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## JAPAN

### ARTICLE 9 OF THE CONSTITUTION

#### *Executive Summary*

*Japan's post-Second World War constitution was born when Japan was occupied by Allied forces. During the first stage of the occupation, the Supreme Commander of the Allied Forces and legislators of the constitution thought Japan would not have a military force again. Article 9 of the Constitution renounces war and prohibits Japan from maintaining the war potential. However, as the United States changed its policy of demilitarizing Japan, the United States asked her to share the burden of maintaining the security of Japan and, for the sake of international peacekeeping, Japan gradually increased its defense capability and developed a somewhat more technical interpretation of article 9. Article 9 does not prohibit Japan from maintaining her defense capability. Article 9 had been popular in Japan for a long time; but as the Japanese started to take their security more seriously, more people have begun to accept the idea of amending article 9 of the Constitution. The ruling party, the Liberal Democratic Party, will bring the Constitutional amendment proposal to the Diet within the next few years.*

#### **I. Introduction**

The current Constitution of Japan was promulgated on November 3, 1946, and came into effect on May 3, 1947. One of the Constitution's distinctive features is its embrace of pacifism. Article 9 of the Constitution, which renounces war, is considered unique. Japan is allowed *Jieitai*, the Self Defense Forces (SDF): the Air SDF, the Maritime SDF, and the Ground SDF. They cannot be called land, sea and air forces (*gun*) because article 9 prohibits Japan from maintaining military forces. However the SDF were named, many have believed the SDF is military and the existence of the SDF is, in essence, unconstitutional.<sup>1</sup> Of course, the government has interpreted the Constitution in a manner in which the SDF would not be unconstitutional.

The government has developed a somewhat unique interpretation of article 9 and its related rules in order to legalize the existence of the SDF, and has also put limitations on the SDF in the spirit of article 9. As the government's interpretation of article 9 has developed further, many think the interpretation has begun to deviate too much from article 9's language. The government interpretation has emerged at a time that the United States has demanded more cooperation from Japan in maintaining Japan's military security.

The Liberal Democratic Party (LDP), which has been the ruling party for most of the era after the Second World War, has discussed amending the Constitution, especially article 9, but resistance has been strong. It once looked impossible to amend article 9 because the majority of Japanese people would not support the amendment. However, global political and security issues impacting Japan have changed, as have the viewpoints of the Japanese people. Recently, there are realistic opportunities to amend article 9.

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<sup>1</sup> JAMES E. AUER, THE POSTWAR REARMAMENT OF JAPANESE MARITIME FORCES, 1945-71, 122 (1973).

## II. Pacifist Constitution and Self Defense

The Constitution of Japan is known as the pacifist Constitution. Both its Preamble and article 9 express principles of pacifism. The Preamble of the Constitution proclaims:

We, the Japanese people, ... resolved that never again shall we be visited with the horrors of war through the action of government....

We ... desire peace for all time ... and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world.<sup>2</sup>

It is not understood commonly that the Preamble of the Constitution has a legally binding effect because the preamble is very abstract; rather, all concepts in the Preamble are realized by individual Constitutional articles. However, the Preamble is used as guidance for the interpretation of Constitutional articles.<sup>3</sup> In the so-called *Sunakawa* case, the Supreme Court stated that “[i]n conjunction with the spirit of international cooperation expressed in the Preamble and paragraph 2, article 98 of the Constitution, it (article 9) is an embodiment of the concept of pacifism which characterizes the Japanese Constitution.”<sup>4</sup> However, the preamble does not lead the Japanese to an unanimous interpretation of article 9.

Paragraph 1 of article 9 of the Constitution renounces war. Paragraph 2 of the same article prohibits maintenance of the potential for war. Interpretation of this article has varied, broadly, from absolute pacifism to admission of the need for utilization of a collective self-defense right. Article 9 of Japan's Constitution reads as follows:

1. 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 a means of settling international disputes.

2. 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.

Regarding paragraph 1 of article 9, the majority of scholars and government officials agree that it renounces war as a means of invading other countries.<sup>5</sup> It is unclear in English translation whether “as a means of settling international disputes” is connected to “war as a sovereign right of the nation.” In the original Japanese text, “as a means of settling international disputes” is clearly connected to not only “the threat or use of force,” but also “war as a sovereign right of the nation.” War “as a means of settling international disputes” commonly is interpreted identically as using war to invade other countries.<sup>6</sup> The General Treaty for the Renunciation of War<sup>7</sup> in 1928, to which Japan is a signatory, uses the similar phrase, “war for the solution of international controversies.” This phrase in the Treaty excluded war in

<sup>2</sup> The translation of the Constitution of Japan is available at Prime Minister of Japan and His Cabinet's website, [http://www.kantei.go.jp/foreign/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html) (last visited Feb. 14, 2006).

<sup>3</sup> MIYOKO TSUJIMURA, *KENPŌ [CONSTITUTION]* 59 (2000).

<sup>4</sup> 13 KEISHŪ 13, 3225, 3232 (S. Ct. Grand bench, Dec. 16, 1959). An English translation is available by searching the Japanese Supreme Court's website, available at <http://courtdomino2.courts.go.jp/promjudg.nsf>.

<sup>5</sup> See NOBUYOSHI ASHIBE, *KENPŌGAKU I [CONSTITUTION STUDY]* 259 (1992); TSUJIMURA, *supra* note 3, at 107-111.

<sup>6</sup> ASHIBE, *id.* at 257; KISABURO YOKOTA, ed., *KOKUSAI HŌ [INTERNATIONAL LAW]* 238 (New ed. 1966).

<sup>7</sup> 46 Stat. Pt. 2, 2343 (1928).

self-defense.<sup>8</sup> It is said in Japan that when such similar phrases are used in legal documents from the same era, they must be interpreted consistently.<sup>9</sup> The majority of scholars and government officials, therefore, think that war in self-defense is not renounced by paragraph 1 of article 9. Some famous scholars, however, insist that Paragraph 1 of Article 9 renounces all wars without distinguishing between offensive and defensive operations. Their reasons are: (1) all wars, including a war in self-defense, can be means of settling international disputes; and (2) practically speaking, it is very difficult to distinguish a war of invasion and a war in self-defense.<sup>10</sup> This view has not persuaded the majority of scholars and government officials, though the majority admit the reasons listed above are correct.<sup>11</sup>

In regard to paragraph 2 of article 9, an opinion has been expressed that a war for self-defense is permitted by the Constitution. The commentators advocating this view emphasize that the second paragraph states “in order to accomplish the aim of the preceding paragraph.” The aim of the first paragraph is to renounce war “as a means of settling international disputes.” Therefore, a self-defensive war and war as sanctioned under United Nations Charter are not forbidden by the Constitution. In addition, they claim that article 66, paragraph 2, of the Constitution, which requires the Prime Minister and other Ministers of State to be civilians, makes no sense if any war is not permitted by the Constitution, because military personnel would not exist if any war is not permitted.<sup>12</sup> The majority of scholars criticize this view because it overemphasizes the phrase “in order to accomplish the aim of the preceding paragraph.”<sup>13</sup> The scholarly majority claims that the phrase does not necessarily have this meaning. In addition, the civilian requirement might mean that former members of the military and SDF officers cannot be the Prime Minister and Ministers of State.<sup>14</sup> This view, authorizing a self-defensive war, historically had not been supported by many scholars although recently it has become more popular.

The majority of scholars’ view is that, though Japan does not renounce a right to self-defense under the first paragraph, the denial of the right to belligerency and to maintain war potential under the second paragraph denies Japan's right to self-defense through either a standing military or quasi-military force.<sup>15</sup> The only ways to resist foreign aggression are through police power and an *ad hoc* militia (citizens with weapons).<sup>16</sup> This is also the view the government adopted during its legislative debates, as discussed below in Section III. The current government agrees that Japan cannot have war potential (*sen-ryoku*), because the second paragraph of article 9 clearly forbids it.<sup>17</sup> The question has been raised, naturally, that: if the government interprets the first paragraph of article 9 to prohibit all kinds of war and that Japan cannot have war potential, how can Japan have the SDF without violating the Constitution? The answer is that the government construes the SDF differently than the “war potential” of article 9,

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<sup>8</sup> Further Correspondence with Government of the United States respecting the United States Proposal for the Renunciation of War, 1. Self-defense. (June 23, 1928), Avalon Project, *available at* <http://www.yale.edu/lawweb/avalon/kbpact/kbbr.htm>.

<sup>9</sup> ASHIBE, *supra* note 5, at 257.

<sup>10</sup> *See* TSUJIMURA, *supra* note 3, at 108. She listed Professor Toshiyoshi Miyazawa, Professor Shirō Kiyomiya, and Professor Noriho Urabe’s books as examples.

<sup>11</sup> *Id.* at 108.

<sup>12</sup> ASHIBE, *supra* note 5, at 258-61

<sup>13</sup> *Id.* at 260.

<sup>14</sup> *Id.* at 259-61.

<sup>15</sup> *See id.* at 266.

<sup>16</sup> *Id.*

<sup>17</sup> Ichiro Yoshikuni’s answer at the Budget Committee of the House of I on November 13, 1972, SANGIIN YOSAN IIN KAIGIROKU [BUDGET COMMITTEE OF HOUSE OF COUNCILORS MINUTES], 70<sup>th</sup> Diet Session, No. 5, at 2 (Nov. 13, 1972).

paragraph 2 of the Constitution. The government insists that, because article 9, paragraph 1 does not deny the state's inherent right of self-defense, creating standing forces for the purpose of self-defense does not constitute the "war potential" forbidden by article 9, paragraph 2. They define "war potential" as forces much greater than those forces minimally required for self-defense.<sup>18</sup> Therefore, the SDF is not "war" potential, but "self-defense" potential. Such an interpretation did not emerge overnight. There is an extensive history for the government's interpretation.

### III. Legislative History of the New (Amended) Constitution

The Constitution of Japan has an unusual legislative history. It was enacted under unusual circumstances. After the Second World War, the Allied Powers occupied Japan, which accepted the terms of the Potsdam Declaration upon its surrender to the Allies in August 1945.<sup>19</sup> Some terms of the Declaration, relevant here, are as follows:

6. There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.
7. Until such a new order is established and until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth. . . .
10. . . . The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established. . . .
12. The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.<sup>20</sup>

In September 1945, General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP), urged the Japanese government to amend the Imperial Constitution of 1889 (Meiji Constitution).<sup>21</sup> In October 1945, the new Prime Minister, Kijūrō Shidehara, appointed Dr. Jōji Matsumoto as the chairman of the Constitution Research Committee (*Kenpō mondai chōsa iinkai*, hereinafter "Matsumoto committee").<sup>22</sup> While the Matsumoto committee researched the amendment of the constitution in closed

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<sup>18</sup> *Id.*

<sup>19</sup> UCLA Center for East Asian Studies, Exchange of Letters Regarding the 1945 Surrender of Japan, <http://www.isop.ucla.edu/eas/documents/surrender-exch.htm> (last visited Feb. 10, 2006). The Potsdam Declaration was issued on July 26, 1945 by Harry S. Truman, Winston Churchill, and Chiang Kai-Shek, outlining the terms of surrender for Japan.

<sup>20</sup> The text of the Potsdam Declaration is available at the National Diet Library's website, <http://www.ndl.go.jp/constitution/e/etc/c06.html> (last visited Feb. 10, 2006).

<sup>21</sup> SUPREME COMMANDER FOR THE ALLIED POWERS, GOVERNMENT SECTION, POLITICAL REORIENTATION OF JAPAN 91 (1968).

<sup>22</sup> KENZO TAKAYANAGI, ET AL., NIHON-KOKU KENPO SEITEI NO KATEI [PROCESS OF ENACTMENT OF JAPANESE CONSTITUTION] II, at 13 (1972).

chambers, many private constitutional research groups published the drafts of the new constitution.<sup>23</sup> Though the Matsumoto committee kept their arguments and two drafts secret, even most of it from the General Headquarters of SCAP (GHQ), one of the major newspaper in Japan, the Mainichi newspaper, scooped and published one of the Matsumoto committee's tentative drafts on February 1, 1946.<sup>24</sup> The scooped committee tentative draft did not meet the standards of the Potsdam Declaration.<sup>25</sup> The draft was based on the Imperial Constitution and amended, little by little, each of its articles. General MacArthur directed his staff to draft a new Japanese constitution on February 3, 1946.<sup>26</sup> Not knowing that MacArthur had given his staff this direction, the Japanese government requested and waited for a meeting with GHQ regarding the Matsumoto draft. At the meeting on February 13, 1946, the Matsumoto draft simply was rejected and the GHQ draft was handed over to the Japanese for consideration.<sup>27</sup>

The fact that GHQ drafted the constitution of Japan without informing the Japanese government, and the contents of the draft itself, surprised the Japanese government.<sup>28</sup> After some negotiations and discussions, on February 22, 1946, Matsumoto, then Minister of State, started to draft a constitution based on the GHQ draft.<sup>29</sup> Although GHQ agreed that the translation of the final draft would be submitted to them by March 11, 1946, they demanded to see Matsumoto's draft (the so-called "March second draft"), which had not yet been discussed in the Cabinet and not yet translated, on March 4, 1946.<sup>30</sup> Most of the changes from the GHQ draft which had been made by Matsumoto were reversed by GHQ by the next day, March 5, 1946. The draft (so-called "March fifth draft"), therefore, which GHQ approved, was very close to the original GHQ draft.<sup>31</sup> GHQ strongly pressured the Cabinet to adopt the March fifth draft of its own volition. Thus, the Cabinet did so.<sup>32</sup> The March fifth draft was released by the Cabinet and SCAP immediately. After some adjustments in Japanese language,<sup>33</sup> the draft was finalized on April 17, 1946.

Though the draft constitution was fundamentally different from the Meiji Constitution, it was submitted to the Imperial Diet as an amendment of the Meiji Constitution by the Emperor's order.<sup>34</sup> The Diet, whose members were elected by the first post-war general election in April 1946, discussed the draft intensively. Both Houses established special committees to discuss and study the new Constitutional bill. After intensive discussions, the bill was amended and passed by the Diet. There have been legal questions on the legitimate genesis of the new Constitution: 1) there was interference by GHQ during the legislative process in drafting the Constitution, which violates article 43 of the Laws and Customs of War

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<sup>23</sup> *Id.* at 15-16.

<sup>24</sup> *Id.* at 23.

<sup>25</sup> SUPREME COMMANDER FOR THE ALLIED POWERS, *supra* note 21, at 99-101.

<sup>26</sup> SUPREME COMMANDER FOR THE ALLIED POWERS, *supra* note 21, 102.

<sup>27</sup> TAKAYANAGI, *supra* note 22, at 55.

<sup>28</sup> Letter from Jiro Shirasu to General Whitney dated February 15, 1946, *reprinted in* JUN ETO, ET AL. ED., KENPO SEITEI KEIKA [LEGISLATIVE PROCESS OF THE CONSTITUTION] vol. 3, 213-219 (1982).

<sup>29</sup> TAKAYANAGI, *supra* note 22, at 77-100.

<sup>30</sup> *Id.* at 101.

<sup>31</sup> *Id.* at 102.

<sup>32</sup> *Id.* at 102; ETO, *supra* note 28, at 255-256.

<sup>33</sup> The English version was kept intact. NISHI OSAMU, NIHONKOKU KENPŌ NO TANJŌ WO KENSHŌ SURU (EXAMINING THE BIRTH OF THE CONSTITUTION OF JAPAN), 135 (1986).

<sup>34</sup> *Shugiin giji sokkiroku dai 5 go* (House of Representative stenographic records), KANPŌ (OFFICIAL GAZETTE), Gōgai (Extra), 63 (June 26, 1946). The Meiji Constitution provided its amendment procedure: the amendment draft should be submitted to the Imperial Diet by the Emperor's order. THE MEIJI CONSTITUTION OF 1889, art. 73.

and Land (Hague IV), October 18, 1907<sup>35</sup> and item 12 of the Potsdam Declaration;<sup>36</sup> and 2) the amendment was beyond the boundary of legitimate amendment of the Meiji Constitution, which had been based on the monarchy.<sup>37</sup> However, because Japan had accepted unconditional surrender, there was no way to reject a new constitution drafted by foreigners. Despite these theoretical problems, the new Constitution of 1946 has been enforced since its date of effect.

#### IV. Changes in Article 9 Draft

When the Matsumoto committee drafted the constitution in early 1946 without GHQ interference, the draft did not include an article that renounced war. Rather, Article XII of the draft stated: “The emperor declares war and makes peace, with the advice and approval of the Imperial Diet.”<sup>38</sup> An article renouncing war was drafted first by SCAP.

The government section of SCAP was bound by two documents when they drafted the Japanese constitution:<sup>39</sup> these were the Reform of the Japanese Government System (SWNCC-228) by the State-War-Navy Coordinating Committee (SWNCC)<sup>40</sup> and the so-called MacArthur note, which General MacArthur handed to Brigadier General Courtney Whitney at SCAP when he directed the drafting of Japan’s new constitution.<sup>41</sup> SWNCC-28 was the guideline for Japanese government reform, in which the basic principles for governing post-war Japan accorded with the Potsdam Declaration. In the MacArthur note, General MacArthur wrote three key points that must be included in the new constitution: a new Emperor system; renunciation of war; and the end of the feudal system.

SWNCC-228 did not suggest Japan would renounce war. Rather, it expected the establishment of a new Japanese military after the abolition of the old Japanese armed forces. Discussion 10 of SWNCC-228 reads as follows:

10. Although the authority and influence of the military in Japan’s governmental structure will presumably disappear with the abolition of the Japanese armed forces, formal action permanently subordinating the military services to the civil government by requiring that the ministers of state or the members of a Cabinet must, in all cases, be civilians would be advisable.

General MacArthur was the first person to write down the idea that the Japanese constitution would renounce war. Researchers agree that the idea was first introduced between General MacArthur

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<sup>35</sup> Article 43 reads: the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. The 1907 Convention can be found at the website of Yale University Avalon Project, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>.

<sup>36</sup> Potsdam Declaration, *supra* notes 19 and 20.

<sup>37</sup> See TSUJIMURA, *supra* note 3, at 52-56.

<sup>38</sup> SUPREME COMMANDER FOR THE ALLIED POWERS, *supra* note 21, at 605.

<sup>39</sup> *Id.* at 41.

<sup>40</sup> The State-War-Navy Coordinating Committee (SWNCC), Reform of the Japanese Government System (SWNCC 228) (Jan. 7, 1946), available at <http://www.ndl.go.jp/constitution/shiryo/03/059shoshi.html>.

<sup>41</sup> Douglas H. MacArthur, the so-called MacArthur Note (Feb. 3, 1946), available at <http://www.ndl.go.jp/constitution/shiryo/03/072shoshi.html>. See SUPREME COMMANDER FOR THE ALLIED POWERS, *supra* note 21, at 102.

and Prime Minister Shidehara.<sup>42</sup> However, there has been a debate as to which one conceived the idea. Both claimed the other told them first, a debate now impossible to settle because both have passed away. The relevant part of the MacArthur note reads as follows:

## II

War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection.

No Japanese army, navy, or air force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.<sup>43</sup>

Brigadier General Whitney instructed Charles L. Kades, Deputy Chief, of the government section of SCAP, to draft a new Japanese constitution in accordance with the MacArthur note.<sup>44</sup> Kades thought renouncing war “even for preserving its own security” was unrealistic. Kades deleted the phrase when he discussed drafting a constitution with other staffs of the government section.<sup>45</sup> In his mind, a constitution should not prohibit war to any country to preserve its own security. General MacArthur and Brigadier General Whitney did not express an objection to this change.<sup>46</sup> The “renunciation of war” chapter of the first draft by GHQ, which was handed over to the Japanese government on February 13, 1946, reads as follows:

Article VIII War as a sovereign right of the nation is abolished. The threat or use of force is forever renounced as a means for settling disputes with any other nation.

No army, navy, air force, or other war potential will ever be authorized and no rights of belligerency will ever be conferred upon the State.

In the March second draft by Matsumoto, article 9, which renounces war,<sup>47</sup> was very similar to the above-quoted article 8 under the GHQ draft. It reads as follows:

Article 9. War, as a sovereign right of the nation, and the threat or use of force, is forever abolished as a means of settling disputes with other nations.

The maintenance of land, sea, and air forces, as well as other war potential, and the right of belligerency of the state will not be recognized.<sup>48</sup>

The most notable difference is that Matsumoto made the two sentences of each paragraph into one sentence. Still, in the Japanese language, “as a means for settling disputes with any other nation” was

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<sup>42</sup> ASHIBE, *supra* note 5, at 253; DOUGLAS MACARTHUR, REMINISCENCES 303(1964); Michitarō Shidehara, *Kenpō 9jō wo kyōyō sareta chichi, shidehara kijūrō no higeki* (Forced to take article 9, my father, Shidehara Kijuro’s tragedy), SHŪKAN BUNSHUN (March 26, 1981).

<sup>43</sup> MacArthur Note, *supra* note 41.

<sup>44</sup> KIICHIRO YASUZAWA, KENPŌ DAI 9 JŌ NO KAISHAKU [INTERPRETATION OF ARTICLE 9] 114-115 (1981).

<sup>45</sup> Kiyoshi Yamamoto, “*Shuyaku*” *kējisu shi wa kataru* [“Main person” Mr. Kades talked], MAINICHI NEWSPAPER, May 31, 1976 (on file with author).

<sup>46</sup> *Id.*

<sup>47</sup> The so-called “March second draft,” *reprinted in* ETO, *supra* note 28, at 238-255.

<sup>48</sup> SUPREME COMMANDER FOR THE ALLIED POWERS, *supra* note 21, at 625.

connected to only “[t]he threat or use of force,” but not to “[w]ar” in paragraph 1. However, under the English translation above, which was done by SCAP, it became ambiguous whether “as a means of settling disputes with other nations” was connected to “war.” In the March fifth draft and final draft which was submitted to the Diet, article 9 reads as follows:

Article IX. War, as a sovereign right of the nation, and the threat or use of force, is forever renounced as a means of settling disputes with other nations.

The maintenance of land, sea, and air forces, as well as other war potential, will never be authorized. The right of belligerency of the state will not be recognized.<sup>49</sup>

The final draft was further amended during the Diet session, as the Constitutional Amendment Committee chaired by Dr. Hitoshi Ashida proposed. The Committee introduced the phrases “aspiring sincerely to an international peace based on justice and order” to the top of paragraph 1 and “in order to accomplish the aim of the preceding paragraph” to the top of paragraph 2, among other changes of wordings.<sup>50</sup> Dr. Ashida reported to the Diet that the proposed changes aimed to express motives of renunciation of war and disarmament and that the meaning of article 9 was not changed because of the proposed change. However, he claimed that the change made it possible for Japan to rearm for its self-defense later.<sup>51</sup> This proposal was accepted by the Diet. The final article 9 reads:

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 a means of settling international disputes.

2. 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.

## V. Rearmament of Japan

The government interpretation of article 9 has changed as the international situation surrounding Japan and U.S. policy toward Japan has changed.

### A. Initial Disarmament

On the same day that Japan signed the instrument of surrender, September 2, 1945, General MacArthur issued General Order No. 1, which ordered all Japanese military officers to disarm completely.<sup>52</sup> By November 30, 1945, dismantlement of the Imperial Army and Navy was completed with the exception of a Navy mine-sweeping group.<sup>53</sup> The Far Eastern Commission (FEC) also imposed limitations on Japanese rearmament.<sup>54</sup> The FEC was composed of the representatives of the Soviet

<sup>49</sup> SUPREME COMMANDER FOR THE ALLIED POWERS, *supra* note 21, at 631.

<sup>50</sup> *Id.* at 73.

<sup>51</sup> See ASHIBE, *supra* note 5, at 260.

<sup>52</sup> KENPŌ CHŌSAKAI JIMUKYOKU, KENPŌ UNYŌ NO JISSAI NI TUIE NO DAISAN IINKAI HŌKOKUSHO [NUMBER THREE COMMITTEE REPORT REGARDING ADMINISTRATION OF THE CONSTITUTION] 117 (1961).

<sup>53</sup> *Id.* at 117-118.

<sup>54</sup> *Memorandum by the Officer in Charge of Japanese Affairs (Green) to the Director of the Office of Northeast Asian Affairs (Allison)* (July 19, 1950) in DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1950 Vol. VI, 1244-6 (1976). The FEC decisions are: (1) FEC-014/9 Basic Post-Surrender Policy for Japan (June 20, 1947); (2) FEC-084/21

Union, United Kingdom, United States, China, and seven other countries. The FEC formulated basic policies regarding occupied Japan and, on the request of any member, reviewed SCAP actions involving policy decisions.<sup>55</sup>

### B. Relevant Proceedings in the 90<sup>th</sup> (1946) Imperial Diet Session

When the Imperial Diet discussed the new constitution of Japan in 1946, Japan did not have any military. During the 90<sup>th</sup> session of the House of Representatives, when Fujio Hara, a House member, asked whether Japan must abandon self-defense right under the proposed article 9, then Prime Minister Shigeru Yoshida, the successor of Shidehara, answered that “the provision of the draft regarding renouncing war does not directly deny the right of self-defense, but as a result of denial of all war potential and the right of belligerency of the state under article 9, paragraph 2, [Japan] renounces even war based on the right of self-defense and the right of belligerency.”<sup>56</sup> In the same Diet session, when Prime Minister Yoshida answered questions from Sanzō Nosaka, a House member, he said:

Regarding the article of the draft constitution concerning renunciation of war, it looks as though you think war based on the self-defense right of the state is justifiable, but I think it is harmful to admit such a thing.<sup>57</sup> Most wars have been fought in the cause of self-defense, so that it is better to wage no war at all in any cases. To acknowledge and justify a war in self-defense would only serve to invite another war and would be harmful and unprofitable.<sup>58</sup>

As seen in Yoshida’s statement during the Diet session that discussed the new constitution, the government understood that all war potential was denied in paragraph 2 of article 9, although paragraph 1 of article 9 did not deny a Japanese right to self-defense.

### C. Continuation of Naval Activities

At the end of the war, there were over 100,000 American and Japanese-planted acoustic, magnetic, and moored mines remained scattered around Japan.<sup>59</sup> Japanese naval forces were the only ones skilled enough to perform the complex and time-consuming duty of minesweeping.<sup>60</sup> Although the Imperial Navy officially had been dissolved, units were, in fact, still operating for the purpose of

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Reduction of Japanese Industrial War Potential (Aug. 18, 1947); and (3) FEC-017/20 Prohibition of Military Activity in Japan and Disposition of the Japanese Military Equipment (Feb. 17, 1948).

<sup>55</sup> See Soviet-Anglo-American Communique (December 27, 1945), available at <http://www.yale.edu/lawweb/avalon/decade/decade19.htm>.

<sup>56</sup> Shigeru Yoshida’s answer at the House of Representatives on June 26, 1946, SHŪGIN GIJI SOKKIROKU (HOUSE OF REPRESENTATIVE STENOGRAPHIC RECORDS) 90<sup>th</sup> session, No. 6, printed in KENPŌ CHŌSAKAI JIMUKYOKU, TEIKOKU KENPŌ KAISEI SHINGIROKU (IMPERIARU CONSTITUTION AMENDMENT MINUTES), No. 5, 46-47 (March 1958). The author translated the quoted sentence.

<sup>57</sup> Shigeru Yoshida’s answer at the House of Representative on June 28, 1946, SHŪGIN GIJI SOKKIROKU (HOUSE OF REPRESENTATIVE STENOGRAPHIC RECORDS) 90<sup>th</sup> session, No. 8 printed in KENPŌ CHŌSAKAI JIMUKYOKU, *id.* at 68. The author translated the quoted sentence.

<sup>58</sup> *Id.* Translated in AUER, *supra* note 1, at 122.

<sup>59</sup> AUER, *supra* note 1, at 49. Shōgo Nose, Chōsen sensō ni shutsudō shita nihon tokubetsu sōkai tai [Special minesweepers dispatched to Korean war], at <http://www.dii.jda.go.jp/msdf/mf/special5.htm> (last visited Sept. 14, 2005).

<sup>60</sup> AUER, *supra* note 1, at 49. Shōgo Nose, *supra* note 49.

performing minesweeping duties. In 1948, the Diet enacted the Maritime Safety Agency Law.<sup>61</sup> The Agency now governed minesweepers.<sup>62</sup>

#### D. Instability of East Asia

The Communist threat to Far East Asia changed the situation regarding the security of Japan. In the Report by the U.S. State Department Director of the Policy Planning Staff, George F. Kennan, in March 1948, it was recommended that:

The United States tactical forces should be retained in Japan until the entrance into effect of a peace treaty. A final U.S. position concerning the post-treaty arrangements for Japanese military security should not be formulated until the peace negotiations are upon us. It should then be formulated in the light of the prevailing international situation and degree of internal stability achieved in Japan. If Russia has not been extensively weakened and sobered by that time or if Japanese society still seems excessively vulnerable in the political sense, we should either postpone the treaty or insist on a limited remilitarization of Japan, preferably under U.S. guidance and supervision. But if by that time the Russian situation should really have changed for better and if we are reasonably confident of the internal stability of Japan, we should aim at a complete demilitarization, guaranteed by an international treaty of the most explicit and concrete nature, to which the Russians would be a party.<sup>63</sup>

The Kennan report was incorporated, for the most part, in the Report by the National Security Council on Recommendations with Respect to United States Policy Toward Japan (NSC 13/2) of October 7, 1948.<sup>64</sup>

Obviously, Russia had “not been extensively weakened” in the following few years. The United States started to change its policy toward the disarmament of Japan. In his New Year’s statement of 1950 to the Japanese people, General MacArthur wrote that “[a]rticle 9 is based upon the highest of moral ideals, but by no sophistry of reasoning can it be interpreted as complete negation of the inalienable right of self-defense against unprovoked attack.”<sup>65</sup> This statement was somehow alarming for the Japanese people.

On June 25, 1950, North Korean forces invaded South Korea. The United Nations called upon its members to aid South Korea. U.S. President Truman authorized American troops in Korea to assist South Korea. A week later, the United Nations placed the forces of fifteen other member nations under U.S. command, and President Truman appointed General MacArthur as the supreme commander.<sup>66</sup> Because the U.S. army stationed in Japan was moved to Korea, General MacArthur needed to protect Japan, which had no military power. There was a fear that the Soviet Union would invade Japan from its northern

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<sup>61</sup> Kaijō hoanchō hō [Coast Guard Law], Law No. 36 of 1948.

<sup>62</sup> AUER, *supra* note 1, at 57.

<sup>63</sup> PPS 28 (Recommendations with Respect to U.S. Policy Toward Japan), March 25, 1948, *Report by the Director of the Policy Planning Staff (Kennan)* in DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1948, vol. VI, 631, 632 (1974). This was the established position of the Policy Planning staff. *Unsigned Memorandum by the Policy Planning Staff*, July 26, 1950 in DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1950, vol. VI, 1255, 1256 (1976).

<sup>64</sup> *Report by the National Security Council on Recommendations with Respect to United States Policy Toward Japan (NSC 13/2)*, in DEPARTMENT OF STATE, FOREIGN RELATIONS, 1948, vol. VI, at 858.

<sup>65</sup> MACARTHUR, *supra* note 38, at 304. Although in the book, when and where the statement was published is not explained, the statement matches with the Japanese translation of his 1950 New Year’s statement that was published in the Asahi and Mainichi Newspapers on January 1, 1950.

<sup>66</sup> *Korean War*, THE COLUMBIA ENCYCLOPEDIA (6<sup>th</sup> ed. 2003), available at Korean War, Yahoo! Reference, <http://education.yahoo.com/reference/encyclopedia/entry?id=26419>.

island, Hokkaido. On July 8, 1950, General MacArthur sent a letter to the Prime Minister Yoshida, which authorized establishing the National Police Reserve of 75,000 people, and adding 8,000 people to the Japan Coast Guard.<sup>67</sup> Though the expression used in the letter was “authorize... to establish” the National Police Reserve, it was based upon no such request from the Japanese government. This was simply an order from General MacArthur to the Japanese government.<sup>68</sup> Based on this letter, the National Police Reserve (*keisatsu yobitai*), which is the origin of the Self Defense Forces, was established.<sup>69</sup> SCAP could not instruct Japan to rearm because the FEC decisions imposed limitations on Japanese rearmament.<sup>70</sup> The arming or mobilization of Japanese people, other than police, was prohibited.

In order to establish the National Police Reserve, the government issued the National Police Reserve Order in August 1950.<sup>71</sup> When a government agency is established under the new Constitution, corresponding legislation by the Diet would be required. However, during the occupation, SCAP had super-constitutional power.<sup>72</sup> As a special measure under the occupation, the government could enact orders and ordinances when SCAP instructed Japan to do so based on the Imperial Order, “Regarding Orders Issued Based on Potsdam Declaration.”<sup>73</sup> Though the government did not submit a bill to establish the National Police Reserve, the Diet members asked many questions regarding the establishment of the National Police Reserve in the 8<sup>th</sup> Diet session. During the discussion, Prime Minister Yoshida stated “the main purpose [of the establishment of the National Police Reserve] is, entirely, to keep peace and the public order of present Japan, under the present conditions. Therefore, [the National Police Reserve] is not of militaristic nature.”<sup>74</sup>

At first, the National Police Reserve had only carbines and machine guns. However, as more equipment, including artillery, airplanes, and frigates, was provided by the United States after the Peace Treaty, the discussion on the interpretation of “war potential,” which Japan is prohibited to possess under the article 9 of the constitution, became more intense.<sup>75</sup>

### E. Peace Treaty and Security Agreement

From 1948 to early 1950, there was a difference of views between the U.S. State Department, the Defense Department, and SCAP regarding the post-war security of and against Japan, and the timing of

<sup>67</sup> GENDAI HŌSEI SHIRYŌ HENSANKAI, SENGO SENRYŌKA HŌREISHU [POST-WAR LAWS AND REGULATIONS UNDER OCCUPATION] 938 (1984).

<sup>68</sup> TETSUO MAEDA, *THE HIDDEN ARMY* 6 (1995).

<sup>69</sup> KENPŌ CHŌSAKAI JIMUKYOKU, *supra* note 52.

<sup>70</sup> *See* FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 50.

<sup>71</sup> Keisatsu yobitai rei [National Police Researve Order], Order No. 260 (Aug. 10, 1950).

<sup>72</sup> “Of course, because any peace treaty has not been agreed upon and Japan is under the occupation, it is inevitable that [Japan] is under SCAP’s super-constitution power and that the government must rely on the Potsdam order if the occupation policy requires.” Shozo Sase’s statement at House of Representatives on July 29, 1950, SHŪGIIN KAIGIROKU [HOUSE OF REPRESENTATIVE PLENARY SESSION MINUTES] 8th Diet Session, No. 10, 1 (July 29, 1950). The author translated it.

<sup>73</sup> Potsudamu sengen no judaku ni tomonai hassuru meirei ni kansuru ken [Regarding Orders Issued As a Result of Acceptance of Potsdam Declaration], Imperial Order 542 (1945). *See* Toshihiro Kato, *Horitsu bangō ga husarete inai hōritsu* [Laws without Law numbers], <http://houseikyoku.sangiin.go.jp/column/column032.htm> (last visited Feb. 14, 2006).

<sup>74</sup> Prime Minister Shigeru Yoshida’s answer at the House of Representatives on July 26, 1950, SHŪGIIN KAIGIROKU [HOUSE OF REPRESENTATIVE, PLENARY SESSION MINUTES] 8th Diet Session, No. 10, 2 (July 29, 1950).

<sup>75</sup> KENPŌ CHŌSAKAI JIMUKYOKU, KENPŌ UNYŌ NO JISSAI NI TUIE NO DAISAN IINKAI HŌKOKUSHO [REPORT OF THIRD COMMITTEE ON ACTUAL PRACTICE OF THE CONSTITUTION] 121 (1961).

the peace treaty.<sup>76</sup> However, in September 1950, a basic agreement between them was decided. The joint memorandum regarding a Peace Treaty in Japan was drafted by the Secretaries of State and Defense, and was approved by President Harry S. Truman on September 8, 1950.<sup>77</sup> The memorandum included the following:

f. It must not contain any prohibition, direct or implicit, now or in the future, of Japan's inalienable right to self-defense in case of external attack, and to possess the means to exercise that right;

g. The Treaty must give the United States the right to maintain armed forces in Japan, wherever, for so long, and to such extent as it deems necessary. Questions ... regarding the detailed implementation of the security arrangement will be subject of a supplementary bilateral agreement between the United States and Japan to come into effect simultaneously with the coming into effect of the Treaty.<sup>78</sup>

President Truman appointed John F. Dulles as the Special Representative of the President for negotiations concerning the Japanese Peace Treaty in January 1951. Though the United States wanted Japan to rearm and “assume at least part of the burden of its own defense,”<sup>79</sup> it was legally difficult under the FEC decisions. Also, the Japanese government was reluctant to rearm Japan.<sup>80</sup> At the last phase of the war, Japanese soil was bombed intensively and much infrastructure destroyed. As a consequence of the war, Japan lost at least 2.7 million servicemen and civilians, roughly three to four percent of the country's 1941 population.<sup>81</sup> The war led by the Japanese military brought Japanese devastation. In the mid-1940s, many Japanese died from hunger. Though the Japanese people's lives were getting better in 1950, there was no money for a standing military. Also, there was little desire to build a new military power in Japan, at that moment. During the peace treaty negotiation, however, Japan was pressured to rearm after the conclusion of the peace treaty by the United States. When Dulles went to Japan in January 1951, he told Prime Minister Yoshida that:

[I]t was necessary for all who expected to benefit by such a system [the United Nation's collective security system] to make contributions in accordance with their own means and abilities. ... [I]t was felt that Japan should be willing to make at least a token contribution and a commitment to a general cause of collective security.<sup>82</sup>

Due to the strong desire to terminate the occupation, finally, the Japanese government agreed that “with the coming into effect of the proposed peace and security treaties it would be necessary for Japan to undertake a program of rearmament.”<sup>83</sup> The treaty of peace with Japan was signed at San Francisco on

<sup>76</sup> See CHIHIRO HOSOYA, SANHURANSISUKO KŌWA E NO MICHİ [THE ROAD TO SAN FRANCISCO PEACE TREATY], 50-71 (1984).

<sup>77</sup> DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1950 vol. VI, 1293-96 (1976).

<sup>78</sup> *Id.* at 1294.

<sup>79</sup> *The Deputy to the Consultant (Allison) to the United States Political Advisor to SCAP (Sebald)* (January 19, 1951) in DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1951 vol. VI, 807 (1977).

<sup>80</sup> *Undated Memorandum by the Prime Minister of Japan (Yoshida) (Tokyo - 1951)* *id.* at 833-4.

<sup>81</sup> JOHN W. DOWER, EMBRACING DEFEAT 45 (1999).

<sup>82</sup> *Memorandum of Conversation, by the Deputy to the Consultant (Allison)* (January 29, 1951) in FOREIGN RELATIONS OF THE UNITED STATES, 1951 vol. VI, *supra* note 78, at 829. The author added explanation in parentheses.

<sup>83</sup> Editorial Note *in id.* at 849. See Shōichi Kozeki, *Amerika ni yoru gunkaku yōkyū no rekishiteki keiken* [Historical experience of demand for armament expansion by the United States] in HŌGAKU SEMINA ZŌKAN, SŌGŌ TOKUSHŪ SIRĪZU 15, NIHON NO BŌEI TO KENPŌ [DEFENSE OF JAPAN AND CONSTITUTION] 170, 171 (1981).

September 8, 1951 by Japan, the United States, and forty-seven other nations.<sup>84</sup> The Soviet Union refused to sign it. The Security Treaty between the United States and Japan was signed later on the same day.<sup>85</sup> The Peace Treaty went into effect in April 1952, officially terminating the United States military occupation and restoring Japan's independence.

The Peace Treaty states “Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter of the United Nations and that Japan may voluntarily enter into collective security arrangements.”<sup>86</sup> Although all occupation forces of the Allied Powers should be withdrawn from Japan as soon as possible, the stationing or retention of foreign armed forces in Japanese territory under any bilateral agreements between Japan and one of Allied Powers was permitted.<sup>87</sup> In the Japan-U.S. Security Treaty of 1951, the United States agreed to maintain its armed forces in and about Japan so as to deter armed attack upon Japan, “in the expectation, however, that Japan will itself increasingly assume responsibility for its own defense against direct and indirect aggression....”<sup>88</sup>

To comply with U.S. expectations, the Japanese government decided to increase Japan's defense ability.<sup>89</sup> On April 26, 1952, the Marine Guard (*kaijō keibitai*) was established within the Maritime Safety Agency.<sup>90</sup> On August 1 of the same year, the Security Agency (*hoanchō*) was established. The Maritime Safety Agency was placed under the Security Agency. The Marine Guard was reorganized as the Security Force (*keibitai*). At the same time, the National Police Reserve came under the Security Agency.<sup>91</sup> The National Police Reserve then was reorganized as the National Safety Force (*hoantai*) on October 15, 1952.<sup>92</sup> The Security Agency Law stated that the forces under it “take action when particular necessity is recognized in order to maintain peace and public order of the nation and protect lives and assets.”<sup>93</sup> The Security Force rented eight patrol frigates and fifty landing support ships from the United States.<sup>94</sup> The government explained to the Diet that both forces were still being maintained in the nature of a police force.<sup>95</sup>

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<sup>84</sup> Treaty of Peace with Japan, Sep. 8, 1951, 3 UST 3169, TIAS 2490 (1951). The Treaty can be found at various websites, such as the UCLA Center for East Asian Studies, available at <http://www.isop.ucla.edu/eas/documents/peace1951.htm>.

<sup>85</sup> Security Treaty Between the United States and Japan, U.S.-Japan, Sep. 8, 1951, 3 UST 3329, TIAS 2491. The Treaty can be found at various websites, such as the Avalon Project at Yale Law School, available at <http://www.yale.edu/lawweb/avalon/diplomacy/japan/japan001.htm#b1>.

<sup>86</sup> Treaty of Peace with Japan, *supra* note 84, art 5 (c).

<sup>87</sup> *Id.* art. 6 (a).

<sup>88</sup> Security Treaty Between the United States and Japan, *supra* note 85, preamble, 5<sup>th</sup> para.

<sup>89</sup> KENPŌ CHŌSAKAI JIMUKYOKU, THIRD COMMITTEE, *supra* note 75, at 122.

<sup>90</sup> Amendment to the Japan Coast Guard Law, Law No. 97 of 1952.

<sup>91</sup> KENPŌ CHŌSAKAI JIMUKYOKU, THIRD COMMITTEE, *supra* note 75, at 122-3.

<sup>92</sup> *Id.* at 123.

<sup>93</sup> Hoanchō hō [Security Agency Law], Law No. 265 of 1952, art. 4 (repealed in 1954).

<sup>94</sup> Charter for Lease of U.S. Vessels to Japan, U.S.-Japan, Nov. 12, 1952, 3 U.S.T. 5183; Senpaku taiyo kyōtei, Treaty No. 20 of 1952. See Tokutaro Kimura's statement at House of Representatives, SHŪGIIN KAIGIROKU [HOUSE OF REPRESENTATIVE PLENARY SESSION MINUTES], 15<sup>TH</sup> Diet Session, No. 24, at 14 (Feb. 2, 1953).

<sup>95</sup> Tokutaro Kimura's statement, *supra* note 94, at 10.

## F. Birth of SDF

In 1954, the bill to reorganize the Security Force in order to establish the SDF and the bill to establish the Defense Agency were discussed in the Diet. Because of the U.S. and Japan Mutual Defense Assistance Agreement (MSA Agreement), which was signed on March 8, 1954 and entered into force on May 1, 1954,<sup>96</sup> Japan was obliged to strengthen its defense capacities. ARTICLE VIII of the Agreement reads:

The Government of Japan . . . will make . . . the full contribution permitted by its manpower, resources, facilities and general economic condition to the development and maintenance of its own defensive strength and the defensive strength of the free world, take all reasonable measures which may be needed to develop its defense capacities, and take appropriate steps to ensure the effective utilization of any assistance provided by the Government of the United States of America.

The SDF Law bill stated that the primary purpose of the SDF was to defend the nation against direct or indirect invasion. During the discussion in the Diet, the ruling party began to state that Japan had the right to maintain some sort of force to defend herself.<sup>97</sup> The bill was passed by the Diet and, subsequently, the Security Agency was reorganized as the Self Defense Agency (*bōeichō*).<sup>98</sup> The Security Forces were also reorganized as the SDF.<sup>99</sup>

Diet member Junzō Inamura's statement, when he introduced the SDF bill to the plenary session of the House of Representative, should be noted. He stated, as a representative of the Cabinet Committee that examined the bill before the plenary session, that many members in the Committee criticized the government because of the ambiguity of the relationship between the bill and article 9 of the Constitution. Among other things, he detailed their concern that after the MSA Agreement became effective, Japan would have obligations under the right of collective defense, and, further, would be obliged to dispatch the SDF overseas. The other doubt he mentioned was that the government interpretation of article 9 ultimately would allow the unlimited increase in self-defense capability under the name of self-defense.<sup>100</sup> When the House of Councillors passed the SDF Law, it also passed the Resolution on Ban of Dispatch of SDF to Abroad.<sup>101</sup> It was feared that the MSA Agreement would lead Japan to dispatch the SDF, not to defend Japan, but for the collective defense of its ally.

At the Budget Committee meeting on December 21, 1954, the Cabinet answered that the SDF was outside the scope of "war potential" in article 9, paragraph 2 of the Constitution, because the right of self-defense was not prohibited by article 9. Possession of the necessary force to defend Japan is not

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<sup>96</sup> Mutual Defense Assistance Agreement, U.S.-Jp., Mar. 8, 1954, 5 U.S.T. 661.

<sup>97</sup> See SHŪGIIN KAIGIROKU [HOUSE OF REPRESENTATIVE PLENARY SESSION MINUTES], 19<sup>th</sup> Diet Session, No. 45, 5 (May 7, 1954).

<sup>98</sup> Bōeichō secchihō [Self Defense Agency Establishment Law], Law No. 164 of 1954.

<sup>99</sup> Jieitaihō [Self Defense Forces Law], Law No. 165 of 1954.

<sup>100</sup> HOUSE OF REPRESENTATIVE MINUTES, 19<sup>th</sup> Diet Session, No. 45, *supra* note 97.

<sup>101</sup> House of Councillors, Jieitai no kaigai shutsudō kinshi ketsugi [Resolution on Ban of Dispatch of SDF to Abroad] (June 2, 1954).

prohibited by the Constitution.<sup>102</sup> On the next day, at the same committee meeting, the Cabinet expressed its official interpretation of the Constitution:

The Constitution did not deny the self-defense right; Japan renounced war, but did not renounce the right to struggle in order to defend itself;

Establishment of the SDF is not against the Constitution because SDF's mission is self-defense and its ability is limited to necessary and adequate levels of self-defense.<sup>103</sup>

Though the government could establish the SDF, Japan's self-defense right must be limited because of the constitutional restriction. The government has stated that there are three requirements which must be met in order to use the self-defense right: (1) there is a present and wrongful danger of invasion to Japan; (2) no other appropriate measures exist to defend Japan; and (3) the use of force to defend Japan is limited to the extent only minimally necessary.<sup>104</sup> Japan adopted the exclusively defense-oriented policy. The Cabinet has changed its members frequently, but it has not changed these interpretations of article 9.

## VI. Cabinet Legislation Bureau

The Cabinet has maintained a mostly consistent interpretation of article 9 since the new Constitution became effective. The Cabinet Legislation Bureau (CLB) is the office that has created the legal theory underlying the government interpretation of the constitution and has kept that interpretation consistent. The CLB was established under the Cabinet.<sup>105</sup> The Cabinet and ministries consult with the CLB regarding various legal matters.<sup>106</sup> All bills to be submitted to the Cabinet meeting, Cabinet Order drafts, and treaties to be ratified are examined by the CLB before the Cabinet meeting.<sup>107</sup> CLB Directors General have been invited to the Diet meetings and answered questions from Diet members. The CLB Directors General have answered questions regarding article 9 at the Diet or its committees' meetings.

The CLB has been pressured to change its interpretation of article 9 by some Diet members or other conservative groups.<sup>108</sup> The former CLB Director General, Ichirō Yoshikuni, stated at the Budget Committee of the House of Representative that a law should be interpreted objectively, with only one meaning, and correctly, and that the Executive branch must never change it indiscriminately.<sup>109</sup> When in 1994 the CLB was pressured to change its interpretation regarding the collective self-defense right and article 9 of the Constitution, the CLB expressed their opinion that, when the government tries to pursue a

<sup>102</sup> Director General of the Cabinet Legislative Bureau, Shūzō Hayashi's answer at Budget Committee of House of Representatives, YOSAN IIN KAIGIROKU [BUDGET COMMITTEE MINUTES, HOUSE OF REPRESENTATIVES], 21st Diet Session No. 1 (Dec. 21, 1954).

<sup>103</sup> Director General of the Defense Agency, Seiichi Ohmura's answer at Budget Committee of House of Representatives, YOSAN IIN KAIGIROKU [BUDGET COMMITTEE MINUTES, HOUSE OF REPRESENTATIVES], 21st Diet Session, No. 2, 1 (Dec. 22, 1954).

<sup>104</sup> Director General of CLB, Tatsuo Satō's answer at Cabinet Committee of House of Representatives, NAIKAKU IIN KAIGIROKU [CABINET COMMITTEE MINUTES, HOUSE OF REPRESENTATIVES], 19th Diet Session, No. 20, 2 (Apr. 6, 1954).

<sup>105</sup> Naikaku hōseikyoku secchi hō (CLB Establishment Law), Law No. 252 of 1952, *as amended*, art. 1.

<sup>106</sup> *Id.* art. 3, item 3.

<sup>107</sup> *Id.* art. 3, item 1.

<sup>108</sup> SHUN ŌIDE, SHIN GAIDORAIN TO NICHI-BEI ANPO NO HENSHITSU [NEW GUIDELINES AND CHANGE OF JAPAN-U.S. SECURITY AGREEMENT], 143-4 (1998).

<sup>109</sup> CLB Director General, Ichirō Yoshikuni's statement, YOSAN IIN KAIGIROKU [BUDGET COMMITTEE MINUTES, HOUSE OF REPRESENTATIVES], 75<sup>th</sup> Diet Session, No. 9, 7 (Feb. 7, 1975).

policy which cannot be implemented unless the interpretation of the Constitution is reversed, the government must begin to amend the Constitution.<sup>110</sup>

One of the reasons that the CLB can keep consistent interpretations of the laws, despite political pressures, is its stable personnel system. The CLB has twenty-six counselors<sup>111</sup> who are experts on legal matters.<sup>112</sup> All ministries, the National Police Agency, and the Cabinet office dispatch at least one counselor to the CLB.<sup>113</sup> Usually after five years of service, counselors go back to the original office. Counselors who excel among the counselors from the five most powerful ministries (Ministries of Justice; Finance; Agriculture, Fishery and Forestry; Economy, Trade and Industry; and Internal Affairs and Communication) will be promoted to manager. The Director General is chosen in turn from all the managers, except for the Ministry of Agriculture.<sup>114</sup> The other reason for consistent interpretations of the laws is the CLB's authority and reputation, which has been earned over many years. The CLB's record was such that any bill examined by it had never been judged unconstitutional by the Supreme Court,<sup>115</sup> although, when the Supreme Court declared a part of the Public Office Election Law unconstitutional in 2005,<sup>116</sup> that record was broken.

The CLB will resist pressure to change its interpretation of article 9 of the Constitution. However, while the current article 9 is maintained, the pressure will be increased as time goes by. The CLB may prefer the amendment of article 9 now instead of being pressured to give authority to a new interpretation of article 9.

## VII. Judicial Interpretation

The Supreme Court has not yet decided directly whether the SDF is constitutional though many lawsuits have been filed regarding the SDF and the Constitution. Article 81 of the constitution states that the Supreme Court has the “power to determine the constitutionality of any law, order, regulation or official act.” It is legally possible, therefore, for the Supreme Court to examine the legislation relating to article 9. However, it appears that the Supreme Court is determined not to render an opinion on article 9 of the constitution. Courts have established the so-called “judicial negativism” custom, influenced by the *Ashwander* rules,<sup>117</sup> rules shown in Justice Brandeis' concurring opinion in *Ashwander v. TVA* in the United States.<sup>118</sup>

In the so-called *Keisatsu yobitai iken soshō* (Constitutionality of the National Police Reserve case), a member of the Diet and the Socialist Party filed a lawsuit to confirm that the establishment of the

<sup>110</sup> AKIRA NAKAMURA, *SENGO SEIJI NI YURETA KENPO 9 JO* [ARTICLE 9 OF THE CONSTITUTION TREMBLED BY POST-WAR POLITICS], 171 (2<sup>d</sup> ed. 2001).

<sup>111</sup> Naikaku hoseikyoku secchi ho sekō rei [Enforcement Order of CLB Establishment Law], Order No. 290 of 1952, art. 8.

<sup>112</sup> They are most likely not members of the bar. Most bureaucrats do not have bar membership. See Richard S. Miller, *Apples v. Persimmons: The Legal Profession in Japan and the United States*, 39 J. LEGAL EDUC. 1, 27, 30 (1989).

<sup>113</sup> NAKAMURA, *supra* note 110, at 18.

<sup>114</sup> *Id.* at 19.

<sup>115</sup> *Id.* at 29-31.

<sup>116</sup> 59 MINSHŪ (S. Ct., Grand bench Sept. 14, 2005).

<sup>117</sup> TSUJIMURA, *supra* note 3, at 511-2.

<sup>118</sup> 297 U.S. 288, 346 (1936).

National Police Reserve under the National Police Reserve Order was unconstitutional.<sup>119</sup> The Supreme Court dismissed the case in 1952, reasoning that it could not determine the constitutionality of a law or an official act in the abstract and in the absence of any concrete legal dispute.

In the so-called *Sunakawa* case, the Supreme Court held in *dictum* that Article 9:

renounces the so-called war and prohibits the maintenance of the so-called war potential, but certainly there is nothing in it which would deny the right of self-defense inherent in our nation as a sovereign power. The pacifism advocated in our Constitution was never intended to mean defenselessness or nonresistance.<sup>120</sup>

Although the interpretation of article 9 was raised as an issue, the Sapporo District Court in the so-called *Eniwa* case,<sup>121</sup> the Tokyo High Court and the Supreme Court in the so-called *Hyakuri kichi* (Hyakuri base) case,<sup>122</sup> and Niigata District Court and Tokyo High Court in *Konishi hansen jieikan* (Konishi, Anti-war SDF personnel) case<sup>123</sup> did not mention anything about the constitutionality of the SDF when they rendered judgments. In the *Eniwa* case, the accused cut the phone lines of a SDF maneuvers facility. The accused was indicted under the SDF Law, which punishes the act of destroying materials that served defensive purposes. The court judged that the phone lines were not material that served defense purposes and acquitted the accused. The court stated in *dictum* that the constitutionality of a law could be examined only to the extent necessary to solve the concrete legal dispute. Since the accused was acquitted, the court did not have to decide the issue of constitutionality. There was strong criticism of the judgment, stating the court did not understand modern war at all.<sup>124</sup> The critique was that the courts did not appreciate that bombs and tanks are not the only materials that serve a defensive purpose.

In the so-called *Naganuma* case, the Sapporo District Court in 1973 held the SDF unconstitutional,<sup>125</sup> but the judgment was reversed by the Sapporo High Court on technical grounds. The Supreme Court confirmed the High Court judgment. The Sapporo High Court in the *Naganuma* case stated in *dictum*, by using “state governance” theory, that whether the establishment of SDF was constitutional was basically outside the scope of judicial review.<sup>126</sup> The court stated that “[t]he choice of means of defense is nothing other than a determination of the most fundamental national policy, requiring both a high level of specialized technical judgment and a high level of political judgment.”<sup>127</sup> The “state governance” theory was developed between Japanese scholars under the post-war Constitution by referring to French *acte de gouvernement*, German *Regierungsakt*, and the United States’ political question theory.<sup>128</sup> Some high courts and district courts adopted this theory in order to avoid the

<sup>119</sup> 6 MINSHŪ 9, 783 (S. Ct. Oct. 8, 1952).

<sup>120</sup> *Sunakawa* case, *supra* note 4, at 3232.

<sup>121</sup> HANREI JIHŌ 476, 25 (Sapporo Dist. Ct. Mar. 29, 1967).

<sup>122</sup> 43 MINSHŪ 6, 385 (S. Ct. 3<sup>rd</sup> petit bench June 20, 1989).

<sup>123</sup> 13 Keiji saiban geppō 3, 251 (Niigata Dist. Ct. Mar. 27, 1981).

<sup>124</sup> Self Defense Agency officer’s comment, cited in Nobuyoshi Ashibe, *Hōritsu kaishaku ni yoru kenpō handan no kaihi in KENPO HANREI HYAKUSEN*, 362, 363 (4<sup>th</sup> ed. 2000).

<sup>125</sup> HANREI JIHŌ 712, 24 (Sapporo Dist. Ct., Sep. 7, 1973). The translation is available in LAWRENCE W. BEER and HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990*, 83 (1996).

<sup>126</sup> HANREI JIHŌ 821, 21 (Sapporo High Ct. Aug. 5, 1976). The translation is available in BEER, *supra* note 125 at 112.

<sup>127</sup> BEER, *supra* note 125. at 118.

<sup>128</sup> Sadao Morone, *Tōchi kōi I – Tomabechi jiken in KENPŌ HANREI HYAKUSEN [A Hundred Selected Constitutional Cases]* (Nobuyoshi Ashibe, *et al.* eds., 4<sup>th</sup> ed. 2000).

examination of the constitutionality of the SDF.<sup>129</sup> Many other lawsuits have been filed regarding the SDF's activities. However, courts have denied standing to sue in those cases.<sup>130</sup> Most recently, citizens groups filed lawsuits against the Japanese government in order to stop dispatch of a SDF troop to Iraq and to confirm the unconstitutionality of such a dispatch.<sup>131</sup>

### VIII. Collective Defense

As Japan and the United States cooperate in the area of security, Japan's ability to participate in a collective defense system is becoming a more important issue. Collective defense had not been discussed when the Japanese Constitution was enacted. The government, at first, took the view that even individual defense would be restricted under the article 9.<sup>132</sup> Collective defense was debated when the Peace Treaty and the Japan-United States Security Agreement were submitted to the Diet for the ratification.<sup>133</sup> The Peace Treaty admitted Japan's right of collective self-defense referred to in Article 51 of the Charter of the United Nations.<sup>134</sup> The 1951 Japan-United States Security Agreement reads:

The Treaty of Peace recognizes that Japan as a sovereign nation has the right to enter into collective security arrangements, and further, the Charter of the United Nations recognizes that all nations possess an inherent right of individual and collective self-defense.

In exercise of these rights, Japan desires, as a provisional arrangement for its defense, that the United States of America should maintain armed forces of its own in and about Japan so as to deter armed attack upon Japan.

When, at the House of Councillors' Peace Treaty and Japan-United States Security Agreement Special Committee, he was asked whether the government took a position that Japan can attack an aggressor based on the collective self-defense right in case a United States military base in Japan was attacked, Kumao Nishimura, the Director-General of Treaty Bureau, Ministry of Foreign Affairs, stated that Japan had a collective defense right, but had decided against war potential under article 9 of the constitution.<sup>135</sup> Therefore, Japan could not attack such an aggressor. When the Diet held debates on the Mutual Defense Agreement Between Japan and the United States in 1954,<sup>136</sup> the government

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<sup>129</sup> Toshihiro Yamauchi, *Jieitai to tōchikōi – Naganuma jiken kososhin* [SDF and state governance – Appealed Naganuma case judgment] in *KENPŌ HANREI HYAKUSEN*, id. 366, 367.

<sup>130</sup> See LOVEPEACE ORGANIZATION, *Jieitai kanbojia hahei soshō* (ōsaka soshō) saikō saibansho hanketsubun (Supreme Court judgment on dispatch of SDF to Cambodia), <http://www.lovepeace.org/ks-m/peace-st/kansai/kan-sai.html> (last visited Feb. 14, 2006).

<sup>131</sup> See the website of Iraku hahei iken soshō no kai [Organization for plaintiff claiming unconstitutionality of the SDF dispatch to Iraq], [http://comcom.jca.apc.org/iken\\_tokyo/](http://comcom.jca.apc.org/iken_tokyo/) and linked websites, [http://comcom.jca.apc.org/iken\\_tokyo/f\\_link.html](http://comcom.jca.apc.org/iken_tokyo/f_link.html). (last visited Feb. 14, 2006).

<sup>132</sup> See the discussion in section B, at page 9, *supra*, and Prime Minister Shigeru Yoshida's June 26, 1946 answer to questions regarding the new constitution at the House of Representatives, *supra* note 56.

<sup>133</sup> KIYOFUKU CHŪMA, *SAIGUNBI NO SEIJIGAKU* (POLITICS ON REARMAMENT), 129-131 (1985).

<sup>134</sup> Peace Treaty with Japan, *supra* note 84, art 5 (c).

<sup>135</sup> Kumao Nishimura's answer at House of Councillors, PEACE TREATY AND JAPAN-US SECURITY AGREEMENT SPECIAL COMMITTEE MINUTES, HOUSE OF COUNCILLORS, 12th Diet Session, No. 12, 5 (Nov. 7, 1951).

<sup>136</sup> Mutual Defense Assistance Agreement Between the United States of America and Japan, U.S.-Japan, March 8, 1954, 5 U.S.T. 661. *Nihonkoku to amerika gasshūkoku to no aida no sōgo bōei enjo kyōtei*, Treaty No. 6 of 1954.

representative also stated Japan could not act based on the collective self-defense right under the Constitution.<sup>137</sup>

When the Japan-US Security Agreement was revised in 1960,<sup>138</sup> there were extensive protests against the agreement in Japan.<sup>139</sup> The Diet had heated debates on it. The collective self-defense right was also discussed in the Diet. The discussion focused on two issues: (1) what is the collective self-defense right; and (2) whether it is an act of collective self-defense if Japan reacts to an attack on a U.S. base in Japan.<sup>140</sup> Article 5 of the new Security Agreement reads as follows:

Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.

Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. ....

CLB Director General, Shūzō Hayashi, answered in the Foreign Affairs Committee, House of Councillors on September 2, 1959, that it is an act of individual self-defense when Japan defends herself against an attack by a foreign country. If a U.S. base in Japan is attacked, such attack necessarily involve invasion of Japan's land and sea. If the United States joins Japan's defense response in such a case, the U.S. activities can be labeled as a kind of act of collective self-defense. If we then use the word as such, Japan has the right to collective self-defense. However, at the same time, such an act can be explained by Japan's right to individual self-defense. The United States defends Japan based on a collective self-defense agreement, but Japan defends herself based on an individual self-defense right.

Since then, from time to time, the government has added explanations of its interpretation on the relationship between collective self-defense and the Constitution. For example, the dispatch of SDF troops abroad, fueling U.S. ships, and use of force against attacks by aggressors on foreign ships that bring commodities to Japan, have been discussed in the Diet and explained as permitted by Japan's right of individual self-defense. Though everything has been explained by referring to a right of individual self-defense, and although the right of individual self-defense does not have concrete boundaries, the government has still not changed its basic position: Japan owns collective self-defense rights, but cannot act on them because of the constitutional restriction.<sup>141</sup>

## X. Recent Legislation

There have been gradual developments regarding the SDF and article 9 of the constitution from the 1960s to the 1980s. However, since the Gulf War in 1990, the climate of security policy in Japan has

<sup>137</sup> Takezō Shimoda's answer at House of Representative, GAIMU IIN KAIGIROKU [FOREIGN AFFAIRES COMMITTEE MINUTES, HOUSE OF REPRESENTATIVE], 19<sup>th</sup> Diet Session, No. 57, 4 (June 3, 1954).

<sup>138</sup> Treaty of Mutual Cooperation and Security Between Japan and The United States of America (Japan-U.S. Security Agreement), U.S.-Japan, January 19, 1960, 11 U.S.T. 1632; Nihonkoku to amerika gasshūkoku to no aida no sōgo hoshō oyobi anzen hoshō jōyaku, Treaty No. 6 of 1960, available at <http://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html>.

<sup>139</sup> GEORGE R. PACKARD, III, PROTEST IN TOKYO: THE SECURITY TREATY CRISIS OF 1960 (1966).

<sup>140</sup> CHŪMA, *supra* note 133, at 133.

<sup>141</sup> The government clarified its opinion in writing in *Inaba Seiichi giin ni taisuru tōbensho* [Written answer from Prime Minister Zenkō Suzuki to House member Seiichi Inaba], (May 29, 1981).

changed more rapidly.<sup>142</sup> There was bitter feeling that, even though Japan provided huge amounts of money to support the Gulf War, the United States and Kuwait did not appreciate it sufficiently.<sup>143</sup> Conservatives gained public recognition by emphasizing international contributions and the importance of the United Nations' decisions.<sup>144</sup>

### A. PKO Law

In 1992, the Law Concerning Cooperation for United Nations Peace Keeping Operations and Other Operations (PKO Law) was passed.<sup>145</sup> As stated before, the House of Councillors drafted a resolution in 1954, which banned the dispatch of SDF overseas, with the pacifism adopted in the Constitution as an underlying basis for the resolution. To avoid constitutional problems, many restrictions were imposed on those SDF troops to be dispatched overseas in the PKO Law. The SDF troops would not be under the U.N. command and would conduct only activities in which use of force would not be expected, *e.g.* medical care and support goods delivery in non-combat areas, and in non-combat (post-conflict) roles, such as constructing roads, and helping run refugee camps and hospitals. The SDF units have been dispatched to Cambodia, Mozambique, the Golan Heights, Rwanda and Honduras since 1992.<sup>146</sup>

At first, the provisions of the law which allowed the SDF troops to join peacekeeping operations, such as deployment to prevent the outbreak of conflict; operation of check-points to prevent supply of arms; and collection, storage, and disposal of arms, were frozen.<sup>147</sup> The ruling parties did not think such operations were the “use of forces” stated in article 9, so that they could be allowed under the constitution. However, the ruling parties had to compromise because opposition to expand SDF rolls was strong. This restriction was strongly discouraged by the so-called Armitage report,<sup>148</sup> discussed below. Later, in December 2001, the Diet activated the provisions.<sup>149</sup>

### B. Guidelines and Situations in Areas Surrounding Japanese Law

The suspicion in regard to nuclear weapons owned by North Korea and North Korea's missile test over the Japanese mainland in 1993 drove the Japanese to seek concrete security measures against North Korea.<sup>150</sup> It became possible for Japan to review the Japan-US security agreement and the guidelines, in order to strengthen it. The Guidelines for U.S.-Japan Defense Cooperation of 1978 were made during the Cold War era. Because the Cold War was dissolved, security situations had changed. The potential for instability and uncertainty in the Asia-Pacific region became of greater importance for the security of both Japan and the United States. Then President Bill Clinton and Prime Minister Ryūtarō Hashimoto agreed

<sup>142</sup> MOTOFUMI ASAI, SHUDANTEKI JIEIKEN TO NIHONKOKU KENPŌ [THE COLLECTIVE DEFENSE RIGHT AND THE CONSTITUTION OF JAPAN], 184-90 (2002).

<sup>143</sup> NAKAMURA, *supra* note 110, at 325.

<sup>144</sup> ASAI, *supra* note 142, at 187.

<sup>145</sup> Kokusai rengō heiwa iji katsudō tō ni kansuru kyōryoku ni kansuru hōritsu (PKO Law), Law No. 79 of 1992, *as amended*.

<sup>146</sup> Japan Defense Agency, Kokusai shakai ni okeru Jieitai no katsudō jōkyō [SDF's activities in the international society] (May 31, 2005), available at <http://www.jda.go.jp/katudou.htm>.

<sup>147</sup> PKO Law, Law No. 79 of 1992, *as amended*, supplementary provision art 2 (repealed by Law No. 157 of 2001).

<sup>148</sup> Armitage Report, *infra* note 181.

<sup>149</sup> Law No. 157 of 2001.

<sup>150</sup> ASAI, *supra* note 142, at 191.

to initiate a review of the 1978 Guidelines in April 1996.<sup>151</sup> On September 23, 1997, the new “Guidelines for U.S.-Japan Defense Cooperation” were approved by the Japan-U.S. Security Consultative Committee.<sup>152</sup> These Guidelines were not submitted to the Diet for its approval because they were not in the form of a treaty. The Guidelines state “Japan will conduct all its actions within the limitations of its Constitution and in accordance with such basic positions as the maintenance of its exclusively defense-oriented policy and its three non-nuclear principles” in Part II, 2. However, its Part V, Cooperation in Situations in Areas Surrounding Japan That Will Have An Important Influence on Japan’s Peace And Security, stipulates details of Japan’s cooperation with the U.S. military. It includes problematic provisions under the view of the constitution<sup>153</sup> and even under the Japan-U.S. Security Agreement.<sup>154</sup> The Japan-U.S. Security Agreement states that both countries will cooperate in cases where either country is attacked within Japan’s territory.<sup>155</sup> However, for the international peace and security in the Far East, Japan is obliged only to provide military bases for the United States.<sup>156</sup>

To implement Part V of the new Guidelines, the Law Concerning Measures in Order to Secure Peace and Safety of Japan in Situations in Areas Surrounding Japan (hereinafter “Situations in Areas Surrounding Japan Law”) was enacted in 1999.<sup>157</sup> Because of strong opposition, more than 120 hours were spent in the special committees of both Houses of the Diet for the discussion of the bill.<sup>158</sup> Article 2, paragraph 2 reads: the operations of the counter measures shall not come under the threat or use of force. “ ‘[T]he threat or use of force’ is prohibited in article 9, paragraph 1 of the Constitution. The Law only allows operations in the ‘rear area’.<sup>159</sup> The ‘rear area’ is defined as Japan’s territory, and public sea around Japan where no act of hostility is and will not be throughout the term in which the operations are expected and the upper air thereof.”<sup>160</sup> Use of weapons is authorized in the law during the rear area support operation and search and rescue operation, if it is necessary.<sup>161</sup> The rear area support includes supply of materials, except weapons and ammunition, and petroleum, oil and lubricants (POL) to U.S. vessels and aircraft at SDF facilities and civilian ports and airports and use of vehicles and cranes for transportation of materials, personnel and POL.<sup>162</sup>

<sup>151</sup> See Japan-U.S. Joint Declaration on Security-Alliance for the 21st Century (Apr. 17, 1996), available at [http://www.jda.go.jp/e/policy/f\\_work/sengen\\_.htm](http://www.jda.go.jp/e/policy/f_work/sengen_.htm).

<sup>152</sup> U.S.-Japan Security Consultative Committee, Completion of the Review of the Guidelines for U.S.-Japan Defense Cooperation (Sept. 23, 1997), available at [http://www.jda.go.jp/e/policy/f\\_work/sisin1e.htm](http://www.jda.go.jp/e/policy/f_work/sisin1e.htm).

<sup>153</sup> See Robert A. Fisher, *The Erosion of Japanese Pacifism: The Constitutionality of the 1997 U.S.-Japan Defense Guidelines*, 32 CORNELL INT’L L. J. 2, 393 (1999).

<sup>154</sup> Japan-U.S. Security Agreement, *supra* note 138.

<sup>155</sup> *Id.* art. 5.

<sup>156</sup> *Id.* art. 6.

<sup>157</sup> Shūhen jitai ni saishite wagakuni no heiwa oyobi anzen o kakuho suru tame no sochi ni kansuru hōritsu (Situations in Areas Surrounding Japan Law), Law No. 60 of 1999.

<sup>158</sup> Toshihiro Yamauchi, Shin gaidorain kanren hō no menpō jō no mondai ten (Constitutional problems of new Guidelines’ related laws), JURISUTO 1160, 36 (1999).

<sup>159</sup> See Situations in Areas Surrounding Japan Law, Law No. 60 of 1999, art. 1. para. 1.

<sup>160</sup> *Id.* art. 3, para. 1, item 3.

<sup>161</sup> *Id.* art. 11.

<sup>162</sup> *Id.* art. 6.

The distinction between the rear area and the combat area is highly theoretical. Many doubt whether there is a clear line. Even if such distinction is possible, “use of weapons” in the rear area can be “use of force.”<sup>163</sup> Many scholars<sup>164</sup> and minority party members<sup>165</sup> think the Law is unconstitutional.

### C. Anti-Terrorism Special Measures Law

Junichirō Koizumi became Japan's fifty-sixth prime minister on April 26, 2001.<sup>166</sup> In his first press conference as the Prime Minister, he stressed the friendly relationship between Japan and the United States.<sup>167</sup> He also stated that it is preferable to amend the Constitution to enable Japan to act based on a collective defense right.

After the terrorist attacks on September 11, 2001 in the United States, Deputy Secretary of State Richard Armitage had sought Japan's cooperation in U.S. campaigns against terrorism by telling Japanese Ambassador Shunji Yanai to “show the flag” on September 15, 2001.<sup>168</sup> Japan enacted special legislation: 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 September 11, 2001 in the United States of America as well as Concerning Humanitarian Measures Based on the Relevant Resolutions of the United Nations (the Anti-Terrorism Special Measures Law).<sup>169</sup> Because the Situations in Areas Surrounding Japan Law covers only areas surrounding Japan, which excludes Afghanistan, Japan needed new legislation to support the United States military action there. It took only twenty-four days for the Diet to pass the Anti-Terrorism Special Measures Law.<sup>170</sup> The constitutionality of the bill was not fully discussed during the legislative process. The bill was supported by the three ruling parties -- the Liberal Democratic Party, New Kōmeitō and the New Conservative Party, who controlled enough votes to pass the bill. Because the U.S. was already deploying its military forces, the ruling parties rushed to pass the legislation and failed to conduct a thorough debate.<sup>171</sup> Under the Anti-Terrorism Special Measures Law, the SDF were allowed to operate

<sup>163</sup> Ichirō Urata, *Buryoku no kōshi/ buki no shiyō to shūdan teki jieie ken* [Use of force/ use of weapons and collective defense right] in NICHIBEI SHIN GAIDORAIN TO SHŪHEN JITAI HŌ [JAPAN-US NEW GUIDELINES AND SITUATIONS IN AREAS SURROUNDING JAPAN LAW] 78 (Toshihiro Yamauchi ed., 1999).

<sup>164</sup> TSUJIMURA, *supra* note 3, at 130; Urata, *id.*; Yamauchi, *supra* note 158; ASAI, *supra* note 142, at 198.

<sup>165</sup> Fusen e no nettowaku, *Shuhen jitai hō seiritsu igo no ugoki* [Movement after enactment of Situations in Areas Surrounding Japan Law] (1999 nen 5 gatsu ~ 9 gatsu [May 1999-Sept. 1999]), available at <http://www.jca.apc.org/~husen/igonougoki.htm>.

<sup>166</sup> Koizumi names new Cabinet, JAPAN TIMES (Apr. 27, 2001), available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20010427a1.htm>.

<sup>167</sup> Koizumi naikaku sōridaijin kisha kaiken [Prime Minister Koizumi press conference] (Apr. 27, 2001), available at <http://www.kantei.go.jp/jp/koizumispeech/2001/0427kisyakaiken.html>.

<sup>168</sup> Armitage wants bills on SDF role passed soon, JAPAN TIMES, Oct. 7, 2001, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20011007a2.htm>.

<sup>169</sup> Heisei jūsan nen ku gatsu jūichi nichi no amerika gasshūkoku ni oite hassei shita terorisuro ni yoru kōgeki tō ni taiō shite okonawareru kokusai rengō kenshō no mokuteki tassei no tame no shogaikoku no katsudō ni taishite wagakuni ga jissai suru sochi oyobi kanren suru kokusai rengō ketsugi tō ni motodoku jindō teki sochi ni kansuru tokubetsu sochi hō (Anti-Terrorism Special Measures Law), Law No. 113 of 2001. A summary in English is available at the website of the Embassy of Japan, Diet of Japan Passed the Anti-Terrorism Special Measures Law (Oct. 29, 2001), available at <http://www.embjapan.org/english/html/pressreleases/2001/102901.htm>.

<sup>170</sup> See House of Representative, *Gian keika jōhō* [Information of bill], [http://www.shugiin.go.jp/itdb\\_gian.nsf/html/gian/keika/1D65E4E.htm](http://www.shugiin.go.jp/itdb_gian.nsf/html/gian/keika/1D65E4E.htm) (last visited Feb. 14, 2006).

<sup>171</sup> A green light for antiterrorism bill, JAPAN TIMES, Oct. 18, 2001, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?ed20011018a1.htm>.

on foreign soil for the first time. According to the Law, Japan still needs to obtain consent from the relevant governments before dispatching the SDF. The SDF troops are authorized to provide non-combatant and humanitarian support,<sup>172</sup> including the transport of weapons and ammunition, to the U.S.-led Coalition in the Indian Ocean. It eased restrictions on the use of weapons, allowing SDF personnel to protect not only themselves but also those “who have come under their control,” such as refugees and injured soldiers of other countries.<sup>173</sup> Maritime Self-Defense Force supply vessels and destroyers were dispatched to the Indian Ocean to provide assistance to combat forces. Air Self-Defense Force cargo planes transported supplies for U.S. forces overseas, to places such as Guam.<sup>174</sup>

At the same Diet session, two other pieces of legislation which enhance Japan’s defense ability were enacted. The Japan Coast Guard was authorized to fire on suspicious vessels, if necessary, in order to search them in Japanese waters.<sup>175</sup> Another act also allowed the SDF to help guard U.S. military bases inside Japan.<sup>176</sup>

Former Defense Agency chief Gen Nakatani, comparing the legislation with a triple jump in track and field, described “the 1992 law on SDF involvement in U.N. peacekeeping operations as a hop, the 1999 guidelines laws as steps, ‘And I call the enactment of the special antiterrorism law a jump.’”<sup>177</sup> Many scholars and observers, and minority parties think the legislation was a triple jump to *de facto* denial of article 9. It would be a small step to act based on a collective defense right. Professor Tetsuo Maeda stated, “the government exploited the people’s compassion and fear stemming from peculiar events, such as the Sep. 11 terror attacks, to enact a series of laws.”<sup>178</sup>

#### D. Three War-Contingency Laws in 2003

In April 2002, a set of bills that defines the rules under which Japan can respond to attacks by a foreign enemy was submitted to the Diet by the Cabinet. In June 2003, the bills were passed by the Diet. Though the Defense Agency studied war contingency legislation between 1977 and 1984,<sup>179</sup> efforts toward legislation were put on hold by the government until 2001. For a long time, it was a kind of taboo to legislate such contingency legislation.<sup>180</sup> Because of strong pacifism, people did not even want to think about contingency legislation.

Many Japanese understand that the United States pressured Japan to enact war-contingency legislation. The Japanese government had realized suggestions shown in the so-called Armitage Report, a report published by the Institute for National Strategic Studies of the National Defense University in

<sup>172</sup> Anti-Terrorism Special Measures Law, Law No. 113 of 2001, *as amended*, arts. 3, 4, 6 and 7.

<sup>173</sup> *Id.* art. 12.

<sup>174</sup> MSDF transport refuels U.S. ships, JAPAN TIMES, Dec. 4, 2001, *available at* <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20011204a3.htm>.

<sup>175</sup> Kaijō hoanchō hō [Japan Coast Guard Law], Law no. 28 of 1948, art. 20 (amended by Law No. 114 of 2001).

<sup>176</sup> SDF Law, Law No. 165 of 1954, *as amended*, art. 81-2 (added by Law no. 115 of 2001).

<sup>177</sup> Kyodo News, Defense policy emerges from 2001 with new face, JAPAN TIMES, Jan. 3, 2002, *available at* <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20020103a6.htm>.

<sup>178</sup> *Id.*

<sup>179</sup> Japan Defense Agency, Yūji hōsei [Contingency legislation], in BŌEIHAKUSHO [DEFENSE OF JAPAN], ch. 3, sec. 6 (1988).

<sup>180</sup> Nao Shimoyachi and Reiji Yoshida, Diet enacts legislation for war contingencies, JAPAN TIMES, June 7, 2003, *available at* <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20030607a1.htm>.

October 2000.<sup>181</sup> Richard Armitage became the United States Deputy Secretary of State in 2001. While he was the Deputy Secretary of State, he was regarded as one of the officials who had the most influence on United States policy toward Japan. He “was one of the driving forces behind a noted study on U.S.-Japanese relations issued before his current appointment.”<sup>182</sup> The report urged Japan to, among other things, diligently implement “the revised Guidelines for U.S.-Japan Defense Cooperation, *including passage of crisis management legislation.*” (Emphasis added by the author.)<sup>183</sup>

The Law Concerning Ensuring National Independence and Security in a Situation of Armed Attack. (Situation of Armed Attack Law) obliges the government to set a plan of action when there is an attack against Japan or when the government determines that the danger of an attack is imminent.<sup>184</sup> After the plan is drafted, the Prime Minister must obtain an approval from the Cabinet and the Diet.<sup>185</sup> The Prime Minister can establish a headquarters to counter the contingency situation, reporting through the Cabinet.<sup>186</sup> In situations deemed particularly urgent, the Prime Minister may mobilize the SDF before drawing up a plan<sup>187</sup> but has to halt the deployment of forces if the plan is rejected by the Diet at a later time.<sup>188</sup> The law also allows the government to put the SDF on standby when it determines that a military attack is anticipated.<sup>189</sup> Even before this legislation, the SDF Law provided the procedure to mobilize the SDF and put them on standby in an emergency situation. This legislation organizes the nation-wide basic emergency system and procedure. Also before this legislation, Japan could not react against an anticipated attack before the attack becomes imminent, but this legislation made it possible. Still, the SDF are not supposed to attack the source of danger until an armed attack is started.<sup>190</sup> But this does not mean the SDF cannot retaliate until after the harm from an aggressor has happened. For example, in a case of missile attack, when missiles are readied into position, the attack is started.<sup>191</sup> In addition, this legislation also provides the system and procedures in case of an emergency situation other than foreign military attack, such as terrorism.<sup>192</sup> This legislation also obliged the government to enact necessary laws and regulations to complete system to protect the nation against attack.<sup>193</sup> There is no constitutional guidance on such legislation because the constitution did not expect the presence of military forces when it was enacted and it does not have any provision for contingency situations. The only constitutional issues concerning this law are based on article 9. The Japanese Communist Party and the Social

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<sup>181</sup> RICHARD L. ARMITAGE ET. AL, THE UNITED STATES AND JAPAN: ADVANCING TOWARD A MATURE PARTNERSHIP (INSS Special Report, Oct. 11, 2000).

<sup>182</sup> James A. Kelly, Remarks to the Woodrow Wilson Center Conference on George W. Bush and Asia: An Assessment, (Washington, DC, Nov. 9, 2004), available at <http://www.state.gov/p/eap/rls/rm/2004/38335.htm>.

<sup>183</sup> Armitage, *supra* note 181, at 4.

<sup>184</sup> Buryoku kōgeki jitai tō ni okeru wagakuni no heiwa to dokuritsu narabini kuni oyobi kokumin no anzen no kakuho ni kanrusu hōritsu, Law No. 79 of 2003, *as amended*, art. 9, para. 1.

<sup>185</sup> *Id.* art. 9, paras. 6 and 7.

<sup>186</sup> *Id.* art. 10.

<sup>187</sup> *Id.* art. 9, para. 4, item 2.

<sup>188</sup> *Id.* art. 9, para. 11.

<sup>189</sup> *Id.* art. 9, para. 5, item 3.

<sup>190</sup> Haruhiko Morishita, Yūji kanren sanpō (2), TOKI NO HŌREI 1699, 12, at 15 (2003).

<sup>191</sup> Masahiko Asada’s statement *in* Kenpō 9 jō no kako·genzai mirai [Past, Present and future of Article 9], JURISTO 1260, 7 at 37 (2004).

<sup>192</sup> Law Concerning Ensuring National Independence and Security in a Situation of Armed Attack, Etc. Law No. 79 of 2003, *as amended*, Ch. 4.

<sup>193</sup> *Id.* arts. 21 and 22.

Democratic Party opposed the legislation, arguing it violates the pacifist Constitution. However, the bill was approved by an overwhelming majority in the Diet.<sup>194</sup>

The law to amend the Security Council Establishment Law<sup>195</sup> was enacted at the same time.<sup>196</sup> Under the amended law, the Prime Minister must ask the opinion of the council regarding contingency measures.<sup>197</sup> The amendment to the SDF law eased and clarified the procedure to seize land and other property for operations.<sup>198</sup> A person who does not maintain the designated personal property for the use of SDF will be punished.<sup>199</sup> The amendment clarified that the SDF are exempted from various regulations, such as the ones in the Road Traffic Law, the Sea Shore Law, the Green Area Preservation Law and the Medical Treatment Law.<sup>200</sup>

### E. Iraq Special Measures Law

In 2003, another legislative expansion of the SDF was enacted. The Special Measures Law Concerning Humanitarian Relief Support Activities and Security Maintenance Support Activities in Iraq (Iraq Special Measures Law)<sup>201</sup> enables Japan to send SDF troops to an occupied country where small-scale fighting continues. The law calls for assistance in two areas: humanitarian relief for the Iraqi people and logistical support for security-maintenance efforts by U.S.-led coalition forces.<sup>202</sup> That support includes water purification, supply of gasoline and other materials to coalition forces, and transportation of personnel and equipment.<sup>203</sup> Up to 600 Ground Self-Defense Force troops have been stationed in Samawah in southern Iraq since early 2004 to repair schools and roads and provide clean water and medical aid. About 200 Air Self-Defense Force troops stationed in Kuwait are transporting goods and U.S. military personnel to and from Iraq.<sup>204</sup> The law is valid for four years.

The SDF troops can be dispatched to an area where there is no “act of hostility” and no such act is expected during the planned activities.<sup>205</sup> An “act of hostility” means acts of killing or injuring persons or destroying buildings and their contents in the course of an international armed conflict.<sup>206</sup> Naturally, many questioned whether there is such an area where there is no “act of hostility” in Iraq. The Cabinet

<sup>194</sup> Shimoyachi and Yoshida, *supra* note 180.

<sup>195</sup> Anzen hoshō kaigi secchi hō [Security Council Establishment Law], Law No. 71 of 1986, *as amended*.

<sup>196</sup> Law No. 78 of 2003.

<sup>197</sup> Security Council Establishment Law, Law No. 71 of 1986, *as amended*, art. 2, items 4, 5, and 7.

<sup>198</sup> SDF Law, Law No. 165 of 1954, *as amended*, art. 103.

<sup>199</sup> *Id.* arts. 125.

<sup>200</sup> *Id.* arts. 115-2 to 115-22.

<sup>201</sup> Iraku ni okeru jindo fukko shien katsudo oyobi anzan kakuho shien katsudo no jisshi ni kansuru tokubetsu sochi ho [Iraq Special Measures Law], Law No. 137 of 2003.

<sup>202</sup> *Id.* art. 1.

<sup>203</sup> *Id.* art. 3, paras. 2 and 3; Iraku jindo fukko shien tokusoho ni motodoku taio sochi ni kansuru kihon keikaku [Basic Plan Concerning Measures Based on the Iraq Special Measures Law] (Dec. 9, 2003), *available at* <http://www.kantei.go.jp/jp/fukkosien/iraq/031209kihon.pdf>; Editorial, Doubts linger as Iraq bill passes, JAPAN TIMES, July 28, 2003, *available at* <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?ed20030728a1.htm>.

<sup>204</sup> Japan to pull troops from Iraq by Dec. 14, JAPAN TIMES, May 5, 2005, *available at* <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20050505a1.htm>.

<sup>205</sup> Iraq Special Measures Law, Law No. 137 of 2003, art. 2, para. 3.

<sup>206</sup> *Id.*

answered that Samawah was such a place. There are restrictions on use of weapons. SDF members in Iraq may use weapons when it is unavoidable to use weapons in order to protect themselves and persons under their protection.<sup>207</sup> Unless it is the case that the self-defense under the Japanese Criminal Code is applied, SDF members must not hurt other people.<sup>208</sup> Because of this restriction, it is hard for SDF troops to secure their safety even in Samawah, allegedly a relatively peaceful place. The Ground SDF in Samawah had been protected by Dutch troops until March 2005 and by Australian troops since then.<sup>209</sup>

It is strange that, even as it is said that SDF is not a military force, the SDF, not the police, is dispatched to foreign soil that is not a peaceful place, and members of the SDF are restricted in the use of weapons, and must secure protection by another foreign military force. Their task is to repair schools and roads and to provide clean water and medical aid. It is generally understood in Japan that the ruling parties think it is important to show support to the United States rather than the effectiveness of that support. At the same time, it is a good opportunity for those who desire SDF to be acknowledged as normal military forces to explore the way to lift restrictions imposed on the SDF under article 9 of the Constitution.

When Iraq regained her independence in June 28, 2004, the Japanese government placed the dispatched SDF members under the framework of the United Nations multi-countries force.<sup>210</sup> There have been debates in the Diet regarding the SDF and the UN multi-countries force. In 1980, the government expressed its view that the constitution restricts the participation of the SDF in the multi-countries force under the United Nations, if the mission of the force contemplates the use of force.<sup>211</sup> In the early 1990s, when the participation of the SDF in the UN Peace Keeping Force was debated in the Diet, the government gave the same answer.<sup>212</sup> Based on these debates, the government placed restrictions on the SDF. For example, they must not fight under the command of the UN forces. Also they are under the Japanese government's control, will not be involved in UN activities that expect the use of force, and must remain in the non-combat zone.<sup>213</sup>

#### F. Seven War-Contingency Laws in 2004

In accordance with the Situation Under Armed Attack Law of 2003, seven laws regarding military emergency were passed in 2004: the Law Concerning Measures to Protect Nationals in the Situations of Armed Attack (Nationals Protection Law);<sup>214</sup> the Law Concerning Measures Taken by Japan During the United States Military Actions While Japan Is Under Armed Attack (Law Concerning Measures Relating to US Military Actions);<sup>215</sup> the Law Concerning Use of Designated Public Facilities,

<sup>207</sup> *Id.* art. 17, para. 1.

<sup>208</sup> *Id.* art. 17, para. 4.

<sup>209</sup> Kanako Takahara, *Dutch-Aussie troop switch to be smooth, Downer says*, JAPAN TIMES, Mar. 23, 2005, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20050323a6.htm>.

<sup>210</sup> *Iraku no shuken kaihuku go no jieitaino jindo hukko shien katsudo tou ni tsuite* [Regarding SDF' Humanitarian Support, etc. after Iraq's Recovery of Sovereignty], Cabinet Understandings (June 18, 2005, as amended on June 28, 2005).

<sup>211</sup> Written answer from the Cabinet to Written Questions from Seiichi Inaba, a Member of House of Representative (Oct. 28, 1980) in ASAKUMO SHINBUN EDITORIAL DEPARTMENT, BOEI HANDBOKKUU [HANDBOOK FOR DEFENSE], 557 (2003).

<sup>212</sup> ASAKUMO SHINBUN EDITORIAL DEPARTMENT, *id.* at 560-562.

<sup>213</sup> *Iraku no shuken kaihuku go no jieitaino jindo hukko shien katsudo tou ni tsuite* [Regarding SDF' Humanitarian Support, etc. after Iraq's Recovery of Sovereignty], Cabinet Understandings (June 18, 2005, as amended on June 28, 2005).

<sup>214</sup> Buryoku kōgeki jitai tō ni okeru kokumin no hogo no tame no sochi ni kansuru hōritsu, Law No. 112 of 2004.

<sup>215</sup> Buryoku kōgeki jitai tō ni okeru amerika gasshūkoku no guntai no kōdō ni tomonai wagakuni ga jisshi suru sochi ni kansuru hōritsu (Law Concerning Measures Relating to US Military Actions), Law No. 113 of 2004.

etc. under Armed Attack;<sup>216</sup> the Law Concerning Punishment of Grave Violations Against International Humanitarian Law;<sup>217</sup> the Law Concerning Regulations of Marine Transportation of Goods, etc. for Foreign Militaries under Armed Attack;<sup>218</sup> the Law Concerning Dealing with Prisoners of War under Armed Attack;<sup>219</sup> and the amendment to the SDF Law.<sup>220</sup>

The SDF Law amendment and the Law Concerning Measures Relating to US Military Actions were intended to facilitate U.S. military operations that will operate in accordance with the Japan-United States Security Agreement in the event of an attack or imminent attack on Japan. The Defense Agency had prepared for this legislation by launching a study group in 2000.<sup>221</sup> The legislation enabled the SDF and U.S. forces in Japan share goods and services.<sup>222</sup> The legislation corresponds to the revision of Japan and the United States' bilateral Acquisition and Cross-Servicing Agreement in February 2004.<sup>223</sup> Before the revision of the agreement, the SDF and the U.S. military could provide logistic support to each other on a reciprocal basis only during joint drills, international relief operations such as U.N. peacekeeping operations, and in a situation in areas surrounding Japan.<sup>224</sup> The laws also empower the prime minister to allow the U.S. military to use privately-owned land or buildings if Japan comes under or anticipates an attack.<sup>225</sup>

### G. New Scholarly Opinions

According to the Japanese government, none of these laws violate article 9 of the constitution. Japan still maintains an exclusively defense-oriented policy. All measures taken pursuant to recent legislation are still for the sake of self-defense. Japan still cannot act based on a collective right of defense.

Even before all these recent laws were enacted, the mainstream constitutional scholars who stated that the existence of the SDF violated the constitution were ridiculed by the government. They were

<sup>216</sup> Buryoku kōgeki jitai tō ni okeru tokutei kōkyō shisetsu tō no riyō ni kansuru hōritsu, Law No. 114 of 2004.

<sup>217</sup> Kokusai jindō hō no jūdai na ihan kōi no shobatsu ni kansuru hōritsu, Law No. 115 of 2004.

<sup>218</sup> Buryoku kōgeki jitai tō ni okeru gaikoku gubyōhin tō no kaijō yusō no kisei ni kansuru hōritsu, Law No. 116 of 2004.

<sup>219</sup> Buryoku kōgeki jitai tō ni okeru horyo tō no toriatsukai ni kansuru hōritsu, Law No. 117 of 2004.

<sup>220</sup> Law No. 118 of 2004.

<sup>221</sup> *Defense Agency seeks new law to ensure military cooperation*, JAPAN TIMES, Aug. 21, 2000, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20000821a1.htm>.

<sup>222</sup> Law Concerning Measures Relating to US Military Actions, Law No. 113 of 2004, art. 10.

<sup>223</sup> Agreement amending the Agreement between the Government of Japan and the Government of the United States of America concerning reciprocal provision of logistic support, supplies and services between the Self-Defense Forces of Japan and the Armed Forces of the United States of America, U.S.-Japan, February 27, 2004; Nihonkoku no jieitai to amerika gasshūkoku guntai to no aida ni okeru kōhō shien, buppin mata wa ekimu no sōgo no teikyō ni kansuru nihonkoku seifu to amerika gasshūkoku seifu to no aida no kyōtei o kaisei suru kyōtei, Treaty No. 8 of 2004. *See*, Exchange of Notes concerning Modification of Annex 2 of the Acquisition and Cross-Servicing Agreement (ACSA) between Japan and the U.S., Ministry of Foreign Affairs (July 29, 2004), available at <http://www.mofa.go.jp/announce/announce/2004/7/0729-2.html>.

<sup>224</sup> “Shishin” oyobi sono jikkōsei kakuho no tame no hō seibi ni tsuite [Completing laws for the “Guidelines” and for securing their effectiveness], 8, Japan Defense Agency, <http://www.jda.go.jp/j/defense/policy/anpo/sisin97/houseibi/seibi2.pdf> (last visited Feb. 14, 2006).

<sup>225</sup> Law Concerning Measures Relating to US Military Actions, Law No. 113 of 2004, art. 15.

called *Don Quixote*.<sup>226</sup> Debates on article 9 have been called “theological debates.”<sup>227</sup> On the other hand, the significance of the constitutional scholarly opinions is that they have given strong support to those who want to keep article 9 as is and eventually reduce the size of the SDF.<sup>228</sup> Leading constitutional scholars in Japan have been rather quiet since 1990, although others have keenly criticized the government. Feelings of powerlessness have been expressed because the courts have not listened to the cases involving legislation relating to article 9 of the constitution; whatever electorates think about the constitutionality of these pieces of legislation, they have kept voting for the same ruling parties.<sup>229</sup> As long as the government’s theory on article 9 is not gravely wrong, it may not matter in Japan.

An increasing number of scholars in a newer generation have doubts concerning the view that the existence of the SDF is unconstitutional. It does not mean the government interpretation has gained more academic or theoretical value. Rather, they started to adopt more practical views. In a prominent law professors’ round table discussion, professor Junji An’nen stated that he supported the government interpretation because it was, as a practical matter, the best interpretation of article 9 for gaining the most profit in the area of security and international relations.<sup>230</sup> He stated that, if the government interpretation was not impossible under article 9 of the constitution, we had better adopt it, and he thought the government interpretation was acceptable under the constitution. He admitted that, if an innocent person without prejudice simply reads article 9, he would understand that Japan would not have any forces.<sup>231</sup> However, with all practical considerations, it is possible to read article 9 as technically as the government does. He stated that, in reality, Japan needs to be protected by the United States, the world’s strongest country, so that Japan needs to cooperate with the United States by interpreting article 9 of the constitution as the government did. However, at the same time, restrictions under article 9, which exist even under the government interpretation, have played a great role in balancing Japan’s interest against U.S. demands.<sup>232</sup> Naturally, there was criticism of such a utilitarian view.<sup>233</sup> On the other hand, professor Kazuyuki Takahashi stated that neither the majority scholarly view nor the government interpretation was satisfactory, and he had not been able to find the perfect answer for the interpretation of article 9. He thought what divided the interpretations was whether a person thinks it is necessary for a force to defend Japan. If a person thinks it is unnecessary and begins the interpretation of article 9 from the words

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<sup>226</sup> See Yasuhiro Okudaira, *Dai 9 jō ni okeru kenpō gakusetsu no ichi* [The place of scholarly opinion on article 9 of the constitution], 76 HŌRITSU JIHŌ 7, 27, at 30. In Japan, *Don Quixote* means someone who is too idealistic and impractical. *Don Quixote* is a character in the novel *Don Quixote de la Mancha*. See *Don Quixote*, New Dictionary of Cultural Literacy, (3d ed. 2002), available at <http://www.bartleby.com/59/5/donquixote.html>.

<sup>227</sup> In Japan where a religion does not play great role in the society and where people tend to think things in relativity, “theological” can be a sarcastic word. It means too idealistic and impractical in the context of article 9 debates. See Shingaku ronsō, ASAHI NEWSPAPER, Evening (Oct. 15, 2001). Prime Minister Koizumi told the Diet Committee, regarding the conditions for SDF members to use weapons in relation with article 9, “I am about to say ‘let us stop the theological debates.’” KOKUSAI TERORIZUMU NO BŌSHI OYOBI WAGAKUNI NO KYŌRYOKU SHIEN KATUDŌ TŌ NI KANSURU TOKUBETSU IIN KAIGIROKU [MINUTES OF THE SPECIAL COMMITTEE ON PREVENTION OF INTERNATIONAL TERRORISM AND THE NATION’S COOPERATION AND SUPPORTS ACTIVITIES], HOUSE OF REPRESENTATIVE, 153th Session, No. 3 (Oct. 11, 2001).

<sup>228</sup> Okudaira, *supra* note 226, at 36.

<sup>229</sup> For a short period in the mid-1990s, the head of the Socialist Party became the Prime Minister. However, then Prime Minister Tomiichi Murayama said that the existence of the SDF did not violate article 9 of the Constitution, although the Socialist Party had been claiming that the SDF was unconstitutional. Tomiichi Murayama’s statement, SHŪGIN KAIGIROKU [HOUSE OF REPRESENTATIVE PLENARY SESSION MINUTES], 130<sup>th</sup> Diet Session, No. 2, 5 (July 20, 1994).

<sup>230</sup> Junji An’nen’s statement, *in* Past, present and future of Article 9, *supra* note 191, at 48.

<sup>231</sup> Junji An’nen’s statement, *id.* at 17.

<sup>232</sup> Junji An’nen’s statement, *id.* at 48.

<sup>233</sup> Takeshi Igarashi’s statement, *id.* at 17-8; Toshihiro Yamauchi’s statement, *id.* at 18-9.

contained in the article, the government interpretation is wrong. On the contrary, however, if a person thinks the self-defense power is necessary for Japan, he interprets article 9 as the government did.

## XI. Effort to Amend the Constitution

Since the present Constitution of Japan was enacted in 1946, the Constitution has never been amended. The SCAP designed the Constitution so as to make it difficult to amend the Constitution, preventing the Japanese society from returning to the pre-WWII situation of imperialism, militarism, and restrictions on democracy.<sup>234</sup> It can be said the United States herself made it difficult to amend article 9 of the constitution, although she changed her mind after several years. The Constitution contains articles stipulating the procedure for its amendment. Article 96 provides that an amendment to the constitution can only be made by a two-thirds affirmative vote in both houses of the Diet and with ratification by a majority of the electorate.

A law to establish the procedure for the national referendum has not been enacted. There was no need for the legislation because there was no concrete proposal to amend the constitution until recently. Also, there had been negative feelings against any move to amend the constitution, with the main target always having been article 9. However, finally, the amendment of the constitution began to be seen as realistic. The ruling coalition prepared the bill to be submitted during the 162nd Diet session in 2005.<sup>235</sup> However, because other important bills could not go through the Diet easily and non-ruling parties had very different opinions about the contents of the bill, the Ruling parties decided not to submit the bill to the Diet during the 162nd session.<sup>236</sup> In September 2005, the House of Representatives established a special research committee in order to discuss various aspects of the national referendum.<sup>237</sup> The ruling coalition plans to submit a national referendum bill during the 164<sup>th</sup> Diet session in 2006.<sup>238</sup> Conservative political groups have wanted to amend the constitution, especially article 9. Just after the Allied Forces' occupation ended, there was a movement to review and amend the constitution without a foreigner's interference.<sup>239</sup> It is true that the 1946 Constitution was not enacted by an initiative of the Japanese people. As previously discussed, it was drafted by Americans while Japan was under occupation. There is not much doubt that the Japanese were forced to adopt the constitution drafted by SCAP. As a preparation for the enactment of a new constitution by Japanese people,<sup>240</sup> the Cabinet established the *Kenpō chōsakai* (Constitution Research Committee) in 1956.<sup>241</sup> *Kenpō chōsakai* examined the process for enacting the constitution, how the constitution is actually applied, and what were the problems within the constitution. *Kenpō chōsakai* released its report in July 1964. It did not articulate just one conclusion, but showed alternative views. However, after the report was released, no bill to amend the constitution

<sup>234</sup> TAKAYANAGI, *supra* note 22, at 274-75.

<sup>235</sup> Kokumin tohyō hōan, sōki seiritsu mezasu [National referendum bill, early enactment sought], Yomiuri Online, Apr. 15, 2005 (on file with author).

<sup>236</sup> Kokumin tohyō hoan: kon kokkai teishutsu miokuri e [National referendum bill, submission postponed], MAINICHI NEWSPAPER, June 8, 2005 (on file with author).

<sup>237</sup> House of Representatives, Nihonkoku kenpō ni kansuru tokubetsu chōsa iinkai [Special Research Committee Concerning the Constitution of Japan], [http://www.shugiin.go.jp/index.nsf/html/index\\_kenpou.htm](http://www.shugiin.go.jp/index.nsf/html/index_kenpou.htm) (last visited Feb. 10, 2006).

<sup>238</sup> Kenpō kaisei no kokumin tōhyō hōan [Constitution Amendment National Referendum Bill], Yomiuri Online, Feb. 10, 2006 (on file with author).

<sup>239</sup> KENPŌ CHŌSAKAI, KENPŌ CHŌSAKAI HŌKOKUSHO (CONSTITUTION RESEARCH COMMITTEE REPORT), 1-8 (July 1964).

<sup>240</sup> Then Prime Minister Hatoyama's statement, House of Representative Plenary Session Minutes, 24<sup>th</sup> Diet session, No. 4, at 1 (Jan. 30, 1956).

<sup>241</sup> *Id.* at 10.

was submitted to the Diet. From the late-1950s to the 1980s, public opinion polls showed that a clear majority of the Japanese people did not favor amendment of the constitution.<sup>242</sup> There had been no chance to amend the constitution at that time. Among other important issues, article 9 has been the center of attention when the Japanese people have thought about the amendment of the constitution.

In the present day, public sentiments favor the amendment of article 9 more. Although the result of public opinion polls varied depending on the conductors of the poll, all major Japanese newspapers' polls found that, since 1993, more people have favored the amendment of the constitution than opposed it.<sup>243</sup> However, resistance toward changing article 9 is still significantly strong.<sup>244</sup> That Japan should draft the constitution without foreign interference is not as popular a reason to amend the constitution as it had been previously. Despite all questionable procedures regarding the birth of the Constitution, the Japanese accepted it and, in general, have liked it. Many Japanese people, however, think the constitution needs to be updated to keep up with the changing world.

Led by the initiative of one of the major ruling parties, the LDP, both houses of the Diet established the *Kenpō chōsakai* (Constitution Research Committee) on January 20, 2000.<sup>245</sup> The Committee researched various aspect of the constitution and submitted reports to the Diet. In July 1999 the House Operation Committee Directors' meeting decided that the Committee was not supposed to prepare any bill to amend the constitution.<sup>246</sup> *Kōmeito*, which is currently one of the ruling parties, did not want a bill to amend the constitution to be submitted to the Diet any time soon.<sup>247</sup> Debates at the Committee meetings were not heated. The attendance rate had been low. Each member and witness stated his or her opinion, but many attendees were not listening and there had been no real discussion.<sup>248</sup> It appeared as though the final report, but not the debates, were important to them. The final report of the House of Representatives Constitution Research Committee was submitted to the House on April 15, 2005.<sup>249</sup> The final report of the House of Councillors Committee was submitted to the House on April 20, 2005.<sup>250</sup> Committee members from LDP tried to insert certain opinions as the "trend" of debates in the

<sup>242</sup> Susumu Wada, *Kenpō kaisei zenin ishiki zōdai to watashitachi no kadai* [Increase of people's acceptance of amendment of the constitution and our task], 473 *KOKKO ROREN CHOSA JIHO* (May 2002), available at <http://www.jca.apc.org/~kenpoweb/articles/wada041202b.html>.

<sup>243</sup> Susumu Wada, *Shinbunsha no seron chōsa o yomu* [Reading public opinion polls by newspapers] (Oct. 30, 2000), available at <http://www.jca.apc.org/~kenpoweb/articles/wada103000.html>.

<sup>244</sup> Osamu Nishi, *Kenpō kaisei rongi no genjō to kongo no kadai* [Current situation of discussion on amendment of the constitution and next tasks], *Foreign Press Center Japan* (Mar. 25, 2005), available at [http://www.fpcj.jp/j/mres/briefingreport/bfr\\_197.html](http://www.fpcj.jp/j/mres/briefingreport/bfr_197.html).

<sup>245</sup> House of Representative, *Shūgiin kenpō chōsakai no secchi no keii* [Circumstances of establishment of Constitution Research Committee], [http://www.shugiin.go.jp/itdb\\_kenpou.nsf/html/kenpou/kenpou-keii.htm](http://www.shugiin.go.jp/itdb_kenpou.nsf/html/kenpou/kenpou-keii.htm) (last visited Feb. 14, 2006).

<sup>246</sup> *Id.*

<sup>247</sup> Katsumi Kawakami, *Kenpō chōsakai: Jimin nado 5 tō ni kuwae Shamintō mo giron ni sankā no hōshin* [Constitution Research Committee: Social Democratic Party, in addition to five parties including LDP, plan to participate the discussion], *MAINICHI NEWSPAPER*, Jan. 8, 2000 (on file with author).

<sup>248</sup> KEN TAKADA, *KAIKEN·GOKEN NANI GA MONDAI KA* [WHAT IS THE PROBLEM OF AMENDING CONSTITUTION/ KEEPING CONSTITUTION], 78-9 (2002).

<sup>249</sup> House of Representative Constitution Research Committee, *House of Representative Constitution Research Committee Report* (Apr. 15, 2005), available at [http://www.shugiin.go.jp/index.nsf/html/index\\_kenpou.htm](http://www.shugiin.go.jp/index.nsf/html/index_kenpou.htm).

<sup>250</sup> *KENPŌ CHŌSA KAIGIROKU* [CONSTITUTION RESEARCH COMMITTEE MINUTES], HOUSE OF COUNCILORS, 162th Diet Session, No. 7 (Apr. 20, 2005), available at <http://www.sangiin.go.jp/japanese/kenpou/houkokusyo/pdf/honhoukoku.pdf>.

reports, but opposition successfully dislodged them.<sup>251</sup> The House of Representatives Committee report stated that most of the members and witnesses said that article 9, paragraph 1, should be maintained.<sup>252</sup> However, regarding article 9, paragraph 2, opinions were divided on whether the constitution must recognize the SDF, and whether Japan must take actions based on the collective defense right. The House of Councillors Committee report also showed different views.

For the first time as a major political party, the LDP completed the first draft of the new Constitution and released it on November 22, 2005, when the LDP celebrated its fiftieth anniversary.<sup>253</sup> It changed the title of Chapter 2 from “Renunciation of War” to “Security.”<sup>254</sup> The spirit of the current article 9, paragraph 1, is kept. As a means of settling international disputes, Japan renounces war and the threat or use of force.<sup>255</sup> The current paragraph 2 is deleted. New article 9-2 clarified the existence of the SDF, puts the SDF under the prime minister’s command and requires Diet control, through the prime minister, over SDF activities. Also, it encourages Japan’s participation in international peacekeeping activities.<sup>256</sup> A right to collective defense is not written explicitly, but obviously included in the right of defense, according to the deputy secretary of the LDP Constitution Draft Committee.<sup>257</sup> However, Kōmeitō, another party in the ruling coalition, is opposing the use of the collective defense right and has not decided its position on other issues relating to article 9.<sup>258</sup> The biggest opposition party, the Democratic Party, released its basic opinion on the new constitution on October 31, 2005.<sup>259</sup> It states that the right of self-defense should be clarified and the restrictions on it also should be clarified.

The biggest business organization in Japan, Keidanren (Japan Business Federation), released its report on January 18, 2005: *Waga kuni no kihon mondai o kangaeru* (Thinking about our country’s basic issues).<sup>260</sup> The report states that article 9, which prohibits Japan possessing the “war potential,” does not recognize reality. The report states that Japan must give a clear constitutional basis for SDF and, further, that its role, such as self-defense and activities to contribute to international peace and cooperation, must

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<sup>251</sup> See Haruko Yoshikawa, “sangiin kenpō chōsakai hōkokusho” ni hanei sareta ka, kokumin no koe [Did Japanese people’s voices were reflected on “the House of Councillors Constitution Research Committee Report”?] (May 5, 2005), available at <http://www.haruko.gr.jp/policy/kenpou/050505.html>; Masao Akamatsu, Shin kokkai repōto [New Diet Report], Giin burogu nikki [Diet Member blog diary] (Apr. 20, 2005), available at <http://www.komei.or.jp/cafe/dialy/akamatsu/050420.html?kw=%B7%FB%CB%A1%C4%B4%BA%BA%B2%F1>. Ms. Haruko Yoshikawa is a House of Councillors member and belongs to the Japan Communism Party. Mr. Masao Akamatsu is a member of the House of Representatives, and belongs to new Kōmeitō.

<sup>252</sup> House of Representative Constitution Research Committee, *supra* note 249, at 301. See Akamatsu, *supra* note 251.

<sup>253</sup> LDP, *Konohi konotoki konoba kara* [From This Day, This Moment, and This Place], Nov. 22, 2005, available at [http://www.jimin.jp/jimin/daily/05\\_11/22/171122a.shtml](http://www.jimin.jp/jimin/daily/05_11/22/171122a.shtml).

<sup>254</sup> LIBERAL DEMOCRATIC PARTY (LDP), SHIN KENPŌ SŌAN [NEW DRAFT CONSTITUTION] (Nov. 22, 2005), [http://www.jimin.jp/jimin/shin\\_kenpou/shiryou/pdf/051122\\_a.pdf](http://www.jimin.jp/jimin/shin_kenpou/shiryou/pdf/051122_a.pdf).

<sup>255</sup> *Id.* art. 9.

<sup>256</sup> *Id.* art. 9-2.

<sup>257</sup> Jimintō ga shin kenpō sōan no jōbun-an kōhyō [New draft constitution was released by LDP], ASAHI SHINBUN (Aug. 1, 2005).

<sup>258</sup> New Kōmeitō, *Shūdanteki jieiken no kōshi mitomerubekidenai* [We Should Not Admit Use of Collective Defense Right], NEW KŌMEITŌ, Dec. 21, 2005, available at [http://www.komei.or.jp/news/daily/2005/1221\\_04.html?kw=%B7%FB%CB%A1%B2%FE%C0%B5](http://www.komei.or.jp/news/daily/2005/1221_04.html?kw=%B7%FB%CB%A1%B2%FE%C0%B5).

<sup>259</sup> MINSHUTŌ [Democratic Party], KENPŌ TEIGEN [PLAN TOWARD NEW CONSTITUTION] (Oct. 31, 2005), <http://www.dpj.or.jp/faxnews/pdf/20051031181802.pdf>.

<sup>260</sup> The report is available at <http://www.keidanren.or.jp/japanese/policy/2005/002/honbun.html>.

be specified in the Constitution.<sup>261</sup> The report also proposes that the constitution clarify that Japan has the collective defense right and may take actions based upon it.<sup>262</sup>

The United States also has pressured Japan to amend article 9 of the constitution persistently.<sup>263</sup> The Armitage Report called for removing “Japan’s self-imposed restriction on the right of collective self-defense.” In July 2004, then Deputy Secretary of State Armitage “told a Japanese lawmaker that the war-renouncing Article 9 of Japan’s Constitution is becoming an obstacle to strengthening the Japan-US alliance.”<sup>264</sup> In August 2004, then U.S. Secretary of State Colin Powell said Japan must consider revising its pacifist constitution if it wanted a permanent UN Security Council seat.<sup>265</sup>

## VII. Conclusion

The Japanese government’s interpretation of article 9 apparently allows unlimited expansion of Japan’s defense ability, as Junzō Inamura pointed out at the plenary session of the Diet in 1954 when the SDF bill was first introduced. The only authority to interpret the article has been the CLB. The Supreme Court has avoided making a decision on article 9 of the Constitution. It seems as though the words of article 9 were simply emptied of much of their original meaning. The Prime Minister is willing to amend the Constitution. The Japanese public appears to be more receptive to rearmament and amending article 9 of the constitution. To maintain the constitution’s supremacy, the strong skepticism about the government’s interpretation of article 9 must be removed by amending the article and clarifying Japan’s military ability. Although people who support the current article 9 resist any attempts at amendment, it seems that, sooner or later, article 9 of the Constitution will be amended.

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<sup>261</sup> Keidanren, *Waga kuni no kihon mondai o kangaeru* [Thinking about our country’s basic issues] (Jan. 18, 2005), ch IV, 2(1).

<sup>262</sup> *Id.* ch. IV, 2(2).

<sup>263</sup> Gavan McCormack, Japan’s Afghan Expedition (Nov. 5, 2001), at <http://www.iwanami.co.jp/jpworld/text/Afghanexpedition01.html>.

<sup>264</sup> Armitage on Japanese Constitution, NAPSNet Daily Report, II Japan, 21, Aug. 5, 2004, <http://www.nautilus.org/napsnet/dr/0408/AUG0504.html>.

<sup>265</sup> *US questions Japan’s pacifism*, BBC News, Aug. 13, 2004, <http://news.bbc.co.uk/2/hi/asia-pacific/3561378.stm>.