Association of American Law Schools (AALS)
Section on Law and South Asian Studies

The Postcolonial Lives of Colonial Law in South Asia

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Marriott Wardman Park Hotel, Washington, DC
Virginia Suite A, Lobby Level
Saturday, January 3, 2015, 3:30pm–5:15pm
Section business meeting will be held from 5:10pm–5:15pm

As scholars across a range of disciplines have observed, the process of decolonization in South Asia has been long and uneven—in significant part due to the persistence of the legal, administrative, and judicial institutions that were inherited from the British colonial state. This session examines the significance of these continuities between colonial and postcolonial laws and public institutions in South Asia. To what extent, if any, was decolonization a moment of rupture? How did colonial laws and legal institutions survive the formal end of colonial rule and how have postcolonial states in South Asia adopted and adapted them? And with what contemporary implications and consequences? The panelists will investigate law in colonial and postcolonial South Asia by looking both horizontally across imperial space and vertically across historical time. The speakers bring to the session interdisciplinary perspectives drawn from law, history, political science, and postcolonial studies.

Panelists:
Elizabeth Kolsky, Department of History, Villanova University
Dinusha Panditaratne, Faculty of Law, Chinese University of Hong Kong
Kalyani Ramnath, Department of History, Princeton University
Umakanth Varottil, Faculty of Law, National University of Singapore

Chair/Discussant:
Anil Kalhan, Thomas R. Kline School of Law, Drexel University

Abstracts

Law, Crime and Colonial Control on the North-West Frontier of British India

Elizabeth Kolsky

According to conventional wisdom, the British empire achieved territorial dominance over the Indian subcontinent with the conquest of Punjab in 1849. However, imperial stability at the northwestern and northeastern boundaries of the empire remained tenuous and tumultuous into the twentieth century. Alternately using the carrots of accommodation and conciliation and the sticks of repression and control, the colonial state continuously struggled to secure dominance on its vulnerable land frontiers. British administrators across the spectrum of political opinion believed that the security of India depended upon the security of its borders. The logic and rhetoric that defined frontier policy rested on the assumption that exceptional circumstances demanded exceptional treatment and exceptional laws and legal procedures. At the heart of this paper sits a fundamental question: what does this space of legal exception reveal, if anything, about the core nature of colonial control?

I seek to answer this question by exploring the formation and implementation of legislation on the northwestern frontier of British India where a series of special laws were passed to protect British subjects and to promote imperial interests. The Frontier Murderous Outrages Regulation and the Frontier Crimes Regulation, which were both designed to suppress violent crime (especially murder), afforded the state extraordinary powers to try and punish alleged criminals. Such powers included summary execution upon sentencing (denying defendants the right to appeal and dismissing the requirement in the ordinary criminal law that a capital case be confirmed by a higher tribunal), collective punishment (fining and confining entire families and villages found to harbor or sympathize with alleged criminals), and preventive jurisdiction (taking security from or arresting persons suspected of being about to commit certain crimes). The paper examines official debates about the framing of this legislation (law on the books) as well as actual trials (law in action).

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The Criminalization of Same-Sex Relations in South Asia: The Significance of Socio-Cultural Factors in Impeding Legal Reform

Dinusha Panditaratne

Every former British colony in South Asia has retained colonial laws that criminalize sexual activity between persons of the same sex. There are intensifying calls for the repeal of such laws, especially as western states have moved towards ending all forms of discrimination on the basis of sexual orientation. In this article, I examine the persistence of laws that criminalize same-sex relations in South Asia, with particular attention to the less studied case of Sri Lanka. I argue that recent western trends do not predict the decriminalization of same-sex relations in South Asia and indeed, may make it more difficult to achieve.

I highlight four socio-cultural barriers to decriminalization in South Asia. These include; (i) a wariness of 'repeat colonization' by ascendant social norms that are popularly associated with the West; in this instance, LGBT civil rights, (ii) the predominance of the extended family unit and multi-generational households, which inhibit notions of intimacy and privacy that are critical to popular support for decriminalization, (iii) widespread corruption, which underlies resistance among the police to repealing criminal provisions that can be used for inducing bribes, and (iv) the elevated legal status of certain religions, which helps to legitimize other types of discrimination. By comparing the legislative inertia in Sri Lanka and other South Asian countries to successful decriminalization elsewhere in Asia – including Nepal, Thailand and Hong Kong – I argue that a transformative change of at least some of these socio-cultural factors is a prerequisite to decriminalization.

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ADM Jabalpur's Antecedents: Thoughts on a Civil Liberties Discourse in Colonial and Postcolonial India

Kalyani Ramnath

The 1975 National Emergency in India is often credited with the rise of civil liberties lawyering in South Asia. Suspending the right to access courts for redress of fundamental rights, over a period of 26 months, the Indira Gandhi government acted swiftly to arrest political opponents and implement a widespread social programme designed to bring citizens in order. Reviewing the habeas corpus petitions of prisoners across the country, the Supreme Court in *ADM Jabalpur* (1975) ruled that there was no *mala fides* on the part of the government in suspending the right to access courts. Subsequently, civil liberties groups and public-spirited citizens emerged as strong supporters of free speech, assembly and movement, shaping the post-Emergency legal culture. Here, the argument about abolishing colonial-era laws or legal practices figured prominently.

Examining the antecedents of *ADM Jabalpur*, the paper seeks to intervene in the debate on colonial continuities in South Asian legal history. It uses a broader canvas for this argument than the persistence of colonial-era legal doctrine or legal infrastructure in postcolonial times. It looks at legal actors, particularly lawyers, litigants, activists and politicians, in the articulation of a civil liberties discourse in colonial and postcolonial India. It redirects attention from national-level institutional frameworks such as the Constituent Assembly of India or the Indian Supreme Court to local conversations amongst supporters of civil liberties. Examining their work, I suggest that the argument against colonial continuities possessed value to them as they dealt with their particular, localized histories of repression.

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The Evolution Of Corporate Law In Post-Colonial India: From Transplant To Autochthony

Umakanth Varottil

The evolution of corporate law in India can be traced back to the colonial era with several previous companies' legislation being modeled on parallel English legislation. The influence of colonial laws continued even after decolonization in 1947 when the most significant piece of companies' legislation, the Companies Act, 1956 (the 1956 Act), was modeled on the English Companies Act of 1948. Although the 1956 Act was the result of a classic legal transplant, its evolution thereafter took on a different trajectory. Constant amendments to the 1956 Act were necessitated due to legislative requirements that arose due to local conditions and problems that were unique to the Indian corporate setting. Moreover, Indian courts too refused to accept English judgments without adjusting and adapting the legal principles to suit the conditions of Indian society.

The divergence between Indian corporate law and its English counterpart became clearer with India's economic liberalization in 1991. With the expansion of foreign investment and the development of India's capital markets, the focus of corporate law extended beyond the 1956 Act and into securities laws pertaining to or promulgated by the securities regulator, the Securities and Exchange Board of India. In this phase, while some influence of English laws did subsist, the Indian Parliament and regulators began to either look to other jurisdictions such as the US to draw inspiration for legal reforms or indulged in soul-searching to mold customized solutions to India's unique problems.

The transition from legal transplant to autochthony culminated in the recent enactment of the Companies Act, 2013 (the 2013) that is being brought into effect in parts so as to replace the 1956 Act. The 2013 Act is not only the result of nearly two decades of debates and discussions, but also a reaction to corporate law and governance problems that have plagued India more recently. The transition away from English company law is nearly complete as the reforms are almost entirely tailored to suit local needs. For example, the legislative focus is on companies with concentrated shareholding that are replete in India, and not on companies with dispersed shareholding that dominate the UK landscape.

The essential thesis of this paper is that while Indian corporate law began as a legal transplant from the UK, its effect has been progressively decoupled with subsequent amendments and reforms being focused either on finding solutions to local problems or borrowing from other jurisdictions such as the US whose influence on the corporate law sphere has since far exceeded that of the UK.