

## Postwar Policy by the Allied Forces in Japan

On 15th August in 1945, the Emperor declared the acceptance of the “Potsdam Declaration” under only condition to uphold the “*Kokutai*”. The Allied Forces agreed to this condition. Eventually, the Imperial Army and Navy surrendered. The Allied Forces, mainly the American Forces, occupied the whole Japan soon and began with its occupation policy.

Above all, “Abolishment of *Tenno* system” was never required by the Allied Forces. Indeed, the most part of the Japanese people had been greatly concerned about the *safety of the Emperor*. They were ready to accept any directive of the occupation army in order to retain the *Tenno* system and to avoid any accusation of the war responsibility against the Emperor. This seems to be a real reason why the Japanese did not try any resistance against the occupation policy. In other words, they did not understand what the occupation army intended to achieve through its policy (total reorganization of the Japanese society). They were very surprised when the GHQ declared its major reform plans.

Compared with the German case, *the question of the war responsibility of the Japanese Emperor* has more complicated characters. Hitler was a real despot. Not only Jews, but also many German people suffered from the barbarism of the Nazis. After all, Nazis was merely a political party. But in Japan, the entire Imperial Army and Navy promoted the expansion policy and performed the war against USA and England. In a certain sense, they were never selfish. Moreover, the Emperor was always “clean and sacred” for the Japanese people. They did not recognize how seriously their Human Rights had been violated and what crimes had been committed in Asian countries in Emperor's name. They felt rather responsible for the difficulties to the Emperor. In this consciousness of the responsibility to the Emperor, the Japanese people identified themselves with those who were really responsible for the war (war criminals). Therefore, the Japanese people were (or “*are still*”) incompetent to proceed with the prosecution of the war criminals.

### Supreme Goals of the Occupation Policy

1. To remove military threats to the safety of the USA and the international peace
2. To remove political, legal, social and economic factors which had blocked democratization in Japan, and to establish a democratic and peaceful regime before the socialism and communism would gain popularity among the Japanese people

### Main Reform Measures for the Total Reorganization of the Japanese Society

1. *Prosecution of the war criminals* and banishment from public positions of those persons who were responsible for the war
2. *Demilitarization*
  - a) Dissolution of armed forces (Imperial Army and Navy)
  - b) Closing all military sectors in industry (ex. ship and airplane building)
3. *Democratization* of political and social structures (“*Five Major Reforms*”)
  - a) Abolishment of all systems to oppress Human Rights, especially freedom of speech, publishing, meeting and religion
  - b) Emancipation of women and equalization of both genders (especially *Family and Succession*)
  - c) Encouragement of labor unions
  - d) Dissolution of authoritarian structures in public organizations and rural communities
  - e) Establishment of a democracy-oriented education system
4. *Liberalization of economic structures*
  - a) Dissolution of 15 conglomerates and division of monopoly firms
  - b) Land reform to create independent farmers (dissolution of tenant farming and rigid limitation of tenant rent)

### Rapid Proceeding of Democratization towards a New Constitution

Aug. 1945	Begin of the dissolution of the Imperial Army and Navy
Sept.	Directive to arrest all suspected war criminals
Oct.	Declaration of “ <b>Five Major Reforms</b> ” Abolishment of the “ <i>Law on the Maintenance of Public Security</i> ” Directive of “ <b>Dissolution of 15 conglomerates</b> ”
Dec.	Directive for the “ <b>Agrarian Reform</b> ” Enactment of the “ <b>Labor Union Law</b> ” Directive to suspend all lessons on moral, history and geography in schools
Jan. 1946	<b>Declaration of “Human Emperor”</b> Begin of the banishment of all responsible persons from public positions
Feb.	<b>The first Agrarian Reform (planned);</b> <i>Land owners should be forced to sell their land to its tenant farmers. Trading conditions should be agreed through the negotiation between owners and tenant farmers.</i> This reform plan could not be enforced because GHQ found it <u>not radical enough</u> . On Feb. 3, MacArthur decided the “ <b>Three Basic Points</b> ” for a new Constitution (Emperor as the head of the state, Renunciation of war, Abolishment of Feudalism). Prime Minister <i>Kijuro Shidehara</i> (幣原喜重郎) brought his draft amendment to the Constitution to General <i>MacArthur</i> in GHQ. <i>Shidehara</i> had thought that some partial changes in the constitutional articles would be enough, for example, limitation of the supreme power of the Emperor. However, GHQ rejected this draft and announced its own draft. Negotiation between both sides for a new Constitution began.
Apr.	The first general election under the genuine universal suffrage
May	Opening of the 90. session of the Parliament under the Meiji Constitution; Discussion about “ <i>Amendment to the Constitution</i> ”, in reality drafting work of <u>a new Constitution</u> , began.
Sept.	Enactment of “ <b>Labor Relations Adjustment Law</b> ”
Oct.	<b>The second enforcement of the Agrarian Reform</b> (Compulsory Purchase); <i>the state bought tenanted land from its owners for fixed price and sold it to tenant farmers for a low price.</i>
Nov.	Promulgation of the “ <b>Constitution of Japan</b> ”
Mar. 1947	Enactment of “ <b>Fundamental Law of Education</b> ”
Apr.	Enactment of “ <b>Labor Standards Law</b> ”, “ <b>Anti-Monopoly Law</b> ” and “ <b>Economic Decentralization Act</b> ” (Antitrust Act) Enforcement of a new school system in American style (6-3 school system)
May	Enforcement of the “Constitution of Japan”
Sept. 1951	<b>Treaty of Peace with Japan in San Francisco</b> (the end of the occupation) <b>Treaty of Mutual Cooperation and Security between the United States and Japan</b>

## Current Constitution of Japan (1947)

### Main Principles of the new Constitution of 1947

- |                               |                        |
|-------------------------------|------------------------|
| A) Sovereignty of people      | Preamble, Art. 1       |
| B) Protection of Human Rights | Preamble, Art. 10 - 40 |
| C) Pacifism                   | Preamble, Art. 9       |
| D) Rule of law                |                        |

#### « Reference 1 »

#### What does the Principle “Rule of Law” really mean in its modern sense?

1. Protection of Human Rights
2. Division of State's Power (Legislative, Executive, Judiciary)

In the Western European countries, the modern democracy (“sovereignty of people”) was achieved through hard struggles against the executive power of absolute kings. Hence, the legislative power (“Parliament”) has a prior position to the other two powers.

According to this tradition, the exercise of Executive power should be strictly controlled through regulations by the legislative power, and Judiciary should apply laws mechanically.

In the USA, however, its independence was achieved through the struggle under the strong leadership of the Executive (“President”) against the Legislative of colonial masters (England).

3. Independence of Judiciary and Judicial Constitutional Review

This is rather an American tradition. Independence of the Judiciary in the European countries was quite weak. “Judicial *Constitutional* Review”, namely the control power of the Judiciary over the Legislative and the Executive was established as “judge-made law” in the USA (1803).

#### « Reference 2 »

#### Two Models of Judicial and Constitutional Review

1. Abstract Normative Control (European style)

An extraordinary court will be founded for this task. This court has a right to examine all legislatures and exercise of the executive power in regard of their constitutionality. This control may be exercised independently from actual and concrete case.

2. Actual and Specific Control (American style)

Any ordinary court has a right to examine constitutionality of legislations by the Legislative and activities of the Executive, but only when this control is necessary in a specific case.

### Pacifism in the New Constitution of 1947 (Art. 9) and Judicial Constitutional Review

- A) Renunciation of “war as a sovereign right of the nation and as means of settling international conflicts”;
- B) Prohibition to maintain any “land, sea, and air forces as well as other war potential”;
- C) Abandonment of “state's right of aggression” (right to declare war to other countries).

**Crucial Issue 1** What is “land, sea, and air forces as well as other war potential”? Should be foreign troops in the Japanese territory included in it?

**Crucial Issue 2** Should Japan abandon also the right to defend itself against aggressions opened by other countries?

The Japanese government has insisted that Art. 9 provides to abandon the right to aggress other countries as means of settling international disputes, but not the right of self-defense. According to this opinion ( this is also the ruling opinion in Japan), the word “war” in Art. 9 means only “aggressive war”, “preemptive attack”, and “invasion”; military activities for self-defense due to foreign aggressions are not implied in “war” in this sense. Therefore, any military potential which would be required and necessary for the effective self-defense in case of expected aggressions should be excluded from “armed force” in Art. 9.

The government is of the opinion that “the Self-Defense Forces” (founded in 1954) should be perfectly constitutional in so far as its scale, formation, and its equipments are kept within the scope which is really necessary and reasonable in the actual international security situation.

This interpretation of Art. 9 could be very realistic, but can not weep away all unclarity and suspicion of violation of Art. 9.

Indeed, under the current Constitutional Review (Art. 81), there is not any effective control and supervision system as “judicial review” in regard of necessity and reasonableness of the scale, formation, and equipments of the Self-Defense Forces. Such issues are discussed and regulated in the Parliament, but it is not any true “*Judicial and Constitutional Review*”. It is merely a “self-control” of the Legislative. The judicial authority for this purpose must be independent from the Parliament according to the principle of Rule of Law.

**Crucial Issue 3** Another problem: International military alliance and “Collective Defense”

International military alliance such as "*Treaty of Mutual Cooperation and Security between the United States and Japan*" in 1951, 60 and 70 are subjects which must be taken under the control of Art. 9. Also in this point, the Japanese government insists on the constitutionality of these treaties and argues that these treaties were concluded only for the security of Japan and not for any aggression war.

Normally, international military alliance obligates its partners to the bilateral duty of defense. But such bilateral duty of defense would be for Japan a violation of Art. 9. For example, suppose that a certain country attacked the USA, and the Japanese Self-Defense Forces participated in the battle against this country to defend the USA. This military activity would mean, however, one case of “preemptive attack” or “aggression”, because this country has not attacked Japan yet.

For this reason, the Japanese government is of the opinion that Art. 9 does allow the right of Self-Defense, but prohibit any “Self-Defense for collective security”. Therefore, the security treaty between the USA and Japan obligates the Japanese government to offer grounds and ports for the US. Army and to cooperate with it for the internal security and international peace in the East-Asian region, but the Japanese government does not have any duty to defend the territory of the USA.

Such a method of “Unilateral Duty”-Solution could work in the actual relationship between the USA and Japan, but not in general. In the future, there will be probably certain cases in which Japan will have to conclude further military security treaties with other Asian countries. In such cases, other alliance partners would not accept this “Unilateral Duty”-Solution.

**Judgment of the Supreme Court, October 8, 1950**

**Case:** In 1950, according to the request of the USA, the Japanese government founded “*Police Auxiliary Force*”. An opposition party brought an action to the court against the government for the violation of Art. 9. They argued that the Police Auxiliary Force was a “*war potential*” in the sense of Art.9, Paragraph 2.

**Judgment:** The Supreme Court rejected this action with the argument that there is not any case. According to the understanding of the Supreme Court, the competence of the Judiciary should be limited to judge specific legal cases. If the court would decide on the Constitutionality of a certain legislation even if there is not any actual legal conflict, then it would mean that the Court would make a decision in advance on merely expected cases in the future. In such a judgment, the Court would exceed its authority and competence under the current Constitution (Art. 81).

**Judgment of the District Court in Tokyo, March 30, 1959**

**Case:** Soon after the Allied Forces (49 countries) and Japan concluded the “*Peace Treaty with Japan in San Francisco*” in 1951, the USA and Japan signed “*Treaty of mutual cooperation and security between Japan and the United States of America*”. Based on this agreement, the US Forces continue to maintain their military bases and ports even after the end of the occupation. In 1957, the US Air Force planed to extend the air force base in “*Sunagawa*” Town in Tokyo. 7 protesting demonstrators were arrested when they cut the wire netting and entered the base. They were accused by the *Special Criminal Act* which was enacted according to the USA-Japan Security Treaty mentioned above. In the first instance, the accused persons insisted that they were innocent because the Security Treaty and the *Special Criminal Act* were unconstitutional. The main question is if such foreign military powers in the Japanese territories would be also included under “*war potential*” in the sense of the Art. 9 or not. In this case, following two questions were discussed:

- 1) the question of the competence of the Judiciary to control constitutionality of international treaties;
- 2) the question of the constitutionality of the stationary troops of the USA

**Judgment:** The District Court in Tokyo declared the innocence of these persons because the USA-Japan Security Treaty was against the Art. 9, and the *Special Criminal Act* violated the Art. 31 of the Constitution (“Due Process”).

**Judgment of the Supreme Court, December 16, 1959**

Against this judgment of the District Court in Tokyo, the public prosecutor brought the direct appeal to the Supreme Court.

**Judgment:** The Art. 9 of the Constitution does not declare the renunciation of the right of self-defense, which is an essential right of a sovereign country by nature. *The USA-Japan Security Treaty* is even an effort to secure the sovereignty without maintenance of “*war potential*”. In this sense, this treaty does not violate the Art. 9.

In general, the Judiciary has also the competence to control constitutionality of international treaties. However, the *USA-Japan Security Treaty* is a highly political matter. So, the control about such issues should be done by the people themselves through their political decisions. The Judiciary may examine and decide such a question only when its unconstitutionality or illegality is quite obvious to everybody.

The stationary troops of the USA in Japan might be “*aggressive*” in the sense of Art. 9, but they do not stand under the command channel of the Japanese government. So, the question of their constitutionality of such foreign troops is not any subject of the Constitutional Review by the Japanese Judiciary.

### **Judgment of the District Court in Sapporo, March 29, 1967**

**Case:** The Self-Defense Agency opened a maneuvering ground for the Ground Self-Defense Force in a small town named “*Eniwa*” in *Hokkaido*. The relationship between the Ground Self-Defense Force and the local residents was highly strained. One day, two persons entered the ground without any permission, and cut the telephone cables to disturb the maneuver. They were arrested and accused by the Art. 121 of the *Self-Defense Forces Act*. This article provides that a person who damaged, destroyed military equipments for the defending activities of the Self-Defense Forces shall be punished with penal servitude for not longer than five years or a fine of not more than fifty thousand yen.

**Judgment:** The District Court rejected the accusation and declared the innocence of the two persons with the argument that the telephone cables did not belong to the “*military equipments*” which should be protected with Art. 121 of the *Self-Defense Forces Act*.

### **Judgment of the District Court in Sapporo, September 7, 1973**

**Case:** The Self-Defense Agency planned to build an air force base for the Air Self-Defense Force in a small village named “*Naganuma*” in *Hokkaido*. But the forest in this area was protected under the “*Act for the Prevention of Floods*”. The Self-Defense Agency requested the Ministry of Agriculture, Forestry and Fisheries to exclude this area from the protection. On this request, the Ministry of Agriculture, Forestry and Fisheries decided to revoke the protection for this area.

The local residents protested against this decision and brought an action to the Court. They insisted that the Self-Defense Forces were “*war potential*” in the sense of Art. 9 of the Constitution, and the founding of the air base would also violate the “*Right for peaceful life*” which was mentioned in the Preamble of the Constitution.

**Judgment:** The District Court in *Sapporo* decided that the Self-Defense Forces were really “*war potential*” in the sense of Art. 9 of the Constitution, and the decision of the Ministry of Agriculture, Forestry and Fisheries was illegal.

### **Judgment of the Appellate Court in Hokkaido, August 5, 1976**

On the appeal from the Ministry of Agriculture, Forestry and Fisheries, the Appellate Court in *Hokkaido* declared that the accusation of the local residents should be rejected because the safety from floods in this area was already secured through alternative measures, and the local residents did not have any reason to accuse the Ministry.

Furthermore, the Court showed its opinion in regard to the constitutionality of the Self-Defense Forces:

- 1) The founding of the Self-Defense Forces was a highly political act of the government. Such issues belong to the matter of the Legislative or the Executive power of the State. After all, the question about the constitutionality of the Self-Defense Forces should be decided by the people themselves. The Judiciary could examine and decide this question only when its unconstitutionality or illegality is quite obvious to everybody.
- 2) The wording of Art. 9 allows a wide range of interpretation. So, the question about the right of self-defense — if the Constitution prohibits also this right or not — can not be decided clearly.
- 3) Regarding to their scale, formation, and equipments, the current Self-Defense Forces can not be considered as clearly aggressive “*war potential*”.
- 4) Therefore, the unconstitutionality of the Self-Defense Forces is not obvious enough to legitimate any judicial judgment.

### **Judgment of the Supreme Court, September 9, 1982**

The Supreme Court rejected the final appeal from the local residents in *Naganuma* with the same argument as in the judgment of the Appellate Court in *Hokkaido*.