Research Note

A Study on Regulations Governing Military Actions

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Abstract

Under current domestic legislation, the Self-Defense Forces (SDF) are an administrative organization. The regulations governing them conform to the principle of a nation governed by law, and any action by the SDF must be grounded in a specific law. The regulations are forced to take the form of a positive list, but if at some time in the future the SDF were to become a military as a result of constitutional reform, the need would arise to create new systems and review the way defense law is organized. As domestic functions of the SDF are directed at the Japanese people and impact their rights and duties, such functions would have to have the aforementioned basis in domestic law and the regulations governing them would also have to take the form of a positive list. On the other hand, there is a need to examine the possibility of external functions being carried out within the bounds of international law even in the absence of specific regulations in domestic law. This will require a shift toward regulations in the form of a negative list.

Introduction

The threats facing Japan have diversified as a result of huge changes in the structure of the international community as well as in the domestic and international environments since the end of the Cold War. The situations to which the SDF are expected to respond have thus become increasingly complex. The basic laws that enable the SDF to act in response to these situations have been put in place through the enactment of legislation including the International Peace Cooperation Law (Law No. 79 of 1992) enacted following the Gulf War; the Law Concerning Measures to Ensure the Peace and Safety of Japan in Situations in Areas Surrounding Japan (Law no. 60 of 1999) and the Law Concerning Ship Inspection Operations in Situations in Areas Surrounding Japan (Law no. 145 of 2000) which were enacted to deal with movements by North Korea; and the emergency legislation such as the Armed Attack Situation Response Law (Law no. 79 of 2003) which had been an issue for a very long time. Special legislation has also been enacted including the Anti-Terrorism Special Measures Law (Law no. 113 of 2001) which enables efforts to combat international terrorism in the wake of the September 11, 2001 terrorist attacks in the United States, and the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq (Law no. 137 of 2003) which aims to provide humanitarian and reconstruction assistance following the war in Iraq.[1]

[1] Other legislation was also put in place in rapid succession. This included legislation to allow the evacuation of Japanese nationals living abroad (revision of the Self-Defense Forces Law [Law No. 165 of 1954]); the conclusion of agreements with the police and the Japan Coast Guard, both law enforcement organizations, allowing action against suspicious boats or armed agents; legislation allowing disaster relief dispatches (revision of the Disaster

The expansion of the role and duties of the SDF, along with the successive creation of the necessary legislation, are generally seen as praiseworthy from the point of view of bolstering Japan's ability to deal with emergency situations. One cannot avoid noticing, however, that the defense law of this country differs greatly from that of other countries in one important respect. The structure of postwar Japan, which was built on the basis of repentance following defeat in World War II (known in Japan as the Pacific War), is such that Japan's military capabilities and preparedness are greatly restricted under the Constitution of Japan (promulgated in 1946, enacted in 1947), the basic law of the state.

In terms of domestic law, the Japanese Self-Defense Forces are not regarded as a military in the regular sense of the word as applied to the armies of other countries. While they are a military organization that exercises the right of self-defense and carries out the defense of the nation, they are nonetheless regarded as an administrative organization and limits are placed on their duties and jurisdiction. It is quite clear, however, that the SDF are treated as a military in international law. What this means is that huge limits, like an exclusively national defense oriented policy, are placed on the SDF in the exercise of the right of self-defense. Japan has found itself placed in an untenable position, caught in the gulf between these political and legal demands on the one hand, and military rationality on the other. In particular, there are huge problems in the fact that the right of collective self-defense is enshrined in international law but is forbidden under the way the Constitution of Japan has been interpreted; there are also problems in the fact that after being tasked with carrying out international peace cooperation, the SDF are restricted in the activities that they can carry out on the ground, particularly in their authority over the use of weapons.

The way the SDF have been positioned in legal terms as an administrative organization has had an enormous impact on the defense laws that govern them. Japanese defense law has the same sort of legal structure as police law, and the regulations of the defense laws are in the form of what is known as a "positive list." This means that action is prohibited in principle unless there is a provision to allow it. In other words, every action by the SDF must have its basis in a specific law, and they are unable to carry out any action that has not specifically been provided for in the law. This contrasts with the "negative list" system of regulations governing the armies of other countries, in which the armies are in principle free to act and can do anything that is not specifically forbidden under international law. It may be appreciated that this characteristic of Japan's defense law came about as a result of historical factors and the situation regarding the nation's self-defense; nonetheless, when one considers the defense functions that the SDF are, by their nature, supposed to carry out, there can be no denying that it represents a major impediment to their ability to fulfill their duty.

This paper examines the problems in Japan's defense law. It starts with an analysis of the differences between the duties and characters of the police and the military, and of the particular features of the regulations governing the police and the military. The position of the SDF in terms of domestic and international law is then defined. This paper looks at the relationship between the right of defense on the one hand and administrative power on the other, and at the various principles of administrative law, before giving an outline of Japan's defense law and noting its special features. On the basis of these discussions, this paper then considers what shape Japan's defense law should take. There is

Countermeasures Basic Act [Law No. 223 of 1961], the Self-Defense Forces Law, and the Law Concerning Special Measures for Large-Scale Earthquakes Countermeasures [Law No. 73 of 1978], as well as enactment of the Special Law on Nuclear Disasters Countermeasures [Law No. 156 of 1999]); and legislation to deal with ballistic missile attacks (revision of the Self-Defense Forces Law).

a particular focus on trends relating to revision of the Constitution at some time in the future. This paper's intention is to propose points that should be considered in reorganizing the defense law relating in particular to action by the SDF, in the event that the SDF are given the status of a military.

This question has been the subject of controversy between Hiroshi Yasuda and Tsukasa Kobari, who have argued over the relationship between the right of defense and the administration, while Rikio Shikama has studied the differences between the police and the military. There is also literature by Tsuneo Yoshihara that gives a thorough discussion of the problems for defense law seen from the perspective of international standards. These analyses have been the subject of studies published recently by Rintaro Yamanaka, Yoshihito Yamashita, and others.[2] This paper will put forward the author's personal view on the ideal shape of Japan's defense law, with reference to these bodies of research.

I. State Organizations with the Power to Act: The Police and the Military

In line with the central thrust of this paper, this section will define the significance of public order and national defense—which are both indispensable features of the state—and will examine the nature of the organizations charged with maintaining public order and national defense, the police and the military.

Policing is the function of controlling the people and, when necessary, exercising force in order to maintain peace within the country; this may be called Polizeihoheit ("police sovereignty").[3] The organization charged with this function is the police. Defense is the function of exercising force in order to protect the country from foreign incursion; the state's authority to do this may be called Wehrhoheit ("defense sovereignty").[4] The organization charged with this function is the military.

A. Duties, Characteristics, and Special Features of the Police and the Military

(1) Concepts of the Police

(a) Ideas Relating to the Police

Ideas relating to the police may be either academic, or else based on positive law.[5] The academic idea of the police is that it limits the natural freedom of the people on the basis of the general sovereignty of the state in order to maintain social and public order. The idea of the police on the basis of positive law is that the police maintain social and public order, and safety through actions that include protecting people's lives, their own physical safety and property; preventing, suppressing and investigating crime; arresting suspects; and controlling traffic. In Japan, these are stipulated in Article 2 Paragraph

2 Hiroshi Yasuda, Introduction to *Defense Law* (Orient Shobo, 1979); Tsukasa Kobari, *A Study of Civilian Control from a Constitutional Perspective* (Shinzansha, 1990); Rikio Shikama, *Analysis of the Power of the State: The Military and the Police* (Sogo Horei, 1994); Tsuneo Yoshihara, "Emergency Legislation and International Law on Armed Conflict: The Need to Introduce Global Standards," *Overseas Situations* (June 2002); Rintaro Yamanaka, "The Concept of Administrative Authority in the Constitution of Japan, and the Defense of the Nation: Toward Further Controversy," *Studies of Defense Law*, No. 29 (2005); Yoshihito Yamashita, "Some Considerations Regarding the Defense Law Debate: Raising Concerns," Studies of Defense Law, No. 30 (2006).

3 Yasuda, *Introduction to Defense Law*, p. 2.

4 Ibid., p. 2.

5 Ei Iba, *The Japan Coast Guard Law Explained* (The Japan Coast Guard Law Explanatory Publication Society, 1972), pp. 19-20.

1 of the Police Law (Law no. 162 of 1954).

(b) The Scope of the Police

From a legal perspective, the scope of the police can be seen in terms of civil law (e.g. continental European law), or common law (e.g. British and American law).[6] In nations that fall under a civil law (continental Europe) system, the police may be regarded as a type of state police force. This means that as well as maintaining security, investigating crimes, and protecting life and property, the role of the police is extended to such areas within their jurisdiction as health and hygiene, labor, fire fighting, and construction.

In nations that fall under the common law (British and American) system, the police are a civil police force and their duties within their jurisdiction are limited to the original role of a police force. It is normal for the police to avoid, as far as possible, interfering with the everyday lives of the people.

(c) Types of Police

There are three types of police.[7] The first is the administrative police, which are attached to administrative objectives such as industry, health and hygiene, and traffic, in order for the state to be able to accomplish these objectives.

The second is the security police. This is a branch of the administration that functions independently, without being attached to any administrative function, in order to remove obstacles to social and public order. It thus has its own assemblies, associations and customs.

The third is the judicial police, which lack the preventative effect of the administrative police and are unable to maintain social order; rather, the judicial police exercise their authority once a crime has been detected. The purpose of the judicial police is to investigate crimes that have already been committed, arrest criminals and make preparations for the state to exercise penal trial rights.

(d) Limits to the Exercise of Police Authority

There are three principles that indicate the limits in the exercise of police authority.[8] The first principle is the principle of police responsibility, which holds that if something that will impede the social and public order happens or is likely to happen, the action of law may only be taken against the person or persons responsible for this eventuality. The responsibility of the police starts when a violation is objectively demonstrated to have occurred, but the police do not have the power to act against unconnected third parties who have nothing to do with the causes of the violation.

The second principle is the principle of public police, which is that the police may only be involved in the interests of specific individuals or groups, and may not have any involvement in anything not directly connected to maintaining social and public order. The following three further principles may be derived from this. The first is the principle of nonaggression on private life, under which the police may not intrude upon the private life of any individual who has no direct bearing on the general life of society, though, the police do have the power to act if that individual's private life impacts upon social and public order. The second is the principle of nonaggression on a private address, which holds that the police generally have no powers over activities carried out within a private address

6 Ibid., p. 19.
7 Ibid., pp. 20-21.
8 Ibid., pp. 86-89.

unless these activities are likely to directly impact society. A private address here means a person's place of private residence. The third is the principle of noninterference in simple civil affairs, under which the state will involve its judicial power in the event of a civil illegal act only on the basis of a request by a rightful claimant; it cannot intervene under police authority.

The third principle is the principle of proportion of police, which holds that the conditions or situations under which police power is put into operation must be of an order that society would generally approve of in relation to the obstacle that is to be removed. In other words, police power can only be put into operation if damage has been inflicted to society of a level that a normal member of society would regard as unacceptable, or else if there is a considerable degree of certainty that an obstacle to society has arisen that a normal member of society would regard as inadmissible. In addition, the limits that are applied to personnel removing an obstacle that would be unacceptable to society at large must be in an appropriate proportion to the obstacle that is to be removed. This paper will consider the differences in character between the police's function and the military's function, and in this respect the principle of proportion of police is the most important principle for showing the striking differences between the two.

(2) Concepts of the Military

While the military is indispensable for protecting a country from foreign enemies, the vicissitudes of history have led to changes in such military as who should control and supervise the military, the positioning and the character of the military within the state, and the service of soldiers.[9] In the traditional sense, the supreme commander of a military was usually the sovereign ruler. Military personnel were required to show unconditional obedience toward the sovereign ruler and they were much like implements at the disposal of the ruler. The military was not what would be known today as an administrative organization, but was a collection of people—military personnel, and commissioned officers in particular, formed their own unique community. It would be true to say that the military was regarded as an honorable calling (ehrenvoller beruf). The wages of military personnel were paid by the ruler as their means of living; this was not remuneration for labor, however, and military personnel had no legal right of claim. For example, the Japanese military is taken to be the Emperor's military in the Constitution of the Empire of Japan (the Meiji Constitution, promulgated in 1889, enacted in 1890); military personnel were thus the right-hand men of the Emperor, while the Emperor was the chief of the military personnel.[10]

The theory of the state as a legal entity developed with the advent of the modern age. Sovereignty was seen as residing not with the ruler, but with the state. This meant that the ruler was an organ of the state who presided over the exercise of sovereignty. Also, the ruler was not the employer, but the highest officer of the military, and was thus the member of the military personnel occupying the highest rank. The nature of the military thus changed from being of the ruler, to being of the people.

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9 Yasuda, *Introduction to Defense Law*, pp. 2-8. An elaboration of the description of the legal nature of a military given in *Introduction to Defense Law* may be found in Hiroshi Yasuda, "Observations on the Legal Nature of Armies," *Bulletin of the National Defense Academy: Studies in Humanities and Social Sciences*, No. 42 (March 1981), pp. 143-191.

10 Constitution of the Empire of Japan, Article 11 (The Emperor has supreme command of the Army and Navy.); Article 12 (The Emperor determines the organization and peace standing of the Army and Navy.); Article 13 (The Emperor declares war, makes peace and concludes treaties.); and Article 14, Paragraph 1 (The Emperor declares a state of siege.).

Presently, the state is the employer of military personnel. The supreme commander is expected to be a civilian rather than a member of the military. From this fact developed the concept of civilian control, and the military now submits to the control of the government. This is one of the most important principles of a liberal democracy. In addition, the military has come to be included within the power of the administration.

(3) Comparison of the Police and the Military

The duties and characteristics of the police and the military may be compared and contrasted as shown in Table 1.[11]

Table 1. The Differences between the Police and the Military

	The Police	The Military
Duties	To maintain security within the country To prevent and investigate crime	To defend the country (may also be used to defend security within the country in emergency situations)
Character	Functions internally	Functions externally
Positioning	Administrative organization	Independent, professional body external to the administration Need for political control by the administration Civilian control in liberal democracies (Note 1)
Units of authority	Police officers Individuals act as administrative organs Chiefs of police, etc. (administrative agency)	Units Act as organizational units
Control and supervision	Orders from senior officers Delegation (*Auftrag*) (Note 2)	Orders from senior officers High command (*Kommando*) (Note 3) The military is the "tool of the ruler" (in the classical sense) Today, military personnel are civil servants with a particular legal status (*Burger* in uniform).
Sphere of activity	Within the region Within the sphere encompassed by the sovereignty of the country	Within the region and externally There is no regional limit in principle
Use of force	Use of weapons, etc.	Use of force Use of weapons
Special features	Civil Police officers are not limited to civil officials (e.g. the French *gendarmerie*)	Military Military personnel are military officials

Note 1: This refers to including armed organizations in the administrative branch of government under the general scheme of a system of separation of powers. The military submits to the control of the government; this is the most important principle of modern democratic nations.

Note 2: As an administrative organ, the individual police officer is given responsibility for the appropriate exercise of authority.

11 Shikama, *Analysis of the Power of the State*, pp. 115-120; Yasuda, *Introduction to Defense Law*, pp. 2-5.

Note 3: Soldiers act exactly as ordered by their superior officers.
Note 4: Under the French police system, the members of the police have the duties of civil officials, but their public position is that they have the status of military officers.

B. Police Functions and Defense Functions

Police functions are the exercise of all types of police authority on the basis of the law regulating police functions (in Japan, the Police Duties Execution Law [Law no. 136 of 1948], etc.).[12] They are carried out with respect to the people residing within the territory of the state, and are carried out with discipline in accordance with domestic laws while at the same time being subject to the principle of proportion of police.[13]

Defense functions are externally directed actions such as the use of force in defending the nation (self defense).[14] They are carried out with respect to other nations, here referring to enemy nations, and are carried out with discipline in accordance with international law. However, under conventional international law, it is possible to exercise force with almost no limits.[15]

The principle of proportion of police is applicable to police functions under domestic law and the legal grounds for application of this principle in Japan are Article 13 of the Constitution of Japan.[16] This principle gives the greatest possible respect to the human rights of the individual and its positive law basis resides in these regulations.[17]

Defense functions, on the other hand, are not regulated by domestic law, and use of force may be permissible except where prohibited by international law. The principle of proportion of police in domestic law does not apply to defense functions and force may be used with no limits placed on it. This is considered to be because the guarantees of Article 13 of the Constitution do not apply to combatant members of an enemy country; in other words, the antagonists against whom the right of self defense is executed.[18] Article 88[19] Paragraph 2 of the Self-Defense Forces Law states that in using force, "the limit as legitimately adjudged necessary for meeting the prevailing situation will not be exceeded"; this is not the principle of proportion of police made into positive law, but is a type of political consideration and is a restriction inherent in the right of self defense.[20]

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12 Yamashita, "Some Considerations Regarding the Defense Law Debate," p. 64.

13 Yasuda, *Introduction to Defense Law*, p. 2.

14 Yamashita, "Some Considerations Regarding the Defense Law Debate," p. 64.

15 Yasuda, *Introduction to Defense Law*, p. 2.

16 Article 13 of the Constitution: "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."

17 Yamashita, "Some Considerations Regarding the Defense Law Debate," p. 69. Yamashita examines three theories of the basis (the source in law) of the principle of proportion of police: (1) it is a general principle in administrative law; (2) it is an administrative law of reason having a basis in Article 13 of the Constitution; (3) it is a constitutional principle made into positive law in Article 13 of the Constitution. Yamashita maintains that (3) is the appropriate theory.

18 Ibid., p. 70.

19 Article 88 of the Self-Defense Forces Law provides that: (1) When mobilized in accordance with the provisions of Article 76 Paragraph 1, the Self-Defense Forces may use the force necessary to defend Japan; (2) In using force when the Self-Defense Forces are ordered to be in operation, international statutes and/or customs will be adhered to, when so required, and the limit as legitimately adjudged necessary for meeting the prevailing situation will not be exceeded.

20 Yamashita, "Some Considerations Regarding the Defense Law Debate," p. 70.

II. Regulations Governing the Police and the Military: Police Law and Defense Law (Military Law)[21]

This section will clarify the sort of features that may be seen in the regulations that govern the police and the military, with reference to the differences in organizational character and function between the two, and will examine the causes of these differences. In either of them, the way its organization is regulated is greatly affected by whether its functions are directed domestically at citizens or externally at foreign countries. In the former case, it is necessary to put checks in place under domestic laws to restrict action, whereas in the latter case, it is necessary to ensure freedom of action as far as possible.

The police and the military are both governed by law: police law and defense law (military law), respectively. Police law is the law governing police functions and defense law is the law governing defense functions (military functions). The particular features of police law and defense law are summarized in Table 2.[22]

Table 2: Differences between the Police Law and Defense Law

	Police Law	Defense Law (Military Law)
Method of regulation	Positive list	Negative list
Special features	In principle, gives limitations	In principle, gives no limitations
Provisions	Provides what "may be done" Only that which is explicitly stated in the law may be done.	Provides what "may not be done" Freedom to do anything other that what is explicitly forbidden.
Regulating law	Domestic law	International law

Police law regulates police functions which are exercised domestically with respect to the citizens. Because they relate directly to the rights and obligations of the citizens, there is a need to control police functions through domestic laws and restrict the use of police authority; any action by the police must always be based on a specific provision of domestic law. Police law is grounded in the idea that actions not stipulated by domestic law may not be taken, which comes from the principles of a nation governed by law, administration governed by law, and reservation of law.[23]

Defense law, on the other hand, regulates defense functions which are exercised both domestically and abroad with respect to other, enemy countries. The irreducibility and equality of sovereign nations in the international community are reflected in defense law and while in reality there are disparities between the national power of different nations, all countries are equal in the eyes of international law. Nations only have an obligation to submit to international law and as the situations

21 Defense law and military law are the same in terms of content, but after World War II, it became the regular practice in Japan to use the word "defense" in reference to anything military, and in this paper the expression "defense law" is used to refer to the legal system relating to the Self-Defense Forces. On the other hand, the expression "military law" is used for legal systems relating to the armies of other countries.

22 Shikama, *Analysis of the Power of the State*, pp. 115-120; Rikio Shikama, "Are the Self-Defense Forces a Military?" *Defense*, Vol. 18, No. 1 (October 1999), pp. 22-23.

23 Yoshihara, "Emergency Legislation and International Law on Armed Conflict," *Overseas Situations,* June 2002. p. 70. For the significance of the principle of a nation governed by law, etc., see 4. a) (1) "Basic Principles of Administrative Law" below.

in which the exercise of defense functions may be envisaged are fluid and unpredictable, they have to be able to give a flexible response.[24] Defense functions are thus bound by international law—the law of war, humanitarian law, etc.—and in principle, anything is possible that is not specifically prohibited in international law.

Domestic defense laws have very much the same implications as the enforcement or restriction laws of international law. They thus have the following three roles: they demonstrate recognition and interpretation of the law of war and others; they clarify specific guidelines for when military organizations embark on combat action; and they legally regulate the domestic support system for military organizations that have embarked on combat action. There are even cases in which the regulation is more limited than the scope approved by international law.[25]

In addition, rules of engagement (ROE)[26] may be formulated, but these are domestic enforcement orders stipulated within the framework of international law relating to armed conflict together with political speculations and considerations. This means that in situations in which ROE have not been established, there are no political or ethical limitations to the use of force and it is possible to use armed force with the full application of international law.[27]

III. Positioning and Character of the Self-Defense Forces: Are the Self-Defense Forces Part of the Administration, or Are They a Military?

The SDF are an armed organization maintained by the state. A premise for any consideration of the thinking underlying the regulations that govern them is the need to clarify how the SDF are positioned in terms of the law, both international and domestic. This section will therefore examine the significance of the administration, the relationship between the right of defense and administrative power, and the positioning of the SDF in terms of both international and domestic law. At the same time, the opinion of the government will be put forward.

A. Ideas on Administrative Power

(1) The Traditional Idea

The functions of the state are made up of three powers: legislative power, jurisdiction, and administrative power. Each power controls and balances the others, ensuring that there is no oppression by

24 Shikama, "Are the Self-Defense Forces a Military?" p. 22.

25 Tsuneo Yoshihara, "Defense Debate: Questioning the Basis of Legal Recognition," in *News Commentary,* June 15, 1999, p. 5; Yoshihara, "Emergency Legislation and International Law on Armed Conflict, p. 65.

26 The rules of engagement are a document of the military authorities that explicitly specify the classification of stages in emergency response to a crisis and the concrete measures to be taken by the front-line commander in order to deal with an emergency situation. This clarifies the duties and responsibilities of the commander in the field, and ensures that response measures are not left to the subjective judgment of the individual commander. It also allows the political and policy side to indicate the limits to the response behavior of units, ensures compliance with laws, and permits concurrence between government guidelines and operational actions. Osamu Nishi et al., *Japanese Security Law* (Naigai Shuppan, 2001), p. 134. A detailed study of ROE has been made by Yasuaki Hashimoto and Masatoshi Gohda, "Rules of Engagement: Roles and Implications," in *NIDS Security Reports,* Vol. 7, Nos. 2 & 3, (March 2005).

27 Yoshihara, "Defense Debate," p. 5; Yoshihara, "Emergency Legislation and International Law on Armed Conflict," p. 66.

the power of the state—this is known as the "balance of the three powers."[28]

Legislative power is the state function of enacting laws and regulations. Jurisdiction is the state function that deals with civil or criminal affairs under the laws and regulations. Administrative power is the sovereign power of the state with the exception of legislative power and jurisdiction, an idea referred to as the "theory of subtraction of administration." In substantive terms, administrative power is the general functions of the state, not including civil or criminal affairs, under the laws and regulations, and in the narrow sense, this was traditionally considered to be the enforcement of law. It is generally referred to as "the administration."

(2) Definition of Administration

There are two ways of thinking regarding the definition of administration.[29] The first of these is the passive definition that administration is the functions of the state with the exception of legislation and jurisdiction. This is an understanding from the point of view of the accepted theory and concurs with the historical developments resulting from the administration. However, this definition has been criticized for being recursive and for not clarifying the details of the administration and a need for a more affirmative definition of administration has been felt. The active definition that holds that administration is the active functions carried out under the law for the public good was developed. In this case, jurisdiction is taken to be the passive function of enforcing and implementing law in accordance with the law. These theories are not contradictory, but examine the administration from different angles and thus complement each other.

(3) Scope of the Administration (Passive Theory)

There are two theories concerning the scope of the administration when it is considered on the basis of the traditional passive theory. The first of these is the theory of subtraction of administration; this assumes that total state function = legislation + jurisdiction + administration, and is grounded in the doctrine of division of the three powers. This is known as the theory of passive definition, because the boundaries of the administration are blurred. The first basis for this argument is the reply by Minister of State Tokujiro Kanamori to the Committee on Amendment of the Imperial Constitution (July 1946), stating that with the exception of legislation and jurisdiction, the administration (the power to administer) resided with the Cabinet. The second basis for the argument is the theory of Toshiyoshi Miyazawa, who maintained that in the Constitution of the Empire of Japan, high command and diplomacy belonged to the supreme authority of the administration.[30]

The second theory is the theory of definitive subtraction. This assumes that total state functions = functions of control of the people (administration + legislation + jurisdiction) + α, where α is some unspecified extra element. This draws a distinction between state functions covering control of the people and other state functions, and defines the scope of the administration by narrowing down the

28 Hayashi Shuzo et al., *Concise Dictionary of Legal Terms* (Gakuyo Shobo, 1978), p. 115.

29 Naohiko Harada, *Theories of Administrative Law: Corrected Fourth Edition, Expanded Edition* (Gakuyo Shobo, 2000), pp. 5-7.

30 Yamanaka, "The Concept of Administrative Power in the Constitution of Japan, and the Defense of the Nation," pp. 35-40.

functions carried out with respect to the people through a process of elimination. Here, diplomacy and defense are excluded from the scope of administration. The first basis for this argument is the theory of Kazushi Kojima, which holds that diplomatic authority, which does not reside with the state functions carried out with respect to the people, bears no relation to the essence of the separation of power. The second basis for the argument is the theory of Tsukasa Kobari, which holds that it is unclear whether or not the right to command the military is included in the administration.[31]

(4) Recent Ideas

The theory of executive power[32] has recently been gaining strength in relation to notions of administrative power. This is the theory that the administration does not stop at passively and subserviently administering laws, but in a wide sense, also includes planning and overall coordinating functions. In addition, the scope of the administration is not regarded solely as the functions directed domestically, but also functions directed at other countries; in other words, the scope of the administration extends to its diplomatic affairs. The administration may be taken to be the core of the high-level functions of government, widely including overall strategy and coordination.[33] The term "executive power" is used for this.

The bases for the theory of executive power are as follows.[34] The first basis is the English translation of the Japanese term for the administration (*gyosei*) in the Constitution of Japan. Article 65 of the Constitution[35] uses the expression "executive power" for *gyosei*, while Article 72[36] uses the expression "various administrative branches" for the Japanese gyoseikakubu; Article 73[37] uses the expression "administrative functions" for the Japanese *ippan gyosei jimu* (literally, "general administrative affairs"), and "administer" for *shikko* (literally, "enforce" [laws, etc.]). The original Japanese text uses the single word *gyosei* ("the administration"), yet it may be conjectured that the scope of administrative power extends beyond the scope of the various administrative branches and administering laws. The second basis for the theory of executive power is the reply by Minister of State Tokujiro Kanamori to the Committee on Amendment of the Imperial Constitution (July 1946). In this it was stated that administration (the power to administer), with the exception of legislation and jurisdiction, resided with the Cabinet. This takes the point of view of the theory of subtraction of administration, holding that the administration has a wide scope and includes diverse functions. The third basis for the theory of executive power is that the list of functions given in Article 73 of

31 Ibid., pp. 36-40.

32 The theory of executive power has been advocated in work such as Koji Sato, *The Constitution of Japan and a Nation Governed by Law* (Yuhikaku, 2002); and Masanari Sakamoto, "Executive Power and Administrative Operations in the Parliamentary System of Government," *View of Fifty Years of the Constitution Vol. 1* (Yuhikaku, 1998).

33 Yamashita, "Some Considerations Regarding the Defense Law Debate," pp. 77-78.

34 Yamanaka, "The Concept of Administrative Power in the Constitution of Japan, and the Defense of the Nation," pp. 35-40.

35 Article 65 of the Constitution: Executive power shall be vested in the Cabinet. (Underlined by the author.)

36 Article 72 of the Constitution: The Prime Minister, representing the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet and exercises control and supervision over various administrative branches. (Underlined by the author.)

37 Article 73 of the Constitution: The Cabinet, in addition to other general administrative functions, shall perform the following functions: Administer the law faithfully; conduct affairs of state. (Rest is omitted.) (Underlined, parenthesis added by the author.)

the Constitution is not limited to functions relating to the control of the people. The viewpoint of the theory of subtraction of administration is thus considered to be valid.

B. The Right of Defense as a Function of the State, and its Relationship with Administrative Power

(1) The Right of Defense (Defensive Prerogative)

The right of defense (defensive prerogative) means the authority under which a nation is able to carry out defense functions.[38] Defense is an inherent right of the state, and is the most fundamental role of the state.[39]

If the right of defense is to be evaluated in constitutional terms, the judgment on the Sunagawa Case[40] (Supreme Court, December 16, 1959) will be of use for reference.[41] This judgment affirms the existence of state authority relating to items of defense, first acknowledging the right of self defense in international law between sovereign nations as legal subjects in international law, and secondly acknowledging that the government, as the state and as an organ thereof, has the right of defense in its relations with the people.

According to the judgment of the Supreme Court in the Sunagawa Case, international law and Article 9 Paragraph 2 of the Constitution[42] cause restrictions to be placed on the use of the right of defense.[43]

First are the restrictions relating to the establishment and organization of a military, and as the SDF are of the smallest size necessary for the purpose of self defense, their existence does not constitute a breach of the Constitution; this is the same basic thrust as the view of the government.[44]

Second, the restrictions relating to the use of force for self defense are as follows: the SDF may only be mobilized when the three conditions of exercising the right of self defense[45] are met; a

38 Yamanaka, "The Concept of Administrative Power in the Constitution of Japan, and the Defense of the Nation," p. 27.

39 Yasuda, *Introduction to Defense Law*, pp. 1-2.

40 This was a case in which labor union members and others opposed the planned expansion of the U.S. Tachikawa Air Base (Tokyo) into the town of Sunagawa trespassed onto a prohibited area on the base in 1957. They were indicted for violation of Article 2 of the Law for Special Measures Concerning Criminal Cases, which implemented the administrative agreement based on the Japan-U.S. Security Treaty (formerly the Security Treaty). The central issues of the court case included the constitutionality of the presence on Japanese soil of the U.S. garrison and the U.S. armed forces on the basis of the Japan-U.S. Security Treaty. Motoaki Hatake, *Article 9 of the Constitution: The Frontline of Research and Debate* (Aobayashi Shoin, 2006), pp. 95-98.

41 Yasuda, *Introduction to Defense Law*, pp. 14-17; Yamanaka, "The Concept of Administrative Power in the Constitution of Japan, and the Defense of the Nation," pp. 30-31.

42 Article 9 of the Constitution: (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 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.

43 Yamanaka, "The Concept of Administrative Power in the Constitution of Japan, and the Defense of the Nation," p. 31.

44 Director General of the Defense Agency Seiichi Omura at the House of Representatives Budget Committee, December 22, 1954: "Article 9 of the Constitution recognizes the right of self defense of Japan as an independent nation. It is therefore not a violation of the Constitution for Japan to have self-defense forces with a mission of self defense, nor to establish troops with the necessary and adequate levels of armed capability to carry out this objective."

45 Submittal data to the House of Councillors Budget Committee, January 14, 1972: The government's interpretation is that invocation of the right of self defense allowed under Article 9 of the Constitution is limited to situations wherein the existing three conditions of exercising the right of self defense ([i] There is an imminent and illegitimate act of aggression against Japan; [ii] there is no appropriate means to deal with this aggression other than to resort to the right of self defense; and [iii] the use of armed strength is confined to the minimum necessary level) are met.

resolution of the Diet prohibits the SDF from being mobilized abroad,[46] and other restrictions.[47]

(2) The Relationship between the Right of Defense and Administrative Power

The Constitution of Japan has provisions stating that executive (administrative) power shall be vested in the Cabinet (Article 65); that the Prime Minister exercises control and supervision over various administrative branches (Article 72); and that the Cabinet shall perform a list of functions in addition to other administrative functions (Article 73). It has already been pointed out that in each of these cases, the Japanese word gyosei has an essentially different meaning. Organizations relating to administration are divided between the Cabinet and the various branches of the administration, and they each have separate authority.[48]

If the right of defense is taken to reside with administrative power, the question of what right of defense is under the control of which administrative organ arises; in other words, the nature of the right of defense residing with the Cabinet and the nature of the right of defense residing with the various administrative branches.

The right of defense, and in particular the question of where the authority of the supreme commander of the SDF resides, is problematic.[49] First, according to the theory of subtraction of administration, the right of defense resides with the administrative power. Second, according to the theory of definitive subtraction, the right of defense is taken to reside in state functions other than administrative power and the other three powers (i.e. in diplomacy and defense).

Looking at the Constitution of Japan, the right of diplomacy is explicitly stated in Article 73 Paragraphs 2 and 3, and this right is explicitly stated to reside with the Cabinet. However, there are no stipulations that make mention of the right of defense. Nonetheless, the list of functions in Article 73 is not limited to functions for ruling the people, and if administrative power is taken in a wide sense in compliance with the theory of executive power, it is valid to consider that the right of defense is also grounded in the thinking of the theory of subtraction of administration and is thus included in administrative power.

(3) Academic Theories Relating to Authority as the Supreme Commander of the Self-Defense Forces

There are two academic theories concerning the authority as the supreme commander of the SDF.[50] The first is the commonly accepted theory that the Prime Minister has authority to command general administrative affairs on the basis of Article 72 of the Constitution. It is stipulated in Article 6 of the Cabinet Law (Law No. 5 of 1947) that the Prime Minister shall represent the Cabinet and "exercise control and supervision over the administrative branches in accordance with the policies to be decided

46 Plenary Session of the House of Councillors, June 2, 1954, Resolution Banning Dispatch of the Self-Defense Forces Overseas, "At the time of the creation of the SDF, given the articles of the present Constitution and the ardent peace-loving spirit of the Japanese people, this House reaffirms that the SDF shall not be dispatched overseas. Resolved by the House of Councillors."

47 A list of specific restrictions is given in 3. d) (3) "Restrictions Under Domestic Law."

48 Yamashita, "Some Considerations Regarding the Defense Law Debate," p. 82.

49 Yamanaka, "The Concept of Administrative Power in the Constitution of Japan," pp. 31-32, 34-35.

50 Nishi, *Japanese Security* Law, pp. 125-127.

upon at Cabinet Meetings."[51] The authority as the supreme commander of the SDF as stipulated in article 7 of the Self-Defense Forces Law[52] is taken to be in accordance with Article 6 of the Cabinet Law. During the time of the Defense Agency, the chain of command of the SDF was as follows: the Prime Minister, acting in his role as head of the Cabinet, commanded the Director General of the Defense Agency through his additional role as head of the Cabinet Office; the Director General of the Defense Agency commanded the units and organizations of the SDF through the Joint Chief of Staff and the Ground, Maritime, and Air Chiefs of Staff. The Defense Agency has since become the Ministry of Defense, and the minister responsible is the Minister of Defense. The Prime Minister's aforementioned role as head of the Cabinet Office is currently carried out by the Minister of Defense.

The second theory concerning the authority as the supreme commander is the theory of creation of supreme command by regulation.[53] Under this theory, the Prime Minister holds authority as the supreme commander and the Director General of the Defense Agency holds the right to supervise the duty of the SDF. The Director General of the Defense Agency receives commands for mobilization of units directly from the Prime Minister as head of the Cabinet, and receives commands and supervision regarding administrative duties of the SDF (business of office) from the Prime Minister as head of the Cabinet Office. Here too, the role of the Prime Minister as head of the Cabinet Office is currently carried out by the Minister of Defense.

In evaluating the two theories, there is the view that the theory of creation of supreme command by regulation is desirable from the point of view of political control over military movements as the Prime Minister, who is head of the Cabinet, takes responsibility for the movements of the Self-Defense Forces in a centralized fashion.[54] This paper tentatively takes the understanding of the commonly accepted theory.

The nature of SDF actions under these two theories is summarized in Table 3.[55]

Table 3: The Nature of Self-Defense Force Actions

Action	Commonly accepted theory	Theory of creation by regulation Defense operations
Defense operations Public security operations	Establishment of legal status (head of the Cabinet) Orders to take action (head of the Cabinet Office)	Establishment of legal status (head of the Cabinet)
Disaster relief dispatch Maritime security operations Action against violation of territorial air space	Command and supervision (head of the Cabinet Office) Orders to take action (Director General of the Defense Agency)	Representative of Director General of the Defense Agency

51 Article 6 of the Cabinet Law: The Prime Minister shall exercise control and supervision over the administrative branches in accordance with the policies to be decided upon at Cabinet Meetings. (Underlined by the author.)

52 Article 7 of the Self-Defense Forces Law: The Prime Minister, representing the Cabinet, shall hold the supreme powers of command and supervision over the Self-Defense Forces. (Underlined by the author.)

53 Hiroki Miyazaki, "Two Laws of National Defense and Authority as Supreme Commander of the Self-Defense Forces: Defense Law Series (6)," *National Defense*, August 1977, pp. 103-107.

54 Nishi, *Japanese Security Law*, pp. 128.

55 Ibid., pp. 127-128. To facilitate comprehension, this is shown based on the interpretation at the time of the Defense Agency.

The Cabinet, which holds administrative power, should retain the defense function of authority as the supreme commander of the SDF. It is necessary to differentiate between the authority of the Cabinet and the authority of the various administrative branches with regard to all other functions carried out by the SDF, and some of these functions are distributed among the various administrative branches.[56]

C. Positioning of the Self-Defense Forces in Terms of International Law

In international politics, a military is known as an "armed force," meaning a standing group bearing arms that is charged with national defense; it is thus a belligerent party retained by the state.[57] The term "belligerent party" is used in international law, and the conduct of hostilities is permissible within the international community.[58]

The meaning of related terms in international law is as shown in Table 4.

Table 4: Meaning of Terms

Term	Meaning
Privileged combatant (Note 1)	A combatant in an international armed conflict who is able to exercise the means to damage the enemy within the limits approved by international law. Those having the status of privileged combatant are combatants, warships, and military aircraft. Privileged status is recognized in maritime and aerial combat for warships and military aircraft as battle units (Note 2).
Combatant (Note 3)	1. Definition, characteristics a. Those with the right to participate directly in acts of hostility using any means to damage the enemy that are not prohibited under international law (Note 4) b. Those who are legitimate targets of the enemy (Note 5) 2. Conditions for combatant status (Note 6) a. Personnel making up a military, with the exception of personnel posted for sanitary or religious service, who openly carry arms at the time of hostilities or when the military is being developed before the start of attack.
Combatant (Note 3)	b. Personnel who are members of militias, volunteer armies, or organized resistance groups, and satisfy the following four conditions: (1) they are under the command and control of a responsible party; (2) they wear a fixed special badge; (3) they openly carry arms; and (4) they act in compliance with the law of war (Note 7). c. Personnel who are members of a revolt and satisfy the following two conditions: (1) they openly carry arms; and (2) they act in compliance with the law of war.

56 Yamashita, "Some Considerations Regarding the Defense Law Debate, pp. 79-82.

57 Shikama, "Are the Self-Defense Forces a Military?" p. 23; Yoshihara, "Defense Debate," p. 5; Yoshihara, "Emergency Legislation and International Law on Armed Conflict," p. 68.

58 Yoshihara, "Defense Debate," p. 5.

Term	Meaning
Warship (Note 8)	(1) Attached to the military of a single country. (2) Displays external markers indicating its nationality and its military character. (3) Is under the command of a member of the military. (4) A crew is deployed that is under the regulations of the military.
Military aircraft (Note 9)	(1) Attached to the military of a single country. (2) Displays external markers indicating its nationality and its military character. (3) The crew are military personnel

Note 1: Naoko Sajima et al., *Concise Encyclopedia of Security Affairs* (Shinzansha, 2004), p. 176.
Note 2: If a vessel other than a warship carries out acts of hostility, it becomes a military target even if it is a commercial vessel. Aircraft other than military-purpose aircraft may not engage in acts of hostility, which include communicating in-flight military information for use directly by personnel taking part in hostilities. If such aircraft carry out acts of hostility, they become military targets.
Note 3: Sajima et al., *Concise Encyclopedia of Security Affairs*, pp. 176-177.
Note 4: It is a punishable war crime for personnel other than combatants to carry out acts of hostility. Regular citizens are non-combatants. Mercenaries do not have the rights of combatants. In accordance with the Optional Protocol on the Convention on the Rights of the Child of 2000, in order to protect children, the status of privileged combatant may only be conferred on personnel aged 18 or over.
Note 5: Personnel placed out of combat, such as injured soldiers or soldiers that have surrendered, are not legitimate targets of attack and any such personnel who fall into the power of the enemy are afforded the treatment of prisoners of war.
Note 6: The conditions for combatant status in the Geneva Conventions of 1949.
Note 7: Conditions (2) and (3) are eased in the Protocol Additional to the Geneva Conventions (Protocol I), and combatant status in a guerrilla war is retained during hostilities or when the military is being developed before the start of attack if arms are openly carried.
Note 8: Sajima et al., *Concise Encyclopedia of Security Affairs*, pp. 149 and 176; Defined in United Nations Convention on the Law of the Sea (1982), Article 29.
Note 9: Ibid., pp. 149-150 and 176; in accordance with the Rules of Air Warfare (1923: common law).

The SDF clearly satisfy the conditions of an armed force in international law; the SDF are an organization tasked with national defense, they have the status of privileged combatant in international law, and SDF personnel may be regarded as combatants. In addition, the vessels and aircraft of the SDF receive the treatment of warships and military aircraft, respectively.[59]

The law of war, etc., applies to an armed force that meets the conditions for a belligerent party.[60]

D. The Positioning of the Ministry of Defense and the Self-Defense Forces in Domestic Law

(1) Basic Regulations and Positioning

The Ministry of Defense and the SDF were established on the basis of Article 3 Paragraph 2 of the National Government Organization Law (Law No. 120 of 1948)[61] and the Ministry of Defense

59 See the government opinions quoted below in section 3. e) "Government Views Concerning the Positioning of the Self-Defense Forces."

60 Yoshihara, "Defense Debate," p. 5.

61 Established for the purpose of administrative organization shall be Office on the Ministerial Level, Ministry, Commission, and Agency. The establishment and abolition of such administrative organs shall be provided for by other law.

Establishment Law (Law No. 164 of 1954),[62] and are administrative organizations.[63]

The Ministry of Defense was established for the purposes of protecting the peace and independence of Japan, and ensuring the country's security. It is tasked with the management and operations of the Ground, Maritime and Air Self-Defense Forces, and with carrying out related affairs. It also carries out affairs related to the U.S. forces in Japan.[64]

The duties of the SDF, the formation and organization of units and agencies, command and supervision of the SDF, the action and authority of the Self-Defense Forces, and other items are stipulated in the Self-Defense Forces Law.[65] As the principal duty of the SDF[66] is to defend Japan against direct or indirect invasion in order to protect the peace and independence of Japan, and ensure the country's security, the SDF are also tasked with preserving public order when necessary. In addition, the secondary duties of the SDF include dealing with emergency contingencies in areas surrounding Japan and international peace cooperation activities.[67]

(2) The Relationship between the Ministry of Defense and the Self-Defense Forces

The Ministry of Defense, an administrative organization, was established in line with the Ministry of Defense Establishment Law, the Self-Defense Forces Law, and other domestic laws, and it may be understood overall in terms of the concept of the SDF.[68] In other words, the single entity seen from the perspective of an administrative organization is called the Ministry of Defense, and seen from the perspective of the organization of units, it is called the Self-Defense Forces.[69]

The Ministry of Defense is one of the various administrative branches making up the Cabinet, and is an administrative organization with static functions.[70] This is the same as any other government ministry or agency. It performs the tasks relating to defense administration, and manages and operates the SDF. The basis for its establishment is the National Government Organization Law and the Ministry of Defense Establishment Law.

The SDF form an organization with the capability to enforce actions for defense and are thus seen in a real-life, dynamic sense.[71] They are one of the various administrative branches making up the Cabinet. The units are one branch of the SDF organization and are positioned as a special organ. The basis for the establishment of the SDF is the Ministry of Defense Establishment Law and the Self-Defense Forces Law.

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62 Article 2 Paragraph 1 of the Ministry of Defense Establishment Law: The Ministry of Defense shall be established in accordance with Article 3 Paragraph 2 of the National Government Organization Law.

63 The Defense Agency became the Ministry of Defense on January 9, 2007. When it was the Defense Agency, it was positioned as an external bureau put in place within the Cabinet Office, and the basis for its establishment was the Cabinet Office Establishment Law (Law No. 89 of 1999) and the Defense Agency Establishment Law (Law No. 164 of 1954). The Minister of State became the Director General of the Defense Agency.

64 Article 3 of the Defense Agency Establishment Law.

65 Article 5 of the Defense Agency Establishment Law.

66 Article 3 of the Self-Defense Forces Law.

67 See note 106 below regarding this.

68 Yasuda, *Introduction to Defense Law*, p. 81.

69 Tadao Takase, "Outline of the Defense Agency Establishment Law and the Self-Defense Forces Law," *Anthology of Police Studies* Vol. 7 No. 9 (September 1954), p. 48.

70 Yozo Kato, "The Main Problems with Both Defense Laws, Part 1," *Police Studies* Vol. 25 No. 7 (July 1954), pp. 27-28.

71 Ibid.

(3) Restrictions under Domestic Law

The duties and actions of the SDF are subject to legal restrictions under the Constitution and the legal structure underneath the Constitution. This has a huge impact on defense policy. These restrictions are the exclusively national defense oriented policy,[72] the minimum necessary level of self-defense capability,[73] the three conditions of exercising the right of self defense,[74] the prohibition of the exercise of belligerent rights,[75] the prohibition of the right to collective self defense,[76] the prohibition of the use of force abroad,[77] the prohibition of armaments deemed to be offensive weapons (weapons of mass destruction),[78] the unconstitutionality of conscription,[79] the prohibition of establishing a court-martial,[80] and the peaceful use of space.[81] In addition to these legal restrictions, the Three Antinuclear Principles[82] and the Three Principles on Arms Exports[83] are imposed through policy decisions.

E. Government Views Concerning the Positioning of the Self-Defense Forces

The government has expressed its views concerning whether or not the SDF are a military in replies in the Diet and written replies to memoranda on questions. These views are that the SDF are a military under international law, but their duties and authority are limited by the Constitution and

72 Prime Minister Kakuei Tanaka, plenary session of the House of Representatives (October 31, 1972); Director General of the Defense Agency Joji Omura, House of Councilors Committee on Budget (March 19, 1981), etc.

73 House of Representatives, "Written Reply to Memorandum on Questions Submitted by Representative Kiyoshi Mori," (December 5, 1970), etc.

74 House of Councilors Committee on Audit, "Submitted Documents," (October 14, 1972), etc.

75 House of Representatives, "Written Reply to Memorandum on Questions Submitted by Representative Seiichi Inaba," (May 15, 1970), etc.

76 House of Representatives, "Written Reply to Memorandum on Questions Submitted by Representative Seichi Inaba," (May 29, 1971), etc.

77 House of Representatives, "Written Reply to Memorandum on Questions Submitted by Representative Seichi Inaba," (October 28, 1970), etc.

78 House of Representatives, "Written Reply to Memorandum on Questions Submitted by Representative Yanosuke Narazaki," (October 14, 1970), etc.

79 House of Representatives, "Written Reply to Memorandum on Questions Submitted by Representative Seichi Inaba," (August 15, 1970), etc.

80 Article 76 Paragraph 2 of the Constitution: No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.

81 Japan ratified the Treaty on Principles Governing the Activities and States in the Exploration and Use of Outer Space Including Moon and Other Celestial Bodies (Principle of Peaceful Use of Space) in 1967. A Diet resolution was adopted in 1969 restricting the use of space to peaceful purposes.

82 The Three Antinuclear Principles were announced by the Cabinet of Eisaku Sato in 1968; they are the principles that Japan shall not "produce, possess, or introduce nuclear weapons." A Diet resolution to this effect was passed in 1969. The possession of nuclear weapons would not be prohibited by the Constitution provided that it came within the limits of the minimum necessary level of self-defense capability (Director General of the Cabinet Legislation Bureau Hideo Sonoda, House of Councilors Committee on Budget, November 3, 1978), etc.

83 The Three Principles on Arms Exports were announced by the Cabinet of Eisaku Sato in 1967; they are the principles that arms exports to the following countries shall not be permitted: (1) communist bloc countries, (2) countries subject to arms exports embargo under United Nations Security Council resolutions, and (3) countries involved in or likely to be involved in international conflicts. The Cabinet of Takeo Miki determined in 1976 that arms exports to regions other than those covered by the three principles should also be avoided, meaning that in effect there was a total ban on arms exports. Subsequently, the Cabinet of Yasuhiro Nakasone lifted the ban on the provision of arms-related technology to the U.S. in 1983, and the Cabinet of Junichiro Koizumi eased the three principles in 2004 to allow joint development and manufacture in relation to missile defense.

domestic laws such as the Self-Defense Forces Law so that their positioning is different to that of regular militaries in other countries.

Specifically, the written replies, etc., are as given below.[84]

Prime Minister Shigeru Yoshida (1954): The SDF are, in a sense, a military. However, they are not "war potential" as stated in Article 9, Paragraph 2 of the Constitution.

Director General of the Defense Agency Seiichi Omura (House of Representatives Budget Committee, December 22, 1954): If a military is defined in terms of being against aggression by another country, then the SDF are a military. It is not unconstitutional to maintain armed units with this capability.

Director General of the Cabinet Legislation Bureau Shuzo Hayashi (House of Representatives Budget Committee, March 2, 1959): A military has the capability to resist armed attack by another country. The SDF are limited to the minimum necessary level. The SDF have restrictions on their defensive capability and the way the defensive capability is exercised, and they have no belligerent rights.

Director General of the Cabinet Legislation Bureau Shuzo Hayashi (House of Representatives Special Committee on Security, April 28, 1960): The restrictions that are applied to militaries and warships under international law apply to the SDF. Under domestic law, the duties and functions of the SDF differ, and there are restrictions under the Constitution. That is to say that the duties of the SDF are limited and restricted under the Self-Defense Forces Law, there are restrictions under Article 9 of the Constitution, and belligerent rights are not recognized. The SDF are different from the regular armies of other countries that have no restrictions.

Director General of the Cabinet Legislation Bureau Masami Takatsuji (House of Councillors Budget Committee, March 31, 1966): The SDF have restrictions under the Constitution, and are thus different in character to a regular military.

Prime Minister Eisaku Sato (House of Councillors Budget Committee, March 31, 1967): The SDF are not designated as a military.

Director General of the Defense Bureau of the Defense Agency Akira Shioda (House of Councillors Special Committee on Security, November 13, 1981): A military is tasked with exchanging hostilities with external enemies. With regard to its activities, its belligerent rights are exercised. The SDF defend Japan from aggression by other countries but under the Constitution they are under a range of restrictions, such as not having their belligerent rights recognized. They are different from a military in the usual sense.

Written reply to memorandum on questions by Councillor Toyokichi Hata (May 11, 1985): The SDF have restrictions under the Constitution, such as only being able to have the minimum necessary level of self-defense capability. They are different from a military in the usual sense.

Minister for Foreign Affairs Taro Nakayama (October 8, 1990): The SDF have strict restrictions under the Constitution, such as only being able to have the minimum necessary level of self-defense capability. They are not a military in the usual sense, but they are a military under international law, and the SDF personnel are members of a military.

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84 Yasuda, *Introduction to Defense Law*, pp. 10-11; Asagumo, ed., 2004 *Defense Handbook* (Asagumo Shimbunsha, 2004), pp. 572-573.

IV. Japanese Defense Law: Basic Character

If the SDF are a military in international legal terms but are taken to be an administrative organization in domestic legal terms, this would imply that defense law, which is the domestic laws and regulations governing the SDF, is a type of administrative law. In order to clarify the character of defense law, this paper will first clarify the basic thinking regarding administrative law, and then examine the particular features of defense law in this country. Defense law resides within the framework stipulated by the Constitution, and has basic regulations at the level of laws. These regulations take the form of a positive list.

A. Special Features of Japanese Administrative Legislation

(1) Details of Administrative Law

Administrative law is the law covering the regulations for the organization and function of the administration.[85] Depending on its content, administrative law may be divided into administrative organization law, administrative civil servant law, administrative function law, administrative relief law, and administrative criminal law. The correspondence relationship[86] with defense law of the regulations in each division is as follows.

Administrative organization law regulates the organization and functions that operate the administration, and correspond to the Ministry of Defense Establishment Law, the Self-Defense Forces Law, and the Security Council Establishment Law (Law No. 71 of 1986).

Administrative civil servant law regulates the qualifications, job content, etc., of personnel appointed to the civil service; this corresponds to the Self-Defense Forces Law, the Law Concerning Allowances, etc., of Ministry of Defense Personnel (Law No. 266 of 1952), the Self Defense Personnel Ethics Law (Law No. 133 of 1999), and the Law Concerning Treatment of Ministry of Defense Personnel Dispatch (Law No. 122 of 1995).

Administrative function law regulates the administrative matters and procedures that the administrative organization should carry out, and this corresponds to the Armed Attack Situation Response Law, the Self-Defense Forces Law, the five situation response laws,[87] the Law Concerning Measures to Ensure the Peace and Safety of Japan in Situations in Areas Surrounding Japan, the Law Concerning Ship Inspection Operations in Situations in Areas Surrounding Japan, the Law Concerning the Dispatch of Japan Disaster Relief Teams (Law No. 93 of 1987), the International Peace Cooperation Law, the Anti-Terrorism Special Measures Law, the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq, the Law Concerning Maintenance of Living Environment of Periphery of Defense Facilities (Law No. 101 of 1974), and others.

Administrative relief law regulates relief procedures for citizens adversely affected by unlawful administrative activity; although there is no particular defense law corresponding to this, in general

85 Harada, *Theories of Administrative Law,* p. 3.

86 Ibid., pp. 14-16.

87 The Civil Protection Law (Law No. 112 of 2004), the U.S. Military Actions Related Measures Law (Law No. 113 of 2004), the Law Regarding the Use of Specific Public Facilities, etc. (Law No. 114 of 2004), the Maritime Transportation Restriction Law (Law No. 116 of 2004), and the Prisoners of War Law (Law No. 117 of 2004).

law there is the Administrative Objection Hearing Law (Law No. 160 of 1962), the Administrative Suit Law (Law No. 139 of 1962), the National Reparation Law (Law No. 125 of 1947), and others.

Administrative criminal law regulates illegal acts by administrative personnel and the punishment of such acts, and corresponds to the Self-Defense Forces Law, the MSA Secret Protection Law (Law No. 166 of 1954), the Law Concerning Punishment of Grave Breaches of the International Humanitarian Law (Law No. 115 of 2004), and others.

(2) Basic Principles of Administrative Law

(a) Basic Principles of Administration

The basic principles of administration are the notions of a nation governed by law and an administration governed by law. This thinking ensures that the use of administrative power is placed under the restraints of law and is reasonable, in order to protect the freedom of the people as citizens from unwarranted intervention by administrative power and to maintain the independence of civil society. It stops administrative power from becoming excessive, prevents abuses, and safeguards civil society and citizens' rights. This is an excellent scheme which derives from the ideas of liberalism.[88]

From these principles may be deduced the fundamental idea of administration by law which states that if the administration is to infringe upon the rights or the freedom of the people, it must do so in accordance with the law established by a parliament representing the people without fail.[89]

(b) The Relationship between Administrative Activities and Law

Under the principles of a nation governed by law and an administration governed by law, administrative activities must follow the law. First, all activities by administrative organizations are stipulated by law as the regulatory norms. Second, the principle of a nation governed by law gives priority in all administrative judgments to the intentions expressed in the law of the parliament representing the people. No administrative activity of any kind may violate the stipulations of the laws that govern administrative activity. Third, administrative activity must be carried out within the authority given under the relevant organization law, and must not violate the regulations of the laws that govern administrative activity. This leads to the idea of reservation of law; an administrative organization may not carry out activities if there are no fundamental regulations for them in law.[90]

(c) The Basic Principles of Administrative Law

The basic principles of administrative law are the demands of democracy and the demands of liberalism. The demands of democracy are that the structure of the administration and the basic framework of how it works should be decided upon through laws of a parliament that represents the people.[91] This embodies control of the military by the government. The demands of liberalism are a nation governed by law and an administration governed by law; as already mentioned, these ensure that the use of administrative power is placed under the restraints of law and is reasonable in order to protect

88 Harada, *Theories of Administrative Law*, p. 75.

89 Ibid., pp. 75-76.

90 Ibid., pp. 80-82.

91 Tsukasa Kobari, "The Constitutional State (Civilian Control) and Japan's Defense Law," *Studies of Public Law*, No. 59 (October 1997), pp. 124-125.

the freedom of the people as citizens from unwarranted intervention by administrative power and to maintain the independence of civil society. At the same time, there is also the demand that the execution of any functions relating to the rights or duties of citizens must have grounding in law.[92]

(d) Types of Norms of Administrative Law

The norms of administrative law can be divided into the following three types.[93] First are the organizational norms, made up of regulations that govern the allocation of authority of administrative organizations within the state administrative hierarchy. Second are the ground norms, made up of regulations that confer authority on administrative organizations in relation to the private citizen. Third are the regulatory norms, which are the general regulations that govern the shape of administrative activities given grounding by the ground norms.

What this means is that the organizational norms are the norms binding administrative organizations to each other within the internal relations of the administration, and the ground norms are the norms binding the relationship between administrative organizations and private citizens within the external relations of the administration.[94]

B. Special Features of Japanese Defense Law

It is possible to identify the following characteristics of Japanese defense law. First are the details of the Constitution of Japan. Article 9 of the Constitution stipulates the renunciation of war, the renunciation of retention of war potential, and the non-recognition of belligerent rights. The interpretation of the government[95] is that this stipulation means renunciation of aggressive war; although defensive war is also not recognized, it is possible to use force for the purpose of self defense. For this reason, the possession of the minimum necessary level of self-defense capability is recognized. Moreover, as belligerent rights may not be exercised, occupying enemy territory, carrying out administration of occupation, searching neutral ships, or capturing enemy ships is not permitted.[96]

Next, there are no stipulations relating to national emergency rights.[97] This means that among the various constitutional patterns, the Constitution of Japan conforms to the model of silence about rights in constitution.[98] The Constitution of Japan was strongly influenced by common (British and

92 Harada, *Theories of Administrative Law,* pp. 75-77.

93 Tsukasa Kobari, "Chapter 5: Changes in the Security Environment and the Transformation of the Duties of the Self-Defense Forces," in Osamu Nishi et al., *A Half Century of Japanese Defense Law* (Naigai Shuppan, 2004), p. 228.

94 Tokiyasu Fujita, "Some Observations on the Significance of Article 2 of the Police Law (2)," in *Law Studies*, Vol. 53 No. 2 (June 1989), p. 79.

95 Director General of the Defense Agency Seiichi Omura at the House of Representatives Committee on Budget (December 22, 1954), etc.

96 Director General of the Cabinet Legislation Bureau Tatsuo Sato at the House of Councillors Cabinet Committee (May 25, 1954); Director General of the Cabinet Legislation Bureau Reijiro Tsunoda at the House of Representatives Special Committee on Security (April 20, 1981), etc.

97 National emergency rights are a concept in constitutional law, giving recognition to the emergency measures that would normally be unconstitutional or illegal in the protection of the existence of the state under situations of critical emergency which normal legal measures would be unable to cope with effectively. Power is centralized on the government or the military, bypassing the principles of power-sharing, and the fundamental human rights of the people are restricted.

98 With reference to constitutional provisions regarding national emergency rights, constitutions may be classified into models of providing rights in detail (Germany, the Republic of Korea, etc.), models of giving rights in general (France, etc.), or models of silence about rights in constitution (the United States, etc.).

American) law during the process of its formulation, and it is considered possible to invoke the Rule of Necessity. This means that it is possible to interpret the Constitution to mean that even in the absence of stipulations in the text of the law, the government has natural authority to deal with a state of emergency.[99] There is also the view taken by the General Headquarters (GHQ) Supreme Commander Douglas MacArthur when the Constitution of Japan was being formulated, that a state of emergency should be dealt with by the emergency powers of the state. In addition, it is possible to consider that the legal principle of "public welfare" stipulated in Article 13 of the Constitution provides grounds for the state to be able to deal with a state of emergency and for the relevant regulations to restrict the rights of citizens during a state of emergency.[100]

Furthermore, with the exception of Article 9, there are no specific provisions in the Constitution relating to defense.[101] The functions of the Cabinet are listed in Article 73, and it is possible to take defense as being included in the function of "manage foreign affairs" or else to take it as one of the "other general administrative functions" referred to, so that in either case, exercising the right of self defense is recognized and the right of defense is one of the powers of the state.

The second characteristic is that while there are no provisions for defense in the Constitution, items relating to defense and security are governed at statutory levels as far up as law, and their purposes, duties, organizations, conducts, personnel, service, penalties, etc., are stipulated. Please refer to 4. a) (1) "Details of Administrative Law."

The third characteristic is that regardless of whether they relate to police functions or defense functions, the various activities and duties of the SDF are all specifically grounded in laws such as the Self-Defense Forces Law. Police functions such as public security operations or maritime security operations are directed at the people, and from the point of view of the constitutional guarantees of human rights, they are expected to be carried out in accordance with the principle of a nation governed by law. However, there is the criticism that given that defensive operations and other defense functions are directed at enemy countries, it should be made possible for the SDF to carry out actions

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99 In contrast to this idea (the theory of tolerance), there is also the view that the fact that the Constitution has no provisions relating to defense has a positive significance, and may be interpreted as meaning that the right of defense is not recognized by the Constitution as the authority of the state (theory of repudiation). Moreover, there is the theory that the absence of such provisions in the Constitution is a legal pitfall and that it is thus necessary to take proactive action to change the legislation on national emergency rights (the pitfall theory). The theories of tolerance and repudiation do not actively involve changes in constitutional legislation in the meaning that diametrically opposed to each other.

100 The reply by Director General of the Cabinet Legislation Bureau Ichiro Yoshikuni at the House of Representatives Committee on Judicial Affairs (May 14, 1975) supports the idea that emergency legislation that extends to restrictions of the freedom and rights of the people may be considered on the grounds of the "public welfare" in the Constitution. The creation of emergency legislation is not considered the same as an attempt to institutionalize national emergency rights that suspend the constitutional order (reply by Director General of the Cabinet Legislation Bureau Osamu Tsuno at the House of Representatives Special Committee on Armed Attack Situation Response [May 8, 2002], etc.). Kazuo Matsuura, "Chapter 6: The Path Toward Formulating Emergency Legislation and Current Issues," *A Half Century of Japanese Defense Law: The Course of its Development and its Future Prospects* (Naigai Shuppan, 2004), pp. 239-240.

101 The discussions and formulation of the Constitution of Japan took place during 1946 and 1947, when Japan was still under occupation by the Allied forces. The Imperial Japanese Army had been dismantled, so that Japan had no military power, and the people had a profound sense of war weariness. The Allies, in particular the United States, made the demilitarization of Japan a matter of policy, and the Japanese government was not oriented toward rearmament. The National Police Reserve, which was the predecessor of the Self-Defense Forces, was launched in 1950 during the Korean War. The fact that there were no provisions relating to defense in the Constitution of Japan can be readily understood in the light of the situation at the time of its formulation.

relating to defense—which is their essential role—without the need for these actions to have specific grounding in law.

The fourth characteristic of Japan's defense law is that the regulations in law for both police functions and defense functions take the form of a positive list, meaning that the provisions are set out like those of police law, stating what may be done. Defense law in other countries takes the form of a negative list, which essentially means that anything may be recognized at the discretion of the government, provided it is not prohibited by international law or the constitution of the country.[102]

The fifth characteristic is that every time a situation arises, laws are put in place in patchwork form to deal with it.[103] This is because there must be a legal grounding for any action taken by the SDF, so that every time a situation arises that was not envisaged under existing law, new legislation has to be put in place to enable the SDF to take the necessary action to deal with the situation.

V. Existing Law Relating to the Self-Defense Forces: Details and Approaches of the Regulations on Action

This section gives an outline of the regulations within defense law relating to the actions of the SDF in particular, and clarifies a special characteristic of the way the regulations are set out, so that for both domestic and external functions, they take the form of a positive list. At the same time, the reasons for why this came to be are examined. The current defense legislation took shape as a result of historical considerations and of the conceptual demands regulating the defense system in postwar Japan.

A. Fundamental Regulations

Within defense law, the Ministry of Defense Establishment Law and the Self-Defense Forces Law are the basic defense organization laws, stipulating the purpose, duties, organization, service, etc., of the Ministry of Defense and the SDF, respectively. The basic laws regulating defense activities are the Self-Defense Forces Law and the various individual laws, which regulate in minute detail the modes of action of the SDF and the authority they can take when acting.[104]

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102 At the House of Representatives Special Committee on Emergency Legislation (May 16, 2002), Representative Shigeru Ishiba (Liberal Democratic Party) stated, "The Self-Defense Forces Law is written essentially in the form of a positive list. The Self-Defense Forces Law developed from the ordinance on the National Police Reserve via the National Safety Agency Law. It is based on the law of the police." Also, as a member of the House of Representatives at the House of Representatives Special Committee on Security (June 14, 2001), and as Director General of the Defense Agency at the House of Representatives Special Committee on Security (May 16, 2003), Shigeru Ishiba stated, "Military legislation is a negative list, the Self-Defense Forces Law is a positive list."

103 Shikama, "Are the Self-Defense Forces a Military?" pp. 20-21; Yoshihara, "Emergency Legislation and International Law on Armed Conflict," p. 63.

104 Tsukasa Kobari, "Chapter 5: Changes in the Security Environment and the Transformation of the Duties of the Self-Defense Forces," p. 192. The individual laws are the International Peace Cooperation Law, the Law Concerning Measures to Ensure the Peace and Safety of Japan in Situations in Areas Surrounding Japan, the Law Concerning Ship Inspection Operations in Situations in Areas Surrounding Japan, emergency legislation, the Anti-Terrorism Special Measures Law, the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq, etc.

B. Regulations Relating to Self-Defense Forces Actions

(1) Special Features

The regulations relating to SDF actions can be divided basically into those relating to domestic functions and those relating to external functions. Regulations relating to domestic functions are those directed at the Japanese people, and directly involve the rights and obligations of the people. Regulations relating to external functions are mainly directed at other countries.

The SDF were originally an organization charged with enforcing external defense functions, but there are cases in which they may exercise police powers domestically if the police force is unable to maintain public security.[105] In addition, international peace cooperation duties such as international peacekeeping tasks (UN PKO activities) came to be added following the Cold War, and the scope of international cooperation has been expanding since the 9/11 terrorist attacks in the United States in 2001. In particular, dealing with emergency contingencies in areas surrounding Japan and international peace cooperation activities were made essential duties of the SDF through the revision of the Self-Defense Forces Law that accompanied the status upgrade of the Defense Agency to the Ministry of Defense in December 2006.[106] Actions of the SDF other than defense or police functions also include additional duties such as response to natural disasters and civil cooperation, which are functions directed domestically.

Additionally, expropriation is stipulated in Article 103 of the Self-Defense Forces Law[107] and elsewhere. As this function is directed at the people and is directly related to the rights and obligations of the people, it is included in the domestic functions.[108]

(2) Details

The regulations regarding SDF actions are stipulated in Section 6 of the Self-Defense Forces Law (Self-Defense Forces Actions). However, in terms of administrative law, the regulations of this section come under the organizational norms,[109] and they indicate the SDF's allocation of authority.

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105 Article 3 Paragraph 1 of the Self-Defense Forces Law stipulates that the main duty of the SDF is the defense of the nation, and that they may be used to keep public order as necessary.

106 International disaster relief and other activities, international peace cooperation and other tasks, activities based on the Anti-Terrorism Special Measures Law or the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq, elimination of mines and other dangerous objects, evacuation of Japanese nationals residing abroad and others, rear area support in situations in areas surrounding Japan, etc., have become essential duties of the SDF (as a result of revision of the original Self-Defense Forces Law and its supplementary provisions). However, national defense is the main duty; dealing with situations in areas surrounding Japan and international peace cooperation activities are carried out provided they pose no obstacle to the performance of this main duty and to the extent that they do not involve armed provocation or the use of force (Article 3, Paragraph 2 of the Self-Defense Forces law).

107 Stipulations regarding expropriation include the following: the expropriation of facilities, the use of land, housing, and goods, the storage of supplies, the expropriation of supplies, and orders to engage in business (Article 103 of the Self-Defense Forces Law); the use of telecommunications facilities (Article 104 of the Self-Defense Forces Law); restriction or prohibition of the operation of fishing vessels to allow training (Article 105 of the Self-Defense Forces Law); and stipulations in the Civil Protection Law, the U.S. Military Actions Related Measures Law, the Law Regarding the Use of Specific Public Facilities, and other laws.

108 Yamashita, "Some Considerations Regarding the Defense Law Debate," p. 64.

109 Administrative activities that extend to changes in the rights and obligations of the people require not just the

The laws and regulations governing actions of the SDF that are domestic functions are domestic laws, and the principle of proportion applies strictly. On the other hand, the laws and regulations governing external functions are international law, and the principle of proportion either does not apply or else is applied very loosely.[110]

Actions corresponding to either domestic or external functions are classified in terms of their objectives, nature and details in Table 5.

Table 5: Classification of Self-Defense Forces Actions (Note 1)

Classification	Function	Action	Regulation on which action is grounded
Domestic functions	Preservation of security	Public security operations by order	Article 78
		Public security operation alert order	Article 79
		Information gathering before public security operation order	Article 79, Paragraph 2
		Control over the Japan Coast Guard (Note 2)	Article 80
		Public security operation by request	Article 81
		Guarding operation	Article 81, Paragraph 2
		Maritime security operations	Article 82
	Response to natural disasters	Disaster relief dispatch	Article 83
		Earthquake disaster relief dispatch	Article 83, Paragraph 2
		Nuclear disaster relief dispatch	Article 83, Paragraph 2
	Maintenance of functions (Note 3)	Guarding weapons, etc.	Article 95
		Guarding facilities	Article 95, Paragraph 2
	Civil cooperation	Undertaking of civil engineering works	Article 100
		Undertaking of education and training	Article 100, Paragraph 2
		Cooperation in athletic competitions and other events	Article 100, Paragraph 3
		Support of Antarctic exploration	Article 100, Paragraph 4,
		Transportation of national guests	Article 100, Paragraph 5
	International cooperation	Evacuation of Japanese nationals residing abroad, etc.	Article 84, Paragraph 3

organizational norms, but also the ground norms (principle of a nation governed by law). At present, however, from the point of view of democracy, there is a need for the ground norms as a part of administrative control. In the case of some regulations, it cannot be determined a *priori* from the arrangement of the sections whether the regulation belongs to the ground norms or not, and a judgment needs to be made as a result of overall interpretation of the meaning of the text. Yoshihito Yamashita, "Some Considerations Regarding the Meaning of Article 84 of the Self-Defense Forces Law," *Studies of Defense Law*, No. 23 (1999), pp. 196-200.

110 Kobari, "Chapter 5: Changes in the Security Environment and the Transformed Duties of the Self-Defense Forces," p. 197.

Classification	Function	Action	Regulation on which action is grounded
	Expropriation	Expropriation of supplies, etc., during defense operations	Article 103
		Use of telecommunications facilities, etc.	Article 104
		Restrictions, prohibition on the operation of fishing vessels to permit training	Article 105
External functions	National defense	Defense operations	Article 76
		Defense operation alert order	Article 77
		Establishment of defense facilities	Article 77, Paragraph 2,
		Measures to be taken before a defense operation order	Article 77, Paragraph 3
		Civil protection dispatch	Article 77, Paragraph 4
		Control over the Japan Coast Guard	Article 80
		Elimination of mines and other dangerous objects (Note 4)	Article 84, Paragraph 2
External functions	National defense	Provision of goods or services to the U.S. military	Article 100, Paragraphs 6 and 7, the U.S. Military Actions Related Measures Law; the Acquisition and Cross-Serving Agreement between Japan and the United States (ACSA)
		Detention inspections, cruising	The Maritime Transportation Restriction Law
		Use of specific public facilities etc.	The Law Regarding the Use of Specific Public Facilities etc.
		Treatment of prisoners	The Prisoners of War Law
	Preservation of security	Destruction measures against ballistic missiles (Note 5)	Paragraph 2, Article 82
	Border police	Action against violation of territorial air space (Note 6)	Article 84
	Maintenance of functions	Guarding weapons, etc.	Article 95
		Guarding facilities	Article 95, Paragraph 2
	International cooperation	Response measures to situations in situations in areas surrounding Japan	(Article 84, Paragraph 4, the Law Concerning Measures to Ensure the Peace and Safety of Japan in Situations in Areas Surrounding Japan)
		Ship inspection operations in situations in areas surrounding Japan	(Article 84, Paragraph 4, the Law Concerning Ship Inspection Operations in Situations in Areas Surrounding Japan)

Classification	Function	Action	Regulation on which action is grounded
	International cooperation	International disaster relief activities	(Article 84, Paragraph 4, the Law Concerning the Dispatch of Japan Disaster Relief Teams)
		International peace cooperation tasks	(Article 84, Paragraph 4, the International Peace Cooperation Law)
		Activities based on the Anti-Terrorism Special Measures Law	(Supplementary provisions 7–9, the Anti-Terrorism Special Measures Law)
	International cooperation	Activities based on the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq	(Supplementary provisions 7–9, the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq)

Note 1: Items in parentheses are the regulations on which action is grounded and its relevant articles and paragraphs. Where the article number only is given for the regulation on which action is grounded, this refers to an article of the Self-Defense Forces Law. Elimination of mines and other dangerous objects, international disaster relief activities, international peace cooperation tasks, evacuation of Japanese nationals and others residing abroad, rear area support, were stipulated in Section 8 (Miscellaneous Provisions) of the Self-Defense Forces Law prior to the revision that accompanied the change in status of the Defense Agency in December 2006. As a result of this revision, they have been newly stipulated in Section 6 (Actions of the Self-Defense Forces) and Section 7 (Authority of the Self-Defense Forces).

Note 2: When an order is given for a defense operation and when an order is given for a public security operation, the Minister of Defense places the Japan Coast Guard under his or her command. This paper classifies control over the Japan Coast Guard into both domestic functions and external functions.

Note 3: Regarding the function of "maintenance of functions," it is possible to imagine situations in which this is exercised with respect to the Japanese people, and situations in which it is exercised with respect to other countries. This paper therefore classifies maintenance of functions into both domestic functions and external functions.

Note 4: Elimination of mines and other dangerous objects is not limited to times when defense operations are taking place and is possible during peacetime. In recent memory, a Maritime Self-Defense Force minesweeping vessel was engaged in mine disposal operations in the Persian Gulf after the end of the Gulf War in 1991, and this activity was carried out on the grounds of the relevant articles of the law.

Note 5: Destruction measures against ballistic missiles are actions established by the 2005 revision of the Self-Defense Forces Law in order to respond to a ballistic missile attack by North Korea. Regarding the legal nature of such actions, the government has positioned them as police functions rather than defense functions. The principle grounds for this are that destruction measures against ballistic missiles are measures before a defense operation order, so that they would be the use of weapons that do not conform to the use of force (reply by Director General of the Defense Agency Yoshinori Ono at the House of Councilors Committee on Foreign Affairs and Defense (July 5, 2005), etc.). A detailed analysis of this point is attempted in Tsukasa Kobari, "Consideration of the Revised Article 82, Paragraph 2 of the Self-Defense Forces Law: Legal Problems of the Ballistic Missile Defense System," in *Studies of Defense Law*, No. 29 (2005), pp. 111-134.

Note 6: The argument that action against violation of territorial air space is classified as an external function, that international law is applicable and that it is not bound by the domestic principle of a nation governed by law because it is a function directed at aircraft from other countries is given in Yoshihito Yamashita, "Some Considerations Regarding the Meaning of Article 84 of the Self-Defense Forces Law," in *Studies of Defense Law*, No. 23 (1999). Also, in the case that the action is taken against state aircraft from other countries it is classified as a defense function, whereas if it is taken against private sector aircraft from other countries, it is classified as a police function. Osamu Nishi et al., *Japanese Security Law* (Naigai Shuppan, 2001), p. 130.

(c) How Regulations on Authority Are Stipulated

In relation to the regulations on the actions that the SDF can take, the authority to act is stipulated in the regulations of Section 7 of the Self-Defense Forces Law (Authority of the Self-Defense Forces). If it is considered that the regulations in this section are a type of administrative law, then they are classified as belonging to the ground norms. For each and every action of the SDF, the corresponding authority is stipulated in detail in law,[111] and the regulations take the form of a positive list; in other words, it is a list of the things that can be done. This is the form of regulations in police law.

Apart from external functions such as the use of force during defense operations, etc., the content mainly concerns regulations over the authority to use force domestically, such as enforcement measures carried out with respect to the citizens of Japan and others. There is a focus on regulations authorizing the use of weapons in domestic functions.

The authority that is stipulated is classified in terms of its purpose, nature and details in Table 6.

Table 6: Classification of Self-Defense Forces Authority

Function	Authority	Regulation on which authority is grounded
Overall	Possession of weapons	Article 87
National defense	Use of force during defense operations	Article 88
	Authority to maintain public order during defense operations	Article 92
	Emergency passage during defense operations	Article 92, Paragraph 2
	Authority during civil protection dispatch	
	Use of weapons in the intended deployment area	Article 92, Paragraph 3
	Authority to restrict maritime transport during defense operations	Article 92, Paragraph 4
	Authority over the treatment of prisoners	Article 94, Paragraph 7
		Article 94, Paragraph 8
Preservation of security	Authority during public security operations	Articles 89–91
	Authority during guarding operations	
	Use of weapons when information gathering before public security operation order	Article 91, Paragraph 2
	Authority for maritime security operations	Article 92, Paragraph 5
	Use of weapons for destruction measures against ballistic missiles	Article 93
		Article 93, Paragraph 2

[111] There are no provisions in Section 7 (Authority of the Self-Defense Forces) corresponding to the use of weapons in action against violation of territorial air space. However, it is considered that the use of weapons in this case is possible because its relation to the organizational norms and to the ground norms is recognized in Article 84. Yamashita, "Some Considerations Regarding the Meaning of Article 84 of the Self-Defense Forces Law," pp. 196-202.

Function	Authority	Regulation on which authority is grounded
Disaster response	Authority during disaster relief dispatch	Article 94 – Article 94, Paragraph 4
Maintenance of functions	Use of weapons for guarding weapons, etc. Use of weapons for guarding facilities Authority of personnel working exclusively to maintain internal order	Article 95 Article 95, Paragraph 2 Article 96
International cooperation	Authority when evacuating Japanese nationals and others who are resident overseas. Authority when providing rear area support	Article 94, Paragraph 5 Article 94, Paragraph 6

Note: The regulation on which authority is grounded refers to the Self-Defense Forces Law throughout.

D. Characteristics of How Laws Are Stipulated

The laws and regulations relating to the actions of the SDF are set out as a positive list, which applies to domestic and external functions alike. In other words, the regulations follow the method of definitive enumeration.

An example is defense operations, which are the best example of external functions. The use of force during such operations is regulated by Article 88 of the Self-Defense Forces Law. As this takes the form of a positive list, the provision is that the necessary armed force can be used (underlined by the author). In terms of its content, this is tempered with the idea of a negative list, the point to note being that it is expressing compliance with international laws and conventions, and the limit of what would reasonably be required to respond to the particular situation. The reason that even external functions are regulated by a positive list is that Japanese defense law is administrative law. What this means is that defense law is rooted in the idea that all actions of the SDF must have grounding in law, in line with the principles of a nation governed by law, administration governed by law, and reservation of law. At the same time, there is also the reason that the concepts underlying defense law are the same as those underlying police law.

E. Reasons Why the Positive List Was Adopted

The reasons why the regulations took the form of a positive list are as follows. First, the form taken by the regulations reflects the process through which the SDF were established. The interpretation of the law from the time when they were an organization for maintaining the peace of the country continued even after they had become a defense organization. The predecessors of the SDF were the National Police Reserve (1950), followed by the National Safety Force and the Coastal Safety Force (both 1952). These were organizations for maintaining the peace, and their influence remained intact even after they became the Self-Defense Forces (1954), an organization for defense.[112]

[112] Shikama, "Are the Self-Defense Forces a Military?" p. 21; Yoshihara, "Emergency Legislation and International Law on Armed Conflict," pp. 67-68.

Second, the executive officials during the period from the National Safety Force to the establishment of the SDF were police officers who took key posts in the defense administration and were involved in this area of work. They created and interpreted defense legislation from the mindset of police law.[113]

Third, there was a powerful opposition to the SDF in the form of influential members of political parties and others[114] who argued that the SDF are unconstitutional. It was necessary to deal with their criticisms, and this was done by establishing strict legal bounds for the SDF.[115]

Fourth, there were regrets over the military-led government before the war, as a result of which the independence of the supreme command was avoided by incorporating the SDF into the administration and giving the Prime Minister authority as the supreme commander of the SDF. It was necessary to establish bounds of strict political control over the SDF in law.

Fifth, it was necessary to make clear that civilian control was carried out by the Diet, and so the organization of the Defense Agency and the SDF and the actions of the SDF were all stipulated by law.[116]

Sixth, under domestic law, the SDF were taken to be an administrative organization rather than a military in the pure sense of the term. The exercise of the authority of administrative organizations relating to the rights and obligations of the people is required to conform to the principle of a nation governed by law, and this was taken to mean that the SDF could not carry out any activities that were not explicitly stated in law.[117]

VI. Proposal: Shape of the Regulations Governing the Actions of the Self-Defense Forces

Finally, this paper will put forward a proposal for the defense law of Japan from the perspective of international standards of defense law (military law). As a result of the way the SDF are positioned as an administrative organization in domestic law, the legal structure that regulates them complies with administrative law. Going on from the preceding discussions, it would appear that under the existing administrative legal system the current framework of defense law is likely to remain intact and there is little chance of any change. Nonetheless, the Japanese people have a mature understanding of defense that has to meet changes in the domestic and external environments. Supposing, as a reflection of this, at some time in the near future the Constitution were revised and the SDF became positioned under domestic law as a military (this could be called the Self Defense Military), then the whole nature of defense law would have to undergo a shift. I would like to give my own personal view of which items should be retained, which points revised and what would be a desirable direction for the discussions to go in.

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113 Yoshihara, "Defense Debate," pp. 2-3; Tsuneo Yoshihara, "How Much is Domestic Law Capable of in an Emergency?" in *Chuo Koron*, Vol. 109, No. 6 (June 1994), p. 53.

114 The best example is the Japan Socialist Party, which argued the unconstitutionality of the Japan-U.S. Security Treaty and the SDF. However, at the time of the Cabinet of Tomiichi Murayama, launched in 1994, Prime Minister Murayama (Chairman of the Japan Socialist Party) announced in a policy speech to the Diet that the Japan-U.S. Security Treaty and the SDF were constitutional, and the Japan Socialist Party modified its previous viewpoint accordingly.

115 Yoshihara, "How Much is Domestic Law Capable of in an Emergency?" p. 53.

116 Nishi, *Japanese Security Law*, pp. 63-64.

117 Yuichi Marumo, *Public Security Guarantees*, University Library, 2006, pp. 2-3.

A. Defense Law under the Current System

The premise to this discussion is that under the current Constitution of Japan, the SDF are positioned in domestic law as an administrative organization. It follows, therefore, that defense law, which is the regulations relating to the SDF, is administrative law and therefore required to conform to the basic administrative principles of a nation governed by law, administration governed by law, and reservation of law. For this reason, it is considered necessary for every action of the SDF to be grounded in law; therefore, the regulations governing actions by the SDF inevitably have to take the form of a positive list.

The current situation of the Constitution is that in 2005 the Research Commission on the Constitution of the House of Representatives and the House of Councillors arranged the various points of contention and drew up a report with arguments for and against revision of the Constitution. In response to this, the different parties made clear their respective positions with regard to revision of the Constitution,[118] and the Liberal Democratic Party and other parties began to submit proposals for constitutional reform. In addition, the National Referendum Law stipulating the procedures for a national referendum on constitutional reform was enacted on May 14, 2007 during the ordinary session of the Diet. In response to this, the Deliberative Council on the Constitution was established in both the House of Representatives and the House of Councillors.[119] However, the formulation and submission of the draft revision of the Constitution have been postponed for the three years following the enactment of the law, although going by public opinion, there is the possibility that constitutional reform will be on a definite political agenda at some time in the near future.

If constitutional reform does come onto the agenda, there will be a great number of points of controversy. From the perspective of security and defense, though, an important point with respect to the revision is what the positioning will be in domestic law of the SDF, which are the armed organization in charge of national defense. Should their present positioning as an administrative organization remain unchanged, even though they are seen as an armed organization for the purpose of exercising the right of defense, or should they be explicitly positioned as a military? This will be the main focus, and whatever the result, it will have an enormous effect on the shape of future defense law.

B. Points to Bear in Mind When Considering the Shape of Future Defense Law

Supposing that the Constitution were to be revised in the near future, it is possible that Japan's possession and exercise of the right of self defense could be clarified in the Constitution and the establishment of a military for self defense recognized, so that the SDF would be positioned as a military, it is also possible that international peace cooperation by the SDF, such as participation in United Nations Forces (including multinational forces) and other measures for collective security,

118 The Liberal Democratic Party advocated constitutional change, the New Komeito advocated the addition of new rights to the Constitution, the Democratic Party advocated discussion, and the Social Democratic Party and the Japanese Communist Parties both advocated protecting the Constitution.

119 The National Referendum Law was issued on May 18, 2007, and the Deliberative Council was to have been established at the first extraordinary session of the Diet to be convened after this (August 7, 2007). However, the ruling and opposition parties were unable to agree upon the regulations of the Deliberative Council to stipulate the quorum and the voting of the council. The situation now is thus that the council exists in law, but has not actually been established.

could be clearly stated in the Constitution (refer to the draft Constitution of the Liberal Democratic Party). If this were the case, it would be desirable for the self-defense military to be clearly positioned as a military in the domestic legal system, and it would be necessary to create a security and defense system based on this positioning and to carry out a review of the system of domestic defense law.

Under this review, there is likely to be a need to examine the establishment within the legal structure under the new Constitution of provisions relating to the possession of a self-defense military, provisions relating to its organization, provisions relating to its actions, provisions relating to the legal position of members of the self-defense military, provisions relating to criminal defense law, etc.

Looking for examples of the legal position of members of the self-defense military and criminal defense law, if the SDF were to be positioned as a military, the need would probably arise to review the status of Ministry of Defense personnel, who are presently government officials occupying special positions, and in particular to position SDF officials as military personnel. With this, a review of the official regulations governing public service of every type would become an issue. Currently, SDF personnel have mainly the same duties and obligations as government officials in regular clerical positions, in addition to which are also assigned duties that relate to the particular affairs characteristic of a defense organization.[120] However, it would become necessary to examine a system of service more appropriate to military personnel. In particular, it would be necessary to configure a system of law for the justice system relating to SDF officials; this would have to include a review of the provisions of the Constitution that forbid the establishment of an extraordinary tribunal and forbid judgment by an administrative organization acting as the court of last resort, in order to try the offense of a SDF official, which is now tried under a regular court, under a court-martial. In this case, the ground norms of trials relating to defense functions should be shifted from criminal law, which is the same as for regular citizens, to military law. While positioning the SDF as a military may appear straightforward on paper, putting defense law and other systems in place actually involves extensive and detailed examinations.

Looking in terms of the problems addressed by this paper, given the differences between the police and the military and the concomitant differences in thinking between police law and defense law, changing the positioning of the SDF would make it necessary to change the regulations that govern them. It would be necessary to examine shifting the form taken by the regulations that relate in particular to actions by a self-defense military and to external functions, which are mainly defense functions, from a positive list to a negative list. On the other hand, domestic functions, which are mainly police functions, are directed at the people and relate to their rights and obligations; regulations that govern these functions, even if they are actions of a self-defense military, therefore need to be grounded in domestic law in the same way as they are at present, and they should be stipulated in

120 The official obligations stipulated in the Self-Defense Forces Law are being on standby for service (Article 56), being in residence in a designate place (Article 55), performance of allotted duties (Article 56), obedience to the orders of superior officers (Article 57), maintenance of dignity (Article 58), non-divulgence of secrets (Article 59), devotion to professional duties (Article 60), restrictions on political acts (Article 61), separation from private enterprise (Article 62), restrictions on involvement in other employment or projects (Article 63), and prohibition of formation of associations (Article 64). Of these, infractions of non-divulgence of secrets, separation from private enterprise, restrictions on political acts, and prohibition of formation of associations are subject to punishment. Furthermore, the prohibition of labor dispute action or labor slow-down tactics, breach of duty through disobedience of orders, breach of duty in work performance, breach of duty in devotion to service, and acting outside authority are also subject to punishment; however, the punishment differs in accordance with whether the offense occurred during peacetime or during a situation such as a defense operation or a security operation.

the form of a positive list.

First and foremost, if the SDF are positioned as a military, the review of the provisions of defense law should be carried out in line with the standards of the regulations governing the armies of other countries (defense law).

C. Points to Bear in Mind Regarding Domestic Laws Relating to External Functions (Defense Functions).[121]

The regulations governing the external functions of a military are basically the law of war and international humanitarian law, which are international laws. A military is, in principle, free to take any actions that are not prohibited by international law.

In addition, international law has customary law, the details of which are often vague. It would, therefore, become necessary to put in place domestic laws (defense law) that indicate the domestic interpretation of this customary law, and which define or limit the range of actions by a self-defense military in accordance with international law. At the same time, as well as putting in place regulations at the level of laws, it would also be necessary to formulate ROE stipulating detailed standards for specific actions by a self-defense military. The ROE would have to be within the framework for the exercise of self defense rights stipulated by the new Constitution,[122] and would have to be in accordance with international standards as far as possible.[123] It should be noted that if there are no restrictions in domestic defense law, a military is able to act or exercise rights to the fullest extent it is capable of within the bounds permitted by international law.

D. The Need for Law Giving Grounds to External Functions (Defense Functions)[124]

The regulations on which external functions are grounded need to be reexamined. External functions are taken in other countries to be the essential duty of a military, and even if there are no regulations in the text of the law giving grounds for such functions, they can be carried out in line with the political judgment of the government or parliament; the conceptual approach here is a negative list. In Japan at present, however, all actions by the SDF must be based on a specific law, and this is the conceptual approach of a positive list. What this means is that if a specific basis in law is required for all functions of the SDF, not just domestic but external as well, new legislation is needed every time there is a change in the domestic or internal situation, or every time some new eventuality arises, in

121 Yoshihara, "Emergency Legislation and International Law on Armed Conflict," pp. 64-67.

122 The idea has been put forward that a basic law on security elaborating on the provisions of the Constitution should be enacted in order to make the meaning of the Constitution clear for discussions being held among the general public. The Constitution stipulates the basic items of the exercise of the right of self defense and the possession of a self-defense military, etc., and the detailed standards governing actions are stipulated in the basic laws. For example, even though a new Constitution might make it possible to exercise the right of collective self defense, the basic law would stipulate restrictions on the range of actions that Japan could take on the basis of its right of collective self defense; while there is no objection to the law itself, it should perhaps be enacted in response to the political choices at the time.

123 The ROE relating to the various actions of the SDF are known as the operational code of conduct, and ROE for each area of SDF activity are starting to be put in place. This dates from the stipulation in 2000 of the Directive Relating to Formation of an Operational Code of Conduct (Ministry of Defense directive No. 91 of 2000).

124 Shikama, "Are the Self-Defense Forces a Military?" pp. 20-21; Yoshihara, "Emergency Legislation and International Law on Armed Conflict," pp. 63-64.

order for the SDF to be able to respond. For this reason, defense law is currently put in place in a patchwork form, very much in the nature of palliative medicine.

It follows that if the SDF were positioned as a military, there would be a need to decide that they could carry out actions in line with the essential duty of a military even in the absence of specific grounds in the text of the law. It would therefore be necessary to review the regulations relating to defense operations, etc., in the event that the SDF became a military, and there would have to be examinations in particular that would go as far as addressing the whole question of whether or not regulations stipulating authority are actually required. This is because, even supposing that these regulations were done away with, a concrete code of conduct for the self-defense military could be stipulated in the ROE, ensuring that the actions of the military are restricted.

In addition, the need for new legislation has been mentioned both in the government and elsewhere, but for the reasons given above there is a need to reconsider this. Examinations are currently underway in relation to international peace cooperation to look at a permanent law enabling overseas activities by the Self-Defense Forces; even though this might be necessary for the Self-Defense Forces as an administrative organization, there needs to be more consideration of whether new legislation would even be required for a self defense military. It would surely be possible to judge that international peace cooperation activities are the national duties of a military.

Furthermore, authority for the use of weapons in overseas duties is given in accordance with the regulations of the Police Duties Execution Law, but there should be an examination of whether there is a need to review this under international standards (this is known as B-type weapon use, in which weapons may be used in order to execute duties or for security). Authority is regulated under the present Constitution to ensure that this use of weapons does not become use of force or threat by force; the draft permanent law proposed by the Liberal Democratic Party[125] aims to expand this authority without conflicting with the provisions of the Constitution.[126] There would be a particular need for further examination of the authority for the use of weapons in overseas duties if the exercise of the right of collective self defense became possible through constitutional reform.[127]

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[125] The International Peace Cooperation Bill was approved by the Sub-Committee for Examination on Defense Policy, National Defense Division, of the Liberal Democratic Party of Japan on August 30, 2006. The bill would enable the SDF to be dispatched not only in the event of a UN resolution or a request from an international organization, but also under the judgment of the Japanese government. In addition to the humanitarian and reconstruction assistance that is currently recognized, the SDF would also be able to carry out activities to ensure security, guard activities, and ship inspection operations. However, the use of force as a means to resolve an international conflict would be prohibited.

[126] The use of weapons is currently recognized for self protection, for the protection of places where there are SDF members, and for the protection of persons under the control of the SDF in cases of legitimate self-defense or emergency evacuation. In addition to cases where these apply, it would also be possible to use weapons, for providing *ad hoc* protection to SDF members and citizens. Furthermore, firing with the intention to harm in order to execute duties is recognized. Activities by the SDF are limited to regions where there are no armed international conflicts; this means non-combatant zones, so that providing *ad hoc* protection to other personnel and firing with the intention to harm in order to execute duties are not considered to correspond to use of force.

[127] There is the view that in peacekeeping operations, if, for example, a unit from another country operating with the SDF came under attack, protection rendered by the SDF would not be a question of the right of collective self defense, but would be a question coming under the category of collective security; though the protection rendered by the SDF is not the sovereign right to war or use of force, collective self defense and collective security have become confused in the debate in this country (Shunji Yanai, Former Ambassador of Japan to the United States, and others). However, the Cabinet Legislation Bureau and others appear to take the position that this question involves the use of force. Reply by Director General of the Cabinet Legislation Bureau Atsuo Kudo to the House of Representatives Special Committee on International Peace Cooperation (September 25, 1991), etc.

Moreover, new legislation giving grounds for actions relating to border policing is held to be necessary, but there is a need for careful consideration of the propriety of this. There is disagreement over theories of whether border policing is a police function or a defense function,[128] but given the military trends in the area surrounding Japan in recent years, it would be desirable to make border policing one of the duties that could be assigned to a self-defense military. However, there is the argument of whether there is a need for regulations at the level of the law giving grounds to such actions.

The opinion of the author is that actions of international peace cooperation activities and border policing should both be taken as part of the defense functions, and that there should be an examination of the regulations that govern them. This is because in the case that the SDF were to be positioned as a self-defense military, if both functions were taken as being external functions, then regulations at the level of the law giving grounds for them would be regarded as unnecessary. In this case, it may be considered sufficient for the standards of conduct of units belonging to a self-defense military to be codified in the ROE.

E. Arrangement of Regulations Relating to External Functions (Defense Functions)

Consideration must be given to the following two factors in any discussion of the provisions of defense law: the point of view of whether regulations giving grounds for external functions are necessary; and the style in which the regulations of external functions are written.

External functions are currently stipulated in the form of a positive list, but it is necessary to shift to the conceptual approach of a negative list and reexamine the current style of regulation. External functions are the essential duty of a self defense military, in line with its particular characteristics as a military. As has already been stated, if we consider the ability of a self-defense military to be able to carry out actions relating to external functions even in the absence of specific grounds in the letter of the law, as is the case in other countries, it then becomes necessary to examine whether there is actually any need to establish regulations giving grounds for action at all.

When regulations are explicitly prescribed in the text of the law, there are many cases in which it is practically unavoidable for the style of the regulations to take the form of a positive list; in other words, stating what can be done.[129] However, the regulations are limited to the types of situation that can be envisaged, and it is not difficult to imagine a case in which some unforeseen contingency arises that cannot be addressed under existing law. A possible option would therefore be to avoid describing actions in exact detail at the level of domestic defense law. This does not mean that the use of force with no limits would be recognized; placing the framework for actions within the range stipulated by international law is an international standard of defense law, and this approach permits a flexible response in accordance with the situation. However, in order to facilitate the judgment of unit commanders and to allow the members of a military that uses force to execute their duty with confidence, as has already been stated, it is necessary to examine the formulation of ROE that define

[128] The position of border policing as a police function is given by Yukio Tomii, "The Japanese Legislative System Relating to Border Policing," *New Defense Treatises*, Vol. 26, No. 3 (December 2000), pp. 3-22; the position of border policing as a defense function is given by Yoshihito Yamashita, "Some Considerations Regarding Border Policing: A General Argument Regarding the Distinction Between Defense Functions and Police Functions," *Studies of Defense Law*, No. 26 (2002), pp. 139-161.

[129] Yamashita, "Some Considerations Regarding the Defense Law Debate," p. 73.

the range of the use of armed force and form the standards of conduct of the units. It would be sufficient for the ROE to place limits on the actions of the self defense military.

F. Distribution between the Administration and the Diet[130] of Matters of Jurisdiction

The legal format[131] of the regulations at present is that all actions by the SDF have grounding in law. However, there should be an examination of the use of legal formats other than laws in accordance with the nature of the action to be taken. An example would be government ordinances that can be established in the Cabinet.[132]

The regulations relating to defense in Japan are currently governed by laws, which are under the jurisdiction of the Diet. In other countries, however, there are also regulations that are stipulated by government ordinances, which are under the jurisdiction of the administration. In order to make matters impacting the rights and obligations of the people into regulations, as demanded by the principles of a nation governed by law, administration governed by law, and reservation of law, provisions of the law are required to govern domestic functions such as police functions. However, external functions, which are mainly defense functions, can be items under the jurisdiction of the Cabinet. It would thus be possible to configure defense law to be made up of regulations up to the level of government ordinances. In other words, there are likely to be matters in defense that should use government ordinances—which are not for regulating matters that relate to the rights and obligations of the people—and which should be governed by these government ordinances. Insofar as it does not damage the character of the Diet as the supreme body of the nation, defense law should be considered a matter for cojurisdiction of the Diet and the Cabinet. This would mean sorting defense matters into those that should be stipulated by law and those that can be entrusted to regulations up to the level of government ordinances.

G. Application of Domestic Administrative Regulations to the Self-Defense Forces[133]

In other countries, administrative law, which comprises the regulations governing the everyday lives and activities of the people, does not apply in principle to the defense field or to the military during times of armed conflict; defense law stipulates only things that are applicable specifically to defense. In Japan, however, administrative laws and regulations, which are the laws and regulations applied to regular citizens, apply also in principle to the SDF. It is the same even during times of armed combat, so that only things excluded from administrative law are stipulated in the Self-Defense Forces Law.

However, it is rather unreasonable from the point of view of military rationality that if Japan were

130 Ibid., pp. 84-88.

131 Administrative law basically takes the form of civil (written) law, and the main source of law is the national law, which the state establishes on the basis of its sovereignty. National law includes the Constitution, laws, orders (government ordinances, Cabinet Office orders, ministerial ordinances, rules), etc. There are also cases in which a treaty can be a source of law. Harada, *Theories of Administrative Law*, pp. 29-33.

132 Article 73 Paragraph 6 of the Constitution lists as a function of the Cabinet to "Enact government ordinances in order to execute the provisions of this Constitution and of the law. However, it cannot include penal provisions in such cabinet orders unless authorized by such law." (Underlined by the present author.)

133 Yoshihara, "Defense Debate," p. 6; Yoshihara, "Emergency Legislation and International Law on Armed Conflict," pp. 71-74.

to come under armed attack, the SDF of Japan would be bound by Japanese domestic laws in spite of the fact that the enemy carrying out the armed attack was ignoring them. Further still, under existing laws, the SDF are able to use the necessary force in the area in which their actions take place, which is what we might call the area of battle action, or the front. In this case, defense actions based on international law take priority over administrative law, which is domestic law. The problem here, therefore, is the application of administrative law in regions outside those involved in the actions of the SDF.

As the Self-Defense Forces Law currently stands, exemption provisions have been created, but it cannot be denied that these provisions are still insufficient, despite the revision of the Self-Defense Forces Law under the creation of emergency legislation in 2003. It would therefore be desirable for administrative law to be inapplicable in principle during a situation of armed attack, and to create a list only of administrative laws that apply to the SDF. This is in line with the style of the regulations in other countries. In addition, there is a need to examine this method for situations other than armed attacks, but to include peacetime as well. However, as the provisions of domestic administrative law are both extensive and detailed, it may well prove difficult in terms of legislative technicalities to only stipulate in the text of law the application of things that are, in principle, inapplicable.

Conclusion

Due to postwar Japan's situation, the defense system in this county has a number of unusual features when seen against the systems of other countries. Japan's position as a peaceful country is emphasized under the Constitution of Japan, while as a consensus of the people there has recently been increased understanding of security and defense issues and the SDF,[134] and the functions of security and defense have been bolstered to a considerable degree in terms of both legislation and operation.[135] Of course, every country faces its own particular situation, and there is no need to raise an objection to the fact that Japan is taking a stance after its own particular fashion. In the future, even if

[134] According to the Public Opinion Survey of the SDF and Defense Issues (survey carried out by the Public Relations Office, Minister's Secretariat, the Cabinet Office in February 2006), 67.4% of people have an interest in the SDF or defense issues; 84.9% have a favorable impression of the SDF; the people who thought the purpose of having the SDF was disaster relief dispatches or ensuring national security balanced each other at around 70%; 84.5% thought either that the current situation regarding efforts for international peace cooperation activities was right, or thought that there should be more proactive efforts; and 66.7% thought that the results of the activities of the SDF in the reconstruction of Iraq had been useful. Also, 76.2% thought that the security of Japan should be protected by the U.S.-Japan security system and the SDF, and 45.0% thought there was a danger of Japan becoming involved in a war. Among the issues that people were interested in from the point of view of the peace and security of Japan, the most common was the situation on the Korean Peninsula (63.7%), followed by the activities of international terrorist organizations (46.2%), the modernization of China's army and its offshore activities (36.3%), and issues of arms control and disarmament such as weapons of mass destruction and missiles (26.9%). Japan Defense Agency, ed., "Data Compilation: Data 64," Ministry of Defense, *The Defense of Japan* 2006 (Gyosei, 2006), pp. 395-398.

[135] For example, with regard to civil protection in the event of emergency, in response to the Civil Protection Law coming into effect in September 2004, the Basic Guidelines on Civil Protection were stipulated in March 2005, in response to which Civil Protection Plans were drawn up by all designated administrative organizations by October 2005, and by all urban prefectural and prefectural governments by March 2006, and Civil Protection Operation Plans were drawn up by all designated public institutions by April 2006. Moreover, the Civil Protection Plans of municipal authorities and the Civil Protection Operation Plans of designated local public institutions were almost drawn up during fiscal 2006. At the same time, hands-on drills and map drills have been carried out repeatedly since fiscal 2005. Also, the Safety Information System, which will check information on the safety of residents across the whole country, is slated to start operation in April 2007.

the arguments for constitutional reform heighten and the momentum increases for a review of Article 9 of the Constitution, the most likely prediction is that Japan will make national defense based on the right of self defense its cornerstone and will fulfill its international obligations to the fullest, while continuing to keep its inhibitory defense policies of prohibition of aggressive war and exclusively national defense oriented policy. However, if the stipulations in Article 9 Paragraph 2 that Japan will never maintain war potential and does not recognize the right of belligerency of the state are revised and the SDF becomes a military in fact as well as in name, and actions acknowledged as those of a military are recognized, it will be necessary to change the positioning in domestic law thus far of the SDF as an administrative organization, and to carry out a radical conceptual shift.

This paper began by looking at the differences between the organizational character of the police and the military, which are both state organizations with the power to act, and the differences between the regulations that govern the two organizations. This paper pointed out that the SDF are treated as a military in international law, but in domestic law they are one of the country's administrative organizations, and the regulations that govern the SDF are ruled by the various principles of administrative law. In particular, the structure of defense legislation was built not from the conceptual approach of defense law (military law), but from that of police law, due to the circumstances surrounding the launch of the SDF, the domestic political situation, the mindset of the postwar defense system and other factors. This paper stressed that for this reason, the regulations do not take the form of a negative list, which is the form of the regulations governing the armies of other countries, but are instead in the form of a positive list. This means that any action taken by the SDF must be grounded in a law that specifically authorizes it.

If the SDF were to become a military at some point in the future, it would be highly desirable for there to be a shift in the conceptual approach to the law and for the legal structure to be reconfigured in the same way as that of other countries. However, the Japanese government and the Japanese people have grown accustomed to defense law regulated in the form of a positive list over the space of the 50 or so years since the start of the SDF following the end of the war; it is by no means certain that they will be able to adapt readily to such a shift. After all, pursuing reforms that go beyond maintaining the status quo needs a fundamental change in awareness, and putting this into practice is invariably accompanied by difficulties. Even supposing that constitutional reform were carried out, it is not hard to envisage a situation in which the structure of defense law stays fundamentally unchanged. The position of the author is that proposals for reviewing the defense system are of course to be made, but with the exception of a few critical analysts, there does not seem to have been much intensification of the discussions concerning the fundamental issues or points of contention in the current structure of the defense legal system. Moreover, from the point of view of the practical work involved, it will take an inordinate amount of energy and effort for the Ministry of Defense, the Cabinet Legislation Bureau, and the other relevant administrative organizations to reconstruct the defense legal system in line with reforms of the Constitution. This is because there is, in all probability, a view that questions whether there is actually anything wrong with the current positive list in terms of national defense. From the point of view of keeping a balance between controlling military affairs and ensuring military rationality, however, it would certainly be desirable to carry out a review of the defense legal system in line with international standards.