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## Does Europe Include Japan? European Normativity in Japanese Attitudes towards International Law, 1854–1945

## Abstract

European normativity has been an epistemological problem for Japan throughout modernity (1868–1945). This essay discusses this problem in the case of international law by tracing its reception and application from the beginning, the opening-up of Japan in 1854, until the final demise of its imperialist project in 1945. During this period, Japan was the only non-Western great power in the hitherto all-European concert of powers. International law and the critique of European normativity played a central role in Japan's ascent to power and confrontation with the West. In the first phase of reception between 1854 and 1905, Japanese attitudes towards international law were marked by an exceptional commitment to and acquiescence with the European standard, in line with Japan's ambition to »leave Asia«. However, due to its strategic purposes, European normativity was more a means of political expediency than a matter of intrinsic conviction. Moreover, after the initial phase of receiving and practicing the principles of international law with considerable success, many Japanese began to feel a certain estrangement and inner reservation to European standards. Not until 1905, was Japan in a position to gradually challenge Europe. Thus, Japan's inter-war period (1905–1931) was an uneasy combination of outward compliance and inner reservation, a tension that Japan eventually resolved by withdrawing from Europe and trying to build its own autonomous sphere in East Asia after 1931. However, the example of Japanese international lawyers shows that in order to save international law from its ultranationalist critics and enemies, European normativity still remained the central cultural reference, albeit now in its revisionist variant (especially Soviet and Nazi German political thought) and subject to a strategic re-interpretation. Thus, from the perspective of Japanese international lawyers, despite the Pan-Asianist pretenses of Japan's official rhetoric during the war, Japan never actually left Europe.



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## Does Europe Include Japan? European Normativity in Japanese Attitudes towards International Law, 1854–1945

### Introduction

Europe has been an epistemological problem throughout Japan's modernity (1868–1945). More than just a geographical region, it was the cultural reference point and yardstick, which measured Japan's progress on the trajectory towards a European present. This was the case in all important matters of state and society, but outwardly no more so than in Japan's diplomatic dealings with western powers and, soon, also with its East Asian neighbours. The key towards acceptance as a »regular« power amidst the all-Western club of great powers was the complete and perfect adherence to the norms of international law which, of course, were set by the European powers and were therefore an example of European normativity. Japan did so assiduously and with immense success, and within fifty years, Japan had acquired a hegemonic position in Northeast Asia and risen to the ranks of great powers. It is therefore not surprising that the few studies on international law in Japan focus on this early »success story« of reception.<sup>1</sup> However, it is also for this reason that the same studies paint a rather bleak picture of Japanese attitudes towards international law as overly Euro-centric, passive and positivistic, with little or no creative input of its own. If taken positively, the Japanese case merely »exemplifies the universal applicability of the concept and logic of international law«.<sup>2</sup>

In a sense, the emphasis on Japan's adherence to European standards is a reflection of a Euro-centrist perspective in these studies itself which leads, conversely, to a rather light treatment of the later and darker side of Japanese attitudes towards international law that harboured considerable reser-

vations against European normativity and longed to regain normative autonomy (or »subjectivity« (*shutai-sei*) to use a more contemporary term). However, »Europe« or Euro-centrism has again come under attack in recent times and demands for readjustments such as »provincializing Europe« (Chakrabarty) or »reclaiming Asia from the West« (Wang Hui) are widely heard in the fields of cultural studies, global history and postcolonial studies.<sup>3</sup> Whatever the justification for these demands in general, the destabilizing critique of the western subject can be productive, too, as Thomas Duve has shown for the field of legal history.<sup>4</sup> It allows us to question fundamental parameters of European normativity, widen the scope and field of enquiry and thereby deepen our understanding both of western *and* non-western normativity.

This ratio certainly applies to the study of Japanese attitudes towards western normativity. The question whether Europe includes Japan may seem strange from a Euro-centric perspective of the concept, which has come to define Europe very much within the confines of geographical borders.<sup>5</sup> However, from the »outside«, such as Latin America or Japan, the question was historically a very real one. From the very beginning of Japan's re-establishment of contact with the west in the nineteenth century, positionality was an issue, and we can observe a constant debate on Japan's standpoint vis-à-vis »Europe« in Japanese politics and the public which expressed either longing to »leave Asia« and become part of »Europe«, or to »return to Asia« and reclaim its subjectivity. Either choice had dramatic consequences, most of all for Japan's neighbours in East and Southeast Asia.

1 See *inter alia* YANAGIHARA (2012); AKASHI (2012); YANAGIHARA (2011); AKASHI (2004); OWADA (1999), ONUMA (1986). For a more comprehensive and detailed study, see ZACHMANN (2013). – Note: Asian names are given in their traditional order, i. e. with their surname first.

2 AKASHI (2012) 742.

3 CHAKRABARTY (2000); WANG (2005).

4 DUVE (2013) and *id.* (2012).

5 DUVE (2013) 3–11.

The following essay will trace the whole trajectory of this discussion on positionality, i. e. beyond the usual focus on Japan's final (but elusive) achievement of equality in 1905 and well into the darker and more troubled period of first tacit reservations towards European normativity and later open challenge through the concept of an alternative »East Asian International Law«. The benefits of this undertaking will be threefold: It will complement the history of international law and relations in general by clarifying the important, but so far under-researched motivations of the only non-western actor that, together with the western powers, shaped international politics until 1945. It will thereby shed light on the interpretation of European normativity from a non-western perspective, including an early critique of its hegemonic nature. And finally, it will demonstrate the complexity of developing alternative visions of international order and establishing an autonomous »subject« merely on the basis of negating European normativity. Although beyond the scope of this essay, this insight may be also useful to discuss contemporary criticism of allegedly western-centred normativity, as it is for example voiced in the human rights or global governance debate today.

### 1 European Normativity in Early Modern and Meiji Japan

Although it is often said that international law entered Japan only in the last phase of the Tokugawa period (1603–1867), i. e. after the arrival of Admiral Perry in 1853,<sup>6</sup> this is a somewhat Eurocentric statement. Arguably one could claim that there existed notions of international order and a normative understanding of it prior to the arrival of the western powers, especially if we adopt a wider definition of international law to accommodate non-Western concepts.<sup>7</sup> Thus, the traditional notion that Japan had been an »isolated nation« (*sakoku*) during the Tokugawa Period has been contested for some time now, and it has become

an accepted opinion that Japan instead maintained a defensive order in the style of other East Asian nations with a very limited number of trade and political relations (the so-called »Tokugawa international order«).<sup>8</sup> Moreover, from very early on, Japanese international lawyers argued that notions of state sovereignty and equality as basic elements of international law existed in Japan even during the early modern period,<sup>9</sup> which of course served as an explanation of why Japan adapted to the western order so much more quickly than, for example, China.

Whatever the truth to these assertions, the fact remains indisputable that Europe in early modern Japan played only a very minor, peripheral role, both as a political region and as a cultural reference. Japan pursued political relations with Korea and the Ryūkyū Kingdom and economic relations with Dutch and Chinese merchants in Nagasaki (and relations with the Ainu in Hokkaidō that are difficult to characterize). The great absent power in this order was not a European power, but China, which played a far more significant role as the absent centre. Politically, the Tokugawa rulers did not want to submit to the hegemony of China and therefore refused to join its tributary system. However, culturally it was omnipresent in Japanese society as the central standard of civilization.<sup>10</sup> Europe as a cultural reference existed in the so-called »Dutch Studies« (*Rangaku*, due to the Dutch presence in Nagasaki), but these were often thought as a complementary rather than alternative knowledge to Chinese centrality.

This arrangement was replicated in the Japanese taxonomy of nations and ethnicities. Thus, Europeans were not considered an ethnic species completely different from other, Asian foreigners with which the Japanese conducted relations. It has been observed that the term *Tōjūin*, i. e. literally a »people of Tang China« or China in general, was commonly used in the Tokugawa period to all foreigners, including the people who resided on Dejima, the Dutch trading station in Nagasaki.<sup>11</sup> Conversely, »Asia« was not a meaningful category for the Japanese either, as it was of wholly Euro-

6 E. g. STERN (1979) 1.

7 ZACHMANN (2013) 44–48. DUVE (2013) 16–18 argues for an inclusion of other forms of normativity; on the problem of assessing non-western international legal orders, see PREISER (1976).

8 TOBY (1984); YANAGIHARA (2012) 477–481.

9 E. g. TAKAHASHI (1901).

10 JANSEN (1992).

11 WATANABE (2012) 315; JANSEN (1992) 86–87.

pean provenience, with no expression in reality as a communal identity among Japanese and »Asian« nations. Thus, the proto-nationalist scholar Aizawa Seishisai wrote in 1833:

The Western barbarians have allocated names to the continents, such as Asia, Europa and Africa. However, this allocation of names is an outrageous abuse because such names have not been approved by the Emperor of Japan nor are these ›universal names‹ that have been conventionally accepted since antiquity. It is only the Westerners' arrogance that has made them use the term ›Asia‹ and include our divine land [Japan] as part of it. For that reason I will never use the names they have given.<sup>12</sup>

Thus, the accustomed binary of opposites, Europe and Asia, did not exist in early modern Japan, nor were Europe and its laws the dominant reference point for the Japanese.

This changed dramatically with the so-called Meiji Restoration (1868) that nominally restored the powers of the emperor, but in effect led to a political oligarchy of patriarchal rulers under imperial auspices which henceforth pursued a drastic modernization course along western lines. One of their first measures was a pledge of the emperor and his feudal retainers to five »oaths« that could be considered as fundamental policy principles. The fourth and fifth declarations already pointed towards a positive engagement with western knowledge in general and international law in particular:

Item. We shall break through the shackles of former evil practice and base our actions on the principles of international law.

Item. We shall seek knowledge throughout the world and thus invigorate the foundations of this imperial nation.<sup>13</sup>

It should be mentioned that the phrase given in this modern translation as »international law« originally reads in Japanese as *tenchi no kōdō*, a phrase laden with Neo-Confucianist meaning that

would most literally translate as »the Common Way of Heaven and Earth«. Thus, there are dozens of alternative translations, such as »just and equitable principles of nature« (transl. 1909)<sup>14</sup> or »just laws of nature« (transl. 1958/2005).<sup>15</sup> This example may already illustrate the general linguistic difficulty of including other forms of normativities in legal history,<sup>16</sup> when the original text is very ambivalent about the scope of meaning in the first place.

Whatever the intended meaning of the above declarations in theory, they very centrally came to apply to international law in the practice of the new Meiji government. Whereas the old Tokugawa government was reluctant to enter diplomatic treaties with the western powers and sought to mitigate their impact through negotiation as much as possible,<sup>17</sup> the new Meiji government declared immediately after the succession to power that it would honour the treaties (which was remarkable in that it had fiercely attacked the old government for concluding them in the first place) and set about to actively »seek knowledge throughout the world« (item 4 of the Charter Oath).<sup>18</sup> For international law, this was done through four channels of knowledge dissemination: contact with western diplomats, the translation of books, Japanese students going abroad and western experts coming to Japan.<sup>19</sup>

Already prior to the Meiji Restoration, the scholars Nishi Amane and Tsuda Mamichi were sent abroad to study international law and other subjects at Leiden in the years 1863–1865. Upon their return, Nishi compiled his notes and published them in 1868 under the title *Bankoku kōhō* (The public law of nations) as the first treatise on international law written by a Japanese.<sup>20</sup> Henceforth, it became *de rigueur* for all Japanese experts of international law (and law in general) to make their »grand tour« through European or US universities before assuming permanent positions in Japan.

The first book on western international law in Japan was, in fact, a reprint of a translation into classical Chinese. Thus, in 1864, the American missionary William A. P. Martin published a Chinese

12 SAALER/SZPILMAN (2011) vol. 1, 49 (transl. Matsuda Kōichirō).

13 As translated in BREEN (1996) 410.

14 KIKUCHI (1909) 45.

15 DeBARY *et al.* (2005) vol 1, 672.

16 DUVE (2013) 16.

17 Cf. AUSLIN (2004).

18 ZACHMANN (2013) 48–84; see also

AKASHI (2012), AKASHI (2004),

MIYOSHI (1994)

19 AKASHI (2012) 732.

20 On Nishi, see MINEAR (1973). Tsuda Mamichi later became influential in the reception of civil law in Japan, see RÖHL (2005).

translation of Henry Wheaton's *Elements of International Law* (1836) to assist the Chinese Foreign Ministry under the title *Wanguo gongfa*.<sup>21</sup> As educated Japanese could read Chinese, this was reprinted in Japan (under the same title *Bankoku kōhō*). However, soon many more translations of authoritative western works directly into Japanese appeared.<sup>22</sup> In 1873, for example, Mitsukuri Rinshō published his translation of Woolsey's *Introduction to the Study of International Law* (1860) under the title *Kokusaihō, ichimei bankoku kōhō* (»International law, also called the law of nations«) and this is considered the first usage and origin of the current Japanese word for international law – *kokusaihō*.

Finally, foreign experts, so-called *o-yatoi gaikokujin* (employed foreigners), played an important role in the early decades of Japan's modernization. Thus it is well known that many of the Japanese codes of law that are still extant today – especially in civil law – were crafted with the help of foreign experts.<sup>23</sup> The field of international law was no exception to the practice of hiring foreign expertise, and the names of E. Peshine Smith, Charles William Le Gendre, Gustave Boissonade, Henry Williard Denison and Thomas Baty are integral to the history of international law in Japan.<sup>24</sup> Some of these foreign experts – although none of them as specialists – taught the subject at Japanese universities. However, as a matter of sustainability, but also of prestige and more importantly, of budgetary constraints, the Japanese government sought to make the costly foreign experts redundant as soon as possible and employ native talent instead. This was realized in the 1890s, when Japan finally made a major step towards joining Europe.

It should be kept in mind that from the outset, the overarching goal of Meiji foreign policy was to renegotiate the initial treaties that had been concluded with the western powers between 1858 and 1869 and achieve a more equal standing vis-à-vis Europe. Due to their lack of reciprocity in tariff matters and the privilege of consular jurisdiction for foreigners, these treaties were considered »unequal treaties« (*fu-byōdō jōyaku*).<sup>25</sup> The Japanese

government thus, as soon as the last treaty had been concluded, tried to re-negotiate these, albeit to no avail at first, as the western powers and especially Britain long argued that Japan had not met the required standard of civilization, yet.

This led to a complete reversal of standards. If »China« had been the cultural standard in early modern Japan, the point of reference soon switched to »civilization« (*bunmei kaika*), which exclusively came to signify *European* (and by extension *American*) culture.<sup>26</sup> However, in terms of strategy, Japanese politicians and intellectuals applied the same to Chinese and European culture. Thus, they invariably argued that »China« or »Europe« signified both a political and a cultural entity and that these dimensions were separate and independent. »China« as manifestation of cultural hegemony could be wherever it was most perfectly realized.<sup>27</sup> Similarly, »Europe« in the eyes of Japanese became a modular, universal standard and was not limited to the geographic region.<sup>28</sup> Conversely, Asia or »the Orient« as the binary opposite of Europe was a cultural concept and could not forever commit a country to being »Asian«. This is most apparent, for example, in the following observation which a Japanese journalist wrote in 1884:

Therefore, what people today call »the Orient« is not the geographic Orient, but refers to the Orient of international relations. It is not an entity defined by natural geography, but it is called Oriental because all institutions of man-made society in a uniquely singular way differ from Europe. [...] Therefore, supposed the Turkish Empire would change all things of their society, from the political system, law, religion, science etc. down to everyday clothing, food, housing, and transform everything into the European style, there is no doubt that nobody would consider it Oriental anymore, and that from that day on [Constantinople] would be added to the capitals of the great countries in Europe.<sup>29</sup>

21 On Martin's translation and other early translations into Chinese, see KROLL (2012).

22 ZACHMANN (2013) 78–80; YANAGIHARA (2011) 454.

23 See RÖHL (2005).

24 See ICHIMAYA (1973) 11–18.

25 See KLEINSCHMIDT (2007).

26 On this radical shift, see WATANABE (2012) 315–390.

27 HAROOTUNIAN (1980) 16.

28 ZACHMANN (2009) 18–20.

29 Hinohara Shōzō, *Nihon wa Tōyō-koku taru bekarazu* (Japan must not be an Oriental country, 1884), as translated in ZACHMANN (2009) 19.

These hopes seem too sanguine for the Ottoman Empire in hindsight, but only served as a hypothetical model for Japan at the time. And it is only from this perspective of Europe and Asia that we can understand the popular idea that Japan should »leave Asia« (*datsua*) and, possibly, join Europe.<sup>30</sup>

However, joining Europe was more than anything a matter of perception, not just power. Thus, the demonstrative application of international law in relation to western powers, but also towards Japan's neighbours was another means to gain the recognition of Europe. Demanding neutrality from the western powers during the Boshin War (1868–1869) and declaring neutrality during the Franco-Prussian War (1870–1871) were early examples of such a demonstrative use.<sup>31</sup> However, between 1871 and 1895, Japan had much more occasion to use international law as an effective tool of imperial careerism in relation to its East Asian neighbours. Thus, in 1871, Japan tried to foist an »unequal treaty« on China, but failed for the time being due to lack of credible military leverage.<sup>32</sup> It was more successful in bullying Korea into concluding the so-called Kanghwa Treaty in 1876, arguably Japan's first success in western-style »canon boat diplomacy«. However, Japan's breakthrough came with the first Sino-Japanese War (1894–95).<sup>33</sup> The peace treaty with China in April 1895, the so-called Shimonoseki Treaty, was in part an unequal treaty in the style of other European-Chinese treaties. Thus, Japan had assumed the role of Europe in its relation towards China and Korea. Moreover, through annexation of Taiwan, it also became the only non-western colonial power at the time. This position was consolidated through the annexation of Korea in 1910.

The war with China also gave Japan the long-desired opportunity to demonstrate its knowledge of the law of war. Although there remain doubts as to Japan's actual compliance in certain cases,<sup>34</sup> Japan had two of its prominent international lawyers, Ariga Nagao and Takahashi Sakuei, publish scholarly treatises in English and French to

publicize the absolute correctness of Japan's warfare; their effort found support in prefaces written by the influential British scholars John Westlake and Thomas Erskine Holland.<sup>35</sup> Japan pursued this line of »responsible« global citizen by actively participating in the two Peace Conferences at The Hague in 1899 and 1907, despite the fact that their common goal, the limitation of war, did not necessarily serve Japan's expansionary policy.<sup>36</sup>

Japan's strategy of presenting itself as diligent and studious pupil of Europe soon produced tangible results in its relations to the western powers. Thus, the shifting balance of power led Britain to accept a new, more equitable treaty with Japan in 1894. Other powers followed suit and the odious institution of extraterritoriality was abolished in 1899, when the new treaties came into effect. Thus, only thirty years after Japan had concluded the last unequal treaty in 1869 it had rid itself of this barrier and acquired the »certificates of civilization«, as the new treaties were aptly called.<sup>37</sup> Britain seemed to confirm this valuation by concluding the so-called Anglo-Japanese Alliance in 1902. Although this was more an expression of British weakness than of Japanese strength, it helped to prepare the way for the Russo-Japanese War (1904/05), the result of which catapulted Japan into the position of hegemonic power in Northeast Asia for the next decades. Once again, Japan used the war to propagate its high standards of compliance with the law of war.<sup>38</sup>

The years 1894–1905 thus had a tremendous impact on Japan's status and the political geography of Northeast Asia. This was also reflected in the status of international law as a discipline in Japan. If international law had been important from the start as a *practice* (and therefore also dictated the very pragmatic approach to international law at the time),<sup>39</sup> it was only a minor academic discipline which, as we have seen above, was only taught on the side at universities. However, this changed in 1895, when the first chair for international law was established at Tokyo University. When Kyoto University was founded in 1899, it already had a chair

30 »Leaving Asia« (*Datsua-ron*) is the title of a famous editorial written by Fukuzawa Yukichi in 1885 that has come to signify Meiji foreign politics in general. For a full translation, see CENTER FOR EAST ASIAN CULTURAL STUDIES (1973) vol. 3, 129–133.

31 Cf. AKASHI (2012) 735 f.; YANAGIHARA (2011) 452 f.

32 ZACHMANN (2013) 62 f.

33 ZACHMANN (2009) 31–54.

34 See HOWLAND (2007) and (2008).

35 HOWLAND (2007) 186–200.

36 ZACHMANN (2013) 76 f.

37 Cf. ZACHMANN (2013) 61.

38 ICHIMATA (1973) 33–36.

39 AKASHI (2012) 734 f.

for international law right from the start.<sup>40</sup> The sudden rise in status was no coincidence; the Sino-Japanese War and the Russo-Japanese War provided a huge stimulus for international law in Japan.<sup>41</sup> The same applies to the Japan Society of International Law (Kokusaijō gakkai), one of the oldest professional associations in the world, which was founded in 1897 as an unofficial think tank for the Ministry of Foreign Affairs to deal with the arising issues in relation to the peace treaty with China.<sup>42</sup> Again, this points at the immensely *practical* role of international law even as an academic discipline. Thus the second chair holder at Tokyo University, Tachi Sakutarō, simultaneously served as permanent advisor of the Foreign Ministry until his death in 1944. Likewise, all other international lawyers until 1945 served more or less frequently on an *ad hoc* basis as advisors to the Foreign Ministry.<sup>43</sup> This may be one of the reasons why Japanese international lawyers, especially the older generation, had an immensely positivistic, policy-oriented approach towards international law. If Japanese leaders wanted Japan to »join Europe«, it was not their task to question Europe.

However, this does not mean that engagement with Europe was wholly uncritical. On the contrary, a certain estrangement or disaffection with the modernization course could be felt from the early 1880s onwards, when the Japanese government came under criticism as being too subservient to the western powers in the treaty renegotiation process.<sup>44</sup> The real break came in the 1890s, when Japan finally vanquished China as its East Asian competitor and therefore entered into direct confrontation with the western powers. The first proof of this came on the very same day that the conditions of peace with China were published in Japan in May 1895 and the public learned that Russia, France, and Germany had intervened and pressured Japan in retroceding an important strategic point (Port Arthur) back to China (Tripartite Intervention).<sup>45</sup> If the official explanation that this was for the sake of »peace and stability in East Asia« seemed hollow to many readers at the time, they

were infuriated to learn in late 1898 that Russia had taken the very same spot by force, followed by Germany occupying and »leasing« Shandong (the so-called Far Eastern Crisis).<sup>46</sup> Thus, the influential journalist Kuga Katsunan lambasted the double standard of western powers which, under the lofty pretexts of the *mission civilisatrice* and a »new interpretation of international law« merely justified their personal greed and egoism:

The ideology of civilization [*bunmei no shugi*] says: »Generally speaking, all the superior races of the world should encourage the unenlightened people and let them follow civilization. They should admonish countries in disorder and let them attain peace and order.« Europeans call themselves civilized people. However, on grounds of racial otherness or differences in the national way, they exclude others and looking for an easy pretext, they pilfer property and rob territory or suppress their freedom or limit their independence. Thus, the so-called »conveniences of civilization« [*bunmei no riki*], have turned again into dangerous weapons of barbarism.<sup>47</sup>

This became the standard rhetoric of protest against a European double standard, alleged or true, until 1945. For the time being, the critique was voiced only unofficially, in the Japanese public opinion, but never from the government side. However, many politicians, diplomats and intellectuals sympathized with this perspective. More importantly it came to condition the perception of international politics and the actions of the western powers as inherently selfish and hypocritical even in cases when objectively there was no reason for such allegations or where at least there was doubt. This was already so in contentious cases of consular jurisdiction during the 1880s in which foreigners were involved and which were tried not by Japanese, but consular courts. In most cases we cannot observe decisions biased towards foreigners and discriminating against the Japanese party, despite public Japanese opinion.<sup>48</sup> Moreover, the so-

40 ZACHMANN (2013) 81–84.

41 ICHIMATA (1973) 33.

42 ICHIMATA (1973) 126–143.

43 ONUMA (1986) 33.

44 On the perspective of major Japanese intellectuals, see PYLE (1969).

45 ZACHMANN (2009) 36–39.

46 ZACHMANN (2009) 55–88.

47 Kuga Katsunan, »Shina bunkatsu no mondai« (The problem of China's partition), 1898, as quoted in ZACHMANN (2009) 82.

48 On these cases, see CHANG (1984).



called Yokohama House Tax case before the Permanent Court of Arbitration (1902–1905) is often cited by Japanese legal historians as the watershed when the Japanese lost trust in the fairness of international law and international arbitration.<sup>49</sup> However, closer inspection does not necessarily uphold the verdict of an unfair and biased decision. The decision that Japan could not levy an isolated tax on houses of which the *properties* had been already exempted does not seem wholly arbitrary, at least from the perspective of continental law of property. Yet, whatever the correct interpretation in this case, so ingrained was the assumption that Japan was the victim of power politics that this became the standard impression of the Japanese public in the following decades and even survived the war.<sup>50</sup>

This is not to say that, at least on the point of racial discrimination, there was not grounds for complaint. It is well known that Japan's unexpected victory in the Sino-Japanese War and rise towards hegemony in East Asia led to the first example of Japan-bashing in history and a resurgence of the »clash of races« discourse which has been hitherto subsumed under the phrase »yellow peril«.<sup>51</sup> The German emperor had a notable role in this, but the discourse was widespread in Britain, the dominions and the US as well. Most troubling in this latter respect was the question of labour migration,<sup>52</sup> but national prestige and international status were also at stake. The Japanese government therefore desperately tried to counter this image and discouraged all notions that would further incite the western fears, such as calls towards a pan-Asianist solidarity in open opposition against the western powers.<sup>53</sup> For the same reason, any challenges towards European normativity in the form of alternative visions of order were unthinkable. This remained so for the next three decades, until 1931.

## 2 Western normativity during the Interwar Period, 1905–1931

The First World War is often seen as the watershed, the »original catastrophe« of the twentieth century which laid waste to the *belle époque* of the long nineteenth century and initiated the cataclysmic convulsions that gave rise to a new epoch.<sup>54</sup> However, this again is a somewhat Euro-centric perspective and does not apply to Japan. If we speak of an »interwar period« in the Japanese context at all, it would be more appropriate to let it begin with the Russo-Japanese War (1904/5), which signalled the consolidation of empire, and let it end with the year 1931, when Japan entered a second and self-destructive round of expansion. This period also tallies with a certain attitude of growing reservations towards western normativity, and international law in particular.

The »Great War« from the perspective of Japan was but a distant occurrence and consequently came to be called the »European War« (*Ōshū sensō*) in Japan. By and large, the government used the war to consolidate Japan's position in East Asia and extend it towards the German possessions in Shandong and Micronesia. It was therefore less than thrilled to hear about the new developments in diplomacy that has come to be known as »Wilsonianism«.<sup>55</sup> After all, Japanese politicians and diplomats had been socialized and particularly successful in the traditional diplomacy of the »Great Game« and were wary of any change that would upset its »running horse«. Due to previous bad experiences with international arbitrations and interventions, they were particularly distrustful of any kind of multilateralization of the game that would allow powers not invested in the region to meddle and contain Japan's position of power. Thus, the Japanese leaders first tried to ignore Wilson's Fourteen Points, but felt confirmed in

49 OWADA (1999) 357; YANAGIHARA (2011) 461.

50 For a discussion of the postwar identification as victim, see ORR (2002).

51 GOLLWITZER (1961); on racial constructions in and of East Asia, see also KOWNER/DEMEL (2013).

52 Cf. MEHNERT (1995).

53 VALLIANT (1974); ZACHMANN (2009) 45 f., 66–73.

54 STOLLEIS (1997) 5.

55 For Japan's position during the war, see Dickinson (1999).

their suspicion when Wilson's call to »national self-determination« threatened to upset colonial rule in Korea in the spring of 1919.<sup>56</sup>

On the other hand, the foreign policy of Japan during the interwar year is often praised as the most »internationalist« and liberal phase of its diplomacy until 1945, as Japan outwardly joined in most international agreements and institutions, even against its own immediate self-interest, and seemed to acquiesce in limited containment of its military. In this respect, Japan continued its policy of presenting itself as responsible »civilized country« in the midst of European powers. The »Shidehara Diplomacy« (named after its most prominent representative, Foreign Minister Shidehara Kijūro) is often seen as the consistent outward expression of the so-called »Taishō Democracy« (ca. 1905–1932), a similar liberal trend in Japanese domestic politics signalled by the ascension of party rule and the extension of the ballot to male universal suffrage. However, in the same way as the »Taishō Democracy« had a very repressive second face and narrowly limited political expression which seemed to threaten its middle-class and elite base (i. e. especially Socialist and Marxist groups), the liberal foreign policy had a dark undercurrent and was determined to forestall all new developments that threatened its »special interests« in Northeast Asia.

Thus, when the Japanese delegation was sent to the Paris Peace Conference in 1919, it was the only one which did not have a draft of its own for a »general association of nations« (point fourteen of Wilson's declaration).<sup>57</sup> On the contrary, even Vice Foreign Minister Shidehara opined at the time that it would be »extremely troublesome« (*meiwa-ku shigoku*) if such a multilateral organization came into existence and that Japan should go along with it only if it could not be helped at all.<sup>58</sup> The Japanese delegation soon had to accept the inevitable and sought to salvage the situation by at least placing a racial equality clause into the Covenant of the League of Nations.<sup>59</sup> This was done less for the sake of solidarity with non-western races as for the simple calculation to improve Japan's standing

vis-à-vis the western powers and mitigate problems with labour migration. It is exactly for the latter reason (and the latent fear of a »yellow peril«) that the British dominions, especially Australia, struck down the proposal.

Feelings towards the League of Nations therefore were ambivalent from the beginning even among international lawyers. Tachi Sakutarō, permanent advisor of the Foreign Ministry and member of the Japanese delegation to Paris, commented in 1918 on the idea of the League of Nations:

Peace in the world will not be maintained merely on the basis of the Covenant of the League of Nations, but has to find its roots in the firm belief of nations in the real benefits of peace. [...] No nation will be persuaded by sweet words alone. But it will be no easy task to make the nations understand the benefits of peace and willingly shoulder the burdens of a League of Nations, as long as there will be nations in peacetime which monopolize the huge natural resources of the world, completely shut out other nations from it and deny them their so-called »spot in the sun«, or as long as some nations will suppress and persecute other peoples because of differences in race, language, culture and creed.<sup>60</sup>

Although Tachi did not name names, it was abundantly clear – and made much more explicit in other publications of a similar tenor – that his critique was directed mainly against Britain and the US, i. e. the »Anglo-American Centred Peace« (as another famous pundit, Konoe Fumimaro, called and rejected the Paris agreements at the time).<sup>61</sup>

A similar combination of outward compliance and inner reservations can be observed in the Washington Treaties of 1922. These were even closer to home, as they ended the Anglo-Japanese Alliance, re-confirmed the US-American Open Door-Policy in China (Nine Power-Treaty) and, even more threateningly to nationalists, limited Japan's naval power as part of a general quota

56 MANELA (2007) 97 f.

57 BURKMAN (2007) 60.

58 ZACHMANN (2013) 93; BURKMAN (2007) 16.

59 SHIMAZU (1998).

60 TACHI (1918) 14.

61 For a partial translation of Konoe's notorious article, see SAALER / SZPILMAN (2011) vol. 1, 315–317 (transl. Eri Hotta).

system (Washington Naval Treaty). Japan on the surface acceded to the agreements. However, part of the Japanese leadership was only willing to do so if the agreements did not touch Japan's »special interests« in Northeast Asia.<sup>62</sup> Thus, they accepted the Nine-Power-Treaty only with the understanding that it tacitly recognized Japan's interests in Manchuria.<sup>63</sup> However, such subterfuges, if they were known at all, did not placate nationalists in Japan who fiercely protested against any limitations of Japan's powers in East Asia, and vented their anger in a series of political assassinations.<sup>64</sup>

The inner reservations against western normativity of the interwar period were most apparent in the case of the other hallmark of Wilsonian institutions, the Kellogg-Briand Pact or Pact of Paris of 1928.<sup>65</sup> This Pact, which sought to outlaw war by a single stroke of the law (and became the predecessor of Art. 2 No. 4 UN Charter and Art. 9 of the Japanese Constitution of 1946), was a deceptively simple piece of legislation on the surface, but with treacherous depths underneath. Both France and Britain declared reservations, the former a general exception for wars fought in self-defence (thus simply shifting the problem to the definition of self-defence), the latter concerning »certain regions« in the world in which Britain had vital interests, but remained conveniently undefined (the so-called »British Monroe Doctrine«).

The Japanese government, which was just in the middle of another troublesome »expedition« to politically unstable China, viewed the Kellogg-Briand Pact with wariness, lest it would circumscribe Japan's abilities to »defend« its interests on the continent in the future, as well. The involved parties deliberated whether they should make a reservation similar to Britain with regards to Manchuria, i.e. declare another »Japanese Monroe Doctrine«. However, in the end, cautiousness won the day and Mori Kaku, one of the prime minister's advisors, cunningly argued that such an open reservation would merely incite the suspicions of the western powers and without necessity circumscribe Japan's actions in Northeast Asia. It

would be much more beneficial for Japan to just wait and see and invoke Britain's precedent when it was necessary and politic.<sup>66</sup> In the end, Japan joined the Pact without open reservations, but made sure that its representative communicated Japan's concerns regarding Manchuria verbally to the other major powers.

Japanese international lawyers by and large viewed the Pact with great scepticism. This was less because of its many loopholes, which the Japanese public criticized. On the contrary, they feared that the Pact was too ambitious and unrealistic in the face of real power politics. As in the case of the League of Nations they argued that the Pact merely served to uphold the *status quo* by outlawing war to enforce (legitimate) change. It was therefore, again, in the interest of great, monopolizing powers and to the disadvantage of smaller, but ambitious and upcoming nations. The international lawyer Taoka Ryōichi formulated the defects of the Kellogg-Briand Pact from the perspective of Japan thus:

In my opinion, the real deficit of the Kellogg-Briand Pact lies not in its many reservations, but in the fact that it outlaws war as a means of self-help [*jiryoku kyūsai*] for states whose rights have been violated, but without providing any *substitute* for this.<sup>67</sup>

Taoka continued that such an arrangement would merely encourage violations of international law, as the harassed country now was prohibited to strike back. It is quite obvious from the context of these arguments that, again, Japanese interests in Manchuria, which were felt to be threatened by Chinese actions, were at the core of these concerns.

Therefore, on the surface Japan in the interwar period seemed to continue its pro-western policy and accepted European or western normativity without formal reservations. However, the chasm which had opened up in the late Meiji period due to the increased potential of conflict and friction with western powers became ever wider under-

62 IRIYE (1965) 62.

63 ZACHMANN (2013) 96 with further references.

64 Prime Minister Hara Takashi was murdered in 1921, on the day of the opening of the Washington Conference; Prime Minister Hamaguchi

Osachi was attacked and subsequently died in 1931 on occasion of the London Naval Treaty; many others followed.

65 On this in more detail, see ZACHMANN (2013) 121–157.

66 ZACHMANN (2013) 140 f.

67 TAOKA (1932) 33; Taoka uses the English word *substitute*.

neath. To the alleged double-standard in European normativity, Japanese politicians and international lawyers reacted with a similarly complex attitude of *bonne* (real intent) and *tatemaie* (public face). The real intent was to protect Japanese hegemony in Northeast Asia and, if possible, regain normative autonomy over it. This desire for autonomy was manifest in the »special interests« of Japan in Manchuria, and as we shall see, Manchuria became the core or seed for a Japanese exclusive sphere in Asia and *raison d'être* for an »East Asian International Law« when all political pretences to submission to East Asian normativity fell away.

### 3 From Western Normativity to an »East Asian International Law«

The great watershed in Japanese modern diplomatic history is the so-called Manchurian Incident of 1931 in which the notorious Kwantung Army (Japan's overseas army stationed in and around Port Arthur since 1905 to guard the South Manchurian Railway) staged an attack on the tracks of the railway near Shenyang and, pretending to defend it, in the course occupied the whole of Manchuria. It subsequently established the puppet regime Manzhouguo in 1932, again on the pretences of Manchurian »national self-determination«. <sup>68</sup>

The Japanese government, although not happy with the methods of the Kwantung Army, certainly was not unsympathetic to its immediate aims and soon endorsed the *faits accomplis* by »recognizing« Manzhouguo. However, China protested to the League of Nations, as is well known, and after a protracted debate, the Japanese delegation left the General Assembly in 1933 never to return. The decision to withdraw from the main body of the League of Nations is one of the more puzzling problems of Japanese diplomatic history, as the League of Nations, despite formal protest, basically handed Manchuria to Japan on a platter (under the construction of an autonomous region Manchuria with foreign, mostly Japanese advisors) and all but factually recognized Manchuria in practical

terms. <sup>69</sup> Especially the great powers kept a suspiciously low profile. It is true that US Secretary of State Stimson declared the principle of non-recognition of territorial changes brought about by use of force (Stimson Doctrine), but he did not want to follow up with sanctions, as public opinion was against sanctions. The British government considered Stimson's declaration a »publicity stunt« and internally showed a very understanding attitude towards Japan. <sup>70</sup>

Whatever the motivations of the Japanese government, in the light of the effectively very lenient attitude of the western powers towards Japan's actions in East Asia, Japan's withdrawal from the League of Nations all the more emphasizes its intention to rid itself of European heteronomy and establish a sphere of autonomous rule. One of the most frequent criticisms against the new developments of international law – be it the League of Nations, the Geneva Protocol, or the Kellogg-Briand Pact – was (apart from the fact that they sought to uphold the status quo) that these institutions were largely crafted with the *European* situation in mind and in order to govern *European* affairs. <sup>71</sup> They were inapplicable to the wholly different situation and interests in East Asia in the first place. Thus, an alternative regional order for Japan's »sphere of interest« should replace European normativity.

The scope for this new order grew with the escalation of the conflict in East Asia. At the beginning, Manchuria formed the core of the new »sphere«. When the second Sino-Japanese War broke out and Japan occupied the coastal area of China in 1937/38, the sphere expanded accordingly; in 1938, Prime Minister Konoe Fumimaro sought to rationalize Japan's advance by declaring a »New Order in East Asia« (*Tōa shin-chitsujo*) that envisioned a union of solidarity among Japan, Manchuria and China on the basis of »same race, same culture«. Similarly, when Japan advanced even further south and into Indochina, a new declaration was issued in 1940 that proclaimed the establishment of the »Greater East Asia Co-Prosperty Sphere« (*Dai-Tōa kyōei-ken*) in East and Southeast Asia for the »liberation« of this region

68 On the Manchurian Incident in more detail, see ZACHMANN (2013)

159–203; NISH (1993).

69 ZACHMANN (2013) 176 f., 183–185.

70 NISH (1993) 184.

71 See ZACHMANN (2013) 139 (Geneva Protocol), 157 (Kellogg-Briand Pact), 182 (League of Nations).

from western imperialism and the realization of a common destiny (less defined than in the »New Order«) through co-operation.<sup>72</sup>

The declaration of the Greater East Asia Co-Prosperity Sphere finally set the stage for the ambitious project of an »East Asian International Law« (*Tōa kokusaihō*).<sup>73</sup> In December 1941, simultaneously with the attacks on Pearl Harbour, the Japanese Society of International Law applied for status as a foundation and henceforth dedicated itself under the auspices of the Ministry of Foreign Affairs to the »study and investigation of the international law which governs the relation between the member states and peoples of the Greater East Asia Co-Prosperity Sphere«. <sup>74</sup> To this end, the society set up a number of committees, among which was the »Committee for East Asian International Law« (*Tōa kokusaihō i'inkai*). All influential international lawyers in Japan were members of this committee, albeit with a varying sense of commitment. Thus, the older generation such as Tachi Sakutarō, Yokota Kisaburō and Taoka Ryōichi remained more in the background and were less conspicuous in their activities than the younger, among which especially Yasui Kaoru (Tokyo Imperial University) and Tabata Shigejirō (Kyoto Imperial University) made the most relevant contributions to preliminary studies of an »East Asian International Law«.

To understand the context and atmosphere in which this project was undertaken, it should be kept in mind that by 1941, international law had lost much or all of its authority in public opinion and, as the realities in the theatres of war demonstrated, was deemed dispensable in practice by the Japanese military as well. If the Manchurian Incident in 1931 still had been discussed in terms of legality, such a concern was considered a wasteful luxury by 1941. For more than ten years, positive international law had been openly criticized as a European concern and thus discussion on these grounds were ridiculed in the press as a »conversation between fish and birds«. Japanese ultranationalists even argued that the concept of law as such (i. e. the notion of duties and rights) did not fit East Asian mentality and would be unnecessary under

enlightened imperial rule. Moreover, although militarists certainly acknowledged the propaganda merits of the »Co-Prosperity Sphere«, they loathed its egalitarian pretences and decried its »cosmopolitanism« as a miniature version of the hateful internationalism of the 1920s and therefore »un-national« (*hi-kokumin-teki*).<sup>75</sup>

In setting up an alternative »international law«, Japanese international lawyers therefore argued from a defensive position, trying to defend the law as well as their profession. More importantly, they had to cope with an even profounder problem, namely the epistemological problem of how to come up with an alternative »East Asian« order from scratch, i. e. without anything to go on and without relying on gradual development from the existing European normativity. Since the project remained – luckily – unfinished and was aborted after less than three years by the end of 1944, when defeat seemed inevitable and imminent, we have but a small number of preparatory studies that indicate the direction which Japanese international lawyers took to tackle this problem. To summarize it in general terms, they maintained a gradualist, »rational« approach and defended the necessity to develop new law on the basis of a critical evaluation of existing models and concepts of international order. However, in choosing their models, they deliberately opted for those which stood in contrast to classical European normativity or posed a recent, revisionist threat to it, i. e. made use of the split in European normativity itself in recent times.

Despite the Pan-Asianist pretences of the Co-Prosperity Sphere, the »East Asian International Law« as its underlying legal framework thus was to become a hybrid of many sources. At its most obvious, traditional level, the US-American Monroe Doctrine set the example of a sphere outside European interference. A Japanese or »Asian Monroe Doctrine« had been a recurrent subject in Japanese discussions since America's rise to imperial power in 1898, and in 1932, Tachi Sakutarō once again confirmed that, if the US and Britain had legitimate interests to protect their spheres of influence, even more so did Japan have a case for Manchuria.

72 For translations of these Pan-Asianist declarations, see SAALER/SZPILMAN (2011) vol. 2, 167–174, 223–227.

73 For a more detailed discussion, see ZACHMANN (2013) 205–260.

74 »Business plan« of the society, December 1941, as quoted in ZACHMANN (2013) 229; see also TAKENAKA (1995).

75 Cf. ZACHMANN (2013) 210, 267–269.

That Japan's interest to guarantee Manchuria's security in Manchuria is even greater than that of the US on the American continent and Britain in Egypt and Persia is proven by the fact that we have been already forced once [during the Russo-Japanese War 1904/05] to send a large army to this region.<sup>76</sup>

However, to add structure to the »Japanese Monroe Doctrine«, younger colleagues such as Tabata Shigejirō and Yasui Kaoru added new layers and used Soviet and Nazi German concepts of international law.<sup>77</sup> As we shall see, especially useful for this purpose were Carl Schmitt's concept of *Großräume* (autonomous large spaces), Evgeny Korovin's »international law during the transitional period« and (more as a cautionary tale) Evgeny Pashukanis' ultra-realist interpretation of international law.<sup>78</sup>

Thus, in a seminal essay on the »Plural Construction of the International Legal Order« (*Kokusaihō chitsujō no tagen-teki kōsei*),<sup>79</sup> Tabata sought to fracture the unity of the global international legal order by arguing that international law was not a »constitution« that set up a closed community outside of which there was no legal life. Rather it was more of a *lex generalis* that could be derogated by more specific legal provisions for specific cases. Japan therefore had been an autonomous legal subject even prior to its accession to the western international legal order and it would be so even after its withdrawal from it. Moreover, Japan could devise its own, more specific regional order or, in fact, become a member of multiple orders. Although Tabata never quotes Evgeny Korovin directly, it is already obvious from the wording of the title of his essay that Tabata refers back to Korovin's idea of a »plural construction of modern international law as a totality of several different legal planes« which Korovin developed in his *International Law during the Transitional Period* (1924, Japanese translation 1933).

Similarly, Tabata shared Korovin's gradualist and conservative approach to the development of

new law in recommending critical legal history as the only rational point of departure:

During transitional phases it often happens that people assume a radical stance that naively rejects all manifestations of the past without sufficiently testing the foundations of their validity. [...] Generally speaking such a direct negation of historical manifestations, i.e. the establishing of a new order as if one could create something out of nothing without any historical precedence, is not possible. This always has to be done through the negation of the past and this negation must be motivated by a profound analysis of the historical order. [...] As long as we speak about the international law of the Co-Prosperity Sphere as a mere conceptual idea without historical analysis of the old international legal order, the question whether one agrees with the new law is not a theoretical issue, but merely a matter of [irrational] belief which leaves no room for constructive debate.<sup>80</sup>

Thus, Tabata obviously sought to defend his gradualist and »traditionalist« approach against the growing criticism and impatience of ultranationalist.

It is well known that Carl Schmitt's theory of »autonomous large spaces with a prohibition against intervention of foreign powers« (1939) was highly influential in the construction of an »East Asian International Law«, even to the extent that it is considered by some as a mere replica of the former.<sup>81</sup> And indeed, the new law was deliberately called an »international law of large space« (*kōiki kokusaihō*, of which the German equivalent would be *Großraum-Völkerrecht*).<sup>82</sup> Thus, Yasui Kaoru devoted a large portion of his notorious study »Basic concepts of the European international law of large spaces« (*Ōshū kōiki kokusai-hō no kiso rinen*)<sup>83</sup> to the discussion of Carl Schmitt (the other, smaller portion to the Soviet authors Korovin and Pashukanis).

76 TACHI (1932) 10 f.

77 SOGAWA / MATSUDA (1978) 59; MATSUI (2002) 15; YANAGIHARA (2004).

78 SCHMITT (1939); KOROVIN (1924); PASHUKANIS (1935).

79 TABATA (1942/43); on this, see ZACHMANN (2013) 238–242.

80 TABATA (1943) 11 f.

81 E. g. AKASHI (2012) 741.

82 ZACHMANN (2013) 233 with further references.

83 YASUI (1942).

However, what is often overlooked is the fact that Japanese international lawyers used these references of alternative or revisionist »European normativity« in a *creative* way to serve their own particular ends in the defence against their ultra-nationalist critics at home. This is particularly obvious in the case of Carl Schmitt, whose theories Tabata Shigejirō, for example, used to defend international law against more racist, hierarchical notions of »international order«. In the same way as Carl Schmitt had to defend himself against his racist nemesis Werner Best in Germany, Tabata argued (with explicit recourse to Schmitt's defence) that even Carl Schmitt did not see the »large space« as a closed, homogeneous unity, but as an open structure which allowed for legal relations outwith and within the large space (i. e. not as a hierarchy of races).<sup>84</sup> Similarly, Yasui Kaoru, who was otherwise an explicit Sovietophile, used the example of Evgeny Pashukanis as a cautionary tale for the consequences of the excessive politicization of international law. Pashukanis is famous for his ultra-realist view of international law as an argumentative »weapon« in the hands of Soviet diplomats. However, due to his political involvement, Pashukanis finally fell victim to the Stalinist purges in 1937, and Yasui pointed out that this was the »inevitable fate of an international lawyer who subjected science [*kagaku*] completely to the dictates of politics«.<sup>85</sup>

Thus, Japanese lawyers creatively used the models and examples of an alternative »European normativity«, not only for the construction, but also for the defence of law itself against those critics who would rather do without »normativity« altogether and proposed an imperial rule based on »moral« precepts and racial principles alone. Tragically, the theatres of conflict during the Asia-Pacific War show that the lawless (and rather immoral) state had become already reality. In line with their general line of defence (and with the policy of the central government and the Ministry of Foreign Affairs), Japanese international lawyers tried to keep up the pretences that Japan was still fighting by the book of humanitarian law, and became in-

creasingly dissociated from reality.<sup>86</sup> Yet, their arguments betray the painful tension between law and reality, and point towards the inevitable moment when »total war« would have swept away all legal pretences and the discipline of international law altogether.

### Conclusion

Luckily, but tragically, defeat in 1945 intervened. Under US occupation, Japan soon reverted to its accustomed commitment to positive international law and re-joined the western powers on the side of the US in the Cold War. Japanese international lawyers, most of which remained in their positions of influence, mastered the transition with remarkable ease, not only personally, but also in terms of their international legal worldview.<sup>87</sup> If until 1945 East Asian »autonomy« had been the goal, Japan's neutrality now became the vaunted ideal for many international lawyers. Likewise, arguments for the Co-Prosperity Sphere were swiftly rededicated to Japan's commitment to the United Nations. Again, the US-Japanese Security Treaty of 1960 and the realities of the cold war soon destroyed dreams of neutrality and world government and Japanese international lawyers reverted to the rather »positivistic« and pragmatic approach to international law that characterized their initial encounter with it in the nineteenth century.<sup>88</sup>

In looking back on the whole trajectory, one could argue that Japanese attitudes towards international law for most of the modern period (1868–1945) were marked by an exceptional commitment to and acquiescence in European, or Western normativity. This was largely motivated by the consistent effort to rise as a power and »join Europe« (*nyū'ō*) or the ranks of the western powers. »Europe« in this sense was defined as modular, i. e. as a de-localized, universal standard which could be applied throughout the world and compliance with which ensured prestige and, ultimately, power. »European normativity« therefore was more a

84 ZACHMANN (2013) 240 f., also on Japanese attitudes toward Nazi racist concepts of international order in general.

85 Yasui Kaoru, »Sovieto riron no tenkai« (The development of Soviet

theory), 1937, as cited and discussed in ZACHMANN (2013), 252 f.

86 In more detail, see ZACHMANN (2013) 261–278.

87 See TAKENAKA (1995); ZACHMANN (2008); ZACHMANN (2013) 279–342.

88 Cf. ÔNUMA (1990).

means of political expediency than intrinsic conviction, and rather than describing the approach as positivistic it would be more appropriate to simply call it purely pragmatic. However, this does not mean that Japanese attitudes were uncritical. On the contrary, after the initial phase (ca. 1854–1905) of receiving and practising the principles of international law in its own foreign policy with considerable success, many Japanese began to feel a certain estrangement and inner reservation towards European normativity. This was less due to western international law as such than arguably the result of Japan's rising status and the beginnings of confrontation with Europe. Until then, Japan had been in no power position to challenge Europe, but gradually came into this position by consolidating its hegemony in Northeast Asia. Thus, Japan's interwar period (1905–1931) was an uneasy combination of outward compliance and inner reservation, a tension that Japan eventually resolved by withdrawing from »Europe« and the project of building an autonomous sphere of its own after 1931. However, the example of Japanese international lawyers shows that in order to save international law from its ultranationalist critics and enemies, European normativity still remained a cultural reference, including its internal split in recent times. Classical European international law served as point of departure for critical historical studies; revisionist »European« (especially Soviet

and Nazi German) concepts and ideas served as current reference for the establishment of an »East Asian International Law«. Thus, from the perspective of Japanese international lawyers, despite the Pan-Asianist pretences, Japan merely made use of the normative rift and fractured state of European normativity itself at the time, but never actually *left* »Europe«.

It is for this reason that Japan's case does not comfortably serve as an historical example for challenging an allegedly still persisting European normative hegemony in international law.<sup>89</sup> On the contrary, as an example it throws a rather revealing light on the so-called »Asian Values« debate of the early 1990s which, more than anything else, should be understood as a similar attempt to re-negotiate universalism towards particular ends and without a clear vision of alternatives.<sup>90</sup> This being said, the Japanese experience is also more constructively valuable in that it has engendered a heightened sensibility for the limitations of European normativity in the face of diverse historical and cultural experiences and a tradition for the holistic study of international law from a »social science« perspective which could be a useful complement to the study of European normativity from a global perspective.<sup>91</sup>



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<sup>89</sup> E. g. LEE (2011).

<sup>90</sup> Cf. SAUL/MOWBRAY/BAGHOOMIANS (2011).

<sup>91</sup> See for example ŌNUMA (2010), MATSUI (2002), ANDO (2011).



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