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FOREWORD

Over the past fifteen years there has been a remarkable growth in the study of Japanese law in the United States. The foundation was laid during the late 1950's when the Harvard-Michigan-Stanford program brought together Japanese legal specialists and their American counterparts for study and research. At the end of this program a major conference was held, and the resulting publication, Law in Japan, continues to serve as a point of departure in descriptive studies of Japanese law.

During the 1960's interest in Japan continued to develop among law faculty members, but an even more important development was the increase in the number of students coming to the law school who already had some Japanese language and area training. With these students as a nucleus, a few law schools have begun to offer work in Japanese law. Some of these courses have been taught by visiting Japanese professors, and a few are taught regularly by Americans trained in Japanese law.

At the same time, the Japanese legal system has been studied by many non-lawyers, such as political scientists, sociologists and anthropologists. Constitutional law, family law and criminal law have been analyzed as political and social phenomena in studies which have gone beyond legal rules to origins and practices.

The four papers in this volume represent these various developments.*

Professor Kazuo Sugeno of Tokyo University was a visiting scholar at the University of Michigan Law School in 1975-76. His paper on unions and strikes in the public sector in Japan is a study of how legal rules developed in the Occupation period, how attitudes were affected, and how the current anomalous "illegal" situation developed.

Walter Ames describes some of his field work for his anthropology thesis in a chapter dealing with everyday police activities. Taking advantage of excellent language ability and prior residence in Japan, he is able to give a unique perspective on one of the most unique features of contemporary Japanese life. The role of the local policeman appears to many to be a major factor in the low level of criminal behavior in Japan, and this chapter supplies a substantial amount of raw material for evaluation.

Ronald Brown took a seminar covering aspects of Japanese law while in the master's program at Michigan, and eventually submitted a legal study as his M.A. thesis. The cases he discusses dealing with intellectual constitutional rights continue to be litigated in Japan, and serve as examples of the broad range of issues with which the Japanese Supreme Court will be dealing for years to come.

Richard Briggs wrote a seminar paper during his M.A. work at the University of Michigan discussing a particularly controversial lower court decision regarding due constitutionality of the Japanese Self Defense Force. While the decision was subsequently reversed by the Sapporo High Court, his careful translation of the lower court's decision continues to be of interest to students of Japanese law and legal terminology, and is included here accompanied by a brief introduction and conclusion.

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*One is by a visiting scholar, two were written by students in a course dealing with Japanese law, and one is part of a doctoral thesis in anthropology.

Walter Ames, Ronald Brown and Richard Briggs went on to law school after writing the pieces published here. They found there an increasing number of Japanese legal specialists who are coming to the United States for formal law study. This growing group of scholars and practitioners on both sides of the Pacific who are able to write about their legal systems with both technical expertise and cultural awareness should produce a unique and exciting body of comparative legal literature. It may in fact serve as a model for comparative legal studies in other geographical areas, where traditional doctrinal writing has been the dominant mode.

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PUBLIC EMPLOYEE STRIKE PROBLEM AND ITS LEGAL REGULATION IN JAPAN

by

Kazuo Sugeno

Professor of Law, Tokyo University. Visiting Scholar, the University of Michigan Law School, 1975-76.

The growth of public employee militancy has been a worldwide phenomenon in the last decade. Most industrialized countries have been struggling with the question of how to reconcile the interests of workers and of the public in formulating laws concerning collective bargaining and strikes in the public sector. Japan, viewed by Western observers as a haven of industrial tranquility, is no exception. There the public sector has been an exceptional area in which union militancy and strikes have caused nationwide public concern for several decades.

This paper examines the development of the public employee strike issue in Japan, in both its legal and factual aspects. It describes the process by which the present strike prohibitions came to be codified after a short period of liberal legal policy; the contents of and problems with the current legal framework; the practice by which the wages of public employees are determined in the whole mechanism of collective bargaining in Japan; the process by which public employee strikes have developed into urgent, nationwide problems; the efforts of the courts to spell out the content of the constitutional right to strike; and the recent attempts to attain a legislative solution. It will pursue the questions of why and how the prohibitive strike laws came to be totally disregarded by the public employee unions, and what kind of legislative action has become necessary for the nation to resolve its public employee strike problem.

THE DEVELOPMENT OF THE CURRENT PROHIBITIVE FRAMEWORK

In pre-war Japan unions were totally suppressed.[1] Immediately after the end of the last war, however, the Occupation Authority began to pursue a policy of encouraging unionization as one of the means of helping to democratize Japanese society. The first Japanese labor law was the Trade Union Law of December, 1945, which gave almost all workers, including government employees, the rights to organize, to bargain collectively and to strike. Only policemen, firefighters and prison officials were excluded from these rights. Although a subsequent Labor Relations Adjustment Law purported to provide some measures to protect the public from crippling work stoppages, it only prohibited strikes by "administrative public servants," and the sanctions it imposed were light, a fine of thirty dollars. It also provided for thirty-day mediation of disputes in "public utilities," that is, in the transportation, postal, telephone, water, gas, and electricity services.

The natural result of this essentially pro-labor policy was the flourishing of unions in both the private and public sectors.[2] The unions soon launched into an active offensive against government and management, demanding guarantees of minimum living standards to protect themselves against the extremely high postwar inflation.[3] Under the strong influence of the Communist Party, the most powerful organizations of public employees, such as the National Railways Workers Union (530,000 members), the All Communication Workers Union (380,000 members) and the All Teachers Union (330,000 members), took the initiative in this offensive. In late November an All Government Employees' Joint Offensive Committee was organized, and it soon submitted the unified demands of government employees to Prime Minister Yoshida. The offensive culminated in an attempt to call a general strike for February 1, 1947, which was to involve two and a half million government employees and tens of thousands of private workers.[4] When the government's proposals for settlement were rejected by the General Strike Committee and mediation efforts by the Central Labor Relations Commission failed, the Supreme Commander, General MacArthur, ordered that the strike be

called off. He declared that in the light of the disastrous situation of the Japanese economy at that time, workers could not be allowed to resort to such measures. This order came to be the turning point of the Occupation Authority's policy toward public sector unionism.

On July 22, 1948, during a subsequent labor offensive by public employee unions, MacArthur sent a letter to Prime Minister Ashida in which he ordered in effect that public employees should not be allowed to enjoy the common method of collective bargaining, and that relevant civil service laws should be appropriately amended. MacArthur also requested that the National Railways and the tobacco and salt monopolies should not be run by the government itself, but should be reorganized into public corporations so that their employees could be treated more liberally than civil servants.[5] The government's response was to issue Ordinance 201 of July 31, which prohibited collective bargaining and "acts of disruption" in all sectors of public employment, under punishment of one year's imprisonment or a fine of sixteen dollars. Violators could also be summarily discharged or disciplined. Subsequently, in December, 1948, the National Civil Service Law was amended to conform to the MacArthur edict and the resulting Government Ordinance. Also, a Public Corporation Labor Relations Law was enacted to regulate the labor relations of two newly created public corporations, the National Railways and the Japan Monopoly Corporation. Later, in December, 1950, the Local Civil Service Law was enacted, leaving only the employees of local government enterprises under the coverage of Ordinance 201. Finally, in July, 1952, soon after the restoration of Japanese independence, the Local Government Enterprise Labor Relations Law was enacted to cover employees of local government enterprises. At the same time the National Civil Service Law and the Public Corporation Labor Relations Law were amended so as to transfer one newly created corporation, the Telephone and Telegraph, and the Five National Enterprises from the jurisdiction of the former law to that of the latter. Thus, the Public Corporation Labor Relations Law became the present Public Corporation and National Enterprise Labor Relations Law.

The current legal framework for public employee bargaining and strikes was therefore constructed on the basis of the MacArthur Letter and Ordinance 201. This outright prohibition of strikes, following a period of liberal legal policy, has affected the atmosphere of labor relations in the public sector ever since.[6] Public employee unionists have resented not only the prohibition itself but also the sudden and wholesale manner in which it was imposed on them. As will be seen later, these workers revived and increased their militancy gradually, nourishing a strong belief that they were unfairly deprived of the basic constitutional right they had once enjoyed.

The MacArthur Letter of 1948[7] stated that since democracy requires that all government functions be exercised by representatives or agencies elected by the sovereign people, such functions cannot be delegated to or usurped by any private organization or any particular class of people. Labor organizations should not be allowed to take the place of these representatives or agencies, or to interfere with the functions entrusted to them. In public employment, as the employer is the entire populace, the terms of such employment should be decided by the laws which are enacted by representatives in the legislature. This letter also points out that employees who dedicate their labor to public service are the very instruments used for the exercise of the people's sovereign power and, consequently, these employees owe unconditional allegiance to the public trust imposed by virtue of their employment. The letter concluded that trade unionism should be allowed to government employees only to a limited extent; that collective bargaining in the public service is subject to "distinct and insurmountable limitations"; and that strikes by public servants are "unthinkable and intolerable."[8]

As can be seen, the letter puts particular emphasis on the democratic nature of decision-making in the exercise of governmental functions, and it is infused with rather exaggerated notions of popular "sovereignty" and assumptions of extraordinary loyalty to the government. These traditional and well-known doctrines, familiar to the American mind, became the rationale for Japan's current comprehensive prohibition against public employee strikes.

THE CURRENT PROHIBITIVE LEGAL FRAMEWORK

In the current legal framework, public employees[9] can be divided into three groups in terms of restriction of their rights to participate in decision-making about their working conditions. The first group consists of those covered by either the Public Corporation and National Enterprise Labor Relations Law (PCNELRL) or Local Public Enterprise Labor Relations Law (LPELRL). The former law covers the so-called "Three Public Corporations"--the Japanese National Railways, the Japan Telegraph and Telephone Public Corporation, and the Japan Monopoly Public Corporation (tobacco monopoly)--and also the "Five National Enterprises"--the postal services, the state-owned forests, the government printing services (including the currency printer), the currency mint, and the alcohol monopoly. The Local Public Enterprise Labor Relations Law covers what are known as the "Local Public Enterprises," that is, enterprises which are operated by the local governments and which undertake the operation and service of local railways, bus transportation, electricity, gas, and water utilities.

The employees of these public corporations and governmental enterprises are permitted to form labor unions and to bargain collectively with their employers (PCNELRL Sec. 4 and 8, LPELRL Sec. 5 and 7). But strikes or any "acts of disruption" (i.e., any form of economic pressure) are prohibited, and violators can be dismissed or disciplined (PCNELRL Sec. 17 and 18, LPELRL Sec. 11 and 12). Presupposing this ban on strikes, compulsory arbitration by the Labor Relations Commissions is provided for in both statutes (PCNELRL Sec. 33, LPELRL Sec. 15).

One of the most critical problems with collective bargaining within the Public Corporations and the National Enterprises is the budgetary constraint on such bargaining. It is provided in the governing laws of these Corporations and Enterprises[10] that the total sum of money to be expended for wages should be specified in each corporation's budget, and that such sums should be approved by the Diet. The Corporations and Enterprises cannot pay wages exceeding this set limit except with Diet approval. They cannot even divert money for wages from other sources or use contingency funds without the approval of the supervisory Minister or the Minister of Finance. Thus, the Corporations and Enterprises cannot give wage increases exceeding the limits specified in the budget. Moreover, the Ministry of Finance determines this limit on the basis of existing wages, without considering the possibility of wage increases in the upcoming yearly wage negotiations. Hence, the public employer receives considerable public sympathy for not having the ability to negotiate on wages, although it is formally required to do so.[11]

The negotiators for these Corporations and Enterprises have found a way to circumvent this restriction through arbitration awards. When a wage increase is won through an arbitration award from the Public Corporation and National Enterprise Labor Relations Commission, the Law (PCNELRL, Sec. 35) says that the government shall endeavor as much as possible to implement the award. The government must so endeavor even when the award

involves the expenditure of funds not available in the appropriated budget. In this case, the award is submitted to the Diet for ratification (PCNELRL, Sec. 16). In addition, an award from the Commission enables each Corporation and Enterprise to divert money for wage increases from other sources or to use contingency funds.[12] Because of these special legal provisions, the negotiators have preferred to settle wage disputes through arbitration, or by disguising negotiated agreements by putting them in the form of arbitration awards.[13]

In recent years, the government has begun to appreciate some of the real difficulties[14] caused by this budgetary constraint, and has made efforts to improve the situation within the existing framework. Since 1967 it has allowed the Corporations and Enterprises to offer the same amount of wage increases as that attained by the unions in the previous year. Since 1971 it has also allowed them to take into account the possibility of five percent wage increases when they specify the total sum of wages in the budget. But these measures have been far from sufficient to enable the Corporations and Enterprises to meet the increasing demands made by the unions.

The second group of public servants is covered by the National Civil Service Law (NCSL) and Local Civil Service Law (LCSL). Americans would regard this group as the civil service proper. Wages and other working conditions of these employees are controlled to the smallest detail by laws enacted by the Diet and/or the Local Assemblies. In order to maintain fair standards in their treatment, the Public Personnel Authority Agency has been set up at the national level by the National Public Service Law. There are also personnel committees at the local levels set up by the Local Public Service Law. The Public Personnel Authority investigates the prevailing level of wages in private industry, and when it finds the wage rate differential between public and private employment exceeds five percent, it makes recommendations to the government to increase the pay scale of national civil service employees by certain rates.[15] The local personnel committees have usually followed the recommendation of the Public Personnel Authority when they made their own recommendation for local wage increases. Therefore, the recommendation of the Public Personnel Authority has in fact been determinative for most local civil servants.[16]

On the basis of this framework, civil servants are allowed to form their labor organizations and to "meet and confer" with the head of each department on wages and other working conditions (NCSL, Sec. 108-2 and 108-5; LCSL, Sec. 52 and 55). But the laws (NCSL, Sec. 108-5; LCSL, Sec. 55) say that a collective agreement cannot be concluded between the parties to this "meet and confer" procedure. More importantly, these civil servants are prohibited from striking or engaging in any other "acts of disruption." Violators may be discharged or disciplined. Besides this punishment, those who conspire, instigate or incite "acts of disruption" can be imprisoned for not more than three years or fined not more than ten thousand yen (about $33) (NCSL, Sec. 98 and 110; LCSL, Sec. 37 and 61).

The third group is composed of special public servants--policemen, firemen, the coast guard, prison officials and the Self Defense Force. They are denied even the basic right to form labor organizations,[17] to say nothing of the right to "meet and confer" or to strike (NCSL, Sec. 108-2; LCSL, Sec. 52: The Self Defense Force Act, Sec. 64). Apart from this, the legal framework for deciding their wages and other working conditions is the same as that of the second group of public employees.

In summary, all public employees of the national and local governments and of certain public corporations are prohibited from resorting to strikes and other "acts of disruption." This prohibition embraces not only civil servants in administrative affairs, but also clerical and unskilled workers in the governments and all grades of workers in the

government enterprises and public corporations. In addition, with regard to the second and third groups of public employees mentioned above, the prohibition is carried to the point that violators are subject to criminal punishment. Thus, the Japanese prohibition of public employee strikes is, if it is literally interpreted, comprehensive in its scope and severe in its means of enforcement.

COOPERATION OF PUBLIC AND PRIVATE EMPLOYEES IN THE ANNUAL SPRING WAGE OFFENSIVE

To understand fully public employee bargaining in Japan it is essential to examine how wages are determined in the private sector there. Private sector wages are settled in the midst of the annual "spring wage offensive."[18] This near ritual can be traced back to the spring of 1955 when, in order to overcome the weak bargaining power of the Japanese industrial unions, each made up of enterprise unions,[19] eight industrial unions[20] began to combine wage negotiations. Leadership in this group was taken by "SOHYO" (the General Council of Trade Unions), which is the biggest national organization of industrial federations in Japan. A joint spring wage offensive committee was organized at the national level in order to coordinate negotiation schedules and strikes among the participating industries. The number of union participants in this annual joint action campaign has grown year by year. In 1956, public employee unions, including the National Railway Workers, Postal Workers, and Telephone and Telegraph Service Workers, joined in, followed by the Steel Workers and the Shipbuilders in 1959, and "CHURITSU ROREN" (the Federation of Independent Unions, Japan's third largest national organization of industrial federations[21]), in 1961. The number of workers represented in the first 1955 spring wage offensive was only 734,000, but this number increased to 4,385,000 by 1961, and stood at 8,800,000 in 1971. At first, the unions which joined the offensive were affiliates of SOHYO and CHURITSU ROREN. However, since 1966, unions affiliated with "DOMEI" (the Japanese Confederation of Labor) have increasingly participated. For example, "ZENSEN DOMEI" (the Japan Federation of Textile Workers Union), one of the biggest and leading unions in DOMEI with its 350,000 members, shifted the date of its wage negotiations from summer to spring in 1971. Thus, the wages of nearly eighty percent of all organized workers (about one-fourth of all employees) in Japan are negotiated during a few months in the spring of each year.[22] Because of the rapid economic growth of the nation, a shortage in the labor force, and soaring rise in consumer prices, the annual spring wage offensive has been attaining higher wage hikes every year.[23]

Typically, recent spring wage offensives have fit the following pattern. In late January the Joint Spring Offensive Committee, organized by SOHYO and CHURITSU ROREN, determines: 1) the rate of wage increase to be achieved by all the participating industrial federations, i.e., the unified target rate of wage increase in each offensive; 2) the basic strategy for coordinating negotiations among the participating industries; 3) the approximate schedule of negotiations and strikes. Since 1965 the established strategy has been that the metal and chemical industries take the lead in order to set the pattern of high wage increases, and the national and private railway workers then try to strengthen this emerging pattern with other Public Corporation and National Enterprise unions. The Iron and Steel Workers have been assigned the front-runner role of key bargainer because of the fundamental importance of that industry for the national economy. A series of four or five joint strikes by the industrial unions is scheduled, and, as a climax, the approximate date of the general transportation strike is set at this time.

Then, in February, each industrial federation sets the minimum rate for wage increases in its industry, and decides a more detailed negotiation-strike schedule. Negotiations are begun according to this schedule at industry or enterprise level,[24] and one or two joint strikes for a day or two days are carried out in March. Early in April the real strike offensive by metal and chemical workers begins, in the midst of which comes the settlement of the "key bargain," i.e., the settlement of the steel negotiations.[25] Settlement in other industries such as ship building, chemistry, metal, cement, and electric machinery follow with or without their final strike efforts. These unions utilize this "key bargain" as an important standard for their own negotiations.

The climax of the spring wage offensive comes in late April or early May. The ending of these negotiations usually follows a general transportation strike of a few days' duration by the national and private railways. This strike is launched by the Council of Public Corporation and National Enterprise Unions, and the Federation of Private Railway Worker Unions. The result of the strike is a shutdown of all national railway lines, as well as major private railways in Tokyo and Osaka. Many of the other unions in the transportation industries, such as local public railways, taxis, bus lines, trucking and domestic airlines, participate in this general strike with strikes ranging from several hours to one or two days.[26] Also, other important public services, such as postal and telephone services, are interrupted during this period by intermittent strikes in various offices and stations. Some other public employees, such as the teachers and municipal employees' unions, strike for several hours or a day to demand that the Public Personnel Authority recommend high wage increases.

A few days before this general strike the Central Labor Relations Commission (CLRC) begins mediating wage disputes for the private railway industries. At almost the same time, mediation efforts by the Public Corporation and National Enterprise Labor Relations Commission (PCNELRC) begin for the employees who fall within their jurisdiction. In the past these commissions have succeeded in obtaining an agreement by the parties to a settlement a few hours before the commencement of any strike, but since 1971 settlements have not been reached until after paralyzing strikes have been carried out for one to three days. The Public Corporation and National Enterprise Labor Relations Commission then sets up an arbitration panel and transforms this mediation agreement into an arbitration award. (This so-called arbitration is merely a legalistic method to overcome the budgetary constraints referred to above.)

A few months after this spring wage offensive is finished, i.e., usually in the middle of August, the Public Personnel Authority makes a recommendation for pay increases for national civil servants. In making its recommendation, the Authority mostly follows the wage increases attained by private workers and workers of the Public Corporations and National Enterprises in the latest wage offensive.[27] It will usually recommend that the wage increases be implemented at certain rates retroactive to April. The government used to put off the effective date of the rate increases by a few months, but since 1970 it has implemented the recommendation without any delay.[28]

In summary, the wages of public employees are determined in the course of the spring wage offensive in Japan in combination with wage settlements gained by private workers, wage demands and negotiations by public employees are promoted and carried out in cooperation with those of private workers, and strikes to back up those demands are closely coordinated between the public and private sectors. A basic strategy of the recent spring offensive has been to create a large-scale emergency situation with nationwide joint strikes in the important public services. The offensive has thereby been successful in pressing the government and Labor Relations Commissions to intervene in the disputes and award high wage increases.[29]

Thus, the Public Corporation and National Enterprise unions, which have under their control essential public services such as the national railways and communication services, have become the major forces to promote this strategy, along with the private railway workers. In this way, for good or ill, strikes by public employees to back up their wage demands have been firmly institutionalized in the mechanism of the annual spring wage offensive in spite of the legal prohibition.

DEVELOPMENT OF PUBLIC EMPLOYEE STRIKES

At the inception of the total ban on strikes, the National Railways workers and other public employees dared to continue their strike efforts in order to resist the government's counterattack on their organizations and employment.[30] But these challenges against the prohibitive law were severely repressed by the government, both with criminal and disciplinary sanctions.[31] Realizing that the government was determined to enforce the strike prohibition by severe punishments, the public employee unions changed their strategy so as to promote their economic demands basically within the boundary of the law and to give a form of legality to their economic pressures.[32] Thus, various means of disruption having legal appearance were devised from this time: concerted refusal of overtime work, concerted claims to take paid holidays at one time, sick-ins, various kinds of "work-to-rule" tactics (i.e., by adhering to work-rules far more strictly than is ordinarily done), slow-downs for safety reasons, and so on. However, until 1955 unions had not practiced these disruptive tactics frequently or in a large scale. The only conspicuous offensive with these techniques was in December 1952, when the public employee unions pressed the government hard to implement the award and recommendation of the competent agencies. Generally the unions utilized disruptive tactics cautiously and reservedly during this period.

Public employee strikes began to develop gradually when public sector unions joined the spring wage offensive in 1956. In this offensive the Council of Public Corporation and National Enterprise Unions[33] assumed the role of "lead off," and carried out a joint "pressure action" on March 12, consisting of a half-day walkout and other disruptive tactics. In the next year's offensive the National Railways workers engaged in a few short but effective walkouts, which made the Kishi government promise to do its best to implement the award by the Commission (PCNELRC). In 1961 the Public Corporation and National Enterprise unions played the part of the pattern setter in the spring wage offensive. On March 13, for the first time, they declared a half-day "strike" for March 31. This challenge to the strike ban was so effective that the government commenced the compulsory arbitration process immediately, and the Commission (PCNELRC) issued a high award before the implementation of the strike. In the spring of 1964 the strike plan by the Public Corporation and National Enterprise unions escalated to a joint strike plan (though again, for a half-day) with the Joint Action Committee of Transportation Workers Unions, which was the beginning of the "general transportation strike" attempt. The Ikeda government headed off the public-employee part of this general strike by promising its efforts to abolish the wage differential with the private sector. Until 1971 the Public Corporation and National Enterprise unions had staged one or two strike plans, usually with the private railway workers, in every spring wage offensive. Also, the Joint Action Committee of Civil Servants began to carry out a short (a few hours) joint strike for their wage demands in the 1965 spring wage offensive.

Thus, during this 15-year period public employee strikes came to be firmly built into the annual spring wage offensive, and the strikes by the National Railways workers jointly with the private railway workers became one of the major weapons in the offensive. But the planned strikes never exceeded one day, and indeed usually lasted no more than a half day.

The law came to be challenged overtly, but the challenges had not yet brought serious inconveniences to the public.

Escalation to frequent paralyzing strikes occurred in 1972. The move towards militancy had been partly encouraged by the liberal judicial interpretations starting in 1966 of the strike prohibition; but it was mainly accelerated by the aggravation of labor relations in the National Railways and other public enterprises as a result of management's oppressive policy. Facing strikes in the spring offensive, the National Railways, Telephone and Telegraph Public Corporation, Postal Ministry and other public employers punished almost all strikes with massive disciplinary measures.[34] Also, in the National Railways and the Postal Ministry, the managers engaged in discriminatory personnel management designed to discourage membership of the militant unions in favor of the company-supported minority unions. In the National Railways this policy was strongly pursued in the name of "productivity movement" (MARUSEI)[35] from the fall of 1970, and this led to bitter confrontation between management and the unions, against which they discriminated. Enraged feelings of unfair discrimination prevailed among members of these unions. This exacerbation of labor relations only fanned the militancy of union leaders and members.

Thus, in 1972, from March through October, the two militant unions in the National Railways engaged in disruptive work-to-rule tactics almost every day. These tactics were carried out to oppose the rationalization measures proposed by management (March 6-14, 22-23, 29), to demand the fundamental improvement of safety measures in the railway system (April 4-17), to press the wage increase demands in the spring offensive (April 19-27), to protest against the treaty for the return of Okinawa and the Vietnam War (May 16, Oct. 21), to protest against the arrests of union members involved in the violence with the management-favored union (May 30-June 18, June 29-July 5, July 16-20, Sept. 26), to demand the full implementation of the wage-increase award by the Commission (PCNELRC) (June 13-18, June 20-22), to protest against the massive disciplinary measures taken against the strikers (Sept. 14-20), and so on. The work-to-rule tactics[36] effectively paralyzed the commuter train services, long-distance passenger train services and/or the freight train system on a nationwide or regional scale. Hundreds of thousands of commuters in the Tokyo metropolitan area experienced almost intolerable irritation and hardship in March through September of this year due to the stoppages, delays and overcrowded conditions of trains.[37] The paralysis of the freight car system temporarily caused higher prices in the metropolitan area.[38] The huge losses incurred by the National Railways due to the stoppages and delays of trains further aggravated its financial problems.[39] When the National Railways workers took a short break at the end of the year, the All Postal Service Workers Union carried out 12-day disruptive tactics demanding the discontinuation of the anti-union personnel management by the postal employer.

Suffering from more frequent and disruptive work-to-rule tactics, resumed in late January 1973, the anger of passengers grew rapidly. On March 13, several thousand commuters, who could not take trains to their homes because of the stoppages, turned into a mob and destroyed the facilities of the AGEO station of the TAKASAKI line. On April 24, on the day of a joint strike by the Public Corporation and National Enterprise unions in the spring offensive, tens of thousands of angry passengers rioted at 38 stations in the Tokyo metropolitan area until midnight.[40] The unions were shocked by this explosion of anger. They began to reconsider their technique of causing the greatest inconvenience to the public with the least legal sanctions for their members. Instead of curbing their militancy, however, they began to replace disruptive work-to-rule with less irritating regular strikes. The public employers still maintained the inflexible policy of punishing every illegal act.

On the other hand, the unions had to fight hard for wage demands to protect their members from mounting inflation.[41] Thus, while work-to-rule tactics decreased considerably in the latter half of 1973 and in the whole year of 1974, the Public Corporation and National Enterprise unions escalated the number and magnitude of regular strikes both for their wage demands and for protesting against the massive disciplinary actions.[42]

In this way, by the end of 1974, the frequent paralyzing National Railways strikes and the "vicious circle" of illegal strikes and disciplines became urgent nationwide problems. The prohibitive law had not only been totally disregarded by the public employee unions, but also the desperate enforcement of the law aggravated the strike situation. It became clear for many people that the law had to be reformed somewhat fundamentally.

JUDICIAL INTERPRETATIONS OF THE PROHIBITIONS

The Constitution of Japan, which was fundamentally altered in the course of post-war democratization, provides in Article 28 that "the rights of workers to organize, and to bargain and act collectively are guaranteed." From the travaux preparatoires of the constitutional revision, it is clear that the right to strike was implied in this "right to act collectively."[43] The new Constitution also gave the Supreme Court the power to nullify laws and other state acts that violate the Constitutional provisions. Thus, public employee unionization and militancy presented the courts with a number of crucial questions. Should the prohibitions against public employee strikes be nullified because they flew in the face of the above Article 28? If not, how then could those prohibitions be rationalized as constitutional? Should the courts not limit the scope of such prohibition as narrowly as possible in view of the basic right guaranteed by the Constitution? And, if the courts took this course, what guidelines should be drawn to delineate this scope? Struggling with these questions, the Japanese Supreme Court has twice dramatically reversed its basic attitude toward the regulation of public employees' right to strike.

The First Stage of Judicial Regulation.

In the "trilogy" of National Railways cases the Supreme Court affirmed the constitutionality of strike prohibitions by referring very briefly to the "all public officials are servants of the whole community" clause of the Constitution, (Art. 15), and to the "public welfare" clause which provides that "people shall always be responsible for utilizing the freedoms and rights guaranteed to them in the Constitution for the public welfare" (Art. 12). In the National Railways HIROSAKI Engine-District Case (Sup. C. Grand C., April 8, 1953),[44] the Court said that the rights guaranteed by Article 28 can be restricted for the benefit of "public welfare." Since civil servants are "servants of the whole community" and are on their job to promote "public welfare," their trade union rights could be subject to special restrictions. In the National Railways MITAKA Engine-District Case (Sup. C. Grand C., June 22, 1955),[45] the Court said that the strike prohibition in Article 17 of the Public Corporation Labor Relations Law was not in conflict with Article 28 of the Constitution, because the Public Corporation was too important to the national economy and the public welfare to be disrupted by a strike. And, in the National Railways HIYAMAMARU Case (Sup. C. 2nd. C., March 15, 1963),[46] the Court held that Sec. 1 (2) of the Trade Union Law, which provides immunity for criminal acts committed by workers while engaged in "appropriate concerted [union] activities," was not applicable to strikers who violated Article 17 of the Public Corporation Labor Relations Law. The Court said that since the right to strike was constitutionally denied to those public employees (Public Corporation

employees), there was no question of applying any immunity clauses concerning the right to strike in the Trade Union Law.

Although the Supreme Court faithfully complied with the intent of the legislators in giving these interpretations, it was criticized very strongly by labor organizers, a corps of labor lawyers, and many labor law scholars for giving no convincing reason for the complete denial of the fundamental right to strike guaranteed by the Constitution. These critics especially emphasized that the current prohibition was too wide in its scope--it encompasses all public employees regardless of the kind of work in which they engage--and too harsh in its sanctions. Above all, the possibility of three-years imprisonment is too akin to a provision in the oppressive statute which existed before the War.[47] Therefore, they argued, the Supreme Court should at least have tried to limit the applicability of the prohibition so as to balance the interests of the public and of public employees.

Attempts at Judicial Reform.

Influenced by the above critics, many lower courts dared to challenge the interpretations propounded by the Supreme Court. Raising grave doubts about the constitutionality of the comprehensive prohibition, they usually tried to limit the scope of the prohibitions to certain employees and certain kinds of acts.[48] But one lower court even went so far as to declare the prohibition unconstitutional.[49] In addition, the all-encompassing and severe characteristics of the prohibition were stressed by the I.L.O. Dreyer Fact Finding Committee in 1965,[50] and this significantly impressed the academic and judicial circles. Eventually, the Supreme Court was forced to reconsider its position about the right of public employees to strike, and it rendered the historic decision of October 22, 1966 in the Tokyo Central Post Office Case.[51] This decision became the turning point of the second stage of judicial regulation. Here, eight officials of the All Postal Workers Union led a strike of several hours at the Tokyo Central Post Office. They were indicted for violating the Postal Service Act, which prohibits willful failure to handle postal materials. The Court of Appeals[52] affirmed the applicability of the penal provisions to the strikers by relying on the National Railways HIYAMAMARU Case. However, on appeal the Grand Court of the Supreme Court concluded that the criminal immunity clause of the Trade Union Law applied to the strikers even though they are public employees covered by the Public Corporation and National Enterprise Labor Relations Law.

The major significance of this decision lies in the fact that the Supreme Court largely changed its attitude on the constitutional questions raised by the right to strike. Maintaining basically a conservative stand, the Supreme Court did not go so far as to nullify the strike prohibition in the law as unconstitutional. But it declared that the prohibition must be interpreted and applied restrictively to meet the constitutional guarantee of trade union rights. It also tried to establish guidelines for restrictive interpretation and application of the prohibition. Its logic was as follows. Since Article 28 of the Constitution also encompasses public employees, the legislators and courts should be very cautious in restricting the rights guaranteed to them. To deny those rights to all public employees by referring to the "all public officials are servants of the whole community" clause of the Constitution cannot be justified. But on the other hand, those rights are inherently limited for the purpose of guaranteeing "people's daily life."[53] Therefore, in order to discover what kind of restrictions on public employees are acceptable, four guidelines should be utilized:

a) Restrictions should be as narrow as possible in terms of scope of applicability;

b) Restrictions can be imposed only on those employees who engage in services closely related to "people's daily life," and only on conduct which seriously endangers those services;

c) The punishment imposed on violators should be the minimal one necessary, and criminal punishment especially should be imposed only where it is absolutely necessary;

d) Appropriate compensatory measures for maintaining equitable working conditions should be provided for workers whenever any restriction is imposed on their rights.

Applying those guidelines, the Court concluded that Article 17 of the Public Corporation and National Enterprise Labor Relations Law does not violate Article 28 of the Constitution. The Court considered that the services provided by workers of the Public Corporations and the National Enterprises were very important in daily life, and that compulsory arbitration provided in the above law was an adequate compensatory measure for the prohibition of their strikes. However, the Court further concluded that violators of Article 17 would not be exposed to criminal sanctions unless the strike had a political objective, or was accompanied by violence, or was so unduly prolonged that it seriously endangered people's daily life. Thus, the criminal immunity clause of the Trade Union Law was applied to public employees under the above conditions.

Summarizing the basic guidelines given by the Supreme Court in the Tokyo Central Post Office Case, the restriction imposed should be the minimal one justifiable in terms of scope and enforcement, and justification for a restriction should be determined by whether it is indispensable to ensure people's daily life. This last question depends on the nature of the service and the magnitude of the work stoppage.

These basic guidelines came to be called the "minimal restriction theory" and the "people's daily life theory." Subsequently, these criteria were applied to strikes by civil servants under the National and Local Civil Service Laws in two 1969 decisions concerning the Tokyo Metropolitan Teachers Union and the Judicial Administrative Employees Union. In these cases it was held that the strike prohibitions in these laws were applicable only to those employees whose services were closely related to people's daily life and only to those work stoppages which were carried out on such a scale and for such a period that they seriously endangered people's daily life.[54]

Although the practical intent of these Supreme Court decisions was to limit invocation of severe criminal penalties in cases of public employee strikes, the lower courts took a more expansive view of the right to strike. They went a step further and applied the Supreme Court's restrictive standards to cases which did not involve criminal prosecutions; that is, cases in which strikers challenged the legality of administrative disciplinary action imposed on them for violating strike prohibitions. Thus, through an accumulation of the lower courts' decisions from 1969 to 1973,[55] a legal situation was created in which the management of public agencies and corporations could not discipline strikers, except when the strike was carried out by employees engaged in services closely related to people's daily life and when the strike seriously endangered people's daily life.

These interpretations by the Supreme Court and the expansion of them by the lower courts were praised by various circles as showing a progressive and creative attitude.[56] But the weak points of the judicial decisions soon became apparent. Beyond the basic theory that strikes by public employees can be prohibited only from the viewpoint of protecting people's daily life, the Supreme Court could not develop more specific standards other than ambiguous ones such as "closely related to people's daily life" and "seriously endangered" daily life.[57] But what are the precise meanings of these phrases?

Facing this problem case by case, the lower courts struggled to establish clearer and more concrete standards for each kind of public service. Some decisions seemed rather successful, at least regarding the disposition of the particular case. For example, in the second Tokyo Metropolitan Teachers Union Case (Tokyo District Court, October 15, 1971),[58] in which one hundred and eleven union officials were suspended from their jobs or suffered wage deductions for leading a one-day strike of 30,000 teachers in Tokyo, the court developed this standard: If the backlog in the educational program could be made up by the end of the educational year without difficulty, the people's daily life was not endangered; that is, the strike would not infringe on the fundamental requirement to give children sufficient education.[59] Also, in the National Railways Locomotive Engineers Union Case (Tokyo District Court, December 19, 1972),[60] the union's campaign against automation measures led to a twenty-nine hour strike at ten important engine districts all over Japan, and resulted in the discharge of twelve union officials. The court held that strikes covered by Article 17 of the Public Corporation and National Enterprise Labor Relations Law should, in relation to the National Railways, be prohibited only when:

a) The strike obstructs the movement of many trains or inconveniences many passengers;

b) The strike obstructs the movement of long distance trains; or

c) The strike obstructs by violence the movement of trains.

The court concluded that since the strike in this case was nationwide for several hours, and as it obstructed the movement of many trains on the major lines, it clearly fell within the above prohibitions (a) and (b) .

These somewhat more concrete standards, however, are not, if examined carefully, particularly clear or appropriate. The terms used such as "many," "inconveniences," and "obstructs" and "violence" are vague and open to many different interpretations. Furthermore, the courts soon became loaded with the work of elaborating and applying such standards. The basic theory for determining the legality of a particular strike rested wholly on its tangible effects on people's daily life. This means that the courts had to measure very precisely the actual effect on such strikes. This turned out to be heavy work for an adjudicative agency.[61] In addition, from the viewpoint of public employers this situation was quite undesirable. Facing a strike by their employees, they could not know until they got the decision of the court whether the strike was in violation of the strike prohibition, or could be combatted by criminal or disciplinary measures. And from the viewpoint of unions, they could not foresee the legal effects of a strike they might carry out.[62]

Besides these uncertain loose ends, there was a more fundamental problem. Since most public employee strikes had been rather short (less than one day) and small (limited to one office of an agency), a great majority of the cases were eventually decided in favor of employees.[63] Although public employers and the prosecutor's office consistently tried to invoke the prohibition against violators, many of these efforts were eventually

voided by court decisions. Understandably, Japanese conservatives became vociferous about a legal situation in which the letter of the law appeared to forbid all public employee strikes, whereas the practice of the court was to permit such strikes on many occasions.[64]

Current Conservative Legal Interpretation

In the space of three years, 1970-1972, the Sato Government replaced seven out of fifteen Supreme Court Justices by new and more conservative Justices.[65] Lamenting the legal situation of public employees' right to strike as being one of "great confusion and disorder,"[66] in the All Agricultural Ministry Workers Union Case[67] of April 25, 1973, the new Supreme Court reversed the more recent "minimal restriction theory" interpretations by an eight to seven verdict. This case concerned the criminal prosecution of union officials who led a two-hour political strike at the Agricultural Ministry--the strike was to protest against a new law giving greater powers to the police. Holding that the strike prohibition and its criminal enforcement in the National Public Service Law were not inconsistent with the Constitution, the majority opinion tried to explain the rationality of the comprehensive strike prohibition with the following logic.

Although civil servants are within the coverage of Article 28 of the Constitution, the rights guaranteed in that article are necessarily restricted by taking into consideration the "common interest of the whole people" (expressed in Article 13 of the Constitution as the "public welfare"). The rights of civil servants may be subject to restrictions which could not be permitted in the private sector. The court based this on distinctions they found between government and private employment:

a) Government employees are the servants of the whole community and are engaged in services in which the whole people have an interest. Their services are estimated to be important for the public welfare without regard to the nature of the particular services.

b) The decision-making process concerning wages and other conditions of employment is quite different in government than in private employment. First, decisions regarding wages are not based on the sharing of profits, but rather on the distribution of taxes. Therefore, a right to strike distorts this decision-making process unjustifiably, because it amounts to giving one interest group too much power. Moreover, decisions regarding conditions in public employment should be made by the legislative body upon the principle of parliamentary democracy. Strikes by public servants not only impose an "insoluble legislative problem" upon the executive but also unduly interfere with the legislative process.

c) Finally, in government employment, the strike is too powerful a weapon. There is no possibility for management to resort to a lockout, employees are not faced with the employer's going out of business, and market constraints against inflationary wage settlements are not available.

With this reasoning the Court concluded that the current prohibition could be deemed a rational one in both its scope and means of enforcement. In reaching this conclusion, it also took into account the compensatory measures provided in the National Public Service Law--mainly the recommendation of wage increases by the Public Personnel Authority.

There are striking similarities between the court's logic and the views expressed in the Taylor Report on public employee bargaining in New York State,[68] as well as the thesis espoused by Professors Wellington and Winter.[69] These writers distinguished public from private employment in terms of the nature of the decision-making process regarding wages and working conditions. Contrasted with this reasoning, the logic of the 1966-69 decisions may be looked upon as equivalent to the so-called "identifying approach" in the United States, which deems that restrictions of strikes are justifiable only when they are based on the importance of the services. To answer the identifying theory the 1973 Japanese Supreme Court decision relied on the theory that the importance of the services is only part of the problem.[70] The Court purported to resolve the other part of the problem (the public being the employer and the legislature deciding working conditions) through copious quotations from the work of American scholars.

However, although this analysis was more persuasive than the simple and impractical logic of 1953-63 anti-strike decisions, it failed to sway legal and other influential groups[71]--mainly because, by this time, the prohibitions had come to be regarded as being too comprehensive and too harsh to be justified by any logic. It can be said that the tide of the public opinion had already turned toward the mitigation of such prohibitions.[72] Also, the ruling seemed to have no effect on the public employee unions' propensity to strike. As has been described above, the ironic result was that the unions felt more free to carry out demonstration work-stoppages, thereby demanding "recovery of the right to strike." In this way, they defied what they regarded as the "anti-union prejudice" of the Supreme Court. Furthermore, in criminal and also in disciplinary cases arising out of strikes, the lower court remained divided. Some faithfully followed the 1973 Supreme Court decision,[73] but many others defied it by sticking to the minimal restriction theory interpretations of the 1966-69 decisions,[74] or even declaring the strike prohibitions to be completely unconstitutional.[75] Thus, although the 1973 conservative court decision took an unequivocal anti-strike stand to end what they called the "confusion and disorder" of the previous legal situation, the decision resulted in even greater confusion.

ATTEMPTS AT LEGISLATIVE REFORM

The efforts of public employee unions to attain a favorable reform of the strike legislation started in 1960, when SOHYO set up a special committee to promote the campaign for recovery of the right to strike. For the next ten years, however, the activities of the committee were largely confined to developing the organizational strength of the unions to carry out unlawful strikes and to defend such strikes by obtaining liberal judicial interpretations based on Article 28 of the Constitution. During this period the ruling Liberal Democratic Party stubbornly refused to listen to any arguments for the mitigation of the current prohibitions, and there was little prospect of change in its conservative leadership in the national elections. The major opposition party, the Socialists--supported by the public employee unions--did not show any enthusiasm for working out a realistic legislative program on the strike issue. It was against this political background that the courts tried to mitigate and reorder the current prohibitive framework by creative interpretations, which indeed were close to legislative action. The unions were content to rely on these favorable judicial interpretations, and they escalated their strike actions to establish a de facto right to strike.

The Early Efforts to Achieve Reform.

The nation's real move towards legislative action began in 1973 when union-militancy and aggravation of labor relations in the National Railways and other important public services became urgent nationwide problems, as has been described above. Crippling work stoppages in the National Railways frequently caused too much public inconvenience; the general transportation strike in the spring wage offensive was on the brink of further escalation; the belief of the public employee unionists that they were unfairly deprived of their basic constitutional right had grown so strong that it became one of the major reasons for their militancy; and the desperate enforcement of the prohibition did nothing but strengthen the vicious circle of illegal strikes and disciplines. In short, the strike laws had fallen into absolute disrepute. As the illegal strikes went on, the public came to realize that a strike prohibition in itself provided no protection once it was defied. Furthermore, the revival of the conservative interpretation by the 1973 Supreme Court decision smashed the illusion of the union sympathizers that reform of the law could be attained through judicial interpretation. At this stage many came to think that legislative action was necessary to revise the current legal framework and to bring order out of the chaos. For them the time had come to begin full-scale efforts to attain a legislative solution.[76]

In September 1973 the Advisory Council for the Public Personnel System made its final report. Since its establishment in 1965 to examine the labor relations systems in the public sector, the Council's deliberations had been deadlocked. Although the conclusions and proposals in this report were abstract and vague, and even divided on critical points,[77] it had sufficient political weight to induce the government to commence efforts for a legislative reform.[78] Thus, in the 1974 spring wage offensive, this right to strike became one of the major issues to be negotiated at the conference of the government and labor; and in the midst of the general transportation strike the government promised labor it would reach a conclusion on legislative reform by the autumn of 1975. A Ministerial Council and an Advisory Council of Experts were then set up, and the latter began deliberations. In addition, in the late spring of 1975 the National Railways and the other two Public Corporations took an unusually generous position when they determined disciplinary measures against the strikers of the 1974 wage offensive. These employers began to modify their hard-line policy toward strikes. At this stage they were even said to have already determined their attitude on the legislative reform, namely, that a limited right to strike should be given to their employees in the interest of good labor relations.[79] In the government itself Labor Minister Hasegawa suggested in the Diet that a progressive attitude be taken in reforming the laws concerning public enterprises.[80]

This smooth start, however, was soon curbed by the more conservative groups of the ruling Liberal Democratic Party. Reacting against the liberal moves within the government, they opposed any limited-right-to-strike proposals. In their view the "outlaw" unions would not abide by a limited right to strike, and such generous provisions would only help to increase the unions' militancy and aggravate the strike situations. Using their majority political powers, they were successful in dominating the opinion of the ruling party and in restraining the weak leadership of the Miki Government, which tended to manifest a more liberal posture. Also, the deliberations in the Advisory Council of Experts[81] came to be dominated by the view that in the light of the financial support and political control given by the government to the Public Corporations and National Enterprises, and because of their importance to the public welfare, the right to strike should be recognized only for the employees of those public enterprises which can be re-

organized into private corporations not having such support and control. The majority members also remained suspicious of the law-breaking tendency of the public employee unions. Although the three Public Corporations came to manifest their limited-right-to-strike policy officially and clearly, and were supported by a few major newspapers,[82] the conservatives continued their "roll-back" efforts determinedly. At the end of November 1975, at the promised time limit for the government's decision on legislative reform, the Public Corporations and National Enterprise unions tried to put pressure on the government for a favorable determination by carrying out an eight-day joint strike solely for the recovery of the right to strike.[83] However, the unparalleled size of this strike only tightened the unity of the ruling party not to make any concessions to the pressures of an "illegal political strike." Indeed, in the midst of this strike the Advisory Council of Experts delivered a final report highly unfavorable to the unions.[84] Moreover, the government postponed its promised decision with a brief statement that the unions' observance of "law and order" is the prerequisite for any reform.

The Situation in 1976. The nation has now decisively moved towards reform of the strike ban. But Japan will still go through time-consuming political battles and perhaps further industrial strife before it implements any reform. One of the key factors seems to be whether the unions will be successful in obtaining support from the public by their effective political campaigns and by restraint in resorting to the strike weapon. The timing and contents of the legislative action will also depend on the power-ratio among the factions of the ruling party, and between the ruling and opposition parties.

A First-Stage Program.

In an article published in July of 1974,[85] Professor Ishikawa of the University of Tokyo proposed a legislative program to reform the most troublesome Public Corporation and National Enterprise Labor Relations Law. He argued that in order to make collective bargaining function and to decrease strikes in this area, it is necessary to allow a limited right to strike. According to his proposal, a ten-day compulsory mediation period should be imposed before a union is allowed to strike. During this period the positions of both parties in the negotiations should be reported daily to the public by the mediator (public pressure is expected to play an important role). When mediation is not successful and the union resorts to a strike, the Prime Minister can issue a cease and desist order if the strike seriously endangers people's daily life or the national economy. Once the order is issued the union has to desist from striking for fifteen days. During this period the Public Corporation and National Enterprise Labor Relations Commission would offer arbitration (not compulsory) or mediation services. If the dispute is not settled by the end of these fifteen days the union can resume the strike. If, however, it still seriously endangers the people's daily life or the national economy, the Prime Minister can again issue a cease and desist order. This time, Professor Ishikawa says, the dispute should be resolved by compulsory arbitration by the Commission.

It seems to me that this proposal contains sufficient measures to protect the public, while still recognizing the basic demands of public employees. The unions are complaining that this plan contains too many restrictions, some of which are too severe. This may be so to some extent, but the unions must know that without an elaborate scheme to protect the public, reform will not be supported by the voters or the Diet. Perhaps the greatest problem in this proposal is that the chief executive (the Prime Minister), not the Court, has the power to stop strikes in a national emergency. In the conventional political confrontation between organized labor and the conservative government, unions

may be able to defy the order of the Prime Minister, denouncing it as being anti-labor. They would say that the order had not been given by a supposedly neutral agency, that is, by either a court or a labor relations commission. This kind of union defiance is likely to occur especially when the government, in close cooperation with business, makes efforts to prevent large wage hikes. But the question of whether a big strike seriously endangers people's daily life or the national economy is too broad and too complex to be resolved in a court decision, which in this case would need to be speedy. Considering this and other difficulties,[86] there seems to be no other way than to entrust the decision to issue a cease and desist order to the politically responsible Prime Minister. The legislators should make efforts to work out more explicit safeguards for issuing such orders, and should add provisos that this power should be used judicially and that the government's income or wage policies should not be made the grounds to issue an order. Rather, such a move should be based solely on the strike's effect on the people's daily life or the national economy.

In order to reinforce the program proposed by Professor Ishikawa, a reform should be added to strengthen the financial ability of public employers to negotiate wages. That is, each of eight Public Enterprises should be given the budgetary authority to divert money from other sources, or to use contingency funds to pay wage increases. The legislative program concerning national-level Public Enterprises should also be extended to those at the local level. Having made these changes, the first stage of reform in the framework of public employment relations will be completed. After that, efforts can be made to work on the second stage of reform, that of the Civil Service Laws.

Although I readily agree with the 1973 recommendation by the Advisory Council of Public Personnel System that the present "meet and confer" system needs to be extended and strengthened in the civil service, there is still much to be debated as to whether collective bargaining should be fully implemented in this area. The question of giving civil servants a limited right to strike is an even more difficult issue. But at the very least, criminal sanctions against strikers should be eliminated. There is no reasonable ground for maintaining such a severe punishment, especially after reforms favorable to employees are made in the public enterprises area. After the elimination of criminal sanctions the law will not be as unfair to civil servants, or so unfair as to drive the country into hasty changes. If the Personnel Authority continues to keep civil servants' working conditions on a par with those of other public and private employees, and if the present "meet and confer" system is in fact utilized extensively by both parties, it can be concluded that the strike prohibition for civil servants is not too unjust for the time being.

April, 1976.

NOTES

Citations to Japanese materials in the Notes are in the form deemed appropriate by the author for American readers. - Ed.

[1]Even in 1936, when the prewar labor movement was at its peak, there were 973 labor organizations with 420,589 members. The organization rate was 7.9 percent (Kazuo Okochi & Hiroshi Matsuo, NIHON RODOKUMIAI MONOGATARI, SENGO 1 [The Story of Trade Union Movements in Japan, Post-War 1], CHIKUMASHOBO, TOKYO, 1969, p. 148). In 1940 most of the unions were forced to dissolve and were replaced by a nation-wide, government-controlled labor agency for the promotion of the War, known as the Industrial Patriotic Association ("SANPO").

[2]The rise of labor unions after the War:

	Number of labor unions	Number of organized workers	Organization rate (%)
Dec., 1945	509	380,677	3.2
June, 1946	12,006	3,679,971	40.0
Dec., 1946	17,266	4,925,598	41.5
June, 1947	23,322	5,594,699	46.8
June, 1948	33,926	6,677,427	54.3
June, 1949	34,688	6,655,483	55.7

From K. Okochi & H. Matsuo, supra, p. 148, p. 223 & p. 331.

[3]The wholesale price index (1933=100) went up to 346.6 in September 1945, to 584.9 in December 1945, and even to 1184.5 in March 1946. The black market price index (September 1945=100) also went up to 128 in December 1945, and to 200 in February 1946. The black market prices were 39.8 times as high as the official prices. K. Okochi & H. Matsuo, supra, p. 131.

[4]The major economic demands were for high wage increases and year-end bonuses for all government employees in order to maintain living standards in a time of hyper-inflation. However, the essential character of this general strike was the political movement to overthrow the "reactionary" Yoshida Government and replace it with a "popular democratic government" led by the Communist and Socialist Parties and organized labor.

[5]In connection with the issuing of this letter, there arose a hot debate within the Occupation Authority. The promoter of the prohibitive policy against public employee bargaining was Blain Hoover, who was the chief of the Public Personnel Division in the Authority. He had had the experience in 1947 of leading the Personnel Advisory Mission from the United States to Japan and drafting the original National Civil Service Law. He had tried to prohibit collective bargaining and strikes by government employees at that time, but the scheme was abandoned before the Law passed the Diet in October 1947. When he came back to Japan to be the chief of the Public Personnel Division, he recommended efforts to amend the Law in order to prohibit collective bargaining and strikes. Such a move was opposed by James S. Killen, the chief of the Labor Division in the Authority, who had been a vice-president of the Pulp and

Sulfate Paper Workers International, AFL. Killen strongly opposed the complete denial of collective bargaining rights to government employees, and on the day the letter was issued the two chiefs debated in front of General MacArthur for several hours. The final decision was made by MacArthur himself, and Killen resigned immediately to come back to the United States. Killen objected to permanent incorporation into Japanese legislation of measures deemed temporarily necessary for occupation safety. He also expressed fears that oppressive measures would aid rather than hinder the Communist leaders in the unions. Cf., K. Okochi & H. Matsuo, supra, p. 275; William T. Moran, 'Labor Unions in Post-War Japan," Far Eastern Survey, Vol. 18, Oct. 19, 1949, pp. 241-248.

[6]Cf. Paragraph 2121 of the Dreyer Report (Footnote 50), Official Bulletin of International Labor Organization (ILO), Geneva, Vol. 49, No. 1, Jan. 1966, p. 487.

[7]The English text of the MacArthur Letter can be found in File 63-A of the "Hussy Papers" in the Asia Library of The University of Michigan.

[8]The MacArthur Letter in fact repeats the views of Franklin Roosevelt on public employee bargaining: "All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. . . . Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of Government employees. Upon employees in the Federal Service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is paramount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable." Letter from Franklin D. Roosevelt to L. C. Stewart, President, National Federation of Federal Employees, August 16, 1937, reprinted in Samuel I. Rosenman, ed., The Public Papers and Addresses of Franklin D. Roosevelt, Random House, New York, 1938, Vol. 6 (1937 Volume), p. 325.

[9]In 1969 the number of public employees was about 4,930,000 or 16.1 per cent of the total number of employees (30,528,000). The composition was as follows:

1.	Public Corporation employees	778,000
2.	National Enterprise employees	652,000
3.	Local Public Enterprise employees	1,729,000
4.	National Civil Servants (except 2)	556,000
5.	Local Civil Servants (except 3)	934,000
6.	Self-Defence Ministry employees	281,000

From Fujio Yamashita, KOKYOBUMON NO CHINGIN KETTEI (Wage Determination in the Public Sector), in Y. Kaneko, ed., CHINGIN (Wages), Japan Institute of Labor, Tokyo, 1972, p. 211.

[10]The Japan National Railways Act, Sec. 44; the Japan Telephone and Telegraph Corporation Act, Sec. 72; the Japan Monopoly Corporation Act, Sec. 43-22; the Act concerning wages of the employees employed in the National Enterprises, Sec. 4 & 5.

[11]In fact, until 1960 the Corporations and Enterprises did not offer any wage increases in the annual wage negotiations. Between 1961 and 1965 they offered only a nominal wage increase to their unions.

[12]Cf., the provisions enumerated in n. 10.

[13]Ever since the Public Corporation Labor Relations Law took effect in 1949 every annual wage dispute has been settled by the intervention of the Public Corporation and National Enterprise Labor Relations Commission. In 1951, 1954 and 1956, settlements were obtained through mediation, but in all the other years disputes went to arbitration. Since 1967 the established practice has been for the Commission to disguise the agreement of the parties, attained through its mediation efforts, as an arbitration award. This total reliance of the parties on the Labor Relations Commission is not only due to the budgetary constraint on wage negotiations, but also due to the basic strategy of the unions in the spring wage offensive. (See infra text following n. 23.)

[14]The most serious problem has been that, because of financial inability to negotiate on the employer-side, the Corporations and Enterprises' unions have resorted to critical strikes to cause public clamor. They thereby have been pressing the government and the Labor Relations Commission to intervene in the dispute and to award big wage increases. Ibid.

[15]In the 1960's yearly wage increases ranging from six to thirteen per cent had been recommended, and these recommendations were implemented by the central government, with a postponement of the date the increase is to take effect by several months. In the 1970's the Public Personnel Authority has recommended high increases ranging from eleven to thirty per cent, taking into account soaring rises in commodity prices and equally remarkable increases in private employees' wages. However, since 1970 the government has implemented such recommendations without any postponement.

[16]In recent years many local governments which were either financially healthy or which had chief executives supported by the Socialist and/or Communist Parties have had better wage increases for their employees than the national government. In these areas the recommendations of the Central Personnel Authority were merely minimum standards to which further increases were supplemented in accordance with respective political and financial situations. However, in the last few years most local governments have experienced financial difficulties and the central government has criticized their high wage policy as one of the major causes of their difficulties. Due to pressure from the central government many prefectures and cities began to adopt tight wage policies.

[17]Whether firemen should be denied the right to organize was recently deliberated by the Advisory Council for Public Personnel System (Cf., text infra following n. 76). But its Final Report of 1973 concluded that the present prohibition should be retained for the time being, although it called for further studies with particular attention to developments in the International Labor Organization.

So far there has been little initiative on the part of policemen or firemen to abolish this prohibition. These essential public servants seem to be strongly dedicated to their occupations in Japan, and have a special pride and sense of responsibility. The general atmosphere

in these departments is that labor unionism is to be abhorred, as a kind of "communist" movement. Thus, this third group of employees has been outside the central controversy about the reform of labor relations systems dealt with in this paper.

[18]See the description of the "spring wage offensive" in Kazuyoshi Koshiro, "Prospects for Collective Bargaining in the 1970's," Japan Labor Bulletin, Vol. 11, No. 5, May 1, 1972, p. 4; and in each year's volume of Ministry of Labor, SHIRYO RODO UNDOSHI (Documentary History of the Trade Union Movement), ROMUGYOSEIKENKYUJO, Tokyo.

[19]The organizational form taken by most Japanese unions is the so-called enterprise union, comprised of the employees of a given company or plant. It often includes both blue and white collar employees. Each plant, if there is more than one, will be considered a branch in a larger enterprise-wide organization, which is usually a centralized federation. Although industrial unions are also organized in most of the major industries, they are usually loose federations of enterprise unions. (About three-fourths of enterprise unions are affiliated with such a national industrial federation.)

The greatest weakness of this unique form of organization is that union leaders and members tend to become overly dependent on the fortunes of their employers. They are susceptible to company manipulation under such slogans as "Protect the enterprise," or "Higher wages will bankrupt the firm." (Cf., Robert E. Cole, Japanese Blue Collar, University of California Press, 1971, pp. 223-229.) Above all, enterprise unions are reluctant to launch a long strike independently because they fear that such a strike will undermine the company's position in the product market. Thus, Kaoru Ohta, who was (and still is) the president of the Industrial Federation of Synthetic Chemical Workers Unions, organized the "spring wage offensive" coalition by his appeal that enterprise unions should combine their bargaining and strikes at the industry level so that they would not have to fear losses by their own companies. He further appealed to combine such industry bargaining on a nationwide scale so as to create a nationwide inter-industry high-wage-increase pattern. Cf., Kaoru Ohta, SHUNTO NO SHUEN (The End of the Spring Wage Offensive), CHUOKEIZAISHA, Tokyo, 1975, p. 93.

[20]The Coal Miners, Private Railway Workers, Paper and Pulp Workers, Electric Machinery Workers, Metal Workers, Synthetic Chemical Workers, Electricity Supply Workers and Chemical (Rubber, Tire, Fat, etc.) Workers.

[21]Since 1964 there have been four national organizations of industrial federations in Japan. According to the 1973 basic survey on trade unions conducted by the Ministry of Labor, the biggest and most militant, SOHYO (the General Council of Trade Unions), has a total membership of 4,341,000; the second largest and more moderate, DOMEI (the Japanese Confederation of Labor), has 2,278,000 members; the third largest, CHURITSU ROREN (the Federation of Independent Unions), has 1,374,000 members, and the smallest, SHINSANBETSU (the National Federation of Industrial Organizations), has 70,000 members. The membership of each organization has risen and fallen over the years, but the basic power ratio based on the size of total membership has been about the same for the last few years.

[22]In 1970, the employees in Japan numbered about 33,060,000, of whom 11,604,770 were organized by labor unions. Ministry of Labor, RODO HAKUSHO (White

Paper of Labor), RODOHOREIKYOKAI, Tokyo, 1971 Vol., p. 314. More than 8,500,000 organized employees took part in the spring wage offensive of this year, including 4,250,000 workers affiliated with SOHYO, 1,960,000 with DOMEI and 1,340,000 with CHURITSU ROREN. Ministry of Labor, SHIRYO RODOUNDOSHI, supra, 1970 Vol., p. 5, p. 1355.

[23]

Year	The percentage and amount of wage increases attained annually		Annual increase in consumer prices
1960	8.7%	1,792 yen	3.6%
1961	13.8	2,970	5.3
1962	10.7	2,515	6.8
1963	9.1	2,237	7.6
1964	12.4	3,305	3.8
1965	10.3	3,014	6.6
1966	10.4	3,273	5.1
1967	12.1	4,214	4.0
1968	13.5	5,213	5.3
1969	15.8	6,768	5.2
1970	18.3	8,983	7.7
1971	16.6	9,522	6.1
1972	15.0	9,904	4.5
1973	20.1	15,159	11.7
1974	32.9	28,981	24.5
1975	13.1	15,160	?

From Ministry of Labor, RODOHAKUSHO, supra, 1975 Vol., p. 271, 289; Kazuyoshi Koshiro, supra, p. 7.

[24]The amount of wage increase demanded by each enterprise union is not necessarily the same, nor is it the same as the target set by the Joint Offensive Committee. It depends on the economic position of the enterprise and the bargaining power of the union concerned. T. Mitsufuji & K. Hagisawa, "Recent Trends in Collective Bargaining in Japan," International Labour Review, Vol. 105, No. 2, Feb. 1972, p. 144.

[25]Since 1957 the Big Five steel corporations have made the unified "once and for all offer" to the Iron and Steel Workers. The unions of these Big Five have accepted this determinant final offer without resorting to strikes.

[26]In recent years labor organizations in the transportation industries, including the national and private railway unions, have organized a Joint Action Committee of Transportation Workers Unions to promote their joint action in the spring wage offensive.

[27]The average wage increases for public employees given by the award of PCNELRC (the Public Corporation and National Enterprise Labor Relations Commission) and the recommendation of PPA (the Public Personnel Authority) have been as follows in the last ten years:

	Arbitration Award of PCNELRC		Recommendation of PPA	
1966	9.8%	(3,425 yen)	6.0%	(2,440 yen)*
1967	11.4	(4,360)	7.9	(3,520)*
1968	11.9	(5,036)	8.0	(3,973)*
1969	13.8	(6,550)	10.2	(5,660)*
1970	15.9	(8,621)	12.67	(8,022)*
1971	14.9	(9,326)	11.74	(8,578)*
1972	13.59	(9,740)	10.68	(8,907)*
1973	17.50	(14,167)	15.39	(14,493)
1974	29.2	(27,691)	32.48	(34,823)
1975	14.13	(17,207)	12.7	(17,765)

*These figures do not include the automatic annual increment for civil servants in each year. If it is included, the percentage and amount of wage increases for civil servants would be the same as that for the Public Corporation and National Enterprise employees, as in the years of 1973-75.

Sources: 1966-74 awards of PCNELRC--Ministry of Labor, RODOHAKUSHO, supra, 1975 Vol., pp. 271-272; 1975 award--ASAHI Newspaper, June 9, 1975 (evening), p. 1, col. 7; Recommendations of PPA--Ministry of Labor, SHIRYO RODOUNDOSHI, supra, 1966 Vol., p. 365; ASAHI Newspaper, Aug. 15, 1967 (evening), p. 1, col. 1; Aug. 16, 1968 (evening), p. 1, col. 1; Aug. 15, 1969 (evening), p. 1, col. 2; Aug. 14, 1970 (evening), p. 1, col. 1; Aug. 13, 1971 (evening), p. 1, col. 3; Aug. 15, 1972 (evening), p. 1, col. 1; Aug. 9, 1973 (evening), p. 1, col. 1; July 26, 1974 (evening), p. 1, col. 4; MAINICHI Newspaper, Aug. 13, 1975 (evening), p. 1, col. 1.

[28]In 1960, the public employee unions under the jurisdiction of the National and Local Civil Service Laws organized a Joint Action Committee of Civil Servants to improve their economic status by joint actions. Until 1969, when the recommendation of the Public Personnel Authority had not been fully implemented by the government, the Committee concentrated its efforts on the full implementation of the recommendation. In October, 1967, it carried out a one-hour joint strike by civil servants, in which the teachers and the local transit workers were the major participants. In autumn of 1968 it carried out one-hour joint strikes twice to protest against the delay in implementing wage increases. When the government adopted the policy of fully implementing the recommendation in 1970, the Committee then commenced efforts to put pressures on the government and the Public Personnel Authority in the course of the spring wage offensive to draw more favorable recommendations from the Authority. In the spring of 1970 the unions began to submit their wage demands to the government and the Authority, and to have meetings with the relevant Ministers and the President of the Authority. In the 1971 spring offensive they came to organize two one-hour strikes to advertise their wage demands. On the other hand, in 1970 the Committee commenced efforts to make the recommendation for the national civil servants virtually effective for the local civil servants. One or two brief strikes for this purpose have been organized in each autumn since that year.

[29]This basic strategy was devised for overcoming the weakness of enterprise unions which are not strong enough to carry out long strikes of indefinite duration. The establishment of such a strategy was also motivated by the lack of budgetary authority on the part of Public Corporation and National Enterprise employers. Cf., Kaoru Ohta, SHUNTO NO SHUEN, supra, pp. 94-96.

[30]In the late summer of 1948, right after the promulgation of Government Ordinance 201, the National Railways workers and postal workers engaged in nationwide unofficial walkouts to protest the deprivation of their right to strike. Also, in the early summer of 1949, the National Railways Workers Union stopped the trains in the metropolitan area for one day and attempted to continue its strike efforts to prevent the layoffs of 95,085 Railway employees--which were part of the massive layoffs of 240,000 redundant public employees, which was carried out by the government as one of the deflationary economic measures to combat postwar inflation and to reconstruct peacetime economy.

[31]Out of the 1,489 participants in the 1948 National Railways walkouts, 1,017 employees were arrested and 1,002 were discharged. Out of 481 postal workers who took part in the walkout, 336 were arrested (70 were prosecuted) and 269 were discharged. The 1949 National Railways strike was beaten by the stop-order of the Occupation Authority and resulted in discharges of many of the militant union leaders in the course of the massive layoffs. Cf. K. Okochi & H. Matsuo, RODOKUMIAI MONOGATARI, SENGO I, supra, p. 281; Ministry of Labor, SHIRYO RODOUNDOSHI, 1949 Vol., supra, pp. 154-164, pp. 202-234.

[32]In 1949 the leadership of the labor union movement in Japan moved from the left (who led the attempted "2.1 General Strike") towards the "Democratization League" movement (the movement to end the "dictatorship" of the communist group in the labor organizations). This shift was completed by July, 1950, when the labor organizations led by new leaders combined together into a new national labor organization, SOHYO (the General Council of Trade Unions). At this time SOHYO represented about 2,760,000 workers, while the once powerful leftist SANBETSU KAIGI (the National Congress of Industrial Unions) had only 290,000 members. Among the major causes of this change were the change in the labor policy of the Occupation Authority; the oppressive attitudes of the conservative government against the leftist union movement (many of the aggressive union leaders were discharged in the 1949 massive layoffs of redundant public employees); the counterdrive by business leaders to restore their management rights; and the criticism of the public against the radicalism of the Communist Party and some union leaders. Against the background of worldwide "cold war," the social psychology came to be dominated by the anti-communist drives of the Occupation Authority and the government.

[33]The Council was organized in 1953 to promote joint actions by the Public Corporation and National Enterprise unions.

[34]See following pages for tables.

[35]The "MARU-SEI" movement was introduced by management as one of the basic measures to reduce the huge financial deficit of the National Railways, which had accumulated to 413 billion yen by 1969. However, anti-union education, persuasion by supervisors to leave the militant unions and move to moderate unions, and discrimination against militant union members in wages, promotion and other personnel matters, were carried out systematically. The National Railways Workers Union and the National Railways Locomotive Engineers Union reacted against this anti-union drive with full assistance from SOHYO. In the fall of 1971 the unions succeeded in obtaining decisions from the Labor Relations Commission (PCNELRC) sustaining unfair labor practice charges made by them. The National Railways were compelled to shake up the higher echelons of its personnel department and to promise changes in the direction of the productivity movement.

(continued on p. 29)

No. 1. The Number of Disciplinary Measures Taken Each Year by the Public Corporations and Government Enterprises

Year	National Railways	Telephone & Telegraph Corporation	Tobacco Monopoly Corporation	Postal Ministry	State-owned Forests	Gov't Printing Services	Metal Currency Mint	Alcohol Monopoly	Local Gov't Enterprises
1949	80	---	---	---	---	---	---	---	
1950	---	---	---	---	---	---	---	---	
1951	---	---	---	---	---	---	---	---	
1952	3	---	---	---	---	---	---	---	
1953	18	---	---	---	---	---	---	---	
1954	348	---	---	---	---	---	---	---	
1955	1	---	---	---	---	---	---	---	
1956	510	3	---	6,014	3	16	---	---	
1957	5,284	60	136	151	205	10	4	---	
1958	22,225	3,857	72	31,010	675	82	---	---	
1959	9,672	759	851	7,914	438	---	---	---	
1960	8,191	88,493	4,768	12,408	358	33	---	---	
1961	3,461	8,449	---	10,592	419	3,155	---	---	
1962	4,116	---	665	---	---	---	---	---	
1963	1,529	8,992	277	6,134	41,943	14	7	---	
1964	1,820	56	319	---	28	20	---	---	
1965	2,890	155,514	152	6,130	55,255	2,461	6	13	
1966	10,445	---	114	10,025	38,084	19	---	---	
1967	5,476	---	1,291	2,717	99	372	---	10	
1968	23,949	1,832	182	3,075	---	44	---	9	
1969	18,624	2,596	820	9,388	507	264	---	8	12,027
1970	8,293	227	659	15,405	4,289	231	1	---	13,230
1971	25,688	8,057	628	170	6,718	287	7	7	13,409
1972	38,772	13,861	269	8,445	32,214	204	10	13	1,832
1973	162,854	42,221	3,707	21,520	39,098	330	7	24	4,921
Total	354,249	334,977	14,910	151,098	220,333	7,542	42	84	45,419

[34] No. 2. The Nature of Disciplinary Measures by Each Public Employer from 1949 till 1973

	National Railways	Telephone & Telegraph Corporation	Tobacco Monopoly Corporation	Postal Ministry	State-owned Forests	Gov't Printing Services	Metal Currency Mint	Alcohol Monopoly	Local Gov't Enterprises	Total
Discharge (KAIKO)	574	73	12	64	16	---	---	---	---	739
Disciplinary Discharge (MENSHOKU)	124	---	2	---	---	1	---	---	---	127
Suspension (TEISHOKU)	4,893	3,222	495	3,917	1,135	113	---	---	381	14,156
Wage Decrease (GENKYU)	93,182	18,368	1,824	23,114	44,622	250	5	10	244	181,619
Reprimand (KAIKOKU)	53,512	182,937	4,681	41,447	31,194	1,686	12	19	730	316,218
Sub-total	152,285	204,600	7,014	68,542	76,967	2,050	17	29	1,355	512,859
Caution (KUNKOKU)	201,964	130,377	7,896	82,556	143,366	5,492	25	55	44,064	615,795
Total	354,249	334,977	14,910	151,098	220,333	7,542	42	84	45,419	1,128,654

Also in the Postal Ministry the All Postal Workers Union fought hard against the discriminatory personnel management with several disruptive tactics in 1970. The compromise settlement made by Union President Takaragi at the end of the year was disapproved by the more militant lower leaders, which led to the fall in the spring of 1971 of the long-lived Takaragi leadership.

[36]The major work-to-rule tactic in the National Railways services is to slow down the speed of trains by 10-30 per cent under the guise of stricter enforcement of safety operation rules. A more ingenious and effective tactic is the so-called "ATS-struggle," in which union engineers of commuter trains in the metropolitan area stop their trains whenever the automatic train stop (ATS) device warns that another train is a certain distance in front. Ordinarily engineers do not stop but merely slow down their trains in such a situation in order to keep up with a crammed schedule of the passenger train services in the metropolitan area (in Tokyo, during rush hours, a train passes each station every two minutes). When this tactic was carried out for about two weeks in April 1972, it was effective enough during rush hours to paralyze the railway schedule of the commuter trains within an hour. and caused great hardship to hundreds of thousands of commuters. Cf. ASAHI Newspaper, April 3, 1972 (evening), p. 1, col. 8; April 4, 1972 (evening), p. 9, col. 1; April 5, 1972 (evening), p. 9, col. 4; April 8, 1972 (evening), p. 1, col. 8; April 10, 1972 (evening), p. 1, col. 3; April 11, 1972 (evening), p. 1, col. 7; April 12, 1972 (evening), p. 9, col. 1; April 13, 1972 (evening), p. 1, col. 1; April 14, 1972 (evening), p. 11, col. 6; April 15, 1972 (evening), p. 1, col. 1; April 17, 1972 (evening), p. 9, col. 9.

Another and no less powerful tactic is to slow down the movement of freight cars when they are switched and rerouted in the freight yards. The union members use all kinds of cautious measures which are provided by or inferred from the safety rules (e.g., the rule only says that the speed of the train in rerouting operation should be less than 25 km/h. The Union interprets that even the speed of 1 km/h. is consistent with the rule.) They thus bring the freight train system to a crawl. Cf. ASAHI Newspaper, June 14, 1972 (evening), p. 10, col. 10.

[37]Due to the overcrowded trains, jostling to get into and out of them, and fatigue and tension from waiting and standing, several commuters were injured or became sick almost every day during the period of work-to-rule. Cf., e.g., ASAHI Newspaper, June 14, 1972 (evening), p. 1, col. 4.

[38]For example, in April, 1972, the "slowdown-of-freight-train" tactic was carried out at several key freight yards for a few days and caused stoppages of more than eighteen hundred trains. This disruption of transportation systems resulted in significantly higher prices of vegetables, fish and meats in the metropolitan area for about a week. Cf. ASAHI Newspaper, April 11, 1972, p. 1, col. 1.

[39]For example, a week-long nationwide work-to-rule action protesting against the massive disciplines against strikers (Sept. 14-20, 1972) caused the stoppages of 170,265 trains (9,116 passenger trains), inconvenienced 11,260,000 passengers. The National Railways incurred 3.4 billion yen damages. Cf., ASAHI Newspaper, Sept. 21, 1972, p. 3, col. 7.

[40]Rioting started with a turmoil by angry passengers at Omiya station at about 4:00 p.m. and spread to other stations rapidly. As the night came and passengers heading

home filled the stations, violence grew. Trains were put on fire, and windows, desks, papers and other facilities of the station were smashed and ruined. The train services came to a complete halt in the metropolitan area for two days. Cf., ASAHI Newspaper, April 25, 1973, p. 1, col. 1.

[41]After the nation's economic shock caused by the so-called "oil-crisis" in late 1973, the consumer price went up by 31.3 per cent in 1974.

[42]At the end of 1973 the public employee unions, demanding a year-end inflation allowance, carried out two joint strikes and won a substantial concession from the government. In the 1974 spring wage offensive the Public Corporation and National Enterprise unions conducted three joint strikes, the last of which was the longest general transportation strike in the postwar history. The National Railways services stopped completely for three days.

[43]The terms first used in the drafting process within the Occupation Authority were "the right to organize," "the right to collective bargaining" and "the right to strike." But soon "the right to strike" was amended to read "the right to act collectively" in order to avoid the unfortunate interpretation that the Constitution encourages workers to strike. Cf., "Hussey Papers," supra, 24-G-4, Sec. 31 & 32; 25-A-2, Sec. 4. In the deliberations on Art. 28 in the Diet, the government and the representatives took it for granted that the "right to act collectively" mainly means the right to strike or the right of workers to put economic pressure on the employer by their collective acts. With this understanding, most discussions centered on the scope and limits of this right. Cf., Shin Shimizu, ed., CHIKUJO NIHONKOKUKENPO SHINGIROKU (Legislative Deliberations on the Constitution; Article by Article Records), Vol. 2, YUHIKAKU, Tokyo, 1962, pp. 666-685.

[44]KEISHU (Supreme Court Criminal Case Report), Vol. 7, No. 4, p. 775.

[45]KEISHU, Vol. 9, No. 8, p. 1189.

[46]KEISHU, Vol. 17, No. 2, p. 23.

[47]The notorious Section 17 of the Public Order and Police Act of 1900, which had been a major oppressive legal provision against trade union activities, outlawed instigation and incitement of a strike. The punishment was six months' imprisonment and a thirty-yen fine.

[48]The leading two decisions were Tokyo District Ct., April 18, 1962 (Tokyo Metropolitan Teachers Union Case, KAKEISHU--Lower Court Criminal Case Report, Vol. 4, No. 3-4, p. 303) and SAGA District Ct., Aug. 27, 1962 (SAGA Prefecture Teachers Union Case, KAKEISHU, Vol. 4, No. 7-8, p. 713). In these cases the courts restricted the meaning of "to instigate and incite" and "acts of disruption," thereby acquitting teachers who engaged in a one-day local strike. These restrictive interpretations were followed by FUKUOKA District Ct., Dec. 21, 1962 (FUKUOKA Prefecture Teachers Union Case, KAKEISHU, Vol. 4, No. 11-12, p. 1094), Tokyo District Ct., April 18, 1963 (All Agriculture Ministry Workers Union Case, KAKEISHU, Vol. 5, No. 3-4, p. 363), KOCHI

District Ct., Nov. 28, 1964 (KITAKAWA Village Teachers Union Case, KAKEISHU, Vol. 6, No. 11-12, p. 1312), SENDAI High Ct., March 29, 1966 (Judicial Administrative Employee Union Case, KAKEISHU, Vol. 8, No. 3, p. 388).

Also in the Public Corporation and National Enterprise Labor Relations field, NIIGATA District Ct. NAGAOKA Division, Feb. 28, 1964 (National Railways Workers Union NAGAOKA Local Case, HORITSU-JIHO--Timely Law Report, No. 372, p. 16) and OSAKA District Ct., March 30, 1965 (All Postal Workers Union MIYAKOJIMA Local Case, KAKEISHU, Vol. 7, No. 3, p. 495) handed down the opposite interpretation to the Supreme Court HIYAMAMARU Decision. NAGASAKI District Ct., April 20, 1964 (National Railways Locomotive Engineers Union NAGASAKI Local Case, KAKEISHU, Vol. 6, No. 3-4, p. 460) restricted the meaning of the prohibited "acts of disruption."

[49]OSAKA District Ct., March 30, 1964 (OSAKA-FU Teachers Union Case, KAKEISHU, Vol. 6, No. 3-4, p. 709.)

[50]Report of the Fact Finding and Conciliation Commission on Freedom of Association Concerning Persons Employed in the Public Sector in Japan, Official Bulletin, Geneva, I.L.O., Vol. 49, No. 1, Special Supplement, Jan. 1966, pp. 490-498.

Since 1958 the major public employee unions in Japan have submitted to the I.L.O. a series of complaints of alleged infringements of trade union rights by the Japanese government. To examine these cases the Governing Body of the I.L.O. set up a panel of Fact Finding and Conciliation Commission led by Eric Dreyer, former Permanent Secretary to the Danish Ministry of Social Affairs, in April 1964, with the consent of the Japanese government. After having examined the allegations and replies of both sides, the panel visited Japan for about two weeks in January 1965 to obtain firsthand information on the cases. In November 1965, the Commission submitted to the Governing Body a final report, which was widely publicized in Japan. On the allegations of infringements of the right to strike, the Report did not support the public employee unions' call for the total restoration of the right to strike, and criticized their tendency to utilize critical strike weapons too easily (sometimes for purely political issues). But the Report also criticized the absolute strike prohibition as unrealistic, and recommended the making of a distinction between essential and non-essential services, and between disruptive and non-disruptive strikes. It also criticized the government's inflexible attitude to punish every infraction of the law by calling it "excessive legalism."

[51]KEISHU, Vol. 20, No. 8, p. 901.

[52]Tokyo High Ct., Nov. 27, 1963 (HANREI-JIHO, No. 363, p. 48).

[53]This concept of "people's daily life" may have almost the same meaning as the American concept of "public welfare." But the Japanese Supreme Court apparently avoided use of the Japanese term "public welfare" because this concept had been attacked by lawyers sympathetic to the unions as being too vague and abstract on which to base a rationale for banning strikes. Instead, the Supreme Court conceptualized the "daily life of the people" as a whole in order to denote the major public interests to be protected from disruption by strikes. The reasoning for this conceptualization may be that Japan is a

small and densely populated country which is highly dependent on the essential public services such as the various public transportation, public utilities and communications services. For example, the general transportation strike in each spring wage offensive paralyzes the whole nation within a day and thus has been denounced by the press as constituting "acts destructive of the people's daily life."

[54]This restrictive standard was the most important theory stated in these decisions, though it appeared only as dictum. The conclusions themselves came from court-created theories that made artificial distinctions between protected and non-protected activities.

In the Tokyo Metropolitan Teachers Union Case (Sup. Ct., Grand Ct., April 2, 1969, KEISHU, Vol. 23, No. 5, p. 305) the Court acquitted six union officials who led a one-day strike of metropolitan teachers to prevent implementation of a new work efficiency rating system. The Court so concluded because these officials had not done more than "ordinary organizing acts" of a strike and because such ordinary acts should not fall within "instigation" or "incitement" of a strike, which is punished by Civil Service Laws.

In the Judicial Administrative Employees Union Case (Sup. Ct., Grand Ct., April 2, 1969, KEISHU, Vol. 23, No. 5, p. 685) the Court upheld a conviction against a union official on the grounds that the strike led by him was a "political strike" which should not enjoy protection under the "minimal restriction theory" standards. The strike in this case was a one-hour demonstration to protest the ratification of the Japan-U.S. Mutual Security Treaty.

[55]These decisions are as follows:

1) Decisions concerning strikes by civil servants:

YAMAGATA District Ct., July 16, 1969 (TSURUOKA City Employee Union Case, GYOSHU-Administrative Law Case Report, Vol. 20, No. 7, p. 912).

KOBE District Ct., Sept. 24, 1969 (KOBE Custom Office Case, HANREI-JIHO, No. 679, p. 83).

SAGA District Ct., Aug. 10, 1971 (SAGA Prefecture Teachers Union Case, GYOSHU, Vol. 22, No. 8-9, p. 1293).

Tokyo District Ct., Oct. 15, 1971 (Tokyo Metropolitan Teachers Union Case, HANREI-JIHO, No. 645, p. 29).

TAKAMATSU District Ct., Dec. 13, 1971 (Ministry of Finance SHIKOKU District Office Case, HANREI-JIHO, No. 676, p. 80).

Tokyo District Ct., Nov. 22, 1971 (MIYAKONOJO Post Office Case, HANREI-JIHO, No. 658, p. 9).

SHIZUOKA District Ct., April 7, 1972 (SHIZUOKA City Teachers Union Case, HANREI-TAIMUZU-Case Law Time, No. 277, p. 91).

HIROSHIMA District Ct. TAKAOKAYAMA Division, March 12, 1973 (TSUYAMA City Employee Union Case, HANREI-TAIMUZU, No. 295, p. 270).

2) Decisions concerning strikes by public enterprise employees:

Tokyo District Ct., Aug. 31, 1971 (National Railways Locomotive Engineers Union Case, ROMINSHU-Labor Case Report, Vol. 22, No. 4, p. 813).

YAMAGATA District Ct., Nov. 27, 1972 (Tobacco Monopoly Corporation YAMAGATA Factory Case, HANREI-JIHO, No. 688, p. 43).

Tokyo District Ct., Dec. 19, 1972 (National Railways Locomotive Engineers Union Case, HANREI-JIHO, No. 689, p. 19).

OSAKA District Ct., March 27, 1973 (Bureau of Forestry Employee Union SAIJO Local Case, HANREI-JIHO, No. 698, p. 17).

[56]Numerous notes and comments were published on the 1966 and 1969 Supreme Court Decisions, most of which took this stand. E.G., cf., the discussions by Prof. M. Ito, K. Ishikawa, and others in JURISUTO No. 360, Dec. 15, 1966, p. 20 (on the 1966 Decision), and the discussions by Prof. H. Fujiki, K. Ishikawa and others in JURISUTO No. 424, June 1, 1969, p. 15 and Noboru Kataoka, HANREI-TAIMUZU No. 234, July, 1969, p. 2 (on the 1969 Decision). Most of the notes on the lower court decisions also praised the liberal attitude of the courts.

[57]When the Tokyo High Court Judges N. Yoshida, K. Ohira and K. Niizeki tried the Tokyo Central Post Office Case, which had been remanded to them by the 1966 Supreme Court Decision, they found difficulty in applying these standards. They criticized the ambiguity of the 1966 Decision standards in the final decision on this case (Tokyo High Ct., Sept. 6, 1967, HANREI-JIHO, No. 509, p. 70).

[58]HANREI-JIHO, No. 645, p. 29.

[59]Since the strike was conducted in the early stage of the school year and lasted only for one day, it was held that the backlog could have been easily made up by the end of the year.

[60]HANREI-JIHO, No. 689, p. 19.

[61]Among the sixteen district court decisions which were handed down between 1969 and 1973 concerning the legal validity of the disciplinary measures taken against public employee strikes, only five were reached within two years of the suit being filed. Four took four to six years, another four took seven to eight years and the other three took eleven to thirteen years. For example, in the second Tokyo Metropolitan Teachers Union Case (Tokyo District Ct., Oct. 15, 1971) discussed above, which involved a 1957 strike, it took the court thirteen years to reach a decision. In the National Railways Locomotive Engineers Union Case (Tokyo District Ct., Dec. 12, 1972) also discussed above, the time spent by the court was eleven years.

The ordinary trial period in the Japanese courts seems much shorter. Among 30,187 district court decisions handed down during 1971 on the ordinary civil cases, 78 per cent of them were issued within two years after the suit had been filed, and those issued within three years reached 88 per cent. Only six per cent of the cases took more than four years to get to decision. Cf., General Secretariat, the Supreme Court, SHIHO-TOKEI-NENPO, MINJI-GYOSEI 1 (Annual Report of Judicial Statistics, Vol. 1, Civil & Administrative Cases), Tokyo, 1971, p. 130.

[62]In their Opinion to Supplement the Majority Opinion in the April 25, 1973 Supreme Court Decision (All Agriculture Ministry Workers Union Case), Justice Kishi and Amano strongly criticized the ambiguity of the 1966-1969 Supreme Court Decisions, and closed their opinion with the following statement:

"We should say that the vague standard such as 'seriously endangered people's daily life' is too loose to be made clear by the accumulation of the court decisions. The legal standard for people's conduct must be clear already when the conduct is to be done. . . . If the standard is so ambiguous that nobody can tell what it means until we have a trial by a judicial court, we are in no better legal situation than that we have no legal standard for our conduct. There, people would have to act according to their own judgment without knowing its legal result. We cannot endure such an unstable and disorderly legal situation." Cf., KEISHU, Vol. 27, No. 4, p. 547.

[63] From 1966 to 1972, over half of the cases involving strikes in the Public Corporations and Government Enterprises were decided in favor of the employees. The 2) group of cases in Note 55 fall here. Besides them, the following decisions nullified the disciplinary measures taken in the case as being too heavy:

Supreme Court, 3rd Ct., Dec. 24, 1968 (CHIYODAMARU Case, MINSHU-Supreme Ct. Civil Case Report, Vol. 22, No. 13, p. 3050).

SAPPORO High Ct. HAKODATE Division, Jan. 17, 1969 (SEIKAN-Line OSHIMA Ship Case, ROMINSHU, Vol. 20, No. 1, p. 1).

TAKAMATSU High Ct., Jan. 22, 1970 (National Railways Locomotive Engineers Union SHIKOKU District Union Case, ROMINSHU, Vol. 21, No. 1, p. 37).

SAPPORO District Ct., April 27, 1971 (National Railways OIWAKE Engine District Case, HANREI-JIHO, No. 634, p. 18).

SENDAI District Ct., Nov. 26, 1971 (National Railways Locomotive Engineers Union SENDAI Local Case, HANREI-JIHO, No. 662, p. 91).

Cases involving disciplinary measures went against this group of employees when the expansion of the minimal restriction theory to discipline cases was just beginning (Tokyo District Ct., June 17, 1969, All Postal Workers Union Case, ROMINSHU, Vol. 20, No. 3, p. 585; NIIGATA District Ct., Nov. 25, 1969, All Telephone and Telegraph Workers Union Case, ROMINSHU, Vol. 20, No. 6, p. 1553), when the case involved a very light discipline (SHIZUOKA District Ct. NUMAZU Division, July 15, 1972, National Railways Locomotive Engineers Union NUMAZU Local Case, HANREI-JIHO, No. 685, p. 128), or when the case involved a paralyzing strike in the National Railways (Tokyo District Ct., Dec. 19, 1972, National Railways Locomotive Engineers Union Case, HANREI-JIHO, No. 689, p. 19).

Criminal cases involving violent picketing went against the employees:

Supreme Ct. Grand Ct., Nov. 30, 1966 (National Railways MASHUMARU Case, KEISHU, Vol. 20, No. 9, p. 1076);

Supreme Ct. 3rd Ct., Feb. 7, 1967 (ANZAI Post Office Case, KEISHU, Vol. 21, No. 1, p. 19);

Supreme Ct. 1st Ct., July 16, 1970 (National Railways Locomotive Engineers Union Case, HANREI-JIHO, No. 605, p. 95);

Supreme Ct. 3rd Ct., July 21, 1970 (National Railways OTARU-CHIKUKO Station Case, HANREI-JIHO, No. 603, p. 98);

Supreme Ct. 3rd Ct., Dec. 15, 1970 (National Railways Locomotive Engineers Union NAGASAKI Local Case, SAIBANSHU-KEIJI-Criminal Case Report, No. 178);

Tokyo High Ct., Oct. 20, 1972 (YOKOHAMA Post Office Case, HANREI-JIHO, No. 689, p. 51).

However, when violence was slight and/or there was some condonable situation, the picketing was held not to merit criminal sanctions:

SENDAI High Ct., April 27, 1967 (SAPPORO City Transit Employees Union Case, KO-KEISHU-High Ct. Criminal Case Report, Vol. 20, No. 2, p. 194);
FUKUOKA High Ct., March 26, 1968 (National Railways KURUME Station Case, HANREI-JIHO, No. 516, p. 25);
HIROSHIMA District Ct. ONOMICHI Division, June 10, 1968 (National Railways OKASO-ITOZAKI Stations Case, HANREI-JIHO, No. 529, p. 23);
Supreme Ct. 3rd Ct., June 23, 1970 (SAPPORO City Transit Employees Union Case, KEISHU, Vol. 24, No. 6, p. 311)
Supreme Ct. 3rd Ct., March 16, 1971 (KANAZAWA Post Office Case, RODOKEIZAI-HANREI-SOKUHO-Quick Report of Labor Cases, No. 740, p. 4);
OSAKA District Ct., April 11, 1972 (National Railways MIYANOHARA Freight Yard Case, HANREI-JIHO, No. 665, p. 40).

Regarding strikes among civil servants, almost all the cases were decided in favor of employees. I can find ten favorable decisions for them concerning criminal prosecutions based on Civil Service Laws:

MAEBASHI District Ct., July 26, 1967 (GUNMA Prefecture Teachers Union Case, ROJUN-BESSATSU-Ten-day Report of Labor Cases, Supplement No. 645, p. 5);
FUKUOKA High Ct., Dec. 18, 1967 (FUKUOKA Prefecture Teachers Union Case, HANREI-JIHO, No. 505, p. 21);
FUKUOKA High Ct., Dec. 18, 1967 (SAGA Prefecture Teachers Union Case, HANREI-JIHO, No. 505, p. 21);
KYOTO District Ct., Feb. 22, 1968 (KYOTO City Teachers Union Case, HANREI-JIHO, No. 520, p. 18);
OSAKA High Ct., March 29, 1968 (WAKAYAMA Prefecture Teachers Union Case, HANREI-JIHO, No. 521, p. 12);
FUKUOKA High Ct., April 18, 1968 (All Agriculture Ministry NAGASAKI-Office-of-Statistics-Local Case, HANREI-JIHO, No. 518, p. 29);
SENDAI High Ct., Feb. 19, 1969 (IWATE Prefecture Teachers Union Case, HANREI-JIHO, No. 548, p. 39);
Supreme Ct. 1st Ct., July 16, 1970 (WAKAYAMA Prefecture Teachers Union Case, ROJUN-BESSATSU, No. 750, p. 2);
Supreme Ct. 3rd Ct., March 23, 1971 (FUKUOKA Prefecture Teachers Union Case, KEISHU, Vol. 25, No. 2, p. 7);
Supreme Ct. 3rd Ct., March 23, 1971 (SAGA Prefecture Teachers Union Case, KEISHU, Vol. 25, No. 2, p. 7).

The only decision which sustained the criminal charge on Civil Service Laws is:

Tokyo High Ct., Sept. 30, 1968 (All Agriculture Ministry Workers Union Case, HANREI-JIHO, No. 547, p. 12).

Concerning disciplinary measures based on Civil Service Laws, I can find nine favorable decisions for employees. The 1) group of cases in Note 55 fall here. Besides them, OSAKA High Ct., Feb. 16, 1972 (KOBE Custom Office Case, HANREI-JIHO, No. 679, p. 78) nullified the disciplinary measure taken in the case as being too heavy.

[64]The Liberal Democratic Party as well as the government officials in charge of public employment management have been very critical against the courts' escalation of liberal interpretations on the strike prohibitions. They claimed that such interpretations were clearly against the legislative intention and made management of public employment relations more and more difficult. Their concerns and criticisms are reported in MAINICHI Newspaper April 23, 1969, p. 2, col. 4; April 16, 1971, p. 1, col. 1; October 18, 1971, p. 2, col. 1; and April 15, 1972, p. 4, col. 1. Stronger and more emotional criticisms are seen in JIYUSHINPO (a newspaper published by the Liberal Democratic Party) against a few lower-court decisions enunciating liberal interpretations: against the decision of OSAKA District Ct., April 11, 1972 (National Railways MIYANOHARA Freight Yard Case, HANREI-JIHO, No. 665, p. 40), cf., JIYOSHINPO, May 2, 1972, p. 3, col. 1; June 6, 1972, p. 3, col. 1; against SAGA District Ct., Aug. 10, 1971 (SAGA Prefecture Teachers Union Case, GYOSHU, Vol. 22, No. 8-9, p. 1293), cf., JIYUSHINPO, Sept. 28, 1971, p. 3, col. 1; May 23, 1972, p. 3, col. 1; May 30, 1972, p. 3, col. 1.

[65]The Sato Government appointed new Justices in place of seven Justices who had reached retirement age (70) during this period. But it had been widely pointed out that most of the new appointees were conservatives. Labor circles complained bitterly about these "political appointments" and feared that they might change the basic stand of the Supreme Court towards the right to strike. Cf., Tadashi Hanami, Labor Relations in the Public Sector: To Strike or Not to Strike, Japan Labor Bulletin, Vol. 12, No. 7, July 1, 1973, p. 8; MAINICHI Newspaper, July 1, 1972, p. 3, col. 1.

[66]In the opinion by Justices KISHI and AMANO to supplement the Majority Opinion, KEISHU, Vol. 27, No. 4, p. 585.

[67]KEISHU, Vol. 27, No. 4, p. 547.

[68]Governor's Committee on Public Employee Relations, State of New York, Final Report, March 31, 1966, GERR, No. 135, April 11, 1966, B-1, D-1.

[69]Harry H. Wellington and Ralph K. Winter, The Unions and the Cities, The Brookings Institution, Washington, D.C., 1971, pp. 7-32.

[70]Ibid., p. 25:

"One should straightway make plain that the strike issue is not simply the importance of public services as contrasted with services or products produced in the private sector. This is only part of the issue, and in the past the partial truth has beclouded analysis."

[71]Most of the notes written on this decision have been critical of the revival of the comprehensive strike prohibition. See the notes and comments in JURISUTO, No. 536 (June 15, 1973), HANREI-JIHO, No. 699 (May 21, 1973) and KIKAN-RODOHO (Seasonary Labor Law Journal), No. 88 (Summer, 1973).

[72]See the opinions of experts and editorial articles on this decision, in the ASAHI Newspaper, April 25, 1973 (evening), p. 2, col. 12; April 26, 1973, p. 5, col. 1;

and MAINICHI Newspaper, April 25, 1973 (evening), p. 2, col. 10; April 26, 1973, p. 5, col. 1. Even the more conservative NIHON KEIZAI Newspaper called for the legislative solution in its editorial article on the decision (April 26, 1973, p. 3, col. 3).

[73]As of Dec. 31, 1975, the following decisions fall here:

SAPPORO High Ct., May 30, 1973 (National Railways Locomotive Engineers Union Case, HANREI-JIHO, No. 707, p. 2);
Tokyo High Ct., June 14, 1973 (SAPPORO Post Office Case, HANREI-JIHO, No. 727, p. 232);
HIROSHIMA High Ct., Sept. 13, 1973 (National Railways OSAKA-ITOZAKI Station Case, HANREI-JIHO, No. 727, p. 105);
MAEBASHI District Ct., April 30, 1974 (National Railways Locomotive Engineers Union TAKASAKI District-Local Case, HANREI-JIHO, No. 743, p. 28);
Tokyo District Ct., June 24, 1974 (National Railways Workers Union Tokyo District-Local Case, HANREI-JIHO, No. 757, p. 116).

[74]As of Dec. 31, 1975, the following decisions fall here:

KUMAMOTO District Ct., Oct. 4, 1973 (National Railways Workers Union KUMAMOTO District-Local Case, HANREI-JIHO, No. 719, p. 21);
OSAKA District Ct., Dec. 22, 1973 (National Railways Workers Union OSAKA District-Local Case, HANREI-JIHO, No. 731, p. 6);
URAWA District Ct., July 10, 1974 (National Railways Workers Union Tokyo District-Local Case, HANREI-JIHO, No. 749, p. 7);
FUKUOKA District Ct., Nov. 19, 1974 (KITAKYUSHU City Transit Workers Union Case, HANREI-JIHO, No. 766, p. 116);
SAPPORO District Ct., Feb. 26, 1975 (KITAMI Post Office Case, HANREI-JIHO, No. 771, p. 3);
OSAKA District Ct., March 14, 1975 (National Railways Locomotive Engineers Union TENNOJI District-Local Case, HANREI-JIHO, No. 774, p. 5);
OSAKA District Ct., April 24, 1975 (HIMEJI Post Office Case, HANREI-JIHO, No. 784, p. 108);
OSAKA District Ct., July 17, 1975 (National Railways Locomotive Engineers Union Case, HANREI-JIHO, No. 785, p. 20);
ASAHIKAWA District Ct., July 17, 1975 (All Forestry Bureau Workers Union ASAHIKAWA District-Local Case, HANREI-JIHO, No. 785, p. 34).

[75]Some decisions went so far as to declare the strike prohibitions in the Local Civil Service Law and the Public Corporation and National Enterprise Labor Relations Law to be unconstitutional and void, in order to avoid the ambiguity criticism against the minimal restriction approach:

WAKAYAMA District Ct., Sept. 12, 1973 (WAKAYAMA Prefecture Teachers Union Case, HANREI-JIHO, No. 715, p. 9);
MORIOKA District Ct., June 6, 1974 (National Railways Locomotive Engineers Union MORIOKA District-Local Case, HANREI-JIHO, No. 743, p. 3);
WAKAYAMA District Ct., June 9, 1975 (WAKAYAMA Prefecture Teachers Union Case, HANREI-JIHO, No. 780, p. 3).

[76]After the Supreme Court handed down the April 25, 1973 decision, and especially as the term of the Advisory Council for Public Personnel System came close to the end (the expiration date was Sept. 3, 1973), the major newspapers called for a legislative solution for the chaotic strike issue, and strongly urged the government and the members of the Council to make serious efforts to reach agreement on the basic direction of the legislative program. Cf., Leading articles in ASAHI Newspaper, May 26, 1973, p. 5, col. 1; June 28, 1973, p. 5, col. 1; and August 29, 1973, p. 5, col. 1; MAINICHI Newspaper, April 30, 1973, p. 5, col. 1; June 28, 1973, p. 5, col. 1; August 8, 1973, p. 5, col. 3; August 29, 1973, p. 5, col. 3; NIHON KEIZAI Newspaper, June 30, 1973, p. 3, col. 3; and August 28, 1973, p. 3, col. 3.

[77]The report stated in the preamble that the present situation of public employment labor relations should not be left as it was, and that it was essential to remove mutual distrust between public employers and unions. The report mainly recommended that the prohibition of labor organization for firemen should be further studied, with special attention to developments in the I.L.O.; that the budgetary constraint on the Public Corporations and National Enterprises in concluding wage agreements should be removed as much as possible, so as to make collective bargaining work more smoothly; that the recommendation of the Public Personnel Authority should be maintained for the time being for the national civil servants' wage determination; but that a machinery to hear opinions of employees should be set up in the process of making this recommendation. However, opinions were divided on the critical issue of the right to strike. Some insisted on the continuation of present comprehensive prohibition; others called for a limited right to strike with restrictions to protect the nation's normal life. But all members agreed that the criminal sanctions against strikers be reconsidered. The Council closed the report by stating that the disagreements on the right to strike issue mainly reflected the difference of views concerning the consequences of the strike-right on the labor relations and people's daily life and that the government should make its best efforts to resolve this issue as soon as possible. (The report appears in the ASAHI Newspaper, Sept. 4, 1973, p. 2, col. 1. The discussions and comments can be found in JURISUTO, No. 546, Nov. 1, 1973, p. 16).

[78]The major newspapers urged the government to make serious efforts to draw a conclusion on the legislative program based on the analysis and recommendations of the final report. Cf., Editorial Articles in the ASAHI Newspaper, Sept. 5, 1973, p. 5, col. 1 and MAINICHI Newspaper, Sept. 5, 1973, p. 5, col. 1. Also see the discussions by the persons representing the government, labor, and public in ASAHI Newspaper, Sept. 5, 1973, p. 4, col. 4, and MAINICHI Newspaper, Sept. 4, 1973 (evening), p. 2, col. 1. The neutrals urged, and the government vowed, full-scale efforts for working out a legislative program.

[79]ASAHI Newspaper, May 31, 1975 (evening), p. 1, col. 1.

[80]ASAHI Newspaper, June 3, 1975 (evening), p. 1, col. 1.

[81]This Council was composed of six professors of law or economics, five business leaders, four ex-government bureaucrats, two commentators, one newspaper president and two labor leaders. The public employee unions complained from the be-

ginning that the composition was quite unfair for the labor side.

[82]Editorial Articles in ASAHI Newspaper, Oct. 18, 1975, p. 5, col. 3; Oct. 22, 1975, p. 5, col. 1; MAINICHI Newspaper, Oct. 23, 1975, p. 5, col. 1.

[83]In this strike, the unions demanded that the government recognize the basic principle of restoring a right to strike to all employees of the public enterprises, that the government also make clear the time limit for its concrete legislative action, and that the public enterprise employers no longer take disciplinary measures against the strikers.

[84]The majority opinion recommended that the right to strike be accorded only to the employees of the public enterprises which can be reorganized into private corporations because of their lesser importance to the public welfare (such as the alcohol and tobacco monopolies and the state-owned forests). As for employees of the other public enterprises, strike prohibitions should not only be maintained but also the sanctions should be strengthened in view of the law-breaking tendency of the public employee unions. They thus recommended as sanctions the stringent rights and deprivation of registration. They strongly condemned the unions' attitude to push the government with paralyzing political strikes, and admonished the government to stop its decade-long practice of making concessions to such union pressures. (The summary of the report is found in ASAHI Newspaper, Nov. 27, 1975, p. 6, col. 1. The full text appears in JURISUTO, No. 604, Jan. 15, 1976, p. 83).

[85]Kichiemon Ishikawa, "KOROHOCHU SOGIKOI-NI-KANSURU-BUBUN-NO KAISEI-SHIAN" ("A Proposal for the reform of strike provisions in the Public Corporation and National Enterprise Labor Relations Law"), in RODOHO-NO-SHOMONDAI (Problems of Labor Law), edited by Tokyo University Society for Labor Law Studies, dedicated to the Late Professor Teruhisa Ishii, KEISO Press, Tokyo, 1974, pp. 107-123.

Professor Ishikawa had been an influential member in the Advisory Council of the Public Personnel System. In this Council's final report (Sept. 3, 1973) basically the same proposal was made as one of the three opinions on the right to strike issue in the public enterprise labor relations area. Proposals for a limited right to strike for the public enterprise employees appeared one after another in the fall of 1975: The report by the Advisory Council for National Railways Services ("Proposals for Reconstruction of the National Railways," ASAHI Newspaper, Oct. 18, 1975, p. 1, col. 1, reprinted in JURISUTO, No. 604, Jan. 15, 1976, p. 78); "A proposal to give a limited right to strike to all public enterprise employees," by Goro Yamazaki, a Diet-member of the ruling party (ASAHI Newspaper, Nov. 24, 1975, p. 1, col. 1); two minority opinions by Takumi Shigeeda, a DOMEI leader, and by Nobuo Hayashi, Professor of Nihon University (reprinted in JURISUTO, No. 604, p. 72 and 76). Among these, some proposed to limit the effective period of the new legislation for a few years to see the consequences of the experiment (Hayashi); another proposed to set up a special advisory committee of experts in the railway services to make standards for the national railway employees' wages (Advisory Council for National Railways Services), and others required the special majority for the union's strike ballot (Yamazaki, Shigeeda). Some advocated punishing the unions and members who broke the rules set in the limited right to strike with fines and other criminal sanctions (Advisory Council for National Railways Services, Shigeeda). Many of them also proposed the removal of the budgetary constraint imposed on wage negotiations in the public enterprise labor relations area (Advisory Council for National

Railways Services, Yamazaki, Shigeeda). Except for these details, these proposals are basically the same as Prof. Ishikawa's proposal.

[86]Japanese courts do not have injunctive power buttressed by the concept of court concept. It therefore remains to be seen how the courts will enforce the cease and desist order.

THE JAPANESE POLICE: ON THE BEAT

by

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The job of policing has certain similarities in all societies. There are basic imperatives demanded of all police systems; that is, to enforce the law and maintain order. Most police systems also perform a "service" function for the citizenry as well. However, the ways in which these functions are performed--the "style" of police work--varies from society to society.

The police articulate directly with society and more constantly affect the lives of citizens than any other governmental agency, except perhaps the schools. Accordingly, the police must accommodate to the cultural norms and patterns of society in order to operate effectively. For instance, the way in which the police enforce the law must match the people's concept of law or the police will face an outraged public opinion. Police methods are colored by and reflect the society in which the police are found.

This article will discuss the man on the beat--the uniformed police officer in the police box and patrol car--with a focus on the cultural content and societal context of police methods.[1] The data were gathered during eighteen months of field work in Japan for my doctoral dissertation in anthropology. The research entailed extensive interviews with all levels of police officials and actual observation of police activities as I walked the beat with patrolmen, rode in patrol cars, went to crime scenes with criminal investigators, trained with the riot police and so forth. The study focused on Okayama Prefecture in western Japan, a rapidly industrializing middle range prefecture, the city of Kurashiki located in Okayama Prefecture, and a farm area near Kurashiki City. I studied in depth the jurisdictions of two police stations situated within Kurashiki City and a residential police box located in the nearby farming area: the Kurashiki police station, which covers the old rice granary town of Kurashiki proper and which has fairly typical residential, small industrial and business districts; the Mizushima police station, which covers a huge ultra-modern industrial complex built recently on land reclaimed from the Inland Sea, some farming areas and vast workers' apartment complexes; and the Kamo residential police box which covers an agricultural area, including the hamlet of Niiike (subject to intensive community study by The University of Michigan Center for Japanese Studies, 1950-1954). I had my own office in the Kurashiki police station for over a year. A preliminary study was also done of the Fuchu police station on the western outskirts of Tokyo prior to the main study in Okayama. Although the data are primarily from one locality in Japan, the patterns and styles of police behavior observed can be fairly safely generalized to Japan as a whole, except for perhaps atypical areas such as the busiest parts of Tokyo, Osaka and a few other very large cities.

DANGERS OF POLICE WORK

I gave a talk once to a group of new assistant police inspectors at the Shikoku Regional Police Bureau School. About forty-five officers were present, all veterans of at least ten years of police service. I asked how many had been in situations in their police work in which they felt that their lives had been in danger. Of the forty-five, only four raised their hands.[2]

Police work in Japan is not very dangerous, at least compared to the United States. A recruiting pamphlet for the Okayama prefectural police states that the job of a policeman may be more dangerous than that of an office worker, but "it is not as dangerous today as most people think it is."[3] Of the 185,850 police officers in Japan in 1973, only eight were killed due to felonious criminal action and four injured.[4] In the United States, of the 511,146 state and local police officers in 1973, 132 were killed and 11,468 were injured by criminal assault.[5] If an adjustment is made for the difference in the total number of police officers in the two countries, this is a ratio of six times as many police officers killed and 1,043 times as many injured in the United States as in Japan.

A large factor in the minimal amount of danger in police work in Japan is the fact that guns are rigorously controlled. It is impossible to legally own a handgun in Japan, unless one is a member of an international shooting team. Shotguns, rifles and air rifles may be purchased for hunting if the buyer has a permit from the prefectural public safety commission. The person's background is investigated before a permit is issued and, if he has a criminal record, he cannot receive a permit. The weapon must be brought to the local police station every five years for inspection for the permit to be renewed, and the gun owner must hear a lecture on gun safety from the police officers. There were 20,989 registered firearms in Okayama prefecture in 1974.[6] Gangsters use guns occasionally in crimes (usually in shoot-outs with rival gangs), and these are usually either smuggled into Japan or converted from realistic metal toy guns. The National Police Agency recently clamped down on model gun manufacturers to modify the toys so that they cannot be easily converted.[7] Criminals occasionally attack policemen in an attempt to steal their revolvers.[8]

Cutting and stabbing weapons are most frequently used in crimes in Japan. Chart 1 compares murders in Okayama prefecture and the United States in 1974 by the type of weapons used. The overwhelming percentage of cutting and stabbing weapons used in murders in Okayama is consistent with the long tradition of using swords and knives as weapons in Japan. There were 83,212 swords registered in Okayama prefecture in 1974 (four times as many as firearms), and the police estimate that there are at least one-and-a-half times as many swords still unregistered.[9] Most are presumed to be family heirlooms. Knives, of course, are used more frequently than swords in committing crimes.

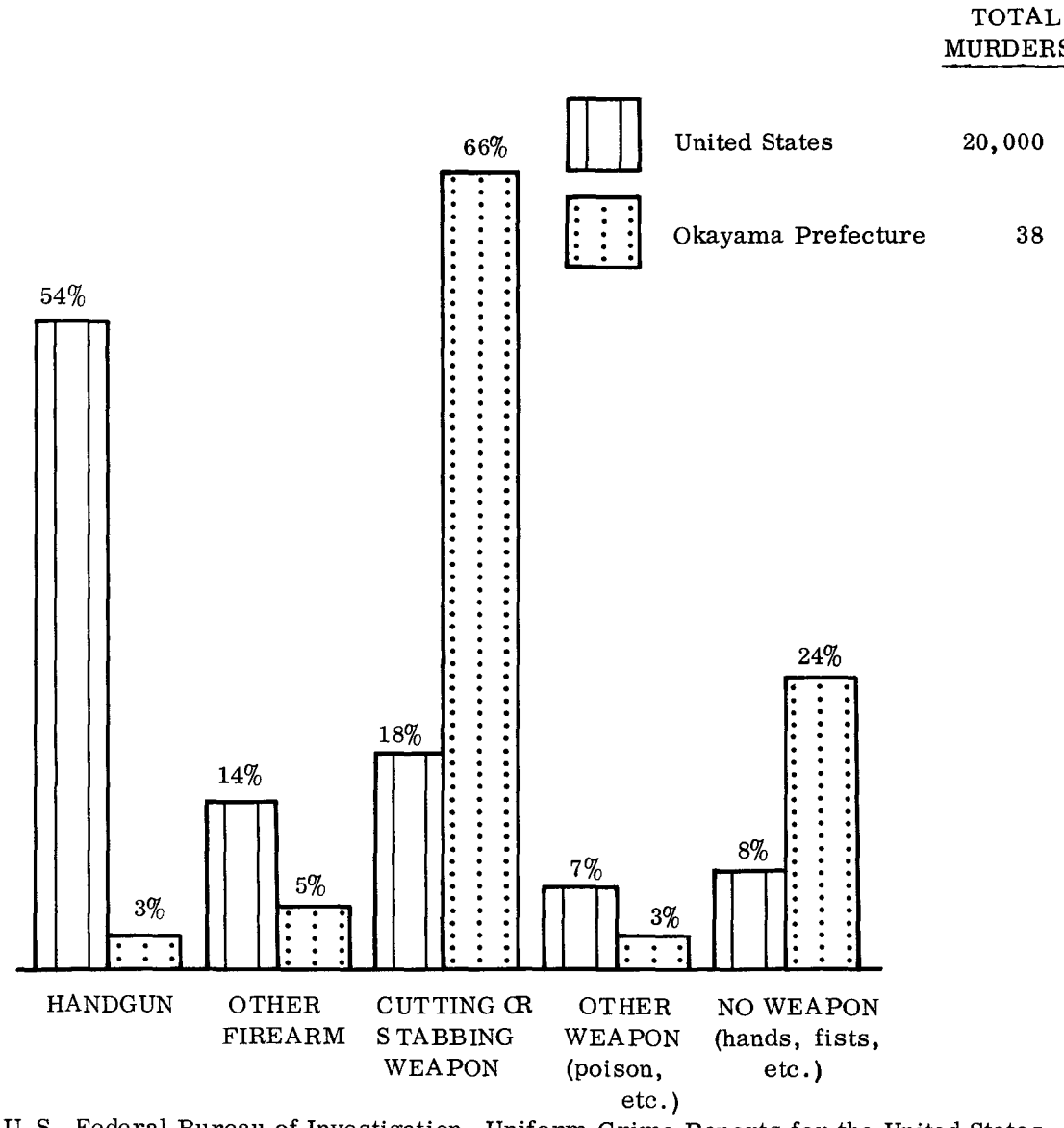
PATROL POLICE

The patrol police--the uniformed policemen who man the police boxes and patrol cars--are the mainstay of the Japanese police system and have the most direct contact with the citizens. They are the "front line" (dai issen), as the Japanese say, in crime and traffic accident prevention; the first to handle almost all incidents before other police specialists are called in. Their duties cover all fields of police activity; they comprise a web that covers all of Japan through police box jurisdictions, channeling information on various incidents to the respective specialized police units for further investigation. Police officers in police boxes are affectionately referred to by local residents as "o mawari san" (literally, "Mr. Walkaround").

Patrol police amounted to 40 percent of all police officers in 1970. They made 40 percent of all criminal arrests, 60 percent of all traffic arrests, and handled 90 percent of all aid and service activities administered by the police (see Table 1):

Chart 1

MURDER BY TYPE OF WEAPON USED
IN OKAYAMA PREFECTURE AND THE UNITED STATES



Sources: U.S. Federal Bureau of Investigation, Uniform Crime Reports for the United States, 1974 (Washington: U.S. Government Printing Office, 1974), p. 17.

Document from the Okayama Prefectural Police Headquarters, 1975.

Table 1

PERCENT OF POLICE ACTIVITIES HANDLED BY PATROL POLICE

1970

	Criminal Arrests (people)	Traffic Arrests (people)	Aid and Service (people)
All police	380,850	5,364,873	426,148
Patrol Police	152,608	3,301,892	369,264
Patrol Police Percent	40.1%	61.5%	86.7%

Source: National Police Agency Unified Planning Commission, ed., 70 nendai no keisatsu, gekidō to henka e no taio [The police of the 70's: policies for upheaval and change] (Tokyo: National Police Agency, 1971), p. 38.

POLICE BOXES (kōban or hashutsusho)

All police school graduates serve in kōban as their first assignment. They work there for a few years before transfer to a specialized police unit such as traffic, criminal investigation or the riot police. Police boxes in Okayama are usually staffed by a majority of young officers with a few old sergeants as the leaders. Many policemen look back at their first days in a police box nostalgically--as their "birth place as a police officer (keisatsukan no furusato)."[10]

Kōban are usually found in cities or towns, with 5,858 nationwide in 1974. There were eighty-four in Okayama prefecture the same year. Kōban and residential police boxes (chūzaisho) frequently are called by the old village name of their jurisdictions, even though the names are no longer used as addresses. For instance, the Masu kōban in a residential area of Kurashiki is named after the old village of Masu that makes up a majority of its jurisdiction, though the name of the village has long been out of usage as a place name. The fact that kōban and chūzaisho jurisdictions frequently match old village boundaries is significant in that the police rely on the long established cooperative relations between households in the villages and neighborhoods in crime prevention and investigations. The police boxes and elementary schools are often the only institutions retaining the old village names, and both, thus, become focal points of traditional village solidarity.

The largest police box in Okayama prefecture is the twenty-two man Okayama Station police box (Okayama eki hashutsusho). The Kurashiki Central police box (Kurashiki chūō hashutsusho), which I studied, is second with thirteen police officers. The two other police boxes I studied in Kurashiki are of medium range: Kurashiki Ekimae (literally "in front of the train station") police box with nine officers and Masu police box with six. The three police boxes I studied in Mizushima had the following manpower: six (Chitori machi), five (Kamejima) and four (Tsuru no ura). I worked a night in the Okayama Station police box, so I thus experienced police boxes with a wide range of manpower.

Okayama is on a three shift system in its police boxes, with the following pattern:

Overnight (tōmu)	8:30 A.M. - 8:30 A.M.
Rest day (hiban)	8:30 A.M. - 8:30 A.M.
Day (nikkin)	8:30 A.M. - 5:15 P.M.

The overnight shift works a total of sixteen hours with five hours for sleep at night, two hours for meals, and an extra hour break at night. The sleep is broken into two portions, with work in between. The day shift has an hour break for lunch. The standard work week is forty-four hours, with from ten to fifteen hours of overtime in addition. Meals are taken in the police box from nearby restaurants that deliver, or police officers change their coat and go to a restaurant. It is against policy to eat in a restaurant in uniform, though many do it in Okayama anyway.

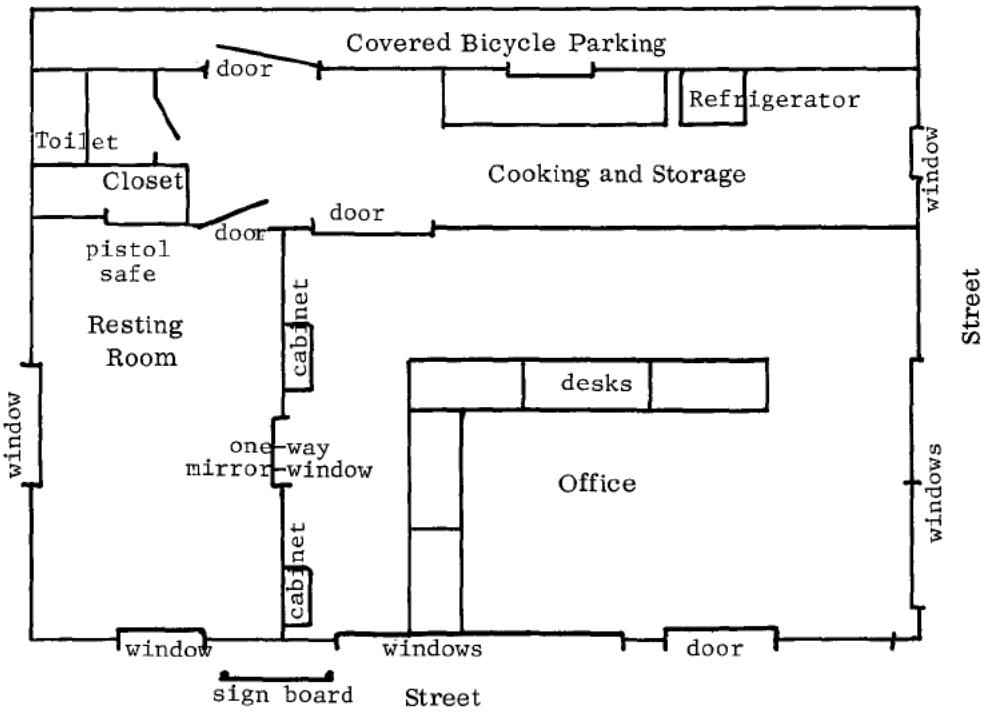
Kōban usually have an office area in front with desks and cabinets, and large glass windows in the front wall for easy view outside by the police officers. A sign board is located in front, pinned full of posters of wanted or missing persons or displaying slogans for crime prevention and other police interests. There is usually a small cooking and storage area in the back, a tatami room for sleeping and relaxing, a safe in the closet of the tatami room for locking up pistols when sleeping, and a covered area in the rear for parking bicycles or motorbikes (see Illustration 1).

A Day in a Kōban.[11]

8:30 A. M. Twenty-two police officers gathered in the Patrol Section office on the third floor of the Kurashiki police station. The intercom of the police station announced that it was time for morning exercises (chōrei no jikan), so the men went down the rear stairs behind the police station and lined up with policemen from other sections in the parking lot. The assistant police chief walked out the rear door and called the policemen to rigid attention. The assistant chief greeted the men and gave some short instructions. The Criminal Affairs

Illustration 1

FLOOR PLAN OF A POLICE BOX IN KURASHIKI



officer then came forward and briefed the men on criminal incidents of the night before. The men were then told to stand at ease. Music was piped over the loudspeaker behind the police station and all the police officers went through light limbering up exercises.

After exercises, the Patrol Section men went to the room on the first floor in which pistols are stored in a safe and signed for their weapons.[12] They then went back up to the Patrol Section office. They stood around the edge of the room and were called to attention by one of the officers. They bowed on command to the Patrol Section chief. They were then put at ease. One of the sergeants assigned to office duty read the shift assignments for the day (times for patrol and for being in the police box are determined by the Patrol Section and varied each day so potential criminals cannot sense a pattern of activity). The men shouted "hai" ("yes") in response to their individual assignments being read. The policemen were again called to attention, bowed to the section chief on command, and were then dismissed. They slowly drifted out of the office, chatting amiably, and headed for their respective police boxes.

9:05 A.M. After arriving at the Kurashiki Ekimae police box (nine officers are assigned to this police box in three shifts and five are usually there during the day) three of the police officers went out to visit homes in their own assigned portions of the police box jurisdiction (called junkai renraku). Two remained in the police box. An old man came in and gave the police a letter he found on the sidewalk. Another man came in and got a permit to drive his delivery truck into the nearby covered shopping mall.

10:00 A.M. A saleswoman from a life insurance company dropped in and gave the police small metal calendars with her company's name on them to attach to their wrist watches. She drops in frequently and knows all the police officers by name. After chatting a while, she left.

10:30 A.M. Two older men came with a poster of their young relative who had disappeared from home. They asked the police to put it up on their sign board. The police agreed. A police officer assigned to the police box but on his day off dropped in and chatted before going to a movie. He stayed about an hour. A businessman came in and asked for help in locating an address.

11:00 A.M. The two police officers in the police box left on an errand, leaving the police box unattended. They had been asked by local residents to inform a nearby restaurant not to throw out chicken bones in their garbage, which dogs were eating. They stopped in the restaurant and gave the owner the message.

11:30 A.M. They returned to the police box. Two of the other police officers returned shortly. They sat and talked for about half an hour and two of the policemen went to a nearby restaurant for lunch after changing their uniform coats in the back room. The other police officer returned from visiting homes after they left. A woman came in and asked for directions to a nearby store.

1:30 P.M. The two police officers who manned the police box in the morning left to visit homes in their assigned areas. The police box was unattended until the other three returned from lunch.

2:00 P.M. Two police officers left on foot patrol while the third manned the police box.[13] The two on patrol checked registration numbers on bicycles parked in front

of the train station and radioed into the police station with a walkie talkie to see if any were stolen. They told a man to move his truck from a "no parking" area and warned two youths to ride their bicycles on the correct side of the street. They stopped in a pet shop to ask if anyone was buying bird seed for protected species. They left, said "hello" to two "meter maids" (junshiin) from the police station who came riding past on motor scooters, and then dropped into a pawn shop. They looked over the register of pawned items to see if any car stereos had been pawned recently (several had been stolen). They left and headed into the shopping mall. They walked by several children playing in the narrow street, one remarking, "no one has done anything wrong." The police did not respond.

They stopped in a flower shop and said thanks to the lady proprietor for bringing flowers to the police box recently. A mother saw the policemen walk by and pointed to them, bending over and saying to her small boy, "o-mawari san."

They walked out of the shopping mall and onto a broad street with a long "no parking" zone. Numerous cars and trucks were parked all along the street. Several drivers rushed out of stores, jumped into their cars and drove off. The policemen stood there for a few minutes looking for the drivers of the other vehicles. One driver soon appeared, and they warned him without ticketing him. They wrote a parking violation notice for the one remaining vehicle requesting that the driver appear at the police box. They left it on his windshield. They stopped a youth on a motorbike and asked to see his license. He produced it and they let him go.

They started on patrol again, stopping at a store that had been robbed recently. They reported that the investigation was still in progress, and advised the lady proprietor to take all cash out of the register at night and leave the cash drawer open. They walked back toward the police box, greeting a bus center guard as they walked by.

3:45 P.M. When they arrived back in the police box, one of the command officers from the Patrol Section of the police station was sitting there. Two criminal investigators were also sitting in the police box and chatting. The driver with the parking violation notice came into the police box. They had him sit and one of the officers questioned him as to why he had parked illegally. He said he needed to do some quick shopping at a store. The police wrote him a ticket for the violation (the notice to appear is not a ticket--it allows the police the opportunity to hear the violator's excuse to see if there was a mitigating circumstance; it recognizes the lack of adequate parking facilities in Japan. It also gives greater discretion to the police in enforcing the law).

5:00 P.M. The police radio in the police box announced that a robbery had occurred in Okayama city. The police station called and ordered two police officers to go to the train station and watch for the suspected criminal. Two men changed into their civilian jackets, and went to the station. They took their ear plug police transceivers to hear reports on the incident. After thirty minutes, it was announced the criminal had been caught so they returned to the police box.

5:30 P.M. One of the police officers went to a busy intersection nearby to observe rush hour traffic. The two police officers on day shift went back to the police station.

6:00 P.M. The three police officers went to dinner in shifts, two going on patrol or manning the police box while waiting for the third to eat. Several criminal investigators came in for a chat.

7:50 P.M. A girl traveler dropped in and asked for a place to stay for the night. One of the criminal investigators called a hotel and then led the girl to another police box located near the hotel. Two police officers left on patrol.

8:00 P.M. A drunk came into the police box and said he did not feel well. The police officer talked to him for a while and helped him toward a taxi.

8:30 P.M. A call came about a stolen car and the policeman went out to investigate. He came back shortly with a criminal investigator and the owners of the missing car. They filled out forms and questioned the owners.

9:30 P.M. A nearby coffee shop proprietor dropped in and sat down. He watched in case something might happen and chatted with the police officers. The two policemen on patrol returned.

10:15 P.M. The manager of the post office next to the police box dropped in and chatted with the police officers. The coffee shop owner chatted a while longer and then left. The post office manager smoked and listened to the police radio.

10:30 P.M. A young man came in and asked for a place to stay. The police called another hotel, and he left.

10:45 P.M. The criminal investigator left.

11:00 P.M. Two young men who are friends of one of the policemen came in, sat and chatted. Two of the policemen served coffee for everyone in the police box. The postmaster left. A breaking and entering was reported over the radio, and the police station called and ordered one man to go. The two young friends left. The other two police officers went into the back room for a three hour sleep. They put up a sign in the empty police box saying, "on patrol."

12:15 A.M. A taxi driver and a laborer came into the police box. The laborer yelled at the taxi driver and threatened to kill him. He was obviously drunk. He made a lot of noise. The two policemen walked out of the back room rubbing their eyes and buttoning their shirts. The man would not pay his taxi fare so the driver had brought him to the police box. He was abusive to the officers and tried to hit one. They pushed him into a chair and held him. The police officer returning from the burglary incident arrived and helped subdue the man.

12:30 A.M. A patrol car came and they put the drunk in to take him to the police station for questioning. The patrol car driver knew him and kidded with him. The taxi driver apologized, bowed and left. The two police officers went back to bed. The other police officer sat in the police box.

1:30 A.M. One of the command officers of the Patrol Section stopped in for a few minutes and chatted with the lone policeman.

2:30 A.M. The two officers awoke and went on patrol. The other policeman went to sleep.

4:30 A.M. The two returned from patrol and went to sleep again. The other policeman got up and sat in the police box. All three alternated sleeping, sitting in the police box and patrolling until they were relieved at about 9:00 A.M. by the next shift of police officers.

This lengthy extract from my field notes is cited to give a feeling of the rhythm of work in a police box. The frequency of incidents is lower in Kurashiki than in larger cities but is very similar to Fuchu. The morning and afternoon hours are spent mostly in visiting homes, patrolling, giving street directions to travelers and handling lost items, i.e., "service activities." It is the time of maximum community contact with police officers. The pace begins to pick up in the early evening, with drunks, fights in bars and other incidents increasing. The peak is from about 10:00 P.M. until 1:00 A.M., and then slacks off abruptly. The early morning hours are spent in sleeping, patrolling and sitting in the police box. The twenty-four hour shift is physically very taxing and the police officers are visibly tired by midnight. One of the problems they face is the boredom of spending hours in the same small police box day after day, yet off-duty police officers often spend part of their days off chatting with their friends who are on duty in the police box. The police box is a focal point for citizens to sit and chat, some spending hours with the police. These people tend to be shop owners with flexible time schedules and people whose personalities are attracted to police officers. The police box is also a location where criminal investigators and other police specialists can sit and relax without being under the direct supervision of their superiors. The police boxes and the police station are the hubs of police activity in a city.

Visiting Homes (junkai renraku)

A major duty of police officers assigned to a kōban is to visit the homes of the jurisdiction regularly. The police officer in a residential police box has a similar responsibility. The jurisdiction is divided into as many segments as there are police officers assigned to the police box. Each police officer is required to visit every home and business establishment in his area twice a year. A record book for each area holds a card for each family or firm. The following information is elicited for families: place of origin, names and birthdays of all members of the family, whether or not they are living in the household, their occupation and employer, and whom to contact in emergencies. Another purpose of this periodic visit is to gather information and gossip about occurrences in the neighborhood. The police cannot force people to provide the information, yet almost all people do so voluntarily (the police say that only communists refuse to answer).

This practice is based on the prewar system of information gathering by the police called tokō chōsa (household survey), instituted in 1874. The same information was requested, with additional questions about whether or not the people were receiving vaccinations, whether they had a criminal record, and if they were of an aristocratic lineage. If persons refused to answer, they were taken to the police box for questioning.

The police insist that the information from junkai renraku is used solely for public service purposes, such as helping an inquirer locate an address. This is certainly one of the main uses of the information, for Japanese streets are usually not named and houses are not numbered serially. Yet, this statement is misleading to an extent. The police frequently use the information in investigations: one of the reasons criminal investigators spend so much time in police boxes is to refer to the junkai renraku record books. The main difference between junkai renraku and the prewar tokō chōsa is that the scope of the information requested is slightly narrower and answering is not compulsory. The police box has a wealth of other data on the jurisdiction as well: lists of people working late at night who might be of help as witnesses to crimes; lists of people who are normally cooperative with the police; lists of people who own guns or swords; lists of all rented homes and apartments that might serve as hideouts for fugitives; lists of people with criminal records; lists of people with mental illness; or-

ganizational charts of gangs in the police station jurisdiction and in the prefecture (complete with photographs of all the gangsters); lists of old people in the area living alone who should be visited periodically; lists of all neighborhood organizations in the jurisdiction and their leaders; lists of all bars, restaurants and amusement facilities in the jurisdiction; a short history of the police box; and a compilation of the total population, area and number of households in the jurisdiction. In addition, records of all recent crimes in the area, wanted posters and bulletins on criminals, and information on left- and right-wing political groups in the area are kept in the police box. All police officers in the police box familiarize themselves with this information and it provides them with an immense knowledge of their jurisdiction. It also provides continuity when new policemen are transferred to the police box.

Mobile Police Boxes (idō kōban)

The Kurashiki and Mizushima police stations each have a blue and white van called a mobile police box used for visiting apartment complexes in their jurisdictions.[14] The police feel that apartment complexes have insufficient contact with police officers, so they make periodic visits in these vans, bringing a folding table, chairs and crime prevention and traffic safety literature for distribution. They announce their presence over loudspeakers on the vehicle and residents are supposed to gather and talk to the police about crimes or other problems. The vehicle is used about twice a week for this purpose in Mizushima, but only once a month in Kurashiki. The effectiveness of the vehicles is open to question in Kurashiki and Mizushima because when I went to several apartment complexes in Mizushima in one of them, the police stayed about five or ten minutes at each apartment complex and only a few women and children gathered around it. The police stood near the vehicle and acted embarrassed, as if they did not know what to do. They are considered "soft" and "friendly" vehicles and are used for visiting schools, nursing homes, and so forth, as well as for hauling police equipment and personnel.

RESIDENTIAL POLICE BOXES (chūzaisho)

A chūzaisho is a police box in which a police officer lives with his family immersed in the surrounding rural village or town. There were 10,239 chūzaisho nationwide in 1974.[15] There were fifteen chūzaisho in the Kurashiki police station jurisdiction in 1974 and there were three in Mizushima; this compares with five kōban in Kurashiki and six in Mizushima the same year. The Kurashiki police station jurisdiction retains the more traditional chūzaisho in higher proportion because the expanding city boundaries incorporated much rural land area here, whereas much Mizushima land came into existence only in the last fifteen years through land fill that was subsequently developed in industrial-urban fashion; one-time villages are fewer in Mizushima. The relationship between the policeman in the chūzaisho ("chūzai-san," as the Japanese say) and the surrounding community epitomizes the ideal relationship of the police and the community in Japan.

A chūzaisho is essentially a kōban with living quarters attached. The quarters are frequently small, especially in the older chūzaisho, and are sometimes run-down in appearance. The neighbors of the Kamo chūzaisho in Okayama that I studied referred to the chūzaisho as a "dilapidated old house" (boro na ie). There is an office in the front with a desk, a cabinet for holding police materials, a sign in the front for posting various things, and a door separating the office from the living quarters area. There is always a red globular light over the door denoting the police, as is found on kōban as well (see illustration 2).

Chūzaisho are usually located rather far from the police station, the main link being the telephone. The chūzai-san goes into the police station about three or four times a month for meetings and other business. He is essentially on his own in policing his jurisdiction and must rely on the cooperation of the community to an even greater extent than the policemen in a kōban.

The chūzai-san traditionally holds high prestige; the three prestige positions in villages (mura no san'yaku), each personifying an aspect of the distant central government in the modern period, have been the village head (sonchō), the school principal (kōchō) and the chūzai-san. In prewar days, the last embodied the entire weight and power of the Home Ministry and was sometimes feared by the villagers. He is not necessarily feared now, but he is still the representative of the police establishment and is viewed somewhat ambivalently by the local villagers. He and the school principal are appointed by the government and come into the village from the outside; the village head is always a local resident. In southern Okayama prefecture, a chūzai-san remains in a village about two years before transfer, thus allowing him to become fully acquainted with the villagers, but not too deeply enmeshed in bonds of reciprocal obligations. The chūzai-san is usually invited to village events such as the school graduation and festivals, and is usually given a seat of honor along with the village head and the principal. Yet, although a resident of the village, he is usually a social outsider and never fully accepted by the villagers as one of them. This same attitude of ambivalence is held concerning policemen in kōban.

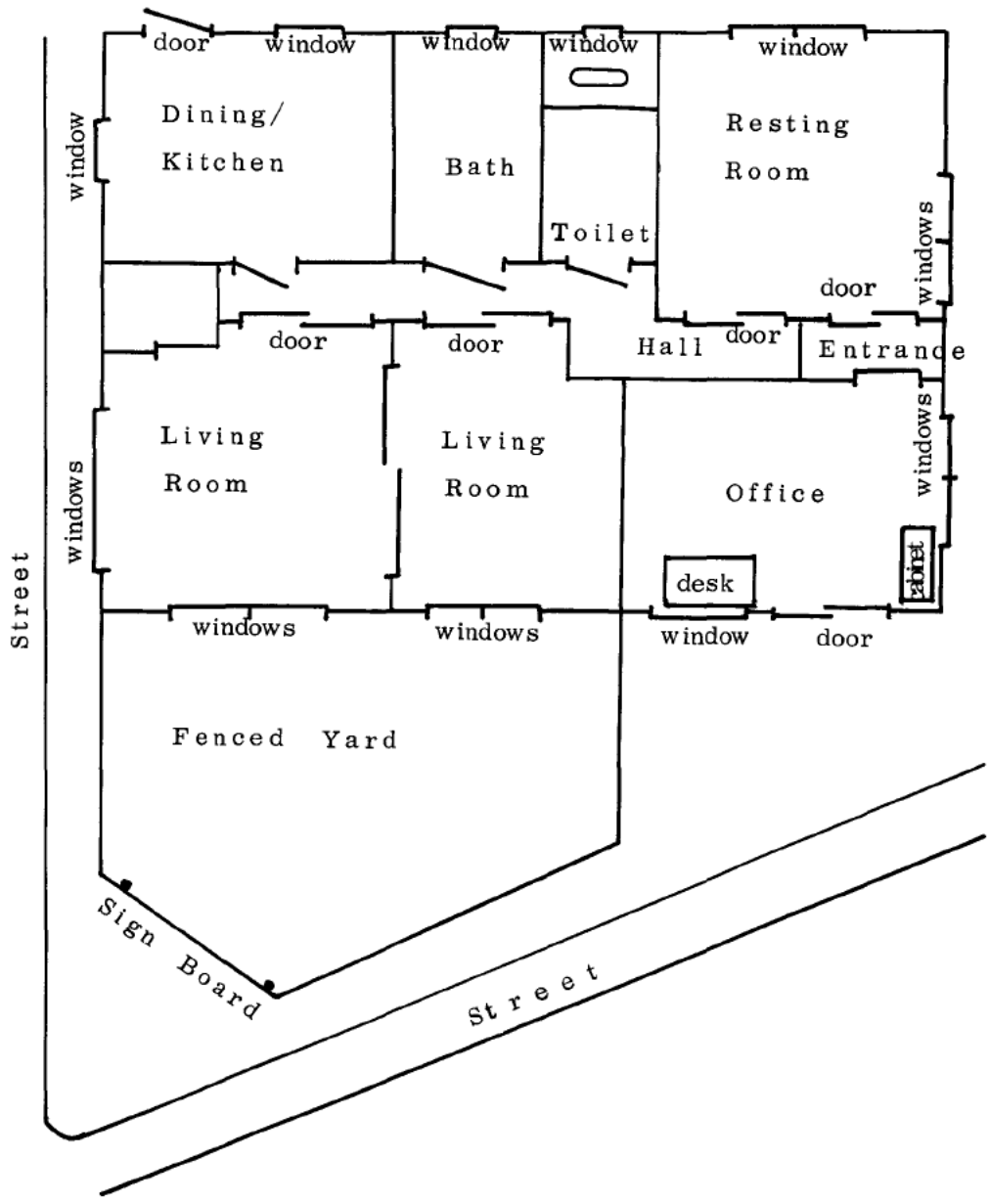
The pace of police work in a truly rural chūzaisho is leisurely compared to a kōban. A chūzai-san is usually only assigned the day shift, working a forty-four hour week. The eight-hour day in Okayama prefecture is divided into four hours of patrol, two hours of junkai renraku and two hours of sitting on duty in the chūzaisho office. In the summer months, the chūzai-san often lounges in front of the television with his children in his pajama-like white underwear during his hours in the police box during the day. The Kamo chūzai-san covers his jurisdiction on motor bike, dropping in at homes of acquaintances and people who like to cooperate with him and chatting about various items of gossip. People sometimes come to the chūzai-san to discuss personal problems, such as plans for a job, schooling and marriage, or to seek his counsel about marital quarrels. This occurs more often in very rural locations and was more frequent in the past, but still occurs now (as even in kōban on occasion). The effectiveness of the chūzai-san in maintaining order in the community stems not so much from his formal patrolling, but from the fact that he knows so much about all the local residents. As we have seen, such detailed information is also a major basis for the effectiveness of the police officers in kōban.

One of the unique aspects of a chūzaisho is the fact that the family of the chūzai-san, especially his wife, is directly involved in police work. When the chūzai-san is absent from the chūzaisho on patrol or junkai renraku, the wife must handle the affairs of the police box. She receives calls from the police station, gives directions to travelers, and locates her husband by phoning around if there is a traffic accident or crime. In Okayama, the chūzai-san's wife gets ¥10,000 per month ($33.00) for her services, in addition to occasional recognition from the police station chief or head of the prefectural police headquarters. Wives of chūzai-san sometimes complain about the intrusions of police work into family life, remarking that someone invariably comes or an emergency occurs whenever the children are being fed or bathed.

A major drawback to work in a chūzaisho is the fact that the police officer never really has a vacation. If there is a problem or a traffic accident on his weekly day off, or in the middle of the night, he must handle it. The result is that younger police officers with stronger notions of leisure and free time dislike working in chūzaisho. Older men, with prewar education that stressed values different from those of postwar education, do not complain

Illustration 2

A CHŪZAISHO IN FUCHU



as much about the inconvenience. In Okayama, eighty percent of the chūzai-san are over forty years old (and, thus, have prewar education) whereas in kōban eighty percent of the police officers are under forty (with postwar education).[16] Kōban are on a shift system and allow scheduled free time every week.

The individual burden of police work in a chūzaisho is relatively high compared to a kōban. This is especially true in chūzaisho that border urban areas, including all of the chūzaisho in the Kurashiki and Mizushima police jurisdictions. Chūzaisho in Okayama prefecture have higher burdens in area and population per police officer than kōban, but are very close to kōban in the ratio of traffic accidents per officer. Only in the ratio of crimes per police officer are kōban higher than chūzaisho (see Table 2):

TABLE 2

COMPARISON OF BURDEN PER POLICE OFFICER BETWEEN KŌBAN AND CHŪZAISHO IN OKAYAMA PREFECTURE, 1974

	Area (miles^2)	Population	Crimes	Traffic Accidents
All-prefecture:				
Kōban	1.04	2,002	30.6	42.9
Chūzaisho	8.65	3,520	16.9	41.0
Kamo:				
Chūzaisho	2.33	4,348	11.0	17.0

Source: Documents from the Okayama Prefectural Police Headquarters, 1974.

Some of the figures shown above for the Kamo chūzaisho reflect its proximity to the metropolis of Okayama city in that its area of jurisdiction is relatively small and its population large for a chūzaisho; yet it is tucked back into the corner of an agricultural valley with no major roads passing through it, a situation reflected in the low crime and traffic accident figures. As we can see in Table 2, a high traffic accident rate is one of the major problems faced by most chūzai-san, and for that matter, the police in general in Okayama prefecture.

Changes in Chūzaisho and Kōban

The present trend in the police is to phase out chūzaisho in areas bordering urban centers and turn them into kōban. Urban encroachment increases the population of the jurisdiction, with an accompanying increase in crime and traffic accidents. In 1974, there were 270 chūzaisho in Okayama prefecture and eighty-four kōban. The former number is scheduled to drop by 70 to 200 in five years, with kōban increasing by 26 to 110.[17] Several chūzaisho jurisdictions would be amalgamated into one kōban jurisdiction because of the increased man-

power of a kōban. Chūzaisho will be retained in mountainous areas with low populations. It should be noted that an intermediate stage in the transition involving the assignment of a police officer to commute to a chūzaisho and assist the chūzai-san in police work is also being used.

Other changes in chūzaisho include the introduction of mini-patrol cars for deeply rural areas. In August, 1974, Okayama sent five tiny, 350 cc., three-piston patrol cars to chūzaisho in the mountainous northern portion of the prefecture. They were complete with siren, red light on the roof and loud speakers. The unimproved roads in the region make travel by motor bike impossible for a portion of the year. More mini-patrol cars will be introduced in time.

Small local kōban are also being amalgamated into larger jurisdictions to concentrate the availability of police manpower. Kōban with three or four men assigned to them usually only have one man on a shift, and this is considered insufficient for dealing with fights or large disturbances. The National Police Agency directed the prefectural police to begin amalgamation in the early 1970's to insure that at least two police officers would be on duty in a police box, especially at night.[18] This was prompted by the increasing danger of police work, still slight though this danger be by American standards. For instance, the small police boxes of Kawanishi-machi and Maegami in central Kurashiki were merged into the the large central police box with thirteen police officers in 1971. This provides at least four police officers on every shift to handle fights or disturbances in the nearby bar district.

PATROL CARS

Patrol cars (pato kā) are the symbol of police mobility in Japan. They are manned by two police officers on shifts and operate either out of local police stations or out of patrol car centers established by the prefectural police headquarters. The Kurashiki police station had three patrol cars in 1974, divided functionally into two Patrol Section patrol cars and one Traffic Section patrol car. Mizushima had two patrol cars--one for the Patrol Section and one for the Traffic Section. In addition, each had several other specialized vehicles for police use:[19]

	Kurashiki	Mizushima
Limousine for police chief	1	1
Criminal investigation car (unmarked, with radio)	1	1
Criminal investigation car (unmarked, no radio)	4	2
Large truck for transporting police officers	1	1
Small truck for transporting equipment	2	1
Traffic accident vehicle (station wagon, marked)	3	2
Mobile police box	1	1

The vehicles are used almost solely for their designated functions; i.e., Patrol Section patrol cars are used to back up foot and bicycle patrol officers in kōban and chūzaisho. They also respond to emergency calls from the police station or prefectural police headquarters. The Traffic Section patrol cars are used essentially for making traffic arrests and for traffic safety purposes. Since the gasoline shortage that began in the latter half of 1973, patrol cars in Kurashiki and Mizushima have cut down their time on the road each day, with the result that Traffic Section patrol cars operate mainly during the day to catch violators and only go out at night if there is a traffic accident or other traffic-related event. Patrol Section patrol cars go out in the day if there is an errand or an emergency call, and they patrol the jurisdiction at night.

Mobile Police Force (kidō keisatsutai)

The small number of patrol cars in the Kurashiki and Mizushima police stations is compensated by the fact that the prefectural police headquarters maintains a mobile police force (kidō keisatsutai) in Kurashiki with thirty-seven men and eight patrol cars. These are divided into four marked "investigation" (sōsa) patrol cars and four traffic patrol cars, two of which are marked and two are unmarked. They also have nine motorcycles for making traffic arrests. These patrol cars cover a wide area of the southern portion of the prefecture from slightly west of Okayama city to the Hiroshima prefectural border. They spend most of their time in the Kurashiki and Mizushima police station jurisdictions, however. Their main function is to respond to emergency calls from the prefectural police headquarters, adding additional mobility to the police in the area. The kidō keisatsutai is considered an elite group, and only the best seasoned veterans are allowed to serve in the unit. They work grueling shifts of twenty-four hours on duty and twenty-four hours off for a total of forty-four hours a week, plus overtime. Patrol cars from this unit are frequently the first at the scene of an incident, and they make a large number of arrests for the small size of the unit.

A Shift in a Patrol Section Patrol Car[20]

7:55 P.M. An emergency call from the prefectural police headquarters reported that a drunk was lying in a roadway. The two paired officers ran out to the patrol car parked in front of the Kurashiki police station, started the engine and left. One was the driver, the other sat in the front seat, checked a map to pinpoint the location and operated the siren and the flashing red light on the roof. This officer also used the car-top loudspeaker to request cars to pull over so they could get through. Not all the vehicles pulled over or stopped. The patrol car slowed down at intersections, the driver looking both ways while the other officer requested over the loudspeaker that vehicles stop.

8:00 P.M. Arrived at the scene. The man was sleeping in the middle of a side street. The police woke him and asked him where he lived, but he did not remember. He could not stand up. They radioed for a police truck to come and haul him to the police station to sleep it off. Neighbors stood around watching, but no one knew him. The police stopped a young man walking by, who said he recognized him as a worker living in his company dormitory nearby. He ran to the dormitory, got a friend and the two helped him to the dormitory.

8:17 P.M. Left on patrol again.

8:25 P.M. Stopped at a camera store near the shopping mall. The driver got out and picked up a roll of film he had left to be developed.

8:27 P.M. Left on patrol. Stopped at a stop light in front of the train station where two young men asked the police where the bar district was. They told them, and then commented that it was ironic, just after handling a drunk, to be directing two men to the bar district so they could get drunk.

8:32 P.M. Stopped a youth for speeding on his motorbike. Looked at his license, warned him, then let him go.

8:35 P.M. Left on patrol again.

8:38 P.M. Stopped a young boy for riding his bicycle without a light on it. Checked his bicycle registration number and radioed in to the police station to see if it was stolen. It was not, so they let him go.

8:42 P.M. Back on patrol again.

8:45 P.M. Stopped a boy for skidding through an intersection on his motorbike. Checked his license, warned him and let him go.

8:47 P.M. Left on patrol again.

9:05 P.M. Emergency call came over radio about a fire. Turned on flashing light and siren and raced through country roads to a farm village.

9:12 P.M. Arrived at the scene, after stopping at a fire station near the village to ask directions. A rush-drying machine had caught fire in front of a farm house. Fire trucks from the fire department and the local village volunteer fire brigade (shōbōdan) wearing happi coats were already there and the fire was extinguished. Two criminal investigators from the police station were also there and had begun investigating the cause of the fire.[21]

9:25 P.M. Back on patrol.

9:35 P.M. Arrived at the police station for a rest.

9:52 P.M. An emergency call came in about a suspicious person. The police officers got in the patrol car and headed for the scene with flashing light and siren. They turned off the siren as they approached the location.

9:55 P.M. Arrived at the scene. Three kidō keisatsutai vehicles were already there. A youth had fled from the garden of a house when the lady who lived there went outside. The police searched the area. The kidō keisatsutai men left first.

10:03 P.M. Went to a nearby park and looked around, radioed in the license number of a parked car.

10:12 P.M. Left to patrol the immediate area to look for a suspicious person.

10:20 P.M. An emergency call came about a traffic accident. Turned on the lights and siren and headed for the scene.

10:26 P.M. Arrived at the scene. A car had driven into a ditch and flipped over. The driver was uninjured. A kidō keisatsutai vehicle was already there. They left after the Kurashiki patrol car arrived.

10:32 P.M. Two Traffic Section police came in one of the traffic accident station wagons. They questioned the driver, filled out papers and then left.

11:10 P.M. A wrecker came and pulled the car out of the ditch. It was demolished. The two police officers shoveled dirt onto the road to absorb oil that had leaked from the car.

11:58 P.M. Headed back to the police station.

12:05 A.M. Arrived at the police station. The two police officers remained on duty until 2:00 A.M., and then had five hours of sleep. Two other police officers relieved them during this time.

Response Time

Response time is the time it takes a patrol car after getting an emergency call to arrive at the scene of an incident. The response time has gotten longer in Japan in recent years, increasing from an average of four minutes and thirty-seven seconds in 1969 to five minutes and twenty-one seconds in 1973. Okayama followed a similar trend of increasing response time until 1973, when it began to drop. In 1975, it was five minutes and thirty seconds, down from seven minutes and four seconds in 1973.

The increasing response time was due mainly to heavier congestion in cities from increased traffic and parking. Okayama prefecture alleviated the problem by banning parking on most streets in Okayama city and Kurashiki. The response time is faster in Mizushima than Kurashiki because the Mizushima police jurisdiction is narrower and has numerous wide and straight roads built on its reclaimed land. Kurashiki roads are crowded and narrow, especially in the center of the city, often wide enough for only one car to squeeze through. Despite the crowded and narrow streets, patrol cars almost always beat a police officer on foot, bicycle or motorbike from a kōban or chūzaisho to the scene of emergencies in Kurashiki and Mizushima. This stems, in part, from the large jurisdictions of police boxes since amalgamations.

Emergency Calls (110 ban) and the Seasonality of Police Work

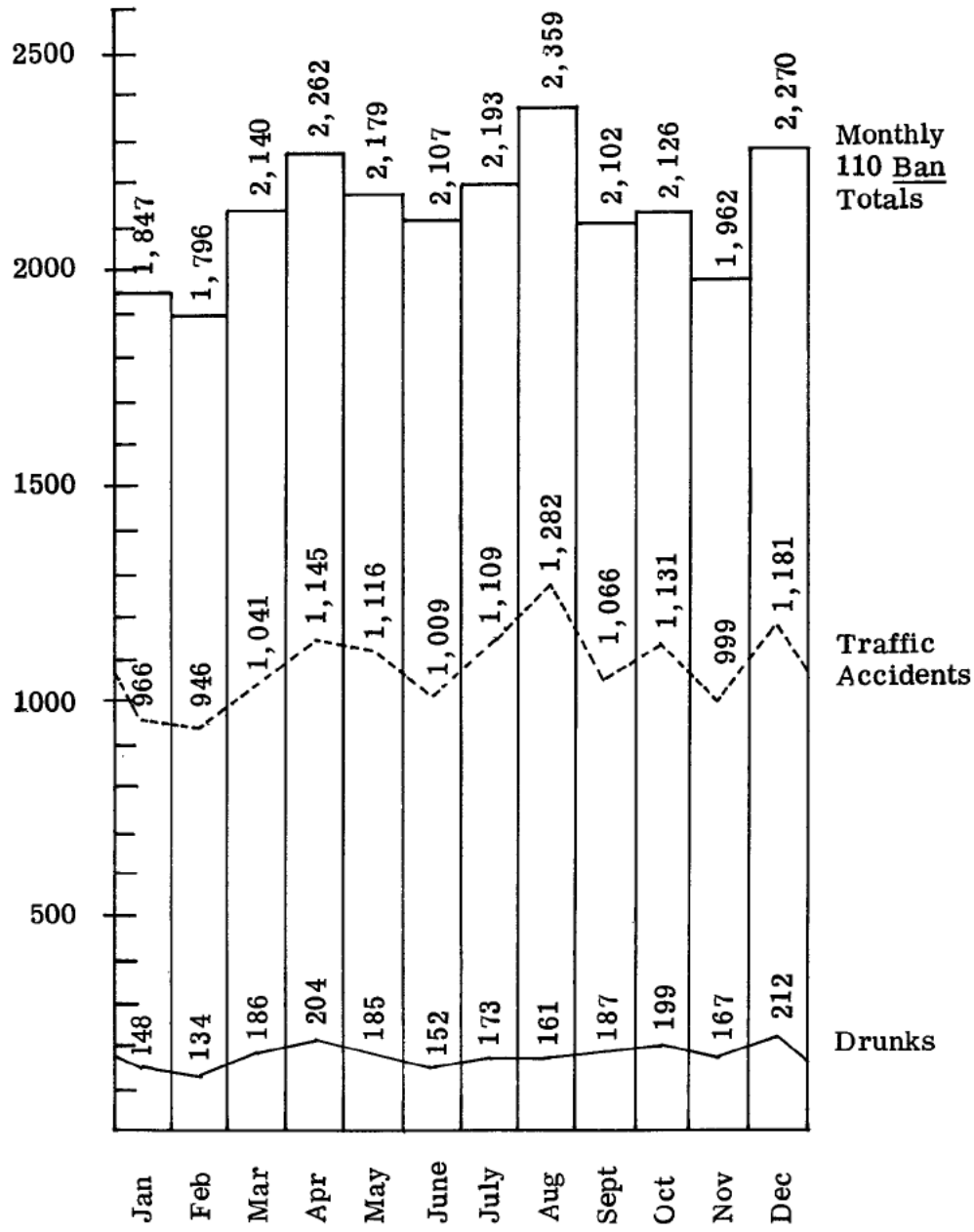
In Okayama, about 95 percent of all emergency incidents are reported to the police by citizens dialing 110 on the telephone, rather than contacting a police box or the police station.[22] The calls are received in the prefectural police headquarters, which then broadcasts the alert over the police radio. Each police station monitors the prefectural police radio, and when an incident occurs in its jurisdiction, it radios its patrol cars or telephones its police boxes to dispatch officers to the scene. All police officers in kōban and chūzaisho carry small pocket transceivers, with ear plugs that allow them to hear emergency 110 (pronounced "hyakutō") ban dispatches and to respond to those in their jurisdiction.

The rate of 110 ban calls partially reflects how busy the police are. There seem to be three slight peaks of police activity during the year, as reflected in 110 ban frequency, each four months apart. Two of the three occur in festival months, and festivals in Japan always involve drinking. The first is April, which coincides with cherry blossom (sakura) viewing and the traditional drunkenness that this entails; the second is August, the hottest month of the year, a time when people stay out late at night on weekends and go on trips to seek relief from the heat; the third, December, is marked by a large number of year-end

parties (bōnenkai) and accompanying drinking. The highest number of drunks are reported in April and December, and the highest number of traffic accidents are in August (see chart 2). 110 ban calls during a typical twenty-four hour period follow the pattern of frequency noted above in the description of the activity during a day in a police box. They increase in late afternoon, peak between 10:00 P.M. and midnight, fall off abruptly after 2:00 A.M. and reach their lowest point between 4:00 and 6:00 A.M.

Chart 2

FREQUENCY OF 110 BAN CALLS IN OKAYAMA OVER TWELVE MONTHS 1973



Source: Document from the Okayama Prefectural Police Headquarters, 1974.

DISCUSSION

The police box--both the urban kōban and the rural chūzaisho--are unique to Japan's police system. There is nothing quite like them in any other country. To the casual observer, Japanese policemen on the beat seem to take a low profile; they are not as visible as American police, for example, who cruise around the city in their patrol cars. They seem to spend a lot of time just sitting in their police boxes talking or waiting for something to happen (keikai, "ready" as the police say). Yet their very presence, distributed over the area in police boxes, acts as a deterrent to crime (in Kurashiki, there is a noticeably low crime incidence in the immediate area surrounding police boxes) and is reassuring to the citizens.

The combination of a network of police boxes backed up by patrol cars fits Japanese society. Japanese cities are compact and densely populated, and even the countryside is dotted with hamlets with houses closely packed together. Police boxes and patrol cars conjoin; the former allow intimate police-community contact at the neighborhood level, while the latter provide mobility to respond to incidents that increasingly involve automobiles. Japanese police are physically more accessible than American police--citizens frequently come to police boxes for street directions, talk to policemen when they come to their homes for junkai renraku or pass them walking along the street or in the shopping mall. By contrast, police officers in most cities and towns in the United States spend their time either in the central police station or inside their patrol cars, out of contact with the average citizen. This pattern perhaps fits the geographically diffuse and mobile nature of American society, but it has certain inherent drawbacks in police-community relations.

NOTES

[1]This article is modified from Chapter 4 of my dissertation, Police and Community in Japan (The University of Michigan, 1976), forthcoming as a book. The reader is referred to David H. Bayley, Forces of Order: Police Behavior in Japan and the United States (Berkeley: University of California Press, 1976) for a perceptive study on Japanese patrol behavior by a specialist on Indian and American police, done through an interpreter. My data are slightly more recent than Professor Bayley's.

[2]A talk given March 19, 1975.

[3]Okayama Prefectural Police Headquarters, Kenkei Okayama [Prefectural Police: Okayama], (Okayama Prefectural Police Headquarters, n.d.), p. 20.

[4]National Police Agency, ed., Keisatsu hakusho, 1974 [Police white paper] (Tokyo: Okurasho insatsukyoku, 1974), p. 385.

[5]The number of police officers was taken from U.S. Bureau of Census, Statistical Abstracts of the United States, 1975, 96th ed. (Washington: U.S. Government Printing Office, 1975), p. 161; the number of police officers killed and injured was taken from U.S. Federal Bureau of Investigation, Uniform Crime Reports for the United States, 1974 (Washington: U.S. Government Printing Office, 1974), pp. 224 and 241. Police officers injured is for 1974.

[6]Okayama Prefectural Police Headquarters, ed., Bōhan-hoan keisatsu no ayumi, 1974, [Progress of the Crime Prevention and Safety Police] (Okayama: Okayama Prefectural Police Headquarters, 1974), p. 78.

[7]"Toy Gun Peril Halted," Ann Arbor News, 20 October, 1975, p. 5.

[8]An older police sergeant in the Kurashiki police station was attacked by a youth and stabbed five times in an attempt to steal his revolver. The officer survived and the youth was caught immediately. This happened a number of years ago and was the only incident of its kind in Kurashiki in recent years.

[9]Crime Prevention and Safety Police, p. 78.

[10]Takahashi Shoki, Kōban to seishun [Koban and Youth] (Tokyo: Tachibana shobo, 1973), p. 3.

[11]This "typical day" is a composite of several days and nights spent in the Kurashiki Ekimae police box, 1974-1975.

[12]Police officers are strictly forbidden to take their weapons home with them. They are stored in a safe in the police station and are issued only when on duty.

[13]Policemen in kōban usually patrol on foot or on bicycles. Japanese streets are very narrow, especially in Kurashiki, and this allows them to patrol hidden areas where crime is likely to occur.

[14]There were 150 mobile police boxes nationwide in 1973; see Police White Paper, p. 53.

[15]Police White Paper, p. 53.

[16]From an interview with a Patrol Section official in the Okayama Prefectural Police Headquarters, 1974.

[17]Interview with Patrol Section official, Okayama Prefectural Police Headquarters, 1974.

[18]Interview with police officials, Okayama, 1975.

[19]Okayama Prefectural Police Headquarters, ed., Okayama ken keisatsu nenkan, 1972 [Okayama Prefectural Police Yearbook] (Okayama: Okayama Prefectural Police Headquarters, 1972), pp. 64-65.

[20]This is an actual shift in a patrol car in Kurashiki, July 1974.

[21]Criminal investigators go to all fires to investigate the cause and determine if criminal negligence charges should be filed.

[22]From an interview with the Patrol Section chief, Okayama Prefectural Police Headquarters, 1975.

EMERGING JUDICIAL RESTRAINTS ON CONSTITUTIONAL GUARANTEES OF FREEDOM OF EXPRESSION

by

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A substantial portion of litigation in postwar Japan has centered on problems in interpreting Chapter III of the Constitution which includes an extensive listing of the "Rights and Duties of the People" (kokumin no kenri to gimu) in 41 articles. Articles 10 through 14 set forth the broadly stated framework for a system of recognized liberties, Articles 15 through 29 enumerate specific liberties that each individual may assert, and Articles 30 through 40 establish precise government restraints when an individual is brought before a court or enforcement authorities. The constitutional standards which concern us here are Article 21, identifying the freedoms of speech and press, and Article 23, guaranteeing academic freedom:

Article 21

1. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.
2. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Article 23

Academic freedom is guaranteed.

Despite the emphatic and all-encompassing language appearing in the Constitution, a review of postwar judicial interpretations of these articles readily suggests a lack of unanimity on the precise legal scope of such freedoms. For our limited purposes, we will examine two recent instances of litigation, one dealing with academic freedom and the other with freedom of the press, which reflect the sharpening character of relatively uncharted constitutional theories underlying a guarantee of freedom of expression. In both instances, the law is still developing through lower court decisions, moving along uncertain channels charted by a few Supreme Court opinions. Inevitably, these cases, too, are expected to receive Supreme Court review, but, given the central questions raised, future decisions may not fully resolve the issues to the satisfaction of the state and various individual interests represented by the litigants.[1] In both the area of free speech and a free press, the most recent judicial outcomes suggest that courts are likely to be exerting cautious restraint in the exercise of freedoms of expression. In order to understand these results, it is necessary to briefly examine the judge-made law interpreting the postwar Constitution. Then, with that perspective, we can proceed to a fuller discussion of the particular details in each litigation. Finally, we can compare the judicial reasoning in reaching outcomes constraining such basic freedoms, and thus suggest upon which premises and which policy factors future judicial decisions may be based.

THE JUDGE-MADE LAW

Other studies conducted by researchers observing constitutional law have already documented the judicial inclination, during the past three decades of postwar legal experience, to balance state and private interests in freedom of expression against a "public welfare" standard.[2] In the Japanese context, the words "public welfare" (kokyo no fukushi) imply that the state acts as a dispenser of legitimate interests, contrary to the notion that the people, as a whole, have rights which they vigorously assert and the state then protects.[3]

The available studies, while recognizing that courts have elaborated on the four references to "public welfare" in the Constitution, have overlooked the more subtle judicial uses of the standard to reach particular results. Twice the constitutional reference is all-encompassing. Article 12 stipulates that major freedoms are guaranteed to the people, but that they also entail a responsibility for "utilizing them for the public welfare." Article 13 outlines broadly a right to life, liberty, and the pursuit of happiness which is realized "to the extent that it does not interfere with the public welfare." The other two references in the Constitution to "public welfare" are linked specifically to named freedoms, once to the freedom to choose an occupation without interference (Article 22) and the other time to property rights "in conformity with the public welfare." (Article 29). Noticeably absent from this enumeration of "public welfare" are the three articles, cited at the outset, that specifically deal with the freedom of expression. At least in the earlier studies examining the academic freedom cases which we will discuss here, it has been assumed that balancing in "public welfare" was the swing factor in determining the court's outcome.[4] As we shall see, however, "public welfare" should be more properly regarded as the "end" of responsible adjudicating rather than the "means" that explains how the court reached its result.

Another instance in which judges have built upon a basic concept in the Constitution has been in the interpretation of a "right." While the American concept contemplates a legally enforcible claim of one person against another, the Japanese sense of "right" (kenri) entails a group relationship as the "people" (kokumin) rather than an individually proposed demand. Furthermore, "one's rights" may be recognized as existing in society even if such "rights" formally lack a legal basis. In the instances that are examined here, the courts speak of such "recognized rights" as the "right to academic research" or "the people's right to know." It is important to note that recognition by the court does not necessarily give that right an enforcible guarantee in law as well as in fact.

In the particular facts of the cases which follow, the terms "rights" and "public welfare" are given meaning through judge-made law. In each instance, we proceed in two steps. First, we consider relevant judicial precedents and statutory law elaborating on the constitutional guarantee. Next, we examine the facts both on procedural and substantive grounds.

A TALE OF TWO TEXTBOOK CASES

Two cases, initiated two years apart in 1965 and 1967, have amplified the pitch level of the Japanese constitutional debate whether Article 21, guaranteeing free speech, should be read as in harmony with Article 23, protecting academic freedom. The cases, though the earlier litigation proceeds on a tort theory and the latter is grounded in administrative law remedies, have involved the same legal pathways, after decisions by the Tokyo District Court they were appealed to the Tokyo High Court; the same plaintiff and defendant, Ienaga Saburo, a well-known historian, versus the Ministry of Education; and essentially the same point at issue, the constitutionality of the Ministry certification system for textbooks (kyokasho kentei).[5]

These cases have emerged against intense political and legal struggles between the Ministry and the Japan Teacher's Union, which as more of a workers union than a professional society has become a powerful spokesman for teachers at all levels. Besides the textbook certification issue, the JTU, in the name of academic freedom, has opposed Ministry plans to establish an efficiency system for teachers,[6] has denounced Ministry-conceived

"common textbook areas" that would remove teacher control over choice of textbooks previously certified by the Ministry,[7] and has attacked centralization in administrative decision-making.[8]

These political battles have surfaced as well in numerous lower court contexts. The Tokyo District Court ruled in 1972 that a high school teacher, whose social studies classes were secretly recorded and reported to the principal, should be reinstated on the basis of a "right to educate" which prohibits recording lectures without the instructor's knowledge. In the same year, the Osaka District Court ruled that teachers who restrained a colleague from hoisting a flag each morning at school were not guilty criminally for interfering with freedom of expression. A year late, the Yamaguchi District Court set aside punishment for a teacher who had distributed blank papers in place of the national achievement tests for high school students.[9]

These decisions, while instructive in indicating the issues surrounding the constitutional debate, would not be controlling to higher level courts hearing arguments in the Ienaga cases. Of more immediate value might be two Supreme Court decisions which found the defendants guilty and imposed criminal penalties despite their assertion of constitutionally insured academic freedom.

In 1963, the Court upheld the conviction of a student, participating in a University of Tokyo play with obvious political overtones, who had accosted a plainclothesman observing the production. The majority opinion, in considering the defendant's argument that Article 23 applied, concluded that the article speaks to freedom for academic research, but not necessarily to the broader concept of freedom of education in general. Seven justices submitted or joined in supplementary opinions, seeking to soften the majority's implication that seemingly would extend academic freedom to professors but not to the objects of their research, i.e., the students themselves.[10]

More recently the Supreme Court, reversing Sapporo and Sendai High Court rulings, decided that 11 defendants, all members of the JTU, were guilty of charges arising from efforts to block or to boycott national achievement tests. This adverse ruling may be significant in the Ienaga cases as well since the defense argued unsuccessfully a similar point, namely, that the Ministry had overstepped the terms of the Basic Law of Education (kyoiku kihonho), specifically Article 10, which states that education administration, "shall not be subject to improper control, but shall be directly responsible to the whole people."[11] In this instance, the Supreme Court concluded that the administration authorities, by conducting the achievement tests, were properly intervening within "necessary and reasonable limits."[12] Those limits were thus within the state's legitimate concerns, acting in the public interest, to protect the educational development of children.

In the Ienaga cases, the issues have centered on Article 23 and Article 10 of the Basic Law of Education. Ienaga, as might be expected, argued that "academic freedom" is the right of the teachers to decide the content of curriculum, a right that is nurtured through scholarly debate and works in concert with Article 26 of the Constitution that provides a right to receive an equal education. The Ministry of Education, on the other hand, contends that the "right to educate," once the private prerogative of parents toward their children, has been entrusted to the state under the postwar Constitution, which implicitly delegates decisions about the content of education. The conflict might be further summarized by examining the divergent perception of the latter portion of Article 10. The article states that the aim of educational administration is for "the adjustment and establishment of various conditions required for the pursuit of the aim of education."[13] Predictably, the defense has interpreted

"various conditions" to apply only to the provision of external facilities; the Ministry regards the provision as sanctioning inroads into educational content.

The two Ienaga cases are interrelated in their origin, but distinct in their legal theories. Ienaga, known as a colorful, pro-leftist scholar, had authored a textbook, "A New History of Japan" (Shin Nihonki), approved by the Ministry of Education in 1952 and widely used since, in slightly different versions, in senior high schools. In 1962, the Ministry disapproved Ienaga's textbook, citing 323 "defective" descriptions of Japanese history. The Ministry objected to illustrations introducing each chapter which "supported" the political ideology that the Japanese populace had been exploited in feudal times by warrior classes, an implication that Japan voluntarily agreed to a nonagression pact against the Soviet Union in 1941, and the downgrading of the legendary beginnings of the Imperial household. By the next year, the Ministry, after accepting some revisions, gave tentative approval, but qualified its endorsement by "advising" 290 corrections.

In June, 1965, claiming that his pride as a scholar and his freedom of expression had been infringed, Ienaga filed the first of his two suits, a 1.8 million yen civil lawsuit in Tokyo District Court (Third Civil Section) that claimed mental anguish and royalty losses. In July, 1974, after nearly a decade of considering the many points at issue raised by each alleged "defect," the court, through its presiding judge, Tamaki Takatsu, ruled that though the Ministry had made some minor illegal errors in applying textbook certification standards, the certification system as such did not violate Article 21's prohibition against censorship. The Takatsu decision, which awarded a token compensation of 100,000 yen (about $330 at the time of the award), was subsequently appealed to the Tokyo High Court.[14]

In June, 1967, Ienaga filed a separate administrative suit in Tokyo District Court (this time, the Second Civil Section) seeking judicial review of the Ministry order requiring revisions. Since the legal issues were narrowed to the three areas of objection by the Ministry mentioned above, the suit moved more quickly through the legal machinery. Consequently, in August, 1970, the court, through Presiding Judge Ryokichi Sugimoto, ruled that while the textbook certification system is not unconstitutional, the Ministry had acted unconstitutionally in interfering with the textbook's contents and thereby infringing academic freedom.[15] In early 1976, the Tokyo High Court, with Eiji Azegami as the presiding judge, dismissed the Ministry's appeal. The Azegami decision ruled that the Ministry, in disapproving parts of the textbook that it had previously approved, violated its own internal certification standards "exceeding the scope of discretion (sairyo no han-i) and thus illegally acting in its abuse" (ranyō). The High Court, however, declined to rule as to whether the textbook certification system violated Article 23 of the Constitution or the Basic Law of Education.[16]

The difference in the lower court Sugimoto and Takatsu decisions, though at least in part attributable to the nature of the legal action, emerged on more substantive grounds from variations in the standard of "public welfare." Side-by-side, Judge Sugimoto appears persuaded by a "powers prohibited" theory that will not yield basic freedoms even in the face of a government banner acting for the "public welfare," while Judge Takatsu appears convinced by a "powers delegated" theory that empowers legitimate state interests to serve as the "public welfare." In the words of each presiding judge:

Judge Sugimoto:

> Freedom to publish, in some circumstances, may be linked by considerations of public welfare, but the essence of the ban on censorship is that where ideological

> or philosophical content of a work is at issue, it is forbidden for the public authority to be used to prevent publication, even in the name of public welfare.[17]

Judge Takatsu:

> It should be said that the administration of textbook certification is not proper in terms of censorship....(however) the textbook certification follows the precedent of every law. One cannot help but believe that the restrictions on freedom of expression, which are continuously limited in a rational way, are submissive to the public welfare.[18]

Although these differences in "public welfare" may suggest one of the underlying reasons for the differences in outcome, the "public welfare" standards, as enunciated, might more readily be seen as the end product or prima facie rationale of the judicial reasoning. How the courts reached the result appears to rest, more fundamentally, on whether the judges have viewed "rights" as resting on a philosophical basis or as based in a rule of law. The tone of the Sugimoto decision suggests the former. The basic freedoms are defined not merely as political views, but as "everything related to life of the spirit," a reference that one legal commentator called a principle which "divides body and soul."[19] The court, on the other hand, will allow certification aimed at physical mistakes in the "body" of the manuscript, but will not permit the Ministry to tamper with the "soul," such as recasting the textbook's explanations of historical fact. In contrast, the Takatsu decision looks to whether the law fulfills the intent of the certification process. Since books may still be published critical of the Ministry process, the court stated that certification "does not have the original purpose of thought control mentioned in the Sugimoto case."[20] The Azegami decision, which follows a similar basis-in-law pattern as in the Takatsu opinion, perhaps reflects a judicial response to return to the firmer groundwork, especially in administrative law decisions, by which the courts evaluate "abuse of discretion" within its own objectives of the rule of law. Hence, the court declined to give weight to "special reasons in society itself" outside of the formal pleading and dealt strictly with the competency of the Ministry in its administrative disposition (seikyo shobun).[21]

From our previous discussion, it would appear that the Supreme Court, too, would tend to follow the Takatsu-Azegami line of reasoning. Since the two guiding Supreme Court cases involved criminal prosecutions, generally giving a greater legitimate state interest in altering freedoms in the public interest than the interest in tort or in administrative law cases, the previous judicial rulings cannot be regarded as irrevocably proceeding to impair basic freedoms of expression. Nevertheless, the emerging trend in the law attaches a narrower construction to the constitutional guarantees and puts greater burdens on the individual asserting certain freedoms, such as Ienaga, to show that public welfare is concommitant with personal liberty.

THE PEOPLE'S RIGHT TO KNOW

Unlike Article 23, which is arguably segregated from the constitutional guarantee explicitly acknowledging the freedom of speech and thus could be treated with different emphasis, the freedom of the press is mentioned within the same phrase as free speech in Article 21. Closer proximity, however, has had minimal weight in judicial interpretation.

Initial arguments advancing the theory that the people have a "right to know" about their government's operations beyond what is officially dispensed were expressed in two

books by American authors in the 1950's.[22] In Japan, the concept of a "right to know" was first applied in a legal context, not generally to persons who could exercise such a right in a freely democratic society, but rather to an inmate in an Osaka prison where a warden had denied access to newspapers and other reading materials. The Osaka District Court, though referring to Article 21, essentially reached its decision permitting the reading materials on the more philosophical grounds that the government "must be moved by the independent expression and imagination of the people," and the people, in order to stimulate that government, "must be given the means and the machinery to understand completely."[23] Subsequent judicial decisions, though speaking in approving terms of the role of the press in making information about government affairs worth knowing to the people, have been less willing to elevate the press to proxies for the people in exercising a "right to know" (shiru kenri).

The only Supreme Court reference to a press "right to know" appeared in the Hakata Railway Station decision in 1969 in which the Court permitted prosecutors to seize broadcast film taken by four television stations during a student-police encounter. The media argued that even if the court ordered seizure of only film already televised, the film would have been used for a purpose not originally intended, endangering the trust of the people for the press. The Court, however, declined to recognize that the use of the film could be determined only by the press itself. Based on a balancing of interests, the Court held that the right to a fair trial outweighed the freedom of newsgathering, casting its preference for Article 37 (right to "speedy and public trial") over Article 21.[24]

The Hakata Railway Station decision may have suggested some judicial preferences in a hierarchy of basic freedoms, but it did not address itself to the issue of whether the press could gain access to newsworthy information from official government sources and then release it publicly, despite official pressures to suppress it. While in the Hakata situation, the news centered on a public event, in part already publicly reported, the unapproached issue focuses on a public event, only in part revealed by official sources. A situation in which the press asserted its "right to know" in the name of the people and the government defended its duty to maintain official secrecy in diplomatic negotiations provided the means to explore this further issue in the courts.

In June, 1971, Takichi Nishiyama, a reporter for Mainichi Shimbun, arranged to secure copies of secret government cablegrams between the U.S. and Japanese governments dealing with the sensitive negotiations on the reversion of Okinawa to Japanese control. The documents indicated that, contrary to the text of an agreement announced June 18 by Tokyo and Washington, Japan, not the U.S., would pay the costs of compensation to Okinawan landowners who claimed property damage due to the U.S. military presence, which would be reduced under the reversion terms. The issue itself was sensitive given the unpopularity of the U.S. presence. But it also had a symbolic importance, since the Japanese government had steadfastly denied any secret arrangements in the process of negotiations, especially secrets relating to the disposal of nuclear weapons in Okinawa.[25]

In a by-lined dispatch on June 18, Nishiyama reported rumors of secret agreements, but did not elaborate. Nine months later a Socialist party member in the Diet, Takahiro Yokomichi, revealed the full content of the secret documents at the close of a budget committee meeting. During the next month, April, 1972, the Tokyo police arrested Mrs. Kakuo Hasumi, a secretary to the Deputy Foreign Vice Minister Takeshi Yasukawa, and also Nishiyama. Both were charged with violations of the National Public Service Law; Hasumi, for leaking official secrets while serving as a public employee (Article 100-1) and

Nishiyama, for abetting a civil servant in leaking a government secret (Article 111). The penalties, set forth in Article 109-12, provide a prison term not exceeding one year and a fine of not more than 30,000 yen (about $105 at the time of the arrest).

In its decision of January, 1974, the Tokyo District Court (Criminal Court, Section 7), with Takeshi Yamato as the presiding judge, found Hasumi guilty, issuing a six-month suspended sentence, but found Nishiyama innocent. The court distinguished between a public employee, duty-bound to protect government secrecy in the interests of an "efficient and democratic management of public duties for the people," and a reporter, who though his means to get the documents might be morally objectionable, nevertheless were "justifiable" (seitosei) since the purposes of the reporting were for the "public benefit" (kokumin rieki).[26]

Should the "public benefit" standard be regarded as more conducive to basic freedoms of expression than the "public welfare" standard examined in the academic freedom cases? On the basis of the initial Nishiyama decision, one might conceiveably take the court's position that "for the level of dangerousness to have hindered the effectiveness of the negotiations, the act of persuasion (shōyō) must exceed the level of benefit to the people."[27] In summer, 1976, however, Tokyo High Court through the presiding judge, Setsuo Kinashi, reversed the judgment, handing down a four-month suspended sentence to Nishiyama for acts of instigation (sosonokashi) in acquiring the documents. While normal newsgathering activities might not constitute the crime of instigation, in this instance Nishiyama had overstepped normal boundaries, the court said. When Nishiyama tried to obtain government secrets, he had acted arbitrarily.[28]

The difference between Judge Yamato and Judge Kinashi's opinions turns not so much on a varying interpretation of "public benefit," but rather on a disagreement as to whether the purposes of the reporting are constitutionally protected when inquiring into matters of government secrecy. The outcomes should be understood, therefore, not only in terms of the "end" result by which the courts announce their "public benefit" standards, but also in terms of the "means" that question what forms of "secrecy" may be publicly disclosed.

Prior to the Nishiyama decisions, a series of espionage cases against Foreign Ministry officials, a Japanese Self-Defense Force soldier, and a Korean resident in Japan accused of spying drew distinctions between "formal secrets" (keishiki himitsu), matters clearly designated by official orders as protected by the national interest, and "substantial secrets" (jisshitsu himitsu), matters generally recognized as worthy of national security protection though lacking an official stamp of secrecy.[29] Judge Yamato's opinion carried forward the same distinction, concluding that, in form, the Ministry secrets in this instance were "substantially secret."[30]

The recent decision by the High Court, however, proposed a new distinction between "genuine secrets" (shinsei himitsu) and "suspect secrets" (giji himitsu). It defines the former as matters clearly guaranteed as secret for the national benefit, while the latter are matters possibly made secret for the political advantage of the government. As the court admits, there is no easy way to clearly distinguish the genuine from suspect secrets. But, unlike the Yamato opinion, which by calling certain matters "substantially secret" intruded the judiciary into making determinations of proper government secrecy on a case-by-case basis, the Kinashi opinion reserves the decision to the government official: "Government officials are in positions in which they are versed as to which secret documents are related to others and in varying conditions are able to distinguish which of the two are proper."[31]

Another way to look at the Nishiyama decisions, besides the broad questions inherent in government-press antagonisms, might be to inquire whether Nishiyama's personal ethics as a reporter should be a factor in determining whether he is entitled to constitutional protection. An apology written by Fujiro Nakatani, Nishiyama's managing editor, who was forced to step down to a lower echelon position because of the public controversy, rejected public criticism that implied improper conduct. Despite rumors that the personal relationship between Hasumi and Nishiyama was quite friendly, if not intimate, and that Nishiyama had betrayed a gradually building system of trust, the newspaper asserted that it "should not clear this up." But it also noted that the company policy that a news source should not be revealed had been violated. "It has to be said from this fact," the apology states, "that in terms of the morals of a journalist, it is a deviation."[32]

The stand taken by Mainichi that it should only be held accountable for the professional culpability of the reporter, but not for his personal culpability while in a professional capacity, is a difficult distinction to be applied in a practical sense. The Japan Newspapers Association adopted in 1946, and revised two years later, a standard or code of journalism ethics which has been generally accepted in principle. Article 7 of the code proposes that all members of the association "should make an effort to cooperate and maintain a higher ethical standard by promoting their moral unity."[33] As early as 1963 the newspaper association argued that the newsman should expect exposure to secrets as part of his occupation, and warned that "the reporter who seems to divulge his news source will not become able to be believed by that news source and good reporting will not be possible."[34]

Despite the High Court's judgment against Nishiyama that he used a situation in which "feelings could not be escaped,"[35] the Supreme Court has ruled in another instance that a reporter could be fined for not revealing a news source. In 1952, the Court dismissed an appeal by an Asahi Shimbun reporter who had been penalized for refusing to testify how he learned that a tax official had been arrested on charges of corruption.[36] The Court, which was not presented with a "right to know" argument by the defendant, reached its decision to permit the fine on the grounds that compulsion would not interfere with the "public welfare," a standard which we have seen often repeated.

The perplexity in delineating the framework for freedom of the press in Japan is closely connected with the ambiguity in the language of Article 21 of the Constitution, "nor shall the secrecy of any means of communication be violated." In Nishiyama's case, the "secrecy" violated might either be regarded as the revelation of government secrets or the infringement on the secrecy desired by the news source. It is instructive to note that, despite a strong public clamor by the press that the Nishiyama decisions turn on the "right to know," the courts themselves did not give lip service to the phrase as the Supreme Court did in the Hakata Railway Station case. The Mainichi Shimbun, responding to the High Court decision, warned that "the means of guidance stated in the decision are a dangerous disturbance which will be an important restraint on newsgathering and cannot be agreed with."[37]

CONCLUSION

Far from enjoying a preferred status in an extensive hierarchy of rights and privileges available through the postwar Japanese Constitution, freedom of speech and freedom of the press are, at best, "givens" which must still be either "won" or "earned" through subsequent judicial decisions. The constitutional guarantees are broadly stated; the judge-made law interpreting those guarantees moves with cautious restraint in with-

holding the full forces of freedoms of expression in accordance with "public welfare" or "public benefit."

From a less than optimistic point of view, in a society which lacked the constituionally enumerated norms of this self-proclaimed democracy, some of the most recent judicial decisions might not be so extraordinary. A conviction of a journalist for acts while engaging in newsgathering, convictions of teachers who refused to work as part of union activities, and a determination that government control of textbook content in the classroom is not unconstitutional--might not all these constitute irreparable impairment on freedom of expression?

From a more positive point of view, however, the recent decisions also demonstrate an emerging trend to more firmly root various "rights" to principles of law rather than relying on merely philosophical exhortations to enforce basic freedoms. Thus, the High Court in the second Nishiyama decision recognizes press freedom, but specifically finds the reporter guilty of violating the National Public Service Law which prohibits instigating the leakage of government secrets. Similarly, in the area of academic freedom, the courts' reasoning is directly connected to considering whether individuals have violated the Basic Law of Education, using that as a second measure for a just determination. Judge Azegami's opinion, however, still raises a disturbing note in that the rule of an external law, either Constitution or the Basic Law of Education, was deemed beyond the scope of the Ministry of Education's "abuse of discretion." If read too literally, the decision implies that the Ministry can only be judicially controlled by its own internal rules.

Furthermore, it should be noted that even if it is conceded that the patterns of law are becoming more restrictive in restraining certain freedoms, the practice of enforcement has not been unduly harsh. The harsher penalties have been restricted so far to criminal prosecutions, such as the Nishiyama case and the case involving the teachers' boycott. Even these cases have involved more suspended sentences than actual prison sentences or monetary penalties.

The Japanese postwar judicial system has gained a reputation, perhaps undeserved, as a reluctant defender of constitutional rights. It can be persuasively argued that the courts have not fought aggressively for preserving constitutionally guaranteed freedom of expression. Perhaps, from a slightly different perspective, however, it may simply be stated that such freedoms as free speech or a free press are merely competitors among other freedoms in a balancing process by the judiciary. Without preferential treatment, such freedoms will only emerge without judicial restraint on a case-by-case basis.

NOTES

[1]One indication of the extensive litigation concerning fundamental human rights is that two efforts to translate major Supreme Court cases have included a majority of decisions related to basic freedoms. John M. Maki, Court and Constitution in Japan: Selected Supreme Court Decisions, 1948-60 (University of Washington Press: Seattle, 1964). Hiroshi Itoh and Lawrence W. Beer, The Constitutional Case Law of Japan: Selected Supreme Court Decisions, 1961-70, forthcoming from University of Washington Press.

[2]Lawrence W. Beer, "The Public Welfare Standard and Freedom of Expression in Japan," Washington Law Review 43, 1968, Maki, op. cit., pp. xli-xliii.

[3]"Public welfare" was not the phrase in the Meiji Constitution. At times, "public benefit" (kokyo no fukuri), which has a similar connotation, was used. Whether postwar courts interpret the phrases as nearly identical is uncertain.

[4]From an "ecological approach," the term "public welfare" is used to denote a mix of culture and politics. See Lawrence W. Beer, "Education, Politics and Freedom in Japan: The Ienaga Textbook Review Cases," Law in Japan 8, 1975. Our approach here is to concentrate on the internal reasoning of the courts within the context of such external policy factors.

[5]John Caiger, "Ienaga Saburo and the First Postwar Japanese History Textbook," Modern Asian Studies, January, 1969, p. 9. Robert P. Dore, "Textbook Censorship in Japan: The Ienaga Case," Pacific Affairs, Winter 1970-1, p. 548.

[6]"The Law of Education," Japan Annual of Law and Politics, Science Research Council of Japan, Tokyo, XXII, 1974, p. 23.

[7]Donald Thurston, Teachers and Politics in Japan (Princeton University Press, 1973), p. 76.

[8]Dore, op. cit., pp. 549-550.

[9]"The Law of Education," op. cit., p. 24.

[10]Decision by Japanese Supreme Court, May 22, 1963, 17 Keishū 4.

[11]For a discussion of the Japan Teachers Union, see Benjamin Duke, Japan's Militant Teachers (1973).

[12]Japan Times, May 29, 1976.

[13]Thurston, op. cit., p. 94.

[14]Hogaku Seminar, 228, September, 1974, pp. 17-19.

[15]Dore, op. cit.,

[16]Decision by Tokyo High Court, December 12, 1975, in Hanrei Jiho, Vol. 800, February 21, 1976, p. 19.

[17]As quoted in Dore, op. cit., p. 552.

[18]Author's translation from Hogaku Seminar, op. cit., p. 18. (Subsequent translations are by the author.)

[19]Hoshino, Tasuasaburo, "Takatsu saiban to kyoiku no horitsu," [The Takatsu Decision and the Education Law], Hogaku Seminar, op. cit., p. 5.

[20]Ibid, p. 18.

[21]Concerning the judicial review of administrative discretion, see K. Hashimoto, "The Rule of Law: Some Aspects of Judicial Review of Administration Action," Law in Japan: The Legal Order in a Changing Society, pp. 239, 243-61.

[22]Harold Cross, The People's Right to Know: Legal Access to Public Records and Proceedings (New York 1953). Kent Cooper, The Right to Know: An Exposition of the Evils of News Suppression and Propaganda (New York, 1956).

[23]Decision by Osaka District Court, August 20, 1954, in Hanrei Taikei (Vol. 1), 1955, p. 347.

[24]"Ruling Upon Case of the So-Called Hakata Railway Station Case," trans. by Supreme Court of Japan (Tokyo, 1970), p. 3.

[25]Mainichi Shimbun, March 27, 1972.

[26]Decision by the Tokyo District Court, January 1, 1974, in Hanrei Jiho, April 1, 1974, pp. 32-33.

[27]Ibid.

[28]Nihon Keizai Shimbun, July 20, 1976, p. 1.

[29]Nihon Shimbun Kyokai, Hō to Shimbun [Law and the Press], Tokyo, 1972, pp. 43-44.

[30]Decision by the Tokyo District Court, January 1, 1974, op. cit.

[31]Nihon Keizai Shumbun, op. cit.

[32] Mainichi Shimbun, April 15, 1972, p. 1.

[33]Nihon Shimbun Kyokai, Shimbun henshū no kijun 「[Standards of Newspaper Editing], 1965, p. 102.

[34]Ibid.

[35]Nihon Keizai Shimbun, op. cit.

[36]Maki, op. cit., pp. 38-46.

[37]Mainichi Shimbun, July 21, 1976, p. 3.

THE SELF DEFENSE FORCE AND THE JAPANESE COURTS: THE NAGANUMA NIKE DISTRICT COURT DECISION

by

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INTRODUCTION

Several times in the last twenty-five years, the Japanese judiciary has been confronted with the issue of the constitutionality of that nation's military force. With one exception,[1] this constitutional question is unique to Japan. It has arisen primarily because of three events: insertion of a far-reaching pacifist provision, Article 9,[2] into the body of the 1947 Constitution; creation of a military force, the Self Defense Force, to protect the country against perceived threats to its security; and failure of an effort to amend the Constitution to clearly permit maintenance of this Defense Force.

Although they possess the power of judicial review, the Japanese courts have for the most part avoided a decision as to the constitutionality of the Self Defense Force.[3] Implicit in these decisions is the belief that this question is inextricably linked with the conduct of the nation's foreign and defense policies and consequently is better left to resolution by the legislative and executive branches of government.

The 1973 decision of the Sapporo District Court in the Naganuma Nike[4] case is in extreme contrast to the above approach. In this case, residents of Naganuma town, Hokkaidō, filed suit to annul a decision of the Ministry of Agriculture and Forestry cancelling the designation of land as a forest preserve in order to permit construction of a Self Defense Force Nike missile base. Ruling for the plaintiffs, the Court faced the constitutional issue directly and held that the Self Defense Force violated Article 9.

Printed here is a translation of a major portion of the REASONS part of this opinion.

OPINION*

DECISION IN SUIT SEEKING REVOCATION OF OFFICIAL ACT CANCELLING DESIGNATION OF FOREST PRESERVE

Shown 44 1969 (Gyō) Number 16

Number 23, Number 24

PART I DESIGNATION OF PARTIES

Asahimachi-ward, business area, Naganuma town, Yūbari District, Hokkaidō

Plaintiffs	Takashi Itō (172 others)
Counsel for Plaintiffs	Toshihisa Hikosaka (453 others)

*This translation is of the decision published in 712 Hanrei Jihō 26 (1973).

Defendant	Ministry of Agriculture and Forestry Yoshio Sakurauchi
Designated Representatives for Defendant	Isaumi Takamatsu (12 others)

(Entries taken from separate list of parties*)

PART II RULING

1. The official act cancelling designation of the forest preserve cited below, which the defendant accomplished July 7, 1969, by means of Ministry of Agriculture and Forestry proclamation number 1023, is revoked.

   (1) Location of forest preserve involved: Naganuma town, Yūbari District, Hokkaidō

   (2) Purpose for previous designation as forest preserve: water conservation

   (3) Reasons for cancellation: Acquisition of land for anti-aircraft training facilities and for a road connecting the same.

2. Expenses of this lawsuit are to be borne by the defendant.

PART III FACTS

not translated

PART IV REASONS

Section 1. FACTS UNDISPUTED BY PARTIES

Of the facts which both the plaintiffs and defendant presented, the following are not in dispute. (More specifically, the court recognizes from all the plaintiffs' arguments that they do not contest the information in Part A or the information in Part B up to the words "submitted the related documents" in subparagraph (6).)

A. Background on Umaoiyama Forest Preserve

1. General

Lying at the upper reaches of a tributary of the Yūbari River, the Umaoiyama Forest Preserve forms a boundary between Naganuma and Yuni towns in Yūbari District.... It is one of several forest preserves for water conservation, that is, for regulating the water that the trees receive and thereby ensuring irrigation water and preventing floods.

....

2. Designation of Forest Preserve

... In 1949 and 1952 a portion of the preserve was released. As a result the area of forest preserve land was 1096 hectares in Naganuma town and 412 hectares in Yuni town. In June 1968, sixty-seven hectares of the forest preserve land in Naganuma were transferred to the jurisdiction of the Defense Agency. The official act in question released thirty-two hectares of that land and three hectares of natural forest under the jurisdiction of the Forestry Agency.

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*Note by editors of Hanrei Jihō.

B. Procedures Releasing Forest Preserve Land of This Case

The procedures releasing the forest preserve land of this case consist of two parts. In one part, the head of the Sapporo branch of the Defense Facilities Administration Agency made application, based on article 27 of the Forestry Law,* to the Minister of Agriculture and Forestry for revocation of the designation of certain forest preserve land in order to obtain sites for the Third Anti-Aircraft Group of the Japan Air Self Defense Force (anti-aircraft training facilities). In the other part, the head of the Sapporo Regional Forestry Office, in response to the former official's application (which was based on the National Forests Law**) to borrow a necessary portion of national forestry land for a road connecting the above facilities, made a report on the release of the forest preserve land to the defendant. Below is a summary of these procedures:

(1) On June 12, 1968, the head of Sapporo branch of the Defense Facilities Administration Agency submitted to the Governor of Hokkaidō an application, dated the same day and addressed to the defendant, for release of the forest preserve land, in order to construct facilities for the Third Anti-Aircraft Group of the Air Self-Defense Force.

(2) On June 13, 1968, the Governor of Hokkaidō forwarded the application to the defendant, together with a written opinion that release of the land could not be avoided.

(3) The defendant received both the application and the written opinion on June 20. After careful examination, which included inquiry directed to the head of the Forestry Affairs Department in Hokkaidō, the defendant, believing release of the land appropriate, made, on July 13, preliminary notification to this effect to the Governor of Hokkaidō as stipulated by article 29 of the Forestry Law. On July 9, the Governor of Hokkaidō officially announced by proclamation number 1485 the content of the preliminary notification, as stipulated by article 30 of the above law, and submitted the related documents to the town of Naganuma for its inspection.

With regard to the portion of land for the connecting road, the head of the Regional Forestry Office submitted a report dated July 8 to the defendant. The defendant, [believing release appropriate], made the preliminary notification stipulated by article 29 on July 23 and the Governor of Hokkaidō officially announced this on July 27 by proclamation number 1570.

(4) The deadlines for submitting dissenting petitions to the aforementioned proclamations were August 18 in the case of the land for the anti-aircraft training facilities and August 26 in the case of the land for the connecting road. One hundred thirty-eight dissenting petitions discussing both matters were submitted by the deadline dates. . . . The Governor of Hokkaidō received them and on August 30 forwarded them to the defendant.

(5) Thereupon, the defendant decided to hold public hearings [at] . . . the Sapporo Regional Forestry Office . . . during the three day period of September 16-18. On September 5, the defendant sent notices of the hearings to 137 people who had submitted statements (one individual was excluded because the nature of and reasons for his dissenting opinion had not been entered on his statement) and proclaimed the same in the Official Gazette of September 7.

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* Shinrinhō (Law No. 249, 1951).

** Kokuyūrinyahō, art. 7 and 8 (Law No. 246, 1951).

The defendant decided to hold a second round of public hearings in the Naganuma Public Hall . . . during the three day period of May 8-10, 1969. At the end of April, it sent notices to this effect to 128 individuals (excepting nine who had withdrawn their statements) and proclaimed the same in the Official Gazette of May 1.

(6) Subsequently, the defendent, believing release of the forest preserve land in question appropriate, officially announced such release on July 7, 1969, by means of Ministry of Agriculture and Forestry proclamation number 1023. At the same time it submitted the related documents to the Governor of Hokkaidō and Naganuma town office for their inspection.

C. All of the plaintiffs except Saki Minagawa reside in Naganuma town, Yūbari district. In Section 2, the court recognized this plaintiff's address to be in Naganuma town because of his letter of proxy to his attorney. . . .

Section 3. WITH REGARD TO PLAINTIFFS' INTEREST TO SUE

The defendant maintains in parts A(1), B(1) and C(1) below that the plaintiffs have no interest to sue in this case. However, for reasons stated in A(2), B(2) and C(2), the court cannot accept the defendant's arguments. For those reasons and that in Part D, it must be concluded that the plaintiffs do have a legal interest in this suit.

A.

1. Complainants who have legal standing in a suit seeking revocation of administrative action must, as stated in article 9* of the Administrative Litigation Law,** be "individuals who have a legal interest in bringing this kind of suit." The plaintiffs, however, have only what may be termed an indirect interest in this action releasing the forest preserve and do not have the legal interest stipulated by the above article. That is to say, the forest preserve is intended to maintain the paddy fields and irrigation facilities of Naganuma and Yuni towns and prevent floods to the same. The decision to designate the area as a forest preserve is done from the perspective of the common good, taking into account the location of the trees in relation to the whole area, the surrounding conditions, and so forth, and is not done for the benefit of any individuals, such as the proprietor or residents of the area. Accordingly, although the plaintiffs may receive benefits by the designation of a forest preserve, these are only indirect or accidental benefits and not ones which the law tries to protect directly. To be sure, articles 27(1) and 32 of the Forestry Law recognize the right of the nearby residents to apply for the designation or release of a forest preserve and provide for both the submission of dissenting petitions and public hearings. However, as is clear from the fact that this right is also granted to the head of the local public entity in question, the provision for petitions and hearings is intended only to gather opinions used by the Ministry in determining the public good and to ensure impartial, proper Forestry administration, and does not mean the plaintiffs come to have an interest directly protected by law.

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* Article 9 states: "A suit to annul or revoke an administrative action shall be brought only by persons who have a legal interest in bringing this kind of suit (including persons who have a legal interest which can be recovered by the annulment of the action, even after its effect having expired owing to the passage of time or other reasons)." The Constitution of Japan: Its First Twenty Years, 1947-1967, at 198 n.45 (D. Henderson, ed., 1968) (hereinafter cited as Henderson).

** Gyōseijiken soshōhō (Law No. 139, 1962), in 2 Eibun hōreisha (hereinafter EHS) no. 2391.

2. The forest preserve system prescribed in Chapter 3 Section 1 of the Forestry Law is intended not only to protect the individual interests of the proprietor of the forest in question or other rightful persons, but also to protect the lives, property, health, and security of livelihood of the residents in the area of the forest. This is clear from the purposes for designating forest preserves, listed in article 25(1) of the Forestry Law: water conservation (no. 1), defense against loss of or sliding of earth (nos. 2 and 3), defense against damage from storm, flood, drought, and so forth (no. 5), prevention of avalanches and the like (no. 6), hygiene of the general public (no. 10), and so forth.

This is also clear from the procedures relating to the designation or release of a forest preserve. Article 27(1) prescribes that "individual(s) who are directly affected by the designation or release of a forest preserve" have the right to apply to the Minister of Agriculture and Forestry to effect designation or release. Article 29 states that "The Minister of Agriculture and Forestry, when he wishes to designate or release a forest preserve, shall make prior notification to such effect to the prefectural Governor* in whose jurisdiction the forest exists" and at the same time specify [a] the location of the affected area, [b] the purpose of designation (if the land is to be designated) or the purpose for originally designating the area (if the land is to be released) and [c] the stipulated conditions for operating the land or the reasons for release. Article 30 prescribes: "The prefectural Governor, when he receives the aforementioned notice, shall without delay . . . officially announce the content of that notice and inform the administrative office of the city, town or village in which the forest exists of the same. . . . In case an individual(s) applied for designation or release of a forest preserve based on article 27(1), the prefectural Governor shall notify those applicant(s) also." Also, article 33(1) provides that "The Minister of Agriculture, in case he designates or releases a forest preserve, shall officially announce the same and shall make notification to such effect to the affected prefectural Governor" at the same time giving the location of the affected area, the purpose of designation or original purpose of designation, and conditions of operation or reasons for release. Paragraph 3 of the same article states: "The prefectural Governor, when he receives notification specified in paragraph 1, shall make notification of the content of the official action to the applicant(s) . . . when application was made in accordance with article 27(1)." (Each of the aforementioned provisions, as well as those prescribed in article 32 below, applies when there is a modification of the stipulated conditions of operation of the preserve provided by article 33-2 and 33-3.) Also, article 32(1) states: "Individual(s) of article 27(1), when they disagree with the content of the official announcement of article 30 . . . may submit a written opinion to the Minister of Agriculture and Forestry. . . ." Paragraph 2 of the same article states: "The Minister of Agriculture and Forestry, when a written opinion prescribed by the preceding paragraph has been submitted, shall conduct public hearings on this"; and paragraph 4 prescribes: "The Minister of Agriculture and Forestry may not designate or release a forest preserve unless forty days have elapsed from the day of the official announcement specified in article 30 (when a written opinion specified by paragraph 1 has been submitted, forty days from the day of public hearings specified by paragraph 2)." Inversely, as a possible result of the official announcement anticipating designation of a preserve, under article 31, "The prefectural Governor . . . may, with regard to a forest to be designated as a forest preserve, prohibit within ninety days" the proprietor or other rightful persons from "cutting down trees, mining or cultivating the land, or performing other acts which would change the shape or nature of the land." Also, after designation, based on article 34, no one, as a rule, "may, without permission of the prefectural Governor, cut down trees" (paragraph 1) and no one

* Also, heads of To, Dō and Fu.

"may, without permission of the prefectural Governor, cut down trees, injure or damage trees, graze animals, use grass, leaves or branches, mine or cultivate the earth and land, or perform other acts which would change the shape or nature of the land" (paragraph 2).

As can be seen from these various provisions, the forest preserve system is intended not only to protect the interests of certain individuals, but also to protect the interests of certain individuals, but also to protect the interests of the residents of a specified area; and although there is no objection to saying the system is for the common good or the public welfare, this does not mean it aims at a general, abstract public welfare which does not consider directly the individual residents of the area. To be sure, articles 27(1) and 33 of the Forestry Law recognize the right of the "head of the public entity which has an interest" to apply for the designation or release of a forest preserve (and accordingly, fall under articles 30, 32 and 33) and for a change in conditions of use, respectively; and article 36(1), relating to the obligations to the beneficiary of a forest preserve, refers to "the public entity which receives benefit by designation of the forest preserve...." However, this does not alter the aforementioned interpretation of the basic purposes of this system.

What the Forest Law tries to protect by the forest preserve system are the interests of life, property, health, and the security of livelihood which the residents possess. These are not simply indirect interests, as the defendant claims, but are interests protected by the Forestry Law.

. . . [A]ll plaintiffs reside in Naganuma town, Yūbari district, where the Umaoiyama forest preserve is located. Consequently, with regard to the request to rescind the official act releasing the forest preserve, the plaintiffs are "individuals who have a legal interest" as specified by article 9 of the Administrative Litigation Law.

B.

1. The defendant maintains that in designating a forest as a preserve the area in question must have the character of a forest and that designation of a preserve which has no trees is invalid; or even if a preserve is designated, if afterwards it loses its character as a forest, the designation action will naturally lapse. With regard to the thirty-five hectares of forest cancelled as a preserve by the official act in question, the trees were cut down following that action, and in their place, Nike missile facilities and a connecting road (semi-permanent in nature) were constructed. The character of the forest was lost and cannot be actually restored even if the previous official act is rescinded. As a result, the plaintiffs' interest to sue has already disappeared.

2. Certainly, if the forest preserve were to permanently lose its nature as a forest (for example, if it were washed away or if it sank into the sea as a result of a natural calamity), then designation as a forest preserve would lose its effect, as the defendant maintains. However, although a preserve may lose its character as a forest temporarily as a result of deforestation, modification in topography, fire, and so forth, it is, of course, possible to restore the forest by man-made efforts of reforestation or replanting or through the power of nature. As long as this is possible, a preserve has not lost its character as a forest.

This is clear from the fact that various provisions of the Forestry Law require reforestation. Article 34-2 states:

> In case the proprietor of a forest or other individual(s) cuts down the trees of a preserve, the proprietor of the forest related to the preserve shall make replantings in the affected area in accordance with provisions relating to the type of, time frame for and methods of replanting established as conditions for the operation of the preserve.

Article 38(1) states:

> The prefectural Governor, having established the type of, time frame for and methods of replanting, may order individuals who violated article 34(1), individuals who cut down trees in violation of the conditions of article 34(6) attached to the permission granted in article 34(1), or individuals who cut down trees having received permission in article 34(1) by deceitful or other improper methods . . . to perform the necessary action for the reforestation in the affected area.

Article 38(2) establishes similar provisions for violation of article 34(2), and article 38(3) prescribes: "In case the proprietor of a forest does not undertake the obligation to replant as required by article 34(2), the prefectural Governor, having established the type of, time frame for and methods of replanting, may order the proprietor to carry out replanting."

Therefore, if the official act releasing the preserve is revoked, because designation as a preserve will be re-established, the government, as proprietor of the preserve, will, based on article 34(2), bear the obligation to replant trees in the affected area in accordance with the specified conditions for operation of the preserve. Even though such specified conditions are lacking (from testimony and documents submitted, it is not clear whether or not conditions for operation have been specified or how their content is to be specified), from article 33* of the Administrative Litigation Law and article 38(1) of the Forestry Law, it is clear that the defendant would bear the obligation to take measures to restore the forest.

Section 1 above noted the characteristics of the preserve affected by the official action. Although it may be seen from [the] evidence** that following the act, the trees were cut down and anti-aircraft facilities and other construction works were built in their place,

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*Article 33 states: "(1) The judgment revoking a disposition or decision shall, with respect to such case, bind the administrative agency being the party and any other related administrative agency. (2) In case the disposition that dismissed or turned down an application or the decision that dismissed or turned down a demand for investigation has been revoked by judgment, the administrative agency which has made the disposition or decision shall make anew a disposition to the application or a decision to the demand for investigation in compliance with the purport of the judgment. (3) The provision of the preceding paragraph shall apply mutatis mutandis in case the disposition that was made on the basis of an application or the decision that granted a demand for investigation has been revoked by way of judgment on the ground there exists a contravention in procedure. (4) The provision of paragraph 1 shall apply mutatis mutandis to a ruling of the suspension of execution." 2EHS no. 2391.

**Court citations of the specific evidence omitted from publication by editors of Hanrei Jihō.

since it is fully possible to restore the forest by reforestation if the facilities and construction works are removed, the plaintiffs have a legal interest which, according to article 9 of the Administrative Litigation Law, "can be recovered by the annulment of the action."

C.

1. The defendant argues that even if the function of the Umaoiyama preserve as a forest to conserve water and thereby prevent floods has declined somewhat as a result of deforestation and construction of the aforementioned facilities, water for irrigation and drinking purposes has been sufficiently maintained and all danger of floods has been eliminated because of implementation and completion of substitute construction works, like the Fujido dikes, numbers 1 and 2, the erosion control dikes (seven sites), and the construction reinforcing the banks of the Umaoi canal. All economic and security effects from the action releasing the land have been completely offset and there is no way to create any new benefits for the plaintiffs even if the official act is revoked. Consequently, the plaintiffs' interest to sue has disappeared.

2. However, from the evidence* which the defendant submitted as the basic plan of the aforementioned construction and results of the same; and from evidence* which the plaintiffs submitted and from their oral arguments, the following can be recognized: with regard to the plan on which construction of the Fujido number 1 dike was based, insufficient data exists as to the frequency and amount of rainfall for a one-hundred year period and considerable doubt remains concerning the estimates of the rate of flow and comparative total flow of flood water. As for the erosion control dikes, considerable doubt also exists regarding the calculations of the quantity of soil which will be lost. Consequently, even with the substitute construction, because it cannot be said that the danger of flooding has been completely eliminated, the plaintiffs' interest to sue to seek revocation of the official act still exists.

D.

In addition, having once fitted the Forestry Law into the constitutional order, the purpose of the forest preserve system should not be understood as being limited to those separate purposes listed in article 25(1). Rather, it is natural to think that the individual provisions try to safeguard the "right to live in peace" (preamble to the Constitution) in order to realize the basic principles of the Constitution, which are democracy, respect for fundamental human rights and pacifism. Accordingly, if the right of the area residents to a peaceful existence is infringed upon by the defendant's official act or as long as there is a danger of such an infringement, those residents have a legal interest to contest the errors of that action.

The reason for the official act cancelling designation of the preserve was, as noted in Section 1 above, construction of facilities for the Third Anti-Aircraft Group. This is a Nike J missile base and from the testimony of witnesses . . . it can be seen that this base, with its anti-aircraft facilities, radar, and so forth, would be the first target of an attack from another country at the time of an emergency. Consequently, the danger exists that the plaintiffs' right to live in peace is being infringed upon. Moreover, since with this kind of infringement, once an incident occurs relief means nothing or is remarkably difficult to obtain, the plaintiffs have a legal interest to contest the official act and to seek its annulment.

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* Court citation of the specific evidence omitted from publication by editors of Hanrei Jihō.

Section 4. ORDER OF DECIDING CAUSES OF ACTION

The plaintiffs' causes of action are lack of public welfare specified by article 26(2)* of the Forestry Law including violation of article 9 of the Constitution by the Japan Self Defense Force, lack of necessity prescribed in article 26(2), defects in substitute construction interpreted to be specified by the same, and inadequacies in public hearing proceedings prescribed by article 32(2).** Any one of these is a basis for the plaintiffs to seek revocation of the official action releasing the preserve.

The view is frequently presented that when arguments maintaining a violation of the Constitution and arguments maintaining a violation of a statute are presented together as reasons to revoke an official act, the court will not venture to pass on the constitutional issues if it can decide the suit by considering only the statutory questions. There is appropriate basis for this opinion. . . .

However, this principle does not mean that the courts should at all times and under all circumstances wait to the last to judge the constitutional issues. Our country is a constitutional state and all three branches of government must exercise power within the constitutional framework. Since only the judiciary has the authority and obligation to ultimately pass on the constitutionality of laws, orders, and so forth, a court has the obligation to forsake its passive position and to examine the constitutionality of the government's actions [a] when, in the process of investigating a concrete legal dispute, it thinks that state power exceeds the constitutional framework, that because of this situation a grave violation of constitutional principles which cannot be overlooked is developing and that as a result the rights of the people are being infringed upon or there is a danger of this; and [b] when the court feels that it can fundamentally solve the dispute at hand only by considering the constitutional issue.

If, even in the situation described above, the court were to dispose of the case on only statutory grounds, although this disposition would provide relief for the party of that suit, this would only be a formal, superficial relief and not be a real or substantial solution. (The same issue will appear later in different form.) In addition, this disposition would invite a result showing that the court had overlooked a situation in which state power actually exceeded the constitutional framework and that it had consequently permitted this unconstitutional situation to become larger and more serious. This fact would make the exercise of judicial review, which is provided to protect constitutionalism, increasingly difficult and would make empty the judicial obligation to uphold the Constitution, which article 99*** assigns to all government personnel, including the courts.

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*Article 26(2) states: "When a necessity has arisen because of reasons of public welfare, the Minister of Agriculture and Forestry may exclude such part of the preserve from national preserve status." C. Stevens, translation of Hiraga Jiken to Iimori Shoshin (The Hiraga Case and Judge Iimori's beliefs) 489 Horitsu Jihō 64 (November, 1969) footnote 1. (Teaching Materials, Columbia University.)

**Article 32(2) states: "When the Minister of Agriculture and Forestry renders a written opinion in accordance with the provisions of the preceding paragraph, he must hold a public hearing concerning such opinion." Id. Footnote c.

***Article 99 states: "The Emperor or the Regent as well as Minister of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution." Maki, 423.

In this case, from the plaintiffs' arguments concerning a violation of article 9 of the Constitution and lack of public welfare specified in article 26(2) of the Forestry Law, doubt has arisen that the Self Defense Force may violate one of the basic principles of the Constitution, that of pacifism. The possibility exists that the right of the plaintiffs to live in peace and other of their rights have been infringed upon because the official act releasing the preserve was closely tied to the creation of the Air Self Defense Force base. Therefore, in such a situation, for the reasons stated above, it is impermissible for the court to avoid a constitutional judgment and the court must exercise judicial review affirmatively.

Therefore, below, we will mainly consider this case from this point of view.

Section 5 WITH REGARD TO VIOLATION OF ARTICLE 9 OF THE CONSTITUTION BY THE OFFICIAL ACT RELEASING FOREST PRESERVE LAND AND LACK OF PUBLIC WELFARE PRESCRIBED BY ARTICLE 26(2) OF FORESTRY LAW

I. Basic Arguments by Both Sides

1. The essentials of the plaintiffs' arguments with regard to the above-entitled points are:

The [objective of the] official act releasing the forest preserve land, which the defendant took based on article 26(2) of the Forestry Law, was to acquire land for facilities (a so-called Nike missile base) for the Third Anti-Aircraft Group of the Air Self Defense Force and for a road connecting these facilities. However, the Ground, Maritime, and Air Self Defense Forces are unconstitutional because they correspond to land, sea and air forces prohibited by article 9 of the Constitution. When exercising the authority provided by the Forestry Law, the defendant has the obligation to act in conformity with the Constitution, and if he has not the result of that exercise of authority is void. Therefore, the action releasing the preserve land is unconstitutional and invalid without reference to article 98(1)* of the Constitution.

Furthermore, because the construction of facilities for the Self Defense Force, whose existence is unconstitutional, does not fall within the reasons of public welfare prescribed by article 26(2), the aforementioned official act is illegal.

2. The basic arguments of the defendant in opposition to this are:

(1) The Defense Agency plans to use the forest preserve land as a site for facilities for the Third Anti-Aircraft Group of the Air Self Defense Force and the like, and this decision is based on the Third Defense Buildup Plan approved by the Cabinet on March 14, 1967. It goes without saying that the defense of the state is for the public welfare. That is to say, defense of the state is a basic condition for maintaining the peace and security of our country and for ensuring its existence; and should there be a deficiency in this respect and the country suffer military attack from abroad, not only the peace and safety of the country but even the guarantee of fundamental human rights would be endangered. Accordingly, defense of the state and construction of defense facilities is a state function which

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* Article 98 (1) states: "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity." Maki 432.

has an extremely high degree of public welfare. Therefore, the official act releasing the forest preserve land is legal as action wherein, as stated by article 26(2) of the Forestry Law, a necessity has arisen because of reasons of public welfare.

(2) Whether or not the Self Defense Force corresponds to so-called "war potential" prohibited by article 9 of the Constitution is not a matter to be examined by the judicial branch. Every independent nation clearly has the right of self defense and clearly article 9 does not go so far as to forbid measures necessary for the maintenance of our nation's peace and security and for ensuring its existence. The question of possessing a Self Defense Force as a means of self defense or, if one is maintained, questions as at what scale and levels of equipment and capability it should be maintained are matters relating to the fundamental sovereignty of the state; they are highly political matters which should be determined taking into full consideration such factors as the changing international situation, scientific advancements, future developments, and so forth, and should be decided in accord with our national power and position. Accordingly, the Diet and the government, which bear direct responsibility to the sovereign people, should decide what to do on the basis of highly political considerations and their decisions should be ultimately entrusted to the political judgment of the sovereign people. Not only are these matters not accustomed to judicial review by the judiciary, which has a purely judicial function and does not bear political responsibility to the people, but in light of procedural limitations which necessarily accompany judicial judgment, these are not matters into which the court should inquire.

(3) Even if the power of judicial review does extend to the matter of the constitutionality of the Self Defense Force, that Force is self defense power based on our country's right of self defense, not war potential of article 9, and is consequently constitutional. The Constitution does not deny the right of self defense which our country has as a sovereign nation; its pacifism has never meant defenselessness or non-resistance; and it does not forbid maintenance of the necessary power to prevent or defend against unjust military attack or aggression from abroad, in other words, self defense power. The Self Defense Force is that self defense power.

3. According to the arguments of the defendant and plaintiffs, if the Self Defense Force does not correspond to "land, sea, and air forces, as well as other war potential" of article 9, then the action releasing the preserve land, which the defendant took to build Self Defense Force facilities, falls within the public welfare of article 26(2); and if the Self Defense Force does violate the Constitution, then the official act releasing the preserve is itself unconstitutional and does not have the nature of being in the public welfare. It can be said that in this respect the argument of the two sides involves a common issue.

Article 26(2) considers as an essential condition for the release of a forest preserve that the purpose of the release be for "reasons of public welfare." Needless to say, that public welfare must be recognized by the legal system which is headed by the Constitution; and if the Self Defense Force exists in violation of the Constitution, the purpose of building the defense facilities does not fall within the "reasons of public welfare." Consequently, in order to judge the existence of "reasons of public welfare" with regard to the official action releasing the preserve, we must judge whether or not the defense facilities of the Self Defense Force violate the Constitution.

However, the defendant argues that judicial review does not extend to the constitutionality of the Self Defence Force. In opposition, the plaintiffs stand on the premise

that judicial review is appropriate. Accordingly, below, we will first look into the matter of the appropriateness of judicial review with regard to the Self Defense Force.

II. Legal Appropriateness of Judicial Review of Self Defense Force (With Regard to the "Political Question" Doctrine)

1. Article 76 of the Constitution prescribes: "The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law." Article 81 states: "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." It requires no comment that the clear words of the latter article mean that the lower courts too, as courts of the first instance, have the power to determine the constitutionality of any law, order, regulation or official act. Also, article 3 of the Court Organization Law* states: "Courts shall, except as expressly provided in the Constitution of Japan, decide all legal disputes." Accordingly, from these provisions, it is natural to say that acts of state relating to the Self Defense Force and associated laws, mainly the Defense Agency Establishment Law** (Law No. 164, June 9, 1954) and the Self Defense Force Law*** (Law No. 165, June 9, 1954), which determine the scale, structure and organization of the Self Defense Force, are in general subject to judicial review.

However, having stated the above, the question exists as to whether because of various practice necessities, there are not areas of law, rules, orders or other acts of state which are outside the sphere of judicial review. This is the so-called "Political Question" issue.

2. Generally, the idea of excluding certain acts from judicial review is less a theoretical conclusion of constitutional structure and national organization and more a result of historical and social conditions in every country. For that reason, the content of that idea varies with each nation. Therefore, we will examine this issue with regard to France and America, which may be considered representative.

. . .

3. In our country we have no established rules, either by court precedent or scholarly opinion, regarding the question of what should be a political question. Furthermore, "actes de gouvernement" and "political questions" were formed and developed in the historical settings of France and America, which differ historically and socially from this country. In addition, our Constitution has prescribed in article 81 that the judiciary has the power of judicial review with regard to all legislative and executive acts, and to that extent has clearly made judicial power superior to the other two branches. Therefore, it must be said that it would be inappropriate to introduce the political question doctrine directly into our country.

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* Saibanshohō (Law No. 59, 1947).

** Bōeichō setchihō.

*** Jieitaihō.

Most especially, exclusion of a definite area of acts of state from judicial review is contradictory to constitutionalism or the rule of law, the framework of modern democracy, wherein all acts of state are under the law and wherein the courts subject all acts to its review and thereby protect the rights of the people. Even granting that "actes de gouvernement" or "political questions" may derive their rationale from specific political circumstances in the historical development of France and America, it must be said they are in all instances exceptions to constitutionalism. From just this fact, even without reference to tendencies in France or [J. P.] Frank's criticism, we can say that "actes de gouvernement" or "political questions" are doctrines which should not be expanded.

4. As mentioned above, article 81 of the Constitution states: "The Supreme Court is the court of last resort with the power to determine the constitutionality of any law, order, regulation or official act." The words "any law, order, regulation or official act" can be interpreted to mean there are absolutely no exceptions. However, other clauses in the Constitution can be said to establish exceptions to articles 76 and 81. For example, article 55 prescribes: "Each House shall judge disputes related to qualifications of its members"; and article 64(1) states: "The Diet shall set up an impeachment court from among the members of both Houses for the purpose of trying those judges against whom removal proceedings have been instituted."*

In addition, the Supreme Court, faced with the issue of the validity of the dissolution of the House of Representatives, said on June 8, 1960: "Dissolution of the House of Representatives is a highly political act closely related to the sovereignty of the state. It is clearly . . . beyond the authority of the judiciary to investigate the legal validity or invalidity of such acts." (Minshū, vol. XIV, no. 7, p. 1206)** Again, on March 7, 1962, in a case in which the validity of the proceedings establishing a law were at issue, the Supreme Court said: "As long as this law has been passed by the resolution of both Houses and officially promulgated in accord with legal procedure, the courts should respect the autonomy of the Houses and should not examine any facts as the arguments relating to the proceedings establishing the said law nor judge the validity or invalidity thereof." (Minshū, vol. XVI, no. 3, p. 448).*** These two cases relate to relations between the government and the Diet and to matters within the Diet.

Moreover, on December 16, 1959, in the so-called Sunakawa case, in which the constitutionality of the Japan-U.S. Security Treaty was at issue, the Supreme Court said:

> Moreover, the Security Treaty in the present case must be regarded as having a highly political nature which . . . possesses an extremely important relation to the basis of the existence of our country as a sovereign nation. There are not a few points in which a legal decision as to the unconstitutionality of its content is simply the other side of

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* Maki 417, 419.

** Tomabechi v. Japan, 14 Minshū 1206 (Sup. Ct., G.B., June 8, 1960).

*** Shimizu v. Governor of Osaka Metropolis, 16 Minshū 445 (Sup. Ct., G.B., March 7, 1962), English translation of this part in Henderson 160.

> the coin of the political or discretionary decision of the cabinet, which concluded the treaty, or of the National Diet, which gave its consent to it. Consequently, the legal decision as to unconstitutionality has a character which, as a matter of principle, is not adaptable to review by a judicial court, which has as its mission a purely judicial function; accordingly, it falls outside the right of judicial review by the courts, unless there is clearly obvious unconstitutionality or invalidity. It is proper to interpret this primarily as a matter that must be entrusted to the decision of the cabinet, which possesses the power to conclude treaties, and of the National Diet, which has the power to approve them; and it ultimately must be left to the political review of the sovereign people. (Keishū, vol. XIII, no. 13, p. 3225).*

Except in situations in which there is "clearly obvious unconstitutionality or invalidity" the Court placed beyond judicial review the interpretation and validity of a treaty.

5. The defendant maintains that the question of the constitutionality of the Self Defense Force is a highly political matter relating to the foundation of state sovereignty and consequently not subject to judicial review. To be sure, the Supreme Court in its opinion of June 8, 1960, in the aforementioned case said:

> However, even under the system of separation of powers in our country, we cannot avoid placing restrictions on the exercise of judicial power ourselves and we should not hastily conclude that all acts of state are subject to judicial review without limit. Acts of state having a highly political nature relating to the foundation of direct state sovereignty are beyond the power of court review even though judgment as to their validity or invalidity is legally possible. Judgment in these instances should be entrusted to the political branches, as the government and the Diet, which bear political responsibility to the sovereign people, and ultimately to the political judgment of the people themselves. The limitations on this judicial power arise ultimately from the principle of separation of powers; they must be interpreted to be limitations that are not expressly provided for, but inherent in the intrinsic nature of the constitutional judicial power because of such considerations as the highly political content of acts of government, the character of courts as judicial organs and procedural limitations necessarily accompanying judgment.

However, as mentioned above, this decision related to the validity of the dissolution of the House of Representatives and does not seem to be directly related to this case. Moreover, this approval excluding acts of state from judicial review is in all instances an exception to the principle of constitutionalism, and the court opinion stating the reasons for this type of exception is not universally applicable. Without noting these points, what is only a descriptive portion of a general idea will expand easily, be made abstract and

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* Japan v. Sakata, 13 Saikō saibansho keiji hanreishū, 3225 (Sup. Ct., G. B., December 16, 1959), Maki 305-6.

in the end present a danger to constitutionalism. Even in France and America, where the political question theory was created, the courts, in their long history, have paid careful consideration to the political and social situations of their times and have recognized such acts as only exceptions.

Also, the aforementioned exceptions should be limited to the maximum extent in order to support a constitutional order which, as stated in articles 97* and 98 of the Constitution, is to protect the freedom and rights of the people to the largest degree.

6. In addition, it must be said that the concepts "highly political nature" and "foundations of state sovereignty" which the defendant uses are very unclear and highly ambiguous. Their vagueness makes possible the broadest interpretation. Also, any law or regulation whose constitutionality is at issue inevitably has a political character to some extent and cannot be unrelated, even slightly, to the foundations of state sovereignty. Moreover, when the court approves exclusion of acts of state from judicial review by employing these vague concepts, it is interpreting them extremely loosely and is not protecting the rights of individuals from abuse of state action but rather is closing the door. The arguments of the defendant about "highly political nature" and "foundations of state sovereignty" do not conform with the meaning or the spirit of the Constitution as seen in articles 81, 97 and 98, which establish the principles of constitutionalism and judicial predominance.

7. The defendant contends that decisions as to whether our country can maintain a Self Defense Force, and if so, at what scale, level of equipment and capability, and so forth, should take into account such factors as the changing international situation, scientific advancements, and the like; and that, in view of the procedural limitations accompanying judicial judgment, the issue of the constitutionality of the Self Defense Force is not adaptable to court investigation. However, the Constitution, both in the preamble and article 9, has laid down clear legal norms concerning the issue of the constitutionality of the Self Defense Force, that is, whether or not this country can maintain military power for the safety and security of the state. The meaning and interpretation of those provisions should be objectively fixed as interpretation of legal norms and should not have two or three meanings depending on changes in governmental structure or a changing international situation. This court will not attempt to investigate or judge such questions as to whether it is appropriate for the country, having considered the above-mentioned circumstances, to possess a Self Defense Force as a policy, and if so, at what level of capability the country can maintain it. Rather, this court will only investigate the conformity of the Self Defense Force to the aforementioned constitutional provision which forbids maintenance of war potential of a military as one of the means which the sovereign people can choose to maintain security of the state. Therefore, within court procedures, if arguments and evidence which make clear to a certain extent the actual state of the Self Defense Force have been presented, the court can easily examine the constitutionality of the Force without inquiring into other factors, such as international conditions, and no limitation on judicial procedures exists. Therefore, there is no reason to exclude the Self Defense Force from judicial review.

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*Article 97 states: "The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the man exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate." Maki 423.

8. In the end, in our country, acts of state which should be excluded from the scope of judicial review, as exceptions to article 81, are only those recognized in part 4 above. Review of the constitutionality of all other laws, regulations, and official acts is within the power of the judiciary as a result of articles 76 and 81 of the Constitution and article 8 of the Court Organization Law. Accordingly, it must be said that judicial review naturally extends to the suit in question.

III. Pacifism of the Constitution and Interpretation of Article 9

A. Meaning of the Preamble

1. In a constitution, the basic law of a country, there are frequently instances in which the origins, motives and purposes for the establishment of the constitution or its basic principles are proclaimed and made clear as a preamble, in preface to the individual articles which comprise it.

Our nation's present Constitution, in its preamble of four paragraphs, has set down certain fundamental principles which should be called the "Constitution of the Constitution." These principles are pacifism, popular sovereignty, and respect for fundamental human rights.

2. With regard to pacifism, in the first sentence of the first paragraph of the preamble, the Constitution stipulates that "We, the Japanese people, . . . determined that we shall secure . . . the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government . . . do . . . establish this Constitution"; again, in paragraph 2, the Constitution provides: "We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationships, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want." Then, after proclaiming in paragraph 3 that "We believe that no nation is responsible to itself alone, but that laws of political morality are universal and that obedience to such laws is incumbent upon all nations . . .", the Constitution concludes the preamble with "We, the Japanese people, pledge our national honor to accomplish these high ideals and purposes with all our resources."*

This pacifism, one of the fundamental principles of the Constitution, is not negative in that Japan was made to renounce war and not maintain armament because of its defeat in World War II and its forced acceptance of the Potsdam Declaration. Rather it is positive in that, as we stated in the preamble, we resolve that "we shall secure for ourselves and our posterity . . . the blessings of liberty throughout this land and . . . that never again shall we be visited with the horrors of war. . . ." Specifically, on the

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*Maki 411.

one hand, this resolve for peace did not just derive from the feeling of abhorrence of war resulting from the calamitous experience of World War II. Rather, it is a rational determination for peace; through re-examination of the causes of all wars, from the Sino-Japanese and Russo-Japanese Wars to the recent World War, and of our country's responsibility therein and by passing the results of that reflection on to future generations, we hope to prevent war in the future and at the same time establish a condition of well-being for our people. On the other hand, by this resolve, we Japanese, realizing the unlimited disaster and untold sadness that war inevitably brings to all people of the world and deeply conscious of the high ideals of human nature, strive to positively realize permanent world peace, which we deeply desire. This determination lives and will continue to live in the hearts of the Japanese people, present and future; it defends the safety and peace of our country and makes both more secure. Eventually, it will create peace in all the world.

In this way, as long as our country stands on pacifism and abolishes armaments, we do not ultimately base the security and existence of our country on war and weapons, as other countries do, but "we have determined to preserve our security and existence trusting in the justice and faith of the peace-loving peoples of the world" and acting affirmatively to support the peace of our country by various activities, as removing the causes of war, internal and external, before they arise and strengthening international peace. This determination is based on the fact that our country, by advancing as a democratic state guaranteeing freedom and rights under a pacifistic constitution, will not permit the causes of war to be created internally; on the wide-spread belief that nothing threatens the safety and existence of our country, one of all demanding peace and national security; on the firm conviction held by the peoples of all countries of the world, who more than at any time in the history of mankind are striving for a world peace linked to national peace, that no antagonistic disputes must arise which would threaten the peace between nations; and finally, on the real possibility of international security guarantees and prevention of war based on the functioning of the United Nations. This is clear from the fact that the Constitution, in the latter part of paragraph 2 and especially in paragraph 3 of the preamble, rejects egocentric, narrowminded nationalism not only for our country but for the countries of the world and strongly admonishes against a self-righteous attitude which, only concerned with the affairs of one's own country, does not consider the position of the others.

Even if by chance one country or a group of countries which do not trust in the justice and faith of the peace-loving peoples of the world comes to exist and even if our country is endangered by aggression from these countries, the idea that we ourselves can maintain armament and can fight again with armed force cannot be found at all in the preamble.

3. This pacifism in the preamble is inextricably linked with the two other principles, popular sovereignty and respect for fundamental human rights.

(1) That the first paragraph of the preamble ties pacifism and popular sovereignty together is clear. . . .This interrelationship is one in which we try to establish a perfect peace by prescribing that government action originates from the authority of the people, thereby eliminating as a cause for war the arbitrariness of a government supported by a few. Inversely, we believe that pacifism must be established perfectly for popular sovereignty actually for the benefit of the people to exist.

(2) . . . [T]he second paragraph of the preamble states, "All peoples of the world have the right to live in peace, free from fear and want." These words proclaim

that the right to live in peace is itself a fundamental human right common to all people of the world. That people can live in peace is not an extra benefit resulting from the government's adoption of pacifism as a policy. Rather, the government itself adopted pacifism as one of its fundamental principles in order to establish the right to live in peace for our people and all peoples of the world. In other words, the only way to establish this right was to adopt pacifism.

These ideas of pacifism and fundamental human rights are pointed out in the preamble of the United Nations Charter and in the preamble of the "Universal Declaration of Human Rights"*. . . . Our Constitution conforms with these ideas and explains them more fully.

The separate fundamental rights given in Chapter III of the Constitution prescribe and make real each individual's rights to live in peace and to pursue happiness. Here, too, it can be seen that the two fundamental Constitutional principles of pacifism and respect for fundamental human rights are inextricably joined.

4. That popular sovereignty is indivisibly tied with respect for basic human rights requires no comment. These three principles come together and form one body; they comprise the foundation of the present Constitution; and if even one of them were to be lacking, the Constitutional structure would collapse.

So that the various principles which characterize the Constitution do not end up as only words, the end of the preamble proclaims to the world that the Japanese people themselves pledge their national honor to accomplish these purposes and high ideals with all their resources.

B. Interpretation of Article 9 of the Constitution

1. The interpretation of article 9 must be based on the above-mentioned fundamental constitutional principles. This is because each article and paragraph of the Constitution including article 9 merely makes concrete and manifests separately those basic principles.

The first paragraph of article 9 prescribes: "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." The second paragraph provides: "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."

2. First, in looking at the first paragraph,

(1) With the words, "Aspiring sincerely to an international peace based on justice and order," we Japanese reaffirm the pacifism of the preamble in prescribing

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* G. A. Res. 217 (III) U.N. Doc. A/810.

** Maki 413. However, the words "will never be maintained" may more correctly be translated "will not be maintained." Sissons, The Pacifist Clause of the Japanese Constitution, 37 International Affairs 45, 49 (1961).

article 9. While trusting all states to esteem justice and order and to value peace, we sincerely aspire for the same, under the belief that peace will be maintained if this is done; and for this purpose, we have established the provisions which follow in the same paragraph.

(2) The words "war as a sovereign right of the nation" have the same meaning as war as an act of state. This does not mean we approve the existence of war not based on the invocation of this sovereign right.

(3) The term "force" in the phrase "threat or use of force" means an organized body of men and material which has as its purpose the use of actual power. In this sense, it has the same meaning as "war potential" in paragraph 2. The phrase "threat . . . of force" means a threat suggesting recourse to war or hostile acts and the words "use of force" mean actual hostile acts not approaching an act of war recognized in international law.

(4) In the phrase, "we forever renounce war . . . as a means of settling international disputes," the "war" renounced is illegal war, namely, war of aggression. Some, believing that the term "as a means of settling international disputes" means all international disputes, argue that the Constitution in article 9(1) renounces all wars, including wars of self-defense and wars to enforce sanctions. However, if this were the case, there would be no need to say, "as a means of settling international disputes." Also, this phrase appeared in the 1928 No-War Treaty [Kellogg-Briand Pact] and was interpreted as a matter of course to mean wars besides those of self defense and wars to enforce sanctions, that is, to mean illegal wars, wars of aggression. (This fact was made clear in a note the American Secretary of State addressed to each country.) Because interpretation of the League of Nations Covenant and the United Nations Charter was and has been premised on this same kind of thinking, it seems appropriate to interpret the above phrase in this way. Accordingly, in this paragraph, the Japanese have not yet renounced wars of self defense and wars to enforce sanctions.

3. Next, we will look at the second paragraph of the same article.

(1) The "aim of the preceding paragraph" refers to the aim of "Aspiring sincerely to an international peace based on justice and order" which is the fundamental spirit or purpose underlying establishment of the first paragraph. We should not limit the scope of these words to the phrase "as a means of settling international disputes" and thereby interpret their aim as only renouncing wars for this purpose, that is illegal wars, wars of aggression. This is clear from the fact that the present Constitution has set down no provision relating to acts of war, such as declaring war or concluding peace. Furthermore, such a position not only does not conform with the meaning of the preamble, but, as will be explained later, runs counter to historical facts relating to adoption of the present Constitution and contradicts the provision renouncing the right of belligerency.

(2) "Land, sea, and air forces, as well as other war potential, will never be maintained." Land, sea and air forces can be said to mean a type of military force in the usual sense of the term, or to attempt a definition, "an organized structure of men and material which has as its purpose combat activity involving actual power against a foreign threat." For this reason, "Land, sea and air forces" are separate from the police which exist for internal security. "Other war potential" is a military force other

than land, sea and air forces, or an organization of men and material which has actual power comparable to and equivalent to a military even though that term may not be used and which, when necessary, can be converted to war purposes. Facilities producing munitions exclusively for the conduct of war are included in this term. However, to interpret "other war potential" more broadly to mean all human or material capability useful for war is inappropriate as this would include a considerable portion of the financial and industrial structure indispensable to modern society.

In this way, as long as we pledge in this paragraph not to maintain any type of "war potential," the actual conduct of wars of self defense and wars to implement sanctions by means of a military force or other war potential becomes impossible.

(3) The defendant maintains that "the minimum level of self-defense power necessary to prevent aggression or illegal attack by force from abroad does not correspond to the war potential of article 9(2)." However, there is no reason why we must interpret the term "war potential" with a special constitutional meaning different from that used regularly in society. In addition, as mentioned before, such an interpretation is inconsistent with the preamble and with the facts relating to adoption of the Constitution and contradicts the provision renouncing the right of belligerency.

More particularly, if we agree with the position of the defendant that "self defense power is not war potential" we are forced to the curious conclusion that because each country of the world maintains a military force and military power considered necessary for its own defense, none maintains war potential. In the end, regardless of whether it may be used for wars of self defense and wars to enforce sanctions or illegal wars and wars of aggression, "war potential" must be determined by objective standards, as was done above.

(4) "The right of belligerency will not be recognized." "The right of belligerency," as defined by international law, are the rights which a belligerent country has as a state and include the rights to kill and destroy the military force of the enemy, to attack cities and towns, to establish a military government in occupied areas, and under certain conditions to search and seize ships of neutral countries and to confiscate their goods. Those arguments which interpret the right of belligerency more broadly to mean the right of a state to wage war repeat the clause "war as a sovereign right" in paragraph 1 and are incorrect.

This provision renouncing the right of belligerency is not qualified by the words "In order to accomplish the aim of the preceding paragraph" and accordingly is absolutely unconditional. Therefore, those who interpret the words "the aim of the preceding paragraph" to mean that wars of self defense and wars to enforce sanctions have not been renounced and those who recognize wars of self defense since self defense power is not war potential are at the least inconsistent if, while approving war in some form, they do not recognize the right of belligerency in international law. Also, they contradict the absolutely unconditional renunciation of the right of belligerency.

C. Substantial Support for the Above Constitutional Interpretation

The above interpretation by this court is supported by the following details concerning the adoption of the Constitution and by other facts.

1. (1) It need not be said that the present Constitution resulted from our country's defeat in World War II and that that defeat came with Japan's acceptance of the Potsdam Declaration on August 10, 1945. The court then quoted paragraphs six, seven, and nine of this Declaration and the first sentence of paragraph eleven.

On August 15, 1945, based on the Potsdam Declaration, post-war Japan started over.

(2) In this way, the "Summary of the Draft Revision of the Constitution" was announced by the government in new-born Japan on March 6, 1946. General elections for the Diet were held on April 10 and on April 17 the "Proposed Revision of the Constitution" was announced. The government later introduced the proposed revision to the 90th session of the Imperial Diet (the so-called Constitutional Ratification Assembly) which had opened on May 16. In those proceedings, then Prime Minister Shigeru Yoshida stated the following about the reasons for inserting the provision renouncing war into the proposed Constitution:

> After the government, realizing the necessity of constitutional revision, began to proceed with the task, many things came to be clarified as to the sentiments and attitudes held towards Japan by America, European countries and other nations. We then discovered that there was something very grave in the international relations of this country. In the first place, there existed a misunderstanding that Japan's national structure was such as would again menace the peace of the world--a misunderstanding that world peace was exposed to a serious danger by the national condition and national structure of Japan that had led her to war. The Allied Powers were most apprehensive Japan might rearm and might again disturb and destroy the world peace. That is why the Allied Powers have first of all demanded that Japan remove her armament. They deem it of prime necessity to prevent the rearmament of Japan. They want to ensure her demilitarization and to remake her national structure into one that will not menace world peace. Of course, this is born of misunderstanding. . . . However, in the light of the catastrophic results of the war of the last five years and in view of the intention of the world to embrace peace, such doubts and apprehensions about Japan are, we must admit, quite justified. . . . It is under such suspicion . . . that we must consider how Japan may preserve her national character, her nationhood. The government came to realize most deeply the necessity of completely revising the Constitution, the basic law of our nation, along the lines of pacifism and democracy, and of demonstrating through the new Constitution that Japan is not a nation as will endanger world peace.
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> (Article-By-Article Deliberations of Japanese Constitution, vol. 1, pp. 42-3*)

Prime Minister Yoshida also clearly stated the following about article 9:

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* Chikujo Nihon koku Kempō Shingiroku 42-43 (S. Shimizu, ed., 1962), English translation in The 90th Session of the Imperial Diet. The House of Representatives, _____ The Official Gazette Extra _____ (June 26, 1946).

> The provision of this draft concerning the renunciation of war does not directly deny the right of self defense. However, since paragraph 2 of article 9 does not recognize any military force whatsoever or the rights of belligerency of the state, both wars arising from the right of self defense and the rights of belligerency have been renounced. Recently, many wars have been fought in the name of self defense.* This is the case with the Manchurian Incident and the Great East Asian War. The suspicion concerning Japan today is that she is a warlike nation and that she may rearm, provoke a war of revenge and endanger world peace. This is a most serious suspicion and misunderstanding. I think the first thing we should do is correct this misunderstanding. I might say that this suspicion is a misunderstanding, but in view of the past it cannot be said it has no foundation. Therefore, in the Constitution, we should first of all show our determination to be the first to renounce the right of belligerency, whatever term may be used; to form the foundation for world peace by this act; and to contribute to the establishment of world peace by standing in the vanguard of all the peace-loving nations of the world. (Aforementioned work, vol. 2, pp. 82-83.)

Minister of State Tokujirō Kanamori expressed similar thoughts in the Diet proceedings:

> With article 9 . . . Japan really takes the first step on the road converting the human race and advances forward setting an example. In this sense, this is a provision which involved great courage. . . . To some extent, paragraph 1, which repeats the provisions of the No-War Treaty, can be seen to have its counterpart in the constitutions of other countries. Japan is not the only leader in this respect. However, our purposes can in no way be fully accomplished by only saying we will not wage certain wars, the content of paragraph 1. In this respect, similar provisions in the constitutions of other nations are very insufficient. Consequently, Japan has considered taking a big step and in paragraph 2 has gone so far as to do away with all means necessary for war and the right of belligerency which results from war. I think it appropriate that our country provides for this epoch-making idea which embraces high morality. (Aforementioned work, vol. 2, p. 27.)

Minister of State Kijūrō Shidehara said the following about the meaning of the renunciation of war:

> The provision of article 9 of the draft Constitution is indeed our renunciation of war, which will earn us the foremost position as a champion of peace in the world. Any attempt under the present circumstances to rationalize or legalize some armed action as a principle determining international relationships is nothing other than a repetition of the numerous failures of the past, no longer worth learning. Civilization

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*McNelly, "The Renunciation of War in the Japanese Constitution," 77 Political Science Quarterly 350, (1962): 369-70.

> and war are inconsistent. Unless civilization wipes out war quickly, war will wipe out civilization first. Bearing such a belief in mind, I took part in the responsible task of drafting the new Constitution. (Aforementioned work, vol. 2, pp. 21-22.)

As indicated above, the proponents of the revised Constitution clearly stated in the Diet that our country stood on the doctrine of complete disarmament and renounced war. Therefore, it is clear that the Diet and people, who support the Diet, recognized permanent pacifism, the renunciation of war, as being one of the fundamental Constitutional principles. From these points about the process of establishing the present Constitution, the correctness of parts A. and B. above is substantiated.

2. The correctness of this interpretation is also clear by contrasting provisions of the Imperial Constitution with the present Constitution. The Imperial Constitution established provisions and procedures relating to the command and organization of the old army and navy and to the commencement and conclusions of hostilities. In article 11, it said: "The Emperor has the supreme command of the army and navy;" in article 12: "The Emperor determines the organization and peace standing of the army and navy;" in article 13: "The Emperor declares war, makes peace and concludes treaties;" and in article 14: "The Emperor proclaims the law of siege. The conditions and operation of the law of siege shall be determined by law." However, our present Constitution, of course, lacks any express provision relating to these important matters and lays down no provision at all for entrusting these concerns to law, statute, and so forth. From this, we can only conclude that the present Constitution, based on the historical facts mentioned above, excludes even possession of arms for self defense.

3. The origins of our Constitutional provision relating to pacifism and the renunciation of war can be found mostly amidst the many provisions relating to the restrictions on and prohibitions of war which various countries of the world inserted into their respective constitutions in this century and into agreed-upon treaties.

(1) The first appearance of a provision renouncing war in the constitutions of other countries can be traced back to the 18th century. However, principally in this century the number of constitutions containing such provisions has increased remarkably. . . .

(2) Along with these moves to insert provisions renouncing war into national constitutions, the tendency to gradually limit national sovereignty so as to curtail and prevent the horrors that armed conflict between nations creates became apparent in international society from the last half of the 19th century. [The court then discussed and quoted from the League of Nations Covenant and the Kellogg-Briand Pact or No-War Treaty.]

We must interpret the [No-War] Treaty to mean that at that time our country renounced wars of aggression in an international treaty and was maintaining an army and navy only for self defense. Nevertheless, we recall that our country started the Sino-Japanese War, beginning with the Manchurian Incident in 1931, and then World War II, beginning in 1941. We must remember that our present Constitution was created on these historical facts.

(3) These efforts to prevent war were in vain and the result was World War II which lasted six years from 1939 to 1945 and which brought unimaginable disaster to every country in the world. On June 26, 1945, representatives of all the Allied Powers agreed

to the United Nations Charter. [The court then quoted from the Charter's preamble and quoted articles 2(3) and (4)] . . . [T]he Charter prohibits completely illegal wars, that is, wars of aggression, and the threat or use of force not approaching the level of war. Even with regard to the exercise of the right of self defense . . . several restrictions exist. . . .

(4) In this way, the trend of the world has brought about, primarily in this century, a significant change in the idea of self defense enhancing a state's self interest, a most important aspect of 19th century nationalism, and in the appropriateness of acts of war based on this idea. More specifically, with the No-War Treaty following World War I, the world trend separated the right of self defense from the right of state self-enhancement, recognizing in international law only the right to defend one's country against imminent and illegal attack from abroad and prohibiting all acts of war going beyond this.

However, in spite of this Treaty, war, claimed to be in the name of "self defense" or as "an exercise of the right of self defense" in several countries, did not become extinct. Soon thereafter, the world became engulfed in World War II.

Thereupon, after World War II, the United Nations Charter established in article 51 very stringent measures on the exercise of the right of self defense itself in order to strictly limit abuse of this right. Specifically, the Charter (1) limits the exercise of the right of self defense to only "if an armed attack from abroad occurs" and does not recognize so-called preemptive self-defense activity (of course, a few international law scholars have expressed different opinions, but this is how it has been interpreted by an overwhelming number of countries); (2) restricts the exercise of the right of self defense to the time "until the Security Council has taken the measures necessary to maintain international peace and security"; and (3) has established the obligation to report, by stipulating that the measures of self defense that members take "shall be immediately reported to the Security Council." Accordingly, self defense activity which does not conform to these provisions cannot be recognized as a proper exercise of the right of self defense in international law.

It must be said that this trend toward the non-recognition of acts of war is a point to which the history of mankind is proceeding. To be sure, even now, the actual situation is one in which each country has the right of self defense as an independent country and in which each nation, based on that right, maintains its own military force. However, the right of self defense itself is inherently filled with the danger of abuse and history records the many instances of its actual abuse. Our nation's Constitution, in addition to being in accord with this trend, goes beyond it, ahead of it. Proclaiming "We desire peace for all time . . . trusting in the justice and faith of the peace-loving peoples of the world" and "We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth" and "We pledge our national honor to accomplish these high ideals and purposes with all our resources," our Constitution has renounced war and embraced permanent pacifism.

D. Right of Self Defense and Self Defense Activity Not Based on Military Power

Of course, although the present Constitution, in the preamble and in article 9, forbids the possession of all war potential and armament, this does not mean our country has renounced the inherent right of self defense which it has as an independent sovereign state. (Refer to December 16, 1959, Supreme Court decision.) However, the possession and exercise of the right of self-defense are not directly connected with self-defense

based on military power. First, the security of a state (this, in the end, means nothing other than the preservation of the life and property, the livelihood, of each person) is, of course, related to both the internal social, economic and political concerns of the country and to its international concerns, as its international position and its diplomacy; and when the country considers these matters together it can achieve that security. Furthermore, above all, the basic foundation for maintaining national security is that each individual, along with firmly resolving to attain peace, recognize and understand correctly the nature of national peace; that each individual, always excluding self-righteousness and intolerance, rely on the faith and impartiality of neighbouring countries, at the same time looking beyond differences in social structure to maintain friendship; that each citizen by considering the above domestic and foreign concerns judge correctly the ways to achieve security; and that the whole populace come together and cooperate in this way. It is obvious that when a country stands on these ideas, it can for the first time dispense with the one-sided thinking that military power is unique, necessary and indispensable for the maintenance of national security; and it is obvious that the present Constitution of our country stands on this ideal.

Looking at the exercise of the right of self defense from this perspective, we can see that the following measures can be taken. From evidence part A, number 179 and the testimony of Shigejirō Tabata, reliance on peaceful diplomacy to avoid aggression, use of the police force, which is mainly for internal security, to repel aggression, mass uprisings in which the people take up arms and resist, confiscation of property held by citizens of the aggressor country or deportation of those individuals can all be recognized as an exercise of the right of self defense. We see from the testimony of Naoki Kobayashi that there are many non-military methods of resistance. In addition, we know of many instances in the history of the human race in which countrymen or tribal people employed their wits and resisted those who had committed aggression. Consequently, in the future also, depending on the time and situation, various methods of resistance will be found through the efforts and intelligence of the people. Moreover, we can add to these the fact that the United Nations, since its founding over twenty years ago, has taken appropriate police action several times and has prevented outbreak of conflict between two sides.

Hence, there are many ways of exercising this right of self-defense. What measures the state selects as its basic policy are to be entrusted entirely to the decision of the sovereign people. The Japanese people have gone ahead of the whole world by renouncing all military power in their Constitution and have established permanent pacifism as the basic policy.

IV. Scale, Equipment and Capability of Self Defense Force (Including Related Laws and Regulations)

A. Development from Formation of National Police Reserve to National Safety Force and Self Defense Force

From [the] evidence . . . and the related laws and orders, the following facts can be recognized:

1. Establishment of National Police Reserve

On July 8, 1950, immediately after the beginning of the Korean War, [General] MacArthur, Supreme Commander for the Allied Powers, ordered, in a memorandum to

the Japanese government, the establishment of a 75,000-man National Police Reserve and an 8,000-man increase in the Maritime Safety Agency. . . .

2. On September 8, 1951, the "Peace Treaty with Japan" was signed between the Japanese government and the Allied nations. At the same time, the "Security Treaty Between the United States of America and Japan" (the old Security Treaty) was concluded. . . . [A]lthough our country did not go so far as to assume a treaty obligation, it did voluntarily assume a responsibility to maintain arms for self defense to meet the expectation of the other signatory. . . . In this way, on July 31, 1952, the National Safety Agency Law (Law No. 265) was promulgated and became effective. . . . The National Police Reserve and the Maritime Guard Units within the Maritime Safety Agency were integrated into one National Safety Agency, and their designations changed to the National Safety Force and the Coastal Safety Force, respectively. . . .

3. On March 8, 1954, the "Mutual Defense Assistance Agreement Between Japan and the United States of America" was signed. Paragraph 3 of the preamble of this agreement prescribed, in terms similar to paragraph 5 of the preamble of the Security Agreement, the obligation of our country to gradually increase its defense power. (However, article 9(2) of this agreement provided that "The present agreement will be implemented by each government in accordance with the constitutional provisions of the respective countries.") Then, on June 9, 1954, the Defense Agency Establishment Law (Law No. 164) and the Self Defense Force Law (Law No. 165) were promulgated and became effective, replacing the former National Safety Agency Law.

According to article 4 of the Defense Agency Establishment Law, the mission of the Defense Agency has been "to protect the peace and independence of our country and to safeguard its security. For this purpose, it shall supervise and manage the Ground Self Defense Force, the Maritime Self Defense Force, and the Air Self Defense Force and carry out the related administration." . . .

The mission of the Self Defense Force, according to article 3(1) of the Self Defense Force Law, has been "principally to defend our country against direct and indirect aggression in order to protect the peace and independence of our country and to safeguard its security, and, whenever necessary, to maintain public order." . . . With regard to the weapons that can be maintained, article 87, similar to the National Safety Agency Law, provides: "The Self Defense Force may retain the weapons necessary for the performance of its mission." . . .

B. Structure, Organization and Activities of Self Defense Force

First, let us look at the structure, organization and activities of the Defense Agency and the Self Defense Force based on the related laws:

1. According to the Defense Agency Establishment Law, the Defense Agency has been established as an extraministerial bureau of the Prime Minister's Office (article 2), based on article 3(2)* or the National Administrative Organization Law.**

*Article 3(2) states: "Administrative organs of state established for administrative organization shall be designated as Offices, Ministries, Commissions, or Agencies and their establishment or dissolution shall be determined by separate law."

**Kokka gyōsei soshikihō (Law No. 120, 1948), in 1 EHS No. 1150.

The Director General of the Agency, its head, is a Minister of State (article 3). The duties of the Agency, in addition to supervision and management of the Self Defense Force, are to handle those matters not falling within the jurisdiction of other administrative organs which relate to the stationing of foreign troops based on the Treaty and which go along with the performance in Japan of American government responsibilities based on the Mutual Defense Assistance Agreement (articles 4 and 5). Within the Agency, in addition to the Director General's Secretariat, the five bureaus of Defense, Personnel and Education, Health, Finance, and Equipment have been established (article 10) and each assists the Director General (article 20). Ground, Maritime and Air Self Defense Force Staff Offices have also been established in the Agency (article 21). Each has a Chief of Staff as its head; he is a member of his respective branch of the Self Defense Force and he administers the affairs of his Staff Office under the command and supervision of the Director General. Each Staff Office drafts plans on defense and security and handles matters of planning relating to education and training, activities, organization, equipment, stationing, intelligence, finance, procurement, supply, and so forth, with regard to its own branch (article 22).

The Defense Agency Establishment Law also provides for a Joint Staff Council in the Defense Agency (article 25). This Council consists of a Chairman and the three Chiefs of Staff (article 27). It formulates joint defense plans, joint supply plans, and joint training plans and adjusts the plans of the individual Staff Offices on these matters. At the time of deployment it issues basic command orders to the Self Defense Force and provides joint coordination. It collects and analyzes intelligence relating to defense and in addition assists the Director General on matters he requests (article 26, paragraph 1). . . .

The National Defense Council has been established within the Cabinet to deliberate on important matters relating to national defense. Its chairman is the Prime Minister and its members are a Minister of State designated according to article 9* of the Cabinet Law,** the Foreign Minister, the Director General of the Defense Agency and the Director General of the Economic Planning Agency. The Council deliberates on the basic policy for national defense, the general outline of defense plans, the general outline of industrial coordination plans and the like relating to defense planning, and on the advisability of defense deployment (article 26; Law Concerning Formation of National Defense Council***, articles 3 and 4).

In addition to these, a Defense Facilities Administration Agency exists in order to acquire facilities for the Self Defense Force, to handle matters relating to this and to effect and supervise construction work (Defense Agency Establishment Law, articles 34 and 41).

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* Article 9 states: "In cases where the Prime Minister is unable to act or where the office of the Prime Minister is vacant, one of the Ministers of State whom the Prime Minister designated in advance shall temporarily perform the duties of the Prime Minister." 1 EHS No. 1140.

** Naikakuhō (Law No. 5, 1947) in 1 EHS No. 1140.

*** Kokubō kaigi no kōseira ni kansuru hōritsu (Law No. 166, 1956).

2. The Self Defense Force Law lays down the responsibilities of the Self Defense Force, the structure and organization of the Force, its actions and authority, and qualification, treatment, and so forth of personnel (article 1). The "Self Defense Force" includes the Director General of the Defense Agency, the Parliamentary Deputy Director General, the Administrative Deputy Director General, Counsellors, the internal bureaus and the Joint Staff Council, affiliated organs, the Ground, Maritime and Air Self Defense Forces, and the Defense Facilities Administration Agency (article 2, paragraph 1). The Ground, Maritime and Air Self Defense Forces include the Staff Offices of each branch and the units and organs under the supervision of the respective Chiefs of Staff (article 2, paragraphs 2 through 4).

The Prime Minister, as representative of the Diet, has the right of supreme command and supervision of the Self Defense Force (article 7). The Director General of the Defense Agency oversees the activities of the Self Defense Force under the command and supervision of the Prime Minister. However, his command and supervision of those units and organs under the supervision of the Chiefs of Staff of the Ground, Maritime and Air Self Defense Forces is accomplished through the respective Chiefs of Staff (article 8).

The Ground, Maritime and Air Chiefs of Staff supervise the functions and personnel of their respective branches under the command and supervision of the Director General and execute the orders of the Director General to their respective units (article 9).

3. Structure and Organization of the Self Defense Force in Addition to Above

(1) The Units of the Ground Self Defense Force consist of armies and other units under the direct command of the Director General. An army is made up of a headquarters, divisions, and other units under its direct command; a division is composed of a headquarters, regiments, and other units under its direct control (Self Defense Force Law, article 10). . . .

(2) The Maritime Self Defense Force consists of the Self Defense Fleet, Regional Districts, the Air Training Command, the Training Fleet, and other units under the Director General's direct command. The Self Defense Fleet is made up of a headquarters, the Fleet Escort Force, an air force, minesweeper flotillas, and other units under its direct command; . . . (article 15).

(3) The Air Self Defense Force consists of the Air Defense Command, the Air Training Command, air wings, the Airways Air Communication and Weather Warning Wing and other units under the direct command of the Director General. The Air Defense Command is made up of a headquarters, Air Defense Forces, and other units under its direct command; . . . (article 20). . . .

(4) In addition to these, schools, supply depots, supply control centers, hospitals, and regional liaison centers have been established as organs of the Self Defense Force. . . . (articles 24 through 28).

4. . . .

(2) The authorized number of Self Defense Force personnel in fiscal year 1972 was 179,000 for the Ground Self Defense Force, 38,323 for the Maritime Self Defense Force, and 41,657 for the Air Self Defense Force. Including the number of Self Defense Force personnel attached to the Joint Staff Council the total number authorized is 259,058 (Defense Agency Establishment Law, article 7).

In addition to these, should a defense deployment order be issued, the number of reserve personnel who would become Self Defense Force personnel by a defense summoning order is 36,300 (Self Defense Force Law, articles 66 and 67). The reserves receive such calls for training and engage in training not more than twice a year (article 71).

5. Activities of Self Defense Force

(1) The Self Defense Force Law prescribes the following with regard to defense deployment: "The Prime Minister, at the time of armed attack from abroad (this includes the threat of such attack), may, upon approval of the Diet, order partial or total deployment of the Self Defense Force, when he deems it necessary for the defense of our country. However, in situations of special emergency, he may order deployment without approval of the Diet" (article 76, paragraph 1). "When he has ordered deployment without approval of the Diet based on the last clause in the preceding paragraph, the Prime Minister shall immediately seek such approval. The Prime Minister shall, when such approval is withheld or when the need for deployment no longer exists, immediately order withdrawal of the Self Defense Force" (article 76, paragraphs 2 and 3). It is stipulated that at times of defense deployment, the Self Defense Force can exercise the force necessary to defend our country, that in the exercise of this force, in cases where it should abide by international law and custom, it will do so, and that it must not exceed the limits considered rationally necessary for the situation (article 88); and that the Self Defense Force can act as necessary to maintain public order (article 92, paragraph 1).

[Relying on the statutory provisions, the court in subparagraphs (2), (3) and (4) discussed the actions which various public officials can take with regard to the Self Defense Force when there is indirect aggression or other emergency (public security deployment), when there is a "special need to protect life or property or to maintain security" on the seas (Maritime Guard Action) or when there is an invasion of Japan's air space.]

C. Equipment, Military Capability and Training of Self Defense Force

(A) Article 87 of the Self Defense Force Law only states, "The Self Defense Force may retain the weapons necessary for the performance of its mission." It is not clear what the content of "weapons necessary" is in terms of type, quantity, or performance, for example. Therefore, below, within limits of the evidence submitted . . . we will try to look at the equipment, military capability and training of each branch of the Self Defense Force. . . .

(1) When the Self Defense Force was formed from the Safety Agency in 1954, almost all of its weapons had been provided by the American military.

Under the First Defense Power Buildup Plan, from fiscal years 1958 to 1960, which had as its aim "the formation of the minimum necessary self defense power," the government strengthened the Self Defense Force with a total appropriation of 472.1 billion yen (total estimated 453 billion). . . .

(2) Afterwards, from fiscal years 1962 to 1966, the government carried out the Second Defense Power Buildup Plan "to establish the foundation of a defense structure able to effectively handle aggression below the level of local war using conventional weapons." Total expenditures were 1.3877 trillion yen (estimated expenditures were 1.15 trillion). Modernization of Self Defense Force equipment, improvement in mobility, introduction of anti-air guided missiles and buildup of intelligence capability were all emphasized. In addition, attention was paid to gradually producing weapons domestically. . . .

(B)

1. . . . Following the Second Defense Plan, the government implemented the Third Defense Power Buildup Plan, effective for the five year period fiscal years 1967-1971. The Plan has as its objective the buildup of an "efficient structure able to cope most effectively with aggression below the level of local war using conventional weapons" and "emphasizes particularly the strengthening of defense capability in surrounding waters and air defense capability around important ground locations and the increase of all types of mobility." To achieve these purposes: (1) While keeping the authorized number of Ground Self Defense personnel at 180,000 to make optimum use of present numbers, the Plan has provided for an increase in the number of helicopters, armored personnel carriers and ground-to-air missile units, the introduction of new equipment, and the renovation of older weapons in order to upgrade mobility and to enhance air defense capability. (2) With regard to the Maritime Self Defense Force, the Plan has sought modernization of and an increase in each type of naval ship and the buildup of new fixed wing anti-submarine aircraft, hydroplanes, and so forth, in order to improve defense capability in the surrounding waters and to enhance security of the shipping lanes. (3) With regard to the Air Self Defense Force, the Plan, along with increasing the number of ground-to-air guided missile units and beginning with the buildup of a new fighter aircraft, has sought improvement of the air defense system . . . in order to strengthen air defense capability around important ground locations. (4) The Plan has provided for research and development of aircraft . . ., of all types of short range ground-to-air guided missiles and of other weapons and fine parts, and has provided for strengthening of the technical research and development structure.

As a result, the equipment, military capability and exercises and training of each branch of the Self Defense Force under the Third Defense Plan are as follows:

2. Equipment, Capability, and Maneuvers and Training of Ground Self Defense Force

(1) Equipment and Capability

. . . Since the Second Defense Plan, the Ground Self Defense Force has consisted of five armies and thirteen divisions, and, in addition, an airborne brigade, an engineering brigade, communications brigade, units under the direct command of the Director General, schools, supply centers, and hospitals. Seven divisions have 9,000 men, five have 7,000 men and one, the Seventh Division, is a mechanized division. . . .

The major weapons the Ground Self Defense Force possesses are: in ordnance, 868 155mm howitzers, 32 cannons, 204 anti-aircraft guns including anti-aircraft machine guns, 1296 recoilless rifles, 464 self-propelled artillery pieces, 2164 mortars, 6700 machine guns and 179,500 rifles; in guided missiles, 55 anti-tank guided missiles (ATM), 30 surface-to-surface missiles (30 rocket-type), and 100 surface-to-air Hawk missiles; in vehicles, 970 tanks including 655 of the M-61 type, 620 armored personnel carriers, and 19,000 other vehicles; in aircraft, 137 fixed wing and 210 rotary wing. . . .

This equipment, all weapons, has performance characteristics comparable to the foremost weapons that each country of the world maintains. Even in comparison with the weaponry of the old Japanese army, this equipment is about four times greater in terms of firepower per division and ten times greater in overall war potential, including mobility and communications power.

(2) Maneuvers and Training

Ground Self Defense Force exercises are conducted daily. Two representative exercises mentioned here are the heliborne maneuver conducted in Hokkaidō between August 23 and 26, 1971, and the public security exercise conducted at the East Fuji Training area in the first ten days of October, 1969.

(A) . . . In the heliborne maneuver . . . participated in by 9,800 men, the 12th Division of Sapporo, the "red army," was the attacking force and one regiment of the 7th Division of Chitose, the "blue army," was the defending force. The attacking side was to invade from the north and attempt to capture the Shimamatsu training area and the area around Chitose; . . . . In the maneuver, the troops, along with anti-tank weapons, 106mm recoilless rifles and a number of jeeps, were transported from Furano, Asahikawa and Takikawa using helicopters. A total of 122 helicopters, mainly the large size V-107 and medium size HU-1B, were used in the maneuver, as were many tanks. . . . and armored personnel carriers. . . .

This kind of heliborne operation is an air mobility operation which has tactical purposes. It carries out the occupation of important positions at urgent and necessary times when there can be no response on the ground or it conducts attacks on important targets. With a heliborne operation, a force's movements can be effected simply and easily with great secrecy; the surprise attack can be mounted to the greatest extent; the initiatives of enemy troops can be countered, and the troops themselves divided, isolated and overwhelmed at a stroke; and withdrawal and replenishment can be effected quickly. In these ways, the conduct of the overall operation is facilitated. In this operation, along with weapons, all the combat troops that can be carried are transported armed by helicopters. The capability is such that 42 V-107 and four LOH helicopters can in two trips transport one regiment (1,000 men) to a point 400 kilometers away, making it in effect a "flying infantry." It can even be said that the increased power of surprise attack of this kind of regiment can influence the outcome for the entire division. Moreover, the helicopters themselves, armed with machine guns, 2.75-inch rocket guns, anti-tank

missiles, and so forth, support the heliborne operation and act as a mid-air artillery force. This type of operation is said to be especially effective in anti-guerrilla wars and was often employed by the French military in Algeria and more recently by the American military in Vietnam.

(B) In general, this type of maneuver is not just an exercise, but is planned and effected having a country's basic defense strategy as its foundation. If necessary, it can be implemented almost as is in an actual war. This type of maneuver should not be seen as having one-time local combat training and the learning of military techniques as its only purposes. That is to say, in this type of maneuver, the location of operation has no inherent, intrinsic importance. Rather the site is chosen and type and scale of forces and methods of transport selected on the assumption that the location is all places of similar weather and geographical features. . . . Also, it is generally rare for this kind of operation to be conducted by the Ground Self Defense Force alone and more common for the Maritime Self Defense Force and the Air Self Defense Force to participate. . . .

[In the public security exercise armed mobile troops were deployed against a group disguised as a "mob of rioters."]

3. Equipment, Capability and Exercises and Training of Maritime Self Defense Force

(1) Equipment and Capability . . .

Excluding support ships (about 310), the Maritime Self Defense Force possesses 216 naval ships, totaling 175,000 tons (the number in actual service 205, totaling 144,000). These include escorts, submarines, minesweepers, minesweeper tenders, patrol boats, subchasers and torpedo boats as guard ships; and transports, icebreakers, oilers and minelayers as special purpose ships. . . .

The Maritime Self Defense Force possesses a total of about 270 aircraft. . . .

When compared with navies of other countries of the world, the Maritime Self Defense Force ranks tenth in tonnage of naval ships possessed, eighth in the number of ships, and fourteenth or fifteenth in appropriations budgeted. Overall, it ranks about tenth.

(2) Exercises and Training

. . . The purpose of the Maritime Self Defense Force is to repel direct attack against our country and to maintain control of the seas in our territorial waters. These waters include not only those around Japan proper, but those around Okinawa, the Nansei Islands, Ogasawara Islands, and Minamitorishima. Also, recently, because of the increased role of the submarines in naval power in the world, anti-submarine operations have been a central part of the Maritime Self Defense Force exercises.

(A) Between 1959 and 1971, anti-submarine exercises have been conducted jointly with the American navy once or twice a year. Maritime Self Defense Force escort ships, submarines and patrol craft and American anti-submarine aircraft carriers, destroyers, submarines and oilers have participated in these maneuvers which have lasted between four and twelve days and have all been conducted in the waters near Japan, including the Sea of Japan.

(B) In February 1971, the Maritime Self Defense Force conducted exercises using the training facilities of the American navy in Hawaii. One submarine and six P-2V aircraft participated in the exercises.

(C) A major exercise, for training in coastal defense and protection of maritime commerce, was carried out by the Maritime Self Defense Force alone between September 29 and October 10, 1971, in an area in the western Pacific extending from the Inland Sea to 1,800 miles south of Shikoku. About 70 naval ships, approximately 60 aircraft and helicopters, and 17,000 personnel from the Self Defense Fleet and Kure Regional District participated in the exercise. Anti-submarine, anti-air, refueling, and communications training were all conducted on a large scale. The Air Self Defense Force and Ground Self Defense Force also participated in this exercise.

(D) Needless to say, these exercises, like those of the Ground Self Defense Force, have as their basis the defense strategy of our country. Participating ships and aircraft are increasing in size and range and are carrying more powerful and higher quality weaponry. The exercise area is gradually expanding, from our inland waters to the Sea of Japan, to the Western Pacific, to the whole Far East. And it can be said that with these exercises, the Maritime Self Defense Force aims to strengthen, either alone or in cooperation with the American navy, its anti-submarine capability in these waters and to establish naval superiority which will protect maritime commerce.

4. Equipment, Capability, Security and Exercises and Training of Air Self Defense Force

(1) Equipment and Capability . . .

(A) . . .

The total number of aircraft the Air Self Defense Force possesses is about 960, including about 280 F-86-F and 190 F-104J fighter aircraft. . . .

The decision to procure 104 F-4EJ Phantoms, successor to the F-104J fighter, was made under the Third Defense Plan and these aircraft are to be deployed under the Fourth Defense Plan. . . . As a fighter, the F-4EJ Phantom has the foremost capabilities of any aircraft possessed by any country in the world today. The F-86-F, the F-104J and the F-4EJ in addition to their use as interceptors, can be used for bombing and ground support.

In addition to the above, the Air Self Defense Force has 72 Nike-Ajax and 29 Nike-J anti-air guided missiles. . . . When looked at from the point of number of aircraft possessed, the Air Self Defense Force at present ranks ninth or tenth amongst the air forces of the world.

(B) The Air Self Defense Force planned the automation of the Air Control and Warning system and introduced and deployed such a system, the BADGE system, during the Second and Third Defense Plans. . . .

With BADGE, radar at twenty-four air defense surveillance sites . . . scan the skies around our country. Information from the radar sites is communicated automatically to air defense command centers. . . . There computers instantly calculate the

altitude, speed and direction of the aircraft, determine whether it is friend or foe, determine its size and type, and choose and assign the weapons, like missiles and aircraft, which should be used to intercept the aircraft. Then, through BADGE, interceptor forces are guided automatically to the target and later returned to base. Of note, it cannot be said that the BADGE system is only for air defense and has only a defensive function. When the range of the radar extends into the territory and territorial waters of another country, while the radar may guide friendly aircraft and prevent attack from the other, it is also possible for it to guide the aircraft so as to participate in an assault. . . .

(C) Organization of Nike-J Force and Characteristics and Role of Nike-J Missile

The surface-to-air missile force of the Air Self Defense Force is divided into the Nike-Ajax force and the Nike-J force. These . . . belong to and are stationed with the 1st, 2nd, and 3rd Anti-Aircraft Artillery Groups. . . .

One anti-aircraft artillery group consists of a command and operations battery, a group headquarters which assists in the accomplishment of command tasks, firing batteries which operate the Nike, and support batteries. One firing battery has between 150 and 200 men and is, in turn, divided into the fire control section and the launching section. The fire control section detects and tracks the opposing aircraft and guides the Nike missile by means of radar. . . . As for the launching section, there are nine launchers in each section and generally two Nike missiles with each launcher.

The group headquarters of the 3rd Anti-Aircraft Artillery Group is stationed at Chitose, the command and operations battery is at Tōbetsu, the 9th and 10th firing batteries are at Chitose base and the 11th is at Umaoiyama in Naganuma town, the location of this suit.

The Nike-J missile itself is 12.5 meters long (including the booster), 80 centimeters in diameter and weighs 4.5 tons. . . . It has a speed of 3 mach, an altitude of 45,000 meters and a range of 130 kilometers. In contrast to its counterpart, the American-used Nike Hercules missile, which is both nuclear and non-nuclear, the Nike-J is entirely non-nuclear. . . . The forward portion of the missile is filled with about 200 kilograms of high explosive which explodes when the missile is very, very near the aircraft, causing fragments to scatter and destroying or damaging the target. . . .

The Nike-J missiles stationed at Naganuma, along with the ones at Chitose, are designed to defend central Hokkaidō, Tomakomai and Chitose base.

(D) Introduction of Nike-J and Changes in Defense Posture

It is obvious that at present the air defense organization of a country is integrated and complex, extending over the entire territory, but the introduction of the Nike-J brought great changes in the air defense organization of our country. Formerly, air control and warning equipment, based on radar, detected invading aircraft and then fighter aircraft, mainly the F-104J, were scrambled to intercept them. However, with the introduction of the Nike-J, it has become possible to establish an effective line of defense against invading aircraft at a point 130 kilometers forward, the range of the missile, and have rear areas covered by . . . [other weapons]. In this situation, because

it is more efficient to have interceptor aircraft conduct defense in areas beyond the defense line, the main pillar of the intercept force is gradually changing from the F-104J to the F-4EJ Phantom (planned improvement from the Third to the Fourth Defense Plan). The F-4, with its comparatively longer range, can generally continue its combat air patrol over the seas and land beyond the defense line of the Nike and can, should there be an indication from BADGE, immediately assume the posture of an attack aircraft. As a result, whereas under the Third Defense Plan, it has been expected that an attack posture, based purely on the F-104J, would mainly be assumed above the land and shores of our country, under the Fourth Defense Plan, the attack posture is to be assumed far away, above the high seas. Furthermore, when combined with the fact that the BADGE system can be used for attack, it cannot be said there is no chance for a preemptive attack on another country.

(2) Security and Exercises and Training . . .

(A) With regard to security, the Air Self Defense Force has established an Identification Zone within an area extending from the Soya Strait in the north, through the center of the Sea of Japan and the Korean Straits to the Nansei Islands, and from there past the Izu Islands up to Nemuro Straits and back to Soya Strait. Along with establishing a warning system against unknown aircraft which enter the zone at any time, the Air Self Defense Force tries to maintain air superiority in the zone. Against unknown aircraft which it detects, the Air Self Defense Force immediately scrambles fighters like the F-104J from the appropriate bases and takes steps to identify the aircraft and remove them from the zone. This kind of activity occurred 2396 times between 1958 and March 1968.

(B) With regard to exercises and training, the Air Self Defense Force, in cooperation with the Maritime Self Defense Force, carried out twenty aircraft search, detection and attack exercises in fiscal year 1968, about forty of the same in fiscal 1969 and thirty in fiscal 1970. In addition, once a year, the Air Self Defense Force conducts overall exercises, ground support exercises, and so forth, using the BADGE system, ECM and ECCM. . . .

It need hardly be said that these exercises, like those of the Ground Self Defense Force and the Maritime Self Defense Force, are planned and implemented in accordance with the defense strategy of our country.

5. Concerning the so-called "Three Arrows Study"

. . . In the so-called "Three Arrows Study," the fiscal 1963 joint defense contingency plan formulated mainly by the administrative bureau of the Joint Staff Council and by the individual Staff Offices, investigation has been made relating to the employment of the Self Defense Force and the like assuming the outbreak of military conflict on the Korean peninsula. . . .

With regard to specific employment of the Self Defense Force, the plan, hypothesizing that the American military has been deployed first to the Korean peninsula and then to the Maritime Provinces and Northeastern China, says that the Self Defense Force, while making our national territory a rear line support base for the American military, will enter into combat activity appropriate to the actual situation.

It discusses in detail the type, scale, and methods of military action which should be taken to cope with an enemy counterattack on the country itself. Furthermore, hypothesizing a variety of situations, as escalation of the dispute to the use of nuclear weapons or American military occupation of the Kurile Islands, Sakhalin and North Korea, the plan discusses the military action which the Self Defense Force should take at these times and calls for coordination and cooperation with the American military (especially formation of a joint operations headquarters). Also, the plan calls for a wartime state structure so as to maintain internal order and to cope with the confusion, resistance and violence apt to break out at these times. This structure would be established with enactment of a state-of-emergency statute.

According to the "Fiscal 1963 Joint Defense Contingency Plan (Three Arrows Study) Top Secret," . . . the purpose of this study is "to investigate both the employment of the Self Defense Force to defend our country in a state of emergency and to various measures and procedures relating to this form a unified perspective. [The Plan will] thereby assist in the formulation of future annual individual and joint defense and security plans, and, by making clear the requirements relating to the American military and state policy, will help make concrete several measures for defense." Yoshio Tanaka, head of the administrative bureau of the Joint Staff Council at the time the study was made, said it was thought that the Three Arrows Study would have an effect on the country's future defense plans. . . .

6. Outlook for Each Branch of Self Defense Force Under Fourth Defense Plan

The Third Defense Plan was to end in fiscal 1971 and be immediately followed by the Fourth Defense Power Buildup Plan, to be effective for the five year period fiscal years 1972-1976. From [the] evidence* we can see that the proposed Plan, wherein the Defense Agency has set down its buildup aims, involves the following:

(1) As reasons for its existence, the Plan says, "It cannot be said that our country's defense power is sufficient to protect our peace and independence in the complex international situation." It also states, "Looking at the recent international situation , . . although there is no imminent threat to our country, in view of international political reality wherein military conflict does not cease, self defense power must be maintained for emergency situations . . . to defend the security of the state." With regard to that self defense power, the Plan states: "Along with aiming for a level of effective defense power appropriate to our national power and position and in line with technological advancement . . . in order to establish a posture exclusively for defense and able to cope with aggression on the level of local war using conventional weapons, the Defense Agency is mindful of being in harmony with other important state policies on the matter of essential expenditures."

The basic idea of defense power under the Fourth Defense Plan is "to strive to repel aggression in the early stages and limit damage by maintaining air superiority and control of the seas in areas around our country." The objective of the buildup of defense power is "to enhance the overall defense power of the Ground, Maritime, and Air Self Defense Forces and to strive . . . for a posture of autonomous defense. Also, in conjunction with the return of political sovereignty over Okinawa, our country will station

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* Court's citation of the special evidence omitted from publication by editors of Hanrei Jihō.

defense power in that area."

More specifically,

> (1) equipment is to be renovated and modernized in line with technological advances and education and training will be improved; (2) the intelligence function, command communication functions and the like are to be strengthened so that the country can respond appropriately to a situation in its early stages and so that the joint operational capability of the three branches can be raised; (3) utilizing capabilities inside and outside the Defense Agency, development of equipment will be forwarded in conformity with the situation in the country in order to improve future defense power and to assist in the domestic production of equipment. . . .

The proposed budget of the Fourth Defense Plan is about 5.2 trillion yen. Taking economic factors into account, expenditures, in the end, will probably amount to 5.8 trillion yen. The nature of the equipment that each branch of the Self Defense Force will come to have is discussed below.

(2) Ground Self Defense Force (budget 1.8 trillion yen)

There will be no personnel increases, but the Ground Self Defense Force will mechanize four divisions and will increase the number of Hawk battalions by four to a total of eight. It will become equipped with 1,000 tanks, mostly of the M-61 type, and will acquire 100 tanks of a new type after fiscal 1975. And it will come to have 240 anti-tank missiles, 200 self-propelled artillery pieces, 90 L-90 anti-aircraft guns, 850 armored personnel carriers and 380 helicopters. Reserve personnel will be increased to 60,000.

(3) Maritime Self Defense Force (budget 1.3 trillion yen)

The Maritime Self Defense Force will procure a total of 80 ships totaling 100,000 tons (during this period 100 old ships displacing 40,000 tons will be decommissioned). As a result, it will possess 200 ships totaling 245,000 tons and 220 aircraft, though the number in actual service during the Plan is expected to be 180 ships displacing 185,000 tons and 180 aircraft. . . . [The court also noted that the Maritime Self Defense Force would acquire additional anti-submarine helicopters and patrol aircraft and would establish a Maritime command and control system, a Maritime BADGE.]

(4) Air Self Defense Force (budget 1.55 trillion yen)

The Air Self Defense Force will come to possess 900 aircraft, 800 in actual service, comprising fourteen squadrons. It will procure 158 F-4EJ Phantom fighters comprising six squadrons (one will be stationed in Okinawa), which, combined with the four squadrons of F-104J aircraft, will make a total of ten. The Air Self Defense Force will add three Nike missile groups for a total of seven. . . .

7. Comparison of Our Nation's Defense Budget with the Military Expenditures of Other Countries

A total of 453 billion yen was budgeted for the First Defense Plan begun in

fiscal 1958, 1.15 trillion yen for the Second Defense Plan begun in fiscal 1962, 2.34 trillion yen for the Third Defense Plan begun in fiscal 1967 and 5.20 trillion yen for the Fourth Defense Plan to have begun in fiscal 1972. The yearly average was 151 billion yen during the First Defense Plan, 230 billion yen during the Second Defense Plan, 468 billion yen during the Third Defense Plan, and will be 1.04 trillion yen during the Fourth Defense Plan. In other words, from the time of the Second Defense Plan, the defense budget has doubled with each next defense plan. From [the] evidence* this rate of increase in the defense budget has no equal in any country in the world. In addition, our nation's planned defense outlays under the Fourth Defense Plan are seventh largest in the world after the United States, the Soviet Union, China, West Germany, France, and Great Britain. Except for West Germany, all these nations possess nuclear weapons; and if we look at just the basic defense expenditures of those countries, subtracting overseas stationing costs, costs necessary for nuclear development and maintenance of nuclear weapons, and so forth, we can see that there is no significant difference as compared with our country.

V. Relation Between Self Defense Force and American Military

[The Court then discussed the close relationship between the Self Defense Force and the American military. It quoted provisions of the Japan-U.S. Security Treaty, which is the basis of this relationship, and of joint agreements relating to the air defense of Japan and to establishment of the BADGE system. The Court also noted that joint military exercises are frequently conducted and that close liaison is maintained. It referred to the "Three Arrows Study" and concluded with a statement made in 1962 by Minoru Genda, former Chief of Staff of the Air Self Defense Force. He said that the Self Defense Force's best strategic policy was to maintain the counterattack capability of the U.S. military.]

VI. Unconstitutionality of Self Defense Force and Related Laws and Regulations and Lack of Reasons of Public Welfare of Official Act Cancelling Designation of Forest Preserve

1. Viewed in terms of its organization, scale, equipment and capabilities, the Self Defense Force is a military force since it is clearly "an organization of men and material which has as its purpose combat activity involving actual force against a foreign threat." Accordingly, the Ground, Maritime, and Air Self Defense Forces correspond to "war potential" of "land, sea, and air forces" maintenance of which is forbidden by article 9(2) of the Constitution. The Defense Agency Establishment Law (Law No. 164, June 9, 1954) and the Self Defense Force Law (No. 165, same date), which prescribe the structure, organization, equipment, activities, and so forth of each branch of the Self Defense Force, and other laws and regulations related to the Force all similarly violate the aforementioned constitutional provision and have no validity under article 98 of the Constitution.

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* Court citation of the specific evidence omitted from publication by editors of Hanrei Jihō.

2. In order to be "for reasons of public welfare" as stipulated by article 26(2) of the Forestry Law, the purpose for releasing a forest preserve must be recognized by the legal system, which has the Constitution at its apex. Therefore, as long as the Self Defense Force and the related laws and regulations violate the Constitution, the construction of defense facilities for the Self Defense Force is not in the public welfare as specified by the Forestry Law. Similarly, the fact that defense of the state by military power lacks a public welfare nature is evident by contrasting relevant provisions of the former Land Expropriation Law* (Law No. 29, March 7, 1901), effective under the Imperial Constitution, with the present law (Law No. 219, June 9, 1951), promulgated under the present Constitution. Article 1(1) of the former law stated: "When it is necessary to use or expropriate land needed for an undertaking for public benefit, that land may be used or expropriated in accordance with the provisions of this law." Article 2 stated: "Undertakings for which land can be used or expropriated shall correspond to those in paragraph 1 of each number below"; and in number 1, "Undertakings related to national defense and other military activities" were prescribed. However, although it clearly states, like the old law, public benefit as the purpose of land expropriation, the present law does not include in its listing undertakings for national defense or for any other military activities.

3. The official act cancelling designation of the forest preserve, which the defendant accomplished on July 7, 1969, by means of Ministry of Agriculture and Forestry Proclamation number 1023, provided land for launching facilities and for a road for the 11th firing battery of the Third Anti-Aircraft Artillery Group of the Air Self Defense Force, one part of the Self Defense Force structure. Accordingly, this official act is illegal since it lacks "reasons of public welfare" and cannot escape from being revoked.

Section 6 CONCLUSION

WHEREFORE, without deciding the other issues, we recognize the claim of the plaintiffs and applying Article 89** of the Code of Civil Procedure*** determine that the defendant is to bear the expense of the lawsuit. Judgment entered as stated above.

Sapporo District Court, 1st Department

[September 7, 1973]

Chief Judge Shigeo Fukushima
Judge Takao Inamura
Judge Ryūki Inada

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* Tochi Shūyōhō.

** Article 89 states: "The court costs shall be borne by the losing party."

*** (Law No. 29, 1890) in 2 EHS No. 2300.

CONCLUSION

On August 5, 1976, the Sapporo High Court reversed the decision of the District Court and dismissed the plaintiffs' suit.[5] The Court recognized that because the revocation decision under article 26(2) of the Forestry Law had adversely affected individual interests which had developed while the land was a preserve, the residents had a legal interest to sue under article 9 of the Administrative Litigation Law. However, it held that any possible injury to the plaintiffs arising from the base construction, for example, deprivation of irrigation water or possibility of increased flooding, had been negated as a result of the government's satisfactory construction of the substitute facilities. Consequently, the plaintiffs' legal basis for suit had disappeared. In contrast to the lower court, which stressed the insufficiency of data presented by the government relating to the facilities, the High Court said that the proper standard was whether the adopted methods of measurement were reasonable.

In dicta the Court stated that the issue of the constitutionality of the Self Defense Force was a "political question" unless the Force was "clearly and obviously unconstitutional or illegal." Later, it examined the nature of the Force to the extent of determining that it did not fall within the forbidden category.

Also, the Court recognized that article 9(2) prohibits maintenance of a military force or other war potential for purposes of aggression. However, it did not decide whether this provision prohibits maintenance of such force or potential for self defense.

The plaintiffs immediately appealed the High Court decision to the Supreme Court and submitted initial briefs in March 1977. Since the Supreme Court will almost indubitably affirm that appellate decision the district court decision will have no legal effect. However, it will have lasting value because it will have forced the courts to face this issue and because it will constitute a significant statement in opposition to what will probably become the prevailing view.

NOTES

[1]In January 1952, 144 members of the West German Bundestag, the lower House of Parliament, requested the Constitutional Court rule that West German military participation in the proposed European Defense Community (EDC) was incompatible with the Basic Law. The petitioners argued that the Basic Law, which did not provide for rearmament and which prohibited conscription, had to be amended before the government could draft men and contribute soldiers to the proposed European army. The Court never had to pass on the merits of the petition since in March 1954 the Basic Law was amended to permit rearmament.

[2]Article 9 states:

> 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.

J. Maki, Court and Constitution in Japan: Selected Supreme Court Decisions, 1948-1960, at 413 (1964) [hereinafter cited as Maki.]

[3]For example, in 1952, the Supreme Court rejected the petition of Mosaburō Suzuki, Secretary General of the Socialist Party, to declare the National Police Reserve, a predecessor of the Self Defense Force, unconstitutional because a "concrete legal dispute" did not exist. Suzuki v. Japan, 6 Saikō saibansho minji hanreishū [hereinafter cited as Minshū] 783 (Sup. Ct., G. B., October 8, 1952, English translation in Maki at 362). Again, in 1967, in the so-called Eniwa case, the Sapporo District Court ruled that two individuals who were prosecuted under Article 121 of the Self Defense Force Law for cutting communication wires on a Self Defense Force base and who raised the constitutional issue as a defense had committed no crime because the wires did not fall within the terms of that provision. Judgment of March 30, 1967 in 476 Hanrei Jihō 25 (Sapporo Dist. Ct.).

[4]Judgment of September 7, 1973 in 712 Hanrei Jihō 24 (Sapporo Dist. Ct.).

[5]Judgment of August 5, 1976 in 821 Hanrei Jihō 24 (Sapporo High Ct.).