State Practices and Interpretation of International Law in Early Japan(1865-), II

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When Europeans once more made their appearance on the shores of Japan, the Emperor was still a myth in their eyes. The Shogun was the *de facto* sovereign with whom they had to deal and as far as they knew, in their ignorance of the history and institution of Japan. In Perry's treaty, he was described as "the August Sovereign of Japan," and in the first English treaty that of Admiral Stirling concluded in 1854-as "His Imperial Highness, the Emperor," in Lord Elgin's treaty of 1858, as "His Majesty the Tycoon" and in the Prussian treaty of 1861, as "Seine Majestät der Taikun."[1] The Shogun apparently retained all his power and influence and the country was governed by his ministry with whom alone the foreign diplomats had any direct relations. But a revolution had already begun which was destined within one decade to destroy utterly the political fabric that had lasted for more than seven centuries and to restore to the legitimate Emperor all the excutive functions that were his undoubted constitutional prerogative.

At that time, there was no choice because Japan was not strong enough to oppose the west, but many in Japan refused to accept this. They demand that foreigners be expelled and Japan return to old ways. The hidden currents already breaking up Japanese feudal society before 1853 now came to the surface. Opposition to the Bakufu was linked with hostility to the foreigners in the cry of "jōi" (Honor the Emperor and expel the barbarians).

The Bakufu was caught in a trap not of its own choosing whichever way it turned, it failed to satisfy either the foreigners pressing it from one side, or its enemies in the country. Assassinations were frequent, those of foreigners being a particular source of trouble. Two of the feudal daimyo, Satsuma and Chōshū, realized the hard way just how strong the foreigners were, but while that modified somewhat their anti-foreign stance, it

did nothing to change their attitude towards the Bakufu.

By the time the Emperor Kōmei died in 1867, the Bakufu was manifestly a failure. It had failed to punish the daimyo of Chōshū for rebellion and was under strong pressure from the other powerful south-western daimyo to abandon the attempt, while the main object of the promoters of the Restoration was the destruction of the Bakufu and revival of the Imperial regime, they had utilised by the cry of "jōi," in order to cement in one common bond of union all the fighting force of the Empire not bound to the Tokugawa cause by ties of consanguinity or material interest.

All who had shared the anti-foreign sentiment and had fought for their beliefs, fondly believed that the moment the Emperor regained his own anti-foreign campaign would be at once instituted under the Emperor's banner, and they were as ready to give their swords to it as they had been to the overthrow of the Bakufu. But while the cry of "jōi" had been openly used to the very last, so long as the Bakufu was a power to be feared, a change had during the last years of the struggle taken place in the minds of the leaders of the moment.

The two most powerful daimyo (Satsuma and Chōshū) who took active part in it had received severe lessons of the consequences of indulging in armed resistance to European powers. They now believed was essential to the future integrity and progress of Japan. This meant a complete subversal of all that they had at once boldly and publicly adopted.[(2)]

When these daimyo called for the surrender of the Bakufu's power, it looked for a time as though there would be a bloodless change, but such hopes prove short-lived.

In January 1868, the Imperial Palace at Kyoto was seized and a decree issued stripping the Shogun of all his power; the rule of the Tokugawa Bakufu was over. Administrative power was nominally at least, restored to the Emperor — hence the "Meiji Restoration"—, and though the Shogun and his supporters fought back for another eighteen month, a new order had begun.

1. Several Approaches to the Law of Nations

During the late Bakufu period, generally considered a time of confusion about Western diplomacy. The initial response to the "law of nations" was to ignore it whenever possible,

substituting in its stead-tested Japanese style. Perry was humiliated as a barbarian unworthy of notice. Japanese had respect only for Perry's cannon, and not his treaty. Neverthless, lofty neglect prove more and more an unviable policy after the arrival of Townsend Harris, some members of Bakufu insisted that virtuous and friendly nations ought to treat each other with cordiality, even if they had to follow a Western code of etiquette. But the others argued, it was important for Shogunate to adopt token gestures of cordiality in negotiating with foreign countries friendly to Japan and respectful of its ancient laws.

The view of the "law of nations" as an etiquette between virtuous equals continued through the late of Bakufu embassys into the early Meiji period. Neverthless, there were those who left that Japan was threatened by foreign intercourse, and needed a shield behind which to build up its military might.

It could crystallize the experience of the late of Bakufu period with the statement that "The defense of a country lie in actual power, not in treaties. When the first treaties on the "law of nations" arrived in Japan, this dichoto my between positive and natural law in the West, therefore it is not surprising that readers of these new books alligned themselves either with those who saw the "law of nations" as a tool of strong, or with those who adopt it as a form of gentlemanly etiquette.

Neverthless, Japanese experiences with foreign diplomacy prior to the arrival of Martin's book had set up the rival camps of the "law of nations" as gentlemanly etiquette between the moral being of states or as a tool of strength. But Japanese, not having the benefit of Martin's personal appearance to explain the conundrums in Bankoku Kōho, were occasionally let into egregious errors.

One translater from the Martin's book into colloquial Japanese, Sigeno Yasushi (yasutsugu), parsed Martin's description of Grotius theories thus:

In short, Hugo Grotius's theory, as well as that of Menciu's discussion of nature of good, and Ōyōmei's dictum, all say that according to the Creator's directive the course of good and evil actions is decided, and this in fine, is just what the Christian's believe.

Wheaton's "Elements of International Law" could be all this to Martin, and more to the

Japanese, due to the unique beliefs of its author, Martin ideally adopted to the Chinese intellect as he said in the English preface to "Wan-Kuo Kun fa":

To its (the law of nations) fundamental principle, the Chinese mind is prepared to yield a ready assent. In their state ritual as well as their canonical books, they acknowledge a supreme arbiter of human destiny, to whom Kings and Princes are responsible for their exercise of delegated power: and in theory, no people are more ready to admit that his law is inscribed on the human heart. The relations of nations, considered as a moral persons, and their reciprocal obligations as deduced from this maxim, they are throughly able to comprehend.[3]

In 1868, Santora Uriu published "Kōdōkigen or Bankokukoho zensho" (Corpus of the Origin of Common Reason or the Law of Nations-complete). In the preface, he wrote that; "I sought to end the confusion caused by Martin's translation of Wheaton by summoning the original book. Despite the claims of this translator to have worked from an English edition of Wheaton, though, Uriu seems to have begun his labors with a preconcetion of the "western law of nations" as a way of moral being, and he concluded that the public way of all nations and a science of the way of man deduced from the principle of the way of Heaven."

The school of Ōkuni Takamasa, an advisor to prince Iwakura on Fukko movement ("Return to Antiquity), was particularly vocal in reminding" joi "activist of their first principle. Ōkuni published "Shin shin Kōhō Ron" (on the new, Real Public Law) in 1867, he pointed in its berating of those Japanese who clung to the belief that all nations were equal:

Great Japan is the heart of the ten thousand lands of the world, and our Emperor the ruler of all the myriad states of the globe. Although there has been a public order (kōhō) beneath Heaven since the Age of the Gods, even people who were born in Greater Japan do not know this, so of course men born in other lands are ignorant of it.……

The Dutchman Hugo is said to have fostered the discipline of the law of nations (bankoku kōhō), but this is not so. The Chinese have a public order (kōhō) of Chinese and barbarians under the son of Heaven……. The teachers of this public order went through China. In 1864 they marked up a book called Bonkoku Kōhō in Chinese, slapped it on

wood, and because they spread it all over the world, it spread even to Japan. In 1865 it was translated and printed, for everyone to read.[4]

In an elaborate parable, Ōkuni spun a tale of a man of "low statute and little strength" who was abused by a huge, brawny foreigners. Try as he might, the little man could not perform his traditional, peaceful worship of the gods, since the way to the local shrine was blocked by foreigners. As a follower of the gods, the little man understood that true strength lay in virture. Neverthless, despondent over his inability to oust the foreign bully, the little man turned to conjuring with foreign magic. In a new locale, (the western law of nations) the downtrodden Japanese conjured up an artificial paradise. Deluded by his illusory happiness, the little man forgot the way of the Gods and prostrated himself at the false shrine of western ideas. This debased condition, Ōkuni remonstrated, is not the proper "new, true law of nations". Oppressed Japanese should remember that "the new, true law of nations" is the way of the Gods, taught by the Emperor. He is the Universal Lord (Sōtei): Japan is the heartland of all the nations of the world.

Ōkuni struck out at those Japanese who thought that the glory of Imperial Japan might be preserved through some foreign "law of nations" rather than through a devotion to the Emperor and Japanese spirit.[5]

These writers, the theorists of the Restoration movement, especially Ōkuni who deplored an eglistic reading of the "law of nations" would have been quick to censure a deviation from the Imperial way by their loyalist activist compatriots. Ōkuni closes his diatribe with the precept that the "great way" of reason is to reject the doctrine that Japan is equal to other nations, Japan is superior, and follows a "law of nations" all its own. By these writers, the "law of nations" might seem to make Japan an equal of the Western powers, but peoples like Iwakura and others insisted that only Japanese spirit and arms could help greater Japan to illuminate the way of the Emperor, and surpass all the nations of the world.

The later and more accurate description of the "law of nations" produced by three of the Bakufu's foreign students (Nishi Amane, Tsuda Mamichi, Enomoto Takeaki) turned Ōkuni's imagined mob of egalitarian into horde.

In June 1863, seven Japanese foreign students arrived in Rotterdam, among them, Enomoto

was charged with learning about Western naval operations and maritime law. Nishi and Tsuda explained to their host: "We know nothing at all of the requisite knowledge for carring on relations with the various states of Europe and for reforming our domestic administation and institutions, nor of such subjects as statistics, law, economics, politics and diplomacy. "Accordingly, Nishi and Tsuda wished to have a crash course in natural law, the "law of nations", domestic legal systems, economics, statistics and philosophy.[6] In 1868 Nishi published a Japanese translation of Vissering lectures on the "law of Nations" dedicated to the Shogun. Book 1, chapter one of Nishi's treatise, "Bankoku Kōhō no taishi" (The Leading Tenets of the Law of Nations) says: The law of nations is a part of jurisprudence that discusses the reciprocal rights in force between all nations, and teaches the duty of acting in accordance with them. The word "nation" in the "law of nations" means that a state that is sovereign and independent is treated as self-determinating and belonging to no other party in its worthy intercourse.

And in the next chapter "seihō ni motozuki kōhō o tatsuru o ronzu" (that the law of nations is a thing based on natural law), he discussed the origin and nature of the right by the "law of nations", and said there are two rights under natural law, natural rights based on external principles above man's existence, and provisional rights. This priori natural right under the law of nations may be more precisely divided into three parts: a) the right to defence, b) the right to independence, c) the right to exploit domestic resources.
This section of Nihi's work seems to provides evidence of influence of vissering's championship of the natural right of man and his legal reasoning. It also went far in making him one of the first men to be selected by the Meiji government to take charge of treaty revision.

The thought that allowed the Japanese to expand the "Western law of nations" into a synonym for traditional etiquetto and probity is excellently illustrated in the following works by Nakamura and prior to his 1870 publication of Samuel Smile's "Self-help" as "Saikoku risshihen" (Tales of success in the West). Nakamura had fallen under the influence of both English liberalism and Christian ethics. As a Japanese by birth and a confucian by avocation, Nakamura made his book a best-seller by examining national success in a way that seemed laudable to ex-shishi.[8]

In 1876 Nakamura wrote a preface to a commentary on Martin's Wan Ku Kung-fa by one Takaya Ryushū, The title of Takaya's work, "Bankuku Koho reikan," shows that both Takaya and Nakamura approached the "Law of Nations" with the reverence reserved for the great ethical principles of the Chinese classics. Reikan is an acronym for a phrase meaning to "to scrutinize the heavens through a bamboo tube: to measure the sea with a gourd". Like the Saikoku risshihen, Nakamura's preface to this book quotes the Chinese confucian Analects (Daigaku → The Great Learning).

In fine, if a household has law, then it is well managed. If a nation has law, then it has enlightened government. If all nations (bankoku) have law, would they not have an international peaceful administration?……the study of this law of nations is a means for adding, day and night, to the goodness and completion of our spirits, which will finally lead us toward a state of beauty and happiness that will be like a paradise on earth.(9)

To be sure, Nakamura's preface follow the introduction of Martin's Wan Ku Kun fa (Bankoku kōhō) into Japan by several years, but with the process of analogy firmly established by Nakamura, it is possible to examine earlier student of the "law of nations" who revealed less of their thinking. One of such students was Uriu Mitora.

Naturally enough, the way of nations as way of man thesis was given wide credence. Tokugawa Yoshinobu (the latest shogun bakufu) felt that a cultivation of virtue would bring Japan to world prominence. Yoshinobu declared in a manifesto to his adherents, in which he stated that.:

> It appears to me the law cannot be maintained in the face of the daily extension of our foreign relations, unless the goverment is conducted by one head, and I propose therefore to surrender the whole governing power into the hands of the Imperial court.

This was followed by the formal tender of his resignation, which declared on 9 December 1867, "……if the Empire be protected with united hearts and combined efforts, our country will hold its own with all the nation of the world".(10)

Many of his followers, however, refused to acquiesce in the transfer of the executive power, and civil war continued for a time; but the Mikado was in the end completely triumphant. After the resignation of the shogun and restoration of peace, The Mikado as Emperor in 1868 took what is sometimes called the "Charter Oath" notified that:

"All narrow customs of the past shall be abolished, and conduct shall be based on the international way". It was the promise giving his people a deliberative assembly, to rule justly, and "to seek for wisdom in all quarters of the world". One further translation of Wheaton, deserves mention. In 1868 Tsutsumi Koshiji (Teigaishishi) published a work entitled "Bankoku Kōhō Shakugi" (yakugi) (The meaning of interpreted) probably employing both English original and Martin's version. Tsutsumi was interested in the "law of nations" for more than its potential as westernized version of the Great Learning. He took every opportunity to prove its use to a Japan suffering under the demands of foreign nations. Thus, in translating Wheaton's mention of the opinion that the "law of nations" is "The sole law of those who are not regulated by other law", Tsutsumi says "A free country uses this law in order not to give into another country". This is the core of the law of nations. His accurate translation of Wheation's discussion of tributary and vassal states, and Wheaton's summary of consular jurisdiction is Turkey, Barbary and China could have bolstered arguments for using the "law of nations" as a shield against Western oppression. Writing in 1868, Tsutsumi must have welcomed the chance to put Wheaton's comments on treaty revision into Japan.(11)

2. The Meiji Goverment and International Law

On January 15, 1868, the Meiji government issued a statement as follows: Since the failure of foreign policy in the transitional period from Edo to Meiji, it has been hard for our Emperor to accept the rules governing relations between nations. It has also been strenuous for Japanese subjects themselves to get used to reformation in Japan. So we will propose amendment to the present restrictive treaty at the intergovernmental meetings. After the conclusion of the revised treaty with other states, we will be able to purge subject's distrust for our politics and strengthen our army ……. But when we determine to change the promise with foreign states the measures to be taken will be decided in the public debate with other states. The rule for relations between nations is viewd as public regulating our state. We should be aware of this.(12)

On the 8th of February, 1868, a nobleman of high rank in the court delivered to the

diplomatic representatives of the foreign powers a formal documents bearing "the Seal of Great Japan" for transmission to their governments, in which the Emperor announced his intention of thence-forward exercising supreme authority both in the internal and external affairs of the country and of substituting in the treaties his own title for that of the Tycoon.

It was claimed that "intercourse with foreign countries shall be in future be carried on in accordance with the "public law of the whole world", and, as a first onward step on this path, an invitation soon followed to the representatives to visit Kyoto and be received in audience by His Majesty.

Now, the foreigners, who a very few years before had been publicly designated by the late Emperor (Komei) as "Sea pirates", "Ugly barbarian", and "Foul beasts" were to be received in person by the direct decendant of the God of Heaven. But the ceremony was destined not to pass without its tragedy one of the many which darkened those days of foreign intercourse with Japan. And foreign merchants were confused by what was happening in Japan; they knew the Shogunate, but did not know the new government, except to remember that the cry "Honor the Emperor!" had gone with the cry "Expel the barbarian". It was not surprising, therefore, that if they supported anybody, they supported the Shogun's party.(14)

When Sir Harry Parkes, the British representative, who had been the first among his colleagues to recognize the new government and to give it his strong moral support, was on his way to the Palace, two fanatics, maddened at the desecration of the Emperor and of the city, suddenly attacked his English escort and inflicted severe wounds on ten of the men composing it before they were themselves killed or disabled.(15)

After few days, An lmperial rescript was issued;

Ordering the nation,—— to obey His Majesty's will in the fulfilment of the treaties with foreign countries in accordance with the rule of lnternational law, all persons in future guilty of murdering foreigners or of committing acts of violence towards them will be acting in opposition to His Majesty's expressed orders and be the cause of national misfortune. They will therefore be punished in proportion to the gravity of their offence, and their names, if samurai (soldier), will be erased from roll.

And on Feburary 14 of the same year, Higashikuze, Daigo Dainagon, who is a governor -general of Osaka trial, and Date, who is a governor-general of hygo trial met with consuls in France, the United Kingdom, Italy, Prusia, Holland, and the U. S. at Nishi Hongan temple in Osaka. Such a situation surprised authorities who had the power to control the state of the nation because people thought that Japan followed the policy of exclusion of foreigners and would not associate with them.(16)

After this meeting, the Meiji government issued a proclamation about the conference of consuls of each state. "The Emperor told us a few days ago according to the rule governing relations beween nations we should treat consuls of every state gently as other nations do. But because our general had a plan to travel in a few days and he would not be able to meet with them some other day, we called for them to visit us before the scheduled time. Moreover, the Meiji government announced another proclamation in a long statement on the same day.

"We once failed in foreign policy and concluded the restrictive treaty with other states. But we may amend the clauses with its own interest after we announce the change to the Japanese cabinet, even though almost all the clauses cannot be changed without good reason. But if we amend the clauses at the cabinet, we will lose their confidence in us. Therefore, we will enter into other treaty based on the principle of the sovereign equality with other states. It is our duty to take into consideration our national policy and adjust our national policy and common law of all nations. So when representatives from our new government attend the conference, we will propose concluding a new treaty. Our new government has been faced with important duties under common law of all nations although we are inexperienced. When we are confronted with troubles which we cannot solve ourselves, public opinion in our nation will help us find a solution". (Dajokan Niishi)

Even though the Japanese government announced these proclamations, the restlessness of the people in Japan could not be assuaged. So the government issued another statement on March 15th. It said,

"Arrangements with foreign states must be decided in accordance with the principle of common law of all nations at the intergovernmental conference while our government considers ensuring benefits resulting from the arrangements. So subjects must take into

account the laborious task of our govèrnment. And subjects must stop committing misdeeds, or murdering foreigners.

In addition, the government ordered subjects to respect the Imperial court and stop anti-foreign ideas in an Instruction of Kyoto governor. It said,

"It is unwise to make a suprise attack on an innocent state from a moral point of view, even if our state could defeat that state. If our state takes such an action against other states, we will lose their trust and be unable to conclude the new treaty based on the principle of sovereign equality. On the other hand, if our state is attacked by foreign states we must take revenge on the states and show them our national power although it is regretful for us to take such an action. But if subjects don't cooperate with us to accomplish our policy, we will not be able to have good relations with other states."

In this way, the new government had a policy which emphasized cooperation of the government and the subjects to achieve the national goal. Furthermore, the government emphasized that they should revise the restrictive treaty based on the sovereign inequality, enter into a new treaty instead of the present treaty, and remove "some disadvantage" from relations with foreigh countries. But they didn't indicate concretely what "some disadvantage" was, what clause in the treaty they should improve, and what "the failure of foreign policy in the transition period" was. (Is the answer that Japan opened a country to diplomatic relations?) It seems to me that the people in charge of diplomacy in the new Meiji government didn't have as much knowledge to handle foreign diplomacy as those in Edo shogunate had. Because all the statements as noted above are too vague and make it hard to understand for what reason the government wanted to improve "some disadvantage" in the restrictive treaty. And while the government said that it should change the treaty based on inequality, it concluded a more restrictive treaty against other states. The purpose of having issued the statements was just to assuage the subjects in confusion.

In addition, their lack of ability in foreign diplomacy was proven more clear by the negotiation of treaty with Habsburg in Holland on Feburary 6, 1868.

While the draft of the treaty proposed by Habsburg contained the same contents as the restrictive one concluded with other states before, the demand of the Japanese government was not that Japan should take responsible for all jurisdiction in its own territory, but that

all of the foreign consuls should be official consul, the salary of whom is paid commensurate with his duty. Japan didn't deal with the unbalanced tariff agreement and most -favored-nation treaty as well. So it is clear that the government didn't know that a sovereign state must have the right of tariff autonomy to ensure the principle of sovereign equality.

Moreover, Japan agreed to three agreements which demanded that Japan yield the right of its jurisdiction to other states in dealing with civil affairs in Japan. Specifically Japan admitted mixed trials with Spain in January, 1868, the trading right around the Japan coast with Germany and not attending trials in dealing with civil cases of Germans in Japan, and opening a port in Yokohama and entering into the commercial treaty with Austria-Hungary, which was more of a disadvantage than ever before.

On the other hand, it is possible to think that the reason why the new Japanese government entered into the unbalanced treaty without the consideration of its own advantage was that Japan had to avoid any doubt about the revival of the anti-foreign system. It was hard for the Meiji government to change the restrictive treaty not because of the commercial treaty concluded at the time of the Bakumatsu period but because of the ignorance concerning foreign policy.

There is evidence at that time that the Meiji government made all experienced officials in the Bakumatsu period resign. If so, the the other question of whether or not the Meiji government was a reformist group for international relations arises because the new government should have referred to the process and technique of diplomatic negotiation of the shogunate if the government wanted to improve the status in the international community and calm down the confused domestic affairs. Judging from this, it seems to me that the reformation called Meiji Ishin was not for all the subjects, but only for the officials of the new government.

After all, there are two reasons why such a failure of the diplomatic negotiations occured. First, the officials in the new Meiji government were ignorant of international law although Japan was part of the international community at that time. Second, because the domestic affairs in Japan were unstable, Japan had to tackle these problems first. So Japan was not experienced enough to negotiate international affairs as one of the states

under international law.

It is useful to compare four cases which occured in Japan to show the difference between Japan and other states. One case was tried in a court of justice of the U. S. in Japan. And the other cases in which Japanese injured some foreigners in Japan was treated in a court of Japan. The former was the Pauru Masuko case in September of the first year of Meiji. The court of justice of the U. S. in Japan passed judgement that the defendant was called for to be expelled from Japan after he was sentenced to one and a half year's imprisonment. The latter was as follows. The prosecutors in courts of Japan falsified the evidence through torturing and threatening the defendants. And the judges decided the punishment of the defendants at Judge's discretion and inflicted severe penalties against them. The defendants in these cases were called to perform hara-kiri, and the Japanese government apologized to the victim's states for the cases. The government took actions in these ways to solve the problems.

The judicial system in Japan was extremely different from that of other states. So it is clear why foreign states could not accept the proposals from Japanese government to change the restrictive treaty into a balanced treaty based on the sovereign equality. And it was proper for foreign states to propose charging the anti-alien policy in Japan.

3. Statesmen in the Early Meiji Period and Internatioanl Law

This chapter is an overview of the essential ways in which statesmen in the early Meiji government viewed international law.

Since Perry, some Japanese had regarded international law that authorized the actions of foreign gunboats policy.

Kido Kōin, one of the elder statesmen in the Meiji period, stated: "When the military power of the West becomes weaker than that of Japan the validity of common law of all nations will decrease. The West may exploit international law to supplement their weaknesses. In other words, the common law is the law which deprives the less developed states of their rights in the international community." (on November 8, 1868)[17]

Iwakura Tomomi also complained about the international law in Feburary 1869 as

follows. "We cannot attain equality through intergovernmental conference under the international law.

Therefore so we will not consider the law as the precedent. Japan cannot have the confidence in the law. Therefore, a Japanese who supports the common law will be thought of as Europeanized.

On the other hand, other statesmen were in favor of the common law of all nations. One said, "We cannot trust other countries and international law because the European states sometimes exploit it for their own advantage in the international community. But even if European states, in some cases, conduct diplomacy in their own interests, we will cooperate with them. Governments usually base their diplomacy on reason and good faith. If these governments behave kindly, they will not discriminate against developing countries. So we will not come back to the closed-door policy. And we will continue to open a port to foreign ships for trade".

And this statement continued to reproach the policy of the Tokugawa shogunate. "The shogunate deserves to be blamed for the failure of diplomacy in the Bakumatsu period. Because they concluded the treaty without consideration of our own advantage after the conferences were held only three or four times, while foreign states pressured Japan to make a treaty. So we must have set up a new diplomatic policy to rectify the failure in the Bakumatsu period and try foreign servicemen in Japanese courts."

We can imply two facts from such statements. First, the Japanese officials didn't know the rights under international law not to be able to try foreign servicemen in Japanese courts. Second, it seems that the Japanese officials didn't recognize that reports to the Emperor were contradictory to those for the subject. The Meiji government considered that international law was surely the commercial treaty itself, and they didn't know international law did not apply only to trade. (So such contradiction accured.)[18]

We can recognize from the follwing report that Ito Hirobumi thought international law applied to European diplomacy. It said, "We can't trade without revising the present treaty.····· The European is afraid of the anti-alien policy in Japan so they forced us to amend the policy and advocated the importance of common law of all nations." (January, 1872)[19]

To the contrary, other two statements prove that the Iwakura mission to Europe didn't have enough knowledge about international law. First, the report of the investigation of the mission said, "We were advised by the U. S. consul about another requirements for changing the treaty." The mission learned from the U. S. consul that a full power of attorney was required to revise the treaty when they proposed changing the restrictive treaty. We can imply from the report that the missions didn't know the necessary requirement to amend the treaty under international law. Second, an official document prepared by General Yamada Akiyoshi, who was a member of the missions, says that "if we follow the common law of all nations based on the universal moral we must build up our military force to fight well with the British or U. S. navies and the armies of Prussia or France. And our modernization will be achieved as soon as possible when we strengthen our military under the common law of all nations"[20]. We can understand the indication that the military build up was required to compete on equal terms with European states. But it is incomprehensible how the build up could be achieved under the common law of all nations.

Iwakura Tomomi, who was one of the leading figures in diplomacy in the early Meiji period, commented not about the disadvantage of consular jurisdiction, but about the neutrality in time of war, and education, in a report to the Emperor as follows. "The jurisdiction which foreign consuls have in Japan should be respected by Japanese courts. And the courts should treat the origin of the law of each country prior to the Japanese law when some foreigners bring a case before the court in Japan." He also suggested that education be given to cope effectively with foreign diplomacy and for Japan to remain neutral in time of war. It said, "The Japanese government should maintain absolute neutrality in the time of war. So we must respect the treaty about the neutrality under common law of all nations for that purpose. But the Japanese government doesn't have enough force to protect Japan against foreign military forces if war spreads to our territory." This statement about neutrality is attributed to the experience of the war between Prussia and France in the 1870[21]. Anyway, the report didn't mention about limited sovereignty such as disadvantage of consular jurisdiction and tariff autonomy. We can imply from the report that the purpose of Iwakura missions to Europe was not to revise the treaty, but to research the domestic administration, the domestic law, and foreign

diplomacy in Europe to allow Japan to remain independent.

As noted above, Japanese statesmen used the common law of all nations to carry out the policy which emphasized cooperation of the government and the subjects to achieve national goal in Japan. They just regarded the common law as applying to European nations, and had difficulties with international affairs. Some letters show the difficulties. "We are reluctant to take responsibility in international affairs. But it is too late now for us to defy the other states. We cannot escape responsibility. Therefore, we intend to fulfill the task with impudence." (a report from the ambassador Iwakura to minister Sanjo Dajo on Feburary 9, 1873).[22] "After Westernization was spread over Japan, Japanese learned foresight and wisdom from Europe, so they became inclined to make profit more greedily than ever before even if commiting a crime. Westernization made them more intelligent and wicked." (a letter from Kido Kōin to Inoue Kaoru on March 11, 1873.)[23] "Our diplomacy cannot make satisfactory progress by calculating how much we will take advantages and adjusting the present situation because the capacity of Japanese diplomacy still hasn't caught up with that of the other states." (a letter from Ito Hirobumi to Okuma in January, 1874)[24]

On March 15, 1874 the members, who had visited Europe, listened to some ideas from Bismarck about international law. He said, "In today's world, every state interacts with other states on the basis of friendship, harmony, and protocol. However, this is merely superficial lip-service, behind which lie actual practice. Even though international law is usually said to be the law to preserve the right which every state has as a sovereign state in the international community, big powers sometimes exploit international law for profit and disregard it to make small powers obey with military power because of their interests. Small powers endeavour to keep their right as a sovereign state with the consideration that they never ignore the duty in the international community and violate morality. But when the big powers strive for their interests the small powers cannot save their right as a sovereign state……. Some states, specificially Great Britain and France and other states were seizing colonies, using their resources, and increasing their power shall other nations watched with fear. In sum, in European diplomacy, trust alone is not sufficient. Small states cannot put confidence at all in such big states. They will not remove the distrust

against big states in the future".[25]

Bismark evidently struck a sympathtic core in Kido.

Kido responded to it as follows. "There is no difference between people in Germany and Japan, except that we were closed countries in the past, and there was not enough time for Japan to study international law after its period of isolation." Ōkubo's initial view of the "law of nations" was as ambigious as the February 1868 proclamation. By 1871, however, he had begun to see glaring inequalities in the tariff schedules signed in accordance with the principles of international law. He complained that the customs regulations gave "rights and options entirely to foreign governments, although the law of nations holds that they ought to be decided in a conference of equal nations."[26] Ōkubo and others were sure that their early view of the "law of nations" corresponded to conditions in the West. Both Kido and Ōkubo returned home immediately after Bismark's words about the Western "law of nations" still ringing in their ears. In addition, his other comment which was reported to Iwakura shows the lack of knowledge of the Japanese officials about international law. It said, "Judging from our observations of other nations, second or third class nations have prosperous cultures, to say nothing of big power, such as Great Britain, the U. S., Germany, and France. Japan is so inferior to other states that we will not be able to reach their level even if we learn a lot from them. Consequently, we have no way to be in the international community except as subordinate to the West."

Such experience in Europe taught the missions that international law applies to relations between civilized nations only. In April, 1876 Iwakura mentioned in Japan's diplomacy report to the Emperor that the restrictive treaty which we concluded before was a violation of the principle of international law and sovereignty. It said, "We used to be convinced that an independent state can stand up to big powers if it is prosperous. But it was not true. We must respect the association with foreign countries and international law to keep the peace and order in the international community. That is, international law is a basic moral principle or the universal validity of human behavior……. When some rival states stand in opposition to seek their interests they cannot violate the common law of all nations. International law should be respected as well as national law. Thus, a sovereign state can opt, on the one hand, for military power and national prosperity. On the other

hand, a nation-state should keep the principle of sovereign equality in the international community……. Big powers forced us to conclude the unbalanced treaty which was the violation of international law because they insisted that the social conditions of our nation were unstable. Even though there is big difference about the state of prosperity of each nation the right which each state has under international law is equal. So our task is to seek the domestic and international affairs in good condition."

In these ways, the object of the modernization of Japan was to be accepted as a sovereign state under international law after the legal system within Japan was improved. Ito commented severly about the attitude of the Japanese government toward the amendment of the restrictive treaty. It said, "It is inevitable that foreigners in Japan didn't comply with our domestic law, specifically the criminal law in Japan, because the law was not suitable for treating foreigners. Since the Meiji Restoration we have treated the legal systems in Western countries as a reference, when we revised the national law in Japan. But we have to be more concerned with the domestic law in each Western country if we wish to improve our politic and nation for subjects …… It goes without saying that the growth of Japan is amazing, compared with Japan's closed door policy period. But the growth is not enough at all. Our object is to be on a par with the civilized nations on the basis of Western style. Various problems will lie in our way." (on July 20, 1888.)

Concluding remarks

The Japanese have been blamed for their lack of understanding of international law for a long time. One reason is said that the Japanese have not tried to find who they are. In other words, the Japansese have not struggled to be effective on the international stage through consideration of the origin of the Japanese culture and international law since the Meiji government had accepted the international norm without an understanding of international law at the time of opening to foreign intercourse.

To be sure, until the first half of the Meiji era Japan had made efforts to achieve the goal of her modernization through its own methods which were trying to just accept the philosophy of Western Europe although in the lack of thinking of general principle of international community.

This one-sided method was also used to develop the Japanese economy rapidly after the Second World War. But through the process of economic development, Japan has ignored political accountabilities required in the international community. It has just been national interests that have dominated over the will of people in Japan. The international community has a rule to keep international balance. It has strived for adjusting various types of policies among nations without discrimination against other states. But the Japanese government sometimes didn't comply with the rule: the withdrawal from the League of Nations, World War II, and Japan-US security treaty are but a few examples. Japanese policies show us through history that we must have imitated the lifestyle of other states to advance modernization.

That is, a particular way to create a new life has been just to subordinate to foreign policies under pressure from the international community. This attitude of Japanese government toward foreign states has been invariable since Meiji Era. Of course, Japan has ascended to the richest state through the doctrine of economy for economy's sake because Japan could concentrate on only her economic development without taking care of political issues in the world. But now many states and peoples around the world criticize Japan's foreign policy, including economy and diplomacy, for its incompetence. What is the reason to censure? Is the reason based on the lack of a cosmopolitan outlook and understanding of international law by the Japanese? If the reason is based on misleading knowledge of the outlook and understanding like the statesmen in the early Meiji period, we should get back to the notion of what the Japanese themselves are. And instead of giving priority to national interests, we should rethink the aim of Japan under the international community from the very beginning. It is difficult for us to understand the reason for international law to exist without rethinking what Japanese are while we prove deeply into the relationship among the states.

One must recall, in addition, for all the interest of the manoeuvres that took place during the early 1870's, the diplomatic issue which most concerned Japan was treaty revision. The first demand for treaty revision on the Japanese side was voiced almost immediatly after the Restoration. An almost perennial theme of diplomacy, its important is difficult to exaggerate.[27] From the Japanese point of view there were three major defects in the

treaties, and these were of sufficient material and psychological importance to justify their use of term "unequal" in describing them. The most obvious mark of inequality was the fact that whereas all the Western countries had insisted on clauses guarnteeing most-favoured-nation treatment, Japan herself possessed no such safeguard, and provision relating to her rights in other countries were mearge. This, however, was of little practical importance in the 19th century and was no more than a nominal objection in comparison with the two other complaints.

The one which was voiced most in the earlier period of treaty revision was that Japan had been inequitably deprived of tariff autonomy. By the 1858 treaties import and export duties had been fixed for the duration of those treaties. Not surprising in a period of enthusiastic free trade advocacy, these duties were made fairly low, though not unreasonably so, but the Bakufu had bequeathed to Meiji Japan a heavy burden by agreeing, in 1866, to a new tariff convention which brought almost every item down to 5%. The lowness of modern industries in Japan, and from the late 1870's, when protectionism returned to Europe in full force, they were out of keeping with international trends. Neverthless, although from the early 1880's the powers were prepared to allow some modification, the price asked in return was so high that Japan was forced to put up win them until 1899.

The other great objection, which probably ranked most deeply of all with the Japanese, and which dominated treaty revision from the middle 1880's, related to the legal provisions of treaties. These had established the bases of a system of extraterritorial jurisdiction, similar in theory to that which had been granted to Europeans by the Ottoman Empires from a position of strength in the 16th century, but even more similar to that which had been in China. Under extraterritoriality, foreigners were not subject to Japanese jurisdiction, except in cases where they brought actions against Japanese, and in practice many of the offences committed by them against Japanese law went unpunished by consular courts.

In the conditions of 1860's and 1870's the system was accepted by most thinking Japanese as the only way in which the gulf between Japanese and Western legal standards could by partially bridged but with the drafting a Western-style code from the late 1870's onwards

some recognition of Japanese progressiveness was expected of the Western powers. When this was not forthcoming, or was so grudging that Japanese attempt to make something of it had to hedged in with very substantial conditions, it aroused fierce resentment among all politically-conscious Japanese.

As a good deal of the Japanese opposition to the treaties was due to the way in which clause whose drafting lacked precision were interpreted by the powers. At the early time, Japanese government was obliged to accept the Western view that the most-favoured-nation right was unconditional one, which entitled any power to claim for its nationals any privilege granted to another power wihtout making an equivalent concession. More important than this, however, was the fact that, because of her weakness, Japan was unable to resist the Western interpretation of the clause relating to the conditions of revision. (Treaties had actually be revised three times in the 1860's)[28]

Since by accepting and seeking modification the powers had accepted the principle that the treaties could be changed by mutual consent at any time, the inclusion of a revision clause in the treaties could have had no meaning unless it signified that both Japan and treaty powers were entitled from 1872 to rescind unilaterally any concession granted in 1858. I think the extreme interpretation of the revision clause also gave the powers the right to ask for new privileges, and the standpoint which they consistently maintained throughout almost the whole course of the treaty revision negotiation, was that no change could be made without their consent. The unfortunate corollary of this for Japan was that the powers were entitled to compensation for forgoing their rights, and they were not disposed to sell these cheaply. (to be continued)

—Note—

(1) The text will be found in Beasley, Select documents on Japanese foreign policy, 1853-1868, (London, 1955). Miyoshi Masahiro, International Law in the Modern History of Japan, Hohkei Ronshu, No. 136 (Dec. 1994).

(2) There were two events: the bombardment of Kagoshima and of Shimonoseki, the first by British fleet in 1863 and second by allied fleets of Great Britain, France, the United States and Holland in 1865. The object of the first was to exact reparation for the

murder of a British subject of the second to open to foreign shipping the Strait of Shimonoseki the daimyo had determined to keep closed. Satsuma and Choshū were powerful daimyo and both had the exclusionist policy through from different motives, Chōshū being a sincere advocate of it, while Satsuma used it as a means of embarrasing the Bakufu. Both suffered severely in the defeat of the flower of their armies by the allied force (it consisted of nine British ships of war, four Dutch, three French and one United States chartered steamer, but the former was the only man-of war in Japanese waters). Both might be recognize Japan's military impotency against great powers of the West, and learned great lessons that national unity was essential to national safty.

The latter's attack was followed by a demand on the Shogunate by the ministers of the four participating powers for an indemnity, which was fix at $ 3 million, and after some delay and great embarrassment, because of the poverty of the treasury, it was paid. The exaction of the indemnity under the circumstances has been subject of much adverse criticism. The attempt to close the port was in violation of international law; but it was not the act of the government with which the powers had relations, and it claimed that, if time was afforded, it would bring about the removal of the obstruction. The sum paid to the United States remained in the treasury unused for twenty years. The public conscience was troubled as to the justness of the exaction and in 1883 by an act of Congress the amount received was returned to Japan, and accepted by that government "as a strong manifestation of that spirit of justice and equity which has always animated the United States in its relations with Japan". None of the other three nations partaking of indemnity have seen fit to follow this example. (U. S For. Rel. 1883, 60).

(3) Martin, English preface to Wan-Kuo Kung-fa, quoted in immanuel C. Y. Hzü, China's Entrance into the Family of Nations (Harvard 1960), 137.

Shigeno was a professor of Hongaku (Kagashima clan), and Ōyōmei's dictum described how the ancients had achieved such a high level by cultivating personal virtue and sense of duty; "Wishing to order well their state, they first regulated their families: Wishing to regulate their families, they first cultivated their persons: Wishing to cultivate their person, they first rectified their hearts."

(4) The text used is in Yoshino Sakuzō, ed., Meiji bunka zenshū, 1927. XV, 170-183, A less readable text is in Nomura Denshiro, Okuni Takamasa zenshū, 1937, III, 211-36. Minoru Okada, Okuni Takamasa, 1944, 193-216.

(5) Another of Okuni's followers, Hachida Chiki, discarded his teacher's lengthy metaphors in his Dairiron-ryaku (Outline of a Theory of Great Reason).

Hachida defined the "great way" of reason as "the will of gods", while the "small way" of reason was found in "the assertions of foreign natural philosophers." Such "small reason" had produced "all form of Western barbarian law" such as the Law of Heaven (tempō), Law of kings (ohō), Natural law (seihō), Law of reason (rihō) to say nothing of the Law of Nations. John Peter Stern, The Japanese interpretation of the "Law of Nations" 1854-1874, 74-75.

(6) John Peter Stern, ibid., 76.

(7) Sumiyoshi Y., The Japan's Failure to make positive use of international law in Early Meiji Era, Horitsu Ronso (Meiji Univ.), vol. 48, No. 2, 18-19.

Nishi was asked by the Foreign Ministry to work on treaty revision in Feb. 1870, but the Ministry of Army refused to let him go.

(8) In the preface Nakamura states "the purpose of this book was for the shishi's (Restroation activist) goal of an Imperial Japan" that was outstanding among the nations of the world. Unlike the shishi, Nakamura rejected military might as the key to Japan's pushing to the fore. He wrote that both national and international society in ordered not by force, but by virture, though which …… the nations of the globe come together, following the way of mutual welfare and profit and together with these receive peace tranquility, happiness and good fortune. Can this be compared to some kind of competition between strong and weak, superior and inferior? If all men fear the order of Heaven (tenmei) as they should if they work with on honest heart and good will, if one man is like this, then one house is like this, then one country is like this, and then all the realms under Heaven are like this, illuminated by love and fanned by the winds of benevolence, The four sea will meet in happiness, harmony will drift into the hearts of all, and good fortune will be visited on everyone.

(9) Sumiyoshi Y. Meiji shoki ni okeru kokusaiho no dōnyu (The Introduction of the Law

of Nations into Japan during the Early Meiji period). Kokusaihō Gaikō Zasshi, No. 71, vol. 5 • 6.

(10) Joseph Pittau, Political Thought in Early Meiji Japan, 1967, 11.

(11) Jhon Peter Stern, op. cit., 70, Sumiyoshi Y., Seiō kokusai hogaku no Nihon eno Dōnyu (Japanese introduction of the western international law), Horitsu Ronso, Vol. 42, No. 4. 5. 6.

(12) Gaimushō Chōsabu, DaiNihon Gaiko bunsho (Diplomatic Documents of Greater Japan) No. 1, vol. 1, 227-8.

(13) P. J. Treat, Diplomatic relations between the United States and Japan, (Stanford, 1932), 311.

(14) Gaimushō DaiNihon Gaiko bunsho, vol. 1, No. 1, 565. "It gave the young Emperor, who was receiving Europeans for the first time, not only in his own life but in all the long history of his dynasty, and whose mind was no doubt full of curiosity, an oppotunity for expressing with the sympathetic tact and dignity which characterized him in after life, his regret at what had happened and of manifesting his desire to prevent its recurrence. Hitherto every samurai (soldier) who murdered a European thought that he was performing a service to his gods, his Emperor and his country. If he was brought to justice and had to pay the penalty of his act, both law and custom permitted him to be his own executioner and find death in a way that brougt no dishonour on either him or his relatives, which was in fact the consummation of martyrdom." J. H. Longford, The Evolution of New Japan, 1913, 32-33.

(15) The last clause involved not only social degredation to the offender and his family, but humiliating death to the former at the hands of the public executioner. Thence forward the murder of a foreigner lost the character of a martyr and became a common criminal like any robber or thief. From that day outrages of this nature entirely ceased. Europeans have, it is true, since been murdered by native in Japan, but these have been cases of sordid crime such as occur in any country, and in none were the murderers actuated solely by political or religious motives.

(16) Gaimshō, Dainihon Gaiko bunsho, vol. 1, No. 1, 348-350, Shimomura Fujio, Meiji ishin -no Gaiko (Diplomacy of Meiji Restration), 35.

(17) Kido Koin, Nihon shiseki kyokai ed., Kido Kōin Nikki (Diary of Kido Kōin) vol. 1, 138.

(18) Gaimshō, Dainihon Gaiko bunsho, Jōyaku kaisei kankei (Diplomatic Documents relating to Treaties Revision of Iwakura Mission), vol. 1, No. 2, 14.

(19) ibid., vol. 1, No. 3, 3.

(20) ibid., vol. 1, No. 4.

(21) ibid., vol. 1, No. 5.

(22) ibid., vol. 1, No. 11.

(23) ibid., vol. 1, No. 12.

(24) ibid., vol. 1, No. 23.

(25) ibid., vol. 1, No. 26.

(26) Ōkubo to Dajōkan, 12 october 1871, Dainihon Gaikō bunsho, vol. 1, No. 4, 64.

(27) There are very few studies of Treaty Revision in Western languages. The three most important works are F. C. Jones, Extraterritoriality in Japan (New Haven, 1931), F. V. Dickins, The Life of Sir Harry Parkes, vol. 2, (London, 1894) and P. J. Treat, op. cit., note 13.

(28) The three occasions were the postponement of the opening of Niigata at the end of 1859, the postponement of opening of Edo, Osaka, Hyogo, and Nigata in 1862, and the 1866 Tariff Convention.