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# Examination of the Liberal Democratic Party's "Draft for the Amendment of the Constitution of Japan" in the light of International Law and Standards\*

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## Refereed Article

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## Abstract

The Liberal Democratic Party announced its "Draft for the Amendment of the Constitution of Japan" in 2012. Following the result of the general election in October 2017, Prime Minister Abe moved anew to spur an initiative for constitutional amendment. This paper analyzes this Amendment Draft in the light of International Law, especially International Human Rights Law, and discusses major issues, in particular, restrictions on human rights, the State's emergency power, torture prohibition, slavery restraint and basic labor rights of public servants. This examination's results show that if enacted, the Amendment Draft will undermine the level of current human rights protection and cannot provide the protection of human rights in line with International Law.

**Keywords :** Restrictions on Human Rights, the State's Emergency Power, Torture Prohibition, Slavery Restraint, Basic Labor Rights of Public Servants.

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## 1. Introduction

Prime Minister Shinzo ABE won a landslide victory in the general election in October 2017. At the Diet which appointed Mr. ABE (President of the Liberal Democratic Party (hereinafter referred to as the “LDP”)) as Prime Minister of the newly formed his fourth administration, the ruling coalition parties hold for the third time more than two-thirds of the seats in both chambers of the Diet, exceeding the threshold for initiating constitutional amendments. Prime Minister ABE upheld the constitutional amendment as one of six main pillars of his policy pledge for the October general election campaign, voicing: “The LDP... will push to realize the first revision of the Constitution.”<sup>1</sup>

Since the formation of the LDP in 1955, the party has enshrined the establishment of self-imposed constitution in LDP’s mission and pursued to amend the Constitution of Japan that was put in place in May 1947, following the defeat of the World War II in 1945 (hereinafter referred to as the “Current Constitution”). However, the Japanese public’s support for amendment of the constitution has yet to be formed, thus constitutional revision has never been realized so far. Following the result of the general election in October, however, Prime Minister ABE moved anew to spur an initiative for constitutional amendment.

The LDP has so far announced constitutional amendment drafts five times, the latest of which is the “Draft for the Amendment of the Constitution of Japan” announced in 2012<sup>2</sup> (hereinafter referred to as the “Amendment Draft”). This paper analyzes the Amendment Draft in the light of International Law, especially International Human Rights Law, and discusses major issues, in particular, restrictions on of human rights, the State’s emergency power, torture prohibition, slavery restraint and basic labor rights of public servants. The purpose of this paper is to clarify that the Amendment Draft makes the levels of protection of human rights in these areas lower than the standards that International Law has required.

Over the past few years, many academic examinations on the Amendment Draft have been made by the scholars of Japanese domestic laws, especially constitutional law.<sup>3</sup> Very few attempts on such examination have been made in the light of International law, especially the International Human Rights Law.<sup>4</sup> In this situation, our examination would contribute to academic research to some extent.

## 2. Restrictions on human rights and “public interest and public order”

### 2.1: Main comparisons between the Amendment Draft and the Current Constitution

While the provisions in the Current Constitution stipulate that there are limitations as general restrictions on human rights on the ground of “public welfare”, the Amendment Draft changes the relevant wording by replacing “public welfare” with “public interest and public order.”<sup>5</sup>

<sup>1</sup> [https://www.jimin.jp/election/results/sen\\_shu48/political\\_promise/manifesto/06.html](https://www.jimin.jp/election/results/sen_shu48/political_promise/manifesto/06.html), last visited on March 31 2018.

<sup>2</sup> <http://constitution.jimin.jp/draft/>, last visited on March 31 2018.

<sup>3</sup> Major examples are the articles published in *The Discussion of the Belief that the Constitution of Japan should be amended (Houritsu Jiho Zokan)*, Nippon Hyoron Sha, 2013.

<sup>4</sup> We can find that the international law discourses on the amending the Constitution of Japan have focused on the pacifism which article 9 stipulates, but not on the protection of human rights. Major example is Hisakazu FUJITA, “Pacifism and International Contribution – Examination on the Argumentation on the Amendment of Article 9 in the light of International Law” *Jurist*, No. 1289, Yuhikaku, 2005.

<sup>5</sup> The Current Constitution provides in Article 12 and Article 13 that human rights are generally subject to limitations on grounds of “public welfare.” In addition, Article 22 and Article 29 specifically stipulate that freedom to choose occupations and economic freedom including property rights are subject to restrictions on grounds of public welfare. The Amendment Draft, on the other hand, replaces the word “public welfare” in Article 12, Article 13 and Article 29 in the Current Constitution with the terms “public interest and public order.” In addition, whereas the Current

Table 1 : Comparisons on Articles 12, 13 and 21

LDP's Amendment Draft 2012 of the Constitution	Current Constitution
<p><u>(Duties and responsibilities of the people)</u></p> <p>Article 12 The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people. The people shall refrain from any abuse of these freedoms and rights, <b><u>shall be aware that freedoms and rights come with responsibilities and obligations, and shall not at any time infringe the public interest and public order.</u></b></p>	<p>Article 12 The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall be always <u>responsible for utilizing them for the public welfare.</u></p>
<p><u>(Respect for people as persons)</u></p> <p>Article 13 All of the people shall be respected as <u>persons</u>. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the <b><u>public interest and public order</u></b>, be the supreme consideration in legislation and in other governmental affairs.</p>	<p>Article 13 All of the people shall be respected as <u>individuals</u>. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the <u>public welfare</u>, be the <u>supreme</u> consideration in legislation and in other governmental affairs.</p>
<p><u>(Freedom of expression)</u></p> <p>Article 21</p> <p>1. Freedom of assembly and associations as well as speech, press and all other forms of expression are guaranteed.</p> <p>2. <b><u>Notwithstanding the provisions of the preceding paragraph, engaging in activities with the purpose of harming the public interest and public order and forming associations to attain this purpose shall not be permitted.</u></b></p>	<p>Article 21</p> <p>1. Freedom of assembly and associations as well as speech, press and all other forms of expression are guaranteed.</p> <p>[Newly established]</p>

The Questions and Answers (enlarged edition) prepared by the LDP<sup>6</sup> (hereinafter referred to as the "Q&A") cites in Q15 the following two points as the main reasons for changing the wording from "public welfare" to "public interest and public order". They are: A) to eliminate the vagueness of "public welfare"; and B) to clarify that the limitations of fundamental human rights guaranteed by the Constitution are not confined to the cases

Institution guarantees freedom of association in Article 21 without any limitations, the Amendment Draft newly introduces limitations on such freedom on grounds of "public interest and public order" in Article 21, paragraph 2. It is noted that, unlike the Current Constitution, the Amendment Draft guarantees freedom to choose occupations without any restriction in Article 22.

<sup>6</sup> <http://constitution.jimin.jp/faq/>, last visited on March 31 2018.

involving conflicts between human rights.

In connection with B) above, the “Q&A” Q15 criticizes the mainstream theory, which asserts “direct limitations on rights by setting public interest above individual human rights cannot be justified” by “public welfare”, is simply helpless in explaining human rights could be restricted on “grounds of maintenance of scenic beauty of towns or sexual morality.” In other words, “public interest” in the context of “public interest and public order” in the Amendment Draft is considered to be something “above individual human rights” and “justifies direct limitations on rights.” With regard to the meaning of “public order” in the Amendment Draft, “Q&A” Q15 explains “it represents a ‘social order’ or a ‘peaceful social life.’” Q15 adds that “it is quite obvious that the individuals should not cause nuisance to people’s social lives when they claim their human rights” and that the Amendment Draft “merely acknowledges this fact in legal form, and hence, resulting in no substantial limitations on human rights.”

Judging from the “Q&A”, it is conceivable that “public interest” or “public order” is assumed to function as an endorser for the constitutionality for limitations on human rights when they are determined to have legitimate grounds for such limitations as well as to function as a coordinator inherent in “public welfare” in the “case of conflicts between human rights.”

Under the Current Constitution, it is difficult to affirm that the basic concept on “public welfare” is common among not only constitutional scholars but also the domestic courts.<sup>7</sup> Therefore, we can say that the concept cited as “the mainstream theory” by “Q&A” is not always common among scholars or courts. Currently, it has recognized by constitutional scholars that the concept on “public welfare” is summarized roughly as follows: “public welfare” stipulated in article 12 and 13 is the general principle of limitation on human rights that limitations for the purpose of protecting people’s life and safety etc. are permitted and “public welfare” stipulated in article 22 and 29 reveals that the government can control economic freedom in order to construct a welfare state, protect vulnerable groups in society and so on.<sup>8</sup>

## 2.2 : Examination in the light of international standards

With regard to the “public welfare” under the Current Constitution, the Human Rights Committee points out in its concluding observations on the sixth periodic report submitted by the Japanese government as follows:

“The Committee reiterates its concern that the concept of ‘public welfare’ is vague and open-ended and may permit restrictions exceeding those permissible under [the International Covenant on Civil and Political Rights (hereinafter referred to as the “Covenant”)].”<sup>9</sup>

This concern has been repeatedly pointed out since the Committee’s concluding observations on the fourth report submitted by the Japanese government<sup>10</sup>. If such vagueness had been eliminated in the Amendment Draft as intended (see A above) and had resulted in effectively narrowing the scope of restrictions not to exceed those permissible under the Covenant, the Amendment Draft could have been positively evaluated to some extent.

<sup>7</sup> Hideki SHIBUTANI and Masahiro AKASAKA, *Constitution 2*, 6<sup>th</sup> ed., Yuhikaku, 2016, p. 341.

<sup>8</sup> *Ibid.*

<sup>9</sup> U. N. Document, *CCPR/C/JPN/CO/6*, 2014, para. 22.

<sup>10</sup> U. N. Document, *CCPR/C/79/Add.102*, 1998, para. 8.

However, the replacement of the term "public welfare" with "public interest and public order" would rather give rise to more situations that "may permit restrictions exceeding those permissible under the Covenant." The reason therefor is as follows.

As "public interest" listed among the permissible grounds for limitation is emphasized in legitimizing "direct limitation on rights" in the Amendment Draft, it is highly likely that a limitation on human rights is regarded as constitutional if the purpose of a limitation is determined to fall within "public interest." Similarly, with regard to "public order", a limitation on human rights is highly likely to be regarded as constitutional if the purpose of a limitation is determined to fall within "social order" or "nuisance to people's social life" (the Q&A Q15). Given that the Q&A recognizes such function is not included in "public welfare", the scope for permissible limitations on human rights is considered broadened by replacing the word "public welfare" with "public interest and public order." As a result, the situations that "may permit restrictions exceeding those permissible under the Covenant" increase all the more.

In order to substantiate the legitimacy of using "public interest and public order", the Q&A Q15 cites that: the Covenant clearly stipulates human rights are subject to limitations on grounds of "protection of national security, public order, or public health or morals." This presumably refers to Article 19, paragraph 3, item (b) of the limitation clause regarding freedom of expression. It should be pointed out, however, that the said clause is not the provision for general limitations on human rights but relates to freedom of expression. In addition, it should be noted the introductory part of paragraph 3 of the said article prescribes that these restrictions shall only be such as "are provided by law and are necessary": (a) for respect of the rights or reputation of others; (b) for the protection of national security or of public order (order public), or of public health or morals. In other words, justification for restrictions on human rights cannot be established merely on the ground of the above-listed permissible grounds for limitation. It must satisfy that: A) the relevant restrictions are provided for by law and B) the relevant restrictions are necessary to attain the above-listed purposes. That is to say, the Covenant requires the measure of restriction should be necessary in addition to the restrictions falling within the listed permissible grounds for limitation. Using the word "necessary" indicates "that limitations on rights are permissible only when they are essential, i. e., inevitable."<sup>11</sup>

The Human Rights Committee clearly emphasizes the above points, and states, in particular, the requirement B) above should be judged based on the "strict tests of necessity and proportionality."<sup>12</sup> It is generally understood that the "strict tests of necessity and proportionality" require that: "a restriction imposed must be the one which is considered appropriate to attain the relevant purpose; and, if a restriction imposed is considered to exert excessive control beyond reasonable limit, the restriction should be judged as illegal in the light of the proportionality between purpose and measure (i.e. whether that much measure is 'necessary' or not to attain the relevant purpose)."<sup>13</sup> The Human Rights Committee's consideration on individual communications is in line with the above-mentioned general understanding.<sup>14</sup> Unlike the Covenant, the Amendment Draft does not place any safeguards from the point of the proportionality between purpose and measure.

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<sup>11</sup> Alexandre Charles KISS, "Permissible Limitations on Rights", *The International Bill of Rights*, Louis HENKIN(ed.), New York, Columbia University Press, 1981, p. 308.

<sup>12</sup> U. N. Document, *CCPR/C/GC/34*, 2011, para.22.

<sup>13</sup> Hae Bong SHIN, *International Human Rights Law*, 2<sup>nd</sup> ed., Shinzansha, 2016, pp. 203-204

<sup>14</sup> Koji FUJIMOTO, "A Consideration on the Limitation Clauses of the International Covenant on Civil and Political Rights (2)", *International Public Policy Studies* Vol.8, No.1, 2003, pp. 132-157.

From the above, the Amendment Draft which provides for the restriction on human rights on grounds of “public interest and public order” allows wider range of limitations on human rights than those under the Covenant. Moreover, “Q&A”’s claim of “resulting in no substantial limitations on human rights” is unsubstantiated.

### 3. State of emergency clauses

#### 3.1 : Main comparisons between the Amendment Draft and the Current Constitution

Table 2 : Comparisons on Articles 98 and 99

LDP’s Amendment Draft 2012 of the Constitution	Current Constitution
<p><b><u>(Declaration of a state of emergency)</u></b></p> <p><b><u>Article 98</u></b></p> <p><b><u>1. The Prime Minister, in the event of armed attacks on the State from abroad, disturbances of social order due to civil unrest and the like, large-scale natural disasters due to earthquakes and the like, or other states of emergency as provided by law, may, when deemed particularly necessary, issue the declaration of a state of emergency after a cabinet meeting, as provided by law.</u></b></p> <p><b><u>2. A state of emergency shall be declared with the prior or subsequent approval of the Diet, as provided by law.</u></b></p> <p><b><u>3. The Prime Minister shall cancel the declaration of a state of emergency promptly through a cabinet meeting, as provided by law, when a resolution of disapproval has been made in cases mentioned in the preceding paragraph, the Diet resolves to cancel the declaration of a state of emergency, or the continuation of the said declaration is no longer deemed to be necessary due to changes of the situation.</u></b></p> <p><b><u>Moreover, when intending to continue to declare a state of emergency for more than one-hundred days, prior approval of the Diet</u></b></p>	<p>[Newly established]</p>

<p><b><u>must be obtained for each one-hundred days.</u></b></p>	
<p><b><u>(Effects of the declaration of a state of emergency)</u></b></p> <p><b><u>Article 99</u></b></p> <p><b><u>3. In the case where the declaration of a state of emergency is issued, every person shall be subject to the orders of the State and other public organs issued in connection with the measures taken at the state relating to the relevant declaration to protect lives, bodies and properties of the people, as provided by law. Even in such case, Article 14, Article 18, Article 19, Article 21 and other provisions relating to fundamental human rights shall be the supreme consideration.</u></b></p>	<p>[Newly established]</p>

There is no provision for a state of emergency in the Current Constitution. Many constitutional scholars are considered to assert that the Current Constitution does not permit the national power to be concentrated in the administrative authority in a case of the state of emergency.<sup>15</sup>

The Amendment Draft adds Chapter 9 entitled "State of Emergency" in accordance with which the human rights protection may be derogated from. Article 99, paragraph 3 of the Amendment Draft also clearly prescribes that the measures of derogation based on the declaration of a state of emergency shall be taken "at the state relating to the relevant declaration to protect lives, bodies and properties of the people" and lists the provisions relating to human rights that "shall be the supreme consideration" even in such state.

### **3.2 : Examination in the light of international standards**

Article 4, paragraph 1 of the Covenant stipulates the conditions for derogating from the Covenant. Among these conditions, the provisions relevantly important to Chapter 9 of the Amendment Draft are: A) derogation may be made "in time of public emergency which threatens the life of the nation" (paragraph 1); B) measures of derogation may be taken "to the extent strictly required by the exigencies of the situation" (paragraph 1); provided that C) such measures are not "inconsistent with the relevant State Party's other obligations under international law" (paragraph 1); and D) no derogation from "Articles 6, Article 7, Article 8 (paragraphs 1 and 2), Article 11, Article 15, Article 16 and Article 18" of the Covenant may be made (paragraph 2 of Article 4)". Set out below are the analyses of Chapter 9 of the Amendment Draft in the light of the above respective conditions.

#### **3.2.A : Derogation may be made "in time of public emergency which threatens the life of the nation"**

In order for a situation to be regarded as a "state of public emergency", the "Siracusa Principles" formulated

<sup>15</sup> Masayuki UCHINO, *The Points in the Interpretation of the Constitution*, 4<sup>th</sup> ed., Nippon Hyoron Sya, 2005, p. 205.



by the International Commission of Jurists in 1984 and the “Paris Minimum Standards” adopted by the International Law Association in the same year require a State Party to determine whether or not there exists a “state of public emergency” based on strict and objective standards<sup>16</sup>. In any case, when a situation is regarded as a “state of public emergency,” there must be exactly the existence of extreme emergent situation<sup>17</sup> and the life of the nation must be actually, directly threatened to an exceptional extent<sup>18</sup>.

While the Amendment Draft cites “armed attacks from abroad” and “disturbances of social order” as specific examples of “states of emergency” in Article 98, paragraph 1, no mechanism is envisaged for verification of the existence of such states on strict and objective standards. As such, it is possible that any and all civil unrests and large-scale disasters are regarded as states of public emergency under the Amendment Draft, although the Human Rights Committee expresses its view that “not every disturbance or catastrophe qualifies as a public emergency which threaten the life of the nation.”<sup>19</sup> Furthermore, it should be noted the Amendment Draft permits the states of emergency “provided by law” in addition to those specified above. In other words, the Amendment Draft entrusts the Diet with determining whether or not a situation falls into a category of state of emergency. And yet, the Diet is not required under the Amendment Draft to apply strict standards in determining the existence of state of emergency, which causes concern in some quarters that the proposed text in the Amendment Draft enables a legislation that legitimizes large-scale labor disputes and the like as states of emergency.<sup>20</sup> Derogation from protection of human rights could then likely be permitted even in the situations that are not permissible under the international standards including Article 4 of the Covenant.

### 3.2.B : Measures of derogation may be taken “to the extent strictly required by the exigencies of the situation”

In General Comment No. 29, the Human Rights Committee states this requirement reflects the “principle of proportionality<sup>21</sup>.” It also states that this requirement “relates to the duration, geographical coverage and material scope of emergency and any measures of derogation resorted to because of the emergency<sup>22</sup>.”

For example, in the case where the duration of the state of emergency has expired, the measures of derogation must be terminated immediately. In this connection, the Siracusa Principles asserts that the necessity of derogation measures should be reviewed for prompt and periodic independent review by the legislature.<sup>23</sup> Article 99, paragraph 3 can be interpreted that “the Diet resolves to cancel the declaration of a state of emergency” during the first 100 days and for more than this first 100 days. Moreover this provision also gives the Diet the competence to review the necessity of derogation at regular intervals (for each one-hundred days<sup>24</sup>).

<sup>16</sup> “Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights”, reprinted in *Human Rights Quarterly*, Vol.7, 1985(hereafter, *The Siracusa Principles*), p.1ff. “Paris Minimum Standards of Human Rights in a State of Emergency”, reprinted in *American Journal of International Law*, Vol. 79, 1985, p.1072ff.

<sup>17</sup> Kohki ABE, *Opposing Dichotomies : Protection of Human Rights in a State of Emergency*, *Human Rights International*, No. 14, Sinzan sha, 2003, p.4.

<sup>18</sup> Manfred NOWAK, *U. N. Covenant on Civil and Political Rights – CCPR Commentary*, 2<sup>nd</sup> ed., N. P. Engel, 2005, p. 90.

<sup>19</sup> U. N. Document, General Comment No. 29, *CCPR/C/21/Rev.1/Add.11*, 2001, para.3.

<sup>20</sup> Kouju NAGAI, *Are State of Emergency Clauses Necessary in the Constitution?*, Iwanami Shoten, 2016, p.63.

<sup>21</sup> U. N. Document, General Comment No. 29, *CCPR/C/21/Rev.1/Add.11*, 2001, para. 4.

<sup>22</sup> *Ibid.*

<sup>23</sup> *The Siracusa Principles*, *op. cit.*, p. 9, para. 55. Nowak quote this paragraph of the Siracusa Principles affirmatively. Manfred NOWAK, *op. cit.*, pp. 98.

<sup>24</sup> The Japan Federation of Bar Associations criticize that this period (one-hundred days) for the regular review is too long because the measures of derogation should be exceptional measures. *Opinion Opposing the Introduction of the Provision Regarding National Emergencies into the Constitution of Japan*, [https://www.nichibenren.or.jp/library/ja/opinion/report/data/2017/opinion\\_170217\\_03.pdf](https://www.nichibenren.or.jp/library/ja/opinion/report/data/2017/opinion_170217_03.pdf) (last visited on April 1 2018), 2017, p. 18. See also, Kouju NAGAI, *op. cit.*, pp. 64-65.

In consequence, it could be said that the Amendment Draft regulates not to continue the measures of derogation after the expiry of the state of emergency.

With regard to specific measures of derogation, Article 99, paragraph 1 of the Amendment Draft prescribes that the Cabinet may enact cabinet orders having an effect equivalent to law, and the Prime Minister may make "necessary fiscal expenditures" and "issue necessary orders to the chief executive officers of the local governments." The legitimacy of these measures is ensured as these measures are resorted to "as provided by law." The "Q&A" Q40 explains: "As the details thereof shall be prescribed by law, the Prime Minister is not supposed to be able to do anything." However, the Amendment Draft does not include any provision concerning the principle that the measures of derogation are taken based on the principle of proportionality; hence the text is worded in a way that allows the relevant laws to give the Cabinet and the Prime Minister the authority exceeding the "extent strictly required by the exigencies of the situation" (Article 4, paragraph 1 of the Covenant).

### **3.2.C : Measures of derogation may not be inconsistent with the "State Party's other obligations under international law"**

Among Japan's "other obligations under international law", those that are noteworthy are Common Article 3, paragraph 1, item (d) of the Geneva Conventions (I, II, III and IV) 1949 and the provisions of the Geneva Convention (IV) 1949, ratified by Japan.

Common Article 3, paragraph 1, item (d) prohibits, in the case of "armed conflict not of an international character", "the passing of sentences and the carrying out of executions without previous judgment pronounced by regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" with respect to "persons taking no active part in the hostilities." That is to say, Japan is prohibited from derogating from the procedural right.

In this connection, the Amendment Draft guarantees such procedural right in Article 31 through Article 40. However, this right is not listed in Article 99, paragraph 3 among the rights that "shall be the supreme consideration", which means this procedural right is likely to be exposed to a danger of derogation in a "state of emergency" in conflict with the provision of the Common Article 3, paragraph 1, item (d) of the Geneva Conventions.

The Geneva Convention (IV) 1949 relates to the protection of civilian persons in time of war and prescribes the details as to how protections are specifically ensured. The Convention imposes States obligation to provide special protection to certain category of civilian persons, such as children, wounded, pregnant women, who require special protection in time of war. It needs to be mentioned in this connection that the Convention on the Rights of the Child does not include derogation clauses and that the Committee on the Rights of the Child shows its understanding to the effect that the provision of the said Convention is applicable in time of war and emergency situations as well<sup>25</sup>. This means that derogation of rights of children is not permitted even under emergency situation, such as war. As such, there are issues in the Amendment Draft in that it lacks the point of view from the special protection of civilian persons who require special protection, and that the rights or

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<sup>25</sup> U. N. Document, *CRC/C/10*, 1992, para. 67 The Human Rights Committee also shows their interpretation that the United Nations Convention on the Rights of the Child is applicable at a state of emergency. See, U. N. Document, General Comment No. 29, *ibid.*, para. 10.

children may be subject to derogation at a “state of emergency”.

### 3.2.D : No derogation from “Articles 6, Article 7, Article 8 (paragraphs 1 and 2), Article 11, Article 15, Article 16 and Article 18” of the Covenant may be made

Under the Covenant, certain human rights may not be derogated from by the declaration of a state of emergency, but the Amendment Draft does not include any provision that stipulates clearly this point. It contains, if anything, Article 99 paragraph 3 which prescribes that Article 14 (right of equality), Article 18 (freedom from bondage and involuntary servitude), Article 19 (freedom of thought and conscience), Article 21 (freedom of expression) and other provisions relating to fundamental human rights “shall be the supreme consideration.” This means, however, that the human right provisions listed above “shall be the supreme consideration” but could be subject to the measures of derogation.

## 4. Prohibition of torture

### 4.1 : Main comparisons between the Amendment Draft and the Current Constitution

Table 3 : Comparisons on Article 36

LDP’s Amendment Draft 2012 of the Constitution	Current Constitution
(Forbiddance of torture and cruel punishment) Article 36 The infliction of torture by any public officer and cruel punishments <u>are forbidden</u> .	Article 36 The infliction of torture by any public officer and cruel punishments <u>are absolutely forbidden</u> .

Article 36 of the Amendment Draft states: “The infliction of torture by any public officer and cruel punishment are forbidden.” It omits “absolutely” from the text of the Current Constitution. As the “Q&A” does not contain anything about Article 36 of the Amendment Draft, no explanation is provided as to the reason for eliminating the word “absolutely.”

“Absolute” forbiddance of torture is prescribed in an effort to get away from many inflictions of torture by public officers before World War II.<sup>26</sup> By placing the word “absolutely” in the text, Article 36 of the Current Constitution allows making no exceptions to forbiddance of torture and cruel punishment by any public officer. Therefore, as a result of omitting “absolutely” from the text, it becomes unclear that making an exception to such forbiddance is absolutely not permissible, thus resulting in creating room for interpretation which allows exceptions to such forbiddance being possible pursuant to Article 12 and Article 13 of the Amendment Draft. Moreover, Article 98, paragraph 3 of the Amendment Draft does not include Article 36 as one of the provisions relating to fundamental human rights which “shall be the supreme consideration” in the case where the declaration of a state of emergency is issued. Consequently, the Amendment Draft creates the possibility of

<sup>26</sup> Koji SATO, *Constitution*, 3<sup>rd</sup> ed., Seirin-Shoin, 1995, p. 597.

derogation from Article 36 at a state of emergency as well.

#### 4.2 : Examination in the light of international standards

Article 7 of the Covenant relates the provision of the prohibition of torture or cruel punishment, and the "text of Article 7" is the one which "allows of no limitation."<sup>27</sup> Therefore, the Human Rights Committee observes that "no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority."<sup>28</sup>

It is of note that Article 4, paragraph 2 of the Covenant specifically lists Article 7 as one of the provisions from which derogations cannot be made even in a "state of public emergency." Accordingly, it is also viewed that the human rights guaranteed by Article 7 have absolute nature in the meaning that the said article "must remain in force" even in a state of emergency.<sup>29</sup> In addition, this view is reflected in the provisions of Article 3 and Article 15, paragraph 2 of the European Convention on Human Rights as well as in the provisions of Article 5, paragraph 2 and Article 27, paragraph 2 of the American Convention on Human Rights. Therefore, we can agree with NOWAK's phrase, "Its unconditional recognition by the present community of States justifies the view that torture is prohibited by customary international law and even ranks as *jus cogens* under international law, pursuant Article 53 of the Vienna Convention on the Law of Treaties."<sup>30</sup>

In contrast, the Amendment Draft proposes a revision which excludes absolute nature of human rights, hence in violation of International Human Rights Law.

### 5. Slavery restraint

#### 5.1 : Main comparisons between the Amendment Draft and the Current Constitution

Table 4 : Comparisons on Article18

LDP's Amendment Draft 2012 of the Constitution	Current Constitution
<p><u>(Freedom from physical restraint and servitude)</u>                      Article 18                      1. No person, <b><u>irrespective of his or her will, shall be subject to physical restraint in social or economic relationships.</u></b></p>	<p>Article 18                      No person shall be <u>subject to any slavery restraint.</u> (The rest is omitted.)</p>

While the Current Constitution prohibits "any slavery restraint", the Amendment Draft changes the wording and prohibits physical restraint in "social or economic relationships."

The "Q&A" Q16 explains the reason for not using the terms "slavery restraints" in the Amendment Draft as

<sup>27</sup> U. N. Document, General Comment No. 20 (adopted in 1992), *HRI/GEN/1/Rev. 9 (Vol.1)*, 2008, para. 3.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Manfred NOWAK, *op. cit.*, pp. 157-158.

follows: “As the terms ‘slavery restraint’ are considered to originate from the countries where slavery system historically existed, these words are replaced with an easy-to-understand expression that well fits in Japan’s constitution.”

The “Q&A” also explains the meaning of “social or economic relationships” in the Amendment Draft as follows: “This paragraph assumes that ‘social relationships’ are those with occult religious groups and the like and ‘economic relationships’ are those relating to ‘person selling himself/herself to bondage.’ The Amendment Draft does not permit such unreasonable physical restraints even with the person’s consent, exactly likewise in the case of the Current Constitution. The meaning of the provision of the Current Constitution will not change because of the change of the word expression in the provision.”

Therefore, according to “Q&A”’s understanding, Article 18 of the Amendment Draft does not change the spirit, etc. of Article 18 of the Current Constitution, but merely changes the word expression of the provision. It means, in turn, that the change in the Amendment Draft will be nothing other than changing the terms of “slavery restraint” in the Current Constitution to the terms of “physical restraint” in “social or economic relationships.” In conclusion, one can say that the Amendment Draft is nothing but a proposal which confines the scope of the application of this provision within the acts of private citizens and excludes the acts of the State. On the constitutional theories, Article 18 of the Current Constitution is recognized as the provision which prohibit the State and private citizens from restraining someone as a slave<sup>31</sup>.

## 5.2 : Examination in the light of international standards

The provisions of Article 8, paragraphs 1 and 2 of the Covenant prohibit the State to hold any person in slavery or servitude. Human Rights Committee has raised the concern for the technical intern training program in relation to Article 8 of the Covenant since the examination of the fifth periodic report of Japan in 2008. In Most recent Concluding Observation on Japan, the Human Rights Committee notes with concern as follows:

“The Committee notes with concern that, despite the legislative amendment extending the protection of labour legislation to foreign trainees and technical interns, there are still a large number of reports of sexual abuse, labour-related deaths and conditions that could amount to forced labour in the technical intern training programme (arts. 2 and 8).”<sup>32</sup>

Indeed, private enterprise put many foreign trainees under that much conditions, but the technical intern training program has been formed by the law the Diet enacted and the ordinances of the Ministry of Justice. Therefore it is the State that has duty to improve the conditions of many foreign trainees which is contrary to Article 8 of the Covenant. This conclusion is also supported by the nature of this Article 8: this provision require the State to take affirmative and active measures to ensure that no one shall be held in slavery or servitude.<sup>33</sup> The Amendment Draft which confines its scope within the acts between private citizens does not

<sup>31</sup> Koji SATO, *op. cit.*, p. 585, Hideki SHIBUTANI and Masahiro AKASAKA, *op. cit.*, Yuhikaku, 2016, p. 21.

<sup>32</sup> U. N. Document, *CCPR/C/JPN/CO/6*, 2014, para. 16.

<sup>33</sup> Scott N. CARLSON and Gregory GISVOLD, *Practical Guide to the International Covenant on Civil and Political Rights*, Transnational Publishers, Inc., 2003, p. 78.

go as far as to require the State "to take affirmative and active measures." In this regard, the Amendment Draft takes a backward step compared with the human rights protection required by the Covenant.

## 6. Basic labor rights of public servants

### 6.1 : Main comparisons between the Amendment Draft and the Current Constitution

Table 5 : Comparisons on Article 28

LDP's Amendment Draft 2012 of the Constitution	Current Constitution
<p>(Right of workers to organize, etc.)</p> <p>Article 28</p> <p>1. The right of workers to organize and to bargain and act collectively is guaranteed.</p> <p>2. <b><u>With regard to public servants, in view of the fact that they are servants of the whole community, all or part of their rights prescribed in the preceding paragraph may be restricted, as provided by law. In such case, necessary measures shall be taken to improve the working conditions of public servants.</u></b></p>	<p>Article 28</p> <p>The right of workers to organize and to bargain and act collectively is guaranteed.</p> <p>[Newly established]</p>

The Current Constitution guarantees basic labor rights in Article 28, imposing no limitations thereon. The Amendment Draft, on the other hand, guarantees basic labor rights in Article 28, paragraph 1 with nearly the same wording as Article 28 of the Current Constitution, although paragraph 2 of the same article prescribes that public servants' basic labor rights may be restricted, "as provided by law."

With regard to the intent of Article 28, paragraph 2 of the Amendment Draft, the "Q&A" Q22 explains that "the provision has been designed to explicitly reflect in the law the admitted fact that public servants' basic labor rights are restricted in exchange for compensatory measures including National Personnel Authority's recommendation on salaries for public servants."

Under the Current Constitution, the Supreme Court, in early times, judged the limitation on the human rights of public servants simply because they were servants of the whole community. This judgement has been criticized on the basis that the concept "servants of the whole community" is too vague to use as the ground of permissible limitation.<sup>34</sup> Thereafter, the Supreme Court declared that all of the basic labor rights of public servants may not be restricted because of the concept "servants of the whole community". Currently, it is supported by most constitutional scholars that such limitations on the basic labor rights should be minimum

<sup>34</sup> Koji SATO, *op. cit.*, pp. 432-433.

necessary for the nature of the duty of the public servant concerned.<sup>35</sup>

## 6.2 : Examination in the light of international standards

It is definitely true that basic labor rights of public servants are subject to wide-ranging statutory restrictions under the Current Constitution. It has been pointed out that there are some violations of the International Human Rights Law with respect to certain statutory restrictions. For example, the Japanese government was urged pursuant to the ILO Conventions No.87 and No.98 by the Committee on Freedom of Association of the ILO, in particular, to fully grant the rights to organize and to bargain collectively to public servants to whom these rights are totally denied<sup>36</sup>. Another example is that the Committee on Economic, Social and Cultural Rights expressed its concern about the general prohibition of strikes for all public servants in its concluding observations and also stated there its opinion that this situation contravenes Article 8, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights as well as the ILO Convention No.87.<sup>37</sup>

The Amendment Draft will give constitutional backing for the accomplished facts and lead to confirming and fixing the present situations which are in contravention of the International Human Rights Conventions.

## 7. Conclusion

This examination's results show that the Amendment Draft undermine the level of current human rights protection and cannot provide the protection of human rights in line with International Law, e.g. the Covenant, the Convention on the Rights of the Child, the Geneva Conventions, the International Covenant on Economic, Social and Cultural Rights, the ILO Conventions No.87 and No.98. Japan ratified all these treaties and has been incorporated in the human treaty system<sup>38</sup> which each treaty established. These human treaty systems have contributed to the improvement of human rights situations in Japan. Therefore, amending Current Constitution would deteriorate the current human rights situations without examining the compatibility with the protection of human rights which these treaties and their systems require.

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<sup>35</sup> See, Koji SATO, *op. cit.*, p. 433, Nobuyoshi ASHIBE, *Constitution*, 5<sup>th</sup> ed., Iwanami Shoten, 2011, p. 269, Masayuki UCHINO, *op. cit.*, 43, Hideki SHIBUTANI and Masahiro AKASAKA, *op. cit.*, pp. 328-330.

<sup>36</sup> Cases Nos 2177 and 2183 (Japan): Interim report, *GB.327/INS/4/1*, 2016, para. 466.

<sup>37</sup> U. N. Document, *E/C.12/1/Add.67*, 2001, para. 21.

<sup>38</sup> See, for example, Suzanne EGAN, *The UN Human Rights Treaty System: Law and Procedure*, Bloomsbury Professional, 2011.