

COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES  
IN INDIA (1984). By Marc Galanter. Oxford University Press,  
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THERE IS a basic tension built into articles 15 and 16 of the Indian Constitution; whereas they imply right of equality for every citizen irrespective of religion, race, caste *etc.*, they nevertheless allow the making of special provisions for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes. Here then there are two sets of principles—formal equality for all and compensatory discrimination for some, competing with each other. In the ultimate analysis, in the framework of the Constitution it is the courts which are called upon to hold the balance between the two competing equalities and hence provide a vantage point for the understanding of the policies aimed at uplifting the backward classes. This in brief is the subject matter of the voluminous yet readable book under review. The subject matter is of special significance because, as the author rightly emphasizes, India's system of preferential treatment for historically disadvantaged sections of the population is unprecedented in scope and extent, and in dealing with the peculiar issues the Indian jurisprudence in this regard is almost wholly a domestic product.

There are three distinct categories of historically underprivileged population which are considered for special treatment in India. Since such treatment is aimed at making up for the oppressive discrimination suffered by these people in the past, the author terms it "compensatory discrimination" in preference to the term "protective discrimination" which is in common parlance. The three categories are the scheduled castes, scheduled tribes and other backward classes. Since all of them have many features in common, Galanter has dealt with them under the larger rubric of backward classes; to avoid confusion, this term is written in smaller case letters to distinguish from its constituent category of other backward classes, which is written in capitals. There are also distinctive issues relating to different constituents of backward classes, especially between the scheduled castes and scheduled tribes on the one hand and other backward classes on the other, which are duly discussed in appropriate places.

Although the analysis of the problem of backward classes through judicial process is the core of the book, Galanter has also provided a good deal of background material about the setting and policies of compensatory discrimination and about the problems of identifying beneficiaries. The treatment of the issues involved is both exhaustive and penetrating. The outcome is one of the most comprehensive yet clearcut discussion on the subject matter.

Galanter is appreciative of the Indian experiment of compensatory discrimination for historically underprivileged classes, which he justifies from an analysis of the Indian society. One of the characteristic features of this traditional society was its division into watertight compartments called castes and the channelling of inequalities through them. The castes were economically and politically unequal and hierarchical, and socially exclusive. Although they were interdependent and cooperative, the relationships were highly exploitative, the lower castes being totally subordinate to the higher ones. The castes at the lowest extreme of the hierarchy were even considered to be untouchable. A substantial proportion of the population was living separately from the mainstream of the society, cut off from civilization. The introduction of formal equality in such a setting of rigid inequality was bound to perpetuate the existing inequality, and so compensatory discrimination was really aimed at operationalizing formal equality.

However, the achievement of the policies of compensatory discrimination so far, although substantial, has fallen far below the expectation. Not only the vast majority of the target population is still found in abject misery, but the inequalities are actually widening between the target population and the higher echelons of the society, and among the different segments of the target population itself. Large proportions of the historically underprivileged population have not yet found their place among the chosen ones. Galanter brings out skilfully the connection between the successes and failures of the objectives of compensatory discrimination on the one hand and the formulation and implementation of the relevant policies on the other, and discusses the impact of the judicial process on the latter. The legal encounter with the problems of compensatory discrimination, however, takes place at the higher echelons of judiciary and lawyers; since the cases in this arena relate to the rights of the people involving writ petitions, they are dealt with at the High Courts and Supreme Court only.

From the statistical standpoint some types of court cases recur more often than other types, and Galanter reasons why it is so. For example, there are more cases pertaining to the problems of other backward classes than to the problems of scheduled castes and scheduled tribes. It is argued that the policies relating to these castes and tribes are anchored in more secure ground. The problem of identifying beneficiaries in their case has been pre-empted to a great extent by restricting beneficiaries to a list of castes prepared before Independence. Whereas the policies pertaining to other backward classes are entrusted to respective state governments, the Central Government itself lends its authority to the policies regarding the scheduled castes and scheduled tribes. Unlike in the case of the scheduled castes and scheduled tribes in which the law provides that the caste should be a unit of selection of beneficiaries, there is no such prescription in this regard in the case of other backwards classes.

Above all, whereas relatively more precise and systematic information is available in the case of the scheduled castes and scheduled tribes, there are no such official statistics available pertaining to other backward classes. Thus it can be readily seen that there is a greater degree of fuzziness in the situation of other backward classes, which naturally results in more court cases.

Another area which has generated much litigation is in the context of reservations. This can be understood by dividing the provisions of compensatory discrimination into two broad categories in terms of the sets of persons who are called upon to pay the price of the policies. One category of provisions, consisting of various educational and economic facilities provided to beneficiaries out of the common pool of resources, affects the society as a whole, whereas the other category of provisions, consisting of various kinds of reservations in educational institutions and public employment, affects particular individuals who have earned their claim by merit but are bumped in order to make place for the reservation candidates of lesser merit. It is when particular individuals are the sufferers that much litigation takes place. A contributing factor is that such individuals invariably belong to the higher castes having sufficient resources to fight court battles.

The major role of judiciary has been, as Galanter shows again and again, to maintain the balance between the two competing equalities based on merit and based on the principle of compensation for historical deprivation.

One of the major abuses of compensatory discrimination especially in the case of other backward classes is the inclusion of relatively more advanced castes in the beneficiary category because of their political clout, thereby inflating the proportion of this category. Such arrangement not only cuts into the opportunities available for the meritworthy candidates, but what is worse, it results in the monopolization of the opportunities for backward classes as a whole by a smaller segment represented by the castes on the top layer. The High Courts and Supreme Court have been quick to see through such a game, struck down government provision where it is excessive, and excluded castes which are patently not backward, as exemplified in the celebrated case of *M.R. Balaji v. State of Mysore*.<sup>1</sup> The courts have also prevented the use of these provisions for justifying the establishment of communal quotas as was attempted in the State of Tamil Nadu.

A second salutary effect of the role of courts is in developing a unity of approach on the part of different state governments with regard to the policies about backward classes especially those relating to other backward classes who have been left to states' jurisdiction. What the Central Government, because of diverse political affiliation in the states, found it difficult to achieve, the courts, because of their

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1. A.I.R. 1963 S.C. 649.

impersonal character, could easily accomplish.

However, the courts, according to Galanter, have not been able to give a positive direction for policy formulation and implementation. Whereas they have struck down quotas which are excessive they have not made any pronouncement on what may be regarded as optimum quotas. Whereas they have found some of the criteria for the selection of beneficiaries to be unsound, they have not succeeded in laying down criteria which may be considered to be adequate. Whereas they have excluded from beneficiaries the undeserving cases, they have not been able to bring in the deserving cases which have not been considered by the government. In some cases they have declined to enter into the controversies about discrepancies in the policies of the government. A glaring instance of this nature refers to the exclusion from the category of scheduled castes some of the deserving groups from certain religious categories. By discouraging further compartmentalization among the designated categories of backward classes the courts have unwittingly contributed towards the growing disparities among backward classes themselves.

The courts have also failed to make a distinction between compensatory discrimination and the measures to remedy various kinds of personal and circumstantial deprivation: for example, the reservations for sportsmen and for children of defence personnel have been treated on par with those for backward classes. Nor have they succeeded in goading the states, lagging behind in respect of the policies for other backward classes, to gear up their performance.

On the whole, in the opinion of Galanter, judges and lawyers, with exceptions here and there, have not acted as the champions of backward classes. The reasons for this inadequate role played by judiciary are many, some of which are beyond their control. One of the most constraining factors is the inclusion of legislation for compensatory discrimination under the category of directive principles so that failure on the part of the government to pass legislation in these matters is not justiciable. Galanter maintains that this is unfair, but the courts have done little to create public opinion to alter this anomaly. As a result, even though the courts have succeeded in keeping out undeserving beneficiaries, they have succeeded neither in bringing in eligible beneficiaries who have been kept out by ill-designed policies nor in spurring easy-going states to introduce necessary legislation.

The other reasons have to do with the type of training and biases of judges and lawyers. As Galanter points out, judges and lawyers, whether trained in India or abroad, have been exposed to legal education which stressed formal analytic treatment of legal doctrine, rather than considerations of policy. Decisions on policy matters, as applicable to court cases pertaining to backward classes, call for a systematic empirical and theoretical learning about the Indian society. Galanter opines that judges and lawyers are handicapped not only because of the scant

availability of such knowledge but also because of a lack of reading of whatever knowledge that is existing.

Judges and lawyers are largely drawn from higher castes and middle class and by virtue of their class bias they are hardly in a position to gain an empathetic understanding of the problems of backward classes. This is not to say that they lack in objectivity and logical analysis. These requirements are satisfied within the type of approachest he jurists select for themselves. Galanter refers to two broad approaches they have. One he calls the "realist" approach which is more theoretical and static and the other "relativist" which is empirical and takes cognizance of the changing reality. He attributes some of the brilliant judgments to the use of empirical approach; where judges have given inconsistent or biased judgments, they have tended to justify their stand on theoretical or doctrinal ground.

Ordinarily there should be a fit between theory and empirical reality since the former is based on the latter, but in the case of the subject matter of backward classes systematic and scientific studies are very rare and what goes by the name of theory are some theological and doctrinal propositions; for instance, caste system is based on the notions of purity and pollution. The fuzziness in this field of knowledge is partly due to the moratorium placed by the government on the collection of information about castes and partly due to the failure of social scientists to grapple with the theoretical problems in the understanding of the caste system.

The study, therefore, emphasizes the need for the development of an accurate and systematic, empirical and theoretical knowledge on the subject matter and a fruitful collaboration between jurists and social scientists, for a better formulation and implementation of the policies regarding backward classes. But Galanter realizes at the end of the study that the courts do not occupy such a pivotal position in shaping the policies of compensatory discrimination as he ventured to think at the beginning and that the centre of the stage in this respect is occupied rather by the political process. The role of the judicial process is confined mainly to balancing the compensatory policies against other commitments. All the same there is much more that the courts can do to promote the interests of backward classes.

Galanter has not only pinpointed the various problems and issues concerning compensatory discrimination but also has succeeded in putting them in a perspective. The book is highly informative and full of new insights. Although lengthy, the reader who has the patience to persevere till the end would be amply rewarded. It is an invaluable reference work for social scientists and an indispensable tool for all those who have to do with the policies of compensatory discrimination, especially for the jurists.

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