大手前大学論集　第19号（2018）pp. 15－93

The John Hartley Cases: Examining the 1870s Anglo-Japanese Dispute over Opium Control

Koji OZAKI

Abstract

This paper discusses the process through which the Japanese government took control of the opium trade. Specifically, it focuses on the John Hartley cases, in which the customs authority at Yokohama accused a British wholesale druggist, John Hartley, in 1877 and 1878, of smuggling opium. The judgements in the two cases issued by Hiram Shaw Wilkinson, especially the judgement in the first case that found Hartley not guilty, led to diplomatic tension between Japan and Britain. The present paper draws an overall picture of the Hartley cases by investigating them from diverse perspectives, including a shift in British diplomatic policy.

The first section discusses the conditions of opium control prior to the Hartley cases, beginning with the Tokugawa era. An outline of the Hartley cases and the negotiations concerning them between the Japanese and British governments is presented in the second and third sections. The fourth section focuses on international law theory in the latter half of the nineteenth century and illustrates that British jurists adopted a new theory of international law theory, whereas the extraterritoriality system that formed the basis of Wilkinson's judgements was becoming old-fashioned.

Finally, the fifth and sixth sections discuss the essential influence that the Hartley cases exerted upon the diplomatic relationship between Britain and Japan. Both

[**Acknowledgements**] This article is based on a paper that I presented at an annual meeting of the American Association for the History of Medicine in New Haven, Connecticut (30 April–3 May 2015). To complete this article, I received a grant from the Japan Society for the Promotion of Science (JPPS) (Scientific Research (C), 2016). The author would like to thank Enago (www.enago.jp) for the English language review.

sections explain the end of the Hartley cases or, more correctly, the establishment of the Japanese state monopolization of opium and the end of Harry Parkes' leadership in Britain's diplomacy with Japan.

Additionally, to explain the change in British diplomacy towards East Asia in more detail, Appendix discusses the British extraterritoriality court regime in China and Japan. Specifically, it focuses on a controversy that arose over the revision of the China and Japan Order in Council of 1865. By examining the outcome of this controversy, it is possible to perceive more accurately the reasons why the Japanese government could establish its own state jurisdiction over opium control in that period.

Keywords: 19th century, Narcotic Drugs, International Law, Extraterritoriality, British Gentlemanly Capitalism

Japan, as is generally known, was an imperialistic nation that smuggled a huge quantity of opium into China and other neighbouring countries until the end of World War II. However, as described in the next section, opium smuggling caused significant suffering when the country began to transform into a modern state in the late 1860s. The Japanese government enacted the Isei (Sanitary Code)[1] in 1874 to establish Western medicine largely because it feared that the smuggling of opium and counterfeit medicines might endanger the lives of people.

I have mentioned this issue in my previous work, stating that members of the Japanese government, such as Nagayo Sensai, decided to adopt the state monopoly system of opium rather than a strict prohibition, and that, by utilizing the exclusive commercial transaction system of medicines which traditional wholesale pharmacists had developed in the Tokugawa era, Nagayo and other government members sought to reject the demand of foreign merchants for free trade and to establish a state

[1] Isei (医制) is usually renderedas 'Medical Law' or 'Medical System', but I employ 'Sanitary Code' as its equivalent because the term was used in contemporary official publications of the Central Sanitary Bureau (Eisei Kyoku) at the Home Department. For the same reason, I translated the titles of other laws or authorities concerned with sanitary affairs by referring to the terms that were employed in those documents. See *First and Second Annual Reports of the Central Sanitary Bureau of the Home Department* (1877), 1; 2; and 7.

monopoly.[2] However, the previous study left something to be desired because I did not take international relationships or international law into consideration and simply focused on domestic circumstances alone. Rectifying those deficiencies, this paper fully elucidates the process through which the Japanese government took control of the opium trade. Specifically, it focuses on the John Hartley cases, in which the customs authority at Yokohama accused a British wholesale druggist named John Hartley twice, in December 1877 and in January 1878, of smuggling opium. Both of the judgements in the two Hartley cases were given by Hiram Shaw Wilkinson, the acting law secretary at Her Britannic Majesty's Court at Kanagawa (hereafter Consular Court at Kanagawa). In the first case, Wilkinson found Hartley not guilty. He dismissed the original charge against Hartley of smuggling 20 pounds of opium by concealing it in one of the shipments that he applied to land. Wilkinson's judgement led to diplomatic tension between the British and the Japanese governments. Drawing its own conclusions during the negotiations over the cases, the Japanese government eventually established its own legal system for opium control by the early 1880s, which constituted the framework of the Opium Act enacted in 1897.

Scholars have hitherto examined these cases. In the 1950s and the 1960s, scholars such as Inoue Kiyoshi or Hanabusa Nagamichi considered these cases as one of the symbolic events that exposed the unjustness of consular jurisdiction under unequal treaties. Their view held a commanding position within the historiography and was taken over by the next generation.[3] For instance, emphasizing the unfairness of the judgements in the Hartley cases, Liu Mingxiu (who later took the name Ito Kiyoshi) argued that the fact that the cases were dropped without anything being settled made the Japanese government feel all the more acutely the need to control opium in Japan and then in Taiwan after the first Sino–Japanese War.[4] John Jennings followed Liu's view.[5]

Nevertheless, the mainstream in contemporary historiography has recently shifted to studies that rather severely criticize such an orthodox view. Richard Chang's work, *The Justice of the Western Consular Courts in Nineteenth Century Japan*, is the

---

[2] Koji Ozaki, 'Sensai Nagayo: Pioneer of Hygienic Modernity or Heir to Legacies from the Premodern Era?', *Otemae Journal*, 17 (2017), 61–88.
[3] Kiyoshi Inoue, *Joyaku Kaisei* (Tokyo: Iwanami Shoten, 1955), 41, and Nagamichi Hanabusa, *Meiji Gaikoshi* (Tokyo: Shibundo, 1960), 65.
[4] Mingxiu Liu, *Taiwan Tochi to Ahen Mondai* (Tokyo: Yamakawa Shuppansya, 1983), 21–25.
[5] John M. Jennings, *The Opium Empire: Japanese Imperialism and Drug Trafficking in Asia, 1895-1945* (Westport: Praeger Publishers, 1997), 11–13.

most notable amongst them.[6] Chang's general perception about the Hartley cases was briefly summarized in the following paragraph:

> Had Japan not insisted upon placing British chemists and druggists under its territorial jurisdiction and procedural law, the question of the importation of medicinal opium could have been resolved between 1873 and 1875, and there would have been no Hartley cases.[7]

Although Japanese historians had alleged that the Consular Court at Kanagawa was unjust in dismissing the original charge, Chang, who considered that the facts of the case did not support this allegation, opposed their view.[8] Yet he unilaterally asserted that the facts Wilkinson found were true and correct; hence, I cannot possibly support Chang's argument. The details of Wilkinson's judgements are described in the second section; nevertheless, the problems with Chang's method of analysing the judgements must be indicated here. Chang acknowledged the following three facts that Wilkinson found as just, but Chang's logic in reaching that conclusion lacked accuracy. First, Wilkinson found that the opium in question was medicinal opium, not the recreational type, the importation of which the treaty of 1858 prohibited. Second, medicinal opium had been imported without Japanese interference until 1872. Third, medicinal opium had occasionally been imported on the payment of a customs duty of 5 per cent on original value since 1866.[9] Article 'Class IV' of the tariff convention of that year (*Kaizei Yakusho* or *Edo Kyoyaku*) provided for the importation of drugs and medicines at a customs duty of 5 per cent, whereas Article 'Class III' of the same provided for the prohibition of opium. Hence, if medicinal opium had been imported on the payment of a custom duty, this indicated that the Japanese government had not viewed it as an item to which 'Class III' applied.

Concerning the first fact, however, Wilkinson found that the opium in question was

---

[6] Richard Chang, *The Justice of the Western Consular Courts in Nineteenth Century Japan* (Westport: Praeger Publishers, Reprint Edition, 1984), 39–79. Recent scholars, such as Christopher Roberts, admired Chang's demonstrating that the Japanese belief that the consular courts were biased was not sustained by a review of well-known cases, including the Hartley cases, and that those cases were correctly decided in the light of contemporary English legal and sentencing practice. See Christopher Roberts, *The British Courts and Extra-Territoriality in Japan, 1859–1899* (Leiden and Boston: Global Oriental, 2014), xxiii.

[7] Chang, *The Justice of the Western Consular Courts in Nineteenth Century Japan*, 44 (note 6).

[8] *Ibid*., 58.

[9] *Ibid*.

medicinal opium, by hearing only the cases for the defendant; such a manner–of–fact finding aroused strong opposition from Japan. Nevertheless, Chang accepted Wilkinson's finding without bringing forward further evidence to substantiate his argument. Regarding the second and third facts, Chang did not adduce adequate evidence in support of them, either. Specifically, when asserting that the tariff convention had not included medicinal opium in the items to which 'Class III' applied, Chang employed one of Harry Parkes' recollections as evidence. Yet, this does not seem to have been appropriate. Parkes, the then–British minister to Japan, recollected in a letter dated 15 March 1879 to the British foreign minister, the Marquis of Salisbury, that he had been one of the framers of the tariff convention and that the framers had certainly understood that Article 'Class III' of the tariff convention was to apply to smoking opium, not medicinal opium.[10] At the time the letter was dispatched, however, Parkes was about to lose his leadership role in both the settlement of the Hartley cases and in the British diplomacy with Japan. This is discussed in the sixth section of this paper, which deals with the end of the Hartley cases.

Additionally, in the same letter, Parkes wrongly referred to the customs duty stipulated in the tariff convention as 'an *ad valorem* duty of five per cent'. What the tariff convention indeed adopted was not an ad valorem duty but a specific duty. Parkes himself had compelled the Tokugawa shogunate, which held power at that time, to adopt such a duty that was unfavourable for Japan.[11] He therefore should absolutely not have confused the two duty systems, but he had, in fact, done so. Judging from this, Parkes seems to have been concealing information in this letter that would have been inconvenient if found. This letter hence cannot by any

---

[10] Parkes to Salisbury, 15 March 1879, FO 46/360, 197–8. The public records of the United Kingdom, such as FO 46/360, are in the possession of the National Archives. See also Chang, *The Justice of the Western Consular Courts in Nineteenth Century Japan*, 46 (note 6).

[11] The tariff convention not only reduced the rate of import duty, which had previously been set at between 35 per cent and 5 per cent, to 5 per cent across the board, but also altered the taxation formula. According to the provisions of this Convention, the amount of the duty on goods was set at 5 per cent on the average price of it for the four years before 1866. After being determined, the amount of the duty varied only according to the transaction volume of the goods and was not based on the transaction value of it. For instance, if the amount of the duty on one item was set at one yen for one gram, the amount on two grams was always calculated at two yen, regardless of the rise in the market price after 1866. This provision had an extremely unfavourable impact on the contemporary Japanese economy in which inflation was rising rapidly. The tariff convention, which the treaty powers had compelled the Tokugawa shogunate to accept as a part of the compensation for the armed conflict in Shimonoseki in 1864, became symbolic of the unequal treaty system.

possibility be considered reliable.

Chang's research may also be considered questionable because viewing the interpretation of extraterritoriality that Parkes offered, as prevalent in Britain. Chang referred to it even as the British construction.[12] Specifically, Chang cited Parkes' memorandum of 25 May 1881, in which Parkes mentioned that: 'I presume that these or any Japanese Regulations can only be enforced on British subjects in Japan by a British Court, *i.e.*, by being made British Regulations under the China and Japan Order in Council, 1865, and I believe it to be a principle of private international law that no foreign Court is obliged to enforce an unreasonable law of another nation.'[13] Chang seems to have assumed that extraterritoriality in those days meant that Western people were entitled to protection and benefits without reference to the laws of the state in which they sojourned because the laws of the nation to which an individual belonged followed him wherever he went. Chang was convinced that such extraterritoriality was granted before the rise of modern nation–states.[14] Parkes' proposition was extremely important to Chang, who examined the meaning of extraterritoriality from the viewpoint of the difference in legal culture. However, Parkes' memorandum, like his letter dated 15 March 1879, was produced when he was about to lose his position as the British minister to Japan; hence, it lacks credibility as evidence.

Scholars, as well as those in Japan and Chang, have hitherto conducted studies on the Hartley cases regarding Wilkinson's judgements. There has been continuing debate between scholars who emphasise the unfairness of the judgements and those who consider them appropriate based on the difference in the contemporary legal conditions between Britain and Japan. However, the present discussion, the interest of which lies in elucidating the establishment of Japanese independent legal power over opium, does not focus on only the judgements. As elucidated in the following sections, the Hartley cases were ultimately shelved because the Japanese government preferred a diplomatic solution to lodging an appeal to the superior judicial authority and moving for an order to strictly punish Hartley. The government rather emphasized the importance of preventing similar cases that

---

[12] Chang, *The Justice of the Western Consular Courts in Nineteenth Century Japan*, 43 (note 6).
[13] Chang, *ibid*., 43. Also see 'Memorandum by Sir H. Parkes on the Draft Opium Regulations proposed by the Japanese Government', 25 May 1881, FO 46/362, 231–2.
[14] Chang, *ibid*., 40.

might occur later and of removing Parkes from his leadership role in British diplomacy to Japan. To accomplish these aims, it gave up the right to appeal, which the British Foreign Office as its counterpart in negotiations did not prefer. Due to this situation, it is not sufficient to examine only Wilkinson's judgements, to obtain an overall picture of these cases. It is also important to discuss various other aspects, including a change of direction in British diplomatic policy.

This paper comprises the following sections. The first section discusses the conditions of opium control before the Hartley cases were brought to court. The problems are elucidated that were related to the treaties and to Japanese opium policy since the Tokugawa era. An outline of the Hartley cases and the negotiations related to them between the Japanese and the British governments is presented in the second and third sections. Specifically, the second section closely examines the judgements delivered by Wilkinson. Scholars have not examined in detail either what line of argument Wilkinson adopted to reach his decision or what theory of international law was referred to at that time. The second section answers these questions. Following the third section that mentions the contacts that the Japanese government expanded in Britain to solve the Hartley cases, the fourth section discusses the issue of international law theory again. Although the latter half of the nineteenth century witnessed a change in international law theory from the classical one, which still displayed many characteristics of mercantilism,[15] scholars have shown little interest in this shift. The fourth section explains that the legal theory or the extraterritoriality system that formed the basis of Wilkinson's judgements was becoming old–fashioned, by comparing the logic of his judgements with the new international law theory developed by British jurists. The fifth and sixth sections discuss the essential influence that the Hartley cases exerted upon the diplomatic relationship between Britain and Japan. Both sections consider the conclusion of the Hartley cases or, more correctly, the establishment of the Japanese state monopolization of opium and the end of Parkes' leadership role in British diplomacy with Japan, by examining the change in the policy of the British government concerning the extraterritoriality system in East Asia. When discussing the cases in

---

[15] Regarding the change in international law theory in the nineteenth century, see Martti Koskenniemi, 'A History of International Law Histories', Bardo Fassbender/Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2014), 952–8.

question, scholars have hitherto focused simply on the relationship between two countries, Britain and Japan, alone. However, it is necessary to examine the Chinese context, too, in order to understand the reasons for the change in the extraterritoriality system in Japan, because China and Japan were regulated by the same Order in Council. Additionally, the United States was beginning to acquire great influence over both China and Japan in those days, thus playing an important role in the change in the Western extraterritoriality system. The adoption of new international law theory as it applied to East Asia was also closely related to such a change in the circumstances surrounding Japan. Hence, taking the relationships among the countries including Britain, the United States, China and Japan into consideration, the fifth and sixth sections discuss the process through which Japanese negotiations with Britain led to a diplomatic solution to the two cases. The fifth section deals with a wide range of issues, and if the details of all these issues were discussed in one section, it would require a great number of pages. In particular, a good number of pages would be needed to explain the revision of the China and Japan Order in Council. The details of this matter hence are presented in Appendix, and the fifth section summarises the main points of it.

Opium Control under the Treaties of 1858

In 1858, abandoning the policy of seclusion that it had employed for 200 years, the Tokugawa shogunate concluded treaties for amity and commerce with the Western great powers, such as the United States and Britain. The treaties strictly prohibited opium importation. In the case of the United States, clause 4 of the treaty stipulated the prohibition, and for Britain, the Regulation II appended to the treaty stipulated the same. Japanese leaders had observed the harmful impact of opium spreading in China after the Opium War.[16] The treaty powers compelled the Tokugawa shogunate to conclude the tariff convention of 1866 as a part of the compensation for the armed conflict in Shimonoseki in 1864. Nevertheless, the shogunate barely succeeded in inserting article 'Class III' into it, which provided for the prohibition of opium

[16] *Ahen Shoka Roku*（*The Memorandum about the Harmful Influences that Opium Exerted*）, which recorded special news between 1840 and 1843 from the captain of the Dutch factory at Nagasaki, describes the details of the Opium War in China to the Tokugawa shogunate. *Ahen Shoka Roku* is available for public perusal on the website of the National Archives of Japan（http://www.archives.go.jp/exhibition/digital/bakumatsu/contents/07.html）.

importation.

In spite of the provisions of the treaties or conventions, opium was smuggled repeatedly, which exposed its harmfulness starting with the opening of the treaty ports. As soon as the political revolution called the Meiji Restoration ended the Tokugawa regime in 1868, the new government proclaimed a prohibition on smoking opium. The Japanese authorities, the Tokugawa and then the new Meiji government seem to have suspected the Chinese people of being pushers of opium.[17] Indeed, two Chinese men were jailed for the illicit sale of opium in July 1870. They sold opium, which they got from other Chinese men at the port of Yokohama, to Japanese men residing in the neighbourhood of a licensed quarter called Yokohama Yoshiwara.[18] Only 11 years had passed since the opening of the port; nevertheless, the bad habit of opium smoking was steadily growing in Japan. The smuggling of opium led the Japanese government to establish regulations for opium control.

Recreational opium was not alone in causing confusion in Japanese society; opium imported for medicinal purposes was also troublesome. The present discussion mainly focuses on the problems surrounding medicinal opium. Opium, a kind of alkaloid extracted from the fruit of the poppy, was often used as a medicine for diarrhoea or was manufactured into certain medical drugs and solutions, such as morphine or laudanum. As a matter of fact, since the Tokugawa era, many Japanese people had taken some medicines containing opium which were prepared based on prescriptions for Chinese–style medicine, such as a kind of analgesic called *Ichiryu Kintan*.[19]

A noteworthy point concerning the sale of medicinal opium in the Tokugawa era

---

[17] Article of September, the First Year of *Meiji* (October 1868), *Ishin Shiryo Koyo* (*Summary Database of the Ishin Shiryo*), vol. 139, 282. *Ishin Shiryo Koyo* is available for public perusal on the website of the database of the Historiographical Institute of the University of Tokyo (http://wwwap.hi.u–tokyo.ac.jp/ships/db–e.html).

[18] 'Hanbai Ahen'en Ritsu Narabini Sho Ahen Toriatsukai Kisoku o Sadamu (Enacting the Law of the Sale of Smoking Opium and the Regulations for Handling Crude Opium)', Article of 9 August, the Third Year of *Meiji* (4 September 1870), *Daijo Ruiten*, vol. 1, book 190, seq. 41. *Daijo Ruiten* is available for public perusal on the website containing the digital archives of the National Archives of Japan (http://www.digital.archives.go.jp/).

[19] According to Narita Maki, cultivation of poppy and opium manufacture was initially launched in Tsugaru province (the area of this province falls within the present Aomori prefecture) and then introduced to some villages in Mishima county, Settsu province (the present Osaka prefecture). Starting in the first half of the eighteenth century, it began to be sold throughout the country. See Narita, 'A Historical Study on the Opium Production in Japan: In the Documents of the Drug Wholesalers, Yakushu–Nakagai–Nakama in Osaka', *Nagoya Studies in Humanities*, vo. 28 (1999), 171–198.

was that the Tokugawa shogunate had already employed a monopoly policy and consistently controlled commercial transactions related to medicinal opium. The shogunate in 1722 ordered wholesale pharmacists who lived in the three larger cities, Edo（Tokyo）, Kyoto and Osaka, to organise guilds. Since that time, possessing exclusive authorization for the commercial transaction of medicines, the guilds had been in charge of drug inspection. The shogunate prohibited trade in medicines which had no stamp of approval from the guilds. Opium was obviously included in the medicines which the guilds should supervise.[20]

Successive outbreaks of cholera following the opening of Yokohama Port made laudanum necessary as a medicine to ease the symptom of terrible diarrhoea from that disease.[21] Morphine became indispensable for treating a great number of soldiers who were wounded during the Boshin War（the civil war between 1868 and 1869）. These outbreaks of war and infectious diseases led the new Meiji government to renounce Chinese–style medicine for Western medicine. As a result of the production of Western–style physicians and apothecaries, the domestic market for medicinal opium inevitably expanded. The quantity of opium required for medicinal use, as of 1875, was estimated at 4,813 pounds.[22] The existence of such a promising market raised many foreign merchants' expectations for the trade.

Whilst the demand for medicinal opium was increasing, however, the Meiji government had temporarily lost control of the measures for supervising trade in its early days. This confusion no doubt arose from the civil war and the political reforms that followed. First, the government required a great deal of monetary contributions from wealthy merchants during the war and forced those same merchants to forgive

---

[20] See Minesaburo Iinuma, *Osaka Yakushu Gyo Shi*（*History of the Business of Medicines in Osaka*）, vol. 1（Office of the Osaka Trade Association for the Wholesale Pharmacists, 1935）, 18–9; 27–8, and Narita, 'A Historical Study on the Opium Production in Japan'（note 19）.

[21] For instance, in case of the cholera outbreak of 1877, the Central Sanitary Bureau believed in the effectiveness of laudanum and added its use to instructions for the prevention of cholera because a foreign teacher at the University of Tokyo, Erwin von Baelz, endorsed the chemical. See *Naimusho Eiseikyoku Hokokusho*（*The Report of the Sanitary Bureau in the Home Department*）, vol. 6（September 1877）, 5–6. This report was compiled into *Korerabyo Hokokusho*（*The Report on the Cholera Epidemic*）（September 1877）.

[22] 'Meiji 8 Nenchu Sanhu ni Oite Kusurisho Toriatsukaitaru Naigai Kokusan Ahen no Gaisu（An Approximate Figure of the Quantity of Opium of Both Foreign and Home Production Which Was Traded by Pharmacists in Three Capital Cities in the Eighth Year of Meiji）'. This document was enclosed in a letter from Terashima to Ueno dated 28 October 1878, *Dai Nihon Gaiko Bunsho*（The Documents of Japanese Foreign Policy）, vol. 11, 509–10. *Dai Nihon Gaiko Bunsho* is available for general public perusal on the website of the Digital Archive of the Documents of Japanese Foreign Policy（http://www.mofa.go.jp/mofaj/annai/honsho/shiryo/archives/mokuji.html）.

the enormous debts of the lords to them when feudal domains were abolished in 1871. Second, adopting a free trade policy in 1872, the government dissolved the traditional guilds. Those measures obviously were a serious blow to merchants and caused a commercial crisis. The guilds of wholesale pharmacists in the larger cities, needless to say, were included in the objects for dissolution, and the execution of the policy caused paralysis of the market and the loss of the checking function against medicines that each guild had been assigned by the shogunate. According to an official in charge of the public health service, it became very difficult between 1872 and 1873 to purchase good–quality quinine and potassium iodide, even in the capital city, due to the widespread availability of the same goods of poor quality.[23]

Due to this situation, foreign traders could easily find loopholes for smuggling medicinal opium. The Meiji government therefore had to establish laws and regulations against this practice as quickly as possible.

In 1870, when announcing a prohibition on the sale of smoking opium following the arrest of the two Chinese men in Yokohama, the Japanese government simultaneously issued the instruction that foreign residents would be permitted to import medicinal opium only through the governor of the prefecture where they resided.[24] However, the customs authority uncovered many cases in which foreign merchants had opium concealed in their cargoes, after the customs procedure was amended in 1872, and it stipulated that not only a bill of entry but also an invoice was required for landing the shipments.[25] The Foreign Office hence issued provisional regulations titled *Yakuyo Toruko Ahen Yunyu Kisoku* (Regulations for the Importation of Turkish Opium for Medicinal Use) in May 1873, of which foreign representatives were notified.[26] The main purpose of the Regulations was to restrict the importation of medicinal opium to Turkish opium (clause 2). According to the Foreign Office, this restriction aimed at shutting out Indian opium, which induced an urge to smoke in Chinese people who resided in Japan.[27] The enactment of the

---

[23] Sensai Nagayo, 'Eisei Iken (An Opinion on Public Health)', October 1877, *The Okubo Toshimichi's Papers*, #327, sheet 5. *The Okubo Toshimichi's Papers* is in the possession of the Modern Japanese Political History Materials Room, the Japan National Diet Library.

[24] 'Hanbai Ahen'en Ritsu Narabini Sho Ahen Toriatsukai Kisoku o Sadamu', (note. 18).

[25] *Yokohama Zeikan Enkaku* (*History of the Yokohama Customs*) (1902), 419–20.

[26] Article of 13 May 1873, *Daijo Ruiten*, vol. 2, book 80, seq. 20. An English translation of the provisional regulations is attached to a letter from Parkes to Salisbury, 15 March 1879, FO 46/360, 271–6.

[27] *Ibid.*

Regulations, however, resulted in various difficulties.

First, *Yakuyo Toruko Ahen Yunyu Kisoku* conferred significant powers on the Japanese prefectural offices, *Kencho*, that were related to the supervision of commercial transactions of medicinal opium by foreigners. Yet those provisions met opposition from foreign representatives. For instance, the Regulations determined the measures for granting a licence for the importation of opium in clause 4 and stated, 'the importation of Turkish opium for medical use shall be allowed only to those, who being registered as apothecaries in their respective Consulates, may obtain permission to import from the *Kencho*.' Not only the respective consuls but also the *Kencho* had the power to grant a licence to foreign apothecaries. Apothecaries who obtained a licence according to the regulations could import a certain quantity of opium in alternate months (clause 6). The *Kencho* alone had the right to permit or forbid the importation of Turkish opium and to increase or decrease the quantity of opium to be imported. No apothecary had the right to question the decision of the *Kencho* (clause 12).[28] Additionally, the *Kencho*, as provided in clauses 8 and 9, had the right to send an authorised officer at any time to examine an apothecary's books in which a buyer's name and residence were entered.

Foreign representatives, Harry Parkes in particular, could not accept such forceful measures as stipulated in these clauses. Thus, on 31 May 1873, Parkes sent a letter to the Japanese Foreign Office expressing his adamant opposition to the regulations as follows:

> I have now to point out that some of the arrangements proposed by Your Excellency would be found impracticable. We cannot agree, as mentioned in Rule 9, that the books of the foreign chemists or apothecaries should be subject to inspection by the *Kencho* officers, and we cannot suppose it to be Your Excellency's intention that the fine named in the same Rule should be enforced by the Japanese authorities, as this would be clearly contrary to the treaty.[29]

Parkes attached an alternative plan to this letter which assumed the form of an agreement proposed by foreign representatives, and it revealed his stance on this

---

[28] *Ibid*. Also see the English translation of the regulations, FO 46/360, 271–6.
[29] Parkes to Ueno Kagenori, 31 May 1873, FO 46/360, 277–80.

issue.[30] Parkes accepted in this plan the rules that only Turkish opium might be imported and that the sale of opium to Japanese people should be prohibited (clauses 1 and 3 of Parkes' draft). However, he proposed in clause 4 that, 'In order to obtain a fresh permit, the Chemist must produce to his Consul an account or statement showing when, and to whom, he sold or delivered all the opium taken out of Bond [the Bonded Warehouses of the Japanese Government] under his last permit'. In contrast to the Japanese Regulations, Parkes insisted that consuls have jurisdiction over foreign apothecaries or chemists. The most noteworthy point in Parkes' draft concerned the importation of Turkish opium. To be sure, Parkes' draft laid down restrictions on the sale of medicinal opium which had already been landed and stored in the Bond. It provided that 'Permits to take opium out of Bond will only be granted by the Commissioners of Customs to Chemists or Apothecaries'. However, it did not introduce any qualifications for importers of Turkish opium. Parkes' draft inserted a single provision alone, which read, 'All opium when landed must be stored in the Bonded Warehouses of the Japanese Government, and an *ad valorem* duty of ten per cent will be paid on all quantities issued for use.' According to this, any person who wished to import medicinal opium could do so on the condition that he stored it in the Bond of the Japanese government when landing it. Compared with the Japanese Regulations, Parkes' draft, had it been enforced, would surely have appeared to emasculate the Japanese laws and regulations over opium control.

When *Yakuyo Toruko Ahen Yunyu Kisoku* was issued, the Japanese government was faced with a different difficulty. Although giving large powers to the *Kencho* in the localities, the Regulations did not determine what central government office should serve as the supervisory authority over the general execution of opium control throughout the country.

In the period immediately after the beginning of the Meiji Restoration, the Japanese government had been no more than a medley of vassals of the influential feudal lords, such as Mori of the Choshu domain or Shimazu of the Satsuma domain. It had not yet established effective internal controls. Individual departments or statesmen often executed their own policy without the Cabinet's permission. As to opium, individual statesmen had privately established connections with some certain

---

[30] 'Agreement as to Importation of Medicinal Opium Proposed by Foreign Representatives', 31 May 1873, FO 46/360, 282–6. This section is based on this document.

merchants, purchasing the drug from them.[31] For instance, there is the case of Yokohama Gunjin Byoin（Yokohama Military Hospital), which was built to treat soldiers wounded in the Boshin War in 1868. Foreign instructors, such as Joseph Bower Siddall, privately secured medicinal opium of foreign production for the hospital. This British physician seems to have had a connection with a British pharmacist named John North for the procurement of medicinal opium. According to his letter, Siddall communicated with various druggists in Yokohama through North, and the amount of opium they severally wished to import was about 100 pounds, making a total of 400 pounds.[32] North, who had come to Japan in 1867, had initially been installed as a pharmacist at the Yokohama Dispensary, which British physicians Griffith Jenkins and William Willis had set up.[33] He then seems to have established a link with Siddall and developed an exclusive contact for the supply of medicinal opium to the hospital no later than 1872.[34]

The headquarters of the military, as well as the military hospitals, seems to have purchased medicinal opium through private connections with foreign merchants, such as Edward Schnell.[35] When testifying about the customer for medicinal opium in court on the first Hartley case, Schnell stated as follows:

> I received orders from the Government which were executed by a Dutch Firm in Japan–Mr. Von Hemert. I mean the Japanese Government. I should specify that by the Japanese Government, I mean the War Department… I was told at

---

31 A Japanese public record shows another case indicating collusion between a government officer and a foreign merchant. Matsumoto Ryojun, chief of army physicians, was arrested in August 1872 on a charge of purchasing medicinal opium from a Swiss merchant named Perregaux without permission from the Cabinet. See 'Gun'i no Kami Matsumoto Jun Ahen Yunyu no Tsumi o Anagau（A Chief Military Physician, Matsumoto Jun, Atones for His Wrongdoing of Opium Importation)', August, the Fifth Year of *Meiji*（between 3 September and 2 October 1872), *Daijo Ruiten*, vol. 2, book 357, seq. 11.

32 Siddall to Russell Robertson, 23 December 1872, FO 46/360, 261–3.

33 William Willis to George Willis, 12 July 1864; and William Willis to Fanny Willis, 18 January 1867, *The William Willis Papers*. These letters are cited from the Japanese translation by Mizuyo Oyama. See Oyama, *Bakumatsu Ishin o Kakenuketa Eikokujin Ishi*（Tokyo: Sosendo Press, 2003), 222–3; 315–8.

34 Siddall to Robertson, 23 December 1872（note 32).

35 Edward Schnell is a merchant who deserves special mention in this point. This Dutch man and his elder brother Henry, who were practicing a foreign trade based in what was then the North German Federation, are known to have once supplied arms and ammunition to the Tokugawa side in the civil war（Hiroshi Hakoishi, *Boshinsenso no Shiryogaku*, Bensei Shuppan, 2013, 49–56). Consequently, they were taken into custody for a while by the new government. Nevertheless, they, and Edward in particular, were released and restarted their business in Japan soon afterwards. To this day, scholars have scarcely understood the reason why they could do so.

> the same time by the Government that I should give notice about the time of the arrival that they might give notice here to the Customs that it was for Government troops… I may have told you the head of the War Department, and he is General Saigo [Tsugumichi].[36]

North attested that he was also familiar with the military demand for medicinal opium.[37] As the two merchants testified, some senior officials concerned with military affairs seemed willing to establish links with merchants such as Schnell or North. The need for medicines containing opium led them to do so. In the case of Schnell, although he sold about 100 pounds of opium to the War Department, it was neither confiscated nor was a customs duty levied on it.[38] John Frederick Lowder,[39] a British legal adviser to the Japanese customs authority and counsel for the plaintiff in the Hartley cases, mentioned the reason why Schnell was not prosecuted, and meaningfully said, 'I don't know whether what Mr. Schnell imported was medicinal opium. I never saw it. I may add that it was seized and not passed by the Commissioner of Customs and not passed except under special instructions from Yedo.'[40] Under the 'special instructions' from Tokyo, specifically the War Department, opium could pass through customs without being seized.

This situation made it more difficult to rigorously and impartially administer *Yakuyo Toruko Ahen Yunyu Kisoku*. The Japanese government sought to enforce the restriction on foreign apothecaries, whereas some of them were exempt from it

---

[36] 'Record of Proceedings,' FO 46/360, 81–2.

[37] North testified that 'For an army in peace and an army in war the requirements would be different. An army in active warfare would require more medicine than an army in a state of rest and peace. Amongst those medicines more opium would be required. If I sent instructions to my shipping agents in Europe not to ship any medicinal opium I could not carry on my business as a chemist'. See 'Record of Proceedings', FO 46/360, 83B–4.

[38] 'Record of Proceedings', FO 46/360, 82. North also stated, 'I imported opium freely for some time after my arrival here' (FO 46/360, 83B).

[39] John Frederic Lowder (1843–1902) was born in Shanghai. After his father's death, his mother married Rutherford Alcock, who was the first British consul at Shanghai and then became British minister to Japan. It was the Alcock connection that led Lowder to come to Japan as one of the first language students in 1860. Having narrowly escaped losing his life in an attack on the Legation on July 1861, he completed his language training and began his consular career. In 1870, Parkes, who succeeded to Alcock's position, allowed him to return home and read for the Bar. He qualified in 1872 and came to Japan again. Then, he resigned from the consular service and worked for the Japanese Ministry of Finance as 'Standing Counsel to the Japanese Customs'. Lowder lived in Japan until 1919 and long served the government and then practiced as a barrister in the Yokohama Court. At his funeral, his Order of the Rising Sun – 4th Class was carried. See J. E. Hoare, 'John Frederick Lowder (1843–1902): Consul, Counsel and *o–yatoi*', *Britain & Japan: Biographical Portraits*, vol. X (Kent: Renaissance Books, 2016), 300–2.

[40] 'Record of Proceedings', FO 46/360, 81.

and could enjoy the benefits of the duty-free trade of medicinal opium. If it had received criticism for this inequity, the government would have soon found itself in a difficult situation. By taking advantage of this sore point of the government, John Hartley appeared.

John Hartley, a British man whose early life is not known, had opened his company in Yokohama in 1866 and had been in the same business as wholesale chemists, druggists and merchants. He had owned another company in Surrey, Britain, with M. A. Hartley.[41] His companies seem to have been connected with a lot of firms in London, India (Strait of Malacca), Hong Kong, China, San Francisco, New York and Philadelphia. Specifically, he seems to have had trading relationships with medicine manufacturers who had their respective offices in the City of London, such as on Aldersgate Street, St. Mary Axe or East India Avenue.[42]

Members of the Japanese government and of Yokohama Customs, in particular, had been keeping an especially close eye on Hartley. They knew that he had been making a huge profit from the production of recreational opium from medicinal opium.[43] His cunning personality made matters more complex.

Hartley had had his opium confiscated by the customs authority several times since the amendment to the customs procedure; nevertheless, the quantity of his opium that was seized amounted to 32 pounds at most, even for a total of four arrests between 1872 and 1873.[44] He, at the same time, had been able to supply Yokohama Gunjin Byoin with much more opium by asking John North to act as an intermediary, before the enactment of *Yakuyo Toruko Ahen Yunyu Kisoku*. The aforesaid letter of Siddall revealed that Hartley was amongst four druggists who wished to severally import 100 pounds of medicinal opium.[45] The enactment of the Regulations, however, seems to have made it difficult for him to supply medicinal opium to governmental institutions. Since then, he had repeatedly smuggled opium, which had been confiscated and then forced to be re-exported.[46] Hartley, through those actions,

---

41 'Copy of Memorial', 6 October 1879, FO 46/361, 251.
42 *Ibid*., 251-2.
43 'San-gatsu Mui-ka Terashima Gaimukyo Eikoku Koshi Ousetsu Hikki', 6 March 1878, *Dai Nihon Gaiko Bunsho*, vol. 11, 465.
44 *Yokohama Zeikan Enkaku*, 419-20 (note. 25).
45 Siddall to Robertson, 23 December 1872 (note 32).
46 In 1875, the quantity of his opium seized rose to 88 pounds in total of powdered and gum forms. See 'Memorandum of Opium Entered for Importation by British Subjects, and Detained at the Custom House Yokohama', 28 October 1875, FO 46/360, 370.

sought to obtain the same privileges as North or Schnell had in fact enjoyed. The following testimony in court explained his motive clearly: '[It is] also by virtue of XXIII Article of Treaty 1858 (Favoured Nations Clause) that I [Hartley] may partake of same privileges accorded to Mr. Schnell, Mr. Von Hemert, and Mr. North. I claim the privilege of Mr. Schnell that I may import it duty free.'[47]

The Japanese government had not been able to take effective countermeasures against Hartley's illegal but intentional acts. The successive superintendents of Yokohama Customs, except for the below–mentioned Ueno Kagenori, could not deal with Hartley at all. They could only choose as safe and risk–free an option as possible, namely, to allow him to re–export all the opium that had once been confiscated from him.[48]

However, circumstances gradually began to shift against Hartley. First, ex–vassal of the Satsuma domain and home secretary Okubo Toshimichi, who had ensured his dominance over the government after his rivals lost their power following a political disturbance in 1873, devised a plan concerning the state monopoly of opium. As he addressed in his following letter, he aimed at establishing municipal laws and regulations for pharmaceutical affairs and building an independent internal administration system to enforce them: '[In execution of this plan,] consulting with foreign delegates will not be required. The Japanese government should independently devise an implemental method and carry it out without failure'.[49]

Second, the foreign minister, Terashima Munenori, who was also ex–vassal of the Satsuma domain, began to negotiate with Western powers to amend the treaties of 1858. Since starting his career as a physician of Dutch–style medicine, Terashima was amongst the government bureaucrats who were familiar with medical or pharmaceutical affairs.

Third, he appointed Ueno Kagenori (contemporary documents referred to him as 'Wooyeno') as Japanese minister to Britain. Ueno, another Satsuma man, who was born into an interpreter's family and so was good at speaking English, served as a diplomat in the new government for much of his life. His service as the

---

47 'Record of Proceedings', FO 46/360, 88.

48 See Hartley to the Commissioner of Customs, 2 March 1874; and Yanagiya Kentaro to Hartley, 11 March 1875, FO 46/360, 101. Also see *Yokohama Zeikan Enkaku*, 419–21 (note 25).

49 Okubo Toshimichi to Terashima Munenori, 28 December 1876. This letter was attached to 'Yakuyo Ahen Kaiirekata ni kanshi Shokai no Ken (Inquiry about the Way to Secure Medicinal Opium)'. See *Dai Nihon Gaiko Bunsho*, vol. 11, 441–4.

superintendent of customs at Yokohama between 1871 and 1872 deeply instilled in him fear about confusion in the medical chemicals trade including opium; hence, he felt the need to control that trade. When *Yakuyo Toruko Ahen Yunyu Kisoku* was enacted, Ueno was the *Gaimu Shofu* (junior assistant minister of the Foreign Office) who took the charge of the enactment of it. As soon as he arrived in London, Ueno began to develop closer contact with the main members of the British government, such as Salisbury, without asking Parkes to act as an intermediary.

Fourth, the director of the Central Sanitary Bureau in the Home Department, Nagayo Sensai, who was a subordinate to and on very good terms with Okubo, launched into the reconstruction of a commercial transaction system of medical chemicals, including opium.[50]

Last, Motono Morimichi, ex-secretary to the Japanese legation in Britain, succeeded to the position of superintendent of Yokohama Customs, after his predecessor, Yanagiya Kentaro, who had been taking a rather weak position against Hartley, went to San Francisco as the consul. Then, in early 1878, Motono took the decision to prosecute Hartley. This was the beginning of the Hartley cases.

The Hartley Cases

On 14 December 1877, officers of Yokohama Customs found that two tins containing 20 pounds of opium were concealed in one of the shipments that John Hartley applied to land, although the invoice of the package in question was stated to contain only scurvy grass and cochineal. It was said that, when the officers examined the package, Hartley 'did not repudiate any knowledge of the case containing opium, but, on the contrary, applied to the Custom House to be allowed to import it under the name of cochineal.' Thus, the superintendent of customs, Motono, decided to prosecute him. This was the beginning of the first case.[51] The charge that was brought against Hartley in the second case seemed graver and more malicious. Although the first case was still under trial, on 8 January 1878, Hartley, first, 'smuggled twelve catties[52] of opium (not being medicinal opium)' and then attempted to land as much as 221

---

[50] On Nagayo and his policy regarding the reconstruction of the pharmaceutical administration system, see Ozaki, 'Sensai Nagayo' (note 2).
[51] 'Judgment', 20 February 1878, FO 46/360, 104.
[52] 1 pound ≒1.008 catty

pounds of gum, that is, medicinal opium, by packing it into the same case as that containing the smoking opium in question, without it duly being entered at customs.[53]

The judgements in both cases, as already mentioned, were rendered by Hiram Shaw Wilkinson at the Consular Court at Kanagawa. Wilkinson, who was born in Belfast in 1840 and subscribed his name on the Roll of Barristers in 1872, was the first member of the Japan consular service to become legally qualified.[54]

In those days, the extraterritorial court regime needed reform.[55] Details concerning the regime will be presented in Appendix; however, an outline of the regime should be given here briefly. There is no doubt that the extraterritorial court regime in Japan was instituted through cooperation between Harry Parkes and the chief judge of the British Supreme Court at Shanghai at the time, Edmund Hornby. Parkes had made an effort to establish a similar regime in China, whereas Hornby had exercised his skills in setting up the British Supreme Court at Constantinople and consular courts in Turkey. Parkes had adhered to the principle of extraterritoriality laid down in the China and Japan Order in Council of 1865, which stated that British subjects were to be tried and punished by the consul of their own country, according to the laws of England, even if they had committed a criminal act against Japanese or were sued in a civil action by Japanese. Although the Anglo–Japanese Treaty of Amity and Commerce of 1858 had provided for mixed jurisdiction, Parkes had never enforced this in Japan.

In conformity with the Order in Council, consular courts were instituted at several treaty ports. Yet, the provisions of this Order for provincial (consular) courts seemed poor, and the volume and importance of the commercial caseload in Yokohama caused Parkes and Hornby to sense strongly the helplessness of consular officers who had no legal education. To rectify these deficiencies, they first established the Yokohama Court in 1871 as a permanent branch of the Supreme Court at Shanghai, as distinct from the Consular Court at Kanagawa; however, the Yokohama Court failed to perform its function properly and staggered under its responsibilities. In these circumstances, Wilkinson was appointed acting law secretary at the Consular Court at Kanagawa in 1876. The point to be noted here is that Wilkinson worked not

---

[53] 'Judgment', 6 April 1878, FO 46/360, 110.

[54] Christopher Roberts, 'Sir Hiram Shaw Wilkinson (1840–1926)', *Britain & Japan: Biographical Portraits*, vol. VIII, (Hugh Cortazzi ed., Global Oriental, 2013), 164–6.

[55] This and the following sections are based on Roberts, 'Sir Hiram Shaw Wilkinson', 166–7 (note 54); and *The British Courts and Extra-Territoriality in Japan*, 20–7 (note 6).

simply as acting law secretary at a provincial court. The more important duty he assumed was serving Parkes as a de facto legal adviser. Indeed, as seen in the fifth section of this paper, he filled such a role when the revision of the Order in Council was under consideration between 1875 and 1876. Wilkinson submitted a voluminous memorandum in which he reviewed Hornby's Draft Order in Council in place of Parkes.[56] The Hartley cases were brought before Wilkinson in this context.

The judgements in both cases that Wilkinson issued, however, could by no means satisfy the claims of the plaintiff.

Regarding the first case, Wilkinson dismissed the suit of the plaintiff. He concluded that Hartley was not guilty because the opium in question had been imported for medicinal use, not for smoking.[57] As to the second case, Wilkinson found that the opium in question had been smuggled for smoking and that Hartley was guilty; however, the acting law secretary simply imposed a fine for smuggling opium upon Hartley and ordered the Japanese authority to confiscate and destroy just the surplus quantity of opium that exceeded three catties. The Regulation II attached to the Anglo–Japanese Treaty of 1858 stipulated that, in the case of an importer having more than three catties of opium on board, the surplus quantity might be seized and destroyed by the Japanese authorities. On this ground, Wilkinson determined that the Japanese customs authority was not entitled to destroy an amount of opium within three catties, and permitted Hartley to re–export it. Nor did the judgement express that it was lawful for customs officers to confiscate the package and its contents except the opium in question. Wilkinson denied the allegation of the superintendent that the gum had not been duly entered at customs.[58] Thus, the Japanese government soon started examining whether it should lodge an appeal to the Judicial Committee of the British Privy Council and simultaneously instructed Ueno Kagenori to negotiate the matter with the British Foreign Office.[59]

On what grounds and with what line of argument, then, did Wilkinson deliver such judgements? Here we consider both parties concerned and discuss the judgements

---

[56] Hiram Shaw Wilkinson, 'Memorandum: China and Japan Order in Council 1876', 8 August 1876 (*The Wilkinson Papers*, D1292/M/5A). *The Wilkinson Papers* is in the possession of Public Record Office for Northern Ireland.

[57] 'Judgment', 20 February 1878, FO 46/360, 104–9.

[58] 'Judgment', 6 April 1878, FO 46/360, 110–1.

[59] 'Hartley Ahen Mitsuyu Ikken Jokoku Tetsuzukikata Sirei no Ken (On an Order for Taking Procedures for an Appeal on Hartley's Opium–Smuggling Case)', 8 April 1878, *Dai Nihon Gaiko Bunsho*, vol. 11, 471–2.

in detail.

In court, whilst Lowder served as counsel for the plaintiff, the defendant did not have counsel initially. In the first case, the plaintiff stated the charges against Hartley as already mentioned; nevertheless, the defendant seems to have proceeded with the trial rather in his favour. Hartley set up his defence, which was that the opium contained in the parcel in question was medicinal opium. Namely, he said that the opium, the importation of which the Regulation II prohibited, meant only smoking opium, whereas medicinal opium was not considered in the regulation.[60] To turn the tide of the trial in his favour, Hartley referred to the confused situation in the opium trade, specifically to the vague and weak–kneed response to him that was taken by the former superintendent of Yokohama Customs, Yanagiya Kentaro. 'In consequence of what Mr. Yanagiya Kentaro told me', said Hartley, 'I sent instructions home for opium, and told them not to put it in the invoice. Mr. Yanagiya was Commissioner of Customs and is now Consul at San Francisco. It is consequence of the instructions from Yanagiya that I claim this charge to be dismissed.'[61] Successively citing instances when the government purchased medicinal opium from North or Schnell, Hartley not only pleaded not guilty but also claimed the same privilege as they had.[62]

Lowder, arguing against the accused, denied that the Regulation had made the distinction between medicinal and smoking opium. The testimony from North must have endorsed his claim that a kind of medicinal opium, such as powdered opium, might certainly be prepared for smoking purposes.[63] Nevertheless, Lowder does not seem to have been able to refute Hartley's point, specifically about the vague measures the Japanese government took. When requested to testify, as a witness, about what advice he had given to the superintendent of customs concerning the importation of opium by Schnell, all Lowder could do was evade the point and simply repeat, 'I have no recollection of having written a letter to Mr. Schnell', or 'I don't think I have written any letter to Mr. Schnell or Mr. Reynders in my own name, but I won't be positive, as I write so many letters.'[64]

---

60 'Judgment', 20 February 1878, FO 46/360, 104.
61 'Judge's Notes of Heads of Arguments', 30 January 1878 ('Record of Proceedings', FO 46/360, 88).
62 *Ibid.*
63 'Cross–examination of John North', 11 January 1878 ('Record of Proceedings', FO 46/360, 84).
64 'Cross–examination of Frederick Lowder', 3 January 1878 ('Record of Proceedings', FO 46/360, 81).

After hearing both sides, Wilkinson accepted Hartley's plea and judged him not guilty. The main findings on which Wilkinson formed the bases for his judgement were threefold. First, Wilkinson found that the opium in question was medicinal opium. Second, he fully acknowledged the case for the accused, concluding that the Regulation II had distinguished between medicinal and smoking opium and intended only the latter. This conclusion was drawn from two further facts: the actual conditions of the opium trade and the interpretation of the word 'opium' in that regulation. Third, he denied the case for the plaintiff that there was at least a slight possibility of medicinal opium being used for smoking.[65] Wilkinson, however, did not determine these facts on the basis of direct and definitive evidence. Instead, he came to his conclusion merely by inference from circumstantial evidence. We shall examine in detail the evidence that his judgement was based on.

Regarding the first fact, Wilkinson acknowledged North's testimony and that of others as positive evidence which showed that the opium in question was medicinal opium.[66] North, as already mentioned, testified about the fact that a particular kind of medicinal opium, such as powdered opium, might certainly be prepared for smoking purposes.[67] And yet Wilkinson did not take this part of his testimony into account. This concerns the third fact. According to his statement concerning the third fact, 'the possibility of medicinal opium being used for smoking, if there was nothing else known about it, would be a good ground for holding that it was intended to be included in the prohibition in the Treaty; but in the other circumstances concerning it which are known we find considerations for holding that it was not intended to be included which, in my opinion, far outweigh the considerations for holding that it was.'[68] The phrase 'the other circumstances concerning it which are known' meant his assumption that the Japanese government had not had an intention to prohibit the importation of medicinal opium because it had been imported freely and openly up to 1872. He thought it inadmissible that the Japanese government, although it had permitted medicinal opium to be imported, stressed the risk of medicinal opium being used for smoking. Thus, the appropriateness of the first and third facts entirely depended on that of the second one.

---

65 'Judgment', 20 February 1878, FO 46/360, 104–5; 107.
66 *Ibid*., 104.
67 See note 63.
68 'Judgment', 20 February 1878, FO 46/360, 107.

As to the second fact, the line of argument with which he reached the conclusion that the Regulation II did not concern medicinal opium, was incoherent and rather arbitrary.

First, Wilkinson assumed that, 'up till 1872 medicinal opium had in fact been freely imported'.[69] Amongst the witnesses who were examined about this question, however, Hilliere M. Miller and Takeoka Matsubei, both of whom had served as appraisers at the customs authority, had only seen medicinal opium stocked in customs. For Takeoka's part, although the main point of his testimony was that Hartley had often imported medicinal opium and had it seized, Wilkinson used this as evidence to prove that medicinal opium had been imported freely.[70] The next two witnesses, Matsumura Senkichi and Nagasawa Toichiro, both of whom were employees of Hartley, testified just about Hartley's business, not about the general conditions of the opium trade. Matsumura testified that 'formerly there was no difficulty about importing opium.'[71] Nevertheless, as discussed in the previous section, Hartley had sold medicinal opium to Yokohama Gunjin Byoin through a privileged merchant named John North before the enactment of *Yakuyo Toruko Ahen Yunyu Kari Kisoku*, and so his testimony could not prove that there was 'no difficulty' as he said was always applicable for all traders. The testimony from which Wilkinson would draw his conclusion was, in the final analysis, that provided by John North alone. North testified, 'I imported that quantity of opium and duty was paid on it' and 'some of it was sold to Japanese.'[72] Yet he had been privileged by the Japanese government, and so it was not at all possible that his testimony could prove that any merchant had been able to trade medicinal opium freely and openly. Also, regarding the remaining two witnesses, Cornelius Heraldus De Jong testified that he had never imported medicinal opium for sale and that he had imported it only for his own use, but that he stopped doing so after the Dutch minister concluded the tariff convention of 1866. Anthonius Franciscus Bauduin, about whom one of his ex–pupils, Tadashi Otsuki, testified, had imported medicinal opium only for medical instruction at the Tokugawa–founded school.[73] Bauduin's case was also included in those in which medicinal opium was traded by persons who were privileged by first the Tokugawas

---

69 *Ibid*., 105.
70 *Ibid*., 80; 82.
71 *Ibid*., 79; 83A.
72 *Ibid*., 83B.
73 *Ibid*., 85.

and then the Meiji government.

The Japanese government, first the shogunate and then the Meiji regime, had consistently prohibited the free trade of both types of opium, putting their distribution under close surveillance. Nevertheless, for foreign residents who refused to use domestically produced opium, the Meiji government had taken lenient exemption measures and allowed them to purchase Turkish opium, but only when it had been procured by the *Kencho*.[74] These measures, needless to say, had certainly not fallen outside the state control over opium. Although he mentioned the instructions that stipulated those measures, Wilkinson neglected to acknowledge the jurisdiction of the Japanese government over the opium trade.[75] The same disregard for the role of the Japanese government was shown in the fact–finding about cases in which the Japanese government had procured medicinal opium from certain privileged merchants. Overlooking the point that the trade had been conducted by the government to fulfil its own demand, Wilkinson assumed that medicinal opium had been marketed.

Wilkinson's unrealistic assumption seems to have been closely related to giving an interpretation of the word 'opium' as stipulated in the treaty and convention that was convenient for the defendant or Britain. When interpreting the word opium, Wilkinson often quoted excerpts from Emer de Vattel's international law theory.[76] He thereby could explain that his judgement was in conformity to international law. Examination of his judgement in detail, however, reveals that Wilkinson did not fully accept Vattel's theory in practice, but rather rejected the crucially important part of his theory as the basis for the conclusion that the Regulation II did not consider medicinal opium. His argument may be summarized as follows.

First, when drawing his conclusion, Wilkinson denied one of Vattel's rules: 'If he who could and ought to have explained himself clearly and fully, has not done it, it is the worse for him: he cannot be allowed to introduce subsequent restrictions which he has not expressed.'[77] Vattel argued here that a nation, which would subsequently

---

[74] See 'Hanbai Ahen'en Ritsu Narabini Sho Ahen Toriatsukai Kisoku o Sadamu' (note 18).
[75] 'Judgment', 20 February 1878, FO 46/360, 105.
[76] Emer de Vattel (1714–1767) was a Swiss philosopher and a representative internationalist in the eighteenth century. He was also the author of *The Law of Nations* (1758). On Vattel, see Emmanuelle Jouannet, 'Emer de Vattel (1714–1767)', *The Oxford Handbook of the History of International Law*, 1118–21 (note 15).
[77] 'Judgment', 20 February 1878, FO 46/360, 107, and Emer de Vattel, *The Law of Nations*, book II, chapter XVII, section 264 (English edition, London: G. G. and J. Robinson, 1797, 245).

suffer a disadvantage without restrictions, had to introduce restrictions on each word during the time when the treaty was still being negotiated. Britain would have suffered a disadvantage if the importation of medicinal opium were prohibited due to a failure to restrict the meaning of the word opium to recreational opium. Therefore, if having followed this rule, Wilkinson could not have failed to conclude that 'the power and duty of making the expression clear lay with Great Britain, and with Great Britain alone.'[78] To avoid such an unfavourable conclusion for Britain, Wilkinson attempted a strained interpretation by quoting not texts but just one footnote from Robert Phillimore's voluminous work *Commentaries upon International Law*.[79] Correctly, he re–quoted William David Evans' note that Phillimore had cited from his English edition of Pothier's *A Treatise on the Law of Obligations or Contracts*.[80] Namely, after stating that the rule of English law was different from that of Roman law, Evans added that 'These two opposite rules have probably both resulted from the same maxim, that *verba ambigua fortius accipiuntur contra proferentem* (a contract is interpreted against the offeror). By the Roman Law, the words of the stipulation were necessarily those of the person to whom the promise was made; the person promising only assenting [assented] to the question proposed by the person stipulating.'[81] In the case of the Anglo–Japanese treaty of 1858 and the Regulation II, Britain represented the nation which was promising, whilst Japan represented the nation which was stipulating, because the treaty was made as a result of Britain's approaching Japan with a proposal to open trade. Hence, if Roman law were applied to the provisions of the treaty, the meaning of opium ought necessarily to meet the will of the nation to which the promise was made, that is, that of Japan. However, according to the words Wilkinson quoted from Evans, 'There is nothing similar to this in the covenant and engagements used in England.' 'An indenture', it went on, 'is the deed of both parties, and the words it contains are taken as the words of both except as to those parts which are in their nature only applicable to one of them.'[82]

---

78 'Judgment', 20 February 1878, FO 46/360, 107.

79 'Judgment', 20 February 1878, FO 46/360, 107, and Robert Phillimore, *Commentaries upon International Law*, note (a) to section LXXX, volume II, part V, chapter VIII (second edition, Hodges, Foster, & Co., 1871), 104.

80 'Judgment', 20 February 1878, FO 46/360, 107, and Phillimore, note (a) to section LXXX (note 79). Also see Robert Joseph Pothier, *A Treatise on the Law of Obligations or Contracts*, trans. William David Evans, volume 1 (1806), 58.

81 'Judgment', 20 February 1878, FO 46/360, 107; Phillimore, note (a) to section LXXX (note 79); and Pothier, *A Treatise on the Law of Obligations or Contracts*, volume 1, 58 (note 80).

82 'Judgment', 20 February 1878, FO 46/360, 107, and Phillimore, note (a) to section LXXX (note 79).

With this allusion to Evans, Wilkinson first sought to illustrate that the duty of making the words of a treaty clear lay with both countries concerned, not Britain alone. Yet he did not conclude his argument with this point. What Wilkinson really wanted to quote from Evans was the following phrase, 'except as to those parts which are in their nature only applicable to one of them'. Based on this, Wilkinson concluded as follows: 'If this Regulation is applicable to only one party, to which is it? It is clear at any rate that the party *proferens* in this case is not Great Britain. If we look upon it as a stipulation and promise, the stipulation must have been made by Japan. But it is enough for the present purpose if it was not made by Great Britain.'[83] On the one hand, Wilkinson suggested in this conclusion that the party *proferens* (offering) would be Japan, but on the other hand, through the expression 'the stipulation must have been made by Japan', he looked upon Japan as the party that accepted the offer with the stipulation.[84] These expressions produced ambiguity, as they were very hard to realise. Nevertheless, the main points he sought to demonstrate would probably be as follows. That is to say, concerning the prohibition of opium, Wilkinson thought it was one of the exceptions to the articles of the Regulation II, which were mainly proposed by Britain, because it was applicable only to trade in Japanese seaports, not that in Britain. He hence concluded that Japan, not Britain, was considered the party offering it. Thus, he cleverly replaced Britain with Japan as the nation which was assigned the duty of making the expression of the word opium clear.

The above logic of Wilkinson left some fundamental questions unanswered. First, Japan had consistently adopted the standpoint that the importation of all kinds of opium, medicinal or recreational, should be prohibited as a rule. So, why would Japan have to trouble itself to take on such a duty and draw a distinction between both

---

[83] 'Judgment', 20 February 1878, FO 46/360, 107.

[84] Evans explained the concept of stipulation, and said that 'the principal mode of engagement, which in the Roman law dispensed with an actual consideration, was a stipulation. The person, to whom the promise was to be made, proposed a question to him from whom it was to proceed, fully expressing the nature and extent of the engagement; and, the question so proposed being answered in the affirmative, the obligation was complete. It was essentially necessary that both parties should speak, (so that a dumb person could not enter into a stipulation) that the person making the promise should answer conformably to the specific question proposed, without any material interval of time, and with the intention of contracting an obligation. From the general use of this mode of contracting, the term stipulation has been introduced into common parlance, and in modern language frequently refers to any thing which forms a material article of an agreement; though it is applied more correctly, and more conformably to its original meaning, to denote the insisting upon and requiring any particular engagement.' See Pothier, *A Treatise on the Law of Obligations or Contracts*, volume 2, 19 (note 80).

types of opium? The second and more important question concerned the international law theory that Wilkinson cited. As is generally known, after the collapse of the medieval world, which had been maintained by the power and authority of the pope or the Holy Roman Empire, internationalists had developed theories of modern international law applicable to the sovereign states that had newly appeared. Vattel especially was amongst the representative figures who emphasized the sovereignty and independence of nations. He considered nations 'bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength', referring to them as 'moral persons'.[85] Based on this view, he elaborated his theory according to the principle that international society was a society of sovereign, equal and independent nations.[86] He, as a natural consequence, expressed support for the rule that the rights of each nation were intended in order for the nation to preserve itself, and said, 'A nation or state has a right to every thing that can help to ward off imminent danger, and keep at a distance whatever is capable of causing its ruin; and that from the very same reasons that establish its right to the things necessary to its preservation.'[87]

Wilkinson, however, neglected this rule that would have obviously been applied to cases that were brought in Western countries. He did not acknowledge the state jurisdiction of Japan. Even though state jurisdiction is mentioned, this does obviously not mean that it was unjust that the Hartley cases were brought before the consular court. Extraterritoriality was stipulated in the treaty. Instead, Wilkinson ignored Japanese jurisdiction over the opium trade. As already mentioned, the Japanese government had consistently put the distribution of opium under close surveillance since the Tokugawa era. The Meiji government had often, since 1870, issued instructions that stipulated state control over the purchase of medicinal opium by foreign residents. Even in the event that the government itself required medicinal opium, it had been supplied by certain designated merchants, but not freely. Those measures had been necessary for the preservation of public safety and order in Japan, and so the enactment of them ought obviously to have belonged to the civil affairs of this country. Nevertheless, Wilkinson did not examine the appropriateness

---

85 Vattel, *The Law of Nations*, book 1, chapter 1, section 1, lv, (note 77).
86 Jouannet, 'Emer de Vattel', 1119 (note 76).
87 Vattel, *The Law of Nations*, book I, chapter II, section 20, 6 (note 77).

of such measures at all. He did not acknowledge those Japanese municipal laws or regulations. Wilkinson thereby could considerably reduce the range of the subjects under consideration in this case to the one question of whether the Regulation II considered medicinal opium. Such a narrowing of the range of subjects and then the assumption that 'up till 1872 medicinal opium had in fact been freely imported',[88] enabled him to render a judgement only if he examined just one point, namely, the meaning of the word opium. Thus, he concluded that Japan should assume responsibility for the ambiguity in the word opium, and that 'it was to show, not that a prohibition had been disregarded, but that there was no prohibition in the case.'[89] In this way, Wilkinson found Hartley not guilty.

Scholars have hitherto concentrated their attention on the matters that were expressly stated in Wilkinson's judgement, not on the whole of his thought, including matters not addressed. Specifically, Chang concluded that Wilkinson's judgement was not unfair, by simply examining the logical coherence of it alone.[90] Yet, if Chang had taken Wilkinson's neglect of state jurisdiction into consideration, how could he have drawn such a conclusion? He said that the laws of the nations to which an individual belonged followed him wherever he went and that he was entitled to their protection and benefits without reference to the laws of the state in which he sojourned.[91] This principle could certainly suggest that Hartley should be judged under English law. Yet, it did not enable Wilkinson to issue a judgement only based on an interpretation of the word opium. That was because the appropriateness of the free trade of medicinal opium as the basis on which he could narrow the range of subjects under consideration to the meaning of opium belonged to Japanese domestic affairs and was not judged according to English law. Thus, given that state jurisdiction, which would have been considered in the case of Western countries, was neglected, I cannot help but find that Wilkinson's judgement still had something unjust.

The Japanese government obviously could not accept this judgement. If it were ultimately confirmed, its impact would no longer be restricted only to the extent that the Japanese government could not punish just the insignificant merchant Hartley.

---

88 'Judgment', 20 February 1878, FO 46/360, 105.
89 *Ibid*., 108.
90 Chang, *The Justice of the Western Consular Courts in Nineteenth Century Japan*, 58 (note 6).
91 *Ibid*., 40.

Instead, as Lowder told the superintendent of customs, the government would not be able to control the trade of medicinal opium any more, although the drug could be used for smoking.[92] The Japanese government hence became frantic about reversing this judgement.

The Diplomatic Negotiations concerning the Hartley Cases

As discussed in the previous section, Wilkinson's judgement caused two difficulties for the Japanese government. It prevented the Japanese from punishing Hartley or maintaining state control over medicinal opium any longer. In the end, the Japanese government gave a higher priority to retaining its control over medicinal opium rather than prosecuting Hartley. This was amongst the main reasons why the Hartley cases eventually came to no definite conclusion. Next, I will examine the process through which the Japanese government reached this point.

As soon as the judgement was delivered in the first case, the Japanese government lodged a complaint with Harry Parkes.[93] Yet Parkes dismissed it. When consulting about this issue with the Japanese foreign secretary, Terashima, on 6 March 1878, Parkes emphasized the same conclusion as Wilkinson had drawn in his judgement, which was that the Japanese government was not able to stipulate the prohibition of medicinal opium because it had known it was useful as a medicine. In the talks of this day, it was revealed that Parkes was very cautious about whether the Japanese government had a plan to encourage the domestic production of opium and that he was still groping for a clue as to how to encourage the Japanese government to open the market of medicinal opium to British merchants. When questioned by Terashima as to whether he desired to see the importation of medicinal opium, he answered 'yes'.[94]

In the meantime, on 6 April, the Consular Court at Kanagawa delivered a judgement on the second case, which also did not at all satisfy the Japanese government. The government hence decided to move for an order declaring the

---

92 Lowder to Morimichi Motono, 28 February 1878, *Dai Nihon Gaiko Bunsho*, vol. 11, 459.

93 'Hartley Ahen Mitsuyu Ikken Yokohama Ei Ryoji Saibansyo Hanketsu Futo no Mune Mosiire no Ken (Putting in a Written Protest against the Case of Hartley's Opium Smuggling at the British Consular Court at Yokohama)', 7 March 1878, *Dai Nihon Gaiko Bunsyo*, vol. 11, 468.

94 'San–gatsu Mui–ka Terashima Gaimukyo Eikoku Koshi Osetsu Hikki (A Note on the Consultation between Foreign Secretary Terashima and the British Minister Parkes)', 6 March 1878, *Dai Nihon Gaiko Bunsyo*, vol. 11, 465–8.

judgements to be null and void and instructed the minister to Britain, Ueno Kagenori, to start negotiations with the British government, especially with Salisbury.

Since arriving at London in 1874, Ueno had already been made acquaintance with different members of the British government or others. First, the Rev Frederick Storrs–Turner, the secretary of the Anglo–Oriental Society for the Suppression of the Opium Trade（AOSSOT), supported Ueno. Storrs–Turner repeatedly sent letters to Salisbury during negotiations between Ueno and Salisbury and put pressure on him not to uphold Wilkinson's judgements. In a letter dated 31 May 1878, Storrs–Turner stated, 'I have the honour to request your Lordship to be so good as to inform me whether the above accounts are substantially correct, and also whether Her Majesty's Government has thought proper to confirm the decision of Mr. Acting Judge Wilkinson.'[95]

AOSSOT was established in 1874 mainly by Quakers and members of other nonconformist churches. Storrs–Turner, who had served the London Missionary Society in China for many years, was installed as secretary of the Society and engaged in disseminating the ideas about the suppression of the opium trade through issuing the society's newspaper, *Friend of China*.[96] The point to be noted was that, besides his devoted efforts to suppress the opium trade, he advocated the abolishment of extraterritorial rights, which he considered an obstacle to accomplishing his purposes. He mentioned this matter in his 1876 work, *British Opium Policy and Its Results to India and China*, saying,

> But now we have treaty regulations by which the British Government claims and exercises exclusive jurisdiction over its own citizens throughout the remotest districts of the Chinese Empire. These are what are popularly referred to as the ex–territoriality clauses. By these all British subjects, whether resident in the ports, or travelling in the interior, are as independent of all Chinese laws as if they were walking the pavement of Regent–street. The one sole right allowed to the Chinese Government, even to the Emperor himself, is that of handing over the offender against Chinese law to the nearest Consul for trial. This exemption from Chinese jurisdiction entailed the necessity of clothing British officials with

---

95 Frederick Storrs–Turner to Salisbury, 31 May 1878, FO 46/360, 2.
96 Kathleen L. Lodwick, *Crusaders against Opium: Protestant Missionaries in China, 1874–1917* (Lexington: University Press of Kentucky, 1996), 55–6.

> authority over residents and travellers in China, and considerable powers have been given to the Consuls and the Judicial tribunal at Shanghai for this purpose…. But this exception in favour of British smugglers, necessary when the introduction of opium had not yet been legalized, and our policy was to preserve the opium revenue at any cost, ought surely now to be treated as obsolete.[97]

Second, Ueno consulted some local lawyers about legal proceedings, such as Wilson Bristows & Carpmael, a firm which had helped the Japanese government win a victory in a different case concerning a railway construction. All lawyers consulted unanimously advised Ueno to take a more discreet course of action at that time. Namely, the fact that double jeopardy was prohibited in Britain made it difficult for the Japanese government to bring an appeal against Wilkinson's decisions to the Judicial Committee of the British Privy Council. Thus, they counselled Ueno not to appeal for an order declaring Wilkinson's judgement null and void and handing down a severe punishment against such an insignificant merchant as Hartley. Instead, they advised him that the Japanese government should ask the Committee to investigate the appropriateness of Wilkinson's judgements. According to them, once the Committee found Wilkinson's judgements unjust, the decision would thereafter become law; thus, the Japanese government would be able to punish subsequent offenders and prevent such unfair judgements as Wilkinson's.[98]

Third, Julian Pauncefote, legal assistant undersecretary at the Foreign Office, was playing a key role for Ueno as an intermediate between him and Salisbury. Pauncefote, known as the first British ambassador to the United States, concluded the Panama Canal Treaty in 1901 with John Hay.[99] Pauncefote, who was a lawyer and an expert in both international law and Far East affairs, was appointed as legal assistant undersecretary after working in the same role at the Colonial Office for a year and a half. Notably, he is said to have begun working on the Chefoo negotiations immediately on his appointment.[100] According to Ueno's report of 16 August 1878,

---

97 Frederick Storrs–Turner, *British Opium Policy and Its Results to India and China*, (London: Sampson Low, Marston, Searle, & Rivington, 1876), 211–2.

98 Ueno to Terashima, '*Betsushin Dai Ichi–go* (An Additional Information, No. 1)', 16 August 1878, *Dai Nihon Gaiko Bunsyo*, vol. 11, 480.

99 R. B. Mowat, *The Life of Lord Pauncefote: The First Ambassador to the United States* (Boston and New York: Houghton Mifflin Company, 1929), 286.

Pauncefote gave him the following advice, which significantly influenced the Japanese course of action in settling the Hartley cases:

> I am always on familiar terms with the Assistant Undersecretary at the Foreign Office, Julian Pauncefort. … When I privately communicated with him about the summary [of the Hartley Cases], he gave me some advice. He was of opinion that it was no doubt that the Anglo–Japanese Treaty prohibited the importation of all kind of opium, both medicinal and recreational. … He then suggested that the Foreign Office had jurisdiction over the things related to treaties and hence the Japanese government should lodge the complaint rather with the Foreign Minister. If the government should do so, this Assistant Undersecretary must assume charge of the cases, and he would be able to settle them without troubling the Privy Councillors.[101]

'The present controversy over opium', Pauncefote went on, 'was caused not only by the judge's fault, but also by the British minister's [Parkes'] inadvertence. The British Minister have not even reported about the details so far. Hence, I will send a telegraph to instruct British subjects to suspend all opium importation into Japan for the time being until the controversy is settled. I am now consulting about this with legal advisors… Faced with this controversy, legal advisors as well as members of Asian Bureau at the Foreign Office are considering that it was the British minister's fault, and really angry about the measures taken by the minister.'[102] Ueno's report revealed that Parkes was becoming a nuisance not only to the Japanese government but also to the head office members of the Foreign Ministry of his country, including Pauncefote.

This advice moved Ueno and Japanese government officials to change their plan. Especially since August 1878, when Ueno submitted the aforesaid report, they came to pursue a diplomatic solution rather than bring an appeal to the Judicial Committee of the British Privy Council. The appropriateness of Wilkinson's judgements was ultimately reviewed by the law officers of the Foreign Office. Here we can find one of

---

[100] Leigh Wright, *Julian Pauncefote and British Imperial Policy: 1855–1889* (Lanham, MD: University Press of America), 27.
[101] Ueno to Terashima, '*Betsushin Dai Ichi–go*', 481 (note 98).
[102] *Ibid*., 482–3 (note 98).

the main reasons why Hartley's cases were gradually consigned to oblivion. The officials of the Japanese government began to think it more significant than doling out punishment to Hartley that, by reaching such a solution, they might be able to strike a blow against Parkes, who actually controlled the British extraterritoriality regime in Japan.

International Law Theory

The previous section elucidated that the Japanese government began to alter its course of action and came to pursue a diplomatic solution rather than move for an order declaring Wilkinson's judgements null and void. Japan chose that path because government officials had perceived that Britain's policy toward the East Asia region was changing markedly. This shift in policy was occurring in diverse areas including economy and law. The problems related to those areas were entangled with each other and led to changes. The fourth and the fifth sections of this paper therefore discuss these problems. First, this section focuses on the theory of international law that influenced Japan's course of action. Here John Frederic Lowder's opinion about the judgement in the first case provides useful information.

As soon as Wilkinson delivered his judgement in the first case, Lowder, the British legal adviser to the Japanese Customs Authority, submitted a written opinion about it to the superintendent of customs on 28 February 1878, criticizing Wilkinson for distinguishing medicinal opium from smoking opium.[103] The notable point in his opinion is that Lowder referred to international law from a different point of view than Wilkinson and rejected his conclusion that the treaty made a distinction between medicinal and smoking opium.

First, Lowder cited here a precedent established by the US Supreme Court in 1796, *Ware v. Hylton*.[104] This action was originally brought by Ware, an administrator for a British citizen, William Jones, against citizens of Virginia named Daniel Hylton and Francis Eppes, on a debt, for a penal sum in July 1774. Then the plaintiff appealed the judgement of the US Circuit Court for the District of Virginia to the US Supreme

---

[103] John Frederic Lowder, 'Lowder Ikensho Yaku (The Japanese Translation of the Lowder's Written Opinion)', *Dai Nihon Gaiko Bunsyo*, vol. 11, 458–64.

[104] *Ibid*., 459–60.

Court.[105] The point at issue in this case was whether treaties could overrule state laws and whether words stated in treaties, such as debt or discharge, needed to be interpreted. The District Court of Virginia had initially issued a judgement against the plaintiff because an act enacted by the state legislature of Virginia during the American War of Independence stipulated that a citizen of Virginia owing money to a British person should be discharged from the debt if the citizen paid the same or any part of it to the loan office. However, the Treaty of Peace, which was concluded in 1783, provided in clause 4 that 'it is agreed that the creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts, heretofore contracted'. Thereby, an associate justice of the Supreme Court, William Cushing, found that the treaty held the original debtor answerable to his creditor, reversing the judgement of the District Court of Virginia.[106] The main points of the justice's opinion were twofold. First, although he had reservations, he thought the treaty had priority over all state laws. Cushing said, 'It cannot be denied; the treaty having been sanctioned, in all its parts, by the Constitution of the United States, as the supreme law of the land.'[107] Second, Cushing interpreted clause 4 of the Treaty of Peace, saying, 'it [the sense of the article] obviates, at once, all the ingenious, metaphysical, reasoning and refinement upon the words, debt, discharge, extinguishment, and affords an answer to the decision made in the time of the interregnum that payment to sequestors [sequesters], was payment to the creditor.'[108] He rejected the unnecessary interpretation of the meaning of words. Wilkinson did not employ this unfavourable precedent making in his judgement. On the contrary, he narrowly interpreted the meaning of the word opium through a ridiculously complicated procedure, as mentioned in the second section. Lowder criticized Wilkinson for this arbitrary approach.[109]

Second, Lowder, as well as Wilkinson, cited Robert Phillimore's work *Commentaries upon International Law*.[110] Yet, the approach that Lowder took in citing it was very different from Wilkinson's. Phillimore, who was a British judge and politician, expressed in his book admiration for Cushing for his opinion on the *Ware v.*

---

105 3 U.S. 199 (Dall.) This precedent is available on the website of FindLaw (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby = case&court = us&vol = 3&page = 199).
106 *Ibid.*
107 *Ibid.*
108 *Ibid.*
109 Lowder, 'Lowder Ikensho Yaku', 459–60, (note 103).
110 *Ibid.*

Hylton case.[111] Wilkinson also referred to the same work by Phillimore, but he cited only a single footnote in it. Lowder, however, had good reason to quote Phillimore's work because he shed new light on international jurisprudence in the 1870s. First, Vattel, as already mentioned, emphasized the sovereignty and independence of nations. Yet, being excessively interested in such characteristics of nations, he considered international law simply as an assemblage of rights and obligations of equal nations. Vattel hence applied the framework of civil law to designing international law, considering treaties as contracts between nations. This view enabled Wilkinson arbitrarily to quote only the chapter on the interpretation of treaties from Vattel's work, *The Law of Nations*, and to judge the Hartley cases only by examining whether either country had committed faults, such as failing to make clear the expression of the words, at the time the treaty was concluded. In contrast, Phillimore mentioned the subject of interpretation of the treaty and said, 'The Covenant or Treaty contracted by two or more parties is to be interpreted with reference to the intention of them all.'[112] He considered Roman legal thinkers more important than Grotius or Vattel, as jurists who had established sound principles on this subject. Concerning the reason why he rated the principles of Roman legal thinkers highly, Phillimore said that they had been 'careful not to apply to the Public Treaty (*publica conventio*) the peculiarities attending the forms and rules of the private covenant.'[113] Phillimore, unlike Vattel, did not believe that international law could be modelled after the framework of civil law, but rather he seems to have considered it as something 'public'.

Phillimore was also different from Vattel in that he considered embassies more important than consulates. Vattel mentioned the consul as the most useful institution for the advantage of commerce,[114] whereas Phillimore did not agree. According to Phillimore's view, consuls had certainly been charged with important duties, such as exerting jurisdiction or obtaining in foreign countries a place of safe deposit for merchandise, because commerce was in its infancy and personal intercourse with foreigners was insecure during the times of oppression which followed the overthrow

---

111 Phillimore, *Commentaries upon International Law*, volume II, part V, chapter VIII, section XCIV, 118–9 (note 79).
112 *Ibid*., section LXVI, 92.
113 *Ibid*., section LXVI, 91.
114 Vattel, *The Law of Nations*, book II, chapter II, section 34, 147 (note 77).

of the Western Empire.[115] However, he went on,

> Before the middle of the seventeenth century, however, a great change had been effected in the whole condition of International Commerce and of International intercourse generally. About this time, permanent and perpetual legations had become a part of the received Public Law of Europe; the idea of national independence, moreover, had taken deep root, and the *exterritorial* jurisdiction, both criminal and civil, of the Consuls was wholly at variance with this principle; at the same time the general refinement of manners, and the improvement of Municipal Law, rendered it less necessity; and throughout Christian Europe, this jurisdiction passed into the hands of the territorial authorities.[116]

This passage revealed Phillimore's belief that the exterritorial jurisdiction of the consuls had been wholly at variance with the idea of national independence since the middle of the seventeenth century. Instead of consuls, he emphasized embassies as 'permanent and perpetual legations'. The point to be noted here is that Phillimore maintained that improvement in municipal laws and regulations had rendered the exterritorial jurisdiction of consuls less necessary, and that this jurisdiction had passed into the hands of territorial authorities. He was amongst the advocates of the proposition that territorial authorities should assume jurisdiction not only over the citizens of the country but also over foreigners. Phillimore's notion of trusting the municipal laws and regulations and the territorial authorities was ideally suited to the position of the Japanese government, which was planning to enact similar laws for the opium trade.

Nevertheless, on the one hand, Phillimore, as seen in the above quoted remarks, could not entirely dismiss ideas that distinguished Christian countries from non–Christian ones. Yet, on the other hand, he expressed the following noteworthy ideas. That is to say, he asserted that international law required considerable improvement in order to rule 'the great community of States', in which many states in Central and Southern America had become members, and in which China and Japan now participated by breaking down a barrier, namely a seclusion policy.[117]

---

[115] Phillimore, *Commentaries upon International Law*, volume II, part VII, chapter I, section CCXLIV, 259 (note 79).
[116] *Ibid*., 261–2.

These remarkable features of Phillimore's theory were securely linked to the notion that international law should be tailored to the development of the international financial market. He especially sought to revise his thinking as it could serve to solve troubles related to public credit.[118] As John Brewer demonstrated regarding Britain, some European countries and the United States had come to obtain a large part of the revenue from public debt since the late eighteenth century;[119] therefore, the international financial market had grown complicated. A state might owe a debt to not only another state but also an individual person or persons. This resulted in an increase in problems concerning debts. In the late nineteenth century, furthermore, Britain had especially come to rely on capital export instead of industrial export, the amount of which had been outstripped by that of Germany or the United States. Phillimore published his work in the 1870s when Britain was evolving into a nation that supplied capital.

Vattel had taken the economic system of mercantilism into consideration when writing *The Law of Nations*, in which he stated:

> It is seldom that nature is seen in one place to produce every thing necessary for the use of man; one country abounds in corn, another in pastures and cattle, a third in timber and metals, &c. If all those countries trade together, as is agreeable to human nature, no one of them will be without such things as are useful and necessary; and the views of nature, our common mother, will be fulfilled.[120]

He viewed consuls as important on this ground. They had originally functioned as judges to settle diverse cases brought in carrying on trade, such as the handling of stranded ships. Phillimore, in contrast, took loan capital into account, theorising about international law as a means to protect the seamless circulation of capital. This was the reason he admired Cushing, who had settled the *Ware v. Hylton* case.

The British government was interested in insuring investment opportunities provided to British investors in Japan during this time. For this purpose, Salisbury

---

117 *Ibid*., volume II, part V, chapter VI, section XLV, 68.
118 *Ibid*., chapter III, sections V–IX, 8–15.
119 John Brewer, *The Sinews of Power: War, Money and the English State, 1688–1783* (Harvard University Press, 1988), 114–126.
120 Vattel, *The Law of Nations*, book II, chapter II, section 21, 143–4 (note 77).

indeed hoped to start negotiations with Japan for revising the treaty of 1858. Ueno was amongst the diplomats who had made an effort to raise a foreign loan from British capital when the railway was first constructed in Japan.[121] This relationship concerning international finance between Japan and Britain worked favourably for Ueno when he sought to gain local supporters in London. What was helpful to Japan, furthermore, was that, in the 1870s, Phillimore was still influential in the British legal profession as a privy councillor.[122] Lowder hence could argue for the Japanese government's intention to control foreigners through applying their own municipal laws, by citing the new propositions in Phillimore's work.

British Gentlemanly Capitalism and Extraterritoriality

Under the circumstances in which Japan found itself in those days, the new international law theory which Robert Phillimore proposed was especially useful in solving the problems that arose from the Hartley cases. By the circumstances in which Japan found itself, I mean the change in international affairs concerning China, which was having an impact on the British extraterritoriality court regime. More specifically, the change revised the British Order in Council that had formed the extraterritoriality regime simultaneously in two countries, Japan and China.

Following the defeat of the Qing government in the Arrow War with which Harry Parkes was involved as acting British consul,[123] in particular after the Peking Convention was concluded in 1860, the opium trade had been legalized in China. As a result, a huge amount of cheap Malwa opium as well as Bengal opium had been imported from British India.

This situation, however, was changing following the conclusion of the Chefoo Convention of 1876. Julian Pauncefote was involved in negotiations relative to this convention, along with the minister plenipotentiary to Peking, Thomas Wade, and the inspector-general of China's Imperial Maritime Customs Service, Robert Hart. The highly controversial point in this convention was the third clause of section III, which

---

121 Kazuo Tatewaki, *Meiji Seifu to Eikoku Toyo Ginko* (*The Meiji Government and the Oriental Bank Corporation*), (Tokyo: Chuokoron-sha, 1992), 92.

122 *The London Gazette*, number 23288, 6 August 1867. See also Norman Doe, 'Phillimore, Sir Robert Joseph, baronet (1810-1885), lawyer', *Oxford Dictionary of National Biography* (2004). I used the online edition of this article (http://www.oxforddnb.com/view/article/22138).

123 John Y. Wong, *Deadly Dreams: Opium, Imperialism and the Arrow War (1856-1860) in China* (Cambridge University Press, 1998), 69.

dealt with inland taxation (likin) on opium. David Sassoon, a British merchant based in London and Bombay, wrote to the Earl of Derby to oppose the ratification of this agreement. In this letter, he revealed that the whole or a portion of the amount of the likin tax which the local authorities collected was in practice credited to the central government revenue:

> Under the existing Commercial Treaty the Import duty on Opium is collected at the port of Import. It is the only charge recognised by the Treaty, … [nevertheless] During the Taeping Rebellion a further tax was imposed upon the drug under the name of the Lekin [Likin] tax, ostensibly for the purpose of defraying the expenses of the War, but, … it has not been repealed with the cessation of hostilities. It is really a local or municipal tax, collected by the local authorities, and varies according to the circumstances of different localities, but the Imperial Government require that the whole, or a portion of the amount so collected, shall be credited to Imperial Revenue… they now propose, under the sanction of a Treaty, to resort to the surer method of enlarging their Revenue by levying this new impost at the port of Import, … [124]

From the collected amount of the likin tax, the portion that should have been credited to the Qing government was, together with the import duty, paid to China's Imperial Maritime Customs Service and was being held by the inspector general, Robert Hart. Hart is said to have preferred that both sources of the customs income, the likin tax and the import duty, be used to the increase the Qing government's revenue. Likin was levied on the transit of not only imported opium from British India but also domestically produced opium in China. In those days, the production of Chinese opium was increasing so greatly that it was driving foreign products out of the domestic market. Hart followed these trends. The Qing government had used the customs income as mortgages in order to have the increasing number of 'imperial' loans underwritten by foreign banks. Hart hence welcomed both the growth of the domestic production of opium and the levy of the likin tax on it as something like a key for promoting the increase in capital export from Britain, even if the profit from the trade of Indian opium might possibly be diminished due to the domestically

[124] David Sassoon to the Earl of Derby, 14 February 1877, FO 17/775, 33–5.

produced opium.[125]

The 1870s and 1880s witnessed a steady decline in China's import–purchasing power. The return on business in British manufactured goods also began to suffer from this trend. Cain and Hopkins pointed out that the leading import and export firms reacted to these shifts by moving out of the old staple trades and becoming managing agencies concerned increasingly with services, notably shipping, insurance and banking.[126] Investigating British imperialism from the viewpoint of 'gentlemanly capitalism', the authors found that a new style of capitalism had developed after 1870 when a new gentlemanly class was arising from the service sector, and that gentlemanly capitalism had widened the influence of British imperialism in not only the colonies that had been brought into the formal empire but also the regions that had remained outside it.[127] China was included in the latter. What Cain and Hopkins especially took notice of as a symbol of the informal influence of British imperialism was the Honkong and Shanghai Banking Corporation. First, the bank had acted as the institutional bank for China's Imperial Maritime Customs Service, underwriting imperial loans through receiving customs income as security.[128] Second, Cain and Hopkins emphasized collusive ties between British politicians and the bank. For instance, Julian Pauncefote was a substantial shareholder of the bank. Harry Parkes also had subscribed heavily to the bank's loans to China.[129] Parkes, who supported the extraterritoriality regime under which British triangular trade had developed, did not resist the trend towards an increase in capital export from Britain.

Nevertheless, British gentlemanly capitalism was not yet completely established in China by the early 1880s, the period in which the Hartley cases came to an end. An objection from the India Government Office delayed ratification of the Chefoo Convention until May 1886 and hence China's Imperial Maritime Customs Service finally came to be entitled to collect both the import duty and the likin tax. Yet, it is enough for the discussion in this section if only the fact becomes known that British informal imperialism was growing in China in the aforesaid way. The notable point is that interest in the expansion of export capital brought a change to the British

---

125 Yuzo Kato, *Igirisu to Asia: Kindaishi no Genga* (*Britain and Asia: A Rough Drawing of the Modern History*) (Tokyo: Iwanami Shoten, 1980), 149–50.
126 P. J. Cain and A. G. Hopkins, *British Imperialism, 1688–2000* (Second Edition, Longman, 2002), 365.
127 *Ibid*., 26; 115.
128 *Ibid*., 366.
129 *Ibid*., 367.

extraterritoriality regime.

At the very time that Japan was searching a way to reverse Wilkinson's judgements in the Hartley cases, the China and Japan Order in Council was revised on 14 August 1878, with the new Order stipulating that 'the Court for Japan' should be located in Kanagawa.[130] This was implemented as just a transitional measure, and in point of fact, a more drastic revision was planned to improve the extraterritoriality regime especially in China, although it failed to be executed. Pauncefote, Parkes, Hornby and Wilkinson were involved with this plan to revise the Order in Council. Hence, an explanation regarding through what process the plan was developed and cancelled, and who had what opinion about it will be surely helpful in understanding the outcome of the trials in the Hartley cases. Nevertheless, a correct explanation of the facts requires substantiation by bringing forward ample evidence; therefore, a great number of pages would be needed here. The facts mainly concerned Chinese affairs and thus, if the details of the explanation were presented in this section, the present discussion would lose its focus. For this reason, I will present the details, including substantiation by evidence, in Appendix, and will only sum up the main points of it in this section.

First, the extraterritorial court regime that Parkes or Hornby had established in the 1860s had come to need reform. I have briefly mentioned the conditions related to that in Japan in the second section. In the case of China, the situation was more complicated. A mixed jurisdiction existed there, unlike in Japan. Especially in the rapidly growing city of Shanghai, there was the International Settlement, in which the Mixed Court at Shanghai was set up in 1864 in conformity with an agreement between China and the treaty powers. Yet, since the conclusion of the Chefoo Convention on 13 September 1876, the expansion of the scope of the business activity into inland cities in China had led the British community within the country to feel dissatisfied with the court regime. First, Hornby had designed the British courts for China on the model of those that had jurisdiction over the Levant and Constantinople; however, the British communities in both areas were entirely different in number and wealth from those in China. Compared with Constantinople, Shanghai was far more distant from London, making it difficult to immediately contact the home government when problems occurred that could not be settled in

---

[130] 'The China and Japan Order in Council, 1878', *The London Gazette*, no. 24616, 23 August 1878.

the localities. Second, the British community in China and Japan felt dissatisfied with the consular officers because the officers who held the positions on the provincial courts did not necessarily have a legal education. Third, it was also questioned whether Hornby or Parkes had made the courts unable firmly to stay neutral in substance. The British minister and consular officers in those countries had the ability to easily interfere in trials. The fourth and the most serious matter which roused a strong feeling of dissatisfaction amongst the community was that the present court regime had not been able to deal adequately with civil actions. Extraterritoriality had been useful for enabling the treaty powers to protect their fellow countrymen from being punished according to Chinese laws. Yet, the same policy was not applicable to civil actions. In the case of mixed jurisdiction, because cases against British subjects were lodged to the British consular court not as mixed cases but as regular ones, the Mixed Court at Shanghai dealt with only those brought against Chinese defendants. The Court was a kind of Chinese court, at which the Shanghai sub-prefect, the Taotai, had the authority to decide cases jointly with a consular assessor, according Chinese laws. The Court dealt with only criminal cases at first. That was because Parkes, who took the lead in setting up the Mixed Court at Shanghai, implicitly sanctioned the traditional Chinese idea that 'law' meant 'criminal law'.[131] Even after the jurisdiction of the Court was extended to civil cases in which British subjects were plaintiffs, in trying a modern civil case, brutal beatings with bamboo were occasionally meted out as punishment at the discretion of the judge.[132] Due to this situation, the British community in China found it almost impossible to accept that the Court could settle such complicated civil actions as disputes concerning rights relations in joint stock companies that were increasing in those days.

Second, Hornby tackled the problem of the revision of the Order in Council earlier than anyone else, but his proposal contrariwise caused him to stand at bay. Hornby renounced the principle that had hitherto maintained the extraterritoriality court regime and expressed a new view in his judgement in the Kwangtung case of 1875. That is to say, he advocated that the mixed court, which was composed of two

---

131 Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford University Press, 2012), 66-7.

132 Anatol M. Kotenev, *Shanghai: Its Mixed Court and Council* (Shanghai: North-China Daily News & Herald, 1925), 57.

co–judges, the consul and the Chinese authorized officer, should hear and decide cases that were brought against British subjects. Hornby drew up his Draft Order in Council based on this new principle. However, this Draft Order met strong opposition from many influential members in British diplomacy with China and Japan. Notably, Parkes and Wilkinson, who had maintained the extraterritoriality court regime in China and Japan together with him, parted ways with Hornby. Hornby ultimately resigned his post as the chief judge at the Supreme Court at Shanghai and returned home to London in 1876. He gradually lost his power also in London thereafter. One of the key persons thus dropped out, a person who had supported the British extraterritoriality court regime, on the basis of which Wilkinson could issue his judgements in the Hartley cases.

Third, Parkes and Wilkinson disputed Hornby's propositions. They were concerned that, if the rules Hornby proposed should frequently be taken advantage of, the consuls would be bound to entertain any complaints against British subjects made by Chinese or by Japanese and that no appeal would be available to any court from a judgement given in conjunction with the local authorities.[133] As Wilkinson remarked, claims against Japanese subjects were always heard in Japanese courts, and claims against British subjects in British courts. It hence was highly desirable that 'no encouragement should be given for any departure from this practice.'[134] Wilkinson and Parkes preferred that, especially in Japan, the extraterritoriality court regime be maintained as before.

Fourth, in contrast, Pauncefote and Francis Savage Reilly expressed an utterly different view as regards China. Reilly was an English barrister and served the British Foreign Office as an unofficial legal consultant. He had been instructed by the Office to prepare a draft of the revised Order in Council repeatedly since 1875. Pauncefote and Reilly were sceptical about the usefulness of the kind of mixed court in which, as advocated by Hornby, the consular officer and the native functionary were equally entitled to hear and determine cases. Such courts did not seem to them adequately to protect the rights and properties of British subjects when the view of the British Consul differed from that of the native authority. The concept of a mixed court that they promoted was that for which the Chefoo Convention provided, as

---

133 Hiram Shaw Wilkinson, 'Memorandum: China and Japan Order in Council 1876', sections 87 (note 56).

134 *Ibid*., 88.

follows: 'so long as the laws of the two countries differ from each other, there can be but one principle to guide judicial proceedings in mixed cases in China, namely, that the case is tried by the official of the defendant's nationality, the official of the plaintiff's nationality merely attending to watch the proceedings in the interests of justice.'[135] Based on this concept, and in order to remedy problem of the absence of security for the due enforcement of joint decisions against Chinese at the same time, they concluded that effectual provisions should be made on the Chinese side, to correspond to the British Order in Council, or, in other words, in conformity with the Western concepts of rights or duties. They began to emphasize the importance of the establishment of a more satisfactory yet purely national system of jurisprudence in a non–Western country.

Fifth, this new principle concerning extraterritoriality was not only advocated by Pauncefote and Reilly. It was also developed as a collective opinion of the representatives of the treaty powers to China. Specifically, the US minister, George Frederick Seward, in addition to the British minister to China, Thomas Wade, held leadership positions amongst them. The United States had adopted, earlier than other treaty powers, a view that permitted the exercise of state jurisdiction by non–Western nations. The US secretary of state, Hamilton Fish, had issued the instruction to John A. Bingham, the US minister to Japan, in 1874, that the rights of the Japanese authorities to enact laws for the government, security and order of its own people could not be questioned and that American residents in Japan were expected and required to observe and obey such laws.[136]

Last, all improvements that Pauncefote and Reilly advocated, of course, were not accomplished by the end of the Hartley cases. The regulation of the Mixed Court at Shanghai remained in force until the court was placed under Chinese jurisdiction in 1927. The revision of the China and Japan Order in Council ended up a partial one that, in 1878, added only the provisions relating to the Japanese courts to it, because Salisbury instructed Pauncefote and Reilly in May 1878 to postpone a complete revision of the Order in Council. The discussion in this section would be enough if it only elucidated the alteration in the British policy of extraterritoriality in East Asia.

---

135 'Agreement between the Minister Plenipotentiary of the Government of Great Britain and China', Section II, 13 September 1876, FO 17/944, 196–7.

136 Fish to Bingham, 7 January 1874 (U. S. Department of State, *Papers Relating to the Foreign Relations of the United States*, 1874, Washington. D. C., 1875, 658–9).

At least this change resulted in Parkes and Wilkinson being unable to exert their authority based on the previous kind of extraterritorial court regime to which they had formerly adhered. After the revision of the Order in Council of 1878, negotiations began concerning the revision of the Amity and Trade Treaties that had been concluded in 1858 between Japan and the treaty powers. Salisbury took the lead in the negotiations amongst the treaty powers. During these negotiations, Japan and the Western countries agreed to the principle that all cases, both civil and criminal, between Japanese and foreigners should be judged by the officer of the defendant's nation. At the same time, Salisbury proposed to Japan that it should employ foreign judges in the Japanese courts as a preparation for the cases with which foreign interests were involved.[137] This proposal was ultimately rejected by the Japanese government; however, this situation revealed that Salisbury was attempting to establish the same mixed jurisdiction in Japan as Reilly and Pauncefote advocated. Thus, these individuals represented the mainstream of British diplomacy with China and Japan and Parkes, at least, gradually lost his leadership role in building a new relationship between Japan and the treaty powers. Here the Japanese government found room for establishing its own municipal laws and regulations based on Western legal concepts, independently of the interference of Parkes in particular.

Government Monopoly and the End of the Hartley Cases

The Hartley cases and Wilkinson's judgements in them are said also to have generated debate in London.[138] As soon as Ueno initiated his action to seek the opinion of the law officers of the Foreign Office, the movement of persons became active. Parkes wrote a letter of explanation to Salisbury, stating that he had again and again requested that the Japanese government agree to a regulation related to the importation of medicinal opium during the previous three years, but in vain.[139] He did

---

137 'Gaikokujin o Saiban subeki Hankan Saiyo Hoho ni kanshi Kaito no Ken (A Reply about the Way to Employ the Judge who Should Hear and Determine the Cases Involving Foreign Interests)', 21 August 1880, *Dai Nihon Gaiko Bunsho*, Joyaku Kaisei Kankei, vol. 2, 621–2.

138 'Hartley Ahen Mitsuyunyu Ikken no Hanketsu narabini Yakuyo Ahen Hatsubai Kisoku ni Taisuru Eikoku Gaimusho no Iko Dentatsu no Ken (On the Conveyance of the Intentions of the British Foreign Office over the Judgments on the Hartley's Opium Smuggling Cases and the Regulations for the Sale of Medicinal Opium)', 7 February 1879, *Dai Nihon Gaiko Bunsho*, volume 12, 409–10.

139 Parkes to Salisbury, 14 October 1878, FO 46/360, 55.

so without hesitation, although he had never made such a request to the Japanese government. Hartley lodged his petition to the Court for Japan, for compensation for the loss and damage inflicted on him by the Japanese government.[140] Notably, Pauncefote seems to have hurried Ueno to move for the opinion of the law officers of the Foreign Office. He explained his reason for this as follows: 'We should endeavour to stop the appeals [by the Japanese government] if we can, as they will expose the want of jurisdiction of the court at Kanagawa which Mr. Wilkinson has been holding as Acting Law Secr. We have cured this for the future by the recent order in council.'[141]

The law officers of the Foreign Office seem to have begun a review of the Hartley cases in July 1878. John Holker, Hardinge Giffard and Parker Deane led the review. Amongst them, Deane had once been one of the advocates in the Doctors' Commons, to which Phillimore had belonged as well.[142] They first reported to Salisbury about the pilot survey of Wilkinson's judgements on 2 July 1878. They discussed their construction of the tariff convention of 1866 in the report, stating, 'In our opinion Medicinal Opium unless expressly named in Class IV amongst "Drugs and Medicines" is a prohibited Article under Class III and cannot be distinguished from "Smoking Opium".'[143] Their formulation of the Convention did not change after they received the full report of Wilkinson's judgement in the first case. They were also informed by Pauncefote that 'the exercise of jurisdiction by Mr. Wilkinson as acting law secretary in the cases in question was not warranted by the Terms of Her Majesty's Order in Council for China and Japan of the 9th of March 1865 by reason of the absence of any special delegation from the Chief Judge to try them.' They thereby submitted their conclusive opinion to the foreign minister on 17 January 1879, and said, 'In obedience to Your Lordship's commands, we have the honour to Report: That in our opinion the Judgement delivered at Kanagawa and a copy of which is enclosure No. 5 in Sir H. Parkes despatch cannot be upheld. … There may

---

140 'Petition', 16 October 1878, FO 46/361, 199–200. The original text of this document referred to the court to which Hartley lodged his petition as 'the Tokio Superior Court'. Yet, this is considered a typographical error because the British Court was established not at Tokyo but at Kanagawa, according to the China and Japan Order in Council of 1878. I hence refer to it in this paper as 'the Court for Japan', as stipulated in the Order.

141 Pauncefote to the Foreign Office, 30 November 1878, FO 46/360, 58–60.

142 The law officers of the Foreign Office to Salisbury, 2 July 1878, FO 46/360, 23–4. On Parker Deane, see J. B. Atlay, 'Deane, Sir James Parker: 1812–1902', revised by Beth F. Wood (Oxford Dictionary of National Biography, 2004).

143 The Law Officers of the Foreign Office to Salisbury, 2 July 1878, FO 46/360, 24.

however be some ambiguity in that Report which states that medicinal opium cannot be distinguished from smoking opium. In thus stating our opinion we did not refer to the qualities of the two kinds of opium as not distinguishable the one from the other but to the terms of the Convention applicable to opium generally.'[144]

Soon after the law officers submitted their opinion, Salisbury informed Ueno on 7 February that Wilkinson's judgement could not be upheld and it became more necessary that immediate steps should be taken for the regulation of the importation into Japan of medicinal opium.[145] Pauncefote told Ueno on the same day that the cases would be taken out of Parkes' hands and that the Foreign Office would have entire jurisdiction over them.[146]

Parkes, for his part, was busily engaged in explaining himself, in order not to lose his post. He replied to Salisbury's inquiry that it rested entirely with the Japanese government to devise the regulations related to the importation of medicinal opium. In this reply, he repeated the words stated in the previous letter, saying, 'during the last three years I had again and again requested the Japanese Government to agree to such regulations as your Lordship contemplates, but without success'.[147] Parkes nevertheless saw through the Japanese government's hesitation about lodging an appeal to the Privy Council. Having been informed that 'the Law Officers of the Crown were doubtful whether an appeal could be entertained as it was a criminal case', he told Salisbury, 'As five more months have elapsed since this conversation, and as the appeal has not yet gone forward, although it has long been lying in the Kanagawa Court ready for transmission, I doubt whether the Japanese Government really intend to appeal.'[148] He then began to draw up a draft of the British equivalent, with which he attempted to replace the Japanese regulations. He seems to have repeatedly ordered his subordinates to do this. The number of revisions of the draft rose to five during just the month of March.[149] I will discuss Parkes' drafts in detail later. Through the drafting process, Parkes intended to secure the trust of Salisbury,

---

144 The Law Officers of the Foreign Office to Salisbury, 17 January 1879, FO 46/360, 137–40.
145 Salisbury to Ueno, 7 February 1879, *Dai Nihon Gaiko Bunsho*, volume 12, 412–3.
146 'Hartley Ahen Mitsuyunyu Ikken no Hanketsu narabini Yakuyo Ahen Hatsubai Kisoku ni Taisuru Eikoku Gaimusho no Iko Dentatsu no Ken' (note 138).
147 Parkes to Salisbury, 5 March 1879, FO 46/360, 438–41.
148 Parkes to Salisbury, 20 March 1879, FO 46/360, 402–3.
149 See 'Rules for Regulating the Importation of Opium for Medicinal Purposes', 15 March 1879, FO 46/360, 287–95, and the documents following this, March 1879, FO 46/360, 320–31; 332–7; 338–9; 346–9; and 350–2.

on the one hand. On the other hand, he had another intention in doing this. In saying that, 'It is obvious that only British regulations can be enforced in British Courts',[150] Parkes was attempting to replace the Japanese regulations with the British equivalent, under which he could exercise jurisdiction over British subjects. He firmly retained the view on extraterritoriality that any Japanese regulations could only be enforced against British nationals in Japan by being made British regulations under the China and Japan Order in Council of 1865.

It is certain that Parkes showed acute discernment in judging the conditions inside the Japanese government. Ueno caused disagreement with the Japanese foreign minister, Terashima, at that time. Not to blight Salisbury's and Pauncefote's honour, Ueno suggested to Terashima that the Japanese government should give up lodging the appeal to the Privy Council. Terashima in contrast stuck to his opinion that the government, to the end, should move for an order of the Privy Council declaring Wilkinson's judgements null and void. Due to this conflict between the two men, Ueno was ultimately dismissed from his post as minister in May 1879, and Tomita Tetsunosuke was appointed in his place as acting minister.[151]

Parkes' attempt, however, ended in failure after all. First, Parkes applied to Salisbury for information and instructions on whether the Japanese government could issue its own regulations with respect to the importation of medicinal opium by foreigners and whether the government could enforce against foreigners the provisions which appeared to Parkes to encroach upon exterritorial jurisdiction. On receiving these inquiries through Salisbury, the law officers of the Foreign Office replied that it was true that these municipal regulations afforded no relief to foreigners, as they could not avail themselves of the provisions without sacrificing their immunity from interference by the local authorities secured to them by Treaty and that the Japanese government therefore should at least issue special regulations produced strictly in harmony with their treaty rights.[152] The law officers by no means mentioned here that it was necessary to make the Japanese regulations into British regulations in order to enforce them against British subjects. However, they

---

150 Parkes to Salisbury, 15 March 1879, FO 46/360, 220.

151 'Ahen Mitsuyu Ikken Jokoku no Gi Sai Sirei arumade Sasihikae Kata Kunrei no Ken (On an Order for the Suspension of Taking the Procedures for an Appeal on Opium–Smuggling Case until the Order for the Resumption of Them', 30 May 1879, *Dai Nihon Gaiko Bunsho*, volume 12, 417.

152 The Law Officers of the Foreign Office to the Foreign Office, 26 May 1879, FO 46/361, 55–60.

permitted the Japanese regulations to be applied to British subjects as far as the provision of them did not infringe on the treaty rights given to British subjects.

Second, Pauncefote told Tomita in July that Parkes was also planning to force British subjects to obey the British regulations that he adapted from the original regulations which the Japanese government made, and that the British government, however, would by no means permit him to enforce such regulations. Notably, Pauncefote simultaneously told him that Hamilton Fish, former US secretary of state; John Bingham, the US minister to Japan; Pauncefote had reached a consensus of opinion that Parkes was wrong in assuming that the Japanese government could not enact regulations applicable to other nationals of its own free will.[153] The United States had decided to accept that the East Asian countries China and Japan could move towards the establishment of a national system of jurisprudence that could be applied to foreign people. Pauncefote agreed with this idea. By obtaining support from the United States, which was jointly struggling with the British to improve the extraterritoriality court regime in China, Pauncefote was completing a net encircling Parkes, to isolate him from a role in British diplomacy with Japan.

Third, Terashima quit the post of foreign minister on 10 September 1879, and Inoue Kaoru, who, as well as Ueno, was amongst the influential statesmen who welcomed the importation of capital from England for railway construction, soon succeeded to the position. Inoue did not attempt to lodge an appeal because he hoped to advance negotiations with the Western countries about revising the Treaties of 1858, and therefore he did not wish to engage in unnecessary conflicts with Salisbury, his counterpart from the most powerful country, Britain.

Parkes ultimately left Japan for Britain on 11 October 1879, due to his and his wife's health condition.[154] Scholars have often cited Parkes' memorandum submitted on 25 May 1881, in which he maintained that any Japanese regulations could only be enforced against British nationals in Japan by being made into British regulations under the China and Japan Order in Council of 1865.[155] They considered this Parkes' construction of the extraterritorial provisions in the British treaties as a British

---

153 'Ahen Mitsuyu Ikken ni tsuite Ei Gaimu Taifu to Danwa no Shidai Joshin no Ken (Report about the Details of the Consultation with Assistant Undersecretary at the British Foreign Office about the Opium Smuggling Case)', 19 July 1879, *Dai Nihon Gaiko Bunsho*, volume 12, 423.

154 John Wells, 'Parkes, Sir Harry Smith: 1828–1885' (*Oxford Dictionary of National Biography*, 2004).

155 'Memorandum by Sir H. Parkes on the Draft Opium Regulations Proposed by the Japanese Government', 25 May 1881, FO 46/362, 231.

construction.[156] This memorandum, however, was submitted more than a year after he had left Japan; by that time, he had lost his power within the British diplomatic establishment in relation to Japan. Parkes returned once to Yokohama in January 1882, but he left Japan again for China in August 1883. He died in Peking in 1885.[157]

Wilkinson had already left for Shanghai in April 1879 to become acting assistant judge of the Supreme Court in that city.[158] Thus, the key persons who had firmly held onto the conventional ideas about British extraterritoriality left Japan one after another.

During these negotiations, the Japanese government proceeded to implement municipal laws and regulations. Members of the government had met adamant opposition from Parkes when enacting provisional regulations (*Yakuyo Toruko Ahen Yunyu Kari Kisoku*) in May 1873. Yet, thereafter, the government, specifically the Home Department, which had been formed in November of that same year, improved the central and local administration system for domestic affairs. Control over pharmaceutical affairs was developed hand in hand with this advancement.

As discussed in the first chapter, the Meiji government had temporarily lost its authority over measures to exert trade control over medical chemicals in the government's early days, due to the dissolution of the guilds in the larger cities as a result of the policy of free trade. Contrariwise, as soon as he ensured effective hegemony over the administration of medical and pharmaceutical affairs in about 1874, Nagayo Sensai, director of the Central Sanitary Bureau at the Home Department, began to strengthen both the domestic production of medical chemicals and the internal distribution system of them by obtaining cooperation from the traditional and influential wholesale pharmacists.[159] Now Nagayo and other members of the government launched into establishing municipal laws and regulations concerning the opium trade that would be applicable to foreign residents as well.

Already before Parkes returned home, two regulations had been enacted: *Yakuyo Ahen Baibai Narabini Seizo Kisoku* (Regulations for the Deal and Production of Medicinal Opium) and *Ahen Uriwatashi Kisoku* (Regulations for the Sale of Opium). *Yakuyo Ahen Baibai Narabini Seizo Kisoku*, which was applied to both native and

---

156 Chang, *The Justice of the Western Consular Courts in Nineteenth Century Japan*, 43 (note 6).
157 Wells, 'Parkes, Sir Harry Smith' (note 154).
158 Roberts, 'Sir Hiram Shaw Wilkinson', 172 (note 54).
159 See Ozaki, 'Sensai Nagayo: Pioneer of Hygienic Modernity or Heir to Legacies from the Premodern Era?' (note 2).

foreign people, was proclaimed on 9 August 1878, by the Daijodaijin (old name for the prime minister), and then enforced on 23 October; *Ahen Uriwatashi Kisoku* was enacted on 14 October by the Central Sanitation Bureau at the Home Department and applied mainly to foreign people.[160]

Yakuyo Ahen Baibai Narabini Seizo Kisoku was initially enforced only against the native people at the time of its enactment and then applied to foreigners after slight revisions and an English translation of it were carried out.[161] On 24 October 1878, the Japanese government publicly notified foreigners of these new regulations. The original Regulations enforced against the Japanese had clarified the definition of the word opium by stipulating that the sale and production of opium should be restricted to medicinal opium (clause 1 of the original Regulations). Clause 2 of the same stipulated a state monopoly. Namely, according to the clause, the Japanese Home Department should initially purchase all medicinal opium used in Japan, regardless of whether it had been produced domestically or imported. And then, through the *Shiyakujo* (National Laboratories for the Testing of Medical and Pharmaceutical Products), the Department should supply the opium to licensed druggists, who could retail it. The Shiyakujos were located in Tokyo, Osaka, Yokohama and Nagasaki in those days. The regulations entitled the *Chihocho* (this was the same as the *Kencho*, prefectural offices) to supervise licensed druggists like the provisional regulations of 1873 had stipulated (clauses 4, 5 and 7). Clause 9 stipulated that neither natives nor foreign residents could obtain a supply of medicinal opium without a doctor's prescription. The latter half of the Regulations provided for the supervision of opium production. The provisions concerning opium production, however, were neither applied to foreigners nor were foreign delegations even informed about them. This meant that foreigners were given no chance to engage in the domestic production of medicinal opium. An offender against the regulations would have his opium confiscated and be fined between 150 and 500 Japanese yen (clause 16).

---

160 *Dai Nihon Gaiko Bunsyo*, vol. 11, 511–4.

161 On the original regulations, see '*Yakuyo Ahen Baibai narabini Seizo Kisoku Ukagai* (Inquiry about the Regulations of the Sale and Production of Medicinal Opium)', *Kobunroku*, the eleventh year of Meiji (1878), vol. 49, August 1878, the Home Office. The English translation of the first half of the Regulations was filed into the document, '*Ahen Uriwatashi Kisoku Gaikokujinn e Hokoku Todoke Nijo* (Two Articles about Notifying Foreigners about the Regulations for the Sale of Opium)', *Kobunroku*, the eleventh year of Meiji (1878), vol. 58, November 1878, the Home Office. Also see 'Regulations for the Sale of Opium', 24 October 1878 (*The Japan Weekly Mail*, 26 October 1878); and 'Translation: Regulations for the Sale of Opium', 20 March 1879, FO 46/360, 422.

Ahen Uriwatashi Kisoku was enacted as the operational regulations of *Yakuyo Ahen Baibai Narabini Seizo Kisoku*. Notably, it stipulated that apothecaries should keep prescriptions of physicians and statements showing such details as the quantity of opium they sold or used in preparing and compounding medicines out of the total amount they received, and that those documents should be examined by officials of the Japanese government, whenever required（clause 6）.[162]

Both regulations expressed the Japanese government's intention of establishing a government monopoly of medicinal opium, and the government enacted them in a determined manner, although it was obviously expected that they would face opposition from the treaty powers. Parkes, as already mentioned, hurried to draw up a draft of the British equivalent of the regulations to prevent them from being enforced against British subjects just as they were. A comparison of the Japanese regulations with Parkes' draft is helpful for us in determining the nature of the Japanese regulations.

First, the Japanese government notified foreigners about the English edition of the first half of *Yakuyo Ahen Baibai Narabini Seizo Kisoku*, which was referred to as Regulations for the Sale of Opium. The preamble of the Regulations, which had been the first clause in the original, read, 'Permission to Foreigners for obtaining Opium for Medicinal Purposes only, will hereafter be granted by the Japanese Government in accordance with the following Regulations'.[163] In contrast, Parkes' fifth draft also had a preamble, which read, 'Whereas the importation of Opium is prohibited by the Treaty, and it is intended to maintain this prohibition, and whereas the use of opium as a medicine is indispensable, the following Regulations for the Sale of Opium（for the medical use）are established.'[164] He seems to have insisted that the phrase 'opium as a medicine being indispensable' be inserted into the draft. He furthermore ordered his associates to omit the last phrase of the above preamble, 'the following Regulations for the Sale of Opium（for the medical use）are established', and to substitute the following sentence for it:

> Its importation for medical use has hitherto been allowed. It being necessary

---

[162] *Dai Nihon Gaiko Bunsyo*, vol. 11, 513, and 'Regulations for the Sale of Opium', 24 October, 1878, FO 46/360, 417–21.

[163] 'Regulations for the Sale of Opium', 24 October 1878（*The Japan Weekly Mail*, 26 October 1878）（note 161）.

[164] 'Draft: The Regulations for the Sale of Medical Opium', 15 March 1879, FO 46/360, 346.

> however to regulate the manner in which opium shall henceforth be sold by foreigners for medical use the following regulations are established.[165]

He still stuck to his idea that the importation of medicinal opium had been allowed by the Treaty, and attempted to stipulate this in the British equivalent of the Regulations. Parkes additionally instructed his associates to omit the word 'always' from the following second clause of the draft and to add another phrase, 'through the Consul', before the phrase 'to furnish the said Local Authorities' in the same clause:

> The Japanese Local Authorities will always request every Consul within whose Consular District his countrymen are carrying on business as druggists or chemists to order the said druggists and chemists to furnish the said Local Authorities at the end of every year with the estimate of such quantity of opium as is required for foreign use in the succeeding year.[166]

The most noteworthy point was that Parkes' draft provided for no punishment. The Regulations that Japan had notified foreigners of determined the manner of punishment in clause 7, which called for any apothecary who offended against the provisions of the Regulations to be denied any further supply of medicinal opium. In contrast, Parkes rejected inserting such a provision into his draft. He explained the reason for this to Salisbury: 'the difference of opinion between His excellency and myself was not as to whether penalties should be imposed or not, but as to who should impose them, he having always contended that they should be imposed by the Japanese Government, while I considered that in the case of British subjects I should reserve this power to the British Authorities'.[167] This statement revealed that Parkes was struggling to maintain the old–fashioned extraterritoriality system that he had hitherto controlled.

However, as previously mentioned, he failed to do so and eventually returned to his home country. Despite the provisions that Parkes attempted to insert into them, the Regulations survived as the Japanese had intended them. The penal provision was retained, and the provisions were rejected that entitled the consular officers to

---

165 'Draft: The Regulations for the Sale of Medical Opium', 15 March 1879, FO 46/360, 350.
166 *Ibid*., 350–1.
167 Parkes to Salisbury, 20 March 1879, FO 46/360, 390.

intervene in the supervision of opium sales. Needless to say, all legal problems concerning opium control were not entirely resolved by the enactment of the Regulations. The Regulations required several revisions before the treaty powers agreed to them. It was not until the enactment of the Opium Act in 1897 that the establishment of opium control finally came into view. Nevertheless, the principles of government monopoly and the application of municipal laws and regulations to foreigners were subsumed by the act.

The Japanese government not only strengthened its legal system but also simultaneously took practical measures for intervening in commercial transactions by obtaining cooperation from native merchants. Regarding domestic control of them, as already mentioned, the Central Sanitary Bureau at the Home Department began to bolster both the domestic production of medical chemicals and the internal distribution system of them by requiring native wholesale pharmacists to establish commercial associations. For opium importation from foreign countries, the government established measures to prevent non–licensed merchants from bringing medicinal opium into the country. A 15 June 1881 article published in *The Chemist and Druggist* magazine contained remarkable information about these measures. It stated that:

> A leading feature in the present policy of the [Japanese] Government seems to be the initiation of what the Japanese are pleased to call 'direct trade', and, with this end in view, a number of native companies or associations have been started under the wings of Government patronage, and no doubt, if the truth were known, by means of Government money also. This 'direct trade' means that the Japanese wish to do both the export and import business of the country without the intervention of foreigners; in fact, it is a step backward, and really means the revival of the old anti–foreign policy of former years.[168]

This passage did not mention opium but rather the general conditions of the chemicals trade. Yet the same conditions applied to the opium trade as well. Indeed, the Japanese government had spent approximately 18,000 Japanese yen on the purchase of imported medicinal opium since 1877.[169] The government, as seen in the

---

[168] 'Foreign and Colonial', 15 June 1881, *The Chemist and Druggist*, FO 46/362, 152.

above passage, advanced money to licensed native wholesalers and required them to purchase medicinal opium from foreign countries at the current price but free of duties.[170] The wholesalers could thus conduct their business under government patronage, and *Shiyakujos* or *Chihochos* supplied the domestic market with the purchased opium at a low price without earning profit margins.[171] The policy of monopolization enabled the government to exclude non–licensed wholesalers such as Hartley from the opium trade. The Japanese government, which succeeded in obtaining support from influential members of the British Foreign Office, established the state monopolization of medicinal opium in this way.

Conclusions

The present discussion has hitherto elucidated the process through which the Japanese government arrived at the establishment of the national system of jurisprudence over opium control and of the state monopoly of medicinal opium. The point to be discussed in the last section is an early sign of the Japanese invasion of neighbouring countries. Whilst making efforts to promote the domestic production of opium, Okubo Toshimichi, the then–minister of home affairs, submitted a proposal to the Cabinet on 22 February 1878 and stated that inferior–quality opium containing less than 6 per cent morphine should be sold to China.[172] The Regulations of the Sale and Production of Medicinal Opium provided that the government purchase of domestically produced opium should be restricted to opium of superior quality that contained from 6 to 11 per cent morphine.[173] Yet, according to Okubo, when any farmer cultivated opium poppy for the first time, the plant could scarcely produce

---

169 'Yakuyo Ahen Kaiire Narabini Shikin Kashiwatashi no Gi Ukagai (Inquiry about the Purchase of Medicinal Opium and the Provisions of Funding Sources for It)', *Kobunroku*, the tenth year of Meiji (1877), vol. 16, from October to December of 1877, the Foreign Office.

170 The fund to purchase imported opium was calculated at 18,000 yen, by multiplying 900 pounds, the quantity needed of the imported opium, by 20 yen, the current price per pound ('Yakuyo Ahen Kaiire Narabini Shikin Kashiwatashi no Gi Ukagai', note 169). The import of such opium was exempted from taxation. See 'Yakuyo Ahen Muzei Yunyu Ukagai (Inquiry about the Duty–Free Import of Medicinal Opium)', *Kobunroku*, the eleventh year of Meiji (1878), vol. 85, September 1878, the Ministry of Finance.

171 'Yakuyo Ahen Kaiire Narabini Shikin Kashiwatashi no Gi Ukagai' (note 169).

172 'Ahen Baibai Tokkyo no Gi Ukagai (Inquiry about Granting the License of the Sale of Opium)', *Kobunroku*, the eleventh year of Meiji (1878), vol. 40, May 1878, the Home Office.

173 See note 161. In the English translation of the Regulations, the opium that the government should purchase was more heavily restricted to that containing from 8 to 12 per cent morphine. See 'Ahen Uriwatashi Kisoku Gaikokujin e Hokoku Todoke Nijo.

opium of high quality. Only by repeated cultivation could the farmer improve the quality year by year. Nevertheless, if the government rejected the purchase of opium of inferior quality and closed off any avenue for farmers to sell such opium, any farmer would necessarily have to give up the production of opium. Okubo thus proposed that the government should make an exception to the Regulations and choose some authorized wholesalers; furthermore, it should permit them to sell opium of inferior quality to China or other countries, to compensate farmers for damage to their crops caused due to the restrictions in the Regulations.[174] He was amongst the key persons who assumed the heavy responsibility of establishing the municipal laws and regulations over opium control by cooperating with members of Foreign Office, such as Ueno Kagenori, and those of the Central Sanitation Bureau at the Home Office, such as Nagayo Sensai. Such an influential statesman as Okubo attempted to lay the blame for damage to native farmers upon neighbouring countries. After Okubo was assassinated in May 1878, another distinguished statesman, Ito Hirobumi, who succeeded to Okubo's post as head of the Home Office, submitted the same proposal as his predecessor on 26 December 1879.[175] Both Okubo's and Ito's proposals were rejected by the Cabinet. Opium of inferior quality could easily be converted to recreational opium, and taking that possibility into consideration, the Cabinet rightly decided that it was absolutely wrong to export the harmful substance to China. The Cabinet went on and said that Chinese people already hated opium, and that, therefore, China would surely lose confidence in Japan if Japan should officially permit the export of such opium to China.[176]

However, farmers soon came to be compensated for their losses caused due to the restrictions on the production of opium of inferior quality. Otozo Nitancho (1875–1951) was notorious as an agricultural engineer who received the nickname Opium King in the twentieth century, because he produced a huge amount of opium in the Japanese colonies, Korea and Manchuria. He also knew the history of opium production in Japan well. In his recollections in 1915, he said that

Taiwan was annexed to Japan as the result of the Sino–Japanese war between

---

174 '*Ahen Baibai Tokkyo no Gi Ukagai*' (note 172).
175 'Morphine 6–bu Ika Ganyu no Ahen Baibai Kata no Ken (Inquiry about the Manner of the Sale and Purchase of Opium Containing less than 6 Per Cent of Morphine)', *Kobunroku*, the thirteenth year of Meiji (1880), vol. 220, March 1880, the Home Office.
176 'Ahen Baibai Tokkyo no Gi Ukagai' (note 172).

> 1894 and 1895. Three million Taiwanese people consumed smoking opium, the quantity of which rose to fifty thousand *kanme* [about 187,500 kilograms] per year. All opium the Taiwanese people consumed was secured from foreign countries. Taking this fact in consideration, I submitted a proposal to the Prime Minister, the Minister of Home Affairs, … The Office of the Governor General of Taiwan, and the governor of Osaka prefecture, that, after that war, the government should promote the domestic production of medicinal opium, and that the Office of the Governor General of Taiwan should purchase that opium. … The Office of the Governor General of Taiwan agreed well with my propositions. … At last, the Monopoly Bureau at the Office leased … twenty–five *chobu* [about 0.248 square kilometres] of opium fields in total from farmers, and cultivated opium by way of trial.[177]

The Opium Act of 1897 still restricted the government purchase of opium to that of superior quality. Yet, farmers were informed that the lease of their agricultural lands to the overseas agency in the new territory far from the mainland could become a loophole in the law through which they could receive compensation for the damages they suffered.

Japan began to rule Taiwan from 1895, after the end of the first Sino–Japanese war. British anti–opium activists recognized Japanese rule of Taiwan at that time. In 1896, the activists sent a delegation to Japan. Prior to the departure of this delegation, some influential members among the activists met the Japanese minister to Britain at that time, Kato Takaakira and exchanged opinions on opium control with each other in December 1895.[178] According to Kato's report, one of the delegates, James Maxwell, admired the fact that Japan rather than China had come to control Taiwan. Another delegate, Joshua Alexaner, especially advised Kato against immediately or entirely prohibiting opium smoking in Taiwan due to the prevalence of the custom there. Instead, he suggested that the Japanese government should allow registered smokers to smoke opium until the last of the population that smoked opium

---

177 Otozo Nitancho, *Keshi Saibai oyobi Ahen Seizoho* (*The Methods of Poppy Cultivation and Opium Production*) (Osaka: Dosaigo Shobo, 1915), 7–8.

178 'Eikoku Ahen Haiseki Sho Kyokai Daihyosha ni Menkai no Ken (About Meeting the Delegates of Various British Anti–Opium Activist Groups)', 28 February 1896, *Taiwan Sotokufu Kobun Ruiju* (*The Classified Collection of the Archives of the Office of the Governor–General of Taiwan*), vol. 19.

recreationally died.[179]

Japanese imperialists adopted this idea, justifying such limited opium use as a medical treatment for opium addiction. Thus, opium came to be supplied openly as medicinal opium, although the Taiwanese actually smoked it recreationally. They referred to this measure as a phase-out policy.[180]

The Office of the Governor General of Taiwan employed a government monopoly to control the opium trade, and the revenue from the sale of opium soon improved the finances of the Office. This phase-out policy enabled farmers on the mainland to obtain compensation for the damage to their livelihood due to the restrictions of the Opium Act.

Before ending the present discussion, I must mention the conclusion of the Hartley cases. It is said that when Hartley asked the customs authority to allow him to re-export his confiscated opium about ten years later, in 1889, customs officers were puzzled by his request. The appeal against Wilkinson's judgements having been shelved, Hartley's cases were completely consigned to oblivion during the ten-year period before Hartley made his request in 1889.[181]

---

179 *Ibid*.

180 Mingxiu Liu, *Taiwan Tochi to Ahen Mondai*, 50-60 (note 4).

181 'Eikoku Sho Hartley Ahen Tsumi Kaeshi Shutsugan no Gi nitsuki Ukagai (Inquiry about the Application for the Re-Export of Opium by the British Merchant Hartley)', 6 August 1889, *Dai Nihon Gaiko Bunsho*, volume 13, 589.

Appendix

This appendix discusses the British extraterritoriality court regime in China and Japan. Specifically, it focuses on a controversy that arose over the revision of the China and Japan Order in Council of 1865 and the regulations for mixed jurisdiction. It arose in the latter half of the 1870s at the same time as diplomatic relations were strained between Japan and Britain over the Hartley cases. The Hartley cases were tried according to the Order, and all the key persons on the British side, such as Harry Parkes, Hiram Shaw Wilkinson and Julian Pauncefote, were involved in the dispute. Hence, through an examination of the outcome of this situation, it is possible to perceive more accurately the reasons why the Japanese government chose a diplomatic solution and did not seek to appeal Wilkinson's judgements through the British Privy council, or why the Japanese government established its own state jurisdiction over opium control in that period.

The China and Japan Order in Council

Although Britain defeated the Qing dynasty in the First Opium War, a long period of trial and error was needed for the British government to establish its extraterritoriality in China and Japan thereafter. The China and Japan Order in Council of 1865 seems to have marked a significant milestone in the sense that it formed a framework for extraterritoriality in those areas; nevertheless, there were still some problems to be resolved. In conformity with the Order, the Supreme Court was set up in Shanghai, and provincial courts were established in other districts. The judicial network, composed of both types of courts, assumed jurisdiction over China and Japan. Yet, this Order had difficulty settling diverse and complex cases. Specifically, the provisions of this Order for the provincial courts seemed poor. For one, it was stipulated that positions on provincial courts should be held by consuls general, consuls or vice consuls, yet those consular officers did not necessarily have a legal education.[1] The inferior courts were not fully entitled to hear and rule on civil

[1] Hornby deplored the present situation of consular officers, and said, '[Her Majesty's Consular Officers] have no legal education, and … are besides very young and inexperienced, the hearing of cases occupies a great deal of time, and the result is often most unsatisfactory'. Hornby to Clarendon, 23 October 1869, FO 881/1749.

cases. Jury trials in civil cases, which would have been held in England, were not carried out in those courts. Only when cases related to money, goods or other property of a greater amount or value than 1,500 dollars, did the courts heard them with assessors, not with a jury (clause 63). Thus, voices that urged the government to revise the Order were raised soon after it came into effect.

The judge of the Supreme Court at Shanghai, Edmund Hornby, began to improve the court system in those areas, especially in Japan, in cooperation with the British minister to Japan, Harry Parkes. Hornby seems to have formed a closer acquaintance with Parkes since 1865, when the former visited Yokohama for the first time after being installed as the chief judge.[2] After the talks with Parkes at Yokohama, Hornby reported on the importance improving the British judicial system, especially in Japan, to the then–foreign minister, John Russell, saying, 'I found the amount greater and the nature of the business at Yokohama much more important than I expected, and as the trade with Japan increases it will become a matter of great consideration whether it will not be necessary to appoint an Assistant Judge of the Supreme Court to reside at Yokohama, and take charge under the superintendence of the Supreme Court at Shanghai, of the different consulates in Japan.'[3] According to Christopher Roberts, Hornby and Parkes' proposals were partially implemented thereafter. Nicholas John Hannen was appointed acting assistant judge of the Japan branch of the Supreme Court in 1870 and the Yokohama Court, over which he presided, was set up in the following year, as distinct from the Consular Court at Kanagawa.[4]

The point to be noted here is their proposal about relationships involving authority or power between the minister and the judge of the Yokohama Court. Hornby and Parkes did not necessarily think that the separation of powers between them should be maintained. Hornby expressed his idea about the role of the judge: 'I propose also that the Judge at Yokohama should act as Law Officer to the Legation, so that all claims on the part of merchants against the Japanese Authorities or princes should be first sifted by him before they are sent up to the Minister, in this way the latter would be saved a great deal of trouble, and many frivolous and absurd claims would be summarily rejected before being brought to the notice of the Japanese

---

2 Hornby to Russell, 11 September 1865, FO 17/433, 107–10.
3 *Ibid*. See Christopher Roberts, *The British Courts and Extra–Territoriality in Japan, 1859–1899* (Leiden: Koninklijke Brill NV, 2014), 20.
4 Roberts, *The British Courts and Extra–Territoriality in Japan*, 23 (note 3).

Authorities."[5] Parkes likewise emphasized the role of the judge and said, 'A material advantage [of the provision for Japan of a separate branch of the Supreme Court] would also be derived by this Legation, if the Minister had at hand a competent law adviser, to give occasional advice in international questions, and to sift, as Sir Edmund Hornby points out, the claims of British subjects on Japanese, and which have frequently to be adjusted or recovered through the Minister.'[6] Mainly from the perspective of cutting the budget, they hoped that the judge at Yokohama would serve also as a law adviser to the minister. However, the Yokohama Court failed to perform its function properly. Hence, Wilkinson, who was legally qualified, was installed as acting law secretary at the Consular Court at Kanagawa, to compensate for the deficiency of the Yokohama Court and strengthen the British judicial system in Japan.

Second, apart from Hornby and Parkes, alteration of the Order in Council was required to address the demand for better protection of the rights and interests of British residents in China. The amendment of the China and Japan Order in Council had been attempted and ended in failure any number of times, until 1878. In 1875, when Edmund Hornby and Francis Savage Reilly[7] were preparing a draft of the revised Order, the Standing Counsel to the British Legation at Peking, Rennie, whose first name is unknown, submitted a letter, questioning some matters related to the new Order. Notably, he treated of the subject of joint stock companies in the Order as follows:

> II. Joint Stock Companies
>
> 11. Mr. Rennie describes the difficulties of the existing state of the law under this head, and suggests in effect that either (1) the provisions of the Acts in force in England should be made available for the protection of British shareholders, or (2) some special provisions should be made for that purpose by Order in Council.[8]

---

5 Hornby to Clarendon, 23 October 1869, FO 881/1749.

6 Parkes to Clarenden, 5 November 1869, FO 881/1750. See Roberts, *The British Courts and Extra–Territoriality in Japan*, 22 (note 3).

7 According to Christopher Roberts, Francis Savage Reilly was an English barrister who was frequently consulted by the Foreign Office in relation to the drafting of the Order in Council. See Roberts, *The British Courts and Extra–Territoriality in Japan*, the footnote no. 84 on page 16 (note 3).

8 Francis Savage Reilly, 'China and Japan Order in Council: Memorandum on Mr. Rennie's Letter of 11 June 1875', 16 August 1875, FO 17/774, 410–5.

Investment in China was increasing and simultaneously becoming diverse and complex. Out of concern over such a situation, Rennie desired to ensure the protection of British shareholders in joint stock companies. The revision of the Order in Council was demanded by people who were interested in the enhancement of British business chances in China. Reilly replied to Rennie's question in this way: 'The question raised by Mr. Rennie will, doubtless, be settled in connexion with that Draft Order.'[9] This statement showed that some influential members of the British home government had developed the same interest, as demonstrated by the overseas agency at Peking.

The conclusion of the Chefoo Agreement on 13 September 1876 attracted the interest of British business investors in China more intensely, and they urged the government to revise the Order all the more strongly to meet their demand. In this convention, Senior Grand Secretary of China Li Hong–Zhang and the British minister plenipotentiary at Peking, Thomas Wade, agreed that China had conceded the opening to foreign trade of four ports, Yichang in Hubei province, Wuhu in Anhui, Wenzhou in Zhejiang and Beihai in Guangdong (clause 1 in section III). The opening of such inland port cities as Yichang and Wuhu along the Chang Jiang on the one hand created a new business opportunity, but on the other hand it required a further Order in Council. Some provisions thus became necessary for the administration of justice and the enforcement of treaty regulations amongst British subjects at those ports, through the appointment of officers who would be termed 'acting consuls' and upon whom it was proposed to confer the powers vested in duly commissioned consuls, or vice consuls or officers acting temporarily for them, by clause 25 of the China and Japan Order in Council of 1865. Reilly hence was instructed to submit a draft of the Order to Lord Derby.[10] It seems that he discussed with some jurists the points to be provided in the new Order. Hornby, as a matter of course, was amongst them. Hornby seems to have drawn up a draft of the Order by June 1876, before the conclusion of the Chefoo Convention.[11] Yet he did not play an important role in preparing the draft because he had already resigned his post as the chief judge of the Supreme Court at Shanghai in 1876. Reilly cooperated more closely with Julian Pauncefote in that enterprise than with Hornby. As to Pauncefote's participation in

---

9 *Ibid.*
10 Treasury to Foreign Office, 9 February 1877, FO 17/774, 498–500.

the matter, some doubts were raised from within the government regarding his qualifications. The secretary of the treasury inquired of the Foreign Office whether Lord Derby had instructed Pauncefote, who had just been appointed assistant under secretary of state of the Foreign Office, to prepare a draft of the China and Japan Order in Council.[12] The Foreign Office, expressing no such doubts, strongly recommended Pauncefote. Specifically, Lord Tenterden, permanent undersecretary of state for the Foreign Office, seems to have desired that Reilly communicate with Pauncefote in preparing the draft.[13] Influential members of the Foreign Office rated highly Pauncefote's professional skills and labour in dealing with numerous legal questions, as seen in their reply as follows to the inquiry from the Treasury: 'Lord Derby is informed that Sir J. P. while Ass. Und. Sec. of State at the Colonial Office prepared a considerable number of measures now in force in several colonies for the reconstruction of the courts of law & the reform of judicial administration.'[14]

Pauncefote submitted a memorandum to the Foreign Office in September 1877, in which he discussed the institutional faults that were requiring stringent remedies in the existing British judicial system for China and Japan.[15] Pauncefote referred to two main causes for the rousing of a strong feeling of dissatisfaction and opposition amongst the British community in China and Japan. First, the judicial system for China and Japan had been modelled on that exercising jurisdiction over the Levant and Constantinople, although the British communities in both areas were entirely different in number of citizens and wealth from those in the Far East. The British Supreme Court at Constantinople and consular courts in Turkey had been set up in 1857 based on Hornby's plan. Based on recognition of his role in this enterprise in Turkey, Hornby was appointed chief judge of the Supreme Court at Shanghai in 1865, became engaged in establishing the same system in China and Japan.

---

11 The original of Hornby's draft has not been found so far, and hence I cannot accurately know the contents of it. However, Wilkinson submitted a memorandum, with commendation by Harry Parkes, in which he explained in detail Hornby's draft and expressed his opinion about it. According to Wilkinson's memorandum, Hornby's draft contained a great number of sections that rose to 599 (Hiram Shaw Wilkinson, 'Memorandum: China and Japan Order in Council 1876', 8 August 1876, *The Wilkinson Papers*, D1292/M/5A). It seems to have been drawn up by June 1876, because Wilkinson was privately requested to submit the memorandum on Hornby's draft, by Robert A. Mowat, in the same month (see note 32). On Hornby's resignation, see Roberts, *The British Courts and Extra–Territoriality in Japan*, 29 (note 3).

12 Foreign Office to Secretary of Treasury, 1 March 1877, FO 17/774, 524–30.

13 Reilly to Philip Currie, 25 February 1875, FO 17/774, 522–3.

14 Foreign Office to Secretary of Treasury, 1 March 1877, FO 17/774, 524–30.

15 'Memorandum by Sir J. Pauncefote Respecting Her Britannic Majesty's Supreme Court for China and Japan', September 1877, FO 17/944, 198–200.

Pauncefote criticized the system that Hornby had established as not functioning well in China and Japan. According to him, 'The business of the latter [Levant] is insignificant in point of amount, importance, and difficulty, as compared with that of the former [China and Japan]. At Constantinople, the British community over which the Consular Court exercises jurisdiction is inconsiderable as regards number and wealth. There is almost immediate communication with London by post or telegraph. The proceedings of the Court take place under the eye of Her Majesty's Ambassador, and in urgent cases advice or redress can at once be obtained by application to the Foreign Office or, if necessary, to the Privy Council.'[16]

The second and more important point Pauncefote argued was that dissatisfaction had been growing amongst the British community in China and Japan about the present extraterritorial court regime, which enabled the British ministers and consular officers in those countries easily to interfere in both civil and criminal trials. 'The British community in China and Japan', Pauncefote said, 'look to the Chief Judge of Her Britannic Majesty's Supreme Court for protection against any illegal or arbitrary action on the part of Her Majesty's Diplomatic and Consular Authorities.' Therefore, he went on, 'I am of opinion that it would be very impolitic and inexpedient to change the character of the Supreme Court by the appointment of a Chief Judge who should be at the same time a Consul, and thus under the immediate authority and control of Her Majesty's Minister at Peking.'[17] Here the difference in opinion about extraterritoriality can be found clearly, between Pauncefote and Hornby or Parkes, who emphasized the role of the ministers. Pauncefote briefly summarized his proposals as follows:

> I venture to observe that no one well acquainted with China can fail to recognize the importance of selecting for the office of Judge of that Court a gentleman of the highest professional standing that can be procured for the salary, and who should be perfectly independent locally of official control. I do not hesitate to say that such a Judge will find his time fully occupied by his judicial functions without being trammelled with Consular duties, especially if he visits the Treaty ports and exercises that personal supervision over the provincial Courts which

[16] *Ibid.*
[17] *Ibid.*

he ought to do.[18]

Mixed Jurisdiction

For Reilly and Pauncefote, who insisted on the importance of revising the Order in Council and who enjoyed the support of influential members in both the Foreign Office and the overseas agency at Peking, the most interesting, but difficult, question concerned revising the regulations of mixed jurisdiction. That was because the revision became possible only when a consensus about the regulations was built not only between two countries, Britain and China, but also amongst all treaty powers.

Mixed jurisdiction was a kind of jurisdiction that was exercised jointly by the foreign and native public functionaries who were so authorized. Officials of both countries heard and determined matters of difference arising between foreign and native people, in cooperation with each other. In the case of China, such jurisdiction was provided in the Tianjin Treaty of 1858; however, it in fact developed in a quite different form from that which was stipulated in it.

First, in the case of British subjects, they were under the authority of provisions of the China and Japan Order in Council of 1865, prior to those of the Treaty. Hence, in conformity with the Order, those subjects were tried and punished mainly by the consul of their own country, according to the laws of England, even if they had committed a criminal act against Chinese or were sued in a civil action by Chinese. Mixed jurisdiction was not applied to those people. The Hartley cases, which were not brought before a mixed court but were heard and determined by a British judge alone, were quite typical of such control by the Order.

Second, therefore, jurisdiction was exercised over cases against Chinese. The matter to merit the greatest attention related to this point was the exercise of jurisdiction at the Mixed Court at Shanghai, called *Yangjingbang lishi gongxie*.[19] This court, which was established under an agreement between the Chinese government and the committee of the consular body, started holding sessions in May 1864. In those days, the Shanghai International Settlement in which the court was placed was

---

[18] *Ibid.*

[19] On the Mixed Court at Shanghai in the period that this paper discusses, see Anatol M. Kotenev, *Shanghai: Its Mixed Court and Council* (Shanghai: North–China Daily News & Herald, 1925), 45–68; 69–83, and Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth–Century China and Japan* (Oxford University Press, 2012), 63–84.

rapidly developing after clearing up confusion due to the Taiping Rebellion. Parkes, at that time the consul at Shanghai, took the lead in establishing the court, amongst the treaty powers. As pointed out by scholars, clause 16 of the Anglo–Chinese Treaty of Tianjin was applied in the tribunal, whereas clause 17 of the same treaty was neglected.[20] Clause 16 of the treaty regulated extraterritoriality in the exercise of criminal jurisdiction. Nevertheless, this clause, especially its English version, did not stipulate mixed jurisdiction anywhere. It provided that Chinese who might have committed any criminal act towards British subjects should be arrested and punished by the Chinese authorities, according to the laws of China, whereas British who might have committed the same act against Chinese subjects should be tried and punished by the consul, according to the laws of England. Following this stipulation, the last sentence of the clause read, 'Justice shall be equitably and impartially administered on both sides.' This was merely a general statement. In contrast, as pointed out by Pär Kristoffer Cassel, the last sentence in the Chinese version bore an entirely different import, that is, mixed jurisdiction. It read, 'All cases about which the two countries ought to negotiate with each other should be tried jointly and equitably. Justice must be satisfied for the first time by doing so (*liangguo jiaoshe shijian bici jun xu huitong gongping shenduan yi zhao yundang*).'[21] China exercised mixed jurisdiction over its countrymen under and according to this clause in the Chinese version. A similar difference in the wording of the clause was not found in the Anglo–Japanese Treaty of Amity and Commerce of 1858,[22] and hence it was typical of the Anglo–Chinese Treaty.

Clause 17, which determined the measures through which people of one country could lodge a complaint against those of the other, was closely related to civil actions.[23] This clause entitled the British consul to listen to and arrange for the complaints to be heard from Chinese subjects as well as those from the British. If the consul could not arrange for hearing cases amicably, the clause allowed for the possibility of holding a joint trial based on the British consul's requesting the assistance of the Chinese authorities. Yet, this clause was not applied. According to

---

[20] Kotenev, *Shanghai*, 56; and Cassel, *Grounds of Judgment*, 67 (note 19).
[21] Cassel, *Grounds of Judgment*, 59 (note 19).
[22] Anglo–Japanese Treaty of Amity and Commerce of 1858 provided the same extraterritoriality in the exercise of criminal jurisdiction in clause 5. The last sentence of the clause read, '*Saidan ha Soho ni oite Henpa nakaru beshi* (Justice shall be administered impartially on both sides)'.
[23] The Anglo–Japanese Treaty of Amity and Commerce of 1858 also had almost the same provision, in clause 6.

Cassel, this was because, when the Mixed Court was established, Parkes implicitly sanctioned the traditional Chinese idea that 'law' meant 'criminal law'.[24] Civil cases hence were not brought before the court initially. In October 1864, the jurisdiction of the court was extended to civil cases in which British subjects were plaintiffs; however, justice was administered by the Chinese judge in conformity with Chinese law, not by the British consul. The clause contained nothing with regard to mercantile contracts, trust, property or the law relating to debtor and creditor. The judge called to try a modern civil case had only at his disposal a badly drawn scale of punishments consisting of so many blows with a light or heavy bamboo rod.[25] The Mixed Court that heard the cases, criminal or civil, against Chinese was placed within the Chinese plural legal order.[26]

In April of 1869, the rules for the Mixed Court at Shanghai were enacted for the first time since it was set up.[27] The new rules confirmed the establishment of the Shanghai sub–prefect (deputy of the circuit intendant, *Taotai* 道台). The sub–prefect, who resided at the Settlement, had the authority to decide both civil and criminal cases jointly with a consular assessor. Nevertheless, mixed cases were decided according to Chinese law. The Mixed Court was entitled to claim the rights which belonged to every Chinese court. In this sense, the court was a Chinese court. The rules, however, still granted foreigners the same rights to be tried and punished by their own consuls as before. The point that made foreigners feel greater anxiety was that, although nominally defined as a deputy of the *Taotai*, the sub–prefect in actual fact had such slight authority as not the circuit intendant but a deputed officer enjoyed. Specifically, the sub–prefect was not entitled to exercise jurisdiction over cases brought about outside the Settlement. The district magistrate of Shanghai was the real local authority. Possessing jurisdiction over the Settlement both inside and outside, he was entitled to deal with grave crimes committed by Chinese against foreigners, independently of the foreign assessor, and to make sweeping alterations to the laws of contracts without reference either to the sub–prefect or to the consuls.

Due to this situation, the treaty powers had raised their voices for a revision of mixed jurisdiction in the 1870s. Hornby seems to have become the object of attention

---

[24] Cassel, *Grounds of Judgment*, 67 (note 19).
[25] Kotenev, *Shanghai*, 57 (note 19).
[26] Cassel, *Grounds of Judgment*, 72 (note 19).
[27] This section is based on Kotenev, *Shanghai*, 70–4 (note 19); and Cassel, *Grounds of Judgment*, 71–2 (note 19).

amongst foreign delegates during this time. Drawing up the Draft Order in Council of 1865, the chief judge of the Supreme Court at Shanghai had devotedly defended the principle of British extraterritoriality framed by the Order, that British subjects should not be punished by anyone but the British functionaries who were so authorized, or according to any rules but the laws of England. In his 1866 report, Hornby responded to the suggestion of the then–British minister to China, Rutherford Alcock, saying that the Ottoman legal system was much more developed than its Chinese counterpart, and that European and Chinese notions of justice were essentially incompatible.[28]

Notwithstanding, Hornby began to alter his principle starting in the middle of the 1870s. First, in the Kwangtung Case of 1875, he upheld the judgement of first instance, as the chief judge at the Supreme Court. This was a collision case at sea, which the captain and the owner of a Chinese junk, the *Kui–tsai–fay*, brought against the captain of the British steamship the *Kwangtung*. The court of first instance in this case was held at the British Consulate at Foochow, and, although the reason remains obscure, the consul, Charles A. Sinclair, unprecedentedly opened a mixed court, hearing and deciding the case in conjunction with the local circuit intendant *Taotai*. Sinclair seems to have thought that the mixed court conformed to clause 17 of the Tianjin Treaty, but opinion was divided on whether it was right or wrong that Sinclair did not apply the provisions of the Order in Council to the decision of the case against the British subject, and whether it was right or wrong that he requested the *Taotai* to sit with him as co–judge at the trial. The clause contained ambiguous expressions that allowed two ways of interpreting it. The first was that the Chinese authorities were requested simply to assist the consuls, and, in contrast, the second was that they could together examine with the consuls the merits of the case. Although such an objection was raised against opening the mixed court, Sinclair heard and decided the case in conjunction with *Taotai*. Ultimately, the judgment went for the plaintiff, that he could recover the value of his vessel and cargo. Therefor, the defendant could not at all accept this judgement and moved for an order declaring the judgement null and void. Yet Hornby upheld the judgement in the first instance and dismissed the application from the defendant. He gave an account of the reason why he reached this decision:

---

[28] Cassel, *Grounds of Judgment*, 70（note 19）.

> It is the Treaty which she has made with China that regulates their position, and in cases of differences arising between them and British subjects it is to the Treaty that they and Consuls must look, and by no act of domestic law [including the Order in Council] can Her Majesty alter or modify an act of public law, which a Treaty undoubtedly is as between the parties to it. She has by the Treaty in question agreed with the Sovereign of China that all questions or matters in difference shall be settled by the Consul and the Chinese authorities.[29]

It was Hornby who had established the principle of British extraterritoriality, in which British subjects were tried and punished only by the consuls of their country under and according to the Order in Council of 1865. Nevertheless, this paragraph revealed that he now attempted to renounce the principle that he had created, in person, in exchange for a new one that stipulated that the mixed court, which was composed of two co–judges, the consul and the Chinese authorized officer, should hear and decide cases that were brought against British subjects. As seen in the following recollection of US minister George Frederick Seward, this decision seems not to have satisfied many other British government officials: 'It does not appear, however, that this reading of the Treaty has been sustained by the English Government by legislation or otherwise.'[30] Yet Hornby stuck so firmly to his original interpretation of the Treaty that, in the next year, he added provisions concerning mixed jurisdiction to his new Draft Order in Council, based on it.

Namely, in the Draft Order, Hornby determined the rules concerning civil jurisdiction in clause 5. The clause, on the one hand, lay down as a principle that all British civil jurisdictions exercisable in China and Japan should be employed under and according to the new Order in Council. On the other hand, he added a sentence to the end of the same clause, which read that consular officers should not be precluded from performing any act of a judicial character that was devolved upon them by law or under the provisions of treaties between Britain and China, and between Britain and Japan. Hornby remarked about this clause that, as far as acts performed under

---

[29] 'The Kwangtung Case', 10 February 1875 (*North China Herald and Supreme Court and Consular Gazette*, 11 February 1875, p. 129). This law report is available for public perusal, on the website of Colonial Case Law at Macquarie Law School (http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/china_and_japan/1875_decisions/the_kwangtung_1875/).

[30] Seward, 'Memorandum', 4 October 1879, FO 17/945, 104.

treaties were concerned, the effect of this provision was to affirm and give sanction to judicial proceedings before the consul and Chinese authorities under clause 17 of the Tianjin Treaty and before the consul and Japanese authorities under clause 6 of the Anglo–Japanese Treaty of 1858.[31] He thought that this provision would avoid the apparent conflict that existed between the Treaty stipulations and the Order in Council of 1865, and that it would pave the way for applying the exercise of mixed jurisdiction to civil cases under and according to the new Order in Council.

Hornby's Draft Order caused controversy. First, Wilkinson expressed his opposition to Hornby's new propositions related to mixed jurisdiction. He submitted a memorandum to Lord Derby that examined Hornby's draft in detail. Robert Anderson Mowat, the law secretary at the Supreme Court at Shanghai, requested that Wilkinson draw it up privately, and then Wilkinson submitted it with recommendations by Parkes.[32] These facts seem to prove that three of them shared the same view about mixed jurisdiction. Wilkinson disputed Hornby's propositions for the following reasons. First, he was concerned that the rules in the last sentence of clause 5, if frequently taken advantage of, would cause grave embarrassment. More specifically, consuls would be bound to entertain any complaints against British subjects made by Chinese or by Japanese, and no appeal would be available to any court from the judgement given in conjunction with local authorities.[33] Second, Wilkinson mentioned the Kwangtung Case of 1875 and Hornby's construction of the Tianjin Treaty expressed in his decision on it. He remarked that Hornby 'would beg to point out that, whatever may be the case in China, the interpretation which the judgement gives to the Treaties has long ceased to be acted on in Japan. Claims

---

[31] Clause 52 of Hornby's Draft Order, which complemented clause 5 with rules for the districts of Shanghai and Kanagawa, provided that consular officers should not be precluded from hearing and deciding civil cases by sitting with Chinese or Japanese authorities respectively, independently of the Supreme Court at Shanghai and the Yokohama Court. See 'China and Japan: Sir E. Hornby's Draft Order in Council, Reports by Mr. Reilly after Conference with Sir Julian Pauncefote', no. 1, FO 17/944, 209–10.

[32] A letter from the consul in Japan, Russell Robertson, to Parkes explained the reason why Wilkinson was engaged in drawing up the memorandum: 'Mr. Wilkinson was occupying himself on this very work in response to a request which came privately from Mr. Mowatt [Mowat], the Law Secretary, and Mr. Wilkinson's observations are doubtless intended for or will at least be submitted to the Chief Judge' (Robertson to Parkes, 20 June 1876, FO 17/774, 472–4). Reilly's report also stated that 'Mr. Wilkinson, whose Memorandum has been sent to Lord Derby with commendation by Sir H. Parkes, … ' ('China and Japan: Sir E. Hornby's Draft Order in Council, Reports by Mr. Reilly after Conference with Sir Julian Pauncefote', no. 1, FO 17/944, 210.)

[33] Hiram Shaw Wilkinson, 'Memorandum: China and Japan Order in Council 1876', sections 86–7 (note 11).

against Japanese subjects are always heard in the Japanese Courts, and claims against British subjects in the British Courts, and it is highly desirable that no encouragement should be given for any departure from this practice.'[34]

Parkes also opposed applying the exercise of mixed jurisdiction to Japan. He said, 'it must be confined to China, and cannot be applied to Japan. Neither the Japanese nor the British authorities have ever supposed that this Article created a special Court or Tribunal, but have always considered that complaints against British subjects must be heard in the British Courts, and against Japanese in the Japanese Courts. … If a Consul were to claim to sit with a Japanese Judge in a suit by a British subject against a Japanese, … such a claim would not be admitted by the Japanese Government, nor would they depute one of their officers to sit with Her Majesty's Consul.'[35]

Hornby and Parkes had cooperated with each other in the 1860s and the early 1870s in maintaining the British extraterritorial court regime in China and Japan. Yet, Hornby's change of mind now caused a split in the good relationship between them.

Hornby ultimately resigned his post as chief judge and suddenly returned home to London, in 1876. As already mentioned, he was consulted by Reilly when the latter was instructed to prepare the further Order in Council after the conclusion of the Chefoo Convention. Nevertheless, Pauncefote began to occupy a more important position as consultant to Reilly on that enterprise, and Hornby's Draft Order, which contained a great number of clauses that rose to 599,[36] was utterly ignored after all.[37] Thus Hornby left the stage of British diplomacy with China and Japan.

Then, what proposals did Reilly and Pauncefote offer? Reilly submitted some reports on issues concerning the revision of the Order in Council, in March 1877, after conference with Pauncefote. As for Japan, Reilly and Pauncefote also did not urgently require, in these reports, to bring provisions for mixed jurisdiction, which was stipulated in clause 6 of the Anglo–Japanese treaty of 1858, into habitual operation.[38] This point will be discussed again later.

As regards China, Reilly expressed an utterly different view. He admired that an

---

34 *Ibid*., 88.
35 'China and Japan: Sir E. Hornby's Draft Order in Council, Reports by Mr. Reilly after Conference with Sir Julian Pauncefote', no. 1, FO 17/944, 211.
36 Wilkinson, 'Memorandum: China and Japan Order in Council 1876' (note 11).
37 Roberts, *The British Courts and Extra-Territoriality in Japan*, 29 (note 3).
38 'China and Japan: Sir E. Hornby's Draft Order in Council, Reports by Mr. Reilly after Conference with Sir Julian Pauncefote', no. 1, FO 17/944, 212.

attempt had been made in Hornby's Draft Order to deal with mixed jurisdiction.[39] He remarked, 'It being found by experience that cases arise from time to time in which Chinese complainants desire to avail themselves of the jurisdiction created by Article XVII [of Tianjin Treaty], suitable provision should be made for regulating the exercise of that jurisdiction by Her Majesty's Consul.' 'Due powers', Reilly went on, 'should be conferred on him for enforcing the joint decisions of himself and the Chinese official, when the enforcement thereof against British subjects becomes necessary.'[40] Just a reading of this passage suggests that he seems to have completely agreed with Hornby's view on mixed jurisdiction; however, that was not the case. He in fact had a significantly different view from Hornby's. Specifically, Reilly felt suspicion about Hornby's construction of the Tianjin Treaty, which he included in his decision on the Kwantung case, and, if anything, had some sympathy for Wilkinson's or Parkes' opposition to it. Parkes submitted a memorandum on Hornby's Draft Order and cast doubt on whether clause 17 of the Tianjin Treaty truly intended that the term 'complaint' should mean all civil suits, and civil suits only, and whether it was intended in the same clause that the conjoint action of the British and Chinese authorities should be exercised, whenever possible, in bringing about an amicable adjustment of contention of any kind.[41] Reilly quoted this point in his report, although there were differences in the view on British extraterritoriality, between Parkes and Reilly or Pauncefote. Reilly pointed out the difficulty in the exercise of mixed jurisdiction by citing another collision case that was brought before the mixed court, which was composed of the British consul at Shanghai and the *Taotai* soon after the end of the *Kwantung* case, and that the consul, who had not been provided with the necessary powers, could not enforce his judgement.[42] Reilly, or more correctly, Reilly and Pauncefote, were sceptical about the usefulness of this kind of mixed court in which the consular officer and the native functionary were equally entitled to hear and determine cases because, as seen in this citation, they thought that such courts could not adequately protect the rights and properties of British subjects when the view of the consul differed from that of the native authority.

Thus, Reilly proposed some points which he thought the revised Order in Council

---

39 *Ibid*., 213.
40 *Ibid*.
41 *Ibid*., 212.
42 *Ibid*.

should provide. First, he emphasized that provisions should be made for appeal from the mixed court if there was a chance to revise the Treaty itself. The judgements given by two officers should be open to review. Yet, revision of the Treaty had not been undertaken so far. Then, he argued the second point that, in the case that the Order was revised so that it regulated consular proceedings under clause 17 of the Tianjin Treaty, the provisions concerning mixed jurisdiction should be kept separate from those relating to ordinary consular jurisdiction and the jurisdiction of the Supreme Court, and that they therefore might be made by a separate Order in Council. His proposal also included that some directions of a general kind should be given to consuls so as to prevent the exercise by them of an entirely arbitrary authority under the clause.[43]

As to the validity of Hornby's interpretation of the Tianjin Treaty, the Standing Counsel to the British Legation at Peking, Rennie, likewise raised a question.[44] As a matter of fact, similar doubts about the efficacy of such a kind of mixed court as Hornby advocated were cast not only by Reilly and Pauncefote but also by more individuals engaged in British diplomacy with China, including Rennie and Thomas Wade, and furthermore, by representatives from other Western countries, especially the United States.

Whilst Reilly was preparing the new Draft Order under instructions from Lord Derby, the representatives of 11 treaty powers, such as Wade, US minister George Frederick Seward and German minister Max von Brandt, assembled a committee, intermittently discussing judicial questions in China. The members of the committee shared an understanding of the institutional fault of their respective jurisdiction in China. Institutional fault meant fault mainly related to mixed jurisdiction. They knew that it especially became more serious when the exercise of mixed jurisdiction was applied to civil cases.

The Chefoo Convention between China and Britain already included the following provisions which influenced this question:

> It is further understood that so long as the laws of the two countries differ from each other, there can be but one principle to guide judicial proceedings in mixed

---

[43] *Ibid*., 213.
[44] *Ibid*., 212; and Francis Savage Reilly, 'China and Japan Order in Council: Memorandum on Mr. Rennie's Letter of 11 June 1875', 16 August 1875, FO 17/774, 414–5.

> cases in China, namely, that the case is tried by the official of the defendant's nationality, the official of the plaintiff's nationality merely attending to watch the proceedings in the interests of justice. … The law administered will be the law of the nationality of the officer trying the case. This is the meaning of the words '*hui t'ung*', indicating combined action in judicial proceedings, in Article XVI of the Treaty of Tientsin〔Tianjin〕, and this is the course to be respectively followed by the officers of either nationality.[45]

The delegates of the 11 treaty powers signed a protocol on judicial administration, on 4 November 1879. To the protocol, US minister Seward's memorandum was attached, in which he gave the following statement that raised a similar question:

> It may be said that a foreign officer sitting as co-Judge with a Chinese magistrate cannot exercise in the absence of Treaty stipulations of a more precise nature than those now existing, a greater authority than he would if his voice were consultative only. Each officer has independent functions and responsibilities by reason of his separate position and allegiance, and directs his conduct accordingly. Judgements can be enforced as matters stand, only under the forms of law to which the defendant and the Judge of his nationality are subjects. It may be said, indeed, that in effect no judgement can be given that does not conform to the laws of the defendant's nation, and that Chinese and foreign laws do not always fall within the same lines.[46]

What was argued in both the convention and the Seward's view was to firmly keep the principle that mixed cases, civil and criminal, between Chinese and foreigners must be tried by the officer of, and under the laws of, the defendant's nation. The officer of the plaintiff's nation merely attended to watch the proceedings in the interest of justice, but he should not be granted the same authority to decide cases as the officer of the defendant's nation.

Seward, who seems to have held a position of leadership amongst the representatives of the treaty powers, explained the matter in more detail in the same

---

[45] 'Agreement between the Minister Plenipotentiary of the Government of Great Britain and China', Section II, 13 September 1876, FO 17/944, 196-7.

[46] George Frederick Seward, 'Inclosure 3 in No. 84: Memorandum', 4 October 1879, FO 17/945, 105.

memorandum.[47] Seward remarked that, when the mixed court at Shanghai had been established, he had been amongst the members of the committee of the consular body in that locality and taken the lead in that enterprise, together with Parkes.[48] The view that lay at the root of Seward's discussion was that, 'There is no country, I feel sure, which wishes to perpetuate here unnecessarily the exterritorial system.' However, he also appreciated at the same time that it would be idle to deny that the mixed courts proposal was one which was greatly favoured by foreigners in China. Hence, he proposed measures to improve the mixed courts.[49] The main measures he discussed were threefold. First, civil as well as criminal matters should be triable in the mixed courts. Second, the mixed courts that he mentioned here did not mean the same court as that which had tried the Kwantung case and as that which Hornby had supported. Seward scathingly criticized Hornby's interpretation of the Tianjin Treaty. He even referred to it as 'the great stumbling–block in the interpretation of the English Treaty'.[50] Seward said, 'In point of fact, a Court composed of two Judges belonging and owing allegiance to different nationalities, … in which, whilst each has equal powers, no referee is provided for, is, to say the least, inconvenient. In such a Court there can be no award unless both Judges agree.'[51] However, Seward drew a picture of the ideal mixed court, stating,

> To be more exact, there is much in the Treaties which will justify us in demanding that the Native Courts shall be open to our suitors and that our own officers shall be allowed to sit upon the trial to assist the native magistrate in the investigation of the facts and the law, and in the preparation of a carful record.[52]

The mixed courts that Seward mentioned did not mean only that at Shanghai. Instead, many native courts should also exercise mixed jurisdiction over cases that were brought against Chinese, and be so open that foreigners could bring suits before them without any inconvenience. The duty of foreign consular officers there was to merely assist the native magistrates.

---

47 *Ibid*., 102–9, and, 'Inclosure 2 in No. 84: Report of the Committee on Judicial Question', 31 October 1879, FO 17/945, 99–100.
48 Seward, 'Inclosure 3 in No. 84: Memorandum', FO 17/945, 104.
49 *Ibid*., 106.
50 *Ibid*., 104.
51 *Ibid*., 105.
52 *Ibid*., 106.

Thus, he supported the principle stated in the Chefoo Convention, that 'the case is tried by the official of the defendant's nationality'. Reilly and Pauncefote agreed with this idea.

Third, and the most noteworthy, was the following paragraph in Seward's memorandum:

> We may indeed go further, and endeavour to secure from this Government the adoption of Rules of Procedure upon such trials which will conform more or less to our own practice, and still later the adoption of a Code by which commercial cases shall be decided in the Native Courts. If the Regulations and the Code as proposed agree measurably with the principles familiar to us, a degree of uniformity in practice and in judgements may be expected which will leave little to be desired at the moment, and the encouragement given to China will be greater, as I think, than if we pursue the idea of Mixed Courts.[53]

This passage indicates that the treaty powers should urge the Chinese government to establish municipal laws and regulations in conformity with legal principles familiar to Western countries. According to Seward, the mixed courts after all could exist only during the period of transition, and China should not pursue the idea of such courts as might bar efforts in the direction of the progress, but the country should move towards 'the establishment of a more satisfactory yet purely national system of jurisprudence'.[54] The United States seems to have decided to accept, earlier than other Occidental countries, that the East Asian countries were moving towards the establishment of state jurisdiction that could be exercised over foreign people. Five years before Seward's memorandum, on 7 January 1874, the US secretary of state, Hamilton Fish, had issued the following instruction to John A. Bingham, US minister to Japan:

> The rights of the authorities of Japan to enact and promulgate laws for the government, security, and good order of its own people, cannot, of course, be questioned for a moment, and of the character and sufficiency of these laws, that

---

[53] *Ibid.*
[54] *Ibid.*

> 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.[55]

Fish's instruction also was based on the same idea that Seward's memorandum emphasized. Reilly and Pauncefote agreed with this notion that the United States advocated. When they permitted Chinese complainants to avail themselves of the jurisdiction created by clause 17 of Tianjin Treaty, they had to prepare a similar jurisdiction for cases which British residents in China brought against Chinese at the same time. However, it seemed to them probable that the British community in China might view with disfavour any arrangement for giving greater efficacy to clause 17 of the Tianjin Treaty, and that one objection would be drawn from the absence of security for the due enforcement of joint decisions against Chinese. Then, they proposed the following for resolving these problems:

> To meet such an objection, it might be desirable for Her Majesty's Government to intimate to the Chinese Government that the Order in Council would not be put into operation by Her Majesty's Government unless and until they were satisfied that effectual provision had been correspondingly made by the Chinese Government.[56]

Effectual provisions, as he said, should be made on the Chinese side, to correspond to the British Order in Council, or, in other words, in conformity with the Western concepts of rights or duties of which the Order was constituted.

Since the 1850s, British extraterritoriality had been exercised by being restricted within criminal cases. Within such restrictions, British subjects who committed criminal acts against Chinese had been tried by the consuls of their own country and under the laws of England, whereas Chinese subjects who committed similar acts had been punished by Chinese authorities and according to Chinese laws. However,

---

[55] Fish to Bingham, 7 January 1874 (US Department of State, *Papers Relating to the Foreign Relations of the United States*, 1874, Washington. DC, 1875, 658–9).

[56] 'China and Japan: Sir E. Hornby's Draft Order in Council, Reports by Mr. Reilly after Conference with Sir Julian Pauncefote', no. 1, FO 17/944, 213–4.

when civil actions came to be brought more frequently, hand in hand with the economic advance of Western countries, especially with the increase in capital export from Britain, extraterritoriality could not remain as it had been but was forced to change to address the more complex problems that arose. Even though British people may have brought a suit against Chinese for compensation for breach of contract, the judgement in the suit according to Chinese laws would not make sense to them if the laws related to civil affairs stipulated only punishments consisting of blows with a bamboo rod. Civil actions would become all the more complex if, as Rennie expressed concern, joint stock companies should increase more. Britain, both the government and the community, could not help but urge the Chinese government to quickly renounce their own traditional laws for those in conformity with Western jurisprudence.

Despite the discussion above, all improvements that had been mentioned were not, of course, accomplished by the end of the Hartley cases. British gentlemanly capitalism was on its way to developing. The regulations of the Mixed Court at Shanghai remained in force until the rendition of the court to Chinese jurisdiction in 1927. Furthermore, the revision of the China and Japan Order in Council ended up a partial one that, in 1878, added only provisions relating to the Japanese courts to it, because Salisbury instructed Pauncefote and Reilly, in May 1878, to postpone a complete revision of the Order in Council and to issue a short Order in Council of temporary character, which should provide for transactions of the business of the Supreme Court in Japan.[57]

The discussion in this appendix would be enough if it only elucidated the alteration in the British policy of extraterritoriality in East Asia. The new mixed jurisdiction that could be exercised over civil cases had not yet been established, but at least this alteration made Parkes and Wilkinson unable to exert their authority based on the conventional kind of extraterritorial court regime to which they had previously adhered.

Reilly and Pauncefote had not urgently required the provisions for mixed jurisdiction into habitual operation, in 1877. However, after the revision of the Order in Council of 1878, negotiations began concerning revision of the Amity and Trade Treaties that had been concluded in 1858 between Japan and the treaty powers

---

[57] Pauncefote to Reilly, 23 May 1878, FO 17/944, 203-4.

respectively. Salisbury took the lead in the negotiations amongst the treaty powers. During the negotiations, Japan and the Western countries agreed with the principle that all cases, civil and criminal, between Japanese and foreigners should be judged by an officer of the defendant's nation. At the same time, Salisbury proposed to Japan that the latter should employ foreign judges to the Japanese courts in cases when foreign interests were involved.[58] This proposal was ultimately rejected by the Japanese government; however, this episode revealed that Salisbury sought to establish in Japan the same mixed jurisdiction that Reilly and Pauncefote advocated. Thus, these people came to represent the mainstream of British diplomacy with China and Japan, and at least Parkes gradually lost his leadership role in building a new relationship between Japan and the treaty powers. Here the Japanese government found room for establishing its own municipal laws and regulations based on Western legal concepts, independently of the interference of Parkes in particular.

[58] 'Gaikokujin o Saiban subeki Hankan Saiyo Hoho ni Kanshi Kaito no Ken (A Reply about the Way to Employ the Judge who Should Hear and Determine the Cases Involving Foreign Interests)', 21 August 1880, *Dai Nihon Gaiko Bunsho*, Joyaku Kaisei Kankei, vol. 2, 621.