

EAST ASIAN OBSERVER

Japanese ‘War Legislation’: International and Domestic Threat Assessment

Brendan Howe*

The two Japanese security laws which came into force on March 29, 2016, have faced severe domestic and international criticism. They are seen as representing a dramatic policy change in violation of due process and international norms, and representing a threat to international peace and security. This paper finds that while the direct implications of the “war” legislation are neither threatening nor without precedent, what the legislative process says about the nature of governance under Abe is deeply troubling. The disdain shown by the Abe administration to due process and constitutional procedures is what threatens domestic and international governance stability.

Keywords

Japan, Security Legislation, Threat, Legality, Governance, Peace, Article 9

1. Introduction

The Japanese National Diet passed two contentious security laws in September 2015. Entered into force on March 29, 2016, these laws have been heralded as marking a historic change in Japan’s pacifist postwar defense posture.¹ The legislation faced stiff opposition and fierce criticism in and out of Japan. Indeed, Liu Tian of the

* Professor and Associate Dean of Graduate School of International Studies, Ewha Womans University, Seoul 03760 Korea. B.A./M.A.(Oxon), M.A.(U. Kent), Ph.D. (U. Dublin-Trinity). ORCID: <http://orcid.org/0000-0001-9603-2792>. The author may be contacted at: bmg.howe@gmail.com / Address: 1102 International Education Building, Ewha Womans University, 52 Ewhayeodae-gil, Seodaemu-gu, Seoul 03760 Korea. DOI: <http://dx.doi.org/10.14330/jeail.2016.9.1.10>

¹ Ayako Mie, *Security laws usher in new era for pacifist Japan* JAPAN TIMES, Mar. 29, 2016, available at <http://www.japantimes.co.jp/news/2016/03/29/national/politics-diplomacy/japans-contentious-new-security-laws-take-effect-paving-way-collective-self-defense/#.Vv3NgCamqmS> (last visited on May 16, 2016).

Chinese state-run Xinhua media organization claimed “Japan’s security laws push Asia-Pacific region into abyss of instability.”²

This paper assesses the extent to which the legislation represents a significant departure from preexisting Japanese defense postures. It then considers whether such ‘war legislation’ poses a threat to Japan’s neighbors and regional stability. This is followed by international legal justifications for security legislation reform, and domestic legal challenges. Finally, the paper asks what the legislation tells us about the nature of the current Abe administration in Japan.

The research tells us that while many commentators overestimate the direct international implications of the legislation, the legislative process under the Abe administration is deeply troubling. Even if, under international law, Japan is allowed to pass such legislation, and it does not pose a significantly heightened threat to neighboring States, the disdain shown by the Abe administration to due process and constitutional procedures could manifest in domestic and international instability.

2. A Watershed Moment?

The “Permanent International Peace Support Law” aims at facilitating the deployment of Japan Self-Defense Force (“JSDF”) logistical support assets abroad. The “Legislation for Peace and Security” is supposed to provide a foundation for reinterpretation of the constitution by amending ten existing laws. They have caused outrage in the region.³ In theory, the new legislation lifts the ban on collective self-defense, allowing Japan to defend its allies, even when not under attack itself. Proclaimed a “landmark defense policy shift in a country with a war-renouncing Constitution,”⁴ it is doubtful whether it amounts to ‘war legislation,’ and whether it marks a significant break with pre-existing policy-making.

As pointed out by Jennifer Lind, while the legislation represents a ‘significant moment’ in the evolution of Japanese national security, it does not mark “Year

² Liu Tian, *Japan’s security laws push Asia-Pacific region into abyss of instability*, XINHUANET, Mar. 29, 2016, available at http://news.xinhuanet.com/english/2016-03/29/c_135232813.htm (last visited on May 16, 2016).

³ F. Gady, *Why China Should Not Worry About Japan’s New Security Laws Little will change (for now)*, DIPLOMAT, Mar. 31, 2016, available at <http://thediplomat.com/2016/03/why-china-should-not-worry-about-japans-new-security-laws/> (last visited on May 16, 2016).

⁴ *Japan’s new security law takes effect in major defense policy shift*, JAPAN TODAY (Mar. 29, 2016), available at <http://www.japantoday.com/category/politics/view/abe-says-security-laws-strengthen-japan-u-s-alliance> (last visited on May 16, 2016).

Zero of a new era in which Japan is becoming increasingly militarist.”⁵ Although opposition law-makers may criticize the bills “for enabling Japan to wage wars,”⁶ this is a far from nuanced or accurate assessment of what the bills permit. In fact, the permissibility of war-fighting is limited to when a close ally of the country comes under attack or when Japanese lives are threatened, as well as allowing JSDF to offer logistic support to US forces without geographical restrictions.⁷

Likewise, this is not a dramatic change from the evolutionary process of the reinterpretation of Japanese ‘pacifism.’ Article 9 of Japan’s constitution notes that: “The Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes” and that “land, sea, and air forces, as well as other war potential, will never be maintained,” with the right of belligerency of the State not being recognized.⁸ Yet, this has long been stretched by interpretations that allow “self-defense forces” and acts of ‘self-defense,’ and even overseas deployment of such forces.

When Japan failed to respond with ‘human contributions’ to the first Gulf War (1990-1), it was criticized for failing to act as a responsible ally and member of the international community.⁹ As a result, on June 15, 1992, the Japanese Diet passed the Law concerning Cooperation in UN Peacekeeping and Other Operations (otherwise known as PKO Law),¹⁰ which entered into effect on August 10 of that same year. It meant that for the first time since World War II, Japanese soldiers could be sent on missions outside Japan.

Prime Ministers Koizumi and Abe (in his first administration) thereafter promoted the notion of Japan as ‘normal nation,’ controlling its own independent armed forces, participating robustly in, even leading international operations.¹¹ As far back as 2005, therefore, Alan Dupont claimed that not only was Japan moving away from its pacifist past towards a more hard-headed and outward-looking

⁵ J. Lind, *Japan’s Security Evolution*, 788 POL’Y ANALYSIS, Feb. 25, 2016, available at <http://www.cato.org/publications/policy-analysis/japans-security-evolution#full> (last visited on May 16, 2016).

⁶ *Survey: Security legislation gaining public support*, YOMIURI SHIMBUN, Mar. 29, 2016, available at <http://the-japan-news.com/news/article/0002839771> (last visited on May 16, 2016).

⁷ S. Chaw, *Japanese military forces unlikely to expand role despite new security laws*, FORBES, Mar. 30, 2016, available at <http://www.forbes.com/sites/riskmap/2016/03/30/japanese-military-forces-unlikely-to-expand-role-despite-new-security-laws/#48d39dfc1e2e> (last visited on May 16, 2016).

⁸ Japanese Constitution of 1946 art. 9, available at http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html (last visited on May 16, 2016).

⁹ C. HUGHES, JAPAN’S RE-EMERGENCE AS A ‘NORMAL’ MILITARY POWER 14 (2004).

¹⁰ Act on Cooperation for United Nations Peacekeeping Operations and Other Operations (Act No. 79 of June 19, 1992), available at http://www.pko.go.jp/pko_j/data/law/pdf/law_e.pdf (last visited on May 16, 2016).

¹¹ B. Howe & J. Campbell, *Evolution not Revolution in Japan’s Foreign and Security Policy under the DPJ*, 109 ASIAN PERSPECTIVE 99-123 (2013).

security posture characterized by a greater willingness to use the Self Defense Forces in support of Japan's foreign interests, but also that this shift was gaining momentum, was palpable, irreversible and was broadly based, particularly among the younger generation.¹²

3. A Threat to International Peace and Security?

Some of Japan's neighbors interpret 'normalization' of the country's foreign and security policy as indicating a return to the expansionist militarism which terrorized the region in the early twentieth century. The fear is that Japan's security policy is once again being configured for regional domination based on militarism, supported by an invigorated nationalist right wing.¹³

Thus, the view from China of the new legislation has been overwhelmingly negative, with comments calling it a "dark stain for Japan" marking the country's return to militarism, and a samurai sword "fatally slashing Japan's seven decades of pacifism."¹⁴ Xiaopeng Wang notes that "the nation concerned has a long history of sneak attacks,"¹⁵ while Tian Liu writes that "the only purpose of the controversial laws are to ride the coattails of Uncle Sam's "pivot to Asia" strategy and pave the way for Japan to further meddle in regional affairs ... in a saber-rattling way."¹⁶ North Korea has labelled the legislation "an evil measure intended to pave the way for invasion of other countries."¹⁷ In South Korea echoes were heard "of *Tenno Heika Banzai* (Long live the emperor!), the battle cry of the imperial Japanese soldiers" as the legislation went into effect. Restoration of the right to wage war is seen as "a long-held dream by Prime Minister Shinzo Abe, whose grandfather served in the imperial war cabinet led by Gen. Hideki Tojo."¹⁸ Indeed, the majority of South

¹² A. Dupont, *The Schizophrenic Superpower*, 79 NAT'L INTEREST 43-51 (2005).

¹³ R. SAMUELS, *SECURING JAPAN: TOKYO'S GRAND STRATEGY AND THE FUTURE OF EAST ASIA 2* (2007).

¹⁴ *China's angry reaction to Japan's new security laws is echoed at home*, ECONOMIST Sept. 26, 2015, available at <http://www.economist.com/news/asia/21667981-chinas-angry-reaction-japans-new-security-laws-echoed-home-abes-stain> (last visited on May 16, 2016).

¹⁵ Xiaopeng Wang, *Japan's new security legislation clouds regional stability*, XINHUANET, Mar. 29, 2016, available at http://news.xinhuanet.com/english/2016-03/29/c_135232926.htm (last visited on May 16, 2016).

¹⁶ *Supra* note 2.

¹⁷ Hiroshi Minegishi, *Seoul accepts Japan's security laws with reservations*, NIKKEI, Mar. 26, 2016, available at <http://asia.nikkei.com/Politics-Economy/International-Relations/Seoul-accepts-Japan-s-security-laws-with-reservations> (last visited on May 16, 2016).

¹⁸ *Japan on warpath Abe out to kill Pacifist constitution*, KOREA TIMES, Mar. 30, 2016, available at <http://www.koreatimes.com>.

Koreans (56.9%) see the current state of Japan as ‘militaristic.’¹⁹

Japanese so-called ‘normalization’ has, however, been encouraged by the US, and well-received by most neighboring countries wary of Chinese assertiveness (with the exception of South Korea).²⁰ In April 2015, Abe was the “toast of Washington” when final agreement on the new set of guidelines governing joint defense operations was announced.²¹ Meanwhile, the Philippine military welcomed the developments, looking forward to security cooperation with Japan.²² While remaining leery of the potential resurgence of Japanese militarism, Seoul seems to accept the legislation as unavoidable, perhaps necessary, and even beneficial, given the US alliance and tensions with North Korea.²³ South Korean Foreign Ministry Spokesman June-hyuck Cho noted the official position that Japan’s security policies should be implemented in a way that upholds the spirit of its pacifist constitution and contributes to regional peace and stability.²⁴

In fact, even with the new legislation, Japan’s security policy is that of a ‘reactive state.’²⁵ For Dupont, “given its geostrategic vulnerabilities, energy dependence and declining birth rate, Japan is hardly in a position to embark on a policy of military adventurism or expansionism in East Asia, not least because it would be vehemently opposed by China ... as well as its major ally, the United States.”²⁶ Indeed, under the new legislation, Tokyo can only come to the aid of an ally if “Japan’s survival is at stake, all other non-military options have been exhausted, and the use of force is limited to the minimum necessary to deter aggression.”²⁷ Abe claims the reinterpretation is confined to logistical support activities, with combat roles even being avoided in the UN authorized missions, since the use of force outside self-

koreatimes.co.kr/www/news/opinion/2016/03/202_201489.html (last visited on May 16, 2016).

¹⁹ *The 3rd Japan-South Korea Joint Public Opinion Poll (2015): Analysis Report on Comparative Data*, Genron NPO and East Asia Institute, May 29, 2015, available at <http://www.genronnpo.net/en/pp/archives/5183.html> (last visited on May 16, 2016).

²⁰ *Supra* note 13.

²¹ L. Repeta, *Japan’s Proposed National Security Legislation - Will This Be the End of Article 9?*, 13 *ASIA-PACIFIC J.* (2015), available at <http://apjif.org/2015/13/24/Lawrence-Repeta/4335.html> (last visited on May 16, 2016).

²² G. Cahiles, *Japan’s new security laws take effect* CNN NEWS, Mar. 29, 2016, available at <http://cnnphilippines.com/news/2016/03/29/japan-security-law.html> (last visited on May 16, 2016).

²³ *Supra* note 13.

²⁴ *S. Korea to Keep Eye on Japan’s Security Policy*, KBS NEWS, Mar. 29, 2016, available at http://world.kbs.co.kr/english/news/news_Po_detail.htm?No=117943 (last visited on May 16, 2016).

²⁵ K. Calder, *Japanese Foreign Economic Policy Formation: Explaining the Reactive State*, 40 *WORLD POLITICS* 517-41 (1988).

²⁶ *Supra* note 11, at 45-6.

²⁷ F.-S. Gady, *Toothless tiger: Japan Self-Defence Forces*, BBC NEWS, Oct. 15, 2015, available at <http://www.bbc.com/news/world-asia-34485966> (last visited on May 16, 2016).

defense remains unconstitutional.²⁸

4. International and Domestic Justifications

The inherent right of individual or collective self-defense is enshrined in Article 51 of the UN Charter. Likewise, State practice, customary international law, and numerous examples of codified positive international law have reinforced the concept of Westphalian sovereignty and the rights of all States to political independence, territorial integrity, and non-interference in their domestic affairs. Indeed, these might amount to *jus cogens*, fundamental principles of international law accepted by the international community from which no derogation is permitted. Furthermore, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations provides: “Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”²⁹ Yet it could be argued that the Japanese constitution, including Article 9, was imposed upon the country in possible violation of the law of treaties, in a manner similar to force ‘unequal treaties’ to China, Japan, and Korea in the 19th and early 20th centuries.³⁰ Japan has not, however, railed consistently against the limitations of the imposed pacifist constitution, but has rather embraced its restrictions. As such, Tokyo may be ‘estopped’ from changing dramatically a position upon which others have relied.³¹

Far more problematic are the domestic legal challenges to the process and content of the new Japanese security legislation. Since returning in a second administration, Abe has championed constitutional revision, including, but not limited to, removal or dramatic reinterpretation of the so-called ‘pacifist’ clause of Article 9.³² According to Article 96, constitutional revision requires a two-thirds (2/3) super-majority in the

²⁸ *Supra* note 3.

²⁹ G.A. Res. 2625 (XXV), U.N. Doc A/RES/25/2625 (Oct. 24, 1970), available at <http://www.un-documents.net/a25r2625.htm> (last visited on May 16, 2016).

³⁰ Vienna Convention on the Law of Treaties of 1969, 1155 U.N.T.S. 18232, art. 52, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (last visited on May 16, 2016).

³¹ M. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CAL. L. REV. 1777-804 (1986). He maintains: “International law has long recognized the doctrine of estoppel, a principle which prevents states from acting inconsistently to the detriment of others.”

³² W. Pesek, *Will Japan's Democracy Survive Abe?* Bloomberg, July 7, 2014, available at <http://www.bloombergview.com/articles/2014-07-03/will-japan-s-democracy-survive-abe> (last visited on May 16, 2016).

Diet, something that Abe lacks. He has thus embarked on an “end-run of dubious legality” to ‘reinterpret’ the constitution through the new legislation.³³ Absent the required super-majority, Abe should have submitted revisions to a national referendum. He did not do so for fear of losing the poll, however.

Domestic opinion is solidly opposed. 176 constitutional law professors issued a declaration condemning the new legislation on June 3, 2015, followed by similar declarations from numerous bar associations and citizens groups.³⁴ Scholars attacked both the procedure through which the Abe administration acted and the substance of the legislation. They expressed outrage that just a single Cabinet tried to overturn this longstanding constitutional principle, by-passing due process of Diet deliberations and/or engagement with the Japanese people through a referendum. They were also furious that the US treaty negotiations were presented as a *fait accompli*, in doing so treating the Diet, (the “highest organ of state power” according to Article 41 of the Constitution), as if it were nothing more than a rubber stamp.³⁵

5. Conclusion: A Failure of Governance

Abe’s justification, that an increasingly hostile international operating environment requires a ‘normalization’ of Japanese foreign and security policy, is political rather than legal. There are three problems with this claim: first, whether the international operating environment is significantly more menacing; second, whether the norms of good governance support this sort of response; and third, whether the political maneuvering actually contributes to domestic and international political stability.

Just as Japan does not pose a direct threat to its neighbors, even with the new legislation, the neighbors do not pose a direct threat to Japan, even with the development of new capabilities in the case of both China and North Korea. Threat requires both capability and intent. Neither of these actors has any intent to attack Japan as it is not in their interest to do so given the existing defensive capabilities, the support of the US, economic interdependence between the great powers, and the certainty of defeat for North Korea in any conflict it initiates. As for more general threats to international peace and security (terrorism, challenges faced by allies, energy supplies, etc.), the new legislation actually permits little additional direct assistance.

³³ *Id.*

³⁴ *Supra* note 21.

³⁵ *Id.*

Also, JSDF are ill-prepared to take on additional roles.

Good governance requires provision of security, generation of collective good, reconciliation of conflicting interests, and responsiveness to the wishes of their people.³⁶ The Abe administration, however, has repeatedly gone against the express wishes of the Japanese people. In addition to reinterpretation or revision of Article 9, Abe has proposed modifying Article 21 of the Constitution regarding freedom of assembly, association, speech, press and expression, with the proviso: “engaging in activities with the purpose of damaging the public interest or public order, or associating with others for such purposes, shall not be recognized.” Thereby, Abe is trying to not only strip free speech protection from the activities that might have the purpose of damaging the so-called ‘public order,’ but also remove protection from the right of association. Likewise, the proposed draft of Article 19-2 reads: “No person shall improperly acquire, possess or use information concerning individuals.”³⁷ It would undermine freedom of information and the press.

If Abe is unable to garner the legally required support for these constitutional revisions, another ‘end-run’ beckons in the shape of the new controversial secrecy bill which has been opposed by as many as 80 percent of respondents. This would give bureaucrats enormous powers to withhold information, grant the government powers to imprison whistle-blowers, prohibit disclosure of classified material even to protect the public interest, and give the government power to imprison journalists merely for soliciting such information.³⁸ In a similar manner, the administration restarted nuclear power plants, despite nearly 90 percent of respondents supporting an immediate or gradual phase-out of nuclear power.³⁹ Abe has scant regard for the will of the people.

This is the true threat to international peace and security. Despite deteriorating views of the neighbors, the Japanese people remain wedded to pacifism. But Abe has repeatedly demonstrated an indifference to the will of the people. Democracies are less war-prone than authoritarian regimes due to increased openness and checks-and-balances on decision-making. As most of allies are democracies, there

³⁶ B. Howe, *Governance in the Interests of the Most Vulnerable*, 32 PUBLIC ADMINISTRATION & DEV. 345–56 (2012)

³⁷ L. Repeta, *Japan’s Democracy at Risk: The LDP’s Ten Most Dangerous Proposals for Constitutional Change*, 11 ASIA-PACIFIC J. 6 (2013), available at <http://apjif.org/2013/11/28/Lawrence-Repeta/3969/article.html> (last visited on May 16, 2016).

³⁸ J. Kingston, *Abe’s Secrets Law Undermines Japan’s Democracy*, JAPAN TIMES, Dec. 13, 2014, available at <http://www.japantimes.co.jp/opinion/2014/12/13/commentary/japan-commentary/abes-secrets-law-undermines-japans-democracy/#.VOaxnyamqUk> (last visited on May 16, 2016).

³⁹ Takashi Mochizuki, Mari Iwata & C. Dawson, *Japan Seeks Slow Nuclear Phase-Out*, WALL ST. J., Sept. 14, 2012, available at <http://www.wsj.com/articles/SB10000872396390443524904577651060130687708> (last visited on May 16, 2016).

is the possibility of both peace between democratic dyads and a regional zone of peace. Yet if Abe focuses not on the interests of his people, but only on those of his regime, Japan's democracy is perhaps one in name only. The governance and unpredictability of which could, in the future, pose a threat to the people of the country as well as the peace and security of the region.