

The book cover features a central dark red background with text. On the left and right sides are vertical panels containing stylized, colorful illustrations. The left panel shows Native American figures, including one with a large feathered headdress and another in a red tunic. The right panel shows a Native American figure in a pink dress, a figure in a blue and white patterned dress, and two British soldiers in red uniforms and white hats. The top of both panels features a stylized sun or moon motif.

KEALLY McBRIDE

Mr. Mothercountry

THE MAN
WHO MADE THE
RULE OF LAW

MR. MOTHERCOUNTRY



THE MAN WHO MADE THE
RULE OF LAW

KEALLY MCBRIDE

OXFORD
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trade mark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

© Oxford University Press 2016

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by license, or under terms agreed with the appropriate reproduction rights organization. Inquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above.

You must not circulate this work in any other form
and you must impose this same condition on any acquirer.

Library of Congress Cataloging-in-Publication Data

Names: McBride, Keally D., author.

Title: Mr. Mothercountry : the man who made the rule of law / Keally McBride.

Description: New York, NY : Oxford University Press, 2016. |

Includes bibliographical references and index.

Identifiers: LCCN 2016005121 (print) | LCCN 2016005532 (ebook) |

ISBN 9780190252977 (hardcover : alk. paper) | ISBN 9780190252984 (Updf) |

ISBN 9780190252991 (Epub)

Subjects: LCSH: Law—Great Britain—Colonies. | Rule of law—Great Britain—Colonies. | Law—Great Britain—Colonies—English influences.

Classification: LCC KD5020 .M38 2016 (print) | LCC KD5020 (ebook) |

DDC 349/.171241—dc23

LC record available at <http://lcn.loc.gov/2016005121>

1 3 5 7 9 8 6 4 2

Printed by Sheridan Books, Inc., United States of America

ACKNOWLEDGMENTS

MY FIRST THANKS MUST GO to the Faculty Development Fund at the University of San Francisco, as it has allowed me to participate in the wonders of archival research and to receive feedback on the chapters of this book at many different conferences over six years. The university and the Faculty Union provide an invaluable resource without which this book would not have been possible.

An invitation from Bernard Harcourt to present at the Criminal Justice Roundtable at the University of Chicago Law School provided the starting point of this research, and his sage advice to avoid thinking of the rule of law “as a blunt instrument” was key in helping the book find its direction. Jesse Goldhammer pointed out that it was a “Roginesque” project and also helped to fundamentally shape my approach. Sylvia Brownrigg and Ellen Bernard helped shelter me in London as I slowly learned how to use the India Office Records and National Archives and uncovered the personal stories beneath the larger history. My thanks also to Marianne Constable for inviting me to be a visiting scholar in the rhetoric department at University of California at Berkeley so I could access the library’s fantastic nineteenth-century holdings.

Audiences at the University of Oregon, University of Chicago, University of Alberta, and the University of San Francisco Law School provided excellent feedback and consistent writing deadlines. Fellow presenters at repeated meetings of the Association of Law, Culture and the Humanities; the Western Political Science Association; and the American Political Science Association also have provided criticism and questions that have made different components of the book much stronger. I promise that I will consider turning the story into a Hollywood screenplay some day!

Colleagues who have read and commented upon pieces of the manuscript include Karl Shoemaker, George Pavlich, Jennifer Culbert, Linda Ross Meyer, Megan Thomas, Samera Esmeir, Austin Sarat, Mark Antaki, Brian Weiner, Renisa Mawani, Jeanne Morefield, Peggy Kohn, David Guterman, Mary Katzenstein, Bernard Harcourt, Susan Silbey, Uday Mehta, and Mathew Unger. My all-time favorite counsel, Kevin Bundy, has also read pieces in various stages of completion. Jinee Lokaneeta has helped me to understand the police and India far more than I would have without her assistance. James Martel and Sarah Burgess have read multiple drafts of most of these chapters, and I am forever grateful for their generous readings and perceptive comments. Conversations with Patchen Markell, Jeanne Morefield, Samuel Moyn, and Chip Turner about the relationship between history and political theory helped me understand (invent?) my methodology.

Tracy Seeley, Marjolein Oele, and Rachel Brahinsky helped support my writing of the manuscript during key moments. A number of students provided research assistance, including Paola Vu, Zachary Scalzo, Cassandra Sutherland, Keith Calara, Maribel Mercado, Sonja Anderson, and Benjamin Schaub. My editor at Oxford, Angela Chnapko, was intrigued by the romance of my unwieldy project and has been wonderfully supportive and enthusiastic as I have corralled it to completion. Reader evaluations provided excellent advice about the style of my argument and the scope of the content. Carol Specter and Debbie Benrubi at the University of San Francisco did their usual magic and found the map included here.

John Zarobell helped me discover the bizarre mirror provided by colonial history, and has encouraged my archival habit and travels. His brilliant mind helped me sharpen my arguments over many glasses of

wine after dinner when the children had fled yet another discussion of “Mom’s guy.” He has read multiple drafts of much of the manuscript at its various stages of development with (mostly) good cheer. He also procured the fantastic image on the cover of this book with the gracious permission of the artist, Andrew Gilbert.

While I was writing this book, my daughter morphed into a serious scholar and even took time from writing college application essays to help me with the bibliography. Thank you, Celeste.



Image of James Stephen at twenty years of age.
Courtesy of the Cambridge University Library.

CONTENTS



Acknowledgments ix

Introduction i

1. Colonialism and the Rule of Law 10
2. Genealogical Explorations: The Rule of Law as Practice 34
3. Lawless Places and Placeless Law: Stephen, Sierra Leone,
and Extraterritoriality 64
4. Codification and the Colonies: Who's Accusing Whom? 94
5. Macaulay to Malimath: Punishment and the Police in India 123

Conclusion: The Rule of Law Today 155

Notes 163

Bibliography 181

Index 191

Introduction

- A. A violent order is disorder, and
B. A Great disorder is an order. These two things are one.

—Wallace Stevens

WHEN POLITICS GO AWRY, PEOPLE instinctively turn to law for resolution. In fact, Alexis de Tocqueville noted the personal tendency to embrace *either* law or politics: “Men who have made a special study of the laws and have derived therefrom habits of order, something of a taste for formalities, and an instinctive love for a regular concatenation of ideas are naturally strongly opposed to the revolutionary spirit and to the ill-considered passions of democracy.”¹ The greatest appeal of law is that it stands above the fray, and can resolve intractable differences that could otherwise lead to violence.

The same observation holds true in international politics today. Laws are created and invoked in order to curb tyrants and terrorists—admittedly to uneven effect. International human rights law was created to provide recourse when domestic politics go horribly wrong and populations are not protected by their own regimes. The United Nations provision against genocide implies what has been coined a “Responsibility to Protect,” whereby in cases of genocide, external forces have the responsibility to intervene and prevent further loss of life. The United Nations claims, “Sovereignty no longer exclusively protects States from foreign interference; it is a charge of responsibility where States are accountable for the welfare of their people.”² In other words, international

law overrides domestic sovereignty. The United Nations Security Council invoked the Responsibility to Protect doctrine to justify intervention in Libya in 2011.

On July 23, 2009, General Assembly president Miguel d'Escoto Brockmann staged a debate in the United Nations concerning the adoption of Responsibility to Protect as formal policy. Brockmann invited Ngugi wa Thiong'o, Noam Chomsky, and Jean Bricmont to participate in the debate, which mainstream media barely noted. These figures pointed out the realities of international power dynamics. On paper, the principle looks universal. However, in practice, more powerful countries would invade countries with less power in order to enforce "the rule of law." Even idealistic proponents admitted that places like China and the United States would never be subjected to external enforcement. Brockmann closed the debate by encapsulating his resistance to what seemed to be a relatively magnanimous desire to protect vulnerable populations: "Recent and painful memories related to the legacy of colonialism give developing countries strong reasons to fear that laudable motives can end up being misused once more to justify arbitrary and selective interventions against the weakest states."³ This story caught my attention; it is not every day that someone calls into question the principle of human rights or the rule of law, particularly in the United Nations. Here was an example of politics roaring back and questioning the presumptive impartiality and ordering function of the law.

After all, it seems that what the world needs is a very large dose of the rule of law. Every day I read stories about police graft, judicial cover-ups, missing lawyers, and state violence against vulnerable populations. These stories are common in countries as diverse as Nigeria, Russia, Mexico, and the United States. There is one overriding principle that is frequently offered up as the answer to such corruption near and far: the rule of law. But the rule of law is a difficult concept to pin down, and is far less self-evident than the policymakers, analysts, and commentators who turn to it as a source of salvation acknowledge.

I began researching the US Agency for International Development's (USAID) rule-of-law initiatives and became increasingly uncomfortable with what I discovered. Frequently, USAID awarded large contracts to different law firms to help build "legal capacity" in countries around the world. This could mean anything from visiting law schools to providing

lectures on property rights, to helping map out proper procedures between different courts. The project of providing law for others seemed problematic at best, particularly given Brockmann's comments about a continuation of colonial relationships through the law. How to understand the intermingling of colonial violence, legal order, and political disorder when one term—the rule of law—portends to stand outside and above the other two?

I turned to the history of colonial powers and their dissemination of law in their colonies. What I found was that the common contemporary narrative that postcolonial countries have not been “exposed” to the rule of law was not accurate. In fact, colonial regimes delivered a rule of law to all of their colonies. The rule of law was and is an inextricable element within the inegalitarian global institutions and power dynamics that we had in the nineteenth century and today. Yet it was—and is—offered as the corrective to these same dysfunctions.

This book explores the rule of law and its evolution within nineteenth-century British colonial relationships and institutions. This may sound like an arcane topic, but I pursue it here with contemporary political goals. In some sense, this investigation follows Walter Benjamin's observation that history is filled “with the presence of the now.”⁴ This book is not a comprehensive historical record of British colonial laws or the Empire's bureaucratic mechanisms; instead I recount particular historical episodes and developments that help explain how we got to where we are today.

Early to mid-nineteenth-century British colonial developments forced a turning point in the administration of the rule of law in British territories, protectorates, and colonies. Skeptics would assume that the rule of law within British colonies was nothing but a flimsy scrim, and I started this project counting myself among them. However, there is a far more complex story to be told from looking at this historical period in some detail.

This era of colonial administrative history reflects international as well as domestic developments. The start of the Victorian era was characterized by fear and anxiety in response to the changes in the British economy and rapid urbanization.⁵ International developments only added to the fear of potential revolution; France's continuing revolutionary proclivities might ignite an increasingly restless British working

class, and the North American settlements were indeed a disappointment to colonial officials in this regard. Would extending the franchise restore order or only encourage more demands? The ruling classes were driven to assert order and their place in it, and the rule of law was an ideal vehicle for this project. Insisting upon the rule of law was, as Tocqueville observed, a way of discouraging disorderly politics and simultaneously promising that the rights of men would be secure under the British Crown. The impulse to substitute orderly administration for messy politics is common in the contemporary world, and it is no accident that the rule of law continues to be a central aspect of this technocratic vision.

The period I examine was preceded by the dramatic seven-year (1788–1795) impeachment trial of Warren Hastings for abuses of the prerogatives awarded to him in his position in the East India Company. This trial spawned a debate about whether it was appropriate for the Crown of England to delegate the exercise of sovereignty to the British East India Company: Was colonialism an occupation of the state or private corporations? Did acting as a colonial power make the entity a sovereign power? There were many aspects of colonialism that exposed the inadequacies of the basic framework of nation-states and forced new innovations, as Antony Anghie has explored in his work, *Imperialism, Sovereignty, and the Making of International Law* (2005). At the start of the nineteenth century, Britain affirmed that colonial ventures *should* be closely regulated and controlled by the state, even if the state's ability to do so was improbable because of distance or lack of resources.

There was a sense that the uprightness of the colonial order needed to be asserted in order to effectively maintain British honor and its interests. Better technologies meant travel times between London and colonial outposts were decreasing, and reports of colonial atrocities could make their way to the newspapers. However, what has been coined “the Second British Empire” was also under increased economic strain.⁶ There was a need to improve profitability generally, and the state wanted a larger share of the returns to help defray the increasing costs of global ambitions. Hence, the colonial administration was centralized and routinized to improve oversight, and economic imperatives started to gain even greater prominence in colonial decision-making.

There was an emphatic embrace of order and morality in British colonial administration, vividly represented in this book by Sir James Stephen. James Stephen was colonial undersecretary and legal counsel who worked in the Colonial Office in various capacities from 1813 until 1847. He was charged with protecting the rule of law in the Empire, and he took this task very seriously, exercising his powers of discretion and earning himself the nickname, "Mr. Mothercountry." He was instrumental in developing a new bureaucracy of colonial administration during his time in the Colonial Office, but even more important, he was driven by a personal mission to use law to create opportunities for the dispossessed persons under British rule.

The rule of law was envisioned by James Stephen as a bulwark against vice and an instrument for promoting freedom during his career. At the end of his period of service, the rule of law as he envisioned it had fallen prey to the very changes he resisted. It became a handmaiden for economic expansion, an instrument of social control and propaganda that accompanied the violence of British rule. This book tells the story of this evolution. I have taken his nickname as the title of the book, and the subtitle indicates that paradoxically, it was one man who tried to achieve the rule of law, contra Aristotle's typology. But the full story shows how his vision failed and the realities of colonial domination resisted the incursion of grand idealism.

Unrest in the colonies was linked with unrest at home. In 1866 there was a high-profile case against Governor Edward John Eyre for the slaughter of Jamaican protesters, and the graphic account of the murders ended up causing riots and political disruption in several locations around Great Britain. Of course, citizens of Great Britain then, just like citizens today, were only so interested in the actions of their countrymen in faraway places. It was not only public pressure that pushed adherence to something called "the rule of law" in the distant reaches of the British Empire. Adherence to the rule of law was the party line in Great Britain in the nineteenth century.

High-profile trials about the behavior and responsibility of colonial officials provided the stage for a public reconciliation of often-violent colonial practices with Great Britain's emphatic embrace of the rule of law. Less spectacular incidents of British settlers engaging in criminal activity throughout the world also caused a crisis of sorts as the

proclamation of the white man's burden to civilize the rest of the world was pointedly belied by British behavior.

The British responded in two ways. First, they tried to centralize colonial administration and "clean up the Empire." In debates that might strike the contemporary reader as familiar, the British explored the possibility that more oversight would create more accountability, and the need to recruit more virtuous men into service abroad. Next, given the impossibility of controlling what happened in faraway places, the British changed the way they understood the rule of law. The first response was deliberate and noisily advertised. James Stephen was part of this vaguely realized plan to create more oversight in London. The second response was quiet and evolved in practice; the shifts are not registered in ideological claims about the rule of law, but through examination of historical episodes.

The fact that the British Empire was struggling to reassert and reform itself during this period is relatively well known, as is James Stephen. Scholarly voices speaking from within the paradigm (note the "we" in this passage) observed,

Criticism of our colonial system came from all sides—religious, humanitarian, political and economic—and after 1830 was reinforced by the Colonial Reformers with their ideas of systematic colonization and the ideal of reviving the ancient glory of British expansion. While Colonial Secretaries, following one another in rapid succession, sought to solve colonial problems in relation to Parliamentary exigencies, one steadfast and penetrating mind was interpreting imperial policy in ethical terms. The intellect and purpose of James Stephen raised colonial government to a higher political plane and contributed greatly to the attempts to solve its new problems.⁷

These "new problems" resulted from the successes of the British Empire as much as from the soul searching following the loss of the North American settlements. As the aspirations of Empire became more developed and widespread, the need for a unified strategy became evident. In London, the Colonial Office was generally, and James Stephen was specifically, charged with being the central clearinghouse for all the

colonies with the exception of India, which had its own apparatus, the India Office.

One of my colleagues commented that I was probably expecting to find “an Eichmann” in the Colonial Office. For precisely this reason, I was shocked instead to discover someone with an intense conscience and spiritual belief who was a critic of British colonialism. Stephen was trained as a lawyer and determined that implementing the rule of law in the colonies meant faithful adherence to the tradition of common law. Stephen understood that all too frequently, the colonists abused their powers. He devoted himself to curbing this abuse, whenever possible, through the law. In practice what this meant was sorting through different sources of sovereignty, local practices and arrangements, and distinct legal provisions that had been established particular to each colony in order to excavate the principle that would apply. During Stephen’s tenure as colonial undersecretary, a clear system of legal accountability emerges in the books of the Colonial Office. He sorted and recorded the particularities of each colony’s political and legal administration in order to create records for present and future administrators. He created paper trails of legal precedent and started to hold colonial officials, who changed very frequently, accountable to the practices established earlier. The maze of specific practices associated with each colony would baffle anyone, and Stephen became irreplaceable given his specific knowledge of the particularities of each colony.

It was a completely unsustainable system. The complexities of common law within one country are enough to defeat the most resolute legal scholar. Trying to follow common-law practice in a mixture of legal systems, shifting boundaries, distinct languages, vastly different populations, and unclear sovereignty is an impossible undertaking. Colonial realities precipitated crisis and change in pursuing the rule of law at an international level. British colonial administration provides an excellent site to trace this evolution because of the centrality of law in its national culture before and during this time frame, as well as its increasing political and military dominance. The increased circulation of British economic interests, citizens, and rapidly accelerating international competition over resources and territories combined to create pressure on the traditional understanding of the rule of law.

After exploring this particular moment of colonial legal administration, the book dwells upon two particular innovations that resulted. These developments paved the way for the current understanding of the rule of law as a universal value, combined with the realities of a deeply unequal international system. Somehow, the rule of law came to be embraced by virtually all powers, great and small, and yet it is consistently trampled. This is not just a matter of inconsistency. Instead, the rule of law came to be subtly redefined so it would facilitate resource extraction and sanctify the ability of some countries to assert sovereignty over others. The rule of law would also be defined to focus upon procedure above all else, thereby dulling its potential for critique and control of powers that be.

The problem of how to control agents of state power in a globalized world is not solved. For the past 140 years, one solution has been to focus upon procedures and stated principles as an indication of allegiance to "the rule of law." Yet, I would argue, this formalism is less and less convincing. People want to live in just polities; they want officials whose powers are bounded; and they want those who abuse their powers to be held accountable. This is ideally what the rule of law means. But what does the rule of law mean in a country that was introduced to its legal system through colonialism? Does it become a tainted instrument that can no longer have power?

The rule of law is supposed to be an eternal and universal principle, yet it has a very particular international history. This history matters for understanding the contemporary potential of the rule of law to create justice, curb the abuse of power, and serve as the foundation for a more peaceful world. I did not set out to write a biography, but James Stephen was a riveting figure for me. As I poured through his notes contained in the archives of the Colonial Office, it became clear that he was a sharp critic of colonialism and no idealist when it came to the law. Why did he go to work every day? It was not uncritical patriotism or blind faith in legal procedure. I came to see my struggle reflected in his; if the rule of law has failed so often to curb power and assert right why do I still venerate it as an ideal worth fighting over? The rule of law is grinding, slow, and impossible work; this book provides a cautionary tale for those who toss it off as a principle that can easily solve issues of power and

inequality. Instead, we should look behind its invocation to see what powers and privileges it actually protects.

Above all, I hope to reveal that invoking the rule of law is not a neutral claim. Thomas Carothers observed, “Despite the close ties of the rule of law to democracy and capitalism, it stands apart as a nonideological, even technical solution. In many countries, people still argue over the appropriateness of various models of democracy or capitalism. But hardly anyone these days will admit to being against the idea of law.”⁸

Many of the regions that are subject to foreign intervention in this regard have been exposed to colonial versions of the rule of law. What initially appears as complete disorder is the result of a historical economic, political, and legal order. There is a postcolonial perspective on the international circulation of the rule of law; seeing this perspective requires knowing the colonial history.