1960 SEMINAR ON THE ROLE OF SUBSTANTIVE CRIMINAL LAW IN THE PROTECTION OF HUMAN RIGHTS AND THE PURPOSES AND LEGITIMATE LIMITS OF PENAL SANCTIONS

TOKYO, JAPAN
10 to 24 MAY 1960

UNITED NATIONS, New York

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ORGANIZED BY THE UNITED NATIONS

IN CO-OPERATION WITH THE GOVERNMENT OF JAPAN

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I. INTRODUCTION

1. ORGANIZATION OF THE SEMINAR

1. Under General Assembly resolution 926 (X) and Economic and Social Council resolution 605 (XXI) on advisory services in the field of human rights, the Government of Japan invited the Secretary-General of the United Nations to organize a human rights seminar in Tokyo on the role of substantive criminal law in the protection of human rights, and the purposes and legitimate limits of penal sanctions. The Seminar was held from 10 to 24 May 1960.

2. The participants at the Seminar were as follows:

Australia

Mr. Norval Ramsden Morris, Dean of the Faculty of Law, Adelaide University

Cambodia

Mr. Douc Rasy, First Secretary, Permanent Mission of Cambodia to the United Nations

Ceylon

Sir Susanta de Fonseka, Ambassador of Ceylon to Japan

China

Mr. Han Chung-mo, Adviser to the Ministry of Justice and Professor of Criminal Law at the National Taiwan University

Federation of Malaya

Mr. Mohamed Suffian bin Hashim, Solicitor-General

Hong Kong

Mr. D.N.E. Rea, Acting Principal Crown Counsel

India

Mr. Asoke K. Sen, Minister of Law

Indonesia

Mr. Sutan Abdul Hakim, Judge of the Supreme Court of Indonesia

Iran

Mr. Mohammed Sorouri, Chief Justice of the Supreme Court

Japan

Mr. Seiichiro Ono, Special Adviser to the Minister of Justice; Mr. Juhei Takeuchi, Director, Criminal Affairs Bureau, Ministry of Justice; Mr. Saizo Suzuki, Director, Civil Liberties Bureau, Ministry of Justice; Mr. Masaru Higuchi, Director, Criminal Affairs Bureau, General Secretariat of the Supreme Court; Mr. Kiichiro Ohtsuka, Japan Federation of Bar Associations

Nepal

Mr. Shambhu Prasad Gyawali, Attorney-General

New Zealand

Mr. H.R.C. Wild, Q.C., Solicitor-General

Pakistan

Mr. Mohammed Munir, N.Q.A., Former Chief Justice of Pakistan

Philippines

Mr. Enrique Fernando, Associate Code Commissioner, Department of Justice

Republic of Korea

Mr. In Koo Moon, Chief of the Prosecuting Administration Section, Ministry of Justice

Republic of Viet-Nam

Mr. Nguyen Luong, Minister of Finance and Professor at the Saigon Law School

Sarawak

Mr. Philip E.H. Pike, Q.C., Attorney-General

Singapore

Mr. Ahmad bin Mohamed Ibrahim, State Advocate General

Thailand

Mr. Sanya Dharmasakti, Senior Judge of the Supreme Court

3. The alternate participants were as follows:

India

Mr. P.K. Banerjee, Chargé d'Affaires ad interim of India, Indian Embassy, Tokyo

Iran

Mr. Nasser Yeganeh, Director, Legal Section, Ministry of Justice

Japan

Mr. Atsushi Nagashima, Chief, Juvenile Section, Criminal Affairs Bureau, Ministry of Justice; Mr. Tomihiko Kambara, Chief Administration Section, United Nations Bureau, Ministry of Foreign Affairs; Mr. Takashi Machida, Chief, Crime Prevention Section, Safety Bureau, National Police Agency; Mr. Kinsaku Saito, Professor, Faculty of Law, Waseda University; Mrs. Shigeko Tanabe, Professor, Senshu University

New Zealand

Mr. J.L. Robson, Deputy Secretary for Justice

Republic of Korea

Mr. Yang Moon, Senior Judge of the Taegu District Court; Mr. Kun-Ho Lee, Professor of Law at the Law College, Korea University

Singapore

Mr. S. Rajaratnam, Minister of Culture

Thailand

Mr. Tanin Kraivixien, Chief of the Legal Affairs Division, Ministry of Justice

4. The following observers from governments were present:

Afghanistan

Mr. Abdulla Nawabi, First Secretary, Embassy of Afghanistan, Tokyo

Japan

Mr. Yoshitsugu Baba, Vice-Minister of Justice; Mr. Senjin Tsuruoka, Director, United Nations Bureau, Ministry of Foreign Affairs; Mr. Chuzo Hagiwara, Vice-President, Civil Liberties Workers' Association of Tokyo; Mrs. Ai Kume, Attorney at Law; Mr. Tadashi Hanai, Attorney at Law; Mr. Ryuichi Hirano, Professor, Faculty of Law, Tokyo University

5. Of the non-governmental organizations in consultative status with the Economic and Social Council, the World Federation of United Nations Associations (Category A) was represented by Mr. Kosaku Tamura and Mr. T. Sri Ramanathan; the International Bar Association (Category B) by Mr. Nobuo Naritomi; the

International Criminal Police Organization (Category B) by Mr. Takahiko Kiriyama; the International Federation of Women Lawyers (Category B) by Mrs. Ai Kume, Miss Terrys T. Olender and Miss Purita Trajano; the International Law Association (Category B) by Mr. Koichi Inomata; the Pan-Pacific and South-East Asia Women's Association (Category B) by Miss Taki Fujita; the International Society of Criminology (Category B) by Mr. Ryuichi Hirano; the International Commission of Jurists (Category B) by Mr. Masaru Higuchi and Mr. Jean C. Morice; the International League for the Rights of Man (Category B) by Mr. Tsuneo Kikkawa and Mr. Kinju Morikawa; the International Association of Legal Science (Register) by Mr. Masami Ito; the World Federation for Mental Health (Register) by Mr. Shiro Takagi.

6. Mr. Minoru Tsuda, Director, Judicial System and Research Division, Ministry of Justice, served as adviser to the Chairman of the Seminar; Mr. Tadahiro Hayama, Chief, Judicial System Section, Judicial System and Research Division, Ministry of Justice, served as conference officer; and Mr. Tomihiko Kambara, Chief, Administrative Section, United Nations Bureau, Ministry of Foreign Affairs, served as chief liaison officer.

7. The Secretary-General of the United Nations was represented by Mr. John P. Humphrey, Director, Division of Human Rights, United Nations Secretariat. Mr. John Male served as Secretary of the Seminar.

2. OPENING STATEMENTS

8. At the opening meeting on 10 May Mr. C.V. Narasimhan, Under-Secretary for Special Political Affairs in the United Nations Secretariat, and Mr. Hiroya Ino, Minister of Justice of the Government of Japan, addressed the Seminar.

3. OFFICERS OF THE SEMINAR

9. Mr. Seiichiro Ono, Special Adviser to the Minister of Justice, was unanimously elected Chairman of the Seminar. The following were elected Vice-Chairmen:

Mr. Asoke K. Sen (India)

Mr. Sutan Abdul Hakim (Indonesia)

Mr. Mohammed Sorouri (Iran)

Mr. H.R.C. Wild (New Zealand)

Mr. Sanya Dharmasakti (Thailand)

4. PROGRAMME

10. The agenda of the Seminar was as follows:

I. The function of criminal law and purposes and limits of penal sanctions with special regard to the protection of human rights

(a) Relationship between the function of criminal law as a safeguard for human rights and its other functions;

(b) Problems of legislative policy in weighing the interests to be protected by criminal law against the penalties to be imposed;

(c) Should criminal law contain punishable offences, the definition of which does not contain a requirement as to the state of mind of the perpetrator such as intention, negligence or guilty mind (mens rea)?;

(d) The definition of insanity and the effect of insanity on criminal responsibility.

II. Criminal law as an instrument for the protection of human rights

How far and to what extent can substantive criminal law ensure the protection of human rights as set forth in the Charter of the United Nations, in the Universal Declaration of Human Rights and in national constitutions?

For example, examination of the following problems:

(a) Penal sanctions against violations of privacy, including the inviolability of the home and the secrecy of correspondence and "droits de personnalité";

(b) Penal sanctions against social discrimination;

(c) Penal sanctions safeguarding social and economic rights, including the right to health and to education.

III. The legitimate limits of penal sanctions

(a) Should there be capital punishment?

The reasons for and against capital punishment - If capital punishment is retained, to what types of crime should it be limited - The question of its limitation and application in the case of young delinquents and of women.

(b) Are there any penalties deemed improper from the standpoint of the protection of human rights?

(c) To what extent should criminal law restrict civil and political rights of persons convicted of crime? When does the disability cease and what circumstances can lead to the restoration of these rights?

IV. Future programme of international co-operation in the solution of problems discussed at the Seminar

Questions relating to promotion of research work, exchange of experts and fellowships, and publications, etc.

11. The Chairman and the Vice-Chairmen constituted the steering committee of the Seminar. The committee appointed Mr. Suffian and Mr. Morris to be rapporteurs. It requested Mr. Morris to lead the discussion on topic I; Mr. Gyawali on topic II; Mr. Munir on topic III; and Mr. Fernando on topic IV.

5. DOCUMENTATION

12. The Secretariat arranged for the preparation and issuance of the following working papers:

WP/A - Capital Punishment, by Professor Sydney Prevezer

WP/E - Role of Substantive Criminal Law in the Protection of Human Rights, and the Purposes and Legitimate Limits of Penal Sanctions, by Mr. Ryuichi Hirano

13. The participants and other experts submitted the following working papers on the topics of the Seminar:

WP/B - by Mr. Sanya Dharmasakti and Mr. Tanin Kraivixien (Thailand)

WP/C - by Mr. Ahmad bin Mohamed Ibrahim (Singapore)

WP/D - by Mr. In-Koo Moon, Mr. Kun-Ho Lee and Mr. Yang Moon (Republic of Korea)

WP/F - by Mr. Mohamad Ali Hedayati (Iran)

WP/G - by Mr. Seiichiro Ono (Japan)

WP/H - by Mr. Shri A.K. Sen (India)

WP/I - by Mr. Han Chung Mo (China)

WP/J - by Mr. Norval Morris (Australia)

WP/K - by Mr. H.R.C. Wild and Mr. J.L. Robson (New Zealand)

WP/L - by Mr. Mohamed Suffian bin Hashim (Federation of Malaya)

WP/M - by Mr. Shambhu Prasad Gyawali (Nepal)

WP/N - by Mr. Ramon C. Aquino (Philippines)

WP/O - by Mr. Phouvong Phimmasone (Laos)

WP/P - by Sir Susanta de Fonseka (Ceylon)

14. This report was adopted by the Seminar at its 17th meeting on 23 May 1960.

6. CLOSING CEREMONIES

15. The closing ceremonies took place on 24 May 1960. The Seminar was addressed by Mr. Yoshitsugu Baba, Vice-Minister of Justice of Japan. Members of the Seminar expressed their appreciation to the host government and to the United Nations for having organized the present Seminar and for having provided an opportunity for such a fruitful exchange of views and opinions.

II. TOPICS DISCUSSED

1. THE FUNCTION OF CRIMINAL LAW AND PURPOSES AND LIMITS OF PENAL SANCTIONS WITH SPECIAL REGARD TO THE PROTECTION OF HUMAN RIGHTS

(a) Relationship between the function of criminal law as a safeguard for human rights and its other functions

16. The Seminar opened with a discussion of the difficult balance between the social protection functions of the criminal law and the need to safeguard individual human rights. It was recognized that the criminal law allowed the State the greatest forces that it could bring to bear on the individual citizens; that this power was essential to the continuity and cohesion of the State; but that there were great dangers in the exercise of such power if due and anxious regard for individual human rights was lacking.

17. Participants were agreed that in striking the balance between social protection and human rights, the social circumstances of each country must constantly be borne in mind. What would be a just balance for one country might be entirely inappropriate in another because of its different state of development socially, politically and economically. With this qualification in mind, there was no dissent from the proposition that the rules of criminal law must strike a just balance between the rights of the individual to life, liberty physical integrity and the protection of his property on the one hand, and the rights of the State and its citizens as a whole to social stability on the other.

18. Participants were of the view that the criminal law safeguards human rights in two ways:

(a) by punishing, and therefore seeking to deter, infringements of human rights by individual citizens and by government agents and instrumentalities, and

(b) by itself, in its substantive and procedural rules and their implementation, avoiding undue interference with human rights in fulfilling its important social purposes. From this second principle there flowed most of the great precepts of all developed systems of criminal law - nullum crimen sine lege; nulla poena sine lege.

19. The general purposes of criminal sanctions were discussed and the possibility was recognized that in all its functions - retributive, deterrent, reformative and educative - it was possible for the criminal law to be defined and applied so as to conflict with human rights. Any one of those purposes carried to extremes could lead to serious and unjustified infringements of human rights.

20. There was protracted discussion on the following questions: Was there a conflict between effective social control and the protection of human rights?

Was such a conflict apparent or real? Were their respective needs mutually contradictory and what principles should guide each country in striking its own balance between them?

21. The discussion made it clear that the balance between social control and human rights would vary with the social stability of the community; but there was general agreement that it was undesirable to exaggerate the demands of social control, it being recognized that the criminal law was, after all, only one of several techniques of social control.

22. The majority of participants were of the view that there was a real and continuing conflict between the demands of social control and the need adequately to protect individual human rights; either, it was felt, could be carried to extremes. Considerable agreement was expressed to the view offered by a participant of Japan who stressed that criminal statutes should cover only the minimum necessity of the social threat and that punishments prescribed by the criminal law should be both humane and proportional to the gravity of the offence.

23. The question was raised whether one could, from the standpoint of substantive criminal law, talk of an "unjust punishment", it being suggested that all that one should consider was whether punishment was legal or not. Participants were of the view that, though this might be correct from the legal standpoint, it was essential to take a wider perspective by which punishments could be regarded as "unjust" on sociological and humanitarian grounds, and in particular if they were excessive in regard to the exigencies of the threat that the crime and the criminal presented to society.

(b) Problems of legislative policy in weighing the interests to be protected by criminal law against the penalties to be imposed

24. The link between the previous topic and the matters arising under this heading was stressed and discussion was concentrated on the relationship between legislative, judicial and administrative bodies in determining the punishment to be inflicted in any given case. The whole discussion was based on the assumption that even if it were difficult accurately to define "just punishment" there clearly could be an "unjust maximum punishment" both with respect to a given type of crime and with respect to a particular offender.

25. There was a lengthy discussion on the question whether it was desirable for a legislature ever to fix the minimum punishment for any given type of crime and there was an exchange of views on how mandatory minimum punishments had worked out in various countries represented at the Seminar.

26. There was a tendency for participants to prefer that the legislature should establish the maximum punishment for any given offence, and then allow a wide discretion to the trial judge to fix the actual sentence in each case.

27. The wisdom of allowing some discretion in a parole board or similar administrative tribunal as to the actual date of release of criminals sent to prison was discussed, and information was supplied by those countries where such a system applied.

28. The general view emerging from the discussion on this topic was that the legislature should fix maxima of punishments in accordance with the gravity of the offence and the threat which it presented to the community at the given time, that the legislature should not ordinarily set up minimum punishments but should allow a sentencing discretion to the trial judge, and that for certain types of prisoners there should be power in an administrative body to fix the exact date of release.

(c) Should the criminal law contain punishable offences, the definition of which does not contain a requirement as to the state of mind of the perpetrator such as intention, negligence or guilty mind (mens rea)?

29. Note was taken of the historical development by which the criminal law had in recent decades come to be used for purposes of establishing minimum standards of public health, marketing, education, labour conditions, and trade practices - the whole development of "public welfare offences". It was recognized that associated with this development there had been an increasing tendency, certainly in the common law systems, to create "strict liability", that is to say, the possibility of criminal convictions in the absence of intentional, reckless or negligent wrongdoing.

30. Participants from several countries whose legal systems had their roots in the European civil systems stressed the theoretical proposition in their legal systems by which there could be no criminal liability without intention, recklessness or negligence; but most went on to point out that, in practice, even in legal systems having this origin, there were developing elements of strict liability.

31. Members of the Seminar were agreed that strict liability was necessary to deal with certain social problems. An endeavour was made to classify and discuss those types of social welfare problems in which it would be undesirable to cast on to the prosecution the burden of proving mens rea. In matters of health, labour regulation, industrial safety, housing, and in times of national emergency, such strict liability seemed unavoidable. There was, however, a clear desire on the part of all participants to limit strict liability as much as possible.

32. Four methods were discussed by which even where "strict liability" was appropriate, some of its occasional injustice to the individual might be removed. These four possible ameliorations of the problem were:

(a) the "third party procedure" as developed in certain United Kingdom statutes, by which an accused person might escape liability upon proof of fault in a third person not under his control;

(b) statutes which allowed the accused to escape liability if he could prove that the offence was committed without his connivance or knowledge;

(c) the suggestion in the American Law Institute's Model Penal Code that a new category of offence, to be called "violations", punishable only by fine or forfeiture should be established. Such a "violation" would

have no subsequent significance in criminal or civil law or for purposes of licensing or trade regulation;

(d) that mistake of fact should be a defence available to the accused even in cases where "strict liability" was thought legislatively necessary.

33. Considerable discussion centred around the mistake of fact defence to "strict liability". It was pointed out that to allow this defence would take the whole problem out of the area of "strict liability", but on the other hand several participants were of the view that it would be legislatively desirable to allow the offender to escape liability if he could prove affirmatively on a balance of probabilities that he reasonably believed in a state of facts which, if true, would mean that he committed no offence. It was suggested that this solution might not encroach upon the needs of the State adequately to regulate certain types of community activities and yet might allow the morally innocent accused to escape liability.

34. Despite the substantial differences between the legal systems represented at the Seminar, there was a large measure of agreement both on the need for "strict liability" and on the desirability of curtailing its operation so far as possible and allowing the morally innocent accused some defence provided that the burden of carrying that defence lay upon the accused.

(d) The definition of insanity and the effect of insanity on criminal responsibility

35. Participants stressed the close relationship between this problem and the degree of development of a country's mental health services. It was pointed out by the discussion leader that in many countries in Asia the prison systems were better developed than the mental hospitals. This was clearly closely related in practice to the problem being discussed.

36. The relationship between this defence and the existence or non-existence of capital punishment in a country was also noted.

37. Participants agreed on the tendency of the various defences of insanity in their respective countries to concentrate on the offender's ability to know what he was doing and that it was legally or morally wrong. There was general agreement that it was desirable to go beyond this stress on knowing and to allow some room in the defence of insanity for the accused's lack of capacity to control his actions. There was protracted discussion on the best means of achieving this result.

38. Several participants stressed that this issue was ultimately a legal issue and not a psychiatric one, it being for the law to determine who were accountable, who were responsible, under law. It was recognized that in deciding on this issue psychiatric information was of the first importance, but it was agreed that in the long run the duty of defining this defence was one for the law.

39. Several participants stressed that because there was no clear psychiatric line drawn between sanity and insanity, the task facing legislatures and courts alike of drawing such a line for purposes of this defence was a difficult one.

40. Attention was directed to the Scottish doctrine of Diminished Responsibility adopted in England and Wales in 1957. Under this doctrine, a person accused of murder, whose responsibility for his act was believed by the jury to have been substantially affected by his mental illness, might be convicted of manslaughter instead of murder and punished accordingly. Many were of the view that this doctrine would, for the time being, be a sufficient solution of the problem.

41. There was a lengthy exchange of views on the question of whether, in countries following the common law system, the ultimate burden of proof in the defence of insanity should be cast on the prosecution or on the defence.

42. There was general agreement that as an immediate practical step, in so far as a country's financial and technical resources could achieve it, it was of importance that there should be an adequate psychiatric examination of all criminals who were thought to be or to have been gravely psychologically disturbed. It was suggested that only thus could knowledge essential to a proper formulation of this defence in each country be built up.

43. Throughout the discussion of this topic, there was a helpful exchange of information on how the defence of insanity operated in the various countries represented at the Seminar.

2. CRIMINAL LAW AS AN INSTRUMENT FOR THE PROTECTION OF HUMAN RIGHTS

How far and to what extent can substantive criminal law ensure the protection of human rights as set forth in the Charter of the United Nations, in the Universal Declaration of Human Rights and in national constitutions?

44. Participants were first invited to say how a country could implement the Universal Declaration of Human Rights in an effective way. They were agreed that substantive criminal law in all countries represented a balance between the need to protect the interests of the community and the need to protect the interests of the individual. They heard that in some countries human rights were incorporated in a written constitution and individuals aggrieved by the infringement of such rights either by the State or by a fellow citizen could have recourse to the civil courts for their remedy. Some countries, however, had no written constitution and in those countries the protection of human rights was implicit in the law. It was generally agreed that the incorporation of human rights in a written constitution was not in itself necessarily the most effective way of safeguarding such rights.

45. Some participants thought that the best safeguard of human rights was the quality of the personnel of the government, particularly the personnel of its agency responsible for the enforcement of law. If the government were tyrannical and regarded the interests of the State as always paramount, the best constitution in the world would guarantee nothing to the citizen. If, on the other hand, the personnel of the government were animated by the ideals of the Universal Declaration of Human Rights, there would be little risk of infringement of such rights. The existence of such a government depended on the education of public opinion, and that required a strong Opposition and a free and courageous Press.

Several participants stressed that the Universal Declaration of Human Rights was an expression of ideals and all should strive to promote respect for those ideals not only among the people but also among their governments.

46. The question was also discussed as to the remedies which should be available to an individual whose human rights had been infringed. Some participants expressed the view that penal sanctions should be available to punish infringers of such rights, though it was admitted that the infringement of some of those rights could not be followed by penal sanctions in some countries. It was thought that where penal sanctions existed, particularly against public officials who might infringe human rights, the mere existence of such sanctions was enough to deter.

47. Some participants expressed the view that substantive criminal law was not enough in itself to provide adequate protection. The object of penal sanctions was to punish officials who had exceeded their power, but something more than penal sanctions was necessary. Even if discipline in the administration improved as a result of penal sanctions, it did not help the citizen who had been injured. Citizens should also possess the right to initiate proceedings for monetary compensation. These might be instituted either in civil courts or through some other expeditious administrative procedure. If ready access was provided to courts of justice for the purpose of proceedings against erring officials, human rights would be respected.

48. In this respect, participants heard with great interest the Australian experience with Police Disciplinary Boards, consisting of the chief police commissioner and one or two leading citizens who sometimes were persons with previous experience as magistrates. The board corrected any excess or abuse of power by the police and injured citizens had ready access to it. Its existence helped to foster the feeling that the police force was anxious to protect human rights and had a sense of responsibility.

49. Participants also heard with interest the functions of the Civil Liberties Bureau and the Civil Liberties Commissioner in Japan, the Civil Liberties Bureau in the Republic of Korea and the Civil Liberties Union in the Philippines in protecting the rights of individuals against excess or abuse of power.

50. Some participants felt that the right of access to courts was not always an effective remedy, because very often injured persons made poor litigants. For this reason the additional administrative remedies which were available in certain countries were welcomed. Participants were informed that legal aid was available in some countries and hoped that such schemes might be extended to other countries in the course of time.

51. The question was also discussed as to whether the injured citizen's remedies should be available against the State or against the offending official. The participant from Indonesia stated that in his country, no suit lay against the official and the injured citizen's remedy was against the State alone. In some countries the remedies lay against both the State and the official. Participants were generally agreed that it was desirable that there should certainly be a remedy against the State.

52. It was asked how a government agency to whom an aggrieved individual had complainted could act against the government agency complained of. Many participants agreed that in their countries this presented a real problem. The Seminar heard with interest the setting up in the Federation of Malaya of an Anti-Corruption Bureau in the Prime Minister's Department, to which complaints relating to corrupt officials could be made without going through the usual channels.

53. The Seminar heard with interest how the system of inquest of prosecution worked in Japan and felt that the system created confidence among the public in the government's regard for human rights.

(a) Penal sanctions against violation of privacy, including the inviolability of the home and the secrecy of correspondence and "droits de personnalité"

54. The participant from Nepal stated that this matter stemmed from article 12 of the Universal Declaration of Human Rights. Two specific questions were discussed under this heading, namely, wire tapping and the collection of evidence by tape recording.

55. Wire Tapping: It was generally agreed that wire tapping was a serious breach of human rights and should be permitted only under proper authority. The Seminar was invited to consider the circumstances under which such authority might be given. In Australia, wire tapping without authority was punishable with two years imprisonment or a fine of £500 or both. Authority to listen in could only be obtained, first, from the Postmaster-General, by the staff operating the telephone system, namely for the purposes of repairs, etc., and secondly, from the Attorney-General when an application was made to him for a specific purpose by the Director of National Security. Participants were agreed that wire tapping was an odious practice and should be subjected to severe restrictions. It should be authorized only for the protection of national security and for the detection of serious crimes, particularly where the evidence would be difficult to obtain by other methods such as in cases of blackmail and kidnapping. The question was then considered as to whether the authority should be given by a judicial or ministerial authority, and after protracted discussion it was generally agreed that expediency and the need for secrecy would make the seeking of judicial authority impractical. Some participants felt that figures regarding the extent of the practice of wire tapping should be published, but all were agreed that such figures were difficult to obtain, as governments were reluctant to reveal them.

56. It was felt that the subject of wire tapping was full of sinister implications because it was carried out in secrecy. The censorship of letters in wartime also constituted a breach of human rights, but such censorship was openly admitted by governments.

57. Tape Recording: Some participants felt that the tape recording of evidence by hidden microphones constituted a breach of human rights, while others were of the contrary opinion. It was pointed out that tape recording was not in the same category as wire tapping. If done openly, it should be regarded in the same category as photography and might, in fact, protect the interests of the accused as it recorded faithfully the tone and contents of a conversation. Danger, however, lay in the possibility of tampering with tape.

(b) Penal sanctions against social discrimination

58. Participants were informed that in some countries there was no social discrimination. The Seminar was generally agreed that the most effective way to eliminate such discrimination where it existed was by the education of public opinion. In countries where it existed, it was the result of social and historical developments and it could be eliminated only when the public were ready for elimination. Penal sanctions in themselves were not always effective.

59. The participant from India stated that his Government regarded penal sanctions as an important technique for the protection of human rights and drew the attention of the Seminar to the situation in South Africa where penal sanctions were deliberately used to violate human rights. He cited several laws passed by the South African Government within the last ten years which completely disregarded the Universal Declaration of Human Rights. In contrast, the New Zealand Government had adopted a policy of integrating the Maoris in the life of the community. A number of participants who spoke were of the view that the policy of the South African Government was contrary to the Universal Declaration.

(c) Penal sanctions safeguarding social and economic rights, including the right to health and education

60. Many participants referred to this and the general feeling of the Seminar was that penal sanctions were necessary to protect the social welfare rights of the individual, certainly as a last resort. Some participants referred to the doctrine of strict liability, which had been discussed earlier, and thought that there should be no relaxation from that doctrine in safeguarding such rights.

3. THE LEGITIMATE LIMITS OF PENAL SANCTIONS

(a) Should there be capital punishment?

The reasons for and against capital punishment - If capital punishment is retained, to what types of crime should it be limited - The question of its limitation and application in the case of young delinquents and of women

61. The discussion on this topic was intensive and detailed and occupied more of the attention of participants at the Seminar than any other topic. Apart from the particular aspects of the problem on which attention was focused, there was an informative and detailed sharing of experience on the law and practice concerning capital punishment in all of the countries that were represented at the Seminar.

62. There was discussion as to whether capital punishment could be said to contravene articles 3 and 5 of the Universal Declaration of Human Rights. It was agreed that there was no inherent conflict between these provisions and capital punishment, and that the question should be considered from wider aspects of the social utility and moral propriety of capital punishment. It was further agreed that the question of whether capital punishment was a necessary and appropriate punishment, and if so, for what crimes and in what circumstances,

could only be answered for each country in the light of the particular social circumstances of that country.

63. Participants told of the crimes to which capital punishment was applicable and applied in their countries. Discussion was concentrated, however, on capital punishment for the crime of murder.

64. There was considerable discussion of the experience of suspension or abolition of capital punishment in certain countries in the geographic area represented at the Seminar. The abolition of capital punishment in New Zealand and in certain Australian States, and the much earlier abolition in Goa in 1870, was mentioned. There was protracted discussion of the experience of suspension of capital punishment in Nepal in 1931 and its abolition under the general law in that country in 1946, the abolition in Travancore-Cochin (later part of Kerala in India) in 1944 to 1951 and the remitting of capital punishment from 1951 to 1957, and the more recent experience in Ceylon in 1956 to 1959 inclusive. There was also interesting information given concerning the abolition of capital punishment in Japan between the years 810 and 1156.

65. The participant from Nepal reported that no social ill effects had ensued from the fifteen year period of suspension and subsequent abolition of capital punishment under the general law in his country. There were reports on the experience of abolition of this punishment in Ceylon, New Zealand and Australia.

66. There was a diversity of view on the relevance of the experience of one country's abolition of capital punishment to the problems of another. Some participants were of the opinion that the combination of wide differences of social organization together with the unreliability of statistical information lessened the relevance of such experiments as had been reported; other participants took the view that the basic similarities in human personality and the frequent repetition of the experiment of abolition or suspension of capital punishment followed by no discovered undesirable consequences constituted an experimental pattern which might well guide a country considering the abolition or diminution of capital punishment.

67. The majority of participants at the Seminar were of the view that reliance should not be placed on capital punishment as a unique deterrent to murder. Many stressed that it was public opinion and the need publicly to affirm the community's abhorrence of murder which were the vital forces tending to retain this punishment. There was general agreement that the legislature should not move too far in advance of public opinion on this question.

68. Several of the participants expressed themselves as personally in favour of abolition while yet recognizing the impracticability of any immediate move in that direction in their countries; the particular social circumstances of their countries and the state of public opinion in them precluded any possibility of immediate abolition of this penalty.

69. There was considerable agreement that it was desirable that capital punishment should be gradually and steadily narrowed in its application. A general tendency towards the application of this penalty only in the most extreme cases was noted and approved. The general sense of the Seminar was that, in

those countries which retained capital punishment, a gradual and steady social evolution towards its severe restriction or possible ultimate abolition was desirable.

70. The connexion between capital punishment and religious, moral and philosophical views was noted.

71. There was considerable discussion of whether the legislature should allow the trial judge in murder cases to exercise a discretion as to the imposition of capital punishment or not, or whether it was better to leave the entire exercise of clemency to the executive. There was a divergence of opinion on this question; but most participants agreed on the desirability of the executive considering each case on its merits, whether or not such anterior discretion had been given to the trial judge.

72. There was discussion as to the types of murder for which capital punishment might be retained and the types of murder and murderers which might be excluded from its operation. This discussion was related to the earlier expressed idea of the gradual narrowing of the operation of capital punishment.

73. Participants noted the wide-spread retention of capital punishment for treason and kindred offences and in times of national emergency. Again, the retention of this punishment on the statute book, even though it is extremely rarely applied, was regarded as necessary at this stage of social development in some countries.

74. Some participants were of the opinion that capital punishment might be applicable also to other serious crimes if necessary.

75. All countries represented at the Seminar reported that women who murdered were extremely rarely executed. Apart from the obvious undesirability of executing the pregnant woman, participants were of the view that there was little logic to support this discrimination between the sexes. Though illogical, this discrimination reflected, in the opinion of participants, the state of public opinion on the matter in their countries.

76. All participants were agreed that capital punishment should never be applied to persons under 18.

(b) Are there penalties deemed improper from the standpoint of the protection of human rights?

77. This question was discussed in the light of article 5 of the Universal Declaration of Human Rights which reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Participants were agreed that any punishment which was an affront to human dignity and offended the social conscience of the times and the country concerned was improper. They noted that in ancient times retribution was the primary aim of punishment, but in recent times the mode of punishment had tended to become more lenient as the social conscience of the people developed. One participant envisaged a future society where the mere public disapproval of anti-social behaviour would be a sufficient deterrent. Particular forms of punishment were discussed.

78. Castration as a punishment for sexual offenders. The Seminar was given facts by an observer arguing the effectiveness of castration as a punishment for sexual offenders.

79. After an interesting discussion, participants were unanimous in their view that it should not be used as a punishment. Its use as a remedial measure was outside the scope of substantive criminal law and participants had no data on which to express any view on this aspect of the question. They noted that in none of the countries represented at the Seminar was this measure used as a punishment.

80. Amputation, another form of mutilation, as a punishment for stealing was briefly mentioned. The Seminar was informed that this was a permissible penalty for certain types of stealing in Moslem law, but in none of the Moslem countries represented was this the law today.

81. General confiscation of property, as opposed to confiscation of the property regarding which any offence was committed or which had been used for the commission of any offence. The Seminar was informed that this penalty did not exist in any of the countries represented.

82. Free Labour. The Seminar was informed that in one country a person sentenced to a fine and unable to pay it might instead elect to do free labour for the State. Participants were of the view that, while in practice this was no affront to human dignity, at any rate in theory, such free labour could be used as slave labour and might, therefore, offend against the spirit of the Universal Declaration of Human Rights.

83. Solitary Confinement. Participants noted that while this still existed in a few countries, it had been abolished in most of the countries represented.

84. Corporal Punishment. Participants noted that this form of punishment had been abolished in most of the countries represented. Opinion was divided as to its desirability. Some participants were of the view that it was a proper penalty, particularly for offences involving violence, as experience had shown it to be an effective deterrent for such offences. Other participants were of the view that it was cruel and excessive, taking into account the nature of the offence for which it was usually meted out, that it was not an effective deterrent, and that in any event it was an affront to human dignity.

85. The general feeling of the Seminar was that the question of whether or not any particular form of punishment was proper was a relative one and each country answered it in the light of the circumstances existing in it at the particular period.

(c) To what extent should criminal law restrict civil and political rights of persons convicted of crime? When does the disability cease and what circumstances can lead to the restoration of these rights?

86. Owing to the limited time available towards the end of the Seminar, these two questions were discussed briefly and only a few participants spoke. There was agreement that a conviction for serious crimes, particularly those involving

moral turpitude, justified the loss of civil and political rights, whether by order of the convicting court or by a subsequent order made by another authority or automatically. One participant thought that the criminal law should not itself prescribe the loss of such rights. There was also agreement that the automatic loss of such rights consequent on conviction for an electoral offence was justifiable, to ensure that elections were free and fair. Participants were also agreed that the loss of such rights consequent on a conviction should be kept to the minimum, taking into account the need for balancing the interests of the community with the interests of the individual. It was also felt that generally speaking such loss should not be permanent and that civil and political rights should be restored after a definite period of time automatically or for good reasons on application by the individuals affected.

4. FUTURE PROGRAMME OF INTERNATIONAL CO-OPERATION IN THE SOLUTION OF PROBLEMS DISCUSSED AT THE SEMINAR

Questions relating to promotion of research work, exchange of experts and fellowships, and publications, etc.

87. It was the sense of the Seminar that there should be further international co-operation in the solution of the problems discussed. In a brief exchange of views, the following points were made:

(1) The countries in the region might consider the possibility of establishing national committees on human rights or research institutes to study problems of human rights in criminal law and procedure.

(2) The possibility of exchange of experts, fellows and scholars in the field of criminal law and procedure was suggested. In this connexion, the participant from Australia said that his Government was prepared to finance and arrange training programmes, for nominees of governments which are signatories to the Colombo Plan, for periods of not less than three months in Australia, studying governmental and police law enforcement agencies, the judicial system, and related matters in the field of criminal law and procedure.

(3) The Seminar was informed that the Government of New Zealand would be host to a seminar, in February 1961, on the protection of human rights in criminal procedure. It was suggested that another seminar on problems of human rights in substantive criminal law should be organized in this region in 1963. It was further suggested a seminar on freedom of conscience and religion, of thought and expression, and of assembly and association might be organized.

(4) It was requested that the report, the summary records and the working papers of the Seminar should be widely distributed. There was a suggestion for exchange of legal literature dealing with problems of human rights. It was also suggested that legal textbooks should cover problems of human rights. The participants realized the difficulties that would arise from a variety of languages in the region. The hope was expressed that United Nations documents in the field of human rights might be translated into the various languages in the region.

ANNEX

ABSTRACT OF PROCEEDINGS

I. The function of criminal law and purposes and limits of penal sanctions with special regard to the protection of human rights

(a) Relationship between the function of criminal law as a safeguard for human rights and its other functions

Mr. MORRIS (Australia), in opening the discussion, said that this topic was one of great difficulty, and had challenged the minds of men for over 2,000 years. The criminal law governed the strongest forces that the State was permitted to bring to bear on the individual. It was important, therefore, to strike a just balance between the interests of society and the rights of the individual. The Chairman had suggested that the seminar should adopt a practical and realistic approach. This could not be achieved without an adequate theoretical foundation. There could be no universal and absolute principles governing the balance between social needs and individual human rights, but the balance would vary from State to State and from time to time in any State. As a safeguard of human rights, criminal law might be viewed in two ways:

(a) it prohibited and thus sought to prevent and control infringements of human rights by individual citizens and by government agencies,

(b) the criminal law itself must be so shaped and administered that it did not trespass on human rights in fulfilling its own social functions. From this second perspective flowed the great fundamental principles of criminal law - nullum crimen sine lege, nulla poene sine lege, the avoidance of retroactive criminal legislation, and so on.

Criminal law had at least three functions: retributive, deterrent and reformative. Another purpose, not often mentioned, was its educational function, by which the criminal law publicly propounded minimum standards of social behaviour. All these purposes could be regarded as techniques of social control. However, all three functions if taken too far might conflict with human rights. Even reformation, if too enthusiastically adapted, without due regard for our lack of knowledge of many aspects of human behaviour, carried with it a profound threat to human rights. The modern tendency was both towards reformation and towards the promotion of human rights. This was clearly brought out in the working papers submitted by participants and alternates from China, Thailand, Japan, Nepal and the Republic of Korea. The basic question in this regard was the conflict between the need for social control and the rights of the individual. It was therefore necessary to raise three questions: (1) Is there a conflict between social control and individual rights? (2) Is the conflict apparent or real? (3) If there is a conflict, how can a balance be struck?

Finally, it was important not to exaggerate the role of criminal law in the community, but to remember that it was, after all, only one of many techniques of achieving social control and social stability.

Mr. HAN (China) said it was necessary to clarify the "purposes" and the "function" of criminal law, since these two terms were usually confused. The term "function" could be interpreted as the integration of powers into a whole, in such a way as to reflect the interdependence of means and ends in criminal law. The functions of criminal law which had an important bearing on the protection of human rights were negative in character. They were concerned with the moral condemnation of the offender. Power had to be vested in governments to punish offenders, and criminal law had to meet requirements of reformation, rehabilitation, etc. In providing for sanctions, due regard should also be paid to the offenders who had to undergo the sanctions; the rights of the criminal should not be sacrificed. He agreed with Mr. Morris that criminal sanctions were not the only means of social control, and too much stress should not be placed on corrective punishment.

Mr. HAKIM (Indonesia) felt that there was no conflict between social control and human rights. If social control was exerted in a national manner, human rights would be protected.

Mr. DHARMASAKTI (Thailand) believed that there was some conflict between the two because in the region from which participants came, and especially in Thailand, problems arose whether emphasis should be placed on the protection of the community or in the protection of individual rights. Such a decision had to be made when the general welfare of the public was involved, e.g., in the case of hooliganism.

Mr. FERNANDO (Philippines) said that while the rights of the alleged offender deserved full protection, the interests of the offended party must not be lost sight of. In regard to social control, he believed that in addition to the interests of the group as a whole, the interests of individuals composing the group should also be considered. In contemplating any possible reconciliation between the interests of the group and the rights of the individual who had committed a crime, the rights of the latter, while entitled to consideration, and as a matter of procedural law given ample guaranty, could not be paramount to the rights of the victims, who in their totality constituted the State.

Mr. MUNIR (Pakistan) agreed that an accused person was entitled to a presumption of innocence and to a fair trial, but once he had been found guilty he could not claim any right against the substantive criminal law of the country. He noted that the seminar would seek to define in a precise manner the kind of punishment that had to be inflicted upon wrong-doers. He was not in favour of capital punishment, but certain kinds of crime prevailing in his country, such as rape followed by murder, murder with torture, etc., justified imposition of the death penalty. The kinds of punishment meted out should be determined by the historical and social background of the community; these were practical questions, depending on the social conditions and the degree of intellectual development prevailing in any given country. Could participants define and spell out the human rights of a criminal who had been found guilty? Was it possible to state which principles should be enunciated in legal terms and be embodied in the law of a country?

Mr. PIKE (Sarawak) observed that the protection of the rights of society involved at the same time the protection of human rights. The question was, what protection could safely be given to the rights of the individual? In this

connexion, he believed, for example, that corporal punishment applied in a strictly controlled manner was one of the most effective deterrents, although it was currently falling out of favour. He did not consider corporal punishment any more degrading than imprisonment.

Mr. REA (Hong Kong) said that sub-items (a), (b) and (c) of the first agenda item were all related to the question of the extent to which private rights should give way to those of the State. In his opinion there was a conflict between social control and the protection of human rights. Such a situation was not mutually contradictory, inasmuch as an individual might suffer in the interests of the State on one occasion and on another might be a beneficiary. He did not believe that any general principle could be laid down with a view to striking a balance. Every case should be dealt with on its own merits.

Mr. WILD (New Zealand) pointed out that fundamental rights such as the presumption of innocence and the right to a fair trial were guaranteed under most systems of jurisprudence but these were legal matters and legal rights, and were apart from the broader aspects of the protection of human rights which should engage the attention of participants. They were concerned with the wider issues of what happened to criminals when charged, with the maximum or minimum punishment to be meted out, and with methods rehabilitating the criminal.

An important principle to be kept in mind in the formulation of criminal legislation and in dealing with criminal cases generally was that every act should be regarded as lawful unless it was expressly prohibited in precise terms, and that no prohibitions should be laid down unless absolutely necessary. He suggested that one way to strike a balance was by constant revision of criminal codes or laws, with a view to determining, from time to time, whether they reflected the needs of the community. Of course he agreed that criminal law should be stable and consistent; however, if criminal law became outdated, it fell into disrepute, and this worked against the interests of the State.

Mr. NAGASHIMA (Japan) said that certain functions of criminal law as a safeguard for human rights were incorporated in the constitution of Japan, under the principles of nulla poena sine lege and the prohibition of ex post facto laws. These functions were negative in character in that they were designed to prescribe the limits of legislation and administration of criminal law. At the same time, criminal law had its own positive purposes and functions. One positive function was to protect certain interests or values; criminal law also had disciplinary or deterrent functions. In addition criminal law had the reformative function of educating and rehabilitating offenders. These functions were more or less contradictory in their purposes and therefore no universal or transcendental principle could be enunciated.

He summarized certain limitations of criminal law:

(1) The definition of a crime must be distinct.

(2) What is punishable by criminal law must be an overt and explicit act.

(3) Criminal law must be cautious in punishing even an overt act, if this act constitutes a mere expression of opinion. As to crimes concerning expression and speech in general, the rule of "clear and present danger" may provide a reliable test even under the Japanese criminal law.

(4) Criminal law is intended to deal with persons who are really culpable.

(5) Criminal statutes should cover only a minimum of situations. Serious re-examination will be required in view of the rapid multiplication of criminal statutes concerning mala prohibita.

(6) Punishment prescribed by criminal law should be humane and proportionate to the gravity of the offence. Moreover, punishment should be designed to contribute to the correction and rehabilitation of offenders.

Finally, criminal statutes should be interpreted in compliance with the basic purpose of legislation. However, this should not mean that an act which was not originally punishable under the law, should be made punishable.

Mr. MORRIS (Australia) felt that "unjust punishments" did exist. As an example, he suggested that society would now revolt against the sanction of capital punishment for an offence such as larceny. He agreed with the participant from New Zealand that this was not a technical,legal proposition and that the wider sociological implications must be considered. He also agreed that punishments should be limited to, and should not be in excess of, the real needs of a community. There was also a need critically and constantly to check the legal prohibitions themselves, since there was a tendency for such prohibitions to survive after their usefulness had ended. The aim should be to control anti-social behaviour with as little infringement of human rights as possible. It was also necessary to find out how effective sanctions were as a deterrent, and was desirable constantly to review the effectiveness of penal sanctions, in order that they might be consistent with the protection of human rights.

I. (b) Problems of legislative policy in weighing the interests to be protected by criminal law against the penalties to be imposed

Initiating the discussion of Item I (b).

Mr. MORRIS (Australia) observed that no refutation had been offered as yet by any participants on the proposition that there could be an unjust punishment. The question therefore arose of the extent to which unjust, excessive punishments were contrary to human rights. In deciding what was a just punishment, it was necessary to consider what factors had to be taken into account at the legislative level. It was necessary for legislators to determine the level of severity of punishment which would ensure minimum social control; they should not thoughtlessly increase the severity of sanctions in the name of deterrence. Many of the questions now raised had been reviewed on page 2 of Working Paper K, by the New Zealand participants.

Whereas it was difficult to formulate a theory as to what constituted a just punishment, it was not difficult in most countries, bearing in mind social differences, to arrive at an idea of what should be a just maximum punishment. It should be possible for the legislature to provide for a just maximum punishment for a given type of offence. Then, other agencies of the State should be relied upon to achieve the social control which was essential, as well as to meet the individual needs of the offender by a variety of techniques, such as correctional institutions, parole boards, etc. He believed that in this geographic area it was desirable to give wider discretion to such agencies.

Mr. ROBSON (New Zealand) supported Mr. Morris's view that techniques of sanctions should be examined and revised from time to time. In New Zealand there was a wide-spread assumption that heavy penalties would act as a deterrent to crime. He was also concerned over the wide range of discretion entrusted to agencies in the correctional field; too much discretion left to such agencies would be dangerous.

Mr. REA (Hong Kong) recalled, from his experience, clear cut cases of murder in Hong Kong for which the penalty was death, but where sentences had been reduced to manslaughter by juries. He was opposed to a set or minimum punishment.

Mr. MORRIS (Australia) felt that it was a legislative duty to formulate maximum punishments, as well as to provide the limits of discretion allowed to other agencies of the State in implementing policy. These agencies should have wider discretion in this connexion.

Mr. SUFFIAN (Federation of Malaya) said that the policy adopted by the legislature of his country was to fix a maximum punishment which the courts might use at their discretion. However there was an important exception in the case of rubber stealing, which endangered the economic and social security of his country. Penalties imposed by the courts for this offence had tended to be inadequate, and as a result the legislature had passed a law fixing a minimum penalty of one year up to a maximum of three years' imprisonment for rubber stealing. Enforcement of this law had reduced the incidence of this crime, and the penalty had then been reduced from one year to six months' and subsequently to three months' imprisonment. This was a good example of the conflict which could arise between the interests of society and the rights of the individual.

Mr. KRAIVIXIEN (Thailand) agreed with Mr. MORRIS (Australia) that the law should give wider discretion to the courts. As in the case of Malaya, Thailand also fixed maximum and minimum punishments. In the case of simple theft, the punishment was imprisonment from twelve months to six years, and a fine of 1,000 to 2,000 bahts. The reason for imposing a minimum punishment was to prevent the courts from imposing penalties which were too light for the offence committed.

Mr. HAKIM (Indonesia) said that Indonesia imposed capital punishment for economic crimes which endangered the security of the State and society, such as smuggling; this served as a deterrent. He felt it was necessary to have capital punishment in order to protect the State and for the purpose of achieving economic stability.

Mr. GYAWALI (Nepal) stated that for purposes of deterrence the legislature should fix minimum punishments. For the purpose of justice, however, the legislature should prescribe maximum as well as minimum sentences, this being a way of striking a proper balance. Formerly almost all punishments in Nepal had been fixed, but now the tendency was towards giving more discretion to the courts.

Mr. NGUYEN LUONG (Republic of Viet-Nam) said that in his country it was left to the judge to determine whether or not the death penalty should be imposed. The penal code specified the punishments which were to be meted out in certain

cases, but left discretion to the courts. In any case, the courts were bound by a maximum penalty and it was within the limits of this penalty that they should exercise discretion.

Mr. PIKE (Sarawak) said, in discussing this subject, that the particular circumstances of a country had to be taken into consideration. Broad principles could not be laid down which could be applicable to and practical for all countries. Penalties should be related as much as possible to the gravity of the crime. If there was too great an imbalance, there would be a tendency to disregard the possibility of punishment, or to treat it with contempt, and the deterrent effect would be lost. He favoured vesting a wide discretion in the courts, and in order that this discretion might be as wide as possible, the legislature should prescribe the maximum penalty only.

Mr. FERNANDO (Philippines) said that the legislature, in its desire to suppress certain crimes, tended to make penalties too severe, which was revolting to the moral sense of the community. This made the enforcement of the law difficult; judges, by using technical devices, would tend to impose the lightest possible penalty. A minimum and a maximum penalty were therefore desirable. He agreed with Mr. PIKE (Sarawak) that judges should have more discretion. In the revised penal code of the Philippines, it was recognized that the executive should not unduly interfere with the administration of justice, but provision was made for presidential or executive clemency in cases of excessive penalty.

Mr. LEE (Republic of Korea) asked what would be the remedy in case the courts abused the wide powers given to them.

Mr. PIKE (Sarawak) said that in British colonial territories, the Governor, in such cases, was vested with the power of pardon, and an unduly harsh sentence might be reduced.

Mr. REA (Hong Kong) said that it was not necessary to seek executive clemency, since there were other measures, such as the writ of certiorari. Under this, an unfair judgement might be crushed.

Mr. WILD (New Zealand) asked whether the participants from Malaya and Thailand could indicate the actual results which followed from the fixing of minimum penalties.

Mr. SUFFIAN (Federation of Malaya) emphasized that the fixing of a minimum penalty was an exceptional case, as far as his country was concerned. The results achieved had been significant, as shown by the subsequent reductions of the minimum penalty from one year to three months' imprisonment. The policy of his Government was against harshness, and the fixing of a minimum penalty had been dictated by a special reason - in the case he had mentioned, rubber stealing.

Mr. KRAIVIXIEN (Thailand) emphasized the deterrent effects which resulted from the fixing of minimum punishments. Such a provision acted as a guide to the courts of first instance throughout the country, thus achieving uniformity for all courts.

Mr. MORRIS (Australia) referred to one aspect which had not been brought up concerning the relationship between the legislature and the judiciary in fixing

sentences. There seemed to be a further shift in the location of sentencing discretion at the present time, with more control being entrusted to the prison administrator. In his estimation, the best balance between social control and the protection of the human rights of the individual could be achieved through the exercise of discretion by an administrative board, subsequent to the judicial sentence. For example, in the state of Victoria, in Australia, the maximum sentence might be fixed by the legislature and the judge might impose a minimum sentence and a maximum sentence. From that point on, the parole board composed of a judge of the Supreme Court, prison administrators and social case workers, took over and decided the specific term of imprisonment to be served and the period of supervised after-care in each individual case. It seemed that a nice balance could be achieved through such means.

Mr. REA (Hong Kong) said that a board consisting of legal as well as social welfare personnel existed in Hong Kong, to which a prisoner could apply for reduction of his sentence. There was no power for a judge to award minimum and maximum sentences.

Mr. WILD (New Zealand) in response to a request for information concerning the bad effects of minimum punishment provisions, explained that the imposition of a minimum penalty might lead to injustice and that there might be cases where a court might regret having been forced to apply a minimum penalty.

Mr. SUFFIAN (Federation of Malaya) said that in his country the imposition of a minimum penalty for rubber stealing had proved unpopular with the courts, the government and the people, but had been necessary to meet exceptional circumstances, The moment the situation had improved, the penalties were reduced.

Mr. NAGASHIMA (Japan) said that at the present time the range of minimum and maximum penalties in Japan was very large, leaving a great deal of discretion to judges and prison authorities. However, the preparatory commission for the reform of the criminal law of Japan was considering reducing the maximum penalty for some crimes, such as larceny, which would limit the discretionary power of judges. Too broad a discretionary power was not favoured in his country.

Mr. RAMANATHAN (World Federation of United Nations Association), speaking at the invitation of the Chairman, said that in countries like Ceylon remedies existed such as mandamus and certiorari; the Supreme Court could also waive fines and discharge criminals for any offence. In Ceylon the prison authorities could reduce prison sentences. He was in agreement with Mr. MORRIS (Australia) that administrative boards might decide the length of the sentence on an individual basis, but certain powers of such boards must be legislatively defined.

Mr. MORRIS (Australia) in reply to a request for further details of the system of administrative boards in Victoria, stated that the system in Victoria seemed to him to strike a sensible balance between social control and individual freedom. The discretion allowed to judges included a choice of imprisonment, probation or other sanctions. If a judge imprisoned an offender, he would define both the minimum and maximum time he should serve (within the maximum provided by legislation for that type of crime). Within that period an opportunity was afforded to welfare officers to investigate the circumstances of the prisoner, including his family background, his employment oppórtunities, and his training in prison. The parole board then decided on the merits of each case, keeping in

mind the question of whether the offender concerned would, on release, become a useful citizen. Even after release, there was supervision for the unexpired term of the maximum sentence in order to safeguard the interests of society. Both the courts and the public were generally satisfied by this procedure.

Mr. RASY (Cambodia) observed the main point to be taken into account was the aims of criminal law, which was designed to protect the innocent from the guilty. If such protection was not available, the law of the jungle would prevail. There was really no conflict between criminal law and human rights as to the aims sought, because the coercion of guilty persons was essential in any society. As to the means to be employed, coercive measures were necessary against innocent people as well as against the guilty, when, for example, they were compelled to be witnesses. Such measures constituted, however, the minimum required by the interests of the community.

It had been suggested that, once he had been declared guilty by a court, a criminal had no rights. However, the right to be treated in conformity with the law should not be denied. The penalty had to be commensurate with the offence, and the guilty person should not be treated as an outcast of society but be entitled to certain restricted rights. As regards the question of minimum or maximum penalties, this depended on whether the legislator, in determining penalties, was addressing himself primarily to the judge or to the potential criminal. In the former case he fixed the minimum, in the latter, the maximum.

Mr. SEN (India) said that, as stated in the working paper which he had presented (WP/H) questions such as the relationship between the function of criminal law as a safeguard for human rights and its other functions, problems of legislative policy in weighing the interests to be protected by criminal law against the penalties to be imposed, etc., required searching and detailed discussion. It was interesting to note that criminal law increasingly provided machinery for the enforcement of fundamental rights comparable to the remedies available in civil law. The high courts in Bombay, Calcutta and Madras, in India, could issue prerogative writs when fundamental rights were infringed. These writs were freely issued not only to the executive branch of the government but also to administrative bodies and quasi-governmental organizations. Article 226 of the Indian Constitution laid great stress upon fundamental human rights, and the high courts were empowered to look into any excesses or abuses of power by administrative authorities; the Supreme Court, moreover, had been primarily concerned with the protection of individual liberties.

Parallel with this development, criminal law had also begun to play an increasing role in protecting fundamental rights. For example, after the abolition by legislation of untouchability in India, violations of this law had been prosecuted. If any hardship was caused or loss of rights occurred, a strict view of the matter was taken and judges awarded maximum sentences, since such offences were considered to be offences against social conscience, and so deserved to be dealt with ruthlessly. An equally strict view was taken in regard to the protection of the rights of workers under factory legislation. Infringements of factory laws were treated as penal offences, and, for example, when there was a failure to provide proper safeguards from dangerous machinery, or when minimum sanitary requirements or health facilities were not met, it was held that protection under civil law was insufficient, and such problems had to be dealt with under criminal law. The rights of the working classes had to be protected vigilantly, and the criminal law had become as important as civil law in protecting and enforcing these rights.

The question of the correlation of crime and punishment depended very much on the social context. In societies where property was considered sacred, infringement of property rights were dealt with severely. With a changing scale of values and with Governments entering more and more into the economic and even social life of the people, new concepts were emerging. Punishment was nowadays considered not only as a deterrent but also as a corrective to the offender. It was relevant that in India, recently, an Offenders' Probation Act had been passed, under which judges were given discretion in appropriate cases to order offenders to be placed on probation.

I. (c) Should the criminal law contain punishable offences, the definition of which does not contain a requirement as to the state of mind of the perpetrator, such as intention, negligence or guilty mind (mens rea)?

Mr. MORRIS (Australia), initiating the discussion under Item I (c), said that the issues were so well known that it was hardly necessary to introduce them for discussion. The main question was whether there should ever be criminal guilt without moral fault. It was necessary to discuss how far punishment could be imposed for foolishness or recklessness. The topic under discussion could also be related to Item II (c) dealing with penal sanctions safeguarding social and and economic rights, including the right to health and to education.

He briefly set forth the historical background of the matter to show how, with the growth of jurisprudence to maturity, more and more stress had been placed on moral fault. However, with increasing industrialization, criminal law was used for purposes such as social regulation, health and welfare legislation, etc., for which its suitability was doubtful. With these developments, mens rea had declined in significance as a precondition to guilt. In view of the larger issues involved, legislative policy had considered it desirable to insist on strict liability, even if there was no moral fault. A very exhaustive and valuable analysis of legislative justification for the exclusion of mens rea had had been presented in Working Paper I, pages 13-16.

It had been suggested that in many types of offences it was difficult to prove intent, and such offences should, therefore, be treated as having been committed with a knowledge of guilt. However, this gave no justification in such cases for refusing to place the burden of proof on the accused and to allow him to escape liability if he could establish his lack of the requisite intent. Secondly, it had been pointed out that the growing mass of regulatory legislation was so great that for the expeditious conduct of judicial business it was desirable not to go into the question of intent. While there was some force in this argument, it should not be overlooked that even when penalties were minor, many other disadvantages might flow from a conviction. Working Papers B (pages 5-6) and C (page 3) discussed the tendency to restrict strict liability.

He wished to suggest four possible solutions to the whole problem. First of all there was the third party procedure, used occasionally in the United Kingdom. Under this procedure, if the accused could prove that the offence had been caused by a third party not under his control, he could escape punishment. The procedure helped to retain liability but provided an escape for those not directly responsible for the offence. Secondly, if the accused could prove that the offence had been committed without his knowledge or connivance, he should be allowed to go free.

This placed the burden of proof on the accused. Thirdly, a solution developed in Australia and in some other countries might be considered whereby the accused could establish the general defence of "mistake of fact". Fourthly, a far-reaching solution devised by the American Law Institute and incorporated in the second draft of its Model Penal Code was worth considering. According to this draft code, which defined various classes of crimes, a distinct class was suggested under the title of "violations". For offenders designated under this class a fine and a civil penalty were the only possible penalties, and no other civil or criminal consequence, procedural or substantive, could follow a conviction.

Mr. HAN (China) said that the general tendency in all civilized countries was towards restriction of strict liability. He doubted, however, whether crimes without moral culpability should be severely dealt with. Modern administrative law had to be re-examined and criminal liability confined to culpable violation. Unintentional violation might be left for administrative authorities to deal with. In China, the early legislation relating to mining, did not exonerate a mine owner from criminal liability for any violation of the law by his agents, employees or any other assistants, on the ground that he had had no knowledge of such a violation (Article 117). However, modifications of the law in 1959 had made it clear that no one could be convicted under such circumstances unless culpable negligence was proved.

Mr. SEN (India) said that mens rea had become an essential ingredient of many legal systems. However, force of circumstances and the demands of public welfare had shown the need for statutes setting forth the principle of strict liability. As it was no defence under the law of torts to claim lack of intent it was also no defence to claim lack of intent in a large number of fields where public welfare was paramount. Factory legislation, health laws, company matters, etc., demanded a high degree of public morality and violations were treated as penal offences. For the sake of the public welfare or security, it was necessary to put up with the disadvantage of punishing offences even when mens rea was not evident. The urgency of the public welfare demanded such an attitude. He was unable to agree with Mr. Morris (Australia) that convictions for technical offences might lead to severe consequences. For example, violations of excise laws, such as selling liquor outside hours, etc., usually resulted in fines, not in cancellation of the offender's licence. Under company law also, only offences which involved moral turpitude were dealt with severely. He could not agree that the third party procedure had any advantages, because even under strict liability no man was convicted for any offence unless he was directly responsible for it. Only in certain extreme cases such as smuggling was the burden of proof placed on the accused. Otherwise, the rule normally was that the onus of proof was on the prosecution - except in cases involving public welfare.

Mr. MORRIS (Australia) wished to clarify two of the points that had been raised. First, as regards licences, the disadvantage flowing from a conviction had to be looked at more realistically. Judicial and administrative bodies often had to be looked at more realistically. There were cases where administrative bodies had not functioned separately. There were cases where administrative bodies had not been responsive to the argument that a conviction had resulted from only a minor technical offence - every one argued thus, and only in some cases was it true, and a licensee might suffer unjustly. Secondly, the third party procedure was distinctly helpful.

Mr. SEN (India) said that a whole new class of offence had developed which had been described as recent visitors in the gallery of crimes. Their separate classification as "violations" was most appropriate, since they were different from the class of crimes where mens rea was considered essential.

Mr. HAKIM (Indonesia) said that in his country, offenders were not punished unless it was clearly proved that they had guilty intent. People suffering from a mental defect were also not punished. An essential ingredient in a crime was culpability, however slight.

Mr. TAKEUCHI (Japan) said that under the penal code of Japan, intention or negligence was required for conviction. Offences without criminal intention or negligence were not punishable and only if the State could prove that a person had a criminal intent could he be punished. Corporations or their owners were responsible for the acts of their agents or employees. Recently, a decision of the Supreme Court had expressed the view that the so-called concurrent penalties clause had not created liability without fault, and that it only had the effect of presuming the negligence of the owner of an enterprise in that he had failed to exercise sufficient supervision over his employees with a view to preventing infringements of laws and regulations.

Mr. FERNANDO (Philippines) suggested that in defining the limits of strict liability it was essential to understand the reason for public support of it. Modern living had become so complicated that legislative bodies resorted increasingly to regulations. In doing so, unless there was a consensus of public opinion in favour of such a course, strict liability should not be insisted upon. For example, in some countries, offences against exchange control were not uncommon, and they should not be dealt with severely if the general public feeling was that the prevalent exchange control measures were too rigorous, and they were not in line with public opinion. Knowledge of an act was also essential. If, for example, a man selling milk was not aware that somewhere and somehow it had been watered, he should not be punished.

Mr. SEN (India) wished to know from the participants from Japan and Indonesia whether mens rea was a necessary ingredient in such minor offences as violations of traffic regulations. In reply to the point made by Mr. Fernando about offences against exchange controls, and the desirability of keeping public opinion in mind, he said that in his country, as in some others, a very strict view was taken of offences against exchange control. It was considered that these were not matters to be decided by the social conscience of the country, but were required by the economic conditions of the country.

Mr. HAKIM (Indonesia) said that even in cases of traffic violations, intent was presumed, and unless it was clearly known that the offender was not a local resident and was unaware of the regulations, he was punished. In clear cases, where it was known that the person who committed the violation was not aware of the rules, he was not charged.

Mr. Y. MOON (Korea) said that in his country, unless there was clear intent or negligence, the offender would not be considered guilty. The concept of strict liability was not known in Korea as it was in Japan and some other countries of Asia. He agreed with the point of view that strict liability might be necessary in some cases, but excessive application of the principle might prove dangerous in countries which did not have long traditions of criminal legislation.

Mr. HAN (China) wished to know whether a colour-blind driver would be punished in Indonesia for driving through a red light.

Mr. HAKIM (Indonesia) said that if it could be proved that the driver had no intent, he would not be punished.

Mr. RASY (Cambodia) said it was important to consider criminal law in the framework of the protection of human rights. Perhaps a helpful approach would be clearly to demarcate criminal and civil liabilities. For example, following a car accident, questions might arise as to the extent of the damage and how a remedy could be sought through civil action. Criminal liability might be involved and this question must also be gone into carefully. Only then would the point arise as to whether a man should be punished even if he had committed the crime in ignorance or without intent. It was difficult to admit the possibility of criminal liability in the case of offences committed unintentionally, for such liability tended to cause undue suffering to the offender, if, for example, the injured party was sure of receiving compensation.

Mr. TAKEUCHI (Japan) said, in reply to Mr. Sen's question relating to intent in minor criminal offences such as traffic violations, that it was important in Japan to prove intent. This caused considerable difficulties for the prosecution. However, the new draft of legislation before Parliament took into account offences committed through negligence.

Mr. KRAIVIXIEN (Thailand) said that there were two types of offences in his country which did not require mens rea and were treated as crimes with strict liability. First of all, there were many petty offences which were defined as such under the penal code, and punishment for which did not exceed one month's imprisonment and a fine of 1,000 bahts. Offences in this class related to public policy and public welfare. For example, indecent exposure, carrying firearms without licenses, etc., came within this group. Other offences with strict liability, and which were taken more seriously, related to smuggling. As proof of mens rea in such cases was exceedingly difficult, and as public policy demanded a severe punishment, smuggling was punished with imprisonment of up to a maximum of ten years. It was perhaps not altogether unjustifiable to exclude the doctrine of mens rea from minor offences involving public welfare, and serious offences with strict responsibility should not be created unless the interest of society was really at stake.

Mr. HAN (China) said that "a mistake of fact" could be used as a defence provided it was a reasonable mistake. Strict liability must be excluded from the sphere of criminal responsibility. If it was not a mistake of fact then the accused must be considered liable; it was important to define the meaning of strict liability.

Mr. REA (Hong Kong) said that "absolute liability" and "the defence of mistake" were contradictory terms. If a defence of mistake of fact could be made, then the liability was not absolute.

Mr. MORRIS (Australia) agreed that, as a matter of terminology, if mistake of fact was allowed as a defence then "strict liability" would not be absolutely strict, but this did not affect the possible wisdom of allowing such a general defence.

Mr. REA (Hong Kong) said that in offences relating to certain social matters, strictly liability would have to be imposed.

Mr. MORRIS (Australia) gave a recent example in his country relating to liquor licensing registration. He pointed out that under the defence of reasonable mistake of fact it was possible to acquit the accused without weakening in any way the strength and simplicity of implementation of such regulatory legislation.

Mr. PIKE (Sarawak) agreed that some form of strict liability was necessary. Its area should, however, be limited as much as possible, and strict liability should not cover serious types of crimes. He felt it would be impractical to adopt any of the four suggestions made by Mr. Morris (Australia) although all of them were worthy of trial. The concept of "violation" without stigma was also a valuable one. For minor violations strict liability should be applied.

Mr. MOON (Republic of Korea) pointed out that strict liability was unknown in his country, and that the mental element was a necessary constituent in a crime. This was applicable in all cases - not only to crimes mala in se but also mala prohibita. His country's law had not excluded the element of mens rea even under recent war-time conditions. The principle of strict liability should be adopted with respect to certain cases such as smuggling of opium, contraband goods, etc. In the interests of public welfare, the smuggler should be punished according to law and at all costs.

Mr. MORRIS (Australia) asked whether participants could furnish examples of legislation relating to industrial safety, health, etc., where the absence of intent or negligence was a defence.

Mr. NAGASHIMA (Japan) said in Japan difficulties had been experienced in proving intention or negligence, and it was contended that some presumptive rules relating to intention or negligence should be adopted. A conviction could be made on circumstantial evidence, and Japanese judges were trained to use such evidence to prove intention or negligence.

Mr. HAN (China) felt there was some justification in imposing strict liability, since this might encourage greater care. It was inconceivable that a person who was free from negligence could be made responsible for any offence. Such a problem should be solved by administrative measures.

Mr. LEE (Republic of Korea) said that even in England, judges were not inclined to impose a sentence on anyone found guilty without mens rea, and this practice was also followed in his country.

Mr. MORRIS (Australia) said there was a tendency to apply the law strictly against the responsible officers of industrial enterprises. Such a practice made him doubt whether the presumptive rule was adequate for all purposes.

Mr. NAGASHIMA (Japan) said that in Japan the owner of an enterprise would be punished by the concurrent penalty clause, which was used very often.

Mr. WILD (New Zealand) said that those countries which had so far been able to maintain proof of intention or legligence as a necessary ingredient of liability were running the risk of imposing strict liability through the courts rather than by legislative action. This was a risky procedure. In order to reflect the social conscience regarding these matters, it was necessary to spell out all cases clearly, rather than to allow the courts to interpret strict liability. The law should be clear and explicit on this point. In his opinion, measures for social improvement in a developing country required strict liability in order to be effective, and to keep a balance between the rights of society and the rights of the individual citizen. Strict liability could be properly applied in cases relating to social welfare for example, in the fields of labour, health and housing. He doubted whether any government policy in the seminar region could be carried out in the social field without strict liability. On the other hand, certain classes of legislation did not lend themselves to strict liability.

Mr. REA (Hong Kong) said it was impossible to have a scale of liability for different classes of legislation. Within one class of legislation the seriousness of offences would vary. He believed that each individual case should be considered on its merits.

Mr. RAMANATHAN (WFUNA), speaking at the invitation of the Chairman, said that the criminal law of Ceylon included as a general principle, the concept of mens rea. However, mens rea was excluded in some social legislation. It was not always a necessary element in a developing society. Under certain circumstances, particularly when there was a public emergency, mens rea would not be required for prosecution.

The CHAIRMAN observed that the idea of strict liability resulted from practical situations. Under Japanese legislation, strict liability did exist. There was a rather doctrinaire tendency that intention or at least negligence was a necessary element in the prosecution of violations of administrative regulations and judicial practice followed this tendency.

Mr. MORRIS (Australia) said that even in cases of strict liability, the defence of mistake of fact should be allowed. He did not understand how social exigencies could ever preclude this possibility.

Mr. REA (Hong Kong) stated that to allow a defence of mistake of fact would be contradictory to the application of the concept of absolute liability.

Mr. FERNANDO (Philippines) reviewed the development of mala in se and mala prohibita in the criminal code of the Philippines from the time of Spanish rule to the present day. Noting that the Philippines criminal code reflected Anglo-Saxon, Continental and indigenous influences, he said that the element of mens rea was accepted in the prosecution of any crime. Under certain exigencies, such as in the early days of American rule in the Philippines, certain acts were classified as crimes of mala prohibita where mens rea was not necessary. In the next stage of development certain social legislation was enacted which fell under mala prohibita with no mens rea. Only where there was no carelessness and where due diligence was employed, was the defence of mistake of fact admissible. There was sufficient flexibility in Philippine law to enable the courts to consider an offence mala in se, thus requiring mens rea, even if the accused were indicted under a special law, ordinarily associated with mala prohibita.

Mr. ROBSON (New Zealand) suggested the rule should be that penal law should lean against strict liability unless exceptions could be justified.

Mr. REA (Hong Kong) stated that the rule suggested by Mr. ROBSON was practical. As to exceptions, each case should be judged on its own merits.

Mr. RASY (Cambodia) raised the question of whether the seminar should lay down general principles relating to this subject or whether an account of the discussions which had taken place would be sufficient.

Mr. MORRIS (Australia) hoped that it might be possible to take the matter further in light of the surprising similarities of approach in the different systems of criminal law and procedure represented at the seminar.

(d) The definition of insanity and the effect of insanity on criminal responsibility

Mr. MORRIS (Australia) in introducing this item, indicated that in both the common law and code systems there was a defence of insanity to a criminal charge. It was not frequently used, however, and almost always its use was confined to homicide cases. The most important theoretical question was the definition of insanity; a question which both psychiatrists and lawyers had argued without reaching any general agreement. The question struck deep into theories of criminal law and into the assumption of free will. It was closely related to the degree of development of health services in the different countries. Sometimes mental hospitals in a given country were not as advanced as correctional and penal institutions even in the treatment of psychologically disturbed people. This matter was also closely connected with the attitude of a country towards capital punishment. The question of insanity was relevant to a trial in a variety of ways: (1) the accused might not be fit to be tried owing to insanity; (2) the accused might not be fit to be punished owing to insanity; or (3) the accused might not be responsible for his act because he was insane at the time. Three different sets of rules would apply, but for the purposes of the seminar, the central issue was the third of these problems, that of criminal responsibility.

One of the difficulties faced in this connexion was the fact that there was no viable definition of what constituted mental illness. The psychiatric viewpoint differed from the legal definition, and in this connexion there was a need to recognize that mental illness and mental health were related.

It was necessary in law to draw a dividing line between insanity and sanity, and there was a tendency to approach the problem in those terms. The difficulty was that the continuum from absolute insanity to sanity was infinitely shaded. Recently a concept of diminished responsibility had been evolved in the English system of law. Here the defence lay in the conduct of the accused being substantially affected by mental illness.

Mr. HAKIM (Indonesia) said that in Indonesia, an offender was punished on the basis of two considerations: (1) whether he had actively wished to do the act; (2) whether he had foreseen the consequences of the act. In Indonesia, insanity was defined within this framework. If the offender had not foreseen the consequences of his act, he was acquitted. In order to arrive at a judgement in this connexion, psychiatric reports might be taken into account, although the final decision was made by the judge.

Mr. TAKEUCHI (Japan) said that the provisions in the Japanese Penal Code regarding insanity were concise. Punishment was either excluded or reduced in case of insanity. The definition of insanity was essentially a legal and judicial value judgment, but it had two different degrees in Japan: (1) the mental inability to distinguish between right and wrong, and (2) the mental inability to behave in accordance with such a distinction. A person who was unable to distinguish between right and wrong was not subject to blame. This reflected an attitude towards the function of criminal law as a safeguard for human rights. It did not, however, eliminate the necessity of placing such persons under therapeutic measures.

Mr. HAN (China) briefly described the situation in Chinese criminal law concerning the definition of insanity. The situation took into account the concept of partial insanity, including feeble-mindedness or mental deficiency, in which case punishment was mitigated. The method of determining insanity was controversial, as the law did not contain any definition. In addition to the test of right and wrong, as in Anglo-Saxon practice, there was also the concept of "irresistible impulse," where an offence was committed by a mentally diseased person who could not control himself. As there was no complete agreement even among the psychiatrists, it was doubtful whether the irresistible impulse test was effective. In his opinion the definition of insanity in criminal law need not conform completely with psychiatric opinion.

Mr. LEE (Republic of Korea) briefly reviewed the criminal law of his country relating to insanity. He felt that the lawyers' approach to this problem was a precarious one and that a broad definition of insanity was required.

Mr. RAMANATHAN (World Federation of United Nations Associations) speaking at the invitation of the Chairman, felt that the topic of insanity was a very important one and that the term should be carefully defined. He reviewed the provisions of the Ceylon Penal Code concerning this matter and felt that the definition contained therein was very limited. The concept of irresistible impulse, he considered, should be borne in mind. In addition to the legal test of responsibility, it was necessary to distinguish the different kinds of mental deficiencies, and the distinctions between idiots, lunatics, drunkards, etc. In his opinion most present day penal codes defined insanity too narrowly.

Mr. MORRIS (Australia) acknowledged that there were cases where judgment was based solely on the ability of the accused to know whether his act was right or wrong. On the other hand there were cases where the law allowed a defence of insanity under other, more realistic circumstances, for example, the depressive condition of some mothers as a result of parturation or lactation occasionally led them to kill their children. In such cases, common humanity led the law to allow a defence of insanity and to convict the mother of the lesser offence of infanticide. The irresistible impulse test could not be applied in all cases. The lawyers themselves should be responsible for the definition of insanity on the basis of existing knowledge.

Mr. GYAWALI (Nepal) wondered whether there could be any satisfactory definition of insanity, and agreed with previous speakers that it was difficult to draw a line between insanity and sanity. In his country, as he had pointed out in his Working Paper, (WP/M) the concept of diminished responsibility was used. In arriving at a correct decision, judges might take account of medical and other expert opinion.

Mr. NGUYEN LUONG (Republic of Viet-Nam) said that in the Republic of Viet-Nam, offences committed in a state of dementia were not punishable. In the case of occasional periods of insanity with intervals of lucidity, the criminal was punished if the crime had been committed during a period of lucidity but was acquitted if the crime had been committed during a period of insanity. Judges based such decisions on expert medical evidence or the evidence of neighbours, etc.

Mr. RASY (Cambodia) stated that there were two definitions of insanity, first, the internal definition made by the doctor, taking into account biological and physiological indications, and secondly, the external definition made by jurists, based on outward signs of insanity. It was only by co-operation between the jurist and the doctor that insanity could be clearly established.

Mr. HAN (China) suggested that it would be useful to have the opinion of psychiatrists on this subject.

Mr. MORRIS (Australia) suggested the formulation of a definition of insanity. In three states in Australia, for the past forty years, the law had accepted the concept that a person could not be convicted of a crime if he could satisfy the court by means of expert testimony that at the time of the crime he had been unable to control himself. This concept might be taken account of in drawing up such a definition.

Mr. MUNIR (Pakistan) said that in his country the defence of insanity required proof that there was derangement of mind; that the derangement was of such a character that it had rendered the person incapable of knowing the nature of his act; and that the person could not distinguish between right and wrong. These criteria had stood the test of time and were employed in cases where insanity was pleaded. It was interesting to note that under the criminal law of Pakistan, it was possible for a case to result in neither conviction nor acquittal. If the charge was not proved, the accused was naturally acquitted. If the charge was proved, and if insanity was pleaded in defence but not proved, conviction followed. If the charge was proved, and if insanity was pleaded in defence and also proved, the accused was neither acquitted nor convicted, being takin into custody and held at the pleasure of the Government in a mental institution. Insanity was one of the "general exceptions" which, if pleaded and proved, led to acquittal in Pakistan.

If the accused pleaded an "exception", the burden of proof rested squarely on him. The principles that were adopted where consistent with the so-called "McNaughton rules". Insanity must be positively proved. He was, of the opinion however, that these rules should be relaxed along the lines of the rules laid down in the Woolmington case, whereby the burden of proof of the general issue of guilt would fall on the prosecution. In each case, every element of the offence, as well as the fact that the accused was guilty, has to be proved, and the totality of guilt had to be proved beyond any reasonable doubt. If the accused could prove that he had acted in self-defence, or if there was a reasonable possibility that he had so acted, the accused could not be convicted.

In Pakistan, the burden of proof on the accused was much lighter when the accused was required to prove an "exception". Perhaps a similar burden would be sufficient in cases of insanity. If the accused was incapable of knowing the

nature of his act and if the charge had been proved, the accused would be convicted under the "McNaughton rules". If, however, the benefit of doubt was given as in the Woolmington case, an acquittal should follow. In other words, if the court felt genuinely uncertain as to the state of mind of the accused, it should give him the benefit of the doubt. In his experience, the court was not in a position, in many cases, to give a definite finding. The question was why should the "golden thread" of the duty of the prosecution to prove the guilt of the accused lose its splendour in cases involving insanity, and more rigorous conditions for its proof be required.

Mr. MORRIS (Australia) said that it was largely historical chance that had led to the burden of proof being placed on the accused. Had the rules on insanity not hardened over a period of time, the House of Lords would not have made exceptions in the Woolmington case. If the accused raised a genuine doubt in the minds of the fact-finders as to his mental condition, this should constitute a successful defence of insanity. In such a case, he should be committed to a mental hospital and kept under control. This met the requirements of justice and also helped in the efficient settlement of doubtful cases. He invited the attention of the seminar to some elements which might be included in any refashioned defence of insanity. The first element was the principle of diminished responsibility, which had much to commend it and could easily be accepted. Secondly, there should be provision for the psychiatric examination, of all offenders who were thought to be psychologically disturbed, and for their subsequent treatment if found to be mentally ill. Rather than to proceed only with legal reforms, it was essential to build up a fund of experience and knowledge on the basis of which it would be possible to take steps to protect human liberty and ensure social safety.

In explaining the third element, he referred to the two main inquiries in the past few years into the defence of insanity, namely, the Royal Commission on Capital Punishment (1949-1953) and the Model Penal Code of the American Law Institute. The Royal Commission on Capital Punishment had modified the "McNaughton rules" so as to include a different class of cases. In addition to the tests as to whether an accused had known the nature or quality of his act, and as to whether he had known the act to be wrong, a third factor was added, i.e., whether he was capable of preventing himself from committing the act. The American Law Institute's Model Penal Code laid down that if an accused lacked substantial capacity to conduct himself according to the law, he should not be held criminally responsible. This defence was available in three States in Australia, where the jury was asked to consider whether the accused had capacity to control his actions. An enlargement of the plea of defence of insanity to include this element of lack of control might be considered in drafting penal legislation.

Mr. PIKE (Sarawak) said that the penal code of Sarawak was identical in its language with that of Pakistan. The laws in the Federation of Malaya and Singapore were also similar. Concerning the points raised by Mr. MUNIR he considered that the decision in Rex vs. Carr-Briant applied as much to proof of insanity as to any other type of defence. What was really necessary was to raise a reasonable doubt in the mind of the jury concerning the sanity of the accused.

Mr. MORRIS (Australia) said that the defence need not prove insanity; an indication of its probability was sufficient.

Mr. PIKE (Sarawak) said that the burden of proof on the prosecution was already severe, and to place the burden of proving sanity or insanity on the prosecution would entail more difficulties. Justice was a two-edged sword which required due regard to the inrerests of the State as well as to those of the accused. It was true that the "McNaughton rules" had outlived their usefulness. However, it was difficult to recommend any changes to those rules which could be generally applied, because conditions were different in each country. For example, Sarawak had only one mental hospital and one qualified alienist. However desirable a psychiatric examination, and if required, the psychiatric treatment, of every convicted person, in many countries this would be impossible.

Mr. SEN (India) said that in practice, when the accused pleaded unsoundness of mind, there was not much difficulty in ascertaining the facts. Even though the "McNaughton rules" had held the field in India and Pakistan, the proof called for was not excessive. In India, the police, as part of the investigation, arranged for a medical examination if there was the slightest doubt about the mental condition of the accused. There were also certain presumptions which had to be taken into account. First and foremost, there was the presumption of innocence; also the presumptions of soundness of mind, and knowledge of the law. These were starting points in any case. If the weight of probability suggested that the accused might be mentally unsound, the jury would have to take this into consideration. There should not be any radical departure from existing law.

Mr. MUNIR (Pakistan) said that if the procedure outlined by Mr. SEN (India) were strictly adhered to, there would be no problem. However, in practice, he had seen case after case in which insanity was required to be proved beyond all doubt. He felt that if there were grounds, even on balance of probability, to indicate that the accused might be suffering from insanity, this should be considered a good defence.

Mr. REA (Hong Kong) said that according to the law as laid down in Rex vs. Carr-Briant it was sufficient if the accused could produce evidence to establish the fact that he was insane on the balance of probalility. It was not necessary for the prosecution to produce evidence to prove that each accused was of sound mind. In all murder cases in Hong Kong, the accused was submitted to a medical examination for a minimum period of one week.

Mr. PIKE (Sarawak) explained that in Sarawak, the prosecution carefully examined each case and, wherever appropriate, presented evidence as to the state of mind of the accused. In a recent instance in the United Kingdom the prosecution had produced evidence as to the unfitness of the accused to plead by reason of insanity, even though insanity had not been pleaded by the defence, and indeed the defence had contested the right of the prosecution to raise the issue.

Mr. SEN (India) quoted from Rex vs. Carr-Briant to show how the onus of proof was discharged if evidence of probability of insanity were presented.

Mr. MORRIS (Australia) said that the question at issue was procedural. What had to be considered was the ultimate burden of proof in cases where the jury were doing their job honestly. There might still be cases of genuine doubt in which it would be difficult to draw the line. It was not right to suggest that according to the Woolmington case the prosecution had to prove in each case the

soundness of mind of the accused. It was only the ultimate burden of proof that was placed on the prosecution. It was only a historical accident that the defence of insanity was not treated in the same way as a defence in cases of accident, self-defence, etc. in which the standard proof required was less rigorous, and that the distinction between this defence and the others had little to commend it.

Mr. RASY (Cambodia) recognized the scrupulous attitude of the jurist who would condemn only those of sound mind, but he could not see why the burden of proof of insanity should fall upon the prosecution. Indeed, it was the accused who claimed insanity, as an "exception". The burden of proof of a fact lay upon the person who brought it forward. The prosecution, whose function was to accuse, could not be in a position to prove that the accused was not mentally unsound.

Mr. ROBSON (New Zealand) said that in revising the Crimes Act in New Zealand, a number of relaxations had been proposed. The "McNaughton rules" were incorporated in the existing law, but some changes had been made in a bill that would soon go before Parliament. First, the section on specific delusions had been deleted, because the weight of medical evidence indicated that no one who had specific delusions could be sane in other respects. Secondly, following the view taken by the Australian High Court, the word "wrong" had been taken to mean morally wrong according to the accepted standards of right and wrong. Thirdly, the crime of infanticide had been included and mental illness could be pleaded as a defence; the killing by the accused woman of any child of hers under sixteen years was included. Lastly, the principle of diminished responsibility ennuciated in Scotland and adopted in England in 1957 had also been accepted. Culpable homicide that would otherwise be murder could be reduced to manslaughter if at the time of the offence the person charged, though not insane, was suffering from a defect, disorder, or infirmity of mind to such an extent that he should not be held fully responsible. In the New Zealand view it was essential to keep the law as close as possible to what the jury might decide, so that excessive burden would not be placed on the use of the royal prerogative of mercy. In conclusion, he wished to add that in his country they were endeavouring to adopt a more humane approach to questions of mental illness.

Mr. HAN (China) said that in his country, this problem was treated not as it was under the Anglo-American systems, but as under the systems prevailing on the Continent. He felt that there was no need to go into the question of the burden of proof of insanity. It was, after all, not so difficult to prove whether a person was insane or not. Courts in China were under an obligation to investigate the state of mind of the accused. He wished to know whether the definition of insanity should also include what was now known as the "irresistible impulse" test.

Mr. FERNANDO (Philippines) said that in his country, as in China, the Continental system was followed in substantive law, and the American practice in procedural matters. Under the present Code, an imbecile or an insane person was exempt from criminal liability unless he had acted during a lucid interval. In a system of law like that of the Philippines, which stressed the role of reason or of intelligence, for criminal intent or mens rea to exist, insanity, if proved, necessarily negated the existence of the criminal mind, and entitled the accused to acquittal. Such acquittal was subject to his being confined thereafter in a hospital or asylum established for persons thus afflicted, which he might not leave without permission of the Court. But what was the degree of mental derangement required for this defence to succeed? Even though a growing body of psychologists and psychiatrists viewed the traditional legal test of

ability to distinguish between right and wrong as no longer adequate under the stress and tension of modern life, the Philippines was not likely to embark on any radical innovation in regard to the concept of insanity. The doctrine of free will was too strongly grounded for that. Thus in its proposed Code of Crimes, an insane person or a lunatic was exempt if at the time of the alleged offence he did not have sufficient mental capacity to understand the nature of the particular act or acts constituting the offence, and to know whether he was doing right or wrong. By way of concession to the advances of modern science, the condition might include any permanent mental disease produced by the frequent use of intoxicating beverages or narcotics or similar drugs. Also, anyone in a state of automatism, for example in a hypnotic spell, a nightmare, or somnambulism, could plead this defence.

Mr. KRAIVIXIEN (Thailand) said that in his country absolute as well as partial insanity was accepted as a defence. Section 65 of the present penal code stated that if a person was in such a state of mind as to be incapable of understanding or controlling his act, he could claim this as a defence. In such cases, the burden of proof rested on the accused. However, the defence of insanity had not been raised in Thailand during the last thirty-five years.

Mr. NAGASHIMA (Japan) said that the problem of burden of proof in his country was treated as in China. The ultimate burden of proof rested with the prosecution. The defence could introduce evidence pertaining to insanity, and in cases where there was doubt about the soundness of mind of the accused, a medical or psychiatric examination was carried out. There was a special prison for the insane. The Governor of a Prefecture had power to order the custody of lunatics in a hospital and to discharge them after they had been cured. The revision of the penal code that was currently being undertaken proposed that if an act was committed by an accused person without his knowing whether it was right or wrong, it would not be punishable. As to the definition of insanity, it should be borne in mind that this was a legal problem and had to be decided on the basis of a judicial value-judgement, even though the practice in his country was that when a question of soundness of mind arose, very often medical evidence alone was taken into account.

Mr. HAKIM (Indonesia) said that in his country there were no juries, judges leading the inquiry. The role of the prosecutor was to accumulate evidence and demonstrate guilt, while the accused was permitted only to listen and answer questions when they were asked. The question of providing proof arose only in civil cases. If there was any doubt as to the sanity of the accused, the courts ordered a medical examination.

Mr. DHARMASAKTI (Thailand) said that the term "irresistible impulse" was rather vague, and he wished to know its exact meaning.

Mr. MORRIS (Australia) agreed that "irresistible impulse" was not a happy term. The basic idea was that an accused did not have the capacity to control his acts. He pointed out that the current or proposed penal legislation in Thailand, Japan and New Zealand had accepted the concept, although the terminology used was different in each case.

Mr. DHARMASAKTI (Thailand) observed that the most important consideration in such cases was the capacity to distinguish between right and wrong.

Mr. WILD (New Zealand) said that there was considerable difficulty in securing precise evidence as to "state of mind". Medical experts often

contributed more confusion than clarification. If the notion of irresistible impulse was accepted and the defence of insanity enlarged accordingly, there was a danger of opening the door too wide. In many cases where it was claimed that the accused had lost his capacity to distinguish between right and wrong it would be interesting to know if the accused would have committed the crime had a policeman been at his elbow. Defences of automatism, irresistible impulse or lack of control etc. were better dealt with by adopting the principle of diminished responsibility.

Mr. MORRIS (Australia) said that the use of the term "irresistible impulse" had created unnecessary confusion. If satisfactory evidence was presented of a diagnosible mental disease or unsoundness of mind, leading to a lessened capacity to control his conduct, the accused should be allowed to enter a plee of insanity. While it was extremely difficult to prove the existence of such mental abnormalities, he felt that juries would provide the necessary scepticism to safeguard against the abuse of this plea. The flood gates would not opened to acquittals, as the jury would not be easily convinced unless there was a genuine doubt about the state of mind of the accused.

Mr. FERNANDO (Philippines) wished to know whether the accused would be exempted from penal consequences when insanity had been established.

Mr. MORRIS (Australia) replied that in such cases, the accused would be indeterminately committed.

Mr. HAN (China) wished to know whether the test of "irresistible impulse" would not be appropriate when an accused, even though he could distinguish between right and wrong, was unable to control his acts.

Mr. MORRIS (Australia) said that such a situation, though conceivable, would seldom occur in reality. He agreed, however, that it would be unjust to punish a person who appreciated the difference between right and wrong and yet could not control his acts. Perhaps the words "lack of capacity to control" were preferable to the phrase "irresistible impulse" around which unnecessary disputation had developed, which tended to render it useless as a concept.

Mr. REA (Hong Kong) referred to the British law on homicide, in which the word "substantial" was preferred to "absolute". Similarly, it might be advisable not to use the word "fully", in order that cases involving a slight lack of control might not be ruled out.

Miss OLENDER (International Federation of Women Lawyers), speaking at the invitation of the Chairman, wished to present another approach to the problem which she believed might be of interest to the seminar. At present the question of insanity was considered after the crime had been committed. But criminal tendencies developed over a period of time, and it would be easier to control them at the stage when they were first detected. The money spent by the State in maintaining the mentally diseased, in treating them or curing them, could be more wisely spent in arresting the growth of criminal tendencies at a much earlier stage.

II. Criminal law as an instrument for the protection of human rights

How far and to what extent can substantive criminal law ensure the protection of human rights as set forth in the Charter of the United Nations, in the Universal Declaration of Human Rights and in national constitutions?

For example, examination of the following problems:

(a) Penal sanctions against violations of privacy, including the inviolability of the home and the secrecy of correspondence and "droits de personnalité"

(b) Penal sanctions against social discrimination

(c) Penal sanctions safeguarding social and economic rights, including the right to health and to education

Mr. GYAWALI (Nepal), in introducing this item, said that there was no disagreement that the human rights as set forth in the Universal Declaration of Human Rights should be protected. There was also no substantial disagreement in regard to the question of the protection of human rights by criminal law. As brought out in the paper by Mr. Han (WP/I), the protection of human rights by criminal law should be a last resort, since criminal law could not be expected to be the only instrument of social control. This was a vast topic, which encompassed all aspects of criminal law in the protection of human rights. The Universal Declaration gave a more concrete enumeration of rights than did the Charter of the United Nations or the national constitutions of countries. To protect these rights it was necessary for countries to take steps to adopt and implement the Universal Declaration. It was not necessary that this adoption should be perfected in the written Constitution and in penal codes; the required result might be obtained by ordinary statutes and effective legal remedies. For example, in the case of Singapore there was no bill of rights in the Constitution, and therefore no penal sanctions for the breach of such rights existed. In such cases, the injured party was left to pursue civil remedies in the courts.

In his own country these rights were written in the Constitution, with constitutional remedies. In addition, criminal statutes provided penal sanctions for this purpose. It was necessary to bear in mind the historical background, the type of government, the economic and social conditions and the moral and intellectual development of any given country. No legislation was useful if it lagged behind or went beyond the times. He posed the question of how a country could give practical effect to the Universal Declaration of Human Rights.

Mr. ROBSON (New Zealand) posed a further question of how a country which had adopted a unitary system of government, having a common law system, could effectively adopt the Universal Declaration of Human Rights.

Mr. MUNIR (Pakistan) said that in a unitary state where the legislature was supreme, the legislature itself could enact laws recognizing certain fundamental rights of the individual and precluding itself from legislating against such rights. In Pakistan, for example, a Constituent Assembly imposed limitations on itself under the Constitution.

Mr. FERNANDO (Philippines) said that in the Philippines, which had a unitary form of government with a written Constitution, the protection of human rights was judicially accepted. All rights referred to in the Constitution were legally enforceable, and, a person might take legal action against infringements of such rights. The Supreme Court of the Philippines had thus been protecting human rights in accordance with the Constitution.

Mr. IBRAHIM (Singapore) stated that Singapore had no written Constitution but followed the practice of the United Kingdom, where the rule of law prevailed. Penal sanctions did exist against violations of privacy, illegal arrest, defamation, etc. There was, therefore, no supreme law which could be changed or amended by the legislature.

Mr. RAMANATHAN (World Federation of United Nations Associations), speaking at the invitation of the Chairman, said that the substantive criminal law in Ceylon was chiefly contained in the penal code. As stated in article I of this code, the equality of men was a fundamental right. The code protected many rights such as the rights to life, liberty, freedom of religion, etc. Certain other provisions of the penal code were also in conformity with the provisions of the Universal Declaration of Human Rights. Except in a state of emergency, the law provided necessary safeguards for human rights. There were a number of such provisions relating to marriage, private and public property, freedom of opinion, and other matters.

Mr. REA (Hong Kong) said that Hong Kong, like Singapore, had no written constitution but followed the English tradition. In his opinion it was more important to enforce sanctions against the infringement of human rights than merely to proclaim them in the constitution. From that viewpoint, criminal law had an absolutely essential role in the protection of human rights.

Mr. PIKE (Sarawak) said that the situation in Sarawak was different from that in most of other British territories. There was provision in the constitutional instruments for the protection of some of these human rights. These constitutional instruments included what are known as the Cardinal Principles of the Rule of the Rajahs which provided guarantees of such rights as freedom of speech, writing, worship, etc.

Mr. HAN (China) said that the Constitution of his country recognized the rights set forth in the Universal Declaration of Human Rights. In addition, there were sanctions in the criminal law protecting the rights guaranteed by the Constitution. The right to vote, freedom of worship, various welfare measures, etc., were guaranteed. Special criminal enactments also provided for the prevention of genocide, the protection of mine workers and other matters.

Mr. SUFFIAN (Federation of Malaya) said fundamental liberties were guaranteed under the Constitution of Malaya. Although there were penal sanctions against the infringement of some of these liberties, the individual was usually obliged to go to the civil courts if his rights were infringed. He felt that it was more effective for a country to have a good liberal government imbued with the ideals contained in the Universal Declaration of Human Rights rather than to rely on penal sanctions.

Mr. NAGASHIMA (Japan) stated that Japan's written Constitution had been drawn up two years before the Universal Declaration of Human Rights was promulgated. The

fundamental rights guaranteed in the Constitution were, however, almost the same as those spelled out in the Universal Declaration, and included certain natural rights as well as social and economic rights. He mentioned articles 17 and 40 of the Japanese Constitution under which any person could sue for redress in cases of violations by public officials and of false accusations. There was judicial supremacy in the safeguarding of individual rights, the Supreme Court being the final authority in interpreting the Constitution.

Mr. NGUYEN LUONG (Republic of Viet-Nam) said that his country had recently adopted a written Constitution containing human rights provisions as proclaimed in the Universal Declaration of Human Rights. Under these provisions citizens had the right to life, freedom, safety of person, etc., and no person could be arrested or detained illegally. Any violation of these fundamental rights was punishable by penal sanctions. The penal code included specific definitions of the way in which human rights should be protected.

Mr. MUNIR (Pakistan) stated that most of the fundamental rights mentioned in the Universal Declaration of Human Rights were protected under the Constitution of Pakistan. There was also provision that any law inconsistent with or repugnant to any of these fundamental rights would be declared void, and the Supreme Court was given the power to adjudicate on the constitutionality of laws as well as of an executive action. As an example, he cited the case of the Foreign Exchange Regulation Act of his country whereby three tribunals had been established having different powers. In a case in which an accused person had challenged the constitutionality of having different tribunals in this manner, the Supreme Court had set aside the original decision in favour of the accused.

Mr. KRAIVIXIEN (Thailand) said that human rights were protected under the Constitution of his country as well as by the criminal and civil laws. In practice, however, full efficiency in the protection of these rights depended on the personnel enforcing the law, for example, the police force.

The CHAIRMAN, referring to the example given by Mr. MUNIR (Pakistan), stated that it was the function of the Supreme Court in many countries to declare ultra vires any legislation contrary to the constitution. He requested further information concerning the redress available in various countries and the remedies which might be sought by individuals for wrongs and illegal actions of public officials.

Mr. NAGASHIMA (Japan) said that a citizen could sue police officers in a civil court if his home was violated without legal ground. The Minister of Justice or some other governmental agency would represent the government as defendant in such a case. He referred to a special procedure under the Criminal Compensation Law and the regulation relating to it which allowed monetary redress when an aggrieved person sued the state following his acquittal of an offence he had not committed.

Mr. SUZUKI (Japan), supplementing the information given by Mr. NAGASHIMA, said that there were administrative remedies for such violations of private rights. In Japan, the Ministry of Justice had established a Civil Liberties Bureau which acted on the complaints of citizens who alleged that their fundamental rights had been infringed by police or private individuals. The case was then sent to the Public Prosecutor if such a step were found justified. The investigation undertaken by the Bureau was on a voluntary basis, the Bureau having no power to

take compulsory measures. In addition to the Bureau and its local offices there were several Civil Liberties Commissioners, appointed by the Minister of Justice, who received direct complaints from citizens, and would contact the Bureau if necessary, with a view to having a further investigation made. He felt that the "progressive measures" mentioned in the Preamble of the Universal Declaration of Human Rights needed close study and implementation.

Mr. HAN (China) said that the situation in his country was similar to that in Japan. A police officer who unlawfully violated the privacy of an individual was guilty of dereliction of duty. In addition to the personal liability of the police officer concerned, the State might also be sued by the private individual in an administrative court.

Mr. FERNANDO (Philippines) felt that the spirit which animated the Government as well as the attitude of the people was very important as regards problems of human rights. In his country a private institution, the Civil Liberties Union, acted as a watchdog over human rights. A written constitution judicially enforceable, was also a more important factor in ensuring the protection of human rights. In the Philippines, decisions made by the Supreme Court were binding on the Legislature as well as on the Executive. Several recourses were available to citizens, such as civil action, civil redress, and penal sanctions. He felt that human rights provisions in a constitution acted as a deterrent to public officials, by limiting their powers. In addition to the civil and penal remedies available, public officials could also be investigated by appropriate authorities. Recourse could also be had to prerogative writs such as habeus corpus and mandamus. He re-emphasized his previous stand that the rights of the offended party were a most important aspect of the whole question. This matter was now one of international concern, particularly in view of the existence of the Universal Declaration of Human Rights.

Mr. HAKIM (Indonesia) stated that for historical reasons, the situation in Indonesia was different from that in other countries. The first Constitution had been written in 1945 after Indonesia had achieved independence, and it did not include human rights provisions such as those later set out in the Universal Declaration of Human Rights. However, human rights were protected by other laws relating to the inviolability of the home, secrecy of correspondence, etc. He stressed that the State was held responsible for any violation by a public official in the course of his duty. The official himself was not held personnally responsible.

The CHAIRMAN suggested that attention be directed to the measures for redress compensation that were available to the citizen as distinct from the penal action which could be taken against public officials who had violated private rights.

Mr. RASY (Cambodia) said that the human rights set forth in the texts of written constitutions could be protected effectively in two ways: first by personal responsibility on the part of the individuals and the officials concerned and, secondly, by a sanction in favour of the victim whose rights had been infringed. In Cambodia the law provided one safeguard by making it illegal for officials to use harmful or unnecessary force in dealing with an offender. Officials contravening these provisions were held personnally responsible. Another provision recognized that the rights of a citizen might have to be restricted in case of emergency, but even under emergency conditions, the

protection of human rights was ensured by means of sanctions against officials who overstepped their powers. In this way a deterrent, acting in the interest of human rights, was present under normal as well as abnormal conditions. But, along with criminal liability, there existed a civil liability aimed at compensating a victim for damage sustained. As the official concerned was often impecunious, it was desirable that the administration should compensate the victim for the damage, subject to recuperating this sum later from the offending official.

Mr. MUNIR (Pakistan) felt that the only effective way of protecting individual rights was by providing legal sanctions against violations of such rights. If substantive criminal law was to play its part, the constitution itself should provide for punishment of violations. Laws must be brought into conformity with constitutional rights and must provide penalties for the violation of these rights. In this respect, it might be necessary to recognize the existence of new types of offence. Certain local regulations might also have to be revised to conform to constitutional provisions concerning human rights.

Mr. NAGASHIMA (Japan) said that in Japan there were many criminal sanctions against violations of fundamental human rights. It was possible for the actions of a public official to be brought to the attention of the Office of the Public Prosecutor, which would then make an inquiry into the merits of the case and take necessary action. Should it fail to prosecute the public official concerned, the injured party whose private rights had been infringed had another recourse by which he might apply directly to a court, seeking the trial of the official. This procedure was, however, very rarely resorted to in practice.

Mr. GYAWALI (Nepal), summing up the discussion on this topic, said that opinion was divided on the question of how a country could effectively give implementation to the Universal Declaration. It was, however, generally agreed that the preparation of a constitutional bill of human rights was not necessarily the most effective way. What mattered was the extent to which civil remedies and penal sanctions were available to enforce these rights. Another proposition which had emerged very clearly was that a liberal government and an efficient administrative machinery were essential prerequisites for the protection of human rights. It was also agreed that the Universal Declaration should be treated more as a set of ideals towards which countries should move rather than as rights which should immediately be incorporated in law. The Declaration should in the first instance serve as a means to awaken consciousness through educational measures.

Item II (a) appeared to relate to Article 12 of the Universal Declaration of Human Rights, and he urged the seminar to examine whether there were any valid justifications for the State to interfere with the privacy of individuals. In discussing Item II (b), Articles 2 and 7 of the Declaration might be kept in mid. Equality before the law would not mean absolute equality, but equality of opportunity. Discussion on this subject, especially in relation to problems of backward classes in some countries and the need to bring them up to the general level, might be useful. Articles 12, 25 and 26 of the Declaration could be considered in connexion with Item II (c). The basic question, which had already been discussed in part, was how far penal sanctions were necessary to safeguard social and economic rights.

Mr. SEN (India) wished to know whether the discussion would be carried over to the next week.

Mr. FERNANDO (Philippines) sought clarification regarding popular participation in the administration of justice in Japan. It seemed to him that the system of inquest into prosecution succeeded in injecting an element of democracy into the administration of justice.

Mr. MORRIS (Australia) referred to constitutional guarantees in relation to the experience gained with the operation of the Australian Constitution. In his country, there were only two constitutional guarantees, neither of which had proved particularly potent in protecting the rights concerned. The guarantee of just compensation was one of them. Only the Commonwealth Government was bound by this guarantee, which did not extend to the State Governments. In practice, there had been only a small amount of litigation concerning compensation granted by the Commonwealth Government, but the record of the State Governments, which were not bound by this constitutional guarantee, had not been noticeably less generous. It appeared as though the principle of just compensation was deeply embedded in the social system, and would have been implemented whether the constitutional guarantees existed or not. The other guarantee, which pertained to freedom of religious observance and prohibition of discrimination on grounds of religion, also bound only the Commonwealth Government and not the Governments of the States. Nevertheless, no significant conflict had developed, and the need for such a guarantee did not seem to exist.

It was difficult to choose the most appropriate technique to enforce many of these rights. A balance had to be struck between constitutional guarantees and other forms of providing legal protection of human rights. In Australia, penal sanctions were used to a great extent to safeguard many of the rights embodied in the Universal Declaration. Quasi-judicial techniques were employed to ensure the observance of many of these rights, but criminal sanctions were, in the last analysis, the most potent weapon to ensure their observance and implementation. A list of many of these statutes had been given in Working Paper J, on pages 11 and 12. A question arose as to whether criminal law should be used to such a large extent to protect social and economic rights, and was worth considering whether many of these human rights could not be protected without penal sanctions.

On the question of the right of secrecy and inviolability, the Australian Government had decided that anyone using the technique of wire tapping could, unless properly authorized, be sentenced to two years' imprisonment and/or made to pay a fine of A£500. Authority to listen in on telephone conversations, other than in the course of telephone maintenance operations, could be obtained only from the Attorney-General upon application to him, for a specific purpose, by the Director of National Security.

Mr. SUZUKI (Japan) said that in Japan penal sanctions came into play when many of the rights referred to had been infringed. If false information were broadcast, it had to be corrected within two months; if not, punishment followed. Difficulty was being experienced, however, with certain weekly magazines, which printed confidential matters under the guise of amusing stories.

While article 17 of the Constitution related to violation by public officials of constitutional rights, there was no article covering the increasing number of cases of violation of human rights by private individuals. The Government was working in close co-operation with the Newspaper Publishing Association with a view to persuading the Press to impose controls on itself.

Mr. WILD (New Zealand) said that the question raised in Item II (a) was how far substantive criminal law could ensure protection of the right to privacy. Substantive criminal law was not enough by itself to provide adequate protection. In this respect, the object of penal sanctions was to punish officials who transgressed their limits. However, something more than penal sanctions was necessary. Even if discipline improved in the administration as a result of penal sanctions, it did not help the citizen who had been injured. They should also possess the right to initiate proceedings for monetary compensation, either in civil courts or through some other expeditious administrative procedure. If ready access was provided to courts of justice for the purpose of proceeding against erring officials, the position might improve. It was not enough to write into constitutions the right to have access to the courts. A readily usable machinery must also be made available.

Item II (b) referred to penal sanctions against social discrimination. This was a very wide subject, and he was of the opinion that this group of rights might best be safeguarded by educating public opinion. In this connexion, he quoted a relevant extract from a statement made by the Prime Minister of New Zealand, Mr. Walter Nash, which appeared in Working Paper K, (page 5).

As for safeguarding social and economic rights, he was convinced that penal sanctions and strict liability were the only way of ensuring social justice for all. This had been borne out by the experience in the State of South Australia. Even the slightest relaxation would lead to a breakdown of the entire system.

Mr. MOON (Republic of Korea) said that the Republic of Korea was faced with the same problem outlined by the participant from Japan. In the Korean Constitution, which was similar in many ways to that of the United States, more than twenty articles referred to rights enunciated in the Universal Declaration. Many rights were protected by imposing penal sanctions in cases of infringement. Guidance was given to members of the public with a view to helping them recognize whether their rights had been violated. In this event, they could either complain to the police and institute criminal proceedings against the offenders, or themselves bring civil actions seeking appropriate remedies. The Intelligence Section of the Ministry of Justice was trying to help the public just as the Civil Liberties Bureau did in Japan.

Mr. RASY (Cambodia) wished to offer a brief explanation of the term "droits de la personnalité" in Item II (a). The "droit de la personnalité" was a right whose object was the human person. The law attempted to make a distinction between rights of property, which had to do with things, and the "droits de la personnalité" which had to do with the intrinsic qualities of the individual. The underlying idea was that while the former could be expressed in monetary terms, and be the subject of commercial transactions, the latter did not lend

itself to such an assessment. There were numerous rights in this group, such as the right to reputation, the right to name, family status, nationality, etc. These rights were intangible but none the less precious.

Mr. MORRIS (Australia) concurred with Mr. WILD (New Zealand) that penal sanctions were essential for safeguarding social and economic rights, and that the development of a mature public opinion was one of the best ways of protecting individuals against social discrimination. Mr. WILD had also suggested that it was of first importance to provide something more than penal sanctions to prevent abuses by government officials or agencies. Excessive zeal rather than positive abuse was in many cases responsible for such violations. In this connexion it had been suggested that in addition to penal sanctions, it might be advisable to provide ready access to the courts. However, the victims in such cases often made poor plaintiffs, being people who were in trouble with the criminal law or suspected of being dangerous to society. But if we failed to protect the rights of even this class of people, we would be jeopardizing the rights of the rest of society. Buttressing the existing system with some administrative machinery might be more appropriate, and he cited the system of Police Disciplinary Boards which served this purpose in Australia. These Boards were constituted in such a manner that besides the chief Police Commissioner, one or two leading citizens were members usually persons with experience as judges or magistrates. These Boards had a genuine respect for human rights and took action to correct any excess or abuse of power by the police. They constituted a strong deterrent to abuse of power, and injured citizens had ready access to them. They helped to foster the feeling that the police force was anxious to protect human rights and had a sense of responsibility.

Mr. FERNANDO (Philippines) agreed that often the victims of abuse did not make good plaintiffs. It was, however, interesting to note that the zeal shown by the police was directly related to the stability of the government. When national security was threatened, it was natural to expect an increased tendency on the part of the police to be more active. He cited the situation in his own country at a time when there had been danger to the stability of the State from the "Huk" movement, and when increased alertness on the part of the military and police had resulted in grave violations of individual liberties. But with the restoration of order, the position had changed. At present the Civil Liberties Union was very active in the Philippines in protecting the rights of individuals. Eminent jurists were members of it, and played an important role in safeguarding such rights.

Mr. REA (Hong Kong) said that disciplinary tribunals existed in Hong Kong also, and the rights and duties of police officers were clearly set out in the Police Force Ordinance. Anyone could report the misconduct of a police officer. Complaints which led to disciplinary or criminal proceedings against police officers were nearly always considered by the Attorney General's department.

Mr. MORRIS (Australia) observed that the practice was not uniform in all states in Australia. To the best of his recollection, the Police Disciplinary Boards themselves dealt with such cases, this being more expeditious than going through the courts.

Mr. REA (Hong Kong) requested clarification as to whether an offender could be required to face disciplinary proceedings after acquittal by a court of law.

Mr. MORRIS (Australia) said that this was a procedural, and not a substantive point, and felt that the Seminar might find difficulty in pursuing it. In fact, the disciplinary processes of the Administrative Boards had no binding effect on any proposed judicial processes.

Mr. REA (Hong Kong) said that in Hong Kong, if the accused had been discharged, he was not subject to disciplinary proceedings on the same charge.

Mr. ROBSON (New Zealand) said that he was more concerned with the rights of aggrieved citizens. As regards the role of the Civil Liberties Bureau of Japan, he wished to know from the Japanese participants whether a citizen who did not possess the necessary evidence was permitted to look into the relevant files, and make use of the material therein, and whether the legal representative of an aggrieved citizen had the same facilities. He also asked the participant from Cambodia what remedies were available to protect the network of "rights of personality" to which he had referred.

Mr. SUZUKI (Japan) said that the Civil Liberties Bureau had no compulsory powers to call for evidence. Investigations were quite voluntary in character. If a person was requested to come to the office of the Bureau but did not comply with the request, nothing could be done. The Bureau had no compulsory powers to investigate the files of the alleged violator.

Mr. RASY (Cambodia), in reply to the question raised by Mr. ROBSON (New Zealand) as to how reparation could be made for infringement of the "droits de la personnalité", which could not be evaluated in monetary terms, said this question was part of the classic question of moral prejudice. In the past, courts had been content to assess damages at a symbolical "franc". Later the principle of monetary compensation was recognized, but the sum was difficult to assess. The deterrent role of criminal law was particularly evident here.

Mr. SUZUKI (Japan) said that even though the Japanese Civil Liberties Bureau had no compulsory powers, it was a highly successful institution, receiving excellent co-operation both from citizens and government officials. It was well known that inquiries conducted by the Bureau were different from police inquiries. This general public confidence had contributed to its success.

Mr. DHARMASAKTI (Thailand) said he had been much impressed by the statement of Mr. WILD (New Zealand), particularly on Item II (b) relating to social discrimination. This problem, however, did not exist in his country. He added that the education of public opinion included also the education of government officials. He wished to know whether the restriction of certain occupations to the nationals of a given country, to the exclusion of aliens, would constitute social discrimination.

Mr. BANERJEE (India) believed that discrimination practised against aliens, as thus described, would fall within the field of international law and, therefore, should perhaps not be considered by the Seminar, which was more concerned with rights under municipal law.

Mr. NGUYEN LUONG (Republic of Viet-Nam) said that in his country the problem was to reconcile the interests of society and the interests of the individual. Examining magistrates heard cases from this standpoint, and attempted to see that justice was suitably administered. He wished to know whether there were any texts of legislation available on this particular point.

Mr. MORRIS (Australia) agreed that the question raised by the participant from Thailand fell within the purview of international law, but all the same it was a problem to be looked into. So far as public opinion was concerned, in Australia the Government had always shown quick response to it, and he believed that the force of public opinion would achieve the same result in other countries also.

Mr. RAMANATHAN (World Federation of United Nations Association), speaking at the invitation of the Chairman, said that in considering this subject, by far the most important point was what remedies were available when human rights had been violated. In Ceylon, action could not be instituted against individual public servants but only against the Attorney-General. In addition, litigation in most countries of Asia was expensive and access to this mode of redress thus tended to be restricted. Many countries had, therefore, instituted a free legal aid scheme. He again wished to emphasize that there was no use possessing a right when it could not be enforced.

Mr. REA (Hong Kong) said that he agreed that public opinion was the best eventual safeguard against social discrimination. Public opinion, however, could not be forcibly developed. He thought therefore that ultimately the liberty of the individual depended on the courts, and legislation was the practical safeguard. Public opinion could be formed through action taken publicly in the courts.

Mr. KRAIVIXIEN (Thailand) agreed that public opinion was a great force in social control. The problem was how to educate public opinion effectively and speedily.

Mr. BANERJEE (India) posed the problem of obvious conflict when one agency of government sought to protect and safeguard the human rights which another agency of the same government had violated, sometimes with apparent justification. The confidence of the public in the effectiveness of the right-safeguarding agency might be undermined, and he wished to know how the conflict could be resolved and how confidence could be developed. Where the civil liberties bureau was a non-governmental organization, as in the Philippines and some other countries, the problem did not arise.

Mr. HAGIWARA (Japan) said that even though the Japanese Civil Liberties Bureau had no compulsory powers to secure evidence or summon witnesses, it received co-operation from all sources. Government officials took any queries from the Bureau very seriously, and did their utmost to co-operate. The public which dealt with the Bureau knew that many of the human rights commissioners who assisted the Bureau worked in an honorary capacity, and this had greatly helped to enhance the confidence of the public in the Bureau.

Mr. MORRIS (Australia) said that the problem of conflict between two governmental agencies might arise if persons senior in any State instrumentality decided as a matter of policy to violate human rights rather than to uphold them. However, there was deep respect in his country for these rights, and the necessary safeguard was provided in the fact that proceedings of bodies like the Police Disciplinary Boards were help in open, and that non-official persons had also been included in the membership of these bodies.

Mr. PIKE (Sarawak) said that while he agreed with the suggestion that a disciplinary body provided a useful check in some smaller countries such as Sarawak, it might not be possible to include outside personnel since suitably qualified persons might not be available. He wished to know whether the State could claim privilege and refuse to disclose the evidence in its possession if any person was dissatisfied with the verdict of a disciplinary body and instituted proceedings in a court of law.

Mr. LEE (Republic of Korea), in answer to the question raised by Mr. BANERJEE (India), said that when a bureau of civil liberties represented public opinion, it could in effect supersede other branches of government.

Mr. PIKE (Sarawak) suggested that the confidence of the public in the protection of human rights by a civil liberties bureau which was a government department would depend on the energy and fairness with which such a bureau conducted its business and on the confidence it created in the public mind.

Mr. HAN (China) observed that the discussion had strikingly demonstrated the need to find out more about the functioning of the Civil Liberties Bureau in Japan.

Mr. SUFFIAN (Federation of Malaya) said that in Malaya and some other countries in Asia where the level of education was low, the question posed by Mr. BANERJEE (India) assumed real importance. In his own country, for example, even though machinery for redress existed, in that anyone could report the misconduct of a public official to his superior, few, in practice would do so, as it was believed that the superior officer would necessarily defend his subordinates. There was little public confidence in such a procedure. With this in mind, the Prime Minister of Malaya, who was acutely aware of the problem of corruption, had set up an anti-corruption bureau in his own Department, with a view to creating greater confidence in the mind of the public. It had been suggested that if one government agency did not assist the aggrieved party against another government agency which had infringed his rights, proceedings could always be instituted in courts of law. This was, however, a highly expensive procedure, full of technicalities and involving considerable delay. Perhaps the practice of giving free legal aid might be useful in such cases. Some difficulties would be experienced in establishing such a scheme in his country at present. He also felt that the Japanese experience with the Civil Liberties Bureau was of great relevance to many Asian countries.

Mr. FERNANDO (Philippines) said that in the proposed Criminal Code of his country, increased emphasis had been placed on the protection of human rights. Stress had been placed on a wide range of individual liberties and human rights, including rights of association, inviolability of the home, freedom of religious worship, etc. With the adoption of this code, a significant step forward would have been taken.

Mr. SUZUKI (Japan) said that in view of the considerable interest expressed by various participants in the functioning of the Japanese Civil Liberties Bureau, his delegation would present a supplementary document in which an attempt would be made to answer the questions raised.

Mr. MORRIS (Australia) viewed with concern the use of wire-tapping as a device for gathering evidence.

Mr. HIGUCHI((Japan) cited an example of liability of public officials in the gathering of evidence. The case involved the setting up of a microphone in a room by police for the purpose of eavesdropping on what was happening in a neighbouring room. The intended victim discovered the police equipment, and brought a case to the public prosecutor's office, which, however, did not proceed with it. The complainant went to a district court, which again did not take any action. An appeal was finally made to the high court, which dismissed the case holding that such eavesdropping could not be regarded as an abuse of authority inasmuch as it was necessary to collect information in the public interest. In Japan there was no penal provision regulating the use of this device. From the legislative viewpoint the use of such devices needed further study, not only from the point of view of substantive criminal law but also of criminal procedure.

Mr. MORICE (International Commission of Jurists), speaking at the invitation of the Chairman, said that the police should secure the authority of the court to use wire-tapping.

Mr. WILD (New Zealand) stated that it was generally agreed that wire-tapping represented an invasion of privacy, and also that its use might be justified if properly authorized. Two problems arose. First, under what circumstances should authority be given? Secondly, could information obtained for one purpose, such as the protection of national security be used for another purpose, such as the investigation of a crime?

Mr. HAN (China) considered that wire-tapping was a serious invasion of privacy, but under Chinese law it was not punishable at the present time. In his opinion it should not be left without controls, but should be subject to judicial control, whether it was used for the purpose of criminal investigation or for the protection of national security.

Mr. PIKE (Sarawak) agreed that the use of wire-tapping was to a certain extent a necessary evil, justifiable under proper safeguards. It should not, however, be used as a general method of crime detection. It should be limited to crimes of a serious nature. In Sarawak, as in many British territories, the power to authorize interception was vested in the Governor, who had to be satisfied that circumstances existed which warranted such an interference.

Mr. MORRIS (Australia) said that wire-tapping was a necessary evil and a solution must be found in means of controlling its use. He inquired whether the authority to use wire-tapping should be issued in the same way as a search warrant. In securing a search warrant, senior police officials had to show cause to judicial authorities. Two problems remained. First, if wire-tapping was not authorized in a given case, what should be the sanctions for its use? Secondly, should evidence gathered by illegal wire-tapping be subsequently admitted as evidence?

Mr. RASY (Cambodia) stated that in his country a case of wire-tapping would be dealt with under the legal provisions relating to the secrecy of correspondence. According to the Cambodian Constitution, secrecy of correspondence was inviolable except temporarily under emergency conditions. The exception could be invoked only by law and in explicit terms. It was not possible to make an exception by implication. Any decision of a judicial character was considered illegal if it tended to destroy the secrecy of correspondence. The temporary nature of the law had to be clearly specified, and it had to be motivated by national interests.

Mr. FERNANDO (Philippines) stated that the law in the Philippines followed certain American precedents. The Philippine Bill of Rights, for example, owed a great deal to American influence. When the Constitution Convention of the Philippines met in 1935, it agreed upon provisions relating to search and seizure similar to those found in American law, and deriving from the Olmstead case. The United States Supreme Court, in that instance, had overruled an objection to the use of wire-tapping on the basis that it was neither search nor seizure. A dissenting opinion by Justice Brandeis, who had labelled it "a dirty business", foresaw that the use of such devices would greatly invade private rights. Concerning the privacy and secrecy of correspondence, the law provided that action could only be taken pursuant to a court order or as required under certain emergency conditions. In his opinion, the utmost restraint should be placed on the use of wire-tapping and other devices such as dictaphones, tape recorders, etc. It was preferable perhaps to allow occasional lapses rather than to risk the violation of individual privacy.

In reply to questions put by Mr. REA (Hong Kong), he added that he considered it objectionable to admit as evidence any information obtained by concealed equipment. In his opinion a third party should be present when tape-recording was used, and the accused should be warned that any information he gave would be admitted as evidence in court.

The CHAIRMAN believed that statements of the accused obtained by tape-recording would not be admissible in countries where the Indian Criminal Procedure Code applied. In countries with a high rate of illiteracy it would be precarious to admit the use of recorded statements made by the accused to the police.

Mr. REA (Hong Kong), in answer to the CHAIRMAN, said that where English law applied, any voluntary statement was admissible as evidence. However, a police officer, when taking a statement, must caution a suspect that this statement might be used as evidence and that he was not obliged to say anything unless he wished to do so.

Mr. NGUYEN LUONG (Republic of Viet-Nam) stated that his country had accepted the principle of the protection of individual rights. However, the law provided for censorship of letters under certain circumstances. He felt that if an examining magistrate authorized the use of wire-tapping, this procedure would be acceptable. He agreed that wire-tapping, like search and seizure, required court authorization.

Mr. MOON (Republic of Korea) said that under the special conditions prevailing in his country there was a strong necessity for the use of wire-tapping to obtain evidence, especially in cases of spying and espionage. Evidence could be collected by wire-tapping and other means if under proper authority and in the interests of national security.

Mr. RAMANATHAN (World Federation of United Nations Associations), speaking at the invitation of the Chairman, said that in Ceylon the right to secrecy of correspondence was protected by certain provisions of the Criminal Code. Violation of rights by public officials, including fraud, misconduct, injury to messages, etc. were punishable under criminal law. Under conditions of emergency the Public Security Act operated, and the government could censor letters, etc. Tape-recording was inadmissible as evidence under the present law of Ceylon and he would like to know in what other countries it was also inadmissible. In his opinion wire-tapping should be permissible under certain circumstances.

Mr. SUFFIAN (Federation of Malaya) cited a recent case in Malaya in which evidence secured by tape recording had been admitted. Tape-recording, like photography, could be used as evidence. It was possible to tamper with tapes, although such tampering affected the weight, not the admissibility of the evidence. As regards wire-tapping, this device could be useful, and was sometimes indeed necessary, in obtaining evidence in such cases as kidnapping and extortion. He agreed that although wire-tapping was an ugly device, and should not be resorted to except in extreme cases, there were exceptions which justified its use, such as the protection of national security. The principal objection seemed to be to its secrecy. There was no objection to the censorship of letters, which was openly admitted in wartime. Few, however, knew the extent to which wire-tapping was resorted to in any country.

Mr. REA (Hong Kong) also agreed with the general view that wire-tapping was undesirable except in special cases. He asked whether it was objectionable to use tape recorded evidence in, say, blackmail cases. A detective hiding behind a screen could, for example, obtain admissible evidence. The tape recorder was only a modern device for obtaining similar evidence.

Mr. YEGANEH (Iran) said that the right of secrecy was provided for in the Constitution of Iran, and there were sanctions in the Penal Code against violations of it. For example, under the Penal Code, public officials tampering with telephonic or telegraphic messages without authority could be penalized. There were no provisions concerning tape-recording and wire-tapping in the law of Iran at the present time, but it was possible for judges to give permission to police officers to use these methods if needed. It depended on the personal convictions of the judges. There seemed to be no difference between opening letters and recording evidence by mechanical means.

Mr. NAGASHIMA (Japan) said that in Japan public opinion was against the use of secret apparatus to obtain evidence. As far as he was aware, there had so far been no cases in which the evidence obtained from secret tape-recording or wire-tapping had been introduced before the courts. Every instance of wire-tapping would be punishable under the law dealing with communications. It was very difficult to authorize wire-tapping since the public official so authorized might not use it properly. It would be helpful if the use of wire-tapping could be provided for and regulated by legislation.

Mr. ROBSON (New Zealand) felt that the permission for the use of such devices should be granted by ministerial or high governmental authorities, as was the case in Australia. He wondered how wide-spread was the practice of tape recording.

The CHAIRMAN believed that wire-tapping should be treated differently from tape-recording, which was a recognized method of collecting information as secondary evidence. Wire-tapping should be allowed only under strict control in cases involving the security of the State and the prevention of certain crimes, and should be authorized only by trusted officers of the State on the level of ministers.

Mr. MORRIS (Australia) agreed that authority for the use of wire-tapping should remain at the ministerial or senior governmental level. Statistical data on the incidence of wire-tapping, without revealing the details of cases, should be published.

Mr. SEN (India) stated that he would like to raise a vital matter in connexion with sub-items (b) and (c) of Item II, dealing with penal sanctions against social discrimination and penal sanctions safeguarding social and economic rights, including the right to health and to education. These subjects, when read together with the main title of Item II, criminal law as an instrument for the protection of human rights, presupposed that nations should accept as norms the provisions in the Charter of the United Nations, the Universal Declaration of Human Rights and national Constitutions. The question was how far and to what extent substantive criminal law would ensure the protection of these rights. It was important to discuss not only the acceptance of these norms of human behaviour and values but also the extent to which countries observed these rights. In his opinion it was also necessary to study certain acts which were subversive of human rights. There was a long history of the expansion of human rights, and the human family was now proud to share common values and laws which had resulted from this historical process. Many constitutions of modern nations, including that of India, provided basic rights for the citizens in conformity with this historical growth. However, in the case of the Union of South Africa, there had been a deliberate attempt to subvert the rights of a large segment of the population, consisting of non-whites of Asian origin as well as indigenous Africans. These people were subjected to laws which in spirit and content were a negation of the human rights advocated by the United Nations Charter and the Universal Declaration of Human Rights. The strangest fact was that the leaders of the State took pride in subverting these human rights. In his opinion civilization could not be categorized as white or non-white. The advancement of the human mind and of human values could not be fitted into compartments because it was the common product of human growth through the centuries. Unless these human rights were accepted as basic tenets in every constitution, it would not be possible to safeguard them. It would indeed be advisable to adopt the provisions of the United Nations Charter and the Universal Declaration of Human Rights as norms of human society. This would prevent discrimination which would give privilege to the few and disadvantages to the many, as in the case of South Africa. He felt that the seminar would be failing in its duty not only to the United Nations but to the people of the countries represented at the seminar if a protest were not made against such deliberate social discrimination. He emphasized that criminal laws could be so fashioned as to subvert human rights. Citing the preamble of the United Nations Charter and articles 1, 3, 4, 7, 9, 13, 16, 17, 19, 21 and 23 of the Universal Declaration of Human Rights he said that the Union of South Africa had violated every one of these provisions, in laws enacted during the past ten years. In spite of these violations the Union of South Africa continued to be a Member of the United Nations.

Among the examples given were the Group Areas Act by which non-whites, including Indians and Pakistanis, were forced to move out from certain urban areas to outlying districts where economic hardships prevailed; and the pass laws, by which Africans were required to carry passes in a "reference book" for purposes of employment, movement, trade, etc, failure to carry these passes leading to the punishment of forced labour on slave farms; the Apprenticeship Act by which it was almost impossible for non-whites to enter certain professions and become chemists, surveyors, etc; the Criminal Law Amendment Act which punished Africans by flogging for going on strike; the Masters and Servants Law by which servants were unjustly bound to their masters; and the Marketing Act which discriminated against the non-whites in the marketing of produce, and which favoured the enrichment of the whites.

All political power was in the hands of the white population although they numbered less than two million of the thirteen million people of South Africa, and he cited further examples of discrimination in respect of voting and other political rights. In view of this obvious discrimination, the seminar participants should protest against the subversion of human rights and freedom in South Africa, especially since many Asian peoples were among those subjected to humiliation and indignities.

As an example of white and non-white integration he mentioned the situation in New Zealand where, as far as his knowledge went, the Maoris were completely integrated in society. Under a legal system which protected their rights, the Maoris had developed amazingly, showing the possibilities in such integration. In his opinion those who tried to subvert fundamental human rights could not be successful in the end. In view of the above, it was important to see how the laws were fashioned in each country, in the interest of protecting human rights. Constitutional provisions should be safeguarded by law in order to ensure that basic rights could not be transgressed at any time.

Mr. HAN (China) said that he shared the feelings expressed by Mr. SEN (India) in regard to racial discrimination. On grounds of humanity and in the spirit of the Universal Declaration of Human Rights, this practice should be condemned. The Union of South Africa should take steps to correct such violations and educate the general public to respect human rights. However, he doubted that the Government would change its policy. He felt that it was not feasible to use criminal sanctions against social discrimination, because punishment tended to aggravate resentment rather than to eliminate prejudices. Education and improvements in social policy offered a better solution to this problem.

Mrs. TANABE (Japan) described the functions of Civil Liberties Commissioners in Tokyo stating that she was one of two hundred such commissioners. If someone approached her with a complaint she would listen to the details of the case, and on the basis of the information received she would, if some infringement of human rights were involved, give immediate advice to the complainant. She would then make a full written report to the Civil Liberties Office. In other cases she might refer the complaint to appropriate governmental agencies, such as the Family Court. Twice a month the local commissioners had consultations concerning cases of human rights. As an example she mentioned the case of a woman, a waste-paper collector of about forty years of age, who alleged that a policeman had made an illegal physical search without the proper attendance of a witness,

the woman being under suspicion of having stolen a wallet from a fellow worker. The policeman did not find any wallet on her body. Mrs. Tanabe had reported the case to the Civil Liberties Office, since under the Code of Criminal Procedure (Article 131) a physical examination of a woman could not be undertaken unless in the presence of a doctor or another adult woman.

Mr. SUZUKI (Japan) believed that Item II (c) was aimed at creating conditions under which the dignity of man as an individual would be upheld. This dignity of the individual required not only recognition of civil and political rights but also the establishment of social, economic, educational and cultural conditions which were essential to the full development of the human personality. These conditions were spelled out in Articles 22 to 27 of the Universal Declaration of Human Rights. The Constitution of Japan, which had been enacted about two years prior to the promulgation of the Universal Declaration of Human Rights, contained provisions relating to such rights in Articles 25 to 28, which referred to social security, employment, health, education, etc. In his opinion, economic, social and cultural rights differed in substance from other rights. The State had a duty to guarantee these rights for its citizens and it was not sufficient for the State merely to punish violations of them. It must undertake positive measures and establish institutions to promote these rights. In the provision of such State services, penal sanctions would necessarily have to be taken against those public officials who violated their spirit. Penal sanctions would also be necessary in the case of a third category of person, for example, the employer who violated the rights of his employees. It was chiefly from this viewpoint that penal sanctions for the protection of social rights should be discussed.

Mrs. TANABE (Japan) said that as an instrument for the protection of human rights, Japan had four years ago enacted an Anti-Prostitution Law which declared prostitution a social evil. Previously in Japan there had been licensed and unlicensed brothels. The rights of prostitutes were not recognized; they were bound to their employers and could not leave their profession. The anti-prostitution law had abolished all brothels and a considerable number of prostitutes and their employers had been rehabilitated. However, there remained some underground activities the extent of which was unknown at this time. The law had at least two merits: it protected human rights, especially those of the women concerned, and it punished transgressors. It was considered that prostitutes were victims of existing social conditions, and present efforts were concentrated on their rehabilitation.

Mr. NAGASHIMA (Japan), in reply to an earlier question by Mr. FERNANDO (Philippines), gave details of the system of "inquest of prosecution" established in 1949. The idea of this unique method derived from the grand jury system. In Japan the Public Prosecutor had discretionary power in dealing with criminal cases. The Code of Criminal Procedure (Article 248) provided that, taking into account character, age, the gravity of the offence, and conditions subsequent to the commission of the offence etc., prosecution might not be instituted in certain cases if deemed unnecessary. As a result there were cases in which an injured party filed a complaint demanding prosecution. If the injured party was not satisfied with the decision of the Public Prosecutor not to take action, he could resort to the "inquest of prosecution". On receipt of the complaint, the "inquest of prosecution", which consisted of eleven laymen, selected by lot and whose

term of office was for six months, would request a re-examination of evidence by the Public Prosecutor, and the testimony of witnesses would be given. Decision was made by majority vote, eight votes being required for a decision to prosecute. Finally, the District Public Prosecutor's Office, on receipt of a written instruction to institute action for prosecution, would proceed accordingly. Approximately 14,000 applications had been received by the "inquest of prosecution" from 1949 to 1958, and about 1,500 cases had been referred to the District Prosecutor's Office advising the institution of prosecution. Of these cases about 260 had been prosecuted, 180 defendants being found guilty and 36 not guilty. He felt that this was halfway towards the grand jury system.

Mr. RAMANATHAN (World Federation of United Nations Associations), speaking at the invitation of the Chairman, agreed with Mr. SEN (India) concerning the abrogation of fundamental human rights in the Union of South Africa. Under Articles 5 and 6 of the United Nations Charter the Security Council might recommend to the General Assembly the expulsion of a country from membership in the United Nations. That right, however, had not yet been invoked. The seminar should voice its disapproval of the subversion of fundamental human rights.

Mr. GYAWALI (Nepal) also agreed with Mr. SEN (India) that Member States of the United Nations in particular should not adopt a policy of racial segregation and fashion laws in support of it, since such a policy ran contrary to the Universal Declaration of Human Rights. He agreed that criminal law could be used as an instrument of human rights for the subversion,as well as for their protection. The question should therefore be considered from both aspects.

Mr. FERNANDO (Philippines) felt that the Japanese system of "inquest of prosecution" was worthy of study in some other countries. He agreed with Mr. SEN (India) that the practice of racial discrimination in the Union of South Africa should be condemned since it was repugnant to human conscience and an affront to United Nations provisions regarding human rights. He was not sure, however, whether the seminar could express an opinion on this matter. In other countries the possibility of criminal law being used for subversion of human rights did not exist in such an unadulterated form as in South Africa. In the Philippines a man's personality was entitled to respect, and the libel laws were intended to give protection to an aggrieved party. Under the libel laws, defamation not only gave rise to tort liability but to a criminal offence. The courts, under the existing system, protected the freedom and the right of an individual to speak publicly without restraint or liability. The Philippines did not apply the "clear and present danger test" to libel cases. However, acts of public officials were always open to scrutiny. The Supreme Court on the whole was sympathetic to articles written by the political opposition. Such development minimized the danger of criminal law being used to subvert human rights.

Mr. MORRIS (Australia), in answer to a request from Mrs. TANABE (Japan), for information on the "white Australia" immigration policy, stated that he would make available to participants a statement concerning the immigration laws of his country. Turning to the points raised by Mr. SEN (India), he said that like other participants he rejected any suggestion of any inherent superiority of particular races, but he sincerely doubted the relevance of the subject to the seminar. The "apartheid" policy in the Union of South Africa did not come within the purview of the agenda agreed to by the United Nations and the host

government. He agreed that criminal law could be used as a technique for subverting human rights, but the case of South Africa was part of a high policy which had already been discussed at the General Assembly of the United Nations, and with the exception of a few very senior participants the other seminar participants would not feel free to discuss this matter.

Mr. SEN (India) felt that the matter he had raised was relevant if items (b) and (c) were discussed in the context of the main heading of item II. There were both positive and negative aspects to the question and unless the subversion of human rights was prevented, their protection could not be fool-proof. As these positive and negative aspects were linked, the discussion of the negative aspects was inherent in the subject itself.

Mr. WILD (New Zealand) acknowledged the reference made by Mr. SEN (India) to the position of the Maoris in New Zealand. The position in New Zealand, however, was different from that in the Union of South Africa in certain respects. For example, there was one white to every six or seven non-whites in South Africa, whereas there were fifteen Europeans to one Maori in New Zealand. In New Zealand, while the Maoris had equality in every respect with Europeans, the assimilation of Western civilization by this Polynesian group had not been without problems. However, every effort was being made to assist their adaptation. Concerning the question of racial discrimination, he entirely agreed with Mr. SEN and he quoted a statement which had been made by the Prime Minister of New Zealand which, in essence, maintained that there were no inherently superior people, although there might be superficial differences of colour, culture and creed. The inherent capacity for moral and intellectual development did not belong to special groups, and there should be no discrimination when it came to human dignity and the equality of man.

Mr. SUZUKI (Japan) observed that some countries had constitutional provisions prohibiting social discrimination. Article 14 of the Constitution of Japan provided that all people were equal, and that the peerage should no longer be recognized. Since the constitutionality of the law was safeguarded by the judicial machinery, social discrimination was strictly prohibited. However, there remained individual instances of social discrimination by private persons. The Civil Liberties Bureau in Japan dealt with such problems. In his opinion, such discrimination usually derived from long-standing traditions and it was difficult to eliminate them by law enforcement alone. Reliance should be placed on social education, and even though this would be a slow process it would in the end eradicate social discrimination.

III. The legitimate limits of penal sanctions

(a) Should there be capital punishment?

The reasons for and against capital punishment - If capital punishment is retained, to what types of crime should it be limited - The question of its limitation and application in the case of young delinquents and of women.

(b) Are there any penalties deemed improper from the standpoint of the protection of human rights?

(c) To what extent should criminal law restrict civil and political rights of persons convicted of crime? When does the disability cease and what circumstances can lead to the restoration of these rights?

Mr. MUNIR (Pakistan), in introducing Item III, said he would like to take up each sub-section separately. The first dealt with the question of whether there should be capital punishment. He would not like to discuss this problem in the abstract, but would like to present it from the viewpoint of Pakistan's experience, and within the framework of the provisions in the Universal Declaration of Human Rights. The modern trend was towards the development of a democratic society based on the rule of law. In this development, the judicial element was no longer the only consideration, and the philosophical conceptions of the State had to be taken into account by lawmakers in order to bring about the realization of certain human values. These values were directly opposed to those of a totalitarian State.

The Universl Declaration of Human Rights, in articles 29 (3) and 30, provided that human rights and freedoms should not be exercised contrary to the purposes and principles of the United Nations, and should not be exercised to destroy the rights and freedoms of others. Article 5 of the Universal Declaration prohibited cruel, inhuman or degrading punishment. He did not think that capital punishment was necessarily cruel, inhuman or degrading, when it was applied to such cases as treason or serious crimes against the state. Because of the gravity of such crimes it was expedient for the state to execute the transgressors; otherwise it would be subject to the possibility of further conspiracy.

There were certain other offences for which the sentence of death seemed necessary, bearing in mind that articles 9, 10 and 11 of the Universal Declaration provided for the rights of the accused person, and article 5 safeguarded the rights of convicted persons. The arguments for and against capital punishment had been given in detail in Working Papers A and J by Mr. Prevezer and Professor Morris. One fact to be borne in mind in approaching this question was that the murderer himself flagrantly violated the fundamental rights of another person by his crime, and if this were not punished by the death penalty, it would mean that society was making murder excusable. There was no mathematical or absolute standard in regard to the application of the death penalty, and in his opinion the answer lay in the peculiar conditions of each country and the degree of abhorrence with which society regarded the offence. Thus, it could not be recommended that capital punishment should be abolished in an a priori manner, irrespective of local conditions. Ideas regarding what constituted cruelty had changed from time to time in the same country, at different stages of development. For example, England had in the past provided capital punishment for certain offences such as

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larceny and forgery. Even at present, in some countries, capital punishment was inflicted for such offences as carrying firearms, kidnapping, etc. Efforts to eliminate capital punishment would not succeed if conditions were not favourable; Ceylon had abolished the death penalty, but had restored it after the assassination of Prime Minister Bandaranaike.

It was his experience that in almost every case of murder, the first and primary effort on the part of the defence was to ensure that the accused did not receive the death penalty. In Pakistan, murders occurred at the rate of 300 to 400 annually, and the incidence was bound to increase if the death penalty were abolished. In his opinion, certain forms of murder, such as multiple-murders, especially warranted imposition of the death penalty. In his country, it would not help to give life sentence for multiple-murders resulting from family feuds, inasmuch as the imprisoned murderers would return to society after about fourteen years, and would be able to pursue their feuds. Another example which might be taken was political murder, where a member of an opposition political party would hire an assassin to kill a member of the party in power. In this process a reduced sentence might be promised to an unlucky assassin should the opposition come to power following the act. If the death penalty were not given in these circumstances, it would be an inducement to assassins.

Very few offences were punishable with death in Pakistan, those that were including treason and serious crimes against the state. It could be generally stated that the only offence punishable with death was murder or a kindred offence, with life imprisonment as an alternative punishment. An accused who had received a death sentence for murder had recourse to several appeals. The Court of Sessions dealt with murder cases with the aid of assessors or in certain districts with the aid of a jury. From this Court an appeal could be made to the High Court and then, by special leave, to the Supreme Court. On the executive side, the provincial Government had the power to remit or commute the death sentence, and this power had been frequently exercised where a judge did not wish to set a precedent, and left the decision to the provincial Government. The central Government had similar powers. There were also certain rules followed by judges which worked for the protection of the human rights of the accused murderer. In Pakistan, it was generally accepted that the death sentence would not be imposed following an unpremeditated murder or one committed impulsively and without forethought. Extreme youth was another factor, and no one under the age of sixteen years had ever been sentenced to death in his country. In the case of family tribal feuds where a youth was influenced by his elders, the court would hold the adults responsible and would not sentence the youth to death. Pakistan did not assert the position that capital punishment could not be applied to women solely on the basis of their sex. In the case, however, of a woman persuaded by her paramour to poison her husband, she would receive a reduced sentence and the paramour would be held responsible for the murder. Pregnant women had never been executed, and in many cases sentences passed on pregnant women had been commuted from death to life imprisonment. In certain other cases, also, such as where the liability was of a vicarious nature, judges would not inflict the death penalty. For example, in a group kidnapping expedition where one man had used a weapon and killed a person, that man alone would be held responsible, and the others in the group would receive lighter penalties. Where there was grave provocation, a murderer would not be sentenced to death. For example, it had happened in a village that a man had been publicly carrying on an immoral liaison with an

unmarried girl, and the father had killed the man. The father was held to have acted under grave provocation, and had not received the death penalty. The death penalty was not imposed on a murderer who, while not coming within the definition of legal insanity, was clearly subject to mental derangement at the time of the offence. The death penalty would be meted out on the basis of circumstantial evidence alone in a clear case of premeditated murder. Normally, a death sentence would not be carried out if two years had elapsed after the arrest of the criminal. The abolition of the death penalty would be an incitement to crimes of violence in his country.

Mr. MORRIS (Australia) said that with reference to the question raised about Australian immigration laws he would circulate the following day a memorandum on this subject to all participants.

Mr. MOON (Republic of Korea) said that there were physical and religious as well as practical arguments against the death penalty, which amounted to the taking of human life by man rather than by God. The available statistical data in some countries such as Australia had shown that the incidence of crime was not related to the retention or abolition of the death penalty. In his country, it had been retained, mainly because of political exigencies. The penal code in the Republic of Korea contained few provisions on the death penalty and these related mainly to crimes concerning collaboration with foreign aggression, sedition, etc. Murder and robbery causing death were the major crimes punishable by death. If an offender who had committed a crime punishable by death was less than sixteen years of age, he was sentenced to life imprisonment. Even though capital punishment had been retained in his country, his personal opinion was that it should be abolished.

Mr. KRAIVIXIEN (Thailand) said that the whole question of capital punishment should be considered in the light of the social history, educational standards, customary behaviour and other prevailing conditions in each country. It was true that in many European and American states, statistical evidence indicated that the abolition of capital punishment had not resulted in an increase in the homicide rate. However, available statistical evidence in Thailand indicated that such abolition would lead to a positive increase in the number of murders and other capital offences. As a matter of fact, during the years of 1944-1957, when the death penalty was in abeyance through the exercise of the Royal Prerogative, and life imprisonment had been substituted for it, the rate of capital crimes and charges had increased considerably. The retention of capital punishment in Thailand had been fully justified, especially since many capital charges had life imprisonment as an alternative to the death penalty. In practice, the death penalty had been restricted to the most heinous crimes. During the last twenty-eight years, only 214 out of 494 persons charged with capital offences had been sentenced to death and of these, 107 had had their sentences converted to imprisonment for life through exercise of the Royal Prerogative of mercy. There were also safeguards such as appeals to the Court of Appeal and to the Supreme Court, both on questions of law and of fact. Even when there was no appeal against the judgement of the Court, the law required a review by the Court of Appeal. This review, or the double appeal coupled with the use of the Royal Prerogative, mitigated the rigours of the law and was a safeguard against any fallibility of the judicial system.

Mr. HIGUCHI (Japan) said that the question was approached in his country from two points of view, namely the constitutional and the legislative. The Constitution

retained this punishment as a deterrent; society had to be protected from certain social evils. Legislative policy was also influenced by history, culture and social conditions and did not favour the abolition of capital punishment. However, it should be noted that the number of offences for which capital punishment was imposed had decreased sharply from about 118 to 13 during the years 1918-1947. At present, only crimes connected with the safety of the state, homicide, robbery or rape linked with violence causing death, were punished by death. Juveniles under eighteen years could not be sentenced to death but only to life imprisonment. He felt that time was not yet ripe in Japan to do away with this penalty.

Mr. HAN (China) agreed that the question of the retention or abolition of capital punishment had to be considered with reference to conditions prevailing in each country. While the general trend might be towards the limitation of the offences punishable by death and the eventual abolition of the death penalty, political unrest in his country had necessitated its retention. The death penalty was imposed mostly in cases of high treason or of heinous crimes. However, illegal traffic in narcotics was also punishable by death. Another feature of the legal system in his country was that repeated perpertrators of certain crimes could also receive this extreme penalty. While the wisdom of this might be doubtful in theory, it had proved an effective deterrent. He emphasized, however, that there was an increasing tendency in his country towards restricted use of capital punishment. The courts were endowed with wide discretionary powers and, for example, offenders under eighteen years and old people above eighty years of age were not subject to capital punishment. In conclusion, he questioned whether this form of punishment should be limited only to murder.

Mr. FERNANDO (Philippines) said that the present law in the Philippines on the subject was contained in the revised penal code of 1932. The proposed code of crimes currently under consideration in Congress was more humane in its outlook. However, he felt that this attitude would not command the approbation of the public or of Congress. Capital punishment was now restricted in the Philippines to more serious offences such as treason, piracy aggravated by murder, homicide, robbery coupled with homicide, etc. In view of its increasing incidence, kidnapping had also been declared a capital offence. However, in practice capital punishment was not often imposed. Even if there was sufficient proof of commission of the crime, the sentence of the lower court had to be reviewed by the Supreme Court, and eight out of eleven judges had to agree to the punishment. When the offender was a person over seventy years of age, or was a pregnant woman, capital punishment could not be awarded. The new code postulated that a death sentence should be imposed only when the offender was found to be unusually dangerous to society. The President also had power to pardon. If new evidence became available, the President could inform the Courts of the facts, and set aside the death sentence. Under the revised code, the age limit for the death penalty would be reduced from seventy years, as at present, to sixty-five years. It had also been recommended that no person under twenty years should be punished by death. However, public opinion in the Philippines was not in favour of many of the proposed changes.

Mr. PIKE (Sarawak) said it would be difficult to give a purely objective answer concerning the justification for capital punishment. He agreed that the circumstances in each country, including the standard of living and the philosophy of the people, were the most important factors in determining this issue.

Generally speaking, there were two kinds of murderers: those who murdered in the heat of passion of one kind or another, and those who committed premeditated murder. He doubted the deterrent effect of capital punishment in either case. In the first case, the consequences were never considered, and a premeditated murderer would have calculated all possible consequences and even ways of escaping from the clutches of the law. He concurred with the participants who thought it would be unwise to abolish capital punishment in any given country if the majority of the people were against abolition. One possible way of aiming at abolition was to provide an alternative penalty. This would result in judges making progressively less use of the death penalty and eventually abolition would follow upon disuse.

Mr. OTSUKA (Japan) said that in his country some surveys had been made of public opinion as to whether capital punishment should be retained or not. In 1926, when the question had become an issue, the Prime Minister's Office had conducted a survey of 2,536 persons of both sexes and of over twenty years of age. Sixty-eight per cent of those polled had voted against abolition. The Mainichi, a leading newspaper, had also conducted a similar survey in March 1956, covering 2,904 persons. Of these, 59.3 per cent were opposed to removal of capital punishment. The Japan Federation of Bar Associations had also conducted a poll in 1953 to ascertain how legal opinion reacted to the question, and 61.3 per cent had been against removal of the penalty.

Mr. HAKIM (Indonesia) said that in Indonesia, fourteen crimes were punishable with death sentence. Of these, some related to the safety and security of the state, while others concerned crimes against persons. The crimes against the safety and security of the state were: attempt on the life of the head of the state, acts of treason and hostility against the state, communicating state secrets to a foreign power, passing secret maps, drawings and texts involving the defence of the country to a foreign power, assisting the enemy in time of war, promoting a strike in essential services during times of emergency, committing a fraudulent act against the state, violent assault on the life of the President, and attempt on the life of a visiting head of state or a visiting prince. The crimes against persons were: murder, theft with violence leading to manslaughter, extortion with violence causing death, and piracy of any character.

In November 1959, a new category had added to those crimes punishable by death sentence: these were related to the economic life of the country. Indonesia was struggling hard to achieve economic stability, and offences which seriously jeopardized such efforts were thought to be serious enough to justify punishment by death. Although this was the statutory position regarding capital punishment in Indonesia, in actual fact it had not been used very frequently. During the last thirty years, few cases of punishment by death had occurred. In 1926, during a Communist insurrection, when Indonesia was still under Dutch sovereignty, four death sentences had been carried out. However, since independence there had been only three instances of capital punishment, all of them for attempts on the life of the President. The death sentence was carried out by hanging. The President had the power of pardon, and every case had to be submitted to him before the sentence was carried out. The law did not differentiate between children and adults, nor between men and women as far as capital punishment was concerned. Pregnant women could not be hanged until after childbirth. Public opinion in

Indonesia, he believed, supported capital punishment. As regards the point raised by some participants concerning the justification for capital punishment, he said that it was not repugnant to Islam which was the religion of 97 per cent of Indonesia's population. According to Islamic doctrines, the taking of a life must be paid for by a life. Capital punishment was effective as a deterrent, and it would not be wise, for the time being, to abolish it in Asia, since this might lead to an increase in crime.

Mr. RAMANATHAN (World Federation of United Nations Associations), speaking at the invitation of the Chairman, referred to the report on capital punishment which had been prepared by Mr. MORRIS, the participant from Australia, at the invitation of the Government of Ceylon. Ceylon had experimented with the abolition of capital punishment. Historically, a murderer had always been liable to capital punishment in Ceylon. In earlier times Buddhist kings, who were against capital punishment on religious grounds, had in deference to public opinion, secretly substituted the corpses of men who had died from natural causes for men sentenced to death. He quoted from Mr. MORRIS's report to show that although the homicide rate was rather high in Ceylon, there were some other countries with an even higher rate. He concurred with the conclusions of the report and said that the theory of the deterrent value of capital punishment was not borne out by facts. The question had to be considered from the point of view of its long-term effects, the administration of justice, prison administration, and public opinion. Citing article 3 of the Universal Declaration of Human Rights, he said that man's sense of innate justice would not be satisfied by taking one life for another. It was morally wrong to take life in the name of law.

Recalling the assassination of the Ceylonese Prime Minister, Mr. S.W.R.D. Bandaranaike, he emphasized that its cause was not the abolition of capital punishment but rather political motives. He urged participants to study the experiment of Ceylon with the abolition of capital punishment, which was singular in this region.

Mr. LUONG (Republic of Viet-Nam) stated that the strongest reasons for the abolition of capital punishment were always religious. For instance, Buddhists as well as Western church leaders had always argued for its abolition, holding the view that society had no right to take a man's life. He himself felt that capital punishment had a place among penal sanctions, but that its use should depend upon the gravity of the crime. He considered that its deterrent value was real, and agreed with Mr. HAN that political exigencies made its retention necessary in some countries. Referring to the aggression with which his own country was threatened, he said that the penal code formally provided this punishment mostly for political crimes. There was no article in his country's penal code which exempted women and children from this punishment, although in practice it was seldom used against them. The death sentence was subject to the possibility of presidential reprieve.

Mr. REA (Hong Kong) said that two main points of view could be discerned in the statements made by the participants who had spoken before him, namely, that the arguments for or against capital punishment were based either on a moral or a practical point of view, but it was essentially a local problem and had to be decided on the basis of the circumstances in each country. For instance, in some circumstances, the possession of firearms might merit capital punishment. If

capital punishment had to be rejected from the moral point of view, considerations based on the practical point of view would not arise at all. In this connexion, the Society of Friends of Hong Kong had asked him to state that they were against capital punishment; this view merited respect even though one might not agree with it. The statement of Mr. HAN, particularly his reference to the fact that traffic in narcotic drugs had been included under capital offences in China was of interest. Public opinion was difficult to evaluate but the attitude of juries might provide some indication. If public opinion was against capital punishment, a jury would sometimes return a verdict of "not guilty" in order to avoid the responsibility of a death sentence. This was an instance when public opinion so influenced law as to make it virtually ineffective.

He agreed with the participant from Japan that the whole question depended on the stage of development of society. If a society were sufficiently developed, there would be no need for the death penalty.

Mr. MORRIS (Australia) said that the balance between social development and the gradual abolition of capital punishment was a difficult one. There were two central issues: the first was an issue of fact, namely, does abolition increase the rate of murder? There were few studies on the subject, but all of them indicated that there was a tendency to exaggerate the correlation between capital punishment and the rate of murder. The leading available studies referred to England, the United States of America and Canada, but useful experimental material relative to Australia and New Zealand was also available. When he was working on the commission appointed by the Government of Ceylon, he had found it difficult to secure conclusive evidence on this point; there was a great need to undertake studies of this nature in the seminar area. The second issue was, how far should a country or its legislature move ahead of public opinion? Asian countries were currently engaged in implementing economic and social development programmes, and with the gradual achievement of these objectives it would be only natural that there should be tendency towards the progressive abolition of capital punishment. This tendency had, indeed, been implicit in every speaker's statement when citing exceptions to crimes punishable by the death penalty. The present status of this question could perhaps be summarized by saying that although capital punishment had been retained on the statute books of most countries, there was a steady narrowing of its use.

Mrs. TANABE (Japan) wished to acquaint participants with the activities of the Penal and Social Reforms Association of Japan. One of the main activities of the Association was advocacy of the abolition of capital punishment. Capital punishment could be objected to on the ground that it afforded no protection to human life but rather ran counter to the right to life, that punishing murder by death was tantamount to the state perpetrating another murder, and that judges were not infallible, and if an innocent person was sentenced to death there was no way of correcting the mistake. Article 36 of the Constitution of Japan forbade cruel punishment and she wondered how, this being the case, capital punishment could be tolerated.

Mr. ROBSON (New Zealand) said that in his country, the issue of capital punishment had become a prey of party politics. In 1935, when the Labour Government was voted into power in New Zealand, the abolition of capital punishment had been

one of the major planks of its platform. The practice was adopted of reprieving condemned murderers and in 1941, capital punishment was abolished by law for all crimes except treason. Later, in 1949, the National Party came into power, and reintroduced capital punishment in 1951. In 1957, when the Labour Party was returned to power, the Government adopted again the practice of reprieving condemned murderers. During 1952 to 1957, when capital punishment had been reintroduced, only eight persons had been sentenced to death. There was apparently no correlation between the existence of capital punishment and the rate of crime. In New Zealand, taking a period of fifteen years, when there was the death penalty, there were thirty-five capital offences, as against thirty-seven during the period when this penalty had been abolished.

In connexion with the case of Caryl Chessman, Governor Brown of California had observed capital punishment was a gross failure, that it was only the weak, the poor and the ignorant that suffered it and that most of the time the rich and the influential "got away with it". In this context, he recounted the case histories of eight offenders who had been executed in New Zealand between 1952 and 1957. It was a poor home background which seemed to have been the decisive factor in some of the cases. Governor Brown's statement could not be said to be substantially true of New Zealand, although there were elements of truth in it.

During the period 1952-1957, a woman in New Zealand had been sentenced to death, but she had been reprieved on the grounds of her sex. Referring to a statement made by Mr. HAKIM (Indonesia) that difficulty had been experienced in Indonesia in finding an executioner or a hangman. He read a passage from the report of the Royal Commission on Capital Punishment, of which Sir Ernest Gowers was the Chairman, which suggested that executions did impose a strain on those officiating, but that the strain was short-lived and had no lasting adverse effects. He doubted whether this could be said of New Zealand. In conclusion, he said that in New Zealand, social development had led to a relaxed and more humane attitude toward the question of capital punishment.

Mr. ROBSON (New Zealand), in amplification of the above statement, made it clear that there had been no executions in New Zealand since 1957 although it was possible to apply the penalty of capital punishment. The policy of the Labour Government was to reprieve every person condemned to death. The next step would be to abolish the death penalty by law. This was being proposed under the Crimes Bill to be considered by Parliament in June 1960.

Mr. IBRAHIM (Singapore) summarized the position in his country, referring to his Working Paper C. Murder was the only offence where the death sentence was mandatory. The Arms Offence Ordinance 1948, which provided for the death penalty, was an annual Ordinance renewable from year to year; it provided an alternative of life imprisonment and there had been a tendency in recent years for judges to impose this alternative punishment as a matter of course. The death penalty could also be imposed in cases of treason, with life imprisonment as an alternative. In all cases there was trial by a jury. Counsel was supplied at public expense for an accused who could not afford his own counsel. A person sentenced to death by the High Court had the right to appeal to the Court of Criminal Appeal, and free counsel was supplied if necessary in such cases. Where an accused was not satisfied with the ruling of the Court of Appeal he could apply for special leave to appeal to the Privy Council but this was rarely granted. In Singapore,

during 1959, out of a total of about sixty murder charges only four persons had been executed. Of these, three had their own counsel. There was no general clamour for the abolition of capital punishment in Singapore; he also believed that there was so far no agitation for abolition in Malaya either.

Mr. MORRIS (Australia) said that in his opinion the seminar had not dealt with the real problems relating to capital punishment, but had skirted the issues. The opinions so far expressed had been those of politicians rather than of experts in the administration of criminal law. While he could appreciate the political viewpoint, he felt that the seminar should deal with the subject from an expert viewpoint. He agreed with the contention that the abolition of capital punishment depended upon such things as the existing social conditions and public opinion, but, in addition, the seminar should not avoid considering the question of the abolition of capital punishment factually, and not only on the basis of the role of public opinion. He was also in agreement with the need to develop and instruct public opinion so that with an improvement in general social conditions, capital punishment could progressively be abolished.

In Asia and the Far East, there were four countries which had experimented with abolition. While this experience had been limited and the information available restricted, he felt that some measure of success had been achieved. These four areas were the former Travancore-Cochin, Goa, Nepal and Ceylon. The case of Ceylon was interesting because it was not a country with a low crime rate, and therefore the abolition of capital punishment had been a major social experiment. As far as available statistics showed, there had been no increase in the murder rate after abolition, and this at a time of very rapid social change and political and social upheaval. While Ceylon had reintroduced capital punishment, all three members who composed the Commission of Inquiry had agreed that capital punishment should be abolished for all murders. One member, however, had advocated that it should be retained for special cases such as the wilful murder of police and prison officials. In the case of Travancore-Cochin, capital punishment had been abolished for six years from 1945 to 1951 and then reintroduced. As far as the limited available data showed, the murder rate had not increased during the two periods.

In his opinion, it was necessary to decide whether capital punishment saved lives or not. If it did not save lives, then it was an indecency to use it as a method of punishment, although political perspectives would condition the means and the timing of its abolition. In the cases of Ceylon and Travancore-Cochin, there were no indications that capital punishment had saved lives. The question of whether abolition would really make any difference to the murder rate was therefore a crucial one. He agreed that certain offences, such as treason, were a different matter, a purely political matter. Certain other offences, such as the carrying of arms, and rape, presented another type of problem. He wondered whether capital punishment should be applied in such cases at all.

In his opinion, to advocate the abolition of capital punishment did not at all mean condoning murder; the fact remained that this punishment did not bring a murdered person back to life. From this point of view, if capital punishment would not save lives, then it was indefensible and indecent.

Mr. GYAWALI (Nepal) felt that capital punishment should be considered from a practical angle. Certain offences such as treason and mutiny justified its imposition. Referring to Working Paper J, he stated that it was not true that capital punishment had been suspended in Nepal; actually it had been abolished except for offences relating to the royal succession, affairs of state, treason, waging war and mutiny. Capital punishment had at first been suspended for fifteen years under the general law of the land in 1931. In cases of murder a form of punishment known as "damal" was applied in its stead, which entailed life imprisonment with confiscation of the accused's property, in addition to a few minor legal consequences. A careful review had been undertaken every five years during this period, and there had been no evidence of an increase in the number of murder cases. As a result, legislation had been enacted in 1946 abolishing the death penalty for murder and other crimes under the general law of the land. He suggested that other countries might adopt this "trial-and-error" method.

Mr. HAN (China) stated that the common argument in favour of retention of capital punishment was its deterrent effect on potential criminals. However, this consideration should not be over-emphasized, since most deliberate perpetrators of grave crimes were motivated by a belief that their crimes would not be detected or that they themselves would not be apprehended. Nor were statistics the sole consideration. Final conclusions should not be arrived at until the effects of the abolition of capital punishment had been observed over a very long period of time. Since punishment was a reflection of public moral conscience, the mode of punishment was closely related to the cultural background of a particular society. Usually, a measure taken by society corresponded to what society regarded as a sufficient expression of disapproval of the offence. Society looked upon capital punishment sentimentally as an instrument to help its members to restrain their criminal impulses. He cited the case of Sweden where for many years capital punishment had not been carried out, and then had been abolished. If abolition was brought about as a result of mere sentimentalism on the part of a minority, it was likely to cause social unrest and undesirable effects.

Mr. SUFFIAN (Federation of Malaya) admitted that feelings on this question were usually influenced by moral, social and religious prejudices. In the Asian countries which had experimented with the abolition of capital punishment, particularly Nepal, Travancore-Cochin and Ceylon, religious feelings had perhaps influenced the decision. Where the religion of a country objected to the taking of human life, it was not difficult to abolish capital punishment. His country embraced the Moslem religion which sprang from an area where, in the past, the doctrine of "a life for a life" had prevailed. The killer had to be surrendered to the tribe of the person killed, to be dealt with as thought fit. The question of whether capital punishment really saved lives could only be answered with reference to the existing conditions of a country. In Malaya, where the rural population was relatively unsophisticated, the victim's family would not be satisfied until the murder had been avenged. The imposition of capital punishment by the state tended to diminish the risk of private revenge.

He agreed with the general view that the trend of modern society was towards abolishing capital punishment, but abolition depended on the social progress of each country, and this could change from time to time. In Malaya, the usual crime for which the death penalty was given was murder. Due to the post-war turmoil, the former penalty of three years imprisonment for carrying arms had been

found inadequate, and it had been increased to a maximum of ten years. It had then been found necessary, in August 1948, to increase this punishment to the death penalty, but this was only a temporary expedient and it would be repealed at the proper time. In fact, the Government had already declared its intention to end the state of emergency in July 1960.

Economic factors, such as a failure of rice crops in Malaya, also tended to increase the murder rate, some murders being committed in stealing food. In such instances, the abolition of capital punishment might not contribute to the stability of the country. He agreed, however, that, viewed in the abstract, capital punishment was a most abhorrent form of punishment. Whether it should be imposed for any particular offence had to be considered in the light of the prevailing circumstances in any given country. He was most interested in the experiment of abolishing capital punishment in Ceylon. The murder rate in Malaya was not high, but so far there was little agitation for abolishing capital punishment, although most thinking people looked forward to the day when this form of punishment could be abolished without endangering the safety of the community.

Mr. SOROURI (Iran) said the abolition of capital punishment had been the subject of discussion and controversy throughout the history of criminal law. It had been discussed by lawyers, judges, legislators and other persons. The classical doctrine of criminal law supported the principle of capital punishment. The various schools of thought for and against this form of punishment could be briefly summed up as follows:

Those in favour of capital punishment maintained (1) that it was a most effective form of punishment from the viewpoint of suppression of the crime concerned; (2) that in the name of absolute justice, which formed the basis of law, it was a just form of punishment for the taking of a life; and (3) that as a matter of criminal policy the death penalty acted as a collective deterrent.

Those against capital punishment argued (1) that from the social point of view it was inhuman to take a life and that it did not serve any useful purpose to eliminate a person who might be rehabilitated and who still might render service to society; (2) that from the point of justice the death penalty was irrevocable, thus underlining the fact that error was always possible; and (3) that from the philosophical point of view God alone had the right to take away life.

Retention or abolition of the death penalty was not purely a theoretical question, but it had practical social implications, depending on the particular circumstances of each country.

Under Iranian law, the death penalty was given for certain grave crimes such as first degree murder, crimes committed against the security of the State, and the revelation of military or State secrets, etc. Juvenile delinquents and women offenders never received the death penalty.

Mr. LEE (Republic of Korea) stated that in order not to lose sight of the question posed by Mr. MORRIS (Australia), it was necessary to consider the concept of "social revenge". "Social revenge" was an expression of the natural

feeling of individuals in society, and could not be ignored. It was true that the abolition of capital punishment would not increase the murder rate but society might not approve of the action in view of the requirement of "social revenge".

Mr. FERNANDO (Philippines) agreed with Mr. MORRIS (Australia) that, in theory, capital punishment should be abolished. It might be useful if such a consensus of opinion was arrived at by the seminar. He did not agree, however, that the opinions which had been expressed on the subject sounded political in character. It was easy to blame politicians for the ills of a country, and to make them scapegoats. In his country, however, politicians with legal backgrounds had contributed substantially to the protection of human rights in the course of framing the laws of the country. He agreed with the participants from Malaya and China that the question could not be divorced from the social and economic conditions of each country; the alternative was recourse to dogmatic judgement. He favoured a progressive approach to the abolition of capital punishment. It was possible that persons in disadvantageous circumstances, such as the poor and the victims of prejudice, were more frequently subjected to the death penalty. In a classic American case, a combination of factors, including rich parents and a clever defence counsel, had helped Loeb and Leopold escape the gallows. In his country, a wealthy offender could hire the best counsel for his defence, and a poor man was at a corresponding disadvantage. He agreed that, considering the present state of affairs in most Asian countries, capital punishment should be the penalty for certain offences such as treason.

Mr. HIGUCHI (Japan) quoted from an enlightened Japanese abolitionist who had contended that adequate spiritual preparation was necessary before an institution such as capital punishment could be abolished. This was especially true in the case of Japan which was backward compared with some other countries in its comprehension of this kind of problem. In this connexion, he considered that television programmes should eliminate scenes of violence and killing; the gradual enlightenment of the public was the most important element in the solution of the problem.

Mr. MORRIS (Australia) explained that his use of the word "politician" had not been contemptuous. By "politician" he had meant a leader who had to make policy decisions in the light of public opinion. The seminar might study various questions relating to capital punishment from the expert point of view. The initial question was, briefly, whether the abolition of capital punishment would cost lives. This was a fair question which faced people of every religion, because no religion proposed that a life must be taken for a life. The question was basic to every other question, and could not be avoided.

Mr. SEN (India) said that a fuller statement containing his Government's view on the matter would be made later. In the meantime, he wished to refer to the statement made by Mr. MORRIS (Australia) regarding the former area of Travancore-Cochin, which now formed part of Kerala, a State of the Republic of India. The matter could be dealt with from a purely pragmatic point of view, without going into metaphysics. Capital punishment had become increasingly rare during the last two centuries, in contrast with the time when it was inflicted for even small felonies. It remained today, however, and in his opinion it would remain so long as people committed dastardly crimes, since it was necessary as a

deterrent. It was difficult to judge the advantages and disadvantages of the retention of this form of punishment merely on the basis of statistical data. In the case of Travancore-Cochin, statistics alone were not enough to adduce an argument in favour of abolishing the death penalty. When incorporated into the Indian Republic, Kerala, as did other States, adopted the Indian criminal law system which was the same all over the country, India having a single system of criminal law and procedure. When the Communist party came into power in Kerala in 1957, the death penalty was, as a matter of policy, remitted. This created a sense of insecurity, since there was a marked increase in crimes of violence other than murder. After bitter political strife, new elections had been held in January 1960, and the party in power now followed the existing Indian criminal law and procedure. It would seem that the leniency shown had tended to encourage an increase in violent crimes. Goa was not a good example because it was a State which did not enjoy civil liberties, free elections, etc. In his opinion, certain dastardly crimes such as murder must be met with capital punishment. Judges should, however, have the possibility of taking into account extenuating circumstances, so that capital punishment was applied as infrequently as possible. Deterrence was a reasonable element in any system of punishment.

Mr. MUNIR (Pakistan) said that if the death penalty were abolished in Pakistan, there would be chaos and the rate of crimes of violence would increase. From 1949 to 1951, after the Indo-Pakistan sub-continent had been divided, new values made an appearance in the intellectual and social life of Pakistan. In Mirwali which was situated near the frontier with Afghanistan, and where crime was prevalent, a new Sessions Judge had decided not to impose the death penalty for murder, being a conscientious objector to capital punishment. The result had been an increase in violent crimes such as murder and dacoity. The judge was finally transferred from the district, and the situation had greatly improved. To take another example, in East Pakistan, although certain crimes required the death penalty, the Courts had not imposed it. As Chief Justice, he had been forced to issue special orders that the penalty required by law should be enforced; the result had been a reduction in the crime rate.

Mr. GYAWALI (Nepal) said that it was not only on religious grounds that Nepal had abolished the death penalty. In fact, some religious texts favoured capital punishment. The main consideration had been a general feeling of abhorrence on the part of the community. Capital punishment could not be applied except in cases involving the security of the State.

Mr. MORRIS (Australia) requested clarification from Mr. SEN (India) of his reference to increased violence in the State of Kerala during the period 1955 to 1959. The four countries enumerated by him were those Asian States which he knew had experimented with the abolition of capital punishment. He agreed with previous speakers that deterrence was indeed a central and vital motivation in the retention of capital punishment. The question was whether capital punishment acted more as a deterrent than other forms of punishment. In the case of Ceylon, there was evidence that the argument of deterrence was not a valid one.

Mr. RASY (Cambodia) said that no one had spoken categorically in favour of abolition except in special cases. Punishment should aim at re-education of the offender. What was for the ordinary citizen the right to education, was for the offender the right to re-education. Capital punishment eliminated the possibility

of re-education. Criminal law had two functions, the first being the re-education of the wrongdoer and the second the prevention of future crime. These were two separate functions. Capital punishment, moreover, should be viewed from two angles: first the legal and psychological aspects; and secondly, its practical application. It was obvious that in its practical aspect, capital punishment was open to severe criticism for a number of different reasons: its immorality, irrevocability and the possibility of judicial error. Most participants would recognize the usefulness of this form of punishment, however, when it came to habitual offenders who regarded life imprisonment merely as a professional risk.

In Cambodia, capital punishment was rarely applied and only in cases of treason and serious offences. In this predominantly Buddhist country, capital punishment was generally repugnant. He cited the case of his father who, as a judge, had passed only one sentence of capital punishment in the forty years of his service. It was a case of matricide where a young man who believed in sorcery had killed his mother because she had disturbed the pot in which he had been cooking a magic potion. The young man was sent to the scaffold, and under Cambodian law, the judge who sentenced him had to be present at the execution. Deeply affected by the occasion, the judge had been eased only by the confession of the murderer, who at the scaffold proclaimed himself a villain and that he deserved his punishment. For Cambodian judges, imposition of the death penalty was something abhorrent and exceptional. From the legal viewpoint, a majority of participants did not favour abolishing capital punishment because of its psychological effect. In this respect the particular situation of a country should be taken fully into account in reaching a decision as to whether capital punishment should be abolished. He wondered if capital punishment could be abolished subject to its being restored later if the need was felt. In any event, it was not legally possible for a Government which reinstated the death penalty to use it to punish offenders who had committed crimes during the period of abolition. He concluded that the best solution was to retain capital punishment and apply it only in the most exceptional cases. For this it would be necessary to have precise rules of procedure, in order to avoid judicial errors.

Mr. HAN (China) observed that most participants accepted the view that capital punishment was not a very effective instrument of deterrence. He agreed with Mr. RASY (Cambodia) that punishment should be aimed at reformation, rehabilitation and re-education.

Mr. SEN (India), in reply to Mr. MORRIS (Australia), said that he had mentioned the period 1955 to 1959 with regard to the State of Kerala only for the purpose of showing that by remitting death sentences, violent crimes had increased, and such a situation could also be brought about by abolishing capital punishment.

Mr. MORRIS (Australia) felt that in the example cited the period when the death penalty had actually been abolished was more important than other periods.

Mr. RAMANATHAN (World Federation of United Nations Associations), speaking at the invitation of the Chairman, said that society had more to lose than gain from an execution. Many countries in the world, including several states of the United States of America, had abolished capital punishment. One factor

influencing this tendency was that the law was not infallible. As regards the application of the death penalty to women, in Japan only one woman had been executed, and in Ceylon no woman had ever been executed. The participants from Iran and India had mentioned that capital punishment served as a deterrent. He wondered whether it actually did discourage crime. There was ample evidence that most murders had been committed in States which had capital punishment. In the early history of most countries a man who had committed a crime was executed and his body exhibited to the public. In spite of this, the crime rate had been higher than now. Belgium, where the rate of murder was very low, had abolished capital punishment around 1850. He agreed with Mr. FERNANDO (Philippines) regarding the unequal application of the law, and that poorer sections of society were more liable to receive capital punishment. In his opinion it was morally wrong for a state to take life. Those who were imbued with the ideals of the United Nations should take the view that the best way of showing respect for human life was not to take it in the name of the Law.

Mrs. AI KUME (International Federation of Women Lawyers), speaking at the invitation of the Chairman, said that the organization which she represented was strongly against capital punishment. After listening carefully to the discussion and also going through the seminar Working Papers, one could not help feeling that the main or the only justifiable reason for retaining capital punishment was that the public deemed it an effective and just punishment. But it was now known that its deterrent value was not as great as once had been imagined, and this was no longer an argument for its retention. It was argued that a majority opinion favoured retention; also that it was not fair to let a killer go unpunished. The basis of this latter argument appeared to be unsatisfied revenge, which was a primitive concept of justice. In modern society the reformative aspects of punishment were more important elements. She was unable to understand why it was too early to abolish capital punishment even though its use had become increasingly rare. It might be true that in some countries the public welfare necessitated its retention; however, it was known that the deterrent effect was small, and retention of the punishment would not contribute to the safeguarding of society. It was necessary to seek other effective ways of safeguarding the security and welfare of society.

Miss OLENDER (International Federation of Women Lawyers), speaking at the invitation of the Chairman, referred to the effect of television and movies on young people, a matter about which Mr. HIGUCHI had spoken earlier. It was important to ensure that these media did not promote juvenile delinquency. The case histories recounted by Mr. ROBSON (New Zealand) showed clearly how delinquent tendencies had been fostered during the formative years of the offenders. She believed that all the crimes cited could have been prevented by early treatment. Finally, she drew attention to an article in the May 1960 issue of Reader's Digest, which discussed the relation between the death penalty and the crime rate in the United States during 1958. The available statistics showed that of the ten states which had the lowest rate of crime, four had no death penalty. Moreover, its retention in some states had not led to a reduction in the crime rate. As a matter of fact, in some of these states the rate was much higher. These statistics, though relating to the United States, were applicable to Asian countries as well; their citizens were not more or less criminally inclined than in the United States.

Mr. RASY (Cambodia) said he had been deeply moved by the general arguments advanced for abolition of the death penalty. But what were the alternative means of protecting society from confirmed criminals? The prospect of prison life and hard labour was considered a normal risk by professional criminals.

Mr. WILD (New Zealand) referred to Mr. MUNIR's statement that under the law in Pakistan, a judge had discretion to impose either the death penalty or life imprisonment, and that the executive branch of the government had power to revoke the sentence. He wished to know whether it was a sound practice to leave the decision of clemency to both the judiciary and the executive agency. It would be interesting to know the facts upon which judges based their discretion; also to know to what extent psychiatric reports were relied upon by judges or whether they simply made their own assessment of the accused as he appeared in the dock.

Mr. MUNIR (Pakistan) replied that in his country there was only one offence for which capital punishment was mandatory, and that was murder committed by a convict. All other offences could be dealt with by alternative punishments such as transportation for life, or imprisonment with hard labour, the choice being left to the judge trying the case. Judicial decisions were subject to review by the High Court, this review being based on the evidence available. The normal rule was that capital punishment was not awarded unless a murder was premeditated, and there had been several instances of the death penalty being withheld even when a murder had been proved to have been premeditated. Provincial or central governments could also exercise powers of clemency which were not based on judicial considerations. These powers ranged from full pardon, to reprieve or commutation of the sentence. Reports of psychiatrists were not admissible in courts of law in Pakistan. However, medical evidence was admitted as a matter of course.

Mr. REA (Hong Kong) said that more information, including a report from the trial judge, was available to the executive than to the court in deciding whether a person sentenced to death should be reprieved. In his opinion this decision was better left to the executive. It would be of interest to know whether a body of case law had developed in Pakistan relating to cases where the trial judge had not, in his discretion, imposed capital punishment.

Mr. MUNIR (Pakistan) replied that a considerable volume of case law had developed in his country resulting from decisions where the courts had exercised their discretion. The rules enunciated in these cases were not rules of law but reflected judicial discretion which could be reviewed by the Supreme Court. The Supreme Court corrected the High Court wherever necessary.

Mr. HAN (China) felt that capital punishment was not based on retribution or retaliation. It was justifiable on practical grounds such as the elimination of dangerous persons. It was necessary for social defence and the protection of society. He felt that discretionary powers should normally be vested with the judge rather than with the executive branch of the government.

Mr. YEGANEH (Iran) said that in Iran judges not only correlated punishment with the gravity of the crime, but also took into account the state of mind of the offender. Judges had the power to diminish a sentence when there were extenuating circumstances such as provocation, ignorance etc., and they could reduce capital punishment to life imprisonment or imprisonment for not less than fifteen years. The Shah had the ultimate power of reprieve.

Mr. MUNIR (Pakistan) said the question of the discretion of judges was of great interest. Under Pakistan law, a trial court had the discretion to award capital punishment or transportation for life. The accused, the Government, or even a private party could appeal to the high court to correct wrongful exercise of discretion by the trial court.

Mr. HIGUCHI (Japan) said that if capital punishment had to be retained, alternative penalties should be provided and discretion given to trial judges in regard to the sentence imposed. A wide range of discretionary powers had been given to judges in Japan, and they could considerably diminish the sentence if there were extenuating circumstances. In practice, the maximum penalty was rarely imposed; normally, the punishment came nearer the minimum sentence provided by law.

Mr. WILD (New Zealand) asked for information whether, according to law or prevailing practice, a review by the executive necessarily followed a death sentence in countries in the seminar region. In Pakistan it appeared that a review followed only if a petition was filed. He personally thought that it might be more desirable if the state, i.e. the Minister of Justice or the cabinet, were given the responsibility for review; those who made the laws should also have a share in administering them.

Mr. MUNIR (Pakistan) pointed out that the explanation he had given related to the procedure when a petition was filed. When a death sentence was passed there was an automatic review by the Home Secretary of the provincial Government. The recommendations made by the Home Secretary were forwarded to the central Government and were examined again by its Law Department. In almost every case, where there were sufficient grounds to take a different decision, this happened.

Mr. DHARMASAKTI (Thailand) explained that in his country, the death penalty was reserved for certain specific offences, and that a wide range of alternative punishments was provided, giving full discretion to judges. He said that the general trend in Thailand was not to inflict capital punishment, and he attributed this tendency to the influence of Buddhism. There was also provision for review by the executive of the sentence of capital punishment and the convict could always petition for the royal prerogative of mercy. This petition had to be made to the Ministry of Interior. Even if no specific petition was made, the Minister of Interior was under an obligation to review every capital case before the sentence was carried out.

Mr. ROBSON (New Zealand) wished to have clarification about the phrase "transportation for life". He wished to know specifically where the convict was transported, how rigorous the system was, and the extent to which it was a deterrent.

Mr. MUNIR (Pakistan) explained that the term "transportation for life" had come into existence in 1860 when the Indian Penal Code was drafted. Convicts who were sentenced for transportation for life were sent to the Andaman islands and not to any other prison. He said that the Andamans were no longer with Pakistan, but that the phrase had persisted in their penal code. In effect, it had since come to mean a sentence of imprisonment for fourteen years.

Mr. NAGASHIMA (Japan) gave an account of the review procedure in Japan. Under Article 475 of the Criminal Procedure Code, the death penalty was executed under an order from the Minister of Justice. It was obligatory for the public prosecutor to forward a transcript of the case to the Criminal Affairs Bureau, which consisted of twenty lawyers, some of whom were former judges. The Bureau made a thorough study of the case and gave its advice to the Minister of Justice regarding its disposal. He said that in his experience as a member of the Criminal Affairs Bureau, he had come across certain criminals who deserved only capital punishment.

Mr. MORRIS (Australia) referred to the point raised by Mr. RASY (Cambodia) as to what alternative punishments there were to the death penalty. One alternative would be to hold the criminal in custody until he no longer presented any threat to the community. If such a time never arrived, the offender might have to be held in custody indefinitely. He emphasized that this alternative could be achieved only if effective diagnostic services were developed. This was also a field where social workers could be of immense help. Another indication as to when the time was ripe for the release of a prisoner would be whether such release would cause public anxiety. He felt that it was not beyond the skill and ingenuity of any country to devise sufficiently effective alternatives to capital punishment. The point raised by Mr. HAN (China), that although it was agreed that capital punishment was not completely effective in checking crime, most countries were nevertheless slow in abolishing it, presented something of a paradox. However, the trend towards providing alternative punishments and restricting the use of the death penalty to a decreasing number of crimes, could be viewed as a hopeful indication that governments were gradually working towards its total abolition. He cited the cases of Nepal which had abolished capital punishment, of Ceylon which had experimented with its abolition and of Cambodia where its use was so rare that it could be considered virtually non-existent. Although the data available on the experience of these countries was insufficient for a compelling case for abolition, he felt that participants should seriously contemplate the possibility of doing away with this kind of punishment which, he personally felt, achieved nothing. The argument for abolition should be considered as something more than mere sentimentalism; it was a path which they were all treading.

Mr. PIKE (Sarawak) said that in Sarawak, and in all British colonial dependent territories, a review of a capital sentence was required irrespective of whether the offender had appealed. This provision was usually contained in the Royal Instructions issued to colonial governors, and the review had to be undertaken by the highest authority in the territory, namely, the Governor in Council. The entire record of the case, a report from the trial judge and a special report from the administrative officer of the district of the offender's domicile were made available to the Governor in Council to assist him in arriving at a decision.

Mr. FERNANDO (Philippines)stated that in the Philippines, a review of all death sentences was made automatically by the Supreme Court. Up to 1948, a unanimous vote had been necessary for the sentence to be upheld by the Supreme Court, but this provision was later amended and now only eight out of eleven judges had to agree for the sentence to be upheld. After the war, because of the high incidence of crimes of violence, kidnapping had been added to those categories of crimes punishable by the death penalty. The President had the power of full pardon. Automatic review did not always mean a reversal of the death penalty.

Mr. HAKIM (Indonesia) said that in Indonesia every death sentence must be referred to the President before it was carried out, and the Supreme Court and the Minister of Justice gave advice to the President in reviewing the case. He felt, however, that since a case was considered and settled before it was referred to the President, the use of the term "review" was perhaps not quite appropriate. The presidential pardon had very often been based on political or humane grounds.

Mr. SUFFIAN (Federation of Malaya) stated that in Malaya death sentences were automatically brought up for review by the Government. The State government and not the federal government, was involved, as reprieve was a state responsibility. The review was made by the Sultan of the state concerned who was assisted in this task by a Pardons Board, which usually consisted of five members, among whom were the Chief Minister of the state and the Attorney General of the Federation. A member of the State Legislative Assembly or the Federal Parliament could not be appointed to the Board, as it was thought advisable not to have politicians as members. After the review, the Sultan issued orders to the trial judge who then, if the Sultan's order so required, signed the death warrant. The Federal government had power to reprieve only in respect of convictions by court martial, defence being a federal responsibility. The Pardons Board took into consideration all kinds of factors before tendering advice to the Sultan.

Referring to the question of whether discretion as regards commutation should be given to the judiciary or to the Executive, he said that in his opinion, it should be vested in the Executive. A review was not always purely legal in character, and the Executive could take social, economic and political questions into account. By review he did not mean a judicial review of the evidence, but consideration by the Executive of all the relevant factors before a death sentence was allowed to take its course. Psychiatric reports were not available to Malayan authorities, though medical reports were always used.

Mr. MUNIR (Pakistan) said that Mr. HAKIM (Indonesia) was technically correct in stating that in exercising his prerogative, the president of a state was not strictly "reviewing" the case. But a study of the case was nevertheless involved.

Mr. ROBSON (New Zealand) referring to the point made by Mr. MORRIS (Australia) regarding holding a prisoner in custody until such time as he was thought to have been cured of any dangerous criminal tendencies, said that it was necessary to gather as much data on this point as possible. He gave some figures for New Zealand regarding behaviour after release from prison. During the period 1939-1958, only two out of twenty-four convicts had committed offences after their release from jail. Two potentially dangerous convicts had escaped from jail, one in 1956 and the other in 1959. He also quoted from the Gowers Report to show that in England, during the period 1934-1948, of 156 men and women who had been turned over to after-care associations subsequent to their release from jails, only sixteen had been reported to have committed crimes again.

Mr. SOROURI (Iran) said that there was no automatic review of death sentences in Iran, but the Code of Criminal Procedure provided for appeals by the convicted offender or by the public prosecutor, and in fact, almost every death sentence was reviewed. In addition, numerous other factors, including

extenuating circumstances, were taken into account. The judge had discretion as regards the application of the sentence, and there was the possibility of pardon. Finally the law itself imposed certain limits upon the execution of the sentence. For example, persons under eighteen years or over sixty years, and women, were never executed. There were also provisions for extraordinary review, in order to guard against judicial errors.

Mrs. TANABE (Japan) said that according to English practice, when a death sentence had become irrevocable, the fact and the date of execution were made known to the public. She wondered whether this procedure increased the deterrent effect of capital punishment, and also whether the period between the sentence and the execution should not be extended in England.

Mr. MUNIR (Pakistan) said that, as he had pointed out in his opening statement, the discussion should not relate only to the moral, religious, humanitarian and other such aspects of the question but should also take into account the relevant provisions of the Universal Declaration of Human Rights. These provisions could be regarded as an expression of the collective conscience of the members of the United Nations and could serve as a common code of basic values. Reverting to the statement by Mr. SEN (India) concerning the Union of South Africa, he agreed that the spirit underlying the statement was not a desire to accuse South Africa, which was not represented at the seminar, but to give a clear-cut example of a country where criminal law was used for the infringement of human rights. The central issue presumably under discussion should be related to Articles 3 and 5 of the Universal Declaration of Human Rights. Article 3 dealt with the right to life, liberty and security of person and Article 5 prohibited torture and cruel, inhuman and degrading treatment or punishment. He wondered whether the traditional concept of "an eye for an eye", "a tooth for a tooth" and "a life for a life" was really contrary to Article 5 of the Universal Declaration. He also wondered whether sparing a murderer seemed to protect the lives of others. The question raised by Mr. MORRIS (Australia) should be posed in a different way: would the abolition of capital punishment have a tendency to make the lives of others unsafe and would it lead to an increase of crime. Each government should consider this question in the light of its own circumstances. Another question was whether the abolition of capital punishment lent itself to mere experimentation.

Mr. MOON (Republic of Korea) said that he was pleased to note the genuine efforts to abolish capital punishment in some countries represented at the seminar. He himself was in favour of abolition. He thought that the most important reason was that capital punishment was irrevocable. An innocent person might be executed and this was an error which should be avoided from the standpoint both of human rights and of the general welfare of society. In the Korean Criminal Code an alternative of life imprisonment was provided. The death penalty was rarely given and then only for the most heinous crimes. In most cases other forms of punishment could be meted out, at the discretion of the court. All death sentences imposed by first trial courts went automatically to a Court of Appeal. Likewise a sentence of death confirmed by the Court of Appeal was reviewed again by the Supreme Court before the sentence could be carried out. Even then the accused could request the court which had rendered the original judgement to review his sentence. Article 420 in the Korean Criminal Code provided that a judge must consider a request for review at any time.

If a request was dismissed, a request for review could be made on other considerations. This was a lengthy process, and it was sometimes as long as nine years before a final conviction was made by the Supreme Court. Execution was ordered by the Minister of Justice upon recommendation of the Attorney-General. However, the Attorney-General must first study the case, including any petitions submitted by the defence.

Mr. MORRIS (Australia) suggested that Mr. MUNIR (Pakistan) had changed the emphasis as regards the burden of proof, which was, perhaps, the essence of the problem. He agreed that the abolition of capital punishment should be decided by each country according to its special circumstances. He did not, however, agree with Mr. MUNIR that the experience of one country could not be applied to another. While people might differ in their motivations and ways of life, owing to their different social backgrounds, folkways, inherited traditions and customs, their fundamental reactions were essentially similar. From that point of view, the experience of one country could be helpful to another country, as long as it was recognized that the keystone was adaptation to local conditions and not wholesale application. It was of interest and relevance to use the experience of other countries in this connexion. He was in favour of gradual judicial, legislative and executive action leading towards the progressive abolition of capital punishment. Such an approach met the demands of the principle of deterrence as well as those of the more modern correctional attitude towards offenders. This approach could be implemented with political sagacity without in any way disturbing social stability.

Mr. FERNANDO (Philippines) said participants seemed in general agreement concerning a gradual movement towards abolition. While there were certain basic similarities among the different cultures of the world, the differences were also very important. In the case of the Philippines, for example, many murders were committed during the period prior to elections as misguided persons succumbed to the temptation to deal violently with their political opponents. In such a situation capital punishment was a necessary deterrent and could save many lives. The results of experiments carried out in one country were not valid in respect to another country except under certain special circumstances.

Mr. HAN (China) said that if a function of capital punishment was the preservation of social values, it could not be regarded as cruel or detrimental to human rights, since it worked for the protection of lives. There could be no complete agreement as to whether the abolition or the retention of capital punishment would save lives. This depended not so much on the physical or economic conditions of a particular country, but psychological factors. If public opinion supported abolition, then legislators and intellectual leaders could easily bring it about.

Mr. ROBSON (New Zealand) agreed that the psychological factor was most important. He admired the analysis which Mr. MUNIR (Pakistan) had made but felt that as a code of human behaviour the Universal Declaration of Human Rights demanded a liberal interpretation. Many answers had been given to the question raised by Mr. MORRIS (Australia) as to whether capital punishment saved lives. Whatever answer was given would not dispose of the problem. In seeking its solution it was necessary to ask to what extent should society express its abhorrence of murder. As to the question posed by Mr. MUNIR (Pakistan), namely whether the abolition of capital punishment would have a tendency to make the lives of others unsafe, he felt that the word "tendency" was vague and should be avoided.

Mr. HAN (China) raised another question relating to the ways and means of limiting capital punishment for juveniles under a certain age and for women offenders. According to Chinese law women stood on an equal footing with men, and he could see no reason for any difference as regards applicability of the death penalty. Criminal responsibility should be equally shared by men and women. However, very few women were executed in China.

Mr. MORRIS (Australia) could not understand why women should not be executed in the same way as men for the same offence except in cases of pregnancy. He did not think that women were less wicked than men - quite the contrary.

The CHAIRMAN stated that as a personal observation he would like to comment on an important fact in Japan's legal history. He believed that Japan had been the first country in the world to abolish capital punishment; this was for a period of 346 years, from 810 to 1156 A.D. Ancient Japanese criminal law had developed under the influence of Chinese law, there being four types of legislation: (1) Ritsu - Penal Code; (2) Ryo - Code containing civil and administrative rules of law; (3) Kaku - Imperial Ordinances; and (4) Shiki - Administrative regulations.

The Penal Code was formulated in 668 A.D. and revised in 682, 701 and 718 A.D. It provided the death penalty for numerous crimes but there was a remarkable tendency during that period gradually to mitigate this punishment. From 810 A.D. on, capital punishment was practically abolished until 1156 A.D. when it was reintroduced. During the period of abolition, the provision regarding the death penalty in the Penal Code was not formally repealed. But by Kaku, the Imperial Ordinance, its suspension was prescribed in some cases. In other cases, the death penalty was simply not applied by the judges. Even when a death sentence was given, the accused was not executed. That epoch was known as the Epoch of Peace and Security (Heian-cho). This situation could be explained by the historical and social conditions of the time; the prevailing religious philosophy was Buddhism, which gave the necessary psychological motivation.

Miss CLENDER (International Federation of Women Lawyers), speaking at the invitation of the Chairman, agreed with Mr. MORRIS (Australia) that if women were to enjoy equal suffrage and the same working conditions as men, then the death penalty should be equally applicable to them. In the United States women constituted 12 per cent of all arrested criminals, although women outnumbered men by about one million in the total population. In murder cases women constituted 18 per cent of all apprehended murderers. In the history of California three women had been executed.

Mr. KRAIVIXIEN (Thailand) agreed that women should not be treated differently from men except when pregnant. The law should not make any differentiation, and the humanitarian aspect should be left to the judges. During the last twenty-eight years in Thailand, only one women had been executed out of 107 persons. Capital punishment should not be inflicted on delinquents under the age of 18 or 20.

Mrs. TANABE (Japan) said that, as she had previously stated, she was against capital punishment for both men and women.

Mr. NAGASHIMA (Japan) explained the circumstances leading to the only death sentence which had been imposed on a woman in Japan. The woman had robbed and murdered a housewife and set fire to the house in which the husband of the victim was ill in bed. The accused had become insane in prison after conviction and so far she had not been executed. No distinction should be made between men and women in the application of capital punishment.

In Japan at the present time about twenty persons were sentenced to death every year and there were no signs of any decrease in the number. Atrocious crimes such as murder for purpose of robbery and rape were frequent and it was difficult to conclude whether the general feeling of the public was leaning towards abolition of the death penalty. Abolition could not, therefore, be effected immediately, although he agreed with the principle of gradual abolition The Preparatory Committee drafting the Revised Penal Code of Japan had provided in Article 47 that punishment should be fair and should not exceed what was required for social order, and that great caution should be used in the application of the death penalty.

Mr. SUFFIAN (Federation of Malaya) said that in theory he agreed with Mr. HAN (China) that capital punishment should be applied equally to men and women. In the experience of Malaya, however, this problem could not be regarded in the abstract. Public opinion had to be taken into account. While a death sentence could be passed on a woman, the Executive, in Malaya, was most reluctant to confirm such sentences. To his knowledge not one woman had been executed even under the temporary emergency laws. It was also the policy of the Attorney-General never to prefer a capital charge against women, save in the most exceptional cases. Further, the law of his country did not allow the death sentence to be passed on a pregnant woman or on young offenders. In his recollection not a single person under twenty years had ever been executed in his country. This might be due to the fact that Malaya was predominantly an agricultural country and juvenile delinquency seemed to be found mainly in urban societies.

Mr. HAN (China) expressed his satisfaction that participants seemed generally agreed that capital punishment was equally applicable to women and men. He appreciated the Chairman's statement regarding the ancient law of Japan. China and Japan had the same cultural origins. Although Japanese law had been influenced in ancient times by Chinese law, Japan had proceeded further with the modernization of its law than China had.

Mr. MORRIS (Australia) said that the general agreement of participants concerning the applicability of capital punishment without distinction as between men and women carried an important lesson for those who argued in favour of retaining capital punishment as a deterrent in one country while admitting its failure in this respect in another - they were forced to draw a distinction between men and women in their own countries, because no country applied this sanction freely to women. This practice of retaining a penalty on the statute book but rarely applying it could,in general, be applied to the problem of the abolition of capital punishment. He admired the present approach in Japan, where there was a gradual narrowing of the application of the death penalty.

Mr. FERNANDO (Philippines), in replying to Mr. MORRIS (Australia), said that practical experience in any given country was an important consideration. This had been recognized by such an eminent jurist as Mr. Justice Holmes as early as 1880 when he said, in essence, that law should not rest purely on logic, but should also be based on experience. Pure reason could not prevail in this connexion; it was existing morality and social and economic conditions that shaped the course of law. The Philippines, as did some other countries, gave special consideration to women, although it was agreed that in principle the liability of women was not different from that of men. Philippine feminists would not go so far as to demand special treatment in regard to criminal liability. Every attempt should be made to prevent the execution of young persons.

Mr. MUNIR (Pakistan) asked Mr. SUFFIAN (Federation of Malaya), what action the Executive would take in the case of a woman who had deliberately robbed and murdered a seven or eight year old girl. Would her sex entitle her to clemency?

Mr. SUFFIAN (Federation of Malaya) explained that in his country such a case would proceed through two stages. First the Attorney-General would have to be informed of the case, and decide whether the woman should be charged with murder. On the facts as stated he would probably authorize a capital charge. Second, if the death sentence was pronounced it would have to be confirmed by the Government. Under the circumstances it was difficult to anticipate what the ultimate fate of the woman would be, but there was throughout Malaya a general tendency towards clemency as far as women were concerned. In Malaya, unlike some countries, women were still regarded as the weaker sex.

Mr. MORRIS (Australia) felt that in such a case the motivations and the psychiatric condition of the offender had to be known before an answer could be given. He urged the wisdom of narrowing capital punishment for men and women in respect of the mentally ill; this would be a move towards progressive abolition of capital punishment.

Mr. WILD (New Zealand) cited two instances involving the question of the death penalty for women. The first related to a middle-aged woman charged with a double murder with violence. She had been sentenced to death after all evidence, including the psychiatrist's report, had been taken into account, it being proved that she was neither legally nor medically insane, although she had a history of illegitimacy and unstable personality. About the same time another case had occurred in one of the islands of the South Pacific administered by New Zealand. It involved three young natives who had attacked a man and his wife and had hacked the man to death and seriously injured the woman. Their defence was that the action had been provoked by ill treatment. The judge and six assessors belonging to the local community had sentenced the three young men to death. Both of these cases had come up for review by the Executive. The sentence on the woman was commuted to life imprisonment, but not the sentence on the three young men. This caused a public protest. The men appealed but lost in the Court of Appeal. The Privy Council, however, had reprieved them. He agreed, as a matter of logic, that if women were to enjoy the same rights as men, they should be treated equally under the law.

Mr. RAMANATHAN (World Federation of United Nations Associations), speaking at the invitation of the Chairman, did not agree that a woman should be executed,

his argument being based on the spirit of Article 25 (2) of the Universal Declaration of Human Rights. It was necessary to have some important medical facts and opinion concerning women in order truly to apply full equality of rights and treatment to both sexes. From a purely legal point of view, a woman should be liable to be executed just as a man was, but justice was uneven. For example, in Texas, a woman who had killed several men had not been executed, in keeping with an established tradition of not executing women. As regards the question whether the abolition of capital punishment would increase crime, he felt that there would be no consequential increase in the murder rate. The states which had abolished capital punishment in the United States of America and Australia showed no differences in this respect from states which had not. One important question concerning capital punishment which had not been brought out was the fact that invariably in a trial where life was at stake, a great deal of sensationalism was involved which often affected the administration of justice.

Mr. RASY (Cambodia) said that the abolition of capital punishment required the adoption of a law to this effect and other laws would have to be modified accordingly. By taking such action, the public would be faced with a danger from professional criminals, since the deterrent effect of capital punishment would be removed. The best solution would be to apply capital punishment rarely and to limit it to certain types of crime. But this restriction of capital punishment must itself be limited; the professional criminal must not have the assurance that he would never be punished by the only sanction he feared, namely, the death penalty.

Mr. MORICE (International Commission of Jurists), speaking at the invitation of the Chairman, said he had noted that the general feeling of participants tended to favour the progressive abolition of the death penalty. The courts usually had power to impose a lesser penalty after taking extenuating circumstances into consideration. He felt, however, that the most appropriate method of reducing and abolishing capital punishment was to educate public opinion in each country against it. Legislators would then be compelled to follow public opinion.

Mr. RASY (Cambodia) said that capital punishment had been an effective deterrent in the past, although in modern times its effectiveness as a deterrent had not been proved. The question was whether it should be permitted to continue. A society which used this form of punishment without restraint would appear to be a barbarous society; however, it was not barbarous to retain capital punishment as long as it was used infrequently. It was necessary to bear in mind the distinction between the legal existence of capital punishment and the frequency of its application. As for hardened criminals, he wished to know what alternative to capital punishment would be an effective deterrent. Criminals who were not sensitive to the death penalty would not be sensitive to lesser penalties. As long as societies were made up of human beings, with their passions and weaknesses, he thought it was necessary to have a penalty that inspired fear in all potential criminals.

Mr. MUNIR (Pakistan) giving the categories of crimes for which he considered the death penalty was appropriate, suggested that they should include treason, conviction of a second murder, murder by a life convict, murder in the course of theft or robbery, murder with rape, murder in preventing lawful arrest, and murder committed in an unusually cruel manner, with the sole proviso that the death penalty should not be inflicted upon any offender under eighteen years of age.

Mr. HAN (China), speaking on the question of whether capital punishment should be limited to serious crimes such as murder or treason, said this proposition appeared untenable since it was based on the theory of retribution or retaliation. The only justification for capital punishment was that it was the most effective weapon for social defence. That being the case, was it valid to distinguish between categories of crimes for which capital punishment was considered appropriate? It was not the nature or the seriousness of the crime, but the dangerous character of the offender, which was the criterion. The distinction between serious and minor crimes depended on the particular circumstances in each country. For instance, arson was punishable with capital punishment in Japan, but not in China; traffic in narcotics was punishable with the death penalty in China, but not in many other countries. It was illogical to restrict this punishment to murder alone.

Mr. REA (Hong Kong) agreed with Mr. HAN (China) that the law and practice in regard to capital punishment was full of illogicalities, and that it did not make sense to limit it to murder and treason. Referring to the statement made by Mr. ROBSON (New Zealand) that the death penalty was inflicted for murder for the reason that society considered this crime the most abhorrent of all, he wondered whether other crimes, such as traffic in narcotics, which had been referred to by Mr. HAN, and the consequences of which were as serious as those of murder, were less abhorrent to society.

Mr. KRAIVIXIEN (Thailand) said that in Thailand, offences such as treason, murder, malfeasance in office, and even robbery were punishable with the death sentence. However, he himself thought that only murder and treason should be subject by law to the death penalty.

Mr. MORRIS (Australia) referred to the categories of capital crimes suggested by Mr. MUNIR (Pakistan) and said that if it were assumed that capital puiishment had to be retained, he agreed regarding some of the crimes for which it was appropriate. In considering treason as a crime, one was perhaps moving out of the province of traditional criminal law. There could be no doubt that the state had a right to execute people whom it considered to be dangerous to its stability or continued existence. Many people in committing treason, were acting according to deeply espoused political convictions. He agreed that the state had a right to eliminate them, but for political and not for criminal reasons. The retention of capital punishment for political purposes would not, he suggested, be contradictory to its abolition as a form of punishment under criminal law.

The validity of some of the other categories mentioned by Mr. MUNIR depended on the diverse social conditions which existed in various countries; it would be difficult to discuss them in general terms. For instance, the categories mentioned had no relevance at all in the State of Queensland, Australia, which had abolished capital punishment, but they might be very real problems for some other countries which had reached lower stages of social development. It would be difficult to distinguish a murder committed in an "unusually cruel manner" from other types of murder. Such terms were not precise and were difficult to define. The categories put forward by Mr. MUNIR would prove valuable in helping society to proceed gradually and cautiously towards narrowing the application of the death penalty. He inquired whether the law in India or Pakistan required previous intent to kill as a necessary ingredient in some of the categories mentioned by Mr. MUNIR.

Mr. MUNIR (Pakistan) replied that if a murder were proved to have been committed in furtherance of theft or rape, the law in Pakistan did not require further proof of previous intent as a prerequisite for inflicting capital punishment. If a murder were committed in the act of perpetrating a major crime, it was punished with death. He agreed with MR. MORRIS (Australia) that it was difficult to specify what would constitute an "unusually cruel manner" in committing a murder, but the circumstances of a case would make it clear.

Mr. NAGASHIMA (Japan) said that he agreed with Mr. MUNIR (Pakistan) that it was appropriate to award the death penalty for murder and treason. In Japan, there were offences which, if aggravated by their consequences, were punished with the death penalty. However, the new Penal Code which was being drafted would remove this category of aggravated crime from among those punishable by a capital sentence. Proof of intent to kill would be necessary.

Mr. MUNIR (Pakistan) explained that the definition of murder differed in different legal systems. For instance, under the English system of law, malice was considered to be an essential ingredient of a murder; also proof of premeditation of the act. In Pakistan, it was not necessary in all cases to prove intention to kill. It might sometimes be possible to infer from the facts of the case whether the offender had a premeditated intent to kill, or whether that intent came on the spur of the moment. But whether premeditated or conceived on the spur of the moment, there would always be intention to kill.

Mr. NGUYEN LUONG (Republic of Viet-Nam) said that premeditation and intent were required to be proved under Viet-Namese law before capital punishment was awarded. He explained the legal procedure in Viet-Nam, where there was a plurality of jurisdiction. A case was considered in the first instance by a single judge with the help of assessors, and then went before a court consisting of three judges, who were also helped by assessors. Capital sentences were referred to a high court which pronounced only on the law, and not on the facts, of the case. These were sufficient safeguards against a miscarriage of justice. There was also a commission designated by the Minister of Justice which made recommendations to the President concerning appeals for clemency. Capital punishment was not imposed in cases where there was the slightest doubt. He felt that some crimes were so loathsome that society was justified in considering it necessary to retain capital punishment as the only effective deterrent.

Mr. MUNIR (Pakistan), in introducing Item III (b), said that penal sanctions ranged from simple admonition to the execution of a bond for good behaviour, detention, fine, whipping, imprisonment, etc., through to the extreme of capital punishment. Imprisonment was of three types: simple imprisonment, imprisonment with hard labour, and solitary confinement. He would confine his introductory remarks to three forms of punishment. One of them was whipping, which had given rise to deep differences of opinion. He personally considered that there were certain offences for which whipping was more appropriate than the alternative punishment of detention in a reformatory. Assault on women by hooligans was the kind of crime for which whipping appeared appropriate as an expression of public resentment. The minimum period of detention in a reformatory was three years in his country, and this offence did not warrant committing the offender to the company of other criminals for such a long period. The second form of punishment he wished to discuss was solitary confinement, which should be abolished because

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it did not achieve its purpose of reforming the offender. On the contrary, it simply led to personality complications. Solitary confinement was only punitive and retributive. In conclusion, castration, to which a reference had been made in some background papers, was a form of punishment which he considered barbarous; it should have no place in the penal sanctions of any country.

Mr. DHARMASAKTI (Thailand) emphasized that neither whipping nor castration were among the punishments provided under the Thai legal system. Only five forms of legal punishment were recognized in Thailand, namely death, imprisonment, confinement, fine and forfeiture of property. There were other punishments, but they were more in the nature of corrective measures; they included training, protective detention, probation, etc. Castration had been referred to in the paper prepared by Thailand because medical scientists in Thailand had recently suggested that it could be an effective treatment for sex offenders. He was aware of objections to this view on the grounds that castration did not always succeed in curing the perverse tendencies of the sexual delinquent, and that it affected the entire personality of the offender. Moreover, by impairing permanently the power of procreation, it infringed a basic human right. He invited attention to the research already being carried out in the United States of America on this subject and referred to papers which had been submitted to a conference on violent crime, organized by the University of Colorado in 1949. Some of these papers had pointed out that far from having deleterious after-effects, castration led to a reduction of aggressive sexual urge and stabilized the personality. It did not lead to sexual incapacitation but, on the other hand, tended to produce a normal personality. If these findings were true, it would seem that castration could be considered as legitimate in the case of sexual crimes.

Miss OLENDER (International Federation of Women Lawyers), speaking at the invitation of the Chairman, suggested, in reply to the question raised earlier by the participant from Cambodia as to what were the alternatives to capital punishment, that castration was one answer. Because of public ignorance and medical and judicial apathy, the step might appear extreme. However, from available documents and medical and legal experience of repeated sex offenders, castration appeared to emerge as a solution. The aggressive urges of sex criminals were reduced thereby; they became stabilized, and when paroled became acceptable members of society. She referred to the report of a conference on crime sponsored by the University of Colorado (15-18 August 1949), the work of Dr. C.C. Hawke, Medical Director, State Training School, Winfield, Kansas, was also of great relevance. In a number of cases, castration had been particularly effective in curbing the violent anti-social tendencies of the offender. It had been found in experiments conducted by Dr. Hawke that after castration, repeated injections of male hormones over some weeks caused a reversion to anti-social tendencies, violence and sex aggression. The experience had proved that castrates could concentrate better and could become more reliable citizens. Many were not incapacitated completely from having marital relations. Dr. Paul Dudley White, an American cardiac specialist, had observed that castrates lived longer and were less susceptible to cardiac diseases. In San Diego County, California, a number of persons convicted of sex offences had voluntarily submitted to the operation, and it had been found that their aggressive urges were eliminated. Of 130 castrates paroled there were no sex recidivists. This approach to the problem created by sexual psychopaths was preferable to keeping them in jail at public expense. She thought that the matter deserved close study and research.

Mr. MORRIS (Australia) observed that the statement of the previous speaker did not represent the majority opinion in the United States, where eighteen states had legislated unsuccessfully on sexual psychopathology. Castration of sex offenders was not a new idea. As a technique of treating sexual offenders, it had been advanced furthest in Denmark, where Dr. Stürup and his associates had done excellent work in this field. The drawback in applying the technique was that it was based on wrong assumptions. It was assumed that a minor sexual offender would proceed to a graver sex offence, and it was also assumed that there was a high rate of recidivism. There was a terrible danger here of the improper application of the criminal law to this type of problem. What was being done in Denmark by Dr. Stürup was that offenders, usually with previous records of sexual crime, who were sexual psychopaths were treated when a court certified that they were unlikely to respond to traditional treatment. If these offenders volunteered to submit to this form of treatment as an alternative to protracted imprisonment, the operation was performed. It had been observed that those who had been operated upon did not require further detention and could be sent back within a matter of months to their homes or jobs. Excellent after-care was also given. Experience suggested that most of the persons so treated had not repeated the offences. This form of medical treatment could be undertaken in countries of the seminar area only if they had sufficiently trained personnel, and would expend on these social and correctional services very much more money than was being spent at present. At least one psychiatrist for every fifty prisoners and two social workers for about seventy to eighty prisoners would be required. He wished to argue strongly that castration should never be forced upon a criminal under the compulsory powers of criminal law. However, he agreed with the participant from Thailand that more knowledge and study of the subject were required.

Mr. RASY (Cambodia) said that it had been suggested that this form of treatment would help certain classes of offenders to become model citizens. However, castration might lead to permanent incapacitation. There was also the question as to whether all professional criminals should be treated in this manner, since only a limited number of them were sex psychopaths. Castration fell into the same class of punishment as mutilation, advocated in olden days, and it revolted the spirit of humanity. Castration might make the person so treated irascible and lead him to take revenge on society.

Mr. SUZUKI (Japan) said he could not agree that castration was a useful punishment. Medical science had not yet become completely reliable in this field. An erroneous decision by a judge or jury, who were laymen, might permanently deprive castrates of their regenerative functions. It would also lead to a complete change in the criminal trial procedures now adopted.

Mr. FERNANDO (Philippines) said that there were dissenting legal opinions on the subject of castration. Justice William Douglas had observed that procreation was a basic human right and it was cruel to remove it. It could be justified only in cases of imbecility running through three generations. Otherwise, in the hands of an obsessed and intolerant majority, this form of punishment might carry grave dangers for civil liberties. The other point of view had found expression in Buck vs. Bell, namely that sterilization did not entail violation of due judicial process. The findings of the Kinsey group suggested that legislation on the subject did not reflect the current social attitudes on morality.

Miss OLENDER (International Federation of Women Lawyers), speaking at the invitation of the Chairman, explained that she had been referring to vasectomy and not castration that might include mutilation.

Mr. MORRIS (Australia) said that sterilization was a eugenic term which referred only to prevention of fertility; it did not involve interference with sexual relationships. Castration was a quite different matter.

Mr. FERNANDO (Philippines) said the effect in both cases was the same; the basic right of procreation was lost.

Mr. RASY (Cambodia) said that in his opinion castration would be an infringement of the "right of personality".

Miss OLENDER (International Federation of Women Lawyers), speaking at the invitation of the Chairman, said that any attack by a sex offender on women or children was also an infringement of their "right of personality". The question was whether the "right of personality" of women and children was more important than that of sex offenders.

Mr. HAN (China) said that propriety of castration as a punishment raised an important issue in criminal law. It was one thing if a person, of his own free will, and for the purpose of controlling his urges, subjected himself to this treatment. Otherwise, castration was inhuman; it meant mutilation and deprived the subject of the right to procreate.

Mr. RASY (Cambodia) said that everyone would agree that an attack on women and children infringed on their "right of personality". What was being discussed here, however, was whether the state could impose this form of treatment as a penalty, whether it was justified in doing so, and if so, whether it did not affect the "right of personality" of the subject.

Mr. SUFFIAN (Federation of Malaya) wished to know whether the Muslim States represented at the seminar carried out the injunctions of Muslim law in full. In his own country Islam was the official religion of the State and some people had suggested a return to the classical days of Islam and that all Muslim laws should be followed. Under Islam law, for instance, a convicted thief would have his hand cut off. He wished to know when there was a conflict between the law of Islam and the present laws, how the conflict, if any, was resolved in the Muslim States, particularly in Pakistan and Iran.

Mr. MUNIR (Pakistan) said that this difficulty was overcome in Pakistan by not permitting anyone to question any provision of the Constitution on the grounds that it was contrary to Islamic law. A commission had been appointed to examine existing laws in the light of the Koran and Sunna, but the commission was also precluded from questioning the Constitution.

Mr. SOROURI (Iran) said that the penal code in his country was independent of Islamic law. The code was humane and modern. Until recently offenders under 18 years of age had been tried by ordinary courts and were subject to imprisonment of not more than five years. According to the new law a special court had been set up to try young offenders. Young persons under twelve years who were found guilty were entrusted to their parents who had to undertake a pledge to correct them. Offenders from twelve to eighteen years of age were detained in reformatories.

Mr. FERNANDO (Philippines) said that it was difficult to disagree with Miss OLENDER about the rights of women and children when they were attacked. He wished to know how the problem would be faced if the offenders were women.

Miss OLENDER (International Federation of Women Lawyers), speaking at the invitation of the Chairman, said that there had been cases of women offenders in Dr. Hauke's institute; they had been sterilized, and were less aggressive afterwards.

The CHAIRMAN suggested that the problem of castration should be considered in relation to Article 5 of the Universal Declaration of Human Rights, dealing with the subject of torture and cruel, inhuman and degrading treatment or punishment. First there was the question of whether castration should be employed as a punishment. Second if the possibility of employing castration and sterilization as forms of treatment or as remedial measures were accepted, it was necessary to consider under what conditions they should be carried out.

Mr. NAGASHIMA (Japan) explained the practice in Japan regarding sterilization. Article 12 of the Eugenic Law provided that a doctor might sterilize a patient for the purpose of preventing the inheritance of undesirable traits. The District Eugenic Committee, consisting of ten members, including a judge, a public prosecutor, doctors, social welfare workers, etc., investigated each case. The person ordered to be sterilized could appeal to the Central Eugenic Committee and the Civil Court of First Instance against the Committee's decision. The Eugenic Law also provided for voluntary sterilization. The practice had worked satisfactorily.

Mr. REA (Hong Kong) supported the view that corporal punishment was an appropriate penalty, not so much from the point of view of its deterrent effect but as a punishment in itself for certain types of offence. In Hong Kong corporal punishment was a useful measure since the Chinese population regarded it as involving loss of face. As regards castration, this was merely another form of the penalty of mutilation, and should not be universally applied. He wondered if solitary confinement in a restricted space was not an improper penalty.

Mr. HAN (China) asked why corporal punishment had not been abolished in Hong Kong when it had been abolished in England by the Criminal Justice Act of 1948.

Mr. REA (Hong Kong) explained that although corporal punishment had been abolished in England, certain groups of people, including the former Chief Justice Lord Goddard had been pressing for its reintroduction to deal with certain forms of crime such as those committed by "teddy boys". In his opinion it was not a question of unequal application of the law as between Hong Kong and England, but that in the United Kingdom it was merely a development resulting primarily from the views of the political party in power when capital punishment was abolished.

Mr. SUFFIAN (Federation of Malaya) stated that solitary confinement had been abolished in 1953 in Malaya. It could be applied only to prisoners who assaulted prison officials and could not be imposed by a court.

Mr. MORRIS (Australia) said that castration should not be used as a punishment; it was offensive to human rights. The question whether it could be used as a form of medical treatment seemed to fall outside the competence of the Seminar; it should not be compulsorily imposed under a judicial order.

In a study he himself had made of 300 habitual criminals, there were 28 who had been subjected to flogging. Some held that people who had been flogged did not commit similar crimes later. His study, however, showed that, with the exception of three persons, all those who had been subjected to flogging had committed graver crimes afterwards. Corporal punishment, then, could not be regarded as a necessarily more effective deterrent than other forms of punishment. He did not know whether it had any higher general deterrent value. In his opinion it was a form of cruelty which debased the person using it and the person to whom it was applied; such punishment should be avoided. In support of the idea that punishments tend to survive their usefulness, he cited the situation in England, where corporal punishment was no longer applied under the law for the general community, but was retained in penal institutions for prisoners who committed offences there. On the other hand, in Australia, State prison administrations did not favour corporal punishment, since it was believed that it heightened tension and made ineffective the rehabilitative approach in prison treatment. The general law of some Australian States, however, retained corporal punishment as a sanction for some crimes in the general community. Corporal punishment was applied much less in the world today than in the past. As countries progressed in economic and industrial development there would be a decline in, and final abandonment of, the use of corporal punishment.

Mr. PIKE (Sarawak) said that corporal punishment was a useful form of punishment and cited two types of offences where it had been proved, in Sarawak, the only effective deterrent. One was larceny of growing crops from plantation owners, and the second was violence against women involving robbery and physical assault without a sexual motive. After legislation had been enacted permitting such offenders to be flogged, these crimes had decreased within a period of six months. It was true that certain countries were veering away from corporal punishment. In his opinion a little more of it would result in a little less crime.

The CHAIRMAN observed that since there was no dissenting opinion concerning Mr. MORRIS's stand that castration should not be applied as a form of punishment, it should be considered as reflecting the general opinion of the Seminar. He agreed with Mr. MORRIS that the adoption of castration as a remedial measure needed further study.

Mr. PIKE (Sarawak) thought that consideration should be given to castration as a remedial measure but much would depend upon the state of the health services within a country.

Mr. OHTSUKA (Japan) said that at the present time the criminal law of Japan did not provide for any penalties which would be deemed improper from the standpoint of the protection of human rights. In the past, however, certain extremely cruel penalties had been inflicted on offenders, including corporal punishment, finger-cutting, etc. Corporal punishment had been abolished in Japan since 1870. There were three elements to consider: (1) the type of penalty, (2) its method of execution, and (3) the extent of the penalty. As regards categories, punishments ranged from the death penalty to imprisonment with forced labour, imprisonment, fine, penal detention, minor fine and confiscation. In the criminal law of Japan there was no distinction between a misdemeanour and a contravention; the penalty was related to the offence committed. As regards the method of execution of penalties, a distinction was made between imprisonment with forced labour and a period of imprisonment during which prison labour might or might not be imposed. The prison labour programme helped in two respects; it

helped finance the prison administration and it trained prisoners in useful skills. The money which prisoners earned was given to them after their release. Under the prison labour programme, prisoners were required to work eight hours per day for a 48-hour-week. In determining the extent of the penalty, certain factors were taken into account. For example, imprisonment with forced labour was normally applied in a flexible manner, with a minimum and maximum which might range from one month to fifteen years. The statutory punishment for theft was imprisonment with forced labour for not more than ten years. Actually about 90 per cent of all persons charged with this offence were sentenced to less than two years, and 35 per cent were sentenced to less than one year. Imprisonment with forced labour and penal detention were imposed under a determinate sentence. In the case of a juvenile the sentence imposed was relatively indeterminate. The maximum and minimum of such a sentence were left to the discretion of the judge within the limits prescribed by the Penal Code. No absolute indeterminate sentence existed under the present law of Japan.

Mr. HAN (China) stated that before the Chinese revolution of 1911, corporal punishment had been based on the theory of retribution and deterrence, reflecting the severity of the old criminal law. All forms of penalties were applied in a cruel manner. In the case of capital punishment, there were two grades depending on the gravity of the crime: the first grade entailed death by beheading, and the second by hanging. In addition to corporal punishment which was widely used, an accessory punishment was total forfeiture of property. After 1911 the criminal law had been revised, and decapitation, total forfeiture and corporal punishment had been abolished. Instead the use of imprisonment had been widely extended. At present there were only five principal forms of punishment: the death penalty, imprisonment for life, imprisonment for a stated period, detention and fine. There were also two other accessory penalties: deprivation of public rights and forfeiture of property.

The historical development of the Chinese criminal law provided a good opportunity for an evaluation of the modern trend of penal sanctions. The mode of punishment had tended to become more and more lenient as countries advanced socially, economically and culturally. If this trend continued and man's moral qualities became further refined, it was conceivable that the time would come when mere condemnation of the offender would be a sufficient punishment. The question of what constituted unusual or cruel punishment should be viewed in relation to the particular circumstances of a country. Criminal law tended to emphasize retribution, and punishment in excess of social needs was not compatible with the idea of moral disapproval and respect for human rights and dignity. Corporal punishment, carrying out the death penalty by unusual and cruel means and the total forfeiture of property, should be regarded as undesirable.

Mr. ROBSON (New Zealand) stated that flogging and whipping had been abolished in New Zealand by the first Labour Government in the 1930's. There had been very few floggings even before that time. Since then there had been occasional public agitation for the restoration of this form of punishment but both political parties had resisted such efforts. The Home Secretary of England had contended that the evidence available did not substantiate the theory that flogging was a deterrent. This policy was, however, now under attack. In New Zealand there was no evidence indicating that flogging was effective.

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He was interested in the views which had been expressed in regard to capital punishment since that question would be debated in the New Zealand Parliament in June 1960, and he appreciated the arguments put forward by Mr. MUNIR (Pakistan) for the case of retention, as well as those of Mr. MORRIS (Australia) in favour of abolition. He would like to see a satisfying re-statement of the theory of punishment, and the emphasis placed by some participants on the need for a practical approach should not obscure the need for the formulation of a satisfying theory to guide those responsible for law reform. He thought that too much emphasis had been placed on deterrence, and that this theory had serious limitations. On the other hand, the reformative idea had almost reached its high water-mark, especially in theoretical statements, although its practical application in many countries was a long way behind. The primary thing to remember was that the machinery of justice went into operation to express society's disapproval of a deviation from a standard of conduct, and the more important question facing the seminar was the extent to which society should express its abhorrence for crime in its various major forms.

Mr. RASY (Cambodia) felt that since a prisoner had been deprived of his liberty by imprisonment, there was no way by which he could be penalized for any offence committed in prison. Therefore, corporal punishment was a necessity created by this situation. But he wondered if this penalty, which was a purely internal administrative measure, should belong in the field of criminal law for application to the general community. He felt that there was a parallelism between corporal punishment in prison and the right of fathers to chastise their children.

Mr. MORRIS (Australia) said that he could offer no satisfactory and all-embracing theory of punishment as requested by Mr. ROBSON (New Zealand). This was a question which had plagued men's minds for centuries and it was difficult to arrive at any definite conclusions. Corporal punishment in prison was for disciplinary purposes. Its application was usually decided upon by a visiting committee which deliberated on the guilt or innocence of the prisoner who had committed the offence within the prison. From this viewpoint, it was akin to a criminal sanction and its usefulness was usually judged on a pragmatic basis from the point of view of whether its application had had positive effects. In his opinion, corporal punishment in prison was completely different from corporal punishment administered to children in the course of parental discipline. Corporal punishment of prisoners was applied after some kind of judgement had been arrived at, whereas corporal punishment applied to children was an immediate reaction to a problem within the family and usually carried out in an atmosphere of love and affection.

Mr. REA (Hong Kong) did not agree with Mr. MORRIS (Australia) concerning the difference in principle between corporal punishment as applied to prisoners and to children. The parties inflicting the punishment were performing a similar duty.

Mr. MORRIS (Australia) emphasized that in the case of children this punishment was applied as an immediate reaction to a problem, and it was done with love and affection. In the case of a prisoner there was a long delay in its application. There was a world of emotional difference.

Mr. FERNANDO (Philippines) felt that the pragmatic approach to the problem was the best one. The provisions of the Universal Declaration of Human Rights imposed certain limitations on the power of the State. The State had the problem of applying penalties and sanctions which might be retributive, reformative or

deterrent, and in making a decision, it had to take account of human dignity and the rights of the individual. This, he believed, meant that an end should be put to certain kinds of punishment. However, the decision as to when the time had come to abolish such punishments was a matter for each particular country. He agreed that corporal punishment was improper. However dangerous an offender was, this danger could be met by confinement in prison. He added that the criminal law of his country had Spanish influences, and recognized temporary imprisonment as well as permanent or life imprisonment. Later, many ideas had been introduced from the United States.

Mr. NAGASHIMA (Japan) said that there were no statistics available concerning corporal punishment in Japan because it had been abolished in 1870. At present there was no need to reintroduce it. Corporal punishment had also been abolished in prisons, in favour of other forms of disciplinary measures which, inter alia, included reduction of food and minor or major solitary confinement. Different conditions were laid down for the application of these measures.

Mr. RASY (Cambodia) said if corporal punishment in prisons belonged in the realm of common law, it would be necessary to follow normal procedures and not inflict it summarily. He wanted to know whether corporal punishment of prisoners was an additional punishment, or simply a disciplinary measure aimed at making the prisoner conform to institutional rules.

Mr. MORRIS (Australia) stated that corporal punishment applied in prison had the same purposes as in the outside community, namely individual deterrence and general deterrence. He doubted whether there was any reformative element in corporal punishment administered to prisoners.

Mr. PIKE (Sarawak) said that within the scope of the question under discussion, it was not possible to distinguish between corporal punishment inflicted inside and outside the prisons.

The CHAIRMAN agreed with Mr. HAN (China) that punishment had become more and more lenient with the progressive development of man's social conscience, and noted that Mr. HAN had envisaged a future society where public condemnation would be an adequate punishment. Concerning the question of what was "cruel and unusual", he felt that punishment should be related to prevailing social conditions. He supported the view that the modern ideas called for the abandonment of old forms of punishment which offended human dignity. Each country, however, would have to decide when to abandon them.

Mr. RASY (Cambodia), in reply to Mr. PIKE (Sarawak), thought that there was a distinction between corporal punishment applied in and out of prison. Corporal punishment applied outside prison was for a crime which required the imposition of a criminal sanction. The violation of prison rules was an offence which came in a different category. One related to problems of discipline, whereas the other related to penal sanctions which were applicable to the general community. Therefore, if disciplinary action went beyond what was necessary from the point of view of prison administration, the common law should be invoked to deal with the matter.

Mr. PIKE (Sarawak) did not agree with Mr. RASY (Cambodia). In his opinion, a human being had rights whether he was outside or inside prison. However, the question seemed rather academic.

Mr. SUZUKI (Japan) said that the question of corporal punishment was a serious one. He did not entirely agree with his colleague from Japan, Mr. NAGASHIMA, that

there was no need to reintroduce corporal punishment in the substantive criminal law of Japan. The examples given by the participant from Hong Kong showed that this form of punishment could be usefully applied. As regards the question whether there was any difference between corporal punishment imposed by parents and by the State, he felt that there was indeed quite a difference. After the war, in Japan, corporal punishment as a disciplinary measure had been prohibited in schools. Teachers breaking this law were the subject of strong complaint, and his Bureau had dealt with such cases as being related to infringement of human rights. Before the war, corporal punishment had commonly been applied by Japanese parents; since the war children seemed to feel insulted to receive such punishment. This was due to outside influences such as that of the Occupation Forces in Japan which had instilled in the Japanese public the idea that corporal punishment was an insult to the dignity of the human being. In view of this influence, and the feeling that it was in opposition to the spirit of the Universal Declaration of Human Rights, it was not likely that corporal punishment would be reinstated.

Mr. OHTSUKA (Japan) summarized the activities of the Japan Bar Association in connexion with corporal punishment and other human rights questions. The Association had local committees on human rights which gave advice to persons with complaints concerning infringements. The Japanese Federation of Bar Associations also arranged lectures and showed movies on the rights of citizens and offered free legal advice. The Association's annual conventions usually heard reports of infringement of human rights, though it had been found that the number of such cases had been rapidly decreasing.

Mr. HANAI (Japan) said that although corporal punishment did not exist in Japan, the newspapers often misrepresented the situation, because the Japanese word for corporal punishment was closely similar to that for imprisonment, and cases involving imprisonment were represented as corporal punishment cases.

Mr. SUZUKI (Japan), in reply to the question raised by Miss OLENDER, namely, how could the rights of the injured party be protected, as distinct from the rights of the sexual offender, said that nevertheless he was opposed to castration for sexual offenders. The punishment was important from the viewpoint of the violation of the human rights of the person on whom it was imposed. In the present Japanese Code of Criminal Procedure, the human rights of the offender were completely protected by appropriate legal provisions. The relevant provisions of the new criminal procedure had received serious public criticism, on the grounds that the rights of society should be protected before those of the criminal offender. This criticism had some merit.

Mr. YEGANEH (Iran), referring to various forms of punishment which might be regarded as improper, said he would like to know the practice in regard to general confiscation of a criminal's property. Did the application of such a penalty extend to his children after his death?

Mr. LEE (Republic of Korea) stated that there was no corporal punishment in the criminal law of Korea. He wondered whether the infliction of forced labour in lieu of a fine, as provided in the Draft German Criminal Law of 1936, could be considered just. He felt that it was akin to corporal punishment.

Mr. SUFFIAN (Federation of Malaya) said there was no general confiscation of property in his country. An accused could be sentenced to imprisonment for default of payment of fine only by a court order.

Mr. RASY (Cambodia) said that in connexion with the question of having forced labour in lieu of fine, another question arose as to whether the penalty imposed on a convicted person could be enlarged. As forced labour was a heavier penalty than a fine, the question needed to be answered. From the human point of view and by virtue of the principle that a penalty was of a public nature, the reply would be negative, and a condemned man should not be given forced labour for failure to pay a fine. He might, however, be obliged to work in order to earn the amount involved in the fine and thus redeem himself.

The CHAIRMAN observed that corporal punishment was an affront to the dignity of man. However, when a person decided to work out his fine by some form of labour, no affront to human dignity seemed to be involved.

Mr. MORRIS (Australia) agreed that although in practice such a provision was desirable, a tyrannical government could use it for the gravest violation of human rights. Its use to justify forced labour camps would represent a basic human indignity.

Mr. MUNIR (Pakistan) said that in his country, corporal punishment was limited to certain cases. The usual penalty was simple imprisonment plus fine, the fine being recoverable from the property of the convicted person. The offender was permitted to work in prison to pay his fine.

Mr. MUNIR (Pakistan), initiating the discussion of item III (c), said that he would take a few examples of deprivation of civil and political rights which followed as a result of criminal conviction. The Working Papers by the participants from India, Ceylon and Singapore showed that the situation in those countries was similar.

The first disability was the disinheritance of a person convicted of murder. If a person murdered another person to accelerate his own succession to his property, such a person would be disqualified from succession under the laws of these countries. A legatee was similarly disqualified from succession if he murdered the testator in order to accelerate the acquisition of the property. Such a deprivation was not a matter of law, but simply of justice, equity and good conscience. The question was whether, under these circumstances, the descendants of the person convicted should also be disqualified from succession.

Another instance of deprivation of a civil right was disqualification from following certain professions as a consequence of criminal conviction. For instance, a person who had been convicted would not be permitted to practise law. If his name was already on a roll of registered practitioners, it would be removed, and if he were a new entrant seeking enrolment, his application would not be entertained. It was, however, necessary that the conviction should be for an offence involving moral turpitude, or a serious departure from professional ethics, such as contempt of court, abetment of bribery, etc. If the conviction were for offences in other fields not relevant to the conduct of the profession, such as violation of traffic regulations, etc., disqualification did not follow. In Pakistan, such disqualification was absolute. However, after a reasonable period, the offender could apply to the High Court for reinstatement. The High Court would consider the case and readmit the person to the profession if it found that his subsequent conduct had improved. The same rule operated in other professions such as medicine, where the discretion regarding disqualification or reinstatement was vested in a disciplinary body such as a medical council.

A third example related to disqualification to hold public office. This was not a matter of law, and the grounds for disqualification had not been defined by law. But if an offence disclosed such a defect of character on the part of the offender as to render him unfit to hold a public office, the authorities concerned disqualified him from holding public office. In this connexion, he referred to the conviction of students on charges of petty offences, which led to their being barred from schools and colleges. Personally he had sympathy for such miscreants and felt they should not be permanently deprived of the right to education. The question was whether the discretion of educational authorities to punish students in this manner should not be restricted, and if so, how?

Deprivation of civil rights occurred also when a conviction led to forfeiture of property. Forfeiture of property had been completely abolished in Pakistan. The question here was whether the descendants of the convicted person should also be deprived of their right to the property.

A previous conviction often rendered an offender liable to enhanced punishment. For instance, theft was punished in Pakistan by imprisonment ranging from six months to a maximum of two years. But a second conviction on the same count rendered the offender liable to a sentence of imprisonment for ten years. Did this not constitute an infringement of the right to equality before the law?

He referred further to the practice which required offenders to report periodically to the police even after their release from jail. Such subjection to police surveillance was inconsistent with the right to freedom of movement and association.

As to the deprivation of political rights which followed from criminal conviction, the most important aspect was loss of franchise and disqualification from seeking election. There was no uniformity in the law of different countries regarding the minimum period of imprisonment which would lead to such disqualification; in some countries it was three months, in some six months, and in others as much as two years. He considered that loss of franchise and disqualification from seeking an elective office following a conviction was absolutely justified when the crime had demonstrated moral turpitude on the part of the offender. If a person were convicted of an election offence such as bribery, exerting undue influence on the electorate, impersonation, or tampering with the ballot, mere conviction should be enough to disqualify him. The period of disqualification was operative for a specified period, usually for five years or more, the intent being to disqualify the person from becoming a candidate at the next, or even the next two elections. There was no rule regarding when the disability would cease to operate. The subsequent conduct of the offender could be a good test of whether the disqualification should be removed.

Mr. SEN (India) agreed with all that had been said by Mr. MUNIR (Pakistan) and described the situation in India, where the law also disbarred a person from succession if he were found guilty of murder to accelerate his succession. He agreed that the children of such a person should, however, not be disbarred from succession unless they themselves were proved to be party to the crime. Succession in this manner was automatically secured in the case of joint family ownership under Hindu law, where inheritance was by survival rather than by succession.

He completely agreed with Mr. MUNIR concerning disqualification from following certain professions if an offender had been found guilty of deviating from

professional ethics. Permanent disqualification was rarely imposed in India, and he remembered only one case where this had been inflicted. The offence, in that instance, had been of a very serious nature, namely, misappropriation of trust funds. However, political activities of which the government in power did not approve should not result in disqualification. In this connexion, he cited the example of Mr. GANDHI whose name had been removed from the roll of barristers by the Inns of Court.

Penalties such as rustication imposed by autonomous educational institutions were best left outside the purview of courts. In India, courts seldom interfered unless it was patent that the institutions had grossly exceeded their jurisdiction or had committed some breach of law. A measure of relief was provided to students by the right of appeal to the Chancellors of the Universities, who very often were also the head of the states in India, for a review of the case.

Forfeiture of property had been abolished in India also. There was, however, one exception. If it was proved that a property had been obtained by perpetrating a fraud on the Government, a person was liable to forfeiture of any part of his property which was proved to have been so acquired. Before India acquired independence, there had been cases of forfeiture of property on account of political activities not approved by the government in power. Referring to forms of taxation such as estate duty and taxes on wealth he said that despite the fact that the state enriched itself by these means, they were not a form of concealed seizure of property. Rather, they were recognized ways of achieving equality of income, which in India, was a basic constitutional aim of the Government.

The practice in India pertaining to loss of franchise and disqualification from seeking election following a conviction, was very stringent. Permanent deprivation of franchise was rarely imposed, but the strictness of the law could be judged from the fact that disqualification resulted if it were proved that a candidate in a political campaign had made an untrue statement about the character of his opponent. The Election Commissioner had discretion to specify the period of disqualification. Profiting from office, or having a pecuniary interest in semi-governmental bodies also prevented a person from seeking election either to the state or the central Legislature. These disqualifications following conviction were necessary safeguards to ensure the success of the democracies which were emerging in Asia.

Mr. TAKEUCHI (Japan) said that in Japan there were many instances when a person had his employment qualifications restricted or was precluded from exercising certain rights as a result of a conviction. There were also some instances when conviction justified dismissal from certain occupations or led to cancellation of the right to engage in business. There were no general provisions in the Japanese Penal Code covering restriction or forfeiture of rights, the governing provisions being incorporated in many other laws and ordinances. It was interesting to note that a convicted person was disqualified not only from holding public office but also from activities normally supervised by public authorities. Voting rights, eligibility for elective office and the right to a pension were also subject to penalties, the scope of which was determined by individual laws. Restrictions or forfeitures were either mandatory or discretionary, and the period during which they applied was not necessarily prescribed in the particular law govering the case. Juvenile law, however, provided important exceptions. The penal code provided two ways for the restoration of rights - by expiration of the period of suspension and by what could be termed "extinction of previous

conviction". In addition, rights could also be restored by amnesty. There were two basic reasons for restricting individual rights as a result of conviction. One was the necessity of imposing a kind of sanction affecting honour, and the other was the protection of the public interest. It was true that the chances of a convicted person gaining employment were limited by these measures and from the standpoint of human rights it meant deprivation of one of the most fundamental rights; however, a balance had to be struck with the protection of the public interest. Caution should be exercised in imposing such restrictions in the case of minor offences. To sum up, legislation in Japan relating to restriction and restoration of rights was not too unsatisfactory. Care was exercised to keep the records of previous convictions strictly confidential, except when inquiries were made by public authorities.

IV. Future programme of international co-operation in the solution of problems discussed at the Seminar

Mr. FERNANDO (Philippines), in introducing this item, said that the question of future programmes of work could be approached in three ways. First, the Seminar might consider what the Division of Human Rights in the United Nations Secretariat could do. Secondly, it might discuss the work that could be undertaken by respective governments, and thirdly, it might examine the possibility of what the participants themselves might be able to achieve.

The Working Paper by the participant from Thailand had pointed out the difficulty of language involved in the promotion of research work in the region, and had suggested that perhaps it would be advisable to set up exchange of experts and fellowships, and student exchange programmes. The Working Paper by the participant from Iran had endorsed all forms of international co-operation and had advocated the exchange of experts. The Working Paper by the participant from Nepal had also pointed up the language problem.

In considering any programme of work, the suggestions of previous seminars should be also taken into consideration. The Baguio City Seminar held in 1958 had recommended that its report be distributed widely and that the rights of accused persons be taken as the theme for a seminar in 1962. The Kandy Seminar had stressed the desirability of making a comparative study of law and administration. Needless to say, the present seminar had been found most useful. Regarding representation, a suggestion had been made earlier that some participants at such seminars should be drawn from higher institutions of learning. He was inclined to believe that while it would be useful to have them as alternates, the present level of governmental participation deserved to be continued. Seminar participants should include a large proportion of persons handling the problems of law in a practical and realistic manner. Programmes contributing to the exchange of scholars in the field should be arranged, and the records of the present seminar should be widely disseminated.

Mr. KRAIVIXIEN (Thailand) drew the attention of the seminar to two practical points. The main problem of international co-operation in this field appeared to be the difficulty of language which would effect any exchange of experts, fellowships or publications. Perhaps it was advisable in the initial stages to set up an exchange programme of post-graduate and undergraduate law students. After overcoming language difficulties, these students could not only get first-hand comparative knowledge of the law and its administration, but would also gain valuable knowledge and experience of the country where they were studying. Secondly, it was necessary to set up a national committee in each country, with the object of carrying out extensive research into various aspects of substantive criminal law, promoting international co-operation in in this field, and seeking solutions to the problems discussed at the seminar. The committee should be composed of high level participants and have adequate staff and financial resources to carry out its objectives.

Mr. RASY (Cambodia), while agreeing with many of the points made by the previous speakers differed with the view that the language difficulty provided an insurmountable obstacle to international co-operation. On the contrary, such co-operation brought different nationalities together and stimulated the study of other languages.

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Mr. MORRIS (Australia) said that he had been authorized by the Government of Australia to state that under the Colombo Plan Technical Assistance Training Scheme, Australia was prepared to provide free training for suitable candidates nominated by member Governments of the Colombo Plan represented at the seminar. Training could be arranged in the field of the problems discussed at the seminar; the period of training could be for three months or more.

Mr. EAN (China) said that budgetary considerations might not permit some countries to institute extensive programmes of exchange of fellowships and experts. Perhaps the United Nations could give assistance in distributing legal literature and act as a clearing house for the exchange of information on current developments in the legal field. The United Nations might also arrange for legal literature to be translated.

Mr. WILD (New Zealand) stressed the usefulness of seminars such as the present one and said that its value undoubtedly went far beyond the discussions. As a direct result of the seminar, many friendships had been formed, and an exchange of views on actual problems could be carried on by correspondence. An invitation from New Zealand to hold a seminar in February 1961 had been accepted by the United Nations, and the provisional agenda offered exciting prospects. This seminar would take up questions of the administration of criminal justice in relation to the protection of human rights. Questions such as the independence of the judiciary, and procedural problems such as permissible techniques in examining suspected criminals, and the securing of confessions and admissions, would be discussed.

As for the subjects that might be discussed at other future seminars, he felt that some of the topics considered at the present seminar could be looked into again after an interval of, say, three years. One other topic worthy of consideration was freedom of speech and the right to opinion. Articles 18, 19 and 20 of the Universal Declaration of Human Rights touched upon subjects which could be taken up at future seminars.

Mr. T.S. RAMANATHAN (World Federation of United Nations Associations), speaking at the invitation of the Chairman, said that seminars such as the present one helped towards an understanding of various legal systems. A legal advisory services programme should be instituted, along the lines of the United Nations Technical Assistance Programme, with a view to providing expert services to member Governments. Scholarships, prizes for legal research, exchange of legal personnel, research, etc., would also contribute greatly towards international understanding in this field.

Mr. FERNANDO (Philippines), summing up the discussion, said that participants apparently did not consider the problem of language to be insurmountable. The value of seminars such as the present one had been fully recognized. In addition to the subjects suggested by the participant from New Zealand for consideration by future seminars, he felt that the newly emerging social and economic rights could also be usefully considered. Setting up informal groups to keep up correspondence on developments in this field would be helpful. An endeavour should be made to furnish the Division of Human Rights with a list of names of persons and institutions actively engaged in this field in each country. In this connexion, he recalled that officials in his country had consulted the report of the Baguio City Seminar during discussion of proposed amendments to the Philippines Constitution.

Mr. BANERJEE (India), while agreeing with the suggestions that had been made, thought it essential to stimulate more interest in human rights at all levels. At present there was a paucity of people at the state or district level who could transmit such knowledge to the people in their areas. It would also be useful if the ministries of education and law in each country helped to give more publicity to the work in this field. Perhaps this could be done by including a chapter on human rights in law text books. A working paper on this question might be prepared by the United Nations for the use of governments.

Mr. FERNANDO (Philippines) observed that the cost of translating the paper prepared by the United Nations into local languages would be high.

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