

The prisoner's rights and the Court

The Portuguese case

Thank you very much for the invitation to this important conference

It is an enormous honour and an immense pleasure to work with

- The Japan Criminal Policy Society (JCPS),
- the Asia Crime Prevention Foundation (ACPF)
- and for the second time, with the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) and, specially, with its Director, Mr. Taro Morinaga, with whom I had the privilege to work and learn in Portugal and also in East Timor some years ago.

My modest conference will try to address the following topics:

A – Introduction

B - The legal status of the prisoner in Portugal

C - Fundamental rights and imprisonment

D - Conditions for the exercise of rights

E - Safeguarding the exercise of rights/ the Court of Execution of Sentences

A - Introduction

Before starting my lecture, I would like to make the following statements:

- The perfect prison does not exist
- Mankind was not made to live deprived of liberty and, therefore, prison will always be something that, whilst necessary in some cases, in a perfect society would not exist, but, in that same society, crimes would not exist either!

It follows that all prison systems have positive and negative developments and that in all of them there is always space for improvement.

Naturally, I will try to emphasize what I consider to be positive in the Portuguese system, even though, at the end, I will briefly comment on some points that I believe should be improved.

Finally, and although I don't know much about the Japanese prison system, from what I have read I can make two important preliminary considerations:

- **Firstly**, it has many positive points, namely the reduced dimension of the prison population and the non-existence of overcrowding, violence among prisoners, gangs or drug trafficking networks, and there is a clear focus on work, education and vocational training, and the transmission of social values to inmates which, surely, is the best way for their future reintegration into the community;

- **Secondly**, I think that legislative amendments introduced in 2005 have been made in the right direction.

Therefore, I will end this introduction by congratulating you for such important positive aspects and, once again, mentioning that all prison systems are in constant need of adjustment.

B - The legal status of the prisoner in Portugal

Let me start my lecture on the Portuguese prison system - which, I repeat, I would like to be understood as a simple exchange of views and that can be surely enriched by your possible questions - with some general principles on the legal status of the prisoner and on the impact that imprisonment has (or does not have) on their fundamental rights.

In Portugal - as generally in Europe - **"PEOPLE GO TO PRISON AS A PUNISHMENT AND NOT TO BE PUNISHED"**.

Indeed, and according to the Portuguese Constitution, the prisoner retains their fundamental rights, subject only to the limitations resulting from the sentence and to the requirements of the respective execution.

According to the Penal Enforcement Law, the execution of sentences must ensure respect for the dignity of the human person and for the other fundamental principles enshrined in the Constitution and in the other national and international laws.

Finally, according to the European Prison Rules, persons deprived of their liberty must be treated with respect for their human rights and retain all the rights that are not taken away by the decision sentencing them or remanding them in custody,

the restrictions placed on those rights shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed

and, finally, conditions of imprisonment that violate human rights cannot be justified on the grounds of lack of resources.

In addition, the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (the so-called Nelson Mandela Rules) also state that all prisoners should be treated with the respect inherent to the value and dignity of the human being.

C - Fundamental rights and imprisonment

More specifically, and in view of the impact that deprivation of liberty has on them, fundamental rights can be grouped as follows:

1 - RIGHTS UNAFFECTED BY IMPRISONMENT

Without being exhaustive and only by way of example, cannot suffer any limitation:

- Right to Life

As Portugal was a pioneer in abolishing the death penalty, the Portuguese Constitution establishes that human life is inviolable.

- Right to physical integrity

The Constitution also establishes that the person's moral and physical integrity is inviolable, and that no one may be subjected to torture or to cruel, degrading, or inhuman treatment or punishment.

In fact, the practice of such acts constitutes a serious criminal offense, punishable by imprisonment up to 16 years.

- Right to healthcare

According to the provisions of article 64 of the Constitution of the Republic, everyone has the right to the protection of health and to access healthcare.

In addition, and according to the Code of Execution of Sentences, a prisoner retains the right to access National Health Service, under the same terms as those ensured to all citizens.

Actually, in some cases prisoners have better and faster access to health care than that provided to other citizens.

I believe this to be fair, since people admitted to prison have worse health conditions - namely due to addictions or because they come from the most disadvantaged or poorest social classes - or because, in some cases, it is not possible to reintegrate the prisoner in the community without first addressing their health problem (namely in cases of drug use).

2 - RIGHTS SUPPRESSED BY IMPRISONMENT

At the opposite extreme we find the rights which exercise is completely suppressed by imprisonment.

- The right to physical liberty

This is the case of the right to liberty which, of course, cannot be exercised to any extent.

Consequently, other rights that are dependent on that one are also suppressed, such as:

- The right to emigrate

- The right of displacement

However, it should be highlighted that the right of liberty which is suppressed is only the right to physical liberty.

In fact, as to what concerns the freedom of will, there is no limitation whatsoever and the law even establishes the State's obligation to promote the sense of co-responsibility of the prisoner, encouraging them to

participate in the planning and execution of their prison treatment, as well as in their social reintegration process, namely through education, vocational training, work and through the participation in various other programs.

In the same vein, it should be also underlined the need for the prisoner's consent to the granting of open regime or parole.

3 - RIGHTS LIMITED BY PRISON

Finally, a brief note to the rights that the prisoner retains, but which, to some extent, are subjected in their execution, to the limitations inherent to the purposes of the sentence or for reasons of prison order or prison security.

- Right to property

This right, although not affected by the application of the prison sentence, is restricted for reasons of order and security.

In fact, according to the law, prisoners may only keep with them objects they need for personal use and for their daily life or to which they attach emotional value, and only if they do not compromise the order, security, and discipline of the prison.

- Right to privacy

This right is safeguarded when, for instance, it is established that the prisoner's admission must take place with respect for their privacy.

However, according to the law, prisoners and their cells may be searched, although this must be done in a way that respects the dignity, integrity, and the prisoner's decency.

- Right to preserve family bonds

A corollary of this protection is, for instance, the right to have visits - which aim to maintain and promote the prisoner's family bonds- or the right to have children with them up to the age of three years old.

However, these rights may be subject to restrictions and control, particularly for reasons of security and order of the prison or because they can be detrimental to the prisoner's social reintegration plan.

- Right to freedom of religion and worship

These rights are recognized by the law but may also be mitigated for reasons of order and security of the prison establishment.

In any case, I would like to take this opportunity to recall that one of the guiding principles in the execution of sentences is its impartiality and the prohibition of privileging, benefiting, harming or depriving prisoners of any right or exempting them of any duty on the grounds of sex, race, language, birthplace, nationality, ethnic origin, religion, political or ideological beliefs, education, economic status, social condition or sexual orientation.

- Right to vote

Prisoners may vote in national elections, but they must do it according to a special procedure, like those used by military or fishers when exercising their missions or activities outside the country.

As we have pointed out, all the aforementioned rights may be restricted for reasons of prison order and security.

However, it is important to stress that these limitations cannot be arbitrary, since they have specific purposes, clearly established in the law.

In other words, these decisions may only be made with a view to ensure compliance with the objectives of the sentence and to maintain an orderly and safe life in prison, they must be also guided by the principles of necessity, adequacy, and proportionality, and must be duly reasoned and recorded.

D - Conditions for the exercise of rights

There is no point in having rights if we cannot exercise them.

For this reason, it is fundamental that the prisoners know their rights (and their duties). The State has the obligation to provide them all this information.

Regarding this matter, I must also congratulate you, because I know that in Japan this obligation is fulfilled in a very rigorous way, through the distribution of an extensive and detailed "Guide to Prison Life" on prisoner's admission.

In addition, it is necessary to make sure that the prisoner fully understands their rights, which means that staff must clarify any doubts that eventually remain and, in some cases (e.g., foreigners), that these documents must be translated into a language that the prisoner can understand.

Moreover, it is important to have in mind that, as a rule, the moment of admission in a prison is always very traumatic:

The individual often enters the prison unexpectedly, in a completely unknown and harsh environment, loses contact with family and friends, can no longer make most of the decisions about their life, is subject to a rigid routine determined by the prison, does not know what their relationship will be with the staff and other prisoners (especially with those who occupy the same cell) and, worst of all, does not know what their future will be.

For all these reasons - and for other circumstances that we could enumerate - it is perfectly normal that the prisoner feels depressed, frightened, anxious, worried, unhappy, and not in a mood to cooperate with the prison administration.

In fact, it is common knowledge that admission to a prison is one of the moments that poses the most problems for order and security and is when there is the greatest risk of self-harm and even suicide for prisoners.

Therefore, it is particularly important to understand the prisoner's state of mind at that moment and to try - in an intelligent, professional, and humane way - to explain to them their new situation, their rights and duties, and the new daily routine they must follow, as well as to understand and try to address their concerns in an appropriate way.

This initial information is usually transmitted by the staff, but there are several European countries that commission inmates to do this, which, if done by the right prisoners, has some advantages because the new prisoner is more likely to believe a peer than an official.

A final note to mention that this duty of information does not end upon admission, but should be maintained throughout all the prisoner's stay in prison.

E - Safeguarding the exercise of rights / the Court of Execution of Sentences

On the other hand, there is also no point in having rights if there are no guarantees that, in case of their violation, there are means to reverse the decision that has been made.

This subject alone would justify another conference.

However, due to the natural limitations of time and while mentioning that there are several mechanisms and instances to safeguard the exercise of prisoner's rights - national or international; local, regional, or global; direct or indirect; official or informal - I will address only the Courts of Execution of Sentences.

To begin with, I would like to mention that in Portugal the execution of sentences has been monitored and supervised, for a long time, in several ways, through these Courts (there are four of them spread all over the country).

In general terms, the **Judges** of those courts are responsible for ensuring:

- that the rights of prisoners - namely those mentioned above - are not violated, which means that the prisoners may appeal the decisions of the Administration to those Courts);
- and that imprisonment be served in accordance with the purposes set out in the law - that is, on the one hand, the defence of society and the prevention of the practice of crimes, and, on the other hand, the social reintegration of the prisoner, preparing them to lead their life in a socially responsible way - which implies having to approve or not, and to ratify or not, certain decisions of the Administration.

On the other hand, the Prosecutors of these courts are responsible, also in general and in addition to the contribution they make to the judge's decisions, for ensuring respect for legality, which implies that several decisions of the Administration must be immediately transmitted to them so that, if they consider them illegal, they can challenge them.

Some examples:

- Individual Rehabilitation Plans

All prisoners sentenced to more than one year of imprisonment must have an individual rehabilitation plan - which contains the measures and activities that must be carried out by the prisoner - that is regularly reviewed.

This plan - and any subsequent amendments - is conceived by the Administration but must be approved by the Judge.

- Prison Regime

In Portugal there are three regimes in which convicted prisoners may serve their sentences: *Common, Open and Security*.

Once again, it is up to the Administration to choose the applicable regime according to the evaluation made of the prisoner.

However, the *External Open Regime* (in which the inmate may leave the prison daily without custody, to study, attend vocational training sessions or health programs) must be approved by a Judge.

And the application of *Security Regime* - which must be mandatorily re-evaluated each three or six months, depending on whether the inmate is over 21 years old - must be communicated immediately to the Public Prosecutor, for verification of its legality.

- Visits and correspondence

The prisoner may receive visits on a very regular basis - either from lawyers, family members or from other persons - and, in certain cases, may also benefit from intimate visits of their wife, husband or partner.

They may also receive letters, which are not subject to censorship, as well as, under certain conditions, make telephone calls to previously authorized contacts.

The Administration is responsible for deciding whether to grant visits and telephone contacts, and also for deciding whether to withhold the prisoner's correspondence, but those decisions can be challenged before the Judge.

Prison leaves

Once the prisoner has served a certain time of their sentence, and provided they meet certain other conditions, they may be allowed to spend some days out of the prison without custody.

The first leave is proposed by the administration, but is decided by the Judge. Only after this first leave may the Administration directly grant temporary leaves.

- Order and Safety Measures

The two most serious measures of order and security are the placement in a separation cell, and the placement in a security room, and the application of both measures must be immediately communicated to the Public Prosecutor for verification of their legality.

- Disciplinary Measures

As to what concerns disciplinary measures, the application of compulsory detention in cell (which may last up to 30 days) or in a disciplinary cell (which may last up to 21 days) can be appealed to the Judge.

- Parole

If certain requirements are met, convicts may be paroled after serving half or two thirds of their sentence. The Judge makes this decision, after considering the opinion of the Administration and of the Public Prosecutor and that decision may be appealed to a higher court.

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A final note to mention, as announced, some of the most important problems affecting the Portuguese prison system at present time:

The first one refers to the excessive size of the prison population, especially if we consider that Portugal is, according to the 2021 GLOBAL PEACE INDEX, the 4th safest country in the World, only surpassed by Iceland, New Zealand, and Denmark.

The second refers to the conditions of the prison park which, in many cases, is old and, in others, is dilapidated.

And the third has to do with the shortage of staff.

However, coming back to the beginning of my lecture, there is no perfect prison system, so Portugal is also trying to overcome these, and other problems.

Thank you very much for your attention.

Lisbon, February 8, 2022

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