The Validity of Emergency Powers in Japan: Should the Japanese Government be Granted Emergency Powers?

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1. Overview

In this paper, I will discuss the current debates on emergency powers in Japan. Emergency powers deal with natural disasters, terrorist attacks, and foreign invasions, among other emergencies.

In Japan, there exist several legislative statutes to deal with natural disasters; for example, the Disaster Countermeasure Basic Act, which stipulates that in emergency situations the government may provide various necessities to citizens, cap prices of day-to-day commodities, set grace periods for paying debts, et cetera. Because Japan is affected by many natural disasters, such as typhoons, earthquakes, and tsunamis, we need such statutes.

In my view, the existence of so many nuclear power stations in Japan is one of the most serious risks the country faces. The stations are vulnerable to natural disasters, as well as terrorist attacks. I think that the Japanese government should seriously consider whether it is worth maintaining these establishments.

I would like to make an observation about the background of the present-day proliferation of terrorism. Terrorist organisations typically germinate in failed or weak states. Before the Second World War, failed or weak states were often conquered and pacified by stronger ones.

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Nowadays, because wars have, in principle, been outlawed, the sovereignty of even a failed state is respected. If we want to respect the sovereignty of every state, we have to endure the risk of international terrorism. If we want to eliminate all the terrorists, then we have to endure the risk of invasion and conquest. As Oona Hathaway and Scott Shapiro point out[2], we cannot have it both ways.

Some politicians in Japan, including Prime Minister Shinzô Abe, claim that we should amend the existing Constitution of Japan and accord the government emergency powers to deal with natural disasters, terror attacks, or foreign invasions. The draft constitution made public by the Liberal Democratic Party（LDP）in 2012 includes a clause that allows the prime minister to propose — if he deems it necessary — to the cabinet to declare an 'emergency situation'; if the proposal is approved and an emergency is declared, the cabinet can change parliamentary statutes by issuing orders[3].

If we take seriously Carl Schmitt's statement that 'Sovereign is he who decides on the exception'[4], this proposal makes the prime minister the sovereign. The proposal, reminding people of the Weimar Republic experiences, has been strongly criticised for being too sloppy and dangerous. Constitutional scholars are generally sceptical about the courts having the will to effectively review the legality of government actions during emergency situations.

Generally speaking, the Constitution of Japan provides only standards or principles restricting government actions; as a result, a broad range of discretionary powers for the government, as well as for the Diet, can be deduced from the Constitution. Therefore, there seems to be little need to amend the Constitution to improve the government's response to emergency situations.

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[2] Oona Hathaway and Scott Shapiro, *The Internationalists: And Their Plan to Outlaw War*（Allen Lane, 2017）, p. 369.
[3] See https://jimin.jp-east-2.os.cloud.nifty.com/pdf/news/policy/130250_1.pdf
[4] Carl Schmitt, *Political Theology*, trans. George Schwab（University of Chicago Press, 2005）, p. 5.

2. Why the Constitution of Japan Does not Provide for Emergency Powers

Article 73, Clause 6 of the Constitution provides that: the cabinet may enact 'cabinet orders in order to execute the provisions of this Constitution and of the law. However, it cannot include penal provisions in such cabinet orders unless authorized by such law'. The latter half of this clause was not included in the original draft proposed by the GHQ.

After receiving the GHQ draft in February 1946, the government of Japan told the GHQ that it wanted to insert an article which would permit the cabinet to issue orders dealing with emergency situations while the Diet is not in session[5]. The GHQ responded that such an article was not necessary because parliamentary statutes could grant the government broad powers to deal with such situations, including issuing cabinet orders. Against this, the Japanese government pointed out that if so, it might become necessary for such cabinet orders to include penal provisions, which the GHQ accepted[6].

In the deliberation of the draft constitution at the Diet, Mr Tokujirô Kanamori, the minister in charge of constitutional affairs, explained why constitutional emergency powers were neither desirable nor necessary. According to him, under the new constitution, the cabinet can at any time convene the Diet (Article 53); when the Lower House is dissolved, the cabinet can ask the Upper House to take emergency measures (Article 54, Clauses 2 and 3). And if necessary, the Diet may enact statutes granting the government broad powers to deal with emergency situations (Article 73, Clause 6)[7]. Mr Kanamori's view seems still valid and sound today.

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[5] Article 8, Clause 1 of the Meiji Constitution stipulated that: 'The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial Ordinances in the place of law'.

[6] Kenzô Takayanagi, Ichirô Ôtomo, and Hideo Tanaka eds., *Nihonkoku Kenpô Seitei no Katei* (*The Making of the Constitution of Japan*), Vol. II (Yûhikaku, 1972), p. 28.

[7] Shin Shimizu ed., *Nihonkoku Kenpô Shingiroku* (*The Minutes of the Deliberations of the Draft Constitution of Japan*), expanded edition, Vol. 3 (Hara Shobô, 1976), pp. 411-12.

3. Should We Amend Article 9?

Article 9 of the Constitution of Japan states that the government is prohibited from exercising threats or use of armed power 'as means of settling international disputes'. The government is also prohibited from maintaining 'war potential'. Successive administrations have claimed that the government may exercise the right of individual self-defence to repel illegal attacks from abroad and, therefore, may maintain a military force that is adequate to perform this task. I think that Article 9 has worked as a rational pre-commitment to lower the risk of military conflicts in East Asia.

The Supreme Court, which is the highest authoritative interpreter of the constitutionality of any state action (Article 81 of the Constitution), has been quite reticent to express its views on Article 9. In contrast, the Cabinet Legislation Bureau, which is, strictly speaking, just a bureau under the Cabinet, has worked as the *de facto* authoritative interpreter. The risk of according such a significant task to a cabinet bureau became apparent when, in July 2014, the Abe administration overturned — without sufficient justification — the long-held view of the government that only the individual right of self-defence is permitted under Article 9[8].

Further, in May 2017, Mr. Abe proposed an amendment to Article 9 to confirm the *status quo* of the self-defence forces. Although he has never disclosed the real motive driving this apparently unnecessary proposal, many people suspect that he intends to consolidate the government's new interpretation of Article 9. These moves have been strongly criticised by not only the opposition parties, but also an overwhelming majority of constitutional scholars, as an attempt to incrementally undermine constitutionalism in Japan.

If Mr Abe's proposal to amend the Constitution were solidly supported by persuasive reasons, it would not be difficult for him to acquire necessary majorities in both houses. In fact, at the time of writing (September 2019), the current government coalition secures necessary two thirds seats in the Lower House and more than 60% seats in the Upper House. The reality is that even MPs of the government coalition are not

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[8] See Yasuo Hasebe, 'The End of Constitutional Pacifism?', *Washington International Law Journal*, Volume 26, Number 1 (2017).

sure whether it is necessary to change the Constitution in accordance to Mr Abe's proposal. According to the opinion poll conducted by NHK (Japan Broadcasting Corporation) in May 2018, only 19% of those polled answered that amending the Constitution was the political issue to be prioritised over other issues.

4. The North Korea Crisis

The recent incidents surrounding the Korean peninsula can be described as a roller-coaster ride. By describing it as a 'deteriorating security situation', Mr. Abe seems to think that he can convince others that the environment is favourable for the revision of Article 9.

What I can say on this is quite limited. First, it is unlikely that enlarging the roles and missions of the self-defence forces will persuade the North to abandon its military projects. North Korea's foremost objective is ensuring regime survival. The security is the pre-eminent factor guiding their actions. Further, it assumes that holding the capability to attack the United States with nuclear bombs is the only effective way to achieve that.

Second, amending the Constitution of Japan cannot be a means to solve the North Korea crisis. We should distinguish between situations to which constitutional law can respond and those to which it cannot. Of course, in a game of chicken, the best strategy is to feign to be irrational. However, changing the Constitution in the face of a nuclear threat is ridiculously irrelevant, rather than feigning to be irrational.

Third, after the standoff and the escalation of tension, North Korea appears to be ready to begin serious negotiations. Perhaps, we should not be too optimistic; this is because North Korea has made similar pledges on numerous occasions in the past, with little or no intention of honouring them. Further, like so much we have witnessed during Trump's presidency, this may be just for show. Even after the US-North Korea summits of 12 June 2018 and 27-28 February 2019, we are as yet no closer to the denuclearization of the Korean peninsula. The first summit produced only a vague communiqué, and the second summit ended abruptly with no agreement. We may not be able to achieve the goal of 'complete, verifiable and irreversible denuclearisation' in the near future.

However, I think that negotiation is unavoidable because there is no feasible military option available to either side[9]. To resort to military

options is disastrous not only for the two countries, but also the whole of East Asia. We should expect a long and winding negotiation process of the denuclearization.

5. The 'Uniquely Japanese Values'

Sometimes, I feel that those advocating the amendment of the Constitution of Japan are suffering from excessive anxiety. They say that the Constitution has many defects. However, as explained in section 1 above, the so-called 'defects' do not seem serious enough to warrant worrying about them. And it is not essential to amend Article 9, if its purpose is just to confirm the *status quo* of the self-defence forces

However, the latent objective of the LDP politicians, clamouring for an amendment of the Constitution, may be to convert Japan into a more authoritarian regime. Right-wing politicians, including Mr. Abe, often claim that liberal constitutionalism is an idea foreign to Japan, and that it can become a much better country if this foreign idea is excluded and the Japanese spirit is purified[10].

The peculiar idea that there are values unique to Japanese culture, and which all Japanese people should embrace, sustained the national seclusion policy during the Edo era, as well as the expansionism through

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[9] It should be noted that North Korea's nuclear capabilities are relatively weak and inaccurate. They cannot annihilate its opponents' retaliating power at a first strike. Thomas Schelling explains that: 'A weapon that can hurt only *people*, and cannot possibly damage the other side's striking force, is profoundly defensive; it provides its possessor no incentive to strike first' (Thomas Schelling, *The Strategy of Conflict* (Harvard University Press, 1960), p. 233).

[10] If we may use the distinction between *societas* and *universitas* made by Michael Oakeshott, these politicians intend to turn Japan under the current constitution into a very different association, that is, *universitas*. In a *societas*, the state only establishes a space of social life and rules to be observed in acting by its members, and each member decides how to live by herself and pursues her own purposes. The current constitution of Japan says that Japan is a *societas* in this meaning. In contrast, in a *universitas*, the state sets common substantive purposes every member should collaborate to realise; the state manages and controls material and human resources in the society to promote the purposes. Japan before and during the second world war was a *universitas*. See Michael Oakeshott, 'On the Character of a Modern European State', in his *On Human Conduct* (Clarendon Press, 1975).

military means before the Second World War. It was argued that because the emperor is a benevolent monarch who rules his subjects without considering his private interests, all people — not just the Japanese — should obey him as if they were his children. Under this ideology, foreigners who did not obey the emperor were seen to be insufficiently compliant and, therefore, deserving of punishment; such an ideology was loathsome to neighbouring nations.

If Japan discards liberal constitutionalism and embraces the so-called 'uniquely Japanese values'[11], its relations with surrounding countries will deteriorate spectacularly. In other words, right-wing politicians' attempt to amend the Constitution is one of the most serious emergency risks that Japan currently faces.

6. Dicey's Suggestion: How to Respond to Unforeseeable Situations

Last, I would like to make an observation on emergency powers. Those who advocate the inclusion of clauses on emergency powers in the Constitution often point out that we cannot foresee the extreme disasters that may occur. Because we are not prophets, their observation is certainly true. However, these people use this reasoning to assert that we should, therefore, accord the government sweeping powers to deal with any emergency that may occur. Their recommendation is disproportionate to the problem they intend to solve, and quite dangerous.

Albert Venn Dicey, the eminent English constitutional scholar, has stressed in his *An Introduction to the Study of the Law of the Constitution* that in England the government has been as much subject to the rule of regular laws as ordinary citizens. However, at the end of his analysis of the rule of law, he says that there are 'times of tumult or invasion when for the sake of legality itself the rules of law must be broken'[12]. He added that

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[11] As to the 'uniquely Japanese values', see, for example, Section IV of Yasuo Hasebe, 'Constitutional Change in Japan', in *Routledge Handbook of Constitutional Change*, eds. Alkmene Fortiadou and Xenophon Contiades (Routledge, 2019).

[12] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (Macmillan, 1959), p. 412; cf. Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Transaction Publishers, 2002 (originally published in 1949)), pp. 138-39.

such executive actions were always undertaken with the understanding that a parliamentary indemnity act would have to retrospectively legalise the actions that are found to be illegal. I should add that such a treatment would presuppose that members of the executive are individually responsible for the illegal acts that may be committed. For example, they may be individually impeached, or suffer a monetary penalty.

We can detect similar precedents in other countries. In the United States, President Abraham Lincoln suspended the writ of *habeas corpus* during the Civil War[13]; however, he had the Congress retroactively constitutionalise his actions. In the 1860s, when the Prussian Diet refused to approve the state budget for several years, Chancellor Otto von Bismarck unilaterally made disbursement to prepare for the wars against Denmark and Austria; after the victories, he asked the Diet to indemnify the ministers.

In Japan too, when the Japan Red Army highjacked a JAL airplane in Bangladesh in September 1977, the prime minister Takeo Fukuda, without any legal basis, decided to release 9 Red Army members who had been imprisoned in order to save passengers held hostages. The justice minister resigned, afterwards. Mr Fukuda's action has been called the 'extra-legal measure'.

To let the government act *contra legem* when dealing with an emergency situation and give parliamentary indemnity afterwards is preferable to according the government dangerously broad-ranging powers beforehand. Thus, the government will take only those actions during emergencies that are absolutely necessary; if it behaves disproportionately, it cannot expect the parliament to indemnify it. Further, we cannot trust politicians who complain that they cannot cope with emergencies without first being granted untrammelled authority. We should not grant any such authority to these cowardly politicians. It should be noted that a delegated dictatorship may easily transform itself into a sovereign dictatorship, as the Weimar precedent shows.

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[13] In his letter to Albert G. Hodges, April 4, 1864, Lincoln wrote that: 'I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the nation'. It should be noted that Lincoln's ultimate purpose was to save the union; abolishing slavery was its means. See, on this point, John Lewis Gaddis, *On Grand Strategy* (Penguin, 2018), pp. 240-45.

7. Conclusion

Although the present situation is very different from that in the 1930s — the mass mobilisation and militarisation of entire societies is not occurring — we should not remain complacent. Even if we do not encounter an outright violent coup d'état, we may witness the undermining of democracy from within through the mechanism of executive aggrandisement. As David Runciman suspects, this may lead to the end of democracy[14].

As Ernst-Wolfgang Böckenförde points out[15], emergency laws as normal legislation bear the risk of eroding the rule of law. However, to insert in the constitutional code sloppy clauses according the government emergency powers would entail more dangerous risks as the experience under the Weimar constitution shows. The government may constantly have recourse to the convenient measures, and political parties in the parliament may evade the responsibility to form a stable majority sustaining the administration on the pretext that the government can always use these measures.

So, my conclusion is that we should think twice before introducing emergency clauses into our Constitution. Before amending the Constitution or legislating special laws, we should make the best use of what we have.

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[14] David Runciman, *How Democracy Ends*（Profile Books, 2018）.
[15] Ernst-Wolfgang Böckenförde, 'The Repressed State of Emergency', in his *Constitutional and Political Theory*, eds. Mirjam Künkler and Tine Stein（Oxford University Press, 2017）.