MARC GALANTER'S LAW AND SOCIETY IN MODERN INDIA (1989). Edited with an introduction by Rajeev Dhavan. Oxford University Press, Oxford. pp. c + 329. Price Rs. 250.

THE BOOK[1] consists of several erudite research papers published in various reputed journals. The style and methodology of writing these papers are in keeping with the analytical approach pointing out the relationship of law and society in some important facts of modern Indian society, viewing law as social engineering and believing honestly that it is an effective instrument to bring about social change. It is edited by a prominent Indian jurist Rajeev Dhavan who has also written a lengthy erudite introduction of the book with remarkable clarity of thought.

The presentation of the papers have been grouped in five parts with some sort of thematic unity. There are twelve chapters plus an epilogue entitled "Will Justice be done?" Most of these papers were published before the year 1979. Galanter himself states in the preface of the book that "A second look has enabled me to catch a few egregious lapses, but it has not been possible to rewrite and update these essays."[2] However, the theoretical conceptions which Galanter has made, the critical views he has expressed as well as the methodology of presentation in these essays are certainly of great significance to the students of jurisprudence and law and society even today.

In the first chapter Galanter points out four peculiar features of Indian law. *First*, legal materials are normative rather than descriptive. *Second*, doctrine in law does not necessarily reflect practice. *Third*, nation wide generalisations are of little value. *Finally*, Indian law is foreign.[2a] He argues that though these objections apply with special force to Indian law yet they apply to some extent to all attempts in any system to study law in relation to society. However, foreignness of Indian law in every day life lend to Indian law a unique and compelling interest for students of India and of comparative law.[3] To Galanter 'law' is more than the contents of a law library. According to him, "[t]he law may be visualised as a continuum streching from this official 'lawyers' law' at one end to the concrete patterns of regulation which obtain in particular localities at the other."[4] Such an approach towards law is practical and reflects the relevance of the relationship between law and society for getting insights into the mechanics of adjustment of legal institutions according to the objects and needs of society.

In chapter two Galanter traces the development of law and legal system from pre-British to the modern times. In this context he believes that there is a complete displacement of traditional law in modern India.[5] He vehemently asserts that

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1. Rajeev Dhavan (introduction and ed.), *Marc Galanter's Law and Society in Modern India* (1989).
2. *Id.* at vii.
2a. *Id.* at 3.
3. *Ibid.*
4. *Id.* at 4.
5. *Id.* at 15.

Indian law is palpably foreign in origin or inspiration and it is notoriously incongruent with the attitudes and concerns of much of the population which lives under it.[6] And he also believes that the present system is firmly established and there is no possibility of its revival by the "indigenous" system.[7]

Galanter writes that the classical *dharmasastra* component of Hindu law is almost completely obliterated in the modern Indian legal system.[8] But at the same time he accepts that many matters are regulated by traditional legal norms; the dispute settlement mechanism and tribunals of traditional type continue to function in many areas and among many groups.[9] In late 1950's the government adopted the policy of community development which resulted in the establishment of elective village *panchayats* (both administrative and judicial *panchayats*) in almost all the states. According to Galanter an attempt to revive the judicial *panchayat* system in India, which did not succeed for various reasons is in fact an "aborted restoration of 'indigenous' law in India."[10]

In the year 1978 Galanter along with Upendra Baxi published an excellent essay on "Panchayat Justice: An Indian Experiment in Legal Access." In this essay a thorough and critical survey of *Panchayati Raj* (PR) and *Nyaya Panchayats* (NP) in India has been made by them. This essay very carefully and with sufficient empirical data about the experience of NP deals with the pros and cons of the NP system in India.

While concluding this essay the authors point out that the *Maharashtra Report* urging for the abolition of NPs and the *Rajasthan Report* advocating reversal of separation from the administrative *panchayat* raise the fundamental question 'Why *Nayaya Panchayats*?' a question of more than academic or historical interest.[11] This reviewer is of the view that NP institutions can be fruitfully utilised to provide judicial services to the village people provided they have sufficient powers and capable and qualified people to man them.

The authors have found that the NPs established after independence in India are for the most part moribund institutions of justice.[12] What is indigenous?, Galanter admits that "indigenous cannot mean just that which is not of foreign origin." On the tree of Indian legal system "there have been many grafts on the tree."[13] He believes that atleast we take "indigenous" to mean a return to earlier forms. And looking at the failure of the NPs he concludes that there is an almost total obliteration of indigenous elements.[14] The imposition of British law introduced both new legal learning and new techniques for impressing this learning on the so called various "lesser regulatory systems."[15]

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6. *Ibid.*
7. *Ibid.*
8. *Id.* at 37.
9. *Id.* at 38.
10. See, *id.*, ch. 3.
11. *Id.* at 86.
12. *Id.* at 96.
13. *Id.* at 93.
14. *Id.* at 98.
15. *Ibid.*

Galanter cites Kidder who believes that the tension between authoritative "higher law" and "local law-ways" was not introduced with British law, but was a constituent part of the earlier indigenous system.[16] But it may be noted that unlike the civil law which spread widely by voluntary adoption, common law spread only by settlement or political dominion.[17] Moreover, official law of the modern type, Galanter aptly states "does not promote the enrichment and development of indigenous legal systems."[18] But at the same time Galanter insists that there is a gap between 'higher law' and local practices.[19] Recognising, as he does, the strength of the presence of local practices where the 'higher law' was merely a formal system introduced by the Britishers in India, one would like to agree with Dhavan that it appears useless conceptually to state that the modern law displaced the traditional "indigenous system."[20]

In part III two papers are grouped together[21] and here Galanter is concerned with the practical and conceptual problems concerning 'group membership' and also of 'group preferences'. He also analyses and examines the changing concepts of caste. Moreover, he has also tried to focus on the problems of "backward classes" and "untouchables" in a very serious and detailed fashion.

While discussing the concepts of caste and sect Galanter accepts the tests as propounded by the Supreme Court in *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram*,[22] where a *mahar* who had joined the *Mahanubhava Panth* (a hindu sect) was held to be *mahar* and he continued to be a member of a scheduled caste. The Supreme Court mentioned three factors to be considered in such cases: (1) the reactions of the old body, (2) the intentions of the individual himself and (3) the rules of the new order.[23] However, Galanter does not like the interpretation of the Supreme Court in *V.V. Giri* v. *D. Suri Dora*.[24]

In *Inder Singh* v. *Sadhan Singh*,[25] where Sikh Brahmins have been recognised to be of brahmins' caste category without any specific reference to any *varna*. And Galanter feels that Sikhs are not Hindus in any sense.[26] It appears that Galanter being an American (and a foreigner to Indian society) is not thoroughly either aware or has the feel of Hindu religion. Hindu religion is not a religion in the strict sense of the term as other dogmatic religions like Christianity or Islam are supposed to be. Hinduism is a way of life and in the stream of history there are some off-shoots of Hinduism like Jainism, Sikhism or Arya Samaj *etc*. Therefore, the impression of Galanter that Sikhs are not Hindus in any sense is not fair in the historical context of India. Galanter points out that there are two approaches of

16. *Id.* at 99.
17. *Id.* at 36.
18. *Ibid.*
19. *Id.* at 32.
20. *Id.* at xliii.
21. *Id.* chs. 6 and 7.
22. (1954) S.C.R. 817.
23. *Id.* at 838.
24. A.I.R. 1959 S C. 1318.
25. I.L.R. (1944) 1 Cal. 233.
26. *Supra* note 1 at 115.

interpretation.[27] One is the fictional approach and the other is the pragmatic approach. And he wants that the Indian courts should adopt the empirical and pragmatic approach in which there is less attention to theoretical incompatibility and gives greater weight to the facts of intention of the individual and acceptance by the group. Thus the sect members can retain their caste membership, an Anglo-Indian can become a tribal and a convert can remain a tribal.

In the seventh chapter Galanter gives different views to describe judicial conceptualization of the caste group.[28] The first view sees the caste group as a component in an overarching *sacral* order of Hindu society.[29] In contrast to this he points out the second *sectarian* view which sees the caste as an isolate religious community distinguished from others by idiosyncratic doctrine, ritual or culture.[30] Both the above views characterize caste in terms of religious factors.[31] The other two views are secular because they do not give religion a central place.[32] The third may be called as an *associational* view and the fourth one as organic view.[33]

For the purpose of securing equality, the government is authorised to give favours to scheduled castes, scheduled tribes, and backward classes. The protective discrimination provisions under the Constitution are the principal exceptions to the constitutinal ban on discrimination on the ground of communal criteria. The Constitution authorises to provide special benefits to previously disadvantaged sections of the society. Galanter in detail critically discusses the criteria which the courts have adopted to give protective discrimination to the scheduled castes, scheduled tribes and backward classes.[34]

Galanter is of the view that the preferences available under the law should be available to all scheduled castes persons who might convert to any religion including Christianity, Islam and Budhism. He argues that in dealing with these conversions to religions outside Hinduism, the courts have forsaken the empirical approach and have treated the conversion as depriving him of his membership of his caste as a matter of law.[35]

Pointing out the changing legal conceptions of caste Galanter says that the sacral view has been drastically impaired particularly since independence. In the area of personal law of Hindus *varna* distinctions have been eliminated.[36] In administering preferences for giving preferential treatment to those at the bottom of the socio-religious order, the courts have avoided giving recognition to the sacral view. But it appears in an attenuated form in dealing with non-Hindus.[37] This reviewer does not agree with the observation of Galanter in relation to non-Hindus. Moreover, Galanter believes that though there has been a decline in the

27. *Id.* at 135.
28. *Id.* at 142.
29. *Ibid.*
30. *Ibid.*
31. *Id.* at 143.
32. *Ibid.*
33. For details, see, *id.* at 142-44.
34. *Id.* at 161-179.
35. *Id.* at 172-73.
36. *Id.* at 179.
37. *Ibid.*

use of the sacral model of caste there is increasing reliance on other models like associational model and organic model.[38] In this context Galanter very aptly points out that :

> We can visualize the judiciary as mediating between the Constitution's commitment to a great social transformation and the actualities of Indian society. The court must combine and rationalise the various components of the constitutional commitment-voluntarism and respect for group integrity on the one hand, and equality and nonrecognition of rank ordering among groups on the other.[39]

In chapter eight Galanter gives the assessment of India's policies of compensatory discrimination. There is no disagreement with the proposition that disadvantaged sections do deserve special help. But there is a considerable disagreement as to who deserves this help and the form and shape of such help.[40] Galanter has very methodically presented the factors to measure the cost-benefit analysis of the policy of compensatory discrimination.[41] The reviewer completely agrees with Galanter that the policies of compensatory discrimination have been a partial and costly success. Distributions are not spread evenly throughout the beneficiary group. It is the urban groups who are getting more advantages. Moreover, the better situated among the beneficiaries enjoy a disproportionate share of programme benefits.[42] Galanter provides arguments of fairness and unfairness of the policy of discrimination taking into account the non-discriminatory theme, the general welfare theme and the reparations theme. He realises that compensatory discrimination policy is needed but there is "an ironic tension that lies at the heart of the compensatory discrimination policy."[43]

In the chapter entitled "Hinduism, Secularism, and the Indian Judiciary" he develops his notions of the relationship between "law" and "morals" and also suggests alternative modes of secularism. Here he analyses the cases decided by the courts on Hinduism, Untouchability (Offences) Act, 1955 and Bombay Temple-Entry Act, *etc.* He also uses American material to formulate his conceptions. It is ver difficult to agree with his conception of Hinduism. Indeed he raises some important questions about the relationship of "law" and "morals".

On the whole it may be said that the present collection of essays in this volume are authoritative work in the field of law and society in modern India. These essays can be used as reference work by students and scholars interested in jurisprudence, law and society, and comparative law. The style of writing is very academic and philosophical and would be liked by the scholarly academic community. The erudite and scholarly introduction written by Rajeev Dhavan has also enhanced the utility and value of this book. The get-up of this book and the title is very

38. *Id.* at 180.
39. *Id.* at 181.
40. *Id.* at 187.
41. *Id.* at 188-190.
42. *Id.* at 193.
43. *Id.* at 203.

attractive. The Oxford University Press has done a commendable job to have published this book in a flawless fashion.

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