CHAPTER IV.

THE MINISTERS OF STATE AND THE PRIVY COUNCIL.

The Ministers of State are charged with the duty of giving advice to the Emperor; they are to serve as media, through which the Imperial commands are conveyed, and are to execute administrative affairs. The Privy Councillors are to give their opinions on important matters of State in response to the Emperor's call therefor. They and the Ministers of State are the Emperor's most eminent assistants.

ARTICLE LV.

The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.

All Laws, Imperial Ordinances and Imperial Rescripts of whatever kind, that relate to the affairs of the State, require the countersignature of a Minister of State.

Every Minister of State shall, on the one hand, take part in the deliberations of the Cabinet, while, on the other, he shall have charge of the affairs of some Department of State, and shall have to bear his responsiblity in the affairs of State. These shall be dispatched through the medium of the Cabinet and

of the different Departments of State, and through no other medium whatever. The object of a constitutional government is, that the rights of sovereignty be exercised through the proper channel. In other words, the rights of sovereignty must be exercised with the assistance of the machinery provided for public representation and with that of the Ministers of State. Therefore, the Ministers of State have towards the Emperor, the duty of encouraging all that is proper and of discountenancing all that is improper; and when they fail to discharge this duty, they will not be able to release themselves from responsibility by pleading an Order of the Sovereign.

In ancient times, the great dignitaries of State called *Ō-omi* and *Ō-muraji** were charged with the duty of giving advice to the Emperor. A Rescript of the Emperor Kōtoku (645–654 A.D.) says:—"He that is the Sovereign of a country and that rules its people, would do well not to govern by himself alone: he should avail of the assistance of his functionaries." In the reign of the Emperor Tenchi (662–671 A.D.), the Council of State (*Daijō-kwan*) was first established, and after that, the control over affairs of State was confided to the Chancellor of the Empire (*Daijō-daijin*), to the Minister of the Left (*Sa-daijin*) and to the Minister of the Right (*U-daijin*); while the First Adviser of State (*Dai-nagon*)† took part in

* *Vide* foot note under Art. XI. (*Translator's note.*)

† It was his duty to serve as a medium, through which state affairs were to be brought to the notice of the *Kwambaku* (*vide* a following foot note). When the Ministers did not attend the court, he had to represent them in their functions. (*Translator's Note.*)

advising, and the Minister of the *Nakatsukasa-Shō* inspected and affixed his seal to Imperial Rescripts. Under the Council of State were placed eight Departments, viz:—the *Nakatsukasa-Shō*,[1] the *Shikibu-Shō*,[2] the *Jibu-Shō*,[3] the *Mimbu-Shō*,[4] the *Hyōbu-Shō*,[5] the

1. The *Nakatsukasa-Shō* had charge of the following matters:—(1) those relating to attendance upon the Emperor, to the giving of advice to Him on His personal matters, and to the assisting of Him in the maintenance of a proper dignity and in the observance of proper forms of etiquette; (2) those relating to the inspection and countersigning of drafts of Imperial Rescripts, and to the making of representations to the Emperor; (3) those relating to the issuing of Imperial Orders in time of war; (4) those relating to the reception of addresses to the Emperor; (5) those relating to the compilation of the history of the country; (6) those relating to the gazetteer and the personal status of Imperial Princesses of from the second to the fourth generation, and of the maids of honour and other court ladies; (7) those relating to the submission to the Emperor for His inspection of the census of the population in the various provinces, of the accounts of taxes to be levied, and the lists of the priests and nuns in the same; (8) those relating to the Grand Empress Dowager, the Empress Dowager, and the Empress; (9) those relating to Imperial archives; (10) those relating to the annual expenditure of the Court and to various articles to be provided for the use of the Imperial family; (11) those relating to astronomical calculations and the arrangement of the calendar; (12) those relating to pictorial artists; (13) those relating to medicaments to be supplied to the Emperor and the medical advice to be given Him; and (14) those relating to the maintenance of order in the palace.

2. The *Shikibu-Shō* had charge of the following matters:—(1) those relating to the keeping of the lists of civil officers; (2) those relating to appointment to office and to rank, and to the rewarding of meritorious services; (3) those relating to the superintendance of schools and of civil examinations; (4) those relating to the appointment of stewards in the houses of Imperial Princes and in those of officials of and above the 3rd grade of rank; (5) those relating to pensions of all kinds and to donations; and (6) those relating to the order of precedence of the various officials at the time of congratulatory occasions and of festivals.

3. The *Jibu-Shō* had charge of the following matters:— (1) those relating to the names of officials and to the succession and marriage of officials of and above the 5th grade of rank; (2) those relating to auspicious omens; (3) those relating to demises, funerals, and the granting of posthumous rank to a deceased person or of donations of money to his family; (4) those relating to the anniversaries of the demise of the late Emperor, and to the recording of the names of all the former Emperors,

Gyōbu-Shō,[6] the *Ōkura-Shō*,[7] and the *Kunai-Shō*.[8] Thus the organization of the Government was near-

so that none of those names shall be used by any of the succeeding Emperors or by any subject; (5) those relating to the paying of homage to the Emperor by foreign countries; (6) those relating to the adjudication of disputes about the order of precedence of the various families; (7) those relating to music; (8) those relating to the registration of the names of Buddhistic temples, priests, and nuns; (9) those relating to the reception and entertainment of foreigners and to their presentation to the Emperor; and (10) those relating to the Imperial sepulchers, and to the list of people in attendance upon them.

4. The *Mimbu-Shō* had charge of the following matters:— (1) those relating to the supervision of the census of the population of the various Provinces; (2) those relating to the contribution of forced labour as tax; (3) those relating to the exemption from forced labour and the rewarding of subjects distinguished for filial piety, or for their integrity in dealing with other people, or of subjects in distress, or of officials of certain classes; (4) those relating to bridges, roads, harbours, lakes, farms, mountains, rivers, etc.; (5) those relating to the estimation and collection of taxes in products, and of those in textures, to the disbursement of the national funds, and to the making of the estimates of national expenditures; and (6) those relating to granaries and to the land tax (tax in grain).

5. The *Hyōbu-Shō* had charge of the following matters:— (1) those relating to the rosters of military officers, their examination, their appointment, their rank, etc.; (2) those relating to the dispatching of troops; (3) those relating to weapons, guards, fortifications, and signal fires; (4) those relating to pastures, military horses, and public and private horses and cattle; (5) those relating to the postal stations; (6) those relating to the manufacture of weapons, and the lists of mechanics engaged in the same; (7) those relating to practice in drumming and in flute playing and to public and private means of water transportation; and (8) those relating to the training of hawks and dogs.

6. The *Gyōbu-Shō* had charge of the following matters:— (1) those relating to the conduct of trials and to the determination of the severity of punishments; (2) those relating to suits for debts; and (3) those relating to the imposition of fines, to imprisonments, and to penal servitude.

7. The *Ōkura-Shō* had charge of the following matters:— (1) those relating to public accounts; (2) those relating to taxes in textures and of offerings to the Emperor; (3) those relating to weights and measures; (4) those relating to prices of commodities; (5) those relating to the coinage of gold, silver, copper, and iron money, and to the lists of the artisans engaged in the coinage; and (6) those relating to the manufacture of lacquer ware, to weaving, and to other kinds of industries.

8. The *Kunai-Shō* had charge of the following matters:— (1) those

ly complete. In later times, court favorites took sole charge of the affairs of State, and even such petty officials as *Kurando* * gradually came to assume the issuing of Imperial Orders; and important measures of State were also executed on the authority of an ex-Emperor, of the private wishes of the Emperor, or of written notes of ladies of the Court. The result was a complete slackening of the reins of power. Immediately after the Restoration, the offices of Regent and of *Kwanbaku*,† that of *Densō*,‡ and that of

relating to rice fields for the supply to the Imperial family; (2) those relating to the harvesting done on the Imperial domains; (3) those relating to the presenting to the Emperor, by subjects, of rare delicacies; (4) those relating to the culinary and engineering departments of the Court, to breweries, to court ladies, to court smiths, to court servants, and to the Imperial wardrobe and the like; and (5) those relating to the list of the Imperial Princes and Princesses of from the second to the fourth generation inclusive.—*From the Taihō Ryō.* (*Translator's Note.*)

* *Kurando* were originally charged with the keeping of important state documents and correspondence; but they gradually came to discharge the duties of chamberlains. (*Translator's note.*)

† It was through the *Kwanbaku* that all proceedings in the affairs of the State were brought to the knowledge of the Emperor. This office was usually combined in the person of either the Chancellor of the Empire, the Minister of the Left, the Minister of the Right, or the Lord Keeper of the Privy Seal. The *Kwambaku* was the highest of the official positions; and consequently, when the Minister of the Left or the Minister of the Right or the Lord Keeper of the Privy Seal was appointed to this post, he took precedence over even the Chancellor of the Empire. (*Translator's note.*)

‡ *Densō.* There were two officers appointed to this post. They were also called *Buke-densō.* *Gisō* (*vide* the following foot note) of the highest rank were appointed to this post. Their functions were chiefly to serve as media between the Imperial Court and the Tokugawa Government; that is, on the one hand, to issue the orders of the Court to the feudal Government, and, on the other, to make the views of the latter known to the former. They were court officials, but in reality they were under the authority of the feudal Government. They pledged fidelity to it, just as its own officials did; and in return they received their salaries from that Government. They ranked *Gisō*, but with regard to certain court affairs, their power was weaker than that of *Gisō.* (*Translator's Note.*)

Gisō,§ were abolished, and orders were issued in the Court strictly prohibiting intrigues and corruptions. Shortly afterwards, the Council of State (*Daijō-kwan*) was revived. In the 7th month of the 2nd year of Meiji (1869), the offices of Minister of the Left (*Sadaijin*), of Minister of the Right (*U-daijin*) and of Councillors of State (*Sangi*) were created in conjunction with the establishment of six Departments of State. In the 4th year (1871), the office of Chancellor of the Empire (*Daijo-daijin*) was established. In the 10th month of the 6th year (1873), the Councillors of State (*Sangi*) were appointed Ministers of State (*Kyō*) in addition to their proper office. After some further changes, the offices of Chancellor of the Empire, of Councillors of State and of Ministers of State were abolished in the 12th month of the 18th year (1885), and their places were supplied by the organization of the Cabinet, composed of ten Ministers of State, namely, of the Minister President of State, of the Minister of State for Foreign Affairs, the Minister of State for Home Affairs, the Minister of State for Finance, the Minister of State for War, the Minister of State for the Navy, the Minister of State for Justice, the Minister of State for Education, the Minister of State for Agriculture and Commerce and the Minister of State for Communications. According to the system that was inaugu-

§ *Gisō*. There were five officers appointed to this post. They had sole charge of matters of the Imperial Court, they had the power to decide on all sorts of court affairs, under the supervision of the *Kwambaku* (*vide* a foregoing foot note under the present Article). They also received their salaries from the feudal Government. (*Translator's note.*)

rated by the Code of Taihō,* the Council of State was placed over the different Departments of State. The latter were consequently offices under the control of the former, while the functions of the Ministers of State were simply to carry out the notices issued from the Council of State; thus these Ministers had no direct official relations with the Emperor and were under no responsibility for the great affairs of State. After the Restoration, modifications were successively introduced until the Cabinet was reorganized by Imperial Rescript in the 18th year of Meiji (1885). By the said reorganization, the Ministers of State were made each separately to bear his share of responsibility to the Emperor directly. Over them was placed the Minister President of State. The object of this change was, on the one hand, to give weight to the functions of the Ministers of State and to impress upon them a higher sense of their responsibility, and, on the other, to maintain the unity of the Cabinet and to avoid all complications and variances therein.

The opinions of European scholars differ on the subject of the responsibility of the Ministers, the systems prevailing in different countries being also various. In some countries (as in England), a mode of impeachment has been specially established in connection with political responsibility, the Lower House instituting the case and the Upper House trying and deciding it; while, in some other countries, either the court of cassation or some special political

* *Vide* foot note under Article X. (*Translator's note.*)

tribunal is entrusted with the power of trial and decision over cases of political responsibility. (In Belgium, the Lower House can impeach, while the Court of Cassation tries and decides. In Austria, either House can impeach, while trial and decision are left to a political tribunal specially established, and which, besides deciding on the political offences indicted, also passes sentence on attendant criminal ones. In Prussia, though there is a provision in the Constitution on the subject, it has not yet been carried into effect, as no law has been specially enacted for the purpose.) Political responsibility is sometimes treated separately from criminality, and effect of judgment stops with dismissal from office and deprivation of service (Law of the United States of America and of Bavaria, 1848). Again, treason, bribery, indiscriminate disbursement of public money, breach of the constitution and the like, are in some cases specially mentioned as offences, for which Ministers of State shall be held responsible. (The Constitutions of the United States of America, of Prussia, and of Portugal, and those of France, 1791 and 1814. The Belgian Parliament has condemned the practice of reciting the offences for which Ministers of State shall be held responsible). The Ministers of State are, in still other cases, held responsible to the Sovereign. (In Holland, a certain Minister once declared that, though he was responsible to the Sovereign, he was not so to the people.) On the other hand, it is in some countries maintained that Ministers are responsible to the people, that is to say,

to Parliament. (In the Constitutions of France, of Belgium and of Portugal, it is provided that no Order of the Sovereign can release Ministers from liability to impeachment for their offences.) On comparing these various practices in different countries, it appears, that no mooted question of constitutional law is further from a solution than the one relating to the responsibility of Ministers of State. Considering the matter from theoretical as well as from practical points of view, it is apparent that Ministers are charged by the Constitution with the important function of giving advice to the Emperor, and that they possess strong administrative powers. Their duty to the Emperor not only charges them with the encouragement of whatever is proper, and with promoting whatever is desirable, but they are also charged with that of discouraging whatever is wrong and of assisting Him to proceed in a righteous course. They ought, therefore, to have responsibility laid upon their shoulders. If Ministers of State were not responsible, the executive power could easily overstep the limits of law, which would thus become a mere collection of nominal enactments. The responsibility of Ministers is, as it were, a pillar supporting the Constitution and the law. It, however, has to do with the matters of State under their charge, and is not one involving criminal responsibility. When a Minister of State errs in the discharge of his functions, the power of deciding upon his responsibility belongs to the Sovereign of the State: He alone can dismiss a Minister, who has appointed

him. Who then is it, except the Sovereign, that can appoint, dismiss and punish a Minister of State? The appointment and dismissal of them having been included by the Constitution in the sovereign power of the Emperor, it is only a legitimate consequence, that the power of deciding as to the responsibility of Ministers, is withheld from the Diet. But the Diet may put questions to the Ministers and demand open answers from them before the public, and it may also present addresses to the sovereign setting forth its opinions. Moreover, although the Emperor reserves to Himself in the Constitution the right of appointing His Ministers at His pleasure, in making an appointment the susceptibilities of the public mind must also be taken into consideration. This may be regarded as an indirect method of controlling the responsibility of Ministers. Thus, in our Constitution the following conclusions have been arrived at:—*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 of Ministers is a political one and has no relation to criminal or civil responsibility, nor can it conflict therewith neither can the one affect the other. Save that all criminal and civil cases

must be brought before the ordinary courts of law, and that suits arising out of administrative matters must be brought before a court of administrative litigation, the cases of political responsibility are left to be dealt with by the Sovereign as disciplinary measures.

The Minister President of State is to make representations to the Emperor, on matters of State, and to indicate, according to His pleasure, the general course of the policy of the State, every branch of the administrative being under the control of the said Minister. The compass of his duties is large, and his responsibility cannot but be proportionally great. As to the other Ministers of State, they are severally held responsible for the matters within their respective competency: there is no joint responsibility among them in regard to such matters. For, the Minister President and the other Ministers of State, being alike personally appointed by the Emperor, the proceedings of each one of them are, in every respect, controlled by the will of the Emperor, and the Minister President himself has no power of control over the posts occupied by other Ministers, while the latter ought not to be dependent upon the former. In some countries, the Cabinet is regarded as constituting a corporate body, the Ministers are not held to take part in the conduct of the government each one in an individual capacity, but joint responsibility is the rule. The evil of such a system is, that the power of party combination will ultimately over-rule the supreme power of the Sovereign. Such a state of things can

never be approved of according to our Constitution. But with regard to important internal and external matters of State, the whole Government is concerned, and no single Department can, therefore, be exclusively charged with the conduct of them. As to the expediency of such matters and as to the mode of carring them out, all the Ministers of State shall take united counsel, and none of them is allowed to leave his share of the business a burden upon his colleagues. In such matters, it would of course be proper for the Cabinet to assume joint responsibility.

The countersignature of a Minister or of Ministers of State has the two following effects:—*First*, laws, Imperial Ordinances and Imperial Rescripts that relate to affairs of the State can be put into force only by virtue of the countersignature of a Minister or of Ministers of State. Without it, they can take no effect; and when issued through any other than a Ministerial channel, none can be carried out by the functionaries charged with its execution. *Secondly*, the countersignature of a Minister or of Ministers of State attests the right of the said Minister, or Ministers to carry out the law, Imperial Ordinance or Imperial Rescript in question, and also his or their responsibility for the same. The Ministers of State are the channels, through which the Sovereign's Orders are to flow, both at home and abroad. This is made clear by their countersignatures. But the political responsibility of Ministers can not be regarded only from a legal point of view: moral considerations must also enter into the question. For, the limits defined by

law are not the only ones within which Ministers must move; consequently when a mistake has been committed by the Government, responsibility should not be confined to the countersigning Minister or Ministers, but those Ministers also who, though not the countersigners, have been consulted about the matter, ought to be held responsible for the mistake. If, therefore, the fact of countersigning is taken as the mark, by which the limits of responsibility are to be distinguished, it will lead to an undue reliance upon mere form and to the disregarding of real facts. To conclude, though countersignature indicates the responsibility of the countersigning Minister, yet responsibility does not arise from the fact of countersigning.

According to the forms for public documents established by the Code of Taihō, Imperial Rescripts were issued in this way. The draft of a Rescript was prepared in the Court, and dated by the Emperor, when it was given to the Minister of *Nakatsukasa-Shō*. The original draft, which the Emperor had dated, was kept in that Department, and a copy of it was transmitted to the Council of State, bearing the joint signatures of the Minister and Senior and Junior Vice Ministers of the said Department. In the Council of State, this copy then received the signatures of the Chancellor of the Empire, of the Ministers of the Left and of the Right, and of the First Adviser of State. It was then returned to the Emperor with the prayer that it be carried out through the proper channel, whereupon it received His sanction.

The copy to which the Emperor had affixed His "sanction", was left in the Government's keeping, and another copy was made out for promulgation. It is to be observed that great caution and respect were used in inspecting and in signing Imperial Rescripts. After the Restoration, in the 7th month of the 4th year of Meiji (1871), it was made part of the duties of the Chancellor of the Empire, to put his name and seal to Imperial Rescripts. But every thing being as yet in a state of transition, Imperial Rescripts were very frequently issued without the signature of the Chancellor and without the phrase "By Imperial Command." In the 11th month of the 14th year of Meiji (1881), it was established that the Ministers of State should put their signatures to laws, regulations and notifications relating to matters within their respective spheres of control. In the 1st month of the 19th year of Meiji (1886), forms as to countersignatures were settled. The forms of promulgating public documents was thus brought to a high degree of perfection.

ARTICLE LVI.

The Privy Councillors shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State, when they have been consulted by the Emperor.

The Emperor, on the one hand, maintains the supreme control of administrative affairs through the medium of the Cabinet, while, on the other, he has established the Privy Council, so that in His wisdom He may have at command its assistance, and that the information He obtains may be thorough and impartial. Ministers of State have to be acute of mind, quick and active in the dispatch of internal and of external affairs. But the task of planning far-sighted schemes of statecraft and of effectuating new enactments, by leisurely meditation and calm reflection, by thorough investigations into ancient and modern history, and by consulting scientific principles, must be entrusted to a special institution made up of men of wide experience and of profound scholarship. In other words, like every thing else in human society, the two different elements follow the general rule of the division of labor. In performing their Heaven-received mission, Sovereigns must first take advice before they arrive at a decision. Hence the establishment of the Privy Council is just as necessary as that of the Cabinet, to serve as the highest body of the Emperor's constitutional advisers. If the Privy Council is competent to lend assistance to the wisdom of the Emperor, to be impartial, with no leanings to this or that party, and to solve all difficult problems, it will certainly prove an important piece of constitutional mechanism. Moreover, when an emergency Ordinance is to be issued or a state of siege is to be declared, or when some extraordinary financial measure is deemed necessary to be taken, the

opinion of the Privy Council is to be sought before the measure is carried out, thereby giving weight to the measures of the administrative in the matter. In this way, the Privy Council is the palladium of the Constitution and of the law. Such being the importance attached to the functions of the Privy Council, it is the established rule that, every Imperial Ordinance, on which the advice of the Privy Council has been asked, shall contain a statement of that fact in the preamble to it. The Privy Council is to hold deliberations only when its opinion has been asked for by the Emperor; and it is entirely for Him to accept or reject any opinion given.

The duty of the Privy Council is to be perfectly loyal and straightforward in furnishing advice to the Emperor. As to a matter about which the opinion of that body has been furnished to the Emperor, no publicity can be given to it, however trifling it may be, without His special permission. For, it is not in an advisory body like the Privy Council, that subjects should seek for fame and glory of the outside world.

CHAPTER V.

THE JUDICATURE.

The Judicature is the authority which, in accordance with the provisions of law and in conformity with reason and justice, redresses injured rights of subjects and metes out punishments. In ancient times, when politics were in a state of primitive simplicity, in no country was the Government distinguished into the judiciary and the administrative, as is abundantly shown by historical records. As, however, civilization advanced and social affairs became more and more complex, a distinct line of demarkation was drawn between the judiciary and the administrative. The two departments have each different organizations, and neither of them suffers any encroachment upon its sphere of business by the other. In this way, it has been possible to witness great progress in constitutional government.

ARTICLE LVII.

The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.

The organization of the Courts of Law shall be determined by law.

The distinction between the administrative and the judiciary may be briefly described as follows.

The functions of the administrative are to carry out laws and to take such measures as may be found expedient for the maintenance of the public peace and order, and for the promotion of the happiness of the people; while the duty of the judiciary is to pronounce judgment upon infringements of rights, according to the provisions of the law. In the judiciary, law is everything, and the question of convenience is left out of consideration. In the administrative, however, measures are taken to meet the ever changing requirements demanded for the convenience and necessities of society; and law simply shows the limits beyond which they are not permitted to obtrude. Such being the distinction between the nature of the administrative and that of the judiciary, were there only administrative officials and no judicial functionaries, the rights of individuals would be in danger of being made subservient to the ends of social convenience and would ultimately be encroached upon by power.

Therefore trials must be conducted according to law; the law is the sole standard for conducting trials, which must always be conducted in a court of law. But the Sovereign is the fountain of justice, and His judicial authority is nothing more than a form of the manifestation of the sovereign power. Therefore judgments shall be pronounced in the name of the Emperor, the judicial authority in this respect representing Him in His sovereign power.

The organization of the courts of law shall be settled by law, in contradistinction with the organi-

zation of the administrative. Officers of justice possess independent positions founded upon law.

According to the system that prevailed in this country during the middle ages, the Department of Justice (*Gyōbu-Shō*)* was, like the others, under the control of the Council of State. The functions of the Minister of Justice were to exercise control over matters relating to the conduct of trials, to the determination of severity of punishment, to the decision of doubtful questions, to the registration of the people according to the higher (*ryō*) and the lower (*sen*) classes, to imprisonment and to suits arising out of debts. Judges were dependent upon the Minister of Justice, and their functions were to conduct trials, to determine severity of punishment to be meted out, and to give judgment on all sorts of actions at law. It is to be observed that both civil and criminal matters were put under the control of the same Department. As the influence of the military class increased, political power passed to that class, and judicial power slipped into the hands of the Chief of the Police (*Kebiishi*). Thus judicial matters were conducted with military despotism.

This evil practice was continued down to the end of the feudal times, during which appeals were strictly forbidden. Immediately after the Restoration, judicial officials named *Keihōkwan* were appointed, and the judicial authority was restored again to the Emperor. The 4th year of Meiji (1871) witnessed the establishment of the Tōkyō Court of Law,

* *Vide* a foot note under Article LV. (*Translator's note.*)

which was the first instance of the establishment of an office for the special purpose of administering justice. In the same year, the business connected with the hearing of law suits hitherto conducted in the Department of Finance, was transferred to the Department of Justice. In the 5th year (1872), law courts were established in the open ports. Subsequently courts were established throughout the country, classified into Judicial Courts, City and Prefectural Courts and District Courts; at the same time appeals and re-hearings became permissible. In the 8th year (1875), the Court of Cassation was established so as to maintain the unity of the law. In the same year, the functions of the Minister of Justice were settled to consist in exercising control over the judicial administration and not in interfering with trials. Since then various reforms have been made with the object of securing the independence of the courts of law. Such is an outline of the history of judicial matters in this country.

The doctrine of the independence of the three powers (the judicature, the executive and the legislative), which prevailed in Europe at the close of the last century, has already been condemned both by scientific principles and by practical experience. The judicature is combined in the sovereign power of the Emperor as part of His executive power. The word "executive", when used as opposed to the word "legislative", has a comprehensive signification: the judiciary is only a part of the executive, and the executive, strictly speaking, is made up of

two parts the judiciary and the administrative, each performing district services. This principle is at present generally acknowledged by writers on public law, and it is not necessary in this place to dwell upon the subject. Though it is in the power of the Sovereign to appoint judges, and though the courts of law have to pronounce judgment in the name of the Sovereign, yet the Sovereign does not take it upon Himself to conduct trials, but causes independent courts to do so, in accordance to law and regardless of the influence of the administrative. Such is what is meant by the independence of the judicature. This theory has no connection with the doctrine of the independence of the three powers, but it is still an immutable principle.

ARTICLE LVIII.

The judges shall be appointed from among those, who possess proper qualifications according to law.

No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment.

Rules for disciplinary punishment shall be determined by law.

The function of judges is to uphold the law and to administer justice to the people in an impartial manner. Special knowledge and experience are accord-

ingly the required qualifications of judges; especially so, as it is on account of the proper qualifications they possess, that subjects trust them as to the manner of their dealing with their rights and property. Hence it is provided in the first clause of the present Article, that certain qualifications for judgeship are to be settled by law.

In order to remain impartial and fair in trials, the judges ought to occupy an independent position free from the interference of power, and should never be influenced by the interest of the mighty or by the heat of political controversies. Accordingly they shall be entitled to hold office for life, unless dismissed from the service by a criminal sentence or by the effect of a disciplinary trial. Disciplinary rules applicable to judicial functionaries are fixed by law, and carried out by decision of a court of law. No interference of any chief of an administrative office is allowed. Such is the guarantee which the Constitution provides for the independence of judges.

All details as to suspension from office, to *hishoku*,* to the transfer of appointment and to retirement on account of age, shall be mentioned in the law.

ARTICLE LIX.

Trials and judgments of a Court shall be conducted publicly. When, however, there exists any fear, that such publicity may be

* *Hishoku* is a temporary retirement from active service on one-third pay. (*Translator's note.*)

prejudicial to peace and order, or to the maintenance of public morality, the public trial may be suspended by provision of law or by the decision of the Court of Law.

That trials are publicly conducted and that parties are orally examined in public, are most effective guarantees for the rights of the people. The publicity of trials is of considerable consequence in making judges feel the importance of their duties and in spurring them on to be worthy representatives of reason and of justice. In this country, a practice, called *shirasu saiban*,* was long in vogue, but in the 8th year of Meiji (1875), the conducting of trials openly was permitted for the first time. This was a great step in the progress of judicial matters.

There are two stages in every criminal proceeding, preliminary examination and trial. The word "trial" used in the present Article does not include, in its meaning, preliminary examination. The cases in which public trial may be "prejudicial to peace and order," are, for instance, those relating to offences connected with a state of internal commotion or with a foreign trouble or those relating to the assembling of mobs, or to instigation to crime, thereby agitating and exciting people's minds. The cases in which public trial may be "prejudicial to the maintenance of public morality," are such, for instance,

* According to this system trials were conducted with close doors. (*Translator's note.*)

as relate to private matters causing scandal and shocking public morality, when exposed to the knowledge of the community. From the expression ".....may be prejudicial to peace and order, or to the maintenance of public morality," it is to be inferred that whether a certain act is calculated to disturb peace and order or to be detrimental to public morality, is to be decided by the opinion of the court. "According to law"—that is, according to the express provisions of the Code of Criminal Procedure and the Code of Civil Procedure. "By the decision of the Court"—that is, when there is no express provision of law, the decision of the court will suffice to suspend public trial. From the expression "the public trial may be suspended," it is to be inferred that judgment and pronounciation of sentence are always to be in public.

ARTICLE LX.

All matters, that fall within the competency of a special Court, shall be specially provided for by law.

Those matters appertaining to men in the military or the naval service, that are taken cognizance of by the courts-martial, belong to the category of matters that fall within the competency of a special court other than the ordinary courts of justice. Further, should it become necessary in future to establish special Tribunals of Commerce for merchants, and

manufacturers, commercial and industrial matters to be taken cognizance of by the said tribunals will also belong to the category of matters that shall fall under the jurisdiction of a special court other than the ordinary civil courts. Provisions for these tribunals shall be established by law. No ordinance can establish legal exceptional cases.

The Constitution does not suffer the establishment of exceptional courts placed beyond the control of law, encroaching upon the judicature through the influence of the administrative authority, and wresting from the people the proper courts where justice can be obtained.

ARTICLE LXI.

No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a Court of Law.

By "the Court of Administrative Litigation" is to be understood a tribunal where cases instituted against administrative measures are adjudicated. The law provides certain limits upon rights of subjects to insure the safety of the same. And no

part of the body politic can claim any exemption from the duty of observing these legal limits. Therefore, when an administrative office in carrying out official measures, infringes the rights of subjects by violating the law or by overstepping the bounds of its functionary powers, such office has to submit to the decision pronounced by the Court of Administrative Litigation.

How is it that, while it is the function of the courts of justice to try cases of law, a Court of Administrative Litigation is to be especially established? The proper function of judicial courts is to adjudicate in civil cases, and they have no power to annul measures ordered to be carried out by administrative authorities, who have been charged with their duties by the Constitution and the law. For, the independence of the administrative of the judicature is just as necessary as that of the judicature itself. Were administrative measures placed under the control of the judicature, and were courts of justice charged with the duty of deciding whether a particular administrative measure was or was not proper, administrative authorities would be in a state of subordination to judicial functionaries. The consequence would be that the administrative would be deprived of freedom of action in securing benefits to society and happiness to the people. Administrative authorities carry out measures by virtue of their official functions, and for these measures they lie under constitutional responsibility, and it follows that they ought to possess power to remove obstacles in the path of these mea-

sures, and to decide upon suits springing from the carrying out of them. For, should the administrative be denied this power, its executive efficacy would be entirely paralized, and it would no longer be able to discharge the responsibilities put upon it by the Constitution. This is the first reason why it is necessary to establish a Court of Administrative Litigation in addition to judicial courts. As the object of an administrative measure is to maintain public interests, it will become necessary under certain circumstances to sacrifice individuals for the sake of the public benefit. But the question of administrative expediency is just what judicial authorities are ordinarily apt to be not conversant with. It would, therefore, be rather dangerous to confide to them the power of deciding such questions. Administrative cases ought, accordingly, to be left to the decision of men well versed in administrative affairs. This is a second and final reason why the establishment of a Court of Administrative Litigation is necessary, in addition to judicial courts. But its organization, like that of the latter, must be established by law.

By Notification No. 46 of the Department of Justice, in the 5th year of Meiji (1872), it was provided, that all suits against local officials should be instituted in a court of law. This led to the accumulation, in the courts, of actions against local officials, and there were manifestations of a tendency, on the part of judicial authorities, to exert their influence with the administrative. By Notification

No. 24 of the 7th year (1874), the expression "administrative litigation" was first made use of. According to that notification, when any one brought a suit against a local official, the judicial authority taking cognizance, had to bring the matter to the notice of the Council of State, with a statement of the circumstances. But this system was meant simply as a temporary means of remedying the evil tendency then manifesting itself, and the establishment of the Court of Administrative Litigation was left to the work of the future.

By the expression "illegal measures of the administrative authorities," it must be understood that no suit can be brought against those measures that have been carried out in conformity with law or with the functionary power of the office in question. No one, for example, shall be allowed to institute a suit touching a measure, which is in conformity with a law placing restriction upon the right of property for the sake of the public good. The expression "rights alleged to have been infringed" points to the evident conclution, that mere damage to one's interest, though it can become the ground of a petition, begets no right of bringing an administrative litigation. When, for example, administrative authorities shall have fixed the course of a line of railroad, according to an established process, the local inhabitants may remonstrate, thinking that it would be more advantageous for them to have its course fixed in some other direction. Such a remonstrance would relate to interest and not to right. So the inhabitants may

petition the competent authorities, but will not be allowed to bring an action before the Court of Administrative Litigation.

CHAPTER VI.

FINANCE.

Finance forms an important part of the administration, as it relates to the management of the annual expenditures and revenue of the State and has a close and intimate bearing upon the resources of the people. Accordingly, great importance is attached to it by the Constitution, which clearly defines the extent of the rights of the Imperial Diet of consent and of control in regard thereto.

ARTICLE LXII.

The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.

However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.

The raising of national loans and the contracting of other liabilities to the charge of the National Treasury, except those that are provided in the Budget, shall require the consent of the Imperial Diet.

It is one of the most beautiful features of con-

stitutional government and a direct safeguard to the happiness of the subjects, that the consent of the Diet is required for the imposition of a new tax, and that such matters are not left to the arbitrary action of the Government. When a new tax is imposed over and above already existing ones, or when the rate of taxation is to be modified, it must be left to the opinion of the Diet what would be a proper degree of taxation. Were it not for this efficient constitutional safeguard, it would be impossible to insure to the subjects security for their resources. "Administrative fees or other revenue having the nature of compensation" as mentioned in the second clause of the present Article, are such as are collected from private individuals for undertakings engaged in, or for transactions conducted, by the Government for them at their request or for their benefit. They are in their nature different from taxes, which are imposed as a common duty to be discharged by all. For instance railway fares, warehouse charges, school fees and the like may be fixed by administrative ordinance and need not be settled by law. But as they are called "administrative fees," a distinction must be observed between them and "judicial fees."

As to the provision of the third clause of the present Article, a national loan involves the incurring of liabilities by the National Treasury to be met in the future. To a new loan, therefore, the consent of the Diet must always be obtained. The effect of a Budget extends over only a single fiscal year, so, in granting subsidies or guarantees or making engage-

ments, that involve the liability of the National Treasury, the consent thereto of the Diet is needed, as in the case of a national loan.

ARTICLE LXIII.

The taxes levied at present shall, in so far as they are not remodelled by a new law, be collected according to the old system.

In the preceding Article, it has been assured that the imposition of new taxes must be determined by law. In the present one, it is provided that the taxes now in existence shall in future be collected in the method and according to the rate heretofore extant, except in so far as changes shall hereafter be effected by new enactments. In order to meet necessary expenses, a State must possess some fixed revenue. Hence, not only has the Constitution not introduced any change in the national revenue produced by existing taxes, but has, on the contrary, confirmed the same by express provisions.

(NOTE.) In Europe, it is generally held in theory as a very important principle, that all taxes should be yearly voted by Parliament, notwithstanding that this practice is in reality nothing more than a mere formality. In the constitutions of some countries, it is provided that the vote of taxes shall have force for one year only, unless expressly fixed otherwise by a special provision of law. The causes that have brought about such a state of things are as follow:—

First, in the middle ages, the Sovereigns of European countries made no distinction between their private domestic matters and national affairs. They defrayed the national expenses out of their family income, and extended their private domains, in order to meet the civil and military expenses of the State out of the taxation imposed thereupon. But with the establishment of standing armies and the consequent enormous increase in military expenses, and in those connected with royal residences, parks, gardens and the like, their private treasuries began to show deficiencies. They then summoned the magnates from all parts of the country and ordered them to pay benevolence to them, wherewith to cover the deficiencies in the annual expenses of the country. From these facts it is to be noticed, that in Europe taxes were originally nothing more than benevolences or donations paid by the people. (As a proof of this assertion we may refer to Art. 109 of the Constitution of Wurtemburg, which provides that when any deficiency occurs in the income produced by the Royal property, taxes shall be levied in order to defray the national expenses.) Under these circumstances the people naturally deemed it necessary, in order to check the extravagant demands of the Ruler, that the Government should prove the necessity for levying such and such a tax, and that the consent of the people be obtained to it. Thus the condition that without the consent of the people there shall be no tax, has become a fundamental constitutional principle. Such is the historical growth of the principle

referred to. *Secondly*, another cause that has brought about the state of things above alluded to, is to be sought in the extreme democratic principle, that the people possess the right of free consent to all taxes, and that as a natural consequence a Government must cease to exist, when the people do not give their consent to the levying of taxes. These two causes, historical tradition and abstract theory, have combined together, and have so thoroughly taken hold of the constitutions of European countries, that it is now impossible to overcome the prestige they have acquired. But how is it in practice? In England, land taxes, customs dues, excise and stamp duties, which are levied by permanent acts and which constitute the consolidated fund, represent six-sevenths of the entire revenue. (The above statements referring to England have been made on the authority of Prof. A.V. Dicey. According to the statistics for 1884, the total amount of revenue was £ 87,205,184. Of this sum, £ 14,000,000 represented the amount levied by yearly Acts of Parliament, while the remaining amount 73 millions in round numbers was levied by permanent Act.) By force of custom and of law, these taxes are regarded as permanent and fixed revenue, and it is not necessary to submit them to the annual vote of Parliament. Art. 109 of the Prussian Constitution provides, that existing taxes shall be collected as heretofore. In France, which is regarded as the centre of philosophical speculation, the principle of submitting taxes to yearly vote is, according to writers in that country, carried out in an indefinite

manner. (*Traité, de la Science de Finances,* by M. Leroy Beaulieu, 3rd edition Vol. II. pp. 75–76.) With regard to direct taxes, the rate of which is fixed annually by vote, some writers maintain that this practice is very inconvenient. What, according to the principles of national existence is most essential for the life of a State, is permanency; therefore, the funds needed for maintaining the permanent existence of the State, should not essentially vary from year to year. No one and no part of the body-politic whatsoever shall have the right to endanger the existence of the State by depriving it of its source of necessary revenue. In Europe, in the middle ages, the property of the Royal Family and not taxes, was the permanent source of funds for national expenditures. Therefore, though the people are at liberty to limit the term for which they consent to be taxed, to a period of one year, yet, with the gradual settlement of the fundamental principles of state in recent years, it has become clear beyond all possibility of doubt that national expenses ought to be defrayed out of taxes, and that the imposition of the permanent taxes, which are necessary for the existence of the State, is carried out in virtue of its right, and not in that of any voluntary gift of the people.

In our country, all national expenses have, from ancient times, been defrayed out of taxes. During the middle ages, three modes of taxation were established: (that is to say, there were taxes payable in grain, taxes payable in products other than grain, taxes payable in textures), thereby causing the people

to bear equitable proportions of taxes, and no resort was ever made to levies other than what furnished the regular supplies. At present all kinds of taxes remain permanent and are not to change from year to year. It is for considerations relating to the peculiar polity of the country and to the probable course of events and for the purpose of preventing all possibility of confusion, that the taxes at present imposed, have been established by the Constitution as permanent ones, to be levied, excepting such of them as may hereafter be changed, in exactly the same way as hitherto it has been done.

ARTICLE LXIV.

The expenditure and revenue of the State require the consent of the Imperial Diet by means of an annual Budget.

Any and all expenditures overpassing the appropriations set forth in the Titles and Paragraphs of the Budget, or that are not provided for in the Budget, shall subsequently require the approbation of the Imperial Diet.

In the Budget are estimated the expenditures and the revenue of each financial year, to show the limits which the administrative ought to observe. The preparation of an estimate of the expenditures of the State is the first step in the proper management of

finance. And it is an important result of constitutional principles of government, that the submission of the Budget to the vote of the Diet is required for its consent thereto, and further that after expenses have been defrayed as set forth in the Budget, the subsequent approval of the Diet to any expenditures overpassing the estimated appropriation or to any expenditures not provided for in the Budget, shall be asked for, as control of such matters lies with it.

No reference is to be found in the Code of Taihō* to matters relating to the Budget. Under the Tokugawa régime, the sums to be expended by each office were fixed, but no estimate of them was made. After the Restoration, the old practice was followed and expenses were defrayed as necessity arose for so doing until the 6th year of Meiji (1873), when an estimate of expenditures and of revenue was prepared in the Department of State for Finance, and submitted to the Chancellor of the Empire. This was the first time that our Government ever prepared a Budget as a public document. In the 7th year (1874), a fresh Budget was prepared for that year, and after various improvements had been made in each successive year in the items of expenditures and in the form in which the items were presented, the preparation of the Budget was brought to a tolerable degree of perfection in the 14th year of Meiji (1881) due to the promulgation of the Law of Finance. In the 17th year of Meiji (1884), Regulations for the Estimates of Expenditures and of Revenue were carried into effect,

* *Vide* a foot note under Article X. (*Translator's note.*)

and matters connected with the Budget made considerable progress. In the 19th year of Meiji (1886), the Budget was promulgated by Imperial Ordinance. This was the first time that a Budget had been promulgated according to a settled form. The preparation of the Budget has now-a-days become an indispensable standard in financial matters. The present Article goes a step further and provides that the Budget shall be laid before the Diet. For, there is no effective method other than this, for having the Budget proper and accurate and for making the administrative offices mindful of their duty of observing the limits imposed by it.

There is one thing that demands explanation in this place, and that is the fact that in most countries a Budget is regarded as a law. A Budget is simply a sort of gauge to be observed by the administrative officials for a current year. Thus a Budget requires the consent of the Diet on account of its special character and is not properly speaking a law. Therefore law has precedence over a Budget, which has no power to change a law. Were it possible for a law to be affected by a Budget, that would amount to an overstepping of the right of settling the Budget beyond proper limits. The usage prevailing in other countries by which a Budget is called a law, has in some cases originated from the custom of giving undue importance to the vote of Parliament on a Budget and of regarding such vote as the unbounded right of Parliament, while, in some other places, it has originated from the practice of giving the name of

law to every matter passed through Parliament. It is true that a law must be passed by the Diet; still, it is not correct to say that everything that has been passed by the Diet ought to be called a law. For those rules which, though they may have been passed by the Diet, relate to particular matters and have no general binding force, are different in their nature from law. When, as provided in the second clause, the appropriations set forth in the Titles and Paragraphs of the Budget have been overpassed, or when expenditures that are not provided for in the same have been incurred, the subsequent approval of the Diet is to be obtained, for, even in regard to an indispensable measure, the Government has still to submit to the control of the Diet. It is to be borne in mind, that a deficit rather than a surplus is in fact to be expected from a Budget that has been accurately prepared. If the Ministers of State are not required, merely because they have been settled in the Budget, to make outlays that are unnecessary, neither are they forbidden by the Constitution to make outlays overpassing the estimated appropriations or outlays not provided for in the Budget, that may be necessary on account of unavoidable circumstances. For, the functions of Ministers of State are not determined by consent of the Diet to the Budget, they are fixed by the Constitution and the law, which are the highest criterions of their conduct. Thus, when funds necessary for the exercise of constitutional rights, or for the discharge of legal duties, have been either insufficiently or not at all provided for in the Budget, no

Minister of State ought to thrust aside an administrative measure on the plea of such circumstances. Consequently, unavoidable expenditures overpassing the estimated appropriations or unprovided for in the Budget are all legal. But if they are legal, why ask the subsequent approval of the Diet to them? Because it is thereby intended to keep harmony and close connection between administrative necessities and the control of the legislative. A State, like an individual, is liable to be prodigal and extravagant. It is, therefore, an important duty of the Government to accurately make the disbursement of funds, as settled in the Titles and Paragraphs of the Budget. (A Resolution of the House of Commons, England, of March 30th 1849, says:—"When a certain amount of expenditure for a particular service has been determined upon by Parliament, it is the bounden duty of the Department which has that service under its charge and control, to take care that the expenditure does not exceed the amount placed at its disposal for that purpose.") But the incurring of unavoidable expenditures overpassing the estimated appropriations or ones unprovided for in the Budget, shall be regarded as exceptional cases. When the Diet discovers that any extravagant expenses have been illegally incurred and does not recognize the necessity of such expenses, it may take the matter up as a political question, though it can not make it a subject of legal contention. But the action of the Diet in such cases cannot affect the consequences of the expenditures already incurred by the Government or of the obligations

thereby devolving upon the Government.

"Expenditures overpassing the appropriations set forth in the Titles and Paragraphs of the Budget," are those expenditures that exceed the amounts voted by the Diet. "Expenditures that are not provided for in the Budget," refer to those expenditures that are incurred, apart from the Titles and Paragraphs mentioned in the Budget, on account of unforeseen circumstances. The following provisions are found in Article 19 of the Regulations of the Board of Audit, Prussia:—"The expression excess over appropriation in Article 104 of the Constitution refers to all payments which have been made in excess of the sums specified in the Chapters and Titles of the General State Budget settled in accordance with Article 99 of the Constitution, or of the sums specified in the Titles of special Budgets passed by the National Assembly, except as to those Titles the votes in respect of which have been expressly declared to be transferable, deficiencies in some being met by the surplus from others. In every case in which an appropriation has been exceeded and payments have been made which have not been provided for in the Budget, a statement shall be laid before the Diet of the next year in order to obtain its approval." This provision supplies the defects of Article 104 of the Constitution of that country, and extends the meaning of the expression "excess over appropriation" to include also expenditures not provided for in the Budget.

(Note.) The finances of no country are practi-

cally entirely free from drafts upon it exceeding the appropriations set forth in the Budget. In the *Control and Audit of Public Receipts and Expenditure*, passed by the Parliament of England in 1885, it is provided that "the accounts of each year are finally reviewed by the House of Commons, through the Committee of Public Accounts, and any excess of expenditure over the amount voted by Parliament for any service, must receive legislative sanction." (Our authority for these statements is Prof. A.V. Dicey.* Mr. M. Cox also says on this subject that "the sums voted by the House of Commons for the different services are those which appear sufficient on the consideration of the Estimates; but it not unfrequently happens that in some of the services the sums so voted are exceeded, and the excess has to be provided for in subsequent years". It will thus be seen that in England the two methods of asking for approbation after the expenses have been incurred and of asking for a vote for a fresh supply for making up the deficiency, are followed. In Prussia, the practice of asking subsequent approbation is followed, and a provision exists in the Constitution to that effect. In Italy, in some cases, the practice of asking for modifications of the Budget of the current year is followed, while in other cases the practice of asking for subsequent approval is pursued (law of 1869). In France, the supplementary funds, that are to make

*In the original Japanese text, the name of Mr. M. Cox is cited as authority by mistake, and we have been requested by the author of these Commentaries to make this correction. (*Translator's note.*)

up the reasonable deficiencies in the Budget, and the extraordinary funds, which are required on account of unforeseen circumstances or on account of the extension of certain operations beyond previous limits, are to be permitted by law. When the legislature is not sitting, a provisional permission shall be given for such funds by a decree, after the matter has passed through the deliberation of the Cabinet at the instance of the *Conseil d'Etat.* Such decree shall be submitted to the legislature at its next session for its approbation (law of 1878).

ARTICLE LXV.

The Budget shall be first laid before the House of Representatives.

It is provided in the present Article that, as regards the Budget, the right of priority shall be given to the House of Representatives. In discussing the Budget, the object sought for is to arrive at a clear conception of the resources of the people as compared with the financial condition of the Government, so that a just mean may be secured. This is the most important duty to be discharged by Representatives elected by the people.

ARTICLE LXVI.

The expenditures of the Imperial House

shall be defrayed every year out of the National Treasury, according to the present fixed amount for the same, and shall not require the consent thereto of the Imperial Diet, except in case an increase thereof is found necessary.

In Article LXIV., it is provided that the consent of the Imperial Diet shall be required to the Budget. But in the present Article, an exceptional case concerning the expenditures of the Imperial House is mentioned.

The expenditures of the Imperial House are those that are indispensable for maintaining the dignity of the Emperor, and to meet them is the first duty of the Treasury. The employment of the funds is an affair of the Court and not one for fnterference by the Diet; consequently, neither consent to these expenditures nor verification of them is required by the Diet. The amount of the expenditures of the Imperial House is, however, stated in the Budget, and also in the statement of the final accounts. But this is merely for the purpose of completing the sum total of public expenditures, and not for the purpose of submission to the deliberation of the Diet. The reason why the consent of the Diet is required, when it has become necessary to increase the amount of expenditures under review, is that the affair in question has a close relation to the taxes contributed by the subjects and that, therefore, it is to be submitted to the

deliberation of their Representatives.

ARTICLE LXVII.

Those already fixed expenditures based by the Constitution upon the powers appertaining to the Emperor, and such expenditures as may have arisen by the effect of law, or that appertain to the legal obligations of the Government, shall be neither rejected nor reduced by the Imperial Diet, without the concurrence of the Government.

"Already fixed expenditures based by the Constitution upon the powers appertaining to the Emperor" include all the expenditures which are based upon the sovereign powers of the Emperor, as set forth in Chapter I. of the Constitution, to wit: ordinary expenditures required by the organization of the different branches of the administration, and by that of the Army and Navy, the salaries of all civil and military officers and expenditures that may be required in consequence of treaties concluded with foreign countries. Such expenditures, whether their origin be prior to the coming into force of the present Constitution or subsequent to it, shall be regarded as permanent expenditures already fixed at the time of the bringing of the Budget into the Diet. "Such Expenditures as may have arisen by the effect of law" include the expenses of the Houses of

the Diet, annual allowances and other miscellaneous allowances to the Members, pensions, annuities, expenses and salaries required by the organization of offices determined by law, and other expenses of a like nature." "Expenditures that appertain to the legal obligations of the Government," include the interest on the national debt, redemption of the same, subsidies or guarantees to companies, expenses necessitated by the civil obligation of the Government, compensations of all kinds and the like.

The Constitution and the law are the highest guides for the conduct of administrative and financial affairs, and the State, in order to accomplish the object of its existence, must accord the supremacy to the Constitution and the law, and subject administrative and financial affairs to the control of the two. Therefore, in taking the Budget into consideration, the Diet, faithful to the Constitution and the law, must make it the rule to provide the supplies that may be required by the national institutions established by the Constitution and by law. Also, all existing contracts and all civil and all other obligations equally beget legal necessity for supplies. Were the Diet, in voting the Budget, to reject entirely or to reduce in amount any of the expenditures based by the Constitution upon the sovereign powers of the Emperor or any expenditure necessitated by an effect of law or for the fulfilment of legal obligations, such proceeding should be regarded as subversive of the existence of the State and contrary to the fundamental principles of the Constitution. From the

wording "already fixed expenditures," it is to be understood, that in regard to new expenditures or to the increase of existing ones, though based upon the sovereign powers of the Emperor, the Diet may have the power to freely deliberate upon them. Even those already fixed expenditures based by the Constitution upon the sovereign power of the Emperor and those that have arisen either by the effect of law or from the necessity of fulfilment of legal obligations, may, with the consent of the Government, be rejected, or reduced in amount or otherwise modified.

(Note.) According to a work by M. Leroy Beaulieu: "The Swedish legislation contains this important restriction upon the powers of the Rigsdag, that the reduction of credits, previously existing, for public institutions, can, in cases where these reductions would be of a nature to render the operations of these institutions impossible, be made only with the consent of the Crown." In several of the German states, the Constitution contains provisions embodying the principle that Parliament can not reject expenditures that have become necessary in consequence of constitutional, legal or civil obligations. Such a provision is found in Art. 173 of the Constitution of Braunsch-Weich, in Art. 187 of that of Oldenburg, in Art. 91 of that of Hanover, in Art. 81 of that of Sachsen-Meiningen. In Art. 203 of the Constitution of Oldenburg, it is provided that with regard to expenditures once fixed by a Budget, the Government, so long as the matter or the object for which they have been voted exists, cannot, without the

consent of Parliament, increase the amount thereof, nor can Parliament entirely reject or reduce their amount without the consent of the Government. These practices, which remain to this day as customs or as express provisions of law, agree with the recent development of the principles of the science of state. This matter has been quoted here for the sake of reference.

ARTICLE LXVIII.

In order to meet special requirements, the Government may ask the consent of the Imperial Diet to a certain amount as a Continuing Expenditure Fund, for a previously fixed number of years.

The expenditures of the State are ordinarily to be voted yearly, for the affairs of the State are in a condition of constant activity and motion, and cannot be managed according to a fixed standard. Consequently, the same amount of national expenditures cannot be continued on from one year to another. But in the present Article, exceptional provisions are made for special cases of necessity. In virtue of such provisions, a certain portion of the military and naval expenditures, and expenditures for engineering works, manufactures and the like, that require several years for completion, may, with the consent of the Diet, be fixed for a period comprising several years.

ARTICLE LXIX.

In order to supply deficiencies, which are unavoidable, in the Budget, and to meet requirements unprovided for in the same, a Reserve Fund shall be provided in the Budget.

In the present Article, provision is made for a Reserve Fund out of which to supply deficiencies in the Budget and to meet requirements unprovided for in the same. Article LXIV. sets forth, that expenditures overpassing the appropriations in the Budget or that are not provided for at all therein, shall require the subsequent approval of the Diet; but in that Article, no provision is made as to the source whence such outlays are to be met. Hence the necessity of providing a Reserve Fund by the present Article.

(Note.) In Holland, a reserve fund of 50,000 florins is allowed to each Department, besides another reserve fund of a like amount to the Government in general, out of which to supply the deficiencies in the items voted upon. In the Italian Law of Finance, of 1869, it is stated that a reserve fund shall be provided by the Budget; and by the same law two sums are provided, out of which to supply unavoidable deficiencies in the Budget. One of the sums (4,000,000 francs) is intended for expenditures consequent upon obligations and decrees, while the other one (4,000,000 francs) is reserved for other expenditures that cannot be foreseen. The first kind of reserve fund is to be disbursed by the Minister of Fi-

nance, after he has had the facts registered in the Board of Audit; in regard to the second, he has to bring the matter to the consideration of the Cabinet, and after its concurrence has been obtained, the fund shall be made use of upon issue of a Royal decree. In Prussia, a reserve fund is provided for each and every Department of State, and in addition, an extraordinary reserve fund is set apart in the Department of Finance. These reserve funds are provided for the purpose of supplying the deficiencies of the Budget and of meeting the requirements not provided for in it. In Sweden, two kinds of reserve funds are provided from the receipts of the National Debt Bureau, for meeting the requirements of unforeseen cases. One kind is for national defence and other important national exigencies; while the other kind is for needs in time of war.

ARTICLE LXX.

When the Imperial Diet cannot be convoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety, the Government may take all necessary financial measures, by means of an Imperial Ordinance.

In the case mentioned in the preceding clause, the matter shall be submitted to the

Imperial Diet at its next session, and its approbation shall be obtained thereto.

The interpretation of the present Article is amply furnished by the remarks made under Article VIII. The point of difference between the present Article and Article VIII. is, that in the case mentioned in the latter, when the Diet is not sitting, no extraordinary session of it need be called, while in the case of the present one, an extraordiary session is required; but even in this case, necessary measures may be taken without the consent of the Diet, when the convening of an extraordinary session is impossible on account of some circumstance of a domestic or of a foreign nature. More precaution is taken in the case of the present Article, as it relates to financial administration.

By "the necessary financial measures" mentioned in this Article, is to be understood those measures which, though by their nature they require the consent of the legislative assembly, are taken without it in cases of urgency.

What would be the consequences, were the Diet to refuse to give its approval to such financial measures taken in cases of urgency as entail future obligations upon the National Treasury? The withholding of approbation by the Diet refers only to the continued efficacy of the measures in question, and shall not possess the retrospective effect of annulling past proceedings (as has been already fully explained under Art. VIII.). Therefore the Diet can

not cancel the obligations of the Government that have arisen by effect of an Imperial Ordinance. The necessity of resorting to the measures in question would occur only in time of great national calamity. So, by the present Article a formal recognition has been given of the measures that may have been imperatively demanded for the protection of the national existence, while at the same time due importance has been allowed to the rights of the Diet.

ARTICLE LXXI.

When the Imperial Diet has not voted on the Budget, or when the Budget has not been brought into actual existence, the Government shall carry out the Budget of the preceding year.

When the Diet has closed before it has acted upon the Budget, it will then be said that "it has not voted on the Budget." When in one of the Houses the Budget has been rejected, it will be considered "not to have been brought into actual existence." Further, when the Diet has been either prorogued or when the House of Representatives has been dissolved, before a final vote has been taken upon it, the Budget will have no existence until the next opening of the Diet.

When the Diet has not voted on the Budget or the Budget has not been brought into actual existence,

the result will be, in extreme cases, the destruction of the national existence, and in ordinary ones, the paralyzation of the machinery of the administration. In the United States of America, in 1877, Congress delayed to vote the Army Estimates, and in consequence the troops did not receive any pay for three months. The same year also witnessed the rejection of the Budget in its entirety in the Parliament of Melbourne, Australia. But such a state of affairs being possible only in countries, where democratic principles are taken as the basis of their political institutions, it is incompatible with a polity like ours. In a certain country, might was once allowed to decide in such cases, and the Government carried out its financial measures at its pleasure, in spite of the sentiments of the legislative assembly (as was the case in Prussia from 1862 to 1866). Such a practice, however, is anomalous and is not proper from a constitutional point of view. In the Constitution of this country, after consideration of the nature of the national polity and a view of the matter from a theoretical standpoint, it has been settled that the Budget of the preceding year shall be adopted as a measure of last resort under circumstances like those above mentioned.

ARTICLE LXXII.

The final account of the expenditures and revenue of the State shall be verified and confirmed by the Board of Audit, and it shall be

submitted by the Government to the Imperial Diet, together with the report of verification of the said Board.

The organization and competency of the Board of Audit shall be determined by law separately.

The Budget is the first piece of work of the yearly financial business, while final accounts are the concluding piece of the same. There are two ways in which the Diet can exercise control over financial operations: one is a preceding, the other a subsequent control. By preceding control is to be understood the power of giving or of withholding consent to the Budget for the coming fiscal year, while by subsequent control is meant the power of verifying the statement of accounts of the past fiscal one. For submission to subsequent control, the Government has the duty of laying before the Diet the final accounts that have already undergone verification by the Board of Audit, together with the report thereon of the said Board.

The functions of the Board of Audit consist: *first*, in verifying the vouchers of the accountants of the different branches of the administration, and in discharging them from responsibility; *secondly*, in control over the measures of the authorities possessing the power of issuing warrants on the Treasury and in examination as to whether or not there has been any disbursement overpassing the estimated appro-

priation, any expenditures not provided for in the Budget, or any operation in violation on provisions of the Budget or of any law or Imperial Ordinance; *thirdly*, in verification of the general accounts of the National Treasury and of the reports on final accounts of the various Departments of State, in comparing the above with the amounts disbursed in the different branches of the administration, as reported to the said Board by the different accountants, and in thus confirming the general final accounts as well as the reports on final accounts of the different Departments of State.

The administrative verification made by the Board of Audit prepares the ground for the legislative one by the Diet. In the Diet, the report of the Board of Audit and the final accounts of the Government will be received at the same time, and the latter will be approved and confirmed, when they are considered to be correct.

For the examination of the financial business of the Government, the Board of Audit must possess an independent character. Accordingly its organization and functions, like those of judges, shall be determined by law and placed beyond the reach of the administrative ordinances. However, rules by which verification is to be conducted shall be determined by Imperial Ordinance.

CHAPTER VII.

SUPPLEMENTARY RULES.

ARTICLE LXXIII.

When it has become necessary in future to amend the provisions of the present Constitution, a project to that effect shall be submitted to the Imperial Diet by Imperial Order.

In the above case, neither House can open the debate, unless not less than two-thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two-thirds of the Members present is obtained.

The Constitution has been personally determined by His Majesty the Emperor in conformity with the instructions transmitted to Him by His Ancestors and He desires to bequeath it to posterity as an immutable code of laws, whose provisions His present subjects and their descendants shall obey for ever. Therefore, the essential character of the Constitution should undergo no alteration.

But law is advantageous only when it is in harmony with the actual necessities of society. Thus, although the fundamental character of the national polity is to continue unaltered for all ages to come, yet it may become necessary at some time in the

future, to make more or less great modifications in the less important parts of the political institutions, so as to keep them in touch with the changing phases of society. The present Article does not prohibit the amendment of the provisions of this Constitution at some future time, but establishes certain special conditions for the operation.

Why is the draft of a proposed amendment of the Constitution to be submitted to the Diet by an Imperial Order, while the projects of ordinary laws have to be laid before the Diet by the Government or initiated by the Diet itself? Because the right of making amendments to the Constitution must belong to the Emperor Himself, as he is the sole author of it. If, it may be asked, the power of amendment is vested in the Emperor, why is the matter to be submitted to the Diet at all? For the reason that the Emperor's great desire is that a great law, when once established, shall be obeyed by the Imperial Family as well as by His subjects, and that it shall not be changed by the arbitrary will of the Imperial Family. The ordinary mode of arriving at a decision by a majority of votes of the Members present, is not practised in this matter; the presence and a majority of at least two-thirds of the entire number of all the Members is required for so doing (in each House), for the reason that the greatest caution is to be exercised in regard to matters relating to the Constitution.

From the express provisions of the present Article, it is to be inferred that when a project for the amend-

ment of the provisions of the Constitution has been submitted to the deliberation of the Diet, the latter cannot take a vote on any matter other than what is contained in the project submitted to it. It is further to be inferred that the Diet is not allowed to evade the restriction of the present Article by voting a law that may directly or indirectly affect any of the principles of the present Constitution.

ARTICLE LXXIV.

No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet.

No provision of the present Constitution can be modified by the Imperial House Law.

How is it, that while the vote of the Diet is necessary for any amendment of the Constitution, a modification of the Imperial House Law alone, needs no submission to it? Owing to this, that the Imperial House Law is one that has been settled by the Imperial Family concerning their own affairs, and bears no relation to the reciprocal rights and duties of the Emperor or of His subjects towards each other. A rule by which a modification of the Imperial House Law is required to be submitted to the Imperial Family Council and also to the Privy Council ought to be mentiond in the Imperial House Law itself, but need have no mention in the Con-

stitution. Such a provision is accordingly omitted in the present Article.

But, should modifications of the Imperial House Law be suffered to either directly or indirectly bring about any alteration of the present Constitution, the foundations of the latter would not be free from exposure to destruction. Accordingly, in the present Article care has been taken to establish a special safeguard for the Constitution.

ARTICLE LXXV.

No modification can be introduced into the Constitution, or into the Imperial House Law, during the time of a Regency.

The institution of a Regency, is an extraordinary state measure and not an ordinary matter. Thus, although a Regent is entitled to exercise the right of reigning over and of governing the country just as if he were Emperor indeed, yet he is not allowed to exercise any power of decision concerning a modification either of the Constitution or of the Imperial House Law. For, the fundamental laws of State and of the Imperial House being of far superior importance than the office of Regent, which is in its nature provisional, no personage other than the Emperor has the power of effectuating the great work of making an amendment to any of them.

ARTICLE LXXVI.

Existing legal enactments, such as laws, regulations, Ordinances, or by whatever names they may be called, shall, so far as they do not conflict with the present Constitution, continue in force.

All existing contracts or orders, that entail obligations upon the Government, and that are connected with expenditure, shall come within the scope of Art. LXVII.

Just after the time of the Restoration, laws and regulations were promulgated under the names of *Gosata-sho* or *Fukoku* (Imperial Proclamation) or of *Futatsu* (Notification). On the 13th of the 8th month of the 1st year of Meiji (Sep. 28,1868), the forms for the proclamation of laws and of regulations were fixed. According to the system then established, the expression *Ōse-idasaru* or *gosata* (let it be proclaimed) was used in the case of laws and of regulations issued by the Central Administrative Council (*Gyōsei-kwan*), while the expression *mōshi-tassu* (let it be notified) was used in the case of those issued by the five Boards (those of Shrines, of Financial Affairs, of War, of Foreign Affairs and of Justice), and by Cities and Prefectures. Imperial Proclamations concerning matters within the sphere of either of the five Boards just mentioned or of a City or of a Prefecture, were first drawn up in the Board, City or Pre-

fecture concerned, and then submitted to the Central Administrative Council, whence they were proclaimed after the opinion of the Legislative Council (*Gyō-sei-kwan*) had been obtained thereon. By an Instruction dated the 8th of the 1st month of the 5th year of Meiji (Feb. 15, 1872), it was settled that all Imperial Proclamations and Departmental Notifications should in future be numbered. From that time also a clear distinction began to be made between Proclamations and Notifications. By an Instruction of the 18th of the 7th month of the 6th year of Meiji (1873) a distinction was made between those Proclamations, Notifications and Instructions that had to be posted in public places and those that need not be; and also different concluding phrases were settled for the above mentioned different kinds of Proclamations, Notifications and Instructions. Those addressed to the Government offices and to officials, concluded with the expression *Kono mune ai-tassu* (the above is notified), or *Kono mune ai-kokoroe beshi* (the above must be borne in mind). Those intended for application to the whole country, concluded thus: *Konomune fukokusu* (the above is hereby proclaimed); and in those addressed to Nobles and to Shizoku alone, or to intendants of shrines or temples, the expression *Kono mune kwa-shizoku ye fukokusu* (the above is proclaimed to Nobles and Shizoku), was contained, or the expression *Kono mune shaji ye fukokusu* (the above is proclaimed to intendants of shrines and temples). Finally, it was settled, that those addressed to Government offices and to officials, need not be posted

in public places. This was the first time that a distinction has ever been made between Proclamations to the people in general and Instructions to Government offices. In the 12th month of the 14th year of Meiji (1881), the forms of Imperial Proclamations and of Notifications were fixed. It was provided that Imperial Proclamations would be promulgated in the following formula:—

Proclaimed in obedience to the command of His Majesty the Emperor.

Chancellor of the Empire.

Notifications were to be issued by the Chancellor of the Empire, with the joint signature or signatures of the Minister or Ministers of State concerned. On the 3rd of the same month, it was settled by Imperial Proclamation, that laws and regulations should thenceforth be promulgated by Imperial Proclamation, but that all regulations hitherto issued by the different Departments of State, would thenceforth be issued by the Council of State. Thus the practice of issuing Notifications by the different Departments of State was abolished, and in its stead was instituted the one of appending to Notifications the joint signatures of the different Ministers of State. By the Imperial Ordinance of the 26th of the 2nd month of the 19th year of Meiji (1886), it was provided that laws and Imperial Ordinances would be promulgated with a preamble; that after the Imperial Sign-Manual had been obtained, the Privy Seal would be affixed, and lastly that the Minister President of State and the competent Minister or Ministers of State would append their

countersignatures to the document; and that Cabinet Ordinances would be issued by the Minister President of State and Departmental ones by the respective Ministers of States. To recapitulate, the expressions *Gosata-sho, fukoku* and *futatsu* which had for some time been used after the Restoration, to designate public documents issued by the Government, were merely expressions employed according to the nature of the form in which a particular document was drawn up. On the other hand, enactments that went by the name of *hō* (like *Koseki-hō* or the Census Law), of *ritsu* (like *Shin-ritsu-kōryō* or the New Criminal Code), of *rei* (like *Chō-hei-rei* and *Kaigen-rei* or the Conscription Law and the Law of Siege), of *jōrei* (*Shimbun-jōrei* or the Press Law), of *ritsu-rei* (like *Kaitei ritsu-rei* or the Revised Criminal Code), and of *kisoku* (like *Fukenkai-kisoku* or City and Prefectural Assembly Regulations)—these were promulgated throughout the land and, having the same binding force upon the whole people, no one of them was of more importance than another. By the promulgation of the Imperial Ordinance of the 26th of the 2nd month of the 19th year of Meiji (1886), the distinctive names of "law" and of "Imperial Ordinance" were adopted, but between what sort of matter should be promulgated as law and what as Ordinance, no definite boundary line has yet been drawn.

In the organization of the Senate issued in the 8th year of Meiji (1875), it is provided that the Senate shall hold deliberations on the enactment of new laws and upon amendments of old ones. It is also pro-

vided in the Imperial Ordinance of the 26th of the 2nd month of the 19th year of Meiji (1886), that projects of laws which are required to be submitted to the debate of the Senate, should be so done as in the past. But, since the 8th year of Meiji (1875), it has not been clear which of the Imperial Proclamations had the nature of law; consequently the limits of the legislative functions of the Senate have remained very vague and undefined (as it was remarked by the Senate in its representation to the Emperor on the 22nd of the 2nd month in the 11th year of Meiji, 1878). Since the 19th year (1886), not a small number of Imperial Ordinances have been submitted to the deliberations of the Senate. The fact is, that until the Constitution comes into effect, a law and an Imperial Ordinance shall be one and the same thing in reality; consequently no distinction can be made as to the binding force of laws and of Ordinances, on the ground of a difference of appellation. In this respect, an analogy may be drawn between law and ordinance on the year hand, and *fukoku* (Imperial Proclamation) and *futatsu* (Notification) of the years previous to the 19th year of Meiji (1886), on the other: at times there was a difference between *fukoku* and *futatsu*, at others there was none.

Therefore, we must look to the establishment of the Imperial Diet for the drawing up of clear distinctions between laws and ordinances, according to the provisions of the Constitution. But until its establishment, neither the name, whether law, regulation, ordinance or what not, shall be taken as the

guide for judging of the relative importance of enactments as to their efficacy. All enactments that have hitherto been passed shall have binding force, despite their diversity of appellation. But, with regard to such enactments as may be in conflict with the provisions of the present Constitution, the whole or any part of such enactments shall lose its effect from the day on which the Constitution comes into force.

Of the enactments of former days now in force and to remain so in future, some of them would have to be in the form of laws, were they to be framed anew according to the provisions of the Constitution. (For instance, the Conscription Law of Article XX., and law concerning taxation, Article XXI.) To make these enactments of the past conform to the provisions of the Constitution by giving them the form of law, would however be attaching too much importance to mere forms, and it would be a useless trouble to do so. It is, therefore, provided, in the present Article, not only that existing laws, ordinances and regulations shall possess binding force, but also that such enactments as are required by the Constitution to be promulgated in the form of laws, shall possess force the same as laws. When it has become necessary in future to make amendments of such enactments, the amendments are to be carried out as laws, notwithstanding that the original enactment in question had been promulgated in the form of Ordinance or of Notification.