

The Threat to Japanese Democracy: The LDP Plan for Constitutional Revision to Introduce Emergency Powers

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Abstract

This article explains why the Abe administration's emergency powers proposal will likely be the cutting edge of its attempt to amend the Japanese Constitution, and assesses the consequences of such an amendment for Japan's democracy.

Keywords: Japanese Constitution, Constitutional revision, emergency powers, Meiji Constitution, Kokutai, democracy.

Since its formation in 1955 the LDP has sought to change the Japanese Constitution. The stringent requirements for amendment (a 2/3 vote of each House of the Diet and a popular referendum vote) have stymied past efforts to submit proposals for popular vote so that the Japanese Constitution is the world's oldest to have no amendment. Prime Minister Abe has repeatedly called for constitutional change. In his first stint as prime minister he pushed a Constitutional Referendum Law through the diet making referendum possible once the diet musters the supermajority votes necessary to submit proposals to the public. Although in his second stint as prime minister he has now held office for more than four years, his administration has yet to submit a single proposal for constitutional revision to a diet vote.

This year is the 70th anniversary of Japan's democratic constitution and, taken together with the LDP's majority in the Upper House and a 2/3 majority in the Lower House

comprised of the LDP and other political parties that say they too seek constitutional amendment, many observers think the first specific proposal for amendment will soon be presented. But what will it be? The LDP's 2012 agenda includes changes that would affect nearly all important constitutional provisions.¹ As Japan's most successful politician of the last half century, it seems clear that Abe will select a step by step approach to amendment: first submitting a proposal seen as non-controversial and likely to gain wide popular support in order to pave the way for more contentious amendments. This article identifies a likely early candidate and assesses its significance for Japan's democracy and society. Amendment of Article 9 - Renunciation of War - the face of the historic LDP drive for constitutional amendment has likely moved down the list as the Cabinet Declaration to the effect that the Article does not prohibit collective self defense under various scenarios appears to give the Government leeway to do what it wishes in the military arena without committing to a NATO style 'attack on one is an attack on all' obligation. Japan has recently sent war ships to accompany and if necessary protect a US Navy supply ship delivering supplies to a US aircraft carrier task force off Korea.² The furor caused by the declaration makes clear that amendment of Article 9 would be controversial.

An Emergency Power Amendment

The Meiji Constitution provided that the Emperor could, in cases of urgent necessity arising when the diet was not in session, issue imperial ordinances that had the force and

effect of law but needed to be confirmed by the diet when it returned. In the era of so-called Taisho Democracy in the 1930s when diet approval of legislation seeking harsher penalties punishing speech and assembly deemed inconsistent with the public interest could not be obtained, the government used the Emergency Clause to make forming or joining an organization that sought to change the Kokutai³ (even by peaceful means) a capital crime punishable by death or life imprisonment.⁴

The 1947 Constitution has no emergency provision. The Diet, the only branch of government whose entire membership is elected to represent the people,⁵ was made the supreme organ of the state. The LDP proposes an amendment that would allow the cabinet, after the prime minister⁶ declared an emergency, to rule via cabinet orders having the effect of law and would compel people to carry out orders issued by the cabinet.⁷ Seen by the LDP as noncontroversial and easily acceptable by a nation traumatized by events such as the Great East Japan Earthquake and Tsunami and subsequent Fukushima Nuclear Disaster, this may be the first amendment proposed. It is a significant amendment and provides much more than simply allowing the Government to call the diet back in session or otherwise obviate a political vacuum in the event of an emergency, as has been suggested.⁸ The current Constitution already allows the cabinet to call special diet sessions. And when 25% of the membership of either house of the diet requests, the cabinet must decide whether to hold a special session. If the diet has been dissolved, the cabinet may call the Upper House back into emergency session to enact provisional measures that are subject to Lower House acceptance or rejection within 10 days of the Lower House returning.⁹ By combining the legislative, judicial and executive power in the hands of a small select group with emergency power - the prime minister-appointed cabinet - the proposal

endangers democratic government and sows the seeds of what James Madison in the Federalist Papers referred to as “tyranny”. This is especially so as the cabinet need contain only a bare majority of elected officials and all cabinet members are appointed by and serve at the prime minister’s pleasure.¹⁰ The contemplated amendment’s definition of ‘emergency’ already broad to cover such things as internal insurrection - subject to broad interpretation - or natural disaster (in a country prone to earthquakes) would allow for expansion of the definition of ‘emergency’ by legislation rather than Constitutional Amendment.



Illustration by Shinya Murakami

Few if any constitutional limits are placed on actions of the 'Emergency Cabinet'. None of the protections that modern democracies use to limit an emergency clause are contained in the contemplated proposal. Any action that might adversely affect the well-being of the Japanese people would suffice to support an emergency declaration setting aside democratic order for cabinet rule. Cabinet rule would not be limited to orders narrowly tailored to deal with the declared emergency nor would they need to be the least restrictive of citizens' rights. There is no prohibition against the prime minister declaring new emergencies as old emergencies expire. During the state of emergency the public would be required to carry out the instructions of the state and the public could be denied the opportunity to replace the government as the cabinet could postpone elections until after the emergency is declared to have ended, thereby doing away with the inconvenience of elections. The proposed amendment states that 'respect' must be shown to fundamental human rights - but this 'respect' is qualified -- the Cabinet would be empowered to disregard fundamental rights when it deemed such actions 'necessary' or 'reasonable' in the face of emergency.

While reflecting the influence of the Meiji Constitution's emergency clause, the contemplated amendment is even more encompassing than that clause. Recognizing that the Meiji Constitution's emergency provision might be abused or used as a pretext, the authors of the Meiji Constitution sought to cabin the emergency clause to situations where the diet was not in session [the Meiji Constitution did not provide for calling the diet back into special session] and subjected emergency use to diet review upon its return. The contemplated amendment is not so limited. In the 100 days of unrestrained Emergency Cabinet Government that would be permitted

(longer if the diet agrees, or if the prime minister declares a new emergency as the old emergency declaration expires), democracy may be toppled or an opposition destroyed. Democracy in Rome ended when the "Dictator" acting under the emergency provisions of governance (which limited his term of office) remained in office. Hitler rode to power on the back of the Weimar Republic's Emergency Clause and repeated emergencies declared seriatim.¹¹ The contemplated clause does not: separate the declaring authority from the executing authority (the prime minister declares and his handpicked cabinet executes the emergency powers); require that the legislative branch immediately be called back in session to approve or reject the declaration and remain in session to review future Cabinet Orders; list freedoms that are exempt from executive limitations; provide judicial review of the declaration or actions taken there under. Nor does it distinguish between emergencies and powers needed when the existence of the state is threatened (e.g., war launched against Japan) and those that may require quick/short term immediate action (such as natural disasters).¹² It does not protect human rights and/or democracy.

The contemplated amendment calls for diet (or at least House of Representatives) concurrence either before or after a declaration, making clear that a declaration may be made without prior diet approval and does not even specify a short time period for diet action to accept or reject the declaration. Giving the diet (or the prime minister via declaration of back to back emergencies) authority to extend an emergency runs the risk that a political party may remain in power indefinitely by simply extending emergency declarations. (This is emphasized by the diet committee's recent deliberations of extending the term of office of diet members during the period of the Emergency thereby avoiding democratic elections).¹³ This danger is enhanced because in Japan the diet, like the cabinet, is ordinarily under the control of the

prime minister's party so there likely is a congruence of interest in remaining in office by the prime minister and the diet. By requiring that all persons are subject to orders of the state (as provided by law) without specifically making an exception allowing for judicial review of orders issued by the emergency cabinet, it can be argued that judges are compelled to abide by state orders and thus are deprived of independent review of emergency cabinet orders and even the declaration itself. This interpretation is even less onerous than the provisions denying the diet a role in cabinet orders before being issued or denying the people the right to vote making it not unlikely that it would be seen as not 'unreasonable' absent a specific reference to judicial review.



Japanese citizens protesting the amendment of the Japanese constitution in 2016.

Democracies are hardly immune from the impulse to take 'emergency measures' that limit citizens' rights in the face of an emergency. Japan's leaders and American civil libertarians, roundly and correctly criticize the internment of Japanese and Japanese

Americans during the emergency of the Pacific War, yet the Abe administration now appears poised to suggest that emergency powers limiting rights and limiting separation of powers be enshrined in the Japanese Constitution. The Supreme Court of the United States in the midst of the Korean War recognized its error during the internment cases in which it upheld the Roosevelt administration's injustice of depriving 120,000 people of Constitutional rights by placing them in concentration camps for the duration of the war solely on the basis of ancestry and began the process of limiting the President's power even during a 'war' emergency - a process that continues in the face of the "war on terrorism."¹⁴

The current generation of LDP leaders would create a constitutional path that could enable a potential future generation of leaders with an autocratic bent to hijack the democratic ideals and the rights provisions of the Constitution much as the Meiji Constitution had within it the seeds that enabled the military and its civilian supporters to set aside democratic government when all of Japan's political parties 'voluntarily disbanded' during the war and an active duty military officer was appointed prime minister.

The need for an Emergency Clause amendment has yet to be shown. No study or analysis of Japan's postwar history has been made that indicates or even suggests that lack of an Emergency clause has hindered Japan's government in reacting to emergency situations. Japan's SDF has frequently been used by the Government to assist in civil defense work necessitated by natural or man-made emergencies such as typhoon, tsunami, earthquakes and nuclear disaster. Prime Minister Kan Naoto, acting in conformity with the Constitution, moved the governing apparatus to the Tohoku region to take a hands-on approach to the Fukushima nuclear disaster brought on by the Great East Japan

Earthquake and Tsunami. Evacuation orders were issued in 2011 to some 300,000 people in areas affected by the nuclear meltdown in conformity with and under the 1947 Constitution. The municipal governments most directly affected by the earthquake, tsunami and nuclear disaster saw no need then or subsequently for a constitutional emergency power.¹⁵ While clearly defined emergency powers may be appropriate in countries with historically strong rule of law/rights based systems with democracy-protecting structures, Japan does not fall into that category. Its overly deferential judiciary is a weak reed on which to rely.¹⁶ Its legislative branch typically follows the cabinet's lead. Its bureaucracy acts in extra-legal fashion with little judicial review and in the debate over 'reinterpreting' Article 9 acting through the powerful Cabinet Legislation Bureau the bureaucracy took a "no comment" position and kept no records of its activities on the subject notwithstanding legislation requiring such record keeping.¹⁷ The

specification of emergency powers in the Japanese Constitution is both unnecessary and dangerous.¹⁸

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Notes

¹ English language translations of Amendments may be found at Voices of Overseas Youth for Civic Engagement, here (<http://www.voyce-jpn.com/#!blank/rthtr>); Colin P.A. Jones, "The LDP constitution, article by article: a preview of things to come?," *Japan Times*, 7/2/13; Lawrence Repeta, "Japan's Democracy at Risk - The LDP's Ten Most Dangerous Proposals for

Constitutional Change (<http://apjjf.org/2013/11/28/Lawrence-Repeta/3969/article.html>),” The Asia-Pacific Journal, Vol. 11, Issue 28, No. 3, 7/15/13; Keigo Komamura, “Constitution and Narrative in the Age of Crisis in Japanese Politics,” 26 Washington International Law Journal 75, Appendix 1, 2017.

² *The Mainichi*, 5/1/17, Japan guards U.S. military vessel for 1st time under security legislation (<http://mainichi.jp/english/articles/20170501/p2a/00m/0na/014000c>).

³ Under Kokutai and enshrined in the Meiji Constitution, the Emperor was deemed to possess Japanese sovereignty and was deemed the essence of the Japanese State through his mythical relationship with the Sun Goddess, a principal Shinto Deity. Other Japanese held a relationship with each other and the Emperor through their relationship with lesser Shinto Deities.

⁴ H.S. Quigley, *Japanese Government and Politics* (University of Minnesota, 1932); Gregory J. Kasza, *The State and the Mass Media in Japan, 1918-1945* (Univ. of Calif. Press, 1988) (Kasza notes that the Emergency Power was exercised on four occasions to restrict press freedom.)

⁵ Constitution "Article 43. Both Houses shall consist of elected members, representative of all the people."

⁶ Constitution "Article 67. The Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet. This designation shall precede all other business. If the House of Representatives and the House of Councilors disagree and if no agreement can be reached even through a joint committee of both Houses, provided for by law, or the House of Councilors fails to make designation within ten (10) days, exclusive of the period of recess, after the House of Representatives has made designation, the decision of the House of Representatives shall be the decision of the Diet."

⁷ For English language translations of amendments under consideration see note 1 supra.

⁸ *The Mainichi*, 1/1/16. Abe gov't looks to add emergency clause for major disasters to Constitution (<http://mainichi.jp/english/articles/20160101/p2a/00m/0na/010000c>); *Mainichi*, 5/8/15, LDP proposes prioritizing debate on contingencies in revising Constitution.

⁹ Constitution **Article 53**. The Cabinet may determine to convoke extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation. **Article 54**. ... When the House of Representatives is dissolved, the House of Councilors is closed at the same time. However, the Cabinet may in time of national emergency convoke the House of Councilors in emergency session. 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.

¹⁰ Constitution Article 68. The Prime Minister shall appoint the Ministers of State. However, a majority of their number must be chosen from among the members of the Diet. The Prime Minister may remove the Ministers of State as he chooses.

¹¹ See, Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006).

¹² 6 Marc de Wilde (2015)) Just trust us: a short history of emergency powers and constitutional change (<http://dx.doi.org/10.1080/2049677X.2015.1041728>), *Comparative Legal History* 3:1, 110-130, DOI:10.1080/2049677X.2015.1041728. John E. Finn *Constitutions*

in Crisis: Political Violence and the Rule of Law (Oxford University Press, 1991) (Constitutional Dissolution in the Weimar Republic).

¹³ Diet panel resumes Constitution debate, eyeing 1st-ever amendment, *Mainichi* 3/16/17.

¹⁴ Justice Stephen Breyer, *The Court and the World* (Knopf, 2015) Chapters 3 and 4. It was not until 2011 that the Executive Branch acknowledged that documents such as the Ringle Report on Japanese Internment (Naval History and Heritage Command (<https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/r/ringle-report-on-japanese-internment.html>)), which had concluded that Japanese American citizens on the West Coast posed no danger in the event of war with Japan, had not been made available to the Supreme Court when it was deciding the internment cases. *Los Angeles Times*, 5/24/11, U.S. official cites misconduct in Japanese American internment cases. For current examples see, Adam Liptak, "Campaign Pledges Haunt Trump in Court," *New York Times* 3/16/17; Vivian Yee, (<https://www.nytimes.com/by/vivian-yee>) "Judge Blocks Trump Effort to Withhold Money From Sanctuary Cities," *New York Times* 4/25/17.

¹⁵ *Mainichi*, 4/30/16, Most municipalities hit by 2011 disasters see no need for an emergency clause in Constitution.

¹⁶ See, e.g., Lawrence Repeta, "Limiting fundamental rights protection in Japan: the role of the Supreme Court," in Jeff Kingston, Ed. *Critical Issues in Contemporary Japan* (Routledge, 2014) and Shigenori Matsui, "Why is the Japanese Supreme Court so conservative?" 88 *Washington University Law Review* 1375 (2011).

¹⁷ Lawrence Repeta, Prime Minister Abe Subverts Japan's Public Records Act (<http://www.freedominfo.org/2015/10/prime-minister-abe-subverts-japans-public-records-act/>), 10/9/15; The *Mainichi*, 9/21/15, Cabinet Legislation Bureau has no record of Constitution reinterpretation deliberations; The *Mainichi*, 2/15/16, Cabinet Legislation Bureau head left no record of meetings about constitutional reinterpretation.

¹⁸ Mark Fenwick, *Emergency Powers and the Limits of Constitutionalism in Japan in Emergency Powers in Asia, Exploring the Limits of Legality* (Victor V. Ramraj and Arun K. Thiruvengadam Ed., Cambridge University Press, 2010).