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THE ARTICLE 9 OF THE JAPANESE CONSTITUTION

1. One of the most salient aspects of the present Constitution of Japan, promulgated on the 3rd of November, 1946, lies in its pacifist character.

The second paragraph of its preamble states: „We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world..."

Furthermore, the article 9 of the Constitution reads as follows:

„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.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized."

We can find in modern history a number of constitutions and treaties which renounced aggressive war. Especially, major powers solemnly promised in the Paris Pact of 1928 to „condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another". This noble declaration, however, lost much of its value, as the representatives of the powers calimed that the Pact did not impose any restriction on the right of each state for self-defense, and that it was in the competence of each nation to decide whether it was necessary to resort to war for self-defense or not. What makes the Japanese Constitution really unique in its stipulations is that not only it renounces war as a sovereign right of the nation, but also it prohibits maintaining of war potential and denies itself the right of belligerency.

In 1950's appeared among conservative circles new demands to revise the pacifist clause of the Constitution on grounds that it was forced

upon the Japanese by the Americans, and that it is too idealistic to match the reality of power politics. Besides, the post-war government, which has been almost incessantly in the hands of conservative party: the Liberal or the Liberal-Democratic, accepting the request by the U. S. government for Japan's rearmament, has established so-called self-defense forces and reinforced it steadily. It has employed for justification such argument that the power for self-defense does not correspond to the armed forces, nor war potential, the maintenance of whch is prohibited by the article 9 of the Constitution. But this argument has by no means been accepted up to now by the overwhelming majority of specialists in the field of constitutional and public law, as will be commented later.

The definite gap between the pacifist clause of the Constitution and the reality of armed forces gives rise to one of the sharpest political controversies in our country(1). This paper aims to offer a rough sketch of the process of change in the attitude of the government, the courts and the public opinion, and to extend the writer's view on the notion of self-defense and the pacifist character of the Constitution.

2. To begin with, let us examine the theory which claims that the article 9 was, like the other democratic parts of the Constitution, forced upon the Japanese by the Americans. It is true that the draft of the Constitution was presented to the Japanese government by the General Headquarters (GHQ), i. e. the supreme organ of the U.S. occupation army, based on so-called MacArthur Note(2). But some evidences are presented that the idea of pacifist clause of the draft was first proposed by the Japanese Prime Minister Shidehara to General MacArthur, the Supreme Commander(3). The full process of draft making is not yet clear, and we cannot definitely say who was the real initiator of the article 9.

This writer does not think the „forced constitution" theory well-grounded for several reasons. Firstly, the pacifist clause of the Constitution, even if it were foreign in origin, had deep roots in the spirit of Japanese people at that time. After the severest war, they hated from the bottom of their heart the militarism which led them to such a disaster, and eagerly wished to denounce the war completely. No politicians could speak or act otherwise. A commentary of the Constitution published by the Government in 1946 asserts, „we stand at the decisive crossroad of increasing the possibilities of war or eliminating the causes of war. Well acquainted people are really anxious that if the civilization could not eliminate the war, then war would eliminate the civilization(4)".

Secondly, extending our scope, we can ascertain that the Japanese Constitution was a product of the World War II, rather than an idea of this or that person. The war was essentially fought between the democratic forces and the fascist forces, and the victory of the former led to the establishment of democratic principles all over the world. Thirdly, it was

(1) As for the standpoint of each political party in the controversy, see *The Article 9 of the Constitution: It's Time now to Think about Peace again*, Yuhikaku, 1983, pp. 103—119.

(2) For the English text, see *ibid.*, p. 8.

(3) Cf. M. Hasegawa, *Modern History of the Constitution*, Vol, I, Nihonhyoronsha, 1981, pp. 170—176; H. Tanaka, *Memorandum on the Formulating Process of the Constitution*, Yuhikaku, 1979, pp. 91—100.

(4) Cited from E. Hisada, „Historical Significance of the Article 9 of the Constitution" *Horitsu Jiho* (Periodical Review of Law), Vol. 51 №. 6 (1979 May), p. 13.

precisely the U. S. which forced Japan to re-arm itself after the 1950's. It seems strange that those people who stand most loudly against the „forced constitution" are most obedient to the U. S. political guidance.

At the time of constitution making, the Government explained clearly that it renounced every kind of war, including the war for self-defense. In 1946 a communist member of the Diet, S. Nozaka asked the Prime Minister S. Yoshida at the plenary session of the House of Representatives, „the war for self-defense is legitimate everywhere, and we do not need to renounce it, do we? Yoshida answered, „I think it is harmful to recognise such a logic. It is an obvious fact that most of wars in modern time have been fought in the name of national self-defense. And so, recognition of the right of legitimate self-defense often leads to war."

Then, the cold war begin to take shape in Europe and Asia during the last years of 1940's, and the U. S. policy toward Japan was radically changed. In the New Year's message of 1950, General MacArthur said, „we can never interpret the article 9 as totally denying the inviolable right of Japan for self-defense." As the Korean War broke out in the same year, MacArthur guided the Japanese government to build up a new police reserve corps consisting of 75,000 personnels. In 1951, Japan recovered its independence by the San Francisco Peace Treaty, on condition that it would conclude the Mutual Security Treaty with the U. S. The Police Reserve Corps changed its name to Security Force in 1952, and to Self-Defense Force in 1954, accompanying expansion in number and equipment.

The Government has changed its interpretation of the article 9 in a clumsy way. At the parliamentary session in 1954, they explained that „it will naturally be permitted to use force to defend the nation's very existence", and so, „if the right of self-defense is permitted, it is not against the Constitution to maintain such a force that is within the limit allowed for self-defense(5)". It was no wonder that the „limit" was really indefinite. At first it was said that the „war potential" stipulated in the article 9 meant ability to fight out a modern warfare, and the self-defense force should therefore be below that level. But later they came to say that for the effective self-defense the ability to cope with any contingency was needed. In 1956 Prime Minister Kishi even claimed that in principle it was not necessarily unconstitutional to have nuclear weapons.

Japanese armed forces have grown up rapidly, especially responding to the strong pressure from the U. S. Reagan Administration. Land force has 180,000 personnels in 1982, sea force 40,000 with 70 large vessels, and air force 45,000 with 400 aircrafts. Military expenditures of Japan rank the 7th in the world, and its armed forces are the strongest in Asia except the Soviet Union and China.

3. Now, let us see the influence of such growth of „war potential" to the courts of justice, public opinion and the opinion of specialists of public law.

The Japanese Constitution has provisions as follows:

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(5) Such phrases in the article 9 as „as means of settling international disputes" or „in order to accomplish the aim of the preceding paragraph" were sometimes used to justify the new interpretation. As for the argument for and against it, see T. Kobayashi, *The Article 9 of the Constitution*, Iwanami Shinsho, 1982, pp. 46—47.

Article 81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

Article 98. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial resript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

Despite of these provisions, Japanese courts are generally not active in reviewing constitutionality of laws and governmental acts. There have been only few active decisions concerning the article 9, and all of them at the district court level. The first and most famous decision in this regard was that of the Tokyo District Court in March 1959, concerning the Sunagawa Affair, which judged that „the authorization of stationing of the U. S. forces in our country, no matter to whom the right of command belongs, or whether the U. S. forces are obliged to take the actual operation or not, amounts to the maintenance of war potential which is forbidden by the paragraph 2, article 9 of the Constitution, and hence the existence of the U. S. forces stationed in our country is impermissible under the Constitution.'"

On the other hand, the Supreme Court reversed and remanded the above decision in the same year, on the ground that „the Japanese-American Security Treaty must be regarded as having a highly political nature which possesses an extremely important relation to the bases of the existence of our country as a sovereign nation. The legal decision as to unconstitutionality of its content is not adaptable to review by a judicial court. Accordingly, it falls outside the right of judicial review by the courts, unless there is clearly obvious unconstitutionality or invalidity."

After this decision by the Supreme Court, almost all decisions at every level concerning the article 9 have been influenced by the „act of state" theory (6), and avoided substantial judgment about it. There appeared a few exceptions, the most inportant of which was the decision of Sapporo District Court in September 1973 concerning the Naganuma Affair. The decision rejected the stand of defendant (the State) based on the „act of state" theory, by saying that „the concepts of a matter being of a highly political nature or concerned with the fundamentals of government are very vague. If one excludes some act of the government from the scope of judicial review by relying on such a vague concept, one might lead the way to closing the doors of the court to people asking redress from the blunders of the government." It reached the conclusion that, „on the basis of the organization, scale, equipment and strength of the Self-Detense Forces, they clearly amount to the armed forces and fail within the meaning of the term of war potential maintenance of which is prohibited by Article 9, Paragraph 2 of the Constitution." Again, this decision was flatly reversed by the higher court, relying upon the „act of state" theory. The majority of the constitutional lawyers is strongly critical of

(6) Concerning the „act of state" theory which imposes grave restrictions on the judicial review of governmental acts, the opinion of the academic circle is divided into two parts: for and against it. The part for that theory is also divided into two: the one supports the theory as an abstract and general principle, while the other takes it restrictively and judges its relevance for individual case.

such a tendency of the court to evade the judicial judgment easily, as abandonment by itself of the inherent power to determine the constitutionality of law.

While the courts as a whole have shown an equivocal attitude toward the ambivalence between the Constitution and the political reality, similar trend could be seen in the public opinion. In 1946, 70% of the people supported the complete renunciation of war, and only 5% were opposed to the waiver of the right for self-defense. After the Korean War the atmosphere changed, and in 1952 30% supported re-build up of forces unconditionally, 24 % conditionally, while only 26% opposed it. In 1956, 32% of the people supported the Self-Defense Force positively, 26% acquiesced in its existence, but at the same poll, 42% opposed the revision of the article 9 of the Constitution. The attitude to support the Self-Defense Force and the article 9 simultaneously has recently grown more distinct. In 1978 those who supported the status quo of the Self-Defense Force came up to 57%, and those who wanted to see it reinforced gained 19%, while those who were against the revision of the article 9 attained to 82%, leaving those who supported the revision at 15%. These changes seem to reveal that the majority of people accepts the interpretation of the article 9 by the government, on one hand, but it expects the article to work as a drag (a brake) against endless growth of military forces in this country, on the other hand.

In contrast to the public poll, the opinion of the specialists is far more consistent. A Japanese law journal sent questionnaires in 1981 to the members of the Japanese Association of Public Law, who numbered 873, and received 418 answers. 71.3% of the respondents thought that the existing Self-Defense Force was against the Constitution, only 26.8% took it constitutional. 59,9% was for the reduction or abolishment of that Force, 16.7% for the status quo, and 16.7% for its reinforcement. Those who were for the revision of the article 9 occupied only 18.9%, while those against the revision reached to 78.7%(7).

4. In conclusion, two questions may be briefly discussed here. The first question is: how to consider the notion of the self-defense beyond the scope of legal interpretation? (a) As the Prime Minister Yoshida once said, most of wars in modern time have been fought in the name of national self-defense, as well as all the national armies claim themselves to be for the self-defense. It may be quite difficult to have a reasonable and comprehensive definition of self-defense. (b) If we try to lay down a tolerable definition of that notion, we should at least take into consideration the differences of size of nations and of their concrete situations. Things may appear quite differently for a small or medium size country which has been under the constant military pressure from a big country, and for a big country with great economic interests abroad to be defended if necessary. (c) As it is well known, the Japanese Self-Defense Force has been closely linked to, or more exactly has constituted an essential part of the U. S. world strategy. It will make the definition of self-defense quite senseless if we include in it the armed forces attached to the military bloc.

(7) *Horitsu Jiho*, Vol. 53 №. 6 (1981 May), pp. 59—66. It should be noted that not a few of them think that, while the Constitution prohibits to maintain any war potential including self-defense force, it does not deny the very right of self-defense itself.

The second question is: do we agree with the often voiced opinion that the article 9 of the Constitution is utopianistic and groundless? The answer of this writer to that question is negative. (a) No country is more vulnerable than Japan to a military attack. Nearly half of its population of 118 millions, as well as almost all the industrial nerve centers is concentrated in a rather narrow belt along the Pacific coast of the main island. Moreover, production and transportation system, being highly organized and automatized, is very weak against outer shock, as it is called „a castle of glass." It depends for nearly 70% of the cereals and almost all the raw materials on foreign countries. A country in such conditions can keep its peace and security never by military means, but only by getting rid as much as possible of the seeds of conflict from the world political and economic structure. (b) Japan is, in that sense, an extreme case, but not an exception. In this age of nuclear overkill, military strength cannot guarantee full safety to any single country. More than 500 billion dollars are yearly spent for military purpose in the world, and the sense of security decreases year by year. And it is precisely the illusion we inherited from the 19 century that our security should and could be obtained by military means, which has brought us to the brink of holocaust. (c) It is all the more true now to say that „if the civilization couid not eliminate the war, then the war would eliminate the civilization." And any move which pulls us out of the present mad situation should be called rational and realistic. We have to re-evaluate the article 9 of the Japanese Constitution as a foresighted gift from the victims of the War, instead of labelling it utopianistic or groundless. Non-aligned and unarmed Japan would be an importan trigger for radical change of the world leading to the survival of mankind.

РЕЗИМЕ

ЧЛАН 9. ЈАПАНСКОГ УСТАВА

Једна од најважнијих особина садашњег јапанског устава је његов пацифизам. Чл. 9. тога устава забрањује Јапану поседовање оружане силе. Упркос таквој уставној одредби савремени Јапан је развио оружане снаге. То је довело до расправе о тумачењу и примени чл. 9. јапанског устава.

Постоји мишљење које тврди да је садашњи устав наметнут Јапану за време окупације. Историјским истраживањем се, међутим, не може утврдити да је предлог чл. 9. устава потекао од окупационих власти. Његово увођење су предложили сами Јапанци и оно је одговарало тадашњем расположењу јавнога мнења.

Педесетих година је извршна власт променила однос према питању оружаних снага и приклонила се учењу о праву државе на самоодбрану, као оправдању за њихово увођење и развијање.

Врховни суд Јапана је по чл. 81. устава овлашћен да цени уставност закона. Међутим, Врховни суд је у више наврата одбио покушаје нижих судова да развој јапанских оружаних снага огласе неуставним са становишта чл. 9. устава.

Испитивање јавнога мнења показује противречне тежње: Јапанци се изјашњавају у прилог јачања самоодбране, али не желе измену чл. 9. устава. Друкчије је, међутим, мишљење правних стручњака, који у ве-

њини сматрају да развој снага самоодбране није у складу са чл. 9. устава. Писац се изјашњава у прилог чл. 9. устава, који сматра поклоном жртава рата и мисли да би несврстан и ненаоружан Јапан највише допринео светском миру.

RÉSUMÉ

L'ART. 9. DE LA CONSTITUTION JAPONAISE

L'une des caractéristiques les plus importantes de la Constitution japonaise actuelle est son pacifisme. L'art 9. de cette Constitution interdit la possession de la force armée au Japon. Nonobstant d'une telle disposition constitutionnelle le Japon contemporain a dévéloppé ses forces armées. Le fait a provoqué les discussions concernant l'interpretation et l'application de l'art. 9. de la Constitution japonaise.

Une opinion soutient la thèse que la Constitution actuelle a été imposée au Japon pendant l'occupation. Par les recherches historiques cependant il n'est pas possible de prouver que le projet de l'art. 9. de la Constitution a été l'effet des pouvoirs d'occupation. Son insertion a été proposée par les Japonais eux-mêmes et correspondait à l'opinion publique de l'époque.

Aux années cinquantes le pouvoir exécutif avait changé de l'attitude par rapport à la situation des forces armées et s'inclinait à la doctrine de la légitime défense de l'Etat, comme à une justification de l'introduction et du développement des forces armées.

Selon l'art. 81. de la Constitution la Cour Suprême du Japon est autorisé à statuer sur la constitutionnalité des lois. Mais la Cour Suprême a refusé à plusieurs reprises les tentatives des cours subordonnées prétendant qu'en vertu de l'art. 9. de la Constitution le développement des forces armées japonaises était inconstitutionnel.

L'examen de l'opinion publique démontre des tendences contradictoires: les Japonais se prononcent en faveur du renforcement des forces de la défense, mais ils ne veulent pas la modification de l'art. 9. de la Constitution. Différent est cependant le sentiment de la majorité des experts juristes qui sont d'avis que le développement des forces de la défense est incompatible avec l'art. 9. de la Constitution. L'auteur s'exprime en faveur de l'art. 9. de la Constitution, le considérant être le temoignage de gratitude aux victimes de la guerre, étant convaincu qu'un Japon non-aligné et désarmé pourrait contribuer au maximum à la cause de la paix mondiale.