

# *Manchukuo's Contested Sovereignty: Legal Activism, Rights Consciousness, and Civil Resistance in a "Puppet State"*

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## **Abstract**

Though often viewed as a mere stepping stone in Japan's gradual early-twentieth-century military and economic encroachment on China, the "puppet state" of Manchukuo was also paradoxically characterized by a high degree of legitimizing legal rhetoric. While its political realities generally failed to reflect these idealized foundations, the latter did provide significant space for legal and other forms of civil society resistance, including by Chinese legal professionals. The germinal resistance movement of these actors demonstrates a complex relationship between the concepts of sovereignty, law, and national affiliation, both in the context of state repression and in the overlapping demands of competing identities. Though various theoretical understandings of resistance help to illuminate this activism, it is perhaps best seen as a radical challenge to the regime's power to define the norms and exceptions of political and social life.

**Keywords:** Manchukuo, Chinese legal history, civil rights, Japanese Empire, social movements, civil society, sovereignty, East Asia, modernity

## 1. INTRODUCTION

The nominally independent country of Manchukuo (1931–45), carved out from what had been and then again became Northeast China, was from its outset often referred to by outsiders as the mere "puppet state" of an expanding Japanese Empire—yet it was from the beginning also immersed in legitimizing legal rhetoric.<sup>1</sup> The state's founding was secured through military violence over the course of 1931–32, for the most part one-sidedly

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1. See e.g. Duara (2003), p. 99 (asking "Why was Manchukuo established as an independent, civilian nation-state, however formal, rather than as a colonial and military state?"); see also Dubois (2010) and Dubois (2008). Dubois's work is a particularly valuable resource on the topic of the Manchukuo legal system.

perpetrated by Japan's continental Kanto Army against the local Chinese warlord regime of Zhang Xueliang. And yet, rather than simply annexing the vast Manchurian territory that Zhang had controlled, the Kanto Army (and other factions within the Japanese Empire) arranged the establishment of a new, "independent" regime, in the name of the region's "30 million people."

In February 1932, deposed Chinese Emperor Pu Yi declared that, henceforth, the large swathe of north-eastern Chinese territory would become the independent state of Manchukuo as an expression of the "will" of these 30 million; at the same time, he issued an Organic Law (*zuzhifa*), which outlined the basic contours of the state's new government. Appended to the latter was, strikingly, a 14-clause statute outlining the basic rights to be enjoyed by all citizens: the "People's Rights Protection Law."<sup>2</sup> From December 1931 through October 1932, the League of Nations conducted an investigation into the question of Manchukuoan sovereignty, under the auspices of a team of diplomats referred to as the Lytton Commission. This team, and then the League itself, found little basis for Japan's contention that Manchukuo's founding was the expression of authentic, autonomous sentiment. Japan promptly resigned from the League and, from that point forth, there prevailed two competing narratives about Manchukuo—the Japanese "puppet" versus the progressive-but-Asianist, modernizing rule-of-law state.

This particular divergence iterated a broader trend whereby the Manchurian region, a "borderland,"<sup>3</sup> had always proved a breeding ground for heterogeneous narratives. When the new state was founded, there had already for three or four decades prevailed among some Japanese policy-makers' visions of a new Manchuria, remade by Japanese arms and capital.<sup>4</sup> In that span of time, the region or important parts of it were variously called Manchuria,<sup>5</sup> the Three Northeastern Provinces, Guandong,<sup>6</sup> Manchukuo/Manchoukuo,<sup>7</sup> the Great Manchurian Empire,<sup>8</sup> "Eastern Paradise" or "Paradise of the Kingly Way,"<sup>9</sup> "False" Manchukuo,<sup>10</sup> "Chinese Tartary," and even "Koryo" or "Gaoli," an anachronistic reference

2. *Renquan baozhang fa*. The term "*renquan*" is today most commonly translated as "human rights," but there was no such standard translation for the term during the period. Some sources, including Manchukuo government publications, have translated the law in question as the "civil rights protection law." See *Manchukuo: The Founding of the New State in Manchuria* (1933), p. 11. Given that the concepts of "human" and "civil" rights had not taken on their modern profiles, the translation "people's rights" seems to better capture the term's ambiguity.

3. Cf. e.g. Dan & Suleski (2005), p. 1.

4. The latter measure would be from Japan's victory in the Russo-Japanese war in 1905, and the founding of the colonially minded South Manchuria Railway Corporation (*Mantetsu*) in 1906. The former count would begin with the first extension of Japanese sovereignty into China's Northeast provinces, following the 1895 Treaty of Shimonoseki which concluded the Sino-Japanese war. "Manchukuo" did not exist until 1932—but, as the ambition or narrative of a Japanized or "pan-Asian" Manchuria, it could be argued to have a longer history.

5. Consistent use of the term *Manzhou* (generally translated as Manchuria) to describe the region has been attested to eighteenth-century official maps created under the Qing Dynasty's Manchu rulers. Elliott (2000).

6. A term meaning "East of the Pass," and referring to Manchuria east of Hebei Province's Shanhai Pass. The same term, in Japanese pronunciation, is the "*Kanto*" of the aforementioned Kanto Army.

7. Officially between 1932 and 1934, and informally afterwards. Notably, the English transliteration of 滿洲國 (modern pinyin, *Manzhouguo*) was never standardized (in keeping with the policy of non-recognition of the state by Western powers), and often a single publication would even alternate between these two versions.

8. After 1934.

9. Both prominent and oft-repeated propaganda tropes of the Manchukuoan authorities. See e.g. *A General Outline of Manchoukuo* (1932).

10. PRC scholarship on Manchukuo tends to uniformly refer to it in this manner; see e.g. Xie (1995).

to the respective Japanese and Mandarin pronunciations of the ancient proto-Korean state of Goguryeo.<sup>11</sup>

This multivalence has never really abated, as memoirs and analyses of Manchukuo retain the power to arouse a wide spectrum of affect. In China, the evocative term “national humiliation” (*guochi*) is used as official shorthand for Manchukuo’s establishment and the subsequent Japanese incursions into China, while a recent Japanese work on Manchukuo, “Chimera,”<sup>12</sup> manifests the ambiguous and pensive treatment that the topic is often afforded there in both academics and literature.<sup>13</sup> Even at the time, one of the state’s most prominent literature and culture journals, *Qilin*, was named after an East Asian mythological beast that, like the chimera, combined disparate and ill-matched elements into an other-worldly mien (albeit one with positive, Confucian, and vaguely messianist connotations). Pu Yi himself was given the role of Chief Executive, although, a mere two years later, he was to formally resume imperial status as “Emperor,” with little attendant practical change to the structure of government. As Jeffrey Wasserstrom writes, “[t]he instability of Pu Yi’s title illustrates ... [how] this state’s creators and backers were intently concerned with making it seem somehow both thoroughly modern and deeply rooted in tradition.”<sup>14</sup>

Manchukuo’s various names and identities both reflected and contributed to the various narratives of power, identity, and “authenticity” or legitimacy that were mobilized by its authorities in the attempt to construct a new state identity and sense of corporate solidarity. Seeking at least rhetorically to accommodate the many heterogeneous elements that went into the formation of the polity, the new regime turned to grandiose narratives of a pluralistic Asian modernity. Prasenjit Duara, in his foundational study of Manchukuo *Sovereignty and Authenticity*, has argued that these ideological and rhetorical bases of the regime did not function solely as hypocritical propaganda, but also drew upon and furthered various forms of intellectual and affective engagement among various groups and actors. He later suggests that, though Manchukuo was quite clearly a Japanese imperialist project, Japan’s creation of it as a “legally sovereign nation-state ... with political and economic structures that resembled [its] own,”<sup>15</sup> rather than as a colony or occupied territory, marked a transition to a new form of ideology-based imperialism that was to form the basic dynamic of Cold War geopolitics.

In his scholarship on the Manchukuo legal system and its significance, Thomas David Dubois has insightfully developed the question of how the “intentional compromises built into the conception of Manchukuo’s sovereignty [vis-à-vis Japan]” introduced “institutionalized exception[s]” into its law and politics.<sup>16</sup> Drawing on the work of Antony Anghie and others, Dubois then argues that the legal/territorial “anomaly” of Manchukuo’s quasi-independent political system served as one of various “ways of euphemizing and thus perpetuating systems of dependence in a world that formally was no longer willing to

11. Duara, *supra* note 1, p. 99.

12. Yamamuro (1993).

13. Notable recent examples of the latter to achieve bestseller status include director Satoshi Kon’s award-winning 2001 animated film *Millennium Actress* and novelist Haruki Murakami’s *The Wind-up Bird Chronicle* and *1Q84*, all of which broadly portray Manchukuo as a sort of liminal territory in equal parts romantic, traumatic, mysterious, quixotic, and chimerical.

14. Wasserstrom (2005).

15. Duara (2006).

16. Dubois, *supra* note 1.

tolerate imperialism.”<sup>17</sup> Seen in this light, Manchukuo’s quasi-sovereign status was less a product of ideological imperatives than the latter are occasionally useful vehicles for establishing unequal and neocolonial relationships. For Dubois, the fact that “such international systems continue to transcend ideology should ... force us to confront the limited significance of ideologies such as pan-Asianism ... to the real work of empire.”<sup>18</sup> These modern imperial projects, ideological justifications aside, are characterized by their production of “inauthentic sovereignty.”

Yet, as Duara writes in *Rescuing History from the Nation*,<sup>19</sup> national narratives, even when they are far more “authentic” than that of the local Manchukuo identity that its authorities invented and sought to inculcate, are frequently situated against transnational visions. The latter can both further and contradict or complicate the former, and “the manner in which territorial nationalism negotiates its relations with the wider identification takes many forms.”<sup>20</sup> The establishment of Manchukuo was in many ways the culmination of a certain strain of Japanese imperial ambition which sought to discover its “legitimation in the ultimate achievement of a transcendent order”<sup>21</sup> constituting an alternative, Asian modernity and this strategy for legitimation led to an opening for certain dynamics of resistance and dissent in Manchukuo, which nonetheless grew less possible as Japan’s war with China grew increasingly open and total.

Along these lines, the Austrian legal scholar Leo Gross suggested in a now very seldom read 1934 analysis of Manchukuo’s legal system<sup>22</sup> that the ideological foundations of the state could constitute the basis of a “right of resistance” (*Widerstandsrecht*) that might be used to check or call into question the regime’s authority.<sup>23</sup> Expanding on this suggestion, I argue that, while the Japanese military always retained the power to decide upon the “state of exception,”<sup>24</sup> and thus to suppress any movements or individuals which it viewed as inimical to its aims, its effective exercise of this position of sovereignty was nonetheless at times compromised by its own modernist, pan-Asianist “political theology,”<sup>25</sup> and thus relied to a degree on the forbearance from open resistance of the people in whose name the state claimed to derive its legitimacy.<sup>26</sup> These people, in turn, made surprisingly frequent use of both the legal forms and normative ideals of the state in order to challenge its excesses and abuses.

To some extent, these tactics might be seen as resembling the kind of “redemptive constitutionalism” described by Robert Cover in the context of the US anti-slavery and civil rights movements, in which civil society actors work to vindicate the rights supposedly

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17. *Ibid.* (citing Anghie, 2002).

18. *Ibid.*

19. Duara (1996).

20. *Ibid.*, p. 13-14.

21. Duara, *supra* note 19, p. 14.

22. In fact, Gross uses the term *Verfassung* (Constitution) to describe the state’s legal order. Gross (1934).

23. *Ibid.*, p. 444.

24. Schmitt (1985), p. 1.

25. See *ibid.*

26. Notably, a nuanced reading of Carl Schmitt’s writings on sovereignty indicates that even this canonical theorist of exceptional political authority acknowledged the practical dependence of the sovereign figure or institution on the people’s forbearance from exercising their “right of resistance” (*Widerstandsrecht*). See e.g. discussion in Schmitt (2004), p. 87.

provided under their legal system by taking its transcendent ideals *more* seriously than the system itself does.<sup>27</sup> By taking the law into their own hands, such resistance activists redefine the state's systematic mechanism for allocating violence into a narrative of how their world might be transformed.<sup>28</sup> On the other hand, that they could do so may arguably say less about the character of the regime to which they were responding than it does about the extent to which context-sensitive activism and tactics of "pragmatic resistance"<sup>29</sup> can sustain social movements even in authoritarian settings. In either case, transcendent ideals like the rule of law, self-determination, or "great unity" can contest sovereign power only if sustained by solidarity and sacrifice. Together, these factors can allow activist movements to resist exceptional authority and to redefine the "normal."

## 2. CHAOS, STATE LEGITIMACY, AND LEGAL NARRATIVES

Manchukuo was crafted in 1932 out of a large piece of Northeast China, in an atmosphere of intense international competition between former and prospective imperial powers, as well as a perceived general chaos in Mainland China.<sup>30</sup> The latter condition had been gradually exacerbated through regional and ideological conflicts since the end of the Qing Dynasty in 1911, with the major players at the start of the 1930s being the Nationalist Party or KMT, the insurgent Chinese Communist Party, and various warlords including the Japanese-supported head of China's "Northeast" region, Zhang Xueliang. Despite the KMT's relative success in achieving a shaky unification of much of China by the beginning of the decade, the Chiang Kai-shek-led government, based in Nanjing, was regarded as highly contingent on quite volatile circumstances, and considered by many to exercise suspect legitimacy. Indeed, the British Conservative Party newspaper *Conservative Morning Post* described the attitude of some political observers when it said in 1932 that "the Chinese Government ... is a polite fiction."<sup>31</sup>

This statement, however, was itself part of the debate over the realities and fictions of East Asian, and particularly Chinese sovereignty. It arose in connection with discussion of the newly released Lytton Report, commissioned by the League of Nations to resolve the escalating situation of hostilities and competing claims in the area. Japan had seized the territory that was to make up Manchukuo in 1931, largely on the autonomous initiative of the Kwantung Army, a branch of the Japanese military that had evolved in size and prominence from the garrison first placed in the Kwantung Leased Territory of southern Manchuria since Japan's obtainment of the same following the Russo-Japanese War-ending 1905 Treaty of Portsmouth. That treaty had been accepted and indeed celebrated as a legitimate source of international law.

Not so the seizure of Manchuria following the Mukden Incident of 18 September 1931. The incident itself was sparked by the detonation of a segment of the South Manchuria

27. Cover (1983), p. 15.

28. See *ibid.*, p. 33: "Law may be viewed as a system of tension or a bridge linking a concept of reality to an imagined alternative."

29. See Chua (2012).

30. See e.g. Dirlik (2002). For a representative publication exploring some contemporary Western perceptions, see the frankly titled *China in Chaos* (1927).

31. "JAPAN-CHINA: Five Wise Westerners" (1932).

Railway, control over which had been granted to Japan along with the Leased Territory. A militant faction within the Kwantung Army exploded a section of track between the cities of Changchun and Lushun, blamed the incident on local Chinese forces, and proclaimed an existential conflict requiring total annexation of Manchuria, and the support of local “secession movements” to found an independent state: Manchukuo.<sup>32</sup> The fact that much of this story was consciously falsified and undertaken in order to establish Japanese hegemony over the vast, fertile area was understood among both Japanese policy-makers and Western observers: the Lytton Report, commissioned in December of 1931 and released in October of the following year, found as much, determining that Manchuria was “unalterably Chinese” in character,<sup>33</sup> and that the incident at Mukden and the subsequent formation of Manchukuo had been motivated by, more than anything else, “the presence of Japanese troops and the activities of Japanese officials, both civilian and military.”<sup>34</sup> It was “for this reason,” the Report concluded, that “the present regime cannot be considered to have been called into existence by a genuine and spontaneous independence movement.”<sup>35</sup>

Being released on 2 October 1932, the Lytton Report articulated an argument for rejection of Manchukuo as an independent state, yet it was anticipated by the formal proclamation of Manchukuo’s sovereignty on 18 February, and by Japan’s official extension of recognition of the new state on 15 September. Indeed, the first Manchukuoan ambassador to Japan made statements only two days later calling for the replacement of the League in favour of an alternative “Asiatic League of Nations,” given that the present organization had “not sufficient authority to enforce its decisions ... and has, thereby, failed to achieve its object—to bring in an era of stability and peace among nations.”<sup>36</sup> The Chinese KMT government issued its perspective on 20 September, arguing that Manchukuo was illegitimate and was a “challenge” to the League of Nations—a case made easier by the “Asiatic League” rhetoric.

By the following January, the US indicated that it would not extend recognition, in part because it considered the establishment of Manchukuo a violation of the Nine Power Treaty of 1922,<sup>37</sup> and by February 1933 the League as a whole voted, 42:1, to advise a Japanese withdrawal. This was followed by Japan’s withdrawal from the League in March.<sup>38</sup> Despite the outcome against legitimizing the establishment of Manchukuo, the proceedings of the League were not without notes of dissent. The Greek delegate cited Aeschylus for the cautionary proposal that “[t]he law is mobile, as those who possess it but do not know how to make use of it with the due moderation, risk seeing it pass into the hands of the adversary” (as we will see below, this same caution could also have applied to the Japanese designers of the new regime). Moreover, he pointed out, “forgetting realities can empty of their substance the principles of law.”<sup>39</sup> The Spanish representative indicated that, while evacuation of military forces should precede negotiations, the League’s role in the dispute ought to go beyond mere

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32. These secession movements were not entirely apocryphal, but their role was greatly exaggerated in such arguments concerning Manchukuo’s origins.

33. Cf. Kuhn (1933).

34. *Ibid.*

35. “Memorandum on the Report of the Lytton Commission” (1932).

36. “Another League: Manchukuo Diplomat Puts Naive Scheme” (1932).

37. See Timperley (1934).

38. *Ibid.*

39. Levy (1932), p. 177.

deterrence of armed intervention. Rather, “the League of Nations must protect the weak against the influence of the strong *and the strong against the anarchy of the weak.*”<sup>40</sup>

Thus, even as its policies in Manchukuo had been ruled invalid by the League of Nations (though this was contested by some legal scholars, see *infra*),<sup>41</sup> Japan’s efforts to portray the move as justified did not cease with its abandonment of the organization. For instance, the Japanese Chamber of Commerce of New York produced in April 1933 a bound pamphlet arguing for recognition and explicitly aimed at American audiences, which begins with the admonition that “[t]he independent state of Manchukuo came into existence as a result of the spontaneous opposition of the people to the outrageous misgovernment by the Chinese officials under Chang Hsue-liang (Zhang Xueliang).”<sup>42</sup> Further, the pamphlet asks whether the substantial involvement of Japan in Manchukuo’s assertion of independence is really so extraordinary:

... is this the first time that a people who sought liberty found aid outside their country? Did not the thirteen English colonies in North America find assistance in France in their effort to establish the United States of America? Was not the freedom of Cuba from Spain won by the United States? ... [W]e are told it was an act of humanity to help Cuba win her freedom. Why is it not an act of humanity to help the Chinese in Manchuria to win their freedom?<sup>43</sup>

These arguments, phrased in precedential and moral terms rather than in the statutorily defined parlance of international law, nonetheless did not go totally unheeded. Statements like that of the British *Conservative Morning Post* on the “polite fiction” of Chinese government, mentioned above, were expressive of a common ambivalence about the role of China in world affairs, which at times tended towards support for the Japanese case in state-building. Such arguments did not prosper in most diplomatic settings, although the persistence of the communist insurrection in China was another factor leading some towards consideration of Japan’s value as a stabilizing force.<sup>44</sup> Arguments premised on “bringing order to China” were to have some continued utility even into wartime. One 1945 US criminal case, prosecuted under the Subversive Organization Registration Act, concerned members of the “Friends of Progress,” a California-based pro-fascist organization whose leaders had held forth during a 1942 meeting on “the marvelous job that the Japs [sic] had done in Manchukuo—that they had transformed it from a barren bandit infested country into a well-controlled territory.”<sup>45</sup>

Nor were such arguments restricted to marginal or extremist circles. It is important to note that the very idea of a policy of “non-recognition” of a self-declared state authority has no clear antecedent prior to its application in the case of Manchukuo—the doctrine was to a

40. *Ibid.*, p. 176, emphasis added.

41. The idea that any self-declared state can be simply “illegal” remains problematic today, and the law of state recognition continues to be highly ambiguous and politicized. “Though states have been the fundamental unit of the international system for nearly four hundred years, there remains no generally accepted definition of statehood,” and to a considerable extent, recognition of states has always been a political rather than a legal judgment. Farley (2010), p. 790. Much more straightforward, though, is alleging the illegality of Japan’s military presence in Northeast China and its actions undertaken in the process of participating in Manchukuo’s establishment.

42. *Manchukuo: The Founding of the New State in Manchuria*, *supra* note 2.

43. *Ibid.*, p. 3.

44. See e.g. “Memorandum on the Report of the Lytton Commission,” *supra* note 35 (“a new menace has arisen in the form of communism ... an actual rival of the national government”).

45. *People v. Noble*, 68 Cal. App. 2d 853, 874 (1945).

large extent an innovation. While influential international legal scholars, in particular Hersch Lauterpacht,<sup>46</sup> would go on to write in favour of the doctrine of non-recognition of Manchukuo as consistent with previous state practice under international law, such views were countered by those of other lawyers and academics. For example, the prominent Yale Law School professor Edwin Borchard, arguing that Manchukuo should be recognized as a *de facto* state (and that there was no right for others *not* to recognize such a state under international law), articulated a view of international legal doctrine very different from those developed by Lauterpacht or the Lytton Commission.<sup>47</sup>

Borchard viewed the doctrine of non-recognition as not just unfounded in pre-existing state practice, but as a dangerous innovation. Holding that “nations do not judge such matters [as legitimate statehood] objectively, but in the light of their interests,”<sup>48</sup> he argued that non-recognition of wars or their consequences “is not only impractical but ... creates but another means for postponing if not preventing understanding and stability in international relations.”<sup>49</sup> As a result, applying the doctrine of non-recognition to Manchukuo, to Italy’s conquest of Ethiopia, or to any other case of changing state status based on disapproval of the circumstances of its origin seemed to him “to make no constructive contributions to a disordered world, but on the contrary embodies potentialities for further disequilibrium.”<sup>50</sup>

Observers in law and policy circles who held such views tended to find the Lytton Commission’s ruling to be a case of liberal overreach into a matter that was ultimately to be decided between only the states involved, not the international community. Those holding such views were also receptive to Japan’s arguments that “chaos” in China could be seen as justifying acknowledgement of the new regime. As Borchard wrote, “the Nine Power Treaty is a ... flimsy document. There was really no such thing in 1922 as the ‘political or territorial integrity of the Republic of China’.”<sup>51</sup> Making use of a term coined by the conservative German jurist Carl Schmitt to criticize idealistic liberal views of politics and law, Borchard wrote that “when the refusal to recognize facts is based on the Covenant or the Kellogg Pact [banning aggressive war], we are in the field of political romance.”<sup>52</sup>

Indeed, so widely recognized was China’s instability at the time, and so tenuous the international community’s faith in the prospect for any extant Chinese political force to bring order to the country, that the Lytton Report’s tenth and final stipulation of principles that should animate a proposed Sino-Japanese resolution ending Manchurian hostilities was “International Co-operation in Chinese reconstruction,” a provision bearing the following revealing language:

Since the present political instability in China is an obstacle to friendship with Japan and an anxiety to the rest of the world, as the maintenance of peace in the Far East is a matter of

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46. Lauterpacht would go on to write the first extended work of doctrinal scholarship on the law of state recognition, Lauterpacht (2012 [1947]). However, there is still no consensus in the international law community on his favoured “constitutive theory” of recognition.

47. The views of both sides are summarized and presented side by side in Wright et al. (1941). Though coming well after the initial reactions to the establishment of Manchukuo and the Lytton Commission’s findings, this volume sums up various arguments that had prevailed on both sides of the issue throughout the 1930s.

48. *Ibid.*, p.176.

49. *Ibid.*, p. 177.

50. *Ibid.*, p. 178.

51. *Ibid.*, p. 159.

52. *Ibid.*; cf. Schmitt (1919).



international concern; and since *the conditions enumerated above cannot be fulfilled without a strong central government in China*, the final requisite for a satisfactory solution is temporary international co-operation in the internal reconstruction of China, as suggested by the late Dr Sun Yat-sen.<sup>53</sup>

The Lytton Report further notes that “[t]he ‘Manchukuo’ authorities have decided that, in the domain of justice, the interference of administrative authorities should not be tolerated. The status of judicial officers is guaranteed by the law, and their salaries are to be adequate”<sup>54</sup> and that the White Russian community “would support any regime which would guarantee to them ... (2) An honest and efficient police administration; [and] (3) Justice in the law courts.”<sup>55</sup>

Even among the US policy-making elite, the case against chaos in China was given a great deal of weight. John V.A. MacMurray, the then head of the International Relations department at Johns Hopkins and recent US Minister to China, argued as much in the January 1933 issue of the *Annals of the American Academy of Political and Social Science*, where, in an attempt to unravel “this tangled Manchurian situation,” he raises the possibility of “what is perhaps to be the century-long political agony of the Chinese people in the effort to find themselves a nation.”<sup>56</sup> Notably, the US did not voice strong condemnation of Japan after the Mukden incident, and its representations before the League largely focused on finding a solution to secure mutual amity among all parties.<sup>57</sup>

In short, legitimization of Manchukuo before the international community likely did not seem to Japanese policy-makers to be a wholly lost cause. Although Japanese (and Manchukuoan) officials were both decisive and highly public in their spurning of the Lytton Report and contempt for the international system it represented, it became clear from the beginning of the Manchukuo project that the establishment of a recognizably modern state was to be an actively pursued, ongoing implicit argument for the legitimacy of the regime.<sup>58</sup> In this effort, there was perhaps no more valuable representation of order than a “modern” legal system. Liberalizing reforms to the Japanese legal system in the successful effort to win repeal of Western extraterritoriality had been a key feature of the Meiji reforms, and had marked one Japan’s most crucial and self-conscious steps toward equal membership in the community of nations.<sup>59</sup>

Japanese officials sought to repeat this success in Manchukuo. The government was “established amid a heavy dose of legal rhetoric, and some of the first acts taken after its founding were legal in nature,”<sup>60</sup> including the passing of the aforementioned “Organic Law” and “People’s Rights Protection Law.”<sup>61</sup> These laws are notable for several reasons, among which is their apparent progressiveness, including detail in establishing different branches of the Manchukuo government, and specifically enumerating powers among the

53. “Memorandum on the Report of the Lytton Commission,” *supra* note 35, p. 5, emphasis added.

54. *Manchuria: Report of the Commission of Enquiry Appointed by the League of Nations* (1932), p. 100.

55. *Ibid.*, p. 111.

56. MacMurray (1933), p. 153.

57. See Stimson (1938).

58. Duara, *supra* note 1, pp. 106–7.

59. See e.g. Hoare (1975).

60. Dubois, *supra* note 1.

61. *Ibid.*

same. Indeed, stipulations such as “the Executive must be responsible before the People”<sup>62</sup> and “the Executive must be chosen by the People”<sup>63</sup> are representative of the overall tenor of the legal norms instituted during this foundational phase of Manchukuoan law. The two simultaneously passed laws together functioned as an Organic Law for the Manchukuoan state, yet were not considered to form a finalized constitution. Rather, officials expressed the future goal of promulgating a final Manchukuoan Constitution and set of revised and final codes.<sup>64</sup> Japanese and Manchukuoan jurists engaged together in state-sponsored consideration of what shape these legal reforms should take.

Ultimately, no final constitution was promulgated. And, indeed, the progressive substantive rights conferred in the early Organic Law were increasingly belied by the totalitarian tendencies of the state, which was in turn increasingly beholden to and dominated by Japanese military influence as world war erupted and then intensified. The first tendencies in this direction were arguably present from the earliest days of Manchukuo,<sup>65</sup> yet one clear turning point for the state was the revision of the Government Organization Law in 1934 to change head of state Pu Yi’s position from “Executive” to “Emperor,” and indeed the state’s transformation from “Manchukuo” into “the Empire of Manchuria” (*manshuu teikoku*).<sup>66</sup>

Such tendencies, towards the consolidation of central power and the rhetoric of “total empire” rather than of quasi-liberal constitutionalism,<sup>67</sup> were to grow more pronounced throughout the remaining lifetime of the state. By 1945, there could be little pretence that Manchukuo had been the regime promised in that first rhetorical flourish of law-making that accompanied its birth. Yet earlier, particularly prior to the outbreak of the Sino-Japanese war in 1937, Manchukuoan law did provide narrative and practical resources for those who sought to engage with, influence, or resist the state.

### 3. IDEALS, RIGHTS, AND RESISTANCE

One of the more striking features of the Manchukuoan state from the perspective of many observers was its conscious marriage of modern Western conceptions of government, law, and planning, with traditional and even mystical “Asianist” conceptions of the human spirit and its role in the idealized Confucian polity. Prasenjit Duara traces some of the key origins for this unique approach to statecraft to Japanese “pan-Asianist” groups seeking to assert a reawakened Eastern civilization in opposition to the theretofore-overwhelming force of Western civilization.<sup>68</sup> As early as 1920, for example, the far-right Black Dragon Society of Uchida Ryohei had joined with Korean nativist groups and other “Asianist” radicals in an attempt to set up a “utopian, anti-Western polity called the Koryo (*Gaoli*) nation in the Jiandao region between Manchuria and Korea ... the heartland of the ancient Koguryo state.”<sup>69</sup>

62. *Renquan Baozhang Fa*, Art. 3, in *Manzhouguo Liufa Quanshu* (1935).

63. *Ibid.*, Art. 4.

64. Dubois, *supra* note 1 (citing British Consular Records (1936)).

65. So argues Dubois in *ibid.*, while acknowledging 1937 and 1941 as “watershed” years which saw substantial change to the Manchukuoan legal system leading to greatly reduced civil liberties.

66. See *ibid.*

67. Young (1998), pp. 11–13.

68. Duara, *supra* note 1, p. 98.

69. *Ibid.*, p. 99.

The movement, moreover, produced a radical constitution enshrining Confucianism as the proposed state's religion, proclaiming equal rights and citizenship for all races, collective ownership of property, and calling on the government's ultimate teleological goal to be the achievement of "*Da Tong*," or "Great Unity."<sup>70</sup> In many ways, as Duara argues, this movement prefigured the later direction of Manchukuo statecraft—a self-conscious, transcendental "Asianism" which offered to participants in its cause the prospect of a whole new civilization and world order.

This "new civilization" was never fully defined, but it was intended to appeal to all of Manchukuo's resident nationalities, and indeed to be an active project of creating new civic identities and forms of solidarity for all citizens. Confucian tradition long considered one of the central aims of government to be "to morally transform (*jiaohua*) through enlightened rule (*wenzhi*)."<sup>71</sup> In line with this ideal, the Manchukuoan state actively sought to enact such "moral transformation" on various levels, through explicit policies and as a matter of rhetorical direction. The initial regnal period of "pre-imperial" Manchukuo (1932–34) was officially named "*Da Tong*," and the term continued even afterward to be used as a stand-in for the state's political project.

"*Da Tong*" was a widely known, though somewhat ambiguous concept in Confucian thought. In an eponymous book by the influential Qing-reformist scholar Kang Youwei, a radical proposal for "Great Unity" is outlined: a single world government, democratic in nature, controls all aspects of economy and society, providing for people's welfare and nurturing human material and spiritual flourishing. Technology, and other trappings of the modern West, are joined with the spiritual essence of the East—resulting in an ideal state, world peace, and the betterment of humanity.<sup>72</sup> Though Kang's *Book of Great Unity* was not released in its entirety until 1935, significant portions had been circulated in Japan and China by the early 1910s. As Prasenjit Duara notes, the "*Da Tong*" ideal was a crucial means by which East Asian nationalists reconciled their local struggles for self-determination with a larger, transcendent set of ideals; even Kang Youwei's political opponent Sun Yat-sen was inspired by the "*Da Tong*" concept as an element for his vision of how China's national independence would contribute to a re-imagined world order.<sup>73</sup>

Similarly grandiose conceptions of an "Asianist" reordering of world power and human affairs were, in any case, not scarce. Such ideas were an explicit motivation for Kwantung Army Colonel Ishihara Kanji as he took the lead role in planning the Mukden incident.<sup>74</sup> They were similarly key motivations for Manchukuo Prime Minister Zheng Xiaoxu, widely respected—indeed, considered by some observers "the only Chinese personality of integrity" in the Manchukuo government—who had a key role in formulating the Manchukuo state's signature neoConfucian governing ideal of "the Kingly Way" (*wang dao*).<sup>75</sup> Though seldom given explicit content, and as open to creative interpretation as "the Great Unity,"

70. *Ibid.*

71. *Ibid.*, p. 106.

72. See generally Kang & Tang (2005).

73. See Duara, *supra* note 1, p. 14 (describing how Kang Youwei's interpretation of *da tong* "justified nationalism as a necessary stage in the ultimate achievement of the 'great unity' of all peoples of the world" and inspired Sun Yat-sen among others).

74. Peattie (1975).

75. See e.g. Dubois, *supra* note 1.

“the Kingly Way” can at the very least be said to have encompassed a Confucian vision of the mutual obligations and moral duty inherent in the relations between ruler and subject, and by extension the state’s role in mediating these relations for the preservation of natural order and the “moral transformation” (*jiaohua*) of citizens.<sup>76</sup>

To the extent that Manchukuo openly embraced these utopian ideals and deeply rooted traditional modes of thought, the state endorsed an explicitly “redemptive” agenda which premised current legitimacy on the eventual delivery of a polity in line with its founding principles. In this sense, it also made possible an engagement with the legality of the state and with the interpretation of law on an ideal, normative level. Describing legal activism in the US, Robert Cover describes such engagement in the realm of constitutional interpretation as “redemptive constitutionalism,” to which he ascribes the motivations of those legal interpreters “whose sharply different visions of the social order require a transformational politics that cannot be contained within the autonomous insularity of (the interpreters’) organization itself.” Cover further expands the “redemptive” character of this legal-interpretation-which-demands-social transformation as entailing “(1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other.”<sup>77</sup>

While Cover largely develops his concept of redemptive constitutionalism in the context of the US abolition and civil rights movements, there are fertile grounds for comparison with Manchukuo, and the interpretations of law and governmental legitimacy that it made possible. Key to the “redemptive” quality of these American rights movements was the extent to which written law, while pointing towards certain liberating features of the legal regime, fell short of prescribing their actual implementation. In this respect, the “promise” or “prophecy” of the US Constitution, encoded in the Bill of Rights and the very premise of representative government, was unfulfilled for a large segment of the US population. Thus the abolition movement, for example, could only either decry the legal regime, including the Constitution, as fundamentally unjust and worthy of elimination (the position taken by Garrisonian abolitionists) or else advocate a radically different interpretation of existing law in order to reconcile its contradictions and realize its prophecy of liberation.<sup>78</sup> It was in this manner, through a “redemptive” engagement with the perceived narrative of the US Constitution, that some abolitionists were able to reconcile a document that promised an extensive list of rights to all people with the reality that it accepted the existence of a rightless slave class.<sup>79</sup>

Of course, the US was founded on the basis of a seemingly authentic act of popular sovereignty and revolution—a true “We The People” moment<sup>80</sup>—while Manchukuo was decidedly not. Nonetheless, there are a handful of episodes in Manchukuo’s short history which intriguingly suggest that its ad hoc mélange of Asianist civilization discourse, modern liberal statecraft, and international and domestic legalizing rhetoric made possible strategies of activism and resistance that resembled a call for “redemption” of the state’s normative ideals.

76. Duara, *supra* note 1, pp. 106–7.

77. See Cover, *supra* note 27.

78. *Ibid.*, pp. 115–20.

79. See *ibid.*

80. Cf. e.g. Ackerman (2000).

One such moment came with the 1934 founding of the Judicial Law College in Xinjing (Changchun). In September of that year, over 1,200 prospective students took an entry examination which, in addition to presenting questions on mathematics and basic legal knowledge, also required exposition on the “political theory of the Kingly Way” and “theory of the harmony of the five races.”<sup>81</sup> The degree of enthusiasm that student evidenced in their responses to these questions and the “outpouring of Confucian rhetoric that students employed in expressing their admiration for the Kingly Way” caused the examiners “surprise, bordering on incredulity.”<sup>82</sup> Unlike the situation during the founding of Manchukuo, as aptly described in the Lytton Commission report, these young, mostly ethnic Han Chinese students indeed presented a “spontaneous and independent” enthusiasm for the study of law and engagement with the rhetorical foundations of the Manchukuoan state which caught their examiners off-guard—and could very well have developed into coherent redemptive theories to bring the state more into line with its foundational ideological commitments. Strikingly, as recent work by Jilin University Professor Jiang Lei has indicated, one of the few liberal publications active in Manchukuo was the “*Da Tong Bao*,” or “*Great Unity Post*.” The rhetorical foundations of the state were invoked to defend such values as greater public participation in decision-making and reduced military expenditures and activities, as well as the general promotion of civilian over military authority.<sup>83</sup>

There were similar moments during which groups supposedly liberated by the Manchukuoan state, but who had not received the full benefits of that prophesied liberation, protested the failure of the state to deliver upon its redemptive vision. These included the mass resignations of Chinese officials in 1935 and 1937, particularly the first episode, in which officials followed Prime Minister Zheng Xiaoxu as he was being forced from office.<sup>84</sup> Notably, however, Zheng did not abandon Manchukuo after leaving his position as prime minister, but rather pursued educational initiatives aimed at furthering his vision of a neo-Confucian, pan-Asianist pedagogical state. Quite different avenues of engagement with the state to explore its redemptive possibilities were explored by groups of leftist researchers working for Mantetsu, who seized various opportunities to suggest liberal or socialist reforms to the Kwantung Army planners that ultimately made many policy decisions.<sup>85</sup> These varied from general reforms of economic policy and private ownership rights to the introduction of agricultural collectives.<sup>86</sup>

Courts, too, did not always adhere to the preferences of the government, as strikingly demonstrated in the Simon Kaspe trial, where members of a fascist Russian group in Harbin had kidnapped for ransom and then murdered a French Jewish pianist, son of Harbin’s wealthiest and most prominent hotelier.<sup>87</sup> Prosecutorial investigation was greatly hampered due to official sympathy with the suspects’ alleged “patriotic” motives; indeed, one of the Russian Harbiners indicted was himself a detective with the local police force.<sup>88</sup> While some sources suggest that

81. Dubois, *supra* note 1 (citing “Sifabu faxuexiao sheli yuanwei” (1934)).

82. *Ibid.*

83. See Jiang (2010).

84. Xie, *supra* note 10, pp. 414–20.

85. Young, *supra* note 67, p. 298.

86. *Ibid.*

87. Goldstein (1999), pp. 90–1.

88. Stephan (1978), p. 64.

Japanese police or military officials had an active role in planning and directing the original kidnapping and murder, no reliable primary source appears to support this claim.<sup>89</sup>

Regardless of the precise role of individual Japanese (or other Manchukuoan) officials, it was clear to all observers that there was general state support for fascist, fervently anti-Soviet White Russian groups like that which enacted the Kaspe kidnapping. Harbin district-level Judge Chang Ping, the first to hear the case, found himself removed from it without any official public explanation shortly after being assigned, with a Judge Liu taking his place. The message to Liu was clear—he would have to tow the line in his decision, or face an outcome similar to or worse than that which had just faced his predecessor. Meanwhile, the state prosecutor arguing the case openly called for lenient sentencing and praised the anti-communist motivations of the accused. Judge Liu appears to have been part of a group of broadly reformist jurists in Manchukuo who engaged in such activities as advocating specific legal reforms, seeking to ensure fair adjudication of disputes for non-Japanese litigants, and such cross-border professional activities as study tours in Japan under the auspices of Manchukuo's Legal Advisory Association.<sup>90</sup> Generally “allowed” reformist activities of such lawyers included, such as writing articles calling for more lenient punishments and penalties at criminal law, such as the abolition of penal forced labour.<sup>91</sup>

Yet, despite the clear signalling to Liu regarding the sensitivity of the case, and despite his considerable investment into a legal career in the Manchukuo justice system, he decided upon an act of judicial defiance: death sentences, under banditry laws, for all of the six implicated in Kaspe's murder—a “shocking” result.<sup>92</sup> The case, and its decision, belied the image of the Manchukuoan jurist as a servile cog in the gears of empire. Among papers making comments on the matter, the Dalian-based *Manchuria Daily News* echoed a common sentiment in calling the case “a global sensation,”<sup>93</sup> while it led some foreign publications to reconsider their assumptions regarding the inauthenticity of Manchukuo's legal system.<sup>94</sup>

It was only through an appeal and retrial initiated by sympathetic officials at the appellate court level, followed by the retroactive invocation of an amnesty law (now applicable because the retrial was initiated following the passage of the amnesty), that the Kaspe defendants were able to avoid their death sentences.<sup>95</sup> Although the Kaspe jurisprudence can be taken to represent the politically manipulable character of the Manchukuo legal system, it equally represents a somewhat astonishing proclamation of independence by a judge who consciously ruled against the administration's wishes. This could perhaps be seen as a form of redemptive constitutionalism in action: a legal practitioner operating the mechanisms of the state based not on the demands of political superiors but on his own interpretation of the law, seeking to redeem the promise of judicial due process.<sup>96</sup>

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89. An account to this effect is provided in Amleto Vespa (1938). Vespa's posthumously published autobiographical work, in which he also claims to have been a spy and to have once married a princess, has generally evaded independent verification. Taking the alternative position that Japanese officials did not direct the kidnapping or murder, though they almost certainly sought to quash both investigation and prosecution, is Balakshin (1958) at p. 211.

90. See e.g. “Di Er Jie Liuxue Riben Sifaguan Jinian Sheying” (1935); Liu (1935); Ukai (1935).

91. See *ibid.*

92. *North China Monthly Review* (1936).

93. *Manshu Nichi Nichi Shimbun*, 30 January 1937.

94. See e.g. *North China Monthly Review*, *supra* note 92.

95. *Ibid.*

96. See generally Cover, *supra* note 27.

That the means adopted by the Manchukuoan administration to circumvent this judicial ruling were so awkward and formalized—so strikingly intent on maintaining the appearance of the rule of law and judicial independence—lends yet more power to Judge Liu's simple act of judicial defiance. Do such moments really signify the possibility of concerted legal action to redeem the foundational promises of the Manchukuoan state, and thus radically transform the regime from within? There are certainly reasons to be sceptical of any such claim, not least the Japanese military's continued position of exerting effective sovereignty over the state and, as in the *Kaspe* case, employing the ability to "decide upon the exception"<sup>97</sup> by removing judges and overturning legal rulings. This exceptional role was further intensified with Japan's increasing military domination over the state, and especially by the later passage of such flagrantly Organic Law-contradicting emergency statutes as the Peace Preservation Law of 1941 and the Thought Rectification Law of 1944.<sup>98</sup>

#### 4. THE PRAGMATICS OF RESISTANCE

Is it really fair, though, to describe such activism and resistance in terms of Cover's redemptive ideal of "jurisgenesis"—the genuine "creation of legal meaning" for an interpretive community?<sup>99</sup> This question should be looked at distinctly from that of the mere deployment of "redemptive constitutionalism" as a tactic in resisting the state's oppressive authority. As Lynette Chua has suggested, activists may make use of the law of authoritarian systems for purely pragmatic, and not ideological, reasons; thus, "they are not concerned with challenging law for its sake, but treat the choices between legality and illegality as merely tactical."<sup>100</sup>

Chua's conception of "pragmatic resistance" both draws upon and seeks to expand James C. Scott's earlier concept of "everyday resistance": the ways in which the individual seeking to avoid domination by the state "defies power covertly, and avoids openly confronting the status quo," or constituting an outright political challenge.<sup>101</sup> Scott considers these kinds of low-grade activism as both important forms of agency in themselves and as a "stubborn bedrock upon which other forms of resistance may grow."<sup>102</sup> For Chua, in the context of authoritarian states that are likely to crack down upon more open forms of collective action, groups that seek to overcome government repression can make more extensive and tactical use of techniques resembling those of everyday resistance, along with more open means, in order "to stay alive and advance with skirmishes, rather than court demise with open warfare declared on grander principles."<sup>103</sup> If Cover's grand narrative of "redemptive constitutionalism" to alter the normative foundations of the state is on one end of the spectrum, and Scott's model of covert resistance to state power is on the other end, Chua's "pragmatic resistance" lies in the ambiguous territory between these extremes.

97. Schmitt, *supra* note 24.

98. The former allowed for summary trial by police or security forces of all alleged crimes related to the internal security of the state, while the latter established a range of ideological offences punishable through an extra-legal security state primarily tasked with detecting and punishing such "thought crimes."

99. The term is Cover's. See Cover, *supra* note 27.

100. Chua, *supra* note 29.

101. *Ibid.*

102. Scott (1985), p. 273.

103. *Ibid.*

This zone of ambiguity would have been quite recognizable to some members of Manchukuo's resistance. Liang Surong (Liang Su-yung), a prosecutor in Manchukuo during his twenties, and later a prominent Taiwanese politician, provides some of the most interesting accounts of the extent to which the regime's officials felt compelled to take seriously its legal and administrative rule structure, as well as how those who made use of this structure to resist the state did not necessarily have normative commitments to the legal system they invoked. Alongside his success in the Manchukuo regime, the young Liang was also active in the underground KMT resistance movement and, in 1944, was discovered and eventually imprisoned for his activities. He recalls that, despite the virulence of government suppression of Chinese resistance in the late stages of the war, every aspect of formal procedure was followed as he was being investigated and then tried for treason—even his government rations, well superior to those allotted to non-officials like his Japanese prison guard, kept being delivered to him in full as he awaited trial.<sup>104</sup>

Liang recalls a conversation regarding Manchukuoan law that he had after fleeing to Taiwan. His interlocutor, Wu Guozhan, was a former classmate who had served as a Manchukuoan judge, and then, like Liang, worked as a lawyer in Taiwan after 1945. Wu exclaimed "Liang! It's truly strange; Manchukuo was fake, but the law was real; the Republic of China is real, but the law is fake!" In analyzing this statement, Liang offers his opinion that, while the binary is "somewhat extreme," it is still overall a fair assessment; "of course Manchukuo was a colonial regime, but the legal system was set up to be very strict. The greatest success of Japanese colonialism was 'implementing the rule of law' (*fazhi hua*)."<sup>105</sup> In his memoirs, Liang also describes the system as "absolutely fair," and recounts several instances in which he was able to successfully defend or mitigate the sentences of Chinese Manchukuoans accused of anti-Japanese crimes. In one instance, while still a "judicial student" acting as a clerk for a district court, Liang interrupted proceedings after the presiding judge personally made a plea offer to the defendants—that they would certainly be spared the death penalty if they admitted guilt—and was able to halt the proceedings, strike the judge's procedural violation, and personally visit the Chinese defendants in their holding cell to explain the matter. The defendants in the case had been charged with the murder of a Japanese policeman.<sup>106</sup>

Liang's own eventual prosecution for revolutionary activities as an underground member of the KMT was also a case in which a utilization of legal arguments seemed to counteract the power dynamics of colonizer and subject. Another ethnic-Chinese Manchukuoan judge, Li Zhengzhong, acted as his defence counsel, having previously worked with Liang and other law school classmates to successfully defend Chinese peasants in yet another case of murder of a Japanese policeman. The defendants in that case were released for lack of evidence. In Liang's prosecution, however, the evidence of his KMT membership was patent given the successful sting operation that had led to his arrest. Nonetheless, Li and his team were able to successfully argue against the potential death sentence that Liang could have received, reducing his sentence to 12 years' imprisonment, because Liang had never received any actual orders to carry out specific KMT work.<sup>107</sup>

104. Personal interview cited in Wu (2004).

105. *Ibid.*

106. Liang's account of the above and related anecdotes is given in his autobiographical work, Liang (1995).

107. The above account is summarized in Jiang (2011).



Thus, Li, Liang, and a number of other young judges and legal professionals, many of them former classmates at Manchukuo's Great Unity Institute (*Da Tong Xueyuan*), formed a kind of embryonic network of legal activists in Manchukuo's last years. Primary documentation of their cases is limited, as few Manchukuo publications devoted much space to legal issues, and official government sources displayed a strong disinclination to report anything that reflected poorly on the regime. One of the primary publications of the Manchukuo legal community, the *Japan-Manchukuo Legal Advisory Association Journal* (*Nichi-Man Housoukai Zasshi*), devoted considerable space to rhetorical examinations of law's role in working toward the Asianist ideals of the new state, yet shied away from reporting on activities like those of Liang and Li.<sup>108</sup>

As the above examples indicate, the larger pattern of semi-organized, non-violent dissent among Chinese activists resisting domination by the Japanese imperial project often allowed individuals who had no interest in "redeeming" the state's narratives (at least for their own sake) to nonetheless pragmatically use such resources to sustain themselves and achieve tactical goals. Jilin University's Jiang Lei has referred to the network of such activists in professional fields and civic life as a "spiritual resistance" in Manchukuoan society. In the field of literature, a number of writers achieved popularity—even winning awards—while challenging official representations of Manchukuoan ideals or conditions. Norman Smith, in his excellent work on female writers of the period, *Resisting Manchukuo*, describes the preceding as examples par excellence of "the simultaneous cooperation and subversion possible in prominent Manchukuo institutions."<sup>109</sup> As the legal activism of Li and Liang indicates, legal institutions were no exception to this dynamic. Publications like the above-noted *Great Unity Post* and the Dalian-based *Manchurian Review* also periodically urged a greater role for civil society in Manchukuo's public affairs.

Smith describes the achievements and setbacks of a set of female writers, several of whom pursued careers in the Manchukuoan education system while producing their work. Distancing themselves from official narratives, the writers "argue[d] that the Manchukuo education system was incapable of empowering women. [Writers] Lan Ling and Zhu Ti both wrote of their experiences as teachers," offering a robust critique of the system even as they continued to engage it.<sup>110</sup> Zhu Ti was also the spouse of judge and legal activist Li Zhengzhong, mentioned above; an indication of the extent that professional "resistance" networks like these were not hermetically sealed pockets, but rather engaged in an ongoing discourse with similarly minded Manchukuo residents in other fields. Indeed, the two collaborated on literary works during the period. Given that, "[a]lthough during the first year of the occupation approximately one-third of the region's teachers left their positions, many teachers who were resistant to Manchukuo propaganda remained,"<sup>111</sup> it is possible to see in such networks a potential systemic threat to the Manchukuo regime's social goals. Even as her husband Li Zhengzhong was representing Liang before the court in 1944, Zhu Ti was publishing her short story "*Wo he Wo de Haizimen*" ("Me and My Children"), "[whose]

108. Dubois, *supra* note 1, gives a detailed account of the usual subjects dealt with in the Journal.

109. Smith (2007), p. 82.

110. *Ibid.*, p. 80.

111. *Ibid.*

female protagonist, a teacher, argues that her duty is to save students ‘from the contagious poisons in the common world’.”<sup>112</sup>

It appears that these young activists and “spiritual resisters,” first-generation products of Manchukuo’s education system, were a significant focal point of tension between that system’s idealized goals and the political realities that belied them. Though their activism could perhaps be seen as seeking to “redeem” the regime’s normative promises, it could also be interpreted as the pragmatic tactical choice of groups and individuals navigating equally unacceptable extremes of mere covert defiance and dangerous, outright political confrontation.

## 5. STATE OF EXCEPTION AND CONTESTED NORMALITY

While Chua’s “pragmatic resistance” might be a more accurate model than Cover’s “redemptive constitutionalism” in accounting for the subjective understanding of Manchukuo lawyers and others seeking to challenge the state while avoiding full confrontation, the situation as a whole is still more complex. For, in the context of Japan’s colonial project in Asia, as well as the “Asianist” transnational ideal foundations of the this project noted *supra* in Section 2, the activities of Manchukuo’s civil resistance inevitably took on a meaning beyond just their own methods and goals. In particular, Manchukuo was also seen by Japanese dissidents as a site for the development of a different vision of transnational solidarity—a threat that was not lost on Japan’s military establishment and intelligence services.

Security documents from the era display both the regime’s paranoia regarding the threat of transnational civil society ties and their special concerns about lawyers and other professionals. Highly suggestive of the military’s view of the potentially disruptive role of lawyers and educators, should they resist in an organized manner, is a 1944 Kempeitai report ostensibly identifying key Japanese nationals involved in so-called (non-violent) “Communist activities” in Manchukuo.<sup>113</sup> The report focuses on 44 cases stemming from the South Manchurian Railroad Company’s Research Department, of which 27 were found to have “dedicated themselves to Communist ideology” while in school—19 of those at the university level. A surprising number of these, nine, came from a single department at a single, prestigious school—the Economics Department at Tokyo Imperial University (TIU). In total, 18 came from TIU, making it the most represented school among the “leftist agitators,” with law the most represented major after economics.

Twelve are listed as having participated in “student (cultural) movements,” while others, listed separately, participated in activism more clearly related to the international communist movement via such organizations as International Red Aid.<sup>114</sup> In addition, several Manchukuoan educators were represented in the group, including notably one instructor at Xinjing’s newly consolidated Law and Politics University (*Fazheng Daxue*), Nagasawa Takeo.<sup>115</sup> Including

112. *Ibid.*

113. *Kanto Kempeitai Shireibu Hen* (1944 [1969]). It is important to note that, by the war’s end, even relatively innocuous expressions of dissident views, liberal or otherwise, were grouped together with “Communism” as radical ideological threats to the military regime.

114. *Ibid.*, p. 90.

115. *Ibid.*, p. 77. It should be noted that romanized names of individuals mentioned in the Kempeitai report are in some cases based on likely, but not certain, kana versions of names provided only in kanji. The original (kanji) names are all available in *ibid.*

those occupying full-time educational positions outside of Manchukuo, but who were active there instead due to research work with Mantetsu, nine individuals in total were educators.

Four studied law at TIU (Watanabe Yuji, Yokogawa Yojiro, Tanaka Kuichi, and Sase Rokuro) and two studied law at Kyoto Imperial University (Ishi Toshiyuki and Noma Aki). Two others studied “French Literature” (*hobungaku*) at Kyushu Imperial University (Ishida Seiichi and Gujima Kanaburo). Of Yokogawa Jiro, the Kempeitai files say that “during his studies at Tokyo Imperial University, he began to feel interested in social problems due to lectures on criminal law.”<sup>116</sup> Of Tanaka Kuichi, the files say that:

... while studying at Tokyo Imperial University, he began to be concerned about social problems owing to the influence of [Peter] Kropotkin’s “An Appeal to the Young,” [Kyoto Imperial University Professor] Kawakami Hajime’s “Research on Social Problems,” and TIU “New People’s Association” (*shinjinkai*) sponsor Morito Tatsuo’s lectures.<sup>117</sup>

Of Sase Rokuro, the files suggest that he had suffered high-school era “discord in the household centred on the figure of his step-mother, the anguish of which resulted in his developing a serious frailty of nerves, causing his thinking to become unstable,” but that, when he reached TIU, his activity in the “settlement” movement led to his “gradual influencing” by the activist student environment and the beginning of his own research into left ideology.<sup>118</sup>

Despite Sase’s “frailty of nerves,” he was apparently able nonetheless to exert great influence upon his classmate in TIU’s Law Department, Watanabe Yuji. The Kempeitai report tells of Watanabe’s first year studying law at TIU, during which he was influenced by the lectures on “socialist thought” of Professor Kawaba, and by a generally “humanist” (*jindoushugi*) perspective which led him to become concerned over social problems. This was followed up by his participation in the “settlement” social justice movement, introduced to him by Sase, and specifically his membership in the settlement’s public interest law clinic-like “Legal Consultation Department.”<sup>119</sup> He also participated in TIU’s similarly activist “RS Law Club,” and promoted related publications.

For its part, the Kempeitai report appears to take seriously the notion that activism in legal and cultural circles might stimulate wholesale revolution—and that, in Manchukuo’s case, a significant threat lay in the possible mobilization of professionals and intellectuals, not least among them the community of law graduates, infected with various forms of liberalism, Marxism, Chinese nationalism, or even just an inclination towards social justice. Whether these anonymous Kempeitai analysts were right in suspecting the potentially transformative role of tight-knit groups of legally educated activists during the period, in Manchukuo and in the larger empire, is a matter that bears further scholarly inquiry—the potential role of lawyers in political reform movements remains an important and divisive topic even in today’s East Asia.<sup>120</sup> Better knowledge of this early-twentieth-century activism may shine further light on current debates.

116. *Ibid.*, p. 102.

117. *Ibid.*, p. 104.

118. *Ibid.*, p. 107.

119. The anti-poverty settlement movement and related forms of pre-war student activism are outlined in Nakamura (1976), and a valuable contemporary source on how establishment actors viewed them as ideologically or socially threatening is the Judicial Investigation Department (1941).

120. See e.g. Alford et al. (2010); Pils (2006); Fu & Cullen (2008); Fu (2011). Regarding the sociopolitical factors attendant to the rise of legal professionals in China more broadly, see e.g. Alford (1995); Wilkins & Papa (2013).

What is clear, however, is that regime actors identified Manchukuo as a site not just of imperial expansion, or the free manipulation of newly invented national identities, but also as a dangerous source of potential challenge and critique. In part, this was because of the Manchukuo state's own invocation of such fungible normative ideals as the rule-of-law, popular sovereignty, and pan-Asian solidarity, as examined in Section 3 *supra*. But another, more concrete reason was because the Japanese military had always had to share the Manchukuo project with elements of the empire that it viewed as ideologically suspect, and even potentially disloyal. As noted in Section 3, Mantetsu in particular had a sizable contingent of leftists and other ideological dissidents, who saw in Manchukuo an opportunity to realize their ideals in a way not possible in Japan itself.<sup>121</sup>

Legal professionals, too, were especially dangerous, because the risk that their activism would become a coherent ideological alternative to the Japanese Empire's mix of military dominance, pan-Asianism, and technological modernity. In this sense, despite the fact that Manchukuo activists generally pursued "pragmatic" strategies of resistance, they can nonetheless be understood as implying a more radical possibility of mass resistance on a collective basis by the Japanese Empire's various internal "others." It is telling that the Kempeitai analysts discussed *supra* were more worried about this possibility than about resistance activities based purely on ethnic or national identities. Transnational solidarity was a greater threat.

As Duara writes in *Rescuing History from the Nation*, "to be sure, pan-Asianism ... also worked nicely to promote Japanese imperialism in Asia, but it would be wrong to see only this dimension."<sup>122</sup> Even cynical rhetoric justifying imperial expansion can become a resource by which to criticize or even sometimes to compel the empire. The same is true of such transcendent ideals as the rule of law, or of "modernity." These ideas do not, of course, need to be seen as "redeeming" the state that makes use of or finds itself challenged by them. But they do indicate a scope for resistance that exceeds the boundaries of pragmatism *per se*.

Certainly, social movements and civil resistance to state oppression are never easy to fully understand in the context of authoritarian states. This is even more the case with a short-lived and highly idiosyncratic polity such as Manchukuo. Though useful, none of the concepts examined so far—"redemptive constitutionalism," "everyday resistance," "pragmatic resistance," "spiritual resistance," or "transnational vision"—seems sufficient to comprehensively account for the phenomenon of resistance in and to Manchukuo. Yet a set of concepts from a somewhat unexpected source may prove helpful in filling in the gaps.

Carl Schmitt's theorization of sovereignty has been extremely influential in both legal and political scholarship, and increasingly in other branches of the humanities and social sciences. Despite his decidedly illiberal affiliations—first with an extremely reactionary strain of German conservatism and then (perhaps only opportunistically) with Nazism—his theory is increasingly viewed as providing key insights into the general workings of political and legal systems under the condition of modernity.<sup>123</sup>

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121. Cf. O'Dwyer (2013).

122. Duara, *supra* note 19.

123. Different interpretations of Schmitt's work are available in e.g. Dyzenhaus (1998); McCormick (1997); Mouffe (1999); Kahn (2011).

As has been noted above, Schmitt saw the political sovereign as defined by its ability to “decide on the exception” or, in an alternative translation, on the “state of exception” (*Ausnahmestand*).<sup>124</sup> In practical terms, this signifies a political authority’s ability to suspend any norm or to adopt any emergency power seen as necessary to its own survival. All of these powers, of course, were enjoyed by the Japanese military administration that undergirded the Manchukuo regime. However, as Schmitt also notes, the power of “exception” is meaningless without the ability to refer to an idea of the “normal”: “For a legal order to make sense, a normal situation must exist, and he is sovereign who definitively decides whether this normal situation actually exists.”<sup>125</sup>

In Japan itself, or even in most of Japan’s conquered territories, the pre-existing “normal” was easier to define against the exceptional setting of war. But, in Manchukuo, the strange, bespoke, chimerical regime packed with various competing normative visions and, built on the shaky foundation of an invented popular identity, there was no “normal” to refer back to. It had, rather, to be newly invented, communicated, and thus defined. The ability of various groups to challenge state power, and also the serious threat that such challenges proved, even beyond those groups’ stated goals, can be seen as referring to the contest over who had this all-important definitional power.

By both resisting and engaging with the state—refusing to either fully submit to it or to treat it as a mere enemy for violent overthrow—Manchukuo’s activists took part in a contest for state power precisely in the “normal situation.” Though the state could always respond with exceptional measures (such as special trials or removals from office), it found itself unable to fully stamp out the “normal” activities of those who decided simply to act as though its rhetoric of popular sovereignty could actually be legitimate. Of course, it could always escalate its confrontation with such actors to the point of direct persecution. But, in doing so, it would expose itself as having lost control of what it, too, claimed to be the “normal” order of society: a serious embarrassment for any sovereign.

To the extent that individuals were willing to risk sacrificing themselves for the sake of such gestures, they presented the ever-present possibility of mass non-violent resistance to reclaim and redefine the political situation. Seemingly everyday or pragmatic acts thus contained the immanent possibility of large-scale civic solidarity. Acts seemingly geared toward “redeeming” the state’s promises also contained the immanent possibility of cancelling or refounding the state in the name of a different, more authentic popular sovereign. And transnational idealism always implied the corresponding ideal of meaningful self-determination, here and now.

Perhaps, then, we can see in the phenomenon of lawyers challenging the state simply by acting like real lawyers, teachers like real teachers, writers like real writers, etc.—a kind of “contest to define normality” that may prove useful in understanding forms of resistance deployed in various other times, places, and political contexts. As Flora Sapio writes in the context of contemporary China, political authorities’ exercise of sovereign power to override positive laws or rights is to a large extent facilitated by public responses. When the public at large “overlooks” the use of exceptional measures to suppress particular groups or individuals—usually because these groups are not seen as part of the social

124. Cf. Agamben (2005).

125. Schmitt, *supra* note 24, p. 13.

mainstream—“legal exceptions [can] become the norm [and] anybody can potentially be reduced to bare life.”<sup>126</sup> Given the lack of a unified public response to arbitrary power, there is thus little prospect for systematic restraint of that power.<sup>127</sup> On the other hand, the experience of Manchukuo’s civil activism suggests that even the most exceptional political regimes often propose ideals of “normality” that can be appropriated, contested, and made the basis for organized resistance.

## 6. CONCLUSION

As has been shown, Manchukuo was a seedbed for various duelling narratives: cultural, political, and legal. Even the basic question of the state’s legal status *as* a state led to the articulation of two competing international legal standards, which remain unreconciled to this day. A further sign of the “puppet state’s” continued polyvalence is that this very term tends to be the one most often used in English to characterize it, while in modern Chinese accounts it is invariably prefaced by the prefix “false” (*wei*), and in Japanese discourse there is, still today, a noticeable lack of such deprecatory modifiers.

This continuing diversity of narratives *about* the state was matched by the diversity of narratives *within* it. Some of these were certainly irreconcilable—even among those who resisted the regime. There is no single platform, after all, that can fully encompass the views of pro-KMT Chinese nationalists, Japanese Marxists, and true-believer Confucian revivalists. Yet all of these different normative commitments, and others, served as the basis for various forms of resistance that challenged both the state’s repressive features and its role in Japanese imperial expansion. In this sense, Manchukuo can be seen as an important stepping stone not just in the story of a global military conflict, or in the national histories of particular peoples, but also in the development of a transnational discourse of civic activism, collective action, and mass resistance against arbitrary political power. This is a story which has tended to be buried not only on the transnational level, but also in domestic historical accounts that tend to obscure the multiplicity of arguments, positions, and identities on display in any given moment of the past. On this theme, Kyu Hyun Kim, in *The Age of Visions and Arguments*, suggests that the development of an engaged civil society in Meiji Japan was an indispensable facet of Japan’s “integration into a modern nation-state”—and that, as a result, that state could never completely “dispense with its (sometimes half-hearted) overtures toward liberalism and democracy, even when [it] penetrated deeply into the lives of individual citizen-subjects during the twentieth century.”<sup>128</sup> This story, too, makes a significant detour in Manchuria.

Duara, relatedly, suggests that “the question of the nation’s historical unity is ... inseparable from the problem of its contemporary diversity,”<sup>129</sup> and that the argument for nation’s collective subjectivity can always be challenged by counter-histories. It is

126. Sapio (2010), p. 96.

127. McCormick develops the point that, for Schmitt, even outright dictatorships could be distinguished based on whether the dictator is able to claim the “sovereign” power to remake society at will, or merely enjoys the “commisarial” authority to deal with emergencies and restore a status quo. McCormick, *supra* note 123. Implicit in this binary is that it is the populace at large—not the dictator figure itself—that can decide on this distinction.

128. Kim (2007), p. 450.

129. Duara, *supra* note 19, p. 32.

to suppress these immanent challenges to the national affiliation as the paradigm for individual identity that political authorities develop “regimes of authenticity,” seeking to “produce the idea that the nation is prior to us.”<sup>130</sup> The resistance of Manchukuo’s civil society, meanwhile, shows that the “authentic,” like Schmitt’s “normal,” can be a site of contestation and the development of alterity.

Because the architecture of Manchukuo’s sovereignty was so artificial, and so suddenly constructed, on such shaky foundations, it was never far from the zone of the exception. As a result, the contest to define the normal functioning of the regime was especially open and intense. But some version of this dynamic seems to characterize all authoritarian systems under the conditions of modernity—even the most illiberal states in today’s world invariably claim to represent “the people,”<sup>131</sup> and to exercise repression only as exceptional measures on their behalf. To simply refuse to accept classification as “exceptional”—to insist instead on exercising or invoking the sovereign’s power to define the “normal”—can be a powerful praxis of resistance in such situations. For today’s lawyers, educators, and others, the example of Manchukuo’s civil society resistance movement serves as a reminder of how members of the professions can use their unique social roles to push for more open societies, even under the most adverse conditions.

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130. *Ibid.*, pp. 32–3, emphasis added.

131. On this point, see e.g. Kahn (2000), p. 1.

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