BOOK REVIEW

COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA. By Marc Galanter.* Los Angeles, California: University of California Press, 1984. Pp. xv, 567. $50.00.

Reviewed by **Richard Power****

India and the United States are the only major nations that have implemented constitutional norms committing their governments to assist large numbers of disadvantaged citizens. India's commitments are expressed in particular articles of her constitution more explicitly than the United States' commitments, which are based on contemporary judicial interpretation of broad constitutional norms. That both nations should have similar commitments is perhaps anomalous in view of their opposite positions on the economic spectrum; most Americans below the poverty level would seem to Indians to be well off materially.

Two decades before affirmative action emerged as a constitutional norm in the United States, Indian courts were struggling with their states' responses to the 1949 constitutional provisions on Fundamental Rights[1] that focus on promoting the interests of disadvantaged groups. Such groups are comprised of Scheduled Castes, Scheduled Tribes, and

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1. Constitution, Part III, Fundamental Rights.

Art. 15(4): Nothing in this article . . . shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. [Added 1951].

Art. 16(2): No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.

Art. 16(4): Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Art. 17: 'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with the law.

Part IV, Directive Principles of State Policy, Art. 46, while not justiciable, is among other Articles, also significant. Unlike Articles 15 and 16, Art. 46 purports to impose affirmative duties on states: The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Other Backward Classes.[2] In *Competing Equalities: Law and the Backward Classes in India*,[3] Professor Marc Galanter evaluates Indian courts' use of compensatory discrimination to promote the interests of India's disadvantaged. The objective of compensatory discrimination is "to redistribute resources and opportunities to those who enjoy the fewest advantages."[4] A consequence is a corresponding detriment to members of non-disadvantaged groups.

Compensatory discrimination involves three principal areas directly affecting individuals: (1) reservation of seats in state legislatures; (2) reservation of places in institutions of higher learning, and (3) reservation of posts in government employment.[5] Although it might come within the purview of Article 46 of the Indian Constitution,[6] compensatory discrimination has not been extended to private employment, thereby avoiding what would probably be an even more fertile source of controversy than compensatory discrimination in public employment has been.

Professor Galanter's book will appeal to a wide range of readers, from the specialist in Indian law to the intelligent layman, who will profit from discovering something of the Indian legal mentality and its impact on the development of the Indian legal system. Most American readers, confused by the complex contours of affirmative action in the United States, will gain perspective and perhaps solace from study of India's experience with compensatory discrimination.[7]

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2. Aiding backward classes extends back to the period of British rule when reservation of places in legislatures for the disadvantaged had its origin, and higher education for Scheduled Castes was encouraged. *See infra* text accompanying note 4. "Scheduled Castes," a term also introduced under British rule, is "the most recent of a long line of official euphemisms for 'untouchables'," supplanting " 'depressed classes,' a term in common use by reformers at the turn of the century." M. GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA 122 (1984). "Scheduled Tribes" refers to aboriginal groups of particular geographical areas who are outside the mainstream of Indian society. "Other Backward Classes," hardly a euphemism, has been and continues to be used with varied references; the term is now frequently used to refer to low caste groups, not untouchables, who are disadvantaged. (Imagine designating a group "backward" in the United States, as does the Indian Constitution!)

3. M. GALANTER, *supra* note 2.

4. *Id.* at 358.

5. Compensatory discrimination has also involved application of funds for housing, schooling, and health services aimed at benefiting disadvantaged groups. These programs have been at best modest and have not engendered litigation or controversy.

6. *See supra* note 1.

7. Professor Galanter's book not only provides a new perspective on problems of the American underclass, but also suggests the universality of norms as to restrictions and burdens placed on the disadvantaged. For example, untouchables suffered disabilities similar to those burdening blacks in the South before the 1960s. Consider an enumeration of typical burdens of disadvantaged Hindus:

After introducing the reader to the social dynamics of British India and contemporary India, Galanter describes the kinds of programs compensatory discrimination embraces. He then turns to the identification of beneficiaries, that is, the elusive questions of how Scheduled Castes, Scheduled Tribes, and Other Backward Classes are to be defined. Galanter then deals with compensatory discrimination and the judicial process. Even the selective reader may make use of self-standing treatments of particular aspects of compensatory discrimination, and will recognize the book's abiding value as a basic resource on the Indian legal system and its interaction with the social system.

Competing Equalities is the only comprehensive essay of the legal treatment of India's disadvantaged. Scores of other writers have contributed pieces of research to the mosaic, but only Professor Galanter has sifted through the enormous volumes of scholarship and data, unreliable and fragmentary as the data often are. Professor Galanter's expertise as legal scholar and sociologist, not to mention his occasional residence in and frequent visits to India over a period of thirty years, has conferred on him mastery of the conglomeration of Constitution, statutes, regulations, judicial system, social structure, and diverse customs. With extraordinary organizational skills, Galanter has forged these disparate elements into a monumental study whose whole is greater than the sum of its

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Denial or restriction of access to public facilities, such as wells, schools, roads, post offices, and courts.

Denial or restriction of access to temples where their presence might pollute the deity as well as the higher-caste worshippers, and from resthouses, tanks, and shrines connected to temples. Untouchables and Sudras were ineligible to become *sanyasis* (holy men) and forbidden to learn the *Vedas* (the earliest and most sacred books of orthodox Hinduism).

Exclusion from any honorable, and most profitable employment and relegation to dirty or menial occupations.

Residential segregation, typically in a more extreme form than the segregation of other groups, by requiring them to remain outside the village.

Denial of access to services such as those provided by barbers, laundrymen, restaurants, shops, and theaters or requiring the use of separate utensils and facilities within such places.

Restrictions on style of life, especially in the use of goods indicating comfort or luxury. Riding on horseback, use of bicycles, umbrellas, footwear, the wearing of gold and silver ornaments, the use of palanquins to carry bridegrooms—all of these were forbidden in many areas.

Requirements of deference in forms of address, language, sitting and standing in presence of higher castes.

Restrictions on movement. Untouchables might not be allowed on roads and streets within prescribed distances of the houses or persons of higher castes.

Liability to unremunerated labor for the higher castes and to the performance of menial services for them.

M. GALANTER, *supra* note 2, at 15.

parts. After a casual reading, one might charge Professor Galanter with redundancy and excessive length, but closer reading confirms that the book is free of inert ingredients. The complexity of Galanter's treatment demands frequent cross-references and occasional repetition.

Professor Galanter discharges his tasks with wit and style, including the task that lies at the heart of his work: an examination of the rulings of the high courts and the Supreme Court relating to constitutional mandates to aid disadvantaged groups. Impressive as is his encyclopaedic understanding of the tangle of pertinent case law, it pales in comparison to his command of the unruly subject of Indian society and how its legal system functions. From these resources Professor Galanter extracts a prodigious quantity of admirably ordered distillations and insights of a subtlety that would occur only to the brilliant yet methodical scholar. They flow endlessly and gracefully. Like the physician who does not despair of his patient's ills, Galanter betrays no feeling of hopelessness to which many foreigners in India succumb. Though focusing primarily on judicial opinions, Professor Galanter's work is an exemplary fusion of the skills of lawyer and sociologist; Galanter relates the judicial opinion to its social context. His work is interdisciplinary on a level that is constantly exhorted but seldom achieved.

Professor Galanter has not, of course, performed the impossible feat of wrestling his adversary to the ground. Neat conclusions could only be false. Analyzing some eighty judicial decisions concerned with compensatory discrimination, Professor Galanter seeks to find patterns in and to impose order on a body of cases riddled with contradiction and antithetical points of view. Approaches vary radically among various state courts, among members of the Supreme Court,[8] and among the remedial programs whose legality the courts are adjudicating.

I. RIDING A TIGER

Professor Galanter wisely resists extended comparisons of problems of Indian and American disadvantaged groups and prescriptions for American problems in the light of the Indian experience. The reader, however, will likely conclude that the legal problems of ameliorating the plight of India's disadvantaged are even more intractable than those faced in the

8. The often divergent and discordant points of view of Supreme Court members are explained in some measure by the relatively short tenure (recently averaging under seven years) of its justices, who must retire at age 65.

United States. For example, the complexities injected by caste, class, tribe, and ethnic diversity in fashioning permissible rules for selecting beneficiaries of compensatory discrimination[9] are different in kind from those of defining minorities in the United States. Though Professor Galanter has provided material for future comparative studies, he leaves ordered comparisons to future efforts.

With the possible exception of a few outstanding Indian legal scholars, only Professor Galanter could have produced this book. British scholars, even those conversant with the Indian legal system, are more attuned to a single voice of authority, and they would likely founder in the frustrations of conflicting judicial opinions of India's high courts generated by rulings on diverse schemes of the states responding to the constitutional mandates on Fundamental Rights. Even the American scholar who attempts such a work must be equipped to deal with basic differences between the Indian and American judicial systems, and to understand the functions that Indian courts and lawyers serve and do not serve. Unlike the United States, where jurisdiction is allocated between state and federal court systems, India has no federal courts except the Supreme Court, despite the paramount legislative and executive powers of the central government. The Indian judicial system, however, resembles the American system in that the high court of each of the seventeen states speaks with final authority for the state, subject only to Supreme Court review. Because states are charged with the responsibility of carrying out the constitutional mandate to aid the disadvantaged classes, state courts rule upon the propriety of the state's particular programs or lack thereof. The primary implementation of compensatory discrimination is, however, in the hands of administrators and clerks, not law professionals. Thus, "one practical task of courts [is to] shap[e] rules and formulae that can be administered by such persons, whose training and capacities usually do not transcend middle ranges."[10] Another limiting factor is that states' initiatives to aid the disadvantaged are not buttressed by administrative agencies or permanent commissions of inquiry. Fact-finding facilities in aid of identification of disadvantaged groups are meager, and such data as exist are often suspect.

Courts in India, says Professor Galanter, are simultaneously regarded as "fountains of justice and cesspools of manipulation."[11] To use the

9. *See infra* Part III.

10. M. GALANTER, *supra* note 2, at 359.

11. *Id.* at 500 (footnote omitted).

courts effectively, parties aggrieved by a state's scheme of aiding the disadvantaged, or by its failure to promulgate or enforce such a scheme, will seek relief in the form of a writ in the state's high court. A writ offers litigants a relatively expeditious procedure for an authoritative ruling and enables a claimant to avoid the morass of litigation in courts of general jurisdiction. Therefore, not only is litigation expensive (India's most successful nationalized enterprise because courts make a profit, it has been said), but defendants make lavish use of dilatory tactics, thereby rendering the courts useless for plaintiffs desiring prompt disposition of claims. Appellate litigation, which often follows, is equally protracted. Some types of civil litigation, such as tort litigation, are virtually unknown in India. District courts, where ineptitude and bribery often flourish, are a far cry from the high courts, where articulate barristers continue British traditions. Even the elite of the bar are, however, advocates and not negotiators or counsellors, who are sorely lacking among the legal profession.

Lawyers are typically called to enter a controversy only at a late stage when litigation is imminent. But whatever the shortcomings of the legal profession, Indian lawyers and judges are discursive and argumentative, traits that often lead to a search for a sound solution. Such an approach seems alien to many legal systems in Asia. While cases involving compensatory discrimination are confused, they pose problems of extraordinary difficulty and it would be an oversight not to recognize the skills of many high court judges and the lawyers practicing before them.

II. IDENTIFYING BENEFICIARIES OF COMPENSATORY DISCRIMINATION

Courts face pervasive difficulties in defining a caste or community as a disadvantaged group. Although the ranking of untouchables at the bottom of social and economic scales is common knowledge, "[d]iscussion of untouchability propels us into problems of nomenclature which condense intense controversies over the identity of these groups and over the characterization of their relation to the bulk of the Hindu population."[12] Untouchables are looked upon as unclean Sudras (the lowest caste) in some parts of India, and as beneath the four *varnas* or classes in others;[13] Ga-

12. *Id.* at 13 (footnote omitted).

13. Brahmins are the priests and scholars, Kshatriyas are rulers and soldiers, and Vaishyas are the merchants and farmers. These three groups are "twice born" by investiture with the sacred thread. Finally, the Sudras are the lowest caste from which come menial servants. *Id.* at 10.

lanter regards them as members of the lowest caste.

Professor Galanter provides a needed description of the status and effects of the caste system in post-independence India. In the reviewer's experience, understanding of caste, beyond the commonplace that the Constitution abolishes discrimination against untouchables,[14] is not acquired by a foreigner merely by living in India for a time. Unlike discrimination's victims in South Africa or the United States, India's untouchables are not distinguishable to the untrained foreign eye from others living in desperate poverty. Even from highly educated Indians, explanations of the nomenclature and enumerations of caste, much less its effects, are not readily forthcoming because of the dizzying complexity of castes and subcastes in a particular region. "Between the local caste hierarchies, and the pan-India *varna* ranking lie a bewildering and irregular set of regional and sub-regional groupings of caste and conceptions of the caste hierarchy." Consider, for example, this description of castes in Madras:

> Synonyms used by certain castes are the names of certain other main castes. For instance, the Chakkiliyans in certain areas are known under the synonym Dombars. Dombara is also a different Scheduled Caste with the synonym of Dombars. Again in Thanjavar district, some Pallars are known by the synonym of Panikkars. But Panikkars in other areas always do not belong to Pallars. Similarly, Pandaram is a synonym of Valluvan, but all Pandarams are not Valluvans. Again, Andi Pandarams do not belong to the Scheduled Castes. Jogi is a synonym of Kuravan. But it is also a synonym of Dom or Dombara in Kanyakumari area. Uralis and Pulayans are found both in the Scheduled Castes and Scheduled Tribes list.[15]

Professor Galanter indicates the subtlety of two related questions:

> In a discussion of the use of caste in designating Backward Classes there are two related and easily confused but distinguishable questions. First, may castes or communities be used as the units or classes that are designated as backward? Second, may the rank, standing, or prestige of a caste group be used as a measure or criterion of its backwardness? The latter points to "caste" as the measuring rod; the former points to "castes" as the things to be measured.[16]

Galanter favors an empirical approach to group membership and takes a flexible position on questions of caste units, which he terms relativism.

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14. Art. 17.

15. M. GALANTER, *supra* note 2, at 284, *quoting* Census of India, 1961, Vol. IX, Madras, Part IV-A(1), Scheduled Castes and Tribes (Report and Tables), p. 13.

16. *Id.* at 189-90.

"[R]elativism . . . is more consonant with the constitutional themes of voluntarism, group autonomy, and non-recognition of rank ordering."[17] Realism, or the formal approach, on the other hand, assumes that India is comprised of "bounded social units, corresponding to our intellectual categories, carrying fixed identities, and arranged in relations of mutual inclusion and exclusion."[18] Group identities, Professor Galanter perceives, are "not natural facts, like geological formations or rainfall."[19]

Relativism focuses on an individual's intention and belief of acceptance in group affiliation rather than on an observer's perceptions of the individual's acceptance by another group. Realism, in contrast, "focuses on the theoretical consequences of certain acts: for example, one who attains caste status loses his tribal affiliation; one who declares himself a member of a non-Hindu religion loses caste membership."[20] Professor Galanter notes that "the very existence of the list [of Scheduled Castes, Tribes, and Other Backward Classes] acts to induce movement across the line into favored categories by manipulation of equivocal nomenclature."[21] Finally, "courts face the problem of keeping these categories available for carrying out policies of eliminating old inequalities without invigorating them as sources of symbolic sustenance for hierarchic patterns."[22]

Of the scores of cases that Professor Galanter discusses, *Balaji v. State of Mysore*[23] is the earliest landmark in which the court purports to lay down guidelines for permissible selection of compensatory discrimination beneficiaries. The *Balaji* decision is, however, anything but conclusive because it simultaneously "(1) disapprov[ed] caste units while (2) permitting them by (3) striking down caste standing as an exclusive test[;] . . . subsequent courts, administrators, and commentators could and did find support for almost any position, pressuring functionaries toward either rigid formalism or broad discretion."[24] *Balaji* also addressed the question of how many of a given number of openings in a university or branch of government service may be reserved for Scheduled Castes, Scheduled Tribes, and Other Backward Classes. While *Balaji*'s answer in

17. *Id.* at 354.
18. *Id.* at 352.
19. *Id.* at 353.
20. *Id.* at 348.
21. *Id.* at 285.
22. *Id.* at 357.
23. A.I.R. 1963 S.C. 649.
24. M. GALANTER, *supra* note 2, at 532.

essence was "reasonable under the circumstances, but never more than 50%," courts subsequently simplified the limit by transforming it into a flat fifty percent.[25]

After two decades of refinement, evolution, and confusion in subsequent cases, *State of Kerala v. Thomas*[26] significantly modified *Balaji* by broadening permissible means of selection. Though *Thomas*' contours and implications are still being revealed, initially it was widely viewed as opening Pandora's box. The most expansive view of *Thomas* would accord a claim of hardship to army veterans and disabled children of diplomats so as to entitle them to preferences. While an overbroad definition was seen at first as a threat to the betterment of lower strata persons, the momentum of established practices and subsequent judicial moderation averted the devastating effects that might have flowed from a broad reading of *Thomas*. States remain free to fashion their own programs for compensatory discrimination and, of course, the criteria of *Thomas*, whatever they are, are permissive and not mandatory.

Regarding reservations in government employment, Professor Galanter finds that, necessary as they are, they have fallen short of announced goals. Though the constitutional mandate for compensatory discrimination has frequently been extended by schemes providing for preference in promotion, their effect in advancing protected classes to higher levels has been limited. Occasionally, qualifying examinations for promotion are waived or postponed for beneficiaries of reservations. Preferences involving promotion arouse the most bitterness among those thereby foreclosed from advancement, particularly middle-level personnel. However, initial hiring of applicants from protected groups for middle-echelon posts has proved virtually impossible because of a lack of minimally qualified applicants despite preferences accorded the disadvantaged by a state's plan.

III. Compensatory Discrimination: Curse, Blessing or Both?

Governmental programs of reservation typically help those most capable of helping themselves and fail to reach those most in need of help. But this is neither a condemnation of compensatory discrimination nor an excuse for not trying at all. Professor Galanter concludes that whatever its shortfalls and unintended effects, compensatory discrimina-

25. *Id.*

26. A.I.R. 1976 S.C. 490, *discussed at* M. Galanter, *supra* note 2, at 382-95.

tion has had a positive, if modest, impact. That compensatory discrimination derives from a constitutional mandate and that officials are charged with its implementation are buoyant forces even for the hundreds of millions of disadvantaged Indians who will not directly enjoy its benefits. Though not ascribing beneficial change entirely to compensatory discrimination, K. Santhanam, writing in the *Indian Express*, took a more exuberant view of social programs since independence when he declared that untouchability had "ceased to exist except in rural hamlets."[27] Higher castes were "getting thoroughly mixed up" and the Harijans "remain a distinctive element perpetuated [only] for the purpose of political exploitation[,] . . . the result of 'defining the Scheduled Castes by birth.' "[28]

Other commentators have assessed the status of caste differently. Hierarchies among castes persist in India according to one body of opinion, and are perpetuated by schemes for selecting beneficiaries of reservations that, as Galanter puts it, "embrace the ancient notion that there is an ordering in society of communities from highest to lowest." For example, B.A.V. Sharma states that the governmental definition of backwardness in terms of caste has "perpetuated and accentuated the caste consciousness. The judiciary, by upholding classifications based on caste, has also helped the growth of the virus of casteism. This has undermined the foundations of the secular state and has been detrimental to the development of secularism."[29]

Everyone is familiar with analagous differences of opinion about affirmative action programs in the United States. Many informed persons agree with Harvard's Nathan Glaser that affirmative action perpetuates the status quo of minorities. Preferential treatment, it is said, causes the disadvantaged to be viewed and to view themselves as victims, thus confining the underclass within its cocoon.[30] While discrimination and disabilities must cease, it is undue optimism to expect, either in India or the United States, that their effects will disappear this year or next.

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27. M. GALANTER, *supra* note 2, at 75, *quoting* K. Santhanam, Indian Express, March 6, 1978.

28. *Id.*

29. *Id.* at 73, (*quoting* B.A.V. SHARMA, *Secular State and Civil Service,* in SECULARISM IN INDIA 70 (Sinha ed. Bombay 1968)).

30. *Accord* V.T.R. Shetty, *Reservation: Blessing or Curse*, Sunday Statesman Magazine, Feb. 19, 1978, *quoted in* M. GALANTER, *supra* note 2, at 74: "The system of reservation kills the beneficiaries' initiative, drive, and capacity . . . . [T]wenty-six years of reservations have not made any dent on untouchability . . . ."

IV. CONCLUSION

Professor Galanter finds that "[o]verall the courts have been harsh critics of governmental arrangements for compensatory discrimination."[31] Of the eighty-one cases dealing with compensatory discrimination between 1950 and 1977,[32] high courts ruled against the state in twenty-four of the fifty-seven cases concerning preferential treatment.[33] The accomplishments of courts, according to Professor Galanter, have been "preventing communal quotas, inhibiting runaway expansion of the category of Other Backward Classes and gross over-inclusion without tangible criteria, encouraging flexibility while confining the quantum of preferences."[34]

An unresolved problem is "the use of . . . castes as the units or classes that are deemed backward, and . . . the use of caste rank or standing as a measure of backwardness."[35] While disapproving castes, "courts have given little guidance to the states as to the limitations on the use of communal units in selecting Backward Classes . . . . [T]hey have left unclear just how [class standing] may be measured. . . . The failure of the courts to make clear the distinction (between castes as units and castes as ranks) has made it difficult to solve either of these problems."[36]

Professor Galanter concludes that compensatory discrimination has been a "partial and costly" success. "The amount of preference afforded is widely overestimated."[37] On the other hand, "compensatory discrimination has undeniably succeeded in accelerating the growth of a middle class within [disadvantaged] groups . . . ."[38] Finally, he warns the reader against grandiose conclusions: "Perhaps the most important lesson is that there is no single big lesson."[39]

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31. M. GALANTER, *supra* note 2, at 486.

32. This reference does not include approximately fifty cases dealing with electoral disputes involving reserved seats for elective offices.

33. M. GALANTER, *supra* note 2, at 487.

34. *Id.* at 534.

35. *Id.* at 535.

36. *Id.*

37. *Id.* at 560.

38. *Id.* at 551.

39. *Id.* at 563.