

*Imperial Incarceration: Detention without Trial in the Making of British Colonial Africa.* By MICHAEL LOBBAN. [Cambridge University Press, 2021. xii + 450 pp. Hardback £90.00. ISBN 978-1-316-51912-7.]

In this book, Michael Lobban examines the extensive use of detention without trial in British Colonial Africa at a period in which, seemingly incongruously, Diceyan rule of law thinking was at its height in the heart of the British Empire. Detention without trial, undermines the rule of law in that the liberty of an individual is constrained without due process, and sometimes without any legal authorisation whatsoever.

Lobban begins by asserting that by the time Dicey first wrote *Introduction to the study of the Law of the Constitution* in 1885, “a unique spirit of legalism . . . was embedded in English constitutional culture” (p. 1). A consequence was that detention without trial was impermissible, and this prohibition was protected by the writ of habeas corpus. How, then, could such extensive use of detention without trial in British Africa at the time have been permissible? Lobban demonstrates that this question is complicated by the fact that many thinkers of the time did not consider the rule of law to be constrained to England itself, but to spread throughout the Empire. Indeed, by the time Dicey was writing, many British imperialists considered the spread of the rule of law to be a central justification for the Empire. In keeping with this, the writ of habeas corpus (in either its common law form, its statutory form, or both) spread across the Empire (p. 5).

Of course, even in Britain itself, detention without trial could be justified by limited “suspension” of habeas corpus by Parliament (suspension here is a misnomer – such acts in fact *empowered* the executive to detain in certain circumstances, thus rendering habeas corpus inapplicable). Notably, Parliament had not enacted habeas corpus suspension legislation in Britain since 1818. Lobban shows that Dicey’s view was that such parliamentary exceptions to the prohibition on detention without trial were acceptable since Parliament could be trusted to introduce such powers only when there was a threat to the rule of law itself. Lobban contends that that this principle translated to the imperial context meant that detention could only be authorised when it was necessary and justifiable in terms of the “common law idiom” (p. 9).

Throughout the book, and central to his conclusions, formal and substantive perspectives of the rule of law are distinguished. Though these terms may be considered by some to be anachronistic in the context of this history, Lobban certainly identifies an important distinction between commitments merely to legal authorisation (“formal” rule of law), and commitments to common law rights and liberties (“substantive” rule of law). Lobban uses his material to illustrate that the degree to which formal versus substantive versions of the rule of law were followed tended to be “determined by the attitudes and practices of particular individuals, and reflected the constitutional culture in which they operated” (p. 33). He contends that a substantive approach tended to occur where there was a commitment to rule of law values amongst the colonial governing class, and this in turn tended to map on to areas in which the subjects of detention mechanisms were deemed to be “part of the same political community” (p. 33) – a matter often deeply affected by racial prejudice. Furthermore, such commitments were bolstered when political pressure was brought to bear upon decision makers either in the colony or the metropole. Conversely, where detainees were not deemed to be part of the same political culture, or where little public notice was

taken of their cases (or indeed pressure was mounted to treat detainees harshly), substantive rule of law norms tended not to flourish. This set of significant insights demonstrates that the law itself was not determinative of the extent to which rule of law values were upheld.

The nine substantive chapters of Lobban's book provide a rich array of examples of detention without trial in British Colonial Africa, and his minutely researched and fascinatingly detailed histories allow him to demonstrate the place of the rule of law in a wide range of contexts. Indeed, this book is a masterclass in demonstrating the importance of providing a detailed socio-political context to properly inform our understanding of the development of legal mechanisms. The book covers detention in formal British colonies such as the Cape and Natal, protectorates such as the Niger Delta and Bechuanaland, as well as areas which were neither colonies nor protectorates but which nevertheless fell under *de facto* British control, such as Egypt in the period after the British invasion in 1882. The material is also widely spread both temporally and geographically, covering large swathes of the African continent and most of the nineteenth century. This detailed and diverse tale of emergency rule in Africa dispels any presuppositions that the continent could be treated as a monolithic whole, as opposed to containing a varied range of political and legal contexts. The African focus is also an important and novel contribution to the study of colonial use of detention without trial mechanisms.

The book's conclusions regarding the contextual factors that tended to produce substantive rule of law responses are particularly well borne out in the juxtaposition of detention under martial law in the Cape (ch. 9) versus Natal (ch. 10). In the former, the colonial legislature, politicians and, in particular, judiciary, sought generally to interpret the contested nature of martial law in line with common law values. During the Zulu rebellion in Natal in 1906, however, Lobban demonstrates that a much more repressive approach was taken, and the fact that the detainees were black Africans meant that "liberal voices found a much less receptive audience than had been the case only a few years earlier [in the Cape]" (p. 385). The role of political voices is further demonstrated, *inter alia*, in the comparison of two leaders from Egypt and Sudan respectively in the 1880s (ch. 4). When Egyptian leader Ahmed Urabi Pasha was removed from power by the British, the matter was widely publicised in Britain, and many in the metropole, including influential supporters of Urabi, were watchful of the manner in which he was treated. The British thus considered it important that he was seen to have a fair trial. The Sudanese leader, Al-Zubayr Rahma, however, was not given similar consideration when he was detained. He was well known as a slave trader and had few sympathisers in Britain, and so British authorities simply detained him under an *ad hominem* ordinance, with no fear of legal challenge.

This book makes a significant contribution to the literature on British imperial detention mechanisms in its exposition of the use of *ad hoc* ordinances. Though not exclusively used in Africa (Napoleon was famously detained under such an ordinance), *ad hominem* ordinances were particularly common across British Africa in the nineteenth century. In some cases, such ordinances were used even when general legislative detention powers were in force. They were generally preferred even when it may have been possible to legally justify detention as an act of state, but where the legal basis for this was not certain, demonstrating a commitment at least to a formal conception of the rule of law. Chapter 8 considers a number of instances in which the legality of *ad hominem* ordinances was considered by the Privy Council. Though in the case of Sigcau, an Mpondo

chief, detention was held to be unlawful, the Privy Council affirmed that *ad hominem* ordinances could in principle be lawful. In the subsequent case of *Sekgoma Letsholathebe*, detention according to such an ordinance was held to be lawful. The chapter, along with other material in the book, demonstrates that the Privy Council generally took an executive-minded approach to colonial detention, and failed to enforce the substantive rule of law.

As Lobban notes, the “study of detention without trial in Africa is also significant for what it reveals about the culture of the rule of law in the metropolis” (p. 34). Though officials in Britain were aware that the rule of law ought to be underpinning the conduct of the British throughout the Empire, it is clear from this book that in no branch of government in the metropolis was there uncontroversial commitment to substantive rule of law in imperial emergency contexts. Lobban’s analysis of the role played by strong political voices, and by the extent to which individuals were deemed to be part of the political community raises questions about whether such considerations might have a similar effect on the rule of law in Britain itself, even into the present day.

This book will appeal to a wide audience. Anyone interested in the history of British Colonial Africa, or colonial history more generally, will find this clearly written and meticulously researched history, based on extensive primary archival sources, original and rewarding. Legal historians and public lawyers more generally will be equally rewarded by this grounded account of the rule of law in operation. Indeed, lawyers with little or no historical background will find it accessible and highly relevant to contemporary debates relating to the rule of law.

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