Online ISSN 2433-4200

Global Security Study Series No. 6

# Analysis and Verification of "Negative List–Positive List Theory":

## Based on a Survey of Domestic Law in the United Kingdom, the United States, Germany, and France

Authored by Rintaro YAMANAKA

CENTER FOR GLOBAL SECURITY

Center for Global Security,

National Defense Academy

Yokosuka, Japan

GLOBAL SECURITY STUDY SERIES

Global Security Study Series is a collection of papers and research notes by single or multiple authors derived through research on global security conducted at the National Defense Academy, published in Japanese or English. The papers and research notes in this series consist of analysis and writing from the individual viewpoints of the authors concerned, and do not represent the opinions of the Japanese Government or the National Defense Academy.


1-10-20 Hashirimizu, Yokosuka, 239-8686 JAPAN

**Global Security Study Series No.6**

# Analysis and Verification of "Negative List–Positive List Theory":

## Based on a Survey of Domestic Law in the United Kingdom, the United States, Germany, and France

Authored by Rintaro Yamanaka

December 2023

Center for Global Security, National Defense Academy
Yokosuka, Japan

# Foreword

On the Publication of the Global Security Study Series

In April 2016, the Center for Global Security (GS) was launched at the National Defense Academy. The objectives of GS include the multifaceted study of diverse security issues involved in the safety and security of the state and its citizens along with the international society, as well as the widespread internal and external publication of the outcomes of this research.

GS is characterized first by its cross-disciplinary and integrated approach to research, blending humanities and STEM viewpoints. Making the most of the expert knowledge of some 300 National Defense Academy instructors, GS engages in cutting-edge interdisciplinary research in areas including humanities and social sciences, science and engineering, and defense studies. Second, it actively conducts joint research backed up by individual research results. By promoting collaboration and cooperation among researchers at the Academy and elsewhere, think-tanks, policymakers in government agencies, civilian actors etc., GS is working toward the goal of becoming a true center of global security research.

Today, GS handles a wide range of security research fields, including Asian security, cybersecurity, space security, marine security, infectious disease control and security, disaster mitigation and crisis management, gender and mental health, military professionalism, security and military rules of engagement, dual-use technologies, and more. GS handles the issues belonging to these research fields flexibly, on a general basis, as two- to three-year projects. As needed, international networks can be constructed for project planning, execution, presentation, and evaluation.

GS research outcomes are made widely available, usually online, on an irregular schedule in the formats of the Study series, the Global Security Seminar series, and the Global Security Reports. The *GS Study series* features original academic work and challenging exploratory research in the form of papers and research notes. It is hoped that series publications will further expand the scope of GS research, while provoking active exchange among researchers within and outside the Academy.

December 2017

Takeda Yasuhiro
Director of Center for Global Security
National Defense Academy

# CONTENTS

# Introduction

The so-called "negative list–positive list theory" (below abbreviated to "negative/positive theory") has been employed to explain certain essential military characteristics, in particular the characteristics of the Japanese Self-Defense Forces and legal systems of defense/military and security. The clearest explanation of this theory is a statement made in the Diet by former Secretary of Defense and Minister of Defense Ishiba Shigeru, quoted below.

Organizations of force include the military and the police, both national organizations of force. How do the two differ, then? … Let's say the Self-Defense Forces Act states that you can do this, you can do that, you may not do anything else. Laws on the military are supposed to be written as negative lists[1]
Our Self-Defense Forces Act is written as a positive list, meaning that it lists various things we are allowed to do. However, basically the legal framework for the military should be written as a negative list, containing the things we are not allowed to do, and adding that anything else is acceptable. I feel that there is also such a problem.[2]

According to this explanation, while Japan's Self-Defense Forces Act lists "things which may be done" or "can be done" and states that "anything else may not be done," laws (or legal frameworks) for the military ought in fact, list "things which may not be done" and add that "anything else is acceptable." In this case, the regulating format of the law (or legal framework) which regulates the activities of the military/Self-Defense Forces is addressed as the main topic.
Negative/positive theory of this kind is believed to have begun with the arguments of Shikama Rikio.[3] Documents thereafter began to contain points dependent on this theory,[4]

[1] 151st National Diet House of Representatives Committee on Security, Minute No. 8 (June 14, 2001), p. 8 (before Ishiba became Secretary of Defense).
[2] 156th National Diet House of Representatives Committee on Security, Minute No. 6 (May 16, 2003), p. 5 (see also Ishiba Shigeru, *National Defense*, Shinchosha, 2005, p. 242) (both after Ishiba became Secretary of Defense).
[3] Komuro Naoki and Shikama Rikio, *War and Peace Laws for the People,* Sogo Horei, 1993, pp. 124ff. (text by Shikama); Shikama Rikio, *An Anatomy of the State Power*, Sogo Horei, 1994, in particular pp. 312ff.; Shikama Rikio, "Essential Differences between the Military and the Police," in *Defense Studies* Vol. 21, April 1999, pp. 32ff.; Shikama Rikio "Is the SDF a Military?," in *Defense* Vol. 18 No. 1, October 1999, pp. 20ff.
[4] While not listed in full here, see, for instance, Momochi Akira, *Constitutional Common Sense and the Common-Sense Constitution*, Bungei Shunjusha, 2005, p. 128, and Okuhira Joji, "Forms of Legal Regulation Regarding Military Action," in *NIDS Security Studies* Vol. 10 No. 2, December 2007, pp. 67 ff.

and reference to this understanding was frequently made in the practice of law (albeit to an unclear degree of acceptance); in particular, the awareness that the Japan Self-Defense Forces Act has a peculiar format in accordance with the positive list method and principle is thought to have become a fairly widespread common understanding. Given that this may be connected with practical arguments as well, it is thought that to enhance the rationality of the discussion, academic examination including methodological reflection is required along with analysis and verification from a specialist perspective in the fields of defense (military) law and security law.

Incidentally, previous research on negative/positive theory includes that of Yamashita Aihito.[5] Yamashita calls the Self-Defense Forces–positive list schema "negative/positive theory as the overall structural theory of the Self-Defense Forces Act" and questions its basic theoretical underpinnings, recognizing the existence of the "positive list status under the laws of the Japanese national defense legal system."[6] Yamashita asks, "Must the basis of the activities and authority of the Self-Defense Forces be logically dependent on statute as act of Diet?" and "Does the current Constitution consign jurisdiction of Self-Defense Force activities exclusively to the Diet?"[7] Yamashita also concludes with reference to the military-negative list schema, by confirming through constitutional articles in the United States, Sweden, and Spain that the regulated format of military activities in the former two countries in particular is in accordance with the negative list method.[8] Yamashita's paper is an important step toward a deepening of the negative/positive theory, based on the following points: 1) having recognized that the Japan Self-Defense Forces Act is a positive list, it attempts to verify the understanding of the negative/positive theory that other countries' militaries have negative lists, and 2) it clarifies that the legal foundation of the negative/positive theory is in domestic Constitutions, particularly in connection with the legal jurisdiction items regulated thereby. However, regarding 1), because the verification's purpose and character are along the lines of "an examination from the angle of how other countries distribute this authority between administrations and parliaments, as preparatory work to draw a final conclusion about the appropriate composition of defense legislation,"[9] the basis of the verification is limited to an overview of part of the relevant constitutional

[5] Yamashita Aihito, *Public Legal Studies on National Security*, Shinzansha, 2010, pp. 61ff.
[6] *Ibid.*, pp. 79ff. In this regard, from page 71, the negative/positive theory is said to include "negative/positive theory as a theory of action regulation," discussing the problem of regulatory legal principles for defense and police actions respectively as problems with the application of the proportional principle. This issue is outside the scope of this paper.
[7] *Ibid.*, p. 85.
[8] *Ibid.*, pp. 104–111.
[9] *Ibid.*, p. 104.

articles of the above three countries (effectively two, the US and Sweden). Regarding 2), since the paper goes no further than an analytical presentation of the location of the points in question, connecting them with existing academic discourse on public law, viewed with an interest in the verification of the negative/positive theory and the clarification of its theoretical basis, it appears to be essentially the first step of research. Based on the state of previous research, the purpose of this paper is to further develop the attempt made mainly in point 1) above, enhancing verification from the perspective of comparative constitutional and military law. This is expected to contribute to further developing awareness on the issues raised in point 2) as well. "Verification" herein refers to the status quo in various countries—here, positive law rather than social facts—and is not positioned in advance within the methodological background of verifying a hypothesis. This is because one of the problems at hand is whether the negative/positive theory is possessed of the theoretical character of a hypothesis.

In acknowledgment of the fact that the negative/positive theory itself is ambiguous and has multiple dimensions and aspects, this paper first specifies the targets of its verification through analysis of the theory (Chapter 1), and then clarifies the status of domestic law—the basis for verification of the theory—in the United Kingdom, the United States, Germany, and France (Chapter 2). Based thereon, the paper verifies the negative/positive theory and clarifies its validity and scope (Chapter 3). Finally, having summarized the results of this verification, the paper presents viewpoints on the development and elaboration of the negative/positive theory and indicates their implications (in lieu of a conclusion).

# CHAPTER 1

# Analysis of the Negative/Positive Theory

(1) Schemata of the negative/positive theory

First, let us organize the various schemata involved in the negative/positive theory. Particularly important are the following concepts: 1) "military–negative, police–positive" and 2) "Anglo-American style military–negative, Continental military–positive." In this paper, the focus of analysis and verification is point 1), which should also lead to a clarification of point 2).

1) The concept of "military–negative, police (→ Self-Defense Forces)–positive"
   Regarding the two "legally armed groups" in modern liberal democratic nations, that is the military and the police, Shikama finds, by "extracting and comparing the 'ideal type' of each from the concepts widely accepted by international society," not only differences in "functions" between the two, but also "essential differences" in "positioning within state authority," "method of bestowing authority," "units of authority," "activity regions," and "basic nature of duties." [1] Of these, the negative/positive theory clarifies the "essential differences" in "method of bestowing authority."

   Regarding the military's "ideal type," "the authority of the military is regulated by the negative list method. This method refers to a list of items which are prohibited or banned. Thus, the attitude is one of essential freedom and unrestricted action on principle, with restrictions presented as exceptions. In this case, the limited negative items amounting to restrictions or prohibitions are mainly those regulated by international law: more specifically, by the law of war, a particular portion of the international law of war, which is the rules regulating restrictions on hostile acts and protection of the victims of war. There may also be supplementary regulations within domestic law." Conversely, regarding the "ideal type" of the police, "the authority of the police is regulated by the positive list method, a list of items which may/ must be performed. This indicates an attitude of essential restriction, particularly in democratic nations."[2]

   Shikama explains the basis for this "essential difference" as follows. Military defensive action is regulated by international law, which in turn is based on the

[1] Shikama, *An Anatomy of the State Power*, pp. 115–120.

[2] Shikama and Komuro, *War and Peace Laws for the People*, pp. 126–127.

principle of absolute sovereignty: therefore, regulations on the activity of the military, the organ of a sovereign state, are essentially unrestricted, with only a few restrictions applied due to the "law of war." Thus, the military are regulated by the negative list method, based on the idea that "anything not explicitly forbidden is permitted."[3] In contrast, the activities of the police involve the use of the general exercise of sovereign power against the people within a sovereign region, and because the arbitrary restriction of the people's freedom and rights by orders or force is not permissible in a liberal democratic nation, their authority must have an explicit legal basis. Therefore, the "method of bestowing authority" on police action is the positive list method, based on the concept of "principle-based restriction."[4]

Based on the construction of the "ideal types" above and having noted that "whether the Japanese Self-Defense Forces are a true military or not should become clear of itself upon comparison with this ideal type," Shikama argues that "here, the restriction regulations of "Self-Defense Force" are an even stricter positive list than that of the police. That is, the attitude is of even more stringent principle-based restriction than in the case of the police."[5] He concludes that the current legal status of Japan's Self-Defense Forces is distinct from the "ideal type" of the military. Thus, based on the concept of "military-negative, police-positive," the contrasting "military–negative, Self-Defense Forces–positive" schema appears.

Shikama then takes a critical approach to the existing "Self-Defense Forces-positive" legal status, asking "Can the proper functions of a military be thus ensured?"[6] With this attitude toward the issues, his prescription is that the Self-Defense Forces become a "proper military."[7]Shikama argues that "if the Self-Defense Forces are, or are trying to become, a true military, the legal system appropriate thereto must be established."[8] The relation with the "method of bestowing authority" would involve a major transformation of the legal system, from positive to negative.

This paper will conduct an examination of the validity of Shikama's negative/positive theory based on its content. However, let us first confirm its theoretical characteristics, which are (1) that it is presented in terms of "ideal types," (2) that it presents these

[3] See Shikama, *An Anatomy of the State Power*, p. 313.

[4] See *ibid.*, p. 314.

[5] *Ibid.*, p. 315.

[6] *Ibid*, p. 315.

[7] *Ibid.*, p. 325.

[8] Shikama, "Essential Differences between the Military and the Police," p. 41.

"ideal types" as showing the "essential difference" between the military and the police, and (3) that these "ideal types" are connected to normative and practical arguments for the evaluation of Japan's Self-Defense Forces. These characteristics require attention when addressing Shikama's negative/positive theory in particular; the relation of these "ideal types" with Max Weber's concept of *Idealtypus* will be discussed at the end of the paper. Regarding this point, let us note in advance that negative/positive theories other than Shikama's are not necessarily possessed of the theoretical characteristic of the "ideal type," whether deliberately or otherwise.

2) The concept of "Anglo-American style military-negative, Continental military-positive"

A concept of contrasting character from Shikama's discussion above is that of "Anglo-American style military-negative, Continental military–positive." The discussion of former Chair of the Joint Staff Council Kurisu Hiroomi does not necessarily produce a precise comparison, but its basis in the perspective of the contrast of the US and UK versus the European continent enables positioning as an expression of this concept. Kurusu says "The view often taken in Japan is that nothing can be done if not permitted by act of parliament; that is, that act of parliament creates administrative authority. This is the former attitude of German law, an ideology which has permeated Japanese law thoroughly due to the acceptance of German law since the Meiji period. In contrast, the Anglo-American conception is that the government independently holds administrative and executive power, thus can handle matters at its own discretion except for those which are prohibited by parliament/congress as the representative of the people."[9] Although we must allow for the general-readership context in which this explanation takes place, it is not without academic problems. Even so, when contrasted with Shikama's phrasing of the problem as the "essential differences" of the military compared to the police, this explanation has its own theoretical significance in its creation of a path to awareness of the diverse images of the military existing among different regions, cultures, and/or legal systems. Therefore, it is treated here as a target for verification as a different schema of the negative/positive theory from Shikama's.

However, Kurisu himself states that "in the postwar period, after total victory on the part of the Allies, the world has almost entirely taken on Anglo-American style ideology. With no act of parliament to authorize it, administrative power can be executed wherever no ban is in place. Even Germany clearly took up Anglo-

[9] Kurisu Hiroomi, *Create National Defense Forces for Japan*, Shogakukan, 2000, p. 100.

American style practices after the war."[10] In that case, the "Anglo-American style military-negative, Continental military-positive" comparison may have lost its validity since the war. However, to draw a conclusion based on the issue of legal regulations on military's external action, it cannot be said that "the world has almost entirely taken on Anglo-American style conception." Even in postwar Germany, an overview of the formational history of its defense and security legislation does not offer much support for this view of the matter. Given that there is still significance in verifying whether the concept of "Anglo-American style military-negative, Continental military-positive" aligns with actual military law in the postwar European continent, this paper takes this point as a target for verification.

(2) Dimensions and aspects of the negative/positive theory

As noted above, the various patterns of the negative/positive theory must be considered in its verification; in addition, the theory has various dimensions and aspects. This section will indicate a path toward their elaboration and development through the perspectives of analysis and evaluation of the negative/positive theory.

1) Classification of duties and stages in the negative/positive theory

a. Classification of duties

First, we must clarify what scope of duties the negative/positive theory concerns. When Shikama refers to the negative list as the "ideal type" of the "method of bestowing authority" on the military, it is clear that he has in mind its relationship with the main military duty of military defense; in addition, he also uses the negative list to explain relations with other external duties, in particular peacekeeping in international society. Elsewhere, Shikama explains that when the military is involved in the duty of maintaining domestic public order, as an issue of the exceptional "extended use" of the military for police functions, "in general, the same stringent restrictions are placed on the format of those activities as for the regular police, and the legal regulations for that purpose are explicitly indicated."[11] Based thereon, when discussing the negative/positive theory, we may note that the distinction between external and internal military duties is significant, and that it is related to external military duties.

[10] Ibid., p. 101.

[11] Shikama, *An Anatomy of the State Power*, p. 294.

Based on this distinction among military duties, the Japan Self-Defense Forces Act is characterized by a general positive list in its relations to all duties of the Self-Defense Forces—that is, defense and the maintenance of public order (Article 3-1), handling of situations that will have an important influence (item 2-1), and peacekeeping in international society (item 2-2). With regard to the relations herein, Shikama does not consider the positive-list approach taken by the Self-Defense Forces Act to the SDF duty of maintaining public order domestically to be a deviation from the military "ideal type." Rather, he states that "as SDF public security operations (Self-Defense Forces Act Article 78) are functions supplementing the regular police, naturally the legal regulations concerning the police apply. There is nothing unusual about this."[12] Other commentators on the negative/positive theory also appear to hold the same opinion.

The above suggests that with regard to the negative/positive theory, it is appropriate to position the "military-negative, Self-Defense Forces–positive" contrast in the context of external duties, and to consider it a target for the next chapter's verification. In contrast, the context of internal duties involves an explanation of both the military and the Self-Defense Forces with the positive list as a rule, within this theory. While verification of this point is not impossible, it is not a target for the examination in the next chapter.

b. Classification of stages

Shikama's negative/positive theory cites the "method of bestowing authority" as one "essential difference" between the military and the police and contrasts this point with regard to the military and Self-Defense Forces as well. This argument requires analysis of which stages of regulations are concerned with military activities.

According to Article 5 of the Act for Establishment of the Ministry of Defense, "the duties of the Self-Defense Forces, the organization and composition of Self-Defense Forces troops and institutions, the command of the Self-Defense Forces, and the actions and authority of the Self-Defense Forces shall be regulated by the Self-Defense Forces Act (including orders based thereon)." According to the structural composition of the Act, content related to SDF activities is organized by the Act into three stages: "duty" (Section 1 Article 3), "action" (Section 6), and "authority" (Section 7). With regard to these regulations, (1) the Self-Defense Forces may act only within the scope of "duty" listed in the Act; (2) when conducting activities which fall into the category of "action" (in the broad

[12] *Ibid.*, p. 315.

sense)—"deployment," "dispatch," and (in the narrow sense) "action"—the Self-Defense Forces may conduct only those "action" (in the broad sense) listed in the Act; (3) during activities, with regard to certain items[13] such as the use of armed force, the use of weapons, etc., the Self-Defense Forces and SDF personnel may use only the "authority" listed in the Act. In this sense, we may consider the Act to be a positive list in the three stages of "duty," "action" (in the broad sense), and "authority" during SDF activities. With regard to points (2) and (3), on May 26, 2014, House of Councilors member Hamada Kazuyuki issued a "Question on Negative and Positive Lists in Defense Legislation" asking for the view of the government on "whether Japanese defense legislation should be considered a positive list method." In response, the government stated, "While it is not entirely clear what the defense legislation mentioned by the Honorable Member refers to specifically, the Self-Defense Forces Act (No. 165, 1954) regulates Self-Defense Forces actions and authorities individually, and is considered a so-called positive list."[14]

Based on the classification of the stages of "duty," "action," and "authority," because Shikama's negative/positive theory focuses on the "method of bestowing authority" of the military, it can be positioned, when realigned to the three stages in the Self-Defense Forces Act above, as a view focusing primarily on the "authority" stage. This is also clear from Shikama's discussion of the negative/positive theory as an issue of the legal regulation of the "use of force" and the "use of weapons."[15]

In addition, the question arises of whether, regarding the negative/positive theory, the contrast of the military and the Self-Defense Forces applies to the regulations for "methods of bestowing authority" at the stage corresponding to "action." In the past, Shikama raised the problem of "the bestowing of SDF authority ad hoc" in Japanese safety and security legislation, citing the 1992 Act on Cooperation with United Nations Peacekeeping Operations and the 1999 "guidelines-related

[13] The demarcation of this scope is an issue for discussion, particularly regarding the parts which cannot be explained by the principle of "Vorbehalt des Gesetzes" in the study of administrative law. Naturally, for activities outside this scope, a legal basis of act of Diet is not required.

[14] "Response to House of Councilors Member Hamada Kazuyuki's Question on the 'Positive List' and 'Negative List' in the Defense Legal System" (June 3, 2014; 186th session, Response No. 105/to Hamada Kazuyuki, House of Councillors).

[15] See Shikama, *An Anatomy of the State Power*, pp.315ff.

Acts."[16] Since the first issue that arose when establishing these acts was their status as the legal basis for the dispatch of the Self-Defense Forces, it was thought to be in effect a positive list problem at the "action" stage of the Self-Defense Forces Act. Later commentators on the negative/positive theory have taken the "action" stage as well as that of "authority" more clearly into consideration.[17] Based on these points, in contrast with Japan's Self-Defense Forces Act, which is a positive list at the "action" stage as well as the "authority" stage, it is thought to be appropriate to take as one of the next chapter's targets for verification the question of whether other countries' laws on the military are negative lists at the equivalent stages.

2) Regulation methods and principles in the negative/positive theory

The negative/positive theory indicates that there are two methods by which laws regulate the activities of "legally armed groups." The first is the positive list method (a list of things which "may be done"), considered the "method of bestowing authority" on police and the SDF. The second is the negative list method (a list of things which "must not be done"), the "method of bestowing authority" on the military. Here "may be done" and "must not be done" refer to the legal dimension. In some cases, opinions may differ on whether a given set of regulations is closer in character to a negative or positive list, and the two may overlap. In addition, within the negative/positive theory, the positive list method is linked with the attitude that "only activities with a legal basis may be done" (below, the "positive principle"). In contrast, the negative list method is linked not only with the attitude that "activities prohibited by law must not be done" but also with the attitude that "activities not prohibited by law may be done" (below, the "negative principle"). This attitude is expressed by Shikama, in his explanation of the negative list, as "unrestricted in principle." It also appears in Ishiba's interpretation that "anything else is acceptable" (see the quotation at the beginning of this paper).[18]

---

[16] Shikama, "Is the SDF a Military?" pp. 20ff.

[17] In Okuhira, op. cit., pp. 88ff., Japan's law is confirmed to use the positive list method at the stages of "action" and "authority." In Yamashita, *op. cit.*, pp. 79ff., the positive list method of Japanese law is confirmed regarding the "activities (actions) and authority of the SDF." The Response of June 3, 2014, noted in the text also indicates that "the actions and authorities of the SDF" use the positive list.

[18] Another issue is the basis for the establishment of both the positive and negative principle, —in this case, their legal basis. A more detailed explanation, albeit limited to the locus of the problem, is provided below. Regarding the negative principle in relation to the "method of bestowing authority"

Thus, within the negative/positive theory, the method of regulation is closely linked with the principle of regulation. However, an analysis of their relationship is required. First, regarding the positive principle and the positive list method, as regulations using the positive list method are normally based on the positive principle, it is understandable that the negative/positive theory has hardly paused to consider the distinction between the two. To begin with, legislative techniques based on the positive principle include (1) the regulation method of making a restrictive list of authority based on the individual bestowal method, generally considered the method of the positive list in the negative/positive theory.[19] There is also (2) the regulation method of bestowing authority in general, based on the comprehensive bestowal method[20], with some actual legislative examples tending toward that direction (the comprehensive bestowal regarding the "use of force" in Article 88 of the Self-Defense Forces Act[21]). In that case, the connection between

for military external duties, the basis in domestic law is an issue as well as in international law, to be clarified through discussion of comparative constitutional law and comparative military law in the following chapters. Contrasted with the negative principle considered to exist in relation with external military duties, Japan has a peculiar legal status in which even the SDF's external duties are based on the positive principle. The problem of its basis in legal principles—as Yamashita puts it, the "need to reconsider the theoretical meaning of determining all SDF activities through Diet legislation, in particular the Self-Defense Forces Act" (*op. cit.*, p. 84)—is the fundamental problem specific to Japanese defense and security law. Yamashita interprets this, legitimately, as "a problem of the jurisdictional distribution of the administration and the parliament (Diet), that is, whether the jurisdiction configuring the norms determining SDF or military activities, authority, and so on belongs to the administration or to the parliament (Diet)" (*op. cit.*, p. 80). Other points also require study, for instance the characterization in function theory of external military action, including military defense (for a discussion of the relation of this point with the negative/positive theory, see the above, pp. 85ff.), the relation with the principle of rule of law (or das Rechtsstaatsprinzip), in particular "der Grundsatz der Gesetzmäßigkeit," and the position of the superior military authority within the separation of powers. However, the elucidation of these fundamental problems exceeds the scope of this paper and requires meticulous preparation. Thus, interpretative discussion will be left to further studies, while here confirming only the locus of the issues and their relation to the content of this paper.

[19] Okuhira, op. cit., expresses this on p. 92 as "the positive list method, which is the limited list method."

[20] Relatedly, Okuhira, op. cit., refers on p. 98 to the "perspective of the style in which regulations on external action are written," noting that "at the level of the legal system of domestic defense, the option exists not to describe in detail the content of actions."

[21] With reference to the point that Article 88 of the Self-Defense Forces Act touches only on the bestowal of authority regarding hostile acts, Shikama also emphasizes its limits (see Shikama and

the positive principle and the positive list method is not inevitable. Rather, the perspective of analysis of their mutual relationship takes on significance when the two have been theoretically distinguished.

Viewing the issue based on distinguishing the regulation principle and the regulation method, a problem regarding the negative principle and negative list method becomes evident. The negative list regulation method is valid as long as it is based on the principle that "activities prohibited by law must not be done," so it should not necessarily entail the attitude that "activities not prohibited by law may be done." The problem is why this connection is believed to exist regardless. This point will be specifically clarified in the next chapter through the approach of comparative constitutional law and comparative military law and is thus noted to exist only.

3) Classification and mutual relations of regulation formats in the negative/positive theory

Shikama's negative/positive theory, regarding the positive principle and positive list method as the "method of bestowing authority" on the police, discusses the relations with domestic law and particularly regulation by act of parliament; in contrast, as noted above, regarding the negative principle and negative list theory as the "method of bestowing authority" on the military, Shikama discusses the relations "mainly" with the regulations of international law, stating that "the authority of the military is regulated by the negative list method. In other words it is essentially unrestricted, with some exceptional restrictions mainly under international law."[22] In any case, Shikama also adds, as stated above, that "there may also be supplementary regulations within domestic law," and according to Ishiba, "Acts on the military are actually supposed to be written as negative lists."[23] In addition, some subsequent writings on the negative/positive theory also discuss it in terms of the relations of act of parliament as domestic law to the negative principle and negative list method as the "method of bestowing authority"

Komuro, *op. cit.*, pp. 139–140). This shows that the evaluation of whether the bestowal of authority in a given article is comprehensive or restrictive may vary by commentator. In any case, this does not render it impossible to make a theoretical division of bestowal formats into general/comprehensive and individual/limited, nor is this a meaningless process.

[22] Shikama, "Essential Differences between the Military and the Police," p. 33.

[23] As cited at the beginning of this paper, he also said that "basically the legal framework for the military should be written as a negative list."

on the military.[24] Bringing up the relations with domestic law in this context of discussion is a legitimate approach. That is to say, the empowerment and restriction of military activities are also issues pertaining to domestic law under the Constitution, the normative framework for empowerment and restriction; a focus on the aspect of restriction brought to the fore in the negative principle and negative list method, based on the relations with international and domestic law, may involve (1) the confirmation or acceptance of the specific content of the restrictions of international law within domestic law; (2) in case of conflicts or doubts on the interpretation of the content of restrictions regarding military activities in international law, the clarification and specification of this content through the establishment of domestic laws in each country based on their interpretations of international law; (3) the establishment of domestic laws in order to add to the content of the restrictions of international law. Given this context, the question of whether the "method of bestowing authority" on the military is done through the negative principle and negative list method calls for verification in relation to domestic law as well as international law, and particularly in relation to act of parliament from the viewpoint of comparison with the Japan Self-Defense Forces Act.[25] However, Shikama's negative/positive theory in particular lacks sufficient verification with regard to the relations with domestic law. Based thereupon, this paper will also examine the question of whether the negative principle and negative list method are used in foreign armed forces from the perspective of domestic legal studies. It is hoped that the examination of international law, which exceeds this author's capacity, will be taken up from the perspective of a specialist in the field.

When focusing on domestic law in this way, and moving further to include regulations beyond the scope of law—for instance, basic guidelines, policies, strategies, plans and budgets concerning defense, security, and military operations, as well as military orders and instructions, etc.—it should become possible to analyze and elaborate on the classification of regulation formats of "methods

[24] Yamashita, *op. cit.*, pp. 79ff. In this case, the expression "the 'problem of the legal format' in which overall SDF activities and authorities are created through acts of parliament" is used to focus on the problem of the legal format.

[25] As well, a point requiring attention during examination including aspects of both international and domestic law is that—strictly speaking—the primary target of the "bestowal of authority" is the state as a legal subject in international law and the legislative and executive branches in domestic law, and that the "bestowal of authority" on the military is derived therefrom.

bestowing authority" on the military, as well as their mutual relations, through connection with the negative/positive theory. Based on this perspective, it is also possible to approach arguments equivalent to the negative/positive theory through their relations with regulation formats at lower levels than act of parliament and Constitution, i.e., operations orders and troop operation regulations.[26]

That said, this paper's topic will be limited, for the moment, to the verification of relation with act of parliament. That is because, if the basis of interest in the negative/positive theory is the comparison of the establishment of the "method of bestowing authority" on the Self-Defense Forces via the positive principle and positive list method with that of foreign armed forces, when taking into account domestic law as well, in direct terms, the primary point of interest for verification is thought to be the relations with the regulation format that is act of parliament. In actuality, the negative/positive theories of Ishiba and Yamashita quoted at the beginning of the paper also focus on act of parliament in their comparison of the "methods of bestowing authority" on the military and the Self-Defense Forces, showing interest of this kind. When focusing on act of parliament in this way, based on superior/inferior relationships with Constitution (in the formal sense), the mutual relations therewith appear as a more fundamental problem, as will be clarified in the following chapters. Thus, the formally superior law that is Constitution is also to be examined. To proceed to the examination of ordinances and other regulation formats at levels below act of parliament and Constitution, the first essential step is to examine act of parliament and Constitution, which serve as the normative framework for the restriction and empowerment of these regulations. Therefore, the paper begins by addressing this point.

[26] Sakamoto Sukenobu, "Organizing the Legal Environment for Issuing Operations Orders in the 'Negative List Method'", *Defense* Vol. 32 No. 1, October 2013, pp. 158ff., focuses on the problem of the operations orders level.

# CHAPTER 2

# Domestic laws of the United Kingdom, the United States of America, Germany, and France

The subject of the negative/positive theory is legal regulations for military activities, in which case, based on the key points of the examinations in the previous Chapter, (1) in terms of the framework of Japanese laws, each stage of "action" and "authority" can be separated in the context of external "duty," (2) problems of methods and principle of legal regulations are included, and furthermore, (3) development is based on differentiation and mutual relationship of the form of internal laws. As such, in this Chapter, in terms of the methods and principles of the negative and positive regulations, we target regulations equivalent to "action" and "authority" of external "duty," in which case, we verified the negative/positive theory based on differentiation and mutual relationship of the forms of domestic laws. At this time, we supplemented the result of the Global Security Report[1] of our center, especially reviewing the legal systems of four western countries, to clarify the facts—the state of the positive law—which is the foundation of the verification of the negative/positive theory. Of course, there is no discussion that is identical to the negative/positive theory in various countries, and laws of various countries are not necessarily organized in a system of "duty," "action," and "authority" as in Japanese laws. Yet, the present paper at times explains the legal systems of foreign countries based on such a framework because it is necessary to verity specific negative/positive theory; thus, it is limited to that level. We are not stating that such explanation is provided in various countries.

## (1) The United Kingdom[2]

Because the United Kingdom (the U.K.) has no constitutional code, its situation is unique. However, its 1689 Bill of Rights prohibits the maintenance of a standing army in the U.K. without an agreement by the Parliament. Thus, in the U.K., a standing army cannot be established or maintained without an Act of congress enacted every five years. In that

[1] Yamanaka Rintaro (ed.), *Domestic Laws and Regulations Governing Military Activities: Comparative Studies of Seven Countries*, Center for Global Security, 2018.

[2] For the UK, we referred to pp. 36ff. of Yamanaka (ed.), *Domestic Laws and Regulations Governing Military Activities: Comparative Studies of Seven Countries* (the part written by Yamazaki Motoyasu) and added analysis and examination from the perspective of the negative/positive theory as needed while supplementing a survey and description.

sense, ultimately, there is a positive principle in relation to act of parliament. Presently, there is the Armed Forces Act,[3] enacted in 2006 and most recently updated in 2016 as an act of parliament that stipulates the legal basis to maintain a standing army, which at the same time establishes the regulations for the substance and procedures related to military service. Indeed, it is unrealistic not to enact or update such laws, and its principle in a sense is a mere formality. The formulation of the abovementioned Bill of Rights is "important not because there is now any possibility that Parliament withdraw authority for the continued maintenance of an army, but because it asserts that the armed forces are constitutionally subordinate to Parliament" according to textbooks on the British constitution and administrative laws.[4]

Traditionally, under such circumstances, the royal prerogative has occupied an important position in the U.K. According to the Review of the Executive Royal Prerogative Powers: Final Report published by the Ministry of Justice in 2009, "The Royal prerogative is central to the existence and organization of the Armed Forces. The prerogative sits alongside a range of primary and secondary legislation, however, which regulates such matters as service discipline and certain functions of the Secretary of State for Defence. The prerogative is therefore one element of a sophisticated structure for the administration of the Armed Forces."[5] As such, it is difficult to clearly specify the extent of the royal prerogative, which coexists with the authority of act of parliament, but in the main contents of a precedent, "the War Prerogative" includes powers to "declare war," "deploy the armed forces," "determine when to deploy the armed forces," determine the objectives of the deployment," "determine the armament of the armed forces," and "conduct the operations of war."[6] The aforementioned final report states that under the classification of "powers relating to armed forces, war and times of emergency," its contents that are closely related to the present study are "right to make war or peace or institute hostilities falling short of war," "deployment and use of armed forces overseas," "control,

[3] 2016 c.21; 2006 c.52

[4] Anthony Bradley and Keith Ewing, *Constitutional and Administrative Law*, London: Pearson Education, 13.ed., 2003, p.328.

[5] Ministry of Justice, The Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report, p. 13.

[6] Rosara Joseph, *The War Prerogative: History, Reform and Constitutional Design*, Oxford: Oxford UP, 2013, p.116.

organization and disposition of armed forces," and "the government and command of the armed forces."[7]

The royal prerogative is in fact exercised by the Prime Minister and the Minister of Defense within a framework of a cabinet decision, granting duties to the armed forces, determining a deployment of the armed forces,[8] and permitting the use of force. In fact, the "National Security Strategy and Strategic Defence and Security Review," formulated by the government in 2015, contained a description of the mission and role of the armed forces within the entire National Security Strategy and Strategic Defence,[9] identifying a certain degree of armed forces deployment. The government determines and orders armed forces deployment within the framework of this kind of foundational strategy and then permits or regulates the use of force through an approval such as the rules of engagement. Such a case requires decisions, orders, and approvals based on the royal prerogative; however, a general or individual statutory provision on military activities from an Act of Parliament is not necessary. In recent years, the overseas deployment of armed forces undertakes a practice of reporting to and asking for approval from Parliament. Such procedures might be regularized by an act of parliament or a resolution (House of Commons Constitution Committee 12th Report [2013–2014][10]). Parliament involvement is worthy of attention moving forward, but this is more of a problem of political control than of legally controlling military actions in a negative and positive form.

Meanwhile, Parliament has the authority to abolish, limit, or maintain the royal prerogative, which is consistent with the mindset of parliamentary sovereignty.[11] The aforementioned final report argues that "Parliament can legislate to modify, abolish or simply put on a statutory footing any particular prerogative power. Prerogative powers

[7] Ministry of Justice, The Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report, p. 32. However, for the last one, the following is added: "government and command of the armed forces belong to the Her Majesty."

[8] In this paper, when we use the word *dispatch* without quotation marks, we are referring to the general meaning of "sending with some mission." "Dispatch" (*haken*) in Japanese law ("disaster relief dispatch" and "overseas dispatch") has a narrower meaning and a characteristic of a legal term; thus, in this paper, we used quotation marks to refer to this sense.

[9] See National Security Strategy and Strategic Defence and Security Review, 2015, pp.23ff.

[10] House of Commons, Political and Constitutional Reform Committee, Parliament's role in conflict decisions: away forward, Political and Constitutional Reform - Twelfth Report of Session 2013-2014, 2014, pp.13ff.

[11] Hilaire Barnett, *Constitutional and Administrative Law*, London: Routledge, 13.Ed., 2020, p.115.

are abolished by clear words in statute or where the abolition is necessarily implied." [12] Thus, unless royal prerogatives are abolished or amended by an act of parliament, such prerogatives can be exercised; this is therefore consistent with the negative principle in relation to act of parliament.

Let us now introduce a perspective of differences in the stages of "duty," "action," and "authority" using the expressions of Japanese laws. No positive principle exists in relation to act of parliament at any stage in terms of the external duties of the armed forces. Instead, there is, in fact, the negative principle, which holds true because an act of parliament can be used to regulate a wide extent of royal prerogatives.

### (2) The United States of America[13]

According to the Constitution of the United States of America (USA), the President is the supreme commander of the army, navy, and state militias (United States Constitution, Article 2, Section 2, Clause 1). This provision is the starting point of presidential authority regarding military activities, and within the range of authority derived from it, the President grants duties to the armed forces, determines deployment, and permits the use of force. In addition, clauses of executive power (Article 2, Section 1, Clause 1) and diplomatic authority (Article 2, Section 2, Clause 2) are incorporated with the clause on the supreme commander, and specific duties may be based on protective authority.

As an important precedent for the clause on the supreme commander, a court opinion by Justice Hugo Black on the Supreme Court ruling on what is referred to as the Steel Seizure Case presumed that when judging whether the President has authority to seize a steel plant, such order must be founded on an act of congress or the Constitution of the USA.[14] In this case, the issue was the seizure of a domestic private company, and as issues of emergency (during a war) had been intertwined, how it was handled requires attention; however, it is also valid as a general theory for the present topic of "bestowing of authority" in relation to an external duty for the armed forces. The concurring opinion of Justice Robert Jackson on the Steel case was that this case would "be discussed in case books for

[12] Ministry of Justice, The Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report, p. 8.

[13] Yamanaka (ed.), *Domestic Laws and Regulations Governing Military Activities: Comparative Studies of Seven Countries*, pp. 8ff. (part written by Tsuji Yuichiro).

[14] Youngstown Sheet & Tube Co. v. Sawyer, 343 US 579(1952), at 585.

posterity and will be referred to as a 'precedence' by the supreme court at critical junctures."[15]

Justice Jackson also analyzed the situations in which the President exercises authority in three categories. First, when the President takes an action based on constitutional authority, but simultaneously, if an act of congress also authorizes the President, the authority of the President becomes the most powerful as it is based on the Constitution and the act of congress. This is the first of three categories, and according to its expression, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[16]

However, if an act of congress has no such explicit or implied authorization, the question becomes more challenging and important in relation to the negative/positive theory. Justice Jackson's concurring opinion states, "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers" as the second category.[17] At this time, even without an authorization by an act of congress, the President's "own independent powers" might allow for an action based on the authority derived from the clause on the supreme commander. This is suggestive, as it includes an opportunity to deny the positive principle in relation to act of congress. In fact, presidents after Harry S. Truman have deployed armed forces based on their constitutional authority derived from the clause on the supreme commander without an authorization by an act of congress permitting the use of force. However, in the second category, Justice Jackson's concurring opinion continues, "there is a zone of twilight in which he [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."[18]

Furthermore, the concurring opinion of Justice Jackson states that in the third category, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[19] If

---

[15] Komamura Keigo, "A Critical, Constitutional, and Political 'Zone of Twilight' — Analysis of the Concurring Opinions of Justice Jackson in the Steel Seizure Case," in Okudaira Yasuhiro/Higuchi Yoichi (eds.), *Constitutional Law of Crisis*, Koubundo Publishers Inc., the 2013 collection, p. 147.

[16] 343 U.S. 579(1952), at.635.

[17] 343 U.S. 579(1952), at.637.

[18] 343 U.S. 579(1952), at.637.

[19] 343 U.S. 579(1952), at 637.

Congress uses a statute to explicitly and implicitly limit or prohibit the President from exercising their authority, it would be equivalent to the third category, and such judgment is consistent with the negative principle in relation to act of congress. Indeed, there remain issues of the possibility, matters, and forms of limiting or prohibiting the use of presidential authority—in the context of this paper, the authority associated with the external deployment of armed forces and use of force—by act of congress and the constitutional interpretation of matters along with the issue of whether prohibition stands in the negative principle in relation to act of congress.[20]

With the reservation that this issue includes all abovementioned points, we can summarize that in the USA, there is a negative principle in relation to act of congress in the context of external duties for the armed forces; simply put, this principle stipulates that actions not prohibited by act of congress are allowed. Such principle holds because wide-ranging authority to order and direct military activities is granted to the President by the Constitution of the USA.

The USA doesn't offer no opportunity for the positive principle in relation to act of congress in terms of the external duty of the armed forces. This is because following the enactment of the Constitution of the USA, and even today, the authoritative relation between the President and Parliament remains complex because of the Congress's adoption of the War Powers Resolution in 1973[21] for the Vietnam War, limiting the President's authority, which was passed again by overturning the President's veto. With the same resolution, the President's authority as supreme commander to "introduce United States Armed Forces into hostilities, or into situations where imminent

[20] Specifically, the relation between the presidential authority based on the clause on the supreme commander, declaration of war, and parliamentary authority to enact the "Rules for the Government and Regulation of the land and naval Forces" (Article 1, Section 8, Clause 14) becomes the point of discussion.

[21] Pub. L. 93-148(87 Stat. 555) See Matthew C. Weed, The War Powers Resolution: Concepts and Practice, Updated March 8, 2019(CRS Report for Congress, R42699) for the background, contents, and challenges of enacting the War Powers Resolution and subsequent development. Also refer to Miyawaki Mineo, *War Powers Resolution of the President of the United States*, Educational Publishing House, 1980; Miyawaki Mineo, *Modern American Diplomacy and Civil-military Relations: Theory and Practice of Presidential and Congressional War Powers*, Ryutsu Keizai University, 2004; Hamaya Hidehiro, *Study of the War Powers Resolution of the United States: Its Influence on the US-Japan Security System*, Seibundo Publishing Co., Ltd., 1990; Tomii Yukio, *Overseas Deployment and Parliament: Comparative Constitutional Discussion for Japan, the USA, and Canada*, Seibundo Publishing Co., Ltd., 2013, pp. 342ff.

involvement in hostilities is clearly indicated by the circumstances" is restricted and limited to the following cases: (1) when war is declared; (2) specific statutory authorization is issued; or (3) a national emergency is created by an attack on the USA, U.S. territories, possessions, or the U.S. armed forces (the same resolution, Article 2, Clause c). Though opinions vary regarding whether the clause lists limited situations where armed forces can be introduced: if we understand it as a limited enumeration, the President's introduction of armed forces as supreme commander excluding a national state of emergency requires a declaration of war or a special authorization by an act of congress.[22,23] An act of congress determining such authorization, for example, is the Authorization for Use of Military Force against Iraq Resolution of 2002.[24] According to Clause a, Section 3, authorization is given as follows: "The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate," that is, (1) "in order to defend the national security of the United States against the continuing threat posed by Iraq" (clause 1) and (2) "in order to enforce all relevant United Nations Security Council resolutions regarding Iraq" (clause 2).[25]

According to the War Powers Resolution, in relation to act of congress, instead of the negative principle, the positive principle partially and selectively exists with a declaration of war, excluding a case of national emergency.[26] However, in the existence and scope of

[22] According to the interpretation criteria of the resolution, to derive authority from a ratified treaty, or legal provisions including the Appropriation Act, such provisions (in the case of a treaty, provisions of the statute to implement treaties) must be authorized, and doing so is prohibited unless it is an authorization by an act of Congress as discussed in the resolution (Article 8, Clause (a)(1) and (2)).

[23] According to Article 5 of the War Powers Resolution, if troops are deployed without authorization by an act of Congress or a declaration of war despite it being a requirement, the troops must be withdrawn within a certain period—within 60 days of a request or submission of a report. Exceptions are possible only when Congress declares war, provides a special authorization for the use of the military, legally extends the duration, or Congress cannot physically meet because of an armed attack against the United States. Other than the latter case, a declaration of war or an authorization by an act of Congress is still necessary.

[24] Pub.L. 107-243(116 Stat.1498.)

[25] The resolution has shown that this provision is equivalent to a special authorization by an act of Congress planned by the War Powers Resolution (Clause c, Item 1).

[26] The provision of the resolution is the "control of procedures; in other words, whether to commit the US military" (Yamashita, *op.cit.*, p. 108), but within the procedure for doing so, the resolution demands a declaration of war (albeit selectively), and the basis for an act of Congress; thus, the relation with the positive principle may be discussed.

such principle, we must note that a conflict between Congress and the President regarding authority causes fluctuations. With such a conflict, according to the interpretation of the executive department since the 1990s—the Office of Legal Counsel (OLC) of the Ministry of Justice—the meaning of "war" in the phrase "to declare war"—the authority of which belongs to Congress in the Constitution of the USA (Article 1, Section 8, Clause 11)—acknowledges the necessity of an authorization by an act of congress or a declaration of war. Meanwhile, for limited military operations within foreign countries to protect important national interests, that is, military operations that do not meet the definition of "war" in terms of the same article and clause in reference to the "anticipated nature, scope, and duration" of the planned operation—the so-called Military Operation Other Than War (MOOTW)—the President can order the armed forces to engage in limited operations according to diplomatic authority or based on the clause on the right to execute or the clause on the supreme commander in Article 2 of the Constitution of the USA without a declaration of war or an authorization by an act of congress.[27] Past presidents have deployed armed forces on external duties based on clauses of the Constitution, such as the clause on the supreme commander, without a declaration of war or an authorization by an act of congress not limited to situations covered by Article 2(c) of the War Powers Resolution. As such, from the viewpoint of constitutional interpretation and practice with a limited view of congressional authority, it can be summarized that the scope of the positive principle is limited in terms of the War Powers Resolution.

Under the above legal framework, the following military activities are currently stipulated. The National Security Strategy of the United States of America, approved by the President in 2017, and the National Defense Strategy of the United States of America, approved in 2018 by the Secretary of Defense, place missions of the armed forces under the national security and national defense basic strategy, specifying the goal and form of armed forces deployment.[28] In addition, in terms of the use of force, the Standing Rules of Engagement (SROE) are formulated as a direction of the Chairman of the Joint Chiefs of Staff through the approval of the Secretary of Defense,[29] implementation guidance on the use of force to execute missions or self-protection is determined, and steps are established along with the basic policy for the action taken by the commander during

[27] Authority to Use Military Force in Libya, 35 Op. O.L.C. at 10(2011); April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op.O.L.C. at 10(2018).

[28] National Security Strategy of the United States of America, 2017, p.4; Summary of the National Security Strategy of the United States of America, 2018, p.4.

[29] CJCSI 3121.01B 13 June 2005, 6.

military operations.[30] With this discipline as the basic format, the use of force is permitted or restricted.

To conclude this section, let us venture to use the wordings in the Japanese law to summarize the above examination of the USA, by introducing a viewpoint on differences in the stages of "duty," "action," and "authority." As has often been revealed, in the USA, in terms of the relation of the external "duty" of the armed forces with act of congress−though we must consider the possibility of prohibition and restriction as discussed above—basically, we can summarize that a negative principle exists. This principle—the principle of being able to take actions that are not specifically prohibited by act of congress—stands because of constitutional clauses such as the clause on the supreme commander. The President directly relies on such constitutional clauses and grants individual or general military "duty" through basic policy, strategic documents, regulations, orders, or guidance; determines the "action"; and approves the execution of "authority" when no basis exists in act of congress. However, in the stage equivalent to "action," we can assume that a positive principle exists based on the War Powers Resolution despite some fluctuations.

(3) Germany[31]

The German Constitution (in the formal sense)—the Basic Law for the Federal Republic of Germany first enacted in 1949 and amended several times since—has a clause that states that "in addition to defense (*Verteidigung*), armed force can be deployed (*Einsatz*) only to the extent explicitly permitted in this Basic Law (Article 87a Clause 2)." It contains the principle that stipulates that to "mobilize" armed forces—referring to the use of armed forces where high-authority activities are generally implemented as a means of exercising executive power—an explicit constitutional basis is necessary (constitutional reservation [*Verfassungsvorbehalt*]; hereafter the principle of constitutional reservation). This principle narrowly limits the government's discretion in terms of constitutional demand for statutory provision (formal) regarding the "deployment" of armed forces. In this manner, this principle is absent in the USA, the U.K., or France. Because of the existence of such a unique principle, Germany applies a positive principle at the

[30] CJCSI 3121.01B 13 June 2005, Enclosure A, 1.a.

[31] Regarding Germany, based on Yamanaka (ed.), *Domestic Laws and Regulations Governing Military Activities: Comparative Studies of Seven Countries*, pp. 90ff. (part written by Yamanaka Rintaro), survey and descriptions are supplemented as needed, and analysis and examination are added from the perspective of the negative list–positive list theory.

constitutional level in terms of the "deployment" of armed forces. Based on this principle, situations where "deployment" is allowed are made into a positive list.[32] While academic conflict within the scope of the principle of constitutional reservation related to the "deployment" of armed forces—the meaning of "defense" and "deployment," whether the stipulations of the same clause are limited to domestic deployment—remains extremely complex, the Federal Constitutional Court decision (second court) of July 12, 1994, did not clearly state the scope of the abovementioned constitutional reservation principle; thus, the official interpretation remains unclear. That being said, the same court refers to Article 24, Clause 2, of the Basic Law, which plans to join the "*System gegenseitiger kollektiver Sicherheit*" ("mutual collective security system") to maintain peace as "the constitutional basis to deploy armed forces within the system's framework."[33] As such, because the scope of the constitutional reservation principle remains unclear, determining the constitutional basis of "deployment" is significant in solving issues. Presently, in relation to the external deployment of armed forces, deployment for the purpose of "defense" (Article 87a, Clause 2) and deployment within the framework of the "mutual collective security system" are based on the Constitution; thus, on this point, there is no issue with constitutional basis. However, other overseas deployment leads to possibilities of constitutional conflict not only in academia but also in actual political operations in terms of constitutional basis.

A constitutionally explicit basis for the relation with the constitutional reservation principle associated with the "deployment" of armed forces is necessary, but for the executive department to decide and direct the "deployment" of armed forces, a basis of act of parliament is not necessary in addition to the basis of the Constitution. Therefore, in relation to act of parliament, no positive principle exists. Indeed, in the above-described determination, the Federal Constitutional Court constitutionally requests the principle of the necessity of advanced agreement of Parliament for each "armed operation of armed forces (*Einsatz bewaffneter Streitkräfte*)" ("the parliamentary reservation" [*Parlamentsvorbehalt*] related to the "armed operation of armed forces,"[34] hereafter referred to as the parliamentary reservation principle). With that, a procedural law that specifies its contents was enacted (Act on parliamentary involvement in the decision for

[32] However, the scope of the positive principle at the level of "action" in Japanese law includes "deployment" (*shutsudō*) and a narrower definition of "action" (*kōdō*) and "dispatch" (*haken*). This makes the scope wider than Germany's principle of constitutional reservation. In addition, caution should be taken that "deployment" (*shutsudō*) in Japanese law and "deployment" (*Einsatz*) in German law are likely different, including the differing significance of setting such a concept.

[33] Vgl. BVerfGE 90, 286(345, 355)

[34] Vgl. BVerfGE 90, 286(381ff.)

armed operation of armed forces overseas [*Gesetz über die parlamentarische Beteiligung bei der Entscheidung über den Einsatz bewaffneter Streitkräfte im Ausland*]). [35] According to this Act, for each "armed operation of armed forces," advanced agreement by Parliament is required in principle; however, general or individual legal basis is not necessary in this case. The German Constitution has "rule of essential matters (*Wesentlichkeitstheorie*)" formulated by the Federal Constitutional Court. For example, as expressed by the Federal Constitutional Court decision of 1978, "separately from the characteristic of infringement, a legislator is obliged to make all essential decisions within the important areas of norms, specifically, in the area of the use of basic rights, as far as it fits the rules of the state."[36] According to books on European comparative military laws, this principle is valid for armed forces as well.[37] In relation to the external "deployment" of armed forces, a theoretical possibility of basing the above-described parliamentary reservation principle on the "rule of essential matters" has been academically discussed.[38] In any case, there is no argument that basis of an act of parliament is generally or individually necessary for the agreement.

Besides these constitutional constraints—the principle of constitutional reservation—there is a constitutional constraint specifically on the parliamentary reservation principle for the "armed operation of armed forces." Under this, the federal government has the right to decide on the "deployment" of armed forces in principle, and to determine the "deployment" of armed forces, a cabinet decision is necessary (see §15, Clause 1).[39] The right to enact a basic policy is granted to the Chancellor (Basic Law Article 65, Sentence 1), and the Minister of Defense can formulate defense policy for jurisdiction matters within the framework. With these abilities, military missions and deployment formats are determined in a way that is not limited to individual cases. In fact, the "White paper on Security Policy and the Future of Federal Forces (*Weissbuch zur Sicherheitspolitik und zur Zukunft der Bundeswehr*)" following a cabinet decision enacted in 2016 and the "Defense Policy (*Verteidigungspolitische Richtlinien*)" enacted by the Minister of

[35] BGBl. I 2005 S. 775.

[36] BVerfGE 49, 89(126f.)

[37] Georg Nolte and Heike Krieger, "Comparison of European Military Law Systems," in Georg Nolte(ed.), *European Military Law Systems*, Berlin: De Gruyter Recht, 2003, p.69.

[38] Vgl. z.B., Tobias M. Wagner, *Parlamentsvorbehalt und Parlamentsbeteiligungsgesetz*, Berlin: Duncker & Humblot, 2010, S.31ff.

[39] Christoph Papenberg, *Das Französische und das Deutsche Wehrrecht*, Baden-Baden: Nomos, 2007, S.72. According to the Executive Provisions of the Federal Government §15, Clause 1, cross-jurisdiction decisions require a cabinet decision.

Defense in 2011 place military missions under security and defense basic policies. Thus, the goals and format of armed forces deployment are specified.[40] The Minister of Defense (nonemergency) or the Chancellor (emergency) is constitutionally granted the highest command of the armed forces— "supreme command (*Befehls- und Kommandogewalt*)" (Basic Law Article 65a); thus, the Minister of Defense or the Chancellor can order armed forces deployment for each situation within the framework of the federal government's decision and the above-described Basic Law. In this case, any use of armed forces equivalent to "deployment" has a condition that requires constitutional basis (the constitutional reservation principle), but general or individual legal basis of act of parliament is not necessary.

Use of force during deployment of the armed forces is outside the abovementioned constitutional reservation principle. However, the (formal) Constitution grants the highest command of the armed forces— "supreme command"—to the Minister of Defense (nonemergency) or the Chancellor (emergency) (Basic Law Article 65a). Thus, the Minister of Defense orders the armed forces to take actions within the framework of decisions by the Chancellor and the Cabinet. Alternatively, approval is given to the rules of engagement (*Einsatzregeln*), which in turn permits or restricts the use of force. In this case, the use of force does not require general or individual basis in the Constitution and an act of parliament.

Meanwhile, acts of parliament may prohibit or limit the execution of constitutional authority by the abovementioned executive branch. In such a case, the executive branch can order and instruct the armed forces to perform anything that is not legally prohibited within the extent of constitutional authority under the constitutional reservation principle. The negative principle in relation to act of parliament remains in such a limited range. Furthermore, it is said in Germany that there is an area of authority belonging to the executive branch that cannot be infringed by Parliament[41]. In the context of the external dutys of the armed forces, which is a point of interest in the present study, there is a possibility that matters and forms that cannot be banned by act of parliament could be questioned.

Let us now use the wordings of Japanese law for the contents examined in this section and introduce the perspective of the differences in the stages of "duty," "action," and "authority." As Germany applies the constitutional reservation principle related to the "deployment" of armed forces, its scope has been subject to deliberation. However, in

[40] Weissbuch zur Sicherheitspolitik und zur Zukunft der Bundeswehr, 2016, S.90-93; Verteidigungspolitische Richtlinien, 2011, S.19-21.

[41] BVerfGE 67, 100(139); Nolte and Krieger, "Comparison of European Military Law Systems," p.69.

relation to the external "duty" in addition to the internal "duty" of the armed forces, at the stage of "action," while there may be a positive principle in relation to the Constitution, there is no positive principle in relation to acts of parliament. Meanwhile, at the stage of "authority," the executive branch might permit or limit the use of force by the armed forces within the extent of authority granted by the Constitution. In such a case, a general or individual statutory provision relating the use of force is not necessary in the Constitution and an act of parliament; thus, there is no positive principle in relation to Constitution and act of parliament. As such, whether Germany can be explained as a country of positive principle depends on whether one focuses on Constitution or act of parliament or focuses on the stage of "action" or "authority." However, as the positive principle is enhanced for the point that constitutional basis instead of basis of act of parliament is necessary at the stage of "action," there is room to think that the positive principle exists in Germany at that stage.

(4) France[42]

Unlike the German Constitution, the Constitution of the Fifth Republic enacted in 1958 does not directly stipulate missions and roles of the armed forces. The preamble mentions the 1789 Declaration of the Rights of Man and of the Citizen and the 1946 Constitution of the Fourth Republic. In addition to various unwritten principles acknowledged by Acts of Parliament since 1905, their constitutional values are acknowledged. As such, the Declaration of the Rights of Man and of the Citizen states, "[t]o secure the rights of people and citizens, a public force (*une force publique*) is necessary; thus, this public force is established for the benefits of all and not for specific benefits for those entrusted with that force" (Article 12). It is also significant that the Constitution of the Fourth Republic states that "[t]he French Republic cannot start a war to conquer, nor can it use the public force against the freedom of citizens" (Preamble, Section 15). This is because these two statements are considered to have constitutional value under the current Constitution of the Fifth Republic. These statements are exemplars of setting up the discipline of the negative method for the constitution within the domestic law that sets out the role of the French armed forces and limits its use. Notably, however, what these statements prohibit is somewhat abstract.

[42] As for France, based on Yamanaka (ed.), *Domestic Laws and Regulations Governing Military Activities: Comparative Studies of Seven Countries*, pp. 70ff. (part written by Okumura Kosuke), survey and description are supplemented as needed, and analysis and examination are added from the perspective of the negative list–positive list theory.

Under such constitutional restrictions, the executive branch determines how to deploy the armed forces and take a flexible strategic response against threats.[43] This is because the executive branch is granted with a wide range of authority related to national security and military matters, specifically the right to create regulations—the highest power to make policies, the right to deploy, and the supreme military command, by the Constitution of the Fifth Republic.

First, let us investigate the right to formulate regulations. The Constitution of the Fifth Republic lists matters of act of parliament (matters belonging to the area of act of parliament [*domaine de la loi*]). In terms of the relation with national security and military matters, judiciary matters are basic principles associated with "obligation (*sujétions*) on citizens' bodies and property to contribute to the national security," "fundamental guarantees granted to national military officers," and "general organization of the national security" (Article 34). Other matters can be determined as an order (without a legal delegation) (Article 37). An actual example of the setting of regulations shows that "defense," which is under "the national security (*sécurité nationale*)"—a more comprehensive concept—is defined by the act as "[t]he defense policy aims to secure the integrity (*integrité*) of the territory and protect residents" (Defense Code L.1111-Article 1, Clause 3). The mission of the military is defined as follows: "The mission of the military is to prepare and guarantee to defend the highest benefits for the homeland (*patrie*) and the nation with the armed forces" (L.3211-Article 2). As such, the mission of the military is thus stipulated in very general terms by the act; however, the present Law Part of Defense Code has no legal stipulation other than the provisions for nuclear deterrence in "the implementation of military defense" (Part 1, Volume 4). This is the same for external operations (*opérations extérieures* [OPEX]): interventions of French military forces outside French territories (*interventions des forces militaires francaises en dehors du territoire national*).

Let us now examine the relation with the highest power to make policies, the right to deploy, and the supreme military command. The Constitution of the Fifth Republic grants the authority to the executive branch as follows: The President is "responsible for the independence of the nation, integrity of the territories, and compliance with treaties (*le garant de l'indépendance nationale, de l'intégrité du territoire et du respect des traités*)" (Article 5, Sentence 2) and is "the head of the military (*chef des armées*)" (Article 15, Sentence 1). Besides "cabinet meetings (*Conseil des ministres*)" (Article 9), especially in relation to national security policies and military policies, the President presides over "the higher national defense councils and committees (*conseils et comités supérieurs de la*

[43] Papenberg, *Das Französische und das Deutsche Wehrrecht*, S.63.

*Défense nationale*)" (Article 15, Sentence 2). In contrast, the Prime Minister countersigns the above authority exercised by the President (Article 19) and commands the government that "controls the armed forces (*force armée*)" (Article 20, Sentence 2) while also being "responsible for the national security" (Article 21, Sentences 1 and 2). As such, the authority and relationship of the President and the Prime Minister regarding defense matters are unclear within the provisions, and their actual power relations dynamically change based on the political situation, especially regarding whether it is cohabitation. For implementations that began with Charles de Gaulle, the position of the President substantially dominated diplomatic, and defense matters because of the influence of the first president and the introduction of a direct election system. This led to the establishment of the President's "reserved domain (*domaine réservé*)"—except for the cohabitation period when the dominance of the President has weakened.[44]

As discussed, though the relation between the internal authorities of the executive branch is dynamic, in any case, it is clear that the constitution grants the executive branch with the right to create regulations, determine basic policies, deploy armed forces, and the supreme military command. Based on such rights, the executive branch can decide, order, and approve the deployment of armed forces and the use of force. In such a case, statutory provisions on the deployment and use of force are not necessarily required for the constitution or an act of parliament. The specifics of the exercise of these powers today are as follows. We already discussed the setting of regulations, but for the basic policies, "the 2017 Review of Defense and National Security Strategies (*Revue stratégique de défense et de sécurité nationale* 2017)" defines that constantly evaluating security threats and determining the appropriate response for each case are the highest responsibilities of the President; thus, while indicating that the vital benefits of security have not been simply defined, the protection of the land and residents is placed at the center of such benefits, and the functions of the military are placed under such strategic benefits and further specified.[45] According to the framework of such basic policies, under Parliament's right of involvement (Constitution Article 35), the President decides the external deployment of the French military based on their position as "bearing the responsibility for protecting the independence of the nation, integrity of the territories, and compliance with treaties" (Article 5) and as "the head of the military" (Article 15, Sentence 1). As for the use of

[44] Papenberg, *Das Französische und das Deutsche Wehrrecht*, S.38f., 55f.; Jean-Christophe Videlin, *Droit de la Défense Nationale*, 2e ed., Bruxelles: Bruylant, 2013, pp.95ff.; Jörg Gerkrath, "Military Law in France," in Georg Nolte(ed.), *European Military Law Systems*, Berlin: De Gruyter Recht, 2003, pp.293-294.

[45] Revue Stratégique de Défense et de Sécurité Nationale 2017, pp.54-56, 71ff.

force, under the common doctrine, rules of engagement (*règles d'engagement*) are issued as "the order for the troops deployed in determined external operations from designated military institutions with the support at the political level," which "permits, limits, or prohibits the use of force in operations."[46] When exercising the above powers, a constitutional provision or a provision of act of parliament for these actions are not generally or individually required; thus, we can summarize that no positive principle exists in relation to Constitution or act of parliament.[47]

Additionally, in France, the constitutional authority of the above-described executive branch related to military actions is exercised within prohibitions and restrictions by acts of parliament. In that sense, a negative principle exists in relation to act of parliament; however, one must note that it is assumed that matters of act of parliament are restricted as described above. In fact, the legal portion of the Defense Code does not stipulate direct prohibitions or restrictions to external military actions.

The above discussion shows that in France, if it is not prohibited or restricted by the Constitution and acts of parliament, the executive branch can order regulations without legal delegation within the area of authority guaranteed by the Constitution, determine the basic policy and strategy, determine the deployment of armed forces within the framework, and permit or restrict the use of force. In such a case, regulations associated with "action" and "authority" in Japanese law and general or individual statutory provisions related to military actions are not necessary in terms of the Constitution or act of parliament. In that sense, there exists no positive principle but rather a negative principle. This is because in the Constitution, matter of act of parliament relating to national security and military is limited, and the Constitution grants the executive branch with the right to formulate basic policies, the right to deploy armed forces, and the exercise of supreme military command.

[46] Doctrine interarmées (DIA)-5.2, L' usage de la force en opération militaire se déroulant à l'extérieur du territoire National, 2006, p.7.

[47] The 2008 amendment to the constitution requires a report to and an approval by Parliament for each deployment of armed forces (however, this is limited to the approval to extend deployment beyond four months) (Article 35, Clause 3). This approval does not require an authorization by an act of parliament; thus, no positive principle exists in the relation to act of parliament.

# CHAPTER 3

# Verification of the negative/positive theory

## (1) Theoretical understandings that position military as negative approach and police (and by extension the Self-Defense Forces) as positive approach

Theoretical understandings that position the police and the Self-Defense Forces (SDF) as positive approaches will not be specifically discussed here. Instead, this paper adopts the understanding that the "method of bestowing authority" to military is a negative list method based on the negative principle; following the analysis of this paper, the issue to be examined is whether "bestowing authority" to the military for overseas duties via a negative list method based on the negative principle is consistent with the current state of positive law in various countries.

We have already established that Shikama's negative/positive theory positions the "method of bestowing authority" to military as a negative principle and a negative list method in relation to international law. In this regard, there may be aspects where Shikama's formulation is inappropriate, and we have no choice but to leave the examination of these aspects to future specialist research from the perspective of international law. Nevertheless, Shikama's negative/positive theory states that "some regulation is possible as a supplement to this under domestic law." Additionally, focusing on the fact that subsequent negative/positive theory have also highlighted domestic law, especially the relationship with the law, as noted above, this paper will instead concentrate on verifying whether the negative principle and negative list method as the "method of bestowing authority" to the military exist in relation to domestic law. In this regard, the previous chapter confirmed that the negative principle exists in relation to act of parliament/congress in the United Kingdom, the United States, Germany, and France. In this sense, negative/positive theories after Shikama have argued that the "method of bestowing authority" to the military was based on the negative principle and negative list method, even in relation to act of parliament, a position which is by no means unreasonable. It is in fact meaningful as a schematic representation of the "method of bestowing authority" to the military in relation to domestic law. However, as confirmed in the case of the United States and Germany, it is possible to question whether a

prohibition by act of parliament/congress (in the negative principle: "it is acceptable to engage in activities other than those prohibited by act of parliament/congress") can hold true to begin with, depending on the details or form of the prohibition.

In addition, even though the "method of bestowing authority" to the military is based on the negative principle in relation to act of parliament/congress, even within the scope of the four countries examined here, this argument applies well to the stage corresponding to "authority" (*kengen*) in Japanese law, albeit with some examples of deviation from this for the stage corresponding to "action" (*kōdō*). One such example is the U.S. War Powers Resolution, which requires a declaration of war (and, optionally, requires grounds in an act of congress, the scope of which is disputed) for military involvement in hostilities, except in the event of an armed attack. Another example is Germany's principle of constitutional reservation regarding the "deployment" of the military. It can be seen as a legal phenomenon in which there are positive principles and positive list methods in relation to the Constitution (in the formal sense) with regard to the parts that roughly correspond to the "action" (*kōdō*) stage as it is expressed in Japanese law. In addition, these principles are strengthened in relation to Constitution to a greater extent than in relation to act of parliament. (It should be noted, however, as confirmed above, that opinions differ in Germany as to whether this principle of constitutional reservation includes external activities of the military).

This phenomenon is observed in the context of external duties other than traditional warfare and military defense and is also observed with regard to the parts roughly corresponding to the "action" (*kōdō*) stage in Japanese law. Given this, if the range of the negative/positive theory extends not only to the military's "authority" but also to the stage of "action," an appropriate generalization is that, in some countries, the positive principle and positive list method may be partially observed at the stage corresponding to "action."

**(2) Theoretical understandings that position Anglo-American-style military as negative approach and continental-style military as positive approach**

Incidentally, with regard to the theoretical understanding that Anglo-American-style armed forces follow the negative principle and the negative list method, while continental-style military follow the positive principle and the positive list method, we must ask whether such an understanding is consistent with these two legal systems as they

currently exist in the different countries. The main purpose of this paper is not to verify this understanding which positions Anglo-American as being the negative approach and continental as the positive approach. Furthermore, given that the survey results in the previous chapter were limited to four countries, it is not possible to draw more than tentative conclusions; we can nonetheless verify at least the following points.

First, it is true that in the United Kingdom and the United States, negative principles can indeed be observed in relation to act of parliament/congress, which is consistent with the understanding that the militaries of these nations adopt a negative approach. Kurisu notes that "the Anglo-American conception is that the government independently holds administrative and executive power, thus can handle matters at its own discretion except for those which are prohibited by parliament/congress as the representative of the people." The fact that "the government independently holds administrative and executive power" is derived from the royal prerogative (U.K.) and presidential authority (USA) in the Anglo-American constitutional order, as demonstrated by this paper. However, it should be noted that in the United States, the restrictions placed on presidential authority by the War Powers Resolution create the opportunity for applications of the positive principle in relation to act of congress with regard to the stage corresponding to "action," albeit if only partially.

Second, with regard to the understanding that positions continental-style militaries as adopting a positive approach, the existence of the constitutional reserve principle in Germany means that it is entirely possible to conclude that there are, in fact, European countries with a basis in the positive principle and positive list method that have a stronger foundation than that of act of parliament. Additionally, although not mentioned in this paper, there are some cases that tend to be amenable to the understanding of continental-style militaries as adopting a positive approach, such as in Austria and Switzerland, where acts of parliament are accorded a significant position and is somewhat like the Self-Defense Forces Act of Japan.[1] We should therefore hesitate in asserting that such an understanding is unjustified. However, there are also facts that are not consistent with conceptions that position continental-style militaries as adopting a positive approach.

[1] See Yamanaka (ed.), *Domestic Laws and Regulations Governing Military Activities: Comparative Studies of Seven Countries*, pp. 102ff. (sections written by Yamanaka Rintaro).

Namely, in Germany the positive principle exists in relation to the Constitution (in the formal sense), rather than the negative principle in relation to act of parliament. Furthermore, as already discussed, the French military is not based on the positive principle in relation to act of parliament. These facts suggest that "the government independently holds administrative and executive power" with respect to the external actions of the military is not a phenomenon that is unique to the United Kingdom and United States.

As aforementioned, in the countries discussed in this paper, there are facts that both support and contradict the understanding that positions continental-style militaries as adopting a positive approach, and therefore the possibility remains that this understanding of continental-style militaries is not valid. The scope of comparative military law research needs to be further widened to verify this more accurately, which will simultaneously make it possible to verify the validity and range of the more generalized understanding of militaries more accurately in general as adopting a negative approach. In this paper, we compared the four countries for the time being, and we have no choice but to present the provisional verification results at that stage and leave it to the results of further progress in comparative military law research in the future. This paper concludes by comparing these four countries, presenting only provisional verification results at this stage and leaving further examination to the results of further future progress in comparative military law research.

## In lieu of a conclusion

### (1) A summary of this verification of the negative/positive theory

This paper attempted to verify the negative/positive theory, especially theoretical understandings that contend that negative and positive approaches are adopted in relation to the military and police, respectively, based on a survey of the domestic laws of four countries, the United Kingdom, the United States, Germany, and France. Particular consideration was given to the understanding of the military as negative, with an attempt being made to draw conclusions on the limitations of this conception.

The conclusion was reached that, as in Japan, none of the four countries followed the positive principle in all areas of "duties" (*ninmu*) and in the stages of "action" and "authority." The negative/positive theory relate to the external duties of the military, and examination of these duties reveals that these four countries conform to the negative principle in the stages roughly corresponding to "action" and "authority" in Japanese law. In this sense, with regard to the understanding that, in terms of the negative/positive theory, while the "method of bestowing authority" to the Japanese SDF conforms to the positive principle in relation to external duties, the "method of bestowing authority" to the militaries of other countries conforms to the negative principle, within the scope of this paper's examination, such an understanding is generally consistent with the law as it currently exists, taking domestic law into account.

However, this conclusion comes with the following caveat. In relation to domestic law, even within the scope of the countries examined in this paper, with regard to the stage referred to as "action" (*kōdō*) in Japanese law, the U.S. War Powers Resolution and the principle of constitutional reservation in Germany provide opportunities to introduce the positive principle into the "method of bestowing authority" to the military. Insofar as this is true, it is possible to conclude that the law as it currently exists may not conform to an "ideal type" in this regard.

### (2) Treating the negative/positive theory in terms of an "ideal type"

How do we then position phenomena that deviate from the scheme of positioning the negative principle and negative list method as the "method of bestowing authority" to the military? To make a judgment in this regard, we must consider the fact that Shikama

presented this scheme as an "ideal type," which is described as "an abstract 'model' constructed by extracting from numerous examples."[1] It is both possible and necessary to methodologically question the methods by which we might "construct by extracting from numerous examples."

According to Shikama, the "military" (*guntai*) is "a concept that is widely accepted in the international community." Shikama further argues that since a "military force … is a functional group whose main mission is to defend its own country from external enemies, it is essentially assumed to be involved with foreign countries". Therefore, "it cannot exist as an organization that is completely isolated from the international community," which thus "must be subject to standardization by the standards or norms of the international community." Shikama further notes that "during the period when modern nation states were being founded on a large scale in the international community, the natural tendency was to see a standardizing effect from the systems of Western Europe."[2] This standardizing effect was to occur based on the minimum standards of international law and inherited domestic legislation. In this case, "the object of observation at the time of this extraction of ideal types was the contemporary liberal democratic nation state."[3] Through this lens, Shikama's "ideal type" can be positioned as a model to empirically extract standardized and normative aspects through observing "numerous examples" in "modern liberal democracies." While no mention is made of the concept of "ideal types" in the negative/positive theory that emerged thereafter, an empirical model in this sense is presented. Furthermore, it can be seen that the "method of bestowing authority" to the military as described in terms of the negative/positive theory is accepted as indicating the "norms" and "standards" of the military.

Nonetheless, as we have already confirmed, Shikama attempts to fully explain the legal basis of the "ideal type" in relation to external duties of the military via the perspective of principled freedom of international law based on the principle of absolute sovereignty. In this case, consideration is barely given to regulations in domestic law when constructing the "ideal type." Within the context of such debate, while it is possible to conceive that a model constructed by taking the principle of absolute sovereignty to its

[1] Shikama, "Essential Differences between the Military and the Police," p. 33.

[2] Shikama, *An Anatomy of the State Power,* pp. 123-124.

[3] Ibid., p. 120.

farthest point legally and rationally may be positioned and presented as an "ideal type," such positioning would be more compatible with the concept of the "ideal type" advocated by Max Weber. This is because Weber's "ideal type" is formulated as follows: "These ideal types are attained by combining a multitude of *individual* and scattered phenomena into a single and united image—by *raising one*, *two, or three* points of view to the level of a single aspect—and saying 'here there are many that fit with this perspective, here there are few, and in some places there are none at all' and so on. This *ideological* image, in its conceptually pure form, can never be empirically found anywhere in reality. It is a *utopia*." (Emphasis present in original translation).[4] In such cases, as Weber warns, we must be careful not to mistake the "ideal type" for reality—which, in relation to this paper, is the positive law as it currently exists.

In addition, the previous chapter confirmed that the U.S. War Powers Resolution and the principle of constitutional reservation in Germany leave scope for the application of the positive principle with regard to external duties of the military other than military defense in domestic law. While it is not necessarily clear whether Shikama's argument regarding "ideal type" includes the "action" (*kōdō*) stage of Japanese law, given that the subsequent negative/positive theory focused on the "action" stage, we must also take the relationship between the aforementioned phenomenon and the "ideal type" as an issue for theoretical investigation. Specifically, the major issue is whether this phenomenon is positioned as a deviation from the "ideal type" or seen as an opportunity to pursue a restructuring of the "ideal type" itself. Further verification is needed with an expanded scope of countries for observation. However, in any case, the verification presented in this paper clearly indicates that (1) if the "ideal type" takes into account the "action" stage, as noted above, phenomena that do not conform to the "ideal type" will be observed, and (2) that such phenomena originate in the rules and logic of domestic law, something which Shikama also hardly considers.

The above is related to the fact that Shikama's scheme has the theoretical characteristic of an "ideal type." Shikama's approach in presenting that "ideal type" as the "essential difference" between the police and the military must be also considered. While it is true

[4] Max Weber (author), Tominaga Yuji, Tatsuno Yasuo (translation), Orihara Hiroshi (supplementary translation), *Objectivity in Social Science and Social Policy*, Iwanami Shoten, 1998, p.113.

that, given that Shikama's "ideal type" was intended to clarify such "essential differences," the existence of some phenomena as detailed above that are inconsistent with that "ideal type" and is not necessarily reflected in the "ideal type" of the "method of bestowing authority" to the military, this is not of any decisive significance in relation to the issue at hand. However, based solely on examination of the four countries herein, it is clear that there is diversity in the "methods of bestowing authority" to the military under tiered legal structures, with constitutional regulations occupying the highest position in domestic law. As such, it is not impossible to gain a relativized understanding of perspectives on the "method of bestowing authority" to the military in modern liberal democracies, based on consideration of such domestic legal structures. In that sense, we may rather say that the perspective in which Anglo-American and continental militaries are associated with a negative and positive approach, respectively—a perspective that focuses on the differences between the militaries of different regions, cultural spheres, or legal systems—expands the horizon of perceptions that focus on diversity in the image of the military. Alternatively, a distinction may be made from a different perspective from that of "continental vs. Anglo-American" that is also consistent with the law as it currently exists. (Although this is merely a hypothesis, there are possibilities for such alternative distinctions, such as whether the military has previously been liquidated, whether or not a country underwent postwar disarmament, or a distinction focused on the degree of directness of democratic systems).

In addition, the "ideal type" relating to the "method of bestowing authority" to the military has been linked to practical arguments for critically overcoming issues relating to the "method of bestowing authority" to the Japanese SDF. This linking phenomenon has already been confirmed as a theoretical feature of the negative/positive theory. However, the treatment of this feature is also problematic. A similar problem arises when the "method of bestowing authority" to the military in the negative/positive theory is lent an air of practicality by being accepted as "common sense" or "standard." Shikama cautions that the "ideal type" relating to the "method of bestowing authority" to the SDF has no practical significance. It is "not an 'idealistic' model based on some sense of values, and therefore, caution is advised."[5] This is in line with what Weber highlights in relation to methodology. Nonetheless, Shikama's argument also has the aspect of formulating its

[5] Shikama, *An Anatomy of the State Power,* p. 119.

practical claims by means of "ideal types," and the evaluation of these claims is a separate issue from the methodological positioning. In this regard, since the "ideal type" itself does not have the normative character of an "idealistic type," it cannot serve as a basis for the practical claims of the theorist, necessitating a separate normative basis. Thus, further examination is required, including evaluation of Shikama's argument that Japan's positive principle and positive list method is inappropriate in relation to the feasibility of executing military duties (as discussed later in (3)3.).

**(3) Developing and refining the negative/positive theory**

Chapter 1 attempted to analyze the negative/positive theory to clarify some perspectives for analyzing the debate on this topic. Building on the results of this analysis, Chapter 2 sought to analytically verify the negative/positive theory. And the results of this analysis developmentally provide perspectives for refining and developing these theories, while also yielding suggestions as to how to break down and relativize the practical claims that these theories advocate. Building up a multifaceted analysis by introducing these multiple viewpoints brings about a complication of the negative/positive theory; however, this complication is not synonymous with confusing the debate based on a division of viewpoints. In lieu of a conclusion at the end of this paper, we will discuss the following points based on the results of the verification detailed above, in the hope of facilitating the development of further research in the future, namely by discussing how a multifaceted perspective can provide suggestions for refining and developing the negative/positive theory, alongside suggestions for breaking down into component elements and relativizing the practical claims advocated by these theories.

1. Viewpoint 1: Differentiation of different duties and stages

The negative/positive theory do not differentiate (or at least do not sufficiently differentiate) between various duties and stages; yet making such a differentiation is useful to develop and refine these theories. As it is clear from summarizing this verification of the negative/positive theory, there are differences in military duties, especially external duties. Moreover, the "method of bestowing authority" to the military also contains stages corresponding to "action" (*kōdō*) and "authority" (*kengen*) in Japanese law, suggesting that it may be necessary to break down the negative/positive theory into smaller component elements. From this perspective, while it may be that the

"method of bestowing authority" to the military for external duties is based on the negative principle and negative list method, it should be recognized that there are differences in the form and legal basis of regulation, both between military defense and external duties that differ therefrom, and between the "action" and "authority" stage.

**a.** Differentiation of different duties

The negative/positive theory was first posited in relation to military defense duties of the armed forces. The scheme whereby the "method of bestowing authority" to the military is based on the negative principle and negative list method is consistent with positive law as it currently exists in the countries that this paper examines, and this is the case both in relation to "action" and "authority." However, in relation to external duties other than military defense duties, it is not self-evident to the same extent that the "method of bestowing authority" to the military is based on the negative principle and negative list method. This is because many such external duties have been newly assigned to the military in the contemporary era. It is also because of the diversity of such duties, which becomes clear if we recall their wide range of purposes and forms, including military sanctions, peacekeeping operations, and extraterritorial law enforcement. Alongside this, there is the possibility of "methods of bestowing authority" both in international law and domestic law that differ from that of military defense. Within the scope of this paper, the positive principle was found partially in the U.S. War Powers Resolution and Germany's principle of constitutional reservation (albeit with some debate about the scope of the latter) regarding regulation on "action" in external duties other than military defense, all of which is necessary to note with regard to the topic of duties.

**b.** Differentiation of different stages

When viewed in terms of the argument regarding the stage corresponding to "authority" (*kengen*) in Japanese law, the scheme laid out in the negative/positive theory—wherein the "method of bestowing authority" to the military is based on the negative principle and negative list method—is consistent within the scope of the facts examined in this paper (i.e., the law as it currently exists). However, while examples corresponding to the abovementioned scheme are generally observed in relation to the law, there are few examples of legislation that has established negative list regulations in act of parliament/congress itself. The more widespread practice is for prohibitions or

restrictions to be placed on the exercise of military authority through directives enacted by executive branches, and especially through rules of engagement enacted by military agencies, with the approval of the executive in some cases.

In contrast, when viewed in terms of the argument regarding the stage corresponding to "action" (*kōdō*) in Japanese law, we must express some reservations regarding the view expressed in the negative/positive theory (i.e., that the "method of granting authority" to the military is based on the negative principle and negative list method). This is because Germany's principle of constitutional reservation and the reservation of act of congress in the U.S. War Powers Resolution—both through declarations of war and selective legislation—create opportunities for the positive principle' application regarding the stage corresponding to "action" in Japanese law. The conclusions based on verifying the negative/positive theory will differ depending on whether the scope of the theory subject to such verification extends to the "action" as well as the "authority" stage in Japanese law. We have already confirmed that it is unclear whether Shikama includes the stage corresponding to "action" and "authority" within the scope of the theory of negative and positive approaches. However, if we include regulation at the "action" stage within our examination, phenomena that deviate to a certain extent can be observed from the conception that the "method of bestowing authority" to the military is based on the negative principle. Further clarifying the form and nature of the legal significance of such deviations will contribute to the development and refinement of the negative/positive theory.

2. Viewpoint 2: Differentiation of regulatory principles and regulatory methods

Although the negative/positive theory have not necessarily drawn a sufficient distinction between the issues of regulatory methods and principles, adopting a viewpoint that considers the interdependent relationship between both issues and having differentiated them (as shown in (2) 2. of Chapter 1) is useful for the development and refinement of this theory.

The practical claim that Shikama links with the "ideal type" of the "method of bestowing authority" to the military states that if we are to remove the obstacles caused by an inseparably linked positive principle and positive list method (positive principle + positive list method), the result would be a fundamental shift to an inseparably linked

negative principle and negative list method (negative principle + negative list method). However, from the perspective of differentiating between the issue of regulatory principles and methods, the linkage between positive principle and positive List method is not inevitable, and even under positive principle, a more general method of authorization is possible (positive principle + general authorization method). The legislative techniques for achieving this include a range of methods; naturally the degrees of generality and comprehensive inclusion of this authorization widely vary. In any case, in comparison with the approach to regulation whereby an individual and specific authorizations are enumerated (an approach which may constitute the typical image of positive list method regulation), the extent of restraint by law would be less strict, creating more room for policy judgments. It would be correspondingly necessary to shift institutional structures away from civilian control in the form of restraints enforced by limited authorization in act of parliament/congress, toward civilian control in the form of political control (which in this case would include control via the rules of engagement) while still based on general powers granted by act of parliament/congress. Examples of regulation oriented toward this kind of general authorization method can be cited such as in relation to the "duty" of defense, the comprehensive provisions of Article 88, Paragraph 1 of the Self-Defense Forces Act, which have traditionally been the basis for granting "authority" for the exercise of military force during a defense operation. Furthermore, in relation to the "duty" of international peacekeeping, recent peace and security legislation are seeking to move away from enacting individual special measures acts by instead enacting "a general act" such as the International Peace Support Act, thereby making the regulation of "action" more general.

The practical claims advocated by the negative/positive theory are also somewhat relativized from this viewpoint. Having argued that the "method of bestowing authority" to the Japanese SDF is based on the positive principle and the positive list method, Shikama acknowledges the following problem based thereon: "This means that, every time Japan has been faced by an 'event' or 'circumstance' that was not envisaged by the current law even when action is necessary from the standpoint of national defense or international cooperation, it has addressed this with new legislative measures. This is the very definition of 'too little, too late.'" Shikama then states: "The reason why I describe it as 'too little, too late' is that international relations are inherently irrational and impossible to define without ambiguity. Indeed, the final measures of resolving

international disputes, such as 'wars' that require the exercise of military force, is not something that can be envisaged in a one-sided manner, or rather in a manner that is convenient for one's own country. One does not know what is going to happen and should be prepared for anything to happen."[6] Elsewhere, Shikama states that "since a military is responsible for defending its nation against foreign nations, it can only be of use as an armed group that is prepared for unforeseen emergencies. It must take to heart the point that in terms of international relations, there is no way of knowing what will happen. Therefore, in the case of the military, its authority must naturally be defined by means of the 'negative list method.' In other words, it must be unlimited in principle."[7] Shikama concludes that "to escape from this 'too little, too late' labyrinth of national defense into which Japan has unwittingly stumbled, there is no satisfactory alternative but to convert the SDF into what is referred to as a 'military force' in the international community, both in name and reality. Doing so would automatically grant unlimited authority in principle, removing the need in the future to take endless new legislative measures that are 'too little, too late.'"[8] Shikama adds a further radical conclusion: "I believe that in the end, the only rational solution will be to transform the SDF into a 'military force.' Yet while we may call this a transformation, it cannot be achieved by making a series of minor adjustments to the current system."[9] The practical claims of Shikama's argument do indeed draw attention to fundamental issues, calling for a reconsideration of this problem. With regard to forcing a binary choice between a positive (positive principle + positive list method) or negative approach (negative principle + negative list method), or in other words, police versus military approach to bestowing authority, the clarity of this practical claim makes it readily acceptable. Furthermore, it aligns with the problems and concerns in practical defense, which has been subject to ongoing difficulties associated with operating under very strict positive list method regulation based on the positive principle. However, this very assertion poses the risk of blinding us to a much broader third solution (positive

[6] Shikama, "Is the SDF a military?" p. 20.

[7] Shikama Rikio, "(Lecture) What are the Self-Defense Forces? —the Essential Difference between the 'Military' and the Police," *Defense Studies*, No.34, March 2006, p.113.

[8] Shikama, "Is the SDF a military?" p. 23.

[9] Shikama "(Lecture) What are the Self-Defense Forces?" p. 112.

principle + general authorization method) and hindering rational legislative policy discussions.

3. Viewpoint 3: Differences and interrelations between forms of regulation

Shikama's negative/positive theory focuses on the regulations of international law, and therefore it takes a secondary interest in the regulations of domestic law. However, developing the debate by incorporating domestic legal regulations into the negative/positive theory, and in so doing, considering differences in the forms of these regulations and their mutual relationships, is beneficial in developing and refining this theory.

The analysis of the legal systems of countries other than Japan in Chapter 2 revealed that it is domestic constitutions (in the substantive sense) that serve as the legal basis for the domestic law aspect of the negative principle (i.e., the principle that "it is acceptable to engage in activities other than those prohibited by law") in relation to act of parliament/congress.[10] I will reiterate the main points here as follows. The United Kingdom has the royal prerogative, which is traditionally recognized as a prerequisite for the establishment of the negative principle in relation to act of parliament/congress. Meanwhile, in France, since only some aspects related to national defense are legal matters in the Constitution of the Fifth Republic, other matters can be determined by decree without the mandate of law. Furthermore, the powers of the President and prime minister to make defense policy decisions and exercise supreme military command are guaranteed as authority under the Constitution. In contrast, in the case of U.S. and Germany, there is potential for application of the positive principle in relation to constitution (in the formal sense) or act of parliament/congress. However, within those limitations, the negative principle is established in relation to act of parliament/congress. This principle has a legal basis in the context of the U.S. in constitutional provisions such as the commander-in-chief clause of the U.S. Constitution. In Germany, meanwhile, the negative principle has a constitutional basis in the authority of the federal government to decide on the dispatch of troops, and the authority of the Chancellor to enact basic policies

[10] In this sense, Yamashita's discussion regarding the negative/positive theory in relation to the domestic constitution provides valid insight regarding the development of the theory. See Yamashita, *op.cit.*, especially pp. 85ff. and pp.104ff.

(Article 65 of the Basic Law), in addition to the authority to issue military orders and commands, which lies with the federal Minister of Defense (in peacetime) and the Chancellor (in times of emergency) (Article 65a). These examples demonstrate that it is the granting authority (at organizational law level) of domestic constitutions (in the substantive sense) that forms the legal conditions for the establishment of the negative doctrine in relation to act of parliament/congress. Of course, saying that "it is acceptable to engage in activities other than those prohibited by act of parliament/congress," does not mean that actions based on arbitrary decisions of armed forces, units, and military personnel are permitted; rather, it is political supremacy and the chain of military command that form the premise based on organizational law, as is clear from the examples of the four countries discussed herein.

However, it is noteworthy that even if the negative principle is valid in relation to the law in this way, its scope is not unlimited, but rather operates within the scope of domestic authorities or restrictions of constitution (in the substantive sense). It may be difficult to see such limits in the U.K., where royal prerogatives have traditionally been extensive, yet even in the U.S., in cases where there is no explicit or implied basis for statutory legislation, the limits of authority derived from constitutional provisions such as the commander-in-chief clause are questioned in terms of constitutional interpretation.[11] In this sense, among the countries examined in this paper, though not as extreme as in Japan, legal regulation of the external actions of the armed forces is not confined to international law.[12]

The above analysis demonstrates that the negative principle has its basis in domestic constitutions (in the substantive sense), with the case of the U.K. being peculiar in this regard as it lacks a written constitution, meaning that there are cases in which the traditionally existing royal prerogative serves as the legal basis for the negative principle. However, in countries with a written constitution, it is clear that the authority of the

[11] Regarding the U.S., while there is a notable tendency for presidential powers to expand, the President's deployment of the military has been explained as within the grounds and limitations of the U.S. Constitution, even when it cannot be explained thereby whether it is within the authorization of the statutory legislation referred to in the War Powers Resolution.

[12] There is also regulation via rules of engagement that are not laws in themselves. Further discussion of this issue is relegated to another occasion.

constitution (in the formal sense) as the supreme law to grant organizational legal authority to the executive branch has a special significance for the existence of the negative principle. It is this state of affairs that guarantees the "ideal type" of the "method of bestowing authority" to the military in terms of domestic law. Thus, the domestic law aspect reinforces Shikama's negative/positive theory, which tended to focus mainly on international legal aspects, and highlights the significance of subsequent negative/positive theories focusing on domestic law.

In this way, the viewpoint that the negative principle in relation to act of parliament/ congress in the context of the military of countries other than Japan is based on domestic constitutions (in the substantive sense) will likely pave the way for recognition of the legal basis of the positive principle in Japan. Although Shikama gives little notice to the fact that the negative principles concerning the "method of granting authority" to the militaries of other countries are based on domestic (in the substantive sense) constitutions, he does duly take notice of the fact that Japan's positive principle has its basis in the domestic constitution (in the substantive sense), pointing out that the "absurdity" of "bestowing authority to the SDF in a 'too little, too late' manner" is that "it does not originate from the legislative policy of the moment. The problem goes deeper than that. It is a problem of the legal structure originating in the fundamental nature of Japan, that is, the current constitution… We must recognize that this originates in the structural defects within Japan's current 'constitutional order.'"[13] I reserve judgment here on whether or not to evaluate this as a "defect" in Shikama's words, but suffice it to say that Shikama was justified in drawing attention to the domestic "constitutional order" as a more fundamental problem than legislative technique.

If we are to position the positive principle in Japan as belonging to the constitutional order in this manner, then it becomes highly significant, both theoretically and in terms of legal practice, to consider whether this has a basis in the Constitution of Japan, whether it arises as a constitutional custom, or whether it is neither of these and is merely a legal requirement. The significance of this issue is that, if the positive principle has a basis in the Constitution of Japan, then constitutional revision would be required for Japan to convert to the negative principle. However, it remains open to debate in constitutional interpretation as to whether the positive principle does indeed have a basis of the

[13] Shikama, "Is the SDF a Military?" p. 21.

Constitution. Shikama argues that, for Japan to switch from the positive to negative principle, "the current 'constitutional order' needs to be changed. In some cases, the written law of the Constitution of Japan may also need to be amended."[14] He argues for the necessity of changing the current constitutional order, but justifiably stops short of concluding that constitutional amendment is necessary for that purpose.

Certainly, we have already mentioned the viewpoint that relativizes the view represented by Shikama (i.e., that it is essential to shift from the positive principle to the negative principle). Even within the framework of the positive principle, there is a considerable breadth of specific possible ways to formulate acts of Diet. It is also possible to relativize the differences between the positive and negative principles if we include consideration of lower-level laws and regulations, action orders, and criteria for unit action. For example, even if there is no change in the premise that the basis at the level of act of Diet is in the positive principle, as with the current Self-Defense Forces Act, it is another point of divergence as to whether, within the scope of authorization based on this premise, the lower-level laws and regulations, action orders, and criteria for unit action (the latter being equivalent to rules of engagement) are established based on negative or positive principles. Approaches to regulation on this level will also have a significant impact on flexibility at the unit level.[15]

While these issues remain open to debate, even if we adopt the practical claim that a fundamental shift from positive to negative principles in relation to act of Diet is essential—which is, needless to say, a highly contentious issue in itself—the wording of the Constitution of Japan refers to the establishment of a "military" (*guntai*) (or "Self-Defense Forces" (*jiei**gun***) or "National Defense Forces" (*kokubō**gun***)), that would not immediately establish the basis for a shift by means of the Constitution.[16] Rather,

[14] Ibid, p. 23.

[15] On this issue, see Sakamoto, "Organizing the Legal Environment for Issuing Operations Orders in the 'Negative List Method'," pp.158ff. It is of theoretical importance that Sakamoto argues for the necessity of carefully considering the regulation of action orders according to the different kinds of duties, and notes that the shift to a negative approach must be paired with the strengthening of democratic legitimacy.

[16] Ishiba's negative/positive theory, mentioned at the beginning of this paper, continues from a preamble stating, "The point is not that all we have to do to make the Self-Defense Forces into an army is to change

fundamentally, as the examination of other countries in this article has made clear, the "method of bestowing authority" to the military is not only a matter of international law, but also of the specific nature of the constitution (in the substantive sense) of each country. Therefore, with regard to the "method of bestowing authority" to the Japanese SDF or "military," as an issue relating to the Japanese constitution (in the substantive sense), it is necessary to specifically question the interpretation of the Constitution of Japan and the constitutional customs or important rules of law that exist under the supreme legal authority of the Constitution. This questioning must be in line with each point of debate, including, for example, the distribution of supreme policy-making authority and supreme command regarding defense and military affairs, the positioning of various military functions in terms of the debate over state functions, and the allocation of jurisdiction for the establishment of norms on defense and military matters. This is a fundamentally different approach from conceptions that lead to Gordian knot-esque solutions to these issues by imposing a normative and practical significance (significance as an "idealistic type," so to speak) onto the "ideal type" of the "method of granting authority" to the military.

the Constitution alone." (Proceedings of the 151st House of Representatives Security Committee Meeting, No. 8 (June 14, 2001), p. 8).

## Summary

# Analysis and Verification of "Negative List-Positive List Theory"

Rintaro Yamanaka
Professor
Department of Public Policy
National Defense Academy, Japan

Negative List-Positive List theory is the concept that explains an essential characteristic of the militaries of liberal-democratic countries and the defense legislations of Japan. According to this theory, the military can legally do anything that is not prohibited by law while Japanese Self Defense Force can only do what is permitted by law.

First, this article makes the target of verification clearer by analyzing the theory (Chapter 1). And next, it clarifies the present situation of four countries (UK, US, Germany and France) positive-laws (Chapter 2). Then it implements verification of the theory (Chapter 3). It also shows implication based on the verification.

The target of verification is legal regulations of "action" and "authority" for foreign military duties. The schema of the theory is fundamentally accurate except for legal of "action", in US and Germany. Also, when a step-by-step relation between constitution and act of parliament / congress is taken into account, the possibility that we can develop the ideal type more will become clear. On the other hand, quoting this schema as the practical guideline for Japanese legislation isn't methodologically appropriate, because the ideal type itself doesn't have practical meaning.

Author

Rintaro YAMANAKA

Professor , Department of Public Policy , National Defense Academy , Japan

GLOBAL SECURITY Study Series NO. 3

Analysis and Verification of "Negative List-Positive List Theory"

December 2023

Author Rintaro YAMANAKA



Center for Global Security, National Defense Academy, Japan Ministry of Defense
1-10-20, Hashirimizu, Yokosuka, 239-8686, JAPAN
Phone: +81-46-841-3810 ext. 2414

ISSN 2433-4200（Online）

Online ISSN 2433-4200


GLOBAL SECURITY Study Series NO. 3

# Analysis and Verification of "Negative List-Positive List Theory"

Authored by Rintaro Yamanaka

December 2023

Center for Global Security
National Defense Academy, Japan Ministry of Defense