

Session Three: The Role of the Judiciary in Juvenile Justice

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THE ROLE OF THE FAMILY COURT IN THE ADMINISTRATION OF JUVENILE JUSTICE IN JAPAN

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I. THE JAPANESE COURT SYSTEM AND THE FAMILY COURT

A. Court Structure

Similar to other countries, there are three levels of court proceedings in Japan. There are five types of courts: the Supreme Court, High Court, District Court, Family Court and Summary Court.

The Japanese Constitution vests all judicial power in the Supreme Court and other inferior courts. No tribunal, organ or agency of the executive branch can be given final judicial power. All criminal and juvenile cases are, without exception, heard and determined by ordinary judicial tribunals.

B. The Family Court

Family Courts were established on January 1, 1949 in order to maintain peace in the family and to promote the sound upbringing of juveniles. Family Courts deal with family affair cases or disputes between family members or relatives such as spouses, parents and children. The Courts also handle juvenile delinquency cases concerning juveniles under 20 years of age, as well as adult criminal cases detrimental to the welfare of juveniles. The requisites for the jurisdiction of the Family Court over juvenile delinquency cases will be referred to in detail later.

It should be noted that, in Japan, juvenile delinquency cases are regarded as different cases from criminal cases, which are mainly dealt with by the District Courts and Summary Courts.

In the Family Court, there are approximately 350 judges including assistant judges, 1,200 court clerks, 1,500 family court probation officers, 50 medical officers, 50 nurses, and 2,350 other staff.

II. PROCEDURE FOR JUVENILE CASES

A. Characteristic Features

Since Family Courts place emphasis on preventing the reoccurrence of disputes or delinquency, they utilize flexible procedures differently from those commonly used in criminal and civil cases. In juvenile delinquency cases, the Courts take protective measures such as probation and commitment to a Juvenile Training School with a view to protecting juveniles rather than punishing them.

The following features of the Japanese system are worth mentioning.

1. The Judge

Juvenile delinquency cases are presided over basically by a single judge. The qualification of the Family Court judge is the same as of the District Court judge, except that an assistant judge, who has less than five years of experience, has the power to render any decision at his/her own discretion basically, while

an assistant judge cannot preside over a trial in the District Court. The Japanese system does not have a jury system nor assessors.

All cases are sent to the Family Court for adjudication. Unlike adult cases, as long as there exists evidence to prove the facts, police officers and public prosecutors do not have the discretion not to send juvenile cases to the Family Court. The Courts are given a broad discretion both substantially and procedurally. In this sense, the Family Court judge plays a pivotal role in juvenile criminal justice.

2. Necessity for Protection

The necessity for protection is the most important factor in determining the protective measures for the juvenile. The existence of delinquent facts is the prerequisite to take protective measures for the juvenile. However, the kind and content of protective measures basically depend upon the necessity for protection. Factors considered include the recidivist nature of the juvenile, the possibility of correction, and the appropriateness of protection as well as other factors.

3. Ex Officio Type of Hearing

When a juvenile case is referred to the Family Court, all the investigation records are also forwarded. The Family Court judge presides over the hearing, which is attended by the juvenile and his/her parents or guardian. His/her attendant, employer or school teacher also attends depending on the case. The Court delivers a decision based on the investigation records, the social inquiry report prepared by the Family Court Probation Officer and what it has heard during the hearing.

4. Non-publicity

A juvenile hearing is not open to the public in order to protect interests of privacy of the juvenile. Moreover, when the Family Court Probation Officer investigates a case (e.g., interviewing the juvenile at the Court, visiting the juvenile's family or inquiring with the school), great attention is paid not to harm the juvenile's feelings and reputation. The case record is not open either, including the social inquiry report prepared by the Family Court Probation Officer and his opinion concerning the case. The news media is not allowed to carry accounts or photographs which might identify the juvenile.

5. Separation of Handling

In Japan, a juvenile suspect or accused is separated from other suspects or accused and is kept, as far as possible, out of contact with them. Social inquiries and hearings in the Family Court are also conducted separately from other juveniles in principle.

B. Jurisdiction of the Family Court over Juvenile Delinquency Cases

The Family Court handles cases involving delinquent juveniles under 20 years of age. "Delinquent Juveniles" include not only minors who have committed criminal offences under the penal laws but juveniles whose tendencies indicate that they might commit offences in future as well.

The Court has primary jurisdiction in regard to all delinquent juveniles, whether the offences are felonies such as homicides or arsons, or misdemeanors such as traffic offences. Thus, all criminal cases concerning minors must primarily be sent to the Family Court as juvenile delinquency cases for investigation and hearing.

The Juvenile Law also provides that the Family Court has jurisdiction over a minor such as one who; (a) habitually disobeys the proper control of his custodian, (b) repeatedly deserts his home without proper

reason, (c) associates with persons having a criminal tendency or who are of immoral character, or immoral persons, or frequents places of dubious reputation or (d) habitually acts so as to harm or endanger his/her own morals or those of others, provided that looking at his/her character or environment there is a strong likelihood that the minor involved will become an offender.

Children under 14 years of age are primarily handled by the Child Guidance Centre, as provided by the Child Welfare Law when they have committed acts which, if committed by a person over 13, would constitute an offence under the penal laws. These young children come under the jurisdiction of the Family Court only when the Prefectural Governor or the Chief of the Child Guidance Centre refer them to the Family Court.

The Family Court ordinarily has jurisdiction over any juvenile under 20 years of age, and has jurisdiction over persons more than 20 years of age in certain exceptional cases.

C. Referral of Cases to the Family Court

Just as in adult cases, the police and public prosecutors are responsible for the investigation of juvenile cases. However, it must be conducted in conformity with the statutory policy for the protection of juveniles with particular concern that investigative procedures do not harm the welfare of the juveniles under investigation.

Following an investigation, if the police or public prosecutors believe that a juvenile has committed an offence, the case must be referred to the Family Court. Neither the police nor public prosecutors possess any discretionary power concerning the referral of such cases.

Other than these referrals of cases, juvenile delinquency procedures commence when the Family Court Probation Officer discovers a delinquent juvenile and reports him/her to the Court, or when the guardian of a juvenile, a school teacher, or any other person informs the Court of a case.

D. Family Court Procedures

Upon receipt of a juvenile case, the Court examines the evidence and decides whether there is probable cause. For this purpose, if necessary, the Court can take legal measures to examine the case, such as calling witnesses. When the Court believes that there is sufficient evidence to prove probable cause, it orders a Family Court Probation Officer to conduct a social inquiry to collect necessary data to decide the appropriate treatment.

1. Family Court Probation Officers and Social Inquiry Reports

The social inquiry reports are equivalent to the pre-sentence investigation and reports used for adults in some countries to determine an appropriate sentence. (However, such a system does not exist in Japan for adults.) According to the Juvenile Law, in making this inquiry, “every effort shall be made to make efficient use of medical, psychological, pedagogical, sociological and other technical knowledge, especially the result of the physical and mental examination conducted in the Juvenile Classification Home, in regard to the conduct, career, temperament, and environment of the juvenile, his guardians or of other persons concerned”.

Family Court Probation Officers have professional backgrounds in psychology, pedagogy or sociology, and are trained as social workers. The inquiry usually covers such matters as the juvenile’s character, personal history, upbringing, environment and degree of delinquency. The Family Court Probation Officer reports the investigative findings to the judge, accompanied by recommendations about appropriate treatment for the juvenile based on his/her professional knowledge and experience.

Family Court Probation Officers usually perform not only investigations themselves but also give various instructions, advice, and admonitions to the juvenile as well as to the parents to prevent further offences and help his/her rehabilitation. If the Court is satisfied that the Officer has laid down sufficient educational action to prevent further offending, the Court will dismiss the case.

The role and the function of the Family Court Probation Officer will be explained further by Mr. Kazuaki Hashimoto.

2. Juvenile Classification Homes

A Family Court judge is empowered to authorize the detention of a juvenile when it is necessary for the purpose of either an inquiry and hearing, or a diagnostic examination of a juvenile's mental and physical condition. Detention is accomplished at a Juvenile Classification Home where the necessary diagnostic examination is conducted.

Juvenile Classification Homes submit diagnostic results and classification recommendations to the Family Court to be utilized as background data for preliminary investigation by the Family Court Probation Officer, Family Court hearings, decision of treatment, and enforcement of protective measures. Detention in a Juvenile Classification Home cannot exceed 4 weeks, an exception has been introduced in the Amendments of 2000.

3. Attendant System

A juvenile, his/her parents, or legal guardians may appoint attendants. The permission of the Family Court is needed unless the attendants are lawyers. The duty of the attendant is similar to a defence counsel's role in criminal procedure: (1) to cooperate with the Court in order to ensure fair and just procedure; and (2) to protect the juvenile's rights and interests.

4. Hearing

After the completion of the inquiry and report, the Court sets the hearing date. However, when the Court thinks that a hearing is not necessary, it can dismiss the case without conducting a hearing. This disposition is taken when the delinquent's act is minor and when contact with the Family Court Probation Officer can be considered as guidance or educational action.

At the hearing, the juvenile, the parents or guardians, and the Family Court Probation Officer in charge must be present, and the attendant may be present as well. However, it is not open to the public.

The judge has wide discretion concerning the procedure of the hearing. Juvenile Law only offers the Court guidance by requiring that the hearing be conducted in a mild atmosphere with emphasis on empathy; it should also be conducted with the prompt introspection of the delinquent.

Generally speaking, the judge usually reads and explains the alleged delinquent acts to the juvenile and hears the juvenile's response. When the judge finds enough evidence of delinquent acts, he/she examines the social inquiry report to assess the juvenile's delinquent tendencies and the possibility of rehabilitation, and then hears testimony from the juvenile's parents or teachers.

When the judge thinks that it is inappropriate to decide a case immediately, or that further and more thorough investigation must be necessary before a determination can be made, the judge can, as an interim measure, order tentative probationary supervision. In such an instance, a juvenile may be placed under the supervision of the Family Court Probation Officer. During this period of supervision, the juvenile may continue to live with the person (his/her parents or guardians) who is charged his/her protection under

conditions imposed by the Family Court or he/she may be placed under the guidance of a suitable institution, agency or individual. This intermediate disposition, taken while the final determination is held in suspension, is called tentative probation and is one of the most important responsibilities of Family Court Probation Officers.

E. Adjudication

The Family Court makes a final decision on the case based upon the evidence submitted by the investigative agency, the social inquiry report and the results of the hearing.

The Court can impose protective measures only when the evidence proves the case beyond a reasonable doubt, the same as in a criminal trial. When there is reasonable doubt, the Court dismisses the case.

According to the underlying philosophy of the Juvenile Law, juvenile delinquents should not be punished but educated and rehabilitated as sound citizens through protective measures. The following categories represent the main types of final decisions rendered by the Family Court:

1. Dismissal

a. *Dismissal Without Hearing*

There are two categories for Dismissal Without Hearing:

- (1) A case will be dismissed without a hearing when there is no probable cause, or when a hearing is legally impossible for such reasons as a juvenile's insanity.
- (2) A case will be dismissed without a hearing when the Court finds it is unnecessary to take an educative measure because the delinquent act is minor and/or actions already taken by the police, school, home, or the Family Court Probation Officer are sufficient for preventing another act of delinquency.

b. *Dismissal After Hearing*

If the Court determines that admonition and advice by the judge and the Family Court Probation Officer to the juvenile will suffice in lieu of protective measures, the case is terminated through a dismissal order.

2. Protective Measures

a. *Probationary Supervision*

The juvenile is placed under the guidance and supervision, as well as the support, of the Probation-Parole Supervision Office. This is an organ of the Ministry of Justice. The actual supervision over juveniles is undertaken by the Probation Officer of the district office and he/she is aided in his/her work by volunteers from among the public who are called Volunteer Probation Officers.

b. *Commitment to Support Facilities for the Development of Self-sustaining Capacity, etc.*

The Support Facilities for the Development of Self-sustaining Capacity were established under the Child Welfare Law and managed by National or Prefectural Governments, or private persons in order to take care of delinquent juveniles or juveniles prone to delinquency. The Homes for Dependent Children created under the same law are designed to care for dependent, abused, or neglected children. The Family Court can send a juvenile to a welfare facility when deemed appropriate.

c. *Commitment to Juvenile Training School*

The Court may refer a juvenile, as a protective measure, to a Juvenile Training School where the juvenile will be accommodated for a specified period and given guidance to promote a positive attitude, as well as the ability to live a normal life.

The Court is supposed to designate the type of Juvenile Training School to which the juvenile should be committed, i.e., Primary-which care for juveniles under 16 without the necessity of medical care, Middle-which care for juveniles over 15 without aggravated criminal tendencies, Special-which care for juveniles 16 to 22 who have aggravated criminal tendencies, and Medical-which care for all juveniles 14 to 25 who need medical treatment physically or mentally.

When making the above decision, the Court may make recommendations to the Training School concerning the juvenile's treatment. For example, the Court may recommend a short-term programme which, in particular, is practically followed by the correctional authority. The term that the juvenile is accommodated for ranges from several months to 2 years, and in exceptional cases more than 2 years.

If the juvenile himself/herself or his/her legal representative or Attendant objects to the Family Court's determination, they may file a Kokoku appeal in the High Court. In addition to that, they may make a Sai-kokoku appeal to the Supreme Court from an order dismissing an appeal only on limited grounds.

3. Others

a. *Referral to Prefectural Governor or Chief of Child Guidance Centre*

When the Court thinks that it is more appropriate for the juvenile to be treated under the Child Welfare Law rather than a protective measure under the Juvenile Law, it may refer a case to the Prefectural Governor or the Chief of the Child Guidance Centre for his/her administrative guidance or supervision. However, this is only available for juveniles under the age of 18.

b. *Sending of Cases to Public Prosecutors*

Family Courts may transfer cases to public prosecutors for criminal prosecution in the same manner as adult criminal cases, when they conclude that criminal punishment is more appropriate for a juvenile who is not less than 14 years of age. Before this decision, the Family Court considers such factors as the gravity and circumstances of the offence, the juvenile's culpability, and the record of previous delinquency. Possible situations for which a case may be sent to a public prosecutor include: (1) when the juvenile's culpability is so advanced that protective measures cannot improve the juvenile; and (2) when the presumed criminal punishment is the imposition of a fine.

Juveniles who have reached adulthood during the proceedings of the Family Court must be sent to the public prosecutors for that reason.

F. Actual Situation of Disposition

According to the White Paper on Crime 2000, the total number of delinquents adjudicated by the Family Courts in 1998 was 285,415. The final disposition by the Family Courts is broken down as follows:

1. Dismissal without Hearing	138,063 (48.4%)
2. Dismissal after Hearing	71,095 (24.9%)

3. Probation Order	54,545 (19.1%)
4. Commitment to Support Facilities for the Development of Self-sustaining Capacity or Homes for Dependant Children	343 (0.1%)
5. Commitment to Juvenile Training Schools	5,485 (1.9%)
6. Referral to the Prefectural Governor or the Director of Child Guidance Centre	170 (0.1%)
7. Referral to Public Prosecutors (suitable for criminal punishments)	11,218 (3.9%)
8. Referral to Public Prosecutors (age of 20 and over)	4,496 (1.6%)

The breakdown of juvenile delinquents by offence is as follows:

1. Violations of the Road Traffic Law	93,142(32.6%)
2. Larceny	92,253 (32.3%)
3. Traffic negligence	37,849(13.3%)
4. Embezzlement	32,332 (11.3%)
5. Bodily Injury	8,644 (3.0%)
6. Extortion	5,372 (1.9%)
7. Violations of the Law for Control of Poisonous and Powerful Agents	3,386 (1.2%)

G. Juvenile Criminal Cases

1. Sending of Cases to Public Prosecutors

Upon receipt of a juvenile case from the Family Court based on the reason that the juvenile's culpability is so advanced that protective measures cannot improve the juvenile, the public prosecutor is obliged, in principle, to prosecute the case in the criminal court as long as he/she believes that there exists sufficient suspicion to support prosecution. This situation is an exception to the discretionary power of the public prosecutor.

2. Exceptional Provisions

There are several exceptional provisions concerning juvenile criminal cases, some of which are as follows:

- a. In the case that a person who is under 18 years of age at the time of an offence is to be punished with death, he/she shall be sentenced to a penalty of life imprisonment. Penalty for life can be mitigated to imprisonment with or without labour for not less than 10 years nor more than 15 years.
- b. In the case that a juvenile is to be punished with imprisonment of which the maximum period is more than three years, he/she shall be given an indeterminate sentence which prescribes the maximum and minimum periods within the limit of the said penalty. However, in the case where he/she is to be punished with a penalty of which the minimum period is more than five years, the minimum period shall be reduced to five years. The minimum indeterminate period of imprisonment is five years and the maximum indeterminate period is 10 years for a juvenile. These provisions concerning indeterminate sentences are not applicable when the Court grants suspension of execution of sentence.

3. Transfer of Cases to the Family Court

The Juvenile Law states that in the case that a criminal court deems it proper, as the result of the

examination of facts, that an accused juvenile shall be subject to protective measures, it shall, by a ruling, transfer the case to a Family Court.

The existence of both systems may appear to be contradictory, namely that the Family Court can send cases to a public prosecutor and that the criminal court can transfer the cases to the Family Court. However, the purpose of the system is to ensure the most appropriate disposition for juveniles through scrupulous and careful consideration.

III. RECENT DEVELOPMENT OF JUVENILE LAW IN JAPAN

A. Introduction

The juvenile justice system in Japan has been greatly discussed. Compared to other countries, the central characteristic is the continuous dominance of a paternalistic philosophy, although the Amendments of 2000 pose interesting challenges to this classical philosophy.

B. History of Juvenile Law in Japan

1. Enactment of the present Juvenile Law

To understand the Amendments, it is advisable to have a brief survey of the history of the system and the debate.

Until 1948, delinquent juveniles were treated in accordance with the Juvenile Law, which was enacted in 1922 and put into effect in 1923. This old juvenile law separated the treatment and criminal prosecution for juveniles from adults. It established Juvenile Tribunals to examine and decide on those cases referred to them for protective rehabilitative measures. However, Japan rushed into the Second World War before this old Juvenile Law had really become effective.

After the Second World War, Japan changed its legal frame-work as suggested by the General Headquarters of the Allied Forces occupying Japan. In the late 1940s and early 1950s, fundamental changes were brought about in the whole legal system including the juvenile justice system. In July 1948, which was exactly the time when the paternalistic philosophy was most dominant in the United States, the present Juvenile Law was enacted with reference to the juvenile justice system in the United States, and was a complete revision of the old Juvenile Law. Although the law was drafted referring to the American juvenile justice system as mentioned previously, it seemed to have fit Japanese society very well. The judges, Family Court Probation Officers, and all people concerned with juvenile justice have done their best to improve practices.

2. Discussion on Amending the Juvenile Law

From about the late 1950's, offences committed by juveniles of the upper age group, 18 and older, became a serious problem in Japan. In 1977, the Justice Ministry's legislative Council submitted recommendations to the Minister of Justice that Juvenile Law be amended, in expanding the participation of public prosecutors in proceedings, implementing different treatment methods with the upper age group of juveniles, and so forth. However, there were strong objective opinions to this recommendation. For almost 20 years, reforms on the recommendation had not been realized, due to the conflict of opinions. Meanwhile, the mainstream of juvenile delinquency in Japan shifted to middle and lower age groups, i.e. from 14 to 17 years of age.

In 1993, there occurred the so-called Yamagata-Mat case, in which a junior high school student, 13

years old, died having been bound up with a mat in the school gymnasium in Yamagata prefecture. Seven students were suspected of assault causing death, and six of them were referred to the Family Court. This was really a difficult case. The Court held a number of hearing sessions, and the fact found by the Court was that three students assaulted the victim and the other three had not. The former three appealed, and the High Court suggested, in the judgment, that the latter three had also committed the assault. This case was widely reported, and frustrated society very much. The juvenile justice system faced severe criticism that there is no guarantee that truth is found in the system, as the juvenile justice system was so different from the criminal justice system. In addition to the Yamagata-Mat case, there were also some cases reported in which fact-finding was difficult.

In 1997 there occurred the so-called Kobe case, in which a 14-year-old juvenile killed an 11-year-old boy in a very bizarre manner. This case made the headlines in the morning papers all over the country, and it was so shocking that tough opinions were expressed. In addition to the Kobe case, there were some other atrocious crimes committed by juveniles which were reported.

The Ministry of Justice started studying what measures should be taken to improve or strengthen the fact-finding functions of the Family Court after the Yamagata-Mat case. The Ministry drafted a bill in 1999 to improve mainly the fact-finding functions following the recommendation of the Justice Ministry's legislative Council of 1999.

However, more than a few members of the Diet thought that the bill drafted by the Ministry was not enough because it did not meet the pressing demand to deter serious and atrocious offences committed by juveniles. Thus a Project Team was organized in the Diet and members drafted a new bill to reform the Juvenile Law, based on the bill drafted by the Ministry, taking into account the aspects of deterring serious offences and reflecting the increasing concern for victims' issues.

The bill drafted by the Project Team was passed by the Diet in October 2000, and it came into effect 1 April 2001.

C. The Amendments of 2000

The Amendments of 2000 consist of three components in accordance with the history with which the bill was drafted; i.e. it focussed on 1) the disposition policy of juveniles, 2) the fact-finding functions, and 3) due respect for victims. Some of the important points of these reformations are as follows:

1. Amendments to the disposition policy of juveniles

- According to the Amendments, the minimum age of a juvenile against whom a criminal prosecution can be initiated was lowered to 14 years from the previous of 16 years. When a juvenile is sentenced to imprisonment according to the above reform, he/she serves the sentence in Juvenile Training School if the correctional authority regards this to be proper.
- The previous law stipulates that the Family Court shall refer cases to the public prosecutor on the basis of the view that the minor should be subjected to normal criminal procedure due to the serious nature of the offence or the circumstances of the case. The Amendments added to this provision state that in a case where a juvenile, 16 years or older, commits an intentional offence and this causes death of a person, the Family Court shall firstly consider criminal prosecution, i.e. sending the case to the public prosecutor. However the Amendments to the provision also stipulate that when the Family Court, after investigation, finds another disposition more proper than criminal punishment, then it shall exercise its discretion not to send the case to the public prosecutor.

2. Improvement of fact-finding procedures

- The Amendments introduced a collegiate body of three judges to juvenile justice, in order to deal with difficult cases.
- On the one hand a hearing procedure without the public prosecutor and an attendant who is a lawyer (hereinafter referred to as lawyer attendant) would have some difficulty in examining the case from every angle, especially in cases where the juvenile denies the fact. On the other hand, in such cases, the Court does not want to give the impression to the juvenile that the Court is hostile to him/her since the Court's function is to give educative cautioning or guidance after finding he/she has committed an offence.

The Amendments introduced the procedure where the public prosecutor and the lawyer attendant attended hearings in certain cases. When the Court deems that the above new procedure is suitable, it decides to have the prosecutor attend the hearing, and if the juvenile has not retained a lawyer as an attendant, the Court has to appoint a lawyer as an attendant.

- According to the previous rule, a period of detention in the Juvenile Classification Home should not be over 2 weeks, and if necessary it is permissible to prolong their period by another 2 weeks at the Family Court's discretion. The Amendments accepted that if the Court takes steps to examine evidence, such as calling a witness to fact, then the Court could prolong detention by another 2 weeks twice (i.e., the maximum term is 8 weeks).

3. Due respect for victims

In Japan, criticism that victims have not been treated properly in criminal procedure stimulated the new legislation of 2000, i.e. the laws for the protection of crime victims. The Amendments of the Juvenile Law of 2000 also considered the proper treatment of victims in the juvenile field. It includes the following:

- The victim of the incident can inspect or copy the documents relevant to the accused fact.
- The victim can state his/her opinion of the case in the procedures.
- The victim shall be notified of the Family Court decision.

4. Effects of the Amendments on the Juvenile Justice System in Japan

The effects the Amendments will have on the practices of juvenile justice in Japan are difficult to predict. However, at least the following can be pointed out.

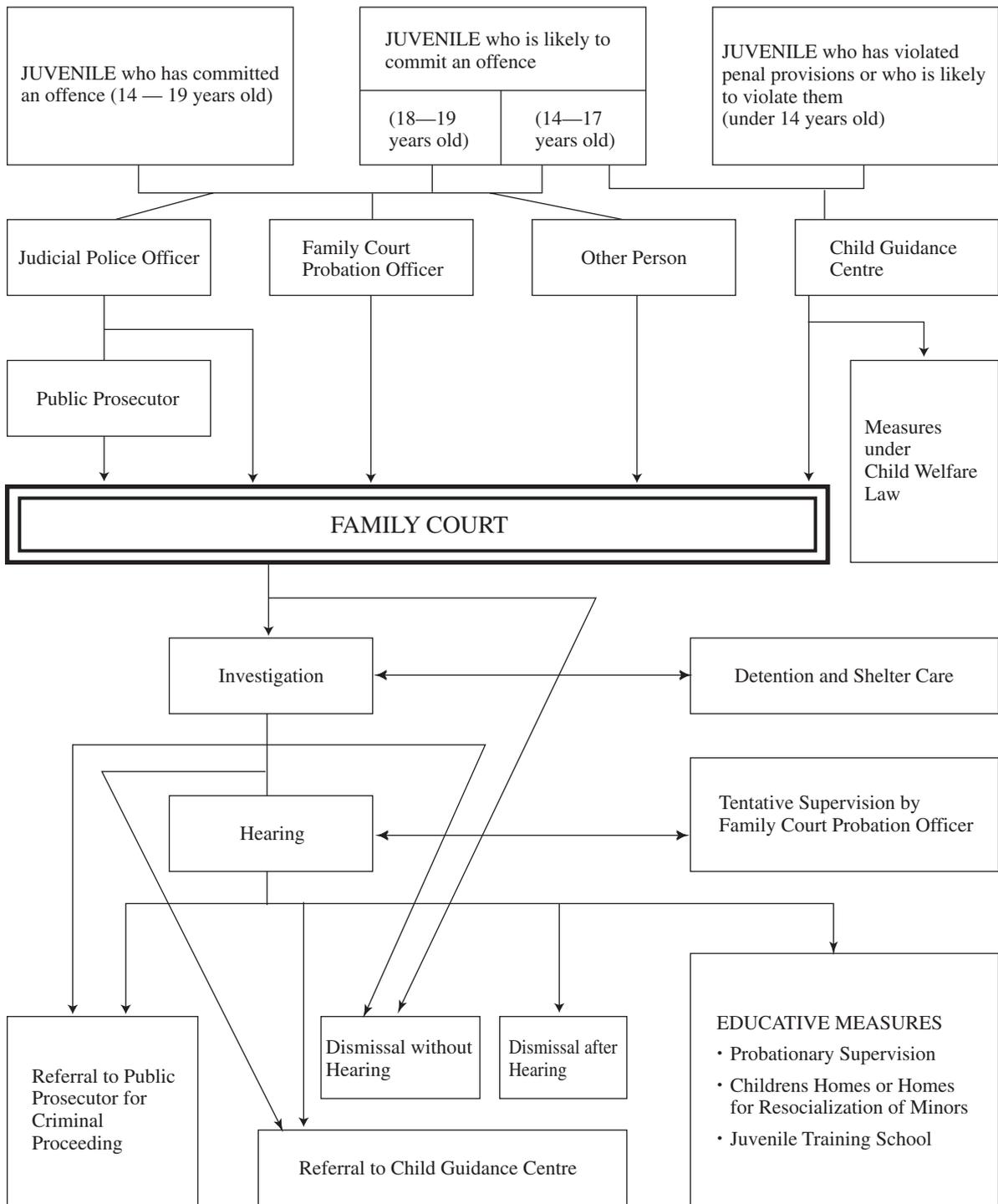
It is certain that the procedure for the improvement of fact-finding functions will be applied to limited cases, i.e. serious offences and, at the same time, when the Court is facing difficult problems in fact-finding. Accordingly most cases are heard without the public prosecutor attending. It is often pointed out that one of the most characteristic features of the Japanese judicial system is the strong will to ascertain the truth. The Family Court is expected to probe into the facts of serious juvenile cases. The Amendments expressed in the new procedure will help the Court to find facts so that the findings by the Court will get more credibility from society.

The effect of the Amendments to the disposition policy is more delicate. The provision does not state that all serious cases have to be referred to the public prosecutor and put under criminal sanction. The Family Court still has wide discretion and consequently heavy responsibility to exercise that

discretion. I should also add that if a juvenile case is referred to the public prosecutor, and the juvenile is tried before the Criminal Court, the sentences the juvenile will receive from the Criminal Court is more lenient and educative than those for adults, as is typically seen in the indeterminate sentence system. The prison system of Japan also generally lays emphasis on rehabilitation. It is, therefore, misleading to simply describe the new Japanese disposition policy as tough justice.

As for the Amendments regarding victims, it is sure a step to enhance the victim's rights.

These analyses lead us to the conclusion that the strong character of paternalism in the Japanese juvenile justice system will be maintained, but the Family Court has to be more sensible in the effects that case dispositions can have on society including victims. The juvenile justice system should be designed to harmonize the needs and interests of juveniles, victims, and society. Although the Amendments were the fruits of discussion brought about by some domestic cases, and elaborated by recent political circumstances in Japan, the Japanese experience provides some useful information.



THE ROLE OF FAMILY COURT PROBATION OFFICERS IN JAPAN

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I. Introduction

In Japan, the family court is a special court dealing with family affairs and juvenile delinquency cases. The family court system is organized with judges, secretaries and clerks. In addition, approximately 1500 family court probation officers are assigned to these courts. I am going to tell you about the role of the family court probation officer in Japan. There are 4 main points. The first is an outline of the family court probation officer. The second, features of educational action by the family court probation officer. The third, I would like to state my opinion about the role of the family court probation officer. And lastly, I would like to talk about future prospects of the Japanese Family Court.

II. An Outline of the Family Court Probation Officer

The position of Family Court Probation Officer was created on June 1, 1954, unifying the functions of the Juvenile Protection Officer and the Family Affairs Investigation Officer. The post of this Juvenile Protection Officer was set up on January 1, 1949, and that of the Family Affairs Investigation Officer on April 1, 1951. The reason for establishing these two separate posts with essentially the same functions had been only historical. The unification materialized as a large step forward for achieving one of the Family Court's goals, i.e., a comprehensive settlement of family problems regardless of whether the most conspicuous symptoms happen to be domestic relations or juvenile cases.

Most of the family court probation officers have degrees in psychology, pedagogy and sociology. After being appointed, they serve a 2-year apprenticeship, and during this period they take a training course at The Research and Training Institute for Family Court Probation Officers (set up in 1957 by the Supreme Court) in order to improve their knowledge and skills in the human sciences such as medical science, psychology, sociology, pedagogy, and economics. The Institute also offers advanced courses to senior family court probation officers. Furthermore, the curriculum includes psychological testing or therapeutic interviews, and several programs on special topics such as school violence, substance abuse, developmental disorders and attention deficit hyperactivity disorder.

The family court performs both judicial and welfare functions. Family court probation officers play a more important part in the welfare function. The family court probation officer, who is working on a juvenile case, is commanded by a judge to investigate the juvenile from a scientific standpoint. Their investigation begins by inviting the juvenile and custodian to court. Family court probation officers begin the investigation by hearing each case and search as to a cause of the misdeed, the character of the juvenile, his / her behavioral tendencies, life history and environment (i.e., home, school, place of work, friends and acquaintances). They listen to juveniles and their parents carefully, patiently, and empathetically. They also attempt to establish a positive relationship and focus on their needs and concerns. At times, as occasion demands, they may use psychological tests to evaluate a juvenile's outlook and to explore their potential. The family court probation officers examine all pertinent issues whether they are objective or subjective. The family court probation officers then report on the investigation's results, which then play a significant role in deciding the most effective and proper means of treating the juvenile.

The purpose of the family court probation officers' investigation is an attempt to predict the

possibility of the same misdeed. Family court probation officers visit the area, the school and the home where the juvenile lives in the process of this investigation, and there can be an assessment of the information and an understanding of the reality of the juvenile.

We call such an investigation a “social investigation” and distinguish between this investigation and a “legal investigation” from the standpoint of the law which a judge does. This “social investigation” constitutes a main part of the scientific investigation in the family court.

III. Features of Educational Action by Family Court Probation Officers

In 1999, according to the Annual Report of Judicial Statistics (table 1), we can find that about 60% of cases were decided by being dismissed without hearing or dismissed after hearing. Most of all juvenile cases are investigated by family court probation officers. In the process of the investigation, juveniles are offered educational treatment. Judges decide when no additional educative measures seem to be needed. Therefore, the percentage of dismissals is higher. Such educational action is expected to prevent the repetition of offenses and avoid the negative effects of stigmatization and contribute to the sound development of juveniles.

A. Educational Action Followed by Dismissal

There are various approaches to educative action. For example, they include: (1) interviews; (2) lecture classes; (3) community service work; (4) camps for training activities. A brief explanation is as follows.

(1) Interviews (Therapeutic Interviews, Intervention and Consultation)

Family court probation officers use some psychotherapeutic techniques that can help juveniles and / or their parents have an insight, as well as greater knowledge of their abilities to resolve their problems, and also explore appropriate ways of problem-solving. The types of psychotherapy, which family court probation officers apply, vary according to the aims and conditions of the interview. The most important technique in all kinds of psychotherapy is the skill of “active listening”, for example; looking, nodding, summarizing, clarification, re-framing, positive-feedback, eye contact, allowing silence, and so on.

On the other hand, family court probation officers have to teach juveniles the legal and social system used to deal with crime and delinquency. In this case, family court probation officers also use psychotherapeutic skills so that juveniles can acknowledge their responsibility and be encouraged to overcome the disadvantageous results of their behavior. If their parents have lost confidence in guiding their children, family court probation officers can assist them, too.

In some instances, family court probation officers intervene in the juveniles’ lives and give them some specific advice and instruction. For example, some juveniles tend to give up the idea of continuing schooling or obtaining employment as the result of “mental stigmatization”, or labeling himself or herself as a “problem child”. If juveniles are pessimistic about their future, family court probation officers duly concentrate on their strengths, and encourage them not to abandon hope. If dropping out of school or employment is likely and this is likely to cause more delinquency, family court probation officers may instruct them not to play truant or to get a job, and follow a juvenile’s progress in this regard. At times, family court probation officers may intervene between juveniles and their schools.

Restitution is another example, If restitution has not been achieved, family court probation officers may recommend that youth offenders and their parents take action to compensate or determine a plan for

restitution, on the grounds that restitution could be a way of increasing an offender's understanding of real loss or harm to the victim.

(2) Lecture Classes

For example, a juvenile who has driven a motorcycle without a driver's license would be assigned to a traffic lecture class. In that class, audio-visual teaching materials, such as educational videos and articles about accidents, are utilized. Similarly, those who have abused glue would be given lectures on the dangers of glue sniffing. In these classes, the medical officers of the family court do a thorough health check of the juvenile, and comment on the pharmacological actions of various drugs. The family court probation officers examine their knowledge of drugs and investigate their drug dependency. The family court probation officers also let juveniles think about how to recover for themselves.

(3) Community Service Work

If appropriate, family court probation officers arrange for juveniles to experience a volunteer job. The purpose of this arrangement is to provide an opportunity for juveniles to help others, but not to inflict punishment on them. In other words, the order to perform community service work is made as an educational and restorative measure rather than one of punishment. Most of the community service work arranged for juveniles is carried out at old peoples' homes, nurseries and institutions for handicapped people.

(4) Camps for Training Activities

Short-term camps are arranged for those who seem to have problems in their interpersonal relationships or lack adequate social skills. So far, few family courts in Japan have implemented this program. In this program, the juveniles go through various groups, assertiveness training, social skills training, sensitivity training as well as some recreational activities.

B. Educational Action in Tentative Probationary Supervision

If the family court finds it improper to decide a final disposition, tentative probationary supervision, or intermediate disposition, can be ordered. Ordinarily, tentative probationary supervision is adopted when the probability exists that juveniles may reform and improve within society if appropriate educational action is taken. The family court then decides a proper final disposition after considering the result of the tentative probationary supervision.

Typically, the juvenile is placed under tentative probationary supervision for a reasonable term (from about four to six months). During this period, the family court probation officer meets the juveniles and their parents at regular intervals and devises various educational methods. Sometimes juveniles under tentative probationary supervision are sent to a suitable institution, agency or individual. Some run businesses such as restaurants, transportation businesses, construction firms, and so on. Some are run by social welfare organizations. In any case, most of them are private institutions, and their staffs voluntarily guide the juveniles.

IV. Role of Family Court Probation Officers

Family court probation officers investigate under the orders of a judge. In the investigations, family court probation officers gain a lot of information mainly through interviews with juveniles and their parents. Sometimes, they use many kinds of psychological tests in order to have a more detailed knowledge about their psychological states. The purpose of the investigation is, of course, understanding the delinquency from all directions, and choosing the most adequate treatment.

By the way, probation officers are not only in family courts, but also in probation offices. The technical official in a juvenile classification home is similar to a family court probation officer. The big difference between family court probation officers and those in other institutions is the content of the investigation. Family court probation officers' investigation is not only about the juvenile's personality and behavioral tendency, but they also address the social investigation such as the home, school and working place environment. Family court probation officers can take part in treatment more closely than other probation officers. The typical example is educational action that is given by family court probation officers.

There is another important difference. The family court is established as a court not only for juvenile delinquency but also for domestic affairs. And the reason why juvenile cases are treated in family courts is that juvenile delinquency is mostly related to domestic problems. For the improvement of juveniles, solutions to family problems are strongly needed. For example, if there is a juvenile whose parents are about to divorce and the conflicts in the home adversely affect their emotions, the solution of the parents' relationship might be very important for the juvenile's recovery. Another example is a juvenile who commits delinquency repeatedly because of his parents' ill-treatment. Then the ill-treatment itself should be taken up as a problem to be solved first. Therefore probation officers in the family courts have widely organized professional knowledge and the skills of sciences related to human beings. They demand solutions to both juvenile cases and domestic cases.

In Court, there are many occupations other than the judge's; that is; the secretary, the clerk, etc. Recently, it is important to be clear about what the role of each occupation is. The judge is literally "a judge" who makes decisions. And the secretary is said to be a "court-manager" who is in charge of the preparation and custody of official documents such as case records. The secretary is responsible for legal research for the judges to whom they are assigned. But there is no definitive view about what a family court probation officer is yet.

When somebody asked me in the past, I answered that the family court probation officer had to be called a "court-player". Everybody didn't agree with me at that time, because they thought I meant "court" as in "tennis court". Which was true. Still I believe that the family court probation officer is a "court-player". The Family Court has different functions from that of the District Court or the Summary Court. One of the main characteristics is that there are probation officers in it. Family court probation officers use a variety of scientific knowledge and skills to collect much information about juvenile cases, not only in the court, but also in their home or in their communities. The family court probation officer looks like a tennis player running around the "tennis" court. In addition, I think a tennis player hitting a ball smashed by another player is similar to a family court probation officer searching for problems experienced by juveniles. This, I believe is the "role as a player". Family court probation officers must be court players, and he must have the knowledge, wisdom, mobility and maturity of a specialist.

V. Future Prospects of the Japanese Family Court

In Japan, the number of juveniles who were arrested for criminal offenses peaked in 1951, 1964, and 1983. It showed a decreasing tendency thereafter, but it has been increasing since 1996 and started decreasing in 1999.

Recently offenses of a serious nature like robbery occur frequently and a lot of people insist that there should be more severe measures even in juvenile cases. Cases where juveniles deny their delinquency have been increasing. Then, family courts often have taken pains to examine whether the delinquent fact could be proved. In such situations, public opinion for amending the Juvenile Law has been getting stronger and stronger. Therefore the Juvenile Law was revised on April 1, 2001.

There are 3 main points to the Amendments. The first is a greater weight given to the due process of

proving facts. The second, the re-examination of measures in juvenile delinquency cases. And lastly, to have a much better understanding of the victim.

The family court has to review this social movement carefully and use these amendments of the Juvenile Law sincerely. However, most juvenile delinquents come from homes which suffer from domestic disputes or conflicts, and they need education and protection while they are rehabilitated. I, as a family court probation officer investigating juvenile cases, can find a lot of points where they are different from grown-up criminals. One of them is, there is the possibility of true rehabilitation. That is true even if the case was very serious. And another point is that delinquent juveniles are easily affected by the environment; if the environment is changed correctly, they can often improve their behavior. Just like during a water and soil shortage, no grass can grow in an undesirable environment, juveniles cannot grow without a sound mind. It is not rare that once a good environment is provided, they begin to grow towards positive socialization. Therefore, the family court has to investigate more substantially and choose an appropriate treatment once it understands a juvenile's character.

Finally, as one of the measures in the prevention of juvenile delinquency, the whole of society in Japan must prevent child-abuse by parents or other adults. Recently in Japan, child-abuse cases have been reported often, and it has become a big social issue. Child-abuse itself did not begin recently. But, I recognize, it is time to think again about child-abuse issues, one by one. Therefore, in Japan, adding to the Child Welfare Law, the Law for the Prevention of Child-Abuse was enacted. It has been in force since October 2000.

The relationship between child-abuse and delinquency has been pointed out a long time ago, but the measures have not been efficient. For example, juveniles who have been suffering physical abuse from their parents or other familiar adults for many years since childhood often commit violence in their adolescence. In other cases, a girl who has been sexually abused by her father tends to think of her own body as unimportant and she often becomes drug dependent or sexually promiscuous. Thus, it is confirmed that many causes of delinquency are related to child-abuse from their parents or other familiar adults in their childhood. But in almost all of these cases, appropriate measures were not taken, at the right time when they were suffering. Therefore, the prevention and punishment of child-abusers is needed for the prevention of juvenile delinquency.

In the family court, the judge can decide upon steps to deprive parents of their parental authority, refuse visitation rights to their children, and send the child to a protective institution for abused children against the parent's wishes. The family court is one of the most important institutes concerning the prevention of child-abuse. The same for juvenile delinquency, the whole of society expects a lot from the family court, and requests a much more positive and speedier resolution for child-abuse cases.

Therefore to save children's lives, the family court must keep trying to decide upon appropriate measures. The family court probation officers are on a special mission to prevent child-abuse.

Table 1. Kinds of Juvenile Delinquency and Dispositions in 1999

The Annual Report of Judicial Statistics

Kind of Juvenile Delinquency	Total Number of juvenile delinquents		(1)		(2)		(3)		(4)		(5)		(6)-1		(6)-2		Transfer	
	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%
Theft ①	42,095	100	1,674	4.0	100	0.2	6,823	16.2	82	0.2	191	0.5	7,921	18.8	25,304	60.1	0	0.0
Bodily injury	8,005	100	885	11.1	49	0.6	3,041	38.0	14	0.2	104	1.3	2,407	30.1	1,505	18.8	0	0.0
Extortion	5,113	100	485	9.5	23	0.4	1,883	36.8	10	0.2	29	0.6	1,412	27.6	1,271	24.9	0	0.0
Violence	616	100	11	1.8	2	0.3	98	15.9	2	0.3	7	1.1	219	35.6	277	45.0	0	0.0
Intimidation	30	100	2	6.7	0	0.0	9	30.0	0	0.0	0	0.0	12	40.0	7	23.3	0	0.0
SUBTOTAL ②	13,764	100	1,383	10.0	74	0.5	5,031	36.6	26	0.2	140	1.0	4,050	29.4	3,060	22.2	0	0.0
Robbery	1,250	100	493	39.4	6	0.5	591	47.3	1	0.1	45	3.6	89	7.1	25	2.0	0	0.0
Killing	47	100	21	44.7	2	4.3	9	19.1	0	0.0	11	23.4	3	6.4	1	2.1	0	0.0
Arson	84	100	39	46.4	0	0.0	24	28.6	3	3.6	2	2.4	13	15.5	3	3.6	0	0.0
Rape	390	100	257	65.9	4	1.0	87	22.3	0	0.0	28	7.2	13	3.3	1	0.3	0	0.0
SUBTOTAL ③	1,771	100	810	45.7	12	0.7	711	40.1	4	0.2	86	4.9	118	6.7	30	1.7	0	0.0
Fraud	239	100	21	8.8	1	0.4	71	29.7	0	0.0	8	3.3	60	25.1	78	32.6	0	0.0
Embezzlement of lost articles	8,687	100	31	0.4	5	0.1	363	4.2	8	0.1	18	0.2	965	11.1	7,297	84.0	0	0.0
Purchase/Receipt of stolen goods	664	100	7	1.1	0	0.0	50	7.5	1	0.2	2	0.3	80	12.0	524	78.9	0	0.0
Obscenity	333	100	67	20.1	2	0.6	131	39.3	0	0.0	8	2.4	78	23.4	47	14.1	0	0.0
House-breaking	793	100	26	3.3	2	0.3	161	20.3	4	0.5	10	1.3	151	19.0	439	55.4	0	0.0
(A)	261	100	49	18.8	0	0.0	148	56.7	0	0.0	3	1.1	51	19.5	10	3.8	0	0.0
(B)	41,384	100	61	0.1	0	0.0	8,114	19.6	0	0.0	2,244	5.4	20,629	49.8	7,621	18.4	2,715	6.6
others	1,121	100	91	8.1	4	0.4	359	32.0	2	0.2	33	2.9	313	27.9	319	28.5	0	0.0
SUBTOTAL ④	53,482	100	353	0.7	14	0.0	9,327	17.6	15	0.0	2,326	4.3	22,327	41.7	16,335	30.5	2,715	5.1
(C)	636	100	39	6.1	3	0.5	223	35.1	0	0.0	10	1.6	195	30.7	166	26.1	0	0.0
Firearms and Swords Control Law	231	100	6	2.6	1	0.4	36	15.6	0	0.0	5	2.2	37	16.0	146	63.2	0	0.0
Minor offense	273	100	1	0.4	0	0.0	13	4.8	0	0.0	0	0.0	47	17.2	212	77.7	0	0.0
Anti-Prostitution Law	29	100	0	0.0	0	0.0	14	48.3	0	0.0	1	3.4	7	24.1	7	24.1	0	0.0
Stimulant Drugs Control Law	785	100	357	45.5	0	0.0	347	44.2	0	0.0	34	4.3	24	3.1	23	2.9	0	0.0
(D)	173	100	1	0.6	0	0.0	0	0.0	0	0.0	1	0.6	33	19.1	138	79.8	0	0.0
(E)	3,553	100	188	5.3	15	0.4	995	28.0	2	0.1	66	1.9	1,122	31.6	1,165	32.8	0	0.0
others	1,849	100	67	3.6	0	0.0	638	34.5	0	0.0	76	4.1	292	15.8	776	42.0	0	0.0
SUBTOTAL ⑤	7,529	100	659	8.8	19	0.3	2,266	30.1	2	0.0	193	2.6	1,757	23.3	2,633	35.0	0	0.0
Pre-delinquency ⑥	872	100	157	18.0	107	12.3	292	33.5	54	6.2	0	0.0	160	18.3	102	11.7	0	0.0
SUBTOTAL 1: (①)+(②)+(③)+(④)	111,112	100	4,220	3.8	200	0.2	21,962	19.8	127	0.1	2,743	2.5	34,416	31.0	44,729	40.3	2,715	2.4
SUBTOTAL 1: (①)+(②)+(③)+(④)+(⑤)+(⑥)	119,513	100	5,036	4.2	326	0.3	24,520	20.5	183	0.2	2,936	2.5	36,333	30.4	47,464	39.7	2,715	2.3
SUBTOTAL 2: (SUBTOTAL 1)-(B))	78,129	100	4,975	6.4	326	0.4	16,406	21.0	183	0.2	692	0.9	15,704	20.1	39,843	51.0	0	0.0
Road Traffic Law	101,065	100	541	0.5	0	0.0	29,570	29.3	0	0.0	12,029	11.9	30,447	30.1	16,543	16.4	6,935	6.9
TOTAL	220,578	100	5,577	2.5	326	0.1	54,090	24.5	183	0.1	14,965	6.8	66,780	30.3	64,007	29.0	9,650	4.4

* Kinds of juvenile delinquency

- (A) : obstruction of the performance of official duties
- (B) : bodily injury through negligence in the conduct of one's occupation
- (C) : Law for Punishment of Acts of Violence, etc.
- (D) : Immigration-Control and Refugee-Recongnition Act
- (E) : Law for Control of Poisonous and Powerful Agents

* Disposition

- (1) : To commit the juvenile to a Juvenile Training School
- (2) : To commit the juvenile to a Child Education and Training Home or The Japanese Orphanage
- (3) : To place the juvenile under the probationary supervision of a Probation Office
- (4) : To place the juvenile under the child welfare office's supervision of a Child Guidance Center
- (5) : To send the case to a Public Prosecutor
- (6)-1 : To dismiss the case after a hearing
- (6)-2 : To dismiss the case without a hearing

THE ROLE OF THE FAMILY COURT IN THE ADMINISTRATION OF JUVENILE JUSTICE IN KENYA

Hon. Justice Mr. Joyce ALUOCH
High Court Judge, Kenya

The Family Division of the High Court of Kenya became operational from 15th January, 2001, after the launch by the Hon. Chief Justice in December, 2000.

Prior to the launch, the Hon. Chief Justice had appointed an administrative Committee to work towards the establishment of the Family Division. The Committee held a work-shop which came up with various recommendations, one of which was to have a separate Juvenile Justice System in Kenya. This has not been achieved and I think some of the reasons are, first because the Family Division is a very new Division, and we are all in a learning process of how to go about things, and secondly, the decision lies with the Hon. Chief Justice. Ours was a mere recommendation. Thirdly and most important is the Children's Bill which is currently in Parliament awaiting debate and which if passed could have facilitated the process.

I say this because the Children's Bill makes provisions for "Children's Court" in part VI thereof. The Jurisdiction of such court's will be both civil and criminal in nature. Section 69(d) proviso (iii) reads,

"The Chief Justice may, by a notice in the Gazette appoint a Magistrate to preside over cases involving children in respect of any area in the country."

This by implication means that Children's Courts will be manned by Magistrates. Appeals will lie to the High Court and further to the Court of Appeal.

As the Family Division of the High Court is now functional, I can safely assume that such appeals will lie to the Family Division of the High Court.

Otherwise at the moment, the Family Division of the High Court only has original jurisdiction in cases under the Guardianship of Infants act, Chapter 144, Laws of Kenya. Jurisdiction under this Act is limited to the High Court only, and it is jurisdiction of a civil nature as opposed to criminal. The overriding principle under the act which the court has to consider whilst making decisions is the "welfare of the infant." This principle has been inco-operated in the new Bill in Part II on "Safeguards for the Rights and Welfare of the Child". Clause 3(2) provides

"3(2) in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interest of the child shall be a primary consideration".

Currently, the Family Division of the High Court exercises jurisdiction in the following matters

- (i) Probate and Administration
- (ii) Marriage Divorce and Judicial Separation
- (iii) Division of Matrimonial Property
- (iv) Maintenance and Alimony
- (v) Guardianship of Infants and persons under mental incapacity
- (vi) Custody, adoption and legitimacy
- (vii) Burial Disputes

Jurisdiction of the Family Division is civil in nature. That is the jurisdiction it exercises whilst handling matters falling under the seven headings listed above.

Though presently issues of juveniles are not specifically mentioned as issues being handled by the Family Division it is obvious that during proceedings of Marriage and Divorce and or Judicial Separation, the issue of maintenance of the children of the marriage must be gone into by the court. So the Family Division, listening to such disputes must make appropriate orders for the maintenance of children, and also orders for payment of school fees to enable children to continue with their education even when there is a dispute between their parents.

Cases of custody of children, adoption and legitimacy and Probate and Administration are also handled by the Family Division.

Permit me to say that for the time being the Family Division of the High Court was launched in Nairobi and it is operational in Nairobi where it has the principal Registry, manned by an experienced Senior Deputy Registrar and about 8 or so other members of staff. Three High Court Judges are attached to the Division.

As the Hon. Chief has stated publicly whilst officially opening work-shops or Conferences of the Judiciary, the Family Division of the High Court will be created in every station where there is a High Court Registry. But even before that is done, it is worth noting that even presently High Court Judges stationed in different parts of the country do handle cases involving family matters. Magistrates also handle cases of divorce, separation and maintenance, adoption of children, and custody.

In the new Children's Bill, the jurisdiction in Part XII on adoption of children will be exercised only by the High court. Presumably this should be the Family Division of the High Court. The Bill introduces International adoption for the first time. This is not provided for specifically in the present Adoption Act, Chapter, 143, Laws of Kenya. However, such adoption orders have in the past been made,

“when the court is satisfied that there are special circumstances which justify, as an exceptional measure the making of an adoption order”.

Broadly speaking, this is what I see as the Role of the Family Division of the High Court in the Administration of Juvenile Justice in Kenya.

In conclusion, I would like to say that the Family Division does appreciate the plight of the most vulnerable in society, i.e women and children and with the onset of the HIV/AIDS pandemic resulting in so many deaths, the Division has paid special attention to the Law of Succession.

The Kenya Women Judges Association in conjunction with CIDA – CANADA and the Judiciary has organised work-shops for Judicial Officers and paralegals handling Succession Causes. So far the work-shops have covered Nyanza, Western and Central Provinces. The Rift Valley and Coast Provinces are yet to be covered.

Judges and only Magistrates duly gazzeted to handle Succession Causes attend these work-shops and go through the provisions of the Succession Act in an effort to fully understand the provisions and also agree on a common approach to adopt in Succession Causes in order to achieve uniformity. These are actually workshops for capacity building, to enable Judicial Officers and paralegals to serve the Kenyan public better and in accordance with the Law.

The Succession Act is fairly technical in nature. The mode of litigation is by the use of set forms, which are found at the back of the act. Litigants are required to complete the forms and then file them in

the Registry. Most of the work is done in the Registry and also on the desk of the Deputy Registrar. The Judge or Magistrate, as the case may be only gets “the tail end” of the whole thing.

Since its inception, the Family Division of the High court has tried to make this procedure cheap simple and quick. We have made the forms available in the Registry at a nominal fee of Kshs.5/= per form. A whole set of 7 forms which one requires to apply for a full grant of Letters of Administration plus the court order to issue the grant of Letters of Administration intestate, will cost a litigant a total of Kshs.2,350/=. The cost of advertisement in the Kenya Gazette costs Kshs.2,735/= and finally, the application for confirmation of Grant, plus the supporting affidavit costs Kshs.550/=.

In total, a litigant needs only Kshs.6,735/= to get a full grant of Letters of Administration issued and duly confirmed from the Family Division of the High Court.

This is what I mean when I say that the Division has tried to make litigation cheap, simple and quick. Anybody comparing this with the fees charged by practicing lawyers will agree that the lawyers fee is too high and discourages litigants from coming to court.

For the short period the Family Division has been in existence we have found that most litigants in the area of Succession are women, who come for legal documents for themselves and their children. We are doing our best to cater for all Kenyans, in the Family Division of the High Court.

THE ROLE OF THE JUVENILE COURT: IN THE ADMINISTRATION OF JUVENILE JUSTICE IN KENYA

**Mrs. Scholastica OMONDI
Senior Resident Magistrate,
Nairobi Juvenile Court, Kenya**

Honourable Judges of the Court of Appeal present here, Judges from the High Court, Fellow Magistrates, Distinguished Guests from different Governmental Departments, Members from Non-Governmental Organizations, Participants, Delegates, Ladies and Gentlemen, I feel most honoured to be able to speak to you today on this important subject of Administration in Juvenile Justice in Kenya. May I take this opportunity first and foremost to thank the organizers of this conference i.e. the Judiciary through the Training Committee and UNAFEI for having made it possible for all of us, stake holders in Juvenile Justice to meet and deliberate on issues affecting our children. I have been asked to speak on The Role of the Juvenile Court in the Administration of Juvenile Justice in Kenya.

The Juvenile Court is a Special Court created under section 3(1) of Chapter 141, Children's and Young Persons Act, which reads:

“For the purpose of hearing all charges against persons under eighteen years of age, except in cases where they are charged jointly with any person or persons over the age of eighteen years, and for the purpose of exercising any other jurisdiction conferred on Juvenile Courts by or under this or any other written law, there shall be courts called Juvenile Courts constituted in accordance with the provisions of this section”

The Juvenile Court is therefore a Special Subordinate Court created for the purpose of hearing cases of children (upto age 18) who are in conflict with the law.

In determining such cases, the Juvenile Court follows the Adversarial Legal System in Kenya. The charge is read to the subject in a language that he understands best, with the help of an interpreter. The subject is expected to plead to the charge. Due to lack of legal representation, most children, having had no legal advice before the plea, more often than not, plead guilty, and the court disposes of the case in one of the several ways provided for by in section 25 of Cap 141, Laws of Kenya.

Where however, the subject pleads not guilty, the child is granted bond with a surety. The court does not insist on security since most of these children come from humble families and cannot afford to raise sureties or cash bail.

The relatives of the child, if they can be traced, become sureties to the children and they do undertake to bring the child to court when required to do so for hearings or mentions of their cases. The relatives have been very co-operative with the courts and there have not been incidences where children released on bond have failed to turn up in court.

Once the case is listed for hearing, it takes a maximum of three months to dispose of the case. The hearing of the evidence against the child is the most challenging task of a Juvenile Court Magistrate. This is because, the child, due to age and immaturity does not comprehend fully, (if any) the seriousness of the offence he/she is charged with and the consequences.

The adversarial system is also not friendly to the child. The child does not know his/her rights during the trial. The Trial Magistrate cannot therefore remain absolutely impartial during the proceedings.

The Trial Magistrate must therefore explain to the child the proceedings and assist in probing the witnesses, for clarification where necessary. Where there is a case to answer, the challenges of the magistrate are even greater. When the child is put on his/her defence, they are unable to answer the allegations made out against them. The majority of them opt to keep quiet.

Whether a plea of guilty is entered by the child himself/herself or entered by the Magistrate after the trial, the child's case is disposed of in a reformatory manner to help the child become a better person in society, to reintegrate him, and to help him realize that what he did was wrong and that it should not be repeated.

Apart from the criminal matters, the Juvenile Court also handles cases of Children in Need of Protection and Discipline, as well as Protection and Care.

The Protection and Discipline cases are largely cases of children who have shown anti-social behaviour, but have not yet come into conflict with the law. This is a way of preventing them from reaching that stage. They include children who are trouble shooters in the community, those who refuse to go to school, those who form groups which engage in activities that are not for their benefit. These children need to be guided and counseled by social workers, under whose supervision the court places them.

The Protection and Care cases include children on the streets for various reasons, orphans, abandoned children, lost children, abused and neglected children. The Juvenile Court makes appropriate orders depending on the nature of the case.

In cases of the abused and neglected children, two files may be opened and be heard in the same Juvenile Court. There would be a file for the protection and care of the abused and/or neglected child, and yet another file for the charge against the person who neglected/abused the child. This therefore, is one instance where an adult may be charged in the Juvenile Court, but nothing stops the charge from being heard by the Ordinary Courts.

The trial of a child should be as private as possible, and the court must be cleared of all uninterested parties before the proceedings begin. If possible, such proceedings should take place in the Magistrate's Chamber. The only people allowed to attend the trial are the child, the victim, their relatives, court officers and any other person whom the court so allows.

Before a Juvenile Court makes a disposal order, it is necessary, that a Social Workers' Report is produced in court by the Children's Officers or Probation Officers to assist the Magistrate to make a decision in the best interests of the child.

What therefore are the various orders that the court may make? Section 17 of Cap 141 provides that where a court is satisfied as to the guilt of a child, one or more of the following orders may be made:

- (a) Discharging the subject unconditionally or with conditions.
- (b) Discharging the subject and requiring him to undertake to do or not to do certain things, and this may be with or without sureties.
- (c) He may be placed under the supervision of a Probation Officer.
- (d) He may be committed under the care of a fit person who may be a relative or not, an Approved Society or a Voluntary Institution, willing to undertake his care.
- (e) If the offender is under the age of 16 years, he may be sent to an Approved School suitable to his needs and attainments.

- (f) Ordering corporal punishment.
- (g) By ordering the offender to pay a fine, compensation or cash or any or all of them. The offender is made to pay back to the victim.
- (h) By ordering the parent/guardian of the offender to pay a fine, compensation or costs.
- (i) By ordering the parent/guardian of the offender to give security for his (offender's) good behaviour thereafter.
- (j) Imprisonment.
- (k) Where the offender is 15 years or more, he may be sent to a Borstal Institution.
- (l) He may be dealt with in any other lawful manner. Here the magistrate has a wide discretion and could for example place the child under community service – provided the child is over 16 years of age and the kind of work is not too demanding or too hard to be performed by the child. The child must be able to learn some skill from the community service.

Provision (f) and (j) i.e. Corporal Punishment and imprisonment are controversial. The Pending Children's Bill attempts to outlaw them and so when the Bill becomes law, they will no longer be applicable.

Where a child is in need of Protection or Discipline, Section 25 (i) Cap 141 provides that the court may:

- Order him to be returned to his parent/guardian or
- Order his parent/guardian to execute a bond with or without sureties to exercise proper care, and guardianship or
- Commit him to the care of a fit person, whether a relative of the child or not, or an Approved Society willing to undertake his care.
- Commit him under the care of a Local Authority, or a fit person, Approved Society or Voluntary Institution willing to take care of him e.g. Non-governmental Institution.
- The child may also be placed under the supervision of an Approved Officer, an Inspector of Children, a Children's Officer or some other persons appointed by the court for a period not exceeding three years.
- The child may also be sent to an approved school, if that would serve his interest

These orders may be varied, revoked or reviewed from time to time by the court on its own motion or on the application of any person.

The Juvenile court therefore plays a very important role in the protection of children from abuse and or neglect. It is also important in trying to prevent children from committing crime, and for those who have already come into conflict with the law, the court tries to ensure that they do not repeat the mistakes, by placing them under the supervision of various Social Workers.

The facilities available at the Juvenile Court however, are not adequate to offer the children full protection.

There is for example only one Juvenile Court in Kenya, based in Nairobi. There is need to set up similar Juvenile courts all over the country. With the support of all stakeholders gathered here today, we hope that *ad hoc* Juvenile Courts will be transformed into Specialized Courts designed as Juvenile Courts, so as to bring Juvenile Justice closer to as many children as possible.

It is my humble appeal to all stakeholders to assist in the setting up of these courts where possible, for child protection is everyone's business.

Thank you all for listening to me.