

AN ANALYSIS OF ADMINISTRATIVE SANCTIONS AND CRIMINAL PROSECUTIONS OF DOCTORS IN JAPAN

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Objectives To illustrate how administrative sanctions (AS) and criminal prosecution (CP) differ with regard to application with doctors' misconducts.

Methods A total 465 doctors who were punished twice by AS and CP were analyzed using the proportional distribution method (PDM) to break down into the charge-specific months of suspension or imprisonment.

Results Overall, the Minister of Health, Labor & Welfare (MHLW) sanctioned doctors by suspending their licenses for twice the number of months that the court ordered for imprisonment. Charge-specific analysis of months (suspension or prison terms) revealed a different pattern of judgment. The MHLW judged obscenity more unethical, allocating a larger share of the total months of suspension to punish this misconduct, but judged bribery less unethical allocating a smaller share of the total months of suspension to punish this than the court. For traditional crimes like swindling, murder and psychostimulant abuse, both judgments followed similar patterns allocating the same share of months for punishment of such acts.

Discussion CP and AS were shown to have different patterns in their judgments of doctors' crimes or misconducts reflecting the different purposes they pursue: justice by CP and ethics by AS. (186 words)

Key words : medical ethics, administrative sanctions, medical malpractice, criminal prosecution, double jeopardy, proportional distribution method

I. Introduction

Pursuant to the Physicians' Act and other legislation for the health professions, the Minister of Health, Labor & Welfare (MHLW) is authorized to give administrative sanctions¹⁾ (AS) to doctors and almost all other health professionals (hereafter, doctors) by either revoking their licenses or suspending their practice for a specified time (the Physicians' Act, Article 7). Doctors who commit professional misconducts or were prosecuted with any crimes punishable by fine or imprisonment are brought before the Medical Ethics Committee (MEC) for review.

The MEC is an advisory board and has no authority to initiate AS, let alone investigative power. The Medical Affairs division of the Bureau of Health Policy of MHLW receives reporting on doctors who were found to have committed misconducts

or were charged with CP and bring them to the MEC, thereby effectively serving as a "prosecutor". Therefore, the role of MEC remains essentially passive and its review determines the severity of AS, effectively serving as a neutral judge in a criminal court. The MHLW, as the defacto prosecutor, retains discretion to select which doctors are to be sanctioned. Not all "eligible" doctors are prosecuted. It was reported that MHLW neglected to prosecute 21 out of 36 doctors who had been confirmed guilty over medical malpractice between 1985 and 1999²⁾.

Doctors are also sanctioned for professional misconduct even if they are not criminally prosecuted. Such professional misconduct is most typically fraud and abuse of health insurance. Medical malpractice cases are subject to AS only when the responsible doctors are prosecuted on charges of "deaths or injuries due to professional negligence (the Penal Code, Article 211)" and are seldom sanctioned as long as they remain civil disputes. Legally, medical malpractice is no different from traffic accidents in that both constitute "deaths or injuries due to professional negligence". A crucial difference is: while traffic acci-

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dents are always investigated and brought to justice, medical malpractice cases seldom prompt police investigation and are not prosecuted, and hence, seldom result in AS.

Given the growing public concern over patient safety and medical malpractice, such a retroactive stance of MHLW has been increasingly under criticism. In response, the MHLW published a new policy on AS in December 2002 and declared that medical malpractice cases not subject to CP shall be subject to AS³⁾. In March 2004, the MHLW changed its retroactive stance by sanctioning three surgeons for failed laparoscopic surgery even if their criminal court procedures were still in progress⁴⁾. In March 2005, the MHLW stepped forward to sanction four doctors who were held liable in civil suits but did not face criminal prosecution since the incidence took place more than 25 years ago⁵⁾. At the MEC subcommittee held on 1 June 2005, 65 malpractice cases which did not warrant CP since December 2002 were reported, with two doctors already sanctioned and 19 doctors under investigation by the Medical Affairs division of the MHLW⁶⁾.

The recent aggressive stance of the MHLW should not be viewed without caution. CP and AS are of different nature: AS pursues ethics while CP pursues justice⁷⁾. From this viewpoint, the 2004 case of three surgeons is alarming. Giving AS while criminal procedures are still in progress may exert undue influence over a judge's decision.

More alarming is nepotism and arbitrariness. Shortly after the MHLW sanctioned the four doctors in March 2005, a doctor was ruled guilty for professional negligence by the Tokyo High Court over the much publicized iatrogenic AIDS scandal. However, no sanctions were taken, presumably because the doctor was a former bureau chief of the then Ministry of Health & Welfare. Likewise, a dental officer of the Ministry of Health, Labor & Welfare who was dismissed from duty on breach of the Civil Servants Ethics Act in September 2004 was also never sanctioned. This was because the new policy adopted in December 2002 which listed up charges subject to AS did not include the Civil Servants Ethics Act. It would be nothing but nepotism sanctioning private dentists violating health insurance rules while forgiving a dental officer violating civil servants rules.

If "equality under the law" is an axiom of criminal justice, AS definitely follows different ethics and principles. Then how are they different? Ideally, one should compare judgments of CP and AS against the same person over the same charges. Of course, prosecuting the same person twice over the same conduct, "double jeopardy", is prohibited by the Constitution stating that "no one shall be punished

twice for a crime already punished" (Article 39). However, the principle of "double jeopardy" does not apply to AS.

The author took full advantage of this otherwise unconstitutional situation⁸⁾ to illustrate the difference between AS and CP by comparing which charges the MHLW considers more unethical and which charges the court considers more unjust.

II. Method

The data used were the list of sanctioned doctors published by the MHLW⁹⁾ from 1989 through 2005. The lists included doctors' names, ages, addresses, institution's names, charges (one or more), the suspended terms with AS, and the prison terms with CP, both expressed as the number of months. Life-imprisonment and revocation of licenses were conveniently converted into 20 years (=240 months) and a fine was converted into one month's imprisonment for the sake of analysis.

Many cases involved more than one charge and PDM (Proportional Distribution Method) Ver.3 was used for breaking down the total months into charge-specific months. PDM was originally developed as a tool to estimate disease-specific costs in health insurance claims and its details are explained elsewhere¹⁰⁾. PDM has been demonstrated by simulation to be effective in analyzing components which do not follow a linear relationship.

The strength of PDM is illustrated by an example of price and calories of food: food A has 500 kCal and costs 500 yen, and food B 300 kCal and 300 yen, respectively. If one eats both, the calorie intake will be 800 kCal of course. However, the price may not necessarily be 800 yen. When ordered together, the price of the two foods is often discounted as a set menu, for example to 700 yen. Unlike calories, price does not follow a linear relationship and it is impossible to attribute which food was discounted how much. PDM assumes that discount was made to both in proportion to their individual prices. In this case it assumes that food A was discounted 62.5 yen and food B was discounted 37.5 yen.

In the case of CP, some countries follow the strict rule of linearity. For example, Spain charged terrorists who had colluded in the 9/11 attack killing 2973 people with 74,325 years imprisonment, 25 years for each victim¹¹⁾. Japan's legal system does not follow such a simple linear relationship. Committing crime A punishable up to 3 year imprisonment and crime B punishable up to 2 years simultaneously will not add up to 5 years: the limit is set at 4.5 years (the maximum X 1.5 pursuant to the Penal Code, article 47). If a suspect for crime A and B

received 4.5 years imprisonment, there is no knowing whether it is a sum of 3 years for A and 1.5 years for B or a sum of 2.5 years for A and 2 years for B. Crime A and B sum up to 4.5 years but the breakdown of A and B can not be known. This is a good indicator for PDM.

III. Results

A total of 588 doctors were sanctioned from 1989 through 2005, of whom 465 received both AS and CP and were included in the analysis. The 465 doctors received a total of 17,047 months suspension of licenses and 8,325 months prison terms for 647 charges (1.39 charges per person).

The most frequent charges were swindling (47) followed by receiving bribery (35), income tax eva-

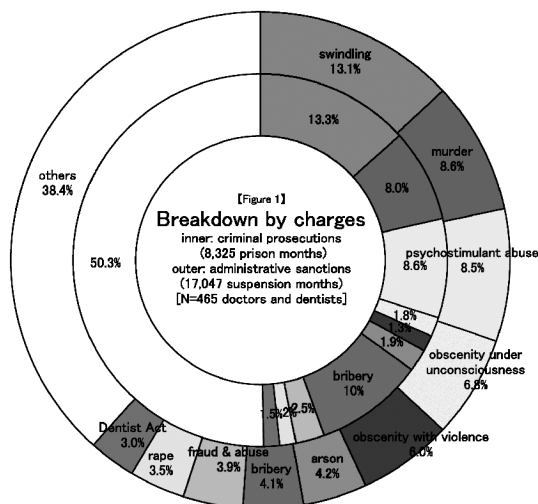


Figure 1.

Table 1. Most frequently appearing charges

charges	N	administra- tive sanctions (months)	criminal prosecution (months)
swindling	47	2,235	1,108
receiving bribes	35	699	802
income tax evasion	34	399	516
psycho stimulant abuse	34	1,453	719
fraud & abuse of health insurance	32	666	206
marijuana abuse	29	293	404
obscenity with minors	27	81	48
traffic violations	26	47	124
medical malpractice (deaths)	25	149	46
Xray Technicians Act violation	19	25	13
Physicians' Act violation	18	78	63
juvenile prostitution	16	56	56
juvenile pornography	16	56	56
Dentists' Act violation	15	513	125
corporate tax evasion	13	137	202
traffic accidents (injury)	13	12	3
presenting bribes	11	72	168
medical malpractice (injury)	11	37	29
fabrication of medical certificates	11	49	47
intentional injury	10	21	100
others	205	9,969	3,490
TOTAL	647	17,047	8,325

※ number of doctors sanctioned 465

※ charge-specific suspension and prison months were estimated using PDM Ver.3

sion (34) and psycho stimulant abuse (35). [Table 1] The breakdown of months by charges is presented in [Figure 1]. Three charges (swindling, murder and psycho stimulant abuse) constituted approximately 30% of the total months in both the AS and CP cases with a similar pattern in both. Obscenity (with violence or under unconsciousness) accounted for only 3.1% of CP but constituted 12.8% of AS. On the other hand, bribery constituted 9.6% in the CP but only 4.1% in the AS.

IV. Discussion

The court executes justice and the MEC pursues ethics with doctors. Consequently, when they face the same person's same act, their judgments may differ. Overall, the MEC suspended doctor's licenses twice more the period than the court ordered for imprisonment. This can be explained by the large number of license revocations by the MEC: 52 out of 465 doctors had their licenses revoked while only one of them was ordered life-imprisonment by the court (both revocation and life-imprisonment were converted into 20 years for analysis).

When broken down by charges, the court and the MEC showed different patterns in their judgment. For swindling, murder and psychostimulant abuse, both allocated approximately 30% of their terms for punishment, suggesting that both have the same attitude toward these "traditional" crimes. A sharp contrast was observed for obscenity and bribery. The MEC punished doctors severely for obscene acts while it was forgiving for bribery but the court judgment was otherwise. Obscenity is rather a

minor crime in the Penal Code punished mostly by fines, whereas bribery is a felony punished usually by imprisonment. In fact, only two out of 35 doctors charged with bribery faced revocation while 15 out of 67 doctors charged with obscene acts faced revocation.

Under the “due process of law” dictated by the Constitution as well as the Administrative Procedure Act, AS is administered through quasi-court procedures. Such procedures include “public hearings” for license revocation and “pleadings in writing” for suspension of licenses pursuant to the Article 7 of The Physicians’ Act and the Article 12–31 of the Administrative Procedure Act. In public hearings, defendants are entitled to delegate agents such as lawyers as well as have the right to review material evidence just as in court. Complaints over AS will ultimately be remedied through court procedures pursuant to the Administrative Litigation Act. Reflecting the recent “proactive” stance of the MEC, there have been a growing number of litigations filed by sanctioned doctors against the government¹²⁾.

Historically, criminal laws have been a major discipline in the legal science. There is a huge accumulation of cases, precedents and scholarly works to support the rationale of CP. On the other hand, AS has very little accumulation of such a theoretical base. For example, criminal laws define the time limits of CP and prohibit retrospective application of a new law. Murders committed more than 15 years ago can not be prosecuted any longer and any revision of the law thereafter can not affect the case retrospectively. In the field of AS, such technical details have not been fully developed, resulting in a myriad of inconsistencies. On the one hand, a malpractice case committed 25 years ago was sanctioned, but on the other, the MEC expressed a policy decision to limit cases to those committed in the last five years for future sanctions¹³⁾.

It is true that administrative procedures involve certain levels of discretion, but the discretion should not be synonymous with arbitrariness. Such discretion shall be executed for legitimate purposes, for example protecting the general public from urgent danger. If a dangerous surgeon continues to operate despite repeated failures, then the MHLW may be justified to suspend his or her license before a court ruling. Whether there was really such urgency, however, must be carefully scrutinized.

V. Conclusions

The analysis demonstrated different attitudes toward different types of crimes or misconducts between CP and AS, reflecting different purposes of the

procedures. However, both CP and AS must comply with a common principle: the rule of law. In this respect, there is much to be improved with the present system of AS.

Acknowledgment

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References

- 1) “*Administrative sanctions*” is a translation of “*Gyosei-shobun*”, which is generally perceived as “punishment”. However, there has been a growing emphasis on “disciplinary” or “correctional” aspects. A report titled “Re-education for sanctioned doctors” published in April 2005, proposed introduction of a mandatory re-education system for sanctioned doctors. If such a new system were in place, the term “*disciplinary actions*” may serve a better translation. In this article, the author adheres to the term, AS, believing that this term well reflects general perception.
- 2) Anonymous. 21 doctors escaped sanctions—MHW neglected to capture. *Mainichi Newspaper*. 21 June 2000.
- 3) Medical Ethics Committee. Policy on administrative sanctions against doctors and dentists. 13 December 2002.
- 4) National Health Insurance Weekly. No. 2402: 18–19. 5 April 2004.
- 5) National Health Insurance Weekly. No. 2449: 16. 14 March 2005.
- 6) National Health Insurance Weekly. No. 2461: 21–22. 13 June 2005.
- 7) Some forms of AS are administered as a tool for policy enforcement rather than pursuing ethics. A typical example would be AS pursuant to the Health Insurance Act. A doctor may face AS (cancellation of practicing privileges) for simply violating the practicing rules if not committing fraud (for example, ordering laboratory exams more than the prescribed numbers). Apparently, AS of the Health Insurance Act pursues not only ethics but also policy implementation. However, it is safe to assume that AS of the Physicians’ Act pursues ethics and is less concerned with simple violation of the practicing rules. In seven years from 1997 to 2003, 239 doctors and dentists had suffered AS of revocation of their practicing privileges by the Health Insurance Act, out of whom only 68 eventually received AS by the Physicians’ Act (the author’s unpublished document).
- 8) The “otherwise unconstitutional situation” is exemplified by the following example. If a doctor of a national hospital intentionally discloses the privacy of an AIDS patient, he or she will face the following CPs: the Penal Code (Article 134), the Civil Servants Act (Article 100) and the Infectious Disease Control Act (Article 67). Also, the doctor is likely to face two ASs pursuant to the Civil Servants Act (Article 82) and the Physicians Act (Article 7). The doctor will be prosecuted

only once with all three CPs and it is unconstitutional to prosecute the doctor separately. However, it is permissible to give ASs for the same conduct separately, i.e., sanctioning the doctor pursuant to the Civil Servants Act but forgiving the Physicians Act. The "otherwise" means that such separate applications would be unconstitutional if they were criminal procedures.

- 9) The lists were obtained mostly from Social Insurance Daily and National Health Insurance Weekly but some details were supplemented by various media coverage.
- 10) Okamoto E. Hata E. Estimation of disease-specific

costs in health insurance claims. *Jpn J Public Health* 2004; 51: 926-937.

- 11) Anonymous. Three terrorists charged with 74,325 years imprisonment in Spain. *Yomiuri Newspaper*: 15 February 2005.
- 12) Anonymous. Litigations by sanctioned doctors on the rise. *Asahi Newspaper*. 29 November 2004.
- 13) Medical Ethics Committee. A policy statement on administrative sanctions against doctors of former Fujimi OBGY Hospital 2 March 2005.

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