

# Godzilla and the Japanese Constitution: A Comparison Between Italy and Japan

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### Abstract

The Japanese movie 'Godzilla' illuminated controversial issues related to the existence of the Self Defense Force (SDF) under the current Japanese Constitution. In this movie, the Japanese Government sent the SDF, emergency power, and leadership of the prime minister to fight against an external enemy, Godzilla. Under the Act Concerning Measures for the Protection of the People in Armed Attack Situations, Etc (*Buryoku Kougeki Jitai hou*, AASRA), the cabinet may send the SDF to use force against an external enemy, with parliament's approval. Godzilla allegedly met the requirements to send in the SDF. This paper questions whether the legal assertion on which the decision was based was valid. One well-known Japanese politician, Shigeru Ishiba, doubts the validity, arguing that Godzilla was an extraordinary natural disaster, not an enemy. Thus, the SDF should have been dispatched to provide safety and relief at the request of the governors of the prefectures, and not for the use of force against an 'enemy'. Godzilla was the unintended product of thermonuclear testing near Bikini Atoll, but not just a dinosaur or a terrible monster. This tale served to shed light on many problems in Japanese society, such as economic crises and climate change.

After the 2015 political shift, constitutional scholars in Japan were compelled to explain the role of the SDF from the perspective of constitutionalism and the role of judicial review outside Japan. For instance, it should be noted that there is no provision for emergencies under the Japanese Constitution. This paper helps to provide a better understanding of these issues for Japan and other countries.

## I. Godzilla and the Constitution

### 1. Story of Godzilla

In 2016, the movie Shin Godzilla was released. In the movie, on 3 November, a vapor explosion occurred and the Tokyo Aqua Tunnel collapsed. In response to accident reports submitted to the prime minister, the chief cabinet secretary (*Naikaku Kanbou Choukan*), the deputy chief cabinet secretary for crisis

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management (*Naikaku Kiki Kanrikan*), and the Cabinet Intelligence and Research Office (*Naikaku Jouhou Chousa Sitsu*) under the cabinet office was called to the cabinet. This group analyzed the damage situation, coordinated emergency measures, and collected and analyzed information regarding damage and response operations. During the meeting, one official indicated that some kind of creature in the water, which might be an animal, was not being dealt with and shortly thereafter, Godzilla landed in the Kamata region along the river.

The Tokyo metropolitan governor requested that the cabinet send in the Self Defense Force (SDF) under Arts 78 and 81 of the Self Defense Force Act (*Jieitai hou*, SDF Act)<sup>1</sup> for public security operations (*Chian Shutsudou*). The SDF may use only police power for public security purposes when the regular police force cannot control the situation.

For natural disasters, upon the request of the governor, the SDF may work for the protection of human life and property under Art 83 of the Basic Act on Disaster Control Measures (*Saigai Taisaku Kihonhou*).<sup>2</sup> It was unclear if Godzilla was a 'natural disaster' such as a typhoon or flood that could possibly be prevented or controlled. Under a natural disaster mission, the SDF may not use armed force for disaster relief operations. The prime minister hesitated to declare a state of emergency (*Saigai Kinkyu Jitai*) as set forth in Art 105 of the Basic Act on Disaster Control Measures.<sup>3</sup>

The members at the meeting discussed first if an attack by a creature or animals constituted an armed attack by a 'foreign state' as clearly set forth under the SDF Act.<sup>4</sup> The defense mobilization order (*Bouei Shutudou*) set forth in Art 76<sup>5</sup> of the SDF Act was targeted at foreign states, not an unknown creature.

The Cabinet Intelligence and Research Office concluded that the unknown creature was an 'animal' as set forth in Art 2 of the Wildlife Protection and Hunting Management Law (*Chouju hogo hou*)<sup>6</sup> and that the SDF may attack to kill a 'harmful animal' under the Art 76 defense mobilization order of the SDF Act. In the two hours it took to hold this session, over one hundred citizens were killed or went missing and Godzilla returned to the sea and disappeared.

Four days later, Godzilla emerged from the sea and landed in the Kamakura area. Its form changed several times and it destroyed many cities. The government hesitated to issue an SDF defense mobilization order under the SDF Act. This implies that, in reality, the prime minister had ordered the defense mobilization order pursuant to Art 76 of the SDF Act for the first time since the World War II.

<sup>1</sup> *Jiei Tai Hou* (The Self-Defense Force Act), Act no 76 as of 2015, Arts 78, 81.

<sup>2</sup> *Saigai Taisaku Kihon Hou* (The Basic Act on Disaster Control Measures), Act no 223 of 1961, Art 83.

<sup>3</sup> *ibid* Art 105.

<sup>4</sup> SDF Act, n 1 above, Art 76.

<sup>5</sup> *ibid*.

<sup>6</sup> *Chouju hogo Hou* (The Protection and Control of Wild Birds and Mammals and Hunting Management Law), Act no 46 of 2014, Art 2.

Under Art 97 of the SDF Act, the cabinet must obtain the approval of the Diet for a defense mobilization order. The act allows the SDF to exercise necessary force to protect Japan pursuant to Art 9 of the Japanese Constitution.<sup>8</sup> Under the SDF Act, a *Sonritsu Kiki Jitai* is defined as an armed attack against a foreign country resulting in a threat to Japan's survival. This language was added to Art 76(1)(ii) of the SDF Act in September 2015.

Godzilla approached the US Embassy in Tokyo, and based on the US and Japan Security Treaty,<sup>9</sup> a bomber flew from the base in Guam and attacked. Godzilla retaliated and destroyed a helicopter carrying eleven ministers, including the prime minister. According to Art 70<sup>10</sup> of the current constitution and Art 9<sup>11</sup> of the Cabinet Act (*Naikaku hou*), another prime minister was selected. The United Nations Security Council decided to initiate a nuclear attack against Godzilla and three million six hundred thousand people began evacuating. This fictional movie shows the decision-making process of the cabinet for a crisis under the current constitution and existing statutes.

## 2. The Origin of Godzilla

The Godzilla of Japan is more than a monster or a dinosaur. The first Godzilla movie, in late 1954, showed that Godzilla was born of an H bomb test near the Bikini coast in 1946. A fishing boat called the *Daigo Fukuryu maru* was exposed to a nuclear experiment in 1954. The crew suffered nuclear contamination. First, Godzilla landed in Tokyo and destroyed the building of the Diet. A medical doctor, Dr Serizawa, used potent medicine to kill Godzilla.

The director of the first Godzilla movie later said that the purpose of the movie was to demonstrate the dangers and foolishness of using nuclear weapons. In 1950, the Korean War commenced on the Korean peninsula, which activated economic recovery in Japan. That same year, the Japanese government established the National Police Reserve<sup>12</sup> and later converted it to the National Safety Force (*Hoan Tai*) in 1952.<sup>13</sup> In 1951, Japan gained its sovereignty by concluding the Treaty of Peace with Japan in San Francisco.<sup>14</sup> The National Safety Force was reorganized as the current SDF in 1954. The Godzilla movies have shown the history of Japanese post-war reconstruction. There is some meaning behind why Godzilla attacked the Diet in the first movie.

In 2016, the movie Shin Godzilla reveals several difficulties with the current constitution and statutes involved for national defense and the leadership of the

<sup>7</sup> SDF Act n 1 above, Art 9.

<sup>8</sup> *Nihonkoku Kenpo* (Kenpo Constitution), Art 9.

<sup>9</sup> *Nippon Koku to no Heiwa Jouyaku* (Treaty of Peace with Japan), 28 April 1952, Treaty no 5.

<sup>10</sup> *ibid* Art 70.

<sup>11</sup> *Naikaku Hou* (The Cabinet Act), Act no 33 of 2015, Art 5.

<sup>12</sup> *Keisatsu Yobitai Rei* (The National Police Reserve ordinance), Ordinance no 25 of 1950.

<sup>13</sup> *Hoan tai Hou* (The National Safety Force Act), Act no 265 of 1952.

<sup>14</sup> *Nippon Koku to no Heiwa Jouyaku* (Treaty of Peace with Japan) n 9 above.

prime minister. Some people argue that it is necessary to amend the constitution to add emergency provisions for disasters such as the Great East Japan Earthquake. Others argue that the Japanese Constitution and relevant statutes are well prepared to cope with natural disasters.

It might be important to simulate an emergency situation and interpret the current constitution and other relevant statutes. Art 9 of the current constitution announces the renunciation of war and prohibits the use of an army. After the Korean War occurred in Korean peninsula, the General Head Quarters asked the Japanese government to establish National Police Reserve (*Keisatsu yobitai*). This was converted into the National Safety Force (*Hoan tai*) in 1952, and the SDF in 1954. If SDF is the 'army', it is unconstitutional. Prime Minister Sigeru Yoshida's cabinet explained that when the National Police Reserve was established, its aim was to work for public security, not for rearmament, and the prohibition of the army in Art 9, with respect to equipment and organization to the extent that it aided modern war, was executed.<sup>15</sup> The Cabinet Legislation Bureau (*Naikaku Housei kyoku*) has explained that the SDF is a necessary minimum defense that is not an 'army' in the context of Art 9 of the current constitution and that defense and security statutes were passed in 2015 before Shin Godzilla was released.<sup>16</sup>

### 3. Public Security Order and the Police Department

The greatest real-life disaster situations that Japan has faced recently are potential nuclear meltdowns, chemical weapon attacks by doomsday cults, and student-hostage cases.

The discussion on emergency power first came up due to the meltdown of Unit 1 of Tokyo Electric Power Company's (TEPCO) Fukushima Dai-ichi Nuclear Power Station in 2011.

The public notice regarding the occurrence of a nuclear emergency situation by the prime minister is still in effect under Art 15(2) of the Act on Special Measures Concerning Nuclear Emergency Preparedness since the Great East Japan Earthquake in 2011.<sup>17</sup>

On 3 March 2016, a member of the opposition asked when the prime minister should cancel the public notice of the occurrence of a nuclear emergency situation.<sup>18</sup> This public notice allows the prime minister to give notice of the

<sup>15</sup> Y. Tsuji, 'Amendment of the Japanese Constitution – A Comparative Law Approach' 37 *Nanzan Review of American Studies*, 51 (2015).

<sup>16</sup> For Japanese governmental formal interpretation of constitution, M. Sakata, *Seihu No Kenpo Kaishaku* (Constitutional Interpretation by the Government) (Tokyo: Yuhikaku, 2013).

<sup>17</sup> *Genshi ryoku saigai taisaku tokubetsu sochi hou* (the Act on Special Measures Concerning Nuclear Emergency Preparedness) Law no 156 of 1999, Act 15, para 2.

<sup>18</sup> *Genshi ryoku kinkyu jitai sengen ni kansuru situmon shui sho* (Inquiry of the public notice of the occurrence of a nuclear emergency situation) (3 March 2016), available at <https://tinyurl.com/y8bdm2bc> (last visited 25 November 2017).

area where emergency response measures should be implemented, and provides an outline of the nuclear emergency situation. The notice is simple and short, and mentions only place and date of the accident at Unit 1 of Fukushima Dai-ichi Nuclear Power Station. It further notes that no effects of radioactive substances have been observed so far, therefore, it is not necessary to evacuate people in the designated area and that people should stay in their homes or current place of residence. The government advised people to get their news from the radio and the emergency broadcast system. After this notice was issued, the cabinet made evacuation zone smaller, but has not yet cancelled it. The cabinet changed the evacuation order from 1 mSv to 20 mSv a year; thus, refugees may now return to their homes.

The second disaster situation was the chemical weapon attacks by doomsday cults that occurred in May 1995. These cults spread Sarin gas in the subway, and the fire and police departments of the Tokyo metropolitan rescued victims. SDF was dispatched to remove toxic substances of chemical weapons. In this case, public security operations (*Chian Shutsudou*) under Arts 78 and 81 of the SDF Act<sup>19</sup> were not implemented.

The governor of the Tokyo metropolitan ordered that the cult group, known as ‘*Aumu Shinrikyo*’, be dissolved under the Religious Corporations Act.<sup>20</sup> The group argued that the order infringed upon their religious freedom and disregarded the separation between religion and government. The Supreme Court<sup>21</sup> held that the order was constitutional, explaining that the order was secular and did not infringe upon religious freedom. This case shows that the governor of the prefecture has the responsibility to take the first response. The SDF worked after the local police and fire department had performed their duties, and the public security operations were not used.

Before the religious attack in 1995, student movements became violent in 1960s, around the time when the US and Japan Security Treaty<sup>22</sup> was renewed. In the *Asama Sansho* case, the famous hostage crisis and police siege in 1972, the public security operations of the SDF were not implemented. In this case, the Coalition Red Army (the defunct Japanese armed militant group) barricaded themselves using hostages for nine days. Riot police of the Tokyo metropolitan police department failed the hostage rescue mission the first time, but subsequently broke into and saved the hostages. After this case, students within the group killed other students in name of thought reform inside the group. Toxic attacks by religious groups and violent student movement cases indicate that the police department was expected to cope with these situations.

<sup>19</sup> *ibid* Arts 78 and 81.

<sup>20</sup> *Shu kyou houjin hou* (Religious Corporations Act), Law no 126 of 1951, Art 81, para 1.

<sup>21</sup> *Saiko Saibansho* (Sup. Ct), 30 January 1996, *Heisei* 8(ku) no 8, 50, para 1, *Saiko Saibansho Minji Hanreishu* (Minshu) 199. English version is available at <https://tinyurl.com/yb8m3lmo> (last visited 25 November 2017).

<sup>22</sup> *Nippon Koku to no Heiwa Jouyaku* (Treaty of Peace with Japan) n 9 above.

#### 4. Nuclear Accident and Emergency Power

The recent, infamous nuclear disaster in history is the Great East Japan Earthquake in 2011. In this case, the first response was poor. The local and central governments are expected to work together, but failed to do so. There was inadequate information sharing, inefficient functioning of the command and control system, and the implementation of relevant statutes were not smooth. Sometimes, the city hall of local government lost its capacity, and officials were not able to work well. The local governments needed support from the central government in Tokyo.

While one can argue for the provision of emergency power in the constitution, on the other hand, it can be argued that the first quick response is by the local government, and strengthening the governor does not infringe upon individual rights of the local people. Central government works to support local governments. This paper defines emergency power as a restriction of individual rights.

For example, the problem of property right occurred during the earthquake recovery period. The fire department and SDF needed to receive permission of the property of car, and drifted homes. Before reviewing the mission of the SDF, this paper first analyzes the strong leadership of the prime minister within the cabinet.

## II. Strong Prime Minister Leadership

Under the previous Imperial Constitution, also called the Meiji Constitution, the prime minister was one of multiple ministers who served the emperor.<sup>23</sup> The Meiji Constitution had no set term for the leadership position of prime minister. The prime minister had no strong leadership authority to manage or coordinate other ministries. Strong objections from the military could not maintain the cabinet as a whole, and this led to war.

Under the current constitution, the position of prime minister was clarified and the power to appoint and remove ministers was provided.<sup>24</sup> It is a debated issue, even under the current constitution, that strong leadership has been achieved. When natural disasters strike, such as the Great East Japan Earthquake in 2011, Japan's leadership and the reform of its administrative branches are questioned.

### 1. Administrative Reform in the 2000s

Japanese administrative reform came after a high economic period. The administrative branches were reorganized in 2001 after the Basic Act on Central Government Reform (*Chuou shouchou to kaikaku kihon hou*)<sup>25</sup> was promulgated

<sup>23</sup> *Dainihon Teikoku Kenpo (Meiji Kenpo, Meiji Constitution)*, Art 55.

<sup>24</sup> *Kenpo* n 8 above, Arts 66-68.

<sup>25</sup> *Chuou shouchou to kaikaku kihon Hou (The Basic Act on Central Government Reform)*,

in 1998 under the second *Ryutarou Hashimoto* Cabinet. Its purpose and principles are that each minister ‘shall take charge of and manage the relevant administrative matters as the competent minister referred to’ in the Cabinet Act.<sup>26</sup>

Before this amendment, coordination among ministries used to be very complex and difficult under the cabinet.<sup>27</sup> The selection of policies was difficult because policy development was too rigid and inflexible. The cabinet could not manage a comprehensive strategy or rapid decision-making even though the current constitution provides that the cabinet can ‘conduct affairs of state’ in Art 73. Thus, it was suggested that the cabinet make the top down decision to shape and develop the main policies and manage their coordination among several ministries. The leadership of the cabinet was to be clarified and strengthened.<sup>28</sup>

There were four purposes for reorganization. First, political leadership was to be established. Second, the government’s compartmentalized public administration was to be resolved. Third, transparency and accountability of the administrative branches were to be established. Fourth, there was to be a reduction in overlapping duties and councils and reorganization of the administrative branches.

The cabinet’s authority was strengthened by this reform. The revision of the Cabinet Act enabled the prime minister to propose fundamental policies for cabinet meeting. The Cabinet Secretariat (*Naikaku Kanbou*, CS) plans the important policies of the cabinet. The number of Special Advisors to the Prime Minister (*Naikaku Souri Daijin Hosakan*) was increased from three to five. The CS had an Assistant Chief Cabinet Secretary (*Naikaku Kanbou Fuku Choukan Ho*), a Cabinet Public Relations Secretary (*Naikaku Kouhou Kan*), and a Director of Cabinet Intelligence (*Naikaku Jouhou Kan*). These agencies were all depicted in the Shin Godzilla movie.

The Cabinet Office (*Naikaku hu*) was established to assist the cabinet in drafting important policies and to coordinate uniform policies among the ministries. These reforms were made without amending the current constitution.

## 2. An Evaluation of the Administrative Reform of the 2000s

After this reform, from 2000 to 2006, the prime minister changed from Yoshiro Mori, to Junichiro Koizumi, and then to Shinzo Abe. These prime ministers were selected from the Liberal Democratic Party (*Jimin tou*, LDP).

The Koizumi Administration, from 2001 to 2006, is viewed as successful in several respects. First, he expanded the power of the LDP through his unique political reforms. He, as leader of the LDP, stated that he would destroy the LDP himself. He had authority to endorse the official candidate of the LDP in a single seat constituency, which started with the election for the House of

Act no 103 of 1998.

<sup>26</sup> *Naikaku Hou* (The Cabinet Act), Act no 5 of 1947, Art 3, para 1.

<sup>27</sup> T. Nonaka, M. Nakamura et al, *Kenpo II (Constitution II)* (Tokyo: Yuhikaku, 2012), 176.

<sup>28</sup> N. Ashibe, *Kenpo (Constitution)* (Tokyo: Iwanami Shoten, 2015), 333.

Representatives in 1996. This meant that he had the power to distribute campaign finances and appoint executives of the LDP. His reform reduced factional conflict within the LDP. Since 1955, the LDP maintained the regime as the ruling party, but with several factional conflicts operating therein. Under Art 67 of the current constitution,<sup>29</sup> the prime minister is selected from among members of the House of the Diet, and the term of a member is four years in the House of Representatives under Art 45<sup>30</sup> of the current constitution and six years for one of the councillors under Art 46.<sup>31</sup> Typically, the prime minister of Japan has been selected from the lower house.<sup>32</sup>

The term of the LDP leader used to be two years. There is no special provision under the current constitution regulating political parties, such as the Basic Law for the Federal Republic of Germany.<sup>33</sup> Art 21 only provides for freedom of association.<sup>34</sup> Every two years, factional disputes within the LDP hindered the leadership of the prime minister. Japanese people did not see a regime change within a political party until 1993 when Morihiro Hosokawa was appointed prime minister from a non-LDP party in a coalition government.

In 1996, after gaining back its regime from Tomiichi Murayama, the prime minister in 1996, Ryutaro Hashimoto, from the LDP, initiated the reform of the administrative branch. His administrative reform was succeeded by Junichiro Koizumi. The administrative reform in 2001 expanded the power of the prime minister through several amended statutes. In a cabinet meeting, a prime minister may propose a fundamental policy for each ministry, which reinforces political leadership, rather than bureaucratic leadership. The sole law on the formation of the Diet is Art 41<sup>35</sup> of the current constitution. Political rather than bureaucratic leadership in shaping policy was a long-cherished wish. The forty-eighth to sixty-third prime ministers, from 1948 to 1972, with the exception of Tanzan Ishibashi, were all bureaucrats. These bureaucratic governments promoted Japanese economic growth until Kakuei Tanaka served as the sixty-fourth prime minister in 1972.<sup>36</sup>

Under Art 72,<sup>37</sup> the cabinet may submit bills to the Diet and the number of bills permitted was increased. An evaluation of this reform to strengthen cabinet leadership depends not only on the short-term political atmosphere but also on mid- and long-term perspectives in terms of the essence of governmental structure.

<sup>29</sup> *Kenpo* n 8 above, Art 67.

<sup>30</sup> *ibid* Art 45.

<sup>31</sup> *ibid* Art 46.

<sup>32</sup> *ibid* Art 67.

<sup>33</sup> *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany), Art 21.

<sup>34</sup> *Kenpo* n 8 above, Art 21.

<sup>35</sup> *Kenpo* n 8 above, Art 41.

<sup>36</sup> J. Iio, *Nihon No Touchi Kouzou* (Japanese Governmental System) (Tokyo: Chuko sinsho, 2007).

<sup>37</sup> *Kenpo* n 8 above, Art 72.



This is because after the Junichiro Koizumi Administration, the prime minister changed every year from Shinzo Abe (ninetieth), to Yasuo Fukuda (ninety-first), to Trou Asou (ninety-second). Then, the mid- to long-term stable regime of the LDP failed in the election of the House of Representatives in 2009.

Under the current constitution, the cabinet is a collegial body<sup>38</sup> not belonging exclusively to the prime minister but to other ministers. The prime minister may appoint and remove ministers under Art 68<sup>39</sup> of the current constitution, but a factional power balance works within the political party. The appointment of ministers depends largely on how many terms a candidate has won in Diet elections and seniority in each faction. They are not necessarily experts from each ministry. Scandals involving the ministers can affect decision-making and the operation of the Diet, and the cabinet may resign in some cases. Thus, administrative reform may not reinforce prime ministerial leadership. Not only is the relationship between the prime minister and ministers sensitive but responses to the parliament are related to the strength of the cabinet. The Diet is composed of two houses under a parliamentary system.<sup>40</sup> Even if the LDP dominates the lower house in the selection of the prime minister, the opposing party in the upper house may gain a majority, this is called *Nejire Kokkai*. This conflict prevents the strong leadership of the prime minister.<sup>41</sup> Japanese constitutional studies teach, generally, that the administrative power was remained power excluding judiciary and the law making power.<sup>42</sup> There is criticism that this explanation fails to explain the positive mission of administrative power under the current constitution.<sup>43</sup> Art 65 of the current constitution provides that ‘executive power is vested in the cabinet’ and Art 72 states that the prime minister controls and supervises various administrative branches. Since the drafting period, it has been controversial if Art 65 is the power implementing statute<sup>44</sup> or if it governs the administrative branches.<sup>45</sup>

Thus, the *Shissei ken* theory has been a focus of Japanese constitutional studies. It divides the cabinet into three layers.<sup>46</sup> The highest layer is the administration, which drafts, directs, and supervises policy via Art 65 of the current constitution. The second layer manages and implements administrative purposes. The third layer works to implement statutes and ministry ordinances.<sup>47</sup>

<sup>38</sup> *ibid* Art 66.

<sup>39</sup> *ibid* Art 68.

<sup>40</sup> *ibid* Art 42.

<sup>41</sup> K. Sato, *Kenpo (Constitution)* (Tokyo: Seibundo, 2011), 439-444.

<sup>42</sup> N. Ashibe, n 28 above, 322.

<sup>43</sup> K. Sato, n 41 above, 479; T. Nonaka, M. Nakamura et al, n 27 above, 166.

<sup>44</sup> S. Matsui, *Kenpo (Constitution of Japan)* (Tokyo: Yuhikaku, 2007), 213-217.

<sup>45</sup> T. Sato, *Nihonkoku Kenpo Seiritsusi* (The History of the Constitution of Japan, Vol IV) (Tokyo: Yuhikaku, 1994), 637.

<sup>46</sup> M. Sakamoto, *Kenpo 1 Classikusu (Constitution I Classic)* (Tokyo: Yushindo, 2000), 195.

<sup>47</sup> Y. Tsuji, ‘Law Making Power in Japan – Legislative Assessment in Japan’ 10 *Korean Legislation Research*, 173, 191 (2016).

This interpretation helps one visualize top-down policy-making in reality and explains the weakness of the undermined ‘sole law-making organ’ as the Diet in Art 41.

Under the SDF Act, the prime minister is the highest commander in chief, the minister of the defense order, and the controller of the SDF.<sup>48</sup> The mission of the SDF is subject to the authority of the cabinet and the approval of the Diet.<sup>49</sup>

### III. SDF Defense or Disaster Relief Operations

#### 1. Ishiba’s Argument and the Mission of the SDF

Shigeru Ishiba served as a minister from Koizumi during the Fukuda and Aso Administrations. He served as the director of the defense agency in the Koizumi Cabinet from 2002 to 2004 and was the minister of defense during the Fukuda Administration from 2007 to 2008.<sup>50</sup> He wrote in his blog<sup>51</sup> that if Shin Godzilla really came to Tokyo, a public security operation or disaster relief operation for the extermination of harmful animals or insects would be desirable. He argued that based on the fictional movie, a defense operation order (*Bouei Shutsudou*) under Art 76 of the SDF Act would have been impossible at that time. Defense operations enable the use of force (*Buryoku kousi*) and the ability to take action to maintain public security under Art 76 of the SDF Act and Art 9<sup>52</sup> of the Armed Attack Situations Response Act (*Buryoku Kougeki Jitai hou*, AASRA), with approval of the Diet. The exercise of such force shall observe international law and customs and not go beyond necessary and reasonable actions.

Godzilla is not an attack from a foreign state but, rather, a natural disaster. Ishiba thinks that a defense operation order is limited to an imminent, unlawful attack which constitutes a clear danger to Japan. He admits that Godzilla has extraordinary destructive power but that it is not an imminent attack by a foreign state. Thus, the SDF can be sent to terminate a harmful animal or insect under disaster relief operations. Disaster relief operations are issued under Art 76 of the SDF Act in the case of a natural disaster, and the SDF may exercise force for the protection of human life and property.

Ishiba’s main argument is that Shin Godzilla is a helpful opportunity to

<sup>48</sup> SDF Act, n 1 above, Art 7.

<sup>49</sup> *ibid* Arts 76, 78.

<sup>50</sup> Defense agency changed into minister of defense in 2007.

<sup>51</sup> Shegeru Ishiba, official blog, available at <https://tinyurl.com/65ab5c> (last visited 25 November 2017).

<sup>52</sup> *Buryoku Kougeki Jitai tou ni okeru Wagakuni no Heiwa to Dokuritsu narabini Kuni oyobi Kokumin no Anezenn no Kakuho ni Kansuru Houritsu (Buyroku Kogeki Jitai hou)* (Act Concerning Measures for the Protection of the People in Armed Attack Situations, Etc), Act no 76 as of 2015, Art 9.

consider Japanese defense and security issues and shows that some members in the LDP think that defense operations must adhere to the strict requirements of the AASRA. Godzilla is not a foreign state and that means that an attack by a foreign state must be carefully recognized and that force must be carefully exercised.

The Abe Administration passed defense and security statutes in 2015, including the AASRA. The Abe Cabinet changed the long-time public interpretation from individual defense power to collective defense power.<sup>53</sup>

Disaster relief operations do not authorize the SDF to use force and weapons.<sup>54</sup> Ishiba mentioned another possibility for public security operations (*Chian Shutsudou*) under Arts 78 and 81 of the SDF Act.<sup>55</sup> Art 78 provides for operations under the prime minister's order, and Art 81 requires a request from a prefecture governor for SDF dispatch. In Tokyo, the metropolitan police department works to maintain public security in daily life. Public security operations for the SDF are issued in the event that ordinary police power cannot maintain public security or compelling necessity against important situations for public security. The SDF may use power equivalent to general police power.

## **2. Hamaya's Thoughts on Using Disaster Relief Operations Against Harmful Animals**

The SDF has participated in disaster relief operations for natural disasters. In 1959, allegedly, the SDF used Steller sea lions in Hokkaido for target practice. Godzilla might be a Steller sea lion under Ishiba's argument.

Hidehiro Hamaya<sup>56</sup> agrees with the use of disaster relief operations. He argues that not only the size of the target animal can mean 'harmful' under the disaster relief operations in the SDF Act. Some statutes protect animals such as birds or small pets.<sup>57</sup> An analysis of the nature and character of large animals should first be conducted. Only for the protection of the lives of Japanese people and property may the SDF extract harmful animals. Before the SDF approaches, a Japan Coast Safety Force<sup>58</sup> ship or helicopter may ask the SDF to change its route in the sea. The case of Godzilla can be used for an analysis.

Hamaya might think that Chinese fishing boats did collide with a Japan Coast Safety Force ship in 2010.<sup>59</sup> Chinese fishing boats are frequently seen in the territorial Sea of Japan. Hamaya argues that it may turn out to be difficult to

<sup>53</sup> Y. Tsuji, 'Constitutional Law Court in Japan' 66 *Tsukuba Journal Law and Politics*, 65 (2016).

<sup>54</sup> SDF Act, n 1 above, Art 83.

<sup>55</sup> *ibid* Arts 78, 81.

<sup>56</sup> H. Hamaya, 'Dakara Kinkyu Jitai joukou ga hitsuyou nanodeha (So we need emergency provision?)' 540 *Seiron*, 211 (2016).

<sup>57</sup> *Chouju hogo Hou* n 6 above, Arts 1, 2, 8.

<sup>58</sup> *Kaijou Hoancho Hou* (The Coast Guard Force Act) no 71 of 2012.

<sup>59</sup> This collision was anonymously uploaded in YouTube in 2010.

change route and damage to civilian ships and fishing nets can be expected. Under Art 82 of the SDF Act, defense operations require an imminent attack by a foreign state or its equivalent.

Hamaya thinks that the Godzilla movies show defective management and control by the government in emergencies. He raises the Godzilla attack as good example of where more than five ministers were lost in one natural disaster in Tokyo. In reality, cabinet meetings are held in the office of the Prime Minister in Tokyo.<sup>60</sup> As the movie suggests that more than five ministers might be killed in one attack, but a cabinet meeting is still held to get all the ministers together under the Cabinet Act. The order of succession does not work when more than five ministers are lost.<sup>61</sup> Since 2000, the cabinet designates order of succession for five ministers in advance when the first cabinet is convened, and this order is published in official gazette. The order of succession does not follow the position of the ministries. The first minister is the Chief Cabinet Secretary.

Hamaya shows several defects in the Japanese Constitution such as an emergency meeting of the House of Councilors.<sup>62</sup> If a significant earthquake hits Tokyo, it might destroy both houses of the Diet. Hamaya argues that we should prepare for such unpredictable situations beforehand. Counter measures against unpredictable situations should be established. He argues for a constitutional amendment that provides emergency power for the following areas: announcements, procedures, summaries of emergent situations, scope and limit of emergency statements, effective term, and any limits on human rights. He thinks that additional statutes for emergent situations should be provided as well. He feels the Japanese Constitution was drafted in the American common law tradition, not a civil law tradition. According to Hamaya's opinion, in common law countries, there is a lack of necessary responses to emergent situations. In order to achieve rule of law, Hamaya concludes that the Japanese Constitution should be amended to address emergent situations.

Although Hamaya believes that the common law tradition lacks the necessary statutory preparation for emergencies, there are many well-drafted statutes in the US.<sup>63</sup> In Japan, the pre-2015 procedures of the AASRA<sup>64</sup> were not complete.<sup>65</sup> It might be true that Godzilla provided the Japanese people with a good lesson in deliberating the circumstances of an imminent attack by a foreign state or

<sup>60</sup> *Naikaku hou*, n 11 above, Art 3.

<sup>61</sup> The order of succession was fixed in 2000. Prime minister Keizo Obuchi was lost conscious, and allegedly Obuchi appointed Mikio Aoki to the position of interim deputy prime minister. From the next Mori cabinet, the order of succession was released in public report when the cabinet is organized.

<sup>62</sup> *Kenpo* n 8 above, Art 54, para 2.

<sup>63</sup> D. Farber, *Disaster Law and Policy* (New York: Wolters Kluwer, 2015).

<sup>64</sup> *Buryoku Kougeki Jitai Hou* (The Armed Attack Situations Response Act), Act no 112 of 2004 (revised Act no 76 of 2015).

<sup>65</sup> H. Ohsawa, 'Kinkyu jitai housei nituiteno oboegaki (Note for emergency statute)' *Jurist*, 143 (2004).

equivalent.

### 3. Murata's Collective Defense Power Argument

The Abe Cabinet changed the public interpretation of Art 9 of the Japanese Constitution, permitting individual as well as collective defense power.<sup>66</sup> In 2015, the Abe Administration passed peace and security bills in the Diet. The amendment to Art 76 of the SDF Act added the new notion of *Sonritsu Kiki Jitai*, that is, an armed attack against a foreign state resulting in a threat to Japan's survival.<sup>67</sup> Three requirements to exercise defense power were modified. First, an attack on Japan must occur, a nation in a close relationship with Japan must be attacked, the existence of the Japanese nation must be endangered, or it must be clear that life, liberty, and the right to the pursuit of happiness is threatened. Second, there must be no alternative measures to prevent the attack, preserve the nation, and protect the people. Third, its exercise must meet the necessary minimum requirements. Today, the government may exercise collective defense power under Art 9 of the current constitution.<sup>68</sup>

Koji Murata<sup>69</sup> argues that Japan over-idealized the United Nations as a symbol of peace. The government, according to Murata and as the Shin Godzilla movie taught, must recognize that cross-ministry responses, cooperation between local and central government, and assistance from international society are vital in an emergency. He argues that this movie shows defects in the existing statutes. He strongly believes the 2015 peace and security statutes permit collective defense power. Collective defense power depends on *Sonritsu Kiki Jitai*. Just before the 2015 defense and security bills were passed in the Diet, he attended the Diet to make a statement as president of Doshisha University that cabinet decision to change public interpretation of Art 9 for collective defense power was constitutional, but his colleagues were against him. Murata insists that constitutional scholars base constitutional analyses only on past facts and criticizes that deliberations for peace and security used to belong exclusively to constitutional scholars.

Constitutional scholars might think that the US-Japan Peace Treaty contributes to stabilizing the relationships among Asian countries, although some are against it. Defense and peace statutes should be deliberated by 'we the people', but the people do not believe that the 2015 statutes belong to them exclusively. Japanese constitutional scholars may think that the unpredictable can always happen and that free discretionary power should be justified and given to the executive branch.

<sup>66</sup> Y. Tsuji, n 15 above, 57.

<sup>67</sup> Y. Tsuji, 'Art 9 and the History of Japan's Judiciary: Examining its Likeness to American and German Courts' 68 *Tsukuba Journal Law and Politics*, 35 (2016).

<sup>68</sup> *ibid* 61.

<sup>69</sup> K. Murata, 'Reitestuna Kokusai seiji to Nihon, Anpo housei ha tadashikatta (Cruel international politics and Japan, I was collect to be for defense and security law)' 540 *Seiron*, 206 (2016).

#### 4. Ozawa's Constitutional Argument

Among constitutional scholars, Ryuichi Ozawa<sup>70</sup> argues that constitutional discussions begin with ordinary people, not professionals. He feels that the definition of *Sonritsu Kiki Jitai* and the use of force requirements are unclear. This is because in 2014, the cabinet announced a change in the formal interpretation of Art 9, and the Cabinet Legislation Bureau gave up the previous public interpretation of Art 9 permitting individual defense power only and changed the interpretation to endorse collective defense power.<sup>71</sup> The old requirement was that an immediate and imminent threat must occur; no alternative measure must exist; and the required minimum ability to use self-defense power must exist. Clear recognition of an attack against Japan was necessary. Preventive and exclusive actions against attacks were limited. The necessary minimum ability excluded the use of a foreign army, including the US Army stationed in Japan.<sup>72</sup>

As stated above, the new requirements are that first, an attack on Japan must occur, a nation in a close relationship with Japan must be attacked, the existence of the Japanese nation must be endangered, or it must be clear that life, liberty, and the right to the pursuit of happiness is threatened; second, there must be no alternative measures to prevent the attack, preserve the nation, and protect the people; and third, its exercise must meet the necessary minimum requirements.

Ozawa argues that the new requirements do not explain how to recognize supplementary and alternatives measures.<sup>73</sup> The quality and character of individual and collective defense powers were completely changed. Recognition of this power is subject to approval from the cabinet from time to time. Ozawa thinks the Abe Cabinet's justification and explanation failed to recognize necessary deliberations in the parliament. It is out of the question that an attack may occur against US maritime ships carrying Japanese citizens, and this does not meet the requirements of *Sonritsu Kiki Jitai*. It is simply an unrealistic situation.

The question is if the Strait of the Hormuz is closed due to underwater mines, would that meet the requirements of *Sonritsu Kiki Jitai*? It would because it would mean an economic crisis existed and this meets the requirement that 'the Japanese nation' is endangered.<sup>74</sup> Ozawa might fear that an economic crisis would permit the SDF to attack other Asian countries under the Meiji Constitution. The legalization of defense and security might be necessary, but deliberations in

<sup>70</sup> R. Ozawa, 'Sangjiin sekyo go no kenpo wo merugu joukyou to kadai (Situation and task around constitution after the election of the house of Councillors)' 15 *Hougakkan kenpo kenkyusho Hou*, 2 (2016).

<sup>71</sup> Y. Tsuji, 'Amendment of the Japanese Constitution' n 15 above, 55.

<sup>72</sup> M. Sakata, n 16 above. See also, Y. Tsuji, 'Amendment of the Japanese Constitution' n 15 above, 36.

<sup>73</sup> Y. Tsuji, 'Art 9 and the History of Japan's Judiciary' n 67 above, 45.

<sup>74</sup> *ibid* 8.

2015 were too short to consider necessary counter arguments to the arbitrary and capricious discretionary power of the executive.

#### IV. Emergent Power Under the Constitution

Godzilla taught us that an unpredictable ‘natural’ disaster could occur in Japan at any time. The Great East Japan Earthquake in 2011 was a good lesson for Japanese people to consider emergency operations. Some people would argue that the current constitution lacks emergency provisions and that an amendment to the current constitution is necessary. Others might argue that without amending the constitution, other relevant statutes could be drafted to serve such purposes.

For example, the Italian Constitution has a provision on emergency power. Art 11<sup>75</sup> rejects invasive war, thus, the term ‘war’ state in Art 78<sup>76</sup> means defensive war. Art 77, paras 2 and 3<sup>77</sup> of the Italian Constitution provides that both houses have the necessary power in the government to resolve war, and the government may issue a temporary decree (*provvedimenti provvisori*) in form of *decreto-legge*, with the force of normal law. This temporary decree loses its effectiveness unless it is submitted to both houses to change into statutes within sixty days.

It would be controversial if the state of war in Art 78<sup>78</sup> of the Italian Constitution applied to natural disasters, *stato di assedio* and *mobilizzazione*.

##### 1. National Emergent Power

In this paper, national emergent power is defined as allowing one person to suspend the human rights guarantee and the constitutional governmental system, such as separation of powers, in the event of an emergent situation.

In the Shin Godzilla movie, more than five ministers were lost as a result of the attack by Godzilla. Art 9 of the Cabinet Act would not work to address such a situation. Hamaya thinks that in Japan, emergency power is an untouchable topic in current constitutional discussions. The preamble<sup>79</sup> and Art 9 of the Japanese Constitution do not prepare Japan for emergent, unpredictable situations. In addition to these provisions, Art 73(6)<sup>80</sup> of the Japanese Constitution permits the delegation of ‘cabinet orders in order to execute the provisions of this Constitution and of the law’, and Art 54<sup>81</sup> grants the cabinet authority to call an emergency session of the House of Councillors (*Kinku shukai*) in the event of a national emergency.

<sup>75</sup> The Constitution of Italian Republic, Art 11.

<sup>76</sup> *ibid* Art 78.

<sup>77</sup> *ibid* Art 77, paras 2, 3.

<sup>78</sup> *ibid* Art 78.

<sup>79</sup> *Kenpo* n 8 above, preamble.

<sup>80</sup> *ibid* Art 73, para 6.

<sup>81</sup> *ibid* Art 54, para 4.

Akira Momochi argues that an amendment to Art 9(2)<sup>82</sup> is needed and that non-military emergent power should be discussed.<sup>83</sup> Natural disasters may happen during the election of the House of the Representatives. During campaigns, there is no lower house. An extension of the term of the House of Representatives for a natural disaster should be provided in the current constitution. As a strong advocate for the amendment of the current constitution, Momochi argues that emergency provisions are for the Japanese people, not members of the Diet. Otherwise, movement for an amendment to the current constitution would fail.

Yutaka Higashi<sup>84</sup> introduced an opinion for amending the constitution. He stated that because the Japanese Constitution has no army provision and emergency power is based on the existence of a military, the Japanese Constitution would not permit emergent power involving a military.<sup>85</sup> He argues that an emergency power provision was not considered during the GHQ occupation. The response to the crisis was a mission for the occupying force stationed in Japan, and after restoring sovereignty, the US Army stationed in Japan took over the mission.

Higashi argues that the emperor could declare a state of siege under Art 14<sup>86</sup> of the Meiji Constitution. It was used during the Great Kanto Earthquake in 1923. Art 31<sup>87</sup> of the Meiji Constitution allowed the emperor to exercise the power contained in the Chapter 2 (Rights and Duties of Subjects) of the Meiji Constitution in time of war or in cases of a national emergency. Art 31 was never implemented. Thus, Higashi concludes that it is wrong to say that the Meiji Constitution allowed for the arbitrary and capricious exercise of emergent power.

## 2. Existing Statutes for Emergent Situations

The Great East Japan Earthquake in 2011 gave the Japanese people the opportunity to consider the mission of the SDF and Art 9 of the current constitution. Under the current constitution, some can be used in the event of foreign state attacks are provided under national peace and security statutes.<sup>88</sup> For example, defense operations under Art 76 of the SDF Act and joint operations

<sup>82</sup> *ibid* Art 9, para 2.

<sup>83</sup> A. Momochi, 'Mazu ha kinkyu jitai joukou ga shouten (Editorial, Priority Is Emergency Provision)' *The Sankei Shimbun*, 12 July 2016, available at <https://tinyurl.com/y98fdnsf> (last visited 25 November 2017).

<sup>84</sup> Y. Higashi, 'Kokka kinkyukenron no shin tenkai (A New Development of the Discussion About Emergency Powers in the Constitution: Looking at an Amendment to the Constitution of Japan with Providing Emergency Power)' 52 *Housei ronsou* (The Japan Association of Legal and Political Sciences), 231 (2016).

<sup>85</sup> K. Takami, 'Kenpo 9 Jou Kaishaku Tairitsu no Genryu (Origin and Development of Conflict of Interpretation of Art 9)', in Institute of Comparative Law of Waseda University, *Nihon Hou No Kokusai Teki Bunmyaku (International Context of Japanese Law)* (Tokyo: Waseda University, 2005), 258.

<sup>86</sup> *Meiji Kenpo* n 23 above, Art 14.

<sup>87</sup> *ibid* Art 31.

<sup>88</sup> *Kenpo* n 8 above, Art 54, para 2.



under the US-Japan Security Treaty<sup>89</sup> are provided.

For domestic emergencies, Art 71 of the Police Law<sup>90</sup> allows the prime minister to issue a proclamation of a state of national emergency upon the recommendation of the National Public Safety Commission to maintain peace and order in the event of a large-scale disaster or disturbance or other national emergency. Arts 78 and 81 of the SDF Act authorize the prime minister and prefecture governor to conduct public security operations. Under Art 82 of the SDF Act, the minister of defense may implement necessary measures to protect people's lives or property with permission from the prime minister.

Art 105 of the Basic Act on Disaster Control Measures (*Saigai Taisaku Kihon hou*)<sup>91</sup> allows the prime minister to call a cabinet meeting to announce an emergency regarding an imminent, natural disaster that seriously affects the national economy and public welfare. Art 83 of SDF Act allows for the disaster relief operations of the SDF.

Whether these measures will leave Japan well-prepared or unprepared is a question for Japanese constitutional studies today. It has been controversial in Japan to discuss if emergent power can suspend constitutional orders and restrict human rights if it is in the public interest to do so.<sup>92</sup>

### 3. Emergency Power Under the Japanese Constitution

It has been debated whether or not the SDF is constitutional under Art 9 of the Japanese Constitution. The Great East Japan Earthquake occurred in 2011 and the SDF worked well for natural disaster operations. Some argue that the mission of the SDF must be exclusively disaster relief. The problem is that its title and equipment do not fit well with disaster relief operations for the protection of victims suffering from serious natural disasters. The SDF automobiles are too large to enter narrow roads in small cities. The Great Hanshin-Awaji Earthquake and the Great East Japan Earthquake show that these types of earthquakes can happen anywhere in Japan and are not necessarily *unpredictable* emergent situations.

Japanese constitutional scholars agree that when discussing emergent situations, governmental power is to protect people, not the government itself. This is controversial if amending the constitution is necessary. In some contexts, emergent power was discussed to protect the state itself, not its people.<sup>93</sup> Even

<sup>89</sup> *Nippon Koku to no Heiwa Jouyaku* n 9 above.

<sup>90</sup> *Keisatsu Hou (The Police Act)*, Act no 94 of 2016, Art 71.

<sup>91</sup> *Saigai Taisaku Kihon Hou* n 2 above, Art 105.

<sup>92</sup> Hajime Yamamoto classifies several theories of emergency powers and explains why Japanese constitutional scholars have objected to amendment of Constitution for emergency power. He argues that at least counterterrorism and role of judiciary should be discussed. Hajime Yamamoto, 'Teto taisaku to Nihon hou no chohendou' (Anti-Terrorism Measures and Changes in the Japanese Law) 59(1) *Shakai kagaku kenkyu* (Journal of social science), 97-100 (2007).

<sup>93</sup> T. Munasue, 'Saigai to Kokka kinkyuken (Disaster and Emergency Power)', in *Kwansei*

some constitutional scholars in favor of amending the constitution argue that emergency power is for Japanese people, not the state.<sup>94</sup> Under the Meiji Constitution human rights were guaranteed by the emperor not the majority party.

Some argue there are four risks in providing emergent power in a statute or in the constitution. First, emergency provisions can easily mask invalid governmental motivation or purposes. Second, the time period for an emergency tends to be easily extended. Even though an emergent situation may pass, the suspension of human rights might continue forever. Third, the human rights of the general public may be infringed upon in the name of public interest. Fourth, the judiciary might refrain from providing a remedy to guarantee human rights and may simply respect all governmental decisions for emergencies. Judicial control of other governmental branches may not work well.

These four dimensions were apparent under the previous constitution.<sup>95</sup> Under the Meiji Constitution, the human rights guarantee was incomplete and some argue that emergency power was abused. Art 8<sup>96</sup> of the Meiji Constitution permitted Imperial Ordinances in place of laws passed in the Diet in order to maintain public safety or to avoid public calamities in urgent circumstances. One such notorious law, the Revised Bill of the Maintenance of the Public Order Act (*Chian Iji hou*),<sup>97</sup> was shelved and discarded. An Imperial Order that had the same effect was issued to amend the Public Order Act. A special high police force conducted surveillance, arrested, and in some cases tortured political activists who were suspected of being socialists or communists.

Art 70<sup>98</sup> of the Meiji Constitution allowed the government to take all necessary financial measures, by means of an Imperial Ordinance (*Kinkyu Chokurei*) in the event of urgent need, to maintain public safety. The government was able to take certain financial measures without approval of the Diet.

Art 14<sup>99</sup> of the Meiji Constitution allowed the emperor to declare a state of siege to control the military throughout Japan. Legislative and administrative power could be moved to the military. The requirements and effects were provided by the Siege Act (*Kaigenrei*) in the event of war or incidental military conflict. Part of this act was implemented for during the Great Kanto Earthquake in 1923.

*Gakuin Daigaku Saigai Fukkou Seido Kennkyuusho* (Institute of Disaster Area Revitalization, Regrowth and Governance) ed, *Kinkyujitai Joukoun no naniga mondaika* (The Problem of Emergent Power) (Tokyo: Iwanami shoten, 2016), 1.

<sup>94</sup> A. Momochi, n 83 above.

<sup>95</sup> K. Nagai, 'Kinkyu jitai joukou no ronten (Issue of Emergency Power)', in *Kwansei Gakuin Daigaku Saigai Fukkou Seido Kennkyuusho Kwansei Gakuin Daigaku Saigai Fukkou Seido Kennkyuusho* (Institute of Disaster Area Revitalization, Regrowth and Governance) ed, *Kinkyujitai* n 93 above, 29 and 37.

<sup>96</sup> *ibid*; *Meiji Kenpo* n 23 above, Art 8.

<sup>97</sup> *Chian Iji Hou* (The Maintenance of Public Order Act), Law 21 April 1925 no 46.

<sup>98</sup> *ibid* Art 70.

<sup>99</sup> *ibid* 14.

The commander allowed the use of force to maintain public security. Some say that innocent foreign people were killed during the military operations.<sup>100</sup>

The drafting of the current constitution showed prudent discussions regarding the provision of emergent power. In 1946, the minister of state, Tokujirou Kanamori,<sup>101</sup> explained how the emergency session of the House of Councilors under Art 54(2) and (3) of the current Constitution would work, and why an Imperial Ordinance would not be needed.

Koju Nagai gives four reasons why the draft of the Japanese Constitution did not include provisions for emergent power. First, democracy must be maintained to protect human rights and measures dependent on the discretion of the government should be avoided. Second, constitutionalism requires that the government not exercise its power arbitrarily in the name of an ‘emergency’ Third, constitutional provisions for an emergency session of the House of Councilors were provided. Only Ordinary statutes can be used in the event of an emergent situation.

Toshiyuki Munasue<sup>102</sup> does not think that the Japanese Constitution should be amended to include emergent power. He explains four measures that are already provided in existing statutes.

First, war is prohibited under Art 9 of the Japanese Constitution. Diplomatic negotiation is granted to the executive branch, and Munasue adds that the US-Japan Safety Treaty was concluded. The SDF was established under the SDF Act for the exclusive exercise of security defense.

Second, Art 77 of the Criminal Code<sup>103</sup> regulates actions such as overthrowing the government or usurping the territorial sovereignty of the state.

Third, potential economic depressions are addressed in the Bank of Japan Act.<sup>104</sup> Art 38 allows the prime minister and the minister of finance to request the Bank of Japan to loan funds to financial organizations such as banks in the event a significant problem occurs.

Fourth, natural disasters are addressed in the Basic Act on Disaster Control Measures. Munasue<sup>105</sup> questions Art 109<sup>106</sup> of this Act because it allows the government to issue ministerial orders without approval of the Diet. Under the rule of law, a ministerial order shall be based on statutes that have been passed in the Diet. To him, it seems that Art 109 allows the legislature to delegate unlimited law-making power to the executive branch. The term ‘public welfare’

<sup>100</sup> K. Nagai, n 95 above, 32.

<sup>101</sup> Comment by T. Kanamori, Volume 13 of the 90<sup>th</sup> for special committee for amendment of the Imperial Constitution in the House of Representatives, 15 July 1946, available at <https://tinyurl.com/ydhyxtb8> (last visited 25 November 2017); T. Sato, n 45 above, 636.

<sup>102</sup> T. Munasue, n 93 above, 12.

<sup>103</sup> *Kei Hou* (Japanese Criminal Code), Law no 86 of 2013, Art 77.

<sup>104</sup> *Nihon Ginko Hou* (The Bank of Japan Act), Act no 74 of 2011.

<sup>105</sup> T. Munasue, n 93 above, 12-16.

<sup>106</sup> *Saigai Taisaku Kihon Hou* (The Basic Act on Disaster Control Measures), Act no 223 of 1961, Art 109.

in the list of fundamental rights under the current constitution works well to limit the fundamental rights of people in the community.

The drafting history shows that the members of the Imperial Diet feared that Art 73(6) would allow for legislative delegation, which could involve criminal sanctions, overbroad delegation, and abuse of delegated power.<sup>107</sup> These analyses match Munasue's perspective on Art 109 of the Basic Act on Disaster Control Measures.

Koji Aikyo<sup>108</sup> argues that we should divide the state of 'emergency' into two categories, *Kinkyu jitai* and *Hijou jitai*. *Kinkyu jitai* is where constitutional control is still available, and a special statute or measure could be made under the normal government. *Hijou jitai* is where the normal government cannot be controlled. Recognizing this distinction is a relatively new concept. Aikyo argues that the exception, which was made by the LDP in a 2012 proposal for a constitutional amendment, should be carefully reviewed because the nature of the state is now being questioned. The state or government is established as a social contract under the current constitution, and the Basic Act on Disaster Control Measures should be more thoroughly analyzed to determine what can and cannot be done under the current constitution. It is necessary to provide a detailed analysis for any exception to the separation of powers and the protection of fundamental rights.<sup>109</sup>

#### 4. Draft of the LDP's Constitutional Amendment Proposal

The LDP proposed a draft of a constitutional amendment<sup>110</sup> in 2012 when it was the opposing party and after the Great East Japan Earthquake of 2011 had occurred. Art 98<sup>111</sup> of the LDP's draft constitutional amendment allowed the prime minister to declare an emergency in the event of an external armed attack situation, social disorder due to internal insurrection, or a large-scale natural disaster. This declaration would require approval of the Diet. The emergency term would be limited to one hundred days. If an extension was

<sup>107</sup> T. Sato, n 45 above, 636.

<sup>108</sup> A. Koji, 'Kaiken mondai toshitenoko kokka kinkyuken wo kangaeru (Consider National Emergency Power in Context of Amendment of Constitution)', in *Kwansei Gakuin Daigaku Saigai Fukkou Seido Kennkyuusho* (Institute of Disaster Area Revitalization, Regrowth and Governance) ed, *Kinkyujitai* n 93 above, 81.

<sup>109</sup> See also, R. Yamanaka, 'Saigai kinky jitai to kokka kinky ken (Natural Disaster Situation and National Emergent Power)', in *Kwansei Gakuin Daigaku Saigai Fukkou Seido Kennkyuusho* (Institute of Disaster Area Revitalization, Regrowth and Governance) ed, *Kinkyujitai* n 93 above, 133; M. Inaba, 'Kinkyu jitai niokeru jinkenhouhou no tekiyou teishito teisisienai kenri (Suspensionable Human Rights, and Unsuspensionable Rights in Emergency Situation)', in *Kwansei Gakuin Daigaku Saigai Fukkou Seido Kennkyuusho* (Institute of Disaster Area Revitalization, Regrowth and Governance) ed, *Kinkyujitai* n 93 above, 169.

<sup>110</sup> LDP amendment proposal, available at <https://tinyurl.com/y98oszl3> (last visited 25 November 2017).

<sup>111</sup> *ibid* Art 98.

necessary after one hundred days, approval of the Diet would be required for each extension.

Art 99<sup>112</sup> provided for the effects of the emergency declaration. The cabinet may issue an executive order with the same effect as a law and may order necessary expenditures. Art 99 also demanded that the government respect human rights and all people under the emergency state and that it should follow necessary governmental measures to protect human life and property. An extended term for both houses of the Diet may be provided.

It is now important to review this amendment proposal in detail. First, there has been a generational change in the LDP which is influencing Japanese constitutional studies. Since 1955, the motto of the LDP has been to establish a new constitution. Some prime ministers selected from within the LDP did not put a constitutional amendment on the agenda because it might influence the regime and lead to conflicts within the party. The senior members of the LDP survived World War II, experienced tough negotiations with the GHQ, and witnessed strong student movements for the US-Japan Security Treaty. They are now retiring and a new generation of members has entered the Diet. One such member is Hiromu Nonaka, who served as the chief cabinet secretary in the Obuchi Cabinet. He has been against amending the constitution and SDF overseas operations since Junichiro Koizumi was prime minister.<sup>113</sup> Other senior members such as former Prime Minister Kichiro Miyazawa and former executives of the LDP, Mikio Aoki and Makoto Koga, have been against constitutional amendments. These strong members have experienced war and other difficult times but are now losing political influence.

Japanese constitutional studies should be concerned about this generational change. One prominent constitutional scholar, Setsu Kobayashi, has been supporting the LDP in moving toward a constitutional amendment. He changed his attitude in June 2015 during a public hearing for the LDP. Kobayashi argues that the commitment of strong statesmen in support of a constitutional amendment is being lost in the LDP.<sup>114</sup>

Second, the Abe Cabinet first argued that any proposed amendment should be based on the 2012 LDP proposal. The other coalition party as well as the non-ruling party strongly objected. These parties are drafting their own amendment proposals. The *Komeito* Party, which formed a coalition with the LDP, insists that three basic principles of the current constitution shall not be changed: people's sovereignty, the list of fundamental rights, and pacifism. The Democratic Party (*Minshu tou*) argues that in an emergency situation, existing statutes should

<sup>112</sup> *ibid* Art 99.

<sup>113</sup> H. Nonaka, 'Kenpo 9 jou dake ha mamotte hoshi (Please protect Art 9 of Constitution)' *The Asahi Shimbun*, 9 June 2016, available at <https://tinyurl.com/jarkan6> (last visited 25 November 2017).

<sup>114</sup> S. Kobayashi, *Kenpo Kaiseino Kakugo Ha Aruka* (Do You Commit To Amend Constitution) (Tokyo: Bestsellers, 2015).

be reconsidered and preparations should be made to protect fundamental rights. They further state that the existence of the Diet shall continue and the people's sovereignty is the primary consideration. The party also feels that the term of the members of the Diet should be considered.<sup>115</sup>

### 5. Executive Power v Administrative Power

While Constitution of Japan was established in 1947, the Constitution of Italian Republic was established in 1948. Both constitutions reflected failure of fascism in World War II.<sup>116</sup> While the Japanese constitution renounced war as a sovereign right of the nation, prohibited the army in Art 9 and organized the National Police reserve for Korean War in 1950, Art 11<sup>117</sup> of the Italian Constitution rejected invasive war.<sup>118</sup> Art 52<sup>119</sup> of the Italian Constitution also provides for the obligation of national defense, and military service was mandatory within the limits and terms set by law.

As Japanese government changed the National Police Reserve into the SDF in 1954 after regaining its sovereignty in 1952 by concluding the Treaty of Peace with Japan in San Francisco, Italy joined NATO (North Atlantic Treaty Organization) which was established in 1949 under the North Atlantic Treaty. Italy, as a signatory of the UN Charter, abides by the collective defense provisions under Art 51<sup>120</sup> of United Nation Charter.

In 2014, Japanese cabinet decision changed the official interpretation of Art 9 without amending the Constitution<sup>121</sup>, and approved collective defense power. Following this, peace and defense statutes were passed in 2015.<sup>122</sup>

Before World War II, in 1926, Italy issued 'Rules for immediate relief efforts in the earthquake disaster and other natural disaster'.<sup>123</sup> This Rule continued after World War II. The minister of public works (*Ministro dei lavori pubblici*) took responsibility to command and control, and to organize rescue missions.

In 1970, after the World War II, the first basic act listed 'Rules on aid and

<sup>115</sup> *Minshin tou seisaku shu* (The DP agenda in 2016), available at <https://tinyurl.com/yd34q9uq> (last visited 25 November 2017).

<sup>116</sup> V. Barsotti et al, *Italian Constitutional Justice In Global Context* (Oxford: Oxford University Press, 2016), 11.

<sup>117</sup> Art 11 of the Italian Constitution.

<sup>118</sup> As for Japanese Constitution rejects invasive war, see Y. Tsuji, 'Amendment of the Japanese Constitution' n 15 above.

<sup>119</sup> Art 52 of the Italian Constitution.

<sup>120</sup> Art 51, UN Charter.

<sup>121</sup> Y. Tsuji, 'Art 9 and the History of Japan's Judiciary' n 67 above. See also, Id, 'Amendment of the Japanese Constitution' n 15 above.

<sup>122</sup> *ibid.*

<sup>123</sup> Regio Decreto Legge 9 December 1926 no 2389, 'Disposizioni per i servizi di pronto soccorso in caso di disastri tellurici o di altra natura' (Rules for immediate relief efforts in the earthquake disaster and other natural disaster).

assistance to people affected by disasters, civil protection'.<sup>124</sup> The 1970 basic Act clarified the natural disaster (*calamità naturale*) and catastrophe (*catastrofe*) in Art 1,<sup>125</sup> and the power to command and coordinate was shifted to Minister of home affairs (*Ministro dell'Interno*) from Minister of public affairs. It aimed to protect civilians from natural disaster (*protezione civile*).

It did not involve Art 138<sup>126</sup> to amend the Italian Constitution.<sup>127</sup> Unlike Japanese Constitution, Italian Constitutional statutes (*leggi costituzionali*) has same power of provisions of Constitution.

In 1981, executive order no 66 promulgated ordinance of enforcement of this 1970 Act after Irpinia earthquake in 1980. Its purpose was to establish the doctrine of prevention (*prevenzione*).

The minister of coordination and protection of civilians in disaster (*Ministro per il coordinamento della protezione civile*) and Agency of disaster protection (*Dipartimento per la protezione civile*) was established in the Minister's office.

In 1992, the Act to national service of protection of civilians (*Servizio nazionale della protezione civile*)<sup>128</sup> was passed in the parliament. This is fundamental policy to protect civilians from natural disaster.

In 2001, by amending Part II, Title V of the Constitution in 2001,<sup>129</sup> the Italian regional system was reinforced, and became flexible to work with the central government. Italian Constitutional statutes (*leggi costituzionali*) provided that central government and states works together.<sup>130</sup> It helps disaster control and protection. The mission of protection comprises prediction (*previsione*), prevention (*prevenzione*), rescue (*soccorso*), and overcoming of emergency situations (*superamento dell'emergenza*). In municipalities (*comuni*), mayor takes first responsibility for protection mission. If it is necessary for some municipalities to work together for large disaster, regional and central government support their efforts. Government assists civilian activities.

In Japan, local government has a responsibility to establish local disaster prevention plan.<sup>131</sup> In Japan, after Great East Japan Earthquake, the Reconstruction Agency was established as an interim administrative agency until 2021.

After World War II, the Japanese Constitution and the Italian Constitution experienced similar history that government lost its control under the Constitution.

<sup>124</sup> Legge 8 December 1970 no 996, 'Norme sul soccorso e l'assistenza alle popolazioni colpite da calamità, Protezione civile' (Rules on aid and assistance to people affected by disasters, civil protection).

<sup>125</sup> *ibid* Art 1.

<sup>126</sup> Art 138 of the Italian Constitution.

<sup>127</sup> V. Barsotti et al, n 116 above, 274.

<sup>128</sup> Act to national service of protection of civilians (*Servizio nazionale della protezione civile*), Legge 24 February 1992 no 225.

<sup>129</sup> V. Barsotti et al, n 116 above, 186-189, 194.

<sup>130</sup> Art 117 of the Italian Constitution.

<sup>131</sup> E. Yamasaki, 'Legislation to Support Disaster Victims in Japan', in Y. Kaneko et al, *Asian Law In Disasters: Towards A Human-Centered Recovery* (London: Routledge, 2016), 163.

Both took special procedures to amend the Constitution. The Italian Constitution was amended in 2001, but Japanese Constitution has not been amended at all since 1947. Emergency powers was put in provisions<sup>132</sup> of the Italian Constitution. In the meantime, official interpretation of Art 9 of the Japanese Constitution was changed only by cabinet decision, and several peace and defense statutes were passed at the same time in 2015.

In 2016, Matteo Renzi proposed amendment of Italian Constitution to minimize the house of Senate (*Senato della Repubblica*). This proposal was rejected, and the Prime Minister resigned. This paper argues that as the experience with the Italian Constitution demonstrates, strong commitment to Constitution requires constitutional amendment procedures if Constitutional power is required to make mid- and long- term decisions for people living there together.<sup>133</sup>

## V. Conclusion

In 2017, the Constitutional Research Council opened the Commission on the Constitution (*Kenpo Shinsa kai*) to discuss amending the current constitution. They found both advantages and disadvantages in maintaining the current constitution. This is the first time that two thirds of the seats in both houses of the Diet are in favor of amending the constitution, although when scrutinized, some conflicts exist. It is beyond the scope of a constitutional studies analysis to predict tomorrow's political fights.

Japanese constitutional scholars may reach a consensus to keep deliberating and analyzing to prepare for emergent situations. As is part of human life, even with detailed preparation in the form of several statutes or constitutional amendments, unpredictable emergency situations will occur. Our statutes and our constitution are human-made documents and are too incomplete to address every potential, unpredictable emergency. However, earthquakes occur in Japan often, and appropriate preventive and resilient responses could be planned. Although damages may be unavoidable, it is possible to limit or reduce them. The question is whether concrete examples of emergencies should be analyzed in detail. Emergency power once written in text might be abused.

The 2016 movie *Shin Godzilla* is a fictional movie that illustrates decision-making in the cabinet during a crisis under the current constitution and existing statutes. As stated above, *Godzilla* in Japan is more than a monster or a dinosaur.

The Meiji Constitution had no set term for the leadership position of prime minister. It has been debated whether even under the current constitution strong leadership has been achieved. When a natural disaster strikes, such as the Great East Japan Earthquake, leadership and administrative reform are questioned.

<sup>132</sup> Arts 77 and 78 of the Italian Constitution.

<sup>133</sup> Y. Tsuji, 'Amendment of the Japanese Constitution' n 15 above.



The administrative branches were reorganized in 2001 after the Basic Act on Central Government Reform (*Chuou shouchou to kaikaku kihon hou*) was promulgated in 1998 under the second Ryutarou Hashimoto Cabinet. These reforms were made without amending the current constitution. Junichiro Koizumi expanded the power of the LDP by his unique political reforms. Koizumi, as leader of the LDP, stated that he himself would destroy the LDP. He had the authority to endorse the official candidate of the LDP in single seat constituency that started with the election for the House of Representatives in 1996.

The forty-eighth through sixty-third prime ministers, from 1948 to 1972, were all bureaucrats, with the exception of Tanzan Ishibashi. Art 41 states that the power of law-making belongs to the Diet and it would be unconstitutional for the cabinet to establish statutes. Therefore, the cabinet submits the bill to the Diet using Art 72, which stipulates the power to submit 'bills'. The Diet may then freely reject or endorse the bills that do not contradict Art 41. The number of bills that the cabinet has submitted to the Diet has increased because of this interpretation. The bureaucratic governments promoted economic growth in Japan until Kakuei Tanaka served as the sixty-fourth prime minister in 1972. Kakuei Tanaka was not a governmental official, and promoted legislation by members of the Diet.

Under Art 68 of the current constitution, the prime minister may appoint and remove ministers; but, a factional power balance exists within the political party. The appointment of ministers depends largely on how many terms a candidate has won in Diet elections and seniority within each faction.

According to Ishiba, Godzilla was not an attack from a foreign state but a natural disaster. He thinks that a defense operation order is limited to an imminent, unlawful attack that presents clear danger to Japan. He admits Godzilla has extraordinary destructive power but that it is not an imminent attack by a foreign state. Hamaya thinks that the Godzilla movie illustrates defective management and control by the government in an emergency. He argues for a constitutional amendment that provides emergency power for: declarations, procedures, a summary of the emergent situation, scope and limits of the emergency statement, effective terms, and any limits on human rights.

Murata insists that constitutional scholars base their analyses only on past facts and criticizes that deliberations for peace and security used to belong exclusively to constitutional scholars. Ryuichi Ozawa would argue that constitutional discussions begin with ordinary people, not professionals. He believes that the definition of *Sonritsu Kiki Jitai* and the use of force requirements are unclear.

It is not clear if economic crisis meets 'existence of the Japanese nation' is endangered to meet *Sonritsu Kiki Jitai*.

In this paper, national emergent power was defined as allowing one person to suspend the human rights guarantee and the constitutional governmental system, such as the separation of powers, in emergent situations. Akira Momochi

argues that an amendment to Art 9, para 2, is needed and that non-military emergent power should be discussed. Natural disasters may occur during the election of the House of the Representatives and during the campaign, a lower house does not exist. Thus, extending the term of the House of Representatives for a natural disaster should be authorized in the current constitution. Momochi also argues that emergency provisions are for the Japanese people, not the members of the Diet. Otherwise, any movement toward amending the current constitution would fail.

Higashi argues that emergency power provisions were not considered during the occupation by the GHQ. The response to the crisis was a mission for the occupying force stationed in Japan, and after restoring sovereignty, the US Army stationed in Japan took over the mission.

The Great East Japan Earthquake in 2011 gave the Japanese people the opportunity to consider the mission of the SDF and Art 9 of the current constitution. Under the current constitution, some measures against foreign state attacks are provided for under the national peace and security statutes.

For domestic emergencies, Art 71 of the Police Law allows the prime minister to declare a state of national emergency upon the recommendation of the National Public Safety Commissions to maintain peace and order in the event of a large-scale disaster or disturbance or other national emergency. Arts 78 and 81 of the SDF Act authorizes the prime minister and prefecture governor to order public security operations.

It has been debated whether or not the SDF is constitutional under Art 9 of the Japanese Constitution. During the Great East Japan Earthquake of 2011, the SDF worked well for natural disaster operations. Some argue that the mission of the SDF should be exclusively disaster relief. The problem is that its title and equipment do not fit well with disaster relief operations to protect victims suffering from serious natural disasters.

The last two great earthquakes have shown that earthquakes can happen anywhere in Japan and that they are not *unpredictable* emergent situations. Some argue there are four risks in providing emergent power in a statute or the constitution. First, emergency provisions can easily mask illegitimate governmental motivations or purposes. Second, the emergency term tends to be easily extended. Even though an emergent situation may pass, the suspension of human rights might continue forever. Third, the human rights of the general public may be infringed upon in the name of public interest. Fourth, the judiciary might refrain from providing a remedy to guarantee human rights and may simply respect all governmental decisions during the emergency.

Toshiyuki Munasue does not think that the Japanese Constitution should be amended to include emergent power. The four provisions in the existing statutes that he references in support of his position were discussed above.

Imagining the risks of significant natural disasters, such as Godzilla, forces

Japanese people to consider amending the constitution or existing statutes to include measures on how to best prepare for such disasters. The Godzilla movies gave the Japanese general public the opportunity to read and discuss how these complex statutes can be used in the type of emergency that would never be considered in daily life. Japanese constitutional studies should now use these movies to explain the relevant yet complex provisions in the Japanese constitution and other statutes.