

## Juvenile Diversion and the Get-Tough Movement in Japan<sup>\*</sup>

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### *Summary*

*In Japan, the police and the public prosecutor must send all juvenile cases to the Family Court. After the cases being referred, the Family Court Probation Officer conducts social investigation about the personality of juveniles and the social backgrounds. It functions as social casework and works practically as diversion. This is reflected in practice, in that more than 80% of the cases sent to the Family Court are dismissed without or after hearings.*

*There is, however, an obvious trend of overemphasis on crime control and a contrasting decline of the educative function. The Juvenile Law was revised in 2000 to expand criminal prosecution and punishment for juveniles. The number of commitment to the Juvenile Correction Centre is also increasing. Decline of educative function caused the deterioration of social casework in the Family Court. The recent get-tough movement has also accelerated the deterioration. Retribution and deterrence is emphasized in disposing juvenile cases. The Family Court Probation Officers are pressured to investigate the facts concerning retribution and deterrence such as public and victim's demand for stringent disposition. These changes have had an adverse effect on the practice of diversion.*

*It was indicated that the primary reason for the low crime rate in Japan was a quite low rate of re-offending by the juveniles who had been processed through juvenile justice after being in their late teens. It was argued that juvenile justice, together with the good condition of the economy and labour market, had been encouraging the reintegration of juveniles and effectively preventing their re-offending. A central role in the reintegrative function has been performed by social casework. It has been diverting many juveniles from formal protective measures and returning them to the community. Thus an essential task of juvenile justice reform should be the restoration of social casework.*

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## 1 Introduction

Diversion from formal judicial procedure has been one of the primary concerns about juvenile justice reform since the President's Commission on Criminal Justice in the United States placed diversion as a main target besides decriminalization, deinstitutionalization and due process.<sup>1)</sup> In the United States, numerous kinds of diversion programs have been developed at all stages of juvenile justice although the serious problems, which include the net-widening of social control and lack of procedural safeguards against improper decision-making, have been pointed out. In England and Wales, diversion contributed effectively to the decrease of formal court procedures and custodial sentences. Also in Germany, diversion has been the most important goal in the internal reform of juvenile justice since the late 1970s.

In contrast, diversion has not always been a primary objective in Japan. One reason is that there is a legal rule that the police and the public prosecutor must send all juvenile cases to the Family Court. They are not permitted to divert juvenile cases from the Family Court procedure. Nearly 40% of non traffic-related cases, however, are sent by *summary referral* and dismissed substantially without any investigation or hearing by the Family Court. Thus *summary referral* functions practically as diversion.

The other reason is that social casework in the Family Court procedure works as diversion. This is reflected in practice, in that more than 80% of the cases sent to the Family Court by normal referral are dismissed without or after hearings. These legal rule and practice are deemed closely related to the purpose of the Juvenile Law, the *sound development* of juveniles.

In this paper, I would like to examine the law and practice concerning diversion in terms of the educative function and the crime control function of juvenile justice. Additionally I would like to analyze the recent get-tough trend in law and practice in order to make clear what impact it has on the practice of diversion. I will demonstrate that the get-tough movement has an adverse effect on the practice of diversion because it deteriorates social casework based on the educative function. Before examining these problems, I will overview the juvenile justice in Japan.

## 2 Overview of Juvenile Justice in Japan

### (1) Purpose and Jurisdiction

There was a big wave of juvenile delinquency shortly after World War II. This was caused by a terrible confusion in Japanese society. Japan enacted a new Constitution that

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1) The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 82-84 (1967).

emphasized the educative and education of children as well as human rights. An entirely new juvenile law was enacted in 1948 replacing the old law of 1922. The Juvenile Law of 1948 was modeled after the Standard Juvenile Court Act of 1943 in the United States that was based on the *parens patriae* philosophy. Thus it emphasized the educative function as a way of addressing the serious problem of juvenile delinquency. Criminal trial and punishment were not deemed appropriate.

The Family Court was established. The Family Court is a purely judicial body on which a professional judge sits, and its jurisdiction covers domestic cases and juvenile delinquency cases. The Family Court plays an essential part in juvenile justice. There is one main Family Court and several branches in each of Japan's fifty prefectures.

Article 1 of the Juvenile Law describes the purpose of the law as the *sound development* of juveniles. The Juvenile Law provides the Family Court hearing as well as protective measures to achieve this purpose.

Article 3 of the Juvenile Law prescribes that the Family Court shall have jurisdiction over the following juveniles: (1) juvenile offender; a juvenile from 14 to 19 years of age who has committed a criminal offense, (2) law-breaking juvenile; a juvenile under 14 who has in violation of penal provisions,<sup>2)</sup> (3) pre-offender; a juvenile under 20 who is likely to commit an offense or act in violation of penal provisions, in view of his or her character or circumstances, because of specific factors.

Under the Child Welfare Law, cases of juveniles under 14 are sent to the child welfare agencies. Only when child welfare agencies refer cases to the Family Court for protective measures may the Family Court deal with them. The total number of cases was 357 in 2002. The number of pre-offense cases referred to the Family Court is also very small, 1,061 in 2002. Almost all the cases referred to the FC are those of juvenile offenders, therefore I will focus on the procedure for juvenile offenders.

## **(2) Outline of the Procedure and Disposition**

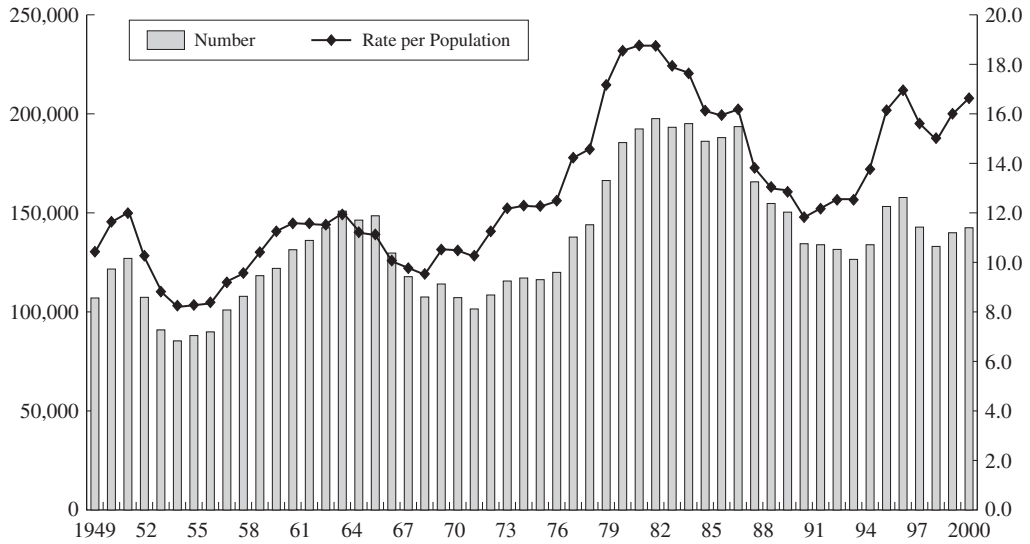
Before outlining the procedure and disposition, I would like to examine the trend of juvenile delinquency. According to the police statistics, the rate of juveniles processed by the police has increased in recent years. The police call this trend 'the fourth peak of delinquency' after World War II. In terms of distribution, larceny and misappropriation of lost property account for nearly 85%. Accordingly the increase or decrease of the number of juveniles processed for these offences is strongly linked with those for all offences. Additionally its fluctuation would be determined by the police law enforcement practice for juveniles since virtually all of these offences are minor ones.

According to the police statistics, the number of juveniles processed for robbery has increased sharply since 1997 although that for homicide has not. As a result of police press

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2) Article 41 of the Criminal Law provides that any person under 14 shall not be criminally responsible.

Figure 1 The Number of Juveniles Processed for Non-Traffic Penal Code Offenses and Rate per Population of 100,000



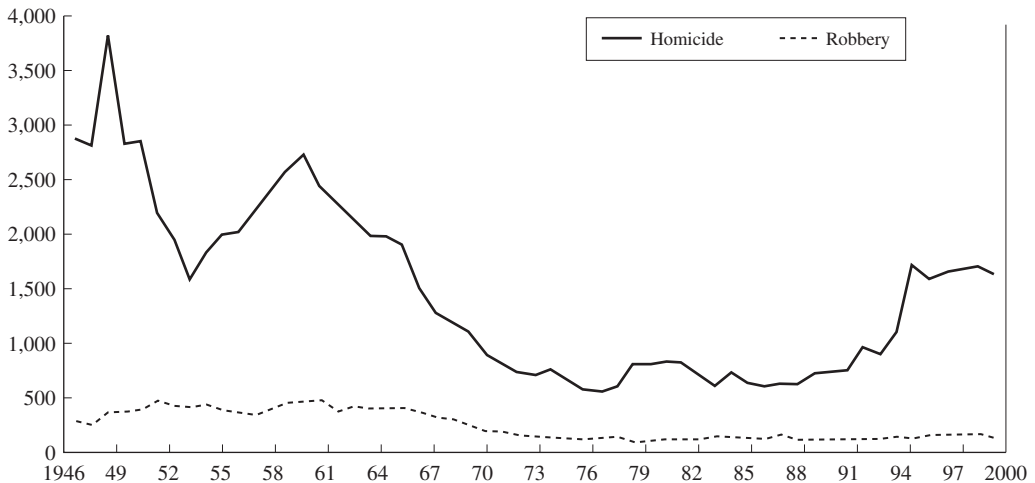
Source: White Paper on Police in 2003.

Table 1 Distribution of Juveniles Cleared for Non-Traffic Penal Code Offences in 2002

<b>Total</b>		141,775	100.0%
<b>Larceny</b>		83,300	58.8%
	Shoplifting	40,511	(28.6%)
	Motorecycle Theft	12,650	(8.9%)
	Bicycle Theft	14,710	(10.4%)
	Others	15,429	(10.9%)
<b>Rough Offences</b>		15,954	11.3%
	Bodily Injury	9,140	(6.4%)
	Extortion	4,616	(3.3%)
	Others	2,198	(1.6%)
<b>Heinous Offences</b>		1,986	1.4%
	Homicide	80	(0.06%)
	Robbery	1,586	(1.1%)
	Others	2,198	(0.23%)
<b>Others</b>		4,053	28.6%
	Misappropriation of Lost Property	34,263	(24.2%)
	Others	6,272	(4.4%)

Source: White Paper on Police in 2003.

Figure 2 Number of Juveniles Cleared for Homicide Robbery



Source: White Paper on Crime in 2003.

releases, the mass media reported this trend to be evidence that juveniles had become much more violent and called for tougher policy on juveniles. Strong public and political concern were generated about juvenile justice reform. The JL was revised in 2000 partly as a result of this.

It was pointed out, however, that police law enforcement for serious cases of juveniles had become tougher than before and that the rapid increase in the number of juveniles processed for robbery was most likely a result of the changes in law enforcement practice, together with increased numbers of participants in specific cases. For example, snatching resulting in bodily injury of victims could have been processed as 'robbery with bodily injury' since 1997, which had previously been processed as two offences of 'larceny' and 'bodily injury', even when the resultant bodily injury was not serious.<sup>3)</sup>

The police investigate juvenile offence cases and search for suspects and evidence based on the general rules on crime investigation of the Law of Criminal Procedure. Although the Juvenile Law and the Police Rules on Investigation have several provisions for special treatment of juveniles such as restrictions on arrest and detention and safeguards concerning police interviews, there is a strong doubt as to whether these are functioning effectively in practice to protect juveniles. The maximum period for the detention of juveniles before the referral of cases to the Family Court is 23 days. During the pre-referral detention, the police and the public prosecutors may interview the juveniles. In practice, the defense lawyers are seldom appointed for the juveniles. The appointment rate is estimated to be about 10% for the arrested and detained juveniles.

3) Hiroyuki Kuzuno, *The Reconstruction of Juvenile Justice* 478-482 (Nihon-Hyoron Sha, 2003).

The police refer minor cases of juvenile offenders directly to the Family Court and other cases to the public prosecutors. The public prosecutor refers all cases to the Family Court after completing the investigation. Thus all cases are sent in the end to the Family Court. In contrast, the public prosecutor has discretion not to prosecute adult cases even when there is probability of guilt. The percentage of suspended prosecutions for non-traffic Penal Code offenses was 36.0% in 2002 while the prosecution rate was 55.4%. Furthermore, the police may not refer relatively minor cases of adult offenders to the public prosecutor. 24.3% were disposed of in this manner among all non-traffic Penal Code offenses processed by the police in 2001.

After the Family Court receives the cases, pre-hearing investigations are then conducted for all referred cases. The Family Court Judge may order, after finding probable cause based on the legal investigation, the Family Court Probation Officer to interview the juvenile, parent(s) and persons concerned and to conduct any other necessary investigations. This is called social investigation. It is conducted in practically all cases. Article 9 of the Juvenile Law prescribes that social investigation shall be conducted in regard to the behavior, life history, characteristics and environment of the juvenile, of his parent(s) or of other persons concerned, making every effort to utilize medical, psychological, pedagogical, sociological and other expertise. The number of Family Court Probation Officer fixed by the national budget for 2001 was 1,533. Half of them are responsible for juvenile cases. The Family Court Judge may adjourn a hearing and place a juvenile under tentative probation, which is supervised by the Family Court Probation Officer. Additionally the Family Court Judge may detain juveniles at the Classification Centre where classification on the predisposition or psychological state is conducted. Detention orders were made for 9.2% of all non-traffic cases in 2002.<sup>4)</sup> The period of detention is generally limited to less than 4 weeks. Under the revised Juvenile Law of 2000, the maximum period may be extended in highly exceptional cases to 8 weeks if necessary for the purpose of finding the facts.

Social investigation has two functions. One is to collect, analyze and summarize the information about the personality of juveniles and the social background. The Family Court Judge decides what disposition is appropriate for the juvenile based on the report presented by the Family Court Probation Officer. The other function is supportive and educative. During the social investigation, the Family Court Probation Officer may offer various instructions, advice and assistance to help the juvenile and parent(s) to overcome their problems, in order to prevent re-offending. The Family Court Probation Officer may make necessary arrangements with social services to support them. After observing such supportive and educative action, the Family Court Probation Officer makes the report.

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4) Statistics concerning the Family Court procedure after 1999 have been made based on the cases excluding *summary referrals*. As a result, it is impossible to compare the data before 1998 very closely with that after 1999.



Table 2 Final Disposition of Juvenile Non-Traffic Offenders by the Family Court

Year	Total	Transfer to the Public Prosecutor		Protective measures			Referral to the Welfare Agency	Dismissal after Hearing	Dismissal without Hearing	
		Criminal Prosecution	Overage	Probation	Welfare Institution	Correction Centre				
1965	Number	158,384	3,119	488	19,262	228	7,079	561	39,668	87,976
	%	100	2	0.3	12.2	0.1	4.5	0.4	25	55.5
1975	Number	118,509	850	256	8,655	115	2,230	168	28,475	77,760
	%	100	0.7	0.2	7.3	0.1	1.9	0.1	24	65.6
1985	Number	191,342	854	490	15,026	199	5,173	175	33,574	133,851
	%	100	0.4	0.3	7.9	0.1	2.7	0.1	17.5	70
1995	Number	123,712	328	340	11,966	194	3,335	114	16,954	90,451
	%	100	0.3	0.3	9.7	0.2	2.7	0.1	13.7	73.3
2002	Number	142,273	371	495	17,683	200	5,064	115	14,623	103,722
	%	100	0.3	0.3	12.4	0.1	3.6	0.1	10.3	72.9
(2002 Number)										
Homicide		47	6	2	4	1	33	1	0	0
Robbery		1,324	62	4	537	5	584	2	68	62
Bodily Injury		8,963	71	91	3,656	53	932	20	2,449	1,691
Assault		839	6	1	173	2	18	3	236	
Extortion		4,569	21	21	1,805	15	516	5	1,053	1,133
Larceny		44,673	100	180	8,041	98	1,967	49	7,340	26,862
Embezzlement		10,104	1	25	468	2	27	5	1,030	8,546
Other Penal Code Offences		5,892	52	75	1,542	10	462	23	1,206	2,986
Stimulant Drug Control Law		612	12	11	225	2	317	1	25	19
Poisonous and Dangerous Substance Control Law		2,678	15	43	866	11	154	1	756	832
Other Special Law Offences		1,894	25	37	371	0	54	5	358	1,044

Sources: White Paper on Crime in 1980, 1996, 1997, 2003.

Note: The number does not include the number of transfers of reference for judgment between courts and cases that ended in joint hearings not requiring the case information sheet.

prescribes that a hearing shall be conducted in a peaceful atmosphere with emphasis upon kindness. It is not open to the general public, mass media or even the victims. The juvenile, parent(s), and attendants are summoned on the date of hearing. The Family Court Probation Officer is also required to be present. Additionally teachers, employers and so on may be permitted to attend the hearing. The public prosecutor may attend the hearing only with special permission given by the Family Court Judge in highly exceptional cases. The juvenile or parent(s) may appoint an attendant. The attendants are usually lawyers. The percentage of such appointments to all non-traffic cases, however, was only 5.7% in 2002 although this was much higher than before. This is the most serious problem



of due process for juveniles.

The Family Court Judge shall dismiss the case after the hearing if the court finds that there is no proof of the offence or that it is unnecessary to place the juvenile under protective measures. Otherwise protective measures are imposed. They can be (1) commitment to the Juvenile Correction Centre, (2) commitment to the Child Welfare Institution, or (3) probation.

The Family Court Judge may refer the case to a child welfare agency after the pre-hearing investigation or hearing. Additionally the Family Court may transfer the case to the public prosecutor for criminal prosecution. Only in this case may a juvenile be tried in the Criminal Court and punished as a 'criminal'. Generally, transfer for criminal prosecution is considered to be exceptional for juveniles. The number was 371 for non-traffic offences in 2002. When the juvenile reaches 20 years of age, the case shall then be transferred to the public prosecutor.

### **(3) Outline of Juvenile Treatment**

The Juvenile Correction Centres are institutions administrated by the Ministry of Justice. As of 1 April, 2003, 53 Centres had been established nationwide. According to age, the likelihood of re-offending and the physical and mental condition of juveniles, they are classified into four categories. With regard to the term of admittance, they are divided into three categories. Normal short-term treatment is provided for juveniles whose correction and rehabilitation are expected through intensive guidance and training for a short period, within 6 months. Special short-term treatment is provided in open facilities for those who are less inclined to delinquency for a period of 2 or 3 months. The term for long-term treatment is generally about 1 year. In exceptional cases where special long-term treatment is necessary in light of mental or other problems, the term may be about 4 or 5 years. The special long-term treatment program started in 1998 when the term of admittance of less than 2 years was heavily criticized after a 14 year old boy's murder case in Kobe. Although some of the Centres are open or semi-open facilities, there is generally strict discipline as well as training programs.

There are two categories of child welfare institutions: Homes for Dependent Children and Homes for the Support of Unsupported Children. In these institutions, rearing, care, education and support are offered to children. There is no difference in treatment between juveniles committed by the Family Court and children committed by the child welfare agencies. Almost all children committed by the Family Court are treated in the Homes for the Support of Unsupported Children whose predecessor was the Reformatory Schools modeled after those in the United States.

One of the protective measures is probation in the form of community treatment. Juvenile probationers may be placed on probation until they are 20 years of age. Probation is supervised by the Probation Officers who are assigned to the Probation Office.

Table 3 Number of Juveniles Convicted for Non-Traffic Penal Code Offences by Ordinary First Instance Court

Total in 2002	Death Penalty	Life Imprisonment	Imprisonment with or without Labor				Fine	Transfer to Family Court
			Indeterminate Sentence	Determinate Sentence	Of which: Suspended Sentence	With Probation		
124	0	4	73	47	44	21	1	7

Source: White Paper on Crime in 2003.

In practice, the Volunteer Probation Officers offer necessary guidance and support directly to juveniles. Juveniles are also placed on probation after they are released on parole from the Correction Centres.

The juvenile prosecuted in the Criminal Court is subject to the same procedure as an adult. However, some special provisions are applicable to juveniles. For instance, a life sentence shall be imposed on offenders under 18 at the time of offence when the death penalty would be considered appropriate, and imprisonment for 10-15 years may be imposed instead of a life sentence. When imprisonment for less than 3 years would otherwise be imposed, this is reduced to an indeterminate sentence within the scope of an applicable penalty. Additionally juveniles shall serve the sentence of imprisonment separately from adult inmates. Although reduction of a life sentence to imprisonment for 10-15 years for juveniles under 18 is now discretionary, it used to be mandatory before the revision of Juvenile Law in 2000. Under the revised Juvenile Law, juveniles under 16 may be tried in the Criminal Court and sentenced to imprisonment. Juveniles under 16 shall serve their prison sentences in the Juvenile Correction Centres until they reach 16 years of age. In such cases, compulsory labor is not imposed until this time.

#### (4) Main Features of the Revised Juvenile Law of 2000

Juvenile justice has been considered to have two functions: the educative function and the crime control function. The educative function has been the primary one since the Juvenile Law declares its purpose to be the *sound development* of juveniles. Accordingly the protection of society can be achieved through the prevention of re-offending as a result of the juvenile's *sound development*. The purpose of criminal punishment such as retribution and deterrence is excluded from the Juvenile Law.

Over the last twenty years, however, theory and practice have been placing greater emphasis on the crime control function. This position requires finding the truth in order that the State would never let a juvenile delinquent off without charge. Additionally it demands stricter dispositions or stronger criminal punishments for serious offences, with the intention of maintaining social order. It regards retribution and deterrence as important factors in disposing of juvenile cases. As a result of this trend, the Juvenile Law was revised in 2000.

The revision in 2000 contains three parts. The most important part was concerned with the criminal prosecution of juveniles. Before the revision, the Family Court was permitted to transfer only the cases of juveniles over 16 to the public prosecutor for criminal prosecution. The revised Juvenile Law lowered the minimum age limit from 16 to 14. Additionally the Family Court is obliged in principle to transfer the cases of juveniles over 16 who have committed a homicide or a malicious offence resulting in death. Thus the likelihood for juveniles to be tried in the criminal court and punished criminally was increased. This clearly shows the nature of the revision as getting tough on juvenile 'crime'.

Secondly, the revised Juvenile Law changed the procedure of fact-finding. The maximum period of pre-hearing detention in the Classification Centre was extended from 4 weeks to 8 weeks. The Family Court may permit the public prosecutor to attend the fact-finding hearing when the juvenile deny the alleged offence or the case is highly complicated. Until this revision, the public prosecutor had been totally excluded.

Thirdly, several provisions concerning victims were enacted. Victims can make statements regarding their opinion or feelings about the offence and offender either to the Family Court Judge or to the Family Court Probation Officer should they so wish. They are permitted to access the case records and shall be informed of the final decision. Similar provisions had been made in the Law of Criminal Procedure immediately before the revision of Juvenile Law.

Schwarzenegger specified the factors that had prompted the revision: (1) a series of heinous offences by young offenders such as the Kobe Case and Saga Bus-jacking Case; (2) the influence of the mass media; (3) a victim's rights movement; (4) clamour for a formalized juvenile procedure; (5) development of political activities.<sup>5)</sup> Yokoyama also specified the factors: (1) change in public opinion after the Kobe Case; (2) maneuver by the police, that is 'fourth peak of juvenile delinquency' and 'rapid increase of heinous juvenile offences' was brought about by net-widening and tougher law enforcement by the police; (3) the reports by the mass media which overemphasized the seriousness in both quantity and quality of juvenile delinquency depending on the press release by the police; (4) the movement by crime victims; (5) political movement for criminalization of juvenile offence.<sup>6)</sup> These are surely important factors. According to the Integrative Conflict Model by McGarrell and Castellano,<sup>7)</sup> however, it is essential to note the factors prompted by the

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5) Schwarzenegger, The Debate about the Reform of the Juvenile Law in Japan, in Gesine Foljanty-Jost (ed), *Juvenile Delinquency in Japan* 181-191 (Brill, 2003).

6) Yokoyama, Revision of the Juvenile Law toward Partial Criminalization in Japan, in A. Manganas (ed.), *Essays in Honour of Alice Yotopoulos-Marangopoulos: Human Rights, Crime, Criminal Policy: Volume B* 1547-1551 (Athens: Bruylant, 2003).

7) McGarrell and Castellano, Social Structure, Crime, and Politics: A Conflict Model of the Criminal Law Formation Process, in William J. Chambliss and Marjorie S. Zatz (eds), *Making Law* 347 (Indiana University Press, 1993).

structural foundations as well as the factors relating to the criminal justice and the triggering events.

Structural foundations include both structural and cultural factors. With regard to the structural factors in the revision of Juvenile Law, we could cite correlative factors such as the globalization of the economy, the change in industrial structure, the moving abroad of industry, serious recession, neo-liberalist reduction of welfare and social security, increasing instability of employment, high unemployment among young people,<sup>8)</sup> higher school drop-out rates, joblessness and other causes of social alienation among young people<sup>9)</sup> and an increase in deviance and offending. As regards cultural factors, elements could be cited such as a neo-liberalist emphasis on 'self-responsibility' and 'self-help', prevalence of the 'winner-or-loser culture', a profound fear for the future and diminished tolerance among the general public, a widespread feeling of insecurity and an increased fear of crime.

These structural and cultural factors correlate to the factors relating to the criminal and the juvenile justice such as increased public concern about victims, public distrust of juvenile justice and demand for getting tough on juvenile 'crime', extensive media coverage and juvenile justice reform becoming a political issue. On the basis of these foundations and factors, triggering events, such as a series of heinous offences by juveniles, political parties making a prime campaign issue of the revision of Juvenile Law in the General Election of 2000 and an exceptionally rapid development of political activity on juvenile justice reform, caused the revision. The revised Juvenile Law was shaped as a reflection of the prevailing 'winner-or-loser' culture and other cultural foundations in expanding criminal responsibility and punishment for juveniles.

### **3 Diversion and Social Casework in the Family Court Procedure**

#### **(1) Summary Referral by the Police: Hidden Diversion**

Under the old juvenile law, the public prosecutor screened all cases and decided which cases should be prosecuted in the criminal court or referred to the Juvenile Hearing Center. The Juvenile Hearing Centre received only the cases that the public prosecutor found it unnecessary to prosecute criminally. The current Juvenile Law, however, requires the police and the public prosecutor to refer all cases to the Family Court.

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8) According to the Statistics Bureau, the unemployment rate of young people between 15 and 24 was 5.1% in 1993, 7.7% in 1998 and 10.1% in 2003 while the total rate was 2.5% in 1993, 4.1% in 1998 and 5.3% in 2003. White Paper on Labour Economy of 2004 pointed out that the number of so-called FREETER, job-hopping part-time workers, most of whom were young people, was estimated to be 2,170,000.

9) White Paper on Labour Economy of 2004 pointed the recent upsurge in so-called NEET youths, young individuals who are not engaged in education, employment or training. The number of NEET youths between 15 and 34 years of age is estimated to be 520,000. The total number of NEET and FREETER constitutes 8% of total population of these ages.

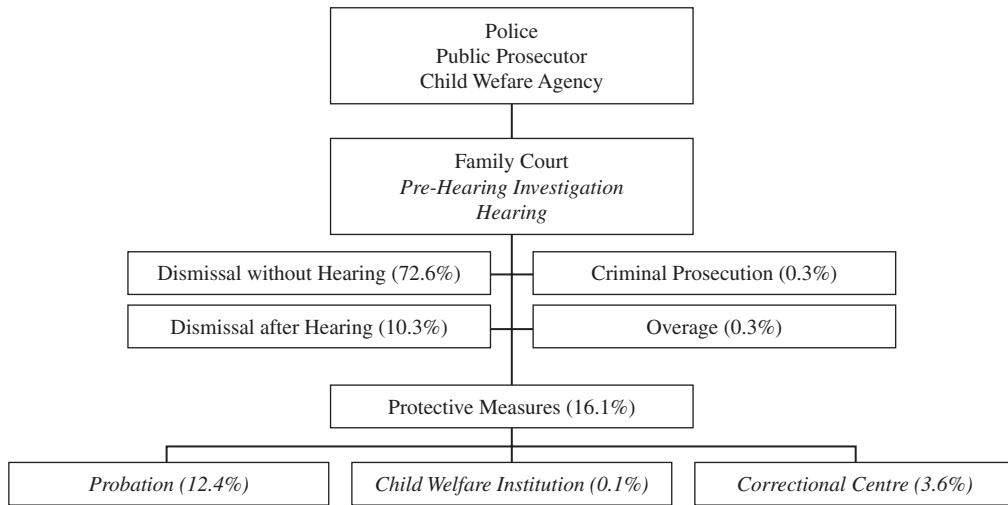
It is thought that the juvenile could be in need of special care and support even when the offence itself is minor one. This is because there could be serious problems concerning the juvenile's personality and environment. Therefore, all cases are legally required to be sent to the Family Court, which has resources for social investigation and social casework. The Family Court can find the social background of the offence and decide what disposition will be appropriate for the juvenile from the viewpoint of *sound development* of the juvenile. It is not thought appropriate for the police and the public prosecutor to decide the final disposition of juvenile cases because they have no such resources. Based on these ideas, a legal rule of total case referral was established.

Rigid compliance with this rule, however, would cause a serious problem of case overload in the Family Court. Additionally it would impose a heavy burden on the police. Based on these considerations, *summary referral* has been implemented by an agreement among the Supreme Court, the Supreme Public Prosecutor's Office and the National Headquarters of Police since 1950. According to the modified agreement of 1969, *summary referral* may be used (1) when the case is concerning theft, assault, bodily injury and other offences punishable by 3 years imprisonment or a lesser penalty; (2) when the amount of economic loss is less than 5,000 yen (less than 1,000 yen for extortion), or the injury will be recovered from completely in 10 days; and (3) unless a weapon has been used, unless the juvenile has a history of referral to the Family Court within the previous 2 years, unless the juvenile denies the alleged offence, or unless the juvenile has been arrested. The police may keep these cases for one month and send them to the Family Court after giving a warning to the juvenile and other persons concerned by reason that the offence is quite minor and any protective measures are considered to be clearly unnecessary. After receiving the cases, the Family Court Probation Officer may undertake no interviews, visits or other social investigation, only examining the documents referred by the police, and the Family Court Judge shall dismiss them without a hearing. The percentage of *summary referrals* to all referrals of non-traffic offences was 36.8% in 2002.

Official understanding is that *summary referral* does not violate the legal rule of total case referral because the police send the cases to the Family Court nominally and further investigation and a hearing can be conducted if necessary. *Summary referral*, however, has been criticized for its violation of the legal rule. According to its critics, *summary referral* and its expansion is inconsistent with the idea that all cases shall be finally disposed by the Family Court in the interests of the *sound development* of juveniles. The Ministry of Justice tried to revise the Juvenile Law, proposing that the police should be authorized to decide not to refer minor cases and that the public prosecutor should be granted the discretion to suspend the prosecution of older juveniles. This proposal failed to be carried out due to grave objections. Thus the legal rule of total case referral has been deemed closely related to the purpose of the *sound development* of juveniles.

Hattori pointed out that *summary referral* was nothing less than non-referral after

Figure 4 Summary Flowchart of the Japanese Juvenile Justice



examining its practice.<sup>10)</sup> Practically all cases sent by *summary referral* are dismissed only after nominal investigation of the documents and there is virtually no possibility of further investigation or a hearing. Thus *summary referral* works in effect as diversion at the police stage.

## (2) Social Casework in the Family Court Procedure

As shown above, more than 80% of all non-traffic cases, even when excluding those sent by *summary referral*, are dismissed without or after a hearing. They are dismissed after social investigation practically in all cases, based on a decision drawing upon expertise in human behavior. Social investigation works as social casework in that it exercises the educative function of juvenile justice. Informal educative action to support juveniles to overcome their problems may be taken by the Family Court Probation Officer. The percentage of dismissals without hearings by reason of educative action for non-traffic offences was 84.8% in 2002 and that of dismissals after hearings by the same reason was 87.4%. Thus such a high percentage of dismissals is a result of social casework in the course of Family Court procedure.

As mentioned above, the juvenile may be placed on tentative probation that is supervised by the Family Court Probation Officer. During tentative probation, various educative action is undertaken. In some cases, provision of guidance is allocated to a volunteer in the community. In addition to such provision, the juvenile may be accommodated in the home of a private citizen or private facility. In practice, tentative probation is ordered for the juvenile who is highly likely to be committed to the Juvenile

10) Hattori, Dealing with 'Minor Delinquency', 63 (12) *Ho-ritsu Jiho* 60-64 (1991).

Correction Centre because of serious problems of personality and environment. It is deemed to be a 'last chance'. After completion of this tentative probation, the Family Court Judge holds a hearing and usually dismisses the case or orders probation. Commitment to Juvenile Correction Centre is usually avoided. Thus tentative probation shows the real nature of social investigation as social casework.

Originally juvenile justice was established to divert juvenile cases from criminal trial and punishment. It has been functioning as such until today. In the light of Japanese practice, furthermore, a quite high percentage of cases is screened out of the Family Court procedure after social investigation. They are diverted from the Family Court procedures and protective measures as a result of social casework. Thus social casework works effectively as diversion. This practice is consistent with the idea that coercive measures or restriction of liberty should be avoided as far as possible in order to promote the *sound development* of juveniles.

#### **4 The Get-Tough Movement and the Changing Practice of Diversion**

##### **(1) The Decline of Social Casework**

Since the beginning, case overload has plagued the Family Court Probation Officer. That is because adequate social casework needs much time and work. Additionally, as mentioned above, there has been a trend with an overemphasis on crime control and the Juvenile Law was revised as a result of this in 2000. Overemphasizing crime control has caused a decline in the educative function inversely, subordinating the purpose of the *sound development* of juveniles to the demand for retribution and deterrence. Accordingly it has had a detrimental effect on social casework and affected the practice of diversion adversely.

In 1979, the first official statement was made that social casework by the Family Court Probation Officer should be subsidiary to judicial work by the Family Court Judge. This implied that the crime control function should be considered more important than the educative function in dealing with juvenile cases. In general, the Japanese judiciary is highly professionalized, centralized and hierarchical and it is organized in a classic bureaucratic structure.<sup>11)</sup> Under the official policy of urging expedient and efficient case disposal, internal pressure within the judiciary was placed on social casework to have it simplified in late 1970s.

This pressure as well as the decline of the educative function produced several changes.<sup>12)</sup> In the first place, although the Family Court Probation Officers had been

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11) Feely, *The Bench, The Bar, and the State: Judicial Independence in Japan and the United States*, in Malcolm M. Feeley and Setsuo Miyazawa (eds), *The Japanese Adversary System in Context* 80-81 (Palgrave, 2002).

12) Fukuda, *A Critical Analysis of the Juvenile Justice System in Japan*, 18 *Hitotsubashi Journal of Law and Politics* 1, 7 (1990).

Table 4 Final Disposal of the Cases in Which Tentative Probation are Ordered

Year	Percentage to All Disposed Cases		Tentative Probation		
		(%)	Tentative Probation at Home	Commitment of Guidance at Home	Commitment of Guidance with Custody
1965	9,602	4.7	6,253	363	2,986
1975	4,563	3.1	3,171	343	1,049
1985	4,300	1.9	3,430	160	710
1995	2,484	1.8	2,021	59	404
2002	2,386	1.7	1,976	114	296

Source: Supreme Court, Annual Report of Judicial Statistics for 2002.

deemed initially to be an independent expert responsible for performing a social casework and providing reports for the Family Court Judge, they were already completely incorporated in the national bureaucratic hierarchy. The Family Court Probation Officers were ordered strictly to regularly relocate. In 1984, a rigid inspection system by the chief Family Court Probation Officer was established. Secondly, the Supreme Court disclosed standards for the Family Court procedure in 1984, which contained the intake criteria for minor cases. Under the criteria, minor cases sent by normal referral rather than *summary referral* may be dismissed in effect without social investigation by the Family Court Probation Officer or only with perfunctory investigation. It was speculated that half of the cases referred to the Family Court, including those sent by *summary referral*, would be dismissed effectively without social casework.

The deterioration of social casework is clearly reflected in the dramatic decrease in instances of tentative probation.<sup>13)</sup> Recently orders of protective measures have been gradually increasing while dismissals have been decreasing. New admissions both to the Juvenile Correction Centre and to the Juvenile Classification Centre have sharply increased since 1996. Between 1995 and 2002, there was a 60.0% increase for the Correction Centre and a 67.7% increase for the Classification Centre. This has caused a serious problem of overcrowding. These changes illustrate the predominance of crime control. Inversely this has caused the decline of the educative function and deterioration of social casework.

## (2) The Practice of the Revised Juvenile Law and Its Impact on Social Casework

Before the revision of 2000, the percentage of transfers to the public prosecutor for criminal prosecution had been small even for very serious cases. Since Article 20 (2) of the

13) Yokoyama pointed out that it was becoming more difficult to recruit volunteers because of the economic, social and cultural changes. He suggested that these changes in Japanese society should be related to the decline of tentative probation (Yokoyama, Juvenile Justice and Juvenile Crime: An Overview of Japan, in John Winterdyk (ed), *Juvenile Justice Systems: International Perspectives* [2<sup>nd</sup> ed] [Canadian Scholars' Press, 2002]).



Figure 5 Percentage of Disposition for Non-Traffic Offense

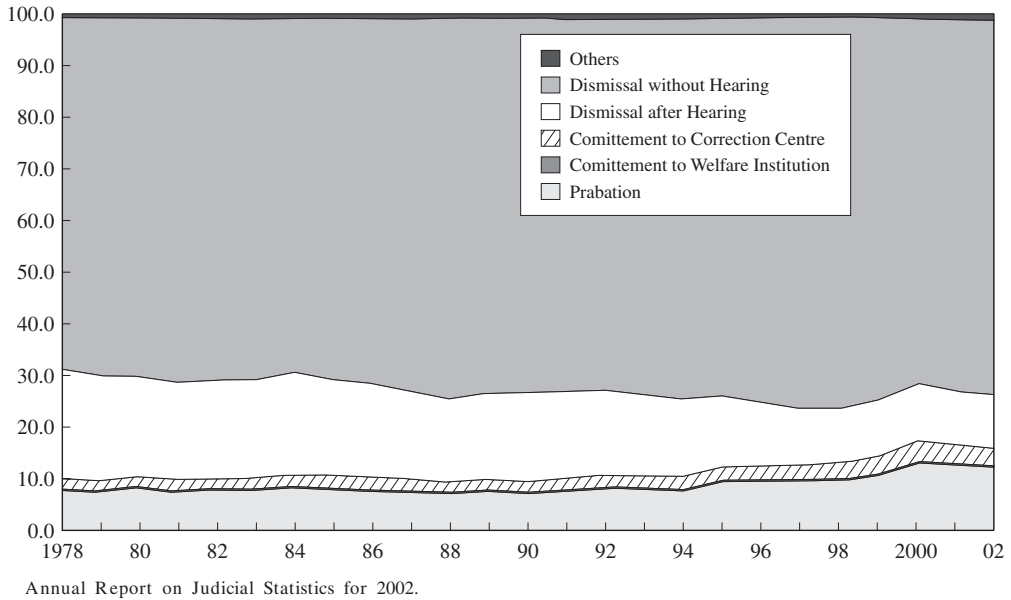
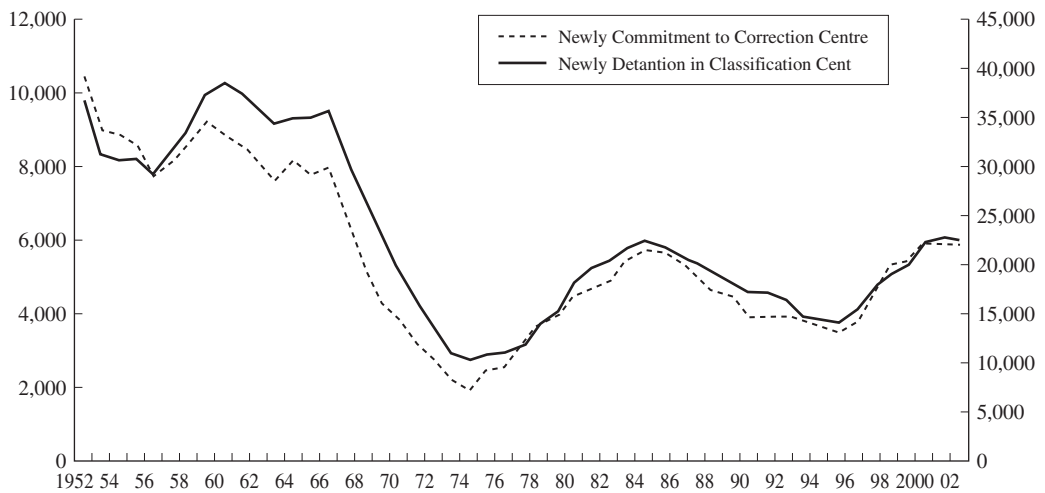


Figure 6 Newly Commitment to the Juvenile Correction Centre and Newly Detention in Juvenile Classification Centre



Source: White Paper on Crime in 2003.

revised Juvenile Law made it a general principle to transfer the juvenile who committed a homicide or a malicious offence resulting in death for criminal prosecution, the percentage of cases transferred for criminal prosecution has rapidly increased. Effectively, the disposition of these cases has been based primarily upon the criterion of the gravity of offence. The predominance of crime control is again illustrated here.

Table 5 Transfers to the Public Prosecutor for Criminal Prosecution

	Average Yearly Percentage over the 10 Years before Enforcement				Number for 2001. 4. 1-2004. 3. 31
		2001. 4. 1-2002. 3. 31	2002. 4. 1-2003. 3. 31	2003. 4. 1-2004. 3. 31	
Homicide	24.8%	50.0%	36.4%	65.0%	43
Bodily Injury Resulting in Death	9.1%	68.2%	43.8%	50.0%	146
Robbery Resulting in Death	41.5%	88.9%	46.2%	33.3%	25
Dangerous Driving Resulting in Death			93.3%	100.0%	22
Total		67.7%	51.7%	55.8%	238

Source: The Supreme Court Homepage, [http://courtdomino2.courts.go.jp/tokei\\_misc.nsf](http://courtdomino2.courts.go.jp/tokei_misc.nsf)

Note: As for homicide, attempted homicide has been excluded since 1 April 2001.

The revised Juvenile Law has an adverse effect on social casework. Primarily emphasis on crime control demands that the Family Court Judge should consider the factors of retribution and deterrence in disposing of juvenile cases. This should bring stricter disposition and increased criminal prosecution. Immediately after the revision, the Supreme Court declared the official understanding that the Family Court Probation Officer should make enquiries regarding the impact of the incident on the community and victims, the public and victims' demand for retribution and the need for deterrence as well as considerations in regard to the juvenile's personality and environment when the Family Court Probation Officer makes the report for the Family Court Judge, with the intent to ensure that transfer for criminal prosecution would be made in a large portion of the cases. Enquiry into the facts concerning retribution and deterrence is clearly inconsistent with the status of the Family Court Probation Officer as an expert in human behavior and social casework. Additionally it should subordinate the educative function even further to the crime control function. According to the informal interviews that I had with some Family Court Probation Officers, it has caused confusion and undermined morale among them.

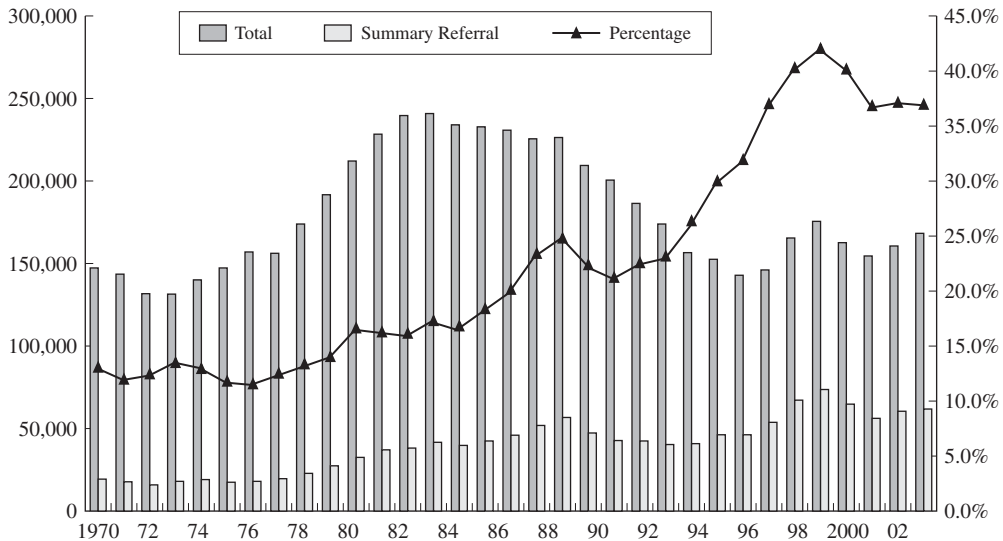
Thus social casework has been further affected for the worse under the revised Juvenile Law. This has had an adverse effect on the practice of diversion as shown by the recent changes in dispositions.

### (3) The Expansion of *Summary Referral* and the Decline of Educative Function

In contrast to the decrease in the number of dismissals, the number of *summary referrals* has expanded sharply. Since, in effect, *summary referral* works as diversion, apparently its expansion seems to be a good method of diversion.

Early release at the police stage would be beneficial to juveniles who have no serious problems and need no special intervention. It would be consistent with their *sound development* because unnecessary intervention would stigmatize them. Together with the efficient disposal of a huge amount of minor offences, this is the reason why *summary*

Figure 7 Summary Referral of Non-Traffic Offense



Annual Report on Judicial Statistics for 2002.

*referral* was established. On the other hand, there are juveniles who have committed minor offences but have serious problems in regard to their personality and environment, who are accordingly in need of adequate care and support. Such problems and needs cannot be identified when just dealing with the offence itself. For this reason, the Family Court is staffed with the Family Court Probation Officer who is an expert in human behavior and social casework. As regards *summary referral*, the problem is whether the police can distinguish such problems effectively.

Harada and Suzuki examined police data and found that re-offending rates for the juveniles processed by *summary referral* were 13.0% for males and 8.3% for females. They were almost half of that for those processed by normal referral without custody.<sup>14)</sup> In this study, however, the factors relating to re-offending were not controlled. Therefore, this finding does not mean either that *summary referral* necessarily decreases re-offending or that normal referral and the Family Court procedure increase re-offending. Whether the police can recognize the juvenile's problems and needs effectively is still open to question.

Hattori pointed out that *summary referrals* were made based on external factors of the offence, primarily on its gravity, and that they functioned in effect to reduce the amount of time and work that the police had to spend making records.<sup>15)</sup> Accordingly they did not consider fully or properly the juveniles' problems and needs.

14) Harada and Suzuki, An Analysis of the Recidivism of Juveniles Referred to Family Court by *Summary referral*, 67 *Reports of the National Research Institute of Police Science* 58, 63-65 (1994).

15) Hattori, *supra note* 10, at 62.

It is important to examine what has caused the dramatic increase in *summary referrals*. It cannot merely have been caused by changes in the nature of offences committed by juveniles. It may have been caused by the change in the criteria of referral upon which the police rely in day to day practice in spite of no change in the written criteria. According to the account of a recently retired Family Court Probation Officer, there have been more cases than before in which the amount of loss is less than 5,000 yen or the injury is not serious but there seem to be serious problems behind the minor offence, such as running away from home, school violence and motorcycle theft. Additionally the police have been manipulating the figures in many cases. For instance, in some larceny cases, a large amount of loss was divided by all accomplices into amounts of less than 5000 yen. In other cases the valuation of stolen motorcycles were inappropriately determined to achieve *summary referrals*.<sup>16)</sup> These instances should demonstrate again that the police do not consider the juveniles' problems and needs properly.

The law enforcement practice toward juveniles by the police has got tougher, as mentioned above. Apparently tougher law enforcement is inconsistent with the expansion in the number of *summary referrals*, which release the juveniles at an earlier stage. These changes of practice, however, have the same essential effect in that the police decide on the manner of disposing of juvenile cases primarily on the basis of the gravity of offence.

*Summary referral* shifts final disposal of juvenile cases from the Family Court to the police since it works practically as diversion at the police stage. The police, as I have mentioned, have no resources to discover the social background behind the offence. Expert officers on juvenile delinquency are very scarce and they are not always engaged in daily case processing. Therefore *summary referrals* are made without considering the problems and needs of juveniles properly. The cases sent by *summary referral* are dismissed with practically no social casework offered by the Family Court Probation Officer. Thus the shift of final disposal to the police accelerates the decline of educative function in juvenile justice as a whole. Although early release from the formal procedure would surely be beneficial for juveniles in almost all minor cases, the final decision to divert the cases should be made in the course of the Family Court procedure rather than at the police stage, from the viewpoint of the *sound development* of juveniles.

## 5 Conclusion

It is a main feature of the Japanese juvenile justice that all cases are referred to the Family Court and a large portion of them are diverted from protective measures as a result of social casework. There is, however, an obvious trend of overemphasis on the crime control function and a contrasting decline of the educative function. This trend caused the

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16) Ayahiko Terao, *Fifty Years of the Juvenile Law from the Viewpoint of Family Court Probation Officer* 150-151 (Gendai Jinbun Sha, 2003).

downgrading and deterioration of social casework in the Family Court procedure. The recent get-tough movement and the revised Juvenile Law of 2000 have also accelerated it. These changes have had an adverse effect on the practice of diversion.

The increase in criminal punishment will most likely not deter the very serious offences by juveniles because they are not a result of rational choice. Criminal punishment, especially imprisonment in adult penal institutions, would keep juveniles from being socially reintegrated and increase the likelihood of their re-offending. Accordingly, and ironically, the number of crime victims in the future would be increased. Since the juveniles have in many cases great need for care and support due to the serious problems with regard to their personality and environment, the serious offences by juveniles do not directly justify harsh penalties. Increase in criminal prosecutions has no more than the symbolic effect of getting the general public to believe something is being done to address the problem of juvenile delinquency. These are the primary reasons why I opposed the revision of Juvenile Law in 2000.<sup>17)</sup>

Japan is famous for its low crime rate. Several reasons have been pointed out. Harada indicated that the adult crime rate had been much lower compared with that of juveniles and that the primary reason for this was a quite low rate of re-offending by the juveniles who had been processed through juvenile justice after being in their late teens. He argued that Japanese juvenile justice, together with the good condition of the economy and labour market, had been encouraging the reintegration of juveniles and effectively preventing their re-offending.<sup>18)</sup> A central role in the reintegrative function has been performed by social casework in the Family Court procedure. It has been diverting many juveniles from formal court hearings and protective measures and returning them to the community.

Thus an essential task of juvenile justice reform should be the restoration of social casework. Additionally the educative function of the community should be regenerated in order to promote reintegration of juveniles diverted from the Family Court procedure. The social casework of juvenile justice and the educative function of the community should combine together to engender the *sound development* of juveniles.

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17) I made a statement to this effect to the Judicial Committee of the House of Representatives in 26 October 2000.

18) Harada, Juvenile Delinquency and Adult Crime in Japan, in Masami Yajima (ed), *Sociology and Daily Life* 20-33 (2<sup>nd</sup> ed, Gakubun Sha, 2001).