

Japanese Response to the COVID-19 Pandemic: Politics of Emergency Powers, Human Rights and the Rule of Law

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Abstract

This paper explores the Japanese response to COVID-19 in order to determine why emergency provisions are not included in Japanese law, and how the Japanese people managed the emergency situation without the use of forcible countermeasures against COVID-19. In so doing, it discusses the Japanese legal system and interpretations of the Constitution of Japan vis-à-vis emergency powers. The Japanese response to COVID-19 shows that the experience of World War II still has significant effects on law and politics in contemporary Japan, especially in terms of limiting excessive power in the executive for fear of impeding democracy. Moreover, Japanese economic and social actors became important forces to apply the government's policies extra-legally. However, the situation also revealed structural weaknesses of the country's rule of law deriving partly from the limitations of the law, and post-war politics.

Keywords: the Constitution of Japan, emergency powers, Japan, COVID-19, the rule of law

1. Introduction

In 2020, many countries around the world, irrespective of whether their form of governance was democratic, autocratic or otherwise, implemented emergency powers in fighting the COVID-19 pandemic, demonstrating diversity in their legal arrangements and emergency measures. The Japanese government declared a state of emergency in April 2020 in order to take measures necessary to counter COVID-19. The role and powers that the Japanese government has under the declaration are different to those found in some other countries, particularly those countries that can impose martial law in response to a temporary emergency, suspending civil law and placing normal civil functions under direct military control.

In the history of post-World War II Japan, there have been only a few occasions on which government declared a state of emergency. The most recent state of emergency was declared in 2011, following the accidents at the Fukushima Daiichi nuclear power station during the Great East Japan Earthquake.¹ At that time, although the government declared a Nuclear Emergency Situation, it targeted only the vicinities of the first and

¹ The declaration was made on 11th (the first plant) and 12th March (the second plant) in 2011.

second nuclear plants.² The Japanese experience of a nationwide state of emergency dates back to the beginning of the Pacific War in December 1941, during which time the country operated under the Constitution of the Empire of Japan, also known as the Meiji Constitution. Therefore, the 2020 emergency declaration was the first time many Japanese people had experienced a *nationwide* state of emergency in the post-World War II history of Japan.

Nevertheless, in post-World War II Japan, the question of whether to include emergency provisions in the Constitution of Japan has become a constant theme of parliamentary discussions.³ This is largely because there are no provisions pertaining to emergency powers in the current Constitution of Japan. The COVID-19 pandemic, therefore, reinvigorates debates of whether to include emergency provisions in the Constitution. In fact, on 3 May 2020, Constitution Day, Prime Minister Shinzo Abe spoke of the necessity of including emergency provisions in the Constitution. Referring to the outbreak of COVID-19, he stated that it was now vital to consider the roles of the state and the nation in emergencies, and to examine the status and content of emergency provisions to include in the Constitution.

The feeling that it was necessary to include emergency provisions in the Japanese Constitution emerged as a political standpoint as early as the 1950s. In practice, the 1947 Police Act then in effect specified that the Prime Minister could declare an emergency. The current Police Act contains similar clauses, Articles 71 and 74.⁴ Moreover, certain provisions for emergency situations are included in some other laws, such as the Basic Act on Disaster Management of 1961 (Articles 105 and 106) and the Self-Defence Forces Act of 1954 (Articles 76, 78 and 81).

There is a globally-apparent inclination to include emergency provisions in a

² The 'nuclear emergency situation' is defined in an Act on Special Measures Concerning Nuclear Emergency Preparedness (Act No.156 of December 17, 1999). It states that "'nuclear emergency situation' means a situation in which radioactive materials or radiation at an abnormal level has been released outside the nuclear site of a nuclear operator See Article 2 in the Act on Special Measures Concerning Nuclear Emergency Preparedness (Act No.156 of December 17 1999).

³ Although different contextual reasons, the issue of emergency provisions was discussed in the parliament, for example, on 18 August 1947 in relation to the Disaster Relief Act, on 14 May in 1975 in relation to the Constitution of Japan, on 13 and 27 April 1981 in relation to the Self-Defence Forces Act and on 3 April 2001 in relation to armed attacks. Apart from these occasions, after the Cold War and the terrorist attacks on the United State in 2001, there were fierce debates on wartime legislation (the so-called *Yūjihō*, that is 'emergency' or 'contingency' legislation) in relation to Self-Defence Forces-related legislation and military emergency legislation.

⁴ The authorisation was given initially under the previous police act introduced in 1947, which was revised to the current police act took effect in 1954.

country's constitution. As revealed in Rooney's 2019 study, the rise of democracy in the post-Cold War world led to an increase in the number of states with emergency powers codified into law (Rooney 2019: 13; Fatovic 2019). By the same token, Bulmer points out that most modern constitutions include emergency provisions that allow a temporary departure from normal constitutional safeguards (Bulmer 2018: 9).

Emergency powers generally allow government powers to promptly respond to public emergencies,⁵ such as war, large-scale natural disasters and internal crises, in order to restore order and national security by suspending the ordinary legal system (Chowdhury 1989: 12). One of the key issues here is that emergency powers enable the partial or complete suspension of a state's normal legal system (Aganben 2005: 23) and the expansion of government power with limiting individual liberties for a certain period (Barendt 1998: 168). Therefore, countries that uphold democratic and rule-of-law values face particular challenges in handling public emergencies, because the legally guaranteed rights associated with a democratic constitutional order can, in emergency situations, impede effective action (Chen 2010: 57; Bulmer 2018: 6).

Japan, which upholds democracy, protection of human rights and the rule of law in the Constitution but stipulates no emergency provisions, faced extreme challenges in encountering the COVID-19 pandemic in 2020. Japan's response to COVID-19 includes some unique legal and political elements. The Japanese government handled the emergency situation without resorting to martial law or mandatory mass quarantines (lockdown).⁶ Some journalists pointed out Japan's relatively low number of cases despite its legally loose system, which they expressed a 'puzzling mystery' or 'mysterious pandemic success' (Stumer and Asada 2020; Sposato 2020).

Japan's response reflects the historical legacies of its laws, as well as Japanese socio-political characteristics that appear in the practice of law and compensate for the legal vacuum. This paper, therefore, explores Japanese response to COVID-19 in order to discover how Japan managed to handle the emergency situation brought by COVID-19 without exercising emergency powers and even without taking mandatory measures, and also to grasp its legal and socio-political dynamics that maintain its constitutional order as an established democratic country. This article discusses Japan's legal system and Japanese interpretations of the Constitution and other laws in regards to emergency

⁵ A public emergency is a generic term that includes a variety of legal terms in diverse legal systems to identify an exceptional situation of public danger. It covers state of emergency, of siege, of prevention of internal war, of alert, of suspension of guarantees, of special powers, of martial law and others. See Chowdhury (1989) p.12.

⁶ The term 'lockdown' can refer to anything from mandatory geographic quarantines to non-mandatory recommendations to stay at home, closure of certain types of business, or bans on gatherings and events.

powers.

This paper reveals that Japanese responses to COVID-19 mirror its legal system, which contains abundance of paradoxes arising from the amalgamation of internal and external influences. The reality that Japan's law and politics are still affected by the experience of World War II, and Japanese attitudes still sustain the deep-rooted dominance of the state in society, is reflected in the human rights situation in the emergency situation brought about by COVID-19. Examining human rights guaranteed in the Constitution together with responses undertaken to counter COVID-19 show us a concealed but genuine way of including emergency provisions in the Constitution. Beyond these issues, in the broadest context, the Japanese response to COVID-19 illustrates certain structural weaknesses of the country's rule of law, which largely derives from the post-World War II political situation in Japan.

This paper first explores the Japanese response to COVID-19 to grasp Japanese legal and political arrangements to respond to an emergency situation. It then describes the Japanese legal system and emergency powers. It shows that, as a result of complex legal foundation of Japan, there are various views on the Japanese Constitution and emergency powers. These foundational explorations help us to examine the Japanese response to COVID-19, from which the paper illuminates the Japanese way of managing an emergency situation, and the structural weaknesses of the rule of law and human rights protection.

2. Japanese Response to COVID-19: Legal and Practical Issues

The COVID-19 pandemic was the first time many Japanese had experienced a state of emergency and left a number of issues to be resolved and discussed. Although the Constitution of Japan does not include emergency provisions, Prime Minister Shinzo Abe declared a state of emergency covering seven prefectures on 7 April 2020, and then extended it to the nation as a whole on 16 April. The duration of the state of emergency was initially until 6 May but was extended until the end of May.⁷ What is the legal basis of the emergency declaration and how did the Japanese government take necessary measures without provisions in the Constitution? These are some of the questions that this section explores.

Legal and Practical Issues in Emergency Response

⁷ The government lifted the extended emergency declaration for 39 prefectures (out of 47 prefectures) on 14 May while the capital and seven prefectures maintain emergency measures. Among the seven prefectures, the declaration was lifted on 21 May for Osaka, Hyogo and Kyoto and the rest, including the capital, on 25 May.

Bringing a state of emergency into effect usually requires two important steps: firstly, an initial decision to declare a state of emergency and, secondly, approval or confirmation (Bulmer 2018: 12). In Japan's case, before these two steps, the government sought a legal basis to guide the process and identify necessary procedures, as there are no emergency provisions in the Constitution. Therefore, prior to making a decision to declare a state of emergency, a law that becomes the basis of government's action has to be identified or enacted and take effect. In Japan, when existing laws cannot provide a legal foundation to respond to a specific situation, an Act on special measures is enacted.

In the case of COVID-19, the Revised Act on Special Measures concerning Pandemic Influenza and New Infectious Diseases Preparedness and Response was enacted on 13 March 2020 and took effect on the following day. The Act was the principal legal basis for measures undertaken to counter COVID-19. This Act's original version, the Act on Special Measures concerning Pandemic Influenza and New Infectious Diseases Preparedness and Response, was enacted in 2012 to provide for future outbreaks of new strains of influenza as a result of lessons learnt from the 2009 A/H1N1 influenza outbreak.⁸ The 2012 Act had to be revised in order to be effective in the COVID-19 context because COVID-19 was not originally thought to qualify as one of the new infectious diseases defined in the original Act.

Soon after the legal basis was identified, based on the Act (Article 6), the Prime Minister set up a national task force on 26 March 2020 and decided the basic national plan on 28 March.⁹ For the initial decision to declare a state of emergency, the Prime Minister is required to seek input from an advisory panel (Article 18), the National Advisory Committee,¹⁰ while he organises a national task force and decides a basic plan. In other words, the Prime Minister does not have the freedom to declare a state of emergency at his own discretion. The advisory panel is principally required to assess whether or not the situation meet two required criteria for declaring a state of emergency.¹¹ The first criterion is that the situation will have a 'considerable impact' on people's lives and health and on the economy. The second criterion is that the infection is likely to become 'rampant' or spread nationwide.

⁸ The Act took effect in 2013. The government issued the National Action Plan for Pandemic Influenza and New Infectious Diseases in 2013. The document is available from the website of the Cabinet Secretariat. See Cabinet Secretariat (2013). Available online: <https://www.cas.go.jp> (accessed on 2 May 2020).

⁹ The government task force was comprised of the Prime Minister as a chair, the Chief Cabinet Secretary and the Minister of Health, Labour and Welfare as vice-chairs, the Minister in Charge of the Special Act and other ministers.

¹⁰ The aim of the National Advisory Committee is to prepare its opinions upon requests from the prime minister.

¹¹ The National Advisory Committee, in this case, was mainly comprised of 20 experts of epidemics and public health, lawyers, academics and medical doctors.

When a state of emergency is declared, the prime minister is required to notify the Diet, as specified in Article 32. The declaration then enables prefectural governors to call for specific actions to prevent the spread of the virus. Local governments are the principal bodies responsible for implementing measures in their own regions based on the National Action Plan (Cabinet Secretariat 2013: 13). In the case of COVID-19, prefectural governors invoked Article 45 of the Act and asked people to voluntarily refrain from going out, stop using schools, nursery schools, and nursing homes, restrict their attendance at music and sports events, and allow the use of land and buildings (even without consent) as emergency medical facilities.

Enforcement: A Collective Sense as a Tool

After the declaration of a state of emergency in April, people's freedom of movement and other liberties were, to a certain extent, restricted. The Revised Act approved on 13 March made it clear that when measures are undertaken and the nation's freedom and rights are restricted, such restrictions should be minimum necessary to take countermeasures (Article 5). This reflects the human rights upheld the Constitution of Japan, which stipulates that "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs".

Under the Act on Special Measures to respond to COVID-19, all requests by the central government and prefectural governors are not legally binding. In other words, people are expected to *voluntarily* co-operate with the national plan and obey requests from the local government. Even if some people defy the prefectural government's request, there is no measure for imposing punishments. This is how the balance between the authority's power and people's liberty and human rights is maintained. However, this method, which requires a collective sense of trust, was not perfectly successful. There are individuals, institutions or facilities that have not followed, or ignored, the requests of prefectural governors even during the emergency period in April and May. Some media outlets, in fact, have pointed out that authority is limited in Japan, as there is no enforcement mechanism that can impose legal punishments (Sugiyama 2020).

When the central government declared a nationwide state of emergency, it called for the nation's cooperation, particularly that of leisure facilities, to shutter in order to avoid further spread of coronavirus. Prefectural governors also requested that individuals and owners of leisure facilities in their regions do so. However, there have been some individuals and leisure facilities that disobeyed such requests. In some prefectures, several leisure facilities refused to obey the prefectural governor's requests

to close. In response to an interview, an owner of a leisure facility claimed that even though he was asked to close, he could not do so, because as there was no support from the government he could not maintain his livelihood.¹²

The Act on Special Measures for COVID-19 allows local governments to, firstly, 'request' cooperation from individuals and facilities (Articles 24-9 and 45-2). If owners of facilities defy the request, prefectural governors can then 'order' them to obey (Article 45-3). Prefectural governors must publicise the information, without delay, whenever they 'request' or 'order' individuals and facilities to close (Article 45-4). To supplement the Act, the government, specifically the Ministry of State for Economic and Fiscal Policy, issued guidelines to prefectural governors regarding such 'requests' and 'orders'.

In Osaka Prefecture, for example, there were several leisure facilities that disobeyed the prefectural governor's request to close their facilities. On 24 April, the Osaka prefectural governor disclosed the names and addresses of the facilities that had disobeyed his request. The next day, some of the named facilities had to be closed because they received a number of telephone calls that criticised them; in some cases they were threatened or intimidated. By 30 April, all facilities named by the local government were closed. If they had not closed their facilities, the prefectural governor would have 'ordered' them to shutter, although, as stated above, neither 'request' nor 'order' are legally binding. There were similar cases in other prefectures and some prefectural governors had to 'order' leisure facilities to close.

Such cases show that while there are no legally binding or forcible measures, such as arrest, the local governments' objectives were achieved by utilising popular pressure through shaming. This is, in a sense, an extra-legal way of enforcing executive power. In Japan, it is not rare to see such 'extra-legal' ways to enforce official requests. For example, Japanese administrative agencies commonly use an 'administrative guidance' (*gyōsei shidō*) with the help of private actions when there is no legally binding force.¹³ The 'administrative guidance' is explained as non-binding 'advice' or 'recommendation' by an administrative agency to the public concerning how best to comply with a certain law or regulation or to persuade private entities to voluntarily cooperate with public officials (Fenwick 2010: 318). The meaning of administrative guidance is even defined in Article 2 of the 1993 Administrative Procedure Act.¹⁴

¹² A comment by a shop owner in response to an interview with a newspaper company on 24 April.

¹³ The author does not intend to argue that the administrative guidance and the situation observed in the local government's practice to counter coronavirus are same. The point is rather they have similarities as both of them include extra-legal methods to achieve the authority's objectives.

¹⁴ In the Act, the administrative guidance is explained as ... "guidance, recommendations,

The way that the local governments achieved enforced the national action plan to counter COVID-19 included a similar extra-legal method as encountered in administrative guidance practices commonly observed in Japan. Administrative guidance is often discussed in the business and financial fields in Japan (Dean 2002: 138-141 and 168-191),¹⁵ and a similar tactic was employed when enforcing the government's policy in response to COVID-19. Matsushita points out that although informal ways of enforcing government policies, such as administrative guidance, are not phenomena unique to Japan, the degree of pervasiveness and importance of such ways in Japan is unique (Matsushita 1993: 59-73). Fenwick considers it a Japanese political culture (Fenwick 2010: 317).

Such political practice or culture in Japan is partly explained by the post-World War political situation, which was dominated by the Liberal Democratic Party (LDP). Japanese elite bureaucracy—in which high-ranking officials had important roles in decision-making, drafting legislation, controlling the national budget and inspiring major policy initiatives—led factionalism and in-fighting. As a result, mechanisms for negotiated consensus could not flourish, resulting in weak formal legal regimes generating administrative guidance (Fenwick 2010: 326). The LDP's dominance in politics from the 1950s caused such an environment to be susceptible to the informal way of enforcing its policy.

3. The Japanese Constitution and Emergency Powers

A brief glance at the overall process, responses and measures undertaken in response to the COVID-19 pandemic in Japan generates several questions. Why does the Constitution of Japan *not* include emergency provisions? How does the origin of the Constitution affect the ways that the government took measures in response to COVID-19? This section explores these questions in order to grasp the Japanese Constitution and emergency powers.

Globally, there are broadly two different systems, based on which measures are undertaken in response to emergencies in general. The first and more common is found in most countries which have traditions of civil law, in which emergency powers are

advice, or other acts by which an Administrative Organ may seek, within the scope of its duties or affairs under its jurisdiction, certain action or inaction on the part of specified persons in order to realise administrative aims, where such acts are not Dispositions" (Article 2). See the Administrative Procedure Act (Act No. 88 of 1993).

¹⁵ The most documented cases of administrative guidance in Japan are those of the guidance by the Ministry of International Trade and Industry to the major oil companies during the oil shock in 1973.

based on existing laws, constitutional measures, or other legal provisions.¹⁶ Therein the second group are countries, for example Norway and Canada, that have no emergency provisions in the constitutional text, or that mention emergencies only in passing¹⁷. This is usually seen in countries following the common law system. In these countries, the legislature, rather than the constitution, plays a vital role in determining emergency provisions.

Japan combines an American-influenced constitution with the parliamentary system, which is a mixture of Anglo-American ideas and French and German legal systems (Dean 2002: 1). The Japanese legal system is an amalgam of contradicting branches with both indigenous and foreign influences. For this reason, when Japan faced the COVID-19 pandemic, while there is no emergency provision in the Constitution as seen in the common law system, the Japanese government's practice was influenced by the civil law tradition. This meant that it sought a legal basis before taking any measure. In order to thoroughly understand this complex legal system, grasping the history of the Constitution is vital.

The Meiji Constitution and Its Influence

The current Constitution of Japan was promulgated in 1946, replacing the previous constitution or the Constitution of the Empire of Japan (known as the Meiji Constitution),¹⁸ which was in force between 1890 and 1947. The Meiji Constitution is often described as 'the first modern constitution of Japan'. The Meiji Constitution contained emergency provisions, such as Article 14 of the Meiji Constitution, for example, stated that "[t]he Emperor declares a state of siege" and "The conditions and effects of a state of siege shall be determined by law". Also, Article 31 stipulated that "[t]he provisions contained in the present Chapter shall not affect the exercises of the powers appertaining to the Emperor, in times of war or in cases of a national emergency". Apart from these two articles, the Meiji Constitution contains another two articles, Article 8 and 70, that provide relevant measures in less serious extraordinary situations.¹⁹ A state of siege, as provided for in Article 14, was declared several times,

¹⁶ Gross and Aolain suggest two different models among the countries that maintain institutionalised emergency powers. See Gross and Aolain (2006).

¹⁷ In the United State (US) case, the constitution permits the suspension of habeas corpus when in cases of rebellion or invasion public safety shall require it.

¹⁸ The Constitution of the Empire of Japan was proclaimed in 1889. It was in force between 1890 and 1947.

¹⁹ The first clause of Article 8 states 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". The second clause adds that "Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not

such as during the Sino-Japanese War (1894-1895), the Russo-Japanese War (1904-1905) and other cases of disturbances and natural disasters. On the other hand, the power stipulated in Article 31 was never exercised in practice.

The Meiji Constitution, consisting of 76 articles in seven chapters, was based on Prussian and British (Westminster system) models. This results from the Japanese mission sent to Europe to study various forms of constitutional government before it was drafted.²⁰ The Constitution provided for a form of constitutional *and* absolute monarchy. While it was influenced by foreign constitutions, the national polity (or *kokutai*) was included as an acknowledgement of the Emperor's authority.²¹

Under the Meiji Constitution, the Emperor was the supreme leader and the Prime Minister was the head of government. Kazuhiro Takii, among others, considers the Meiji Constitution to be an authoritarian document, following the German model "with strong and extensive imperial powers supported by a superficial constitutionalism" (Takii 2007: xi). A prominent characteristic of the Meiji Constitution was that it was bestowed upon the nation as a gift from the Emperor, and sovereignty resided in person of the Emperor rather than the people.²² Also, the Emperor united all three powers of government – executive, legislative and judiciary – and thus laws were issued "in the name of the Emperor".

Beyond the legal arrangement, the Meiji state encouraged *shintō* to emphasise the Emperor's divinity (Nishikawa 2019)²³. *Shintō* is Japan's indigenous religion and was made Japan's state religion by the Meiji state, called "state *shintō*". However, as the Meiji Constitution allows freedom of religion, the government emphasised that *shintō* was not a religious belief but reflected the historical fact of the Emperor's divine origins. By doing so, *shintō* was considered a non-religious moral tradition and patriotic practice (Zhong 2014: 53). The non-religious conception of *shintō* was incorporated into state bureaucracy. The social relation between the Japanese state and the Japanese people is extremely

approve the said Ordinances, the Government shall declare them to be invalid for the future". Article 70 states that "When the Imperial Diet cannot be convoked, owing to the external or internal condition of the country, in case of an urgent need for the maintenance of public safety, the Government may take all necessary financial measures, by means of an Imperial Ordinance".

²⁰ The drafting the Meiji Constitution was done secretly by an appointed committee without public debate.

²¹ The question of polity entails spirituality in relation to the political system because the Meiji state had re-established the Emperor as the head of the state. See Nishikawa (2019) chapter 4.

²² For more details about the Meiji Constitution, see Takii (2007).

²³ During the Meiji period, Shinto priests became state officials, government's funding was given to important shrines and many mythical stories were used to foster a national identity with the emperor at its centre.

hierarchical, and this characteristic is largely explained by the Meiji state's emphasis on *shintō*, and the policy created by the Meiji state. This Meiji state practice later helped to mobilise the Japanese people to wage devastating war at the state's request.

The Meiji Constitution, accordingly, did not recognise individual rights as fundamental. It apparently operated on the German concept of the *Rechtsstaat*, which held that "all powers and rights naturally vest in government" (Urabe 1990: 62). In the Meiji state, the people were expected to obey the orders of the Emperor and thus it was rule *by law* (Urabe 1990: 63), which is proved by the denial of judicial control of administrative and legislative action. The Meiji Constitution and society were thus far from the rule *of law*, in that "powers and rights vest naturally in individuals and that the government is limited in its power to infringe upon these rights" (Urabe 1990: 62).²⁴

The Constitution of Japan: The Legacy of World War II

The fact that emergency provisions were included in the Meiji Constitution generates a question: why did the Constitution of Japan enacted in 1947 as a revised constitution of the Meiji Constitution not include similar emergency provisions? The answer to this question is closely linked with the origin of the Constitution of Japan.

The Constitution of Japan was drafted after World War II, when Japan was under occupation rule, led by the Supreme Commander for the Allied Powers (SCAP) or the General Headquarters (GHQ). The Occupation took the form of indirect rule by the SCAP, which controlled the Japanese government. The Japanese government then carried out the SCAP directives. The revision of Japan's constitution was ordered by the GHQ and undertaken in marathon exchanges between the GHQ and the Japanese government.²⁵ However, as the submitted revised draft was not so different from the Meiji Constitution, the Government Section of the GHQ took the leading role for drafting a revised constitution.

In March 1946, the Japanese government received a revised Constitution drafted by the GHQ, which it then reviewed, subsequently proposing some changes. One point that the Japanese government raised was about emergency provisions. The

²⁴ Although there is no consensus on its meaning, the core of the rule of law supported as a fundamental principle of the English and American Constitution is that government power be bound by law in order to protect individual's freedom and liberty. Dicey (1982) part II. Indeed, scholarly discourse on the rule of law endorses that it is a vital check against abuses of power and essentially functioning rule of law is to guard against tyranny, serving as a normative ideal that is in opposition to arbitrary forms of rule. See Fatovic (2019).

²⁵ This section only briefly explains the process of the revision. For more details about the process of constitutional revision between the Japanese government and the GHQ, see Nishikawa (2019) Chapter 2.

government intended to include emergency provisions in the new Constitution, as Article 76, which was similar to Article 8 and 70 of the Meiji Constitution.²⁶ However, the GHQ directed that an administrative emergency power should be exercised in extraordinary situations. This idea was based on the American and British legal systems, or the common law system. It was intended to avoid the possibility of giving excessive powers in any situation. As a result, emergency provisions proposed by the Japanese government, as Article 76, were not included in the revised Constitution. Nevertheless, after the GHQ and the Japanese government's discussion and upon the Japanese government's request, an article that stipulated measures to hold emergency sessions of the upper house in time of emergency was included in the Constitution (Article 54-2) ²⁷.

After the GHQ and the Japanese government's exchanges concerning the draft Constitution, the Japanese government discussed the revision of the Constitution at the Diet meeting in May 1946. However, there was little discussion concerning emergency provisions in the meeting.²⁸ Nevertheless, from a record of the Diet meeting, it is revealed that the then-government did not include such clauses for two major reasons: firstly, in order to reduce the possibility of free judgment by the administrative power and secondly, because of the government's view that in cases of emergency, the nation's fundamental rights should be guaranteed to the extent that it did not interfere with the public welfare and the Supreme Court should make an assessment as to whether or not an appropriate extent of human rights was guaranteed.²⁹ Similarly, at a meeting of the House of Representative on 2 and 15 July 1946, Secretary of State Tokuji Kanamori explained the four reasons why emergency provisions are not included in the proposed revised Constitution (JFBA 2017). Firstly, it was vital to prevent the cabinet's sole decision in emergencies as much as possible in order to protect the nation's rights and deepen the country's democratic politics. Secondly, Kanamori explained, even a sophisticated constitution could be nullified if there was abundant space for the

²⁶ The suggested Article 76 allows promulgating a cabinet order in cases of public emergencies, when the diet meeting cannot be held due to the dissolution of the lower house or other reasons, on condition that the cabinet would obtain an approval from the diet after it has taken measures.

²⁷ The second clause of Article 54 states that "When the House of Representatives is dissolved, the House of Councillors is closed at the same time. However, the Cabinet may in time of national emergency convoke the House of Councillors in emergency session". The third clause adds that "Measures taken at such session as mentioned in the proviso of the preceding paragraph shall be provisional and shall become null and void unless agreed to by the House of Representatives within a period of ten (10) days after the opening of the next session of the Diet.

²⁸ The revision of the Constitution of the Empire of Japan was discussed at the 90th Imperial Diet meeting held in 1946.

²⁹ The information presented here is based on the national record of the 90th Imperial Diet meeting.

government's free decision in the name of an emergency. Thirdly, it was possible to handle emergencies by holding an emergency session even after the lower house was dissolved. Fourthly, the country could prepare for emergencies by making the necessary laws applicable in emergencies.

After this, the only clauses relevant to emergencies remaining in the Constitution of Japan are Article 54-2 and 54-3. These clauses enable the cabinet to convene emergency sessions of the Upper House, even after the House of Representatives is dissolved, on condition that the measures taken as a result of such emergency sessions are approved by the lower house within ten days. The rationale of including these clauses is that in the Constitution, the Diet is the highest organ of the state power and the sole law-making organ (as specified in Article 41). For that reason, even in emergencies, it is considered that the Diet should be convened in order to make law.

Even though these clauses allow the exercise of administrative powers in emergencies, these are not necessarily synonymous with emergency powers. This is because interpretation of these clauses is divided on the issue of whether or not the application of these clauses allows the suspension of the Constitution and other ordinal laws. In other words, even in an emergency situation in which Article 54 is applied, the Japanese do not agree on the issue of the government's power to limit the nation's rights and liberties beyond the extent defined in the Constitution and other (ordinary) laws.

The historical background of drafting and enacting the Constitution of Japan explains why emergency provisions are not included in the Constitution. In addition, it shows why the Constitution of Japan is radically changed from the Meiji Constitution, which was based on the *Rechtsstaat* principle. On the other hand, the current Constitution of Japan, at least in theory, stands on the rule of law as it establishes the notion of binding the government power by the 'will of the people' (Urabe 1990: 64). It also entails the perpetuity and inviolability of fundamental human rights (Article 97), the placement of Constitution as the supreme law (Article 98), the establishment of the system of judicial review (Article 81) and the due process (Article 31).³⁰ Accordingly, unlike the Meiji Constitution, these characteristics evince a general view that the basic principle of the Constitution is the rule of law. Nevertheless, controversies still remain concerning the

³⁰ Article 31 states that "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law". Article 81 states that "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act". Article 98 states that "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity".

legitimacy of the Constitution of Japan, primarily whether it is a 'Japanese' constitution or a constitution imposed by the GHQ. As illustrated in the drafting process, the original draft was written by the Government Section of the GHQ. In other words, the foundational and key principles of the Constitution were laid out by the GHQ. Accordingly, there are still some Japanese who consider it as an imposed Constitution and thus question its legitimacy.³¹

4. Emergency Powers that Divide the Japanese

While the Constitution does not include emergency provisions, some other laws in Japan do include articles related to emergency response.³² This contradictory situation led to diverse and conflicting views with regard to Japan's emergency powers.³³ Among Japanese scholars and politicians, there are those who believe that Japan has and can exercise emergency powers, namely those stipulated in the Police Act and the Self-Defence Forces Act. As stated earlier, there are also other countries that have no constitutional emergency provisions but which exercise administrative power when responses are necessary in an emergency. The Japanese government principally maintains this position.

On the other hand, other commentators take the view that the current Constitution does not recognise emergency powers and thus although emergency provisions are included in other laws, they are not technically emergency powers because the exercise of these laws allows temporarily suspending a Constitutional order. Among those who claim this view, there are further divisions regarding *why* the Constitution does not contain emergency provisions. One interpretation is that the lack of emergency provisions in the Constitution is a flaw of the law and constitutional revision is required. Another interpretation is that the non-existence of emergency provisions derives from Japan's pre-war and war-time experience, and thus the absence

³¹ Keigo Komamura writes about the legitimacy debate of the Constitution. See Komamura (2010).

³² These laws include the Police Act (Article 71 and 74), the Basic Act on Disaster Management (Article 105 and 106) and the Self-Defence Forces Act (Article 76, 78 and 81). For example, in the Basic Act on Disaster Management enacted in November 1961, the first clause of Article 105 states that "...when the Prime Minister finds a special necessity to enforce emergency disaster control measures concerning the disaster, preserve the economic order of the State, and address other important issues concerning the disaster, the minister may declare a state of emergency disaster involving the whole or part of the affected area, after deliberation in a cabinet meeting". These articles or clauses, similarly with Article 54 of the constitution, does not represent emergency powers as even if these clauses are applied, the constitution and other laws will not be suspended even temporarily.

³³ Various views introduced in this section are based on the document by the Constitution Research Council of the House of Representatives issued in 2003.

results from endorsing the basic democratic and pacifist principles of the Constitution. In this context, the historical experience refers to the government's oppression of democratic movements before World War II. For example, between 1894 and 1925, the government enacted the Public Security Preservation Laws (or commonly said the Peace Preservation Laws). There were Imperial ordinances intended to suppress the Japanese pre-democracy political and social movement of the 1890s.³⁴ Those who have this opinion believe that giving excessive powers to the executive recalls Japan's pre-war and war-time attitudes, and caution against repeating this. Accordingly, those who hold this view claim that constitutional revision for including emergency provisions is not advisable because such provisions are inconsistent with the fundamental principles of the Constitution.

As demonstrated by these different views, there is no single interpretation and varying opinions concerning emergency powers exist regarding the Japanese Constitution. Nevertheless, there was once agreement within the cabinet that certain Constitutional provisions were necessary in order to promptly respond to emergency situations. This view was presented in a final report issued by the Research Commission on the Constitution of the House of Representatives, which existed in the cabinet between 1956 and 1965.³⁵ Within this commission, members held opposing opinions concerning the inclusion of emergency provisions in the Constitution. The majority of the Commission members believed that emergency provisions should be included in the Constitution while others contended that no provisions were required for the Constitution because it was possible to take necessary measures even under the current Constitution as seen in common law practice.

More recently, a draft proposal of the revised Constitution presented by the Liberal Democratic Party (the ruling party) in 2012 included emergency provisions as Article 98 and 99 in Chapter Nine (LDP 2012: 24-25). The Japan Federation of Bar Associations immediately expressed opposition to a constitutional revision that would include emergency provisions on the grounds that such provisions would enable the government to suspend the Constitutional order, albeit temporarily, increasing the risk of human rights violation (JFBA 2017). By the same token, constitutional law professors and some news organisations also publicly opposed the proposal.

Such divided opinions are also found in other cases. When a new law was introduced in 2003, there were fierce debates concerning emergencies and Constitutional order. The law is the so-called *Yūjihō* ("Military Emergency Legislation" or

³⁴ The movement was called the Freedom and People's Rights Movement.

³⁵ The Research Commission on the Constitution was later re-formed in both upper and lower houses in 2000 and also renewed in 2007.

“Contingency Legislation”) that took effect in 2003, a package of legislative measures that empower the executive to take action in case of an armed attack from overseas. Before this legislation was approved, there were intense debates in the Diet regarding the protection of basic rights when exercising this legislation.³⁶ As a result of negotiations, provisions that sought the protection of constitutionally guaranteed human rights were included in the legislation.

At the heart of conflicting views are diverging opinions concerning how emergency situations should be treated vis-à-vis the Constitutional order: whether emergencies are considered as situations that should be handled within a Constitutional order so as the normal situation (understood as the rule of law), or whether they are to be considered situations outside the Constitutional order, i.e. as exceptions (understood as entailing, at least in part, the suspension of the rule of law). As stated earlier, several Japanese laws include some provisions for emergencies. Nevertheless, these are expected to be exercised within a Constitutional order. As there is as yet no satisfactory resolution to this divide of opinion, the measures Japan undertakes in emergencies depend on the interpretation of relevant laws at in each case, because to the issue of whether or not the country can temporarily suspend a Constitutional order as an exception is as yet unresolved.

5. Important Denominators: Human Rights and the Rule of Law

The Constitution of Japan maintains the protection of human rights as one of its key principles. In fact, Chapter Three (Article 10 to Article 40) of the Constitution is devoted to providing a legal foundation of human rights protection. Article 12 states that "The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavour of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilising them *for the public welfare*". Article 13 then stipulates that "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, *to the extent that it does not interfere with the public welfare*, be the supreme consideration in legislation and in other governmental affairs". Article 22 further states that "Every person shall have the freedom to choose and change his residence and to choose his occupation *to the extent that it does not interfere with the public welfare*" (italic by the author).

These articles of the Constitution show that the rights of the people are

³⁶ There were marathon negotiations in the lower house with regard to the contingency legislation and human rights protection. The original bills were reviewed and revised upon demand from the Democratic Party of Japan to include provisions for the protection of constitutionally guaranteed human rights.

guaranteed to the extent that they do not interfere with the 'public welfare'. These articles apparently indicate that rights of the people can be restricted for "public welfare". The Japanese government has been internationally criticised due to these articles that give more weight to 'public welfare' than the rights of the people. For example, in October 1981, the United Nations Human Rights Committee pointed out that restriction of human rights for the purpose of the public welfare is a violation of the International Covenants on Human Rights (CCPR/C/SR319. Para. 10). Similar criticisms were given to the Japanese government in many occasions. Although the Japanese government explained the meaning of public welfare as public safety, order, health and morals (CCPR/C/SR324, para.6) or as a national interest, ambiguities remain concerning the meaning of 'public welfare'.³⁷

Under the Constitution, the rights of the people can be restricted or violated in many ways in the name of 'public welfare' irrespective of whether the is normal or an emergency. In that sense, without special provisions, people's rights and liberty can be restricted in an emergency situation. In response to COVID-19, most people voluntarily obeyed the local government's requests. In fact, Lawrence Repeta pointed out that "*jishuku* (or self-regulation) really works" in Japan in his explanation of why mandatory powers are not stipulated in the revised Act to counter coronavirus (Repeta 2020). Although certain rights of those who defied the local government's requests were restricted, the people who disobeyed were urged to follow the requests by a collective social pressure rather than legal or executive powers. Shaming and social punishments are vital ingredients of the extra-legal or informal way of enforcing executive power in this case. For such social punishments to function, it requires the majority's support of the government's policy, which manifests as 'peer pressure'.³⁸ Mark Tushnet points out how moralised politics, in which political leaders appeal for popular support on the basis of moral claims, might function as a strong normative restraint, particularly in an emergency situation (Tushnet 2008). In Japan's case, to counter COVID-19, such moral claims were linked with 'public welfare'.

This extra-legal way of achieving authority's objectives is sometimes taken positively as flexible and responsive, which is believed to have contributed to Japan's notable post-war economic recovery and growth (Fenwick 2010: 318). At the same time, they are criticised as a manifestation of abusive executive power and thus a violation the

³⁷ The section does not explain the very details of the Japanese government and the UN Human Rights Committee's exchanges, for more details see Kubo (2016).

³⁸ Peer pressure here is the effect on an individual who is encouraged to follow majority opinions and behaviours that are supported by many or the peers. Thus it is expected to change attitude, ideas, values and behaviours to conform to those who have influence or who are dominant in the society.

separation of powers. The practice is, in fact, far from the practice of the rule of law. Nevertheless, the extra-legal way of achieving authority's objectives is widely exercised in Japan and it seems to be, to a certain extent, accepted by the general public, at least in the context of taking countermeasures to COVID-19.

Both human rights protection and the rule of law in Japan, as seen in combatting COVID-19, have structural (and perhaps, for some people, 'cultural') weaknesses. Japanese laws tend to avoid giving excessive powers to the executive as a result of Japanese historical experiences. Nonetheless, in practice, various socio-political measures have been developed that can informally enforce policies and the power the executive, such as using an administrative guidance and peer pressure, or a moralised politics, which affect the country's rule of law. The fact that the human rights guaranteed in the Constitution of Japan can be restricted in the name of 'public welfare' proves the structural weaknesses of both human rights protection and the rule of law in Japan.

6. Concluding Remarks

When the revised Act on special measures against COVID-19 was approved in the Diet in March 2020, it could include compulsory power or forcible measures. The ruling and coalition parties together occupy majority seats in both houses and thus could pass the law they needed. The prime minister, however, did not request compulsory power; the Diet did not grant it. As seen in the measures undertaken to counter COVID-19, the law does not provide any penalty against refusal to the government's requests. This is largely because any heavy-handed approach by the government can be criticised out of concern for human rights and constitutional issues. In addition, a mandatory shutdown would be abhorrent to big business organisations, which are the bedrock of political support for the ruling party, the Liberal Democratic Party (LDP). The relation between the LDP and Japanese large business organisations has been key for Japan's post-World War II economic growth, for which long-sustained formal and informal interactions between the two were inescapable. Nevertheless, the case of COVID-19 is not directly comparable to cases that deriving from different types of emergency, such as war, disturbances that include military actions and invasion by other countries.

A noteworthy issue is that Japanese war-time experience still has significant effects on both law and politics in contemporary Japan. This reality is manifested when encountering COVID-19 and has been explained from two different perspectives. Firstly, it appears in the absence of emergency provisions in the Constitution and also as the lack of forcible measures in the act on special measures introduced to counter COVID-19. This legal vacuum derives from politicians' awareness of the prevalent fear of excessive power originating from Japan's wartime history. Secondly, it is exhibited in the

protection of rights and liberty of the people. The protection is, in principle, fulfilled without demarcating a situation as normal or emergency. The Japanese government's response to COVID-19 shows that all government actions in the emergency situation fulfilled rights guaranteed in ordinary times, and are in accordance with principles of ordinal law.

The revision of the Constitution continues to be discussed in Japan. Nevertheless, from the explorations undertaken in this paper, it is apparent that Japan's constitutional reform should not just examine the law text or a particular issue like emergency powers or the pacifist clause, but should be done following thorough examinations on broader Japanese democracy, rule of law, human rights protection and constitutionalism upheld since the end of World War II. The rights and liberty of the people guaranteed in the Constitution of Japan can be restricted by 'the public welfare' irrespective in a normal or an emergency situation. In that sense, inclusion of emergency provisions in the Constitution as debated in Japan is more about the expansion of power or the suspension of the rule of law (rather than restricting the rights and liberty of the people), which many people fear as also a reason why revision of Article Nine is considered.

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