Contemporary Comment

PROSECUTORIAL DISCRETION AND CONDITIONAL WAIVER: LESSONS FROM THE JAPANESE EXPERIENCE

A unique characteristic of prosecutorial discretion in Japan is the formal practice of suspension. From the later part of last century, public prosecutors were presented with the discretionary option of waiving or suspending prosecution dependent on certain conditions. According to the law of the time,

> the prosecutor should inevitably institute prosecutions if he had found the offender to be guilty a reasonable doubt ... because of increasing numbers of convicted prisoners, the government suffered from overcrowding prisons and increased expenditure for prisoners. The practice (of suspended prosecution) was introduced in order to alleviate the suffering of the government at first.[1]

What makes this admission concerning the expedient motivation behind the development of a particular prosecutorial discretion all the more remarkable is that it prevails within contemporary public prosecution policy in Japan. The practice was legislated for in 1922 by the provisions of the former Code for Criminal Procedure (Article 279). The present criminal procedure code in Japan provides (Article 248) that "if after considering the character, age and situation of the offender, the gravity of the offence, the circumstances under which the offence was committed, and the conditions subsequent to the commission of the offence, prosecution is deemed unnecessary, prosecution need not be instituted."

The suspension of prosecution in Japan has now developed into a formal disposition available to the public prosecution service. It should be distinguished from those decisions taken by common law prosecutorial agencies such as the Directorates of Public Prosecution in the States of Australia, and the Crown Prosecution service in England, which amount to a choice not to continue with prosecution. These decisions are not determined as forms of diversionary practice, but rather are admissions as to the inappropriate or futile likely consequences of a continued prosecution.

Suspension of prosecution in the Japanese system has developed into what amounts to a conditional waiver. In this respect the Public Prosecutor's Office considers a suspension of prosecution from the point of view of whether the offender is able to continue his social existence as a productive citizen and "whether social discipline shall be maintained or not without penal sanction to the offender."[2] The decision to suspend prosecution is governed by the informal practice of the Japanese prosecutorial service. Formal guidelines are not

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1 Miura, M, "Characteristics of the Role of Japanese Public Prosecution — the power of investigation and the discretionary power of prosecution" (1992), unpublished paper presented to 90th Internatinal Seminar of UNAFEI, Tokyo, Japan, at 8.

2 Id at 9.

prepared nor are they published to govern the exercise of this discretion. It becomes clear in discussions with the service that each case is dealt with in terms of the individual potential of the offender to reintegrate, the risk posed to the community by the offender and the offence, the community desire for formal punishment, and the possible deleterious effects of a custodial sentence on the offender.

Suspension of prosecution, or conditional waivers, are widely used in Japan. For example, the percentage of such suspensions as against the total number of possible and actual prosecutions in 1990 was 26.2 per cent. In other words in Japan a quarter of the offenders coming to the notice of the Public Prosecutor were given suspended prosecution even though it had been found by the prosecution service that sufficient evidence was available to proceed to trial. It is recognised by the public prosecution service in Japan that this discretionary process of suspension provides a potential for the abuse of power. In order to avoid accusations that the exercise of suspension is discriminatory or corrupt, three systems have been created to guard against such a consequence.

1 Constraints Within the Public Prosecutor's Office

Japanese prosecutors work in a system of seniority. Younger public prosecutors submit the dispositions of controversial cases to senior prosecutors. This is the case with all recommendations to suspend. Senior prosecutors with experience of office policy on suspension give a second opinion on such dispositions.

2 The "Quasi-Prosecution"

Regarding this mechanism, Article 262 of the Code for Criminal Procedure states that

> if in a case with respect to which complaint or accusation is made concerning the offences mentioned in Article 193–196 of the Penal Code or Article 45 of the Subversive Activities Prevention Law (these articles provide for cases of abuse of authority), the complainant or accuser is dissatisfied with the disposition made by a public prosecutor not to prosecute, he may apply to a District Court having jurisdiction over the place of the Public Prosecutor's Office to which the public prosecutor belongs, for committing the case to a court for trial.

Subsection 2 states "the application mentioned in the preceding paragraph shall be made by submitting a written application to the public prosecutor within 7 days from the day on which the notice mentioned in Article 260 was received." Therefore while not taking on the form of an appeal process, the views of the complainant which arise as a consequence of a suspension of prosecution are essentially addressed before the suspension is concerned.

Article 264 of the code of Criminal Procedure provides "a public prosecutor shall institute prosecution if he considers that the application mentioned in paragraph 1 of Article 262 is well founded." Even if the District Court believes that a prosecution should not have been suspended, the final decision remains with the Public Prosecutor's Office. It has been conceded however that should the court recommend that a prosecution should

ensue, it is highly unlikely that the Public Prosecutor's Office would not comply with such a determination.

Article 266 of the Code of Criminal Procedure states that:

> on receipt of the application mentioned in paragraph 1 of the following classification:
> i) in the event of the application having been made contrary to the form fixed by law or ordinance after the right of application has extinguished or of its being without grounds it shall be dismissed;
> ii) if the application is well founded the case shall be committed to a competent District Court for trial.

In such a situation Article 267 recognises the possibility of a "quasi-prosecution" by providing that if a ruling in the form of subsection 2 of Article 266 is forthcoming, then the prosecution shall be deemed to have been instituted on that case.

During the District Court's consideration of the suspension of prosecution the prosecutor concerned may not be called in person to give explanation of his decision, but rather be required to submit a statement of explanation that indicates the rationale for the exercise of his discretion. Relevant considerations may include the severity of the sentence, and the repentance and contrition of the offender. The Judge may then consider the submissions of the complainant, or deal with the matter ex parte.

3 THE INQUEST OF PROSECUTION

The most unique of the mechanisms for reviewing this form of prosecutorial discretion is that which casts the motivations for the decision against the concerns of the community. Article 30 of the Law for the Inquest of Prosecution states that:

> in case the victim of a crime or any person other than such victim who has demanded prosecution or a person who has demanded prosecution in a case which shall be tried only on the demand of a specified person or a person who has sustained a damage or injury from a crime, is not satisfied with the public prosecutor's disposition that he will not institute public action in the criminal case concerned, he may apply to the Inquest of Prosecution having jurisdiction over the place where the Public Prosecutor's Office to which the said public prosecutor belongs is situated for the examination as to whether or not the disposition is proper; provided that the same shall not apply in the case provided for in item 4 of Article 16 of the Court Organisation Law, and in the case connected with the crimes violating the provisions of the law concerning the prohibition of private monopoly and the methods of preserving fair trade.

The mechanism of this inquest is that 11 lay representatives selected at random from the community are charged to examine the merits of the decision not to prosecute in the light of public conscience and community desires for punishment. The decisions of the inquest are not binding and the recommendations revert to the Public Prosecution Office for reconsideration. The usual response of the prosecutor is to commence a reinvestigation in an effort to accumulate further evidence, or to reinvestigate the evidence on hand. In this regard the function of the inquest is to give the public prosecutor the option to reassess their original decision.

Article 40 of the Law of Inquest of Prosecution stipulates the procedures for the inquest determination:

> The Inquest of Prosecution shall, when it has made a decision as a result of examination, prepare a written decision containing the reasons therefore, send its copies to the Chief of the District Public Prosecutor's office who directs and supervises the public prosecutor concerned and to the Committee for Examination of Qualification of the Public Prosecutors, put up notice of the gist of the decision on the bulletin board of the secretariat of the Inquest for 7 days after such decision has been made, and in case a person has made an application in accordance with article 30, serve notice of the gist of the decision to that person.

However, again ultimately the fate of the suspension rests in the hands of the public prosecutor. Article 41 of the Law of the Inquest of Prosecution empowers the Chief Prosecutor of the District Public Prosecutor's Office that where a copy of the decision has been sent to him in accordance with the provision of the preceding article, take proceedings for an indictment, if he deems after consideration of the decision a public action should be instituted.

Regarding the possible reactivation of a suspension or a conditional waiver, the public prosecutor can at any time choose to proceed to prosecution because the suspension will only be considered prior to the institution of formal trial proceedings. Decisions on reactivation will depend on the conditions influencing the original suspension, and the duration of the offender's crime-free existence following suspension. While the time frame of the suspension is relevant, it will not formally bind determinations to reactivate.

CONCLUSIONS

Obviously the potential provided by such formal system of suspension is influenced by the powers, status and origination of the public prosecution service in Japan. These in turn are affected by —

i) the investigation and prosecution powers of the Japanese prosecutor;

ii) the relevance of contrition in Japanese culture;

iii) the relevance of informal diversion in the Japanese criminal justice process;

iv) the absence of private prosecutions in Japan;

v) the power of public prosecutors in Japan to lay charges;

vi) the traditional removal in Japan of police from the prosecution process.

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