Negotiating custom : colonial lawmaking in the Galle Landraad

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Conclusion

The nature of legal pluralism is closely related to the fragmented nature of colonial rule. Contested arguments over evolutionary or revolutionary change in early colonial society have largely overlooked the practical realities of pluralities when translated into everyday lives. This thesis has contributed to an open debate of over two hundred years on the extent to which Dutch laws, or Sinhalese laws, were applied to the Sinhalese of the maritime provinces. L J M Cooray has expressed the opinion that the question of the application or non-application of Sinhalese customary law remains a purely academic one today, as it is the Roman-Dutch law that is applied to the low-country (coastal) Sinhalese today.[1] For, whatever the outcome of a study into Dutch legal records, Roman-Dutch Law is here to stay in Sri Lanka as its proponents would say that 'it continues to be of great value to the legal system'.[2] Developments under the British in the nineteenth century may be even more important in understanding present-day law, but the foundation for such developments was laid before that. The question of the application of Sinhalese law is of more relevance when one considers that the legacy of Partha Chatterjee's 'rule of colonial difference'[3] is that 'difference, exclusion, and exemption might still define how states and structures continue to behave. That is to say, it is worth considering the fact that the legal history and relevance of colonialism does not lie dormant in the archives.'[4] New developments in the fields of socio-legal studies of legal pluralism warrant further attention being paid to the Sri Lankan example.

The British legacy of its understanding of Dutch rule is still with us today. Legal pluralism is said to be practised in modern Sri Lanka. A modified version of the *Thesawalamai* which is a codification of the customary laws of the Tamils of Jaffna that the VOC commissioned and produced in 1707, is a part of the official laws of Sri Lanka. The British also made some local practices which they believed to be exclusive to the upcountry 'Kandyan' residents, statute law. Yet the pluralism of British times and today's world is a much reduced version of the pluralities in practice under early colonial rule.

In legal matters, British moves to make Roman-Dutch law statute law in many areas of the law can be seen as a marked break from the more plural manner in which the local normative order was approached by the Dutch, as revealed in this study. Claims of a rupture in the legal arena created by the British can be contextualised in an important debate about either evolutionary or revolutionary change in nineteenth-century colonial rule. The question is whether late colonial rule was transformational, marking an epistemological break with an earlier period when the East India companies were operating, or merely a change of the guard. For Sudipta Kaviraj, Chatterjee and Gyanendra Pandey,[5] the dynamic and fluid nature of social relations changed in the nineteenth century. For others such as C A Bayly and Susan Bayly, the continuities rather than the radically transformational effects of late colonial rule

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[1] Cooray, *Legal System*, 69.
[2] Amerasinghe, 'The Dutch Influence', 321.
[3] *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton, N.J: Princeton University Press, 1993), 10, 18.
[4] Kolsky, "A Note on the Study of Indian Legal History."
[5] Sudipta Kaviraj, 'On the Construction of Colonial Power: Structure, Discourse, Hegemony', in *Contesting Colonial Hegemony: State and Society in Africa and India*, ed. Dagmar Engels and Shula Marks (London: British Academic Press, 1994); Chatterjee, *Nation and Its Fragments*; Gyanendra Pandey, *The Construction of Communalism in Colonial North India* (Oxford: Oxford University Press, 2006). Other works stress a similar transformational nature of nineteenth-century developments: Dirks, *Castes of Mind*; Appadurai, *Worship and Conflict under Colonial Rule*. Pandey argues that colonialism played a significant role in the creation of religious communalism in India in Pandey, *The Construction of Communalism in Colonial North India*.

are more striking.[6] Further study into the British legal arena in Sri Lanka is necessary to determine the full extent of its transformational role. In contrast to nineteenth-century British understandings of an imposition of Roman-Dutch law, this study has been a story of how Dutch law intertwined with local legal orders in the eighteenth century. Within the social arena of Dutch-controlled Galle, social actors from both elite and non-elite groups identified more than one source of law, a situation that was mutually recognised if not successfully followed.

Negotiating Custom

The Dutch set up an institutional legal structure through the Landraad that peasants approached for mediation. To use Mumford's words, '[j]udging the colonized population was both a claim to legitimacy and a major part of the colonizers' job.'[7] Sri Lankan peasants faced courts of record for the first time through the Dutch legal system, the textual proceedings of the Landraad being novel within the local normative order. Boosting judicial efficiency was not far from the minds of the Dutch government, but efforts to bring down costs of litigation or improve local participation were not always successful. The Galle Landraad can be seen as a site for negotiation between Sinhalese, other locals and the VOC, rather than simply as an instrument for colonial domination. Yet this process was mired in uncertainty, confusion and the lack of a clear trajectory.

A racialised hierarchy of dominant 'white' members were pitted against 'black' councillors in the Landraad. As in the Landraad in Java, where also there were indigenous councillors, there was never a local chairman or majority on the bench. The Indonesian and Sri Lankan sides were thus subordinate to the Dutch side—ultimately a sign of direct rule.[8] Native headmen were powerful, but clearly less so in comparison with company officials; peasant farmers were even less powerful in the equation. Yet we must consider the considerable interdependence, however uneven, among the parties concerned. The locals wielded independently created entitlements and could use tools such as the petition or riot to compel the stronger coloniser to enter into negotiation over rule-making. Without the native department of the bureaucracy, the indirect rule of the company had little hope of survival; for their provision of labour services including the collection of the prized cinnamon the native inhabitants were indispensable to both local and foreign elite formations. While the company held the threat of coercion and if necessary violence in establishing 'collaboration', locals had the recourse of turning to the Kandyan Kingdom and harming the company's economic interests. The relative bargaining powers of company, local elite and peasant groups is indeterminable and is unlikely to have been spatially and temporally static. Men and women of high and low ritual status groups crossing cultures and economic status appeared in the Landraad, which engaged in the task of essentialising identities based on caste and occupation that were linked to labour services. The litigants and witnesses who appeared in the Landraad—presented here in a hitherto unseen manner in the Sri Lankan historical literature—were not necessarily undiscerning collaborators for affirming the legitimacy of the colonial judicial forum. As Lauren Benton says, drawing on Pierre Bourdieu, '[i]t is possible simultaneously to use imposed law (thereby reaffirming it) and to seek to undermine its authority.'[9] Authority,

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[6] C A Bayly, *Origins of Nationality in South Asia: Patriotism and Ethical Government in the Making of Modern India* (Oxford: Oxford University Press, 1998), 44–9, 210–37. He argues that communalism during the colonial period had its origins in the eighteenth century. Susan Bayly argues that caste was a distinct part of Indian life, and one that evolved from the precolonial period in Susan Bayly, *Caste, Society and Politics in India from the Eighteenth Century to the Modern Age* (Cambridge University Press, 2001).
[7] Mumford, 'Litigation as Ethnography in Sixteenth-Century Peru'.
[8] Daniel S. Lev, 'Colonial Law and the Genesis of the Indonesian State', *Indonesia*, no. 40 (1985): 57–74.
[9] Benton, *Law and Colonial Cultures*, 257–258.

through recognition of plural authorities of law, could also contain features of the local normative order, achieved through that very process of collaboration. This can be seen in the subtle and more evident processes analysed in part two of this thesis.

The Dutch recognised that clearly defined property rights through the implementation of the land registration had obvious economic benefits and helped individuals to live together in peace and prosperity. Indigenous practices of land tenure and fixing property boundaries, existing and new practices of registering lands, Dutch and local practices of surveying, and traditional means of communicating information by tom-tom beaters combined with a new institutional setting in which to settle disputes. On entering the local framework the Dutch colonial power sought to establish a legal foundation for the exercise of authority based on both Roman-Dutch legal procedures and laws and the local normative orders. Traditional forms of ordering society were then faced with different forms of knowledge, different institutional practices in assigning of meanings. In seeking to combine written records such as gift and *koop olas* and the oral evidence and memories of the inhabitants in a new legal forum, new forms of ordering knowledge emerged. But it was not purely an imposition of a foreign system—the system in place in the eighteenth-century grew out of multiple systems of knowledge. For the VOC, there was a need to define laws on property, and the thombo and the Landraad were the central instruments made use of for that purpose. At times there were conflicts between procedural rules and practical experience. Process had to be adapted during the course of the registration. Governance had to be on a stable footing, but the primary aim of the thombo was to know who owned what and how much was due to the company in cash or crop shares. In the end, it was a means by which the Dutch possession could become more profitable through a coherent and functional basis for revenue collection. It had also to have meaning ideologically—the definitions of the land while having its foundations in the local normative order had also to have meaning for the new European rulers.

The ideas and practices of the agrarian regime at the time were renegotiated in the formal legal spaces of the thombo registration and the Landraad, an effort that involved both official and shareholder in the process of lawmaking. The interdependence of the relationship between them on this question would have been a key factor leading towards negotiation. The 'law' was central to controlling the lands of the colonised—or of economically powerless groups—and incorporating plural legal orders was often a part of this effort. In the end, the law has to be productive, not repressive or a hindrance. The texts of law had to be made real in the court room, where they were potentially either received or rejected. In a colonial setting, it is to be expected there would be difficulties in translating terms cross-culturally. Chapter five focused on how the VOC went about deciphering local land tenure in practice. It dealt with the continuation of local customs and the flexibility of rules, given that an expectation of colonialism as a 'great watershed'[10] of change is no longer tenable.

A reading of legal narratives from eighteenth-century Galle shows that the company and its legal system were regarded by the natives as a means of affirming ownership and resolving land disputes. This was rendered necessary through the registration process. It can be imagined that the compilation of the thombos gave out a clear signal to the citizens as to who controlled the country. Interplay between colonial and indigenous needs would eventually lead to a compromise. Chapter five showed how the thombo and the Landraad were sites of interaction or negotiation for both Europeans and locals and a means of colonial domination. They battled out on the cadastre their own particular unique understandings of property rights, and these battles come alive in the Landraad in the succession disputes analysed in chapter six. By the mid-eighteenth century the native inhabitants were at least reasonably knowledgeable of the Dutch forms of law and used this knowledge to their advantage in

[10] Dirks, 'From Little King to Landlord'.

navigating the law. Pluralities of laws were seen as opportunities by some. To others they signified the imposition of baffling judgements. Chapter six showed how within one area of law, namely inheritance, pluralities or rules could be oppressive or accommodating.

Exactly what aspects are borrowed or rejected between foreign and local legal orders cannot be easily predicted, but the dominance of inheritance, land and marriage law in sociolegal studies of legal pluralism gives some indication. Not all attempts at assimilation are fully realised; aspects of evidence law such as the decisory oath were unsuccessfully adopted in practice in Sri Lanka. The oath in Dutch Sri Lanka was a judicial site in which religious differences between the cultural spaces of Europe and Asia were both passionately and dispassionately denied, debated and endorsed within the platform of the Landraad. The decisory function of the Dutch oath had an accidental congruence to the local practice, as did the bilateral laws of inheritance explored in chapter six. More conscious adoption or adaptation of local practices, as in the acceptance of the Sinhalese forms of the oath, local land tenurial practices, the concept of familial assistance in inheritance cases, the Sinhalese way of marriage or more locally consensual decision-making in the case of the inheritance of nonmarital children can also be seen.

Through this discussion I question the notion of the enforcement of distinctly defined cultural boundaries in jurisdiction and suggest that accommodation, negotiation and resourcefulness are more appropriate concepts for understanding the legal interactions that occurred in eighteenth-century Sri Lanka. The coloniser would negotiate on rule-making 'because he believes himself morally obliged to do so, or, more pragmatically, because he believes that establishing rules by the sheer use of power may entail undue costs.'[11] Resistance by the locals would impose costs that would make the colonial enterprise in the island economically unviable. Recognising the local normative order was conducive to the company, yet this was done within limits. In family law, the Sinhalese way of marriage, concept of familial assistance, or resistance to the disinheriting of illegitimate issue was recognised in the Landraad. These were normative practices to which the people were able to induce compliance on the part of the Dutch. Land tenurial agreements were recognised by the Dutch government for their obvious economic benefits. On the adoption of Sinhalese laws, the company can be said to have found the middle ground between strict and permissive extremes.

Discerning Pluralities

The conventional legal literature in Sri Lanka has tended to draw a sharp line between the use of Sinhalese laws and Roman-Dutch law. The underlying assumptions of the discussion have seen mostly a dichotomous solution to the problem. This early debate can benefit from the developing legal literature on 'pluralism as a central concept in studies of diffusion or transplantation of law'[12]. The cultural deformation in the discussion about the lack of a Sinhalese code is hard to shed, but I emphasise moving away from culturalist arguments in this thesis. For the inhabitants of Galle, the law could have been simply a means to an end, and the use of customary laws, or the lack thereof could have assumed a secondary role with the local population in at least certain areas. The people were provided with a 'durable, if flexible resource'[13] and it would enhance our understanding to be conscious of a 'hodge-podge of courts and norms operating side by side' and of 'various complex mixtures and combinations,

[11] Eisenberg, 'Private Ordering through Negotiation', 675.
[12] William Twining, 'Normative and Legal Pluralism: A Global Perspective', *Duke J. Comp. & Int'l L.* 20 (2009): 487.
[13] Lauren Benton and Richard J Ross, eds., *Legal Pluralism and Empires, 1500-1850*, Kindle Edition (NYU Press, 2013), 3.

and mutual influences'[14] within the legal system, let alone within the operation of the Landraad. This warrants a refashioning in the way the story is told in legal education in Sri Lanka. Emphasis should be laid on legal pluralism and how that works, despite conventional suspicions lawyers hold of legal pluralists.[15]

The Galle Landraad exemplifies a forum where a choice of laws came into play, that choice being significant at varying degrees for different areas of the law. The councillors were asked to adjudicate according to local customs, but also told they had the option of resorting to Dutch laws where local laws were unclear or unreasonable. The Landraad shows the tension of two apparently competing sets of norms within a single system. It is no surprise that the likes of Kalegana Bastian Naidelage Maria of Galle said that even her dog would not appear before the Landraad. Nominal Christians in Galle rejected the Dutch form of the oath, yet at the same time used its non-acceptance to their advantage in preventing opponents from being admitted to the oath. Pilaane Godakandege Gimara collided more visibly with the Dutch government in appealing the loss of inheritance due to her late husband's illegitimacy, which she did not seek to hide. Resistance, however subtle, was unavoidable and served in undermining state power. At the same time, the company was careful to ensure subordination and widespread recognition of their authority. The Dutch law had priority at the level of the higher judicial councils. Where possible this predominance was also imposed on the Landraad, but the effort, at times successful, to recognise the local normative order in that body was also perceivable. The exclusion of such adaptability between legal orders from the concept of legal pluralism is not viable, as it would thereby exclude the lived experience of inter-legality within the single Dutch legal regime. The local normative order was as much a social fact as Roman-Dutch law, and early colonial rulers understood that it could not be ignored.

We may use an 'ism' in the term 'legal pluralism', but Paul Halliday is right to have said that 'in the living of laws in the past, they were simply pluralities'. As in this study, in the hands of historians 'pluralism has become pluralities'.[16] Thus the sources of all laws are hardly likely to be acquired rather than existing normative practices. Pluralities, both imposed and existing, operated within the council or in the codifications of the laws of other ethnic and religious groups in Sri Lanka. Pluralities show us the ways in which the early colonial world in southern Sri Lanka was experienced by its inhabitants. It is not the intention of this study, however, to romanticize the notion of pluralism.[17] I have, as Halliday advocates for historians, observed pluralities. The observation of pluralities however must not be an end-point: I have shown that when discerned in practice they may fail as they could be either supported or contested. This is seen, for example, in the ultimately unsuccessful adoption of the local form of the oath, and in the Landraad's more consensual stance on the inheritance of non-marital children backfiring at a higher level of legal authority. In-depth studies of this nature can thus greatly inform us about legal pluralism in practice.

This in turn informs us about the nature of early colonial rule. Benton is right to have said that '[c]olonial states did not in an important sense exist *as* states in the early centuries of colonialism. They did not claim or produce a monopoly on legal authority or on the assignment of political and legal identity.' She points out that there was an undeniable dominance, 'but both colonizing factions and colonized groups were not irrational or deluded when they

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[14] Tamanaha, 'Understanding Legal Pluralism'.
[15] William Twining refers to how lawyers can be resistant to the idea of legal pluralism in 'Normative and Legal Pluralism', 476. See for a fuller account Cotterrell, *Law, Culture and Society*.
[16] Halliday, 'Laws' Histories: Pluralisms, Pluralities, Diversity', 262.
[17] Santos and others have warned against such romanticisation. See Twining, 'Normative and Legal Pluralism', 502; Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press, 2002), 89.

sought advantage in the fractured qualities of rule.'[18] As explained in the introduction, I have presented the 'nuanced historical analysis of legal pluralism' that Benton and Ross have lamented the loss of, but state is not as practicable as a focus on jurisdictional conflict that show structural changes.[19] This thesis, however, uniquely gestures towards a nuanced history from below of the headmen and peasants involved in lawmaking through an approach that integrates socio-legal studies, the nature of colonial rule and peasant studies. An emphasis on jurisdictional conflicts alone would have skewed our understanding of legal pluralism and colonialism in Dutch Sri Lanka.

The incorporation of existing practices and ideologies into the enterprise of colonialism makes it less of a rupture than Nicholas Dirks contended.[20] The practice of law in Dutch times further emphasizes that the transformative role of colonialism, as it trickled down to peasants was not consistently dissonant with the local normative order. The legal structure had to come to terms with existing norms and legal practices. Yet the transplant, as it were, also sought to disrupt the existing order. The pluralities of the system in practice would invariably bring about a seemingly unsatisfactory association of both change and continuity, a position taken up by David Washbrook.[21] The tempered normality of the recognition of pluralities would inevitably lead to such an association, as other means of managing the diversity of laws that were encountered would not be feasible. As Benton and Ross state, '[i]mperial officials could regard jurisdictional complexity as acting to reinforce state power rather than unleashing transformative conflicts. The dynamics of legal pluralism, they show, extended well beyond the end point of the mid-nineteenth century…, and beyond any other artificial marker separating "early modern" and "modern" worlds.'[22] The Landraad in Galle shows the early colonial practices of legal pluralism, which in turn arguably had its origins in a much earlier time under the local normative order.

The company's extensive penetration into native society can be seen through the Landraad, which is a rich source for understanding the intersection of local and external normative orders. This thesis is a rare step towards an in-depth study of a colonial judicial forum, but much unexplored territory still lies buried in the archives, waiting to be noticed.

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[18] Benton, *Law and Colonial Cultures*, 259.
[19] Benton and Ross, *Legal Pluralism and Empires*, 5–6.
[20] Dirks, *The Hollow Crown*.
[21] David Washbrook, 'South India 1770–1840: The Colonial Transition', *Modern Asian Studies* 38, no. 03 (July 2004): 479–516.
[22] Benton and Ross, *Legal Pluralism and Empires*, 14.