The Justice of the Western Consular Courts in Nineteenth-Century Japan

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Preface

In 1876 Baba Tatsui, then a twenty-six-year-old man who had just completed two years' study of English law in London, published a booklet there called *The Treaty Between Japan and England.* It was a remarkable work in that it was destined to become the source most frequently cited by many Meiji publicists and later historians who attacked the inequity of the extraterritorial regime in Japan. In this work, Baba wrote that it was evidently in the interest of the British consuls in Japan "to protect their countrymen rather than to prosecute or convict them," and that the majority of the English residents in Japan had "strong prejudices against the natives of the country . . . and . . . against the native government." These facts alone, Baba went on to say, "show that the judges of the consular courts are not impartial, and therefore it is difficult to see how justice can be done in a court of justice where the judges have so much interest for the one and prejudice against the other."[1] In a similar vein in 1893 the *Kaishintō Tōhō,* a bimonthly periodical published by the Kaishintō, commented: "Injustice is the general rule in these [British and American consular] tribunals: justice is rare. Nevertheless, when they render just judgments we applaud their justice, hoping thereby to encourage them in the exercise of that quality."[2] Thus arose in the late nineteenth century the far-reaching generalization that the Western consular tribunals in Japan were so partial—toward Westerners and against Japanese—that they seldom rendered evenhanded justice.

This sweeping condemnation has been uncritically accepted and amplified by numerous historians who have written on the subject of revision of the unequal treaties in Meijii Japan. Moriya Hidesuke, for example, writes: "Consular jurisdiction was entirely abused. It is not surprising, therefore, that in the open ports the illegal application of it was frequent and the appearance of unruly

foreigners was rampant." Yamamoto Shigeru observes: "Trials by foreign consuls were often biased in favor of protecting the interests of their own countries and therefore unfair, and this in turn created resentment on the part of the Japanese." Finally, Inoue Kiyoshi states: "In both civil and criminal cases the consular courts were likely to render decisions that were advantageous to foreigners and disadvantageous to the Japanese. In civil cases it was actually impossible for the Japanese to be tried fairly there."[3] Thus the pervasive generalization that for the Japanese defendant in a consular court injustice was the rule and justice the exception remains to this day an unquestioned major historical interpretation.

I once subscribed to this interpretation. Only after several years of research on the history of treaty revision in Japan did I begin to question whether the Western consular courts commonly treated Japanese litigants unfairly. Such a question led me to undertake a full-scale investigative study of the subject of justice in Western consular courts in nineteenth-century Japan. This book is the fruit of that research.

Conceptually, determining whether the Western consular courts in Japan did indeed seldom deal impartially with Japanese litigants requires two steps: (1) ascertaining how many *mixed* cases were adjudicated—cases with Western defendants and accused and Japanese plaintiffs and complainants; and (2) determining how many of the cases thus adjudicated were decided prejudicially against the Japanese litigants. The previously generally accepted interpretation would be valid only if at least one out of every two mixed cases were found to have been decided unfairly against the Japanese plaintiff or complainant.

Procedurally, these two criteria are applied here to two groups of mixed cases, publicized and unpublicized. The term "publicized" conveys the notion that a particular case was "widely discussed by both press and public"; "unpublicized" means that such widespread press coverage and public discussion did not occur in connection with the case under scrutiny. In examining the groups of publicized and unpublicized cases, therefore, four questions arise: How many publicized cases were there? How many of these cases were decided unfairly against the Japanese litigants? How many unpublicized cases were there? How many of these were decided unfairly against the Japanese litigants?

The focus of this inquiry is not on whether consular jurisdiction in Japan was unjust to the Japanese in the second half of the nineteenth century, since the overall inequity of the system is not likely to be denied. What is being questioned is the hundred-year-old Japanese interpretation that, as a rule, no Japanese could expect justice in the Western consular courts. An examination of this interpretation takes unequal consular jurisdiction as a given, with no evaluation of prevalent arguments for its abolition.

Of the two groups of publicized and unpublicized cases, the first includes a handful of cases on which hinges the Japanese interpretation of the prevalence of inequity in judicial decisions. Some of these cases have been cited and re-

cited in many historical studies, both scholarly and popular, of pre- and post-World War II Japan. They have been adduced as conclusive pieces of evidence that inequity existed in the extraterritorial regime in Japan. These oft-cited cases number only five, all decided by British consular courts: the *King* case of 1875, the two *Hartley* cases of 1878, the *Drake* case of 1886 (more commonly known as the *Normanton* incident), and the *Chishima* case of 1892–1895. Full of legal issues, courtroom battles, and many elements of human drama, these cases may enthrall a researcher. They may also at times exasperate the scholar, for they have been subject to a host of simplistic, downright inaccurate accounts and misinterpretations. In an attempt to reconstruct and evaluate each of these cases by means of multiarchival research and legal analysis, the following three questions are addressed: Do the accounts of the case present both the Japanese plaintiff's and the British defendant's side of the story? Did the consular courts involved render their decisions in accordance with the law applicable? Had the plaintiff been English rather than Japanese, would the sentence or the decision have been harsher to the defendant than it actually was?

The second, unpublicized group is composed of all other mixed cases adjudicated by the Western consular courts in nineteenth-century Japan. There were numerous such cases. Listing and counting them, though largely a mechanical task, turned out to be a major research undertaking. Archivists around the world kindly responded to my queries concerning the possible existence of documents from which to ascertain the number of mixed cases. On the basis of the number of mixed cases recorded in the returns of British and U.S. cases that I was able to discover, I have estimated, first, the total number of cases adjudicated by the British and U.S. consular courts and, second, the total number adjudicated by the consular courts of the other treaty powers.

Of the book's seven chapters, Chapter 1 presents the first attempt ever made to provide an overview of the extraterritorial arrangements of all the Western powers that maintained commercial relations with nineteenth-century Japan. Chapters 2 through 5 deal with the second of the four questions mentioned—namely, how many of the publicized cases were decided unfairly against the Japanese litigants? These four chapters therefore concentrate on reconstructing and evaluating the five cases to ascertain whether they support the opinion in question: that, for the Japanese, injustice was the rule and justice, the exception. Chapter 6, on the other hand, is concerned with the twin questions of how many unpublicized cases there were and of how many of these were decided unfairly against the Japanese litigants. Consequently, the chapter details how the aggregate number of cases adjudicated by the Western consular courts in Japan has been estimated, and how many of the cases thus enumerated may have been decided unjustly. Chapter 7 presents the conclusions of my investigation.

In variant versions, Chapters 2 and 5 were published in the *Journal of Asian History* and the *Journal of Asian Studies*, respectively. The conclusion pre-

sented in Chapter 2 of this work, however, differs from that of the article published in the *Journal of Asian History*. I wish to thank the editors of these two journals for their permission to reprint the articles.

In writing this book, I have incurred greater debts of friendship and goodwill than one could imagine from the relative slimness of the book. But for the conceptual understanding and knowledge of law I gained at Harvard Law School and the Tokyo University Faculty of Law, I could not have written the book. For this legal training, I received support from the National Endowment for the Humanities and the Japan Foundation. Jerome Alan Cohen of Harvard Law School encouraged and facilitated my affiliation with Harvard; and Ishii Shirō of Tokyo University (Tōdai) paved the way for my connection with Tōdai. Martha Jean Chang of the Florida State Department of Education read and criticized Chapters 2 and 3; Malcolm Smith of the Monash University Faculty of Law, Chapter 3; Robert M. Spaulding, Jr., of Oklahoma State University, Chapter 4; and Alfred B. Clubok of the University of Florida, Chapter 6. I have profited from the advice and knowledge of Tanaka Hideo of Tōdai, Tanigawa Hisashi of Seikei University, Yamamoto Sōji of Tōhoku University, and, above all, W. R. Cornish of the London School of Economics and Political Science. Of all archivists around the world who responded to my inquiries as to the possible existence of returns of cases adjudicated by the Western consular courts in Japan, several deserve special mention here for either the valuable information they offered me on their own or the exceptional courtesy with which they entertained my persistent queries: Miss Eve Johansson and Miss M. E. Golfrick, both of the British Library in London; Ronald E. Swerczek of the National Archives and Record Service; P. H. Desneux of the Belgium Ministry of Foreign Affairs and Foreign Trade; and E. van Laar of the General State Archives at The Hague. For a variety of help and services rendered, I am grateful to Ray Jones and the interlibrary loan staff of the University of Florida Libraries; J. K. Dixon of the Privy Council Office in London; Key K. Kobayashi of the Asian Division and Sung Yoon Cho of the Far Eastern Law Division, both of the Library of Congress; the staff of the Public Record Office in Kew; the staff of the Harvard Law School Library; the staff of the National Diet Library in Tokyo; and the staff of the Tokyo University Faculty of Law Library. Finally, I thank Mrs. Rita Barlow for her editorial service and Mrs. Adrienne C. Turner for typing the manuscript.

Of course, I am solely responsible for any errors that may have crept into the book, and I welcome queries from any readers.

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The Western Consular Courts in Nineteenth-Century Japan: An Overview

This chapter, the first attempt to provide an overview of the Western extraterritorial system in Japan, presents the organization, jurisdiction, and distribution of the consular courts set up in Japan by each of the sixteen Western treaty powers during the third quarter of the nineteenth century.

Today extraterritoriality means an alien's privilege of exemption from local law and law enforcement agencies while he or she is in a foreign country. In legal theory the alien's activities take place outside the territorial jurisdiction of the country where they actually occur. Extraterritoriality, including immunity from arrest and prosecution, extends to the visiting head of a foreign state and to diplomats and their families. Officials of the United Nations enjoy extraterritorial privileges when performing their duties.

Extraterritoriality was once granted to resident foreigners with no diplomatic or official position. This practice developed when law was personal rather than territorial, that is, regardless of where a person was, he or she came under the law of his or her nation.

In the nineteenth century Western powers, often by means of coercion, secured unilateral extraterritorial status for their citizens resident in Morocco, Turkey, Persia, Egypt, Siam, China, and Japan. The Western consul was usually granted jurisdiction to try all civil and criminal cases involving his countrymen. Extraterritoriality of this type meant "the extension of jurisdiction by a state beyond its borders," as well as immunity from the law and jurisdiction of a state in which an alien resided. Nondiplomatic extraterritoriality was strongly resented not only as an infringement of sovereignty but also as an opportunity for abuse. Whereas such extraterritoriality did not come to an end in China until 1946, it was abolished in Japan in 1899.[1]

In nineteenth-century Japan extraterritoriality of both types, diplomatic and

nondiplomatic, was in operation. Only nondiplomatic extraterritoriality is of concern in this study, which focuses on Western consular jurisdiction in Japan.

With the exception of F. C. Jones' work which provides an overall view of the British and the U.S. consular courts in Japan,[2] there is virtually no literature on the subject of the Western extraterritorial regime there. This dearth of literature prompted my search for records of the sixteen powers' consular courts. Here, too, I encountered a scarcity of documentation. With the exception of Great Britain and the United States, none of the treaty powers has preserved an appreciable number, if any, of the records of its consular courts in Japan. Therefore, no full and satisfactory analysis of the extraterritorial arrangements of the other fourteen powers is possible, such as for Great Britain and the United States. In fact, the analysis of the fourteen powers' arrangements is of necessity incomparably shorter and far less comprehensive than that of the British and the U.S. arrangements. Nevertheless, both groups are presented in order to throw light, however meager, on the overall understanding of the Western extraterritorial regime in nineteenth-century Japan. The analysis of the fourteen powers' arrangements is based largely on information culled from extensive and prolonged correspondence with numerous archivists around the world.

The sixteen Western treaty powers were Great Britain, the United States, France, Germany, Austria-Hungary, Belgium, Denmark, Hawaii, Italy, the Netherlands, Peru, Portugal, Russia, Spain, Sweden and Norway, and Switzerland. Of these, the first four—Britain, the United States, France, and Germany—can be said to have had substantial commercial interests in Japan, while the interests of the other twelve powers were far less extensive. This may be evident in Table 1, which indicates the breakdown by nationality of Western shipping entered at the open ports of Japan in 1869.

Great Britain

Of the four trading nations, Great Britain was the foremost. Table 2 shows that Britain supplied an incomparably larger share of Japan's imports than did any other treaty power. In 1883, for example, its share of Japan's total imports, 44 percent, represented four times the value of the United States' 11 percent; in 1888, the two figures stood at the ratio of five to one.

Britain's preponderant commercial interests in Japan were dramatized in the report of British Minister Sir Francis L. Plunkett to the British foreign secretary, the Earl of Granville, dated July 22, 1884. Although the volume of American trade with Japan came next to that of England, observed Plunkett, the number of Americans resident in Japan was less than half that of the British, and the crews of American ships entering Japanese ports in 1883 numbered few more than one-sixth the number of those of Great Britain for the same year.[3] The American minister to Japan, Richard B. Hubbard, too, attested to the preponderance of British commercial interests in Japan in 1885, followed by those of the United States. According to Hubbard, the number of British subjects resident in Japan that year was 1,124, and of American citizens, 475. In sharp

Table 1
Western Shipping Entered at the Open Ports of Japan in 1869

Flag	Ships	Tonnage
British	897	410,115(a)
American	352	509,008(b)
North German	179	74,150
French	48	29,042(c)
Dutch	47	12,969
Russian	50	19,128
Danish	26	6,707
Swedish and Norwegian	9	2,315
Hawaiian	4	1,610
Austrian	2	1,457
Portuguese	2	1,070
Other	4	1,096(d)
	1,620	1,068,667

SOURCE: DeB. Randoph Keim, A Report to the Hon. George S. Boutwell, Secretary of the Treasury, Upon the Condition of Consular Service of the United States of America (Washington, D.C., 1872), p. 60.

(a)Including mail steamers, 26 ships, 21,200 tonnage.

(b)Including mail steamers, 97+? ships, 355,615 tonnage.

(c)Including mail steamers, 12 ships, 12,668 tonnage.

(d)Under American, North German, and Dutch colors; flags not distinguished.

contrast, the year's total resident population of European nationality, other than English, amounted to only 789. Moreover, during the year 1885, 28,896 British and 5,206 American merchant seamen visited Japan, while the total number of merchant seamen of other European nationalities who visited was only 8,466.[4] Stated another way, of the aggregate number of Western merchant seamen who visited Japan in 1885, 67.9 percent were British, 12.2 percent were American, and the remaining 19.9 percent European.

The British consular establishment in nineteenth-century Japan reflected the domination of the British commercial interests there. (The years in which both British and U.S. consulates were established in Japan are indicated in Appen-

Table 2
Japan's Imports from the Four Powers as a Percentage of Its Total Imports by Value, 1883, 1888, and 1893

Power	1883	1888	1893
Great Britain	44.0%	43.8%	31.3%
United States	11.0	8.6	6.8
France	6.4	6.3	3.7
Germany	4.1	8.0	8.2

SOURCE: Computed from The Statesman's Year-Book, vols. for 1890, 1895, 1896, passim. Nihon teikoku...tōkei nenkan, vols. for 1885, p. 2; 1891, pp. 167ff.; and 1894, p. 502.

dix Table 1.) "Great Britain is really the only Power which has made entirely adequate provision for the discharge of the duties imposed upon foreign nations by the necessity of exercising Consular jurisdiction," wrote Plunkett to Granville. "She is as much ahead of the other Powers in this respect as her interests are in excess of theirs."[5] So it was. Quite apart from and in addition to its legation in Tokyo, Britain maintained a professional consul at each of the three principal ports—Kanagawa, Hyōgo, and Nagasaki—and a professional consul or vice-consul each at Hakodate and Niigata. Table 3 shows the distribution of Britain's Japan service as of October 1, 1879.

The consular officers listed in Table 3 were professional consuls, commissioned by the queen and invested with ample judicial powers for the trial of all civil and most criminal cases; these were not merchants sitting as trading, or honorary, consuls. Clive Perry, an authority on international law, observes: "It is impossible for anyone who has read widely in the [British] Foreign Office papers to fail to be impressed by the very considerable expertise in international law . . . the rank and file of the Diplomatic Service has in the past possessed." Three factors may explain the British diplomats' expertise. First, "care was taken to select men of experience and probity for the British Consular Service and complaints of their unfitness were usually shown to be unjustified." (Unlike the United States, Great Britain made no distinction between the diplomatic and consular services. Instead, the distinction lay in the diplomat versus the clerk of the Foreign Office.) Second, a person serving in a diplomatic mission or ministry of foreign affairs is bound in time to acquire a reasonable working

Table 3
Distribution of Britain's Japan Service, October 1, 1879

City	Rank	Name	Salary
Tokyo	Envoy and consul general	Sir H. Parkes	£4,000
	Secretary of legation	J. G. Kennedy	800
	Second secretay	Hon. J. Saumarer	400
	Japanese secretary	E. Satow	880
	Assistant Japanese secretary	E. Aston	600
	Vice-consul	J. Gibbins	300
	Medical officer	W. Anderson	250
	Student interpreter	L. Kucher	250
Kanagawa	Consul	M. Dohmen	600
	First assistant	J. Enslie	500
	First assistant	G. H. Hodges	400
	First assistant	R.R.H. McClatchie(a)	300
Hyōgo and Ōsaka(b)	Consul	M. Flowers	1,000
	First assistant	J. J. Quinn	400
	Student interpreter	J. McCarthy	250
Nagasaki	Consul	J. Troup	850
	Second assistant	W. A. Wooley	300
Hakodate	Consul	R. Eusden	850
Niigata	Vice-consul	H. W. Wilkinson(a)	600
On Leave	Assistant Japanese secretary	W. G. Aston	
	Consul	R. B. Robertson	
	First assistant	J. C. Hall	
	Second assistant	J. H. Longford(c)	
	Second assistant	E. B. Paul	

SOURCE: FO 46/250/341.
(a)Drew extra allowances for their acting appointments. McClatchie was acting as assistant interpreter to Her Majesty's Court for Japan, and Wilkinson was acting as assistant judge of the same court.
(b)As of October 1879, there were two seals--one for a consulate at "Hiogo" and the other for a vice-consulate at Ōsaka. FO 46/251/253.
(c)Drew an allowance of £100 as interpreter in addition to a salary as assistant.

knowledge of at least parts of international law. Third and finally, it was the practice of the foreign secretary to encourage members of the Diplomatic Service to supplement this practical experience by appropriate reading and to proceed to an examination in international law, success in which brought additional financial compensation.[6] English diplomats serving in Japan customarily sought leave to study for and take such an examination.[7]

The legal qualifications of the British consular officials, together with the speed