

Change and Continuity in Japanese Criminal Justice

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Introduction

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INTRODUCTION

It is said that Japanese criminal justice is becoming increasingly punitive.¹ The chain of events leading to this development has been described as follows: In the 1990s there were a number of scandals that revolved around a failure of the police to act. Most publicized in this regard were two murders (one by a stalker, another by a group of teenagers) that happened even though the victims' families had repeatedly asked for police protection.² These scandals led to radical changes in policing practices and policies. As a consequence, more "trivial" crime was both reported and recorded, crime rates soared and clearance rates went down. Media coverage of the rising crime rate helped create the perception that more serious crime was increasing as well. This circumstance, combined with an increasing attention for and "visibility" of victims of crime, led to a "moral panic" and hardening public attitudes to crime and punishment.³

* Translations are the author's, unless otherwise provided. The author would like to thank Cameron McLauchlan for his help in obtaining the figures needed for the graphs on p. 139 and 104.

1 K. HAMAI/T. ELLIS, Crime and Criminal Justice in Modern Japan: From Reintegrative Shaming to Popular Punitivism, in: *International Journal of the Sociology of Law* 34 (2006) 157-178. K. HAMAI/T. ELLIS, Japanese Criminal Justice – Was Reintegrative Shaming a Chimera?, in: *Punishment and Society* 10 (2008) 25-46; S. MIYAZAWA, The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy, in: *Punishment and Society* 10 (2008) 47-77.

2 For a description of these cases, see K. HAMAI/T. ELLIS, 2006, *supra* note 1, 162.

3 K. HAMAI/T. ELLIS, 2006, *supra* note 1, 162, see also generally M. KAWAI, *Anzen Shinwa Hôkai no Paradokkusu* [Paradox of the Collapse of the Safety Myth] (Tokyo 2004).

These developments led in turn to a kind of “penal populism,” as described by Pratt: more public influence on criminal justice policy at the expense of that of the establishment, as politicians readily responded to what they perceived to be “public opinion” (rather than “expert” research, etc.).⁴ The results were changes in legislation, such as an amendment of juvenile law, the creation of new categories of crime (such as the crimes of “dangerous driving resulting in death or injury” and that of “gang rape”), and an amendment allowing for, among other things, the imposing of longer prison sentences.

What these changes had in common is that they provided criminal justice authorities with the tools to deal with offenders, young and old, in more punitive ways than before. As a consequence, Japanese criminal justice has in fact become more punitive, not only on the level of legal rules but also in practice: More people are now serving longer prison sentences than before. A widening of the criminal justice net has furthermore been observed, as “a greater proportion of the population once diverted from criminal justice processes are now processed formally, and a greater proportion of the offenders who were tried and fined, are now formally tried and sent to prison.”⁵

And so it would seem that a more punitive “public opinion” is now expressed by means of penal policy and practice, by those responsible for the administration of justice. The legal infrastructure has become more retribution-oriented, judges are meting out increasingly strict sentences, and public prosecutors’ freedom to exercise their discretionary authority to deal with (suspected) offenders by means of informal procedures has been reduced.⁶

These last two observations are important ones, as they could be interpreted as evidence that Japanese criminal justice is no longer what it used to be. It has been with particular reference to the widely used system of discretionary prosecution and (relatively) lenient sentencing practices that Japanese criminal justice has been qualified as re-integrative, rehabilitation-oriented, and lenient.⁷ Statistics reveal that judges are in fact imposing stricter sentences.⁸ They also show, however – and this information has not been incorporated in the discussion on Japanese penal populism – that the famously high rates of suspended prosecutions as well as sentences have remained stable (see *graph 1* and 2).

4 J. PRATT, *Penal Populism* (London 2007).

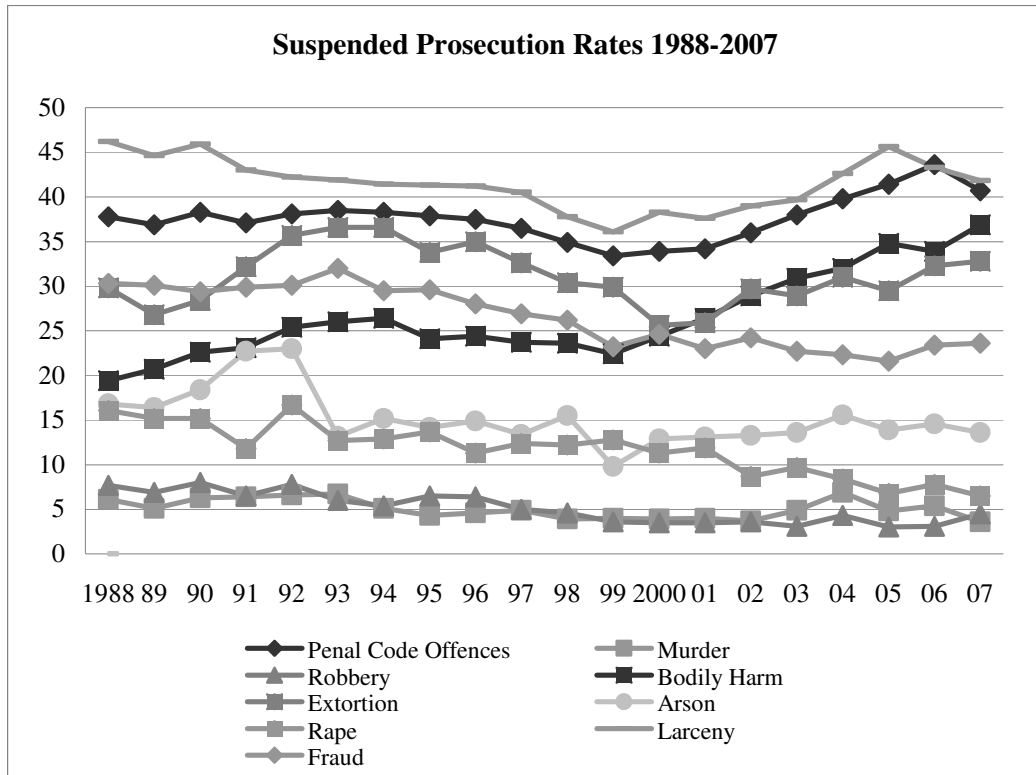
5 K. HAMAI/T. ELLIS, 2008, *supra* note 1, 36.

6 K. HAMAI/T. ELLIS, 2008, *supra* note 1, 36.

7 J.O. HALEY, *Authority Without Power – Law and the Japanese Paradox* (Oxford 1991) 129-138; J.O. HALEY, *The Spirit of Japanese Law* (London 1998) 72-78; T. SASAKI, *Nihon no Shihôbunka* [The Legal Culture of the Japanese Administration of Justice] (Tokyo 2000) 107-120; D.H. FOOT, *The Benevolent Paternalism of Japanese Criminal Justice*, in: *California Law Review* 80 (1992) 317-390. J. BRAITHWAITE, *Crime, Shame and Reintegration* (Cambridge 1989) 61-65, 79.

8 K. HAMAI/T. ELLIS, 2008, *supra* note 1, 36.

Graph 1



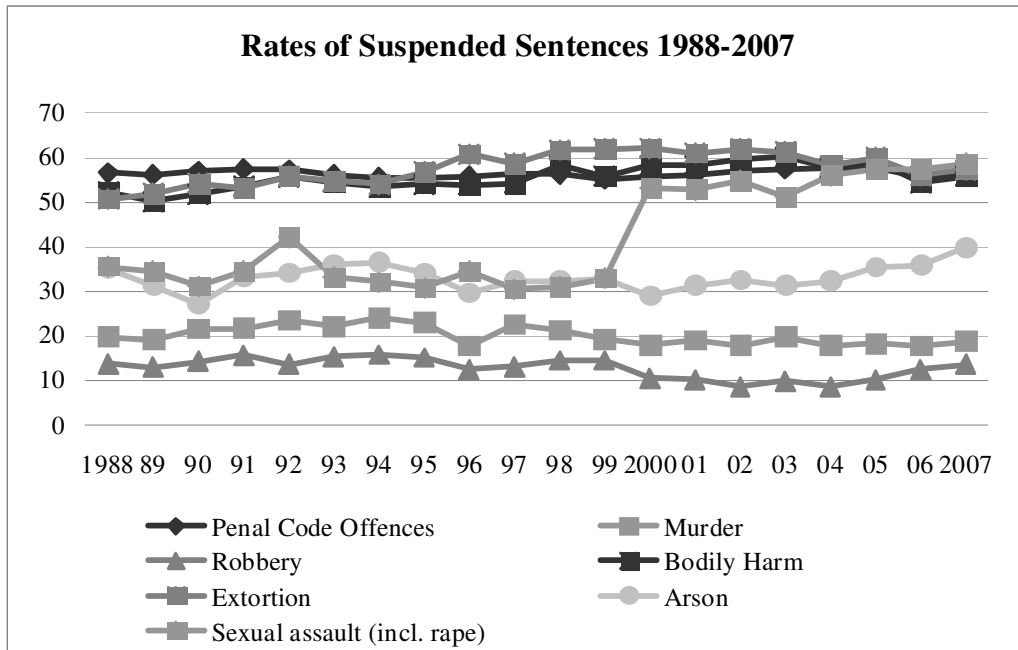
Rates of suspended prosecutions 1988-2007.

Suspended prosecutions rates (expressed in percentages) = the number of persons whose prosecution was suspended ÷ (the number of persons prosecuted + the number of persons whose prosecution was suspended) * 100

Source: White Paper on Crime 1989-2008 (see *supra* note 29).

How can we interpret these percentages, and what do they tell us about “the Japanese approach” toward justice as it has been characterized? To answer these questions, I will first take a closer look at the way decisions regarding (suspended) prosecution and (suspended) sentences are made.

Graph 2



Rates of suspended sentences 1988-2007 District/Family Courts.

Suspended sentences rate (expressed in percentages) = number of persons receiving a suspended sentence ÷ number of persons sentenced to factual term of imprisonment * 100. Specified date for larceny and fraud could not be obtained.

Source: White Paper on Crime 1999-2008 (see *supra* note 29).

I. TO PROSECUTE OR NOT TO PROSECUTE

Article 248 of the Code of Criminal Procedure⁹ states that “where prosecution is deemed unnecessary owing to the character, age, environment (境遇, *kyôgû*), gravity of the offence, circumstances or situation after the offence, prosecution need not be instituted.”¹⁰ Prosecutors’ decisions in this regard thus obviously depend on a range of elements, but one necessary condition for suspending prosecution is the confession of guilt, ideally accompanied by an expression of remorse.

9 *Keiji soshô-hô (Keiso)*, Law No. 131/1948, last amended by Law No. 66/2009. Engl. transl.: <http://www.japaneselawtranslation.go.jp> (last accessed 28 July 2009), German transl.: H. NAKAMURA, *Die japanische Strafprozessordnung vom 10. Juli 1948* (Berlin 1970) 8 ff. (as of 1969).

10 This evaluation of act and actor allows for the possibility that even serious offences such as bodily injury resulting in death or infanticide are dealt with by means of a suspended prosecution (T. SASAKI, *supra* note 7, 41).

This importance attached by public prosecutors to confessions of guilt and expressions of remorse when exercising their discretionary authority has received a great deal of attention in the literature on Japanese criminal justice. This is especially true in terms of cultural explanations for this circumstance, as well as the oppressive consequences that have been said to result from it.¹¹ What I would like to focus on here, however, is the institutionalized, “formal” importance attached to confessions of guilt and expressions of remorse, and prosecutors’ discretionary judgment more generally.

The emphasis on confessions is not only a consequence of their vital importance for the suspension of prosecution and in terms of evidence, but also because confessions are a virtual necessity if prosecutors wish to indict the offender. Prosecutors will indict a person only if they are close to 100% sure that this indictment will result in a conviction, and a confession of guilt is close to being indispensable to make that happen – not in the least because judges “expect” confessions and are reluctant to convict without them.¹²

Given this importance of confessions for prosecutors carrying out key parts of their duties (i.e., suspend prosecution and indict), it is not surprising that prosecutors have been observed to engage in plea bargaining-like practices.¹³ This is nevertheless an important observation, as it brings into focus an aspect of the “confession culture” that has received relatively little attention. Much attention has been given to the ways in which prosecutors exercise discretionary judgment based in part on an assessment of the sincerity of an offender’s confession and remorse – in other words, to the “substantive” importance of confessions and expressions of remorse. One could wonder, however,

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- 11 On the negative consequences of the confession culture, see, e.g., S. HAMADA, *Jihaku no Kenkyū*. [A Study on Confessions] (Tokyo 1992); J. VIZE, Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System, in: UCLA Pacific Basin Law Journal 20 (2003) 329-373. See in this regard also JAPAN FEDERATION OF BAR ASSOCIATIONS COMMITTEE ON PRISON LAW REFORM, Japan’s ‘Substitute Prison’ Shocks the World. *Daiyō Kangoku* and the UN Committee against Torture’s Recommendations, available online at http://www.nichibenren.or.jp/en/activities/statements/data/daiyo_kangoku.pdf (last accessed 28 July 2009). The existence of the Substitute Prison System could arguably also be understood as part of a legal culture in which confessions of guilt are a necessary requisite for the suspension as well as the institution of prosecution – see also *infra* note 11); AMNESTY INTERNATIONAL (ed.) Amnesty International Report 2009. Available online at <http://amnesty.org> (last accessed 27 July 2009). On the cultural/ historical background of the “confession culture,” see, e.g., T. TSUCHIMOTO, *Keiji soshō-hō yōgi* [The Essentials of Criminal Procedure Law] (Tokyo 1991) 93-100; D.H. FOOTE, Confessions and the Right to Silence in Japan, in: K. Fujikura (ed.), *Japanese Law and Legal Theory* (Sydney 1996) 209-282.
- 12 D.T. JOHNSON, Justice System Reform in Japan: Where Are the Police and Why Does It Matter? For Hōritsu Jihō, T. Suami / M. Ibusuki (eds.), published online at http://www.law.usyd.edu.au/anjel/documents/ResearchPublications/Johnson2004_JusticeSystemReform.pdf (last accessed 27 July 2009) (2004) 7. See also SASAKI, *supra* note 7, 37 *et seq.*
- 13 D.T. JOHNSON, 2001. Plea Bargaining in Japan, in: *The Japanese Adversary System in Context*, M.M. Feeley / S. Miyazawa (eds.), (London 2001) 140-172, D.T. JOHNSON, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford 2002) 245-248.

how relevant it is whether the offender is truly remorseful.¹⁴ After all, there is a *quid pro quo* relationship here, between an offender's acts (confessing) and the prosecutor's acts (offering a (relatively) lenient disposal).¹⁵ What the "plea bargaining-like" practices bring into focus is, in other words, the importance of the confession as a formal external act.

The existence of plea bargaining practices accordingly draws attention to the formal, "mechanical" importance of confessions of guilt within Japanese criminal procedure. While this importance may be most evident within the context of plea bargaining practices, there are more indications that there is a "mechanical" element to the exercise of discretionary judgment more generally, and the confession of guilt/expression of remorse as points of reference for such judgment.

Expressing remorse and confessing guilt are two important factors within a range of factors that prosecutors refer to when determining how to deal with a specific offence and offender. Johnson, who has conducted a survey among Japanese public prosecutors that deals with, among other things, their beliefs about factors influencing suspension of prosecution decisions, has found that most prosecutors believe (like many of their colleagues in other countries) matters related to the seriousness of the offence, likelihood of reoffending, remorse, prior record and motive to be very important in this regard.¹⁶

If, however, public prosecutors had to make their assessment of offence and offender based only on unguided assessments of a complex of potentially relevant factors, starting from zero with every case, their job would obviously become very difficult indeed. Johnson also describes, however, how prosecutors need to consult their seniors about the disposal of a case. Prosecutors accordingly receive "institutional support" – support that helps ensure consistency in the ways cases are dealt with. And so one can expect (given also the caseloads that public prosecutors are faced with¹⁷) there to be "tracks" for "ideal types" of offenders/offences,¹⁸ or certain "going rates" – if only for reference.¹⁹

14 The importance attached to expressions of remorse has been said to be significant as the first steps on the road to rehabilitation. See, e.g., TSUCHIMOTO *supra* note 11, 98; SUPREME COURT PUBLIC PROSECUTOR'S OFFICE (*Saikō Kensatsuchō*), *Saiban'in saiban ni okeru kensatsu no kihon hōshin* [Basic Policy of the Prosecution in Lay Assessor Trials], available online at http://www.kensatsu.go.jp/saiban_in/img/kihonhoshin.pdf (last accessed 27-7-2009) (2009) 15.

15 Conversely, denial may result in a harsher treatment, consisting of an added "denial tariff" (*hinin-ryō*) or a demand for a harsher sentence (or prosecution, where it might otherwise be suspended). See JOHNSON, 2002, *supra* note 12, 114.

16 For the complete list of factors, see JOHNSON, 2002, *supra* note 12, 111.

17 J.M. RAMSEYER / M. NAKAZATO, *Japanese Law: An Economic Approach*, (Chicago 1999) 181; T. ŌNO, (1992), *Nihon no Kensatsu* [The Japanese Public Prosecutor], (Tokyo 1992) 63; HALEY, 1991, *supra* note 7, 123; etc.

18 Johnson in fact argues that public prosecutors evaluate suspects, and their deserts and corrigibility, in terms of "sinisterness" of character. With regard to this sinisterness, they distinguish three basic categories (ideal types) of suspects: 1) bad people; 2) people headed for trouble; and 3) good people in trouble. The kind of punishment/treatment that they are deemed to deserve, then, is determined by combining considerations of character with

Confessions of guilt and expressions of remorse can as such be regarded as institutionalized factors of reference, vital for institutionalized ways of exercising discretionary judgement.²⁰

II. THE TRIAL STAGE – CONFIRMING GUILT AND SENTENCING

There are no provisions directly relating to standards for sentencing in the Japanese Criminal Code. The *draft* of the revised Code of Criminal Procedure defines some very general guidelines, stating (in Article 48) that the amount of punishment imposed should be in accordance with the criminal's culpability, and that the aim of punishment should be to contribute to the prevention of crime and the rehabilitation of the offender, and that judges should furthermore take into account (among other things) the offender's age, character and personal circumstances as well as the motive of the offence, etc. One other important clue when it comes to the standards that judges refer to in sentencing is provided by Article 248 of the Code of Criminal Procedure, even though this article defines the standards for the suspension of *prosecution*.²¹

Besides these formal legal provisions, there are, of course, also currents in legal doctrine that will affect judges' decision making. It is said that the mainstream legal doctrine on punishment and sentencing is that of "relative retributivism" – in other words, both retributive considerations as well as the aim to achieve special prevention

considerations regarding the seriousness of the crime. As the "bad person" who commits a serious crime is perceived to be less correctable (that is why s/he is a bad person) than a "good person in trouble" who committed a similar serious crime, the way a case will be dealt with is (obviously) not going to be the same in both cases. JOHNSON, 2002, *supra* note 12, 182-185.

- 19 See also S.A. HERBERT, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations*. 4th ed. (New York 1997) 88.
- 20 The existence of ideal types of offenders (and in all likelihood also offences), and tracks corresponding with these types of offenders, make it probable that there are certain guidelines – either explicit or implicit guidelines deducible from "generalized" daily practices of prosecution. These guidelines, however, remain unknown. In fact, it appears that public prosecutors in Japan prefer to keep their discretionary assessment as (theoretically) unpredictable as possible. When conducting his survey, Johnson did not get permission for questions about hypothetical cases, as prosecutors "feared (they said) two deleterious consequences: that the published results would encourage the calculators to take as many bites from the apple of leniency as the survey evidence seems to allow (...), and that the results would be interpreted as an official statement of procuracy policy which might give defense lawyers a new resource for arguing that indictments were unfair" (JOHNSON, 2002, *supra* note 12, 108).
- 21 Significantly enough, when addressing the topic of sentencing standards in his book on Japanese criminal law, Dando (University of Tokyo professor emeritus of criminal law and former justice of the Supreme Court of Japan) starts with an explanation of this article, a matter which draws attention to the fact that prosecutors and judges refer to the same basic standards in constructing culpability. S. DANDO, *The Criminal Law of Japan: The General Part*, Translated by B.J. GEORGE, (Colorado 1997) 328 *et seq.*

(preventing the person on trial from committing another crime) and general prevention (preventing other people “in general” from committing crimes). The punishment meted out should correspond with the level of responsibility of the actor – in other words, be in (retributive) proportion to the crime. For the sake of achieving utilitarian purposes, giving a person a sentence that is lower than what he or she deserves in terms of responsibility should be allowed, while giving somebody a higher sentence than he or she deserves (because, e.g., the offender is considered to be a dangerous person) should not be allowed.²²

Based on the principle of “freely forming convictions” (自由心証主義, *jiyû shinshô shugi*), every single judge is free to evaluate and judge the evidentiary value of the evidence presented in court.²³ Nevertheless, the application of this principle appears to result in remarkable predictability concerning the way cases are generally handled,²⁴ as well as well-established “going rates” with regard to sentencing.²⁵

The need for such going rates can be understood on the one hand in terms of a need for (relative) consistency, and on the other hand (as in the case of public prosecutors) in terms of judges’ case loads, which, according to Haley, are “enormous.”²⁶ Nevertheless, in view of the fact that there is a close correlation between the sentences demanded by prosecutors and those imposed by judges (judges typically apply a 20-30% reduction to the sentence public prosecutors demand²⁷), one could argue that sentences are in an important sense calculated by public prosecutors,²⁸ and consistency in sentencing is hence to a great extent made possible by and based on the sentencing demands made by public prosecutors.

22 See, e.g., Y. SHIROSHITA, *Ryôkei kijun no kenkyû* [A Research of Standards of Punishment], (Tokyo 1995); K. HARADA, *Ryôkei handan no jissai* [The Practice of Sentencing in Japan], (Tokyo 2004), and references listed there. One could arguably devote a series of articles to the different theories or subtle differences between theories and opinions on sentencing, and in the end still not be all the wiser – if only because the connection between such sentencing theories and currents within these theories on the one hand and sentencing practices on the other is not clear. This is in part because these theories were not necessarily created to be actually applied to sentencing practices. Nevertheless, especially the ideas of Harada, a judge of the Tokyo High Court, arguably give a good impression of the sentencing philosophy influencing actual sentencing practices.

23 See TSUCHIMOTO, *supra* note 11, 343-345.

24 J.M. RAMSEYER / E.B. RASMUSEN. 2003. Measuring Judicial Independence – The Political Economy of Judging in Japan, (Chicago 2003) 100-101. There are in addition established “going rates” with regard to sentencing.

25 See HARADA, *supra* note 22, 3, 4, 90, 138; JOHNSON, 2002, *supra* note 12, 65.

26 J.O. HALEY, The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust, Paper Presented at the Symposium Law in Japan: At the Turning Point. Seattle, Washington, August 22-24 2002, honoring the late Dan Fenno Henderson.

27 T. SASAKI, *supra* note 7, 44-45.

28 Prosecutors have been observed to calculate the appropriate sentence recommendation using computer databases. See JOHNSON, 2002, *supra* note 12, 66.

As indicated, analogous to the widely used practice of suspension of prosecution, judges suspend sentences. The percentages of suspended sentences have in the past decades been hovering around 56% (White Papers on Crime 1989-2008). In applying this “measure of leniency,” judges appear to refer to standards similar to those of public prosecutors (or conversely, public prosecutors refer to what they perceive to be judicial standards).

Like public prosecutors, they apply, for example, a “denial tariff.” A confession made by the defendant is accordingly not simply a mitigating circumstance that may be absent or present. The absence of a confession, or the making of “irrational excuses” while confessing, can be taken as an aggravating circumstance. Although as a matter of law a defendant can hardly be punished for asserting the right to remain silent, the absence of a confession of guilt and/or remorse can be (and is) interpreted as an indication of (among other things) a defendant’s lack of moral consciousness, and is in legal judgments often listed under matters “unfavorable” and adding to the guilt of the defendant. Absence of remorse can furthermore be – and often is linked to – a perceived risk that the offender will commit another crime.²⁹

Given the fact that Japan has a 99.98% conviction rate,³⁰ one could argue that trials mainly have the function of confirming guilt.³¹ As a consequence, the sentencing decision arguably is the only one that still leaves room for meaningful discussion – relatively little, given the above-mentioned correlation between the sentence demanded and the sentence pronounced, but room for discussion nonetheless. (Consider also in this regard the difference between a prison and a death sentence.)

III. JAPANESE CRIMINAL JUSTICE: INTEGRATIVE, PUNITIVE OR...?

Works of scholars such as Braithwaite, Haley and Foote³² have painted a picture of Japanese criminal justice as being reintegrative, rehabilitation-oriented and lenient – in view of, among other things, the widely practiced suspension of prosecution, the emphasis placed on confessing guilt and “absolution” granted in return (as described *supra*), and relatively lenient sentences.

29 See in this regard, e.g., Sendai District Court, 25 February 2009, 6; Osaka District Court, 27 February 2009, 18; Matsuyama District Court, 13 March 2008, 9; Kobe District Court, 17 December 2007, 6; Saitama District Court, 4 September 2008, 63; Wakayama District Court, 28 June 2006, 16, etc., etc. Judgments accessible at: <http://www.courts.go.jp/> (website of the Supreme Court of Japan – last accessed 28 July 2009). See also HARADA, *supra* note 22, 16.

30 Hômu-shô Hômu-shô kenkyû-jo, *Hanzai Hakusho* 2008 [White Paper on Crime 2008], (Ôita 2008).

31 See in this regard also generally T. ISHIMATSU, Are Criminal Defendants in Japan Truly Receiving Trials by Judges?, in: *Law in Japan: an Annual* 22 (1989) 143-153, and R. HIRANO, Diagnosis of the Current Code of Criminal Procedure, in: *Law in Japan: An Annual* 22 (1989) 129-142.

32 See references listed *supra* note 7

By contrast, Miyazawa has argued in a recent article, drawing on earlier publications, that this picture is not correct. According to Miyazawa, criminal justice officials may believe in their own “rhetoric” about rehabilitation, but they do not have the resources to implement their ideals.³³ The rise in the length of prison sentences seems to lend further support to the idea that the “traditional” picture needs adjusting.

Hamai and Ellis furthermore state in this connection that

apology and forgiveness may have played roles in diverting offenders from formal criminal justice, [but] these diversions were almost completely controlled by professional lawyers and judges. (...) From an outsider’s perspective, Japanese criminal justice may have seemed reintegrative and lenient to offenders, but in reality, the system was operating under the control of professional lawyers and bureaucrats rather than according to the views of ordinary people.³⁴

They claim in fact that “the evidence indicates that the public has been more punitive than reintegrative all along.”³⁵

Let us now address the question of how these observations relate to qualifications of Japanese criminal justice as re-integrative, rehabilitation-oriented, and benevolent, starting with the observations or claims made by Hamai and Ellis, who appear to be addressing several issues simultaneously.

One issue essentially concerns the question of whether the character of Japanese criminal justice is in line with pervading public attitudes. To substantiate the suggestion that this is not the case, and that furthermore “the public has been more punitive than reintegrative all along,” reference is made to historical evidence of punitive attitudes and penal regulations, a constantly high percentage of public support for the death penalty, and results from the 2000 International Crime Victims Survey.

Qualifications of *the* mentality or attitude of the general public as more punitive than reintegrative – or vice versa – are, in spite of such evidence, arguably still problematic, as a person’s attitude toward an offender is hardly an unchangeable property of that person. Hamilton and Sanders have shown in this regard, for example, how people’s attitudes toward offenders in both Japan and the United States can differ, depending on the social relation a person has with this offender. “Strangers” are judged and punished equally harshly in Japan and the United States, but the structure of social life in Japan would appear to result in Japanese people dealing with fewer “strangers” in their daily routine.³⁶ Be that as it may (I will come back to this issue *infra*), more important for this argument is the claim that Japanese criminal justice may have *seemed* reintegrative and

33 S. MIYAZAWA, The enigma of Japan as a testing ground for cross-cultural criminological studies, in: D. Nelken (ed.) *Comparing legal cultures* (Dartmouth, 1997) 201; see also S. MIYAZAWA, *supra* note 1, 75, and more generally S. MIYAZAWA, *Policing in Japan: A Study on Making Crime* (New York 1992).

34 K. HAMAI/T. ELLIS, 2008, *supra* note 1, 42.

35 K. HAMAI/T. ELLIS, 2008, *supra* note 1, 27.

36 V.L. HAMILTON / J. SANDERS, *Everyday Justice*, (New Haven and London 1992).

lenient to offenders, but was *in reality* not operated on the basis of the views of ordinary (punitive-minded) people.

One might expect a system of criminal justice to reflect, to a certain extent, the social life of the society in which it is set. Nevertheless, that link is not necessarily a straightforward one, and criminal justice policies may or may not have been (or be) in line with popular attitudes. It is in any case hardly self-evident whether (possibly) punitive public attitudes preclude the existence of a re-integrative system of criminal justice or not. And so the question that still remains is whether Japanese criminal justice can be qualified as integrative, rehabilitation-oriented, etc.

Qualifications of Japanese criminal justice as re-integrative, non-re-integrative, benevolent or rather punitive are useful to the extent that they bring into focus different aspects of this system. Nevertheless, they are by their very nature relative – and drawing “hard conclusions” in these terms is arguably difficult. As indicated, in Japan offenders are dealt with on the basis of a hybrid sentencing (and prosecuting) philosophy. Accordingly, by its own definition, “the system” is both retribution and reintegration-oriented. As Miyazawa suggested, and as Johnson’s findings indicate, criminal justice officials do indeed appear to believe in their own “rhetoric” about rehabilitation, and seem genuinely committed to offenders’ rehabilitation.

Speaking in more practical terms, the process of (repeatedly³⁷) confessing guilt and admitting one’s wrong may, depending on the offender, function as a rehabilitative measure of its own. On the other hand, the emphasis placed on confessing and admitting one’s wrong may simply be – as we have seen – about achieving outward compliance, and as such not necessarily have much “substantive” meaning for an offender.

The observed commitment to rehabilitation in terms of suspended prosecutions and sentences appears to consist mostly of what are in fact diversion practices. Given, however, that those whose prosecution or sentence was suspended are thereby not set apart from other members of society as a trial might, or a prison sentence would do – considering, in other words, the alternative – these diversion practices could in any case be qualified as “relatively non-disintegrative.”³⁸

37 See also D.H. FOOTE, *supra* note 10, 278. Looking at the files of different cases as kept in the archives of the Yokohama District Prosecutors’ Office in 2003 and 2004, I also found that defendants’ confessions tended to consist of numerous statements consisting of hundreds of pages.

38 It is nevertheless also true that people whose prosecution or sentence was suspended may face severe “social sanctions” (something which courts have been known to take into account when determining or suspending an offender’s sentence). Besides the punitive attitudes that may be at the base of such “social sanctions,” however, one could also find evidence of a more forgiving mentality. When judges suspend an offender’s sentence, reference is regularly made to those around the offender, such as family members and employers, who have, e.g., expressed their willingness to watch over the offender, a circumstance indicative of judges’ concern for the rehabilitation of offenders (see with regard to “social sanctions,” e.g., Osaka District Court Penal Section 14, 25 May 2009, 5-6; Ōtsu District Court, 23 January 2007, 13; Osaka District Court Sakai City Branch, 23 June 2008, 19 (etc.,

Nevertheless, any assessment of the integrative elements in Japanese criminal justice (or lack thereof) would, besides an analysis of the (pre-)trial stages of criminal justice, have to involve a study of overall measures and policies more concretely directed at helping people lead “integrated lives.” While this is obviously a topic one could devote another article to, it seems that to an important extent the assistance provided to those released from prison is offered by non-professional citizens. For example, while there have been said to be around 1,000 formally employed probation officers (*hogo kansatsu-kan*), around 650 of whom are actually involved in first-line probation activities, there are around 49,000 voluntary probation officers (*hogo-shi*). In this sense the state mobilizes civil society to realize people’s reintegration into society.³⁹

In any case, as indicated *supra*, in spite of lengthening prison sentences and an apparently increasingly populist criminal justice climate, the percentages of those whose prosecution and sentences have been suspended have remained relatively stable. Public prosecutors’ discretionary authority to deal with cases and offenders by means of informal procedures remains, with regard to arguably their most important discretionary decision, intact. And given that the percentages of suspended sentences have also remained stable, judges’ freedom to exercise their discretionary judgment does not appear to be impaired by the stricter sentencing climate.

In 2007 prosecution was suspended in 41.3% of all general penal code offences, and sentences were suspended in 56.6% of all penal code offences. A very large proportion of the cases handled by prosecutors and judges thus remains unaffected by the stricter sentencing climate. The penal populist climate as such seems to particularly affect the

etc.), and with regard to supporting family members (etc.) Saitama District Court, 13 February 2009, 20; Osaka District Court, 8 August 2008, 4; Yamagata District Court, 26 March 2008, 16, etc., etc. More examples can be found at <http://www.courts.go.jp>, see *supra* note 28). This “mixed picture” of offenders facing different levels of punitive attitudes is arguably in line with Hamilton and Sanders’ argument (V.L. HAMILTON/J. SANDERS *supra* note 35) – see *supra*.

39 See generally <http://www.moj.go.jp/HOGO/index.html> (website of the Ministry of Justice “Bureau of Protection” – last accessed 27 July 2009). To give an indication of the results obtained with this approach: According to the 2007 White Paper on Crime, of those who had served their first prison sentence, 56.5% eventually committed other crimes after release (45.3% did so within five years). In more general terms, the impact of recidivists on the crime rate was, according to the same White Paper, considerable, as they appeared to be responsible for 58% of the crimes committed (for an English summary of the findings regarding recidivism, see: <http://search.japantimes.co.jp/cgi-bin/ed20071117a1.html> [Japan Times Editorial on recidivism – last accessed 28 July 2009]). Little appears to be known about recidivism rates of those whose prosecution was suspended (the 1985 White Paper on Crime published the results of a study involving 1,575 persons whose prosecution was suspended. The overall recidivism rate was 11.5 with percentages ranging from 1.3% [for gambling] to 100% [for abduction/kidnapping]). How representative this study was remains questionable given the relatively small number of offenders involved (one person was, e.g., responsible for the 100% recidivism rate for abduction/kidnapping). More is known with regard to those whose sentence was suspended: In the period from 2002 to 2006, 12 to 14% of the sentences were revoked because offenders committed another crime.

percentage of offenders who would in any case receive a prison sentence (around 5% of the total number of offenders whose case went to trial⁴⁰). And accordingly, the influence of the penal populist climate is less than all-pervasive – and the rising length of prison sentences is not necessarily a symptom of an until now misconstrued picture of the “real” character of Japanese criminal justice.

Nevertheless, when reexamining this picture, as I have done here, it is important to recognize the fundamentally hybrid character of the penal philosophies underlying prosecution and sentencing practices, and the retributive elements alongside the rehabilitative ones. And so, rather than looking for a dominant penal-philosophical orientation, it may be more fruitful here to look at the “procedural orientation” that becomes apparent in various parts of Japanese criminal justice.

Prosecutors and judges both have considerable discretionary authority in exercising their duties. I have emphasized here how the ways in which this authority is exercised are structured. The structured nature of this authority will result, to those familiar with the system and its “going rates,” such as lawyers, in a certain level of predictability regarding the outcome of cases. The informal character of the rules structuring discretionary authority ensures that one cannot formally base expectations on them – and as indicated *supra*, prosecutors may consciously avoid the creating of such expectations.

One could argue that this is only understandable, given that discretionary authority stops being just that when rules structuring such discretion become official. What needs to be considered here, however, is that as the surrender to the “benevolence” of authorities is expected, and an unwillingness to do so is punished, the “lenient treatment” based on (in principle) unpredictable discretionary judgment becomes the *standard* procedure. This standard procedure is to an important extent one in which public prosecutors make the decisions, in view of their powers to indict or suspend prosecution, as well as the strong correlation between sentences recommended by prosecutors and those imposed by judges.

As we have seen, to become “eligible” for lenience, a suspect/defendant essentially has to give up his/her right to silence, and be careful when presenting arguments in his/her favor, as these might be construed as symptoms of a less than complete willingness to own up to one’s faults. And accordingly, the average confessing suspect/defendant finds himself with very little procedural protection to cling to or rules to appeal to.⁴¹⁻⁴²

40 White Paper on Crime 2008, see *supra* note 30.

41 Decisions *not* to prosecute may be subject to review of Prosecution Review Commissions (*kensatsu shinsa-kai*), whose non-binding recommendations in the past often remained ignored (in 2002-2006 only 20-30% of the recommendations that prosecution was appropriate resulted in actual prosecution – White Paper on Crime 2007). Since May 21, 2009, however, prosecutors may ignore the recommendation that prosecution is appropriate (*kisosô-tô*) once, but if after a second review the commission again finds that prosecution is appropriate, a lawyer designated by the court will file a public indictment, and a trial will be held. In addition, there is also the Analogical Institution of Prosecution (*fu-shinpan seikyû*), which is, however, seldom used (between 1960 and 2009, 18,000 complainants requested

In practice, prosecutors' decisions may come about via offenders' genuine or less than genuine subservience to these prosecutors' authority. These decisions may, depending on the offender, be rehabilitation-oriented and/or retributive. The procedure in which their (as well as judges') decisions come about will, however, regardless of the penal-philosophical orientation of these decisions, typically be characterized by a citizen's formal subservience to formally unpredictable state authority.⁴³

IV. LEGAL REFORMS: IMPACT OF THE LAY ASSESSOR (*SAIBAN-IN*) SYSTEM

Since 1999, a number of legal reforms have been implemented in Japan. Important changes with regard to criminal justice are, among others, measures taken to speed up criminal trials and the introduction of a system of state-appointed lawyers for suspects in certain cases.⁴⁴ The arguably most conspicuous reform consisted of the introduction of a lay assessor (*saiban-in*) system that was put into effect in May 2009. With this new system, a judicial panel composed of six lay persons selected from those eligible to vote and three professional judges will determine guilt as well as the appropriate sentence. It would seem that with the introduction of this system, the character of Japanese criminal justice is bound to change radically. As with the introduction of a (quasi-)jury, the outcome of trials might no longer be as predictable as before and the conviction rate might go down. Criminal procedure might assume a more adversarial character, and the control over proceedings as it was "traditionally" exercised by public prosecutors might diminish.

How these matters will work out remains to be seen, of course (the first trials in which the system will be put into practice are expected to take place in July 2009). It is important to keep in mind, however, that public prosecutors will still determine in which cases they will or will not bring charges – and it seems unlikely that where they have up

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- judges to file charges in cases where no indictment had been made, resulting in 13 indictments against 14 persons, and finally in 8 not-guilty verdicts – *Nishi Nihon Shimbun* [West Japan Newspaper] March 3, 2009, referring to Supreme Court Statistics – available at <http://www.nishinippon.co.jp/wordbox/display/6409> – last accessed 28 July 2009).
- 42 It is, of course, possible (based on Art. 381 and 414 Code of Criminal Procedure) for both prosecutors and defendants to appeal against the sentence meted out. In this regard, even though there are no clear public sentencing guidelines, there is more transparency with regard to the motives behind judges' sentencing decisions.
- 43 One finds this commitment to rules that nevertheless remain unknown to those subject to them also in the corrective stage of criminal justice. See in this regard J. VIZE, *supra* note 11, 331, 336, writing about prison regulations. The formally unclear nature of these rules again ensures a minimum of accountability of those applying them.
- 44 See also *supra* note 42. See generally: <http://www.kantei.go.jp/jp/singi/sihou/index.html> (website of the Headquarter for the Promotion of the Reform of the System of Justice Administration, part of the Website of "The Prime Minister of Japan and his Cabinet," last accessed 28 July 2009); http://www.nichibenren.or.jp/ja/judicial_reform/criminal.html (website of the Japan Federation of Bar Associations, last accessed 28 July 2009).

until now only prosecuted “air-tight” cases, they would suddenly decide to prosecute less than air-tight cases now.^{45,46} Considering in addition the penal populist climate that has prevailed in Japan in recent years,⁴⁷ as well as the more visible presence of victims of crime in court,⁴⁸ one may wonder just how critical lay assessors are going to be toward the claims of public prosecutors. Accordingly, the lay assessor system may have the effect of adding a stamp of legitimacy, provided by the participation of the average citizen, to what remains – perhaps more than ever – prosecutors’ justice. Nevertheless, the effects of the implementation of the lay assessor system on sentencing (and other decision making) practices and their significance will be, of course, a matter for future research.

45 SUPREME COURT PUBLIC PROSECUTOR’S OFFICE, *supra* note 14, 2.

46 One might, judging from the policies set out by the Supreme Court Public Prosecutor’s Office, see changes in courtroom strategy, possibly resulting in a diminished emphasis on confession statements, if time-consuming arguments about the voluntary nature or reliability of these confession statements are expected, and other means of evidence could still be effective. Especially objective evidence and scientific investigation is expected to be effective when it comes to convincing the lay assessors (SUPREME COURT PUBLIC PROSECUTOR’S OFFICE, *supra* note 14, 15). However, the same document also states: “On the other hand, in investigations of cases that will be tried by lay assessors, too, statements by those involved – and first of all those of the suspect – remain extremely important. There are, in particular, many cases in which it is not possible to establish the truth without the truthful statements of a suspect, and it is often the case that the motives (etc.) of a crime, necessary to decide the appropriate measure of punishment, become only clear through the statements of the suspect. Furthermore, it is exactly when a suspect out of remorse speaks the truth, that true improvement and rehabilitation can be expected. Prosecutors must accordingly, as they have done up until now, do their best to conduct sufficient investigation so as to make suspects open their hearts to tell the truth, and obtain suspects’ true confessions.” (*ibid.*, 15).

47 See K. HAMAI / T. ELLIS, 2006, 2008; S. MIYAZAWA, *supra* note 1.

48 Pursuant to an(other) amendment of the Code of Criminal Procedure that was implemented on December 1, 2008, victims of certain serious crimes now have the right to participate in criminal proceedings (sitting alongside the public prosecutor), by, e.g., questioning defendants and recommending a sentence (See Code of Criminal Procedure Art. 316 – 33 *et seq.* *Keiji soshô-hô*, Law No. 131/1948, as amended by Law no. 54/2008. Engl. transl.: <http://www.japaneselawtranslation.go.jp/> – last accessed 28 July 2009). See also generally T. SAKAMAKI (ed.) *Heisei 19nen Hanzai higai-sha no tame no keiji tetsuzuki kanren-hô kaisei*, Q&A [2008 Criminal Procedure-Related Revisions of the Law for Victims of Crime] (Tokyo 2008).

ZUSAMMENFASSUNG

Es wird behauptet, dass als Folge "strafpopulistischer" Einflüsse die japanische Strafjustiz strenger wird, da immer mehr Menschen immer strengere Strafen erhalten. Die „traditionelle“ japanische Herangehensweise an die Justiz, oft – zutreffend oder nicht – als rehabilitations- und wiedereingliederungsorientiert qualifiziert, sei im Begriff, einem mehr strafenden, vergeltenden Charakter zu weichen.

Dennoch sind die Fälle eines Absehens von der Anklageerhebung und der Aussetzung von Strafen zur Bewährung anteilmäßig stabil geblieben (gewalttätige, „schwere“ Straftaten inbegriffen) und scheinen daher immun gegen das bisherige „strafpopulistische“ Klima zu sein. Diese Prozentsätze sind bedeutend, wurden sie doch oft als Symptome oder Beweis für einen rehabilitations- und wiedereingliederungsorientierten Charakter der Japanischen Strafrechtspflege interpretiert. Wie kann dieser scheinbare Widerspruch zwischen einem zunehmend vergeltungsorientierten Verurteilungsklima und unveränderter Praxis hinsichtlich des Absehens von Anklage oder Strafe verstanden werden? Dies ist die wichtigste Frage, die dieser Aufsatz behandelt. Hierzu werden statistisches Material, Urteile, Kommentare und Dokumente usw. der zuständigen Behörden sowie Zeitungsartikel herangezogen.

Nach einer kurzen Charakterisierung der bisherigen Tendenzen der Bestrafung analysiert der Text den Entscheidungsfindungsprozess hinsichtlich der Verfolgung und Verurteilung im vorprozessualen und prozessualen Stadium. Basierend auf dieser Analyse wird argumentiert, dass die Entscheidungsfindungspraktiken die Beibehaltung einer Art von Strafjustiz ermöglichen, die weniger durch eine bestimmte strafphilosophische Orientierung als durch eine Betonung der Autoritätshörigkeit auf der einen Seite und einem relativen Mangel an Verantwortlichkeit derer, die die Entscheidungen treffen auf der anderen Seite, charakterisiert ist.

Die Unanfälligkeit insbesondere der Strafverfolgungs- und Entscheidungspraxis gegenüber strafscharfenden Tendenzen hat wichtige Konsequenzen, wenn man sich einige der Reformen vor Augen führt, die die japanische Regierung einführt und einführen wird. Strafjustiz kann damit, möglicherweise mehr als je zuvor, zu einer Justiz der Staatsanwälte werden.