

❖ 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 **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.

(→ highly political matter beyond the correct authority and competence of the Judiciary)
“Judges are not elected by the people”

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.
 (→ *highly political matter beyond the correct authority and competence of the Judiciary*)
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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*.