

Acquisition of “Colonies” and Legal System of Japan

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1 Introduction

This chapter explores how Japan perceived the concept of “territory” when it acquired so-called *gaichi* (overseas territory of Japan or colony) and how that impacted legislation. The term *ryōiki* (domain; especially territory) is a translation of the English word “territory,” is considered a Japanese-made Chinese word derived from *ryōchi* (appanage),¹ and is believed to differ from a traditional understanding of territory consisting of *hanto* (territory), *kyōdo* (territory within a boundary), and *kyōiki* (territory). As will be discussed below, the Constitution of the Empire of Japan (hereinafter, “Meiji Constitution”) did not stipulate the limits of Japan’s territory, nor did it mention anything about the gain or loss of territory after its promulgation. Therefore, whether it was the cession of Taiwan in 1895 or the annexation of Korea in 1910, the question of whether the Meiji Constitution would apply to Taiwan and Korea became a matter of debate both practically and academically. Furthermore, the decision of what type of legislation to be established in *gaichi* was the basis of controlling such *gaichi*. Japan’s acquisition of *gaichi* is often described as (national) imperialization or imperial(istic) expansion, and one of its characteristics is that “the home country and the territory under control [colony] exist as a union of different jurisdictions based on the principle of disparity and integration.”²

1 Okamoto Takashi 岡本隆司, “Chūgoku ni Okeru Ryōdo Gainen no Keisei” 中国における『領土』概念の形成 [Formation of the Concept of Sovereignty in China], Okamoto Takashi 岡本隆司 (ed.), *Sōshuken no Sekaishi – Tōzai Ajia no Kindai to Honyaku Gainen* 宗主権の世界史—東西アジアの近代と翻訳概念 (Nagoya: The Nagoya University Press, 2014), 294; and Matsui Yoshiro 松井芳郎, “Kokusaiho ni Okeru Ryōiki to Kokkyō – Sono Henyō no Kizashi” 国際法における『領域』と『国境』—その変容のきざし [Concepts of “Territory” and “Boundary” under International Law: Indications of Their Change], *Higashi Ajia Kindaishi* 東アジア近代史, no. 17 (2014), 6.

2 Yamamuro Shinichi 山室信一, “Kokumin Teikoku Nihon ni Okeru Ihōiki no Tōgō to Kakusa” 国民帝国日本における異法域の統合と格差 [Integration and discrimination in the Japanese nation-empire], *Jinbun Gakuhō* 人文學報, no. 101 (2011), 64.

As Asano Toyomi points out, “Japan’s ‘imperialization’ is not characterized by an expansion to *terra nullius*, but rather an expansion to the surrounding areas where the system of Western ‘settlements’ already existed.”³ Consequently, for Japan, the acquisition of *gaichi* was not only defined by relations with the State from which it was acquiring territory, but also required the political support and approval of the Western countries that had advanced into East Asia. In this context, Japan attempted to replace Japan–China–Korea relations based on traditional East Asian logic with those based on the logic of modern international law, thereby maintaining its own independence and ensuring its security.

An examination of this from the perspective of “sovereignty” can be summarized as follows. First, sovereignty is transferred through treaties. In chronological order, this is the Treaty of Shimonoseki in 1895, the Treaty of Portsmouth in 1905, and the Japan–Korea Annexation Treaty in 1910. In addition, the Mandate for the German Possessions in the Pacific Ocean Lying North of the Equator of 1922 can also be added here, but as will be described below, the question of sovereignty over the mandated territories was a great source of international debate at the time, and no conclusion was ever reached. In any case, through these, Japan acquired *gaichi* and exercised its sovereignty domestically. Although it is difficult to firmly define what constitutes sovereignty, if considered in terms of internal supremacy and external independence, sovereignty means the basis under international law on which a State exclusively exercises domestic governance.

The sovereign State under (modern) international law is premised on the exercise of effective control over territory and the exercise of jurisdiction based on the principle of territoriality. In addition, the different branches of the federal State may have different legal systems, and, as a whole, it may be a State with more than one system of law. In the rule of a colony, however, for several reasons, a legal system that is different from the suzerain State and intrinsically discriminatory may be promulgated, resulting in the creation of different laws (or jurisdictions) in one whole state. This condition was also described in German *Staatsrecht*⁴ at the time as “domestic under international law but foreign under the constitution.” Since the enactment of laws over colonies (the

3 Asano Toyomi 浅野豊美, *Teikoku Nihon no Shokuminchi Hōsei* 帝国日本の植民地法制 [Colonial Legislation of Imperial Japan] (Nagoya: The Nagoya University Press, 2008), 2.

4 *Staatsrecht* was a distinctive field of 19th century German jurisprudence that sought to analyze the nature of States from a legal standpoint. In the Anglosphere, it generally equated to constitutional law and administrative law, but to avoid confusion, the term *Staatsrecht* will be used in this chapter.

periphery) is carried out by the colonial power (the center), it is not accurate to describe them as “foreign.” Rather, the word “foreign” should probably be regarded as something metaphorical, implying the unequal and discriminatory nature of center-periphery relations. In any case, after the cession of Taiwan, Japan was forced not only to carry out the simple spatial unification of Japan and its *gaichi*, but also to establish an order based on nationality that included relations with the foreign nationals living in its *gaichi*.

Prompted by Commodore Perry’s arrival in 1853, Japan demarcated territories by drawing “borders” under the (modern) international legal sense and established a system of effective control based on sovereignty. For Japan, this involved a process of translating, understanding, interpreting, and applying (hereinafter collectively referred to as “accepting,” etc.) international law, as well as the task of repositioning the traditional system of rule in East Asia within the framework of international law based on Japanese logic. Typical examples are Ryūkyū (Okinawa), Hokkaido, the Kuril Islands, and Sakhalin. After the “incorporation” of these regions, the space that made up Japan was demarcated both domestically and internationally.

This process involved Japan’s participation and accession to the international order of Western origin, as well as the conflict, coordination, and reorganization of the East Asian regional order headed by China (Qing and the Republic of China). After the Opium Wars, Qing continued to adhere to the Chinese order and accepted international law based on its own understanding thereof. At the same time, Western States established settlements in East Asia and placed Southeast Asia under colonial rule except for Thailand. The question of how to position Taiwan and Korea, which were on the periphery of Japan geographically, had been major issues in Japan’s domestic and diplomatic affairs since the early Meiji Era, taking the form of the *seitairon* and *seikanron* debates, respectively, and both of these issues related to relations with China. Japan and China showed different levels of acceptance towards international law, with Japan deemed to have been more proactive.⁵ This manifested itself in the difference of views between Japan and China regarding the status of Korea, as will be discussed later.

Below, this chapter summarizes how Japan understood sovereignty at the time. Needless to say, sovereignty is a concept in international law as well as a concept in domestic law, particularly at the constitutional law level. Given

5 See, for instance, Ōhata Tokushirō 大畑篤四郎, “Higashi Ajia ni Okeru Kokusaihō (Bankokukōhō) no Juyō to Tekiyō” 東アジアにおける国際法(万国公法)の受容と適用 [Reception and Application of International Law in East Asia], *Higashi Ajia Kindaishi* 東アジア近代史, no. 2 (March 1999), 5–6.

that Japan was under Imperial rule at the time, it would be necessary to verify how Japan accepted sovereignty, and whether it understood sovereignty as “control” over “territory” in the international legal sense. Next, this chapter will examine how Japan acquired *gaichi* and what kind of legislation it established there, on a case-by-case basis. It will focus in particular on the cession of Taiwan in 1895, in light of the fact that, as will be described later, there was intense debate at the time on whether or not to apply the Meiji Constitution to “territorial expansion” that was not planned for under said Constitution, a typical example of which is the issue of “Act No. 63.” This chapter will also outline how academic theory, particularly in the field of constitutional law, responded to the imperial expansion of Japan.

2 Constitution and International Law, and Sovereignty

2.1 Introduction of the Concept of Sovereignty

It is not necessarily clear when *shuken*, used as a translation of “sovereignty,” became a widely accepted Japanese word. Supposing that the Chinese translation of Henry Wheaton’s *Elements of International Law* (1836) was subsequently translated into Japanese, *shuken* would have been derived from the Chinese language.⁶ In said work, *shuken* or “sovereignty” is defined as “the supreme power by which any State is governed”⁷ and its contents correspond to today’s internal sovereignty (supremacy) and external sovereignty (independence); i.e., “that which is inherent in the people of any State, or vested in its ruler, by its municipal Constitution” and “the independence of one political society, in respect to all other political societies,”⁸ but there is no description of the territoriality of the State. *Shuken* also appears in *The Laws of Western Countries* by Tsuda Masamichi published in 1868.⁹ Therefore, it is necessary to conduct

6 Okamoto Takashi 岡本隆司, “Sōshuken to Kokusaihō to Honyaku – Tōhō Mondai kara ‘Chōsen Mondai’ e” 宗主権と国際法と翻訳—『東方問題』から『朝鮮問題』へ [Suzerainty, International Law, and Translation: From ‘Eastern Issues’ to ‘Korean Issues’], Okamoto, *supra* note 1, 98–99.

7 Ministry of Justice Collection of *Elements of International Law by Henry Wheaton* (1883) (National Diet Library Digital Collections NDLBibID S0000116), 35 (last accessed on September 21, 2021).

8 *Ibid.*, 36.

9 Tsuda Masamichi (Shinichirō) 津田真道 (真一郎), *Taisei Kokuhōron* 泰西国法論 [*The Laws of Western Countries*] (Waseda University Library Classical Books Comprehensive Database https://archive.wul.waseda.ac.jp/koshu/wa07/wa07_00839/wa07_00839_0001/wa07_00839_0001.pdf). (Quoted passage from the 19th image; last accessed on September 21, 2021).

further study of the origin of the term *shuken* while expanding the scope to include literature other than the two aforementioned works. According to Tsuda, *shuken* is explained as “the authority to govern an entire country” and “it is the monarch who holds this *shuken*.” The debate over where or with whom sovereignty resides in Japan, be it the “ruler” or the “monarch,” would later be associated with Japan’s own theory of national polity and would define the structure and interpretation of the Meiji Constitution. However, chronologically speaking, the theory of national polity appears first, and then the debate over the Meiji Constitution, including the concept of *shuken* or sovereignty, emerges; thus, the concept of sovereignty is interpreted based on the concept of national polity. It can therefore be understood that there was little awareness of territory (territorial land) in Japan, and that the rule by the Emperor based on the theory of national polity, with the Emperor as the “holder of the right of sovereignty,” was pushed to the fore.

2.2 *Existence of the Theory of National Polity*

The question of how to define the national polity, i.e., the constitutional foundation of the country or the fundamental system of the State, was related to the question of how to position Japan after the Meiji Era and how to build a system of governance through the ensuing Meiji Constitution. What should be confirmed here is that the theory of national polity eventually converged on the “sovereign monarch,” and furthermore, the basis for this was sought in the myths of the *Kiki* mythology (the *Kojiki* [*The Records of Ancient Matters*] and *Nihonshoki* [*Chronicles of Japan*]). As a clear illustration of this understanding, an editorial published in the *Tokyo Nichinichi Shimbun* on January 27, 1882, for example, which claimed that “it is clear that the sovereignty of Japan has always been held by the Imperial Family since the time of the first emperor,”¹⁰ is deemed to have played an important role.¹¹

The influence of this understanding on the provisions of the Meiji Constitution and its interpretation will be discussed below. It should be first established that the perception of the Emperor, belonging to an unbroken line of Imperial pedigree, as being eternal did not diminish thereafter, despite debate on the subject intensifying up to Japan’s defeat in World War II. The

10 “The Fourth Sovereignty Deliberation,” *Tokyo Nichi Nichi Shimbun*, January 27, 1882.

11 See Yonehara Ken 米原謙, *Kokutairon wa Naze Umaretaka – Meiji Kokka no Chi no Chikeizu 国体論はなぜ生まれたか—明治国家の知の地形図* [*Why was the Idea of Polity Born?: Topography of the Knowledge of the Meiji State*] (Kyoto: Minerva Shobō, 2015), 208–213 for the role *Tokyo Nichi Nichi Shimbun* played in the formation of the idea of polity.

culmination of this perception can be seen in *Kokutai no Hongi* [*The Essence of Japan's Polity*]¹² of 1937. At its outset, the work explains, regarding “Japan’s polity, which has not changed since ancient times,” that “the unbroken line of Emperors, receiving the divine edict of the founder of the nation, shall rule forever over the Empire of Japan.” It is well known that this book was intended as a denunciation of Minobe Tatsukichi’s theory of the Emperor as an organ of government. At the same time, there is no doubt that it curtailed the discourse of other legal scholars,¹³ and it should be noted here that it had a considerable impact on “laws in *gaichi*” (theory/studies), which will be reviewed below.

2.3 Sovereignty in International Law

Under international law, States have sovereignty, which is the basis upon which they control their territories. The rights afforded by sovereignty over land is generally called territorial sovereignty¹⁴ (or dominion). This is sometimes referred to as State possession or State dominion.¹⁵ The legal nature of territorial sovereignty has been the subject of much historical debate. This debate can be broadly divided into those that perceive territory either as *dominium* that can be used and disposed of freely by the State, or *imperium* over people, property, and facts within the territory.¹⁶ However, today, territorial sovereignty is commonly understood as having the properties of both *dominium* and *imperium*, and it is said that there are aspects of “ownership (possession), governance, and disposition.”¹⁷

In addition, the term *ryōdoken* (territorial rights) is generally used in Japan, including the debate between Minobe Tatsukichi and Tachi Sakutarō triggered

12 Ministry of Education (ed.), *The Essence of Japan's Polity* (National Diet Library Digital Collections NDL BibID 00000713777) (last accessed on September 21, 2021).

13 *Ibid.*, 9.

14 Iwasawa Yūji 岩沢雄司, *Kokusaihō 国際法* [*International Law*] (Tokyo: University of Tokyo Press, 2020), 220; and Yanagihara Masaharu 柳原正治, Morikawa Kōichi 森川幸一, and Kanehara Atsuko 兼原敦子 (eds.), *Purakutisu Kokusaihō Kōgi* [*Dai 2 Han*] プラクティス国際法講義[第2版] (Tokyo: Shinzansha, 2016), 186 (written by Fukamachi Tomoko), and so on.

15 Yanagihara Masaharu 柳原正治, *Kyōiki, Hanto, Hōdo, Soshite Ryōiki* [“The Concept of ‘Territory’ in Europe and East Asia”], *Kokusai Mondai 国際問題*, no. 624 (September 2013), 2.

16 Iwasawa, *supra* Note 14.

17 While it is not clear when this view took hold in the field of international law in Japan, this positioning can already be found in Yokota Kisaburō 横田喜三郎, *Kokusaihō II* (*Hōritsugaku Zenshū 56*) 国際法 II (法律学全集 56) [*International Law II* (Complete Works of Law 56)] (Tokyo: Yūhikaku, 1958), 1. (The same is also true of the new 1972 edition.)

by the annexation of Korea in 1910. Whether *ryōdoken* is the same as today's territorial sovereignty and dominion is debatable. Setting this debate aside, the Minobe-Tachi debate was over the nature of annexation under international law, as was also evidenced by the fact that it was triggered by Tachi's “The Annexation of Korea as Viewed under International Law.”¹⁸ From there, as the specific content of *ryōdoken* and its relationship with sovereignty were discussed, the debate expanded to include the relationship between international law and domestic law.¹⁹ Without going into too much detail, it is necessary to take into account how *ryōdoken* and *tōchiken* (rights of sovereignty), as terms found in constitutional law and *Staatsrecht* at the time, relate to the *dominium* and *imperium* used when discussing sovereignty in international law today.

2.4 *Shuken* (Sovereignty) and *Tōchiken* (Rights of Sovereignty) in the Meiji Constitution

In the Meiji Constitution, *shuken* was understood to be synonymous with the *tōchiken* of the Emperor. The fact that Itō Hirobumi also used the two interchangeably can be seen in his *Commentaries on the Constitution of the Empire of Japan*.²⁰ First, Article 1 stipulated that “The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal,” and Article 4 provided that “The Emperor is the head of the Empire, combining in

18 Tachi Sakutarō 立作太郎, “Kankoku Heigō Kokusaihōkan” 韓国併合国際法観 [The Annexation of Korea as Viewed under International Law], *Hōgakukyōkai Zasshi* 法学協会雑誌, vol. 28, no. 11 (1910), 1–19.

19 Previous research examining the history and discussion points of the Minobe-Tachi controversy include Nakahara Seiichi 中原精一, “Minobe Tachi Ryōhakase Ronsō no Sobyō – Kokunaihō to Kokusaihō tonon Kankeiron ni Tsuite” 美濃部・立両博士論争の素描—国内法と国際法との関係論について [A Sketch of the Controversy between Prof. Minobe and Prof. Tachi: On the Relationship between Domestic Law and International Law], *Meijidaigaku Shakaikagaku Kenkyūsyō Kiyō* 明治大学社会科学研究所紀要, No. 7 (1969), 37–54; Ebara Yoshiyasu 穎原善徳, “Kokusaihō no Kankei o Meguru Minobe Tachi Ronsō” 国際法と国内法の関係をめぐる美濃部・立論争—韓国併合と領土権・主権論争 [Minobe-Tachi Debate over the Relationship between International Law and Domestic Law: Annexation of Korea and Territorial Rights/Sovereignty Debate], *Hisutoria* ヒストリア, no. 181 (2002), 1–25; and Nishimura Yūichi 西村裕一, “Nihon ni Okeru Shukenron – Senzen Kara no Shikaku” 日本における主権論—戦前からの視角 [The Theory of Sovereignty in Prewar Japan: A Perspective from the Prewar Period], *Shuken wa Ima* (Nenpō Seijigaku 2019–) 主権はいま (年報政治学2019–1) (2019), 113–136.

20 Itō Hirobumi 伊藤博文 (annotation by Miyazawa Toshiyoshi 宮沢俊義), *Kenpō Gikai* 憲法義解 [Commentaries on the Constitution of the Empire of Japan] (Tokyo: Iwanami Shoten, 2019).

Himself the rights of sovereignty.” It is evident that these terms are directly connected to the theory of national polity discussed above. In addition, Itō stated that “the body of sovereignty is the control of the rights to sovereignty,” and Miyazawa noted that in the English translation by Itō Miyoji, the term *tōchiken* was translated as “the rights of sovereignty.”²¹ On the other hand, the basis of the Emperor’s rights of sovereignty is “the supreme power We inherit from Our Imperial Ancestors” as stated in the Imperial Speech on the Promulgation of the Constitution, and the proclamation of the Meiji Constitution was also based on this “supreme power” (authority). Based on this premise, Itō also wrote, with regard to Article 1, that “[the Emperor] shall wield the authority and govern the land and subjects.”²²

Furthermore, that which was to be reigned over and governed was the people, and it is not clear to what extent the possession and control of land and space in the international legal sense was envisaged, whether by the Meiji Constitution itself or by the “govern the land” in the *Commentaries on the Constitution of the Empire of Japan*. This point is evident in the Imperial Speech. In other words, what is emphasized as being reigned over and governed by the Emperor is “Our beloved subjects,” “the very same that have been favoured with the benevolent care and affectionate vigilance of Our Ancestors.”²³ The Imperial Speech further mentions that “The right of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to Our descendants.” These are the origins of the “one great family-like nation,” mentioned in *Kokutai no Hongi [The Essence of Japan’s Polity]*.²⁴ This led to a reliance on the “fictional history”²⁵ that the Imperial ancestors created the land and space of Japan, and the Emperors of the unbroken Imperial pedigree expanded it and passed it down from generation to generation. This point had fundamentally different roots to the Christian and European beliefs that separate God from man and keep the creation of heaven and earth exclusively in the domain of God.

As mentioned above, the Meiji Constitution has no territorial provisions. Usually, the territory of a State has the possibility of expansion or contraction, and there are other countries with constitutions that include pre-determined

21 *Ibid.*, 27–28.

22 *Ibid.*, 21.

23 *Ibid.*, 223.

24 Ministry of Education (ed.), *supra* note 12, 9.

25 Okamoto Kōichi 岡本公一, “Ryōdomondai to Dainihonteikoku Kenpō” 領土問題と大日本帝国憲法 [Territory, Expansionism and the Meiji Constitution], *Waseda Global Forum*, no. 7 (2010), 237.

rules for such scenarios. The draft of the Meiji Constitution, which was prepared in accordance with the Meiji Emperor’s decree to “consider the laws of foreign countries,”²⁶ included territorial provisions. However, just before the Privy Council held its deliberations, Itō deleted the provisions and submitted the new draft for consideration.²⁷ As for the reason for not establishing territorial provisions, Inoue Kowashi explained, “Japan has not changed its borders for 2,500 years, so we do not recognize any need to do so now.”²⁸ Itō also collectively referred to Ōyashima, as well as Hokkaido, Okinawa (Ryūkyū) and the Ogasawara Islands, which were incorporated after the Meiji Restoration, as the territory or land of Japan, while making reference to the *Kojiki* [*Records of Ancient Matters*] and the *Nihonshoki* [*Chronicles of Japan*].²⁹ Furthermore, in Japan’s case, the fact that there are naturally limits to its expansion due to the geographical condition of being surrounded by the sea on all sides, and the fact that it had not experienced a reduction in its territory may have played a role. Even today, it is an implicit domestic understanding that the space of Japan entails Hokkaido, Honshu, Shikoku, Kyushu, Okinawa, and its accompanying islands, and there is no territorial provision in the current constitution. There is no doubt, both from Japan’s own understanding and that internationally, that Japan’s territory falls within the scope defined in Paragraph 8 of the Potsdam Declaration. While the problems surrounding the interpretation of “various small islands” (Northern Territories, Senkaku Islands, Takeshima/Dokdo) remain even now, the territory of Japan is nevertheless rarely discussed in the context of constitutional law today.³⁰

How does this spatial perception of Japan differ from the concept of “territory” in international law? Also, what is its relationship with the perception of land in the East Asia region, such as *hanto* (territory) and *kyōdo* (territory within a boundary)? Furthermore, despite both being located in East Asia, was the understanding of territory in China the same as in Japan? These issues are deeply related to those concerning East Asia’s integration into the European

26 Kokken Kisō no Mikotonori 国憲起草の詔 [Imperial Edict for the Drafting of the Constitution] (National Archives of Japan Digital Archive <https://www.digital.archives.go.jp/gallery/000000004> [last accessed on September 21, 2021]).

27 Okamoto, *supra* note 6, 228–232.

28 “Records of the Privy Council Meeting, 1. Draft of the Constitution, 18th June to 13th July, 1888,” Center for Asian Historical Records, National Archives of Japan (JACAR) Ref. A03033487900 (last accessed on September 21, 2021).

29 Itō, *supra* note 20, 21–22.

30 Ishimura Osamu 石村修, “Kenpō ni Okeru Ryōdo” 憲法における領土 [Territory in the Constitution], *Hōseiron* 法政理論, vol. 39, No. 4 (2007), 158.

international order and its acceptance of international law, as well as the ensuing reorganization of the international order in East Asia.³¹

3 Formation of *Gaichi* (Overseas Territory of Japan) and Its Concept

3.1 Colonial Lands (*Gaichi*) and Legislation

While the Prussian Constitution, which served as the model of the Meiji Constitution, also did not contain territorial provisions, the cession of Alsace-Lorraine and the acquisition of colonies (protectorates) in non-European regions led to the implementation of a colonial system and control over local populations that were different from the domestic equivalents in Germany, and such a state of unconstitutional governance became difficult to explain.³² As will be discussed below, Japan found itself in the same situation with the cession of Taiwan in 1905.

As mentioned above, colonies are explained as having different jurisdictions, or legal status, to their colonial rulers. Moreover, different jurisdictions may exist even within the same colonial power itself.³³ Generally, in Japan, the areas that have been under control before the promulgation of the Meiji Constitution are referred to as *naichi* (domestic territory), while areas acquired thereafter are referred to as *gaichi* (overseas territory). However, the “center and periphery” in Japan is not exactly the same as its “*naichi* and *gaichi*.” This is because periphery areas such as Ryūkyū (Okinawa) and Hokkaido also existed

31 There is much previous research on these issues. See, for example, Yanagihara Masaharu 柳原正治, “Bakumatsuki Meijishoki no ‘Ryōiki’ Gainen ni Kansuru Ichi Kōsatsu” 幕末期・明治初期の『領域』概念に関する一考察 [A study on the concept of territories in the late Edo period and the early Meiji period], Matsuda Takeo 松田竹男, Tanaka Norio 田中則夫, Yakushiji Kimio 薬師寺公夫, and Sakamoto Shigeki 坂元茂樹 (eds.), *Gendaikokusaihō no Shisō to Kōzō 1 Rekishi, Kokka, Kikō, Jōyaku, Jinken* 現代国際法の思想と構造 I 歴史、国家、機構、条約、人権 (Tokyo: Toshindo, 2012), 45–73; and Kawashima Shin 川島真, “Kingendai Chūgoku ni Okeru Kokkyō no Kioku – ‘Honrai no Chūgoku no Ryōiki o Meguru’ 近現代中国における国境の記憶—『本来の中国の領域』をめぐる [The Memory of the National Border in Modern and Contemporary China: China’s Imagined Original Territory], *Kyōkaikenkyū* 境界研究, no. 1 (2010), 1–17.

32 Ishikawa Kenji 石川健治, “Kenpō no Naka no ‘Gaikoku’” 憲法の中の『外国』 [Foreign Countries in the Constitution], Waseda University Comparative Law Research Institute (ed.), *Nihon no Naka no Gaikokuhō – Kihonhō no Hikakuhōteki Kōsatsu* 日本法の中の外国法—基本法の比較法的考察 (Tokyo: Seibundo, 2014), 15–16.

33 A typical example in Japan is that the conscription ordinance based on the proclamation of conscription (Dajōkan Proclamation no.379 of November 28, 1872) was not enforced in Okinawa and Ogasawara until January 1, 1898.

within Japan's *naichi*.³⁴ In addition, since the Meiji Constitution did not have territorial provisions, the boundary between *naichi* and *gaichi* was not necessarily clear. In terms of legislation, Article 1, Paragraph 1 of the Common Law of 1918 (Law No. 39) stipulates that “the term ‘region’ refers to *naichi* (domestic territories), Korea, Taiwan or Kwantung,” so among the areas controlled by Japan, Korea, Taiwan and Kwantung were *gaichi*, and other areas were *naichi* (according to Paragraph 2, Article 2, Sakhalin belongs to *naichi*.) In any case, there is no legal definition of *gaichi* as a term or which areas it corresponds to. It is said that *gaichi* came into regular use after the establishment of the Ministry of Colonial Affairs in 1929 and that it became a legal term after the promulgation of the Foreign Territory Telephone Communication Regulations (Ministry of Communications Ordinance No. 51 of 1934) and the Personal Income Tax and Corporate Income Tax Internal and Foreign Territory Relations Law (Act No. 55 of 1940).³⁵

In Kiyomiya Shirō's *Introduction to Foreign Territory Law*, published in 1944, the following five examples of the use of *gaichi* are as follows.³⁶ (1) Taiwan, South Sakhalin, Korea, Kwantung Leased Territory and the South Sea Islands, which became territories or quasi-territories after the enactment of the Meiji Constitution; are positioned as “the most common usage”; (2) In addition, territories occupied by Japan as a result of the Second Sino-Japanese War and the Greater East Asia War are included; (3) “Foreign countries that have special relations with Japan” such as Manchuria are included; (4) The territory of foreign countries and foreign States themselves are *gaichi*; and (5) Only Honshu is *naichi*, while all other land is *gaichi*. Yamazaki Tanshō shared the same understanding as (1) in Kiyomiya's classification, and defined “Korea, Taiwan, Sakhalin, the leased territory of Kwantung, and the mandated territory of the

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- 34 On this point, see Okazaki Mayumi 岡崎まゆみ, “‘Naikoku Shokuminchi’ Toshite no Hokkaidō Kindaihō Shiron – ‘Minji Hanketsu’ Bunseki o Tsūjita Gaichi Hōshi tonō Hikaku Kanōsei o Mezashite” 『内国植民地』としての北海道近代法史論—「民事判決」分析を通じた外地法史との比較可能性を目指して [Considerations on the Modern Legal History of Hokkaido: Aiming for comparability with foreign legal history through the analysis of ‘civil judgments’], *Horitsu Ronsō* 法律論叢, vol. 90, no. 2–3 (2017) 139–163. For example, even today, the terms *naichi* (domestic territory) and *hondo* (mainland) are used almost interchangeably in the local dialects in Hokkaido and Okinawa. (However, the geographical scope of these terms is not necessarily definitive.)
- 35 Legal Affairs Division, Treaty Bureau, Ministry of Foreign Affairs, *Gaichi Hōrei Seido no Gaiyō* (*Gaichi Hōseishi Dai 2 Bu*) 外地法令制度の概要 (外地法制誌第2部) [Overview of Legal Systems in Foreign Territories (Journal of Legal Systems in Foreign Territories, Part 2)] (Tokyo: Bunsei Shoin, 1990 [reprint]), 1–3.
- 36 Kiyomiya Shirō 清宮四郎, *Gaichihōjōsetsu* 外地法序説 [Introduction to Foreign Territory Law] (Tokyo: Yūhikaku, 1944), 3–5.

South Sea Islands” as *gaichi*.³⁷ Research conducted in relatively recent years on laws in *gaichi*, focusing particularly on the family register system, also follows the general terminology of the time and defines *gaichi* as “a territory of a different jurisdiction that was under Japanese rule.”³⁸ In addition, among previous studies that comprehensively examined *gaichi*, there are also those that have considered Taiwan and Korea as “colonies” without using the word “*gaichi*.”³⁹

Nevertheless, Kiyomiya separated Japan’s territory and its quasi-territory, while, as seen in Yamazaki’s definition, Kwantung is sometimes explained as “leased territory” and the South Sea Islands as “a mandated territory.” It is thus not clear how each author understood the difference in legal nature between cession, annexation, lease, and mandated territory. In any case, focusing on the degree to which sovereignty was transferred, it can be seen that it was implicitly recognized that there were three types of *gaichi*: Taiwan and Sakhalin (both ceded), as well as Korea (annexation), sovereignty over which can be understood to have been completely transferred; Kwantung, where the residual sovereignty of the lessor State was recognized; and the South Sea Islands (mandate), sovereignty over which was the subject of international debate.

3.2 *Cession of Taiwan*

3.2.1 Background

As an outcome of the Sino-Japanese War, Taiwan Island and the Pescadores Islands were ceded to Japan from Qing (Paragraphs 2 and 3, Article 2 of the Sino-Japanese Peace Treaty signed on April 17, 1895, entered into force May 8, 1895). The Liaodong Peninsula was also to be ceded according to Paragraph 1, but it was returned by a further treaty with Qing in November of the same year following the Triple Intervention. Sino-Japanese relations after the Meiji

37 Yamazaki Tanshō 山崎丹照, *Gaichi Tōchi Kikō no Kenkyū* 外地統治機構の研究 [Research on Foreign Territory Organizations] (Tokyo: Takayama Shoin, 1943), 1. In addition, Minami Karafuto was incorporated into the *naichi* in 1943, regarding which Yamazaki stated, “It goes without saying that we can no longer call this a *gaichi*” (*ibid.*).

38 Mukai Hidehiro 向英洋, *Shōkai Kyū Gaichihō* 詳解旧外地法 [Detailed Explanation of the Old Foreign Land Law] (Tokyo: Nihon Kajo Publishing, 2007), 9.

39 For example, see Endō Masataka 遠藤正敬, *Kindai Nihon no Shokuminchi Tōchi ni Okeru Kokuseki to Koseki -Manshū, Chōsen, Taiwan* 近代日本の植民地統治における国籍と戸籍—満洲・朝鮮・台湾 [Nationality and Family Register in Modern Japanese Colonial Rule: Manchuria, Korea, and Taiwan] (Tokyo: Akashi Shoten, 2011); and Yamanaka Einosuke 山中永之佑, *Teikoku Nihon no Tōchihō - Naichi to Shokuminchi Chōsen, Taiwan no Chihōseido o Shōten Tosuru* 帝国日本の統治法—内地と植民地朝鮮・台湾の地方制度を焦点とする [Governance Law of Imperial Japan: Local Systems of Domestic Territory and Colonial Korea and Taiwan] (Osaka: Osaka University Press, 2021).

Restoration meant the reorganization of the East Asian order through the Taiwan Expedition (1874) and the Ryūkyū Disposition (1879).⁴⁰ In particular, Article 1 of the Treaty of Shimonoseki denied that the tribute paid by Korea to Qing amounted to Korea being part of the Chinese tributary system, stating, “China recognizes definitively the full and complete independence and autonomy of Korea, and, in consequence, the payment of tribute and the performance of ceremonies and formalities by Korea to China in derogation of such independence and autonomy, shall wholly cease for the future.”

On the other hand, despite the fact that “the question of how to govern modern Japan’s first colony was, for the Meiji Government, an important issue in relation to the constitutional system,”⁴¹ there was much confusion in the initial debate on the cession. One of the reasons for this was the situation on the ground in Taiwan, where Japan had no choice but to prioritize pacification “unconstrained by laws and regulations”⁴² in response to the fierce resistance of the Taiwanese people. However, as an even more fundamental issue, there was a difference of opinion on how to position Taiwan and how to govern it, both in terms of colonial (rule) policy and the legal system to support it. As part of the discussion on this point, Hara Takashi, who was Vice Minister of Foreign Affairs and a member of the Taiwan Secretariat, wrote, in *Two Proposals on the Taiwan Issue*,⁴³ “A. Deem Taiwan to be a kind of ‘colony.’ B. Taiwan is somewhat different from the *naichi*, but it should not be regarded as a type of colony.” (Punctuation added by the author.) Hara himself “advocated” the second proposal because Taiwan and its people “represented a completely different situation from the case of European countries controlling people of other races.” Rather than being based on any legal position, this stance can be appropriately

40 Okamoto also positions the Sino-Japanese War as a watershed moment in world history. Okamoto Takashi 岡本隆司, “Nisshin Sensō to Higashi Ajia” 日清戦争と東アジア [The Sino-Japanese War and East Asia], Yamauchi Masayuki 山内昌之 and Hosoya Yūichi 細谷雄一 (eds.), *Nihon Kingendaishi Kōgi – Seikō to Shippai no Rekishi ni Manabu* 日本近現代史講義—成功と失敗の歴史に学ぶ (Tokyo: Chuokoron-Shinsha, 2019), 56.

41 Kurihara Jun 栗原純, “Meiji Kenpō Taisei to Shokuminchi – Taiwan Ryōyū to Rokusanhō o Meguru Shomondai” 明治憲法体制と植民地—台湾領有と六三法をめぐる諸問題 [Meiji Constitutional System and Colonies: Various Issues Concerning Sovereignty over Taiwan and Act no.63], *Tōkyō Joshidaigaku Hikakubunka Kenkyūsyō Kiyō* 東京女子大学比較文化研究所紀要, No. 54 (1993), 56.

42 “Naikakusōridaijin no Kunrei” 内閣總理大臣ノ訓令 [Instruction of the Prime Minister of the Cabinet] (July 16, 1895), Itō Hirobumi 伊藤博文 (ed.), *Hisho Ruisan Dai 18 Kan Taiwan Shiryō* 秘書類纂第18卷臺灣資料 (hereinafter referred to as “Taiwan Materials”) (1936), 444 (NDL Digital Collection bibID 00000855219). (Last accessed on September 21, 2021).

43 *Ibid.*, 32–34.

viewed as being based on Hara's position of so-called "*naichi* extensionism."⁴⁴ If one is to take this standpoint, however, the same laws as Japan's *naichi* should, in principle, be enforced in Taiwan as much as possible, and the power of the Governor-General of Taiwan should be weakened.

In reality, however, the "Act on Laws and Regulations to be Enforced in Taiwan" (Act No. 63 of March 30, 1896; hereinafter referred to as "Act No. 63") gave the Governor-General of Taiwan broad power to enact laws.

3.2.2 Establishment of Taiwan's Legislation: Confusion over Act No. 63
Issues arose regarding what type of legislation to create for Taiwan's territory, especially how to understand its relationship with the Meiji Constitution. *Taiwan Materials* includes documents by an unknown author entitled "Position of Taiwan in Japanese Law"⁴⁵ and "Authority to Govern Territory."⁴⁶ First, "Position of Taiwan in Japanese Law" can be summarized as follows.

Based on the premise that "Taiwan is a new territory acquired by the Empire in accordance with international law," it is understood as being "a newly acquired territory, with the fact of its incorporation into the Empire meaning that the borders of the Empire will change." However, since the Meiji Constitution does not provide any procedure for changing borders, Taiwan's status under Japanese law has to be determined through the "Ordinary Principles of the State" and the "Spirit of the Imperial Constitution." The State is free to decide whether or not to incorporate a new territory. The existence of foreign constitutions that provide for procedures for changing borders means that the method of expressing the intention to incorporate a new territory after acquiring it has been stipulated. Then, in the case of Japan, how can it express its intentions? One would be to amend the Meiji Constitution, and the other would be to understand it as part of the prerogative of the Emperor. Whichever position is adopted, the conclusion is the same: "Taiwan is not part of the Empire even though it is under the sovereignty of the Empire," and therefore, "the Empire's Constitution and its various laws and regulations cannot directly be promulgated in Taiwan."

44 For the relationship between policy on Taiwan before and after the possession of Taiwan and the Constitution, and Hara's theory of colonial policy in general, see Haruyama Meitetsu 春山明哲, "Kindai Nihon to Taiwan – Musha Jiken, Shokuminchi Tōchi Seisaku no Kenkyū" 近代日本と台湾—霧社事件・植民地統治政策の研究 [Modern Japan and Taiwan: A Study of the Wushe Incident and Colonial Policy] (Tokyo: Fujiwara Shoten, 2008), 155–221, especially 173–179.

45 *Taiwan Materials*, (note 42), 71–74. Page numbers are omitted when quoting. (The same applies hereinafter for this reference material.)

46 *Ibid.*, 75–77.

Based on this understanding, the following arguments are developed in the "Authority to Govern Territory." Although Japan has not promulgated its constitution or laws in Taiwan, it is also not the case that Japan is governing the independent State of Taiwan under a personal union; thus, the Emperor is exercising "the sovereignty of the Japanese Empire as the sovereign of the Japanese Empire" over Taiwan. "The Emperor is the head of the Empire, combining in Himself the rights of sovereignty," as stipulated in Article 4 of the Meiji Constitution, and this is those rights being exercised. Such an exercise is in accordance with the provisions of the Meiji Constitution. When legislating with regard to Taiwan, Article 55, Paragraph 2 of the Meiji Constitution required the countersignature of a Minister of State, but it did not require the consent of the Imperial Diet, and "the authority of the Emperor is unlimited in this respect." This is the same as for diplomatic authority, and "the authority over the territory can also be summed up and called the authority to govern territory under the Meiji Constitution, so long as it is invoked for the territory and does not relate to internal affairs."

The following can be pointed out about these two documents. First, while they recognize the border change as a fact, if, due to the absence of a procedure for changing borders, Taiwan is "not part of the Empire" and neither the Meiji Constitution nor the laws and regulations are promulgated, then no legal restrictions would be imposed on the Emperor's possession and control of Taiwan. This synonymous treatment of *shuken* and *tōchiken* is the same as in Itō's *Commentaries on the Constitution of the Empire of Japan*, but it is a contradiction or circular theory to derive the authority to govern territory under the Meiji Constitution as a positive law through analogical inference from diplomatic authority. The diplomatic authority under Article 13 of the Meiji Constitution to "declar[e] war, mak[e] peace, and conclud[e] treaties" is believed to "belong to the authority of the Emperor and does not require the consent of the Diet," and the reason for this was "the unity of the sovereignty of representing the State to foreign countries."⁴⁷ Although it is a trivial point, it is possible to infer the cession of territory (Taiwan and Sakhalin) and the acquisition of leased land through peace treaties in this diplomatic authority, but when this is "authority ... under the Meiji Constitution," then the argument for removing the need for the consent of the Imperial Diet would be extremely weak if the authority is regarded as being pre-constitutional in nature.

In response, William Montague Hammett Kirkwood, an adviser to the Ministry of Justice, summarized the arguments in his "Opinion on the Taiwan

47 Itō, *supra* note 20, 43.

System, the Emperor's Authority, and the Imperial Diet"⁴⁸ as follows, stating that both are valid interpretations of the Meiji Constitution.

- a) Since the authority of the Emperor is not restricted by the Meiji Constitution in Taiwan, it is constitutional to formulate laws concerning Taiwan without the approval of the Diet.
- b) As long as Taiwan is a Japanese territory, the Meiji Constitution applies, and laws concerning Taiwan require the support of the Diet.

Kirkwood then pointed out, as a legislative policy issue, that, "In the current Japanese public opinion, there is a strong democratic tendency, and if my interpretation is carried out, it is difficult to predict whether a Diet that is not close to the existing Government may give rise to more aggressive arguments against the government or not."⁴⁹ Thus, he advised making a decision from a political and practical perspective rather than a legal one, placing emphasis on parliamentary strategy rather than constitutional interpretation.

After that, the government began to formulate the "Act on Laws and Regulations to be Enforced in Taiwan." After many twists and turns, it was promulgated as Act No. 63 of 1896 (March 30), commonly known as "Act No. 63." The law was intended to settle the question of what powers should be given to the Governor-General's Office and how to harmonize it with Japan's own system of governance, in light of the ongoing but sporadic uprisings on the island of Taiwan, despite it having been pacified.

According to the original "Statement of Reasons for the Bill," the recognition at the time was as follows:

Taiwan has only just been included in the Japanese Empire, and not only are all matters still in their infancy, but there are also concerns about uprisings by armed groups in the region. Despite this, this island is located far from the capital of Tokyo and transportation between the two lands is still completely undeveloped. The emotions and social customs of the people of this island are also completely different from those of Japan, so they should not be governed by the same laws and regulations as the home country. This is why we are submitting this proposal.⁵⁰

48 "Mr. Kirkwood's Opinion on the Taiwan System, the Emperor's Authority, and the Imperial Diet" (July 24, 1895), *Taiwan Materials* (note 42), 78–107.

49 *Ibid.*, 105.

50 Establishing ordinance on laws and ordinances to be enforced in Taiwan (JACAR Ref. A01200843100).

What was the nature of the draft of the Act? The validity of Act No. 63 under the Meiji Constitution was questioned for a long time after that for the reason that Article 1 of the Act stipulated, “the Governor-General of Taiwan may issue ordinances having the power of law within his jurisdiction” and Article 5 stipulated “any existing law or a law to be promulgated in the future which is necessary to be enforced in whole or in part in Taiwan shall be determined by Imperial Ordinance.”

This was “nothing more than a bill with provisions concerning the legislative power of the Governor-General, which were included in the draft bylaws of the Governor-General’s Office,”⁵¹ but, at the same time, it also contained an element of danger in that “granting legislative power to the Governor-General, who is the bearer of administrative authority, and recognizing administrative ordinances as having the same power as laws clearly runs counter to the principles of constitutional government.”⁵² Even in the Imperial Diet, which deliberated Act No. 63, there was debate about whether the Meiji Constitution would extend to Taiwan, and, if so, how it would be extended, but it is unlikely that either the Government or the Diet fully understood and digested the issues. Below, the author will cover the background to the law’s enactment using historical reference materials.⁵³

Attending the Diet as a Government committee member (since March 17, 1896) was Mizuno Jun, Director of the Civil Affairs Bureau of the Office of the Governor-General of Taiwan. First, Mizuno explained the reasons for the proposal to almost the same effect as above. In response, Nakamura Katsumasa asked,⁵⁴ “As stated in Articles 8 and 9 of the Meiji Constitution, in Japan, no one but the Emperor has the authority to issue laws and ordinances, but does this actually apply to all matters under civil administration?” Article 8 of the Meiji Constitution is a provision concerning “Imperial Ordinances in the place

51 Kurihara, *supra* note 41, 49.

52 Komagome Takeshi 駒込武, “Kokusai Seiji no Naka no Shokuminchi Shihai” 国際政治の中の植民地支配 [Colonial Rule in International Politics], Kawashima Shin 川島真 and Hattori Ryūji 服部龍二 (eds.), *Higashi Ajia Kokusai Seijishi* 東アジア国際政治史 (Aichi: Nagoya University Press, 2007), 184.

53 As will be explained below in the main text of this chapter, Act no.64 was enacted as a three-year time-limited law. It was extended to four years by Law no.31 in 1906, and further revised according to Law no.3 in 1921. The relevant minutes of the Imperial Diet are summarized in Legal Affairs Division, Treaty Bureau, Ministry of Foreign Affairs, *Minutes of the Laws Concerning Taiwan’s Enforcement Laws (Acts no.63, no.31 and No.3)* (*Journal of Foreign Legislation Part 3, Annex*) (Tokyo: Bunsei Shoin, 1990 [reprint]). According to the preface of the same book, the original stenographic records of the proceedings were created and published by the Governor-General of Taiwan in 1921.

54 *Ibid.*, 4.

of law” (emergency ordinances) to maintain public safety when the Imperial Diet is not sitting, and Article 9 refers to “Ordinances” to enforce the laws. However, could the Governor-General of Taiwan be delegated the authority to issue “ordinances having the power of law” in the first place? In other words, if, according to Article 4, “The Emperor is the head of the Empire, combining in Himself the rights of sovereignty,” and, having “exercis[e]d the legislative power with the consent of the Imperial Diet,” as stated in Article 5, “gives sanction to laws, and orders them to be promulgated and executed,” as stated in Article 6, then it is unlikely to be coherent to have a “legislative” process that ignores the Emperor’s procedure for promulgating laws (including the consent of the Diet), and allows the Governor-General to issue “ordinances having the power of law” and obtain Imperial sanction through the Minister of Colonial Affairs. Setting that point aside, Mizuno’s response was also extremely unclear. Specifically, in response to Nakamura’s question, he replied, “This has nothing to do with the Meiji Constitution, which is to say that the Meiji Constitution has no power in Taiwan.”⁵⁵

If it has nothing to do with the Meiji Constitution, the basis of the Emperor’s rights of sovereignty under Article 4 is lost, and it means that Taiwan would be ruled based on a pre-constitutional authority. On this point, Sakurai Yoshiki once again asked, “You have said that the Meiji Constitution has not been enacted in Taiwan, but it is a matter of course that the Meiji Constitution would be enforced once a land comes into the possession of the Empire of Japan, no matter where it is, and I believe there is something mistaken in your assertion that the Meiji Constitution is not even partially enforced in Taiwan.” In response, Mizuno replied, “The Meiji Constitution has, in its entirety, not been promulgated there. To put it another way, even within the Constitution, the ‘Rights and Duties of Subjects’ do not apply to Taiwanese subjects. However, it goes without saying that the authority of the Emperor under the Meiji Constitution is exercised over Taiwan.” The relationship between authority and the Meiji Constitution was also extremely unclear.⁵⁶ However, if the “Emperor’s authority” extended to Taiwan, then some form of the Emperor’s rights of sovereignty extended there and Taiwan’s status as a “territory” of Japan were confirmed.

The Government temporarily withdrew the bill (March 24), but resubmitted it (March 26) with a provision (Article 6) that the bill would be legislated for a period of three years, and it was passed by the House of Peers.

55 *Ibid.*

56 *Ibid.*, 6.

3.2.3 Evaluation of Act No. 63

It is not clear where the true intention of removing the need for the consent of the Imperial Diet through Act No. 63 lay. Ariga Nagao shared an episode about the budget related to Taiwan saying, “It is troublesome to have to get approval for each and every matter, so we decided that Taiwanese matters would be decided at the discretion of the Governor-General’s Office, and that there is legal power in these decisions made at its discretion.”⁵⁷ Based on the opportunistic idea that “Itō would take on Itagaki’s Liberal Party” and “it would be convenient later if the delegated power were to be passed at that time,”⁵⁸ a precautionary front was set up in preparation for the emergence of a “Diet that is not close to the Government,” as Kirkwood was concerned about.

Since then, the relationship between Act No. 63 and the Meiji Constitution has been a controversial topic among scholars of constitutional law and *Staatsrecht*.

Act No. 63 was subsequently prolonged by revisions in 1899, 1902, and 1905. In addition, Act No. 31 of 1906 required the Governor-General of Taiwan to obtain “Imperial sanction through the competent minister” (Article 2) when prescribing ordinances. On top of that, according to Act No. 3 of 1922, when all or part of the law was enforced in Taiwan, an Imperial Ordinance would be required in principle (Article 1). Furthermore, the authority of the Governor-General to issue ordinances was exceptional, and there was a shift to *naichi* extensionism (Article 2).

3.3 *Background of the Sakhalin Cession*

As a result of the Russo-Japanese War, in September 1905, Japan was ceded Sakhalin south of the 50th parallel (Article 9, Paragraph 1 of the Treaty of Portsmouth). The Treaty of Portsmouth also stipulated that, “The Imperial Russian Government, acknowledging that Japan possesses in Korea paramount political, military and economical interests engages neither to obstruct nor interfere with measures for guidance, protection and control which the Imperial Government of Japan may find necessary to take in Korea” (Article 2). The Russo-Japanese War was about the hegemony of both countries on the Korean Peninsula. More details will be covered in the next section, but first a brief description of Sakhalin will be provided here.

57 Ariga Nagao 有賀長雄, “Taiwan ni Kansuru Rippō no Sakugo (Takano Mondai ni Tsuite)” 臺灣ニ關スル立法ノ錯誤(附高野問題) [Taiwan’s Legislative Error (附高野問題)], *Kokka Gakkai Zasshi* 国家学会雑誌, vol. 14, no. 172 (June 1901), 4.

58 *Ibid.*, 5.

At first, military administration was established for Sakhalin, but in 1907, the Sakhalin Agency was established and placed in charge of governance. The “Act on Laws and Regulations to Be Enforced in Sakhalin” (Act No. 25 of 1908) stipulated that “those laws that need to be enforced in whole or in part in Sakhalin shall be made by Imperial Ordinance, but special provisions may be made by Imperial Ordinance with respect to the matters listed above.” Examples of such matters were those related to indigenous persons; the powers of administrative offices or public offices; legal periods; and counsel, litigation attorneys, or successors appointed or selected by the court or the presiding judge. Unlike Taiwan, the head of the Sakhalin Agency was not given the authority to issue ordinances. It has been pointed out that the background to this is that Sakhalin “was not recognized as being *gaichi* in nature.”⁵⁹ This is thought to be due to the fact that, from the beginning, 90% of the inhabitants (10,000 people) were Japanese (from the *naichi*), while there were only a small number of Ainu and other local people, and Russians.⁶⁰

Partly because of these circumstances, Sakhalin was completely incorporated into the *naichi* on April 1, 1943.

3.4 *Korea*

3.4.1 Background to the Korean Annexation⁶¹

One issue in Japanese diplomacy in the Meiji Era, or an issue of concern between Japan and Qing and between Japan and Russia, was the handling of

59 Legal Affairs Division, Treaty Bureau, Ministry of Foreign Affairs, *Nihon Tōchika no Karafuto (Gaichi Hōseishi Dai 13 Bu)* 日本統治下の樺太(外地法制誌第 13 部) [Sakhalin under Japanese Rule (Journal of Foreign Legislation Part 13)] (Tokyo: Bunsei Shoin, 1990 [reprint]), 53.

60 *Ibid.*, 5. According to the same book, by the end of 1941, the number of domestic Japanese and Koreans had increased to over 400,000, while the number of other residents was less than 1,000. In addition, the population density was about one-sixth that of the South Sea Islands (6–7).

61 With regard to the annexation of Korea, as symbolized by the stipulation of Article 2 in The Treaty on Basic Relations between Japan and the Republic of Korea, which declares that “It is confirmed that all treaties or agreements concluded between the Empire of Japan and the Empire of Korea on or before August 22, 1910 are already null and void,” the debate over its legality and illegality under international law has not been resolved between Japan and the Republic of Korea, and between Japan and North Korea. In addition, controversy continues at the level of historical materials over the signature of Park Jae-sun, Minister of External Affairs (Foreign Affairs) of the Korean Empire, and the circumstances leading up to the signing of the Second Japan-Korea Agreement (Eulsa Treaty). However, regardless of the perceptions of the parties concerned, this chapter will not go into discussion on the legality or illegality of the annexation of Korea itself, based

Korea. Without going into the significance and background of this matter,⁶² the author would like to briefly summarize Korea’s status at the time under international law. Article 1 of the Sino-Japanese Treaty of Amity of July 29, 1871 stipulated non-aggression toward “land belonging to” Qing with Korea in mind. From this article, it can be inferred that Qing regarded Korea at that time as not a fully sovereign State, but Article 1 of the Japan-Korea Treaty of Amity of February 1876 stipulated that “[Korea], being a sovereign and independent State, enjoys the same equal rights as does Japan,” with the premise that Japan recognized Korea as an independent sovereign State or, in other words, had the expectation of its independence from Qing.

However, Korea itself did not believe that this established a sovereign State relationship, at least in terms of its relations with Japan, but rather recognized it as a restoration of the old relations between the two. Thus, there was a gap in understanding between Japan and Korea.⁶³ Through the subsequent Treaty of Peace, Amity, Commerce and Navigation between the United States and Korea (1882), Western countries opened their legations in Hanseong (present-day Seoul). Based on these facts, it can be assumed that other countries regarded Korea as a State in the sense according to international law. However, for Qing, Korea continued to be a vassal State but retained a relationship as an “autonomous vassal State” whereby its autonomy in the handling of ordinary political affairs was recognized.⁶⁴

Subsequently, with the Sino-Japanese Peace Treaty (1895) eliminating traditional Qing-Korean relations and the Treaty of Portsmouth (1905) establishing Japan’s supremacy over Russia in Korea, Japan made Korea a protectorate. Article 1 of the Japan-Korea Protocol of February 1904 stipulated that

on the fact that the Potsdam Declaration and the San Francisco Peace Treaty were drafted on the premise that Japan actually ruled Korea.

62 As a matter of course, there are countless previous studies dealing with the annexation of Korea. Examples of research that analyzed the annexation in terms of the resonance between Qing-Korean relations with Korea as an “autonomous Vassal State” and international relations include Okamoto Takashi 岡本隆司, *Zokkoku to Jishu no Aida – Kindai Shinkan Kankei to Higashi Ajia no Meiu* 属国と自主のあいだ—近代清韓関係と東アジアの命運 [Between Vassal State and Independence: Modern Qing-Korean Relations and the Fate of East Asia] (Aichi: Nagoya University Press, 2004); and Okamoto Takashi 岡本隆司, *Sekai no Naka no Nisshinkan Kankeishi – Kōrin to Zokkoku, Jishu to Dokuritsu* 世界のなかの日清韓関係史—交隣と属国、自主と独立 [History of Japan-China-Korea Relations in the World: Neighborhood and Vassal State, Autonomy and Independence] (Tokyo: Kodansha, 2008).

63 Okamoto, *Sekai no Naka no Nisshinkan Kankeishi* 世界のなかの日清韓関係史 [History of Japan-China-Korea Relations in the World] (note 62), 67–68.

64 *Ibid.*

“the Imperial Government of Korea shall place full confidence in the Imperial Government of Japan, and adopt the advice of the latter in regard to improvements in administration.” Furthermore, the first Japan-Korea Agreement of August of the same year allowed the acceptance of financial advisors and diplomatic advisers, and the second Japan-Korea Agreement of November 1905 stripped Korea of its diplomatic rights. Needless to say, behind this series of events was the support and approval of the United Kingdom and the United States through the Anglo-Japanese Alliance (1902) and the Katsura-Taft Agreement (1905). The third Japan-Korea Agreement of July 1907 further expanded the involvement of Japanese people in all aspects of Korea’s domestic affairs, and the financial advisory and diplomatic advisory system based on the first Japan-Korea Agreement was abolished.

On August 22, 1910, the Japan-Korea Annexation Treaty was signed (promulgated on August 29). Article 1 stipulated that “His Majesty the Emperor of Korea makes the complete and permanent cession to His Majesty the Emperor of Japan of all rights of sovereignty over the whole of Korea,” and Article 2 stipulated that “His Majesty the Emperor of Japan accepts the cession mentioned in the preceding article and consents to the complete annexation of Korea to the Empire of Japan.”

3.4.2 Structure of the Korea Governance Act

The question of what kind of legislation should be used to govern Korea was also an issue. In the Cabinet decision of June 3, prior to the signing of the Japan-Korea Annexation Treaty, entitled “Administrative Policy for Korea after the Annexation,” it was decided that “the Constitution shall not be enforced in Korea for the moment and Korea shall be ruled based on the Emperor’s prerogative”; “The Governor-General shall be directly subordinate to the Emperor and have the power to preside over all political affairs in Korea” and “The Governor-General shall be empowered to issue orders on legal matters in accordance with the authority (omitted).”⁶⁵ In other words, the principle of governance over Korea was based on prerogative.⁶⁶ One month later, however,

65 Unno Fukuju 海野福寿, *Kankoku Heigōshi no Kenkyū* 韓国併合史の研究 [Research on the History of the Annexation of Korea] (Tokyo: Iwanami Shoten, 2000), 351–352. Legal Affairs Division, Treaty Bureau, Ministry of Foreign Affairs, *Korea in the Japanese Colonial Period (Journal of Foreign Legislation Part 9)* (Tokyo: Bunsei Shoin, 1990 [reprint]), 12.

66 Ogawara Hiroyuki 小川原宏幸, *Kankoku Heigō to Chōsen eno Kenpō Sikō Mondai* 韓国併合と朝鮮への憲法施行問題——朝鮮における植民地法制度の形成過程 [The issue of constitution enforcement to Korea on Korean annexation], *Nihon Shokuminchi Kenkyū* 日本植民地研究, no. 17 (2005), 19.

it was decided in an ambiguous way that the Meiji Constitution would be promulgated in Korea, but it would not be applied in practice. This is considered to stem from an effort to ensure consistency with the official view that the Meiji Constitution was interpreted as being applied to Taiwan.⁶⁷

In response to this, Article 1 of the “Act on Laws and Regulations to be Enforced in Korea”⁶⁸ stipulated that “matters in Korea for which laws are required shall be prescribed by ordinance of the Governor-General of Korea,” and such ordinances were collectively referred to as “Regulations” (Article 6). Article 1 is the same as the aforementioned Act No. 63. However, while Act No. 63 was revised by Act No. 3 of 1922 and shifted to *naichi* extensionism, Korea continued to be ruled by the Emperor’s prerogative until the end. According to Unno, there was an ambiguous handling of the matter as, “According to the ‘Interpretation,’ the Meiji Constitution was enforced in Korea, but it was not enforced in reality, and the title of Korean rule is based on the prerogative of the Emperor, not the Meiji Constitution.”⁶⁹

3.5 *South Sea Islands*

The South Sea Islands (the Marianas, Caroline and Marshall Islands) became subject to the League of Nations mandate system as a result of World War I, and was placed under the administration of Japan by the “Class C Mandate Clause Imperial Mandate Clause for the South Sea Islands” (Ministry of Foreign Affairs Notification No. 16 of April 29, 1922) of 1921. Article 22 (6) of the Covenant of the League of Nations stated that it “can be best administered under the laws of the Mandatory as integral portions of its territory.” Therefore, at first glance, it can be immediately determined that it is a territory to which the sovereignty of the mandatory extends. However, the Cabinet Decision entitled “Decision on Matters Concerning the Governance of the South Sea Islands”⁷⁰ stated with regard to the South Sea Islands, which were governed by the South Sea Islands Agency under the Cabinet, “It shall be interpreted that, as in the case of the Kwantung Leased Territory, the Meiji Constitution shall be exercised” (Paragraph 6). Even before addressing the issue of whether or not to apply the Meiji Constitution, there were conflicting theories regarding the sovereignty over the mandated territories. According to the summary in Taoka Ryōichi’s *The Essence of the Mandate*, there were the “League of Nations

67 *Ibid.*, 22–23.

68 JACAR Ref. A01200064500 (last accessed on September 25, 2021).

69 Unno, *supra* note 65, 353.

70 “Decision on matters concerning the governance of the South Sea Islands” (JACAR Ref. A01200193500 [last accessed on September 25, 2021]).

sovereignty theory,” “mandate sovereignty theory,” “major power sovereignty theory,” “German sovereignty theory,” and “mandatory sovereignty theory.”⁷¹

Although it is not possible to go into the details of each theory here, the author would like to summarize the understanding of the Japanese Government by focusing on the fact that Japan continued its mandate over the South Sea Islands even after its withdrawal from the League of Nations (notification of March 27, 1933, effective on the same day in 1935). Immediately before the notice of withdrawal, the Japanese Government compiled the “Cabinet Decision on the Policy Determination Method of the Imperial Government Concerning the Consequences of the South Sea Islands Mandate after the Empire’s Withdrawal from the League of Nations.”⁷² The sovereignty of the mandated territories was determined by the Treaty of Versailles, as “Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions,” (Article 119) expressing the understanding that the territories belonged to the Principal Allied and Associated Powers, including Japan. Therefore, withdrawal from the League of Nations would not affect Japan’s sovereignty over the mandated territories in any way. Based on this premise, Minister for Foreign Affairs Uchida Kōsai (Yasuya) stated, “Since our mandate is a Class C Mandate, we can carry out all forms of administration as part of our territory. Therefore, there is absolutely no need to return it to the League, even after our withdrawal therefrom. Simply submitting an annual report shall suffice.”⁷³ It was not always clear whether “territory” under the Covenant of the League of Nations and territory under domestic law (Meiji Constitution) were considered to be the same thing. This was because, “the view is taken that laws are not implemented in the South Sea Islands, but on the other hand, there is no delegation of law and even matters which should be stipulated by law are stipulated by ordinance,” so the view that “contrary to the clear fact that the Imperial Constitution extends to Korea, Taiwan, and Sakhalin, the situation of the South Sea Islands is completely different; that is, the South Sea Islands is not recognized as territory under the application of the Meiji Constitution,⁷⁴ also exists.”⁷⁵ In addition, Tōmatsu Haruo, after analyzing the discussions at

71 Taoka Ryōichi 田岡良一, *Inin Tōchi no Honshitsu 委任統治の本質* [The Essence of the Mandate] (Tokyo: Yuhikaku, 1941), 155–259.

72 Legal Division, Treaty Bureau, Ministry of Foreign Affairs, *Mandatory Territory of the South Sea Islands, Part 1* (*Journal of Foreign Legislation Part 10*) (Bunsei Shoin, 1990 [reprint]), 62–64.

73 *Ibid.*, 65.

74 *Ibid.*, 58–59.

75 As an example of evaluating this treatment as “custom,” see Sakai Kazuomi 酒井一臣, “*Bunmei no Shimei*’ to Shite no Nihon no Nanyō Guntō Inin Tōchi – Kajō Tōchi no Haikei”

the Permanent Mandate Committee (PMC), stated that “to whom sovereignty of the mandate belonged was ultimately inconclusive.”⁷⁶

Furthermore, the situation was unique in that the residents of the South Sea Islands (islanders) were not granted Japanese nationality. As a background to this, a resolution at the Council of the League of Nations was passed in April 1923 to the effect that native inhabitants of Class C Mandates could voluntarily naturalize, but that they would not necessarily acquire the nationality of the mandatory.⁷⁷ In the report presented by the chairman at the first session of the PMC in 1922, it was stated that “the mandate system was established because it was recognized that there was a strict distinction between higher civilizations and mandated territories, and if the nationalities of the two are equated, there would essentially be no distinction made between them.”⁷⁸ Thus, the Japanese Government simply referred to the inhabitants of the South Sea Islands as “islanders” and distinguished them from “subjects.”

In this regard, as in the case of the Kwantung Leased Territory, there were statements that cited, as evidence, the fact that the mandated territories were “not pure territories of Japan under international law”⁷⁹ or that they “were quasi-territories.”⁸⁰ Certainly, views were divided on whether the sovereignty of a mandated territory had been completely transferred to the mandatory, but the debate at the League of Nations was only about whether or not to grant nationality based on the difference in the degree of civilization, not the difference in the legal status of the area in question. If one considers that the intention of this discussion was not to prohibit the granting of nationality, it is reasonable to assume that it was only a policy measure. In addition, in the Common Law of 1918 (Act No. 39 of 1918), Paragraph 1, Article 1 and others were revised by Act No. 25 of 1923 five years later to add the South Sea Islands.⁸¹

『文明の使命』としての日本の南洋群島委任統治—過剰統治の背景 [Japan's Mandatory Rule of the South Sea Islands as a 'Mission of Civilization': The Background of Overrule], Institute of Social Science, Chukyo University, Edited by Asano Toyomi 浅野豊美 (ed.), *Nanyō Guntō to Teikoku Kokusai Chitsujo (Shakaikagaku Kenkyūsho Sōsho 21)* 南洋群島と帝国・国際秩序 (社会科学研究所叢書 21) (Aichi[Nagoya?]: Chukyō University Social Science Research Institute, 2007), 82.

76 Tōmatsu Haruo 等松春夫, *Nihon Teikoku to Inin Tōchi – Nanyō Shotō o Meguru Kokusai Seiji 1914–1947* 日本帝国と委任統治—南洋群島をめぐる国際政治 1914–1947 [The Japanese Empire and the Mandate: International Politics of the South Sea Islands 1914–1947] (Aichi: Nagoya University Press, 2011), 32.

77 Ministry of Foreign Affairs, *supra* note 72, 59.

78 *Supra* note 39, 53–54.

79 *Ibid.*, 52–53.

80 *Ibid.*, 132.

81 JACAR Ref. A03021426100 (last accessed on September 25, 2021).

From this, it is appropriate to assume that even with the islanders of the South Sea Islands who did not have nationality, conflict of law between the laws of *naichi* and the laws of *gaichi* could be expected, as will be described below.

4 Systematization of the Laws of *Gaichi* and Their Problems

4.1 Questions Raised by Minobe Tatsukichi

The first call for systematic study of the laws of *gaichi* or colonial law (hereinafter “colonial law”) was probably Minobe Tatsukichi’s report⁸² at the Jurisprudence Research Seminar on May 18, 1911, and his essay⁸³ based on said report. Minobe points out, as evidence of the necessity of colonial law research, that “the laws applied to people in the *naichi* and to indigenous populations are often different ... that is to say, in a sense, the nationality principle is applied.”⁸⁴ He points out that, as a result, “a relationship similar to private international law has formed between the laws of *naichi* and colonial law, as well as between indigenous laws and the laws of *naichi*, and there is a need to alleviate potential conflicts between them according to certain rules.”⁸⁵ Minobe then defines “the legal concept of a colony” as “a part of the territory of the *naichi*, in principle, whose laws differ from those of other places in the *naichi*” or “land within the territory of a country to which, in principle, a jurisdiction other than that of the *naichi* applies.” The term *hōiki*, a Japanese translation of the German *Rechtsgebiet* (jurisdiction), is said to have been established by Yamada Saburō, a scholar of private international law.⁸⁶ Minobe made the point that, while “*hōiki* (*Rechtsgebiet*; jurisdiction) and *ryōiki* (*Staatsgebiet*; domain) are usually compatible,”⁸⁷ further research of colonial law had become necessary due to

82 For an overview of the report given that day, see “Articles of the Law Research Society,” *Hōgaku Kyōkai Zasshi*, vol. 29, no. 11 (November 1911), 162–168.

83 Minobe Tatsukichi 美濃部達吉, *Nihon Shokuminchihō ni Tsuite* (Meiji 44 Nen 5 Gatsu 18 Nichi Hōri Kenkyūkai ni Oite) 日本殖民地法に就て (明治44年5月18日法理研究会に於て) [Japanese Colonial Law (at the Jurisprudence Research Seminar on May 18, 1911)], *Kokka Gakkai Zasshi* 国家学会雑誌, vol. 26, no. 1 (January 1912), 89–108.

84 *Ibid.*, 91.

85 *Ibid.*, 92.

86 Ishikawa Kenji 石川健治, ‘Keijō’ no Kiyomiya Shirō 『京城』の清宮四郎 [Kiyomiya Shirō of ‘Keijō’], Sakai Tetsuya 酒井哲哉 and Matsuda Toshihiko 松田利彦 (eds.), *Teikoku Nihon to Shokuminchi Daigaku* 帝国日本と植民地大学 (Tokyo: Yumani Shobō, 2014), 322. The above work also notes that Minobe’s understanding of the colonies was informed by Hermann Edler von Hoffmann’s *Deutsches Kolonialrecht*.

87 Minobe, *supra* note 83, 99. As pointed out by Ishikawa in *supra* note 86, the *ryōiki* here refers to the *ryōiki* of Japan.

the acquisition of Korea, Taiwan, Sakhalin, and the Kwantung Leased Territory and the resulting creation of multiple *hōiki* or jurisdictions within Japan’s *ryōiki* or domain.

The emergence of jurisdictions that differed from that of the *naichi*, i.e., a different jurisdiction, was semi-inevitable. This was because the *gaichi* of Japan were acquired as part of a State or as its whole via treaty, rather than by occupation of *terra nullius*. They were thus already territories, with inhabitants, under some form of domestic legal system. For this reason, it was necessary to respect the existing legal system and longstanding customs. In addition, in the cases of say Taiwan or Korea, since there were forces opposing their cession and annexation, it was necessary to have harsh laws for maintaining public order, such as the “Ordinance for the Punishment of Bandits”⁸⁸ in Taiwan (Ordinance No. 24 of 1898) and the “Ordinance for the Summary Judgment of Criminal Matters in Korea”⁸⁹ (Imperial Ordinance No. 240 of 1909), which existed before Japan’s annexation of Korea. The application of these laws was geographically limited to Taiwan or Korea. In effect, however, it was inconceivable that they would be applied to the Japanese (from the *naichi*), and were effectively only applied to the Taiwanese and to Koreans. In this way, elements of the nationality principle accompanied Japan’s colonial law (*gaichi* law), both formally and practically, until the end.

4.2 *Minobe’s Theory on Constitutional Law and Gaichi*

At the beginning of the Minobe-Tachi debate, Tachi understood *ryōdoken* (territorial rights) to be “real rights under international law that consider a certain region as an object, and that include the function of a State exercising its own inherent sovereignty, in other words its *tōchiken* (rights of sovereignty), within the scope of the land, or allowing another State to exercise sovereignty on its behalf for a specific period of time (in the case certain types of leases, etc.)”⁹⁰ In response, Minobe argued that it was clear that “*ryōdoken* have a ‘public’ relevance while *dominium* has an exclusively ‘private’ relevance.”⁹¹ As background to this, Minobe had revered the intent in German *Staatsrecht* to break away from the medieval patrimonial State, which could not distinguish between public and private, in other words, the intent to form a nation-state.⁹²

88 JACAR Ref. A01200876000.

89 JACAR Ref. A03020810800.

90 *Supra* note 18, 4 (note 2).

91 Minobe Tatsukichi 美濃部達吉, “*Ryōdoken no Hōritsujō no Seishitsu o Ronzu*” 領土權ノ法律上ノ性質ヲ論ス [Discussing the Legal Nature of Territorial Rights], *Hōgakukyōkai Zasshi* 法学協會雜誌, vol. 29, no. 2 (February 1911), 16.

92 For a detailed outline of the controversy, see Ishikawa, *supra* note 32, 20–25.

Subsequently, however, Minobe changed his position and began to regard *ryōdoken* as real rights as well.⁹³ The logical consequence of this, according to Ishikawa, was that,

Under Minobe's formerly held theory, the annexation of Korea would have plunged the Japanese Empire into a crisis of identity, and depending on the circumstance, the previous Meiji State would have ended and a new 'Empire' would have to be established on August 29, 1910. However, under the theory newly advocated by Minobe, *ryōdoken* as real rights were simply transferred from the Korean Empire to the Japanese Empire, and the identity of the Meiji State would not be impaired. This amounts to no less than a theoretical shift towards Taisho 'Imperialism,' which envisioned the further acquisition of new territories in future.⁹⁴

This is because, by defining territorial sovereignty as having both elements of possession and control, and positioning them as one aspect of *tōchiken*, the acquisition (possession) of any *gaichi* and the control (governance) of any acquired *gaichi* would be free from the Meiji Constitution. Whether or not to apply the Meiji Constitution to *gaichi* (i.e., to possess and govern them in accordance with the provisions of the Meiji Constitution) would be a matter of policy, not a matter of jurisprudence.

Minobe's description of colonies (colonial law) in the *Compendium of the Constitution* is largely in line with the views he presented in his report at the Jurisprudence Research Seminar. He again states that a colony is a different jurisdiction, and even within the text of the Meiji Constitution, except for "laws concerning the supreme body of government which by nature must be common throughout the country,"⁹⁵ the Constitution itself can differ. Minobe was of the opinion that, as a result, the incorporation of a colony into the *nai-chi* was no longer a constitutional issue. Rather it would be sufficient to amend the laws in force in the colony to have the same content as laws in the *naichi*.⁹⁶

93 On the other hand, Tachi did not change his position on the "real rights theory" even after theories such as the "spatial theory" and the "authority theory" were introduced. Tachi Sakutarō, "The Concept of a State under International Law and the Territory of a State," *Journal of International Law and Diplomacy*, vol. 28, no. 3 (1929), 1–22.

94 Ishikawa, *supra* note 32, 25.

95 Minobe Tatsukichi 美濃部達吉, *Kenpō Satsuyō (Kaitei Dai 5 Han)* 憲法撮要(改訂第5版) [Constitutional Law (Revised 5th Edition)] (Tokyo: Yūhikaku, 1932). Discussion here is based on the reprint edition of the same book (Hiroshima: Kure PASS Publishing, 2019), 142.

96 *Ibid.*, 154.

5 Conclusion

The problems surrounding the laws of *gaichi* were subsequently taken up by scholars such as Kiyomiya Shirō of Keijo Imperial University and Nakamura Tetsu of Taipei Imperial University. However, with the loss of all *gaichi* on August 15, 1945, the subjects and significance of such studies had disappeared. As mentioned at the beginning of this chapter, the territory of Japan is rarely examined from the perspective of constitutional scholarship today. International legal scholarship also considers this issue within the context of the territorial issues that Japan is facing.

This chapter attempted to summarize how Japan as a colonial empire was formed by reviewing the formation of the laws of *gaichi* with a focus on the debate over the process of concluding treaties for acquiring *gaichi* and over the application of the constitution to *gaichi*. As Hatano Sumio points out, Japan's colonial rule, unlike that of European countries, targeted areas close to Japan, including Taiwan and the Korean Peninsula.⁹⁷ Since it opened itself up to the world, Japan had simultaneously undertaken modernization (acceptance of international law) and imperialization (the acquisition of colonies based on international law) in East Asia. Needless to say, the colonization of areas controlled by China (Qing), including not only Taiwan but also the Korean Peninsula, marked the beginning of various so-called “issues concerning the recognition of history” that continue to this day.

Setting that point aside, while the acquisition of colonies and what kind of legislation to promulgate there were theoretical issues, the issue of the application of the Meiji Constitution also involved political aspects, such as parliamentary strategy and factional strife within the Meiji Government. It is also important to note that under Japanese colonial rule, despite slogans such as “universal brotherhood” and “Japan and Korea as one,” the colonies, with the exception of Sakhalin, were considered to be different jurisdictions until the end, and no progress was made in incorporating them into the *naichi*. On March 26, 1945, at the end of World War II, the House of Representatives adopted the “Petition for the Abolition of the Term *Gaichi*.”⁹⁸ However, this

97 Hatano Sumio 波多野澄雄, *Chōyōkō Mondai towa Nanika – Chōsenjin Rōmu Dōin no Jittai to Nikkan Tairitsu* 「徴用工」問題とは何か—朝鮮人労働動員の実態と日韓対立 [What is the ‘Requisitioned Workers’ Issue?: The Reality of Korean Labor Mobilization and the Japan-Korea Conflict] (Tokyo: Chūōkōron Shinsha, 2020), 3.

98 Mizuno Naoki 水野直樹, “Senjiki no Shokuminchi Shihai to ‘Naigaichi Gyōsei Ichigenka’ 戦時期の植民地支配と『内外地行政一元化』 [Colonial Rule in Wartime and ‘Unification of Domestic and Foreign Administrations’], *Journal of Humanistic Science*, vol. 79 (1997), 77–78.

was not done from the viewpoint of achieving equality between domestic and foreign people, but from the perspective of the war effort, and it was criticized for the fact that “this unification only served to strengthen colonial rule in that it led to stronger calls to reinforce and deepen the Imperial subjugation of the people of the *gaichi*.”⁹⁹ Looking at this point from the perspective of *gaichi* legislation, Japan had to continue to rule and govern on the basis of the nationality principle based on disparity until the end, and it must be said that the laws of *gaichi* were potentially suppressing human rights (although the guarantee of human rights even in *naichi* during the prewar period was also generally restrictive).

There has been a certain amount of research on (the history of) *gaichi* legislation up to the present day, not only in terms of history but also in the context of research on the “Empire” (research on colonies) and constitutional law in relation to Japan. Much of this work has essentially been conducted from a domestic perspective, and there are relatively few systematic studies conducted with international relations in mind, like that of Asano Toyomi. In addition, in relation to the degree of acceptance of international law in Japan at that time, even fewer have examined *gaichi* legislation. As mentioned at the beginning of this chapter, there were already Western settlements in the *gaichi* of Japan, especially Taiwan and Korea, and it was necessary for Japan to negotiate treaties with the Western powers before engaging in its own colonization. Modern international law, which allowed colonial rule, supported the unequal (treaty) system of securing the economic interests of Western Powers and their nationals who maintained a presence there. How did Japan, having accepted such modern international law and worked to revise the unequal treaties it had concluded on the one hand, utilize the logic of modern international law in the development of its own interests, including the acquisition of “colonies,” and engage in negotiations with the States concerned on the other? Due to the limited space available here, the author wishes to further consider this point in future research.

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99 *Ibid.*, 98.

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