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Inauthentic Sovereignty: Law and Legal Institutions in Manchukuo

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Although Manchukuo is easily dismissed as a puppet of Japan, at the time of its founding, it was one of many examples of a partially sovereign state. Specific compromises of Manchukuo's sovereignty shaped the formation of its domestic institutions, such as the legal sphere, in tangible ways. Manchukuo handed over to Japan the power to staff and ideologically mold its judiciary, while the tutelary attitude that Japan took toward the state was concretely manifested in aspects of Manchukuo penal and civil law, and a surprisingly contentious path to the abrogation of Japanese extraterritoriality. With the outbreak of war, Manchukuo effectively surrendered its national sovereignty to the needs of the Japanese empire, sacrificing its jurisdictional integrity as well. While not denying the deliberate attempt made by Japan to misrepresent the independence of Manchukuo, this article also seeks to understand more precisely how Manchukuo's architects assumed certain limits to state sovereignty, and how this understanding systematically crippled the new state's legal institutions.

Within days of its founding on March 1, 1932, press and politicians had branded Manchukuo a "puppet state," an appellation that conjures up rather unambiguous images not merely of control, but also of willful deception. Such terms continue to appear in historical writing on Manchukuo, along with the implicit idea that by hiding behind a front of powerless institutions, the Japanese manipulation of Manchukuo represented something more morally insidious than foreign occupation.

Yet the idea that all nations should possess absolute sovereignty is relatively recent. British jurists of the late nineteenth century created the concept of partial sovereignty, or what they termed "quasi-sovereignty," to describe the limited rights enjoyed by polities within the empire, such as the Indian princely states. The separation of such rights between the monarch and the empire was based on the claim, voiced in 1862 by Sir Henry Summer Maine, that "sovereignty has always been regarded as divisible" (Benton 2008, 605). A similar principle created nested hierarchies of authority, allowing the needs of the empire to trump those of functioning states within its realm during times of distress—

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consider, for example, Britain's ability to command the loyalty and resources even of self-governing dominions such as Canada and Australia during the Great War (Scott 1944). Moreover, even as interwar jurisprudence gradually came to affirm sovereignty as an *absolute* right for all nations, emergent international systems such as the League of Nations effectively found ways to deny these rights to many non-European states by keeping them in a permanent state of political or cultural tutelage (Anghie 2002). Whatever the good or bad intentions Japan may have had in the creation of Manchukuo, the fact is that the state was founded on legal grounds that were not substantially different from the American "insular possession" of the Philippines or the British mandate in Palestine.

This article will examine how the compromised sovereignty of Manchukuo was reflected in its evolving legal system. Never fully sovereign in the modern sense, and yet more complex than a simple puppet state, Manchukuo at times exhibited elements of quasi-, nested, and developmental sovereignty. In the same manner, Japanese control of the judiciary represented something more subtle and specific than the political theater of show trials and sham justice. To better understand the contingent understanding of law in Manchukuo, and its relation to the ideological and practical needs of the state's diverse backers, we focus on three questions. First, how did Japanese authorities attempt to imprint a set of ideologies onto Chinese jurists brought in from the previous regime, and create a stratum of lawyers who were committed to the new state? Second, how did the developmental tone of codified law in Manchukuo reflect both the limited sovereignty of the state, and the place of law in a larger social project of Japanese cultural tutelage? Finally, how was the consolidation of the Japanese empire in the face of war with China and the Allies reflected in the changing jurisdictional integrity of Manchukuo?

Background: Rule of Law in Manchukuo and the Japanese Empire

Long before Manchukuo appeared on the horizon, legal ideas and institutions had already proven vital to the founding and formation of the Japanese empire. Since 1900, Japan had been a signatory to many world treaties, and it vigorously pursued its interests, especially the 1910 annexation of Korea, through the channels and rhetoric of international law. The role that law should play in the governance of Taiwan and Korea lay at the heart of fundamental questions about how and how quickly these new possessions were to be integrated into Japan. The answer to both reveals the complex and uneasy relationship Japan developed with its young empire. On the one hand, limited expressions of extraterritoriality, such as a bifurcated criminal code for Japanese and natives, maintained a sphere of Japanese privilege. On the other hand, movement toward a Japanese-style civil code provided an incentive for native participation in the unique program of cultural integration, or "imperialization"

(*kōminka*), into Japanese-style subjects (Chen 1984, 240–74; Dudden 2005; Wang 2000, 36–62).[1]

Law was equally central to the formation of Manchukuo. Expressing support for Japanese actions in Manchuria, the Tokyo-based Imperial Bar Association released a statement in November 1931 placing the blame for hostilities squarely on the unwillingness of the Chinese republic to honor treaties or institute the rule of law within its own borders. Thomas Baty, resident legal advisor to the Japanese government, forcefully argued the right of Japan to respond militarily to this situation (*HS*, November 23, 1931; Oblas 1994). The state of Manchukuo was founded amid a wave of legal rhetoric, along with a Declaration of Independence, temporary statutes, an Organic Law that established the structure of the government, a twelve-part Rights Protection Law (*renquan baozhangfa*), and the promise that permanent codes and a national constitution would soon follow.

During the short life of Manchukuo, the development of the legal sphere passed a number of significant milestones. In 1934, Manchukuo was rechristened the Empire of Manchuria, a change that visibly centered on the enthronement of Pu Yi, but also instigated a sweeping administrative reform, including the replacement of judges grandfathered in from the Fengtian regime. The 1937 invasion of the Chinese heartland prompted vast changes within Manchukuo, marking the end of the provisional or transitional solutions that had been meant to ease Manchukuo into statehood. In this year, Manchukuo first promulgated its own legal codes, and Japan formally renounced its extraterritorial rights. After the commencement of war with the Allies in December 1941, the legal system of Manchukuo fell quickly into line with the needs of the empire, coordinating its activities and jurisdiction with that of Japan, and promulgating a series of laws emphasizing national security and military procurement. What remained constant throughout the period, up until the very last days before the Japanese surrender, was an overwhelming concern with the forms and language of law and legality, expressed most tangibly in the massive human and material resources that were invested in the creation and maintenance of the legal regime.

Courting the Courts: The Ideological Formation of the Manchukuo Jurist

Ideology and Legal Education

Although there was never any question that Manchukuo would be governed by law, many of the state's founders expressed an open contempt for its Western liberalist interpretation. People such as Ishiwara Kanji 石原莞爾 and Prime Minister Zheng Xiaoxu 鄭孝胥 instead promoted a rhetoric of Confucian moralism

[1]The main elements of the *kōminka* policy included the adoption of Japanese surnames, dress, language, and religious customs and the integration of the subject into a network of state-sponsored organizations (see Chou 1996).

voiced alternately as the Kingly Way (*wangdao/ōdō* 王道) or, later, as the equally vague "spirit of national foundation" (*jianguo jingshen* 建国精神). The framers of Manchukuo thus faced the task of adapting its legal system and personnel to this unique political ideology.

Yet, in doing so, they were hardly alone. Since the early twentieth century, political ideologies had grown increasingly prominent in the formation and adjudication of law in both Japan and China. In both places, legal reformers had initially demanded certain safeguards to keep the courts free of politics, and had drawn a clear line of separation between the judiciary and political parties. In Japan, a general hostility to political parties, and the sense of crisis and urgency that characterized the Taishō period as a whole, effectively kept parties and party ideologies out of the judiciary, even as the judiciary became increasingly galvanized against the left, and willing to support private political factions (Mitchell 1973, 317–45). In China, regulations requiring all sitting judges to renounce party affiliation were enacted in 1912 under the newly organized government of Yuan Shikai, and expanded in 1915 to include county magistrates who exercised judicial powers (Xu Xiaoqun 1997, 6). In both cases, however, the separation of judiciary and parties was less idealistic than political in motive—specifically, it was driven by the desire to keep rival factions out of power. In China, the ban was quickly reversed with a change in political fortunes, resulting in the institutionalization of party power within the courts. Soon after its military success in the Northern Expedition, the newly victorious Guomindang began the integration of party members into the judiciary, formally abolishing the prohibition on party membership for judges, and openly advocating a policy of "partification" (*danghua* 黨化) after 1926. The logic of such policies was eminently clear: because the dominant party represented not only political orthodoxy but also social progress, there was no conflict between party ideology and a truly independent judiciary.

Manchukuo initially retained many of the well-trained administrative personnel it had inherited from the Fengtian regime of Zhang Zuolin 張作林, but it was always assumed that sitting judges would soon be replaced with jurists trained under Manchukuo auspices (Qin 2005, 69–112). Thus, plans were made early on for two levels of legal education. Late in 1934, the Judicial Law College (*sifabu faxuexiao* 司法部學校) was opened, with Furuta Masatake 古田正武, formerly a public procurator of the Tokyo Supreme Court and later appointed as the assistant director of the Manchukuo Judiciary, as its head. Three years later, a larger Law University (*falü daxue*) was founded in the "new capital," Xinjing 新京 (Shinkyō, modern Changchun). To the surprise of British consular observers (from the tone of the reports, one might say chagrin), people responded to the opportunity for legal education with great enthusiasm. In September 1934, 1,210 local candidates in Mukden, Xinjing, and Harbin competed for one hundred places in the first class of the Judicial Law College. Thereafter, the school continued to enroll sixty to seventy students per year for the three-year

course, which was taught by Japanese instructors and included Japanese language training (BCR Mukden September 30, 1934; BCR Mukden, March 31, 1934; BCR Annual Report 1934; Fang and Yao 1993, 468; *Manchoukuo Year Book* 1943, 435–36; Soejima 1995, 140–42). Although political ideals were at the forefront of the school's mission (Imperial Ordinance No. 205 founding the school calls for a legal order to "realize the governance of the Kingly Way"), the college curriculum only vaguely suggests the possibility of ideological content, with courses in political theory offered alongside an otherwise standard legal training. The entrance examination was a bit more suggestive. Following a handful of questions on advanced algebra and geometry, applicants faced a choice of essays on legal basics, as well as topics ranging from the guardedly political "practical differences between consular jurisdiction and extraterritoriality" to the overtly ideological "political theory of the Kingly Way" and "theory of the harmony of the five races" ("Sifabu faxuexiao" 1934, 103–11).

What surprised even the examiners was the enthusiasm with which potential students responded to such questions. The first issue of the Japan-Manchukuo Legal Advisory Association (*Nichi-Man hōsō kai*) journal dealt at length with the founding of the law college, and included an outline of the examination as well as brief articles by three of the examiners, two Japanese and one Chinese. The first of the two Japanese examiners, Mutō Tomio 武藤富男 (at this time, head of the Punishment Board of the Manchukuo Judiciary) noted that none of the examinees was vocally dissatisfied with the new legal system. Indeed, many expressed a favorable disposition toward Japan and relief at the overthrow of the Zhang Xueliang 張學良 government, leading him to theorize that those who were willing to take the examination represented a stratum that had been dispossessed under the former regime. Both he and a second reader, Sugawara Tatsurō 菅原達郎 (who would later serve as governor of Jiandao Province), expressed surprise, bordering on incredulity, at the outpouring of Confucian rhetoric that students employed in expressing their admiration for the Kingly Way. Students enthusiastically, if formulaically, called for a return to a reign in the style of the legendary sage kings Yao and Shun, and espoused a society with "law and no law, form and no form" (*youfa wufa, youxing wuxing* 有法無法, 有形無形).[2] Mutō lauded this sort of ideal, but saw it as something to be achieved only thousands of years in the distant future, and attributed this naive enthusiasm to the hot-blooded youth of the examinees, even going as far as to call Confucianism a kind of "intellectual opiate" (*aru imi no ahen*). For his part, Sugawara was impressed with the rhetorical elegance of the students, but noted that their answers were all roughly the same (*daidō shōi* 大同小異) and generally lacking in depth. Most answers repeated identical stock phrases about the mythical sage-kings Yao and Shun, but neglected the more relevant political thought of

[2]The latter is a Buddhist expression, originally used in reference to the dharma rather than to law.

Song dynasty Neo-Confucian Shao Kangjie 邵康節 (Shao Yong 邵雍). Others quoted texts such as the Buddhist *Prajñā-pāramitā sūtra* about the relativity of law and punishment, but few seemed able to expound on them in detail. Most significantly, while most examinees were able to cite ancient political ideals, few seemed in any way concerned with the practical question of how to adapt them to a modern legal system (Mutō, Jiang, and Sugawara 1934, 112–30). Far from needing to indoctrinate prospective jurists into the ideology of Manchukuo, the first problem faced by the legal training system was a surfeit of students who were, if anything, a little *too* proficient in its rhetoric.

Judicial Personnel and the Legal Advisory Society

Although it remains common to characterize the large numbers of Chinese who joined the Manchukuo government as opportunists of the worst type, the fact is, they brought with them a wide range of personalities, loyalties, and agendas (Mitter 2000, 72–100). Like Zheng Xiaoxu (whom normally skeptical British consular observers once referred to as the "only Chinese personality of integrity" in the government), Chief Procurator Luo Zhenyu罗振玉 was devoted to the former Qing and to the person of Pu Yi. Nearly thirty years after the fall of the Qing, until his death in 1940, Luo still wore the Qing plait. At the same time, Luo was also convinced that only Japan could bring China out of its current state of degradation; according to Pu Yi, "in Luo's eyes there were only Japanese" (Aixinjueluo Pu Yi 2007, 178–84; BCR Mukden, January 18, 1936; Wang 1993, 445–53). In contrast, Zhao Xinbo 趙欣伯, head of the legislature, was entirely a product of Japanese education, having earned a doctorate in law from Meiji University in 1925. Zhao had risen to prominence through the earlier alliance between Zhang Zuolin and Japan, and later opposed the anti-Japanese stance of Zhang Xueliang, saying that "not taking the Japanese road is walking into a dead end" (Guo 1993, 468–81).[3]

Over time, ideological or professional motivations gave way to cynicism, particularly after the 1937 invasion of China proper prompted the mass resignation of many among this first wave of Chinese officials, leaving top Chinese positions to be filled by men of the caliber of Zhang Jinghui 張景惠, characterized as an "illiterate ex-bandit" and "singularly unbeautiful tool in the hands of the Japanese." Nor were Japanese officials eager to fill the vacuum. British consular reports observed somewhat hyperbolically that "no Japanese with first class qualifications is willing to accept so equivocal a post" as one in Manchukuo (BCR Mukden, January 18, 1936; for a very different assessment of Zhang, see Mitter 2000, 87–91).

Growing cynicism aside, great efforts were made to encourage loyalty among Manchukuo officials and jurists by helping them better understand and identify

[3]British consular observers were somewhat less sanguine, calling Zhao a "pro-Japanese opportunist of notorious reputation" (BCR Harbin, December 24, 1934).

with the Japanese legal system, in particular through official trips and exchanges to Japan. High-level judicial officials made numerous short and highly publicized visits—such as that by Feng Hanqing 馮涵清, head of the Manchukuo Judiciary, in November 1932, while visits by other top Manchukuo officials, such as that by Zheng Xiaoxu in April 1934, generally included a visit to the Diet or Supreme Court, and a reception by the Tokyo Bar Association or the Japan-Manchukuo Legal Advisory Society (*Nichi-Man hōsō kai* 日満法曹会) (*HS,* December 5, 1932; April 10, 1934).

A less visible but perhaps more meaningful type of exchange was the chance for jurists of a slightly lower level to make longer visits or even study in Japan. Late in 1934, a group of five Chinese jurists attached to the high courts and procuracies of Manchukuo, accompanied by Sugawara Tatsurō, made an exhaustive one-month tour of the major legal, economic, religious, and educational institutions in Tokyo, followed by visits to the major courts in Nagasaki, Nagoya, Osaka, Kobe, and Hiroshima, as well as lower courts and punishment and rehabilitation facilities in Japan and Korea (Xu Weixin 1935, 111–19). The following year, a larger group of four Japanese and seven Chinese (the latter being the chief judges of the major high courts) embarked on a similar tour. In the same month, sixteen lower judicial officials chosen from the second graduating class of the Judicial Law College arrived in Japan for a one-year study program, which included an apprenticeship with Japanese legal institutions. Such exchanges were repeated annually, and indeed became frequent enough as to no longer be considered newsworthy (*HS,* April 20, 1940; October 15, 1940; October 20, 1940; *Manchoukuo Year Book,* 1943, 435–36).

Such visits appear to have made an impression. Two members of the November 1934 delegation, Xu Weixin 徐維新 and Wang Zhaoxun 王肇勳, high procurates of Fengtian and the Northern Manchuria Special District, respectively, each wrote a short account of his impressions for the *Legal Advisory Journal*. Of the two, Xu's was the more detailed, beginning with an account of the trip, and dwelling at length on the lavish hospitality of his hosts. What impressed him most, however, was none other than the independence of the Japanese courts. Xu saw the court system in Japan as absolutely inviolable. "The judges rule independently," he wrote, "with no interference from any quarter…. When they undertake their judicial duties, they are solemn and fair minded, with a lofty spirit of sacred inviolability." Nor did he stop there. Xu praised the penal facilities in Japan as humane and moral, with good food and rehabilitative activities such as judo and kendo, and he was particularly impressed with the popular understanding of and respect for the law. Praise for Japanese law in each case was tempered by an admission of how far behind Manchukuo remained (*HS,* November 8, 1934; Xu Weixin 1935, 113; Wang 1935, 132).

Indeed, the problem was less in finding willing Chinese jurists, than in recruiting experienced Japanese to join them. By the late 1930s, investment in legal education and exchanges had created a relatively stable and loyal

coterie of local judges, many of whom, such as Waseda-trained Chief Justice Lin Qi 林棨, were already very friendly toward Japan. However, by the time of Furuta Masatake's 1933 "Hire Japanese Jurists Plan" (*Nihon shihōkan shōei keikaku* 日本司法官招聘計画), all courts were also to include a proportion of Japanese judges and procurators, and for these, demand consistently exceeded supply (Wu 2004, 96–101). A 1934 article in the Tokyo-based *Legal News* announced large numbers of vacancies for Japanese: more than thirty high court judges, twenty procurators, and a hundred legal secretaries, in addition to instructors at the newly founded Law College to be hired on contracts of three years (*HS,* August 30, 1934; Wu 2004, 102). In June of the following year, a special call went out for Japanese jurists to staff twenty-four local courts in the provinces of Rehe and Qiqihaer (*HS,* March 8, 1935). As the number of Japanese judicial officials (judges, investigators, and secretaries) more than doubled, from 152 in 1935 to 342 in 1937, standards necessarily slipped. Nor were they very high to begin with: Japanese jurists in the Kwantung (Kantō) Territory were twice implicated in corruption scandals during 1934–1935 (*HS,* September 8, 1934; April 28, 1935; June 3, 1935; May 25, 1936; Soejima 1995, 142). In contrast, Chinese talent trained under Manchukuo auspices was in steady supply. With the prospect of new lawyers graduating from the Manchukuo legal colleges, planners now had the luxury of more closely scrutinizing the native lawyers already at work in Manchukuo, with the first reaccreditation exam scheduled for 1936 as part of the Court Reorganization Law (*HS,* June 3, 1940).

Legal Developmentalism

When the long-promised Manchukuo codes were finally promulgated in the first half of 1937, they strikingly resembled those being used in Japan. However, even more than the domination of Japan over the revision process, this degree of similarity reflects the long-term influence of Japan on Chinese law. Since the waning days of the Qing dynasty, Chinese jurists had looked to Japan for guidance and inspiration, specifically in the reexamination of foundational legal principles. As a result, the codes developed during the late Qing reforms, as well as those eventually adopted by the Republic of China during the mid-1920s, were advised by Japanese jurists, and hewed closely to a Japanese model, including even some reforms that Japanese advisors had been unable to implement at home (Henderson 1970).

Under such circumstances, is it worthwhile to look for any signs of either independence or progress in the codified law of Manchukuo? The fact that the codes, promised from the outset, required five years to formulate (during which time the issue of code revision was frequently in the public eye) suggests that the decision-making process was more complicated than might be expected. Moreover, although similar, the Manchukuo codes were not simply copies of

Japanese laws. As had been the case with the late Qing legal reforms, the law enacted in Manchukuo included reforms that superseded that in Japan, such as the weakening of the Manchukuo legislature (which had the ability to "assist" the executive, but not to enact a veto) that presaged what some may have wished for the Imperial Diet in Japan (Mitani 1992, 186–87). Nevertheless, Japanese law always remained the standard. Both before and after the promulgation of Manchukuo codes, Japanese law and judicial decisions were held up as a model for Manchukuo jurists. Each issue of the *Legal Advisory Journal* included a section on recent Supreme Court rulings in Japan, explaining the reasons behind the ruling and, in some cases, outlining the difference between the same law in Japan and Manchukuo. Most differences represented minor tinkering with the existing code—indeed, some were so small that we can only guess why anyone would have seen fit to codify them. For example, a Japanese court could be called to assess a person's competence to hold property at the individual's own request, or that of his spouse, close relatives, household head, heirs, or guarantor, while in Manchukuo, it would do so on the testimony of individual's spouse or that of two immediate relatives (*Hōsō zasshi,* October 1936, 112).

Corporal Punishment

Certain significant differences did separate the codified law of Japan and Manchukuo, and many of these differences had a distinctly developmental character. Among the most characteristic of these was the selective use of corporal punishment, particularly flogging. Such punishment had a complicated history in the Japanese empire. As part of the drive to end foreign extraterritoriality, Japan had banned the use of corporal punishment on its own soil in 1872 (Botsman 2005, 151, 211–20). However, having gained possession of Taiwan and Korea, it retained and even increased the use of flogging overseas. The use of corporal punishment continued, amid vocal criticism over the use of "barbaric" punishments abroad, until unrest in both colonies during the late 1910s prompted a general softening of military-style rule and a shift toward the cultural "imperialization" policy (Katz 2005, 193–213). Thus, it is something of a surprise to see corporal punishment not only continued in the leased Kwantung territory, but also instituted afresh in Manchukuo.

In Kwantung, which in many ways served as a model for Manchukuo, a policy promulgated by special punishment ordinance (*batsurei* 罰令) in 1907 allowed the commutation of fines of less than one hundred yuan into punishment by flogging. This option was available only to Qing subjects, a provision changed to "Chinese" after the fall of the dynasty, and only to those without land. Echoing sentiments expressed by early proponents of flogging in Taiwan, a 1934 delegation sent to observe the formation of civil and procedural codes in Manchukuo applauded the use of corporal punishment in Kwantung. In a speech made upon his return to Japan, one member of this delegation, Saitō Yūsuke 齋藤悠輔,

proclaimed himself "deeply convinced that this is the appropriate punishment for propertyless (*lumpen*) Chinese men," presumably because such men would not be affected by the imposition of fines that they could not pay (*HS,* June 8, 1934).

The use of flogging in Manchukuo was portrayed not merely as a practical measure, but also as a uniquely appropriate one for a culturally backward people. A 1936 article explained that the new law of Manchukuo was based on the spirit of Japanese law, while retaining Manchuria's traditionally "retributivist" (*ōhō shugi* 応報主義) stance toward criminal punishment (*HS,* October 18, 1936). A common view, expressed with uncommon directness by Ono Jitsuo 小野実雄 (not to be confused with his closely named contemporary Ōno Jitsuo 大野実雄), was that while the criminal law of Manchukuo was modeled on that of Japan, physical punishment must be retained as a temporary and expedient measure to account for the cultural and economic backwardness of the common Manchukuo criminal:

> I will offer my opinion on the eradication of flogging from the criminal punishment system of Manchukuo. Of the thirty million people of Manchukuo, more than half are ignorant and completely illiterate barbarians. If we put every petty thief into jail, how many jails will be enough? Just feeding them every day will become a drain on the national economy. (*HS,* November 3, 1940)

Such ideas were not universally accepted by Japanese jurists. Writing in 1936, Okamoto Hanshirō 岡本繁四郎 noted an important contradiction in the legal use of corporal punishment: while the original 1907 ordinance had restricted the commutation of fines to flogging to Chinese, the treaty by which Japan had recognized Manchukuo stipulated that all references to "China" in existing treaties be automatically replaced with "Manchukuo." This created the entirely unacceptable possibility that Japanese settlers in Manchukuo would be subject as well. Comparing various definitions of who might be legally considered Chinese for this purpose, Okamoto found none sufficient to justify the difference in treatment, and concluded that flogging was "uncultured and barbaric." Having been eliminated in Japan, it should be purged from every civilized country, Manchukuo and China included (*HS,* July 8, 1936). Yet the very fact that such moral objections by Japanese jurists could go unheeded demonstrates the utility of maintaining Manchukuo's nominal sovereignty. While colonial governance of places such as Taiwan was subject to the moral scrutiny of Japanese public opinion, the putatively independent state of Manchukuo was much more able to avoid or deflect it. The continued use of flogging in Manchukuo, while represented as a temporary concession to the backward nature of the native society, was a penal anachronism that would not likely have been tolerated under direct Japanese rule.

Court Reform and the Abrogation of Extraterritoriality

In a similar manner, the image of Manchukuo's backwardness was used to justify the maintenance of Japanese extraterritoriality. Following the precedent established by Western powers in the mid-nineteenth century, citizens of Japan were, by treaty, not subject to Chinese law; crimes committed in China would be tried either in their home country or by Japanese consular authorities. Despite the legal reforms enacted in China during the late 1920s, Japan remained unwilling to consider relinquishing these rights, as is evident in a 1933 Tokyo court ruling upholding Japanese consular jurisdiction in China (*HS,* September 25, 1933).[4] Even before the formation of Manchukuo, Japan was by far the largest extraterritorial power in the northeast, directly administering large areas of ceded territory, such as the holdings of the South Manchuria Railway, and employing a particularly aggressive interpretation of consular jurisdiction (Esselstrom 2005).

At independence, the new government of Manchukuo gave assurance that existing treaties pertaining to China would be honored, thus retaining the extraterritorial rights enjoyed by Japan and other nations. Officially, the extension of extraterritoriality in Manchukuo was a temporary measure to be upheld only until the local judiciary was brought up to standard, and given that Japan already maintained an overwhelming influence over the government of Manchukuo, the issue of extraterritorial revision might appear to be nothing more than a particularly crass exercise in empty rhetoric. The topic certainly did command a great deal of rhetorical attention in legal publications within Japan before the actual revision in 1937. The reason, however, was that the steps leading up to this moment were a surprisingly wide-ranging enterprise, involving the efforts of numerous individuals in both Manchukuo and Japan, and the systematic reform of the Manchukuo Judiciary.

Just as Manchukuo jurists routinely visited Japan, delegations were sent from Japan to assess the state of the legal system in preparation for the eventual abrogation of extraterritoriality. The first such delegation was organized in 1933 by the Tokyo and Imperial bar associations. It consisted of eighteen representatives from the former and five from the latter, who planned to arrive in late August and remain for twenty days, during which time they were to visit courts and prisons and meet various local officials, including Zhao Xinbo and the not-yet-crowned Pu Yi. Beyond observing, they were also to lay the foundation for what would become the Legal Advisory Society and to gather materials outlining progress in the legal realm (*HS,* August 15, 1933; August 30, 1933; October 3, 1933). Over the next few years, numerous delegations would follow suit, always with preparing the way for treaty revision at the forefront of their stated goals.

[4]In this, Japan was hardly alone. See H. G. W. Woodhead (1929) for a particularly spirited response to the suggestion that Western powers should voluntarily abrogate extraterritoriality.

Most of the writing on extraterritoriality in Manchukuo spoke about abrogation in laudatory but consistently vague terms; it is no coincidence that the specific steps or conditions were never clearly spelled out. However, the most definitive step was the 1937 promulgation of new codes. An essay by Matsubara Shigemi 松原重美 (1937, 185–86), written soon after the treaty ending extraterritoriality was concluded, categorized the work of legal reform into three parts: the standardization of the judiciary, the compilation of new law codes, followed immediately thereafter by the formal abrogation of extraterritoriality. For Matsubara, the second of these was the watershed moment, the one that finally established Manchukuo as a country ruled by law (*hōsei koku Manshū* 法制国満州).[5]

Those planning treaty revision needed to take into account how such a step would be perceived within Japan, a fact that explains the domestic publicity given to the topic. Beyond the military, Japanese interests in Manchukuo were diverse. Beginning in 1936, the settler movement had sought to coax a million Japanese farmers to emigrate, thereby easing overcrowding at home and providing the foundation for a new Manchurian society (Young 1998, 307–51). More important, Japanese businesses were very active in Manchukuo, seeking new markets for their own products, but also investing in the development of strategic industries (Hikita 2000). The great efforts made to lure Japanese capital to Manchukuo were reflected in the early promulgation of laws regarding banking, investment, and the formation of professional associations. In contrast to the easy dismissal of Okamoto's moral queasiness over corporal punishment, the policy makers planning to abrogate Japanese extraterritoriality were profoundly sensitive to public opinion, particularly those who needed assurance that their investments and persons would remain safe.[6]

In a 1934 essay, jurist Minami Tetsutarō 南鐵太郎 attempted to assuage any such fears, repeating a frequently voiced explanation that Japan must demonstrate its good intentions by leading the drive toward abrogation, but also explaining why such a change would have no adverse implications for Japanese. He noted that the entire judicial structure been reformed, that large numbers of Japanese experts had been brought in to guide it, and that all judges would be accompanied by two assistants, one Manchukuo native and one Japanese. Speaking directly to the fears of his audience, Minami asserted confidently, "since a Japanese sitting in a Manchukuo courtroom would in practice receive the same result that he would from a Japanese judge, you must cast off any unease about the abrogation of extraterritoriality" (*HS*, January 15, 1934).[7]

[5]The Manchukuo Six Codes (*Manshūkoku roppō*) appeared as a draft early in 1935, followed by full civil and criminal codes in 1937. The most complete chronology of the promulgation of laws in Manchukuo appears in a special issue of the journal *Waseda hōgaku* (1943).

[6]Nearly a century earlier, British residents in India had lobbied their government for a bifurcated colonial law (Kolsky 2005).

[7]In a similar fashion, a raft of Japanese-modeled laws ensured investors of the government's commitment to the protection of capital (Matsubara 1937, 184–91).

Custom and Family Law

A third manifestation of developmental ideology in Manchukuo was the revision of civil law, in particular family law. Given such pressing issues as maintaining security and attracting Japanese investment (the provenances of criminal and commercial law, respectively), one might reasonably expect civil law to be a somewhat distant concern. However, civil law was an important facet of Japanese colonial jurisprudence, as a conduit for encouraging and shaping cultural integration. Taiwan and Korea both employed criminal law that was more draconian and arbitrary than that used in Japan, yet they adopted what was essentially a Japanese civil code. Colonial civil law did recognize the legal status of "local customs," albeit as a temporary expedient for the convenience of administration, rather than any principled recognition of native rights. In Taiwan, law concerning land sales, for example, initially respected local customs as legally binding, a policy that necessitated a great deal of investigation into precisely what these customs were. By the late 1920s, however, the complex tangle of graded landownership and usufruct rights had all been leveled into a single category of Western-style ownership. In contrast, apart from those areas where property was concerned, family law did not undergo any such transformation. Largely to streamline questions of inheritance, courts emphasized the Japanese definition of household over the divided authority of the Taiwanese one, but left other specifically Taiwanese arrangements, such as concubinage and adoption practice, untouched (Chen 2006; Wang 2000, 145–69).

In Manchukuo as well, the revision of family law (particularly inheritance law) was equally a matter of acculturation and practical conflict resolution. Here, the line between recognition of custom and development toward a single model was complicated by the fact that Manchukuo was a multiracial state. Despite its name, Manchukuo was not intended and almost never portrayed as a polity reserved specifically for the Manchu people; indeed, official portrayals took great pains to convey the novelty of its multiracial makeup, which consisted of a Han majority, as well as significant Japanese, Korean, Mongol, and other populations, each of which was to be allowed and even encouraged to maintain its distinct culture, religion, and customs. Manchukuo lawmakers could appreciate the problems inherent in substituting racial for local custom by looking at places such as British India, where policies of "cultural federalism," on the one hand, and the overly aggressive application of a unified code, on the other, had provoked a bitter backlash (Rudolph and Rudolph 2001). While lawmakers in Manchukuo made no specific mention of this heritage, they were sufficiently well versed in British colonial policy as to be aware of it, and of the fact that they faced very similar problems. Compared to the small colony of Taiwan, or Korea, which was to be assimilated into Japan, Manchukuo was a more ambitious form of polity, a test case for a new form of Japanese imperialism that could embrace a "Greater East Asia" otherwise too large

and diverse for assimilation. As such, lawmakers understood the need to successfully impose unified spiritual principles on a conspicuously multiracial state, a contradiction reflected in the reform of family law.[8]

Writing in 1943, jurist Chikusa Tastuo 千種達夫 outlined the basic principles for the role of custom in inheritance law and, by extension, much of family law in Manchukuo. Not surprisingly, his understanding and application of custom was neatly divided by race. For three years, beginning in March 1940, his civil code deliberation committee (*minji hōten shingi iinkai* 民事法典審議委員会) had traversed Manchukuo, conducting a combination of ethnography and diplomacy and meeting with local leaders of the "five races" to establish the direction of future law making and accommodate a standardized version of racial customs.[9] Chikusa emphasized the delicacy of balancing custom and universal principles, noting that Taiwan and Korea had been wrestling with the problem for decades, and that multiracial Manchukuo would face an even more difficult challenge. At the same time, he felt that certain principles had to be adhered to. Law had to be practical and accessible. Inheritance laws were very real concerns for ordinary people, and even if written in Japanese, they should be translated into simple and easily understood vernacular. Chikusa also felt that laws should also be generally progressive and acceptable to East Asian morality. He did suggest that bad customs should be reformed, but criticized revisions of family law enacted during the 1920s by the Republic of China for having gone too far in this regard, blindly disregarding the Asian patrilineal family in favor of Western ideas individualism and gender equality.

The ostensible compromise was a spectrum of universal principles and racial customs for the various races of Manchukuo. On the one end, Japanese, Taiwanese, and Koreans would continue to operate under the laws of their own countries, although, as with other areas of law following the abrogation of extraterritoriality, these laws would be adjudicated by Manchukuo courts. At the other extreme, the small but politically important "white" (i.e., non-Soviet) Russian population would be ruled entirely according to their own laws. By Chikusa's account, the reason for leaving the Russian population outside the pale was the need to respect the different customs of non-Asian peoples, even within an Asian empire, although the need to court this strategically important community certainly played as role as well. In between these two extremes, the Han, Mongol, and Manchus, who together composed the vast majority of the population, would

[8]To some degree, this emphasis on multiculturalism in Manchukuo derives from the size of the state and the need to court minorities to counter pro-Chinese sentiment among the Han majority. At the same time, however, it was also integral what Prasenjit Duara (2006) calls the "new imperialism" of the latter twentieth century, of which Manchukuo was the first instance.

[9]This was one of many massive efforts—Chikusa himself led ethnographic projects on inheritance customs that would not be completed until after long after the end of the war. The most significant compilation of Chikusa's ethnographic data is the three-volume *Manshū kazoku seido no kanshū* 滿洲家族制度の慣習 (1964–67).

be subject to a uniform code. The reason given for this was as simple as it was striking: the result of three years of investigations had concluded that these races operated essentially according to the same marriage and inheritance customs. The exception was the Hui population, which, according to this investigation, consisted less of Chinese Muslims than of Arabs and Balkan Muslims, who, like the Russians, lay outside the pale of Asian custom (Chikusa 1943a, 1–12).[10]

Whether the exclusion of the Russian and putatively "Arab" Muslim populations from the progressive reform of law was a rhetorical flourish to emphasize the community within the family of East Asian cultures, or simply a way to explain their de facto autonomy, it is worth questioning why Japanese, Taiwanese, and Koreans would remain divided from the other East Asian races, who were artificially lumped together by virtue of their supposedly similar customs. Obviously, this was at one level simply a nominal transference of Japanese extraterritorial rights under the thin guise of custom. At the same time, it also shows the two faces of customary law as both gradation of civilization and as a civilizing agent, with Japan as both standard and standard-bearer.

Moreover, other configurations of law and culture were also made. In contrast to a family law that combined Manchukuo races by virtue of their similar customs, other laws separated them, with the implication that Chinese and Koreans were to be gradually merged into a Japanese legal world, while others, Mongols in particular, were to be allowed to continue to operate according to "local custom" in perpetuity. This distinction even included the maintenance of special jurisdiction, with banner courts established in September 1937 in the heavily Mongol areas of Xing'an and Rehe.[11]

Even then, Chinese and Koreans were by no means equal to Japanese—the continued use of corporal punishment demonstrated that. But such differences were always portrayed as temporary. When Kwantung finally abolished flogging in 1938, Okamoto Hanshirō (the same person who had two years earlier condemned flogging in any civilized country) attributed the "great strides" the area had made in thirty years to the "strength of Japanese culture" (*HS*, July 28, 1938). Seen in reverse, this graded civilization would always relegate non-

[10]Such themes are presaged in an earlier article announcing a draft of the Manchukuo inheritance law (*HS* January 28, 1938). The claim that Manchurian Hui are transplanted Arabs is equally striking, but fits into a larger Japanese view of Islam largely in terms of pan-Asianism, and of trying to court Muslims as a counterweight to Chinese (see, e.g., Abu Talib Ahmad 1995; Esenbel 2004; Tō-A kenkyūjō 1931). The claim that other races share the same customs is striking, particularly in light of an ethnographic tradition that was more prone to dividing races than to combining them (DuBois 2006).

[11]Some clues to the operation of these courts may be gleaned from a 1935 investigation, which asked a variety of questions about the role of elders and lamas, of custom and precedent in making decisions, the status of women, and whether Mongols and non-Mongols would be judged according to the same laws (*Manchoukuo Year Book* 1943, 432; "Mōko shihō seido" 1935).

Japanese to a subordinate role. Like any civilizing project, the legal reform of the New East Asian order preached unity while it enshrined difference.

Cooperation and Joint Jurisdiction

The 1937 abrogation of extraterritoriality marked the point at which Japanese authorities were reasonably confident that the legal system in Manchukuo was structurally comparable to that at home, and staffed with personnel who were sympathetic to Japanese interests. More than a goodwill gesture, Zhang Runsheng estimates that abrogation freed up to 65 million yen in annual administrative costs, and rechanneled large numbers of personnel into more productive projects (1995, 421–26). The timing of abrogation, in step with the outbreak of hostilities with China, is no coincidence. War with China, and later the Allies, required greater coordination of the empire as a whole, such that what once might have been seen as long-term economic, social, or legal plans for Manchukuo were accelerated and given a new sense of urgency. It also necessitated a new attention to security concerns, and a heavier hand against any hint of antistate activity.

This combination of new realities prompted the increasingly direct integration of Manchukuo and Japanese imperial law, in the form of shared legal codes, the merging of police powers, and the establishment of joint jurisdiction. The foundation for this integration would be the Japan-Manchukuo Judicial Services Aid Law (*Nichi-Man shihō jimu kyōjo hō* 日満司法事務共助法), which was concluded by treaty in April 1938 (and promulgated in Manchukuo as Ordinance 71) by the same group of diplomats and judicial officials who had arranged the termination of Japanese extraterritoriality. The aim of the law was straightforward, pledging cooperation on basic judicial functions, including the investigation of crimes, gathering of evidence, and arrest and detention of criminals. Beyond this, it expanded jurisdiction to allow each others' courts to hear both civil and criminal trials, although this agreement did not extend to matters related to constitutional law, national defense, or security. At a more prosaic level, the validity of legal documents, as well as postage and tax stamps, was now extended to both countries. Beyond obvious applications in criminal law, such steps were also meant to streamline commercial relations; Ōno Jitsuo illustrated the utility of these new measures by raising the example of communication between stockholders in one country and company directors in the other. It also integrated and facilitated a variety of procedural concerns. In private suits, for example, a claimant in Japan could appeal to his own court system to serve litigation papers directly to a defendant in Manchukuo, rather than having to go through the Foreign Affairs Office (*HS*, January 18, 1940; Ōno 1943; Sugawara, Nomura, and Watanabe 1938).[12]

[12]Ōno felt that still more needed to be done to help Japanese pursue nonactionable (*hishō* 非訟) incidents in Manchukuo courts.

These steps were not entirely unanticipated. As the *Legal Advisory Journal* pointed out, Germany had already outlined similar arrangements when it concluded treaties of judicial cooperation with Britain, Austria, and the Soviet Union during the 1920s, and more recently with Czechoslovakia and Italy. These could serve as a model for the new relationship between Japan and Manchukuo, although the unique cultural, economic, and political ties between Japan and Manchukuo being so much greater than those among European countries, the breadth and depth of their judicial cooperation should exceed them as well (Sugawara, Nomura, and Watanabe 1938). Such integration had been called for earlier on, as well, through proposed measures such as the 1936 suggestion to allow the Japanese Supreme Court (*Daishinin*) to review decisions of the Kwantung High Court on appeal (*HS,* May 25, 1936). As was so often the case, Manchukuo would be the test case for the entire empire. Just as the Japan-Manchukuo law was being promulgated in June 1939, a consultative committee, led by Sugawara Tatsurō, Oikawa Tokusuke 及川徳助 (vice head of the Manchukuo Judiciary), and Zhang Xinbo met in Xinjing with representatives from Japanese Northeast Asia to chart a course for the expansion of this same law into North China and Mongolia (*HS,* November 23, 1939).

By 1942, the legislature and court systems of Japan and Manchukuo were far more unified than they had been at any point earlier, with their energies singly directed to supporting the war effort. This support took a number of forms. The most obvious need for increased security was aided not so much by the promulgation of new laws as by the more vigorous application of existing ones, particularly the conveniently vague 1932 Provisional Law for the Punishment of Political Criminals, which allowed for the prosecution of any behavior that "undermined the state." This law was buttressed by more specific statutes, specifically the Maintenance of Internal Security Special Law, promulgated on December 27, 1941, which allowed for the preventative detention of "thought criminals," and the appropriately Orwellian-sounding Thought Rectification Law of 1944. These laws allowed for a free hand in policing, including the power to round up tens of thousands of "vagrants" for reeducation through labor, thus providing a convenient solution to the manpower shortage that by 1943 had reached a critical stage (DuBois 2008). Manchukuo law also supported the economic needs of the war by establishing the category of "economic crime," and introducing a series of laws controlling the sale and possession of important commodities.[13] For the final years of the war, the entire legal machinery of Manchukuo was seamlessly integrated into the military and security needs of the empire.

Conclusion

In his 2003 *Sovereignty and Authenticity*, Prasenjit Duara takes aim at the simple collaborationist image of Manchukuo by demonstrating the power and

[13]A full listing of such laws is given in *Keizai tōsei hōrei mokuroku* (1942).

reach of its ideology: the intellectual currents that sustained the nation and set it within a Japan-centered, pan-Asian universe. In later work, he and others have carried the importance of Manchukuo further, positing the state not as the end of imperialism, but as the opening of the "new imperialism" of the Cold War, in which hegemonic powers created not colonies, but "legally sovereign nation-states with political and economic structures that resembled their own" (Duara 2003, 2006).

However, returning to some of the ideas presented in the introduction, it is precisely the intentional compromises built into the conception of Manchukuo's sovereignty that shaped the ambiguous independence of that nation's legal system. Manchukuo was quasi-sovereign in the sense that it freely surrendered to a foreign power the right to staff and ideologically mold its judiciary. It was developmentally sovereign in the issues and theater surrounding the revision of extraterritoriality, as well as the acculturating implications of corporal punishment and family law. Finally, the nesting of its national sovereignty within that of the Japanese empire allowed for the effective erasure of Manchukuo jurisdiction with the outbreak of war.

This more precise view of how the nature of Manchukuo sovereignty shaped the development of its domestic institutions provides tools for a more careful assessment of the real significance of the state to the larger sweep of history, be it as the culmination of colonial trends, a precursor to the international relations of the Cold War, or a model for understanding recent events (Wasserstrom 2005). Even if the state was officially rejected by the League of Nations and reviled by many of its contemporaries, Manchukuo was at the time of its creation only one of many dozens of partially sovereign states, dependent polities, insular possessions, and other examples of what Lauren Benton (2008) has referred to as legal and territorial "anomalies." The point, made very compellingly by Anthony Anghie (2002), is that this sort of institutionalized exception, as well as arrangements such as the mandate system instituted by the League of Nations following the Great War, were ways of euphemizing and thus perpetuating systems of dependence in a world that formally was no longer willing to tolerate imperialism. That such international systems continue to transcend ideology should, I believe, force us to confront the limited significance of ideologies such as pan-Asianism, or the ideologies that produced the bipolar world of the Cold War, to the real work of empire. Moreover, the fact that such systems and anomalies not only survived the fall of formal imperialism, but indeed continued to proliferate in the aftermath of its demise, makes the sort of compromises faced by the Manchukuo legal system a uniquely useful point of comparison for other forms of institutional dependence in the postwar international order.

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