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ARTICLE

Human Rights in Japanese Prisons: Reconsidering Segregation as a Disciplinary Measure

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Abstract

This article discusses the legitimacy of solitary confinement in prisons in Japan, which is still used despite the spread of modern international human rights norms in the twentieth century. The article examines the disciplinary measures provided for in the Act on Penal Detention Facilities and the Treatment of Inmates and Detainees (2006), which is a revision of the Prison Law (1908), and argues that although the legal revisions appear to have been made, the discretionary power of prison wardens remains unrestrained, wardens retain decision-making power for disciplinary measures. The article then critiques this approach on two grounds: first, there is an overuse of solitary confinement (over 85%) among other means of disciplinary measures; and, second, this violates both the spirit and the provisions of the Mandela Rules. International standards are based on the idea of human dignity with the established principle that solitary confinement should be imposed only as a last resort. The article ends with practical suggestions to make a more serious move forward to comply with international standards.

Introduction: An Overview of the Japanese Criminal Justice System[1]

Japan is a unitary state where the national government has the authoritative decision-making power over local governments. This is also applicable to the criminal justice system. This judicial power, which is also national, has the power to find defendants guilty or not guilty and, in cases where they find the defendants guilty, they decide the punishment—whether the death penalty, imprisonment with or without labor, the length of the sentence, or a fine depending on the offense.[2] The

[1] For general accounts of the Japanese Penal Code and its criminal justice system, see Lawson 2015; Vize 2003; Johnson 2007; Oda 2009. For information on the old Japanese prison regime before 2006, see Dando 1997 and Johnson 1996; see also the official pamphlet of the Correction Bureau, "Penal Institutions in Japan."

[2] There are also small fines for misdemeanors (Penal Code, Article 17).

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Department of Justice, to which the Prosecutors Office belongs, has power over defendants, not only during pretrial and the trial, but also in the implementation of punishments after a guilty sentence has been handed down.

In this article, I will show that one of the challenges regarding the criminal justice system, among others, is the overuse of solitary confinement as a disciplinary measure against prisoners. It is well known that "high rates of psychosis and other mental disorders are common in prisoner populations worldwide" (Chowdhury et al. 2019). Furthermore, "Solitary confinement as a disciplinary measure" in Japanese prisons is referred to as a "prison of prisons" or a "cage of cages" (Kikuta 2010, 161), and, as such, it has been recognized internally as a particularly severe form of punishment. Given the international literature on its consequences, there is every reason to be concerned that solitary confinement plays a major role in the severe mental deterioration of prisoners. At the very least, it may have a "negative influence,"[3] which makes it even more difficult for prisoners to be reintegrated back into society after their release.

Before I consider the issues of solitary confinement, in the first section I will clarify what happened in Nagoya Prison in 2001–2002 when eight prison guards killed two prisoners on different occasions, leading to the reform of the prison law in Japan. The main reasons for these incidents were (1) overcrowding and (2) the broad discretionary power of the wardens. The difficulties in managing prisoners may have been augmented by overcrowding, which, for prison guards, made their daily duties even more stressful. The difficulty in treating prisoners in this environment finally reached a critical level of public scrutiny as a result of these incidents, which exposed severe abuse of prisoners and policies that were clearly contradictory to the prison's duties under Japanese law to support prisoners' reintegration into society. I will also discuss a judicial precedent from 1983 regarding a warden's discretionary power.

In section 2, the new prison law, the Act on Penal Detention Facilities, which came about due to these incidents, will be shown in comparison with the old. The new Act expressly aims to protect the human rights of prisoners and to facilitate their rehabilitation with the main goal being to reintegrate them back into society, whereas the old law focused on punishment by way of incarceration and segregation from society rather than reintegration. The new Act therefore includes articles that narrow a warden's discretionary power and enhance the transparency of the prison's administration.

In section 3, to illustrate the actual implementation of human rights in prisons, I consider some features that have remained unchanged even after the reformed Act came into being, such as visitation, hygiene, solitary confinement, and the discretionary power of wardens. Wardens are allowed broad discretion not only in the daily life of the prison but also when deciding to segregate prisoners.

In section 4, I show that "cruel punishment," while also prohibited by the Japanese Constitution permits many problematic prison practices to continue. Since the meaning of "cruel punishment" may depend on the historical era and culture, as

[3] Regarding the "negative influence," see, for example, Weir 2012; Smith 2006; Haney and Lynch 1997; Liebling and Maruna 2011.

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demonstrated in the parallel provisions of the United States Constitution, Japanese prison regulations would be clearer if they were to refer to contemporary international standards for prisons, in particular, the Nelson Mandela Rules (Minimum Standard Rules; see UN General Assembly 2015) the prevailing international standard, which, unlike the language of "cruel punishment," has objective standards and conditions in the use of disciplinary measures. Through my analyses, I will show that the Act is in breach of the Nelson Mandela Rules, not only by the articles that comprise the Act but also by their application. I also show that the UN Committee Against Torture, as well as International NGOs, have criticized it from the perspective of international standards.

I will conclude by emphasizing that the use of solitary confinement as a disciplinary measure in Japan is against the Nelson Mandela Rules, and not only constitutes a violation of international standards but violates human dignity, which is the basis of the international community as well as that of post-World War II Japan.

Nagoya Prison (2001–2002)

Prison Deaths[4]

In December 2001, prison officers used a firehose to "clean" a prisoner's body from head to toe, leading to the prisoner's death due to severe damage to his rectum. In May 2002, a particular type of leather restraining device (*kawa tejō*), consisting of handcuffs attached to a belt (Croydon 2016, 4; hereafter "leather restraining device") was applied to a prisoner in order to suppress their "defiant" actions. The officers caused internal bleeding in the prisoner as they used the restraining device too violently. The prisoner was left alone overnight and was found dead the next morning. The injury of another prisoner using the same leather restraining device was reported in September 2002 (Croydon 2016, 4–5).

All eight officers involved were indicted at Nagoya District Court. On March 30, 2004, one of the eight was found guilty (*Asahi Shinbun*, March 31, 2004).[5] He was sentenced to two years imprisonment with a three-year suspended sentence (with no criminal activity for three years, the two-year sentence will be invalidated). The sentence was finalized without an appeal. On November 4, 2005, two other officers were found guilty (*Asahi Shinbun*, November 6, 2005).[6] One of the two was sentenced to three years with a four-year suspended sentence, and the other was sentenced to one year and two months with a three-year suspended sentence. Both officers appealed to Nagoya High Court, but this resulted in a longer suspension period of five years for the former and a longer sentence of one year and six months imprisonment for the latter on October 20, 2008. They then brought their case to the Supreme Court, which affirmed the Nagoya High Court judgment on June 28, 2011. Four other officers were also found guilty by the district court on March 30, 2007. Two of them were sentenced

[4] This section is a summary of the accounts discussed in Lawson 2015 and Croydon 2016; see also Sawanobori 2006.

[5] "Prison guard Okamoto found guilty of abusing inmates" (Nagoya D. Ct., 31 March 2004). *Asahi Shinbun*, March 31, 2004.

[6] "Prison guards guilty of assault" (Nagoya D. Ct., 4 November 2005). *Asahi Shinbun*, November 6, 2005.

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to two years imprisonment with a three-year suspended sentence, one of the four was sentenced to three years with a five-year suspended sentence, and the fourth officer to one year with a three-year suspended sentence. The eighth officer was found not guilty on the same day as the four, on March 30, 2007, which was finalized. The four officers went to Nagoya High Court but their appeal was rejected on February 26, 2010; all four then appealed to the Supreme Court only to find the decision of the District Court finalized on May 21, 2012. The trials brought public attention to what had happened in Nagoya Prison and also shone a light on other cases of abuse in prisons throughout Japan.

The Underlying Reasons for the Incident

The Broad Discretionary Powers of Wardens

The abuses of Japanese prisoners and the legitimacy crisis of Japanese prisons exposed by the prisoner deaths in Nagoya had their origins in a longer history of legal tolerance for authoritarian power within prisons. A 1983 Supreme Court ruling on the discretion of the head of a penal facility is still referred to in many cases when discretion comes to be an issue. It deals with the right to free speech for suspects who are placed in the custody of a detention house. The suspect in this case was arrested on a charge of assembling with weapons and obstructing the duty of police officers. He was placed in a Tokyo detention house to await trial. On March 31, 1970, while he was in the detention house, a terrorist group he was a member of hijacked a Japan Airlines airplane at Fukuoka Airport. Since he was subscribing to the *Yomiuri* newspaper in the detention house, he had hoped to read about the incident. However, the articles on the incident were deleted by the detention house before the paper was handed to him. He brought the case to court as an infringement of his pursuit of happiness guaranteed by Article 13 of the Constitution, as well as that of freedom of speech guaranteed by Article 21. The case finally went to the Supreme Court, where the decision was rendered on June 22, 1983, in favor of the detention house. The summary of the opinion of the court is as follows:

The fundamental issues in this case are the following two points: 1. If the reading of newspapers is guaranteed by the Constitution; 2. If so, in what circumstances could it be restricted, if it could be restricted at all? (Case Number 1977 (O) 927, Reporter Minshu vol. 37, no. 5, 793)

Regarding the first point, admitting the right to read newspapers for unsentenced detainees, the court held that this is safeguarded by articles 13, 19, and 21 of the Constitution, stating, "The Constitution guarantees the freedom to read newspapers or books as media by which people can obtain opinions, knowledge, and information, and this is in conformity with the purport of Article 13 of the Constitution providing for the personal dignity of all people." Therefore, under normal circumstances, any unsentenced detainees are allowed to read newspapers in a detention house when in custody. However, the court stated that the freedom to read is not absolute, and, therefore, it can be restricted in cases of "paramount public interest." The opinion goes on to say, "It cannot be said ... that restricting freedom of reading is absolutely impermissible, and therefore it may inevitably be subject to a reasonable restriction in individual aspects of life out of the necessity to promote the paramount public interest." Here, the court had to specify what "the necessity to promote the

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paramount public interest" was in exchange for the freedom of detainees to read newspapers.

The court upheld the assertion of the head of the detention house, stating, "Restriction on unsentenced detainees' freedom to read newspapers or books to a certain limit must be permitted when it is necessary not only for the purpose of achieving the goal of detention——preventing escape and destruction of evidence——but also for the purpose of maintaining prison discipline and order." Here, "paramount public interest" is equal to "preventing escape and destruction of evidence" and "maintaining prison discipline and order." The court says on the latter, even for "maintaining prison discipline and order, such restrictions must be limited to the extent that is truly necessary to achieve it." Consequently:

> It is not sufficient to establish that there is a general or abstract fear that prison discipline and order would be impaired if reading were permitted, but it must be recognized, in light of the predisposition and behavior of the detainee(s), prison management and security conditions, the content of the newspapers or books concerned, and other specific circumstances, that there is *a high likelihood* that problems would occur to the extent that should not be left unsolved for the purpose of maintaining prison discipline and order if reading were permitted, and in this case, the restriction should be within the limit that is necessary and reasonable to prevent the occurrence of such troubles (emphasis added).

However, here again, "high likelihood" invites the question as to how to judge this; on this point, the court specifically determines that it is "the head" of a prison:

> [This] should largely depend on a discretionary decision made on a case-by-case basis by the head of the prison who is well versed in the actual conditions within the prison and directly in charge of prison management.

The court also grants the head of a prison the presumptive legitimacy of the decision almost automatically. It says:

> If reasonable grounds can be found for the head of a prison to determine that there is a high likelihood of the occurrence of trouble, and the head's decision that the restrictive measures are necessary to prevent the occurrence of trouble is reasonable, it is appropriate to construe that the measures taken by the head can be accepted as legal.

Therefore, if the head of a detention house, by discretion, sees that there is a "high likelihood" that problems could occur, the warden can restrict the freedom to read. In this particular case, considering all the factors, including the nature of the detainee's "predisposition and behavior" that demonstrated the"high likelihood," the head's decision to restrict was upheld as legal and constitutional.

This case was about an *unsentenced detainee*'s freedom to read newspapers. If *unsentenced detainees*' freedoms can be restricted when the "high likelihood" standard is met, so can the freedom of *sentenced prisoners* be restricted because, for them, the

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"presumed innocent" principle does not apply. Prison wardens are allowed a wide range of discretion (see Tokyo District Court, 5 December 2019, case number: 2019WLJPCA12058018 [Westlaw Japan]).

This judicial deferral to the discretion of prison wardens extends well beyond the specific facts of the 1983 decision. Based on this general restriction of prisoners' rights, the warden of Nagoya Prison in 2001 and 2002 also was presumed to have had broad discretion when determining methods to subdue violent prisoners, such as using leather restraining devices.

Overcrowding in Prisons

Overcrowded prisons are difficult to manage; for example, single cells with two prisoners instead of one, dorm-style cells, or common cells designed for six prisoners but used by seven or eight. An extreme example of overcrowding has been ongoing in California since 2007,[7] and the state is still struggling to lower the occupancy rate down from 137.5%, which was ordered by the federal court.

At the time of the Nagoya Prison incidents in 2001 and 2002, the occupancy rates for Japanese prisons holding sentenced prisoners were between 116.5–117.6% (Ministry of Justice, *White Paper on Crime* 2003; 2005).[8]

Even with this occupancy rate in Japanese prisons, the penal code was changed by a "tough on crime" policy; the law went into effect in 2006. Indeed, the policy itself was nothing new but the principal policy began in the 1990s (Johnson 2007). Corresponding to this, the number of penal code offenses increased from 1996 until they peaked in 2002, and the prison population, similarly, started to grow in 1995 until it peaked in 2006. The number of reported cases and the number of inmates started to decrease in 2003 and 2007 respectively (*White Paper on Crime* 2022).[9] The reasons for this decrease have yet to be determined but a change to the penal code in 2006 extended the maximum term of definite imprisonment from twenty to thirty years. Terms of imprisonment for felonies were also extended. For example, murder carries a sentence of up to twenty years (from fifteen years previously), rape up to twenty years (from fifteen), and assault up to fifteen years (from ten). New crimes were

[7] This is regarding the incapability of the prison management at the occupancy rate of 200% and the intervention of Federal court orders; see for example, Ralph Coleman, et al., Plaintiffs, v. Arnold Schwarzenegger, et al.

[8] Fig. 2-4-1-1, "Trends in the rate of imprisonment of penal institutions" (as of December 31 each year, 1983–2002); *White Paper on Crime* 2003 (http://hakusyo1.moj.go.jp/en/49/nfm/n_49_2_2_4_1_0.html#H002004001001E); Fig. 2-4-2-1, "Trends in the rate of imprisonment of penal institutions" (as of December 31 each year, 1985–2004); *White Paper on Crime* 2005 (http://hakusyo1.moj.go.jp/en/53/nfm/n_53_2_2_4_2_1.html#H002004002001E) (accessed 11 May 2023). Violence in Japanese prisons is rare according to the "Annual report of statistics on correction" (2021) published by the Ministry of Justice. Among 26,329 disciplinary measures in 2021 of male prisoners, 25 were for deaths/injuries against other prisoners, 1,179 were for assault against other prisoners, 21 were for death/injuries against prison employees, and 266 were for assault against prison employees. https://www.e-stat.go.jp/dbview?sid=0003280192 (accessed 22 April 2023).

[9] Fig. 1-1-1-1, Penal Code offenses: reported cases, cleared persons and clearance rate (1946–2021); Fig. 2-4-1-1, Inmate population of penal institutions and rate per population at the end of the year. *White Paper on Crime* 2022 (https://www.moj.go.jp/content/001393404.pdf) (accessed 23 April 2023). The figures show that the numbers started decreasing in 2003 and 2007.

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introduced: gang rape, and gang rape resulting in death or injury. Punishments for these new crimes are longer prison sentences.[10] In order to solve the issues surrounding the law and the prison system, the Ministry of Justice began reforms that are detailed in the following section.

Prison Reform

Proposal to the Minister of Justice and the Act on Penal Institutions (2005)

The deaths of prisoners at Nagoya Prison caused the public to question the adequacy of the ninety-seven-year-old Prison Law and the prison system itself, and the government finally responded to complaints about the treatment of prisoners. Beginning in 2003, the Ministry of Justice studied (1) the treatment of prisoners permitted under the law and (2) the abuse of prisoners outside the law. The Justice Minister devised an advisory body called the Correctional Administration Reform Council (Gyō-kei Kaikaku Kaigi; hereafter, "Council"). The Council was divided into three subcommittees. These subcommittees met eight to nine times each and the Council met ten times over a period of nine months (March 2003 through December 2003). The Council handed its Proposal (Gyō-kei Kaikaku Kaigi Teigen) (2003) [hereafter "Proposal"] to the Minister of Justice in December 2003 (Croydon 2016,[17]).

The fifty-page "Proposal" suggested reforms in six major areas:

1. Better treatment of prisoners
2. Transparency of the prison administration
3. Establishment of a remedial system for the violation of human rights
4. Establishment of rehabilitative medical support
5. Opening of regular study meetings on human rights for prison officers
6. Modification of the personnel system in rehabilitation institutes[11]

After the recommendations were considered by different groups and organizations, the old Prison Law (Kangoku Hō) was rewritten (Croydon 2016, 16–18, 24). This was the first time since 1908 the law on the treatment of prisoners was drastically rewritten.[12] The new law was adopted on May 18, 2005, and implemented in May 2006. The law is now known as the Act on Penal Institutions and the Treatment of Sentenced Inmates, and, in 2006, it was integrated into the current law, the Act on

[10] The following articles of the Penal Code were amended by Law No.156, 2004: Penal Code, Article 12, sec. 1 (maximum term of imprisonment with labor); Article 13, sec. 1 (maximum term of imprisonment without labor); Article14, sec. 2 (maximum term of augmentation of punishment); Article 177 (rape); Article 178–2 (rape in a group); Article181, sec. 3 (rape in a group resulting in death or injury); Article 199 (murder); and Article 204 (injury).

[11] Area one is discussed on pages 10–25, area two on 26–29, area three on 31–35, area four on 35–44, area five on 44–45, and area six on 46–47 of the Proposal.

[12] A gradual process of modernization of the Criminal Justice system in Japan took place starting in the Meiji Era (1868). After decades of enforcement of criminal justice by Imperial Proclamations, Criminal Law (law number 45, April 23, 1907) simplified the punishments to match up with Western standards by abolishing ancient penalties, such as an exile to a remote island, flogging, and caning, and by introducing more custodial sentences such as imprisonment. Along with modernizing the Criminal Law, Prison Law (law number 28, March 27, 1908) was also enacted in the following year (1908), which contained only 75 articles. Therefore, the daily management of prisons and prisoners was in the hands of prison wardens.

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Penal Detention Facilities and the Treatment of Inmates and Detainees[13] (hereafter, the "Act"). The Act consists of 293 articles and requires prison officers "to ensure the adequate treatment of inmates ... by respecting their human rights" (Article 1). Successful rehabilitation of prisoners is a key factor in reducing recidivism, which is also written down in the Act as follows:

> Article 30. Sentenced persons are to be treated with the aim of motivating them to reform and rehabilitate and to develop an adaptability to life in society by developing their awareness while taking into consideration their personalities and circumstances.

Treatment of Prisoners under the Act

Some of the specific reforms that were intended to improve prisoner treatment include:

(a) Prisoners may have a minimum of two visitations per month (Article 114(2));
(b) Prisoners may meet not only with family members or an attorney but with friends or others (Article 111(1)-(ii) and (iii) and (2));
(c) Prisoners may send a minimum of four letters a month (Article 130(2));
(d) Model prisoners in an open-type institution may have telephone privileges (Article 146(1));
(e) Model prisoners who belong to certain categories may be permitted for "day leave or a furlough" for a specific period up to seven days (Article 106(1));
(f) Model prisoners who belong to certain categories may be permitted "outside work with commutes" (Article 96(1));
(g) Prisoners who are dependent on drugs such as narcotics or stimulants or who belong to a gang under a category specified by law are required to attend guidance for reforms (Article 103(2));
(h) Leather restraining devices are forbidden;
(i) Prisoners are permitted to exercise outside daily (except Sundays and specified days) (Article 57);
(j) There is a procedure by which a prisoner may claim and reclaim a review of disciplinary measures with the Superintendent of the Regional Correction Headquarters (Article 157(1) xiv), file complaints with the Minister of Justice (Article 166) and/or with the inspector (Article 167), as well as with the warden (Article 168).

The treatment of prisoners should improve because the Act limits the discretion of prison officers by enumerating eleven acts against which disciplinary measures can

[13] The Act on Penal Institutions and the Treatment of Sentenced Inmates (Act No. 50 of 2005) was augmented by further legislation in 2006, which became the Act on Penal Detention Facilities and the Treatment of Inmates and Detainees (Act No. 50 of 2005). This law includes provisions for treatment of not only prison facilities but also detention houses that intern defendants and death row prisoners, as well as Coast Guard detention facilities.

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be imposed (Article 74, sec. 2 [eleven deeds]).[14] To keep a balance, six categories of disciplinary measures and the maximum penalties for each measure were also enumerated.

Article 151(1). The categories of disciplinary punishments which may be imposed on sentenced persons are as follows:

(i) Reprimands;
(ii) Suspension from work pursuant to the provisions of Article 93 for a period not exceeding ten days;
(iii) Complete or partial suspension from the use or consumption of self-supplied articles pursuant to Article 41, paragraph (1) for a period not exceeding fifteen days;
(iv) Complete or partial suspension of access to books, etc. (except those deemed necessary for the protection of the rights of defendants or suspects, or for the protection of rights such as making arrangements for a lawsuit) for a period not exceeding thirty days;
(v) Reduction of up to one-third of the calculated remuneration;
(vi) Confinement for a period not exceeding thirty days (for a person not less than twenty years of age at the time of imposing the disciplinary punishment, and if the circumstances are especially serious, for a period not exceeding sixty days).

However, there are numerous elements in prison life in practice that remain unchanged even after the Act and exemplify the harsh punitive spirit of the original penal law rather than the expressed aspirations of the reforms. Noting a couple of examples may suffice. Prisoners have to march between living quarters and factories, and they are subjected to physical inspections in between. And, as a written Ministerial Order (No. 57 of May 23, 2006, hereafter the "Regulation"), they are entitled to bathe more than twice a week (Regulation, Article 25),[15] but in practice, only the minimum of twice a week is allowed, except for three times a week during summer. These unchanging practices, including solitary confinement, should be challenged in light of the human dignity that the international community of post-World War II recognizes, and upon which this community was reestablished (refer to the preamble of the Charter of the United Nations). In section 3, I consider solitary confinement, looking in particular at the above sixth section of the Article.

Establishment of the Penal Institution Visiting Committee

Another change brought into the prison system by the Act and intended to improve the treatment of prisoners is that, in order for the transparency of the administration of prisons to be maintained, a "Penal Institution Visiting Committee" (hereafter "PIVC") was established for each of the seventy-four penal facilities, including fifty-

[14] See also Article 96(4) for "Special compliance rules" in cases of Outside Work with Commute. Also, Article 150(1)–(3) for requirements of disciplinary action.

[15] The same article states that bathing can be restricted to once a week while a detainee is imposed with solitary confinement as a disciplinary measure. See also Kikuta 2010, 63–66.

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nine adult prisons, seven juvenile prisons, and eight detention houses.[16] A PIVC is composed of a maximum of ten members, with a lawyer, local medical personnel, and citizens (Act, Article 8; see also Kikuta 2010, 202), and each prison is visited by the members for inspection on a regular basis. The PIVC has a legal right to enter the prison and requires the warden to furnish information about the prison in order to inspect various aspects of the prison. They are charged with forming opinions based on information gathered through interviews with prisoners and corrections officers (including wardens), as well as the inspection of documents and sending their opinions to the warden in writing. Summaries of these opinions expressed by each PIVC, and the measures taken by each prison in response, are made public on the Ministry's website every year.[17]

Establishing a PIVC at each prison in 2005 was a step forward; however, this monitoring body is not an oversight mechanism required by the Optional Protocol of Convention Against Torture (OPCAT) for signatory states. This is understandable, as Japan—like the US and Canada—is not an OPCAT signatory state. However, Japan's PIVC regime may be able to become an external oversight organization. Naturally, we might have to wait for decades until this happens, as the Canadian example has demonstrated. The Office of the Correctional Investigator (OCI)[18] in Canada was established in 1973 and will be celebrating its fiftieth anniversary in 2023. OCI became an oversight organization for the Canadian federal prison system, and the development and expansion of the OCI into the functioning mechanism as it is today took a significant amount of time and experience. The UK's dual oversight mechanism, comprised of the Independent Monitoring Boards (IMB)[19] and His Majesty's Inspectorate of Prisons (HMIP),[20] has a similar history. Japan has much to learn from these oversight mechanisms and the experience of Canada, the UK, and other European countries where prison oversight mechanisms have been established for many years to try to resolve problems raised by prisoners.[21]

Opening the prison to a PIVC may help prevent the abuse of prisoners at the hands of prison officers. However, the system of inspection and the capability of members of the PIVCs to carry out the inspections or investigations are challenges for future discussion.[22] I will discuss the issues regarding solitary confinement in the next section.

[16] As of April 2023. http://www.moj.go.jp/content/001262557.pdf (accessed May 8, 2023). On top of the seventy-four penal institutions, there are thirty-eight committees for Juvenile Training Schools, forty-four for Juvenile Classification Homes, and two for Immigration Detention Facilities, and divisions.

[17] https://www.moj.go.jp/content/001380227.pdf (Accessed May11, 2023).

[18] OCI, see https://www.oci-bec.gc.ca/index-eng.aspx (accessed May 8, 2023).

[19] IMB, see https://imb.org.uk/ (accessed May 8, 2023).

[20] https://www.justiceinspectorates.gov.uk/hmiprisons/ (accessed May 8, 2023).

[21] OCI, for example, states in its "Roles and Responsibilities," that "The primary function of the Office is to investigate and bring resolution to individual offender complaints. The Office as well, has a responsibility to review and make recommendations on the Correctional Service's policies and procedures associated with the areas of individual complaints to ensure that systemic areas of concern are identified and appropriately addressed." The experience of the OCI shows that oversight mechanisms can serve not only as a resolution process for prisoners' complaints but also as a method of identifying systemic challenges for correctional services.

[22] Incidents at Nagoya Prison were revealed in December 2022, involving twenty-two prison guards abusing three prisoners. Ten of the twenty-two guards were prosecuted for criminal offenses. These repeated abuses may have been avoided earlier if the oversight mechanism had been improved since its establishment in 2005. They show the necessity of a more effective oversight regime in Japan.

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What Remained Unchanged Under the Act

A glimpse of the old system can still be seen in such aspects as visitation rights, hygiene, the overuse of solitary confinement, and the prolonged use of "protection" cells.

Visits and hygiene

Regarding visits, Article 110 of the Act states:

> Article 110. In permitting, prohibiting, suppressing, or imposing restrictions on a sentenced person's contact with the outside world (visits, [. . .]), attention must be paid to the fact that appropriate contact with the outside world is instrumental to their reformation and rehabilitation, and to their smooth reintegration into society.

In other words, visitation rights should be guaranteed by the above Article. However, Article 114 allows certain limits on the conditions of visits.

> Article 114 (1). With regard to the visits a sentenced person receives, wardens of penal institutions may, pursuant to a Ministry of Justice Order, impose restrictions necessary for either maintaining discipline and order or the management and administration of the penal institution as to the number of visitors, the visiting site, date and time, duration and frequency of visits, and other conditions of visits; (2)when wardens of penal institutions impose restrictions on the frequency of visits pursuant to the provisions of the preceding paragraph, the frequency must be not less than twice per month.

Paragraph (2) above allows for a minimum number of visits of twice a month. Regarding the duration of a visit, the Regulation states in Article 73:

> Article 73. If the duration of a visit to an inmate is restricted pursuant to the provisions of paragraph (1) of Article 114 of the Act, the duration must not be shorter than thirty minutes; provided, however, that if there are compelling reasons in light of the circumstances in which the request for a visit is submitted, the number of rooms specified as visiting sites, or other reasons, the duration may be limited to shorter than thirty minutes but not shorter than five minutes.

Therefore, visits can be limited to only twice a month and for five minutes each time.[23] This rule applies to regular prisoners, and for those prisoners who are placed under solitary confinement as a disciplinary measure, there are different rules.

Hygiene is maintained by exercising and bathing. Article 59 of the Act states, "Inmates are, pursuant to a Ministry of Justice Order, required to take baths adequate for maintaining hygiene inside the penal institution." Therefore, prisoners have the

[23] Most visits are held in a booth with a window divide, which does not allow any physical contact or the passing or sharing of goods or food.

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right to take baths. However, again, Article 25 (1) of the Regulation allows this to be limited: twice a week; and three times during summer in practice.

> Article 25 (1). An inmate is provided with the opportunity to take a bath promptly after the commencement of the inmate's commitment to a penal institution, and after that, at a frequency of twice a week or more . . . .

Once a prisoner is placed in solitary confinement, bathing opportunities can be, and in most cases are, limited to only "once a week" according to the same paragraph in parentheses:

> (An inmate undertaking disciplinary confinement (the punishment prescribed in item (vi) of paragraph (1) of Article 151 of the Act) is given an opportunity to take a bath at a frequency of once a week or more.)

I will also touch on the limitations placed on exercising in the next section.

Many aspects of the daily lives of prisoners are restricted without being limited to the aspects mentioned above. Moreover, once they are placed in solitary confinement as a disciplinary measure, their lives are even more restricted based on the Ministry of Justice Order, whose constitutionality should be reviewed in light of global standards. Another point to keep in mind is how easily or arbitrarily solitary confinement can be imposed as a disciplinary measure. For example, a chat with another prisoner while working resulted in twenty days solitary confinement as a disciplinary measure, a stare at a prison officer resulted in ten days, and a bad word said to an officer who gave a warning on poor job performance resulted in thirty days.[24] A prisoner is completely regulated while in solitary confinement. Below I will examine how their lives are restricted.

Solitary Confinement

There are two types of solitary confinement: one is solitary confinement in living quarters, commonly referred to as "administrative segregation," and the other is solitary confinement as a disciplinary measure.

Solitary Confinement in Living Quarters (Administrative Segregation)

Prisoners with problems that hinder them from living in the same cell as other prisoners are placed in single cells. For example, prisoners with psychoneurotic disorders are placed in single cells to maintain order and discipline in prison. Article 76(1) of the Act justifies the segregation of these types of prisoners and placing them in single cells. The duration of administrative segregation is limited to three months with the possibility of renewal for one month if there is a particular necessity (Article 76(2)), or after obtaining the "opinion of a medical doctor on staff . . . at least once every three months" (Article 76(4)). However, because these prisoners did not breach

[24] This is based on my observations as a PIVC member at Nagoya Prison in the Disciplinary Committee, where offenses and the disciplinary actions for them are discussed and decided, held from 1 p.m. until 3:15 p.m. on September 17, 2009; see also Kikuta 2010, 151–52; Kikuta and Kaido 2007, 129.

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any rules, prohibitions on disciplinary measures are not applied. They stay in single cells all day long, except for bathing or exercising as directed by the provision, and work alone during the daytime, also in their cells. This outdated and inhumane treatment was carried out even after the Act had been enacted. There have been a couple of lawsuits: a prisoner in Nagoya Prison spent 192 days from 2012 to 2013 in a solitary cell as a "provisionary measure" until assigned factory work. In 2018, Nagoya District Court awarded him compensation after confirming that solitary confinement for such a long period was illegal (1470 Hanrei Times 195; Nagoya District Ct., September 6, 2018). Another lawsuit for compensation was rendered for a prisoner in Kumamoto District Court in the same year. A prisoner was segregated in a solitary cell with a surveillance camera for 216 days, which was found by the District Court to be illegal because "the necessity of placing the prisoner under strict surveillance was considerably low" (1455 Hanrei Times 103, 2395 Hanrei Jiho 83; Kumamoto District Ct., 23 May 2018).

Solitary Confinement as a Disciplinary Measure

Solitary confinement is a method or category of disciplinary measures authorized by the Act. Most prisoners who are sanctioned with disciplinary measures are given solitary confinement. In 2003, when the incidents occurred in Nagoya Prison, 33,346 cases resulted in solitary confinement from a total of 43,173 disciplinary cases. This figure represents 77.2% of total disciplinary measures against male prisoners (Ministry of Justice, *Annual Report of Statistics* 2003, volume I, 344).[25] The number increased in 2004 to 37,558 from a total of 46,166 (*Annual Report of Statistics* 2004, volume I, 344),[26] representing 81.4% of disciplinary measures. In 2018, the total number of disciplinary measures was 34,228 for males and 2,461 for females, among which 30,084 cases resulted in solitary confinement for males and 2,102 for females. This means that about 87.9% of males and 85.4% of females ended up in solitary confinement, although there are other types of disciplinary measures authorized by Article 151(1) of the Act, such as reducing remuneration for prison work (1,078 for male/17 for female), deprivation of reading privileges (37/8), and reprimands (3,029/334) (*Annual Report of Statistics* 2018, volume I, table 18-00-95). Solitary confinement is the most-used disciplinary measure in Japan even today, or maybe even more so today than in the past (although reliable data does not exist prior to 1961.).

There are legal provisions that further specify restrictions on freedom when solitary confinement is imposed—such as using or consuming self-supplied articles, access to books, visitation, and the sending and receiving of letters—are all prohibited by Article 152 (1) of the Act, and (2) of the same article restricts hygiene:

> Article152 (2). Notwithstanding the provisions of Article 57, an inmate under disciplinary confinement is, in accordance with the standards provided by the Ministry of Justice Order, to be restricted from exercising as long as it does not hinder maintaining their good health.

[25] For female prisoners, 1176 were placed in solitary confinement out of 1517 incidents, comprising 77.5%.

[26] For female prisoners, 1067 were in solitary confinement out of 1481 incidents in the same year, comprising 72.0%.

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On top of the restrictions, wardens are authorized to use a wide range of further restrictions by the Regulation:

> Article 86 (2). The warden of the penal institution may impose, within the limit necessary for the purpose of the confinement, restrictions on the life and activities of an inmate serving disciplinary confinement beyond what is provided for in the Act.
>
> (Granting of Opportunities to Exercise)
>
> Article 87. An inmate serving disciplinary confinement must be granted the opportunity to exercise at least once per week.

Regarding these provisions, we need to keep in mind the following: (1) sixty-day consecutive isolation is permitted by Article 151 (1)(vi) of the Act if the circumstances are "especially serious," and (2) as per Article 86 (2) of the Regulation, the warden "may impose . . . restrictions . . . beyond what is provided for in the Act." These provisions grant wardens broad discretionary powers beyond the Act. These articles are not compatible with today's international standards.

Although it is neither in the Act nor in the Regulation, in practice, prisoners who are in solitary confinement must sit upright on the floor with their knees together and legs folded under them (in the *seiza* position) on tatami mats on the floor for about ten minutes every hour from 9 a.m. until 5 p.m. They are prohibited from reading, speaking, or writing all day, and they cannot meet with anyone except their legal counsel. This solitary confinement is limited to sixty days by the Act. However, with only a one-day interval, a prisoner can once again be placed in solitary confinement—even a minor misbehavior during the first solitary confinement may result in further confinement. Thus, a prisoner who is caught standing up to stretch out his legs might find himself back in solitary confinement after a one-day respite.

"Protection" Cells (Regulation Article 39)

Before the Act came into effect in 2006, unofficial disciplinary actions were carried out against those prisoners who became uncontrollably violent by placing them in "protection" cells. "Protection" cells are designed and constructed, following Article 39 of the Regulation, so that other prisoners and prison officers are protected from violent prisoners by isolating them until they have calmed down (Croydon 2016, 25). The "protection" cell contains nothing but a toilet, and there is a surveillance camera on the ceiling, through which guards can watch from a separate room. Unlike regular cells, the cell is air-conditioned because there are no regular windows, and the floor has electrical heating to be switched on when needed. The flush button for the toilet and the air-conditioning and heating switches are located outside the cell. Only prison officers may operate these switches. The cell is soundproof so the segregated prisoner cannot bother other prisoners. It is for isolation, and, therefore, by location or construction, the prisoner's existence may be erased from others' consciousness.

Under these circumstances, when the officers needed to subdue a violent prisoner and isolate them, a leather restraining device was often used. In a notification from

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the Ministry of Justice in 1967, isolation in a "protection" cell was restricted to seven days. However, there was a proviso that allowed for an extension of three days. The extension may be renewed again and again, which virtually allows a warden to isolate a "dangerous" prisoner as long as they wish. Thus, prison wardens are unrestricted when isolating prisoners in "protection" cells.

The use of "protection" cells today is limited by Article 79 (3) of the Act to seventy-two hours and, when "particularly necessary," it can be extended by forty-eight hours each time after "promptly obtaining the opinion of a medical doctor on the staff" (Article 79 (5)). Although the Act tries to protect prisoners' rights by clarifying the limit of the usage, the heavy reliance on internal incarceration in prison must be questioned in light of today's international standards.

In this section, we examined what has not been changed by the Act; visitation and access to hygiene is very limited, although Article 30 of the Act aims, as the basic purpose of treatment, to rehabilitate and reintegrate prisoners back into society. Since the maintenance of good relationships with family members and workplaces outside is important for their rehabilitation and reintegration, so is hygiene to maintain their good physical and mental health. Other restrictions of the old system that are still used include the overuse of solitary confinement, which consists of over 85% of all disciplinary measures. The use of "protection" cells is usually employed before disciplinary measures. Prisoners may be placed there until the necessity disappears, which could be abusively long (FIDH and CPR 2022). On top of the overuse of solitary confinement, "administrative segregation" in living quarters, for which the same level of due process procedures for disciplinary action is not required—and is at the discretion of wardens—prisoners can be isolated for a long time, with the only condition for extension being the advice of an on-staff medical doctor. In Articles 76 (4) and 79 (5), wardens are authorized to implement such isolation.

In the next section, I will consider how solitary confinement can be deemed in violation of the prohibition of "cruel punishment" and the international standard for prisoners' rights.

Cruel Punishment and International Standards

Before I examine the Nelson Mandela Rules as the international standard, I will consider the context of the Rules in the post-World War II era.

Cruel punishment and Human Dignity

Similar to the Eighth Amendment of the U.S. Constitution, Article 36 of Japanese Constitutional Law prohibits cruel punishment as follows:

> Article 36. The infliction of torture by any public officer and cruel punishment is absolutely forbidden.

However, the meaning of "cruel punishment" relies on the historical era and culture, as the Chief Justice of the U.S. Supreme Court Warren clarified in *Trop v. Dulles*, 356 U.S. 86 (1958). "[T]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." And "[T]he Amendment must draw its meaning from the

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evolving standards of decency that mark the progress of a maturing society" (*Trop v. Dulles*, 356 U.S. 86, 100–101).

In the postwar era, with the creation of the United Nations, the international community created fundamental documents on human rights based on the idea of human dignity, such as the Universal Declaration of Human Rights (1948) (General Assembly resolution 217 A), the International Covenant on Civil and Political Rights (1966) (General Assembly resolution 2200A [XXI]), and, more specifically, for those people in detention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984; General Assembly resolution 39/46).

Solitary Confinement and the Nelson Mandela Rules

Regarding detention or imprisonment, the international standard is the United Nations Standard Minimum Rules for the Treatment of Prisoners of 1955 (Economic and Social Council by its resolutions 663 C (XXIV)) (hereafter SMR), which were revised in 2015, and are now known as the Nelson Mandela Rules (A/RES/70/175) (hereafter, the Mandela Rules). The Mandela Rules have been particularly strong in protecting prisoner's rights by limiting the use of solitary confinement.

Article 31 of the SMR (1955) states, "Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences." The Mandela Rules of 2015 are specific regarding the excessive use of solitary confinement as a disciplinary measure under the following rules:

Rule 43.

1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:
   a. Indefinite solitary confinement;
   b. Prolonged solitary confinement;
   c. Placement of a prisoner in a dark or constantly lit cell;
   d. Corporal punishment or the reduction of a prisoner's diet or drinking water;
   e. Collective punishment.
2. Instruments of restraint shall never be applied as a sanction for disciplinary offences.
3. Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact.

This means family contact may only be restricted for a limited time and as strictly required for the maintenance of security and order.

Rule 44.

For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for twenty-two hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of fifteen consecutive days.

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> Rule 45.
>
> 1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.

As mentioned in the previous section, solitary confinement can be as long as thirty days a time as per the Act, and in specific cases, where "the circumstances are especially serious"—which means that a prisoner is, for example, destructive or very disobedient—it can last for sixty consecutive days. This duration of solitary confinement, even if for thirty days, is contrary to Rules 43.1(b) and 44, which prohibit prolonged solitary confinement of over fifteen days. While prisoners are held in solitary confinement, the cell is not lit during the daytime, although a small amount of natural light comes in through a window. This treatment may be contrary to Rule 43.1(c), which prohibits solitary confinement in a dark cell. As prisoners are obligated to sit in *seiza* position on tatami mats for more than one hour a day in total for meditation in the cell, this is incompatible with Rule 43.1(d), which prohibits corporal punishment.

Further, prisoners held in solitary confinement are prohibited from both receiving visitors and sending or receiving letters. Their contact with the outside world is restricted to correspondence and meetings with legal counsel. This is also contrary to Rule 43.3. Aside from all the violations of the Mandela Rules, the fact that more than 85% of disciplinary measures are carried out in the form of solitary confinement is a violation of Rule 45.1, which restricts its use to "only in exceptional cases as a last resort."

The prisoners are kept inside solitary cells all day, for many days, without any meaningful activities other than one brief bathing period and one thirty-minute exercise period each week. It is obvious that this form of solitary confinement, which is predominant in Japan, is a practice that violates the Mandela Rules. It can be regarded as "cruel, inhuman or degrading punishment" by the international standards of today (Sawanobori 2019, 13).

Even if the Mandela Rules are not legally binding on each UN member state, Japan should respect and pay more attention to them because the Mandela Rules were unanimously adopted by the UN General Assembly in December 2015, of which Japan is a member state, and are today's international standards for prisoners.

Solitary Confinement and the UN Committee Against Torture

Though not specifically regarding solitary confinement as a disciplinary measure, international organizations such as the United Nation's Committee Against Torture and a few NGOs[27] have expressed their concerns regarding the abusive usage of solitary confinement, including administrative solitary confinement, in Japanese prisons.

[27] FIDH(The International Federation for Human Rights) and the Center for Prisoners' Rights (CPR) released their report on Japanese detention conditions publicly on July 14, 2022.

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For example, the Committee Against Torture expressed its concerns about the use of solitary confinement as early as 2007. In paragraph 18, the report states:

> The Committee is deeply concerned at allegations of continuous prolonged use of solitary confinement, despite the new provisions of the 2005 Act on Penal Institutions and the Treatment of Sentenced Inmates limiting its use (UN Committee Against Torture 2007).

After receiving comments and replies from Japan on the report, the Committee, in its second conclusions in 2013, reiterated the same concerns, and offered recommendations: "The Committee remains deeply concerned that solitary confinement continues to be used often extensively prolonged without a time limit, and that decision of isolation for detainees is left to the discretion of the prison warden." It also urged Japan to "Revise its legislation in order to ensure that solitary confinement remains a measure of last resort, for as short a time as possible, under strict supervision, and with a possibility of judicial review. The state party should establish clear and specific criteria for the decision of isolation" (UN Committee Against Torture 2013).

The Japanese government has much work to do to improve its prison conditions, including the treatment of prisoners, before it will be able to reach an internationally acceptable standard.[28]

Conclusion

In this article, I clarified that the incidents in Nagoya Prison in 2001 and 2002 led to the Prison Law being replaced with the new Act on Penal Detention Facilities in 2006, whose main aim is "to ensure the adequate treatment of inmates . . . by respecting their human rights" (Article 1) with its ultimate purpose being their reintegration into society through "reformation and rehabilitation and developing adaptability to life in society" (Article 30). However, the prison administration did not change overnight; the prisons, and staff members, remained the same, and the new Act did not change actual practice in some respects.

A quintessential example of outdated use is that of solitary confinement as a disciplinary measure. Though it is obvious today that such prolonged solitary confinement is against the Mandela Rules, it is legal in Japan under the Act. Not only is it unjustifiable before the Mandela Rules, but with its usage as high as 85% of all disciplinary measures as of 2018, it must be reconsidered as overused in practice and against its own legal mandate of achieving prisoners' reintegration to society.

Prison authorities must understand international human rights instruments such as the Mandela Rules and take onboard the reports and recommendations of the UN Committee Against Torture. Above all, it is essential to promote an understanding of human dignity and the importance of the human rights of prisoners in order to achieve the goal which the Act on Penal Detention Facilities of Japan clearly expressed: the reintegration of prisoners into Japanese society.

[28] For further challenges facing the Japanese prison system, see Lawson 2015, 155, 156–157.

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