

SOME PROBLEMS ON THE CONSTITUTION OF JAPAN

by JOJI TAGAMI

Professor of Constitutional and Administrative Law

I

The present Japanese Constitution was decided by the past Imperial Diet in accordance with the amendment procedure provided in the old Meiji Constitution. For this reason, some people hold the view that the former, like the latter, is a constitution granted by the Emperor. Whether there is any legal identity and continuity¹ between the two constitutions is a question to be discussed from two angles.

First, as to its process, the Diet amended the bill revising the old Constitution in defiance of its provisions concerning amendment procedures, an action which ran counter to the principle of the old Constitution. Regarding the Imperial initiative as the sole agency qualified to effect a revision, it never authorized the Diet to insert any additional provisions. Second, as to its substance, a distinction must be made between a partial amendment and a total revision. If a substantial change is effected in the original constitution, there cannot be any legal continuity between the old and new.

On the principle that sovereignty is vested in the Emperor, the old Constitution provided the people with no rights other than those granted them by the Emperor; the people had no guarantee against the Emperor. Accordingly, if a change had been made in the Constitution to the extent of abolishing armaments as a result of the lost war, or modifying the form of the separation of powers, it would not necessarily have been more than an amendment. But inasmuch as sovereignty has been transferred to the people from the Emperor, and the rights of the people accorded by the Emperor have been replaced by the basic human rights, no one can say that there is a legal continuity between the old and new constitutions. Hence, it can be said that Japan has gone through a sort of revolution.

Then when did this revolution take place? The new Constitution was promulgated on November 3, 1946, for enactment from May 3, 1947, which did not imply that the old Constitution had remained valid in its original

¹ Carl Schmitt, *Verfassungslehre*, p. 102; Karl Loewenstein, *Erscheinungsformen der Verfassungsänderung*.

form until then. The fact that the new Constitution based on popular sovereignty was adopted, nullifies the contention that the old Constitution continued to be valid for sometime after the war's end. The transfer of sovereign power from the Emperor to the people was effected by Japan's acceptance of the Potsdam Declaration. The old Constitution lost its real significance as the constituent power, i.e. the "Grundnorm" standing above the written constitution or, in brief, the principle of the constitution itself changed. The validity of the old Constitution was recognized only during the transitional period until the enactment of the new Constitution, insofar as it did not run counter to the principle of the latter. This was possible just as the Weimar Constitution was considered valid under Nazi Germany. Immediately after the end of the war, the Japanese Government held that the contents of the old Constitution did not necessarily offend the principles of democracy and liberalism, and hence did not contradict the spirit of the Potsdam Declaration. Accordingly, the Government did not see why the old Constitution should be revised until it was advised by the Supreme Commander of the Allied Powers of its misconception in this regard. In short, the guiding principle of the new Constitution lies in the Potsdam Declaration accepted by Japan, and when she accepted the Allied document as a sequel to her surrender, she underwent a peaceful revolution.

In the constitutional concepts embodied in the Potsdam Declaration, one can find such factors as the establishment of popular sovereignty and the respect for basic human rights and international laws and regulations. All these basic principles by nature cannot be changed through a revision of the Japanese Constitution; their alteration denotes an illegal revolution. According to Article 96 of the new Constitution, all constitutional amendments are to be conducted through a special referendum and, according to Article 79, judges of the Supreme Court may be dismissed by popular vote. Since all these constitutional provisions concerning direct democracy indicate that sovereignty lies with the people in contrast to British-style parliamentarism, they cannot be abolished. That basic human rights are eternal and inviolate is definitely provided for in Articles 11 and 97 of the new Constitution, and that they shall not be abolished through a constitutional amendment, is based on the concept of natural law as embodied in the Potsdam Declaration. Articles 11 and 97 of the new Constitution merely serve to declare this fundamental principle. Article 9 refers to the renunciation of war by the Japanese people; but there is room for debate as to whether this article can be amended. Its first paragraph sets forth that the Japanese people renounce war as a means of settling international disputes. No contrary provision can be instituted through an amendment of the Constitution, inasmuch as this particular paragraph affirms the anti-war pact of 1928 and the established laws of nations written in the United Nations Charter. The second paragraph of Article 9, on the other hand,

is peculiar to Japan in that it provides for the abolition of armament and no participation in any war. Hence this provision can be revised, so long as such action does not violate the surrender terms.

Next, the question arises as to what restrictions should be imposed on the Constitution under the occupation. According to the terms of surrender, the Emperor and the Japanese Government are under obligation to issue all such orders as may be called for by the Supreme Commander for the Allied Powers to enforce the Potsdam Declaration, and, furthermore, to take all measures necessary to implement such orders. As a result, the emergency Imperial ordinance issued under the date of September 20, 1945, which continues to be valid as a law under the new Constitution by virtue of the Diet's subsequent approval, empowers the Cabinet, if directed by the SCAP, to issue ordinances to manage such affairs as would be governed by statute law under the Constitution. Cases of the so-called Potsdam ordinances are many. Regarded as supra-constitutional, some scholars hold that they can contradict the new Constitution. It is true that the SCAP is authorized to supervise the Japanese Government through his directives and memoranda; in so doing, he is not bound in principle by provisions of the Japanese Constitution.

However, government according to the Potsdam ordinances is a formula of indirect supervision, and hence it is compatible with the concepts of the new Constitution, especially in view of the fact that the fundamental principles of the latter are applied in such government, and SCAP directives and memoranda are designed to implement the Potsdam Declaration. Such reasoning proves the fallacy of the contention that the Potsdam ordinance is supra-constitutional.

Features of such a Cabinet ordinance are two-fold. First, it is a comprehensive mandate of law (Imperial ordinance) instead of an ordinary mandate. What Article 73 of the new Constitution sets forth, are Cabinet ordinances needed to enforce the law or those of a legally mandatory nature. In the case of the latter, it is given mandatory power over specific matters individually and if it accords the Cabinet a comprehensive legislative right, it violates the principle of the Constitution like the Henry VIII Clause of England.²

Second, the Japanese court of law is unable to judge whether a Potsdam ordinance runs counter to the Constitution or the Potsdam Declaration itself. Since the new Constitution provides in Article 81 for the supremacy of judicial power as recognized in judgments of American court, the Japanese court of law can judge the constitutionality of laws and Cabinet ordinances, though it cannot pass judgments on the Potsdam ordinance since its judicial review involves criticism of SCAP directives or Occupa-

² Erwin Jacobi, in *Anschtitz-Thoma, Handbuch des Deutschen Staatsrechts, II*, p. 242.

tion policy. Nevertheless, a distinction must be made between the fact that the contents of the Potsdam ordinance are above dispute from a standpoint of legal procedures, and the fact that they violate the Constitution from a standpoint of their substance. Criticism that the Potsdam ordinance is supra-constitutional, cannot be accepted offhand.

II

Provisions concerning the Emperor are found in the first chapter of the new Constitution as in the old, but popular sovereignty has deprived the Emperor of his powers relating to government in a comprehensive manner (Article 4). The concept of the monarch has changed historically. In countries such as England under the Tudors and the Stuarts and France under the Bourbons, the basic principle of the ancient Roman law, "Princeps legibus solutus est," was recognized and the sovereignty of the monarch was advocated. But under a constitutional monarchy, the prerogatives of the monarch were more or less restricted, laws and budgets were subject to the approval of the Parliament, and judicial power was held by the court of law.

Like the Bayern Constitution of 1818, the old Constitution of Japan empowered the Emperor to supervise sovereignty as head of the nation; this Constitution of Southern Germany has handed down the legal concept of the British Constitution as expounded in the Blackstone theory through the French Constitution of 1814. Under the new Constitution, however, the Japanese Emperor is to act in matters of state alone, as under the Belgian Constitution of 1831, which in principle vested sovereignty in the people and provided that the king exceptionally held the rights as enumerated in the Constitution and the law of the land, "Le roi n'a d'autre pouvoir que ce que lui attribuent formellement par la constitution et les lois particulieres" (Article 78). The Japanese Emperor under the new Constitution has no right to sanction legislation; treaties are concluded by the Cabinet on Diet approval (Article 73); the Emperor cannot appoint the Prime Minister without the designation of the Diet, and Ministers of State are appointed by the Prime Minister (Articles 67 and 68). It is true that after England came under the rule of the Hanover dynasty, there grew up a constitutional convention barring the king from rejecting the sanction of law and that under parliamentary government, the fate of the Cabinet was determined by the confidence shown by the Parliament, especially the House of Commons. Furthermore, in the German Empire of the Hohenzollerns, the Emperor was not empowered to sanction laws. But the Japanese Emperor, who has no right to issue ordinances or to conclude treaties, differs radically from other monarchs. Although his

position as head of the nation is definitely set forth in Article 1 which looks up to him as symbol of the state and of the unity of the people, such designation is merely moral in nature. From this point of view, some scholars regard Japan as are public.

Many of the rights accorded to the Emperor by the new Constitution with regard to acts in matters of state are merely ceremonial in nature. For instance, although the appointment of the Ministers of State by the Prime Minister requires the Emperor's attestation, opinion is divided as to whether such attestation is a necessary condition to make the appointment valid. But the truth is that the attestation is necessary for the purpose, since the Constitution is the supreme law of the state, and any act of government contrary to its provisions shall have no legal force or validity (Article 98). The Emperor shall appoint the Prime Minister as designated by the Diet, promulgate laws passed by the legislature, and dissolve the House of Representatives with the advice and approval of the Cabinet (Articles 6 and 7), but even if the Emperor should fail to discharge any of these duties, no authority of the state can dismiss him nor can the Cabinet or other state agencies take the place of the Emperor as head of the nation. Legally speaking, therefore, it cannot be said that the authority of the Emperor over acts in matters of state is politically meaningless. But it is not the spirit of the new Constitution to plunge the Emperor into political strife by giving him substantial authority.

While the authority of the Emperor is radically restricted under the new Constitution, little change has taken place in his person. The provision of the old Constitution, that the Emperor is sacred and inviolable, finds its counterpart in the provision, "heilig und unverletzlich" of the Bayern Constitution mentioned above and "inviolable et sacré" of the Constitutional Charter of Louis XVIII, the basic principle common to all monarchies in Europe. Although the new Constitution does not make such a provision, the Japanese Emperor is not charged with either political or criminal responsibility like British conventional law embodying the idea that "The King can do no wrong"; Article 3 of the new Constitution holds the Cabinet responsible for all acts of the Emperor in matters of state. That the Emperor has no criminal responsibility can also be explained from an interpretation a fortiori of Article 21 of the Imperial House Law, which specifically states that the Regent is not subject to legal action while he is in office. Furthermore, that the Emperor cannot be dismissed by the people like ordinary public officials, is clear from the fact that Article 1 of the new Constitution regards him as a symbol of the unity of the people, and that Article 2 recognizes the hereditary system of the Imperial Throne. It is possible to recognize the abdication of the Emperor by revising the Imperial House Law which stipulates that the Throne can be ascended to only when the Emperor dies. But it is understood that a compulsory

abdication is incompatible with monarchy.

III

Renunciation of war, as provided for in Chapter II of the new Constitution, and the guarantee of the basic human rights stipulated in Chapter III of the new Constitution, reflect the influence of natural law. That Paragraph 1, Article 9 of the new Constitution renounces war as a means of settling international disputes, indicates that it has taken cognizance of the existing international agreements as hitherto explained, and that the new Constitution follows the fundamental principle, "Pacta sunt servanda," (contracts are to be observed) in international relations. At the same time, it may be readily seen that these constitutional provisions have been made in view of the fact that war, for aggressive purposes, runs counter to the spirit of natural law.

Next, the provision concerning the guarantee of basic human rights in Chapter X on the Supreme Law, is set apart from other constitutional provisions and furthermore, it is shown here that the former is given priority over the latter. While Article 98 states that the Constitution shall be the supreme law of the nation, Article 97 holds that the basic human rights as conferred upon the people, present and future, are in trust to be held for all time inviolate. For this reason, positive provisions of the Constitution as the supreme law can be changed through special procedures of revision, while it is interpreted that the guarantee of basic human rights cannot be changed even through any procedure of constitutional revision since it is regarded as a declaratory regulation of natural law.

There still is room for argument, however, as to whether such basic human rights are inclusive of all the rights as guaranteed in Chapter III of the new Constitution. According to the "System der subjectiven öffentlichen Rechte" (Theory of the Civic Rights) by Georg Jellinek, the civic rights of the individual in relation to the state are divided into "Freiheitsrechte" (right to freedom) or "Status negativus" (negative status), positive civic rights and franchise. Needless to say, the individual right to freedom is a supra-state human right, based on the theory that natural freedoms and private rights shall not be violated by the state. On the other hand, such a positive right as the right of the individual to sue for redress from the state (Articles 17 and 40) is given to the people by the state pursuant to positive law; they are not those rights as are guaranteed by natural law. But since such civil rights, as the right of petition and the right of access to the court (Articles 16 and 32), are indispensable for the protection of human rights, it is interpreted that they are included in the basic human rights. Franchise was considered different from the hitherto-

recognized human rights in that it has been conferred on the citizen alone as a premise to the organization of the state. However, inasmuch as the new Constitution, regarding popular sovereignty as a universal principle of mankind, recognizes that franchise is by nature of natural law, franchise is included in the human rights in this particular sense. For reasons stated above, it cannot be violated through procedures designed to amend the Constitution.

Besides, the new Constitution guarantees the rights peculiar to the twentieth century as provided for in Articles 25 to 28. They are primarily designed to let the state protect the interests of the fourth class positively and ease class conflict in society, resulting from the industrial revolution in the preceding century; which served to pit the free citizenry against the proletariat, thereby making it difficult to maintain the basic human rights as a premise to the society of free and equal citizenry. These rights, therefore, can be said to be the right to existence or the basic social right. This belongs to the positive civic rights, but inasmuch as it lays the substantial foundation for the right to freedom, it was embodied in the human rights in this century. It must be added in this regard that since basic social rights are conferred on the people pursuant to the positive provisions of the constitution, they can be appended in the constitution through its amendment and cannot be curtailed arbitrarily. All these qualities of the basic social rights are common to other human rights.

As to the guarantee of basic human rights, it is necessary to discuss the relationship between legislative and judicial powers. There have been arguments as to whether human rights can be restricted by law. While social human rights by nature require the backing of law as positive civic rights, which depend on special legislative and judiciary measures of the state, the right to freedom can stand by itself without special legislative action, since it is a negative civic right. For instance, the right to maintain the standards of wholesome and cultured living has been guaranteed not to give directly any concrete and realistic right to individual citizens, but to set forth the governmental duties vis-a-vis the people at large in a comprehensive manner. Accordingly, people can sue the state only in cases where provisions concerning individual rights are made in such legal measures as the Livelihood Protection Law. Any lawsuit against the state by an individual citizen for the sole reason of the right to work (Article 27), and despite provisions of the Employment Stabilization Law, is liable to be rejected. Since the Trade Union Law is not applied to the type of labor union primarily concerned with political activities, such a union shall not insist in court trials on labor's right to organization (Article 28). In such cases, the people cannot dispute in court the defects of law on the basis of constitutional provisions regarding the social human rights, but parties concerned may dispute in court the constitutionality of the law

restricting their right to freedoms on the strength of constitutional provisions thereof. It should be added here, however, that although the new Constitution, unlike the old, has no legal reservations, "Vorbehalt des Gesetzes,"³ any theory holding that it is always unconstitutional to control the right to freedoms by law, is wrong. Article 12 of the new Constitution specifies that the people shall refrain from any abuse of the human rights and shall always be responsible for utilizing them for the public welfare, and Article 13 provides that the right of the people to life, liberty and the pursuit of happiness is entitled to supreme consideration in legislation and other governmental affairs as long as it does not interfere with the public welfare.

Thus, it is clear from the standpoint of natural law that the right to freedoms is subject to immanent restrictions because of the public welfare. The difference from the provisions of the old Constitution, which recognize legal reservations in the right to freedoms, lies in the possibility of a judicial review as to whether there is any inevitable need for law to protect the public welfare. What requires attention here is the fact that the restrictions to be imposed on the human rights for the sake of the public welfare should be kept to a minimum; it ought to be considered unconstitutional to control the right to freedoms more than necessary or for the positive promotion of the public welfare.

In relations between the guarantee of the human rights and judicial power, it must be noted that a judicial review can be made with regard to the law restricting the right to freedoms, and that suit may be made in general concerning administrative actions that infringe upon the human rights. Under Article 32, no person shall be denied the right of access to the courts, but Article 24 of the old Constitution, which made virtually the same provision, stated that the people were entitled to only civil and criminal trials by court. Accordingly, if the system of "Generalklausel" (general clause) should be given recognition under the new Constitution in making lawsuits regarding administrative matters, such a system should find its base in Article 13 which asserts that the human rights shall be respected to a maximum in governmental affairs. The reason is that if a person is disqualified from the protection of the court when his human rights are violated, it runs counter to the basic principles of the new Constitution demanding the supreme consideration for them. On the other hand, such administrative suits as "Organkonflikt" (disputes between administrative agencies) or "action populaire," which do not call for the protection of the human rights, are permitted only in cases where special regulations are provided by law.

³ Otto Mayer, *Deutsches Verwaltungsrecht*, Bd. I, p. 70.

IV

The Diet is the highest organ of state power and the sole law-making organ (Article 41 of the new Constitution). This stipulation apparently gives the impression that the Diet stands above the executive and judiciary branches of the government as in England. It merely means, however, that since the new Constitution recognizes judicial supremacy over other departments of government after the American pattern (Article 81), the so-called highest organ of state power denotes parliamentary government under which the law-making body is superior to the Cabinet. By the sole law-making organ is meant that legislation becomes complete only by the decision of the Diet as a sequel to the abolition of Imperial sanction, and that legislation by administrative and judicial powers should be always designed for execution of law or individually mandated by law. Exceptions to this rule are the treaties to be concluded by the Cabinet (Article 73), statutes to be passed by local legislatures (Article 94) and the Potsdam ordinance mentioned above. There still are doubts as to the rule of the Supreme Court (Article 77). In Japan there has been a tradition to respect the Continental legal system and judicial precedents still are not regarded as part of law. Under such circumstances, the rule of the Supreme Court not only cannot change the law of the land, but is interpreted as requiring a legal mandate in case it directly restricts the basic human rights. As regards treaties, since they need Diet approval prior or depending on circumstances subsequent, they do not always ignore the legislative power of the Diet. And local statutes do not contradict the guiding principles of the Constitution, since they are not only inferior to the validity of the law but also democratic legislation to be enacted by local legislatures.

The Diet consists of the House of Councillors and the House of Representatives. Unlike the Senate of a Federal State, which represents the constituent states, the House of Councillors is entrusted with the mission of criticizing the House of Representatives from a non-partisan point of view. Since all the members of both Houses are chosen by universal adult suffrage, huge expenses are needed for their elections, and there is danger that a majority rule detracts from quality, a criticism equally true of both Houses. Accordingly, to rationalize the bicameral system, it is necessary not only to make the Upper House supra-partisan by granting a long term of office for the Councillors, by the election of half their number alternately every three years, by fixing the lowest age at a high level, etc., but also to place the Lower House above the Upper House in the exercise of vested authority. The Japanese Constitution follows the pattern of the U. S. A. in law bills and the British procedures on Money Bills based on the 1911 Act of Parliament.

According to Article 59 of the new Constitution, a bill which is passed by the House of Representatives but not by the House of Councillors because of a difference in opinion, becomes law if passed a second time by the House of Representatives by a majority of two-thirds or more of the members present. Relations between the House of Councillors and the House of Representatives in this particular instance resemble those between the United States Congress and the President, who exercises a suspensive veto over the decision on law bills, as provided for in the Constitution. The British method of reaching decisions on money bills is contrived in Article 60 of the Constitution, and provides that if a conflict of opinion arises below the House of Councillors and the House of Representatives and no agreement can be reached even through a joint committee of both Houses, the decision of Parliament shall prevail.

Instead of adopting the American system of a legislative period, the Japanese system follows the British practice which recognizes the discontinuity of session. No bill remaining undecided in a preceding session for further deliberation, can be taken up for debate in the next session (Article 68 of the Parliament Law).

The Constitution provides that the Emperor may dissolve the House of Representatives as an act of state (Article 6 of the Constitution), which corresponds to the authority of the House of Representatives to pass a non-confidence resolution against the Cabinet (Article 69). In the United States where a separation of powers is strictly observed, Congress cannot be dissolved, and is a little different from that in France whose Lower House cannot be dissolved readily even after the adoption of a non-confidence resolution; this is what Redslob calls "den unechten Parlamentarismus" (unbalanced Parliamentarism).⁴ Accordingly, the dissolution of the Lower House does not always follow a head-on clash between the Government and the House of Representatives. In England, precedents show, the House of Commons may be dissolved not only when the Cabinet clashes with the House of Commons, but also when the Government clashes even with the House of Lords, and when the Commons are considered not to represent the people any longer as a result of the revision of election laws. It is assumed that the same practice has been adopted in Japan too.

With regard to proceedings of both Houses, provisions are made in the Constitution, House regulations and the Diet Law. The provisions of the Diet Law pave the way for mutual restrictions on both Houses, although such legislation is rare in other parts of the world (Article 58 of the new Constitution). While proceedings are, in principle, conducted in secret in the United States and Great Britain in respect for the independence of national legislators, they are carried out in open sessions, in principle, under

⁴ Redslob, *Le regime parlementaire*, p. 258.

the new Constitution in Japan (Article 57). In many countries, a quorum is fixed at a majority of those present, pursuant to the majority rule, but a one-third rule is adopted under the old and new Constitutions in Japan (Article 56).

The Diet is authorized to vote laws and budgets, approve treaties and designate the Prime Minister, but there are doubts as to whether the Cabinet can submit bills to the Diet. The drafting of law bills is an important part of legislative procedure, but inasmuch as laws provide the basis of administration and justice, and the Government faces the greater need for legislation than the legislators, it is commonly accepted that law bills can be included in the Government's measures for presentation to the national legislature (Article 72), as specified in the Cabinet Law. Under the old Constitution, the system of three readings constituted part of the Diet deliberations, but the existing Diet Law charges the Speaker the responsibility of turning bills over to competent committees for debate, and then to the plenary session of the House after completion of their deliberations.

Under the French Constitution of 1814, the king is the sole agency for concluding treaties, but in the United States they do not become valid unless ratified by the Senate. The general rule, however, is that only those treaties which are valid as domestic laws and which impose a burden on the national treasury, need Diet approval. The Japanese Constitution provides that the Cabinet is required to obtain prior, or depending on circumstances, subsequent approval of the Diet, when concluding treaties (Article 73). Subsequent approval of the Diet is limited to treaties which have been concluded by the signing of a plenipotentiary without ratification by the Cabinet, or which are concluded without awaiting prior approval by the Diet because of urgency. In case the Diet rejects prior approval, it is understood that the Cabinet cannot ask for subsequent approval from the national legislature after concluding treaties. If the Cabinet concludes a treaty without securing prior Diet approval for unavoidable reasons, it must inform the other contracting party in so doing that the treaty will become null and void, if it fails to obtain subsequent approval by the Diet. If the Cabinet can ask for subsequent Diet approval for a treaty in the next sessions even though the national legislature rejected its prior approval in the former session, the Cabinet would be able to enforce the treaty and to press for the Diet approval repeatedly, no matter how often the latter might reject it. The reason is simple in that the rule of "ne bis in idem" or that a matter, once decided, cannot be put to Diet debate again shall not apply in this case. Therefore, in this circumstance, the Diet's right to approval loses its effectiveness. Also if the Government fails to attach a condition in concluding a treaty that it will lose its validity unless given subsequent Diet approval, the Cabinet will not be able to invalidate the treaty for any peculiar reason of its own that may crop up afterwards.

Next, the Diet determines how national finances are to be administered (Article 83). As to forms for enforcement, the enactment of a law is necessary in the case of taxes (Article 84), but only subsequent Diet approval is sufficient in the case of revenue fund outlay, where recognition of the supremacy of the Lower House is not called for (Article 87). By and large, however, the supremacy of the Lower House must be upheld, depending on the form of the budgets. In discharging its financial obligations, the national treasury has to make all appropriations in the form of budgets under the new Constitution, unlike the old, which provided special measures for such purposes (Article 85 of the new Constitution and Article 15 of the Finance Law). Budgets have not been approved in the form of a law in Japan; their procedures and effect likewise are kept apart from the law in general under foreign constitutions. If the Diet is authorized to add new items to the budget or increase outlay, while holding the Cabinet responsible for keeping the balance between revenue and expenditure, there is a strong likelihood that such Diet action will occasion an expansion in expenditure. Accordingly, such Diet action runs counter to the spirit of the Constitution, as in the United States Budget and Accounting Act of 1921, and the Cabinet is vested with the sole authority to prepare the budget (Article 73 of the new Constitution), which must first be submitted to the House of Representatives (Article 60 of the Constitution).

V

The Cabinet is the supreme administrative organ and, at the same time, is the agency charged with giving advice and approval on the Emperor's acts in matters of state (Article 3 and 65 of the new Constitution). Under the old Constitution, administrative authority lay with the Emperor, hence the Cabinet functioned in principle as an advisory organ to the Emperor and the decision on administrative affairs by the Cabinet was limited to cases where law or the Imperial ordinance made specific provisions thereof. Under the new Constitution, however, administrative power belongs to the Cabinet, and acts of the Emperor in matters of state are limited to the exceptions prescribed by the Constitution. Accordingly, the general rule and exceptions have been reversed. While a Cabinet in old Japan sometime collapsed due to its disunity, or was often influenced by such undemocratic extra-Cabinet forces as the military or the Privy Council, the new Constitution strengthens the authority of the Prime Minister for maintaining unity in his Cabinet and at the same time, clarifies the collective responsibility of the Administration, thereby emphasizing the parliamentary government system and preventing dictatorship by the Prime Minister.

The Prime Minister appoints the Ministers of State, the majority of

whom must be chosen from among the members of the Diet. He is authorized to remove Ministers of State as he chooses (Article 68 of the new Constitution). Although the Prime Minister was merely authorized under the old Constitution to make recommendations on the appointment and dismissal of Ministers of State, the new Constitution gives him a position approximating that of the United States President. The Ministers of State are not subject to legal action during their tenure of office without the consent of the Prime Minister (Article 75 of the new Constitution), a provision guaranteeing the position of the Cabinet vis-a-vis judicial authority after the French Constitution of 1800 and the German system patterned after the French document. The French Constitution prescribed the Constitutional guarantee system, "garantie constitutionnelle," which required the decision of "Conseil d'Etat" to subject public officials, other than Ministers of State, to legal action in connection with their acts of administration, while the German system set forth legal action accompanied by official permission. It is understood, however, that the Prime Minister cannot refuse to consent to such legal action, if based on justifiable grounds.

Next, the Prime Minister can, representing the Cabinet, exercise control and supervision over various administrative branches (Article 72 of the new Constitution). The Cabinet is in nature a higher agency than various Ministries and the Attorney General's Office. Since it is a collective body, it issues instructions and cancels them through the Prime Minister, who exercises control and supervision over various administrative branches on the basis of the policy fixed at Cabinet meetings. If doubts arise as to the competence among the Ministers, the Prime Minister submits the case to the Cabinet and makes a decision thereon, and he can, furthermore, order the Ministries to suspend their measures and orders and to wait for action by the Cabinet (the Cabinet Law).

In the exercise of administrative power, the Cabinet is held collectively responsible to the Diet (Article 66 of the new Constitution). Collective responsibility springs from the unity of the Ministers of State maintained by the Prime Minister, and responsibility to the Diet is part of the requirements of parliamentary government. In the first place, it is provided that if the House of Representatives passes a non-confidence resolution against the Cabinet, or if the Prime Minister resigns, the Cabinet is to resign en masse. Within this limit, therefore, the collective responsibility of the Cabinet to the Diet is a legal responsibility. It must be added, however, that in case any of the Ministers of State makes a decision on some matters without submitting it to a Cabinet meeting, the House of Representatives may confront him of such action and pass a resolution demanding his resignation. This independent responsibility resting on the Minister of State is a political responsibility, and if the Prime Minister fails to dismiss him or take other action, in response to the Lower House resolution, the Cabinet

is liable to be held collectively responsible for the independent action of the Minister.

In the second place, by virtue of collective responsibility to the Diet, the Prime Minister and other Ministers of State, whether they hold a seat in the House or not, can attend its session at any time with a view to submitting opinions on bills, and they must attend Diet sessions if called upon to give answers or explanations (Article 63 of the new Constitution).

In the third place, as to Cabinet meeting proceedings, the Government is required to maintain a high degree of secrecy, as well as secure a unanimous vote. Since the majority rule merely serves to restrict a minority of the Ministers of State in regard to what has been decided at a Cabinet meeting, but does not hold them responsible, such a rule does not fit in with the idea of the collective responsibility of the Cabinet. Furthermore, inasmuch as the Prime Minister can dismiss a Minister of State who may hold an opinion at variance with his, the general rule of unanimous approval by the Cabinet is not liable to weaken the Cabinet.

VI

There is seemingly no dispute on the judicial power concerning both civil and penal actions, of which, however, there are some which do not require an independent agency to act independently in their behalf as non-contentious cases or enforcement of sentences. Lawsuits on administrative cases, on the other hand, are primarily designed to establish and maintain the order of the Administrative Law and indirectly to meet executive purposes. Judgment on such suits, therefore, must be passed independently by an independent agency, but since the new Constitution forbids the establishment of extraordinary tribunals (Article 76 of the new Constitution), they fall under the jurisdiction of the ordinary courts and are in nature considered subject to judicial power. Accordingly, judicial power, as referred to in Article 76 of the new Constitution, denotes trials on civil, penal and administrative cases; by trials are meant the application of laws and conclusive recognition of facts by authorities concerned, in disputes which arise over the existence or formation of definite legal relations, on hearing the views of both parties concerned. For this reason, decisions on disputes concerning the validity of abstract and general laws is not part of the jurisdiction belonging to judicial power. Herein lies the distinction between legislation and the judicature in their material sense.

Administrative agencies, in some cases, conduct trials on disputes in reference to the jurisdiction of lower organs or trials for cancellation of unjustifiable dispositions by the latter. If trials by administrative agencies are asked by citizens, redress of their right is not considered a premise to

such action. Such trials in nature belong to the sphere peculiar to the administration, and are outside the scope of judicial power, since they are not legal disputes over which the court of law has the right of trial without any special provisions. Although an administrative tribunal existed under the old Constitution, after the fashion of various countries in Continental Europe, it was abolished immediately after the enforcement of the new Constitution.

The right of the court to review laws and regulations is patterned after the American system. There is no dispute that laws and orders can be invalidated by judicial review when they are in substance clearly and seriously unconstitutional. If the authorities concerned make laws and orders unconstitutional through a misinterpretation of the Constitution or higher laws and orders, they are not necessarily invalid. As to whether the court is authorized to review such cases, dominant interpretations are negative under the old Constitution and affirmative under the new. Since an administrative tribunal existed under the old Constitution, the judicial court did not review the illegality of orders which constituted the cause of cancellation of administrative acts. Furthermore, it was interpreted that the court had no authority of review whether there was any mistake in enacting laws and Imperial ordinances for application to civil and criminal trials, since they were made valid by Imperial sanction. Under the new Constitution, on the other hand, not only do the suits on administrative cases fall under judicial power, but also even the authority to review the constitutionality of laws and other measures belongs to it (Article 81 of the new Constitution). In this regard, it is necessary to note the following points:

First, the judicial review concerning the constitutionality of laws and orders is shown in the reasons for final decisions. If the court is asked merely to cancel a law or order, or for affirmation of their constitutionality, it rejects such requests without any material examination since they are not legal disputes. If the court passes judgment on these disputes in the text of decisions, it runs counter to the basic principle that there can be no trial if there is no legal complaint (*nemo iudex sine actore*). Accordingly, even when laws and orders have been recognized as illegal, the court merely affirms their invalidity or unconstitutionality, but cannot cancel them.

Second, the supreme Court is the court of last resort charged with determining the constitutionality of laws and orders (Article 81 of the new Constitution). Accordingly, the way must be open for submitting to the Supreme Court an appeal for special action on the final decisions made by a higher court for reasons of the unfair judgment passed on the constitutionality of laws, orders or regulations (Article 409 II of the Code of Civil Procedure). Judgment on unconstitutionality, as expressed in the reasons for the decision of the Supreme Court, makes a law or order null and void

pursuant to the provisions of Article 98 of the new Constitution; such precedents of court decisions, different from other precedents, cannot be changed. Although it is a general rule that final decisions take effect only in relation to the parties concerned, judgment of the Supreme Court on unconstitutionality is valid in general. If the parties concerned dispute the judgment that some laws or orders are constitutional, a large court of all the Supreme Court judges can rule that such laws or orders are unconstitutional. Although the Supreme Court may affirm the constitutionality of some law or order, in a small court attended by three Supreme Court judges, it is provided by law that it affirms the unconstitutionality of such laws or orders in a large court (Article 10 of the Court Law), clearly showing that a Supreme Court judgment on the unconstitutionality of a law or order cannot be reversed even in a large court afterwards. That lower courts are authorized to review the constitutionality of laws and orders is clear from the fact that judges are bound by the Constitution and the law alone.