PROSECUTORIAL DISCRETION IN JAPAN: A RESPONSE

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Marsha Goodman's *Prosecutorial Discretion in Japan*, with its thoroughly researched description of the manner in which that discretion is exercised—including several new case studies—is an important addition to English-language literature on the Japanese legal system and raises numerous interesting issues regarding the Japanese criminal justice system.

Goodman focuses much of her attention on the lengthy battle over the abuse of prosecutorial discretion doctrine in Japan. This discussion provides a fine example of a classic pattern of legal debate in Japan. As in this case, defense counsel familiar with an issue frequently initiate movements for change in criminal procedure standards by advocating new legal theories and drawing public attention to a particular issue. Following these initial efforts by practitioners, academics often take up the cause, generating a plethora of different theories. These often turn on fairly fine gradations in approach and on occasion reach exactly the same conclusions on somewhat different grounds.

In some cases, such efforts result in adoption of new criminal procedure standards by the courts (with success occurring most often in those cases where the academics have achieved a high degree of consensus). In others, the academic debates seem to become primarily a theoretical exercise with a life of their own. Lower courts may on occasion base a decision on one of the theories. The Supreme Court may even discuss certain basic principles of the reform efforts with apparent approval, but this is typically dictum in a decision rejecting the reformers' position in that particular case. While such Supreme Court dictum is sometimes adopted readily by lower courts as a new controlling standard, in many cases the dictum ends as just that. It may serve as an admonition to police and prosecutors, but it does not create any enforceable rights for

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defendants.[1]

Despite Goodman's apparent optimism about the success of the abuse of prosecutorial discretion movement in Japan, I am inclined to regard this as yet another example of the above pattern of legal debate. An active and vocal defense bar has focused attention on the issue, which has subsequently generated extensive academic debate. Certain theories have gained acceptance in isolated lower court decisions and have even been cited with apparent approval in dictum by the Supreme Court. Nonetheless, for the most part, such efforts have yet to result in concrete changes in legal standards, and the ultimate effect of the Supreme Court's pronouncements in the field remains in doubt. Yet, rather than expand on these thoughts, which I have discussed at greater length in a somewhat different context elsewhere, I would instead like to turn to two other issues raised by Goodman's article: the extent to which plea bargaining exists in Japan, and due process considerations raised by the system of so-called "suspension of prosecution."

PLEA BARGAINING IN JAPAN

It is widely accepted, at least among Japanese, that plea bargaining does not exist in Japan. Japanese prosecutors have willingly perpetuated this picture. They have frequently pointed to plea bargaining as one of the "excesses" of the adversary system in the United States that Japan would do well to avoid, describing plea bargaining as an unseemly practice necessitated by such restrictions on prosecutorial power as the exclusionary rule and limits on the ability of American prosecutors to obtain admissible confessions.[2]

In contrast, the commonly accepted view is that Japanese prosecutors need not engage in plea bargaining and, instead, exercise completely independent judgment in deciding whether to prosecute. Even when Japanese prosecutors possess ample evidence of guilt, they frequently elect to forego prosecution, based upon a judgment that, for reasons such as the character of the suspect and nature of the crime, prosecution would not serve the best interests of society. Nevertheless, it is widely thought that once the decision is made to prosecute, Japanese prosecutors will "throw the book" at the suspect, charging him or her with the highest crime supported by the evidence. Japanese prosecutors also frequently undertake a thorough investigation to determine whether the suspect may have committed any other crimes, whether or not related to the crime for which he or she was originally arrested. If any such other crimes

1. For a more extended discussion of this pattern of legal debate and legal change in Japan, see Foote, *From Japan's Death Row to Freedom* (work in progress).

2. Yonezawa, *Higisha no Torishirabe* [*Questioning of Suspects*], 537 HANREI TIMES 61, 63 (1984).

are discovered, the popular image is that Japanese prosecutors will seek an indictment covering all such crimes.[3]

Although Goodman implies that a Japanese equivalent of plea bargaining is fairly common, her research largely confirms the above picture. She herself seems to agree that there is little explicit plea bargaining in Japan (although she raises the intriguing possibility that just such bargaining may on occasion take place behind closed doors, noting that retired prosecutors are often perceived to be more effective as defense counsel because of their ability to arrange informal meetings with the prosecutors responsible for their clients' cases).

A simple explanation for the absence of explicit plea bargaining would perhaps be that there is no such thing as a guilty plea in Japan. Even if the defendant admits all material elements of the offense, he or she may not be convicted on that basis alone.[4] Practically speaking, however, a full confession coupled with an agreement not to contest the prosecution's case is essentially the equivalent of a guilty plea in Japan (and such cases may often be handled in summary proceedings, although the prosecutor is still constitutionally required to present additional evidence corroborating the confession).[5]

Nonetheless, at least insofar as many suspects provide full confessions in anticipation of more lenient treatment, Goodman is entirely accurate in suggesting that the tacit equivalent of plea bargaining on its face would appear to exist in Japan. At the initial level of the criminal justice system, Japanese police possess broad discretion with respect to minor crimes. Police may elect to overlook many incidents—and frequently do so if the suspect displays appropriate remorse, often accompanied by a formal letter of apology. As Goodman discusses, prosecutors have an even wider range of discretion. Consistent with their popular image, Japanese prosecutors exercise broad discretion over whether or not to prosecute and in fact can choose the intermediate category of "suspension of prosecution" with its implicit determination of guilt. Contrary to the commonly accepted view that prosecutorial discretion in Japan is generally limited to the decision on whether to indict, however, Goodman's Case Study 5 reveals that the decision to prosecute does not necessarily mean that the prosecutors will seek the highest charge supported by the evidence. Rather, as with their American counterparts, prosecutors in Japan may opt for a lesser charge.

3. *See, e.g.*, Matsuo, *Gendai Kensatsuron* [*Concerning Current Prosecutions*], SŌGŌ TOKUSHU SERIES 16, GENDAI NO KENSATSU 2, 5 (1981).

4. KEIJI SOSHŌ HŌ (Code of Criminal Procedure), Law No. 131 of 1948, art. 319(3).

5. KENPŌ (Constitution) art. 38, para. 3 (Japan).

Again at the trial stage, moreover, Japanese prosecutors have considerable leeway in their sentencing recommendations.

Defendants and defense counsel are keenly aware of this broad range of police and prosecutorial discretion in Japan. They are equally aware that a showing of remorse by the defendant, including a full confession and cooperation with investigators, can be very important in influencing the manner in which the prosecutors will exercise that discretion. The existence of such a perception alone might be enough to influence the actions of defendants; the accuracy of that perception, however, is amply borne out by numerous writings on the Japanese criminal justice system, and is further confirmed by Goodman's case studies.

Does this mean, then, that when a Japanese prosecutor accepts a defendant's confession and expressions of remorse, and recommends lenient treatment as a result, one should regard this as in some sense a tacit equivalent of plea bargaining, in which the defendant truly believes that he is giving the prosecutors what they want in return for an unstated but nonetheless understood expectation of lenient treatment? In some cases that may, in fact, be exactly what is happening. Thus, for example, in a number of Japanese cases in which prior convictions have been overturned on appeal or on retrial, defendants have explained that they initially confessed to crimes they did not commit, precisely because they thought (or had been told by fellow suspects or even police or defense counsel) that they would receive lenient treatment in return.[6] In a similar vein, I am reminded of a trial I once observed in Tokyo District Court. The defendant had been charged with driving while intoxicated and other traffic offenses and had already received a suspended sentence following an earlier conviction for a similar violation. During the trial the defendant was the picture of contrition, freely confessing to all charges and voluntarily offering to give up his driver's license. Yet when I found myself in an elevator with him just a few minutes later, after he had received another suspended sentence, he was triumphantly telling a friend that his demeanor was exactly what judges wanted to see and that that was how one had to act to get off lightly.

On their face, these incidents would seem to suggest a set of attitudes similar to those found in American plea bargaining. Yet that is far from the whole picture. As several commentators have observed, attitudes toward apology are far different in Japan and the United States.[7] From an early age, Japanese learn that appro-

6. For a discussion of many of these cases, see Foote, *supra* note 1.

7. *See, e.g.*, Wagatsuma and Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986); Haley, *Comment: The Implications of Apology*, *id.* at 499.

priate expressions of responsibility and apology are the preferred response in many situations where Americans would normally opt for explanations or excuses. Japanese also learn that they can often smooth matters over and avoid problems by apologizing in a sincere manner—even in situations where they do not truly feel that they were in the wrong.

Given this cultural difference, it becomes much less clear whether the plea bargaining analogy is appropriate. When viewed from the standpoint of the typical defendant, it may be true that the Japanese defendant hopes—and probably even expects—to be treated with lenience after confessing and expressing remorse. Yet given this difference in cultural backgrounds, the typical Japanese defendant probably does not regard himself as engaged in a bargain in which his own confession is seen as something of value being traded for more lenient treatment. Rather, the more appropriate image would seem to be that of one throwing himself on the mercy of the prosecutors, confessing to his transgressions, and imploring their forgiveness.

Similar differences almost certainly exist in the perceptions of prosecutors. In addition to the cultural factors described above, various legal factors (including the right to question suspects for up to twenty-three days before indictment) enable Japanese police and prosecutors to obtain full confessions in the vast majority of cases. Moreover, standards on the admissibility of evidence are more favorable to prosecutors in Japan than in the United States, and the Japanese equivalent of the exclusionary rule has been applied in only a handful of cases. For these reasons, the job of investigators would appear to be somewhat easier in Japan, making plea bargaining less essential for prosecutors. After all, little incentive exists to offer a special deal to one co-conspirator in return for testimony against his accomplice when the investigators can be quite confident of obtaining a full confession from that accomplice in any event. Therefore, Japanese prosecutors are likely to share the view that the exercise of their discretion is a unilateral dispensation of lenience, rather than part of a bargaining process.

Of course, the reality in both countries undoubtedly falls somewhere between the extremes suggested above. For many first offenses in the United States, prosecutors dispense lenience in much the same manner as their Japanese counterparts; electing to forego prosecution despite convincing evidence of guilt, in large part because of the character of the suspect and the sincerity of the suspect's contrition. Conversely, notwithstanding denials by Japanese prosecutors, elements of implicit bargaining undoubtedly occur in their give-and-take with experienced defendants.

Nevertheless, the difference in mindsets between the two countries is significant. That difference naturally results in quite differ-

ent approaches and reactions by suspects and prosecutors in the United States and Japan. Japanese prosecutors are often familiar with American attitudes and might make some allowance for these cultural differences when dealing with American suspects. Moreover, while an American suspect might offend a Japanese prosecutor by making a steady stream of excuses and justifications and could in the long run face stricter treatment as a result, such actions would not give rise to the immediate threat of conviction, and the adverse effects would seldom be irreversible. On the other hand, if a Japanese suspect in the United States, despite truly feeling that his or her actions had been justified or unavoidable, nonetheless were to provide a voluntary full confession to American prosecutors expecting such a confession to be treated in the same manner as it would be handled in Japan, the effects could be grave indeed.

The difference may be of considerable significance at another level, as well. Goodman implies that the right to silence guaranteed by article 38 of the Japanese Constitution may be violated when suspects confess in the hope of obtaining lenient treatment. As described in considerably more detail elsewhere, I have serious reservations about the meaningfulness of the right to silence in Japan.[8] Reasons for these reservations include the right of Japanese investigators to question suspects intensively for up to twenty-three days between arrest and indictment, broad acceptance of the permissibility as an investigatory tool of arresting a suspect for a minor crime and then using the legally-permitted detention period to interrogate the suspect on a major crime as to which investigators lacked probable cause, and a very liberal interpretation of the limits of "voluntary" questioning.

Nonetheless, I cannot accept the notion that the defendant's right to silence has somehow been violated simply because he has chosen to confess in the hope of lenient treatment. A long line of Japanese court decisions has clearly established that a confession may be rejected as involuntary if induced by promises of lenient treatment.[9] In some of those cases, the promises were not even explicit. If anything, Japanese prosecutors appear to be unduly scrupulous in this regard (at least in their public pronouncements), even suggesting that because of this line of decisions they cannot risk giving any privileges to a suspect, "such as the opportunity to meet with his family," since if they did so they might then face a claim that they had induced a confession by promising such "privi-

8. Foote, *supra* note 1.

9. *See generally* Takesaki, *Yakusoku ni yoru Jihaku [Confession Pursuant to Promises]*, 74 BESSATSU JURISUTO KEIJI SŌSHŌHŌ HANREI HYAKUSEN 150 (4th ed. 1981).

leges."[10] While one may question the scope of this definition of "privileges," the message is clear—promises of lenient treatment, including such typical plea bargaining alternatives as reducing the charges against the suspect, may jeopardize the admissibility of any confession that is subsequently obtained. Particularly given this body of precedent, it would seem impossible to sustain an argument that a confession given by a Japanese suspect in the hope of lenient treatment somehow represents an induced and involuntary waiver of the constitutional right to silence.

SUSPENSION OF PROSECUTION

In one important respect, the range of prosecutorial discretion in Japan is even broader than that found in the United States. In addition to such powers as the choice whether or not to indict, the choice of charges, and the recommendation as to sentence, Japanese prosecutors retain the further option of "suspending prosecution." As Goodman explains, this is tantamount to a declaration by the prosecutors that, although they have concluded that the suspect in fact committed the crime, nonetheless they have chosen to treat the suspect leniently and forego prosecution for that particular incident.

It would perhaps go too far to suggest that there is no counterpart to suspension of prosecution in the United States. As noted above, American prosecutors often choose not to indict a particular suspect despite strong evidence of guilt, where they feel that the suspect for some reason deserves lenient treatment. In such cases, however, they do not typically make a public pronouncement that the suspect was guilty but is nonetheless being treated leniently. Rather, when American prosecutors publicly state that they are convinced of a particular individual's guilt but that he or she is being "let off," the underlying sentiment is usually not one of lenience, but rather of frustration at not having sufficient admissible evidence.

Such American practices are a far cry from the institutionalized system of "suspension of prosecution" in Japan. As Goodman describes, this form of disposition, which is currently given in approximately thirty-eight percent of the cases referred to Japanese prosecutors, constitutes a formal third category between release and indictment, conveying the prosecutors' official position that the suspect was in fact guilty but has been "given a break."

Goodman notes that challenges to the exercise of prosecutorial discretion in Japan have invariably focused on the borderline between prosecution and non-prosecution, and not on the borderline

10. M. SUZUKI, HIGISHA TORISHIRABE NO JISSAI [THE PRACTICE OF THE INTERROGATION OF SUSPECTS] 111-12 (rev. ed. 1972).

between suspension of prosecution and simple release. In a sense, this is exactly what one would expect. After all, defendants facing trial have a very real incentive to argue that their prosecution should be barred because of abuse of prosecutorial discretion. In contrast, defendants who have received suspended prosecutions no longer face legal action. Those who in fact committed the crime in question are likely to be grateful for the lenience shown them. And even if truly innocent individuals are given "suspended prosecutions," they may well choose to let the matter end there, rather than incur the trouble and expense, and risk the added publicity, of a challenge to that disposition.

Nonetheless, the distinction between a suspended prosecution and a simple release may be highly significant. As noted earlier, suspension of prosecution carries with it the determination of prosecutors that the suspect has in fact committed an indictable crime. In a nation where well over ninety-nine percent of all suspects indicted by prosecutors are found guilty, a mere statement by prosecutors that a given suspect is guilty may have a great stigmatic effect indeed. In Japan, even simple arrests may result in suspensions or even dismissals from employment, and a suspension of prosecution decision may have a serious impact on a suspect's life. Moreover, as Goodman observes, a suspended prosecution is regarded as a suspect's "first bite at the apple" of lenience, insuring much harsher prosecutorial attitudes in the event of a second arrest. The fact that a determination carrying the potential for such adverse consequences can be imposed unilaterally by prosecutors in their sole and, for the most part, unreviewable discretion would appear to raise serious due process concerns.

Goodman notes such concerns; she also suggests that Japanese prosecutors may on occasion opt for "suspension of prosecution" when they would be unable to prove guilt beyond a reasonable doubt yet remain convinced of the suspect's guilt and do not want to let him or her go scot-free. Goodman nonetheless concludes that the existence of the "suspension of prosecution" option is on balance a positive aspect of the Japanese criminal justice system. The basis for this conclusion seems to be the view that the Japanese system, with its three categories, provides more definite standards and greater predictability than "the unexplained sifting of cases which is common in the United States."

This conclusion appears to confuse two distinct issues. Observers in both nations agree on the desirability of more definite standards to guide the exercise of prosecutorial discretion, and in that respect the efforts by Japanese prosecutors to establish clear internal guidelines are certainly worthy of praise and emulation. Yet such guidelines can be adopted without establishing a separate intermediate category of suspects—a sort of gray zone of individuals deemed

guilty on the word of prosecutors without ever having had a hearing before a judicial tribunal. (Nor, one may note, does the existence of this intermediate category ensure that those who are given simple releases will thereafter be treated as though they had been completely innocent and have been vindicated. Rather, the stigma of the arrest will remain despite this subsequent classification into the presumably "unindictable" category.)

Perhaps the above emphasis on the absence of judicial review for suspension of prosecution decision is, however, misplaced. One can posit a number of reasons why Japanese prosecutors should be regarded as fair and impartial arbiters, sufficient to satisfy any due process concerns that might arise in the suspension of prosecution setting. Among these reasons are the perceived role of Japanese prosecutors as impartial guardians of the public welfare, the perceived homogeneity of Japanese society (with consequently lower levels of bias), and the perceived existence of a common set of societal values—the *shakai tsūnen* referred to by Goodman—that guides the exercise of discretion by prosecutors. As Goodman notes, however, the popular image in each of these areas goes somewhat beyond the reality. While Japanese prosecutors regularly refer to their duty to serve as impartial representatives of the public, they retain a strong adversarial role: it would be unrealistic to expect them to be able to maintain complete impartiality in their attitudes toward criminal suspects. With respect to the perceived homogeneity, Goodman describes widespread bias among prosecutors toward certain political groups: her case studies reveal unconscious prejudices with regard to women, and one would expect many prosecutors to share biases toward Koreans and other minorities commonly found in Japan. Moreover, the common set of societal values, while in fact widely shared, is by no means unanimously accepted or easily defined.

Even if all of these reasons were completely true, however, concerns would still remain regarding such elements of due process as the ability of suspects to be heard and to respond to the evidence against them. While Japanese suspects are legally guaranteed the opportunity to explain their actions,[11] this may take place in the highly-charged atmosphere of a private interrogation session, without the presence of counsel or any other outside party, and suspects in confinement may have to rely entirely on the prosecutors to track down exculpatory witnesses and evidence.

In strictly legal terms, it may be inappropriate to take into consideration the likely alternative to suspension of prosecution in assessing whether that system meets due process requirements. The narrow legal issue would appear to be the sufficiency of the proce-

11. KEIJI SOSHŌ HŌ, *supra* note 4, art. 203(1).

dural standards governing the imposition of suspension of prosecution decisions as judged by reference to the impact of such determinations themselves. Hypothesizing about the likely alternative may only confuse that issue. Nonetheless, when considering this matter from a comparative prospective, one's views on the desirability of this practice may well turn on one's assumptions regarding the likely alternative.

In a sense, the earlier discussion rests on the assumption that if the suspension of prosecution option did not exist, the suspects would simply be released without prosecution. If that is the case, suspension of prosecution would appear to represent the unilateral imposition by prosecutors of an additional stigma.

If, on the other hand, one supposes (as Goodman apparently does) that the alternative to suspension of prosecution would be prosecution and conviction, followed by a suspended sentence, a different set of considerations may come into play. There, suspension of prosecution would appear to be a more lenient option carrying less of a stigma and thereby promising a greater chance of rehabilitation (or, perhaps more accurately, a lower likelihood of recidivism) than a public trial followed by a suspended sentence. In this regard, there is little question that Japanese suspects given the choice between suspension of prosecution and prosecution would choose the former, even if acquittal rates in Japan were many times higher than their current level (well under one percent).

Moreover, viewed in this latter manner, the nearest equivalent to suspension of prosecution in the United States would appear to be a guilty plea accompanied by a prosecutorial recommendation of a suspended sentence. As a practical matter there may be relatively little difference in due process terms between suspension of prosecution and such a disposition. Despite the involvement of a judge as the final arbiter in the United States (and the theoretical ability of the judge to inquire into the merits and reject any negotiated plea), in the vast majority of cases the prosecutor will play the central role, and there is no guarantee that the suspect will have received a full and fair hearing by the prosecutor prior to the abbreviated trial proceedings.

Where does the reality lie concerning the likely alternative to suspension of prosecution? Goodman strongly implies that the alternative in Japan would be prosecution followed by conviction and a suspended sentence. As support for this conclusion, she cites statistics showing that the rate of suspended sentences has remained relatively stable while the rate of suspended prosecutions has risen steadily over the years. This, she argues, shows increasing lenience through greater use of suspended prosecutions. Yet these two statistics alone are insufficient to provide a full picture. Without also comparing the statistics on the rate of simple releases, it is impossi-

ble to judge whether the increase in suspended prosecutions reflects more lenient treatment or whether it actually reflects stricter treatment, in which those who in the past simply would have been released are now branded as guilty (but unindicted) by the suspension of prosecution designation. If anything, the statistics cited by Goodman would appear to support the latter conclusion, for if suspended sentence rates have remained stable while suspended prosecution rates have risen, the increase presumably has come at the expense of a drop in the rate for simple releases.

Of course, the system of suspension of prosecution is now so firmly entrenched in Japan that it is probably impossible to say in every case what the alternative would be if that system were not available. While that system may in fact enhance rehabilitation goals by classifying first-time offenders yet explicitly providing for their lenient treatment, further investigation would be necessary to confirm such a conclusion.