

Protection of Prisoner-Lawyer Confidential Communications and Japanese Prison Law

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I. INTRODUCTION

Ten years have passed since the Act on Penal Detention Facilities and Treatment of Sentenced Persons (2005 Prison Act)¹ was enacted on 24 May 2006. The Act which includes landmark provisions such as the establishment of “the Board of Visitors for Inspections of Penal Institutions”, imposed major changes on the administration of Japanese prisons. However, ten years of prison practice under the new law have revealed various flaws, especially those regarding the protection of confidential communications between prisoners and lawyers. While all prisoners, namely un-sentenced persons, sentenced persons and inmates sentenced to death, may be visited by their lawyers, it is often in the presence of monitoring guards. Additionally, correspondence from lawyers is, in practice, censored without exception. This article examines the legality of such restrictions, applying the international human rights standards expressed by relevant international instruments.

The history of Japanese prison law goes back to 1908, when the former Prison Law² was enacted. It had long been criticized that (i) the former law was far below the international standard on prison administration, since it

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1 *Keiji shūyō shisetsu oyobi jūkei-sha no shōgu ni kansuru hōritsu*, Law No. 50/2005, as amended by Law No. 60 and 69/2014.

2 *Kangoku-hō*, Law No. 28/1908, as amended by Law No. 68/1953.

lacked clear descriptions of prisoners' rights and obligations, and (ii) the treatment of prisoners under the former law was insufficient to promote their rehabilitation.³ Drafts of a revised Prison Law were submitted to the Diet several times, but they were not adopted because the Diet was thrown into confusion over *daiyō kangoku* issues.⁴ A *daiyō kangoku* is a detention cell in a police station that is used as a legal substitute for a detention center or a prison, and the Japan Federation of Bar Associations (JFBA) strongly opposed adhering to the *daiyō kangoku* system whereby the police detain and exercise full control over investigated suspects all day long.⁵ In 2002, a series of violent assaults at Nagoya Prison (Nagoya Prison Incidents), in which inmates died or were injured by violent assaults while restrained in leather handcuffs in protection cells, shed light on prison administration issues. As a result of the Nagoya Prison Incidents, "the Correctional Administration Reform Council" consisting of fifteen eminent persons from the private sector was formed under the Ministry of Justice at the end of March 2003. This advisory panel published "Recommendations of the Correctional Administration Reform Council: Aiming at Prisons that Gain the Understanding and Support of Citizens" on 22 December 2003. Based on the recommendations, the Prison Law was revised for the first time in nearly 100 years, and the 2005 Prison Act was enacted.⁶ Although the new law did not initially have any provisions concerning un-sentenced persons and death row inmates, in 2007 it was revised to include the treatment of those inmates, and the title of the Act was changed into "the Act on Penal Detention Facilities and Treatment of Inmates and Detainees".⁷

This article seeks to answer the question whether the 2005 Prison Act satisfies the human rights standards established by international instruments, focusing especially on prisoner-lawyer communications. In doing so, it first surveys the international standard regarding prisoner-lawyer communications. Then, it argues that the restrictions imposed on lawyers' visits and correspondence do not meet the international standard, after

3 CORRECTIONAL ADMINISTRATION REFORM COUNCIL, *Gyōkei kaikaku kaigi teigen: kokumin ni rikai sare sasaerareru keimu-sho* [Recommendations of the Correctional Administration Reform Council: Aiming at Prisons that Gain the Understanding and Support of Citizens] (Tōkyō 2003) 5.

4 M. HAYASHI/A. KITAMURA/T. NATORI, *Chikujō kaisetu keiji shūyō shisetsu shōgū-hō* [Article-by-Article Comments on the Act on Penal Detention Facilities and Treatment of Inmates and Detainees] (Tōkyō 2013) 2–4.

5 The JFBA, Japan's 'Substitute Prison' Shocks the World: Daiyo Kangoku and the UN Committee against Torture's Recommendations (Tōkyō 2008) 5.

6 The Japan Federation of Bar Associations, *Information for Prison Inmates* (3rd ed., Tōkyō 2006) 1.

7 HAYASHI/KITAMURA/NATORI, *supra* note 4, 4–5.

overviewing the relevant provisions of the 2005 Prison Act. The new law provides for visits and correspondence in accordance with the legal status of each inmate, namely sentenced persons, un-sentenced persons and persons sentenced to death. This article outlines that system and examines whether these provisions meet international human rights standards.

II. INTERNATIONAL HUMAN RIGHTS LAW

The ability of prisoners to consult, correspond and communicate with their lawyers in private and without interception is of great importance. This section surveys the international law on prisoner-lawyer communications as recognized by the United Nations Human Rights Committee (HRC) and other international instruments. Then, it examines the legal consequences of the views expressed by them.

Article 14.3(b) of the International Covenant on Civil and Political Rights (ICCPR)⁸ establishes that the criminally accused have the right to have adequate time and facilities for the preparation of their defense and the right to communicate with counsel of their own choosing. In relation to Article 14.3(b), the HRC states in its general comments that “[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications”.⁹ While the ICCPR is silent on communication regarding non-criminal matters, the HRC has recognized the importance of protecting the confidentiality of communications between lawyers and their clients, whether it relates to criminal matters or not. In fact, the HRC expounded on the right to privacy, explaining that “[c]ompliance with Article 17 requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*”.¹⁰ In *Antonius Cornelis Van Hulst v. Netherlands*,¹¹ the HRC acknowledged the importance of protecting the confidentiality of communications, in particular the right as relating to communications between a lawyer and a client.

The importance of confidential communication has been repeatedly affirmed by international legal instruments. The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention

8 International Covenant on Civil and Political Rights, adopted on 16 December 1966, entry into force: 23 March 1976.

9 General Comment No. 32: Article 14 (Right to equality before courts and tribunals and to a fair trial), HRC, CCPR/C/GC/32, 23 August 2007, para. 34.

10 General Comment No. 16: Article 17 (Right to privacy), HRC, 28 September 1988, para. 8.

11 *Antonius Cornelis Van Hulst v. Netherlands*, HRC, Communication No. 903/1999, at para. 7.6.

or Imprisonment (UN Body of Principles)¹² guarantees the right to communicate with counsel in full confidentiality. It provides that

“[c]onfidentiality concerning the request or complaint [regarding his treatment] shall be maintained if so requested by the complainant”,¹³ and that “[t]he right of a detained or imprisoned person to [...] communicate, without [...] censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.”¹⁴

The Basic Principles on the Role of Lawyers also guarantee the right to communicate with counsel without censorship and in private.¹⁵ In addition, the UN Standard Minimum Rules,¹⁶ which were recently revised for the first time in 60 years, enunciate that the protection of the right to communicate with a lawyer should be expanded to non-criminal matters and not limited to criminal matters. It provides that “[s]afeguards shall be in place to ensure that prisoners can make requests or complaints safely and, if so requested by the complainant, in a confidential manner”,¹⁷ and that

“[p]risoners shall be provided with adequate opportunity...to communicate and consult with a legal adviser of their own choice [...] without [...] interception or censorship and in full confidentiality on any legal matter, in conformity with applicable domestic law”.¹⁸

While neither the general comments and legal opinions of the HRC nor the international instruments mentioned above are *per se* legally binding, they still have legal significance. In the *Diallo* case, the International Court of Justice (ICJ) explained its understanding of the significance of the HRC’s work, stating that the Court should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.¹⁹ As is often the case with ‘soft law’ instruments, the principal value of instruments such as the UN Body of Principles, the Basic Principles of the Role of Lawyers and the UN Stand-

12 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA res. 43/173, 9 December 1988.

13 *Ibid.*, Principle 33 para. 3.

14 *Ibid.*, Principle 18 para. 3.

15 Basic Principles on the Role of Lawyers, adopted by UN Congress on the Prevention of Crime and the Treatment of Offenders, Habana Cuba, 27 August to 7 September 1990, para. 8.

16 UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), GA. res. A/RES/70/175, 17 December 2015.

17 *Ibid.*, Rule 52 para. 2.

18 *Ibid.*, Rule 61 para. 1.

19 *Republic of Guinea v. Democratic Republic of the Congo*, I. C. J. Reports (2010) 639, para. 66.

ard Minimum Rules for the Treatment of Prisoner (SMR) will lie in helping governments and the relevant international bodies to interpret and apply a broader legal norm.²⁰ In particular, it would be obvious that the SMR has served as guidance in interpreting the general rule against cruel, inhuman, or degrading treatment or punishment since its initial adoption in 1955. And, substantial non-compliance with the SMR has been said to constitute a violation of general rules which are enshrined in the ICCPR.²¹

Considering these facts, the Japanese government should not ignore the general comments and legal opinions of the HRC nor these international instruments.

III. LAWYERS' VISITS

1. Overview

Prior to the enactment of the 2005 Prison Act, persons other than inmates' relatives were in principle not allowed to visit them. The former Prison Law had provided that persons other than relatives might not visit inmates unless there was a special need to do so.²² Additionally, the warden had been given considerable discretion so as to have prison guards attend meetings. While the former Prison Law had not clearly described the discretion given for the attendance of officers,²³ the ordinance for enforcement of the former Prison Law²⁴ provided that guards could attend meetings except those with defense counsel.

By contrast, the 2005 Prison Act establishes an inmate's right to receive visits and sets out the requirements for having prison guards present at meetings, depending on the legal status of each inmate. This current section outlines how the 2005 Prison Act effectuates these provisions by taking a brief look at the background of the Act.

a) Sentenced Persons

The 2005 Prison Act enunciates that when one of the following persons requests to visit a sentenced person, the warden of the penal institution must permit the visit except in those cases where interpretation is necessary but

20 N. S. RODLEY/M. POLLARD, *The Treatment of Prisoners under International Law* (3rd ed., Oxford 2009) 459–460.

21 *Ibid.*, 383–384.

22 The former Prison Law, *supra* note 2, Article 45.

23 *Ibid.*, Article 50.

24 *Kangoku-hō sekō kisoku*, No. 18/1908, as amended by Ordinance No. 12/2003, Article 127.

the interpretation fees have not been paid, or where the meeting is prohibited because the inmate is currently subject to disciplinary punishment: (a) a relative of the sentenced person; (b) a person who visits the sentenced person regarding a matter of important concern to the inmate, such as reconciliation of marriage, pursuance of a lawsuit or the maintenance of business; and (c) a person who is expected to contribute to reforming and rehabilitating the sentenced person.²⁵ In conformity with this provision, lawyers are allowed to visit sentenced persons regarding any legal matters because this qualifies as a meeting regarding an important concern of the inmate. In addition, the Act prescribes the requirements for having a guard attend the meeting.

Before the 2005 Prison Act, the warden often had guards attend lawyers' visits. In the *Tokushima Prison* case,²⁶ where the warden had a prison guard present at the lawyer's visits regarding legal action against the prison, the Supreme Court rejected the argument that the attendance of guarding officers constituted an abuse of discretion. It stated that it was of great necessity to have officers attend the visits in order to prevent unexpected incidents or to determine the condition of the inmate in the case, though the dissenting opinion perceived the unlawfulness, stating that it is obviously unfair that meetings regarding complaints lodged against the prison should be obligatorily held in the presence of a prison officer who is a *de facto* opponent of the case.²⁷ At the same time, the Correctional Administration Reform Council recognized the significance of ensuring that inmates be in a position to seek remedy without any intimidation when a prison officer has committed human rights violations.²⁸ It proposed that wardens allow lawyers to visit inmates without the attendance of a guard in cases where such privacy was necessary.²⁹

Taking into account the proposal of the Reform Council, the Act provides that guarding officers are not to be present when a sentenced person receives a visit from one of the following persons unless there are special circumstances such that the visit is deemed likely to cause a disruption of discipline and order in the penal institution: (a) national or local governmental official conducting an inquiry into measures taken by the warden of the penal institution toward the sentenced person, or (b) a lawyer dealing with legal matters regarding measures taken by the warden.³⁰

25 The 2005 Prison Act, *supra* note 1, Article 111.

26 Supreme Court, 7 September 2000, Hanrei Taimuzu 1045, 109.

27 *Ibid.*, 114.

28 Correctional Administration Reform Council, *supra* note 3, 23.

29 *Ibid.*, *supra* note 3, 24.

30 The 2005 Prison Act, *supra* note 1, Article 112.

As a result, lawyers are in principle allowed to meet a sentenced person without the attendance of guarding officers when they are meetings relating to legal action against the penal institution.

b) Un-sentenced Persons

Under the 2005 Prison Act, un-sentenced persons are allowed to receive visits from anyone except for the following cases: where interpretation fees have not been paid; where the inmate is currently subject to disciplinary punishment; or where the Court has made a decision to prohibit meetings with persons other than defense counsel.³¹ In consideration of inmates' privacy, the provision on a sentenced person is applied to an un-sentenced person so that guards are not to be present when a sentenced person receives a visit from specific individuals, such as a lawyer dealing with the legal matters regarding measures taken by the warden, or a national or a local government officer who is in charge of investigating measures taken by the warden.³² Other than such visits, however, the Act grants the warden wider discretion on the attendance of officers compared with sentenced persons. For instances other than visits with defense counsel, the Act provides that the warden may have the officer attend any visits made to an un-sentenced person unless there is no risk of either the disruption of discipline and order in the penal institution or the destruction of evidence.³³ In addition, the Act has special clauses on the treatment of un-sentenced persons detained at a *daiyō kangoku* (substitute prison).³⁴ A *daiyō kangoku* is a detention cell found in a police station and is used as a legal substitute for a detention center or a prison. The Act provides that the detention services manager should have a guarding officer attend any visits made to un-sentenced persons detained at *daiyō kangoku* other than visits by defense counsel.³⁵ The detention services manager is not permitted to have officers present at visits when they are regarding a lawsuit against the detention facilities or at visits by national or local government officers to investigate measures taken by the detention facilities; however, except for these visits the manager must have an officer present at the meetings regardless of whether there is a risk of disrupting discipline and order in the facilities.³⁶

The differences in those provisions are attributed to the different legal status of sentenced persons and un-sentenced persons. The treatment of sen-

31 *Ibid.*, Article 115.

32 *Ibid.*, Article 116 para. 2.

33 *Ibid.*, Article 116 para. 1.

34 *Ibid.*, Articles 180–240.

35 *Ibid.*, Article 218 para. 1.

36 *Ibid.*, Article 218 para. 3.

tenced persons is aimed at their rehabilitation and reformation, whereas the detention of an un-sentenced person is not for rehabilitation since the case has not been finalized.³⁷ However, prior to determination of the sentence, the truth-seeking function of the court and the need to properly apply the relevant law make it necessary to prevent the destruction or concealment of evidence.³⁸ To avoid the destruction or concealment of evidence, the 2005 Prison Act basically grants considerable discretion to the warden to attend visits from individuals other than defense counsel. Among other aspects, most of the un-sentenced persons detained at *daiyō kangoku* are suspects who are still under investigation, and it would be quite rare when meetings with individuals other than defense counsels entail no risk of the destruction or concealment of evidence. Thus the Act does not provide that the presence of an officer is impermissible when there is no risk of either inhibiting discipline and order in the penal institution or destroying evidence.³⁹

c) *Inmates Sentenced to Death*

The 2005 Prison Act provides that when the following individuals request to visit an inmate sentenced to death, the warden is to permit the inmate to receive visits unless the interpretation fees have not been paid or the inmate is currently subject to disciplinary punishment: (a) the relatives of the inmate; (b) a person who is visiting the inmate regarding a matter of important concern to the inmate such as reconciliation of marriage, pursuance of a lawsuit or the maintenance of business; and (c) a person who is expected to contribute to maintaining the inmate's peace of mind.⁴⁰ While this last category of visitor is slightly different than the category provided for sentenced persons allowing a visit from a person who is expected to contribute to the inmates' reformation and rehabilitation, analogous to sentenced persons this provision allows lawyers to visit inmates sentenced to death for any legal matters.

In relation to the attendance of guarding officers, the Act lays down that the warden is in general to have a prison guard attend visits made to an inmate sentenced to death. Considering the inmate's interests, the Act goes on to provide that this does not apply when there is a legitimate interest in not having the officer present at the meeting, and it is deemed appropriate not to do so.⁴¹ While it is said that a legitimate interest would be recognized when the purpose of the lawyer's visit lies in preparation of legal actions against the

37 HAYASHI/KITAMURA/NATORI, *supra* note 4, 590.

38 *Ibid.*, 593–594.

39 *Ibid.*, 592.

40 The 2005 Prison Act, *supra* note 1, Article 120 para. 1.

41 *Ibid.*, Article 121.

penal institution, the warden may have a guard attend the meeting under the current practice, unless it is deemed appropriate not to do so. For instance, in cases where the officer's presence is necessary to prevent inadequate behavior or remarks by the inmate or where it is necessary to discern the inmate's state of mind, the guarding officer may monitor the meeting even if it relates to litigation against the penal institution.⁴²

Under the 2005 Prison Act, visits to inmates sentenced to death are more likely to be subject to a guard's attendance than those to sentenced persons. The asserted reason is the necessity of ascertaining the state of mind, and preserving the peace of mind, of death row inmates who – as compared to persons sentenced to a punishment other than death – are forced to await their coming execution and are likely to experience mental distress or agitation. The Act thus provides that unlike sentenced persons, the warden is in principle to have an officer present at visits to death row inmates, and that the attendance can be exempted only when there is a legitimate interest and it is deemed appropriate not to monitor the meeting.⁴³

2. *Attendance of Guards*

While the 2005 Prison Act provides some prerequisites for having guards attend visits, especially for visits to un-sentenced persons and inmates sentenced to death, there remains considerable discretion on having the officer present. This section looks through the recent developments regarding an officer's attendance subsequent to the implementation of the Act. Even after the 2005 Prison act was introduced, guards have often attended the meetings between un-sentenced persons and lawyers in charge of investigating their human rights relief complaints. Additionally, officers have been present at meetings for the preparation of retrial cases. Recently, these practices have been improved in a way allowing for greater respect of confidentiality. This section first considers these developments. Then it examines the remaining issues taking into account international human rights law.

a) *The Bar Association's Interviews for Human Rights Relief Cases*

The human rights protection committees of the JFBA and the local bar associations provide individual relief services when requests are received from the general public. Upon receiving a complaint, the committees investigate the individual cases as necessary and determine whether there is a human rights violation. If the committees conclude that an infringement of human rights has taken place, the JFBA or local bar associations issue a warning,

42 HAYASHI/KITAMURA/NATORI, *supra* note 4, 624.

43 *Ibid.*, 622.

recommendation or request to infringing institutions or organizations seeking the elimination and rectification of the infringement.⁴⁴ The committees deal with all types of human rights abuses. Among others, complaints against penal institutions account for a major part of all requests. According to the JFBA, of 367 complaints received by the Federation in 2014, 127 were complaints against penal institutions.⁴⁵ Warnings or recommendations do not have a legally binding effect, but they do have strong social influence – as many lower courts have pointed out⁴⁶ – because they are the result of strict and fair procedures conducted by an organization of legal professionals that, through many years and cases, has established its trustworthiness with the general public.

In investigating infringements by penal institutions, the human rights protection committees can send their member lawyers to conduct interviews with inmates who have made complaints. Their visits to inmates are generally allowed regardless of the inmate's legal status, and as far as visits to sentenced persons are concerned, the attendance of a guard has been exempted since the implementation of the 2005 Prison Act. On the other hand, unlike sentenced persons, it is reported that guards were often present at the interviews of un-sentenced persons even if they were conducted as part of a committee investigation. This would be because under the 2005 Prison Act the officer's presence at visits to un-sentenced persons can be exempted only in exceptional cases.⁴⁷

However, attendance at a committee interview could violate the UN Body of Principles⁴⁸ and the SMR,⁴⁹ which guarantee confidentiality concerning complaints with regard to inmates' treatment. Interviews conducted by lawyers who have strict professional ethics standards backed by disciplinary systems inside bar associations happened unlikely to hinder the legitimate purpose of detention. Concealment or disruption of evidence can be kept to the minimum by making *ex-post* measures, including disciplinary systems, work effectively. It would be an excessive restriction of prisoner-lawyer communications to withhold confidentiality because of a vague risk of hindrance, and such restriction could obstruct both inmate complaints

44 The JFBA, *Protection of Human Rights*. For text see the JFBA's website <http://www.nichibenren.or.jp/en/about/activities/protection.html>

45 The JFBA, *Bengo-shi hakusho 2015 nenpan* [White Paper on Attorneys 2015] (Tōkyō 2015) 191.

46 Hiroshima High Court, 26 October 2005, Hanrei Jihō 1928 (2006) 64, Tōkyō District Court, 31 May 1989, Hanrei Jihō 1320 (1989) 43, Tōkyō District Court, and Supreme Court, 15 April 2008 (M. Harada, J., concurring), Minshū 62 1005.

47 The 2005 Prison Act, *supra* note 1, Article 116 para. 1.

48 The UN Body of Principles, *supra* note 9, Principle 33 para. 3.

49 The SMR, *supra* note 12, Rule 57 para. 2.

and effective human rights remedies premised on thorough investigation by the committees.⁵⁰

In response to the protest of the JFBA, the Correction Bureau issued a notice directed towards regional correction headquarters and wardens of penal institutions with the aim of improving practice. The notice includes a guideline providing that guarding officers are, as a general rule, not to present unless the prosecutor has delivered an opinion on the risk of concealment and disruption of evidence. In accordance with the notice, member lawyers have been widely permitted to visit un-sentenced persons without the presence of guards.⁵¹ Such a change of practice could be seen as preferable. Nonetheless, there is still a possibility that an officer might be present at the meetings given that (i) the change in practice relies on the discretion of the warden and (ii) the Act does not prohibit the warden from having an officer attend interviews for human rights relief services.⁵² Among other things, with regard to visits of un-sentenced persons detained at *daiyō kangoku*, the 2005 Prison Act has no provision allowing lawyers in charge of the investigation to meet such prisoners without the attendance of an officer even if there is no risk of disrupting order and discipline and no risk of destroying evidence. In conformity with the UN Body of Principles and the SMR, the government should revise the Act so that the lawyers in charge of an investigation can meet inmates without an officer's presence unless there are special circumstances establishing a likelihood of the destruction of evidence or a disruption of order and discipline.

b) Lawyers' Visits for Preparation of Cases Subject to Retrial

Since a warden has been granted considerable discretion under the 2005 Prison Act to have an officer attend visits made to death row inmates, guards have often been present at the meeting of death row inmates with their lawyers concerning retrial where retrial has not yet been commenced. Whereas the government contends that it is permissible for a warden to require the attendance of a guard since an inmate's death row status requires a secure custodial setting and careful monitoring of the inmate's

50 H. KUZUNO, *Bengo-shi-kai no jinken kyūsai katsudō to keiji hikō kinsha* [Human Rights Remedy Activities by Bar Associations and Prisoners], *Jiyū to Seigi* 162 (2011) 15, 21–23.

51 Human Rights Protection Committee of Tōkyō Bar Association, *Keimu-sho kōchisho anken gaidobukku* [Guidebook for Prison or Detention Center Cases] (Tōkyō 2011) 37.

52 KUZUNO, *supra* note 50, 21.

emotional state,⁵³ the HRC⁵⁴ and the UN Committee against Torture (CAT)⁵⁵ have repeatedly expressed their deep concern about such practice.

Under such circumstances, the Supreme Court has made a remarkable decision on prison officers' attendance at meetings between death row inmates and their lawyers concerning retrial. In the *Ishiguchi and Takei case*,⁵⁶ the Supreme Court stated that since it is necessary for a death row inmate to be guaranteed substantial opportunities to receive legal assistance from defense counsel so that he can appeal for retrial, his interest should be protected as a "legitimate interest" under Article 121 even if it is a meeting prior to the request of retrial. In consideration of the interests supporting confidential meetings, the Court determined that the attendance of a prison officer could be unlawful unless there are special circumstances whereby confidential meetings are deemed likely to disrupt discipline and order in the penal institution or where it is deemed highly necessary to monitor the inmate's state of mind and take account of the inmate's wishes. A prison officer's presence at meetings between death row inmates and their lawyers concerning retrial would be inconsistent with the UN Body of Principles, Basic Principles of the Role of Lawyers and the SMR, all of which guarantee inmates – including death row inmates – the right to communicate with their legal counsel in private. As argued by the government, Article 14.3(b) and (d) of the ICCPR is applicable only to communications between unsentenced persons and their defense counsel.⁵⁷ However, the HRC has recommended in its recent concluding observations that the Japanese government should guarantee the strict confidentiality of all meetings between death row inmates and their lawyers concerning requests for retrial.⁵⁸ The Supreme Court decision allowing the attendance of prison officers only when there are exceptional circumstances would be compatible with these human rights standards. The practice regarding a prison officer's attend-

53 HRC, Information Received from Japan on the Implementation of the Concluding Observations of the Human Rights Committee (CCPR/C/JPN/CO/5), HRC, 3 May 2010, CCPR/C/JPN/CO/5/Add.1, para. 6.

54 Concluding Observations of the Human Rights Committee, Japan, HRC, 18 December 2008, CCPR/C/JPN/CO/5, para. 17.

55 Conclusions and Recommendations of the Committee Against Torture, Japan, CAT, 3 August 2007, CAT/C/JPN/CO/1, para. 20 (a), and Concluding Observations on the Second Periodic Report of Japan, CAT, 28 June 2013, CAT/C/JPN/CO/2, para. 15 (c).

56 Supreme Court, 10 December 2013, Minshu 67 1761.

57 Hiroshima District Court, 23 March 2011, Hanrei Jihō 2117 (2011) 45.

58 HRC, Concluding Observations on the Sixth Periodic Report of Japan, HRC, 20 August 2014, CCPR/C/JPN/CO/6, para. 13(d).

ance would be improved in that the confidentiality of meetings with lawyers concerning retrial would be fully respected.

c) *Remaining Issues*

Many cases regarding an officer's presence at lawyers' visits have been brought to courts since the enactment of the 2005 Prison Act.⁵⁹ The new law provides that meetings falling under certain categories, e.g. meetings with sentenced persons or un-sentenced persons for the purpose of preparing litigation against the penal institution, are generally not to be monitored by a prison guard.⁶⁰ The new legislation has, however, left wardens broad discretion on monitoring meetings, and various issues have remained unresolved.

In the *Ishiguchi Takei* case the Supreme Court enunciated that meetings between death row inmates and lawyers engaged in their retrial will be confidential unless there are special circumstances,⁶¹ conversely, meetings with death row inmates other than those related to retrial, even if they are for litigation against the penal institution, may be monitored insofar as confidential meetings are deemed inappropriate.⁶² The legality of monitoring such meetings has been raised by some lower courts,⁶³ but the Supreme Court has not established any concrete standard with regard to the legitimacy of monitoring meetings with death row inmates which are meetings other than those for retrial. Additionally, nearly all of the meetings in certain categories, such as lawyers' visits to sentenced or un-sentenced persons who are preparing their family law cases, are monitored, although the Correction Bureau issued a notice which required the wardens to refrain from the aimless attendance of a prison officer.⁶⁴ Among other things, the

59 Ōsaka District Court, 15 January 2016, Heisei 25 (Wa) 12789, Ōsaka District Court, 28 October 2015, Heisei 26 (Wa) 8881, Tōkyō High Court, 10 September 2014, Hanrei Taimuzu 1409 (2015) 176, Nagoya District Court 28 August 2014, Hanrei Jihō 2274 (2016) 15, Hiroshima High Court, 25 October 2013, Hanrei Jihō 2209 (2014) 108, Hiroshima District Court, 30 January 2013, Hanrei Jihō 2194 (2013) 80, Hiroshima High Court, 27 January 2012, Hanrei Taimuzu 1374 (2012) 137, Hiroshima District Court, 23 March 2011, Hanrei Jihō 2117 (2011) 45.

60 The 2005 Prison Act, *supra* note 1, Article 112, Article 116 para. 2, Article 218 para. 3.

61 Supreme Court, *supra* note 56.

62 HAYASHI/KITAMURA/NATORI, *supra* note 4, 624.

63 Nagoya District Court, 19 February 2013, Heisei 21(Wa) 4801, Heisei 22 (Wa) 7629.

64 *Hishu yōsha no gaibu kōtsū ni kansuru kunrei no unyō ni tsuite* [Notice Regarding Application of the Instruction Concerning the Inmates' Access to the Outside

Act provides that the detention services manager is to have a guarding officer attend any visits to un-sentenced persons detained at *daiyō kangoku* other than those visits falling under certain categories, these including meetings with defense counsel and those for litigation against the penal institution.⁶⁵ As a result, legal counseling for those un-sentenced persons is always monitored unless it falls under an exempting category.

These provisions of the 2005 Prison Act and the actual practice in Japan could be seen as falling far below the human rights standard recognized by the newly revised SMR, which requires the government to provide prisoners with adequate opportunity to communicate with their legal advisors in full confidentiality on “any legal matter”.⁶⁶ The government has the responsibility to implement this internationally-agreed standard into the domestic law. In doing so, it needs to revise the provisions of the new Prison Act which grant the warden broad discretion on monitoring lawyer’s visits. Especially in relation to un-sentenced persons detained at *daiyō kangoku*, the provisions that prohibit inmates from meeting with their lawyers in private unless they fall into certain categories should be abolished.

It is generally accepted that meetings with lawyers who are subject to professional ethics standards which are backed by rigorous bar association disciplinary systems are unlikely to hinder the aims of imprisonment or detention.⁶⁷ Illegal communication can be minimized by an effective disciplinary system and the threat of criminal punishment. Given the significance of confidential communications, the 2005 Prison Act could be considered as imposing excessive restrictions on the inmate’s right to communicate in private. In accordance with the SMR, the government should change the relevant provisions and improve the practice so as to fully respect confidential communications between lawyers and inmates.

IV. LAWYERS’ CORRESPONDENCE

1. Overview

The former Prison Law had imposed a general prohibition on contacts with the outside world, which had been considered as resulting from the nature of incarceration.⁶⁸ The general ban had on some occasions been partially

World] *Hōmu-shō kyōsei* No. 3350/2007 as amended by *Hōmu-shō kyōsei* No. 3000/2011, para. 3 (1).

65 The 2005 Prison Act, *supra* note 1, Article 218 para. 1.

66 The SMR, *supra* note 16, Rule 61.1.

67 HAYASHI/KITAMURA/NATORI, *supra* note 4.

68 *Ibid.*, 642.

lifted *de gratia* at the warden's discretion.⁶⁹ Nevertheless, correspondence with those other than relatives had not been allowed unless there had been special need to do so, as was the case for visits.⁷⁰ The warden could examine correspondence from and to inmates without exception.⁷¹

However, the 2005 Prison Act has abolished such a general ban and widely permitted contact with the outside world according to the legal status of each inmate. It also restricts the authority to examine correspondence, allowing inspection only for certain types of correspondence. This section provides an overview as to how the Act treats correspondence with sentenced persons, un-sentenced persons and inmates sentenced to death.

a) *Sentenced Persons*

Unlike the former Prison Law, the 2005 Prison Act grants sentenced persons the right to correspondence, except for mail to and from those who have criminal tendencies or are likely to either disrupt discipline and order in the penal institution or hinder the adequate pursuance of correctional treatment.⁷² While correspondence by inmates could be reasonably restricted because of the aims of incarceration – reformation and rehabilitation of inmates – and as a part of punishment, it would still be appropriate to guarantee contact with inmates' relatives for humanitarian reasons; furthermore, supporting contact with acquaintances could contribute to inmates' rehabilitation and reformation. In addition, contact with the outside world could be seen as part of the right to expression, and inappropriate correspondence could be properly censored, unlike in respect of meetings where it would be rather difficult to prevent inappropriate communication by having an officer present. For these reasons, the 2005 Prison Act widely permits correspondence, including that between sentenced persons and their lawyers.⁷³

The Act grants the warden of the penal institution the authority to examine correspondence from and to sentenced persons when it is deemed necessary for the maintenance of discipline and order in the penal institution or for adequate pursuance of correctional treatment. By contrast, the Act restricts such authority for the following correspondence, taking into account the interests of inmates: (a) correspondence from a national or local government agency; (b) correspondence to a national or local government agency which is conducting an inquiry into measures taken by the warden of the penal institution;

69 The former Prison Law, *supra* note 2, Article 46 para. 1.

70 *Ibid.*, Article 46 para. 2.

71 The Ordinance for Enforcement of the Former Prison Law, *supra* note 24, Article 130 para. 1.

72 The 2005 Prison Act, *supra* note 1, Article 128.

73 HAYASHI/KITAMURA/NATORI, *supra* note 4, 642.

and (c) correspondence to and from lawyers dealing with legal matters regarding measures taken by the warden.⁷⁴ With regard to these types of correspondence, the warden can examine mail only to determine whether the mail concerned can be properly categorized as correspondence listed in the provision. This last provision was included in response to the Correctional Administration Reform Council's proposal and reflects the need to ensure that inmates can submit complaints without fear of intimidation.⁷⁵

b) Un-sentenced Persons

Unlike sentenced persons, the aim of incarceration – the rehabilitation and reformation of inmates – does not give any reason to deprive un-sentenced persons of access to the outside world, since the aim of detaining them lies in preventing concealment or destruction of evidence rather than their rehabilitation and reformation.⁷⁶ Correspondence between un-sentenced persons and anyone, including their lawyers, is thus generally allowed under the Prison Act except where the Court has prohibited contact with individuals other than an inmate's defense counsel.⁷⁷

At the same time, the Act exposes un-sentenced persons to broader censorship than sentenced persons since there is a compelling need to prevent concealment and disruption of evidence as well as a need to block inappropriate communication and monitor communication for reference to their treatment.⁷⁸ The Act provides that the warden of the penal institution is to have an officer examine correspondence to and from un-sentenced persons in general.⁷⁹ It then restricts the authority to examine the following types of correspondence: (a) correspondence from defense counsel, (b) correspondence from a national or local government agency and (c) correspondence from lawyers dealing with legal affairs regarding measures taken by the warden.⁸⁰ These types of correspondence are subject to censorship to the extent necessary to confirm that the mail in question falls under one of the categories listed above.

Censorship of correspondence from defense counsel and correspondence from lawyers dealing with legal affairs concerning measures taken by the warden would be inappropriate in terms of effectively protecting the right

74 The 2005 Prison Act, *supra* note 1, Article 127.

75 Recommendation from the Correctional Administration Reform Council, *supra* note 3, 24–25.

76 HAYASHI/KITAMURA/NATORI, *supra* note 4, 683–684.

77 The 2005 Prison Act, *supra* note 1, Article 134.

78 HAYASHI/KITAMURA/NATORI, *supra* note 4, 686–687.

79 The 2005 Prison Act, *supra* note 1, Article 135 para. 1.

80 *Ibid.*, Article 135 para. 2.

of defense or the right to remedy of human rights violations. Additionally, such correspondence usually carries little risk of enabling escape, concealment or the destruction of evidence. Therefore, the Act restricts the censorship of such correspondence solely to the extent necessary to make sure that the mail concerned falls under one of the categories listed in the provision. Simultaneously, the authority to examine correspondence written by un-sentenced persons to defense counsel or to lawyers dealing with legal affairs concerning measures taken by the warden has not been altered, since lawyers could show such mail to a third party without recognizing that it entails a risk of evidence being concealed or destroyed (which would create the same risk as mail being directly sent to a third party).⁸¹ While the JFBA recommended that not only correspondence from defense counsel but also correspondence to defense counsel should be immune from censorship,⁸² the 2005 Prison Act has retained the authority of the warden to censor correspondence sent to defense counsel or other lawyers.

c) *Inmates Sentenced to Death*

By contrast, correspondence with inmates sentenced to death is limited to relatives and individuals whom the warden specifically authorizes, as is the case for visits. The 2005 Prison Act provides that the warden is to permit inmates sentenced to death to send or receive the following correspondence: (a) correspondence to or from relatives; (b) correspondence of important personal, legal, or occupational concern, such as reconciliation of marital relations, pursuance of a lawsuit, or maintenance of a business; and (c) correspondence deemed to contribute to maintaining the inmate's peace of mind.⁸³ Other correspondence might be permitted at the discretion of the warden, but correspondence is rather restrained compared with sentenced persons or un-sentenced persons, who can correspond with anyone in principle. As to why correspondence with inmates sentenced to death is more limited than that with sentenced persons, it is often explained that further restraints are acceptable as a punishment imposed on inmates who have received the most severe sentence and that contact with the outside world could cause emotional distress to inmates awaiting their coming execution.⁸⁴ Despite such restraints, corre-

81 T. NATORI, *Keiji shūyō shisetsu oyobi hishū yōsha tō no shogū ni kansuru hōritsu no gaiyō* [The Outline of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees], *Keiji Hō Journal* 5 (2006) 8, 18.

82 The JFBA, *Miketsu kōkin hōan ni taisuru nichiben-ren no iken* [The JFBA's Opinion Regarding the Bill to Partially Amend the Act on Penal Detention Facilities and Treatment of Inmates and Detainees] (Tōkyō 2006) 21.

83 The 2005 Prison Act, *supra* note 1, Article 139 para. 1.

84 HAYASHI/KITAMURA/NATORI, *supra* note 4, 711–712.

spendence with their lawyers is allowed because it falls under the category of correspondence for a legally important concern.

In addition, correspondence with death row inmates is subject to broader censorship than correspondence with sentenced persons or un-sentenced persons. Censorship of the following correspondence is restricted, analogous to the treatment of sentenced persons: (a) correspondence from a national or local government; (b) correspondence to a national or local government concerning measures taken by the warden; and (c) correspondence to or from lawyers dealing with legal affairs concerning measures taken by the warden.⁸⁵ Correspondence of this nature can be censored only to the extent necessary for ensuring that the correspondence in question falls under one of the categories listed above. However, mail which does not fall into one of the above categories is censored without exception,⁸⁶ whereas correspondence with sentenced persons or un-sentenced persons cannot be censored when there is no risk of its causing either a disruption of discipline and order in the penal institution or the destruction of evidence.⁸⁷ The justification for different treatment of sentenced persons or un-sentenced persons is that there is a substantial need to discern the mental condition of death row inmates who are awaiting their execution and are likely to feel mental anguish.⁸⁸ For these reasons, under the 2005 Prison Act, only a limited number of people are allowed to correspond with death row inmates, and broader censorship has been imposed on correspondence they send and receive.

2. *Mail Censorship*

As compared to the presence of guards at lawyer visits, there have been fewer precedential court rulings regarding the legality of a warden's censoring of mail to or from lawyers. Prior to the enactment of the 2005 Prison Act, the Supreme Court ruled constitutional the former Prison Law allowing the blanket censorship of lawyer mail.⁸⁹ While some lower courts have dealt with the legality of censoring mail to or from lawyers under the new law,⁹⁰ the Supreme Court has not made any decision on the issue since the introduction of the Act.

85 The 2005 Prison Act, *supra* note 1, Article 140 para. 2, Article 127 para. 2.

86 *Ibid.*, Article 140 para. 1.

87 *Ibid.*, Article 127 para. 1, Article 135 para. 3.

88 HAYASHI/KITAMURA/NATORI, *supra* note 4, 715.

89 Supreme Court, 5 September 2003, Minshū 210, 413.

90 Chiba District Court, 9 September 2015, Heisei 25 (Wa) 953, Tōkyō District Court 14 November 2012, Heisei 22 (Wa) 18516, Kyōto District Court, 10 April 2012, Heisei (Wa) 1090.

Nonetheless, this does not mean that the Act has few issues as regards mail censorship. Rather, the JFBA has repeatedly issued recommendations against a warden's censoring an inmate's mail to his or her lawyers, concluding that such mail censorship violates the right to a fair trial and the freedom of expression.⁹¹ This section examines whether the provisions of the new law and their application are compatible with international human rights law concerning the confidentiality of communication between lawyers and prisoners. As is discussed below, the provisions of the 2005 Prison Act regarding mail censorship and their application cannot be seen as respecting the requirements of international human rights law.

a) *Legality of Relevant Provisions*

Under the 2005 Prison Act, correspondence between lawyers and prisoners is subject to the restraint of censorship. In particular, correspondence with death row inmates and un-sentenced persons detained at *daiyō kangoku* has been censored without exception if it does not come under certain defined categories of correspondence. The Act does not provide the warden with any authority to refrain from censoring such correspondence. This must be considered incompatible with the SMR, which provides that prisoners are to be provided an adequate opportunity for uncensored communication with a legal adviser on "any legal matter".⁹² The asserted aims of the 2005 Prison Act are discerning the state of mind of inmates awaiting their coming execution and preventing the destruction or concealment of evidence. Nevertheless, the interest in determining the state of mind of death row inmates does not justify a restriction of their rights, as was affirmed in a supplementary resolution when the 2005 Prison Act was partially revised in 2006.⁹³ Lawyers who are obligated to adhere to strict professional ethics – as enforced by the disciplinary systems of bar associations – are unlikely to help un-sentenced persons destroy or conceal evidence. The concealment or disruption of evidence can be kept to a minimum by making *ex-post* measures work effectively, such measures including attorney disciplinary systems. The 2005 Prison Act should therefore be revised in conformity with the SMR.

In addition, correspondence sent from un-sentenced persons to defense counsel or lawyers dealing with legal affairs regarding measures taken by

91 The JFBA, *Tochigi keimu-sho ni okeru shinsho ken'etsu ni kansuru jinken kyūsai mōshitate jiken* [Human Rights Relief Case Regarding Examination of Correspondence in Tochigi Prison] (2013); The JFBA, *Fukushima keimu-sho ni okeru bengo-shi tō ate shinsho kaifu ni kansuru jinken kyūsai mōshitate jiken* [Human Rights Relief Case Regarding Examination of Letters to Lawyers in Fukushima Prison] (2011).

92 The SMR, *supra* note 16, Rule 61 para. 1.

93 The House of Councillors, Supplementary Resolution, 1 June 2006, para. 13.

the warden is censored in the same manner as other general mail. This is because lawyers might show such mail to a third party without recognizing any risk, which might cause the concealment or destruction of evidence. Nonetheless, such risk of concealment or destruction would be deterred if not completely removed by attorney disciplinary systems. International human rights instruments such as the UN Body of Principles,⁹⁴ Basic Principles of the Role of Lawyers⁹⁵ and the SMR⁹⁶ require the government to guarantee the confidentiality of correspondence from un-sentenced persons to their defense counsel or lawyers, and *vice versa*. Thus the Act does not meet the standard recognized by these instruments.

The UN Body of Principles enunciates that communication between prisoners and their defense counsel can be censored only in exceptional circumstances, providing that confidentiality may be suspended only when “it is considered indispensable by a judicial or other authority in order to maintain security and good order”.⁹⁷ While the SMR and the Basic Principles on the Role of Lawyers do not specify such exceptional circumstances, when considering HRC works advancing the importance of confidential communication between lawyers and their clients it becomes apparent that the confidentiality recognized here should not be restricted unless censorship is deemed indispensable for maintaining the security and order of a penal institution. The 2005 Prison Act, however, generally allows the warden to censor correspondence between lawyers and un-sentenced persons or death row inmates. Under the new law, the censoring of correspondence with sentenced persons must be necessary either for maintaining discipline and order in the penal institution or for adequately pursuing correctional treatment; however, this correspondence is, in practice, censored without exception since the warden inevitably perceives the existence of such necessities. These provisions allowing broader censorship can be considered far below the international human rights standard prohibiting the censoring of correspondence with lawyers unless justified by exceptional circumstances. The government should revise the Act and establish a higher threshold in order to restrict censorship and fully respect confidential communications.

b) Legality of Application

The 2005 Prison Act stipulates the maintenance of discipline or order in a penal institution as being prerequisite for the censorship of correspondence

94 UN Body of Principles, *supra* note 12, Principle 18 para. 3.

95 Basic Principles on the Role of Lawyers, *supra* note 15, para. 8.

96 The SMR, *supra* note 16, Rule 61 para. 1.

97 UN Body of Principles, *supra* note 12, Principles 18 para. 3.

with sentenced persons,⁹⁸ and it specifies those categories of correspondence that are not to be censored except where necessary to confirm that the correspondence concerned falls under one of these categories.⁹⁹ These provisions were initially expected to work as restraints against censorship, but in practice broader censorship has still been conducted.

The warden is tempted to perceive such necessities and censor mail to or from sentenced persons, even though the legislation requires each warden to avoid aimless censorship.¹⁰⁰ Even correspondence falling under the categories such as those with regard to legal matters concerning measures taken in the penal institution can be opened and read by the prison staff. The government explains that the censorship undertaken here is merely a rough examination rather than detailed inspection and is done to confirm that the correspondence in question falls under one of the categories listed in the Act.¹⁰¹ Yet while the 2005 Prison Act clearly allows the warden to review correspondence for the purpose of determining whether the correspondence concerned falls under one of the specified protected categories, such a rough examination – entailing that the correspondence is opened and read by an officer – could intimidate inmates who wish to consult with their lawyers. Censorship should be lifted when the warden can confirm the protected status of the correspondence without opening or reading it. For instance, where lawyers send correspondence in an envelope stating on the front that the mail falls under a certain category provided in the 2005 Prison Act, or where an inmate addresses correspondence and the warden confirms that the intended recipients are lawyers, the warden should refrain from reviewing the correspondence because he or she can confirm that the mail concerned falls under a category protected from censorship.

The requirements for censorship established in the Act do not seem to effectively guarantee the confidentiality of communications between lawyers and prisoners. The relevant provisions should be applied appropriately, taking into account the significance of confidentiality, and practice in Japan should be improved in accordance with international human rights standards.

98 The 2005 Prison Act, *supra* note 1, Article 127 para. 1.

99 *Ibid.*, Article 127 para. 2, Article 135 para. 2, Article 140 para. 2, Article 222 para. 3.

100 *Hishu yōsha no gaibu kōtsū ni kansuru kunrei no unyō ni tsuite* [Notice Regarding Application of the Instruction Concerning the Inmates' Access to the Outside World] *Hōmu-shō kyōsei* No. 3350/2007 as amended by *Hōmu-shō kyōsei* No. 3000/2011, para. 11 (1).

101 HAYASHI/KITAMURA/NATORI, *supra* note 4, 650–651.

V. CONCLUSION

The 2005 Prison Act has established some safeguards regarding (i) the presence of guards at lawyer visits and (ii) censorship. These safeguards represent an obvious improvement of the former Prison Law. Nevertheless, the Act overestimates the risk presented to the aims of incarceration and in so doing fails to respect the confidentiality of communications between lawyers and prisoners. Lawyers would be unlikely to disturb the order or discipline of penal institutions even if allowed to communicate with inmates without censorship and in full confidentiality. Illegal communications can be kept to a minimum by effectively implementing *ex-post* measures such as attorney disciplinary systems and criminal punishment. The government has stated that mail sent to lawyers could be subsequently provided to a third party by lawyers, which might threaten the aims of incarceration. However, confidential communications should not be restricted merely on account of such theoretical risks. Given that the importance of confidential communication between lawyers and prisoners has been repeatedly affirmed by both the HRC and other international instruments, it would be excessive to impose restraints on confidentiality because of such vague fears. Legal and practical reform is required in accordance with these international standards, and prison administration in Japan should pave the way toward protecting the confidentiality of prisoner-lawyer communications.

SUMMARY

Ten years have passed since the Act on Penal Detention Facilities and Treatment of Sentenced Persons (2005 Prison Act) enacted on 24 May 2006. The Act, which includes landmark provisions such as the establishment of “the Board of Visitors for Inspections of Penal Institutions”, imposed major changes on the administration of Japanese prisons. However, ten years of prison practice under the new law have revealed various flaws, especially those regarding the protection of confidential communications between prisoners and lawyers.

While all prisoners, namely un-sentenced persons, sentenced person and inmates sentenced to death, may be visited by their lawyers, it is often in the presence of monitoring guards. Correspondence from lawyers is, in practice, censored without exception. This article examines the legality of such restrictions, applying the international human rights standards expressed by relevant international instruments. After an overview of how the new law provides for visits and correspondence for sentenced persons, un-sentenced persons and death row inmates, the article concludes that the 2005 Prison Act

does not meet the human rights standards recognized by the UN Human Rights Committee as well as other international instruments. In particular, the newly revised UN Standard Minimum Rules for the Treatment of Prisoners (SMR) enunciate that protection of the right to communicate with a lawyer in private should be expanded to cover "any legal matter" and not be limited to criminal matters. It would thus be difficult to deny that the 2005 Prison Act and the practice under the new law are far below the higher standard established by the SMR.

Given that the importance of confidential communication between lawyers and prisoners has been repeatedly affirmed by both the HRC and other international instruments, it would be excessive to impose restraints on confidentiality solely on account of a vague threat to the aims of incarceration. Legal and practical reform is required in accordance with these international standards, and prison administration in Japan should pave the way toward protecting the confidentiality of prisoner-lawyer communications.

ZUSAMMENFASSUNG

Zehn Jahre sind seit Inkrafttretens des Gesetzes über die Gefängnisse und die Behandlung inhaftierter Personen (Gefängnisgesetz 2005) am 24. Mai 2006 vergangen. Das Gesetz hat wichtige Neuerungen wie etwa das „Board of Visitors for Inspections of Penal Institutions“ und wesentliche Veränderungen für die Verwaltung von Gefängnissen gebracht. Die zehnjährige Verwaltungspraxis auf der Grundlage der Neuregelung lässt aber auch verschiedene Defizite erkennen, insbesondere was den Schutz der vertraulichen Kommunikation zwischen Inhaftierten und ihren Rechtsanwälten angeht.

Auch wenn alle Gefängnisinsassen, sowohl die noch nicht verurteilten wie verurteilte und zum Tode verurteilte Personen, das Recht haben, von ihren Rechtsanwälten besucht zu werden, ist dies oftmals nur in Gegenwart von Wachpersonal des Gefängnisses möglich. Der Schriftwechsel zwischen Inhaftierten und ihren Rechtsanwälten wird in der Praxis ohne Ausnahme zensiert. Der Beitrag untersucht die Rechtmäßigkeit dieser Praktiken anhand der einschlägigen internationalen rechtlichen Instrumente. Nach einem Überblick über die Praxis des Besuchsverkehrs und des Schriftwechsels zwischen den Inhaftierten und ihren Rechtsanwälten kommt der Verfasser zu dem Ergebnis, dass das Gefängnisgesetz von 2005 weder den Standards des UN-Menschenrechtsausschusses noch anderen internationalen rechtlichen Vorgaben entspricht. So erstrecken die jüngst novellierten Mindestnormen der Vereinten Nationen für die Behandlung von Gefangenen (Nelson Mandela-Regeln) das Recht auf eine vertrauliche Kommunikation mit Rechtsanwälten auf alle rechtlichen Belange und sind nicht lediglich auf strafrechtliche beschränkt. Vor diesem Hintergrund

lässt es sich nicht leugnen, dass das Gefängnisgesetz von 2005 und die Praxis nach diesem Gesetz in Japan weit unterhalb der Standards liegt, welche die Nelson Mandela-Regeln etabliert haben.

Da der UN-Menschenrechtsausschuss und die anderen internationalen rechtlichen Instrumente wiederholt die Bedeutung einer vertraulichen Kommunikation mit Rechtsanwälten bestätigt haben, erscheint es unverhältnismäßig, Einschränkungen der Vertraulichkeit allein mit einer vermeintlichen Gefährdung der generellen Ziele einer Inhaftierung begründen zu wollen. Vielmehr sind Reformen der gesetzlichen Regelung und der Praxis erforderlich, wobei die Gefängnisverwaltungen in Japan den Weg zum Schutz einer vertraulichen Kommunikation zwischen Inhaftierten und Rechtsanwälten ebnen sollten.

(Die Redaktion)