

COMMENTARY / JAPAN

## The coronavirus and Japan's Constitution

Article 41 provides the government with sufficient power to take aggressive action

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**SEATTLE** – Many foreign observers are puzzled by Japan's odd response to the COVID-19 pandemic, which some call a "soft lockdown." After dithering for weeks, Prime Minister Shinzo Abe finally exercised power granted under the recently revised New Influenza Special Measures Act to declare a state of emergency on April 7 over Tokyo and six other prefectures, authorizing prefectural governors to request social-distancing measures and other actions.

Without exception, foreign news reports emphasized that the law does not mandate penalties for violation. That's right. Under this law, governors like Tokyo Gov. Yuriko Koike can strongly request that people stay home but they cannot order them to do so.

Why doesn't Japan's pandemic law provide mandatory power? At least one major foreign publication has declared that Japan's Constitution would need to be amended to impose and enforce a lockdown.

But that's not correct. There is certainly no need to revise Japan's Constitution to create legal authority to enforce a lockdown. Article 41 of the present Constitution provides the Diet with sufficient power to authorize aggressive government action against the coronavirus and other threats to public health.

Perhaps the best-known example of mandatory orders in a public health emergency concerns the nuclear power plant meltdowns of 2011. Acting under authority created by a different special measures law (concerned with nuclear emergency preparedness), officials issued mandatory orders to evacuate the zone within 20 km of the power plant.

Civil libertarians may argue that an order to evacuate your home — or to stay inside — is an extreme limitation on constitutionally guaranteed rights like freedom of movement, public assembly, and others. They would be correct. But constitutional scholars like professor Hajime Yamamoto of Keio University explain that those rights must be balanced against other constitutional provisions, especially Article 13, which stipulates that the "public welfare" is the highest consideration of all law and government action. There is no doubt that reasonable restrictions calculated to limit the spread of the coronavirus pass constitutional muster.

If there is no constitutional limitation, why did the Abe administration fail to request mandatory powers when it proposed revision to the New Influenza Law in March? The ruling coalition holds comfortable supermajorities in each house of the Diet so the administration certainly has the power to craft the law it needs.

We hear several possible explanations. One is that the Japanese people are so responsive to official requests they don't need such orders. Jishuku (self-regulation) really works. Another is that such orders are unnecessary because of Japan's extremely high standards of hygiene. Others suggest that a mandatory shutdown would be anathema to the big business organizations that provide the bedrock of political support for the ruling Liberal Democratic Party.

As for government action following the nuclear disaster of March 2011, some say that was a very different case. Extreme anxiety among members of the public and government officials alike was ignited by the massive earthquake and tsunami and the unprecedented radiation release. By contrast, the pandemic did not commence with such a great shock. It is a slow-moving disaster in which country after country delayed taking action until the numbers of victims reached alarming levels.

But these explanations provide only partial answers at best. The Diet could have expressly provided compulsory power to address the virus as it did for nuclear emergencies. If the prime minister was swayed by factors like these, he could simply stay his hand until the critical moment.

The prime minister did not request compulsory power and the Diet did not grant it. The reason is not legal, but political. Every Japanese politician knows of the widespread fear of excessive power rooted in Japan's wartime history. This leads us back to the Constitution for it is the Constitution that both creates governmental power and places limits on its use.

Abe and his supporters have ceaselessly clamored for fundamental revision of Japan's postwar Constitution for many years. They oppose its broad protections for individual rights and seek to shift the balance in favor of greater government power over the people. The LDP's most recent proposal for comprehensive revision was announced in April 2012. One of many proposals to expand government authority was an entirely new article designed to create constitutional emergency power for the first time.

Under the LDP's proposal, the prime minister would gain authority to declare national emergencies for a very broad and poorly defined range of circumstances. The declaration would empower the Cabinet to issue orders with the same effect as laws during the period of the emergency.

The emergency power proposal was vociferously opposed by Japan's bar associations, constitutional law professors, news organizations, and others. They rightly feared a serious threat to Japanese democracy.

The Diet's broad legislative power is subject to great public scrutiny. Diet debates over proposed laws involve members of all parties, member votes are a public record, and legislation must be adopted by a majority of each house. People in every corner of the country often observe Diet debates on their television screens.

No such transparency applies to Cabinet meetings. If Cabinet orders had the same effect as law, the nation could be ruled by secret government for as long as the declaration remained in effect.

At an early stage of the crisis, some of Abe's most extreme allies suggested taking advantage of the present crisis to push through their demands for constitutional change. As Abe and other leaders consider action to address the pandemic, they must exercise the powers created by Japan's present Constitution. There is no need for revision.

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