Japan’s Newest Security Bill: Constitutional, Legitimate, and Necessary

Serene Papenfuss

Mariah Kerr

Follow this and additional works at: https://scholarsarchive.byu.edu/byuplr

Part of the Law Commons

BYU ScholarsArchive Citation
Available at: https://scholarsarchive.byu.edu/byuplr/vol30/iss1/15

This Article is brought to you for free and open access by the All Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.
War as a sovereign right of the nation is abolished . . . No Japanese army, navy, or air force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.²

During the years following World War II, the Japanese were likely unaware of the extent to which the imposition of this seemingly small suggestion by U.S. General Douglas MacArthur would be used as an argument to deepen their ties to a newly created pacifist culture. Due to years of controversial wars, centuries of civil strife, obliteration of a generation of males, and effects of nuclear bombings, Japan was in a state of shock—yet it was ready to turn its back on a past of inhumane actions and brutal warfare.

At the conclusion of World War II, Article 9 was added to the Japanese Constitution. It states, in part, that “the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes. In order to accomplish th[is] aim [. . .], land, sea, and air forces, as well as other war potential, will never be maintained.”³ To this day, legal scholars and historians debate over who first advocated this pacifist

1 Mariah Kerr is a senior majoring in Social Science Teaching and minor ing in Editing at Brigham Young University.


article. Many believe it was strongly promoted by General MacArthur, but regardless of whether or not General MacArthur imposed this idea on Japanese Foreign Minister Yoshida, he played a significant role in propelling Japanese citizens and government officials into a prolonged dispute over the constitutionality of militaristic mobility as outlined in Article 9.4 This dispute has turned into a series of parliamentary debates. As of September 18, 2015, these debates culminated into the Diet’s5 approval of overseas combat capabilities for the Japanese military.6

The approval of overseas combat in this new legislation does not mean Japan is denying the principles of its 1946 Constitution. The Japanese still desire cooperation, world peace, and stability—the very principles Article 9 intended to uphold. However, for these values to exist and be perpetuated, the principle of self-defense (whether on Japanese soil or overseas) is essential. The Japanese Government has traditionally permitted self-defense since the 1950s; moreover, members of the United Nations acknowledge the right as legitimate under international law.

On the surface, defending principles such as peace and cooperation through maintaining a military seems paradoxical, yet such defense is applied in many situations to uphold stability in society. Allowing for a military that can use force as deemed necessary does not equate to condoning violence or abandoning principles of cooperation and peace. For example, the head of a university desires a safe learning environment for students. In order to maintain this, a university prohibits the use of weapons or violence on campus.


However, to uphold this safe environment, a university may provide for its own police to protect students as deemed necessary. The police force does not exist to engage in offensive acts of aggression; it exists to defend where needed. The presence of the police does not mean the head of the university is disregarding rules against weapons and violence.

In addition, several concerns prompt supporters of the new legislation to question the need for Article 9 because it restricts logical actions that could better protect Japanese citizens. For example, how is it sensible for Article 9 to render Japan defenseless when it is the third largest GDP in the world? The debate and protests over the constitutionality of the legislation in relation to Article 9 must come to a conclusion—and soon if Japan is to be unified in protecting itself sufficiently against hostile nations and groups. Although defensive military organizations are acceptable on an international level (even in historically neutral countries such as Switzerland) according to polls, 68 percent of Japanese voters deem the latest security legislation as unnecessary, 44 percent of poll respondents are against the bill, and only 29 percent are in support. Seventy-five percent think the Diet did not sufficiently deliberate the new legislation.\(^7\)

This 75 percent must come to understand not only the reality and urgency of the dispute, but also that the new legislation is currently the best option for Japan. The Japanese need to accept the legislation as appropriate and necessary. Now that a change in law has come, a change in perspective needs to follow. For nearly a decade, members of the Liberal Democratic Party—particularly Prime Minister Abe Shinzo—and other government officials have attempted to take various avenues in allowing for collective defense and combat abroad, and this new legislation—through democratic and legitimate means—has finally worked.

This Article responds to the Japanese concerns over the constitutionality of the new security legislation. It will briefly cover the history of Japan in relation to the military: how it transitioned from

---

a military regime to a pacifist state and how Japan is adjusting while in the international arena. This Article argues that the new legislation is both constitutional and legitimate as evident by Japan’s role in the United Nations, its changed circumstance, and its inalienable right to self-defense.

**BACKGROUND: ROLE IN THE UNITED NATIONS, CHANGED CIRCUMSTANCE, AND THE INALIENABLE RIGHT TO SELF-DEFENSE**

*i. Fundamental History*

Due to Japan’s militant past and its attempts to rectify past wrongs, the Japanese are extremely reluctant to accept the latest security bill signed on September 18, 2015. After years of being a militant state, Japan was forced into pacifism after World War II. Treaties, such as the Kellogg–Briand Pact of 1928, and the idealism that persisted during the first half of the twentieth century caused Japanese leaders to succumb to MacArthur’s influence. Thus, Article 9 was inserted in the new Japanese Constitution: Japan could no longer support a military or use the threat of force.

Despite the passive nature that has persisted in Japanese culture since the end of World War II, Japan has slowly evolved away from its reputation as a pacifist state. This evolution began when the cabinet permitted self-defense in the 1950s because MacArthur needed aid in Korea and requested that Japan create a self-defense force. In order to ease into the change of having a militaristic body again, Japan created the National Police Force in 1950. Shortly thereafter,

---


this organization became the National Safety Force. This change in name did not change the organization;\(^\text{11}\) rather, it aided in the transition towards a greater sense of security, but neither force was militaristic in nature.\(^\text{12}\) The body’s main purpose was not to guard against foreign aggression and invasion, but to maintain public order. However, by 1954, the force became the Jietai, or Self-Defense Force (SDF), and the cabinet permitted the notion of self-defense in order to defend the nation against invasion.\(^\text{13}\)

Since the creation of the Constitution, various prime ministers, Abe Shinzo in particular, have explored and attempted a variety of avenues for expanding the interpretation of self-defense: creating Japan’s first amendment, changing the amendment process itself, and reinterpreting Article 9 in the context of the rise of terrorism and the need for defense against aggressive Asian states.\(^\text{14}\) Each of these avenues received major backlash and resulted in failure, necessitating the most recent legislative approach, which ultimately passed.

\(\text{ii. Japan’s Role in the United Nations}\)

In 1990, Japan began participating in the Persian Gulf War by pledging $13 billion in military aid to the United States and its allies, thus becoming the Gulf War’s third largest financial contributor.\(^\text{15}\) Two years later, the Diet deliberated and passed a bill allowing Japan to participate in UN peacekeeping operations. These actions led to

\(\begin{align*}
\text{11} & \quad \text{Mark A. Chinen, } \text{Article 9 of the Const. of Japan and Procedural and Substantive Heuristics for Consensus, } 27 \text{ Mich. J. Int’l L. Rev. } 55, 59 (2005). \\
\text{12} & \quad \text{Japan: Article 9 of the Const., } 2004-01207 \text{ Law Libr. of Cong. } 1, 13 (2006), \text{ available at http://www.loc.gov/law/help/japan-constitution/japan-constitution-article9.pdf.} \\
\text{13} & \quad \text{James E. Auer, } \text{Article Nine of Japan’s Const.: From Renunciation of Armed Force “Forever” To the Third Largest Defense Budget In the World, } 53 \text{ L.C.P. } 171, 176 (1990). \\
\text{14} & \quad \text{S.P. Seth, } \text{Japan’s Const. Debate, } 29 \text{ E.P.W. } 907 (1994) \text{ (reinterpreting Article 9 in light of new circumstances).} \\
\text{15} & \quad \text{Karen Piotrowski, } \text{Keeping Pace With the Progress of the World: Article 9 of the Japanese Const., } 83 \text{ Wash. U. L. Rev. } 1653, 1665 (2005). 
\end{align*}\)
controversy and uneasiness among the Japanese people.\textsuperscript{16} Although Japan’s role was primarily financial and the extent to which Japanese troops could use force was extremely limited, the issue has continued to resurface even into the present.

\textit{iii. Changed Circumstance}

Years of effort to change the Constitution finally culminated in the security bill being passed through the Upper House of the Japanese Diet on September 18, 2015. Although democratic means enabled the change, opinion polls remain at an all-time low of 42 percent, with protestors gathering by the thousands throughout the country to express their fear of being dragged into unnecessary American wars.\textsuperscript{17}

\textit{iv. Inalienable Right to Self-Defense}

According to Black’s Law Dictionary, self-defense is “an excuse for the use of force in resisting an attack on the person, and especially for killing an assailant.”\textsuperscript{18} In the case of a sovereign nation, self-defense could be interpreted as an excuse for the use of force in resisting an attack on its citizens, and especially for killing antagonistic forces. Additionally, the Abe Cabinet has established three conditions to define circumstances necessary to exercise this right to self-defense:

1. when Japan or a close ally is attacked, posing a threat to Japanese national security or survival

\begin{itemize}
\item \textsuperscript{17} Sean Mirski, \textit{A Primer on Japan’s Const. Re-Interpretation and Right to Collective Self-Defense}, \textit{Lawfare Institute} (Nov. 7, 2014, 12:00 PM), https://www.lawfareblog.com/primer-japans-constitutional-reinterpretation-and-right-collective-self-defense.
\item \textsuperscript{18} \textit{Self-Defense}, \textit{Black’s Law Dictionary} (10th ed. 2014).
\end{itemize}
2. when all other appropriate means have been exhausted to deter attackers

3. when use of force is restricted to a necessary minimum

Since these conditions have all been met, particularly in the case of the current crisis caused by the Islamic State of Iraq and Syria (ISIS), Prime Minister Abe Shinzo has called for a bold review of Article 9 and pushed the security legislation through Japan’s Diet.

PROOF OF CLAIM

This next section will review the claims of the respective background sections above. Through understanding the history of Article 9’s place in Japanese culture, as well as the rigid interpretation thereof which hinders Japan from protecting itself, it is clear that the 2015 security legislation was necessary. Furthermore, the legislation is constitutional. This core argument comes down to three main reasons: Japan needs to maintain its credibility internationally; circumstances have fundamentally changed; and Japan has the inherent right to practice self-defense.

i. Maintaining Credibility Internationally

The cornerstone of Japan’s approach to foreign policy is its commitment to international agreements, particularly its agreement with the United Nations. Article 98 of the Japanese Constitution emphasizes the importance of following international law: “The treaties concluded by Japan and established laws of nations shall be faithfully observed.” Moreover, Japan even has a provision—Article 81—that requires the government to treat international laws like domestic laws.


20  Nihonkoku Kenpō [Kenpō] [Constitution], art. 98, para. 2 (Japan).

Some countries, including Armenia, Kazakhstan, Tadzhikistan, Turkmenistan, Estonia, Belgium, and the Netherlands, explicitly state in their constitutions not only that they will treat international and domestic laws similarly, but also that international law will always take precedence over domestic laws.\textsuperscript{22} For example, the Estonian Constitution states, “The Republic of Estonia shall not conclude foreign treaties which are in conflict with the Constitution. If Estonian laws or other acts are in conflict with foreign treaties ratified by the Parliament, the articles of the foreign treaty shall be applied.”\textsuperscript{23} This reasoning is logical—it gives power to the domestic constitution, but concedes that if a treaty is voted on and approved by the legislature, it must take precedence over the state’s law(s). In the \textit{Montijo} case between the United States and Colombia in 1875, the arbitrator added to this idea by stating, “A treaty is superior to the constitution, which latter must give way.”\textsuperscript{24} A treaty is an independent form of law and cannot be overridden by a nation’s laws, especially if the international law is agreed upon after the nation’s law is created.

In the \textit{Sunakawa} case of 1959, the Supreme Court ties this obligation of following international precedent with Japan keeping its promises made in the UN charter by stating, “Allied Powers . . . recognize that Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter . . . and that Japan may voluntarily enter into collective security arrangement.”\textsuperscript{25} Thus, the Japanese can assume that international law—especially agreements signed by Japan—can take


precedence over domestic law. Furthermore, a bill passed in 1995 set forth regulations regarding seconding of Ministry of Defense personnel to international organizations.\(^26\) This demonstrates a past initiative taken in the direction of prioritizing international law over domestic law.

These international laws include articles in the UN Charter. Articles 39, 40–43, and 53 require members to participate in collective defense as circumstances may require.\(^27\) If a state were to attack a member of the United Nations, the Security Council can determine what action is necessary to restore peace and security.\(^28\)

After receiving brutal criticism from fellow members in 1991 due to acts of aggression by Iraq in the Persian Gulf, Japan yielded by contributing monetary aid.\(^29\) Due to the nature of Article 9 and its restrictive power over Japan’s ability to exercise its right to self-defense, the United States and other countries have repeatedly pressured Japan to amend or abolish the article. U.S. Secretary of State Colin Powell threatened that if Japan wanted to hold a seat as a permanent member of the UN Security Council, Japan must take such action to prove itself.\(^30\) His skepticism helped many of the Japanese realize that they could not enjoy the perks of hiding under the United States’ ballistic missile defense shield forever.

Japan will face various repercussions if it does not maintain its credibility and if it turns its back on international obligations.

---

\(^26\) Cabinet Secretariat, "我が国及び国際社会のは岩及び安全の確保に資するための自衛隊法等の一部を改正する法律案 [Bill to amend parts of the Self-Defense Force Law, etc. in order to contribute to ensuring peace and security of the country & int’l community]," (2015), http://www.cas.go.jp/jp/gaiyou/jimu/pdf/sinkyuu-heiwaanzenhouseiseibihou.pdf.


\(^28\) U.N. Charter art. 51, ¶ 1.


and responsibilities. Japanese diplomacy will suffer, and relationships built on trust, dependability, and loyalty will deteriorate. Japan cannot continue to depend entirely on America to act as its all-encompassing security umbrella if opposing forces become more aggressive, especially when Japan has the militarizing capabilities to protect itself. How could Japan expect other countries from the United Nations to keep their promises as stated in the United Nations charter and support Japan if Japan neglects to fight rogue states or terrorist groups when its turn to act has arrived? A similar case of shirking of duty led to the League of Nations becoming void and discontinued: When Italy invaded Abyssinia, many key members of the League did not take proper action to allow the body of states to act as a unified force. States refused to take up arms; member states such as Venezuela continued to trade with Italy despite the embargo the League members had agreed upon. League actions and the body itself proved to be ineffective and inefficient, leading to the League’s own demise. When states do not cooperate with the international system that they are a part of or keep their promises, order collapses. It is crucial that Japan maintains its own credibility and that of the United Nations in order to prevent the weakening or ultimate downfall of this international organization. Downfall may seem dramatic, but weakening is certainly realistic considering the current state of the international organization of states.

To prevent the creation of competitive security environments while perpetuating the status quo, the United Nations needs its member states to protect each other and maintain their commitment to keep the charter’s requirements. In large part, this depends on states with greater power, particularly the economic capability, to keep their promises. As such, Abe used the new legislation not only to bolster Japan’s commitment to protect the state and its citizens, but also to provide international security by doing what it signed up to do when it became a member of the United Nations. On September 29, 2015, Abe spoke to the UN General Assembly to announce

Japan was tripling its aid to the Syrian refugee crisis caused by the conundrum between rebels, Bashar al-Assad, and ISIS. Through such aid, Japan hopes to change the Security Council by securing a seat as a permanent member.\textsuperscript{32}

\textit{ii. Changed Circumstance, Changed Laws}

Similar to the principle of \textit{rebus sic stantibus}\textsuperscript{33} in the case of changing or cancelling treaty obligations to recognize changed circumstance, a state should be able to view current conditions and make laws that accommodate them within a reasonable and legitimate scope.\textsuperscript{34} Upholding a constitution is vital, but legislators and citizens must remember the intentions that went behind the creation of a particular law as well as current circumstance. The purpose of the Japanese Diet is to provide laws as deemed necessary by circumstance. If Japan still lived in an ideal world where the United States was providing a consistent and reliable security umbrella under which Japan could evade responsibility, perhaps Japan could remain perfectly pacifist and stay out of conflict. However, this is no longer the case: The United States cannot and will not continue to protect Japan in every circumstance.

Japan has the economic competitiveness, technological dexterity, and international influence to be capable of defending itself from


\textsuperscript{33} \textit{Rebus sic stantibus} LEGAL INFORMATION INSTITUTE (Feb. 15, 2016), https://www.law.cornell.edu/wex/rebus_sic_stantibus (\textit{Rebus sic stantibus} is a clause that allows for the termination of a treaty due to fundamentally changed circumstances. The principle has become a form of customary international law).

\textsuperscript{34} WILLIAM SLOMANSON, FUNDAMENTAL PERSP. ON INT’L LAW 369 (Katherine Haynes ed., Wadsworth Publishing 6th ed. 2010) (“In international relations, sometimes it is necessary to revise or abrogate a treaty in the light of fundamental change of circumstances… When a fundamental change of circumstances occurs, the contracting states should seek revision or reconclusion of the original treaty through diplomatic negotiation.”).
aggressors. Its allies recognize this, and thus need Japan to step up to its role. This role is not a role of aggression; nor is it the obligation to enter unnecessary American wars: it implies Japan is reasonable and has the capability of entering collective defense if its national security is threatened. Analogously, the United Nations aims to ban war, but delineates the permissible nature of using force in order to defend international security or protect member states.35

Various circumstances have changed international politics, heightening the risks within the competitive security environment Japan resides in. Japan would be foolish to wait until there is a major blow to national security or status quo to amend its constitution. When Japan’s Socialist Party attempted to argue against self-defense in 1959, the Kishi Cabinet responded, “In the event that an attack is waged with guided missiles and there are no other means of defense, counter attacks on enemy bases are within the scope of defense . . . the Constitution does not mean for the nation to sit and do nothing and await its death.”36

Because nations in close proximity to Japan continue to expand their military force, Japan has further reason to establish a more active self-defense force. Japan participated in the Persian Gulf War

35 David Krezmer, *The Inherent Right of Self-Defense and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT’L L. 235, 241 (2013) (“...the principles on use of force since the adoption of the Charter have been fairly clear. The Charter set out to ban war between states. To achieve this aim it adopted a policy of collective security to be guaranteed by the Security Council, which is responsible for maintaining and restoring international peace and security. Under Article 2(4) of the Charter states are prohibited from ‘the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’. The only concession made in the Charter for the unilateral use of force by states is the recognition in Article 51 of their inherent right of individual or collective self-defence when an armed attack occurs... The Charter prohibition on unilateral use of force and its exception in the case of self-defence against an armed attack are regarded as part of customary international law, and have the status of *jus cogens*.”).

during the 1990s when Iraq posed a national security threat to Japan’s closest ally, the United States; now threats come from North Korea and China, which have both become more powerful and aggressive toward Japan and other fellow Asian states. Additional threats (particularly ISIS) come from the Middle East, and these threats now directly affect Japan. Abe and the rest of Japan were shocked when ISIS captured and beheaded a second, innocent Japanese man.37 Abe’s cabinet attempted to negotiate with ISIS through peaceful means, such as by trading an Iraqi suicide bomber for Japanese reporter Kenji Goto.38 Although the rest of Japan did not all approve of the actions of Abe’s cabinet, Abe took the lead to respond by expanding the SDF’s powers. When ISIS threats first emerged, the SDF did not have the capabilities to retaliate or properly protect itself against maliciously antagonistic groups such as ISIS under the previous, rigid interpretation.

Not only has ISIS sent threats to states such as Japan, but it has also been responsible for the beheadings of innocent Japanese citizens. It poses a clear threat to Japanese national security. The United States has recognized a national security threat as a sufficient condition to exercise self-defense (even though it is not technically restricted by rules on self-defense to conduct an attack or air strike) against ISIS;39 Japan should adopt this approach as well. ISIS fits the description of “assailant” as used in the definition of self-defense by Black’s Law Dictionary.40 If ISIS continues to expand its territorial borders, recruitment of members, and terrorist or nuclear capabilities, it could force Japan and other states to exercise their right to


38 Roy Greenslade, *Japan hoping to work with Jordan to free journalist from ISIS; Japanese Prime Minister calls for release of reporter Kenji Goto*, THE GUARDIAN, (Jan. 27, 2015)


self-defense—especially collective, if ISIS is to be defeated. The expansion and clarified definition of self-defense will prove useful as Japan prepares to defend itself against these rogue states and terrorist groups.

Japan has already attempted to increase self-defense powers through passing legislation such as the Law Concerning Measures in Order to Secure Peace and Safety of Japan in Situations in Areas Surrounding Japan in 1999 to respond to North Korean hostility. However, this has proven inadequate. Because a constitutional amendment has never been created—and doing so is nearly impossible with the requirement for a two-thirds majority in the House of Representatives as well as a referendum—legislation was perhaps the most viable and proper means of addressing the lack of an adequate self-defense force.

This begs the question: Is the Constitution living? Does a change in a nation’s circumstances make certain legislation constitutional and legitimate? The answer depends on the nation. Provisions in Japan’s Constitution allow for international law to take a powerful arm in its political system. These provisions point to a path of constitutionality for legislation like the security bill passed in September 2015.

Furthermore, those interpreting the Constitution and the recently passed legislation must consider the intent behind the creation of the Constitution. When MacArthur aided in the writing of the 1946 Constitution, his objectives were to demilitarize and democratize Japan. With these two goals in mind, MacArthur pushed for the specific, limiting wording of Article 9: thus Japan proclaimed itself an


aspirer of peace, committed to abstain from the threat or use of force as means of settling disputes.\textsuperscript{43}

However, MacArthur’s own intent shows that the way he rigidly applied his goals were not compatible with changing circumstance. As stated, only a few years after occupying Japan and essentially creating their Constitution, MacArthur himself requested Japan organize troops to aid America in Korea, or balance against Korea in Asia. MacArthur\textit{ himself} wanted military support. In his memoir, MacArthur wrote that Article 9 does not stop Japan from taking “any and all necessary steps for the preservation of the nation . . . If attacked, Japan would have the right of self-defense.”\textsuperscript{44} If MacArthur assumed this mentality at the time the Constitution was written, suggesting that a self-defense force was surely intended. MacArthur saw the need to create a defense force back in the 1950s; the urgency is even greater now.

This urgency is seen through various cases, including China continuing to militarize\textsuperscript{45} and North Korea still posing a threat today, having kidnapped Japanese citizens while possessing and testing

\begin{itemize}
\item \textsuperscript{43} Japan: Article 9 of the Const., Libr. Of Congress, http://www.loc.gov/law/help/japan-constitution/article9.php (last updated Sept. 29, 2015); Nihonkoku Kenpō [Kenpō] [Constitution], art. 9, para. 1 (Japan) (“Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.”).
\item \textsuperscript{44} James E. Auer, Article Nine of Japan’s Const.: From Renunciation of Armed Force “Forever” To the Third Largest Defense Budget In the World, 53 L.C.P. 171, 174 (1990).
\end{itemize}
nuclear weapons. Through the security legislation, Japan has responded preemptively to these circumstances, and strengthened the US–Japan alliance particularly in regard to ballistic missile defense. For example, if North Korea were to shoot a missile over Japan to the United States, under the previous interpretation, Japan would not have been able to do anything to protect its ally, despite being in a security alliance. Japanese anxieties continue over North Korean’s aggressive disposition, considering Pyongyang fired a missile over Japan in 1998. The security legislation adds legitimacy to action such as shooting down missiles to prevent unnecessary deaths and further protects Japan by allowing it to take action without the original and far-too-rigid interpretation hindering it.

In order to accommodate these changing circumstances, Japan has re-interpreted its Constitution and allowed for the SDF to expand considerably. In another example, the United States Constitution allows for a military. George Washington warned citizens that they should apply a policy of isolationism to prevent themselves from becoming entangled in messy European wars and affairs. The United States has moved far beyond this policy. Just because it has distanced itself from an isolationist perspective and become more involved does not mean it is an aggressive state. Mizuho Fukushima of Japan’s Social Democratic Party has gone as far as to say, “We


48 Matthew Spalding, George Washington’s Farewell Address, 20 The Wilson Quarterly 65, 67-70 (1996) (George Washington recommended a policy of isolation because he was “wary of foreign influence,” “an entangling of foreign policy,” and “policies that might undermine the Union.” Washington’s isolationism was intended for a policy of neutrality to prevent an early downfall similar to many European nations. “Isolationism” did not mean “a passive condition of detachment,” but rather “an active policy of national independence as necessary for America, at some not too distant period in the future, to determine its own fate.”)

must not become accomplices to murder."49 Yes, the United States has engaged in more war than Japan. Japan does not strive to become the world’s next hegemon: that is not the purpose of its recent security legislation. Nor is the purpose of the legislation to allow Japan to become an accomplice to murder, even if an unintentional one. The security legislation does not mean Japan is militarizing on a large-scale, or preparing for war; rather, the legislation allows for this if the necessity arises. Moreover, the legislation reinforces deterrence that will help restore a balance of power in Asia. Japan has been, and can remain a peace-loving nation.

The Supreme Court of Japan50 ruled with similar justification in the Sunakawa case in 1959. The decision states that Article 9 was “a product of the Potsdam Declaration and was a reflection of the errors of the nation’s prior militaristic activities . . . Article 9 reflected the spirit of international cooperation and was ‘an embodiment of the concept of pacifism which characterized the Japanese Constitution.’”51 Justices realized the changing nature of the international stage and the need for Japan to make accommodations. Hence, the use of force in the name of self-defense was no longer limited to security measures for the United Nations (protecting other member states when attacked).52

Japanese citizens need to remember the events surrounding the rewriting of the Constitution in 1946. Did MacArthur and participating Japanese officials really intend for Japan to always remain


50 Y. Yamada, The New Japanese Const., 4 INT’L & COMP. L.Q. 197, 202 (1955) (Japan’s Supreme Court functions similarly to the United States Supreme Court, using the Constitution as a guideline for interpreting laws to make judgments on disputes.).


52 See supra note 20 and accompanying text.
pacifist? Perhaps. However, Japan must realize that the post-World War II idealism has come to an end. Assuming that Japan can remain pacifist and stay out of conflict—despite hostile neighbors—is completely naïve. The hegemons of the globe have taken huge steps toward minimizing conflict or refraining from war. For example, states have made attempts at creating treaties for non-proliferation. Because aggressive groups or states persist in raising arms or resisting international protocol, some big states—and smaller states—have continued to maintain nuclear arms or a conventional army. Japan needs to escape its bubble of idealism and accept pacifism as an obsolete policy. Pacifism is not compatible with international law, nor is it wise when trying to preserve allies and diplomatic relations.

iii. The Inalienable Right to Self-Defense

Although the technical definition of self-defense and the extent to which it can be used are disputable, self-defense is legally permissible due to the charter Japan agreed to upon entering United Nations membership. Moreover, the Japanese Supreme Court has interpreted the Constitution in the Sunakawa case of 1959 such that the “pacifism advocated in [the] constitution was never intended to mean defenseless or nonresistance . . . In view of this it is only natural for our country, in the exercise of powers inherent in a state, to maintain peace and security, to take whatever measures may be necessary for self-defense, and to preserve its very existence.”53 Although the Court avoided determining the legality of the SDF, it established that Japan has an inherent right to self-defense.54 This right is also based


in natural law.\textsuperscript{55} To add to this, referring to the phrase in Article 9, the Supreme Court gave a definition of “war potential,” as meaning instigating conflict.\textsuperscript{56} Hence, as accepted under international law, threat of force is the justification for exercising self-defense, including preemptive measures.\textsuperscript{57}

For centuries, even prior to an explicit right in the United Nations charter, the right to exercise self-defense has been accepted by customary international law. The idea concerning the right is rooted in natural law, that such a right to protect oneself cannot be taken away.\textsuperscript{58} This right has increased in scope from the individual to the state, and as such, has been implemented and interpreted in light of international law.

International law is created by either treaty or custom; the right to exercise self-defense is accepted through both means. The doctrines of collective and anticipatory self-defense are accepted as permissible. The latter is evident through the Caroline case in 1837, where the British exercised anticipatory self-defense. Consequently, the United States and Great Britain articulated conditions necessary to exercise this right.\textsuperscript{59} Other circumstances have led to the exercise of self-defense, especially in countries that face rogue states or are surrounded by hostile nations. Such examples are seen in the Cuban Missile Crisis or Six-Day War, where the United States prepared

\textsuperscript{55} Lawrence W. Beer, \textit{Peace in Theory and Practice Under Article 9 of Japan’s Const.}, 81 Marq. L. Rev. 815, 817 (1998) (Japan’s progression from feudal clans to militarism to pacifism).


itself against the Soviet Union, and Israel raised arms against neighboring Arab states.\(^{60}\)

To create the law internationally in “treaty” form, the United Nations charter ensured the inclusion of the right to collective self-defense through a provision in Article 51. The article even includes the right for a third state to participate in collective self-defense by aiding a victim state.\(^{61}\) This is not the current motive of Japan; however, it should be noted that this right is allowed. Article 9 would be justifiably removable at Japanese citizens’ discretion from an international perspective.\(^{62}\) Moreover, if opposition were to argue that defense forces are incompatible with the bounds set by Article 9, they must remember that signing the treaty came after the article, so the treaty would become the new law, taking precedence. Hence the Abe Cabinet is directing action to allow collective self-defense in cases where threats are posed directly on Japan’s national security.

If the Japanese Diet had not passed the most recent security legislation and a hostile group or state was to pose an imminent threat to Japanese citizens, how would Japan react? It would protect itself. Furthermore, it would preempt an attack from ISIS forces. Japan would not abstain from conflict, regardless of the security legislation. When it comes to national security, the government must protect the welfare of its citizens. Even General MacArthur—the mastermind of the 1946 Constitution—wrote, “Article 9 is based on the highest of moral ideals, but by no sophistry of reasoning can it be interpreted as a complete negation of the inalienable right of self-defense against unprovoked attack.”\(^{63}\)


When the Japanese were alarmed by the reorganization of Security Forces as the SDF in the 1950s, the Cabinet reasoned, “The Constitution did not deny the self-defense right; Japan renounced war, but it did not renounce the right to struggle in order to defend itself.”\textsuperscript{64} Hence it is logical for Japan to pass explicit security legislation stating the permissible nature of collective self-defense. Article 2 of the new International Peace Support Act in the security legislation package even says Japan can use force only in response to another use of force.\textsuperscript{65} Thus, the legislation does not change circumstances; it only articulates an existing right—a right that has been exercised in order to prevent or minimize future opposition to exercising the right of self-defense.

Those that resist the right to collective defense or the ability to expand the right to self-defense need to reevaluate their positions. The Japanese need to realize that expanding this right does not equate to greater war obligations or entanglements. The new legislation sets stringent restrictions for the circumstances under which Japan can act: For example, the new legislation states, “Response measures shall be implemented in a foreign territory only if there is consent from the foreign country in question (or, in cases where there is an institution that performs administration in the said foreign country, where there is consent from the said institution, in accordance with the resolution of the General Assembly or the United Nations Security Council) to execute said measures.”\textsuperscript{66}

Moreover, the Japanese people must realize that the pacifist age has come and gone. By signing the UN Charter, Japan became obligated to participate in collective defense, should necessity arise. It is too late for Japan to remain pacifist because it is a powerful force of balance in Asia and is already being affected by inevitable


\textsuperscript{65} Heiwa anzen hōsei seibi-hō [Int’l Peace Support Act], Law No. 366 of 2015, art. 2, para. 2 (Japan).

\textsuperscript{66} Heiwa anzen hōsei seibi-hō [Int’l Peace Support Act], Law No. 366 of 2015, art. 2, para. 3 (Japan).
and external conditions. In a 1954 Budget Committee meeting, the Cabinet stated, “The constitution did not deny the self-defense right; Japan renounced war, but did not renounce the right to struggle in order to defend itself.”

**Conclusion**

Japan is legally ready to take on collective self-defense and has been for decades.

Culturally, this has not been the case. Pacifism is good, but good intentions can lead a state toward poor ends if not carried out properly. The intention behind pacifism is commendable, but the application of the policy is now obsolete. When Japan applies its domestic laws—while following international law—it must consider the environment in which it resides, and create foreign policy with that environment in mind. It is time for Japanese citizens across the board to recognize that the security legislation passed in September of 2015 is not only necessary, but legitimate and constitutional as well.

---