

# Exploring the Possibility of Designating a National Preventive Mechanism in Japan

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## Abstract

Japan acceded to the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT) in 1999. However, the Government has been reluctant to ratify the Optional Protocol to the UNCAT (OPCAT) to date. On the other hand, an independent visiting mechanism, the Penal Institution Visiting Committees (PIVCs), was introduced through a series of prison reforms after a series of notorious cases of human rights violations in prisons became publicised. This article focuses on the evolution of the PIVCs and the possibility of designating this mechanism as part of a multi-institution national preventive mechanisms (NPM) in Japan, once ratification of the OPCAT has occurred. The purpose and standards, independence, power/authorities, and transparency of the PIVCs, in relation to the standards required of NPMs under the OPCAT, are explored. Thus, this paper establishes the possibility that Japan will designate the PIVCs as part of multi-institution NPM due to the appropriate breadth of its authority; however, there are some concerns about its purpose, standards, independence, and transparency under the current system and practices. In particular, the purpose of the PIVCs and the standards the mechanism should observe remain unclear. This raises fundamental questions about the possibility of its designation as one part of a multi-institution NPM. The implications of ratification of the OPCAT contribute to the conclusions drawn about the direction that the organisation – the first independent visiting mechanism in Japan – will take.

## 1. Introduction

Japan acceded to the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT) in 1999; this was long overdue compared to the ratification of the International Covenant on Civil and Political Rights (ICCPR), which Japan ratified in

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1979. On the occasion of the political decision to accede to the UNCAT, the Japanese Government did not propose any new legislation or changes to existing legal documents. In parliamentary discussions and statements, and also the initial governmental report submitted to the UN Committee against Torture in 2007, the Government considered that there were no issues of incompatibility with the UNCAT with regard to existing legislation, including the Penal Code, the Code of Criminal Procedure and the State Redress Law; the decision not to accept the individual complaints procedure under Article 22 was the sole exception.<sup>1</sup>

However, the Government has been reluctant to ratify the Optional Protocol to the UNCAT (OPCAT). During the adoption of the OPCAT, at the United Nations General Assembly in December 2002, the Japanese representative abstained from voting on the issue. During the 2007 session for the initial report of the Japanese Government to the Committee against Torture, the representative of the Ministry of Foreign Affairs stated that the Government was considering the details of the visiting mechanisms required by the OPCAT and the compatibility between the OPCAT and related provisions under domestic law.<sup>2</sup> Although matters regarding national preventive mechanism (NPM) were not raised during this session, some members of the Committee against Torture drew attention to a new Japanese visiting body for penal institutions,<sup>3</sup> the Penal Institution Visiting Committees (PIVCs).<sup>4</sup> This system was an important aspect of the Japanese Government's claim regarding the improvements in the human rights situation in Japan.

Moreover, demands to establish an independent mechanism to address human rights violations, and to try to prevent them through monitoring detention facilities, have been increasing, especially among non-governmental organisations (NGOs) that have been engaged in supporting Japanese victims of human rights violations in penal institutions, psychiatric hospitals, and immigration detention facilities. They have primarily modelled their proposals on the European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT), though they have also taken account of the experiences of a variety of individual countries. In fact, during the discussions of the advisory panel for prison reform (Gyokei Kaikaku Kaigi [Correctional Administration Reform Council]), the members identified the Independent Monitoring Boards in the United Kingdom, and the Anstaltsbeirat in Germany, as models for the PIVCs.<sup>5</sup> The establishment of the PIVCs has promoted greater demand for similar mechanisms for other types of detention facilities. Shortly after the establishment of the PIVCs

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<sup>1</sup> Regarding the individual complaints system, the Government stated, in its initial governmental report to the Committee against Torture that 'the system needs careful examination as it may cause problems in relation to the judicial system including the independence of the judiciary guaranteed by the Constitution'. Japan's Initial Periodic Report to the UN Committee against Torture, UN Doc. CAT/C/JPN/1, 13 June 2006, para. 512.

<sup>2</sup> Japanese Federation of Bar Associations (JFBA), *Kaikaku o Semarareru Hikoukinyu no Jinken: 2007 nen Goumon tou Kinshi Jyoyaku Dai 1 kai Seifu Houkokusyo Shinsa (For Urgent Reform on Detainee's Human Rights Situation: Record of Consideration by the UN Committee against Torture in 2007)* (Japan: Gendai Jinbun Sya, 2007), p.88.

<sup>3</sup> In this article, the term 'penal institution' refers to prisons for pre-sentenced criminals (defendants) and those for criminals who have been sentenced to imprisonment with or without labour or death.

<sup>4</sup> For example, one of the members of the Committee against Torture, Mr Claudio Grossman welcomed Japanese Government's decision to establish the PIVCs and expressed interest in the standards and process for the appointment of members of the PIVCs. He posed a question to the Government on the way to properly judge 'the enthusiasm for the improvement of the administration of the penal institution'. JFBA, p.65. See fn.2.

<sup>5</sup> Gyokei Kaikaku Kaigi (Correctional Administration Reform Council), *Gyokei Kaikaku Kaigi Teigen (Recommendations of the Correctional Administration Reform Council)*, 22 December 2003, p.27.

in 2007, a similar system was established to monitor detention facilities at police stations.<sup>6</sup> The Government also presented a bill, in the recent Diet session, to establish a visiting committee for immigration detention institutions.<sup>7</sup>

However, the PIVCs mechanism remains one of the strongest candidates to become the NPM (or the leading institution in a multi-institution NPM) when Japan ratifies the OPCAT. The purpose of this paper is to examine the PIVCs in relation to the possibilities for more effective action, and also the limiting factors, if the PIVCs are designated as part of a multi-institution NPM.

## 2. Overview and Background of the PIVCs

Under Article 7 of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees (Prison Act),<sup>8</sup> which was enforced in 2006, each penal institution is required to establish its own PIVC. As of 1 April 2008, there are 76 penal institutions in Japan, including ones for sentenced adults, juveniles,<sup>9</sup> and pre-sentenced prisoners; therefore, there were 76 PIVCs at that time. Each PIVC is a body attached to each penal institution, rather than coming directly under the auspices of the Ministry of Justice; the prison's administration is required to fund the committee from its own budget and to provide an official as the PIVC's secretariat.

As described in Article 7(2), the mandate of the PIVCs is to 'inspect the penal institution where the Committee [PIVC] is established and ... provide the statement of its opinions to the warden of the penal institution with regard to the administration of the penal institution'. Under Article 8(1), each PIVC comprises a maximum of ten members, though, in practice, the number of members varies between four and ten. Regarding the qualification of the members, Article 8(2) only requires that members be 'persons of advanced integrity and insight with enthusiasm for the improvement of the administration of the penal institution'. The Minister of Justice appoints the members (according to Article 8[2]) from a list of candidates submitted by the relevant prison: this list of candidates usually include attorneys nominated by the local bar association, medical doctors nominated by the local medical association, local government officers,<sup>10</sup> representatives from community associations, and university professors. The PIVCs membership term is one year and re-appointment for further terms is possible under Article 8(3). PIVCs members are part-time national public servants (Article 8[4]), under both the Prison Act and the National Public Service Act. The PIVC does not have its own office and staff; instead, the officer who

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<sup>6</sup> In Japan, there are detention facilities at each police station (1, 259 facilities as of 1 April 2008), according to the White Paper on Police 2008. These places are known as 'substitute prisons' or *daiyo-kangoku*. The police authority can control the treatment of suspects in this type of place of detention during the investigation of suspects. The system has been controversial for a long time.

<sup>7</sup> The bill was submitted to the 171<sup>st</sup> Diet session and enacted on 8 July 2009. According to the bill, this mechanism will be very similar to the PIVCs. See Articles 61-7(2-6).

<sup>8</sup> Act No 50, enacted on 25 May 2005. In this article, names and provisions in English are cited from the Japanese Law Translation site by the Ministry of Justice. Available at: <http://www.japaneselawtranslation.go.jp/>. Last accessed 27 July 2009.

<sup>9</sup> Most criminals or delinquents under 20 years old are processed under the juvenile justice system; however, some juvenile criminals over the age of 14 years old are treated as adult criminals. There are 7 penal institutions for juveniles in the country as of 1 April 2008. These institutions detain sentenced juveniles through the same criminal procedures as adults, rather than using the procedures of the juvenile justice system.

<sup>10</sup> The local government agencies that these local government officers belong to are not the ones that come under the prison authority's remit. This is because, in Japan, administration of all penal institutions, both for sentenced and remand (pre-sentenced) prisoners, comes under the remit of the national government, not the local governments.

belongs to the administration unit of each penal institution acts as a member of the secretariat of the PIVC (Article 5 of Rule on Penal Detention Facilities and Treatment of Inmates and Detainees).<sup>11</sup>

Under the Prison Act, the warden of each institution has to ‘furnish the Committee on a regular or as-needed basis with the information on the penal institution with respect to its state of administration’ (Article 9[1]) and also ‘provide the necessary cooperation for such visit[s] and interview[s] with inmates’ (Article 9[3]). Each PIVC conducts visits to its associated institution ‘in order to grasp the circumstances of the administration of the penal institution’: ‘when the Committee finds it necessary, [it may] elicit cooperation from the warden of the penal institution for holding an interview with inmates’ during visits (Article 9[2]). The PIVCs are required to compile their findings within one year, and submit a report to the Minister of Justice by the end of the fiscal year. Afterwards, the Minister of Justice is requested to publish ‘the outline’ of all the PIVCs’ findings; subsequently, the prison wardens are expected to respond to the findings (Article 10). The tables below consist of data on the PIVCs’ activities and recommendations made public by the Minister of Justice.<sup>12</sup>

### 2.1 *The PIVCs’ Activities*

Year	2006	2007	2008
Number of PIVCs	74	75	76
Number of PIVC members	358 (as of 14 July 2006): 75 Attorneys at law 74 Medical doctors 81 Local government Officers 128 Representatives from the community and others	363 (as of 30 March 2008): 77 Attorneys at law 74 Medical doctors 72 Local government officers 140 Representatives from the community and others	368 (as of 30 March 2009): 78 Attorneys at law 75 Medical doctors 72 Local government officers 143 Representatives from the community and others
Number of meetings (total for all PIVCs)	360	400	398
Number of visits to prisons (total for all PIVCs)	195	187	207

<sup>11</sup> Pursuant to Article 5 of the Rule on Penal Detention Facilities and Treatment of Inmates and Detainees, officers of the general coordination division of each prison authority shall be in charge of the secretariat of each PIVC. As to the upper levels, the general coordination division of the Correction Bureau of the Ministry of Justice has jurisdiction over high-level PIVCs issues.

<sup>12</sup> Tables 1 and 2 are based on data titled ‘Keijishisetsu Shisatsu Inkaei no Katsudou Jyokyo ni Tsuite (On Facts and Figures of the Penal Institutions Visiting Committee)’ on the Ministry of Justice’s website. Available at <http://www.moj.go.jp>. Last accessed 13 October 2009.

Number of interviews with inmates (total for all PIVCs)	433	589	598
Number of recommendations from the PIVCs to the wardens of their respective prisoners	<p>In 330 cases (59%), the authorities have taken (or will take) action in reaction to the recommendations.</p> <p>121 cases (21%) were forwarded to the Ministry of Justice.</p> <p>In 114 cases (20%), including in cases that were identified as requiring further consideration, the authorities have not taken any action.</p>	<p>In 367 cases (59%), the authorities have taken (or will take) any action in reaction to the recommendations.</p> <p>93 cases (15%) were forwarded to the Ministry of Justice.</p> <p>In 165 cases (26%), including in cases that were identified as requiring further consideration, the authorities have not taken any action.</p>	<p>In 366 cases (56%), the authorities have taken (or will take) any action in reaction to the recommendations.</p> <p>95 cases (14%) were forwarded to the Ministry of Justice.</p> <p>In 198 cases (30%), including in cases that were identified as requiring further consideration, the authorities have not taken any action.</p>

## 2.2 Key Categories of PIVCs' Recommendations<sup>13</sup>

Year	2006	2007	2008
Organisation and prison staff	130 (63-48%) <sup>14</sup>	155 (96-62%)	152 (90-59%)
Buildings and equipment	69 (41-9%)	60 (28-47%)	62 (28-45%)
Condition of cells, including overcrowding	30 (7-23%)	31 (11-35%)	26 (8-31%)
Work of the PIVCs	68 (41-60%)	65 (45-69%)	62 (42-68%)
Possession and purchase of goods	77 (48-62%)	100 (61-61%)	112 (53-47%)
Health and medical treatment	169 (96-57%)	136 (88-65%)	140 (84-60%)
Access to media (books, radio, and other)	26 (15-58%)	27 (16-59%)	30 (10-33%)
Discipline measures	29 (24-83%)	31 (19-61%)	38 (29-76%)
Rehabilitative programmes and prison works	94 (61-65%)	50 (26-52%)	76 (45-59%)
Contact with the outside world	26 (11-42%)	29 (6-21%)	48 (24 -50%)

<sup>13</sup> One recommendation sometimes includes several issues; therefore, the totals in Table 2 are different from the ones in Table 1.

<sup>14</sup> In Table 2, the first number refers to the number of recommendations issued by the PIVCs. The first number in parenthesis refers to the number of cases in which the authorities have taken or will take action in response to these recommendations; the second percentage is the Government's response rate.

As Table 2 demonstrates, there are a considerable number of recommendations regarding Organisation and Prison Staff and Health and Medical Treatment compared to other issues. The Government's response rate varies depending on the substance of each recommendation from the PIVCs. For example, the category of Organisation and Prison Staff includes recommendations for increasing the number of prison and medical staff, and improving the employment conditions of staff. Issues regarding staff numbers and employment conditions are difficult for the authorities to rectify because they require additional funds and, thus, a high-level decision at the Ministry of Justice: naturally, more time is needed to obtain such a decision. On the other hand, some recommendations, such as increasing opportunities for exercise and setting up health equipment (i.e. Health and Medical Treatment issues) and offering additional kinds of goods for inmates to use and purchase (i.e. Possession and Purchase of Goods issues), are comparatively easy for prison authorities to adopt.

### 3. Background and Process of Introduction of the PIVCs

The idea of independent visiting bodies helping to prevent human rights violations in penal institutions existed within professional and academic fora long before the establishment of the PIVCs,<sup>15</sup> but it has taken a long time for this ideal to be realised. The focus on such bodies stems from a growing interest in the protection of prisoners' human rights, especially since the current Japanese Constitution was enacted after the end of World War II. However, the previous Prison Act of 1908, which did not recognise the human rights of prisoners, was not revised after the enactment of the Constitution, and was, therefore, in contradiction with the human rights ideals of the Constitution. Partly due to this inconsistency, the idea of independent visiting bodies took a long time to be accepted. In addition, many policymakers considered that independent visiting mechanisms would not be necessary because the existing internal visiting mechanisms were judged to be sufficient.<sup>16</sup>

A detailed plan for establishing independent monitoring mechanisms was presented during the discussions on changing the previous Prison Act. The more liberal side (the Japanese Federation of Bar Associations [JFBA]) and a group of criminal justice scholars opposed the bill proposed by the Government, suggesting a system comprised of independent visiting mechanisms as an alternative.<sup>17</sup> Their proposals referred to international human rights standards, as well as systems

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<sup>15</sup> For example, in the Penal Act text, the author (Dr Shigemitsu Dando), who was acting a representative of criminal law scholars in Japan, was concerned about the extent to which discretion was permitted in the enforcement of criminal sanctions that have a high risk of violating human rights. Dr Dando suggested that judges should be more involved in relation to this issue, and that systems such as prison boards and parole boards, with participants from outside the prison system, be established in order to prevent violations. See Shigemitsu Dando, *Keihou Kouyou Souron (The Elements of the Penal Act, General Theory)* 1<sup>st</sup> edition (Japan: Soubun Sya, 1957), p.441.

<sup>16</sup> Mechanisms for visiting penal institutions have existed under both the old and the new Prison Act. One mechanism comprises inspection by Ministry officers, designated by the Minister of Justice, who 'conduct on-the-spot inspections at each penal institution at least once per annum or more frequently' (Article 5 of the current Prison Act). The other key mechanism comprises visits by judges and public prosecutors; these visits are more independent. However, the Act only stipulates that 'judges and public prosecutors may observe the penal institutions' (Article 11) and, thus, there have only been a few visits to date. Accordingly, this mechanism does not function effectively as an independent monitoring measure.

<sup>17</sup> The JFBA suggested an independent visiting mechanism in their Bill on Treatment of Criminal Detainees 1992: JFBA, *Kaisetsu Nichibenren Keijisyogyo Houan: Shisetsu Kanri Hou kara Ningenteki Syogyo Hou e (Commentary of Bill on Treatment of Criminal Detainees: For Change from Facility Management Act to Human Treatment Act)* (Japan: JFBA, 1994), p.175. The academic group, Keiji Rippou Kenkyukai (Study Group on Criminal Legislation),

and practices that had been effective in other countries; they pointed particularly to the success of the CPT. However, these ideas were never included in the bill, which ultimately failed.

However, about a decade after the bill was withdrawn (due to the growing movement against the bill) a series of cases of serious human violation – the Nagoya Prison cases<sup>18</sup> – became the motivating force behind the introduction of independent mechanisms. Soon after the cases came to light, the Minister of Justice established an advisory panel for prison reform (the Correctional Administration Reform Council) consisting of independent members, including a medical doctor, attorneys-at-law, university professors, journalists and other professionals. The Panel recommended the introduction of independent visiting mechanisms in its final report, which was the result of an eight month series of discussions.<sup>19</sup> The impact of the Nagoya Prison cases was so serious that the Government came under pressure to accept certain ideas for establishing new measures to protect the human rights of inmates, especially those suggested by the JFBA, academics, and NGOs working to support prisoners' human rights. Several key NGOs, including the Centre for Prisoners' Rights, lobbied parliament members to pressure the Government, while the JFBA opened a continuous consultation process with the Government on these issues, in the hope that this would lead to disclosure of facts about the incidents and, thus, encourage the Government to adopt some measures to prevent similar violations occurring. In addition, the media treated these stories as serious scandals, the responsibility for which lay with the Ministry of Justice. This was a break from the past: the human rights of prisoners had never previously been treated as important news.

#### 4. Some Concerns about the PIVCs

At the time of writing, the PIVCs are entering their fourth year. Since published data are only available about the 'outline' of the PIVCs' activities, and the level of detail of its work varies between individual committees, it is only possible to achieve a partial understanding of the institution as a whole. Thus, the following discussion of the extent to which the PIVCs are compatible with the rules for NPMs under the OPCAT, and the limitations of the PIVCs' work at the domestic level, will need to be revisited when more information is available.<sup>20</sup>

##### 4.1 Purpose and standards

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suggested its own outline revisions to the Prison Act: *Nyumon Kangoku Kaikaku (Introductory Prison Reform)* (Japan: Nihon Hyoron Sya, 1996), pp.91 and 207, and *21 seiki no Keijishisetsu: Global Standards to Shimin Sanka (Prisons in the 21st Century: Global Standards and Civil Participation)* (Japan: Nihon Hyoron Sya, 2003), pp.236 and 335.

<sup>18</sup> Five prison officials of Nagoya Prison were arrested and investigated for having seriously injured one prisoner, and caused the death of two other prisoners in assaults involving leather handcuffs and other tools, during the period December 2001 to September 2002. The fact of the incidents and subsequent proceedings are referred to in Gyoukei Unei ni kansuru Cyousa Kentou Iinkai (Special Investigating Committee of the Ministry of Justice), Gyoukei Unei no Jitsujyo ni kansuru Cyukan Houkoku: Nagoya Keimusyo Jiken no Genin to Gyoukei Unei no Mondaiten ni tsuite (The Interim Report on the Current Situation of Prison Administration: Issues regarding the Causes of Nagoya Prison Incidents and the Prison Administration), 31 March 2003, and Centre for Prisoners' Rights, (2002) *Centre for Prisoners' Rights News Letter* 32.

<sup>19</sup> Gyoukei Kaikaku Kaigi (Correctional Administration Reform Council). See fn.5.

<sup>20</sup> Relatively few details on the PIVCs have been published to date. Therefore, the facts and issues about the PIVCs described in this article are drawn from a limited number of PIVCs' reports, published articles on the PIVCs, interviews with members of the PIVCs, and newspapers.

The first issue to consider is the ambiguity of the purpose and standards for PIVCs under the current Prison Act. In fact, the purpose and standards of the PIVCs depend on the interpretations and implementation of each PIVC. For example, in reports submitted to the relevant prison warden, one PIVC expressed its confusion over its role, stating that ‘it is unclear which points of view it should monitor the institution upon’. Thus, the PIVC seems to be expected to monitor from the view of both ‘lay persons’ and ‘professionals’. Such ambiguity has resulted in confusion among the members about their work.<sup>21</sup>

Another PIVC came to conceptualise its role as revolving around the fact that the committee was ‘a body consisting of mainly lay persons’; it decided that its purpose was to become a deterrent measure, against various troubles in prison, by actively asserting the existence of the PIVC.<sup>22</sup> The member of this PIVC seem to consider themselves a body of ‘lay persons’ who are not specialised in prison administration (i.e. an inexpert body) that should pursue the possibility of playing a preventive role in penal institutions.

On the other hand, articles and reports written by prison officials reveal different perceptions about the PIVCs’ role. For instance, one officer says that the PIVCs are supposed to provide comments reflecting the ‘sound common sense’ of the people and are, thus, expected to play a role in monitoring the Government’s efforts to keep ‘ensuring security’ in the community through the administration of prisons.<sup>23</sup> He also argues that (i) members should give their opinions on what standards of treatment are appropriate for prisoners from the view of ‘tax payers’ who contribute to the budget allocation<sup>24</sup> and (ii) that the PIVCs should reflect ‘broader common sense’ in giving these opinions.<sup>25</sup> Similarly, an administrative instruction issued by the head of the Correctional Bureau of the Ministry of Justice stipulates that the purpose of the PIVCs is to understand the current situation of penal institutions properly, to make their comments as citizen representatives, and to contribute to the improvement of the management of penal institutions.<sup>26</sup> However, budget allocation should be only one of the areas of consideration for PIVC members’ on matters related to penal institutions. Moreover, there is a lack of clarity about what the ‘common sense’ of the people is, and what ‘comment as citizen representatives’ means. The officer’s comments about ‘common sense’ make reference to prioritising safety in

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<sup>21</sup> Satoshi Mishima, ‘Osaka Iryo Keimusyo Shisatsu Iinkai no Nenji Houkokusyo ken Ikensyo: 2006 nendo, 2007 nendo ni tsuite (Regarding Annual Report with Statement of Comment by the Penal Institution Visiting Committee for Osaka Medical Prison: Year of 2006 and 2007)’, (2008) *Hogaku Zasshi (Bulletin of Law Faculty of the Osaka City University)* 55(1), p.409.

<sup>22</sup> Yuichi Kaido, et al., ‘Keiji Shisatsu Iinkai no Katsudou to Kadai (Activities and Issues of the Penal Institution Visiting Committee)’, (2009) *Ningengaku Kenkyu (Bulletin of Faculty of Human Relations of Otsuma Woman’s University)* 10, p.161.

<sup>23</sup> Satoshi Tomiyama, ‘Keiji Shisetsu Shisatsu Iinkai no Genjyo to Kadai (Facts and Problems of the Penal Institution Visiting Committee)’, (2008) 155 *Hanzai to Hikou (Crime and Delinquency Journal)*, p.32. He also expresses his concern about the current PIVCs’ work; he argues that it mainly focuses on prisoners’ needs and requests which result from the Government’s omission and failure, and that it should pay attention to the Government’s supply of profit to inmates (in order to examine whether the supply is according to proper budget allocation or not).

<sup>24</sup> Satoshi Tomiyama, ‘Keiji Syuyou Shisetsu Hou no Unyoujyo no Kadai (Problems under the Practice of Act on Penal Detention Facilities and Treatment of Inmates and Detainees)’, (2007) *Keisei (Correctional Association Journal)* 118, p. 21.

<sup>25</sup> Tomiyama, p.33. See fn.23.

<sup>26</sup> Keijishisetsu Shisatsu Iinkai ni taisuru Kyouryokutou ni tsuite (Regarding Cooperation with the Penal Institution Visiting Committee), instructions by the Head of the Correctional Bureau of the Ministry of Justice, 23 May 2006.

the community. A serious issue arises with regard to such an understanding: if security is given priority over all other issues, there may be a conflict with the promotion of human rights of prisoners.

The OPCAT requires States Parties to ‘ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge’ (Article 18). On the other hand, in regard to the PIVCs, since the Prison Act, under Article 8(2), only requires that members be ‘persons of advanced integrity and insight with enthusiasm for the improvement of the administration of the penal institution’, the requirement regarding the key professions that should be represented in the PIVCs are legally and practically ambiguous, especially in relation to the role of members from the local government and community associations.<sup>27</sup> Who should be, and how they should be, involved in the NPM must be considered in relation to the most effective way to prevent torture and ill-treatment. In order to make the PIVCs effective, it is necessary to choose people who will be appropriate for the work from broader social and political point of view. For example, people who have been involved in social work for the resettlement of ex-prisoners and delinquents in the community, and NGO members who have been working for the promotion and protection of human rights for detained persons, would make good candidates.<sup>28</sup>

## 4.2 Independence

Since the drafting of the current Prison Act, independence has been one of the most controversial points regarding the PIVCs. Article 18 of the OPCAT provides for ‘functional independence’ and ‘independence of their [the NPM’s] personnel’ in conjunction with the Principles relating to the Status of National Institutions (The Paris Principles).<sup>29</sup> The OPCAT also requires NPMs to have a legal basis, independence of members and staff, clear rules regarding the appointment process of members (i.e. in relation to method, criteria, and other aspects), immunity and privilege for members, and financial independence.<sup>30</sup>

In 2008, the Human Rights Committee of the International Covenant on Civil and Political Rights (CCPR) was concerned about the ‘lack of independence’ of the PIVCs, and its lack of resources and authority. In its Concluding Observation, the Committee recommended that the PIVCs be ‘adequately equipped and have full access to all relevant information in order to effectively discharge their mandate’ and also that ‘their members are not appointed by the management of penal institutions’.<sup>31</sup>

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<sup>27</sup> Maiko Tagusari, ‘Goumontou Kinshi Jyouyaku Sentaku Giteisyo no Hijyun to Kokunai Boushi Kikou no Kakuritsu ni Mukete (For the Ratification of the Convention against Torture and the Establishment of the National Preventive Mechanisms)’, (2009) *Centre for Prisoners’ Rights News Letter* 58, p.6.

<sup>28</sup> Regarding the involvement of civil society in the NPM, see The Association for the Prevention of Torture (APT), *Civil Society and National Preventive Mechanisms under the Optional Protocol to the Convention against Torture*, June 2008. Available at <http://www.apr.ch/>. Last accessed 6 July 2009.

<sup>29</sup> Paris Principles relating to the status and functioning of National Institutions for Protection and Promotion of Human Rights, adopted by the UN General Assembly, Resolution 48/134, 20 December 1993.

<sup>30</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, pp.37-48. Available at <http://www.apr.ch/>. Last accessed 6 July 2009.

<sup>31</sup> Concluding Observation of the Human Rights Committee, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, para. 20. Prior to this, the Committee against Torture also examined the PIVCs when the initial governmental report was considered in 2007. However, insufficient information on the PIVCs’ work was presented. The Committee

Regarding the appointment process, the Prison Act only stipulates the guidance as mentioned above; further details are provided via instructions from the Ministry of Justice. For example, the inclusion of attorneys-at-law and medical doctors as members is stipulated in the Ministry's instructions,<sup>32</sup> not in the Prison Act. This tenet was based on the result of consultations between the Ministry of Justice and the JFBA.<sup>33</sup> More detailed procedures for the appointment process should be provided in order to ensure that members are not appointed and removed arbitrarily. In addition, professional expertise from various fields is necessary to strengthen the independence and credibility of the PIVCs: this need should be a formal requirement for PIVCs. The range of professional organisations that can nominate PIVCs' members should be broadened. There is also a need for greater discussion about the kinds of professional expertise, experience, and knowledge that committee members should offer to support the effectiveness of the PIVCs.

The issue of under-resourcing is the most important problem faced by the PIVCs at present. The PIVCs do not have their own secretariat; instead, the officers of the general coordination division of each prison authority are in charge of secretariat of the PIVC (Article 5 of Rule on Penal Detention Facilities and Treatment of Inmates and Detainees). In some cases, if the PIVCs want to work independently, the chairperson of each committee will be in charge of this job. However, the chairperson is only a part-time civil servant and does not have enough time and resources to do the job.<sup>34</sup> Moreover, costs for the PIVCs are covered within the budget, allocated by the Ministry of Justice, of each penal institution. This means that the amount each prison authority pays for the PIVCs are at the discretion of the warden, apart from the day wage for members, which is prescribed.<sup>35</sup>

Furthermore, an umbrella organisation to coordinate all PIVCs is needed to strengthen the independence of the PIVCs as a whole and to improve consistency: the mandates, standards, and methodologies of each committee are decided individually by each PIVC. This lack of unity raises concerns about the lack of effectiveness and credibility of the PIVCs' work and, thus, weakens its independence. The JFBA has held a forum for the attorney members of the PIVCs to share their experiences and discuss improvement of their work. However, as the impact of such fora is limited, an official umbrella organisation must be established to coordinate all the individual PIVCs. An independent human rights committee, which coordinates all independent organisations working for the protection of human rights in the country (including all the PIVCs) and also communicates with the Subcommittee on Prevention of Torture and other related international human rights mechanisms, is needed.<sup>36</sup>

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expressed its concern about the lack of authority of the PIVCs in its Concluding Observations and Recommendations (UN Doc. CAT/C/JPN/CO/1, 3 August 2007).

<sup>32</sup> The instruction stipulates that the bar associations and the medical associations in the region where the penal institution is located are appropriate organisations for the prison management to ask to nominate potential the members of the PIVC.

<sup>33</sup> Aya Kuwayama and Yuichi Kaido, 'Koukinshisetu nai ni okeru Goumonntou Boushi no Igi – Nihon ni okeru Kokunai Boushi Mekanizumu no Jitugen o Saguru (The Importance of the Prevention of Torture or Ill-treatment in Detention Places – Examination of the Possibility to Establish National Preventive Mechanisms in Japan)', (2009) *Ryukoku University Corrections and Rehabilitation Research Centre Research Journal* 6, p.87.

<sup>34</sup> This view was advanced during the author's interviews with PIVCs' members.

<sup>35</sup> In fact, according to the JFBA report on the PIVCs' practice (unpublished document) and interviews with the PIVCs' members, some members are negotiating with their prison management about increasing the number of meetings and visits.

<sup>36</sup> Kuwayama and Kaido. See fn.33.

### 4.3 Power/Authorities

According to the experiences of members of the PIVCs whom the author interviewed, the PIVCs have virtually full authority – legally and practically – to visit ‘their’ penal institution repeatedly and to visit all places within in the institution that they demand to see. In addition, members are able to receive letters from inmates without censorship and to interview inmates and officials privately. The range of powers and the extent of the authority given to the PIVCs are adequate for it to be considered part of an NPM.

However, practical problems have been uncovered in the system with regard to troubling practices that have been employed in Japanese prisons for a long time. For example, an inmate has to request an officer to provide specially formatted papers and envelopes in order to write to the PIVCs. After the inmate posts the letter into the mailbox, the prison authorities cannot open it and censor it because the PIVCs are supposed to keep the key. However, prison officials know which inmates have written to the PIVCs because of the need for the inmates to request the required paper. Reportedly, this leads inmates to refrain from writing to their PIVC out of fear of reprisals.<sup>37</sup>

The PIVCs have the legal and practical rights to meet, without the presence of officers, with all inmates who requested a meeting beforehand. Regarding the PIVCs’ freedom to choose who to meet, because they do not have enough time and resources, they are rarely able to exercise this legal freedom effectively.<sup>38</sup> In addition, medical doctors who are members of the PIVCs should be afforded the opportunity to examine detainees (and also prison staff).<sup>39</sup>

According to Yuichi Kaido, who is a member of a PIVC and an attorney at law,<sup>40</sup> the PIVCs’ ability to engage in a constructive dialogue with prison officials depends on the nature of the relationship between the PIVC and the prison management. If an incident causes an adversarial relationship, it becomes more difficult to engage in a constructive dialogue regarding prison reform. The PIVC in a Tokushima prison recently reported a worrying experience: the PIVC received many prisoner complaints about torture and ill-treatment by a particular prison doctor. The PIVC reported this and warned the warden about repeatedly before these incidents came to light via the press in November 2007, when one of prisoners committed suicide because of the doctor’s violence.<sup>41</sup> Even though the PIVC recommended that the warden withdraw the doctor before a prison riot occurred, the authorities did not take any measures until the facts were reported in the media.

If a PIVC discovers evidence of torture or ill-treatment by prison officers, deciding on how to approach the authorities is a delicate and difficult issue. However, the PIVCs’ ability to accomplish this effectively is one of the most important issues in considering designation of the PIVCs as part of Japan’s NPM.

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<sup>37</sup> Kuwayama and Kaido. See fn.33. In response to this problem, some PIVCs’ members distributed forms to all inmates and then collected them in personally.

<sup>38</sup> The author’s interviews with members of the PIVCs revealed that members often do not have enough time to meet detainees other than those who requested to see them; however, members have commented that they should meet other inmates to gain a broader understanding of the conditions in the institution.

<sup>39</sup> APT, Establishment and Designation of National Preventive Mechanisms, p. 60. See fn.30.

<sup>40</sup> Kuwayama and Kaido. See fn.33.

<sup>41</sup> The details of these incidents are discussed in *Centre for Prisoners’ Rights News letter* 52 (2007) and 53 (2008).

#### 4.4 Transparency

The disclosure of PIVCs reports is not sufficient to meet OPCAT requirements in relation to transparency. As mentioned above, under the Prison Act, the Minister of Justice is required to publish the outline of all opinions reported by each PIVC, and the measures that each respective warden takes in responding to these opinions (Article 10). The reports that have been published to date do not include enough detailed and specific information to judge the effectiveness of the PIVCs.<sup>42</sup>

Although the disclosure of each report is not prohibited under the law and administrative instructions,<sup>43</sup> realistically it may be difficult for a PIVC to disclose its report if the prison authority does not agree with it or is reluctant to support the publication. From the perspective of the PIVCs' purpose, all reports should routinely be disclosed.<sup>44</sup> If there are worries about problems related to privacy and safety of inmates (for instance, in relation to reprisals for bringing violations to light), these problems should be resolved through a consultation on the range and timing of disclosure between the PIVC and the prison authority beforehand. Disclosure will enhance the credibility of the PIVC system, and of prison authorities, in the eyes of civil society.

### 5. Conclusion

The conclusion of this article should be the answer to the question 'Could the PIVCs be designated as a part of a multi-institution NPM when Japan has ratified the OPCAT?' Regrettably, it is not possible to offer a firm answer at this time. Although the PIVCs have a large range of powers and extensive authority in relation to visiting penal institutions, interviewing inmates and staff, and also accessing related documents, there are practical stumbling blocks that render the PIVCs' powers and authority ineffective. Members of individual PIVCs are making efforts, through a trial and error process, to increase their effectiveness. However, this often means, in practice, that the effectiveness of the PIVCs depends on individual members' own efforts and, thus, there is a high degree of variability between the effectiveness of the individual PIVCs.

One of the fundamental problems that require reconsideration is the purpose of this mechanism. Looking back at the process preceding the adoption of the current Prison Act, the PIVCs were originally envisaged as a measure for ensuring the transparency of prisons. At that time, the

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<sup>42</sup> Since 2008, the Ministry of Justice has made public more detailed information on their website, including summaries of the PIVCs' recommendations and the Governments' responses to them, specifying each penal institution' name. In addition, related authorities may be asked to disclose reports, including each PIVCs' report, under the Act on Access to Information held by the Administrative Organs. However, it takes usually one month to access the information and, reportedly, some parts of the disclosed documents cannot be accessed (these parts are blacked out) due to privacy issues. Maiko Tagusari, 'Keijishisetsu Shisatsu Iinkai ni-nenme o Mukaete (The Visiting Committee of Penal Institutions in the Second Year)', (2008) *Kikan Keijibengo (Quarterly Journal on Criminal Defence)* 54, p.119, note 4.

<sup>43</sup> Since the PIVCs members are part-time civil servants, they are duty-bound to keep the certain information gained through their work confidential under the law.

<sup>44</sup> Reports by the PIVCs should be disclosed as soon as possible after their submission; however, some reports may not be disclosed until after a period of time due to, for example, concerns that the disclosure of the report would clearly disturb the preventive purpose of the PIVCs' work.

advisory panel for prison reform, the Correctional Administration Reform Council, also discussed whether the role of the PIVCs, as a body, was to ‘help’ prison authorities to achieve greater transparency via civil participation, or to ‘monitor’ prisons more actively via civil participation.<sup>45</sup> The definition of ‘help’, ‘civil participation’, and ‘monitor’ were interpreted differently during the discussion. Moreover, in its final report, the advisory panel emphasised the PIVCs’ role as paving the way for participation by citizens in penal institution management. They also noted that the PIVCs are essential for the Government to encourage greater public ‘understanding’ about prison management.

To date, the range of purposes and goals attributed to PIVCs have caused confusion over the PIVCs’ work and hampered their effectiveness. In order to move forwards, it will be necessary to distinguish what the PIVCs’ purpose is and what the best measures to achieve this purpose are. If the PIVCs have a primarily preventive purpose, then, without cooperation from the Government, they will not be able to achieve their preventive goals in their respective penal institutions. Moreover, in order to support the Government’s efforts to improve prison conditions, including via preventing human rights violations, all of the PIVCs’ recommendations and suggestions, whether they agree with or oppose current prison management practices, should be discussed. However, for these discussions to be effective, PIVCs must develop a deeper understanding of prison management concerns in order to engage in more constructive dialogue with prison authorities.

In identifying the real purpose of the PIVCs, a discussion that explores the implications of ratification of the OPCAT is of paramount importance. The interim aim of this discussion should be to clarify what standards the PIVCs should base its guidelines on and what direction efforts to advance the organisation’s effectiveness should take. Ultimately, this decision will revolve around whether treatment of inmates and management of penal institutions should be based on international human rights standards and practices, or on other paradigms.

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<sup>45</sup> For discussion of this matter in the session’s record of the advisory panel, see Gyokei Kaikaku Kaigi (Correctional Administration Reform Council): for example, the 6<sup>th</sup> session of the Second Sectional Meeting on 4 November 2003.