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History of the Arguments on the Legal Framework for Mentally Disordered Offenders and Penal Reform in Japan

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1. Introduction

The bill for mentally disordered offenders ("the medical treatment and probation bill for those who have committed serious offence[i] and are Not Guilty by Reason of Insanity") was passed in July 2003. Though the trend of the arguments on mentally disordered offenders has come to be in favor of introducing the bill, there was and is a certain objection and anxiety to it. In this paper, I review arguments surrounding the legal framework for them, and examine how the focus of debate has shifted and what kind of supports and objections have been made. And I suggest that the disagreements for the legal framework still remain.

Mentally disordered offenders have been covered by the Mental Health Welfare Act under the same definition as the other mental patients so far. However, this bill is designed to introduce a special legal framework for mentally disordered offenders, and the plan for introducing this bill was begun to discuss after a school killing was happened in 2001. Although it is now revealed that the suspect is not mentally disordered, the lack of a legal framework for mentally disordered offenders gained attention in the media and society[ii]. I must add that this case has not occurred because of this lack, and many comments on this case pointed out that the bill wouldn't prevent this type of injury. We can refer that the case shocked the society enough to prompt to introduce the bill. And this is because the bill and the way of introducing it are problematic.

The government also began to examine the introduction of a legal framework, but it seems too sudden, if we consider the course of arguments about the legal framework thus far. Introducing the legal framework for mental disordered offenders has been discussed and failed repeatedly in Japan. Certain psychiatrists and criminalists claimed the necessity of the special framework before this murder case, but the plan for the bill was begun to discuss in the actual way after this case.

Since the content of the bill became clear, mentally disordered patients, their families, psychiatrists, criminalists and lawyers have made objections against the bill as associations or individuals. Therefore, there were and are pros and cons on the point of introducing a special legal framework and on the content of the bill.

However, many of the points of these pro and con arguments were already noticed in the 1970s and the 1980s, even though the details of the argument were not same. It shows that the problems pointed out in the former arguments and disagreements still remain. The arguments have not converged, and introducing the bill is not consequence of previous discussions. It is worth examining the current arguments from the historical point of view.

In the following, I point the changes of procedure that the new bill bring, and briefly sketch arguments and situation related to them. Next, I compare these arguments with ones from the

1970s and the 1980s when similar bills were discuss and failed.

2. The bill for mentally disordered offenders

Table 1 shows the major changes in the procedure of treatment of mentally disordered offenders from the Mental Health Welfare Act to the bill for mentally disordered offenders.

Table 1. Procedure in The Mental Health Welfare Act and in the new bill

Procedure of involuntary hospitalization in The Mental Health Welfare Act	**Procedure of treatment in the bill for mentally disordered offenders**
A police officer or a prosecutor reports an offender as a (supposed) patient to the governor.	Court gets an offender diagnosed whether s/he is insane and whether s/he is at ***risk of recidivism***.
Hospitalization: ***Two qualified psychiatrists*** diagnose whether the subject is at risk of ***harming him/herself or others*** for assessing necessity of hospitalization.	Hospitalization and other treatment: ***A judge and a psychiatrist*** cooperate to decide hospitalization or psychiatric treatment outside hospital for the offender based on above diagnosis.
Discharge: If the subject is not at risk of harming him/herself or others anymore, the director of the hospital reports this to the governor, and ***a qualified psychiatrist diagnoses adequacy of discharge***.	Termination of the treatment: If the subject is not at risk of recidivism, the director of the hospital reports to the court, ***and a judge and a psychiatrist decide termination of the treatment or deinstitutionalization including outside hospital treatment***.
	Probation: A subject who is treated outside the hospital is ***placed on probation*** to insure compliance with his/her medical treatment.

In short, psychiatrists solely decide hospitalization and discharge of patients, whether they are offenders or not, in the procedure so far. In procedure defined by the bill, a judge and a psychiatrist decide hospitalization and discharge of patients if they committed serious offence. And if a judge and a psychiatrist order an offender to be treated outside hospital, the probation officers who treat ex-convicts and juvenile delinquents are supposed to insure their medical treatment.

3. Arguments related to the new bill

Amongst those who support this bill and those who oppose it, there is general consensus on several points.

It is generally (though not unanimously) agreed that the current juridical system is problematic. Many mentally disordered offenders cases are not brought before court and police officers or prosecutors often report to governor to hospitalize with or sometimes without summary diagnosis[iii]. Both supporters and detractors of the bill point that customary nonindictment and high rate of guilty (ninety nine percent of offenders prosecuted are found guilty) in current juridical system are problematic. Prosecutors rarely indict the cases that would not be guilty. And

contrary, once a case is prosecuted, the accused is rarely decided as NGRI (Not Guilty by Reason of Insanity). Both sides of the argument recognize that there are mental patients currently incarcerated without medical treatment, and though some are treated in a Medical Prison, such treatment is poorer than that found in ordinary mental hospitals.

3.1. Arguments in favor of the new bill

Other than this, several reasons for reforming the current system are pointed out. Those arguing in favor of the bill raise the following points:

- The current system includes a defect when mentally disordered offenders are given only short-term treatment.
  (There is controversy about whether or not this is true. The bill proponents claim that mentally disordered offenders who commit serious crimes are sometimes discharged from hospitals after a short-term treatment because they are deemed recovered or the hospitals have trouble in dealing with them. The opponents claim that the terms of treatment tend to be longer than the corresponding sentence would be, and that psychiatrists tend to be more cautious in discharging mental patients who have committed crimes.)
- It is difficult for hospitals to treat offenders side by side with other patients. Without special facilities for the treatment of mentally disordered offenders, it is difficult to assure public safety and prevent recommitment by mental disordered offenders in the recent normalization of psychiatry.
- It is problematic to expect psychiatrists to be solely responsible for discharge when dealing with mentally disordered offenders. Not only psychiatrists but also judges should decide discharge in case that the patient committed crime, taking account of the risk of recidivism.
- Many other states have introduced special laws or measures to deal with mentally disordered offenders, and these have been successful.

3.2. Arguments against the new bill

On the contrary, those who oppose the bill think that it will enhance the current tendency that prosecutors withhold indictment of mentally disordered offenders'cases. They also fear that the council system of a judge and a psychiatrist is not the adeguate body for determination of hospitalization. Opponents of the bill also argue the following:

- Longer-term hospitalization[iv] would increase because administrators would assume the higher risk of recidivism. Because the authorities concerned must respond to the risk of recidivism, they would be more cautious in discharging offenders, and institutionalization under the bill could prompt longer-term treatment than the present involuntary hospitalization.
- Hospitalization should not be equate with 'penalty' or 'sanctioning'. The penalty confinement based on responsibility should be different from hospitalization medical treatment. The bill might include penal function in medical hospitalization implicitly. It is not necessarily problematic that the penal system to get mentally disordered offenders off the

penalty by the reason of irresponsibility. And hospitalization of them should be done not from the punitive point of view but from the medical point of view. Some supporters to the bill criticize short-term treatment, but such criticism is produced because they confuse penal sanction with psychiatric treatment.

- Assessing the risk of recidivism (which the bill uses as a criteria for discharge) is not the same as assessing the risk for the patients risk to hurt him/herself or others. The bill defines psychiatrists responsible for their patient's risk of recommitment of offence. And there are arguments on the certainty of assessing recidivism. Some argue that the assessment of recidivism is doubtable or even impossible.
- Proponents of the bill care the rate of recidivism. But statistically, the rate of recidivism of mentally disordered offenders is lower than that of other offenders[v]. Considering most mentally disordered offenders' cases are first-offenses, the system that the bill defines is not based on reality.
- The bill does not define to introduce staff for the probation. It is difficult to perform probation work defined by the bill without assignment of professional staff.

And opponents especially concern that the bill will reinforce current problematic conditions in psychiatry. It is pointed out that psychiatry in Japan is characterized by a small number of medical staff per patient[vi], far more beds than other states, and fails in normalization because it lacks resources and a set system of community care. Opponents to the bill claim that if we do not give priority to improvement of the conditions of mental health service, the bill will result in long-term confinement of mentally disordered offenders.

4. A Historical Perspective on the Arguments

If we examine the above arguments from an historical perspective, we see considerable similarity with controversy in the 1970s and the 1980s, when a previous framework for mental disordered offenders was unsuccessfully proposed. Many points above were already pointed out then.

The legal measures for the mentally disordered offenders have been argued mainly in the framework of "the Security Measures" ("measures de sûreté", "Sichernde Maßnahmen") accompanying the penal reform, from 1921 to the 1980s, though they have not been realized[vii]. However, we also note that the controversy on the Security Measures in the 1970s and the 1980s are fundamentally different from the previous one.

The Security Measures, borrowing the definition by M. Oya, "are isolating or remedial measures with the purpose of protecting society, on the basis of one's risk that s/he may recommit a crime. ...and they complement or substitute the penal punishment"[viii]. Therefore, *originally*, the Security Measures stand for the legal or administrative measures that respond offenders' risk in general, and they are not intended for mentally disordered offenders especialy. And whether the Security Measures should just "complement" or totally "substitute" The Penal Code was the issue at the early stage.

Historically, penal reform has evolved in stages:

1921 The penal reform deliberation started.
1926 The prospectus of the penal reform was announced.
1940 The provisional draft was announced.
1947 The current constitution was enforced.
1961 The draft of penal reform was announced.
1981 The Ministry of Justice and The Japan Federation of Bar Associations began to exchange views on the issue.

After the Ministry of Justice gave up to introduce the Security Measures in the 1980s, proponents came to avoid the term of "the Security Measures" in arguments on the legal framework for mentally disordered offenders, and arguments or discussions on such a legal framework were rapidly decreased in the 1990s. The new bill is characteristic in that it is not proposed as the Security Measures. But their contents resemble each other, as does controversy on them.

4.1. Arguments on the security measures from the 1920s to the 1960s

When the plan of the penal reform started in 1921, the new theory of criminal law influenced the arguments. In the 1910s, theory of the Modern School (l'école nouvelle, Moderne Schule) in criminal law was introduced in Japan, and the debate between the Modern School and the Classic School (école classique, Klassiche Schule) started.

The Modern School proposed that the penal punishment should be remedial and preventive rather than retributive, and that the punishment should aim at special prevention depending on the degree of the criminals' danger to public safety. Therefore, the Security Measures, which have remedial and preventive nature, were to become penal punishment itself. The Classic School claimed that penal punishment should be retributive on what a person had done, rather than preventive for what a person will do. Therefore, they considered the Security Measures as administrative measure independent of the Penal Code.

Thus from the 1920s to the 1960s, the main point of debate was whether the Penal Code should be totally displaced or just supplemented with the Security Measures. Whether the Security Measures should be introduced or not, and how they should treat mental disordered offenders were not the issue.

The Measures were not limited to mentally disordered offenders. For example, it was assumed that they should include vagrants and recidivists. The subjects of the Measures were defined as "those who were dangerous."

Independent from discussion on the Security Measures, in the 1920s to the 1940s psychiatrists supported the notion of "dangerousness" of criminals and claimed that psychiatry could eradicate "dangerousness". Some psychiatrists who played central roles at the early stages of Japanese psychiatry were also criminologists. They claimed that most criminals were mentally disordered and that most of the mentally disordered were socially dangerous.

In penal reform process, the Penal Code was defined as retributive and based on responsibility. The Security Measures were thought as administrative measures different from penal punishment to the Classic School's advantage in 1926 and in 1961. Though the Security Measures had not

been defined or clearly recognized as a special framework for mental disordered offenders, in "the draft for the penal reform" which was announced in 1961, the Security Measures were defined that they were to apply to mentally disordered offenders, including alcohol and drug addicts, were the supposed subjects.

Kikkawa saw this definition as "a compromise of the thoughts of the Classic School and the Modern School." And he declared that to avoid eqating the Penal Code with the Security Measures, they might have thought that when the Penal Code does not cover the subjects because they are irresponsive, the special measures should be used[ix].

In these processes, those who were supposed to be "dangerous" were transformed into those who were problematic because of "irresponsiblity", and mentally disordered offenders were to be thought the proper subject for the Security Measures. And proponents of the measures began to claim that it was wrong if a offender was not sentenced by reason of irresponsibility.

After the draft was announced in 1961, the arguments gradually shifted from (the status of) the Security Measures themselves to issues of mentally disordered offenders. Especially after the objections arose in 1971, the argument came to concentrate on how to treat mentally disordered offenders and the process mentioned above was forgotten.

4.2. Movement concerning the security measure from the 1970s to the 1980s

Objections to the security measures arose in the 1970s. In 1971, "the Japanese Neurology and Psychiatry Association," which is one of the most representative association of psychiatrists in Japan, manifested the objection against the Security Measures, though it had previously supported them. Negative statements from psychiatrists and lawyers increased rapidly. The opponents against the Security Measures claimed that psychiatry should respect medical treatment distinguished from the social defense.

However, both who oppose and support the Measures concentrate on deciding how to treat mentally disordered offenders, unlike preceding discussions that mainly examined the legal state of the Measures. And both agreed in that institutionalization for mentally disordered offenders should consist of medical treatment, not just confinement. And as I mentioned above, the many issues that are argued these days were already pointed out.

But there are some differences between current arguments and those in the 1970s and the 1980s.

- There was less criticism of high rates of nonindictment in juridical procedure. Current arguments deal with the defect of juridical procedure itself in which produces high rate of nonindictment from both pros and cons standpoints.
  But the new bill does not necessarily solve this problem concerning juridical procedure.
- In the 1970s and the 1980s, there was more objection to psychiatry taking a social defending role. Psychiatrists objected to their potential social defending function more intensively and extensively than the present. But we can see that mental patients are taking over to argue this issue. They express this concerns realistically and convincingly.
- In the 1970s and the 1980s, there was more fear that the Measures could be applied to mental patients and/or people in general who did not commit offense. This was supposedly related to

that there were two drafts of the Security Measures and that the subject of the Measures was not clear.

4.3. Movement after 1990

After the Ministry of Justice and the Japan Federation of Bar Associations exchanged views in 1982, the Ministry of Justice gave up introducing the Security Measures in the 1980s.

In the 1990s, instead of introducing the Security Measures, the Health and Welfare Ministry discussed setting up madical institutions for the difficult cases. The institutions are to treat both mentally disordered offenders and serious mental patients including the patients who are hard to deal with. The plan was supported, by psychiatric professionals who faced difficulties in treating the so-called the difficult cases. But the plan was questioned mainly because the definition of "the difficult cases" was not clear, and the due process was not assured, in addition to the parallel discussions against the Security Measures.

5. Conclusion

Reviewing the history of arguments on the legal framework for mentally disordered offenders, I suggest that the Security Measures were not thought of measures that treat the mentally disordered in an early stage, but the proponents came to think the mental disordered offenders are problematic because they are "dangerous" and "irresponsible" in the very course of arguments. And after this claim was established, how to treat them became a central issue. After the Ministry of Justice gave up to introduce the security measures in the 1980s, some have sought the other way to respond to mentally disordered offenders.

The new bill has a different legal status from the Security Measure in that it is not related to the Penal Code that require the principle of the responsibility for punishment. But the arguments for the altered measures seems go back to the issues that emerged in the 1970s and the 1980s.

Again, I think that the arguments have not converged or introduction of the bill is not based on previous debate enough. The problems pointed out and disagreements still remain. The arguments in those days have offered the fundamental view for the problems and we have not overcome the difficulty pointed out at that time, even though the legal status has changed.

（本稿は、2002 年の 27th Congress of the International Academy of Law and Mental Health において報告したものに、2003 年の心神喪失者医療観察法の成立という事実を鑑みて、必要な補足修正を加えたものである。本研究は稲森財団の助成を受けている。）

Notes

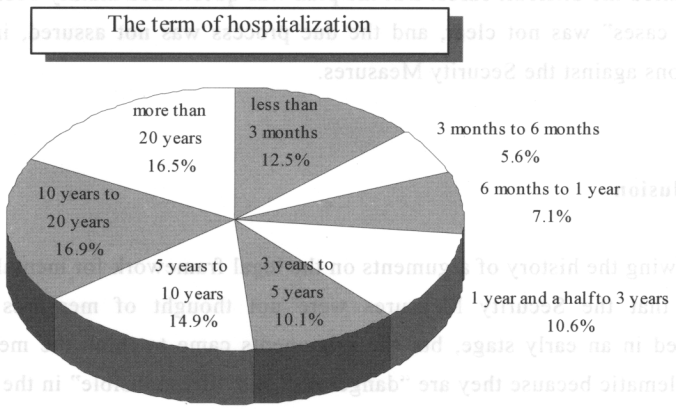
[i] *Serious offence* is defined as murder, arson, robbery, rape, indecent assault and inflicting injury.

[ii] Precisely, both the Minister of Justice and the Minister of Health, Labor and Welfare answered in Diet that these ministries had discussed a legal framework for mentally disordered offenders before this case, responding with a supplementary resolution of the reform of the Mental Health Welfare Law in 1999. But they also admitted that this case prompted the proposal. Records of the House of Representitives, 2002.5.28, in http://www.seirokyo.com/archive

[iii] We can often find this kind of criticism of the custom of non-indictment by prosecutors in both pro and con discussions in these days, but seldom find it in preceding arguments.

[iv] Patients under this type of involuntary hospitalization are only 0.5% of the total. But 40% of them are hospitalized over 20 years. And figure 1 shows the term of hospitalization of patients in total.

Figure 1. The term of hospitalization
(Japanese Association of Psychiatric Hospitals' comprehensive research in 1996.)



[v] Regarding murder and arson, it is pointed out that the rate of recidivism of the mental disordered is about one forth of others. In serious crime that the bill defines, first-offense cases were 84% in total in statistics in 2001 (*White Paper on Crimes*, 2001.)

[vi] The Medical Service Law admits that one-third number of doctors (one doctor for forty eight patients) and fewer nurses (one nurse for four patients) are required in psychiatric hospitals compared to other ones. Because the Medical Service Law admitted fewer nurses until reform in 2001, it will aim to meet previous criteria by 2006.

[vii] And the Penal Reform has not been accomplished either.

[viii] Oya, M.,大谷実『刑事政策講義』[*Lecture on Penal Policy*] 弘文堂, 1990, p.101, translated by the present author.

[ix] Kikkawa, T.,吉川経夫「保安処分に現れた刑法思想」『法学志林』[Notion on the penal law expressed in the security measures],69(2),1971,p.36, translated by the present author. And he suggested also that this was applied to other countries.

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