Death Penalty and Rehabilitation Ideal in ICCPR

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I. Background – Present Situation in Japan

The Penal Code in Japan provides that not only life imprisonment but also death penalty can be imposed on any person who committed a serious crime, such as a murder. As my colleagues will refer to, we currently have over seventy prisoners on death row and about one thousand lifers. Prisons on death row can file a motion of retrial for their cases in claiming miscarriages of justice. Although we also have the habeas corpus act, the Supreme Court has ruled that judges should only have a restricted power of issuing the writ. It doesn’t work at all in reality. If they do not motion to be retried or can not do so, the final measure to relieve their lives is an application of commutation of the sentence as a pardon. But such a pardon has actually never been accepted by the government for the last thirty years. Eventually almost all prisoners cannot help hopelessly waiting for their executions.

On the other hand, every life prisoner is eligible to apply for parole after imprisoned for over ten years, which the Penal Code, article 28, provides. But statistics show the fact far from the provision. Among prisoners who have been permitted to parole, their average incarceration period is actually over twenty-two years. As a zero tolerance sentiment does lately prevail over Japan, the average period has become much longer. Of course, as long as the prisoners are not permitted to be paroled, they have to remain inside the bar for their whole life. The longest prisoner is being imprisoned for nearly fifty years. Even if lifers are released from prison, they could be recalled forever. The only measure to quit a risk of future recall is a pardon of an exemption from sentence execution.

A recent ‘harsher penalty’ policy makes much more prisoners remain in prison and consequently prison population is constantly increasing in many countries. We need to reflect on what suggestions the rehabilitation ideal does have for prisoners who are deprived of any chance to be released. In this context I would like to look closely on how the International Covenant on Civil and Political Rights (ICCPR) should deal with a social rehabilitation.

II. Stipulations in ICCPR

Among ICCPR provisions the most relevant article referring to a rehabilitation ideal is article 10, particularly the first clause of the paragraph 3. A title of this paragraph had been “Orientation of the penitentiary system towards the reformation and social rehabilitation of prisoners” on its drafting stage. The original proposal of the clause in 1953 was “The penitentiary system shall compromise treatment directed to the fullest possible extent towards of prisoners the essential aim of which shall be their reformation and social rehabilitation.” 1 In 1958 the UN General Assembly Third Committee deleted “to the fullest possible extent” from the original text so that the State Parties might be much more bound to this clause.

United Nations Human Rights Committee (HRC) revised its general comment concerning humane treatment of persons deprived of liberty (Art. 10) in 19922. General Comment No. 21 replaced General Comment No. 9. According to the new comment, HRC made it clear that the state party should essentially seek the reformation and social rehabilitation of the prisoner. It seems that HRC had an intention/desire to have this article used more efficiently.

We can also find a view of HRC in its rulings of communication cases under the Optional Protocol to ICCPR. Unfortunately article 10 (3) has arisen in very few communication cases. It is said to be very difficult to establish that one was a specific ‘victim’ of a State’s failure to adopt a rehabilitation model of criminal justice. But in the recent of communication case of Kang v. Republic of Korea (878/1999)3, ruled in 2003, HRC found that there had been several breaches of article 10. HRC admitted that his detention in solitary confinement for a period as long as thirteen years and considered that confinement for such a lengthy period, apparently on the sole basis of his presumed political opinion, failed to meet a particularly needed high burden of justification. The committee held that constituted at once a violation of article 10, paragraph 1, protecting the inherent dignity of the author, and of paragraph 3, requiring that the essential aim of detention should be reformation and social rehabilitation.

I would like to point out how HRC concluded a violation of article 10 (3), in the Kang case. The committee considered whether violations had occurred in an individual case. The essential aim of imprisonment of all the prisoners in States parties should be the reformation and social rehabilitation. Even if a State party has a partially reformative and rehabilitative penitentiary system, it might be concluded to be a breach of this article.

III. Death Penalty and Zero Tolerance – Are they compatible with Rehabilitation Ideal?

ICCPR article 6 is a provision particular for the death penalty. On the one hand ICCPR premises the existence of the death penalty on article 6, on the other hand it has a provision to request the states parties to accept a rehabilitation model on article 10. It seems that there are some contradictions between them. Moreover HRC has observed that the wording of article 6, paragraph 4, did not prescribe a particular procedure for the modalities of the exercise of the prerogative of mercy. As the covenant has this insufficiency, it would be

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3 CCPR General Comment No. 21, 10/04/92.
inevitable that the Second Optional Protocol to ICCPR, aiming at the abolition of the death penalty, had been adopted.

It seems that article 10 (3) is not only a remarkable one but also a controversial one, because it means to dictate the policy States should adopt regarding the treatment of prisoners. The preponderance of ‘law and order’, ‘zero tolerance’ or ‘cracking down’ campaigns throughout the world indicates that prison policy has become a highly politicized area in recent years. There has actually been a trend not towards the ‘rehabilitation’ model of criminal justice but towards the ‘retribution’ one. Some recent powerful politicians may regard the ‘rehabilitation’ aspect of article 10 (3) as anachronism. But if a State party respects the goal of article 10, that is, ‘humane treatment of persons deprived of liberty’, it should be extreme difficult for it to reject the rehabilitative ideal of imprisonment.

As for the reformation and social rehabilitation, there seem to be two implications. Firstly, every prisoner, including a death row prisoner, should have the substantial right to be released at any time. Every one should have a chance to come back to the community all the time. No hope to be released does absolutely mean an inhumane imprisonment. Both a parole and a pardon can be envisaged as measures to be set free. All prisoners are conceived to have a right to pardon and to parole. In this context life imprisonment without parole could be a breach of article 10 (3).

Secondly, as it has so far been specified, the States parties are requested to provide prisoners with teaching, education, vocational guidance and training as well as the outside world. And also the States parties should take care of contacts with prisoners’ families, lawyers and so on. The state party should make it easier that prisoners rehabilitate themselves to the community. The treatment programmes of prisoners should be aimed to social reformation and rehabilitation.

IV. Conclusions

If the ‘harsh penalty’ policy becomes a mainstream throughout the world in the 21st century, article 10 (3) might completely be ignored or eliminated as a useless thing. However, such a policy will surely result in overcrowding of prisons and eventually damages on the inherent dignity of the human being. In considering that, HRC is expected to play a proactive role towards a more rehabilitative and reformatory penitentiary system. Hopefully, HRC makes article 10 (3) more fruitful and effective either in a next general comment or in future communication cases.

Finally I point again to the present situation in Japan. For prisoners on death row and life imprisonment there seems to be rare chances to be released. It is getting worse in terms of length of imprisoned period. The present situation may be found to be a breach of article 10 (3). Unfortunately the government of Japan has been very reluctant to sign up either the First Optional Protocol to the ICCPR or the Second one.

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Article 6
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 judgement rendered by a competent court.

3. (omitted) …

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. (omitted) …

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.

HRC General Comment 21(10/04/92) …

10. As to article 10, paragraph 3, which concerns convicted persons, the Committee wishes to have detailed information on the operation of the penitentiary system of the State party. No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner. States parties are invited to specify whether they have a system to provide assistance after release and to give information as to its success.

11. In a number of cases, the information furnished by the State party contains no specific reference either to legislative or administrative provisions or to practical measures to ensure the re-education of convicted persons. The Committee requests specific information concerning the measures taken to provide teaching, education and re-education, vocational guidance and training and also concerning work programmes for prisoners inside the penitentiary establishment as well as outside.

12. In order to determine whether the principles set forth in article 10, paragraph 3, is being fully respected, the Committee also requests information on the specific measures applied during detention, e.g., how convicted persons are dealt with individually and how they are categorized, the disciplinary system, solitary confinement and high-security detention and the conditions under which contacts are ensured with the outside world (family, lawyer, social and medical services, non-governmental organizations). …