# Colonial Law and Its Uncertainties

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Colonialism was always an uncertain process. Even the imposition of colonial law was fraught with incomplete application, resistance, and the reinterpretation of European categories in indigenous terms. Magistrates often operated with fragmentary and inaccurate understandings of local cultural practices and rules, seeking to rectify this disadvantage by relying on local experts yet unable to adjust their decisions according to the class and kin interests of these experts. Staffing was often limited, local linguistic knowledge lacking, and a sociological understanding of how custom operated according to social status and shared knowledge of individuals often missing. Colonial officials faced the problem of limited capacity and large populations to manage and govern. Indeed, recognition of distinct regimes of personal law was one solution to the dilemma of the need to control populations at the lowest possible cost. Even though retrospective histories tend to emphasize the transformative power of colonial law, as this

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collection shows so well, at the time the practices were far more ambiguously linked to the power to change. Instead, they created spaces for contestation and agency. However, these wonderfully detailed and careful studies also show that despite creative uses of the courts, women often did not succeed in legally challenging the marriages that bound them.

One of the intriguing patterns of European, and particularly British, colonialism was the rush to use the new courts the imperial powers created. In many cases, this enthusiasm was led by relatively powerless individuals such as women or people of low social status. Many saw in the new institutions opportunities to escape the bonds of kinship or unfree status. It was common in colonial situations for less powerful individuals to seek out the colonial courts as an opportunity to escape other forms of subordination. When this enthusiastic use of the courts appeared to threaten social order by offering women opportunities to escape local authorities, including husbands, however, colonial officials often backed off. As Martin Chanock observed in British Central Africa, colonial officials also gradually withdrew their legal support for followers in order to avoid toppling the chiefs whom they needed as support for their rule.[1]

As this fascinating collection of articles shows, British India shared this pattern of fragmentary and incomplete control. They also illustrate the ongoing struggle between providing more autonomy for women and other subordinates and maintaining social order and traditional hierarchies. Clearly, the terms of the struggle changed over time. Piecing the articles together, it appears that as new opportunities for women opened up, the legal system often closed them down. As Elizabeth Kolsky's introduction points out, colonial law existed as a sphere of negotiation and opportunity to contest relations of power. The new courts offered opportunities as well as constraints. Litigants creatively moved to new courts, new jurisdictions, or even new religious identities in order to better their situation. As Chandra Mallampalli shows, even the decision to create separate personal law systems for religious groups failed to diminish uncertainty. There were many more religious groups than originally imagined, and it was often hard to know to which religious group a person belonged. Furthermore, as a result of processes of conversion from one religion to another, systems of law and custom tended to be hybrid, with varying combinations of local and religious laws in regions with differing histories and customary practices. As Mallampalli's article shows, local religious communities did not share in any uniform set of religious codes but developed their own combination of rules and practices in each locality.

1. Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press), 1985.

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To this complexity, Mitra Sharafi adds the uncertainty produced by mobility. As she describes the way litigants moved from one jurisdiction to another, such as from British India to Baroda, from Britain to India, or India to Persia, she shows that they were also able to shift their reigning legal regime. As she demonstrates, temporary moves tended to fail, but permanent moves opened up possibilities for litigants to escape undesirable legal restrictions on marriage and divorce. Conversion offered another form of mobility, this time among religious communities. As Rohit De shows through a series of legal cases, moving to a new religion might provide a woman the opportunity to divorce when all other avenues were closed. However, even this path was not certain, as his careful reading of the legal cases indicates.

Indeed, the set of essays in this forum demonstrates vividly the partial nature of the system of control colonialism was able to create. Part of this fractional authority lies in the nature of legal order itself, where much of the ordering of social life takes place outside of formal courts. Part rests in the ignorance and short-handedness of colonial officials. And I suspect part came from a lack of interest in investing substantial resources in the management of family life among colonized populations.

My work on colonial law and family life in Hawai'i suggests that this third factor may have played a more significant role than is generally recognized.[2] During the early part of the nineteenth century, the creation of a new legal system in the Kingdom of Hawai'i was the product of a collaboration between the king and his or her missionary advisors. Since the central concern of the missionaries was the conversion of Hawaiians in belief and conduct, transforming their family and sexual lives was a major preoccupation. To facilitate this conversion, missionaries not only preached the moral and religious value of a sexually exclusive and permanent marriage but they also promoted the substantial prosecution and punishment of fornication and adultery. The court records describe Hawaiians peeping through the thatched walls of their neighbors' houses to uncover acts of nonmarital sex, which were then reported to the courts. In the early years of mission influence, the missionaries bemoaned the influence of whites who also failed to live up to these standards, such as some of the merchant community and the crews of whale ships, some of whom deserted and disappeared into native communities. Such individuals were prosecuted if possible.

During the first half of the nineteenth century, cases concerning sexuality and marriage made up a substantial portion of the caseload of the

2. Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton, N.J.: Princeton University Press), 2000.

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lower courts and almost all of the defendants were Hawaiians. At the time, the courts were under the jurisdiction of the Kingdom but increasingly enforced American law through American legal procedures. Unlike the legal system of British India, that of Hawai'i did not accept the idea of separate legal systems for separate religious or ethnic communities but insisted on a single system of law to govern all in the Kingdom. This strategy derived from at least two sources: a desire to convert all Hawaiians and produce a Christian kingdom, and repugnance for the system of slavery and racial separation in the United States.

With the advent of workers imported to work in the sugar plantations from China, Japan, Portugal, Korea, and the Philippines, among other places, the caseload of the courts shifted. The family and sexual lives of these immigrants were not a concern to the leaders of the Kingdom and their missionary advisors, but their drink, gambling, drugs, and violence were. As the mission influence waned at the end of the nineteenth century, a new tolerance for other forms of marriage and sexuality appeared for these groups, but it seems to be based largely on indifference. The Kingdom's leaders, and later the leaders of the 1893 coup that ousted the Hawaiian monarchs, assumed that these "coolie" laborers would not stay and need not be assimilated. The lack of intervention into their family lives reflected a lack of interest in converting them into citizens and changing their lives to conform to the standards of Christian morality.

The implication of the Hawaiian colonial experience is that efforts to govern the family lives of colonized subjects grow out of projects to convert religiously and to produce citizens. Given the constraints of limited time and resources and the lack of concern for people of other religions, it is notable that any colonial contexts generate efforts to police and govern their populations. Why, in the absence of any real economic benefit or Christian mission pressure and funding, would a colonial power engage in regulating the family lives of its subjects at all? The Hawaiian case seems an anomaly, and perhaps its divergent patterns are because it is a small place with a large mission contingent, the centerpiece of the American mission enterprise. The incomplete and inconsistent governance of British India that these articles reveal seems more prevalent. Given the difficulty of governing the family life of the population, it is not surprising that the courts offered opportunity rather than constraint, and that they created some space within which individuals could seek to overthrow community controls.

However, it is worth considering how widespread this opportunity for contestation and agency was and how often individuals were able to take advantage of it. These articles offer rich examples, but do not indicate how frequent they are. Nor do they show clearly how often these strategies

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were successful. Each of the articles provides many examples of strategies that failed in the courts. However, what they show very well is the agency of the colonized, the way individuals pursue litigation strategies in the new courts creatively, and with the resources at hand.

They also suggest a dialectical relationship with the colonial government, which apparently sought to close off these opportunities and establish a more homogeneous system. The shifting and uncertain nature of colonial control, both among jurisdictions and over time, appears as the central insight of the collection. Control was never complete but always contested, yet colonial authorities did not accept failures without making efforts to buttress their control in new ways or strengthen the old ones. Detailed historical ethnographic studies such as the carefully researched articles in this forum provide excellent insights into this dialectical and changing process and help redefine our understanding of colonization. Finally, the picture that emerges shows the continuities with the present expansion of the international economic and legal order. It does so far more effectively than the view, challenged by this collection, that colonialism was a form of control that drove out all competing systems of law.

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