

## Introduction

### ***Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government*<sup>1</sup>**

The Commonwealth<sup>2</sup> boasts the common law legal tradition, easily the most dominant of the leading international legal systems today; spreading from North America to Singapore and from India to South Africa. The Peace, Order and Good Government (POGG) clause is a common feature of considerable vintage in Commonwealth constitutions. With its origins in the royal prerogative of the British monarch,<sup>3</sup> the POGG clause has been a considerably versatile and ubiquitous clause in Commonwealth constitutionalism. It is, as Lord Hoffman stated, 'the traditional formula by which legislative powers are conferred upon the legislature of a colony or a former colony upon the attainment of independence.'<sup>4</sup> The origins of the POGG clause in an anachronistic feature of British constitutionalism marks it out as a constitutional element that ought to be critically interrogated in an age of human rights and democracy. Significantly, in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (Bancoult No. 2 (CA))*<sup>5</sup> Sedley LJ observed that

peace, order and good government' has a 'long legislative pedigree' and has become 'a term of art in the sense that it is regularly used without further explanation to denote the delegation of large but undefined powers to a nominated rule-maker. Since at its fullest it can bring about the creation of independent states, it is a power of the greatest importance carrying commensurate responsibilities.'<sup>6</sup>

The POGG power has played an important role in colonial and post-colonial constitutionalism as it has had not only a legal but also, political and historical significance in various jurisdictions in the Commonwealth. It has for instance been regarded as a key expression of Canadian socio-political life. A former Canadian Prime Minister has advocated for it to be taken as the mainstay of Canadian foreign policy. In 2001, peace, order and good government also featured prominently during the centenary celebration of the Australian federation where, among others, it formed the theme of the Senate exhibition to commemorate the inauguration of the First Parliament of the Commonwealth of Australia in 1901. A collection of speeches delivered at the launch of the exhibition was aptly titled *For Peace, Order, and Good Government: the Centenary of the Parliament of the Commonwealth of Australia*.<sup>7</sup> In much unrelated circumstances, in Nigeria (and some other parts of the Commonwealth) 'peace, order and good government' hallmarked military legislation which abrogated or curtailed fundamental constitutional rights, completely subordinated the Constitution to military fiat, or at the least, critically hollowed out its provisions in favour of authoritarian military 'legislation' for the better part of three decades in its post-colonial period. In South Africa, it was a rather subtle but nonetheless effective part of the legal stratagem of apartheid regimes for legalising spatial segregation, internal displacement and deportation.

Despite its ubiquitous nature and its continued deployment for a variety of purposes in Commonwealth jurisdictions, the POGG clause remains a relatively under-theorised and under-researched theme. Existing analyses have tended to generally take for granted the appropriateness of the POGG clause itself while critiquing political application and

judicial interpretation of it. The nature of the power, its objects and limits has been subject of considerable judicial interpretation in Commonwealth jurisdictions. This justifies much more comprehensive, comparative, or at least, cross-jurisdictional analysis than currently exists in the literature on Commonwealth constitutionalism.

The peace, order and good government clause has continued to wax strong in the constitutions and in some cases, legislation, of Commonwealth countries. Most federal and even some unitary states' constitutions or constitutional arrangements contain a general power conferred on the legislature (or in some instances, the head of government, state or province as in India)<sup>8</sup> to make laws for the 'peace, order and good government' of the whole country or a province, region or state within it. For instance, in countries like Canada, Australia and Nigeria, there is a well-established legislative practice of denoting the residual jurisdiction through the peace, order and good government in the usually contested division of subject heads of power between national and subnational units. As a result, the interpretation of the POGG clause has been central to moderating contending jurisdictional claims in such countries. This practice contributes considerably to its versatility in both constitutionally sophisticated, advanced democratic Commonwealth countries like Canada and Australia as well less sophisticated and even semi-authoritarian or at best, democratising states like Nigeria and Fiji.

At the constitutional level, the POGG only applied to a part of the United Kingdom (Northern Ireland from 1921-1972) but it also featured in some legislation in England and Wales to where this book traces its origins. Importantly too, United Kingdom's judicial institutions (especially the Judicial Committee of the Privy Council, but also -

before its demise - the House of Lords) have, not surprisingly, played a pivotal role in the interpretation and controversial application of the POGG clause.

The foregoing justifies a cross-jurisdictional analysis. The analyses in this book focuses mainly on six key Commonwealth jurisdictions; Australia, Canada, India, Nigeria, South Africa and United Kingdom (but also the United States as part of the British North American colonies but not the Commonwealth). This book traces the history, judicial interpretation and political application of the clause as a constitutive and statutory provision. The inquiry shows that the POGG clause has relevance in a number of significant aspects of legal and socio-political ordering across the Commonwealth. This book explores how the POGG clause has been used not only as a moderating mechanism for resolving jurisdictional disputes in Commonwealth federations, attribution of emergency powers, review of administrative action, but also further the designs of colonialism, authoritarianism and apartheid.

Critical analysis of the peace, order and good government clause presents a paradox. There is on the one hand, the deployment of the POGG clause to promote (presumably) liberal democratic values of (even if initially, limited) self-government, consociation of elite power and public welfare and on the other hand, its application to further opposing values of authoritarianism and apartheid. A major reason for that paradox, this study argues, is the imperial origins of the clause. Notwithstanding its imperial origins, the POGG clause has remained considerably resilient and remained, with few exceptions, in Commonwealth constitutions for over a century in some cases. One of the

last decisions of the British House of Lords; *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (Bancoult No. 2)*, highlights the significance of a surviving power crafted in a pre-democratic age. This book argues that the paradox of the POGG clause justifies a case for change regarding its application and judicial interpretation.

It will be obvious to any reader of this book that despite the cross-jurisdictional focus, there are more references to Canadian materials; primary and secondary, in advancing the discussion in various parts of this book than any other Commonwealth jurisdiction. There are two reasons for this. The first is purely functional. It is the fact that there are easily more Canadian cases than in any jurisdiction and Canadian authors have been easily the most prolific on evaluating peace, order and good government as a concept. Thus, the jurisdiction has the most extensive literature on all the perspectives of interest in this book; legal history, constitutional law and politics. The second derives from the crucial position of the doctrine of precedent in the common law system. This is particularly significant when it converges with the *de facto* 'supreme tribunal' of the British Empire role of the Judicial Committee of the Privy Council (JCPC). The influence and impact of the JCPC, as will be discussed almost throughout this book, is writ large in Commonwealth constitutionalism and this still remains the case for a number of Commonwealth countries or territories. In any event, a major consequence of the convergence is that some early Canadian cases, as highlighted in various parts of this book, have remained the most influential in fixing the conventional, (some would claim, 'originalist') notions of the POGG from the colonial period till date.

## Style

It is also relevant to say a few words about the presentational style of this book. The reader may find that there are quite a number of quotes in the book; this is deliberate. I consider it appropriate to provide direct quotes from a number of primary materials, a good number of which are referenced in this book for two key reasons. First is the fact that a reasonable part of the book is concerned with the history of 'peace, order [welfare] and good government' in the Commonwealth which to my mind requires taking the reader through the instruments which constitute the sources of its introduction across the British Empire and allowing them to 'speak for themselves'.

More importantly, the 'orthodox' legal position on the meaning of the POGG is assumed, indeed claimed, to flow from historiographical accounts of its introduction and application. That view is claim is directly challenged in this book. Among others, I present a counter argument to the *originalist* account of peace, order and good government as 'a term of art' that means a plenary grant of power in a style that allows the reader to form an opinion based on access to archival and historical sources; political, social and legal, relevant to the introduction and development of the clause. These are mainly imperial instruments that have been commonly alluded to in scholarly and judicial discussions of the clause but scarcely ever *directly* allowed to *speak* for themselves. Indeed, the picture that emerges from a survey of scholarly and judicial discussion of the peace, order and good government clause has been mainly one that can be described as 'legal recycling'. By this I mean constant reference to a closed circle of cases which are hardly interrogated as to their *actual* facts and *ratios* for (re) stating what is considered to be the *settled* position on 'peace, order [welfare] and good government' in the Commonwealth. To set the tone for the need to cast a closer look at

the meaning of the clause, I have taken a fairly detailed look at the facts of the four most popular cases on the peace, order and good government clause; *R v Burah and Anor*,<sup>9</sup> *Russell v The Queen*,<sup>10</sup> *Hodge v Queen*,<sup>11</sup> and *Louis Riel v The Queen ex parte Riel*<sup>12</sup> in the hope that any irritation that may be occasioned thereby is hopefully overshadowed by a fresh attempt to capture the *essence* of the cases in their context. Finally, it is relevant to point out that I have tried as much as possible (I suspect without complete success though) to retain the style of reference to judicial officers in the respective jurisdictions as reflected in law reports and relevant academic literature.

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<sup>1</sup> This is a draft introduction of the book of this title to be published by Routledge, London 2014:

[http://routledge-ny.com/books/search/author/hakeem\\_o\\_yusuf/](http://routledge-ny.com/books/search/author/hakeem_o_yusuf/)

<sup>2</sup> Commonwealth countries are: Antigua and Barbuda, Australia, Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei, Cameroon, Canada, Cyprus, Dominica, Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Rwanda, Saint Kitts , and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa., Seychelles, Sierra Leone, Singapore, Solomon Island, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, Vanuatu and Zambia.

<sup>3</sup> Rightly described as ‘anachronistic’ by Lord Bingham of Cornhill in his dissenting judgment in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (Bancoult No. 2)* (HL) [2009] 1 AC 453. See Chapter 5 *infra*.

<sup>4</sup> *Bancoult No.2* (HL) *ibid*, per Lord Hoffmann at [46].

<sup>5</sup> [2006] EWHC 1038(Admin).

<sup>6</sup> *Ibid*. [50].

<sup>7</sup> Kay Walsh (ed.) *For Peace, Order, and Good Government: the Centenary of the Parliament of the Commonwealth of Australia* (Department of the Senate Canberra 2001).

<sup>8</sup> It is interesting to note in this regard that despite the fact the Indian Constitution contains the peace, order and good government power (and its variant formulations including ‘peace and good government’), the Constitution of Pakistan, following its partitioning from India, did not contain the power.

<sup>9</sup> [1878] UKPC 1, (1878) LR 3 A.C. 889 (PC).

<sup>10</sup> (1882) 7 A.C. 829 (PC)

<sup>11</sup> (1883) LR 9 A.C. 117 (PC)

<sup>12</sup> (1887) LR 10 A.C. 675 (PC).