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Author(s): Oliver Mendelsohn

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## *The Pathology of the Indian Legal System*

OLIVER MENDELSON

*La Trobe University*

THE Indian court system is by all accounts unusual.<sup>1</sup> The proceedings are extraordinarily dilatory and comparatively expensive; a single issue is often fragmented into a multitude of court actions; execution of judgements is haphazard; the lawyers frequently seem both incompetent and unethical; false witness is commonplace; and the probity of judges is habitually suspect. Above all, the courts are often unable to bring about a settlement of the disputes that give rise to litigation. So great are these failings that the Indian judicial process can reasonably be seen as a 'pathology' of a legal system.<sup>2</sup>

<sup>1</sup> This work is based primarily on field research in India during 1971–72, and shorter periods in 1974 and 1980. The core research was a stay of some six months in a village fictionally titled Haripur, in Alwar District of Rajasthan. Haripur is the seat of several magistrates' courts which serve the sub-District, and so presented the opportunity for observation of one of the many hundreds of local court complexes in India. It was also a convenient village for the study of dispute settlement outside the courts. For financial assistance I thank the Indian and Australian Governments, which supported me with a Commonwealth Scholarship in 1971–72, and La Trobe University for a travelling grant in 1980.

<sup>2</sup> The sociology of both the British-based legal system of India and indigenous legal processes is at a low level of development. This contrasts sharply with the great volume of commentary on substantive law in the Anglo-Indian courts. The most systematic description of processes in the courts is in Robert L. Kidder, 'Courts and Conflict in an Indian City: a Study in Legal Impact', *Journal of Commonwealth Political Studies*, 11:2 (1973), 121–39; see also, Robert L. Kidder, 'Litigation as a Strategy for Personal Mobility: the Case of Urban Caste Association Leaders', *Journal of Asian Studies*, XXXIII:2 (1974), 177–91; Robert L. Kidder, 'Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India', *Law and Society Review*, 9:1 (1974), 11–38; Charles Morrison, 'Clerks and Clients: Paraprofessional Roles and Cultural Identities in Indian Litigation', *Law and Society Review*, 9:1 (1974), 39–62; Charles Morrison, 'Munshis and their Masters: the Organization of an Occupational Relationship in the Indian Legal System', *Journal of Asian Studies*, XXXI:2 (1971), 309–28; R. S. Khare, 'Indigenous Culture and Lawyer's Law in India', *Comparative Studies in Society and History*, 14:1 (1972), 71–96; Marc Galanter, 'The Modernization of Law', in M. Weiner (ed.), *Modernization* (New York, 1966), 153–65; Marc Galanter, 'The Displacement of Traditional Law in Modern India', *Journal of Social Issues*, XXIV:4 (1968), 65–91; and the several articles on the Indian legal profession in *Law and Society Review*, 3:1–2 (1968–69).

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The roots of the pathology have not been subjected to so intense a study as the symptoms, and most European observers have been content to account for the system in terms of a litigious disposition in the Indian people. There have been two attempts to mount a more systematic explanation of the special nature of the Indian judicial system; the purpose of this paper is to give a third account. The argument is not that the two existing views are entirely false but that neither is sufficient to explain the way in which the Indian judicial system has developed.

Bernard Cohn sees the problem (which he never empirically identifies at any length) to be rooted in the character of Indian peasant society. Indian peasants have failed to accept the very basis of the court system and have therefore abused its processes:

It is my thesis that the present attitude of the Indian peasants was an inevitable consequence of the British decision to establish courts in India patterned on British procedural law. The way a people settles disputes is part of its social structure and value system. In attempting to introduce British procedural law into their Indian courts, the British confronted the Indians with a situation in which there was a direct clash of the values of the two societies; and the Indians in response thought only of manipulating the new situation and did not use the courts to settle disputes but only to further them.<sup>3</sup>

The British legal system is based on the idea of equality but 'North Indian society operates on the reverse value hypothesis: men are not born equal, and they have widely differing inherent worth'. Indian peasant society is dominated by status values as opposed to the contractual values that predominate in European society. Moreover, the Indian village is a multiplex social world in which people are bound together in a variety of relationships; these are ignored by a court concerned only with the issue of the moment. The Indian peasant values compromise rather than decisive victory, which is the rationale of the British courts. The result of this comprehensive clash of the values and structure of Indian society with the introduced legal system could only result in a fundamentally flawed judicial process.<sup>4</sup>

Robert Kidder has contested Cohn's argument.<sup>5</sup> Unlike Cohn (and most other observers of Indian courts), Kidder does not start from a judgement that the courts are basically unsatisfactory. He adopts a functionalist, putatively value-free perspective, which rests on the assumption that conflict is endemic to all societies and that the way of acting out conflict will vary with the society.

<sup>3</sup> Bernard S. Cohn, 'Some Notes on Law and Change in North India', *Economic Development and Cultural Change*, 8 (1959). p. 90.

<sup>4</sup> *Ibid.*, pp. 79-93 *passim*.

<sup>5</sup> Kidder, 'Courts and Conflict in an Indian City'.

For Kidder, the central problem is to account for the variance between the 'norms' of the judicial system and the character of the practical judicial process. He argues that,

if formal legal provisions are not having their intended impact on the relations between litigants, the explanation lies in the relationship of those provisions to the social structure of the judicial system rather than their incongruity with indigenous values.<sup>6</sup>

Kidder, then, wants to explain the special character of Indian litigation by reference to the internal workings of the judicial administration itself, rather than by a clash of indigenous Indian values with those of the British-based courts. He argues that the judicial process in India is best conceptualized not as adjudication but as 'negotiation', and that an understanding of the nature of this process will account for the features of litigation that are commonly thought unsatisfactory:

the skills developed by the various specialists of legal administration and the interest structure which has evolved within and around the bureaucracies of legal administration have produced a maze of such intricate and unstable practices and relationships that the legal system cannot provide predictable, decisive, final outcomes through knowledge of, and appeal to, 'the law' in Bangalore . . . . The social process of litigation has produced a mechanism for prolonged negotiations based on a utilitarian manipulation of every resource, both personal and organisational, made available by the court system.<sup>7</sup>

In short, the courts cannot provide quick, decisive outcomes because they have become immensely complex social systems in themselves.

Kidder does not confront Cohn's thesis squarely. Granted that the legal administration has developed in a way that works against rapid adjudication in favour of one party or the other, we are left with the problem of explaining why this is so. Kidder has remarkably little to say about this. He alludes to the multiplex relationships of Indian village society as a fruitful source of disputation. But he argues that there is nothing especially Indian about such relationships; they also exist in western societies, where they can complicate litigation in the same way they do in India. And in one unclear passage, Kidder observes that the 'factual ambiguity' common in land disputes can produce unusual complications in litigation.<sup>8</sup>

Insofar as Kidder has attempted an explanation of the phenomena he notes, he has been thrown back towards Cohn's argument. Kidder's main difference with Cohn is his rejection of the idea that Indians have acted out a root-and-branch rejection of all the courts stand for. But if

<sup>6</sup> *Ibid.*, p. 122.

<sup>7</sup> *Ibid.*, p. 123.

<sup>8</sup> *Ibid.*, p. 136.

this point is severed from the argument, Kidder is saying something not incompatible with Cohn's account. For both writers there is something about the nature of village society in India which deflects the courts from delivering the kind of justice they theoretically stand for. Kidder merely adds the point that it is possible to find the same kind of deflection in lower-order western courts; and he declines to be judgemental about the process of Indian litigation, since for him protracted judicial proceedings represent a way of achieving 'self-definition' in a complex social order.<sup>9</sup>

This paper follows both Cohn and Kidder in arguing that the structure of village Indian society has pushed the court system into its peculiar mould. And the paper accepts Kidder's argument that the problem is not one of a clash of values, or at least not the comprehensive clash of values that Cohn identifies. But the burden of the argument presented here is that there is a missing factor which can largely account for the pathology of the Indian legal system: land. Overwhelmingly, the courts have been concerned with land disputes and it is the character of land relations in Indian village society which has both inhibited the western-style courts from effectively settling these disputes and shaped the judicial administration itself. The pathology of the judicial process in India is ultimately inexplicable without an understanding of the concrete issues of litigation. To simplify, the courts have been unsatisfactory institutions because they have been charged with resolving a uniquely entrenched class of disputes.

The first part of this paper is a case study which exemplifies some of the structural problems of Anglo-Indian justice. The second part attempts to locate these problems in an historical context and to spell out a more general account of Indian litigation.

## I. The Case of Jagat Singh

### THE HISTORY OF THE CONFLICT

Jagat Singh was in 1972 involved in at least ten cases in the courts of Haripur, in Alwar District of Rajasthan, and he has an extensive history of litigation.<sup>10</sup> All the cases centre on land he possesses in or near his

<sup>9</sup> *Ibid.*, p. 137.

<sup>10</sup> This study is written on the basis of extended interviews with Jagat Singh and his opponents at the courthouse and in the village itself, and interviews with lawyers and magistrates in Haripur. These interviews took place at various times in the period 1971-72 and in 1974. A short visit to Haripur in 1980 showed that the conflict was then as bitter as ever.

village. For years Jagat Singh has been resisting the efforts of his kin and neighbours to gain control of parts of this land. The struggle has been waged through a variety of means including physical force and litigation.

In 1965 Jagat Singh retired as a Major in the Indian Army and he immediately set about fulfilling a longstanding ambition to become a full-time farmer in his ancestral village, rather than settling into the superannuated urban life that most of his fellow officers choose. He now occupies over 200 acres of cultivable land in his own and the adjacent villages. Only about one-quarter of this land is ancestral property; the rest he bought from fellow Rajput landholders in three neighbouring villages. The manner in which he inherited and acquired this land is important in understanding the conflict.

Jagat Singh's ancestral lands are part of an original block of 125 acres owned by his great-grandfather. This man had four sons, each of whom succeeded to one-quarter of the estate. One share was extinguished by the death of one of the sons and Jagat Singh has succeeded to two of the remaining three shares; his father and he himself were the sole heirs of their generation, and the other share came through his adoption by a childless first cousin of his father. The remaining share is greatly subdivided: the initial shareholder had five sons, thereby reducing the share of his heirs to one-fifteenth. The succeeding generations have also been greatly productive of male heirs; one of the five sons had six sons and another had two. Thus today the one-third share of the estate is divided between a very large number of Jagat Singh's kinsmen.

By 1945 his inheritance of almost 85 acres was complete. The holding, however, was greatly fragmented and he sought to consolidate it through exchange with his kinsmen. They refused to co-operate with him out of a belief that he would cheat them in the exchange, so Jagat Singh turned to other Rajput landholders in an effort to build a farm that could support his family in comfort. In 1947 he managed to buy very cheaply 157 acres of cultivable land and 63 acres of pasture from his own and two neighbouring villages. By the end of 1947 he had become what was for the area a very large landowner, possessing 230 acres of cultivable land and 63 acres of pasture. For what is now more than thirty years, Jagat Singh has been waging a ceaseless battle to retain these lands.

The disputes and litigation fall into two categories which mirror the two ways in which he acquired his land. The first category is disputes within Jagat Singh's own family: these have been the most durable and serious disputes. The second conflict has been with cultivators who were

one-time tenants on land he bought or who still work lands adjoining his own.

Chronologically, the disputes with the non-kinsmen were the first to develop in earnest. Jagat Singh's purchase of the lands immediately gave rise to disputes with the tenants who had worked the land by sharecropping or other arrangement. A condition of many of the purchases was the removal of the tenants prior to payment. Where this was not the case, Jagat Singh's first effort was to eject the existing tenants as a precaution against land reforms which might deliver land to the actual tillers of the soil. In all, Jagat Singh was able to retain about two-thirds of the land he had purchased. The other one-third went to tenants either by court decision or by his capitulation in the face of the reform legislation enacted in a series of measures beginning in 1949. Between 1950 and 1953, two of Jagat Singh's disputes with the tenants were fought to the level of the High Court of Rajasthan. In both cases the decision went against him. Generally speaking, those longstanding tenants who strongly resisted their ejection and defended Jagat Singh's court suits, were able to retain their status as tenants and eventually succeed to full proprietary rights. The many tenants who did not appear in court were ousted virtually by default.

For many years now Jagat Singh's chief adversary has been one Raghbir Singh, a first cousin of his father. Most of Jagat Singh's kinsmen in the village are descended from Raghbir Singh and he commands the support of the whole family except Jagat Singh's nuclear group. The dispute between the two men has an inherited dimension, since there was ill-feeling between Jagat Singh's father and his two uncles on the one hand and Raghbir Singh on the other. Jagat Singh can give no explanation for this, other than to note the frequent fractiousness among Rajputs and to impute jealousy to Raghbir Singh in the face of the greater prosperity of his father and uncles.

Jagat Singh's personal situation was a favoured one from the beginning. He received a superior education and joined the Army as an officer. His own children have been similarly successful. In contrast, Raghbir Singh and his descendants are either illiterate or minimally educated. Almost all of them have had to remain in the village and depend on the 35 acres of mediocre land that is their patrimony. It is in this context of poverty and prosperity within the one family that the dispute must be placed. Jagat Singh's lands have been a painfully tangible expression of his social superiority and, more importantly, they have represented a vehicle by which Raghbir Singh's group might be able to better their poor condition.

Although with hindsight the conflict seems to have been almost inevitable, it was slow to develop. The period between the end of the major struggle with the tenants in 1953 and Jagat Singh's retirement from the Army in 1965 was comparatively free of disputes, simply because Jagat Singh could exercise no more than sporadic superintendence of his land. He was unable, for example, to prevent his kinsmen from grazing a flock of two hundred goats on the tasty thorn bushes that grow on his land. But there were at least two issues that came to a head in this period. The first arose from Jagat Singh's attempt to sell 20 acres of his land to a fellow Army Officer. The plot was distant from his other fields and could therefore be disposed of with profit. It was part of the ancestral property and still registered in joint names, so the sale required the consent of the kinsmen or partition of the whole family property. The kinsmen refused to give their consent and, indeed, claimed the land as theirs. In retaliation, Jagat Singh made an official report that Raghbir Singh had fraudulently been collecting a State annuity of Rs 50 for some twenty years. The annuity was eventually stopped and Jagat Singh went on to instigate court proceedings which resulted in the wrongdoers having to repay Rs 800 to the State. They were forced to sell some of their land to meet this payment.

A second family conflict before 1965 entailed protracted litigation. Jagat Singh claims that while he was away on service he had habitually extended various aids to Raghbir Singh through the agency of his wife who was resident in the village, chiefly grain and money when the crops failed. But since the debts were not being repaid, Jagat Singh stopped the loans. He states that in retaliation his kinsmen came to his house and threatened his wife with violence unless she continued to lend them assistance. In order to protect her, Jagat Singh sought a court order that the kinsmen cease their intimidation. The case dragged on for a number of years until Jagat Singh dropped it as, he says, a conciliatory gesture.

The struggle intensified almost immediately after Jagat Singh's return from the Army. The stance of both parties rapidly became entrenched, Jagat Singh refusing to yield the slightest portion of his property and Raghbir Singh determined to wrest land from his kinsman that he believed was rightly his own. The years between 1965 and 1974 can be seen as one continuous struggle which is focused from time to time on a particular issue. I will sketch some (not all) of the individual disputes.

One of Jagat Singh's first efforts on his return was to turn out the goats that had grazed on his land for over fifteen years, and from 1965 to 1967 there was a running battle over this issue. The dispute was pressed

through physical confrontation, although there does not seem to have been any actual exchange of blows. Jagat Singh was finally successful in repulsing the invading goats, perhaps through having worn out his opponents by his obvious intransigence. But another dispute in 1965 took a more violent turn: as an incident in one of the several disputes over field boundaries, Raghbir Singh's party demolished part of a mud wall separating fields occupied by the different parties. The action occasioned a serious physical clash with *lathis* (wooden sticks) and both sides sustained injuries. They each instituted criminal proceedings for assault against the other and, seven years later, the cases were still pending. The dispute over the boundary was not, of course, settled by the fight—five years later it again broke into violence.

In physical confrontations, Jagat Singh's party is the weaker. Raghbir Singh controls in his family a number of able-bodied men who are themselves vitally concerned in the ongoing dispute, since part of the stake is the use of much-needed land. The family group has also been aided on occasion by other groups within the village who have been prejudiced against Jagat Singh through their own disputes with him. Jagat Singh, on the other hand, has remained an outsider in the village and can physically depend only on his eldest son. His career and outlook set him apart from the other villagers and he takes little interest in village affairs. Even his dwelling lies outside the village, since he prefers to leave his large house in the village to his son and daughter-in-law in favour of living with his wife in a rudimentary shed in the fields. But in spite of his relative weakness, both prudence and his own disposition have sometimes impelled Jagat Singh to engage in physical resistance. Any loss of possession could only be repaired by physical action at a later time or by lengthy and expensive litigation in which there would be no certainty of success. Moreover, his own disposition makes him less than reluctant to chastise his opponents physically. Force and litigation are often complementary rather than alternative modes of struggle for Jagat Singh. But overall, his preferred method of conflict is through the state legal structure, where his greater resources and understanding lend him a distinct advantage over his opponents. His favoured tactic is to use the state legal system to raise the costs of opposing him—through framing cases of criminal assault or breach of the peace, for example. He is usually the aggressor in the legal system, whereas in the village he is constantly on the defensive. The intractability of the struggle owes much to the advantage that each side enjoys in a different arena of conflict.

One of the most complex of the long chain of disputes occurred in 1967, and it illustrates some of the strengths and weaknesses of Jagat

Singh's position. In 1965 the land revenue settlement officials collected their information from Jagat Singh's village, and he states that one of their mistakes was to omit some 63 acres of pasture land from his holding; the land was noted as pasture common to the village as a whole. Jagat Singh was later able to have this determination overturned in the courts, since he was able to produce a sale deed for the land. But he deliberately neglected to execute the favourable judgement; he reasoned that he could retain at least partial use of the pasture without further swelling his formal holding to the point where it would become a prime target for confiscation under the land ceiling laws. He has no intention of abandoning his claim to the land; the law allows him a number of years to execute a judgement, and he intends to wait for a more propitious time to do this.

The pasture land again came into contention in 1967, when the kinsmen began to push their cattle through Jagat Singh's cultivated lands in order to reach it. Raghbir Singh claimed that in so doing he was simply trying to make use of an established right-of-way, whereas Jagat Singh disputed the existence of a path and complained that his lands were being damaged by the unauthorized practice. The dispute was taken before the statutory *gram panchayat*, the legal authority for pronouncing on public ways. The panchayat found in favour of Raghbir Singh—Jagat Singh complains that the *sarpanch* sided with his kinsmen for his own ends—and in the face of Jagat Singh's intractability, the matter was taken up with the head official of the administrative subdivision. He in turn referred the matter to the local police inspector, who duly inspected the site and found that a right-of-way did exist. Jagat Singh complains that the inspector wrote his report and promised to report favourably on any subsequent effort of Raghbir Singh to force the way, in return for a payment of Rs 220. No fight ever eventuated on this issue, since Jagat Singh succeeded in his appeal to the magistrate against the finding of the panchayat; the final decision was that there was no right-of-way for the cattle. So although Jagat Singh had failed at the village, his persistence through the legal structure was finally rewarded. This is one of the rare occasions in which he was placed on the defensive both in the village and in the official world.

These, then, are some of the individual disputes in the long conflict between Jagat and Raghbir Singh. There is every indication that the conflict will persist, since neither side demonstrates any disposition to moderate its stance and each has the expectation of further conflict. Whenever Jagat Singh walks between his fields and the village, he straps a revolver to his side and his son goes armed with a wire-bound *lathi*. He

has lost what he says was his previous willingness to help people less fortunate than he is, since he has learnt that 'in life one usually harvests only trouble from good deeds'. But amid regret for the passing of his bucolic dreams, his present situation is not without its compensations. He finds village life dull compared with his Army days, and the dispute does at least have the merit of a diversion. It is a kind of game, a deadly serious game of point and counterpoint and also a game from which he can derive some amusement. He views the institutions of the law as bodies that can be manipulated to provoke continuous irritation to his opponents. Indeed, his enthusiasm for the law is such that one lawyer speaks of him as 'the perfect litigant'. He has quite rightly seen that entanglement in the legal system is far more of a nuisance to his kinsmen than to himself, and that he can use the system to offset his physical inferiority.

Raghubir Singh's party is equally committed to the struggle but they do not share their kinsman's enthusiasm for it. Since Jagat Singh's return to the village they have suffered a nett loss; they have lost benefits they enjoyed in the past and gained nothing in return. The legal unsoundness of their claims and their poverty rule out the courts as an habitual mode of attack. Only rarely do they make an appearance in court. Very occasionally they have used the legal structure in an offensive capacity—to frame assault charges—but otherwise they have simply exploited Jagat Singh's difficulty in controlling a large tract of land with only his son as a reliable physical support. Their perception of the conflict is less sophisticated than Jagat Singh's but on occasion they, too, act out a (joyless) game in which points are scored by harassing one's opponent. They know that they can at least succeed in denying Jagat Singh the capacity to enjoy his lands in peace.

It is superfluous to discuss at any length the numerous disputes between Jagat Singh and villagers other than his family in the years since 1953. But we can note that many of them have been over encroachments by neighbouring cultivators. In 1965 and 1971 two separate disputes of this nature broke into physical fights and on the second occasion the police consented to Jagat Singh's demand that his opponents be prosecuted. He later dropped the charges in return for a written apology lodged with the court. The gesture did not spring from any real spirit of reconciliation but from a calculation that he had harassed his opponents to the point where they will be reluctant to trouble him in future. He notes that a magistrate has chided him for litigiousness, but he has no intention of heeding such criticism. It is a question of right and wrong.

## COMMENT

This study does not purport to be typical of contemporary disputes and litigation in the area from which it is drawn, let alone for other regions of India and other times. It is atypical in the complexity of Jagat Singh's situation and in the profuseness and longevity of the litigation. But at the same time it is not unrepresentative of structural problems of Anglo-Indian justice both now and in the nineteenth century past. The inconclusiveness of litigation in relation to the basic conflict is certainly characteristic of litigation over land in India. And at the level of *process* it displays characteristic traits, such as the harnessing of litigation in tandem with direct action, the intertwining of civil and criminal actions, the slowness of the judicial process and the imaginative exploitation of judicial opportunities. In this sense it represents a good starting point for a more general discussion of Indian courts.

As to this case itself, the primary question to be asked is just why the courts have been unable to resolve the most deep-seated conflict, the one within the family. Why does the family conflict now produce court cases which are only incidents in a continuing struggle rather than points of resolution? If we pursue Cohn's logic, we should conclude that the problem lies in the attitudes of the litigants towards the courts. Jagat Singh could be seen to be so assertive and litigious a personality as to have needlessly burdened the courts and fatally injured their capacity to resolve the conflict. In turn, Raghbir Singh might be taken to have acted out his rejection of the values of the courts by ignoring the courts wherever possible and taking direct action which confounds the most fundamental principles of Anglo-Indian justice. I want to argue that this is not a useful perspective on the judicial process revealed in the present case.

There can be no doubt that Jagat Singh has been marvellously productive of litigation. His criminal prosecution and suits for injunction are particularly good evidence of his judicial fecundity, and it would do no violence to the word to call him litigious. But if a principal criterion of litigiousness is the extravagance of litigation and the triviality of the cause, then Jagat Singh does not qualify. Although various motives have entered into his judicial career, he has never lost sight of the fundamental aim of protecting his own and his immediate family's livelihood. He has only instituted those legal actions which he calculates to be either necessary or desirable for maintaining his position. And there is nothing in the case to suggest that his calculations have been

either wrong or irrational. His occasional enjoyment of the conflict is nothing more than light relief in a grindingly serious business.

Indeed, much of Jagat Singh's litigation has been a response to the very failure of the courts to settle his disputes. He initially approached them as a means of securing a quick victory and he is on occasion almost wistful at finding himself still embroiled in the system. So, while his character and resourcefulness have helped create and sustain litigation, it would be misleading to see in his disposition the reasons for the courts' failure to settle the conflict. Jagat Singh has done no more than take limited advantage of institutions that strike him as defective in their incapacity to provide him with the protection that his legal entitlement merits. Moreover, much of the character of the litigation has not been of his own making. The dilatoriness of proceedings and the technicalities of procedure have not always been promoted by him, nor have they always worked in his favour.

The ineffectiveness of litigation can more plausibly be attributed to the failure of Jagat Singh's opponents to accept their faulty position at law. While at almost every point Jagat Singh has been careful to satisfy the rules of the Anglo-Indian legal order—he has always, for example, insisted on the execution of written documents attesting his land purchases—his kinsmen opponents have often contested litigation without the benefit of evidence that will prove acceptable to the courts. They have kept their chances alive through refusing to act out the assumptions underlying the judicial system: unfavourable judgements are either ignored or treated as temporary setbacks to be countered by whatever means are at their disposal, including physical force. In fact, violence appears not so much a consequence of a breakdown in justice as an ordinary feature of the conflict. In the eyes of the disputants, physical force seems to exist in the same universe as judicial action.

But Cohn's argument can give no real insight into the actions of Raghbir Singh and the other opponents of Jagat Singh. It is true that their actions fail to correspond with the expectations underlying the judicial order, but the ground of this is not a cultural or narrow psychological distaste for the courts. Their attitude to the courts is as instrumental as is Jagat Singh's. But unlike him, they have seen that the courts do not in the main represent a useful opportunity structure in their struggle to appropriate 'their' land. Hence they have done their best to ignore them. Nor can the courts be seen as having provoked an irrational stand in Raghbir Singh's party. Their initial actions rested on a quite reasonable hope that they could divest Jagat Singh of some of the land in dispute, and even after thirty years of failure they can still hope

that eventually they will inherit the earth. Jagat Singh's burden is becoming no lighter with his advancing years and a political climate increasingly hostile to large landowners.

If Cohn's thesis cannot account for the present case, then nor can Kidder's. His discussion does not so much as speak to the material in this case study, since his analysis is confined to the judicial process narrowly construed. If we tried to apply his views here we would have wrongly to concede that the material conflict is not the key to the judicial inconclusiveness. Moreover, most of the active conflict does not even take place in the court—Raghubir Singh hardly ever attends. Clearly, the heart of the case lies in the village and we would grasp only a pale shadow if we concentrated on the court process.

Our own account of the case proceeds from material factors. We can reduce the complexity of the background to the conflict to several such factors. First, we can note that all those who have fought for the land have had some intimate connexion with it: ancestral history, prior tenancy and the possession of neighbouring and poorly demarcated fields have given Jagat Singh's opponents a sense of entitlement to parts of his land. No claimant has made a bid that is totally without justification, though it may not be one acceptable to the court. That there are so many people who have claimed an interest in the land is largely attributable to the number and depth of disruptions in its social setting.

At least four major disrupting factors can be identified. The first is Jagat Singh's inheritance of two-thirds of the family's ancestral lands. The effect of this was to reinforce a gap in prosperity which had already divided his father and uncles from their kinsmen in the village. The second disruption was Jagat Singh's purchase of a large block of land in 1947. This act both widened the economic division within the family and, more importantly, brought Jagat Singh into conflict with the then tenants of the land. It is scarcely conceivable that such a radical deprivation of the tenants' livelihood could have been effected without causing serious animosity. The third disruption was the revenue settlement, which played an indirect part in the cattle-path dispute and led directly to disputes and litigation with neighbouring cultivators. A fourth factor was the return of Jagat Singh from army service in 1965 with a determination to end the encroachment on his land by kinsmen and neighbours. His return hardened into physical reality his displacement of old interests and his rise to the status of the largest landholder of the village.

Beyond these material factors, there are elements of individual psychology and culture which have also shaped the conflict. It is not a case

of exclusively economic calculation by perfectly rational actors. Aside from the unusually tenacious character of Jagat Singh himself, the conflict has been fuelled by a pre-existing family feud. It would be wrong to see the conflict as a feud which has conveniently and incidentally been expressed in a dispute over land; this is not the way it appears to the disputants themselves or to this observer. Rather, problematic social relations have been enlisted to deepen what is basically a conflict over land. From this and other cases we can draw the conclusion that the more intimate the relations between villagers, the deeper they can explore their difference over material issues. This perspective goes some way towards explaining the more serious nature of the disputes within Jagat Singh's family. Family relations are peculiarly 'multiplex' and they often serve to entrench and ramify a dispute beyond the bounds of a similar material conflict between socially more distant people.

The economic interests of the disputants, their belief in the rightness of their cause, the social complexities—these are the basic reasons for the failure of the courts to resolve this particular case. But we are not compelled to regard the courts as a total failure. They have played an important part in helping Jagat Singh retain the land that is his by legal entitlement. He would scarcely have been willing to use them so assiduously if they possessed no utility. Moreover, it could be argued that had the courts not been there, the conflict would have been acted out through more systematically uncivilized means. Still, none of this serves to blunt the fact that the conflict is no closer to resolution after thirty years of judicial consideration.

Could the outcome have been any different if the courts had acted differently? Could they have been more successful if they commanded a more powerful enforcement agency? Enforcement is generally a difficult matter for Indian courts, but in this particular case they have (albeit slowly and inefficiently) secured compliance with most of their judgments. What, then, if they had made a real attempt to bring the parties to a compromise, such that the whole basis of the conflict was removed? They would in this way have met Cohn's objection that they are out of kilter with indigenous authorities, which are said not to single out one incident in a conflict but to address the whole affair and to try to restore harmony on the basis of compromise. It can be conceded that a measure of material satisfaction may well have induced Raghbir Singh to give up his struggle, at least temporarily. But what incentive would Jagat Singh have had to give up any of his land? For him harmony is a minor value when it is opposed to legitimate self-interest, and his standard of legitimacy is the law of the land. He would have been prepared to make only

the most minor concession to his opponents, so minor that it would scarcely have satisfied them. But again, we should resist seeing the problem as stemming from Jagat Singh's particular personality. On a structural level, it would be almost impossible to graft a compromise model of justice on to a land system founded on the principle of apportionment according to finite legal principles. Either one is or is not entitled to particular property in dispute. Jagat Singh is simply acting out the legal model in claiming what is his by right.

Ultimately, then, the failure of the courts in this case is not something which can be attributed to the personality of the litigants or the culture and procedures of the courts themselves. The failure must be connected to problems in the structure of land relations. The second part of this paper will attempt to broaden and deepen, particularly historically, the discussion of problems raised in this case study. We will then be in a position to confront the views of Cohn and Kidder more directly.

## II. The General Problem of Anglo-Indian Justice

### LAND DISPUTES AS THE BASIS OF LITIGATION

Before the close of the nineteenth century, Britain had furnished India with legal doctrine and judicial procedures sufficient to a great modern economy.<sup>11</sup> In practice, however, the judicial system implanted by the British and inherited by independent India has always reflected the concerns of what is overwhelmingly a peasant society. The great majority of court cases have had to do with the use, ownership and profit from agricultural land. This is true for all three jurisdictions of the courts: civil, criminal and revenue. The only other large bloc of cases has been suits brought by moneylenders and merchants for the repayment of simple money debts.<sup>12</sup> While there have been important changes in the

<sup>11</sup> The best (though still limited) account of the growth of Anglo-Indian law is A. Gledhill, *The Republic of India: The Development of its Laws and Constitution* (Steven & Sons: London, 1951). See also C. Fawcett, *The First Century of British Justice in India* (London, 1934); H. S. Bhatia (ed.), *Origin and Development of Legal and Political System in India* (Deep and Deep: New Delhi, 1976).

<sup>12</sup> The revenue courts were by definition exclusively concerned with land matters. In the early part of the nineteenth century their jurisdiction was limited to delinquencies in the payment of land revenue and disputes over revenue liability. (In Bengal and certain other areas these were within the civil jurisdiction.) Later their jurisdiction was expanded and they tended to overlap with the civil courts. On the latter problem, see Elizabeth Whitcombe, *Agrarian Conditions in Northern India* (University of California: Berkeley, 1972), pp. 205–34 *passim*.

In the criminal courts, the most common prosecutions since the late nineteenth

pattern of litigation over the last century, the predominance of land as the subject of litigation has remained constant.

What is the reason for the dominance of land as a cause of judicial action? The obvious answer is that land is bound to be the most contentious issue in a peasant society. Unfortunately, this answer is more obvious than illuminating. The question masks what are really three distinct inquiries: why has land come into dispute in India, why have the disputes ended up in the courts, and why has there been so little litigation over matters other than land?

The first question is not at all easy to answer, partly because land may be valued for a variety of ends including livelihood, power and status. The effect of British dominion over India was to render impossible the highest level of conflict, viz. the effort by individuals or clans to carve out new kingdoms by force.<sup>13</sup> But what the British did not accomplish was the reduction of land conflict in general; indeed, it is probable that there

century (when annual statistical returns became available) have been for physical violence, theft and breach of the peace. To give a random example, in 1876 in the princely State of Alwar (which had a Punjab-style land system and Anglo-Indian courts from mid-century) 4,960 out of a total of 5,913 cases covered by the Indian Penal Code (which does not deal with breach of the peace—this falls under the Criminal Procedure Code) fell into the categories of violence or theft. Reading back from my own field observations and interviews, it would appear that the great majority of these flowed from land disputes. The subject of theft allegation is very often crops on disputed land. Many of the allegations are deliberately false, and there is a steady flow of prosecutions for laying false information to the police.

Litigation in the civil courts was classified from the late nineteenth century under three heads: suits for money or movables, rent suits, and title and 'other' suits. The breakdown between these categories varied over region and, to some extent, over time. (For changes in the post-independence period, see below.) The permanent settlement areas (mainly the original Province of Bengal) had far more rent suits in both absolute terms and relative to the other categories than did, say, Punjab or Madras. To take one year at random, Bengal in 1900 had 287,261 suits for money or movables (the former being the principal item), 284,288 rent suits and 76,976 cases to do with land title and other matters, making a total of 648,525. This excludes all appeals and also suits in the High Court and certain minor courts; the figures are from the *Report of the Civil Justice Administration for Bengal Province for 1900* (Calcutta, 1901). In Madras, by contrast, only 11,028 out of a total of 208,132 suits in 1880 were for rent. *Report of the Civil Justice Administration for Madras 1880* (Madras, 1881). While official figures may have been accurate enough, the mode of classification of suits greatly understated the land factor. A very high proportion of the money suits were the functional equivalent of rent suits; they were brought by either full-time money-lenders or farmers cum money-lenders, people who in effect represented simply another tier in the land hierarchy concerned to maximize its share of the profits from agriculture. See the discussion below. For readily accessible material on the pattern of litigation see the *Civil Justice (Rankin) Committee Report* (Government of India: Calcutta, 1925).

<sup>13</sup> For an interesting view of land conflict before the British intervention see Richard G. Fox, *Kin, Clan, Raja and Rule* (University of California: Berkeley, 1971).

was more dispute over land after the coming of the British than there had been before.<sup>14</sup> These disputes can be seen to fall into two categories. The first category is perennial disputes which survived British intervention and includes succession issues caused by the death of a landholder; the intrusion of an outsider (often through marriage) into the village community; resentments stirred by the adoption of an heir by a landholder; instability caused by desertions of land during droughts; and a landholder's inability (through infirmity, a too-small family, a too-large holding or sundry other reasons) to impose full physical control on his land. In circumstances such as these, it has been common to find multiple claimants to the one piece of land.<sup>15</sup>

The second class of disputes had no precedent in pre-British India, since it was contingent on an ideological and administrative revolution which changes the very basis of land tenure in India. The British administration injected into India an alien, western conception of property and artificially reconstituted land relations in conformity with it. The new scheme of land tenure was at once the direct cause of a vast number of disputes and also the basis for practical developments that entailed further deep and widespread conflict over land.

Both these classes of land conflict—the 'traditional' and the British-inspired—have been generously expressed through litigation since the nineteenth century. The logic of this litigation is substantially the same in both cases and is bound up with the transformation of Indian land relations by the British. Despite the seeming digression, we are forced to consider the basis of this transformation; without this, no more than a superficial understanding of Indian litigation is possible.

#### THE FORMAL BASIS OF THE BRITISH LAND ADMINISTRATION

The root of the changes engineered by the British was a concern to

<sup>14</sup> Cf. L. I. and S. H. Rudolph, *The Modernity of Tradition* (University of Chicago, 1967), p. 261: 'It seems likely that the "rise" in litigiousness was in part a statistical artifact reflecting the transplantation of disputes to a new location where they were easier to record.' It would seem that these authors pay insufficient attention to the new causes of dispute and hence litigation under British administration of India; see the argument below.

<sup>15</sup> Commentary on the village situation prior to British rule is necessarily conjectural; available accounts lack the detail necessary for definitive statement. Nonetheless, an understanding of the 'timeless' quality of some of the conflicts observable today can be laid beside scattered comments in early British reports on India and the work of historians of mediaeval India, in order to provide a plausible outline of the pre-British situation. For the Mughal period, there is some useful material in Irfan Habib, *The Agrarian System of Mughal India* (Asia Publishing House: New York, 1963).

formalize and simplify land tenure in India.<sup>16</sup> The new ruler encountered an imprecise, legally ambiguous agrarian situation in which it was often difficult to find a single 'owner' of land. Rather, land was shared in a bewildering variety of ways between three categories of competitors: the cultivators of the land; the controllers of the cultivators (often known as zamindars or intermediaries); and different levels of what can be called 'the state'. Ceaseless competition between these categories and even within them—between large and small intermediaries, for example—meant that the agrarian situation was highly fluid. What seems to have been at stake was not ownership of land as a unitary physical entity, but interests in land; it was possible for multiple and legally imprecise interests to co-exist in relation to a single plot of land. This situation could be tolerated by successive rulers of India because, by and large, their interest was in collecting a share of the profits of agriculture. It was of little importance to them to legislate the question of 'ownership' of land.

A similar pragmatism on the part of the new British rulers soon yielded to systematic attempts to define the tenure of land in India. Thus for the British the pragmatic question, 'from whom will we collect our revenue demands?' gave way to the very different question, 'who is the proprietor or owner of land, such that he has the duty to pay the revenue demand?'.<sup>17</sup> This question was not the product of mere naïveté or passion for abstract logic. Behind the conceptual engineering were a variety of motives, but above all the concern to maximise revenue for the state. Once the identity and duties of the proprietors had been fixed, the exchequer of Company and, later, Crown would be secure. The recognition of title as a transferable commodity would underpin the invariability of the revenue demand; agriculture would develop through the inefficient yielding title to the efficient, and the government would always receive its handsome due.<sup>18</sup>

<sup>16</sup> The literature on British land policy is very large. Among the most useful are W. H. Moreland, *The Revenue Administration of the United Provinces* (Allahabad, 1911); B. H. Baden-Powell, *Land Systems of British India*, 3 vols (London, 1892); Elizabeth Whitcombe, *Agrarian Conditions in Northern India*; the various articles in R. E. Frykenberg (ed.), *Land Control and Social Structure in Indian History* (University of Wisconsin: Madison, 1969); Neil Charlesworth, 'The Myth of the Deccan Riots of 1875', *Modern Asian Studies*, 6:4 (1972), 402–21; Richard G. Fox, *Kin, Clan, Raja and Rule*; Eric Stokes, *The Peasant and the Raj* (Cambridge, 1978).

<sup>17</sup> Moreland, *Revenue Administration*, p. 36.

<sup>18</sup> The concept of land as a freely transferable commodity seems to have been largely unknown to pre-British India. During the Mughal period there had been occasional instances of zamindari rights being sold but such transactions were not an ordinary feature of agrarian life. The most common mode of land acquisition seems to have been

Who, then, were the legal proprietors of land? Throughout North India this question was answered in favour of intermediaries, in the sense that nowhere was there a systematic effort to give title to the actual cultivators.<sup>19</sup> But the 'intermediaries' varied between an individual who controlled hundreds of villages to a corporate group in control of a single village. The standard of recognition differed over both time and region; how far the variance was justified by tenurial reality remains an open question. In the West and South the *ryotwari* system of proprietorship was said to recognize actual farmers rather than intermediaries, but most of the proprietors were landlords rather than tillers of the soil. The flexibility of these attempts to answer the almost unanswerable was grafted on to an arbitrary scheme whose premise was refusal to take Indian land tenure on its own terms.

By virtue of having embarked on the effort to identify and define the rights of the proprietors of land, the British revenue authorities were logically committed to the further task of specifying the nature of non-proprietorial interests. If the zamindars and landlords were the owners of the land, then what was their legal relationship to the people who cultivated it? By the latter part of the nineteenth century this further question had been worked into a complex edifice of tenancy legislation. The various and imprecise customary relationships yielded, at least in theory, to legal relationships in which the rights and duties of both parties were clearly defined. The landlord's right to rent and the ejection of delinquent cultivators was secured while one class of tenants—'occupancy' tenants—was afforded legal protection against excessive rents and arbitrary ejection by the landlord. The tenancies of this class were declared to be property susceptible of alienation and inheritance. The remaining tenants—the great bulk of the cultivating population—were accorded no rights at all in the land they worked.

The tenancy legislation was the last great addition to the formal structure of land relations in British India, of which the barest sketch has been given here. What had begun as a concern to secure the financial base of British rule in India had burgeoned into an enterprise that changed the very structure of land relations. Irregularity, imprecision and custom had yielded to a regular, clear and formal scheme of rights and duties in relation to land. For the first time a ruler of India had used inheritance, conquest or expansion into vacant lands. See Habib, *Agrarian System of Mughal India*, *passim*.

<sup>19</sup> See Moreland, *Revenue Administration*; Bernard S. Cohn, 'Structural Change in Indian Rural Society 1596–1885', in Frykenberg, *Land Control*, 53–121; Whitcombe, *Agrarian Conditions in Northern India*; and M. F. O'Dwyer, *Final Report of the Alwar Settlement* (n.p., 1901).

its authority to define the very concepts of ownership and tenancy and to apportion land among the population in conformity with its definitions. This had been done through a monumental series of revenue 'settlements', which had also entailed a vast scientific study to specify the productivity of land and hence the revenue that could be levied from the designated owners. The scheme had immense consequences for the countryside, not the least of which was the creation of a staggering quantity of frequently intractable litigation.

#### THE CAUSES OF LITIGATION DURING THE BRITISH PERIOD

Given the attention that has justifiably been paid to the British land system, we have a surprisingly incomplete picture of litigation over land through the century and a half of British rule. This relative ignorance notwithstanding, a kind of conventional if contradictory wisdom grew up to account for what seemed to be the ready reception of British law by the rural population. On the one hand British officialdom could look with intense satisfaction on what seemed to be a popular recognition of the merits of British law. At the same time there was a suspicion—sometimes a conviction—that Indians had over-indulged themselves in litigation, either because they were a quarrelsome, litigious people or because they had somehow missed the point of litigation.

But not every official was content with the conventional view. One nineteenth century magistrate in Bengal noted that,

the complaints of these people are seldom or never litigious. I have seen some conspiracies supported by false evidence; but suits simply litigious, brought forward merely from the quarrelsome disposition of the prosecutor, are not common . . . . Out of one hundred suits, perhaps five at the utmost, may fairly be pronounced litigious . . .<sup>20</sup>

The useful suggestion here is that the conventional view erred in attending to the form of litigation without an appreciation of the purposes of the litigants themselves. In more technical terms, the error was selection of a too narrow unit of analysis. The more we concentrate on external judicial behaviour and the less on purpose, intention and motivation, the more prone we are to see a 'litigiousness' in India. There can be no controversy that 'conspiracies supported by false evidence' and an unusually high level of judicial gamesmanship were rife in India, and that these helped to undermine the official aim of Anglo-Indian

<sup>20</sup> A magistrate at Midnapore, quoted in Rudolph and Rudolph, *The Modernity of Tradition*, p. 261.

justice—settlement of disputes according to definite law within a finite period of time. But it is quite another claim that Indians were prone to institute or prolong litigation out of motives unconnected with a substantial conflict. This claim is generally false and since the conventional view subscribes to it, we would do better to avoid speaking of Indian judicial behaviour in terms of 'litigiousness'. While not completely inapposite, the label creates more confusion than illumination.

As a psycho-cultural stereotype, 'the litigious Indian' cannot account for the incidence, nature or style of Anglo-Indian litigation. The concept fails, for example, on simple logic: if litigious personality were the mainspring of litigation, we should expect to find court actions stemming from every category of dispute endemic to village society—marital conflict, for example. In fact, land disputes have been shown to account for the great bulk of litigation. Moreover, the diagnosis of a litigious Indian personality assumed a general over-resort to litigation without designating a yard-stick for measuring what was a 'reasonable' quantum of litigation. Was the standard to be that of Europe, in which case the *per capita* involvement in law suits may well have been low? Or was there to be a notional standard for a country of the particular social profile of India? The question of the relevant standard was persistently ignored.

Any satisfactory explanation of Indian judicial action must proceed from a clear understanding of the material causes of litigation. Thus, what the British had done was to draw land relations more tightly into the web of government than any other facet of social life. They had singled out land relations from all other social relations—labour and marriage, for example—and successfully asserted a claim to regulate them. This claim entailed not only legislative and executive intervention but also the right to adjudicate disputes over land. The Indians, for their part, were prepared to use the British courts because they could see an advantage in so doing. They saw no such advantage in disputes about issues other than land, though the formal scope of the courts was sufficient to cover these disputes. Had the British intervened in, say, marital relations as deeply as they had in land matters, then it is likely that marriage would have been a greatly litigated affair too.<sup>21</sup> What follows is a working out of this perspective through consideration of several of the leading issues in land litigation of the British period. The

<sup>21</sup> It is well known that in parts of Africa the British courts were heavily preoccupied with matrimonial matters. This was presumably a consequence of the British intervention into domestic relations regarded as uncivilized, in contrast with a general policy of non-intervention in Indian marriage.

examples are selective—they do not purport to exhaust even the principal types of litigation.

An overwhelming proportion of litigation before Indian independence was intimately related to the quantum of land revenue demanded by the British authorities. In very simple terms, the burden pressed so hard as to impoverish many proprietors and at the same time to drive them into pressing their sub-proprietors and tenants equally hard. This pressure tended to lead either directly or indirectly to law suits. A good example of this can be seen in the problem of mass transfers of title. The early revenue settlements occasioned the transfer of an almost incredible proportion of land. In the Banaras region of the North-West Provinces, for example, nearly half the land went to new owners in the years 1801 to 1806.<sup>22</sup> The transfers owed almost entirely to the high-pitched revenue demands of the Company, the non-payment of which provoked compulsory sale of the defaulter's land. In practice, the transferee was often unable to translate his formal title into physical possession, and the fledgling courts were sometimes—just how often is unclear—enlisted as a means of acting out the conflict between the purchaser and the incumbent.<sup>23</sup>

After about 1820 the early form of compulsory sales was abandoned but the phenomenon of mass transfers was soon continued through a new means. The heavy revenue demand and increased agricultural costs (sometimes associated with irrigated cash crops) were now leading an unprecedented proportion of zamindars to borrow money from professional moneylenders and affluent fellow zamindars. Rural credit was available as never before, largely because of legal innovations that worked to the advantage of the creditor. In 1855 the usury laws were abandoned out of fidelity to the most modern laissez-faire European thought. And through a series of court decisions and legislation, including the Civil Procedure Code (1859) and the Transfer of Property Act (1882), land was made newly vulnerable to the ambitions of moneylenders. A mortgagee of land was extended the same rights to foreclosure and judicial sale as a mortgagee in Britain, rights which seem not to have existed in pre-British India. The effect of such court orders was to transfer the mortgaged property, either to the lender (in the case of foreclosure) or to a purchaser (in the case of judicial sale, though this

<sup>22</sup> An official report cited in Cohn, 'Structural Change in Rural Indian Society', p. 69.

<sup>23</sup> The disparity between formal transfers and dispossession has been remarked by a number of officials and historians, among them Cohn, *ibid.*, p. 89, and Whitcombe, *Agrarian Conditions in Northern India*, p. 227.

purchaser might well be the lender himself). Even where a loan had not been secured against the zamindar's land, the latter could now be judicially attached and sold in order to discharge the zamindar's debts. In short, the refinement of legal doctrine (and the sheer increase of courts) had ensured that the judicial apparatus would become the most powerful means of acquiring title to agricultural land.<sup>24</sup>

It was not the case that every moneylender moved to divest his zamindar creditors of their land. For the 'pure' type of moneylender, as opposed to the zamindar-cum-speculator, the object was often to perpetuate an advantageous loan arrangement. The transfer laws could be used as a threat to ensure a steady flow of interest payments and the threat executed only if payments ceased or dwindled to an uneconomic level. But in the instance where a moneylender of whatever category did invoke the judicial transfer machinery, the logic of the approach was hardly mysterious. Application for a foreclosure decree, judicial sale or attachment and sale was simply the perfection of a logic that underpinned the whole loan transaction. The moneylender had acted from the first on the basis of the capitalist conception of property that had been introduced by the British. In going to court, he was simply making use of the available enforcement machinery.

The incumbent acted on a quite different, a traditional, set of values. He may have known the risks of entering into a mortgage or other heavy borrowing arrangement but he was quite unprepared to accept the consequences of his act. Whatever expedients he had been forced into, he regarded the land as rightfully his. The profuse exchange of land for money notwithstanding, no regular market in land was ever established in the nineteenth century. Commercial calculation was all on the side of the purchaser or mortgagee; on the other side were desperate measures taken to stave off disaster. Where it occurred, loss of land was almost always a thoroughly involuntary event that overtook the impoverished zamindar. How could he agree to be robbed of his livelihood, status, identity? How could his heirs agree to this?

Intransigence on the part of the incumbent led directly to a highly problematical judicial process. The threatened zamindar invariably cast around for means of avoiding his own displacement; he did not set out to choose means that conformed to the 'rule of law' but simply to discover an effective means. This he might find in the court system or the village itself, or in both. The court system abounded in opportunities to thwart what might have seemed an open-and-shut case for the pur-

<sup>24</sup> For a fuller discussion of the 'modernization' of the legal machinery in the late nineteenth century, see *ibid.*, Ch. V.

chaser or mortgagee. And the zamindar stood ready to defend his land physically, where this seemed prudent. In short, and through mechanisms described below, the depth of feeling in the incumbent represented a challenge to the orderly working of the judicial apparatus. The courts laboriously struggled with a problem that was ultimately beyond their competence.

The revenue burden was even more directly related to what was by far the largest category of suits which had land as their immediate subject, *viz.* rent suits. Landlords were forced to pass the demand down the line, thereby inevitably incurring a problem of enforcement. The most common form of rent suit—as much as 99 per cent of the whole category—was for arrears of rent with or without a demand for ejection of the delinquent tenant.<sup>25</sup> The remaining rent suits had to do with claims for enhancement of rent by the landlord, claims to occupancy status by tenants, and a range of other tenancy problems. In a great many instances the landlord employed the judicial remedy as merely an adjunct to self-help within the village.

The tenancy issue was also directly related to the problem of mass transfers of title to land. A very high proportion of the transfers did not result in any physical dispossession. Rather, the auctions and judicial pronouncements created what was in effect another interest in land.<sup>26</sup> The incumbent zamindar was left in possession but was now obliged to treat the purchaser as a landlord. This arrangement must have suited many of the new proprietors, particularly the fresh class of commercial speculators who lacked any knowledge of agriculture. But these new proprietors tended to run into difficulties in enforcing their rent rights against tenants who continued to see themselves as zamindars. Often they had little alternative but to turn to the courts.

But much of the conflict following the revenue settlements was not the result of any British policy calculated to push land relations in a particular direction. Rather, it was a simple consequence of the almost defeating task of preparing a 'record of rights', a register of titles to all the land in a given region. Free exchange of land within the villages, formal or informal partitions of joint holdings, imperfect boundaries between fields, the fact of household or village servants often cultivating land free of rent, and the ambiguous, sometimes meaningless, distinction between

<sup>25</sup> Of 93,289 rent suits in Bihar in 1914, 92,494 were for arrears of rent. *Report of the Civil Justice Administration 1914* (Patna, 1915). This was a typical figure.

<sup>26</sup> W. C. Benett, a settlement officer in Gonda, put it thus: 'The result of all these transactions is the creation of a number of concurrent interests in the same soil.' Quoted in Whitcombe, *Agrarian Conditions in Northern India*, p. 227.

landlord and tenant—these were some of the problems that made preparation of the record of rights a frequently arbitrary affair that violated the practical scheme of tenure. The difficulty was compounded by the quality of the personnel enlisted to draw up boundaries and assign plots to particular owners and tenants; the complaints about the capacity and honesty of many of these minor officials were so persistent as to be impossible to discount.

Many of the mistakes of the settlement were corrected before it was promulgated, or soon after. But in many instances, the assignment of holdings provoked conflict where there had previously been harmless ambiguity. The beneficiaries of the settlement were happy to accept their fortune; indeed, bribery quickly became a common means of ensuring a favourable assignment. But those who believed they had a greater right to the land in question were now faced with permanent extinction of their claim. Rationally, they had to contest the settlement decision, and they turned to the courts in great numbers. Judicial challenge to the record of rights was renewed with every fresh settlement.

The litigation flowing from traditional land disputes was somewhat different in character. Here it was not a case of disputants operating on different standards of entitlement, merely the translation of an old kind of dispute to a new forum. But the two classes were alike in the logic of the litigants. Like the auction purchaser who lacked possession, these disputants were responding to the opportunities offered by the courts. The willingness to take the judicial option was in part a function of the absence of an institutional alternative: there appears never to have been regular adjudicative control of land disputes in India. The basic solvent of such conflict had always been more-or-less naked power. The village was a world of super- and sub-ordination, and in a dispute between an economically (hence politically) dominant individual or group and a subordinate, the will of the former was likely to prevail. The process was ordinarily not of a kind that could be termed 'juridical'.<sup>27</sup> Disputes between relative equals occasionally attracted the judicial intervention of a princely outsider, but this was essentially an *ad hoc* event. And while custom played a crucial role in the day-to-day ordering of economic life, it was ultimately unenforceable in the face of opposition from a dominant party in the village. Overall, a practical if precarious economic order was possible without the existence of a concrete judicial structure.

<sup>27</sup> Cf. Bernard S. Cohn, 'Anthropological Notes on Disputes and Law in India', *American Anthropologist*, 67:6, Pt II (1965), pp. 82-122.

Establishment of the courts injected a wholly new element into agrarian conflict. Old sources of power and coercion were by no means rendered obsolete but their efficacy was now suspect in certain situations. The courts represented a quite fresh opportunity structure for both outsiders and villagers. It now seemed possible to secure victory by means other than simple *force majeure*. But by the same token, the capacity of the courts actually to deliver 'justice' was qualified by the old village processes. Willingness to litigate did not preclude resort to other forms of struggle. Litigants chose the weapon(s) most suited to the struggle and their own situation.

The logic that dictated litigation was absent in most disputes where land was not the matter in contention. The myriad marital disputes and petty village quarrels are a good example. Importantly, the authorities had attempted far less to regulate these incidents of social life. Even the fragmentary efforts to overrule custom tended to be half-hearted. Thus, efforts to fix the minimum age of marriage seem not to have been implemented with any degree of seriousness. And while the body of written Hindu law was now administered by the regular courts, this was of limited scope and mainly invoked in relation to landed property. In short, the British gave remarkably little encouragement to litigation which did not involve a substantial property issue.

This restraint served to keep alive the traditional authorities at or near the village level. There was no invariability to either the structure or quality of authority throughout village India but, as a generalization, it can be said that standards of behaviour within marriage, the caste community and the village as a whole were enforced and disputes adjudicated by a range of interlocking authorities including village headmen, dominant castes and individual caste panchayats. These bodies seem to have been strongest—sometimes exercising a clear juridical authority—in relation to the very disputes that had failed to engage the attention of the British. For instance, an individual caste had both a strong corporate interest in enforcing its own laws and customs and the capacity to do so through more-or-less regular tribunals with a range of sanctions, including outcasting. While the British ultimately contributed to the erosion of these traditional authorities, in the short run they seem to have imposed their will on law-breakers much as before. Even today, some of the traditional bodies continue to exercise a calculable, if greatly diminished, authority. But significantly, they take no part at all in land disputes.<sup>28</sup>

<sup>28</sup> The anthropology of Indian law is at a primitive stage of development: M. N. Srinivas, *Caste in Modern India* (Bombay 1962), p. 118. These comments are based on my

In sum, there was nothing uniquely Indian about the popular response to the Anglo-Indian courts. The origins of most litigation lay in a land structure deeply disrupted by the British administration. There was a clear and not obviously irrational logic in the decision to go to court: whether plaintiff or defendant, the claimant was acting out of calculated self-interest. His logic was materialist, rather than rooted in a unique culture or psychology. He was not uncomprehending, mischievous nor enacting a quarrelsome disposition. It is true that not every litigant conformed to the character assumed in the formal model of the new justice: the model pre-supposed a willingness to comply with a decision of the court, whatever it might be. Many litigants, the physical incumbents above all, were quite unwilling to concede the validity of any decision that took away 'their' land. But there was nothing 'Indian' about this psychology. It was a case of peasants casting around for means of avoiding their own downfall.

#### THE CAUSES OF LITIGATION IN INDEPENDENT INDIA

Within a framework marked by continuity, there have been important changes to the pattern of litigation in India over the last thirty years. There is now less litigation in absolute terms than there was in the nineteenth century or first half of the present century and, therefore, far less relative to population.<sup>29</sup> The great change has been the virtual disappearance of rent litigation as a result of land reforms; other suits have declined in more modest number.

Post-independence land reforms had the stated goal of giving land to the tiller, but achievement has fallen ludicrously short of this ideal.<sup>30</sup> At the same time, the scheme has had considerable impact on agrarian life. The major change goes by the general name of 'zamindari abolition', a measure which was implemented by the various States during the decade after 1947. The scheme had the effect of abolishing what was largely a formal and financial tier in the rural hierarchy; it stripped property rights from those (zamindars *et. al.*) who were intermediaries in own field work and the scattered material in published work. For a summary of the latter, see Cohn 'Anthropological Notes', also, Louis Dumont, *Homo Hierarchicus* (Delhi, 1970), pp. 167-83.

<sup>29</sup> For example, in Bihar in 1912 there were 56,939 suits for money or movables, 96,508 rents suits, and 22,570 title or 'other' suits, making a total of 176,017. The figures for the same categories in 1972 were 22,758, 579, and 17,923, making a total of 41,260. Source: *Civil Justice Administration Report* for 1912 and 1972 (Patna, 1913 and 1979).

<sup>30</sup> For a guide to the literature on recent land reforms, see P. C. Joshi, *Land Reforms in India* (Bombay, 1975). Daniel Thorner, *The Agrarian Prospect in India* (New Delhi, 1976), is still the best introduction to the subject.

relation to the collection of state revenue from land. North and East India were in effect converted to the *ryotwari* system of land tenure prevailing in the West and South; the state was brought into a direct revenue relationship with every individual proprietor of land, now called proprietary tenant or a synonym for this.

In most States the change brought about very little direct redistribution of land and certainly failed to do away with widespread landlordism.<sup>31</sup> The rights of the long-established and legally protected tenants (the occupancy tenants) were in effect made absolute in relation to their land. This entailed no physical transfer of land: it was in essence a formal legal change. Tenants with inferior rights, usually called tenants-at-will—these constituted a majority of the tenantry over India as a whole—were *not* converted into proprietary tenants in most States. While the zamindars lost their right to collect revenue on behalf of the state (for which they were handsomely compensated), they were certainly not stripped of all rights in land. The ex-zamindars were allowed to retain those lands (usually termed *khudkasht* or *sir*) which they had worked with their own hands (an occurrence limited to very minor zamindars), by hired labour or through periodic lease in return for a share of the crop or a cash rent. In some areas this extremely loose formula allowed the ex-zamindars to retain a large proportion of ‘their’ lands; legally, they became proprietary tenants of the land, in the same way that their former occupancy tenants became proprietary tenants. None of this helped the majority tenants-at-will. Indeed, many of them were positively harmed by zamindari abolition. Where the tenants were weak, they were frequently ejected from land that the zamindar sought to claim as *khudkasht*.<sup>32</sup>

Zamindari abolition did not occasion the flood of litigation that attended nineteenth-century ‘reforms’ of the land system of India. Where tenants were relatively strong, the zamindars quickly realized the futility of trying to dislodge them through judicial action. And where the tenants were weak, they could be ejected by direct action; they themselves were too poor and timid to use the machinery of the courts, no matter how strong a case at law they might have had. Overall, zamindari abolition greatly reduced the quantum of litigation in India. There were only 579 rent suits in Bihar in 1972, compared with tens of

<sup>31</sup> *Ibid.*, 31–51.

<sup>32</sup> There is still a marked lack of empirical studies of the land reforms. These comments are largely based on interviews with land officials in Bihar and West Bengal, February–May, 1980. See F. Tomasson Januzzi, *Agrarian Crisis in India: the Case of Bihar* (University of Texas: Austin, 1974).

thousands of such cases in any pre-independence year.<sup>33</sup> The explanation for this is very simple: the state has replaced the zamindars as direct collector of revenue and there is now no ground for the old-style rent suit, which was intimately connected with the levy imposed on the zamindar by the state. The remaining rent suits are of a kind familiar in landlord-tenant relations in the West. Nor has the state taken over rent (more properly, revenue) suits from the zamindars. An effectively reduced revenue demand and a more benevolent attitude to the farmers have meant comparatively few judicial claims for revenue by the state. The reduced demand has worked to dry up litigation in another way too. Impoverishment of title-holders by the intolerable revenue demand and the consequent enforced sales, mortgages and litigation, are now largely a thing of the past.

But a later measure in the reform package has provoked a considerable quantity of litigation, since its potential for redistribution has been far greater than that of zamindari abolition. Beginning in the fifties, the various States enacted legislation specifying a 'ceiling' on the amount of land which could lawfully be owned by an individual or family. Surplus land was to be redistributed to the landless or to poor tenants. The early legislation was studded with loopholes reflecting a general lack of political will on the part of national and State governments. But from the late sixties and particularly the seventies, the legislation has been amended to give it more bite, and implementation has become somewhat more serious. The response of landholders holding parcels surplus to the ceiling has been dramatic: they have approached the courts in large numbers in order to set aside orders to divest them of land.<sup>34</sup> The novel aspect of these judicial contests is that they pit landholders against the state rather than against other citizens. The same phenomenon can be seen in relation to another reform measure, the effort to give the former tenants-at-will security of tenure and a guaranteed share of the produce of their land. As soon as government has become relatively serious about this measure, it has been assailed by landholders desperate to retain their traditional dominance.<sup>35</sup>

<sup>33</sup> *Civil Justice Administration Report* (Patna, 1979).

<sup>34</sup> There are no available statistics. However, interviews with officials in Bihar and West Bengal in 1980 suggest that there are many thousands of such cases in the High Courts of these two States. Most of them have reached the High Court direct, without appeal from lower courts, by the device of a writ petition. The argument is that there has been a breach of a fundamental right guaranteed by the Constitution. The favourite peg, until it was recently abolished, was Article 31 of the Constitution, the 'right to property' clause.

<sup>35</sup> This is particularly true of West Bengal, where the Communist Government's *Operation Barga* (a drive to register the names and plots of sharecroppers) has provoked

There remain many other causes of litigation in contemporary India, undoubtedly the greatest single one being land revenue settlements.<sup>36</sup> These invariably lead to thousands of suits in any District of India. The settlement tends to revive old conflicts—the drawing of boundaries between fields is a perennial problem—and create new ones. Many of the disputes are either caused or fuelled by simple errors or deliberate falsehoods in the new record of rights. This is the work of minor officials, many of whom are notoriously susceptible to bribery. For the rest, litigation is incidental to many small categories of land disputes of both a ‘traditional’ and modern kind. Thus the old problem of succession (including adoption) continues to be a fruitful source of discord, as does the modern problem of sale of land; both these kinds of dispute are represented in the earlier case study. But beyond these comments, it is too early to give a definitive account of the developing character of post-independence litigation. It remains to be seen whether litigation will continue to decline; if it does, the ground will not be any reduction of tension in agrarian relations. Rather, the developing tensions are not always of a kind that can easily be expressed in civil court action. Thus, tensions arising from the growth in consciousness of poor tenants may well be expressed in political rather than judicial terms.

#### THE JUDICIAL PATHOLOGY

The seeming puzzle of Anglo-Indian justice is the contrast between the eminently ‘rational’ motives of the litigants and the nature and outcome of the judicial process, which tends to what I have termed a ‘pathology’. The central failure of the courts has been their inability to resolve disputes by their judgements. Official statistics, some historical analysis and contemporary case studies reveal a picture of extraordinary judicial inconclusiveness. This can be separated into two parts, though in practice the parts are often intertwined: first, a widespread lack of enforcement of court judgements and secondly, an unusual complexity in the process of litigation itself.

The first problem is clearly evident in rent and moneylending suits, by far the largest group of cases in British India. Relatively few of these were actually contested by the defendants—poverty, ignorance and even lack of notice of the case deterred most peasants from making an appearance

widespread panic among landholders. Source: interviews and observations in West Bengal, April 1980.

<sup>36</sup> This is based largely on discussions with revenue staff and interested parties in Alwar District, 1971–72.

in court, and the plaintiffs were almost routinely awarded judgement. But a judgement debt had to be realized, and at the stage of execution a very high proportion of decrees were returned as 'wholly infructuous'.<sup>37</sup> In other words, the judgement debtor was either unwilling or unable to pay the debt. The plaintiff's next option was to seek court approval to attach and sell the debtor's property (including rights in land) or, more frequently, to come to some kind of accommodation with him outside the court. The plaintiffs were quick to learn that the courts could be used as a valuable resource, if not an ultimate arbiter according to the rule of law. Indeed, for the money-lender (as opposed to the straightforward zamindar) the court's incapacity to make good its judgement could be an ultimate boon; the pressure of the judgement could be used to renegotiate the loan at even more usurious rates and so bind the peasant to him in perpetuity. The judges, however, took their failure more seriously—they engaged in an annual wringing of hands over the 'wholly infructuous' column in the administration report. But it was scarcely their fault. They were being asked to provide authoritative backing to the grossest form of exploitation arising from their colleagues' revenue policies and the appetites of native petty capitalists. The peasants could only be squeezed so far at any one time.

The most remarkable example of the same problem was the chronic lack of enforcement of judgements which transferred title to land from zamindars to auction purchasers or mortgagees.<sup>38</sup> There were several distinct reasons for this. First, the transferee who was a purely commercial man had no interest in taking possession of land. His concern was merely to secure a high return on his loan and he would invoke the judicial transfer machinery only as a last resort to make good his investment. Transfer of title must often have been only a formal stage in the decline of a zamindar and his relationship with a creditor; certainly, it was no panacea for the creditor's problem of loan enforcement. He now had to collect rent as landlord, a task no easier than extracting repayments on the original loan. The moneylender-cum-landlord would be continually forced to seek judgements against the declining and recalcitrant ex-zamindar. The judgements were not always enforceable, but over time the whole process was bound to exact a heavy toll on the incumbent. Ultimately, either he or his heirs may have been so beaten down and impoverished that it was both feasible and profitable

<sup>37</sup> For example, 36,235 of 98,730 execution proceedings (40 per cent) were returned as wholly infructuous in Bihar during 1912. Moreover, another 15,429 cases met with only 'partial satisfaction'. Source: *Civil Justice Administration Report* (Patna, 1913).

<sup>38</sup> See note 23.

for the lender to make a genuine transfer to a more buoyant farmer. The lender had thus been able to make the courts work for him, albeit in a roundabout way and perhaps to a lesser degree than strict legal right would have dictated.

The most bitter contests of all were those where both claimants were agriculturalists. Any judicial decree calling for the expulsion of an occupant was met with solid opposition. He would leave his land only when forced to and the ground for compromise was far more limited than in the above case. The conflict tended to be acted out on a number of levels and at a degree of intensity that might be termed 'irrational'. The incumbent, for example, might be prepared to enter into crippling loan transactions in order to maintain his fight for control of land which had been jeopardized by his previous borrowing. Both parties might use the courts in an aggressive capacity in order to raise the costs of opposition. False witness, bribery, proliferation of suits in the several jurisdictions—these were routine tactics. This kind of conflict must have given rise to much of the work of the criminal courts. The motives for instigating prosecution were revenge and, more importantly, harassment of one's opponent; it is doubtful that self-protection was a serious consideration. A considerable number of the cases were obviously sheer fabrications, though there was clearly a high incidence of physical confrontation.

The courts, though lacking an autonomous power of enforcement, could call on the enforcement mechanisms of the state—ultimately the police force. But the police were unequal to the demands made of them.<sup>39</sup> The British had created the most systematic police force ever known in India but it was a bureaucratized, highly centralized force. They were based in the great cities and provincial towns, with comparatively few outposts in minor centres of the countryside. Inevitably, they could exercise only intermittent control of agrarian conflict. Once they got to a village they could go through the motions of enforcing a judicial transfer or reaffirming the rights of an occupant, but as soon as they retired to the barracks an already violent conflict was likely to erupt in new incidents which confounded their action. Moreover, the police were notoriously susceptible to financial inducements and to intimidation by dominant groups. Poor pay and low status did little to instill in them a resolute commitment to enforce the law without fear or favour.

But the insufficiencies and inadequacies of policemen were in no sense the root frustration of the judicial system. A body of courts effective only

<sup>39</sup> For a useful discussion of the problems of police in the countryside see L. I. Tomkins, *Report on the Reorganisation of the Police of the Alwar State* (Lahore, 1912).

through the routine use of force could scarcely be regarded as the custodian of the rule of law. The frequency and fruitlessness of claims for police enforcement were more symptom than cause of the judicial malaise. In any case, a ruthlessly efficient scheme of enforcement would have created as many problems as it solved. Protracted struggles were no doubt socially wasteful and intellectually unsatisfactory, but on another level they were a means of gradual adjustment to the disruptions worked by British intervention in land relations. The very flaws of the judicial system gave it some (albeit unintended) success as an anti-revolutionary instrument. An effective system of British justice in India would have tended to yield swift and total victory to those who challenged the *status quo*—the moneylenders, speculators and expansionary farmers. These were the groups which usually had legal right on their side. But the incapacities of the system afforded the parties of the *status quo*—the impoverished zamindars and tenants—room to manoeuvre. They could use their position in the village and sometimes the courts themselves to limit or forestall the judicially sponsored victory that rightfully belonged to their opponent. Had this not been the case, physical displacement and the consequent resentments and instability would have proceeded even further than they did.

Of course, not every instance of protracted and inconclusive litigation could be directly related to British land policy. The conflict over partition of great family estates was hardly an artefact of British rule, even if the incidence of partition was promoted by British policies. What the British provided was a new structure for acting out these conflicts. We can freely concede, moreover, that motives other than simple economic interest entered into such struggles, as they sometimes did in more prosaic disputes of both a time-worn and new kind. In more general terms, Gluckman's remarks about the Lozi tribesmen are equally applicable to the multiplex world of the Indian village: a dispute about a specific thing often 'precipitates ill-feeling about many trifling incidents in the past between the parties and among their kind, incidents which may go back many years.'<sup>40</sup> What we need not concede is that social complications of this order were a powerful factor in any but a strict minority of the cases about land that appeared before the courts. And secondly, we should remember that socially complex disputes about land had always belonged to a category of disputes for which there was no regular means of settlement. The courts certainly made hard weather

<sup>40</sup> Max Gluckmann, *The Judicial Process Among the Barotse of Northern Rhodesia* (Manchester, 1955), p. 19.

of such cases, but this was not because of any defect relative to comparable modes of dispute settlement.

Some of the sham and complexity of Anglo-Indian justice has disappeared in the post-independence world. The deliberately formal rather than physical transfer of land to moneylenders and the attendant judicial complications are no longer common; the dwindling taxation of agriculture has largely removed the condition for this development. There also seems to be a tendency to less intense resistance to loss of land on the part of large landholders. The beneficiaries of the steady decline of this class—they are rarely serious about agriculture and are in many ways anachronistic figures—are middle-peasant proprietors who buy up land piece-by-piece. This is not a process which can easily lead to bitter conflict between seller and buyer. These transfers may well harm tenants (often share-croppers) on the land, but these are people who are usually too weak to put up a realistic fight. There is certainly no lessening of competition for land—quite the reverse. But there tends to be less ground (and less financial capacity) for expressing this competition in litigation. Despite all this, the case of Jagat Singh is testimony enough that epic struggles and complex judicial activity do still occur. Moreover, any generalization for so recent a period must be strictly tentative.

Thus far I have been preoccupied with land litigation from the perspective of the village. The object has been to identify the deep-seated nature of disputes over land, in order to supply the context for the narrow judicial history of land litigation. By now the dimensions of the British ambition to subject conflict over land to the 'rule of law' must be obvious. The *raj* was attempting to bring to order what was the most unruly class of small-scale conflict in agrarian India, and this at a time when, through its own intervention, the incidence of such conflict was running at an unusually high level. Inevitably, performance fell far short of ambition. The judicial system was not rejected out of hand but rather, developed a character quite distinct from its rationale. It was unable to provide 'predictable, decisive, final outcomes through . . . "the law"'.<sup>41</sup> Instead, the system came to be a forum for the stylized acting out of conflict. The beneficiaries of the system were those who learnt to put together a good judicial 'performance'. These people were in effect awarded points for their performance, points which acted as a resource in the larger struggle for land. A litigant who took the courts at face value and failed to master the rules of what was a unique game, was unlikely to secure great benefit from them.

<sup>41</sup> Kidder, 'Courts and Conflict', p. 123.

The distinctive character of the Anglo-Indian judicial system emerged through the medium of the most cherished foundations of British law, the rigorous procedures designed to promote justice. British, indeed all western-style, courts are essentially cautious institutions: they are authorized to give judgement for one or the other party—there can never be a compromise, though the winner may receive less than his claim—only after each side has had an opportunity to put its case. This principle is met in practice by complex rules governing procedure and evidence, by the right to representation by a lawyer and the capacity to appeal against an adverse decision. It is these procedures and rights which have been systematically distorted in the Indian case.

Schooled by their lawyers—a key group which flourished very early in the new order—the litigants found marvellously intricate ways of exploiting procedural opportunities. The one land dispute could become a whole series of court actions, civil, revenue and criminal. If speed of action were undesirable, opportunities for delay through adjournment were abundant. An adverse decision could be appealed to ever higher courts. False witness (positively encouraged by many lawyers) could be employed almost with impunity: the complexity of cases tended to be such that lying was virtually impossible to detect. The appearance of rival ‘hand-writing experts’ to prove the veracity/mendacity of crucial documents was commonplace. And in the face of their manifold professional and financial problems, officials—land record-keepers, police, the magistrates themselves—frequently capitulated to the bribery of a desperate litigant.

Why did the litigants behave in a manner that made a mockery of the processes designed to promote justice between them? This question can be answered indirectly through another question: what reasonable alternative did they have? Each of the parties would eagerly have seized any opportunity for a decisive result in his favour. But the background to many cases meant that no such opportunity was forthcoming. Once aware of this situation, the litigant (strictly, the plaintiff) had two logical options: he could abandon the court system in favour of some other means of advancement, or he could attempt to derive some residual advantage from the courts. For many litigants, the first was no real option at all. It was only the traditionally powerful agrarian figure who could have any confidence that his cause would be successful in the village itself. And even this confidence tended to be misplaced as the second option became an institutional possibility. As a response to the very weakness of the courts, litigants and lawyers quickly learnt to exploit the system in their own interest. Very quickly systematic distor-

tion of judicial procedures was routinized: the very structure of the judicial system came to embody the ploys and ruses of the cunning. In short, a fundamentally incompetent mode of conflict resolution had been redefined by its clients in a way that offered them some hope of ultimate success. On its own terms the court system was an abject failure; for the litigant, the system was not without redeeming value.

The successful litigant has learnt to skirt the many pitfalls surrounding the courts. Above all, he has learnt to extract some value from his 'friend' at court, the lawyer. This man is drawn (initially with the likely aid of a tout) from one of the world's most parasitic legal professions. The development of a high standard of professional legal ethics in India has been inhibited by factors such as poor legal education, a frequent contempt for the figure of the peasant, and the very desperation and hence vulnerability of the litigants. The Indian lawyer is paid only to litigate: he cannot ordinarily charge fees for mere advice. Hence, he is never reluctant to counsel court action. This structural bias towards litigation is furthered by intense competition within a too numerous profession.<sup>42</sup> Both client and lawyer are anxious to win their joint case, the lawyer because his business depends at least partially on a reputation for success. But the client wants a victory that is cheap and as rapid as possible, the lawyer one that is as protracted and therefore expensive as possible. Observation of the relations between lawyer and client in contemporary India suggests that in a high proportion of cases, the original cause of action is submerged at least temporarily in the machinations of a too resourceful lawyer. The problem is compounded by the habitual intervention of various other third parties—the *munshis* ('lawyers' clerks), touts, 'social workers', village politicians and sundry unclassifiable intermeddlers. Some of these perform a genuine service in smoothing the path of ignorant villagers on a daunting bureaucratic expedition. But like the lawyers (in whose pay they often are), these people tend to have an interest which cuts across the concerns of the litigant.

There is ample evidence, then, that the judicial system has become a complex social structure in itself. The various specialists in legal administration, to use Kidder's phrase, have entrenched themselves so as to be capable of operating as a force independent of the will of the parties to the dispute. Clearly, this tends to make the judicial process more unwieldy, less predictable and even less just than it otherwise

<sup>42</sup> The size of the profession is quantified and set in comparative perspective in Marc Galanter, 'The Study of the Indian Legal Profession', *Law and Society Review*, 3:2-3, 1968-69, pp. 201-17.

might be. At the same time, neither the procedures nor the third-party professionals are the root problem of the judicial system. A large part of the reason for the emergence of such an unsatisfactory legal profession is the opportunities offered by conflicts which are essentially beyond the competence of the courts to resolve. If the disputes had been more tractable, then it is doubtful that the lawyers would have had so great a room to manoeuvre in their own interest.

#### COHN, KIDDER AND A THIRD VIEW

Kidder's analysis of the Anglo-Indian legal system is obviously quite different from Cohn's, but at one level the two converge. Both accounts rest on an assumption that the character of the judicial process can be explained in isolation from the other organs, policies and consequences of Anglo-Indian rule; we are invited to view the courts as a wholly independent institution. The present account proceeds from a denial of this assumption. What I have called the pathology of Anglo-Indian justice—essentially its inconclusiveness—was not at root a function of *a priori* attitudes to British justice as a discrete system of rules and procedures (Cohn), nor of internal developments within a due process system inherently susceptible to distortion by the participants in it (Kidder). Rather, the formal independence of the courts masked the fact that they were part of a larger administrative whole and were preoccupied with the economic consequences of policy framed by other organs in the administration. The fate of the courts was bound up with the land structure of India under British rule. A turbulent agrarian structure was reflected in an immensely problematical judicial system. The most basic problems of Anglo-Indian justice would have beset an equally ambitious judicial system of whatever procedural and cultural complexion.

The language of Cohn's argument suggests that the function of the courts was simply to settle disputes. From another perspective, however, their function was to enforce the new definition and allocation of rights and duties concerning land. In this sense, the courts were an enforcement arm of the land administration. They were there to enforce the taxation claims of the state and to back those who acted in conformity with the new scheme of entitlement. This can be seen most clearly in the revenue courts. By the mid-nineteenth century, the jurisdiction of the revenue courts in the North-West Provinces and some other areas was to hear charges of delinquency in payment of revenue to the land administration and also to adjudicate disputes relating to the occupancy

of land and the incidents of tenure, such as rent rights. The link between these two seemingly quite distinct functions was the British concern to redefine the whole legal status of land in India, so as to benefit themselves and the 'worthy' among the Indian population. The courts were in effect asked simultaneously to enforce the revenue claims of the state, to hammer home the dispossession and impoverishment decreed by the land authorities, and to bridge the divisions which had been opened up. It is no wonder that they failed in all but the first task.

Cohn is right to argue that the Anglo-Indian courts did not fit into Indian society very neatly, but the lack of fit was not as he identifies it. Initially, the courts did not fit Indian society in proportion as the new land policy did not fit; the courts were derivative institutions designed to apply this policy (the law) to individual cases. The land policy was not intended to 'fit' Indian society; it was a radical policy which aimed at the installation of something like a capitalist order in India. But the problem for the courts was that a category of Indian villager did not accept the validity of rules which worked to deprive them of land they regarded as legitimately theirs. The relevant clash was not over values to do with status and culture and between native and alien judicial procedures, but an economic clash. The courts obediently set out to give support to the party whose conception of right coincided with that of the policy makers, but they were obstructed in this by the degree of resistance put up by the other party. There was nothing 'Indian' about this resistance; it was resistance to economic deprivation. The seemingly curious effect of the courts' incapacity to cope with this resistance was that the lack of fit between administration and society was somewhat reduced; the old order could persist to a greater extent than it would have had the courts done their job, that is given support to the rising, anti-*status quo* parties which usually had legal right on their side. A class of litigants had in effect managed to disaggregate the courts from the land administration and to invest them with some of the independence that the formal model suggested.

The question of perjury is relevant in this context. There is no ground for believing that lying is more prevalent in village India than it is in any other society, and yet false witness is a notorious feature of Indian court behaviour. For Cohn, the disparity can be explained as a reaction to the alienness of the courts and a consequent willingness to violate ordinary canons of action. While there may be some little truth in this, overall the view lacks explanatory power. The better view is that perjury stems from a knowledge of both the dangers and opportunities inherent in the courts. Elizabeth Whitcombe quotes a nineteenth-century revenue

official remarking the dramatic growth in perjury over a ten year period. At the beginning of the period the zamindars perjured themselves rarely; ten years later they did so freely.<sup>43</sup> Now it is unlikely that during this time the litigants had come to see that their 'Indian' values clashed with the values of the courts. It is more plausible that the zamindars had learnt what to do in order to pursue their own interests in the courts. They had learnt that if the courts were not their natural friend, they could at least be manipulated so as not to be an effective enemy. Over time, false witness became virtually an institutionalized part of the judicial process. By now, even a novice litigant tends to realize that honesty is a luxury in the courts. The lawyers, of course, reinforce this perception; the client is routinely coached to give evidence to suit his own case rather than the facts of the matter.

If Cohn were correct, a court system more sensitive to Indian values and processes would presumably have been more successful. Again, there may be some truth in this. Some of the litigated disputes may have been confronted more productively had the courts considered the totality of relations between the parties, or been willing to effect a compromise between them. But it is highly unlikely that greater flexibility and institutional reform could have cured the pathological aspects of the system. There were strict limits to the potential for reform. As we noted in the case study, it would have been logically impossible to replace the 'winner-take-all' principle with a commitment to bring the parties to a compromise. The whole basis of the British land scheme was a concern to define and apportion land according to strict legal right. The purchaser of land could scarcely be told that he had purchased full proprietary rights in a property but that in the event of a dispute, a court would be committed to conceding him much less than this. Moreover, there would have been little 'traditional' about such a stance; we have repeatedly noted that land disputes were not subjected to such orderly treatment in pre-British India.

Kidder has also rejected Cohn's psychology of the Indian litigant, but he has done so through reasoning which is itself open to objection. Kidder claims that far from having rejected the basis of the courts, Indians were attracted to them by the very characteristics that marked them off from native processes: 'the court system draws new customers specifically because of its ideology of legal-moral absolutes', or the principle that the party with legal right on its side is entitled to a total victory.<sup>44</sup> The objection to this view is its suggestion that prospective

<sup>43</sup> *Agrarian Conditions in Northern India*, p. 216.

<sup>44</sup> 'Courts and Conflict', p. 124.

litigants evaluated the courts as an autonomous entity. Litigants appear to have approached the courts as part of a whole new land scheme, rather than as a novel mode of justice that was seen to have a normative value superior to native processes. The initiators of litigation were acting out a logical imperative, rather than opting for a kind of justice they specially trusted. Just as the British authorities had perceived that establishment of courts was the corollary of defining and allocating rights and duties in land, so disputants came to the courts for defence of rights they claimed under the new system. This is not to say that the winner-take-all principle was not attractive to many litigants, only that it was not the primary ground for going to court. The British had dictated court use by the way in which they had intervened in land relations.

The strength of Kidder's work is his description of the manner in which the 'adjudicative ideal' is displaced in the judicial system. The central weakness is the failure to give an adequate explanation for the appearance of the processes he identifies. It is not enough to point to the inherent susceptibility of due process systems to distortion by the several participants in them. Why has the same distortion not taken place in the U.S., Britain, France? Kidder's response is to draw on an influential short article by van Velsen in order to argue that comparable distortion has in fact taken place in lower-level courts in the West.<sup>45</sup> Despite the fact that this is on a strictly minor scale when compared with India, Kidder is able to discern an identical basis for these western and the routine Indian processes: 'multiplex' social relationships. This throws him back perilously close to Cohn, and suggests a level of irrationality in the average Indian litigant which cannot be sustained by empirical work. Indians are neither so self-indulgent nor so driven by lawyers that they would persist with a judicial system that offered them no material hopes.

The most telling argument against both Kidder and Cohn is that they have concentrated too little on the nature of the disputes that the courts had to contend with. To put the matter differently, both writers have neglected to stress that land relations are a crucial part of 'social structure'. If this is made clear, then we *can* say that problems within the social structure of India led directly to the worst problems in the judicial system. No doubt due process schemes of justice are peculiarly susceptible to distortion, but the extent to which the procedures are

<sup>45</sup> J. Van Velsen, 'Procedural Informality, Reconciliation and False Comparisons', in M. Gluckmann (ed.), *Ideas and Procedures in African Customary Law* (Oxford University Press: London, 1969).

exploited will be contingent on the character of the society in question. The nature and bitterness of land disputes after the British intervention provided an ideal basis for extraordinary distortion of the Indian model of western-style justice. So, the judicial pathology is curable only by a cessation of the kind of cases that have been its principal cause. This, in turn, is contingent on changes within land relations, and we have suggested that some of these changes have already taken place. The judicial pathology appears not so marked today as it was during the British era.