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## Layering Law upon Custom: The British in Colonial West India

*James A. Jaffe*\*

The panchayat, or customary village council, holds an iconic place in Indian social and political ideology. Largely due to the influence of Mahatma Gandhi, the panchayat came to possess almost mythic standing as an indigenous democratic institution that could form the basis for an authentically Indian democracy. Gandhi's imagining of the panchayat, however, was only one of many that circulated among Indian nationalists at the end of the nineteenth and the beginning of the twentieth century. Few, if any, of the most prominent nationalist leaders ever had actually seen a functioning village council. Indeed, by the time of the nationalist movement, the panchayat, as an institution to order village affairs, had become largely moribund, although caste panchayats often continued to regulate the norms and practices of separate castes.<sup>1</sup> Nevertheless, the resurrection of the all-village panchayat became one of the essential unifying elements of the movement to create a truly national identity.<sup>2</sup>

A significant portion of the explanation for the survival of the panchayat ideal lies with the British idealization of the institution. Twice during the nineteenth century, British administrators in India "discovered," romanticized, and attempted to institute a form of *panchayati raj*, or rule by panchayat. The first discovery, which will be the focus of this essay, dates to approximately the first third of the nineteenth century, when several prominent East India Company military officers sought to adapt the panchayat to the needs of the British administration of justice, especially in the newly-conquered regions of southern and western India. To meet these requirements, the panchayat was put forth as an Indian analog of both the English jury and European tribunals of arbitration. The second "discovery" dates to the final third of the nineteenth century. At that time, the necessities of urban and rural development required new forms of local and municipal administration. The consequent widespread support among British administrators in India for political decentralization was expressed in the form of a new desire to recreate the panchayat, but this time as a

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<sup>1</sup> JOHN MATTHAI, VILLAGE GOVERNMENT IN BRITISH INDIA 181 (1915).

<sup>2</sup> C.A. BAYLY, RECOVERING LIBERTIES: INDIAN THOUGHT IN THE AGE OF LIBERALISM AND EMPIRE 279-90, 347 (2012).

municipal body in the image of European local administration. Both times, it should be noted, the panchayat appeared as an instrument of colonial rule in a form created to meet the demands of British governance and fashioned by contemporary streams of Western political theory.

The first iteration of the panchayat as a judicial institution was largely the work of two officer-officials of the East India Company, Thomas Munro and Mountstuart Elphinstone. Most British officer-officials had active experience with the panchayat since the British Articles of War allowed the panchayat to be used both as an arbitral institution to resolve monetary disputes between soldiers and camp followers and for the court-martial of sepoy (Indian) troops.<sup>3</sup> However, Munro imagined the panchayat as much more than that. For him, the panchayat was analogous to the British common law jury and, moreover, was evidence that India possessed its own common law tradition. In a quote often repeated by East India Company officials in London, Munro had reported that “there can be no doubt that the trial by Panchayat is as much the common law of India in civil matters, as that by Jury is of England.”<sup>4</sup>

While Munro worked to consolidate the Company’s holdings in southern India, his fellow officer, Elphinstone, did the same in the West.<sup>5</sup> At the end of the Third Anglo-Maratha War in 1818, the Company had come to occupy an area of approximately 50,000 square miles containing about 4,000,000 inhabitants in India’s western Deccan. While Elphinstone shared Munro’s idealization of the panchayat, the two differed sharply over its functions in practice. For Elphinstone, the panchayat was indeed an aspect of India’s common law, but it functioned less as an analog of the English jury system and much more as an analog of an English tribunal of arbitration.

Elphinstone’s determination to resurrect panchayat justice in the western Deccan of the Bombay Presidency was certainly among the most

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<sup>3</sup> See WILLIAM HOUGH & GEORGE LONG, *THE PRACTICE OF COURTS-MARTIAL, ALSO THE LEGAL EXPOSITION AND MILITARY EXPLANATION OF THE MUTINY ACT, AND ARTICLES OF WAR* 369-70 (London, Kingsbury, Parbury, & Allen 2d ed. 1825) (Regulation II, enacted 1809); *id.* at 595-96 (Regulation XX, enacted 1810).

<sup>4</sup> Thomas Munro, *Report of the Collector of the Ceded Districts 15th August 1807, on the Advantages and Disadvantages of the Zemindary Permanent Settlements and of the Ryotwar Settlements*, in PAPERS CONCERNING REVENUE, ADMINISTRATIVE AND JUDICIAL MATTERS IN INDIA 292-97, IOR/H/686 (1807) (on file with the British Library).

<sup>5</sup> See generally KENNETH BALLHATCHET, *SOCIAL POLICY AND SOCIAL CHANGE IN WESTERN INDIA, 1817-1830* (1957); T.H. BEAGLEHOLE, *THOMAS MUNRO AND THE DEVELOPMENT OF ADMINISTRATIVE POLICY IN MADRAS, 1792-1818* (1966); MEERA SINGH, *BRITISH REVENUE AND JUDICIAL POLICIES IN INDIA: A CASE STUDY OF DECCAN, 1818-1826* (1994); BURTON STEIN, *THOMAS MUNRO: THE ORIGINS OF THE COLONIAL STATE AND HIS VISION OF EMPIRE* (1989); Catherine S. Meschievitz, *Civil Litigation and Judicial Policy in the Madras Presidency, 1800-1843* (1986) (unpublished Ph.D. thesis, University of Wisconsin-Madison) (on file with Law Library, University of Wisconsin-Madison).

significant attempts to incorporate customary Indian systems of justice into the British judicial system. Not only did Elphinstone and his officers engage in substantive historical and contemporary research on the panchayat's activities under the Maratha Peshwa, or Prime Minister, but they also took a very active role in supervising and promoting its use under their own administration. By adapting the panchayat to British needs, most officer-officials believed that they were reviving an ancient and customary institution that would be welcomed by the people of the country. At the same time, they also believed that the panchayat had to be reformed and restructured to meet the British government's present-day needs. The paradox of attempting to achieve both of these goals did not occur to them. Perhaps the ultimate failure of British attempts to revive the panchayat during this era was therefore inevitable.

Elphinstone had first come to India in 1796.<sup>6</sup> For many years, he served at Pune conducting diplomatic relations with the Maratha Peshwa. However, after the British victory in the Third Anglo-Maratha War, Elphinstone was given responsibility to occupy and settle the Deccan, which the Peshwa had been forced to cede to the British. In 1819, Elphinstone was appointed governor of the Bombay Presidency, a position he would hold until 1827. Upon the British occupation of the Deccan, the Marquis of Hastings, Governor-General of India, permitted Elphinstone "to establish such temporary measures as he might deem requisite or proper, and to avail himself of the talents and experience of Brigadier-General Munro, by inviting assistance from the latter in introducing the British authority into the southern territory."<sup>7</sup> However, Hastings also ordered that these temporary measures "were limited to the restoration of [civil administration] as nearly as might be practicable, to the character of its original institutions."<sup>8</sup> Elphinstone dutifully followed these orders. In 1818, he ordered his subordinate Collectors to "scrupulously avoid all sorts of innovations" in order "to show the people that they are to expect no change but in the better administration of their former laws."<sup>9</sup> Therefore, British Collectors, who were responsible for the general administration of individual districts, were to employ former Maratha officials and to maintain the system whereby the Patails might settle village disputes by

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<sup>6</sup> C.A. Bayly, *Elphinstone, Mountstuart (1779-1859)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (David Cannadine ed., online ed. 2008), available at <http://www.oxforddnb.com/view/article/8752> (last visited May 25, 2011).

<sup>7</sup> Letter from the Marquis of Hastings to the Secret Committee (Aug. 21, 1820), in PAPERS RESPECTING THE PINDARRY AND MAHRATTA WARS 416, 422 (London, J.L. Cox 1824).

<sup>8</sup> Similar instructions were issued for the settlement of Nagpur, Pune, and the North-West Provinces. *See id.* at 439, 445.

<sup>9</sup> Letter from Mountstuart Elphinstone to the Marquis of Hastings (June 18, 1818), in POONA AFFAIRS (ELPHINSTONE'S EMBASSY), PART II, 1816-18, at 408 (G.S. Sardesai ed., 1950).

village Panchayets (arbitration). The Mamlutdars would superintend the trial of more important causes by Panchayets of the most respectable people within their divisions, while those of greater magnitude and all appeals would come before the Collector himself assisted also by Panchayets and Hindoo Lawyers.<sup>10</sup>

Both East India Company officials in London and Elphinstone himself made it clear, however, that this was only to be a temporary measure until the territory was settled; further improvements would then be made. For his part, Elphinstone appeared somewhat confident that relatively few substantive reforms would be needed in the future. He wrote,

[t]he present system is probably not bad in itself as the country has prospered under it notwithstanding the feebleness and corruption which it was administered. At all events it is generally known and understood; it suits the people whom indeed it has helped form, and it is probably capable of being made tolerably perfect by gradual improvements introduced as they appear to be called for.<sup>11</sup>

John Adam, Hastings's Chief Secretary, however, was not as sanguine and suggested that significant reforms would eventually be forthcoming. "Such a system [of the panchayat]," he noted, "while it not only secures in the most satisfactory manner of which present circumstances admit, the ends of essential equity, will form the best possible basis for such future ameliorations as the superior integrity and intelligence of the British Agents may enable them to introduce."<sup>12</sup>

By the following year, 1819, Elphinstone, then serving as Commissioner of the Deccan, had become convinced that in the administration of civil law "our principal instrument must continue to be the Panchayet" and that the panchayat was "the great instrument in the administration of Justice."<sup>13</sup> It is not exactly clear why or when his previously qualified support had given way to such a vigorous endorsement of the panchayat. Munro's influence may very well have been of great importance, but, as noted above, the two did not share the same understanding or interpretation of the function of the panchayat. Whereas Munro believed that the panchayat was analogous to the English jury,

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<sup>10</sup> *Id.* at 410.

<sup>11</sup> *Id.*

<sup>12</sup> Letter from John Adam to Mountstuart Elphinstone (Sept. 26, 1818), in POONA AFFAIRS (ELPHINSTONE'S EMBASSY), PART II, 1816-1818, at 478 (G.S. Sardesai ed., 1950).

<sup>13</sup> MOUNTSTUART ELPHINSTONE, REPORT ON THE TERRITORIES CONQUERED FROM THE PAISHWA 78, 99 (Cambridge Univ. Press 2011) (1821). An initial version of the Report was completed in October 1819 and circulated to Elphinstone's Collectors. Circular of the Honble the Commissioner to the Collectors in the Newly Acquired Territories from the Late Paishwa (Oct. 25, 1819), in BOMBAY PROCEEDINGS 1820-1829, IOR/P/398/71 (1820) (British Library).

Elphinstone thought it much more akin to a board or tribunal of arbitration. In English practice and in English law, these were obviously significantly different institutions with significantly different legal authority. Perhaps of greatest significance was the fact that, in England, arbitration was a wholly voluntary process. Further, arbitration suits were pursued largely beyond the purview of the courts; decisions were based upon equity and not precedent; the process was free of pleadings, fees, and lawyers; and an arbitration tribunal lacked any means of enforcing its award. These qualities obviously would not apply if the panchayat were deemed a “native jury.”

Nevertheless, as Commissioner of the Deccan, Elphinstone quickly began to make significant inquiries into the jurisdiction and procedures of panchayats. His roughly-penciled notes indicate what he understood to be some of its principal advantages:

Old appeals says Gen Munro were always [stated?] to be made because [there?] had been no Panchayet or because the cause was tried before a [illegible] officer[.] The natives have no confidence in any plan but panchayets.

The Ct. attribute the success of the best Collectors to *their leaving the detailed management of affairs to the natives* according to the existing [?] forms & usages of the Country & to see they do their duty instead of attempting to do it for them.

Complaints to be made to Assistants or referred to them by the Courts either party may demand a Panchayet . . . .

Panchayets on revenue suits particularly recommended by the Fortescue.<sup>14</sup>

As early as December 1817, a circular had been sent to the various judicial officers in the Presidency inquiring whether the panchayat system could be adapted there as it had been in Madras under Munro.<sup>15</sup> The response from the judges was noticeably mixed. Much of the muddle was apparently caused by the confusion between their perception of the panchayat as an arbitration tribunal or the panchayat as a jury trial. Thus, Saville Marriott, the Collector of the Northern Konkan, described the panchayat as a “mode of trial,” while S. Babington, the Judge and Magistrate at Tannah, assumed that judgment by the panchayat was “the judgment of arbitrators.”<sup>16</sup> Elphinstone also circulated to his principal

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<sup>14</sup> Mountstuart Elphinstone, Notes, in PAPERS OF MOUNTSTUART ELPHINSTONE ON THE POWER OF THE PATELS AND PANCHAYETS, ETC. 63-65, Mss Eur F88/408 (1819) (British Library) (emphasis in original).

<sup>15</sup> Bombay Judicial Proceedings (Dec. 27, 1817), in INDIA OFFICE RECORDS: PROCEEDINGS AND CONSULTATIONS 1702-1945, IOR/P/398/69 (British Library).

<sup>16</sup> Bombay Judicial Proceedings, *supra* note 15, at 160-61, 168-69.

subordinates questionnaires on the Peshwa's administration of law in the territories. These were quite lengthy, comprising well over a hundred questions, many of which related in some way or other to the form and function of panchayats.<sup>17</sup> The responses provided to Elphinstone thus provide a contemporary account of how British officer-officials first understood the work of the panchayat as well as the processes involved in securing panchayat justice. Significantly, the responses to this questionnaire did not always coincide with one another. It is difficult to ascertain whether the discrepancies indicate local differences in the functioning of the panchayat or whether the officer-officials themselves misapprehended the processes involved. Nevertheless, when taken together, the officer-officials' responses provide a unique view of how the British came to understand the panchayat system in the Deccan when they first sought to adapt it for their purposes. At the very least, the responses' importance lies in the fact that the British administration of justice in the region would be substantially based upon these initial perceptions and misperceptions for the next two decades.

Four of the five principal regional officer-officials under Elphinstone provided written answers to the questionnaire: Captain Henry Pottinger, Collector in Ahmednagar; Captain John Briggs, Political Agent in Khandesh; Captain James Grant, Resident at Satara; and William Chaplin, the only civilian, Collector at Dharwar and soon-to-be Commissioner of the Deccan. The fifth, Captain H.D. Robertson, the Collector of Pune, may very well have been in personal contact with Elphinstone. There was universal agreement among them that the panchayat decided local disputes that could not be resolved through the personal intervention of the village headman (*patel*). Pottinger explained, for example, that a panchayat was convened to settle disputes only after "amicable arbitration" had failed.<sup>18</sup> The respondents also agreed that the authority to convene a panchayat lay exclusively with the *patel*. Hence, they argued, the revival of the ancient panchayat to a great extent depended upon maintaining the *patel's* authority. Together, an active *patel* and an effective panchayat constituted the essential administrative foundation for Elphinstone's *ryotwari* system of revenue collection and peasant proprietorship in the Presidency.<sup>19</sup>

The *patels* were, as Elphinstone put it, "the most important

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<sup>17</sup> Different selections from the questionnaire and the response are reproduced in H. GEORGE FRANKS, *PANCHAYETS UNDER THE PESHWAS*, 77-80, App. No. 1 (Poona Star Press ed., 1930) and R. D. CHOKSEY, *TWILIGHT OF THE MARATHA RAJ*, 1818, at viii-xii (R.D. Choksey ed., 1976). Both books are based on the Poona Residency Daftar in the Pune Archives. Franks, in particular, provides a reliable, albeit dated, guide to the panchayat system as it was being adapted by the British.

<sup>18</sup> Choksey, *supra* note 17, at 61.

<sup>19</sup> The various later interpretations of the "sociological" connection between the panchayat and the land revenue system are analyzed in RONALD INDEN, *IMAGINING INDIA* (1990).

functionaries in the villages, and perhaps the most important class in the country.”<sup>20</sup> Not only was the *patel* responsible for the administration of justice through both his personal arbitration of disputes and the convening of panchayats, but he also was head of the village police and watchmen. Moreover, he was responsible for the collection of the revenue and essentially functioned as the representative of the village’s needs and interests. Therefore, as Elphinstone realized, the *patel* was a critical intermediary: he was both an agent of government and a representative of the people. The *patel*, he wrote, “is not less useful in executing the order of the Government, than in asserting the rights, or at least making known the wrongs, of the people.”<sup>21</sup>

While the *patel* possessed the authority to convene a panchayat, there were various explanations as to how the panchayat process might be initiated. According to Pottinger, a panchayat could be “demanded” by the litigants, after which the *patel* “gave his permission to one being assembled.” Grant, however, simply indicated that the *patel* “had [the] power to call a Panchayet or not as he judged proper.”<sup>22</sup> In Briggs’s report from Khandesh, a third possibility was described in which the parties themselves took their dispute “to the patails and elders of the village when they sat as is customary under some large tree at the village gate of an evening.”<sup>23</sup>

There was, however, fundamental agreement that panchayats were a voluntary mode of settlement and that litigants could not be compelled to accept their intervention in disputes. Thus Elphinstone’s *Report on the Territories Conquered from the Paishwa* described Maratha practice as follows: “the Patail assembled a Panchayet of inhabitants of the Village, who enquired into the matter with very little form, and decided as they thought best; but their decision could not take place without the previous consent of the parties.”<sup>24</sup> As Captain Briggs later wrote, “It is one of the invariable rules of the Panchayut as it was originally instituted for the object of doing Justice, not to enter upon business without having the consent of both parties to abide by their judgement.”<sup>25</sup> In this respect, the panchayat was often compared to the system of English arbitration, and members of panchayats often were referred to in Company accounts as arbitrators.

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<sup>20</sup> Elphinstone, *supra* note 13, at 21.

<sup>21</sup> *Id.* at 22.

<sup>22</sup> Choksey, *supra* note 17, at 61.

<sup>23</sup> *Id.* at 64.

<sup>24</sup> ELPHINSTONE, *supra* note 13, at 57.

<sup>25</sup> *Bombay Judicial Consultations, Briggs to Chaplin* (May 31, 1822), in INDIA OFFICE RECORDS: BOMBAY PROCEEDINGS 1823-1830, IOR/P/399/23 (British Library).



Once a panchayat was called, the process of selecting its members was of paramount importance. Chaplin and Pottinger agreed that the parties themselves were allowed to choose their own representatives to serve on the tribunal.<sup>26</sup> There were no prerequisites for service on a panchayat, although some sort of “respectability” was often referred to. Thus, Chaplin noted that the members of panchayats were comprised of “respectable ryots, merchants, persons out of employ living upon their means or others who were supposed capable of the duty,” while Grant described them as “the more intelligent villagers,” and noted “outcastes and any low castes were excluded.”<sup>27</sup> Yet Pottinger also reported, “there was no rule or even established custom on this point. In general disputants selected their friends of whatever rank they might be.”<sup>28</sup> Thus, British officials later thought it necessary to decide whether eligibility requirements should apply to the members of panchayats. In this, they subsequently accepted what they believed was customary practice. They determined that service on the panchayat was to be open to all adult males and that the litigants were to be free to select their own representatives.

The number of people who would serve on a panchayat was also open to question. The term “panchayat” is derived from the Hindi word “*panch*,” or “five.” The prevailing notion was that, under the Marathas, two representatives were selected by each litigant while a presiding fifth member, the *sarpanch*, directed the proceedings and represented the state.<sup>29</sup> Thus, it was reported that in petty matters the village clerk (*karkun*) would often serve as *sarpanch*, while in more significant ones the Maratha district officer (*mamledar*) might do so.<sup>30</sup> However, it is quite clear that this number could vary widely.<sup>31</sup> Some panchayats, as Briggs suggested, comprised all the male elders of the village.<sup>32</sup> Elsewhere, in an important inheritance case heard under British authority in 1819, there were seven members of the panchayat.<sup>33</sup> William Charmier, an Assistant Judge at Dindori, explained, “there is a notion that a panchaiet always consisted of five persons which as far as I can ascertain does not appear to be the case. When first instituted it most probably was so but that such has been the case

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<sup>26</sup> CHOKSEY, *supra* note 17, at 65, 66.

<sup>27</sup> CHOKSEY, *supra* note 17, at 63, 65.

<sup>28</sup> CHOKSEY, *supra* note 17, at 66.

<sup>29</sup> FRANKS, *supra* note 17, at 15.

<sup>30</sup> *Id.* at 14, 15.

<sup>31</sup> *Id.*

<sup>32</sup> CHOKSEY, *supra* note 17, at 64.

<sup>33</sup> JUDICIAL DEPARTMENT, CIVIL JUDICATURE, *Minute on the Proceeding of Captain Robertson and Mr. Lumsden on Their Award in the Disputed Claim of Luximon Row Sadasew and Mulhar Row Appa* (July 7, 1821), in EAST INDIA COMPANY PAPERS: MUNKESHUR’S APPEAL 10/10 (Maharashtra State Archives).

latterly I mean for many years, I can no where find out.”<sup>34</sup> British officials therefore eventually found it necessary to regularize both the size of the panchayat and the position of *sarpanch* when integrating the panchayat into their system of judicial administration.

British officials perhaps welcomed the fact that panchayat justice was often encumbered by a significant amount of documentation, something they found recognizable although not necessarily entirely comprehensible. Perhaps inevitably, therefore, panchayat procedural documents soon became equated to their supposed British cognates and thus integrated into the British system of justice. The *razeenamah*, for example, which Elphinstone explained as the “consent of the parties to the arbitration” by panchayat, soon enough became understood as equivalent to an English “bond,” legally binding the litigants to accept the award of an arbitrator.<sup>35</sup> Other forms of documentation bore a much closer resemblance to English legal forms and thus were also readily assimilated. The *sarounsh*, for example, an abstract of the panchayat’s decision, was easily adopted as equivalent to an English arbitrator’s “award.”

Enforcement was perhaps the final area of panchayat justice that the British sought to reform and regularize. Chaplin reported that the enforcement of a panchayat’s decision was often the responsibility of various officials, including the village accountant, district officer, or village watchman.<sup>36</sup> However, Pottinger indicated that enforcement could also be executed by “personal authority.”<sup>37</sup> He was undoubtedly referring to the practice of *tukaza*, a term one mid-nineteenth-century dictionary defines as “dunning” or “exacting.”<sup>38</sup> It is fair to say that British officials sometimes were appalled by the practice, which came in a variety of forms. Elphinstone explained that *tukaza* included “every thing from simple importunity up to placing a guard over a man, preventing his eating, tying him neck and heels, or making him stand on one leg, with a heavy stone on his head, under a vertical sun.”<sup>39</sup> Chaplin argued that *tukaza* often amounted “to a degree of torture.”<sup>40</sup>

However, there was disagreement among British officials as to

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<sup>34</sup> JUDICIAL DEPARTMENT, *William Charmier, Assistant Judge, Dindoree, to Saville Marriot* (Apr. 24, 1827), in EAST INDIA COMPANY PAPERS: ANNUAL AND PERIODICAL REPORTS 1/127 (Maharashtra State Archives).

<sup>35</sup> ELPHINSTONE, *supra* note 13, at 59, 74.

<sup>36</sup> *Id.* at 65.

<sup>37</sup> *Id.* at 67.

<sup>38</sup> CHARLES PHILIP BROWN, THE ZILLAH DICTIONARY, IN THE ROMAN CHARACTER: EXPLAINING THE VARIOUS WORDS USED IN BUSINESS IN INDIA 120 (1852). ELPHINSTONE also defined *tukaza* as “dunning” in REPORT ON THE TERRITORIES CONQUERED FROM THE PAISHWA, at 64 (1821).

<sup>39</sup> ELPHINSTONE, *supra* note 13, at 64.

<sup>40</sup> CHOKSEY, *supra* note 17, at 65.

whether *tukaza* was intended to enforce a panchayat's award or whether it was intended to forcefully encourage potential litigants to submit their dispute to a panchayat. Ultimately, Elphinstone adopted the latter interpretation. In his 1819 Circular on the use of panchayats, he wrote, "it is absolutely necessary to prohibit the use of force, but all restraints and inconveniences that depend on the point of honor ought to be allowed to remain" because "if done away entirely, the great principle which drives men to Panchauts, private arbitrations and voluntary compositions, is put an end to, and every creditor is compelled to come to Court."<sup>41</sup> Similarly, W.R. Morris, Captain Grant's Assistant Political Agent, explained how the reformed *tukaza* system operated in Satara:

Tukazza or Tukada as it is termed in this Country still continue to exist, although it is never carried to such lengths as it was under the former Government; during that period there were four different descriptions of it constantly practised; that of obliging a person to stand in the sun to perform the same with a heavy weight upon his head, or with one of his feet raised up; to seat a man at the door of his house and prevent him eating during the day, or to keep him confined in his house & oblige him to afford provision for the man who was seated at his door. In order to abolish the two former of these, orders have been issued strictly forbidding any recourse to violence, for the purpose of effecting a settlement of debts, but any one is at liberty to try and enforce such arrangement by either of the two latter expedients which are generally put in practice for one or two days, after which the plaintiff comes and lays his complaint before the Mamletdar or the Nyadeish.<sup>42</sup>

In Pune, on the other hand, *tukaza* was understood as a form of post-conviction punishment. There, imprisonment for debt had been a common practice under the Maratha government and continued to be so under the British. In 1822, Chaplin reported, "no definite rules have been established in regards to the period of imprisonment for debt, if the debtor failed to satisfy the demand upon him, creditors requiring the confinement of debtors pay them subsistence."<sup>43</sup> H.D. Robertson, the Pune Collector, suggested however, that imprisonment was considered to be an alternative to *tukaza*. He wrote:

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<sup>41</sup> *Circular of the Honble the Commissioner, in INDIA OFFICE RECORDS: BOMBAY PROCEEDINGS 1820-1829, IOR/P/398/71 (British Library).*

<sup>42</sup> *Replies to Supplemental Queries by Mr. Morris (No. 2), in INDIA OFFICE RECORDS: BOARD'S COLLECTIONS 1820S, IOR/F/4/839/22429 (British Library).* The *nyadeish*, more commonly spelled *nyayadesh*, was the chief justice minister under the Marathas.

<sup>43</sup> *From the Commissioner in the Deccan (Aug. 20, 1822), in INDIA OFFICE RECORDS: BOMBAY REVENUE PROCEEDINGS, IOR/P/368/34 (British Library).*

Tuggaza is not carried to excess, and many prefer placing their debtors under restraint in the Debtor's Jail to resorting to it. This is especially the case where the Debtor being rather respectable may be afraid of losing his character by being thrown into Prison, the threat of which frequently makes him pay his debt.<sup>44</sup>

Nevertheless, the panchayats themselves possessed no direct power of enforcement. Their decrees were implemented either through an individual's "personal authority," such as a *tukaza*, or the intervention of the state.<sup>45</sup> In cases of debt, this involved the seizure and sale of property to fulfill the terms of the panchayat award. In the Deccan, Chaplin noted, "decrees are executed in the usual manner by distraint of property and personal restraint, if necessary. Houses are sometimes sold, but the implements of trades are usually, spared, unless no other property be forth coming."<sup>46</sup>

As British reforms of the panchayat proceeded, it sometimes became clear that attempts to restrict the use of *tukaza* adversely affected the poor's access to justice. In 1823, for example, the enforcement of panchayat awards was formally delegated to the civil magistrates (*munsifs*) and *mamledars* whose actions had to be authorized by the Collector. However, the delay involved in getting that authorization, it was reported, often proved to be a hardship upon poorer litigants. Without the threat of direct violent action, poor litigants often did not have the means to initiate a *tukaza* since, at the very least, this required the employment of a peon to stay outside the home of the debtor. *Tukaza*, therefore, became a weapon of the rich against the poor. Chaplin subsequently indicated that further regulation might be necessary to correct this unintended consequence. "It is said," he wrote,

[T]hat those who have means of exercising Tugazar have pressed the execution of Decrees in their favor before the expiration of the period allowed for appealing. It will require the Judges' attention to correct these defects and abuses, but no sale of property should ever take place in my opinion without his previous sanction. The appointment of persons specially responsible for the legal seizure and distraint of goods and chattels under Decrees of Court will perhaps be eventually necessary.<sup>47</sup>

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<sup>44</sup> Extract from *Revenue Consultations connected with the Commissioners report of the 10 August 1822*—not included in the *Judicial Consultations*, in INDIA OFFICE RECORDS: BOARD'S COLLECTIONS 1825-6, IOR/F/4/837/22427 (British Library).

<sup>45</sup> CHOKSEY, *supra* note 17, at 67.

<sup>46</sup> From the Commissioner in the Deccan, *supra* note 43.

<sup>47</sup> Papers of East India Company, Letter from William Chaplin to D. Greenhill (Dec. 14, 1825), in 1 ANNUAL AND PERIODICAL REPORTS (1826) (Maharashtra State Archives).

While the observations of Company officers were being solicited, Elphinstone also sought the advice of local Hindu law scholars (*shastris*) and undertook the investigation of panchayat practices under Ram Shastri Prabhune, the legendarily incorruptible chief justice (*nyayadesh*) of the Peshwas during the late eighteenth century.<sup>48</sup> From these investigations, it is clear that the eighteenth-century panchayat also had been encumbered by many rules and therefore need not be romanticized as an informal community-based institution of dispute resolution. The responses of three *shastris* survive. Although the evidence does not make this precisely clear, it appears that these *shastris* were all from Pune and that one, or perhaps two, served under Ram Shastri. Thus, the picture they present is one of the panchayat as it functioned in a courtly urban environment at the heart of the central administration of the Maratha government and not in the village community.

Nevertheless, British officials, and Elphinstone in particular, valued these “authentic” sources as the foundation upon which to rebuild the panchayat system under British authority. In the *Report on the Territories Conquered from the Paishwa*, Elphinstone explained that such historical research was necessary for a full understanding of the panchayat. “The Panchayet,” he wrote, “may therefore be considered as the great instrument in the administration of Justice, and it is of consequence to determine how the assembly was constituted, what were its powers, and what its method of proceeding and enforcing, or procuring the enforcement of its decrees.”<sup>49</sup> Certainly, much of this historicist perspective can be attributed to the Orientalist perspective that several important Company officer-officials, including Elphinstone, brought to their work in India.<sup>50</sup> This perspective necessitated an understanding of the ancient constitution of the country in order to revive it. Thus while the observations of Elphinstone’s subordinate officials on the panchayat were important to the British, the remarks of the *shastris* were equally vital.

The most extensive responses to the British investigation were those provided by Ragopunt Tutte who had served under Ram Shastri and also had provided information to Arthur Steele for his influential book, *The Law and Custom of Hindoo Castes* (1826). Additional replies survive from two other *shastris*, Nukka Ram and Rumeshur, the latter of whom may also have served under Ram Shastri.<sup>51</sup> Two of the three *shastris* agreed that

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<sup>48</sup> Gune indicates that the panchayat “became the accepted principal of law” only during the mid-eighteenth century when the Peshwas came to control the Maratha government. See V.T. GUNE, *JUDICIAL SYSTEM OF THE MARATHAS* 47-50 (1953).

<sup>49</sup> ELPHINSTONE, *supra* note 13, at 76.

<sup>50</sup> MARTHA MCLAREN, *BRITISH INDIA AND BRITISH SCOTLAND, 1780-1830: CAREER BUILDING, EMPIRE BUILDING, AND A SCOTTISH SCHOOL OF THOUGHT ON INDIAN GOVERNANCE* (2001).

<sup>51</sup> The investigation into the practices during Ram Shastri’s time appears to have been

there were two types of panchayats: those that were convened by the government, and those that were organized within each caste or profession and independent of government interference.<sup>52</sup> A third *shastri*, Nukka Ram, whose remarks were very brief and quite sketchy, only indicated that a local judicial official (*amin*) was present at all panchayats.<sup>53</sup>

Both Ragopunt and Rumeshur remarked that convening a panchayat without government oversight often required the authority or influence of someone of substance. Thus, Rumeshur noted, “Every man who [had] power enough to enforce the decision of a Panchaet could assemble one.”<sup>54</sup> However, personal influence was not absolutely necessary. Without it, a government *karkun* might be assigned to assist the panchayat, especially to ensure the attendance of all those concerned in the suit. Ragopunt explained that among bankers,

[I]f there was no Banker of sufficient weight to assemble the Panchayet [illegible] & to make the Members & Witnesses attend them they met above the Sircar Houses & a Govt. Carcoon was appointed to do this for them. This Carcoon though he sat with them had no voice in the Panchayet but was merely a link between it & the Govt. He was the executive officer of the Panchayet in doing all that could not be done without the influence of a Govt. Officer in assembling Witnesses & Parties &c. He might offer his advice but it was not incumbent on the Panchayet to receive it.<sup>55</sup>

The *shastris* appeared to have had almost exclusive experience with government-sponsored panchayats, or at least provided the most details about them. Government-sponsored panchayats were convened by the government itself, and a *karkun* appointed a guard to ensure the attendance

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undertaken by two of Elphinstone’s subordinates at Pune, Lieutenant Macleod and William Lumsden, and much of their findings were later incorporated into Elphinstone’s *Report on the Territories Conquered from the Paishwa*. See *supra* note 13. Macleod notes that two of the people he employed in his court (*kachari*) had also served under Ram Shastri. See Papers from Mountstuart Elphinstone, *Lieutenant Macleod to Elphinstone*, in INDIA OFFICE RECORDS: NOTES, MEMORANDUM AND RELATIVE LETTERS REGARDING THE POWERS OF PATAILS AND PUNCHAYETS, C. 1819, IOR/Mss Eur F 88/408 (British Library).

<sup>52</sup> Papers from Montstuart Elphinstone, *Queries on Panchaits and answers by Raggopunt Tuttee*, in INDIA OFFICE RECORDS: NOTES, MEMORANDUM AND RELATIVE LETTERS REGARDING THE POWERS OF PATAILS AND PUNCHAYETS, C. 1819, IOR/Mss Eur F 88/408 (British Library).

<sup>53</sup> Papers from Montstuart Elphinstone, *Observations of Panchaets by Nukka Ram Pundit*, in INDIA OFFICE RECORDS: NOTES, MEMORANDUM AND RELATIVE LETTERS REGARDING THE POWERS OF PATAILS AND PUNCHAYETS, C. 1819, IOR/Mss Eur F 88/408 (British Library).

<sup>54</sup> Papers from Montstuart Elphinstone, *Rumeshurs Account of Panchait*, in INDIA OFFICE RECORDS: NOTES, MEMORANDUM AND RELATIVE LETTERS REGARDING THE POWERS OF PATAILS AND PUNCHAYETS, C. 1819, IOR/Mss Eur F 88/408 (British Library).

<sup>55</sup> Papers from Mountstuart Elphinstone, *Queries on Panchaits and Answers by Raggopunt Tuttee*, in INDIA OFFICE RECORDS: NOTES, MEMORANDUM AND RELATIVE LETTERS REGARDING THE POWERS OF PATAILS AND PUNCHAYETS, C. 1819, IOR/Mss Eur F 88/408 (British Library).

of the members, the litigants, and the witnesses. Both Ragopunt and Rumeshur indicated that the government had the authority to imprison both the defendant and the witnesses if they did not respond to the panchayat's order. Ragopunt added that the government also had the authority to "place a Mahussul over the contumacious person."<sup>56</sup> This, like *tukaza*, involved placing one or more peons who had to be fed at the delinquent's door.<sup>57</sup>

The government also had extraordinary powers to convene panchayats. Ram Shastri, it was reported, authorized regional administrators (*sirkars*) and *mamledars* to hear cases and then put the evidence before a panchayat. The *mamledar* was not required to accept the panchayat's verdict although he did have the authority to inquire further into the matter. The government could also refer cases to *karkuns*; however, in these instances, the clerk acted more as an interested observer. Rumeshur explained, "a Karkoon of Govt. often sat with a Panchait (for the purpose of influence) but he was never considered so much a member that he could not be excluded [from?] their sittings whenever the Punch wished to deliberate apart."<sup>58</sup>

In all government cases, the panchayat was composed of members selected separately to represent them by each of the litigants. They also retained the right to object to the government's appointees, which they apparently often did. Nukka Ram noted,

[T]he Govt. added such members [to the panchayat] as it thought proper and always had a Govt. Officer present who kept every thing in motion, and superintended & conducted generally the proceedings shaping and preparing the whole for the consideration of the members. The parties would object to every Member proposed by the Officers of Government, and on the other hand the Sirkar often rejected unworthy members proposed by either party.<sup>59</sup>

The enforcement of panchayat decrees was also the responsibility of government and, once again, there were notable differences between the treatment of the rich and poor. While the poor could be subject to imprisonment for refusing to abide by a panchayat's award, the rich generally could not. Rumeshur indicated that the first step taken to persuade a recalcitrant rich person to perform an award involved government officials "sitting in his house & demeaning him & sometimes keeping him from eating for three or four days."<sup>60</sup> In the cases of both rich and poor, however, the next step was to confiscate property, although there

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<sup>56</sup> See *supra* note 52 and accompanying text.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

were certain limits. The houses of neither the rich nor poor appear to have been subject to confiscation. For a poor person, his tools or farm implements also were exempt. “His effects . . . were sold,” Ragopunt said, “but with great consideration so as not to effect his entire ruin.”<sup>61</sup> A rich person, on the other hand, appears to have had no such special exemption, Ragopunt noting that even his horses could be taken.

British officials hoped to ensure that, under their administration, the panchayat would be resurrected as an efficient, accessible, and inexpensive system of justice. Therefore, many questions sought to uncover existing problems that were believed to be hampering the efficiency of the panchayat system. However, as we shall see, it was in the attempt to rectify these perceived problems that the British most seriously undermined their own admitted goal to rule by “the customs of the country.”<sup>62</sup> Among the most common complaints expressed to Elphinstone was the dilatoriness of panchayat proceedings, the difficulty of securing members to serve, and the potential for bribery and other forms of corruption. By 1819, Elphinstone had already distributed a Circular to his Collectors cautiously outlining the reforms that were necessary “to purify, and invigorate the native system.”<sup>63</sup> According to these orders, the jurisdiction of village panchayats was to be limited to cases valued at 150 Rupees or less; employment of professional pleaders (*vakils*) was prohibited; suits for debts had to be instituted within twelve years; and property suits within sixty years of the origination of the dispute.<sup>64</sup> Elphinstone indicated that several further reforms might be necessary but withheld any decision for the time being.

After 1819, the inefficiencies of the panchayat system of justice plagued the Collectors and other British judicial officials. Ultimately, suits brought before panchayats formed only a fraction of the cases within the British system of justice. Nevertheless, the correspondence from these officer-officials reveals an immense amount of frustration at being ordered to make the panchayat “the great instrument in the administration of Justice,” but, at the same time, to “clear the books” of their accumulating caseloads in the districts under their command. Their chief complaint was the length of time it took for a panchayat to convene, hear a case, and reach a decision. One example will suffice to illustrate the nature of these complaints, but there were a great many more like it. George Giberne, the Register at Ahmednagar, explained to Henry Pottinger, the Collector, that

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<sup>61</sup> *Id.*

<sup>62</sup> John Adam, *Letter to Mountstuart Elphinstone*, in POONA RESIDENCY CORRESPONDENCE, *supra* note 12, at 478.

<sup>63</sup> *Circular of the Honorable Commissioner*, in INDIA OFFICE RECORDS: BOMBAY PROCEEDINGS (1820-29) IOR/P/398/71 (British Library).

<sup>64</sup> *Id.*



the panchayat was, in theory, both “expeditious” and “beautiful.”<sup>65</sup> In many ways, he suggested, it “may even be considered Superior to our far famed British Courts where the parties can only object to, not choose, their Jury, and on account of the variety of forms and intricate law questions, few men are capable of pleading their own causes.”<sup>66</sup> However, the reality of the panchayat system was much different. “It is now my intention,” he wrote, “to shew the difference between that beautiful theory and the present base practice.” Giberne went on to explain:

In the first place a person makes a complaint and shews good cause to have an investigation [made?] into his case, the Defendant argues the Plaintiff’s right and in short a Panchaiet is ordered; the parties give the necessary Security to abide by the decision, and write down the names of the members they select; they commence sitting upon [the?] question, but [now?] one day, half of the members will attend, the next day not so many, the day after very likely not one; and for several successive days, sometimes indeed weeks, nothing whatever will be accomplished; in this case what is to be done. The Custom is, to send a Peon to exhort them to attend, and this must be done four or five times a week, and even then the attendance is precarious.<sup>67</sup>

British officers and officials further complained that it was also often difficult to find people who were willing to serve on a panchayat. Many argued that too few people were willing to take the time away from their businesses or other personal pursuits, and this compounded the problem of delays and postponements. Thus, Capt. Pottinger reported,

[T]he Members [of a panchayat] usually consider it a tax on their time, and are careless as to the question before them unless they have an interest at stake either directly or indirectly. In the latter event they are partial, and in the former they are inattentive, and occupy them selves [sic] with any thing else than that which should demand their whole thoughts.<sup>68</sup>

As early as January 1819, Capt. Briggs in Khandesh requested the authority to pay the members of a panchayat in order to encourage participation.<sup>69</sup> Elphinstone quickly refused the request noting that the payment of panchayat members “would take away the principal motive they

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<sup>65</sup> Papers of East India Company, Letter from George Giberne to Captain Pottinger (Aug. 1, 1822), in 9A CIVIL AND CRIMINAL JUDICATURE (1823) (Maharashtra State Archives).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Letter from Pottinger to Elphinstone (Oct. 29, 1818), in INDIA OFFICE RECORDS: 20 BENGAL POLITICAL CONSULTATIONS, DECEMBER 12, 1818, IOR/P/121/28 (British Library).

<sup>69</sup> Letter from Briggs to Elphinstone (Jan. 20, 1819), in INDIA OFFICE RECORDS: 27 BENGAL POLITICAL CONSULTATIONS, FEBRUARY 13, 1819, IOR/P/121/40 (British Library).

now have to use Dispatch.”<sup>70</sup> However, Briggs continued to believe that such payments would improve the panchayat system. Three years later, he was still lamenting,

[A]t a very early period I perceived the great reluctance with which almost all persons attended Panchayuts excepting on occasions where Cast was concerned, and I accordingly recommended that an allowance should be granted to the members while sitting, but it was considered that it might be an encouragement to them to delay decision, and it was not authorized, and has therefore never been again agitated.<sup>71</sup>

Among the most grievous complaints, however, were often those alleging bribery or corruption, and these grievances were very often suffused with racist condemnations of Indian culture and character. Once again, one example here represents many others. Capt. Pottinger, who otherwise might be considered a staunch advocate of the panchayat system, wrote in 1818:

The system of receiving Bribes in adjusting all disputes was universal before the War, and has taken such deep root that nothing but time and the example of an upright and good Government will extirpate it. I have been obliged to turn apparently respectable Brahmuns and Soukars ignominiously out of the Court, when it has been shown that they took a few Rupees from each of the Parties on whose cause I had requested them to sit. On such occasions they have acted with great effrontery and showed no symptoms of remorse at their disgrace. The better classes of our subjects, I am grieved to say seem to me to be deficient in almost every fine or honorable sentiment, and a total absence of a sense of shame is a marked deformity in their characters; My anxious and fullest endeavours have been, and are directed to reform this degraded state of the Native Society, and I trust my exertions will not be unavailing.<sup>72</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> Papers of East India Company, Judicial Department, Letter from Briggs to William Chaplin (May 3, 1822), in 9 CIVIL AND CRIMINAL JUDICATURE (1822) (Maharashtra State Archives). Nevertheless, Briggs, who later became the Resident at Satara, remained a staunch advocate of the panchayat. See BRIGGS, LETTERS ADDRESSED TO A YOUNG PERSON IN INDIA: CALCULATED TO AFFORD INSTRUCTION FOR HIS CONDUCT IN GENERAL, AND MORE ESPECIALLY IN HIS INTERCOURSE WITH THE NATIVES 176 (London, 1828) (stating, with regard to the panchayat, that “I can with truth assert, that it is a most simple, cheap, and efficient mode of administering justice, and is admirably calculated for a people situated as is the present state of Indian society.”).

<sup>72</sup> Letter from Pottinger to Elphinstone (Sept. 10, 1818), in INDIA OFFICE RECORDS: 49 BENGAL POLITICAL CONSULTATIONS, OCTOBER 10, 1818, IOR/P/121/22 (British Library).

In the summer of 1822, H. D. Robertson, the Collector at Pune, sought further advice from the local *shastris* and *amins* as to how best to remedy the perceived ills of the panchayat system. To do this, he employed the services of Harry Borradaile whose indefatigable labors produced both the *Reports of the Civil Causes adjudged by the Court of Sudur Udalut for the Presidency of Bombay* (1825), the first of its kind in western India, and the massive compilation of *Gujarat Caste Rules*, which would lay unpublished for more than half a century. As was the case when Elphinstone sought the advice of the *shastris* in 1819, the Pune experience of the *shastris* and *amins* in 1822 was unlikely to have reflected panchayat practices outside of the city. Yet, their testimony is most revealing for the fact that there was a general agreement among them that to be effective, the panchayat needed to become more systematized and regularized. In a word, the panchayat needed to be bureaucratized. One should be careful, however, to distinguish between whether the respondents had previously believed that panchayat reforms were essential, or whether, when asked, the interrogatories necessitated the articulation of both grievances and suggestions for reform that heretofore had lain dormant. That is, the question remains as to whether the *shastris* and *amins* would have thought it necessary to recommend further reforms to the panchayat system if they had not been prompted to do so by British officials. In this regard, unlike the extensive documentation of the complaints of British officers and judicial officials, there is no surviving evidence to suggest that either the *shastris* or the *amins* had previously proposed or demanded reform.

Nevertheless, many of the panchayat reforms later adopted by Elphinstone reflect the suggestions collected by Borradaile. The introduction of a variety of fines to ensure that panchayats functioned expeditiously was the most common recommendation.<sup>73</sup> Wishnoo Kushen, a Pune *amin*, suggested fines be imposed upon either litigants or witnesses who delayed the panchayat's proceedings. He explained,

[M]any Plaintiffs, after giving in their petition stay away for many days, and when they do reappear there is considerable delay from the Defendant, who refuses or puts off giving an answer; and there is delay on both sides in collecting all the papers, so that a considerable time elapses before the business is prepared to be laid before the Panchayet. It is recommended above all, however, that when all the papers are collected, and the list of evidence given in, that some penalty should be enforced [sic] both on Plaintiffs and Defendants and witnesses, who do not attend when wanted.<sup>74</sup>

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<sup>73</sup> *Mr. Morris, Replies to Supplemental Queries, supra* note 42, at 16-42.

<sup>74</sup> *Id.* at 47-48.

Chintanum Leley, a *shastri*, further recommended that both parties be required to promise that their version of events is true “and that if found to be false they will submit to be fined.”<sup>75</sup>

The imposition of time limits on panchayat proceedings was also frequently suggested or specifically recommended. The *amin* Anunrow Pandoring submitted a variety of time restrictions depending upon the type of case being adjudicated.<sup>76</sup> However, in no case was a panchayat to take longer than six weeks to come to a decision.<sup>77</sup> Others were much less definite about the time restrictions that might be necessary. Wishnoo indicated only, “I recommend strongly that the Panchayet should be bound to a particular time to decide in,”<sup>78</sup> while Chintamun advocated that “when a suit is referred to a Panchayet, the Panchayet ought to be bound to settle it within a given time, otherwise the Suit to be rendered liable to be taken from before it, and referred by Government to any one person it may please to appoint.”<sup>79</sup>

The variety of other recommendations for reform indicates further areas in which delays were experienced. From Anunrow’s extensive set of suggestions we can infer that many hurdles had to be overcome even before a panchayat could begin to hear a dispute. One problem might arise if only one of the litigants sought to refer their case to a panchayat while the other preferred a judge, and another if the parties could not agree upon the *sarpanch* of the panchayat. In either case, Anunrow urged greater government intervention to resolve the deadlock leaving much of the ultimate authority in the hands of the regional *sirkar*.<sup>80</sup>

A still further delay might be caused by the failure to secure the attendance of the defendant before the panchayat. Anunrow recommended the employment of sepoy to deliver written summonses to defendants who would then be provided with a receipt noting the time and date of their appearance. In the event that the defendant was able to avoid being served or the sepoy accepted a bribe to report that the defendant could not be found, then “either fining him or letting judgment go against him would be

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<sup>75</sup> *Id.* at 44-45. Chintamun used the term *khutbee* to refer to this guarantee of the truth. *Khutbe*, as it usually is transposed, is more commonly translated from the Arabic as “prayer,” but I have not been able to find a suitable definition that indicates its use in colonial India as a legal or judicial term. Reverend Joseph Wolff, who sought to convert the Jews of Palestine and Syria, however, defines it as a material engagement “promise” as reflected in the early nineteenth-century *Missionary Journal of the Rev. Joseph Wolff*. I have therefore adapted this usage of the term. See 2 JOSEPH WOLFF, MISSIONARY JOURNAL AND MEMOIR OF THE REV. JOSEPH WOLFF 197 (New York, E. Bliss and M. White, 1824).

<sup>76</sup> *Mr. Morris, Replies to Supplemental Queries, supra* note 42, at 60-64.

<sup>77</sup> *Id.* at 69-71.

<sup>78</sup> *Id.* at 48-49.

<sup>79</sup> *Id.* at 44-45, 48-49.

<sup>80</sup> *Id.* at 60-64.

easy and justifiable.”<sup>81</sup> Similarly, recommendations were made to remedy the perceived problem of frivolous litigation, that is, the practice whereby litigants applied for a panchayat only in order to prolong judicial proceedings and delay judgment.<sup>82</sup> Wishnoo, an *amin* himself, therefore suggested that *amins* should be authorized to proceed by summary judgment in suits whenever “the justice of litigiousness . . . is clear.”<sup>83</sup>

Finally, Anunrow proposed that panchayat meetings be held only at the courthouse (*cutcherry*) “to act as a check against evasion.”<sup>84</sup> Otherwise, he noted:

[I]f the Plaintiff or Defendant are asked any questions by the Panchayet they will not give direct or proper answers; one says he will tomorrow, and in this manner procrastinate; the Plaintiff and defendant occasionally absent themselves altogether and a Panchayet entirely composed of persons not in the employment of Government, has no power over them: Panchayets should therefore sit where the Aumeen is, instead of in the Bazar [sic] or purgunnah where he cannot be to give them instructions; if the Panchayet sits in presence of the Sircar and any hindrance takes place, an order can be readily given and the Panchayet will not be delayed.<sup>85</sup>

Therefore, in almost all instances, the Pune judicial and resident legal experts recommended greater government scrutiny, greater government supervision, and greater government interference in order to ensure the efficacy of panchayats. Perhaps this should have been expected. These were, after all, government-appointed judicial officers and high-ranking legal scholars, most of whom had previously served the Peshwa.<sup>86</sup> However, their view from the top coincided to an extraordinary degree with the perspective of the leading officer-officials of the British occupation.<sup>87</sup> Thus it should not be surprising to discover that a great many of the recommendations proposed by the *shastris* and *amins* found their way into British judicial policy.

By January 1823, Elphinstone had become convinced that further and much more significant reforms of the panchayat were needed. Writing from the field, he reluctantly admitted that the panchayat had failed to live up to his expectations and instead had exhibited all of the potential weaknesses he

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<sup>81</sup> *Id.* at 69-71.

<sup>82</sup> *Id.* at 45-46 (statement by Kuchoo Appajee, an *amin*).

<sup>83</sup> *Id.* at 48-49.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 66-67.

<sup>86</sup> *Id.* at 16-17.

<sup>87</sup> Extract of a Minute by the Governor (January 14, 1823), in INDIA OFFICE RECORDS: BOARD'S COLLECTIONS, *supra* note 41, at 11A-13A.

had warned of in his *Report on the Territories Conquered from the Paishwa*. “The Judicial arrangements, I am sorry to say, have not been so successful as the Revenue,” Elphinstone wrote:

Few causes have been decided, and those with considerable delay and dissatisfaction to all concerned. . . . The Panchayet on which so much depends under the Native System, has shewn all the inconveniences ascribed to it in my report of 1819, while the remedies applied to them have been less efficacious than was then expected.<sup>88</sup>

He remained convinced, however, that the problems could not be solved by more intensive British supervision or more extensive intervention. Like Munro, Elphinstone believed that Indian customs and practices lay beyond the comprehension of most British officials. “It is indeed one of the great inconveniences of the system of Panchayets,” he wrote:

[T]hat it is so ill adapted to European Superintendence; the want of regularity in the proceedings of Panchayets make them difficult to revise; their decisions being founded on traditional maxims are not easily understood by a foreigner; no European improvements can be grafted on a traditionary [sic] body of law, and no hope can be entertained in such circumstances of ever framing a simple Code, alike intelligible to the Judge and to the people.<sup>89</sup>

Elphinstone concluded, therefore, that a greater number of Indian civil magistrates (*munsifs*) with summary jurisdiction needed to be employed and that a stricter set of rules was required for panchayats. He summarized the plan that would be adopted later in the year:

The principal features in the plan are, that the number of Moonsifs is increased; that the Moonsifs are empowered to try all causes, not specially excepted, without obtaining the previous consent of both parties; that Panchayets are confined to particular classes of causes, unless when both parties desire that mode of trial; that the Members of Panchayets are named from a rotation list, when they cannot otherwise be procured; that it is obligatory to serve on Panchayets; that greater strictness and regularity of proceeding is introduced, and greater facilities given to appeals both from Moonsifs & Panchayets.<sup>90</sup>

The 1823 reforms therefore restricted the original jurisdiction of panchayats to ten specific classes of suits, including those regarding local customs and privileges, marriage, maintenance, partition of property, “old

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

and intricate” accounts, and disputes involving less than fifty Rupees.<sup>91</sup> Thus, the panchayat’s authority was limited generally to administering family disputes, small debts, and questions of local customs. Even in this much more limited sphere of action, litigants were not required to initiate their cases before a local panchayat.<sup>92</sup> Instead, if they preferred to do so, they could submit a written request to have their case heard by one of the new *munsifs*.<sup>93</sup> The responsibility for hearing suits concerning larger debts and property disputes, except those regarding village boundaries, also shifted to the civil magistrates and district officers, both of whom were also authorized to convene panchayats if they deemed it necessary.<sup>94</sup> However, ultimate authority was reserved for the Collector. No panchayat award could be executed without his authorization.<sup>95</sup>

The new rules did not so much displace the panchayat as the principal locus of justice as to restrict its independence, limit its jurisdiction, and regularize its procedures within the administrative structure of the British judiciary. In the courts of the *mamledars* and *munsifs*, for example, panchayats were restricted to no more than five members.<sup>96</sup> The *sarpanch* was to be jointly selected by the litigants, but, if they could not agree, then one was to be appointed for them. Litigants were required to sign both a *razeenamah*, now interpreted as an “arbitration deed,” as well as a “penalty bond,”<sup>97</sup> the latter of which subjected the plaintiff to a maximum fine of ten percent of the value of the claim, if they failed “to substantiate their allegations.”<sup>98</sup> This fine was intended to prevent frivolous litigation. In one sense, such a fine was not altogether new, but it is another example of the extraordinary ways in which customary procedures were constantly being redefined for contemporary ends. Under the Peshwa’s government, such fines, called *goonhangari*, had been levied as a penalty upon the party who lost their cause. Here, however, the British shifted the burden entirely onto the plaintiff who became solely subject to the potential fine in order to inhibit litigation.

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<sup>91</sup> Papers of East India Company, Judicial Department, 6 RULES RESPECTING PANCHAYETS 94-98 (1829) (Maharashtra State Archives). The ten categories were: religion, marriage, peculiar customs of places, hereditary estates (*watans*) and privileges (*huks*), division of property, maintenance, old and intricate accounts, disputes between two inhabitants of the same village for personal property worth less than fifty Rupees, personal injuries or other personal damages, and boundary disputes. A reliable overview of the administrative changes in the panchayat system under British rule in the Deccan is provided by SINGH, *supra* note 5, at ch. 5.

<sup>92</sup> See generally Judicial Dep’t, *supra* note 91.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See *id.*

Further restrictions were placed upon the panchayat intended to routinize their proceedings. Panchayat deliberations were limited to three months, after which both parties had to agree in writing to an extension.<sup>99</sup> If they could not agree, the case was then sent before the Collector or a British magistrate for summary justice.<sup>100</sup> Panchayat members were to be drawn from among “respectable people of the class or degree of the parties.”<sup>101</sup> However, if no one was willing to volunteer their services, then rotation lists were to be created of respectable people, such as the hereditary police and revenue officers (*desmukhs*), hereditary revenue accountants (*despandes*), and other hereditary landholders.<sup>102</sup> Those who refused to serve when called upon became subject to a fine of up to five Rupees.<sup>103</sup> If witnesses or litigants failed to appear upon the summons of a panchayat, they became subject to fines of two Rupees.<sup>104</sup> Plaintiffs who continued to fail to appear could be non-suited with costs while a defendant’s failure to appear could result in the panchayat proceeding *ex parte*.<sup>105</sup>

It should be clear, therefore, that rather than reviving the panchayat according to the customs of the country, what had developed within the space of five years was largely a hybrid of British arbitration practices and British law-court procedures that was called a “panchayat.” Perhaps not surprisingly, this does not appear to have been apparent to even its most ardent advocates. Elphinstone himself did not find it paradoxical that in his *Report on the Territories Conquered from the Paishwa* he recommended both that the panchayat “must continue to be exempt from all new forms, interference and regulation on our part” and, at the same time, that action needed to be taken “to remove [the panchayat’s] abuses and revive its energy.”<sup>106</sup> He appears to have believed that changes in “the mere administration of the law” could only improve, and not radically alter, the panchayat.<sup>107</sup> Similarly, William Chaplin, Elphinstone’s successor, as Commissioner of the Deccan and also a keen proponent of the panchayat system, noted, “it is obvious that if left to work spontaneously, without a well regulated authority to stimulate them to action, they can be of very little utility as Engines of Justice.”<sup>108</sup> However, it does not appear that

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *See id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *See id.*

<sup>106</sup> ELPHINSTONE, *supra* note 13, at 99.

<sup>107</sup> *Id.*

<sup>108</sup> Letter of William Chaplin to Elphinstone, (23 March 1822), in BOMBAY JUDICIAL CONSULTATIONS, IOR/P/399/12 (1822) (British Library).



either Elphinstone or Chaplin understood that the imposition of a “well regulated authority” would inevitably reshape the form and function of the panchayat system.

Ironically, one of the few instances in which this inherent contradiction in panchayat policy was recognized came from the East India Company’s Judicial Department in London. Their observations are worth quoting at length for they emphasize the logical flaw in attempting to incorporate what was assumed to be a voluntary system of dispute resolution into a formal system of judicature. Unfortunately for the Bombay Presidency, the relevant passage quoted here was later excised from the Department’s final version of the dispatch:

Suits in which the parties can be persuaded to agree may be conveniently determined by arbitration, and if the Panchayet were restricted to this, which no doubt was its original function, it would perfectly answer the purpose, and would still be regarded with affection by the Natives, but the great mass of litigation consists of cases in which the enforcement of a claim is peremptorily insisted on by one party or pertinaciously resisted by another. For the decision of all such Suits, whatever the subject of the claim may be, there should be regular Courts, freely accessible to the people and subject to safeguards for the due observance of the Law. Till these are established there is no general protection. To refuse their aid to a Suitor, sending him to arbitration against his will, is to deny him justice.

The objects of arbitration and those of Judicature are so essentially different, and the means best adapted to the one are so ill calculated for the other, that every attempt to assimilate them must be impracticable. The superintending and regulating of Panchayets by Officers of Government, are represented as necessary to their success, but, by the interference of authority, these bodies are rendered unfit for arbitration without being made fit for judicature.<sup>109</sup>

The 1823 reforms did little to improve the efficiency of the panchayat or to reduce the backlog of cases in the British courts of justice and, by 1827, the panchayat experiment in the Bombay Presidency had been deemed a failure. Between 1819 and 1827, less than five percent of all cases in the Presidency were adjudicated before a panchayat.<sup>110</sup> Therefore, the new Elphinstone Code of 1827 relegated the panchayat to a marginal

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<sup>109</sup> Papers of East India Company, Judicial Department, *Administration of Justice in the Deccan*, in BOMBAY DISPATCHES, 486-89, IOR/E/4/1047 (1827) (British Library).

<sup>110</sup> Calculations based on surviving data in the Annual and Periodical Reports in the Company’s Civil Judicature files are preserved in the Maharashtra State Archives and supplemented by reports surviving in the Bombay Judicial Consultations files at the British Library.

and very subsidiary role as an aid to British judges who might or might not seek their advice. In a rare moment of reflection, Elphinstone appeared to regret the fact that the entire superstructure of British governance in India was tending to destroy what he believed to be the traditional village community. “The native system,” he wrote shortly before he retired as Governor,

may long be tried with success in a moderate portion of an extensive Government at a distance from the Presidency and out of the neighbourhood of a supreme Court, but in a country situated like ours in the Deckan, it is in vain to attempt to preserve that system unimpaired.

The first effect of the introduction of forms and the divisions of authority, is, I think, very unfavorable to the natives. They have no longer any head to look up to. Each person being charged with a Department, no one looks after the whole, and it is only in the duties connected with Justice, Revenue or Police that our functionaries come in contact with any class of the Natives. The effect of these circumstances is already observable in the Deckan. The intercourse between those of the higher orders and Europeans is already much less than it used to be and will probably diminish with every new arrival.<sup>111</sup>

Whether the local, voluntary, and informal panchayat that the British imagined had been characteristic of India’s ancient constitution could ever have been made an effective tool for the dispensation of justice is a moot albeit highly contentious point. It is clear though that British attempts to “revive” and “purify” the panchayat to serve their judicial administration made it increasingly less flexible and bound by an increasingly more complex set of procedural rules, all of which were based upon the assumption that Indians preferred to settle disputes through some form of a community-based arbitration forum rather than seek a winner-take-all decision in the British courts. This is not to say that access to justice was better or worse under the new British-style panchayat or that substantive justice was better or worse served by these changes. It is to say, however, that the British attempts to resuscitate the imagined ancient panchayat inevitably killed the patient.

Once again, the Company’s Court of Directors in London understood this inherent contradiction although their imagining of the panchayat was based wholly upon their preconception of the Maratha system of justice as well as their own understanding of English legal custom and practices. As

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<sup>111</sup> Papers of East India Company, Judicial Department, *Extract of the Honorable the Governor’s Minute dated the 4th January, connected with his late visit to the Deccan, in 10 DECCAN NEW JUDICIAL ARRANGEMENT 486-89 (1827)* (Maharashtra State Archives).

the failure of Elphinstone's panchayat experiment increasingly became apparent, they wrote of "the true and correct idea of the Panchayet."<sup>112</sup> Under the Marathas, they explained, people preferred to avoid the government's courts:

Not choosing to go before such imperfect tribunals, they had recourse to a plan of settling their disputes among themselves, the plan general throughout India, that of referring them to private arbitration. The whole of the proceeding was voluntary. The parties resorted to it by mutual agreement, and they had recourse to such Arbitrators as they could induce to undertake the arbitration. This was not an institution of the Government, it was an expedient of the people to *supersede* an institution of the Government which they could not trust, or to supply the place of one where it did not exist. It was to mistake the nature of this expedient of Individuals to make it an institution of Govt. and the attempt has accordingly failed.<sup>113</sup>

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<sup>112</sup> See generally *Administration of Justice in the Deccan*, *supra* note 109.

<sup>113</sup> *Id.* Perhaps it was the harshness of this evaluation that later led to the excision of this paragraph from the final version of the dispatch.