THE PRINCIPLE OF SEPARATION OF POWERS IN JAPAN

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Abstract: The 1946 Constitution of Japan adopted the principle of separation of powers, dividing three governmental powers and vesting each in a different department. However, it also adopted the Westminster system of parliamentary government, creating a very close relationship between the legislature and the executive. As a result, there are several differences between Japan and the United States, which adopted a presidential system based on the separation of powers principle. The Japanese system is also different from the system in the United Kingdom. Moreover, the actual relationships among the three departments are heavily influenced by the dominant administrative law doctrines, resulting in a much stronger executive department. This article closely analyses the separation of powers principle in Japan and critically examines its actual implementation.

Keywords: *separation of powers; cabinet; Prime Minister; the executive power; the legislative power; dissolution; delegation; judicial injunction*

I. Introduction

The Constitution of Japan, promulgated in 1946,[1] adopted the principle of separation of powers, dividing legislative power, executive power and judicial power and reposing each in a different department: legislative power in the Diet, executive power in the Cabinet and judicial power in the Judiciary.[2] At the same time, it adopted the Westminster system of parliamentary government, which entails a very close relationship between the legislature and the executive; in Japan, the head of the executive department, the Prime Minister, is chosen by the legislature, the executive power is granted to the Cabinet, a collegiate body and the Cabinet is collectively responsible to the Diet. As a result, the Japanese arrangement can be distinguished from the US system of presidential government, which seeks to clearly divide powers among the legislature, executive and the judiciary and grant the executive power to a single person, ie, the President. The Japanese system is also different from the system adopted in United Kingdom, although both

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1 Nihonkoku kenpō [Constitution of Japan] (promulgated on 3 November 1946); Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (Oxford: Hart Publishing, 2011).

2 It also vertically divided the powers of the central government and local government. In this article, this aspect of the vertical separation of powers will not be examined.

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countries share the Westminster system;[3] in Japan, the structure of government is regulated by the written constitution, there is no parliamentary sovereignty, and the Constitution has granted the executive power to the Cabinet and not to the monarch. Additional differences have been introduced by constitutional interpretation and not by explicit constitutional provision. Moreover, due to the pervasive influence of German administrative law doctrines, the actual administration of the system is heavily inclined to grant vast powers to the executive. As a result, the actual implementation of the principle of separation of powers in Japan is quite different than in other countries.

This article seeks to illuminate the unique approach that the Japanese constitutional system takes to the principle of separation of powers. Section II briefly outlines the historical background of the current system. Section III explains the basic system of government under the Constitution of Japan, describing how the principle of separation of powers and the Westminster system of government are combined into the single framework. This analysis will reveal differences between Japan's system of government and the presidential system in the United States, and that of the Westminster system in the United Kingdom. Section IV focuses on the influence of German administrative law doctrines on the principle of separation of powers in Japan, illuminating the very strong powers of the executive. Section V critically examines whether the current system and constitutional interpretations are appropriate or whether they ought to be reconsidered. This article concludes with an argument that the current system adopted by the Constitution of Japan may work effectively, but that some of the dominant constitutional interpretations and understanding of the separation of powers may need serious reconsideration.

II. Path to the Current System

A. Structure of government under the Meiji Constitution

After the Meiji Restoration in 1868, the political leaders of the restoration attempted to build a modern system of government, based on the sovereign power of the Emperor. The Meiji Constitution,[4] promulgated in 1889, was the first modern constitution of Japan. It adopted a system of government modelled after Prussia,

3 Although many scholars in the United Kingdom used to deny the principle of separation of powers as an essential component of constitutional law in United Kingdom, a growing number of scholars now came to view it as an essential ingredient of the British constitutional law. See Eric Barendt, "Separation of Powers and Constitutional Government" (1995) 1995 PL 599; Nicholas W Barber, "The Separation of Powers and the British Constitution" (Oxford Legal Studies Research Paper No 3/2012), available at http://dx.doi.org/10.2139/ssrn.1995780. This article is written on the assumption that the principle of separation of powers is accepted both in the United States and the United Kingdom.

4 Dainihonteikoku kenpō [Constitution of the Emperor of Japan] (promulgated on 11 February 1889) (Meiji Constitution).

the most powerful state in Germany at that time, and attempted to create a Japanese government similarly based on the absolute powers of its ruler.[5] Above all, the Emperor was sovereign[6] and had total power to govern Japan, even before the enactment of the constitution.[7] This power is deemed to have passed on to him through an unbroken succession of ancestors.[8] The Meiji Constitution did not limit the Emperor's powers. By enacting the constitution, the Emperor had merely promised to abide by it voluntarily when exercising his political power.[9]

The Meiji Constitution explicitly vested the Emperor with all governmental powers.[10] He was expected to exercise legislative power with the support of the Imperial Diet (the Legislature)[11] and exercise governmental powers with the assistance of the state ministers.[12] Under this system, a Cabinet was established[13] and a Prime Minister was appointed[14] to give advice to the Emperor. Judicial power was supposed to be exercised in the name of the Emperor.[15] There was therefore some indication of the idea of separation of powers under this system.

Despite this, legally speaking, the Emperor retained all governmental powers under the Meiji Constitution. The Imperial Diet consisted of the House of Peers comprising unelected peers and the House of Representatives, whose members were elected by eligible voters.[16] However, only very few wealthy people were granted the right to vote for members of the House of Representatives.[17] This means that, although the House of Representatives was supposed to represent the whole people, in reality it represented only a very few. Although the Imperial Diet was supposed to give support to the Emperor for his exercise of legislative power and the statute needed to be approved by the Imperial Diet, the agreement of the House of Peers was necessary to pass a bill into statute.[18] Furthermore, in the end, the Emperor retained the power to veto legislation.[19] The Emperor also had the power to issue imperial orders in emergency situations[20] without legislative authorisation and to issue an

5 George A Malcom, "The Constitution of the Empire of Japan" (1920) 19 Mich L Rev 62.
6 Meiji Constitution (n.4) art.1. He was also sacred and inviolable; *Ibid*., art.3.
7 *Ibid.*, at the Preamble.
8 *Ibid.*, art.1.
9 *Ibid.*, art.4.
10 *Ibid*.
11 *Ibid.*, art.5.
12 *Ibid.*, art.55.
13 Naikaku kansei [Imperial Edict for the Cabinet] (Imperial Edict No 135 of 1889).
14 *Ibid.*, art.2.
15 Meiji Constitution (n.4) art.57.
16 *Ibid.*, art.33.
17 The first general election for the members of the House of Representatives was held in 1890 after the promulgation of the Meiji Constitution. Only male citizens over the age of 25 who paid more than 15 JPY as a national tax were allowed to vote in this election, and they comprised only 1 per cent of whole population. It was only in 1925 that universal suffrage was allowed for all male citizens over the age of 25.
18 *Ibid*., art.38.
19 *Ibid*., art.6.
20 *Ibid*., art.8.

order if it was necessary to maintain public order.[21] The principle of representative government was thus severely compromised. While the Emperor was supposed to be assisted by the Cabinet as a whole, under the Meiji Constitution the Cabinet was only an institution in form, and the ministers of state were supposed to give advice to the Emperor individually. The Emperor also retained the prerogative to command the army and navy;[22] to decide on the organisation and peace-time standing of armed forces;[23] and to declare and end war.[24] There was a special court system outside the jurisdiction of the ordinary courts,[25] and the Administrative Court adjudicated on the legality of administrative action.[26] The Administrative Court was a part of the government, and ordinary courts did not have any power to hear these cases or to review its decisions.[27] In other words, judicial power included only the power to adjudicate civil and criminal cases.[28] Moreover, there was no system of judicial review on the constitutionality of the exercise of government powers. The principle of separation of powers under the Meiji Constitution was thus not well developed.

Indeed, the political leaders explicitly rejected the principle of separation of powers as enshrined in the US Constitution. The US Constitution, following the political philosophy of Montesquieu,[29] separated and vested legislative power in Congress,[30] executive power in the President[31] and judicial power in the courts, respectively.[32] Still, the system that the framers of the US Constitution adopted was not totally separationist but saw the separation of powers as a way to institute a scheme of checks and balances. The US Constitution gave the President the power to veto legislation,[33] and it required the consent of the Senate of the Congress for the President to appoint officers[34] and to conclude international treaties.[35] Later, the Supreme Court developed the doctrine of judicial review, thus subjecting the legislative and executive powers to review by the courts.[36]

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21 *Ibid*., art.9.
22 *Ibid*., art.11.
23 *Ibid*., art.12.
24 *Ibid*., art.13.
25 *Ibid*., art.60.
26 *Ibid*., art.61.
27 *Ibid*.
28 Moreover, the independence of the judges was not specifically protected. Since the power of judicial administration was granted to the Ministry of Justice, there was a possibility that the judicial independence might be compromised.
29 Charles Baron de Montesquieu, *The Spirit of the Laws* (Amherst: Prometheus Books, 2002) (originally published in 1748). Also, see generally MJC Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 2nd ed., 1998).
30 Constitution of the United States of America 1787 art.I s.1.
31 *Ibid*., art.II s.1. The president is also granted the power to appoint "public ministers" and "all other officers of the United States" with the advice and consent of the Senate; *Ibid*., art.II s.2.
32 *Ibid*., art.III s.1.
33 *Ibid*., art.I s.7.
34 *Ibid*., art.II s.2.
35 *Ibid*.
36 *Marbury v Madison* 5 US 137, 1 Cranch 137 (1803).

Faced with criticism that the structure of the government in the proposed US Constitution violated the maxim of the separation of powers,[37] James Madison replied that "the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied."[38] Madison pointed out that "the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other."[39] Rather, he insisted that "unless these departments be so far connected and blended as to give to each other a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."[40] The solution he advocated is that "each department should have a will of its own," and that there should be given "to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[41] According to Madison, a system that enables each department to check the others is necessary.[42] Such a scheme of separation of powers and checks and balances were unacceptable for political leaders under the Meiji Constitution, since they wanted to establish the government system to grant very strong powers to the Emperor with serious limitations on the power of the legislature and the judiciary.

B. Subsequent developments

The system of government under the Meiji Constitution was quite similar to the system of government in the United Kingdom before the development of the parliamentary government. The United Kingdom developed the Westminster system of parliamentary government largely by convention.[43] Eventually, the monarch no longer exercised his or her veto power, and as the political party system developed, he or she came to affirm the leader of the ruling party as Prime Minister and was required by convention to rely upon the advice of the Prime Minister and the Cabinet in exercising the executive power. As a result, the British monarch does not exercise actual political power, and almost all power is left to the Prime Minister and Cabinet. The monarch no longer attended or participated in discussions in Cabinet. The Prime Minister gradually came to be responsible to Parliament and not to the monarch. When the House of Commons passes a non-confidence vote

37 Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (New York: New American Library, Clinton Rossiter ed., 1961) p.301 (*Madison*).
38 *Ibid*.
39 *Ibid*., 302.
40 *Ibid*., 308.
41 *Ibid*., 321–322.
42 *Ibid*., 322.
43 Christopher Edward Taucar, *The British System of Government and Its Historical Development* (Montreal and Kingston: McGill-Queen's University Press, 2014).

against the Prime Minister, the Prime Minister is by convention required to resign or he or she must seek the monarch's consent to dissolve the House of Commons and call for a general election. These are the main characteristics of the modern Westminster system.[44]

While it was theoretically possible that a similar Westminster system of government could have developed in Japan, the development of such a system was hampered by several factors. First, the political leaders did not have any desire to limit the powers of the Emperor.[45] They flatly denied and rejected the British system's merely symbolic role for the monarch and, instead, established a system that granted all governmental powers to the Emperor.[46] Second, the Emperor's prerogative to command the army and the navy was used to allow his military forces to make decisions without interference from the Imperial Diet or from the Cabinet.[47] Understandably, military leaders also did not want to limit the powers of the Emperor. Third, although a party system had gradually developed in Japan,[48] it was never fully established. This precluded the possibility of appointing a political leader of the ruling party as a Prime Minister to decide government policy, with the possibility of changes of government.[49] The failure to fully establish a Westminster parliamentary system was also partly due to a lack of trust for a political party from the people of Japan, which caused party politics to diminish especially after the 1930s.[50]

Eventually, due to a rush to give complete support to rising military expansion, and a total mobilisation for the war effort, even the pretence of constitutionalism disappeared in Japan.[51] Refusal to actively support the Emperor and the military action conducted in his name was condemned as "anti-Japanese", and anyone who did so could be arrested and tortured. As a result, there was only total militarism and dictatorship leading up to World War II.

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44 For a brief outline of the traditional British government system, see Ivor Jennings, *The Law and the Constitution* (London: Hodder & Stoughton, 5th ed., 1976); Ivor Jennings, *The British Constitution* (Cambridge: Cambridge University Press, 5th ed., 1971). For the United Kingdom's current system of government, see Eric Barendt, *Introduction to Constitutional Law* (Oxford: Clarendon, 1998); Peter Leyland, *The Constitution of the United Kingdom* (Oxford: Hart Publishing, 2nd ed., 2012).

45 Katsutoshi Takami, "Meiji kenpoka niokeru kenryoku bunritsuron no tenkai" [Development of Principle of Separation of Powers under the Meiji Constitution] (1990) 40 Hokudai Hogaku Ronshu 1341, 1343–1345.

46 *Ibid*., 1344.

47 Makoto Ohishi, *Nihon kenpoushi [History of Constitution in Japan]* (Tokyo: Yuhikaku, 2nd ed., 2005).

48 Ernest W Clement, "Political Parties in Japan" (1912) 27 PSQ 669.

49 The year 1924 was a peak year for the development of party politics in Japan when Takaaki Kato was appointed as a Prime Minister for the first time from the first political party with the support of other liberal parties. In 1925, the government amended the election system to grant the right to vote to all adult male citizens.

50 JAA Stockwin, *Governing Japan: Divided Politics in a Resurgent Economy* (Oxford: Blackwell, 4th ed., 2008) p.23.

51 Jun-nosuke Masumi, *Nihon Seijishi [Japanese Political History]* (Tokyo: University of Tokyo Press, 1988) p.3.

III. The Current System

A. The principle of separation of powers

The current Constitution of Japan was enacted during the occupation by Allied Powers after Japan's defeat in World War II, and it significantly changed the structure of the government.

First, it changed the status of the Emperor from powerful sovereign to a mere symbolic figure.[52] It adopted a model premised on popular sovereignty by specifically declaring that sovereign power resides with the people and the Constitution was enacted by the people of Japan,[53] which further made clear that the position of the Emperor is derived from the will of the people, who have sovereign power.[54] Ultimately, all the powers of the government are derived from the people of Japan. The role that the Emperor is supposed to play was stipulated in the Constitution[55] and is primarily a ceremonial one. The Constitution also makes clear that the Emperor does not have any political power.[56]

Second, the Constitution separated the three governmental powers: legislative, executive and judicial. It vested all "legislative powers" in the Diet as the national legislature,[57] which was declared to be "the highest organ of state power."[58] The Diet consists of the House of Representatives and the House of Councillors, both elected by the people,[59] and the people are guaranteed their right to vote.[60] In order to pass a bill into legislation, the two houses in the Diet essentially need to agree on the bill.[61] Once the bill is passed by the Diet, the Prime Minister and responsible ministers must sign the bill,[62] and the legislation needs to be promulgated on the official gazette under the name of the Emperor.[63] However, the signature and promulgation requirements are merely ceremonial in nature and are not necessary for the legislation to take effect.[64]

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52 Constitution of Japan (n.1) art.1.

53 *Ibid*., at the Preamble.

54 *Ibid*., art.1.

55 *Ibid*., arts.4 and 7.

56 *Ibid*., art.4, which states that the Emperor "shall not have powers related to government". It is the Cabinet that gives approval for all acts of the Emperor in matters of state and is responsible for them. *Ibid.*, art.3.

57 *Ibid*., art.41.

58 *Ibid*.

59 *Ibid*., art.43.

60 *Ibid*., art.15(1) and 15(3).

61 *Ibid*., art.59(1). However, the House of Representatives could override the rejection of the House of Councillors by a two-thirds majority vote; *Ibid*., art.59(2).

62 *Ibid*., art.74.

63 *Ibid*., art.7(i).

64 In Japan, the promulgation of statutes on the official gazette is believed to be necessary to enforce the statute. However, it is the Cabinet that is responsible for the Emperor's action; *Ibid*., art.3. Furthermore, since Japan now follows the Westminster system, the ruling party and the Prime Minister belong to the same party. It is unlikely that the Prime Minister would advise the Emperor not to promulgate statutes passed by the ruling party in the Diet.

The Constitution of Japan then grants "executive power" to the Cabinet.[65] The Cabinet is a collegiate body led by the Prime Minister and consists of the Prime Minister and other ministers of state chosen by the Prime Minister.[66] This is a critical difference from the United States, where the presidential system grants executive power to the President, a single person.[67] The functions of Cabinet are listed in the Constitution,[68] and undoubtedly the most important function is to administer the law "faithfully".[69]

Finally, the Constitution of Japan vested the "whole judicial power" in the Supreme Court of Japan, and other inferior courts to be established by the Diet.[70] It specifically prohibited the establishment of extraordinary tribunals[71] and also the executive department from adjudicating a case as a final authority.[72] It also guaranteed the independence of all judges.[73] As a result, the Administrative Court was abolished, and all cases against administrative agencies are now heard by judicial courts.[74] Therefore, members of the public can file civil suits in the ordinary courts — even against administrative actions.

The Constitution of Japan also adopted a system of checks and balances between the three departments of government. First, although it vested the legislative power in the Diet, the enforcement of the law is left with the executive branch. Since statutes passed by the Diet simply authorise the responsible ministers of state to enforce them, the ministers of state have very broad discretion in enforcing the law. Second, if the Diet is not satisfied with the execution of a statute by the executive department, it can revise the statute or enact a new one to reverse the executive action. Furthermore, although Cabinet has the power to prepare a budget, the budget needs to be approved in principle by the Diet.[75] Likewise, while the Cabinet has the power to conclude a treaty, such a treaty must also be approved by the Diet.[76] Finally, all the actions of the Diet and the executive are subject to judicial review. The Supreme Court of Japan has the ultimate power to decide the constitutionality of all government actions, including the constitutionality of the statutes passed by

65 *Ibid*., art.65.
66 *Ibid*., art.66.
67 Constitution of the United States of America (n.30) art.II s.1.
68 Constitution of Japan (n.1) art.73.
69 *Ibid*., art.73(i). But note that the Constitution refers to "administer the law faithfully" instead of "execute the law faithfully".
70 *Ibid*., art.76(1).
71 *Ibid*., art.76(2).
72 *Ibid*.
73 *Ibid*., art.76(3).
74 The "whole judicial power" granted to the judicial courts has been interpreted to include cases against the administrative actions as well.
75 *Ibid*., arts.60 and 73(v).
76 *Ibid*., arts.61 and 73(iii).

the Diet.[77] Therefore, the Constitution of Japan separates powers and institutes a system of "checks and balances."

B. Westminster system of government — differences from the United States

At the same time, the Constitution of Japan adopted a Westminster system of parliamentary government whereby the head of government is the Prime Minister who is elected by the Diet,[78] appointed by the Emperor[79] and who then, in turn, appoints the ministers of state[80] and the Cabinet is granted the executive power. This is unlike in the US presidential system, for instance, where the head of government is the President, who is chosen by the public in an indirect election[81] and the executive power is granted to the President. The Cabinet in Japan, vested with the executive power, is "collectively responsible" to the Diet.[82] No such responsibility exists in the United States between the President and the Congress. When the House of Representatives passes a resolution of no confidence against the Cabinet in Japan, the Cabinet must resign *en masse*, or alternatively, the Prime Minister must dissolve the House within 10 days and call for a general election.[83] No such vote of non-confidence was anticipated in the United States and the President does not have any power to dissolve the House of Representatives. The Constitution of Japan clearly envisages that the leader of the majority party in the Diet will be selected as the Prime Minister, and that the Cabinet, with the support of the majority in the Diet, will be responsible for executing all statutes passed by the Diet. As a result, the relationship between the ruling party in the legislature and the executive is much closer in Japan than in the US presidential system, where the Cabinet is not even a constitutional organ.

Since the Prime Minister must be selected from the members of the Diet, he retains the status of a Diet member. Although the selection of the ministers of state is left to the Prime Minister, at least a majority of them must be members of the Diet.[84] In practice, most of the ministers of state are members of the Diet, unlike in the United States, where Cabinet members are all non-members of Congress. Japanese Cabinet members, even after their appointment to the Cabinet, do not lose their status as Diet members.

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77 *Ibid*., art.81 ("[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act").
78 *Ibid*., art.67.
79 *Ibid*., art.6(1).
80 *Ibid*., art.68.
81 Constitution of the United States of America (n.30) art.II.
82 Constitution of Japan (n.1), art.66(3).
83 *Ibid*., art.69.
84 *Ibid*., art.68(1).

Furthermore, the Prime Minister and other ministers of state "may, at any time, appear in either House for the purpose of speaking on bills, regardless of whether they are members of the House or not."[85] They must appear when their presence is required in order to give answers or explanations.[86] Finally, the Prime Minister is authorised to submit bills on behalf of the Cabinet.[87] This is also different from the United States, where the President does not have the power to directly submit a bill to Congress,[88] and the President and Cabinet members do not attend Congressional proceedings or participate in discussions, except when they are summoned to appear before Congressional committee hearings as witnesses.[89]

The Constitution of Japan was enacted based on a draft provided by the occupation forces.[90] It is now clear that the adoption of the Westminster system was contemplated by drafters from the occupation forces from the very outset.[91] The occupation forces placed emphasis on the establishment of a principle of responsible government. There is no evidence that the drafters ever considered the possibility of introducing a presidential system in Japan.

C. Differences from the United Kingdom

Despite having been modelled after the Westminster system of parliamentary government in the United Kingdom, there are significant differences between the Japanese system and the UK system. In addition to the fact that the structure of government is written in the Constitution and not regulated by conventions, there is no parliamentary sovereignty in Japan. Sovereignty resides with the people of Japan. The Diet is not sovereign but is subject to constitutional restraints. The Judiciary can review the constitutionality of a statute and strike it down if it determines that the statute is unconstitutional.

The executive power is granted to the Cabinet, a collegiate body, and not to the monarch. This is distinct from the United Kingdom, where the monarch retains the executive power. By convention, the UK Prime Minister and the Cabinet provide advice to the monarch, which results in an unclear relationship between the Prime Minister and the Cabinet. In contrast, in Japan, it is not the

85 *Ibid*., art.63.

86 *Ibid*.

87 *Ibid*., art.72. As we will see, this provision has been interpreted to allow the Prime Minister to introduce a legislative bill into the Diet. See works referred to in Note 92.

88 The President submits budget to the Congress, but it is merely a request and not a bill. The President may also submit treaties for the Senate to advise on and consent to, but it is also not a bill.

89 The President can deliver the State of Union address in the Congress but this is merely a message from the President.

90 Shoichi Koseki, *The Birth of Japan's Postwar Constitution* (Ray A Moore tr, New York: Perseus, 1998); Ray A Moore and Donald L Robinson, *Partners for Democracy* (Oxford: Oxford University Press, 2004).

91 Kenji Saito, "Nihon niokeru giin naikakusei no design [Design of the Parliament System in Japan]" The Reference (November 2010) Research and Legislative Reference Bureau, National Diet Library, p.3.

Prime Minister but the Cabinet that exercises the executive power, and as a result, the role of the Prime Minister in the Cabinet becomes an important issue.

D. Additional differences introduced by constitutional interpretation

In addition to the differences specifically arising from the text of the constitution, there are other differences introduced by constitutional interpretation.

First, in Japan, the prevailing interpretation allows the Cabinet to introduce legislative bills in the Diet.[92] This marks a total departure from the practice in the United States, where under the principle of separation of powers, only members of Congress can introduce a legislative bill. Although the Constitution vests legislative power in the Diet in Japan, many believe that the Cabinet should be allowed to introduce legislative bills, because the Japanese system is a Westminster system.[93] The Prime Minister is clearly authorised by the constitution to submit a "bill" on behalf of the Cabinet, but unlike budget and treaty approvals, there is no specific mention of legislative bills. Nevertheless, proponents of Cabinet-introduced legislative bills point out that the Diet retains the total freedom to discuss and pass legislative bills, even when the Cabinet introduces them.[94] They thus believe that the power of the Prime Minister to introduce legislative bills does not infringe upon the legislative power of the Diet. As a result, the Prime Minister has also been allowed to introduce legislative bills in the Diet.[95] Indeed, the overwhelming majority of legislation passed by the Diet are actually government bills, introduced by the Prime Minister representing the Cabinet.[96]

The budget is prepared by the Cabinet and must be introduced into the Diet as a budget bill rather than as ordinary legislative bill.[97] This practice differs from that of the United States, where the budget prepared by the President is merely a proposal, each appropriation and expenditure needs to be included in regular bills introduced by a Congress member, and Congress has full power to amend these bills. In Japan,

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92 Nobuyoshi Ashibe (supplemented by Kazuyuki Takahashi), *Kenpō [Constitution]* (Tokyo: Iwanami Shoten, 6th ed., 2015) p.297; Koji Sato, *Nihonkoku kenpōron [Japanese Constitution]* (Tokyo: Seibundo, 2011) p.438; Masami Itoh, *Kenpō [Constitution]* (Tokyo: Koubundo, 3rd ed., 1995) p.423; Toshihiko Nonaka *et al.*, *Kenpō II [Constitution II]* (Tokyo: Yuhikaku, 4th ed., 2006) p.74 (Katsutoshi Takami); Mutsuo Nakamura *et al.*, *Kenpō III [Constitution III]* (Tokyo: Seirin, 1998) p.235 (Mutsuo Nakamura).

93 See Ashibe, *Kenpō [Constitution]*, *Ibid.*, p.297; Sato, *Nihonkoku kenpōron [Japanese Constitution]*, *Ibid.*, p.437; Itoh, *Kenpō [Constitution]*, *Ibid.*, p.423.

94 See Ashibe, *Kenpō [Constitution]*, *Ibid.*; Itoh, *Kenpō [Constitution]*, *Ibid.*

95 Naikakuhō [Cabinet Act] (Act No 5 of 1947) art.5.

96 For instance, during the 183rd Diet in 2013, 75 government bills were submitted out of which 63 of them were passed; in contrast, only 10 of the 81 private-member bills which were submitted were passed. See Cabinet Legislation Bureau, *Saikin niokeru houritsuan no teishutsu/seiritsu kensu [Number of Bills Submitted and Passed in Recent Diet]*, available at: http://www.clb.go.jp/contents/all.html (visited 21 July 2018). Among the bills passed, the government bills thus occupied roughly 83 per cent.

97 Constitution of Japan (n.1) arts.60 and 73(v).

the budget is not an authorisation to collect the budget without passing separate tax bills, notwithstanding that it is an authorisation to spend tax money.[98] It is also different in that the budget needs to be submitted for approval every year.[99] Further, since it is supposed to be prepared by the Cabinet, many believe that there is a limit on how much the Diet can modify the budget.[100] Although there is no consensus on the specific limit, many tend to believe that the Diet is not allowed to fundamentally revise the budget, which would be to deny the power of the Cabinet to prepare the budget bill.[101]

Furthermore, although the constitution mentions the dissolution of the House of Representatives only in response to a vote of no confidence,[102] many believe that the Prime Minister should be allowed to dissolve the House of Representatives whenever he deems necessary because the Japanese system follows the Westminster model.[103] As a result, most of the dissolutions of the House of Representatives in Japan have been mandated by the Prime Minister without a vote of no confidence being passed beforehand.[104]

Additional differences were also introduced by constitutional interpretation to differentiate Japan from the United Kingdom. First, the Diet is understood to have a legislative power over the organisation and structure of the Cabinet. The Constitution of Japan provides that the Cabinet shall consist of the Prime Minister, who shall be its head, and other ministers of state, "as provided for by law" thereby anticipating legislative regulation of the Cabinet. Pursuant to that, the Diet enacted the Cabinet Act[105] which stipulates not only the number of ministers of state[106] but also how the Cabinet conducts its business.[107] In contrast, in the United Kingdom, these are matters left to autonomous decisions of the Cabinet. Nevertheless, legislative interference has been justified in Japan because the Diet

98 See Ashibe, *Kenpō [Constitution]* (n.92) pp.362–363; Hideki Shibutani, *Kenpō [Constitution]* (Tokyo: Yuhikaku, 3rd ed., 2017) p.629.

99 Under the Meiji Constitution, the same power to prepare a budget was granted to the government, and the budget needed to have a support from the Imperial Diet. See Meiji Constitution (n.4) art.64. When the Imperial Diet failed to support the budget bill, the government was entitled to enforce the same budget as the previous year; *Ibid*., art.71. There is no such authorisation under the Constitution of Japan.

100 Under the Meiji Constitution, the Imperial Diet was precluded from abolishing or reducing the budget based on the constitutional prerogatives and the budget already mandated by the statutes; *Ibid*., art.67.

101 See Itoh, *Kenpō [Constitution]* (n.92) p.666.

102 Constitution of Japan (n.1) art.69. It is the Emperor who dissolves the House of Representatives; *Ibid.*, art.7.

103 See Ashibe, *Kenpō [Constitution]* (n.92) pp.50, 334; Sato, *Nihonkoku kenpōron [Japanese Constitution]* (n.92) p.478.

104 Only 4 out of 24 dissolutions under the Constitution of Japan were mandated in response to the non-confidence vote.

105 Cabinet Act (n.95).

106 *Ibid*., art.2(2).

107 *Ibid*., art.4(1): the Cabinet conducts its business through the Cabinet meeting.

is the "highest state organ," and therefore the legislative power of the Diet should include regulation of the executive organisation.

Moreover, although the Prime Minister is supposed to be the head of the Cabinet, the dominant understanding is that the Prime Minister does not act unilaterally but act as a member of the Cabinet[108] and that Cabinet decisions should customarily be unanimous.[109] This means that the Prime Minister cannot dictate the decisions of the Cabinet. After all, it is the Cabinet that has the executive power, and not the Prime Minister alone. The Japanese Prime Minister's role is seriously restricted because he needs unanimous support from all ministers of state for a Cabinet decision.

This has raised a serious question in Japan as to whether the Prime Minister can control and supervise the executive department without the support of a Cabinet decision. The Constitution stipulates that "[t]he Prime Minister, representing the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet and exercises control and supervision over various administrative branches."[110] There is an ambiguity whether the Prime Minister can "exercise control and supervision" over the executive department without the support of the Cabinet decision. The dominant view is that the Prime Minister cannot.[111] As a result, sometimes a weird provision is needed to allow the Prime Minister alone to act without a Cabinet decision. For example, despite the pacifism principle in the constitution (a renunciation of war powers and a ban on the maintenance of armed forces),[112] the Japanese government has maintained the Self Defense Forces,[113] justified as a minimum force to defend Japan and which does not constitute a prohibited armed forces. The constitution does not expressly state that the Prime Minister is the commander-in-chief. Consequently, there has been a question as to whether the Prime Minister alone can order the deployment of the Self Defense Forces or make a defense decision, or whether he needs to convene a Cabinet meeting for each decision. In emergency situations, there is no time to gather all Cabinet members, and it is much more practical to grant the final decision to the Prime Minister. The Self Defense Forces Act specifically provides for the Prime Minister to be the commander-in-chief "representing the Cabinet,"[114] viewing the decision of the

108 *Ibid*., art.4(2): the Prime Minister will preside over the Cabinet; art.6: the Prime Minister can control and supervise each administrative departments based on the policy approved by the Cabinet meeting.

109 See Ashibe, *Kenpō [Constitution]* (n.92) p.328; Itoh, *Kenpō [Constitution]* (n.92) p.534; Nakamura *et al.*, *Kenpō III [Constitution III]* (n.92) p.203.

110 Constitution of Japan (n.1) art.72.

111 See Nonaka *et al.*, *Kenpō II [Constitution II]* (n.92) p.182; Nakamura *et al.*, *Kenpō III [Constitution III]* (n.92) p.238.

112 Constitution of Japan (n.1) art.9, where a renunciation of war powers and a ban on the maintenance of armed forces are expressed.

113 Jieitaihō [Self Defense Forces Act] (Act No 165 of 1954).

114 *Ibid*., art.7.

Prime Minister as automatically representing the Cabinet and thus enabling the Prime Minister to command the Self Defense Forces without actually convening a Cabinet meeting for each decision.

Whether the Japanese courts will find this provision constitutional remains uncertain. However, in the absence of such a special provision, it is arguable that the Prime Minister "represents the Cabinet" only insofar as he or she has the support of Cabinet. The Supreme Court of Japan was called upon to construe otherwise in the *Lockheed Case*.[115] In this case, former Prime Minister Kakuei Tanaka was prosecuted for receiving a bribe in exchange for directing All Nippon Airways (ANA) to purchase aircrafts from the Lockheed Corporation or directing the Transportation Minister to encourage ANA to purchase them. Naturally, there was no Cabinet decision supporting his actions. The Supreme Court of Japan upheld the conviction, concluding that the Prime Minister had exercised his official power in exchange for a bribe.[116] It further held that the Prime Minister did not have the power to exercise control and supervision without a Cabinet decision. Instead, it authorised the Prime Minister to give non-legal "advice and direction" to the ministers, provided that it does not reach the level of a legal "control and supervision", without a Cabinet decision, and in this case, he exercised this power to direct the Transportation Minister to encourage the ANA to purchase Lockheed aircrafts.[117] Thus, the Supreme Court is clear that the Prime Minister is precluded from exercising legal control and supervision over the executive department without a Cabinet decision.

This interpretation also raised the important issue of whether the Prime Minister can exercise powers granted by the Diet to each minister of state by passing statutes. In other words, the question arose as to whether the Prime Minister could order a minister of state to exercise those powers as he or she wishes or otherwise make decisions for that minister of state. The result of the Court's determination was that in Japan, the Prime Minister is usually allowed to "instruct" the minister of state on how to exercise the authorised power but does not have the power to issue such a legal order.[118]

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115 *Judgment upon case on the admissibility of depositions prepared through the proceedings of international judicial assistance and the power and duties of the Minister for Transport* [1995] JPSC 5; 49:2 Keishu 1 (Saikō Saibansho [Supreme Court], grand bench, 22 February 1995).

116 *Ibid*.

117 *Ibid*.

118 This awkwardness caused disastrous consequences during a massive natural disaster following the Tohoku Earthquake in 2011. For instance, the municipal head has a legal power to declare a particular area as hazardous area to force the resident to leave but the Prime Minister does not have a power to order evacuation. The Prime Minister only has a power to direct the municipal head to exercise his power. During the nuclear disaster in Fukushima, the Prime Minister also does not have a legal power to order evacuation. The Prime Minister could only direct the local governor to instruct the resident to evacuate. See Shigenori Matsui, *Disaster and Law: Earthquake, Tsunami and Nuclear Meltdown* (Abingdon: Routledge, 2019).

IV. The Influence of Administrative Law Doctrines

A. Continued influence of administrative law doctrine

Despite the original division of government power into the legislative, the executive and the judicial branches, during the early twentieth century, the United States witnessed a radical increase of independent regulatory commissions to regulate various private activities. Created by separate statutes, these commissions consisted of appointed commissioners who were guaranteed independence and were placed outside of the traditional executive departments. These bodies and commissions exercised a rule-making power like the legislature, an adjudicative power like the courts and were different from the traditional executive department. These commissions came to be called "administrative agencies", and the powers they exercise came to be called "administrative power". With this phenomenon came the growth of administrative law.[119]

The US Supreme Court had difficulty incorporating this administrative power into the tripartite model of separation of powers under the Constitution. Initially, the Court granted the president power to control and supervise all executive departments by striking down a limitation on the presidential power to dismiss officers as he or she wished as an infringement of the executive power.[120] However, with respect to commissioners of independent administrative agencies, it sustained the limitation by differentiating these commissioners from the heads of departments inside the executive.[121] The US Supreme Court viewed these agencies as belonging to Congress and the Judiciary, and not within the purview of the executive;[122] it viewed their power as an "executive function" distinct from the "executive power".[123] Thus, unlike heads of the departments exercising executive power, commissioners of independent administrative agencies could not be dismissed freely by the president. Nevertheless, the US Supreme Court has never explained the status of the administrative power, since the Constitution vests the president with executive power.[124] If the administrative power exercised by these independent administrative agencies is executive power, then it should

119 Edward L Metzler, "The Growth and Development of Administrative Law" (1935) 19 Marquette L Rev 209; John R Tresolini, "The Development of Administrative Law" (1950) 12 U Pittsburgh L Rev 362; Richard B Stewart, "The Reformation of American Administrative Law" (1975) 88 HLR 1667.

120 *Myers v United States* 272 US 52 (1926).

121 *Humphrey's Executor v United States* 295 US 602 (1935).

122 *Ibid*., 628.

123 *Ibid*.

124 The US Supreme Court occasionally cast doubt on the functional approach to separation of powers underlying this distinction. See *Immigration and Naturalization Service v Chadha* 462 US 919 (1983); *Bowsher v Snyder* 478 US 714 (1986). But it still sticks to such an approach in other cases: for instance, those of *Morrison v Olson* 487 US 654 (1988) and *Mistretta v United States* 488 US 361 (1989).

still be the President who has the ultimate responsibility. If it is not the executive power, then what is it?[125]

In the end, many scholars in the United States came to acknowledge that it is impossible to fit the administrative power into one of the tripartite governmental powers.[126] It is a combination of quasi-legislative, quasi-adjudicative and quasi-executive powers, and these agencies are not located within the executive department. Nevertheless, many scholars came to accept the existence of these administrative agencies and administrative power under a functional analysis of the separations of power and the checks and balances system.[127] In this sense, they suspended the question of whether the administrative power is included in the definition of the "executive power" of the president and, instead, sustained its existence and their powers functionally or by resorting to the theory of checks and balances.[128]

In Japan, however, the concept of "administrative law" came from Germany. Japanese administrative law doctrines have been heavily influenced by German doctrines even before the adoption of the Constitution of Japan. These German administrative law doctrines are, simply put, based on totally different premises than US doctrines.[129] Even after the structure of the government went through a radical change under the Constitution of Japan, German-influenced doctrines continue to dominate the understanding of Japanese administrative law. As a result, these administrative law doctrines have had a significant influence on how the principle of separation of powers in Japan is understood.

B. Executive power as residual

For instance, administrative law doctrine heavily influenced the interpretation of what executive power granted to the Cabinet is. In Japan, the dominant perception of executive power stipulated in art.65 is that it is residual: all government powers

125 This question has become more complicated because an increasing number of such independent regulatory agencies are now created inside the executive, such as the Environment Protection Agency.

126 Peter L Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch" (1984) 84 CLR 573, 575.

127 *Ibid*., 578–579.

128 Some questioned this functional approach. See Steven G Calabresi and Saikrishna B Prakash, "The President's Power to Execute the Laws" (1994) 104 Yale LJ 541; Steven G Calabresi, "Some Normative Arguments for the Unitary Executive" (1995) 48 Arkansas L Rev 23; Steven G Calabresi, Mark E Berghausen and Skylar Albertson, "The Rise and Fall of the Separation of Powers" (2012) 106 NWULR 527; Ilan Wurman, "Constitutional Administration" (2017) 69 Stan L Rev 359. However, such a view is thoroughly criticized by others. See Jon D Michaels, "An Enduring, Evolving Separation of Powers" (2015) 115 CLR 515; Gillian E Metzger, "The Supreme Court 2016 Term: Foreword: 1930s Redux: The Administrative State under Siege" (2017) 131 HLR 1.

129 For German administrative law doctrines, see Mahendra P Singh, *German Administrative Law in Common Law Perspective* (Berlin: Springer, 2001); Florian Becker, "The Development of German Administrative Law" (2016) 24 Geo Mason L Rev 453.

except for the legislative power and the judicial power are "executive".[130] In other words, the executive branch can exercise all the government powers with the exception of legislative and judicial power. This definition would grant the utterly comprehensive powers to the executive branch.

This paradigm needed a precise definition of legislative power. Following the German formulation, the dominant view defines legislative power as the power to establish general legal rules.[131] If the Diet decides or disposes of a particular case by statute, that would be regarded as an encroachment on executive power since the disposition of a particular case is not legislative in nature. Private bills, commonly accepted in the United States — for instance, those granting citizenship to a particular person, issuing a licence to a particular construction project or incorporating a particular university — cannot be enacted by the Diet in Japan as they exceed legislative power.

Moreover, many consider that the legislative power only extends to matters that need to be regulated by legislation. What kinds of subject matters then need to be regulated by a statute passed by the Diet? There is consensus that in order to restrict rights and freedoms or to impose legal obligations on the public, the Diet needs to pass a statute to authorise such actions. The Cabinet is then supposed to execute the statutes. But what about the creation of some government benefit or grant programme and the distribution of the benefit or grant to the public? What about the creation or adoption of a plan or guideline? Creation of special task force or consulting body inside the agency? Exercising the administrative guidances? Does the Cabinet need a statute to execute these? In Japan, since the executive power granted to the Cabinet has been interpreted as residual, and only the matters to be reserved for the legislature are left for the Diet, it was natural that the executive could enforce these without statutory authorisation if the narrow definition of legislative matters is adopted.

Hence, the executive power granted to the Cabinet is equivalent to "administrative power" exercised by the government. Indeed, many people in Japan do not understand the difference between the executive and administrative powers maintained in the United States. The confusion was exacerbated by a mistaken Japanese translation where the drafters of the occupation forces' draft constitution — likely influenced by American diction — chose to grant the "executive power" to the Cabinet. They presumably wanted to grant the same powers granted to the US president to the Japanese Cabinet. The most appropriate Japanese word for the executive power would probably be "shikko-ken", meaning the power to execute the power granted. Yet, when the draft was translated into Japanese to create the official Japanese draft, the power granted to the Cabinet was called "gyousei-ken",

130 See Ashibe, *Kenpō [Constitution]* (n.92) p.323; Itoh, *Kenpō [Constitution]* (n.92) p.513; Hidenori Tomatsu, *Kenpō [Constitution]* (Tokyo: Koubundo, 2015) p.423.

131 See Ashibe, *Kenpō [Constitution]* (n.92) p.296.

meaning administrative power.[132] The reason why this translation was adopted is not clear, but this aggravated the confusion of the executive power and the administrative power in Japan.[133]

This confusion had a significant implication for the status of independent administrative agencies. When Japan was placed under occupation and various legal reforms were introduced, the occupation forces introduced many such independent administrative agencies in Japan. However, after the end of occupation, all these independent administrative agencies were incorporated into one of the departments of government. Today, there are no truly independent administrative agencies outside of the government departments.[134] As the power granted to the Cabinet has been interpreted to mean "administrative power", and there is no distinction between "executive power" and "administrative power", this incorporation came about quite naturally in Japan.[135]

C. Precluding judicial interference with the executive

The principle of separation of powers was also invoked by leading administrative law scholars to secure the independence of the executive from judicial interference. For instance, leading administrative law scholars have insisted that a judicial injunction against the executive is contrary to the principle of separation of powers and should not be accepted in Japan.[136]

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132 In Germany, the Basic Law vested the power to execute the law with the federal government and Land. But the Basic Law also uses the concept of "administration" and there is thus no distinction between the executive power and administrative power; Basic Law for the Republic of Germany 1949 (Revised Edition published in Pt.III of the Federal Law Gazette, as last amended in 2014) arts.83, 84 and 86. See Carl J Friedrich, "The Development of the Executive Power in Germany" (1933) 27 APSR 185; David P Currie, "Separation of Powers in the Federal Republic of Germany" (1993) 41 Am J Comp L 201. The concept of the executive power is defined as unitary but there is no clear definition of the executive power; see Paul Craig and Adam Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford: Oxford University Press, 2006).

133 Texts of the Constitution further aggravated this confusion. Whereas art.65 of the Constitution of Japan gave the "executive" power to the Cabinet, it listed the functions of the Cabinet to include, "in addition to other general administrative functions," the function to "administer" the law faithfully; Constitution of Japan (n.1) art.73.

134 See Kokka gyousei soshikihō [National Administrative Organization Act] (Act No 120 of 1948) art.3(2) and 3(3), which define administrative agencies as ministries, commissions or agencies, and characterize commissions and agencies as external bureaus of the ministry. Some commissions were established according to Naikakuhu secchihō [Cabinet Office Establishment Act] (Act No 89 of 1999) art.64. The Fair Trade Commission, one of the independent commissions in Japan, is a commission created under this provision and it is thus assumed that it is still a part of the executive.

135 As a result, all the discussions on the constitutionality of the independent regulatory commissions are premised upon the assumption that they are part of the executive and are exercising the "executive power". See Ashibe, *Kenpō [Constitution]* (n.92) p.324; Itoh, *Kenpō [Constitution]* (n.92) p.517; Nonaka *et al.*, *Kenpō II [Constitution II]* (n.92) p.194; Nakamura *et al.*, *Kenpō III [Constitution III]* (n.92) pp.183–190; Shibutani, *Kenpō [Constitution]* (n.98) pp.595–596; Tomatsu, *Kenpō [Constitution]* (n.130) p.425.

136 Jiro Tanaka, *Gyosei soshou no houri [Jurisprudence of Administrative Litigation]* (Tokyo: Yuhikaku, 1954) p.134; Jiro Tanaka, *Shihoken no genkai [Limits of Judicial Power]* (Tokyo: Kobundo, 1976).

As a result, the government in Japan has established a different litigation procedure against administrative action in the Administrative Case Litigation Act, which is distinct from genuine civil actions against private persons or corporations.[137] The main judicial remedy against administrative action used to be a suit seeking for the court to revoke an administrative action already taken by an administrative agency.[138] There was no provision for a pre-enforcement suit against an administrative action. Suits seeking *mandamus* or an injunction were thus not permitted under the procedure. Moreover, the Administrative Case Litigation Act does not allow the judicial courts to issue temporary or preliminary injunctions against administrative agencies;[139] it simply allows the suspension of an administrative action.[140] Even when such a suspension is ordered, the Prime Minister is empowered to override that temporary remedy should he believe that such is justified by the public interest.[141]

Judicial reform in 2004 brought about a significant change. Now, *mandamus* and injunctive suits are specifically permitted by the Administrative Case Litigation Act.[142] Indeed, the public is now applying for *mandamus* and injunctions more frequently. However, the number of administrative cases filed each year by the public is very small,[143] and the chance of winning such a suit is even slimmer.[144] It is still very difficult to obtain *mandamus* or an injunction against the executive, and it remains a far cry from the situation in the United States — where the judiciary came to allow increasing administrative injunctions against the administrative agencies[145] and now quite willing to issue preliminary injunctions as well.

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137 Gyosei jiken soshohō [Administrative Case Litigation Act] (Act No 139 of 1962).

138 *Ibid*., art.3(1).

139 *Ibid*., art.25(1): filing a revocation suit does not prevent or hamper the validity of the administrative action.

140 *Ibid*., art.25(2).

141 *Ibid*., art.27.

142 *Ibid*., art.3(6) and 3(7); art.37(2)–37(4).

143 In 2016, for example, only 2,093 new administrative cases were filed in the district courts. Saikō saibansho [Supreme Court], *Dai yon-hyō minji gyōsei jiken-sū [Table 4: Number of Civil and Administrative Cases]*, available at http://www.courts.go.jp/app/files/toukei/178/009178.pdf (visited 21 July 2018). In contrast, the first instance administrative court in France heard 183,000 cases a year. Republique Francaise, The Administrative Justice System: An Overview (Conseil d'Etat), available at http://www.legislationline.org/download/action/download/id/4505/file/France_administrative_justice_overview_July2013_en.pdf (visited 28 July 2018).

144 Before the 2004 reform, the winning ratio of the plaintiffs in administrative cases was only 10–15 per cent. Japan Federation of Bar Associations, Gyosei sosho kaikaku rippou eno michisuji to sono naiyo [The Path to Administrative Litigation Reform and Its Agenda] (Kantei 20 May 2003), available at https://www.kantei.go.jp/jp/sihouseido/kentoukai/gyouseisosyou/dai4/4siryou2.pdf (visited 28 July 2018). See also Kaisei gyouseijiken soshoho sekou joukyou kenshou kenkyuukai [Study Group on the Implementation Status of the Amended Administrative Case Litigation Act], Final Report (November 2012), available at http://www.moj.go.jp/content/000104296.pdf (visited 21 July 2017).

145 For the increase of administrative injunction in United States, see Daniel J Walker, "Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief" (2006) 90 Cornell L Rev 1119. Moreover, the courts have increasingly come to issue nation-wide injunction against the government. Getzel Berger, "Nationwide Injunctions against the Federal Government: A Structural Approach" (2017) 92 NYU L Rev 1068.

V. Critical Examination of the Current System

A. Is the system of government in the constitution appropriate?

Although many countries around the world have adopted the principle of separation of powers, they differ significantly in specific arrangements and actual administration. Some countries adopted a presidential system, while others adopted the Westminster system. Some even adopted both. It is therefore difficult to determine whether the system adopted in Japan is the most appropriate system for the country or not.[146] It may well be as the system seems to work effectively for the nation.

One of the drawbacks of the current system is, however, the inability of the public to choose their political leader. There has been a call for the introduction of a presidential-style public election of the Prime Minister in Japan.[147] Some proponents of such an election insist upon constitutional amendments that would allow the public to directly elect the Prime Minister.[148] If such a public election system was introduced for the selection of the Prime Minister, the status of the Prime Minister would probably become much closer to that of a President elected by the public. A public election would also significantly boost the prestige of the Prime Minister, allowing a Prime Minister supported by a strong public vote to exercise his power more aggressively. Some therefore fear that such system would allow a charismatic Prime Minister to govern like a despot. For this reason, other proponents prefer a more nuanced approach, which would adopt a public election without a constitutional amendment.[149] This approach would allow the public to choose their leaders without significantly enhancing the status of the Prime Minister.

Nevertheless, such proposals are not supported by the majority of the public. The overwhelming majority is satisfied with the current constitutional system of government. Although there have been many proposals for constitutional amendment, few are of specificity or significance towards the structure of government itself.[150] Overall, the Japanese public seems to be satisfied with current system of government.

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146 See Bruce Ackerman, "The New Separation of Powers" (2000) 113 HLR 633, where he argues that the US presidential system should not be a model.

147 Cabinet Office, *Shushou kousensei wo kangaeru kondankai — hokoku-sho [Conference on Public Selection of the Prime Minister — Final Report]*, available at https://www.kantei.go.jp/jp/singi/kousen/kettei/020807houkoku.html (visited 21 July 2018).

148 *Ibid*.; the elected Prime Minister will be appointed by the Emperor.

149 *Ibid*.; one alternative is to mandate each political party to nominate their Prime Minister candidate for the election, create more room for the public to participate in his selection and amend the election system to have direct general elections for the Prime Minister's position.

150 The ruling Liberal Democratic Party wishes to make clear that the Prime Minister can control and supervise the administrative department and provide general coordination, that the Prime Minister can submit a legislative bill and that the Prime Minister is the commander-in-chief of the proposed national defense force. See Jiyuminshuto [Liberal Democratic Party], Nihonkoku kenpō kaisei souan [Amendment Draft to the Constitution of Japan] (27 April 2012), available at https://jimin.ncss.nifty.com/pdf/news/policy/130250_1.pdf (visited 21 July 2018) arts.72 and 73.

B. Is the current dominant paradigm appropriate?

It is well known that Japan's executive branch is very powerful relative to the other branches of government. Since bureaucrats working inside the executive draft most of the legislative bills to be submitted and passed by the Diet, these bureaucrats could be considered the real legislators. Due to the huge number of regulatory statutes which require licences, permits or approvals, and which delegate very broad regulatory power to bureaucrats, these bureaucrats can exercise regulatory power with almost no judicial interference. Judicial control over the executive departments is scant as remedies are seriously restricted. Despite repeated calls for administrative reform and deregulation, the fact still remains that Japanese society is heavily regulated by government bureaucrats and by the executive department. Due to close relationship between the legislature and the executive, however, the legislative control over the executive is very week. Moreover, it is a well-known fact that the Japanese Prime Minister does not play much of the leadership role. This is partly due to the constricted role of the Prime Minister inside the executive. In light of these realities, it is worth reconsidering the dominant constitutional interpretation and formulation of the constitutional framework regarding the executive branch and executive power.

First, the power of the Prime Minister to introduce legislative bill should be called into question. The Constitution clearly allows the Prime Minister to submit a bill to the Diet, but it does not explicitly allow him to introduce a legislative bill. Since legislative power is granted to the Diet, it makes more sense to only allow the members of the Diet to introduce a legislative bill. The fact that the Constitution of Japan presumes a Westminster system of government should not preclude a commitment to the more foundational principle of separation of powers. Moreover, allowing the Cabinet to submit a legislative bill has brought some important harms. For instance, since the Cabinet is allowed to introduce legislative bills, and since almost all important bills are government bills, the member of the Diet have essentially lost the ability to craft and draft legislation. Furthermore, since government bills are introduced only after agreement by the ruling party, there is not much opportunity for opposition parties to revise bills in the Diet. Almost all bills introduced by the Cabinet are passed without any significant discussion — let alone any significant revisions. This deprives the Diet of any real significance in the legislative process.

The same could be said on the limitations in relation to revising budgets. The budget is submitted by the Prime Minister to the Diet, with a separate procedure for approval. But there is nothing to indicate that budget bills and legislative bills need to be different in other regards. It is therefore doubtful whether there are any special grounds for limiting on the legislative revision of the budget. The better way forward may be to grant full power to the legislature to revise budget bills.

Second, legislative regulation of the executive should be also reconsidered. Even though the Diet is the "highest state organ", this status should not alter the fact that the Constitution vests executive power with the Cabinet by adopting the

principle of separation of powers. The organisation, composition and decision-making process of Cabinet may be better left to Cabinet itself.

Third, with respect to the status of the Prime Minister, there is serious cause for reconsidering the dominant view that the Prime Minister is not unique among the members of Cabinet and only has the power to preside over Cabinet meetings and coordinate the ministers of state in exercising their power. This view ignores the status of the Prime Minister as the head of the Cabinet.[151] Since the Prime Minister has the power to appoint and dismiss ministers of state, it would be more appropriate to view Cabinet as an advisory organisation for the Prime Minister. Then, the grant of the executive power to the Cabinet could be interpreted as a grant to the Prime Minister in the Cabinet, ie, with the advice of the Cabinet.

This reconsideration would in turn require a similar rethinking of the Prime Minister's power to control and supervise departments of the government. Although the dominant view requires the Prime Minister to obtain a supporting decision from Cabinet before exercising these powers, he may be allowed to exercise more effective control and supervision of the executive department as head of the Cabinet, without the requirement for Cabinet support.

C. Further implications of administrative law doctrines need to be reconsidered

The dominant view of administrative law in Japan, which derives from the influence of German doctrines, may also need to be reconsidered.

First, the recognition of "executive power" as residual must be rejected; it is patently wrong. This paradigm presumes that the Constitution of Japan created and granted all governmental power to the government, before dividing that power into three specific powers. It has led to the interpretation of executive power as residual, consisting of all government powers except the legislative and judicial powers. Yet, in reality, the Constitution of Japan specifically vests legislative power with the Diet, executive power with the Cabinet and judicial power with the judiciary separately. There is no room left for a residual definition of executive power.[152]

This also calls into question the attempts to narrowly define the legislative power as a power to establish general rules, and to confine the Diet's exclusive domain to general matters reserved for legislative regulation. There may not be any barrier for the legislature to legislate on a specific subject or on a specific person, so long as the legislature is not attempting to impose a specific punishment or disadvantage without judicial process.[153] Moreover, the adoption of a residual definition of the

151 See Nakamura *et al.*, *Kenpō III [Constitution III]* (n.92) p.195.

152 If there is any residual power, those powers would need to be reserved to the people*;* Constitution of the United States of America (n.30) 10th Amendment.

153 Such an attempt could be excluded in the United States as a bill of attainder; *Ibid*., art.I s.9.

executive power and allowing the executive to act without statutory authorisation is dangerous and harmful. It may be better to require legislative authorisation for all executive actions.

The paradigm of executive power as residual and its conflation with administrative power have also a risk of obscuring the critical political nature of some of the executive decisions. While there may be Cabinet powers which are quite mundane and secretarial, some of the powers exercised by the Cabinet are highly political — for example, national defence and foreign affairs. By ignoring this difference and treating all powers of the Cabinet as "administrative", the dominant view downplays the highly political nature of the latter category of Cabinet powers.[154] It also engenders a tendency to view the role of the Cabinet as more managerial rather than political. By categorising the power of the Cabinet as administrative, the dominant view fails to recognise the significant policymaking role of the Cabinet to propose, adopt and enforce foundational government policies.[155]

The preclusion of *mandamus* or judicial injunctions by invoking the principle of separation of powers is manifestly absurd. In the United States where the principle of separation of powers is clearly adopted, there is nothing to prevent the judiciary from issuing a *mandamus* or an injunction against the executive. Pre-enforcement suits against the executive are indeed quite common, and the United States judiciary is willing to grant temporary or preliminary injunctions to prevent the executive from enforcing laws before a final decision from the courts, and before a permanent injunction can be made against the executive.[156]

It might be uncertain to what extent these reconsideration might contribute to the restriction of the executive power. But it would at least lead to more separation between the three branches and more checks and balances. Then, the legislature and the judiciary could be tempted to exercise their powers more actively and the executive might lose some of the advantages in the government.

VI. Conclusion

Although the Constitution of Japan adopted the principle of separation of powers, it adopted a Westminster system with respect to the relationship between the legislature and the executive. As a result, there are several differences between

154 See Shibutani, *Kenpō [Constitution]* (n.98) pp.592–593.

155 See Sato, *Nihonkoku kenpōron [Japanese Constitution]* (n.92) pp.480–482; Yasuo Hasebe, *Kenpō [Constitution]* (Tokyo: Shinseisha, 5th ed., 2011) p.364. These scholars emphasize the function to "conduct affairs of state" in addition to administration of the law among functions of the Cabinet as a manifestation of such highly political function; Constitution of Japan (n.1) art.73(i).

156 It could be argued that the denial of *mandamus* or injunction against the executive could infringe the right of access to the courts; *Ibid*., art.32.

the Japanese system of government and those in the United Stated and the United Kingdom. In addition to the differences enumerated in the text of the constitution, dominant constitutional interpretations in Japan have introduced other significant differences. Furthermore, due to the strong influence of German administrative law doctrines, there is a significant skew towards granting vast powers to the executive in the dominant perception of the relationships between the legislature and the executive, and between the executive and the judiciary. Most of the Japanese public supports this unique system and understanding of the principle of separation of powers. Nevertheless, in light of the excessive concentration of power in the executive and bureaucrats in Japan, there is at least a need to reconsider the dominant understanding of the separation of powers.