

CONSTITUTIONAL OVERSIGHT MECHANISM FOR GOVERNMENT DECISION MAKING IN AN ERA WITH COVID-19

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I. INTRODUCTION: TIME TO COMPARE DECISION-MAKING BY GOVERNMENTS

Since COVID-19 pandemic spread all over the world, we frequently compare countries by number of infections and deaths. Why did some countries manage to keep the virus under control and others not? Moreover, why did some governments respond to the situation swiftly and effectively, and others not? Why did some governments take more drastic measures and others not? The decision-makings by governments is a result produced from a particular constitutional mechanism. It is time to compare not only decision-makings but also constitutional mechanisms in which government decisions are made.

In the present situation two things are clear. First, the virus will not disappear in the near future and continue to remain a problem until we discover vaccines and treatments. It takes time for everyone to get a vaccine. Therefore, the rhetoric of “emergency” (particularly states of emergency) needs to be revisited from perspective of human rights, democracy and rule of law. It is more difficult for the government to persuade people by saying that this is a state of emergency and if we can endure it together, we may return to the normal situation.

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Second, the countries who were initially reluctant to take measures promptly to cope with COVID-19 are more likely to be badly affected. The risk is real. The WHO had warned the world at the end of January (public health emergency of international concern), but very few countries immediately reacted. Many people cannot stop questioning if the government had taken certain measures earlier, we could have saved more lives. We need to constitutionally evaluate what the national governments have done so far.

Now the world is facing either an unstoppable incessant increase in infections or a clear sign of a second wave of pandemic, it is time to examine how far the existing constitutional mechanism can oversight the government and make the government accountable for their actions or not taking actions. This short article aims to explore the measures taken or not taken by the Japanese government as a case study in order to emphasize the importance of constitutional oversight and scrutiny mechanism for government decision-making in an era with COVID-19. Japan seems to deal with the first wave of COVID-19 quite effectively as the rate of infections and deaths in relation to the population (126 million) is relatively low in the world. However, it is not the result of the well-planned policy nor its effective implementation but a result of the people's voluntary efforts to stay at home and probably some lucky factors which are not scientifically proven yet. If the government had taken more drastic measures earlier, could more lives have been saved and the duration of a state of emergency could have been shorter (less economic impact) or even a state of emergency would have been unnecessary? Japan is presently facing a risk of the second wave of spread of the virus. The government seems to fall into the similar pattern as the previous one: waiting until a real danger (a sign of collapse of the medical institutions) re-appears. It is time to explore what Japan could have learned from the previous lesson (the first wave) if it had had an appropriate oversight mechanism.

II. BACKGROUND

1. *The First Wave*

The first case of COVID-19 in Japan was confirmed on 16 January 2020. On 30 January, the Japanese government set up the COVID-19 Countermeasures Headquarters. It published emergency countermeasures policy against COVID-19 on 13 February and presented Basic Policies for Coronavirus Disease Control on 25 February. In the meantime, a quarantine of an inter-

national cruise ship began on 4 February at Yokohama Port (712 people (appeared as “Other” in the WHO Situation Report) were confirmed positive).

The number of confirmed cases has steadily increased, but not dramatically as in other countries in Europe and North America. When Northern Italian cities started a lockdown on 21 February, there were only 93 cases in Japan. When several states in the U.S. introduced severe restrictions in mid-March, there were about 800 cases in Japan. The Japanese government repeatedly explained that it was not necessary for Japan to take drastic measures, like a lockdown, until the decision of postponement of the Tokyo Olympic and Paralympic Games was announced on 24 March. The very next day, the Tokyo Governor strongly asked residents to avoid non-essential outings in order to avoid a surge in infections. She even put pressure on the central government by suggesting the possibility of a lockdown of Tokyo. However, the central government did not declare a state of emergency until 7 April, when the number of confirmed cases reached 3,906. Furthermore, the initial declaration only applied to the seven most affected prefectures including Tokyo. It was finally widened to cover the whole nation on 16 April when the number reached 8,582. However, the declaration is based on the New Influenza Special Measures Act 2012 (NISMA, Act No.31 of May 2012) which does not have a power to introduce strict restrictions such as a lockdown. On 15 May, the government lifted the declaration of the state of emergency for 39 prefectures (except for major eight prefectures) two weeks earlier than the original duration. A week later the government lifted the declaration for three prefectures. On 25 May, the government lifted the declaration for remaining five prefectures including Tokyo when 31 new confirmed cases and 10 new deaths were reported.

2. *The Second Wave?*

After a month the new confirmed cases started to increase. On 24 June, new 966 cases (per day), which is the all-time highest number, was reported. The total confirmed cases reached 29,382 and 996 (as of 26 June). The number of infections soars in Tokyo particularly: almost every day 200-300 cases have been reported since 9 July. When the state of emergency was lifted most prefectures (except for Tokyo and a few big cities) reported no new cases. However, infections started to spread again all over Japan. Now 35 prefectures among 47 reported new cases on 26 June. However, the government keeps the position that it is not necessary to declare a state of emergency by arguing that the hospitals have enough capacity to deal with critically ill patients.

It is unclear that the government makes a decision on what conditions. It seems that the government takes a similar attitude which it showed at the peak of the first wave. It was the initiative of the experts who strongly warned the general public who took the alert seriously and closed the shops and facilities and change the lifestyle dramatically under a declaration of a state of emergency without legal penalty.

III. LEGISLATIVE RESPONSE

1. *Reluctance of the Diet to Legislate*

The only new legislation adopted since the outbreak of COVID-19 is the amendment of the New Influenza Special Measures Act 2012 (NISMA, Act No. 4 of 13 March 2020) to include COVID-19 under the category of “new influenza etc” which, other than budgetary measures, needs legislative approval. The bill was submitted to the Diet (Japanese legislature) on 10 March, passed on 13 March 2020, and came into effect on 14 March. However, it took more than three weeks for the government to announce the declaration based on the NISMA despite the fact that it had set up the Government Countermeasures Headquarters based on the NISMA on 26 March. In the Prime Minister’s speech upon the declaration of a state of emergency, he asked people to refrain from going out in order to achieve a 70 to 80 percent decrease of opportunities for person to person contact, and to follow social distancing policy of avoiding the “3-Cs” (closed spaces, crowded places and close contact with people) for a period of one month.

By the declaration of a state of emergency, the prefectural governors can clarify which facility should be closed under the declaration and request to close. After the declaration of a state of emergency the Tokyo governor consulted with the central government and announced a list of facilities to be closed, and requested for them to do so. However, the request is still without legal penalty. There exists ambiguity and resistance. Most shops and facilities obeyed the request but some pachinko parlours (pachinko is a Japanese gambling machine) stayed open despite the request for their closure. The only action that governors can take is to give instruction for measures and publicize the name of the parlours if they do not follow the instruction. In fact some parlours which ignored the request and whose names were publicized by the Osaka governor received more customers than usual as other parlours were closed. Supermarkets which were allowed to open in

order to supply daily goods and food became the popular place for families and couples as there were no other places to go together. Beaches and mountains became crowded with people. Furthermore, the fundamental problem is that many office workers could not work at home because of technical deficiency and work culture although there were some progress. Therefore, the goal to decrease direct personal contact by 80 percent, which was strongly recommended by the expert group in order to avoid an explosive increase in infections which would burden the medical care beyond capacity, has not been achieved.

The only successful closure has been those of schools based on Art. 20 of the School Health Safety Act 1958 (Act No. 56 of 10 April 1958). On 28 February, temporary closure of all elementary schools, junior high schools, and high schools was suddenly announced and they were all closed on 2 March. This created chaos for working parents. Most of the public schools re-opened from June but many universities in the major cities closed the campus and provide online teaching from April which is the beginning of the new academic year.

Presently faced with a new crisis (the second wave), the government set out to extend the existing legal instruments without undertaking legislative changes. The government is thinking to utilize the existing laws: e.g. the police power to do onsite-inspection at night clubs under the Act on Control and Improvement of Entertainment Business (Act No. 122 of 10 July 1948) and the power of the public health centre to do onsite-inspection at restaurants under the Food Sanitation Act (Act No. 24 December 1947).

2. *Budgetary measures*

Another measure to persuade the people to stay at home is financial support. The Diet (Japanese legislature) passed the supplementary budget twice. The first one amounts to 25 trillion yen (250 billion US\$), half of which is distributed to every resident (including foreign resident registered in local resident register). Each resident can obtain 100,000 yen on request. One third is used to support small companies and tourism industry. The second supplementary budget amounts to 32 trillion yen mainly for helping small companies, workers, and hospitals. Local governments also introduced their own subsidy to support residents and companies. However, it is doubtful that they can continue to provide the similar support for the second wave.

IV. OVERSIGHT MECHANISM

1. *Legislative Oversight*

The regular session of the Diet ended on 17 June despite the opposition parties requested the Diet to keep open. Therefore, the role of the Diet in scrutiny and oversight of the government is limited. It was agreed that the examination during the closing session will be held once a week, but it is unclear how it works now. Prime Minister Abe has not attended the above examination during the closing session.

During the Diet session, Prime Minister had to answer all kinds of questions by members of the Diet related to the policy and implementation of the measures for COVID-19. However, since 18 June, the press conference of Prime Minister has not been held despite that there are many issues to be questioned. For example, why has the implementation of specific measures such as sustainable support money for small companies and individual specific subsidies been delayed? Should the promotion measure for tourism (the individual can obtain travel subsidy (upper limit is 80,000 yen) from the government) should be implemented as it was planned (from 22 July) when a new risk of the second wave is arising? After all, the second supplementary budget included 10 trillion yen for the reserve fund (Contingency funds for the COVID-19). Who can scrutiny the use of the reserve fund?

2. *Judicial Oversight*

The role of the judiciary for oversight of the government is limited in Japan. First, at present there is no adjudication directly related to the issue caused by the COVID-19. Even if someone bring a case to the court, how far the Japanese judiciary can admit the obligation of the central and local governments remains to be seen. As many Japanese measures are based on non-binding request without penalty, it may not be easy to make a justiciable case.

3. *Independent Oversight*

Since the outbreak of COVID-19 and particularly the infections in the Diamond Princess were reported, expert views of infectious disease specialist have been widely reported and relied on. In fact, it was the initiative of

the medical experts of the expert meeting who pushed the government to declare a state of emergency because of the fear of medical collapse. The problem is that it is unclear that who took the responsibility for a declaration of a state of emergency. Moreover, who should have taken the responsibility? According to the principle of democracy it should be the government not the disease specialist. However, the government made an impression that it was the expert meeting board who made a decision because the government constantly relied on the views of the expert meeting although the expert meeting was just an advisory body for the Government Countermeasures Headquarters for COVID-19 and did not have legal backing. Due to the criticism, on 7 July the government abruptly reorganized the expert meeting to establish a new panel under the government's COVID-19 advisory council, which is based on the NIMSA. The membership of the new panel is extended to include not only the existing infectious disease experts but also wider experts including economists, a lawyer, a journalist and a local governor. To widen the membership is useful as it is necessary to take a balance between the medical concern and other economic and social concerns. However, the disappearance of the previous expert meeting seems to create a situation where the general public can hear only the conclusion of the decision by the government but not the explanation based on the scientific evidence. Formerly when the government declared a state of emergency, the head of the expert meeting provided the supplementary explanation from the perspective of a scientist. There is a concern with the relationship between the government and experts that a scientific (and more objective) approach based on standards set in advance may be compromised by other economic considerations.

The first wave was a completely new incident nobody expected nor experienced. However, for the second (and future more) waves, there are more experiences from which we can collect good practices. The relationship between the government and the experts continue to be explored further. It will be helpful to establish an independent body to oversight and scrutinize the decisions afterwards with the cooperation of international institutions and academia (*international oversight*).

V. CONCLUSION

Until every country set up a mechanism to be able to put the virus under control, we continue to see the world *with* COVID-19 not the world *after* COVID-19 because our world is globalised. Therefore, it is time for com-

parative constitutional and international lawyers and academics to share comparative and international experiences related to countermeasures against COVID-19 in order to explore a possibility to set up an efficient and effective mechanism. The more comparative study on the constitutional oversight mechanism is necessary.