

AN OVERVIEW OF DIVERSION AND THE PRISON SITUATION IN JAPAN¹

6 October 2015
YAMASHITA Terutoshi (Mr.)
Director of UNAFEI

I. INTRODUCTION

This paper provides an overview of diversion and the prison situation in Japan. The information presented here lays the foundation for discussing the issues relating to the treatment of women offenders. As stated in the name, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) remind us of the importance of non-custodial measures. In so doing they have returned the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) to the spotlight. In this sense, the Bangkok Rules and the Tokyo Rules are mutually reinforcing instruments, and they should be promoted together. As UNAFEI was involved in formulating the first drafts of the Tokyo Rules in the 1980s, I greatly appreciate the activities of the Thailand Institute of Justice (TIJ) related to the Bangkok Rules.

As you know, academics and practitioners tend to view legal issues from the perspective of their own legal systems and practices. To some extent, this habit cannot be helped, but it often leads to misunderstanding. Thus, this paper outlines the Japanese criminal justice system by considering differences from other systems with reference to relevant statistics. Then it addresses the current situation of prisons in Japan.

II. CHARACTERISTICS OF THE JAPANESE CRIMINAL JUSTICE SYSTEM

Let me start by pointing out some characteristics of the Japanese system:

- A. Public prosecutors have the authority to conduct investigations in cases referred by the police as well as to initiate investigations by themselves.

¹ The views expressed in this paper are solely those of the author, and are neither those of the Government of Japan nor other official entities, including UNAFEI.

- B. Japan does not have a system of private or police prosecution, nor does it have a grand jury or preliminary hearing conducted by judges.
- C. Wire-tapping and undercover operations are generally prohibited.
- D. Public prosecutors have discretion to drop cases even when the evidence is sufficient to secure a conviction. Although this disposition is called “suspension of prosecution”, in practice it is identical to non-prosecution. Many factors are taken into account, especially the possibility of the suspect’s rehabilitation without formal punishment.
- E. Instead of private prosecution, the Prosecution Review Commission, which consists of ordinary citizens, reviews prosecutors’ non-prosecution decisions, and the Commission has the authority to bring such cases to the court under specific conditions.
- F. All cases are handled by professional judges²; serious cases are tried by a three-judge panel and others by a single judge. One exception is the recent adoption of the lay judge system in 2009, which added lay judges to the panels of judges who handle certain serious cases.
- G. Neither immunity nor plea-bargaining is allowed.
- H. The standard of proof at criminal trial is “beyond a reasonable doubt.” “Preponderance of evidence” is not enough to convict. Moreover, prosecutors bear the burden of proving all material elements of the crime, including both *actus reus* and *mens rea*. In practice, prosecutors are very careful to ensure that the evidence meets this standard before they decide to prosecute
- I. Hearsay evidence is not admissible in principle. A statement before a prosecutor or a police officer may be admissible under rigid conditions concerning necessity and credibility.
- J. Each party is entitled to appeal to a higher court to contest fact-finding, the judgement (including acquittal) and sentencing.

² However, this was not the case for the period from 1928 to 1943.

III. JAPAN'S DIVERSION SYSTEM FROM A STATISTICAL PERSPECTIVE

In order to give you a rough idea of how suspects and defendants are diverted from the main stream of the criminal procedure in Japan, I would like to show the statistics from the White Paper on Crime, 2014 edition (Appendix, slide No. 2). The number of the Penal Code cases reported to investigative agencies amounted to around 1.9 million throughout Japan in 2013. Out of those cases, approximately 880,000 suspects were identified. Due to the fact that some suspects commit more than one crime, the clearance rate (detection rate) was 52.0 percent. As for special law offences, such as cases relating to drugs, traffic violations, etc., the number of cases and suspects was almost the same because unknown cases are not counted in the statistics, which reached 450,000 (cases/suspects). The number of suspects totaled 1.33 million in 2013.

Turning to the number of defendants sentenced to imprisonment, only 23,000 defendants (or 1.73 per cent) were sent to prison. Accordingly, almost all defendants are diverted from imprisonment under Japanese criminal procedure:

- A. Prosecutors have discretion to avoid formal prosecution by choosing options such as non-prosecution and requesting summary proceedings that only impose fines, and
- B. The court may suspend the execution of a sentence of imprisonment

Current statistics show that non-prosecution has been utilized for 830,000 (or 62 per cent) of all criminal defendants; summary proceedings resulting in fines and no prison time have been used for 310,000 defendants (or 23.31 per cent); and suspended execution of sentence has been imposed by the courts for 32,000 defendants at a rate of nearly 60 per cent among formal trial cases.

These statistics demonstrate the important role played by the prosecutors in terms of evaluating which suspects should be tried in open court. In other words, defendants who are tried in open court or sentenced to imprisonment without suspended execution of the sentence are the so-called "elite" criminals.

At the same time, I would like to explain several points in order to avoid possible misunderstanding of the Japanese system and statistics.

First, the statistics include very minor offences such as theft of a bicycle on the street, shoplifting of goods of very small value, assault without injury or with very minor injury, etc. These cases account for the high rate of non-prosecution.

Second, summary prosecution is the procedure when suspects admit their guilt in writing and accept imposition of fines up to 1,000,000 yen (US\$ 8,000). Prosecutors can request a local court judge to impose a fine merely by examining documentary evidence sent from the prosecutors. Summary prosecution cannot result in imprisonment.

Third, even defendants who admit their guilt are tried in open court. This is a significant difference from plea-bargaining systems which skip fact-finding when guilty pleas are entered and proceed directly to sentencing. This is one of reason that suspended execution of sentence accounts for nearly 60 per cent of those formally prosecuted annually.

Finally, you may notice that the figures do not add up to 100 per cent. This is because figures are rounded off and the years of the statistics are different. Nevertheless, these statistics provide a rough idea of the extent to which diversion is used in the Japanese criminal justice system.

IV. THE LEGAL SYSTEM AND PRACTICES ENABLING DIVERSION

The Japanese criminal justice system has a number of built-in characteristics that facilitate diversion. These characteristics ensure that prosecutors properly evaluate each offender in order to determine whether diversion is appropriate. The legal basis and practices that enable prosecutors to evaluate the suspects are as follows (Appendix, slide No. 4):

A. Exclusive Authority for Prosecution and for Requesting a Detention Order from a Judge

The Japanese system allows both the police and prosecutors to investigate criminal cases in general and to request a judge to issue an arrest warrant, but the power to request a detention order and prosecutorial discretion are solely vested in prosecutors.³ In a sense, prosecutors are expected to confirm the legality and appropriateness of the investigation conducted by the police. This system facilitates prudent decisions before the initiation of prosecution.

³ See section II.B, above.

B. Prosecutorial Discretion

Among non-prosecution decisions made by prosecutors, over 90 per cent of those cases result in “suspension of prosecution”. Suspects in such cases are not prosecuted even when the case against them is strong.⁴ According to the Code of Criminal Procedure (CCP) Article 248⁵, public prosecutors may decide not to prosecute a case based on their consideration of the following factors:

1. The offender’s character, age and situation. For example, whether the offender has a previous criminal record;
2. The gravity of the offence;
3. The circumstances under which the offence was committed. For example, the motivation for the offence, and whether or not and to what extent the victim was at fault in provoking the offence; and
4. Conditions subsequent to the commission of the offence. For example, whether or not and to what extent compensation for damages have been made; whether or not the victim’s feelings are remedied; settlements between both parties; the effect on the local community; and whether or not the offender repents the commission of the offence.

Historically speaking, this discretionary power was introduced by the leadership of the Minister of Justice in the 1880s in order for offenders who committed minor offences to rehabilitate themselves in their communities, as well as mitigating prison overcrowding at that time. Although no law explicitly gave such power to prosecutors and the prevailing academic interpretation of law was against such power, prosecutors continued to exercise suspension of prosecution. As a result, the CCP of 1922 introduced an article similar to the present Article 248 which established the legal basis for prosecutorial discretion.

A question naturally arises as to whether or not certain criteria or guidelines have been stipulated for exercising suspension of prosecution. In fact, there are no such guidelines. The power is exercised based on past practices and experiences, which are similar to unwritten and customary laws established

⁴ See section II.D, above.

⁵ Article 248 (CCP): “Where prosecution is deemed unnecessary owing to the character, age, environment, gravity of the offence, circumstances or situation after the offence, prosecution need not be instituted.”

inside the prosecution.

The Prosecution Review Commission (Inquest of Prosecution) was introduced in 1948, and it is a safeguard against malpractice or inappropriate practices in deciding non-prosecution based on both suspension of prosecution and other reasons such as the insufficiency of the evidence.⁶ The Commission is an independent organ consisting of 11 ordinary citizens selected by lot. The Commission is located in the same building of the district court, and its secretariat normally consists of a court clerk transferred under a periodic rotating system. Under a 2009 amendment to the law establishing the Commission, if the Commission twice rules that a case should be prosecuted, a designated private attorney who exercises the powers of a prosecutor is required to prosecute the case even if prosecutors refuse to do so. However, such cases are extremely rare. Only 11 persons/cases were brought to court, and only two persons/cases resulted in findings of guilt (one case is on appeal) over the last six years.

C. Degree of Certainty in Proving a Case for Prosecution

The court requires proof beyond a reasonable doubt in order to convict a defendant: this standard is common throughout the world. On the other hand, the criteria for prosecution are not well established. There are various criteria such as preponderance of evidence, reasonable prospect of conviction, etc. Japanese prosecutors adopt the same criteria as necessary to support a conviction in court, that is, proof beyond a reasonable doubt. This is because the criminal court proceedings impose disadvantages and burdens on each defendant. Adopting a high standard to prosecute protects human rights and results in early diversion from the criminal proceedings. This policy is responsible for the high conviction rate in Japan (around 97 per cent of contested cases in courts of first instance).

D. Utilization of Summary Proceedings

An overwhelming majority of cases were disposed through summary proceedings; for example, 310,000 suspects received fines, which is over three times the number of formal prosecutions and 5.6 times the number of cases resulting in imprisonment and suspended execution of sentence. Summary proceedings also function to mitigate overcrowding in prison and detention houses, which accommodate persons awaiting trial.

⁶ See section II.E, above.

E. Investigative Authority of Prosecutors

In order for prosecutors to identify suspects who deserve criminal punishment and to decide whether the suspect should be tried in the open court, referred to summary proceedings, or should not be prosecuted, prosecutors need to conduct investigations and interviews of the victims, witnesses and concerned persons close to a suspect.

V. CURRENT SITUATION OF PRISONS IN JAPAN

After realizing the thorough screening system and practices during the Japanese criminal procedure, you may presume that certain types of prisoners committed very serious offences, such as repeat drug offences, theft, organized crimes or street crimes committed by *Yakuza* (Japanese mafia), etc. Japanese institutional corrections face challenges in dealing with the following types of prisoners:

A. *Yakuza*

The National Police Agency reported the population of *Yakuza* at around 80,000 (members and quasi members included), but its population decreased to 58,600 in 2013 (Appendix, slide No. 5). Whether the *Yakuza* population has actually decreased is doubtful because the recent strict policy against organized crime groups may not have counted them in the police survey. The percentage of *Yakuza* among all prisoners has decreased from nearly 30 per cent in 1992 to around 9 per cent in 2012. Slide No. 6 of the Appendix shows the population of *Yakuza* in the prisons compared to that in the society.

B. Drug Offenders

In Japan, methamphetamine (a stimulant drug) is prevalent, and it accounts for a majority of drug offences prosecuted, that is, for personal use or possession. Drug traffickers or dealers are difficult to detect and prosecute. One of the reasons is that investigators need to clear strict conditions for wiretapping and undercover operations. Investigators have to identify drug dealers based on the statements of drug users, which entails problems of their credibility. Almost all drug users prosecuted for the first time receive suspended execution of sentence, so that those who were sentenced to imprisonment without the suspension are repeat

drug offenders. Over 25 per cent of prisoners newly sent to the prisons are drug-related offenders (Appendix, slide No. 7). Some of them are members or quasi-members of organized crime groups.

C. Repeat Offenders (Recidivists)

As a result of the evaluation of suspects during the criminal investigation, repeat offenders tend to be prosecuted and sentenced to imprisonment without suspended execution of sentence. Slide No. 8 of the Appendix shows the percentage of repeat offenders sentenced to imprisonment among those newly received by the prisons. In 2013, 58.9 per cent of all prisoners were ex-prisoners (43.3 per cent of female prisoners).

D. Female Prisoners

Crimes committed by Japanese women peaked in number in 2005 and have since been on the decline. Offences by girls under 20 have decreased sharply since the beginning of the 21st century. On the other hand, offences by elderly women are increasing (Appendix, slide No. 9). However, about two-thirds of the crime committed by women involves shoplifting at large scale shopping centers or convenience stores. The value of the goods shoplifted is not so high, but they are prosecuted and sentenced to imprisonment because of repeating the same crimes.

E. Elderly Prisoners

“Elderly prisoners” are those over 64 years old. As seen in slide No. 10 of the Appendix, the number of elderly prisoners has been increasing, and in 2013, it became five times that of 1994. Japanese society has been facing a phenomenon, that is, an aging population. This same phenomenon is found in the prisons. There are no direct or clear causes for ageing in the prisons. Theft accounts for a large portion compared to other crimes. One reason may be the insufficiency of social welfare. Another possible reason, although nobody mentions it, is the amendment of the Penal Code in 2006 that made theft punishable by fine of not more than 500,000 yen. Before the amendment, theft was only punishable by imprisonment of up to ten years. Prosecutors dropped simple theft cases such as shoplifting because of the small amount and low value of the goods, even in cases where suspects repeated shoplifting. However, after the amendments, if a suspect was

already prosecuted by summary proceeding and punished with a fine, prosecutors tend to feel that more severe action is needed to punish a repeat offence. If this analysis is correct, amending criminal laws to support one law enforcement agency may affect and cause unexpected results in other criminal justice organizations. The criminal justice system is an integrated mechanism that functions as an entire process. It is critically important to understand a particular issue in the context of the criminal justice system as a whole. This is one of basic principles on which UNAFEI places great emphasis, that is, taking an “integrated approach” to problem solving.

VI. CONCLUSION

There is a saying that the situation of prisons in a particular country reflects the real society of the country. Thus, I recommend that legal practitioners should visit and observe prisons and prisoners in order to grasp the society itself. If you visit a prison in Japan, you will realize what the Japanese society is and how Japanese behave in the society. A famous Japanese writer who was a medical doctor called the Japanese society “A Straight Jacket Society”, which means that Japanese were well organized but behave under various unwritten rules and regulations. You may sense this if you observe a prison in Japan.

On the other hand, looking at photos or watching TV reports on prisons and prisoners may be useful, but they will not help you understand the real situation of the society. For example, when I toured a prison in one Asian country, I saw that the prisoners wore only shorts—they had no shoes and no shirts. While this seemed strange to me inside the prison, my experiences outside of the prison revealed that ordinary citizens were dressed in a similar manner. Thus, you cannot understand the real society merely through photos and videos.

This same cautionary approach should be applied to the criminal justice system in Japan. It is important to be mindful of how a system is implemented and functions in a particular country. Although academic research and study may provide some clear ideas useful to improving some legal systems, it is also important to probe into details and consider the effects that such changes may have on the present systems.