

## Japanese Modernization Lecture Series

### Chapter 10. Japan and Modern International Law

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#### **Introduction**

My name is Kanehara Atsuko. It is a great honour for me to be here with you.

I will speak about Japan's reception of international law.

To introduce this topic, I will set the perspective from which we may understand Japan's reception of international law.

International law has sovereign States as its subjects.

Let's focus on the meaning of "subject."

There is a dual side to it.

First, since international society does not have any authoritative legislative organs, sovereign States themselves create international law by, typically, concluding treaties and raising customary rules.

Second, sovereign States are bound by international law, and they implement international obligations.

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Text citation: (Kanehara 2020)

Reference: Kanehara, Atsuko. 2020. "Chapter 10. Japan and Modern International Law" Japanese Modernization Lecture Series. JICA-Open University of Japan. Makuhari, Chiba: BS231, Nov.

The first is the positive side of being a subject of international law.  
We may call this the creator or a reformer side.

The second is the passive side of being a subject of international law.  
We may call this the conformist side.

The most important thing is that sovereign States should maintain these two sides, “at the same time.”

On the one hand, they need to positively contribute to the revision or creation of international law.

And on the other hand, “at the same time” they need to comply with international law.

Lack of either side would mean, in reality, a lack of the perfect status of being a “subject” of international law.

This lack would mean that States do not deserve “sovereign” States.

From this perspective, I will explain three issues regarding Japan’s reception of international law.

First, reception of modern European international law: the passive acceptance of law, second, the motivation to be a great power: law and force, and, third, the negation of international law by force: deviation from being a subject of international law.

As my conclusion, I will give you a brief analysis of Japan’s treatment of the “Corona virus” pandemic of 2020 and its diplomatic policy of “the rule of law,” as seen in the South China Sea dispute.

I would like to raise a very important question here: is Japan, as a sovereign State and an important player among Asian countries, really a subject of international law, including the dual side of it?

Then, let’s move onto the first issue.

## **Section 1: Reception of the Modern European International Law: Passive acceptance of international law**

In the period of reception of modern European international law, the salient feature was the passive side of Japan of being a subject of international law.

Japan under the Tokugawa Shogunate imposed a seclusion or isolationist policy between 1639-1854.

While during that time Japan had intercourse with several foreign countries, Japanese were not allowed to go abroad, and foreigners were not allowed to enter Japan.

At the end of its seclusion, in 1853, the Tokugawa government was demanded by US and other great powers, to “open up”, even in some cases by the threat of force.

Japan did not have enough knowledge of international law and military power.

So it had no choice but to conclude in 1858 unequal treaties of commerce with the great powers, such as US, UK, The Netherlands, France and Russia.

Under these unequal treaties, Japan admitted extraterritoriality and lost its tariff autonomy.

As to extraterritoriality, within Japan’s territory, the great powers had consular jurisdiction in certain designated areas.

Thus, even within its territory Japanese jurisdiction was limited in relation to the great powers.

In the Normanton incident of 1886, the Normanton, a vessel flying the UK flag became stranded and sank in the vicinity of the Wakayama Prefecture of Japan.

The vessel with its crew was rescued by local people, but all 25 Japanese passengers, without exception, died on board.

The fact is that the Japanese were humiliated to death by the captain and crew of the Normanton. They were not given any tools to escape.

But by exercising its consular jurisdiction, the Marine Accident Tribunal of UK gave a “not guilty” verdict in favor of the captain.

Japan by itself could not try or decide the incident. This was because Japan’s criminal

jurisdiction was limited by the consular jurisdiction of UK.

This incident provoked in Japan a strong protest against the consular jurisdiction of the great powers.

In addition, Japan could not decide tariffs in that period by its own will.

The imposition of tariffs is very important element of sovereignty of States, but Japan was not allowed to decide tariffs on imported foreign products.

As a result, Japan's revenues from tariffs remained very low.

The Tokugawa government came to understand that this was serious and it urgently needed knowledge of international law and military power to alleviate the unfavorable situation.

This policy was continued by the Meiji government after the 1868 Meiji reformation and the collapse of the Tokugawa Shogunate.

After the abolition of its seclusion policy, Japan entered an age of enlightenment and civilization.

At the end of Tokugawa Shogunate, Japan sent people to The Netherlands, for instance, to study international law.

In the Meiji era, many authoritative textbooks of international law were translated into Japanese.

In 1897, the Japanese Association of International Law was established, which is now the Japanese Society of International Law.

I have served as its President.

It is a well-known fact that in the 1868-1869 "Hakodate War," in which the new Meiji government clashed with the old Samurais (soldiers) of the Tokugawa Shogunate, the rule in the law of war relating to "abordage" was applied between the two hostile sides.

Abordage is a strategy for maritime wars. It is, where after coming alongside a hostile ship, combatants are sent to the ship and they attack it on board.

Regarding “civilization”, Japan tried to incorporate Western civilization into Japanese society.

By holding western-style balls Japan expected to absorb Western culture and be able to demonstrate to international society its absorption of that culture.

With respect to the enlightenment and the civilization, the critical point is that the cultural elements were “European” or “Western.”

Japan tried to receive modern European international law without having serious doubts about the nature of that law.

Some reservation is needed on this. There was special background for Japan’s reception of modern European international law.

Japan had a long tradition of Confucian thought that had been imported by the long history of intercourse with China.

With the Confucian tradition of the concept of “a universal law,” and the understanding of the natural law basis of modern European international law, (which was somehow doubtful) Japan was said to be able to easily receive modern European international law.

Therefore, it is totally understandable that in the age of enlightenment and civilization, Japan also demonstrated its faithful observation of modern European international law.

Japan expected that this was an important requirement for being treated as equal to Western countries.

Thus, in seeking the revision of the unequal treaties, Japan regarded the enlightenment, civilization and observation of international law as indispensable factors to achieve its desire.

This acceptance by Japan of European or Western civilization and modern European international law definitely shows its passive attitude toward international law.

Japan tried to be a conformist of modern European international law.

As explained in the introduction to this lecture there is a dual side to the subject of international law, namely, its passive side and its positive side.

In this era of reception of international law we find Japan exercising solely the passive side of the law.

However, in the same era, we cannot deny that there were some precursors for the Japan's later change of attitude toward international law.

First, Japan held some doubts with international law in relation to the reality of the force of great powers.

Japan somehow harbored the idea that international law was useless and too weak to bind States, especially, the great powers.

Second, Japan made every effort to strengthen its own power, both militarily and economically.

This policy is called by a special Japanese term: "hukokukyohei-saku," the policy of "rich nation, strong military."

Certainly, the purpose of the "rich nation, strong military" was to obtain a favorable position in the negotiations for the revision of the unequal treaties with the great powers.

In this sense, the policy of "rich nation, strong military" was among Japan's policies for the purpose of catching up with the Western powers, as well as the adoption of the policies of enlightenment and civilization.

Nonetheless, with cherishing its fundamental doubts about the effectiveness of international law in relation to great powers, the policy of "rich nation, strong military" pushed forward Japan's motivation for being a great power.

Now, we come to the second talking point of this lecture.

## **Section 2: Motivation for being a great power: Law and force**

At the beginning of the Meiji era in 1871 the government dispatched a delegation to US and to European countries to study Western systems of politics, laws, military, societies, and cultures.

This policy of the Meiji government was the successor to the enlightenment policy initiated by the Tokugawa government.

The head of the delegation was Iwakura Tomomi.

Councilor Kido Takayoshi, and Finance Minister Okubo Toshimichi were among the vice ambassadors in the mission.

This mission's travel was recorded in detail by one of its attendants.

When the mission visited Germany, they met Chancellor Bismarck and Army Chief of Staff Moltke.

The small country of Prussia, after wars with Austria and France, had achieved the unification of the German Empire (Reich).

Against this background, Bismarck made to the Iwakura mission an impressive statement with respect to international law:

“(quote) The law of nations is not a law that can protect the rights of great powers. Small countries earnestly obey it.

Great powers disregard international law by military force, as soon as it turns out to be unfavorable to their national interests. And thus, small countries cannot preserve their rights of autonomy. (end of quote)”

We can find similar remarks in a speech in the German Parliament by Army Chief of Staff Moltke in 1874.

Although his speech was given after the Iwakura mission returned to Japan, it is not difficult to imagine that the members of the Iwakura mission knew the speech by Moltke.

The important figures of the Meiji government in the Iwakura mission were no doubt impressed by these remarks regarding international law and its weakness against force.

The ambassador of the Iwakura mission, Iwakura Tomomi wrote in 1869, “(quote) International law is not a rule agreed by mutual consents of States and States do not obey it. (end of quote)”

In addition to these politicians, one of the most influential Enlightenment thinkers in Japan, Fukuzawa Yukichi, wrote, “(quote) A hundred volumes of international law textbooks are inferior to a couple of cannons. (end of quote)”

This recognition of the fragility of international law in the face of force raised a strong fear in the Japanese politicians that Japan would lose its status as a sovereign State and its sovereign independence if it did not have enough military and economic power.

The following remarks can be fully understood in this context.

The ambassador of the Iwakura mission, Iwakura Tomomi said, regarding the Western powers,

“(quote) They have the heart of tigers or wolves. If we are only frightened and do not resist their violence, our imperial nation will come to be enslaved. (end of quote)”

The vice ambassador Kido Takayoshi, wrote in 1868, “(quote) International law is a tool to take away from the weaker. (end of quote)”

These fears, and the policy of “rich nation, strong military” went side by side.

The policy of “rich nation, strong military” had initially purported to make Japan equal to the Western countries.

It had been understood by Japan as an indispensable requirement for the revision of the unequal treaties that Japan had concluded with the great powers.

Nonetheless, the policy of “rich nation, strong military” under the fear of Japan’s being further inferior to Western countries, might suggest a different significance.

Beyond being strong enough not to have anything taken away by the great powers, Japan began to harbor a self-image of becoming a great power that could by force even negate and trespass on international law.

In addition, we need to remember the European bias that strongly covered Japan’s enlightenment and civilization policy at that time.

As a dark side of the coin of Eurocentrism, Japan’s ambition to be a great power showed its fangs to Asian countries.

This tendency was called in Japanese “datsua nyuo,” namely “leave Asia, join Europe.”

For Japan, international law was regarded as “a political bargaining chip” that could be



taken advantage of, solely by “civilized nations,” which meant European or Western nations.

Also, Japan’s demonstration of its will to observe international law was toward the Western countries, and not toward Asian countries.

In other words, Japan did not have any hesitation in violating international law in relation to Asian countries.

Now, we come to the third point of today’s lecture.

### **Section 3: Negation of international law by force; Deviation from being a subject of international law**

In the enlightenment period Japan eagerly tried to acquire a knowledge of international law, and, then, to become a rule-obeying country.

In the 1904-1905 Russo-Japanese War, Japan abided by the law of war.

During this war Japan’s treatment of Russian prisoners of war was extremely courteous and humane.

This is totally in accordance with the law of war.

But, the Russo-Japanese War was a turning point after which Japan changed its policy of faithfully obeying modern European international law.

An important reservation to this, however, is as follows:

Japan’s motivation for being a great power did not necessarily entail a negation of international law.

Actually, Adatchi Mineichiro, a highly esteemed Japanese diplomat at the end of the 19th century, thought that Japan was required to play a very important role as a strong country in the international community.

And it would do so by abiding by existing international law.

Therefore, being a great power does not necessarily bring the idea of a negation of international law.

Nonetheless, after its victory in the Russo-Japanese War, having gained the confidence to be a great power, Japan stepped toward the negation of international law principally by force.

From 1931, it is said that Japan went into a period of militarism. It rushed into a long war with China in 1931, and finally with US from 1941.

In 1933, while Japan was a permanent member of the Council of the League of Nations, it withdrew from this organization.

This was for the reason that the General Assembly of the League of Nations adopted a resolution to urge Japan to leave from Manchuria in China.

As a background for Japan's aggressive conduct, particularly against Asian countries, there was the policy of "datsua-nyu-o-saku," "leave Asia, join Europe."

Japan tried to obtain a dominant status among Asian countries and this was in sharp contrast to the equal relations, which Japan eagerly tried to attain with Western countries.

Japan concluded unequal treaties with Asian countries, such as Korea in 1876 and Thailand in 1898.

Against China, Japan presented the 21 points of demand in 1915, which eloquently showed Japan's unequal treatment of that country.

Thus, Japan sought to establish a new international order in East Asia.

The "Dai Toa Kyoei Ken," "a Greater East Asian Co-prosperity Sphere," may explain such an idea of creating a new international order in East Asia.

After Japan surrendered to the United Nations (Allied Powers) at the end of World War II, it enacted in 1947 a new constitution, the Constitution of Japan.

Article 9 of the Constitution reads that aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In addition, international cooperation is one of the main pillars of the Constitution of Japan.

Its Article 98 prescribes that treaties concluded by Japan and established laws of nations shall be faithfully observed.

It is clear that Japan, under its Constitution, has a passive side of being a subject of international law.

Then, did Japan come to take the conformist position toward international law, again, as it did in the era of the reception of modern European international law?

Or, is Japan, as a sovereign State, really becoming a subject of international law, with the dual side of it, namely, passive and positive sides being seen at the same time?

In doing so, has Japan, as a nation in Asia, departed from its past Euro-centrism?

In conclusion, by taking up the examples of Japan's coping with the "Corona virus" pandemic of 2020 and the South China Sea dispute, I would like to deal with these issues.

### **Conclusion: a conformist and a reformist at the same time**

As you know well, in February of 2020, the gorgeous cruise liner, the Diamond Princess, was at Yokohama port.

And there were Corona virus infected passengers and crew inside the Diamond Princess.

It is reported that the number of the infected was 712 and 13 had died.

For the situation when the Diamond Princess was at Yokohama port, what basic stance should have been taken by the Japanese government, from the perspective of the dual side of being a subject of international law?

There are several relevant treaties that can be applied to the Corona pandemic situation.

Among them, the most important international law is the United Nations Convention on the Law of the Sea, UNCLOS.

Given these international law rules and regulations, what basic stance should the Japanese government have taken in this incident?

In this regard, above all, I emphasize the two fundamental principles to be abided by Japan as a sovereign State and as a subject of international law.

As a sovereign State and as a subject of international law, first, Japan has the right to protect its territory and people from the pandemic.

At the time Japan was really in danger of an explosive and rapid infection of “Corona virus” that would occur within its territory and seriously harm its people.

Second, Japan has the obligation to prevent the infection of “Corona virus” from spreading beyond its territory to other countries in the world.

These two principles are, without any doubt, convincing.

In facing the Corona virus pandemic, there would be no argument with these principles from the commonsense point of view.

By adhering to these principles, Japan should have exercised the dual side of being a subject of international law.

First, Japan, as a conformist, should have applied UNCLOS and the relevant treaties to the situation, as much as possible.

This is the passive and conformist side of being a subject of international law.

However, the Corona virus pandemic is, particularly in terms of its scale, the first one for almost 100 years since the Spanish Flu that began in 1918.

Therefore, it cannot be expected that existing international law would fully cover the Corona virus pandemic, and the situation of the Diamond Princess.

This fact brings us to the second point.

Second, Japan, as a reformist, should have taken leadership in revising UNCLOS and other international treaties, and even in creating new rules that can effectively cope with pandemic challenges.

For future disasters, some revision of UNCLOS or even the creation of new rules of the law of the sea is strongly required.

For this purpose, Japan, as a country that has experienced the Corona virus pandemic, should take the leading role.

This is the positive and reformist side of being a subject of international law.

Appropriate realization of the dual side of a subject of international law, namely, a passive conformist side and a positive reformist side, is really a condition for being a sovereign State.

In addition, there is one more important thing.

The dual side of being a subject of international law should be realized and maintained by Japan, totally in cutting off its past Euro-centrism in the era of its reception of modern European international law.

In the South China Sea, irrespective of the historical award in the South China Sea dispute that was rendered in 2016 by the arbitral tribunal, serious tension has continued.

This is due to China's unilateral aggressive conduct.

China's claim of historic rights over an extravagant sea area has seriously harmed the fundamental principle of the freedom of navigation.

Against this, Japan has continuously urged "the rule of law" in the South China Sea, along with other countries in the world.

Japan is taking a solid stance to require adherence to international law.

And it is supporting the Southeast Asian countries to build regional order to recover and maintain principally the freedom of navigation in the South China Sea.

Under the Euro-centrism in the era of its reception of modern European international law, Japan's compliance with international law was toward Western countries, not toward Asian countries.

Japan did not appropriately hold its self-image as one of being an Asian country.

The current international society is far more diverse than the past European society in which modern European international law was established.

While it is not an easy task, international law should maintain its universal validity by really being based upon the respect for diversity in the current international society.

Japan needs to take an important role to faithfully abide by and to positively develop international law within its own background as one of the Asian countries.

For Japan, to have the dual side of a subject of international law, namely, the passive and positive sides discussed earlier, should be accompanied by a basic stance of being among the Asian countries.

This is the end of my lecture today.

Thank you all for your attention.