日本醫師法第19條「應召義務」之適用限度與案例整理*

On the Limitation of the Application of the "On-Call Duty" according to Paragraph 19 of the Japanese Physicians Acts and the Studies of the Relevant Cases

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摘 要

日本醫師法第19條之應召義務，是以醫療由個人開業醫師主導的時代為背景所制定的，自明治時代起即有附帶刑罰的類似規定，約束醫師面對診療請求時不得拒診，承載起社會期待與國民信賴，具有超出純法律效果的重大意義。然而時過境遷，現代醫師多為醫院聘僱，應召義務作為對個人義務的解釋已存在局限性，過度拘泥此概念不僅造成醫師長期過勞，也使醫院在應對不合理的診療請求時出現困難。

本文基於厚生勞動省自2019年研究報告，探討醫師法

*本篇參考相關網站：日本産婦人科医会，https://www.jaog.or.jp/；厚生勞動省第 67 回社會保障審議會醫療部會（2019），https://www.mhlw.go.jp/content/12601000/000529089.pdf 。

關鍵詞：正當理由（justification）、拒絕診療（refusal of treatment）、急救義務（emergency treatment obligations）、急診（Emergency）、強制締約（wether to contract or not）

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第19條「應召義務」之適用限度，指出該義務具有訓示性質，並非無條件強制。透過厚勞省過去的通知及五則民事訴訟案件，包括自宅併設診療所的診療義務、交通事故重傷患者被急診拒收、小兒疑似肺炎被急診拒收、嚴重妨礙醫療機構運作的患者、信任關係破裂的患者，期待能具體呈現於何種狀況下拒絕「應召義務」可被認為正當，於何種情況下則可能引發民事責任。

The on-call duty according to Paragraph 19 of the Japanese Physicians Acts, which was enacted against the background of the era in which medical treatment was dominated by individual practitioners, ha had similar provisions with penalties since the Meji era, binding physicians not to refuse treatment in the face of a request for medical treatment, and carrying the expectations of the society and the trust of the people, which is of great significance beyond the purely legal effect. However, as time has passed and many physicians are employed by hospitals, the interpretation of the on-call duty as a personal obligation has become limited, and excessive adherence to this concept not only leads to long-term overwork of physicians, but also makes it difficult for hospitals to respond to unreasonable requests for medical treatment.

Based on a study conducted by the Ministry of Health, Labor and Welfare of Japan (MHLW) in 2019, this essay examines the limitations of the application of Paragraph 19 of the Japanese Physicians Act, and states that this duty is admonitory in nature and is not unconditionally mandatory. Through past notifications of MHLW and five civil lawsuits, including the duty to provide medical treatment at a clinic set up in one's own home, the refusal of emergency medical treatment for patient seriously injured in a traffic

accident the refusal of emergency medical treatment for a child suspected of having pneumonia, the refusal of emergency medical treatment for a patient who seriously interferes with the operation of a medical institution, and the breakdown of a trusting relationship between patients and clinicians, the MHLW expects to show specifically under what conditions refusal of the "on-call duty" may be considered proper, and under what circumstances civil liability may be triggered.

壹、關於應召義務

日本醫師法（昭和23年法律第201號）第19條規定：「從事診療之醫師，於有診察治療之請求時，無正當理由者，不得拒絕。」即所謂「應召義務」。其法律性質有二，第一，應召義務為醫師基於醫師法對國家所負之公法上義務，並無刑事處罰規定，亦未確認有行政處分實例。第二，應召義務並非私法上義務，醫師對患者並不直接負有民事義務。

雖應召義務係對醫師個人之訓示性規定，其違反所生之法律效果有限，但若不合理地拒絕診療，仍可能導致對患者的私法上損害賠償責任，下級審判中於認定過失時，亦會引用應召義務的概念。然而，為推進醫師工作方式改革，不應將「醫師有應召義務」解釋為可以無限制要求其長時間工作，因此有必要進一步釐清，在何種情況下醫療機關或醫師可正當地不回應診療請求，亦即構成應召義務觀點下的「正當理由」拒診。在探討此一問題時，有助於參考的是厚生省針對各都道府縣知事所發出的通知中所作出的解釋，以及相關民事判決案例。