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Justice and International Law in Meiji Japan: The María Luz Incident and the Dawn of Modernity

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The *María Luz* Incident (the Incident) is one of the most famous events from the Meiji period of Japanese history. It is still introduced today, in various treatises, textbooks, and novels, and even in popular comic books (like Samurai X), figuring into diverse narratives of racism, feminism, human rights, international relations and international law. However, none of these dealt appreciably, in English, with the technical aspects of the legal proceedings triggered by the Incident until the publication of Professor Giorgio Fabio COLOMBO's *Justice and International Law in Meiji Japan: The María Luz Incident and the Dawn of Modernity* – an excellent book addressing the intersection of "Japanese studies, private and public international law, civil and criminal procedure and international relations". It aims to fill a gap in the vast and excellent literature on the *María Luz* Incident by "providing another perspective: a *legal* one, deeply embedded in the historical context of Meiji Japan". This book, a valuable resource for undergraduate and postgraduate students and scholars, eloquently provides the legal perspective. They will particularly benefit from the book's structure, carefully crafted by Professor COLOMBO with outstanding clarity and simplicity: 1. Introduction, 2. Background, 3. Criminal Proceedings, 4. Civil Proceedings, 5. International Dispute Resolution and Arbitration and 6. Conclusions.

Chapter 1 begins with a prologue in which Professor COLOMBO succinctly and effectively elaborates on the rather complicated facts, proceedings and results of the Incident:

> In the month of July 1872, a Peruvian barque, the *María Luz*, chartered by a Spanish subject, was carrying Chinese indentured servants from Macau to Peru. Due to a storm, the ship had to stop for repairs in Kanagawa Bay. While in harbour, some Chinese labourers escaped from the *María Luz* and, claiming to have been mistreated by the captain, a Peruvian national named Ricardo Herrera, sought protection by the British consular authorities. The British referred the matter to the Japanese governor of Kanagawa, and this led to a number of legal proceedings: a criminal case against Herrera for having illegally detained and punished his passengers, and two civil cases brought by the captain himself against the fugitives to force them to return on board. The Chinese inden-

tured servants were freed by the Japanese authorities. Peru protested and, after a complex negotiation, the case was eventually referred by Japan and Peru to arbitration by the Czar of Russia, who decided the case in favour of Japan in 1875.

The author then explains the importance of the case in Japanese legal history. The new Meiji government was temporarily in a legal vacuum – a transitional period between feudal Tokugawa law and the modern *Roppō* (六法 "six laws") system – when the Incident happened. However, it nevertheless required Japanese (legal) elites to deal with several issues of international maritime law, criminal proceedings (e.g., a criminal trial without a modern court system or modern criminal law), private international law, and international dispute resolution, some of which would not be easy to resolve even in the more advanced Japan of 2023, or anywhere else. The Japanese elites ultimately achieved "a brilliant legal victory in one of the first cases of international arbitration ever recorded", taking full advantage of the tools of international law based on their and their foreign advisors' expertise.

As discussed in the "Legal Modernisation and the Road to Modernity in Japan" section, this is exactly what those elites had strived to do, as they regarded the Incident and the legal and arbitration proceedings that followed as arenas for demonstrating their capacity to handle complicated legal issues. They were keen to project an image of Japan as an advanced, civilised nation that upheld the rule of law and the general principles of international law. This keenness was for the sake of renegotiating the Unequal Treaties, which Japan had been forced to sign by Western colonial powers, who categorised the country as a "semi-civilised" nation with a barbaric legal tradition (putting aside barbaric elements of their own legal systems). After reviewing this general historical background based on 160 (mostly) secondary sources in English, French, Italian and Japanese, Professor COLOMBO concludes Chapter 1 with a section on methodology that elucidates the empirical method the book employs and how the following chapters will proceed.

The section "Facts of the Case" in Chapter 2 provides a detailed factual reconstruction that refers to several primary sources. They include: (1) a site visit report on the *María Luz* written by Michisaburō HAYASHI (林道三郎),[1] an inspector appointed by the governor of Kanagawa prefecture; (2) a letter from E.S. BENSON, the municipal director whom the foreign repre

1 Michisaburō HAYASHI was the first-class translator (一等訳官 *ittō yakukan*) and ninth grade civil servant (権典事 *gon-tenji*) of Kanagawa prefecture at the time of the Incident: *https://www.kyorin-u.ac.jp/univ/graduate/international/student/report/no13.pdf*. See also *https://dl.ndl.go.jp/pid/784500/1/1*.

sentatives had assigned to police Yokohama, which informed the acting governor of Kanagawa prefecture (大江卓 Taku ŌE) of the result of BENSON's own site inspection on the ship; (3) the decision of a criminal trial before the governor of Kanagawa that found Captain HERRERA guilty of having abused and unduly restrained his Chinese passengers; (4) a formal objection to that decision drafted by the German consul Eduard ZAPPE and supported by the representatives of Portugal, Denmark and Italy; (5) a response to that objection from the acting governor of Kanagawa; and (6) the witness testimonies of several expatriate residents of Yokohama taking the side of Captain HERRERA.

These primary sources are followed by the section "Points of Contention", which explains how Japan was forced to ink the Unequal Treaties by US Commodore Matthew Calbraith PERRY's "gunboat diplomacy" and compelled to accept the consular jurisdiction of Western powers. This special privilege prevented Japan from adjudicating foreign criminals in Japanese courts. As Peru was not a signatory to the Unequal Treaties, the Court of Kanagawa (prefecture) exercised jurisdiction over Captain HERRERA, notwithstanding the absence of a modern legal system in Japan in 1872. Professor COLOMBO notes that "[t]he results were remarkable, as the Court of Kanagawa was able to create the impression [to the West] of applying established and clear rules and respecting due process, while basically there were no procedural guarantees in place".

Chapter 3 then addresses the criminal proceedings in which Captain HERRERA was charged with several counts of mistreating his Chinese passengers. The section "Lack of Legislation" indicates that these proceedings were held under the "old Tokugawa rule". Modern statutes on the tribunal system inspired by French law – e.g., the Criminal Code (旧刑法 *Kyū-keihō*) of 1880, the Code of Criminal Instruction (治罪法 *Chizai-hō*) of 1880 and the Lawyer's Law (旧々弁護士法 *Kyūkyū-bengo-shi-hō*) of 1893 – came into force only after the Incident, although Captain HERRERA and the Chinese indentured servants were represented respectively by Frederick V. DICKINSON and John N. DAVIDSON, both of whom were British barristers practising in Yokohama. The Criminal Court Rules (獄庭規則 *Gokutei kisoku*) of 1870 were in line with Tokugawa law, whereas the Prefecture Establishment Ordinance (県治条例 *Kenchi jōrei*) of 1871 conferred judicial authority on the new prefecture-level administrative divisions (県 *ken*) and thereby maintained an overlap, derived from the Tokugawa Shogunate, between the executive and the judiciary.

As the "Composition of the Court" section of Chapter 3 demonstrates, criminal and civil proceedings in the *María Luz* case were entrusted to the governor of Kanagawa. Thus, the twenty-four-year-old acting governor Taku ŌE, the vice governor (権令 *gonrei*) of the prefecture, heard the case in the

presence of the following advisors to the court: George Wallace HILL (an American jurist who accompanied Michisaburō HAYASHI on board the *María Luz* for a site inspection), Nicholas John HONAN (Acting Assistant Judge at His Britannic Majesty's Supreme Court for China and Japan) and Erasmus Peshine SMITH (an American economist and a prominent legal advisor to the Japanese government). The "Procedural Law" section then shows how the acting governor and his advisors conducted the criminal proceedings under internationally accepted standards and thereby established the court's jurisdiction based on HERRERA's crimes committed in Kanagawa Bay. However, the "Substantive Law" section points out that the judge and his advisors found the Peruvian captain guilty of the offences while also granting him a pardon, "elegantly avoiding" discussion of which statutory rule(s) he had violated, which specific statute had determined his penalty and which article allowed them to grant the pardon. The acting governor was afraid that not pardoning HERRERA would have exposed the weaknesses of Japanese law to the Western powers.

Next, Chapter 4 considers the civil proceedings arising from the Incident. Like the criminal proceedings, these too were likely conducted under the Prefecture Establishment Ordinance of 1871. The Rules of Inter-Provincial Civil Procedure (府藩縣交涉訴訟准判規程 *Fuhan-ken kōshō soshō junban kitei*) of 1871 were unclear on the role and power of the judge. The Judicial Operating Rules (司法職務定制 *Shihō shokumu teisei*) of 1872 were not yet fully operational. Moreover, the Code of Civil Procedure (旧民事訴訟法 *Kyu-minji soshō-hō*), based on the German Zivilprozessordnung, was not enacted until 1890, and so could not have been of any assistance. The acting governor, (again) serving as judge, thus heard the case with his foreign advisors at the Court of Kanagawa.

As mentioned in the "Procedural Law" section, the litigation consisted of two separate actions filed against the Chinese indentured servants by the Peruvian captain, who acted under different designations – once as an agent of the *María Luz*'s Spanish charterer and again in his own name, as Captain HERRERA. Because both actions sought specific performance of the labour contracts signed by the Chinese indentured servants, and due to the subjective and objective connections of those actions, the Court decided to consolidate the actions and unify the hearings and decisions. The civil proceedings were conducted in an Anglo-American style, without any reference to a specific provision of Japanese law, because all the legal professionals involved in the dispute – legal advisors and counsel – were lawyers with a common law background. Therefore, and because of the plurality of nationalities, the primary language of the civil proceedings was English. However, as the book suggests in the "Language of the Procedure" section, some attempts were made to deliver English-Japanese and English-Spanish-

English translations by which to keep official records and interview witnesses. The "Substantive Law" section then delves into the merits of the case, examining the law governing the labour contracts and their enforceability under the *lex fori*. The court held that the applicable law was the *lex loci contractus* and thus the law of Macau. It also found that the contracts violated the public policy of Japan and thus were unenforceable under Japanese law.

Chapter 5 then discusses the final phase of the Incident, the arbitration proceedings before the Czar of Russia. The section "Diplomatic Relations and the Treaty Regimes" examines the negotiations between Minister Extraordinary and Plenipotentiary Aurelio GARCÍA Y GARCÍA of Peru and Deputy Vice Minister Kagenori UENO (上野景範) of Japan. The former demanded a diplomatic solution to the whole Incident based on dubious legal grounds, whereas the latter rebutted that position by invoking the "well-known" international law principle of exhausting internal remedies and moreover suggested that the legal proceedings at the Court of Kanagawa complied with law and justice. The negotiations did not result in a settlement. As a result, Japan and Peru agreed to resolve their differences through arbitration before the "Chief of a friendly State" and in 1873 appointed the Czar of Russia, Alexander II, as arbitrator.

As Professor COLOMBO mentions in the "Arbitration" section, arbitration experts would regard the appointment as peculiar because the parties had reasons to doubt the Czar's impartiality. The Russian Empire had an outstanding territorial issue with Japan over Sakhalin,[2] while Alexander II was notorious for his emancipation of Russia's serfs in 1861. However, this dual partiality probably made the parties feel content with the appointment. The arbitration was held in Saint Petersburg, using French as the official language. Minister Extraordinary and Plenipotentiary to Russia and Vice Admiral Takeaki ENOMOTO (榎本武揚) and Senator José Antonio DE LAVALLE represented their respective governments in the arbitration. The Czar issued the arbitral award in 1875, deciding in favour of Japan. The award is so succinct that the "Award" section reproduces its English version in full.

Finally, Chapter 6 examines the legacy of the Incident. The "A Trial on Trial: Dialogues between Japan and the West" section suggests that the Incident was an invaluable learning experience for the Japanese authorities. The Incident allowed Japanese elites to experiment with Western-style criminal and civil proceedings before a Japanese court, involving foreign

2 In addition, the Tsushima Incident (the Russian Empire's failed attempt to seize the island of Tsushima; ロシア軍艦対馬占領事件 *Roshia gunkan Tsushima senryō jiken*) happened in 1861.

subjects probably for the first time. Although Japan later ended up establishing legislation based on French and German laws, those elites were indeed indebted to their foreign advisors, such as Peshine SMITH, for their knowledge of common law, which was crucial for the (marginal) success of the experiment. In addition, the experiment and the following arbitration before the Czar of Russia had enormous consequences for Japan's foreign relations. As noted in the "Implications for Japan's International Standing" section, "[t]he *María Luz* case was instrumental in the improvement of Japan's image [as a civilised nation] in the eyes of Western observers". The case became a cornerstone for renegotiating the Unequal Treaties with Western powers.

This positive experience turned Japan into a passionate supporter of arbitration. However, according to the "Japan and International Arbitration" section, the Permanent Court of Arbitration (PCA) threw cold water on Japan's positive attitude towards arbitration in 1905 by issuing the House Tax Award. This award recognised tax privileges for foreigners under lease contracts in Japan, along the lines of the Unequal Treaties that had already been renegotiated. Professor COLOMBO observes that the PCA tribunal was likely driven by the Yellow Peril, which was enough to break Japan's trust in arbitration and international law. However, the Japanese have not forgotten the Incident. Professor COLOMBO emphasises in an epilogue that many Japanese intellectuals still remember the Incident as "a moment of glory for their country, in which they demonstrated their humanity and mastery of legal skills in spite of the difficulties the nation was facing in negotiating with Western powers". Professor Colombo is right.

This book deserves to be a standard treatise on the *María Luz* Incident. The trajectory of the book's discussion of primary sources vividly depicts the transition from the traditional to a modern legal system in Meiji Japan, which turns the volume into an invaluable contribution to the literature on Japanese law and legal development. The price of the book, £120.00 for 134 pages in hardcover (and £38.99 as an e-book), is probably reasonable, considering the enormous amount of time and intellectual labour Professor COLOMBO has invested in the volume.

Nevertheless, the exclusion by the publisher of the Japanese characters for specialist terms is curious. Including such characters would possibly prompt reviewers proficient in Japanese to spot a few loose translations at a pre-production stage. For example, the book reads on page 34, "[t]he captain was therefore summoned before the governor (*kenchō*) of Kanagawa". However, around the time the Incident occurred, the prefecture governor was called *kenrei* (県令), as found in Peru's objection to the jurisdiction of the Court of Kanagawa on page 56. If *kenchō* was 県庁, it would probably

mean prefecture government. Of course, this minor linguistic deviation would not undermine the book's outstanding status – the best single English volume on the *María Luz* Incident on the market. Readers of the Journal of Japanese Law should own at least one copy of the book.

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