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### **The Limits of Justice and Fairness: Expanding the Scope of Arbitration in Britain and India during the Late Eighteenth and Early Nineteenth Centuries**

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There has been a good deal of debate surrounding the issue of the respective roles played by indigenous and British legal systems in colonial India. Much of the debate has focused on the extent to which British law was imposed upon India, or the extent to which indigenous laws and legal practices survived under colonial rule, or the extent to which native Indians availed themselves of British legal institutions. One of the more recent contributions is that of the Danish historian Neils Brimnes.<sup>1</sup> To grossly oversimplify, he argues that native Indians “instrumentalized” – his term – both indigenous and British courts to pursue their legal objectives. Brimnes adopts Burton Stein's notion of “layered sovereignty” to suggest that British law, as exercised through local courts, left intact many indigenous institutions of dispute resolution. Thus litigants were free to use both systems of law in a strategic way to further their own cases.

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<sup>1</sup>Neils Brimnes, “Beyond Colonial Law: Indigenous Litigation and the Contestation of Property in the Mayor's Court in Late Eighteenth-Century Madras”, *Modern Asian Studies* 37:3 (2003), pp. 513-550.

As an historian of Britain, I am not at all qualified to criticize the work of Dr. Brimnes. Indeed he presents an astute and cogent discussion of this phenomenon. For my discussion here, the important aspect of his essay is the recognition that “a broad agreement prevails among modern scholars that indigenous dispute management in pre- and early colonial India was centred on arbitration at various levels.”<sup>2</sup> The existence of arbitration in India is considered important by South Asian historians precisely because it is regarded as an indigenous, pre-colonial system distinctly different from and at odds with the British-imposed system of text-based and precedential legal practices.

What I will suggest here is that this dichotomy does not necessarily withstand closer scrutiny, especially when put into the broader context of what might be called the “native” practices of the Britons. In particular, this is because a closer look at British practices in the area of dispute resolution reveals that arbitration was both well-known and commonly practiced in late eighteenth and early nineteenth century. In Britain, as in India, common-law arbitration was not based on legal texts or precedence. Moreover, arbitration in England during this period had become something of a jurisprudential fad and was, in fact, part of a broader effort to make justice cheaper, more accessible and more efficient. The East India Company similarly fostered the application of arbitration to manage disputes, but in a unique way. Their representatives combined not only measures both to promote and impose arbitration, but also the traditionally informal and voluntary system of British arbitration. The result was perhaps the first modern system of compulsory arbitration.



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<sup>2</sup>Ibid., p. 518.

*COMMON-LAW ARBITRATION IN ENGLAND*

Let me begin by outlining the chief characteristics of informal and voluntary arbitration in England. Although arbitration stretched back to the medieval period, its history may be described as a chequered one at best. Into the nineteenth century, arbitration was often employed by individuals to resolve a wide variety of private disputes. According to Chitty, individuals might simply agree to abide by the decision of one or more mutually-acceptable arbitrators in order to resolve a dispute. The great advantage of such informal arbitration was that it offered a relatively quick and inexpensive means to resolve disputes outside of the courts. Parties to an arbitration were rarely represented by legal counsel, hearings were informal, and the whole process was free of rules of pleadings, evidence and procedure. The arbitrators themselves need not have had any legal training or experience. Instead they were expected to be men of good reputation, honest, trustworthy and with practical experience in the matter. They received little or no recompense and were bound to decide matters solely in “equity and good conscience” avoiding arcane language or obscure legal precedents. Finally, the scope of arbitration was exceedingly broad. According to Chitty, nearly any dispute could be resolved through arbitration, excepting those involving titles to real property and high crimes against the state or the Established Church.

Therefore, those persons choosing to resolve disputes through arbitration could enter into a relatively autonomous sphere of informal justice and private law-making that, unlike the courts, was flexible, efficient, and cheap. Blackstone was only one of a number of important jurists who heaped praise upon the “infinite importance of these peaceable and domestic

tribunals” of arbitration that avoided “the inevitable delay and expence of public litigation”.<sup>3</sup>

Parenthetically, I should point out that this form of common-law form arbitration was distinct from its statutory form embodied in the Arbitration Act of 1698, which was later associated with Mansfield.<sup>4</sup>

Horwitz and Oldham have noted that in the case of statutory arbitration the most significant obstacles dispute settlement were informal arbitration’s lack of compulsion and its revocability. That is, informal arbitrators could not enforce their own awards.<sup>5</sup> Instead, litigants who either rejected the arbitrator’s award or who needed to enforce the performance of an award were forced to seek satisfaction through the courts, which paradoxically mitigated the efficacy of arbitration. It was this weakness that the 1698 Act was intended to remedy.

It also was nearly impossible at common law to force someone or some group to arbitrate a dispute. Throughout the eighteenth and nineteenth centuries, the common law and equity courts had developed an extensive set of rules governing the performance of an arbitrator’s award. However, there remained significant limits upon the courts’ willingness to compel parties to enter into arbitration. Even contractual agreements to arbitrate disputes were not fully enforceable by the courts. According to Holdsworth, an agreement to go to arbitration and the act of appointing an arbitrator was considered a contract but not an enforceable one. Thus damages could be recovered but the offending party could still not be forced into arbitration. Into

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<sup>3</sup>See Sir William Blackstone, *Commentaries on the Laws of England*, Volume III, 13<sup>th</sup> ed. (London, 1800), III, pp. 15-17.

<sup>4</sup>See Henry Horwitz and James Oldham, ‘John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century’, *Historical Journal*, vol. 36: no. 1 (1993), 137-159.

<sup>5</sup>On the law of arbitration, generally, see Stewart Kyd, *A Treatise on the Law of Awards*, 2<sup>nd</sup> ed. (1799; Philadelphia, Pa.: Farrand & Co., 1808).

the twentieth century, the courts consistently held that the failure to enter into arbitration under contractual circumstances merited only nominal damages.<sup>6</sup>

These difficulties attendant upon the courts' apparent unwillingness to compel persons to arbitrate disputes were compounded by arbitration's revocability. While a submission to arbitration was considered by the courts to be an unenforceable contract, it was at the same time also considered to be a mandate, which indicated that it could be revoked at any time before the award was made. A standard nineteenth-century treatise noted, for example, that oral agreements to arbitrate could be aborted simply by announcing to the arbitrator: "I discharge you from proceeding any further."<sup>7</sup> In the end, therefore, arbitration awards could only be secured if both parties fully agreed to proceed to arbitration and accepted the legitimacy of the entire arbitration procedure. Anything short of that was liable to terminate the process.



*ARBITRATION IN INDIAN COURTS OF APPEAL*

This rather lengthy discussion of common-law arbitration in England was necessary in order to better understand the ways in which arbitration was transferred to and adapted to colonial India. Eighteenth-century India Office records reveal that the Company not only frequently revisited the question of the administration of justice in India, as is well-known, but they also reveal the lesser-known fact that arbitration played a central role in its thinking. Henry Horwitz has noted recently that one of the principal areas of British legal reform during the

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<sup>6</sup>Sir William Holdsworth, *A History of English Law*, Volume XIV (London: Methuen & Co.), pp. 188-91.

<sup>7</sup>Kyd, *A Treatise on the Law of Awards*, p. 44.

eighteenth century concerned efforts to facilitate the collection of debts.<sup>8</sup> This was no less true for India than it was for England.

It often is noted by historians of Indian arbitration that the resolution of disputes occurred through native tribunals, such as the *panchayat* or Kacheri courts, which performed very much the same function as arbitrators. Moreover, they also have noted that the transfer of dispute resolution to these native courts was part of an intentional policy to create a bifurcated judicial system and hence to more promote more effectively Indian subordination. Admittedly, there is some slight evidence to support this assertion. As early as 1726, when the Company's Charter created local Mayor's Courts, the residents of Madras petitioned to transfer property disputes from the Company's jurisdiction to the native Cutcherry, or Kacheri, Courts before local princes. Further, in 1753, the Company's new charter specifically exempted suits between "Indian Natives" from the Mayor's Courts and referred them to the determination of indigenous courts or councils unless both parties agreed to submit the suit to the Mayor's Courts.<sup>9</sup>

However, the evidence supporting this thesis may be much weaker than it at first appears. These "indigenous courts or councils" had long ceased to exist in many parts of India, as a 1770 Report to the Court of Directors indicated.<sup>10</sup> A later report, written in 1793, argues that this transfer of power to non-existent courts was no accident. As early as the 1780s, the Company Solicitor, Steven Popham, had reported that the impetus for this reform had arisen "from private

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<sup>8</sup>Henry Horwitz, "Changes in the Law and Reform of the Legal Order: England (and Wales), 1689-1760," *Parliamentary History*, Vol. 21, pt. 3 (2002), pp. 301-24.

<sup>9</sup>British Library (hereafter BL), India Office Records (hereafter IOR)/H/412.

<sup>10</sup>Brimnes, "Beyond Colonial Law," pp. 520-21.

motives and not from public policy.”<sup>11</sup>

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<sup>11</sup>BL, IOR/H/416, “First Report on Matters of Judicature, 28 November 1793,” fols. 74-77. Brimnes appears to dismiss the significance of this argument: see “Beyond Colonial Law,” ftnt. 48.

In particular, Popham reported that the Governor's *dubash*, or personal interpreter *cum* secretary, administrator, go-between, moneylender, and advisor, among other things, had promoted this reform in order to extend his personal influence and authority. (As Susan Neild-Basu notes, the Madras *dubashes*, for example, were notorious for their corruption and influence-peddling. Among the contemporary terms used to describe them were "evil," "diabolical," and possessed of "wily wickedness."<sup>12</sup>) Without the existence of native courts, the effect of shifting disputes out of the Mayor's Courts was to force most suits to be settled by arbitration, the arbitrators for which were appointed by none other than the *dubash* himself. Popham concluded: "The references of arbitration are said to have been generally made under the immediate influence of the native Dubashes of the British Magistrates and carried into execution under their auspices, by which a door has been opened for the commitment of a multitude of frauds & impositions."<sup>13</sup>

To eliminate this problem, Popham made two recommendations. First, that justices in the court play a more active role in hearing, investigating, and gathering evidence in native suits and/or, second, to find a way to make the awards a rule of court under the strict scrutiny of local judges, the latter of which also had been in part the goal of the 1698 Arbitration Act.

As early as 1783, there appears to be little doubt that the Company Directors sought to implement a good deal of Popham's suggested reforms, especially by introducing important elements of judicial compulsion into the process of arbitration. In the Regulations issued that year to the Bengal *Diwani Adalat*, the East India Company's appeals court in the Bengal

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<sup>12</sup>Susan Neild-Basu, "The Dubashes of Madras," *Modern Asian Studies*, Vol. 18, No. 1 (1984), pp. 1-31.

<sup>13</sup>BL, IOR/H/416, "First Report on Matters of Judicature, 28 November 1793," fol. 75.



Presidency, in cases involving disputed accounts, partnership agreements, and non-performance of contracts, judges were given the authority to refer suits to arbitration “with or without the Consent of the Parties” in cases under 200 rupees.<sup>14</sup> Moreover, as had been developing in the British equity courts at this time, arbitrators were allowed to administer oaths to witnesses.<sup>15</sup> Unlike the British courts, however, arbitrators in India were given several additional compulsory powers, including that of compelling witnesses to testify and to impose fines or other penalties upon witnesses who refused to appear before them, or who refused to sign their depositions, or were otherwise guilty of contempt of court. These penalties all were subject to the review of a British judge as was the registration of the final awards. Finally, judges were authorized to take defendants into custody in the event that they refused the orders of the court.<sup>16</sup>

Similar powers were given to arbitrators in suits under 100 rupees in the local, or *mofussil*, courts, courts which were intended to administer Hindu and Muslim personal law and were staffed by British civil servants.<sup>17</sup> In these cases, judges specifically were directed to appoint *Zamindars*, the local large landholders, or “some public Officer or principal Man, near

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<sup>14</sup>§ XXVI and XXXVI, *Regulations for the Administration of Justice in the Courts of Dewannee Adulut* (Calcutta, 1785).

<sup>15</sup>Henry Horwitz and James Oldham, “John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century,” *The Historical Journal*, 36:1 (1993), p. 151. In England, arbitrators were being the power compel parties to produce documents, but apparently not to testify themselves.

<sup>16</sup>*Ibid.*, § XXIX.

<sup>17</sup>See, for example, Elizabeth Kolsky, “Codification and the Rule of Colonial Difference: Criminal Procedure in British History,” *Law and History Review*, Vol. 23, No. 3 (Fall 2005), p. 641; Upendra Baxi, “Law and Social Change: The Colonial Experience,” in J. Nichani, U. Laing, and L. Lang, eds., *Between Law and State: A Law and Society Reader* (Alternative Law Forum, DVD, 2007), p. 11.

the place where the Cause of Action shall have arisen” to arbitrate the dispute.<sup>18</sup> It does not appear that the arbitrators were delegated the authority to compel testimony or administer oaths. As in other appeal cases, however, judges were granted the authority to review the award and to make such revisions as were thought necessary. The award was then registered as a rule of court. Finally, in an apparent effort to correct the abuses of the *dubashes*, all judges were enjoined to “afford every Encouragement in his Power to Inhabitants of Character and Credit to become Arbitrators.”<sup>19</sup> And, even more explicitly, judges were not permitted to appoint “any of his private Servants, or any of the Officers or Ministers of the Mofussil Dewannee Adaulut ... to be Arbitrators in any Cause.”

A decade later, in 1793, Cornwallis’ Permanent Settlement in Bengal both reiterated and retreated from these 1783 Regulations. The most significant revision certainly was the repeal of the judge’s power to compel arbitration. The new Regulations claimed that “this rule deprived the parties in such suits of the benefit of having their claims tried by the regular tribunals, and was further inexpedient, as it vested in the judges a discretionary power of committing the administration of the laws to any persons (with certain exceptions) whom they thought proper.”<sup>20</sup> Contrary to its intentions, the effect of this older section of the Regulations had been to increase the number of suits brought before the courts by plaintiffs who were dissatisfied with the award.

As a result, the 1793 Regulations encouraged judges to promote the settlement of the dispute by arbitration, but strictly forbade them from “using any compulsion, to prevail upon

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<sup>18</sup>*Ibid.*, § XXVII..

<sup>19</sup>*Ibid.*, § XXXVI.

<sup>20</sup>Bengal Regulations, 1793, § I.

parties to submit their cause” to arbitration.<sup>21</sup> Instead the parties to the dispute were to select their own arbitrators, or a single umpire, as was typical in English voluntary arbitration.

Still, unlike most English cases, arbitrators retained their authority to compel witnesses to testify, to administer oaths, and to fine or otherwise punish those who refused to abide by the arbitrator’s authority. Only in the case of property disputes among *Nazim* families, the native Governors or mayors, or their widows and female descendants, was it explicitly stated that the “long-established rights” of Muslims were to be protected.<sup>22</sup> These cases were to be referred to the *Nazims* themselves or their appointees for settlement. Furthermore, it should be noted, that these revised Regulations were applied to the Bombay Presidency in 1800.<sup>23</sup> The sole exception in that region was that the clause limiting the authority of the courts in property disputes among *Nazims* was eliminated.

#### *ARBITRATION IN THE INDIAN LOWER COURTS*

It may appear that these arbitration regulations, except in the case of the country *mofussils*, were confined largely to the appellate level. This is not the case, however. The Mayor’s Court records of Bombay in the late eighteenth and early nineteenth centuries reveal that the lower courts also became involved in arbitration matters in two ways. The first was identical to English practices: Two parties jointly and voluntarily could agree to submit their dispute to mutually acceptable arbitrators. If this attempt at arbitration failed, appeals could be made to the Mayor’s Court.

The second way, however, exemplifies the new powers exercised by the Mayor’s Court

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<sup>21</sup>*Ibid.*, § IV.

<sup>22</sup>*Ibid.*, § X.

<sup>23</sup>Regulation VI of the Bombay Presidency, 1800.

after 1783, namely, the power to compel arbitration. In May 1784, for example, Governor R. H. Boddam appointed two arbitrators to resolve an inheritance dispute between a widow and her brother-in-law. The order simply read: “I hereby order you to examine the same paying due attention to all papers &c vouchers to be produced by the said parties and make report on the same to me within one month from this day, taking care to shew partiality to neither party given under my hand in Bombay the 15<sup>th</sup> May 1784.”<sup>24</sup> Often, the awards made by arbitrators began with phrase such as “By your Worships [sic] order”<sup>25</sup> or “In obedience to your Worships [sic] order.”<sup>26</sup>

In part because these processes were conducted under the court’s authority, they have left a unique body of historical evidence. As in the comparatively few cases administered under the 1698 Arbitration Act in England, the records of these proceedings include the names and occupations of the arbitrators. However, they include much more than that. Especially in cases in which the award itself was disputed, these records include both depositions and interrogatories. In several cases, in fact, the interrogatories were directed at the arbitrators themselves.

While Britons sometimes were called upon to give evidence, native Indians invariably served as arbitrators. It is by no means clear whether Britons were excluded by Regulation from serving as arbitrators, but several pieces of evidence point to the fact that the employment of Indian arbitrators was intended to be part of a benevolent cultural and social reform process. This can be seen, albeit obscurely, in the language of Cornwallis’ 1793 Permanent Settlement. The

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<sup>24</sup>BL, Bombay Mayor’s Court Proceedings, IOR/P/418/7, 8 November 1791.

<sup>25</sup>For example, see BL, Bombay Mayor’s Court Proceedings, IOR/P/418/1, 12 October 1790.

<sup>26</sup>BL, Bombay Mayor’s Court Proceedings, IOR/P/418/14, 5 February 1793.

purpose of arbitration was “to promote the reference of disputes of certain descriptions to arbitration, and to encourage *people of credit and character* to act as arbitrators.”<sup>27</sup> [Emphasis added.] This same injunction was invoked in disputes over land, for example, in which large landholders “or any other creditable person” should be nominated by the court to act as arbitrator. In general, judges were “enjoined to afford every encouragement in their power to persons of character and credit to become arbitrators.”<sup>28</sup>

A much clearer picture of the relationship between moral and legal reform is revealed in a letter written by Sir James Mackintosh, the Recorder of Bombay, to James Morley, an advocate before the Recorder’s Court. In 1809, Mackintosh had adopted new rules for the court that recommended that requests or orders for arbitration be referred to *maulvis* (Islamic lawyers) or *pundits* (Hindu lawyers).<sup>29</sup> Morley submitted several complaints to Mackintosh, the most relevant of which was that this new policy opened the door to native corruption and deceit, especially since it was determined “by an unknown Law written in an unknown language.”

Mackintosh replied that this was hardly a matter for concern since arbitration awards were not based on law, but only on the “application of the plainest sense to the common affairs of life.” If there were any evidence of corruption, the judge’s power of review gave the court “the means of instantly crushing these native Lawyers.”

Mackintosh further argued that by delegating this responsibility to “native Lawyers” he would be contributing to the cultural reformation of all Indians. In domestic matters, especially,

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<sup>27</sup>Bengal Regulations, 1793, § I; see also Bombay Regulations, 1783, § XXXVI and Bombay Regulations, 1800, § IV.

<sup>28</sup>*Ibid.*, § IV.

<sup>29</sup>BL, IOR/H/MISC/432.

he wrote, Indians had little faith in European courts. By giving them the responsibility to resolve their own disputes, Indians would learn to trust the courts more because they will “have a sort of domestic tribunal [the same term Blackstone used] composed of Judges who partake their own feelings, to whom they can speak without restraint & who can act with effect in those numerous instances where it is much more important to compose the differences than to decide the Question.”

Most important of all, however, would be the cultural and moral effects of these changes:

If indeed confidence be uniformly withheld [sic] from them, they never will seek to deserve it. On the other hand if by a cautious & gradual communication of some inferior & well checked power to the leaders & teachers of the Indian community they are raised in their own estimation & in that of their country men there is no reason to apprehend that this confidence will not in process of time teach them those principles of integrity & honour from which they will be for ever alienated by coarse invective by undistinguishing disgrace & by perpetual exclusion from all dignity and trust.

He concluded: “As for me there is certainly no part of my very humble exertions in the public service on which I shall look back with such pleasure as on this attempt to supply the poorer classes of the natives of Bombay with a mode of administering justice cheap, expeditious & agreeable to their feelings.”

### *CONCLUSION*

From the perspective of a social and cultural historian, two things appear to be missing in the current debates about whether or not Indians resisted imperial law, or had it imposed upon them, or sought to make their way someplace between the two. One is a more thorough understanding of the nature of British dispute resolution outside of the courts and the extent to which these practices were transferred to the empire. Second, is an acknowledgment of the way in which the law was imbricated in efforts to re-form and re-build colonial character. The law, of course, is not only a set of rules governing behavior or a compilation of case law, but it necessarily is also an expression of contemporary moral and cultural values. Perhaps an analysis of the complementary and competing moral prerogatives expressed in the Indian and British legal system would be more enlightening than the current debate between formal and informal systems of law. I would guess that the question of the law's moral and cultural objectives would be equally important to an examination of who imposed the law.