figure was essentialised by Greek authors, such as Aristotle, as the 'Oriental despot'.[5]

The idea of RoL as we know it today began to coalesce in Europe in the Middle Ages. In Britain its earliest conception is linked to the Magna Carta 1215,[6] particularly the section stating that no one could be deprived of property except in accordance with the 'law of the land'.[7] However, it is important to note that many of these protections were only afforded to the propertied classes, and most of the population was excluded from its remit. This conception of RoL slowly evolved to become an integral part of modern liberalism (and as critics argue, modern capitalism)[8] and is the basis of the current doctrine of RoL.

Today, RoL is most closely associated with the works of the British jurist A.V. Dicey (1835-1922) who articulated, though he did not originate, [9] the modern idea of RoL at the end of the 19thC.[10] Dicey argued that the supremacy of law had been a characteristic of the English constitution ever since the Norman conquest,[11] and was distinguished by three features which he used to formulate his definition of RoL: firstly, the absence of arbitrary powers of the state, i.e. no person was punishable except for a distinct breach of the law; secondly, legal equality amongst people of all classes, i.e., every person is subject to ordinary courts administered by ordinary tribunals; and lastly, that the general principles of constitutional law had developed as part of common law rather than attributed to a written constitution.[12]

[5] Venturi, F. (1963) 'Oriental despotism', *Journal of the History of Ideas* 24(1): 133-142, 133.
[6] Dallmayr, F. (1990) 'Hermeneutics and the Rule of Law' *Cardozo Law Review* 11:1449-1469, 1452.
[7] The Magna Carta 1215, Cl 39.
[8] For instance, see Unger, R.M. (1976) *Law in Modern Society: Toward a Criticism of Social Theory*, New York: The Free Press; and Tamanaha, B.Z. (2008) 'The Dark Side of the Relationship between the Rule of Law and Liberalism', *NYU Journal of Law and Liberty* 3: 516-547.
[9] Simpson, A.W.B (2002) *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford: Oxford University Press, 25-26.
[10] See Dicey, A.V. (1889) *Introduction to the Study of the Law of the Constitution* (3rd edn), London: Macmillan and Co.
[11] Dicey (1889) 171.
[12] Dicey (1889) Ch 4.

Dicey was writing at a time when the British Empire was rapidly expanding[13] and many of its moral and legal claims were being debated in Britain and in the colonies. Dicey himself was a frequent participant in these debates, and in some of his writings he recognised that RoL when imposed by one society on another may itself be 'arbitrary and oppressive'.[14] However, for Dicey, the problem did not lie with the doctrine of RoL, but was based on his assumption that certain civilisations were too 'backward' to appreciate the benefits of the doctrine.[15] Despite these reservations, he held a positive view of the British Empire and its commitment to RoL, even noting that: '[t]he one permanent, certain, indisputable effect of English government in the East has been the establishment of the rule of law'.[16]

Thus, we see that, not only did Dicey popularise the doctrine of RoL, he was also instrumental in 'identif[ying] it with the English way of life'.[17] However, scholars such as Judith Shklar are critical of Dicey's intervention and have labelled it 'an unfortunate outburst of Anglo-Saxon parochialism' and blamed him for both traditionalizing and formalising the concept.[18] That is, Dicey's intervention cemented the claim that the doctrine of RoL had emerged out of British tradition and that only particular procedures or practices, such as the common law system that developed in Britain, were suitable for it's development. Dicey's exposition on the subject coincided with the accelerated expansion of the British Empire, with the ideology of RoL subsequently being projected as a necessary companion and exemplary benefit of this Empire as it spread across the globe.

As Hugh Tulloch notes in his critique of Dicey and the latter's attitude towards demands for greater rights by the Irish: '[I]t is impossible not to detect in Dicey's own writing an air of narrow and stultifying paternalism, and a rigid adherence to the letter

[13] The British Empire established its earliest colonies in the 16thC in North America. The Empire expanded rapidly in the 19thC before peaking in the early 20thC covering a quarter of the world and ruling over more than 450 million people.
[14] Lino, D. (2018) 'The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context', *The Modern Law Review* 81(5): 739-764, 743.
[15] Lino (2018) 743.
[16] Dicey, A.V. (1880) 'Wheeler's Short History of India' quoted in Lino (2018) 762.
[17] Weiner, M.J. (2009) *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870–1935*, Cambridge: Cambridge University Press, 8.
[18] Shklar, J. (1987) 'Political Theory and the Rule of Law' in A. Hutchinson and P.J. Monahan (eds) *The Rule of Law: Ideal or Ideology*, Toronto: Carswell, 1-16, 5. Also see Kirby, J. (2019) 'AV Dicey and English constitutionalism' *History of European Ideas* 45(1): 33-46.

rather than to the spirit of the law.'[19] In fact, Dicey's attitude towards the movement for Irish home rule shows that he was even willing to forego his commitment to the letter of the law in order to oppose greater rights for colonised people. Dicey remained steadfastly opposed to Irish home rule and any break-up of the Union, going so far as to champion armed rebellion by the Irish Unionists.[20]

Here, Dicey's thoughts are in keeping with most British jurists and philosophers of his time. The idea that colonial rule was not about the economic and racial exploitation of the colonised people but about something else 'was a persistent theme in the rhetoric of colonial rule itself.'[21] This something else was the 'civilizing mission', which included the supposed transfer of state and legal institutions including ideas of RoL, justice, and liberty from 'civilised' Britain to the 'savage' colonies. This was usually accompanied by physical signs of civilisational 'progress' i.e., the expansion of infrastructure – of trains and roads and other signifiers of 'development' that allowed for rapid transport of goods and humans and further deepened the exploitation of colonial hinterlands. However, as we shall see in this essay, despite these promises of transplanting 'good governance' and RoL in the colony, the British colonial legacy was one of ingrained inequality between the coloniser and the colonised, and an entrenchment of colonial and racial difference within the legal systems of the colonies.

3. Modern conceptions of the rule of law

The doctrine of RoL has developed significantly over the 20thC. In addition to Dicey's formal or procedural idea of RoL,[22] later developed by F.A. Hayek and Joseph Raz, today we also understand the substantive nature of RoL found in the works of scholars such as Richard Dworkin, John Laws, Tom Bingham and T.R.S. Allan. Scholars who support a formal or thin understanding of RoL, argue that RoL should be concerned with the procedure and form of the law and not its content. If a law is public, prospective, intelligible, and consistently applied it meets the criteria of RoL, even if

[19] Tulloch, H. (1980) 'AV Dicey and the Irish Question: 1870-1922' *Irish Jurist* 15(1): 137-165, 145.
[20] Dicey's letter to St. Loe Strachey, 13 July 1913, quoted in Tulloch, 'AV Dicey and the Irish Question', 145.
[21] Chatterjee, P. (1993) *The Nation and Its Fragments: Colonial and Postcolonial Histories*, Princeton, N.J.: Princeton University Press, 14.
[22] For a discussion of Dicey as a formalist see Craig, P.P. (1997) 'Formal and substantive conceptions of the rule of law: An analytical framework' *Public Law*: 467-487, 470-4.

the content of the said law is reprehensible and against human rights. As Raz famously noted:

> [a] non-democratic legal system, based on the denial of human rights, or extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.[23]

Within this category, the thinnest conception of RoL takes the form of rule *by* law. Rule *by* law is the idea that law is the means by which the state conducts its affairs and, thus, easily collapses into the notion of the 'rule by the government'.[24] In fact, such an idea of RoL offers minimal limitations on state power and little protection to citizens and communities against the state.

On the other hand, substantive theories of RoL associate the doctrine with ideas of 'good' i.e. democratic government, the protection of human dignity and rights, and notions of liberty. In response to Raz, Bingham has noted:

> While … one can recognize the logical force of Professor Raz's contention, I would roundly reject it in favour of a 'thick' definition, embracing the protection of human rights within its scope. A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.[25]

Despite the differences between the formalist and substantive conceptions of RoL 'all non-trivial accounts of the rule of law conceive equality and freedom as intimately related,'[26] that is, all ideas of RoL have some idea of equality and liberty at their core.

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[23] Raz, J. (1979) *The Authority of Law: Essays on Law and Morality*, Oxford: Oxford University Press, 211.
[24] Tamanaha, B.Z. (2004) 92.
[25] Bingham, T. (2010) *The Rule of Law*, London: Allen Lane 2010, 67.
[26] Bellamy, R. (2003) 'The rule of law' in R. Bellamy and A. Mason (eds), *Political Concepts*, Manchester: Manchester University Press, 118-130, 120.

As we shall see below, the RoL espoused under British colonialism was the formalist version of the doctrine; however, even this thin conception of RoL wasn't properly upheld and principles of equality were frequently discarded to maintain the efficiency of the Empire.

4. Law, the rule of law, and the British Empire

4.1 Law in the colony

Colonialism, simply put, is the process through which one society seeks to rule and transform another.[27] It typically involves an overhaul of the colonised legal system, often accompanied by the transfer of laws from the metropole to the colony. However, it is important to recognise that there is/was no universal experience of colonialism or colonial law. Colonialism differs by coloniser; by colony;[28] by location within the colony – popular port cities and urban areas had a different experience of colonialism and colonial law than the hinterland; and by time – for instance, early and later European colonialism differed in both purpose and intensity. What is common across all forms of colonialism is that such empires are based on coercion and not consent, and that law plays a legitimising role in both establishing and maintaining the empire.

Law, thus, was central to the British colonial project to subjugate the colonised population and maximise their exploitation. However, it was perceived and projected instead as a 'gift' from the British to the colonised peoples to facilitate the latter's civilisational and cultural development. For instance, in 1833, Robert Miller, a member of the Legislative Council of the Governor-General of India, was adamant that the very notion of law was introduced to India by Englishmen:

> When we came to this country did we find equitable law courts in which Englishmen and Natives could alike obtain equal justice?...There was no such thing as law and justice. The land was a land of violence, of systematic and periodical marauding, of constant blackmail [and]…many forms of anarchy and misrule and lawlessness... It was for us, a mere handful of

[27] Merry, S.E. (1991) 'Law and Colonialism' *Law and Society Review* 25(4): 889-922, 890.
[28] For instance, British colonies could be classified as crown colonies, self-governing dominions, protectorates, mandates or condominium territories. For an explanation see: Birnhack, M.D. (2012) *Colonial Copyright: Intellectual Property in Mandate Palestine*, Oxford: Oxford University Press, 28-29.

> strangers, to introduce law and order, and to import into this country as much justice as was possible under the circumstances.[29]

Almost a century later, writing in the context of Africa, F.D. Lugard, the first Governor General of Nigeria (previously Governor of Hong Kong) summed up the benefits of European imperialism in Africa as:

> Europe benefitted by the wonderful increase in the amenities of life for the mass of her people which followed up the opening of Africa at the end of the nineteenth century. Africa benefited by the influx of manufactured goods, and the substitution of law and order for the methods of barbarism.[30]

These quotes reveal the colonial stance that colonised territories did not usually contain any indigenous laws before the advent of colonialism.[31] In its most extreme form this manifested as a claim of *terra nullius* – or nobody's land – where the coloniser believed that the indigenous population lacked any form of political organisation or system of land rights. Therefore, not only did the land not belong to any individual, in the absence of political organisation there was also no community leader with whom a treaty could be signed. Thus, whole countries, and in the case of Australia, a whole continent was declared to be *terra nullius* and the coloniser was able to claim ownership of it. Antony Anghie notes that while Africa may not have been explicitly labelled '*terra nullius*' in the way Australia was, it was undeniably treated in similar ways: The 'exclusion [of Africans from the Berlin Conference[32]] was reiterated and intensified in a more complex way by the [legal] positivist argument that African tribes were too primitive to understand the concept of sovereignty to cede it by treaty…[I]ts effect was to transform Africa into a conceptual terra nullius; as such, only dealings

[29] Robert Miller speaking during the debate on the Ilbert Bill 1883. Quoted in Kolsky, E. (2010) *Colonial Justice in British India: White Violence and the Rule of Law*, Cambridge: Cambridge University Press, 100.
[30] Lugard, F.D. (1922) *The Dual Mandate in British Tropical Africa*, Edinburgh: William Blackwood and Sons, 615.
[31] See Banner, S. (2005) 'Why Terra Nullius? Anthropology and Property Law in Early Australia', *Law and History Review* 23(1): 95-131; and Idowu, W. (2004) 'African Philosophy of Law: Transcending the Boundaries between Myth and Reality', *EnterText* 4(2): 52-93.
[32] The Berlin Conference (1884–1885) was attended by 13 Europeans states (including Russia and the Ottoman Empire) and the USA. It marked the end of the European colonisers' 'scramble for Africa' by regularising trade and formalising European territories in Africa.

between European states with respect to those territories could have decisive legal effect.'[33]

By using a self-referential definition of what constituted law, the British were able to overthrow indigenous law in the colonies, or marginalise it to the sphere of personal laws i.e. laws relating to marriage, succession and inheritance.[34] Three key developments further bolstered the spread and entrenchment of colonial law; firstly, the use of repugnancy clauses to restrict the application of pre-colonial laws that were deemed to be 'repugnant' by the coloniser; secondly, establishing a dual system of law i.e. different laws and adjudicating courts for the colonisers and the colonised; and lastly, the codification of colonial laws. Thus, while most indigenous law remained unrecognised as 'law', any indigenous law that was 'discovered' was usually found to be lacking. It was either repealed on the grounds of repugnancy or seen to be fit only for the colonised population within the dual system of law. The biggest impact on colonial legal systems, however, was wrought by the colonial strategy of legal codification, under whose guise, indigenous laws were swiftly replaced by colonial law. As McBride notes, this process of codification was particularly central to ideas of RoL, especially positivist ideas of the doctrine,[35] because codification i.e. the process of writing down laws, gave the impression that these laws were open and transparent and applicable to all, though they were far from any such thing. For instance, under the biased Section 72 of the Indian Criminal Procedure Code 1872, European British subjects could only be tried by judges, magistrates, or justices of the peace of their own race;[36] and as we shall see below, the proposal to remove this privilege was robustly challenged.

Crucially, closely following the discriminatory codified laws allowed the coloniser to portray themselves as following the RoL – if only in the formalist sense. This provided impetus for introducing codified laws across the British colonies, and networks of laws and law makers spread across the British Empire. For instance, the Indian Penal Code (IPC) (1860) went on to influence the development of colonial legal regimes in distant

[33] Anghie, A. (2005) *Imperialism, Sovereignty and the making of International Law*, Cambridge: Cambridge University, 95.
[34] Tan, C.G.S. (2012) 'On Law and Orientalism', *Journal of Comparative Law* 7(2): 5-17, 6.
[35] McBride (2016) 32.
[36] Whereas, non-European British subjects could be tried by an adjudicator of any race.

parts of the Empire including Malaya (now Malaysia), Singapore, Egypt, Somalia and the Sudan, and further afield to Cyprus and Nigeria.[37] In fact, during the colonial period all criminal codes in common law countries in Africa could trace their ancestry to either the IPC, the St Lucia Criminal Code of 1889, or the Queensland Criminal Code of 1899.[38] Further, direct connections were forged through peculiar legal arrangements necessitated by colonial exigencies: for instance from the late 19thC, appeals from the Consular Court in Zanzibar (in modern Tanzania) and later Mombasa (in modern Kenya) in Africa were designated to be heard at the Bombay High Court (now Mumbai) in India.[39]

This leads us to our next question: since colonial legal systems by their very nature are based on the absence of freedom of the colonised and actively enforce inequality between the coloniser and the colonised, can they ever be said to maintain RoL?

4.2 Rule of law in the colony

Despite its claim to the universal, as we have seen in the previous section, RoL as we understand it today has a very particular origin, historical context, and mode of travel across the globe. Originating in Europe, its introduction – in concept, if not in practice – to non-European states, was part and parcel of the colonial project, whether we speak of Asia, Africa, the Americas or Australia. Within the British Empire, this claim to the equality of individuals, whether they were from the colonising race or the colonised ones, and the promise that the law offered equal protection to all, was not just a tenet of RoL, it was also an important part of Britain's self-perception of their commitment to RoL in the colonies. This so-called commitment to RoL was placed in direct opposition to the rule of the 'oriental despot' that the coloniser (cl)aimed to replace.

Though some attempts were made to honour the principle of equality under the RoL doctrine, these were limited. For instance, in the late 18thC in the case of *Campbell v Hall*, almost echoing modern substantive – especially rights based – ideas of RoL

[37]Mawani, R. and Hussin, I. (2014) 'The Travels of Law: Indian Ocean Itineraries', *Law and History Review* 32(4): 733-747, 741; and McBride (2016) 11.
[38] Morris, H.F. (1970) 'How Nigeria Got its Criminal Code', *Journal of African Law* 14(3): 137-154, 137.
[39] Metcalf, T.R. (2007) *Imperial Connections: India in the Indian Ocean Arena, 1860-1920*, Berkley: University of California Press, 23-25.

Lord Mansfield noted: '[a]n Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives while he continues there.'[40] Despite these claims, RoL was largely a formalist enterprise in the colonies. As we shall see below, even at the time it was made, Lord Mansfield's statement did not ring true as slavery was still being widely practiced across the British Empire. The end of slavery coincided with new forms of racial distinctions and violence being instated across the Empire. Yet, while turning a blind eye to these deep racial and colonial inequalities, 'the English prided themselves on possessing a rule of law surpassing in its perfection that of other peoples.'[41]

At the time of the *Campbell* judgment, and a century before Dicey's interventions, debates already raged in the UK on whether the content of RoL extended to wider civil rights such as freedom of press, conscience, religion, association, and assembly.[42] These debates, however, remained restricted to the UK alone, and in the colonies only the narrowest version of RoL as formal legality was ever realised. For when it came to making laws for the colonies 'British politicians, administrators, and jurists struggled with the effort to balance flexibility and a discretionary authority, putatively required by colonialism, with the stability and predictability associated with a rule of law regime.'[43] For instance, most colonised people were denied the right to a jury trial, and far from being independent, judges were appointed 'at pleasure' and were expected to be loyal to the colonial state, with their office being subject to executive removal. This latter objective led to the Privy Council advising the removal of Joseph Beaumont as the Chief Justice of British Guiana in South America in 1868, on the grounds that he lacked 'judicial temper' and tended to embarrass the colonial government by criticising their practices against indentured labourers in the colony.[44]

As critics have shown, rather than being an emancipatory ideal, in the colonial context the concept of RoL was 'a key coercive instrument in the dispossession and

[40] *Campbell v Hall* (1774) 1 Cowp 204.
[41] Metcalf (2007) 17.
[42] McLaren, J. (2015) 'Chasing the Chimera: The Rule of Law in the British Empire and the Comparative Turn in Legal History', *Law Context: A Socio-Legal Journal* 33(1): 21-36, 24-5.
[43] Hussain, N. (2019) *The Jurisprudence of Emergency: Colonialism and The Rule of Law*, Ann Arbor: University of Michigan Press, 42.
[44] McLaren (2015) 30.

subjugation' of the colonised people.[45] It was 'a handmaiden for economic expansion, [and] an instrument of social control and propaganda that accompanied the violence of British rule'.[46] The concept veiled the exploitative reality of wealth extraction from the colonies while legitimising everyday inequalities and racial violence that were inherent to the colonial structure of law. RoL, thus, was part and parcel of an oppressive colonial regime that continued to maintain colonial and racial difference and privileged the rights of the coloniser above all else.

5. The rule of law and the rule of colonial difference

Partha Chatterjee has posited that the 'rule of colonial difference'[47] underlies all colonial legal systems. That is, despite the supposed liberal ideology of the coloniser and their promises of equality, liberty, and the 'gift' of law, the colonial systems could only operate through a preservation of the superiority of the ruling group. Thus, the hierarchy between the coloniser and the colonised was intrinsic to the system.

We find that the application of law in the colonies was dependant on the so-called dichotomy between the 'civilised' and the 'savage' and all the categories in between. These distinctions were based on ideas of permanent physical and biological difference in terms of either race or of cultural differentialism, with the white Anglo-Saxon man placed at the apex of both the racial and cultural hierarchies.[48] With biological racism and cultural differentialism acting as 'racism's two registers' and constantly slipping into one another.[49] Those who were considered racially 'inferior' were also considered to be culturally 'backward', with each category serving to reinforce the other. This involved the linking of hitherto value-neutral physical attributes or cultural practices and assigning to them value-laden interpretations, either positive (as in the case of the ruling races) or negative (as in the case of colonised

[45] Dunstall, G. and Godfrey, B. (2005) 'Crime and Empire: Introduction,' in Godfrey and Dunstall (eds), *Crime and Empire 1840-1940: Criminal Justice in Local and Global Context*, Cullompton: Willan Publishing, 1-7, 2.
[46] McBride (2016) 5.
[47] Chatterjee (1993)18.
[48] Hall, C. (2007), *Civilising Subjects: Metropole and Colony in the English Imagination 1830-1867*, Cambridge: Polity Press, 17.
[49] Hall, S. (2018) 'The Multicultural Question', in Morley, D. (ed), *Stuart Hall: Essential Essays*, Vol 2, 95–133, Durham: Duke University Press, 110.

races).[50] Thus, 'race' was a socio-political rather than a biological or cultural category, and the demarcation between races was constantly being redrawn.

The perceived racial hierarchies played a crucial role in legitimising colonialism. Colonialism itself was projected as being for the 'good' of the colonised people, who could only hope to achieve civilisation through European intervention.[51] A stark example of this idea of racial difference can be seen in Lord Sumner's Privy Council judgment:[52]

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society…On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest…

Race, thus, played an important role in determining the types of rights that were made available to the colonised populations. As a result, during the 19thC white settler colonies came to enjoy some of the freedoms that were supposed to be ideologically linked to RoL, while the same freedoms continued to be denied to non-European colonial populations. In fact, based on where they were assumed to be on the 'scale of civilisation', some groups were regularly placed entirely outside the ambit of RoL altogether but were still subject to law's coercion. For instance, the aboriginal people belonging to what were described as 'savage tribes' in Australia were seen to be inherently outside the law, as were those who were deemed to be 'hereditary criminals' and thus categorised within the colonially constituted 'criminal tribes' in India. In a

[50] Tabili, L. (1994) 'The Construction of Racial Difference in Twentieth-Century Britain: The Special Restriction (Coloured Alien Seaman) Order, 1925', *Journal of British Studies* 33(1): 54-98, 59.
[51] Fitzpatrick, P. (1992) *The Mythology of Modern Law*, London: Routledge, 110.
[52] *Re Southern Rhodesia* (1919) AC 211 (PC) 233, 234.

blatant disregard for the doctrine of RoL these communities were collectively punished for any crime by an individual of the group.[53]

As we shall see in the next section, the supposed racial and cultural superiority of the British became one of the key legitimising ideologies behind the British Empire. It allowed the coloniser to lay claim to following the doctrine of RoL, while justifying the colonial state's unequal legal treatment based on race.

5.1 *The rule of law and racial discrimination in the colony*

Nowhere were the limits of RoL clearer than when the concept met the everyday racial inequalities that sustained the Empire. At their most stark, these racial inequalities took the form of slavery that dehumanised the African origin population and remained legal until 1834.[54] For instance, the slave code passed in Barbados in 1668 explicitly noted that the slave population 'are of Barbarous, Wild, and Savage Natures, and such as renders them wholly unqualified to be governed by the Laws, Customs, and Practices of our Nation'.[55] This justified the creation of a dual legal system, wherein 'slave crimes' were to be tried in slave courts without the benefit of juries. This and other similar slave codes in Barbados became the model for slave laws passed later in Jamaica, the Leeward Islands and even some American states.[56] Such laws not only created 'status crimes' i.e. crimes that could only be committed by enslaved people, such as being a runaway, abusing a planter/ free person, possession of weapons, they also created a dual system of punishment wherein only enslaved people faced brutal punishments that sought to attack their bodily integrity including flogging, branding, dismemberment and other bodily mutilations.[57] As a result, 'the dominant experience of [colonial] legalities' from the enslaved peoples' point of view 'was of terror and violence'.[58]

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[53] Dunstall and Godfrey (2005) 3; Singha, R. (2000) *A Despotism of Law: Crime and Justice in Early Colonial India*, New Delhi: Oxford University Press, 27-28.
[54] Slave trade across the British Empire was abolished through the Slave Trade Act 1807, but slavery itself was only abolished later through the Slavery Abolition Act 1833.
[55] An Act for the Governing of Negroes, 1668. Barbados.
[56] Morgan, K. (2007) *Slavery and the British Empire: From Africa to America*, Oxford: Oxford University Press, 113.
[57] Paton, D. (2001) 'Punishment, Crime, and the Bodies of Slaves in Eighteenth-Century Jamaica' Journal of Social History 34(4): 923-954, 939.
[58] Paton (2001) 924.

Not only did the colonial state turn a blind eye to everyday forms or racial violence in the colony, despite its claims to upholding RoL it also often directly legally endorsed racial discrimination against the non-white populations. Elizabeth Kolsky argues in her study of colonial India that '[t]he notion of a rule of law as a system of principles designed to govern and protect equal subjects – a notion introduced to India by Britons themselves – was blatantly contradicted by the institutionalization of racial distinctions in the statutory law and the overt partiality of white police, judges and juries.'[59] In fact, so aware were the ruling race of the partiality of the European judges and juries, that one of the biggest legal controversies in colonial India arose out of the Ilbert Bill 1883 which proposed to allow Indian magistrates to preside over cases involving European British defendants. After sustained protest by the white population the bill was finally passed in 1884 after securing the compromise of ensuring that they could only be tried by European British majority juries. Of course, similar provisions were not made for the Indian population.

Similarly, in South Africa, RoL developed in the country 'primarily along the racial frontiers' and was used to determine what sort of rights the African and Asian population in the country may enjoy. [60] For instance, under the Urban Affairs Act 1923 increasingly arbitrary and despotic powers were exercised by local municipalities to remove Africans from urban municipal areas, including a regulation which empowered the local superintendent to not only remove people from an area, but to order their huts to be destroyed if they did not comply within twenty-four hours. And yet, this regulation was found to be neither *ultra vires* nor unreasonable.[61] With regards to the Asian population, various laws sought to deny them licenses to trade in South Africa. While couched in economic terms i.e. to protect white traders from being undercut by Asian traders who supplied the same goods for cheaper prices, the laws, in fact, reflected the racial unease of the ruling elite. They worried that the proximity of white housewives to Asian traders in the absence of their husbands may lead to inappropriate contact, that Asian traders extending credit facilities to poor whites may erode racial hierarchies, and similarly, white women working in Asian shops may lose

[59] Kolsky (2010) 12.
[60] Channock, M. (2001) *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice*, Cambridge: Cambridge University Press.
[61] *Tutu and others v Municipality of Kimberley*, 1918 - 23 GWLD 64; Channock (2001) 485.

their sense of 'racial superiority'.[62] As a result we find that, though the colonial South African state continued to lay claim to ideas of RoL, racial difference was built into the very edifice of the law itself. This racial segregation was strengthened after South African independence and eventually took the form of Aparthied.

Direct racial discrimination was also apparent when the colonial state meted out punishment for crimes committed. The most severe punishments were saved for violence committed by non-whites against the white population. If the perpetrator was white, punishment for white-on-white violence was a lot more rigorous than the punishment for acts of violence committed by white men against the non-white population. In large part, the latter kind of violence was normalised through – and was an intrinsic part of – the colonial capitalist structure, that allowed 'masters' to have the 'right of correction' to brutally beat, flog, mutilate or confine their workers as and when they saw fit.[63] Even after the official end of slavery,[64] racial violence against the indigenous population was a 'constant and constituent element' of British colonialism and yet 'white violence remains one of the empire's most closely guarded secrets'.[65] White violence was invisibilized by its omnipresence and was embedded in the framework of colonial difference upon which the very structure of colonial law was built.

Further, the issue of equal punishment for the same crime for people of different races had always been contentious and arguments against it focused both on the supposed mental and civilizational differences between the races or their physical or biological differences. For example, in the 19thC Legislative Member Herbert Maddock argued for shorter jail sentences to be awarded to Englishmen in India: 'It would be even absurd to sentence an Englishman and an Indian to the same term of confinement in a jail. Such a confinement is of itself a very slight evil to the native and the heat of a crowded building surrounded by high walls is not at all injurious to his health.'[66]

[62] Channock (2001) 487-497.
[63] For instance, see Paton (2001) and Kolsky (2010) 55.
[64] The modern popular discourse in Britain on slavery in the British Empire overwhelmingly focuses on the British contribution to the abolition of slavery rather than their centuries of participation in the practice.
[65] Kolsky (2010) 1-2. For an account of 20thC white violence in Kenya see Elkins C. (2005) *Britain's Gulag: The Brutal End of Empire in Kenya*, London: Pimlico.
[66] Maddock's minute of 4 September 1844, quoted in Kolsky (2010) 80.

Racial discrimination under the law was further entrenched through indirect means by restricting the access of the non-white populations to both legal education and legal professions. For instance in Tanganyika, in the absence of any local legal training being available, the colonial government required a British law degree to practice law in the territory, while at the same time following a policy of preventing Africans from receiving scholarships to study in Britain.[67] Similar policies were followed by the British elsewhere in Africa, thus, effectively excluding the non-white population from entering the legal profession in large parts of the continent. This discrimination helped to stifle local resistance against colonial law and governance.[68] As a result, except for Ghana and Nigeria, at the time of independence in the mid-20thC most African countries had very few lawyers and even fewer black lawyers.

Thus, we find that, in the colony the state paid lip service to its commitment to RoL while always possessing and frequently displaying a commitment to violence – seen as essential to protecting the coloniser from the 'savage', 'primitive', 'barbaric' colonised population. If RoL failed – and its precarious establishment in the colony meant that it failed routinely – the rule and its suitability were never questioned, instead the failure was blamed on the corruption of local officials both white and non-white, or the backwardness and criminality of the native population. Both this 'corruption' and 'backwardness' were then posited as reasons for colonial rule to continue until the civilisation was advanced enough to accept the mantle of RoL by itself. The rule of law emerged, then, as the 'stated goal, means, and justification for British colonialism.'[69]

5.2 Anti-colonial movements and the repurposing of the rule of law ideal

The rule of law discourse in the British Empire encountered an unexpected twist in the 20thC. As the struggle against colonialism intensified in Asia and Africa, British officials' lack of commitment to RoL in the colony came to be branded by the anti-colonialists as 'un-British' and condemned as the 'lawless law of British rule'.[70] On one hand the

[67] Joireman, S.F. (2001) 'Inherited legal systems and effective rule of law: Africa and the colonial legacy', *Journal of Modern African Studies* 39(4): 571-596, 580.
[68] Ojwang, J.B. and Slatter, D.R. (1990) 'The Legal Profession in Kenya', *Journal of African Law* 34(1): 9-26, 11. Also see contributions to Dias, C.J. et al (eds) (1981), *Lawyers in the Third World: Comparative and Developmental Perspectives*, London: Holmes and Meier.
[69] McBride (2016) 23.
[70] Weiner (2009) 232-3.

idea of RoL was denounced as simply being a veil to cover the colonial and capitalist exploitation of the colonies, on the other hand colonised people actively chose to use the concept as a means of legal and political 'protection, resistance, adaptation and collaboration.'[71]

Even a scholar such as E.P. Thompson, a Marxist historian who was critical of law as a device that mediates and reinforces existing class relations,[72] valorised the idea of RoL and described the British contribution to it as a 'a cultural achievement of universal significance'[73] In fact, Thompson, like others, justified the 'goodness' inherent in RoL by arguing that Indian freedom fighters including M.K. Gandhi and Jawaharlal Nehru had used the idea of RoL in their quest for Indian independence.[74] However, it is important to remember that when colonised people couched their own demands for greater rights in the conceptual language of RoL, they did so as a strategic move to gain legitimacy and visibility for their causes rather than any 'strong intellectual or emotional commitment to the Rule of Law in the British sense.'[75]

At the same time, the anti-colonialists choice to use the rhetoric of RoL in their own movements, even if it was a choice made for strategic reasons, points to the endurance of some of the ideals associated with the concept of RoL. Despite the protest of formalists such as Raz, as we saw at the start of this essay, for most supporters of RoL the concept has come to stand as shorthand for justice, equality and democracy, which were precisely the objectives that the anti-colonial struggles sought to achieve. It can be argued, therefore, that in this new pursuit of the RoL the anti-colonialists sought to distance themselves from the procedural idea of RoL that was favoured by the colonial state and replace it with a more substantive understanding of RoL which was undergirded by truly equal rights for all races.

[71] Dunstall and Godfrey (2005) 2.
[72] Thompson, E.P. (2013) *Whigs and Hunters: The Origin of the Black Act*, first published 1975, London: Breviary Stuff Publications, 205.
[73] Thompson (2013) 207.
[74] Thompson (2013) 208.
[75] McLaren (2015) 35.

6. Rule of Law and the Rule of Empire: An inherent incompatibility

If we move away from the European coloniser's view of the pre-colonial state, we must accept that the pre-colonial forms of society on other continents were not *terra nullius*. These societies in Asia, Africa, Australia and the Americas were governed by rules and laws that may not have been recognisable to European sensibilities but nevertheless were used locally. If we take this as our starting point, we must also accept that the structure of colonial law could only come into being after the violent and illegal removal of the pre-colonial order. Thus, in the colonial setting the discourse on RoL, with varying degrees of success, always sought to hide its illegitimate origin. This leads us to the inexorable fact that the RoL and the rule of empire are inherently incompatible, and the latter can only be achieved by at worst annihilating the former, or at best by upholding the weakest procedural notion of RoL and using it as a fig leaf.

A few key reasons point towards the inevitable failure of substantive notions of RoL in the colonies. Firstly, the concept of RoL could not overcome its origins. Its cultural underpinnings meant that imposing it on other societies which did not share the same historical or cultural development could itself constitute a form of 'arbitrary domination'.[76] Despite its universal claims, RoL could not transcend its European social origins and, thus, took oppressive forms in 'the lands of others'.[77]

Secondly, the concept of RoL remained incompatible with the continuing need of colonial law to oppress and exploit the colonised population. As Nasser Hussain notes, in the colony the tension between 'illimitable sovereignty' that the coloniser required in order to rule over an alien population and 'RoL' which the coloniser claimed to possess, was at its most stark.[78] Due to its very nature, the colonial state needed to possess autocratic powers: '[g]overnment was usually by decree or proclamation, while a battery of laws and reserve powers were directed at the maintenance and preservation of the colonial order.'[79] This left little room for a substantive RoL regime to flourish.

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[76] Dylan Lino (2018) 743.
[77] Evans, J. (2005) 'Colonialism and the Rule of Law: The Case of South Australia', in Barry Godfrey and Graeme Dunstall (eds), *Crime and Empire 1840-1940: Criminal Justice in Local and Global Context*, Cullompton: Willan Publishing, 57-75, 62-67.
[78] Hussain (2019) 9.
[79] Killingray, D. (1986) 'The Maintenance of Law and Order in British Colonial Africa', *African Affairs 85(340): 411-437, 433*.

Thirdly, racial discrimination within the colony further weakened the commitment to RoL. As Bonny Ibawoh notes: 'A uniform rule of law would have profoundly threatened the power dynamic that distinguished colonizer from the colonized, and abrogated the very foundations of the imperial project.'[80] Indeed, as we saw in the previous section, despite the rhetorical stance of legal equality, legal practice and conventions awarded distinct privileges to the white population and frequently tolerated, and even excused, white violence against the non-white population.

And lastly, within the colonies, even formalist notions of RoL were regularly undermined by the frequent suspension of civil law through the invocation of autocratic martial law under which the colonised people's already limited freedoms were further restricted. Across the Empire, the British frequently resorted to martial law from the 19thC onward,[81] especially in response to popular movements such as the Demerara slave rebellion of 1823 (in modern Guyana), the Indian Uprising of 1857, and the Mau Mau Uprising in Kenya in the mid-20thC. As R.W. Kostal notes in the context of the Morant Bay Uprising in Jamaica in 1865, events such as these and British responses to them 'exposed the tectonic stresses created by the nation's embrace both of the will to power and the rule of law.'[82]

While it is in the colonial context that the duplicitous nature of RoL becomes most evident, what we can learn from this setting about how law interacts with and relates to violence, race, oppression and power has global application, whether in states that have an imperial legacy or post-colonial states that continue to bear the structural imprints of colonial law.[83]

7. Conclusion

Colonial law remains deeply intertwined with the history and development of British law and politics. But this relationship wasn't just one way. While undoubtedly, the

[80] Ibhawoh, B. (2013) *Imperial Justice: Africans in Empire's Court*, Oxford: Oxford University Press, 9.
[81] For a list see Hussain (2019) 108; Kostal, R.W. (2005) *A Jurisprudence of Power: Victorian Empire and the Rule of Law*, Oxford: Oxford University Press, 8.
[82] Kostal (2005) 20.
[83] Anghie, A. (2019) 'Foreword' to Hussain, N., *The Jurisprudence of Emergency: Colonialism and The Rule of Law*, Ann Arbor: University of Michigan Press, xiii.

various colonial legal systems were moulded by British ideals and desires, the British legal system too, especially its constitutional arrangements, were constantly shaped by the development of colonial law. As Hussain notes: '[t]he colonies here become the site for both the manifestations of contradictions embedded in the British constitution and the alternative locale for elaborating on these questions of power and restraint.'[84] An analysis of the ways in which the doctrine of RoL was deployed in the British colonies, the way in which it not only interacted with existing inequalities, but also helped to constitute and legitimise new regimes of inequalities, reveals the ideological origins of the doctrine and its inextricable connection to modern liberalism and capitalism. Whether the law was deployed to treat enslaved people of African origin as less-than-human and the property of their masters, or to restrict Asian people from trading in South Africa, or to overlook the daily violence perpetrated by the white population on their workers across the British Empire, the claim to RoL sought to present the existing deeply unequal law as being 'sanitised of self-interest',[85] and therefore, hide the fact that it primarily worked to protect the privileges and the property of the ruling race. Once we understand the fact that the RoL doctrine's antecedents lie in a particular type of liberalism which is closely associated with capitalism, and the protection of property rights,[86] it also makes visible the use of the doctrine to mask class difference and oppression back at home.[87] In Britain, the elite attempted to use the claim to RoL as a means of maintaining the existing social order, and amongst other things to resist the redistribution of property and the expansion of suffrage to women and working class men.[88]

Today, the promotion of RoL has devolved into a multi-billion-pound industry where international developmental aid is tied to RoL commitments, and the so-called beneficiaries of such projects still largely comprise of post-colonies in the global south.[89] Our study of the ways in which the RoL doctrine was, and continues to be, used as a tool to legitimise British colonialism serves as a warning: We must guard

[84] Hussain (2019) 24.
[85] McBride (2016) 15.
[86] Tamanaha (2008) 541.
[87] Thompson (2013) 202-3.
[88] Tamanaha (2008) 517-8.
[89] For a discussion of the promotion of rule of law and claims of 'neo-imperialism' in Africa today see Humphreys, S. (2012) 'Laboratories of Statehood: Legal Intervention in Colonial Africa and Today', *The Modern Law Review* 75(4): 475-510.

against the use of the RoL doctrine by the elite in the global north to impose neo-imperialist structures in new guises on the global south.

Recommended further reading:

- Evans, J. (2005) ‘Colonialism and the Rule of Law: The Case of South Australia’, in Barry Godfrey and Graeme Dunstall (eds), *Crime and Empire 1840-1940: Criminal Justice in Local and Global Context*, Cullompton: Willan Publishing, pp 57-75.
- Hussain, N. (2019) ‘Introduction: The Historical and Theoretical Background’ in *The Jurisprudence of Emergency: Colonialism and The Rule of Law*, Ann Arbor: University of Michigan Press, pp 1-33.
- Ibhawoh, B. (2013) ‘Africa and the Umpires of Empire’ in *Imperial Justice: Africans in Empire’s Court*, Oxford: Oxford University Press, pp 1-24.
- Kolsky, E. (2010) ‘Introduction’ to *Colonial Justice in British India: White Violence and the Rule of Law*, Cambridge: Cambridge University Press, pp 1-26.
- McLaren, J. (2015) 'Chasing the Chimera: The Rule of Law in the British Empire and the Comparative Turn in Legal History', *Law Context: A Socio-Legal Journal* 33(1): 21-36.