

Room for Improvement in Japan's Penal System

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We have been reminded recently of the potential for abuse of prisoners by the photographs of the humiliations suffered by some Iraqis at the hands of some of their American captors in Abu Ghraib Prison, which Japan quite properly condemned as 'inhumane and regrettable' (Japan Times [hereinafter J.T.] 8/5/04). Unfortunately Japan's own record of taking care of its prisoners has been less than perfect. News in 2002 of abuses in Nagoya Prison galvanized the government into setting up a Correctional Policy Reform Council the following year which has since reported back with its recommendations for reform. In what follows I intend to consider (a) problematic aspects of Japan's penal system which gave rise to these abuses (b) proposed reform measures and (c) possible reasons why reform has not occurred earlier. In doing so, I do not wish to appear to be indulging in an activity beloved by at least a few foreign residents of Japan — Japan-bashing. I like the country in which I choose to reside very much. Having said that, I also recognize that, like my own country, England, and indeed anywhere else, Japan has its share of social problems. Also, whilst deeply respecting the work done by the charity Amnesty International in its campaigns against the death penalty, torture and individual campaigns to free people imprisoned for their beliefs, I do not intend to follow the Amnesty International 'party line' on Japanese prisons as I feel it concentrates exclusively on negative features of Japan's criminal justice system.

I will start off by reviewing the various news stories of the abuses at Nagoya Prison and their aftermath since, as I mentioned above, the new

openness towards penal reform springs directly from the shame induced by these reports.

On December 14, 2001 two Nagoya Prison guards, as a punishment, directed water from a high-pressure fire hose at a 43-year-old prisoner's bare buttocks. As a result the prisoner suffered serious injuries to his rectum and anus, and died of an infection the next afternoon. The Justice Ministry reported that the prisoner had died of self-inflicted injuries (J.T. 12 & 21/3/03).

On May 27, 2002 three Nagoya Prison guards placed a 49-year-old prisoner, as a punishment, in a restraining device, consisting of leather handcuffs and belt, and tightened it to such an extent that he died later in the day due to abdominal injuries and a pulmonary infarction. The family members of the prisoner said that nobody at the prison told them that he had been placed in the restraining device prior to his death (J.T. 10/11/02 & 12/3/03). [Prisoners placed in restraining devices are then left in solitary confinement in *hogobo* (protection cells). On at least some occasions inmates have had not only to use the toilet whilst they are still wearing the restraining devices, but also eat their meals i.e. without being able to use their hands, like an animal, even though this runs counter to the Justice Ministry's instructions on the use of the restraints (J.T. 29/11/02).]

On September 25, 2002 five Nagoya Prison guards, as a punishment, placed a 30-year-old prisoner in a restraining device and pulled the belt so tight that he suffered internal bleeding requiring 70 days of medical treatment. The prisoner had made a complaint about punishments to both the Justice Minister and the Nagoya Bar Association in April 2002. The inmate said that he was placed in the restraining device on seven other occasions during September 2002 and that on September 25 he was also kicked and beaten by guards after he had refused to withdraw his complaint to the Bar

Association, which had planned to interview him the following day (J.T. 28/11/02; 12/3/03 & 2/10/03).

A 37-year-old former inmate of Nagoya Prison claimed that petitions that he wrote to the Minister of Justice complaining about the violence of the guards as well as notebooks and documents related to the matter were all thrown away by the guards (J.T. 17/11/02).

The Chairman of the Nagoya Bar Association said that Nagoya Prison “has not been cooperative in allowing the Bar Association to probe complaints filed by inmates regarding human rights violations” (J.T. 12/11/02).

The Japan Federation of Bar Associations announced that the Justice Ministry has ignored most of the approximately 100 warnings about abuse of prisoners' human rights which were issued by local bar associations between 1998 and 2002 (J.T. 4/12/02).

Some of the consequences of the above matters being brought to light have been:

Eight prison guards involved in the abuses have been brought to trial. One has received a suspended two-year prison sentence and, in his case, the court found that the restraining device had been used as a means of punishment (J.T. 22/11/03 & 1/4/04).

The families of the two men who died, mentioned above, as well as three other former inmates of Nagoya Prison sued the government and guards (J.T. 22/11/03 & 31/1/04).

The Justice Ministry decided in early March 2003 to replace the restraining devices and announced in June 2003 that the new devices would consist of felt-lined leather manacles without a belt and would be introduced in October 2003 (J.T. 18/6/03).

The Correctional Policy Reform Council, consisting of both legal experts

and lay people, was set up in March 2003 to advise on prison reform (J.T. 1/4/03).

The Justice Ministry announced that it would re-examine the death records of all of the 1,592 people who died in prison between 1993 and 2002 to see if abuse by guards might have been a cause. The Ministry subsequently reported in June 2003 that apart from the 2 inmates mentioned above, it could identify 15 suspicious deaths but was unable to tell whether they involved abuse by guards (J.T. 5/4/03 & 9/7/03).

According to internal Justice Ministry documents, of the 15 suspicious deaths, at least five inmates had died after being placed in restraining devices (J.T. 14/6/03).

Fuchu Prison claimed to have lost documents on 9 inmates who died there between 1996 & 2000 (J.T. 18/4/03).

Internal documents from the Justice Ministry reveal that prisoners have died from insufficient and inappropriate medical care (J.T. 21/5/03).

Many prison doctors' have failed to put in the required number of working hours (J.T. 7/9/03).

An interim report on the abuses by guards at Nagoya Prison issued by the Justice Ministry in March 2003 stated that a 'lack of awareness of the human rights of prisoners' among many prison guards was the major problem 'rather than individual problems of the guards being accused.' It also mentioned overcrowding, 'the secretive and self-protective nature of prison officials that led to a series of cover-ups', the need for greater transparency and the need for a system so that prisoners can effectively register complaints about mistreatment (J.T. 1/4/03).

What to say about all this then? It is of course to be welcomed that the Justice Ministry decided to replace the restraining devices but it is unfortunate that it took the publicity surrounding the death of one prisoner and the

hospitalization of another before the Ministry acted. The Ministry would have already been aware of complaints about the devices from human rights groups as well as from prisoners themselves, some of whom brought lawsuits. For example in 1993 Kevin Mara sued the government for ill-treatment in Fuchu Prison, one of his complaints being that the belt of the restraining device was pulled so tight that he could hardly breathe (Amnesty International 1997). In 1994 a Japanese male prisoner 'K' sued the government for ill-treatment in Fuchu Prison, one of his complaints being that the belt of the restraining device was pulled so tight that it caused internal bleeding and numbness in his toes (Amnesty International 1998a). [In the same Amnesty International document, cases in other prisons are mentioned, one Japanese man saying that he could not eat because the belt was pulled so tight, another Japanese male saying that the tightness caused him to defecate involuntarily and various people saying that after they were placed in the restraining device and were effectively defenceless, the guards beat them.] As in the recent cases in Nagoya Prison, it is clear that the device was being used not simply to prevent a prisoner from hurting either himself or others — its proper use — but (a) as a means of punishment / torture itself and (b) to render the prisoner defenceless prior to a beating. In fact one guard has been quoted as saying that of fifty inmates who he placed in a restraining device, only two had been violent (Amnesty International 1998a). In October 1998 the United Nations Human Rights Committee expressed deep concern about various aspects of the Japanese prison system including frequent use of the restraining devices which it stated may constitute cruel and inhuman treatment (Amnesty International 1998b). What is noteworthy is that the use of the restraining device decreased in both Fuchu and Osaka Prisons after 1998, Fuchu using the device on 97 occasions in 1997 and then only 10 times a year between 1999

& 2001. In contrast, use at Nagoya Prison increased substantially, in 2001 it was used 53 times and in 2002 on 148 occasions (J.T. 13/11/02). It is perhaps justifiable to interpret the decrease in use at least partly as a direct consequence of the criticism by the United Nations Human Rights Committee, but then are we to interpret the dramatic increase in use by Nagoya Prison as a direct snub to this criticism?

I agree with the interim report from the Justice Ministry that awareness of the human rights of prisoners among prison guards needs to be raised and think that these rights should be spelled out clearly to all prison guards not only at the time of recruitment but also at regular intervals during the course of their employment. Although I only have a limited understanding of the circumstances of the above cases of abuse, I am not so confident about the Ministry's assessment that the problem does not lie with the individual guards, considering that there seemed to be a pattern in the abuse. I think that just as western countries have become aware that jobs offering access to children have the potential to attract pedophiles and that jobs in psychiatric nursing or nursing of the elderly also may act as a magnet for predators with sadistic and / or sexual motives, so there is also, I think, an awareness in the West that the job of a prison guard may attract people with a sadistic bent or that the person may discover his predilection after starting the job. On top of this there is also the possibility of guards becoming brutalized by their contact with prisoners and fellow workers. In western prisons, at least, it is not only prisoners who believe that they need to put on a tough exterior to survive. In an ideal world, people with questionable motives would be weeded out at the job interview stage but given that unsuitable people do slip through the net and anyway may become brutalized after starting work, there needs to be vigilant monitoring of guards in their dealings with prisoners.

As for the comment in the interim report referring to 'the secretive and self-protective nature of prison officials that led to a series of cover-ups' and the need for greater transparency, I am left speechless. I do not find the cover-ups themselves surprising (albeit they are of course disturbing), as it seems to be human nature to (a) not wish to own up to mistakes and (b) close ranks and protect one's own when mistakes occur, and can be seen in other workplaces e.g. when medical malpractice occurs in hospitals. What is flabbergasting is that the Justice Ministry is reporting that the nation's correctional facilities, which are anyway under its own control, should be less secretive and more transparent, when it is the Justice Ministry itself which has developed secrecy into an art form in for example its attitude to public disclosure of information about the death penalty. As I mentioned in an earlier essay on the death penalty (Lister 2001: 43), one would assume that one purpose of having a system of punishments in prison would be its deterrent effect not only on those banged up but also those outside contemplating a life of crime. In which case, the policy of secrecy makes no sense. If, however, the Justice Ministry understands that at least some of the punishments could be interpreted as inhumane / abusive, then, of course, their policy of secrecy makes perfect sense.

The Correctional Policy Reform Council reported back to the Justice Minister in December 2003. Amongst its proposals were: (a) the immediate setting-up of an independent council made up of people outside the Justice Ministry to look at complaints from prisoners (b) the establishment of local watchdog committees, with no government employees as members, to monitor the running of each correctional institution (c) more effective monitoring of prisons by the Justice Ministry (d) greater access for prisoners to communicate with their families and lawyers and a lifting of the ban on meeting with non-family members (e) the imposition of solitary confinement

as punishment to be allowed only in certain limited circumstances (f) less regimentation — marching in military formation, having to remain motionless in the *seiza* position for lengthy periods as a punishment (g) the provision of a standard of medical services equivalent to that offered by the National Health Insurance system (h) a change to a more flexible system with less working hours, more job training, a minimum exercise period and greater privacy. In light of these findings it is thought that the Justice Ministry will propose either amendments to the current Prison Law or new legislation which is likely to come before the Diet in 2005 (J.T. 9/12/03).

What of these proposals then? Most of the suggestions are, unsurprisingly, absolutely sound. For example the proposal to set up an independent council to review prisoner complaints is an essential step to ensure that prisoners can effectively register complaints. However it is also necessary to ensure that there is **absolutely** no possibility that such complaints will be screened by the very people against whom the complaints are being directed, the prison officials, before being passed to the independent council. Such a foolproof system is necessary because, up until now, even though the current Prison Law states that inmates' complaints must be handed unopened to the Minister of Justice, such complaints have not only been screened by prison officials but the complainant has on occasions been subject to retribution from the very people who he has complained about. The proposal to establish independent watchdog committees to monitor each correctional institution is also a very good suggestion but perhaps they should have added that such committees should be able to visit the institutions unannounced and should be permitted unrestricted access within. If the same privileges were also extended to international human rights organizations, the system would become even more transparent. As far as the suggestion about less regimentation is concerned, I don't think

that having a military style of discipline in prison is necessarily a bad thing. I am against prisoners being forced to stay motionless in either a *seiza* or cross-legged position for extended periods as a punishment. Also, in principle I think that the less rules there are, the less petty-mindedness there will be, both on the part of guards as well as prisoners, and the more that prisoners are treated as adults, the easier their rehabilitation will be once they are released. Having said that, though, in prisons in America or Britain, where there is less regimentation and control, there is more prisoner-on-prisoner and prisoner-on-guard violence resulting in more injuries and more deaths, there are also more riots, escapes, suicides, rapes, AIDS cases and drugs (some of which are smuggled in by or with the help of guards). Perhaps this is no more than a reflection of the society outside as for example Japan is a much less violent and aggressive society than my own country, Britain, which I am constantly assured by my hosts here, is 'the land of gentlemen'. However I think that even in the less aggressive society of Japan, if regimentation was substantially reduced, there would be a danger that the hard men among the prisoners (the *boryokudan* presumably being high on the list of likely suspects) would step in and terrorize the weaker prisoners. Returning to the proposals of the Correctional Policy Reform Council, I have another one to add, addressed not only to the Justice Ministry (both in its role as supervisor of prisons and in its role of supervising the initiation of criminal prosecutions) but also to medical staff at prisons in particular and to Japan's medical community in general. The fact that there had been at least 15 suspicious deaths of prisoners between 1993 and 2002, which only became public knowledge after the Nagoya abuses had come to light, suggests not only that (a) the running of prisons needs to be more transparent but also (b) medical staff who examine prisoners, sign death certificates etc. need to be alert to signs of abuse and

should be held accountable if they are a party to a cover-up. More generally, just as the Japan Federation of Bar Associations has made clear stands about human rights of prisoners, so too the Japan Medical Association should make clear its view on issues such as minimum medical treatment standards for prisoners, how best to achieve those etc. [For example the Japan Federation of Bar Associations has suggested that if jurisdiction over medical facilities within prisons was transferred from the Justice Ministry to the Health, Labor and Welfare Ministry, this would make it more likely that the quality of medical services would be the same inside and outside prison (J.T. 9/7/03).] The media too needs to be more vigilant in pursuing stories of deaths of people in government custody (whether prisons, detention centres, immigration or juvenile detention centres etc.) especially those who are not old. Having singled out the medical profession and media as bearing a large responsibility in, what will necessarily be an ongoing matter — penal reform — I should add that I do not think that citizens of a society can abdicate their own responsibility simply by pointing to people whose jobs can have a direct influence on prisoners' welfare. It is true that as well as international human rights organisations, there are a few selfless, Japanese individuals and groups who are actively involved in fighting for the rights of, and thereby trying to improve the lives of prisoners, chief amongst these being (1) the non-profit organisation, the Center for Prisoners' Rights staffed by the Director, civil rights lawyer, Kaido Yuichi and Secretary General, Kikuta Koichi, Professor of Criminal Law at Meiji University as well as (2) the formerly-mentioned Japan Federation of Bar Associations. The point, though, is that (a) in a democratic country, punishment is carried out in the name of the people. (b) Since the deaths at Nagoya came to light, few can claim ignorance of the abuses. (c) Adult citizens who say and do nothing are not neutral but are expressing tacit approval of the sys-

tem as it is. (d) If a person finds himself in prison in future, whether as a result of breaking the law or a Kafkaesque turn of events and suffers abuse, is it reasonable for him to expect others to come to his aid if he himself has not tried to help those in a similar predicament when he was able to?

Returning to the concerns expressed at least ten years ago by human rights organisations and prisoners about the restraining devices and other conditions in prison, how are we to explain how it was that these criticisms did not translate into a will to carry through reform long ago? I suppose we can say that (a) the majority of Japanese people were in some sense not open to change on this matter at an earlier time (since I arrived in Japan at the end of the *Showa* era, there has for example been a huge change in peoples' consciousness towards and in law enforcement against such things as molesting of women on trains, sexual harassment in general, child abuse, child pornography and child prostitution). (b) No consecutive abuses as extreme as those in Nagoya Prison had **come to light**, at least in the *Heisei* era. (Please recall that in 2003 the Justice Ministry itself admitted that, apart from the two deaths at Nagoya, there had been 15 suspicious deaths between 1993 and 2002, at least five of which had occurred after the prisoners had been placed in the restraining device.) (c) It was not until 1999 that Japan ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which had been adopted by the United Nations a full 15 years earlier in 1984 (J.T. 3/12/99). (d) Perhaps a certain number of people felt that there was sufficient protection of prisoners' rights in Article 36 of the Constitution. "The infliction of torture by any public officer and cruel punishments are absolutely forbidden" (Itasaka 1983). (e) It is debatable whether the Japanese think of human rights (whether those of prisoners or not) in exactly the same way as, say, British people, albeit there will probably be at least some common

ground. It might be the case, then, that some Japanese people, whose lives may be totally unconnected to prison officials or Justice Ministry bureaucrats, may believe that, depending on the inmate's behaviour, guards have the right to treat a prisoner in a way that others would describe as infringing on a human's basic rights. That is to say that, in the case of prisoners, the right to be treated humanely is not considered inalienable but as something to be earned (by good behaviour) and which is withheld or graciously bestowed by the people in control. This of course smacks of *Tokugawa* feudalism. (If this is the case it might also be relevant to understanding the treatment of prisoners of war by the Japanese during World War II.) Even though there probably are those in the prison service, the Justice Ministry, the ruling LDP and the general population of Japan, who even now would subscribe to the belief that convicted criminals have forfeited most of the human rights accorded to the rest of the population, perhaps the majority of these would feel obliged to admit that most people's concept of human rights has substantially altered since the Prison Law was enacted in 1908. (f) Some people would think that prisoners' lives are too comfortable anyway. (g) A proportion would also consider that too much taxpayers' money is being spent on incarceration. (h) There were and are also a number of people who do not care one way or the other about human rights of prisoners and prison reform. (i) Considering that human rights abuses seem also to be endemic to other areas of Japan's criminal justice system and that those merely suspected but not convicted of committing crimes have been subject to violence not only by police but also, incredibly, by prosecutors themselves, perhaps, after all, it is not so surprising that prison reform has been such a long time coming. Johnson (2002: 253~262) relates three cases of brutality by different prosecutors from the early 1990s. In 1990 during an interrogation a prosecutor in Tokyo, with 6 years

experience, punched a 54 year-old accountant, breaking his jaw. In 1994 a Tokyo prosecutor with ten years experience slammed a desk into the forearm of a 59-year-old assemblyman. In 1993 a Sendai prosecutor with five years experience made a 65 year-old former government worker kneel on the floor, 'pressed his head to the floor with his foot, slapped him in the head and face numerous times, and kicked him in the chest and hips' (Johnson 2002: 257). In the course of investigating the same corruption case, the abuse which the same prosecutor meted out to a 57 year-old company executive, who had recently undergone surgery on his gall bladder and small intestine, left him with 'cuts to the mouth requiring multiple stitches, bloody congestion of the left eardrum, contusions to the abdominal and genital regions, a sprain of the cervical vertebrae, and extensive bruising' (Johnson 2002: 258). (Johnson takes a page to describe the brutality and it should be read with caution by those with weak stomachs.) In the above cases, all five victims sued the government which made a financial settlement with each one. Given this disregard for human rights of those not convicted of any crime by highly-educated elite bureaucrats it is not only unsurprising that prison reform has been so slow coming but perhaps also indicates that we should not be too optimistic about a change in the mindset of at least a proportion of those working in the prison service or Justice Ministry regarding the human rights of the inmates in their care. (j) There have been 3 occasions in the last two decades, 1982, 1987 and 1991, when revision of the 1908 Prison Law has been raised by the Ministry of Justice itself, with a view amongst other things, to clearly spell out prisoners' rights. Attempts to revise the law have principally foundered over disagreement from opposition party politicians over the *daiyo kangoku* (substitute prison) system. Criticized by human rights groups as well as the Japan Federation of Bar Associations as having the potential to violate

the human rights of detainees, the police wish to maintain the *daiyo kangoku* system whereby they are able to keep a suspect in a police cell, available as, when and for however long they wish to interrogate him / her up to a maximum of 23 days in order to extract the desired confession (J.T. 17/4/03). The fact that confessions are accorded a great deal of importance in Japan's criminal justice system — the police, prosecutors and judges consider the confession as *shoko no o* [the king of evidence] (Johnson 1972: 149) — and that 99.9% of those sent to trial are convicted (J.T. 15/4/03), means it is essential to ensure that any confession is not coerced. This is, however far from easy as there is neither audio nor video recording of interrogations. The fact that there is no recording of interrogations, unlike in other developed countries, suggests that there may be interrogation practices which the powers that be understand could be interpreted as abusive. This, recall, is the same point which I made earlier about the policy of secrecy regarding prisons and punishments meted out to their inmates. On the other hand, this explanation for why there is no recording of confessions may be totally wrong or at least only partially correct.

Given that one important reason that reform has been a long time coming is the resistance to change on the part of at least some lawmakers, perhaps we should not be too optimistic that all of the proposals of the Correctional Policy Reform Council will be adopted. My own position about how a country should care for its prisoners is (1) the punishment of a prison sentence is meant to consist only of withdrawing a person's right to liberty, not, for example, loss of liberty as well as being subject to violence. (2) People whose liberty has been taken away by the state are potentially in a terribly vulnerable situation, locked up sometimes with extremely violent predators, some of whom may even suffer from mental diseases, dependent on guards

for their food and most other things and because the state is responsible for putting them in this very vulnerable situation, it is the state which has to ensure the well-being of all of these people in its care and their protection from both fellow prisoners as well as sometimes rogue guards and other prison officials. (3) In a developed country like Japan, the state should not deny the same standard of medical care to its prisoners which it provides to the rest of its citizens, just because they have been convicted of a crime. (4) The state should not neglect its duty to ensure the safety and well-being of the prisoners in its custody even though it may be able to do so with impunity because (a) many people are apathetic about the matter (b) among minority groups, prisoners are not the ones who are likely to elicit the greatest public sympathy. (5) Given the current overcrowding and forecasts for further increases in prison population (J.T. 24/7/02 & 8/9/04), perhaps more thought should be given to alternative, non-custodial, punishments for non-violent offenders such as drug users.

Having written various negative things about Japanese guards, I should balance this by saying that (a) there have of course been terrible cases of abuse of prisoners by guards in my own country, Britain, as well as in other developed countries. (b) Considering that the number of prisoners greatly exceeds that of guards and that at least some of the former have a history of being violent, prisons are bound to oblige inmates to follow rules and also have some kind of sanctions against those who wilfully break them such as punishments or some kind of demerit system in which privileges are withheld, to protect the guards from the inmates as well as, of course to protect the inmates from one another. (c) The number of rogue guards is, I believe, limited. (d) Guards who successfully act as mentors to their charges deserve praise. (I understand that unlike America where guards are taught to maintain a distance from their charges to avoid being manipu-

lated, in Japan they are expected to act as an older brother or even father figure. This, I think, is potentially a very positive feature of the system here.) (e) The overcrowded conditions in prisons are far from ideal, creating stress among both guards and prisoners. (f) Whilst no amount of provocation could ever justify the abuse by high pressure hose referred to above, the guards allege that the deceased prisoner had spread feces around his cell and kicked them (J.T. 14/2/03).

Finally, if it were needed, I suppose a further factor to motivate the government to bring about quick, effective reform is that with the increase in the number of lawyers and judges in the near future, the Japanese population, unfortunately, may well become increasingly litigiously-minded like North Americans. Japan then may become more like my own country, England, has turned into over the past decade or so — a blame culture with many people perceiving what used to be regarded as unfortunate human errors as money-making opportunities. At least some British lawyers, then, have become like their American counterparts, people who not only orchestrate but also feed on people's greed and this part of their work, at least, is, I think, fundamentally shameful. Up until now I suppose a lot of prisoners here have just put up with the abuse meted out to them by guards because (a) *gaman* is a highly-regarded character trait here. (b) Complaints often just led to further abuse as mentioned above. (c) Prison was accepted as an institution with elaborate rules and at least some tyrannical guards. In future though many more current and ex-prisoners who've been subject to abuse may very well choose to seek justice through the courts.

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