

**Creating ‘Problem Kids’:  
Juvenile Crime in Japan and Revisions to the *Juvenile Act***

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I. INTRODUCTION

“Well, this is the beginning of the game. Stupid police, stop me if you can. It’s great fun for me to kill people,” wrote 14-year-old Sakakibara Seito.<sup>1</sup> He had beheaded an 11-year-old boy and left the head at the gate of his middle school in Kôbe with this message stuffed in its mouth. Shock waves reverberated throughout Japan and the world. Only two years after the 1995 Sarin gas attacks on the Tokyo subway, the nation was in a state of panic. Something had to be done. The outrage felt by the victims’ families and communities was taken up by the media and extensive reporting creating a momentum which politicians ignored at their peril, particularly considering upcoming elections. Lawmakers responded by revising the *Juvenile Act* (*Shônen-hô*)<sup>2</sup> for the first time in 50 years.

This article examines these revisions effective from April 2001. I consider both the intended changes and the changes as implemented in their first three years. Based on this, I argue that each change, while neutral on its face, represents a departure from the original best interests of the child standard to a penal standard. Driven by populist politics, the revisions embody a ‘tough on crime’ philosophy that, on the one hand, seeks to

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1 Asiaweek.com, <<http://www.asiaweek.com/asiaweek/97/0711/feat5.html>>.

2 Law No. 168/1948 as amended by Law No. 153/2004.

standardise treatment of offenders, but on the other, shifts the focus away from the juvenile and his or her environment to the specific incident itself. Among other aspects of the revisions that indicate the encroachment of criminal procedure into juvenile justice, victims have been configured in an adversarial manner vis-a-vis the juvenile, reflecting lawmakers' desire to placate the long neglected victims of crime in general. The political urgency of the revisions ensured a lack of substantial discussion and planning which has engendered a pervasive ambivalence within the juvenile justice system. While the benevolent paternalism of the Family Court has been significantly eroded, it has not been replaced with adequate procedural fairness requirements to protect the rights of the juvenile. An intrusive, uncritical, and irresponsible press has not only provided a pretext for the state to increase its control over juveniles, but also to regulate more tightly the behaviour of the press itself. It is disturbing that both the bureaucracy and the Supreme Court have played complementary roles in these incursions. Most importantly, the punitive trend embodied in the revisions may be counter-productive in an era in which rapid social change has made well-considered, community-based reintegration-oriented solutions more crucial than ever. Nevertheless, consistent with what some see as a gradual strengthening of civil society in Japan intimately connected with recent law reform,<sup>3</sup> there have been some initiatives on an informal level towards such solutions.

This article proceeds as follows. Part II examines the history, philosophy, and implementation of the original *Juvenile Act*. Part III examines the movement leading to reform, the new provisions in detail, and how those provisions have been applied from 2001 to 2004. Part IV examines some overlooked causes of crime in Japan, such as economic factors and abuse. Then it considers the media's role in creating perceptions of crime. These perceptions are then linked to police data. Next, I examine the Supreme Court's involvement in the creation of misconceptions and in the diffusion of the penal standard. Part VI concludes by re-emphasising the various problems with the revisions and the process that led to them.

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3 While the broader justice system reform movement (*shihō seido kaikaku*), directed towards increasing the rule of law and accountability and away from discretion particularly in the judicial system, may be very relevant to the reforms in juvenile justice, a full exploration of that relationship is unfortunately beyond the scope of this paper. See further, J. KINGSTON, *Japan's Quiet Transformation: Social Change and Civil Society in the 21st Century* (New York, 2004) 85-94.

## II. PRE-REFORM JUVENILE JUSTICE

### 1. *The 1948 Juvenile Act*

The *Juvenile Act* was passed in 1948 to bring the juvenile justice system into line with the post-war democratic constitution.<sup>4</sup> Juvenile justice systems had already been in place in the United States for half a century,<sup>5</sup> and the Family Court and juvenile justice system of Japan were American initiatives during the occupation.<sup>6</sup> The US system was focused on what was best for the juvenile (and thus society) in the long-term.<sup>7</sup> Hence, Article 1 of Japan's *Juvenile Act* states:

This law has as its purpose, both the carrying out of protective measures relating to the correction of the character and environmental adjustment of juvenile delinquents and the taking of special measures with regard to criminal trials of adults who have harmed juveniles, or the well-being thereof, in full anticipation of the *sound upbringing of the juvenile*.

According to Takeuchi, there were three elements to the original understanding of this purpose. Firstly, it was considered a modern democratic departure from the pre-war criminal system.<sup>8</sup> Thus, it emphasised respect for the dignity of the individual juvenile, enshrined in Article 13 of the Constitution.<sup>9</sup> This entailed providing assistance to the individual juvenile to allow for self-development.<sup>10</sup> Secondly, welfare *and* justice aims were integrated in the Family Court.<sup>11</sup> Thirdly, it was forward-looking in that it sought to prevent future delinquency rather than attribute responsibility for past misdeeds.<sup>12</sup>

Like the *Convention on the Rights of the Child*, to which Japan is a ratified member,<sup>13</sup> the difference between 'juvenile justice' and that of the criminal justice system generally is one of emphasis. That is, juvenile justice prioritises reintegration over punishment.<sup>14</sup> This is due to the juvenile's early stage of development and, thus, greater

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4 H. ÔDA, *Japanese Law* (2nd ed., New York 1999) 70.

5 UNICEF, *Innocenti Digest 'Juvenile Justice'*, January 1998, <<http://www.unicef-icdc.org/publications/pdf/digest3e.pdf>>, 10.

6 ÔDA, *supra* note 4, 70.

7 UNICEF, *supra* note 5, 10.

8 K. TAKEUCHI, *Shōnen shihō no genjō to kadai, "kaisei" Shōnen-hō ni kansuru rironteki kentō* [The present situation and problems of the juvenile justice system: a theoretical consideration of the revised *Juvenile Act*], in: *Keihō Zasshi* 43 (2003) 2.1.

9 Article 13 states: "All of the people shall be respected as individuals. Their right to life, liberty and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." *Constitution of Japan*, 1946.

10 TAKEUCHI *supra* note 8, 2.1.

11 *Ibid.*

12 *Ibid.*

13 *United Nations Convention on the Rights of the Child* (20/11/1989), ratified 22/4/1994.

14 UNICEF, *supra* note 5, 4.

potential for re-education and rehabilitation.<sup>15</sup> Its guiding principle is not ‘leniency’. Rather, rehabilitation and reintegration are seen as the most effective means of achieving behavioural change by engendering a sense of empathy and accountability in the mind of the juvenile.<sup>16</sup> Furthermore, juvenile justice systems have different procedures to those of criminal justice, reflecting their different goals.<sup>17</sup> For example, the juvenile is spared the rigours of a long and detailed criminal trial. Instead, the hearing is informal, to enhance the participation of the juvenile, and thus the educative benefits.<sup>18</sup> It is also speedy, to reduce the negative impact on the juvenile’s development and integrated rehabilitation.<sup>19</sup>

## 2. Context: How the Law Operated

The *Juvenile Act* gave jurisdiction to the Family Court over all offences committed by juveniles, that is, those between the ages of 14 and 20 (the age of majority in Japan).<sup>20</sup> Children under 14 years of age are sent to Child Guidance Centres (*jidō sōdansho*), administered under the *Jidō fukushi-hō* (Child Welfare Act).<sup>21</sup> The most common route to the Family Court is through referral by police officers after investigation.<sup>22</sup> Serious offences, however, are referred through the public prosecutor, whose broad powers and special role in prosecuting crime are characteristic of Japan’s criminal justice system.<sup>23</sup>

Under the pre-reform Act, the Family Court judge assigned a Family Court Investigation Officer to the case. This officer conducted an investigation into the personality, personal history, family background, and environment of the juvenile.<sup>24</sup> Then he or she compiled a report containing recommendations regarding the juvenile’s protective needs (*yōhogosei*). During this period, it was possible to detain the juvenile for two weeks, with a possible two-week extension.<sup>25</sup> In principle, this took place in a Juvenile Detention and Classification Home (*shōnen kanbetsusho*).<sup>26</sup> The hearing was closed and informal.<sup>27</sup>

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15 *Ibid.*

16 *Ibid.*, 2.

17 *Ibid.*, 10.

18 *Ibid.*

19 *Ibid.*

20 Art. 3 *Juvenile Act*.

21 Art. 15 *Jidō fukushi-hō*, Law No. 164/1947 as amended by Law No. 153/2004.

22 Supreme Court of Japan homepage: <[http://www.courts.go.jp/english/procedure/juve1\\_e.html](http://www.courts.go.jp/english/procedure/juve1_e.html)>.

23 See D.T. JOHNSON, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York 2002).

24 Supreme Court of Japan homepage, *supra* note 22.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

The judge had four options for disposition.<sup>28</sup> Firstly, the case could be dismissed. Secondly, the juvenile could be sent to a Child Guidance Centre and dealt with under the *Child Welfare Law*. Thirdly, the judge could place the juvenile under protective control (educative measures), such as probation,<sup>29</sup> placement in a Child Education and Training Home (*jidô jiritsu shien shisetsu*) or Home for Dependent Children (*jidô yôgo shisetsu*),<sup>30</sup> both administered under the *Child Welfare Act*,<sup>31</sup> or a reform school (*shônen-in*).<sup>32</sup> Fourthly, the Court had the option of referring the juvenile back to the public prosecutor (thus into the criminal justice system) when the juvenile was 16 years or older, but only as an exception.<sup>33</sup>

Thus, the philosophy and implementation of the original *Juvenile Act* were characterised by an emphasis on rehabilitation and directing juveniles away from the criminal justice system.

### III. REFORM OF THE *JUVENILE ACT*

#### 1. *Movement Leading to Reform*

In November 2000, the Japanese Diet passed the *Act Revising Part of the Juvenile Act and Other Laws* (“*Revision Act*”), effective from 1 April 2001.<sup>34</sup> According to the Ministry of Justice’s commentary on the *Revision Act*, the revisions were a direct result of the lack of public confidence in the juvenile justice system.<sup>35</sup> This was said to be due to both a succession of brutal crimes committed by juveniles (for example, the Kôbe killing of May 1997), and a series of juvenile cases in which problems of fact-finding arose in the Family Court.<sup>36</sup>

Much of the stimulus for reform of the *Juvenile Act* came from such dissatisfaction with the system’s procedural failures.<sup>37</sup> In the mid 1990s the Japan Federation of Bar

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28 *Ibid.*

29 Art. 31(1) *Juvenile Act*.

30 Art. 31(2) *Juvenile Act*.

31 Art. 45 *Child Welfare Law*.

32 Art. 31(3) *Juvenile Act*.

33 Supreme Court of Japan homepage: <[http://www.courts.go.jp/english/procedure/juve6\\_e.html](http://www.courts.go.jp/english/procedure/juve6_e.html)> (accessed 1/9/2004, before updated to revised *Juvenile Act*).

34 Y. IJIMA, *Shônenhō-tô no ichibu wo kaisei suru hōritsu no gaiyō-tô* [Outline of the law to partially revise the *Juvenile Act* and other laws], in: *Jurisuto* 1195 (2001) 2.

35 *Ibid.*

36 *Ibid.*

37 K. TAKEUCHI, *Yamagata matto jiken, shônen jiken no jijitsu nintei to sôsa, Shônen-hô “kaisei”* [The Yamagata Mat incident, fact-finding and investigations in juvenile cases, the “revision” of the *Juvenile Act*], in: *Hôgaku Seminâ* 582 (2003) 31.

Associations, the Ministry of Justice,<sup>38</sup> and the Supreme Court<sup>39</sup> all called for procedural reforms. This was largely in response to several controversial cases such as the 1993 'Yamagata Mat Incident', so-called because the victim was found dead rolled up in a gym mat in a middle school.<sup>40</sup>

In the Yamagata Mat case, of seven suspects, only three had reached the age of criminal responsibility (14 years old) and were arrested.<sup>41</sup> The younger four were taken into protective custody. Although each suspect had confessed involvement in the killing at the investigation stage, they produced alibis after the case had been sent to the Yamagata Family Court. As a result, a decision of 'no disposition' was made for all except three of the younger suspects, who were sent to reform school.<sup>42</sup> These three lost on appeal to the Sendai High Court.<sup>43</sup> In its opinion, the Court observed incidentally that the three older children might also have been involved in the killing.<sup>44</sup>

Meanwhile, the victim's family had initiated civil proceedings for damages. However, the Yamagata District Court rejected the claim, holding that objective evidence did not support the confessions. It was thus held that the confessions had no credibility. The Court criticised the investigation of the incident, noting the harsh and drawn out treatment of the defendants and their isolation from their parents during this period. The discrepancy between the District Court and the Family Court's rulings drew attention to the problems of fact-finding both in the Family Court and at the police investigation stage.<sup>45</sup>

The latter half of the 1990s saw a number of events, such as the Kôbe killing, that hastened the movement towards reform. The Ministry of Justice introduced legislation to the Diet in March 1999 based on the recommendations of the Legislative Advisory Committee (*hōsei shingikai*) made in January.<sup>46</sup> The bill failed with the dissolution of the lower house in June. The next year saw further serious crimes being committed by juveniles. In May 2000, the legislative committee of the lower house passed a resolution calling for measures to deal with juvenile delinquency. Following this, the ruling coalition (the Liberal Democratic Party, *Kōmeitō*, and the Conservative Party) assembled a 'project team' to tackle the 'juvenile problem'.<sup>47</sup> This team made certain additions to the previous bill based on the results of its own deliberations. A new bill tabled

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38 Childhood Deprived in Japan, The 2<sup>nd</sup> Uniform Report to the United Nations Convention on the Rights of the Child from Japanese NGOs and Citizens: (<<http://www.crin.org/docs/resources/treaties/crc.35/01.main.pdf>>) 548.

39 T. ÔTAKE, 'Proposals for juvenile law reform adopted', Japan Times, 21/12/1998.

40 TAKEUCHI, *supra* note 37, 31.

41 *Ibid.*

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*, 32.

46 IJIMA, *supra* note 34, 2.

47 *Ibid.*

29 September 2000, was approved by the lower house legislative committee, and passed through the lower house on 31 October. It passed through the House of Councillors on 27 November after certain revisions. The bill returned to the lower house and became law the next day,<sup>48</sup> marking the first significant change to the *Juvenile Act* in 50 years.<sup>49</sup> Article 3 of the scheduled annexed to the *Revision Act* stipulates that further consideration of the *Juvenile Act* will be undertaken five years from coming into force, namely, April 2006.

It should be noted that member's bills have traditionally been uncommon in Japan, and the insertion of new material makes the bill even more exceptional.<sup>50</sup> This was made possible by overwhelming public support (91% according to an Asahi Newspaper poll).<sup>51</sup> The major opposition party hence dropped its resistance to the bill, fearful of jeopardising its position in the upcoming House of Councillors election.<sup>52</sup> The brevity of the deliberation period is also notable. Due to lack of participation, particularly by opposition members in the legislative committee, some regard the process as having been a mere formality.<sup>53</sup> Kawasaki criticises the lack of a proper investigation and the failure to collect adequate statistics.<sup>54</sup>

Gotô suggests that the law may be seen as democratic, as it represents the failure of 'experts' to defend the juvenile justice system against a dissatisfied public.<sup>55</sup> However, Kobayashi stresses both the dangers of mob politics and disapproves of the shift in focus from the issues at hand to a desire to please voters in the short term.<sup>56</sup> Thus, it is clear that although the reform process began with legitimate concerns about procedure, there was a distinct shift mid-way. The end product was coloured by political motives and a character easily understandable by voters, namely, tougher disposition. It is inter-

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48 *Shônenhō-to no ichibu wo kaisei suru hōritsu* [Law to Partially Revise the *Juvenile Act* and Other Laws], Law No. 142/2000, effective 1/4/2001.

49 ÔTAKE, *supra* note 39.

50 H. GOTÔ, *Keiji shobun no han'i no kodai to sono kadai* [The extension of the scope of criminal disposition and its problems], in: *Jurisuto* 1195 (2001) 11.

51 Asahi Newspaper, 4/8/2001, morning edition.

52 M. KOBAYASHI, *Kyôaku na shônen hanzai ga fuete iru yô desu. Shônen-hô ga kaisei sareta koto de, jôkyô wa yoku naru deshô?* [It seems that serious juvenile crime is increasing. Will the situation improve now that the *Juvenile Act* has been revised?], in: *Sekai* 687 (2001) 209.

53 ZENSHIHÔ RÔDÔ KUMIAI [All Administration of Justice Workers' Union (hereinafter "Justice Workers' Union")], *Kokuren kodomo no kenri jôyaku "dai 2 kai nihon seifu hôkokusho" ni tai suru orutanatibu repôto "kiso hôkokusho" teishutsu ni atatte* [Submission for the alternative report ('basic report') to the 2nd report of the Japanese government to the UN Convention on the Rights of the Child] 2002/11/11, <<http://www.zenshiho.net/syonen-file273-01.html>>, 1.3.

54 H. KAWASAKI, *Zur Reform des Strafverfahrens- und Jugendverfahrensrechts in Japan* [The reform of criminal procedure and juvenile procedural law in Japan], in: *ZJapanR / J.Japan.L.* 17 (2004) 92.

55 GOTÔ, *supra* note 50, 11.

56 KOBAYASHI, *supra* note 52, 210.

esting to note that this appears to be an international trend amongst many industrialised countries,<sup>57</sup> and importantly, Japan is not the only country in which there has been a significant gap between the data (or lack thereof) used to introduce tougher legislation and the data available for consideration.<sup>58</sup>

## 2. *The Revision Act*

The amendments may be grouped into three categories: “rethinking the way cases are disposed,” “making fact-finding more just,” and “substantiating consideration towards victims.”<sup>59</sup>

### a) *Changes in Disposition*

Due to the proviso to Article 20 of the original law, a juvenile could not be sent to the public prosecutor (*i.e.* the criminal justice system) until the age of 16:

In cases where the offence is punishable by death or imprisonment with or without labour, the Family Court must remit the case to a public prosecutor of the public prosecutors office who operates within the jurisdiction of a district court when it is accepted that criminal disposition would be proper considering the results of a Family Court investigation and the quality and nature of the offence. *However, when the juvenile is below the age of 16 a decision to remit to a public prosecutor cannot be made.*<sup>60</sup>

Because the *Revision Act* has now deleted the section in italics, 14 and 15 year old juveniles may now enter the criminal justice system and face imprisonment with or without hard labour<sup>61</sup> as a child may be held criminally responsible at the age of 14.<sup>62</sup> However, until such juveniles turn 16, they may be remanded in a reform school if this

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57 See for example, R.G. GREEN / K.F. HEALY, *Tough on Kids: rethinking approaches to youth justice* (Saskatoon, 2003); C. BALL, *Youth justice? Half a century of responses to youth offending*, in: *Criminal Law Review* (UK) 3 (2004) 167-180; E.K. KLEIN, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, in: *American Criminal Law Review* 371 (1998) 401-409; S. MUKHERJEE, ‘Juvenile crime: overview of changing patterns’, Australian Institute of Criminology Conference paper presented at ‘Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond’, Adelaide 6/1997, <<http://www.aic.gov.au/conferences/juvenile/mukherjee.pdf>>.

58 UNICEF, *supra* note 5, 7; MUKHERJEE, *supra* note 57, 8.

59 IJIMA, *supra* note 34, 2.

60 Art. 20 *Juvenile Act*, before 2000 revision (italics added).

61 Imprisonment for life or up to 12 years with hard labour (*chôeki*), and without labour for life or up to 20 years (*kinko*) are defined in Articles 12 and 13 of the *Criminal Code* respectively (*Keihô*, Law No. 45/1907, as amended by Law No. 156/2004). Hard labour is compulsory under a sentence of *chôeki*, and is thus regarded twice as severe as *kinko* by courts (K. MIKI / H. TOYODA, *Roppô* (Tokyo 2003)). Article 51 of the *Juvenile Law* renders those under 18 years old immune from the death penalty.

62 Art. 40 *Criminal Code*.



is seen as “necessary for a sound upbringing,” (Article 56 (3)). This change in disposition is a result of the perceived leniency of the juvenile justice system towards middle school student offenders involved in recent serious crimes, such as the Kôbe incident.<sup>63</sup> Although it seems that this is sometimes considered the representative feature of the *Revision Act*,<sup>64</sup> it is not well understood. It is often mistaken to be a lowering of the age of criminal responsibility, which was 14 years of age even before the revisions.<sup>65</sup> Such confusion reflects the way in which “one age may hide another”<sup>66</sup> in juvenile justice. There are many variables in both process and disposition that can make concepts such as ‘criminal responsibility’ mean little.<sup>67</sup> It also makes international comparisons of ‘severity’ difficult.<sup>68</sup> Nevertheless, the change in age represents a shift towards more severe disposition of younger juveniles relative to the old law.

The second significant aspect of this revision is the standardisation of remittance to the public prosecutor of juveniles 16 years or older accused of premeditated crimes resulting in death (Article 20(2)). The law states that this is to “foster an awareness of social norms and promote the sound upbringing of the juvenile, by clearly indicating the principle that even juveniles will be the object of criminal proceedings.”<sup>69</sup> Such remittance was possible before the amendments, but the general rule and the exception have now been reversed:

Regardless of the above provision, the Family Court *must* make the decision to remit contained in that provision when the juvenile involved is 16 or older, and it is a case in which a premeditated offence has led to the death of the victim. However, the family Court is not limited to making a decision to remit to a public prosecutor if it is accepted that measures other than criminal disposition would be proper considering the results of a Family Court investigation, the motive and circumstances of the offence, the situation subsequent to the offence, the juvenile’s character, age, behaviour, and environment, and other matters.<sup>70</sup>

Although it appears that the Family Court may consider a broad range of factors, the judge’s discretion is limited in practice, as discussed below.

Finally, special consideration for juveniles when considering parole periods have also been removed in cases where the death penalty or life imprisonment has been downgraded (Articles 58(2), 51(2)). These three changes in disposition mark a considerable shift towards severer treatment of juveniles.

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63 IJIMA, *supra* note 34, 2.

64 See for example, ‘Revised juvenile law clears the lower house: age of criminal liability lowered to 14’, Japan Times 1/11/2000.

65 See for example, ‘Kôbe killer set free’, Japan Times 11/3/2004.

66 UNICEF, *supra* note 5, 4.

67 *Ibid.*

68 *Ibid.*

69 IJIMA, *supra* note 34, 3.

70 Art. 20(2) *Juvenile Act*, (italics added).

b) *Making Fact-finding More Just*

The first of the reforms ostensibly designed to introduce more accountability and accuracy to the Court's fact-finding role is the option of assembling a court of three-judges for juvenile hearings (Article 31-2). According to the Family Bureau of the Supreme Court Secretariat, there is no specific limit on when this measure can be taken, but it is to be used, for example, when there is debate over the facts of the case and more than one perspective is required.<sup>71</sup> The Family Bureau also expects that a three-judge court will be used in particularly serious cases, taking into account the public's concern and the complexity of the surrounding circumstances.<sup>72</sup>

Secondly, the possibility of involving prosecutors and defence lawyers (and other 'attendants') in Family Court hearings has been introduced by Article 22-2. The role of the prosecutor in such cases is not to 'prosecute' as such, but "to collect evidence, to ensure a plurality of viewpoints, to assist in the prevention of confrontation between judge and juvenile, and to enhance the faith of victims and the general public in the fact-finding process."<sup>73</sup> On the other hand, this is a fine distinction and may also be seen as introducing a basic element of the criminal justice system into juvenile justice. Kawasaki also criticises the ambiguous nature of the prosecutor's new role.<sup>74</sup> The model is, for example, an adversarial one: the court must also appoint a legal representative for the juvenile when the decision to involve a prosecutor has been taken (Article 23-3).

Thirdly, the permitted period of protective custody before trial, required for the Investigation Officer to compile his or her report, was limited to four weeks under the old law. The revisions extend this to eight weeks (Article 17(3)). This, the article states, is to "facilitate investigation and prevent the juvenile from escaping, hiding evidence, or committing suicide."<sup>75</sup> The period remains two weeks in principle and can be extended to four if necessary, and eight if:

The offence, if committed by an adult, is punishable by death or life imprisonment; it has been decided to conduct questioning of witnesses, a hearing, or examination of evidence; and there are sufficient grounds to consider that if the juvenile is not incarcerated there may exist a significant obstacle to the hearing.<sup>76</sup>

Fourthly, it is now possible for a High Court to grant a public prosecutor who has been allowed to participate in a juvenile hearing leave to make an interlocutory appeal with

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71 SUPREME COURT SECRETARIAT FAMILY BUREAU, *Kaisei Shōnen-hō no unyō no gaikyō* [The implementation and general state of the revised *Juvenile Act*] (1/4/2001-21/3/2004), <[http://courtdomino2.courts.go.jp/tokei\\_misc.nsf/e2cf159e9940cdf249256b7400152dd9/cf6b263f795367d949256eb30016ee25?OpenDocument](http://courtdomino2.courts.go.jp/tokei_misc.nsf/e2cf159e9940cdf249256b7400152dd9/cf6b263f795367d949256eb30016ee25?OpenDocument)>, 2.1.

72 *Ibid.*

73 Art. 22-2 *Juvenile Act*.

74 KAWASAKI, *supra* note 54, 93.

75 Art. 17 *Juvenile Act*.

76 *Ibid.*

respect to disposition decisions of the Family Court (Article 32-4).<sup>77</sup> Thus, the finality (and resulting stability for the juvenile) of juvenile hearings has been compromised by the prosecutor's involvement.

As discussed below, the motive and effects of these new procedural measures are not readily discernible from the letter of the law. In practice they seem to operate as penalties upon juvenile offenders and thus complement the tougher disposition measures above.

c) “*Substantiating Consideration Towards Victims*”

With the aim of “encouraging a deeper level of reflection by the juvenile of his or her actions to assist rehabilitation,”<sup>78</sup> victims are now permitted, under Article 9-2, to have their opinions considered in juvenile hearings. They are also permitted to apply for permission to view and copy records (Article 5-2). Importantly, this allows victims and their bereaved to access material necessary for success in a civil action for damages.<sup>79</sup>

Secondly, victims and other relevant persons may apply for information to be conveyed directly to them by the court, such as the name and address of the juvenile, and the date of and reasons for judgement (Article 31-2). However, as discussed below, these provisions seem less concerned with considering victims, than with configuring victims in opposition to offenders in a way that also complements harsher disposition.

3. *Context: How the Law is Being Applied*

The revisions did not explicitly alter the purpose of the original Act (the sound upbringing of the juvenile). Therefore, the revised Act remains bound by this.<sup>80</sup> Nor was it considered necessary to discuss the theoretical basis of the *Juvenile Act* during the deliberations.<sup>81</sup> Furthermore, the government continues to emphasise this purpose in its reports to the UN Committee of the *Convention on the Rights of the Child*.<sup>82</sup>

However, there are a number of factors within the *Revision Act*, and in its implementation, that suggest a fundamental shift has taken place in the understanding of this principle. Before the age of 20, juveniles are generally treated as ‘children’ by the law.

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77 Art. 32-4 *Juvenile Act*. Note that under Art. 352 of the *Keiji soshô-hô* (Criminal Procedure Act) Law No. 131/1948 as amended by Law No. 156/2004, a public prosecutor may appeal decisions of criminal courts. The introduction of this measure further indicates the encroachment of criminal procedure into the juvenile justice system.

78 Art. 9-2 *Juvenile Act*.

79 IJIMA, *supra* note 34, 8.

80 TAKEUCHI, *supra* note 8, 1.1.

81 GOTÔ, *supra* note 50, 10.

82 The government of Japan's second report to the Committee of the Convention for the Rights of the Child, <<http://www.mofa.go.jp/policy/human/child/report2/protection.html>>, 295(ii).

They are unable to vote, for example.<sup>83</sup> However, Gotô notes that criminal justice has become the exception to this rule.<sup>84</sup> This is despite claims by some commentators that children are becoming *less* mature as urbanisation and a decreasing birth-rate have created a poor environment for children to interact with others and learn the necessary social skills for adulthood.<sup>85</sup>

Perhaps one reason why the fundamental principles of the *Juvenile Act* were not discussed is that proponents of the 'tough-on-crime' approach do not see this as inconsistent with the sound upbringing of the juvenile. Hence, the *Revision Act* justifies a number of the tougher measures on the basis of "fostering an awareness of norms and promoting the sound upbringing of the juvenile."<sup>86</sup> This understanding is a departure from the original understanding of 'sound upbringing', in that it tends to emphasise the gravity of, and responsibility for, the conduct, rather than the environmental factors that may contribute to the child's behaviour. It is difficult, however, to regard the primary goal of this model as the sound upbringing of the juvenile. Rather, crime-control is its main aim. Hence, determining the culprit becomes the key issue, and the facts of the event a primary concern for deliberation.<sup>87</sup> The same is true of the 'due process' model.<sup>88</sup> To protect the individual against abuse of state power, however, the due process model emphasises reliability over speed of disposal.<sup>89</sup> Its absence is a conspicuous element of juvenile justice systems for this very reason.<sup>90</sup> That is, a long trial was considered detrimental to the juvenile's development, thus determining what 'really happened' was a concern secondary to reform.<sup>91</sup>

A shift in emphasis towards a crime control model in the juvenile justice system is all the more significant, therefore, for the absence of due process to prevent abuses of state power. This was a central issue of debate in the United States' gradual abandonment of its juvenile justice systems.<sup>92</sup> The revisions with respect to disposition and fact-finding display both a shift to a crime control model, and an absence of due process to compensate for this.

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83 Art. 9 *Kôshoku senkyo-hô* (Public Offices Election Act), Law No 100/1950 as amended by Law No. 150/2004.

84 GOTÔ, *supra* note 50, 14.

85 KOBAYASHI, *supra* note 52, 211.

86 Art. 20(2) *Juvenile Act*.

87 D.H. FOOTE, The Benevolent Paternalism of Japanese Criminal Justice, in: *California Law Review* 80 (1992) 317, 323.

88 *Ibid.*, 319.

89 *Ibid.*

90 UNICEF, *supra* note 5, 10.

91 *Ibid.*

92 *Ibid.*

*a) Disposition*

## (1) Standardised Remittance

As described above, the purpose of the *Juvenile Act* was originally taken to emphasise the development of the specific juvenile through so-called ‘casework’, tailored to that individual’s needs. The standardisation of the decision to remit to the prosecutor in Article 20(2) is a departure from this understanding. This is all the more so as the criteria for this is based on the severity of the consequences of the offence, rather than the juvenile’s particular circumstances.<sup>93</sup>

It may be argued that scope remains for considering these circumstances in the proviso to Article 20(2) permitting decisions not to remit. However, the shift in emphasis is revealing. Before the revisions, judges gave their reasons for not remitting to the prosecutor in their decisions only when the prosecutor specifically recommended such a course of action.<sup>94</sup> Now, judges must justify taking protective measures (*i.e.* not criminal) as the *exception*.<sup>95</sup> This is given added importance now that victims may be given access to the contents of such decisions.<sup>96</sup> Furthermore, in the view of the Family Bureau of the Supreme Court, the Family Court Investigation Officer (*katei saibansho chôsakan*) in their recommendations to the Family Court must specify not only why protective measures are appropriate, but also why criminal measures are *not*.<sup>97</sup>

It is worth considering Investigation Officers and the role they play. The investigations they hold are crucial to upholding the guiding principle of the *Juvenile Act* (the sound upbringing of the juvenile) and the rehabilitative role of the Family Court.<sup>98</sup> Although they are court officials, they are employed as “professionals in the various sciences of human relations”<sup>99</sup> and are expected to balance the justice and welfare functions of the Family Court.<sup>100</sup> The revisions do not seem to interfere with this basic role. However, other factors affect the performance of their role.

As can be seen above from the Supreme Court’s directives above,<sup>101</sup> there is a rigid hierarchy in the administration of courts presided over by the General Secretariat of the

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93 TAKEUCHI, *supra* note 8, 1.4.

94 GOTÔ, *supra* note 50, 11.

95 *Ibid.*

96 *Ibid.*

97 JAPAN FEDERATION OF BAR ASSOCIATIONS, Alternative Report on the Convention on the Rights of the Child, May 2003, <[http://www.crin.org/docs/resources/treaties/crc.35/JFBA\\_Report\\_on\\_CRC\\_2003.pdf](http://www.crin.org/docs/resources/treaties/crc.35/JFBA_Report_on_CRC_2003.pdf)>, 184.

98 GOTÔ, *supra* note 50, 14.

99 Supreme Court of Japan homepage, <<http://courtdomino2.courts.go.jp/shônen.nsf/0/cbd9e955c8d6423549256469004e95b8?OpenDocument>>.

100 Justice Workers’ Union *supra* note 54, 6.2.

101 See note 96.

Supreme Court.<sup>102</sup> This significantly compromises the autonomy of Investigation Officers. According to the union to which Investigation Officers belong, the Justice Workers' Union, they are often forced to make decisions with which they do not agree.<sup>103</sup> This autonomy has been further eroded since April 2004, when the Investigation Officers Training Institute was merged with that of the secretarial staff of the Family Court.<sup>104</sup> The Court Workers Union argues that this reinforces their image as employees of the Court, and will further compromise their independence.<sup>105</sup> Institutional incapacity in the criminal justice system, such as a lack of prosecutors, has been seen by some as a key component of keeping offenders out of the system, and back into the community, which has reduced recidivism.<sup>106</sup> In this case, however, it appears as though 'resource starvation' is being used more selectively to achieve the opposite result in regard to juvenile offenders. That is, although on the face of it the revisions do not alter the role of Investigation Officers, they are increasingly faced with structural barriers external to the law; namely, reductions in personnel and the quality of training. These factors impede their capacity to conduct thorough investigations of juveniles. Furthermore, awareness within the legal community with respect to juvenile law issues is generally low.<sup>107</sup> Usually only two hours is devoted to the topic at the Legal Institute of Research and Training, and even Investigation Officers are not well informed of Japan's obligations under the *Convention on the Rights of the Child*.<sup>108</sup> This is despite their unique role in ensuring that these rights be realised.<sup>109</sup>

The Court hierarchy, and lack of resources, personnel, and training, arguably contribute to the active manner in which Investigation Officers have been implementing Article 20(2), the standardised remittance clause. Following the revisions, there was a significant rise in remittances to the prosecutor of juveniles 16 years old and over.<sup>110</sup> However, the average dropped from around 70% to 50% of eligible cases over the period April 2001 to April 2004. This pattern is heralded by some as a result of the increased vigilance on behalf of Investigation Officers in their investigations, yet decried

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102 See for example, S. MIYAZAWA, Administrative Control of Japanese Judges, in: Milhaupt / Ramseyer / Young (eds.) *Japanese Law in Context, Readings in Society, the Economy, and Politics* (London et al. 2001) 79.

103 JUSTICE WORKERS' UNION, *supra* note 53, 6.2.

104 Supreme Court of Japan homepage, <<http://courtdomino2.courts.go.jp/home.nsf?OpenDatabase>>.

105 JUSTICE WORKERS' UNION, *supra* note 53, 6.2.

106 See for example, J.O. Haley, *Authority Without Power: Law and the Japanese Paradox* (Oxford 1991). See also J.M. RAMSEYER / M. NAKAZATO, *Japanese Law: an Economic Approach* (Chicago et al. 1999) 182, which seeks to explain Japan's high conviction rate as a result of resource shortage among prosecutors.

107 JUSTICE WORKERS' UNION, *supra* note 53, 6.1.

108 *Ibid.*

109 *Ibid.*

110 SUPREME COURT SECRETARIAT FAMILY BUREAU, *supra* note 71, 1.2.

by others as bias towards juveniles.<sup>111</sup> However, the Justice Workers' Union sees further reasons for the decrease. For example, changing interpretations by the courts with regard to the laws of aiding and abetting, and accessory, have provided a larger pool of candidates for Article 20(2), but also more exceptions due to the physical and 'mental'<sup>112</sup> distance from the crime itself.<sup>113</sup> The Union agrees that Investigation Officers are scrutinising certain cases more carefully. This tends to unearth extra matters such as the victim's desire that the juvenile not be prosecuted when a family member. However, the continued high percentages of remittance for murder and injury causing death reflect an emphasis on the *results* of the offence rather than the circumstances of the individual juvenile. This explains the Investigation Officers' closer scrutiny.<sup>114</sup>

There seems to be a clear shift in Article 20(2) and the other changes to disposition away from the purpose of the law as specific prevention – that is, rehabilitating the individual juvenile – to general deterrent – that is, reducing tolerance as a message to other potential offenders.<sup>115</sup> Recall the purpose of the new measure: “clearly indicating the principle that even juveniles will be the object of criminal proceedings.”<sup>116</sup> Takeuchi argues that this ‘retribution as rehabilitation’ view is flawed in that as a specific deterrent it lacks an understanding of the rapid and vital nature of juvenile development.<sup>117</sup> Moreover, he argues, as a general deterrent, it has no supporting evidence in studies on juvenile crime.<sup>118</sup> Kobayashi also denies that serious crimes by juveniles are the result of a rational appraisal of the consequences, emphasising the extreme immaturity of young offenders.<sup>119</sup> He further notes that exposure to the criminal justice system and harsher penalties often *increase* recidivism and are thus inimical to a sound upbringing.<sup>120</sup>

From the above it can be seen that there has been a shift away from considering the juvenile as an individual with individual needs. The offence itself has become the criteria for disposition. Furthermore, the resourcing and structure of the Family Court enhance the tough new measures.

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111 SANKEI NEWSPAPER CORP., *Dare ka boku wo tomete kudasai: shōnen hanzai no byori*, [Somebody please stop me: the causes of juvenile crime] (Tokyo 2002), 216.

112 Such as ‘blindly following’ another’s lead.

113 JUSTICE WORKERS’ UNION, *Dai 5 kai “kaisei” Shōnen-hō unyō jōkyō chōsa kekka matomaru* (Results summary of the survey of the implementation and situation of the revised *Juvenile Act*, No. 5), <<http://www.zenshiho.net/syotai20030926.html>>.

114 JUSTICE WORKERS’ UNION, Results summary of the survey of the implementation and situation of the revised *Juvenile Act*, No. 6, <<http://www.zenshiho.net/syotai/040622.html>>.

115 GOTŌ, *supra* note 50, 10.

116 IJIMA, *supra* note 34, 3.

117 TAKEUCHI, *supra* note 10, 2.2.

118 *Ibid.*, 1.3.

119 KOBAYASHI, *supra* note 53, 210.

120 *Ibid.*

### (2) Reduction of the Age of Criminal Liability

The revised law permits 14 and 15-year-olds to be remitted to the prosecutor and, thus, into the criminal justice system. Some argue that imprisoning children deprives them of the right to education, guaranteed by Article 26 of the Constitution.<sup>121</sup> Perhaps this underlines the new Article 56(3), allowing for provisional incarceration in a reform school (with educational facilities) until the age of 16, when this is deemed suitable. This is not a general protection of the right to education, however, and Takeuchi argues that the confusion caused by different treatment within the same institution will be counterproductive.<sup>122</sup> Moreover, it acknowledges, by implication, that criminal sanctions are not appropriate for children in the first place.<sup>123</sup>

There had been only three juveniles under 16 sent to the prosecutor until March 2004.<sup>124</sup> According to the Justice Workers' Union, this demonstrates the low incidence of serious crimes committed by this age group, rather than reluctance to remit.<sup>125</sup> One case was remitted despite not having met even the criteria for standardised remittance of elder juveniles in Article 20(2). The Union points to excessive media coverage in contributing to this.<sup>126</sup> Indeed, a series of highly publicised killings by young offenders has strengthened calls to lower the age limit for criminal prosecution lower still when the *Juvenile Act* is reviewed in 2006. The Ministry of Justice is also seeking to have the lower age limit for admission to reform schools (14 years old) abolished.<sup>127</sup>

### (3) Summary

Combined with new stricter parole measures, it can be seen that the revisions with regard to disposition, namely standardisation of remittance for 16 years and older juveniles, and the abolition of the immunity of 14 and 15-year-olds from criminal prosecution, focus on increased punishment. Furthermore, disposition is increasingly determined by the facts and consequences of the event, rather the individual juvenile's circumstances. Furthermore, the influence of the *Revision Act* upon disposition extends beyond its specific provisions. The attitudes of judges appear to have changed, for example. Hence, according to a Justice Workers' Union survey, the decision to remit to the prosecutor is being made more readily, even in cases that do not fit the criteria of Article 20(2), the 'standard remittance' clause.<sup>128</sup> Indeed, this change was apparent

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121 Article 26 Japanese Constitution states: "All people shall have the right to receive an equal education correspondent to their ability, as provided by law. All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free."

122 TAKEUCHI, *supra* note 8, 3.3.

123 *Ibid.*

124 SUPREME COURT SECRETARIAT FAMILY BUREAU, *supra* note 71, 1.1.

125 JUSTICE WORKERS' UNION, *supra* note 53, 2.2.

126 JUSTICE WORKERS' UNION, *supra* note 114.

127 Juvenile crime wave prompts Justice Ministry crackdown, Japan Times 25/8/2004.

128 JUSTICE WORKERS' UNION, *supra* note 53, 2.4.



even when the revisions were merely being debated.<sup>129</sup> Moreover, ‘protective measures’ dispositions, such as detention in reform schools, have increased<sup>130</sup> and lengthened.<sup>131</sup> Diagnostic reports from Juvenile Detention and Classification Homes to the Family Court also appear to have been influenced by the revisions.<sup>132</sup> Thus, the tenor of the new law has affected the administration of the juvenile justice system in a manner beyond the scope of its specific provisions.

b) *Fact-finding*

Recall the Yamagata Mat case outlined above. Measures that were introduced in response to such procedural problems ostensibly seek to address concerns about the accuracy of fact-finding in juvenile justice. The elevation of ‘accuracy’ as a primary goal of a Family Court hearing is indicative of a deeper shift in juvenile justice. The procedural rigours and necessary time for attaining such accuracy would previously have been considered inconsistent with the purpose of the *Juvenile Act* (the sound upbringing of the juvenile). Recall that speed and informality of hearings were considered to be in the best interests of the juvenile’s education and rehabilitation.

The concern with accuracy highlights what some see as the downside of the benevolent, paternalistic model that has characterised Japan’s post-war criminal justice system.<sup>133</sup> Namely, it is marked by discretion, and is prone to mistake and bias. Procedural safeguards such as due process (obliging the state to present its case ‘accurately’ and fairly) are not a primary feature of such a model.<sup>134</sup> A confession’s veracity is thus less crucial relative to its value as a token of acknowledgement for wrongdoing. This in turn evokes a paternalistic, benevolent response.<sup>135</sup> Due process *does* become crucial, however, when reliability is regarded as a key feature of the criminal justice system. This is particularly true as sanctions for breach increase in severity. The Japan Federation of Bar Associations’ increasing concern with the lack of due process in juvenile justice (the lack of the presumption of innocence, the hearsay rule, and double jeopardy; supplementary (mid-hearing) investigations, and little legal representation, as examples)<sup>136</sup> corresponds to a general shift away from a paternalistic rehabilitation-focused model.<sup>137</sup>

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129 *Ibid.*

130 *Ibid.*, 2.4.

131 *Ibid.*, 5.4.

132 JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 97, 185.

133 D.H. FOOTE, *supra* note 87, 511.

134 *Ibid.*, 513.

135 *Ibid.*

136 JAPAN FEDERATION OF BAR ASSOCIATIONS, Shōnen “kaisei” hōan ni hantai suru ketsugi, (resolution opposing the Juvenile Act ‘Revision’ bill) 15/10/99, <[www.nichibenren.or.jp/jp/katsudo/sytyou/jinken/70/1975\\_1.html](http://www.nichibenren.or.jp/jp/katsudo/sytyou/jinken/70/1975_1.html)>.

137 The All Administration of Justice Workers’ Union suggests, somewhat cynically, that there is also an element of self-interest at play here, perhaps reflecting some of the current

The revisions to the process of fact-finding in the Family Court appear designed to complement harsher disposition rather than offset it with due process guarantees. This is disturbing considering that the stimulus for reform initially arose partly from concerns with a *lack* of due process. Moreover, the revisions have not addressed due process inadequacies at the investigation stage, such as undue reliance on (often dubious) confessions, the key problem in the Yamagata case.<sup>138</sup> The three-judge court system and prosecutor's involvement therefore, may only reinforce the findings of a flawed investigation.<sup>139</sup>

#### (1) Three-judge Court

As of March 2004, there had been 100 juvenile cases in which a three-judge court has been assembled.<sup>140</sup> However, it appears that courts are using the measure as a *disposition* choice rather than for fact-finding. This is illustrated by the decision to form a three-judge court in a case where the juvenile was accused merely of 'delinquent tendencies' (*guhan shōnen*).<sup>141</sup> That is, there was no offence for which to 'find' facts.<sup>142</sup> On a practical level, the system may be interfering with the court's ability to interact with the juvenile, as it appears to affect juveniles' confidence to express themselves.<sup>143</sup> The new measure alters the atmosphere of the court considerably. These factors may be inhibiting the rehabilitative function of the Court, not least because of the juvenile's confusion<sup>144</sup> and lack of participation in the proceedings (guaranteed under the *Convention on the Rights of the Child*).<sup>145</sup>

#### (2) Prosecutor's Involvement

The same criticisms may also be levelled at the prosecutor's involvement in juvenile hearings. As of March 2004, Courts had allowed prosecutor involvement in juvenile cases on 72 occasions.<sup>146</sup> The decision to allow involvement seems to be being made for the *appearance* of fairness, rather than for fact-finding. This is demonstrated by permitted involvement even in cases where guilt is uncontested.<sup>147</sup> Recall that contested cases such as the Yamagata Mat incident were the 'problem cases' that provided the stimulus for the new measure. Other reports also suggest that issues of fact

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tensions that exists between allied advocates for law reform in Japan.

138 TAKEUCHI, *supra* note 37, 31.

139 *Ibid.*

140 SUPREME COURT SECRETARIAT FAMILY BUREAU, *supra* note 71, 2.1.

141 *Juvenile Act* Art. 3(1)(3).

142 Factors such as the undesirability of places frequented, and people associated with, are sufficient grounds to warrant remittance to the Family Court in Japan, constituting 'potential' delinquency: Art. 3(3) *Juvenile Act*.

143 JUSTICE WORKERS' UNION, *supra* note 114.

144 *Ibid.*

145 Art. 40. United Nations Convention on the Rights of the Child (1989).

146 SUPREME COURT SECRETARIAT FAMILY BUREAU, *supra* note 71, 2.2.

147 JUSTICE WORKERS' UNION, *supra* note 113.

had arisen that reflected a problem at the investigation stage.<sup>148</sup> Note that in Japan prosecutors, rather than police, conduct criminal investigations in serious cases with wide-ranging powers.<sup>149</sup> Thus, it is ironic that in effect, the revisions seek to remedy the problem (improper investigations held by prosecutors and police) with the problem itself (namely prosecutor involvement at the hearing stage). Moreover, cases of prosecutor involvement going beyond fact-finding, determining the ‘protective needs’ of the juvenile for example, have been reported.<sup>150</sup> As have cases in which more than one prosecutor has been involved in the same hearing.<sup>151</sup> This seemingly limitless involvement is inconsistent with the fact that the measure was a key reason for the failure of the original bill, and led to subsequent tightening of the conditions for its application.<sup>152</sup>

### (3) Detention

The bill tabled by the government also sought an extension to twelve weeks of the four-week limit on pre-trial incarceration.<sup>153</sup> This was subsequently reduced to eight weeks and the relative ease with which courts are approving special extensions to incarceration periods (a total of 155 extensions as of March 2004)<sup>154</sup> is inconsistent with the concerns that led to this reduction.<sup>155</sup> From the perspective of rehabilitation, as reflected in the *Convention on the Rights of the Child*, it is beneficial that incarceration and isolation be imposed only as a last resort, and for the shortest possible period.<sup>156</sup> Moreover, long periods of incarceration interfere with schooling and employment.<sup>157</sup> It seems that courts are making the decision for reasons of convenience,<sup>158</sup> or lack of resources and personnel.<sup>159</sup> In one case the child was incarcerated for 84 days because his/her legal counsel was “busy.”<sup>160</sup>

There appears to be a general trend for police to extend periods of detention. The Justice Workers’ Union reports that it is not uncommon for juveniles to be rearrested, leading to some incarceration periods totalling up to six months.<sup>161</sup> Thus, the assertion in the Government’s second report to the *Convention on the Rights of the Child* that

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148 JUSTICE WORKERS’ UNION, *supra* note 114.

149 See D.T. JOHNSON, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York 2002).

150 *Ibid.*

151 *Ibid.*

152 TAKEUCHI, *supra* note 8, 1.2.

153 *Ibid.*

154 SUPREME COURT SECRETARIAT FAMILY BUREAU, *supra* note 71, 2.3.

155 TAKEUCHI, *supra* note 8, 1.2.

156 Convention on the Rights of the Child, Art. 40.

157 TAKEUCHI, *supra* note 8, 1.2.

158 JUSTICE WORKERS’ UNION, *supra* note 114.

159 JUSTICE WORKERS’ UNION, *supra* note 54, 5.3.

160 *Ibid.*

161 JUSTICE WORKERS’ UNION, *supra* note 114.

“consideration is given to the character of the juveniles detained in the investigation stage, for instance no juvenile may be detained without unavoidable reason,”<sup>162</sup> rings hollow. The Government report states, “The Juvenile Classification Home may be designated as a detention place.”<sup>163</sup> This rarely occurs, however, as the majority of juveniles are sent to so-called ‘substitute prison’ (*daiyō kangoku*) facilities, often in the company of incarcerated adults.<sup>164</sup> This is despite Article 26 of the *Beijing Rules*, urging that juveniles be detained separately from adults to prevent abuse and undesirable influences.<sup>165</sup> ‘Substitute prison’ is the name given to the practice of confining suspects in lock-ups administered by the police, as opposed to detention centres, or Juvenile Classification Homes in the case of juveniles. This is largely due to a lack of proper detention facilities, but prosecutors often express preference for such incarceration, as the lack of rules and poor conditions facilitate confessions, arguably often false, extracted through treatment that at times may amount to torture.<sup>166</sup> Such practices lie at the root of the procedural problems that gave rise to, but were not addressed by, the new revisions. Indeed, the Japan Federation of Bar Associations warns of an increased danger of false charges.<sup>167</sup> The revisions have introduced fact-finding measures that in concept, and implementation, only complement the toughening of disposition.

#### (4) Summary

From this discussion of the new fact-finding measures, it can be seen that ‘push’ factors do not explain or justify their content. In other words, they have not been born of necessity. Rather, although on the surface they provide an *appearance* of fairness, their true aim appears to be penalising juvenile offenders as a means of disposition rather than procedure. This also explains why their implementation appears to be counter-productive. Furthermore, the extension to permitted periods of detention is further evidence of ‘resource starvation’, lack of appropriate facilities for example, contributing to tougher disposition.

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162 The government of Japan’s second report to the Committee of the Convention for the Rights of the Child, *supra* note 82, 306.

163 *Ibid.*

164 JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 97, 472.

165 *I.e.* United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985).

166 T. SAITŌ, Substitute Prison: a Hot Bed of False Criminal Charges in Japan, in: Kenneth L. Port, Comparative Law, Law and the Legal Process in Japan (Durham 1996) 507; also, Childhood Deprived in Japan, The 2<sup>nd</sup> Uniform Report to CRC from Japanese NGOs and Citizens, *supra* note 38, 561.

167 JAPAN FEDERATION OF BAR ASSOCIATIONS, *Shōnen-hō “kaisei” hō seiritsu ni taisuru kaichō seimei* [President’s declaration with respect to the enactment of the *Juvenile Act* ‘Revision’ bill], 28/11/2000, <[www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/00/2000\\_14.html](http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/00/2000_14.html)>.

c) *Victims*

Dissatisfaction expressed by victims and the bereaved, and sympathy felt by the general public, strongly influenced new initiatives in both fact-finding and disposition.<sup>168</sup> Thus, the opportunity given to victims to contribute to (but not participate in) the hearing appears to be influencing disposition and fact-finding.<sup>169</sup> However, Takeuchi argues that the role of such involvement is not well explained by the legislation, nor is there any clear reason why it should influence disposition or fact-finding.<sup>170</sup> He also cautions against the danger of victims disclosing sensitive information to the media.<sup>171</sup> The Justice Workers' Union notes the reporting of such an incident.<sup>172</sup> However, the law does not penalise such behaviour, only the *publication* of information.<sup>173</sup>

The contribution of victims (and the involvement of the prosecutor and three-judge court system) may be seen as a means by which victims' concern with the subjectivity and discretion of judges and Family Court Investigators may be expressed.<sup>174</sup>

More importantly though, victims require access to objective findings of fact that arise from the hearings to succeed in a civil claim for damages. This highlights a fundamental reason for victims' dissatisfaction and public sympathy. Namely, there has traditionally been very little support given to victims of crime from the state.<sup>175</sup> On the other hand, in recent years, particularly following the Sarin gas attacks on the Tokyo subway in 1995 and also due to perceptions of increasing serious crime, certain NGOs have been successful in lobbying for the rights of victims.<sup>176</sup> The *Basic Law for Victims of Crime Act*<sup>177</sup> and the 'victim provisions' of the new *Juvenile Act* reflect this success.<sup>178</sup>

A lack of support for victims has given rise to the impression that the rights of the offender have been emphasised to the detriment of the rights of the victim.<sup>179</sup> Even after the revisions, victim dissatisfaction remains high. Victims remain critical of the Family Court Investigation Officers' proximity to the juvenile.<sup>180</sup> As examined above,

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168 KOBAYASHI, *supra* note 52, 211.

169 TAKEUCHI, *supra* note 8, 3.1.

170 *Ibid.*

171 *Ibid.*

172 JUSTICE WORKERS' UNION, Results summary of the survey of the implementation and situation of the revised *Juvenile Act*, No. 2, <<http://www.zenshiho.net/syotai20011214.html>>.

173 Art. 61 *Juvenile Act*.

174 GOTÔ, *supra* note 50, 12.

175 KOBAYASHI, *supra* note 52, 209; also H. MOROSAWA, Three rights of the victim and efforts in Japan: the course of establishing victim's rights since 1990, paper submitted to the 11th International Symposium on Victimology 13-18 July 2003, Stellenbosch, South Africa, <<http://www.victimology.co.za/papers.htm>>, 1.

176 MOROSAWA, *supra* note 175, 8.

177 *Hanzai higaisha-tô kihon-hô*, Law No. 161/2004.

178 KOBAYASHI, *supra* note 52, 209.

179 JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 97, 423.

180 SANKEI NEWSPAPER CORP., *supra* note 109, 215.

the Investigation Officers operate in a controlled hierarchy. However, because this is internal and structural, from the victims' perspective they appear biased and unchecked.<sup>181</sup> Furthermore, some Investigation Officers confess that even after the revisions, they have little scope to consider victims; it is not built into the system. Under the old model, their work is deliberately subjective:

“We are prosecutor and defence lawyer rolled up into one. It is not an easy task to make the juvenile appreciate the gravity of their crime and draw out their emotions. If we aren't on the same wavelength, we can't even listen to their stories.”<sup>182</sup>

Moreover, responsibility tends to land squarely on the shoulders of Investigation Officers as most reports are reflected verbatim in judge's opinions.<sup>183</sup> Victims are disturbed by this lack of accountability, especially when some Investigation Officers confess that they are sometimes susceptible to manipulation by the juvenile,<sup>184</sup> perhaps an inevitable result of the 'involved' nature of their work. Victims are also critical of cases in which judges interpret the facts in ways that eschew application of the new provisions.<sup>185</sup> For example, one judge emphasised the date of the *event* over the date of death, narrowly avoiding the date the revision came into force,<sup>186</sup> a legal argument unlikely to be well-received by the bereaved.

They also complain of unresolved issues of fact and of having civil action as their only recourse.<sup>187</sup> The chairman of one victims' group in Osaka complains: “Only civil proceedings remain for us. This is the only way we have of knowing the truth.”<sup>188</sup>

Gotô stresses that the rights of victims and offenders need not be balanced against each other in this manner. Rather, he argues, it is necessary to clarify the victim's status (and give support) to enable coexistence within the same system.<sup>189</sup> The adversarial manner in which the revisions conceptualise victims and offenders is reflective of the shift away from the community and integration based principles of juvenile justice. Although there may be other reasons why victims groups have begun to demand retribution, such as a weakening of community values, Kobayashi's point that a lack of assistance and provision of information by the authorities has encouraged this should not be missed.

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181 *Ibid.*

182 *Ibid.*, 215.

183 *Ibid.*, 214.

184 *Ibid.*

185 *Ibid.*

186 *Ibid.*

187 *Ibid.*, 216.

188 *Ibid.*

189 GOTÔ, *supra* note 50, 14.

## IV. ROLE OF MEDIA AND STATE IN DEBATE, REFORM, AND CONTEXT

1. *Overlooked Causes of Crime*

In the debates leading to the revisions, there was also a perception that juveniles were deliberately taking advantage of their rights to commit crimes without fear of sanction.<sup>190</sup> Indeed, in its July 1999 report to the Prime Minister, the Juvenile Problem Legislative Advisory Committee stated:

One of the causes of the increase in problem behaviour amongst juveniles is that only the perspective of the freedom and rights of the juvenile has been emphasised, and adults don't even have the confidence to deny it.<sup>191</sup>

These views share a failure to recognise the widespread abuse and neglect that often lies at the root of serious juvenile crimes.<sup>192</sup> A Japan Federation of Bar Associations' survey revealed that of 14 serious cases 60% of the offenders had been the victims of abuse.<sup>193</sup> Child welfare officers confirm these findings.<sup>194</sup> Teachers, often closest to the children, reject the image of children well versed in their rights, reporting the exact opposite.<sup>195</sup> As do lawyers.<sup>196</sup> The *Act with Respect to the Prevention of Child Abuse*<sup>197</sup> enacted in 2000 represents lawmakers' recognition of, and attempts to deal with, such problems. However, some argue that abuse is not a new problem in Japan; rather, more cases are being reported as society becomes more open.<sup>198</sup> On the other hand, others point to increasing economic pressure on families as a large contributing factor in the increasing incidences of abuse.<sup>199</sup> Economic factors are also more directly related to crime. Indeed, Tamura suggests that the increase in crime is primarily a result

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190 S. WADA, *Gakkô no naka kara miete kuru mono* [Observations made from within schools], in: The Japan Federation of Bar Associations, *Kenshō shōnen hanzai: kodomo oya tsukisoi-nin bengoshi ni taisuru jittai chōsa kara ukabiagaru mono* [A true examination of juvenile crime: the results of a factual survey of lawyers, the attendants of parents and children] (Tokyo 2002) 416.

191 JAPAN FEDERATION OF BAR ASSOCIATIONS, *Kenshō shōnen hanzai: kodomo oya tsukisoi-nin bengoshi ni taisuru jittai chōsa kara ukabiagaru mono*, *supra* note 190, 423.

192 H. KAWASAKI, *Hikō, gyakutai to jidō sōdansho* [Delinquency, abuse, and child counselling centres], in: Japan Federation of Bar Associations, *supra* note 191, 412.

193 KAWASAKI, *supra* note 192, 423.

194 JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 191, 412.

195 WADA, *supra* note 190, 416.

196 JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 191, 423.

197 *Jidōgyakutai no bōshi nado ni kansuru hōritsu*, Law No. 82/2000 as amended by Law No. 153/2004.

198 T. SAEGUSA, *Child Abuse in the Context of Criminal Law in Japan*, in: D. Myers / K. Ishido (eds.) *Japan Today: Legal and Social Reform* (Rockhampton 2003).

199 See for example, JAPAN FEDERATION OF BAR ASSOCIATIONS, *Jidō fuyō teate no sakugen ni hantai shi, yōikuhi shiharai kakuhosaku no jitsugen wo motomeru kaichō seimei* [President's declaration opposing the reduction of child support allowance, and petitioning for the implementation of measures to guarantee payment of child maintenance)], 8/1/1998, <[http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/00/2002\\_6.html](http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/00/2002_6.html)>.

of chronic recession and youth unemployment.<sup>200</sup> Ôta confirms that most of the increase in crime (90%) is actually an increase in *theft*, 70% of which is petty theft.<sup>201</sup> He also notes that 40% of homicide is committed within families, which further highlights endemic domestic violence and abuse.<sup>202</sup> Also, almost certainly related to economic factors is an alarming increase in suicide.<sup>203</sup> On this issue, however, the government has offered few initiatives,<sup>204</sup> perhaps as there are no easy targets to focus blame upon.

From the above it can be seen that responsibility for juvenile crime lies with society as a whole as well as the juveniles themselves. However, this responsibility is largely evaded in the media's preoccupation with the juveniles involved discussed below.

## 2. *The Media*

There is a sense (a common measuring stick of public safety)<sup>205</sup> that children are committing more (and more brutal) crimes.<sup>206</sup> They are on the news almost every day. Fierce debate about the harmful effects of violent entertainment media such as film and comics on impressionable minds has led to intermittent periods of censorship in Japan, particularly over the last 10 years.<sup>207</sup> An often-cited example of extreme violence in film is Fukusaku Kinji's *Battle Royale* (2001), portraying a kind of gladiatorial death quest between schoolchildren.<sup>208</sup> Indeed, the influence of this film was suggested in the recent killing of an elementary school student at the hands of her classmate in Nagasaki prefecture.<sup>209</sup> The role of Internet chat rooms in provoking the killer was also given detailed attention, provoking calls for stricter regulation. However, such calls did not extend to other forms of media, such as television and print media, despite similar issues of content control.

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200 M. TAMURA, Changing Japanese Attitudes Toward Crime and Safety, in: Japan Echo 31 (2004) 14.

201 T. ÔTA, Public Safety in Today's Japan, in: Japan Echo 31 (2004) 20.

202 *Ibid.*

203 D. CAMERON, Suicide chatrooms symptom of Japanese epidemic, Sydney Morning Herald, 14/10/2004.

204 *Ibid.*

205 See for example, D. BAYLEY, Forces of Order: police behaviour in Japan and the United States (Berkeley, 1976) ch. 2.

206 Asahi Newspaper, *Hikô shônen*, "miteminufuri" 5 wari kosu, naikakufu yôronchôsa [Those who pretend not to see juvenile delinquents over 50%, Cabinet public opinion survey], 19/3/2005.

207 F.L. SCHODT, Dreamland Japan: Writings on modern *manga* (Berkeley 2002) 57.

208 A. FAIOLA, Youth violence has Japan struggling for answers, Washington Post 9/8/2004.

209 *Ibid.*



Ayukawa argues that the media may create perceptions of issues that do not necessarily reflect reality.<sup>210</sup> It relies on advertising for its profits. The value of advertising space depends on viewer/ readership, and the media thus has an incentive to provide fresh and sensational news that may not correspond to reality.<sup>211</sup> The media thus ‘creates’ topics, which become ‘current affairs’.<sup>212</sup> The media is also often guilty of creating misleading first impressions that last in the public memory. Thus, in the 2003 murder of a 4-year old by a 12-year-old boy, also in Nagasaki, media reports suggested that the offender was “a normal child that could be found anywhere,”<sup>213</sup> leading to suggestions that the causes of juvenile crime in Japan are uniquely random.<sup>214</sup> Later examination of the juvenile, however, revealed problems in his family life.<sup>215</sup>

On the other hand, the media’s actions can have unintended effects. For example, Ayukawa argues that some children see crime as a means of expressing their existence and of creating a feeling of self-importance and control (over the media, for example).<sup>216</sup> This is made possible precisely because of the excessive media attention given to juvenile crime. The juvenile convicted of the 1997 Kôbe killings displayed this in his manipulation of the media, particularly the Kôbe Newspaper, under the pseudonym ‘Sakakibara Seito’ (‘wine, demon, rose, saint’).<sup>217</sup> The juvenile at the centre of the so-called ‘bus-jacking’ incident of 2000 confessed that he “wanted to stand out,” and that he “wanted the world to take notice.”<sup>218</sup> In this case, a high school student with a history of mental illness hijacked a passenger bus with a knife in Saga prefecture and stabbed a female passenger to death.<sup>219</sup> He reportedly felt resentment towards another juvenile, who had murdered an elderly woman the previous day, stating, “He beat me to it.”<sup>220</sup>

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210 J. AYUKAWA, *Shônen hanzai: hontô ni hatsu-ka, kyouaku-ka shite iru no ka*, [Juvenile crime: is it really increasing and becoming more brutal?] (Tokyo 2001) 157.

211 *Ibid.*

212 *Ibid.*

213 Yomiuri Newspaper, *Doko ni demo iru futsû no ko* [A normal child that could be found anywhere], 10/7/2003.

214 FAIOLA, *supra* note 208.

215 Yomiuri Newspaper, *Kasai kettei no kosshi* [Main points of the Family Court’s judgement], 12/7/2003.

216 AYUKAWA, *supra* note 210, 158.

217 Japan Times, Kôbe killer set free, 11/3/2004.

218 AYUKAWA, *supra* note 210, 160.

219 *Ibid.*, 159.

220 *Ibid.*

Moreover, a copycat effect can be traced to the media. The juvenile who hijacked the bus in Saga confessed to admiring the Kôbe juvenile.<sup>221</sup> Similar statements of admiration and empathy exist amongst other young offenders, and pseudonyms similar to ‘Sakakibara’ have been reported.<sup>222</sup> Ayukawa detects the same copycat effect in *enjo kôsai*, or ‘sponsored dating’, a euphemism for teen prostitution, and teen suicide caused by bullying.<sup>223</sup>

As can be seen from the above, the lack of responsibility taken by society as a whole towards juvenile crime extends to media. The media may be seen as irresponsible in its sensationalised reporting and short-term focus. Viewers are also irresponsible in their detached and uncritical acceptance of the issues that the media creates for them. Furthermore both are irresponsible in their ignorance of the harmful effects this sensationalism can have on impressionable young minds.

### 3. *Police Data*

Young juveniles committing brutal crimes is not a new phenomenon in Japan, despite the media’s tendency to portray it as such.<sup>224</sup> Indeed, Ayukawa argues that the coincidence of a low level of norm awareness and the physical potential to cause harm makes juveniles an inherently high-risk group.<sup>225</sup> Juvenile crime has fluctuated since the war, peaking in the early 1980s and dipping and rising again in the late nineties, according to police figures.<sup>226</sup> According to these figures, the rate of arrests within the age group 14-19 increased by 50% from 1993 to 2003.<sup>227</sup> Maeda concludes that statistics show an undeniable increase in the number and severity of crimes committed by juveniles.<sup>228</sup>

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221 *Ibid*, 160.

222 *Ibid*, 161.

223 *Ibid*.

224 *Ibid*, 154.

225 *Ibid*, 155.

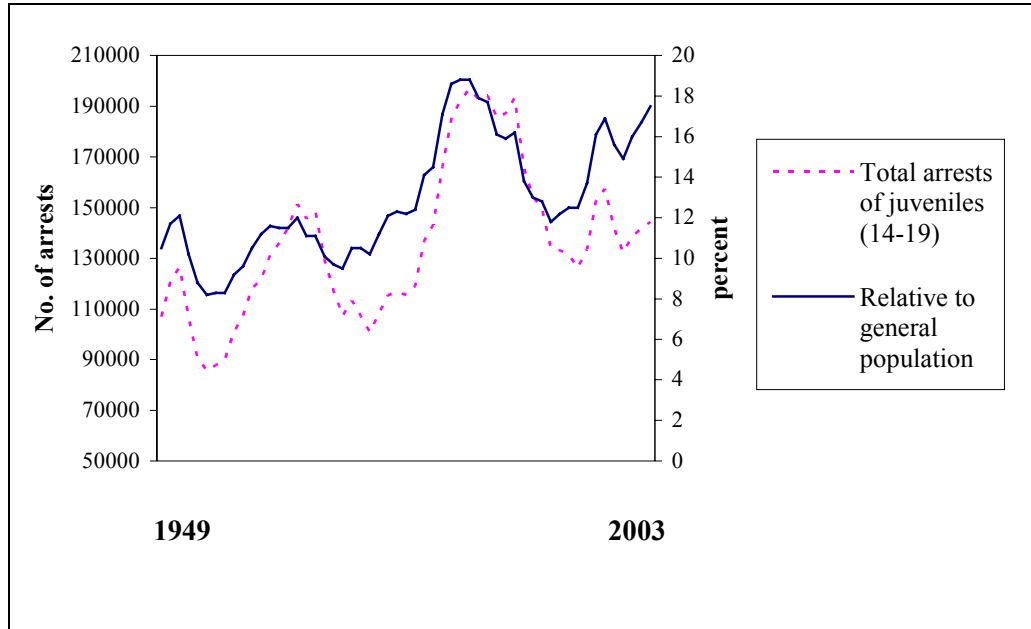
226 GOVERNMENT OF JAPAN, *Heisei 16 nen Shônen-hô hakusho* [2004 Juvenile Law White Paper], <[http://www8.cao.go.jp/youth/whitepaper/h16zenbun/pdf/ymp1\\_5\\_1.pdf](http://www8.cao.go.jp/youth/whitepaper/h16zenbun/pdf/ymp1_5_1.pdf)>, pt 1, ch.5(1), 12.

227 *Ibid*.

228 M. MAEDA, *Shônen hanzai: tôkei kara mita sono jitsujô*, [Juvenile crime: the true picture based on statistics] (Tokyo 2000) 102.

FIGURE 1:

**Juvenile offenders (1949-2003). Total number of arrests,  
and proportion of juvenile offenders (14-19) to general population** <sup>229</sup>



An Asahi Newspaper opinion poll taken in early 2004 found that 80% of respondents were in favour of an even tougher *Juvenile Act* due to a perceived threat to their security.<sup>230</sup> However, a study conducted by the Justice Ministry's Legal Research and Training Institute found that such perceptions of crime do not reflect the reality.<sup>231</sup> In absolute terms, juvenile crime actually hit a 20 year low in 2002, although this is largely due to a drop in the birthrate.<sup>232</sup> For the same reason, there is a *more* conspicuous rise in crime amongst the elderly.<sup>233</sup>

There has been an important policy shift in police work in recent years.<sup>234</sup> A zero tolerance approach is being taken to incidents previously regarded as 'minor' offences (such as sex offences, reflecting changes in social attitudes).<sup>235</sup> But this has created more 'difficult' cases and the arrest rate generally has dropped from as high as 90% to

229 Data from the National Police Agency homepage: <<http://www.npa.go.jp/safetylife/syonen20/syouden15.pdf>>.

230 TAMURA, supra note 200, 14.

231 H. GOTÔ, Crime Anxieties Bred by Neglect, in: Japan Echo 31 (2004) 24.

232 *Ibid.*

233 *Ibid.*

234 *Ibid.*

235 *Ibid.*

under 40% in recent years.<sup>236</sup> The ratio of youth apprehended is higher than adults due to the relative ease police have in tracking down juvenile suspects:

Minors accounted for around half of arrests for theft and embezzlement, reflecting the fact that they are easier to identify owing to their limited area of movement and to their tendency to commit offences on the street and other readily visible areas... The apprehension of minors, who are relatively easy to track down, does not necessarily signify that they alone are committing more crimes.<sup>237</sup>

Thus, within the smaller percentage of arrests, juveniles may be over-represented. According to Ôta, there has been no marked rise in homicides committed by juveniles, and juvenile crime is *not* a major threat to public security.<sup>238</sup> It is important to note that the National Police Agency is under the supervision of the National Public Safety Commission, whose members are appointed by the Prime Minister.<sup>239</sup> This link makes the following warning by UNICEF salient:

Figures in this sphere are wide open to political manipulation. A government wishing to demonstrate the success of its 'fight against crime' may well find a different set of data to publish from that of a government seeking to arouse a feeling of public insecurity in order to secure support for repressive measures.<sup>240</sup>

On the other hand, police activity in the informal sphere makes for a more complex picture. Perhaps reflecting a parallel trend towards a gradually strengthening civil society (for example the strengthening of NGO and information disclosure legislation),<sup>241</sup> there has been some movement at a local level towards directing juveniles at an early stage of delinquency towards institutions beyond police control such as independent Juvenile Support Centres (*shônen sapôto senta*).<sup>242</sup> These provide the space and privacy to allow juveniles, families, victims and others to work together to find solutions to prevent further delinquency, although most support centres are still run by local police.<sup>243</sup> There is also recognition that it is essential to involve Japanese society as a whole, which entails better communication and exchange between government and civil institutions (through Juvenile Support teams (*shônen sapôto chîmu*), for example, composed of a teacher, a social worker, a police officer and others).<sup>244</sup>

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236 *Ibid.*

237 *Ibid.*

238 T. ÔTA, Public Safety in Today's Japan, in: Japan Echo 31 (2004) 20.

239 Editorial: 'Law Enforcement on Trial', in: Japan Echo 31 (2004).

240 UNICEF, *supra* note 6, 7.

241 See KINGSTON, *supra* note 3, but see comments attached.

242 National Police Agency homepage: <[http://www.npa.go.jp/seisaku\\_hyoka/houkokusho-h13jigyousupport.pdf](http://www.npa.go.jp/seisaku_hyoka/houkokusho-h13jigyousupport.pdf)>.

243 *Ibid.*

244 *Ibid.*

#### 4. *The Involvement of the Bureaucracy and the Supreme Court*

Blame cannot be cast solely upon the media for contributing to misconceptions about juvenile crime. The state has also played a role in scapegoating juvenile offenders for problems with deeper causes. As early as the 1950s conservative forces attempted to roll back the democratic reforms to criminal justice system introduced by the US occupation.<sup>245</sup> However, due to the low rate of crime, a stronger civil society,<sup>246</sup> and perhaps scepticism of state control in light of its abuses before and during the war,<sup>247</sup> these attempts have largely been unsuccessful. Significantly, the consistently low rate of general crime, despite fluctuations in the juvenile rate, was seen as testament to the success of a rehabilitation-based juvenile justice system.<sup>248</sup> That is, young offenders were being 'cured'. However, perceptions of crime created by the media have provided an opportunity to toughen criminal justice.

Of concern is the way in which the state seems to feed the media's fire. I argued above that the National Police Agency releases figures on juvenile crime selectively. But, there are other ways in which the police have given the media 'access' to the juvenile justice system, traditionally seen as closed in the interest of the sound upbringing of the juvenile. For example, the police frequently release details about juvenile incidents to the media, despite the prohibition on this contained in Article 209 of the *Criminal Investigation Guidelines*.<sup>249</sup> Of more concern is the National Police Agency's notice of intent to conduct public investigations of juvenile accused in serious cases if there is a danger of reoccurrence.<sup>250</sup> In such cases they are prepared to release the name and photo of the accused.<sup>251</sup>

Article 61 of the *Juvenile Act* states:

In cases where a juvenile is the subject of a hearing in the Family Court, or a person has been indicted for an offence committed while a juvenile, it is forbidden to publish articles or photos in a newspaper or other publication that enables an inference to be made of the identity of the person in question by name, age, occupation, address, appearance, and so forth.

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245 ÔDA, *supra* note 4, 414.

246 See for example, Norgren's discussion of interest groups and civil society in T. NORGREN, *Abortion Before Birth Control* (Princeton 2001).

247 TAMURA, *supra* note 200, 14.

248 JUSTICE WORKERS' UNION, *supra* note 53, 1.4.

249 JAPAN FEDERATION OF BAR ASSOCIATIONS, *Shōnen higisha no kōkai sōsa ni tsuite no keisatsuchō tsūtachi ni taisuru kai seimei*, [Statement regarding the National Police Agency's notification with respect to open investigations of juvenile accused], 12/12/2003, <[http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/00/2003\\_34.html](http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/00/2003_34.html)>; see *Criminal Investigation Guidelines* (National Public Safety Commission Regulations no. 2, 1957).

250 *Ibid.*

251 *Ibid.*

The Japan Federation of Bar Associations argues that Article 61 of the *Juvenile Act* also applies to the investigation stage of juvenile proceedings.<sup>252</sup> This argument seems reasonable. Firstly, it is the only reading consistent with the purpose of the *Juvenile Act*. Secondly, although not explicitly mentioned in Article 61, the police investigation is logically prior to the hearing. That is, if the article was not applied to investigations, it would be rendered meaningless. On the other hand, as will be discussed below, the Supreme Court has shown no willingness to champion the rights of juvenile offenders in relation to this issue, perhaps paving the way for the National Police Agency's new policy. It is thus difficult to predict how the Court will interpret Article 61 in relation to police investigations.

The Japan Federation of Bar Associations has made repeated criticisms of what it regards as serious violations of juvenile offenders rights by the media.<sup>253</sup> Despite the existence of Article 61, there have been numerous examples of its breach in print media and on the Internet.<sup>254</sup> In most cases the perpetrators of such breaches are merely given warnings.<sup>255</sup> Although there have been examples of district and high courts ruling in favour of juvenile offenders who had initiated civil claims based on an illegal act amounting to tortious behaviour under Article 709 of the *Civil Code*,<sup>256</sup> most of these cases were overruled on appeal.<sup>257</sup>

The Supreme Court made its opinion clear on this matter in a decision handed down in March 2003.<sup>258</sup> In this case, the appellee was accused of a murder that occurred in 1994 when he was 19 years old, still a minor in Japan. In 1997 the appellant's weekly magazine, *Shūkan Bunshun* reported in great detail on the trial, taking place in the Nagoya District Court. It printed a pseudonym of the accused that closely resembled his real name, his age, place of birth, record of delinquency and employment, and details about his personal history and connections.<sup>259</sup>

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252 *Ibid.*

253 JAPAN FEDERATION OF BAR ASSOCIATIONS, *Kōbe shōgaku-sei satsujin jiken ni kansuru hōdo no arikata ni tsuite no kaichō seimei*, [Statement regarding the state of reporting on the murder of an elementary school student in Kōbe], 2/7/97, <[http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/90/1997\\_17.html](http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/90/1997_17.html)>; also JAPAN FEDERATION OF BAR ASSOCIATIONS, *Nagasaki yōji yūkai jiken, 12 sai shōnen no puraibashi shingai ni kansuru kaichō danwa*, [President's statement on the kidnapping of an infant in Nagasaki and the violation of the 12-year-old juveniles privacy], 16/7/2003, <[http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/00/2003\\_25.html](http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/00/2003_25.html)>.

254 *Ibid.*

255 JUSTICE WORKERS' UNION, *supra* note 53, 8.1.

256 *Minpō*, Law No. 89/1896 and No.9/1898 as amended by Law No. 147/2004.

257 JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 96, 188. For example, a case in the Osaka District Court (9/6/1999) was overruled by the Osaka High Court (29/2/2000), <<http://www.kanto.npa.go.jp/contents/05contents/oshirase03.html>>.

258 Supreme Court judgements, full text of judgements, 14/3/2003, 2nd Petty Court, re: case 1335 (2000) (claim for damages case) Vol. 57, no.3, 229.

259 *Ibid.*, 2.1.

The Nagoya High Court affirmed that Article 61 exists to protect the right of the sound upbringing of the juvenile, and also to protect the privacy and reputation of the juvenile. Therefore, a breach of the article would amount to a violation of rights justifying a tort claim.<sup>260</sup> The standard required by Article 61 differed to the adult standard of limitations upon publishing facts relating to a crime. The adult test considers whether publishing the facts was (i) in the public interest and (ii) *solely* in the public interest. Broadcast of facts in juvenile cases only avoids illegality in special circumstances, *i.e.* if it was clear that it was *necessary* to protect the public interest.<sup>261</sup> The Court held that such criteria were not met in this case.<sup>262</sup>

However, the Supreme Court rejected this argument. It held that the High Court had failed to properly distinguish between defamation and the right to privacy on the one hand, and that of the sound upbringing of the juvenile on the other. The Supreme Court, therefore, proceeded on the assumption that the High Court had based its argument on the former. It then held that the magazine had indeed invaded the juvenile's right to privacy. However, the decision as to whether this was justified or not was remitted back to the District Court with instructions to apply the *standard* tests with respect to privacy and defamation.<sup>263</sup>

The court commented on Article 61 incidentally. It stated that the inference of which the article speaks with regard to identifying the juvenile referred to an inference that could be made by an "ordinary member of the general public."<sup>264</sup> Because such a person could not identify the juvenile, the magazine had not breached Article 61. The implication is that the article does *not* apply to members of the juvenile's community, or at least those likely to be in close proximity to him or her.

The decision appears flawed on two counts. Firstly, the High Court plainly based its decision on both defamation and privacy issues *and* the right to a sound upbringing. The confusion perceived by the Supreme Court is a natural result of the overlapping nature of these issues. The High Court merely considered it unnecessary to restate the common understanding of Article 61, reflected in Article 40 (2)(b)(vii) of the *Convention on the Rights of the Child*. That is, for a sound upbringing the juvenile must be allowed to avoid the stigma of criminality, and should thus be protected from public scrutiny. Privacy in such a case is the means by which this protection is achieved. The Supreme Court did not share this understanding. Nor did it mention Japan's obligations under international law.

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260 *Ibid*, 2.3.

261 *Ibid*.

262 *Ibid*, 2.4.

263 *Ibid*, 3.4.

264 *Ibid*, 3.1.

Secondly, the Court's opinion that those in close proximity to the juvenile are not included in Article 61 is inconsistent with the rehabilitative understanding of 'sound upbringing'. Indeed, the community in the proximity of the juvenile is the only logical object of Article 61. These are the only people who can have any foreseeable impact on the upbringing of the individual juvenile, unless the juvenile leaves that community, which would be inconsistent with the rehabilitative notion of reintegration.

This case illustrates not only that the rehabilitation/ reintegration understanding of the purpose of the *Juvenile Act* is losing currency amongst the judiciary, but also that attempts to reconcile the trend towards tougher disposition with the explicit purpose of the *Juvenile Act* (sound upbringing of the juvenile) are unworkable. The case also demonstrates the drawbacks of relying on courts and legislation to rein in the excesses of the media. As Suzuki observes, for a healthy democracy, the media must be able to control *itself*.<sup>265</sup> Some commentators have criticised the lack of industry-wide ethics committees and other forms of self-regulation in the Japanese media world.<sup>266</sup> Tajima warns that irresponsible reporting is providing a pretext for the state to intensify its attempts to regulate information. He gives the *Basic Act on the Protection of Individual's Information*,<sup>267</sup> and the *Basic Act for Measures to Address the Social Environment of Youths Bill*, as examples.<sup>268</sup> On the other hand Kingston observes that the media has begun to respond to this threat:

Media organisations have adopted tougher rules of conduct and self-imposed restraints aimed at placating critics and warding off legislation they regard as placing unconstitutional and unwarranted restrictions on their activities.<sup>269</sup>

However, state initiatives continue and the future of information regulation in Japan is still a highly contested area.<sup>270</sup>

## 5. Summary

From the above it can be seen that the Supreme Court has employed the penal standard in its decisions relating to juvenile crime. Recall that the Supreme Court had been active in the reform movement from the very beginning and its influence has been instrumental in the diffusion of the penal standard throughout the juvenile justice system.

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265 S. SUZUKI, What's wrong with the education system?, in: Japan Echo 10 (1983) 23.

266 Y. TAJIMA, *Terebi ya zasshi no jinken shingai wa hidoi to omoimasu. masukomi wo kibishiku kisei subeki de wa nai desu ka* [I think that there are gross violations of human rights by television and magazines. Shouldn't we tightly regulate the mass media?], in: Sekai 687 (2001) 215.

267 *Kojin-jôhō no hogo ni kansuru hōritsu*, Law No.57/2003 as amended by Law No. 119/2003.

268 *Seishōnen shakaikankyō taisaku kihon-hōan* (see <[http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/00/2001\\_3.html](http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/00/2001_3.html)>)

269 KINGSTON, *supra* note 3, 58.

270 *Ibid*, 67.



It has also facilitated irresponsible reporting in the media, giving lawmakers a pretext to intensify attempts to control information. As can be seen from the police data above, however, the state cannot always be trusted to provide information that is accurate and objective.

## V. CONCLUSION

The changes affected by the 2000 *Revision Act* represent a significant departure from the original understanding of the purpose of the *Juvenile Act*, though this shift has not been explicit. This lack of clarity characterises the closed, hasty nature of the revision process, made possible by populist politics. An examination of the new measures and their implementation reveals that a tough-on-crime approach has begun to permeate the juvenile justice system. Kawasaki identifies a convergence of criminal procedure and juvenile justice, a development he regards as undesirable.<sup>271</sup>

Disposition is becoming harsher, more standardised, and incident-focused. The new fact-finding measures, ostensibly introduced to increase accuracy (not hitherto regarded as a primary goal of rehabilitation), have in fact been conceived of and implemented to complement harsher disposition. Meanwhile, due process measures have not been introduced in counterbalance to remedy concerns about procedure, largely at the police investigation stage that initially stimulated the movement towards reform. Furthermore, 'victims' provisions have been designed to pacify dissatisfied victims' groups at the expense of the juvenile. The adversarial nature in which the revisions thus conceptualise victims and offenders is inconsistent with a reintegration, community-based approach to juvenile justice. It is also of doubtful value in addressing the real concerns of victims, who have largely been left to fend for themselves. Changes in disposition, fact-finding, and 'victims' provisions all share a background of 'resource starvation', which constitutes a structural factor that encourages and facilitates tougher disposition beyond the letter of the law.

It seems to have been regarded that a shift in the philosophy of the *Juvenile Act* would not undermine the structure of the *Juvenile Act* and the system based upon it. However, it is the very ambivalence towards the purpose of the *Juvenile Act* created by the revisions that makes the juvenile justice system problematic. This is because, without the protections of due process, and stripped of its rehabilitative function, the juvenile justice system can only be characterised as a 'paternalistic-benevolent' model without benevolence.

Of serious concern is the apparent unity on this issue between separate arms of government. The Ministry of Justice was instrumental in initiating the reform process.

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271 KAWASAKI, *supra* note 53, 93.

The National Police Agency, with links to the Prime Minister's office, has encouraged sensationalism in the media by releasing selective figures and allowing excessive and intrusive coverage. The Supreme Court has been active from the outset, initially calling for reforms, pressuring lower court officials to act in ways contrary to the rehabilitative purpose of the *Juvenile Act*, and failing to rein in the media, whose failure to self-regulate is providing a pretext for intensifying state control over information, as well as juveniles. Irresponsible reporting in the media has also provided a means for juveniles to express themselves through crime, and influence other juveniles in the process. Finally, lawmakers have responded to voter panic and have played their part, through the revisions, to legitimise and reinforce the existence of a 'juvenile problem', continuously requiring new state initiatives.

Most disturbing is the deflection of the public's interest away from social problems that often lie at the heart of delinquent behaviour, that is, chronic economic recession and its social ramifications, such as an increase in domestic violence and child abuse. Furthermore, Takeuchi observes, in an age in which diversification and structural change are unavoidable realities, rehabilitation and reintegration are more important than ever to maintain social cohesion.<sup>272</sup> The *Revision Act*, with its tenor of retribution, is likely to be counterproductive in this respect.

#### ZUSAMMENFASSUNG

*Sowohl im In- als auch im Ausland herrscht derzeit der Eindruck vor, daß Japan von einer Welle der Jugendkriminalität überschwemmt wird. Die damit im Zusammenhang stehenden Befürchtungen haben im November zu den ersten umfassenden Reformen des Jugendstrafverfahrens- und Jugendstrafrechts in Japan seit über 50 Jahren geführt. Die Änderungen, die vor allem die Rolle und das Verfahren der Familiengerichte betreffen, lassen sich in drei Überschriften zusammenfassen.*

*Erstens hat die Reform zu Veränderungen in den Möglichkeiten der Familiengerichte geführt, einzelne Fälle zu behandeln. Sofern an der Begehung von bestimmten schweren Straftaten Jugendliche im Alter von sechzehn Jahren und darüber beteiligt sind, werden die Ermittlungen im Strafverfahren nun automatisch in die Hand der Staatsanwaltschaft gelegt. Diese Fälle werden also regelmäßig der allgemeinen Strafjustiz zugeleitet. Zudem wurde nun die Möglichkeit eröffnet, in bestimmten Fällen auch Strafverfahren gegen Jugendliche unter sechzehn Jahren, das heißt gegen Vierzehn- und Fünfzehnjährige, nach allgemeinen Strafverfahrensregeln durchzuführen. Diese werden dann ebenfalls vor allem auf Betreiben der Staatsanwaltschaft durchgeführt.*

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272 TAKEUCHI, *supra* note 8, 6.4.

*Zweitens wurde das Verfahren der Tatsachenermittlung vor den Familiengerichten umgestaltet. Fortan können dem zuständigen Gericht in bestimmten Fällen drei Richtern statt wie bisher ein Richter vorstehen. Es wurden zudem Regelungen geschaffen, die die Beteiligung von Staatsanwälten in der Verhandlung vor den Familiengerichten zulassen, auch wenn diese dort nicht als Staatsanwälte im herkömmlichen Sinne auftreten. Diese sollen das Gericht in der Aufklärung des Falles unterstützen. Darüber hinaus wurde zum Zwecke der Ermittlung die mögliche Untersuchungshaftdauer von Jugendlichen, die einer Straftat verdächtig sind, verlängert.*

*Schließlich soll die Einführung neuer Vorschriften dazu dienen, daß Interessen der Opfer von Straftaten stärker als bisher Berücksichtigung finden, indem etwa die Möglichkeit der Informationsgewinnung einschließlich der Akteneinsichtnahme zugunsten von Opfern erweitert wurde und die Opfer nun größere Befugnisse erhalten, an der Verhandlung aktiv teilzunehmen.*

*Der Autor untersucht die Reformen unter Berücksichtigung der ursprünglich beabsichtigten Änderungen und der Auswirkungen, die diese in den ersten drei Jahren tatsächlich hatten. Er ist der Ansicht, daß alle Reformen, gleichwohl sie auf den ersten Blick „neutral“ erschienen, eine Abkehr vom ursprünglichen Prinzip des Jugendstrafverfahrens im Sinne der besonderen Berücksichtigung der Interessen und der Rücksichtnahme auf die Entwicklung von Jugendlichen hin zur Einführung der Prinzipien des allgemeinen Strafverfahrens auch in Jugendstrafverfahren darstellten.*

*Er meint, daß den Reformen populistische Motive zugrunde lägen, die eine allgemeine Zustimmung der Bevölkerung reflektierten, härter gegen Straftäter vorzugehen. Diese Philosophie habe einerseits die Absicht, Maßstäbe der Behandlung von Straftätern zu vereinheitlichen, und andererseits, das Hauptaugenmerk der Justizbehörden im Jugendstrafverfahren von der Berücksichtigung der individuellen Persönlichkeit und des sozialen Umfeldes des Jugendlichen hin zu den Umständen und dem Ausmaß der Folgen der Tat zu verschieben. Der Autor kritisiert unter anderem, daß die Reformen zu einem allgemeinen Übergreifen der Grundlagen des allgemeinen Strafverfahrens in das Jugendstrafverfahren führten und daß das Jugendstrafverfahren nun in einem zu großen Maße die Gegnerschaft von Opfern und Angeklagten in den Vordergrund rücke. Diese Veränderungen reflektierten den Willen eines Großteils der japanischen Parlamentsabgeordneten, die Berücksichtigung der Opferinteressen in Strafverfahren im allgemeinen zu verstärken. Der Autor vermutet zudem, daß auch strukturelle und finanzielle Aspekte einen Ausschlag dafür gegeben hätten, daß den Familiengerichten und ihren Ermittlungsjustizangestellten nun größere Möglichkeiten eingeräumt worden seien, strengere Verfahrensmaßnahmen einzuleiten.*

*Der Autor glaubt auch, daß wegen der scheinbaren politischen Dringlichkeit, mit der das Thema behandelt worden sei, die notwendige sorgfältige Diskussion über das Reformvorhaben zu kurz gekommen sei. Dies habe insgesamt eine tiefgreifende Ambivalenz innerhalb der Jugendstrafjustiz hervorgerufen. Während die wohlwollenden und auf die Entwicklung des Jugendlichen Rücksicht nehmenden Züge des Verfahrens vor*

*den Familiengerichten weithin beseitigt wurden, seien keine angemessenen Standards, die wenigstens ein faires Verfahren sicherten, an deren Stelle getreten.*

*Der Autor kritisiert die unkritische und unverantwortliche Presse in Japan, die für die Verschärfung des Umgangs mit jugendlichen Straftätern mitverantwortlich sei. Er äußert zudem seine Bedenken über die sich gegenseitig ergänzenden Rollen, die die Verwaltung und der Oberste Gerichtshof Japans bei der Vornahme der einschneidenden Eingriffe in das bisherige System des Jugendstrafverfahrensrechts gespielt hätten. Der Autor sieht die besondere Problematik der Reformen darin, daß der sich in den Reformen widerspiegelnde allgemeine Trend zur härteren Bestrafung als Antwort auf Entwicklungen in der heutigen Zeit des schnellen sozialen Wandels kontraproduktiv sei. Gerade in solchen Zeiten sei es wichtiger den je, sorgfältig durchdachte Maßnahmen der gesellschaftlichen Reintegration von Straftätern zu fördern.*

*(Deutsche Übersetzung durch die Redaktion)*