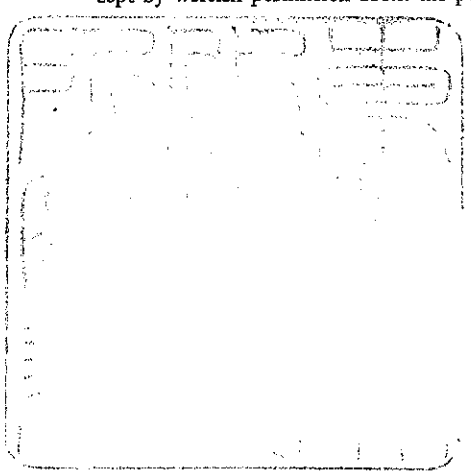
Extraterritoriality in Japan

By F. C. Jones



Foreword

SUCH an obvious anomaly in international relations as extraterritoriality is bound to be the subject of controversy, whatever its original justification may have been as a means of facilitating, for mutual benefit, an intercourse which might otherwise have been difficult or impossible without an even more serious impairment of sovereignty. The purpose of this book, however, is clearly neither to defend nor to oppose the principle or practice of extraterritoriality, but rather to give an objective history of its inception, operation, and abolition as applied to one country during the last century. Mr. Jones has ably fulfilled his purpose of telling and documenting the story of a finished episode in the modern history of Japan. It will be for others to discover whether the experience of Japan can throw light on the discussion of extraterritoriality as found elsewhere, though it would be too much to expect that the experience of Japan had offered a magic formula for the solution of the problem under different conditions.

The Japan Society of New York has been glad to cooperate, through its Townsend Harris Committee, in making Mr. Jones's study available to students of Japanese history and others interested in international relations. Japan experienced many of the characteristic injustices and exasperations which, whatever its advantages, have almost inevitably been associated with extraterritorial jurisdiction. Her Government and people endured them, on the whole, with remarkable patience and dignity, aided doubtless by a realistic apprehension of the conditions on which the demand for extraterritorial jurisdiction had been based, no less than of the practical measures necessary to effect its

abolition. In the eyes of the world the latter achievement stands greatly to the credit of Japan and the episode as a whole forms an honorable chapter in her history.

JEROME D. GREENE
Chairman of the Townsend Harris Committee of the Japan Society of New York

New York City,
July 27, 1931.

Preface

THIS work was originally a dissertation for the Master of Arts degree of the University of Bristol, and I wish to thank Professor R. B. Mowat for suggesting to me a subject which I have found of the greatest fascination, as well as for facilitating my researches by obtaining permission for me to read in the Library of the Foreign Office. I am also indebted to Mr. K. Nihro, of the Imperial Japanese Embassy in London, who translated to me a chapter of *Hakushaku Mutsu Munémitsu* (*The Memoirs of Count Mutsu*). Further, I have to thank the Controller of H. M. Stationery Office, London, for permission to reproduce extracts from *Treaties between Great Britain, etc., and Japan, 1861;* Hertslet's *Treaties and Tariffs Regulating the Trade between Great Britain and Japan, 1879;* and *Japan,* No. 1 (1894) [C-7545].

My heartiest thanks are due to Professor C. K. Webster and to Mr. Charles P. Howland for their kindly interest in this monograph, for their valuable suggestions as to its emendation, and for their efforts to further its publication, which have helped to secure the appearance of the book before extraterritoriality in the Far East becomes entirely a thing of the past.

Above all, it is owing to the very generous financial assistance of the Japan Society of New York, afforded through its Townsend Harris Endowment Fund Committee, that this work is now published. I am deeply grateful to the officers of the Society and to the members of this Committee and find it hard to express in fitting words my appreciation of their kindness and liberality to a stranger.

While I thank them all most sincerely, I must render a special tribute to Mr. Alexander Tison, the president of the Japan Society, for reading through my manuscript and recommending its support, and to Mr. Jerome D. Greene, the chairman of the Townsend Harris Endowment Fund Committee, for his ready championship of my cause before his Committee and for all the trouble that he has taken to insure the early publication of this book.

F. C. J.

Bristol, England,
July, 1931.

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CHAPTER I

Introduction. The Origin and Development of Extraterritoriality

EXTRATERRITORIALITY may be most simply defined as the extension of jurisdiction by a state beyond its own borders.[1] While, therefore, foreigners enjoying extraterritorial rights may claim some immunity from the jurisdiction of the native courts, they are to the same extent subject to the authority of tribunals specially erected by their own state for their benefit.

Extraterritoriality, then, since it implies jurisdiction as well as immunity, should be clearly distinguished from exterritoriality, or the exemption from all jurisdiction of heads of governments traveling abroad, ambassadors, ministers plenipotentiary, and other persons enjoying especial privileges. It also differs from diplomatic protection, or the attempt of a state to safeguard the rights of its citizens abroad through the intervention of its accredited ministers, since such action never takes the form of a claim to jurisdiction. For the right of diplomatic protection is based upon the assertion by a state of sovereign authority in general over its citizens even when resident abroad, so long as they make no formal renunciation of their allegiance to it. Such sovereign authority is, however, personal in character, whereas jurisdiction, although an element of sovereignty, is now generally held to be territorial in nature.[2] Hence, only under an extraterritorial *régime* can a state exercise both sovereignty *and* jurisdiction outside its own territories. This is the distinctive and peculiar feature of extraterritoriality.

This exercise by one state of judicial authority within the territories of another is often imagined to be confined to the relations between occidental and oriental peoples and to imply some degree of inferiority on the part of those who have conceded it, since it is an exception to the general rule that sovereign independent states have full judicial autonomy within their own borders. In consequence extraterritoriality now appears as something of an anomaly needing special justification, and is frequently denounced as an instrument devised by the stronger nations of the West for the exploitation of the equally cultured but militarily impotent races of the East. In fact, the system has existed elsewhere than in Asia, has no essential connection with the relative merits of different civilizations, and finds its origin in a concept of law which is as old as the most primitive of societies.

For the belief that the stranger within the gates should be judged according to his own law and not by that of the people among whom he resides is much older than the contrary axiom of the territoriality of law, which is largely derived from the comparatively modern theory of sovereignty. In ancient times law was universally held to be personal in nature since it was a crystallization of customs which were inextricably interwoven with religious beliefs and ceremonies. Participation in legal rights and obligations was an integral part of citizenship which could not possibly be extended to the alien, no matter what the cultural standard of his city or tribe might be.

This remained the general custom in Europe throughout the Middle Ages and was strengthened by the rise of Mohammedanism. Thus the Turks, when at the zenith of their power, granted extraterritorial privileges with a lavish hand, and permitted their exercise even when they had not been conferred by treaty. For the Ottomans, in com-

mon with most oriental races, still considered law as personal rather than as territorial in character and were not conscious of any infringement of their sovereign powers by the exemption of a few alien traders from their jurisdiction. Rather did they consider it as only natural and right that the infidel should be excluded from the benefits of Moslem law. As Lord Milner wrote in discussing the Capitulations in Egypt:

> The first Capitulations were not so much treaties as concessions. The Sultans of those days neither regarded the rulers of the Christian states of the West as equals to be treated with, nor was their principal aim to obtain reciprocal advantages in exchange for the privileges they granted. Their primary object was to make it possible for Christians to reside and trade in the territories of the Porte, by protecting them against the ill-usage to which, as defenceless strangers of an alien faith, they would otherwise have been exposed. The omnipotent despots who granted the first Capitulations would have smiled at the thought that the favours they were almost contemptuously conferring could ever become a serious source of weakness or embarrassment to their successors.[3]

Originally, therefore, the feeling of superiority, in so far as it existed at all, was on the side of the Power which conceded extraterritorial rights. In general, however, it is plain that extraterritoriality was regarded as a natural and simple means of facilitating harmonious commercial intercourse between Christian and Moslem states.

> En effet, cet exercise d'une jurisdiction exceptionelle par des magistrats de leur propre nationalité était une condition indispensable pour que les marchands étrangers fussent autorisés à établir des comptoirs permanents dans les ports d'un peuple dont la langue, la religion, et les coutumes n'étaient pas identiques à celles des étrangers.[4]

It was only to be expected that the nations of the Occi-

dent should endeavor to extend to the Far East a system of which they had such experience in the Levant, and which was there accepted as obvious and fair by all concerned. But there were two important differences between the system in the Levant and in the Far East. In the former case it was established by common consent and so for long occasioned little dispute; in the latter, it was included in treaties submitted to as a result of the use or the menace of force, and hence was resented from the first. Secondly, extraterritorial privileges in the Levant were based as much on custom as on formal treaties, whereas in the Far East they rested from the outset on treaty alone[5] and were in consequence more restricted. Rights, established by treaty, while more carefully defined, lack the same element of permanence as those hallowed by the usage of centuries,[6] especially if the treaty contains a revisionary clause. It is not too much to say that the history of extraterritoriality in Japan was conditioned largely by these divergencies from Levantine conditions.

CHAPTER II

The Early Treaties with Japan and the Period of Conflict

IN the middle of the nineteenth century the hostility of the Japanese ruling classes to foreign intercourse was as bitter as that displayed by the Chinese, but it arose from different causes and was excited by particular apprehensions. The Japanese are an alert and inquisitive people, by no means averse to commercial and cultural relations with other nations. As early as 1813 Dr. Ainslie, an English physician who resided for four months at Nagasaki, described the Japanese as a people eager for knowledge and "ready to throw themselves into the hands of any nation of superior intelligence."[1]

Since 1638, however, the Japanese Government had maintained a policy of total exclusion of all Europeans save the Dutch, and these were allowed to trade only by submitting to the most minute and humiliating restrictions.

The first Europeans to reach Japan were the Portuguese in 1542, the Spaniards appeared in the last decade of the sixteenth century, and the Dutch and English in the opening years of the seventeenth. To all these nations the Japanese at first behaved with a liberality which left nothing to be desired. In particular, they made no difficulty about the concession of extraterritorial privileges. The so-called feudal system of Japan was based more on the personal bond between *daimyo* (lord) and *samurai* (retainer) than on landholding, and hence the Japanese regarded law and justice as personal rather than territorial in nature.[2] Consequently they were as willing as the Ottoman Sultans to

grant exemption from the native jurisdiction to foreigners. In 1573, for example, the daimyo of Omura conceded to the Portuguese the right to exercise jurisdiction in the port of Nagasaki even over the Japanese inhabitants, because he feared their withdrawal elsewhere and the loss of a lucrative commerce.[3] This was, however, an exceptional grant wrung out of a minor local magnate. Of more importance as an indication of Japanese policy in regard to the legal position of aliens is the letter patent of Iyeyasu[4] to Captain John Saris, representative of the English East India Company. This document was issued October 8, 1613, and, by its fourth clause, the English in Japan were to be amenable only to the head of their factory for all offenses they might commit in Japan, while the same official was to have cognizance of all questions affecting the property of his countrymen.[5] The Spanish and the Dutch were accorded similar privileges.

Thus the question of extraterritoriality caused no difficulties during the first period of European intercourse with Japan; the change of attitude which led to the expulsion and exclusion of all but the Dutch was due to the missionary activities of the Catholic nations, which were carried on in a manner that provoked a very natural reaction. The Tokugawa authorities, moreover, came to fear an alliance between the subjects of the King of Spain and converted feudatories to upset the *bakufu*[6] and perhaps place Japan under foreign domination. Therefore they set to work with truly Nipponese thoroughness to expel the dangerous aliens[7] and exterminate native Christians. The Dutch were allowed to remain because they were clearly hostile to the Spaniards and Portuguese and, since they eschewed all missionary activity, were supposed by the Japanese not to be Christians at all.[8]

Various attempts were made by Great Britain,[9] France,[10]

Russia,[11] and the United States[12] to persuade Japan to reopen commercial relations, but all proved fruitless until in 1852 the United States determined to send a naval expedition to Japan under the command of Commodore Matthew C. Perry. The objects of this mission were thus described by President Millard Fillmore in his third Annual Message to Congress dated December 6, 1852:

> Our settlements on the shores of the Pacific have already given a great extension, and in some respects a new direction, to our commerce in that ocean. A direct and rapidly increasing intercourse has sprung up with eastern Asia. The waters of the Northern Pacific, even into the Arctic Sea, have of late years been frequented by our whalemen. The application of steam to the general purposes of navigation is becoming daily more common, and makes it desirable to obtain fuel and other necessary supplies at convenient points on the route between Asia and our Pacific shores. Our unfortunate countrymen who from time to time suffer shipwreck on the coasts of the eastern seas are entitled to protection. Besides these specific objects, the general prosperity of our States in the Pacific requires that an attempt should be made to open the opposite regions of Asia to a mutually beneficial intercourse. It is obvious that this attempt could be made by no power to so great advantage as by the United States, whose constitutional system excludes every idea of distant colonial dependencies. I have accordingly been led to order an appropriate naval force to Japan, under the command of a discreet and intelligent officer of the highest rank known to our service. He is instructed to endeavor to obtain from the Government of that country some relaxation of the inhospitable and anti-social system which it has pursued for about two centuries. He has been directed particularly to remonstrate in the strongest language against the cruel treatment to which our shipwrecked mariners have often been subjected and to insist that they shall be treated with humanity. He is instructed, however, at the same time, to give that Government the amplest assurances that the objects of the United States are

such and such only, as I have indicated, and that the expedition is friendly and peaceful.[13]

Commodore Perry was intrusted with a letter from the President to the Emperor of Japan in which it was stated that the object in sending him out was to propose that the United States and Japan "should live in friendship and have commercial intercourse with each other," and in which it was declared that "the Constitution and laws of the United States forbid all interference with the religions or political concerns of other nations."[14]

Before describing the results of Perry's mission, it will be well to give some account of the political institutions of Japan in 1853, as the misapprehension of these by Perry and subsequent negotiators had an important bearing on future developments. The principle of the vicarious tenure of power was all-pervasive in Japanese politics, and the Shogunate itself rested largely upon this. The sovereign *de jure* was the Emperor, or Mikado, the descendant of the gods and representative of a dynasty "coeval with heaven and earth"; but for centuries *de facto* sovereignty had been exercised by the Shoguns, or military leaders, who had arisen as the result of feudalism. In theory, the Emperors remained the ultimate sovereigns, but delegated executive and administrative power to the Shoguns; in practice, they were but puppets in the hands of their overmighty vassals, and might be compelled to abdicate if they showed any desire to cast off the yoke and resume their legitimate rights.

This state of affairs was not understood by foreigners at the time of Commodore Perry's mission, and the prevalent view, taken from the Dutch, was that there were two Emperors in Japan, one supreme in matters spiritual, the other in temporal affairs.[15] Therefore Perry and subse-

quent envoys supposed that the potentate at Yedo, whom they knew as the Tycoon,[16] was equivalent to an Emperor or King, whose decision would be final in all ordinary matters of state. They knew vaguely of a second ruler in the interior, but his power, so it was said, was limited to things ecclesiastical and so they recked little of him.[17]

But the relation of Emperor to Shogun was only the beginning of the intricacies of Japanese governmental arrangements. The administrative system of the Shogunate, as created by Iyeyasu Tokugawa and perfected by his grandson Iyemitsu, was also marked in 1853 by the divorce of real from apparent power. Below the Shogun came the *Gorojiu* or Great Council of Five, originally the chief executive organ, assisted by the *Wakadoshiyori* (Council of Junior Elders) whose functions were in appearance advisory only.[18] By 1853, however, owing to the decline in ability of the later Tokugawa rulers, the Shogun had ceased to exert personal authority and was himself but a tool in the hands of any able and ambitious individual in the Gorojiu or even the Wakadoshiyori.[19] Such a system, which gave to the government an air of mysterious impersonality, was an excellent forcing ground for cliques and intrigue, while it insured that decision on any policy would be extremely tardy.

The daimyo, or feudal nobles, had also to be taken into account. These were divided into two classes, the *fudai* or hereditary vassals of the Tokugawa, and the *tozama,* those whose ancestors had only submitted to Iyeyasu by virtue of necessity.[20] The members of the Gorojiu were usually fudai daimyo, those of the Wakadoshiyori were taken from a special class called *hatamoto,* unequal in rank to daimyo, but above the ordinary samurai (retainer).[21] The greatest of the daimyo were the eighteen *Kokushiu* or lords of provinces, chief among whom were the Gosanke

or three branches of the Tokugawa family.[22] The Kokushiu exercised some influence on the administration, the exact extent of which depended on the strength or weakness of the Shogun and his immediate advisers. For the rest, the daimyo, great and small, exercised considerable powers of administration within the boundaries of their fiefs; and with the decay of Tokugawa power, which was increasingly apparent in the first half of the nineteenth century, it was becoming difficult to insure that the writ of the Shogun ran in the territories of the greater tozama feudatories. It is easy to understand, therefore, how even skilled diplomatists, much less blunt and straightforward naval commanders like Perry, failed entirely to fathom the sources and gradations of political authority in Japan, and were sometimes inveigled into negotiations with quite minor officials who passed themselves off as persons of high rank.[23]

Commodore Perry, with his squadron of four warships, arrived off Uraga on July 8, 1853, and on the fourteenth of July delivered the letter from President Fillmore, together with a rather more forceful communication from himself, to the ministers of the Emperor (as he imagined); and having announced his intention of returning early in the following year for an answer, he sailed for the Luchu Islands.[24] On February 12, 1854, he reappeared, this time with six ships, and moved up the Bay of Yedo to Kanagawa.[25] His mission was already causing a new orientation in the internal politics of Japan which was destined to bring Japan and the Powers to the verge of war, to cause civil strife within the country, and to end in the fall of the Shogunate.

For all the power of the *bakufu* was helpless before the "black ships of the barbarians," and that it knew, yet dared not openly acknowledge. Conscious of its loosening grip

upon the greater nobles, the Shogunate realized that to reverse the policy of exclusion at the bidding of the foreigner would mean a fatal loss of prestige at home. Yet to refuse might mean the destruction of Yedo by the United States' fleet against which no effective defense could be provided.[26] In this dilemma the Yedo government endeavored to shift the responsibility of a decision on to other shoulders, by asking the advice of the Court of the Mikado at Kyoto and of the Kokushiu.[27] This was a policy as dangerous as it was futile. There was no necessity for such an act, for the Shogunate had always handled foreign, as well as domestic, affairs and had decreed the exclusion of foreigners without seeking any opinion from Kyoto. Its action now was a confession that it did not know what to do, an exhibition of weakness that encouraged both Kyoto and the daimyo to oppose it. The move was a futile one because the Emperor and the feudatories knew less than the Shogunate of the real power of the foreigner and had not realized that Japan was practically defenseless before him. Consequently, they quite naturally declared that he should be driven away.[28] But this was just what the Shogunate could not do and knew it could not do; so that the only result of its appeal was that it received instructions from the Emperor as the representative of the gods and guardian of the national welfare to justify the title of *Sei-itai-Shogun* and expel the barbarian, and dared not act upon them. When it made treaties with him instead, the Yedo administration put itself in the fatal position of appearing to act unpatriotically and in a manner prejudicial to the national safety. Thus the Yedo authorities were reluctantly compelled to conclude a treaty with Commodore Perry on March 31, 1854.

By the terms of this "Treaty of Peace, Amity and Commerce,"[29] peace and amity were provided for between the

United States of America and the Empire of Japan; the ports of Shimoda and Hakodate were to be opened to American ships to replenish their stocks of coal and provisions,[30] and arrangements were made for the proper treatment of shipwrecked sailors.[31] The treaty made only slight provision for trade[32] and none for the permanent residence of United States citizens; so the question of extraterritoriality did not arise.

The treaty included, however, a most-favored-nation clause which secured to the United States any future privileges granted to other nations,[33] while provision was also made for the establishment of a United States Consulate at Shimoda.[34]

In general, the importance of the Treaty of Kanagawa[35] lay in the fact that it was the first breach in the wall of seclusion and that the success of Perry in concluding it made the task of future negotiators easier. The Japanese are said to have congratulated themselves on having conceded so little;[36] if so, they failed to perceive that by granting anything they had opened the door to foreign penetration.

If the United States thus led the way in the reopening of Japan, Great Britain followed closely behind, although from different motives. The Crimean War was in progress and it was important, from the British standpoint, to prevent the Russian warships in the Pacific from using the ports of Japan as bases for raids on British shipping. Accordingly Admiral Sir James Stirling arrived at Nagasaki on September 6, 1854, and negotiated a convention with the Japanese authorities there which was signed on October 14, 1854.[37]

By the first and second articles of this convention the ports of Nagasaki and Hakodate were opened to British ships for effecting repairs and securing supplies, but while there they were to conform to the rules and regulations of

the port authorities.[38] The convention made no reference to trade or residence and so contained no mention of extraterritoriality, although provision was made for any breach of Japanese law by British vessels.[39] The agreement included a most-favored-nation clause[40] and also a stipulation that it should not in future be altered.[41] Ratifications were exchanged at Nagasaki on October 9, 1855, and on the eighteenth an exposition of the convention was agreed on containing fuller provision for the anchorage and repair of ships, and permitting British warships to touch at other Japanese ports if this were absolutely essential, but not otherwise.[42]

The result of this convention is best stated in Admiral Stirling's own words:

> Taken in conjunction with the circumstances elicited in the course of the negotiation it is evident that it puts an end to any apprehension that the Russians will be permitted in any way to avail themselves of the ports and resources of Japan for purposes of war, and although it makes no sort of provision for commercial intercourse,[43] it affords the means of cultivating a friendly understanding with the Government and people of an extensive Empire, whose neutrality in war, and friendship at all times are matters of vital importance to British interests in the adjacent seas.[44]

Four months after the conclusion of the Stirling Convention, however, the Russian Admiral Poutiatine, who had already made a fruitless visit to Nagasaki in 1852, concluded a treaty at Shimoda of a somewhat wider character than the United States or British agreements.[45] By this the ports of Shimoda, Hakodate, and Nagasaki were opened to Russian ships, which could effect repairs and obtain supplies at all three,[46] and could engage in trade at the two last.[47] The Russians were given the right to station a consul at Shimoda or Hakodate[48] and, by Article VIII, the

principle of extraterritoriality was clearly stated for the first time.[49]

The next agreement was concluded with the Dutch, who, through the medium of the superintendent of their factory at Deshima, Mr. Donker Curtius,[50] sought to escape the humiliating restrictions to which they had for so long been subject. By what was termed a Preliminary Convention of Commerce, concluded on November 9, 1855, between the Netherlands and Japan, the Dutch secured full personal freedom[51] and the privileges of extraterritoriality,[52] and were to share in whatever privileges might be accorded to other nations in the future.[53]

Such were the general provisions of the first group of treaties. From the historical standpoint their importance is threefold: the policy of seclusion was shattered, however much the Japanese might refuse to face that fact; the principle of extraterritoriality was laid down, although its exact extent and the method of its application had yet to be defined; while the most-favored-nation clause made it certain that what was granted to one Power was granted to all. On the other hand, the treaties were inadequate as a basis of commercial relations, since they made no provision for the permanent residence of foreigners, and the ports opened were in different ways ill adapted for foreign trade.[54] Thus further agreements were necessary and here again it was the United States that led the way.

On August 4, 1855, Mr. Townsend Harris was appointed United States Consul General for Japan,[55] on the joint recommendation, as he later discovered, of Commodore M. C. Perry, and Mr. W. H. Seward.[56] Harris had two aims to accomplish, first to deliver another letter from the President to the Tycoon, which he resolved to do at a personal audience in Yedo, and secondly to secure a wider agreement than the Treaty of 1854. He arrived at Shi-

moda on August 21, 1856,[57] and found himself confronted by a wearisome and apparently insuperable task. The Japanese realized that his advent meant an attempt on the part of the United States to secure fresh privileges which they had no mind to grant, and they put every possible obstacle in his way with the object of making him go home in despair. They asserted that:

> They did not expect the arrival of a Consul,—a consul was only to be sent when some difficulty arose, and no such thing had taken place. . . . The Treaty said that a Consul was to come if *both* nations wished it; that it was not left to the simple will of the United States Government.[58]
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> . . . . . .
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> They said the Governor was very ill the previous night with a violent headache, so they were unable to consult with him. They then said that the Treaty provided for a Consul, but not a Consul General.[59]
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> . . . . . .
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> I was asked what was the secret object of my Government in sending me to Japan. . . . They then run over all the old objections, and civilly ask me to go away; and, on my declining to do so, they asked the Commodore if he had no power to take me away. . . . Next, would the Commodore write to his Government, explaining the reasons why the Japanese refused to receive the Consul General. . . . Would I write to my Government asking for my own removal? This was declined.[60]

Townsend Harris was a man of determination and resource, and by stubborn perseverance he at last succeeded in concluding on June 17, 1857,[61] a convention regulating the intercourse of United States citizens with Japan. This opened the port of Nagasaki to American ships for provisions and repairs, provided for the permanent residence of Americans at Shimoda and Hakodate and for the appointment of an American Vice Consul at the latter port,[62] and

secured the privileges of extraterritoriality to Americans in criminal cases.[68] Harris thought that some of these concessions could be claimed by the United States by virtue of the most-favored-nation clause in the Perry treaty, and that the Japanese were disposed to evade their obligations in this respect; but the Dutch Convention of November 9, 1855, had been superseded by the agreement of January 30, 1856, which was not yet ratified.[64]

Meanwhile the internal difficulties of the Shogunate were increasing, owing to a division of opinion, not only among the daimyo, but in the ranks of the Yedo bureaucracy itself. Tokugawa Nariaki, lord of Mito, and one of the Gosanke, was bitterly opposed to the conclusion of agreements with foreigners,[65] and had numerous adherents, not only among the feudatories, but also at Kyoto and at Yedo among the members of the Gorojiu and the Wakadoshiyori. He was opposed by Ii Naosuke or Ii Kamon no kami,[66] a member of a family famous for its loyal service to the Shogunate since the days of Iyeyasu. Ii Naosuke, while having no great affection for foreigners, perceived that the policy of seclusion must be abandoned, at least temporarily, in order that Japan should gain time for adequate military and naval preparations.[67] The difference between these two parties was perhaps one more of detail than of principle, but they were also at variance over the question of a successor to the Shogunate, as the reigning Shogun was childless, and it is probable that Nariaki used the antiforeign cry largely as a weapon against those whom he hated chiefly for more personal reasons.[68] His rival, Ii Naosuke, was, however, a man of ability and unusual force of character, who obtained the upper hand in the councils of the Shogun, and succeeded in having his way in both foreign and domestic questions at issue.[69] In June, 1858, he was appointed *Tairo* or Regent,[70] and as such was

the leading figure in Japanese politics until his death in 1860.

This explains why Townsend Harris was able, after long months of negotiation, to secure his audience with the Shogun in Yedo and to present the President's letter,[71] to which the Shogun gave a short, but favorable, reply.[72]

Harris then devoted his energies to negotiating a comprehensive treaty of commerce. In pursuance of this object he directed the attention of the Japanese ministers to the war then in progress between China and the forces of Great Britain and France, and asserted that these Powers, whose aims he represented as much more far-reaching and imperialistic than those of his own country, would, as soon as they had conquered the Chinese, send powerful armaments to Japan to dictate whatever terms they chose. Should Japan accept the more moderate proposals of the United States she could put these forward as a basis in her dealings with other Powers, and might in addition, rely upon the good offices of the United States in any difficulties which should arise between herself and the nations of Europe.[73]

Ii Kamon no kami and his followers in the Yedo government appear to have been convinced by these arguments, and the provisions of the new treaty were agreed upon by February, 1858, but the Regent, mindful of the sleepless hostility of the Nariaki faction, thought it necessary to gain the consent of the Emperor before proceeding to the final signature of the agreement. But in this he failed, for Nariaki, foiled at Yedo, had succeeded in convincing the Imperial Court at Kyoto that no fresh treaties with the foreigner should be concluded and that the country was in peril from them. Consequently the Emperor expressed his disapproval of the policy of signing agreements, but in view of the issues at stake proposed a further

consultation of the greater feudatories before proceeding to any definite action.[74] Ii, although he perceived the danger of delay, saw also the grave risks he would run if he concluded the treaty with Harris without waiting for the decision of the Emperor and the Kokushiu. Such an action would be construed as an affront to Kyoto and would give the enemies of the Shogunate a legitimate excuse for rebellion against it. The Regent[75] therefore postponed the signing of the treaty, while he bent all his efforts to winning over the nobles and defeating the intrigues of the Nariaki party.[76]

This procrastination was naturally very disappointing to Harris, who put it down to trickery and was furthermore afraid lest the Dutch steal a march on him. He was only imperfectly aware of the difficulties of the Shogunate, although he was beginning to grasp the fact that the "spiritual Emperor" counted for a good deal more than the Shogun's ministers were willing to admit.[77] So he agreed only reluctantly to the delay, which he warned the Japanese might be dangerous, and even declared he would go to Kyoto himself if he could not get satisfaction from the authorities at Yedo.[78] He then returned to Shimoda to await events. On July 23, 1858, however, an American warship appeared at Shimoda with the news that the Chinese had been defeated and that the ambassadors of Britain and France were on their way to Japan. Determined to be first in the field, Harris returned to Kanagawa and urged the Japanese ministers to sign the treaty at once lest worse befall them.[79] The Regent, still busily engaged in countering the activities of his opponents, was not a man to be stampeded into hasty action, but the majority of the ministers were for immediate signature and he gave way.[80] So it was that, without waiting for the consent of the Emperor, the Treaty of Amity and Commerce was signed on

board the United States warship *Powhatan* on July 29, 1858.[81]

The chief provisions of this treaty were the opening of fresh ports for the trade and residence of Americans,[82] the appointment of United States' diplomatic and consular officials in the Treaty Ports,[83] and the extension of extraterritorial rights to cover civil as well as criminal cases.[84] It is also noteworthy that the United States pledged itself to act as mediator in any differences that might arise between Japan and a European Power,[85] and that the treaty contained a clause providing for its revision after July 4, 1872, should either of the two contracting Powers desire this.[86]

This treaty, which was taken as the model for subsequent agreements concluded between Japan and other Powers, was a crowning triumph for Townsend Harris. Estimates of the man himself and of his work differ, American historians writing in a strain of uncritical laudation,[87] while British writers are apt to be bitterly hostile, or to neglect Harris' work altogether.[88] The truth is that while Harris should indubitably stand beside Commodore Perry in the work of opening Japan to the world, the methods he employed were unfortunate in their results. Upright and honorable in his dealings with the Japanese, although readier to threaten force than his apologists allow,[89] Harris through his bias against European nations and especially Great Britain,[90] imputed to them intentions with regard to Japan which had no basis in fact. The suspicion he aroused in the minds of the Japanese against those whom he denounced had unpleasant consequences later, while the way in which he frightened the Shogunate into concluding his treaty meant that it, as well as those subsequently concluded with Britain and other Powers, were in a sense "in the air," since the government with which they

were concluded could not carry them out in the face of its increasing internal difficulties. Harris, in his eagerness to get in first, was at least partly responsible for the ensuing confusion and civil strife in Japan and the intensified anti-foreign movement which accompanied it from 1860–67.

In July, 1858, Lord Elgin, who had been sent to the Far East by Lord Palmerston with full powers to settle outstanding differences and who had succeeded in concluding the Treaty of Tientsin with China, decided to go to Japan and see if he could secure an agreement with the rulers of that country.[91] He had no special credentials for treaty making in Japan,[92] nor did he come with "a mighty fleet,"[93] and his brief mission to Japan, although important in itself, was to him entirely subordinate to his much greater and more difficult tasks in China.[94]

Elgin arrived at Nagasaki on August 2,[95] and from there went to Shimoda where he met Townsend Harris and had an opportunity of examining the treaty which the latter had just made.[96] From Shimoda, Elgin resolved to proceed straight to Yedo with his squadron, the presentation of a yacht to the "Emperor" (i.e., the Shogun) being a suitable pretext for such a move, the real reason being to avoid delay and to see at once what could be done in Japan.[97] He arrived off Yedo on August 12[98] and after an ineffectual effort to persuade him to leave, the Japanese ministers bowed to the inevitable and began treaty negotiations. Everything went smoothly, a refreshing contrast to Elgin's experiences in China,[99] and both he and his secretary, Laurence Oliphant, were much impressed by the abilities of the Japanese and charmed by the country.[100] The terms of the proposed treaty were settled by August 23, the actual signature taking place on the twenty-sixth of that month.[101]

Meanwhile the Dutch and the Russians had also been

successful in negotiating fresh treaties with the Shogunate,[102] and the French, who had not hitherto entered into any agreements with Japan, followed suit a few months later.[103] All these treaties were generally similar to that concluded by Townsend Harris, although there were differences in detail. The ports of Kanagawa and Nagasaki were to be opened on July 1, 1859;[104] Niigata, or some other suitable place on the west coast of Nippon, on January 1, 1860; and Hiogo, on January 1, 1863. In these places foreigners could trade and reside permanently. In addition, from New Year's Day, 1862, Yedo and, a year later, Osaka, were to be open to foreigners for the purposes of trade only. Provision was made for the appointment by the Powers of diplomatic agents, consuls-general, and consuls, and for the exercise of extraterritorial rights in criminal and civil matters.[105]

The conclusion of these various treaties did not, however, result in an era of peaceful and increasing commercial relations between the Powers and Japan; on the contrary it was followed by almost a decade of bitter conflict. As the Regent Ii had feared, the signing of these agreements by the Shogunate without the consent of the Emperor gave its enemies an opportunity which they used to the utmost. It would be a mistake, however, to imagine that the antiforeign agitation was wholly stimulated and encouraged only because of its value in the internal struggle between Yedo and Kyoto. A deep-rooted dislike of foreigners and a fear of the consequences of their penetration existed among the entourage of the Emperor and the bulk of the feudal daimyo.[106] Some were animated by blind hatred of the "ugly foreign barbarians" and indignant because the Shogun had timidly abandoned the seclusion policy at their bidding; others, remembering what had happened before, feared the renewed influence of Chris-

tianity.[107] Some were alarmed lest the respect paid to merchants among foreigners should be observed by the Japanese people generally and have a deleterious effect upon the position and privileges of the military caste.[108] Others, again, complained of the rise of prices and economic distress arising from foreign trade, and objected to the monopolistic policy of the Shogunate in the matter of customs duties at the open ports.[109] It was generally held by the reactionary party that the agreements were simply favors conferred upon foreigners that Japan could rescind at will, and this the Shogun was urged to do.[110] It is to be noted that the objection was to *all* the new privileges granted to foreigners and not to any one in particular. Since, therefore, extraterritoriality was not singled out for special attack, the events of the years 1858–67 can be dealt with briefly.

The first British minister in Japan was Mr. (afterward Sir) Rutherford Alcock, who arrived at Yedo on June 26, 1859,[111] and at once found all sorts of difficulties to contend with. As a start, he discovered that the Japanese were preparing to open to trade, not Kanagawa, as the treaties stipulated, but Yokohama, then a little fishing village, situated on the opposite side of the Bay of Yedo.[112]

Kanagawa was on the *Tokaido*, or main road between Yedo and Kyoto, whereas Yokohama was some miles from this, and so Alcock, who had had experience of oriental duplicity in China, suspected a plan to entice foreign traders into a worthless and isolated site. The reason given by the Japanese for the change was that the daimyo and their retainers passed through or near Kanagawa on their way to and from Yedo and that collisions would be frequent between them and foreigners if the latter were settled at Kanagawa. Alcock would have stood firm on the treaty stipulations, but his hand was forced by merchants

settling in Yokohama.[113] As it happened, Yokohama, although built on swampy ground, has a far better harbor than Kanagawa and so grew rapidly into a great city. But owing to the fact that Kanagawa was the place mentioned in the treaties, the British, United States, and other consular courts which were actually held in Yokohama were by a legal fiction described as sitting at Kanagawa.[114]

Matters more serious than this, however, soon engrossed the attention of Alcock and the other foreign ministers. Samurai of the Mito and other clans hostile to aliens, together with numerous *ronin*,[115] gathered in Yedo and Yokohama and made attacks with their two-handed swords upon foreigners, natives in the employment of foreigners, and members of the Yedo government. The diplomatic correspondence of the British and United States' ministers during 1860–63 is a record of one murder after another. In 1860 the Regent Ii was murdered by Mito swordsmen, and the one strong man in the councils of the Shogun removed.[116]

The British Legation was twice attacked,[117] and for a long time the menace of assassination hung over every foreigner in the country. The Shogunate, already rapidly declining in power, could do little to prevent these outrages, and its helplessness was mistaken by Alcock and most of the other foreign representatives for downright complicity.[118] The United States Ministers, Townsend Harris and his successor, General Pruyn, had more faith in the sincerity of the Yedo government and a clearer grasp of its difficulties.[119] On June 6, 1862, however, a memorandum was agreed upon at London between envoys of the Shogunate and the British Government by which the opening of Hiogo and Niigata and the admission of foreigners to trade in Yedo and Osaka were delayed for five years from January 1, 1863. The Japanese, for their part, were to exe-

cute strictly all the other treaty stipulations and to remove various restrictions on trade.[120] Despite this concession affairs in Japan soon came to a crisis. On September 14, 1862, a party of four British subjects were attacked on the Tokaido outside Yokohama by retainers of the daimyo of Satsuma. One of them, Mr. Richardson, was killed and two others severely wounded.[121] The British Government demanded as reparation £100,000 indemnity from the Yedo government, and from Satsuma £25,000 indemnity and the trial and execution in the presence of British naval officers of the murderers.[122] The unhappy Shogunate had to pay its share of the indemnity, but was too weak to coerce Satsuma, which remained defiant.[123] The result was the bombardment and destruction of the town of Kagoshima by a British squadron on August 11, 1863.[124]

Meanwhile in the spring of 1863 the Emperor felt strong enough to summon the Shogun to Kyoto, and in June a date for the expulsion of the foreigners was fixed, the harassed Shogun being forced to give an outward consent to this impossible demand.[125] The only step the Shogunate took to carry out its promise was to broach the matter rather timidly to the foreign ministers, from whom it received no uncertain reply.[126] The daimyo of Choshiu, however, began to enforce the imperial edict by firing on foreign ships passing through the Straits of Shimonoseki,[127] and Alcock, on his return to Yedo,[128] determined, despite Russell's injunctions against using force,[129] to bring Choshiu to reason by concerted naval action. On the fifth and sixth of September, 1864, an allied squadron destroyed the fortifications and batteries the daimyo had erected at Shimonoseki.[130]

The actions at Kagoshima and Shimonoseki mark a turning point in the history of the relations of the Powers with Japan, since they convinced the Satsuma and Choshiu

clans, the leaders in the movement to overthrow the Shogunate, that to persist in the attempt to tear up the treaties would be disastrous for Japan.[131] But this belated recognition of the wisdom of its foreign policy did not save the Shogunate, whose weakness became increasingly apparent. In June, 1865, Sir Harry Parkes, a man of great ability and determination, who had already won a name for himself in China, arrived in Japan as successor to Alcock.[132] It was now apparent that the Emperor was the real sovereign in Japan and Parkes was instructed to secure either the ratification of the treaties by the Emperor or an admission that this was unnecessary once they had been signed by the ministers of the Shogun.[133]

Parkes was soon convinced that the former course was the correct one to pursue and when, in the summer of 1865, the Shogun went to Osaka to prepare for a war with Choshiu,[134] Parkes urged him to procure the Emperor's consent to the treaties,[135] and, together with the other ministers, proceeded with a squadron to Hiogo, the nearest port to Osaka, as a silent but effective reminder of the consequences of refusal.[136] Parkes' bold maneuver was entirely successful and on November 25, 1865, he was able to report to Russell that the Emperor had at last ratified the treaties.[137]

The heart was now taken out of the antiforeign movement and the policy of expulsion was tacitly dropped by the advisers of the Emperor, although outrages by individual fanatics still continued, and British and French forces remained in Yokohama till 1875. In November, 1867, the Shogun, defeated in the war with Choshiu, resigned his position and surrendered the governing power into the hands of the Emperor.[138] A civil war followed between the Tokugawa adherents and the western clans—Choshiu, Satsuma, Hizen, and Tosa, who were supporting

the restoration of the Emperor to full powers. By 1869, the imperial forces were everywhere victorious and the way was thus cleared for the building up of the new Japan. In that great labor of reconstruction, while the coöperation of the "barbarians" was now sought for, their special privileges, and especially their extraterritorial rights, were soon found to be an obstacle and an indignity.

CHAPTER III

The System of Extraterritoriality in Japan

THE extent of the jurisdiction enjoyed by each Treaty Power in Japan depended in the first instance upon the terms of its treaty, in the second place upon the existence of a most-favored-nation clause in virtue of which it could claim to participate in any rights enjoyed by another Power having treaty relations with Japan, and, finally, upon interpretation or custom in matters with which the treaty did not deal specifically, or in which its terms were obscure or open to more than one interpretation. The practical result was that every Treaty Power exercised, or claimed, much wider powers of jurisdiction than had been provided for in its original treaty with Japan.

Curiously enough, the Power which secured the widest privileges of extraterritorial jurisdiction was one which had quite minor interests in Japan, namely, the Austro-Hungarian Empire. These privileges were as follows:

> All questions, in regard to rights, whether of property or of person, arising between Austro-Hungarian citizens residing in Japan, shall be subject to the jurisdiction of the Imperial and Royal authorities. In like manner the Japanese shall not interfere in any question which may arise between Austro-Hungarian citizens and the subjects of any other Treaty Power.
>
> Austro-Hungarian citizens, who may commit any crime against Japanese subjects, or the subjects of any other nation, shall be brought before the Imperial and Royal Consular officers, and punished according to the laws of their country.[1]

These clauses covered two points upon which the British treaty, for instance, had either been vague or altogether si-

lent. The British treaty reserved, for British jurisdiction, civil actions brought by one British subject against another, and criminal offenses committed by British subjects against Japanese or the subjects of any other country. It provided, rather vaguely, for civil actions brought by Japanese against British subjects, but said nothing directly about civil actions brought by foreigners (not Japanese) against British, or crimes committed by one British subject against another. It might naturally be supposed that the intention was to reserve these also to the jurisdiction of the British courts,[2] but a poorly drafted treaty always provides golden opportunities for the exercise of legal subtlety and diplomatic ingenuity. It all depended on circumstances whether the strict letter or the spirit of a treaty was laid stress upon.

For example, in 1868, a collision occurred between a British and a United States steamer off the Japanese coast. The British company concerned sued the owners of the United States ship for damages in the United States consular court at Kanagawa. The decision was that both should bear in equal parts the aggregate loss suffered. The American company appealed to the United States Department of State, on the ground that the treaty with Japan covered only controversies between citizens of the United States and Japanese, and hence the British company had no right to bring an action in the consular court.[3] The examiner of claims of the State Department held, though wrongly, that "when China and Japan became open to the subjects of the western Powers, the latter imported with them the views and practices in respect to exterritoriality which had been matured through ages in the Levant."[4] Mr. Seward, the United States Secretary of State, considered that if a foreigner was not amenable to native jurisdiction when sued by a Japanese, it was absurd to suppose the framers of the

United States or any other treaty meant him to be so amenable when sued by another foreigner.[5]

The wider rights secured by the Austro-Hungarian treaty, which accrued to the other Treaty Powers by virtue of the most-favored-nation clause, did something to clear these matters up. Further, whatever might be the view taken where disputes occurred between the subjects of one occidental state and those of another, where the dispute was between Japanese and foreigners the widest possible exemptions were usually claimed. "The most cursory glance at the treaties will show how slight, indeed how incomplete, a foundation the articles of those treaties are for the very extensive structure of jurisdiction which has been raised upon them."[6] It was hardly possible for men like Harris or Elgin, who were neither lawyers nor primarily concerned with legal matters in negotiating the treaties, to foresee all the difficult questions of jurisdiction to which extraterritoriality gives rise. Therefore the strict letter of the treaties could not always be adhered to since to do so would have caused unnecessary hardships and aroused a chorus of protest. In 1895, the Judicial Committee of the Privy Council, in *Imperial Japanese Government* v. *Peninsular and Oriental Steamship Company*, laid it down that "the treaties must be interpreted according to their manifest spirit and intent. In construing such instruments a too slavish adherence to the letter would be out of place, although, of course, violence must not be done to the language used."[7]

In general, therefore, the jurisdictional rights claimed by the Powers by virtue of treaty provisions and acquiesced in by the Japanese were the following: in civil matters, all cases in which citizens of Treaty Powers were sued by Japanese, all actions between citizens of the same Treaty Power, and all actions between citizens of different Treaty

Powers; in criminal matters, all crimes committed by citizens of a Treaty Power against either Japanese or foreigners, even when these last were subjects of a non-Treaty Power.[8] Further, all offenses committed by citizens of a Treaty Power against treaty provisions or trade regulations were dealt with in the consular courts of that Power.

Japan claimed jurisdiction for her courts in all civil actions brought by foreigners against Japanese, or by a citizen of a Treaty Power against one of a non-Treaty Power, or by the Japanese Government against any foreigner. In criminal matters she held that all cases in which a Japanese was a defendant, all crimes committed by foreigners against the Japanese Government, and all offenses by foreigners affecting matters not covered by the treaties should be dealt with in her own courts.[9]

She was not, however, successful in making good these claims, and in practice, in all cases, civil or criminal, in which a citizen of a Treaty Power was defendant, the consular courts of that Power exercised jurisdiction.[10] So far as citizens of non-Treaty Powers were concerned, Japan successfully asserted her right to jurisdiction over them within her territories in the case of the *Maria Luz* in 1872. This was a Peruvian vessel which was carrying a cargo of coolies from China to the nitrate fields of Peru and was driven into Kanagawa by bad weather. As this traffic in coolies was notorious for its abuses, the Japanese authorities made an examination of the Chinese on board the ship and released some of them. The Peruvian Government, although it had no treaty with Japan, protested, and even went so far as to threaten hostilities, but was finally induced to refer the case to the arbitration of the Czar of Russia, who in May, 1875, declared in favor of Japan.[11] As was natural, the treaties themselves dealt only with

the general extraterritorial rights of foreigners, while the organization of consular courts and the definition of the powers of the officials administering these were left to each Power concerned.

The result was that, owing to the loose drafting of some of the treaties, the operation of the most-favored-nation clause, the claim to jurisdiction by sufferance based on false analogies from the Levant, and the fact that the legal aspects of extraterritoriality were, as Sir Fitz James Stephen said, "of great curiosity, but very little known,"[12] there was an extension of jurisdiction, unconscious rather than deliberate, beyond what the treaties warranted. The system established by Great Britain is an excellent illustration of this tendency.

While the power to conclude treaties was indubitably a prerogative right of the Crown, the question soon arose whether any foreign jurisdiction thus acquired could be exercised without the sanction of Parliament, and the prevailing view was that it could not be.

> The law does not fetter the prerogative with regard to the mere acquisition of rights from, nor the mere incurring of obligations to, a foreign Sovereign. But if either the enjoyment of the right, or the performance of the obligation, involves the performance of any act in the kingdom, though it be the mere giving of an order, then the law of the constitution steps in and the sanction of Parliament is required.[13]

The result was a series of general Foreign Jurisdiction Acts, the first of which was passed in 1843.[14] These were consolidated by the Foreign Jurisdiction Act of 1890, which states that:

> Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries, and it is expedient to consolidate

the Act relating to the exercise of Her Majesty's jurisdiction out of Her dominions: Be it therefore enacted. . . . I. It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that Jurisdiction by the cession or conquest of territory.[15]

Two points in the above call for special notice. The wording of the preamble shows that the Act applied equally to countries where extraterritorial rights had been secured solely by treaty and those where they also rested upon custom or sufferance. Therefore it tended to encourage the erroneous idea that there was no difference between the two and that British ministers and consular officials in Japan could be invested with the same judicial powers as their confrères in the Levant. Second, the reference to cession or conquest was unfortunate and misleading. All it actually meant was that the Sovereign should exercise prerogative rights acquired by treaty in the same manner as prerogative rights in the Crown Colonies, through the instrumentality of Orders-in-Council.[16] "The comparison is not between the State granting the privileges and a conquered country, but between the method of exercising the rights corresponding to them in a conquered country."[17] In practice, however, the wording of the Act was often taken to apply to the position of the country granting extraterritorial privileges.

The words are misleading to the ordinary British subject who is placed under the jurisdiction, for he is disposed to consider that the Act makes the country in which exterritorial privileges have been acquired, to all intents and purposes, so far as he is concerned, a colony of the British Crown. And they are not only misleading to the country by which these privileges have been

granted, but have, in strenuous times, been viewed there as insulting to its Sovereign and its Government.[18]

It was not only "the ordinary British subject," who mistook the meaning of the Foreign Jurisdiction Acts, but the British Government itself. The clearest case of this is in the matter of extradition. The British Government asserted that persons who committed offenses in British territories and escaped to Japan could be arrested in that country on a warrant indorsed by the consular court and then deported to stand trial in the place where the crime had been committed. This was done by virtue of the Fugitive Offenders Act, 1881, which extended the principles of extradition to the British Empire.[19] For the purposes of extradition, therefore, Japan, in common with other countries where Britain enjoyed extraterritorial jurisdiction, was put on the same footing as a British overseas possession.

There can be little doubt that this infringes what is known as the "right of asylum": that sovereign right, possessed alike by civilized and uncivilized, Christian and Mohammedan states, to protect all who come within their borders. There is a right to refuse to surrender, as well as a right to surrender, criminals to their own Governments: and the right to demand the surrender can only be acquired by treaty.

The extension of the Act of 1881, is, however, not even a demand of the right of extradition, but a claim to exercise that right by our own officers, tacked on to the grant of exterritorial rights. Sufferance must be looked to in support of it, and I cannot refrain from expressing the opinion that the strongest evidence of the existence of the ingredients of sufferance, knowledge, assent or acquiescence, would be required by a Court before which the practice was challenged. It has the appearance of interpreting the reference in the Foreign Jurisdiction Act to "the cession or conquest of territory" too literally.[20]

There was no assent or acquiescence on the part of Japan, but, none the less, the example of Great Britain was followed by most of the Powers having treaties with Japan. The United States, on the contrary, upheld the Japanese contention that the right of extradition was not a part of extraterritorial jurisdiction, but could be secured only by a special treaty.[21] The Japanese Government did, however, surrender as an act of amity an American criminal who had fled to Japan,[22] and as a result a treaty of extradition was concluded between the United States and Japan on April 29, 1886.[23] This did not affect the British standpoint, which was reaffirmed by the Foreign Jurisdiction Act, 1890, Section 5.

(1) It shall be lawful for Her Majesty the Queen in Council, if she thinks fit, by Order to direct that all or any of the enactments described in the First Schedule to this Act, or any enactments for the time being in force amending or substituted for the same, shall extend, with or without any exceptions, adaptations, or modifications, in the Order mentioned, to any foreign country in which for the time being Her Majesty has jurisdiction.

(2) Thereupon those enactments shall, to the extent of that jurisdiction, operate as if that country were a British possession, and as if Her Majesty in Council were the Legislature of that possession.[24]

Under the authority of the Foreign Jurisdiction Acts a series of Orders-in-Council were issued providing for the organization of British courts in Japan and defining the jurisdiction of the officers administering them.[25] The first of these was the Order-in-Council of March 3, 1859, but this was soon repealed by that of January 23, 1860,[26] which remained in force until it was superseded by the Order-in-Council for the better government of Her Majesty's subjects in the Dominions of the Emperor of China and the Tycoon of Japan, March 9, 1865, or more shortly,

the China and Japan Order-in-Council, 1865.[27] This was amended by the Order of August 14, 1878, and these two Orders, taken together, formed the immediate basis of British jurisdiction in the Orient.

An ordinary court, or as the Orders term it, a Provincial Court, presided over by a consul, was established in each of the Treaty Ports in Japan.[28] It should be noted, however, that consular jurisdiction was not confined to cases arising within those ports, but extended throughout the Empire of Japan. "The fundamental idea of extraterritoriality involves this cardinal proposition, that the territorial area within which the rights are exercised must be coincident with the territory of the Sovereign who grants them."[29] Each consul, therefore, had his "consular district" and all British subjects within that district were amenable to him. Foreigners wandering in the interior of the country without permission were arrested by the Japanese authorities and turned over to their consuls for punishment.[30]

On July 6, 1863, Letters Patent were issued making the Supreme Court of Hongkong a Court of Appeal from the decisions in civil cases of British consuls in Japan.[31] In any suit in which more than a thousand dollars were at stake either of the parties involved could, within fifteen days after the judgment, give to the consul concerned, notice of appeal to the Supreme Court at Hongkong.[32] He was then required to transmit all the evidence in the case to it and in due course the Supreme Court would uphold or revise his judgment as it thought fit. There was no need for either the consul or the parties at variance to go in person to Hongkong.[33]

By the China and Japan Order, 1865, Hongkong was replaced as a Court of Appeal by a new court established at Shanghai.[34] For this Supreme Court there was a judge appointed by the Queen[35] and holding office during her

pleasure.[36] He was to be a member of the Bar of either England, Scotland, or Ireland, of seven years' standing at the time of his appointment, or else to have served as assistant judge, legal vice-consul, or law secretary in the consular service.[37] An assistant judge and a law secretary were also appointed by the Queen to the Supreme Court at Shanghai.[38] In the absence of the judge the Foreign Secretary or the British Minister to China could appoint an acting-judge.[39] This Supreme Court had wide powers both as a Court of First Instance and as a Court of Appeal. In the former capacity it had a concurrent civil and criminal jurisdiction with the ordinary consular courts,[40] and its officers could visit any provincial court in China or Japan and hear any case they chose.[41] It alone handled matrimonial and probate cases,[42] as well as any questions arising out of the custody of lunatics.[43] It could deal with any case referred to it by a provincial court,[44] and could issue writs, orders, or warrants which the provincial courts had to execute.[45] Each provincial court was required to send to the Supreme Court every six months a report on every case, civil and criminal, which had come before it.[46] All capital offenses and other grave crimes were tried before the judge of the Supreme Court with a jury.[47]

As regards appeals, an appeal lay from a consular to the Supreme Court in matters involving two hundred and fifty dollars or over,[48] and leave could be given to appeal in any other civil case by either the consular or the Supreme Court.[49] In criminal cases anyone tried summarily could appeal to have the case sent for the opinion of the Supreme Court,[50] and in all such cases, whether tried summarily or not, questions of law could be reserved for the decision of the Supreme Court.[51] In cases where property worth two thousand five hundred dollars or more was involved, an appeal lay from the Supreme Court to the Judi-

cial Committee of the Privy Council.[52] By the China and Japan Order-in-Council, 1878,[53] a Court for Japan was established at Kanagawa,[54] replacing the old consular court at that place.[55] The Supreme Court at Shanghai lost its concurrent jurisdiction with the provincial courts[56] and its right to try grave cases of crime, so far as Japan was concerned, and these powers were transferred to the new court.[57] The Court at Kanagawa, therefore, had general powers of supervision over all the British consular courts in Japan and to it were appointed a judge and an assistant judge.[58] The qualifications of these officers were similar to those appointed to the Supreme Court at Shanghai under the provisions of the Order of 1865.[59] This new court was not, however, styled a Supreme Court and did not secure all appellate jurisdiction, for appeals from it were vested in the Supreme Court at Shanghai, to which a chief justice was now appointed, with an assistant judge.[60] These, sitting together when possible, were to hear appeals from the Court for Japan.[61]

With regard to the provincial or consular courts, the consul in each of these could by himself decide civil cases in which the property or goods at stake were under fifteen hundred dollars in value;[62] and could alone decide all criminal cases in which the maximum punishment did not exceed three months' imprisonment or a fine of two hundred dollars.[63] In other civil and criminal cases he was required to summon "not less than two and not more than four indifferent British subjects of good repute resident in the district of the Court"[64] to act as assessors.

> An Assessor shall not have voice or vote in the decision of the court in any case, civil or criminal, but an Assessor dissenting in a Civil case from any decision, conviction, or amount of punishment may record in the minutes of the proceedings his dissent and the grounds thereof.[65]

This would usually result in the decision of the Consul being reviewed by a higher court. These assessors were in no sense lawyers, nor should they be confused with a jury; they were simply representative members of the local British community called in to insure that the law was equitably administered.

The maximum penalties which could be imposed in a consular court were a fine of a thousand dollars, or this amount of fine together with twelve months' imprisonment, with or without hard labor.[66] All criminal cases involving heavier penalties than these went to the Supreme Court at Shanghai,[67] or, after 1878, to the Court for Japan at Kanagawa.[68] In cases where the nature of the offense or the state of local opinion made it advisable to try the case outside of Japan and on British territory, the prisoner could be sent to Hongkong for trial.[69] Article 5 of the China and Japan Order, 1865, declared that:

> Subject to the other provisions of this Order, the civil and criminal jurisdiction shall, as far as circumstances permit, be exercised upon the principles of and in conformity with the Common Law, the Rules of Equity, the Statute Law, and other law for the time being in force in and for England, and with the powers vested in and according to the course of procedure and practice observed by and before the Courts of Justice and Justices of the Peace in England.

In general, therefore, the law applied was English law and what was not an offense in England was usually not one in Japan.

But there were two exceptions to this rule. In the first place, the Orders-in-Council themselves might create new offenses and impose fresh penalties. Article 81 of the China and Japan Order, 1865, for example, forbade any British subject to help the enemies of the Tycoon while

Britain remained at peace with him; and anyone doing so might be sentenced to two years' hard labor and fined five thousand dollars. Article 92 forbade all trade with Japan elsewhere than in the Treaty Ports under a penalty of two years' imprisonment and a ten-thousand-dollar fine. It was useless to plead in court that such rules were unknown or repugnant to English law, for the Crown was authorized to make them by the Foreign Jurisdiction Acts,[70] and unless any rule made by Order-in-Council could be clearly shown to go beyond what these acts warranted, the courts had to uphold it.

Secondly, the British Minister to Japan was empowered to make regulations "for peace, order and good government, or for carrying out the stipulations of the Treaty."[71] These were, except in urgent cases, to be submitted first of all to the Secretary of State for approval.[72] Breach of these regulations made the offender liable to two months' imprisonment and a fine of five hundred dollars.[73] Such regulations had to be printed and displayed in the ministerial and consular offices and were not to be enforced until they had been so displayed for a month.[74] Copies of the rules made by the Minister were also to be sold.[75]

In addition to these powers, the British Minister in Japan had the right to scrutinize the verdict of the Supreme Court in all capital offenses, and no death sentence could be executed without his approbation. Should he refuse to agree to its being carried out, it rested with him to fix an alternative penalty.[76]

The British citizen in Japan, therefore, saw his immunity from the native courts somewhat offset by restraints imposed upon him not only in virtue of the common law of England, but also by Order-in-Council or ministerial regulation. He was required to register his name at the nearest consular office as soon as possible after his arrival

in the country and if he failed to do so might forfeit his right to protection.[77] Furthermore, if his conduct was such as was likely to provoke a breach of the peace, he could be required to give security for future good behavior on pain of deportation.[78] He could also be deported if he had been convicted of grave crime,[79] or twice for any offense,[80] or if, having committed an offense, he failed to give adequate guarantee that it would not be repeated.[81] While these special restrictions were apt to be regarded by Britons in Japan as burdens imposed upon them by meddling officialdom, their justification lay in the fact that they all had the aim of enforcing obedience to the treaty obligations, or respect for the laws and customs of Japan.

> The elaborate code of offences which lie beyond the purview of the law of England, and the carefully minute way in which it endeavours to reach every possible case of offence, cannot fail to impress the oriental Government with the scrupulous regard which it is the policy of all western Governments to pay to the rights of that State and the idiosyncracies of its people. It is indeed the practical recognition that the West does in fact regard the rights which the East has conferred as a privilege, and one which it is worth safeguarding from possibility of being diminished or curtailed owing to reckless misbehaviour of those who profit by it.[82]

Two further peculiarities of the British consular courts in Japan deserve notice. Provision was made for the impaneling of juries in the Supreme Court, and, after 1878, in the Court for Japan.

> Every male British subject resident in China or Japan, being of the age of twenty-one years or upwards, being able to speak and read English—having or earning a gross income at the rate of not less than two hundred and fifty dollars a year—not having been attainted of treason or felony or convicted of any crime

> that is infamous (unless he has obtained a free pardon) and not being under outlawry shall be qualified to serve on a jury.[83]

Civil servants, persons in the army and navy, and clergymen, and those in the employment of the Japanese Government were exempt.[84] As in England the verdict of a jury had to be unanimous,[85] but unlike England, five jurors constituted a jury.[86] In the second place the consular courts in Japan were given jurisdiction in the case of offenses committed by British subjects in British ships which were within a hundred miles of the coast of Japan.[87] This constituted an exception to the rule that extraterritorial jurisdiction ended with the boundaries of the state conceding it, and also to the maxim that offenses by British subjects on British ships were cognizable in the courts of England. This power was, however, only given to the consular courts for the sake of convenience and did not affect the sovereign rights of Japan or of any other Power, since no jurisdiction was given to the consuls in the case of offenses committed by foreign seamen in British ships on the high seas.

The great merit of the numerous British Orders-in-Council is the care with which they provided for the adequate and efficient exercise of extraterritorial jurisdiction. Foreign consular courts and jurisdiction were generally similar to the British, but no other Power took such great pains to correct defects and to put its extraterritorial courts on so high a level as those at home. In particular, no other country made provision for an Appellate Court of high judicial standing, presided over, not by consular or diplomatic officials unskilled in the law, but by judges with the soundest qualifications, in or near Japan itself. Whatever the defects of the British consular courts, however ignorant a consul might be of legal principles or however preju-

diced the assessors called in to aid him, there existed in the Court for Japan and the Supreme Court at Shanghai, tribunals of which the ability could not be questioned and to which an appeal could be taken in all but the smallest civil or criminal cases. Moreover, these courts were close at hand and therefore the dissatisfied party, whether Japanese or foreigner, was not always precluded by considerations of distance or expense from appealing to them. Further, whenever he was so prevented, the concurrent jurisdiction of the Supreme Court at Shanghai and, after 1878, of the Court for Japan at Kanagawa, with the provincial courts, enabled the verdicts of the latter to be reviewed and, if necessary, amended without the parties concerned having to appear in the higher courts themselves.

This does not imply that other Powers made no provision for appeal from the decisions of their consular courts, but in their case such appellate jurisdiction was vested in the first instance in the resident minister for Japan, who normally had no legal training, and ultimately in the higher courts of their home territories, thousands of miles distant, and so almost useless from the standpoint of a would-be appellant in Japan.

The United States extraterritorial arrangements may be taken as a basis of comparison. The first United States' statute defining the judicial functions of ministers and consuls of that country was approved on August 11, 1848. This was superseded by a more comprehensive Act of Congress of June 22, 1860, which was subsequently amended by statutes passed in 1866, 1870, 1874, and 1876. These enactments are consolidated in the Revised Statutes of the United States, Sections 4083–4130.[88]

By virtue of these acts consular courts generally similar to those of Great Britain were established in the Treaty Ports of Japan. United States consuls sitting alone could

try all civil cases where the damages demanded did not exceed five hundred dollars, and all criminal cases where the penalty did not exceed ninety days' imprisonment or a fine of five hundred dollars. Otherwise they had to call in associates,—United States' citizens whose functions were similar to those of the assessors in a British court.[89] The United States Minister in Japan had original and appellate jurisdiction. He could try "capital cases for murder or insurrections against the government, . . . or for offences against the public peace amounting to felony."[90] In criminal cases an appeal lay to the minister in the case of difference of opinion between a consul and any associate, or in cases where the consul had imposed a penalty of over sixty days' imprisonment or a fine exceeding a hundred dollars.[91] If a consul with associates tried murder cases or other grave offenses, there could be no conviction unless all were agreed and the minister approved.[92] In civil cases an appeal lay to the minister if there was disagreement between a consul and his associates, and in all cases where more than five hundred dollars were at stake.[93]

There was an appeal from all sentences of the Minister in Japan to the United States Circuit Court in California,[94] and direct from a consular court to this in civil actions where the amount in dispute exceeded twenty-five hundred dollars.[95] An appellant from the consular or ministerial court in Japan to the Circuit Court in California had, within four months of the appeal, to file in the court a transcript of the record of the ministerial or consular court. This consisted of a notice of appeal, pleadings, or amended pleadings in the consular court, the judgment rendered, a statement of the grounds of appeal, and a certificate by the inferior court that the papers were correct. Failure to do this, or to do it correctly, might involve a dismissal of the appeal.[96] Furthermore, "if the appellant fails to appear, or

to proceed to a trial or hearing, unless, for sufficient cause shown, the court shall otherwise direct, the appellee may have the appeal dismissed."[97] There was nothing unusual in these rules in themselves, but they presented grave difficulties to appellants in Japan, especially if of Japanese nationality and unversed in the legal lore of the West. Few, also, could afford the time and expense involved in going to a court five thousand miles distant.

In 1882, in the case of *Mitsubishi Steamship Company* v. *Pacific Mail Steamship Company,* the Japanese claimed that to carry an appeal to the United States Circuit Court in California was in contravention of Article VI of the Treaty of 1858 between the United States and Japan, because this article only mentioned the consular courts as tribunals to which Japanese could resort. This objection was, however, overruled and it was laid down that "Japanese subjects, in seeking to maintain their rights in the United States Consular tribunals, must submit to the inconvenience and enjoy the protection afforded therein, subject to the law and provisions of the statute."[98]

This doctrine overlooked the fact that a Japanese who wished to bring an action against a foreigner had no choice but to sue in the consular courts, owing to the immunity from the native jurisdiction secured by the privileges of extraterritoriality. This point was stressed by the Judicial Committee of the Privy Council in the case of *Imperial Japanese Government* v. *P. and O. Company,* 1895. The P. and O. liner *Ravenna* collided with the Japanese cruiser *Chishima* and the latter was sunk. The action brought in consequence by the Japanese Government came eventually to the Judicial Committee, which made several important rulings. The P. and O. Company wished to bring a counterclaim against the Japanese Government in the British courts. Counterclaims were allowed by English law, but in

this case the Judicial Committee held that such a claim could be heard only by the Japanese courts, since the treaty gave no right to the British courts to hear actions, however brought, against Japanese.[99]

> It is said, however, that if a Japanese chooses to sue in a British Consular Court he submits to its jurisdiction in all respects: so that if, according to the rules by which its practice and procedure are governed, a defendant is entitled to set up a counterclaim, the plaintiff cannot escape from the obligation to submit to adjudication upon it. He has elected his tribunal, and he must take the consequences of that election. Their Lordships think that this is altogether a false view of the situation. It is not a matter of election on his part to seek his remedy in the Courts of the defendant's country. He has no choice.[100]

The Judicial Committee, therefore, considered it would be a violation of the treaty for a British consular court to take cognizance of claims brought by British subjects against Japanese. It pointed out that if counterclaims were admitted in British courts against Japanese, the Japanese courts could claim the same rights, and the whole purpose of the treaties would be in a measure defeated.[101]

Finally, so far from admitting that a Japanese suing in the consular courts must of necessity submit to any possible inconveniences resulting, the exactly opposite doctrine was enunciated. The P. and O. Company complained of hardship as a result of the counterclaim being ruled out, but such hardship was termed

> the necessary result of the immunity afforded to British subjects from suit in the local courts. It is the price which they must pay for this immunity. . . . A British subject cannot claim the advantage of being amenable exclusively to his own Consular Court, and at the same time object to the limited jurisdiction which alone it possesses.[102]

This case is one of the clearest examples of the value of the facilities, which Great Britain alone had provided, for effective appeal from the ordinary consular courts to the highest tribunal in the judicial organization of the foreign Power. When the defects of the system of extraterritoriality are considered, therefore, this redeeming feature should always be borne in mind. It insured substantial justice in the majority of cases and it militated against the tendency to extend the jurisdiction of the consular courts beyond strict treaty limitations.

CHAPTER IV

The Working of the Extraterritorial System

WHEN in the early seventies the Japanese began their long-continued efforts to secure the abolition of extraterritoriality, they based their objections to it mainly upon the infringement of their sovereign rights as an independent nation which it entailed. A keenly sensitive people, they resented bitterly the imputation of racial inferiority which they thought to lie behind the insistence of the occidental Powers upon concessions from Japan which they neither claimed nor submitted to in their relations with one another. "Japan asserted that a great national wrong had been done her by the Powers. . . . She alleged that it was prejudicial to the dignity of an independent and civilized state to have foreign law-courts sitting within its dominion."[1]

It would be a fatal error to denounce this as mere sentiment, based upon a newly discovered conception of national sovereignty itself drawn from contact with the West. The fact that Japan took this attitude, that she objected not to particular abuses, but to the whole principle of extraterritoriality made its abolition, not merely an official and diplomatic, but a popular and national objective. It was to the Japanese people not a question of a handful of foreigners enjoying or ceasing to enjoy a partial immunity from the native jurisdiction, but a feeling that they were dishonored as a nation so long as they permitted the system to continue. It was this attitude that caused the extraterritorial issue to become a major one in Japanese foreign politics for over two decades, to cause the downfall of cabinets and the near assassination of a famous minister,

and to arouse in the Japanese all that fierce energy and determination to succeed which has carried them to victory over all the enemies with whom they have yet had to contend.

Thus among the masses, at least, passion obscured reason, and it was therefore of little avail, in the heat of the struggle, to point out the impossibility of subjecting foreigners to Japanese law and jurisdiction as these were in 1858; or to discuss the merits or demerits of the consular courts in practice. The hostility to extraterritoriality, however, would scarcely have developed so widely and rapidly had the system worked in practice without friction and had both the Japanese Government and individual Japanese who came into contact with the consular courts been satisfied with the treatment they received. An examination of the system in action is therefore pertinent.

It is obvious that the standard of the consular courts in Japan depended mainly upon the character and training of the officials who administered justice in them. The first point to note in this connection is that the judicial duties of a consul were only a small part of his various activities. He could not, therefore, even when the greatest care was exercised in his selection, be chosen mainly for his ability to mete out justice, and he usually was a man of small legal training or experience. This, however, might not be so serious a defect as would appear at first sight. The skilled lawyer does not always make the most impartial of judges, and moreover, most of the cases which a consul was called on to decide did not involve any very abstruse legal technicalities. In November, 1878, Sir Harry Parkes, at that time British Minister to Japan, wrote to Mr. Flowers, the British Consul at Nagasaki, as follows:

> It is certainly most desirable that a Consul should possess a

> knowledge of law and of the language, but both admit of being acquired by those who did not join the service as pioneers and I think the Foreign Office set a higher value on knowledge of the language than on that of law . . . a professional judge could never know as much of the language, and that is as important to a Consul as law. Consuls by reading law may generally give fair and common sense decisions and if they happen to be in error on technical points they can be set right on appeal.[2]

On another occasion he expressed the view that aspirants to consular position should first of all acquire the rudiments of the Japanese language and then spend a year attached to the assistant judge of the Shanghai Supreme Court, reading law under his direction.[3]

Sir Rutherford Alcock expressed a similar view:

> But a decision on the merits of a case, where the points at issue are generally free from intricacies turning on points of law—and such are the great majority of consular cases,—may meet all the requirements of justice, if intelligence and honesty of purpose be not wanting in the presiding officer.[4]

This leads on to a consideration of the type of man appointed to consular positions, and the influences to which he was subjected while in the Orient.

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. The fact that such representations were occasionally made in Parliament, however, was in itself a safeguard against ill-considered appointments. On February 25, 1859, for example, Mr. Milnes, M.P., who had been chairman of a Parliamentary Committee of Enquiry on the Consular Service, declared that Captain Vyse had been appointed to Japan although he had no commercial knowledge and no regular training for the consular service.[5] The Government's justi-

fication of this was not very convincing. Mr. Milnes returned to the charge on March 1 of the same year and extracted from the Government a promise that there would be a special training for appointees to the Consular Service in Japan. "They will not be instructed in Chinese, but in Japanese and also in Dutch, the European language chiefly spoken there."[6]

On March 13, 1863, further attacks on the character of the consuls sent to Japan were made in the House of Commons by Mr. H. Seymour. He asserted that Consul Hodson had had to be recalled, Consul Morison had been sent home for grave indiscretions, and that Colonel Neale, then acting minister, was at variance with the whole British community in Japan. "He believed he represented the general feeling of British merchants in Japan when he said that sufficient care had not been taken by the Foreign Office in the selection of its agents."[7]

In reply the Foreign Office spokesman said that Morison came home for reasons of health and that the charges made against him in a Singapore newspaper had been disproved. He had on one occasion struck a Japanese, but otherwise his conduct had been exemplary. As for Colonel Neale, he had proved very successful in the consular service in Turkey and in China, and the Government had every confidence in him.[8]

In general the type of man sent out by the British Government to fill consular posts in Japan appears to have been as good as it was possible to get. He usually had considerable experience of the kind of work required of him, and, while he might frequently display a good deal of official hauteur, he was rarely lacking in honesty and conscientiousness. In her care as to consular appointments Great Britain stands in contrast to most of the other Powers having extraterritorial rights in Japan. "All the Consular

Agents, except our own, are themselves traders, unsalaried and mixed up with the practices objected to in others."[9] This statement is borne out by Baron von Siebold, who was in the service of the British Legation at Yedo from 1861 to 1870, and then entered the employ of the Japanese Government and was concerned in most of the diplomatic negotiations for treaty revision. He thus had a unique opportunity of seeing the extraterritorial system from both sides. According to him

> only a few of the Treaty Powers were represented by regular Consuls, and among these it was the exception to find a trained lawyer. Most of the States were represented by merchants sitting as honorary Consuls, whose judgment in commercial matters was expert, but who knew little of law. It often happened that they were not even subjects of the State they represented, and, being themselves in business, it was thus possible for a Japanese plaintiff to be confronted by defendant and judge in the same person.[10]

It is unnecessary to dwell upon the radical viciousness of this state of affairs.

Even if a consul were competent and upright, he might find all sorts of difficulties in his path, and not the least of these was the character of the community which it was his duty at once to protect and supervise. This community was a small group of his fellow countrymen in the Treaty Port at which he was stationed, with all, or most of whom, he came into continual contact, not only officially but in his hours of recreation also. The assessors who helped him in serious cases were drawn from the ranks of this little community, and shared its views and prejudices. It usually expected the consul to be its champion, right or wrong, and if he did not come up to expectations he was denounced as a hidebound and tyrannical minion of the Foreign Office and socially ostracized. Alcock, who had long experience of

the consular system in the Orient, declared that so far from consuls acting arbitrarily there was danger lest they should shrink from the local clamor against them if they inflicted due punishment upon an erring member of the treaty port community. "I believe the real danger to be guarded against under the existing state of things and in the interest of every community in the East, is that of Consuls being debarred and deterred from doing their duty."[11]

So far as my observation extends,—and it certainly has not been very limited in scope—there is no part of the world where foreigners are freer from any vexatious restraints of law and more constantly able to evade the legal consequences of misdeeds and an abuse of liberty, than in China and Japan. There is no country . . . in which manifest infractions are more leniently dealt with, even when they are brought under its cognizance.[12]

Alcock goes on to point out how misconduct by individual white men in oriental ports may exacerbate the relations between foreigners and natives and bring about an uprising and perhaps a massacre, and consequently the necessity for the strict and impartial execution of justice is all the greater. In England a person guilty of assault would be locked up, fined, or imprisoned.

Let the same thing take place in one of the Chinese or Japanese ports, when the safety and material interests of a whole community are at stake, and let a Consul presume to inflict a penalty of fine or imprisonment upon a resident, and he may esteem himself very fortunate if the press does not teem for weeks and months with declamation and abuse, on the standard theme of consular tyranny,—or he be not subjected to all the harass, cost and anxiety, of an action in the Supreme Court of Hong-Kong, when, if any technical flaw can be detected, the risk of vindictive and ruinous damages hangs over his head.[13]

This state of affairs does not speak well for the Euro-

peans and Americans in the Japanese ports, and Alcock took a very low view of them indeed. "Nowhere, unless it be at some gold diggings, is there a greater influx of the lawless and dissolute from all countries."[14] In a dispatch to Lord John Russell he asserted that nothing could have been worse than the conduct of the foreigners in Japan, and that they were doing much to justify the hostility of the Japanese to intercourse with the West.[15] When they were not trying to swindle the Japanese they were heaping ridicule upon them as, for example, in the matter of changing European or American money into Japanese currency. "Please change for me today 250 million dollars and oblige

"Yours truly, B. Telge."

It is not surprising that when, a little later, Mr. Telge complained of brusque treatment by the Japanese Treasury officials, Alcock made a very frigid reply.

I have to instruct you, therefore, as regards Mr. Telge's complaint, to inform him, in answer to his letter of the 5th instant, that I must be better satisfied than I have hitherto had reason to be that he has not, by his own conduct on a former occasion, provoked incivility from these officials, before I can feel called upon to afford him any redress.[16]

There is, of course, a good deal to be said on the other side. Generalizations are notoriously inaccurate, and Alcock was always inclined to paint things in too lurid colors. He himself declared that in twenty years he could remember inflicting a sentence of imprisonment on only two occasions.[17] Since he was not a man to be deterred from doing his duty through fear of local opinion, this must surely indicate that the majority of the British residents in China and Japan were reasonably law-abiding. Sir Ernest Satow, who was student interpreter at Yedo in the early sixties

and later rose to eminence in the diplomatic service, says that the foreign residents were "not really worse than their co-equals elsewhere."[18] He adds that the consular officials had their salaries paid in Japanese coin at a rate fixed by agreement which was higher than that which the merchants could obtain in the open market and that this caused much ill feeling.[19] Alcock's pungent remarks about the foreign community in his book *The Capital of the Tycoon* caused so much resentment that no member of the British legation or consulate was allowed inside the Club at Yokohama until 1865, when Alcock finally left Japan.[20] According to Satow, Colonel Neale, Alcock's *locum tenens*, was a man of small political capacity, who did not understand the circumstances among which he was thrown, while "his temper was sour and suspicious."[21]

An excellent example of the difficulties surrounding jurisdiction, and of the various forces telling against the execution of strict justice is afforded by the case of Mr. Moss. Mr. Moss, an English trader at Yokohama, went out on a duck-shooting expedition toward the end of November, 1860. There was a Japanese law that no one should use firearms within ten (native) miles of the Shogun's palace on pain of death.[22] To avoid trouble Alcock issued a regulation enforcing this prohibition on Europeans. Moss asserts that this was not displayed for a month in the consular office as the Order-in-Council required, nor was there any official notification, but only a letter sent round by Captain Vyse asking the community to refrain from shooting for the time being. He also says that the consular officials themselves began shooting when the season came round. Alcock is silent on these points.[23]

On November 27, 1860, as Moss was returning home, followed by his servant with the bag of ducks, a large number of armed Japanese policemen appeared and

stopped the servant. Moss turned back to intervene, and the Japanese advanced upon him. What happened next is uncertain. The Japanese declared that he deliberately took aim and fired, badly wounding one of them. Moss admits that he cocked and pointed the gun as he was afraid that they were going to do him an injury, but says that the Japanese closed with him and that the gun was accidentally discharged in the struggle.[24] The rest of the Japanese tied Moss up in a very painful fashion and carried him off to gaol, from which he was rescued some time later by Consul Vyse with the aid of some sailors from the Prussian gunboat *Arkona*.[25]

The hapless duck hunter was thus rescued from the death he had anticipated, but his woes were only just beginning. A Court of Enquiry was held, as a result of which Moss was put on his trial for shooting the Japanese policeman. The case was heard by Consul Vyse, with two assessors.[26] The Consul found Moss guilty of malicious wounding, and sentenced him to a fine of a thousand dollars and deportation from Japan.[27] The assessors disagreed with this; apparently they thought the penalty too heavy because they were not satisfied that Moss meant to shoot, and pressed by the Consul to give a reason for dissenting they found Moss not guilty.[28] This meant that the case was referred to the British Minister, Sir Rutherford Alcock, for his decision.

It is plain, from Alcock's own words, that he looked at Moss's case mainly from the diplomatic standpoint. Moss had shot a Japanese; the other Japanese were demanding vengeance; if Moss were not heavily punished, there might be an outbreak against the whole foreign community. No doubt Alcock, holding the views he did about the character of the foreign community, was convinced that Moss had meant to shoot, but other considerations than the question

of accident or design weighed with him. "In this case the punishment appeared to me inadequate, whether as regarded the evidence of animus and the injury inflicted on the Japanese, or the mischief and danger to the whole community which resulted, and I added three months' imprisonment in addition."[29] Alcock also censured the assessors for presuming to decide on Moss's guilt, contrary to the definition of their position in the Orders-in-Council.[30] Moss was therefore sent to the criminal gaol at Hongkong to serve his sentence, and he complains bitterly of the bad state of the prison in which he was confined.[31] But it soon transpired that Alcock had acted *ultra vires* in adding imprisonment to the sentence of the consular court. By the Order-in-Council of January, 1860, he was given power "to confirm or vary, or remit altogether the punishment awarded to the party accused."[32] He could furthermore sentence the accused to deportation in addition to the penalty already given. But his powers were to be read subject to the provision that the maximum punishment should be twelve months' imprisonment *or* a fine of a thousand dollars.[33] Alcock could choose between fine or imprisonment, but he could not legally award both, which he had actually done. Such was the judicial interpretation of the rather obscurely worded article of the Order-in-Council.[34]

Moss, whose fine had been subscribed by the resident foreign community at Yokohama,[35] was therefore released and brought an action against Alcock in the Supreme Court at Hongkong. He wished to claim thirty thousand dollars damages for wrongful imprisonment, injury to his health, and the ruin of his business.[36] The judge, however, decided that the jurisdiction of the Hongkong court was concurrent with that of Alcock in Japan, and so it could not deal with what happened there.[37] Moss was awarded two thousand dollars damages for illegal detention at Hongkong,

and the jury declared that had they been free to decide on the whole case, they would have awarded twenty thousand.[38] Alcock has some hard things to say of the jury system in the Far East.[39] Moss returned to England and approached the Foreign Office for redress, but was told that his remedy lay in the law courts.[40] As he was ruined by the loss of his business and the expenses of his action at Hongkong this advice was useless to him. He managed to interest one or two M.P.'s in his case and questions were raised in Parliament,[41] but the Foreign Office, while it reproved Alcock for his misreading of the Order-in-Council,[42] agreed with his general attitude. "That person went out to shoot within prohibited limits, he shot a bird held sacred by the Japanese, and, when he was stopped, he shot at and dangerously wounded a policeman,—accidentally, it was said, but, as he (Layard) believed, by design."[43] So Moss got scant sympathy at home.

This case deserves to be dwelt on because it is so admirable an illustration of the shortcomings of even the British system of consular jurisdiction. The informal nature of the regulation against shooting, the careless attitude of the foreign community "who held it absurd to expect English residents to observe Japanese customs,"[44] the disagreement between consul and assessors, the obscurity of the Order-in-Council, the inadequacy of the punishment that could in any case be awarded, even if the crime were deliberate, the diplomatic rather than judicial view taken by the Consul-General and the Foreign Office, the bias of the foreign community and of the Hongkong jury—all these things made the maintenance of law and order a thorny task.

Where the consuls were simply merchants undertaking honorary official duties, miscarriages of justice were apt to be more frequent. Apart from their personal leanings, their powers were in any case very limited, and in many

instances of serious crime they simply sent the offender home, where he not infrequently escaped all punishment because the laws of his country made no provision for offenses committed abroad.[45]

Apart from the character of the individuals, whether consuls, assessors, or foreign residents generally, concerned in the administration of justice, the extraterritorial system itself was not always adequate to fulfil the purposes for which it was designed. There could be no uniformity in the legal obligations of foreigners in Japan or in the facilities afforded to Japanese plaintiffs in the consular courts when each of eighteen Treaty Powers maintained its own courts and administered its own law.[46] The Treaty Powers stood together when the general question of the continued existence of extraterritorial jurisdiction came up; on most other matters each went its own way. The consuls of each nation enforced its own law together with such special regulations affecting its citizens in Japan that were either embodied in the treaty or had been enacted later. This state of affairs, inevitable though it was, bore hardly upon both foreigners and Japanese.

For example, a citizen of one western nation wishing to bring a civil action against a citizen of another would sue him in his consular court, since the Japanese courts had no jurisdiction. But what if the decision found both parties equally in the wrong, or found for the defendant and so assigned part or all of the costs to the plaintiff? If the plaintiff refused to abide by the decision the court had no power to make him since he was not subject to its jurisdiction, being of different nationality. In the British consular courts the rule[47] was that if a foreigner wished to sue in a British consular court he must first obtain the written consent of the competent authority of his own nation to the jurisdiction of the court, and must, if required by the

court, give satisfactory security for the payment of costs.[48] Some objection was taken to this by United States citizens, but they were not upheld by the State Department.

> You are quite right, I think, in saying that British subjects resident in Japan can not, except by comity, sue in an American Consular court; the same, of course, must be admitted as to an American's status towards a British consular court. Now, on this, as well as other grounds, and in the light of the broad view which sound policy dictates should be taken of this extra-territorial judicial system, it appears to me most desirable that, in its administration, harmony and comity should be cultivated between the different foreign nationalities, and that niceties and technical views should be as far as possible ignored, thereby facilitating that justice to foreign residents in those countries which the system was intended to secure.[49]

A similar difficulty was sometimes experienced in getting subjects of one Treaty Power to appear as witnesses in the courts of another. For example, the United States Consul at Kanagawa fined for contempt a British subject, who, as a witness, refused to answer certain questions. The British Consul refused to enforce the penalty on the ground that the United States Consul had no power to fine a British subject, nor had the British authorities any jurisdiction over what happened in a foreign court. Apparently the Japanese authorities could have punished in this case, but they were unlikely to intervene where their own subjects were not concerned.[50]

Another fertile source of dispute between the foreign Powers was the question of jurisdiction over seamen. The drunken sailor was a frequent sight in Yokohama and other Treaty Ports, and Alcock, as might be expected, has some hard things to say about him.[51] The trouble was that the sailor was often a subject of one nation, while the ship on which he served belonged to another. If he committed

a serious offense while his ship was in Japanese waters, who should deal with him, the consul of the nation to which he belonged, or the consul of the nation whose flag his ship flew? The United States took the latter view, Great Britain the former. So far as warships were concerned an agreement favorable to the United States view was reached in 1875,[52] but the question of seamen in the mercantile marine continued to cause occasional trouble. A case arose in 1880 which resulted in diplomatic conversations between the two Governments.

The indictment, trial, and conviction in the consular court at Yokohama of John Ross, a merchant seaman on board an American vessel, have made it necessary for the Government to institute a careful examination into the nature and methods of this jurisdiction.

It appeared that Ross was regularly shipped under the flag of the United States, but was by birth a British subject. My predecessor felt it his duty to maintain the position that during his service as a regularly shipped seaman on board an American merchant vessel, Ross was subject to the laws of that service and to the jurisdiction of the United States consular authorities.[53]

Ross killed a fellow seaman while on board the *Bullion*, a registered vessel of the United States, in Yokohama harbor. He was sentenced to death by the United States consular court there, but his sentence was commuted to imprisonment for life by the President. He appealed against his conviction on the ground that he was a British subject and so should not have been tried in an American court. The British Government also put forward this view. The case was discussed both in the United States and between the United States and Great Britain until 1891, when Ross's detention was decided to be legal.[54]

The position taken by the Government of the United States in

this legislation, under the articles of the treaty, is, that a foreign seaman duly enrolled on an American merchant vessel, is subject to the laws and entitled to the protection of the United States to precisely the same extent that a native-born seaman would be, during the period of his service; that although not an American citizen, he is unquestionably an American seaman. . . . If, therefore, the Government of the United States has, by treaty stipulation with Japan, acquired the privilege of administering its own laws upon its own vessels and in relation to its own seamen in Japanese territory, then every American vessel and every seaman of its crew are subject to the jurisdiction which by such treaty has been transferred to the Government of the United States.[55]

On the other hand, in the case of Fullert, a German subject serving on an American ship, who had aided an American naval officer to desert his ship at Yokohama and was convicted in the consular court, the sentence was quashed. The reason for this was that the ship on which Fullert served, although she flew the American flag, was not registered and so was not from the legal viewpoint an American ship.[56]

From the Japanese standpoint the chief deficiency in the legislative and judicial machinery of the extraterritorial courts was the failure to subject foreigners to the same degree of control in matters of police and administration as Japanese subjects underwent. The foreign communities in the Treaty Ports were not only immune from the native jurisdiction, but considered themselves under no obligation whatever to obey any law promulgated by the Japanese authorities, however unexceptionable and necessary it might be. Their attitude in this matter has already been touched on in the case of Mr. Moss. Whatever may be thought about the native law in that case, there is no doubt that, as Japan reorganized her administration, central and local, her judiciary, and her industrial and commercial sys-

tem, on occidental lines, a work which necessitated a whole host of laws, decrees, and ordinances, she found herself seriously hampered by her inability, directly or indirectly, to secure conformity by the foreign residents to the general standard of conduct which in the interests of tranquillity, safety, or health she was trying to attain.

It is important to notice that, by the treaties, foreigners did not secure total exemption from Japanese law, but only immunity from the Japanese courts. In the case of Middleton, an American who disobeyed the Japanese hunting regulations, the United States Consul General at Kanagawa held that "foreigners in Japan are exempt from obedience to Japanese laws only in so far as the treaties with Japan define such exemption."[57] The State Department concurred and added that the right of residence granted by treaty to foreigners in Japan did not necessarily carry with it all the rights common to Japanese subjects.[58]

The general right of Japan to make regulations binding on its own citizens and foreigners alike was also explicitly recognized.

> The right of the authorities of Japan to enact and promulgate laws for the government, security and order of its own people cannot, of course, be questioned for a moment; and of the character and sufficiency of these laws that government must be the sole judge. Citizens of the United States resident in Japan are expected and required to observe and obey such laws in the same manner and to the same extent that the like obligations rest upon the subjects of that Empire. In regard to the enforcement of these laws, and the imposition of penalties for their infraction, citizens of the United States have secured to them, by the provisions of existing treaties, the right of being tried in the Consular Courts of their own nation, established in Japan, and according to the mode prescribed by the laws of the United States, and are protected from the infliction of any other penalties than those

> prescribed or warranted by the laws of their own country. So long as these privileges are recognized and respected by the Government of Japan, there can be no cause of complaint on the part of the Government of the United States in relation to the promulgation of any municipal law or regulation which the legislative authority of Japan may deem necessary to its public interest and welfare.[59]

Such was the diplomatic view. The difficulty lay in the fact that offenses against Japanese regulations could be punished in the consular courts only according to the law of the country to which the transgressor belonged. But what if the particular offense were unknown to that law? In that eventuality no punishment could legally be awarded and the case had to be dismissed. The consuls had no authority at all to make new laws or regulations, and only a few of the ministers of the Treaty Nations were given such powers.[60]

Even when, as with the British and United States Ministers, they did possess them, the difficulty was not entirely surmounted. The minister had the power to make regulations but it was at his discretion to use or not to use it. When therefore any new Japanese law or municipal ordinance was issued, it was necessary to apply to the foreign ministers to issue regulations making them binding on their nationals. "As a rule this only happened after they had been subjected to a metamorphic process which entailed on the Japanese Government the necessity of submitting to a searching criticism of its legislative measures and frequently to a limitation of their scope."[61] The exasperation this would arouse can well be imagined, especially as the Japanese were employing expert European legal advisers in the remodeling of their law codes, and so did not bring forward anything which foreigners could not be expected to endure.

Furthermore, assuming that the minister concerned was willing to coöperate with the Japanese Government, his ability to do so was often inadequate to the occasion. His power to create new law was sometimes called in question. In 1870, Mr. Fish, United States Secretary of State, was very doubtful about some regulations promulgated by the then United States Minister in Japan, Mr. de Long. He described the minister's power to make regulations as being "confined to the course of procedure in pursuing judicial remedies, and as not extending to the creation of new rights or duties in citizens of the United States, or to the modification of personal rights and obligations under the existing law."[62] In this connection Mr. Fish put clearly the two views of consular jurisdiction which were current.

> A report made to Congress by my predecessor, Mr. Seward, shows that it has been the habit of this Department to regard the judicial power of our consular officers in Japan as resting upon the assent of the Government of that Kingdom, whether expressed by formal convention or by tacit acquiescence in the notorious practice of the consular courts. In other words, they were esteemed somewhat in the same light as they would have been if they were constituted by the Mikado with American citizens as judges, and with all the authority with which a Japanese tribunal is invested in respect to the native subjects of Japan, to the extent that our Government will admit a jurisdiction understood to be extremely arbitrary. They were, so to speak, the agents of a despotism, only restrained by such safeguards as our own Government may interpose for the protection of citizens who come within its sway.
>
> Between this view and that which would regard our consular courts as possessing only that authority which has been conferred upon them in express terms by Congress there is a wide margin.[63]

Congress, however, remained silent upon the question and Mr. de Long's regulations remained in force.[64]

By Article 85 of the Order-in-Council of 1865, the British Minister was given the power to make regulations for peace, order, and good government or for carrying out the stipulations of the Treaty. These regulations had to be approved by the Foreign Office, except in cases of urgency when a regulation could be issued at once and was valid unless and until the Foreign Secretary disapproved of it.[65] The Foreign Office, although it did not usually interfere in judicial matters dealt with in the consular courts, could intervene if it thought fit even in the case of the Supreme Court and direct reports of any case to be sent to it.[66] Thus a rigid legal interpretation could, if necessary, be softened and diplomatic exigencies provided for. On the other hand

> the (U.S.) Department of State has no appellate or other jurisdiction over any proceeding had in any United States Consular Court in Japan nor the slightest power to interfere with a judgment duly rendered in, nor with writs issued to collect or enforce judgments according to law by such Courts.[67]

The basis of the jurisdiction exercised by United States officials in Japan was the Act of Congress of June 22, 1860, and the regulations for consular courts provided for in Section 5 of that Act could not be touched by the Secretary of State.[68] These regulations, however, had to be read subject to the laws of the United States and were only of a general character. The United States Minister in Japan held in the case of Fullert that

> the Regulations for United States Courts in Japan create no new rights unknown to the laws, and are intended only to aid and assist in their administration and execution; constituting what may be figuratively and appropriately called the machinery of the Courts necessary to reach the ends of justice in the process of its attainment.[69]

Thus neither the State Department nor the United States Minister in Japan could create any new offenses unknown to the laws of the United States. This had the merit of preventing arbitrary conduct, but the defect that in certain circumstances United States citizens could commit misdemeanors and yet escape scot-free, because the ministerial powers of legislation were so narrowly circumscribed. In 1870, it was laid down by the United States Minister in Japan that neither he himself nor any of the consuls had any power to enact penal laws.[70] It was even decided by the State Department in 1873, and again in 1875, that "it is not within the province of a minister in Japan to make a regulation requiring citizens of the United States to enroll their names at a Legation or Consulate—consequently the attempt to impose a pecuniary penalty for refusing to register is unauthorized by law."[71] Yet registration of citizens of a Treaty Power at their local consulate was of equal use to consul and to citizen, and could not be reasonably taken exception to. A small fee was usually charged for registration, but only the miserly or obstinate person could find much to object to in the system. The consuls knew exactly for what persons they were responsible and the fact of an individual being accepted for registration at a consulate might obviate a wearisome argument as to his status if any case arose in which he were concerned. The British Order-in-Council of 1865 made it obligatory for British citizens to register themselves as soon as possible after their arrival in Japan.[72]

In general, therefore, despite the earnest desire of the United States Government to see justice done in the territories of a nation which America prided herself on having reopened to the world, and which she regarded as a *protégé*, many Japanese complaints against United States citizens went unredressed, not for lack of a sense of justice,

but for want of power, on the part of the consular officials. For example, when railways were first introduced in Japan a good many foreigners traveled on them without troubling to observe the formality of purchasing a ticket, and the American Consul had to confess his inability to punish such offenders of his own nationality.[73]

Another point in connection with the United States jurisdiction in Japan should be noted. The laws of the United States administered in Japan meant, in the first instance, "The Constitution and Federal Statutes in conformity therewith, and Treaties with Foreign Powers."[74] But the Federal Statutes scarcely touched such matters as private contracts, property, or domestic relationships, since these subjects were left to the various states of the Union.[75] State laws were not applied in Japan, because of the lack of uniformity in them.[76] The gap was mainly filled by the application of the common law, together with the law of equity, of admiralty, and a certain amount of international law.[77] Even so, there were inadequacies, sometimes of a serious character. For example, in 1881, in the case of *Osaki Yoshinosuke* v. *Marians* it was discovered that there was no statute of fraud in existence for controlling the contracts of citizens of the United States in Japan.[78] It is needless to dwell on the golden opportunities this would afford to the unscrupulous trader or merchant.

The United States Government, however, did uphold, as has been observed above, the right of Japan to enact suitable regulations in the interests of foreigners and Japanese alike, and it did its best to enforce respect for them.[79] The attitude of most of the other Powers was not so accommodating and this occasionally had most unfortunate results. In 1879, for instance, a cholera outbreak was causing the Japanese authorities much anxiety and they imposed quarantine regulations on ships coming from in-

fected parts abroad. The United States Minister recognized these regulations and bade his compatriots observe them; the British Minister, followed by those of the other Powers, refused to do so, on the ground that Japan had no right to make regulations affecting foreign ships. A German ship from an infected port was escorted into Yokohama by a German warship in defiance of the quarantine imposed on her by the Japanese officials. Plague did break out in Japan and cost a hundred thousand lives. Gen. U. S. Grant, then on a visit to Japan, declared that the Japanese would have been justified in sinking the ship concerned.[80]

Thus the determination of the Japanese Government to secure a revision of the treaties and the abolition of consular jurisdiction did not arise wholly from national sentiment. Revision was an absolute necessity because the immunities secured by the Treaty Powers constituted one of the worst obstructions that government had to surmount in the great work of reorganization it was endeavoring to complete. As Alcock wrote in his usual graphic style:

> Existing relations are based on a fiction of exterritoriality which assumes that the laws and executive power of foreign Governments are in full force in the soil of Japan, as regards all foreigners, and effectually supply the place of the laws of the country, making adequate provision for the preservation of the peace and the repression of crime. But the right of exemption from the law of Japan is alone a reality, the other condition of the exterritorial clause is too much a fiction.[81]

On the other hand, it would not be fair to leave this subject without saying something of the good as well as the bad in the extraterritorial system. It was the only reasonable way of dealing with the problem of the foreigner in an oriental country until that country effected reforms in its legal and judicial systems. Many of the defects enu-

merated above were due to the inevitable circumstance of there being so many foreign Powers, each represented by its consuls and courts. Great Britain, at least, took the greatest care in the organization of her consular and appellate courts and in the choice of those who were to administer them. The United States, with more cumbrous legal and constitutional organization, and lacking Great Britain's experience in the administration of overseas territories, was animated by equally worthy motives.

Further, the various cases cited above to illustrate the defects of the consular courts attract notice because they are exceptional; doubtless in the great majority of cases reasonable justice was executed by the consuls and no more was heard of the affair. The evil that the consuls did lived after in appeal cases or diplomatic exchanges of notes, the good was usually interred in the archives of the court and lay forgotten.

Again, consular justice had the great merit of being cheap. The consuls and assessors got no special salaries for their judicial work, and the fees demanded of the litigant were very moderate indeed.[82] It was open to either party to secure advocates, but there were not usually many lawyers to pocket large fees. This, however, does not apply to the Courts of Appeal, even those at Hongkong or Shanghai, where procedure was slower and costs heavy.[83]

Normally, therefore, the foreigner in Japan had little at which to grumble with regard to the consular courts. He got cheap and speedy decisions which were usually equitable enough. It is significant that the growls of discontent with the consular system from foreign residents in Japan were speedily drowned in the universal wail of apprehension which went up whenever the fatal words "treaty revision" or "abolition of consular jurisdiction" were heard.

The Japanese plaintiff in a consular court had often

more substantial causes of complaint. He had to plead before a tribunal where both the procedure and the language in which the proceedings were conducted were usually totally strange to him, and where he might prejudice his case through ignorance of the necessary formalities. He might meet with downright bias and injustice, and, even without this, might be deprived of a remedy through the inadequacy of the law by which his case was decided. Expense alone usually precluded his appealing to a higher court even when there was provision for such an appeal.[84] Here also, however, failure to do justice would not be normal, while the European or American plaintiff in a Japanese court labored under much the same disabilities, save that Japanese law was the same for foreigners, and Japanese Courts of Appeal, when once these had been created, were within easier reach.

Nevertheless, the general conclusion must be that the extraterritorial system in Japan was at best a makeshift, and that the defects inseparable from it, apart from the abuses which attended it, justified its abolition so soon as the Japanese had put into effective operation an adequate body of law and an efficient judiciary. This they bent all their efforts to achieve, but the Powers were mostly slow, and their subjects in the Treaty Ports slower still, to realize that extraterritoriality was transitory and not permanent in character.

CHAPTER V

The First Judicial Reforms in Japan and the Early Attempts at Treaty Revision, 1870–79

THE impossibility of permitting Europeans to be subjected to the harsh procedure and barbaric penalties of oriental law courts is the usual justification given for the extortion of extraterritorial privileges. Thus, when in July, 1864, Earl Grey brought forward, in the House of Lords, twelve resolutions on Japan, which questioned, among other things the expediency and justice of consular jurisdiction,[1] the Government defended the system on this ground. Lord John Russell replied that Japanese laws were most sanguinary, that in some cases all the relations of a criminal could be put to death for his offense. He also seemed to think, although wrongly, that the unwritten code of honor of the samurai which demanded suicide by disembowelment in certain eventualities, was a legal penalty which could be inflicted on criminals.[2] He asked, very sensibly: "Is it desirable that we should abandon a plan which has now been acted upon for three centuries, in accordance with which, when we enter oriental nations we carry with us our own tribunals and our own notions of justice?"[3]

The barbarity of unreformed oriental jurisprudence is not, however, the only or even the main reason why exemption from its operation is essential to Occidentals. Were this so, the problem would be much simpler, since a comparatively easy amelioration of procedure and penalties would remove the objectionable features. But law is a

product, not only of the humanity or inhumanity, but also of the character and social development of a people, it is, like their constitutional arrangements, rather organic and natural, than suddenly created and artificial. The social relationships and customs of oriental countries, which lie at the root of such law codes as they possess while still uninfluenced by the West, are utterly alien from all European conceptions of what is right and proper. One general difference deserves notice. Oriental relationships center around the family group, occidental ones stress individual freedom and rights. This divergence of ideas alone suffices to make the laws of either race seem unjust to the other.

Again, whether the social order of the West be superior to that of the Orient or not, it is certainly more complex, especially in matters of industry and commerce and in the law relating thereto. In this field there are a whole host of rules familiar to the European lawyer or judge but utterly unknown to the Asiatic. And since commercial penetration is the main object of the European in the Far East, these are the very matters which are most likely to be in dispute. The inadequacy of oriental jurisprudence in these respects is another great argument for extraterritoriality. A brief survey of Japanese law as it stood in the mid-nineteenth century will illustrate these points, although it was, despite considerable Chinese influence, mostly unlike anything to be found elsewhere, even in Asia.

In the first place there was no general system of law for the whole of Japan. The codes occasionally drawn up by the Shogunate were enforced in the domains directly controlled by the Tokugawa, and the feudal daimyo were expected to follow their main provisions, or at least enact nothing in direct opposition to them. Apart from this each daimyo had full legislative and judicial authority within his fief, and thus all sorts of differences sprang up.[4]

Secondly, the laws of feudal Japan were chiefly concerned with the upper classes, the *Kuge* or court nobility, the *Buke* or military caste, and the priests. Such were the three codes compiled by Iyeyasu in 1615,[5] the "Law for Military Men," the "Law for the Court Nobles" and the "Law for the Priests." These were chiefly concerned with the relation of these classes to the Shogunate and with the rules of moral conduct that should govern individual members of each.[6] Their provisions did not touch merchants or the commonalty who were left to the lords of the fiefs in which they dwelt, or to customary and family relationships. This does not mean that the commoner enjoyed much personal liberty; on the contrary he was subjected to an iron discipline. "Every detail of the farmer's existence was prescribed for by law—from the size, form, and cost of his dwelling, down to even such trifling matters as the number and quality of the dishes to be served to him at mealtime."[7]

The samurai were, of course, in a privileged position. Iyeyasu laid it down that they were "the masters of the four classes," and that if any commoner dared to behave to a samurai in any but the most abjectly humble fashion he was to be cut down at once.[8] Again, Japanese feudal law was, in practice, arbitrary. The codes that were drawn up were not promulgated, but kept secret from all but the authorities. The maxim of Iyeyasu was that "a ruler had better make the people rely upon his will and never let them know what it consists of."[9] Such regulations as it was absolutely essential for the people to know were published by means of announcement boards or government circulars. In remote villages the local magistrates called the people together and read the text to them, or made the schoolmasters write it out and give it to their pupils as a copy

book. Otherwise the masses knew nothing of the laws by which they were governed.[10]

Also, such laws, based as they were on custom, changed hardly at all. Another of Iyeyasu's precepts was that "all shall be conducted according to old customs and everything new is prohibited. What has been in vogue for half a century shall not be altered even if it be found wrong."[11]

In 1742, a more comprehensive edict was compiled by order of the eighth Tokugawa Shogun, Yoshimune. This was termed the "Edict in a Hundred Sections," and, in 1790, was revised and amended by Matsudaira Sadanobu, the chief minister of the Shogun Iyenari (1786–1831). Matsudaira added three articles, or sections, to it, making a hundred and three in all.[12]

It is a compendium of the legal procedure and of the penal law which was in force throughout the whole period of Tokugawa rule, more than two and a half centuries, for, though compiled only about the middle of that period it embodied the customs which, with very little change, had prevailed from the beginning of the dynasty.[13]

The first group of articles in this code deal mainly with boundary disputes, questions of land tenure, mortgages, debts, loans, and shipping. A few of their provisions may be noted as illustrating the stage of development which had been reached in these matters.

The peasants could not sell their farms outright at all, any attempted sale was made null and void, the seller was fined, and the village headman who affixed his seal to the deed of sale deprived of office.[14] As far as possible disputes over land were to be settled by the local authorities, in the feudal domains by the daimyo or his steward.[15] Only in special cases were they to come before the High Court (*Hyojosho*) of the Shogun at Yedo.[16] "When a number of

persons are co-signatories of a deed (i.e. a contract) . . . and a suit regarding the division of the profits . . . is brought . . . such a suit is not to be entertained, being a matter of company adjustment." In general the courts took no cognizance at all of company affairs.[17]

The rest of the Edict deals with the penalties for various crimes and methods of criminal procedure; and makes grim reading.

If an infantry soldier (*ashigaru*—the lowest class of two-sworded man) is addressed in coarse and improper language by a petty townsman or peasant, or is otherwise treated by such with insolence, so that he has no choice but to cut the aggressor down on the spot, if after careful enquiry there be no doubt as to the fact, no notice is to be taken of it.[18]

For killing one's lord or master the culprit is to be exposed bound to a stake at the most frequented bridge (the Nihonbashi) under a placard stating the details of his crime; after two days of this exposure he is to be led around through the streets for one day for further exposure, then after submission to the pulling of the saw, he is to be crucified.[19]

It was also death, by crucifixion or decapitation, to wound or attempt to wound a present or former lord or any of his relatives. The same applied in the case of a mayor or other official or a teacher. It was likewise death to assault or attempt to assault a parent or other superior relative, i.e., uncle, aunt, father-in-law, elder brother, or sister. But parents or elder relatives were only put to death if they deliberately killed their children or younger relatives for the sake of gain.[20]

A host of other offenses meant death also. Incendiaries were burned to death and so were those who instigated them.[21] If children (presumably of age) saw their parent(s) trapped in a burning house and made no attempt at rescue they were executed.[22] Most cases of robbery, making

counterfeit money, false weights or measures, swindling, blackmail, menaces, forgery, kidnapping, and such like were capital offenses.[23]

An unfaithful wife was decapitated and so was her paramour. If the husband caught them he could slay them both without incurring any penalty.[24] Drunkards who committed murder,[25] insane persons who slew their masters,[26] carters who carelessly ran over and killed people, were also executed.[27] Lesser offenses were punished by flogging, bastinadoing; tattooing on the forehead or arm; banishment and deportation. All the property of executed felons was confiscated.[28]

Generally sentence could not be imposed unless the prisoner confessed to his guilt; consequently in cases of murder, arson, robbery or treason, if the prisoner refused to confess despite circumstantial evidence against him, torture was applied. It could also be resorted to in other cases at the discretion of the judges.[29] The prisoner condemned to torture was first of all bound, with his arms twisted behind his back and pulled tightly up to his shoulders. He then received up to a hundred and sixty blows with a scourge of split bamboos. If the accused remained obdurate he was tied to a pillar in a kneeling position and heavy slabs of stone, each weighing a hundred and seven pounds, were piled on his lap until he either confessed or became unconscious. The hardy criminal who still held out next had to endure what was termed "the lobster."

The arms were twisted behind the back and tied together and pulled up to the shoulders, then the two legs were tied together in front and pulled up to the chin, and front and back pulled together as tightly as possible with a rope twisted of green hemp, and the victim was left for three or four hours in this position.[30]

In the very rare event of a confession still not forthcom-

ing, the prisoner was tied with his hands behind his back and then hoisted off the ground by a rope fastened around the wrists. There he remained until he either confessed or died.[31]

Terrible as this Edict sounds, the penal clauses were not much more severe than were those of European legal codes in the mid-eighteenth century. In England, for instance, the *peine forte et dure* remained a legal method of procedure until 1772.[32] A hundred years later, however, the penal laws of most western nations had been greatly reformed and humanized, whereas the "Edict in a Hundred Sections" remained in force down to the opening of the Meiji era (1870). But the distinction it draws in favor of the military caste, its scheme of family gradations, and its lack of provision for mercantile affairs are more important than even its scale of punishments in illustrating the gulf between occidental and oriental conceptions of social and legal relationships.

With regard to the administration of the law, executive and judicial functions were usually combined in the same persons. The Hyojosho or Supreme Court, for example, which had general control over all matters relating to justice, consisted of ministers of state.[33] Under this, cases concerning temple or shrine lands were handled by the ecclesiastical magistrate (*Jisha Bugyo*); matters arising between residents of Yedo by the city magistrate (*Machi Bugyo*); and suits by parties living on the demesne lands of the Shogun by the exchequer magistrate (*Kanjo Bugyo*).[34] The *Shoshidai* or governor of Kyoto, and the *Gojodai* or warden of Osaka castle, also had judicial as well as administrative duties to perform.[35] Such police as existed also performed military duties.[36]

The Shogunate maintained a few prisons, and each feudal lord kept up his own gaol. In the Shogunal prisons

twelve felons were confined together in each cell, and epidemics were frequent. The feudal gaols were probably much worse. Japan undoubtedly grew more humanitarian between 1750 and 1850 and suggestions for prison reform were put forward in 1858 but went unheeded by the declining Shogunate.[37]

The fall of the Shogunate and the concentration of authority under the Emperor heralded the period rightly termed *Meiji* (Enlightenment). On April 6, 1868, the Emperor took the Imperial Oath of Five Articles, or Charter Oath,[38] by which he pledged himself to introduce reforms of a far-reaching character, and from which the westernization of Japan may be dated. The first necessity was the abolition of the feudal system, and Japan was fortunate in that the leaders of the western clans who had overthrown the Tokugawa, themselves saw that the old powers and privileges of the two-sworded class must go. In March, 1869, the four clans of Satsuma, Choshiu, Hizen, and Tosa, surrendered their fiefs and revenues to the Emperor,[39] numerous others followed their example,[40] and by August, 1871, the Government was able to issue a decree abolishing the clans and establishing prefectures in their place.[41]

The collapse of Tokugawa power invalidated the legal enactments of that dynasty, and consequently the advisers of the Emperor early perceived that a new law code had better be issued, which at the same time would give greater uniformity in the penal law than had hitherto been the case. A commission for this purpose was therefore appointed which drew up what were termed the "Chief of the New Fundamental Laws," issued in January, 1871.[42] This comprised six volumes based very largely on the *Taiho Ryo*, an ancient law code issued in 701 A.D., and copied almost *en bloc* from Chinese legislation.[43] The code

of 1871 did, indeed, introduce large modifications into the amount and nature of the punishments prescribed in the Taiho, and in this marked an advance on the Edict in a Hundred Sections.[44] The death penalty was greatly curtailed; merciless whippings were abolished and penal servitude prescribed for the majority of offenses.[45] At the same time prison reform was taken in hand and the chief of the prison office and two of his assistants were sent to inspect the British prison system in Hongkong, Singapore, and India.[46]

All this was to the good, but the criminal code was still far from being acceptable to Europeans, while no code of civil law existed. At the same time the Japanese Government had now realized the inferiority of their international status due to the extraterritorial provisions in the treaties, and wished to take advantage of the revisionary clause in them which could become operative in 1872. The first suggestion of revision was made in a private memorandum submitted by Count Terashima, Minister for Foreign Affairs, to Sir Harry Parkes, the British Minister, in April, 1871.[47] This contained the following significant paragraph.

> The Treaties are made entirely for foreigners coming to Japan and the only stipulation for Japanese going abroad is that a diplomatic agent may reside in the capital. In these things the same power ought to be inherent in both, and after the question has been examined, equal and concurrent powers should be the phraseology of the Treaties.[48]

The Japanese Government at first resolved to deal directly and singly with the home governments of the Treaty Powers and it therefore sent abroad a special mission, known as the Iwakura Mission, from its most distinguished member, Prince Iwakura. The mission was a large one, containing no less than fifty members,[49] among whom

were the ablest of the new leaders of Japan, such as Kido, Okubo, and Ito,[50] and officials from every department of the public service were attached to it.[51]

Its objects were most plainly set forth in the letter of credence it presented to the President of the United States upon its arrival in that country.

> We expect and intend to reform and improve the Treaties so as to stand upon a similar footing with the most enlightened nations, and to attain the full development of public right and interest. The civilization and institutions of Japan are so different from those of other countries that we cannot expect to reach the desired end at once. It is our purpose to select, from the various institutions prevailing among enlightened nations, such as are best suited to our present condition, and adopt them, in gradual reforms and amendments of our policy and customs so as to be on an equality with them.[52]

The Iwakura Mission left Japan in December, 1871.[53] It arrived in Washington on February 29, 1872, and was received by the President on March 4.[54] In the summer of 1872, it arrived in England, leaving in January of the next year,[55] and reached Japan in September, 1873.[56] The members of the mission, during their visit to the United States, England, and Continental countries were afforded every facility for seeing all that they wished. Sir Harry Parkes was even recalled from his post at Tokyo to act as guide to them during their tour of England and earned their gratitude for the help he gave them.[57] But they were completely unsuccessful in procuring the revision of the Treaties. In his Fourth Annual Message to Congress of December 2, 1872, President U. S. Grant stated that

> our Treaty relations with Japan remain unchanged. An imposing embassy from that interesting and progressive nation visited this country during the year that is passing, but, being unpro-

> vided with powers for the signing of a convention in this country, no conclusion in that direction was reached. It is hoped, however, that the interchange of opinions which took place during their stay in this country has led to a mutual appreciation of the interests which may be promoted when the revision of the existing treaty shall be undertaken.[58]

On March 1, 1872, when Mr. Whitwill, M.P., asked the Under-Secretary of State for Foreign Affairs whether the British treaty with Japan was likely to be revised at an early date the reply was that the British Government had complied with the request of the Japanese Government, put forward in November, 1870, that the revision of the treaty might be postponed until the return home of the special mission from Japan.[59]

The Iwakura Mission was therefore only empowered to open the question of revision, not to conclude any new agreement, but the instructions to the ministers of Great Britain and the United States show how unlikely it was that any concessions would be made by the two Powers whose interests in Japan were predominant.

On January 13, 1873, the Foreign Secretary, Earl Granville, sent the following dispatch to Parkes:

> The special ambassadors from Japan having now left England, there is no occasion for you any longer to delay returning to your post.
>
> From your own direct intercourse with the Ambassadors during their stay in England and also from having been present at the interview which I had with their Excellencies, you will have learned how little they had to offer in explanation of the objects of their mission and the views and wishes of their Government, and how little in the uncertainty in which I was left in these respects, I was able to convey to them regarding the policy and intentions of Her Majesty's Government in regard to intercourse with Japan.

The same difficulty prevents me from giving you any but the most general instructions for your guidance on your return. . . . The main principles by which you should regulate your conduct were more or less adverted to in my conversations with the Ambassadors. Her Majesty's Government desire to maintain the most friendly relations with Japan, but they are not prepared, out of deference to the wishes of its Government, to expose the maintenance of them to risk by complying with their suggestions that the small British force still maintained in Japan, should, at the present time . . . be withdrawn, or by renouncing the security for British life and property which the extraterritorial jurisdiction now enjoyed by Great Britain in Japan is calculated to secure to British subjects.[60]

The dispatch went on to say that the British Government

would see with great satisfaction the establishment in Japan of order and justice as the rule of administration permanently accepted and observed, which would enable them, with confidence to entrust the interests of British subjects, as in most countries, to the safe-keeping of the local Government.[61]

It would not, however, be to the advantage of Japan to try to undertake such responsibilities too soon. Parkes was to give the Japanese some idea of the changes they would first have to effect, and was to discuss any possible minor changes in the treaties with his diplomatic colleagues. Finally, "Her Majesty's Government fully rely on your ability to judge what the interests of the British subjects require, what concessions it may be expedient to make, and how far you may be able to carry the representatives of Foreign Powers along with you."[62]

Mr. Fish, the United States Secretary of State, wrote to the American *Chargé d'Affaires* on September 2, 1874, that

the president is impressed with the importance of continued concert between the treaty powers in Japan, at least until after the revision of the treaties, and until the government of Japan shall have exhibited a degree of power and capacity to adopt and to enforce a system of jurisprudence, and of judicial administration, in harmony with that of the Christian powers, equal to their evident desire to be relieved from the enforced duties of exterritoriality.[63]

If, however, the Iwakura Mission failed in this respect, its sojourn in the countries of the Occident was of great importance in other ways. "The fifty members of it, many of whom probably were men of exceptional ability and liberality obtained a close and prolonged view of western civilization, which bore fruit on their return and made the mission an epoch-making event in the history of modern Japan."[64] Especially did they realize the far-reaching legislative and judicial measures that would have to be undertaken before the Powers would listen to the plea of Japan for the abolition of extraterritoriality, and they devoted themselves to this task with unflagging zeal. It is very important to notice the great impetus, sometimes too great, indeed, that the desire to get rid of consular jurisdiction gave to the reconstitution of the political, administrative, and judicial organization of Japan. "Every recommendation made by the embassy, every step taken on that recommendation was influenced by the burning desire to secure the abolition of extraterritoriality."[65]

In May, 1873, the existing penal code was revised and materially amended by the issue of the "Revised Fundamental and Supplementary Laws."[66] This was arranged on a European pattern, and consisted of two volumes, divided into three hundred and eighteen sections, each consisting of thirteen chapters.[67] "This marked the first adoption of the European legal system in the realm of penal law."[68]

The use of torture was abolished, the death penalty further curtailed, and corporal punishment almost entirely got rid of.[69]

But this code still contained many provisions repugnant to western conceptions of justice. Decapitation and exposure of the severed head was still the penalty for some crimes,[70] the samurai still got off lightly compared with the commoner,[71] crimes against officials were visited with much greater severity than those against civilians,[72] soldiers and sailors were exempted from the operation of the ordinary laws and were in all cases dealt with by their own authorities.[73] The duty of personally avenging the murder of one's parents was no longer encouraged by law, but mild penalties only were inflicted for doing so.[74] Junior members of the family were still punished with especial severity for crimes against their elders.[75] The husband whose marital rights were outraged could still slay the guilty parties with impunity, provided he did it at once.[76] He could also kill his wife for abusing or assaulting his parents or grandparents, with only a penalty of one year's penal servitude to fear.[77] He could assault and even wound her without being punished at all.[78] Parents and grandparents could beat their children without interference from the law, and even if they wilfully murdered them, the maximum penalty was but three years' penal servitude.[79]

The Japanese Government, after the return of the Iwakura Mission, determined on further innovations and, in the closing months of 1873, a committee was organized in the Department of Justice and charged with the task of investigating and compiling a Penal Code and a Code of Criminal Instruction. M. Boissonade, a French legal expert, was engaged as collaborator, and the *Code Napoléon* was to be taken as the model.[80] In 1875 the Government appointed another committee to prepare a Civil Code,

which was also to be inspired by the law of France.[81] Police and prison reforms were also undertaken in the years 1876 and 1877, although financial stringency hampered the Government's efforts in these directions.[82]

The wiser among the Japanese innovators, however, understood the magnitude of the task the Government had set itself and the dangers of overhasty action. They saw that the proposed new codes, civil and criminal, would be worse than useless unless they conformed very largely to the customs and traditions of centuries and harmonized reasonably well with Japanese social organization and personal relationships. To try to adopt foreign legal systems *en bloc* would inflict great hardship on the people, arouse universal discontent, and end in a complete and dangerous failure.

Thus in the *Nichi-nichi Shimbun* ("Daily News"), a Japanese newspaper edited by Fukuchi, a former high official of the Department of Foreign Affairs, the following article appeared on October 26, 1874:

> At the risk of being thought prejudiced in favour of foreigners, let us place ourselves in the position of Foreign Ministers of State, and we shall certainly refuse to call upon our countrymen to obey the laws of Asiatic countries, and the duties of a Government towards its people would certainly not permit of it. This is one of the most important of its duties. In no Asiatic country are there satisfactory laws, or a complete system of jurisprudence, to which life or property could be entrusted. For example, suppose that our own Government were to enter into Treaties with China, Korea, Annam, and Ava, and were to agree to place our people under the jurisdiction of those countries, could it be said to have discharged its duties? It is the same in the case of Treaties between Europe and Asiatic countries.

After pointing out the necessity of legal and judicial re-

form before Japan could hope to secure the abolition of extraterritoriality, the article went on to say that

> of late frequent reforms have been made in the judicial system and the earnest desire of the Government is that our laws shall not differ from those which are common to all countries. But laws must be established on the basis of the customs and old precedents of the country for which they are intended and it would be impossible to transplant the law of another country and apply it to our own. . . . Let us, pray, go on gradually and gently. . . . As for the notions of those, who, utterly disregarding our want of legal officers and counsel, and leaving out of view the differences of custom and precedent, propose to adopt all of a sudden a translation of the Code Napoleon just as it is, and, with that as a Japanese national system of law, would propose to abolish extra-territorial jurisdiction, we can only regard them as the ideas of beardless schoolboys.[83]

Considering the former status of the writer, and the strict press censorship then exercised by the Government, this may fairly be taken as representing the official view of the situation.

In the meantime the efforts of Japan toward treaty revision met with little success. In 1873, some Italian merchants in Japan for the purpose of buying silkworm eggs were much hampered by the restrictions on travel imposed on foreigners, and the Italian Government actually negotiated a revised treaty which would have given partial judicial autonomy to Japan in return for freedom of movement for Italians within Japan. But the rest of the Powers registered a vigorous protest and the proposed agreement was dropped.[84] In 1874, Count Soyejima, then Minister for Foreign Affairs, tried to secure revision by means of a joint conference of the representatives of the Powers in Tokyo, but met with failure.[85]

For the next few years therefore, Japan devoted her at-

tention to the other chief grievance inflicted on her by the treaties, the restrictions on her tariff autonomy. By the Tariff Convention of June 25, 1866, concluded between Japan and the United States, Great Britain, France, and Holland, the Japanese Government was prohibited from levying a duty of more than five per cent on the majority of foreign articles imported.[86] This at once hampered its efforts to raise an adequate revenue, and exposed its attempts to create new native industries to the full blast of foreign competition. Therefore the Japanese Government, considering this the worst injustice, strove to secure complete tariff autonomy. In this aspiration Japan had the sympathy of the United States.

> It is hoped that negotiations between the Government of Japan and the treaty powers, looking to the further opening of the Empire and to the removal of various restrictions upon trade and travel, may soon produce the results desired, which can not fail to inure to the benefit of all the parties.[87]

Further, while Mr. Fish held that the United States should act in concert with the rest of the Treaty Powers,[88] who were far from willing to concede tariff autonomy, his successor as Secretary of State, Mr. Evarts, agreed with Mr. Bingham, the United States Minister at Tokyo, on the advisability of separate action.[89] The result was the signature on July 25, 1878, of a commercial convention between the United States and Japan.

> The Japanese Government has been desirous of a revision of such parts of its treaties with foreign powers as relate to commerce, and it is understood has addressed to each of the treaty powers a request to open negotiations with that view. The United States Government has been inclined to regard the matter favourably. Whatever restrictions upon trade with Japan are found injurious to that people can not but affect injuriously nations

holding commercial intercourse with them. Japan, after a long period of seclusion, has within the past few years made rapid strides in the path of enlightenment and progress, and, not unreasonably, is looking forward to the time when her relations with the nations of Europe and America shall be assimilated to those which they hold with each other. A treaty looking to this end has been made which will be submitted for the consideration of the Senate.[90]

Article I of the Convention of 1878 annulled that of 1866 so far as the United States was concerned, and added:

It is further understood and agreed that from the time when this present convention shall take effect, the United States will recognize the exclusive power and right of the Japanese Government to adjust the customs tariff and taxes and to establish regulations appertaining to foreign commerce in the open ports of Japan.[91]

Article V declared that "It is understood and declared by the high contracting parties, that the right of controlling the coasting trade of Japan belongs solely, and shall be strictly reserved to the government of Japan."[92]

But so far as judicial matters were touched on by the convention, no concessions were secured by Japan. Article IV ran:

It is further stipulated and agreed, that, so long as the first three sentences which are comprised in the first paragraph of Article VI of the treaty of 1858, or the fifth year of Ansei, shall be in force, all claims by the Japanese government for forfeitures or penalties for violations of such existing treaty, as well as for violations of the customs, bonded-warehouse, and harbor regulations, which may, under this convention, from time to time, be established by that government, shall be sued for in the consular courts of the United States, whose duty it shall be to try each and every case fairly and render judgment in accordance with the provisions of such treaty and of such regulations, and the

amount of all forfeitures and fines shall be delivered to the Japanese authorities.[93]

Finally, by Article X it was agreed that:

The present convention shall take effect when Japan shall have concluded such conventions or revisions of existing treaties with all the other treaty powers holding relations with Japan as shall be similar in effect to the present convention, and such new conventions or revisions shall also go into effect.[94]

This last proviso rendered the convention a dead letter, since none of the other Powers would agree to conclude a similar agreement. The British Foreign Office regarded it as "contrary to all usage" for the United States to act secretly and independently in such a matter.[95] Parkes was also very annoyed.

The Americans have made a Treaty with Japan—such a Treaty! but they have protected themselves from its consequences by stipulating that it is not to take effect until other nations agree to a similar treaty, which we, for one, are certainly not likely to do. They would throw themselves by it entirely into the hands of the Japanese. The object of the Americans is, of course, transparent—they wish to lead the Japanese to believe that they are willing to meet their wishes, and, if unable to do so, it is because other nations, notably England and H.S.P. (Parkes), won't enable them to do so.[96]

So Parkes wrote on January 5, 1879.

The Japanese then attempted to deal separately with the various other Powers, acting on the advice of Mr. Smith, the American councilor of the Foreign Office.[97] But their negotiations fell through both in London and Berlin because they demanded full tariff autonomy, while the Powers were willing to discuss only a new tariff.[98] Parkes wrote, on March 2, 1879:

It came out that the Japanese claim, not a revision of the Treaty and Tariff,—but the total abolition of the Tariff by commercial articles of the Treaty, with full liberty to impose what duties on foreign commodities might please them. The object of the Japanese is to divide us and to negotiate with each separately, as they have already done with America, while ours, on the other hand, should be to endeavour to secure general co-operation.[99]

Finally, on April 2, 1879, Parkes was able to write:

I have received a telegram today from Lord Salisbury saying that the scheme of the London Conference is abandoned and that the revision of the Treaty must take place in Yedo. So that a year and a half have been lost by the Japanese to no purpose by passing over the Foreign Ministers here and making their proposals in Europe. They are obliged to come back to us after all.[100]

And on July 28, 1879: "Our Government has demanded that the Japanese Government make their proposals in a practical form, which they have not yet done."[101] This ended the negotiations for the time being.

Thus, in the first decade of the long struggle the Japanese had suffered defeat on both fronts, the judicial and tariff privileges of the Powers remaining intact. But they were only biding their time to deliver a fresh and more determined onslaught. Meanwhile they were cheered by one success. The various Treaty Powers had established their own post offices in the open ports and the Japanese Government wished to take postal administration into its own hands and to get rid of the foreign post offices. Largely through the good offices of Herr von Stephan, the Imperial German Postmaster-General, Japan was enabled to accede to the Berne Convention of 1874 in a protocol signed by the Japanese Minister, Aoki, and the Swiss envoy, Dr. Roth, at Berlin on March 3, 1877.[102] Thus she

became a member of the Universal Postal Union and her representatives attended a Postal Convention at Paris in 1878 on a footing of equality.[103] England, however, maintained her post offices in Japan until the end of 1879, when by a special convention concluded between Parkes and Inouye, the new Japanese Foreign Minister, they were abolished.[104]

CHAPTER VI

The Second Decade of Judicial Reform in Japan and the Period of Conferences, 1880–87

THE years 1880 to 1890 saw the struggle for the abolition of extraterritoriality in Japan continued with an ever increasing intensity. During this period, the Japanese Government, while pressing on with legal and judicial administration and a host of other internal reforms, strove to secure full judicial and tariff autonomy. Having discovered that the method of dealing with the foreign Governments separately and in their own capitals had proved in the long run ineffective, it next endeavored to attain its ends by the instrumentality of conferences with the representatives of the Powers sitting together at Tokyo. Before dealing in detail with these conferences a short survey of more general features affecting the negotiations conducted in them may be apposite.

The first point to notice is the preponderating influence of Great Britain and of the British representative at Tokyo. This was so, not only because Britain was the greatest of world empires and the supreme naval Power, but more especially because her interests in the Far East in general and in Japan in particular, far surpassed those of any other Power. In 1863, out of 32 firms engaged in business in Yokohama, 16 were British; and 140 out of the 300 foreign residents in the port were of British nationality. Of the 170 vessels arriving and departing during the year, 100 flew the British flag, and carried 35,000 tons of cargo out of the total of 65,000 tons handled. The total trade of

the port was valued at $14,000,000, of which the British share was $11,000,000. The United States, which came next, did less than $1,000,000 worth of trade.[1] In the same year the Acting Minister was able to report that, despite the political crisis and the antiforeign movement, there had been a great increase in the value of British trade.[2]

The United States, however, increased in importance relative to Britain as time went on, chiefly because she took a large proportion of Japanese exports, mainly silk. But Great Britain remained far ahead in the exports of manufactured goods to Japan. In 1880, of the total Japanese exports, the United States took 42 per cent, France 19 per cent, and Great Britain 9 per cent.[3] The share of Germany was insignificant.[4] Of the total goods imported into Japan, England supplied 53 per cent; France 10 per cent; the United States 7 per cent; and Germany 4 per cent. "Prior to 1886 the United States was at a disadvantage in having no facilities for direct transport, so that Japan's import trade was chiefly with England. As late as 1890 more than one half of Japanese foreign trade was carried by British vessels."[5]

With regard to the numbers of foreign residents in Japan, the total in 1882 was 2,650, of whom 1,200 were British; in 1890 the total had risen to 3,260, of whom 1,400 were British.[6] In 1898, just before extraterritoriality actually came to an end, there were in Yokohama 2,096 foreigners (Occidentals), including 869 British.[7] At Hiogo (the treaty settlement was actually at Kobe, then only a suburb of Hyogo) there were in the same year, 534 British residents, 155 Americans, and 136 Germans.[8]

The personality of the British Minister, Sir Harry Parkes, also counted for much. Parkes was a self-educated man who had come out to China in quite poor circum-

stances in 1841, and by sheer energy and ability had won his way to the foremost rank. He had had a long and adventurous career in China before his appointment as Minister to Japan in 1865.[9] Dickins thus describes him on his first arrival in Yokohama.

> The writer was present on the occasion and well remembers the alert figure, vigilant questioning face, and quick step of the consular officer, concerning whom General Sir Charles von Straubenzee wrote in 1854 to Lord Elgin, "his energy is untiring, never sparing himself in any way, personal danger and personal comfort were never thought of, when he could in any way advance the public service."[10]

As Minister to Tokyo, Parkes took a keen and friendly, if sometimes patronizing, interest in the new Japan that was shaping itself under his eyes. When he left Japan for a short rest in 1871, the chief councilor of the Emperor wrote a letter to the British Premier expressing his appreciation of Parkes's services:

> My Lord,—Sir Harry Parkes, the British Envoy Extraordinary and Minister Plenipotentiary, has held those functions in Japan during a period of years, and is well acquainted with the affairs of our country; he has earnestly endeavoured to ensure the amicableness of our relations, and has performed the duties of his office in a loyal and upright manner, so that the friendly intercourse between our respective nations has become more and more intimate, which is a matter of rejoicing.
>
> Furthermore, our Government has trusted profoundly to him as a support and has frequently received his aid in different matters with various nations, and it is truly impossible to express our sense of gratitude. He has informed me that he is about to return to England, and I have been commanded by His Majesty the Tenno (Emperor) to take the opportunity of telling your Excellency of his merits during his period of office, and I have the

> honor to request that you will lay these facts before Her Majesty the Queen of England. I have etc. Sanjo Udaijin.[11]

The Emperor also expressed his gratitude to Parkes in a private interview.[12]

One especially important work was performed by Sir Harry Parkes which was of great value to the Foreign Office, the Consular Service in Japan, and to Japan herself. He understood the value of sound training and careful research all the more because he had largely trained and taught himself.

> Sir Harry's practical wisdom was shown, among other things, in the training of his officers,—he developed the intelligence of each in its special line. . . . His stimulating influence raised the members of the consular service to the position of chief authorities in all subjects connected with Japan.[13]
>
> He had the immense advantage of being served by an admirable staff of officers, in large measure trained by himself; with such men as Aston, Gubbins, Hall, McClatchie, Mitford, Siebold, and Satow to forage for him, he could trust to his inductions with an assurance which no other Minister could feel.[14]

This mass of detailed knowledge which Parkes could command at will enabled him to act as *doyen* of the foreign representatives in Japan, and, after his transference to Peking in 1883[15] and his death in 1885,[16] the group of experts in Japanese affairs whom he had trained up remained to give to the British Government that special knowledge of Japan which not only influenced the negotiations for treaty revision but led up to the Anglo-Japanese alliance of 1902.

Parkes did not regard the extraterritorial system as a permanent one, but considered that it should go as soon as a really effective system of law and judicial machinery was in full operation and had been found to work well.[17] He

held, however, that Japan had not yet reached this stage, and while willing to discuss reforms of detail, set his face against the total abolition of the consular courts or any striking changes in their jurisdiction and procedure. He held that progress must be gradual and that, as Dickins puts it "what Japan has in effect demanded is that the jurisdiction should be abandoned upon the strength of her good intentions."[18] This he was not prepared to concede, and the Foreign Office, which had great faith in his ability, left matters very largely to him[19] and gave him full support. As for the Treaty Port residents, they bombarded their Governments with resolutions of protest at the first hint of treaty revision.[20]

In July, 1880, the new Penal Code, drawn up under the aegis of M. Boissonade, was promulgated, and came into force in January, 1882.[21] Further police and prison reforms were also undertaken.[22] In the realm of civil law, M. Boissonade was in 1879 intrusted with the task of preparing a draft of a code,[23] while in 1881 a committee was organized by the *Daijokwan* (Council of State) for the compilation of a commercial code, and the work of drafting this was intrusted to a German legal expert, Dr. von Roesler.[24]

On the strength of this the Japanese determined to approach the Powers once more on the question of judicial autonomy. In 1880 Count Inouye, the Foreign Minister, made a draft of a proposed new treaty and opened the campaign for revision.[25] It was not until February, 1881, however, that the Japanese proposals in their complete form were submitted to the British Government.[26] Similar proposals were made to the other Treaty Powers, and an exchange of views took place between them.[27] On July 23, 1881, Earl Granville addressed a letter to Mr. Mori, the Japanese Minister in London.

It was obviously incumbent on Her Majesty's Government to exchange views with the European Treaty Powers who had received the same proposals, and I may add that the character of the changes which your Government desires to introduce into the existing Treaties, and which extends far beyond the scope of revision provided for by the Twenty Second Article of the British Treaty with Japan, has materially contributed to the difficulty of speedily arriving at a common ground of agreement.

Thus, in regard to the new system of jurisdiction to which it is proposed that the British subjects in Japan should in future be amenable and which forms almost the sole subject of the draft Treaty of Friendship, I may point out that the questions raised by your Government are of too wide and important a nature to admit of being treated without previous careful examination of the laws of Japan and the constitution and legal procedure of the Japanese Courts.

On these subjects Her Majesty's Government is still only imperfectly informed, and they have no means of judging how far the laws which are believed to be under revision and the practice of the Courts, which do not appear to be regulated by any positive rules of procedure, have been brought into conformity with the principles received by Western nations.

For these and other reasons—Her Majesty's Government feel that they cannot accept the two draft Treaties proposed by your Government as a suitable basis of negotiation. . . .

I shortly expect to be able to instruct Her Majesty's representative at Tokyo to propose to your Government to enter in joint preliminary negotiations with all the foreign representatives at that capital, for the purpose of arriving at a general agreement as to the essential amendments in the existing Treaties which experience has proved to be desirable. This agreement, after being accepted by all the European Treaty Powers, should serve as the basis of revised Treaties which might then be separately concluded by the various contracting Powers at the place and in the form, which they may severally consider most convenient.[28]

It will be noted that the British Foreign Secretary re-

fers to the European Treaty Powers only. This was because the United States had decided to pursue a different and separate policy. On May 20, 1881, Mr. Bingham, the United States Minister in Japan, was instructed by Mr. Blaine, the Secretary of State, that, with reference to a report that the European Powers were disposed to insist on a revision of the treaties with Japan by a joint conference to be held in Europe, the United States "would not take part in any such conference."[29]

> The intimacy between our own country and Japan, the most advanced of the Eastern nations, continues to be cordial. I am advised that the Emperor contemplates the establishment of full constitutional government, and that he has already summoned a parliamentary congress for the purpose of effecting the change. Such a remarkable step toward complete assimilation with the Western system can not fail to bring Japan into closer and more beneficial relationship with ourselves as the chief Pacific power.[30]

The United States, while adopting a cautious attitude on the question of judicial autonomy, was prepared to concede full independence to Japan in tariff matters.

> I do not see that I need at present repeat or add to the previous instructions of the Department of State with which you are familiar, or to qualify the belief this government entertains that Japan is in a position to assert her independent national right to fix her own taxation and import dues, within just and usual limits, as an incident of national sovereignty.[31]

Despite the friendly attitude of the United States, the prospects of the Conference at Tokyo were not bright. The draft treaty submitted to the Powers by Inouye in 1880–81, had asked for full judicial autonomy as soon as Japan had got her new codes of law and procedure completed, and for consular jurisdiction to be abolished at once in matters of police administration, in cases of partnerships

between Japanese and foreigners, and in Customs affairs. Nothing was offered in return.[32] The European Powers followed Britain's lead in refusing even to discuss these proposals.[33]

Therefore at the Conference which opened in Tokyo on January 25, 1882,[34] Inouye brought forward fresh suggestions. Mr. Bingham, the United States Minister, was present at these deliberations and was at once challenged by Parkes who said that he begged to

> welcome the minister of the United States and to assure him of the pleasure it afforded them to see him join their meeting, not only on account of the high regard they entertain for him personally, but also because his presence denoted, as they believed, the friendly desire of his government to act *in concert* with the powers.[35]

Mr. Bingham replied that he had been authorized to "participate in the deliberations of the Conference, but in no wise to thereby commit the government of the United States to any action that may be taken."[36] After some preliminary discussion Inouye brought forward his revised plan for the revision of the judicial clauses of the treaties.[37]

Within five years from the date of the ratification of the proposed new treaties extraterritorial jurisdiction was to be entirely abandoned, except in certain capital offenses and in matters affecting the personal status of foreigners. During the transition period of five years, the Japanese courts, composed in part of foreign judges, were to exercise criminal jurisdiction over foreigners in all cases of "contraventions" wherever committed, and all cases of debits committed beyond the immediate treaty limits. Further such courts were to enforce all police or administrative regulations both within and without those limits. They

were also to exercise full jurisdiction in all civil cases between foreigners of different nationalities.[38]

In return Japan offered the enlargement of foreign rights of residence and land tenure within the Treaty Ports and permission to foreigners to travel, although not to reside, or hold land, in the interior.[39]

The United States Minister at once approved of these proposals,[40] and the German Minister, Herr von Eisendecker, also welcomed them.[41] Most of the other representatives were at any rate inclined to take them as a basis of discussion.[42] But Parkes at once adopted an attitude of uncompromising opposition, and presented a memorandum stating his view of the situation.[43]

He pointed out that the new penal code had been in operation only a year and that as yet no civil or commercial codes were in existence; no period of probation was provided for in Inouye's plan, even if the proposed Japanese courts worked badly, extraterritoriality would still have to go entirely at the end of five years, and Parkes evidently did not think the courts would function successfully.[44] He was not enthusiastic over the prospect of subjecting the English-speaking foreigners in Japan, who formed the great majority, to laws which were mainly French and German in origin, and held that English systems of law should alone have been considered in preparing the new codes.[45] Finally, he asserted that the removal of the extraterritorial provisions should be undertaken gradually.[46]

Another point that aroused uneasiness was Inouye's suggestion that the proposed treaties should be valid for twelve years, and the new tariff schedules for eight, after the expiration of which, either party should be free to denounce treaty or tariff if it were so inclined.[47] "This proposal to accord Japan the right of denunciation—not given

in previous treaties and never granted to non-Christian states—excited grave misgivings with some of the delegates."[48] Inouye replied that the Japanese Government was entitled to insist on this right as being in accordance with the principles of international law.

> For by its acknowledged achievements in the field of political reform, as well as by its having taken the initiative in proposing the admittance of foreigners to its territory in conformity with the usual practice of civilized States, it had conclusively proved that it had broken with the old system of oriental isolation, and was prepared in the future to be bound by the general principles of international law.[49]

Thus a deadlock resulted in the Conference, which broke up on July 27,[50] having achieved no substantial results. "Its voluminous proceedings were sent to the respective Governments which simply shelved them."[51]

It is not easy, without very exact knowledge of the internal condition of Japan in the eighties, to judge fairly the conduct of Parkes and the British Government. Siebold contrasts their reactionary policy with the liberal attitude of Germany and the United States and suggests that the *non possumus* attitude of the British Government was at least partly due to the apprehensions of the British community in the Treaty Ports who considered that subjection to Japanese jurisdiction would expose them to intolerable abuses of justice, a fear Siebold considered groundless. He also suggests that the British Government was afraid that the concession of judicial autonomy to Japan would have unpleasant repercussions in the British position in China and India.[52]

Dickins, on the other hand, supports Parkes without hesitation. He considers, as did Parkes himself, that the Americans and Germans were simply trying to curry fa-

vor with the Japanese and hoped to benefit at the expense of British trade.[53] The Japanese, he holds, exaggerated the importance of extraterritoriality and the slight to their national self-esteem involved in its maintenance.[54]

> In some thirty or forty millions of Japanese, this exiguous amount of half-exemption, accorded to a few aliens residing in three or four open ports, could scarcely be a matter of material concern—aliens who might not wander a foot beyond a strictly guarded frontier, drawn at a few miles from their port, save under a rigid passport system which forbade . . . even a verbal contract of purchase or sale being made beyond the boundary. Neither in China nor anywhere else, in modern times, has so severe a system of isolation ever been enforced against foreigners.[55]

This is true, but it is not the whole truth. The foreign merchants at the Treaty Ports, while few in number, controlled a large proportion of the overseas trade of Japan, while the places in which they were resident were the largest cities in Japan. It has already been noted how serious were the obstacles placed in the path of the Japanese Government by the accretions which had grown up around the original privileges conferred by the treaties, especially with regard to matters of police, quarantine, and harbor regulations. The imperfections in the Japanese judicial system were, at least to some extent, offset by the shortcomings of some of the consular courts and the Japanese Government could fairly reply to the contention that the abolition of consular jurisdiction was likely to subject foreigners to an inadequate and possibly unfair native tribunal, with the answer that its own citizens were actually in many cases so subjected every time they had occasion to bring an action against a foreigner. It was scarcely just, therefore, for some of the Powers to insist upon an irreproachable judicial organization being in full operation in

Japan before they made any surrender of extraterritorial privileges.

Nor is it necessary to deny to the United States or Germany all disinterestedness in their advocacy of Inouye's proposals. The United States Government had always been especially friendly to Japan since the days of the Perry expedition, and since Americans were in the employ of the Japanese Government, it had its own sources of information upon the state of the country. The German Government too, which then meant that of Bismarck, may well have been influenced by what it had seen of the Japanese statesmen who had come to study the constitution and the administrative and military organization of the new empire, as well as by those of its subjects who were also engaged in the service of the Japanese Government.

As to the competence of the Japanese judges and advocates, there is considerable difference of opinion. Mr. Kirkwood, a member of the Japan Bar, wrote as follows to Parkes:

> I do not say that the actual organization of the Courts is bad, but I do say that the judges are as a body incompetent and without qualifications, that in all the Courts in Tokyo and Yokohama (Supreme, Appeal and First Instance) there is not a single interpreter of any pretensions to competency, that the judges have no idea of the relative position of bench and bar, and that the equipment of the Courts is such as to render the proper conduct of a suit by counsel almost an impossibility.[56]

Dickins' own view is rather different. He writes:

> My own seven years' experience of Japanese tribunals was I confess, somewhat different, though equally dismal. The judges seemed to be able, painstaking, and impartial, but appeared to have no body of law upon which to found their decisions or guide their procedure. The method of carrying judgments into execu-

tion amounted to a plain denial of Justice, while with hardly an exception, Japanese evidence was wholly untrustworthy and subject to no sort of control whatever.[57]

Parkes was thoroughly justified by the event in believing that Japan would experience much more difficulty than was anticipated, in applying a body of law drawn largely from European sources to serve the needs of a social organization utterly alien from anything to be found in Europe. Some Japanese themselves doubted the wisdom of the experiment. Dr. Masujima, for instance, declared that "the introduction of a new system of laws in its entirety by direct importation from foreign countries involves the complete subversion of the basis of Japanese society."[58] Dickins declares that the Tokugawa systems might easily have been made the basis of one adapted to modern needs—a very bold statement. He adds that after the Iwakura Mission "the plan adopted was the simple one of stretching the whole Japanese people upon a Procrustean bed of imported foreign law, in order to obtain over a few cooped-up foreigners that half-jurisdiction which the deficiencies of Japan had made it absolutely necessary to reserve by treaties."[59]

It should be borne in mind that even if extraterritoriality had never existed in Japan, contact with western civilization, especially with occidental industrial and commercial organization, would have inevitably brought about great changes in Japan and compelled a recasting of her laws. Since she had little civil and no commercial law, and custom in those matters was that of a mediaeval, rather than a modern, society, it seems that she would have been compelled to borrow largely from abroad in any case. Legal concepts, like political ideas, are firmest rooted when indigenous in origin and character, but this does not exclude

the possibility of any society making accelerated progress through coming into contact with a more advanced group. In this connection, it is interesting to notice that much of mediaeval Japanese law was not derived from local customs, but was Chinese in origin.[60]

Granting the necessity for the introduction into Japan of laws based on western practice and procedure, there still remained a vast deal to be done before the Japanese jurisdictional system reached the standard of the greater Powers of Europe or of the United States. A year before the opening of the 1882 Conference, Fukuchi wrote in the *Nichi-nichi Shimbun* a criticism of the existing law and police powers from the standpoint of a Japanese subject.

Let us now give an example of what may befall a native of Japan under the existing laws. Suppose that a gentleman arouses the suspicion of the police. They can enter, or if necessary, break into his house at dead of night, without notice or warrant. Although in disguise they may arrest him, rummage through his papers, and thrust him into prison, where he may be kept for weeks and months undergoing preliminary examination. He may be charged with all sorts of offences, refused bail, deprived of every trace of freedom. Sent to a higher tribunal, the doors may be closed and the public excluded. He will not be allowed the assistance of counsel, and, unless very clever and well versed in law, cannot hope to extricate himself from the net which surrounds him . . . though perfectly innocent. Law books cannot be used in prisons, and he cannot therefore refer to them for his defence. There is no jury—his guilt or innocence lies in the uncontrolled discretion of the Judge who presides . . . if acquitted, he may be tried for the same offence over and over again.[61]

The Japanese Government perceived the necessity of reëxamining what had already been done in the way of legal reform as well as of proceeding farther with it.

From 1882 onward, various committees were at work on the important and difficult problems of revising the Criminal Code of 1880 which had been found largely unsuited to Japanese needs,[62] and drafting a Civil Code[63] and Codes of Civil[64] and Criminal Procedure.[65]

In the meantime Count Inouye had received sufficient support for his proposals put forward at the 1882 Conference to hope that he might be successful in obtaining a large measure of treaty revision as the result of fresh negotiations. Mr. Bingham, the United States Minister in Tokyo, proposed to his Government that it conclude a separate treaty with Japan on the basis of Inouye's proposals in 1882.[66] This the United States was not yet prepared to do. The Secretary of State replied that the United States was "not yet prepared to accept unreservedly the Japanese claim to exclusive jurisdiction," but preferred "an intermediate period of mixed jurisdiction."[67]

President Arthur, in his Third Annual Message to Congress of December 6, 1883, said:

> The question of the general revision of the foreign treaties of Japan has been considered in an international conference held at Tokyo, but without definite result as yet. This Government is disposed to concede the requests of Japan to determine its own tariff duties, to provide such proper judicial tribunals as may commend themselves to the Western powers for the trial of causes to which foreigners are parties, and to assimilate the terms and duration of the treaties to those of other civilized states.[68]

On October 31, 1885, therefore, Mr. Hubbard, then the United States Minister at Tokyo, was instructed to attend the forthcoming conference for the revision of the treaties. He was to support the claims of Japan to make separate and terminable treaties covering both the tariff and judicial administration, but was to accept an equitable

compromise, so as not to interfere with any agreement that Japan might make with the other Powers.[69]

In later instructions Mr. Hubbard was informed that

> the chief object of the United States is to secure to Japan, as far as practicable, complete autonomy. The speediest and most effectual way of accomplishing this end appears to be by coöperating with the other treaty powers, at the same time taking care not to depart from our settled policy of avoiding entangling alliances —The object, as understood by this government, of the past and present conferences of revision is to seek and frame a common basis for independent treaties. . . .
>
> The United States are indisposed to accept any result of the pending revision which does not embrace the terminality of the treaties within a reasonable period. The objective point to be kept in view in the discussion is the recognition of Japan's autonomy. This being established and conceded on all sides, the regulation by Japan of her foreign commerce and of her domestic affairs follows as an attribute of sovereignty, to be restrained only so far as she may deem it expedient by independent treaties. Every step, therefore, that tends towards the unquestionable autonomy of Japan is a progression towards our position. If the work of revision should fail to secure to Japan, now or within the near future, the measure of autonomy to which we think she is entitled, it will remain for this government to determine its course, and consider whether the desired result may be otherwise reached by independent negotiation between the United States and Japan, on more practical and more immediately applicable bases than are found in the separate treaty of 1878.[70]

The second Conference of the representatives of all the Treaty Powers met in the Department of Foreign Affairs at Tokyo on the first of May, 1886.[71] The Japanese negotiators were Count Inouye and Viscount Aoki, the Japanese representative in Berlin, who had been summoned home to take part in the proceedings of the Conference. Great Britain was represented by her minister at Tokyo, Sir Francis

Plunkett, and Germany by Herr von Holleben, assisted by Consul General Zappe.[72]

Germany was, as in 1882, prepared to support the Japanese in their claim to autonomy, while the attitude of Great Britain had also undergone a change since the days of Sir Harry Parkes.[73] The progress that Japan had made in legal and judicial reform, as well as the establishment of a system of cabinet government on European lines in 1885,[74] produced a favorable effect on the Treaty Powers. The representatives of Great Britain and Germany, therefore, declared, with the full approbation of the other Powers concerned, that the progress made by Japan offered a sufficient guarantee for carrying into effect the proposals of reform which had been made in 1882.[75]

The prospects of the Conference therefore appeared to be bright. The general principle of autonomy was conceded to Japan, and the Conference was in consequence largely concerned with the extent and nature of the safeguards against miscarriage of justice to foreign residents which should be stipulated for over the period during which the new codes were being completed and the Japanese Bench and Bar gaining experience.

The proposals of Count Inouye were, first, that consular jurisdiction outside of the foreign settlements was to be abolished as soon as an English version of the new Japanese Civil Code should be published, secondly, the enforcement by the consular courts of Japanese laws and regulations. After three years from the date of the signature of the proposed new treaties consular jurisdiction was to be abolished entirely.[76] In return for these concessions Japan was prepared to concede the establishment of mixed courts, by which a certain number of foreign judges would sit on the Japanese Bench. Japan was to be thrown entirely open to foreign trade and residence, and, after the final

abolition of extraterritoriality, foreigners were to be allowed to acquire real estate outside the foreign settlements.[77] Inouye was also ready to submit the new law codes to the Powers for their scrutiny and approval.[78]

These proposals were taken as a basis of discussion by the Conference, which met some thirty-six times in all.[79] On June 15, 1886, the British and German representatives brought forward a new scheme, which became known as the "Anglo-German Project."[80] In February, 1876, mixed tribunals had been established in Egypt, and had been found to work well.[81] These courts were exclusively competent to try all suits in which the plaintiff and defendant were of different nationalities, and were authorized to deal with actions concerning real estate, even between persons of the same nationality. Only cases of personal status, such as questions of marriage and inheritance, were excluded from their jurisdiction.[82] In criminal matters they could deal with breaches of police regulations and offenses committed against, or by, members of the tribunals themselves.

Foreigners were in a majority, in these courts, of four to three in the Courts of First Instance, and of seven to four in the Court of Appeal. The honorary presidency of each court was reserved for an Egyptian subject, but the vice-president, the real acting chief, was a foreigner.[83]

Such was the system which the Anglo-German Project proposed should be applied to Japan. Inouye accepted it, at least in general outline,[84] and the Conference seemed to be heading for agreement, when it was unexpectedly wrecked by a typhoon of hostile public opinion in Japan.

Ever since 1882, there had been growing irritation in Japan at the delay in conceding what were regarded as the legitimate sovereign rights of the country, full judicial and tariff autonomy. It was held that by the principles of inter-

national law Japan had an unconditional right to these privileges, and that if they were not accorded her by agreement, she would be justified in seizing them by the simple method of denouncing the existing treaties.[85] Why, therefore, should she make concessions to obtain what was hers by right, and what, if the Government only had sufficient courage, could be taken at any time? The rapid growth of the Press in Japan enabled the masses to grasp the general facts of the situation to a hitherto unknown degree.

When, therefore, knowledge of the proposals under discussion leaked out, and the proposed draft treaty was actually published in a Yokohama newspaper,[86] a storm of protest arose. One party in the country protested against the concessions in matters of judicature as humiliating and dangerous.

A deep impression was produced on public opinion by the reasoning of those, who, referring to the analogy between what was thus proposed and the state of things in Egypt, with its "mixed tribunals," essayed to show that the nominal recognition of Japan's sovereign rights would, in effect, be rendered nugatory by the various safeguards promised to the Powers in the field of jurisdiction and, that, therefore, the new condition of affairs could scarcely be regarded as an amelioration of the existing system of Consular Courts.[87]

A more ominous note was sounded by the still numerous die-hards who hated the introduction of foreign ways and manners[88] and considered that the full policy of *Sono-joi* (reverence the Emperor and expel the barbarian!) ought to have been adopted at the time of the Restoration of 1867–70. At least, so this group held, the hated foreigners must continue to be confined to the Treaty Ports, even at the cost of continued consular jurisdiction![89] Others, again, feared the effect on the position of native industrial-

ists and merchants if the country were everywhere freely thrown open to foreign traders, and umbrage was also taken at the proposal to allow aliens to acquire real property outside the Treaty Ports.[90]

No concessions! became the popular battle cry;[91] political agitators poured into Tokyo from all over the country;[92] and the storm shook the Japanese Government itself and caused a split in its ranks. In June, 1886, Viscount General Tani, Minister of Agriculture and Commerce, and the leader of the reactionary party, resigned his position.[93] Inouye struggled on until the summer of 1887, but was forced to adopt a stiffer attitude with regard to the concessions asked for by the Powers.[94] This made progress increasingly difficult, especially as the clamor in Japan, the sounding of the old antiforeign note, increased by the unfortunate circumstance of the loss of an English steamer, in which many Japanese passengers were drowned while the crew escaped,[95] alarmed the representatives of the Treaty Powers. A deadlock was finally reached over the question of the draft convention on jurisdiction which required the submission of the Criminal Code of the Japanese Empire to the Treaty Powers before it was put into operation.[96] On July 19, 1887, Inouye adjourned the Conference *sine die* "in order to allow the accomplished facts of codification to prove that the Japanese Government was at last in a position to identify its legislation with western principles and render guarantees unnecessary."[97] In the following month he resigned office.[98]

Thus were negotiations broken off just when revision seemed in sight. That Japanese fears of the mixed court system being prejudicial to the longed-for judicial autonomy were not unfounded is shown by what Milner has to say about the system as he saw it in Egypt.

The tribunals were a new stronghold of foreign influence, a new surrender of the sovereign rights of the native government. They might nominally be the Courts of the Khedive, who appointed their foreign members, although on the proposal of the Powers. But they were in reality foreign Courts deriving their authority from outside, and they have not hesitated to exercise that authority against the native government, whenever they thought it right to do so. Add to this, that they naturally enjoy an amount of influence and respect which could not attach to the numerous petty tribunals (Consular Courts) for which they were substituted. Judicially far better, they are at the same time politically far more formidable than the authorities whom they have supplanted.[99]

It seems fortunate, therefore, both from the Japanese standpoint and for the sake of good feeling between Japan and the Powers, that this system was not introduced into that country. It would have provoked irritation, been harder to get rid of even than the consular courts, and might have driven the exasperated Japanese people into dangerous courses.

The Japanese statesmen were now in a difficult and dangerous position, between the Scylla of the Powers' opposition to the unqualified concession of judicial autonomy, and the Charybdis of popular antipathy in Japan to any concessions. So bitter was the feeling aroused, that the minister who displayed any signs of agreement to what the people considered an unequal treaty might even be menaced with assassination. In such circumstances, treaty negotiations were bound to be long and arduous, and many years were to elapse before Japan gained her long-desired autonomy in matters of jurisdiction.

CHAPTER VII

The Efforts of Count Okuma at Treaty Revision

IN February, 1888, Count Okuma succeeded Count Inouye as Japanese Foreign Minister.[1] Okuma, whose liberal sympathies in matters of domestic politics had hitherto caused him to be in opposition to the ruling group among the Japanese statesmen,[2] was a man of great ability and determination. He well understood the difficulties of the situation which confronted him, but he was resolved to overcome them by perseverence and by unflinching adherence to the policy which he had planned.[3]

Okuma was convinced that the experience of Inouye showed that the scheme of negotiations for treaty revision at conferences between Japan and all the Great Powers would never result in any substantial progress in the direction of judicial autonomy. He therefore resolved to revert to the policy of separate negotiations with each of the Powers concerned, believing that if he could succeed in persuading one of them to sign a revised treaty, the others would be bound to follow suit before long.[4]

First of all, however, he determined to approach a Power which had hitherto concluded no treaty with Japan because of the poverty of its interests in that country. He calculated that such a nation would be fairly easily persuaded to sign an agreement on equal terms and that then Japan could point to this as a precedent in her dealings with the Treaty Powers. For this purpose he fixed upon Mexico, which had no residents in Japan and little trade worth speaking of with her.[5] His overtures proved success-

ful and on November 30, 1888, a Treaty of Amity and Commerce was concluded at Washington between the two Powers.[6]

This treaty, concluded by Count Mutsu, then Japanese Minister at Washington and Señor Romero, the Mexican Minister to the United States,[7] provided for peace and amity between the two Powers,[8] for the establishment of diplomatic agents and consular officers by each signatory in the territories of the other,[9] and for reciprocal freedom of commerce and navigation.[10] By Article IV it was especially provided that all of Japan should be thrown open to trade and residence by Mexican citizens.[11]

Articles VI and VII provide for reciprocal treatment with regard to harbor dues, or other port charges,[12] and duties on imported or exported goods.[13] Article VIII deals with the question of jurisdiction and by it Japan secured full judicial autonomy over Mexicans entering her territories or territorial waters.[14] By Article IX it was laid down that the treaty should come into operation immediately after the exchange of ratifications and provision was made for its termination by either party if desired.[15] The treaty was written in Japanese, Spanish, and English, and the English text was to be the official one.[16] It was ratified by Japan on January 29, 1889, and the ratifications were exchanged at Washington on July 18, 1889.[17]

Having won this success, Count Okuma next turned to the far more difficult task of negotiations with the Treaty Powers. He was well aware of the inflammable state of Japanese public opinion on this question, as well as of the fact that his political opponents were waiting for a chance to raise a hue and cry against him and secure his overthrow.[18] But he also realized that the Treaty Powers would not, for the most part, concede absolute and unconditional jurisdictional powers over foreigners to Japan,

and that, therefore, some concessions would have to be made. He hoped, however, to make these as small as possible, and he therefore insisted upon the strict legal interpretation of the existing treaties,[19] so as to make them as unpalatable as possible to the foreign residents, and thus decrease the opposition to their revision.

President Cleveland, in his Fourth Annual Message to Congress of December 3, 1888, said:

> On the 9th of August, 1887, notification was given by the Japanese minister at this capital of the adjournment of the conference for the revision of the treaties of Japan with foreign powers, owing to the objection of his Government to the provision in the draft jurisdictional convention which required the submission of the criminal code of the Empire to the powers in advance of its becoming operative. This notification was, however, accompanied with an assurance of Japan's intention to continue the work of revision.
>
> Notwithstanding this temporary interruption of negotiations, it is hoped that improvements may soon be secured in the jurisdictional system as respects foreigners in Japan, and relief afforded to that country from the present undue and oppressive foreign control in matters of commerce.[20]

The United States was, therefore, willing to enter into separate negotiations and the German Government also expressed its readiness to do so.[21] Okuma therefore approached these Powers first, thinking that they would be more accommodating than Great Britain; and while he conducted negotiations at Tokyo with Mr. Hubbard, the United States Minister,[22] Marquis Saionji, the Japanese Minister at Berlin, carried on similar conversations with Count Herbert Bismarck, the German Foreign Secretary.[23]

The United States Government telegraphed its approval of the principles contained in the proposals for a revised treaty laid before it, and Okuma then began nego-

tiations with Great Britain by a conversation with Mr. Trench, the British Minister at Tokyo, on December 29, 1888.[24] He said that

his Government was anxious to resume at once the negotiations which had been interrupted by the adjourning of the late Conference in July, 1887. In the new proposals which his Government were now bringing forward, their desire was to adhere as far as possible to the basis of the previous negotiations. That basis included two important points; the completion of Japan's Codes, and the arrangements to be made for the exercise of jurisdiction over foreigners. The preparation of the Codes was being pushed on rapidly, and the Japanese Government hoped that they would be completed and promulgated before the close of the year 1889. He felt confident that they would, when completed, be found to be in no way inferior to the laws obtaining in Western countries, but it must be borne in mind that their application to Japanese subjects, and not to foreigners residing in Japan, was the primary object for which these Codes were prepared.

Western Powers could not but admit that the progress, both moral and material, which Japan had made during the thirty years which had elapsed since the conclusion of the existing Treaties was great. Her railways and telegraphs, her educational measures and administrative and social reforms, placed her in a position quite different to that which previously existed, and the development of her trade showed that at the present rate of progress her foreign trade would before long exceed in amount the total foreign trade of China. Simultaneously with this material progress a concurrent growth of public opinion had taken place, and the course of affairs, both foreign and domestic, was being watched by the Japanese public with an ever increasing interest. The failure of the late Conference had been caused by the strong pressure brought to bear upon the Cabinet by the nation, which had condemned the scheme of treaty revision then put forward, on the ground that the concessions therein made to Western Powers were not consistent with the dignity of Japan.

The Japanese Government were now of opinion that it was

undesirable to assemble a fresh Conference for the discussion of matters relating to Treaty revision, and that a more satisfactory solution of the question would be obtained by separate and independent negotiations with the Great Powers of Europe and the United States. The other Powers, whose interests in Japan were inconsiderable, would, he felt assured, acquiesce readily in any settlement which might be arrived at in the course of the separate negotiations which it was proposed to institute. The Japanese Government, moreover, felt that to wait until the completion of Japan's Codes before revising the present Treaties would be to delay that revision unnecessarily, and it was considered that sufficient guarantees for the exercise of jurisdiction over foreigners would be provided by the employment for a term of years of a certain number of experienced foreign jurists in the Supreme Court, and the concession for the same period of a right of appeal to that Court in all cases, whether civil or criminal, above a certain degree of gravity in which foreigners might be directly concerned.

Okuma went on to say that he hoped the British Government would give a favorable reception to his proposals, as he attached special importance to Great Britain's attitude because her interests in Japan were larger than those of any other Treaty Power.[25]

Count Okuma, then, in reply to my enquiry as to whether he had already communicated the new proposals to any of the Treaty Powers concerned, informed me that he had shown them to the Representatives of Germany and the United States, and that the American Government had signified by telegraph their approval of the principles contained in them; ill-health and domestic bereavement had prevented him from communicating them to me at the same time.[26]

I thought it advisable to express my regret that this delay had occurred, observing that Her Majesty's Government, as His Excellency must be aware, would always give their friendly atten-

tion to any proposals on this subject which might emanate from the Government of Japan.[27]

On January 19, 1889, Viscount Okabe, the Japanese *Chargé d'Affaires* in London, sent to Lord Salisbury a draft treaty of revision and two draft diplomatic notes.[28] The preamble to the draft treaty was worded thus:

> His Majesty the Emperor of Japan, and —— being equally desirous of maintaining the relations of good understanding which happily exist between them, by extending and increasing the intercourse between their respective States, and being convinced that this object cannot better be accomplished than by revising the Treaties hitherto existing between the two countries, have resolved to complete such a revision, based upon principles of equity and mutual benefit, . . .[29]

By Article I of the proposed treaty full liberty of entrance, travel and residence was granted to the subjects or citizens of each of the two contracting Powers in the territories of the other, as well as full protection and liberty to use the Courts of Justice.[30] Freedom of conscience and worship, national treatment in the matter of taxation, and exemption from military service were also provided for.[31] Article II provided for freedom of commerce and navigation,[32] Article III granted reciprocal protection for patents and trademarks,[33] and Article IV conceded most-favored-nation treatment in the case of import duties or prohibition of import,[34] Article V dealt with general tariff questions[35] and Article VI with export duties.[36] The eight following articles also were concerned with commercial and maritime affairs.[37]

By Article XV of the proposed treaty, consular jurisdiction was to continue for five years in the Treaty Ports only; outside of them, Japanese courts were to have jurisdiction over natives and foreigners alike.[38] The succeeding

article laid down rules for the determination of Japanese and consular courts.[39]

Article XVII provided for the contingency of any foreign subjects wishing voluntarily to submit themselves to Japanese jurisdiction before the five years had elapsed.[40] Article XVIII dealt with the appointment of consuls and other similar officers.[41] By Article XIX a conditional most-favored-nation treatment was to be accorded each Power.[42] Article XX made it certain that all special privileges would be abolished when consular jurisdiction ceased,[43] while Article XXI specified in general what taxes were to be levied upon foreigners in Japan.[44] The incorporation of the foreign settlements in the Treaty Ports was arranged for by Article XXII,[45] the next article dealt with the commercial regulations attached to the treaty,[46] while by the last article it was provided that the treaty should remain in force for twelve years after its ratification, either party having a right to denounce it after eleven years had expired, the denunciation to take effect after a further twelve months had passed.[47]

Such was the draft treaty submitted to the Powers by Count Okuma. With it were two diplomatic notes, the first of which set forth the various codes of law which the Japanese Government were preparing and provided for the possibility of their being delayed in coming into operation;[48] the second gave the important guarantee that a number of foreign judges would be employed in the Supreme Court of Japan, and explained the position and duties that the Japanese Government proposed for these.[49]

The British Government, while it gave these proposals favorable consideration, was not inclined to accept them quite as they stood. Accordingly, on June 21, 1889, Lord Salisbury sent a counter-draft treaty to Mr. Fraser, the new British Minister at Tokyo, with a warning that, as it

was the intention of the Government to communicate its terms to the other Great Powers, he was not to present it to the Japanese Government until further instructions reached him.[50]

The counter-draft treaty, apart from various alterations and additions to the articles relating to matters of commerce and navigation,[51] made some important amendments in those dealing with the abolition of consular jurisdiction. It substituted a completely new article for Article XV of Okuma's draft treaty, which defined more carefully what the treaty limits were to be during the transition period of five years, and reserved jurisdiction in matters of personal status over British subjects anywhere in Japan to the consular courts.[52]

Some alterations of note were also suggested in the Draft Notes accompanying the treaty. The Japanese Government was to announce that "His Imperial Majesty's Government are now actively engaged in the labor of elaborating the following Codes, *in accordance with Western principles.*"[53] It was to "render the Laws *and Police Regulations* of the Empire into some European language."[54] Finally, "*The English language shall be declared* to be *the foreign judicial language of all Courts in which Judges of foreign nationality sit.*"[55]

In the second note a guarantee was required that foreign judges were to be appointed in the *Appeal Courts* as well as in the Supreme Court.[56] They were to hold office for *six* years in the first instance and were only to be dismissed by a court composed of members of their own body.[57]

Further telegraphic instructions from Lord Salisbury to Mr. Fraser authorizing the presentation of these counter-proposals to the Japanese Government were issued from the Foreign Office on July 27, 1889.[58]

At the same time Count Okuma was to discover that his treaty with Mexico might prove a source of embarrassment rather than of profit. Mr. Fraser was instructed to claim for British subjects under Article XXIII of the Treaty of 1858 all the privileges of travel, trade, and residence in the interior of Japan, conceded to Mexicans under Article IV of the Treaty of 1888.[59] It was the contention of the British Government that the most-favored-nation clause in the Treaty of 1858 was absolute and that therefore even if Japan gave special privileges to any other Power in return for particular concessions by that Power, those special privileges accrued to Great Britain without her giving anything in return.

This sounds unjust, and it was contested by the Japanese Government as well as by that of the United States.[60] But all the European Powers held this view of the most-favored-nation clause and Japan had raised no objection at the conclusion of the treaties, so the British Government was within its strict legal rights.[61]

It is significant, in this connection, to notice that Count Okuma inserted a conditional most-favored-nation clause both in the Mexican Treaty of 1888 and also in his draft treaty submitted to Great Britain, that the British Government refused to accept this, and submitted an absolute clause instead.[62]

In the meantime, Count Okuma's negotiations with the other Treaty Powers had been progressing. On February 20, 1889, Mr. Hubbard, the United States Minister at Tokyo, signed the proposed new treaty,[63] Germany followed suit later. Negotiations with France and Russia were also developing favorably toward the same end.[64]

The British Government, while it reserved its rights under the Treaty of 1858 with regard to the opening up of the interior of Japan to foreigners, at the same time

made it clear that this did not affect its desire to conclude a revised treaty satisfactory to both parties.[65] Discussions continued and by November 12, 1889, all seemed ready for the signing of the treaty. Revision at long last appeared an accomplished fact.[66]

One event which exerted a favorable influence on the attitude of the Powers toward Japan was the grant of a Constitution by the Emperor on February 11, 1889.[67] This was largely the work of Ito, then the foremost of Japanese statesmen and was modeled on the German example, with a Diet, or Parliament, of two houses.[68] Thus Japan received representative, though not responsible, or still less democratic, government.

The grant of this Constitution made it certain that there would be no turning back in the march of progress toward the complete westernization of Japanese institutions. To the Japanese Ministers, however, the new Diet was for many years a curse and a stumblingblock, for the representatives, with little political experience and no chance of responsibility, assumed a hostile attitude in season and out, with the result that political deadlocks and crises succeeded each other with bewildering rapidity, and, as will be seen, more than one Japanese Government was forced to resign just when it was on the point of concluding the treaty negotiations.

Moreover, public opinion in Japan was becoming more than ever insistent on the point of absolute equality of treatment in whatever new arrangements were made with foreign Powers. Okuma had persuaded the Treaty Powers to go beyond the position they had taken in 1886; but the popular standpoint in Japan, with the courage of ignorance, was far in advance of his own. There was much talk, encouraged by some of the foreign advisers employed by the Japanese Government, of its right to denounce the ex-

isting treaties if the Powers would not concede full judicial and tariff autonomy of their own accord. Professor Alessandro Paternostro, one of the chief councilors of the Japanese Ministry of Justice, brought out a treatise in which he declared that Japan by international law had the right to do this, although he advised against it.[69] Count Okuma and the other level-headed members of the Japanese Government well knew how disastrous the consequences of any such hasty action would be, but the members of the Diet and the public at large could not, or would not, realize this.

While the negotiations with England were in progress their general purport became in some way known outside of the British Foreign Office and the *Times* was able to print a summary of the proposed treaty.[70] This was soon reproduced in Japan and at once a storm of opposition arose over the suggested appointment of foreign judges to act on Japanese tribunals.

The Conservatives, under Viscount Tani, opened the attack by an article in their organ, *Nippon*, and were soon followed by all Count Okuma's political opponents, who saw in this their chance to overthrow him.[71] "Undismayed by this clamorous opposition, Count Okuma stood his ground and would have concluded the new treaty in defiance of everything, but the joint and united demonstrations of the various parties opposed to it grew more and more violent."[72] Okuma continued his discussions with Mr. Fraser, who was in sympathy with the Japanese desire for judicial autonomy, and rapid progress was made. The British counter-draft treaty was taken as the basis of negotiation, and agreement was reached as a result of mutual concessions. Okuma accepted the absolute most-favored-nation clause,[73] and the maintenance of British consular jurisdiction in matters of personal status over British

subjects throughout Japan.[74] Further, he agreed that, in view of the large number of British subjects resident in Tokyo, but outside the foreign concession, British courts were to have full jurisdiction over these during the five years of continued consular jurisidiction.[75] In return, the proposed British amendments to the draft notes, including the provision as to the Appeal Courts and the special court for the trial of foreign judges, were dropped, a great success for Okuma.[76]

By October, 1889, therefore, treaty revision appeared an accomplished fact. Treaties had actually been concluded with the United States, Germany, and Russia, while those with England and France were on the eve of signature.[77] So confident was Okuma of success, that he proposed February 11, 1890, the first anniversary of the grant of the Constitution, as the date when the revised treaties should come into operation.[78]

But, on October 18, 1889, as Count Okuma was returning from a rather stormy cabinet meeting on the question of treaty revision, a fanatic named Tsuneki Kurushima, a member of the political organization known as the *Genyosha* of Fukuoka, hurled a bomb into the Minister's carriage in front of the Department of Foreign Affairs.[79] Okuma had his right leg blown off and received other injuries but he eventually recovered. A few days after this outrage, the Kuroda Ministry resigned and the work of revising the treaties was once more suspended.[80]

It is impossible not to feel that Okuma deserved to succeed and that his fate was peculiarly hard and unmerited. If he strove to do what political opponents had failed to achieve, he could not fairly be said to have done anything that would lower his country's prestige in the eyes of the world, or jeopardize the coveted autonomy in jurisdiction for which she had striven so long. The principle of equi-

lateral treatment was expressly set forth in the treaties he sponsored, as well as implicit in the right of denunciation accorded to Japan as fully as to the other contracting Power. The appointment of some foreign judges to sit in the Japanese tribunals can hardly, when looked at closely, be stigmatized as a surrender of Japanese judicial autonomy. The courts remained Japanese and so did the law administered in them; the foreign judges themselves were, so far as was consistent with the principle of judicial independence, subordinated to the law and Government of Japan. Their position would, at least for the first four years of their tenure of office, be more secure and independent than that of any ordinary European employed by the Japanese Government—and these were numerous; but in general there was no vital difference. Above all, Okuma had secured for his Government the right to dispense with the foreign judges altogether after twelve years had elapsed. By that time consular jurisdiction would already be a thing of the past, and Japan have attained complete and absolute independence in all matters of law and jurisdiction.

Nor, if the matter were looked at rightly, could Japan be said to have suffered, even in appearance, if the treaties of 1888–89 had been carried into effect. The provision as to foreign judges was not embodied in the treaties, but in a note which made it seem the spontaneous grant of the Japanese Government. It is true that the British Government in its counter draft, inserted a clause making the notes as binding on Japan as the treaty itself,[81] but even so their exceptional and temporary nature was still apparent. Further, it was no evil thing for Japan that, during the difficult period of transition from an oriental to a European jurisdictional and legal system, there should be some eminent and carefully chosen foreigners on the Japa-

nese Bench, to aid and advise her own upright and well-meaning, but of necessity inexperienced, magistrates. Since no special courts independently constituted, as in Egypt, were to be established, Japan would have had the benefit of sound foreign advice without the irritant of dictation. She may have lost something when she flung this chance aside.

The opposition to Okuma, while to a considerable extent the result of political intrigues and animosities, was no doubt in the main sincere. Apart from stubborn conservatives like Viscount Tani, who wished the hated foreigners to be confined to the Treaty Ports, the average Japanese could not see why his country should have to give anything or make the slightest concessions, when she asked no special favors but only the same rights over those within her own territories which all Western states exercised as a matter of course. The demand for conditions and guarantees he regarded as a sign that Japan was not thought fit to be trusted by the Powers, that her people were not able enough to administer justice fairly or efficiently on occidental lines, that, in short, the Japanese were an inferior race. In a blaze of resentment at this he refused to listen to all arguments for temporizing or concession, and turned with savage fury on even his own leaders and statesmen at the slightest sign of what he considered weak and unpatriotic conduct.

Count Okuma, however, looked upon the question from the standpoint of an experienced statesman who realized how much danger to the international repute of his country would be incurred by precipitate action, or by preferring demands which foreign Powers, rightly or wrongly, were not prepared to countenance. He realized, too, that to the nations of the West the exercise of jurisdiction over their subjects by an oriental Power was something altogether novel and experimental, a state of affairs which they could be brought to recognize only by the most patient and tactful methods. Considering that but eight years had passed since the Conference of 1882, when Great Britain, the most important of the Treaty Powers, had been unprepared to make any major changes at all in the system of consular jurisdiction, the wonder is, not that Okuma had to give the guarantees embodied in the draft notes, but that in general he secured the assent of the Powers to the principle of judicial autonomy.

Although his plans were shattered, when on the very verge of success, and the final work of revision fell to others, he had at least the satisfaction of knowing that his efforts had brought the whole problem far nearer to a successful solution than before. Henceforth it was to be not so much the opposition of the Treaty Powers, but difficulties in the work of legal reform and recurrent political crises at home that delayed the gratification of the Japanese desire for complete sovereign rights.

CHAPTER VIII

The Diplomatic Negotiations Leading Up to the Aoki-Kimberley Treaty of July 16, 1894

THE attempted assassination of Count Okuma and the resignation of the Kuroda Ministry threw the whole question of the revision of the treaties into a state of complete uncertainty.[1] A temporary administration was at first formed with Prince Sanjo as Prime Minister, and Viscount Aoki as Acting Foreign Minister.[2] On December 24, 1889, Count Yamagata was intrusted with the formation of a cabinet, and Viscount Aoki was definitely made Minister for Foreign Affairs in succession to Count Okuma.[3]

Aoki had an extremely difficult problem to solve, but he was not wanting either in ability or courage. The stopgap government of Prince Sanjo had come to an agreement with the Governments of Russia and Germany by which the conventions on treaty revision agreed on during Okuma's tenure of office were to have their date of operation deferred indefinitely.[4] Further the treaty concluded with Mr. Hubbard met with the disapproval of the United States Government, as well as of Mr. Swift, the new American Minister to Tokyo.[5] On December 6, 1889, Mr. Swift was informed that the treaty would not be approved nor submitted to the Senate by the President, without serious modifications.[6] The United States Government was nervous about the concession of full judicial autonomy to Japan without more guarantees than were embodied in the treaty, and it also objected to the reciprocal provision in favor of alien ownership of land, because of the feeling

against oriental immigration in the Pacific Coast states of the Union.[7]

It was clear to Viscount Aoki that he dared not continue the negotiations for treaty revision on the lines laid down by Count Okuma, since to do so would only provoke another crisis. No agreement which carried with it in any form the provision for the appointment of foreign jurists to the Japanese Bench would ever be accepted in Japan. On the other hand could the Treaty Powers be expected to make fresh concessions for which Japan had no equivalent to offer? Seldom can any Foreign Minister have been in a more unpleasant position, but Aoki none the less resolved to open fresh conversations.

On December 27, 1889, he had an interview with Mr. Fraser, accompanied by Mr. Gubbins, as interpreter, in which he outlined the new suggestions of the Japanese Government. He said that

> Her Majesty's Minister was aware of the serious excitement which had been produced in Japan by the disclosure of the terms of the Treaties signed with the United States, Germany, and Russia. Two points in these Treaties had aroused the most violent opposition—the employment of foreign judges and the fixing of a date for the completion of the Codes. The public in Japan considered that these stipulations were injurious to the national dignity, and the delay in the conclusion of the negotiations with Great Britain, France, and other Great Powers enabled the agitation to attain such formidable dimensions that the Government felt it would be unwise to disregard it, and that to persevere with Treaty revision on the present lines might lead to an outbreak of popular feeling against foreigners. Sooner, therefore, than expose themselves to this imminent risk, they preferred to propose the following changes in the scheme of revision.
>
> 1. The withdrawal of the diplomatic notes, which would involve the renunciation of all judicial guarantees.
>
> 2. The postponement of the right of foreigners to hold real

estate until the date when Consular Jurisdiction should have ceased to exist.

3. The modification of the first article of the Treaty, so as to make it clearly understood that the equality of the treatment accorded to foreigners must be subject to the laws of each of the contracting parties.

His Excellency added that the Emperor had given close attention to the subject of treaty revision, and that the modifications in question had received his approval.

With regard to the first point, Viscount Aoki explained that his Government did not propose to substitute anything in place of the diplomatic notes. The written guarantees which these notes contained would be replaced by "guarantees of fact" in the shape of the judicial organization of the Courts and the Codes which it was hoped would shortly be promulgated, but the Japanese Government was not prepared to say when these "guarantees of fact" would be forthcoming.[8]

Viscount Aoki went on to say that the Japanese Government knew that they were laying themselves open to the reproach of using the concessions already obtained from the Powers as a pretext for asking for more, and that an unfavorable impression might in consequence be created. They considered, however, that the domestic situation left them no other alternative and hoped that the British Government would understand the difficulties of their position and make due allowance for this change of attitude.[9]

Mr. Fraser replied that

in view of the important nature of the modifications which were now proposed by the Japanese Government, he must request His Excellency to submit them direct to London. His instructions and full powers related, as His Excellency was aware, solely to the basis on which the negotiations for treaty revision had up to that time been carried on between Count Okuma and himself. The proposed changes enumerated by His Excellency constituted, in his opinion, such an extensive alteration of that basis, that they were

quite beyond the range of his instructions. He could therefore offer no opinion upon them. He thought it right, however, to warn Viscount Aoki that if now, for the third time, the Japanese Government went back on their former proposals, they must be prepared for some hesitation on the part of Her Majesty's Government to acquiesce in the new arrangements suggested. Her Majesty's Government might, he thought, fairly argue that if the Government of Japan were not strong enough to guarantee the carrying out of their own proposals, then treaty revision had better be left alone.[10]

On February 28, 1890, Viscount Aoki sent to Mr. Fraser, for transmission to Lord Salisbury, a note and a memorandum stating in greater detail the new proposals of the Japanese Government, and the reasons for them.[11] These were duly forwarded to the Foreign Office by Mr. Fraser on March 5.[12]

The memorandum set forth, first of all, the causes which had decided the late Kuroda Cabinet to try and bring the revised treaties into operation by February 11, 1890. These were, first, their desire to make whatever advantages were given to foreigners by the new agreements apply simultaneously to all.

While the Imperial Government were well satisfied that no Conventional obligations resting upon them made the synchronous substitution of new Treaties in place of the existing covenants essential,[13] they were nevertheless convinced of the practical difficulty of drawing such a marked distinction between the subjects and citizens of the different Powers as would be necessary if new Treaties with some of the Governments were put into force, while the status quo was maintained in respect of other States.

But the most important reason for haste was the impending convocation of the Imperial Diet.

The people, through their chosen representatives, will then have a voice in the legislation of the Empire, and then the Im-

perial Government will not be in a position to pledge with the same degree of certainty as they would now be able to do the enactment of those numerous enabling laws which are absolutely essential to the proper and complete operation of the new Treaties.[14]

It was now obviously impossible to conclude any new treaties before the Diet met and consequently the situation was profoundly changed.

If, therefore, they (the Japanese Government) should at the present time, and under existing circumstances, push on without change the work of Treaty revision, they would lay themselves open to a charge of want of good faith, because they are convinced that, unless amendments are introduced into the present proposals, the Imperial Government will be unable to secure the enactment of those laws in aid of the new compacts which are regarded as essential.[15]

Consequently the Japanese Government had to choose between postponing indefinitely the work of treaty revision, or introducing such amendments to Okuma's scheme as would satisfy the Diet, and secure its coöperation in putting the treaties into force.

As between these two courses the Imperial Government cannot hesitate. Their anxious desire to preserve what has already been accomplished in the direction of Treaty revision, at the expense of so much time and enlightened labour; their constant and abiding wish to secure a fair and equitable solution of the question, and, above all, the important consideration that an irreconcilable incompatibility exists between Constitutional institutions and those immunities which are claimed in connection with Consular jurisdiction, imperiously demand the unconditional acceptance of the latter alternative.[16]

The modifications which the Imperial Government are convinced would, on the one hand, serve to conciliate divergent opinions which the introduction into the Government of a new legis-

lative element will create, and would, on the other hand, remove from the arena of discussion all questions concerning the constitutionality of the Treaties, may be summarized as follows:

1. The cancellation of the engagement concerning the appointment of Judges of foreign origin to the Daishin-In;
2. The withdrawal of the stipulations concerning the elaboration, codification, and promulgation of the laws of the Empire;
3. The withdrawal of the stipulation concerning the right of foreigners generally to hold real estate, it being understood that this amendment is not to affect the Conventional right at present enjoyed by the subjects and citizens of the Treaty Powers to lease land within certain defined localities in Japan; and
4. The introduction of certain reservations in reference to the right of aliens to be placed upon a national footing.

The memorandum explained that, apart from the question of what attitude the Diet would adopt, the Government had been greatly influenced in making the first two suggested modifications by constitutional considerations.

Having regard to the first of the proposed amendments, the Imperial Government are unable to controvert the proposition that any Conventional engagement or law which makes alienage the chief essential qualification for appointment to office of trust under the Constitution of the Empire is certainly antagonistic to the spirit, if not the letter, of that instrument.

Turning to the second modification, the Imperial Government are of opinion that any engagements or stipulations in reference to future legislation which in any wise hamper or attempt to interfere with the free and independent legislative functions of the Government as organized under the Constitution must be regarded—if not as unconstitutional—certainly as impolitic and unwise, and they are consequently convinced that they ought not now to give their adhesion to them.

They are, moreover, constrained to think that the guarantees

to be given by them in connection with jurisdiction and legislation should only be commensurate with the interests to be subserved. When the proposals now under discussion were submitted to the Great Powers, not only had the constitution not yet been proclaimed, but it was thought until long after the promulgation of the Great Charter that in the matter of going into operation the Treaties would take precedence over the Constitution. The nature and scope of the free and spontaneous grants made by His Imperial Majesty to his subjects are now known, and it is also known that the new Treaties when concluded must come into force under and in subjection to the Constitution. These circumstances, and the no less important facts that the Constitution carefully guards and fully protects the rights and liberties of the people, and that under it the Representatives of the people will have a voice in the enactment of the laws of the land, ought, in the judgment of the Imperial Government, to be regarded as a sufficient assurance that those laws will always be responsive to the requirements of the people, foreign as well as native.[17]

In the explanatory note[18] accompanying the memorandum, Viscount Aoki said that he wished to deal fully and frankly with the reasons which had compelled the Japanese Government to put forward its amendments. The first amendment did not mean any extension of the sphere of jurisdiction of Japanese tribunals; during the proposed transition period of five years the consular courts would still exercise jurisdiction over foreigners to the extent provided for by Count Okuma.[19] He pointed out that despite the expressly transitory nature of the Treaties of 1858, interests had grown up around them and these constituted a difficult problem in relation to treaty revision. "It has even been seriously suggested that any material modification of the treaties would render the imperial Government financially liable in respect of those interests, in so far as they were disturbed by such modifications."[20]

The Japanese Government did not for a moment admit

any such liability, but they were afraid that similar interests might grow up around the appointment of foreigners to the Japanese Bench.

If under the aegis of an undertaking to make such appointments foreign capital should seek investment in the interior of the Empire, and foreign industries should spring into existence throughout the land, it would be found to be as difficult at the expiration of twelve years to withdraw those guarantees under which capital and industries had been introduced into Japan as it is now to reconcile the interests of foreigners with those modifications of the existing Treaties which are deemed essential.[21]

Viscount Aoki gave an outline of the progress Japan had made in judicial organization and codification of her laws and said that this justified her in the demand for full and unqualified judicial autonomy.

Assuming that the amended Treaties are brought into operation within the ensuing year, a simple calculation will show that when Consular jurisdiction is finally abolished, and Japanese jurisdiction in respect of foreigners loses its facultative characteristics, the new order of things will be met by a judicial organization of nearly a quarter of a century's existence; by a system of Codified Criminal Laws of sixteen years standing; and finally by a bench in the selection of which the principle of competitive examination will have exercised a controlling influence for twelve years, and the perfect independence and permanency of which will have been constitutionally guaranteed for six years.

In the light of these important facts it may be asserted, without fear of contradiction, that when Japanese Tribunals supersede Consular Courts, no case in which a foreigner is interested will ever be tried in Last Instance, except by a Court composed, at least, of a majority of Judges who have submitted to the test of a severe competitive examination, and are, consequently, well grounded in the principles of Western jurisprudence, besides being thoroughly conversant with the laws of Japan. These considerations are guarantees of fact.[22]

The actual work done by the Japanese Government in formulating new codes was, Aoki asserted, a clearer guarantee of its good intentions than any treaty stipulation could afford.[23] The objection to foreigners holding land in the interior was, according to the Foreign Minister, because it feared for the success of its policy in promoting small holdings if free purchases by foreigners with capital were to be permitted.[24] The fourth amendment he declared to be

> in principle a reproduction of the concluding paragraph of Article 1, of the Anglo-Russian Treaty of 1859, and that the chief reason why the Imperial Government must seek to introduce the reservation is to enable them without question, to control, if necessary, the ownership of Japanese vessels and shares in the Bank of Japan, and cognate institutions, in which the interests, either political or economical, of the State are directly involved.[25]

Finally, Viscount Aoki declared:

> I desire to invite your attention to the declaration declared in the Memorandum to the effect that "an irreconcilable incompatibility exists between Constitutional institutions and those immunities which are claimed in connection with Consular jurisdiction," and at the same time to assure you that the proposition implies no menace whatever, neither is it intended to indicate in any event any particular line of policy in the future.[26] Consular jurisdiction had never existed in a country in which constitutional principles prevailed and Aoki considered that two elements so antagonistic could not long abide together.
>
> The actual stipulations contained in Japan's ancient Treaties are not so directly responsible for the incompatibility as are the privileges and immunities which are destitute of any express warrant for their existence, but which have been claimed upon the supposition—a supposition which the Imperial Government do not share—that they are essential to the proper and complete enjoyment of guaranteed rights.

> The extra-Conventional immunities, which touch more directly upon the sovereign rights of Japan, and are at the same time more diametrically opposed to Constitutional principles than any others, are those relating to legislation.
>
> There are certain laws which, in order to be of any value or effect whatever, must necessarily be territorial in their application, such, for instance, as the enactments relating to game, quarantine, and neutrality. Notwithstanding this manifest necessity, some of the Powers have claimed that the jurisdictional stipulations in the Treaties carry with them, as an essential incident, complete immunity on the part of foreigners from Japanese laws.[27]

The Japanese Government had never admitted the validity of such an interpretation of the treaties, but nevertheless, endeavored by coöperation with the various Powers concerned to prevent any conflict from arising over these questions. This was now no longer possible.

> While it might be possible under a governmental organization such as exists in Japan today to continue thus to *negotiate* the general laws of the Empire, it is clear that in the presence of a Legislative Body possessed of power to *enact* laws that system must inevitably disappear.

The Diet might insist that those who were not bound to observe the laws should be excluded from the benefits of the statutes and thus foreigners might be deprived of railway and general travel facilities, and those of the postal and telegraph services.

> The Treaties which today form the basis upon which Japan's international relations rest have existed without material modifications for two and thirty years. Of this fact, however, the Imperial Government do not complain. They prefer to regard it as an inevitable part of their national discipline, but they can no longer avoid the conclusion that apart from Constitutional considerations, the changed and changing condition of affairs in Ja-

pan renders an immediate and comprehensive revision of the existing compacts not only desirable, but necessary.[28]

Such was the determined tone adopted by Aoki. His note meant in effect that if the Powers did not concede the new Japanese demands, means might be found to make things very unpleasant for their subjects in Japan, without any formal repudiation of the treaties. It was hazardous to employ such language since the Treaty Powers might well have replied that they would regard any discriminating legislation by the Japanese Diet such as was hinted at by Aoki as an unfriendly action, in which case the Japanese Government would either have had to secure the amendment of such legislation or face a joint ultimatum. This would have meant a diplomatic humiliation of the worst kind, for Japan, although growing rapidly in strength, was as yet far from powerful enough to face one Great Power, let alone a coalition of them.

But Aoki had gauged the situation well, and he probably calculated that the Powers, judging by the amount of success that had attended the efforts of Okuma, were no longer so attached to consular jurisdiction that they would risk the possibility of grave trouble in order to maintain it. If he thought thus, the event justified his belief.

On June 5, 1890, Lord Salisbury sent a dispatch to Mr. Fraser in reply to the proposals of Viscount Aoki.[29] He said that they constituted a very serious departure from the former terms which the Japanese Government had offered at the beginning of 1889. The British Government did not at all like the proposal to reserve the liberty of subjecting foreigners to special disabilities, and invited the Japanese Government to reconsider this matter. Lord Salisbury did not agree that the proposed article was identical with that of the Anglo-Russian Treaty of 1859, but considered it to

be more comprehensive in scope. It would, he asserted, cause suspicion and alarm among the foreign community and it would not remove all likelihood of future discussions or misunderstandings, as Aoki considered, since foreign Powers would still be free to protest against any law they considered unfair to their nationals.[30]

As regards the appointment of foreign Judges and the extent of their jurisdiction, I hope it has been made abundantly clear in the course of the negotiations that the proposals of Her Majesty's Government have not been dictated by any distrust of the impartiality or high qualifications of the native Magistrates, or of the liberality of the Codes which they will be called upon to administer. But it seemed eminently desirable that at the inauguration of the new state of things provision should be made to settle those difficulties and complaints which almost necessarily arise on such occasions with as little recourse as possible to diplomatic intervention. Even with the best systems of jurisprudence, perfected by long practice, miscarriages of justice will occasionally occur, and disappointed suitors are apt to believe in such miscarriages on grounds more or less inadequate. It would have been of advantage to both Governments that there should have been a Tribunal to the composition of which even the most prejudiced could take no exception, and to which all such cases would have been referred in the natural course of legal procedure.

If, however, for reasons of internal policy, the Japanese Government see insuperable objections to making such an arrangement, Her Majesty's Government believe that the wisest course will be to postpone altogether the extension of Japanese jurisdiction to foreigners until the new system has been in operation for some little time, and practical experience has been had of its working. There would then probably be no difficulty in arranging for its application to all foreigners without exception or limitation. Her Majesty's Government are convinced that this plan will be found far more convenient, and that it will give rise to much less embarrassment than an immediate but partial exercise

of Jurisdiction over foreigners, with concurrent Consular jurisdiction within the foreign Settlements.[31]

The British Government saw no reason to abandon or postpone treaty revision or to forfeit the progress already made toward agreement.

> They would propose that a Treaty should at once be signed, containing all those provisions on which the British and Japanese negotiators have already been able to come to an agreement, and that by a Protocol, to be signed at the same time, the extension of Japanese jurisdiction over British subjects, and all those concessions which the Japanese Government make dependent upon it, should be postponed for a period of not less than five years, and until the new Courts and Codes have been in operation for at least twelve months, the Japanese Government engaging in the meanwhile to give full facilities to British subjects to travel in the interior with passports, but not to reside or trade there.

A draft convention and protocol[32] embodying these suggestions accompanied the dispatch.

Such was the generous response of the British Government to the proposals of Viscount Aoki, a response which meant another considerable advance along the road to a revision of the treaties compatible with the aspirations of the Japanese nation. The conciliatory attitude of Lord Salisbury was further evinced by the fact that in reply to a suggestion from Mr. Fraser that the period during which consular jurisdiction should be retained in Japan ought to be extended from five to eight or ten years,[33] the British Foreign Minister replied that he thought the delay of five years would be sufficient.[34]

Mr. Fraser received Lord Salisbury's dispatch and the drafts of the treaty and protocol on July 14, 1890, and presented them to Viscount Aoki on the following day.[35] As it was necessary for consultations to take place among

the members of the Japanese Cabinet, and as the summer vacation was just beginning, some delay was inevitable, but Viscount Aoki at once expressed "in very warm terms, his sense of the liberality and friendliness which Her Majesty's Government had evinced both in the character of their proposals and in the language of the despatch that had served to inclose them."[36]

But a long delay followed, due in the first place to Aoki's desire to secure support from all possible quarters before beginning the regular negotiations,[37] and, secondly, because the Japanese Government wished to defer these until the Diet met and the situation was explained to it,[38] in order to avoid another outburst of popular feeling. The Diet met in November, 1890, and lasted till May, 1891, and proved not at all amenable to the guidance of the Government.[39]

Count Yamagata, therefore, was still unwilling to begin fresh negotiations, especially since there was a good deal of protest against foreigners being allowed to hold real property anywhere except in the foreign settlements.[40] Finally, owing in part to illness, he resigned.[41] This need not have involved the downfall of Aoki himself, but in May, 1891, a fanatic made an attack upon the Tsarevitch (the future Nicholas II), who was at that time traveling in Japan.[42] This brought about the resignation of all the Cabinet, including Aoki.[43]

The Yamagata Government was replaced by a Cabinet presided over by Count Matsukata, with Viscount Enomoto as Foreign Minister.[44] Enomoto was anxious to renew treaty negotiations, but a fresh difficulty blocked the way.[45]

In April, 1890, that part of the Japanese Civil Code which dealt with property was published, and in the following October the portion relating to persons was also

promulgated.[46] It was intended to bring the parts of the Code into force in January, 1893.[47] But a storm of adverse criticism was directed at the Code,

on the ground that it was unsuited to the popular customs of the country in its several bearings, and that it lacked, in not a few points, logical clearness, which would have been secured, it was suggested, if recent legal precedents in Germany and other Western nations had been consulted.[48]

The Commercial Code, published in April, 1890,[49] met with a similar reception.

This Code also evoked much unfavourable comment in legal circles. It was condemned on the ground that some of the provisions were not adapted to the traditional customs of the country, and also because it ran counter in several points to the Civil Code completed by M. Boissonade.[50]

Consequently, despite the appointment by the Emperor on April 12, 1892, of a special committee for treaty revision,[51] little could be done. Moreover when the Diet met again in 1892, a bill was introduced for the postponement of the Codes for four years in order to give time for their amendment.[52] The Government opposed this measure, and on May 26, 1892, Viscount Enomoto made a speech in the Upper House pointing out that delay in the enforcement of the Codes would inevitably mean a retardation of the progress of treaty revision.

Gentlemen, I appeal to you: is it not imperative that these Codes—our indispensable weapon of offence, so to speak, against these hated Consular Courts—should be duly carried into operation from the beginning of next year? At the present moment, when the whole nation is bent upon revising the Treaties, and the operation of the Codes is the *sine qua non* for the attainment of that object, is it not the height of inconsistency to seek to have them postponed? It is not that I maintain that all the 2,826 sec-

tions of the Civil and Commercial Codes are absolutely without a flaw—let sections requiring revision be revised by all means. All that I contend is that the term of the operation of the Codes be not postponed, and to this one contention I adhere on the ground . . . of the intimate connection existing between the Codes and Treaty Revision.[53]

But this appeal was of no avail, the Government was defeated and the bill for postponement was passed in the Diet. Worsted on this point and also on some of its Budget provisions the Matsukata Cabinet shortly afterward resigned.[54] Thus yet another Foreign Minister had fallen and the prospects of treaty revision appeared to be gloomier than ever.

One minor success, however, Enomoto had gained. In 1892, Portugal withdrew her consuls from Japan, on the ground of expense, and did not replace them. The Japanese Government, considering this a failure on the part of Portugal to carry out her duty under the treaty with her of August 3, 1860, to provide an effective system of jurisdiction over her subjects in Japan, asserted its right to judicial authority over them. By an imperial ordinance of July 17, 1892, all treaty provisions with Portugal relative to consular jurisdiction were denounced.[55] Portugal apparently made no protest. This success at the expense of a Power of minor importance, however, had little effect on the general situation with regard to treaty revision.

The Matsukata Ministry was succeeded by a Cabinet headed by Count Ito, the framer of the Constitution. He chose as Foreign Minister, Mr. (later Count) Munemitsu Mutsu.[56] Mutsu was "a man of singular talent,"[57] who had been Minister at Washington and Minister of Agriculture and Commerce in the Yamagata Administration of 1890–91.[58] He determined to succeed where so many others had failed, and to secure the revision of the treaties on lines ac-

ceptable to the Japanese nation. This he considered would be possible if he concentrated on negotiations with Great Britain, the Power with most subjects and greatest interests in Japan, and obtained the signature of a treaty with her first of all. The other Treaty Powers would then be forced to follow suit.

He himself writes:

> I made up my mind to accomplish this great task, and, consulting with the Prime Minister, I made a new draft and again reopened the negotiations. My new draft was quite different from those of my predecessors. My predecessors differed in form and the later ones showed some advance in comparison with the earlier ones, but after all they belonged to the class of Count Inouyé's draft, and were not completely equilateral. But when the constitutional system was adopted in Japan, and the nation had progressed greatly, these semi-equilateral treaties would not correspond with the constitutional system and could not satisfy the desires of the nation. If we proceeded on these lines it was quite clear that we should repeat the former failures. Therefore I thought, however much it would increase the difficulties in negotiating with foreign countries, I had better take measures which would prevent internal troubles. So I made a draft which upset the foundations of the semi-equilateral treaties since Count Inouye and proposed a completely equilateral Treaty to the Foreign contracting Powers. On the 5th of July, in the 26th year of Meiji (1893), the draft was presented to the Cabinet and was approved by the Emperor.[59]

On August 18, 1893, therefore, Mutsu, in a conversation with Mr. de Bunsen, expressed his desire to prepare the ground for a renewal of negotiations by means of a conference between Viscount Aoki, then Japanese Minister at Berlin, and Mr. Fraser. Viscount Aoki was therefore being instructed to go to London in September and it was hoped that his discussions with Mr. Fraser, if sanctioned

by the British Government, would lead to formal negotiations for the conclusion of a treaty.[60]

Lord Rosebery, Foreign Secretary in the new Liberal Cabinet,[61] received the overtures of Mutsu favorably, and Viscount Aoki accordingly went to London and had conversations with Mr. Fraser. By December, 1893, sufficient progress had been made to warrant the opening of formal negotiations for the conclusion of a treaty. Mutsu therefore proposed to the British Government that this be done in London and that he appoint Aoki as Minister Plenipotentiary for the purpose.[62]

A fresh obstacle now seemed to threaten the negotiations. The Japanese Diet met in November, 1893,[63] and, as usual, adopted a very hostile attitude to the Government. Among other things it dealt with the question of treaty revision in no temperate mood.

> At that time in Japan there was a faction which was very anti-foreign and conservative and the opposition party, which did everything to hinder the Government, joined this faction and assisted them. The foolish opinion that it was better to prohibit mixed residence in the Interior and retain the existing treaties was popular with the majority of the Parliament. This caused some hindrance to the negotiations in London which very often seemed on the point of failure.[64]

But both Mutsu and the Premier, Ito, realized that if party strife were again allowed to ruin the treaty negotiations Japan's prestige abroad would suffer greatly. They therefore determined to adopt strong measures. When the Diet declared that the Government had failed to enforce the existing treaties properly and voted an Address to the Throne demanding the abolition of consular jurisdiction, the recovery of tariff autonomy, and the prohibition of the coasting trade,[65] the Government replied by a

dissolution in December, 1893.[66] Count Ito, in explaining to some of the Press why this step had been resorted to, gave the members of the Diet a sound rating.

> Noise and tumult characterized the proceedings in the House, which hardly gave ear to the explanations offered by the Ministers of State. . . . [It] went to the length of abusing the power vested in it of presenting an Address to the Throne, and when asked by His Majesty for an explanation of its meaning, it had to apologize for the ignorance it had displayed.[67]
>
> Several parties in the House of Representatives . . . on the pretext of securing strict enforcement of the Treaties, concocted various projects for restraining the movements of foreigners, heedless of the fact that such measures were in conflict with the provisions of the present Treaties. Moreover, taking advantage of the ignorance under which some persons labor, as to the important bearing which the conduct of foreign affairs has upon national interests, they even tried to promote the aggrandizement of their parties by disseminating exaggerated opinions on the subject, thereby exciting the passions of the public.[68]

Consequently the Government had advised the Emperor to dissolve the Diet.

Mutsu writes:

> The Japanese Government took a very firm attitude and did not change their intention to accomplish this their greatest task since the Restoration. They fought against the general opinion and dissolved the Parliament, prohibited several political societies, and also the publication of some newspapers.[69]

The way was therefore cleared for further progress in the treaty negotiations.

On December 27, 1893, Viscount Aoki communicated to the British Government the new draft treaty proposed by Mutsu.[70] While there was not such a wide difference between this draft and the proposals of Aoki in 1890, as well as the proposed treaty submitted by Lord Salisbury in

June of that year, as Mutsu's statement would suggest,[71] there were some significant novelties. The draft was, as Mutsu writes, on a completely equilateral basis. The stipulation of Salisbury that British subjects should retain all privileges and rights not especially abrogated by the new treaty, was dropped.[72] Article II of Mutsu's draft read "There shall be *reciprocal* (instead of entire) freedom of commerce and navigation between the dominions of the two High Contracting Parties." It ended with a clause to the effect that "It is, however, understood that the stipulations contained in this and the preceding Article do not in any way affect the special Laws, Ordinances or Regulations with regard to trade, police, and public security in force in each of the two countries, and applicable to all foreigners in general."[73]

Article XVIII declared that from the date the proposed new treaty came into force the existing treaties were to be abrogated and consular jurisdiction, with all the special rights and privileges connected with it, entirely abolished.[74] By Article XIX it was provided that the treaty should not take effect until at least five years after its signature and that it should come into force a year after the Japanese Government gave notice of its wish for the treaty to become operative. The treaty was to remain in force for seven years.[75] A draft protocol accompanied the treaty which dealt, among other matters, with the incorporation of the foreign settlements with the Japanese Communes.[76] There was also a diplomatic note which declared that the Japanese Government would not ask to have the treaty enforced until the Japanese Codes were in full operation.[77]

The British Government, reconstituted after the retirement of Mr. Gladstone by Lord Rosebery as Prime Minister, and Lord Kimberley as Foreign Secretary, did not

view these proposals favorably. It objected particularly to the refusal to allow foreigners to hold real property, to the provision at the end of Article II, and to the short duration which the Japanese Government proposed for the treaty. However, it was willing to accept the draft as a basis for negotiations.[78] A series of interviews were therefore held at the Foreign Office between Mr. F. L. Bertie, Mr. Gubbins, Viscount Aoki, and Baron von Siebold.

Thus the negotiations did not promise to run altogether smoothly and they were very nearly wrecked at the outset by reports from Tokyo that the Japanese Government were contemplating the repudiation of the existing treaties. Count Ito in his reply to the members of the Upper House, was reported to have declared that "it is, of course, necessary to strictly enforce such provisions of the existing treaties as are essential to the assertion of the national rights, and when required, *efforts must be put forth for the abolition and amendment of such provisions as may interfere with the exercise of the sovereign rights of the country.*"

This was reported to the Earl of Rosebery by Mr. de Bunsen, in his dispatch of February fourteenth, and he at the same time stated that, in an interview with Mr. Mutsu, the latter had declared that "it would be a great blow to his policy if he should be compelled, by meeting with discouragement in London, to turn to other Powers, or to *resort to other means of asserting what Japan believes to be her rights.*"[79]

The British Government took offense at this, and, when Viscount Aoki came to the Foreign Office on April 2, 1894, to continue negotiations, he was warned that "if the Japanese Government wished to approach the question of treaty revision in a conciliatory spirit, Her Majesty's Government were prepared to meet them, but no proposals

suggested by anything in the shape of a menace of denunciation could possibly be entertained."[80] The Japanese Minister was invited to consider the Protocol signed by most of the European Great Powers on January 17, 1871,[81] which arose as a result of the attempt of Russia to tear up the Treaty of Paris of 1856.

Viscount Aoki replied that he was sure the Japanese Government had not meant that they intended to denounce the treaties and that possibly the English translation of Count Ito's speech was inaccurate.[82]

On April 11, in a memorandum communicated to the British Government,[83] Viscount Aoki declared that he had telegraphed to Mr. Mutsu and had received a reply authorizing him "to declare most emphatically that the same had not, whether in conversation with Mr. de Bunsen, or anybody else, alluded to a renunciation of the Treaties."[84] In the meantime, however, a dispatch had been received on April 3, at the Foreign Office from Mr. Fraser, who had returned to his post in Tokyo. In this communication, Mr. Fraser said that in an interview with Mutsu, on February 28, the latter had stated: "Nor did the Japanese Government consider themselves bound to acquiesce forever in its present position, or to go on maintaining indefinitely a system of relations with foreign Powers which they considered to be no longer compatible with the progress and changed institutions of the country."[85]

Lord Kimberley consequently instructed Mr. Fraser to "point out to the Japanese Government that such expressions as those used by Mr. Mutsu . . . if they mean that she (Japan) will set aside her Treaty obligations, will retard rather than advance the revision which they desire."[86] Explanations were, however, forthcoming from Count Ito and Mr. Mutsu, which averted the threatened breakdown of the negotiations. Count Ito's speech had

been mistranslated by the *Japan Mail,* and Mr. de Bunsen had misunderstood Mutsu's words.[87] All that was intended was to lay stress on the dangers of trying to continue consular jurisdiction in a country governed constitutionally.[88] "It was in this sense and this sense alone, that Mr. Mutsu spoke to Mr. de Bunsen. Anything even suggestive of denunciation was wholly foreign to his intention, as it certainly is antagonistic to the policy of the Imperial Government."[89]

The treaty negotiations therefore continued,[90] the discussions, apart from matters concerning the tariff and general commercial provisions, centering chiefly around four points. These were the omission of Lord Salisbury's provision in Article I of his draft treaty, the exact state of the new Japanese codes, the matter of the foreign ownership of real property, both within and without the settlements, and the question of the duration of the treaty.

With regard to the provision that all rights not abrogated by the new treaty should be expressly declared to stand,[91] Viscount Aoki said "that he did not know what these rights were, and that if such an Article were inserted, a false impression might get about in Japan that some remnants of extraterritoriality still remained, and trouble would result."[92] The British Government replied that there "might be certain rights and privileges which, though not strictly speaking treaty rights, had grown up by custom during the operation of existing treaties, and these it was desirable to protect."[93] But in return for concessions by the Japanese Government in other matters, this demand was eventually dropped.[94]

The objectionable last paragraph of Article II of Mutsu's draft also caused a good deal of negotiation. Viscount Aoki used the same arguments with regard to it as he had done in his note to Mr. Fraser of February 28, 1890.[95]

An amendment proposed by the British Government was finally accepted with some slight changes.[96]

> With regard to the contemplated abolition of extra-territoriality, Mr. Bertie observed that it was a very serious matter for Her Majesty's Government to agree to the surrender of Consular jurisdiction without knowing the nature of the judicial system to which British subjects would be subjected. Japan had objected during previous negotiations to submit her Codes to Treaty Powers *ad approbandum,* and on this condition, Her Majesty's Government had no desire to insist. But they considered they were entitled to ask for full information as to the laws which would be enforceable upon British subjects on the cessation of Consular Jurisdiction.[97]

Viscount Aoki, in reply, furnished a statement of the existing state of the work of codification[98] and also pointed out the security contained in Article XIX, by which the Japanese Government undertook not to give notice for the treaty to come into operation until the work of legal reform was finally complete.[99] This satisfied the British Government, which only desired that the Codes should be translated into English or some European language. Viscount Aoki gave assurances on this point.[100]

As to the matter of land ownership by foreigners in the interior of Japan, the Japanese Minister explained that it was desirable, in view of the feeling against this, to leave it for future settlement through legislation passed in Japan and not to regulate it by treaty. He pointed out that the United States and Russia pursued the same policy.[101]

The question of land in the Foreign Settlement stood on a different basis.[102] The British Government desired the existing system of leases to remain untouched, and introduced a special draft article to that effect.[103] This was accepted by the Japanese Government after some amend-

ments in the wording, but not in the general purport, had been made.[104]

The British Government found it impossible to accept the term of seven years proposed by the Japanese Government for the duration of the treaty.[105] It was giving up unterminable arrangements[106] for a terminable treaty, and for the sake of stability, it desired the treaty to endure as long as possible. The fact was that Great Britain, seeing that consular jurisdiction must go and that the Japanese Government was not in a position to make any jurisdictional concessions, was bent on securing as favorable a tariff agreement as possible, and for as long a time as possible. The British Government therefore proposed twenty years as the period of duration,[107] at the same time asking for a Japanese counter proposal. The Japanese suggested ten years,[108] to which the British countered with asking for fifteen.[109] The term of duration was finally settled at twelve years.[110]

By July 13, 1894, agreement on all points had been reached, and the treaty seemed ready for signature,[111] when trouble arose from an unexpected quarter which threatened delay at the least. War was brewing in the Far East between Japan and China over Korea and both Powers had sent troops to that country to maintain their interests. Some writers have supposed that the Japanese victory over China contributed to her success in securing treaty revision because it impressed the Powers with her strength and military efficiency.[112] Others have pointed out that this view is erroneous since the treaty with Great Britain was concluded before the war broke out.[113]

Mutsu's Memoirs show that in fact, the trouble between China and Japan, so far from assisting, actually endangered the progress of the treaty negotiations.[114] The British Consul General and other British residents in Korea

were anti-Japanese in sympathy and incidents occurred between some of them and the Japanese troops in Seoul. On July 11, Mutsu sent instructions to Otori, the Japanese Minister in Korea, to take any action which he considered necessary relative to this state of affairs. On July 13, Mutsu received a telegram from Aoki saying that the treaty would be signed the next day (July 14). But on July 15, another telegram came in from Aoki to the effect that the British Minister had refused to sign the treaty on the fourteenth, because he had received a report that the Japanese Minister in Korea had requested the Korean Government to dismiss Mr. Caldwell, a British subject employed as naval instructor to the Korean Government. The British Government requested an explanation of this, and Aoki reported that if it were not forthcoming in two days' time the treaty would not be signed. When he received this report Mutsu had only one day in which to act.[115]

He himself says:

> I felt I must not destroy the work of Treaty revision in London owing to such a trifling matter as the dismissal of one Englishman in Korea. We had to reply to Great Britain at once and I had no time to spend in communicating with Otori. Therefore, considering that I could take some action in regard to Mr. Caldwell, if necessary, I sent a telegram to Aoki to the effect that the Japanese Government had never requested the dismissal of Mr. Caldwell from the Korean Government. Just then I received a telegram from Otori in which I found some clauses which would remove the suspicion of the British Government. So I sent another telegram to Aoki to the effect that the Japanese Government had never taken such a foolish action as to request the dismissal of a British subject. . . . I instructed Aoki to say that the Japanese Government would do anything to give satisfaction and that we hoped that the British Government would sign the Treaty

as quite a separate matter. But I thought that the work of revision had failed and I was very depressed.[116]

But on July 16, the treaty was at last signed and the long efforts at revision crowned with full success.[117]

Mutsu received the news very early on the morning of the seventeenth, when he was still in bed.

I at once got up, bathed, got ready, and went to the Palace and reported the signature of the Anglo-Japanese Treaty. I sent to Aoki the following telegram:—"His Majesty the Emperor appreciates your success. I congratulate you on your success in the name of the Cabinet. Please go to the British Minister and express our gratitude for the goodwill of the British Government in signing the new Treaty.[118]

Mutsu might justly feel elated. He had played a difficult and hazardous game and had won it, after being twice on the verge of disaster. He had gained for Japan far more than her ablest diplomats had dreamed of securing a few short years previously. Had he failed, not only would his own career have been ruined and the Ito Cabinet brought down, but treaty revision might have been indefinitely postponed, and a dangerous antiforeign outbreak on the part of the populace in Japan precipitated. Had this occurred, coming at a time when a crisis with China was at hand, and the sympathies of most of the Great Powers with that country, the consequences to Japan would have been of the gravest.

Aoki, also, deserves his full meed of praise. No one had labored more assiduously than he in the cause of treaty revision, whether as Minister at Berlin, Foreign Minister, or Plenipotentiary in London. His notes and correspondence reveal him as one determined to secure all that was possible for his country, yet invariably frank and moderate, evincing a readiness to compromise whenever this was

possible without sacrificing vital interests, and always appreciative of the difficulties of the other party.

Finally, credit is also due to the British Government for the successful conclusion of the long negotiations. It may have realized that a refusal to abolish the extraterritorial provisions of the treaty would be to risk an upheaval in Japan which, whatever its outcome, would jeopardize the lives and property of British residents there. On the other hand, it was taking a step in the dark when it abandoned its citizens to the jurisdiction of an oriental Power, an action for which there was no precedent. In doing so, it was moving counter to the strongly expressed opinion of practically all the residents in the Treaty Ports, while such public opinion as existed in England on the subject was not particularly favorable to Japan. "Time only can show whether the Government or the residents (in Japan) are right, and, as the Government have refused to take the residents into their confidence while the negotiations were proceeding, their responsibility will be heavy if they have made a mistake."[119] Time showed that they had not made a mistake, and the conciliatory policy of the British Government obtained its reward in that it ushered in a period of friendship and alliance between Great Britain and the new Great Power of the Orient.

CHAPTER IX

The Emancipation of Japan

WITH the conclusion of the Aoki-Kimberley Treaty, Japan had really won the victory in the long struggle for complete judicial autonomy. As Mutsu had foreseen, the action of Great Britain left the other Treaty Powers, whose interests in Japan were less than hers, no option but to conclude similar treaties themselves. Nor, as the course of past negotiations proved, was there any great desire among them to resist the claims of Japan. The principle of equilateral treatment was everywhere conceded, although the details occasionally took a long time to arrange.

As might be expected from her general attitude toward Japan, the United States was the first to follow the example of Great Britain. The negotiations between the Japanese Minister Plenipotentiary Kurino and Secretary of State Walter Q. Gresham went smoothly enough, and the revised treaty was concluded on November 22, 1894.[1] But it had to be submitted to the Senate for approval and that body, always rather crotchety in foreign affairs, took alarm at a report that Japanese troops had massacred the Chinese in Port Arthur after they had stormed the fortress.[2] So the Senate hesitated to approve the treaty, fearing to expose Americans to the full control of a people who would do what it was rumored the Japanese had done in Port Arthur.

On December 14, therefore, Kurino telegraphed to Mutsu that if the reports about Port Arthur were true the Senate would probably throw out the treaty.[3] Mutsu replied that there had been some excesses, but not as serious

as were reported; that in general the conduct of the Japanese soldiers was unexceptionable, and that there was some justification for their action in this instance.[4] Further, most of those shot were soldiers who had thrown off their uniforms and hastily donned civilian dress.[5] Finally, Mutsu urged Kurino to get the treaty approved, if he could, as soon as possible, before any more exaggerated accounts of this incident became current.[6]

The Senate, however, put in an amendment to the treaty which, according to Mutsu, was of few words, but destroyed the whole value of the treaty.[7] "So I instructed Kurino to consult again with the American Secretary of State and the influential members of the Senate."[8] President Cleveland, also, in his Second Annual Message to Congress of December 3, 1894, said:

> Apart from the war in which the Island Empire is engaged, Japan attracts increasing attention in this country by her evident desire to cultivate more liberal intercourse with us and to seek our kindly aid in furtherance of her laudable desire for complete autonomy in her domestic affairs and full equality in the family of nations. The Japanese Empire of today is no longer the Japan of the past, and our relations with this progressive nation should not be less broad and liberal than those with other powers.[9]

So the Senate consented to reconsider its action and a solution satisfactory to both parties was reached in February, 1895.[10]

This treaty,[11] in its provisions for the abolition of extraterritoriality was similar to the one with Great Britain. Freedom of trade and residence was, however, subject to a limiting clause of somewhat wider scope than the corresponding provision in the British treaty,[12] while the most-favored-nation clause was conditional and not absolute.[13]

Viscount Aoki, after his success in London, returned to

Berlin, where he began negotiations for the conclusion of a new treaty. On April 4, 1896, the revised German-Japanese Treaty was concluded.[14] Russia had already agreed to follow the example of Great Britain, the treaty between her and Japan being signed on June 8, 1895.[15] France took similar action on August 4, 1896,[16] while the Austro-Hungarian treaty was concluded somewhat later, on December 5, 1897.[17] These treaties were all generally similar and all provided for the abolition of consular jurisdiction in 1899.

While most of the new treaties came into force on July 17, 1899, those with France and Austria-Hungary did not become operative until August 4 of that year.[18] Consequently, through the most-favored-nation clause, the citizens of these two Powers would, from July 17 to August 4, enjoy all the rights of other foreigners under the new treaties in matters of commerce, as well as all the old extraterritorial privileges.[19] However, they did not remain in that happy position long enough to cause serious diplomatic complications. The United States held that a claim for the continuance of American consular jurisdiction up to August 4 could not be maintained, but that American citizens were entitled to all privileges of trade and navigation that would be enjoyed by French citizens from July 17 to August 4.[20]

During these years Japan also concluded treaties on an equilateral basis with Powers with which she had previously had no agreements, namely, Brazil, the Argentine, and Chili.[21] It is interesting to observe also that over the same period treaties were signed with China and Siam, by virtue of which Japan exercised extraterritorial jurisdiction in those countries.[22]

Meanwhile the task of reëxamining and perfecting the Japanese legal codes made steady progress. In March,

1893, a committee was organized, composed of members of the Diet, professors of the Imperial University, lawyers, judges, and business men, and intrusted with the task of revising the Civil Code.[23] "In the work of amendment the German system of textual arrangement was adopted and the texts were classified into five books, namely, general provisions, real rights, obligations, family, and succession."[24] The first three books were duly approved by the Diet and were promulgated in the beginning of 1896.[25] "The remaining two books were promulgated in June, 1898, in company with a general law concerning the application of laws (which contains provision chiefly as to international private law), a law concerning the operation of the Civil Code, and other accessory laws."[26] The whole Civil Code was put into force in July, 1898.[27]

The Committee also dealt with the Commercial Code, and, after thorough and painstaking revision, this was finally promulgated in March, 1899, and brought into operation in June of that year.[28] "This Code was chiefly based on the German model, but care was taken to make it harmonize with the business usages of the country and accord with the provisions of other laws, including the Civil Code."[29] The work was carried out under the guidance of a German jurist, Dr. Lönholm,[30] and both Codes owed much to the new German codes which were being compiled at the same time for the Reich,[31] although care had to be taken that there should not be too great a breach with Japanese social and family organization, customs, and traditions.[32] This proved a difficult task. "The attempts to reconcile the legal conceptions of Europe with the traditions of the patriarchal family life of Japan, apart from the heterogeneous views on the subject of marriage, were problems of which the future alone can bring the complete solution."[33]

Thus by the time the revised treaties were due to come into operation, Japan possessed a thoroughly organized system of laws based on the most up-to-date European models. She had further a police and administrative organization equal to the best that could be found in the Occident. None could say, therefore, that she had not put forth the utmost efforts and done as much as, if not more than, could be expected of her, to fulfil the guarantee that her statesmen had repeatedly given that when the time came for the abolition of consular jurisdiction, the foreign resident would suffer no great hardship. It was, indeed, the conservatively-minded Japanese, rather than the foreigner, who found most reason to complain of the new order of things.

The only point which aroused some uneasiness was the question of prison accommodation in Japan. She had effected as many reforms here as in other branches of judicial administration, but it was feared that Europeans or Americans who were sentenced to imprisonment in Japan might have to endure conditions, especially as to diet, which, while fair and humane in the case of Japanese, would inflict hardships on foreigners. The question was raised in the British House of Commons on July 25, 1898, and Mr. Curzon, the Under-Secretary of State for Foreign Affairs, replied that the Japanese Government had appointed a Commission of Enquiry over a year ago and were undoubtedly alive to the necessity of providing suitable accommodation for European prisoners.[34] The matter was again brought up on April 25, 1899, by Mr. Ashcroft, who inquired what arrangements had been made with the Japanese Government as to British prisoners in Japanese prisons, and whether any concessions had been obtained in this matter. Mr. Brodrick (the Under-Secretary), informed him that assurances had been given by the Japa-

nese Government that measures would be taken to provide foreign prisoners with food and accommodations suitable to their manner of living.[35] Thus this matter also was satisfactorily arranged.

Finally, on June 30, 1899, an Imperial Rescript was issued on the subject of the new treaties.

> Assisted by the surviving influence of the virtues of Our Ancestors, it has been our good fortune to uphold the reign of sovereign rule and to disseminate the benefits of orderly administration, resulting at home in the increased prosperity of the nation, and abroad in the strengthening of our relations with foreign Powers. As to the revision of Treaties, Our long-cherished aspiration, exhaustive plans, and repeated negotiations have at last been crowned by a satisfactory settlement with the Treaty Powers. Now that the date assigned for the operation of the revised Treaties is drawing near, it is a matter for heartfelt joy and satisfaction that, while on one hand, the responsibilities devolving upon the country cannot but increase Our friendship with the Treaty Powers, on the other it has been placed on a foundation stronger than ever.
>
> We expect that Our loyal subjects, ever ready faithfully to discharge public duties, will, in obedience to Our wishes, conform to the national polity of enlightenment and progress, and be united as one man in treating the people from far-off lands with cordiality, and in thereby endeavouring to uphold the character of this nation and enhance the glory of the Empire.
>
> Further, we command Our Ministers of State to undertake the responsibility of putting the revised Treaties into operation in such a manner that, by means of proper supervision over their subordinates and the exercise of prudence and discretion, both Our born subjects and strangers may be enabled equally to participate in the benefits accruing from the new system, and that the friendly relations with the Treaty Powers may be permanently cemented. (His Imperial Majesty's Sign Manual.)
>
> The thirtieth day of the sixth month of the thirty-second year of Meiji. (Countersigned. Names of Cabinet Ministers.)

By August 4, 1899, all the new treaties were in operation and the emancipation of Japan was at long last an accomplished fact.[86]

APPENDICES