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Justice in Emergency

「緊急事態における正しさ」

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Abstract: This article purposes to consider how should the government or law respond to the emergency of pandemic caused by COVID-19. First, I argue that the frustration and anger people feel during pandemic is not caused by pandemic, but pandemic only revealed people's underlying awareness of unfairness in general regardless of pandemic. Second, I consider the value of the rule of law by comparing deontology and consequentialism. Basically, consequentialism is supposed to prefer flexible extrajudicial measures to the strict rule of law. However, I argue that consequentialism can promote the value of the rule of law if it is combined with conservatism.

Over the past year and a half, unprecedented and drastic global changes have been a source of consternation for people in most societies. Some of these people were (and still are) in despair, and others seem to pretend to be calm.

Sometimes, in a crisis, the essence of things becomes clear. Be it at an individual or societal level, things that have been brushed under the rug during normal times can no longer remain hidden in times of crisis. In an emergency, where conventional wisdom is no longer valid, people try to see the essence of things, which is exactly where philosophy comes into play. If, during an emergency, many of us become philosophers and begin to rethink ourselves and our society, then the COVID-19 crisis is a unique opportunity for this.

1. On Risk Assessment - pluralism or fragmentation

(1) All evaluations are multidimensional, and absolute correctness should not be assumed.

Saying "COVID-19 only exists in your head," may sound suspicious and occult, but I believe it to be true to some extent. In more serious terms, risk assessment should be considered as something that can only be claimed to be correct subjectively, or at best inter-subjectively, and never objectively. Subjectivity here is an individual's idea, and if that idea is shared among several individuals, an intersubjective agreement is established. On the other hand, what I mean by objective is something that is established independent of anyone's subjective ideas.

And as I have argued in several separate papers, I do not believe that we should advocate for the objective correctness of risk (or any other) assessment in general (Kawase, 2018; Kawase, 2019, pp. 60-61, 177-179). This is also true for risks associated with coronavirus infections, and the harmful side effects of therapeutic drugs and vaccines against them. If there is an objectively correct and

recognizable answer for these kinds of questions, then in the event of conflicting views about risks of infectious diseases and vaccines, either one is correct and the other is wrong, or both are wrong.

Of course, COVID-19 infections are a problem of such enormous social consequence that it would be inappropriate to suggest that the extreme views of individuals have the same credibility as those of experts or the general public. Therefore, in my opinion it is desirable to adopt an intersubjective approach to this issue, not only to exclude objectivism, but also to reject subjectivism. The correct answer is not naturally or inevitably determined independent of anyone's opinion, nor is it something that can be considered by each individual. Rather, it should be seen as something that is formed and shared in each industry or society.

In this context, conflicting views on the risks of viruses and vaccines do not mean that one is right, and the other is wrong, but that both have their own validity and reasons. In other words, correctness is not monistic, but plural. It is a given that political correctness and appropriateness differ from those in epidemiology, not that one of them is normatively higher than the other. Nor should we assume that there will always be a universal standard that encompasses both. Monism, which holds up a single standard and demands that it be always applied to all cases, asserts its own rightness from an imperialistic, superior perspective toward other industries and societies that have different standards, values, histories, and contexts, and when this does not work, it may scorn such opponents as fools. Pluralism, on the other hand, believes that each industry and society, has its own righteousness, and that each of them should protect its own territory.

For example, the appropriate number of cycles of Ct value, when a PCR test is judged to be positive, is a matter of customary practice and policy judgment of various industries, companies, and organizations, and no appropriate answer can be obtained by ignoring such a context.

(2) Because of the division, there are feelings of alienation and complaints about injustice, which leads to further division.

To say that justice should be considered pluralistic should not be to encourage division among people who think differently about justice. Claims such as "I'm doing the right thing (voluntary self-quarantine) and everyone should be doing the same thing, so why doesn't anyone understand," or "masks don't mean anything, so why do we follow suit without thinking," expresses the frustration of those who disagree with the risk assessment of COVID-19. It is interesting to think about why we can be so irritated and audacious.

For one thing, by exchanging opinions about risk within a narrow circle of people who share the same views, such as evaluating risk as small or large, we may be purifying and radicalizing our thinking. It is sometimes pointed out that one of the reasons of this phenomenon is that the structure of information transmission has changed from mass media to social media. Anyway, we should never think that we have the monopoly on rightness.

As for the other background that generates people's irritation, we may consider that it is a problem that is never directly related to the new coronavirus infection and has only come to the surface in the wake of the emergency.

Why is it that people who are convinced by virus and vaccine conspiracy theories don't trust what the government, mass media, and their family and friends say? Various causes can be pointed out, but the feeling of alienation, of not being listened to, of not being understood, is undoubtedly one of the most important. Much of the anger in the anti-vaccination debate is directed not at vaccines, but at social marginalization.

It is also important to note that this is not actual alienation, but only a "feeling" of alienation. At least contemporary Japanese people have their rights and interests strongly protected by Japanese society (laws, etc.). We are never abandoned. However, if people do not have the opportunity to be aware of and understand this, they may feel that they are excluded from society, which may weaken their motivation to actively contribute to society. This is a serious problem, given that the price is that many people fall into a sad vicious circle, further away from the chance of engaging in their society.

This is no longer a coronavirus problem or a vaccine problem. For those who expressed anger over the headline "Diet member eats 100,000 yen dinner while state of emergency declared!" would they have felt the same way if the headline had read, "Diet member eats dinner in front of convenience store while state of emergency is declared"? From the viewpoint of infection prevention, the latter may be more problematic. However, the anger is not directed at the lack of awareness of disease prevention, but at the 100,000 yen. However, there might not be any legal or moral problem with the 100,000 yen, let alone as an infection control measure. Lack of trust, ability, and willingness to communicate, in relation to the other side of the wall of division and alienation, is a crisis of national unity - a crisis of the state.

2. On the Rule of Law - Consequentialism or Deontology?

(1) Consequentialism prevails in emergency situations.

In the early days of the COVID-19 crisis, there were strong voices asking why the government was not doing anything, especially regarding border measures at airports and the operation of pachinko parlors. The less intelligent version of this kind of argument was one that lacked any understanding of the value of the rule of law, that the government cannot and should not do things without legal rules. This is something that is not worth refuting here. (Of course, this is a highly interesting issue in view of the poor education of law in Japan.) Conversely, a more intellectual version needs to be taken seriously. This version argues with a good understanding of the meaning and importance of the rule of law, but posits that in emergency situations, ignoring it and considering extrajudicial measures will, in the end, better achieve the purposes intended by the existing legal system.

Let us now use the contrast between deontology and consequentialism to make the structure of this

problem clearer. In this paper, we will understand that deontology is an argument that evaluates the normative goodness or badness of an act or rule by the value inherent in the act or rule itself, while consequentialism is an argument that evaluates the goodness or badness of an act or rule not by the value of the act or rule itself, but by the goodness or badness of the content of the secondary results they bring about. For example, the act of lying is normatively undesirable. However, in some cases, it would be better to tell a lie, so as not to hurt anyone and to facilitate the relationship. In such a case, consequentialism thinks that lying is not bad because a lie improves the state of the world for the better, whereas deontology thinks that improving the state of the world does not mitigate the wrongness of lying. (Kodama, 2010, pp. 241-242)

Certainly, it is understandable that consequentialism would prevail in an emergency. According to the deontology strictly demanding the rule of law, even if COVID-19 infections destroy health care, even if they kill many people, we must do what the law demands and not do what the law does not permit. Such a deontology is uncompromising¹. In contrast, consequentialists have no hesitation in flexibly discarding or picking up the obligations of the rule of law if the state of the world would be better off by ignoring the rule of law. In the first place, law is supposed to make society a stable and comfortable place. If society is harmed by adhering to the law, it is counterproductive. Certainly, in peacetime, the rule of law contributes greatly to the stability and prosperity of society. However, it can be said that in emergency situations, extrajudicial measures to overcome them are normatively required.

My position is that neither extreme and pure positions of deontology nor consequentialism is desirable, and that it is important to strike a balance between the two, and the way to strike the good balance is not something that can be answered theoretically but should be sought in each individual case. Therefore, it is possible to argue against extreme consequentialism from the viewpoint of deontology, but here I would like to explain that even if we rely on consequentialism alone, there is a problem with the theory of advocacy of extrajudicial measures in emergency situations.

(2) Evaluate the consequences in the long run.

I mentioned above that in emergencies, flexible consequentialism is more likely to gain people's approval than stubborn deontological arguments, but perhaps more accurately, I mean that in emergencies, an argument for evaluating consequences with a shorter time span is more likely to gain people's approval than in normal times. It means that people will be looking for more short-term results or will be more short-sighted.

¹ To say that deontology is stubborn and consequentialism is flexible is actually just to say that there are many such phenomena, not that it is a logically necessary implication. An extremely strict consequentialist would never tolerate anything other than those actions and rules that would optimize the state of the world.

Since consequentialism only says that an action or rule is evaluated by its consequences, there is no fixed correct answer intrinsically in consequentialism about what time span it should be evaluated in. With an evaluation span of every day, today's actions and rules that may bring about improvements in tomorrow's results may be evaluated as good in a future-oriented manner, or yesterday's actions and rule applications may be evaluated based on today's conditions in a past-oriented manner, or the evaluation span may be every 100 years, and matters 100 years from now or 100 years ago may be evaluated. So, when it comes to people becoming short-sighted in emergency situations, consequentialism does not say that it is good or bad.

So, the only argument I have, to reinforce my consequentialism, is from outside it, but it is conservatism, which says that evaluations and decisions should be made from a long-term perspective and with caution. We must not forget that our present behavior can be evaluated by those who existed long ago ², and those who will exist in the future. What consequences will our behavior today have for people in the distant future? What will people in the distant future say when they look back at us? Additionally, in light of the values inherited from the past, are we not trying to bring about strange results? An emergency is a state in which people's thoughts become short-sighted. It is understandable in a pandemic, but in such a case, it may be wise to have a conservative conclusion that requires a broad and long-run thinking.

Now, to return to the question at hand, if we adopt this position, what can we say about the value of the rule of law in emergency situations? You might say, "what's the point of taking legal regulations so seriously when people are dying right in front of your eyes?" Which is more important, the law or human life? Indeed, when considered choice between this one life and the application of this specific legal rule to this specific case, consequentialism is likely to require disregard of the law. However, if we compare the number of lifesavings in the long term between whether the long-term and stable application of this rule of law is made, consequentialism may demand the rule of law.

Of course, even in the long run, it is conceivable that the stable application of the legal rules in question could have resulted in the loss of many more lives. Even then, it seems likely that what the long-term, conservative consequentialist theory requires is the abandonment or revision (in accordance with prescribed legal procedures) of these specific laws and regulations, and not the abandonment of the rule of law itself.

However, the following counterargument may be made to this as well. The distinction between individual specific rules of law and the general spirit of the rule of law is oversimplified. To be sure, the long-run consequentialist argument may not demand that we go so far as to abandon the spirit of the rule of law in general in emergency situations, but it would also acknowledge that there are many

² Of course, in principle, our present behavior is never actually evaluated by those in the past.

Rather, it means that we should think about what that evaluation would be like if someone from long ago were here today and evaluated us based on their values.

rules that are individually better left ignored (or implemented without following due process). As a compromise, they argue that a partial relaxation of the spirit of the law might be acceptable, in which an emergency clause is prepared in advance in the Constitution or other laws, and broad discretionary powers are granted to the executive on a provisional basis (e.g., for a limited period) if the conditions of an emergency are met.

This could possibly be correct. I say “possibly” ambiguously because what follows is a question of fact about how much compromising the spirit of the rule of law will have desirable consequences in the long run, not something that normative theories like consequentialism or conservatism can answer. My normative argument is that I want to discourage people from thinking shortsightedly, whether it be in defense of the rule of law or in mitigation.

3. On the method of collective decision-making - Utopian or gradualist?

In an emergency, one reason of people being short-sighted is that they will want a quick, clear, and firm policy (especially in politics). It is often said, “Our government is opportunistic and has no principles.” For example, it is correct to point out that there are no consistent standards for issuing and lifting emergency declarations and that they are ad hoc. However, it is my view that in such cases, decision-making can only be, or rather should be, ad hoc.

In collective policy making, the search for a clear strategy requires the assumption that there is a right answer to how to deal with the problem and that we can recognize that right answer. Many of those who seek a clear strategy rely, perhaps consciously or unconsciously, on such assumptions. The same is true of the claim that “we should rightly fear the COVID-19” It sounds very wise to say something like this, but what exactly is the right thing to do?

Rightness, as mentioned above, is multidimensional and it should be considered natural that the answer to this question will vary greatly between every individual, each group, and each industry. If that is the case, it may be possible for an individual to act based on a subjectively held “correct answer” based on a clear and firm policy, but it is misguided to expect the same performance from society as a whole³. The careful reconciliation of the claims and interests of individuals with a wide variety of different correct answers is the method of collective decision-making for society, which can only be piecemeal, incremental trial and error. There is no way one could suddenly come up with the best answer. We have no choice but to repeat the process of listening to the opinions of a variety of

³Therefore, the suggestion that “the government is hiding something” often misses the point. (I am not sure how one can say they are “hiding something,” but that is beside the point.) It is not that governments are hiding the right answers that are inconvenient for them; it is that they often do not know what the right answers are. Often, though never always, governments and other authorities do not possess as much information as those applying for their disclosure would expect. A skeptical attitude toward government and power is extremely useful, but if it is done poorly, it is those who seek to misuse power who will benefit from it.

individuals, trying out some measures, evaluating the results of them, and making minor adjustments to the measures. There is no definitive goal to aim for, a priori, before trial and error. It is utopianism that posits such an unchanging goal (Popper, 1945, pp. 1638-148.).

It would have been much easier if the goal was fixed in advance and all we had to do was to go straight for it. It is easy to see the results and progress of one's efforts, and most importantly, there is no need to wonder, think, or debate about direction. However, we have no choice but to grope our way through a foggy road. We must develop a spirit strong enough to endure this frustration. It is understandable that people are anxious when they do not have a clear answer, but isn't the attitude of simply waiting for the government or other authority to give us an answer, evidence that the spirit of the modern independent individual has not yet been acquired?

The spirit of waiting for easy answers from someone is vulnerable to manipulations. If agitators who advocate a clear right answer or utopia use it for some intention, it may lead society to an unwanted consequence and keep us from solving the problem. For a society to be strong, the individuals who make it up must be strong. The COVID-19 is a very good opportunity for us to change. I hope that our society, and by that, I mean each one of us, will be reborn even stronger, tougher, and kinder to others than before COVID-19.

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