

Imposition of a Western Judicial System in the Hawaiian Monarchy

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Three groups were active in imposing a Western judicial system on Hawaii in the first half of the 19th Century. The first group, women *alii* (chiefs), reached out from their traditional culture to adopt Western judicial forms. The second group, American Protestant missionaries, taught Christian ethical standards and principles of civil government. The third group, American lawyers, transferred American laws and recreated their judicial environment in the Islands. By the time of the 1852 Constitution, these groups had used *alii* authority combined with Western precedents to create a Hawaiian judicial system that was Western in philosophy, structure and procedure.

The imposition of a Western judicial system had important political and social consequences for Hawaii. It was a key element in keeping the sovereignty of the Hawaiian monarch intact. By creating a system that could settle the disputes of foreigners in a manner they found acceptable, the government defused foreign pressure to take over the government. The courts became an instrument in the restructuring of the society by interposing a judicial authority over the *maka'ainana* (common people) that superseded the authority of their chiefs. The courts also became a transmitter of Western culture by enforcing legislatively created standards of behavior on the native population and on the immigrant groups as they came to settle.

This article will discuss the roles of the three groups, the women *alii*, the American Protestant missionaries, and the American lawyers, in the imposition of a Western judicial system in Hawaii.

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THE ROLE OF THE WOMEN *alii*

Women *alii* created the conditions which made the imposition of a Western judicial system possible, and then led its actual imposition. The women *alii* brought about the abolition of the traditional religious *kapu* shortly after Kamehameha's death in 1819. They did away with an intricate system of regulations intertwined with the functions of daily life and removed the power of the *kahuna* (priests) to try and to punish the people for breaches of those regulations. The civil power of the *alii* still remained; but in the numerous, everyday matters of dispute between commoners, the *alii* seldom intervened unless called upon by friendship or family ties. Commoners were left to handle their own disputes based on accepted patterns of settlement or retaliation.

In the following decade, the women *alii* found a new religious framework for the regulation of their society by becoming Christians. They pronounced laws based on Christian ethical standards and adopted Western forms for judging the conduct of their people. Kaahumanu, Queen Regent and *Kuhina Nui* (premier), the most powerful chief after Kamehameha's death, led the women *alii* in the work of moral and legal regulation. She proclaimed laws prohibiting drunkenness, murder, including infanticide, theft, fighting, prostitution, and laws to protect the sacredness of the Sabbath and to encourage school attendance. Keopulani, the most sacred of the women *alii*, was the first to send away her second husband and follow Christian standards of monogamous marriage. Kapiolani proclaimed and enforced laws on drinking and monogamous marriage on her lands on Hawaii, punishing those who broke the laws by work sentences on the public roads.¹

On December 5, 1825, after six months probation and orientation on their Christian duty as magistrates for God's law, Kaahumanu and several other high chiefs were covenanted to the church. At Kaahumanu's urging, the chiefs moved quickly the following week to hold a council at which she intended that they would announce the Ten Commandments as the law of the land. But opposition by foreigners, supported by the Governor of Oahu, caused the idea to be dropped. Two years later Kaahumanu and Kauikeaouli, the young King, proclaimed the first national laws against murder, stealing, and adultery.²

To judge the first person accused of murder under the new law, Kaahumanu adopted some of the forms of Western judicial procedure. She held a trial, presided over it, and appointed a twelve member jury of chiefs, after the missionaries explained the manner in which the guilt

or innocence of the person should be determined. Kaahumanu, at the same time, appointed several persons to be magistrates.³

The missionaries assigned personal, women's reasons to the women *alii's* revolutionary actions. Sheldon Dibble thought that Keopuolani, the mother of the king, had helped Kaahumanu in the overthrow of the religious *kapu* because of her love and sympathy for Kaahumanu. Hiram Bingham felt Kaahumanu had given up her *alii* hauteur and become a Christian because he and his wife Sybil had nursed her through a sickness. William Richards felt that Keopuolani's religious steadfastness in her last days related to her hopes and fears for the future of her children.⁴

These are outsiders' views. It is difficult to know from within the culture what motivated the women *alii*. It is possible to see that as women *alii* led in adopting the ethical codes of Christianity, translating them into law and using Western forms of judicial procedure, they moved into a central place in the new religion and law. They sat in the front pew on the Sabbath. They held consultations with the missionaries. They traveled their lands exhorting their people to follow the new ways. They created new relationships of authoritative control over the daily activities of their people. Some of these controls had been exercised earlier by the *kahuna* (priests); some were western modes of social control not previously exercised in Hawaiian society. The women *alii's* alliance with Christianity gave them a place they would never have had under their traditional religious system. In that system they were allowed specialized participation in some rituals as *alii*, but denied general participation because of their lack of sacredness as women. Their involvement came in a transitional space between the two cultures; for the missionaries would not have granted such a central place to women in their own culture. The missionaries needed the authority that the women *alii* could wield in bringing their people to Christianity and in creating a well-regulated society, and for that they granted these women a special place in their Hawaiian churches.

In the judicial system, Kinau and Kekauluohi, the women *alii* who succeeded Kaahumanu as *Kuhina Nui*, were the protectors of law and the administrators of the judicial process. The *Kuhina Nui's* primary judicial responsibility over "life and death, condemnation and acquittal" became institutionalized in the first constitution (1840).⁵ The *Kuhina Nui* was also given the duty of presiding, with the King, over the Supreme Court.

Below the Supreme Court level, the island governors who were also *alii*, both women and men, handled the daily operation of the judicial system.

It became customary for the Governors to preside over trials and to appoint judges, enforce decisions, and channel appeals from the district and tax collector courts to the Supreme Court. Although the constitution did not give them the power, they held trials as though they were circuit judges. Gerrit P. Judd, Minister of Interior, indicated the pragmatic nature of the operation, saying, "It was for the interest of the parties litigant that those powers should exist somewhere."⁶ This was especially true in the busy commercial port of Honolulu. There Kekuanaoa, the urbane, affable, and respected Governor of Oahu who received his status by marriage to Kinau, daughter of Kamehameha and *Kuhina Nui*, was called to settle the acrimonious disputes of foreign merchants.

DISPLACEMENT OF THE *alii*

The dominance of the *alii* within the judiciary was short lived. Western governmental and judicial systems had their own complex internal logic built painstakingly over the centuries which, once set in motion, displaced *alii* in the judiciary. By their own vote in the House of Nobles, the King and chiefs adopted the instrument of their displacement, the Act to Organize the Judiciary (1847). This act, drafted by an American attorney, set up the judiciary as a specialized function, separate from the executive. The King was constrained to act separately in his judicial and executive roles.

The King, in his executive capacity, shall in no case control the judgments, decisions, and awards made or sanctioned by or before any of the said judges and judicial officers, neither shall he have authority to overrule the judgments, decisions, or awards so made or sanctioned, except as Chief Judge of the Supreme Court a majority of said court concurring with him in opinion.⁷

The Governors were stripped of their role as judges, except that they continued to handle divorces concurrently with the courts until 1853. They also retained the power to appoint district court judges.⁸

Complete separation of the *alii* from positions within the judiciary came when the king and *kuhina nui* were dropped from presiding over the Supreme Court in the 1852 Constitution. Instead the king gained executive power over appointments to the Supreme and Circuit courts, with the advice of the Privy Council. The House of Nobles, dominated by *alii*, was given the power to remove justices and judges by impeachment.⁹

The *alii*, by creating the judicial system and bringing their people with them from the old system into the new, gave it legitimacy. Unaware of the myriad implications of adopting a Western judicial system, they

soon found that they had begun their reform at the center of their culture and were required to surrender much of their authority over their people to the new institution.

AMERICAN MISSIONARIES SHAPE THE JUDICIAL SYSTEM

The American Protestant missionaries, who first arrived in the islands in 1820, forged an alliance for social control with the *alii* that lasted into the 1860s. Their viewpoint, example, and Christian teachings were the strongest influence that nurtured and shaped the growth of Western law in Hawaii. The missionaries created the foundation for law through their teaching of the prohibitions and permissions of the Bible. Through their school system they taught both adults and children to read, making it possible for the *alii* to publish national laws that could be read by their people. In the 1830s magnetic religious revivals swept twenty percent of the population into the churches. As members of the congregations, the people made decisions to impose Christian standards of behavior, expelling members for immorality, including several chiefs.

The missionaries were extremely litigious. They were drawn into conflict with seamen, merchants, consuls of foreign governments, and with the Catholic mission. In each controversy, they justified their position in legalistic terms to the Hawaiian community and to their governing board at home in New England. The missionaries were dependent on the moral and financial support of the donation-giving American public for the continuation of their enterprise. They argued their case publicly and righteously, citing Biblical chapter and verse, for the imposition of a moral, well-regulated Christian community.

Politically, the missionaries supported the American concept of the separation of church and state. They accepted their Board's instructions that they were not to interfere with the political interests of the people. Philosophically, the missionaries believed in an intimate relationship between Christianity and secular law. When the *alii* proposed adopting the Ten Commandments as law, the missionaries welcomed the idea. Hiram Bingham, the leader of the mission, undertook a tour around Oahu with Kaahumanu during which they both preached to the people about that relationship. Bingham believed that "the state, deriving all its powers from God, both rulers and subjects being bound to do God's will, and its chief magistrate being emphatically God's minister, ought to be, and in an important sense is a religious institution." The two roles of mission and state were so close that a man could move from one to the other and still feel he was working for the same master and in the same cause.¹⁰

William Richards, motivated by a vision of reform, was the first of the missionaries to accept the King's request to become an advisor to the government. For political reasons the mission required his complete severance from their group but still considered him one of their own. Richards was from Massachusetts, a graduate of Williams College and Andover Theological Seminary. He had come to the Islands in 1823. Richards was a kind, even-tempered man who had the full trust and confidence of the chiefs. In the late 1830s he returned to the United States to seek a lawyer who would train the chiefs in political and economic matters. When he was unable to find one willing to come to Hawaii, the King drafted him into service. Richards influenced the King and chiefs to adopt the basic rights that are the foundation of English law. The Declaration of Rights (1839) which Richards drafted stated that God had established the office of chiefs and the rule of kings for the "protection" of commoners as well as chiefs. The Declaration went on to protect the lives of the people and their houselots from being taken "except as provided by law."¹¹

Richards called on adult students at Lahainaluna, the mission school, to draft a constitution. In the fall of 1840 the Council of Chiefs' sessions on the constitution were interrupted by the arrival of the United States Exploring Expedition under Commander Charles Wilkes. Richards, the King, and chiefs went to Honolulu to meet Wilkes. There, an extraordinary criminal case created a precedent and precipitated the promulgation of the constitution.

Kamanawa, a high ranking chief, grandfather of Kalakaua and Liliuokalani, wishing to marry again, poisoned his divorced wife Kamo-kuiki. The law (1835) prohibited a person who had been guilty of adultery from marrying again as long as the former partner was still alive. Kamanawa was tried before the Governor of Oahu and a jury of chiefs. He confessed and was convicted of willful murder. The penalty was death. Kamehameha III (Kamehameha III) and Kamanawa had grown up together, and the King told Captain Wilkes that he was reluctant to put a man of such high rank to death. Wilkes replied that there was "no escape," that it was far better that "a prince of the blood should suffer rather than the law be set aside." The *Kuhina Nui* pronounced the death sentence, and Kamanawa and his accomplice were hanged on the wall of the fort before a crowd of ten thousand people. The Polynesian newspaper emphasized the significance of the event for the development of the Hawaiian judicial system. "Kamanawa is of very high rank by blood, and his trial and condemnation by his peers shows in them a com-

mendable determination to assert the supremacy of their laws, however high the rank of the offender.”¹²

Equality before the law of *alii* and *maka'ainana* became part of Richards' expanded Declaration of Rights in Hawaii's first constitution. The King and *Kuhina Nui* promulgated the constitution between the date of Kamanawa's sentence and his execution. The constitution went on to guarantee due process of law: the right of trial before an impartial judge and jury and the right to face one's accuser. The constitution formally established courts: a supreme court, island district courts, and tax collectors' courts.¹³

The second member of the mission to become involved with the judiciary as part of the government was Dr. Gerrit P. Judd. Judd had grown up in a village on the New York frontier, graduated from medical school, and gone into his father's practice. The evangelical zeal of the great preacher Charles Grandison Finney influenced him to join the mission. Dr. Judd arrived in Hawaii in 1828 and served as the mission doctor. He was called to government when William Richards was sent on a diplomatic mission to England to gain recognition of Hawaiian independence. Judd's role in the new legal system was to develop the operations of the fledgling courts and to protect them from foreign interference. Judd oversaw the workings of the district courts on Oahu. Under a resolution passed by the Hawaiian legislature in 1842, his job as government translator included sitting with the island Governors while they were holding trials of foreigners, many of whom complained about the procedures of the Hawaiian courts.¹⁴

British merchants living in Honolulu protested to the British consul about the handling of land and business cases in Governor Kekuanaoa's court. The consul called in a warship. The guns of the British cruiser *Carysforth* sighted on Honolulu forced Kamehameha III to surrender the government into the hands of its commander Lord George Paulet for five months in 1843. Dr. Judd led the Hawaiian government's resistance to the seizure which the British government later disavowed. A joint declaration by England and France and a separate message late in 1843 by the United States recognizing the independence of the Sandwich Islands and guaranteeing "never to take possession" of its territory gave the Hawaiian nation the security to insist on its sovereign rights.¹⁵

Judd also herded the government's defense of the Hawaiian courts against the frontal attack of American commissioner George Brown. Brown supported American citizen John Wiley's appeal from a lower court fine of \$50 in a case of rape of a Hawaiian girl. The appeal came

before Kekuaanoa, Governor of Oahu, who handled foreign cases. Judd, as translator, and John Ricord, as legal advisor, sat beside the Governor on the bench. Brown insisted that the American consul be allowed to propose the jury panel. Under French and English treaties, consuls of those countries were allowed to submit names for a jury panel when their citizens were involved in criminal cases. In the Wiley appeal, Judd and Ricord insisted on Hawaii's sovereignty. They stated that the jury must be based on Hawaiian law which said that when one party was a foreigner and one an Hawaiian, the jury would be half foreign and half Hawaiian. The government said it would not allow a consular jury because Hawaii did not have a treaty with the United States, and besides rape was considered a misdemeanor, not a crime, and so did not come under treaty provisions.¹⁶

The arguments and rationale appeared in correspondence and in the columns of the *Polynesian* after John Wiley had refused to accept the court's jury and had withdrawn his case. The conflict of words became so heated that Kamehameha III wrote to the President of the United States asking for Commissioner Brown's recall. United States naval ships adopted Brown's pique and refused to fire courtesy salutes when they came into Honolulu Harbor.¹⁷

In the James Gray case that followed, Commissioner Brown tried to overpower the Hawaiian courts. Brown came into court as attorney for Gray who was appealing a conviction for assault. Brown brought two associate counsels with him, A. Robert Bogardus, secretary to the Commander-in-chief, U.S. Naval Forces in the Pacific, and Archibald H. Gillespie, Lieutenant of the Marines from the *USS Cyane* which was then in port. Although he had no legal training, Brown argued every point of procedure; but the major battle was again over the jury. Brown wanted foreigners who had taken an oath of allegiance to the Hawaiian government to be disqualified as foreigners for jury purposes. The court, in which the Governor was again flanked on the bench by Judd and Ricord, decided that in the Hawaiian version of the law the word was "haole" (foreigner) and that a "haole" was still a "haole" even if he had become an Hawaiian citizen. The jury upheld Gray's conviction.¹⁸

The *Polynesian* commented that in the presence of the U.S. Commissioner, the secretary for the commodore, the Lieutenant of the Marines, and numerous gentlemen from the frigate as spectators, the abusive language of Mr. Brown "must have given the impression to the spectators that the whole scene was intended to intimidate the court" or "insult . . . its individual members." Diplomatic exchanges again grew

tense, and Commissioner Brown was interdicted from any further correspondence with the Hawaiian government. The new Polk administration in the United States replaced Brown as commissioner. Judd had stubbornly protected the sovereignty of the Hawaiian courts as they were, but the government soon moved to allay foreigners' complaints.¹⁹

On September 19, 1845, Governor Kekuanaoa appointed former missionary Lorrin Andrews to be judge of foreign cases. Andrews had taught at the mission school at Lahainaluna and was an accomplished scholar of the Hawaiian language. He left the mission in 1842 as a matter of conscience because the board in New England had accepted funds from slave owners. He was not trained in law but was a graduate of Princeton Theological Seminary. His role in the courts was to initiate internal procedural uniformity. He began by issuing a "Lex Forti" containing twenty-one rules of practice. Although there were only three lawyers at this time practicing besides Attorney General John Ricord, who undoubtedly drafted the rules, this was the beginning of the internal regulation of the courts. Andrews handled his duties carefully and quietly and did not become notorious or a subject of diplomatic correspondence.²⁰

THE AMERICAN LAWYERS—RICORD AND LEE

The missionaries, who had lived through a generation of cultural conflict and change in the islands before they came into government service, had a good knowledge of traditional Hawaiian society. They had formed intimate friendships with Hawaiians and had lived in the countryside in the midst of their congregations and schools. The two American lawyers who became the legal technicians in the imposition of the Western judicial system were plunged into the government's legal work as soon as they arrived. They lived in the *haole* and *alii* community of Honolulu. Both used their legal knowledge and skills to recreate the society in the image of the one they had come from: one being primarily concerned with questions of judicial structure, the other striving to transmit the values of a democracy.

The first was John Ricord, a restless adventurer practicing law on the frontiers of American expansionism, in Texas, Florida, and Oregon. By the time he drifted to Honolulu, he was a true frontiersman, acting in legal debate like a fast draw sheriff who dared his opponent to test him. His actions bordered on bravado, he being the only lawyer in the country when he arrived. Yet under the mask of his disruptive public stance, his long hours of hard work produced the legal and judicial structure for a permanent, settled community. Ricord represented the controversy-

filled time when the boundaries were not yet set, nor the basic rules yet agreed upon. The other American lawyer William Little Lee's careful integrity and professionalism perfectly fitted him for the self-consciously stable settlement period that followed.²¹

Ricord's sojourn as government Attorney General began on March 9, 1844. He used his legal ability to organize and systemize the overall government structure and the courts. As an advisor to Governor Kekuaanoa in foreign cases, he incorporated into Hawaiian law large areas of common law, equity, admiralty, and probate law "by writing elaborate opinions with marginal references to authorities."²² The Governor adopted the opinions as his own and indicated that the principles would be precedent in future cases.

Ricord drafted the two organic acts which set the form of government organization in 1845-46. Under the office of the Attorney General he placed an elaborate law enforcement agency headed by a Marshall of the Kingdom, island sheriffs, and constables who were executive officers of the courts. Included in the second organic act were brief provisions to handle judicial matters until a judiciary act could be written. The existing courts were not altered; but Ricord added new courts to handle disputes of foreigners. These were called Police Courts and were located at the port cities of Honolulu and Lahaina. He also formalized Judge Andrews' position by proposing the legislation which created the Court of Oahu.²³

Ricord's major contribution to the judicial system was his Act to Organize the Judiciary (1847) which put in place a national hierarchical court structure. This third organic act created a Judiciary Department with courts of record. On its most fundamental level this meant that things would be written down—clerks would keep notes of proceedings, a record which could serve as a basis for appeal, and for decisions which could serve as precedent to future decisions. A written record meant that procedures had to be formalized, that the practice, sequence, and a form of process were defined.

Ricord committed the courts to the use of codes by indicating in the Third Act that both a penal and civil code would be written. Beyond that, the legal basis upon which the judges could make their decisions was as broad and international as possible. Decisions were to be founded on the Hawaiian constitution, statute law, vested and acquired rights of individuals, the law of nature, the laws of nations, and subsisting treaties with foreign powers. In addition, the common law and the civil law, "so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this kingdom," could be cited and adopted

by the courts. Only as an aside was traditional Hawaiian usage included.²⁴

The economic concerns of foreigners and the political concerns of the government were foremost in Ricord's mind when he drafted the act. He said that the judicial system would set up "a well demarked process for attaining the civil rights to which commerce inland and foreign, ownership of property real and personal, and relations public and private, give rise."²⁵ Ricord's usefulness to the government was compromised by an unsuccessful suit brought against him by his Honolulu opponents, for mishandling the fee of a former Florida client. He resigned and left the Kingdom before the Judiciary Act was presented to the legislature.

It fell to William Little Lee, a young judge who had been appointed to sit with Andrews on the Court of Oahu, to do the final revision of the judiciary bill. This was the first of Lee's significant contributions to the Hawaiian judiciary. Lee had received the best legal education available for an American of his time. He had been a law student at Harvard under U.S. Supreme Court Justice Joseph Story and the renowned law teacher Samuel Greenleaf. After a year's practice in Troy, New York, a consumptive condition caused Lee to take a sea voyage to Oregon. Stopping en route at Honolulu, he and his friend Charles R. Bishop were persuaded to stay in Hawaii. Lee at the age of twenty-six was intelligent and analytical with a strong moral sense fortified by steadiness and a firm grasp of his responsibilities. Hawaiian historian R. S. Kuykendall said that his appointment "marks the beginning of a new era in the history of the Hawaiian judiciary. His character and attainments were such that under his leadership the courts won and retained public confidence."²⁶ Lee's impact was felt in every area of westernization of the judicial system: in the structure of the courts, in major areas of substantive law, and in the administration of the courts.

The all-Hawaiian legislature headed by Kamehameha III showed a marked deference to Judge Lee. It passed the judiciary act, apparently without debate. The legislature requested his advice on drafting several bills. A broad resolution of both houses asked him "to go through the laws and make certain changes so as to make them more clear," which became his authorization for drafting codes.²⁷

Lee's major impact on the structure of the courts was to integrate them into a highly centralized system. This he did in the 1852 Constitution. He fused the internal racial duality of separate courts and appeal routes for Hawaiians into a unified structure. The traditional tax collector courts and the King's all-Hawaiian Supreme Court, established by the 1840 Constitution, were abolished. The functions of the "local

circuit judges,” who were predominately Hawaiian and had jurisdiction only over Hawaiians appealing from the district courts, were broadened to handle all cases at chambers. They became designated simply “circuit judges.” Lee’s elimination of separate racial approaches in the courts was undoubtedly tied to his avid anti-slavery convictions which gave strength to his fight against racial inequality.

The Superior Court of Law and Equity, over which Lee had presided since the 1847 Judiciary Act, was elevated to become the Supreme Court. The three justices heard all cases of original or appellate jurisdiction above the district court level. They sailed circuit to preside, sitting with the island circuit judge on jury trials. They heard original cases and appeals at chambers, and they came together in Honolulu to sit en banc. Through this highly centralized system, any three men sitting on the Supreme Court could control judicial decisions. Within a decade after Lee’s death, these men would all turn out to be *haole*.²⁸

Lee had been pessimistic about passage of his draft constitution “because the King and chiefs have been talked into a belief that it is too Republican.” He felt that opposition arose because “the chiefs begin to be jealous of the growing power of the people, for you know it is a maxim with them, that ‘Kanakas were made for the Chiefs.’” The 1852 Constitution was the high point in the imposition of democratic American governmental forms; but it was not as republican as Lee had proposed. He gained universal male suffrage and a strong role for the popularly elected House of Representatives, but lost the fight to have the legislature control the appointment of judges. The Nobles chose to give the King the power to select the Supreme and Circuit judges. The Nobles also allowed the island Governors to continue to appoint district justices, although the proviso was added that those appointments should be approved by the Supreme Court.²⁹

Legislative debate over the passage of the constitution was not about whether Hawaiian or Western law would prevail, but whether the primary influence would be American or British. Foreign Minister Robert C. Wyllie, a Scotsman, who led the campaign for revisions in the House of Nobles and wanted to pattern the role of the Chief Justice after the British Chancellor, spoke of the conflict. He wrote former Attorney General Ricord that the Constitution “assumed quite a new shape” in the House of Nobles. Wyllie claimed that Gerrit P. Judd “stoutly and avowedly opposed me, as desiring them to copy from the British Constitution, scornfully rejecting my charge that the whole project . . . was copied in the main, from the Constitution of Massachusetts.” Under the new constitution, the legal basis for the court decisions was not as

broadly defined as it had been in the 1847 Judiciary Act. The laws of nature, nations, common, and civil law were no longer cited, nor was there any reference to traditional Hawaiian usage.³⁰

Lee drafted a judiciary bill to implement the provisions of the 1852 Constitution. It was passed by the Privy Council and signed by the King who appointed the incumbents of the Superior Court to the new Supreme Court. These appointees were Lee as Chief Justice, and Lorrin Andrews and John Ii as associate justices.³¹

When Lee came to write the codes requested by the legislature, he decided to draw up the penal code first, thinking it more urgently required. In drafting the code he seriously considered conforming to "the ancient laws and usages of the kingdom" but decided instead, "in the main," to adopt "the principles of the English common law, as the foundation of a code best adapted to the present and approaching wants and condition of the nation." Lee was consciously concerned to draft a code which would be "equally well adapted to the native and foreign portions of our community." He thought that would best be done by making the laws "so brief, simple, clear and direct, in thought and language, as not to confuse the native and yet so full as to satisfy his increasing wants, together with those of the naturalized and un-naturalized foreigners."³² Lee's comments indicate his support for the views of Eugene Field, American proponent of codes, who believed that in a democracy the laws that govern a man's conduct should be simple and available so that every man could know ahead of time what the rules were. Lee drew his code from a proposed Massachusetts penal code of 1836. The code was not adopted in Massachusetts. However, through the liberal ideas of Lee, many of its provisions became law in Hawaii in 1850 to serve a population that had never asked to know the rules that governed their lives.³³

The civil code took longer to draft. Lee's heavy duties and his increasingly poor health meant slow progress. The last year of his life, Lee withdrew from two sessions of the court while he and his protege George M. Robertson wrote the major part of the code. After Lee's death in 1857, Robertson completed the draft. It was adopted by the Legislature in 1859.

Lee brought major areas of substantive Western law into the Hawaiian legal system by drafting legislation which was frequently passed without alteration. He wrote the Masters and Servants Act (1850) which governed the terms of contract labor of thousands of Hawaiian and immigrant plantation workers. He drafted the Marriage and Divorce law (1853) which liberalized divorce grounds to include several causes, instead of

adultery only. He undoubtedly drafted basic business legislation, such as the bankruptcy law (1848).³⁴

As much as anyone, Lee was responsible for carrying into effect the system of private property ownership. All of his deepest beliefs came together in his support of land ownership by commoners. He felt that “merely to preserve” their rights “would be no gain.” He wanted to go forward to “define their rights—to separate them from those of their chiefs.” He sought “to give them what they have as their *own*, to inspire them with more self respect, more independence of character, and to lead them if possible to work, and labor, and cultivate, and improve their land.” Lee drafted principles and served as President of the Board of Commissioners to Quiet Land Titles, which under his leadership awarded some 12,000 titles.³⁵

As Chief Justice first of the Superior Court (1847–52) and then the Supreme Court (1852–57), Lee administered the court system. He created the position of clerks in the Supreme and Circuit courts and placed them under centralized control. They were appointed and removed by the justices. Their duties in regard to seals, process, and the keeping of minutes and records were prescribed in Lee’s judiciary act of 1853. As administrator, he often counseled Hawaiian judges who felt uncertain on procedures or applications of law. In one such letter Lee replied to J. W. Makalena, a new judge, about handling payment of witnesses, signing of judicial decrees, and the definition of “felony,” and then went on to advise, “In your judicial duties, then, here is the proper course: be careful, deliberate justly, always read the printed statute, and read often the law set down by Jehovah, for the secret is in Exodus and in Acts.”³⁶

The American lawyers, like the *alii* converts and the missionaries, looked to Biblical scripture for the foundation of their ethical precepts and their institution. Editorial comment in the *Polynesian* spoke of “the principles of law, like those of Christianity of which they are the essence in earthly dress,” as being of “universal application.” The comment went on to express the symbiotic relationship as one in which the missionaries defined the general principles, whereas “the jurist defines it in its relation to the external affairs of men, applies it, equalizes it, and makes it the rule which all men must respect, equally with the laws of physical nature or suffer the penalty.”³⁷

Soon after the 1852 Constitution went into effect Chief Justice Lee moved into the newly constructed coral block courthouse located near the harbor. This courthouse was the first structure in the islands built expressly for court purposes. It was built on the site of Halekauwila, a

large Hawaiian house belonging to Kamehameha III, where earlier court sessions had been held.³⁸

The courts and judicial system produced new roles and new levels of management, such as the *loio* (lawyer) and the *lunakanawai* (judge) just as the church and school had created new roles. New patterns of attendance to watch, participate in, and comment on the public drama of trials developed just as the daily routine of school classes and of Sunday and Wednesday church services changed the routine events of the days of the people. The message founded in Protestant Christianity came from everywhere in the new institutions, that each soul, legal entity, reader of the printed word, land owner, or contract laborer was a separate, responsible being.

The formal structure of a Western judicial system was imposed in Hawaii with a minimum of cultural conflict. This happened because women *alii*, persons with power and authority in the traditional culture, began the process of adopting Western judicial forms, and *alii* participated in authoritative positions as judges in the new system. The foundation for the transition was achieved over a generation, as *alii* worked together with the American Protestant missionaries in building churches and an extensive school system and indoctrinating their people in the concepts of Christian ethical behavior. Only after that foundation was laid, was a court system formally established in the 1840 Constitution. The pace of imposition accelerated as pressure from foreigners spurred the need to adopt Western standards, more complex organization, administrative efficiency, and detailed procedures. Here the general citizen's competence of the missionaries gave way to trained technicians, the American lawyers John Ricord and William Little Lee who transplanted American law and judicial institutions, fitting them to the highly centralized structure of the Hawaiian monarchy.

NOTES

¹ Ralph S. Kuykendall, *The Hawaiian Kingdom*, I (Honolulu: Univ. of Hawaii Press, 1968), p. 118; Hiram Bingham, *A Residence of Twenty-One Years in the Sandwich Islands* (New York: Praeger, 1969), p. 183; MH, September 1828, p. 275.

² Levi Chamberlain Journal, 5, 7, 12-14, 18 December 1825, and 14 December 1827, HMCS MS.

³ *Ibid.*, 28, 29 February 1828; letter, Bingham to Jeremiah Evarts, 15 December 1827, HMCS MS.

- ⁴ Sheldon Dibble, *A History of the Sandwich Islands* (Honolulu: T. H. Thrum, 1909), p. 126; Bingham, *Twenty-One Years*, p. 149; [William Richards], *Memoir of Keopuolani* (Boston: Crocker & Brewster, 1825), pp. 31-32. Marshall Sahlins, *Historical Metaphors and Mythical Realities* (Ann Arbor: Univ. of Michigan, ASAO Special Publication No. 1, 1981), pp. 62-66, discusses the pivotal role of Kaahumanu and her family in cultural change.
- ⁵ Const., 1840, in Robert C. Lydecker, *Roster of Legislature of Hawaii, Constitutions of Monarchy and Republic* (Honolulu: Hawaiian Gazette Co., Ltd., 1918), p. 8.
- ⁶ Minister of Interior, annual report draft, crossed-out passage, 1 April 1845, IDM, AH MS.
- ⁷ Third Act to Organize the Judiciary Department of the Hawaiian Islands (7 September 1847), ch. I, sec. II.
- ⁸ *Ibid.*, ch. III, art. I, sec. IV.
- ⁹ Const., 1852, art. 89, 86 and 90.
- ¹⁰ Bingham, *Twenty-One Years*, pp. 295, 281; letter, Chamberlain to Jeremiah Evarts, 26 July 1826, HMCS MS.
- ¹¹ Hawaiian Mission Children's Society, *Missionary Album* (Honolulu: HMCS, 1969), p. 162; Declaration of Rights entitled "The Constitution and the Law Regulating Property for these Hawaiian Islands Promulgated by Kamehameha III," [7 June 1838] (Honolulu: 1840, typescript translation), Laws, AH.
- ¹² Amos Starr Cooke Journal, 4 October 1840, HMCS MS; W. J. Morgan and others, eds., *Autobiography of Rear Admiral Charles Wilkes* (Washington, D.C.: U.S. Govt. Print. Off., 1978), p. 499; *P*, 3 October 1840.
- ¹³ Const., 1840, in Lydecker, *Roster*, pp. [8]-9, 14-15.
- ¹⁴ HMCS, *Album*, p. 128; He Buke a na lunakanawai ma ka Papu o Honolulu no 1844 & 45 [Minutebook of the Court of the Fort of Honolulu 1844 & 45] is inscribed with Judd's name on the frontispiece as *luna nui* (supervisor), AH MS; SL 1842, Ch. L (12 May 1842), p. 185.
- ¹⁵ Kuykendall, *Kingdom*, I, pp. 202-203.
- ¹⁶ *Correspondence between H. H. Majesty's Secretary of State and the U.S. Commissioner on the case of John Wiley, an American citizen* (Honolulu: Govt Press, 1844); *P*, 2 October, 2, 23, 30 November 1844; *F* (Extra), 14 November 1844.
- ¹⁷ *P*, 2 October, 2, 23, 30 November 1844.
- ¹⁸ *P*, 8, 15, 22, 29 March 1845; *Report of the Case of James Gray* (Honolulu: Govt. Press, 1845).
- ¹⁹ *P*, 15 March 1845.
- ²⁰ HMCS, *Album*, pp. 24-27; *Lex Forti of the Court of Oahu or Rules of Practice before Hon. Lorrin Andrews* (Honolulu: Chas. E. Hitchcock, 1846).
- ²¹ F. Muir, "John Ricord," *Southwestern Historical Quarterly*, 52 (July 1948), 50; Donald W. Griffin, "The Life of William L. Lee," M. A. thesis Vanderbilt Univ. 1956.
- ²² Walter Frear, *The Evolution of the Hawaiian Judiciary*, HHS Papers no. 7 (Honolulu: HHS, 1894), p. 7.
- ²³ Second Act to Organize the Executive Departments (1846), pt. 5, ch. I "Of the Executive Judicial Officers," pp. 233-245; General Provisions, sec. III, IV and V, pp. 270-272.
- ²⁴ *Ibid.*; Third Act, Judiciary, ch. I, sec. III, IV.
- ²⁵ Report of the Attorney General (Honolulu: Charles E. Hitchcock, Printer, 1847), pp. 4-5.

- ²⁵ Kuykendall, *Kingdom*, I, p. 244.
- ²⁷ Legislative Journal, 1847, 7 September 1847 (English typescript), AH; letter, Lee to G. M. Robertson, Supreme Court Letterbook, 30 September 1847, AH MS.
- ²⁸ Const., 1852, Art. 81-93; SL 1853, Relating to the Judiciary (3 December 1852), sec. 35, p. 9.
- ²⁹ Letter, Lee to Joel Turrill, 24 March 1852, HHS MS; Nobles Journal, 19 May 1852, AH MS.
- ³⁰ Letter, Wyllie to John Ricord, 4 March 1853, FO & Ex, AH MS. The Judiciary section of Lee's draft contained two articles similar to the Massachusetts constitution of 1870. It allowed the legislature, governor, and council to "require the opinions of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions." Reworded to include the king and ministers, this became art. 188 of Hawaii's 1852 constitution. Limitations on the term of office of the Massachusetts justice of the peace in art. III was transferred to Hawaii's district justices, art. 91. The common law was not again defined by statute as a basis for interpretation by Hawaii's courts until the Judiciary Act of 1892.
- ³¹ Privy Council Minutes, 3 December 1852, PCR, AH. An Act Relating to the Judiciary Department, originally passed by the Privy Council, was approved by the Legislature, 26 May 1853.
- ³² SL 1850, Penal Code of the Hawaiian Islands (21 June 1850), iv.
- ³³ Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (New York: Simon & Schuster, 1970), pp. 257-258, 315-317, 371, discusses the significance of codes.
- ³⁴ Legislative Journal, 1850, 21 June 1850, AH MS; Chief Justice of the Supreme Court, Annual Report, 1852, p. 113, AH.
- ³⁵ Letter, Lee to J. S. Emerson, 8 January 1848, Supreme Court Letterbook, AH MS.
- ³⁶ Letter, Lee to J. W. Makalena, 25 January 1848, Supreme Court Letterbook (trans. from Hawaiian by Ruth Horie), AH MS.
- ³⁷ *P*, 3 May 1845.
- ³⁸ Meiric K. Dutton, *William L. Lee: His Address at the Opening of the First Term of the Superior Court Held in the New Courthouse, Honolulu, July 5, 1852* (Honolulu: Loomis House Press, 1953), [8].