A Preliminary Survey of Action to Further Human Rights in the Asian Region Specifically by the United Nations Through its Programme of Advisory Services in the Field of Human Rights

A PAPER PRESENTED ON BEHALF OF THE INTERNATIONAL LAW ASSOCIATION (AUSTRALIAN BRANCH)

I INTRODUCTORY

Among the documents presented by the Human Rights Committee of the International Law Association to the 54th Conference at The Hague, was a paper by the Australian Branch commencing the survey above described. The Australian Branch is interested in the possibilities of achieving progress in the protection and implementation of human rights on a regional basis, especially in the Asian region. It is of the view that the United Nations Human Rights Seminars held in recent years in the ECAFE area have made a significant contribution to the understanding and development of human rights in this area of the world. The Branch considered that it would be a valuable exercise to make a preliminary survey of the work and achievements of these Seminars which had been held within the ECAFE area from 1957 to 1968.

In its first paper abovementioned, the Branch listed the Seminars and selected for consideration the Seminar on the Role of the Police in the Protection of Human Rights, held in Canberra, Australia, in 1963, and the several seminars held in the area on matters affecting the status of women. The paper reviewed the deliberations of these particular seminars and made some recommendations in the light of such review. It suggested that the seminars reviewed indicated the desirability of the establishment of a Regional Institution for Human Rights (eg a Commission or a panel of experts) and that perhaps a Regional Human Rights Committee of the International Law Association or individual Branch Committee could give special study to problems within the Asian area. The Australian paper appeared to create interest among the participants at The Hague Conference, and constructive comments upon the paper were made at the Human Rights Session, at Committee Meetings, and otherwise.

Among the resolutions adopted by The Hague Conference arising out of the Human Rights Session were the following:

(i) Universal and regional systems providing for international protection of Human Rights are in fact complementary to each other and may well serve by their co-existence to promote more effectively the implementation of Human Rights;

(ii) It is considered advisable to retain in all relevant international treaties as far as possible uniform definitions of Human Rights following the

model of the substantive norms enumerated in universal treaties, without excluding regional solutions more favourable to the individual.

The Conference approved a further resolution recommending "that the Committee on Human Rights be invited by the Executive Council to report at the 55th Conference about matters currently under consideration by the Committee and to give consideration, in consultation with the Executive Council, to other legal problems which are relevant to the further development of effective international protection of Human Rights, bearing in mind the suggestions submitted at the present Conference."

The Australian Branch has thus been encouraged to continue its preliminary survey of the achievements of the ECAFE Human Rights Seminars. This present paper will consider in the first place, primarily, the work of the 1960 Tokyo Seminar (ST/TAO/HR/7), the subject of which was the Role of the Substantive Criminal Law in the Protection of Human Rights and the Purposes and Legitimate Limits of Penal Sanctions. In the second place, this paper will consider the work of the various Status of Women Seminars with particular reference to deliberations and viewpoints on aspects of property law. This, of course, is a subject vitally concerning all members of any community (male or female) and one of great importance, which it is thought hitherto has received insufficient attention in its Human Rights aspects. As to each subject some comments or recommendations will be made, prompted by the examination of the topics reviewed, and it is hoped that thereby discussion will be provoked at the 55th Conference which may make some contribution to progress in this field.

II. THE SUBSTANTIVE CRIMINAL LAW AND PENAL SANCTIONS

The seminar was held in Tokyo from 10 to 24 May, 1960. It was attended by participants from Australia, Cambodia, Ceylon, China, Federation of Malaya, Hong Kong, India, Indonesia, Iran, Japan, Nepal, New Zealand, Pakistan, Philippines, Republic of Korea, Republic of Vietnam, Sarawak, Singapore and Thailand. The participants were largely senior persons engaged in the administration and enforcement of the criminal law, such as Attorneys-General, Solicitors General, Government criminal advisers, Crown counsel, Judges and ex-Judges, and also some law teachers. There was thus a unique pooling of experience of many diverse systems of law as existing in the more developed and developing countries, though it may be that there was some lack of Government Ministers, Members of Parliament, sociologists and others concerned or interested in legislative changes necessary for progress in the field of human rights.

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 personnalite*";

(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.

Mr Suffian, the Solicitor General of Malaya, and Mr Norval Morris, the then Dean of the Faculty of Law, Adelaide University, South Australia, a well-known criminologist, were appointed rapporteurs to the seminar. The secretariat had arranged for two working papers, one on Capital Punishment by Professor S Prevezer, and the other on the general topic of the seminar. Most of the countries represented had also submitted working papers describing aspects of their own laws and institutions as relevant to the topic of the seminar. These papers were distributed and constituted a mine of research material for comparative studies on subjects covered by the seminar.

The first item on the Agenda initiated a discussion on the fundamental aim and rationale of the criminal law—the difficult balance between its social protection functions and the need to safeguard individual human rights. The great powers necessarily wielded by the State under the criminal law called for a compensating anxious regard for individual human rights. It was at once conceded that in striking a balance between social protection and human rights, the social circumstances of each country must be borne in mind and a just balance would necessarily vary according to the social, political and economic situation.

Participants agreed that the great precepts of all developed systems of

criminal law—*nullum crimen sine lege*; *nulla poena sine lege*—were based upon the postulate that the State, in fulfilling its important social purposes, should avoid undue interference with human rights. It was recognized that the criminal law as regards all its purposes, retributive, deterrent, reformative and educational, could be so defined and applied as seriously to conflict with human rights, if carried to extremes. Most participants agreed that there was a real and continuing conflict between the demands of social control and the adequate protection of human rights. There was also a general measure of agreement that it was undesirable to exaggerate the demands of social control; thus criminal statutes should cover only the minimum necessity of any threat to the social order or system, and criminal punishments should be both humane and proportional to the gravity of the offence. Punishments, though legally duly established, might, on a wider perspective, be regarded as unjust on sociological and humanitarian grounds, particularly if excessive in regard to the threat which the crime and the criminal presented to society. The discussion was based on the assumption that even if difficult to define, there could be an "unjust maximum punishment" both with respect to the type of crime and to the particular offender. It was stressed, by the then Solicitor General of New Zealand, that 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 prohibition should be laid down unless it was absolutely necessary. It was suggested that one way to strike a balance between the interests of society and the rights of the individual 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. Whilst criminal law should be stable and consistent, it was pointed out that if criminal law became outdated it fell into disrepute and worked against the interests of the State.

There was a discussion on the desirability of legislatively fixing minimum punishments. After an exchange of views as to how mandatory minimum punishments had worked in practice, participants indicated preference for the establishment of maximum punishments (related to the gravity of the offence and the threat to the community) leaving a wide judicial discretion in fixing the actual sentence in each case. In some of the countries represented, the release of prisoners following sentence, but before expiry thereof, was entrusted to the discretion of a parole board or other similar authority. Punishments not related to state of mind of the offender (intention, negligence or *mens rea*) were discussed. There was an increasing modern tendency to create "strict liability" of a penal character for purposes, for example, of establishing minimum standards of public health, of marketing, education, labour conditions and trade practices. In the legal systems of some of the countries there could, in strict legal theory, be no criminal liability without intention, recklessness or negligence; but even in such countries there were developing elements of strict liability. It was agreed that strict liability was necessary to deal with certain social problems and an endeavour was made to classify such cases. In matters of health, labour regulation, industrial safety, housing, and in times of national emergency, strict liability seemed unavoidable. All participants agreed, however, that it should be limited, as far as possible. Even in the case of offences where strict liability was

appropriate, injustice to the individual might be ameliorated in four ways:

(a) By allowing the accused to escape liability upon proof of fault in a third person not under his control ("third party procedure");
(b) By allowing an accused to avoid conviction upon proof that the offence was committed without his knowledge or connivance;
(c) A new category of offence called "violations" punishable only by fine or forfeiture might be established—such violations having no subsequent significance, criminal or otherwise;
(d) Mistake of fact might be available as a defence. It was pointed out that to allow this defence and thereby to enable the morally innocent to escape, might still be consistent with the need of the State to be able adequately to regulate certain types of activities.

The subject of insanity and criminal responsibility (including the concept of "diminished responsibility") was discussed in the light of the existing law of the various countries, but it is not proposed in this paper to pursue this topic.

The second item on the Agenda "Criminal Law as an Instrument for the Protection of Human Rights" led (*inter alia*) to a consideration of the question as to the remedies which should be available to an individual whose human rights had been infringed. There was some support for the view that penal sanctions should be available to punish infringers of such rights, though it was conceded that this was not always possible in some countries. The mere existence of such sanctions, particularly against public officials, might well serve to deter such infringements. Penal sanctions of the criminal law, however, were thought to be not enough to provide adequate protection. Disciplinary action within the administration, though necessary to check infringements, did not assist the injured citizen who should have the right to sue for compensation. Reference was made to the Australian experience with Police Disciplinary Boards designed to correct any excess or abuse of power by the police and ready access to which helped to foster a feeling that the Police Force had a sense of responsibility and was anxious to protect human rights. There was a description of the functions of the Civil Liberties Bureau and the Civil Liberties Commissioner in Japan, the Civil Liberties Bureau in Korea and the Civil Liberties Union in the Philippines. In some countries (for example, the Federation of Malaya), an Anti-Corruption Bureau, responsible to the Prime Minister, had been set up. Penal sanctions against social discrimination were discussed, and it was agreed that such penal sanctions were not alone effective. Education of public opinion was the best way of eliminating such discrimination. It was considered that some penal sanctions were also necessary (if only as a last resort) for the safeguarding of social and economic rights.

It is of interest to interpolate here that in 1971 New Zealand brought down legislation against racial discrimination. There is, of course, in New Zealand, a substantial minority population of native Maoris. Under this "Race Regulations" enactment, it is an offence to discriminate on the grounds of colour, race or ethnic or national origins. The objects of the Act were to re-affirm the New Zealand Government's commitment to racial equality and to implement the provisions of the United Nations Convention on the elimination of all forms of racial discrimination. Conciliation in cases of alleged discrimination is provided for, but the Attorney-General

may consent to criminal proceedings being taken. It is unlawful to discriminate in the provision of goods and services, employment, land, housing and other accommodation. It is unlawful to publish or display an advertisement or notice which indicates intention to discriminate. Incitement to racial disharmony carries a prison sentence or substantial fine, and a fine may also be imposed for denying access to places, vehicles or facilities on colour, racial, or ethnic grounds. On the other hand, measures genuinely taken to assist particular groups of people will not be open to the charge of unlawful discrimination.

Participants exchanged views on the subject of penal sanctions against violation of privacy, including the inviolability of the home, secrecy of correspondence, etc. It was generally agreed that secret wire-tapping was a serious breach of human rights and was often attended by sinister implications. Unless done under proper authority it would be penalized. The Seminar was invited to consider the appropriate conditions for such authority. There was some discussion on proposed legislation in Australia where it had been decided that wire-tapping without authority was to be punishable with two years' imprisonment or a fine of £500 ($1,000) or both, and that authority was to be required from the Attorney-General on an application made to him for a necessary specific purpose by the Director of National Security. Participants agreed that wire-tapping should be subjected to severe restrictions and only authorized for reasons of national security or for the detection of serious crimes (for example, blackmail or kidnapping), where evidence would otherwise be difficult to obtain. A requirement of obtaining of judicial as distinct from ministerial authority in all cases was considered impracticable because of the necessity for expedition and secrecy. The subject of tape recording of evidence by hidden microphones proved more controversial, and reference was made to the danger of possible tampering with tapes.

Under the third item of the Agenda "The Limits of Penal Sanctions", the first subject considered was "Should there be Capital Punishment?" This topic was intensively discussed and there was an informative and detailed sharing of experience in the countries represented. It was debated whether capital punishment contravened Articles 3 and 5 of the Universal Declaration of Human Rights, and it was agreed that the question of capital punishment should be considered from the aspects of social utility and moral propriety; the particular social conditions of each country had to be weighed on the questions whether capital punishment was necessary and appropriate and, if so, for what crimes and in what circumstances? The discussion showed that there was widespread retention of capital punishment for treason and like offences, and in times of national emergency. This retention was regarded as necessary, even though the punishment might be rarely carried out. The Seminar was informed of the experience in various countries represented, of the abolition or suspension of capital punishment, for example, in New Zealand, certain Australian States, Nepal, parts of India, Ceylon and Japan. It was questioned whether the experience of one country on this matter was relevant to that of another. Discussion concentrated on capital punishment for the crime of murder. It was agreed that reliance should not be placed on capital punishment as a unique deterrent to murder. It was also agreed that legislation towards abolition or suspension should not move

too far in advance of public opinion, even though it might be desirable that capital punishment should be gradually and steadily narrowed in its application. A general tendency in this respect was noted and approved. An important question was whether legislation should allow the Trial Judge in murder cases to exercise a discretion or not. Most participants agreed on the desirability of the Executive considering every case as to the exercise of clemency. There was discussion on the types of murder and murderers which might be excluded from operation of capital punishment. It appeared that in all countries, women murderers were extremely rarely executed, though apart from the cases of pregnant women, there was little logic to support this distinction between the sexes. It was agreed that persons under 18 should not be executed.

Other penalties which might be deemed improper from the standpoint of human rights were discussed, namely, castration, amputation of limb, general confiscation of property, free labour, solitary confinement and corporal punishment. Another topic discussed briefly was the extent to which the criminal law might, consistently with human rights, restrict the civil and political rights of persons convicted of crime, and when and in what circumstances there should be a restoration of such rights. It was agreed that a conviction for serious crimes, involving moral turpitude, justified the loss of civil and political rights, though generally not permanently. It is not proposed to deal further with these matters in the present paper.

The fourth and final item on the Agenda was the "Future Programme of International Co-operation in the Solution of Problems Discussed at the Seminar". It was considered that there should be further cooperation to this end. The report of the Seminar suggests that countries in the region might consider the possibility of National Committees or Research Institutes to study problems of human rights in criminal law and procedure. The possible exchange of experts, fellows and scholars in this field was also suggested. The Australian Government, through its representative, offered to finance and arrange training programmes for nominees of Governments which were signatories to the Colombo Plan for not less than three months study in Australia. (The Australian Government has since implemented this offer by holding a number of courses and providing facilities for this purpose.) It was announced that the Government of New Zealand had invited the United Nations to hold a seminar there in February, 1961 on the protection of human rights in criminal procedure. (It might be mentioned that this Seminar was duly held in Wellington, New Zealand, and a very useful exchange of views resulted, which, it is hoped, will be the subject of a further paper in the course of the present survey.) It was suggested that the Seminar Report and Summary Record and the Working Papers of the seminar should be widely distributed. It is doubted whether that suggestion has been sufficiently implemented: the seminar gave rise to a very great deal of valuable material on the subject discussed (eg the Working Papers) and this, if more readily accessible, would be most useful for study and reference both within and without the region.

Post-Seminar Developments

It is worth noting that the discussions at Tokyo on the subject of strict

liability for criminal offences were followed up at the seminar held at Wellington, New Zealand in February 1961, on "The Protection of Human Rights in the Administration of Criminal Justice". The view again was taken that, in certain classes of regulatory legislation creating offences of absolute liability, it could well be proper to permit an accused person to exculpate himself if he proved (the burden of proof being on him) a reasonable but mistaken belief in a state of facts which, if true, would have made his action innocent. This would involve no criminal liability in the absence of intentional or negligent wrongdoing. This view was clearly in line with the view that had been held by the majority of participants at the Tokyo Seminar. The issue of strict liability arises prominently in connection with legislation passed in many countries in the region in recent years to cope with the increase in trafficking of drugs. The question of wire-tapping in the investigation of crime was also discussed further at Wellington. It was agreed that indiscriminate wire-tapping could constitute a threat to human rights, in particular the right to privacy defined in Article 11 of the Universal Declaration of Human Rights. Therefore its use should be severely restricted, and there should be public awareness of the extent of wire-tapping permitted in any country and of the prescribed restrictions and safeguards. Participants at Wellington tended to support legislation prohibiting and penalizing wire-tapping except in specific circumstances and by a specific procedure—subjecting it to careful control by a high executive officer of the State who should report periodically to the legislature. The Australian Telephonic Communications Interception Act 1960 (which incidentally came into operation on 26 May 1960, immediately after the Tokyo Seminar) was discussed as an example of a legislative attempt to control wire-tapping.

At the very time when the Tokyo Seminar was being held there was initiated by the United Nations *a study of the whole question of capital punishment, of the laws and practice relating thereto, and of the effects of capital punishment (or the abolition thereof) on the rate of criminality.* A report on the subject was prepared by Mr Marc Ancel, a Justice of the French Supreme Court and Director of the Criminal Science Section of the Institute of Comparative Law of Paris. This was based on comprehensive questionnaires addressed to members and certain non-members of the United Nations and to national correspondents in this field and certain non-governmental organizations. The Report (1960), a most valuable study, together with a Supplementary Report (developments 1961 to 1965), was published by the United Nations (Sales No E 67 IV 15). The Supplementary Report summarizes the highlights thereof as follows:

(*a*) There is an overall tendency in the world towards fewer executions. This is the result of less frequent use of the death penalty in those States whose statutes provide for that penalty, and of a steady movement towards legislative abolition of capital punishment.

(*b*) There is a slight but perceptible contrary tendency in the world towards legislative provisions for and actual application of the death penalty for certain economic and political crimes.

(*c*) Where it is used, capital punishment is increasingly a discretionary rather than a mandatory sanction.

(*d*) Almost all countries have provision for the exclusion of certain offenders from capital punishment because of their mental and physical

condition, extenuating circumstances, age and sex; the scope of the categories of offenders thus exempted is broadening.

(*e*) A growing number of offenders who are sentenced to death are spared through judicial processes or by executive clemency.

(*f*) There is a great disparity between the legal provisions for capital punishment and the actual application of those provisions.

(*g*) With increasing frequency, an offender who is sentenced to death is confined, while awaiting execution, in conditions similar to those of other prisoners. Execution, if it takes place, is likely to be accomplished by shooting or hanging and accompanied by a minimum of publicity.

(*h*) The tendency with regard to offenders who are subject to capital punishment but who have been accorded another penalty is to confine them in conditions similar to those of other prisoners and to provide mechanisms for their eventual release.

(*i*) With respect to the influence of the abolition of capital punishment upon the incidence of murder, all of the available data suggest that where the murder rate is increasing, abolition does not appear to hasten the increase; where the rate is decreasing, abolition does not appear to interrupt the decrease; where the rate is stable, the presence or absence of capital punishment does not appear to affect it.

On 16 December 1966, the General Assembly of the United Nations adopted the Covenant on Civil and Political Rights, Article 6 of which was formulated as follows:—

1 Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2 In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3 When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4 Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5 Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6 Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant.

The subject of capital punishment was again reviewed by the United Nations Consultative Group on the Prevention of Crime and the Treatment of Offenders meeting in Geneva, 6-16 August 1968. The report is contained in United Nations Publication (Sales No E 69 IV 3). The subject should be kept under continuous and dispassionate study, it being of such consummate

importance in the field of human rights in today's world of violence and revolt.

It will be recalled that the Tokyo Seminar suggested, *inter alia*, the possibility of research institutes to study problems of human rights in criminal law and procedure. Since then, the "Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders" has been set up in Tokyo. It was established on 15 March 1961, consequent upon an agreement between the United Nations and the Government of Japan. Its training courses have included studies of human rights in the administration of criminal justice and of human rights and penal sanctions.

Comments

As was earlier stated, criminal codes or laws ought to be kept constantly under revision in order to strike an up-to-date balance between the needs and interests of society and the human rights of the individual. As countries develop socially, politically, economically and culturally, their needs and attitudes must change. Constant evaluation should be made of the state of the criminal law and its capacity to deal effectively with current problems, at the same time affording the maximum measure of humanity and regard for the individual that is possible.

The seminar which this paper reviews was held more than a decade ago and dealt with the substantive criminal law in its more conventionally criminal aspects. Over the intervening years, different though just as serious criminal problems have arisen. Many of the countries in the ECAFE region are going through a period of great development and change, often accompanied by turbulence and unrest, bordering on violent revolution. Recent years have seen a great increase in demonstrations and protests of all kinds. The balance between the requirements of law and order and the so-called rights of dissent, demonstration and disobedience is one of the crucial human rights issues facing the world of to-day. We have seen coups d'etat, conspiracies to subvert legitimate government, organised resistance against government, and improper interference with elections. The criminological aspects of these problems need to be and indeed are being studied widely in the ECAFE region, as elsewhere. It is suggested that a United Nations seminar might well be held in the region on this general topic.

There are other important contemporary forms of serious criminality which must be faced up to while constantly bearing in mind the requirements of human rights, for example, organised crime, secret criminal societies, international criminality on the part of individuals or corporations. As well there are problems involving interrelation of crime and morality, for example, abortion, homosexuality, euthanasia, sexual offences, corruption and obscenity.

In its former report, the Branch suggested the desirability of the establishment of some form of regional institution for human rights, such as a commission or panel of experts. As a first and provisional step in this direction, the Branch would at least like to see established in the ECAFE region a central office to act as a clearing house and means of coordination for research, studies or legislative and criminological developments. Such an office is envisaged as paving the way for a more permanent establishment,

by the receipt, recording and distribution of studies, reports and recommendations concerning, inter alia, the criminal law and human rights.

III WOMEN AND PROPERTY LAW

General Considerations

The United Nations Human Rights Seminars organised in the Asian region during the past fifteen years have offered diverse subjects for examination and discussion. They have nevertheless been designed with a common purpose—to assist the development of all countries of the region by promoting the understanding and implementation of human rights. They have been directed to assisting the development of the countries legally, socially, politically and economically and among other things this implies full development of their economic potential both in the agricultural and industrial sectors of the economy, and thus the necessary participation of the women of a community. The seminars on the status of women have all emphasized that women's status is conditioned by their economic status, and the latter again depends upon the economic situation of all citizens of a country. Where all citizens, without regard to their sex, contribute to the economic growth of their country and share the rewards of that growth, that growth tends to accelerate. Equality of property rights for men and women therefore becomes a goal for any developing country.

The Universal Declaration of Human Rights specifically refers to property rights. Article 17 proclaims:

> "(1) Everyone has the right to own property alone as well as in association with others;
> (2) No one shall be arbitrarily deprived of his property."

Article 22 develops this basic view of property rights, thus:

> "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensible for his dignity and the free development of his personality."

while the concept of social security is further developed in Article 25 (1), namely:

> "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

It is noted that Article 22 links the right to social security with the full enjoyment of economic rights. Where the right to property exists for all members of a community, regardless of sex, this implies the right to acquire and hold property including the right of acquisition by inheritance. Thus, a person's social security may derive partly from services provided by the State and partly from his or her own efforts. In many communities, the full exercise of the right to property is essential to the enjoyment of the right to social security.

The right to property has been described as an essential element in man's freedom but while giving due respect to the necessity of preserving this

fundamental individual human right recognition should also be made of the participation by the family, by the corporate group, the village group or other entity, and by the State to a varying extent, in matters affecting the ownership, administration and disposition of property. In developing countries (and most countries of the Asian region are at different levels of development and fall within this category) a measure of participation exists. If must be noted, too, that the nature of property capable of individual or group ownership may exist in a range of forms, again depending on the level of economic development of a country. In those countries with a predominantly rural economy the notion of "property" may comprise land ownership by the individual or the group or the right of occupancy of land whether in perpetuity or for a limited period, but where a more complex economic pattern exists property will include not only land and its products but the ownership of goods, services, industrial plant, money and the sophisticated variants of "investment" known to the businessman and financier.

The Tokyo Seminar on the Status of Women in Family Law (1962) (ST/TAO/NH/14)

The Tokyo Seminar, while dealing at length with matters affecting personal status, also dwelt on matters affecting property rights, more particularly as seen in the context of Article 17 (supra). The Seminar touched on social questions in its final sessions, and these questions, raising as they do problems associated with "social security" and "the right to security" as elaborated in Articles 22 and 25 (1) (supra) were investigated more fully at the subsequent Manila Seminar on Measures Required for the Advancement of Women (1966) (ST/TAO/NR/28).

Participants at the Tokyo Seminar included judges, members of legislatures, senior law officers of governments, academic lawyers and legal practitioners in approximately equal numbers of men and women. They came from the following countries and territories (so described at that time): Australia, Ceylon, China, Federation of Malaya, Hong Kong, India, Indonesia, Iran, Japan, Nepal, New Zealand, North Borneo, Pakistan, Philippines, Republic of Korea, Republic of Vietnam, Sarawak, Singapore and Thailand, while observers from France, Israel, Liberia and the United States of America also attended, in addition to representatives of WHO, UNICEF and 24 non-governmental organisations. There was accordingly a diversity of participation which made possible the comprehensive exchange of views at this seminar from persons representing different legal systems in the region. To date, the Tokyo Seminar has been the only United Nations seminar on the status of women held in the Asian region which has confined itself strictly to legal questions and consequently the findings of that seminar have important relevance to the brief survey undertaken in this paper.

The seminar dealt particularly with the effects of marriage on property rights of women. It was noted that in all systems under review problems arose on—

(*a*) matters of ownership, administration and disposition of property during marriage, and

(*b*) distribution of property on dissolution of marriage whether by decree or death.

It was found that property rights of unmarried women for the most part were the same as those of unmarried men—the situation tended to change only on marriage and then problems of inequality arose. However, in some systems of inheritance law, the position of women whether married or unmarried differed from that of men although not always to their disadvantage as such differences were sometimes closely interwoven with the social patterns of the community.

As to (*a*), (ownership etc during marriage) these matters varied according to the matrimonial regime or system prevailing in a country. Broadly speaking these might be considered to fall within three groups:

1 *Community of Property*:

In this group hardship could result for the wife from the operation of community property regimes where, although the property was in absolute common ownership, the husband was the sole administrator, or his consent was required for the acts of the wife. If the consent were unreasonably withheld, the wife could only have recourse to the courts which entailed considerable expense. The system was harmful for third parties because the husband could refuse to recognise his wife's debts or deny his consent. In some countries, recent reforms had granted rights of joint administration as well as joint ownership or had introduced the requirement of the consent of the wife for all acts of disposition of common property by the husband.

2 *Limited Community*:

This group, as also the regime of conjugal partnership and the united property system, was characterized by the common ownership of property acquired by either spouse during marriage and the separate ownership of and control over property owned at the time of marriage or acquired after marriage by will or gift. In these systems the husband was the sole administrator of the property but the consent of the wife was required for acts of disposition.

3 *Separate Ownership*:

In systems influenced by English Common Law and Statute Law each spouse retained the ownership of his or her property and right to administration and disposition of it independently of the other spouse. Under Moslem law the property rights were very similar. However, some participants noted a trend in their countries towards common ownership of the matrimonial home and its contents, and to the protection of the wife's right to share in any increase of property during marriage.

The seminar generally felt that no one system could be preferred over another but that the full application of the principle of equality of husband and wife should be secured.

As to (*b*), (distribution on dissolution of marriage by decree or death) variations on the distribution of property on dissolution by divorce decree were discussed at length but will not be examined here. However, dissolution of marriage by death may give rise to discrimination against women resulting from inheritance laws. In certain cases, a widow did not have the right to a share in the property of her deceased husband, but was entitled to the usufruct during her lifetime. In others, on an intestacy she shares equally

with the male and female heirs. The seminar made reference to Moslem law under which the widow takes a fixed or guaranteed share. In considering the application of inheritance laws to women other than widows, it was noted that in some countries women took a lesser share than men in the same degree or relationship to the deceased, while in others descendants in the male line were preferred. However, there could be compensatory factors—for example, the lesser share of a daughter inheriting under Moslem law was often supplemented by her dowry.

It appeared that the general principle of the law of inheritance under Moslem law is that the female is entitled to half of what is due to the male. The widow is entitled to one-quarter of the estate of her deceased husband if the deceased left no child. If the deceased left a child, then the widow is entitled to one-eighth. If the deceased leaves a daughter and no son, the daughter is entitled to one-half of the estate of her father. If there is more than one daughter and no son, the daughters share two-thirds of the father's estate equally. If the deceased leaves sons and daughters, then the sons and daughters are residuaries in the proportion of two shares to a son and one share to a daughter.[1] However, it was pointed out by participants from countries where Moslem law was applicable that the question of giving half the man's share to the woman might be justified by the economic opportunities available to women within their community. Change accompanied economic development. Thus in some States of Malaysia, the widow's share on an intestacy was now supplemented by the institution of *narta sapencharian* under which the widow is entitled to half of jointly acquired property. Reference was made to reforms adopted in Iran and also in Arab countries outside the region, specifically Egypt and Syria.

Some participants referred to the *adat* or customary law existing in some countries of South East Asia. It is of interest to note that where in certain areas the law of inheritance is the *adat*, this law reflects the tribal social structure. Thus, the social unit is not the family but the tribe and therefore all rules affecting persons tend to maintain the integrity of the tribe and all rules affecting property are designed to conserve the property in and for the tribe. The tribe is the unit and it is matrilineal. The main object of the *adat* is to provide for the continuance of the tribe through its female members and to prevent alienation of property so that there will always be sufficient to provide maintenance for the women through whom alone the tribe can be continued. From the principle that the matriarchal tribe is the social unit, four cardinal principles of distribution have been declared:

(a) all property vests in the tribe, not the individual;
(b) acquired property, once inherited, becomes ancestral;
(c) all ancestral property vests in the female members of the tribe; and
(d) all ancestral property is strictly entailed in tail female.

The women hold as trustees for the tribe rather than as owners. Property may be acquired and disposed of during life but cannot be disposed of by will and an agreement made during life to vary the succession is void. All property owned by a married couple is joint property and on the death of the husband reverts to the wife's tribe.[2]

The Tokyo Seminar showed that a kind of discrimination may exist against men but, as with the status of women under Moslem law, the distinctions are based on the cultural structure of the community at the time

and its economic organization. As the economic situation of a community develops and grows more complex so of necessity the cultural structure must grow to support it with consequent changes in the legal system.

In general, the seminar agreed that the principle of equality between the sexes must find expression in the law of inheritance; that the surviving spouse should have a share in the estate of the deceased spouse; that the share inherited by a woman should be her absolute property and she should have complete control of it; and that, where there was freedom of disposition by will, the widow and children of the deceased, deprived under the will of the means of subsistence, should be able to apply to the court seeking proper provision.

There emerged from the discussions at the Tokyo Seminar an encouraging view of the legal status of women in the region as revealed by legislative and social action to ameliorate existing hardship and to improve laws relating to property as they affect women. This view was endorsed by the Kabul Seminar on Human Rights in Developing Countries (1964) (ST/TAO/RR/21). Both the Kabul and Manila Seminars made specific mention of the necessity for land reform in developing countries of the region, in order to bring about a more just distribution of land and agricultural income. The Manila Seminar in particular emphasized that agrarian reform in rural areas leads to expanding employment opportunities for women and the Kabul Seminar had already made this point but rightly referred to the benefits to the whole community, both men and women.

Comments

Discussions at these seminars referred to legal change following economic change. An illustration of this may be seen in the Australian experience in its administration of Papua New Guinea where property passing under customary law came to be interpreted as including not only land but new forms of property such as leasehold land, motor trucks and trade stores.[3] The Wills Probate and Administration (Amendment) Ordinance 1970 provides that an indigenous person may make a will disposing of his or her property except native land or other property held entirely by custom over which there is no power of disposal by will. In the absence of a will, property will descend in accordance with existing custom, but if there is no such custom, then in accordance with the general law of intestacy.

The lesson of the human rights seminars in Asia whether dealing specifically with problems affecting the status of women or more widely with general problems associated with Human Rights in developing countries is that any consideration of women's rights whether to property or otherwise must extend to a consideration of the rights and duties of all citizens. In studying women and property law the scope of the subject and particular aspects emphasized at the seminars have served to underline the significance of the right to property as a human right requiring protection and implementation in the region.

Inheritance Law may be seen as one aspect of the right to property. It falls into three categories:

1 *Acquiring the right to property*—The Tokyo Seminar showed how the conditions for inheritance may be more difficult for some than for others (daughters in comparison with sons).

2 *Maintaining the right against all-comers*—this brings in problems of ownership and title.
3 *Disposing of property*—this includes the right of nominating a successor which raises problems of testamentary capacity. This capacity may be limited by law, where the type or amount of property which may be disposed of by will is restricted, or where it depends on status.

A consideration of the second category—the maintenance of the right of ownership against all-comers—raises further problems, thus:
1 *Ownership for a term*—Here the kind of relationship between landlord and tenant is material. The definition of the rights of each, the balancing of joint and conflicting interests may present difficulties, with inadequate solutions provided by existing legislation or customary law. Thus, in the State of West Bengal in the Indian Federation, a system of *barge* cultivation (ie sharecropping) is predominant. This system has suffered two inadequacies: first, arbitrary eviction by the landowner, and secondly, the terms and conditions relating to the share of the produce and costs. The West Bengal Land Reforms Act 1956, provided for a more equitable distribution of the share of the crop. The West Bengal Acquisition and Settlement of Homestead Land Act 1969, provided for the permanent right to homestead land for poor people in rural areas who had for some years been living on the land of others and was designed to prevent arbitrary evictions. But the Government of West Bengal has not yet realised all its plans for land reform.[4]
2 *Delineation of title*—This may be uncertain and ideally should be in a form both accurate and easily capable of recognition. Thus, land has been deliberately flooded and stated to be a tank fishery and not farm land in order to render identification difficult. The setting up of special land tribunals, a new survey of land for the purpose of settlement of title difficulties and cancellation of all *mala fide* records have been recommended in one Asian country concerned with land reform as offering some solutions to these problems.
3 *Recording of title*—This is essential as offering a means of proving and preserving the right to property. It must be up-to-date to be effective. A government should have power to verify the authenticity or otherwise of deeds where they are alleged to have been back-dated and to declare them as made *mala fide* if the evidence so warrants. It will be noted with interest that the system of registration of titles initiated in the State of South Australia (the Torrens system) has been adopted to a considerable extent in countries and territories of South East Asia, notably in the Philippines, Malaysia and Brunei.
4 *The effect of prescriptive rights*—In at least one country in the region, possession of land maintained physically for a period without a break, regardless of the short extent of that period, will confer title. Where vacant land is valuable, for example by reason of its situation, under existing laws it becomes necessary to employ guards as the only way of maintaining ownership. In one of the great capital cities of the region, owners of vacant land in valuable sections of that city employ their own armed personnel to mount guard over their "territory". Again, the full and adequate recording of title appears to be vital.

In brief, the right to inherit becomes meaningless, particularly in relation to an interest in land, if this cannot be enjoyed under known conditions,

identified with certainty, and one's right preserved from forcible deprivation.

It will thus be seen that a preliminary survey of the human rights seminars on the status of women has led to this brief examination of one aspect touched on at those seminars, namely property rights, and this in turn now throws open for general consideration the whole question of the right to property as it presently exists in the Asian region. A short list of problems attaching to one aspect of that right, namely inheritance law, in turn leads to matters affecting ownership of property which are common to everyone in a community both men and women. The Australian Branch Report presented at the 54th Conference of the International Law Association indicated that the question of land ownership covered urban home ownership, State Housing programmes, rural land holding rights and problems of finance and pointed out that these matters were of importance to every country in the region at whatever stage of development.

Finally, it is suggested that a study of property law in the Asian region might be usefully considered by Branches in that region in collaboration with each other, thereby extending the studies initiated by the United Nations Seminars. Such a study might well contribute to reforms of the law relating to the right to property in the area.

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1 A A A Fyzee, *Outlines of Muhammadan Law*, 2nd Ed (Oxford 1964), p 380 ff.

2 Dr Ahmad Ibrahim, "The Status of Muslim Women in Family Law in Malaysia, Singapore and Brunei". (Singapore, *Malayan Law Journal* (Pte) Ltd. 1965), p 85 ff.

3 John Ball, "The Rule of Law in an Emerging Society." (*Justice*, Journal of the International Commission of Jurists, Australian Section No 4 May 1971), pp 63, 64.

4 Mrs Sally Ray, "The Politics of Agrarian Struggle in West Bengal, 1967 and 1969-70." (*The Australian Outlook* August 1971 Vol 25, No 2), p 213 ff.