

## CHAPTER VII

### THE LEGAL RIGHTS OF PRISONERS

Men in prison are subjected to numerous rules and regulations which govern their movements and actions. They are being deprived of their freedom. The deprivation of some fundamental liberties in the case of prisoners are provided expressly in the Federal Constitution. Article 6(3) of the Federal Constitution states that

6(3) Work incidental to the serving of a sentence of imprisonment imposed by a court of law shall not be taken to be forced labour within the meaning of this Article.

Thus, a prisoner cannot complain that he is forced to do work in prison be it cleaning the prison grounds or working under the employment training scheme. He cannot argue that such work is forced labour because it is expressly provided in the Constitution that it is not.

Further, Article 9(2) deprives the prisoners of their freedom of movement.

Article 9(2) states that

9(2) Subject . . . to any law relating to . . . the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

"Punishment of offenders" can be taken to include offenders serving their term of imprisonment. Such offenders are confined within the prison grounds till the time they are discharged. Even within the prison they cannot leave the workshop, cells, recreational grounds without the permission of the Prison Officers.

But, even though prisoners are subjected to such restrictions, nevertheless, there exist some legal rights of prisoners which are embodied in the Prisons Ordinance 1952 in West Malaysia and other similar penal statutes in other countries. These legal rights pertain to the treatment and condition of the convicted offenders in prison.

For the purposes of this Chapter, the writer will discuss the provisions of the Standard Minimum Rules for the Treatment of Offenders' as drawn up by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders<sup>1</sup> on 30 August 1955, and assess how far the Prisons Ordinance 1953 attain or fall short of this standard.

Standard Minimum Rule 7 provides that

1. Rules or conditions governing the conduct of offenders and the consequences which may follow from violation shall be printed and furnished them together with any explanation that may be necessary for their guidance.

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<sup>1</sup>These Rules are predicated upon standards drawn up by the International Penal and Penitentiary Commission in 1929, revised in 1933, endorsed by the Assembly of the League of Nations in 1934 and revised again in accordance with a resolution of the International Penal and Penitentiary Commission in 1949.

In the prisons of Peninsular Malaysia; a printed abstract in English with translations in Chinese, Malay and Tamil of the Rules regarding the treatment and conduct of the prisoners together with a copy of the prison dietaries are posted in places accessible to the prisoners. In the case of illiterate prisoners, these Rules are read to them within twenty-four hours after admission, and once in every three months.<sup>2</sup>

It would seem, therefore, that the prisoners are given a chance to acquaint themselves with the Rules and have knowledge of the consequences of any violation. In such a state of awareness, the convicted offender has the choice either to follow or breach the prison rules. If he decides to breach them, then the consequences of which he is aware of will befall him.

Standard Minimum Rule 2 provides that

2. Such rules or conditions shall be corrective, not abusive or punitive, in purpose. They shall be no more numerous or restrictive than is necessary to produce responsible and orderly conduct.

Rule 3(1)(a), Prison Rules 1953 provides that

- 3(1)(a) Discipline and order shall be maintained with fairness but firmness, and with no more restriction than is required for safe custody and to ensure a well-ordered community life.

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<sup>2</sup>Rule 22, Prison Rules 1953.

The emphasis, therefore, is not to subject the prisoners to numerous rules and regulations for the sake of punishing them but rather that they learn to discipline themselves in their actions towards the members of the society in which they live in, namely, the Prison Officers and fellow-inmates, so that a well-ordered community life will evolve among the prisoners themselves.

Standard Minimum Rule 3 provides that

3. No penalty shall be inflicted upon any offender for the isolation of a rule or condition except in accordance with established disciplinary procedure adopted by the responsible administrative department.

Such a caution to unjust infliction of punishment is provided by the Prison Rules 1953. Only one Officer-in-Charge of the prison or in his absence the Officer appointed to act for him can deal with the report of a disciplinary offence against the offender.<sup>3</sup> Further, the prisoner concerned shall be entitled to be informed of the offence of which he is said to have committed and shall be given a chance to answer the facts alleged against him.<sup>4</sup> It is mandatory on the part of the Prison Authority to give an opportunity to the offender of prison rules to defend himself.

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<sup>3</sup>Rule 116, *ibid.*

<sup>4</sup>Rule 118, *ibid.*

Standard Minimum Rule 4 provides that

- 4. Penalties shall not be cruel, inhumane, or degrading and no corporal punishment shall be employed as correctional measures. No instrument of restraint shall be applied as a punishment. Penalties shall be assessed and applied only in accordance with an ordered system of regulations and sanctions promulgated by the administrative department and made known to the offender.

Under the provisions of the Prisons Ordinance 1952, punishment by means of rottan is still imposed. This type of punishment would seem to be out of place in view of the aim of rehabilitation. Where a prison offender is sentenced to undergo close confinement in a punishment cell for more than three days on a punishment diet, he shall be given a full diet on every fourth day.<sup>5</sup> Provision is also made to provide against the use of mechanical restraint as a punishment.<sup>6</sup> Fetters can only be employed as a means of restraint or to prevent escape never to be used as a means of punishment. The prisoner, however, has to be examined and certified fit to undergo such restraint by the Medical Officer before the use of fetters is imposed on him.<sup>7</sup>

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<sup>5</sup>Rule 129, *ibid.*

<sup>6</sup>Rule 140, *ibid.*

<sup>7</sup>Rule 141, *ibid.*

Standard Minimum Rule 5 provides that

5. Standardized methods of seeking information concerning offender rights and obligations and of making complaints to the correctional administration shall be established. The offender shall be informed of such methods and permitted to make use of them without intimidation or censorship. Unless it is patently frivolous, every request or complaint shall be dealt with and replied to without undue delay.

Part II of the Prison Rules 1953 provides for petitions and complaints of prisoners. Prisoners have the right to voice their complaints to Visiting Justices or the Chief Officer. They have the right to see the appropriate authority to voice their complaints. As soon as such requests are made, arrangements will be made to record these requests and the matter is brought to the notice of the Officer-in-Charge as soon as possible so that he will notify the Visiting Justices of these requests.<sup>8</sup> In addition, the Officer-in-Charge is under a duty to hear the application of all prisoners who have requested to see him at a convenient hour everyday except on weekends and public holidays.<sup>9</sup> Thus, every prisoner has a right to launch a complaint concerning matters which affect his life in prison to either the Officer-in-Charge or Visiting Justices.

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<sup>8</sup>Rule 114, *ibid.*

<sup>9</sup>Rule 115, *ibid.*

Standard Minimum Rule 6 provides that

6. There shall be no discrimination in the administration of correctional procedures on grounds of race, colour, sex, language, religion, politics, or other opinion, national or social origin, property, birth or other status.

The population of the inmates in the prisons of Malaysia consist mainly of Malay, Chinese and Indian convicted offenders who are allowed to practise their own religion respectively. Every prisoner is treated equally (though subject to the Progressive Stage System) during his stay in prison, given vocational training, education if he wants it, has access to recreational facilities and allowed to practise his religion.

Standard Minimum Rule 7 provides that

7. All accommodations provide for the use of prisoners, including sanitary facilities, clothing, diet and care shall meet proper requirements for health, safety and rehabilitation. To this end, a medical officer shall examine every prisoner as soon as possible after admission, thereafter as necessary. He shall make appropriate recommendations for segregation and classification of those who are found to suffer from disease, defect or other conditions requiring specialized treatment.

Such a health standard is provided by the Prisons Ordinance.

It is usually recommended that one prisoner be allotted to one cell.

Such cells have to be certified as sufficient to contain one prisoner by the Medical Officer. In the Special Prison, cells which are allotted to inmates in the First Stage of the Progressive Stage System are equipped with a bed and blanket in each cell. Inmates in the Second Stage and above are further entitled to a reading table and stool in their individual cells. But under special circumstances, a maximum of three inmates can be put in a cell. It is submitted that such a situation should be remedied as soon as possible as three people living in an extraordinary small cell is unsuitable for health as well as provide an opportunity for contamination of the mind among the three inmates. Further, in every prison there is a section of the prison set aside as a sick bay for prisoners. Where the Medical Officer deems it necessary, sick prisoners can be sent to hospitals for treatment.

Standard Minimum Rule 8 provides that

8. The correctional authorities, in fulfilment of their responsibility to keep offenders free from harm, shall exercise all reasonable care to protect their life and health, and are liable for negligent failure to do so.

The duties and obligations of Prison Officers are heavy. Though they are armed, these weapons can only be used in certain conditions. Even when a Prison Officer sees a prisoner escaping, he shall not resort to the use of his weapon at once unless he has reasonable ground to believe that he cannot otherwise prevent the



escape.<sup>10</sup> But where there is a combined outbreak or attempt to escape such weapons can be used as long as the outbreak or attempt continues.<sup>11</sup> Where a prisoner attacks a Prison Officer, any other prison officer can use weapons on that prisoner provided that he reasonably believes that his fellow-officer is in danger of life and limb.<sup>12</sup> But before a prison officer fires at a prisoner under the above circumstances, he must warn the latter first and such aim must be to disable the prisoner and not to kill him.

Standard Minimum Rule 9 provides that

9. Prisoners shall be allowed to communicate with their family, reputable friends, and legal counsel at appropriate intervals, both by correspondence and by receiving visits and such rights shall not be restricted by reasons of discipline except in instances where they have been abused.

Communication by way of letters and visits are available as of right to prisoners other than banishment prisoners. Such communication to prisoners waiting to be banished is provided as a privilege under Rule 176(1) Prison Rules 1953. Further, any disciplinary offence by a banishment prisoner can result in the withdrawal of privileges, that is to say, including communication to family and friends. Such a

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<sup>10</sup>Rule 25(1), Prisons Ordinance 1952.

<sup>11</sup>Rule 25(2), *ibid.*

<sup>12</sup>Rule 25(3), *ibid.*

situation should be amended. Communication by letters and visits should be made a right. Rule 102(1) provides the legal right of a prisoner to see his legal adviser in the sight but not in the hearing of a Prison Officer where the matter involves the prisoner himself as a party. But where the matter deals with any other legal business, the legal adviser has first to request the permission of the Officer-in-Charge to see the prisoner and furthermore the visit is conducted in the sight and hearing of a Prison Officer.<sup>13</sup> Where the prisoner after conviction has given notice of appeal or where a prisoner detained on an order of banishment, he shall be provided with all the reasonable facilities for seeing his legal adviser.<sup>14</sup> The granting of such a right is extremely important since most prisoners need to be advised in legal matters be it concerning their themselves or their immediate families.

Standard Minimum Rule 10 provides that

10. No impediments shall be imposed upon the rights of any prisoner to free access to the books of law and to the preparation and prompt forwarding of writs, appeals or complaints to courts of law or to governmental authority.

In Malaysia, laymen are not yet well conversant with the intricate rules of procedure but generally leave these matters to their legal practitioners. Therefore the right promulgated in Standard

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<sup>13</sup>Rule 102(2), *op cit.*

<sup>14</sup>Rule 102(3), *ibid.*

Minimum Rule 9 is more appropriate to prisoners in this country than Rule 10.

In the United States, in addition to the above legal rights, statutes apply some liability of prison personnel for the abuse or neglect of State prisoners. But the prisoners themselves face great difficulties in securing redress for such neglect or abuse. This is so because of the failure to provide adequate procedural remedies to support each substantive right and protection which the prisoners are supposed to enjoy. Prisoners may be refused access to their lawyers. Majority of them are, in the first place, ignorant of their legal rights. Even if they want to enforce these rights, they may not have the means to hire a legal practitioner. Furthermore, they face the fear that if they enforce their rights, they may face further harassment and scorn from the Prison Officers who may do everything to make them suffer for the rest of their stay in the prison. Moreover, the prisoners will have to prove the abuse or neglect alleged to be committed by prison officers and thus it is the word of the convict against the word of the officers who are the law-enforcement officers.

Therefore, though such rights are existing and enforceable, the process of such enforcement are difficult and unfavourable to the prisoners.

## CHAPTER VIII

### THE PRISONS ORDINANCE AND THE PRISONS RULES :

#### A COMMENTARY

The Prisons Ordinance and Prisons Rules were enacted in 1952 and 1953 respectively and until today there have been very few amendments incorporated into these laws. In the light of the rehabilitative view today, some of the provisions may seem to be out of line with the trend towards the reformation of offenders. In this Chapter, the writer will assess and comment on some provisions of the law regarding prisons and prisoners.

5.7(1) Prisons Ordinance 1952 provides that

7(1) The Commissioner may, either for effecting the separation of different classes of prisoners or for the enforcement of penal labour or for the training of such classes of prisoners or for other reasons, from time to time by order appropriate particular prisons to particular classes of prisoners, or limit the classes of prisoners who may be imprisoned in particular prisons . . .

This section, it is submitted, paves the way for the enforcement of an effective rehabilitation programme. The different classes of prisoners should not be allowed to mix for fear of contamination, the vulnerable first offender may be influenced

by the hardened criminal who may paint a glorious picture of his criminal career. Further, the different classes of prisoners may require different rehabilitation programmes and therefore specialisation of prisons to some extent is necessary. In Malaysia, therefore, some prisons are set up for particular classes of prisoners, for example, the Special Prison for long-term prisoners and prisoners waiting to be banished from this country, Borstals for young offenders, detainee camps for preventive detainees and rehabilitation centres.

3.9(a) provides that

9(a) Whenever it appears to the Commissioner that the number of prisoners in any prison is greater than can be conveniently kept therein, and that it is not convenient to transfer the excess number to some other prison; such provision shall be made as the Commissioner may direct for the shelter and safe custody in temporary prisons of so many of the prisoners as cannot be conveniently or safely kept in the prison . . .

In the writer's opinion, temporary prisons are satisfactory only from the administrators' point of view but not from the prisoners' point. The word "temporary" has not been defined in the Ordinance and therefore the prisoners may be kept in the temporary prisons till there are vacancies in the prisons but such may not be available since offenders are being convicted and sent to the prisons daily. Moreover, the prisoners may take time to

adapt themselves to their new environment especially to the officers and fellow-inmates. It is doubtful whether such temporary prisons are equipped with rehabilitation facilities. If they are not available, the most important aim of punishment could not be achieved. To remedy the situation, it is suggested by the writer, that the various courts of law be equipped with the statistics of the various prisons' population and the optimum number of prisoners each prison is capable of housing so that overcrowding and unnecessary transferring be avoided.

S.44(2) Prisons Ordinance 1952 provides for the transfer of prisoners who are medically certified as lepers to any leper colony or settlement for treatment.

Leprosy is no longer a major disease in the prisons. In the past few years, there has been a sharp increase in the number of drug addicts and it is very probable that many prisoners are addicted to drugs too. Therefore, in view of the needs of the present day, this lacuna in the law should be filled and provision made to send prisoners, who, although they are convicted of offences other than drug-taking are "checked" on drugs; and prisoners convicted of drug-taking, to hospitals and rehabilitation centres till they are cured.

Rule 3 Prison Rules 1953 provides that rehabilitation is the most important aim of punishment.

Rule 3(1)(a) states that discipline and order "should be maintained with firmness but fairness", in order to ensure a well-ordered community life, a setting which is conducive for the rehabilitation programme.

Rule 3(1)(b) specifies the role of Prison Officers in this programme, that "they should seek to influence (the offenders), through their own example and leadership."

Rule 3(1)(c) seeks to establish the main aim of incarceration, "to encourage (the inmates) self-respect and a sense of responsibility, so as to rebuild their morale, to inculcate in them habits of good citizenship and hard work, to encourage them to lead a good and useful life on discharge and to fit them to do so." Every Rule, therefore, made under the Prison Rules should be in compliance with the principles laid down in Rule 3 though allowance has to be made for the differences in character of the prisoners and varying degrees of discipline pending on their character which can be imposed on them.

Rule 13 provides that

13. A child under three years of age may be admitted with its mother.

It is submitted that this Rule should only be resorted to when all other efforts to find somebody to look after the child

have failed. Prison environment may be harmful even to a child below three years of age, moreover, the child's presence may hamper the mother's rehabilitation programme.

In view of the proposal of a work-release programme for prisoners due for discharge, an incorporation of such a Rule is suggested. Selection of prisoners should be based on their work and social attitudes, the final choice being left to the Discharge Board of which the Superintendent shall be one of its members.

Rule 122 provides that

122. An Officer-in-Charge, if a Chief Officer or Principal Officer Grade 1, may punish any prisoner, found after due enquiry to be guilty of a minor offence, by ordering him to undergo one or more of the following punishments:

- (a) confinement in a punishment cell for a period not exceeding three days on the punishment diet . . . ;
- (b) reduction in Stage, or postponement of promotion in Stage, or forfeiture of privileges for a period not exceeding one month;
- (c) forfeiture of earnings not exceeding one quarter; removal from the Earnings Scheme for a period not exceeding one month, and reduction in earnings grade until such time as the prisoner is considered fit for restoration



to his original grade by virtue of his good conduct and skill at his trade.

Rule 123 provides that if the Officer-in-Charge is of the opinion that in the circumstances of the case his power of punishment is inadequate, he shall refer the case to a Superintendent whose powers of punishment under Rule 124 are much more extensive than that under Rule 123.

It is submitted that in cases where minor offences are committed, a new rule should be incorporated where Prison Officers have the discretion to warn first-offenders of Prison Rules instead of reporting them to the appropriate authority. In many cases, discovering the cause for the breach of the Rules and furnishing sound advice may be more effective than punishment. Rule 124 should only be invoked in the case of prisoners who despite previous warnings continue to indulge in Prison Offences.

Rule 125 states the punishment which can be awarded for an aggravated prison offence by an Officer-in-Charge.

Rule 125(a) awards corporal punishment not exceeding twelve strokes of the rattan. The writer submits that this rule is hardly in line with rehabilitation. The infliction of physical pain can, instead of making the offender repent, harden him in his resistance against any rehabilitative treatment.

Rule 125(b) awards confinement in a punishment cell for a week on a punishment diet. This type of punishment may not be effective since it is highly improbable that the prison offender will repent for his offence while confined in the cell. Moreover, such punishment will hamper the offender's progress at the workshop and educational classes. In place of confinement or whipping, it would be better if the offender is talked to, made to see his mistake by a group counsellor and given another chance to reform himself. The group counsellor, as recommended in an earlier Chapter, should guide the offender and should be able to change his rehabilitation programme if he deems it necessary to do so.

Rule 125(c) provides for the forfeiture of remission. Under the remission scheme, offenders do not have to serve their full term of imprisonment. Therefore, if their remission is forfeited, they will have to serve the whole term. Except for some who are attuned to prison life, majority of the prisoners will be counting the days to their release, to these then, Rule 125(c) will serve as an effective deterrence to the commission of prison offences.

Rule 125(d) awards reduction in stage or postponement of promotion in Stage or forfeiture of privileges as punishment for an aggravated offence. To see the effect of such a rule, reference has to be made to Rule 41 which governs reduction and

postponement of promotion. Rule 41 states that

- (1) as a result of a disciplinary charge . . . , a prisoner may be reduced in Stage or have his promotion to another Stage postponed by the Officer-in-Charge for a period not exceeding three months and by the Visiting Justices for a period not exceeding six months
- (2) a prisoner reduced to a lower Stage shall not be entitled to restoration until he has completed at least three months without a disciplinary charge, or if reduced from the Special Stage, until he has completed at least six months without a disciplinary charge
- (3) a prisoner reduced in Stage shall also be liable to forfeiture of earnings, reduction in Earnings Grade, or removal from the Earnings Scheme for a period not exceeding three months.

It is submitted that the period of reduction in Stage and subsequent restoration should not be fixed but left to be determined by the Superintendent basing his decision on the conduct of the offender after the commission of the offence. To this recommendation must be added the proviso that the offender realise the implications of his future actions and that Prison Officers observe the reformation of the offender and give guidance where necessary. The punishment of reduction in Stage and postponement of promotion in Stage will not be effective if nothing is done to change the offender's attitudes towards

obedience of prison rules. A three months' or six months' limit of reduction in Stage may be too long for some offenders and too short for some. The punishment noted out should be able to suit the needs of a particular offender and the prison Authority should not assume that the character and needs of all prisoners are the same or nearly the same. It is for this reason also that the prisons should not house too many inmates for it is difficult to cater for the changing needs of each inmate when the population is large.

The forfeiture of privileges is the least harmful of the punishments imposed on prison offenders. But this may not be very effective if, in the end, forfeiture of privileges amount to the foregoing of library books or deprivation of recreational activities for a few days.

Rule 125(e) provides for

125(e) Forfeiture of earnings not exceeding three quarters; removal from the earnings scheme for a period not exceeding six months, and reduction in earnings grade until such time as the prisoner is considered fit for restoration to his original grade by virtue of his good conduct and skill at his trade.

The rate of earnings as pointed out in Chapter IV is very low. The prisoners can only spend up to two-thirds of their earnings with which they usually buy their toilet requisites and

and tobacco. It is submitted, that the forfeiture of earnings to the limit of three-quarters and removal from the Earning Scheme with the maximum limit of six months be amended.

It is submitted therefore that a revision of the punishment section for prison offences is due.

Rule 167(1) provides that every banishment prisoner shall be given the opportunity of electing to perform work but Rule 169 states that every such prisoner who does not elect to work under Rule 167 . . . shall not be permitted to return to his former work as a prisoner when serving sentence . . . until he has undergone such period of penal labour as the Officer-in-Charge may in his discretion order. The law seems to be giving with one hand and taking away with the other. Further, under Rule 168, such prisoners who do not elect to work shall be segregated from others who do elect to work.

By Rule 170(1)(b) and (c), as a result of a disciplinary charge, the banishment prisoner by an order of the Officer-in-Charge or Visiting Justice, may be deemed not to be a prisoner to whom the provisions relating to persons detained with a view to banishment apply. An interpretation would be that the banished would not be able to partake in the Earnings Scheme provided by Rule 171, not permitted to purchase articles at the canteen, not eligible for the Progressive Stage System and its accompanying

privileges under Rule 176 which contains to letters and visits, receiving of parcels and entitlement to Stage pay. These Rules, it is submitted, are too severe. Banishment prisoners are often frustrated during the period of waiting to be transferred to another country. They too have to be rehabilitated and depriving them of earnings and opportunity to acquire an industry seem hardly to fulfil the aim of rehabilitation.

Rule 287 provides that no prison officer shall on any pretence whatever fail to make an immediate report to his superior officer of any misconduct or wilful disobedience of these Rules or any abuse or impropriety which may come to his knowledge.

Practice has shown and proved that it would be more effective if the Officers warn and advise first time offenders of Prison Rules. Only habitual offenders of these Rules need to be reported immediately. Therefore, it is advocated that discretion should be given to the officers depending on the particular circumstances of each case.

Thus it is urged that the whole Prisons Ordinance and its subsequent rules be revised so that existing provisions which are too severe or punitive in the light of rehabilitation be repealed and that new provisions which work towards the above aim be enacted.