

WAR AND DIPLOMACY IN THE JAPANESE EMPIRE

Volume 49

TATSUJI TAKEUCHI



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TATSUJI TAKEUCHI

Introduction by
QUINCY WRIGHT

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**WAR
AND DIPLOMACY
IN THE JAPANESE EMPIRE**

By

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Introduction by
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Author's Preface

THIS VOLUME undertakes to examine and evaluate the processes of formulating, executing, and controlling the Japanese foreign policy since the establishment of a parliamentary system of government in 1890. The primary emphasis is placed upon procedure rather than the substance of policy. Therefore, no attempt is made in this volume to give an exhaustive treatment of the substance of policy, as it more properly belongs to a separate study on the diplomatic history of modern Japan.

Part I is devoted to a brief discussion of the structure and functions of various organs for the conduct of Japanese foreign relations. In Part II, on the other hand, detailed procedural analyses of eighteen diplomatic incidents are made in order to examine the conduct of foreign relations in practice. Part III, which comprises the last three chapters, may be said to constitute the summary and conclusions of the present study.

It is obviously impossible for a study of this nature to avoid errors in data or mistakes in judgments, particularly when dealing with recent incidents. It is the author's humble wish that the present inquiry may only serve as an incentive to further research in this important field of international relations.

It is impossible to make individual acknowledgments of all the assistance received by the author during the course of his research on this subject. However, special mention should be made of the courtesies so generously extended to the author by the heads of the following libraries: the University of Chicago libraries, Northwestern University Library, Tokyo Imperial University Library, Kwansei Gakuin University Library, the Teikoku Toshokan (Imperial Library) at Uyeno, and the

Teikoku Gikai Toshokan (Parliamentary Library) in Tokyo. He also takes this opportunity to mention his indebtedness to Dr. Tatsukichi Minobé, the late Dr. Sakuzo Yoshino, Professors Masamichi Royama and Kisaburo Yokota of the Tokyo Imperial University, and Professor Jumpei Shinobu of Waseda University. Thanks are also due to Dr. Ichiro Kiyosé, former vice-speaker of the House of Representatives, the late Marquis Kinichi Komura, former chief of the intelligence bureau of the foreign office, as well as Mr. Setsuichi Aoki, former chief of the Tokyo office of the secretariat of the League of Nations. These gentlemen and others, whose names are deliberately withheld here, read portions of the manuscript or otherwise gave invaluable assistance to the author. And finally, the author begs to mention Professor Quincy Wright, under whose guidance and inspiration the present work was executed at the University of Chicago. These gentlemen, of course, are not responsible for the general plan of the work, the conclusions reached, nor for the errors found in this volume,

TATSUJI TAKEUCHI.

Kwansei Gakuin University
Nishinomiya, Japan
June 20, 1935

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Introduction

THE PRESENT STUDY is part of a cooperative project for investigating the causes of war initiated by the Social Science Research Committee at the University of Chicago in 1927. While it is planned to publish a general summary of the results of the investigation, those special studies which have an independent interest, of which this is one, are published as they are completed.¹

The project began with no theory of the causes of war but with a series of approaches suggested at several meetings by members of the departments of Political Science, Economics, History, Sociology, Anthropology, Geography, and Psychology at the University of Chicago in the spring of 1926. Certain of these suggestions were selected for detailed study by research assistants working under the direction of members of the university staff, or by members of the staff itself, but such unity as the project may eventually acquire will be a result of final synthesis rather than of initial analysis.

The studies planned included several on the internal structure and functioning of governments in making war and conducting diplomacy.

¹ Those published to date as books or articles include the following: Frederick L. Schuman, *War and Diplomacy in the French Republic*, New York, 1931; Harold D. Lasswell, *World Politics and Personal Insecurity*, New York, 1935; Eugene Staley, *War and the Private Investor*, New York, 1935; Hazel C. Benjamin, "Official Propaganda and the French Press During the Franco Prussian War," *Journal of Modern History*, June, 1932; James T. Russell and Quincy Wright, "National Attitudes in the Far Eastern Controversy," *American Political Science Review*, August, 1933; Philip Davidson, "Whig Propagandists of the American Revolution," *American Historical Review*, April, 1934; Schuyler Foster, "How America Became Belligerent: A Quantitative Study of War News, 1914-1917," *American Journal of Sociology*, January, 1935.

It is clear that governments of states are immediately responsible for the initiation of most modern wars. Governments differ from each other according to the types of men in positions of power, and according to the constitutional structures which more or less determine the classes or sections of the population which shall exert influence and the degree of deliberation and breadth of participation which shall precede important decisions. One might expect to find that the frequency of war in the foreign relations of a given state is related to the type of governing personality and constitutional structure which prevails in the state, but before such an expectation can be tested, detailed descriptive accounts on a somewhat common model of these personalities and constitutional structures operating in a number of states in the same international milieu must be available.

In 1931, Dr. Frederick L. Schuman published a study prepared under the auspices of this committee entitled *War and Diplomacy in the French Republic*. The present study follows a similar model with respect to Japan. In successive parts it discusses the constitutional structure of Japan, sets forth the operation of this structure in the most important international transactions from 1890 to 1934, and finally synthesizes this material according to types of activity involved. These are classified as treaty making, war making, and the formulation of foreign policy. Although the outlines of the two books are the same, Dr. Takeuchi's treatment differs from that of Dr. Schuman in that it is more descriptive and less interpretative. In the second part, particularly, Dr. Takeuchi gives less attention to the diplomatic background of the episodes treated and the actual motivations of the actors. The extraordinary detail, however, with which Dr. Takeuchi has explained the internal workings of the Japanese government in these incidents on the basis of documents and other materials, mostly in the Japanese language, renders it invaluable for understanding that curious combination of oriental and occidental elements, the Japanese state.

The manuscript, with exception of Chapter XXVI, was completed just before the Mukden incident of September, 1931. It was decided to postpone publication until an account of this incident could be added, but the momentous international events which followed—the occupation of Manchuria, the bombardment of Shanghai, the Japanese recognition of Manchukuo, the censuring of Japan by the League of Nations Assembly, Japan's withdrawal from the League, as well as significant internal changes in Japan—succeeded each other with

such rapidity that Dr. Takeuchi found it impossible to conclude his chapter until the last of these events had occurred in the spring of 1933. Even then it was scarcely possible to appraise the situation from the standpoint either of Japanese foreign policy or of Japanese constitutional development until another year had passed. In the meantime new events had occurred, especially the London naval conversations and the Japanese denunciation of the naval treaties in December, 1934. The consequences of these events, however, are still pending, and it was decided to publish this study without further delay, terminating it with Japan's withdrawal from the League.

The period from the promulgation of the written Constitution of 1889 to the ratification of the London Naval Treaty in 1930 constitutes a definite epoch in Japanese constitutional history, an epoch in which parliamentary control of the executive began and developed, reaching its peak in the latter episode. Since that episode, perhaps, in part, because of it, parliament has been forced to retire into the background, while the military and naval authorities have increased their influence. How long this new trend will last, it is impossible to say, but the circumstances precipitating it are described in Chapter XXVI in more detail than in any other publication in the English language.

Dr. Takeuchi's treatment of the Japanese participation in the process of negotiating and ratifying the London Treaty, written it must be recalled before the Mukden incident, is of exceptional interest. First, because it seems to mark the triumph of the cabinet and parliament over the Privy Council and the military and naval advisers. Second, because it discloses the reality of "dual government" between civilian and military authorities in Japan. Third, because it seems to point toward just such an effort of the military to reestablish its prestige as occurred in September, 1931. Dr. Takeuchi points out that while the Hamaguchi cabinet was able to retain the confidence of the Diet for its signature of the treaty, against the advice of the naval advisers, yet in spite of its recent victory at the polls, it did not dare to state the constitutional grounds on which it assumed this responsibility. To have done so would have been to assert cabinet superiority in state affairs, not only over the naval advisers, but also over the army advisers. Such a statement would have resulted in aligning the army, even more powerful than the navy, against the cabinet, and the cabinet could not face that risk. As a final comment on this episode, Dr. Takeuchi notes that after the treaty had been ratified the foreign minister, Shidehara, was forced to retract his statement that the imperial ratification of the

treaty was convincing evidence that the national defense was secure under the London Treaty. The opposition would not tolerate this shielding of what it considered a grave diplomatic blunder by dragging the throne into politics. There perhaps, also, was something ominous in the fact that Premier Hamaguchi, whose vigor had put the London Treaty through, and who had seen in its ratification evidence that the world had progressed "from the pioneer to the settlement stage," was shot six weeks after this event. As a result of the shooting he died nine months later.

Less than a year after the treaty was ratified, the Manchurian incident occurred, with consequences which Dr. Takeuchi describes in Chapter XXVI no less objectively than he has described those of the earlier period of constitutional development.

Comparison of the Japanese institutions for conducting foreign relations, with the French institutions discussed by Dr. Schuman, throws further light on the general relationship between constitutional institutions and foreign policies. In theory the two constitutions are very different. The French Constitution is based upon parliamentary sovereignty with full cabinet responsibility to the parliament and the subordination of the military to the civilian cabinet. Dr. Schuman, however, points out that in practice parliamentary control is sometimes nominal, particularly in the conduct of foreign affairs. The executive usually initiates and acts, and parliament follows. On certain occasions the military or naval authorities have taken action on their own responsibility, and the cabinet, confronted by a *fait accompli*, has had to endorse it.

In Japan constitutional theory places the Diet in a much less important rôle. The Privy Council is the constitutional adviser of the Crown on foreign affairs, and the military and naval advisers have direct access to the Emperor on matters of imperial defense. Practically the *genro*, or elder statesmen, were the main advisers of the Emperor on all important matters. But with only the aged Saionji surviving of this group, its political importance is nearing an end. The dominance of the Diet over these bodies is not established in constitutional theory, nor is its dominance over the cabinet, although the parliamentary responsibility of the cabinet was gaining in recognition prior to 1931. The rôle of parliament had tended to increase during the first forty years of Japanese development under the Constitution of 1889, but Dr. Takeuchi is very cautious about predicting the continuance of

this development. The theoretical position of the Privy Council and of the military and naval advisers, supported by powerful clans, has been sufficiently maintained in practice so that the triumph of parliamentarism is by no means assured. Especially in policies relating to China, Dr. Takeuchi points out, military and naval circles had a large influence since the Russo-Japanese War and dominated the situation during the Manchurian episode from 1931 to 1933.

In both France and Japan, the executive and the military have often initiated warlike activities without prior parliamentary consent, but in France they have had to reckon with the possibility of parliamentary veto, while in Japan they have been urged to act by anxiety to maintain an accepted constitutional position in the face of practical parliamentary encroachments. In both France and Japan the foreign policy of the state has in the main been determined by factors other than its constitutional organization. But in France, so far as constitutional institutions have an influence, they check war-like activities, while in Japan they more often act as a spur to such activities. It is difficult to avoid the conviction, in reading Dr. Takeuchi's detailed account, that a development of the position of parliament and cabinet in Japan beyond the possibility of constitutional challenge by the military would be in the interest of peace

QUINCY WRIGHT.

University of Chicago
September, 1935

PART I:
CONSTITUTIONAL ORGANIZATION

Chapter I

THE IMPERIAL CONSTITUTION

FUNDAMENTAL CHARACTERISTICS OF THE CONSTITUTION¹

THE CONSTITUTION of Japan represents a compromise between the old monarchical traditions and the modern constitutionalism of the West.² That is, the Constitution embodies in broad outline the foundations of Japanese national polity developed since the beginning of her history, colored by basic principles of modern constitutionalism. Hence, the fundamental characteristics of the Constitution may be comprehended under the following three heads: (1) monarchism, (2) constitutionalism, and (3) unitarism.³

The monarchical features of the Constitution are brought out most strikingly in the following four aspects: (1) amendment of the Constitution, (2) the autonomy of the imperial household, (3) limitations upon the legislative power of the Diet, and (4) independence of the supreme command.

The power to initiate the process of constitutional amendment is exclusively reserved to the throne. Therefore, the Imperial Diet is denied the power to initiate a constitutional amendment, while the people cannot petition for it. Moreover, such important matters as those relating to the succession to the throne, institution of regency, and other matters concerning the imperial household are regulated by

¹ For constitutional history of Japan prior to the promulgation of the written Constitution on Feb. 11, 1889, see Yoshino, "Draft Constitutions," *Kokka Gakkai Zasshi*, XLII (1928), 1793–1804; Prince Ito, "History of the Establishment of the Constitution," *ibid.*, XI (1897), 417–428, 529–544; Viscount Kaneko, "Prince Ito and the Drafting of the Constitution," *ibid.*, XXIV (1910), 979–1001; Count Okuma (ed.), *Fifty Years of New Japan* (Tokyo, 1910), I, 122–132; Kudo, *Teikoku Gikaishi* (Tokyo, 1901), 1, 1–14; Minobe, *Kempo Satsuyo* (Tokyo, 1932), pp. 85–98.

² For commentaries on the Constitution, see Prince Ito, *Kempo Gikai* (Tokyo, 1889); Hozumi, "Principles of the Constitution," *Kokka Gakkai Zasshi*, III (1889), 170–177, 193–214, 274–300, 339–364, 397–410, 431–461, 505–533; Minobe, *Kempo Seigi* (Tokyo, 1928).

³ Minobe, *Kempo Satsuyo* (1932), pp. 119–127.

imperial household laws, and placed outside the jurisdiction of the Diet. The legislative prerogative of the throne, to be exercised independent of the legislative branch of government, is far wider than is recognized in most monarchical states. This power of the throne is particularly noted in its prerogatives over police ordinances and foreign relations. Another point to be noted in this connection is the separation of the imperial prerogative over supreme command from other prerogatives over state affairs. The placing of this important prerogative outside the scope of cabinet responsibility and parliamentary discussion constitutes a significant feature of the Japanese Constitution.

The principles of modern constitutionalism incorporated into the Constitution by its framers represent an interesting contrast with the fundamental nature of Japanese polity. So far as compatible with those foundations of the state which are the products of history, such general principles as (1) government with the consent of the governed, (2) parliamentary responsibility of the ministers of state, and (3) "government of laws" were incorporated into the Constitution. To carry out the principles of government with the consent of the governed, the Imperial Diet was established to represent the views of the people. To restrain the autocracy of the House of Representatives, however, the imperial prerogative to dissolve the popular chamber is recognized, and also a second chamber, the House of Peers, having equal powers, was established. Furthermore, the establishment of the Privy Council as an advisory organ to the throne on important affairs of state places further restrictions upon the basic principles of popular government. The second characteristic of constitutional government is that the responsibility in the exercise of the rights of sovereignty can be definitely located, and that the people and their representatives in the Diet can question and vote upon the same. The parliamentary responsibility of cabinet ministers is an instance of this practice. The doctrine of government of laws and not of men is recognized in that the rights and duties of the subjects are defined in the Constitution and that they are modifiable only by laws and not subject to the arbitrary discretion of the executive branch of government.

The third characteristic of the Japanese Constitution is that it sets up a unitary system of government. The only two notable exceptions to this general principle are local self-government and the relatively large degree of autonomy enjoyed by colonial governments.

NATURE AND EFFECT OF THE CONSTITUTION

The supremacy of the Constitution over ordinary laws is generally recognized by jurists.⁴ Thus, the Constitution cannot be modified by statutes, emergency imperial ordinances, treaties, or Imperial House Law, and all organs of the state are subject to the provisions of the Constitution.

INTERPRETATION OF THE CONSTITUTION

There is no express provision in the Constitution providing for interpretation thereof. From the general principles of separation of powers, each branch of the government is independent of the other within their respective jurisdictions, and hence each is competent to interpret the Constitution not binding upon other branches of government.⁵

AMENDMENT OF THE CONSTITUTION⁶

The power to initiate constitutional amendment is exclusively vested in the throne. Thus, a draft of a proposed constitutional amendment must be submitted to the Diet by imperial order.⁷ Prince Ito, the principal drafter of the Constitution, attributes this exclusive power to the fact that the emperor is the sole author of it.⁸

Two important restrictions upon the nature of draft amendments should be noted: (1) that it must be either a modification of, or an addition to, the Constitution, and not designed to abolish or suspend the

⁴ Minobe, *Kempo Seigi*, p. 24; Ichimura, *Teikoku Kempo Ron*, pp. 170–194; Shimizu, *Kempo Hen* (Tokyo, 1923), pp. 211–220.

⁵ For a fuller discussion of this subject see Chap. VI, *infra*.

⁶ Prince Ito, *Kempo Gikai*, pp. 134–136; Minobe, *Kempo Satsuyo* (1932), pp. 102–104; also his *Kempo Seigi*, pp. 718–726; Shimizu, *Kempo Hen*, pp. 192–209; Ichimura, *Teikoku Kempo Ron*, pp. 218–226.

⁷ Constitution, Art. LXXIII, Cl. I.

⁸ Prince Ito, *Kempo Gikai*, p. 135. Professor Minobe takes exception to Prince Ito on this point and argues that, since the coming into effect of the Constitution, Japan ceased to be an autocracy and became a constitutional monarchy, and hence an amendment to the fundamental document which set up the constitutional system should no longer be made by the prerogative of the emperor alone but should require the consent of the Diet (*Kempo Seigi*, p. 720).

Constitution itself;⁹ and (2) that it may not conflict with the principles embodied in Article I of the Constitution that “the Empire of Japan shall be reigned over and governed by a line of emperors unbroken for ages eternal.”¹⁰

Before submission to the Diet for deliberation and consent, a draft amendment must be referred to the Privy Council for advice.¹¹ Inasmuch as the amending power of the Constitution belongs to the prerogative of the throne to be exercised upon the advice of the ministers of state, a draft amendment is to be prepared by ministers of state in cabinet and petitioned to the emperor for submission to the Privy Council. In this connection, it should be noted that, although the Diet is denied the power of initiating a constitutional amendment, it would be within its constitutional powers to petition the throne for proposing a constitutional amendment.¹²

Though the Constitution provides only for submission of draft amendments to the Diet, there can be no doubt as to the necessity of obtaining parliamentary consent thereto as in the case of ordinary projects of law, since the amendment of the Constitution is a legislative function. However, the legislative power of giving consent to a project of constitutional amendment differs from its ordinary law-making power in that it is greatly limited and that greater caution is required in its deliberations.

As a natural consequence of the denial of the power of initiating the amending process, the Diet cannot take a vote on any matter other than what is contained in the project submitted thereto. That is, no amendment can be offered on matters not within the scope of the draft or new items inserted by the Diet. The power on the part of the Houses of the Diet to amend a draft submitted thereto is implied from the power of consent.¹³

⁹ Minobe, *Kempo Seigi*, pp. 62–64, 721. Dr. Shimizu concurs with Minobe on this point (*Kempo Hen*, p. 209). On the other hand, Ichimura holds that, though the Constitution may not be suspended by the emperor alone, there is nothing in legal theory to prevent its suspension, in part or in whole, under Article LXXIII of the Constitution (*Teikoku Kempo Ron*, p. 226).

¹⁰ Minobe, *Kempo Seigi*, p. 723.

¹¹ *Sumitsuin Kansei*, Art. VI, Cl. II.

¹² Minobe, *Kempo Seigi*, p. 724.

¹³ *Ibid.*, pp. 724–725. Ichimura denies this power of amending the draft on the ground that to admit the amendment power would be tantamount to admitting the power of initiating the amendment process (*Teikoku Kempo Ron*, p. 219). Ichimura is supported by Shimizu (*Kempo Hen*, pp. 201–202), Y. Hozumi (*Kempo Teiyo* [1910], 1, 168).

While in ordinary law-making process the presence of only one third of the members of the House is sufficient to open debates, and a majority of votes cast by the members present is required for its passage,¹⁴ the quorum for deliberation upon constitutional amendment is two thirds of the whole membership of the House, and two-thirds vote is required for decision upon such a project.¹⁵ Moreover, the Constitution cannot be amended during a period of regency.¹⁶

There remains an interesting question as to the fate of a draft amendment in case of its adverse vote in either House. Such jurists as Ichimura,¹⁷ Hozumi,¹⁸ and Minobe,¹⁹ hold that parliamentary consent is required for valid amendment of the Constitution, while Justice Shimizu supports a contrary view.²⁰

THE IMPERIAL HOUSE LAW

Imperial House Law was issued for the governance of internal affairs of the Imperial Family. Minobe holds that, in so far as the provisions concern the imperial household, the Imperial House Law binds the state and the people, and calls this “a principle of the antonomy of the Imperial Court.”²¹ Although the *Koshitsu Tempan* was issued without the countersignature of a minister of state, the *Koshikirei* of 1907 provides that in promulgating an amendment to the Imperial House Law, ministers of state as well as the minister of the imperial household attach their signatures.²² To amend the Imperial House Law, a draft prepared in conference between the minister of the imperial household and the ministers of state is submitted by imperial order to the deliberation and advice of the Imperial Family Council and the Privy Council. Although no amendment to the Constitution has been made,²³ the Imperial House Law has been amended twice. Thus, eight

¹⁴ Constitution, Art. LXVI, LXVII.

¹⁵ *Ibid.*, Art. LXXIII.

¹⁶ *Ibid.*, Art. LXXV.

¹⁷ *Teikoku, Kempo Ron*, p. 222.

¹⁸ *Kempo Teiyo*, 1, 168.

¹⁹ *Kempo Seigi*, p. 720.

²⁰ *Kempo Hen*, p. 205.

²¹ Minobe, *Kempo Satsuyo* (1932), pp. 104–107.

²² Imperial Ordinance No. 6, 1907, Art. IV.

²³ Prince Ito, the principal drafter of the Constitution, prepared a draft amendment to the Constitution and also one for the ordinance concerning the House of Peers, in 1898, and ordered the then chief of the Legislative Bureau, Dr. Kenjiro Ume, to examine the same. But no tangible result was accomplished because of the violent opposition raised by bureaucrats and conservative members of the House of Peers (Gozo Noma, *Rippo Ichigen Ron* [Tokyo, 1927], II, 372–373).

articles were added to the Imperial House Law on February 11, 1907, and one on November 28, 1918.²⁴

A question may be raised here as to the relative position of the Constitution and the Imperial House Law. A majority of jurists agree that the Constitution stands above the Imperial House Law, and in consequence, an amendment to the Imperial House Law may not affect the Constitution, whereas under Articles II, XVII, and LXXIV of the Constitution, the Imperial House Law may be radically modified. On the other hand, it is equally evident that the Imperial House Law may not be modified by ordinary laws or imperial ordinances. Hence, the Imperial House Law stands between laws and the Constitution.²⁵

²⁴ Minobe, *Kempo Seigi*, pp. 728–733.

²⁵ Cf. Ichimura, *Teikoku Kempo Ron*, pp. 253–266; also Minobe, *Kempo Satsuyo*, p. 107.

Chapter II

THE IMPERIAL THRONE, THE LORD PRIVY SEAL AND THE GENRO

THE EMPEROR AND THE THRONE

BARON HOZUMI, the late president of the Privy Council and a leading jurist, once defined the fundamental principle of Japanese constitutional system as theocratico-patriarchal constitutionalism.¹ Indeed, the most characteristic feature of her national polity is that the emperor reigns over and governs the state as the head of the vast Japanese family. This inherited power of the imperial throne is expressly confirmed in the first article of the Constitution which declares that “the Emperor of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.”² The emperor, to whom the Constitution attributes sacredness and inviolability,³ is the symbol of national unity.⁴

¹ “The Emperor holds the sovereign power, not as his own inherent right, but as an inheritance from his Divine Ancestor. The government is, therefore, *theocratical*. The Emperor rules over the country as the supreme head of the vast family of the Japanese nation. The government is, therefore, *patriarchal*. The Emperor exercises the sovereign power according to the Constitution, which is based on the most advanced principles of modern constitutionalism. The government is, therefore, *constitutional*. In other words, the fundamental principle of the Japanese government is *theocratico-patriarchal constitutionalism*” (*Ancestor-Worship and Japanese Law* [Tokyo, 1901], pp. 87–88).

² A leading liberal, Yukio Ozaki, M.P., aptly states this point as follows: “The sovereign has no mind of his own; the mind of the people is his mind, and on this principle our successive Emperors have acted. It implies the guiding of, as well as acting upon, the sentiments of the people” (*Voice of Japanese Democracy* [Tokyo, 1918], p. 11). Cf. Prince Ito, *Commentaries on the Constitution of the Empire of Japan* (Tokyo, 1889), p. 205; Minobe? *Kempo Seigi*, pp. 65–76; Y. Hozumi, *Kempo Teiyo*, I, 183–188.

³ Constitution, Art. II. Commenting upon this article, Prince Ito says: “Not only shall there be no irreverence for the Emperor’s person, but also shall He not be made a topic of derogatory comment nor one of discussion” (*Commentaries*, p. 6).

The distinction which exists between the king and the crown in the practice of the British Constitution applies in some measure to Japan. Thus, with the establishment of constitutional government in 1889, important restrictions have been placed upon the emperor in his exercise of the prerogatives of the throne.

THE SUCCESSION TO THE THRONE

The throne never dies. It is a hereditary institution whose order of succession is regulated by the Imperial House Law, promulgated by Emperor Meiji at the same time with the Constitution. The principle adopted is that of primogeniture.⁵ Unlike the British system, the Imperial Diet is without power to participate in its amendment.

When the emperor is a minor or when he is prevented by some permanent cause from personally governing the state, a regency is instituted, with the advice of the Imperial Family Council and with that of the Privy Council, to exercise the prerogatives of the throne in the name of the emperor.⁶ Here again the Diet is denied a voice.⁷

Though there is no express provision either in the Constitution or the Imperial House Law concerning temporary incapacity of the emperor to exercise his powers, on account of sickness, travel abroad, or other causes, leading jurists are divided upon the constitutionality of

Minobe holds that this inviolability implies that: (1) no disrespectful act may be done towards him; (2) no political responsibility in the exercise of his imperial prerogatives, minister of imperial household assuming responsibility for imperial household affairs; (3) he is not accountable to laws for his private conduct; and (4) the emperor may not be dethroned under any circumstances. The only exception to this general principle of non-accountability of the emperor to ordinary laws of the state is a civil action concerning ordinary imperial property (*Kempo Setgi*, pp. 114–120). Cf. Ichimura, *Teikoku Kempo Ron*, pp. 290–304.

⁴ Cf. Uyesugi, *Kempo Jutsugi* (Tokyo, 1927), pp. 97–98.

⁵ Constitution, Art. II; Imperial House Law, Art. I. Cf. Minobe, *Kempo Satsuyo* (1932), pp. 211–221.

⁶ Constitution, Art. XVII; Imperial House Law, Art. XIX. The only limitation placed upon regency is that neither the Constitution nor the Imperial House Law may be amended during the period of a regency (Constitution, Art. LXXV). For further discussion on the institution of regency, see Shimizu, *Teikoku Koho Taii* (Tokyo, 1926), pp. 116–131. Cf. Ichimura, *op. cit.*, pp. 326–346; Minobe, *Kempo Seigi*, pp. 315–325; Uyesugi, *Kempo Jutsugi*, pp. 125–138; Y. Hozumi, *Kempo Teiyō*, I, 250–262.

⁷ Prince Ito opposed a parliamentary participation in the institution of a regency on the ground that it would tend to bring about the degradation of the Imperial Family (*Commentaries*, p. 33).

entrusting to some member of the Imperial Family the exercise of the imperial prerogatives within certain limits.⁸

SOVEREIGNTY AND THE THRONE

On the constitutional position of the emperor, students of Japanese law hold two conflicting theories.⁹ The question of the location of the sovereignty of the state constitutes the bone of controversy between the two schools. The conservative school, led by Prince Ito, contends for imperial absolutism, holding that the sovereignty resides in the emperor, while the liberal school argues for the limited character of the emperor's prerogatives, holding that the sovereignty of the state resides in the state and that the emperor is an organ of the state.

Thus the defenders of the conservative school maintain that the emperor granted the Constitution of 1889 as a benevolent sovereign to his subjects and not as a concession to the demands of the people, that in the exercise of his inherited powers the emperor receives no restrictions by the constitution of his own making, and that, rightly interpreted, it says nothing concerning the rights of the subjects. This school, upholding the doctrine of imperial absolutism, even denies the representative character of the Diet.¹⁰ On the other hand, the expounders of the liberal school, led by Professor Minobe, emphasize the universality of the basic principles of constitutional government. In support of the limited character of imperial prerogatives in the exercise of the rights of sovereignty, they point out that (1) the constitutional provision for the exercise of imperial prerogatives with responsible advice of ministers of state, (2) the parliamentary consent to law,

⁸ Minobe (*Kempo Satsuyo*, pp. 282–284) supports its constitutionality, while Shimizu (*Kempo Hen*, pp. 623–635) and Ichimura (*Teikoku Kempo Ron*, pp. 346–350) deny it.

⁹ The conservative school was founded by Professor Yatsuka Hozumi, and succeeded by Professor Shimizu, Uyesugi, and Kakei, while the liberal school was founded by Professor Minobe and supported by Professor Ichimura, Sasaki, and others. Most outstanding of the controversies on the interpretation of the Constitution was the one between Professors Uyesugi and Minobe of the Imperial University of Tokyo. For the views of Minobe, Uyesugi, Hozumi, Ichimura, Inouye, Oda, Ukita, see Hoshijima (ed.), *Saikin Kempo Ron* (Tokyo, 1927), *passim*.

¹⁰ For instance, Dr. Y. Hozumi holds that the sovereignty which resides in the position of the emperor is inherent, absolute, complete, one, permanent, and without limitations, and that the existence of the state of Japan is dependent upon the existence of the sovereignty of the emperor, and boldly declares that “the Emperor is the State” (*Kempo Teiyo*, I, 213, 220–221).

budget, and taxation, and (3) the exercise of the judicial power through the court are the outstanding instances of express limitations placed upon the emperor in exercising the prerogatives of the throne by the Constitution itself.¹¹

THE NATURE AND SCOPE OF THE PREROGATIVES OF THE THRONE¹²

In a broad sense, the prerogatives of the throne are co-extensive with the sovereignty of the state and include the legislative power as well as the judicial power of the state, not to speak of the broad executive power. However, when used in a more limited sense, it refers to the autocratic power of the emperor as the head of the state, and includes only those powers to be exercised without parliamentary consent and not delegated to independent organs. In other words, it excludes the legislative power in its formal sense and also those powers exercised by independent organs such as the ordinary courts of law, the Administrative Court, and the Board of Audit.¹³

Regarding the scope of the prerogatives, distinction should be made between the legislative, judicial, and executive powers. In view of the constitutional stipulations for the exercise of the legislative power with the consent of the Diet and that of the judicial power by the courts of law, the imperial prerogatives in these two spheres should be strictly construed. On the other hand, there is no reason to restrict the executive prerogatives of the emperor to those enumerated in the Constitution, since administrative acts, in the nature of the case, are executed independent of the Diet or the courts.¹⁴ In exercising this broad executive power, the emperor always acts upon the advice of the ministers of state who assume the responsibility therefor. Consequently,

¹¹ For a systematic exposition of the functional theory of the emperor, see Minobe, *Kempo Seigi* (Tokyo, 1928) *passim*.

¹² Minobe, *Kempo Seigi*, pp. 163–168. Cf. Y. Hozumi, *Kempo Teiyo*, II, 620–683; Uyesugi, *Kempo Jutsugi*, pp. 605–645; Shimizu, *Kempo Hen*, pp. 1159–1178.

¹³ Cf. Minobe, *Kempo Seigi*, pp. 163 ff.; also Sasaki, *Nihon Kempo Yoron* (1931), pp. 323–329.

¹⁴ Minobe, *Kempo Seigi*, pp. 167–168. Justice Shimizu places judicature and administration outside the scope of imperial prerogatives (*Kempo Hen*, p. 1170). Uyesugi defines the prerogatives as comprehending residual powers, that is, those powers whose modes of exercise are not expressly provided for in the Constitution (*Kempo Jutsugi*, p. 610 ff).

it falls within the constitutional liberty of the people to comment upon and to criticize such matters.

We may discuss the prerogatives under the following five categories: (1) imperial household affairs, (2) supreme command of the army and navy, (3) ritualistic affairs, (4) conferment of honors, and (5) general affairs of state.¹⁵

PREROGATIVES OVER IMPERIAL HOUSEHOLD AFFAIRS¹⁶

The prerogatives over imperial household affairs are clearly separated from those over general affairs of state and exercised by the emperor as the patriarch of the Imperial Family with the advice of the minister of the imperial household, who is independent of the cabinet.¹⁷ Prior to the establishment of constitutional government, however, no clear distinction was recognized between dynastic matters and general affairs of state, and consequently, the property of the Imperial Court was not separated from that of the state. With the establishment of constitutional government, however, imperial household affairs were placed beyond the reach of the Diet, and the separation was drawn between the affairs of the Court and those of the state. And yet, within the prerogatives over the imperial household are included matters which are not, strictly speaking, internal affairs of the Court but of vital concern to the people and to the state as well, such as those relating to the succession to the throne, institution of regency, and to the Imperial House Law. Over those matters bearing upon the general affairs of state, the cabinet is consulted, but the Diet has no means of questioning responsibility for such consultation.

The emperor exercises his prerogatives over imperial household affairs upon advice of the minister of the imperial household, who, unlike the cabinet, cannot be questioned or made subject of

¹⁵ Minobe, *Kempo Satsuyo*, pp. 221–223 ff. Cf. Shimizu, *Kempo Hen*, pp. 1171–1288; Ichimura, *Teikoku Kempo Ron*, pp. 790–896. Sasaki enumerates thirty-five specific prerogatives under the Constitution (*Nihon Kempo Yoron*, pp. 329–335).

¹⁶ Minobe, *Kempo Satsuyo*, pp. 246–273.

¹⁷ Ministers of state do not assume responsibility for imperial household affairs and refuse to make reply to interpellations in the Diet. For the well-known case of Minister Tanaka of the imperial household during the Twenty-fifth Diet see *Teikoku Gikaishi*, VII, 11, 1175–1176, 1197–1198, 1300.

parliamentary debate. The emperor is further assisted by the Imperial Family Council, the Privy Council as well as the Lord Privy Seal.

PREROGATIVES OVER THE SUPREME COMMAND¹⁸

The imperial prerogatives over military affairs may be divided into (1) the prerogative over supreme command of the army and navy, and (2) the prerogative over the administration of the nation's armed forces. The former prerogative is recognized in Article XI, while the latter is in Article XII of the Constitution. The *tosui taiken*, or prerogative over supreme command, comprehends the power of using the forces for the protection of the state from attack both from without and from within, and other powers directly relating to military operations. On the other hand, the *hensei taiken*, or prerogative over the organization and administration of armed forces, includes the organization of military divisions and of fleets, and all matters relating to military districts and sub-districts, to the storing up and distribution of arms, to the education of military and naval men, to inspections, to discipline, to modes of salutes, to styles of uniforms, to guards, to fortifications, to naval defenses, to naval ports and to preparations for military and naval expeditions, and also to the fixing of the number of men to be recruited each year.¹⁹

Though both the power of supreme military command and that of administration of the forces belong to the prerogatives of the emperor, the principle of the separation of military command from that of military administration has been recognized since the establishment of the cabinet system in 1885.²⁰ Under the existing system, the supreme military command is exercised by the emperor, not through the cabinet, but through the chiefs of general staffs of the army and navy, who are directly responsible to the emperor. From the time of the promulgation of the Constitution, the constitutionality of the existing military

¹⁸ The view propounded by Minobe that the supreme military command is a prerogative of the emperor as generalissimo and not as the head of the state is sharply challenged by Sasaki. Cf. articles by Minobe and Sasaki in *Kaizo*, XII, Nos. 6, 7 (June, July, 1930), pp. 19–26, 104–126.

¹⁹ Prince Ito, *Commentaries*, p. 26.

²⁰ Minobe in *Kaizo*, XII, No. 6 (June, 1930), p. 21.

organization had never been seriously questioned by constitutional jurists.²¹

Thus, the doctrine of the independence of the supreme command of general affairs of state has been recognized and practiced since the establishment of the general staff in 1878, and the subsequent development of political institutions, notably the establishment of the cabinet in 1885, the promulgation of the Constitution in 1889, and the gradual development of cabinet responsibility for state affairs, has not only confirmed this independence but has had the tendency even to enlarge its scope. The system finds no express sanction in the written Constitution. On the contrary, it is to be observed that the present system constitutes an important exception to, if not a violation of, the basic principles of constitutional government,²² and that a new system of civilian control of military affairs might be instituted without amending the Constitution.²³ Moreover, the imperial prerogative over the supreme command, being outside the domain of ministerial responsibility, does not permit parliamentary interference in its exercise; and the distinction between the prerogative over the supreme command and that over the organization of the armed forces being juridical, the demarcation between them has been left to practice and tradition.

That the existing system violates the fundamental principles of responsible government, and that certain limits upon the scope of this power should be defined, goes without saying. Thus, the exercise of the prerogative over the supreme command should be confined to the command as well as the direction of military operations, the determination of internal organization of the forces, the subject of budgetary limitations, the instruction and education of those within the service as well as volunteers, and the internal discipline of the forces.²⁴

²¹ In reply to a question asked in the Budget Committee of the House of Peers in the Fifty-sixth Diet, Prime Minister Tanaka confirmed the independence of the prerogative over supreme command of that over state affairs (*Kwampo gogai*, March 16, 1929, p. 446). Compare Ito, *Commentaries*, p. 25; Minobe, *Kempo Seigi*, pp. 250–256; Ichimura, *Teikoku Kempo Ron*, pp. 586–865.

²² On this point see Dr. Yoshino, *Niju Seifu to Iaku Joso* (Tokyo, 1922), *passim*.

²³ Minobe, *Kempo Seigi*, p. 255; Sasaki, *Nihon Kempo Yoron*, p. 687.

²⁴ Minobe, *Kempo Satsuyo* (1932), pp. 325–326.

In exercising this prerogative over supreme command, the emperor is assisted by organs which are separate from, and independent of, those which advise the throne over general affairs of state. Hence, in Japanese constitutional practice, His Majesty's government and His Majesty's high command are independent of each other. Over the high command, the emperor is assisted by the minister of war, minister of navy, chief of general staff, chief of naval general staff, and the chief aid-de-camp to the emperor.²⁵ Moreover, as advisory organs to the emperor on important military affairs, the *Gensui-fu* (board of field marshals and fleet admirals)²⁶ and the *Gunji Sangiin* (supreme war council)²⁷ were established. In time of war, the supreme military command is concentrated in the *Senji Daihonei*, or Imperial Headquarters.²⁸

The general staffs are charged with the duty of drawing up a program for national defense and military operations. Such program for national defense is reported directly to the emperor by the chief of army general staff (in case of land defense) or the chief of naval general staff (in case of naval defense). When the matter is of sufficient importance, it may be submitted to the deliberation of the Board of Field Marshals and Fleet Admirals, or to the Supreme War Council, or to both. After an imperial sanction has been given, the matter is referred to the war minister or to the navy minister for execution.²⁹ The *Gensui-fu*³⁰ and *Gunji Sangiin*³¹ are both advisory organs to the emperor. Only matters of vital importance are referred to the deliberation of these bodies for advice. The Supreme War Council corresponds to the Privy Council on civil affairs and consists of (1) field marshals and fleet admirals, (2) minister of war, (3) minister of navy, (4) chief of general staff, (5) chief of naval general staff, and (6) specially appointed war councilors.³²

²⁵ *Op. cit.*, p. 330. For further discussion on this point, see Chap. III, *infra*.

²⁶ Imperial Rescript, Jan. 20, 1898, and also Imperial Ordinance No. 5, 1898 (Jan. 20, 1898). Texts in *Genko Horei Shuran* (1927), Vol. 1, Bk. III, p. 42.

²⁷ *Gunji Sangiin Jorei* (Imperial Ordinance No. 294, 1903). Issued on Dec. 28, 1903. Text in *ibid.*, Vol. 1, Bk. III, p. 42.

²⁸ *Senji Daihonei Jorei* (Imperial Ordinance No. 293, 1903). Issued on Dec. 23, 1903. Text in *ibid.*, Vol. 1, Bk. III, p. 42.

²⁹ Strictly speaking, general staffs are planning boards and not of execution or administration. However, in practice, the staffs have extended their activities into military administration.

³⁰ In Sept., 1929, the board consisted of one naval member and three army members (*Jiji Nenkan* [1930], p. 105).

³¹ In Sept., 1929, supreme war councilors numbered thirteen, of whom eight were army members and five were naval members (*Jiji Nenkan* [1930], p. 165).

³² *Cf.* Minobe, *Kempo Satsuyo* (Tokyo, 1932), p. 332.

A measure that concerns the national defense as a whole is submitted to the deliberation of this war council as a whole, but if the matter in question concerns only the naval defense, only the naval members of the Council deliberate upon it, while only army members are consulted in case of land defense. The petition to the emperor for submission of a measure to the deliberation of these bodies may be made either by the chiefs of staff, minister of war, or the navy minister. In practice, however, it is made upon agreement between the minister and the chief concerned.

PREROGATIVES OVER RITUALISTIC AFFAIRS

The rituals and worship which long constituted important activities of the government in Japan³³ are now performed by the emperor personally or by a member of the Imperial Family or by ritualistic officials. This prerogative of the emperor over ritualistic affairs is placed outside the domain of cabinet responsibility.³⁴

THE THRONE, AND THE “FOUNTAIN OF HONOR”

Even under the Tokugawa regime the emperor retained this prerogative of conferring honors, and is expressly recognized in the Constitution.³⁵ This prerogative is exercised with the advice of either the minister of the imperial household or the director of the Bureau of Decorations³⁶ and placed beyond the scope of ministerial responsibility.

PREROGATIVES OVER GENERAL AFFAIRS OF STATE

We have already examined elsewhere the nature and scope of the prerogative of the throne over state affairs and have observed that it comprehends the legislative, the executive, and the judicial powers of the state.

³³ Cf. Y. Hozumi, *Ancestor-Worship and Japanese Law*, pp. 1–76.

³⁴ Minobe, *Kempo Satsuyo*, pp. 240–243.

³⁵ Art. XV.

³⁶ *Koshikirei*, Arts. XVI–XXI. Cf. Minobe, *Kempo Seigi*, pp. 288–307; Prince Ito, *Commentaries*, pp. 29–30; Ichimura, *Teikoku Kempo Ron*, pp. 886–893.

Under the legislative prerogative, the emperor convokes, opens, closes, and prorogues the Diet, and dissolves the Lower House,³⁷ subject to the limitation that the Diet must be summoned at least once a year for a period of three months. Thus, the Diet is denied the power to meet upon its own initiative. Moreover, the emperor causes the cabinet to initiate bills;³⁸ he sanctions laws, and orders the same to be promulgated and executed.³⁹ His sanction, though never denied since the establishment of the Diet, is the necessary condition precedent to the making of laws.

The throne is not only an integral part in the law-making process but it possesses a large executive power, extending over the organization of various administrative establishments, appointment of civil and military officers, foreign relations, martial law, pardoning power, colonial administration, and other powers. More important of these powers shall receive our attention.

Under Article X of the Constitution, the emperor determines the organization of the different branches of the administration, the salaries of all civil and military officers, and the conditions of the service.⁴⁰ In the exercise of this organization prerogative, the emperor receives restrictions under the Constitution, the laws, and the budgetary power of the Diet. The Constitution provides for statutory determination of the organization of certain organs of government, placing them beyond the reach of the ordinance power of the emperor. Hence, the organization of the ordinary courts of law, the Administrative Court, the Board of Audit are to be determined only by laws, while the ministers of state and the Privy Council cannot be abolished or deprived of their constitutional powers. Moreover, the budgetary power of the Imperial Diet may seriously affect the operation of this prerogative. The Diet, for instance, by refusing to appropriate necessary funds, may render a new organization non-operative. In practice, therefore, when the establishment of an organization requires new appropriations, the cabinet usually seeks the necessary parliamentary consent to such appropriations prior to its actual establishment. In case of an urgent

³⁷ Constitution, Art. VII.

³⁸ *Ibid.*, Art. LVII.

³⁹ *Ibid.*, Art. XII.

⁴⁰ Compare the author's discussion upon the Japanese civil service in White, *The Civil Service in the Modern State* (Chicago, the University of Chicago Press, 1930), pp. 515-555.

necessity, however, the necessary expenditures may be provided for out of the reserve funds or other “expenditures over the budget,” but by subsequent parliamentary reduction its abolition may be forced. The appointing prerogative also receives like limitations.

The broad scope of the diplomatic prerogative of the throne may be observed from the sweeping language employed in the Constitution. Thus, Article XIII of the fundamental law provides that “the Emperor declares war, makes peace and concludes treaties.” Unlike the practice in other constitutional governments, no formal restrictions are placed upon the foreign relations power of the emperor. In Part II and in Part III, we shall observe in detail the nature, scope and operation of this prerogative so sweepingly stated in the organic law of the land.

The judicial prerogative of the throne is provided in the Constitution as follows: “The Judicature shall be exercised by the Courts of law according to law, in the name of the emperor.”⁴¹ We shall discuss this subject in our chapter on the judiciary.

THE LORD PRIVY SEAL

The Lord Privy Seal is an organ of the imperial household.⁴² Being closest to the throne, this office becomes important in state affairs as well. Presumably, the most important function of this office is to advise the throne in the formation of a new cabinet, but in practice this is done by the *genro*.⁴³

THE GENRO OR ELDER STATESMEN

The body of elder statesmen called *genro* is an extra-constitutional, extra-legal institution. This body, more or less informally constituted toward the latter part of the Meiji Era, has no status within the Constitution, laws, or ordinances.⁴⁴ Yet there gradually developed the custom that

⁴¹ Art. LVII.

⁴² Baba, *Kempo Seiji no Riron to Jissai*, pp. 268–270. For the organization of the office of the Lord Privy Seal, see Imperial House Ordinance No. 4, 1907 (Nov. 1, 1907).

⁴³ Cf. Minobe, *Kempo Satsuyo* (1932), p. 312.

⁴⁴ With the formation of Yamagata cabinet in 1898, *genro* as an institution began to be recognized. *The Tokyo Nichi Nichi*, in its leading article (Nov. 5, 1898), cited Ito, Yamagata, Oyama, Saigo, Kuroda, Matsukata, and Inouye as comprising the *genro*. Cf. *Kokka Gakkai Zasshi*, XXXVIII, No. 4 (April, 1924), p. 611.

those statesmen who played leading rôles in the Restoration of 1868 and in the early period of the constitutional history of Japan⁴⁵ are to be consulted by the emperor on matters of paramount importance, both domestic and foreign, such as the formation of a new cabinet, declaration of war, conclusion of peace, or negotiation of important international commitments.⁴⁶

The most important function of the genro is to be consulted in the formation of a new cabinet. This practice of recommending a successor to the retiring prime minister started as early as 1892.⁴⁷ And the recommendation of the genro has always been followed by the emperor in appointing a new premier.⁴⁸ The request for opinion of the genro on the selection of a new prime minister is formally made upon the advice of the Lord Privy Seal, usually in cooperation with the minister of the imperial household, while on other matters, upon that of the cabinet.

At present,⁴⁹ Prince Saionji is the sole remaining genro. Various views are entertained as to the fate of the institution after Prince Saionji's death. The present genro is known to favor the disappearance of this extra-legal institution. The sole function of the genro having become that of recommending a new prime minister, the establishment of a sound system of parliamentary responsibility of the ministry

⁴⁵ Until the formation of the Katsura cabinet in June, 1901, the office of prime minister was always occupied by a genro. Cf. *Kokka Gakkai Zasshi*, XXXVIII, No. 5 (May, 1924), p. 781; also *Taiyo*, XXXIII, No. 13 (Nov., 1927), p. 86.

⁴⁶ On several occasions, the genro was made a subject of parliamentary discussion. For instance, at the outset of the Twenty-fourth Diet (Jan. 23, 1908), Representative Sawa made a scathing attack upon the body, declaring it a useless political relic of the *régime ancien* (*Teikoku Gikaishi*, VII, 203–204). All the cabinets have uniformly denied encroachment by the genro in the administration. Thus, in reply to an interpellation in the House Budget Committee of the Thirty-third Diet (June 24, 1914), Prime Minister Okuma vigorously defended his constitutional responsibility and flatly denied any interference by the genro (*Dai Sanjusankai Teikoku Gikai Shugiin Yosai Inkaigiroku*, pp. 18–19).

⁴⁷ The following statesmen have been included among the genro: Ito, Yamagata, Inouye, Kuroda, Yamada, Oyama, Saigo, Matsukata, Katsura, and Saionji. With the exception of Prince Saionji, all the elder statesmen belong to *Choshu* or *Satsuma* clan (*Kokka Gakkai Zasshi*, XXXVIII, No. 5 [May, 1924], p. 806).

⁴⁸ Only two instances in which a retiring prime minister recommended his successor are known in Japan. The first instance was the recommendation of Marquis Okuma by Prince Ito in June, 1898, and the last instance was that of Count Komei Kato by Marquis Okuma in Sept., 1916. The genro accepted the Ito recommendation but ignored that of Okuma. Ito (ed.), *Kato Komei*, II, 62–64.

⁴⁹ March, 1932,

will render the genro a “political relic.” However, under the present stage of constitutional development in Japan, political fortunes of a cabinet depending upon the wishes and whims of the Privy Council, the Peers, military and naval cliques, and other extra-parliamentary forces, it is difficult to imagine a sudden disappearance of the genro as an institution.

To abolish the genro is to place upon the shoulders of the Lord Privy Seal and of the minister of the imperial household too great a political responsibility to be consonant with the principles of constitutional government. Hence, an institution of quasi-genro is likely to be developed, and this new body may be composed of the Lord Privy Seal, the minister of the imperial household, president of the Privy Council, and the two presidents of both houses of the Diet until a parliamentary system has been more firmly established in the Island Empire.⁵⁰

⁵⁰ Prince Ito advocated the transfer of this function to the Privy Council (Hiratsuka [ed.], *Ito Hirobumi Hiroku*, 1929, pp. 61–63).

Chapter III

THE CABINET

THE WORD “CABINET” is nowhere found in the Constitution. Yet there exists, as a matter of fact, a collective body composed of departmental ministers under the presidency of a minister president for the purpose of initiating, directing, and carrying out the general policies of the government and to serve as the channel through which the imperial prerogative over general affairs is placed in operation.¹ Established in 1885,² the cabinet has been the directing and guiding force in government, ensuring unity and harmony in administration.³ An attempt is made in this chapter to inquire into the structure, functions, and operation of this deliberative body, to ascertain its exact position in the constitutional system of Japan, a thorough understanding of which is indispensable to our inquiry into the conduct of foreign relations.

ORGANIZATION OF THE CABINET

When the system was first established in 1885, the cabinet consisted of a prime minister and nine departmental ministers,⁴ but it has

¹ Minobe, *Kempo Seigi*, pp. 510–512; Moriguchi, *Kensei no Genri to sono Unyo* (Tokyo, 1929), pp. 206–235.

² By Dajokan Notification No. 69, 1885 (Dec. 22, 1885), *dajo daijin* and other posts were abolished and minister president of state, minister of the imperial household, minister of state for foreign affairs, finance, home affairs, war, navy, justice, education, agriculture, and commerce and communications were newly created (*Horei Zensho* [1885], p. 1044). On Dec. 23, 1885, an imperial rescript was issued by Emperor Meiji establishing a cabinet system, in response to a formal memorial praying for establishing the same by Prince Sanjo, the *dajo daijin* or the chancellor of state. For the texts of the imperial rescript and the memorial see *Horei Zensho* (1885), pp. 1–3.

³ Cf. Prince Sanjo’s memorial to the throne (quoted in Minobe, *Kempo Seigi*, pp. 521–522).

⁴ Ministers of state for foreign affairs, home affairs, finance, war, navy, justice, education, agriculture and commerce, and communications. Minister of the imperial household was not included (*Horei Zansho* [1885], p. 1044).

gradually been enlarged, and at present the prime minister and twelve departmental ministers comprise this body.⁵ The head of the cabinet is the premier, who maintains the unity of the cabinet, advises the throne on all affairs of state, exercises general supervision and control over all branches of the administration, and represents the cabinet in public affairs.⁶ Hence, with the exception of the war and navy ministers over military and naval affairs, other ministers usually advise the throne through the prime minister.⁷

FORMAL FUNCTIONS OF THE CABINET

Ministers of state, being charged with the responsibility of advising the throne on state affairs on the one hand, and of directing the administration of their respective departments on the other, the matters to be submitted to the deliberation of the cabinet include items of both categories. The ordinance concerning the organization of the cabinet stipulates the submission of following matters to the cabinet council: (1) drafts of laws, estimates, and accounts; (2) treaties and important international questions; (3) imperial ordinances concerning administrative organization or execution of regulations and laws; (4) jurisdictional disputes among departments; (5) petitions from the people which may be handed down from the throne or submitted by the Diet; (6) expenditures apart from the budget; (7) appointments, promotions, and removals of *Chokuninkan* officials and local governors; and (8) other matters coming within the domain of the business of departments, involving questions of high policy of the administration as a whole.⁸ Furthermore, a minister may submit any matter bearing upon his official functions to the minister president for consideration by the cabinet.⁹

⁵ In 1896, *Takushokumu-sho*, or Department of Colonial Affairs, was established, but was abolished the following year. In 1920 the Department of Railways was established; in 1925 the Department of Agriculture and Commerce was replaced by the new Department of Agriculture and Forestry, and of Commerce and Industry. In 1929 the Department of Overseas Affairs was established. At present the cabinet is composed of a prime minister and twelve departmental ministers (Minobe, *Kempo Satsuyo* [1932], p. 294).

⁶ *Naikaku Kansei*, Art. 11.

⁷ Minobe, *Kempo Satsuyo*, pp. 295–299.

⁸ *Naikaku Kansei*, Art. V.

⁹ *Op. cit.*, Art. VI. Cf. Minobe, *Kempo Seigi* (1928), pp. 524–525; also Sasaki, *Nihon Kempo Yoron* (1931), p. 392.

The above enumeration should not be regarded as exhaustive and placing limitations upon matters which may come before cabinet meetings. In fact, any matter, either upon the request of cabinet ministers or upon the initiative of the prime minister, may be considered in the cabinet.¹⁰

The cabinet meets ordinarily once a week, while special meetings may be called at any time by the premier. The meetings are usually held at the official residence of the prime minister, but, while the Diet is in session, such meetings may be called in the cabinet chamber of the Diet Building. Moreover, informal conferences of several ministers concerned may be held before submitting a matter to a formal meeting of the cabinet.

The meetings are secret, and the members of the cabinet are bound by honor not to disclose anything that is said at the cabinet table, either in the Diet or out of it. Most of the cabinet deliberations relate to matters of general policy. Discussions are not followed by a vote save in exceptional cases. When it develops that a very wide difference of views exists among members of the cabinet, the matter is left open until some compromise is arrived at, as the cabinet must present an outward unanimity. Often the final decision is left to the premier.¹¹ During the early period, the emperor attended some meetings, but this practice has long been discontinued, to facilitate free discussions.

FORMATION OF A CABINET

When a ministry falls,¹² the emperor, upon recommendation of the genro, or elder statesmen, appoints a new prime minister and commands him to select his own cabinet, and the selection thus made is always accepted by the throne.¹³

¹⁰ Minobe, *Kempo Satsuyo* (1932), pp. 294–295.

¹¹ See the famous cabinet memorial to the throne, Dec. 24, 1889 (*Jiji Shimpō* [Jan. 16, 1890], p. 2).

¹² Professor Minobe enumerates the following six circumstances which may cause a downfall of a ministry: (1) opposition of the House of Representatives; (2) lack of harmony in the cabinet; (3) opposition of the House of Peers, Privy Council, or military or naval factions; (4) opposition of the public opinion; (5) defeat in elections, and (6) death of the prime minister (*Kempo Seigi*, p. 541). For a table showing the cabinet changes during 1885–1930, see *Jiji Nenkan* (1930), pp. 153–155.

¹³ Yamada in *Kokka Gakkai Zasshi*, XXXVIII, No. 5 (May, 1924), pp. 814–815.

In selecting his cabinet, the prime minister ostensibly has a free hand, but in practice his selection is restricted by practical considerations. The army and navy posts cannot be occupied by civilians, and by tradition the foreign minister has usually been selected from among career diplomats. Again he must give due considerations to various factions of his party, as well as those in the Upper House.

In the early period of Japanese parliamentary history, the prime ministers were always bureaucrats, having no organic connections with political parties. In fact, the framers of the Constitution warned against “party cabinets.” However, the first few years of experience with a hostile Diet convinced the more liberal statesmen of the practical necessity of cooperation with political parties to ensure a smooth working of the administration; and immediately after the Sino-Japanese War, Prince Ito allied himself with the *Jiyuto* party.¹⁴ This close “cooperation” between the cabinet and a major political party in the Lower House opened a way to the gradual evolution of party cabinet.

THE RESPONSIBILITY OF THE CABINET

Article LV of the Constitution declares that: “The respective Ministers of State shall give their advice to the Emperor and be held responsible for it.”¹⁵ We may inquire into the significance of this express fundamental law of the land under three heads: (1) for what are the ministers of state responsible; (2) to whom are they responsible, and (3) the nature of such responsibility,

We have seen elsewhere that the emperor is inviolable, that he cannot be held responsible for any of his acts, that he exercises his prerogatives only upon the responsible advice of competent organs of the state, and that it is only upon the advice of a minister of state that the imperial prerogative over general affairs of state may be exercised.

¹⁴ Kudo, *Teikoku Gikaishi*, I, 468–471.

¹⁵ Prince Ito summarizes the Japanese cabinet system as follows: “*First*, that the Ministers of State are charged with the duty of giving advice to the Emperor, which is their proper function, and that they are not held responsible on His behalf; *secondly*, that Ministers are directly responsible to the Emperor and indirectly so to the people; *thirdly*, that it is the Sovereign and not the people that can decide as to the responsibility of Ministers, because the Sovereign possesses the rights of sovereignty of the State; *fourthly*, that the responsibility for Ministers is a political one and has no relation to criminal or civil responsibility, nor can it conflict there-with neither can the one affect the other” (*Commentaries*, p. 93).

The scope of ministerial responsibility as stipulated in this article is co-extensive with the imperial prerogative over state affairs. Accordingly, the ministers cannot evade their constitutional responsibility, even when the advice of the Privy Council or the *genro* has been sought by the emperor.

On the juristic significance of this article there is unanimity among constitutional jurists. They are one in holding that, in legal principles, the ministers are directly responsible to the emperor and that no other organ of the state may question their legal responsibility or remove them from office. With the gradual development of parliamentary government in Japan, however, it has come to signify primarily their responsibility to the Diet. That the ministerial responsibility provided for in the Constitution refers to the legislative control of the administration may reasonably be implied from the constitutional recognition of the means through which the Diet exercises this power as the most important organ of control of the executive through parliamentary interpellations and asking questions, passing resolutions, presenting addresses to the throne, and representations to the government, voting approbations of emergency imperial ordinance, as well as its budgetary powers. In further support of the doctrine of political responsibility we may cite the well-established practice that, when a resolution of lack of confidence is voted in the Lower House, the cabinet must either resign or dissolve the House to carry the question to the electorate.¹⁶

On the question of whether the ministerial responsibility as stipulated in the Constitution is collective or individual there is no unanimity among jurists nor in practice. The conservative jurists, headed by Hozumi,¹⁷ Uyesugi,¹⁸ and Shimizu,¹⁹ argue for the doctrine of individual responsibility, holding that to recognize a contrary doctrine would be to admit the principle of parliamentary government of the British type. They contend that to admit this principle would be contrary to the spirit of the Constitution and the fundamental nature of national polity, reducing the emperor to a titular headship of the state. On the other hand, the more liberal jurists, headed by Minobe,²⁰ Ichimura,²¹ and

¹⁶ Minobe, *Kempo Satsuyo*, pp. 304–311.

¹⁷ *Kempo Teiyo*, II, 549–556.

¹⁸ *Kempo Jutsugi*, pp. 646–656.

¹⁹ *Kempo Hen*, pp. 646–649, 688–727.

²⁰ *Kempo Seigi*, p. 552.

²¹ *Teikoku Kempo Ron*, p. 632.

Baba,²² support the collective doctrine for all matters which concern the cabinet as a whole and are submitted to its deliberations, and argue for individual responsibility only for those matters which fall within the exclusive jurisdiction of a department.²³

Closely related to the subject of ministerial responsibility is the constitutional requirement that all laws, Imperial ordinances and rescripts of whatever character that relate to the affairs of state must bear the countersignature of a minister of state.²⁴ A ministerial responsibility, however, does not arise from the fact of countersigning, but from that of advising the throne.²⁵ The scope of the countersignature is coextensive with that of ministerial responsibility, and it is an external evidence of advising the emperor.²⁶ It naturally follows that a minister must be free to decline his counter-signature when he deems the subject matter to be contrary to the Constitution, the law, or to public interest, and that, should his advice be refused, he must be free to resign his post.²⁷

²² *Kempo Seigi no Riron to Jissai* (Tokyo, 1926), pp. 258–265.

²³ Prince Ito, the chief drafter of the Constitution, recognized the principle of collective responsibility for the general policies of the administration while upholding the doctrine of individual responsibility for matters coming within the scope of a particular department (*Commentaries*, pp. 94–96). Cf. Moriguchi, *op. cit.*, pp. 216–219.

²⁴ Constitution, Art. LV, Sec. II.

²⁵ Prince Ito, *Commentaries*, p. 96; Minobe, *Kempo Seigi*, p. 519; Hozumi, *Kempo Teiyo*, 11, 549–556; Uyesugi, *Kempo Jutsugi*, p. 674; Moriguchi, *op. cit.*, pp. 208–210.

²⁶ Therefore, matters relating to purely internal affairs of the Imperial Court, supreme command, conferment of honors and decorations, ritualistic affairs, and others beyond ministerial responsibility, do not require ministerial countersignature (Shimizu, *Kempo Hen*, pp. 656–669; Minobe, *Kempo Seigi*, p. 416).

²⁷ Justice Shimizu, however, holds a contrary view. He argues that a minister of state is not free to decline his countersignature on the ground of unconstitutionality or its being contrary to public interest since the emperor has the supreme power of interpreting the Constitution and the law as well as the ultimate authority to judge public interest (*Kempo Hen*, pp. 670–674). Uyesugi holds a similar view. He declares that a minister has no choice in attaching his countersignature when ordered to do so. Hence, in Uyesugi's opinion, ministerial responsibility is juridically independent of his countersignature (*Kempo Jutsugi*, pp. 675–677). In this, Uyesugi supports his teacher, Dr. Y. Hozumi (*Kempo Teiyo*, 11, 543–548).

THE DUAL CHARACTER OF THE CABINET

We have seen in foregoing pages that the chief functions of the cabinet are found in its formulation of general policies, its determination of the modes, in large measure, of the exercise of the authority vested in the throne, its formulation of legislative program, and its effective leadership in the Diet.

Probably one of the greatest obstacles against the establishment of a responsible government lies in the peculiar position the war and navy ministers enjoy in the cabinet of Japan. And the full import of this "dual cabinet" cannot be overemphasized in the workings of the Japanese constitutional system. This dualism constitutes an important exception to the general principle of collective responsibility of the cabinet.²⁸ Thus, the war and navy ministers play a dual rôle: one as heads of departments like other ministers, and the other which we designate under the term *iaku joso*, or direct access to the emperor without consultation or even knowledge of their cabinet colleagues.²⁹ Originally enjoyed only by the chiefs of general staffs of both services, it was gradually extended to these two ministers. Accordingly, under the present system, both chiefs of army and naval staffs and the war and navy ministers have direct access to the emperor on matters relating to the supreme command of the forces. The scope of this prerogative has been gradually enlarged, and now the precise demarcation between matters falling within *iaku joso* and those within state affairs is difficult to draw.³⁰

The qualifications required of the war and navy ministers constitute another hindrance to a sound development of cabinet responsibility. Though a prime minister is free in his choice of other ministers, his selection is restricted to a general or a lieutenant general for the war portfolio and to an admiral or vice-admiral for the navy

²⁸ Article VII of the organization of the cabinet provides: "With the exception of *gunki gunrei*, or matters relating to military secrecy and command, which, having been reported directly to His Majesty the emperor, may have been submitted to the cabinet for deliberation, the ministers of state for war and navy shall report to the minister president of state."

²⁹ See Yoshino, *Niju Seifu to Iaku Joso*, *passim*; also Dr. Nagao Ariga, "The Armed Forces in Japan," *Kokka Gakkai Zasshi*, June, July, 1900, Supplement, pp. 21-47.

³⁰ As a recent case illustrating this point we may cite the conflict between the cabinet and the chief of naval general staff in connection with the so-called Reed-Matsudaira compromise at the London Naval Conference of 1930. See Chap. XXVI, *infra*.

post.³¹ Should the military or the naval clique decline to furnish a qualified person for any cause whatever, a prime minister is unable to form his cabinet. Hence, under the present system of dualism, military or naval clique can prevent the formation of a cabinet, or wreck it after it is once formed.³²

The gradual encroachment of *iaku joso* upon the scope of cabinet responsibility has led to a popular demand for abolition of the present dualism by instituting a new system of civilian control of these posts.³³

³¹ Appended tables to *Rikugunsho Kansei* and *Kaigunsho Kansei*. Prince Ito, president of the Privy Council, declared in his report to the emperor as early as Sept. 15, 1891, that the system whereby military and naval officers fill the posts of war and navy departments was indispensable to place the supreme military and naval command beyond parliamentary interference and party politics and to maintain the principle of constitutional monarchy and to prevent gradual decline of imperial prerogatives (Hiratsuka [ed.], *Ito Hirobumi Hiroku*, pp. 113–116).

³² The second Saionji cabinet was pledged to a policy of retrenchment. However, General Uyehara, war minister, proposed at the cabinet meeting of Nov. 22, 1912, that two divisions be placed on garrison duty in Korea. The program of a military expansion had been adopted soon after the close of the Russo-Japanese War, and Uyehara's proposal had the firm backing of the military cliques, headed by Field Marshal Yamagata. The Saionji cabinet could not accede to the program, and at its extraordinary meeting held on Nov. 30 rejected Uyehara's program. War Minister Uyehara was received in audience by the emperor on Dec. 2, 1912, and reported to the throne the urgent necessity for army expansion, and denounced the action of the cabinet, and handed in his resignation directly to the emperor, instead of presenting it through the premier, Prince Saionji called on Yamagata for an "understanding," but to no avail. The army clique refused to supply any general or lieutenant general (in active list) for the post. Under the circumstances the Saionji cabinet had to resign, although it enjoyed the support of a majority in the Lower House (Kudo, *Taisho Kenseishi*, pp. 13–20). Saionji induced the navy minister, Admiral Saito, to resign with him. Therefore Prince Katsura could not obtain any admiral to serve as his navy minister, due to a "strike" of the naval clique. He appealed to the *genro*, and in desperation petitioned the emperor to issue an imperial edict to Admiral Saito to remain in post, Katsura won his navy minister, but in doing so he sacrificed his political career. His cabinet fell in less than two months (Hirota, *Naikaku Kotetsu Gojunenshi*, pp. 665–667). Popular demand for the liberalization of the qualifications for the war and navy ministers began to be heard on all sides (articles in *Chuo Koron*, No. 288, Feb., 1913, pp. 50–60, 60–67). To meet and to strike a blow at the army clique after fighting with the chief of general staff and war minister, Count Admiral Yamamoto succeeded in widening the qualifications to include those in reserve list. This resulted in the resignation of the war minister (Kudo, *Taisho Kenseishi*, p. 72). With the fall of the Yamamoto cabinet in 1914, Kiyoura was ordered by the emperor to form a cabinet, March 31, 1914. He succeeded in obtaining all cabinet ministers except the navy minister, Hence, he had to decline the task of forming a cabinet, on April 7, 1914 (*ibid.*, p. 96; *Teikoku Gikaishi*, IX, 786).

³³ The most outstanding work on this subject is Yoshino, *Niju Seifu to Iaku Joso* (Tokyo, 1922). Compare Baba, *Kempo Seiji no Riron to Jissai*, pp. 201–205; Captain Mizuno, "Liberalization of War and Navy Ministeries," *Chuo Koron*, No. 412 (Aug., 1922), pp. 84–91. For parliamentary discussions during the Forty-fifth Diet, see *Teikoku Gikaishi*, XIII, 655–660, 947–948, 1273–1283; Moriguchi, *op. cit.*, pp. 262–265.

That this dualism must be abolished to insure a smooth working of the cabinet there can be no doubt. To realize this far-reaching reorganization in constitutional mechanisms, Professor Yoshino, a well-known student of constitutional government, proposes the following reforms: (1) abolition of *gunrei* or the present system of military and naval ordinances; (2) abolition of the present qualifications for the war and navy posts; (3) reorganization of the general staffs, and (4) amendment of Article VII of the Constitution.³⁴

³⁴ Yoshino, *op. cit.*, p. 79.