

The Emperor as Captive of the Constitution

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On August 8, 2016, Emperor Akihito issued a video message to the people of Japan. Based on this message, Akihito abdicated to current Emperor Naruhito on April 30, 2019, and the name of the era was changed from Heisei to Reiwa. This was the first time since Japan established the Meiji Constitution and became a constitutional state that an emperor abdicated during his own lifetime. In this respect, Akihito's abdication was a challenge to constitutional order. In this paper, we will examine the continuity of Japan's national framework since the Meiji period and the strain that this framework is currently facing, as revealed by this question of abdication.

Keywords: the emperor as a symbol of the state, abdication, the Constitution of the Empire of Japan, Itō Hirobumi

On August 8, 2016, Emperor Akihito 明仁 delivered a televised video message to the Japanese people. In it, he expressed his grave concern that he would be unable to fulfill his symbolic role as prescribed by the constitution due to his advanced age, and he appealed to the people to understand his desire to abdicate. In response, the government began to deliberate the possibility of him ceding the throne to the crown prince, and in June 2017, a special law was enacted for this purpose. On April 30, 2019, Emperor Akihito duly abdicated, and Crown Prince Naruhito 徳仁 immediately ascended the throne as the new emperor. The era name changed from Heisei 平成 to Reiwa 令和. This was the first time in about two hundred years that an emperor had abdicated, and had not been foreseen since Japan became a constitutional state in 1898.

I will begin by examining the provisions of the current Constitution of Japan. In Article 2, it is stipulated that “The Imperial Throne shall be dynastic and succeeded to in accordance with the Imperial House Law passed by the Diet.” The Imperial House Law stipulates in Article 4 only that, “In the event of the demise of the emperor, the heir shall immediately ascend the throne.” This implicitly assumes that succession occurs only on the death of an emperor. Although abdication is not explicitly prohibited, it is safe to say that the law did not permit it. This was also the case under the Constitution of the Empire of Japan.

The current Constitution states that succession to the throne shall be governed by laws passed by the Diet, and this was duly the case with the abdication. However, the fact that the reason for

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the abdication was the emperor's wish raised serious constitutional issues. The Constitution of Japan severely restricts the emperor's official activities and the state affairs that he can conduct. The fear was that the amendment to the law and the abdication, based on the emperor's personal wish, were unconstitutional acts.

However, there was no outcry questioning the emperor's message due to the Japanese people's respect for and trust in the emperor. After all, he had made his way to disaster-stricken areas every time Japan was hit by natural disasters and had continued to stand by the people and encourage them. He had, in other words, imparted a new warmth to his role as a symbol of national unity. This paper is not an examination of the constitutional issue of this abdication. Rather, I would like to give an overview of the legal status of the emperor since the Meiji era, before considering the historical significance of the abdication.

The Constitution of the Empire of Japan and the Constitution of Japan are regarded as two completely different constitutions with distinct legal characteristics. The former established the sovereignty of the emperor, and is considered to be the instigator of militarism, creating strong imperial prerogatives, including that of the emperor as commander-in-chief. The latter, meanwhile, is considered to be a democratic and pacifist constitution based on the sovereignty of the people. To be sure, there are certainly various principled differences between the two constitutions, but we can also point out the continuity that runs through them. One aspect of continuity concerns the status and the functions of the emperor.

This statement of mine demands a great deal of exposition. The Imperial Constitution of Japan stipulated in Article 1 that "The Empire of Japan shall be ruled by the Emperor of Japan for all time and in all lineages," while the Constitution of Japan stipulates in Article 1 that "The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power." It is clear that the Imperial Constitution advocated the sovereignty of the emperor, and the Japanese Constitution changed it to establish the sovereignty of the people, making the emperor a non-political symbol.

In spite of this, I would like to argue that there is a commonality in the way the emperor is portrayed by these two constitutions. In brief, both of these constitutions effected the institutionalization of the emperor as a public figure.

The Constitution of the Empire of Japan may seem to have established the emperor as a monarch who ruled the country with autocratic power. However, the emperor was a highly institutionalized presence in the political arena. For the emperor to make political decisions of his own volition was considered something best avoided. The emperor is said to have been rendered sacred as a living god in the Imperial Constitution, but the actual historical background of this is complicated. The "Declaration of Humanity" issued by Emperor Hirohito on January 1, 1946, allegedly denied the emperor such divine status. However, this was also what Ōkubo Toshimichi 大久保利通 (1830–1878), a leading figure in the Meiji Restoration, was seeking. In his famous memorandum of November 1873 suggesting how Japan might move towards the creation of a constitution, Ōkubo argued that the emperor should move away from being worshipped like a god in the inner recesses of the palace, as in the past, and become a human sovereign who would be personally in

charge of the government.¹

While Ōkubo positioned the emperor as the reigning monarch of the nation, he also demanded of the emperor a strong sense of dignity and self-discipline. In his mind, the emperor was to placate the people and promote their unity. To this end, Ōkubo demanded that the emperor actively appear before the people to gain their support and adulation. It was in realization of Ōkubo's ideas that the capital was moved from Kyoto to Tokyo, where the emperor would reside, that the Meiji emperor embarked on tours throughout Japan, and attended such national events as expositions. It was expected that through such activities the emperor would serve as the focus for national unity.

It was Itō Hirobumi 伊藤博文 (1841–1909), Japan's first prime minister, who created the emperor system by focusing on the emperor's power to unify the nation. Itō is known as the drafter of the Japanese Imperial Constitution, but what role did he expect the emperor to play?

On June 18, 1888, at a meeting of the Privy Council, established to deliberate on the draft of the Constitution, Itō stated, "The axis of our nation is the imperial house alone," and "the power of the sovereign should be respected, and not be constrained."² He may have been trying to establish an absolutist state centered on the emperor.

However, with the meeting convened, Itō also stated, "The establishment of a constitution and the implementation of politics is a matter of specifying the sovereign's great authority in the constitution and restricting some parts of it," and declared, "The constitutional government is clearly a matter of restricting the sovereign's authority."³ How should we understand this?

First of all, there is no doubt that Itō's ideal in the real world of politics was not a politically active emperor. He abhorred the possibility of the national government being influenced by the arbitrary will of the monarch. This is easy to appreciate when one considers his political leadership before and after the constitution was enacted. Prior to the enactment of the Constitution, Itō blocked movements by the emperor's entourage for direct imperial rule, and worked to institutionalize the imperial court.⁴ In the actual implementation of the constitution, Itō usually advised the emperor to refrain from intervening in politics, but when the confrontation between the Diet and the government reached an impasse, he asked the emperor to mediate from a neutral standpoint.⁵ Itō thought of the constitutional monarch as someone who would not get deeply involved in politics, but neither would he be completely divorced from it.

1 "Rikken seitai ni kansuru ikensho" 立憲政体に関する意見書, Ōkubo Toshimichi 大久保利通, *Ōkubo Toshimichi monjo* 大久保利通文書, vol. 5, Nihon Shiseki Kyōkai, 1928, p. 182. This point had been in Ōkubo's mind from the beginning when he overthrew the Tokugawa shogunate and established a new government ruled by the emperor. In early 1868, immediately after the restoration of the monarchy, Ōkubo planned to relocate the capital to Osaka in the hope that the emperor would be removed from Kyoto, where he was mired in old customs, and that he would become a monarch who would lead the people. See also Ōkubo, *Ōkubo Toshimichi monjo*, vol. 2, 1927, p. 191.

2 *Sūmitsuin kaigi gijiroku* 枢密院会議事録, vol. 1, University of Tokyo Press, 1984, p. 157.

3 *Ibid.*, p. 173.

4 Sakamoto Kazuto 坂本一登, *Itō Hirobumi to Meiji kokka keisei* 伊藤博文と明治国家形成, Yoshikawa Kōbunkan, 1999.

5 Itō Yukio 伊藤之雄, *Rikken kokka no kakuritsu to Itō Hirobumi* 立憲国家の確立と伊藤博文, Yoshikawa Kōbunkan, 1999.

This point can also be made with regard to the exercise of the so-called imperial prerogatives. The Meiji Constitution set forth a truly wide range of exclusive political powers for the emperor from Article 5 to Article 16, but these were to be executed only on the advice and with the approval of his subjects. For example, the appointment of the prime minister was first recommended by a council of elder statesmen called *genrō* 元老. The emperor never once appointed anyone other than their nominee as prime minister. The same was true for the other ministers, and the emperor automatically appointed to the cabinet the men recommended to him by the prime minister.

At first glance, the omnipotent emperor and the constitutionally constrained emperor are contradictory. How can the two be reconciled? In a speech in 1899, Itō said, “A nation is like a piece of cloth wrapped around its land and people. It is represented by the sovereign,” and the word “represent” (*daihyō* 代表) is typically used. However, I choose not to say that the Japanese sovereign “represents” the nation, rather that he “symbolizes” or “expresses” the Japanese nation.⁶

I interpret Itō’s intention here as follows. First of all, he was trying to emphasize the symbolic function of the emperor vis a vis the exterior. This is evident from the fact that, in the quote above, he says that when one nation faces another, it should be as if one individual were facing another, and he asks the sovereign to play the role of such an “individual.”

At the same time, Itō’s request for the “symbolic” function of the emperor may have had another meaning. It may be possible to grasp it in the sense of a “symbol of national unity.” This also points to the real meaning of Itō’s speech at the opening of the Privy Council meeting. In other words, what Itō wanted to emphasize was that the emperor could create laws and stand above them as an omnipotent legislator, precisely because he was a symbol of national unity. In other words, the emperor could be such a sovereign insofar as he was one part of the national community, the *res publica*, composed of the entire nation.⁷

Itō’s call, in the aforementioned statement before the Privy Council, for the imperial house to play the role of an axis that might unite the hearts of the people, as Christianity did in Europe, would support this view. In this way, Itō seems to have attempted to construct a duality in the imperial body, such that he “symbolizes” the absoluteness of the state to the world, while at the same time acting as an organ of the state in the concrete political process.

As described above, with the Meiji Restoration, the emperor was required to change from being a ritualist who served the gods to becoming a monarch as a human being, and his new status was confirmed by the Imperial Constitution. The emperor reigned over the people as an omnipotent sovereign, but his existence was thoroughly institutionalized and embedded in the structure of the state. The emperor became a national institution. Across the three generations of Meiji, Taishō, and Shōwa, each emperor knew his role and practiced it, sometimes stifling their own true feelings in the process. For example, Mutsuhito 睦仁, the Meiji emperor, rejected the award of the Order of the Garter bestowed upon him by the British royal family in 1906. Why did he do so, when the public and private sectors were thrilled at this proof that Japan had become a “developed” country? The official biography of Emperor Meiji tells us the reason: “The emperor was always averse to receiving guests from abroad. He was always reluctant. However, once the time came, he never

6 Takii Kazuhiro 瀧井一博, ed., *Itō Hirobumi enzetsushū* 伊藤博文演説集, Kōdansha Gakujutsubunko, 2011, p. 169.

7 This point recalls the legal maxim *Rex infra et supra legem* (“the king who is both under and above the law”).

showed any displeasure toward the guests.”⁸

Emperor Mutsuhito must have felt the contradiction between the emperor who served the gods in the inner recesses of the Imperial Palace in Kyoto by purifying himself and removing himself from all pollution, and the emperor as a sovereign who symbolized the nation at home and abroad.

Finally, I would like to return to Emperor Akihito’s video message and question its meaning. After the Meiji Restoration, Japan became a centralized nation-state and promoted Western-style modernization. As a symbol of this, the emperor was taken out of the Imperial Palace in Kyoto to appear before the eyes of the people as a monarch. “Symbol of national unity” is the phrasing of the Japanese Constitution enacted after World War II, but the emperor had been such a symbol since the Meiji era, when the Japanese Imperial Constitution was enacted.

If we look at this from the emperor’s point of view, we might say that ever since the Meiji Restoration, the emperor has been the captive of the state constitution. Emperor Akihito’s expression of his “feelings” to the Japanese people can be seen as an appeal to this idea. At the same time, it may be said to signal the end of the current “shape” of Japan, which Japan has fashioned since the Meiji Restoration.

As Kariya Takehiko explains, in the twenty-first century, Japan has no national goal.⁹ This is because the sense of catching up with the West—modernization, the goal of the nation until now—has disappeared. In the simple sense of being economically on a par with the West, Japan has already caught up. However, if we view modernity only as a goal to be caught up with, we will overlook the values it encompasses. The Japanese nation and society are now in a state of great uncertainty as a result of losing the goal of modernization and losing sight of the meaning of modernity. How will the country construct a new constitution (the “shape” of the nation) in accord with the changes within and without? Emperor Akihito’s video message raises the issue of how to locate the emperor in this new context.

憲法に囚われた天皇

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2016年8月8日、当時の明仁天皇は日本国民向けのビデオメッセージを發し、これがきっかけで、2019年4月30日、明仁は現天皇の徳仁に讓位し、元号も平成から令和に変わった。天皇が生前に退位することは、日本が1889年に大日本帝国憲法を制定して立憲国家となって以降、初めてのことだった。この点、明仁による讓位は、立憲秩序への挑戦でもあった。本稿では、

8 *Meiji tenno ki* 明治天皇紀, vol. 11, Yoshikawa Kōbunkan, 1975, p. 492.

9 Kariya Takehiko 荊谷剛彦, *Oitsuita kindai kieta kindai* 追いついた近代消えた近代, Iwanami Shoten, 2019.

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この退位問題を通じて見えてくる明治以降からの日本の国家体制の連続性と
目下直面しているひずみを考察する。

キーワード：象徴天皇、退位、大日本帝国憲法、伊藤博文