

PREFACE

From June 13 through June 15, 1983 an Indo-American Seminar on Law and Social Change took place at The Fletcher School of Law and Diplomacy, Tufts University.

Bi-national seminars take a great deal of time and planning; this one was no exception. The action which began the process leading to this Seminar was a meeting of the Indo-U.S. Subcommittee on Education and Culture on 19-20 March, 1979 at Azad Bhavan in New Delhi. Shri Soli Sorabjee, an Indian member of the Subcommittee, said that "it was necessary for lawyers and judges, besides law enforcement officials and legislators, to have an understanding of socio-economic process". He proposed a joint seminar on the Role of Lawyers in Social Change.

Following up on Sorabjee's proposal Ted Tanen, the American Executive Secretary of the Subcommittee, organized a meeting of American academics interested in India at Asia House in New York City in September 1979. The goal was to agree on some form of joint programme with Indian counterparts.

The U.S. group agreed that a seminar on law and social change would be a good idea. Attention was to be directed to the relationship between legal systems and socio-economic political change. To what extent and under what circumstances does law promote or limit change? Does it lead or follow change? A list of possible topics was compiled as the basis for discussion with the Indian group.

Meetings and exchange of correspondence took place over a period of months. An agreed upon agenda was approved by the Subcommittee and the Seminar took place in June 1983.

The Seminar, which is the subject matter of this book, was viewed as an initial effort to bring together Indian and American scholars working together in the area of law and social change. It is anticipated that the first Seminar will be followed up by subsequent meetings in both India and the United States.

The Seminar was divided into four general areas of discussion and two or more papers were included in each area.

Law and Social Change constituted the opening topic with papers by Robert F. Meagher and David Silverstein and Yogendra Singh.

The Meagher and Silverstein paper reviewed various approaches to law and social change in U.S. academic circles. They argued for a culturally specific perspective giving a strong interactive role to "reglementation", "non-state law" or "customary" law with enacted law. They stressed the linkage between law and the socio-economic system; the interaction between

customary and enacted law; and, the linkage between the legal-administrative infrastructure and the implementation of law. Their analysis favours incremental change and they discuss receptivity to change as an important analytical element in the role which law can play in bringing about change. Singh opened with an historical and institutional perspective on the relationship between law and social change and modernization in Indian society. He reviewed pre-colonial and colonial institutions and discussed current moves for change through law.

The second group of topics used *Dissent, Violence and Development* as their common theme. J. Stuart Lemle centered his attention on the Nuclear Freeze Movement in the United States. He outlined and analyzed the activities of various activist groups. His central thesis is that "Dissent and the operation of legitimate channels for factoring it into the political decision-making process have become an American hallmark and a linchpin of American development". Upendra Baxi's central theme was that violence and repression pre-eminently characterize the process of "development" and "regression" in the United States and India. He then differentiated the societies on the basis of wealth. He put forth a broad definition of violence which includes collective political violence. How do those out of power act "legally" to replace those in power, the latter being the group which defines what is legal. The paper is replete with agricultural and communal examples.

Human Rights and the Administration of Criminal Justice was the third general topic. Abraham Goldstein gave the group a view of the tension between legal norms and practices in U.S. criminal justice. He directed his comments to: right to counsel; prosecutorial discretion and the guilty plea; pre-trial detention and release; and, police investigation and the exclusionary rule i.e. may illegally obtained evidence be used in a trial. Illustrating his comments, within a historical context, emphasis was put on the "gap" between norms and practice. Each of the listed topics was developed from a norm/practice perspective. Serious questions are raised about which branch of government is responsible for closing the "gap". S.N. Jain developed the question how can society protect itself from criminals without threatening the rights of the innocent. Although the procedures he covered were similar to Goldstein's, the Indian practices gave an interesting contrast to the American ones. Jain covered: self-incrimination; undertrial procedures; bail; power of arrest; legal aid; prior justice; and illegally obtained evidence.

The last part of the Seminar, *Protection of Socially Vulnerable Groups*, was handled by three papers. Richard Schwartz asked if law can succeed as an instrument of equalization and redistribution. Arguing that in any open society normative consensus is extremely limited, he suggests that law may be needed to facilitate norm formulation. He states that a basic premise of law and society is that they affect each other. Failure of law is usually due to too wide a variation with societal norms, or that law is not generally

understood to be serving a shared goal. With the growing complexity of society shared norms and purposes decline as the primary basis for law. Law then comes to depend more on reciprocity. Examples are introduced from commercial, labour and criminal law to support his theses. He concludes with a discussion of the role of the legal profession including judges and attorneys. He finds they coordinate activities, are an instrument of dominance, they equalize society and facilitate exchange. S.K. Agrawala analyzes the *2nd Backward Classes Commission Report*. His initial figures are quite startling. The Other Backward Classes (OBCs) make up 53% of the Indian population and the Scheduled Castes and Scheduled Tribes constitute 22.56%. How is backwardness defined, what special rules have been instituted for OBCs, are the rules implemented? These are the kinds of questions discussed. He then moves on to a discussion on how these laws have been received by society. Have reserved jobs, seats in the legislature, admissions to universities taken place? He notes the lethargy of protected groups and asks for more viable legal aid services. The final paper by Marc Galanter was read by Rajeev Dhavan. Galanter dealt with two important questions: the enforcement of anti-disabilities legislation and the implementation of measures for compensatory discrimination. Both the Untouchability (Offences) Act (UOA), 1955 and the Protection of Civil Rights Act, 1976 (PCRA) are analyzed as to substance and implementation. Galanter, struck by the declining number of cases brought under these laws and negative judgements against those protected, seeks an analytical explanation. His analysis suggests needed reforms in the legal process including procedural rules and an effective way to give more access to the legal system.