

DOUGLAS HOWLAND

International Law and Japanese Sovereignty.

The Emerging Global Order in the 19th Century

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In his important new work, Professor Howland makes an important and overdue contribution to Japanese legal and political history, demonstrating that conventional understandings of Meiji Japan's interaction with international law – including the struggle to renegotiate the unequal treaties, Japan's domestic legal reforms, and the nation's rise to "Great Power" status – are incorrect, or at least misleadingly incomplete. His new book is impressively concise yet meticulously researched and referenced, reinstating to their proper prominence aspects of the complex 19th Century international legal order that have been long neglected.

Chapter 1 introduces the book's central thesis. Howland rejects the "received historiography",¹ according to which Meiji Japan was largely "passive in the face of a gradual process of assimilation or conformity": the victim of a mature, Western-authored international legal system from which Japan was long denied equal membership.² Rather, despite the weaknesses of the late Tokugawa regime forced to accept the unequal treaties, the Meiji authorities "were actors to be reckoned with from day one",³ skilfully navigating the mechanisms of public international law to secure Japan's autonomy and advance its national interests. In so doing, "Japan refined the very nature of international society and catalyzed the formation of a global order",⁴ influencing the shape the still-embryonic international legal order would eventually assume.⁵ In Chapter 2, Howland tackles the common

1 Douglas HOWLAND, *International Law and Japanese Sovereignty: The Emerging Global Order in the 19th Century* (London/New York 2016) 4. This historiography "argues that Japan was not included within the international community or accepted as a sovereign state until it was deemed 'civilized'".

2 *Ibid.*, 5.

3 *Ibid.*

4 *Ibid.*, 3.

5 Throughout the book Howland presents the 19th Century as period of sustained contingency in the development of public international law, an issue receiving increased attention. Contingency in the history of public international law forms the basis of an immanent conference: "Contingency in the Course of International Law: How International Law Could Have Been" 14–16 June 2018 University of Amster-

assumption that an accepted “standard of civilization” prevented Japan’s equal membership of the international legal order in the 19th Century, an assumption that “presupposes both a unity of values and an international society that did not exist” at the time in question.⁶ Howland shows that the 19th Century global community was influenced by multiple, competing visions of international law, and the notion of international law as the preserve of polities recognised as *sovereign* states did not triumph until the 20th Century. Identifying the orthodox historiography with an overly-positivistic understanding of international law in the 19th Century, Howland contends that the truth of that period was more complex, since throughout the 19th Century a powerful current of thought – which Howland regards as a proposition of “natural law”⁷ – embraced Japan’s legal equality with the colonial states of the West. This complex 19th Century legal order did not maintain against Japan any prospectively posited *legal* “standard of civilization” as a criterion for entrance into international legal relations; rather, the standard held out against revision of the unfair treaties was simply political rhetoric. The treaty powers were specifically concerned with domestic Japanese legal reform,⁸ and this only to guarantee Japan as a location safe for the interests of global capitalism, namely one whose courts would reliably uphold the rights of Western entities as defined by the law of their home jurisdictions.⁹ As Howland shows, these demands deserve to be seen in light of Europeans’ own growing sensitivity to the inadequacy of traditional, informal approaches to what is now private international law, and growing pressure for integration between national systems of private law even in the West.¹⁰

Chapter 3 reflects in detail on the vexed questions of extra-territoriality and the other privileges granted to foreign nationals in Japan under the unfair treaties.¹¹ It problematises the common view of Meiji Japan as essentially responsive, acting to satisfy conditions imposed on it by the treaty powers. Although the treaties were unfair in substance, Howland demonstrates that Meiji Japan successfully invoked the sanctity of public international law to resist the treaty powers’ demands where these exceeded the letter of those treaties,¹² particularly to deny general rights of access to the

dam, which is expected to produce a dedicated collection of essays exploring this important topic.

6 *Ibid*, 27.

7 *Ibid*, 4.

8 *Ibid*, 38.

9 *Ibid*, 29.

10 *Ibid*, 47.

11 *Ibid*, 40.

12 *Ibid*, 49.

Japanese interior for the purposes of trade, and became adept at restrictively interpreting many of the most advantageous foreign privileges.¹³ In doing so, the Meiji authorities created powerful incentives for the Western powers themselves to seek treaty renegotiation. Howland develops his portrayal of Meiji Japan as a skilful participant in international legal mechanisms in Chapter 4, in which he draws on the 19th Century emergence of international administrative unions to show a competing vision of the international community, one that was “not an exclusive international order of great powers and their model of the sovereign state, but an inclusive global order in which all polities were welcome – states, semi-sovereigns, vassals, and colonies – and in which membership was voluntary”.¹⁴ Howland shows how Meiji Japan’s equal participation in this parallel international legal order helped it successfully oppose the treaty powers’ designs in Japan, especially by protecting Japanese control of emerging industries such as its telecommunications infrastructure.

In Chapter 5, Howland engages with the aspect of Japanese international legal history most contentious in terms of contemporary politics, namely its conduct of war in the 19th and early 20th Centuries. Through this, Howland demonstrates that Japan’s achievement of Great Power status derived ultimately from its conduct of international relations within the international legal order of the 19th Century, even prior to its military triumph over Russia in 1905. Japan is shown delicately to have combined general adherence to the international laws of war with politically adroit applications of raw state power in legally unregulated or contentious areas. Because Japan had successfully cultivated its recognition as a “civilized” nation capable of participating lawfully in armed conflict, especially vis-à-vis its “backwards” opponent, China,¹⁵ the Western powers largely adopted Japan’s position on the legality of its contentious military actions, and explained-away Japan’s more patent breaches of international law just as they did their own – regarding them as specific and regrettable lapses in conduct attributable to the vicissitudes of war, rather than indicative of a barbarous national character. A sobering implication of this insight is Meiji Japan’s complicity in 19th Century Western Orientalism. Japan’s conduct of international affairs did not dislodge the West’s racism towards Asiatic nations, but *relied* on it in order to exceptionalise itself among the “primitive” nations of the East. Moreover, Howland explains that Japan’s principal contribution to the refinement of the international law of war was as a catalytic irritant: Japan’s successful exploitation of lacunae, weaknesses and uncertainties in public international law showed the

13 *Ibid*, 50.

14 *Ibid*, 73.

15 *Ibid*, 125.

shortcomings of the existing order and incentivised reform. This narrative is powerfully concluded in Chapter 6, which offers expansive reflections on the history of theories of state sovereignty, integrated with discussion about the rise of Japanese imperialism and Western support for Japan's early colonial projects in East Asia.

No work of scholarship is without shortcomings. Howland's book shows signs of its origins in discrete, previously published articles, which has introduced a degree of drag into the book's otherwise linear narrative. In parts, previously discussed content is presented afresh, with limited sensitivity to the attention it has already received – repetition uncalled for in a book this concise.

One juristic reservation also seems appropriate. The supposed contrast between propositions of natural and positive law features prominently throughout Howland's narrative. In expressing the complexity of 19th Century legal thought, he notes that while "legal positivism identified European states as the natural community and imposed the standard of civilization on outliers",¹⁶ "a natural-law understanding of the family of nations continued to inform international relations".¹⁷ Of course, locating different legal opinions – for instance, about the criteria for full international legal personhood – within the relevant intellectual traditions is an important aspect of the history of ideas. But in places Howland offers what are presumably his own reflections about the nature of public international law, reflections that seem anachronistically to channel the thinking of 19th Century jurists, to the exclusion of subsequent progress in legal theory. For instance, Howland seems himself to assume legal positivism is "unable to furnish an explanation for the obligatory nature of international law",¹⁸ impliedly presenting its obligatory nature instead as a proposition of so-called *natural* law. He moreover sees something "paradoxical" in legal positivists' claim that "a *political* process of 'recognition'," is the basis of "*legal* confirmation of state sovereignty."¹⁹ None of these points are remotely problematic from the perspective of contemporary positivist thought. Space precludes a detailed exposition of the contributions 20th Century positivists and their successors have made to legal theory, or these contributions' application to international law in particular, but the literature offers compelling answers to Howland's concerns. Since the seminal work of H.L.A. Hart, legal positivism has amply demonstrated the irreducibly sociological – read, *political* – basis of legal normativity, which derives from nothing more metaphysical than a critical mass of social endorsement of some rule according to which other, more

16 *Ibid.*, 9.

17 *Ibid.*, 127.

18 *Ibid.*, 9.

19 *Ibid.*, 25 (emphasis in original).

specific, rules are sanctioned as valid and obligatory rules of the particular legal system. Howland presents the modern international legal order (composed exclusively of sovereign states) as intrinsically positivistic, in contrast with the 19th Century's nebulous community of polities, apparently attributable to natural law. Certainly, a proposition about the criteria for international legal personhood is necessarily a proposition *of law*, and necessarily one that arises logically prior to any "legislative" act of the international community thus comprised. But there is no reason that this proposition cannot be regarded as "posited" in the sense required to debunk the metaphysical affectations of the natural law tradition. While the rudimentary legal positivism of the 19th Century – particularly that of Bentham and Austin – would share Howland's assumption that custom cannot be understood a source of positive law for want of an identifiable, Leviathanic legislator, the transformative insight of 20th Century positivist theory was to explain its applicability even in the absence of conscious legislative design.

Much of the material on which Howland's book reflects is politically sensitive, since competing perspectives on modern Japanese history are intimately connected with contemporary issues, not least the question of constitutional revision and the increasingly nationalistic flavour of Japanese politics. Howland insists his book does not seek to exonerate Japanese aggression in the 19th Century and early 20th Centuries,²⁰ but only "to understand how Japan became a great power by 1907, how Japan was encouraged to become a world power, and how the international community condoned Japanese aggression."²¹ Indeed, the book strikes a sensitive balance, showing the contributions that the wider international situation made to Japanese foreign policy in the 19th and early 20th Centuries, while also re-emphasising Japan's own agency in its conduct of international legal affairs. In place of the traditional story of Meiji Japan as a reactive victim of 19th Century public international law, Howland tells a story of Japanese empowerment that simultaneously reveals important truths about the development of public international law in general. In this, Howland's book has the distinctive characteristic of the first-rank of English-language scholarship on Japanese law, namely that it combines intimate reflections on Japanese legal issues with insights about law in general. This book makes a contribution to Japanese – and international – legal history that deserves to be applauded, and which every scholar of Japanese law will benefit from reading.

*James C. Fisher**

20 *Ibid.*, 26.

21 *Ibid.*

* Project Associate Professor, University of Tōkyō Faculty of Law & Graduate Schools for Law and Politics.