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# MAJOR LEGISLATION

Jan. – Dec., 2001

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## 1. Constitutional Law

**The Special Measures Law Concerning Measures Taken by Japan in Support of the Activities of Foreign Countries Aiming to Achieve the Purposes of the Charter of the United Nations in Response to the Terrorist Attacks which Took Place on 11 September 2001 in the United States of America as well as Concerning Humanitarian Measures Based on Relevant Resolutions of the United Nations**

Law No. 113, November 2, 2001 (Effective on November 2, 2001).

### **Background:**

On September 11, 2001, the so-called “the simultaneous terrorist attacks” took place in the United States. Immediately after the terrorist attacks, President Bush emphasized: “This is not terrorism, but war.” At last, on October 7 (8 Japan Time), the U.S. government started a military attack in Afghanistan, which was said to be hiding the ringleaders of the terrorist attacks, arguing its “right of self-defense”.

Right after the terrorist attacks, Prime Minister Junichiro Koizumi

expressed strong support for the U.S. fight against terrorism. On September 19, a Ministerial Meeting Concerning Measures against Terrorism was convened, and the “Japan’s measures in response to the simultaneous terrorist attacks in the United States”, which provided a “Basic Policy” related to the terrorist attacks and “Immediate Measures”, composed of seven measures, was announced. As a “Basic Policy”, it provided that Japan would actively engage in the combat against terrorism, which it regarded as Japan’s own security issue, and that Japan strongly supported the United States, its ally, and would act in concert with the United States and other countries around the world. As “Immediate Measures”, it provided that the government would promptly take measures necessary for dispatching the Self-Defense Forces (SDF) to provide support for the U.S. forces and others taking measures related to the terrorist attacks, for further strengthening protection of facilities and areas of the U.S. forces and important facilities in Japan, for providing assistance to the displaced persons as necessary, including the possibility of humanitarian assistance by the SDF, and so on.

On October 5, the government determined this bill in a Cabinet meeting and submitted it to the Diet. After deliberation in the House of Councilors and the House of Representatives, the bill was passed on October 29. On November 2, this law was promulgated and effectuated together with the “Law amending the Self-Defense Forces Law” (Law No. 115, 2001) and the “Law amending the Japan Coast Guard Law” (Law No. 114, 2001) passed at the same time. The period of the deliberation of the bill was only about three weeks.

### **Main Provisions:**

#### **(1) Purpose**

The purpose of the law is to specify the following measures in order to enable Japan to contribute actively and on its own initiative to the efforts by the international community to prevent and eradicate international terrorism, thereby ensuring the peace and security of the international community including Japan: including (a) the measures Japan implements in support of the activities of the armed forces of the U.S. and other countries which aim to eradicate the threat of the

terrorist attacks which took place on 11 September 2001 in the U.S., thereby contributing to the achievement of the purposes of the Charter of the U.N.; (b) the measures Japan implements in a humanitarian spirit based on the relevant resolutions of the U.N. or requests made by the U.N.. (Art. 1)

(2) Response Measures

The government shall implement “Response Measures” such as “Cooperation and Support Activities”, “Search and Rescue Activities”, “Assistance to Affected People” in an appropriate and swift manner, thereby contributing actively and on its own initiative to the efforts by the international community to prevent and eradicate international terrorism, and ensuring the peace and security of the international community including Japan (Art. 2, para. 1). These measures must not constitute the threat or use of force (Art. 2, para. 2). “Cooperation and Support Activities” are the provision of materials and services, conveniences and other measures implemented by Japan in support of Foreign Forces (Art. 3, no. 1). “Search and Rescue Activities” are the activities implemented by Japan to search for and rescue combatants in distress due to combat in the case of the activities of the Foreign Forces (Art. 3, no. 2). “Assistance to Affected People” is the transportation of necessities, including food, clothing and medicines, medical services and other humanitarian activities implemented by Japan, with regard to terrorist attacks, based on resolutions of the U.N. or on requests by the U.N. and Others (Art. 3, no. 3). Relevant government agencies, including the SDF, shall implement these activities (Art. 3, no. 4).

(3) Areas in which the Response Measures shall be implemented

Response Measures shall be implemented in the following areas: (a) Japan’s territory; (b) the high seas and airspace above; (c) territory of foreign countries (implementation shall be limited to cases where consent from the territorial countries has been obtained). As to (b) and (c), implementation shall be limited to cases where combat is not taking place or not expected to take place while Japan’s activities are being implemented (Art. 2, para. 3).

(4) Diet Approval

The Prime Minister shall put the Response Measures implemented

by the SDF, within twenty days after their initiation, on the agenda in the Diet for its approval. If the Diet disapproves, Response Measures must be promptly terminated (Art. 5).

(5) Uses of Weapons

Members of the SDF in charge of Response Measures may proportionately use weapons when an unavoidable and reasonable cause exists for the use of weapons to protect their own lives and bodies, those of other members of the SDF who are with them on the scene, or those who have come under their control while conducting their duties (Art. 12)

**Editorial Note:**

The Japanese Constitution adopts pacifism as one of its fundamental principles and proclaims a renunciation of war, based on the tragic experiences of World War Two and the deep reflection about war. Article 9, Paragraph 1 of the Constitution provides: “Aspiring sincerely to an international peace based on justice and order, 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 Article 9, Paragraph 2 provides: “In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized”. If Article 9 is interpreted literally, the SDF appears to be unconstitutional, because Article 9 prohibits the maintenance of all forces in Paragraph 2 at any rate. Most constitutional scholars have interpreted it so.

But the government has adopted the interpretation that “the minimum level of armed strength necessary to exercise the right of self-defense” does not constitute the “forces” prohibited by Paragraph 2, so the SDF is not unconstitutional under Article 9. This interpretation was adopted by the Cabinet in 1954, when the SDF, whose main mission was “to defend Japan against direct and indirect aggression in order to ensure the peace and independence of Japan and to maintain the security of Japan”, was established following the establishment of the National Police Reserve Force in 1950 and the establishment of the National Safety Force and the Maritime Safety Security Force in

1952. And later Cabinets have fundamentally followed this interpretation. This interpretation says: “As long as Japan is a sovereign state, it is recognized beyond doubt that the provision in the article does not deny the inherent right of self-defense that Japan is entitled to maintain as a sovereign nation. And since the right of self-defense is not denied, the Constitution does not prohibit the possession of the minimum level of armed strength necessary to exercise the right of self-defense”.

This interpretation, which draws the constitutionality of the maintenance of “the minimum necessary level of armed strength for self-defense” from the existence of the right of self-defense, has determined the conditions of the national defense policy of Japan. On the one hand, the limit of “the minimum necessary level of armed strength for self-defense” is inherently ambiguous. The government recognizes that it is impossible to establish a “stable” limit and the limit of “the minimum necessary level of armed strength for self-defense” varies depending on the prevailing international situation, the standards of military technology and various other conditions. Under such a variable and unstable limit, the equipment of the SDF has been gradually expanded, and now the SDF maintains eminence as a military power in the world. On the other hand, from the limit of “the minimum necessary level of armed strength for self-defense”, the so-called “Exclusively Defense-Oriented Policy” is demanded, and the overseas deployment of the SDF and the exercise of the right of collective self-defense (the right to use force to stop armed attack on a foreign country with which it has close relations, even when the state itself is not under direct attack) are not permissible under the Constitution. The government has adopted the following interpretations: “The government believes that the Constitution does not permit it to dispatch armed forces to foreign territorial land, sea and airspace for the purpose of using force, because such an overseas deployment of troops generally exceeds the limit of the minimum necessary level of self-defense”; “It is beyond doubt that as a sovereign state, Japan has the right of collective self-defense under existing international law. The government, however, is of the view that the exercise of the right of self-defense as permissible under Article 9 of the Constitution is authorized only

when the act of self-defense is within the limit of the minimum necessary level for the defense of the nation. The government, therefore, believes that the exercise of the right of collective self-defense exceeds that limit and is constitutionally not permissible”.

However, particularly since the 1990s, the area where the SDF can act has been expanded so widely that the government interpretations based on the limit of “the minimum necessary level of armed strength for self-defense” can no longer explain the expanded role of the SDF. When Iraq invaded Kuwait in 1990 and the Gulf War broke out in 1991, the government made a monetary contribution to the Multinational Forces. But the arguments for the “international contribution”, such as arguing that a contribution without personnel was not a real contribution to international society, were strongly argued and a request for the overseas deployment of the SDF rose. And the “Law Concerning Cooperation with United Nations Peacekeeping Operations and Other Operations” (Law No. 79, 1992. The so-called “P.K.O. Law”) was passed. The purpose of this law was to provide appropriate and prompt cooperation for “United Nations Peace-Keeping Operations” and “humanitarian international relief operations”. By this law, the overseas deployment of the SDF became legally possible under the requirements of the so-called “five principles for participation in PKO” (the existence of a cease-fire agreement among the parties to armed conflict; the existence of the consent of the host countries and the parties to armed conflict on the undertaking of peace-keeping operations; the impartiality of peace-keeping operations; the withdrawal of personnel in the case of the above requirements no longer being satisfied; the use of weapons being limited to the minimum necessary to protect personnel’s lives). In fact, based on this law, the Government deployed the SDF in areas such as Cambodia, Mozambique, the Rwandan circumference area and the Golan Heights.

Furthermore, the collapse of the cold war entailed the so-called “re-definition of U.S.-Japan Defense Cooperation”, which attempted to give the new meaning corresponding to the post-cold war era to the U.S.-Japan Defense Cooperation which had been the product of the cold war era. The “Treaty of Mutual Cooperation and Security between Japan and the United States of America” agreed in 1960 recog-

nized the stationing of U.S. Forces in Japan for the purpose of contributing to “the security of Japan and the maintenance of international peace and security in the Far East” and provided for cooperation in “the territories under the administration of Japan”. And the “Guidelines for Japan-U.S. Defense Cooperation”, which was made to embody this treaty in 1978, provided for cooperation in “the Far East” outside of Japan. The “Japan-U.S. Joint Declaration on Security-Alliance for the 21st Century” announced in 1996 and the new “Guidelines for U.S.-Japan Defense Cooperation” made in 1997 defined the U.S.-Japan Defense Cooperation as the cornerstone for maintaining a stable and prosperous environment for “the Asia-Pacific region” and provided that in “situations in areas surrounding Japan” Japan shall provide “Rare Support” to U.S. Forces. By these “Declaration” and “Guidelines”, the applicable area of the U.S.-Japan Defense Cooperation was expanded from “the Far East” to “the Asia-Pacific region”, and the area which Japan must commit itself to was stretched by introduction of the concept of “areas surrounding Japan”. And, in 1999, the “Law Concerning Measures to Maintain the Peace and Security of Japan in Situations in Areas Surrounding Japan” (Law No. 60, 1999. The so-called “Situations in Areas Surrounding Japan Law”) was passed. This law made it possible for the SDF to provide “Rear Area Support” (the provision of materials and services, convenience and other measures implemented by Japan in support of the U.S. Forces in the rear area) in “Situations in Areas Surrounding Japan” (situations which will have an important influence on Japan’s peace and security in areas surrounding Japan, such as situations which will lead to the direct military attack on Japan if left as they are).

As mentioned above, especially in the last ten years, the law-making to expand the area where the SDF can act has advanced steadily. However, under the existing legal system, such as the “P.K.O. Law” and the “Situations in Areas Surrounding Japan Law”, it was impossible for the government to take “measures necessary for dispatching the SDF to provide support to U.S. forces and others taking measures related to terrorist attacks” which was expressed as one of the “Immediate Measures” by the Government on September 19. Under the “P.K.O. Law”, there were the limits to the overseas deployment of

the SDF, such as U.N. resolutions and cease-fire agreements. And the government said that under the "Situations in Areas Surrounding Japan Law" it was impossible to deploy the SDF in the Indian Ocean. The law introduced here removes these limits and enables the government to deploy the SDF on completely new ground, based on neither "Cooperation with the U.N." nor "U.S.-Japan Defense Cooperation". So, the gap between the role of the SDF and the previously held government interpretation has become wider. When Prime Minister Koizumi was asked about the relationship between this bill and the Constitution in the process of the deliberation of the bill, he replied: "If I am asked about the legally clear consistency between them, I can hardly reply." Does this Prime Minister's reply show that this law is inconsistent not only with the real meaning of Article 9 but also the previously held government interpretation of Article 9? In the following, we briefly suggest the problems of this law from the viewpoint of the pacifism adopted by the Constitution.

First, this law adds the "territory of foreign countries" to the area where the SDF can act for the first time. As mentioned above, this addition removes even the limits of the "P.K.O. Law" and the "Situations in Areas Surrounding Japan Law" and makes it possible for the government to deploy the SDF overseas without any geographical limits. This can hardly be justified by the previously held government interpretation of Article 9. This law provides that implementation shall be limited to cases where combat is not taking place, but it is difficult to distinguish between areas of combat and areas of non-combat given the actual conditions of terrorism, and if implementation would really be limited to cases where combat is not taking place, it is unintelligible why this law provides for the use of weapons. Second, this law gives the decoration that "Response Measures" does not correspond to "the use of force" prohibited by Article 9 by providing that "these matters must not constitute a threat or use of force". But the activities such as supply, transportation, repair and maintenance, medical services, communication etc., which "table 1" of this law specifies as the contents of "Cooperation and Support Activities", are generally called "logistics" activities. And because the use of force is impossible without such "logistics" activities, these activities constitute an essential



part of “the use of force”. Third, this law includes the protection of the lives and bodies of “those who have come under their control” as the purpose of the use of weapons. According to the previously held government interpretation about the use of weapons, the use of weapons as the exercise of a “natural right of self-defense” does not constitute “the use of force” prohibited by Article 9. The validity of this interpretation itself is dubious, but even this interpretation can hardly justify the use of weapons for “those who have come under their control”. Finally, under this law, the implementation of “Response Measures” by the SDF would be taken without advance Diet approval, and only a later Diet approval would be forthcoming. Even the “P.K.O. Law” and the “Situations in Areas Surrounding Japan Law” provide advance Diet approval for the overseas deployment of the SDF, so this law clearly weakens civilian control.

Needless to say, “the simultaneous terrorist attacks”, which killed a huge number of citizens, cannot be forgiven, even if there are political, economic or religious reasons in the background. Measures to eradicate terrorism are necessary so that such a tragedy is not repeated again. And since terrorism has the nature that one country alone cannot cope with it, each country needs to cooperate internationally for the eradication of terrorism. But do measures against terrorism with military forces really contribute to the eradication of terrorism in a true sense? In the process of the deliberation of this bill, Prime Minister Koizumi developed the arguments that there was a “gap” between the Preamble, which adopts an international cooperation principle, and Article 9, so this law filled this gap. But there is no “gap” between the Preamble and Article 9. The ideal of the Preamble is embodied in each article of the Constitution and the Constitution adopts an international cooperation principle based on a thorough pacifism without military forces. And we think that to show our attitude to adhere to this international cooperation principle adopted by the Constitution toward the world will lead to a real international contribution to the eradication of terrorism.