

Rise in the Crime Rate

Many people expressed a fear of increasing crime. Although in most cases this was a vague impression, the criminal statistics partially confirmed their fears.¹⁵ The number of people convicted of crimes shows a gradual increase beginning in the mid-1920s: 137,804 in 1920; 163,192 in 1930; and 188,203 in 1936, the highest number in the prewar period. This trend paralleled the increase in the number of reported thefts: 13,121 in 1920; 16,508 in 1930; and 20,574 in 1936. The number of offenders convicted per 100,000 people was also on the rise: 245.8 in 1920; 252.1 in 1930; and 265.7 in 1934. Moreover, the number of penal code offenses brought to the Public Prosecutor's Office showed an even more dramatic rise: 227,255 in 1910; 298,525 in 1920; and 427,092 in 1930. A sharp rise occurred in 1929, and the trend peaked in 1934 at 545,360.¹⁶ This rapid increase was partially due to the fact that the police became more inclined to arrest persons committing petty crimes and public order offenses, against which charges were easily dropped.

The cause of this trend seems complicated, but experts of criminal statistics have provided some explanations.¹⁷ The relatively low crime rate at the beginning of the twentieth century may be due to the general improvement in the standard of living. However, beginning in 1910, inflation and the soaring price of rice led to an increase in the number of property crimes. Even though this increase leveled out between 1918 to 1923 as a result of the prosperity following World War I, the trend reaccelerated in 1924 due to economic recession, which was aggravated by the great Kanto earthquake that struck Tokyo and Yokohama in September 1923. The steady increase in the crime rate during this period can be attributed mainly to poverty in the farming districts and to the increase of unemployment in the cities.

Concern about the menace of crime, however, was influenced more by the particular aspects of the trend rather than by the aggregate figures. This can be understood by looking at some of the important traits, which I discuss in the following sections.

Juvenile Crime and Urbanization

Although no precise statistics are available for juvenile crime during this period, it is interesting to note that some administrators of prisons and

15 Annual Report of Criminal Statistics, Ministry of Justice.

16 On the details of the criminal trends in Japan, see Minoru Shikita and Shinichi Tsuchiya, *Crime and Criminal Policy in Japan: An Analysis and Evaluation of the Showa Era, 1926-1988* (New York, 1992).

17 Ibid.

reformatories perceived a worsening of the situation in the 1920s. In the *Archives of Criminology*, the director of a provincial prison reported that the number of youths incarcerated in his prison increased by 40 percent from 1923 to 1927.¹⁸ According to another report by the director of a reformatory, a rapid increase was seen in the 1920s in the number of minors referred to the family court in the Kyoto, Osaka, and Kobe regions.¹⁹ Because these worrisome trends were more noticeable in the cities than in the countryside, specialists often related this change to the bad influences of urban culture on the younger generation.

Beginning in the first decade of the twentieth century, when Japan was transformed into an industrial state, a population migration took place on a large scale from farming districts to industrial centers, producing a sharp rise in the urban population. In 1913, 72 percent of the population lived in townships with a population of less than 10,000. By 1930, this had fallen to 59 percent. However, 14 percent of the population lived in cities of 50,000 or more in 1913, and this number had swelled to 25 percent by 1930. Driven by "city fever," a large number of young people flocked to the industrial centers, where they were forced to work in shops or factories under very poor conditions. The situation was not greatly improved by the passage of the Factory Act of 1916, which limited the working day for women and children to eleven hours and prescribed a minimum working age of twelve.²⁰

Specialists in juvenile crime worried that not only the discontent produced by the low standard of living but also the temptations of the urban environment would induce young workers to commit immoral acts. In fact, there emerged many venues for recreation, such as restaurants, cafes, dance halls, theaters, movie houses, department stores, and brothels. Among these forms of entertainment, moviegoing was considered to be the most harmful. Introduced from the United States in 1896, movies rapidly became a popular form of amusement, particularly after 1929 when the first "talking pictures" were released. The audience was mostly young workers. According to a survey on recreation among city residents, which was conducted by the Ministry of Education in 1921, movies were the most popular form of entertainment for about one out of every three respondents. The movies were considered harmful not only because movie theaters offered places for delinquents to gather but because the stories in the films were sometimes

18 Yumatsu Usui, "On the Causes of Juvenile Crime," *Archives of Criminology* 3 (1930): 13–19 (in Japanese).

19 Junzo Ogawa, "Juvenile Criminals in the Kyoto, Osaka, and Kobe Region," *Archives of Criminology* 4 (1931): 382–3 (in Japanese).

20 Yoshiteru Iwamoto, "Hometown, Emigration, and Foreign Land," in Naohiro Asao et al., eds., *Synoptic History of Japan*, 18 vols. (Tokyo, 1994), 97–132 (in Japanese).

easily mimicked. After the release of a French movie entitled *Gigolo*, there was a rash of juvenile crimes imitating the story, and the Tokyo Prefectural Police consequently created a regulation prohibiting children under fifteen from viewing such movies.²¹

Riots and the Left-Wing Movement

Concern about the rising crime rate was also linked to the fear of political unrest, especially after the war, when social discord was intensified by a series of events: strikes in factories, rioting in cities, the appearance of left-wing organizations, and terrorism by fanatics of both the left and right wing.

Serious inflation in 1918 and the growth of the urban proletariat contributed to the spread of strikes in the factories. The Federation of Labor, which was founded in 1919 and had thirty thousand members, continued to grow over the next few years. The development of the labor movement as well as the Russian and German revolutions encouraged the formation of left-wing parties. With the support of the Comintern, the Communist Party was established in Japan in 1921 and immediately declared an illegal organization.

Another important event was the "rice riots" of 1918, which started in a rural town as a housewives' protest meeting against the rising cost of rice and rapidly spread to the big cities where mobs attacked and sometimes burned the buildings of rice dealers and moneylenders.

In what context were these political upheavals perceived by criminologists? The *Archives of Criminology* contained many articles discussing this matter. Psychologists repeatedly expressed concern about the epidemic of strikes and riots. The mentality of the working class, they argued, was characterized by a lack of scientific knowledge and understanding, superstition, a tendency toward imitation, and excitability. As a result, these people were highly prone to reckless action, presenting a typical example of "mass psychology."²² From the viewpoint of the defense of the social order, public prosecutors regarded the riots as intentional, suggesting that they were more ideologically inspired and organized than their precedents, which seemed simply induced by mass psychology.²³ The police officials in charge of

21 Taketoshi Yamamoto, "Essay on Mass Media," in Naohiro Asao et al., eds., *Synoptic History of Japan*, 289-303 (in Japanese).

22 Mizuyo Shimozawa, "Psychology of Strikes," *Journal of Abnormal Psychology* 5 (1920): 389-96 (in Japanese).

23 Tokisaburo Sugimoto, "Memoirs on the Arson in Hibiya," *Archives of Criminology* 4 (1931): 375-8 (in Japanese).

regulating left-wing parties were particularly concerned about the profiles of arrested rioters and members of the Communist Party. These persons, it was said, usually had familial, educational, and medical problems, and this fact would be a clue for reforming them and for preventing "the collapse of the embankment," that is, preventing the unlimited expansion of communism.²⁴

The view of Hideo Egami, an instructor of psychology at a high school, was more pedagogical. He analyzed the ongoing "deterioration of thought" among youth and found that psychological problems played an important role in this process. He then attributed receptivity to "dangerous thought," or "the seductive appeal of Marxism" among students to the psychological peculiarity of youth: curiosity for novelty, compassion, eagerness to learn, a tendency toward imitation, and ambitiousness. For Egami, it was therefore crucial that teachers and parents be able to detect such tendencies and intervene as soon as possible to correct the "errors" of potential left-wingers.²⁵

Thus, involvement in communist activity became a psychological problem and, accordingly, a subject for criminologists. This kind of behavior was usually interpreted as resulting from a "fault" or "illusion" on the part of vulnerable individuals. In the *Archives of Criminology*, a prison physician proposed to "bring these individuals to their senses" by persuasion (much as parents should do with their children).²⁶ This paternalistic attitude was clearly stated in the opinion of a chief justice of the court of appeals: "Despite the decline of the Communist Party due to strict police regulation, there remain students, teachers, and even scholars who are devoted to Marxism. It is a pity that they are exploited as a tool of the Comintern and are dishonored by being arrested." It was essential, he stressed, that those "stray sheep" be awakened from their dream by making them recognize the Comintern's plot to conquer the world.²⁷

These opinions of specialists can be related to a particular tendency of Marxism, which thrived in Japan in the 1920s. The Marxist movement was supported mainly by youth in their twenties. The majority were unmarried, well-educated men from middle-class families. Thus Marxism attracted those people who felt compassion for the poor as well as strong indignation

24 Kiichiro Sakata, "Recent Trends of Socialist Movement," *Archives of Criminology* 2 (1927): 131-9 (in Japanese).

25 Hideo Egami, "Psychology of Youth and Their Thought," *Archives of Criminology* 4 (1931): 328-37 (in Japanese).

26 Keiji Kuroda, "Essay of a Criminologist," *Archives of Criminology* 5 (1931): 154-63 (in Japanese).

27 Hosui Tateishi, "Love of Family, Marxism, and Patriotism," *Archives of Criminology* 8 (1934): 285-9 (in Japanese).

about the corruption of the privileged class. Accordingly, the movements tended to be idealistic and dogmatic.

Terrorism

The rise in terrorism also gave rise to fear among criminologists. Assaults on party politicians by right-wing fanatics occurred repeatedly. First, Takashi Hara, the first commoner ever to become prime minister, was assassinated in 1921. Then, Prime Minister Osachi Hamaguchi was shot and wounded in 1930, which was followed by the assassination of Prime Minister Tsuyoshi Inukai by young army officers in 1932. After the assault on Hamaguchi, a psychiatrist commented in the *Archives of Criminology* that a scientific method of criminology should be applied to terrorists, because many of them were either insane, degenerate, mentally retarded, or adolescents with high levels of suggestibility.²⁸

The most shocking incident, though, was the assault on the Emperor Showa, then prince, in 1923. The perpetrator, Daisuke Nanba, a twenty-four-year-old anarchist, fired into the car that was carrying the prince to Parliament, but the prince was not harmed. During the trial he did not hesitate to profess his homicidal intent and accordingly was hanged a year later. The documents from the investigation and the trial reveal an interesting profile of the assassin.²⁹ He was born to a reputable family in one of the outlying prefectures, and his father was a member of the House of Representatives. Although all his brothers were bright, his performance in school was mediocre, and he even failed the entrance examination for a prestigious high school. He then left his hometown to attend high school in Tokyo, where he was exposed to radical thinking. He began to have compassion for the poor in the slum neighborhoods in Tokyo and to feel indignation over the authorities' harsh oppression of the socialists. His hatred then turned to the privileged class to which, he thought, his father also belonged. According to his testimony during the trial, he did not have any resentment toward the prince himself, but he reasoned that the imperial family helped the ruling class to oppress the people and that terrorism was the last resort to awaken the proletariat, who were still operating under an illusion about the imperial system.

It is interesting to read the memoirs written by jurists who had close contact with Daisuke Nanba. Rikisaburo Imamura, the lawyer who defended

28 Junji Kaneko, "Essay on the Assault of the Prime Minister," *Archives of Criminology* 4 (1931): 55-6 (in Japanese).

29 A psychiatric report on Daisuke Nanba argued that he was completely sane.

Nanba, analyzed his life history in order to clarify the cause of the “unprecedented disgraceful affair.” Imamura compared Nanba’s profile to that of other left-wing terrorists. The common characteristics he found were “despair due to poor health, and strong self-respect.” Imamura’s explanation of Nanba’s behavior is as follows: He suffered from renal disease and was convinced that he had only a few years to live. The desire to end his life as a hero drove him to commit this reckless act. Books and pamphlets on socialism and anarchism also helped Nanba give voice to his immature thoughts. He further cites an episode that showed the extent of Nanba’s belief: Despite Imamura’s efforts to make his client repent for his foolish act, Nanba shouted “banzai (long life) for the Japanese proletariat!” in front of the judge at the time of sentencing. Imamura later confessed that he took great pains to understand Nanba’s thinking but was only disappointed by his tenaciousness.³⁰

Hideo Yokota, the presiding judge for Nanba’s trial, also stated that it was hard for him to understand Nanba’s act. For Yokota, the core of the problem was that Nanba was a “dropout.” Born to a good family, he ended up “falling into communism” due to the influence of several unfortunate circumstances: his mother’s premature death, his father’s harshness, and the destructive effects of the urban environment. Yokota suspected that the confluence of these factors brought about Nanba’s “moral corruption,” and he strongly emphasized the role family and education should play in preventing the indulgences that would allow youth to slip into communism.³¹

Mass Media and Crime

Another important trend that contributed to the development of criminology was the popularization of knowledge about crime. As mentioned above, both the *Journal of Abnormal Psychology* and the *Archives of Criminology* carried many nonacademic contributions, including essays on sensational criminal incidents, excerpts of newspaper articles, experiences of police officers, and reviews of foreign and domestic detective novels. According to an essay in the *Archives of Criminology* of 1931, interest in crime was growing rapidly among the general public, as evidenced by the large number of books and popular magazines featuring stories about crime.³²

30 Rikisaburo Imamura, “Memoirs,” in *Documents of Modern History*, 3 vols. (Tokyo, 1988), 53–64 (in Japanese).

31 Hideo Yokota, “On the Affaire of Toranomom,” in *Documents of Modern History*, 163–82 (in Japanese).

32 Keiji Kuroda, “Essay of a Criminologist,” *Archives of Criminology* 5 (1931): 154–63 (in Japanese). He complained that even though knowledge about crime became popular, criminology as a discipline was rather underdeveloped.

This interest in crime was probably fed by the mass media, which saw unprecedented growth in the 1910s and 1920s. Two major newspapers had begun publication at the beginning of the century and soon had achieved a large circulation. One had a circulation of 160,000 in 1910, 440,000 in 1921, and 1,050,000 in 1932. This rapid increase in subscribers was due mainly to an increase in the number of people who were educated enough to read newspapers, particularly members of the growing urban middle class. By 1923 the illiteracy rate in Tokyo had dropped to 8 percent. Added to the already established daily newspapers was a steady stream of new weekly and monthly magazines. In the 1930s each of the two major monthly magazines aimed at housewives had a circulation of one million or more.³³

POLITICS AND CRIMINOLOGISTS

Finally, it is important to examine the links between criminology and the resurgence of nationalism that occurred in the 1930s, when Japan invaded Manchuria in 1931 and withdrew from the League of Nations in 1933. I will concentrate on two conservative movements: racism and eugenics. These movements developed parallel to the development of criminology, and some leading criminologists were involved with one or both.

Racism

Japan had made astonishing political and economic progress in the late nineteenth and early twentieth centuries, which was highlighted by the victory over Russia in 1905. These successes encouraged Japanese leaders to compete with European powers. As a result of the subsequent rise in Japan's international status and its acquisition of colonies in East Asia, the Japanese people became more aware of the physical and cultural diversity among different peoples.

This concern can be seen in the works of Tanemoto Furuhashi. In the *Archives of Criminology*, he reported numerous studies on blood types and fingerprints.³⁴ At that time, these two topics attracted the attention of specialists

33 Yamamoto, "Essay on Mass Media."

34 Tanemoto Furuhashi's main works on blood types and fingerprints in the *Archives of Criminology* include "Identification of Individuals," 1 (1928): 18-30; "Heredity of Fingerprints and its Application for Anthropology" 2 (1929): 20-28; "Trends of Study on Fingerprints" 2 (1929): 110-15; "Paternity Test through Blood" 2 (1929): 140-46; and "Particularity of the Japanese Nation through Distribution of Blood Types" 2 (1929): 311-29. In these articles he cited methods of criminal identification developed by European scientists such as Alphonse Bertillon and Francis Galton. But he insisted that identification through fingerprints originated in Japan, where a thumbprint had been customarily used in place of a signature.

not only as tools of criminal investigation but also as means for identifying the specific characteristics of race. In his reports Furuhata detailed large-scale surveys and concluded that he had identified the racial uniqueness of Yamato-minzoku (the archaic term for “the Japanese nation”) based on the distribution of blood types and fingerprints. He argued that, rising from multiple origins, Yamato-minzoku was a sort of big family (the culmination of a longstanding process of fusion and integration). What is most interesting about Furuhata’s argument is the contrast between the very sophisticated scientific analysis used to prove his hypothesis and the old-fashioned rhetoric he employed to state his findings. Using many clichés suggestive of ultranationalism, he asserted that Yamato-minzoku, ruled by the emperor (a descendant of God), was characterized by an incomparable racial uniqueness and was therefore superior to other racially mixed nations.

Takeji Furukawa, a pedagogue, carried out another blood-type study with a similar hypothesis and conclusion. He compared the distribution of blood types among two different peoples, the Formosans, found on Taiwan, and the Ainu, a people spread throughout Northeast Asia, including Northern Japan, particularly on the island of Hokkaido. Furukawa’s motivation for the study may have derived from a political incident. After the occupation of Taiwan following Japan’s victory over China in 1895, the inhabitants continued to tenaciously resist their occupiers. Insurgencies in 1930 and 1931 killed hundreds of Japanese settlers. The purpose of Furukawa’s study was to “penetrate to the essence of the racial traits of the Taiwanese, who recently revolted and behaved so cruelly.” Based on the finding that 41.2 percent of a Taiwanese sample had type O blood, he assumed that their rebelliousness was genetically determined. This reasoning was supported by the fact that among the Ainu, whose temperament was characterized as subordinate, only 23.8 percent had type O blood. Furukawa contrasted the passiveness of the Ainu with the intransigence of the Taiwanese, who refused to be “moralized.” In conclusion, Furukawa suggested that the Taiwanese should intermarry more with the Japanese in order to reduce the number of individuals with type O blood.³⁵ His proposal was consistent with the policy of integration adopted by the Japanese governors.

The Taiwanese mentality was analyzed from yet another perspective. Hideo Egami, a psychologist and one of the main contributors to the *Archives of Criminology* in 1929 conducted research sponsored by the Ministry of Education. He carried out fieldwork for the purpose of determining the

35 Takeji Furukawa, “Racial Traits of the Taiwanese and the Ainu Through Blood Types,” *Archives of Criminology* 4 (1931): 130–34 (in Japanese).

characteristics of the Taiwanese: their moral and religious sensibility, native intelligence, and customs. He then compared the data with those obtained from Japanese counterparts. The results were satisfactory, for the Taiwanese subjects showed the desired effects of the integration policy, which supported the possibility that the Taiwanese would one day become a part of the Japanese nation. Understanding the psychology of “savages” was meaningful for him because of a perceived urgency to “make them enjoy, as soon as possible, the benefits of Koka (becoming subordinate to the Japanese emperor).”³⁶

The core of Japan’s ethnic policy was to assimilate the inhabitants of colonies and occupied areas in order to establish the “Greater East Asia Co-Prospersity Sphere,” a policy that contrasted sharply with the exclusionist policy adopted by the Nazis.³⁷

Eugenics

At the beginning of the twentieth century, the enactment of sterilization laws in the United States aroused the curiosity of several Japanese scholars. Hisomu Nagai, a professor of physiology at the Imperial University of Tokyo, was concerned about the future of the Japanese nation and began to spread the principles of eugenics, proposing sterilization as an effective means of reducing the element in the population having “malignant heredity.” However, health professionals as a whole did not subscribe to these ideas, nor were they even interested in this problem because at that time they were too busy dealing with chronic diseases, tuberculosis, and malnutrition.

From the late 1920s to the early 1930s, eugenics was widely discussed as a means of solving the problem of overpopulation. In 1930 Hisomu Nagai organized the first meeting of the Japanese Society of National Hygiene, which brought together about eight hundred attendees. It should be noted that Tanemoto Furuhashi was a member of the board of directors. The stated purpose of the society was to study heredity and its relation to the Japanese people’s physical constitution. Meanwhile, the enactment of the Sterilisierungsgesetz (sterilization law) in Germany aroused debate about eugenics in Japan. Opponents criticized the excesses of Germany’s

36 Hideo Egami, “Moral Sensibility of the Japanese and the Taiwanese,” *Archives of Criminology* 3 (1930): 261–83 (in Japanese). The works of Furukawa and Egami were examples of anthropological studies to which Japan’s territorial expansion to East and South Asia gave an impetus.

37 Under the Nazi regime, Jews and gypsies were often regarded as predisposed to commit crime. (See Richard Wetzell’s chapter in this volume.) On this point, the German racist discourse differed from the Japanese counterpart, in which criminal disposition was not emphasized as a racial trait.

legislation and demanded more careful consideration, suggesting that the current knowledge of heredity was not sufficient to justify taking such radical steps.³⁸ The proponents of sterilization, headed by Nagai, rejected these critics, arguing that it would be reasonable to sacrifice a minority for the sake of the “eternal life of a nation.” They stressed that Japan’s prosperity had been brought about by the superiority inherent in Yamato-minzoku and that it therefore was of the utmost importance to prevent “racial degeneration.”³⁹ The Japanese Society of National Hygiene actively promoted eugenics research, including a study on the Ainu, who were regarded as an example of an “inferior race.”⁴⁰

Furthermore, the society was engaged in the formulation of a bill for sterilization. The Ministry of Health also began to prepare drafts of legislation, conducting a survey in 1939 of families of mentally ill people on the basis of which the Ministry of Health contended that some forms of mental illness were strongly heritable. In order to popularize such eugenic ideas the Ministry of Health organized an “Exhibition of National Eugenics” that proved to be a great success, drawing over one thousand visitors a day. The exhibits were composed of two distinctly different elements: scientific knowledge and religious concepts. The display appealed to the audience based on the findings of ethnology and then preached to them the value of a eugenics policy that would help Japan, a divine nation, to overcome its present difficulties. This idea was symbolized by an exhibit showing a tree buffeted by a storm yet standing strong, upon which were painted the words “Kodo-Seishin” (Spirit of the Empire).⁴¹

In 1940 the bill for the National Eugenics Law was passed and enacted by the Diet. The purpose of this law was to foster an increase in the healthy population by improving the people’s physical constitution. It aimed to do so by promoting an increase in the number of individuals with healthy predispositions and a decrease in the number with unhealthy predispositions.

38 Jinichi Kikuchi, a forensic psychiatrist, raised strong objections to the eugenics movement promoted by the Japanese Society of National Hygiene. His criticism addressed not only the eugenicists’ lack of psychiatric knowledge but also the risk of the abuse of eugenic measures by the ruling class. He warned that sterilization would be exclusively applied to “abnormal proletarians.”

39 Proponents often argued that sterilization had already been practiced in many Western countries and that current genetics, especially Ernst Rüdin’s research, had provided sufficient evidence supporting the effectiveness of the measure.

40 In 1933 the Japanese Society of National Hygiene formed a committee under the chairmanship of Hisomu Nagai. Aiming to explain the decrease in population of the Ainu, the committee performed a series of surveys on physical conditions, especially tuberculosis, syphilis, and eye disease. The fact that this project was expected to offer preventive measures against racial degeneration suggests the close relationship of eugenics to racism.

41 Yutaka Fujino, *Japanese Fascism and Eugenic Ideas* (Kyoto, 1998) (in Japanese).

The law further stipulated that sterilization could be performed on patients with specific disorders: hereditary mental illness and deficiency, as well as serious types of hereditary morbid character and malformations.⁴² A person with such a patient as a blood relative also could be sterilized. However, only the person affected could apply for an operation; in the case of a minor or an incompetent person, a father or spouse could apply. Even an administrator of a mental hospital or prison could apply for it, if the person's disorder was determined to be extremely serious.⁴³

How many people were actually sterilized under this law? According to statistics from the Ministry of Health, the number of sterilizations totaled 538, which included 217 men and 321 women, from 1941 to 1947, when the law was abolished. For the most part, these were persons with severe mental illness or mental deficiency. This figure seems rather small when compared to that of Germany, where over 56,000 people were sterilized in 1934 alone.⁴⁴ The reason for this limited practice of sterilization in Japan is not clear. I suspect, however, that two major factors hindered the practice. First, because there were relatively few mental hospitals at that time, it was difficult to systematically deal with patients who met the sterilization criteria.⁴⁵ Second, even though some psychiatrists, especially leaders in academic circles, argued for the value of the project, most doctors were reluctant to become involved in the practice.⁴⁶

CONCLUSION

Tracing the early history of criminology in Japan, I have argued that the "science of crime" developed through the contributions of specialists in three

42 The inclusion of criminals in the sterilization law was a matter of debate during the Nazi era. (See Richard Wetzell's chapter in this volume.) In Japan, criminal behavior was not included among the criteria of sterilization, unless it was regarded as a sign of a "hereditary morbid character." Furthermore, the number of sterilized persons with hereditary morbid character was low.

43 The German law provided a powerful judicial organization (Erbgesundheitsgerichte), which made decisions about sterilization. The Japanese law stipulated that a local governor, assisted by a board of specialists, was responsible for the decisions.

44 Ernst Klee, *"Euthanasie" im NS-Staat: Die "Vernichtung lebensunwerten Lebens"* (Frankfurt am Main, 1983).

45 According to the statistics of 1941, the total number of psychiatric beds was about 20,000, which was disproportionately small for the patient population. A large number of psychiatric patients were sequestered in their own homes.

46 There were several reasons for psychiatric practitioners' reluctance regarding sterilization. First, most of them showed little interest in the ideology of the eugenics movement, even though they recognized possible benefits of sterilization for patients with hereditary diseases. Second, they contended that interruption of reproduction would conflict with the Japanese values based on the family unit. Finally, they thought of sterilization as an unnatural act that was in conflict with their medical ethics.

disciplines: forensic medicine, psychiatry, and psychology. On the one hand, an increase in the crime rate led scientists to establish methods for criminal investigation. The technical progress in forensic medicine subsequently aroused an interest in the biological differences among races. However, this new field could not have been explored if people had not faced the problem of Japan's international status and racial identity. This is the reason why the rhetoric of racism easily mixed with anthropological discourse. Psychiatrists and psychologists involved in the study of crime also became concerned about social problems that seemed to endanger the soundness and stability of the Japanese nation. It is therefore understandable that some leaders of criminology were ready to accept the ideas of racism and eugenics.

At the root of these scientific trends was the fear of the growing menace of crime, which was widespread and was intensified by the perception of particular aspects of criminality: the decadence of youth, moral corruption caused by urbanization, the mass psychology of the lower class, and the infiltration of anarchism and Marxism. All these changes were reflections of the economic and political upheavals Japan experienced in the first half of the twentieth century. Criminologists played a role in helping the nation to face this crisis, mainly by making the phenomenon of crime a subject of scientific research. A similar process can be found in the United States. It has been argued that when criminal anthropology reached U.S. shores in the late nineteenth century, crime was becoming a compelling issue due to the transformation of society, and people concerned with social control were primed for exactly this sort of doctrine.⁴⁷

To conclude, although Japanese criminology showed peculiarities related to Japanese politics and society, it also illustrates how the science of crime developed in connection with the modernization of society.

47 See Nicole Rafter's chapter in this volume.

II 司法精神医学の歴史と現状

ドイツの司法精神医学——責任能力と処遇制度

近代日本の医学と法律はドイツの学説や制度に多くを負っており、わけても司法精神医学の分野では榊俣や呉秀三の時代からその傾向が顕著であった。しかし、歴史的背景や社会条件が異なる両国のあいだでは相違点も少なくない。これまでドイツの司法精神医学の紹介¹⁴⁾¹⁶⁾は学説に重点がおかれてきた。改善保安処分を軸とする処遇制度については、法律の立場からは解説されているが⁹⁾、精神医学の観点からは検討される機会が少ない。2005年から施行されている心神喪失者等医療観察法との比較のうえでドイツの処遇制度は特に参考になるので、この側面も考慮しながら歴史と現状を述べることにしたい。なお民事法の領域や、わが国の成年後見制度に相当するドイツの成年者世話法も重要であるが、ここでは省略する。成年者世話法については、新井の解説¹⁾を参照されたい。

1 歴史的背景

a. 刑法の変遷

精神医学と司法のかかわりは、法律の変遷を縦糸、精神医学のパラダイムを横糸とする発展として理解される。ドイツでは、刑法の制定や改正作業がレールを敷き、そのレールの上で刑法学、精神医学双方で活発な議論が展開され、制度の改革に結実するという過程が見いだされる。

まず、近代ドイツの刑法の歴史を要約する”。

1871年にドイツ帝国刑法典が成立した。これは、1851年のプロイセン刑法典、1870年の北ドイツ連邦の刑法典を受け継いだ伝統的な内容である。第一次大戦後の政治的革新や近代刑法学派の影響のもとで全般的な改正が進められたが、ワイマール共和国の終焉とともに中断された。国家社会主義の時代には、1933年の常習犯罪人法や1943年の少年裁判所法などの改革が図られた。1949年にドイツは連邦共和国と民主共和国に分割され、連邦共和国では1950年代末以降の国際的な改革運動の一翼を担って刑法改正作業が進められた。1969年の第一次、第二次の刑法改正法を経て、1974年の刑法施行法によって1871年刑法典の全面改正が実現し、1975年に新刑法典の施行をみた。新刑法典では総則が一新されるとともに各則の大幅な改正が加えられた。

このように、1871年刑法典、1933年刑法改正、1975年新刑法典が大きな節目をなしており、以下の論述はこれに沿って進める。

b. 1871年刑法典と「自由な意思決定」

Langelüddecke¹¹⁾によると、1827年にJarkeが初めて「意思自由の欠如 (Mangel an Willensfreiheit)」という用語を使い、以来、これが責任無能力の基準とみなされ、プロイセン刑法典にも取り入れられた。1870年代までの刑法理論は観念論とりわけヘーゲル哲学に支配され、刑罰は罪の重さによって決定されるべき応報を意味した。この影響のもと

で、1871年刑法典の51条は自由な意思決定(freie Willensbestimmung)の阻却を責任無能力の要件とした。

「行為の当時において意識喪失または精神活動の病的障害の状態にあり、自由な意思決定が阻却される時、罪となるべき行為は存在しない。」

応報原理(Vergeltungsprinzip)に基づいて一般予防——刑罰を加えることで社会一般の人が犯罪を犯すことを抑止する——が目的とされた。人間は自由な意思決定者であり、違法行為は自由に選択された行為として道義的非難を向けられる。精神病とはこの自由の喪失であり、責任能力は有りか無しかの二者択一とされる。

ここから非決定論と決定論の対立が生まれた。Witter²⁰⁾の言葉を借りて2つの立場を次のように図式化することができる。

非決定論：責任能力は自由な意思決定に基づく——行為者は刑罰に「値する」——責任刑法的な正義思想——犯罪への応報が前景。

決定論：刑罰は行為者の動機づけを目的とする——行為者は刑罰を「必要とする」——処法的な目的思想——犯罪者の教育・治療が前景。

Huber²¹⁾が指摘するように、人間行動がすべて法則性に支配されているとする絶対的決定論が正しいとすると、倫理そのものの存在基盤がなくなる。したがって、決定論も非決定論も相対的でしかありえないが、行動の決定要因をどこまで重視するかという問いが、その後の議論の枠組みをつくったことは重要である。

C. 精神医学と刑事政策——改善保安処分の源流

1871年刑法典に対して、社会的変化や犯罪学の登場を背景として当初から改革が求め

られた。教育と再社会化を通して行為者個人の犯罪を防止する特別予防に関心が向かった²⁰⁾。自由意思を犯罪の前提におき、刑罰を道義的な応報とみなす旧派と、犯罪者の教育や社会防衛を目的とする刑罰を主張する新派との論争が活発となった。責任非難に向けられた刑罰とは異なり、犯罪者の危険性を除去することで社会の安全を図る保安処分は、ヨーロッパのいくつかの国と並んで、ドイツでは1933年の常習犯罪人法の制定によって実現した。後述するように、現在は改善保安処分として重要な役割を担っており、「ドイツ刑法の敏感な部分」ともいわれている²¹⁾。興味深い歴史的事情は、改善保安処分にはその起源から精神医学が深くかかわったことである。以下、浅田の解説²²⁾その他を参照してまとめる。

Listzを旗頭とする新派の刑法学者は、刑事政策と犯罪者処遇の合目的性に関心を向けた。政府の改正草案に大きな影響を与えたListz²³⁾は、責任能力*1の本質を「動機による正常な決定可能性」ととらえた。この可能性はさまざまな心的生活の障害によって欠落しているのであるが、未熟と成熟、健康と精神病、清明と錯乱のあいだには無限の移行がある。移行状態での犯罪について、応報的正義のもとで刑罰が加えられているが、刑罰では精神的障害は改善されないために社会の保安は維持されない。したがって、限定責任能力者が公共に対して危険な場合、施設への監置が不可欠である。その施設は刑務所であってはならない、なぜなら「正義の剣でなく医師の技こそが施設の目的に適った象徴であるから」とListzは主張した。

他方、精神医学、次いで心理学の学会は、1871年刑法典が完全な責任能力者か無能力者かという二分法を採用したことに対して、中間的状态を考慮していないとして異論を提

*1 責任能力：Zurechnungsfähigkeit, Schuldfähigkeit. 前者は帰責能力とも訳され、旧刑法51条「罪となるべき行為は存在しない」に対応し、後者は新刑法20条「責任なく行為した者」に対応する。法律概念としては「行為者に責任を帰属させること」「行為者が責任を負担しうること」という意味の違いはあるが、司法精神医学の実際には同義と扱ってよいので、「責任能力」の訳語で統一する。

出した。しかし、限定責任能力を設けた場合、その多くは累犯者であり、彼らから社会を保護するためには特別な施設が必要と考えられるようになった。新派の刑法学者と呼応して、精神医学者も中間状態の者への特別な処遇を求めた。精神病質概念の形成はこれと深くかかわっている¹⁷⁾。精神病質-人格障害の源流をなす精神病質低格 (psychopathische Minderwertigkeiten) の概念を 19 世紀末に提唱した Koch¹⁸⁾ は、51 条が、責任能力が限定されるにとどまる心的異常について定めていないことを誤りとし、刑法典に限定責任能力を導入することを強く求めた。同時に、器質-病理学的条件を有する精神病質低格者のための保護-防御-改善施設 (Bewahr-, Schutz-, und Besserungsanstalten) を提案した。これは精神病院とも刑務所とも異なるもので、指導と管理、公共の安全を図るための施設である。

精神病質を臨床概念として発展させた Kraepelin¹⁹⁾ は、犯罪と刑罰の問題にも一貫して関心を向け、Koch と軌を一にして限定責任能力の導入に積極的にコミットした。精神病質人格は軽度の生得性疾患状態であり、健康と疾病との中間の曖昧な領域の一部である。彼らに対しては、応報原理に基づいて刑罰を軽減するだけでなく、医学的治療と行刑が結合した特殊な処置が必要であるとする。Koch, Kraepelin のいずれにおいても、限定責任能力およびそれと抱き合わせの特殊な処遇方式の導入にかける情熱は並々ならぬものがある。Kraepelin 門下の Aschaffenburg も、健康から病気への移行状態を問題にし、性格不完全の犯罪者は実際にきわめて多く、彼らは健全な者よりも長期間の刑罰執行により改善効果が期待されるが、そのためには刑務所と精神病院の中間物としての特別施設が必要であると述べた²⁰⁾。

精神医学者のなかでは Wilmanns が反対論を代表した。浅田²¹⁾によれば、その主張は次のようなものである。Wilmanns は社会的原因を重視し、常習犯罪者の反社会性は相対的なもので、精神的な優格者でも重大な社会危機のもとでは犯罪者となる可能性があることなどを指摘しつつ、「限定責任能力の規定の導入は、正にその不確実性および限定責任能力の条件となる状態の認定の著しい困難性の故に、司法の平等性を高度に侵害し、且つ司法を不平等と恣意とに導かざるを得ないのである²²⁾」と論じた。もっとも Wilmanns も、常習犯罪者に対する社会防衛を目的とする特別な法規や保安裁判所の必要性を認めており、実際的な対策に関しては両者に隔たりはない。

以上の経緯から、刑法に限定責任能力の規定をおくことと、その対象と想定される人々に対する特別な監置制度の設置を焦点として、刑法学と精神医学が緊密に交錯したことがわかる。応報原理による限り、限定責任能力は単に刑罰の軽減を意味する。ところが現実には、限定責任能力者の多くは精神病質を有する累犯者であり、彼らの刑期を短縮することは公共の安全を脅かす。そこで刑罰とは異なる制裁、つまり将来の危険性を除去する目的をもった制裁が不可避と認識される。これが保安処分にはほかならない。

d. 1933 年の刑法改正

第一次大戦による中断を挟んで草案の改訂と議論が重ねられ、限定責任能力の導入への反対論は後退し、刑事政策的考慮が一段と前進するのと並行して医師の発言が増大した²³⁾。1933 年の改革の柱は限定責任能力の導入および常習犯罪人法の制定である。ここにおいて〈責任には刑罰、危険性には保安処分〉という二元主義もしくは制裁の複線方式

(Zweispurigkeit) が実現した。

まず、51 条の責任能力の規定は次のように変更された。

「1. 行為者が行為の時に意識障害、精神活動の病的障害もしくは精神薄弱のために行為が許されないことを弁別し、又はこの弁別に従って行為することができない時、罪となるべき行為は存在しない。

2. 行為の時に行為の許されないことを弁別し、もしくはこの弁別に従って行為する能力が著しく限定されていた時、未遂の処罰の規定により刑罰は減輕される。」

ここで2項に新しく限定責任能力の規定が加えられるとともに、いくつかの重要な変更がなされた¹¹⁾。すなわち、

- ① 意識喪失 (Bewußtlosigkeit) が意識障害 (Bewußtseinsstörung) に変わった。
- ② 第三の категорияとして精神薄弱 (Geistesschwäche) が加えられた。
- ③ 「自由な意思決定」が「弁別及び統御能力 (Einsichts- und Steuerungsfähigkeit)」に変わった。

他方、新設された常習犯罪人法——正式名称は「危険な常習犯罪人及び保安と改善の処分のための法律 (Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung)」——は、特別予防すなわち犯罪者個人を対象とする犯罪予防を目的とするもので、当時としては画期的な法律である。Langelüddeke¹¹⁾によると、51 条に基づく無罪放免者について裁判官にできることは行政官庁に注意を促すことくらいで、それが収容のきっかけになったかは疑わしく、責任無能力者は「狩猟免許」を渡されてその後も犯罪を重ね、それは精神科医の要望にも全く反していたと当時の情勢を描いている。Langelüddeke が、常習犯罪人法が「長い努力の末に」実現したと総括しているよう

に、当時の精神科医によって待望された施策であった。

e. 戦後の論争から新刑法典へ

1. 責任能力をめぐる論争

第二次大戦後に再開された刑法改正作業に呼応して精神医学界で論議が高まったが、この時期は何よりも責任能力がクローズアップされた。1933 年の刑法 51 条が責任能力の減免の要件として、意識障害、精神活動の病的障害、精神薄弱の3カテゴリーおよび弁別・統御能力の欠如ないし著しい限定を明記したことによる。前者は病氣概念 (Krankheitsbegriff)^{*2}、後者は不可知論者 (Agnostiker) と可知論者 (Gnostiker) の論争を喚起した。

不可知論は、弁別・統御能力を自由意思にとらえ、それを形而上学の次元にある、経験科学的には解答不能の問題とみなす立場で、Schneider と彼の学派によって代表された。Schneider²²⁾によれば、鑑定人は刑法の条文に沿って、「某々は統合失調症に罹患していた。従って51条1項の適用をもたらす精神活動の病的障害が存在した」と答えればよいのであり、「弁別する能力またはこの弁別に従って行動する能力がなかったことを暗黙のうちに認めるだけである」という。

可知論は、不可知論に対するアンチテーゼとして出された。その立場は弁別・統御能力をより実体的な能力にとらえ、経験科学的な証明が可能であるとする。そして、精神疾患の診断それ自体よりも、具体的な行為状況における障害と犯罪の内的関連に力点をおく¹⁸⁾。

病氣概念をめぐる議論の端緒も、精神医学で広範な影響力をもった Schneider の説——「疾患」は常に身体的過程を意味し、「疾病の結果としての心的異常性」と「心的本性の変種としての心的異常性」とのあいだに根本的

*2 Krankheitsbegriff は医学的には「疾病概念」であるが、責任能力論の文脈では法律上の意味合いを含むため、「病氣概念」と訳す。

な相違があるとする——にある。51条の“精神活動の病的障害”はそのような意味で解釈されたが、それに対して裁判所の判例はこれをより広くとらえ、精神病質、神経症、衝動障害も免責の対象となりうるとした。刑法学者の Schreiber²³⁾は、身体的過程に依拠する病気概念を批判した。精神病質の障害が内因性精神病よりも軽いとは一概にいえないのであって、責任無能力、限定責任能力はあらゆる種類の精神的疾病状態に対して適用可能であるとする。それに対する伝統的立場からの批判は、広い概念は免責の無制限の拡大と責任刑法のダム崩壊をもたらすというものである。またそれに対して、改革的立場に立つ Venzlaff^{25,26)}は、不可知論にも身体論的な病気概念にも未来はなく、それは改革の努力を遅延させるにすぎないと反論する。

刑法草案が重ねられる過程で対立が收拾され、“精神活動の病的障害”が“病的な心的障害”と“重いその他の心的変異”に分けられた。そして精神病質などを“重いその他の心的変異”に含めることによって、“病的な心的障害”の意味づけに関しては伝統的な病気概念を維持するという妥協が成立したわけである。20条と21条で同一のカテゴリーが設けられるという、差別的でなく調和的な解決が図られ、人格障害、性的偏倚、衝動制御障害などに関しても責任無能力が認められる余地が生じた。ただし、意識障害については「根深い」、心的変異については「重い」という限定が付されていることも妥協の産物である。

2. 保安改善処分から改善保安処分へ

次に処遇制度であるが、常習犯罪人法は変更を重ね、1975年の新刑法典で改正されて現在につながっている。新刑法典以前は、刑法42条が保安改善処分として、治療施設ま

たは看護施設 (Heil- oder Pflegeanstalt) への収容、飲酒者治療施設または禁絶施設への収容、保安監置、職業禁止、運転免許取消しを定めた¹¹⁾。

改正以前の実情を Horn²⁾は次のように描く。保安改善処分の施設は保安的思想に沿って建築され、高い壁などが監獄を思わせた。スタッフも保安的思想にとらわれ、監視の緩和は再社会化のための治療としてよりもリスクを伴う手段として警戒された。一般精神科医は処分施設を要塞とか監置の館と呼び、そうすることで本来自らの患者であるべき人々を貶めた。こうした事情から、司法精神医学は広範囲の問題を抱えながらも、精神医学の愛されない継子とみなされた。

かつて精神医学が保安改善処分をどのように認知していたかは興味ある問題である。Rasch²¹⁾によると、精神障害犯罪者の処分は長らく科学的関心から遠ざけられており、論文で扱われた数は1970年代までは微々たるもので、司法精神医学の教科書でも取り上げられないか、せいぜい法律の視点からふれられるにすぎなかった。その主な理由は、大学の司法精神医学が処分執行施設との協力にほとんど関心を向けなかったためであるという。

司法精神医学の発展の遅れもこれと無関係ではない。Witter²⁸⁾によれば、連邦共和国では1960年代初頭に初めて大学に司法精神医学講座が設置されたが、教授候補者の不足から講座の数は遅々として増加しなかった。司法精神医学は個人的興味に依存し、精神鑑定への委託はわずかな施設や部門に集中した。大学の精神科医は法律問題に無知であった。加えて1970年代の反体制運動の波のなかで、司法精神医学は司法の既成秩序を攻撃するための格好の標的とされた。鑑定人は「体制の雇われ人」として非難され、司法精神医学は

公然たる名誉毀損にさらされた。その結果、精神科医は司法とのかかわりを避け、鑑定を受託する医師はますます減少した。この経緯はしばらく前の日本で司法精神医学がおかれた状況を彷彿とさせる。

1975年の新刑法典では社会内処遇である行状監督が新たに設けられるとともに、“保安改善処分”が“改善保安処分”と改称された。行為者個人の改善 (Besserung) と保安 (Sicherheit), つまり社会の安全確保の優先順位が言葉のうえで逆転されたわけである。この改称は実質的意味を伴うであろうか。Horn⁹⁾は次のように、錯覚すべきではないと論じる。

改称は刑法改正では保安に対して改善の優先性が考慮されたことによるが、法律は行為者個人に対する特別予防的な処分を通して社会の安全を確保することを主目的とするものである。精神科病院収容は同時に保安を意味する自由の剥奪でもあり、改善と保安を明確に分けることはできない。行刑法 136 条は被収容者の処遇を医学的視点で行うと定めているが、同時に「もはや危険でないほどに治療もしくは状態の改善が図られなければならない」と、危険性の除去を明記している。人間的な処分執行においては完全な保安は保障されず、逆に保安が完全であるためには改善の試みを放棄しなければならない。改善と保安という2つの目的は、組織と人員の不足、不測の事故とそれに対する公衆の反応など、多くの問題に満ちた緊張の場 (Spannungsfeld) によって隔てられている。

以上の Horn の指摘は今なお改善保安処分に潜むジレンマを暗示する。

以上のような経緯で、1933年以降の論争は新刑法典に収斂し、それによって司法精神医学は新しい局面を迎えた。Venzlaff^{25,26)}, Schreiber²³⁾の言葉を借りると、純粹に診断学

的な選別者の立場から治療と予防の立場へと司法精神医学の重点がシフトし、鑑定人は処遇の決定にまであずかることを求められるという。

2 現況

責任能力および改善保安処分に関する規定および運用の実態をみる。条文は Nedopil¹⁸⁾から引用する。

a. 責任能力

1. 刑法の規定

ドイツの新刑法典は 20 条と 21 条に責任能力に関する規定をおいている。

20 条：責任無能力 行為の実行の時に、病的な心的障害、根深い意識障害、精神薄弱、若しくは重いその他の心的変異により、行為の不法性を弁別し、又はこの弁別に従って行為することができない者は、責任なく行為した者である。

21 条：限定責任能力 行為の不法性を弁別し、又はこの弁別に従って行為する能力が、20 条に指示された事由の一つにより、行為の実行の時に著しく限定されている時、刑罰は 49 条 1 項〔法律上の特別軽減事由〕に従ってその刑を減輕することができる。

一見してわかるように、日本の刑法 39 条——「心神喪失者の行為は、罰しない」「心神耗弱者の行為は、その刑を減輕する」——と比較すると、責任無能力と限定責任能力の2段階構成は同じであるが、責任が減免される要件が法律上で明文化されている点が異なる。すなわち、適用のメルクマールとしての4種の障害の存在と、それに基づく弁別および統御の能力の欠如または著しい減弱である。

精神医学的に問題となるのは4つのメル

クマールの解釈である。これらは一見すると医学的カテゴリーと思われるが、本質的には法的概念²¹⁾、あるいは純粹に医学的でもなければ法的でもない概念¹⁸⁾とされている。改正の議論のなかで、4つのメルクマールを一つにまとめるべきだとする意見もあった¹⁹⁾。他方、日本の刑法改正作業においては、将来の精神医学の発達を考慮して、精神障害を個々に列挙して固定化することは適当ではないとされた²⁴⁾。ドイツのようにメルクマールが条文で具体的に提示されると、それらと臨床カテゴリーとの対応が当然問題となる。以下、Rasch²¹⁾、Nedopil¹⁸⁾を参照してそれぞれについて述べる。

2. 臨床的カテゴリーとの対応

病的な心的障害 (krankhafte seelische Störung)

伝統的な概念では外因性、内因性の広い範囲に及ぶ疾患である。すなわち、身体的に基礎づけられうる精神病 (Schneider)、外因性精神病、変性脳疾患、中毒性または外傷性の原因による通過症候群、アルコール酩酊、薬物中毒、てんかん性疾患とてんかん性もうろう状態、感情障害および統合失調症圏の精神病、ダウン症候群などの遺伝性疾患である。

根深い意識障害 (tiefgreifende Bewußtseinsstörung)

不安、怒り、感情麻痺など強度の感情的負荷の結果として健常人でも生じうる意識変容であり、睡眠酩酊、夢遊症も含まれる。アルコール離脱せん妄などの外因性・器質性の意識障害は「病的な心的障害」に含まれることに注意が必要である。「根深い」ことが条件であり、刑法改正特別委員会の見解では、心的構造が破壊されている (20条) か震撼されている (21条) ほどに意識障害が強度でなければならない。

精神薄弱 (Schwachsinn)

器質的基盤が証明されない知能の障害を包括する。それに対して、老年の認知症や遺伝性の精神遅滞では「病的な心的障害」を考慮する。

重いその他の心的変異 (schwere andere seelische Abartigkeit)

上記3つに当てはまらないものを総括する寄せ集め概念である。すなわち、人格障害、神経症的発展、性的行動偏倚、慢性物質乱用、妄想様発展、衝動制御障害などである。ここでも「重い」という限定が付され、障害による機能低下や社会的能力の損失が精神病性疾患と同等であることが条件とされる。

以上のように、「病的な心的障害」というメルクマールで非常に広い病態を包括し、なおかつ4番目に「重いその他の心的変異」を加えることで、理論上はあらゆる精神障害について責任能力の減免が考慮される形となっている。

なかでも「重いその他の心的変異」は議論を呼んでいる。責任の減免の理由として最も頻繁に挙げられるが、しばしば不幸にして選択された概念であると指摘され、単に「4番目のメルクマール」と呼ぶ鑑定人もいる¹⁹⁾。Rasch²¹⁾によれば、変異 (Abartigkeit) という言葉には、第二次大戦中にドイツ国防軍で兵役不適格者をより分ける標識として使用されたという忌まわしい過去があり、変質 (Entartung) を思わせる差別的響きがあるという。

b. 改善保安処分

改善保安処分は次の各項から構成されている。精神科病院収容 (63条)、禁絶施設収容 (64条)、保安監置収容 (66条)、行状監督

(68条), 運転免許の取消し(69条), 職業禁止(70条). 改正作業のなかでは65条として社会治療施設に関する規定が設けられる予定であったが, 刑法からは削除された. 以下, これらのうち重要な4つについて解説する.

1. 精神科病院収容 (Unterbringung in einem psychiatrischen Krankenhaus)

「人が責任無能力(20条)もしくは限定責任能力(21条)の状態において違法行為を行った時, 裁判所は, 行為者及びその行為の全体的評価に基づき, その者の状態の結果として著しい違法行為が予測され, そのため公共に対して危険であることが明らかであれば, 精神科病院への収容を命じる。」

収容期間は無制限であるが, 連邦最高裁決定(1985年)による均衡性の原則(Verhältnismäßigkeitsgrundsatz)が定められている. すなわち, 「精神科病院への収容が長期に及ぶほど, 自由剥奪の均衡性のための要件は厳格でなければならない」というもので, 収容の命令・継続は高度の法益侵害が予想されるため, 対象者の自由と公衆の安全との拮抗関係が妥当な形で調整されることを求めた. なお限定責任能力が認定された場合は病院収容と自由刑を併科することができる. 63条を補完するものとして行刑法136条があり, 「精神科病院の被収容者の処遇は医療的(ärztlich)視点に従う. 可能な限りにおいて被収容者は治癒されるか, もしくはもはや危険ではない程度まで状態が改善されるべきである. 被収容者には監督, 介護(Betreuung), 看護が与えられる」と定められている.

改善保安処分が“公共に対する危険性”を処分の要件として法律に明記していることは, 日本の心神喪失者等医療観察法との大きな相違である.

2. 禁絶施設収容 (Unterbringung in einer Entziehungsanstalt)

「アルコール飲料もしくはその他の酩酊薬を過量に摂取する性癖を有し, 酩酊におきかした違法行為又は性癖に由来する違法行為により有罪宣告を受けるか, 責任無能力が証明されたか除外し得ないために有罪宣告を受けない時, 性癖の結果として著しい違法行為をおかす危険が認められる場合には, 裁判所は禁絶施設への収容を命じる。」

Entziehungは「嗜癖からの離脱」を意味するが, 従来から「禁絶」と訳されているので, それに従う. Rasch²¹⁾によると, 医学的には性癖(Hang)は嗜癖(Sucht)として, また酩酊は薬剤の作用に基づく気分, 意識状態, 欲動の変化で, 時に妄覚を伴うものと解釈される. また64条が適用されるには, 鑑定で嗜癖を確認するだけでなく, 嗜癖と犯罪行為との直接的関係, つまり行為が症状としての性質をもつことが証明されなければならない.

3. 保安監置収容 (Unterbringung in der Sicherungsverwahrung)

(1) 次の3つを満たすとき, 裁判所は故意の犯罪行為により2年以上の有期自由刑の言渡しを受ける者について刑罰と併せて保安監置を命じる.

- ①すでに1年以上の自由刑の言渡しを2回受けた.
- ②すでに2年以上の自由刑または改善保安処分による自由剥奪の執行を受けた.
- ③行為者および行為の全体的評価から, 被害者に心身の損傷や重い経済的損害を与える著しい犯罪への性癖のため, 公共に対して危険であると認められる.

(2) 3回の故意の犯罪——それぞれで1年以上, うち少なくとも1回は3年以上の自由刑を申渡される——を行い, 上記③の要