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Judicial Review of War Renunciation in the Naganuma Nike Case: Juggling the Constitutional Crisis in Japan

WILLIAM R. SLOMANSON*

On September 7, 1973, a courageous three-judge Japanese district court held1 that the existence of Self-Defense Forces (SDF) violates Article 9 of the Japanese Constitution, which prohibits armed forces and the maintenance of "war potential." This decision quashed administrative rescission of a national forest reserve designation, designed to provide for a Nike missile base2 in Naganuma under the 1968 defense

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1. Itō v. Minister of Agriculture and Forestry, HANREI JIHÔ (No. 712) 24, in HANREI TAIMUZU (No. 298) 140 (Sapporo Dist. Ct., Civ. Dep't, Sept. 7, 1973) [hereinafter cited as Naganuma Nike case]. A summary translation of the case by Professor Hideo Tanaka together with an English statement of facts reprinted from 6 LAW IN JAPAN 175 (1974) appears on p. 46 as an Appendix.
2. Japan's Constitution dictates that:
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 a means of settling international disputes.
2. 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.
KENPÔ (Constitution) art. IX, paras. 1 & 2 (Japan, 1946) (emphasis added) [hereinafter cited as Article 9]. The official translation is found in MINISTRY OF JUSTICE, THE CONSTITUTION OF JAPAN AND CRIMINAL STATUTES (1958).


buildup plan. 4

Governmental 5 and popular 6 sentiments have varied drastically since the promulgation of Article 9 in 1946. As long as SDF activities can be characterized as "[w]ar potential, [which] will never be maintained,"7 Japan's Constitution does not live with the times, thereby spawning fruitless controversy. The case has been appealed 8 to an intermediate court, but authoritative interpretation by the Japanese Supreme Court is necessary since constitutional amendment is currently unlikely. 10

This article will review the case, its significance within the framework of Article 9 and potential legislative resolution, and will discuss the viability of judicial interpretation as an invitation to legislative amendment. Although Japan's Supreme Court may avoid judicial resolution of this heated political controversy, the highest court must interpret Article 9, the supreme law of the land, if it is to give life and meaning to the Japanese Constitution. The Naganuma Nike case presents a justifiable basis for meeting this challenge. The Supreme Court will have to face it in the near future. The outcome will affect the United States' defense posture in the Orient, particularly in view of the fall of South Vietnam, and whether Japan will be able to make military contributions to United Nations Emergency Forces.

5. See generally id., at 3, col. 3.
7. Article 9, supra note 2. The 1954 SDF law provides that:
   The Self-Defense Force shall have as its main duty the self-defense of our country against direct aggression and indirect aggression in order to guard our country's peace and independence and to maintain its security, and, to the extent necessary, it shall undertake the maintenance of public order.
8. The Sapporo District Court is one of forty-nine courts of original jurisdiction. The District Courts utilize only one judge in the vast majority of cases, but a three-judge court handles the most important cases and is a prerequisite to appellate review to the Sapporo High Court, one of eight intermediate courts in Japan. Supreme Court appeals are generally taken from High Court judgments; however, "jumping appeal" from the District Court is possible where both parties consent. See SUPREME COURT OF JAPAN, OUTLINE OF JAPANESE JUDICIAL SYSTEM 4 (1970). See also SUPREME COURT OF JAPAN, JUSTICE IN JAPAN 22 (1972).
10. See section III infra.
I

CASES AND CONTROVERSY

A. HISTORICAL AND LEGAL CONTEXT

Prior to *Naganuma* *Nike*, the judiciary struggled with two cases in which the constitutionality of defense forces was attacked. In the 1959 *Sunakawa* decision, the Supreme Court ruled that the “war potential” clause of Article 9 did not apply to troops over which Japan could not exercise the right of command or supervision, reasoning that “[t]he pacifism inherent in our Constitution was never intended to mean defenselessness or non-resistance.” Authority disposition of the constitutional issue was avoided by invoking the “political question” doctrine for the first time in modern Japanese constitutional history, and the Court refused to discuss the constitutionality of the SDF.

Eight years later, the *Eniwa* case was decided, wherein the Sapporo District Court applied the principle of *nullum crimen nulla poena sine lege*, and found that the destruction of SDF communication lines by an anti-SDF group did not come within the terms of the criminal statute. The “political question” doctrine of *Sunakawa* was not sufficiently fungible to be utilized.

Following the *Eniwa* decision, the instant litigation began. Extensive

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12. *Id.* at 3.

13. The Court indicated that the constitutionality of the Treaty, and its effect in Japan, is left primarily to the Cabinet and ultimately to the people. See *Sunakawa* case, supra note 11, at 6.

14. The “preservation of security and existence” clause of the Constitution’s Preamble was the source for judicially implying the right of self-defense.


16. The defendant’s conduct must conform in all respects to the definitional elements of the crime charged. Otherwise, there is no crime and punishment cannot be administered. This is referred to as *Tatbestandsmässigkeit* in German criminal law and *Normatividad* in Spanish criminal law. *But see* *Roschen v. Ward*, 279 U.S. 337, 339 (1928).

17. The group had cut communication lines between on-base artillery practice sites. The applicable criminal statute prohibited destruction of “[w]eapons, ammunition, aircraft or other defense material which is owned or used by the Self-Defense Force.” *MODERN JAPANESE LAW* 261, art. 121. By deciding that the statute was not violated, the District Court avoided the issue of whether the Self-Defense Law controverted the constitutional doctrine of pacifism.

18. For a more extended discussion of the issue avoided by the *Eniwa* case, see *Wada, A Discussion of the Right of Self-Defense and War Potential, 370 Juristo (Jurst) 73* (1967), English translation in *MODERN JAPANESE LAW* 269.
forest areas around the town of Naganuma had been long protected as a forest preserve under the Japanese Forest Law, but in 1968 the Chief of the Sapporo Defense Facilities Office petitioned successfully for a cancellation of a portion of the Forest Preserve Designation in order to permit the construction of an Air-Self-Defense Force Nike-Zeus missile base. Local residents opposed to the base brought an action for suspension of this order on conservation grounds, but were defeated in the Sapporo High Court since there was no "urgent necessity" to avoid "irreparable damage," as provided by statute. In a companion suit initiated by 369 Naganuma residents, however, the District Court revoked the earlier cancellation of the forest reserve designation, holding that the Japanese Self-Defense Forces were in violation of Article 9.

B. Procedural Issues

The District Court found various procedural arguments unacceptable grounds for evading the substantive issue centering upon constitutionality of the defense installations of the SDF. These included standing, judicial duty to decide constitutional issues, and the political question doctrine.

1. Standing to Sue

Standing to sue was confirmed. The forest reserve system, which is designed to safeguard local inhabitants legally protected by the Forest Law, was reviewed within the framework of the entire constitutional fabric. This resulted in a determination that the "right to live in peace" was threatened by state administrative action. The Supreme Court

19. Naganuma is a town in the Mt. Umaoi National Forest in Hokkaido. For a complete statement of the facts of the case, see the Appendix to this article.
21. At question was the adequacy of antiflooding measures.
22. Article 25(2) of the Administrative Case Litigation Law of 1962 provides that:
   In the event an action for the revocation of a disposition is filed and there is an urgent necessity to avoid irreparable damage brought about by the disposition . . . the court may upon application and by decision suspend . . . the effectiveness of the disposition . . .
6 Law in Japan 175 n.2 (1974) (emphasis added).
23. Eighty-eight residents were persuaded to withdraw from this suit designed to invalidate operation of the missile base ab initio.
24. This action was authorized by the same section of the Administrative Case Litigation Law, supra note 22. Following this decision, construction of the base continued. It was completed in June 1972 and went into operation as of September 1973. Japan Times, Sept. 8, 1973, at 5, col. 1.
25. The Constitution provides for recognition "[t]hat all peoples of the world have the
could overrule the Sapporo District Court's verification of standing by deciding that either the "urgent necessity" or "public interest" issues should have been determined adversely to the plaintiffs. However, the alleged injury would continue to threaten these or other potential plaintiffs. The Supreme Court should concede standing to sue in an Article 9 claim by adopting either of two alternative theories. First, an economic injury-in-fact was alleged. The cancellation of the Forest Reserve Designation increased the likelihood of flooding, thus causing real conservation problems. Second, assuming *arguendo* that there was no economic injury-in-fact, summary disposition on the grounds of standing would discount the unique characteristic of the Constitution's literal wording regarding pacifism. As indicated by a Japanese commentator:

[M]aintenance of military forces . . . can not guarantee human rights and the general welfare of people to their full extent. Costly armaments require the financial sacrifice of the people, and a war can not be waged without restricting fundamental human rights.

28 Since rearmament boldly contradicts the literal language of Article 9, these plaintiffs have demonstrated their personal stake in this litigation. Neither the Sapporo High Court nor the Supreme Court can comfortably refute the District Court's favorable determination of standing.

2. Judicial Duty to Decide Constitutional Issues

Article 99 of the Constitution imposes the duty upon all officials to uphold it. The *Sunakawa* case, affirming the constitutionality of American forces in Japan, evidences judicial conservatism likely to reappear in *Naganuma Nike*, although the latter involves indigenous Japanese forces. The *Sunakawa* Court determined that "unless the said treaty is obviously unconstitutional and void, it falls outside the right to live in peace, free from fear and want." *Kenpō* (Constitution) Preamble, para. 2 (Japan, 1946).

26. See note 22 supra and accompanying text.

27. The Forest Law provides that "[i]n the event that it becomes necessary for reasons of public interest, the Minister of Agriculture and Forestry may cancel the Forest Reserve Designation . . . ." 6 LAW IN JAPAN 175 (1974).


29. The text requires that "[t]he Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution." *Kenpō* (Constitution) art. 99 (Japan, 1946) (emphasis added).

30. In reference to the District Court decision in *Naganuma Nike*, one front-page news story suggested that "[m]any observers think that the unprecedented decision is destined to be short-lived in view of the conservative nature of the top court panel." Japan Times, Sept. 8, 1973, at 1, col. 7.
purview of the power of judicial review granted to the court.\textsuperscript{31} In \textit{Naganuma Nike}, the Sapporo District Court measured the administrative action by a constitutional standard, although it need not have done so,\textsuperscript{32} and thus the Supreme Court could decide the case without reaching the constitutional issue. However, the District Court's election to use the Article 9 yardstick highlighted the artificiality of tolerating what it considered the unconstitutional exercise of state power. The court stated that when

\begin{quote}
[t]he court finds that a judgment of a case will not settle the underlying dispute without deciding a constitutional issue raised therein the court has the duty to decide the constitutionality of the act taken by the state.\textsuperscript{33}
\end{quote}

It appears that the ultimate appeal must be determined on constitutional grounds or else the Supreme Court is in effect insulating state action from judicial review. Like the Sapporo District Court, it must accept its duty to settle constitutional issues in order to satisfy Article 99's judicial "[o]bligation to respect and uphold [and interpret] this Constitution."

3. \textit{Political Question Doctrine}

The grounds for invoking the political question doctrine were considered by the District Court as being too vague to operate as a procedural barrier to deciding the substantive constitutional issue.\textsuperscript{34} The defendant's position, that acts of government are excluded from judicial review if political in scope, is incompatible with the principle of judicial supremacy.\textsuperscript{35} The premise behind this doctrine is that defense matters involve political considerations not within the legal domain of the Japanese Supreme Court.\textsuperscript{36} A former Chief Justice of the Supreme Court of Japan\textsuperscript{37} recently commended this theory as a general rule for judicial review. However, he commented:

\begin{quote}
\textsuperscript{31} Sunakawa case at 6 (emphasis added).
\textsuperscript{32} The litmus for ascertaining the validity of agency action could have been "urgent necessity" from the Administrative Case Litigation Law, \textit{supra} note 22, or "public interest" from the Forest Law, \textit{supra} note 27.
\textsuperscript{33} \textit{Naganuma Nike} Case, Appendix at 47.
\textsuperscript{34} \textit{Id}.
\textsuperscript{35} The Constitution provides that "The Supreme Court is the court of last resort with the power to determine constitutionality of any law, order, regulation or official act." \textit{Kenpō} (Constitution) art. 81 (Japan, 1946). The Constitution is "[t]he supreme law of the nation and no . . . act of government . . . contrary to the provisions hereof, shall have legal force or validity." \textit{Id}., art. 98, para. 1.
\textsuperscript{36} See Sunakawa case at 6.
\textsuperscript{37} Kisaburo Yokota, Professor Emeritus of the University of Tokyo.
\end{quote}
Stated reversely, it follows that, if an act is recognized as obviously unconstitutional and void at first sight, it comes within the scope of the power of judicial review of the court and is judged and decided by the court to be unconstitutional and void.38

The better view, therefore, would be that if an act, alleged to be a political question, apparently conflicts with the Constitution’s “war potential” clause, there exists an exception to the general rule which subjects the Government’s action to judicial scrutiny.

Review will necessitate consideration of how objective wording and subjective framer’s intent regarding the Preamble and Article 9 are to influence the outcome.

II

LEGAL NORM OR POLITICAL GOAL?

A. CREEPING CONSTITUTIONALITY

1. Constitutional Origins

Assuming that the Supreme Court opts to review Naganuma Nike on its constitutional merits, little legislative history will support alternative conclusions although some documents will facilitate the inquiry.

The Potsdam Proclamation39 refers to disarmament of Japan but is too indistinct to assist in the construction of Article 9's intended meaning. Although the potential victors sought complete disarmament and abolition of industry enabling Japan to rearm,40 preconstitutional war threats cannot be properly relied upon as a post-war tool of legal analysis. The United States Initial Post-Surrender Policy for Japan41 is likewise without probative value; little weight can be attached to a foreign policy document designed to implement the occupation of Japan. These documents only guided General MacArthur in issuing various directives and establishing the broad outline of reformation.42


39. See SUPREME COMMANDER ALLIED POWERS, 1 POLITICAL REORIENTATION OF JAPAN app. A, at 3 (Report of Government Section 1949) [hereinafter cited as Report of Government Section]. On July 26, 1945, the U.S., the Republic of China, and Great Britain notified Japan that Japan could end the war prior to their striking the final blows.

40. Id. paras. 9 & 11.

41. Id. app. A, no. 11. Japan was to be demilitarized and “the influence of militarism will be totally eliminated from her political, economic, and social life.” Id. Part I. The document further provides that “[J]apanese military strength must be destroyed and not be permitted to revive.” Id. Part IV. However, “[t]he Japanese Government will be permitted . . . to exercise the normal powers of government . . . .” Id. Part II.

42. Report of Government Section xix.
A Matsumoto draft constitution alluded to "[a]rmed forces . . . of a very limited scope such as are necessary for the maintenance of peace and order in the country." General MacArthur’s rejection of this draft was designed to reorient Cabinet thinking. Government Section was ordered to prepare a draft constitution to incorporate the following major point from MacArthur’s own notes:

War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security.

No Japanese Army, Navy, or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.

Naganuma Nike’s challenge is based upon similar language adopted in Article 9. Article 9 would be even stronger had the Cabinet utilized MacArthur’s exact wording, but the Cabinet did not retain the italicized portion of his draft. Nevertheless, renunciation of the sovereign use of force to settle disputes currently prohibits maintaining forces which would create the safest defense, that of striking the first blow.

Unadulterated compliance with the literal wording of Article 9 was short-lived. A bitter political controversy arose over inception of the Japanese Self-Defense Forces in 1950. Some have characterized the SDF as a tool of American imperialism or as part of a reactionary plot designed to reinstitute clandestine control of Japan; others have viewed it as a legitimate expression of the sovereign right of self-defense.
gardless of the political debate, however, Japan is now primarily responsible for its external defense.  

2. United States-Japanese Relations

The United States surely regrets the zeal with which it sought to make Japan a nonmilitary nation in connection with Article 9. The Communists succeeded in the 1949 civil war in China. In 1950, the outbreak of the Korean War further threatened both the American and Japanese defense posture in the Orient. By 1951 a peace treaty between Japan and the Allies avowed that, despite the existence of Article 9:

[J]apan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter of the United Nations and . . . Japan may voluntarily enter into collective security arrangements.

Naganuma Nike can be viewed as challenging this language despite the ruling in Sunakawa. However, the Defense Agency has not clearly posited that Japan is now substantially responsible for its external defense. Defense of Japan is still officially considered to be a joint responsibility undertaken by treaty with America.

3. United Nations Obligations

These treaties give rise to an additional issue, dormant until the Supreme Court authoritatively interprets the constitutional applicability of Article 9 to the SDF. As a member of the United Nations, Japan

48. The number of SDF Forces in Japan has steadily grown: from 146,285 in 1954 to 231,438 in 1967, for example. Meanwhile, the United States forces stationed there have been shrinking in size. Id. Table I.


49. See note 45 supra. General MacArthur later repudiated any earlier notions of depriving Japan of all self-defense mechanisms. Id. See also N.Y. Herald Tribune, Jan. 1, 1950 at 1, col. 4 and at 17, col. 2.


51. See text accompanying note 12 supra, wherein the Court alluded to Japan's inherent right of self-defense as a basis for permitting foreign war potential to be maintained on Japanese soil.

52. See, e.g., JAMINTÔ ANZEN HOSHÔ CHÔSAXI (Liberal Democratic Party Research Committee), NIHON NO ANZEN TO BÔEI (Japan's Security and Defense) 266 (1965).
shares an international obligation to "[g]ive the United Nations every assistance in any action it takes in accordance with the present Charter . . . ." If constitutional interpretation invalidates all war potential, participation in United Nation interventions may be foreclosed. If nothing else, the wording of Article 9 casts grave doubt upon the dispatch of the SDF abroad, even for a purpose incidental to international peacekeeping. United Nations members are not legally bound to provide such forces absent agreement, but security treaties with Japan assert the U.N. Charter obligation of collective self-defense and foreshadow Japanese acquiescence in an arrangement potentially requiring use of her armed forces in foreign conflicts. The breadth of the Constitution's war renunciation clause is susceptible to an interpretation that neither wars of sanction nor wars of self-defense are permissible. Assuming the Supreme Court analyzes Naganuma Nike on constitutional grounds, the issue of United Nations participation would not be embraced in a holding concerning validity of internal administrative action. If the SDF is unconstitutional, the Government impliedly would continue to violate the war potential clause by maintaining forces under the guise of contributing to United Nations Emergency Forces.

Resolution of these issues is contingent upon whether Article 9 is a legally established norm or merely a political goal. The Court cannot bootstrap the more liberal interpretation of Article 9 by relying on foreign-related documents, treaty terms, or United Nations Charter provisions as a basis for constitutionality. The proper construction of Article 9 in Naganuma Nike must be based on indigenous constitutional sources for measuring administrative or other governmental acts.

53. U.N. CHARTER art. 2, para. 5 (emphasis added).
54. The Charter provides that:

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities . . . necessary for the purpose of maintaining international peace and security.

U.N. CHARTER art. 43, para. 1 (emphasis added). Members must agree to accept and carry out all Security Council decisions. Id. art. 25. If a member, not represented on the Council, is called upon to provide armed forces under art. 43, that member may participate in decisions incident to the satisfaction of its obligation. Id. art. 44.
55. See, e.g., note 50 supra and accompanying text.
56. Japanese scholars are split over the type of "war" renounced by Article 9. One school insists that wars of self-defense are not within its scope. NATIONAL STUDIES ON INTERNATIONAL ORGANIZATION, JAPAN AND THE UNITED NATIONS 214 (1958). The majority view interprets Article 9 as prohibiting all wars. Kozai, Japanese Participation in United Nations Forces: Possibilities and Limitations, 9 JAPAN. ANNUAL INT'L L. 10, 11 n.3 (1965). Under this view, Japan cannot use force in any international dispute since it does not recognize the right of belligerency of the State.
B. THE PREAMBLE

One intrinsic basis for measuring the legality of the SDF is the preliminary language introducing the Constitution. Its analytical utility in resolving the Article 9 controversy focuses upon whether it created positive norms, or is merely declarative of political aspirations. Both foreign and Japanese scholars have referred to the Preamble as only political rhetoric serving no useful purpose. In spite of these opinions, the Naganuma Nike court espoused the judicial viewpoint that "[t]he meaning of the Preamble (and Article 9) should be found objectively in the same manner as any other legal norm." 59

Six clauses in the Preamble are relevant in characterizing it as either political or normative. The first clause, the proviso that "[n]ever again shall we be visited with the horrors of war," 60 could hardly be construed as positive law since it is not an identifiable statement of state responsibility. Other international documents espouse the natural law philosophy that war is no longer an acceptable means of international diplomacy; 61 such wording is too readily identified with diplomatic rhetoric abandoned in the course of time and under the shadow of alien forces.

The second clause, the preambular expression "peace for all time," 62 similarly lacks the force of positive law. The concept of disarmament, as a positive duty of the state, has persisted since the Old Testament. This tradition arguably represents an aspect of the Japanese way of life,

57. SECRETARIAT OF THE COMMISSION ON THE CONSTITUTION, COMMENTS AND OBSERVATIONS BY FOREIGN SCHOLARS ON PROBLEMS CONCERNING THE CONSTITUTION OF JAPAN, 1946 at 79 (1964). The language of the Preamble has been characterized as "[r]hetoric and evangelical, strongly flavored by the natural law concepts of the 18th century [evidencing] the American aspiration of the entire document." Id. 154. The conceptual background of the revision debate can be found in Takayanagi, Some Reminiscences of Japan's Commission on the Constitution, supra note 45, and Takayanagi, The Conceptual Background of the Constitutional Revision Debate in the Constitution Investigation Commission, 1 LAW IN JAPAN 1 (1967).

58. See, e.g., Yokota, Renunciation of War in the New Japanese Constitution, 4 JAPAN. ANNUAL INT'L L. 16, 18 (1960); Wada, A Discussion of the Right of Self-Defense and War Potential, supra note 18, at 114.

59. Naganuma Nike case, Appendix at 48.

60. KENPO (Constitution) Preamble, para. 1 (Japan, 1946). This phrase was considered by the Court in Sunakawa, and the Court determined that in providing Japanese facilities for foreign armed forces, it could not be said that "there is no danger of the horrors of war being visited upon our country . . . contrary to the spirit of the Constitution . . . ." Sunakawa case, MODERN JAPANESE LAW 199. In finding the treaty constitutional, however, the Court did not rely on this clause.


62. KENPO (Constitution) Preamble, para. 2 (Japan, 1946).
but it expresses a broad hope, and is not a legal yardstick for measuring constitutionality of government action. Japan’s so-called "Peace Constitution" expresses a desire for peace not necessarily coextensive with a denial of the right of self-defense. All too often, the unavoidable path to peace is frequently marked by maintenance of war potential as a deterrent.

A more substantial inquiry, regarding the characterization of the Preamble as political aspiration or legal norm, results from examination of the third clause; that "[w]e have determined to preserve our security and existence . . . ." and the fourth clause, which says that Japan must "[o]ccupy an honored place in an international society striving for the preservation of peace . . . ." Other nations adopt preservation of their own national interests as the underlying rationale for maintaining war potential for self-defense. Therefore Japanese progressives view the constitutional doctrine of unarmed neutrality as inimical to Japan’s own rational interests. Japan cannot be conquered by those who would take advantage of her pacifist model for international relations. The rejection of naked neutralism in *Sunakawa* attests to Supreme Court interpretation of the "preservation of security" and "honored place" clauses as a logical basis for maintaining defense potential rather than war potential. Since *Naganuma Nike* focuses upon indigenous rather than foreign forces, former judicial construction of the Preamble could be only marginally relevant. It is this author's opinion that the preservation of security clause is a pervasive norm defining state responsibility to its citizens. When the Preamble is juxtaposed with Article 9 of the Constitution, a practical conflict is evident. The uniqueness of Japan’s pacifist Constitution is rooted in its literal renunciation of war potential. Since other nation states have not adopted corresponding constitutional language, Japan’s war potential renunciation is by definition in a vacuum. This has given rise to creation of the SDF and *Naganuma Nike* litigation. Since the Government recognizes a duty to sustain defense potential, "preservation of security" has been redefined.

63. *Id.*
64. *Id.*
65. For a discussion of this theory beyond the scope of this article, see Ueyama, *Wanted: An Autonomous Approach to Defense*, 4 J. Soc. & Pol. IDEAS IN JAPAN 43 (1966). A representative Japanese constitutional scholar advocates that "[t]he preamble . . . has never meant that we cannot help it even if our nation is conquered by a foreign power." *Yokota, Renunciation of War in the New Japanese Constitution*, supra note 58, at 18.
66. The Court stated:
In view of this [occupation of an honored place] 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 . . . .

*Sunakawa* case at 3.
The fourth clause, asserting a "right to live in peace," further supports the normative value of the Preamble, albeit adversely to the interests of the plaintiffs in Naganuma Nike. If the Government presses the typically political connotation of preambular wording, it will advocate that this right is an empty promise if Japan is without forces to maintain peace. This reading is supported by an opinion of two Justices in the Sunakawa case, although the Naganuma Nike court used it differently. Nonetheless, judicial utilization of this clause is evidence of its legally binding effect, notwithstanding mixed interpretations. When compared with the war renunciation proviso of Article 9, the Naganuma Nike construction of the right to live in peace is more rational. Renunciation of war potential, arguably including the stationing of Nike-Hercules missiles, conflicts with the Sunakawa interpretation of the right to live in peace as guaranteed by the Constitution's Preamble.

The sixth and final clause relevant to interpreting the alternative political or legal status of the Preamble is that "[n]o nation is responsible to itself alone . . . ." The duty of Japan to sustain its sovereignty in relation to other nations includes maintaining regional defense posture and cooperative United Nations maintenance of international peace and security. If the Constitution is not altered to clearly conform to this duty, State responsibility is merely political in nature and convertible by changing circumstances and variable interpretations.

As indicated by the Sunakawa District Court, which held American troop presence to be an unconstitutional violation of Article 9, the Preamble "[r]epresents a lofty ideal and an heroic resolve that we will be the vanguard in realizing ever-lasting world peace based on justice and order." The principle of pacifism has been legalized in its strictest sense in the Japanese Constitution. This does not prohibit repulsion of aggressive forces, but does prohibit laws and administrative acts in conflict with pacifism. Considering the Constitution as a whole, it is

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68. Our Constitution recognizes the "right of survival" of our country as it is clear from the proclamation that "... we recognize ... the right to live in peace" as contained in the Preamble. Sunakawa case at 59 (supplemental opinion by Okuno and Takahashi, JJ.).
69. The court in Naganuma Nike reasoned that the Forest Act protects "the local inhabitants' right to live in peace . . . ." and determined, therefore, that "such inhabitants shall have standing in court to attack the validity of such disposition." Id., Appendix at 47.
71. Kenpō (Constitution) Preamble, para. 3 (Japan, 1946).
72. Sunakawa Dist. Ct. case, MODERN JAPANESE LAW 201. The District Court was reversed on appeal to the Supreme Court.
73. Id. at 197.
apparent that at least the preambular governmental duties to "preserve security and existence" and ensure the "right to live in peace" are legally binding requirements that must be injected into appellate consideration of Naganuma Nike. Characterizing these clauses as binding norms is a condition precedent to analyzing the meaning of constitutional war renunciation.

C. ARTICLE 9

1. The Civil Law and Statutory Construction

A common lawyer's attempt to guide the Supreme Court in Naganuma Nike is fraught with the danger of superimposing common law statutory construction upon the civil law of Japan. Civil law courts do not judicially legislate as freely as do their common law counterparts; intent is secondary to manifest meaning. In Japan, the imported Western apparatus for administering the laws has not been utilized extensively as in the West. Although the codes, statutes, and Constitution itself are of Western origin, judicial interpretation is not expected to operate as in the United States. Drawing from the common law method, the Supreme Court would attempt to fathom the intent of the framers while construing the Constitution within a contemporary framework.

The first version of Article 9 emanated from General MacArthur's

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74. Statutory interpretation in the United States, in the words of one scholar, "permits the court to be inconsistent. The freedom is concealed either as a search for the intention of the framers or as a proper understanding of a living instrument, and sometimes as both." E. LEVI, AN INTRODUCTION TO LEGAL REASONING 7-8 (1963).

75. This difference is typically rooted in the supremacy of the legislature to create sufficiently detailed laws so that mistrusted judges do not arbitrarily misapply the law. See generally, F. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW (1963).

76. See generally authorities cited in note 8 supra.

77. The Japanese people prefer the mediation method to the black-and-white judicial method in the resolution of disputes. Some account for this attitude by the deep influence of the Confucian teaching that "harmony is to be valued," that is to say, by the general feeling that the judicial method is not conducive to abiding harmony between the parties concerned.


78. Participants included the U.S. Department of State (State-War-Navy Coordinating Committee & Office of the Political Advisor), Supreme Commander Allied Powers (Government Section), Far Eastern Advisory Commission (Headquarters in Wash., D.C.), Japanese Diet's Matsumoto Committee for the Investigation of Constitutional Problems. Regarding the interplay of these participants, see Ward, supra note 45. See generally Report of Government Section.

79. This approach is particularly urged since, as one observer has put it, "of all the possible candidates, only the Japanese Government displayed any reluctance to father this document." Ward 987-88.
due to impatience with the meticulous drafting process of the
Mastumoto Cabinet Committee for the Investigation of Constitutional
Problems. His draft did not permit war potential even for preservation
of security. The Occupation's zeal to ensure permanent elimination of
Japanese war potential, however, does not dictate contemporary adher-
ence to that policy. After the outbreak of the Korean War, MacArthur
issued a subsequent directive to Prime Minister Yoshida to establish a
National Police Reserve. It is possible that MacArthur drew upon the
authority of the very first official SCAP directive as a legalistic cello-
phone masking fear of a Korean or Chinese takeover of Japan.

2. Analysis of Article 9

Several portions of Article 9 must be analyzed by the Naganuma Nike
Supreme Court in order for the Court to mitigate popular accusations
of arbitrary statutory construction in its attempt to interpret the Consti-
tution as a "living" document.

The initial phrase, "Aspiring sincerely to an international peace based
on justice and order, . . ." bears upon whether subsequent clauses are
normative or merely expressions of a pacificist political posture. The
Japanese Commission on the Constitution has pointed out that during
the drafting of the 1946 Constitution General MacArthur stated that
"Article 9 is in the nature of a political manifesto, however important,"
and that it would not prevent Japan from defending herself from aggres-
sion. This observation is clearly contrary to MacArthur's personal draft
of Article 9 renouncing war potential even to preserve internal security.
His subsequent opinion would be analogous to a reverse ex post facto,
supporting SDF constitutionality while the 1946 text prohibits mainte-
nance of air, sea, and land forces. Various Japanese and American

80. See text accompanying note 45 supra.
81. SCAP lamented that "[t]he Government . . . indicated little desire to undertake
the work, and attempted to resolve the issue with a show of words and a bow in the
82. The difficulties of implementing this directive, in view of the attitude of the popu-
lace toward war, is discussed in S. Yoshida, The Yoshida Memoirs 182-95 (1962).
83. SCAP's first General Order provided that "[t]he Japanese Police Force . . . will
be exempt from this disarmament provision." Supreme Commander Allied Powers,
SCAP Directive to the Imperial Japanese Government No. 1 (Military and Naval) at 2
(1945).
84. Article 9, para. 1 (emphasis added).
86. Commission Chairman Takayanagi agreed with MacArthur's interpretation that
Article 9 is essentially a political manifesto. See Commission on the Constitution 218.
Scholarly opinions advocating constitutionality of the SDF law are summarized in Wada,
A Discussion of the Right of Self-Defense and War Potential, supra note 18, at 90.
87. Prof. John Maki of the Far Eastern and Russian Institute of the Univ. of Washing-
ton spoke of the Article 9 controversy as an issue that is political, not constitutional, in
scholars do not consider Article 9 to be legally binding. Notwithstanding the apparent normative nature of subsequent clauses, interpretations based upon intent of the framers is conflicting. The “political manifesto” characterization of the internal text is far less acceptable than when advocating the similar political effect of the Preamble.

The legally binding nature of Article 9 is more evident in the phrase whereby the Japanese “[f]orever renounce war as a sovereign right of the nation.”\textsuperscript{88} The plain meaning of the phrase indicates that all war, not only aggressive war, was thereby renounced. Arguably, if a sovereign possesses the inherent right of self-defense,\textsuperscript{89} it may renounce that right. The clause implies that Article 9 provided for unilateral disarmament since Japan is expressly precluded from maintaining war potential.

The difficulty of statutory construction is discernible from reviewing the phrase which modifies the war renunciation clause. Threat or use of force “[a]s a means of settling international disputes” is clearly illegal. Whether this clause applies to internal defense is unclear. The constitutional vantage point from the pending Naganuma Nike litigation gives rise to a different connotation than existed during the occupation. Article 9 resolved an international problem, not necessarily a domestic one. Allied zeal for suppressing Japan’s future war potential was evidenced by the mostly give-but-little-take of the entire constitutional drafting process.\textsuperscript{89} A modern view of the international dispute clause indicates that the Article 9 prohibition of war potential does not extend to indigenous self-defense measures.\textsuperscript{91} In an age of atomic intercontinental ballistic missiles, Japan’s SDF would not amount to a tenable offensive war force.\textsuperscript{92} Due to the alternative theoretical constructions of the international disputes clause it could be understood as normative in nature, but such an understanding would be a makeweight argument

\textsuperscript{88} Article 9, para. 1.

\textsuperscript{89} See U.N. CHARTER art. 51. When the SDF bill was pending before the Japanese Diet, Minister Kanamori recognized the right of self-defense although it was not stated in the Constitution. COMMISSION ON THE CONSTITUTION 217.

\textsuperscript{90} Address by Dale Hellegers, Japan Society of New York City, Feb. 5, 1975. The results of Ms. Hellegers's exhaustive study of the process will be published by the Parker School of Foreign and Comparative Law of Columbia University in early 1976.

\textsuperscript{91} In this connection, see the self-defense provision of the United Nations, U.N. CHARTER art. 51.

\textsuperscript{92} On the other hand, if warfare is limited to tactical rather than strategic combative forces due to fear of atomic weapons, the SDF would continue to represent a militarily feasible means of waging external combat.
for whichever constitutional position the Supreme Court ultimately adopts.

The phrase "[i]n order to accomplish the aim of the preceding paragraph . . ." at the beginning of paragraph two of Article 9 was added by amendment of Chairman Ashida of the House of Representatives' drafting committee with the apparent intent of making way for the interpretation that Article 9 was not applicable to self-defense mechanisms. This could ingeniously be used as a device for legalizing the SDF. The intent underlying the Ashida amendment conflicts with the explicit language following it, which prohibits land, sea or air forces. Proponents of the Ashida amendment rationale would attempt to demonstrate that the ground-to-air missiles of Naganuma Nike cannot be used as offensive weapons. The aim of paragraph one of Article 9 is merely to prevent accumulation of offensive war power. Therefore, deployment against foreign aircraft or offensive missiles is inherently a defensive military function. This line of reasoning was developed to controvert the plain meaning of paragraph two's conspicuous renunciation of land, sea and air forces which constitute war potential without any stated exception.

When the Defense Forces Bill was presented to the Diet in 1950, the Government adopted the Kanamori theory of unilateral disarmament. The SDF was not considered to be war potential in conflict with Article 9, and the judicial dictum in Sunakawa reiterated that the prohibition on war potential was not intended to mean naked neutralism. Nevertheless, Article 9 is not to be retracted as easily. Its elasticity is limited by examining the Constitution as a whole. Of eleven chapters, it is one of only two chapters which contain only one article. This attests to its preferred position among other constitutional articles as well as a limitation on broadened interpretation surely disavowed by the drafters. In support of this view, the Naganuma Nike District Court determined that the interpretation of legal norms such as Article 9 should not be

93. For the complete text of Article 9, see note 2 supra.
94. COMMISSION ON THE CONSTITUTION 217-18. This intent is in square conflict with the feelings of Former Prime Minister Yoshida that "[r]earmament, for Japan, is simply a word with which politicians and others may conjure, but which to anyone with the slightest knowledge of the subject can never be anything more than a word." YOSHIDA, supra note 82 at 191-92.
95. See note 89 supra.
96. COMMISSION ON THE CONSTITUTION 218.
97. See text accompanying note 12 supra.
98. Article 96, regarding amendments, is the only other article occupying a complete chapter with its text. This reinforces a construction that both renunciation of war and constitutional amendment were deemed important enough to be treated as complete and separate chapters.
inherently altered by changed political circumstances.\footnote{Naganuma Nike case, Appendix at 48.}

The final clause of Article 9 prohibits the "[r]ight of belligerency of the state . . . .\footnote{Article 9, supra note 2, para. 2.}

Belligerency implies taking part in war or participating in actions likely to provoke fighting.\footnote{It is theorized that international law should recognize an intermediate phase between war and peace and that the existence of "war" should be defined differently for different purposes. \textit{See} Jessup, \textit{Should International Law Recognize an Intermediate State Between Peace and War?}, 48 \textit{Am. J. Int'l L.} 98 (1954); McDougal, \textit{Peace and War: Factual Continuum with Multiple Legal Consequences}, 49 \textit{Am. J. Int'l L.} 63 (1955).}

Based upon the belligerency clause, a makeweight argument could be asserted in favor of SDF constitutionality. The SDF currently exists for nonaggressive purposes, and is therefore nonbelligerent. The mounting equipment, strength, and budget of the SDF, however, is proportional to its mounting capability for belligerency. The balance of power has historically affected the decision of potential belligerents to wage acts of belligerency. The contemporary operational size of the SDF is not conducive to continued strained interpretations of Article 9, attempting to legalize what the literal language of the Constitution prohibits.

III

LEGISLATIVE REFORM—INITIATIVE OR INERTIA?

Since constitutional interpretation is an unsatisfactory method of resolving the Article 9 controversy, it would be preferable if the constitutional issue in \textit{Naganuma Nike} can be resolved by the legislative process rather than by judicial decision. As a practical matter, therefore, considerations of public sentiment become paramount.\footnote{A Japanese opinion poll published in 1969 indicated popular sentiment for and against the SDF. 17 percent of the 3000 voters interviewed thought that the SDF was unconstitutional, while 40 percent thought it was constitutional. A majority of 64 percent thought that the constitution need not be revised, while 19 percent favored revision. \textit{Asahia Shimbum}, \textit{Opinion Poll on the Problems of Defense and the Security Treaty} 8, English translation in \textit{Modern Japanese Law} 319.}

Sometime prior to the decision, the internationally famous novelist Yukio Mishima had committed harakiri at Eastern Army headquarters in Tokyo, appealing for constitutional revision.\footnote{Japan Times, Sept. 8, 1973, at 3, col. 6.}

Twenty-five minutes prior to the \textit{Naganuma Nike} decision, the Defense Agency's Director Yamanaka told a press conference that he was prepared to walk a "road of hell" since the SDF authorities expected the Sapporo District Court to rule adversely to the SDF.\footnote{Id.}

The day of the decision, Mayor Motoyama of Nagoya announced that he would not allow a park in the city to be used
for the October 28th anniversary of the SDF. After the decision, the General Council of Trade Unions of Japan launched a nationwide anti-SDF campaign on the basis of Naganuma Nike.

These reactions encompassing the District Court decision are indicative of a rift between political fact and the constitutional fiction of Article 9. SCAP did not "order" the Japanese Government to adopt its 1946 draft constitution. Due to impatience with the Matsumoto Committee, Cabinet representatives were given two days to "accept" Government Section's draft as a basis for revision acceptable to the Occupation. Ten days later, Japan adopted a draft constitution substantially similar to the MacArthur draft. The Emperor officially sanctioned a draft, produced the following month, as representing the will of the people.

Since withdrawal of the Occupation in 1952, constitutional revision has been continuously debated. Japan's mutual interests with the United States regarding Japan's defense posture has by fait accompli given rise to creeping constitutionality for her maintenance of land, sea, and air forces which includes the missile base controversy in Naganuma Nike.

As reported by the Commission on the Constitution, those favoring amendment are of two varieties. First, there are those who support the unilateral disarmament interpretation of Article 9, seeking amendment in order to legitimize the SDF. This view finds support in the Sunakawa case which carved the implied right to self-defense from the Preamble.

A second basis for revision is rooted in disgust with academic interpretations, with a view toward revising the scope of Article 9 with crystal clarity. As stated by the Managing Director of the Federation of Employer's Associations, "[a]s long as Article 9 of the Constitution remains the SDF will continue to be a headache."

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105. Id.
106. Japan Times, Sept. 12, 1973, at 2, col. 1. The 1,000,000-member All Japan Prefectural and Municipal Workers' Union similarly lauded the court's decision by refusing to cooperate with the SDF in recruitment of men and women. Id., Sept. 8, 1973, at 3, col. 6. The Sapporo SDF decided to hold its annual anniversary review on base rather than in the city. The change was allegedly not the result of the Naganuma Nike decision. Id., Oct. 16, 1973, at 3, col. 6.
108. Id. at 1000.
109. Id. at 1002, drawn from Supreme Commander Allied Powers, Summation of Non-Military Activities 18 (1946).
110. See generally Commission on the Constitution, supra note 85, at 219.
111. See note 89 supra and text accompanying notes 95-96 supra.
112. See text accompanying note 12 supra.
113. Japan Times, Sept. 8, 1973, at 3, col. 1. Mr. Sakurada noted that "[t]he SDF is
Liberal-Democratic Party adheres to this second rationale for revision. From its strong and controlling Diet position, the Party has urged that revision is necessary to clearly delineate the role of the SDF. The Party rebuked the *Naganuma Nike* decision as being unacceptable since “[e]very Japanese understands that Japan has a right to self-reliant defense.” Other political parties, however, oppose amendment and support the *Naganuma Nike* ruling. These parties are backed by business and labor.

The Commission on the Constitution reported that those opposed to amendment are also of two groups. One viewpoint is that there is no practical need to revise Article 9 since establishment of the SDF was impliedly constitutional. The moderates in this group reason that the Constitution does not negate the right of self-defense and that “[i]t is natural that Japan should maintain a minimum level of self-defense power in order to maintain her territorial integrity.”

The three major opposition parties do not favor amendment. They support the unilateral disarmament interpretation of Article 9 and agree with the *Naganuma Nike* ruling. All three parties unsuccessfully urged the Government not to appeal. The Japan Socialist Party and Japan Communist Party ventured a step further than the Komeito Party in demanding immediate dissolution of the SDF.

This parliamentary clash precludes the likelihood of legislative resolution of the issue prior to a Supreme Court decision in *Naganuma Nike*. Pacifists view the SDF as inherently unconstitutional. The moderates support the SDF’s inherent constitutionality. These strange bedfellows oppose revisionist hopes of amending Article 9 to either prospectively...
create or retrospectively ratify SDF constitutionality. This political stalemate has vitiated legislative momentum towards amendment of Article 9, making it impossible for the Japanese people to vote upon the SDF's constitutionality. The condition precedent to popular referendum is a concurring vote of two-thirds of the members of each House of Japan's bicameral legislature.\textsuperscript{124} Constitutional amendment is therefore unlikely.

Progressive politicians and a majority of constitutional scholars want Japan to remain unarmed and neutral, thereby avoiding participation in the cold war. Conservatives adhere to individual and collective defense measures and scoff at what they term naked neutralism. As one Japanese commentator laments:

\begin{quote}
It is noteworthy that these two schools, both of which completely rule out an independent defense system for Japan, grew out of American foreign policies which, at two different periods, the United States formulated on the basis of her own national interest.\textsuperscript{125}
\end{quote}

Nevertheless, the tide of public opinion appears to be increasingly opposed to revision of Article 9.\textsuperscript{126} On the other hand, recruitment by the SDF has steadily increased throughout the same period.\textsuperscript{127} Proponents of the SDF view Article 9 as incidental to a foreign constitution imposed by clandestine American influence, designed to restrain the otherwise universally recognized inherent right of self-defense.

**CONCLUSION**

National debate has pervaded armed forces activities since the inception of the Self Defense Forces over twenty-five years ago. This has given rise to the notion that the renunciation of war in Article 9 is the dead letter of an outmoded Constitution imposed during foreign Occupation. Article 9 contains no reservation in its renunciation of war potential, however, and the phrase "war potential" should include the missile base at Naganuma. The fault regarding this long-smoldering controversy lies both with the legislative and the judiciary: the former has been unwilling to put the war renunciation article to the democratic test of popular referendum and the latter has acquiesced in the creeping constitution-

\textsuperscript{124} *Kenhō* (Constitution) art. 96, para. 1 (Japan, 1946).
\textsuperscript{125} Ueyama, *Wanted: An Autonomous Approach to Defense*, supra note 65, at 43.
\textsuperscript{126} The Asahi Shimbum polls, e.g., note 102 supra, show that in 1952 32 percent opposed revision; over a span of eleven years, this figure climbed to 61 percent. See also Ueyama, *Wanted: An Autonomous Approach to Defense*, supra note 65, at 45. Ueyama is of the opinion that distrust of military power which accrued during the Meiji period coupled with contemporary abhorrence of nuclear weapons are the prime factors causing increased opposition to revision.
\textsuperscript{127} See note 48 supra.
ality of the Japanese forces by its stagnant view that the SDF is an irreversible \textit{fait accompli}.

If the \textit{Naganuma Nike} Supreme Court holds the missile base to be "war potential," in accordance with the plain meaning of the Constitution, the legislature will be abruptly disgorged from the ivory tower dispute which has worked to deny the \textit{people} an opportunity to amend Article 9. The SDF should be authoritatively ruled unconstitutional. The voter would then be afforded the occasion to authorize the SDF by constitutional amendment, thereby validating both treaty obligations with the United States and international peacekeeping contributions.\footnote{Japanese constitutional scholars are split regarding the conflicting Constitutional Supremacy theory and the Treaty Supremacy theory. Sato, \textit{Treaties and the Constitution}, 43 \textit{Wash. L. Rev.} 1057, 1063-66 (1968). If the latter theory prevails, a finding of SDF unconstitutionality would not relieve Japan of treaty obligations in the nondomestic sphere. Even if the former theory prevailed, customary international legal principles dictate that domestic law is no defense to breach of a public international covenant. \textit{See}, \textit{e.g.}, notes 3 \& 54 supra.} Autonomous self-defense will be more palatable to the most extreme pacifist than would another generation of creeping SDF constitutionality. Government branches which fear placing the national destiny in the hands of the voter are as defunct as the Constitution they purport to uphold.
APPENDIX

Itō v. Minister of Agriculture and Forestry*
HENREI JIHÔ (No. 712), in HANREI TAIMUZU (No. 298) 140
Sapporo District Court, Sept. 7, 1973

In order to permit the construction of an Air Self-Defense Force Nike-Zeus missile base and connecting roads, the Chief of the Sapporo Defense Facilities Office on June 12, 1968, presented to the Governor of Hokkaidō a petition addressed to the Minister of Agriculture and Forestry requesting the cancellation of the Forest Preserve Designation (Hoanrin shitei) of a section located in the Township of Naganuma of the Mt. Umaoi National Forest in Hokkaidō. Since 1897 extensive areas of the forest had been protected as a forest preserve under article 25(1) of the Forest Law or equivalent statutes for the purpose of water resource conservation. After two public hearings—the second gavelled to a close in the midst of disruption and turmoil—the Minister of Agriculture and Forestry on July 7, 1969, announced cancellation of the designation pursuant to article 26(2) of the Forest Law. Article 26(2) provides:

In the event that it becomes necessary for reasons of public interest, the Minister of Agriculture and Forestry may cancel the Forest Preserve Designation as to that portion.

Construction began immediately. Whereupon 271 local residents opposed to the base and their 453 attorneys of record brought the above action for revocation of the cancellation of the disposition of the Minister of Agriculture and Forestry and an additional suit for suspension of its enforcement. In the latter action the Sapporo District Court ordered the suspension (Itō v. Minister of Agriculture and Forestry, HANREI JIHÔ (No. 565) 23 (1969), HANREI TAIMUZU (No. 238) 287 (1969). The Sapporo High Court, however, reversed the decision on the grounds that adequate precautions had been taken to preclude any “urgent necessity” (kinokyū no hitsuyōsei) arising out of a danger of flooding that might require suspension of the administrative disposition. The facilities for the missile base were completed by June, 1972.

The decision on the action for revocation of the cancellation of the disposition of the Minister of Agriculture and Forestry was handed down on September 7, 1973, Judge Fukushima writing the opinion for the three judge court.

* The English statement of facts is reprinted with permission of the Japanese American Society for Legal Studies from 6 LAW IN JAPAN 175 (1973) (footnotes omitted). The English summary translation of the court’s opinion has kindly been provided by Professor Hideo Tanaka of the Tokyo University School of Law.
The District Court revoked the disposition which cancelled the forest reserve designation on the grounds that the construction of the missile base did not constitute "public interest" as provided by the Forest Act.

The Court first found that the plaintiffs had standing to sue. It said: As the provisions of the Forest Act show] the system of forest reserve purports to protect interests in the safety of life, person, property, health and other conditions of life of inhabitants in localities surrounding a forest reserve. Such interests are not merely reflex interests as the defendant argues but something legally protected by the Forest Act . . . .

In addition, the provisions of the Forest Act shall be understood in the context of our constitutional system . . . . Thus understood, they are to be understood as protecting the local inhabitants' "right to live in peace" (Constitution, Preamble) with the aim of realizing the fundamental principles of our constitution, i.e., democracy, respect of fundamental human rights, and pacifism. Accordingly, if the disposition made by the defendant under the Forest Act invades or threatens to invade the local inhabitants' "right to live in peace," such inhabitants shall have standing in court to attack the validity of such disposition. [Then the court said that this case should not be disposed of solely as a matter of statutory interpretation even if possible, because] In case the court finds that a judgment of a case will not settle the underlying dispute without deciding a constitutional issue raised therein the court has the duty to decide the constitutionality of the act taken by the state. It should not take a negative stand to evade deciding a constitutional issue.

For though the court may give the appearance of giving redress to the parties by deciding the case on other grounds, such redress is only formal and superficial in nature and may give rise to another case under a different outlook deriving from the same basic dispute. This is not the right way of truly settling the dispute and giving redress to the parties. In addition, such judgment would mean that the court acquiesces and tolerates the unconstitutional exercise of state power, thereby opening the way for further development of unconstitutional practice. This would in fact make it difficult for the court to exercise its power of judicial review in the future . . . ., and would nullify the "obligation to respect and uphold this Constitution" imposed upon all public officials including judges by Article 99 of the Constitution.

. . . .

Article 26(2) of the Forest Act provides that cancelling the forest reserve designation should be done on the ground of "public interest." Needless to say, "public interest" should be something recognized of value under our entire legal system which has the Constitution at its top. If the Self Defense Force is unconstitutional in its existence, the aim
claimed by the defendant in cancelling the forest reserve designation... cannot constitute "public interest." In order to construe the term "public interest" in the Forest Act, we must therefore decide the issue whether the installation of defense equipment in question is unconstitutional or not.

[The court then dismissed the defendant's argument on the "political question", saying that past cases invoking this doctrine were concerned with the relationship between the Cabinet and the Diet, international affairs of the Diet, or treaties, and that] "the concept of being highly political nature" or "concerned with the fundamentals of government" alleged by the defendant as the basis for invoking the doctrine of "political question" is very vague... Whenever the constitutionality of a statute is questioned the matter inevitably involves a question of more or less political nature... If one excludes some act of the government from the scope of judicial review by relying on a dangerously overbroad interpretation of such a vague concept, one might lead the way for closing the door of the court to people asking redress from the blunder of the government. The defendant's argument, we believe, is not compatible with the principle of government by law, and judicial supremacy as provided by Article 81 of the Constitution, as well as Articles 97 and 98.

... The Constitution clearly sets up legal norms in its Preamble and Article 9 on the issue of the constitutionality of the Self Defense Forces, i.e., whether Japan should maintain armed power for her national security. The meaning of the Preamble and Article 9 should be found objectively in the same manner as in interpretation of any other legal norm. Their interpretation should not change with the shift in political institutions and international situations... If the realities of the Self Defense Forces, its size, equipment, power etc., were to be proved through the judicial process, the constitutionality of the Self Defense Forces would be decided easily without considering international situations and the like.

The present Constitution thus prohibits the maintenance of armed forces or other war potential in its Preamble and Article 9. This does not mean that Japan has renounced the right of self defense... The right of self defense, however, does not necessarily mean self defense by armed forces... As other possible means there are... as witness Shigejirō Tabata [of the Kyoto University] mentioned, elimination of invasion by the police, uprising of the people with arms, confiscation of property held by the nationals of an invading nation, deportation of such nationals... [Then the court examined in detail the history, organization, scope of activities as provided by laws and regulations, equipment, strength,
drill, budget of the Self Defense Forces as well as their link with the American armed forces. Then it concluded:

On the basis of organization, scales equipment and strength of the Self Defense Forces as found above, it is clear that the Self Defense Forces is "an organization of men and materials with the purpose of carrying out battle with force against a foreign enemy." It, therefore, falls within the meaning of the term of "armed forces". . . . whose maintenance is prohibited by Paragraph 2, Article 9 of the Constitution.

Since the Self Defense Forces is unconstitutional in itself, the reason given for the cancellation of forest reserve designation in question cannot satisfy the requirement of "public interest" provided in Article 26(2) of the Forest Act.