

The Otsu Affair:
The Formation of Japan's
Judicial Conscience

Barbara Teters
Iowa State University

As the goal of modernization preceded that of democratization by some three-quarters of a century, so did the establishment of rule-by-law in the Meiji era precede the fulfillment of the rule-of-law after World War II. Seventy-seven years separated 1945, and its promise of the rule-of-law, from 1868 and the Charter Oath. During that time, the principle of rule-by-law—that is, government by statute, ordinance, and regulation—replaced the Tokugawa system, which Henderson has called the rule-by-status; rule-by-law was adopted and applied with remarkable vigor and consistency by generations of men who did not yet accept the proposition that the law itself must be subject to a higher law.¹ Nonetheless, early in the modern period the fragile presence of the rule-of-law became apparent in the form of judicial independence. As a result of the Otsu crisis in which that principle was tested and established, the atmosphere in which the individual daily confronted his government and the presuppositions on both sides regarding that confrontation were basically, although ever so slightly, altered in the direction of the supremacy of law. Japan thus took a small but significant step toward constitutionalism.

Article 57 of the Meiji constitution consisted of an explicit statement of the principle of judicial independence. The meaning and durability of that constitutional provision were challenged two years after the constitution was promulgated when the *hambatsu* intervened in the judicial process to attempt to secure the death sentence for the policeman, Tsuda Sanzō, who had attempted to assassinate Crown Prince Nicholas of Russia. The primary issue in that crisis was the sole right of judges to determine what law should be applied and to apply it without interference from executive officials and without regard to political considerations, however grave. The test was the clearest

possible. The oligarchy's intervention was not prompted by the personal whims of executive officials, nor by political convenience, nor even by considerations involving cherished *hambatsu* policies. The stake seemed rather to be the very existence of the nation. When the independence of the judiciary prevailed in spite of the awesome risk of war, it was likely to survive almost any test, and in the limited sense of the integrity of the judge or judges in deciding specific cases, it did so, its slight spirit remaining throughout even the tumultuous 1930's.²

As the sorry history of individual rights in prewar Japan demonstrates, although judicial independence is essential to the existence of the rule-of-law, it is not in itself sufficient. The victim of unjust laws, brutal police procedures, or the arbitrary and political decisions of the procurator-general may not be much comforted by the knowledge that when he appeared in the courtroom he was tried and sentenced only according to law and by a judge or judges who were immune to political pressure and scrupulous in their application of the law without regard to extraneous factors. Nonetheless, when these principles of the rule-of-law triumphed in the dramatic confrontation between justice and expediency in the Otsu trial in May 1891, a solid though narrow foundation for the later development of constitutionalism was laid in the indigenous tradition.

The Otsu or Konan affair began with the attempted assassination of Russian Crown Prince Nicholas by a policeman, Tsuda Sanzō, as the prince's entourage prepared to leave Otsu to return to Kyoto after a morning of sightseeing and ceremony in and around that lovely city on the shores of Lake Biwa. The new Matsukata government, indeed the oligarchy as a whole, believed the diplomatic crisis could only be averted by imposition of the death sentence. The pressure exerted by the oligarchs on the judges of both the Otsu court and supreme court was very great indeed. *On* and *giri* were invoked along with *han* loyalties and other personal bonds. Threats were utilized: martial law would be declared or an imperial ordinance promulgated if the judges refused to serve the national interest as defined by the oligarchy. The judges were reminded of the emperor's own deep alarm as he viewed the possible consequences of the attack on Nicholas. Every newspaper reinforced their impression of the intensity of popular indignation against Tsuda, who had sullied the national honor and endangered the nation. When the judges voted six to one, on May 27, 1891, in favor of life imprisonment,

it was in the face of the dreadful knowledge that a disastrous war might result.

That the six judges allowed no such considerations to deter them from a just decision was due in large part to the influence of their chief justice, Kojima Iken, whose own record of the Otsu affair reveals the very considerable extent to which he had internalized the alien concept of the rule-of-law and, as a consequence, had arrived at a clear formulation of his role and that of his fellow judges as the independent judiciary established by the Meiji constitution, and indeed considered it essential to constitutional government.³

Born in 1837, Kojima did not belong to that later generation of samurai leaders who studied abroad during Japan's enlightenment. One of his younger intimates, Hozumi Nobushige, for example, studied at the Middle Temple in London and qualified as a barrister before going on to study in Berlin.⁴ Kojima, born a generation earlier, gave illustrious service to the imperial cause before and during the Ishin wars, and went directly from the battlefield into the new bureaucracy, first serving in the Dajōkan and then in 1871 transferring to the new ministry of justice where he remained until he resigned as chief justice in 1892.

It was in the ministry of justice that Kojima's judicial conscience was formed, tested, and tempered, and his insight into the role of law and the judiciary in constitutional government grew and deepened. In 1875-76, for example, the young Kojima defended the principles of law and justice during the Tsurugaoka incident. On that occasion, the Tokyo government stayed its hand for fear of lighting the fuse which led from Tsurugaoka to Satsuma and Saigō to whom many of the Tsurugaoka warriors were personally devoted as well as ideologically committed, but Kojima argued persuasively that such considerations must not deter the application of justice.⁵

Nine years later, Kojima was president of the Osaka court of appeals when the case of Ōi Kentarō and his colleagues came before that court. The *hambatsu* was determined to secure the death sentence under *ex post facto* law promulgated for that purpose. Kojima's decision was nevertheless based on the law in effect at the time of the Ōi conspiracy.⁶ Thus he had early made and sustained a commitment to the supremacy of law in the form of judicial independence.

As Pittau has pointed out, and Kojima Iken long before, the Meiji constitution provided in Article 57: "The Judicature shall

be exercised by the Courts of Law according to law, in the name of the Emperor," and in his *Commentaries* on the Meiji constitution, Itō Hirobumi himself articulated the principle of judicial independence:

In ancient times when politics were in a state of primitive simplicity, in no country was the Government distinguished into the judiciary and the administrative. . . . As, however, civilization advanced and social affairs became more and more complex, a distinct line of demarkation was drawn between the judiciary and the administrative. The two departments have each different organizations, and neither of them suffers any encroachment upon its sphere of business by the other. In this way, it has been possible to witness great progress in constitutional government.

. . . The functions of the administrative are to carry out laws and to take such measures as may be found expedient for the maintenance of the public peace and order, and for the promotion of the happiness of the people, while the duty of the judiciary is to pronounce judgment upon infringements of rights, according to the provisions of the law. In the judiciary, law is everything, and the question of convenience is left out of consideration. In the administrative, however, measures are taken to meet the ever-changing requirements demanded for the convenience and necessities of society; and law simply shows the limits beyond which they are not permitted to obtrude. Such being the distinction between the nature of the administrative and that of the judiciary, were there only administrative officials and no judicial functionaries, the rights of individuals would be in danger of being made subservient to the ends of social convenience and would ultimately be encroached upon by power.

Therefore trials must be conducted according to law; the law is the sole standard for conducting trials, which must always be conducted in a court of law.

. . . Though it is in the power of the Sovereign to appoint judges, and though courts of law have to pronounce judgment in the name of the Sovereign, yet the Sovereign does not take it upon Himself to conduct trials, but causes independent courts to do so, in accordance to law and re-

ardless of the influence of the administrative. Such is what is meant by the independence of the judiciary.⁷

Nonetheless, just two years later Itō participated in the *hambatsu's* effort to secure Tsuda's execution. One assumes that he justified himself in doing so with the thought that in this case the very physical existence of the nation might be imperiled. Faced with the fearsome possibility of a dreadful war, Itō was willing to consider any means by which Tsuda Sanzō might be "legally" executed, balking only when Mutsu and Gotō proposed that the government hire an assassin to arrange Tsuda's death.⁸ Despite his lengthy elucidation of the principle of judicial independence in the *Commentaries*, Itō's role in the Otsu affair suggests that his commitment was to rule-by-law, not the rule-of-law.

The choice as it was presented by the Otsu crisis was between application of the law at the risk of war or sacrifice of the rule-of-law for the sake of the national security. Faced with the dilemma Itō himself had suggested when he wrote the above passage in his *Commentaries*, Kojima applied the principle Itō had articulated and then repudiated.

The chief justice was by no means alone in his defense of the rule-of-law. Initially, the judges of the supreme court all supported his position and although some vacillated later as they were subjected to extreme pressure, in the end Tsuda was sentenced to life imprisonment by a vote of six to one. The functionaries of the ministry of justice fought Minister of Justice Yamada to a standstill in a spirited three-hour oral battle on May 12. Highly respected scholars of jurisprudence such as Hozumi Nobushige gave Kojima their moral and professional support, and many of the small number of practicing lawyers rallied round as the crisis mounted. Indeed, one of the significant aspects of the Otsu affair is the degree to which it both revealed and contributed to the professionalization of the judiciary and the differentiation of both legal and judicial roles.

The judges also received strong political support. Prince Konoe had been much influenced by English constitutional history and theory while studying abroad. Surely the story of Coke's historic confrontation with James I in Whitehall had been part of that political education. By 1891, he was already emerging as a leader of the nonparty anti-*hambatsu* forces in the Diet. He was greatly exercised by the Otsu affair and, after it was over, led a movement in the upper house to censure the government,

charging, "This is an invasion of the judicial power by the executive, and is a distortion not to be permitted in constitutional government."⁹

One of the most eloquent statements of the necessity of living by the rule-of-law, even in the extraordinary, dangerous circumstances of May 1891, came from the opposition newspaper *Nihon*, which published on May 17, 1891, an article declaring that if Tsuda were to be judged on the basis of the heinous nature of his act and the outrage felt by patriotic Japanese, no punishment would be too severe: "However, Japan has law, it has courts, it has judges. Criminals, whether their crimes are great or small, grave or trivial, all are judged by the court which has jurisdiction according to the judges. . . . There is no criminal law by which men can be judged except the statutory law. Therefore, no matter how heinous the crime, . . . not even the slightest encroachment by others must be permitted. The statutory law must not be distorted by farfetched interpretations for the sake of other considerations."

On May 17, 1891, the least perceptive reader of *Nihon* would have recognized the reference to the Otsu affair, but the writer proposed to leave nothing to chance. He went on to refer explicitly to the forthcoming trial of Tsuda, saying, "Therefore, we hope our judges will forthrightly defend our statutory law and refrain from taking into account any other circumstances at all."¹⁰ For its audacity in defense of the rule-of-law, *Nihon* paid, first with censorship, then with suspension, all very legally under the rule-by-law.

It was in this atmosphere that the judicial conscience of pre-war Japan was formed. In a popular and elite climate of opinion that came close to panic regarding the possibility of war with Russia, seven judges hesitated, several indeed vacillating for sixteen days. Nonetheless, in the end, on May 27, 1891, when the moment came to hand down a decision in the case of Tsuda Sanzō, six out of seven judges voted for life imprisonment. They had indeed vacillated, but in the circumstances it may be understandable that they paused when the price of their integrity might well have been the physical extinction of the nation. The leadership came from Kojima Iken, whose commitment to the rule-of-law began long before the crisis and continued, undiminished, throughout it. Together the six and the one have provided a tradition which legitimizes in post-World War II Japan the

otherwise alien concepts of judicial independence and the supremacy of law.

Crown Prince Nicholas began his tour of the East in late 1890, when he left home for Austria and then Greece, where he was joined in his travels by Prince George. Together, the two princes, Russian and Greek, aged twenty-five and twenty-three respectively, journeyed to India, Siam, and China. Finally, on April 27, 1891, the Russian warship on which they traveled anchored in the harbor of Nagasaki. The party planned to spend the month of May in Japan, traveling from Nagasaki and Kagoshima in Kyushu to Aomori in northern Honshu. In Tokyo, the crown prince was to be the honored guest at ceremonies celebrating the completion of Nicolai Cathedral. This appearance and his presence in the Russian Far East when the eastern end of the Trans-Siberian Railroad was commenced constituted the official justification for his journey. No doubt Nicholas' government and parents also regarded the tour as part of the education of the prince who would one day be czar.¹¹

The crown prince's grand tour of the East seemed to many Japanese more likely to be a part of a great Russian design for encompassing Eastern Asia. With the beginning of the Trans-Siberian Railroad and the crown prince's visit to Japan, the ancient menace of Russia assumed a form apparent to the man in the street and cabinet member alike. More than one Japanese was sure that all the elaborate sightseeing in fact masked an assessment of Japan's defenses.

The European princes arrived in Kobe harbor on May 9 and went to Kyoto late that afternoon. It was a lovely season in which to visit Japan, and their hosts had spared no effort in arranging for their pleasure. Prince Arisugawa himself superintended arrangements and accompanied them on their travels. The visiting princes spent May 10 sightseeing in Kyoto, seeing many things familiar to most tourists in the famous city as well as treasures reserved for the sight of only the most honored guests.

Early the morning of the eleventh, Nicholas and George left their Kyoto inn, the Tokiwa, in a long and colorful rickshaw procession. The route to Otsu was gaily decorated; the flags of Russia, Greece, and Japan flew everywhere; fireworks brightened the sky. When the princes reached the border of Shiga prefecture, its governor greeted them and joined their party, escorting them to Miidera to enjoy its magnificent view of Lake Biwa.

The last stage of the little journey to Otsu was by boat. On arrival in the lakeshore city, the party went to the prefectural office for the inevitable welcoming ceremonies and luncheon in the meeting hall. About 1:30 that afternoon the procession formed to begin its return to Kyoto.¹²

Tsuda Sanzō was one of the policemen on duty at a street corner where the procession would pass on its return to the old capital city. The thirty-seven-year-old former samurai from Iga had attended the *han* school, and when the *han* were abolished went with his classmates to the Nagoya garrison, first as a common soldier, then as a noncommissioned officer. He fought ably and bravely against the Satsuma rebels and then left the army in 1882. In 1884, Tsuda became a policeman, first in Mie prefecture and finally in Shiga where on May 4, 1891, he was assigned to guard duty in Otsu during the European princes' stay in Kansai.¹³

From his youth Tsuda had harbored a dread and suspicion of Russia. Such incidents as the 1875 exchange in which Russia took Sakhalin and Japan took the Kurile Islands seemed to him to be entirely to Russia's advantage. With the beginning of the Trans-Siberian Railroad and Nicholas' visit to Japan, the menace took shape. Tsuda did not believe for a minute that the Russian crown prince had come to Japan merely to see the dancers of Gion or to be refreshed by Miidera's view of Lake Biwa, and he was appalled at the prospect of the spy's reception at court by the Emperor Meiji. On duty in the precincts of Miidera temple the morning of May 11, Tsuda dwelt on the past and the future, and when two Europeans came to his post and surveyed the district's famous sights as pointed out by their rickshaw bearers, Tsuda thought perhaps the younger one was the Russian prince, setting about the real purpose of his visit. Fortunately for Miidera's two unknown guests, Tsuda let the moment pass, preferring to wait for an occasion when he could be sure of the identity of his victim. Thus there was never any doubt that the Otsu attack was premeditated.¹⁴

There was never any suggestion that others were implicated in Tsuda's action. The attack was the private deed of a distraught patriot, who was never applauded for his act of sacrifice, as were so many other perpetrators of violence in the name of patriotism in prewar Japan. Rather Tsuda was vilified by his countrymen since, in the national climate of hysterical Russo-

phobia, he appeared to have threatened the very existence of Japan itself.

When the crown prince's rickshaw reached his post along the return route through the Otsu streets, Tsuda saluted, then pursued it, drew his sword, and slashed twice from the right at the prince's head. Nicholas jumped down from his rickshaw to the left, holding his right hand to his wounds, and tried to escape, followed by his assailant. Young Prince George leaped from his rickshaw and ran to Nicholas' aid, beating Tsuda on the back with a bamboo whip. One of the prince's bearers seized Tsuda's legs and pulled him down, another picked up his fallen sword and struck at his back and neck. When Police Chief Kimura hurried back from the head of the procession and ordered him arrested and bound, Tsuda was saved, only to die of pneumonia in a Hokkaido prison less than five months later. The injured prince was given first aid in Otsu; late that afternoon he was returned by train to Kyoto and carried to his rooms at the Tokiwa where Russian doctors, rushed to the scene by special train from Kobe, took over his care.

The officials involved flashed their separate messages to their superiors in Tokyo. Meiji Tennō's court knew the ominous news by 2:30 P.M. Court, government, and public were at once seized by apprehension, even panic, regarding the reaction of mighty Russia. Nishimura Shigeki described the national consternation: ". . . when the incident became known, the whole country shook with fear. Some said the Crown Prince was dead. Others said his wounds were grave and his life was in doubt. There were all kinds of rumors and the public became more and more agitated."¹⁸ Though it soon became known that Nicholas' wounds were slight, for the next sixteen days the diplomatic aspects of the crisis dominated the thoughts and actions of most of those concerned.

All that was customary, and more, must be done to assure the Russians of Japan's profound regret. That very afternoon the emperor dispatched Prince Kitashirakawa to Kyoto as his personal representative at the bedside of the future czar. In the evening, Home Minister Saigō and Foreign Minister Aoki left for Kyoto accompanied by the army surgeon general. Other delegations, official and unofficial, prepared to carry their apologies and the nation's to the crown prince and his party. Nishimura himself, as president of the peeresses' school, hastened off to Kansai, as did Harai Takuzō representing the Tokyo law

academy and Konoe Atsumaro from the upper house of the Diet.¹⁸ The management of Shimbashi Station must have been hard-pressed to meet the requirements of the greatly increased flow of traffic to Kansai, much of it requiring special trains and very special courtesy.

During that first afternoon, an imperial conference met at the palace. Messages went out summoning those who were not in town. Itō and Inoue Kaoru, for example, were vacationing after the extended and elaborate machinations which had accompanied the establishment of the Matsukata cabinet just a few days before. Both genro hurried to Tokyo, Itō arriving at 1:00 A.M. at Shimbashi where he was met by a carriage sent by the palace and carried at once to see the emperor in the imperial bedchamber.

Early the morning of May 12, those members of the cabinet who were still in Tokyo, the genro, court officials, and Chief Justice Kojima, were among those gathered at Shimbashi Station to see the emperor himself off to Kyoto. The atmosphere in the station was sombre, the sky was darkened by a drizzling rain, and members of the assemblage, many of whom thought Japan would be at war when Meiji Tennō returned to his capital, wept as they watched the imperial train pull out of the station.

Now that the customary, almost instinctive, and very necessary courtesies had been set in motion, court and government assessed Japan's position and came to two conclusions as to remedial measures to be undertaken at once. Japan's diplomatic position would be greatly improved if the crown prince were to convalesce at the Tokiwa and to continue his tour, particularly if he were to visit the capital city and be received at the palace by the emperor as originally planned. It was also essential to assuage the anger of Russia and improve Japan's bargaining position by executing Tsuda Sanzō. If these objectives could be accomplished, Russia's retaliation might be less severe.

Early on the twelfth the members of the government and the genro hurried from Shimbashi to the prime minister's official residence to discuss the further steps to be taken. In the hysteria of May 12, 1891, they laid aside the preoccupation with treaty revision and Japan's "image" in the eyes of the treaty powers, which for twenty-three years had prevailed over almost every other consideration. The good opinion of no other foreign power mattered now; only St. Petersburg counted in the deliberations. The constitutional principle of judicial independence

so nobly elaborated by Itō in his *Commentaries* was abandoned. Only Mutsu Munemitsu spoke for constitutionalism when he urged the life sentence provided for those who attempted the murder of ordinary persons; and this brief impulse was stilled by Inoue Kaoru's eloquent arguments in favor of the political and expedient execution of Tsuda Sanzō.¹⁷ The participants therefore agreed unanimously that no effort must be spared to secure the death sentence, and the meeting broke up, each member departing to perform his assigned role in Tsuda's execution.

Itō himself rushed off to prepare to leave for Kyoto where he had been instructed to join the emperor by the next train. His primary function in Kansai would be diplomatic contacts with the Russians, first of all in the hope of persuading Nicholas to remain at the Tokiwa until he recovered and then to complete his scheduled tour of Japan. He would also participate there in the numerous conferences designed to further the execution of Tsuda.¹⁸

When he left Shimbashi that morning after the departure of the emperor's train, the new chief justice of the supreme court, Kojima Iken, also hurried to the prime minister's official residence, accompanied by his successor as president of the Osaka court of appeals, Kitabatake Harafusa. There, after the government's breakfast conference adjourned, Matsukata and Mutsu received the two judges. As Kojima himself recalled the conversation, the constitutional issue at once became explicit. The prime minister explained why the government felt it was essential to execute Tsuda and said that the cabinet, even including the minister of justice, Yamada, had therefore decided on the death sentence in accord with Article 116 of the criminal code which provided for that penalty for anyone who committed violence against the emperor, empress, or crown prince. Mutsu elaborated on the cabinet's position, arguing that since the text of Article 116 referred simply to the "emperor," its provisions did not apply merely to the emperor, empress and crown prince of Japan, but to those of foreign countries as well. Thus this first confrontation revealed that the constitutional aspect of the crisis was going to revolve around the question of who should determine what law should be applied, while a secondary argument would rage over the applicable law.

Kojima dealt forthrightly with both issues, declaring, "Whatever the cabinet has discussed and decided, I [as chief justice of the supreme court] cannot agree to any interpretation

contrary to the spirit of the law." The cabinet's interpretation of Article 116 was just that. When the Genrō In had revised the penal code in 1880, the word "Japanese" had been omitted from Article 116 because the word used for emperor was "Tennō" which could only refer to the emperor of Japan. Use of the adjective "Japanese" would therefore have been redundant. "The intent [of the revision]," he pointed out, "was not at all to broaden the scope of application." The prime minister responded that this might be so, but was not legalism irrelevant when the existence of the nation was at stake? "The nation's existence comes before that of the law," he said. "If there is no nation, there will be no law."¹⁹

Troubled, though not in conscience, Kojima left the prime minister for the ministry of justice where he found Minister of Justice Yamada engaged in legal disputation with the staff and already besieged. The legal question at issue was again the applicability of Article 116. With the greatest earnestness, Yamada urged the government's position. The purpose of the criminal law was primarily to preserve the tranquility and order of the nation. The reason for distinguishing between crimes against ordinary persons and those against the imperial family was not merely to preserve the latter's exalted dignity but also because crimes against them threatened the peace and order of the nation. In this respect there was no difference between acts of violence directed toward the Japanese imperial family and those committed by Japanese subjects against the monarchs of foreign countries or members of their families. Since Article 116 used only the phrase "Tennō oyobi Sankō Kōtaishi," unqualified by the adjective "Japanese," there was no obstacle to the application of Article 116 in the case of the attempted assassination of the Russian crown prince. Officials of the ministry of justice refuted these arguments in the same manner Kojima had employed not long before in conference with Matsukata and Mutsu. When the meeting broke up three hours later, no minds had been changed.²⁰

On the next day, May 13, Kojima met with the judges of the supreme court and raised with them the question of the proper interpretation of Article 116. They too were unanimous; the word "Tennō" meant the emperor of Japan, no other. When Kojima so informed the minister of justice that afternoon, the latter responded with the bluff the government was to use repeatedly for the next fourteen days: "If the judges . . . adhere

only to the letter of the law and do not change their stubborn view, we will . . . in the end be unable to entrust these grave matters of state to the judges and it will be necessary to handle the matter as an emergency by declaring martial law."²¹

On the same day the Otsu trial court notified the chief justice that it proposed to try Tsuda as though his crime had been against any ordinary person, that is, under Articles 292 and 112 which provided for the death sentence for premeditated murder and reduction of that sentence by one or two degrees when the premeditated murder was attempted but not completed. In reply, Kojima urged that the Otsu court proceed at once to trial. In view of what Yamada had said about martial law, it was clear that the interests of justice would best be served by quick action before the cabinet could intervene further.

Yamada immediately dispatched the procurator-general, Miyoshi Taizō, to Kansai. Although Miyoshi believed that Article 116 was not applicable and privately argued this point with Yamada and other members of the government, he complied with the minister's orders and the ordeal of the Otsu judges began.

In Kansai that day each event heightened the government's alarm. Those who called on the Russian ambassador found his attitude threatening. The security arrangements had been deplorable from the beginning; now he feared for the safety of all his countrymen throughout Japan.²²

Late in the morning of the thirteenth, the emperor himself called on the crown prince, who was magnanimous, telling Meiji Tennō, as he told all who called on him, that what had occurred in Otsu had not in the least altered his warm feelings for Japan. This made for a pleasant and gracious conversation, no doubt, but his visitors would have been relieved to hear that his warm feelings would cause Nicholas to convalesce at the Tokiwa and then to continue his tour. Instead, not long after the emperor returned to the palace from the Russians' inn, the crown prince sent the dreaded word that his parents had instructed him to remove at once to the Russian warship in Kobe harbor. The Russian ambassador turned the screw once more when he insisted that the emperor accompany the crown prince to Kobe in order to ensure the latter's safety on the journey. Court and government leaders flinched, but the emperor consented and the move was accomplished without incident in the late afternoon of May 13. Such were the consequences of the deed of the police-

man who had been appalled at the prospect of the crown prince's ceremonial reception at the court of the emperor in Tokyo!

As alarm mounted in Kansai, the government increased its pressure on the Otsu judges and intensified its diplomatic efforts. The court decided to send Prince Arisugawa to Russia as the head of an official mission carrying Japan's profound apologies to the Russian court, government, and people. Meanwhile, Itō and others redoubled their efforts to persuade the crown prince to complete his scheduled visit to Japan, and particularly to accept the emperor's hospitality in Tokyo.

When an imperial conference convened at the palace in Kyoto on May 15, the participants explored in detail the possibility of an imperial ordinance. Foreign Minister Aoki had prepared a draft which provided *ex post facto* for the death penalty for those who committed acts of violence against foreign chiefs of state or members of their families. That project was dropped for the moment when privy council chief secretary, Itō Miyoji, vigorously opposed it, but there was no lessening of the resolve to see Tsuda dead.²³

On the following day, May 16, the Russian crown prince informed the emperor by letter that his parents wished him to convalesce in the Russian Far East before attending the ceremonies celebrating the eastern commencement of the Trans-Siberian Railroad. Nicholas would therefore depart from Japan on May 19. The shocked emperor responded that he would personally travel to Kobe on the nineteenth in order to say farewell and he invited the prince to meet him ashore for that occasion. For a brief interval it appeared that the invitation would be accepted, but word soon came that the prince's doctors had vetoed any departure from the ship. Nicholas therefore courteously invited Meiji Tennō to come aboard for luncheon. Nowhere in Japan's history was there any precedent for the emperor to visit the ship of a foreign government, and the occasion hardly seemed propitious for the inauguration of a new practice. It is a measure of the degree of panic within the government that some immediately had visions of the Russian warship steaming out of Kobe harbor, bearing the Meiji Emperor off to St. Petersburg as hostage. Itō pronounced this nonsense. Since Russia was a civilized country, the risks involved in accepting the luncheon invitation were nothing as compared with the consequences which might follow refusal. The emperor therefore accepted the Russian in-

visitation, but many would be anxious until Meiji Tennō was safely back on the Kobe pier on the afternoon of May 19.²⁴

When Itō Hirobumi and Inoue Kaoru called on the Russian ambassador that day in Kobe, he said nothing to relieve the growing tension. Itō speculated aloud on the possibility that Tsuda might be sentenced to life imprisonment rather than to death and was at once given to understand that Russia would not regard that outcome as satisfactory.²⁵

The same day an imperial ordinance was promulgated providing for prior censorship of all materials regarding foreign affairs. The ordinance served a dual purpose. It made it possible for the government to prevent the publication of articles that might stimulate further incidents or expressions of hostility toward the Russians. Now that the constitutional aspect of the crisis was reaching its climax, and the moment approached when someone must sentence Tsuda, the ordinance also gave the government an invaluable political advantage in the struggle against the judges since it could be used to prevent the publication of materials that would mobilize support on the side of the judiciary.²⁶

In these circumstances of panic and pressure, the Otsu trial court on May 18 concluded its preliminary hearing with the finding that Article 116 was the applicable law; this being so, the Tsuda case was not within its jurisdiction. Under the law, the supreme court must now establish a special court to try Tsuda Sanzō, and on the eighteenth the constitutional struggle was transferred from Kansai to the ministry of justice in Tokyo.

Early that morning in Tokyo, Matsukata called Kojima to an emergency conference. Today this in itself strikes a warning note, but in the circumstances of Japan in 1891, very early in its experience with the practice of judicial independence, the chief justice went at once to the prime minister who greeted him with an implied threat. Was the position he understood to be Kojima's in fact the view of the entire court? he asked. The question presaged the *hambatsu's* tactics in the next few hours and indeed, the next nine days. Kojima immediately replied that he could speak only for himself as the chief justice of the supreme court.

The prime minister at once produced the appeal most likely to secure the compliance of any Japanese. On the morrow the emperor himself would confront the Russians. The government was understandably anxious, considering the unfavorable cir-

circumstances in which the meeting would take place. The difficulty of the emperor's position was greatly increased by the probability that the Russians would ask some specific questions regarding Tsuda's future. When the visit of the crown prince had been first discussed by the two governments, the Russian ambassador had suggested that it might be wise to issue an imperial ordinance since the Japanese law contained no explicit provision regarding attacks on the heads of foreign states or members of their families. The foreign minister had replied that there was no need for such action since, if the totally unexpected disaster occurred, it would be dealt with under the law regarding such occurrences affecting the Japanese imperial family. Moreover, after the attempted assassination, Foreign Minister Aoki, acting in accord with the cabinet's decision that Japan must not go back on its word, had told the Russian ambassador that Article 116 would be the law applied, and the home minister had informed the prefectures to the same effect. What then was the emperor to say if he were questioned tomorrow? If the court were unreasonable, there would be no course for the government to take other than the declaration of martial law to be applied retroactively.

These complications caught the chief justice by surprise. Both foreign minister and home minister had acted unconstitutionally, and there was no doubt that in doing so they had created a situation of great potential embarrassment for the emperor and the nation. Still, he reflected in his memoirs, "was not this the responsibility of the members of the cabinet? The responsibility of the judiciary is simply to adhere to the spirit of the law." Nonetheless, Kojima hesitated a while before answering, troubled by the burden that would be his if the emperor were indeed sharply questioned by his hosts.

When he finally replied, he explained that though he was chief justice, he would not be participating in the trial of Tsuda, which would be conducted by a special court in accordance with the provisions of the law. He went on to discuss the legal points at issue. Since he and the prime minister had conferred on May 12, he said, he had explored European and American precedents and had found that while there were some for special treatment involving foreign chiefs of state, there were none where crown princes or other members of ruling families were concerned. In Russia itself there was no death penalty except for injury to the emperor or treason.

To apply 116 to the monarchs of foreign countries and their families would without a doubt be a violation of Japan's sovereignty. It would invite the ridicule and scorn of foreigners familiar with the law and the regret of generations still to be born. [Whatever the feelings aroused by Tsuda's act] we must understand that the law is the spirit of the nation and judges must not act on the basis of their personal feelings. What would happen if they were to do so? They would be in fact untrue to their responsibilities and their disloyalty and infidelity to the nation would have the result of causing the august Emperor to abuse his sacred sovereignty. Therefore, no matter what the danger to the nation, those who are judges can only rely on the exact words of the law and so safeguard its spirit.²⁷

After Kojima had also dismissed the possibility of martial law as being both inappropriate and, as *ex post facto* law, unconstitutional, Matsukata turned to a technique described by the chief justice as "when shooting at the enemy, shoot first at the horse." The prime minister said in effect that it was plain that it was the view of the seven judges that would count in the end, not the legalisms of the chief justice who could do little to interfere. Who would the seven be, he asked? Kojima took up a pen and wrote down their names: President Tsutsumi Masami, Haji Tsunesuke, Yasui Shūzō, Inoue Masakazu, Takano Saneson, Kinoshita Tetsusaburō, Naka Sadamasa.²⁸

Kojima left the prime minister shortly before noon. While at lunch he learned that at noon Minister of Justice Yamada, Minister of Education Oki, and Minister of Agriculture Mutsu had appeared at the supreme court, calling for Tsutsumi, Naka, Takano, and Kinoshita, who had answered the summons. Each of the emperor's ministers had talked to the judge or judges on whom he could expect to exercise the greatest influence: Mutsu to Tsutsumi, Yamada to Naka, Oki to Takano, Yamada and Judge Kurizuka to Kinoshita. Haji, or so the ministers thought, was theirs since he was a Satsuma man with close links to Saigō.²⁹ Yasui and Inoue had no friends in the cabinet and were known to be committed to opposing the government.³⁰ Four votes were needed to execute Tsuda, and therefore three of the four whom the ministers summoned must be persuaded by appeals to reason, self-interest, or loyalty.³¹

At two that afternoon Kojima received a telegram from Procurator-General Miyoshi requesting the appointment of a hearing commissioner to conduct the preliminary examination necessary before trial by the special court. The request was in line with the law, and Kojima accordingly transmitted it to Tsutsumi, who convened his colleagues. Kojima was then requested by them to appoint a commissioner, and he named Doi Yōtarō of the Otsu court.

Doi's report was received by telegram at ten o'clock the night of the eighteenth. To no one's surprise, and certainly not Kojima's, the commissioner found Article 116 to be the applicable law in this case of the premeditated attempted assassination of Crown Prince Nicholas.²² While Kojima waited alone in his chambers composing the memorandum he proposed to deliver to the prime minister and minister of justice on May 19, the seven judges met and in the early hours of the nineteenth notified Kojima that they would constitute themselves the special court to try Tsuda: Tsutsumi, Naka, Haji, Yasui, Inoue, Takano, and Kinoshita. Of these only Yasui and Inoue could be expected to adhere to the position all seven had agreed to on May 13. The struggle seemed to be all but over, with expediency bound to prevail over the law. Kojima recorded his despair: "When I received this document [notification of the establishment of the special court], I knew for the first time the full extent of what had occurred in those conversations between the ministers and the four judges. Personal feelings had prevailed even over the law which is the life of the nation The rights and obligations of Japanese citizens and the sacred independence of the judicial power would in the future be destroyed thanks to the judges' weakness of will and purpose."²³

Kojima could have taken only small comfort from the news that the emperor's visit to the Russian warship had concluded without incident. The conversation between the emperor and crown prince had been pleasant. The embarrassing questions had not been asked; indeed, the Russians had assured Meiji Tennō that there was no need to dispatch the Arisugawa mission to St. Petersburg. The emperor had safely returned to his palace in Kyoto. One wonders if the Russians were unaware of the state of the Japanese nerves, or if kindness prevented them from finding it necessary to shift the position of their ship ever so slightly sometime during the luncheon party.

While government and court officials in Kansai and Tokyo

had waited anxiously for news of the emperor's visit with the Russians, Kojima spent much of the day in completion of the memorandum which he hoped would cause the cabinet to reconsider. During the day his old friend and junior clansman from Uwajima, the distinguished jurist Hozumi Nobushige, came to call. He gave his stout support to the draft in preparation, greatly heartening the chief justice. Later, Soyeda Juichi, private secretary to Matsukata, asked for an interview and was most encouraging. Late in the afternoon, the chief justice delivered his memorandum to Matsukata and Yamada, and at 9:50 the evening of the nineteenth he left Shimbashi Station for Kansai, accompanied by the seven judges who would try the case of Tsuda.

The judges of the nation's highest court stopped in Kyoto on the way to Otsu, summoned there to an audience with the emperor. The imperial edict was an admonition to proceed at once and "with care" to settle the crisis which threatened the nation. The phrase "with care" was ambiguous: it could have been a warning not to tamper with the new constitution; it could as well have been a reminder of the awful risk of war. Kojima went directly to Imperial Household Minister Hijikata in the hope of enlightenment, but he was told only that the imperial message had been worded correctly. He and everyone else remained free to interpret the emperor's will as suited his purpose.⁸⁴

With Tsuda's trial by a special court scheduled for May 25, the chief justice found himself handicapped by the very law he had sworn to defend. Since he was not himself a member of the special court there was little he could properly do to intervene. Fully conscious of the limits of judicial propriety, he may well have gone beyond them in the end.⁸⁵ He met with Tsutsumi on the twenty-first for a private and forthright conversation in their Otsu inn. The chief justice told the junior judge quite frankly how he saw the stakes in the crisis: the issue was a matter not only of his and Tsutsumi's honor and that of the judiciary collectively, but also the honor of the emperor and the nation. In his argument, he used the ambiguous words of the imperial rescript to advantage: "The words '*chūi shite*' [with care] were the main point and spirit of the rescript and we must not overlook them!" Kojima himself interpreted the emperor's command as requiring him to oppose the cabinet with every means possible, "for the sake of the honor of the nation and the authority of the

constitution." Tsutsumi now must choose between the personal considerations invoked by the ministers on the eighteenth and the requirements of justice and constitutionalism. "Indeed," Kojima admonished him, "the outcome of the nation's crisis depends upon what you and your colleagues do."⁸⁶

Kojima handed Tsutsumi a copy of the memorandum he had delivered on the nineteenth to Matsukata and Yamada and begged him to read it carefully. He himself was going to Osaka on business. He could be reached there and would return at once if Tsutsumi wished. Kojima regarded this interview as his final effort.

The chief justice went to each of the judges to say goodbye and left for Osaka by train at four that afternoon, seen off at the station by Tsutsumi. It was an emotional parting in view of both men's knowledge of the gravity of the issue which would be decided before they met again. For his part, Kojima appreciated Tsutsumi's dilemma and sympathized.⁸⁷ All now depended on Tsutsumi's resolution of his own conflict. While the chief justice's appeal had been a moving one, Tsutsumi must have considered the wrath of the *hambatsu* should he give way, and far more serious, he must have contemplated what it would be like to be known by himself and all others as the man who had insisted on judicial independence and thus brought on his country a terrible war and perhaps extinction of the nation.

The document Kojima left with Tsutsumi had been written in the hope of influencing the *hambatsu*. It had more effect in shaping the decision of Tsutsumi; its largely legal and constitutional argument served to recall Tsutsumi to his role as a member of the judiciary under the Meiji constitution. In his memorandum, the chief justice discussed once more the inapplicability of Article 116 to the rulers of foreign states and members of their families. He reviewed the laws of foreign countries and found that even if the ordinary law were applied to Tsuda, his punishment, a life sentence, would be more severe than that provided in Western penal codes for such offenses. If Articles 23 and 57 of the Meiji constitution were violated in Tsuda's case, how could confidence in the law and the integrity of the judicial power be maintained?⁸⁸

Moreover, Kojima appealed to one of the deepest concerns of his countrymen during the Meiji era, the ardent wish for equal status for Japan in the ranks of the great powers, when he argued that if Article 116 were wrongly interpreted to include foreign

chiefs of state and members of their families, then the distinction between Japan and other countries would be lost. "Ah," he wrote, "if the nation is not sovereign, how can it be said to be an independent country?" Since "Russia is not at all a barbarian country," there was in fact no reason to suppose it would take advantage of the situation to make unjust and harsh demands on Japan. This being so, would it not be a pity to give the treaty powers an excuse for postponing still further the long-delayed revision of the unequal treaties or even for making new demands? Thus Kojima argued that even from the political point of view, what the government was seeking was unnecessary and would be unwise.³⁹

At two o'clock the afternoon of May 23, just two days before Tsuda's trial was to begin, the chief justice, marking time with routine chores in the familiar environment of Osaka, received a telegram from Tsutsumi calling him back to Otsu. The summons was the signal of the beginning of the awakening of the collective judicial conscience and Kojima obeyed at once. The two men conferred late that afternoon in their Otsu inn. Yasui, Inoue, and now Tsutsumi, would do what was right; one more vote was necessary if the rule-of-law were to prevail. By midnight, Kojima, assisted by Yasui, had assured at least two more votes, Kinoshita's and, surprisingly, Haji's, making a certain total of five.⁴⁰

The morning of May 24, Kojima notified Minister of Justice Yamada by telegram that Article 116 would not be applied in Tsuda's case. The cabinet, caught by surprise and confronted with the beginning of the trial the next day, requested a postponement, which was granted by the court. Minister of Justice Yamada and Home Minister Saigō departed for Kansai that afternoon, and their final confrontation with the chief justice began the morning of May 25. Miyoshi, the procurator-general, was also present.

When the legal arguments, by now familiar to all concerned, had been once more exhausted, Yamada asked for the names of the defecting judges; Kojima refused to tell him in order to protect not only the individual judges but also the principle of the confidential nature of the court's proceedings.

Saigō's approach was highly emotional. "I don't know anything about the law," he declared, but if the judges were to proceed as they intended, "not only will the Emperor's will be disobeyed but the Russian fleet will enter Shinagawa harbor and

our country will be overthrown. If this happens, we cannot say that the law has protected the nation but rather that it has destroyed the country." Kojima responded indignantly; how could anyone say that the law would destroy the nation when the law was itself "one of the main arteries supporting the life of the nation In the eyes of the judiciary, there is only the law."⁴¹

The emperor was distressed, Saigō reminded the chief justice. Could the judges ignore his wishes? Kojima's conscience was quite clear on this point. The emperor had only instructed the judges "to take care," which was indeed what they were doing; Meiji Tennō's rescript had made no reference to Article 116.

Yamada brought the meeting to an end with a request that he and Saigō be allowed to meet separately with each of the judges. Kojima naturally enough feared a repetition of what had occurred at the ministry of justice on May 18. While he would discuss the justice minister's request with the judges, he made it clear that he would use his influence to persuade them to refuse to meet with Yamada and Saigō. Supported by Yasui and Tsutsumi, Kojima secured the judges' agreement that it would be quite improper to permit those who were bringing charges to meet privately with those who would judge the case. Yamada took the news of their final defeat philosophically, confiding to Kojima that the government's purpose now was not so much to alter the court's decision as to impress the Russians with its sincerity in wishing to make amends for the injury to Nicholas. The distraught Saigō, already drinking heavily, responded with an anger undiminished when Kojima told him that the relationship between the minister of justice and judges was not like that which prevailed between the home minister and prefectural officials: "[Judges] submit only to the law. They have no obligation to submit to the orders of any man."⁴²

Tsuda Sanzō's trial began shortly after noon, May 27, in the crowded Otsu courtroom. The now-worn facts and arguments were presented by the procurators and the attorneys representing Sanzō. At three the judges began their deliberations and at six o'clock that evening the sentence of life imprisonment was handed down. Six out of the seven judges had in the end decided that the applicable laws were Articles 292 and 112 of the criminal code, not Article 116. Since Kojima in his scrupulous way did not record it, we do not know who the sixth judge was, Takano Saneson or Naka Sadamasa.⁴³ Jubilant with what the

six had done, the chief justice at once telegraphed the grand news to Hozumi Nobushige who shared it, rejoicing, with his colleagues in Tokyo. The telegram from Otsu was long cherished in Hozumi's home.⁴⁴

At midnight on the twenty-seventh, the chief justice went to the Otsu station to see the ministers off for Tokyo. The leave-taking of the minister of justice and the chief justice was civil, each having done what his role required him to do, but a final embarrassing scene occurred when Kojima parted from the home minister who returned to Tokyo expecting the imminent calamity of war.⁴⁵ He was wrong by thirteen years; when war came, it had nothing to do with the attempted assassination of Nicholas; it ended in the victory no one would have hoped for in the spring of 1891. The apprehensions of the Japanese government and public notwithstanding, the Otsu affair was from first to last primarily a constitutional crisis, producing no significant diplomatic consequences. Preoccupied by the prospect of bad harvests and famine at home, and ever-conscious of the logistics problem that would not be finally solved until completion of the Trans-Siberian Railway in 1905, the Russians accepted with an unexpected grace the news that Tsuda's life would be spared. Indeed, the Russian ambassador, whose mischief had added greatly to the crisis atmosphere in Kansai, informed the foreign office that if the sentence had been death, the czar would have requested the emperor to exercise mercy.⁴⁶

Politically, the Otsu affair was no more than another of a long series of incidents used by anti-*hambatsu* forces to harass the government, some like Konoë denouncing its intervention in the judicial process, others like Tani Kanjō attacking it for failure to execute Tsuda.⁴⁷ Those ministers most closely identified with the crisis left office; the Matsukata government remained in power until August 1892. When it fell, it fell because the oligarchy found it useful to transfer responsibility to Itō and Chōshū, not because the Matsukata cabinet had mismanaged the security arrangements for the crown prince's visit, had attempted to execute Tsuda, or had failed to do so.

Insignificant in Japan's diplomatic and political history, the Otsu affair was an important episode in Japan's constitutional life. The judicial crisis did a great deal to bring into being a judiciary with high standards of professional conduct and a keen sense of identity and solidarity, and the subsequent role formulation of Japan's judges was to a large extent determined by what

happened at Otsu in May 1891. In these ways, the events of the sixteen days of crisis contributed greatly to Japan's legal modernization, since the existence of the modern state would be precarious at best without a professional judiciary.

Constitutionalism or limited government, with its focus on the individual and his rights, would be out of the question if there were no independent judges guarding the constitution and the supremacy of law. True, as much depends on the content of the law and constitution as on the integrity of the judges who apply them. Nonetheless, the post-World War II emphasis on the rights of the individual would be meaningless unless there existed the means to defend them, and the establishment of the tradition of the independent judge was the most lasting and most significant of the consequences of the Otsu Affair.

Although Kojima's record of the contest of wills and conscience through which he had passed in May 1891 gives us no reason to suppose that his dedication to the supremacy of law arose out of consciousness of individual rights as the end and purpose of constitutionalism, his devotion to the law and his definition of his own role as a judge in defense of the supremacy of law were sufficient to assure him a proud place in the history of Japanese constitutionalism. Over and over again during the sixteen days of the Otsu affair, Kojima said to the emperor's ministers in effect what Coke had said to James I in Whitehall in 1608, quoting Henry de Bracton, "The King should be under no man, but under God and the law." In the context of Japan in the spring of 1891, just two years after promulgation of the Meiji constitution and in a climate of Russophobia, Kojima's performance was no minor act of courage, and its consequences reach into the lives of individuals in post-World War II Japan.

NOTES

1. Dan Fenno Henderson, "Law and Political Modernization in Japan," Robert E. Ward, ed., *Political Development in Modern Japan* (Princeton, 1968), pp. 387-456.

2. *Ibid.*, pp. 425-26.

3. Harai Takuzō, ed., *Otsu jūhen temmatsuroku* (A detailed record of the Otsu affair; Tokyo, 1931).

4. *Shinsei daijimeiji jiten* (Newly selected biographical dictionary; Tokyo, 1938), V, 485.

5. Harada Mitsusaburō, *Kojima Iken den* (The life of Kojima Iken; Matsuyama, 1961), pp. 11-26.
6. *Ibid.*, pp. 43-46; Mori Senzō, ed., *Meiji jūmbutsu itsuma jiten* (An anecdotal dictionary of Meiji personalities; Tokyo, 1965), I, 362, citing Ozawa Shōjirō, *Meiji shūshi tan* (Stories of Meiji gentlemen).
7. Itō Hirobumi, *Commentaries on the Constitution of the Empire of Japan* (Tokyo, 1889), pp. 100-01; Joseph Pittau, *Political Thought in Early Meiji Japan, 1868-1889* (Cambridge, 1967), pp. 192-93.
8. Shunbō Kō Tsuisōkai, *Itō Hirobumi den* (The life of Itō Hirobumi; Tokyo, 1940), II, 758.
9. Konoe Kazan Kai, *Konoe Kazan kō* (Prince Kanoe Kazan; Tokyo, 1924), p. 39, pp. 49-51.
10. *Nihon*, May 17, 1891, "Kyōjin to Keihō" (The assassin and the penal code).
11. Harada, pp. 47-55.
12. *Ibid.*, pp. 55-58.
13. *Otsu jiken temmatsuroku*, pp. 52-53.
14. The text of the report of the judge who conducted the supreme court's preliminary examination is found in *Otsu jiken temmatsuroku*, pp. 51-59. See also Onatake Takeshi, *Konan jiken* (The Konan affair; Tokyo, 1951), p. 112, p. 120.
15. Matsudaira Naosuke, *Hakusō Nishimura Shigeeki den* (The life of "Hakusō": Nishimura Shigeeki; Tokyo, 1932), II, 50.
16. *Otsu jiken temmatsuroku*, short introduction, p. 9; *Konoe Kazan kō*, p. 49.
17. Harada, pp. 79-80.
18. *Itō Hirobumi den*, II, 747-72.
19. *Otsu jiken temmatsuroku*, pp. 18-24.
20. *Ibid.*, pp. 24-29.
21. *Ibid.*, pp. 27-29.
22. *Itō Hirobumi den*, II, 759.
23. Harada, pp. 85-86.
24. *Itō Hirobumi den*, II, 767-68.
25. *Ibid.*, 764.
26. *Otsu jiken temmatsuroku*, pp. 14-16.
27. *Ibid.*, pp. 41-42.
28. *Ibid.*, pp. 35-44.
29. Harada, p. 93.
30. Unfortunately, a remark concerning Yasui and Inoue was omitted when Kojima's memoirs were edited for publication. *Otsu jiken temmatsuroku*, p. 64.
31. *Ibid.*, pp. 48-51.
32. *Ibid.*, pp. 51-59.
33. *Ibid.*, pp. 62-63.
34. *Ibid.*, pp. 76-78.
35. *Ibid.*, pp. 79-80; Pittau, p. 193, citing Ishii Ryūsuke, *Japanese Legislation in the Meiji Era*, pp. 488-89.
36. *Otsu jiken temmatsuroku*, pp. 80-83.
37. *Ibid.*, p. 85.
38. Article 23 of the Meiji constitution provided, "No Japanese subject shall be arrested, detained, tried or punished, unless according to law." Itō,

Commentaries, p. 46. Article 57 read, "The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor." *Ibid.*, p. 100.

39. *Otsu jiken temmatsuroku*, pp. 68-74.

40. Harada, p. 107.

41. *Otsu jiken temmatsuroku*, pp. 97-98.

42. *Ibid.*, p. 106.

43. *Ibid.*, p. 136.

44. *Ibid.*, p. 141.

45. *Ibid.*, pp. 144-47.

46. *Ibid.*, p. 149.

47. Hirano Michio, *Shikoku Tani Kanjō den* (The life of Viscount Tani Kanjō; Tokyo, 1935), pp. 645-46.