

1990

## Law and the Poor in Rural India: The Prospects for Legal Aid

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# ARTICLES

## LAW AND THE POOR IN RURAL INDIA: THE PROSPECTS FOR LEGAL AID

Richard K. Gordon, Jr.\* and Jonathan M. Lindsay\*\*

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Support for fieldwork came from the Committee on General Scholarships and the Sheldon Fund of Harvard University, and from the Harvard Law School. The authors wish to thank the American Institute of Indian Studies, the Indian Law Institute, former Chief Justice P.N. Bhagwati and the Supreme Court of India, and the School of Oriental and African Studies for their institutional support. We also wish to thank Professors V.S. Rekhi, Marc Galanter, John Mansfield, David Smith, Lance Liebman, Gary Bellow, Kenneth Phillips, Mr. Zubair Khan, Mr. Michael Macy, Ms. Betsy Burns, and Jane L. Taylor for their invaluable assistance and comments on earlier versions. We especially thank those villagers in western Uttar Pradesh, India who so kindly tolerated our presence and our questions, and who made us feel so welcome.

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## I. INTRODUCTION

Movements come and go, in society at large no less than in the academy. Theories are refined; they inspire action, engender criticism, and secure successes and failures. Modern programs for social intervention in the contemporary United States, particularly those designed to alleviate poverty or to secure equal treatment for unpopular minorities (the "have-nots"), have lately fallen on harder times. An obvious sign of this trend is the federal government's curtailment of financial support.<sup>1</sup> Recent signs from the Supreme Court also indicate a major withdrawal

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1. See PERSPECTIVES ON THE REAGAN YEARS (J. Palmer ed. 1987) (providing an overview of the reduction in government spending).

from past judicial activism in favor of the have-nots.<sup>2</sup> Criticism of programs of social intervention, however, has come not only from conservative politicians, but also from both the left and right of the scholarly community. A crisis of confidence has evolved in the government's ability to help engineer a better society.<sup>3</sup>

The subject of this article involves two such movements: free legal aid (and related public interest litigation)<sup>4</sup> and law and development (particularly the application of Western legal experience to the study of developing countries). Both movements have suffered intense criticism. Nevertheless, a new field has emerged—free legal aid in developing countries—which somewhat surprisingly has attracted support from scholars, governments, lawyers, and international institutions.<sup>5</sup>

As with other movements, legal aid in developing countries has undergone theoretical refinement. It has engendered action, criticism, some successes, and many failures. This is not to say that criticisms of

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2. See, e.g., *City of Richmond v. Croson*, 109 S. Ct. 706 (1989) (noting the government's strict standards of demonstrated necessity when government uses race to distribute burdens and benefits); *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115 (1989) (shifting the burden of proof in setting out discrimination claims to the plaintiffs); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (holding that racial harassment is not actionable under 42 U.S.C. § 1981); *Martin v. Wilks*, 108 S. Ct. 2843 (1988) (allowing white workers to challenge previous affirmative action settlements).

3. For conservative critiques, see, e.g., C. MURRAY, *LOSING GROUND* (1984) (arguing in part that welfare is empirically ineffective because it creates disincentives to self-improvement); M. NOVAK, *THE NEW CONSENSUS ON FAMILY AND WELFARE: A COMMUNITY OF SELF-RELIANCE* (1987) (arguing that culture is the primary determinant of success). For an example of criticism from the left, see Simon, *Rights and Redistribution in the Welfare System*, 38 *STAN. L. REV.* 1431 (1986) (offering an example of criticism from the left). Simon argues that welfare creates an illusion of redistribution without actual improvement in the life of the poor, thereby defusing the impulse for real change. *Id.*

4. These two forms of legal involvement representing special vulnerables are distinguishable. Public interest litigation is more often political and ideological than is legal aid for the indigent and can serve as an adjunct to other forms of political mobilization. Legal aid is primarily associated with the vindication of individual rights and supported by state aid. Some public interest litigation, however, particularly regarding the environment and land use, is of interest to the middle class more than others. Both, however, seek to empower special vulnerables. Moreover, public interest litigation and legal aid depend on one another. Test cases need to extend and clarify rights, and individual cases ensure enforcement.

5. Professors Marc Galanter and David Trubek have criticized both legal aid in the United States and the law and development movement. Both, however, have argued for the creation of free legal aid programs in developing countries. Galanter, *The Duty Not to Deliver Legal Services*, 30 *MIAMI L. REV.* 1 (1976); Trubek & Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *U. WIS. L. REV.* 1062; M. Galanter, *New Patterns of Legal Services in India* (1982) (unpublished manuscript on file with the authors); Trubek, *Unequal Protection: Thoughts on Legal Services, Social Welfare, and Income Distribution in Latin America*, 13 *TEX. INT'L L.J.* 243 (1978).

both left and right have been so devastating as to invalidate these programs for social intervention. Instead, many argue for program improvement and not for elimination. There exists, however, some profound criticisms of public interest litigation, legal aid, and law and development.

#### A. CRITIQUES OF LEGAL AID AND LAW AND DEVELOPMENT

Criticisms of the modern legal aid movement range from those of specific aspects of program implementation to those of the theoretical basis of the Western legal model. Similar issues are raised in the evaluation of the law and development movement.

Political conservatives criticize legal aid on many levels and propose the curtailment or elimination of public funding of legal aid activities. They argue that the legal aid is too expensive, that the private bar can meet the genuine need for individual legal representation among the poor, and that legal aid (as public interest litigation) tends to confound the political decisions of democratic government.<sup>6</sup> Political conservatives contend that court enforced rules, such as affirmative action for racial minorities, are anti-democratic and instill a greater antagonism in the haves.<sup>7</sup>

Liberal critics have also raised questions about the nature of government funded legal aid. They suggest that legal aid can create an inappropriate dynamic of state supported lawyers litigating against state interests or against those individuals or institutions with an interest in preserving the status quo (the "haves"). This situation can result in unreliable financing<sup>8</sup> or restrictive rules placed on the use of these funds; both scenarios have occurred in the United States.<sup>9</sup>

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6. Phillips, *Legal Services and the Public Interest*, 8 HARV. J.L. & PUB. POL'Y 355, 357 (1985); Rabxin, *Public Interest Law; Is It in the Public Interest?*, 8 HARV. J.L. & PUB. POL'Y 341, 343 (1985); Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C.L. REV. 281 (1982).

7. T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY 90 (1984); see also Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336-46 (1988) (discussing Sowell's views and the conservative assault on antidiscrimination law).

8. Government-supported legal aid lawyers in the United States are paid far less than the average wage for the legal profession. It is argued that the government has an ambivalent attitude toward financing its own opposition. Abel, *Lawyers and the Power to Change*, 7 LAW & POL'Y 1, 5-9 (1985); Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 524-33 (1985) [hereinafter Abel, *Law Without Politics*].

9. Until the 1988 fiscal year budget, the Reagan Administration unsuccessfully attempted to end funding for the Legal Services Corporation. Congress restored the funds. Federally funded legal aid centers are prohibited from engaging in political activities, strikes, or labor organizing, and from bringing suits on behalf of abortion rights

Liberals have also raised questions concerning the efficacy and validity of the judicial model of resolving social and economic inequality. First, lawyers that litigate issues concerning social or economic inequality often have their own profound ideological beliefs that may supersede the needs or best interests of the client.<sup>10</sup> This problem becomes far more pronounced as the number and diversity of clients increases and the social, racial, cultural or other differences between lawyers and clients become greater.<sup>11</sup> Second, liberals argue that courts are institutionally incapable of both understanding complex social and economic relationships and of overseeing the process of social intervention. For example, when judges attempt to fashion rights-based remedies for minority children in public schools, or inmates in prisons, or patients in mental hospitals, the process can present complexities well beyond the capacity of the court system to address.<sup>12</sup> Third, those interested in protecting the status quo normally have better access to legal resources and, therefore, a continuing advantage over the have-nots in the legal arena.<sup>13</sup>

The fourth and perhaps most profound criticism is that government funding of legal services creates an illusion of justice and an image that the state does not truly wish to rectify inequality through more substantive means.<sup>14</sup> This can be done in two ways. First, encouraging recourse to the court system may result in the neglect of more meaningful political activity, which may create more substantive benefits for the have-nots.<sup>15</sup> Second, the use of the legal system may legitimate existing inequalities inherent in society, inequalities entrenched in ex-

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or school integration. 42 U.S.C. § 2996f(b) (1982).

10. See Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Cahn & Cahn, *Power to the People or to the Profession? The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1014, 1040 (1970).

11. See Abel, *Law Without Politics*, *supra* note 8, at 521-22; Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

12. See Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983). Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 448-55 (1977).

13. Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); see Bachman & Wetcheck, *Acorn Law Practice* 7 LAW & POL'Y 29, 41 (1985) (arguing that a specialized private bar is more effective at marshalling information and managing the legal system).

14. This argument is associated with the Conference on Critical Legal Studies. M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982) [hereinafter POLITICS OF LAW].

15. Bachman, *Lawyers, Law and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1985); Dhavan, *Managing Legal Activism: Reflections on India's Legal Aid Programme*, 15 ANGLO-AM. L. REV. 281, 283-95 (1986) (arguing that litigation prevents the development of effective political activity in India).

isting Western legal systems.<sup>16</sup> Abstract legal categories such as "landlord" and "tenant" are stripped of factors indicating the true nature of inequality and, when enforced through judicial proceedings, that inequality is reinforced.<sup>17</sup>

Many of the questions raised in the field of law and development mirror the criticisms of legal aid in the United States. Legal system advocates may be unaware of the intricacies of the social and economic systems of specific developing countries and their interactions with the legal system. As a result, these advocates may place too much emphasis on legal doctrine and action without an awareness of consequences or alternatives.<sup>18</sup>

The Western comparativists, through their ignorance of a particular foreign culture, may suggest inappropriate plans of action. Consequently these plans are unlikely to work or may result in pernicious action.<sup>19</sup> The distance between the advocate of a "Western" legal strategy and the intended beneficiaries is probably greater than that between a lawyer and plaintiffs in the United States.<sup>20</sup> The legal systems of developing countries may slant more against the interests of the have-nots, in terms of procedure and substantive law, than in the West. Because the Western legal model may not even work well in the West, its applicability to developing countries is doubtful.<sup>21</sup>

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16. See Kennedy, *Antonio Gramsci and the Legal System*, 6 AM. LEGIS. STUD. A.F. 32 (1980); Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379; Gordon, *New Developments in Legal Theory*, in POLITICS OF LAW, *supra* note 14, at 284-86; Greer, *Antonio Gramsci and "Legal Hegemony,"* in POLITICS OF LAW, *supra* note 14, at 305; see Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (noting American race relations); Crenshaw, *supra* note 7, at 1349-69 (discussing generally the critique from the left).

17. See Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25, 26-28, 32 (1980); Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363-64 (1984); Gordon, *supra* note 16, at 286.

18. See Trubek and Galanter, *supra* note 5, at 1076-78.

19. Merriman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 481 (1977) (summarizing some of these issues and noting that foreign scholars have "unfamiliarity with the target culture and society (including the legal system), innocence of theory, artificial access to power, and relative immunity to consequences").

20. Trubek & Galanter, *Scholars in the Fun House: A Reply to Professor Seidman*, 1 RES. L. & SOC. 31, 38 (1978).

21. Trubek & Galanter, *supra* note 5, at 1081-85; see Seidman, *The Lessons of Self Estrangement: On the Methodology of Law and Development*, 1 RES. L. & SOC. 1, 5-6 (1978); Greenburg, *Law and Development in the Light of Dependency Theory*, 3 RES. L. & SOC. 129 (1978).

B. AN APPROACH TO EVALUATING THE PROSPECTS FOR LEGAL AID: AN INTRODUCTION TO THE INDIAN CASE

We believe that the resolution of the debate outlined above is in no way self-evident. While it raises appropriate issues for a Westerner studying legal aid in a developing country, only a detailed empirical examination can successfully answer these questions underlying it. There is a tendency in critical writing to assume that a particular thesis can be answered merely by posing the question. We, however, believe otherwise.<sup>22</sup> Using these critical theses as guides, this article examines the nature of dominance in one particular developing country and how law and a legal aid program may work within the existing context to benefit the dominated.

We chose India as our area of study for a number of reasons. First, lawyers trained in the common law tradition can readily understand the formal structure of the Indian judicial system. The structure and powers of the courts, the roles of judges and lawyers, the adversary system of trial, the reliance on judicial precedent, the doctrine of stare decisis, and the shared fund of concepts and techniques locate Indian law in the mainstream of the Anglo-American legal tradition.

Second, judges, lawyers, activists, and scholars in India have expressed a growing interest over the last two decades in establishing a system of legal assistance for the poor and have actively debated the form such a system should take. This debate has been the focus of considerable interest on the part of international agencies such as the Ford Foundation, which has funded a number of important free legal aid activities in India, including international scholarly conferences, legal aid camps, and public interest groups.<sup>23</sup> Moreover, in the past fifteen years, the Indian government impaneled two government committees on legal assistance and created a Federal Committee on Implementation of Legal Aid Schemes. In addition, virtually every state has enacted legislation creating state and district level legal aid bureaucracies.<sup>24</sup> The Indian Parliament has promulgated a constitu-

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22. See generally Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject Study*, 7 *LAW & SOC'Y REV.* 719 (1973); McCauley, *Law and the Behavioral Sciences: Is There Any There There?*, 6 *LAW & POL'Y* 149 (1984) (noting that social science research may answer questions which are posed by broad social theories and the law); Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575 (1984) (noting that empirical research may answer some of the larger questions posed by critical legal theory, including legitimation, reification, and other issues).

23. See generally THE FORD FOUNDATION, 1986 ANNUAL REPORT (1987).

24. See GOVERNMENT OF INDIA, MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS, PROCESSUAL JUSTICE TO THE PEOPLE: REPORT OF THE EXPERT COMMITTEE ON



tional article that was adopted (albeit imbedded in the nonjusticiable Directive Principles of the Indian Constitution), calling for the creation of free legal aid.<sup>25</sup> Most recently, the Indian Parliament has adopted the Legal Services Authority Act, which aims to extend legal services to the poor.<sup>26</sup> The Indian Supreme Court has also played an important and vigorous role in promoting both free legal aid and public interest litigation.<sup>27</sup>

To a great extent, the current debate over legal aid in India parallels the past debate in the United States. While its proponents begin with the assumption that easier access to the legal system by the poor is, by its very nature, a desirable goal, skeptics dispute the assumption. Some activists for the poor instinctively distrust legal aid as the creation of the state. They maintain that pursuit of rights in a state-run legal system would merely dilute their efforts and divert their energies away from more direct action.

To such critics, legal aid has the effect (if not the intent) of coopting the disadvantaged into a system that presents a veneer of impartiality and justice, but which in reality is slow, complex, and inherently stacked against them.<sup>28</sup> In addition, critics point out that unlike Western courts, Indian courts are particularly slow and proceedings are often bogged down in extraordinary procedural complexities.<sup>29</sup> Indian courts have difficulty implementing their decrees even more than courts in the United States. The Indian legal profession has no tradition of providing the wide range of counseling and monitoring services that Western legal services lawyers typically provide.<sup>30</sup>

Although Indian courts from the village to the national level are both slower and less efficient than those in the West, Western-style legal institutions have long been firmly entrenched features of Indian life. Indians have flocked to the courts with enthusiasm since the establishment of the first English court over two and one-half centuries ago. This behavior promoted the evolution of a legal profession of immense

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LEGAL AID (1974); GOVERNMENT OF INDIA, MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS, REPORT ON NATIONAL JURIDICARE: EQUAL JUSTICE-SOCIAL JUSTICE (1977).

25. INDIA CONST. art. 39A.

26. LOK SABHA ACTS, ACT 39 OF 1987.

27. See Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561 (1985).

28. Dhavan, *supra* note 15; see also LEGAL AID IMPLEMENTATION COMMITTEE, PUBLIC INTEREST LITIGATION IN INDIA: AN INVESTIGATIVE REPORT (Dhavan ed. 1982) (providing a critical overview of legal aid proposals in India).

29. See *infra* notes 205-221 and accompanying text.

30. See discussion *infra* notes 95-96 (noting that legal services are not available outside of the large cities).

size and an elaborate system of courts and administrative tribunals. In spite of arguments that a Western legal system is inappropriate and alien to Indian culture, efforts to replace that system with "indigenous" methods of dispute resolution have met with virtually no success.<sup>31</sup>

Although much is known about the formal structure of the Indian legal system, as well as many of its successes and failures, little is known about the interaction of the poor and that system. How do the poor, the have-nots, view the legal system? What types of problems do the poor face and can legal aid address them? What form should legal aid take? "The problem," according to former Chief Justice Bhagwati, "is that no one knows what the legal needs of the poor really are. Yet we go out and try to provide for them."

Our purpose is to approach the prospects for legal aid in India from this angle, guided by the proposition that both skepticism and optimism about legal aid are not currently informed by sufficient empirical examination. Although legal aid is the topic of this essay, the article does not begin with a discussion of legal aid in India or of the Indian legal system. We have instead elected to examine the possibilities for legal aid within the existing Indian social, political, and economic setting. As a result, our inquiry follows the path of such settings and tracks the possibilities for change within the existing milieu. This approach aims to avoid the pitfalls of laying too much importance on legalism or on formal legal structures. Though this process may be somewhat daunting for the those who are not Indian specialists (and, inevitably, oversimplified to the specialists), it is the only effective way of understanding how recourse to a legal system in a developing country may affect social change.

What follows, therefore, is an examination of a rural Indian community, the structures of dominance within that community, and how those structures interact with the formal legal system and other state institutions. The analysis is based primarily upon observations and interviews conducted in three North Indian villages, principally the village of Kisanpur in District Krishnapur, in the state of Uttar Pradesh.<sup>32</sup>

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31. See Galanter, *The Aborted Restoration of 'Indigenous' Law in India*, 14 COMP. STUD. IN SOC. & HIST. 53 (1972). This is not to suggest that traditional methods of settling disputes do not also continue to operate in some fashion in Indian communities.

32. Krishnapur is a fictional name of an actual district and Kisanpur is a fictional name for an actual village. Field work was carried out during 1982-83, and 1985. The authors conducted all interviews in Hindi (with the not infrequent assistance of Mr. Zubair Khan, then a graduate student in the Law Faculty of the Aligarh Muslim University) and transcribed each interview upon its completion.

The analysis starts with the proposed beneficiaries of the services, rather than with the providers, and poses in a specific setting the questions suggested above: What is the status quo of the have-nots in a particular Indian community?; What are the religious, social, and economic forces that reinforce dominance and hierarchy?; What, if any, are the existing dynamics of change, particularly those that benefit the have-nots?; Could the legal system advance the interests of the have-nots without diverting or weakening other forces for change?; In speculating on a form of legal aid, can the interests of the have-nots override those of the providers of services or of the state?; How can the system be designed to provide the have-nots with the best chance to prevail over the haves?; And, finally, is it possible to minimize the preference for radical change along western cultural lines (without sacrificing the benefits of a comparative perspective), and achieve the possibility for change within the existing religious and cultural system of rural India?

## II. THE STRUCTURES OF DOMINANCE IN RURAL INDIA

India is a large, spectacularly diverse country, with approximately 820 million people living in an area only one-third the size of the United States.<sup>33</sup> Of those, approximately 75%, or 615 million, live in rural areas. Although there are a substantial number of religious minorities,<sup>34</sup> over 80% of all Indians classify themselves as Hindus.<sup>35</sup> Since the partition of British India into Muslim Pakistan, Hindu society has dominated nonsectarian India.

The definition of "Hindu" is not entirely clear. Although Hinduism is very old—the earliest scriptural authorities date back perhaps three and one-half millennia—there is no centrally organized church or clergy. There are, however, temples and priests. Despite the hundreds of different sects of Hindus existing in India, a number of common threads unify most adherents. With regard to self-identification within society (if not with regard to philosophy or ethics), the most obvious and perhaps most important aspect of Hinduism is caste.

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33. Dhavan, *supra* note 15, at 281-82 (reviewing scholars complaints that too much emphasis is placed on caste and not enough on economic considerations, particularly with regard to social legislation). Courts have also noted the over-emphasis on the caste system. *Id.*

34. THE CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 108-09 (1988). India is eleven percent Muslim (predominantly Sunni), making it the second largest Muslim nation in the world. *Id.* It is two percent Christian, with the remainder split among Sikhs, Jains, Buddhists, and a few Jews. *Id.*

35. *Id.*

A. CASTE AND THE RELIGIOUS, SOCIAL AND ECONOMIC ORDERING  
OF VILLAGE LIFE

1. *Introduction to Varna and Jati*

If caste is among the most basic of all social divisions in Hindu society, it is also among the most difficult to describe or to understand. The word "caste" itself is not of Indian origin; it comes from either the Portuguese or Spanish meaning "not mixed" or "chaste,"<sup>36</sup> and scholars have criticized it as describing too many things.<sup>37</sup> It is easier to start by referring to the caste system, which Bernard Cohn describes as a "closed stratification system in which recruitment to its constituent parts is by birth and in which there is little movement from one group to another, either through marriage or through individual mobility."<sup>38</sup> The French structural anthropologist Louis Dumont (citing the nineteenth-century sociologist Celestin Bougle) further defines the caste system as dividing society into different hereditary groups, distinguished from and connected to each other by three characteristics: (1) separation in matters of contact; (2) division of labor, with each group (theoretically or traditionally) having a profession from which it is difficult for members to depart; and, perhaps most important, (3) hierarchy or the ranking of groups as relatively superior or inferior.<sup>39</sup>

Cohn and Dumont refer to "groups." The legal scholar Marc Galanter refers to Hindu India as the "compartmental" society.<sup>40</sup> Indians see themselves belonging to these "groups" or "compartments" and use these categories to define their social relationship. There are many different groups and sub-groups within the caste system. The most important are *varna* (from the Sanskrit for color),<sup>41</sup> *jati* (from the Sanskrit for rank or race),<sup>42</sup> *gotra*, and *khandan*. This list should also include *pariwar*, or family.

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36. C. BOUGLE, *ESSAIS SUR LE REGIME DES CASTES* [ESSAYS ON THE CASTE SYSTEM] 4 (1927), cited in L. DUMONT, *HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS* 21, 347 n.11a (rev. English ed. 1980).

37. P. MANDELBAUM, *I SOCIETY IN INDIA* 29 (1970).

38. B. COHN, *INDIA: THE SOCIAL ANTHROPOLOGY OF A CIVILIZATION* 125 (1971) [hereinafter *SOCIAL ANTHROPOLOGY*].

39. L. DUMONT, *supra* note 36, at 21, 43.

40. M. GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 1 (1984).

41. J. PLATTS, *A DICTIONARY OF URDU, CLASSICAL HINDI AND ENGLISH* 1189 (1982).

42. *Id.* at 369. One also encounters the word *qu'om*, that is Arabic in origin and usually refers to *jati*. *Id.* *Qu'om* can also refer to all members of a particular religious community. *Id.*

The first category, *varna*,<sup>43</sup> refers to the four (or five, if one counts those who remain outside the *varna* system, sometimes known as "untouchables")<sup>44</sup> major ritual/occupational groups in Hinduism. The *varnas* consist of the *brahmins* (priests), the *ksatriyas* (kings or warriors), the *vaisyas* (those who have domain over commerce), and the *sudras* (workers or slaves). A brief reference to *varna* is first found in the *Vedas*, the oldest and only truly sacred collection of Hindu religious writings, although *varna* is discussed extensively in post-Vedic religious commentary. The historical origins of *varna* are unknown. As groups delineating power and authority, *varnas* may simply have begun as classes. Some scholars have suggested a partial racial theory, with the higher *varnas* representing the invading Aryans, with the *sudras* and those not belonging to *varnas* representing the enslaved aboriginal peoples of the subcontinent.<sup>45</sup>

Although not the most central groupings in contemporary day-to-day Hindu social intercourse, *varna* categories, are nevertheless significant. Contemporary Hindus frequently identify themselves with *varna* categories, particularly when they attempt to improve their hierarchical status.<sup>46</sup> Most Hindus have an idea of where they fit within the *varna* scheme, and agree on the hierarchical nature of *varna* categories.<sup>47</sup> Perhaps most importantly, Hindus have an important relationship to the next largest grouping, the *jati*.<sup>48</sup>

Most Hindus consider their *jati* (fellow *jati*-mates often refer to *jati* as the *biradari*, or brotherhood)<sup>49</sup> as belonging to a particular *varna*, and therefore fitting within a scheme of *varna* hierarchy. Unlike *varna*

43. R. LINGAT, *THE CLASSICAL LAW OF INDIA* 28-72 (J. Derrett trans. 1973).

44. M. SRINIVAS, *SOCIAL CHANGE IN MODERN INDIA* 3 (1966).

45. L. DUMONT, *supra* note 36, at 1-32.

46. M. SHARMA, *THE POLITICS OF INEQUALITY* 63 (1979). The British denoted *varna* categories in the taking of censuses from 1901 until 1941. The census takers attempted to rank various Hindu *jatis* in part through association with hierarchical *varna* categories. In order to improve their relative rankings, leaders of various *jatis* attempted to describe themselves as belonging to higher-ranked *varnas*. M. SRINIVAS, *supra* note 44, at 94-100; L. DUMONT, *supra* note 36, at 79-83.

47. Fox, *Varna Schemes and Ideological Integration in Indian Society*, 11 *COMP. STUD. IN SOC'Y HIST.* 27, 32-33 (1969). Broad groupings are more important in the south of India, where *brahmin*, *non-brahmin*, and *untouchable* (those outside of the *varna*) categories are more important. See M. SRINIVAS, *supra* note 44, at 102-14 (noting that sub-*varna* groupings are more important in terms of day-to-day social, political, and religious activities).

48. A. BETEILLE, *CASTES OLD AND NEW* 146-51 (1969) (explaining that the meaning of the term *jati* shifts with geography and local tradition). Regional variation in *jatis* are often referred to as sub-*jatis*. *Id.*

49. Scholarly writings on *jati* are voluminous. See A. MAYER, *CASTE AND KINSHIP IN CENTRAL INDIA* (1960) (containing a good descriptive introduction on *jati*); see also L. DUMONT, *supra* note 36.

categories, *jati* is never mentioned in the *Vedas*, and is rarely mentioned in post-*Vedic* religious commentary.<sup>50</sup> Most *jatis* are associated with a particular occupation: in fact, the names of most *jatis* are those of occupational categories and many contemporary *jatis* continue in their traditional occupational roles.<sup>51</sup> *Jatis* are normally endogenous and have elaborate rules regarding work, the eating and sharing of food, religious rituals, and associations with other *jatis* (including physical contact).<sup>52</sup> As with *varna* the historical origins of *jati* are a matter of some debate. Because *jatis* are often identified with a particular type of labor, some scholars have speculated that they arose originally as guilds. Other scholars suggest that *jatis* were originally tribes or clans because they maintain close social and religious ties.<sup>53</sup>

When one asks Hindus what their community is, they may reply with their<sup>54</sup> *varna*, *jati* or *gotra*. Our experience in Kisanpur,<sup>55</sup> and the experience of most students of Indian anthropology, reveals that Hindus will provide their *jati* (or the regional sub-*jati* group, referred to also as the *jati*). Other subgroups are also important. For example, one or more *gotras*, normally exogamous sub-*jati* groupings that trace their ancestry to a single person, may replace the *jati* as the principal sub-*varna* grouping.<sup>56</sup> Hindus will also define their place in society with reference to the *khandan*, or large extended family, as well as to smaller family groups. These subgroupings can play important roles in defining contemporary political alliances. Most authors refer to the *jati* or sub-*jati* when discussing reference groups or compartments. Although *jatis* are divisible into regional sub-sub-*jatis*, it is still preferable to use *jati* as a corporate reference group.<sup>57</sup>

The *jati* category is ubiquitous in India. Because each *jati* has rules regarding labor, food, religious ritual, and is endogenous, *jati* affiliation often directs social and political ties. Traditionally, *jatis* enforced their

50. See *infra* note 76 and accompanying text (explaining when *jatis* is mentioned in post-*Vedic* religious commentary).

51. See *infra* text at 678-81 (discussing the list of *jatis* and traditional occupations in Kisanpur). Not all *jati* names are those of professions, nor are the *jati* member professions always related to the traditional professions of that *jati*. *Id.* Most *jatis* engage in agriculture. *Id.*

52. See L. DUMONT, *supra* note 36, at 92-183 (providing an overview of *jati* rules and citing additional sources).

53. See *id.* at 1-32.

54. In conducting our interviews we used the term *qu'om* because it has an Arabic origin and, therefore, is less likely to prejudice a response.

55. See *supra* note 33 and accompanying text.

56. M. SHARMA, *supra* note 46, at 86.

57. L. DUMONT, *supra* note 36, at 62-64 (discussing Meyer's observations).

own *jati* law through meetings of *jati* elders, known as *panchayats*.<sup>58</sup> Class references, particularly to the ownership of land, usually correspond to *jati* divisions. The Indian constitution, like central and local law, refers to *jatis* in order to provide the Indian version of affirmative action.<sup>59</sup> Historically, members of individual *jatis* have banded together to form political associations; today, from the village level to state and national politics, *jati* affiliation is of extreme importance.<sup>60</sup>

One of the most obvious, and for the purposes of this essay important, characteristics of *jati* is hierarchy. As we shall discuss in greater detail below, contemporary Hinduism involves an elaborate hierarchical ranking not only of *varnas*, but within *varnas* of *jatis*, a ranking indicating the relative intrinsic worth of every Hindu. Reference to Hindu religious dogma often justifies this ranking and elaborate *jati* rules regarding food, work, and social intercourse maintain the hierarchy. Some scholars argue that hierarchy and dominance are the most central aspects of Hindu religion.<sup>61</sup> Most studies of equality in contemporary India begin with discussions of *varna* and *jati* hierarchy and the religious justification for such dominance.<sup>62</sup> While contemporary village India seems obsessed with hierarchy, however, its justification within Hinduism is not certain. Because the hierarchy of *varna* and *jati* is central to the position of the have-nots in contemporary India and because it has religious origins, an examination of Indian society must begin with Hindu religious law.

## 2. *Varna and Jati as Religious Law*

As previously noted, the earliest and only truly sacred Hindu religious collection are the *Vedas*. Hindu scholars refer to the *Vedas*, which dates to the second millennium B.C., as the *shruti*, literally meaning "what is heard" or revealed. Within Hinduism, only the *Vedas* constitute divinely revealed truth.<sup>63</sup> The existence of *varna* cate-

58. See *id.* at 170-83 (describing a traditional *jati panchayat* acting in modern times); R. Hayden, Fact Discretion and Normative Implications: The Nature of Argument in a Caste *Panchayat* (June 7, 1982) (unpublished manuscript on file with the authors).

59. Sivaramayya, *Equality and Inequality: The Legal Framework*, in EQUALITY AND INEQUALITY: THEORY AND PRACTICE 34-50 (A. Beteille ed. 1983) (providing a simple overview of the legal framework for *jati* and positive discrimination); see M. GALANTER, *supra* note 40, at 119-20, 282-92 (giving a detailed description of how *jati* is used and defined in determining positive discrimination).

60. See J. BROWN, MODERN INDIA: THE ORIGINS OF AN ASIAN DEMOCRACY 103, 158-59, 252, 357 (1985).

61. L. DUMONT, *supra* note 36.

62. See Sivaramayya, *supra* note 59; M. SHARMA, *supra* note 46.

63. Embree, *The Roots of the Tradition* in THE HINDU TRADITION: READINGS IN

gories is briefly made only once in a later *Vedic* poem.<sup>64</sup> This one reference does not, however, make clear if membership in a particular *varna* is considered hereditary or fixed. In fact, *varnas* could merely have suggested the existence of different economic or social classes.

Elaborate descriptions of *varnas*, including rules defining their hierarchical position and interrelationship, are found in post-*Vedic* religious law and commentary. These texts are known as the *smriti*, or "what is remembered," and Hindu scholars do not consider them divinely "revealed."<sup>65</sup> There is, according to these texts, a distinct hierarchy to the *varnas*.<sup>66</sup> The *brahmin*, as priest, is himself divine.<sup>67</sup> The *ksatriya*, as king and as soldier, directly controls earthly power but is nevertheless required both to consult the *brahmin* and to honor him with gifts.<sup>68</sup> The *ksatriya* rules the *vaiśya*, while the *sudra* is only a servant or slave of the other three.<sup>69</sup> Post-*Vedic* writings on *varna* include strict prohibitions on intermarriage, on performing the labor of the other *varnas*, and on other activities.<sup>70</sup>

In the earliest *Vedas*, the following of religious rules seemed primarily a way of controlling natural events. But in the later *Vedas*, one's place in the universe is seen as resulting from the operation of the law of *karma*, literally "action." The law of *karma* is described as the

ORIENTAL THOUGHT 4-7 (A. Embree ed. 1972). The *Rig Veda*, composed during the second millennium B.C., is the first of four parts of the *Samhitas*, the collection of hymns used in Aryan rituals. The *Samhitas*, along with the more philosophical and speculative works known as the *Brahmanas*, *Aranyankas*, and *Upanishads*, complete the collection of Aryan religious texts known collectively as the *Vedas*.

64. HYMNS FROM THE RIG-VEDA 12 (A. MacDonell ed. & trans. 1966). The *Purushasukta*, a poem that describes *varnas* as originating from different parts of a celestial body, is generally considered a later interpolation of the *Rig Veda*. *Id.*

65. Embree, *supra* note 63, at 6; P. KANE, HISTORY OF DHARMASTRAS (ANCIENT AND MEDIEVAL, RELIGIOUS AND CIVIL LAWS) 27 (1962) (discussing how the most important *Varna* categories are the *Sutras* and the *Dharmasastras*).

66. See L. DUMONT, *supra* note 36, at 66-68.

67. THE LAWS OF MANU 398 (G. Buhler trans. 1969) [hereinafter MANU]. According to the *Manu dharmasastra*, dated around A.D. 400 and considered as the most important and authoritative *smriti*, the *Brahmin* is divine and possesses the *Veda*. Only *brahmins* can perform religious rituals and teach the sacred religious texts. *Id.* at 24, 401.

68. THE VYAVAHARA MAYUKHA AND THE YAJNAVAKYA SMRITI 20-21 (A. Madalik trans. 1880). For example, the *ksatriya* must consult the *brahmin* when making secular political decisions and also give the *brahmin* material gifts in order to obtain religious merit. A *brahmin* can restrain an imperious *ksatriya*. MANU, *supra* note 67, at 399.

69. MANU, *supra* note 67, at 24, 401.

70. *Id.* at 401-30; THE BHAGAVAD GITA 7-8 (F. Edgerton ed. and trans. 1972) [hereinafter THE BHAGAVAD GITA]. The *Bhagavad Gita* is perhaps the most popular religious epic in northern India. *Id.* Composed around 200 B.C. to A.D. 200, it does not provide detailed *varna* rules, but describes the performance of *varna* duties as essential and notes that violation of *varna* duty, or the mixture of *varnas*, results in destruction of family and the passage to hell. *Id.*



“conservation of energy . . . applied to the moral world”;<sup>71</sup> specifically each good deed rewards the doer, each bad deed punishes the doer. What constitutes a good deed or a bad deed is described in the *dharma*, or duty, of each person. At the end of a lifetime, a person is reborn according to the net sum of good and bad deeds. As can be imagined, the law of *karma* could act as a powerful tool of social control. As we shall discuss below, contemporary belief in the laws of *karma* plays an important role in how both lower *jati* and higher *jati* Hindus interpret their relative positions within village society. Individuals may use *Karma* as a moral justification for treating those born into lower *jatis* as inferior. For example, it is believed *jatis* are born into a lowly position as a consequence of bad deeds done in their previous lives.

The post-*Vedic brahmin* commentators are greatly concerned with defining the duty of each *varna*.<sup>72</sup> It is clear that in this commentary, the rules delineating each *varna's* duty constitute religious law.<sup>73</sup> Only the *Vedas*, however, are the ultimate source of divine law because they are the product of divine “revelation.” Yet, the *Vedas* set out no rules; the rules are found only in the post-*Vedic* law and commentary. These commentators base the legitimacy of their detailed *varna* rules, and of the *dharma*, or duty of each Hindu as a member of a *varna*, in the tradition of the virtuous or “good custom.”<sup>74</sup> These “good customs,” apparently justifying *jati* rules, are based on the intrinsic worth of each *varna*, and establish the appropriate treatment for other *varnas*. They are, in effect, an essential aspect of hierarchy and stratification. But what determines good custom? The authors of the post-*Vedic* legal texts understood the past meaning of good custom.<sup>75</sup> But later commentators have argued that the earlier writer's description of good custom is appropriate only for ancient times and is not necessarily applicable to the present.<sup>76</sup> It is, in other words, subject to an interpretation

71. Edgerton, *The Upanisads, and Later Hindu Thought*, in THE BHAGAVAD GITA, *supra* note 70, at 123.

72. We use the terms post-*Vedic* and classical Hinduism interchangeably.

73. R. LINGAT, *supra* note 43, at 176-77.

74. Lecture by Richard W. Lariviere on the *Baradasnrtu* and Hindu Law, Harvard University (Mar. 15, 1988). Though the interpreters and preservers of what is ‘good custom’ are *Brahmins*, the final source of the law subject to interpretation is not the *Vedas* or the *Shastras*, but local practice. *Id.* “Anything goes as long as it is the practice of those the community thinks virtuous, although there is an attempt to tie this practice to a forgotten *Vedic* text. The acceptance of this fiction is orthodox.” *Id.*

75. *Id.*

76. See R. LINGAT, *supra* note 43, at 192-93 (discussing one commentator's view that the sacrifice of cows, described in great detail in the earlier compilations of post *Vedic* law, became so odious as to be forbidden).

based upon contemporary "good custom." No conclusory rules are spelled out.

While post-*Vedic* Hindu religious commentary is greatly concerned with both the relative hierarchy of *varnas* and the duties associated with them, there are few references to sub-*varna* categories such as *jati*. There are no detailed rules regarding sub-*varna* orderings with the exception of naming the occupation of a small number of *jatis*.<sup>77</sup> Although *jati* is rarely discussed in such commentary, the contemporary religious justification for elaborate *jati* hierarchy, rules, and duty stems principally from analogy to *varna*. There is one important reference to *jati* in the *Manu smriti*, perhaps the most respected of post-*Vedic* religious law commentary. In *Manu*, the Hindu king is admonished to uphold the customs (*dharma*) of "*jatis*, countries, guilds and families." In this principal reference to *jati* and to *jati* duty, Manu suggests that proper behavior is that which in fact practiced, or "customary" behavior. Although such a judgment is always made in consultation with the *brahmin*, the *Vedas* do not precisely define who a *brahmin* is.<sup>78</sup> British East India Company judges, fulfilling the role of the Hindu temporal power and unable to find *jati* rules in classical Hindu religious writings, cited this provision and enforced contemporary *jati* customs. Initially the judges consulted with *brahmins*.<sup>79</sup>

In contemporary Hinduism, *jatis* have taken on the post-*Vedic* importance of *varna*, and traditional *jati* rules have taken on an air of immutability. According to post-*Vedic* commentary the interpretation and enforcement of religious law is the duty of many: the *brahmins*, who must interpret it according to the *Vedas* and according to virtuous custom, and the king, who must see to it that the law is followed. But the enforcement of such law also falls on each *jati* and individual. Each *jati* maintains its own rules regarding almost every aspect of social, economic, and political life. These rules define the duty of its members. Because of *karma*, the proper following of these rules determines the *jati* into which one is born. Only if one accepts the hierarchy of *varna* and *jati* and the immutability of these rules does *karma* justify the inferior treatment of some *jatis*.

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77. See MANU, *supra* note 67, at 260 n.41 (referring to guilds, merchants, husbandmen, and actors); *id.* at 412-14 (suggesting that *jatis* arose from offspring of mixed *varnas*).

78. *Id.* at 260; see R. LINGAT, *supra* note 43, at 195 (discussing the *Vedas* lack of definition for the *Brahmin*).

79. MANU, *supra* note 67, at 27, 260; Collector of Madura v. Moottoo Ramalingaa Sathupaty, 12 Moore's Ind. Appeals 397 (P.C. 1868); see R. LINGAT *supra* note 43, at 222-23 (noting that according to post-*Vedic* writers, the King could temporally punish violations of the law).

As many Hindu religious reform movements have noted, such acceptance is far from a requirement. First, according to the *Vedas*, *varna* is not necessarily hereditary or even hierarchical. With the *Vedas* constituting the only revealed truth, the hierarchy of *varna* or *jati* found in the post-*Vedic* commentary is arguably not required. Even if one accepts some or all of the post-*Vedic* commentary, *varna* rules, including how one acts and how one treats other *varnas*, are open to new interpretations based on the customs (perhaps new) of the virtuous. *Jati* and *jati* duty are not even described in the *Vedas* and only rarely in the post-*Vedic* commentary, thereby making *jati* and *jati* hierarchy open to even greater interpretation. Even if one extends the treatment of *varna* rules to *jati* rules, one may conclude that *jati* membership is not necessarily hereditary and that contemporary opinions of the virtuous *jati* can constitute rules. Therefore, even accepting much of post-*Vedic* commentary, the performance of new *jati* rules, rules which may not be circumscribed by visions of dominance, may result in good *karma*.

There is no clear consensus in modern Indian society as to the religious justification for *varna*, for *jati* hierarchy, or for traditional *jati* rules. The scriptural gaps described above have resulted in numerous reinterpretations of Hindu practices and beliefs. Most Hindus are familiar with such reinterpretations. It is true that most contemporary Hindu practice follows the view that *varna* and *jati* membership is hereditary, that hierarchy is religiously ordained, and that *jati* rules are immutable. But numerous sects within mainstream contemporary Hinduism have seized upon the lack of sacred textual support for *varna* and *jati* hierarchy, for the immutability of *jati* rules, and even for the existence of *jati* itself. It is possible, and many contemporary and popular religious leaders have so argued, for an ideology of equality to exist within Hinduism. While it is clear that contemporary Hinduism includes *jati* hierarchy, we found that within the religious views of many villagers, there were serious questions as to its validity. Reinterpretations of *varna* and *jati* play an important part in the contemporary dynamics of religious law and politics. Even within classical or post-*Vedic* Hinduism, a modern government may play the role of king, and any virtuous man (such as Mohandas Gandhi, who was a *vaishya*) may play the role of *Brahmin* interpreter. A denial of *varna* or *jati* hierarchy can follow, as can a rescripting of *jati* rules.

3. *Varna and Jati as Social Referents*

<i>Varna</i> <sup>80</sup>	<i>Jati</i> Structure in Kisanpur		
	<i>Jati</i> <sup>81</sup>	Population <sup>82</sup> (percent)	Traditional Occupation <sup>83</sup>
<i>Brahmin</i>	<i>Brahmar</i>	3	priest
	<i>Mahabrahmin</i> <sup>84</sup>	1	cremator
<i>Ksatriya</i>	<i>Rajput Thakur</i>	36	prince/warrior
	<i>Jat</i>	6	landowner
<i>Vaisya</i>	<i>Bania</i>	2	shopkeeper
	<i>Baghaili</i> <sup>85</sup>	13	shepherd
<i>Sudra</i> (backward) <sup>86</sup>	<i>Barhai</i>	1	carpenter
	<i>Kumhar</i>	1	potter
	<i>Lohar</i>	1	ironmonger
	<i>Kohar</i>	6	bearer
	<i>Nai</i>	2	barber
	<i>Teli</i>	1	oil presser
Untouchables <sup>87</sup> (Scheduled Castes)	<i>Jatav</i> <sup>88</sup>	16	leather worker
	<i>Dhobi</i>	2	clothes washer
	<i>Dom</i>	1	pigherder
	<i>Bhangi</i>	4	sweeper
Muslims <sup>89</sup>	<i>Julaha</i>	1	weaver
	<i>Manihar</i>	2	bangle seller

The relative ranking of *jatis* seems to be based at least in part on the traditional rules of each *jati*. The relevant issue is how these rules determine (or are determined by) ritual pollution. Hinduism is obsessed with the issue of pollution. Pollution is of two kinds; pollution affecting only the individual as a participant in a polluting act (for example, a

80. *Brahmin*, *ksatriya* and *vaisya* categories are fairly well agreed upon by all *jatis*, although see *infra* note 85 regarding *Bagailis*. Upper *varna jatis* agree on *sudra* and untouchable categories. *Jatis* from these *varnas* tend not to refer to themselves as belonging to *varnas*.

81. Ranking is our best estimate, arrived at by asking each person to rank *jatis* hierarchically.

82. Population percentages are approximate.

83. Traditional occupations are taken from the Hindi meanings of *jati* names. With the exception of *Brahmars* and *Rajput Thakurs*, at least some members of each *jati* practiced the traditional occupation at least part-time.

84. *Mahabrahmins*, though a type of priest and generally, categorized as *brahmins*, were traditionally considered untouchables due to their profession of handling corpses.

85. *Baghailis* were considered *sudras* at one time, but had recently managed to gain acceptance as *vaisyas*.

86. These *jatis* identified themselves as backward classes.

87. These *jatis* identified themselves as scheduled castes. Higher *jatis* identified them as either lower *jatis* or scheduled castes.

88. *Jatav* is a *jati* name designed to support the *jatis*' claim to *ksatriya* status (the full name is sometimes given as *Rajput Jatav*). *Jatavs*, however, claim *jati* kinship to *Chamars*, or leather workers.

89. Though Muslims are not properly part of the *varna* and *jati* system, their social organization does display some aspects of these systems.

person who touches beef, an upper-*jati* man who cohabits with an untouchable woman, or a woman who is menstruating) and pollution associated with an entire *jati*. In the former category of pollution, time or ritual may remove the pollution, although until the pollution is removed, other members of the *jati* may not share with that person in particular types of social intercourse, particularly eating. In the latter, the impurity attaches at birth and nothing can alleviate the impurity.

Members of greater-polluted *jatis* may never engage in certain types of social intercourse with lesser-polluted *jatis*. The least polluted *jatis*<sup>90</sup> are *brahmin jatis* whose members traditionally performed no manual labor. The lowest *jatis*, traditionally known as "untouchables" because of the extremity of their pollution, usually were engaged in such tasks as disposing of dead animals or cleaning latrines. The latter is more polluted, in part because the *jati* is associated with an unclean activity.<sup>91</sup>

It is not simply that members of one *jati* touch the unclean and others do not. Pollution is ritual, not literal, and in the case of *jatis*, attaches at birth. The work of Mary Douglas demonstrates that, even in contemporary Western societies, visions of cleanliness and filth are often more ritual or psychological than actual.<sup>92</sup> In India, the difference between literal and ritual is considerably greater. One will find a husband who will eagerly drink horribly polluted water drawn by his wife from the Ganges River, but who would never drink from a hermetically sealed soft drink bottle selected by her while she was menstruating. A *brahmin* might not accept the latter from a member of an untouchable *jati* regardless of actual occupation or objective state of cleanliness.

Still, the traditional occupations of different *jatis* do not seem so easily to fit into a simple scale of ritual pollution. For example, it is not obvious why bearers should be ranked below shepherds, although the respondents in Kisanpur made this distinction clear. But the distinction is far less than that between the *brahmin* and the latrine cleaner. The highest *jatis* demand respect from the lowest; they refuse to take food from many *jatis* and will not even share close physical proximity with

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90. See L. DUMONT, *supra* note 36, at 46-61.

91. See Stevenson, *Status Evaluation in the Hindu Caste System*, 84 J. ROYAL ANTHROPOLOGICAL INST. 45-65 (1954); Harper, *Ritual Pollution as an Integrator of Caste and Religion*, 23 J. ASIAN STUD. 151-97 (1964). In Kisanpur, for example, the *Mahabrahmins*, who are the priests who care for the dead, are recognized as *brahmins* and even live on the edge of the *brahmin* neighborhood, but are essentially untouchables.

92. See M. DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* (1970).

some untouchables.<sup>93</sup> Among less distant *jatis*, contact is easier and more intimate.

*Jati* rules extend far beyond traditional occupations. In fact, the principal occupation of most *Jats* in rural India is agricultural labor and not the work associated with the *jati's* name. Elaborate rules restrict the types of food *jatis* can eat and how they must eat it. Some of the highest *jatis* restrict even their vegetables (some *brahmins* will not eat onions or garlic, for example), while some of the lowest *jatis* will even eat beef. Some of these rules are clear signs of relatively higher or lower *jati* status, though with some exceptions. For instance, meat-eating is generally a sign of lower *jati* status but is still permitted among many *ksatriya jatis*.<sup>94</sup> *Jati* rules regarding other aspects of daily activity, from dress to marital and other social relations to worship, also differ. As is the case with eating, it is usually easy to define which activities are relatively "higher" and which are "lower."

Both *jati*-mates and members of other *jatis* enforce *jati* rules. Both formal and informal social persuasion act to preserve conformity to the rules. Councils of *jati* elders, known as *panchayats*, may take action against members who fail to follow the rules. Possible actions range from fines to "outcasting," or ejection from the *jati*.<sup>95</sup> Higher *jatis* acting like arbitrators or judges may also enforce rules on lower *jatis*.<sup>96</sup> Higher *jatis* often apply these rules to subjugate lower *jatis*.<sup>97</sup> Of course, the upper *jatis* use physical intimidation and violence as the ultimate sanction against lower *jatis*. Violence against the lower *jatis* was not common in Kisanpur. However, the threat of violence, and in one prominent case the actual murder of a number of *Jatavs*, was an important factor in *jati* relations.

During the early British colonial period, the new rulers took the traditional place of the king and enforced many *jati* rules in British East India Company courts, particularly regarding marriage.<sup>98</sup> During

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93. See Mahar, *A Multiple Scaling Technique for Caste Ranking*, 39 MAN IN INDIA 127 (1959). Relative ranking of various *jatis* can be approximately determined by comparing inter-*jati* pollution, or by ascertaining which *jatis* are considered polluting by other *jatis*, particularly with regard to the sharing of food or of hooka (water pipe).

94. See M. SHARMA, *supra* note 46, at 26-27.

95. See Hayden, *supra* note 58; L. DUMONT, *supra* note 36, at 172-79.

96. See Gough, *The Social Structure of a Tanjore Village*, in VILLAGE INDIA 44-52 (M. Marriott ed. 1955) (discussing how higher *jati panchayats*, or simply wealthy or powerful individuals from higher *jatis* will sometimes act to settle disputes of lower *jati* members); M. SHARMA, *supra* note 46, at 38-39.

97. See M. SRINIVAS, *supra* note 44, at 15-16.

98. M. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY* 464-74, 479-83 (1981); J. DERRITT, *RELIGION, LAW AND THE STATE IN INDIA* 229-53 (1968).

the nineteenth century, the British enacted statutes to overturn a number of *jati* rules, particularly those perceived as reprehensible. For example, the statutes addressed restrictions on inter-*jati* marriage, restrictions on some higher *jatis* against the remarriage of widows, and the condoning of child marriage. While Indian civil courts still enforce some Hindu personal law (again primarily regarding marriage), it is a law more or less devoid of restrictions based on *jati*. Civil law now strictly forbids disabilities based on *jati*, particularly those relating to untouchability.

In our interviews in Kisanpur, each *jati* member identified each *jati* within the general scheme of *jati* hierarchy, though *jati* members invariably placed their *jati* in a higher category (and, among the lower *jatis*, often in higher *varnas*). Almost every aspect of social intercourse from eating, to simple congregating and talking to marriage, was done along *jati* lines. The higher *jatis* made numerous references to their position of superiority within the Hindu system. The most important *jatis*, both numerically and in terms of wealth, were the *Rajput* and *Jat Thakurs*, who during interviews often reminded us of their *ksatriya* status and of their descent from warriors and kings. In this sense, the description of their *jati* status sounded more like a simple inheritance from noble ancestors and less like a description of personal merit due to *karma*.

Although, *Jats* held themselves equal to *Rajputs* and intermarriage is now allowed between the two *jatis*, *Rajputs* still maintained that the *Jats* are inferior. Both made reference to the relatively lower status of the *Brahmars* in the village. One larger farmer noted that “*brahmins* are supposed to be scholars, but these *Brahmars* in Kisanpur aren't scholars, so they aren't real *brahmins*. We have to go outside of the village to get *brahmins* for weddings.” Contradictory views were often given regarding *jati* hierarchy; for example, one *Rajput* said that “Gandhiji opposed castism” and that “*jati* prejudice is holding back the progress of the nation.” One educated *Rajput* noted that “true Hindus are followers of the *Vedas*, and there is no *jati* in the *Vedas*.”<sup>99</sup> In general, however, the *Ksatriyas* were very proud of their *jati* position and tradition.

As we progressed down the *jati* hierarchical ranking, respondents made fewer comments explaining their relative ranking. Once below the *Jats*, respondents were reluctant to discuss such information. In

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99. In a further discussion with one powerful *Rajput* family, *jati* hierarchy was described as *rivaj*, the Hindi for folk custom, and not as *riti*, the Sanskrit word for religious custom.

fact, the question seemed to elicit blank stares, as if we should certainly know the answer to the question. Respondents, with the exception of the *Jatavs*, would answer only with their relative position and offer no explanation. All respondents were, however, quite certain of their relative position above other *jatis*.

The use of *panchayats* to solve intra-*jati* disputes is still very common. *Panchayats*, however, do not operate in the traditional way, but act more like forms of mediation; in fact, many villagers described going to *panchayats* as "using a mediator." These mediators are generally the wealthiest or most respected members of a particular *jati*. Among the *Rajputs*, the *panchayats* consist of the leaders of various factions within the village. While *jati* pressure ensures that the decisions of the *jati panchayat* are important, it was clear that a reprimand from this body is not equivalent to outcasting. In one instance, a *Rajput* widower married a *Jatav* woman and adopted her two male children. Although a *Rajput panchayat* discussed the issue, the only sanction imposed on the *Rajput* was that no one was to attend the wedding. For a while the *Rajputs* in the village did not accept the adopted children as *Rajputs*. Once the boys became older and began to take charge of the running of the *Rajput's* farm, however, they were accepted. They are all now invited to other *Rajput* weddings.

The influence of *panchayats* was relatively less pronounced when the dispute concerned an economic as opposed to a social or religious issue. In the case of land disputes, it was clear that the men consulted were mediators only and normally unable to force their decision on a recalcitrant loser. The loser would frequently go to the law courts.

It would be wrong, however, to suggest that complete intra-*jati* unity ever existed. While *jati panchayats* traditionally work to solve intra-*jati* disputes, it is highly unlikely that competition, jealousy, and envy were ever absent within *jatis*. With the evolution of democracy at the village level, intra-*jati* factionalism has become endemic, particularly among the larger and more powerful *jatis*. These factions often seek alliances with lower *jatis* as a means of mobilizing support.<sup>100</sup> Competition over politics and over resources that political power brings have accelerated the process toward factional alignment. Factionalism at the village level, however, often gives way to unity when a particular *jati* is under intense pressure from without, and often disappears as politics

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100. See D.B. MILLER, FROM HIERARCHY TO STRATIFICATION: CHANGING PATTERNS OF SOCIAL INEQUALITY IN A NORTH INDIAN VILLAGE 116-18, 124 (1968) (providing an overview of Indian village stratification). The village term for factionalism is "*parti bandi*," meaning the separation of people into parties, and the word "*parti*" comes from the English. *Id.*



moves up from the village level. Nevertheless, this source of *jati* disunity is an important force and discussed more fully below.

The maintenance of many *jati* rules is due simply to a belief in the existing culture or tradition. *Jati* rules are enforced through repetition, expressions of *jati* solidarity, the persuasive power of social approval or disapproval, and an (uncertain) belief in their religious origin. As a system, *jati* rules and *jati* hierarchy reinforce each other in daily life.

#### 4. *Jati and Economic Relations*

Access to, and control over, economic resources results in power over those who do not have this control and constitutes part of a social relationship.<sup>101</sup> Similar to other aspects of village relations, economic hierarchy closely mirrors *jati* hierarchy. Because economic power and *jati* both constitute social relations in the village, they often tend to reinforce each other. But because *Jati* relationships are such an important aspect of society and their referents are so different from economic power (status group vs. economic class),<sup>102</sup> they are rarely congruent. The relative importance of the caste system, of class on social relationships, and the transformative power of one upon the other are essential issues in examining the affect of Western legalisms on hierarchy and power.

##### a. *Jati and access to land*

The most important economic attribute in rural India is land ownership. Land ownership, which mirrors the general pattern of *jati* ranking, is perhaps the single most important determinant of status in a village.<sup>103</sup> Members of *jatis* who are dominant in a particular area in terms of ritual ranking and in numbers, are usually the largest landholders.<sup>104</sup> Scheduled castes tend to constitute the greatest percentage of landless laborers.<sup>105</sup> According to government surveys, a little less

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101. Some of the ideas expressed in this section are derived from Desai, *Power and Agrarian Relations: Some Concepts and Measurements*, in *AGRARIAN POWER AND AGRICULTURAL PRODUCTIVITY IN SOUTH ASIA* 171-97 (1984) (containing a theoretical economic analysis of the relationship between land ownership and power).

102. See M. WEBER, *THE RELIGION OF INDIA: THE SOCIOLOGY OF HINDUISM AND BUDDHISM* (H. Gerth & D. Martindale trans. 1958).

103. L. DUMONT, *supra* note 36, at 207; A. BETEILLE, *STUDIES IN AGRARIAN SOCIAL STRUCTURE* 43 (1974).

104. A. BETEILLE, *supra* note 103, at 26.

105. NATIONAL SAMPLE SURVEY (GOV'T OF INDIA), NO. 233, 25TH ROUND TABLES, WITH NOTES ON EARNINGS, INDEBTEDNESS, CULTIVATED HOLDINGS AND ASSETS OF THE WEAKER SECTION HOUSEHOLDS IN RURAL INDIA 20 (1976).

than 80% of the rural population in India actually owns some land. Half this number owns less than an acre.<sup>106</sup> In all, 90% of the population owns only 40% of the land.<sup>107</sup> Although *jati* affiliation is no longer a part of the All-India Census, it is safe to assume that the upper *jatis* own the vast majority of all the land. In Uttar Pradesh that means *Brahmars*, *Rajputs*, and *Jats* own most of the land.

In north central India, the dominant pre-British land use system consisted of local magnates known as *zamindars*, or landholders, who collected revenues from others living within their *zamindari*, a portion of which they then sent along to the local ruler.<sup>108</sup> Everyone, from the king to the *zamindar*, to the actual tillers and laborers, had certain rights to the produce of the land. These rights, as well as duties to each other, were primarily based on each person's place in the *jajmani* system, the *jati*-based patron-client structure.

As the British took control of larger areas in the first half of the nineteenth century, this system was formalized. The *zamindar*, whose holding could include many villages, had actual title to the land and had to collect all land revenue. These *zamindars* would let out land to tenants who paid rent, usually in kind, and who in turn let out land to others. The larger tenants normally had legally enforceable fixities of tenure whereas the smaller tenants held their pieces of land more or less at will. Elements of *jajmani* continued to exist.<sup>109</sup>

In 1951 Uttar Pradesh abolished *zamindari* and replaced it with a "land to the tiller" program that eliminated tenancies.<sup>110</sup> *Zamindari* abolition had a number of important effects, some presumably unintended, that this article will later address.<sup>111</sup> The abolition of *zamindari*, however, accomplished little in the way of transferring

106. NATIONAL SAMPLE SURVEY (GOV'T OF INDIA), No. 215, 25TH ROUND TABLES, ON LAND HOLDINGS, ALL INDIA 67 (1978).

107. *Id.*

108. See T. METCALF, *LAND, LANDLORDS, AND THE BRITISH RAJ: NORTHERN INDIA IN THE NINETEENTH CENTURY* (1979) (describing land tenure in British North India). Other methods of land ownership were instituted in Punjab, that eliminated intermediaries and where land was held by the tiller directly from the government. R. Gordon, *The Social Origins of Punjabi Nationalism* (May 1978) (on file at Sterling Library, Yale University).

109. See Pouchepadass, *Peasant Classes in Twentieth Century Agrarian Movements in India*, in *PEASANTS IN HISTORY: ESSAYS IN HONOUR OF DANIEL THORNER* 147 (E. Hobsbawm ed. 1980) (explaining that the difficulty of classifying rights of ownership in land continued during *zamindari* and was directly related to whether or not persons received a principal part of their livelihood from an area of land. This definitional problem made the abolition of *zamindari* particularly difficult). *Id.*

110. Uttar Pradesh Zamindari Abolition and Land-Reforms Act 1950 (U.P. Act 1 of 1951). Other Indian states also abolished tenancy with similar statutes.

111. See *infra* notes 234-38 and accompanying text.

large tracts of land to the landless.

Anyone who owns land, even a small amount, has a relatively dependable source of income (with the exception of the vagaries of weather). Naturally, the sense of financial security increases with the size and quality of the land. In addition to providing edible or marketable crops, land is important for other reasons. Perhaps most importantly, land provides pasture and fodder for farm animals. Water buffalo, cow, and goat ownership is widespread in rural India; milk is consumed or sold and male buffalo and bullocks are often used as draft animals. Each village is supposed to preserve common lands for village pasture, but the amount is rarely sufficient and is often barren during the summer months.

Land is also needed to store crops, which have been harvested or paid in wages for manual labor, as well as to store manure or other cooking fuels. One of the most important uses of land is as a place for human defecation. Rising in the morning is difficult if one does not have a nearby plot. Land is also needed to extend or improve houses as family size increases. If a house is built of sun-dried mud, which is often the case with poor villagers, land can provide a source of building materials. Finally, the ownership of land makes it easier to secure bank loans.<sup>112</sup>

Villagers fall into three categories: those whose landholdings are too large to work without hired labor; those who own enough land to support themselves; and those who own either no land or not enough to support themselves.<sup>113</sup> In villages in the district in which Kisanpar is located, those who seek labor other than agricultural work on their own lands include agricultural landless labor constituting 25% of the village, marginal holders having less than .5 hectares equalling 30%, and small holders having between .5 and 2.5 hectares, at 20%. Those who would normally not need to seek outside labor, and who might have to hire occasional agricultural workers, are those having medium-sized holdings of between 2.5 and 7 hectares, or 20% of the village. The remaining 6% of the village hold more than 7 hectares and are dependent on hiring additional labor.<sup>114</sup>

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112. See *infra* notes 279-80 and accompanying text (discussing the issuance of bank loans to landowners).

113. D. THORNER, *THE AGRARIAN PROSPECT IN INDIA* 9-11 (1976). Thorner classifies rural society into three principle groups: the *malik*, *kisan*, and *mazdur*; these classifications refer respectively to the proprietor, working peasants, and labourers. *Id.*

114. Percentages are approximate, from data provided in Zeela Sankhyikeeyay Kiryalay, Aligarh, Sankhyikeeyay Patraaka Aligarh Zeela (District Statistical Office, Aligarh, Statistical Digest for Aligarh District) (1983) (copy on file at the District Statistical Office, Aligarh, U.P. India).

The only *jati*-related set of statistics that government agencies gather is information regarding scheduled castes. In the district, a little less than one-half of all scheduled castes were landless, with 30% marginal and 18% small farmers, with most of the remaining 4% consisting of medium-sized holders.<sup>115</sup> Interviews with Kisanpur residents revealed other approximate *jati* ownership patterns. Specifically, three *Jatav* families owned medium-sized holdings: they were the only scheduled caste members to do so. Approximately 30% of the others have marginal holdings. Among the middle-level *jatis*, perhaps 25% of the *Baghailis* are small holders and another 30 to 35% are marginal holders. Other middle-level *jatis* are relatively less well off. The five largest landholders are *Rajputs*; 30% of *Rajputs* have medium-sized holdings or larger, 30% are small holders, and the rest are marginal holders or landless. *Jats* are less well off and rank between the *Rajputs* and the *Baghailis*, although closer to the *Rajputs* in terms of landholdings. The few *Brahmar* families are divided between medium and small-sized holders.

Those who do not own enough land to support themselves must seek outside work, a process we discuss at greater length below. The members of the landless or marginal holders of that group, composed primarily of scheduled castes, experience greater problems. There are insufficient amounts of village common land to provide fodder, mud for building or repairing houses, and places for defecation for all marginal and landless laborers. As a result, they must seek permission from the landed to use their property for these purposes. This gives the larger landowners a powerful tool over the landless; nearly all poorer or lower-caste respondents lamented this problem.

#### b. *Jati and labor*

As described above, most *jatis* are traditionally associated with the performance of certain economic activities; in fact, these tasks form part of their traditional religious duty. One form of organization facilitating the flow of goods and services among *jatis* is referred to as *jajmani*.<sup>116</sup> *Jajmani* involves the exchange of goods and services in kind at levels determined by tradition. While the overall *jajmani* system can

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115. Computed from the Statistical Notes of the Block Development Office regarding the Integrated Rural Development Programme (Mar. 23, 1983).

116. See W. WISER, THE HINDU JAJMANI SYSTEM: A SOCIO-ECONOMIC SYSTEM INTER RELATING MEMBERS OF A HINDU VILLAGE COMMUNITY IN SERVICE (1936) (presenting a detailed introduction to the traditional *jajmani* system); see also L. DUMONT, *supra* note 36, at 92-108 (discussing the division of labor traditionally associated with the *jajmani* system of hierarchy).

be said to include the reciprocal duties owed by each *jati* to another, it is dominated by the relationship between the landholder (usually referred to as the *jajman*, or patron) and those who perform services for the landholder (referred to as *prayas*, or clients). The tie between particular patrons and clients is usually hereditary.

There is also a close tie between *jajmani* and traditional concepts of land ownership. Services (or the provision of goods) to the patron are a duty; so are the reciprocal provision of services to the client. The type of service to the patron depends on the *jati* of the client and its duty. Services to the client can be varied, including handling relations with people outside the village, mediating disputes, and providing additional material resources when necessary.<sup>117</sup> The most important service is a share in the proceeds from the land.<sup>118</sup> These proceeds are distributed in a hierarchical fashion mirrored, more or less, by the ranking of *jati*. They are, however, more easily analogized to a right in the land than to a payment for services. As Dumont notes, unlike the provision of services in a market, where the orientation is to the individual, *jajmani* is oriented to the whole.<sup>119</sup>

In modern times, *jajmani* relationships are most clearly pronounced between the patron and the lowest *jatis*, particularly, those who provide the most obviously religious (usually in terms of dealing with ritually polluting activities) or social functions. In Kisanpur, for example, *jajmani* is most clearly distinguished from payment for labor in the case of *Nais*, *Dhobis*, and *Bhangis*.<sup>120</sup> *Nais*, whose primary function is to serve as barbers, have also played other important roles, particularly those of messengers and negotiators. The largest landholders in Kisanpur maintain close *jajmani* relations with particular *Nais*, who help make wedding arrangements and preparations for other social and religious events. In return, the *Nais* receive either a standard allocation of grain from their patrons or, as in one instance, a small piece of land. *Nais* would not perform similar services for others for compensation. The relationship between patron and *Nai* is hereditary. The incapacitation of a *Nai* does not affect the requisite share of produce or land.

Like *Nais*, *Dhobis*, or washers, play an important religious and social

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117. Assistance in arranging and providing for marriage is still one of the most important services provided by patrons to clients. A. Rekhi, *The Status of Women in India* (Feb. 12, 1988) (draft manuscript on file with the author).

118. See *supra* notes 109-14 and accompanying text (discussing other important uses of land within the client/patron relationship).

119. L. DUMONT, *supra* note 36, at 105.

120. See M. SHARMA, *supra* note 46, at 68-69. The distinction between *jajmani* and payment for labor also applied to the *Nais* and *Dhobis* in Sharma's village of study. *Id.*

role, particularly regarding childbirth and the purifying of polluted garments. We found that *Dhobis* would do our wash at a per-piece fee, although it was unclear if they would do so for other villagers. *Bhangis*, who clean dwellings and remove night soil, also had strong *jajmani* ties. In addition to these traditional tasks, however, the members of these *jatis* also perform agricultural labor.

One scholar has drawn a distinction between relationships based primarily on religious services, described as true *jajmani* (like those of *Nais*, *Dhobis* and *Bhangis*), and those that are more economic in nature.<sup>121</sup> A number of important points arise. First, most *jatis*, regardless of their traditional occupation (including *Nais*, *Dhobis* and *Bhangis*), provide agricultural labor. Second, most nonlandholding *jatis* (in the case of Kisanpur this includes all *jatis* except *Brahmars*, *Rajputs* and *Jats*) partake in the provision of their *jati*-defined traditional goods and services on at least a part-time basis. This means that although the landless must perform agricultural labor for upper *jatis*, they also provide traditional goods and services. Consequently, the relatively nonreligious agricultural work of all *jatis*, as well as the relatively nonreligious but still *jati* defined provision of other goods and services, may fit less well into the definition of traditional *jajmani* reciprocal relationships.

In Kisanpur, outside of the traditional "religious" services of the *Nais*, *Dhobis* and *Bhangis*, the pure and paradigmatic form of *jajmani* does not really exist. There are, however, many variations in work relationships. *Jajmani* can be thought of as one end of a continuum with individual market-based transactions on the other.<sup>122</sup> In Kisanpur, relationships vary from one end of the continuum to the other. It is unclear if the paradigmatic *jajmani* system ever existed in nonreligious transactions. It is clear, however, that in general the pattern has been changing along the continuum away from *jajmani* and toward a market, a subject which we will address in greater detail below.<sup>123</sup>

The paradigmatic *jajmani* relationship reinforces *jati* hierarchy in terms of deference to and close dependence on higher *jatis*, in terms of the uniqueness of *jati* duties, and in terms of ritual pollution. It also suggests a patron-client relationship that entitles the client to a share of

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121. See Pocock, *Notes on Jajmani Relationships*, 6 CONTRIBUTIONS TO INDIAN SOC. 78 (1962), quoted in L. DUMONT, *supra* note 36, at 103-04 (commenting on religious specializations properly called *jajmani* and economic pseudo-specializations).

122. See Cohn, *From Indian Status to British Contract*, 21 J. ECON. HIST. 613 (1961) (evaluating *jajmani* systems in light of modern day market-based systems).

123. See *infra* notes 270-73 and accompanying text (providing further textual comparison between a traditional *jajmani* system and a modern market-based system).

agricultural produce, and other services. This share of wealth, however, cannot be altered (at least not easily) by the actions of the client. Rather, tradition, as affected at the patron's discretion, is the determining factor.

At the other end of the continuum is the economic relationship, in which hierarchy is defined in terms of control over assets, particularly, although not exclusively, land. Religious and social hierarchy is affected far less. While the client may have greater choice, in terms of for whom he or she might work or under what circumstances, the client has no entitlement to services from the patron. The relative extent of economic opportunities open to the client, as well as the freedom from social and religious hierarchy gained from a more market-oriented relationship, will determine if the client is better off in a market relationship than under a more traditional *jajmani* relationship.

## B. SHIFTS AND STABILITY IN THE HIERARCHY: SOURCES OF CHANGE AND SOURCES OF REINFORCEMENT IN THE STRUCTURES OF RURAL DOMINANCE

### 1. *Jati and Religion: Continuity and Change*<sup>124</sup>

Hindu society has retained a certain stability; the prominence of *jati* and hierarchy, reinforced with custom and religion, is striking to the Western observer. While Hindu society is changing, its relative stability is perhaps the most puzzling aspect. A social system must constantly renew itself. Renewal requires its participants, or at least a number of the most influential of its participants, to derive benefits from that system. In order to understand the forces of change in a society, it is first necessary to understand who benefits and how from the status quo. This includes not only those at the top, but also those at the bottom of the system.

It is the *brahmin* who is the principal keeper and mediator of religion and who is in control of a system which not only makes him superior in terms of ritual hierarchy, but which justifies his position through moral appeal. Those *jatis* lying below the *brahmin*, in Kisanpur most particularly the *Rajputs* and the *Jats*, benefit from the system of hierarchy in relation to those lying below them. Social theorist Peter Berger's conclusions that ideology often exists to legitimate the vested in-

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124. David Mandelbaum's two volume work suggested the title of this section. D. MANDELBAUM, *SOCIETY IN INDIA: CONTINUITY AND CHANGE* (1970) and D. MANDELBAUM, *SOCIETY IN INDIA: CHANGE AND CONTINUITY* (1970).

terests of various sectors of society<sup>125</sup> is clearly manifested in the *jati* system. The lower *jatis*, the have-nots in such a system, however, are not in an enviable position. How much do they accept what we have outlined as the Hindu view of society?

a. *Reform and perpetuation from below*

There are many ways lower-*jati* members can view their place within the system. We will start first by examining the more traditional social view, at least in part because this view is an important one in Kisanpur. As noted above, the most numerically significant of the scheduled castes in Kisanpur are the *Jatavs*. The name *Jatav* was coined in the early years of the twentieth century by leaders of the *Chamar jati* in what was then called the United Provinces of Agra and Oudh (now mostly the state of Uttar Pradesh). The *Chamars* are an "untouchable" *jati* whose traditional occupation included taking possession of dead animals and tanning their skins into leather. By 1931, many *Chamars* in the United Provinces reported themselves as *Jatav Rajputs*, of the *ksatriya varna*, to the government census takers.<sup>126</sup> Many members of the *jati* collectively asserted that they were miscategorized as untouchables, and were higher in *jati* ranking. Besides the new name, the *Jatavs* in Kisanpur adopted other upper-*jati* styles. For example, they became vegetarian even though *Chamars* traditionally ate not only meat but beef.<sup>127</sup> They refused to carry away the carrion of Kisanpur, although they did provide such services for a fee to residents of neighboring villages. Also, the *Chamars* did not engage in the traditional occupations of leatherworking in the village. Only one family had relatives who worked for a shoe manufacturer in a nearby city. In matters of religious ritual, the *Jatavs* also adopted higher-*jati* traditions.<sup>128</sup> A number of *Jatav* informants, for example asserted that they would not eat at the house of *Thakurs* because the *Thakurs* were "unclean."

The assertion of higher-*jati* status and the subsequent adoption of higher-*jati* rules is a process known as sanskritization. Sanskrit is the language of Hindu religious writings that discuss the performance of

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125. P. BERGER, INVITATION TO SOCIOLOGY 111 (1963).

126. Gov't of India, Census of India, 18 UNITED PROVINCES OF AGRA AND OUDH 530 (1931).

127. *Id.*

128. See M. SRINIVAS, *supra* note 44, at 149 (addressing various examples of religious rituals that the *jatis* adopted). Several of these rituals include *saptapadi*, an elaborate ritual for marriage, a prohibition on widow remarriage, and the partial adoption of *purdah* for women. *Id.* Only the higher *jatis* traditionally followed these rules. *Id.*



higher-*jati* rituals.<sup>129</sup> Sanskritization is a phenomenon common throughout the lower *jatis* in India. As discussed above, according to Hindu religious law each *jati* should perform its own *jati* duty based on its own customs. It is not wrong, per se, to eat meat or to permit widow remarriage. It is only wrong so to do if a *jati*'s "virtuous" customs prohibit such actions. In fact, failure to perform a *jati* task, such as removal of carrion, is in strict violation of Hindu law if one accepts such a task as a "virtuous custom." One *Rajput* complained that *Jatavs* violated their *jati* rules because they refused to remove dead animals from the village. By acting like a higher *jati*, the *Jatavs* sought to prove to others, or to themselves, their status as *Rajputs*.

*Jati* mobility is not unknown in Indian history. It was the duty of the king to maintain the caste system and *jati* rules, and in such capacity, to make the ultimate determination as to which *jati* was which.<sup>130</sup> The claim of untouchables to British census takers that they were *Rajputs* or *Brahmans* can be understood as a type of petition to the king for higher-*jati* status. This behavior suggests two possible motivations; an actual belief in the system, with the stipulation that one should have higher status or a belief only in the inevitability of the system and therefore a strategic acceptance of the rules by which others play.

There are many instances where anthropologists have discovered that lower *jatis*, while not accepting their own place in the hierarchy, accept the validity of the system overall. After questioning the degree to which the lower *jatis* believed in the system of hierarchy, Berreman concluded that Himalayan untouchables considerably accept the system of hierarchy.<sup>131</sup> He further noted that the same individuals who generally accepted the system did not accept their position within it,<sup>132</sup> with a number of excuses offered for the current low status of each respondent. According to one, his *jati* had been mistakenly categorized as untouchable because a *Rajput* ancestor had married an untouchable.<sup>133</sup> Another respondent asserted servants had tricked him out of his *Rajput* status when he had tried to bestow presents on a *brahmin* in a previous life. A servant took the presents instead and the respondent

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129. See *id.* at 1-46, 148-53 (providing an introduction to the concept of sanskritization).

130. See Singh, *The Changing Pattern of Social Stratification in India*, reprinted in DIMENSIONS OF SOCIAL CHANGE IN INDIA 139 (M. Srinivas, S. Seshaiyah & V. Parthasarathy eds. 1972) [hereinafter DIMENSIONS OF SOCIAL CHANGE] (explaining how the pattern of social stratification in India is based on the caste system).

131. G. Berreman, *Caste in India and the United States*, 66 AM. J. OF SOC. 120, 127 (1960).

132. G. BERREMAN, HINDUS OF THE HIMALAYAS 220-24 (2d ed. 1972).

133. Although *jati* status derives from the father, not the mother. *Id.* at 222.

was therefore reborn as an untouchable.<sup>134</sup> Additional stories are similar. In no instance did Berreman find a rejection of *jati* hierarchy in principle. He did, however, discover that the same untouchables invariably asserted superiority over those *jatis* with traditionally accepted as being lower in status than their own.<sup>135</sup>

Moffat found another untouchable *jati* with similar beliefs regarding the overall system of *karma* and rebirth. They asserted that they were once a higher *jati*, and that their downfall resulted from honest errors on their part. Moffat also found virtually no criticism of the legitimacy of the system itself.<sup>136</sup> Similarly, Cohn reports that the *Chamars* of Senapur claimed either a *Rajput* or a *brahmin* lineage.<sup>137</sup>

There is a difference between accepting one's place in the system as valid but not justified ("I am an untouchable, because of a virtuous error I or my ancestor made in an earlier lifetime") or invalid because of the error of others ("I am not an untouchable but a *Rajput*, because others have classified me incorrectly"). In either instance, however, the individual still accepts the system of hierarchy and the religious ideology that supports it. In Kisanpur, the *Jatavs* generally accepted the system, to the extent they had sanskritized and in their insistence on their higher status than other untouchables.

Sanskritization, however, is a difficult process. It requires the enforcement of often stricter *jati* rules and may evoke strong opposition from upper *jatis*.<sup>138</sup> Sanskritization also often results in a tighter *jati* cohesiveness, both at the village level and beyond.<sup>139</sup> If the Kisanpur *Jatavs'* attempts at sanskritization were merely to impress the higher *jatis* into accepting their Rajput status, it was clear they had failed, though there may have been other effects on the upper *jatis*, which we will discuss later.<sup>140</sup>

There were other, more ambiguous indications of the *Jatavs'* acceptance of the legitimacy of *jati* hierarchy. The reverence felt by the leaders of the *Kisanpur Jatavs* for Dr. Ambedkar, the untouchable political

134. *Id.*

135. *Id.* at 224-25.

136. M. MOFFAT, AN UNTOUCHABLE COMMUNITY IN SOUTH ASIA: STRUCTURE AND CONSENSUS 147 (1979).

137. B. COHN, The Chamars of Senapur: A Study of the Changing Status of a Depressed Class 112 (1954) (Ph.D. dissertation, available University Microfilms, Ann Arbor, Michigan).

138. P. KOLENDA, CASTE IN CONTEMPORARY INDIA: BEYOND ORGANIC SOLIDARITY 101-02 (1978).

139. See Sharma, *Stresses in Caste Stratification*, 4 ECON. & POL. WEEKLY 217, 221-22 (1969) (discussing the effects of sanskritization on lower *jatis* on a village-wide or larger basis).

140. See *infra* notes 147-50 and accompanying text.

leader who organized mass conversions from Hinduism to Buddhism in the 1950s, is just one indication. Ambedkar, who had played an important role in fashioning Republican India's Constitution, embraced Buddhism, which shares many aspects of Hindu theology but rejects the caste system, after concluding that it was impossible to reform Hinduism of *jati* hierarchy.<sup>141</sup> While the *Jatavs* of Kisanpur often spoke positively of Ambedkar's leadership of the *dalits* (literally the "oppressed," a word used by some militant Buddhist political leaders), they still remained Hindus and not Buddhists.<sup>142</sup> Although we cannot be certain (and although some *Jatav* converts to Buddhism seem to have accepted its anti-hierarchical ideology),<sup>143</sup> it appears that most of the Kisanpur *Jatavs* approve of Dr. Ambedkar's quest for political, economic, and social benefits but not his religious conclusions.

Religious conversion, in and of itself, does not often materially affect the secular life of the convert. For example, members of the dominant Hindu community do not act any differently (or perhaps worse) toward the convert.<sup>144</sup> Moreover, the new religion itself seems to perpetuate

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141. See D. KEER, DR. AMBEDKAR: LIFE AND MISSION 68-75 (1962); B. AMBEDKAR, ANNIHILATION OF CASTES WITH A REPLY TO MR. GANDHI (1945) (relating Ambedkar's views on Hinduism and subsequent adoption of Buddhism); Dalton, *The Gandhian View of Caste, and Caste after Gandhi, reprinted in INDIA AND CEYLON: UNITY AND DIVERSITY* 171-74 (P. Mason ed. 1967) (providing Gandhi's views of the caste system and his thoughts on Hinduism); M. GALANTER, *supra* note 40, at 29-40 (discussing the compartmentalization of Hindu society). Ambedkar originally sought the elimination of *jati* within Hinduism. In this regard, his views contrasted greatly with those of Gandhi. *Id.* Gandhi originally believed in the maintenance of traditional *jati* occupational categories in order to prevent pernicious competition while simultaneously eliminating hierarchy from the system. *Id.* Ambedkar eventually abandoned Hinduism, concluding that it could never purge itself of *jati* and hierarchy. *Id.* Before deciding on Buddhism, he initially contemplated a mass conversion to Sikhism because it does not recognize the caste system. *Id.* Gandhi eventually accepted the impossibility of retaining *varna*, eliminating hierarchy, and including untouchables within the *sudra varna*. Instead, he argued for complete elimination of all *jati* and *varna* distinctions. *Id.*

142. Examples of mixing Hinduism with Ambedkar's political views appeared throughout Kisanpur. In one instance, Ambedkar's name was found over the portico of the house of an influential *Jatav*, along with a traditional symbol of Hinduism, the *mantra om*.

143. See B. JOSHI, DEMOCRACY IN SEARCH OF EQUALITY 100-107 (1982) (explaining that Ambedkar's religious beliefs were not accepted as fully as his views on political change throughout the social and economic realm of the *jati* system). Even among untouchable *jatis* who actually convert to Buddhism, however, the emphasis is more on Ambedkar as a leader than on Buddhism as a religion. Lynch, *The Politics of Untouchability: A Case from Agra, India, reprinted in STRUCTURE AND CHANGE IN INDIAN SOCIETY* 209 (M. Singer and B. Cohen eds. 1968) (analyzing the views of Buddhist converts relating to Ambedkar as a leader).

144. See *Granpat v. Presiding Officer, A.I.R. 1975 S.C. 420, 424* (noting that converting to Buddhism does not prevent prejudice by higher Hindus); see also Zelliot, *Buddhism and Politics in Maharashtra, reprinted in SOUTH ASIAN POLITICS AND RE-*

existing *jati* distinctions.<sup>145</sup> In addition, the law holds that conversion to Buddhism, Christianity, or Islam may result in the forfeiting of benefits accorded to untouchables under modern legislation.<sup>146</sup>

Rather than adopting stricter forms of upper-*jati* Hinduism (sanskritization), or converting to different religions, other communities of untouchables have instead embraced forms of Hinduism that reject *jati* hierarchy or limit its importance. One of these alternate forms of Hinduism known as *bhakti* dates back to approximately 1400 A.D. and literally means "devotion."<sup>147</sup> *Bhakti* accepts the *Vedas*, and places supreme importance on individual acts of devotion to God rather than on *jati*. Active today among some *Chamars* in Uttar Pradesh,<sup>148</sup> the *bhakti* ideal is essentially an ascetic one. It involves the adoption of ascetic values such as vegetarianism that, because they are often also *brahmin jati* rules, are associated with styles of sanskritization.<sup>149</sup> Unlike sanskritization, however, *bhakti* is not associated with improving

LIGION 191, 205 (D. Smith ed. 1966) (explaining that while the self-image of untouchable Buddhist converts improves, upper *jati* Hindus still subject them to abuse); M. GALANTER, *supra* note 40, at 25-34 (describing the long-standing Hindus' fear that untouchable *jatis* will convert to other religions and reduce the numbers and political clout of Hindus); *Conversion Convulsions*, *India Today*, June 30, 1986, at 78-80 (explaining that untouchable converts from Hinduism, especially those to Islam, the largest non-Hindu community, may experience more opposition than they did when Hindus).

145. See Aggarwal, *Caste Hierarchy in a Meo Village of Rajasthan*, reprinted in *CASTE AND SOCIAL STRATIFICATION AMONG MUSLIMS IN INDIA* 148-53 (I. Ahmad ed. 1978) (observing that in the Gurdaspur district of Punjab in 1977, Sikhs recognized *jati* and imposed upon *mazhabis*, or "untouchable" Sikh *jatis*, including those untouchable Hindus who converted to Sikhism, many of the disabilities associated with untouchability in Hinduism). Because *Mazhabi* Sikhs tended to support the Congress (I) Party against the principal Sikh religious party, the Akali Dal, this attitude may be changing, along with the evolution of radical, fundamentalist Sikh politics; see also Bhatti, *Status and Power in a Muslim Dominated Village of Uttar Pradesh*, reprinted in *CASTE AND SOCIAL STRATIFICATION AMONG MUSLIMS IN INDIA*, at 210-14 (explaining that Muslim Indians often recognize a divisional hierarchy analagous to *jati* and that converts from low Hindu *jatis* are treated as being at the bottom of the hierarchy). In addition, village conversion of untouchables often means that fellow religionists are sometimes far away and unable to offer much support. A Muslim student who assisted us in our fieldwork, for example, introduced himself to local *Rajputs* with the explanation that his ancestors were also *Rajputs*, who had converted to Islam in the early nineteenth century. After hearing this, *Rajputs* invariably treated him in a far friendlier manner than before, and were far more likely to offer him food.

146. See M. GALANTER, *supra* note 40, at 319-33 (commenting that Hindu caste order requirements mandated the exclusion of Buddhists).

147. See Edgerton, *The Way of Devotion to God*, reprinted in *THE BHAGAVAD GITA*, *supra* note 70, at 172-78 (explaining that *Bhakti* is associated with Krishna worship).

148. See R. KHARE, *THE UNTOUCHABLE AS HIMSELF: IDEOLOGY, IDENTITY, AND PRAGMATISM AMONG THE LUCKNOW CHAMARS* (1984) (providing an overview of *bkakti* ideals among *Chamars*).

149. See M. SRINIVAS, *supra* note 44, at 25-27.

the position of one's *jati* within the system. Instead, *bhakti* strives to avoid the system entirely and emphasizes individuality rather than collectivity.<sup>150</sup>

Some scheduled caste *jati* members in Kisanpur vehemently criticized the *jati* system entirely. These main criticisms came from individuals claiming to be secular or atheist. Some others criticized the system in Ambedkar's terms, or in terms associated with *bhakti*. But, while it may seem counter-intuitive, lower *jatis* exhibited a surprising degree of acceptance of the overall legitimacy of the *jati* hierarchy system, at least within social and religious contexts. At the same time, however, there exists a longing to find a way out of their lowly position in that hierarchy.

*b. Reform and perpetuation from above*

It takes less imagination to understand the attractiveness of the system to those who see it from the top. There is no doubt that those at the top accept much of the religious legitimacy of the system. Their lives within the system, combined with the practical benefits realized thereby, work together constantly to reinvent the system and its beliefs. Even the highest of the upper *jatis*, the *Brahmars*, *Rajputs*, and *Jats* had reservations about the system. In Kisanpur, there are a number of *Arya Samajists* among the *Brahmar* community. The *Arya Samajists*, began as an anti-caste system movement of substantial influence in North India in the later nineteenth century. The movement emphasizes the *Vedas*, denies *brahminical* authority, and calls for the eradication of untouchability and the readmission of converts to Hinduism through a ceremony known as *shuddi*, or purification.<sup>151</sup> The *Arya Samajists*, like a number of other "return to the *Vedas*" reform movements, seek to eliminate the hierarchical aspects of contemporary Hinduism for philosophical reasons (such aspects are opposed to fundamental concepts of human rights, they are opposed to the *Vedas*) and to prevent large numbers of untouchables from leaving the Hindu fold and joining competing religious communities.<sup>152</sup> *Arya Samajism* is primarily a movement of upper-*jati* Hindus and not of untouchables. In fact, in Kisanpur there are no *Arya Samajists* among the untouchables at all.

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150. See R. KHARE, *supra* note 148, at 51-63, although there is still accountability to the community.

151. See K. JONES, *ARYA DHARAM: HINDU CONSCIOUSNESS IN 19TH CENTURY PUNJAB* (1976) (providing a good introduction to the *Arya Samaj*).

152. See J. FARQUHAR, *MODERN RELIGIOUS REFORM MOVEMENTS IN INDIA* (1915) (supplying a helpful, albeit dated overview of religious reform movements).

One *Brahmar* shopkeeper, a fervent believer, insisted on sharing cigarettes and food with untouchables in the village. He and his family associated with a regional *Arya Samaj* organization. Some of the other upper-*jati* members in Kisanpur ostracized him. He had once been physically assaulted for "encouraging the lower *jatis* to be disrespectful." He had a successful shop, however, and he had no recent difficulty with the upper *jatis*.

One of the most important Hindu religious and political leaders in Indian history is Mohandas Gandhi. Gandhi commanded enormous respect from Hindus largely because of the extreme version of personal asceticism he practiced. It is difficult to suspect the sincerity of Gandhi's beliefs.

Gandhi's combination of political and religious leadership made him uniquely able to command the role of "virtuous man" and delineating "virtuous custom." Gandhi always opposed untouchability, although at first he did not oppose *jati dharma* per se, only a hierarchical ranking of *jatis*. Later he opposed all *jati* distinctions.<sup>153</sup>

Gandhi not only represented a return to *Vedic* Hinduism free of caste distinction but a "virtuous man," one who could reinterpret or redefine proper *dharma*. In Kisanpur, many upper-*jati* members made reference to Gandhi's views on *jati* and untouchability. Some spoke in terms of there being nothing polluting in formerly polluting activities ("Gandhiji lived with untouchables, did their work with them"); or the *dharma* of lower *jatis* as no longer being exclusive to them ("Gandhiji said that we must all clean up after ourselves, carry away our own night soil"); or the desirability of the elimination of the *jatis* ("Gandhiji said we must get rid of this caste system").

We believe that each of these views had some effect on the religious beliefs of the upper *jatis* in Kisanpur. While Gandhi's name was usually used when discussing these opinions, his views were only reflections of traditions preexisting in Hinduism. These traditions continue through such organizations as the *Arya Samaj* and others.

To the extent that Hindu religious movements focus on these issues, acceptance of nonhierarchical beliefs as a part of Hinduism may grow. That is not to say that these views are fully accepted. However, it is important that they coexist with post-*Vedic* views of pollution, *dharma*, and hierarchy, and moderate those views and create an opportunity for

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153. See M. GALANTER, *supra* note 40, at 37 (presenting Gandhi's conclusion that untouchability can end only if *varna* and *jati* are completely eliminated from Hinduism. Once this is achieved, Gandhi explained "there will be only one caste known by the beautiful name of *Bhangi*, that is to say, the reformer or remover of all dirt"). *Id.*

change.

The effects could be seen in the manner in which lower *jatis* were referred to and treated by upper-caste members in daily social intercourse. Most upper *jati* members referred to the untouchables as "lower *jatis*" and almost never used the more traditional and denigrating term "untouchable." In this regard, most upper *jati* members told us that there wasn't any real untouchability anymore. For example, even the lowest *jatis* could now use wells and containers belonging to higher *jatis*, although this practice was forbidden "in times gone past." While most aspects of *jati* separation remain, such as prohibitions on inter-dining and intermarriage, the lower *jatis* themselves commented on the end of strict untouchability and the overall improvement of their social position.

Actions of the lower *jatis* themselves constitute other notable forces for change. The sanskritizing activities of lower *jatis* often bring on the active opposition of the higher for diverse reasons. More obvious reasons include the higher *jatis* fear of the lower *jatis* acting "uppity" and demanding more rights and respect, a fear of losing lower *jati* services such as the removal of carrion and night soil, or even a religiously-based belief that sanskritizing behavior of the lower *jatis* violates their *dharma*. Sanskritization also means that lower *jatis* no longer do or do less of those things that the upper *jatis* find polluting, such as removing carrion and night soil. Over a period of time, seeing the lower *jatis* act more like themselves may remove some of the feelings of otherness or distance from the upper *jatis*. Even though pollution is status-based, attaching at birth to lower *jatis*, the mere fact that they no longer engage in polluting activities may make them seem somewhat less polluting. The most sanskritized members of the *Jatav* community seemed to be treated with less distance by the upper *jatis* than were the lesser sanskritized members, and certainly more than those who had not abandoned their traditional polluting activities.

Sanskritization of the lower *jatis* may reinforce in some upper *jatis* some of the "Gandhian" religious views. Some aspects of sanskritization, such as abstention from eating meat, are ascetic and may attract more admiration from upper *jati* Hindus. Sanskritized behavior can also suggest a redefinition of *dharma* on the part of the lower-*jatis*. For example, although it is wrong to act according to another's *dharma*, it is possible to change one's own *dharma*. If Gandhi advises that it is virtuous to treat the lower *jatis* as equals, it is far easier to do so if the upper *jatis* believe it is a virtuous custom. While it is not clear, we sometimes detected a certain grudging respect for the most sanskritized of the lower *jatis* invariably accompanied, however, with complaints of

“uppity” behavior.

While we do not know exactly how potent the *Vedic* (including the ascetic, *bhakti*, or Gandhian) traditions in Hinduism are among higher *jatis*, we believe that in Kisanpur there is an element in the religious consciousness that suggests that *jati* hierarchy is not completely valid. A shift toward greater religious identification and observance, which appears to be taking place among Hindus throughout North India, could actually accentuate this admittedly limited opposition to *jati* hierarchy or at least to untouchability.

Why the *Vedic* view of hierarchy appears more prominent in the upper *jatis* than in the lower is not readily apparent. Perhaps the advantaged upper *jatis* simply have a greater reason to feel guilty. Also, the upper *jatis* are generally more educated and more likely to know about *Vedic* religion as opposed to village interpretations of Hinduism. They are possibly less concerned with the validity of a system based on competition because they are already at the top of that system. Or the upper *jati* are more aware of a need to put on a good face for the researchers from “egalitarian” America.

We do not mean to make too much of the fact that lower-*jatis* seemed preoccupied with sanskritization while the upper-*jatis* seemed marginally less so. What we do believe is important is that many of the lower *jatis* seem to accept the existing system of hierarchy (while many others also question it) and that many of the upper *jatis* question the system’s validity (while many also accept it). For the purposes of our analysis, it is these two counterintuitive facts that we find particularly interesting.

### c. *Jati and religion: society and change*

Both *jati* and hierarchy have an important place in contemporary Hindu society. That which separates one *jati* from another creates a strong sense of solidarity among *jati*-mates. For the lower *jatis* who wish to improve their status and position, this solidarity is best expressed when the *jati* acts collectively through sanskritization, or less frequently, when an entire *jati* converts to a new religion. Logically, *jati* solidarity is not enhanced when religious change emphasizes individual action, such as asceticism, or through movements that deny the importance of *jati*.

*Jati* solidarity is multifaceted. Practically, the *jati* can provide a physical support network among members, similar to a family, a close community, or organization. Perhaps even more importantly, however, the *jati* can give the individual a sense of belonging or meet what Un-



ger refers to as the need to be an "insider."<sup>154</sup> The anthropologist Clifford Geertz suggested that religion can make suffering both understandable and bearable.<sup>155</sup> In the case of the Hindu vision of *jati*, religion can make suffering understandable either through karma, ("we are here because we deserve it"), or through sanskritization, ("but for an error we should be higher"). In addition, this suffering is more bearable, ("we have each other, we are better than others, we are doing god's bidding"). As reform movements have discovered, escaping both *jati* and hierarchy while preserving benefits of the system is not an easy task. An alternative to fully rejecting all aspects of *jati*, is to move relatively away from the hierarchical aspects. It may also be possible to retain some of the beneficial aspects of *jati*. We will discuss this issue at greater length below.

We see a number of important conclusions. First, lower *jatis* do not act in a socio-religious context devoid of hierarchy. It appears unlikely that, left to their own devices, they would embrace an ideology of equality. While many wish to improve their status, at least in the context of society and religion, they implement that wish primarily through a hierarchy perceived as partially legitimate. The Western view, that at least formally identifies individuals as equal, seems far more egalitarian than does the view dominant among those below. In addition, those that wish to achieve a higher position in the hierarchy may accept a Western view that advances their relative position. As we shall see, such Western views, through Western institutions, have been accepted by those below as useful tools to improve their position. We also feel, however, that increased adoption of these views may also favorably serve to influence hierarchical views at the social and religious level as well. Fears that Western institutions might reify inegalitarian views rather than advance equality are misplaced.

On the other hand, while those above also embrace hierarchy, its acceptance is far less than we originally expected. We have already seen that an ideology that does not embrace hierarchy need not clash with *Vedic* Hinduism and in practice it often does not. Even the sanskritizing activities of the lower *jatis* may contribute to this. Because of the importance of solidarity to the use of Western legal institutions by lower *jatis*, the issue is an important one. An ideology based in part on Western concepts of equality need not clash completely with accepted

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154. See R. UNGER, LAW IN MODERN SOCIETY 137-38 (1976) (describing individuals' need to identify with a group or belong as insiders in society).

155. See C. GEERTZ, THE INTERPRETATION OF CULTURES 43 (1973) (discussing the utility of religion as a method of coping with suffering).

religious and social values and practices among those at the top. Any fears that Western views would run completely counter to existing religious and cultural views are misplaced. And certainly, to those among the have-nots who reject Hindu hierarchy, as well as those among the haves who accept it, these arguments hold equally true.

## 2. *Westernization and Secularization: Continuity and Change*

Sanskritization, the reform of Hinduism, and conversion all describe methods of religious change sought from both above and below, but within the context and according to the internal logic of ancient traditions. Over the last several centuries, Westernization has tremendously affected relationships within Indian society. "Westernization" is a catch-all term used to describe the new technology, institutions, and values either brought to the subcontinent from the West or strengthened by it.<sup>156</sup> Sometimes referred to as modernization, it is the predominantly secular force of change and includes industrialization, Western-style education, and the development of legal and democratic institutions based on an ideology of individual equality. Though less a Western development, mass politics is an integral part of this process. Important both to upper and lower *jatis*, this process constitutes an essential element of caste mobility.<sup>157</sup>

Control over the forces of Westernization and access to its benefits constitute important issues in effecting change in rural India. It also has a profound effect on the individual's view of oneself and others within the hierarchy of Hindu society.

### a. *New rights and politics*

#### i. Democracy, rights, and benefits

Of great importance is the effect of secularizing relationships among *jatis* with the introduction of an individual rights-based, rather than a strictly status-based, legal and political system.<sup>158</sup> Indian independence

156. See M. SRINIVAS, *supra* note 44, at 46-88 (providing an overview of Westernization).

157. See Oommen, *Analyzing Rural and Social Change: A Perspective*, in DIMENSIONS OF SOCIAL CHANGE, *supra* note 130, at 96-97; and Singh, *The Changing Pattern of Social Stratification in India*, in DIMENSIONS OF SOCIAL CHANGE, *supra* note 130, at 137-39 (listing religious conversion, sanskritization, modernization and political movements as the principal patterns of social change). Singh particularly notes the connection of modernization and politics with traditional patterns of caste mobility in pre-British India. *Id.*

158. Cohn, *Some Notes on Law and Change in North India*, 8 ECON. DEV. AND SOC. CHANGE 79, 91 (1959) (noting a shift to equality of status under law, particularly

was won in a flurry of mass politics at both the level of educational and *jati* elites and organized, lower-*jati* (particularly untouchable) politics.<sup>159</sup> In addition to universal adult suffrage and relatively free elections for representative bodies, ranging from the village statutory *panchayat* (somewhat similar to a board of selectmen) to the national parliament, seats are reserved in each of these bodies for scheduled caste members.

Authority for these reservations is found under a provision in the constitution designed to guarantee a minimum representation for the scheduled castes in all levels of government.<sup>160</sup> Laws abolishing caste disabilities and guaranteeing civil rights, reforming various other Hindu social practices, and providing certain financial and other benefits for those from lower *jatis* have been strengthened and expanded over time.<sup>161</sup> Many of these new rights and social programs have had relative success, while others have provided little real benefit to their intended beneficiaries. Land reform legislation, for example, has failed to turn over meaningful amounts of land to the landless, notably the lower-caste *jatis*.<sup>162</sup>

One of the most important developments is the increased political participation of the lower *jatis* who attempt to enforce their new rights through political and legal action. National and regional party politics has involved appeals to "backward" *jatis* and to untouchable *jatis*. This has sometimes alienated higher *jatis* and caused a violent backlash effect.<sup>163</sup> Scheduled caste associations exist at the national level, both

in courts). The anthropologist Max Gluckman referred to status-based relationships as "multiplex," or those in which a person "tends to occupy the same position relative to the same set of other persons in all networks of positive ties—economic, political, procreative, religious, educational." M. GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* 19 (1955), *quoted in* Cohn, *supra* at 91.

159. See M. SRINIVAS, *supra* note 44, at 114-17 (maintaining that the so-called backward classes, or anti-Brahmin movement, originated primarily in the southern Indian states, where *Brahmin* dominance was more pronounced than in the North); see also S. SARASWATHI, *MINORITIES IN MADRAS STATE: GROUP INTERESTS IN MODERN POLITICS* (1974) (noting that a split existed between upper and lower non-Brahman movements). In the North, there is a constant struggle between "dominant" *jatis*, "non-dominant" *jatis* (or "backward classes") and scheduled castes.

160. INDIA CONST. arts. 330, 332; U.P. Panchyati Raj Act (Act 26 of 1947), Rules 7, 9; see M. GALANTER, *supra* note 40, at 44-55 (describing these reservations in national and state parliaments).

161. See *infra* notes 279-81 and accompanying text (discussing economic rights).

162. See Newell, *Ideology and Realities: Land Redistribution in Uttar Pradesh*, 45 PAC. AFF. 220 (1972); 2 REPORT OF THE COMMISSION FOR SCHEDULED CASTES AND SCHEDULED TRIBES 22 (1981) (documenting the relatively insignificant amount of land that lower *jatis* own).

163. Benefits generally accepted as legitimately belonging to the scheduled castes, are increasingly extended to higher and higher *jatis*. This has occurred to the disadvan-

formally and informally, to protect their preferred position under the constitution and under substantive laws.<sup>164</sup>

Despite widespread poverty throughout the country, and a relatively long history of mass political involvement, revolutionary politics has had a checkered career in India. The Naxalite movement, centered primarily in Bihar and West Bengal, was brutally put down by state police action in the early 1970s. Although Naxalites and other revolutionary left movements still exist, many observers have concluded that the preoccupation with *jati* identity partially explains the apparent absence of large class-based movements among the peasantry. The connection between class and *jati* in India, however, is often a close one. In Bihar especially, battles between landowners, who are almost entirely upper-*jati*, and the landless, who are mostly scheduled caste, have raged with particular brutality.<sup>165</sup> Landlords and landless have formed groups which they label "armies"; even the police have often served as private armies for the landed.<sup>166</sup>

## ii. Village politics and factionalism

As we have described, it is inaccurate to suggest that the traditional patterns of hierarchy, *jati* solidarity, or *jajmani* were ever complete. It is likely that the paradigms of Hindu religious and social organizations are only paradigms, and that diversity and competition have always existed in rural India in a manner which at times contradicts that paradigm. What we describe here may be only a development that modernization and the influence of politics and law have accelerated. They are, however, different from what might be called traditional Hindu ideals. There is a current of change that is working both within and against the primary Hindu social and religious structure.

Hindu social structure revolves around *jati* solidarity and hierarchy, both of which have religious origins. Villages do not contain representa-

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tage of those *jatis* not so classified and even to the disadvantage of the scheduled castes, whose benefits are diluted and bear some of the opprobrium of the highest *jatis*, who are given no additional advantages. The main reason for the continued extension of benefits to an ever-widening group of "backward classes" is politics. The state government that extends benefits is likely to gain greater support from the new beneficiaries. See M. GALANTER, *supra* note 40, at 161 (discussing the legal ramifications of extending benefits to backward classes).

164. Joshi, "Ex-Untouchable": Problems, Progress, and Politics in Indian Social Change, 53 PAC. AFF. 193, 197 (1980).

165. Sinha, *Report: Class War, Not Atrocities Against the Harijans*, 9 J. PEASANT STUD. 148 (1982).

166. Sinha, *Bihar: Teaching the Landless a Lesson*, 20 ECON. & POL. WEEKLY 343, 344 (1985).

tives of each *jati* equally, nor do all *jatis* carry out their *jajmani* functions exclusively. Absolute numbers and control over economic resources, such as land, have always played an important role in the relative power of different *jatis*. Srinivas coined the term "dominant caste" in the 1940s to describe the *jati* that had the greatest influence in a particular area, the *jati* upon which even those who were ritually superior depended.<sup>167</sup>

Factors determining the dominant *jati* include its hereditary ranking, its numerical strength, its economic power, its ownership of land, its relative educational development, and its control of the local political apparatus.<sup>168</sup> There is often symmetry among these categories although the symmetry is not always complete. New factors affecting the determination of dominance, including politics and changes in economic structure, have further muddied the paradigmatic Hindu social hierarchy.

North Indian villages can, by and large, be divided into three types: those in which only one particular *jati* lives; those in which many different *jatis* live but in which there exists some semblance of balance among several strong *jatis*; and those in which one *jati* is numerically dominant (though not necessarily in an absolute majority). The last is the most common.<sup>169</sup> In Uttar Pradesh, numerical and economic power are usually held predominately either by *Brahmans* or *Rajputs*, depending on the location.<sup>170</sup> Even in villages where there is no clearly dominant *jati*, there is usually a *jati* that is dominant for a wider group of villages.

There are three important constraints on *jati* solidarity and hierarchy: first, dominant *jatis* are quite large; second, there is sometimes a scarcity of village resources; and third, areas of competition are forever increasing.<sup>171</sup> In villages where the dominant *jati* is quite large, cleavages in the *jati* may form. Factions can form around traditional divisions such as the exogamous sub-*jati* groups known as *gotras*, around lineages or families, or simply around friendships of those who tend to

167. M. SRINIVAS, *supra* note 44, at 151-52.

168. See Dube, *Caste Dominance and Factionalism*, 2 CONTRIBUTIONS TO INDIAN SOC. (NEW SERIES) 58, 59-60 (1968) (listing the factors that determine dominant *jati* status as numerical strength, economic power, political power, ranking of caste (*jati*), and education, in that order); Oomen, *Political Leadership in India, Image and Reality*, 9 ASIAN SURV. 515-17 (1969) (concentrating on land ownership and hereditary ranking).

169. SOCIAL ANTHROPOLOGY, *supra* note 38, at 143-45.

170. M. SHARMA, *supra* note 46, at 20.

171. *Id.* at 134-59; see Mayer, *Caste in Local Politics in India*, in INDIA AND CEYLON: UNITY AND DIVERSITY (P. Mason ed. 1967).

share economic interests. Each can become a corporate group with a different definition than the traditional *jati*.<sup>172</sup>

In Kisanpur, the *Rajputs* clearly represent the dominant *jati* because they are more numerous than other *jatis*, are high in the *jati* ranking, own more land, and dominate the local *panchayat*. Changes induced by or accelerated by westernization, however, are evident. Land reform legislation has caused increasingly fragmented land ownership among the *Rajputs*. Instead of extended Hindu undivided families holding land in common, increasingly smaller sub-*jati* corporate groups now hold land. The creation of new resources, including government loans and agricultural inputs, have also heightened intra-*Rajput* competition. Because control or at least influence over the allocation of these resources lies in the democratically elected *panchayat*, intra-*Rajput* competition for control of that body has helped to intensify *Rajput* divisions.

The belief in *jati* hierarchy can work, along with these forces of Westernization, to the detriment of *jati* unity. Not all Kisanpur *Rajputs*, for example, are large landowners or well-educated. Less wealthy *Rajput* families have a strong sense of deprivation because they too were descendants of a princely *varna* and deserved what their wealthier *jati*-mates already had. Jealousy, which would perhaps be expected anyway, seemed to be exacerbated by the sense of entitlement that all *Rajput* families hold as an attribute of their *jati* identity.

The lower *jatis* in Kisanpur are smaller and less engaged in intra-*jati* competition. Having less to begin with, they understood that their only real chances of attaining benefits would come in acting together. Furthermore, the new legal rights have altered the lower *jatis* self-image with potentially important implications for *jati* solidarity and interaction. One immediately visible change is the manner in which untouchable *jatis* refer to themselves. When asked to what community they belonged, every member of an untouchable *jati* replied first with a *jati* name (*Jatav*, *Bhangi*, etc.) followed by, in English, "scheduled caste".<sup>173</sup> When asked to describe the use of the term, many described it as coming from both the Constitution and from statutes designed to protect their welfare. While the *Jatavs*, for example, clearly stated that they were of a higher rank than the other untouchables, and while they still maintained ritual separation, they also noted that these other *jatis*

172. SOCIAL ANTHROPOLOGY, *supra* note 38, at 125-26.

173. See R. KHARE, *supra* note 148, at 118-22 (contrasting in his study of *Chamars*, the language of "guilt-raising" terms like "untouchable" and Hindu reforming terms common in *Arya Samajism* or in *Bhakti* with "secularizing terms" like "scheduled caste").

were also scheduled castes.<sup>174</sup> The new rights, therefore, have resulted in new, inter-*jati* solidarity and identification, as opposed to what has happened to the upper *jatis*. We will discuss this at greater length below.

Much of the intra-*jati* competition of the dominant *Rajputs jati*, and the somewhat tenuous solidarity of the lower *jatis* is played out in the arena of elective politics, particularly the politics of the statutory village *panchayat*.<sup>175</sup> *Panchayats* are elected by adult suffrage.<sup>176</sup> A *pradhan*, or president, heads each *panchayat*, calls meetings, signs the disbursement of funds,<sup>177</sup> and is viewed as the representative of each village. There is an *up-pradhan* or vice-president, and seven other members, with scheduled castes in theory holding the same percentage of seats as they do in the village population. Also, each *panchayat* must include at least one woman.<sup>178</sup>

The *panchayat* controls or influences the control of numerous scarce resources. Among the most important are control over the management of the village lands,<sup>179</sup> control of drought relief and certain public works programs from higher levels of government,<sup>180</sup> overseeing the allocation of benefits under the Integrated Rural Development Programme,<sup>181</sup> and control in general over relations with the outside world. Because control of the *panchayat* represents substantial benefits, elec-

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174. See Harris, *Why Poor People Stay Poor in Rural India*, 85 SOC. SCIENTIST 20, 58 (1979) (finding that lower *jatis*, while not seeing themselves in terms of relative ranking, remained separate and uncooperative with other lower *jatis*); M. SIDDIQUI, *AGRARIAN UNREST IN NORTHERN INDIA* 117 (1982) (noting that while *jati* separation was maintained in ritual matters, peasants, including lower *jatis*, were able to unite on a broad political front).

175. U.P. Panchayati Raj Act (Act 26 of 1947), Rules 7, 9; see K. VAN DE SAND, *FOUNDATIONS AND PROBLEMS OF LOCAL GOVERNMENT IN RURAL INDIA* (1980) (offering an introduction to local government in India). We describe here the statutory *panchayats* in Uttar Pradesh as of this writing. Other states, most notably Karnataka, have delegated substantially more authority to village *panchayats* than Uttar Pradesh. On May 10, 1989, the Congress (I) proposed a constitutional amendment to create new, federally required statutory *panchayats* throughout India with mandatory powers, proportional representation for scheduled castes and tribes, a 30% reservation for women, and powers over finance, development, planning, and expenditure. Given the recent loss by Congress (I)'s of its substantial majority in the Federal Parliament, form of this amendment, it is uncertain whether some form of this amendment, which would be the Constitution's 65th, will pass. Chawala, *Panchayati Raj: From Doon to 'Dehat'*, INDIA TODAY, May 31, 1989, at 18-21.

176. U.P. Panchayati Raj Act (Act 26 of 1947), § 11B.

177. *Id.* Rule 47.

178. *Id.* Rules 7, 9.

179. Acting as the *Bhumi Prabandhak Samiti*. *Id.* § 28; U.P. Zamindari Abolition and Land Reforms Act (Act 1 of 1951), §§ 117 & 122.

180. V.P. Panchayati Raj Act (Act 26 of 1947), § 15.

181. Government of Uttar Pradesh, U.P. Integrated Rural Development Programme Manual (1983).

tions to and control of the *panchayat* are among the most frequent causes of modern factionalism within a dominant *jati*.<sup>182</sup>

In Kisanpur, the modern *panchayat* plays a very important role in social and political life, although it would be a mistake to suggest that it is a fully functional governing body. Perhaps one of the *panchayats'* most significant roles is as an arena for and intensifier of factional conflict. According to most *Rajputs*, before the beginning of modern elected *panchayats*, traditional *panchayats* dominated by elders and including all members of the *jati* settled all disputes. Over time, however, traditional *panchayats* became increasingly less important. Now, factionalism is so strong that only factional rumps of the traditional *jati panchayat* meet and then only to solve family problems. Almost everyone blames factionalism on the advent of modern elections.

In the context of village politics, where the *panchayat* is often the focal point, factions within dominant *jatis* often form alliances with other *jatis* or even with factions within other large *jatis*. Traditional *jajmani* ties often form the basis of inter-*jati* factional alliances. Entire *jatis* may form alliances with one or another faction based on implicit or explicit promises from a faction within the dominant *jati*. As such, *jati* cooperation in factional struggles may be bought and kept only so long as the alliance is beneficial to the nondominant *jati*, and only for so long as the rival faction does not hold out the promise of greater benefits if allegiance is switched.<sup>183</sup>

At the time of this study, the dominant *Rajput* community consisted of two clearly defined factions: one led by the former president, Jaswant Singh, and the other led by the current president, Dev Singh.<sup>184</sup> Jaswant Singh was the largest landholder in the village and his supporters were in control of the *panchayat* before the schism of the *Rajputs* into two clearly defined factions. Dev Singh's faction evolved from those disgruntled with Jaswant Singh's presidency. Each faction accused the other's leader of corruption while acting as president. Each accused the other of using the office to sell village land and of pocketing the money to help family and faction members. As president, Jaswant Singh apparently did turn over village common lands to his relatives and used certain drought relief funds to build a road to one of his fields. Since that time, factions had become increasingly active, and the

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182. See Nicholas, *Elites, Class and Factions in Indian Politics: Review Article*, 6 S. ASIA REV. 143, 145-53 (1973); Yadava, *Factionalism in a Haryana Village*, 70 AM. ANTHROPOLOGIST 890, 898-910 (1973) (providing further discussion of this phenomenon).

183. M. SHARMA, *supra* note 46, at 134-59.

184. The authors have changed all proper names of the residents of Kisanpur.



search for allies among the lower *jatis* had become vigorously competitive. In a number of instances, for example, people supported fellow faction members of different *jatis* in land and boundary claims against *jati*-mates who were members of the other faction.

While factionalism existed among the Kisanpur *Rajputs* at the time of this study, it had not yet reached the stage whereby relations had completely broken between the two groups. Faction members would still attend each other's weddings and other ceremonial events. This is in contrast to a nearby village with a three-fourths *Rajput* population, and three existing factions. The factions had split so completely in that village that all friendly social intercourse reportedly ended.

The method of participation in village factionalism varied from *jati* to *jati*. The *Brahmar jati*, which lies ritually above the *Rajputs*, and the majority of whose members owned land seemed largely above the factional fray. One politically active *Brahmar* family, however, tended to side with the Jaswant Singh faction. The *Kohars* (bearers) sided primarily with the Dev Singh faction, because they perceived Dev Singh as less corrupt than Jaswant Singh, and because he has a reputation of not favoring *Rajputs* from other factions over non-*Rajput* members of his own faction. The *jati panchayat* of the *Baghailis* formally decided not to participate in the factions. The *jati* managed, with the help of a loan from a wealthy *Baghaili* who lived in the nearby market town, to expand from its traditional sheep and goat herding work into transporting agricultural goods. They also managed to purchase land and some families owned three or four acres. Because the *jati* members shared at least some resources, they managed to expand their fleet of bullock carts and substantially increased their wealth. They did not wish to join a faction for fear of alienating any potential *Rajput* clients.

The *Jatavs*, the second largest *jati* numerically and the most Sanskritized of the scheduled castes, had become deeply involved in village politics and were important players in the *panchayat* elections. The majority of *Jatavs* lived in one section of the village. Krishna Singh,<sup>185</sup> a small cultivator and educated *Jatav* led their active *jati panchayat*.<sup>186</sup> Krishna Singh was already a reserved member of the village *panchayat* and decided to run for *panchayat* president in the next village elections. The struggle between the main *Rajput* factions for control of the *panchayat* and the importance for both sides of gaining the support of

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185. Most *Jatavs* adopted Singh, normally the surname of *Rajputs* and *Jatis*, probably as part of their *jati* sanskritization.

186. This *Jatav's* family received its land during the end of *zamindari* as a token distribution of land to scheduled castes. Two other *Jatav* families worked as marginal cultivators and received their land at the same time and under the same circumstances.

lower *jati* allies in that struggle is amply illustrated in the following case.

### Case 1: The Presidential Election

After nearly twenty years as president of the *panchayat*, Jaswant Singh decided to retire and let another member of his faction run for president. A number of individuals decided to stand for office including a *Brahmar* and a *Baghaili*, who were not associated with any faction, Krishna Singh, and two *Rajputs*, one from each faction. Both *Rajput* candidates set about to garner as many votes as they could. Both made promises to members of all *jatis* that their candidate would be more "open" as president. They also made specific promises to members of the scheduled caste *jatis* that upon election they would make donations of wheat and would let scheduled caste *jati* -members use their land for grazing animals. The secrecy of the ballot prevented easy intimidation of voters.

After some time, it became clear that most of the *Jatavs* would vote for Krishna Singh. Krishna Singh had been leading a court fight to return certain *Rajput* captured lands (described in Case 5, below). The *Rajput* belonged to the Jaswant Singh faction. If the suit were successful, these lands would be distributed to other scheduled caste *jatis*. A committee composed of many of these *jatis* organized to prosecute the case and it appeared as if they too would support Krishna Singh's candidacy.

Jaswant Singh invited a number of scheduled caste *jati* members to his house, many of whom worked as laborers in his fields, saying that he had gifts and bonuses for them. Thinking that this was simply another election eve bribe, many went. Each person was brought individually into Jaswant Singh's walled courtyard. Jaswant Singh then offered the person a glass of cool water. After he had drunk, Jaswant Singh offered a small amount of wheat and asked if the person would vote for his faction's candidate. Knowing the ballot was secret and wishing to keep the gift, each person assented. At this point, Jaswant Singh would reveal that the water from the glass had been taken from the Ganges River during a *tirth yatra*<sup>187</sup> and to break the oath would be a great sacrilege.

After this incident, the *Jatav panchayat* met and agreed that the oath "had been given improperly, and that it was invalid, and that

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187. A *tirth yatra* is a pilgrimage to collect holy water and return it to villages for use in religious rituals.

there was no sacrilege to God.” They also agreed that they would do better to support the anti-Jaswant Singh group than to “throw away” their vote on Krishna Singh. They decided that, if they voted for Dev Singh, he would be far more likely to help them in their lawsuit against Jaswant Singh’s relatives. In addition, it seemed that Dev Singh would be more honest than Jaswant Singh. If Dev Singh knew that the *Jatavs* helped to elect him, perhaps they would have more influence with him. Consequently, they voted for Dev Singh. According to the *Jatavs*, at the last minute the other scheduled caste *jatis* became afraid of the oath and voted for Jaswant Singh. Nevertheless, Dev Singh was in fact elected.

If the *Jatavs* have derived some benefits from the increasing disunity and competition among upper-*jati* factions, there are schisms within the *Jatav* community itself that weaken its political strength. One small group of *Jatavs* did not join in the decision to support Dev Singh nor did it participate in another *Jatav*-led collective action against the *Rajputs* (the land suit described in Case 5). This group of fifteen families lives in a neighborhood colony cut off from the rest of the village, and consists of small to medium sized cultivators. According to this group of *Jatavs*, their ancestors reclaimed the land from the jungle hundreds of years earlier and managed to have their land rights recorded under the British Administration. These *Jatavs* shared little in the way of *jati* unity with other *Jatavs* in the village. One person from the majority *Jatav* group explained “they are landholders—they are like the *Thakurs*; they don’t care about us poor people at all.” The minority community, however, claimed that they were afraid to help because they were physically isolated and more vulnerable to higher *jatis* physical intimidation. As described in Case 6, a group of *Rajputs* physically attacked some of the *Jatavs* in the colony and killed one. The majority community of *Jatavs* apparently offered no assistance to their *jati*-mates in this matter. The continued vulnerability of the *Jatavs* to the upper-*jati* faction leaders manipulation is illustrated by the following case.

#### Case 2: The Election for Vice-President

In 1983, the *panchayat* consisted of four *Rajputs*, one *Brahmar*, two *Baghailis* (shepherds), one *Kohar* (bearer), and three *Jatavs*. Each *Jatav* was a “reserved member.” The president was Dev Singh; two of the *Rajputs*, the *Kohar*, and the *Brahmar* supported the Dev Singh

faction,<sup>188</sup> the *Baghailis* supported no faction, and the *Jatavs*, including Krishna Singh, tended to side with Dev Singh. An election was announced to fill the vice-president's position in the *panchayat*. The vice-president is elected from the membership of the *panchayat*. Besides acting in place of the president when the latter is not present, the vice-president also serves as clerk and has access to all records.<sup>189</sup> The *Jatavs* decided that easy access to the records of the *panchayat* was important. This would enable them to determine if and how much land and other resources had been improperly withheld from the scheduled castes or improperly given to the higher *jatis*. The *Jatav panchayat* decided that one of its number, although not Krishna Singh, should contest the elections. This *Jatav* secured the tentative support of the Dev Singh faction in return for the *Jatav* vote in the next presidential election. It seemed as if the *Jatav* would win.

The candidate of Jaswant Singh's faction was a *Rajput*. Jaswant Singh approached the other two *Rajput* members of Dev Singh's faction and urged them to vote for their *jati*-mate. He told them that they should not support an untouchable because they were becoming too bold in challenging the hierarchy of *jatis*. One member of the Dev Singh faction changed sides but the other held fast.

Jaswant Singh then approached the *Jatav* candidate and told him that he must withdraw his name from the nomination. Jaswant Singh threatened to see to it that no one would hire him if he ran, and that he would not be able to use *Rajput* land for grazing animals or as a latrine. Jaswant Singh also threatened him with physical violence.

The candidate was not too concerned about his being locked out of work or land use, because the members of the Dev Singh faction would certainly hire him, but the *Jatav panchayat* feared violence on election day. They went to the local police station and filed a First Information Report<sup>190</sup> alleging assault and requested the presence of the police in the village during the election. On election day, a police sub-inspector went to the village to observe. It turned out that the policeman knew Jaswant Singh's son, a judicial magistrate in eastern Uttar Pradesh where the policeman had earlier been posted. Instead of seeing the village president, the policeman visited Jaswant Singh, who gave him a cup of tea and sent him home.

After the policeman left, Jaswant Singh went to see the *Jatav* candidate. Jaswant Singh apologized and offered the *Jatav* eight quintals of

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188. Most *Brahmars* in Kisanpur eschew factionalism.

189. U.P. Panchayati Raj Act (Act 26 of 1947), § 11C.

190. A first information report is a criminal complaint.

wheat if he would resign from the race. The *Jatav* took the wheat and withdrew his name from the ballot on election day. Jaswant Singh's candidate won. After the election, Jaswant Singh informed the *Jatav* that the wheat was only a loan, and that any gift would have been a bribe and illegal. Although the *Jatav* candidate was not formally out-cast, the other *Jatavs* in the village turned him out from the *panchayat* and have little social intercourse with him or his family.

The *Jatavs* often seemed obsessed with the possibility that there was a spy in their midst, someone who was reporting to the *Rajputs* on their actions. "The *Thakurs* always know what we are doing. When we file an application [court case], they always know. Jaswant Singh, he always knows. They pay some one of us, and they find out." Krishna Singh reported that the law of the *Rajputs* was "divide and rule," using the English phrase. He said that the *Rajputs* wanted to keep the scheduled castes divided so that they could not challenge the rule of the *Rajputs*.<sup>191</sup>

The political involvement of the "religious" *jatis*, including the *Nais* (barbers), *Dhobis* (washers), and *Bhangis* (sweepers) had, until recently, followed a different pattern from that of the *Jatavs*. For the most part, these *jatis* had divided along traditional *jajmani* lines. Individual families supported the faction to which their patron belonged. This, however, was changing because in the previous election individual families and entire *jatis* were promised special favors if they voted for the candidate of a particular faction. *Jajmani* relations among the *Dhobis* and *Bhangis* and their traditional *jajmani* patrons had begun to break down. Both *jatis* began to present their interests as a group, sometimes along with other scheduled castes, and conditioned their support upon receiving reciprocal benefits. Nevertheless, the next case illustrates the persisting importance of patron-client relationships in the context of present day village politics.

### Case 3: The Capture of the Village Lands

This case involves a wealthy *Rajput* family whose farm abutted the commons, and their "grabbing" of village common lands. The *Rajput* family was closely related to Jaswant Singh and they had acquired the land during his tenure as village president. In theory, village commons are under control of the entire *panchayat* as the *bhumi samiti*, or "land committee." Land ownership, however, is registered with a state

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191. M. SHARMA, *supra* note 46, at 177. Sharma notes that, according to *Chamar* (the original *jati* name of the *Jatavs*) informants, the biggest obstacle to empowerment is a lack of *Chamar jati* unity.

records office.<sup>192</sup> The Registrar presides over the state records and is under the supervision of the District Land Officer.<sup>193</sup> The *Rajput's* possession of the common lands caused particular hardship to one *Bhangi* (sweeper) named Ram Das. The amount taken was not large, perhaps only an acre, but it was on this particular section that Ram Das had usually grazed his animals.

Ram Das performed the ritual services of a *Bhangi* for a *Rajput*, a member of the Dev Singh faction. Ram Das complained about the land capture to his patron who directed him to the District Land Officer. The District Officer ordered the Registrar to make an investigation into the complaint. While traditionally most government officials from outside the village report directly to the President of the *panchayat*, the Registrar went directly to the *Rajput* who had captured the land. There he secured a bribe, returned to the Land Officer, and reported that the land was private property. It turned out that the Registrar was also a *Rajput* of the same *gotra*.

After hearing the Land Officer's decision, Ram Das went to Dev Singh, the president of the *panchayat*. Ram explained that the decision was improper and threatened to file a lawsuit. Dev Singh knew that Ram Das was a member of his faction and that the *Rajput* who had captured the land was a member of the Jaswant Singh faction.<sup>194</sup> Dev Singh assured Ram Das that he would handle the situation. Dev Singh summoned the Registrar back to the village and ordered the recordation of the land as common. As president of the *panchayat*, he then ordered the offending *Rajput* to vacate the land and threatened that the *panchayat* would take legal action if he did not. Faced with these prospects, the *Rajput* relented and returned the captured land.

Other cases have been reported in which encroachment by landowners on common lands has successfully been reversed in the Collector's Court.<sup>195</sup> It is clear that in Kisanpur untouchable *jatis* have adopted revised attitudes based on their new legal and political rights. Traditionally, lower *jatis* would have little or no say in the operations of the village. *Bhangi* Ram Das' action, however, was in a sense grounded in tradition. Ram Das' right to a limited use of a certain piece of land is a

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192. The Registrar is known in English as well as in Hindi by the vernacular name *Lekhbal*.

193. The District Land Officer is known in English as well as in Hindi by the vernacular name *Tehsildar*.

194. It is unclear if Ram Das' patron had gone to see Dev Singh on Ram Das' behalf, or even if Ram Das had ever gone. We suspect that Ram Das may have taken credit for his patron's actions in order to impress us during the interview.

195. See *Gaon Sabha v. Hakim*, 1986 B.R. 95.

benefit concordant with traditional *jajmani* principles. Ram Das' relationship with his *jajman* patron proved crucial in his receipt of the benefit.

Cases 1 and 2 are better indications of the changes new legal rights have encouraged. The cases arose from the introduction of democratically elected village governments, from the legislative empowerment of those governments, and from caste reservation principles. The lower *jatis* felt entitled to these new rights and, as we will discuss further, there was even some inter-*jati* scheduled caste identification and solidarity. But even here change has been limited. In Case 1, *jati* unity worked to hold together the vote of the *Jatavs*. In Case 2, inter-*jati* cooperation between upper and lower *jatis* based upon unity of interest played an important role. The unity has weaknesses, however, as evidenced in one *Rajput* member switching from supporting his faction to supporting his *jati*-mate.

The establishment of new political rights has altered the balance of power in Kisanpur and holds great potential for future change. First, these new rights have helped to change how lower *jatis* perceive themselves. Second, they have created a system whereby politics can advance change for the benefit of the have-nots. The manipulation of factions in the village by lower *jatis* could improve not only the delivery of those services provided by the *panchayat* but all aspects of social and economic life in the village.

The *Jatavs* were willing to call in the police when they thought that they might lose the election through intimidation. Although we found no example in Kisanpur of election-related court filings, records in the local magistrate's office revealed numerous instances of court cases contesting allegedly unfair elections in other villages. Though each of the cases we examined appeared to have been filed by upper *jatis*, the cases demonstrate the potential for the *Jatavs* to remedy unfair election techniques (such as bribery or intimidation) through court action. As of this writing, however, the issues in Kisanpur politics appeared to be related to traditional social and economic relations as confronted by the institution of democracy and *panchayati raj*, and not of overtly illegal behavior.

In Case 3, the *Bhangi* Ram Das used the threat of legal action in making his case to the *panchayat* regarding the theft of common land. In the next section, we discuss in greater detail the use of courts and the changes brought about by this use. In our examination of village life, we discovered that the institution of courts, like the new political rights, has already effected substantial changes and that the have-nots have already begun to use the courts to their advantage. We will dis-

cuss some specific examples of court use, particularly among the lower-*jatis*. But it should be noted that the use of courts is only one part of the broader process of the adoption of new rights that include political participation as the most important component. In the cases described here, legal action is taken along with political action through traditional *jajmani* patron-client relations, through the harnessing of factionalism, or through the inter-*jati* solidarity. The development of politics and of court use constitute related parts of the changing dynamic that Westernization has instigated in village society.

*b. Courts, police, and the new rights*

i. The modern formal judicial structure<sup>196</sup>

India's move toward mass representational and interest group politics began in earnest in the twentieth century. The move to a British style common law court system, however, began much earlier.<sup>197</sup> The system changed dramatically from colonial judges enforcing *jati* rules and conventions<sup>198</sup> to a law that theoretically applied to all persons regardless of social or religious status.<sup>199</sup> Indians have flocked to the courts since colonial times, and this practice continues today.

India's common law system was imposed upon it in the eighteenth century by British colonial rulers who were eager to have a legal system that would maintain law and order and secure property rights. Parliament in London or the Governor General in Council enacted legislation. The highest court of appeal, the Judicial Committee of the Privy Council, was located in London. Courts were relatively few in number; steep ad valorem court fees discouraged their use for civil cases. Lower courts, which Indians increasingly controlled over time,

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196. Much of this section is taken directly from M. Galanter, R. Gordon, and J. Lindsay, Affidavit of Marc Galanter, In Re: Gas Disaster at Bhopal, India, MDL No. 626 (J.F.K.) Misc. No. 21-38 (S.D.N.Y. 1985) (Dec. 1985) [hereinafter Galanter Affidavit] (copy on file with the court and the authors) (summarizing both the British roots of the Indian judicial system and its modern form).

197. See M. JAIN, *supra* note 98 (providing a summary of the Indian legal system from the 1600s through the 1960s).

198. See Galanter Affidavit, *supra* note 196, at 11 (discussing the British system in India and its lack of concern for the needs of Indians).

199. See *id.* at 414-23 (summarizing the *Lex Loci* Act that asserted that English law should govern members outside the Hindu and Muslim communities). Specifically religious law, or at least law the British understood as "religious" at that time, was not immediately affected. *Id.* The Caste Disability Removal Act of 1850, however, abrogated the Hindu and Islamic requirement that converts to other religions forfeit their property. This began the secularization of the Indian legal system. *Id.* at 423.



were generally not trusted by the colonial appellate judges, who were almost always British. This resulted in provisions for the appeal of almost every lower court interim decision and order.<sup>200</sup> Executive officers exercised criminal jurisdiction, and juries were virtually eliminated.<sup>201</sup> After gaining independence, India adopted a democratic government at both the federal and state levels. The Supreme Court of India is now the highest court of appeal with remarkable original jurisdiction in certain areas involving the abridgement of fundamental rights.<sup>202</sup> Criminal jurisdiction has passed into judicial hands. The tradition of relatively few judges and courts, of high court fees, of frequent appeals, and of no juries, however, has remained. In many ways, its colonial precursor has profoundly influenced India's legal system.

Since the adoption of its independent Constitution in 1950, India has maintained a unified system of courts. At the apex is the Supreme Court, consisting of a Chief Justice and an authorized level of twenty-eight *puisne*, or associate judges. Burgeoning case loads have caused its expansion from seven judges in 1950 to its present size. In its early years the Court sat en banc, but it now sits in benches of two, three, five (in constitutional cases) and (extraordinarily) seven or more judges.

The Supreme Court is the highest appellate court in all matters of law. Its authority extends to state as well as central law. Its appellate jurisdiction extends to the state and federal territory high courts and through them to all inferior courts and all quasi-judicial tribunals.

Jurisdiction is exercised when a high court has certified that a case involves substantial questions of law of general importance; or, if such certification is refused, where the Supreme Court grants special leave to appeal. The Supreme Court has a limited but much used original jurisdiction under Article 32 of the constitution to issue writs to prevent violations of the constitution's chapter on fundamental rights. The Supreme Court justices are appointed by the President of India, which effectively means the federal cabinet in the Indian parliamentary system, in consultation with the Chief Justice. Traditionally, the most senior member of Court is selected as Chief Justice. Judges must retire at

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200. See Galanter Affidavit, *supra* note 196, at 20 citing Gledhill, *The Expansion of the Judicial Process in Republican India*, 8 INT'L & COMP. L.Q. 4, 13 (1964) (comparing British and Indian appellate procedures). The Indian lower courts generally only prepare a record of evidence so the appellate court serves as the first real step in the process. *Id.*

201. See M. JAIN, *supra* note 98, at 145 (discussing the British criminal justice system established in India).

202. See *id.* at 317-20 (discussing the very broad jurisdiction granted the Supreme Court under the new Constitution, especially in the area of fundamental rights).

age sixty-five.

There is no lower central (federal in American terminology) judiciary. Each state and the Union Territory of Delhi has a single judicial hierarchy with a high court at its head.<sup>203</sup> The high courts exercise an extensive jurisdiction to review the lower courts, and share with the Supreme Court under Article 226 of the Constitution an original jurisdiction to issue writs against violations of fundamental rights. Also under that Article, the high courts have jurisdiction to issue writs against violations of any right guaranteed under law.

The high courts, which vary in size from two judges to more than forty, sit as single judges, division benches of two judges or, occasionally, as Full Benches of three, five, or even seven or more judges. In some instances an appeal or a reference on a point of law is possible from a smaller to a larger bench of a high court.

Below the high courts are the district courts. These consist of district judges and include a chief judge, who is analogous to the American chief judges of federal district courts. These judges sit for civil cases in the "district" court and for criminal cases in the "sessions" court. Appeals, revision petitions, and references are sent from the district court to the high court.

Below the district courts are various judicial tribunals, such as, the collector's court (that hears land dispute issues), family and renters' courts, lower-level criminal magistrates, and various quasi-judicial tribunals. Appeals from these may go to the district court or directly to a high court. Judges of the district courts and of the lower judiciary are filled through competitive examination at the state level.

The doctrine of precedent, or *stare decisis* governs Indian courts, like those of other common law systems. Not only the narrow holding but the dicta of Supreme Court decisions bind the courts. The body of precedent consists of the decisions of the Supreme Court and of the high courts; in addition, certain other decisions are also reported, such as some decisions of the collector's court. Reporting is slow and often more than a year may elapse before a decision of even the Supreme

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203. The high courts themselves occupy a mixed status. The constitution discusses them under the heading of "the States," and various state governments and the Union Territory of Delhi appoint the staff and bear the administrative expenses. Judges are paid from the federal Consolidated Fund of India, and the President makes appointments in consultation with the Chief Justice of India and the chief justice of the particular high court. The central Parliament controls removal through impeachment. The central government can transfer judges from one high court to another. There are currently 18 high courts, one for each state, except that the far eastern states share a high court, as do Punjab and Haryana. The Union Territory of Delhi has had its own high court since 1966.

Court is widely available. In the Supreme Court and in the High Courts cases are argued, decided, and reported in English. In the subordinate courts and tribunals, evidence may be taken in English, in Hindi, or if the local language is not Hindi, in that local language.

Perhaps the most salient feature of the Indian legal system is its enormous backlog of cases and inability to cope adequately with problems of delay. Professor M. P. Jain, in his work *Outlines of Indian Legal History*, notes that: "the problem of law's delay has been a perennial problem in the Indian judicial sphere since the introduction of the Cornwallis code in 1793. It has engaged the attention of the government from time to time, but still it has defied solution."<sup>204</sup>

In 1964, the Indian Law Commission noted that "the appalling backlog of cases. . .has unfortunately become a normal feature of nearly all the courts in the country."<sup>205</sup> Fifteen years later, another Law Commission noted that "the problem has persisted" and has attained "gigantic proportions."<sup>206</sup> In 1985, the Supreme Court of India had pending some 15,017 constitutional cases and 25,062 non-constitutional cases, not including criminal cases. Roughly half of these criminal cases had entered the Supreme Court in or before 1981, approximately one quarter had entered the Court in or before 1978.<sup>207</sup> In the summer of 1985, a conference of chief justices of the high courts, chief ministers, and law ministers of the states addressed the problem of the mounting backlog, then estimated to equal over ten million pending cases throughout the Indian judicial system. The Agenda Notes, after recounting the last decade of proposals for reform concluded "unfortunately, there has been no perceptible improvement in the situation and the arrears are increasing steadily."<sup>208</sup>

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204. M. JAIN, *supra* note 98, at 254 (summarizing the historic and continuing problem of enormous backlog in Indian courts).

205. See Galanter Affidavit, *supra* note 196, at 22 (quoting LAW COMMISSION, 27TH REPORT, THE CODE OF CIVIL PROCEDURE, 1908, MINISTRY OF LAW 6 (1964)).

206. See *id.* (quoting LAW COMMISSION, 77TH REPORT, DELAY IN TRIAL COURTS, MINISTRY OF LAW 1 (1978)).

207. See Galanter Affidavit, *supra* note 196, at 24 (citing R. Dhavan, Materials on Judicial Backlogs in the Supreme Court of India 27-34 (July, 1985)) (discussing the enormity of the Supreme Court's backlog and summarizing the problems). Most of the cases came to the Supreme Court after spending many years in lower courts and tribunals and the total duration of the suits is often far greater than the period of their pendency in the Supreme Court.

208. Galanter Affidavit, *supra* note 196, at 22, F-1 (quoting from Agenda Notes from the Conference of Chief Justices of the High Courts, Chief Ministers, and Law Ministers (Aug. 31-Sept. 1, 1985) (copy on file with Prof. M. Galanter, University of Wisconsin School of Law, Madison, WI) (discussing the problems of backlog in the Indian legal system and summarizing the number of cases instituted, disposed of, and pending from 1950-1984).

The harmful results of such delays are obvious. In *L. Babu Ram v. Raghunathji*,<sup>209</sup> a suit instituted in 1950 and finally disposed of over twenty five years later, the Supreme Court observed that:

[a]t long last, the unfortunate and heroic saga of this litigation is coming to an end. It has witnessed a silver jubilee, thanks to our system of administration of justice and our callousness and indifference to any drastic reforms in it. Cases like this, which are not infrequent, should be sufficient to shock our social as well as judicial conscience and advise us to move swiftly in the direction of overhauling and restructuring the entire legal and judicial system.

Because final decisions are delayed for years, judicial cases are turning into prolonged battles of attrition. In such instances, those who have sufficient financial resources to fight a long judicial battle are naturally at a profound advantage.

There are numerous reasons for such delays. One is the paucity of courts relative to the population.<sup>210</sup> Another is that Indian judges work in the poorest facilities, with often poorly qualified staff, and with relatively low pay. In view of the poor facilities and staff, the disparity in the quantitative presence of courts is even greater than any numerical comparisons suggest.

The ingrained work habits and culture of lawyers make for an inefficient use of scarce judicial resources. Following the old English tradition, Indian lawyers normally make time-consuming oral arguments rather than presenting written motions and briefs. Even in the high courts and the Supreme Court, oral arguments on points of law, not fact, can go on for days, weeks, and even months. In trial courts, there is a tendency to over-prove both essential and inessential and to protract cross-examinations.<sup>211</sup> Part of the reason for this is the Indian Code of Civil Procedure does not provide for pretrial depositions. While provisions exist, for limited interrogatories, production and inspection of documents, and the securing of admissions, there is no provision for pretrial depositions, and they are unknown in Indian legal practice.<sup>212</sup>

209. *L. Babu Ram v. Raghunathji*, A.I.R. 1976 S.C. 1734, 1735.

210. See Galanter Affidavit, *supra* note 196, at 15-16, C-1 (discussing India's large population and relatively small number of judges). India has only 10.5 judges per million. Comparable figures for the United States are 107 per million, Canada 75.2 per million, and England and Wales 50.9 per million. *Id.*

211. *Id.* at 16 (citing U. BAXI, *THE CRIME OF THE INDIAN LEGAL SYSTEM* 74-75 (1982) (reviewing the problems with the Indian legal system).

212. INDIA CODE CIV. PROC. § 30, Order 11 (1908). Even here, the use of discovery is limited. Discovery is limited to parties, and does not extend to witnesses. Interrogatories "may not extend to the evidence wherewith the opposite party intends to support his case at the trial." *Jamaitrai v. Motilal*, 1960 A.I.R. (Cal.) 536, 537. The discovery of documents is confined to those "which do not themselves constitute exclusively the other party's evidence of his case or title." *M.L. Sethi v. R.P. Kapur*, 1972

Various Law Commissions have noted that even the limited forms of discovery provided for in the Code are rarely used. In 1973, the Law Commission noted that the Code provision for pretrial discovery is rarely used.<sup>213</sup> Nevertheless, in a recent consideration of trial delay, the Law Commission, while reiterating this observation, rejected proposals for enlargement of the provision for pretrial discovery.<sup>214</sup>

Indian civil procedure does not include any counterpart of the pretrial conference, nor is there usually any attempt by judges to engineer compromises or settlements among the parties.<sup>215</sup> The Supreme Court attempted to depart from tradition and negotiate a settlement in the Bhopal gas disaster case. Strong public reaction against the settlement and attempts to overturn it, however, may have negated any precedential value from the attempt.<sup>216</sup>

Cases are plagued with frequent adjournments and are normally heard only in fragments, with day to day hearings as the exception and interrupted hearings as the rule.<sup>217</sup> The constant fragmentation of professional effort is reflected in a district court bar of a study of that civil lawyers on the average appear in 14.3 court proceedings each day.<sup>218</sup> Superimposed on these delaying practices in the trial court are opportunities for a profusion of appeals. As the Law Commission noted in its 14th Report:

Since the early [eighteen hundred] seventies, the Indian legal system has met with the criticism that it permits a multiplicity of appeals causing enormous delays and costs. . . . There may be—and there, not infrequently, are—cases where the same matter may be given three or four or even five hearings. . . . Even the party emerging as the ultimate victor may find that he has achieved only a pyrrhic victory, for his unrecoverable costs may exceed the value of the judgment he has obtained. . . . [A] litigant today . . . can never know when his case will

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A.I.R. (S.C.) 2379, 2382. The difficulty of challenging the adequacy of the response of the party from whom discovery is sought further limits the discovery of documents. "If a party states in his affidavit . . . that he has no documents relating to the matters in question in the suit . . . his oath is conclusive." K. MULLA, *THE CODE OF CIVIL PROCEDURE* 508 (11th abr. & ed. 1982 Supp. 1985).

213. LAW COMMISSION, 54th REPORT 142 (1973).

214. LAW COMMISSION, 77th REPORT, Ministry of Law 16-17, 51 (1978).

215. There is a provision for the court to examine parties for purposes of framing issues. INDIA CODE CIV. PROC., § 30(a), Order 10, Rule 1 (1908). This technique, however, is rarely used. As V.R. Krishna Iyer, later a Supreme Court Justice and a former member of the Law Commission wrote, "(O)ur judiciary now views active promotion of settlement of disputes with unconcern and as even objectionable." V. KRISHNA IYER, *LAW AND THE PEOPLE, A COLLECTION OF ESSAYS* 137 (1972).

216. This was suggested by Mr. Michael Macy.

217. LAW COMMISSION, 14th REPORT, Reform of Judicial Administration: Ministry of Law 335 (1958) (discussing the constant interruption of most hearings).

218. J. GANDHI, *LAWYERS AND TOUTS: A STUDY IN THE SOCIOLOGY OF THE LEGAL PROFESSION* 89 (1982).

end.<sup>219</sup>

There are not only appeals of final decisions, but a profusion of opportunities for interlocutory appeal. A vast number of rulings and orders taken to higher tribunals can, given the state of arrears in the appellate judiciary, stay proceedings for years. A recent Supreme Court case lists some fifteen types of orders that have the requisite finality and are appealable.<sup>220</sup>

The Indian legal profession is a unified one, with a single set of qualifications for practicing in any court or engaging in any aspect of legal practice. Traditionally, however, most lawyers divide themselves into primarily civil or criminal practices. The Indian lawyer, particularly in rural settings, is primarily a courtroom advocate rather than an advisor, negotiator, planner, or investigator. Except for limited exceptions confined to large cities, lawyers practice on their own, though occasionally leading members of the bar take on a small number of juniors recently out of law school. Lawyers rarely employ specialized investigators or paralegals trained to conduct factual inquiries. The low priority given to fact-gathering and research is reflected in lawyers fee arrangements: lawyers typically charge their clients based on court appearance.

A number of entrenched features of Indian legal practice inhibit the use of whatever specialized expertise exists and discourages its cultivation. Contingent fees are not permitted, so that there is no way for lawyers to finance litigation for claimants who are unable to afford lawyer's fees. There are provisions for free legal assistance in each of India's states, but the amounts appropriated are tiny and rarely sufficient to compensate adequate counsel. State-sponsored legal aid programs, typically without staff lawyers of their own or back-up facilities, rely upon the same solo practitioners for delivery of legal services.<sup>221</sup> Bans on solicitation and advertising help to prevent an assembly of an appropriate set of related cases. The practice of awarding costs, including lawyer's fees, against the losing party also inhibits pioneering litigation. In this setting, there are few incentives to invest in developing any expertise in problems likely to affect the poor.

Juxtaposed against these numerous deficiencies are the remarkable

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219. LAW COMMISSION, 14TH REPORT, Reform of Judicial Administration: Ministry of Law 364 (1958). There is no indication that this situation has improved since the issuance of the report.

220. *Shah Babulal Khimji v. Jayaben*, 1981 A.I.R. (S.C.) 1786, 1817 (listing fifteen interlocutory orders appealable from a lower to a higher court).

221. See *infra* notes 363-64 and accompanying text (discussing the question of free legal aid).

accomplishments of the Indian courts. Unlike much of the third world, the Indian judicial system remains relatively independent and free from corruption, although some corruption apparently does exist, particularly in the lower judiciary.<sup>222</sup> Judges themselves appear relatively free from *jati* prejudice and take their neutral role seriously, particularly within the higher levels of the judiciary. In addition, the higher judiciary controls the lower judiciary through the close supervision of appeals. In general, the judiciary helps to preserve and extend the rule of law as enacted through democratic government. In addition, the judiciary acts as a potent check on governmental arbitrariness and protects the nascent democratic processes.

One of the most important developments of the Indian judicial system is the special jurisdiction of the Supreme Court, under Article 32 of the Constitution, and of the high courts, under Article 226, to issue writs, orders, and directions for the protection of fundamental rights. Parties are permitted to petition these courts directly to invalidate legislation or set aside an administrative order that contravenes a petitioner's fundamental rights. The courts have proven themselves willing to exercise this power and have struck down governmental action in numerous circumstances. One respected constitutional commentator notes that:

The Law Reports bear witness to the fact that legislative and executive interference with fundamental rights has been effectively checked by the courts. However, the Law Reports tell only a small part of the tale because for one case that goes to Court there are hundreds in which actions violating fundamental rights have been restrained by the knowledge that a cheap and effective remedy exists for their enforcement.<sup>223</sup>

The writ jurisdiction has proven extremely popular with litigants, and lawyers exercise considerable ingenuity to cast client's claims in the form of a writ. In addition, recent Supreme Court holdings have limited rules of standing for public interest cases. In fact, even a letter addressed to a court can act as a petition for redress of fundamental rights.<sup>224</sup> However, with a few exceptions, most notably involving the prohibitions against discrimination in public access on the basis of religion, race, caste or gender, against the practice of untouchability, and against bonded labor,<sup>225</sup> fundamental rights run only against the state.

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222. See our discussion in Case 6, at 728 (discussing the case of the *Rajput* Bandits who bribed a judge and were then found innocent).

223. H. SEERVAI, 1 CONSTITUTIONAL LAW OF INDIA 212 (3d ed. 1983).

224. See *infra* notes 317-21 and accompanying text (discussing the Indian courts' recent strides in accepting more public interest cases).

225. See Galanter Affidavit, *supra* note 196, at 14 (explaining that writs are used

In addition, because these petitions are admitted primarily on the basis of affidavits before what are essentially courts of appeal, it is often difficult to deal with substantial factual controversies. We will discuss the use of this type of legal action in greater length below when we address the role of public interest litigation.<sup>226</sup> In addition, under Article 226, the high courts may entertain petitions for writs or orders to prevent the violation of any rights of a petitioner as guaranteed under law. Again, these rights, with the above exceptions applicable to fundamental rights, normally only run against the state.

Despite its flaws, the Indian legal system has become an integral and important part of Indian society. Individuals from all walks of life continue to flock to the courts, and it is impossible to dismiss their importance.

## ii. The Indian legal system in village life

Scholars have disagreed on the extent to which courts, with their emphasis on equality of status, have been accepted by village society as a method of adjudicating disputes. At least in theory, neutral courts should provide an opportunity for the lower *jatis* to enforce their new rights in a forum not unaffected by their continued inferior status in village politics. Cohn has suggested that the continuing clash of values between village and court has encouraged Indians to use the courts to further and not solve disputes.<sup>227</sup> Mendelsohn has argued that the villagers' use of the legal process as a weapon against an opponent, rather than as a device to settle disputes, is due to the fact that the vast majority of legal cases involve land.<sup>228</sup> Courts were viewed as part of a larger administrative system dealing with vast complexities of land ownership and could not handle these issues in a simple, adjudicatory manner.<sup>229</sup> Other scholars have suggested that "lawyer's law" is ac-

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to protect the people's fundamental rights from government violation).

226. See *infra* notes 334-61 and accompanying text (discussing the use of petitions in public interest litigation).

227. See Mendelsohn, *The Pathology of the Indian Legal System*, 15 MOD. ASIAN STUD. 823, 824 (1981) (stating that Indian peasant society and British society had antagonistic methods of dispute resolution); Galanter, *The Displacement of Traditional Law in Modern India*, 24 J. OF SOC. ISSUES 65 (1968); Khare, *Indigenous Culture and Lawyer's Law in India*, 14 COMP. STUD. IN SOC. AND HIST. 71 (1972).

228. See Mendelsohn, *supra* note 227, at 842-50, 860 (discussing the clash of values between British policymakers and the Indian villagers over rights to land). According to Mendelsohn, most criminal cases, including trespass and assault, are also related to land disputes. O. Mendelsohn, Remarks Delivered to the Conference on the Career and Prospect of Law in India, University of Wisconsin-Madison (June 8, 1982).

229. See *id.* at 859 (summarizing Cohn as blaming the lack of acceptance of the courts on the difficulty of new land administration policies).



ceptable only in very limited circumstances where there is no deep conflict with traditional values.<sup>230</sup> For example, cases involving family disputes or ones where Hindu beliefs are paramount would remain within the traditional system.<sup>231</sup>

In Kisanpur, the most common types of lawsuits were those brought by the male offspring of large landowners, mostly *Rajputs* and *Jats*, involving the partition of land between them.<sup>232</sup> There are two types of partition battles: those involving inheritance and those involving land ceiling laws. Because there is no tradition of primogeniture in Hinduism, assets are divided up evenly among all male children upon the death of the father.<sup>233</sup> Traditionally, such divisions were simple, because families normally lived together and divided up the land's produce evenly. Because land ownership is now legally recorded and brothers may wish to leave the village, there is a greater interest in making certain that one's inheritance in the equal share of land is legally recorded. Major court disputes can arise over the relative size and quality of each brother's inheritance.<sup>234</sup>

Disputes centered on the land ceiling laws are a permutation of the inheritance partition battles. In Kisanpur, for example, the state government has set an ownership limit of a little over forty acres per family.<sup>235</sup> In order to stay under the limit and not forfeit land to the state,

230. See LAW COMMISSION 14TH REPORT, *supra* note 219.

231. Singh, *Legal Perceptions and Usages in North Indian Village Disputes*, 19 J. OF SOC. RES. 14, 26 (1976).

232. M. SHARMA, *supra* note 46, at 136-38. In the principal village of Professor Sharma's research, a lack of funds to pay lawyers prevented intra-*jati* disputes over land from going to court. She discovered that mediators or "big men" resolved these disputes. Only inter-*jati* disputes went to court. *Id.* This is not the case in Kisanpur. In one instance, a particularly litigious *Rajput* landowner had instituted over fifty lawsuits, almost all against his *Rajput* neighbors. While faction leaders often resolved intra-*jati* conflicts, conflicts involving land often went to court. Inter-factional conflicts almost always went to court.

233. See B. COHN, *supra* note 38, at 146-47 (discussing the frequency of disputes among brothers who inherit land). Traditionally, while men received land, women received *istridhun*, or bride wealth, upon marriage, usually in the form of jewelry. *Id.* The practice of *istridhun* is possibly the precursor to the spreading modern practice among most upper and middle-level *jatis* of the payment of *dahayj*, or dowry. *Id.* Unlike *istridhun*, which is the property of the woman, *dahayj* is in effect a groom-price paid to the parents of the groom, usually based on the earning potential of the future husband. *Id.* In modern times, women are legally entitled to an equal share of land, and the law prohibits the payment of *dahayi*. In an attempt to battle the practice of dowry, the Indian Supreme Court has recently held that *dahayj* is equivalent to *istridhun* and, thereby, converts into the property of the wife.

234. M. SHARMA, *supra* note 46, at 54. In her primary village of study, Sharma found that most court cases involved disputes with neighbors and not members of the same family. Rivals go to court, she concludes, while relatives or members of the same faction do not. *Id.*

235. U.P. Imposition of Ceiling on Land Holdings Act (1960) (Act 1 of 1961), §§

it often becomes necessary for the family to make a fictitious partition. These partitions often turn into bitter court battles.<sup>236</sup> Fictional divisions among relatives often become real as *de jure* transfers of land become *de facto* partitions.<sup>237</sup>

Another common form of legal action involves land disputes among neighbors. The often poor quality of surveying and the legal recording of land ownership serves as a basis for disagreement. A common example of land disputes is the subtle moving of irrigation barriers (often at night) onto neighboring pieces of land in an attempt to expand ownership. These claims frequently result in litigation. Because such actions usually involve *Rajputs* or *Jats*, these disputes may reinforce factional divisions or create new ones.<sup>238</sup>

At least among those upper *jatis* who own land, courts have become familiar allies in local power struggles. Almost all of these families have a passing acquaintance with the courts and view them as a manner of furthering their cause in a dispute. It is noteworthy that the focus of litigants is often less on the actual outcome of the lawsuit than may be the case in most Western countries.

One of the most important effects of legal process appears to be its usefulness in harassing one's opponents. As we noted in our discussion above, there is no provision in the judicial system for taking depositions outside of court. Due to adjournments and frequent appeals, most cases remain in trial for long periods of time, frequently months and even years. Continued court appearances over a period of months or years to give testimony is a very expensive, time-consuming, and degrading experience. Besides lengthy court battles, another powerful weapon, is the ability to secure interim orders and temporary injunctions. The effect

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3 & 5 (1961), § 4 (1961). A family of more than five members is allowed an additional eight acres per child, with a maximum of twenty-four acres extra. *Id.*

236. See O. Mendelsohn, *The Role of the Courts in the Failure of Indian Land Reform* 23 (June 1982) (unpublished manuscript on file with the authors) (paper presented at "The Career and Prospects of Law in Modern India" Conference, University of Wisconsin, Madison) (explaining that transfers of land to distant relatives, managers, temple keepers, etc. occurred in order to enable larger landholders to keep land).

237. V. GAIKWOD, *AGRICULTURAL DEVELOPMENT THROUGH COMMUNITY ACTION: SCOPE AND LIMITATIONS* (Indian Institute of Management Technical Report No. 98, 1975), cited in Vyas, *Changes in Land Ownership Pattern: Structural Change in Indian Agriculture*, in *PEASANTS IN HISTORY, ESSAYS IN HONOR OF DANIEL THORNER* 187 (E. Hobdbawn ed. 1980). Vyas notes that at the very least, land reform has prevented big owners from getting any bigger. *Id.* at 187-88.

238. In fact, we witnessed the creation of a new third faction when Jaswant Singh allegedly moved his irrigation ditch onto one of his neighbors' land. The neighbor, a member of Jaswant Singh's faction, was another *Rajput*. It is unclear whether this *Rajput* would eventually join the Dev Singh faction or not. As of this writing, he appears to be a faction unto himself.

of actual legal judgments (both interim and final) in these cases is less clear. In most instances, the mere threat of police action to enforce eviction seemed sufficient to end the dispute. The threat of police action also assisted the legal victor in negotiating a better compromise outside of the court. Criminal trespass could result in the actual arrest of an individual, a potentially terrifying and extremely embarrassing experience in India.<sup>239</sup> In addition, the ability of the victor to register land with the Land Office is important because only registered land can be effectively sold or used as collateral for a loan.

Within the village forum, *jati* status and *jati* solidarity continue to play a major role in determining outcomes of disputes. Thus, one might not expect a higher-*jati* member to bring a dispute with a lower-*jati* member to a neutral court that would not extend traditional respect to the higher-*jati*. One might, however, expect a lower-*jati* member to bring a dispute with a higher-*jati* member to a court. Unlike the traditional rules of *jati*, *jati* status or hierarchy theoretically do not affect the judicial system. The judicial system allows the lower *jatis* to enforce new legal rights and to present cases in a forum unconcerned with their inferior status in village politics. Factors determining court use include the lower-*jati* members' awareness of their legal rights and their wish to take advantage of them, whether they have the stamina to fight the case, the perceived degree of the court's neutrality, and the effect that legal action might have on furthering the lower-*jati* member's claim versus some alternative form of action.

#### Case 4: The Road

A road has always existed from the village proper, past the small colony of *Jatav* families, toward the principal metalled road. During land consolidation,<sup>240</sup> the Land Officer recorded that the land under the road actually belonged to a neighboring *Rajput*. The Land Officer, however, then recorded that the road itself lay through some land belonging to one of the *Jatavs*. The *Rajput* started to construct the road through the *Jatav* property and to cultivate the actual road.<sup>241</sup>

The *Jatav*, who owned the property through which the new road lay,

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239. See *infra* notes 256-60 and accompanying text (discussing the impact of police action).

240. See *infra* notes 245-46 and accompanying text (discussing land consolidation and a case arising from it).

241. According to the *Jatav* informants, the *Rajput* paid the Land Officer to change the records, but we could find no one to confirm this part of the story. Furthermore, the informants did not offer a convincing explanation as to how they knew that the Land Officer had received a bribe.

went to see a *Bania* lawyer in a nearby town. Soon afterward, the *Bania* referred the case to another *Jatav* lawyer. The *Jatav* lawyer and the landowner then apparently went to see the Land Officer, but he refused to see them. It is not clear if he asked for a bribe or simply refused to talk to them.

The two then went to see the Sub-Divisional Magistrate (S.D.M.), a member of the state administrative service who oversees all local civil affairs, including the police. The S.D.M., who was also a *Rajput*, agreed to come to the village to make an investigation. While there, he visited the *Rajput* who claimed title to the land where the road had been. The *Rajput* landowner knew a *jati*-mate, who had a prostitution business, in the same market town as the location of the S.D.M.'s office.<sup>242</sup> The *jati*-mate sent a prostitute to see the S.D.M.<sup>243</sup> and she spent three or four days with him. The S.D.M. then refused to act on the case.

The two *Jatavs*, landowner and lawyer, then went to see the Collector, who is the chief local tax official, the direct superior of the Land Officer, and the presiding officer of the Land Court. Although the Collector did not send someone out to see the village, the same prostitute was sent to the Collector for a period of four days. The Collector then also refused to act on the case.<sup>244</sup> The lawyer never filed a formal case before the Collector's Court. As the lawyer stated: "What would be the point? We have no money to fight a court case."

The frustrations the *Jatav* litigant encountered in Case 4—a lack of resources to follow through on a legal challenge and a feeling that the upper-*jatis* easily manipulated outside authorities—were not atypical of the stories related to us when we raised the question of the use of courts. Perhaps this elaborate tale of prostitutes and the Collector is somewhat apocryphal, but these stories shape village attitudes even if they are exaggerated. Nonetheless, existing side by side with this frequently expressed cynicism about the value of pursuing legal strategies is a countervailing perception that lower *jatis* can benefit from the court system. Those who most effectively articulated the frustrations simultaneously expressed this belief. The following case illustrates the

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242. The relationship between the two *Rajputs* was not clear, but they apparently were not relatives.

243. A number of *Jatavs* insisted that the woman was not a prostitute, but simply the daughter of the *jati*-mate.

244. We have some doubt about the prostitute visiting the Collector. The *Jatav* relating the story seemed embarrassed that he never actually filed a case before the Collector's Court. He may have embellished the story to show that he did not file a case because of lack of money and corruption in the system.

persistence of this belief.

#### Case 5: The Capture of Consolidation Land

This case involved capture of certain lands by several *Rajput* families after the completion of land consolidation. Consolidation is a statutory program that reconfigures property ownership so that landowners no longer have numerous, noncontiguous pieces of land. In return for their old and scattered properties, landowners received new, undivided lands equal in agricultural output to their original holdings. The purpose of consolidation is to make cultivation more efficient, and to pave the way for mechanization. Because of the increased efficiency and contemplated enforcement of land ceiling legislation, consolidation usually results in a small surplus of land after the reassignment of all prior holdings. According to the statute, the Registrar is supposed to distribute the surplus land to landless villagers, beginning with the scheduled castes.<sup>245</sup>

During Jaswant Singh's tenure as president, a number of his relatives received title to the surplus land. Jaswant Singh directed the Registrar, who was from the same *jati* and *gotra*, to record title in the names of his relatives, who apparently also paid the Registrar hefty bribes.<sup>246</sup> These transfers involved a significant amount of land and a number of *Rajput* families benefited.

Krishna Singh, the leader of the Kisanpur *Jatavs*, heard about the statutory distribution scheme for scheduled castes from a *Jatav* lawyer in a nearby town. Krishna Singh knew of the numerous court cases involving land partition among the upper *jati* landowners. In addition, he had previously spent three years in Delhi working as a brick kiln worker. In Delhi, he participated in litigation concerning back pay due to kiln workers under the state minimum wage act. A Delhi *Jatav* lawyer prosecuted the litigation, taken on behalf of all kiln workers, most of whom were scheduled caste members from different *jatis*. The case succeeded and Krishna Singh and his fellow workers received a substantial financial settlement. Krishna Singh felt that a court case might force the *Rajput* land grabbers to return the land and force the *panchayat* to distribute it to the scheduled castes in the village. He organized a committee,<sup>247</sup> including members from each of the other

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245. See U.P. Consolidation of Holdings Act, Rule 24A (outlining the rules for land distribution and the permissible uses for reserved land).

246. This is the same Registrar as in Case 3.

247. Although they normally used the English word "committee", occasionally they also used the word *panchayat*, possibly suggesting that the committee was like a *panchayat* for the "scheduled castes." This also suggests that some may have thought

scheduled caste *jatis*, to fight the case.

The majority *Jatavs* decided at a *jati panchayat* to support the suit. The other scheduled caste *jatis* failed to reach an unanimous decision. A small number of families split on factional lines and declined to become involved while others decided to support the committee even though they had ties to patrons associated with Jaswant Singh's faction. The committee collected a small amount of money from each family and engaged a local *Jatav* lawyer to prosecute the case. The *Jatav* lawyer filed suit before the District Magistrate, who ordered the Registrar and the District Land Officer to conduct an investigation and report back to him. The Registrar arrived in the village and went directly to see Jaswant Singh, the president, who had made the initial arrangements to register the land in his name. The Registrar agreed to drop the investigation.

Shortly thereafter, one of the *Rajputs*, who received some land, stopped Krishna Singh on the road and threatened to kill him if he did not stop the lawsuit. After learning of this threat, the committee decided to wait. They did not go to the police because they feared that the police would only go to the president, who would send them away. In the next election for president of the *panchayat*, the committee decided to support Dev Singh, who ultimately won the election. Krishna Singh then went to Dev Singh and asked for his help. Dev Singh said that he would not oppose the filing of the case or the decision of the court.<sup>248</sup> The case is still in litigation but the committee is no longer afraid to summon the police. The committee has vowed to fight the case as long as they can afford to do so.

As our discussions with the committee continued, we noted a substantial interest among the scheduled castes in working together to use the courts to advance their collective interests. The scheduled castes are in Kisanpur surprisingly aware of their constitutional and legislative rights and have an interest in learning more.<sup>249</sup> Scheduled caste leaders clearly understood the importance of courts in village land disputes; we often heard stories concerning legal battles among the upper *jatis* from

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of the "scheduled castes" as constituting a new type of *jati*.

248. At this moment, Krishna Singh approached both the member of the Legislative Assembly [M.L.A.] and Member of Parliament [M.P.] from their constituency for help. Because both were reserved constituencies and *Jatavs*, Krishna Singh expected some help. The M.L.A., however, and the *Rajputs* became friends after the election and would not do anything except refer the case back to the Magistrate. They received an encouraging letter from their M.P., but no offer of help.

249. D. KHOSLA, MYTH AND REALITY OF THE PROTECTION OF CIVIL RIGHTS LAW: A CASE STUDY OF UNTOUCHABILITY IN RURAL INDIA (1987) (discussing how legal information is communicated in a village).

lower *jati* faction members. Krishna Singh's experience with the brick kiln lawsuit impressed upon him and others the advantages of working together and the potential power of the courts. Not surprisingly, some skepticism existed about the outcome of the consolidation case and about the final effects of a positive judgment. One *Jatav* stated that "the new president is going along with [the Court petition] because it is harassing a member of the opposing faction. But if anything ever comes of it, then the facts will disappear and the *Thakurs* will stand together against the scheduled castes, so nothing will come of it." Nevertheless, most scheduled caste members accepted the courts as an effective tool in furthering the interests of the lower *jatis*.

The committee also informed us that it planned to file a case in the Collectors Court regarding a parcel of land for a scheduled caste colony. The land consolidation legislation provided for some land to be set aside for untouchable housing. The committee formally requested the *panchayat* to set aside the necessary land for a new colony, and it planned to petition the government for the necessary loans to build the houses.<sup>250</sup> The president replied that some land had been set aside, near the small and heavily polluted pond in the back of the village. Krishna Singh explained, however, that the land "is unhealthy; it floods all the time and is dirty. And, anyway, the local *Rajputs* have captured it." Apparently, some land near the *Jatav* colony was considered, but the committee decided that it would split up communities represented by the committee and would be unsafe because of exposure. The committee planned to file a suit in the Collector's Court, but it lacked money at that time to pay a lawyer.

We repeatedly asked other members of the scheduled caste community if they planned to make greater use of the courts. Although some complained about the poor quality of lawyers, the length of legal proceedings, and the difficulty of enforcing judgments, they agreed with near unanimity that they would make further use of the courts. In fact, the substantial delays involved in court litigation, plus the necessity of repeatedly travelling to court over long periods of time, did not seem to bother the members of the committee. The committee did not perceive of the time and expense involved in travelling to court as a problem because of cooperation among members and the high level of underemployment. The committee believed that the defendants have a greater burden because they lose time and prestige in repeatedly attending

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250. Provided under the Integrated Rural Development Programme. See *infra* notes 279-86 and accompanying text (outlining the government assistance program for rural development).

hearings to dispute a claim that a lower *jati* instituted. When we asked about the problem of delay, the committee members noted that this annoyed them, but not enough to prevent them from fighting the case. Once again, members noted that dragging the defendants into court is a part of the battle. Everyone agreed that the only major problem is finding enough money to pay the lawyer. We asked about petitioning the court for legal aid money to pay their lawyer and they professed complete ignorance of such a possibility. If they could find such funding, they said, they would certainly use it.

The lack of expertise among lawyers in the area of litigating lower *jati* rights presented another problem. Though the lawyer in the case brought by the committee belonged to a scheduled caste and knew of the general law regarding the rights of the lower *jatis*, he had no experience litigating this type of case. We interviewed the lawyer, and though he clearly had some expertise in land cases in general, he had little in this particular area. He hoped to turn to other scheduled caste lawyers for assistance, but discovered that no one in the local bar had any experience. He did not know where to turn for help in preparing the case. We also asked him about filing a writ petition in the High Court to secure an injunction against the *panchayat* requiring the creation of a scheduled caste colony. He stated that a writ petition is improper because the issue of whether the proposed sight is unhealthy is a factual issue and the trip to the high court to file the petition is expensive. We questioned the lawyer about the problem of delays, particularly in the High Court. He concluded that not many issues are appealed because of the expense of taking a question to the High Court. The lawyer acknowledged that only very big cases are appealed to the High Court, but that if the opposing party files an appeal, he would consider taking some action. He noted that he had a relative, meaning a *jati-mate*, who had a High Court practice and who could handle any necessary appeal. He conceded that an appeal consumes a great deal of time and money. The lawyer speculated that the opposing lawyer would also probably have a relative in the High Court. He also noted that delays are fairly minor in the Collector's Court and related to constant adjournments, but that they do not go on indefinitely as they do in the High Court. We also asked the lawyer about using legal aid funds to fight the committee's cases. He replied that these funds are so limited that they accomplish very little and are quickly depleted. He noted that he would receive the small amount of Rs.12 per court appearance, which was "nothing at all."

The fear of upper *jati* retaliation for filing court cases varied from one community to the next. Unlike the scheduled caste members, who



live in the heart of the village, the *Jatav* residents of the colony reacted negatively to the idea of free legal aid. They said that because of their vulnerability to physical attack, prosecuting cases would incite violence against them.<sup>251</sup>

Of great importance is the use of *jati* networks to transfer information regarding legal rights and to find lawyers to fight those cases in courts. The *Jatav* lawyer, who prosecuted the case for the committee, entered law school under a reservation plan. He admitted that his admission as a member of the bar was partially due to scheduled caste reservations and scholarships. Although the *Jatav* lawyer only had minimal skills and was not particularly eager to spend time on the case, it is clear that the committee members felt more comfortable in approaching him simply because he belonged to the scheduled castes.<sup>252</sup> In addition, he often communicated with other scheduled caste lawyers and noted that he would use this connection to secure assistance whenever he could.

Any appraisal of the have-nots' use of courts must consider the relationship of the have-nots and the larger community with the Indian police, the supposed enforcers of legal judgments. The Indian police are noted primarily for their high level of corruption, their use of impermissible force, and their repeated violations of civil and human rights.<sup>253</sup> Numerous studies reveal that poor villagers rarely turn to the police for assistance because of the fear that the police will always side with those who pay them the most. In some areas, most notably certain districts in Bihar, the local police are little more than private armies of the landed.<sup>254</sup>

The upper *jatis*' ultimate sanction against the lower *jatis* is physical intimidation and violence. The criminal justice system should act to protect those who are subjected to physical coercion. The Protection of

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251. One of these *Jatavs* noted that the *panchayat* offered to purchase land for the scheduled caste colony, but no one would move to this site because of its dangerous nature, even if the land was free.

252. In fact, the attorney ignored the case until we and Dean Rekhi of the Aligarh Law School interviewed him. After the second interview, where Dean Rekhi suggested that the attorney failed to pursue the case with the vigor required of a member of the bar, he apparently did some actual legal research and filed numerous motions with the Collector. As of our last examination, he is pursuing the case with a renewed vigor.

253. See Bayley, *The Police and Political Order in India*, 23 *ASIAN SURV.* 484 (1983) (discussing the increased political activity of the police force and its ability to exercise power in Indian society for its benefit).

254. See Ahmed, *Private Armies*, *INDIA TODAY*, Mar. 15, 1984, at 72 (noting that landlord's private armies often threaten and kill extremists in order to maintain the landlord's dominance); Ahmed, *Armies of the Night*, *INDIA TODAY*, Jan. 15, 1986, at 76, 77 (discussing the attacks of private armies on extremist and innocent villagers).

Civil Liberties Act is theoretically designed to facilitate the scheduled castes' use of the criminal justice system's protection.<sup>255</sup> Some police have filed occasional cases under civil rights acts, in an attempt to help scheduled caste members.<sup>256</sup> However, these cases rarely deter the upper castes' use of physical assaults and social boycotts; they may actually increase the frequency of such incidents. Even the police themselves are subject to attack.<sup>257</sup> Of course, the alleged corruption of many members of the police and their simple physical inability to control or coerce powerful lawbreakers greatly diminish the practical importance of court decrees. Victories to the landless in court may result only in further violence against them at home.<sup>258</sup>

Scheduled caste informants in Kisanpur stated that they would rarely summon the police. "They just come and have tea with the *Thakurs*, take some money from them and go," stated Krishna Singh. This statement referred to the visit of the police during the vice-presidential election described in Case #2.<sup>259</sup> Others said that the police would only come and threaten to beat them up if they did not pay a bribe.

The antipolice sentiment extended to the upper *jatis* as well. Jaswant Singh, the former president who exercised considerable influence with the police, noted that "they are all corrupt. They only take your money." In fact, we found no one in the village willing to say anything positive about the police, and only on rare occasions did anyone call them to the village. According to Krishna Singh, only in cases such as murder or threat of death would they summon the police because of necessity.<sup>260</sup>

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255. See Protection of Civil Liberties Act [originally entitled the Untouchability (Offenses) Act (Act 22 of 1955)] (creating a means of protecting untouchables and members of lower castes from discrimination in public places).

256. See Kannabiran, *Scheduled Castes: Who's Afraid of the Law?*, 19 *ECON. & POL. WEEKLY* 930 (1984) (discussing the violence and rioting that result from the lower caste members' attempt to enforce their rights through the police and the courts).

257. See Joshi, *Whose Law, Whose Order: "Untouchables," Social Violence, and the State in India*, 22 *ASIAN SURV.* 676, 679 (1982) (discussing a group of villagers' attack on two constables summoned to restore order).

258. See *id.* at 678 (recounting that after a group of sharecroppers won a lawsuit against their landlord for illegal eviction, a mob attacked their huts and killed four sharecroppers).

259. See *supra* notes 189-96 (discussing the vice-president's election case).

260. Krishna Singh explained that the case of the vice-presidential election was different, because the general publicity given to the elections would reduce the chance that the police would act violently.

Case 6: The *Rajput* Bandits

Some difficulty arose between one *Rajput* family, made up of relatively passive members of the Jaswant Singh faction, and one of the landowning *Jatav* families, who lived in the separate *Jatav* colony. One member of the *Rajput* family stopped a *Jatav* and scolded him for dressing like a *Rajput* and for not giving the *Rajputs* enough respect. Later, one of the *Rajputs* approached this *Jatav* and demanded that he sell the *Rajput* his land. The *Jatav* refused.

Some time later, ten or twelve *Rajputs* dressed as bandits. The group of bandits included the man who had earlier tried to buy the land and most of the others came from a neighboring village. They assaulted some of the *Jatavs*, including the man who refused to sell his land, and caused minor damage to a few homes. The *Jatavs* who were assaulted went to the local police headquarters and filed a First Information Report. They included in the report the names of the *Rajputs* from Kisanpur.

Soon afterward, a number of *Rajputs*, including four from Kisanpur and two of their relatives from a nearby village, staged another attack on the colony. During the attack, one of the bandits shot and killed the son of the man who had refused to sell his land. The father went with some other residents of the colony to file another First Information Report at the police station. They gave the exact identity of the assailants, and accused them of murder.

The police returned to the village. They bypassed the village president because of the case's importance and went straight to see the family of the dead *Jatav*. The family directed them to the houses of the *Rajput* bandits. All four were in hiding somewhere outside the village. Instead of arresting anyone, the police confiscated as much property as they could find and one of them assaulted the pregnant wife of one of the *Rajputs*. One week later, the four *Rajputs* went to the judicial magistrate to proclaim their innocence. They hoped that, with the payment of a bribe, they could collect their property and return home. Instead, the magistrate ordered the immediate arrest of the four *Rajputs*. The police had already arrested two others from a neighboring village, charged them with murder, and set bail at a very high amount. It took over two months for the families of the *Rajputs* to raise enough bail money for release. Apparently some *Rajput* members of the Jaswant Singh faction contributed to the fund, but not very much.

While the *Rajputs* were still in jail, a group of around sixty *Rajputs* surrounded the *Jatav* colony and demanded that the charges be

dropped. After a short period of time they left. The *Rajputs* did not attack, said one of the *Jatavs*, because an attack would look bad to any judge who would try the criminal case. Also, many of the *Rajputs* had had complaints registered against them already and were in danger of becoming classified as habitual criminals under Section 10 of the Criminal Procedure Code. Classification as a "number 10" increases one's vulnerability to police harassment. One *Rajput*, who belonged to the Jaswant Singh faction but who did not directly participate in the attack, said that the group was gaining a reputation as "a bunch of bandits" bringing dishonor on the *Rajput* community. The community placed pressure on them to stop.

The *Jatavs*, distrusting the competence of the government prosecutor, hired their own lawyer for a private criminal prosecution of the *Rajputs*. They settled on one of the best lawyers in the District Court Bar, who would charge them a substantial amount of money. As soon as they learned of the private prosecution arrangement, the *Rajput* defendants managed to hire the attorney first. The *Jatavs* abandoned the idea of a private prosecution.

The murder trial lasted a few weeks. Toward the end of the trial, the judge's clerk approached the defendants and asked for a bribe of over Rs. 100,000. The judge found the defendants innocent after they paid the bribe. Although they were freed, the defendants were financially insolvent after paying for both the expensive lawyer and the bribe. They were forced to sell all of their land and are now working as agricultural laborers. The family of the murdered *Jatav*, fearing future harassment, sold its land and moved to Delhi.

The first and most obvious aspect of this case is the vulnerability of the lower *jatis* to physical intimidation. Perhaps, more importantly, is the deeply flawed fashion in which the courts and the police "punished" the bandits. It is true that the *Jatavs* suffered great damage and were forced to leave the village. It is also true that the *Rajput* bandits bribed their way out of a hanging.

The system, however, still imposed substantial punishment on the bandits. First, a social stigma attached to their illegal behavior. While the harassment of the *Jatavs* was initially deemed acceptable, the repeated conflict with the courts and police became an embarrassment and a blot on the honor of the *Rajput jati*. Second, the police, who often act in a lawless manner themselves, directed their hostility toward the *Rajputs* in this instance. Possible reasons for this police behavior include the relative severity of the crime, the magistrate paying greater attention to police actions, and an opportunity to keep a percentage of

the *Rajput's* property seized during the police visit.<sup>261</sup>

We were also told a number of other personal stories involving the police, mostly concerning matters relating to marriage and adultery. In these instances, fights between rivals resulted in disturbances big enough for the president to call in the police. Apparently, police presence acted as an effective deterrent to these disturbances because the police normally demanded bribes from both parties with the threat of arresting the party who did not pay. Presumably, police corruption targets the more powerful and wealthy members of the community who own money and property that the police can confiscate. In some ways, the poor are judgment proof. It also means that the poor are less capable of bribing the police to do their bidding. Thus, poverty and wealth can cut both ways in such cases.

First, although the judge accepted a bribe and dismissed the charges against the bandits, the substantial bribe destroyed the perpetrators financially. We interviewed a large number of lawyers in Krishnapur about the prevalence of bribes in judicial cases. They did not consider bribery a problem in the courts, although the lowest-level magistrates allegedly accept bribes in petty cases. In general, they reported, a judge would only take bribes prior to transfer to a different jurisdiction and any judge known to accept bribes forfeits any chance for advancement. In addition, the lawyers noted that judges would accept bribes only in close cases. This is due, in part, to the appellate courts' relative liberty in overturning trial court findings of fact. A holding clearly contrary to the evidence would be appealed and likely reversed, not only invalidating the effect of the bribe but embarrassing the judge. One lawyer noted that the more the equities against the defendant the higher the bribe. The higher the bribe, the greater the indirect form of a "fine."

Although this system is hardly perfect justice, or even rough justice, it is still better than no justice at all. In its own way, it can advance the cause of the weaker over the stronger. The *Jatavs* in Case 6 understood the benefits of hiring a lawyer for a private criminal prosecution. A number of lawyers pointed out that the victim's successful hiring of counsel often acts to manipulate the system for the benefit of the

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261. There was another story, which we could not verify sufficiently to be reasonably certain what happened, that involved the murder-for-hire of one *Rajput* by a *Bhangi*. The *Bhangi* had been paid to kill the *Rajput* by his patron, with whom he had a dispute over some land. The *Bhangi* had originally been arrested by the police, who had beaten him until he had admitted that he had been paid by the *Rajput* to commit the murder. The *Rajput* was then arrested and was hanged. The *Bhangi* only served a few years in prison, and was then released. We spoke with the *Bhangi* involved, who admitted that he had served in jail for a murder-for-hire, but would not discuss any other facts, which had been told to us by others not directly involved.

weaker. This occurs even when the public prosecutor already agrees to pursue the case and a private criminal prosecution is not technically necessary. Such legal representation for the victim can monitor the progress of the prosecution and force the government to move quickly and effectively. In addition, the monitoring of the case, combined with the threat of instituting a private prosecution, can act as a kind of "corruption management."

As may be seen, the courts and police may advance the agenda of the have-nots in a number of important spheres. The legal system has preserved and advanced a number of the new rights. In the political sphere, these rights are in the area of land use and land entitlements and protection against physical intimidation. In each of these areas, the have-nots in Kisanpur knew of the potential effectiveness of legal institutions in advancing these causes. Often the legal system served merely as a tool, an adjunct to either the old politics of *jajmani* patron-client or to the new politics of democracy and factionalism. The legal system did not replace action in these spheres, it enhanced it. The courts and police did not appear as alien imposed institutions, but rather as tools available to fight to improve one's situation. These legal institutions, perhaps as (albeit imperfect) instruments of a more egalitarian order or perhaps as an imperfect expression of a relatively nonhierarchical ideology, appear to foster intra-*jati* cooperation among the poor.

For the upper *jatis*, the courts remain an important forum for advancing various disputes among themselves. The legitimacy the upper *jatis* attach to the courts in such disputes helps to protect the legitimacy of the courts when they take the side of the lower *jatis* against the upper *jatis*. However, if the courts were to become more of a menace by advancing the cause of the lower *jatis* against the upper, they might overall lose a greater part of their legitimacy. The more the courts are successful in helping the have-nots, the less legitimate they may seem in the eyes of the haves.

Numerous problems exist for the poor in using the legal system, the most notable of which is a lack of funds to fight cases. A second problem is the lack of expertise in fighting cases by scheduled caste lawyers. These problems, however, are not unsolvable. In fact, a well designed legal aid program may reduce them substantially.<sup>262</sup> The basic legal set-up, as currently in effect in Kisanpur, clearly suggests that the courts do currently play a role in mitigating the lot of the have-nots. Although the legal system has been embraced in the areas of politics,

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262. See *infra* pages 769-72 (discussing a proposal to provide legal aid to disadvantaged people in rural areas).

land, and in certain instances, physical protection, it is not used in advancing other new rights, mainly economic entitlements to the poor. These entitlements, that we shall discuss in the context of economic change in the village, constitute some of the most important benefits available to the have-nots. The potential for use of the legal system in improving access to these benefits as well, though in Kisanpur yet untapped, appears substantial.

c. *Economic change*

i. Changes within the village

Land ownership is the most important determinant of power and independence in village India. Patterns of land ownership continue to change with the most important changes involving partition. Although far from effecting a major redistribution, land reform efforts have destabilized unity and furthered factionalism among property holders. This has provided opportunities for the lower *jatis* to form new, and often fruitful, political alliances. In addition, some actual redistribution has taken place.

In Kisanpur, the government recorded the transfer of approximately twenty hectares from landowning *jatis* through the abolition of *zamindari* or through consolidation. The government added half of the recovered land to the village commons. Though mostly land of bad quality, this common land was not insignificant. The few family recipients of redistributed land (one acre or so on the average)<sup>263</sup> noted that, at the very least, the land provided a place to store crops or to defecate. One *Bhangi*, who received about an acre, commented that any amount of land is "helpful for something." As demonstrated in Case 5 any enlargement of common lands helps the landless become less dependent. Each lower-*jati* member whom we interviewed agreed that any successful efforts to claim land for the use of the landless is worthwhile.

For those who own land, the securing of necessary inputs, fertilizer, water, and seeds can greatly increase yields. The government instituted programs to help improve farm productivity with combinations of loans and grants for farmers in general, and for backward and scheduled castes in particular. The benefits of the Green Revolution are not restricted to large landowners.<sup>264</sup>

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263. 2 REPORT OF THE COMMISSION FOR SCHEDULED CASTES AND SCHEDULED TRIBES 34 (1980) (noting that the government reports one to two acres, on average, in U.P.) [hereinafter R.C.S.C.S.T.].

264. See *infra* notes 279-81 and accompanying text (explaining the types of governmental assistance and the agencies that coordinate rural development efforts).

While some continue their *jati* tasks, the advent of new modes of technology and the presence of nearby bazaars and services outside the village system suggest that many *jati* traditional activities will become increasingly less economically viable.<sup>265</sup> Some *jatis* will adapt—the *Barhais* or carpenters, for example, purchased more modern tools, and the *Baghailis*, the animal herders, plan to purchase a truck. The advent of a modern market economy is unlikely to affect the employment of those *jatis* with more distinctly religious functions. For the vast majority of the lower *jatis*, however, daily survival means working for the landed. Most of the land poor or landless work not within the *jajmani* relationship, but either as contract laborers or as wage laborers.<sup>266</sup>

Contract labor is like sharecropping.<sup>267</sup> A group of laborers contract to farm a section of a larger landholder's property in return for a share of the harvest. Contract labor accounted for less than ten percent of all labor in Kisanpur and is declining, primarily due to the shrinking number of large farms. Most landholders hired wage laborers who were paid daily in kind, which could be exchanged for cash at any one of the village shops. The supply and demand of labor at particular time determined wages. Unlike contract laborers, wage laborers did not tend to work for any particular or repeat employer; they simply work where help is wanted.

There are two basic crop seasons in Northern India, with a third in areas with substantial irrigation. Demand for labor depends on the season. During planting and harvest times, which last for about ten to twelve weeks every year, there is a shortage of labor.<sup>268</sup> Wages may rise to Rs. 15 to 16 per day at the height of harvesting and fall to half that amount during slack periods. This is particularly true in Kisanpur, where Green Revolution technology increases both the productivity of the land and the amount of labor needed to fertilize, tend, and harvest

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265. See M. SHARMA, *supra* note 46, at 74-75 (discussing the effects of various social and technological changes on the *jati* culture).

266. As suggested above, traditional *jati* labors can sometimes turn into profitable village handicraft industries, particularly if modern technology is used. Traditional *jati* work can extend beyond the village. A number of *Jatavs* from the district have become very wealthy shoemakers, with factories in the neighboring town. Due to the stigma attached to technology, competition in this business sector may have been relatively less.

267. See U.P. Zamindari Abolition and Land Reforms Act of 1950 (noting that sharecropping is prohibited in Utter Pradesh). This labor use system is described as a contract between the land owner and the contractor. The contractor hires laborers and pays them for their work, and receives a fee based upon the laborers' productivity.

268. These shortages are reduced during a prolonged drought, such as the drought that affected the 1987-88 *kahrif* and *rabbi* crops.



the crops.<sup>269</sup>

During the off-season, owners offer use of their land for fodder, storage, or as a source of building mud. They also offer loans of food or money. Wage laborers are caught in a difficult bind. If wage laborers become tied to a particular owner during the harvest months, it reduces their ability to command the highest wages possible. Laborers often, however, must turn to employers for help during the slack season. They need the use of the owner's land for themselves and for their animals because common land is so sparse. In particular, medical emergencies and weddings require large sums of cash and are often impossible to avoid. In many villages, local moneylenders charge high rates of interest for such loans. In Kisanpur, the local *Banias* (merchants) charged an average of 20% to 25% over the rate of inflation. Apparently these high interest rates drove borrowers away very few people turned to local money lenders. Instead, people turned to their employers, their patrons, or occasionally, their faction members or relatives. In return for lending money at low or no interest rates, landowners required the borrower to work for them during the periods of slack labor until the debt was paid off.<sup>270</sup>

Although we discovered an extensive knowledge about legal rights among many lower *jatis*, especially among the scheduled castes, they demonstrated no awareness of minimum wage law. Under both federal and state law, a committee is empowered to set minimum wage stan-

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269. See B. DASGUPTA, VILLAGE SOCIETY AND LABOUR USE 65 (1977) (discussing the effects of irrigation on labor demand). The effects of Green Revolution technology on labor use are disputed. Because farmers owned relatively small landholdings, little use existed for tractors in Kisanpur. Over the course of the revolution, the use of high-yielding crops, fertilizer, and pesticides increased and required more labor than the old low-yielding varieties. In addition, irrigation increased double cropping. *Id.* These factors, when taken together, seem to result in increased labor demands. *Id.* at 65-74 (providing charts that illustrate the relationship between labor demand and irrigation). Increased farm incomes resulted in greater education for the sons of larger landowners, thereby, increasing the migration of sons from farms to jobs in towns and cities. *Id.* at 78. In a perhaps unrelated development, larger numbers of landless have immigrated to manufacturing jobs outside the village. *Id.*; Saini, *Green Revolution and the Distribution of Farm Incomes*, 11 ECON. & POL. WEEKLY 20-22 (1976) (noting that the Green Revolution employed capital intensive technology that benefitted only farmers with adequate financial resources). The Green Revolution technology may have increased the disparity in income between those who own land and agricultural landless laborers.

270. See Pradesh, *The Burden of Freedom*, INDIA TODAY, Apr. 15, 1983, at 126-28 (explaining that freed bonded laborers do not enjoy typical freedom, do not receive equal rights under the law, and are underpaid). Unlike in other parts of India, bonded labor is not a problem in Kisanpur. Debts rarely extend past a year, and wages are paid to the debtor at a rate between the low and high demand rates; see also *Bandu Mukti Morcha v. Union of India*, 1984 A.I.R. (S.C.) 802 (describing bonded labor and laws enacted to prevent it and to rehabilitate bonded laborers).

dards for the state; in 1986, the law called for a minimum wage of Rs. 12 per day, paid in cash and not in kind.<sup>271</sup> When we informed laborers of the minimum wage law, no one appeared either surprised or interested. Laborers understood the role of the market in setting wages and exhibited a disbelief that anything short of changing market conditions would affect rural wages.<sup>272</sup> The Block Development Officer informed us that he knew of no rural area where minimum wages are paid and suggested that the minimum wage would be impossible to enforce.<sup>273</sup>

Sometimes a dispute would arise between a particular landowner and a laborer, members of the landowner's particular faction would not hire the laborer and a boycott would ensue. We were told that if a major dispute developed between a scheduled caste and a *Thakur*, the *Thakurs* would unite and make it impossible for the scheduled castes to get employment anywhere.

### Case 7: The Agricultural Workers' Union

In late 1979, Krishna Singh, the leader of the *Jatav* caste *panchayat*, decided to organize a union of agricultural laborers. Krishna Singh observed the benefits of working together as a brick kiln worker and he was eager to organize within the village. He spoke with a local Communist Party of India (Marxist) worker, also a *Jatav*, who urged Krishna Singh to organize the masses.

Krishna first persuaded the other elders of the *Jatav* caste *panchayat* to accept the idea of organization. One of the landowners learned of the scheme, probably from one of his *Jatav* clients, and sent word that he wanted to see Krishna Singh. The landowners told Krishna Singh that if he tried to organize a labor union the landowners would boycott him and anyone else who joined in. Krishna Singh decided to continue with his plans, but he succeeded only in recruiting the five members of the *panchayat*. Krishna Singh thought the laborers feared lack of employment during the slack periods.

That year produced a particularly bountiful harvest and a severe

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271. See Minimum Wages Act (Act 11 of 1948) (providing the fixed minimum rates of wages in certain occupations); The Minimum Wages (U.P. Amendment) Act (U.P. Act 20 of 1960); U.P. Minimum Wages Rules, 1952, Ch. II (discussing the various terms and functions of the minimum wage committee); Notice of Agricultural Minimum Wage, U.P. Gazette, Mar. 1980, at 32.

272. See discussion of Case 7 at pages 735-37 (discussing the agricultural laborers attempts to form unions).

273. See Pradesh, *The Wages of Hypocrisy*, INDIA TODAY, June 15, 1983, at 62-66 (discussing the wealthy landowner's denial of minimum wage to agricultural workers and the government's failure to alleviate the situation during the 35 years of the Minimum Wages Act).

shortage of agricultural labor. Despite this, the landowners refused to hire Krishna Singh or the five others in the union. Krishna Singh tried to appeal to the different factions, but did not succeed. Although Krishna Singh owned some land, and could manage for some period of time without wage earnings, the others could not. They abandoned the labor union idea. As soon as the landowners heard that they no longer planned to organize, all five received jobs.

Krishna Singh concluded from this episode that the only way to succeed is to have one's own economic resources. The securing of land, either common or personal provides a large measure of independence. Aside from this, a modicum of independence from the landlords can be accomplished in two basic ways: leaving the village and finding work in the cities or finding supplementary nonagricultural employment in the village. The practice of traditional *jati* occupations continues and some earn cash in the village market. The *Kumhars* (potters), *Barhais* (carpenters), and *Manihars* (bangle sellers), for example, all supplement their agricultural work with the sale of their traditional *jati* products. The *jati* occupations of the lower castes are defiling, however, and those involved in sanskritization eschew them.<sup>274</sup> For others, the advent of technology and industrialization has and will continue to undercut their traditional crafts economy. Others managed to add a new, often related, business to their traditional occupation. The *Baghailis*, for example, progressed from their traditional task of herding sheep and goats to keeping more profitable herds of water buffalo. They then started a lucrative transport business using the male buffaloes. One *Baghaili* told us that he planned to purchase a truck.

Still others managed to begin new cottage industries unrelated to their traditional *jati* occupations. According to the scheduled caste informants, the landowners, especially the *Rajputs*, oppose any lower *jati* employment. The reasons for this opposition include keeping wages down, having something to hold over the heads of the scheduled castes, and requiring demonstrations of respect.<sup>275</sup> The most obvious success story is the *Jatavs* lockmaking enterprise, as described in the following case.

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274. The *jatis* have not completely eschewed lower class occupations. Krishna Singh knew a *jati*-mate who owned a profitable factory that made shoes.

275. See M. SHARMA, *supra* note 46, at 191 (discussing the landowner's attitude toward *Chamars*). The landowners believe that if the *Chamars* receive sufficient money or food, they will rebel and demand more. *Id. Brahmin* landowners tend to interpret every dispute as a sign of *Chamar* revolution. *Id.* at 176. This view is based on the *Chamars'* potential for disobedience, power, large numbers and the *Brahmin's* reliance on the *Chamars* for cheap labor. *Id.*

Case 8: The *Jatavs* and Lockmaking

A *Jatav* heard through a *jati*-mate, who had left a nearby village and moved to the nearby city of Krishnapur, of available jobs. The *Jatav's* family owned no land, and the *Jatav* wanted an additional source of income. He went to the lock factory looking for work, and met the manager, a *Rajput*. The *Rajput*, an *Arya Samajist*, befriended the *Jatav* and explained that he could do lockmaking piecework for his factory in the village. The *Jatav* had to acquire some simple tools used to assemble the locks.

On returning to the village, the *Jatav* tried to secure a loan to buy the necessary tools through the local branch of the State Bank of India. The loan officer demanded a substantial bribe in order to put through the loan application, but the *Jatav* could not afford to pay. The *Jatav* then approached another *Rajput*, his patron, and asked him if he would either lend him the money directly or act as an intermediary with the bank officer. This *Rajput* perceived these requests as too bold and maintained that *Jatav* untouchables "must stick to their *jati* work as God commands."<sup>276</sup> The *Rajput* warned the *Jatav* of danger if he tried to enter the lockmaking business.

The *Jatav* returned to Krishnapur and informed the *Rajput* manager that he could not secure the money to purchase the tools. The *Rajput* agreed to lend him the necessary tools without charge. The *Jatav* had to return the tools as soon as he could afford to purchase new ones.

The *Jatav* returned to the village and began to assemble locks with a few of his close *jati*-mates. After a few months, another ten or so *Jatav* families joined the lockmaking business because of large profits. A few days after they began making locks, one of the larger *Rajput* landowners, an important member of the Dev Singh faction, came to the *Jatav's* house. The *Rajput* said that they should not be so presumptuous, and that they should return to the fields where they belonged. If they did not abandon their lockmaking business, he warned, they could not work as laborers nor use any landowner's fields for fodder for their animals.

The *Jatavs* continued their lockmaking business and expanded their operations among new families. The landowners did exclude the lockmaking *Jatavs* from agricultural work. The landowners, however, never physically assaulted the *Jatavs*. At one point, some *Rajputs* did disrupt a *Jatav* wedding but no violence ensued and the *Jatavs* simply

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276. The Hindi word *zabardusti* might also be translated as "uppity" in this context.

ended the wedding procession. The *Jatavs* primarily used the common land and the income from their business to survive until the harvest season. At that time, the boycott broke down, first among the members of the Dev Singh faction. Since then, these *Jatavs* have spent most of their time making locks and working in the fields only when the wages are high. In addition to making locks, a number of *Jatavs* work as tailors doing piecework for a factory in the nearby market town. These families complain about the difficulty of obtaining loans to expand their business.

The lockmakers and the tailors, like the *Baghailis* and their new transport operations, have found that village employment outside traditional agricultural wage labor has greatly changed their lives. Each has reported greater independence from the landowners and greater security. They are less susceptible to boycotts from the landed and to other forms of pressure. Consequently, they are in a position of greater strength when bargaining with the landed for wages or for other favors. "It is the best thing that has happened to us," said the leader of the *Jatav* lockmakers. "It [the business] isn't enough, but it makes us tougher when dealing with the *Thakurs*. We didn't used to get anything from them, but now we are a force to be reckoned with."

Improvement in the political position of the lower *jatis*, as exemplified in their ability to organize and to protect themselves, is essential to improving their economic well-being. Their economic well-being, in turn, reinforces their political position. Access to resources outside the village plays an important role in this process.

A number of Kisanpur families have relatives working outside the village or have personally returned from working in local towns or cities. It is common for wealthier families to have close relatives who live or work outside the village. Among the most common form of employment is government service in one of its multifarious forms. Among the wealthy, the most coveted position is to work for the Indian Administrative Service or the Provincial Civil Service. These jobs produce considerable prestige and income and usually depend on superior education that is available only outside the village. Others who cannot aspire to such positions often find jobs as lower-level government servants. Recently there is an increasing interest in employment in private industry.

For the poorer inhabitants, particularly the scheduled castes, it is harder to find gainful employment outside the village. Underemployment and unemployment in North India are high and finding and securing jobs are very difficult for the poorly educated. Some, however, have had successes. A number of males from a Kisanpur *Bhangi* extended family secured relatively lucrative, if grueling, work as cycle

rickshaw drivers in the nearby city of Krishnapur. The first brother to seek such employment travelled to the city after hearing about these jobs from a *jati*-mate from another village. He first secured a position as a driver and then sent for one of his brothers. They, in turn, sent for others as they saved up enough money to provide for the arriving relative and his settlement. In this way, opportunities for employment unfolded for the extended family of the *Bhangi*. The rickshaw drivers return to the village most evenings. They stay in the village during harvest season if the wages are higher than those they would earn driving a rickshaw.

Krishna Singh, as described earlier, had spent a number of years in Delhi working at a brick kiln.<sup>277</sup> He heard of the job from a *jati*-mate from a nearby village. He decided to pursue the employment opportunity and his extended family agreed to care for his wife and two small children. In addition, his ownership of land made his family less dependent upon his wage labor for survival. The money he earned enabled him to improve his land and to play a role in politics and in prosecuting cases.

Another *Jatav* took advantage of scheduled caste reservations in the Indian army. He heard about joining the Indian army in school. When he turned eighteen he took the necessary test but the army rejected him. Soon after, a *jati*-mate who had taken the test and had been accepted asked if he had specifically applied for a reserved seat. The *Jatav* hadn't known of the special procedure for obtaining scheduled caste reservations.<sup>278</sup> The friend urged him to reapply, to obtain a scheduled caste certificate, and to assert his rights. He was admitted. His position in the army provided him with good pay, and he sends most of it back to his family in the village. Since joining the army, he has gone to school and learned English. "When I marry, my children too will get an education and enter service," he told us.

One *Kohar* reported how he secured outside employment as a class four *jamadar* (janitor, general laborer) at a government office in the nearby market town. He first worked as a laborer for one of the *Rajputs* in Dev Singh's faction. As a *Kohar*, he had also provided some ritual services as a palanquin bearer during the wedding ceremony of one of the *Rajput*'s daughters. The *Rajput* heard of the job opening from one of his relatives, an employee in the Provincial Civil Service,

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277. *Supra* note 239.

278. The interview did not reveal if the *Jatav* had not known about the special procedure for obtaining reservations or had only hoped for admission without such a procedure. He displayed some embarrassment about his status as a scheduled caste member.

and told the *Kohar* that he could help him get the job. The *Rajput* secured a small payment for acting as an intermediary, but primarily helped the *Kohar* because "I was a loyal worker. I never agreed to work for anyone else. Now my family will work for him."

## ii. Sources of government assistance

The ability to secure additional financial resources through land, nonagricultural employment in the village, and employment outside the village depends in part on government assistance.

Broadly speaking, there are two different types of governmental development assistance programs: those that provide services, such as access to new seeds and fertilizers, and those that provide loan funds distributed through branches of nationalized banks, and to a lesser extent, through rural cooperatives.<sup>279</sup> Bank loans, the most important of these subsidies, are made primarily to finance the purchase of specific assets, such as irrigation pumps or farm animals. Normally, banks make loans only if land is available as security. However, there are special provisions for subsidies for the small or marginal landowner, as well as for the landless laborer.<sup>280</sup> Scheduled caste members and members of the backward classes are eligible for even higher concessions.<sup>281</sup> Subsidies can be substantial, and include differential rates on interest on loans and heavily subsidized agricultural inputs such as fertilizer, seeds, animals and trees. There are also special provisions to assist in the starting of cottage industries.

In Uttar Pradesh, the state government administration organizes the rural development bureaucracy. The district collector heads the bureaucracy and acts with the locally elected *zila parishads*, the local members of parliament, and members of the state legislative assembly. Krishnapur District is divided into eight development blocks, each headed by a block development officer, or B.D.O., who supervises the

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279. See S. MAHESHWARI, *RURAL DEVELOPMENT IN INDIA* (1985) (providing an introduction to rural development). The most ambitious of the government's rural development programs is the Integrated Rural Development Programme. This program is designed to raise the incomes of the poorest village families above the official poverty level through a program of grants and assistance. Parties that provided detailed information on the Integrated Rural Development Programme in Uttar Pradesh include P.K. Sharma, Block Development Officer, Aligarh, Feb. 16, 1983, A. Aggarwal, Loan Officer, State Bank of India, Aligarh Branch, Mar. 2, 1983, V. Singh, Director, Agricultural Extension Services, Aligarh Branch, Feb. 16, 1983.

280. See Reserve Bank of India, Report of the Working Group on the Role of Banks in Implementation of the New 20-Point Programme 3 (1984).

281. See R.C.S.C.S.T., *supra* note 263, at 66 (providing a list of programs for scheduled caste members).

work of the village level workers, or V.L.W. (now also known as *gram sevas*, or village servants). The B.D.O. and the presidents of the villages in the block constitute the block *Panchayat Samiti*, which oversees all development activity. Both the B.D.O. and the V.L.W. are supposed to cooperate with village *panchayats* to determine the families which are most deserving of assistance. The development bureaucracy works with representatives of the nationalized banks, local cooperatives, and agricultural extension services in providing development assistance to villagers.

The V.L.W. is a linchpin in rural development. The V.L.W. is supposed to live in or near a particular village or group of villages, to counsel villagers as to what resources are available and directly assist villagers in securing loans and other assistance. In those instances where concessions are available, the V.L.W. is required to certify that the particular individual is eligible. Under the Integrated Rural Development Programme, the V.L.W. assists in selecting those families chosen for special services and concessions and ensures that each family receives the assistance promised. The B.D.O.'s supervision of the V.L.W. is somewhat tenuous because there are usually forty to sixty villages in each block.

Wealthy landowners reputedly control rural lending cooperatives and corruption is allegedly widespread. Benefits supposedly reserved for the poor often go to their wealthy patrons.<sup>282</sup> Politicians often use bank funds as their personal resources, taking out loans and never repaying them.<sup>283</sup> A study in one city found that 20%-30% of rural development benefits go to those not entitled to receive them.<sup>284</sup> In addition, up to one-half of all such rural loans are expected to go bad.<sup>285</sup> According to the B.D.O. for the Kisanpur block, it is far easier for wealthier borrowers to escape repossession or to receive new loans because poorer

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282. See D.N. Dhanagare, *Agrarian Reforms and Rural Development In India*, 7 RES. SOC. MOVEMENTS, CONFLICTS & CHANGE 177, 192-93 (1984) (describing the wealthy's control over cooperative institutions); see also Premi, *Uttar Pradesh: Web of Corruption*, INDIA TODAY, July 15, 1986, at 59-60 (explaining that fictitious weaving societies have defrauded funds from rural lending cooperatives).

283. See J.W. BJORKMAN, POLITICS OF ADMINISTRATIVE ALIENATION IN INDIA'S RURAL DEVELOPMENT PROGRAMS 98 (1979).

284. Maheshwari, *Rural Development and Bureaucracy in India*, 30 INDIAN J. PUB. ADMIN. 1102, 1108 (1984). But see R. Singh, *More Serious Rural Thrust on 20 Point Programme*, INDIA TODAY, Sept. 15, 1986, at 19 (disputing the report by Union Minister for Program Implementation A.B.A., Ghani Khan Chowdhry that only 5% of funds were misappropriated).

285. See RESERVE BANK OF INDIA, REGIONAL RURAL BANKS REPORT OF THE REVIEW COMMITTEE, REGIONAL RURAL BANKS (1978) (discussing banks' activities to improve rural economy).



borrowers "haven't the clout. They will be harassed, or at least they think that they will." This corruption and failure to provide services to the needy is the result of the interaction of each person involved in the development process, particularly the V.L.W., the local *panchayat*, and the bank loan officers.

In Kisanpur, the poorer villagers identified the V.L.W. and his interaction with the village president, as the most substantial problem.<sup>286</sup> In 1984, the V.L.W. received less than Rs. 700 per month, barely placing him above the poverty line and occasionally making him poorer than the people he helps. The Kisanpur V.L.W., a *Rajput*, reputedly made between four and ten times that much in bribes. He lived in Gandhipur,<sup>287</sup> a city approximately twelve kilometers from Kisanpur, and visited the village only once or twice per year.<sup>288</sup> On these occasions he stayed with the president or with one or two of the other wealthiest *Rajput* families. The V.L.W., whenever in Kisanpur, made it clear that he expected to be well treated and well fed. One *Rajput* commented, "He thinks he is a *raia* (king)."

The village president, and to a lesser extent the other large *Rajput* families of Kisanpur, had close relationships with the V.L.W. The V.L.W., with the president's assistance, selected those families entitled to receive the principal benefits of the Integrated Rural Development Programme. Although most *Rajputs* did not qualify for concessional loans or other benefits, the V.L.W. was often able to arrange such rates. In a number of cases, the V.L.W. certified that *Rajput* landowners was entitled to such concessions.<sup>289</sup> This can be done in a number of ways. First, a family might obtain a fraudulent scheduled caste certificate. This is the less favored route because upper caste members do not want to claim, even for the purpose of cheating the government, that they are scheduled castes. "If word got out that we were certified as scheduled castes, we could be made to look very bad to the other faction. How could we marry off our daughters?"<sup>290</sup>

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286. *Panchayats* have been described as "gatekeepers" preventing flows of benefits to poorer villagers. M. Bhattacharya, Administrative and Organizational Issues in Rural Development (discussion paper), *Proceedings of the 22nd Annual Conference of Members of the Indian Institute of Public Administration*, JIPA, New Delhi (1979), quoted in Hooja, *Machinery for Delivering Benefits to the Rural Poor: A View From an Indian State*, 28 INDIAN J. PUB. ADMIN. 53, 63 (1982).

287. A fictional name.

288. The V.L.W. at a nearby village used to visit approximately once per month to attend a banquet that the largest landowner in the village held in the V.L.W.'s honor.

289. See M. SHARMA, *supra* note 46, at 58 (finding that the V.L.W., the land registrar, and seed store inspector, regularly took bribes). The seed store inspector also sold seed on the black market. *Id.*

290. Our initial research began not in Kisanpur, but in another village in a differ-

In the second instance, the V.L.W. would certify that a family had a smaller landholding than was actually the case. Because benefits not so substantial for this category, this method is also less popular. The third, and more common way, would be to have a bona fide scheduled caste family be the "straw" for the loan or benefit. A scheduled caste certificate or loan application would be filed in the name of the scheduled caste family by the upper caste member, who would then receive the loan or benefit. Sometimes the scheduled caste family is a party to the deception, but in most instances the family is unaware. In one instance a *Dhobi* scheduled caste family suddenly began receiving demands from the local branch of the State Bank of India for payments for a loan to purchase an irrigation pump. The *Dhobi* went to see his patron, an affiliate in the Dev Singh faction, to complain, and thereafter the demand for payments stopped. The *Dhobi* understood what had happened, but was unconcerned long as the demands for payment ceased.

In theory the V.L.W. is required only to certify that concessional rates or other benefits are available. In the case of bank loans, however, the bank manager or loan officer rarely approves any loan without the presence either of the V.L.W. or of some other middleman. The middleman is normally someone from the village who has prior friendly relations with the bank manager. In these cases, either the V.L.W. or the other middleman invariably takes some kind of gratuity and splits it with the loan officer. Because the V.L.W. was rarely in the village, and because he lived so far away, most villagers opted for a local middleman. There are a few successful middlemen in Kisanpur, both related to the leaders of the two major factions. For loans of between Rs. 3,000 and 5,000, a middleman charges a fee of approximately Rs. 200 to 300. In addition, in order to receive a loan the borrower must open a "buy down" account at the bank of at least Rs. 300 to ensure the first payments of interest and principal. Opening these accounts often requires an additional loan because borrowers do not receive cash in connection with the original loan, only the second purchase. Again, a middleman is often involved and charges substantial interest.

A V.L.W.'s certification is still necessary to receive concessional loans or scheduled caste loans. In those instances where the borrower

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ent development block. After a few weeks, we conducted a lengthy interview with the Chief Divisional Magistrate, or C.D.M., who related a number of specific stories regarding the illegal procurement of concessions. One of the stories revealed that the president and largest landowner in the village had apparently secured a number of fraudulent loans for members of his faction. The president's son heard the contents of the C.D.M.'s story and related them to his father. We were unceremoniously escorted out of the village the next morning.

actually qualifies for concessional rates, the V.L.W. charges a fee of Rs. 150 simply to travel to the bank and another Rs. 250 to 300 to make the arrangements for the loan. In general, marginal or landless laborers and scheduled castes do not even approach the V.L.W. because of the excessive fees. In addition, the V.L.W. often will not even talk to scheduled caste members and a village middleman is required at an added expense. There is a general fear that no one could service the loan, resulting in the pump or animal would be repossessed, and that scheduled caste members would be harassed by the police.

Although there were considerable complaints about the corruption inherent in the system of receiving government assistance, only in two instances did we find anyone who had taken action. The first case involved a *Mahabrahmin* who claimed not to be aware of the bribery system. The *Mahabrahmin*, not a member of any faction, first went to a branch of a local bank and asked for a loan. He had a small amount of land, and felt that, combined with his funerary work he could afford a loan to purchase a water buffalo. The bank officer told the *Mahabrahmin* to go back to the village and see one of the middlemen. The middleman arranged the loan and withdrew Rs. 200 from the *Mahabrahmin's* bank account. When the *Mahabrahmin* found out, he complained to the village president, Jaswant Singh, who "contacted the bank manager, but nothing came of it." When asked why he did not pursue the claim, he replied "What could I do? This is the way."

The second case involved a *Nai*, who had a small business stitching clothes. He had a savings account in a local cooperative bank. At one point, he went to the bank to make a deposit. He discovered the withdrawal of a substantial amount of money from his account. After consulting with the bank manager, he discovered that his name had been used to take out a loan at concessional rates. The bank manager, however, refused to assist him in solving the dilemma. The *Nai* went to see the new village president, Dev Singh, for help. Although the *Nai* was not an active member of Dev Singh's faction, the village president still offered to help.<sup>291</sup> Dev Singh went to the cooperative bank and forced an investigation, apparently threatening to go to the police if the bank did not cooperate. It turned out that an upper caste member from a nearby village had taken out the loan. As a result of the investigation, the *Nai's* account was settled. In addition, the bank instituted a new system requiring passbooks to contain a notarized photograph of the holder.

In general, however, people did not complain about the system of

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291. We are not, however, completely convinced that the *Nai* offered to help.

bribery, even though it prevented them from taking full advantage of benefits and concessions. Some individuals felt that they could not take out loans because they could not start a buydown account. Many others, however, said that they would take advantage of financial assistance if they could do so without paying bribes. When we asked why they had not complained to the bank managers, block development officers, magistrates, or others, we were told that they would not listen to them, or that this was simply "the way it is." We asked the members of the scheduled caste committee that had prosecuted the suit against the *panchayat* for failing to distribute the land why it did not pursue cases of loan fraud or minimum wage violation. They replied that it was not worth the trouble. "That is land. This is a loan." In fact, it appeared that no one conceived of the problem as a legal one.

This reaction surprised us, given the fairly high level of legal literacy among the scheduled castes. After some discussions with the scheduled caste committee prosecuting the land case, we realized that it had not occurred to them to engage a lawyer in an essentially administrative action. After further discussion, the scheduled caste committee seemed willing to accept the possibility of court action as a way of forcing an administrative change. We pointed out that using the courts in such instances is analogous to the court action to recover lost wages in the brick kiln. "If we had free lawyers, we would try it. Anything that works," concluded Krishna Singh.

In these cases, legal representation and the threat of court can help the lower *jatis* to secure numerous government guaranteed benefits. Affirmative action benefits, as well as grants and low interest loans (without the payment of bribes), can constitute essential elements in the formation of economic security. For the lower *jatis*, a small benefit is extremely valuable. A small loan can begin a lockmaking business or secure tools for other cottage industries. For those with small amounts of land, subsidies can improve crop yields or help with the purchase of animals. An effective use of reservations policies can help secure employment outside the village. It is even remotely possible that had legal action been taken in Case 7, regarding the minimum wage laws, might have worked as a bargaining chip in securing some increase in pay.

Although the upper *jatis* may not support these steps toward economic independence, it will not necessarily prompt them to harass lower *jatis*. Such steps may work as part of traditional and modern social and political relationships to secure greater independence for the have-nots. Clearly the ability to secure more of the benefits of economic development, particularly those provided by the government, is of vital importance in and of itself. But it should be remembered that eco-

conomic independence is necessary to political and social independence, and vice versa. Advancing one necessarily advances the others. The example of Kisanpur suggests the ability to make advances in each area. However, it is in the economic area in which courts are currently used least that their use may help secure important benefits.

What is first needed is an example of a lawyer successfully using the court to enforce benefits, drawing on analogy between existing land cases and other cases where benefits are withheld from their intended beneficiaries. It is clear that there now exists in Kisanpur some interest in trying that route.

### III. LAW AND CHANGE

#### A. THE STATUS QUO, SANSKRITIZATION, AND WESTERNIZATION

We began this inquiry with the following proposition in mind—that one cannot understand the importance of increasing access to legal systems for the have-nots, let alone devise programs to facilitate that access, without a detailed look at the structure of dominance in a particular society. Preceding sections describe the nature of hierarchy and domination in a not atypical Indian village. Although villages in other parts of India or other parts of the world differ from Kisanpur in important respects, the major questions remain the same: what are the patterns of domination and in what way are those patterns changing?

In Kisanpur, the status quo in religion, society, and economic relationships principally works against the have-nots. Hierarchy is present and ingrained in each, and each reinforces the other. There are, however, certain chinks in the armor. Hindu religious views, while generally accepted as hierarchical, are open to broad and occasionally prevailing, reformist views. Belief in equality is not limited to religious apostates. A person perceived as a good, or even a great Hindu can also preach equality and base it on scriptural authority. Traditionally the state, from the Hindu king to modern governments, has had an important role in enforcing religious interpretations. Thus, there is some religious precedent for the modern state to encourage increasing equality among *varnas* and *jatis*.

That being said, it is clear that very strong anti-egalitarian beliefs, grounded in religion and tradition, do exist, held not only by those most able to benefit from them, but by the lower *jatis* as well. While the view from above is relatively easy to understand, the view from below is not so obvious. There are several basic components. First, the structure of belief is very old and tradition gives it religious significance. At least with regard to religion, people tend to believe what they are told when

very young. Second, subscribing to such beliefs is practical because the overwhelming majority of others also believe in the same system. Life is more orderly and less dangerous if one follows the rules. Third, *Jati*, as a system of cohesive groups, provides a sense of belonging, an order to one's life, and a support structure larger than one's family. It provides an explanation for one's relatively miserable position and passes the blame for one's current failure either onto an ancestor or onto one's previous incarnation.<sup>292</sup> Also, *jati* provides an accepted mechanism for improving one's life through the spiritual—via rebirth, and through the practical—via sanskritization. Because no *jati* considers itself at the bottom of the hierarchy, there is always someone beneath you to look down on.

The two principal ideological agents of change in the underpinnings of village hierarchy are sanskritization and liberal modernization. Perhaps unfortunately, other models for change, such as complete religious conversion and revolutionary egalitarianism, are empirically not possibilities.<sup>293</sup> The State's standards of equality, often dovetailing with religious reform, have played the leading ideological role in modernization. The most obvious effect is among the lower or "untouchable" *jati* members who now often refer to themselves as "scheduled castes" (the constitutional term) before referring to themselves as *Rajput Jatavs*, the sanskritizing name. The use of the latter term implicitly accepts the Hindu view that everyone must conform to a *jati*, and that the only way to improve one's status is to operate within the system. The "scheduled caste" label indicates an acceptance of one's status as a member of a minority, larger than one's own *jati* and including those traditionally inferior to oneself. The bond in this larger minority is the common experience of discrimination. The lower *jatis* in Kisanpur are edging tentatively toward a common ground among themselves and further reinforcing their self-perception as "scheduled castes." The lower *jatis* have exercised their influence through their participation as voting blocks in the political process. Previously, lower *jatis* had to approach their *jati* superiors for assistance; now upper *jatis* must also come to them for help. The persisting strength of *jati* exclusivity remains a significant constraint against lower *jati* unity and is a factor which upper *jatis* may also manipulate to their own advantage. In a

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292. See C. GEERTZ, *supra* note 155, at 87-125 (addressing the cultural significance of religion); J. HABERMAS, LEGITIMATION CRISIS 118 (1975) (examining the function of religion in establishing collective and individual identity and in creating social order).

293. See *supra* notes 152-54 and accompanying text (discussing reasons for the lack of religious conversion as a major phenomenon among lower *jatis*).

growing number of instances, however, common action has resulted in greater gains. Exercising rights in a collective fashion may create a new or additional community based on a sort of legally defined "*varna*"—i.e., scheduled castes—rather than a religiously defined *jati*. The comfort provided in knowing that one's position in life is divinely ordained shows signs of being increasingly overpowered by a belief that one's treatment by the upper *jatis* is simply unfair. At least with regard to avoiding self-blame for one's lowly position, this conclusion may be as comforting as a belief in the designs of fate, although it certainly suggests action against the upper *jatis* rather than a resigned adherence to tradition.

The workings of Hindu religious reform and the pronouncement of egalitarian legal rights have had an effect on at least some members of the upper *jatis*. Many have an internal sense that untouchability is bad. In at least some isolated instances, upper *jati* members have accepted the antihierarchical interpretations of the *Arya Samajists* and other *Vedic* orthodoxies. More importantly, political competition has required increased attention to the condition and aspirations of the lower *jatis*, including the need to treat them with some measure of increased social respect. Affirmative action programs, while falling far short of their enunciated goals, suggest that the number of scheduled caste members in positions of authority will continue to grow. This increase will require the further social acceptance of scheduled caste *jatis*. If the next V.L.W. or bank officer is a *Jatav*, member of the successful upper *jati* faction may invite that official to their homes for dinner. This cognitive dissonance leads to change.

We cannot predict with certainty if the forces of change in the village will result in an ensuing breakdown in *jati* solidarity or a resulting psychological loss from such a breakdown. *Jati* solidarity can have very substantial practical benefits. *Jati* solidarity among the *Jatavs* (with regard to lockmaking) and *Baghailis* (with regard to their burgeoning transportation business) played a major role in the ability of these *jatis* to improve their economic position. And sanskritization, though accepting the hierarchy of traditional Hinduism, does strengthen *jati* solidarity.

Powerful psychological issues are also raised. The need to belong as a *jati* insider, or as a member of a close group, is particularly powerful in India, though it is longing common throughout humankind.<sup>294</sup> Because

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294. See R. UNGER, *LAW IN MODERN SOCIETY* 137-38 (1976) (describing the societal interaction of insiders); R. UNGER, *PASSION* (1984) (discussing human interrelationships); B. BERGER, P. BERGER & H. KELLNER, *THE HOMELESS MIND* 82 (1973)

a *jati* insider is part of the divine order, there is even greater comfort in its permanence and its importance. We do not know if other social structures can replace the feelings of community that *jati* provides. Acceptance of an antihierarchical ideology is more likely if people are able to gain the practical benefits of solidarity as well as the psychological benefits of belonging to some group. This group can consist of the hypothetical fifth *varna*, or the village as a unit, the family, or some other corporate group, such as a social action group. None of these groups, however, has the religious, social historical significance or power of *jati*. Perhaps *jati* will evolve into something like an extended family, or a group based upon religion but not hierarchy. Perhaps political allegiances will become increasingly important. Perhaps the traditional view of *jati* will remain with an increase in inter-*jati* cooperation. From the actions of the scheduled caste committee, at least among the lower *jatis*, the last two alternatives are the most likely. Nor do we believe that, on balance, such a development is necessarily pernicious. *Jati* solidarity remains, but inter-*jati* solidarity is, to a certain extent, replacing or supplementing it. An evolution in religious justification may follow. Some of the feelings of self-worth garnered from effectively carrying out *jati* rules can be replaced with other ideological standards, both modern (garnered from ideals of equality, nationhood, etc.) and *Vedic*.<sup>295</sup>

Changes in the relevance and justification of *jati* distinctions are also crucial to changes in economic relations. Customarily, the *jajmani* system provided a highly limited degree of paternalistic sharing of wealth. Opportunities to improve one's position were essentially nonexistent. The *jajmani* system restricted the lower *jatis*' share because of their low place in the religious and social hierarchy based on their lack of merit. In the modern market-based rural economy, the share received from an upper *jati* patron involves a more interactive process. This process is partially based upon political allegiances given the patron that are readily transferable.

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(submitting that religious secularization and modernization have resulted in individual disenfranchisement from society).

295. See R. UNGER, *LAW IN MODERN SOCIETY*, *supra* note 294, at 150-53 (distinguishing between feelings of honor within rank or caste, and rising above one's rank and applying the concept of honor to all people); Berger, *On the Obsolescence of the Concept of Honor*, 11 *EUR. J. OF SOC.* 339, 343 (1970) (correlating concepts of honor to institutional roles). It is clear that changes in the perception of *jati* have also occurred among the haves. Although the haves may require less of *jati* affiliation than the have-nots, their economic position is not so precarious, and they are less in need of a reason to explain their failures. They may also prove themselves less in following the dictates of traditional *jati* rules and more through competitive success in the modern world.



Even if unsubstantial in terms of qualitative redistribution, the redistributive aspects of land reform, governmental assistance programs, and similar efforts are symbolically substantial. The more wealth and power are seen as susceptible to State manipulation, the less immutable the relative positions of wealth and power appear.<sup>296</sup> The pressure on the State to effect those changes, through the use of voting blocks on a state or national scale, is only likely to increase. Because traditional society and religion reinforce traditional economic inferiority, an attack on one serves as an attack upon the other.

#### B. THE LEGAL SYSTEM AND THE HAVE-NOTS IN RURAL INDIA

In the first part of this essay, we outlined the central issues raised in the debate about legal aid and the value of facilitating access to a western liberal legal system for the poor in non-Western societies. More particularly, we've noted the arguments typically heard as this debate is carried on in India—some for, some against, and some just skeptically neutral about the prospects for legal aid in that country, especially in its rural areas. The case of Kisanpur allows us to hazard some local responses to these arguments.

Initially, we can discard the assertion that legal aid is unrealistic because poor villagers are unknowledgeable about and mystified by law and courts. This proposition is often raised less as an argument against developing legal aid programs than as an observation about the immensity of the task. It carries with it a paternalistic pessimism that, in its most extreme form, is debilitating. At its most optimistic, it suggests that legal aid must primarily focus on the education of the rural poor about their legal rights. Again, this assumes that the poor are ignorant and in need of outside instruction.

The converse of this proposition is Justice Bhagwati's complaint that the proponents of legal aid in India often have little idea of the needs and aspirations of the rural poor. Kisanpur led us to the unexpected conclusion that this is not as severe a handicap as it may first appear; however deficient the understanding outsiders might have, the rural poor themselves have a pretty clear understanding of their needs and aspirations. The have-nots of Kisanpur understand the benefits of ap-

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296. See Joshi, *Whose Law, Whose Order: "Untouchables," Social Violence and the State in India*, 22 *ASIAN SURV.* 676, 678 (1982) (arguing that the egalitarian social policies of the state have a force of their own, independent of the reluctance and weak personal commitment of state actors to these policies). *But see* Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 *TEX. L. REV.* 1576-78 (1984) (arguing that the reliance on state derived rights is equivalent to reliance on state goals).

pealing to the legal system in certain specific situations and recognize the limitations of those benefits. They know what soft spots in the hierarchy will work to their advantage, what pressure points will set off unpleasant reactions, and what solutions will cause new problems. Above all, they have shown that when given the opportunity and the resources, and after weighing the possible benefits against the wide range of risks, they may pursue solutions to their problems in court.

Clearly, not all scheduled caste *jatis* in Kisanpur match the relative sophistication of the *Jatavs* in these matters. Nevertheless, one of the more striking aspects of life in Kisanpur is the extent to which the have-nots' are aware of their legal rights and privileges. Such legal knowledge is due in great part to the increasing presence of lower *jatis* in legal and bureaucratic professions (a presence brought about in part by reservation policies) and the continuing nature of *jati* solidarity and *jati* communication. While this was particularly true of the *Jatavs*, the information provided by *Jatav* lawyers outside the village has been communicated among all lower *jatis* and often acted upon in concert.

Indeed, the notion that the Indian legal system is alien, inscrutable, and mysterious to the rural poor must be discarded or at least regionally confined. To the extent that it is a puzzle to the Indian peasant, it partakes of the universal characteristics of legal systems throughout the world. A tendency to be intimidated by a complex system is *not* evidence of an inability to function within the confines of imported institutions. It may be simply be a universal tendency to be intimidated by complexity. In our experience, the ways and means of going to court are a part of the folk-knowledge of Kisanpur. Without exception, every one of our respondents knew someone involved in the system who could provide the type of information and informal assessment of a particular case necessary to get started.

Of course, the Kisanpur community's knowledge of legal rights and process, while extensive, was not complete. For example, when problems arose concerning government-provided entitlements, such as subsidized loans and grants, there was little appreciation that legal action might help to secure these benefits. However, these did seem to be a quick realization that the legal process could secure such entitlements from the government, just as it could secure rights from other villagers. Educational efforts, concerning both substantive rights and procedural techniques, are a crucial part of legal aid efforts. Our experience in Kisanpur, however, suggests that it is important to discard the popular notion that such education begins with a blank slate.<sup>297</sup>

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297. There are various suggested strategies for sharing legal information for the

An argument clearly related to the question of legal literacy, but deriving more directly from the debate over law and development, is that an emphasis on villagers' greater use of Western-style courts is culturally irrelevant. Many of the critiques of law and development suggest that western style legal liberalism is inappropriate for developing countries. In India, whether appropriate or not, at least the trappings of the system—constitutional government, elected parliaments, village self-government, and a system of common law courts<sup>298</sup>—are now very well entrenched. The importance to landowners of obtaining legal title to their land, the extent that the lower *jatis* identify themselves as scheduled castes or backward classes, the vigor of election battles, and the use of courts demonstrate the degree of acceptance of these systems. Once considered Western, these systems are now clearly indigenous. The question is no longer whether they are appropriate, but to what end they are working.

This is not to say that more "indigenous" systems have completely withered. Caste *panchayats* still play a role in village life, particularly with regard to intra-*jati* conflicts among the middle and lower *jatis* not involving land. And despite the failure of *nyaya panchayats*, or informal courts,<sup>299</sup> some organized, non-legal alternatives to dispute resolution are successful.<sup>300</sup> There are obvious limits to the assistance the have-nots can expect to find when battling the haves in local noncoercive dispute settlement institutions. Have-nots benefit only if they use impartially supervised systems of mediation backed up with the possibility of going to court. In government courts, different *jatis* at least formally have equal personal status. In the village, tradition militates

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benefit of litigation strategies for the have-nots. With the assistance of Professor Galanter, the Ford Foundation in New Delhi is working to set up a clearinghouse on legal information of assistance to lawyers for the poor.

298. In this context, we refer to courts as including all government adjudicative forums.

299. See Meschivitz & Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution*, 2 POL. INFORMAL JUST. 47 (1982) (delineating weaknesses in the *nyaya panchayat* system).

300. See Baxi, *From Takrar to Karar: The Lok Adalat at Rangour—A Preliminary Study*, 10 J. CONST. & PARL. STUD. 2, 95 (1976) (recommending increased empirical research in the field of alternative legal systems); see also The Legal Services Authority Act, 1987 (Act No. 39 of 1987), Chapter VI (authorizing state or district authorities to establish *Lok Adalats* (literally, people's courts) for the purpose of arriving at compromises or settlements of cases that would otherwise fall under the jurisdiction of a civil, criminal or revenue court). Notwithstanding their names, *Lok Adalats* are to consist of State and/or district judicial officers "and such other members possessing such qualifications and experience as may be prescribed by the State Government." *Id.* Their jurisdiction extends only to cases where the litigants have made a joint application to the relevant court that they intend to "compromise or settle" their suit. *Id.*

against lower *jatis* receiving even ostensible equal status in an upper *jati panchayat* or mediators, and it is nearly impossible to imagine an upper-*jati* member submitting to a lower-*jati panchayat* or mediator. As in courts around the world, a lower-*jati* disputant is potentially disadvantaged in an Indian court because of the disparity in socioeconomic status between parties (the landless laborer vs. the landowner). Wealthy clients can bribe judges and government officials and can secure the best legal talent. Such disadvantages, however, are inevitably magnified in an informal dispute settlement situation.

Indeed, the whole point of much modern legislation in India, including those "new rights" most often discussed by our have-not informants in Kisanpur, involved in (village common lands, scheduled caste colonies, loan concessions, and scheduled caste reservations) has to conflict with preexisting local views of justice. Given the inherent clash between a legal framework that promotes egalitarian values and a culture that diminishes such values, the importance of forums as immune as possible from the influence of local elites is clear. While the court system is not completely independent, either procedurally or substantively, it is relatively more so. It is also difficult to imagine that under any alternative dispute settlement system, the haves would voluntarily comply with decisions against their interests or agree to compromises absent some kind of coercion.<sup>301</sup> Most village coercions, social or religious, are directed against members of the same *jati* or against members of relatively lower *jatis*.

Unfortunately, the coercive power of outside courts themselves are greatly attenuated in the village setting. It is on this fact that some of the more fundamental critiques of legal aid are based. Put bluntly, these arguments can be reduced to the question of why one should bother. Greater use of courts simply won't make a difference because winners can't get their decrees enforced.

Assuming for the moment that a have-not litigant can win judgments in court because of violations of statutory or constitutional rights by local elites or officials, what solace is there in victory? The distance between court and village is a great one, both physically and psychologically. A winner in court often returns to a setting where the coercive power of village elites is greater than the strength of a court writ and where the police are unwilling or unable to help. Thus, many social activists conclude that pursuing a legal strategy is at best a waste of time and at worst a cooption by a corrupt and slow behemoth lulling

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301. See Dhavan, *supra* note 15, at 25. (referring to people's courts as "redistributing poverty among the poor").

the poor to sleep with false promises. Our study of Kisanpur suggests that the attempt to vindicate certain rights in court will not necessarily turn those rights into reality.

Although the legal system is often a weak and imperfect ally, the field of alternatives is narrow. With *jati* affiliations still so important, it is unlikely, if not impossible, that in the near future a strong alliance can develop between the landless scheduled castes and the poorer middle or upper castes. Temporary alliances of a relatively minor sort are likely in factional politics, for example, but not for action of a revolutionary kind. The poverty of the lower *jatis* and their numerical inferiority, makes them vulnerable. In Bihar, where scheduled castes have attempted to take radical action against the landed, they have always suffered the most. By turning to the legal system, we do not feel that they are giving up other alternatives; in fact, they have very few other alternatives.

And while there is a strong basis for pessimism about the direct effect legal action might have on village patterns of domination, the Kisanpur example suggests that this pessimism is exaggerated. Practically, the legal system has in fact worked to advance a number of causes of the lower *jatis*. The courts do have certain coercive powers, such as requiring land registration, ordering payments of certain loans or benefits by the state, and a limited control over the police.

But perhaps more importantly, as Kisanpur demonstrated, the value of legal action to the have-nots cannot be measured strictly in terms of winning in court or getting a victory enforced. Scholars have long observed that court settlements are seldom considered a full resolution of the underlying dispute by village litigants, even when the dispute is between members of the same *jati*. Instead, appeal to the legal system is often viewed as an elaborate method of increasing one's bargaining position in the local arena. Macauley has touched on this question in the western context:

We are all subject to many private governments where the influence of the legal system is problematic. Long term continuing relationships have their own norms and sanctions, often far more powerful than anything the legal system has to offer. [However], sometimes individuals and groups seek to affect the balance of power within these private governments by appeal to courts, administrative agencies and legislatures.<sup>302</sup>

The precise effect courts have on social relations in Kisanpur is unknown, but the fact remains that courts are an established part of village life, and are perceived as very important to the people who use

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302. McCauley, *supra* note 22, at 152.

them as a means to affect the balance of local power. The courts do have a positive effect in this regard. Greater access to courts for the have-nots is a tool with which to play the game of village politics more effectively. And the haves often find that manipulating the system illegally carries certain costs. If one is clearly wrong and expects to lose a case, bribing judges or the police becomes an expensive proposition.

As long as the upper *jatis* continue to control socially, economically, and often numerically, there is a limit to their tolerance for change. In this context, perhaps one of the more important allies of the lower *jatis* is the legitimacy, albeit strained, of the legal system in the minds of the upper *jatis*. Presently, a version of the liberal state (albeit a weak or soft version and one that coexists with traditional patterns of dominance) is active in the village. Courts and certain ideas of rights, particularly the right to property, expressed in land records, deeds, and litigation over land ownership, are an accepted part of village life, because they do not deviate too far from traditional Hindu views of hierarchy. Given the alternatives, it makes sense to harness what currently exists and attempt to benefit from it. The alternative, to "delegitimize" the liberal legal system, is unlikely to have any positive practical effect upon the lot of the have-nots.<sup>303</sup>

Admittedly, however, the vigorous pursuit of legal rights in Kisanpur remains a risky and dangerous proposition. Sowell's argument that legal benefits provided for the have-nots can often result in a revolt by the haves has proven itself true in India time and again.<sup>304</sup> The caste riots in a number of states, most prominently Gujarat, have been in large part reactions by upper *jatis* against what they see as overly preferential treatment, enacted by the state and enforced through the legal system, for lower *jatis*.<sup>305</sup> But these warnings should not be so severe as to curtail all forms of resistance to the haves' domination of the have-nots. The courts, along with other forces of social change, may advance the cause of the have-nots and counter the haves' resistance. It is only necessary that caution precede action.

Other problems with the legal system, such as huge court backlogs,

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303. See Crenshaw, *supra* note 7, at 1357 (noting that because racism, not legal thought, creates a coerced existence for blacks, attempts to analyze liberal theory that purports that whites consensually dominate blacks, will not render a valid conclusion in understanding racial domination); Schneider, *Dialectic of Rights and Politics: Perspectives from the Women's Movements*, 61 N.Y.U. L. REV. 589, 593-98, 612-22 (1986) (discussing the relationship between legal rights and personal consciousness).

304. See T. SOWELL, *supra* note 7, at 90 (claiming that increased benefits to minorities heightens animosity of racial hatred).

305. Bobb & Kapoor, *Gujarat: State of Siege*, INDIA TODAY, May 15, 1985, 24-39 (attributing the violent 1985 uprising in Gujarat to an internal class struggle).

the inefficiencies of the current Civil Procedure Code, the weaknesses of the legal profession, and the expense of filing and fighting cases, are not fatal to effective use of the courts. The have-nots are eager to use the legal system, even though they are aware of these failings. In some instances, these problems are not as important as they appear to Westerners. Courts are often simply one tool in the battle against the haves; even if the courts appear to act inefficiently or "pathologically," they may still be useful weapons in that battle. In some instances, these problems may be mitigated, as discussed below.

### 1. *The Current State of Public Interest Litigation*

Over the past decade and a half, Indian appellate courts have broken substantial new ground in the area of public interest litigation. Most of this litigation has emerged from the appellate judiciary's jurisdiction to issue writs and orders to enforce fundamental constitutional rights. Litigation also arises from the high courts' jurisdiction to issue writs against the state to prevent the violation of any guaranteed legal right.<sup>306</sup> Former Chief Justice Bhagwati, one of the principal patrons of the public interest litigation movement, described it as a "judicial revolution."<sup>307</sup>

Due to innovative approaches by the courts, the appellate judiciary has heard the claims of numerous classes of have-nots. Such landmark cases include *People's Union for Democratic Rights v. Union of India* [*The Asiad Workers Case*]<sup>308</sup> and *Sanjit Roy v. State of Rajasthan*,<sup>309</sup> both involving the payment of the minimum wage to poor workers; *Sheela Barse v. Maharashtra* [*Sheela Barse I*],<sup>310</sup> regarding the condition of female prisoners; *Miss Veena Sethi v. State of Bihar*,<sup>311</sup> regarding the condition of undertrial prisoners; *Bandu Mukti Morcha v. Union of India*<sup>312</sup> and *Neeraj Chaudhry v. State of Madhya Pradesh*,<sup>313</sup> both regarding bonded labor; *Lakshmi Kant Pandey v. Union of India*,<sup>314</sup> regarding methods of adopting children; *Sheela Barse v. Union of India* [*Sheela Barse II*],<sup>315</sup> regarding custodial re-

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306. INDIA CONST. arts. 32, 226.

307. See Bhagwati, *supra* note 27, at 561.

308. 1982 A.I.R. (S.C.) 1473.

309. 1983 A.I.R. (S.C.) 328.

310. 1983 A.I.R. (S.C.) 49.

311. 1983 A.I.R. (S.C.) 339.

312. 1984 A.I.R. (S.C.) 802.

313. 1984 A.I.R. (S.C.) 1099.

314. 1984 A.I.R. (S.C.) 469.

315. 1988 A.I.R. (S.C.) 2211.

straints on children; and *Olga Tellis v. Bombay Municipal Corporation*,<sup>316</sup> involving pavement dwellers. This is quite a list of have-nots.

In none of these cases was there a named plaintiff or a class action. Under the Indian Code of Civil Procedure, there is no provision for class actions similar to Rule 23 in the United States Federal Rules of Civil Procedure. Order 1, Rule 8 of the Code of Civil Procedure allows representative suits "where there are numerous persons having the same interest in one suit," but the application of this provision is usually confined to pre-existing groups, typically religious sects.<sup>317</sup> Nor is there anything approximating the United States Manual for Complex Litigation. Instead, these cases were brought by parties whom the laws of the United States would define as having no standing. In fact, most of these cases began, not as regular court petitions, but as letters addressed to judges on the court, often from public interest groups, legal aid groups, or even from social workers or journalists.<sup>318</sup> The pleadings, and in most cases the facts contained in the supporting affidavits, are fairly "amorphous."<sup>319</sup> In a number of cases, a letter making the broadest allegations of the violation of the rights of a particular group has prompted the court to order a special judicial commission to investigate the facts.<sup>320</sup> The elimination of standing requirements and the acceptance of abbreviated forms of petitions with only limited fact allegations is a revolutionary development. For the sake of convenience, we refer to cases admitted under such relaxed rules as public interest petitions or cases.

There are a number of obvious advantages in allowing public interest cases under such modified rules of procedure. First, such a petition involves relatively little preparation and puts the onus on the court to prepare the case. This could substantially reduce the cost of litigation for the have-nots, one of their principal complaints regarding the legal

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316. 1986 A.I.R. (S.C.) 180.

317. See *Gidney v. Anglo Indian Association*, 1930 A.I.R. (Rang.) 177, 181 (holding in a defamation case on behalf of members of an association that the "same interest" required by Order 1, Rule 8 did not exist or else every plaintiff would have to receive separate damages); *Radhaswami Satsang Sabha v. Puttani* (deceased by L.R.'s), 1984 A.I.R. (All.) 198 (indicating a possible expansion of the rule). Recently, in a case involving a dispute between two factions of a Hindu sect, a case litigated for forty-two years, the U.P. High Court remanded the case to the District Court allowing plaintiffs application to proceed under Order 1, Rule 8. *Id.*

318. *Asiad Workers Case* (letter from public interest association); *Sheela Barse v. Maharashtra* (letter from a journalist); *Bandu Mukti Morcha* (letter from public interest organization, framed in legal form); *Lakshmi Kant Pandey* (letter from a lawyer involved in adoption issues).

319. *Sheela Barse v. Union of India* [*Sheela Barse III*], 1988 A.I.R. (S.C.) 2211, 2215.

320. *Bandu Mukti Morcha*, at 808-12.



redress of violations of rights. Second, such petitions essentially avoid the crowded district and other lower courts and reduce the possibility of delay through appeal. In addition, the higher judiciary enjoys considerably more prestige than does the lower. Presumably, the higher judiciary is more honest and not as concerned with caste or class as the lower judiciary.

While this form of public interest litigation has advantages, its disadvantages are also plentiful. First, there must be a showing that the person or group bringing the action is acting in good faith even though the petition requires no actual aggrieved plaintiff.<sup>321</sup> Although these two requirements may not serve as substantial barriers, other requirements do.<sup>322</sup> Under Arts. 32 and 226, with the exception of the prohibition against practicing discrimination in public places, untouchability, and bonded labor,<sup>323</sup> standing exists only if there is a violation of a right that runs against the state. The Supreme Court may proceed under Art. 32 only if a fundamental right is violated. Fundamental rights are limited in scope, and do not, with the exception of the right to receive the minimum wage,<sup>324</sup> involve any basic economic rights.<sup>325</sup> As discussed below, the high courts are often reluctant to accept a public interest case unless a fundamental right is violated.

Second, a substantial violation must occur, at least in order to receive the attention of at least the Supreme Court. Given the massive backlog of cases already extant throughout the Indian judicial system, the appellate judiciary and the Supreme Court must be concerned that not all of these cases come before them under their original jurisdiction. In *M.C. Metha v. Union of India*, involving a major leak of poisonous gas resulting in numerous injuries and a demand for damages, a five judge constitutional bench of the Supreme Court tried to define those public interest cases the Court to exercise its original jurisdiction. The Court required large scale or harsh violations:

[T]he infringement of the fundamental right must be gross and patent. . .and

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321. *Gupta v. Union of India* (original text), 1982 A.I.R. (S.C.) 149, 189 (stating that only letters from bona-fide individuals acting without personal self-interest are acceptable in lieu of technical adherence to writ of petition procedures).

322. *Id.* at 189.

323. INDIA CONST. ARTS. 15, 17 & 23.

324. See INDIA CONST. Part III. The Supreme Court has held that prohibitions against bonded labor and the taking of life without due process combine to make the receipt of a minimum wage a fundamental right. *People's Union for Democratic Rights*, at 1488-89.

325. This is not the case under Article 226 of the constitution, vests authority in the high courts to issue writs to enforce any legal right against the state. Whether a case is admissible to a high court as a "public interest" case, with relaxed standing requirements, is not entirely settled.

either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability. . . . *Ordinarily, . . . a petition under [Art.] 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through ordinary process of a civil court* (emphasis added).<sup>326</sup>

It is unclear if a high court may accord public interest status to cases not involving violations of fundamental rights or large scale or particularly harsh violations of other rights. Clearly, under Article 226, a high court has jurisdiction to issue writs to enforce any legal rights, not just fundamental rights, against the state. In Justice Khalid's concurring opinion in *Shri Sachidanand Pandey v. State of West Bengal*,<sup>327</sup> however, he noted that:

It is only when Courts are apprised of a gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience *that the Courts, especially this Court*, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the underdog and the neglected (emphasis added).<sup>328</sup>

This would certainly allow high courts to restrict public interest cases either to violations of fundamental rights or to particularly egregious violations of other legal rights. The Kerala High Court, in *Mampilly v. State of Kerala*, suggested that whenever there is a public injury, any member of the public may approach the court for a writ under Art. 226. However, this decision depended upon a broad interpretation of Supreme Court precedent<sup>329</sup> and preceded both the *M.C. Metha* or *Shri Sachidanand Pandey* cases. In addition, though the Kerala High Court did not explicitly restrict public interest petitions to far-reaching violations, the case did involve a substantial and broad threat to public health. The Rajasthan High Court held, in a public interest case, that citizens are entitled to utilize the Court to insure that the State performs its legal duties.<sup>330</sup> Similar to the Kerala case, this case involved a substantial public health threat. The Rajasthan High Court also noted that the case involves Article 21, a fundamental right, although it did not base its acceptance of the petition on this

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326. *M.C. Metha*, at 1091.

327. 1988 A.I.R. (S.C.) 1109.

328. *Id.* at 1136 (Khalid, J., concurring).

329. 1985 A.I.R. (Ker.) 24, 28 (involving the sale of liquor in dangerous containers).

330. *Koolwal v. State of Rajasthan*, 1988 A.I.R. (Raj.) 2, 4 (involving a substantial public health hazard due to poor sanitation in the capital city of Jaipur).

fact.<sup>331</sup>

The Andhra Pradesh High Court admitted a public interest writ petition involving "large scale violations or abuses of power" by the state government but no alleged violation of fundamental rights.<sup>332</sup> The Delhi High Court, however, rejected a public interest writ petition concerning the prosecution of rioters after Mrs. Gandhi's assassination, because the petition did not allege a violation of fundamental rights.<sup>333</sup> By contrast, the Allahabad High Court, one of two seats of the High Court of Uttar Pradesh, has stated in dicta based on older Supreme Court decisions, that the Court would entertain a public interest writ petition even though neither fundamental rights nor conscious-shocking facts are involved.<sup>334</sup>

As these cases indicate, the rules and standards regarding the nature of the right violated and the extent of the violation for the admission of public interest claims are in a state of uncertainty and change. There is a tendency, especially in the Supreme Court, to restrict such cases to substantial violations of fundamental rights. This restriction is partially based on the need for docket control and reducing case backlog. Although the High Court has issued dicta that public interest writs are admissible under broad criteria, reported cases involve rather substantial and broad-ranging problems, such as high-level public corruption or threats to public health.

Another major drawback in using public interest writ petitions is the frequent inability of an appellate court to hear evidence, to adjudicate individual claims, and to order specific relief. Articles 32 and 226 authorize the appellate judiciary to issue writs to enforce rights factually alleged in affidavits. Writ petitions are admitted to decide questions of law, and are not normally admitted if there is a substantial question of fact.<sup>335</sup> The reason for this is obvious. The high courts and the Supreme Court are appellate tribunals and not trial courts, with the limited exception of original criminal jurisdiction in three high courts. In public interest cases, the courts have often appointed commissions to investigate alleged rights violations, but the power of these commissions is limited. In some instances, the violations are so egregious that it is vir-

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331. *Id.*

332. *Satyanarayana v. Rao*, 1988 A.I.R. (A.P.) 144, 154.

333. *People's Union for Democratic Rights v. Ministry of Home Affairs*, 1985 A.I.R. (Del.) 268, 279.

334. *Umsh Chand v. Samiti*, 1984 A.I.R. (All.) 46, 50.

335. *See Naidu v. Government of Andhra Pradesh*, 1977 (1) S.C.C. 561, 565 (dismissing petition on account of dispute over question of fact); *see also* Rules of the Allahabad High Court, adopted under art. 226, ch. XXII, para. 1(2).

tually impossible to deny them.<sup>336</sup> These cases are essentially collaborative rather than adversarial. Parties may always contest a commission report alleging violations of rights.<sup>337</sup> In such instances, substantial questions of fact remain, making it difficult for an appellate court to fashion appropriate relief. In *Bandhu Mukti Morcha*, the Court based its conclusion that working conditions were appalling and that forced labor is legally equal to bonded labor on a commission's investigation and report.<sup>338</sup> The court ordered various local authorities to prevent the occurrence of bonded labor and to rehabilitate victims.<sup>339</sup> The Court refused simply to accept the reports of the commissioners or the affidavits of the employees regarding the liability of the employers. The Court explained that these issues required litigation at the magistrate level.<sup>340</sup> In other cases, the courts issued general instructions to state authorities to end certain practices but left case by case factual issues to state agencies or lower tribunals. In *Sheela Barse I*, a case initiated by a social worker's letter to a Supreme Court judge, the Court could not determine the reliability of the allegations but suggested that the state of Maharashtra institute new procedures for female prisoners.<sup>341</sup> These procedures included providing legal aid, instituting surprise judicial visits, and ensuring that magistrates investigate allegations of torture.<sup>342</sup>

The problem of adjudicating factual issues often prevents the courts from awarding individual money damages. In *The Asiad Construction Workers Case*, the Court ruled that the class of employees involved had the legal right to receive the minimum wage. The Court, however, had to appoint ombudsmen to monitor the situation to ensure that the workers subsequently received the amounts due them. The Court did not impose any retrospective relief.<sup>343</sup> The Court in the *M.C. Metha*

336. See, e.g., *Barse v. Maharashtra*, 1983 A.I.R. (S.C.) 378, 381-82 (involving a petition alleging custodial violence towards prisoners and prescribing protective measures); *Koolwal v. State of Rajasthan*, 1988 A.I.R. (Raj.) at 4 (involving a substantial health hazard due to poor sanitation in Jaipur).

337. See Cunningham, *Public Interest Litigation in the Supreme Court: A Study in the Light of American Experience*, 29 J. INDIAN L. INST. 494, 504-05 (1987) (stating that collaborative litigation assumes that parties will voluntarily reach agreement and take necessary action). One court has referred to "persuading" a municipal government to make changes in light of a writ petition regarding municipal sanitation. *Janki v. Sardarnagar Municipality*, 1986 A.I.R. (Guj.) 49, 50.

338. *Moreha v. Union of India*, 1984 A.I.R. (S.C.) 802, 808.

339. *Id.* at 820-21.

340. *Id.*

341. *Barse v. Maharashtra*, 1983 A.I.R. (S.C.) 380.

342. *Id.* at 381-82.

343. *People's Union for Democratic Rights v. Union of India*, 1982 A.I.R. (S.C.) 1473, 1491.

case after lamenting the horrible effects of the gas on the victims,<sup>344</sup> concluded that the Delhi Legal Aid and Advice Board should file compensation actions on behalf of each injured party in an appropriate lower court.<sup>345</sup> The Court did note that in a very few other cases monetary damages had been ordered, but that these were only where the violation "shock[ed] the conscience of the Court."<sup>346</sup> One of the cases cited by the Court where monetary damages were ordered was *Sah v. State of Bihar*,<sup>347</sup> where a man was held in jail for fourteen years after he had been acquitted. The State of Bihar had no plausible reason for keeping the prisoner in jail and was ordered by the Court to pay money to the prisoner to enable him to pursue a case for damages against the state.<sup>348</sup> The Bihar High Court noted that while no evidence had been presented with regard to the amount of damages that would eventually be due, the Court was certain that something would be owed.<sup>349</sup> The Court described the interim award as palliative.<sup>350</sup> Even in this highly unusual case, the Court struggled with the problem of making a factual adjudication.

Other high court cases demonstrate the problems in pursuing questions of fact via the writ petition. In *Mahesh v. Ahmedabad Municipal Corporation*, a physician brought a suit against the city of Ahmedabad to abate the nuisance caused by hutment dwellers and hawkers.<sup>351</sup> The Gujarat High Court clearly did not approve of the use of a public interest writ petition against what the court perceived as the interests of poor people.<sup>352</sup> The Court explained that this type of case is not appropriate under Section 226 due to disputes questions of fact.<sup>353</sup>

The Madhya Pradesh High Court had a similar reaction in *Prayagi v. State of Madhya Pradesh*,<sup>354</sup> involving a petition for a writ of man-

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344. *Id.* at 1491-92.

345. *Id.* at 1100.

346. *Id.* at 1091.

347. 1983 (1) S.C.C. 1086.

348. *Id.* at 1089. In addition, the Bihar High Court requested to monitor prison statistics in the future. *Id.* at 1088.

349. *Id.* at 1089.

350. *Id.*

351. 1988 A.I.R. (Guj.) 154.

352. *See id.* (stating that "[i]n substance, the petition provides an illustration as to how the concept of 'Public interest litigation' can be twisted, distorted and then misused so as to deprive the numerous citizens of their right to exist"). The Court further declared that "no purpose would be served by calling upon the Municipal Corporation to take action which would definitely [do] harm to [the] lot of the poor." *Id.* at 156.

353. *Id.* at 155.

354. 1987 A.I.R. (M.P.) 25. In another writ petition involving public corruption, the Andhra Pradesh High Court requested an investigation of public corruption, but ruled that it could not order the central government to appoint a commission to investi-

damus directing the State of Madhya Pradesh to, among other things, remove a cabinet minister for alleged corruption. The High Court dismissed the writ petition because the allegations required factual investigation and the proper forum for inquiry into complaints against Ministers and public servants is the Lok Ayukt, a statutory board for investigating public corruption cases.<sup>355</sup>

The problem of the courts making only general orders and requests in appellate writ petition cases is demonstrated in *Sheela Barse II*.<sup>356</sup> In that case, a social worker had previously brought a writ petition seeking an improvement in the treatment of children under custodial restraint. The social worker now sought to withdraw the writ petition, because the court had become "dysfunctional,"<sup>357</sup> and none of its general orders had been followed.<sup>358</sup> The Court refused to dismiss the petition and instituted various orders and requests concerning the welfare of the children in custody, including orders releasing two named children.<sup>359</sup> The Court also attempted to justify the fact that its orders were of a general nature. "Again, the relief to be granted looks to the future and is, generally, corrective rather than compensatory, which sometimes it also is. The pattern of relief need not necessarily be derived logically from the rights asserted or found. . ."<sup>360</sup>

The conclusion to be drawn is not that writ petitions involving unresolved questions of fact are of no use. The appointment of commissioners to make investigations that are reported to the court may result in compromise orders (or what is termed in the United States as consent decrees) and in the articulation of important legal rights. In addition, such cases may prompt courts to apply pressure either to administrative units of government or to triers of fact to enforce those rights that courts articulate through the regular adjudicative process. If those rights are not enforced, further orders can apply more pressure until, presumably, an official is placed in contempt. The extent of the appellate court's actions depends on the nature of the right violated, the extent of the violation, the numbers of people involved, and on the degree to which factual issues are in contention.

The types of legal problems we discovered in Kisanpur are, in general, less amenable to writ petitions in the appellate judiciary. First, in

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gate the charges. *R. Satyanarayana v. Rao*, 1988 A.I.R. (A.P.) 144, 176-79.

355. *Prayagi v. State of Madhya Pradesh*, 1987 A.I.R. (M.P.) 25, 27.

356. *Sheela Barse v. Union of India*, 1988 A.I.R. (S.C.) 2213.

357. *Satyanarayana v. Rao*, 1988 A.I.R. (A.P.) 2213.

358. *Id.* at 2214.

359. *Id.* at 2216-19.

360. *Id.* at 2215.

instances involving the usurpation of village lands, the complaints are considered as against the individuals who have illegally occupied the land, and not against an instrumentality of the state (*i.e.* the village *panchayat*). Arguably a villager could draft a mandamus against the *panchayat* to force it to evict the offenders. There is some question as to whether an appellate court would exercise jurisdiction in cases where relatively few individuals are involved, or a fundamental right is not at issue, as is currently the case in Kisanpur. Except in those instances where people are killed or the wages are so low that they threaten the very lives of the workers (such as in the *Asiad Construction Workers Case*),<sup>361</sup> cases in Kisanpur may not involve an unconscionable violation of rights.

In other instances involving the *panchayat's* designation of land for individual or scheduled caste colonies or in the event a mandamus is requested to evict common-land occupiers, complex questions of fact necessarily arise. It is unlikely that an appellate court would make a factual finding in such cases merely on an affidavit. The appellate court would probably refer the matter to the collector's court. The same would be true in most cases involving individual corruption.

Two areas most amenable to writ petition cases are those involving the failure to pay minimum wages and those where no public assistance as guaranteed in law, is ever distributed. Even in these cases, however, factual issues may arise that result in either a dismissal of the petition or a referral to a lower tribunal or administrative agency. Given the potential expense of hiring a lawyer in Lucknow, and the likelihood that the High Court would not entertain these petitions for one or more of the reasons listed above, it is probably more practical to bring these cases before lower-level triers of fact or administrative personnel in the first instance.

The recent experiments with public interest litigation in the appellate judiciary, however, can still play an important role in resolving some of the types of cases found in Kisanpur. First, there is a clear articulation in the appellate courts that the interests of the have-nots are to be vigorously addressed and their cause served. Although public interest cases are discussed and followed in the context of writ petition practice before the appellate judiciary, there is no reason that lower courts cannot implement public interest rules. At the outset, this would reduce the amount of legal preparation and the need to follow strict rules of

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361. See *Roy v. State of Rajasthan*, 1983 A.I.R. (S.C.) 328 (invalidating provision in 1948 Minimum Wages Act allowing for the payment of less than minimum wage to famine relief workers).

pleading. A letter may bring a public interest case before the collectors court or a district court. Commissioners could be appointed by the trial court to make preliminary investigations, which could greatly assist the preparations of cases. We are not currently aware of any instances where lower courts have adopted the public interest rubric in such cases. In addition, the courts could impose the requirements that there be a breach of fundamental rights, and that a violation must be substantial or involve large numbers of people. We encourage experimentation with this technique because it could greatly assist the preparation of cases in lower tribunals.

Second, there is the benefit of the implicit or explicit possibility to a high court in the event the lower tribunal did not provide sufficient assistance to the plaintiffs. It is easier to approach the high court with a public interest writ petition after noting that an attempt to find redress in a lower tribunal has failed. In any case, an adverse decision in a lower tribunal is appealable to the high courts. Even if an appeal does not take on the technical benefits of public interest case, including relaxed rules of standing, of pleading forms, and of evidence, it would at least benefit from the new amenability of the appellate judiciary. to help the have-nots, to expand their rights, and to oversee implementation of those rights.

While most of the individual grievances we heard in Kisanpur may appear limited and fact-specific and therefore appropriate for lower level courts, this is not always the case. For example, a case involving the payment of minimum wages could proceed before a high court as a public interest case. In addition, there is no doubt that have-nots from other villages have experienced injuries better suited for a writ petition, such as bonded labor. Even in the more routine cases, such as the failure to provide scheduled caste colonies or loans and other economic benefits, the patterns of abuse most likely are replicated outside of Kisanpur. A substantial, systemic failure of instrumentalities of the state to provide these benefits and services constitutes the type of high court writ petition requiring the appointment of commissioners and the institution of a broad investigation of such practices under the high court's supervision. Any resulting order by the court might be only general, and individual cases might have to be litigated before the appropriate lower-level triers of fact. However, the investigative powers of the court's commissioners and the court's scrutiny of any subsequent action taken on the part of administrative or judicial organs are potentially of great benefit. This process may reduce costs for the poor litigants and implement decisions with greater reliability than a case not yet before the higher judiciary.



The ability to gather information about the systemic violations of rights over a wide area, resulting in the effective aggregation of such claims in a public interest case before a high court, is crucial. The problems we have discussed earlier about limited discovery, and the length of time required in putting facts before the court, could be reduced if judicial commissions performed the lion's share of the work. As we have discussed above, lower *jatis* are in constant communication from one village to another; this resource could be used for the task. In addition, lower *jati* lawyers are also in communication with each other. A test case might be needed to discover if a high court is amenable to a writ petition in any of the problem areas discovered in Kisanpur. Assistance in understanding how to file such petitions, what allegations to allege, and how the litigation could best proceed would be invaluable. However, even if the expense or lack of familiarity with public interest cases deters local lawyers from proceeding to the high court in Lucknow, the mere existence of the high court public interest forum benefits the have-nots when taking cases to lower-level forums.

## 2. *The Current State of Legal Aid*

There is substantial skepticism about expending effort or money on providing legal services instead of on programs that concentrate on building multifaceted organizations for the poor. Increasingly, advocates of legal aid favor funding grass roots social action organizations. In this theory, legal strategies are just one part of social action organizations of the rural poor. If this argument is accepted, the success of legal aid generally depends upon the development of such organizations, especially on those that Professor Baxi calls 'participatory organizations of the rural poor,' or those that grow out of the oppressed themselves and are relatively freer from being co-opted, absorbed, or derailed.<sup>362</sup>

Certainly there is much in our examination of Kisanpur that lends support to the preferability of this multifaceted approach. Individual litigants are vulnerable to intimidation by village elites. There is a clear need for some sort of political clout in order to enforce court articulated legal rights and to ensure that the haves do not apply pressure upon the have-nots in some other area of village life not before the court. This is true whether that clout takes the form of temporary alliances with upper *jati* patrons or of using lower *jati* organizations that take advantage of upper *jati* factionalism.

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362. Dhavan, *supra* note 15, at 284.

It is important to encourage these types of organizations. A number of such rural organizations exist already. Various groups have existed for years under the supervision of religious or political organizations, and have met with varying degrees of success. One example is the Social Work Research Centre, based in Tilonia, Rajasthan, that is highly effective at organizing the have-nots socially and economically. The Social Work Research Centre has also had some success in pursuing legal strategies; in fact, this group filed one important public interest case regarding bonded labor.<sup>363</sup>

Another successful group is the AWARE, a scheduled caste uplift society in Andhra Pradesh, that has made great progress in organizing lower *jati* communities, particularly with regard to social goals. The AWARE has also had some success in using the courts to recover land.<sup>364</sup>

Unfortunately, the majority of the most well-organized, active, and successful of these groups are confined to tribal areas. While tribals, or scheduled tribes, are among the most impoverished groups in India, they have certain advantages over other groups of have-nots in terms of organization building. Tribal peoples have remained largely on the periphery of the Hindu social structure and have maintained a group identity outside of and independent of caste hierarchy. Tribal groups are not subdivided into *jatits*. Secondly, tribal groups are concentrated geographically and all of their members frequently share common problems. Most of their legal problems are against outsiders, such as, logging companies and others who usurp land and forest products from all members of the tribal group. As a result, it is easier for tribal groups to organize effectively as a group.

While there has been some success in organizing the have-nots, it seems unlikely that such social action groups can be fashioned among more than a tiny percentage of members of non-tribal rural have-nots any time soon. Many people and organizations have tried accomplishing this organizational goal for some time, and there is little reason to expect a sudden large scale success.

On the other hand, legal action itself, can serve as a catalyst for organization. Consider, for example, the scheduled caste committee in Kisanpur. Krishna Singh's legal victories when he worked as a brick kiln worker in Delhi encouraged him to organize the committee for the

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363. Roy v. State of Rajasthan, 1983 A.I.R. (S.C.) 328.

364. K. Bhat, Harijan Uplift Programme of the AWARE in Khanna District of Andhra Pradesh: A Study Report (December 1982) (available from the Ford Foundation, New Delhi).

purpose of fighting a law case. The legal rights due to each scheduled caste member overcame differences between the lower *jatis*. Victories only strengthened that common cause. It seems to us that supporting pre-existing, home-grown forms of legal activism among at least this group of have-nots actually serves to assist further collective action in the future. To wait until "participatory organizations of the rural poor" have formed unnecessarily delays an activism ready to develop.

The organization of legal aid in India is, in many ways, in its infancy and is concentrated usually in larger cities and towns. Many cities and towns already have different types of legal aid or public interest litigation oriented groups. The groups are mainly private, often single-issue oriented, while others are organized under the auspices of the bar, the courts, or of the government. Such organizations have brought many of the public interest cases cited above. The new Legal Services Authority Act, designed to "provide free and competent legal services to the weaker sections of society," although not widely implemented is likely to increase the number of at least partially working legal aid committees.

Krishnapur, the city where the district court nearest Kisanpur is located, had a legal aid committee headed by the district judge and included a number of prominent members of the bar. In addition, a law school located in Krishnapur had a working and active clinical program focusing on legal aid. The district judge had control over certain government funds available to pay for legal assistance for the poor, although the amount was meager and the per appearance reimbursement rate insufficient. The judge also was able to use his powers of "moral suasion" to encourage private lawyers to take on some cases, although the ability to find private lawyers with enough time or resources was obviously limited. Criminal cases used most of these funds. We witnessed a "legal aid camp" organized by the district judge, members of the bar, and the law faculty of the local university. The camp included the district judge and a number of magistrates, as well as twenty or so volunteer lawyers. Over five hundred people attended the camp and it lasted a single day. Almost all of the cases involved the disposal of minor criminal matters.

While it is important to encourage public interest litigation-oriented groups and legal aid committees, they are not a complete solution to the problem of inadequate legal assistance for the have-nots. Such groups and committees are principally organized in cities and the larger towns and away from villages. Legal aid committees include the more senior and upper *jati* members of the bar. The funds available for fighting cases are scarce. We found in Kisanpur that it is relatively

easy for the poor to find legal representation among members of their own *jati*, usually through *jati* connections. Though the lawyers had little connection with the larger Krishnapur district court practice, they lived nearer to Kisanpur, in the market town containing the collector's court, where most cases are filed and heard. The benefits to the Kisanpur litigants of hiring a lawyer of their own choosing, from their own *jati*, and who lived closer to them and to the court where most cases are heard is clear. The poor litigants are far more comfortable with the attorney and more likely to control their own case. It would be less likely that a lower *jati* member from Kisanpur would be comfortable with approaching the legal aid committee in Krishnapur, even if someone would listen to him or her, and even if a lawyer could be found to help him (most city lawyers are not fond of spending time in villages) or that money could be found to pay the lawyer. As such, it would be preferable if a system could be created where it was these lawyers who could provide legal aid to the have-nots.

### 3. *A Proposal for Rural Legal Aid*

The two principal obstacles to effective use of the legal system by the Kisanpur have-nots are: (1) the lack of money to pay lawyer's fees, and (2) in cases regarding government benefits, the lack of familiarity with effective legal strategies. A third obstacle is the lack of appreciation as to how the lower judiciary could be mobilized under appellate public interest rules, as well as how the appellate judiciary might be used. This includes the related ability to martial information regarding large scale violations of rights.

A legal aid program should concentrate on solving the financing problem without requiring potential litigants to proceed through any distant legal aid committees. This should be done by using those working parts of the system as they currently exist; this would mean that one was not starting from scratch, and fewer toes would be stepped on.

If a nearby legal aid committee is already constituted, this committee is the beginning. Otherwise, a committee could be drawn up from any existing social service or rural action groups, the nearest judiciary, and members of the bar. The intended principal goal of the committee would be to distribute funds to lawyers representing the have-nots under the supervision of the various courts and tribunals. It is important to prevent the distribution of funds to non-needy plaintiffs and their lawyers; restrictions on *jati* and perhaps on income level could be employed. The distribution of funds would begin immediately after a case is filed in an appropriate forum. Disbursement of funds may rely

on a formula that the committee and the appropriate judicial officer approve. Funds would not be disbursed in the event of continuing litigation because this would discourage settlement of cases. Filing some type of case in a forum, however, would act as an effective gatekeeper to the payment of funds.

Lawyers would have the duty to complete applications for funds, to ensure that the have-nots could select their lawyer without having to approach a legal aid committee or a judicial officer. News on how to receive payments for representing the poor would travel fast among members of the bar. Attorneys could make the necessary applications from the committee and from the judicial officer involved. Plaintiffs would have to consent to continuing disbursements, however, to ensure that they retained control over the course of the litigation.

The additional funds to pay these lawyers may come from a number of sources, such as government appropriations, a small additional fee for court filings, grants from volunteer agencies, and donations from the local bar. In addition, courts could elect to award costs more frequently, although the length of most cases may make such a potential funding mechanism relatively less relevant. If the funding base is diverse, it would remove the process from the untoward influence of politics and the vagaries of appropriations. In addition, the more diverse the source of funds, the greater the number of people interested in keeping the system free from corruption.

As we learned in Kisanpur, the poor are likely to band together to raise some funds. Any additional financing may, at least in some cases, need only be a supplement. The local organized bar, a powerful political force throughout India, would support a system that allows the funding to go directly to the lawyers and not the bureaucracy. In any case, a pilot program instituted in a few areas could experiment with different methods of raising and distributing funds.

In addition to using the existing system to provide legal services through new sources of funding, relatively easy improvements in legal literacy of the have-nots and their lawyers is possible. Legal literacy is already surprisingly prevalent and has inspired an active interest in learning more. The Indian Law Institute, with the assistance of the Ford Foundation, has already begun a national clearinghouse for information regarding public interest law.

At the local level, handbooks and leaflets could disseminate information on what types of cases are amenable to legal action and possible types of action. Indians could obtain this information at public meetings or legal aid camps. Also, the courts could distribute these handbooks to attorneys once they accept legal aid funds. The information

contained in such a handbook could spread through word of mouth, primarily through *jati* ties.

We would encourage the filing of test cases regarding the implementation of public interest case appellate rules in lower tribunals. This involves filing cases using simplified procedures, alleging only broad facts in affidavits, and requesting the appointment of commissioners to investigate the facts. Test cases would facilitate the collection of this relevant information and may form a new tool in assisting lawyers in cases involving the have-nots. We would also encourage the filing of new public interest test cases in the high courts. Test cases would normally involve allegations of broad, systematic denials of rights, primarily in the areas of economic rights.

Part of the handbook would include discussions on how to create and file such cases. In addition, we would encourage legal aid committees, bar associations, and existing law school clinical programs, to offer assistance to legal aid lawyers in preparing cases and strategies, particularly when such test cases are involved. Such assistance should expand if a case is appealed.

The most important method of disseminating information about legal strategies is through their successful pursuit. Nothing spreads like a success story. The active promoting of such uses of the courts will, by itself, result in others following similar strategies. We believe that any pilot programs implemented to effect these strategies is more than information-gathering devices. Pilot programs would encourage the have-nots to effectively use the courts.

These suggestions would need to be implemented differently depending on varying local conditions. A number of pilot programs could develop information as to details. However, starting with poor villagers and ensuring that they are in control, avoiding new bureaucracies, and concentrating on the development of existing legal pathways, such pilot programs have a realistic opportunity of success. They would also avoid many of the problems that critics of legal aid programs, both in India and in the United States often describe.

Based upon our examination of Kisanpur, we conclude that much may be accomplished simply by facilitating access to the existing legal system in a fairly modest fashion. We believe that villagers may effectively improve their social and economic status within the existing village framework without creating too much danger to themselves. We believe that the legal system may play an important part in this process because it is not foreign and does not necessarily run counter to existing village institutions. We believe that poor villagers will, on their own initiative, often attempt to use legal institutions to advance the

process, and that a legal aid system would, in many ways, only be assisting that preexisting process. We also believe that, because of recent innovations in public interest litigation, the courts are relatively amenable to assisting the poor in pursuing such legal strategies. And, finally, we believe that pilot legal aid programs can be organized which will be effective, and which could avoid many of the potential difficulties pointed to by critics.

Our suggestion for a relatively modest approach depends less on extraordinary leadership, mass organization, bureaucracy or extensive volunteership, and more on what is already in place. Some of what we have suggested is already happening. But a series of pilot programs and studies in detail to confirm or deny the types of observations and conclusions made in this essay, may pave the way for a serious reevaluation of legal aid on a grander scale.