

The Yakuza on Trial

Sentencing Patterns of Members of Japanese Organized Crime

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Sentencing in Japan has been the subject of academic inquiry since the 2000s. The introduction of a set of judicial reforms (e.g. enhanced access to justice, the lay judge system (*saiban'in seido*), the expansion of legal aid, the reform of law schools and the vitalization of alternative dispute resolution) recommended by the Final Report of the Justice System Reform Council in 2001 were thought to have a direct impact on various aspects of the Japanese judiciary, including sentencing practices.¹ Indeed, the reform took form in the introduction of a mixed lay judge system (*saiban'in seido*) and the introduction of a new system of graduate professional law school education.² Moreover, two revisions of the Code of Criminal procedure introduced victim participation in trials, who can now express their opinion and in some

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1 K. HAMAI/T. ELLIS, Genbatsuka: Growing Penal Populism and the Changing Role of Prosecutors in Japan, *Japanese Journal of Sociological Criminology* 33 (2008) 67.

2 D. VANOVERBEKE/T. SUAMI, Reforms of the Judiciary in Japan at the Start of the Twenty-first Century: Initial Assessment of an Ongoing Process, in: Vanoverbeke/Maesschalck/Nelken/Parmentier (eds.), *The Changing Role of Law in Japan. Empirical Studies in Culture, Society and Policy Making* (2014) 66.

cases question witnesses and defendants.³ Scholars such as HAMAI and ELLIS, and MIYAZAWA reacted to these changes with preoccupation, arguing that the punishment patterns of the Japanese courts are steering towards popular punitivism,⁴ also known as *genbatsu-ka*.⁵

Before wistfully recalling the “good old times” when Japanese criminal justice was reintegrative⁶ and benevolent⁷, it is important to note that such overly optimistic traditional depictions of the Japanese criminal justice system have already been contested. Scholars such as JOHNSON⁸ and VAN WOLFEREN⁹ harshly condemned the prosecutors’ virtually unlimited power and partisanship, while GOOLD¹⁰ criticized how a certain part of scholarship has tended to insist on the so-called ‘essential traits’ of the Japanese people in terms of law and order (such as their communitarian spirit, and their polite, orderly, law-abiding disposition) thus reinforcing the idea of Japan as a utopic space where criminal justice is fairly and equally exercised. Secondly, the changes in the judiciary should be considered against the background of an increasing sense of crisis that, in conjunction with economic turmoil, have permeated Japan since the 1990s.¹¹ The social and economic crisis translated into anxiety towards public safety, as proven by the 44% increase in perceived fear of crime registered between 1995 and 2004.¹²

This article analyzes if and how the alleged increased punitivist tendencies of Japanese criminal justice, in particular after the implementation of the reforms, have impacted on the sentencing of members of criminal syndicates. In particular, I argue that the criminal court reforms of one decade ago have not been a turning point in the history of Japanese judiciary, but rather, politicians have boasted the changes respond to the widespread sense of

3 M. SAEKI, Victim Participation in Criminal Trials in Japan, *International Journal of Crime, Law and Justice* 38/4 (2010) 149.

4 K. HAMAI/T. ELLIS, *supra* note 1.

5 S. MIYAZAWA, The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy, *Punishment and Society* 10/1 (2008) 47.

6 J. BRAITHWAITE, *Crime, Shame, and Reintegration* (1989).

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

8 C. JOHNSON, *Conspiracy at Matsukawa* (1972).

9 K. VAN WOLFEREN, *The Enigma of Japanese Power* (1989).

10 B. GOOLD, Idealizing the Other? Western Images of the Japanese Criminal Justice System, *Criminal Justice Ethics* 23/2 (2004) 14.

11 D. VANOVERBEKE/J. MAESSCHALCK/D. NELKEN/S. PARMENTIER. The Changing Role of Law in Japan. *Empirical Studies in Culture, Society and Policy Making: an Introduction*, in: Vanoverbeke et al., *supra* note 2, 1.

12 K. HAMAI/T. ELLIS, Crime and Criminal Justice in Modern Japan: From Reintegrative Shaming to Popular Punitivism, *International Journal of the Sociology of Law* 34/3 (2006) 157.

social and economic crisis that have infested Japan since the 1990s. The case of the yakuza is representative, in that enhancing punishment for organized criminals does not seem to be fully applied in the sentencing process: the blatant rhetoric of increasing harshness towards the yakuza that Japanese politicians have adopted (e.g. the insistence on ‘*sekai ichi anzen-na Nihon*’¹³) is consistent with the *modus operandi* of a political class that has been trying to solve social problems with a nailed fist. As tendencies within the regulation of organized crime illustrate, legislation is geared towards an expanding and pervasive approach: data on sentencing and imprisonment show that the yakuza have not been treated more harshly, but that the legislation can now also be applied to people external, even if related, to the yakuza.

This article starts with an assessment of different sentencing mechanisms and practices enforced to counter organized crime, particularly enhancement of punishment. It goes on to explore the laws that regulate organized crime and how sentencing of organized criminals is currently carried out in Japan. Using governmental data such as the White Paper of the Police and White Paper on Crime by the Ministry of Justice, it illustrates the shifts and changes in sentencing patterns towards the yakuza, showing how judicial reforms and new provisions did not lead to harsher sentences for yakuza members. This article also considers the sentencing of external participants, as a tool that widens the scope of punishment and put more citizens under governmental control. It further reflects on punitivism and leniency, and extends its analysis to the broader picture of dynamics between law, politics, and other social forces in Japan. This paper concludes by suggesting that programs of social reintegration are needed to ensure that members who leave the yakuza remain out of the criminal underworld, especially because the alternative would see the yakuza become undetectable, a scenario that the Japanese law-enforcement has never been used to and is not ready to confront.

I. SENTENCING ORGANIZED CRIME: ENHANCEMENT OF PUNISHMENT

Because of the serious and systematic nature of crimes committed by organized criminal groups, many countries adopt measures such as sentencing enhancements which lean towards a more punitive approach when it comes to trying members of organized criminal groups.

Italian Criminal Law regulates organized crime membership through Articles 416 (simple criminal association) and 416^{bis} (mafia-type criminal association), according to which the associative bond is considered criminal

13 SHUSHŌ KANTEI [Prime Minister’s Office of Japan], ‘*Sekai ichi anzen-na Nihon*’ *sōzō senryaku ni tsuite* [Strategy for making Japan the safest country in the world], 10/12/2013.

in itself, whether or not a criminal act is committed. Law enforcement agencies and practitioners agree that 416^{bis} is the “strongest component of the anti-mafia legislation and the historical turning point of the organized crime strategy”,¹⁴ the “real turn of the screw of the system”.¹⁵ While that article initially targeted exclusively the Sicilian Cosa Nostra, throughout the years Italian judges have interpreted the norm to include other rooted and long lasting criminal groups, such as the ‘Ndrangheta. The behaviors that make a criminal group a mafia-type association deserving to be targeted by this norm are the following:

“the existence of associative bonds that intimidate the community; the condition of subjection of both associates and non-associates to the group and their *omertà* (voluntary silence, non-cooperation with authorities); the commission of criminal activities by the group as a whole to directly or indirectly acquire control of business activities, authorisations, licences, contracts, public services or other gain or benefit; the ability to influence and/or alter political elections”.¹⁶

PAOLI points out the effects of the combination of harsher sentences and the confiscation of goods from mafia families, which drove some mafia families to bankruptcy and left them unable to pay salaries to convicted members (a tenant of mafia code).¹⁷ The intensification of law enforcement action after the staged terrorist attacks of 1992–1993 determined a turnaround in the strategy adopted by the mafia vis-à-vis the state: while until the early 1990s mafia groups were openly challenging state sovereignty, later they aimed at becoming invisible and impermeable to law enforcement. This resulted in a sharp decrease in mafia-related murders, and in an increase of economic activities that do not provoke too much popular resentment. However, in order to make up for the economic losses, high-density mafia districts became more heavily exploited by mafia groups.¹⁸

By contrast, the United States introduced a different approach to tackle the emerging problem of mafia-type associations. In 1970 the United States responded to the Italian mafia groups – which had already settled and mutated from their original Italian counterparts by then – with the Racketeer Influenced and Corrupt Organization (RICO) Act. Through this counter-

14 A. SERGI, The Italian Anti-Mafia System between Practice and Symbolism: Evaluating Contemporary Views on the Italian Structure Model against Organized Crime, *Policing: A Journal of Policy and Practice* 10/3 (2015) 194, 195.

15 SERGI, *supra* note 14, 198.

16 A. SERGI, National Security vs Criminal law. Perspectives, Doubts and Concerns on the Criminalisation of Organised Crime in England and Wales, *European Journal on Criminal Policy and Research* 22/4 (2016) 713.

17 L. PAOLI, The Decline of the Italian Mafia, in: Siegel/Nelen (eds.), *Organized Crime: Culture, Markets and Policies* (2008) 15.

18 PAOLI, *supra* note 17.

measure, US prosecutors were able to go after a large number of mafia members and associates, and undermine their influence in major US cities. RICO is used to target those who repeatedly (at least twice in ten years) engage in racketeering activities, where these include federal as well as state felonies.¹⁹ RICO's scope has also been continuously widened by the US judiciary, which traditionally interprets and applies the Act openly and at their discretion.

Enhancement of punishment for organized criminals has also been adopted in China. According to the 2011 revision of article 297 of the 1997 Criminal Law, criminal ringleaders are held legally responsible for offenses committed, and they are subject to enhanced punishment measures that include forfeiture of property. State functionaries involved in organized crime activities are also punished.²⁰ Furthermore, since the 1978 post-reform period, political and legal debates in China on how to police and punish serious crime were centred around the reform agenda and its goals for development. This led to a culture of campaign justice, that for 25 years set the pace for Chinese criminal justice. In this sense, policing and punishment of serious crime are controlled by politics. State campaigns include the generic "strike hard" campaigns, in which politico-legal organs (criminal detective, judges and prosecution) focus their effort on a variety of crimes for a set period of up to three years, or the "specialized struggle", in which 'strike hard' is used as a policy to target a specific subset of crime. In 2006, this campaign led to trials for 377 syndicates: within months, 2749 members belonging to the 244 mafia-style syndicates were convicted, and half of them received a sentence ranging between 5 years to life imprisonment, and in some cases the death penalty.²¹ Despite these peaks of anti-organized crime activities though, organized crime in China has not declined.²²

Jurisdictions that have otherwise little in common adopt severe sentencing practices towards members of criminal organizations: aimed not only at the individual criminal but also at the disruption of the organization itself. Since the yakuza are a deeply rooted phenomenon whose activities and *modus operandi* have been known to the Japanese state for more than a century, it

19 B. SCOTTI, Rico vs. 416-bis: a Comparison of US and Italian Anti-Organized Crime Legislation, *Loyola of Los Angeles International & Comparative Law Review* 25 (2002) 143.

20 R. BROADHURST/N. FARRELLY, Organized Crime 'Control' in Asia: Experiences from India, China and the Golden Triangle, in: Paoli (ed.), *The Oxford Handbook of Organized Crime* (2014) 634.

21 S. TREVASKES, Policing Serious Crime in China: From 'strike hard' to 'kill fewer' (2010).

22 S. ZHANG/K.L. CHIN, Enter the Dragon: Inside Chinese Human Smuggling Organizations, *Criminology* 40/4 (2002) 737.

would be expected that apposite countermeasures had been implemented early in the history of the modern Japanese state. The next sections examine how, when, and with what results the *yakuza* have been sentenced in contemporary Japan.

II. SENTENCING ORGANIZED CRIME IN JAPAN

The main features of the Japanese judiciary and the major reforms that may have determined changes within sentencing practices will firstly be laid out. The Japanese judiciary is well known for its extraordinarily high rates of conviction, which have constantly been over 99%.²³ There are a number of reasons behind this phenomenon: the fact that Japanese prosecutors, often understaffed, only bring their strongest cases to court, and that acquittals do not reflect positively on the judge who administers them; indeed, it has been observed that judges who often acquit serve in branch offices for longer periods, rather than being promoted and moved to central, prestigious courts. Thus, confessions from the defendants are favored, in that they accelerate trials,²⁴ and they are the safest route to the prosecutor's aim of uncovering the truth and to the defendant's correction.²⁵ Confessions are actively encouraged by pre-trial conditions, which have routinely been denounced for violating international protocols for the treatment of suspects and prisoners. A further reason may be found in the methods of pre-trial detention, which can last as long as 23 days: 3 days for the suspect to be brought in front of the judge, 10 days pre-trial detention to interrogate before pressing charges, possibility of 10 days extension if no confession is obtained. Likewise, interrogations can last up to 10 hours, may be carried out in the middle of the night and the suspect may be subjected to sleep deprivation and the application of physical stress.²⁶

The judicial reforms undertaken in connection with the Justice System Reform Council (JSRC) were based on three pillars: building a justice system able to meet the public's expectation; reforming the judicial community to address the changes in the justice system; involving the general population in the justice system. After having considered a classic jury model and the col-

23 HŌMU-SHŌ [Ministry of Justice], *Heisei 30-nenpan hanzai hakusho* [White Paper on Crime Heisei 30 Issue] (2018) para. 4.2.3.1.

24 J. M. RAMSEYER / E. RASMUSSEN, *Why is the Japanese Conviction Rate so High?* Harvard Law School M. Olin Centre for Law, Economic and Business Discussion Paper Series (1998) 240.

25 D. T. JOHNSON, *The Japanese Way of Justice. Prosecuting Crime in Japan* (2002).

26 J. VIZE, *Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System*, *UCLA Pacific Basin Law Journal* 20 (2003) 329.

laborative court model, the JSRC produced a hybrid system in which lay judges are randomly chosen to collaborate in one trial, and sit with professional judges to examine evidence and determine sentences in serious criminal cases.²⁷ Furthermore, the establishment of the National Association of Crime Victims and Surviving Families (NAVS) in 2000 constituted a further push towards the inclusion of citizens' participation in trials. The NAVS requested, and obtained, access to the legislative process: in serious criminal cases (e.g. murder, rape, kidnapping) the victim, their family or their legal representative are now allowed to seek explanations from the prosecutor, question witnesses and the defendant, and present an opinion on the trial.²⁸ All in all, the reforms²⁹ have produced slow changes in the legal profession, pointing towards a gradual transformation rather than a radical shift.³⁰

A possible change in sentencing patterns for the yakuza should be considered against this background, as well as specific anti-yakuza provisions, which will now be examined. Yakuza members are controlled by a number of laws and regulations, which have been piling up in the past two decades. The first law introduced to limit and regulate the activities of the criminal syndicates is the *Bōtai-hō* (*Bōryoku-dan* Countermeasures Law),³¹ and falls under the category of administrative law (*gyōsei-hō*). The main provisions of this law are the designation of *bōryoku-dan* groups by the Public Safety Commission, administrative control over a number of prescribed activities by yakuza members, limitations on the use of offices and headquarters during periods of conflict, and the establishment of centres for the assistance of victims of *bōryoku-dan* and for the promotion of yakuza eradication.³² Since the *Bōtai-hō* is an administrative law, it simply prescribes an injunction that orders the perpetrator of an illegal act to stop. If the injunction is violated,

27 P.L. REICHEL / Y.E. SUZUKI, Japan's Lay Judge System: A Summary of Its Development, Evaluation and Current Status, *International Criminal Justice Review* 25/3 (2015) 247.

28 S. MIYAZAWA, Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in *International Perspectives*, *International Journal of Crime and Justice* 42 (2014) 71.

29 Another important aspect of the reform not elaborated here is the establishment of postgraduate law school programs to increase the numbers allowed to pass a revamped national bar examination (*shin-shihō shiken*). The JSRC Final Recommendations suggested that 70–80% of graduates should pass the bar examination, but despite a promising start (48.25% in 2006), due to the gatekeeping to Japan's legal profession the pass rate has already dropped consistently.

30 L. NOTTAGE / S. GREEN, Who Defends Japan? Government Lawyers and Judicial Reforms in Japan, *Asian Pacific Law and Policy Journal* 13/1 (2011) 129.

31 *Bōryoku-dan-in ni yoru futō-na kōi no bōshi-tō ni kansuru hōritsu* [Law for the prevention of improper conduct by members of violent groups] Law No. 77/1991.

32 P.B.E. HILL, *The Japanese Mafia: Yakuza, Law and the State* (2003).

prosecution and punishment may be pursued. Following a 2012 amendment,³³ penalties for violating an injunction include imprisonment of up to three years (previously one year) and a fine of up to 5,000,000 Yen (Euro 40,000, previously 1,000,000 Yen). Subsequently, the *Mayaku tokurei-hō* (Anti-Drug Provision Law),³⁴ the *Soshiki hanzai shobatsu-hō* (Organized Crime Punishment Law)³⁵ and the *Hanzai shūeki iten bōshi-hō* (Transfer of Criminal Proceeds Prevention Law)³⁶ were promulgated with the specific aim of cracking down on yakuza profits, by targeting financial fraud, money-laundering and transnational underworld banking.³⁷ Moreover, in 2010, the city of Fukuoka promulgated a set of ordinances, the *bōhai jōrei* (*bōryoku-dan* exclusionary ordinances), which have since been applied throughout the whole nation. These ordinances introduce a more radical and normative approach to the issue of organized crime in Japan, also raising concerns about the human rights of people related to the yakuza. Finally, in 2017, Abe's cabinet passed the *Kyōbō-zai-hō* (Anti-conspiracy Bill),³⁸ a major amendment to a law targeting organized crime, that criminalises the act of planning a criminal activity. Penalties applied vary according to the crime, spanning from a short imprisonment to the death penalty for the most serious offences. The government stated that this law was a necessary step to ratify a 2000 UN convention against transnational organized crime, and would be essential to prepare for potential terrorist attacks with a view to securing the 2020 Tōkyō Olympics. However, UN experts have criticized the law on the basis that it may allow for unprecedented surveillance of the

33 NPA, *Bōryoku-dan taisaku ni kansuru yūshiki-sha kaigi hōkoku-sho* [Report of the meeting of experts in anti-bōryoku-dan strategies], 5 January 2012.

34 *Kokusaiteki na kyōryoku no shita ni kisei yakubutsu ni kakawaru fusei kōi o jochō suru kōi tō no bōshi o hakaru tame no mayaku oyobi kōsei shinyaku torishimarihō tō ni kansuru hōritsu* [Law regarding the control of drugs and psychotic drugs, to prevent behaviors that foster wrongdoing in relation to drugs restricted by international cooperation], Law No. 94/1991.

35 *Soshikiteki na hanzai no shobatsu oyobi hanzai shūeki no kisei tō ni kansuru hōritsu* [Law for the punishment of organized crime and regulation of criminal proceeds], Law No. 136/2000.

36 *Hanzai ni yoru shūeki no iten bōshi ni kansuru hōritsu* [Law for the Prevention of the Transfer of Criminal Revenues], Law No. 22/2007.

37 A. RANKIN, 21st-Century Yakuza: Recent Trends in Organized Crime in Japan, *The Asia Pacific Journal* 11/7 (2012) 1.

38 *Kyōbō-zai soshikiteki na hanzai no shobatsu oyobi hanzai shūeki no kisei-tō ni kansuru hōritsu—tō no ichibu kaisei suru hōritsu* [Partial revision of the Act for Punishment of Organized Crimes, Control of Crime Proceeds and Other Matters] Law No. 67/2017.

population and pre-emptive arrests³⁹. Similar concerns have been raised by the Japanese Federation of Bar Associations⁴⁰ and several citizens groups.⁴¹

III. SENTENCING THE YAKUZA: TRENDS AND SHIFTS IN THE PAST DECADE

Conviction rates in Japan remain amongst the highest compared to international averages. Even with the introduction of the *saiban'in* system, the participation of jurors in trials did not have a considerable impact on the determination of the defendant's guilt. Furthermore, the lay jury is involved only in a minority of cases, therefore overall conviction rates have constantly remained above 99.9%.⁴² Since virtually all defendants confess to most of the features of the offense charged,⁴³ issues have been raised in relation to forced confessions and wrongful convictions. In particular, these concern the use of substitute prison (a subject widely discussed in international media because of the arrest and prolonged detention of Nissan's chairman Carlos GHOSN),⁴⁴ limited access to defence counsel, use of physical and psychological violence to extract a confession, and judges' tendency to indiscriminately use confession documents.⁴⁵

Since conviction rates reflect almost the totality of prosecuted crimes, prosecution rates for yakuza will now be compared to those of common offenders, in an effort to understand whether there is a bias against yakuza members when prosecutors decide to bring their case to court. As is clearly shown in the graph below, in 2017, prosecution rates (cases brought to trial by the Public Prosecutor's Office) for yakuza were a total of 50.3%, while

39 'U.N. Privacy Expert Challenges Japan's Defense of Conspiracy Law'. The Japan Times, 21 October 2017.

40 NIHON BENGŌ-SHI RENGŌ-KAI [Japan Federation of Bar Associations], *Nichibenren wa kyōbo-zai-hō no haishi o motomemasu* [The Japan Federation of Bar Associations Demand the Abolition of the *kyōbo-zai-hō*].

41 'Zettai haian ni shūkai, demo kōshin ni 120nin' ['Reject the Bill' 120 People at the Assembly and Demonstration], Mainichi Shinbun, 15 May 2017.

42 D. SENGER, *The Japanese Quasi-Jury and the American Jury: A Comparative Assessment of Juror Questioning and Sentencing Procedures and Cultural Elements in Lay Judicial Participation*, University of Illinois Law Review (2011) 741–744.

43 Y. SHIROSHITA, *Current Trends and Issues in Japanese Sentencing*, Federal Sentencing Reporter 22/4 (2009) 243.

44 P. LYON, *Carlos Ghosn to Remain in Jail After Prosecutors Extend Detention*, Forbes, 31 December 2018.

45 H. FUKURAI/K. KUROSAWA, *Impact of the popular legal participation on forced confessions and wrongful convictions in Japan's bureaucratic courtroom: A cross-national analysis in the US and Japan*, US-China Law Review 7/7 (2009) 1.

common offenders were prosecuted in 41.8% of cases.⁴⁶ Considering these trends in prosecution rates reveals that the decrease of prosecution rates for yakuza is more substantial even if the prosecution rates for both yakuza and common offenders have been constantly declining for the past 30 years. In 1991⁴⁷ and 1992⁴⁸ prosecution rates were over 80%, they then decreased but remained over 70% for the most part of the 2000s.⁴⁹ In 2009,⁵⁰ for the first time, they fell below 70% and from that moment continued to decline,⁵¹ ebbing to 60% in 2012⁵² and losing a couple of points every year until the last statistic available.⁵³

46 HÖMU-SHÖ [Ministry of Justice], *Heisei 28-nenpan hanzai hakusho* [White Paper on Crime Heisei 28 Issue] (2017) para. 4.3.2.3.

47 HÖMU-SHÖ, *Heisei 3-nenpan hanzai hakusho* [White Paper on Crime Heisei 3 Issue] (1991) para. 1.2.3.

48 HÖMU-SHÖ, *Heisei 4-nenpan hanzai hakusho* [White Paper on Crime Heisei 4 Issue] (1992) para. 1.2.3.

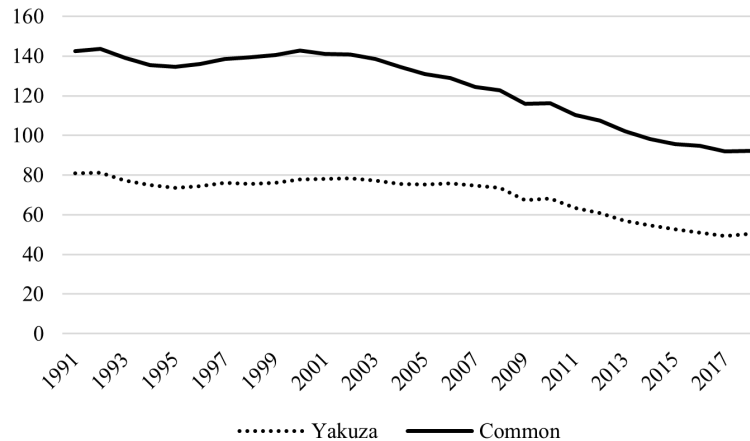
49 HÖMU-SHÖ, *Heisei 12-nenpan hanzai hakusho* [White Paper on Crime Heisei 12 Issue] (2000) para. 7.4.1; HÖMU-SHÖ, *Heisei 14-nenpan hanzai hakusho* [White Paper on Crime Heisei 14 Issue] (2002) para. 1.2.1.3; HÖMU-SHÖ, *Heisei 15-nenpan hanzai hakusho* [White Paper on Crime Heisei 15 Issue] (2003) para. 1.2.1.3; HÖMU-SHÖ, *Heisei 16-nenpan hanzai hakusho* [White Paper on Crime Heisei 16 Issue] (2004) para. 1.2.1.3; HÖMU-SHÖ, *Heisei 17-nenpan hanzai hakusho* [White Paper on Crime Heisei 17 Issue] (2005) par. 2.6.3.1; HÖMU-SHÖ, *Heisei 18-nenpan hanzai hakusho* [White Paper on Crime Heisei 18 Issue] (2006) para. 3.2.3.1; HÖMU-SHÖ, *Heisei 19-nenpan hanzai hakusho* [White Paper on Crime Heisei 19 Issue] (2007) par. 3.2.3.1; HÖMU-SHÖ, *Heisei 20-nenpan hanzai hakusho* [White Paper on Crime Heisei 20 Issue] (2008) para. 3.2.3.1.

50 HÖMU-SHÖ, *Heisei 21-nenpan hanzai hakusho* [White Paper on Crime Heisei 21 Issue] (2009) para. 3.2.3.1.

51 HÖMU-SHÖ, *Heisei 22-nenpan hanzai hakusho* [White Paper on Crime Heisei 22 Issue] (2010) para. 3.2.3.1; HÖMU-SHÖ, *Heisei 23-nenpan hanzai hakusho* [White Paper on Crime Heisei 23 Issue] (2011) para. 4.2.3.1.

52 HÖMU-SHÖ, *Heisei 24-nenpan hanzai hakusho* [White Paper on Crime Heisei 24 Issue] (2012) para. 4.2.3.1.

53 HÖMU-SHÖ, *Heisei 25-nenpan hanzai hakusho* [White Paper on Crime Heisei 25 Issue] (2013) para. 4.2.3.1; HÖMU-SHÖ, *Heisei 26-nenpan hanzai hakusho* [White Paper on Crime Heisei 26 Issue] (2014) para. 4.3.3.1; HÖMU-SHÖ, *Heisei 27-nenpan hanzai hakusho* [White Paper on Crime Heisei 27 Issue] (2015) para. 4.3.3.1; HÖMU-SHÖ, *Heisei 28-nenpan hanzai hakusho* [White Paper on Crime Heisei 28 Issue] (2016) para. 4.3.2.3; HÖMU-SHÖ, *Heisei 29-nenpan hanzai hakusho* [White Paper on Crime Heisei 29 Issue] (2017) para. 4.3.2.3; HÖMU-SHÖ, *Heisei 30-nenpan hanzai hakusho* [White Paper on Crime Heisei 30 Issue] (2018) para. 4.2.3.1.

Prosecution rates yakuza members vs common offenders

Source: Data from the Ministry of Justice

While prosecution rates decrease, there have been cases where the prosecution persists until they obtain a conviction. A recent example of this is the judicial journey of Takashi TAKIZAWA, boss of the Kōbe-based Hōryōkai. In the first instance, TAKIZAWA was indicted for firearm possession in 1997, together with Shinobu TSUKASA and Kaneyoshi KUWATA, who at the time were both candidates for the position of *waka-gashira* within the Yamaguchi-gumi (as history shows, TSUKASA prevailed). While TSUKASA and KUWATA were found guilty of knowing that one of their underlings was in possession of an irregular firearm (a historic sentence in the sense that it was the first time the responsibility for a member's action were ascribed to the bosses), TAKIZAWA was acquitted in 2004. However, the prosecution appealed the decision of the court and TAKIZAWA was tried again in 2006 at the Ōsaka High Court. Charges against him were dropped, but in 2009 the Supreme Court referred the case back to the Ōsaka District Court. For the third time, TAKIZAWA was found innocent in 2011. The prosecution, however, was determined to have TAKIZAWA charged, and thus appealed to the Supreme Court, which again transferred the case to the Ōsaka District Court. At the seventh hearing and 20 years after the incident, TAKIZAWA, then 80, was finally sentenced to 6 years of imprisonment with labor,⁵⁴ but at the

54 Y. YAMANOUCI, *Yamaguchi-gumi komon bengo-shi* [The Lawyer of the Yamaguchi-gumi] (2016); “*Yamaguchi-gumi moto-kanbu ni chōeki 6-nen, 7-dome banri de hatsu no yūzai Jūtō-hō ihan sashi modoshi-ban*” [Ex Yamaguchi-gumi leader sen-

second hearing, in May 2018, the judgement was adjourned. TAKIZAWA died a few days later, his legal *peripeteias*⁵⁵ still on going.

Leaving aside particular cases, trends in prosecution rates suggest that since the application of the first anti-yakuza law in 1991 the percentage of prosecuted yakuza has diminished. Brazen announcements on cracking down on the yakuza did not translate to higher prosecution rates for yakuza members: since prosecution almost inevitably leads to conviction, the downward trend in prosecution rates arguably resulted in fewer yakuza convicted.

The length of the sentences handed down to yakuza offenders will now be considered, in particular, whether yakuza are usually assigned longer sentences than common offenders. Judges do not have to follow official guidelines to determine the length of a sentence, nevertheless prosecutor demands are often used as a reference in order to establish an appropriate punishment.⁵⁶ Statutory penalties in Japan have a wide range of punishment, but prison terms are set following the indication of the prosecution in 70 to 80% of the cases.⁵⁷ The table below has been compiled using the latest data available from the Ministry of Justice.⁵⁸ More than half of common offenders received short sentences, in the order of below one year (21.7%) and of one to two years (36.7%). The majority of yakuza members received sentences of one to two years (34.7%), and two to three years (28.7%). Sentences of three to five years were more common for yakuza offenders (17.1%, 12.4% for common offenders), and sentences over five years are uncommon (6.4% for yakuza, 4.9% for common offenders).

tenced to 6 year imprisonment with labour, first conviction after 7 trials for violation of Swords and Firearm Control Act], Sankei West, 24 March 2017.

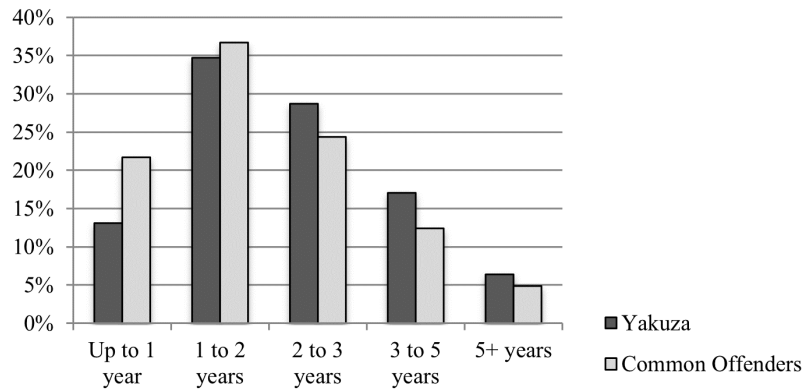
55 *Peripeteia* is a literary term from the Classical Greek drama meaning a sudden change of fate for the worse (*the editors*).

56 E. D. HERBER, Japanese Sentencing Practices: Creating an Opportunity for 'Formal' Paternalism, *International Journal of Criminology and Sociological Theory* 2/2 (2009) 303; J. WEITZDÖRFER/Y. SHIROSHITA/N. PADFIELD, Sentencing and Punishment in Japan and England: A Comparative Discussion, in: Liu/Miyazawa (eds.), *Crime and Justice in Contemporary Japan* (2018) 189.

57 SHIROSHITA, *supra* note 43.

58 HÖMU-SHŌ (2017), *supra* note 53. The latest White Paper of Crime, published in 2018, did not include this information.

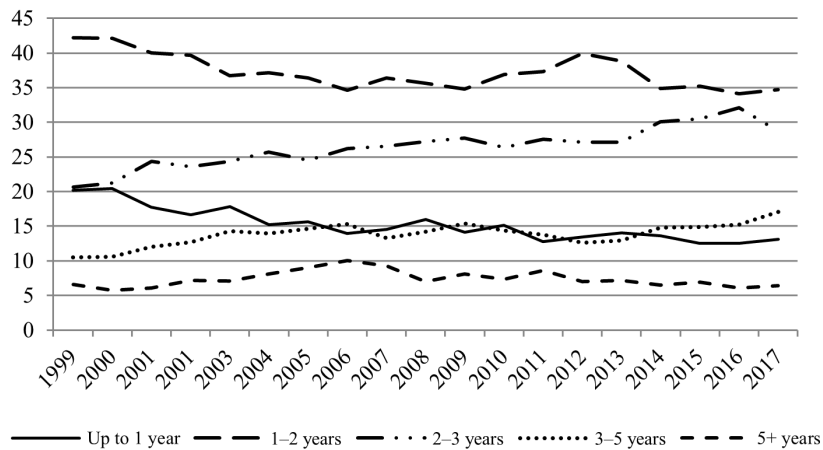
Length of sentences for yakuza vs common offenders



Source: Data from the Ministry of Justice

If this data is examined in a wider timeframe, it can be noticed that the length of the sentences for yakuza members has not undergone significant shifts in the past twenty years. Sentences of one to two years have remained the most common, even though there has been a decrease, in part compensated by the increase in frequency of sentences between two to three years. Sentences of two to three years and of three to five years show a slight increase, but in general, long sentences (over five years) are hardly ever administered.

Length of sentences for yakuza members 1999 to 2017



Source: Data from the Ministry of Justice

However, this data does not consider a significant factor: many inmates present a notification of withdrawal from their gangs in order to have their sentences reduced. Yakuza defendants are given longer sentences because of the likeliness that the crime has been committed in or as part of systematic criminal activity. YAMANOUCHI⁵⁹ reports the words of a judge in regards to sentencing yakuza members:

“If a defendant belongs to a yakuza group related to the Yamaguchi-gumi, the aims and activities of the Yamaguchi-gumi itself may not be clear to him, but if, according to evidence, this person’s criminal history is long, we must infer that the organisation this person works for aims at accomplishing crimes, and that he maintains this criminal behavior in order to sustain a criminal group”.

Tomohiko SUZUKI, one of the most prominent investigative journalists reporting on the yakuza, contends that sentencing yakuza members to prison does not have a real impact on the organization but it is rather an instrument for law enforcement to boost arrest numbers and garner a positive image in the eyes of the population. According to him, the much heralded “cracking down” on the yakuza does not lead to a disruption of the groups’ activities, since members are often prosecuted for trivial crimes that result in short prison sentences.⁶⁰ The data supports this hypothesis, and the present article argues that, despite proclamations, sentencing of the yakuza has not become more severe. Instead, there has been a shift in the discourse surrounding organized crime that required the intervention of policy-makers, who used expansive measures to address public concerns. That said, a political agenda has been pushed to underpin targeted political opposition and, ultimately, move from liberal practice to a more authoritarian form of government.⁶¹

IV. SENTENCING FOR EXTERNAL PARTICIPANTS: EXTENDING PUNISHMENT

Criminal organizations do not rely exclusively on their members in order to carry out the group’s activities. Therefore, in many jurisdictions, people external to the criminal association who facilitate the group can be prosecuted as external participants. In Italy, people who are not affiliated to a mafia group but participate in their criminal activities are prosecuted through the *concorso esterno* (external participation), as set out in Article 416^{bis}.⁶² How-

59 YAMANOUCHI, *supra* note 54, 31.

60 T. SUZUKI, Interview, Tōkyō, 15 April 2018.

61 A. STOCKWIN/K. AMPIAH, *Rethinking Japan: The Politics of Contested Nationalism* (2017).

62 C. VISCONTI, *Contiguità alla mafia e responsabilità penale* [Mafia contiguity and criminal liability] (2003).

ever, Italian criminal law considers “members” not only those who have been affiliated formally, but also those who act as members *facta concludentia*.⁶³ In fact, distinguishing between external participation and membership has become more complicated, and the provision keeps being discussed.⁶⁴

Unlike Italy, where organized crime tends to be considered a unitary entity, the UK has favored an approach that tackles conspiracy and joint enterprise.⁶⁵ In the past decade, the doctrine of joint enterprise has proven to be particularly useful in addressing problems of street gangs. Under this provision, an individual in a group who is aware of the group’s common criminal purpose, and agrees to act together to reach said purpose, assisting and encouraging a crime, is considered guilty. Yet, this raises many issues regarding the validity of joint enterprise, because of the uncertain distinctions between the status of a gang member, of an aspirant member, of a friend of a gang member who sporadically joins in, and of a youth living in a gang affected neighborhood who inevitably entertains some kind of relationship with the local gang.⁶⁶ Criticism of joint enterprise revolves around the possibility that peripheral roles in serious offences may result in conviction even without substantial evidence,⁶⁷ and the fact that it disproportionately affects young Black and Asian men, whose groupings are often seen as gangs and are accordingly criminalized.⁶⁸

In Japan, after the promulgation of the *Bōtai-hō* it became clear that the yakuza could resort to external figures to carry out illegal acts. To respond to this often successful circumvention of the law, the 1997 revision of the *Bōtai-hō* expanded the scope of the provisions, by acknowledging figures such as *jun-kōsei’in* (associate member) and *kigyō shatei* (front companies). The gradual introduction of the *bōhai jōrei* (*bōryoku-dan* exclusionary ordinances) from 2010, marked a step towards the extension of liability not only to members of the yakuza, but also to persons related to the criminal

63 P. INTOCCIA, Il processo Andreotti. Il confine labile fra la partecipazione e il concorso esterno nei reati associativi [Andreotti trial. Blurring boundaries between participation and external participation in associative crimes], *Rivista di Studi e Ricerche sulla criminalità organizzata* 3/3 (2017) 79.

64 L. D’AURIA, Mafia: il concorso esterno è una ‘perversione’ intellettuale [Mafia: the external participation is an intellectual ‘perversion’], *Il Fatto Quotidiano*, 7 March 2016.

65 SERGI, *supra* note 14.

66 J. PITTS, Who dunnit? Gangs, joint enterprise, bad character and duress. *Youth and Policy* 113/1 (2014) 48.

67 J. JACOBSON/A. KIRBY/G. HUNTER, Joint Enterprise: Righting a wrong turn? Report of an exploratory study (Institute for Criminal Policy Research, University of London 2016), <http://www.prisonreformtrust.org.uk/Publications/AZ>.

68 P. WILLIAMS/B. CLARKE, Dangerous associations: Joint enterprise, gangs and racism (Centre for Crime and Justice Studies 2016), <https://www.crimeandjustice.org.uk/publications/dangerous-associations-joint-enterprise-gangs-and-racism>.

syndicates, commonly referred to as *bōryoku-dan kankei-sha* (person related to the *bōryoku-dan*). This ambiguous term includes ex-yakuza members, people surrounding the organization, members and people working externally for the yakuza, and relatives of yakuza members. Although these terms have not been made official, and there is still confusion about their meaning, *bōryoku-dan kankei-sha* or similar expressions such as *jun-kōsei'in* (associate member) are routinely used in documents issued by the police or other authorities.⁶⁹ For instance, as reported in the White Papers of the Police, a *jun-kōsei'in* is described as someone who is not a yakuza member, but has a relationship with the organization, and supports it through illegal acts, or someone who, by providing funds and weapons to the group, participates in the maintenance and operations of the group.⁷⁰ A *kyōsei-sha* is a person – or a group – who supports the yakuza by participating in the economic activities of the criminal group, who invests in activities managed by the organization, or who accepts funds from the yakuza and invests in them to gain a profit for the group.⁷¹ This category may therefore include *sōkai-ya* (financial racketeers), front businesses, scene stores, laborers, and fake social movements.

Some critics such as Atsushi MIZOGUCHI view the definitions of *bōryoku-dan* or *bōryoku-dan kankei-sha* as too vague and at the same time not flexible enough. A *bōryoku-dan* is defined as a group posing the risk that its members will collectively or routinely promote illegal violent behavior. Furthermore, the Public Safety Commission considers three more criteria: that the influence of the group is used to gain some kind of financial advantage, that some of the members hold a criminal record, and that the group is organized hierarchically.⁷² However, criminal groups not related to the yakuza, even when they meet the criteria of a criminal organization, are not included in the category of *bōryoku-dan*. In particular, foreign (or at least, considered foreign by the police) criminal groups and *hangure* groups (“disorganized” criminal groups) are routinely excluded from the category of *bōryoku-dan*, and are considered as a class of their own.⁷³ For instance, Chinese criminal groups specializing in fraud involving electronic money, Malaysian groups involved in credit card fraud, and Iranian or Taiwanese drug networks may easily be classified as *bōryoku-dan* because of their organizational features, but are omitted from the official list of *bōryoku-dan* groups.

69 A. MIZOGUCHI, *Bōryoku-dan* [Violent Groups] (2011).

70 KEISATSU-CHŌ [National Police Agency], *Keisatsu hakusho* [White Paper of the Police] (2018).

71 KEISATSU-CHŌ [National Police Agency], *Keisatsu hakusho* [White Paper of the Police] (2007).

72 HILL, *supra* note 32.

73 MIZOGUCHI, *supra* note 69.

The main objective of the *bōhai jōrei* is to disrupt the relationship between the yakuza and members of the public. To do so, it intends to criminalise all willing and unwilling transactions between the yakuza and civilians. It follows that if these ordinances are strictly applied, their scope becomes very wide. For instance, one of the aims of the *bōhai jōrei* is to hinder yakuza income by criminalizing individuals or societies engaged in business transactions with the syndicates: at first a company doing business with the yakuza is warned, and if the ties are not severed, the company may be fined up to 500,000 yen (Euro 4,000) and imprisonment for a year.⁷⁴

The *bōhai jōrei* have been discussed nationwide, but the fact that these ordinances are implemented at the prefectural level, and, more importantly, that there is no clear definition as to what constitutes a collaboration with the yakuza, means that their interpretation may be ambiguous, and in certain cases, overblown. Kōji HIJIKATA, the director of “Yakuza to Kenpō” a documentary about the impact of new anti-yakuza provisions on an Ōsaka-based yakuza group, reported that he had to decline the offer of *takoyaki* (octopus balls), and a lift to the hotel, from a yakuza member because he believed he could be criminally liable.⁷⁵ While Mr HIJIKATA’S precaution might seem exaggerated, the veiled threats and harassments his crew received in the months during and following the shooting of the documentary, despite no formal investigation having been started, and no formal charge being prosecuted, prove that the *bōhai jōrei* are indeed open for interpretation and can be used arbitrarily. Mr HIJIKATA reported:

“The police don’t like us [the crew] since we made this report on the group. In particular, the Ōsaka police is very cross with us...we didn’t contact them before or during our shootings. We broadcast the commercial of the documentary on TV, and then the police called me. They wanted to know whether I was offered and accepted something from the yakuza group. I asked them if I was under investigation for something I did, and they answered that they just wanted to talk to me. I turned to a lawyer for advice, and I was told I was not under any obligation to talk to the police so I quit communication with them. The police then started pressing the yakuza group, they were threatening to arrest their boss. [...] They wanted us to cut the scene of the police search [...] because they were worried that they would be criticised for how they conducted the search. [...] In the end we didn’t cut any scene. We talked to a lawyer and he reassured us that we could keep it as it was. The producer and I had doubts, but in the end we just broadcast the whole thing. At first the police were very cross but in the end it was ok. The police gave us more trouble than the yakuza. It was like a triangle: the media has influence over the police, the police over the yakuza, and the yakuza over us.”⁷⁶

74 *Okinawa-ken bōryoku-dan haijo jōrei*, [Okinawa Prefecture Bōryoku-dan Exclusionary Ordinances] No. 35/2011.

75 TŌKAI TEREBI SHUZAI-HAN, *Yakuza to kenpō: ‘Bōhai jōrei’ wa nani o mamoru no ka?* [The yakuza and the Constitution: what do the anti-yakuza ordinances protect?] (2016).

Examples of the overexpansion of institutional surveillance can be found in a number of ordinary, small actions, which nevertheless make surveillance even more suffocating. Atsushi MIZOGUCHI, a journalist who has been working on the yakuza for decades, reported that he is now unable to send parcels to addresses that are registered to someone related to a yakuza group, since the post service refuses to deliver to a list of yakuza-related addresses.⁷⁷ Similarly, a yakuza boss admitted that the new regulations forced him to stop meeting acquaintances external to the yakuza in public spaces. He now meets them in private spaces.⁷⁸

However, the patterns of increased expansion of institutional control are not only present in the regulation of organized crime, as the case of the new probation system illustrates. A remaining prison term may be commuted to a longer parole, thus resulting in a longer presence in the criminal justice system for the convicted: law-makers insist this method allows for prolonged rehabilitation.⁷⁹ Another clear case of increased surveillance is the extended community-based treatment and obligatory drug testing for suspended sentences.⁸⁰ These trends towards an increased control of state over private citizens, have also been confirmed by the introduction of the *Kyōbō-zai-hō*,⁸¹ the controversial anti-conspiracy law. The *Kyōbō-zai-hō* criminalizes the plotting, and the execution, of 277 crimes, as listed in the bill, and *de facto* increases the power of investigation and confers more authority and tools of control to the government. In relation to this, an amendment to the Wire-tapping Law⁸² has also been passed.

V. DISCUSSION: ARE JAPANESE COURTS PARTICULARLY LENIENT TOWARDS THE YAKUZA?

In an effort to avoid ethnocentric approaches, it is important to start with some considerations on punitiveness and leniency. As pointed out by NELKEN,⁸³

76 K. HIJIKATA, Interview, Nagoya, 7 February 2018.

77 A. MIZOGUCHI, Interview, Tōkyō, January 2018.

78 M. KUMICHŌ, Interview, Tōkyō, February 2018.

79 Y. MARUYAMA, *Yakubutsu shiyō-sha ni tai suru ken no ichibu shikkō yūyo seido*, [The parole system for drug users] *Risshō Hōgaku Ronsho* 46 (2013) 87.

80 *Kōsei hogo-hō*, Law No. 88/2007.

81 The *Kyōbō-zai-hō* (official name: *Soshikiteki na hanzai no shobatsu oyobi hanzai shūeki no kisei tō ni kansuru hōritsu no ichibu o kaisei suru hōritsu*) is the 2017 amendment of Law No. 136/2000.

82 *Hanzai sōsa no tame no tsūshin bōju ni kansuru hōritsu* [Law for Criminal Investigation Wiretapping], Law No. 137/1999.

83 D. NELKEN, Comparative Criminal Justice beyond Ethnocentrism and Relativism, *European Journal of Criminology* 6/4 (2009) 291.

despite recent concerns amongst scholars about growing punitiveness, finding out whether a criminal justice system thinks of itself as more punitive or tolerant does not represent the end of the matter. Often, indicators used to measure punitiveness or leniency are problematic, in that the situation of the judiciary may differ greatly. For instance, only considering the fluctuation of punishment outcomes, such as imprisonment rates, ignores differences in crime rates across countries. Moreover, sometimes politicians decide to deliberately alter imprisonment rates to be in line with international standards, or recur to collective pardons.⁸⁴ Similarly, tolerance can be the result of increased welfare intervention, or the consequence of non-enforcement, or loose application, of a rule.⁸⁵ It is not easy to derive valid indications on the level of punitiveness or leniency in a country. What is more, the merit of labelling one approach “punitive” and one “tolerant” is doubtful. The choices of those in the criminal justice system are limited by their room to manoeuvre, by what they think their role is vis-à-vis larger social problems.⁸⁶ With regards to the present discussion, I do not wish to generalize the discourse on the yakuza, and label the whole of Japanese judiciary as more or less punitive than, say, the Italian system with regard to the mafia. Instead, I aim to analyze how institutions have handled the yakuza by considering the presence of the yakuza in court and in prison, prosecution rates and the length of their sentences, in light of the treatment they have traditionally received in the past. At the same time, I note that much of the debate around the Japanese criminal justice system has been centred on the perceived benevolent and reintegrative character of the judiciary.

Recent events in the yakuza underworld may help us assess whether Japanese courts are particularly lenient towards the yakuza. The internal split of the Yamaguchi-gumi has catalyzed the interest of the police over the past two years, as these struggles often result in shooting incidents and injuries. As minor groups split and sided with one of the three sides (the Rokudaime Yamaguchi-gumi, the Kōbe Yamaguchi-gumi, and the Ninkyō Yamaguchi-gumi), violent incidents did in fact happen. Since the government and law enforcement had been boasting about cracking down on the yakuza, and eradicating them from society, it was expected that these accidents would be used to undermine the influence of the strongest yakuza group, the Yamaguchi-gumi prior to its split. However, law enforcement action proved to be superficial and short-sighted. For instance, it is custom for the yakuza to hold end-of-year meetings (*nōkai*) on 13 December. In the same period, police

84 D. NELKEN, Making Sense of Punitiveness: the 2008 Wiarda Inaugural Lecture, in: Nelken (ed.), *Comparative Criminal Justice and Globalization* (2011).

85 NELKEN, *supra* note 83.

86 NELKEN, *supra* note 82.

activities intensify and result in an increased number of arrests. During the last meeting of the Yamaguchi-gumi, the police were able to arrest two yakuza bosses: one was charged with document forging, and one with violation of occupational safety laws. These arrests though did not cause any disruption to the group, because the two bosses were charged with minor infractions of administrative law and soon released. It is clear that the objective is not to prosecute and arrest key persons, but to hold them in custody so they cannot participate in the *nōkai*.⁸⁷ By doing so, the police increase the total number of arrests, marginally disrupting the meetings and addressing public concerns. However, this type of action does not bring any serious repercussions for the organization.

Similarly, the data reported above demonstrate how the legislation passed since 1991 to counter the yakuza, and its influence over legitimate businesses and civil society, has not had a meaningful impact on the sentencing patterns of yakuza members. At the same time, it is undeniable that yakuza membership has been constantly decreasing, making the case that these provisions are indeed effective because they constitute a deterrent. However, it is easy to cancel one's membership of the yakuza: members in prison can officially leave the organization by writing a "withdrawal notification" addressed to their boss. The letter is handed to the penitentiary police, which will have it delivered to the headquarter of the group. After the boss puts his stamp on it and the letter comes back, the member has officially left the group, even if they *de facto* continue working for it.⁸⁸

The vast majority of the thousands of members who have supposedly left the yakuza have not found an occupation, raising the suspicion that they are still involved in illegal activities.⁸⁹ The law proved to be a major obstacle in their reintegration, as ex-members of the yakuza are treated as active members for five years following their withdrawal. In the words of an ex-yakuza boss, who is now the owner of an *udon* shop, they have to "start from below zero".⁹⁰ Indeed, as a yakuza who has been out of the organization for less than five years, he is still not allowed to open a bank account, have a phone contract or an insurance policy for his shop. If the shop caught fire, he would be responsible for covering all his expenses and those of the nearby shops.⁹¹ The

87 G. OKITA, *Rokudaime, Kōbe, ninkyō ... mittsu no Yamaguchi-gumi ga sorotte nennai saigo no kaigō o kaisai* [Sixth generation, Kōbe, Ninkyō ... all the three Yamaguchi-gumi hold the last meeting of the year] Business Journal, 20 December 2018.

88 N. HIROSUE, *Yakuza to kaigo – bōryoku-dan ridatsu-sha-tachi no kenkyū* [Yakuza and nursing care – a research on withdrawn yakuza] (2017).

89 HIROSUE, *supra* note 88.

90 Ex-Yakuza Boss, Interview, Kyūshū, 3 April 2018.

91 N. HIROSUE, *Yakuza no kanbu o yamete, udon-ya hajimemashita* [I quit being a yakuza boss, and started an *udon* shop] (2018).

deterrent effect of the anti-yakuza provision, in order really to be effective and long-sighted, should be paired with measures that facilitate the reintegration of the yakuza. At the regional level some steps in this direction have been made, but a national social reintegration strategy is not in sight.

The current administration seems to be more interested in addressing social fears with repression and an iron fist. The 2020 Tōkyō Olympics put Japan at the center of international scrutiny and increased the pressure on politicians to place Japan in a more prominent position within the international community: as Prime Minister ABE declared, the aim is to make Japan the “safest country in the world”. The imperative of presenting a beautiful, crime- and poverty-free façade to the world has resulted also in the elimination of urban spaces for homeless people: the gentrification of new areas has been accompanied by the implementation of urban impediments, such as the instalment of strong lights in parks where homeless spend their nights, single-seat benches so they cannot sleep on them, and the forced removal of their cardboard homes and belongings.⁹² Similar to the case of ex-yakuza, the removal of beggars and homeless in Tōkyō is not followed by a plan of social reintegration: like the yakuza, they simply ought to disappear.

VI. CONCLUSION: SHALLOWER BUT WIDER

This article examined the shifts and changes in sentencing the yakuza against the background of anti-yakuza legislation and the wider background of reformed Japanese judiciary. The Japanese criminal justice system has traditionally been described as reintegrative and benevolent, therefore it comes as no surprise that the announcement of harsher treatment of the people who go through the system was met with concern, especially abroad, where many scholars have indeed talked about increased populism, and growing penalism. Looking at the case of the yakuza, this article has evaluated whether the new sentencing tools and the judicial reforms – two contemporary events – have had an impact on the sentencing patterns handed down to yakuza members. Confession and conviction rates remain extraordinarily high, but recent figures show that only half of the cases are prosecuted. In particular, it has been shown that the prosecution rate for yakuza members has been consistently declining since the introduction of anti-yakuza countermeasures in the 1990s, from above 80% to below 50% (still slightly higher than common offenders). Proportionally, more yakuza are arrested nowadays, but evidence suggests that many of them are immediately released or not pros-

92 T. INABA, *Gorin made ichinen, rōjō seikatsu-sha wa doko e? Toshi saikatsu de owareru hitobito* [One year to the Olympics, where will the homeless go? The people expelled by the urban redevelopment], Ronza, 26 August 2019.

ecuted. The average length of prison sentences is still somewhat higher than average for yakuza members, but has not varied much over the years despite the introduction of new tools that would allow the judge to deliver harsher sentences: the majority of yakuza members are sentenced to one to two (a figure constantly around 35%) and two to three years of prison, while long sentences (more than five years) are slightly less common. This suggests that the firm hand boasted by the government is more a response to the sense of crisis and insecurity than an actual strategy to fight the yakuza.

External participation, a judicial tool used to prosecute enablers of criminal groups and people who offer assistance to meet the goals of the associations, is enshrined in the 1997 amendment of the *Bōtai-hō* and is included in the *bōhai jōrei*. However, the introduction of the latter resulted in an over-expansion of institutional control: a greater number of offenders are under the control of the state, and for a longer period. This trend was also confirmed by the introduction of the controversial *Kyōbō-zai-hō*, which further expanded the presence of the state to almost ubiquitous permeation and put more individuals under governmental social control. This also illustrates how the authoritarian tendencies of the government have been developed through the introduction of legislation that allows political opposition be targeted.

To conclude, the government has used instrumental descriptions of the criminal justice system, claiming increased harshness in the treatment of offenders to address the concerns of victims' movements and popular anxieties around crime, but in fact, even if reforms were introduced, there is more continuity than change. In particular, the blatant rhetoric of increasing harshness towards the yakuza that Japanese politicians have adopted in recent years fits with the portrait of a country that has been trying to resolve social problems produced by cutbacks in welfare with policies that focus on policing and punishment. Even if the government is pushing for the disbandment of yakuza groups, it is not actually implementing a national plan to reintegrate the thousands of people into Japanese society, where the stigma against members of the criminal syndicate is embedded in prefectural ordinances that increase discrimination and decrease the possibility of social rehabilitation, forcing them to remain in the criminal underworld to survive. Yakuza groups are becoming weaker, but at the same time they are becoming invisible or hardly detectable, and new forms of disorganized crime are on the rise: Japanese law enforcement, used to openly finding agreements with the yakuza rather than aggressively tackling it, will have to prove that they are ready to face the challenge.

SUMMARY

The Japanese criminal justice system, traditionally considered benevolent and reintegrative, has recently been the object of academic debate for its alleged increased punitivist tendencies: scholars have talked about processes of genbatsu-ka, popular punitivism and increased penalism. In particular, following the set of judicial reforms introduced since the early 2000s, concerns have been raised on sentencing practices within the Japanese judiciary. The growing harshness of anti-organized crime regulations and the decreasing membership of the yakuza seem to confirm both the increased severity of the Japanese judiciary as well as the validity of an iron-fist approach with crime. However, a closer analysis shows how the effects of these reforms do not represent a turning point in the history of the Japanese judiciary, but rather represent a political tool used by the state to justify its increasing tendency towards authoritarianism.

Using governmental data such as the White Paper of the Police and the White Paper on Crime by the Ministry of Justice, as well as data collected during fieldwork involving Japanese experts and members of the yakuza, this article considers whether the supposedly increased harshness of the Japanese criminal justice system has had an impact on the sentencing patterns of members of the yakuza. The analysis highlights that judicial reforms and new anti-yakuza provisions did not determine a tightening of sentences against members of organized crime: in fact, while confession and conviction rates remain extraordinarily high, prosecution rates have decreased for both yakuza and common offenders. At the same time, the introduction of new provisions that aim to punish external participation in criminal groups contributed to the over-expansion of institutional surveillance over private citizens. Reflecting on central aspects of punitivism and leniency, and how these terms are used in discourse on sentencing practices and how they may be deliberately constructed to gain political consensus, this article ultimately expands its analysis to the broader picture of dynamics between law, politics, and other social forces in Japan.

ZUSAMMENFASSUNG

Das japanische Justizsystem gilt traditionell als eher nachsichtig und auf Reintegration bedacht. In jüngster Zeit ist es jedoch wegen möglicher strafverschärfender Tendenzen zum Gegenstand einer akademischen Diskussion geworden. Wissenschaftler sprechen diesbezüglich von genbatsu-ka, populistischen Bestrafungen und schärferen Strafzumessungen. Nach einer Reihe von Justizreformen seit den frühen 2000er Jahren wird insbesondere die Praxis der Strafzumessung kritisch gesehen. Die zunehmende Härte der Regeln gegen die organisierte Kriminalität zusammen mit dem Rückgang der Mitgliederzahl der Yakuza scheint auf den ersten Blick sowohl die Tendenzen zur Strafverschärfung

in der japanischen Justiz als auch den Erfolg einer Strafdurchsetzung mit eiserner Faust zu bestätigen. Eine genauere Analyse zeigt jedoch, dass die Auswirkungen der Reformen keineswegs einen grundlegenden Wechsel in der Tradition der japanischen Justiz indizieren, sondern vielmehr von der Regierung als politisches Werkzeug genutzt werden, um deren wachsenden Autoritarismus zu rechtfertigen.

Der Beitrag untersucht, ob die behauptete zunehmende Härte der japanischen Strafjustiz tatsächlich zu einem Wandel in der Praxis der Strafzumessung gegenüber Mitgliedern der Yakuza geführt hat. Die Verfasserin stützt sich dabei vor allem auf die von staatlicher Seite in Form der Weißbücher der Polizei und des Justizministeriums zur Kriminalität in Japan zur Verfügung gestellten Informationen sowie auf eigene Feldforschungen vor Ort in Form von Gesprächen mit japanischen Experten und Mitgliedern der Yakuza. Die Untersuchung zeigt auf, dass die Justizreformen und die neuen Vorschriften gegen die Yakuza nicht zu einer Verschärfung der Bestrafung von Mitgliedern der organisierten Kriminalität geführt haben. Tatsächlich ist die Zahl der Strafverfolgungen vielmehr sowohl bezogen auf Mitglieder der Yakuza als auch bezogen auf andere Straftäter zurückgegangen, auch wenn die Zahl der Geständnisse und die Verurteilungsrate von angeklagten Personen außerordentlich hoch geblieben sind. Gleichzeitig hat die Einführung neuer Vorschriften, welche eine Beteiligung an kriminellen Gruppen unter Strafe stellen, dazu geführt, dass nunmehr auch die Bürger im Allgemeinen institutionell stärker überwacht werden. Der Beitrag erweitert die Perspektive in diesem Sinne auf die zwischen Recht, Politik und weiteren gesellschaftlichen Kräften in Japan bestehenden Dynamiken. Dabei analysiert die Verfasserin die zentralen Aspekte einer populistischen Bestrafung einerseits und einer Zurückhaltung bei der Bestrafung andererseits und den Gebrauch dieser Parameter in der Diskussion über die Praxis der Strafzumessung sowie deren möglichen Einsatz als Mittel zur Gewinnung politischer Zustimmung.

(Die Redaktion)