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# THE STUDY OF LAW AND INDIA'S SOCIETY: THE GALANTER FACTOR

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## I

### INTRODUCTION

The study of law in Asia, [like that] nearer home, has been heavily preempted by professional interest in the rules and doctrines promulgated at the upper levels of the system. Rather than view[] the legal system as a body of rules, we proposed to view it as a body of men—who they are, what they do, how they interact with one another and with other social groups.

This quote, as much as any other, highlights the impetus given by Marc Galanter (and a select group of others) to the interdisciplinary study of the influences flowing between the law (as a set of normative rules laid out in statutory form or in appellate court decisions), and those who are charged with enforcing, implementing, and interpreting it, as well as those subject to it. This approach accentuated what now seems self-evident, that the law is not simply a set of objective rules that affects everyone equally. Nor do all members of society have equal influence on or access to the justice system. Whereas Galanter's approach certainly has brought the study of the law much closer to the realities of what occurs on a daily basis in courthouses, police stations, and villages, it has also highlighted the difficulties inherent in accessing much of the information necessary to such studies. This includes the realities of going into lower courts or village settings to uncover not merely numbers, but attitudes and behavior patterns and the reasons behind them. To understand the effects of the justice system, and why it functions as it does, it is not sufficient to simply study the written law and courts' interpretations of it. What Galanter's early works recognized was the need to understand why the system functions as it does, and this means cracking open the inner workings of local courts and their relations to the surrounding society.

The research agenda that emerged from these early works is far removed from the issues surrounding the more glamorous policymaking powers of upper courts. The world of law and society leads to more mundane questions, but

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1. Marc Galanter, *The Study of the Indian Legal Profession*, 3 *LAW & SOC'Y REV.* 201, 202 (1968–69).

questions certainly no less important for the well-being of any justice system. Who uses the courts and for what purposes? Certainly one purpose is the settling of disputes, but what about defense of honor, harassment, securing a political advantage over a rival, or possibly even speculating in land?<sup>2</sup> No less important is the issue of who does not use the courts and why. Who are the winners and losers among those accessing the courts? How should winning and losing (which do not necessarily equate to favorable or unfavorable rulings at the trial level) be measured? What are the relative power relations among actors to the process? What alternatives to the formal courts are made available, and how are they affected by the courts and the actors inside them? These are issues that transcend any single justice system, but under the influence of the work of Marc Galanter, and others such as Bernard Cohn and Robert Kidder,<sup>3</sup> they have been the types of questions explored in much of my own work on India.<sup>4</sup>

Galanter perhaps best summarized what this “multi-disciplinary enterprise” of law and society entails in the Epilogue to the 1989 collection of his essays, *Law and Society in Modern India*:<sup>5</sup> “It cultivates a second kind of learning about law, that seeks explanation rather than justification, that emphasizes process rather than rules, and that tries to appreciate the distinctiveness of law against the background of larger patterns of social behavior rather than as something autonomous and self-contained.”<sup>6</sup> The quest in India to uncover these mysteries continues, but the relations between law and society are not static. As India’s economy and society change, so do the demands and expectations for justice services, creating a perpetual race for the academic to collect, digest, and analyze the relevant information. It is a race that often encounters roadblocks for those working in India on the lower levels of the judiciary due to the unavailability of much of this information.

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2. These types of rationales for resorting to the courts in India have been reported in the literature and observed by the author. See Bernard Cohn, *Anthropological Notes on Disputes and Law in India*, 67 AM. ANTHROPOLOGIST 82, 105 (1965); Robert Moog, *Indian Litigiousness and the Litigation Explosion: Challenging the Legend*, 33 ASIAN SURV. 1136, 1138 (1993).

3. See, e.g., Bernard Cohn, *Some Notes on Law and Change in North India*, 8 ECON. DEV. & CULTURAL CHANGE 79, 83, 90–91 (1959–60); Robert Kidder, *Courts and Conflict in an Indian City: A Study in Legal Impact*, 11 J. COMMONWEALTH POL. STUD. 121, 121 (1973); Robert Kidder, *Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India*, 9 LAW & SOC’Y REV. 11 (1974–75).

4. See, e.g., Robert Moog, *Delays in the Indian Courts: Why Judges Don’t Take Control*, 16 JUST. SYS. J. 19 (1992) [hereinafter Moog, *Delays in the Indian Courts*]; Robert Moog, *Conflict and Compromise: The Politics of Lok Adalats in Varanasi District*, 25 LAW & SOC’Y REV. 545 (1991) [hereinafter Moog, *Conflict and Compromise*].

5. MARC GALANTER, *Epilogue: Will Justice Be Done?*, in LAW AND SOCIETY IN MODERN INDIA 296, 298 (Rajeev Dhavan ed., 1989).

6. *Id.*

## II

## THEMES IN THE INDIAN CONTEXT

In this short article I pursue three related themes or lines of inquiry that have marked my own research, the roots of which are to be found in Galanter's earlier works and the broader law-and-society movement. The significance of lower courts, the role of the local bar, and the evolution of alternatives to formal court proceedings all represent essential areas for exploration in the attempt to understand the successes and failures of the Indian justice system.

"To find the 'law' in India we must look beyond the records of the legislatures and the higher courts to the working of the lawyers and the police, to the proceedings in the local courts, to the operations of informal tribunals, and popular notions of legality."<sup>7</sup> The search is not simply for how the law influences and shapes society, but also for how society influences and shapes the law and how the law is applied. To explore these questions, researchers must visit the points at which these interactions take place. In the Indian context, this means working at the district level in the district courts, and with other district or local alternatives to the courts, where the overwhelming majority of Indians have their contacts with the justice system and the law. This is the case, whether the interaction between the justice system and the individual is direct (the individual in question is a disputant) or indirect (through word-of-mouth to others beyond the immediate dispute). It is at this level where attitudes are shaped and patterns of behavior developed. Although their roots are at the local level, these attitudes and patterns of behavior certainly can have reverberations throughout the upper reaches of the justice system. There is little reason to expect their effects to be contained at the district level. Such reverberations may be the undermined legitimacy of the process in the higher courts, perceived as simply an extension of the abuse of the system at the lower level, or an extraordinary number of revisions, reviews, or appeals, which overburden the higher courts, or the use of the higher courts as alternatives to filing at the lower levels through the use of a very liberal writ procedure. In all these situations, what happens in the lower courts and the attitudes regarding them affect those above.

The study of trial courts in India presents a variety of barriers, some of which are common to trial courts elsewhere, that unquestionably discourage many would-be researchers. The two upper levels of courts—the high courts and the supreme court—are unquestionably far more glamorous for the researcher. They are the policymakers, and the only courts in India that can decide constitutional issues. Many of their decisions are also published or available electronically (in English), which greatly simplifies their accessibility

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7. Marc Galanter, *The Uses of Law in Indian Studies*, in LANGUAGES AND AREAS: STUDIES PRESENTED TO GEORGE V. BOBRINSKOY (1967), reprinted in LAW AND SOCIETY IN MODERN INDIA, *supra* note 5, at 4.

for scholars and legal professionals. They are also situated in large cities, which normally provide far more comfortable surroundings than district towns in which to conduct research. The combination of heat, mosquitoes, a lack of reasonable accommodations, and monsoon rains so severe that in some years rowboats are needed to ferry lawyers, litigants, and others between buildings on a court compound, can discourage even the heartiest of souls from working in some district towns.<sup>8</sup> But the district-level courts remain the foundation of the system, and without a comprehensive understanding of what they do and why they do it, reformers have been left to operate based upon little more than anecdotes and stereotypes.<sup>9</sup>

Integral to the significance of the district courts is the role of the bar at that level. Galanter, along with others, pioneered the study of the legal profession in India,<sup>10</sup> and what they found to be the case in the 1960s is still predominantly so today. Lawyers remain the most powerful actors in the district courts and, as such, they exercise great influence over how those courts operate and how the public perceives them. Except among a small but growing number in certain major urban areas, the bar today largely remains limited to advocacy in court.<sup>11</sup> Lawyers understand their role as that of litigators, and little else. As the most powerful actors with a vested interest in the system as it currently functions, the bar has resisted and continues to resist reforms considered deleterious to those interests. In 1968, Galanter noted that Indian lawyers “are quite unable to visualize any basic change in either the legal system or the organization of professional services.”<sup>12</sup> And, for the most part, the bar has remained a force perpetuating the status quo in independent India in terms of justice-system reform. The role played by lawyers has to be considered at or near the top of the list of explanations as to why the system remains slow, inefficient and expensive. Yet the bar’s cooperation in effecting change is essential for reform in the justice system as a whole. The questions for researchers today are whether significant changes are currently occurring in the practice of law, and, if not, then what will produce the desired changes. If so, then what segment or segments of the bar are subject to these changes, and what is producing them? Can they be replicated nationally, or will India be left with a bifurcated delivery system of legal services—one for those who can buy into this new system for

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8. I confronted these conditions while working in Deoria District in the state of Uttar Pradesh. Deoria is situated in the far northeastern corner of the state bordering Nepal.

9. See Robert Moog, *The Significance of Lower Courts in the Judicial Process*, in 2 THE OXFORD INDIA COMPANION TO SOCIOLOGY AND SOCIAL ANTHROPOLOGY 1389, 1389–90 (Veena Das ed., 2003) (discussing the significance of India’s lower courts and the need for a much fuller understanding of what it is that they achieve, or fail to achieve).

10. For an early collection of essays on lawyers in India and other developing societies, see generally Symposium, *The Study of the Indian Legal Profession*, 3 LAW & SOC’Y REV. 201 (1969).

11. Marc Galanter, *New Patterns of Legal Services in India*, in LAW AND SOCIETY IN MODERN INDIA, *supra* note 5, at 282; Moog, *Delays in the Indian Courts*, *supra* note 4, at 27.

12. Galanter, *supra* note 1, at 215–16.

delivery of holistic legal services, and one for the vast majority of Indians left behind?

Linked to the role of lawyers at the district level is the development of alternatives to the courts designed to bypass the time and expense generally associated with lawyers and their affinity to litigation. Here again, Galanter's work—whether his earlier work on *panchayats* and their state-sponsored progeny, the *nyaya panchayats*,<sup>13</sup> or his more recent work on *lok adalats*<sup>14</sup>—continues to lay the groundwork for further exploration of a topic that is often portrayed as essential to reforming the justice system and to enhancing access to justice. As Galanter's work suggests, India has moved aggressively into this realm of alternative dispute resolution. Whatever form it has taken, whether through government-sponsored *panchayats*, tribunals, consumer courts, fast-track courts, or a disparate collection of *lok adalats*, there has been a concerted effort to move cases out of the formal courts. Although far more research is required on these institutions, at the district level, they have proven to be unavoidable, and quite diverse in the advantages and disadvantages attached to them.<sup>15</sup>

Galanter's early notice of these informal tribunals and his continuing work on the topic has lent impetus to this crucial area of research. As some of these institutions expire, others emerge, and still others evolve into differing formats. India's diverse experimentation in this area potentially provides valuable data on a wide variety of forums to facilitate access to justice.

### III

#### THE CONTEMPORARY SCENE

Galanter's multidisciplinary emphasis on the district-level justice system in India has inspired much of my work over the course of the past twenty years or so, but it is important to emphasize the relevance of his work in a contemporary setting. Reform of the lower courts, changes in the practice of law, and

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13. These refer to traditional village- or caste-based councils that sometimes perform dispute-resolution functions. Upendra Baxi & Marc Galanter, *Panchayat Justice: An Indian Experiment in Legal Justice*, in 3 ACCESS TO JUSTICE 341, 343 (Mauro Cappelletti & Bryant G. Garth eds., 1979); Marc Galanter & Catherine S. Meschivitz, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution*, in 2 THE POLITICS OF INFORMAL JUSTICE 47 (Richard L. Abel ed., 1982).

14. Literally translated as peoples' courts, these bodies encompass a wide variety of less formal structures and processes for resolving disputes throughout India. Marc Galanter & Jayanth K. Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in Modern India*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 96 (Erik G. Jensen & Thomas C. Heller eds., 2003) [hereinafter Galanter & Krishnan, *Debased Informalism*]; Marc Galanter & Jayanth K. Krishnan, "Bread for the Poor": Access to Justice and the Rights of the Needy in India, 55 HASTINGS L.J. 789, 791 (2004) [hereinafter Galanter & Krishnan, *Bread for the Poor*].

15. See, e.g., Galanter & Krishnan, *Debased Informalism*, *supra* note 15, at 113–16; Robert Moog, *Democratization of Justice: The Indian Experiment With Consumer Forums*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 142 (Erik G. Jensen & Thomas C. Heller eds., 2003) [hereinafter Moog, *Democratization of Justice*]; Galanter & Krishnan, *Bread for the Poor*, *supra* note 15, at 792–94; Moog, *Conflict and Compromise*, *supra* note 4, at 550–51.

alternative dispute resolution all remain topics of great significance in a rapidly modernizing twenty-first century India that in many ways differs markedly from the one Galanter first confronted in the 1950s and '60s.

Reform of India's justice system has been an ongoing battle since well before independence.<sup>16</sup> Although attempted reforms continue, the problem Galanter described nearly forty years ago regarding inadequate understanding of the district level courts largely continues today.<sup>17</sup> Record-keeping for the lower courts is haphazard at best, and annual reports on the administration of justice at the state level have all but ceased to exist.<sup>18</sup> Who is using these courts, and for what purposes, remains largely a guessing game. What variations show up on a state-by-state basis, or within states? Who is not using the courts, and why? These questions only scratch the surface of what remains to be explored regarding the least understood, but arguably the most important level of courts.

Regarding the bar, Galanter's concerns about lawyers' inability to visualize any changes in the organization of the profession may finally be changing somewhat, at least among a small segment. In certain major urban centers, law firms have become much more common. This would seem to be a response by a part of the bar to market demands for services that law firms can provide. This may include "all-purpose lawyering" with a variety of specialists on staff. In many cases it may also involve the transformation from a predominantly courtroom-advocacy approach to one more suited to risk management, which would involve an emphasis on advising, negotiating, and drafting, as opposed to litigating. Arguably, these are the types of changes Galanter envisioned in his 1968 article,<sup>19</sup> and they would represent a dramatic expansion of the role of the bar and opportunities for a new generation of lawyers. How deep and widespread this transformation has become, though, remains an open question. It seems unlikely to have spread beyond certain major urban centers (New Delhi, Mumbai, Chennai, Bangalore, and Kolkata), where the demand for such services would be the greatest.

An additional and quite intriguing possible avenue for growth in lawyers' services, the specific setting of which certainly could not have been envisioned

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16. Many of the problems I have noted in my own research were recorded as early as 1925 in the Rankin Committee Report. See Moog, *Delays in the Indian Courts*, *supra* note 4, at 22–25. An early and extensive study of the problems confronting the justice system was the *Civil Justice Committee Report, 1924–25*, commonly referred to as the Rankin Committee. Since then there have been a wide variety of commissions and reports issued (often with the recommendations being ignored). See, e.g., REPORT OF THE ARREARS COMMITTEE 1989–90 (1990); MINISTER OF LAW, LAW COMMISSION OF INDIA SEVENTY-SEVENTH REPORT: DELAY AND ARREARS IN TRIAL COURTS (1978), available at <http://www.lawcommissionofindia.nic.in/51-100/Report77.pdf>; MINISTER OF LAW, LAW COMMISSION OF INDIA FOURTEENTH REPORT: REFORM OF JUDICIAL ADMINISTRATION (1956), available at <http://lawcommissionofindia.nic.in/1-50/index1-50.htm> (last visited Mar. 25, 2008).

17. Galanter, *supra* note 1, at 209, 214.

18. To the best of my knowledge, as of 1992–93, the only state still issuing such annual reports was Kerala, although a complete set was very difficult to find. As recently as 1995, the high court did not have a full set in its library.

19. Galanter, *supra* note 1, at 216–17.

in 1968, is the movement towards outsourcing legal jobs to India. Such “legal-process outsourcing” (LPO) is a movement still in its infancy, and its prospects for growth remain very unclear.<sup>20</sup> Still, LPO provides another example of adaptation by the bar that Galanter encouraged forty years ago when he asked, “Will lawyers detach themselves from the courts and learn to operate in a wider range of legal settings?”<sup>21</sup>

Finally, alternatives to the formal court processes are sometimes portrayed as a panacea for the problems plaguing the Indian justice system. As Galanter observed over twenty years ago regarding the government-sponsored *nyaya panchayats*, there are no guarantees of success, and, just as with the courts, what lies behind the numbers and written rules may be more important than the numbers and rules themselves.<sup>22</sup> The seemingly increasing reliance on a wide variety of alternatives as a solution to the problem of enhanced access to justice provides new and fertile areas for building upon Galanter’s earlier work. But these forums raise a variety of issues concerning their own processes that require exploration. Questions remain surrounding the quality of justice dispensed,<sup>23</sup> the impact an alternative has on the case flow in the formal courts, whether access to justice is facilitated, and whether the legal culture of the courts bleeds into the new forums, corrupting their processes and negating some of the intended benefits.<sup>24</sup> All these issues require far more intensive study before conclusions regarding the value of courtroom alternatives can be reached.

#### IV

#### CONCLUSION

We certainly have a better understanding today of the realities of the workings of India’s legal system and the interactions of law and society at the local level than when Galanter began working in the area over forty years ago. But India is such a vast and diverse country that a great deal remains unexplored, and the policy implications of this should not be underestimated. As India makes its leap into the twenty-first century, and as its economy continues to rapidly expand, its state institutions are pushed to modernize and adapt to changing circumstances. Although justice-system reform has been on the agenda in India for quite some time, the courts at the district level have long been viewed as inefficient, ineffective, and often corrupt. The pressure for

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20. See Abhinav Ramnarayan, “Go Slow” in Order, BUSINESS LINE, Feb. 6, 2006, <http://www.thehindubusinessline.com/bline/ew/2006/02/06/stories/2006020600020100.htm> (last visited Mar. 25, 2008).

21. Galanter, *supra* note 1, at 216.

22. Baxi & Galanter, *supra* note 14, at 380–86; see also Galanter & Meschivitz, *supra* note 14, at 64–66.

23. Galanter & Krishnan, *Debased Informalism*, *supra* note 15, at 113–16; Moog, *Conflict and Compromise*, *supra* note 15, at 562.

24. Moog, *Democratization of Justice*, *supra* note 15, at 150–56.

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reform is perhaps greater now than it has ever been, due to India's new status as one of the world's emerging economic powers and its drive towards modernization. Yet, despite the impetus to change, the courts continue to struggle in providing basic justice services to large segments of the population. Absent an understanding and appreciation of what is actually occurring at the local level and of why the system functions as it does, it is impossible to know the policy prescriptions necessary for effective reform. And, as many would argue, absent justice-system reform, India's development and modernization efforts will almost certainly be hampered.

The vibrancy of Galanter's work is enduring. Particularly since the beginning of India's liberalization in 1991 and under the current influence of globalization, changes are occurring with remarkable speed. The private sector, in particular, has raced ahead to become an integral player in the international economy. The challenge for the state is not simply to avoid any unnecessary impediment to this movement, but to facilitate it. An efficient justice system is certainly a key component of the solution to this challenge. The major themes highlighted here, which emerged from Galanter's research over the past forty to forty-five years, remain essential to understanding and reforming India's justice system today. If the objective is not just to have a twenty-first-century economy but a justice system to match, then the role of the bar will have to be transformed, efficient and effective alternatives to litigation will have to be put in place, court processes will have to be restructured, and public confidence in the justice system enhanced. An often compassionate and seemingly well-respected supreme court is not enough.<sup>25</sup> More attention must be given to the frequently overlooked lower level of the justice system, and its relation to Indian society. It is here where the most serious problems for the justice system fester, and ultimately infect the higher tiers.

What is needed are more individuals willing to go "into the field" and spend time working at the district level and below on justice-related issues. We need a better understanding of who is using these courts and why. How has that group changed over the past fifteen years as India's economy has sped ahead? What are the new demands being placed on the system? We know, for example, that more motor-vehicle cases, a reflection of the burgeoning middle class, are affecting caseloads in urban areas. What other changes is the caseload undergoing, and what adaptations, if any, are being made in response to such changes?<sup>26</sup> Are these reflected in courts outside the major urban areas? Just as important, if not more so, is who is not using the courts and why? To the best of

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25. Although I know of no opinion polls regarding the court's status among segments of the public, anecdotal evidence suggests that it is generally well liked. See Robert Moog, *Judicial Activism in the Cause of Judicial Independence: The Indian Supreme Court in the 1990s*, 85 JUDICATURE 268, 270 (2002).

26. In response to the increase in motor-vehicle cases, at least in New Delhi, the use of an informal "contingency fee" system has developed. These contingency-fee arrangements were observed by the author while at the Patiala House courts in New Delhi in March 2004.

my knowledge, no one has attempted a survey of the public to gauge what is keeping those not using the justice system from doing so. Whether it is a lack of credibility in the system as a whole or in the bar, potential cost, time involved, physical distance to travel, the unlikelihood of collecting on judgments, or some other obstacle, the reason needs to be understood before the barriers to access can be lowered. These are the areas that must be explored in order for policymakers to determine what reforms are required to ease access to the system. At the same time, it needs to be emphasized that this is not simply a matter of quantity (enhancing the capacity of the system to handle more matters more efficiently), but just as importantly, a question of the quality of justice dispensed. Of course, such reforms carry inherent problems: if successful, what additional burdens will be placed on the system, and what resources will be necessary to handle any expected increase in demand, whether in the formal courts or in alternatives to them?

What we must realize now is how rapidly the context within which the justice system operates is changing, and how that is altering the demands and expectations placed upon it. As the Indian economy, political system, and society continue to evolve, certainly both the written law, and the delivery of justice services, must adapt as well. As the law-and-society movement amply demonstrates, the law and the actors involved in enforcing and interpreting it do not reside isolated in a rule-bound universe of their own making, but must interact with societal forces on a daily basis and respond to economic and political changes and demands. As Galanter observed, ultimately the legal system is not simply a "body of rules," but also a "body of men [and women]."<sup>27</sup> And it is the interactions among these men and women within the system, as well as their interactions with outside forces, that ultimately determine what "the law" is in practice and the net benefits, or harms, it brings to society.

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27. Galanter, *supra* note 1, at 202.