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978-1-107-08792-7 - The Ironies Of Colonial Governance: Law, Custom, and Justice in Colonial India

James Jaffe

Excerpt

[More information](#)

INTRODUCTION

This book concerns several discussions, discussions that took place first among British officers and officials serving in India or residing in London and then among Indian nationalists. The discussions concerned the nature and function of the Indian village council – the *panchayat* – its place in Indian society, and its role in the British governance of India. Much like Peter Robb’s work on the Bengal Tenancy Act, I have tried to “treat the evolution of events and concepts as the outcome of a dialogue between various, changing, mutually-influenced voices.”¹ More specifically, the book is about the colonial imagination of indigenous legal customs and government and the attempts to adapt those imagined customs to the practices of colonial governance. It thus adopts a transnational perspective that emphasizes the ideological sources of Western perceptions of indigenous governing practices, the variety of efforts to “revive” and implement these “authentic” institutions, and the unintended consequences that resulted. Therefore, it recounts the complicated and contested history of the construction of colonial knowledge and the political and intellectual influences that shaped it. In the words of Rosane Rocher, my intent is to examine “the intricate dialectics between the pursuit of knowledge and governmental pursuits.”² I would not say that this is a cautionary tale, but it is a study of the ways in which customs are

¹ P. G. Robb, *Ancient Rights and Future Comfort: Bihar, the Bengal Tenancy Act of 1885, and British Rule in India* (Richmond, Surrey: Curzon Press, 1997), p. xxi.

² Rosane Rocher, “British Orientalism in the Eighteenth Century: The Dialectics of Knowledge and Government,” in Carol A. Breckenridge and Peter van der Veer, eds., *Orientalism and the*

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Excerpt

[More information](#)

IRONIES OF COLONIAL GOVERNANCE

imagined and re-imagined, the role of ideology in their creation, and how they developed their own political and social inertia.

Thus this book is about the various incarnations of the Indian “panchayat.” I would like to tell the reader that there is a simple and accurate definition for the term “panchayat.” However, that is impossible. There is no consensus as to the precise etymology of the word, but it is generally accepted that it is derived from the Sanskrit *pañca*, meaning five, and *āyatta*, depending on. Yet the Hindi word *panchayat* is most commonly defined as a village or caste tribunal or council, five being the customary number of elders on this council or court. The panchayat, however, is protean in both form and function. Over the course of the nineteenth and twentieth centuries, the term has been used to identify and define a number of different institutions, including village councils, municipal councils, conciliation boards, arbitration tribunals, judicial benches, panels of judicial assessors, juries, committees, representative assemblies, and democratic governing bodies. The very indeterminacy of the term has been an essential source of its longevity as well as its contestation. The fact that today the term can be applied equally to the constitutional Panchayati Raj Institutions (PRIs) of local governance and, at the same time, to the infamous “kangaroo courts” of the *khap panchayats* is continuing evidence of the panchayat’s political and social significance as well as its resistance to precise categorization.

Nevertheless, since at least the beginning of the nineteenth century, the belief that the panchayat was a fundamental source of Indian authenticity has stood as an iconic idea in both Indian and Western thought. In the early nineteenth century, Sir James Mackintosh, the Scottish Orientalist, described it as “the institution which has preserved society from total shipwreck in India.”³ At that time, other Orientalists, many of whom were among the officer-official corps of the East India Company, fully accepted this description. In their minds, it was chiefly a judicial institution that had been corrupted during the reign of the Mughals or Marathas. Later in the nineteenth century, however, the understanding, adaptation, and implementation of panchayat institutions changed along with the development of liberalism and its imperialist applications. By the last quarter of the nineteenth

Postcolonial Predicament: Perspectives on South Asia (Philadelphia: University of Pennsylvania Press, 1993), p. 215.

³ James Mackintosh, *Memoirs of the Life of the Right Honourable Sir James Mackintosh*, R. J. Mackintosh, ed., 2nd edn., Vol. I (London, 1836), p. 489.

Cambridge University Press

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Excerpt

[More information](#)

INTRODUCTION

century, the panchayat was less often imagined as a judicial institution, but instead it had come to be viewed largely, although not exclusively, as an ancient Indian council for local administration. This is the view that came to dominate much of the ideology of the early nationalists, many of whom, from Gandhi to the liberal Gokhale to the radical Tilak, invoked the panchayat as the foundation of self-governance. During the interwar period, this imagining of the panchayat also became one of the foundations of Britain's efforts to devolve the administration of local and provincial affairs within the system of diarchy.

How that transformation came about is the subject of this book. It attempts to trace the lineages of the panchayat ideal, particularly to its origins within the structures and practices of British governance during the nineteenth and early twentieth centuries. The vast subject of caste and *jati* panchayats during this period, therefore, is not addressed in any detail and is left to other scholars. This is largely because the colonial state imagined caste and *jati* panchayats as largely autonomous corporate institutions possessing, like other corporate bodies, the authority to regulate their own members.⁴ The colonial state's imagining and implementation of a variety of civil panchayat projects nevertheless had a profound impact upon the political and ideological development of modern India. Those ideological underpinnings of the panchayat ideal today, I would argue, owe as much to the British colonial imagination as they do to the Indian historical experience.

The panchayat was certainly not unknown to British colonial administrators in India before 1800, but during the first three decades of the nineteenth century it took on both a new meaning and new significance. In tandem with the idealization of the Indian village community – the so-called “metaphorical heart of orientalism,” – the project of resurrecting and restoring the panchayat to what was believed to be its traditional role in local society became of paramount importance to both East India Company officials in London and

⁴ Trade, professional, and artisanal panchayats under British control have received little if any attention, unfortunately. Bankers' panchayats, for example, appear to have been especially prominent in the settlement of commercial disputes in Pune, for example. Nevertheless, for earlier cases, see Nandita Prasad Sahai, “Artisans, the State, and the Politics of Wajabi in Eighteenth-century Jodhpur,” *Indian Economic and Social History Review*, Vol. 42, No. 1 (2005), pp. 41–68 and *idem*, “Collaboration and Conflict: Artisanal Jati Panchayats and the Eighteenth Century Jodhpur State,” *Medieval History Journal*, Vol. 5, No. 1 (2002), pp. 77–101. On caste panchayats during the earlier era, see Amrita Shodhan, “Caste in the Judicial Courts of Gujarat, 1800–1860,” in E. Simpson and A. Kapadia, eds., *The Idea of Gujarat: History, Ethnography and Text* (Hyderabad: Orient Blackswan, 2010), pp. 32–49.

Cambridge University Press

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Excerpt

[More information](#)

IRONIES OF COLONIAL GOVERNANCE

military officer-officials in India, especially in the Company's southern and western possessions on the subcontinent.⁵ It was there and then that British officials began to imagine the panchayat as a local judicial institution meting out justice according to the "customs of the country" and without recourse to the Hindu law codes. Along with the village headman (*patel*), the panchayat, it was believed, was an institution derived from Indian common law and the basis of India's ancient constitution.⁶ As such, India shared a common history with that of early medieval England. As one local Political Agent wrote, according to this perspective, civil justice in India "seems not to differ much – from what we understand – to be our own antient [*sic*] local Courts."⁷ In this manner, India's history was reshaped to fit the mold of British political ideologies. This particular type of Enlightenment historicism continued to be reformulated and reinterpreted throughout the nineteenth and early twentieth centuries in ways that would affect not only British attempts to adapt the panchayat to colonial rule but also the emerging nationalist movement.⁸

Thomas Munro, who served as Governor of the Madras Presidency between 1820 and 1827, and Mountstuart Elphinstone, Governor of the Bombay Presidency from 1819 to 1827, were among the leading proponents of the judicial function of the panchayat during the early nineteenth century. Their efforts to resurrect the panchayat as "the great instrument in the administration of Justice," to use Elphinstone's words, entailed adapting it to their own needs as colonial administrators.⁹ Foremost among these was the effort to make the panchayat an inexpensive, accessible, and efficient judicial institution. Thus, much of the British interest in the panchayat here, unlike in Bengal, was adjectival, that is, concerned with legal procedure, rather than uncovering the substance of customary law. Implementing their vision, however, required regularizing panchayat procedures, supervising its

⁵ David Ludden, "Orientalist Empiricism: Transformations of Colonial Knowledge," in Breckenridge and van der Veer, *Orientalism and the Postcolonial Predicament*, p. 263.

⁶ The theme of India's "ancient constitution" was not an uncommon one and can be traced in the writings of such disparate characters as Warren Hastings, Edmund Burke, and Philip Francis. See Thomas Metcalf, *Ideologies of the Raj* (Cambridge: Cambridge University Press, 1995), Chapter 1.

⁷ MSA, EIC, Judicial Department, Civil and Criminal Judicature, Vol. 9A/9A, 1823, John Briggs to William Chaplin, 3 May 1822.

⁸ On the development of nineteenth-century historicism and its effects on British rule, see Metcalf, *Ideologies of the Raj*, Chapters 1 and 2.

⁹ Mountstuart Elphinstone, *Report on the Territories Conquered from the Paishwa* (Calcutta, 1821), p. 78.

INTRODUCTION

operation, limiting its jurisdiction, and, in general, incorporating the panchayat into the structures of British judicial administration. Inevitably, such attempts to “remove its abuses and revive its energy,” Elphinstone’s words again, created an altogether new institution that still carried the name “panchayat,” but had been remade in the image of its creators.¹⁰ However, by the end of Munro and Elphinstone’s tenures as Governors, these panchayat experiments had proven to be a failure. In both the Madras and Bombay Presidencies panchayats would survive, but only as an adjunct and alternative to the British courts, and very few litigants ever sought them out. In Bengal, meanwhile, the steadfast resistance of judicial and other Company officials to its introduction there prevented the panchayat from ever becoming incorporated into the formal systems of justice.

Ideologically, there is much in common here with Robert Travers’ recent work on Bengal in the late eighteenth century.¹¹ As in Bengal, British rulers in western and southern India were immersed in the language and ideology of ancient constitutionalism, and the development of colonial governing practices was often the result of the interaction between these ideological predispositions and their observation and interpretation of Indian custom. However, unlike Travers’ Bengal, in the Bombay and Madras Presidencies these practices did not end in the last decades of the eighteenth century. One very obvious reason for the continuity in the south and west was the fact that neither Munro in Madras nor Elphinstone in Bombay were anything like Cornwallis in Bengal whose antipathy to the employment of Indian administrators, separation of executive and judicial authority, and advocacy of a permanent settlement of land revenues under the aegis of large-scale landholders (*zamindars*) marked his tenure as Governor-General there. Indeed, the governing ideologies, revenue settlement, and judicial practices in the south and west were proposed and implemented in direct contradistinction to the perceived failures of Cornwallis’ Permanent Settlement in Bengal.

Moreover, the displacement of the ideologies of ancient constitutionalism by those of a commercial and modernizing Enlightenment narrative that Travers describes in Bengal did not occur in the same way in the south and west.¹² Instead, the specific idiom of English

¹⁰ Elphinstone, *Report*, p. 99.

¹¹ Robert Travers, *Ideology and Empire in Eighteenth-Century India: The British in Bengal* (Cambridge: Cambridge University Press, 2007).

¹² Travers notes this distinction in *Ideology and Empire*, pp. 252–3.

Cambridge University Press

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James Jaffe

Excerpt

[More information](#)

IRONIES OF COLONIAL GOVERNANCE

ancient constitutionalism continued to be deployed there and increasingly in a fashion that had been molded by its contact with Scottish Enlightenment thought, thereby forming a properly British ideology of colonial governance. Particularly important in this regard was the reimagining of history as a process that occurred in definable stages of social, political, and economic development, the so-called stadial or conjectural interpretation, as well as the valorization of India as a once-great civilization in and of itself. This form of “Scottish Orientalism” shared with some of the earlier British governors of Bengal the notion that India had been corrupted by the rule of arbitrary despots, both Muslim and Maratha, but in the south and west the goal was to restore India to its proper path of historical development. The irony was that such a restoration was very unlikely, if not impossible, to occur under colonial governance, and its demands for revenue were neither understood nor appreciated by the likes of either Munro or Elphinstone.

In one sense, therefore, British attempts to adapt and reform the panchayat epitomized the bureaucratic complexity of establishing indirect colonial governance. From the East India Company’s perspective, the panchayat experiments adopted in Madras and Bombay were just that – experiments. Under Munro’s influence, the Company agreed to employ the panchayat as the basis for the administration of colonial justice, but then only after the failure of British-staffed courts in Bengal had become too obvious to ignore. Yet the incorporation of the panchayat into the British judicial bureaucracy required constant tinkering and repeated interventions in order to attempt to correct the unforeseen and unintended consequences of such a policy. One such unintended consequence was the constant expansion of the number of Indians employed in judicial roles to monitor and supplement the panchayat. By 1829, there were already almost eighty Indian commissioners and magistrates in the Bombay Presidency, almost the full complement of subordinate judges that would be employed by the end of the nineteenth century.¹³

In another sense, the adoption of the panchayat to colonial governance during this period revealed not only the ideological sources of such an undertaking but also the very limits of that ideology itself. The Orientalist ideal that the panchayat was an essential component of

¹³ PP, *Report from the Select Committee on the Affairs of the East India Company* (1831–1832), General Appendix, No. III, p. 125. By 1887, the number of Indian judges in the Bombay Presidency totaled only 104; see, Christophe Jaffrelot, *Dr. Ambedkar and Untouchability* (Delhi: Permanent Black, 2005), p. 12.

Cambridge University Press

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James Jaffe

Excerpt

[More information](#)

INTRODUCTION

India's ancient constitution and was based upon Indian common law restricted the range of possible reforms. Whether or not any reform of the panchayat might have made it a success is not the pertinent question here. Much more important was the perception that any plans of reform had to be limited to those that did not violate the panchayat's supposed origins in Indian common law. Therefore, in the Bombay Presidency, for example, where the panchayat was understood as an analog to British arbitration practices, litigants could bring their suit to a panchayat, but only voluntarily; any individual could serve on a panchayat, but only upon the request of the litigant; and, panchayats could issue a decision, but they could not enforce it. These kinds of self-imposed limitations ultimately restricted the efficient disposal of suits by panchayats. The resulting failure of the British-reformed panchayat to provide cheap and efficient access to justice was the key factor in that institution's eventual rejection by India's colonial governors as a suitable venue for dispute resolution.

After the first third of the nineteenth century, the idea and symbolic significance of the panchayat only temporarily lost its material embodiment under the British administration of India. During the second half of the century, the panchayat was re-imagined and resurrected once again. This time, however, it came not in the guise of a judicial institution but as an instrument of village and town governance. The first incarnations during the 1860s and 1870s were in the form of appointed bodies for local tax assessment purposes, and then for the levying of taxes to provide for local policing. By the 1880s, panchayats could also be appointed to manage roads, schools, sanitation, and other municipal responsibilities. A key impetus to this transformation was the increasing influence of what Thomas Metcalf has called the "eclectic liberalism" of the later nineteenth century.¹⁴ Of particular importance were the elements of liberalism that emphasized the historicism of the Indian village community as well as those elements of liberalism that emphasized the importance of fostering the growth of Indian civil society. Yet both of these elements of liberalism drew heavily upon the older idioms of ancient constitutionalism and Scottish Orientalism, and both exercised an enormous influence upon the panchayat ideal.

Of special note in this regard was the notion that the panchayat could be employed as a means by which Indians could be educated and trained into the arts of modern civilization. Such notions had already

¹⁴ Metcalf, *Ideologies of the Raj*, p. 33.

Cambridge University Press

978-1-107-08792-7 - The Ironies Of Colonial Governance: Law, Custom, and Justice in Colonial India

James Jaffe

Excerpt

[More information](#)

IRONIES OF COLONIAL GOVERNANCE

been mooted under Company rule, but the institutional means through which this tutelary function might be achieved shifted from the panchayat imagined as a judicial forum to the panchayat imagined as an institution of village and municipal governance. Notably, these local governance panchayats of the second half of the nineteenth century were in no way representative and instead were comprised of “respectable” Indians, appointed by local British officials, who would thereby be educated into the arts of Western-style government. Significantly, by the time of the 1908 Royal Commission on Decentralization, both British and Indian witnesses lauded the ideal of the panchayat as an institution that would promote the growth of civil society in India, but they also offered a wide variety of often-contradictory opinions as to its possible form, function, and composition. Therefore, not only is it true, as C. A. Bayly has written, that the panchayat was continually reinvented during the nineteenth century, but it is similarly true that memories of the panchayat had become muddled and confused.¹⁵

Yet, once again, the British imagining of an appointed municipal and village panchayat was unsuccessful. In part, the “autocratic structure” of these British-appointed panchayats made them unpopular and their function, to levy taxes, made them even more so.¹⁶ However, the ideological limits of liberalism were palpable as well. Despite liberalism’s adherence to the goal of expanding representative institutions, it remained hostile to and suspicious of the political participation of the uneducated masses. Moreover, as several authors have emphasized, liberalism’s tutelary project in India faltered in the face of popular political agitation, the growth of Indian nationalism, and the spread of “scientific racism.”¹⁷

The resuscitation and adoption of the panchayat by the British after mid-century was a matter not only of colonial administration through indirect control but also of liberal “nation-building” in a specific historical form. Explicit in the discussions surrounding the panchayat as a tutelary instrument was the desire to use it as a means by which to build a civil society in India. The term “civil society,” however, should not be

¹⁵ C. A. Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire* (Cambridge: Cambridge University Press, 2012), p. 347.

¹⁶ Hugh Tinker, *The Foundations of Local Self-Government in India, Pakistan, and Burma* (New York: Frederick A. Praeger, 1968), p. 70.

¹⁷ Metcalf, *Ideologies of the Raj*, Chapter 2; Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-century Liberal Thought* (Chicago: University of Chicago Press, 1999), pp. 111–14; 151–2; Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press, 2010), pp. 160–71.

Cambridge University Press

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James Jaffe

Excerpt

[More information](#)

INTRODUCTION

taken to mean the collection of autonomous or independent groups and associations outside of the political sphere, the meaning that became attached to it in the late-twentieth and early twenty-first centuries. Nor should it be taken in the sense expressed in Partha Chatterjee's *Nationalist Thought and the Colonial World*, in which the term is used as a synonym for the political, economic, and moral structure of modern industrial society.¹⁸ Instead, the term as used in this book should be understood in its historical context as indicating a specific set of conservative institutions based not only upon an idea of progress but more specifically upon the rule of law, the right to private property, and the importance of elite civic participation in government.¹⁹

As José Harris has noted, this was a specifically Anglophone tradition, distinct from both the French and German understanding of “civil society,” and stretching back through the works of a great many prominent theorists and moralists, including Adam Smith, Adam Ferguson, Bernard Mandeville, John Locke, Thomas Hobbes, and Richard Hooker.²⁰ Most important for the first generation of advocates of the panchayat was the influence of the so-called Scottish Orientalists, especially William Robertson, who viewed India as a once-great civilization that had been corrupted by the arbitrary rule of Mughal and Maratha despots. The “civilizing mission” of Munro and Elphinstone, therefore, was not to convert the heathens, but to return India to its “natural” path of historical development toward a civil society. In the British imagination, this entailed the restoration of the social and political standing of the village headman, the definition of property rights, and the revival of the panchayat for the dispensation of civil law.

Once again, such an ideology, based as it was upon the Scottish school of history, possessed its own inherent limits. It was by no means democratic, but it was intended instead to restore the traditional authority of an imagined landed gentry and yeomanry. The authority to administer the criminal law remained the prerogative of the British

¹⁸ Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* (1986; Minneapolis: University of Minnesota Press, 2011), Chapter 4.

¹⁹ For a similar point, see Peter Robb, “The Colonial State and the Construction of Indian Identity: An Example on the Northeast Frontier in the 1880s,” *MAS*, Vol. 31, No. 2 (May, 1997), pp. 251–2.

²⁰ José Harris, “From Richard Hooker to Harold Laski: Changing Perceptions of Civil Society in British Political Thought, Late Sixteenth to Early Twentieth Centuries,” in José Harris, ed., *Civil Society in British History: Ideas, Identities, Institutions* (Oxford: Oxford University Press, 2005), pp. 13–37.

Cambridge University Press

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James Jaffe

Excerpt

[More information](#)

IRONIES OF COLONIAL GOVERNANCE

company-state with little or no role for the “natives.” And, the restoration of Indian civil society certainly did not entail the ultimate creation of a democratic, sovereign, and independent India.

When the panchayat ideal resurfaced among British administrators in the second half of the nineteenth century as a body suitable to take on the responsibility of decentralized village and municipal governance, it nevertheless continued to be imagined as a school for civil society. This new liberal ideal of the panchayat, heavily influenced by the works of John Stuart Mill and Henry Sumner Maine, necessarily possessed its own ideological limits. Like previous generations, this new imaginary retained a pronounced antipathy to democracy, preferring instead to educate a cadre of respectable and propertied local officials into the values of civic morality and the science of government. High matters of state, such as defense and foreign policy, were excluded from this training, of course, and, once again, very few British officials ever foresaw the likelihood of yielding ultimate sovereignty over India.

The ironies of colonial governance, therefore, included not only the unintended consequences of British efforts at reforming the panchayat but also the attempts to resurrect the “customary” legal institutions of southern and western India within the ideological parameters of Anglophone political theory.²¹ Yet the panchayat was not an “invented tradition.” In western India, it was a very real institution that had been a functioning part of the judicial administration of the Marathas before the British conquests.²² Elphinstone believed that the role of the new British occupiers was only to “remove its abuses and revive its energy,” cleansing the panchayat of the venality, partiality, and corruption that had encrusted it under the Marathas’ arbitrary and despotic rule.²³ By the late nineteenth and early twentieth centuries, many of these fundamental ideas had found new voices in the writings of Mill and Maine. As Christopher Bayly has noted, it would be a mistake to draw too sharp a distinction between the Orientalist and liberal traditions with regard to their imagining of Indian society. “One reason that Maine’s thought was well received in the India of the 1870s and 1880s,” he has written, “was that it spoke to the older

²¹ In a somewhat similar manner, for South India, Arjun Appadurai notes the ironic tension between “the [British] urge to maximize vertical accountability and the fantasy of *pancāyat* models of local self-sufficiency.” See Arjun Appadurai, *Worship and Conflict under Colonial Rule: A South Indian Case* (Cambridge: Cambridge University Press, 1981), p. 141, ff. 6; 153–4.

²² See V. T. Gune, *The Judicial System of the Marathas* (Poona: Deccan College Post-Graduate and Research Institute, 1953).

²³ Elphinstone, *Report*, p. 99.