【論文】

Kumazawa Agonistes: The Right of Conquest and the Rise of Democratic Ideology (Part One)

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Introduction: The Kumazawa Case

A very curious letter came across Douglas MacArthur's desk on August 11, 1947. It was hardly the only letter to arrive that day, to be sure. MacArthur was the Supreme Commander for the Allied Powers—SCAP—and essentially the de facto shogun of Japan. Since Japan's defeat in the Greater East Asia War, MacArthur had reigned as head of General Headquarters, GHQ, and, in effect, as the benevolent dictator of the entire archipelago.

The SCAP archives, housed in the National Diet Library in Nagatachō, contain boxes and boxes of microfiched letters to the power behind the Chrysanthemum Throne. Summarized and also mimeographed from the originals, the letters touch on every conceivable subject, from complaints about the black market and concerns about building practices to denunciations of individuals and organizations for reasons both public-minded and personal, profound and petty.

But one letter stands out. Here is how the English summary of an August, 1947 missive reads:

Doc No 33528 JRB/GI/SN

GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
MILITARY INTELLIGENCE SECTION, GENERAL STAFF
ALLIED TRANSLATOR AND INTERPRETER SECTION

NOTE: Translation directed by Commander-in-Chief

Received ATIS: 11 Aug 47.

DIGEST OF LETTER

TO: General MacARTHUR.

FROM: KUMAZAWA, Hiromichi (熊沢寛道)
KYOTO To, SAKYO ku, TANAKA KITAHARUNA – 1.

DATE: (No date.)

The writer states that during the period when the Imperial throne was divided between the Northern and Southern Dynasties, Emperor GOKOMATSU (後小松) of the Northern Dynasty killed Prince JITSUHITO (実仁), son and heir of Emperor GOKAMEYAMA (後亀山) of the Southern Dynasty, thus putting an end to the Southern Dynasty. The Northern Dynasty then became sole claimant to the Imperial throne.

The writer has conducted extensive research throughout NARA, MIE, FUKUSHIMA, and AICHI prefectures and has discovered the continuance of the lineage of the Southern Dynasty. He submits 25 photographs of old documents, tombstones, treasures of the Southern Dynasty, Imperial Seals, etc. This evidence allegedly supports the writer's claim to the Imperial Throne as the direct descendant of the Southern Dynasty.

The writer further states that the present emperor, who led JAPAN into war and disastrous defeat, is now touring the nation, expending huge sums of the tax payers [sic] and is unconcerned about his responsibility for the war.

There follow copies of the envelope, the original letter (running to eleven mimeographed pages), and the aforementioned twenty-five photographs, each duly annotated in the letter's text. Whoever Kumazawa was, this was not a letter done lightly. Even if the arguments of the letter were false—that is, if Kumazawa Hiromichi, a shopkeeper from

Nagoya, was not really the legitimate heir of the Southern Dynasty, or, even if he was, if the Southern Dynasty was not the legitimate claimant to the Chrysanthemum Throne—Kumazawa seemed to be convinced of the legitimacy of his claim.[1]

Indeed, shortly after sending the letter to Gen. MacArthur, Kumazawa visited Niigata, where he repeated the gist of what he had conveyed to GHQ. This was part of a nationwide tour on which Kumazawa was embarked, timed to coincide with the tour of the Shōwa Emperor organized by the Occupation authorities to help buttress his popular standing and thereby cement MacArthur's dual decision to maintain the imperial system while also democratizing Japan. The Kumazawa shadow-tour was also part of Hiromichi's ongoing fight to have his claims recognized and himself installed on the Chrysanthemum Throne, a fight which would culminate in a lawsuit filed in 1951 in Tokyo District Court seeking to have the Shōwa Emperor de-recognized as the legitimate sovereign of Japan.[2]

Kumazawa was not alone in his criticism of the Emperor. In a famous incident from May of 1946, a Communist named Matsushima Matsutarō (1915-2001) had appeared in a crowd in Tokyo with a sign on which were written, front and back, messages mocking the Emperor and criticizing him for eating well while regular people starved to death. Matsushima was brought up on charges of *lèse-majesté*, but SCAP officials forced the reformulation of the charge to defamation on the grounds that the Emperor should not receive special legal treatment.[3] Nor was Kumazawa alone in claiming to be the legitimate emperor—as many as eighteen other men claimed during the early postwar years to be the real heir to the throne.[4]

What makes Kumazawa's case noteworthy, in part, is its prominence. He was by far the most famous, or infamous, person in living memory to attack the legitimacy of the reigning sovereign by claiming to be the real Emperor himself. But this prominence had an equally noteworthy reaction, for Kumazawa, although the object of curiosity among many people in Japan, was also subjected to intense scorn. Kumazawa was an amusing sideshow for some, but overall his appeal to the man and woman in the street fell disastrously flat. In stark contrast to Kumazawa, the real Emperor was really and truly popular, a fact that played into MacArthur's plans to use him to build political stability in the country MacArthur was ruling. Kumazawa failed to enlist even a fraction of that kind of popular regard.

Many could not contain their contempt for Kumazawa and took to the papers to vent it. For example, SCAP archives contain an English translation of a letter sent by a certain Izumo Asahi[5] to the *Jiji Shimpo* newspaper, apparently in early September of 1947 (right after Kumazawa sent his letter to GHQ), which began:

> A person named Emperor KUMAZAWA came to Niigata City on the 22nd [of August, 1947?] and stated the so-called 'legitimacy of the Southern Dynasty'. He said, 'I have not renounced the throne but leave the judgement to the people's free will,' or 'I do not have any personal feelings toward Hirohito but I may allow him just to see me.' How audacious he is!

"The people are laughing at you," Mr. Izumo declared in his missive to the *Jiji Shimpo*. His opinion was widely

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[1] The debate over the legitimacy of the current Northern Dynasty line has largely gone into abatement in recent decades, but it remains substantially unresolved. See, e.g., Shimura Kunihiro, ed., *Tennō kōzoku rekishi densetsu daijiten* (Tokyo: Bensei Shuppan, 2008), Nitta Ichirō, *Taiheiki no jidai* (Tokyo: Kōdansha, 2001), Fujii Jōji and Yoshioka Masayuki, eds., *Go-Daigo tennō jitsuroku*, vols. 1 & 2 (Tokyo: Yumani Shobō, 2009), Fujimaki Kazuho, *Wagahai wa tennō nari: Kumazawa tennō jiken* (Tokyo: Gakushū Kenkyūsha, 2007), Yamaji Yūichirō, *Gonanchō saihakkutsu* (Tokyo: Soubunsha, 2003), Yamaji Yūichirō, *Nanchō: saigo no shōgen* (Tokyo: Choeisha, 2008), and Murata Masashi, *Nanbokuchōron* (Tokyo: Shibundō, 1959). Murata comes down hard on Yoshida Chōzō, Kumazawa's shadowy champion (and possible communist provocateur), agreeing with his mentor Watanabe Yosuke (1874-1957) that the Kumazawa genealogy Yoshida had produced was "utterly baseless, and predicated upon a mistaken reading" of other documents. (Murata, *Nanbokuchōron*, op. cit., 260-61, citing Watanabe Yosuke, "Keizu no gisaku ni tsuite: Kumazawa tennō, Sakamoto tennō ryō keifu no bakugeki," *Nihon Rekishi*, no. 35 (April, 1951). Undaunted, Yoshida published the next year *Kiku no kāten wo hiraku: Shin tennōron* (Tokyo: Chiyoda Shoin, 1952), which contains two photographs: "Kumazawa tennō" and his family, as well as a photograph of the Imperial Family, to the leader of which Yoshida refers as the "Ashikaga tennō". George Sansom writes, "Viewed in the light of subsequent events, the struggle between the two Courts [i.e., Northern and Southern] failed to decide the issue of legitimacy. It has never been settled." *A History of Japan, 1334-1615* (Stanford: Stanford University Press, 1961), 118.

[2] The lawsuit was dismissed, both on first instance and on appeal, on the grounds that the constitution of Japan does not provide for conducting trials of the Emperor.

[3] See Yokosaka Kenji, "Tennō to fukeizai," in *Kenpō hanrei hyakusen* II, no. 5 (Yuhikaku, 2007).

[4] See Hosaka Masayasu, *Tennō ga jūkunin ita: samazama naru sengo* (Kadokawa Bunko, 1995).

[5] The handwriting of this name is not entirely clear in the original.

shared. As the realities of postwar life, and the return to power geopolitics with the outbreak of the Korean War in 1950, set in, Kumazawa's odd star faded rapidly from view. He is now almost completely forgotten, only rarely appearing in scholarly monographs as, at most, a footnote in a section on postwar Japanese legal history.[6]

The Right of Conquest and the Pre-Modern Japanese Past

Setting aside the question of whether Kumazawa really was the legitimate heir to the Chrysanthemum Throne, however, as well as the historical importance (arguably very slight) of his public relations and legal campaigns during the immediate postwar, there is something abidingly unsettling about Kumazawa, both the legacy that he represents (or at least claims to have represented) and the questions that that legacy raises about legitimacy in general. Kumazawa, in his tragicomic way, interrogates the right to rule over given territories and populations and the uneasy relationship between the scepter and the sword, a relationship that has changed over time, in many ways, but in many ways also remains unaltered from time immemorial. Whether Kumazawa really was the emperor or not, his case unsettles many of our assumptions about current political rule. In short, Kumazawa's antics dredge up the often inconvenient facts of history. Chief among these is the right of conquest.

Many have argued that conquest is the most basic form of politics. The predecessors of the Japanese Imperial Line were no exception to this often-stated rule. The earliest Japanese rulers had been as the early kings of Europe: conquerors who led troops into battle but who administered territory loosely, lacking the apparatus of the modern state as well as the technology—such as writing and printing—to form a bureaucracy and impose systematic order on a realm. But there is an important difference, too. Japanese emperors, from the beginning, were unlike European kings in that the former were also high priests—more than that, descended from the gods, as was also said of Egyptian pharaohs and Greek heroes.[7] As such, Japanese emperors held more than just terrorizing dominion over those under them. They had a charism of rule that went far beyond the subjugation of rivals at the point of a sword. This charism allowed the emperors to shift back and forth from active to passive rule, and it is one such shift in particular that forms the basis of Kumazawa's claims, and which puzzles us today as to the real nature of legitimate government.

But in order to get a proper understanding of Kumazawa's plaint, we must first go back to a time before this shift occurred. During the Heian Period, the Japanese emperors, formerly compelled by an elaborate network of taboos to abandon capitals and establish new bases of government whenever a reigning emperor died, settled into a fixed capital city, Heian-kyō (today's Kyoto), where they oversaw a cultural flourishing rarely equalled elsewhere. The key to this highly-developed civilization was the political passivity of the Imperial Household, the emphasis on religious and cultural pursuits, and the near-total abandonment of the active mode of sovereignty.[8] During this period of the flowering of the arts and climaxing of the aesthetic sensibilities of the Imperial Household and associated nobles, security was farmed out to provincial police. When order broke down in Heian-kyō and these armed forces began to war with one another, a long season of civil war ensued and the old Heian halcyon days were lost. The emperors remained passive cultural figures, and retained their religious authority and courtly dignity, but they had become captives of the warlords. Real power lay with the Minamoto clan, warriors who had defeated their rival, the Taira, and instituted martial law in 1192 in a new political capital, Kamakura. By an odd right of half-conquest, military leaders had seized the realm but left the charism of religious and spiritual rule untouched. The emperors were kept in a gilded cage inside the palace grounds, and a multi-generational standoff ensued. No warrior dared to have himself crowned emperor in a reigning emperor's place, and emperor dared to try seizing power from the shogun who ruled Japan in his stead.

As is often the case with warlords, the Minamoto were unable to govern the realm they had wrested from the crown. Eventually, the Minamoto were themselves subjected to regency, in the same way that the powerful Fujiwara family had once controlled the Imperial Household from behind the scenes during the Heian by means of marriage politics and courtly intrigue. By a continuation of this same basic policy, the Hōjō clan, a branch of the Taira family (the Minamotos' mortal enemies), managed to install weak shoguns in Kamakura and

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[6] Kumazawa's case was widely covered in the American press at the time, as well, although writers seem to have been conflicted on how to cover Kumazawa—was he comic fool, pathetically delusional, serious rival to Hirohito? See, e.g., Richard E. Lauterbach, "The True Emperor of Japan?" *Life*, vol. 20, no. 3 (Jan. 21, 1946).

[7] On early Japanese kingship, see Kishi Toshio, ed., *Ōken wo meguru tatakai* (Tokyo: Chūō Kōronsha, 1986).

[8] See, e.g., Michitsuna no Haha, tr. Edward Seidensticker, *The Gossamer Years (Kagerō nikki): A Diary by a Noblewoman of Heian Japan* (Tokyo: C.E. Tuttle, 1973), Ivan Morris, *The World of the Shining Prince: Court Life in Ancient Japan* (New York: Kodansha International, 1964), and Murasaki Shikibu, tr. Arthur Waley, *The Tale of Genji* (Tokyo: Tuttle, 2010).

also to control the Imperial Household in Kyoto. During the period of Hōjō control, Japanese emperors were intentionally "retired" into cloistered desuetude at a very young age, before they posed any danger of insisting on ruling Japan in their own name. This fear of an emperor switching from passive to active mode was not an unfounded one. Emperor Go-Toba staged a revolt against Hōjō dominance in 1221, and there was no guarantee that another such manly emperor would not again attempt something similar.

The Hōjō managed to keep the chain of emperors weak for almost one hundred years after Go-Toba's attempt to recover full rule in his own person. However, an interruption in the supply of infant heirs to the throne led to the installation of an adult, Go-Daigo, in 1318. Just as the Hōjō had always feared, a determined emperor became a kinetic force for imperial restoration and eventually led an assault on the entrenched Hōjō shadow-usurpers. In the course of the long civil war that followed Go-Daigo's restorationist drive, a rival to Hōjō power, Ashikaga Takauji—a turncoat who had originally been sent to help the Hōjō suppress Go-Daigo's rebellion—saw a chance to become the shogun in the wake of Go-Daigo's salient into Kamakura power.

When Go-Daigo's forces emerged victorious after Hōjō support collapsed, Ashikaga and the many other retainers who had rallied to the imperial cause expected boons for their loyalty, especially in the form of rich estates that the warrior clans had originally stolen from the Imperial Household at the end of the Kamakura. But when it became clear the Go-Daigo had no intention of returning to the former program of submission to samurai control, Ashikaga defected once again, installing a new "emperor" on the throne as a way to reinstate the practice of manipulating pliant emperors into doing the will of the warlords.

Go-Daigo continued to reign in exile, first from the remote Oki islands, and then from Yoshino, in Nara. This situation continued through several generations of emperor and counter-emperor—the so-called Southern and Northern Courts—until Go-Daigo's great-grandson, Emperor Go-Kameyama, was tricked into a duumvirate by one of the Ashikaga puppet "emperors" and then betrayed once he had delivered into Ashikaga hands the three sacred treasures (later claimed to be counterfeits) of the imperial line. The Northern Court thus won the protracted civil war by sheer skullduggery. Although the impostor emperor was a member of the Imperial Household, he hailed from a lateral line. The true, patrilineal heirs were—and are, it has often been asserted—the descendants of Go-Daigo. If such a person could be found, then he would have a much stronger claim to the Chrysanthemum Throne than the "Ashikaga emperor," as Kumazawa derisively called the Shōwa Emperor. Any direct male descendant of Go-Daigo would pose a serious threat to imperial legitimacy.

After the civil war, this issue went into almost complete abatement. For centuries after the Ashikaga betrayal (which ushered in the Muromachi period (1336-1573) of Ashikaga rule), the emperor was, again, under warrior control. The Tokugawa shoguns were no exception, and the Japanese emperors' captive-exalted status continued until Mutsuhito—Emperor Meiji—was installed on the throne by crusading reformers in 1868. But the ghost of Go-Daigo still haunted the Ashikaga line. The new Meiji Emperor's counsellors were fearful lest a rival claimant appear to relitigate the nearly-600-year-old case. This is exactly what happened when Hiromichi's father, Hiroshika, appealed to the Meiji Emperor for redress of his grievances as the legitimate descendant of Go-Daigo. The Meiji Emperor, greatly troubled by these claims, instructed his ministers to deal sincerely with Hiroshika, even ordering that he and his kin be made part of the Imperial Family.[9] But Hiroshika, believing himself to be the real Emperor, and not just a member of the peerage, refused. The Japanese government intervened with a special pronouncement in 1911, but the debate that had been raging prior to that year over the legitimacy of the Ashikaga line continued to simmer.[10] When Hiroshika's son, Kumazawa Hiromichi, made a play for imperial succession after the end of the Greater East Asia War, the old wounds of the Southern and Northern courts opened again and the question of the legitimacy of the Northern line—the line that sits on the Chrysanthemum Throne to this day—threatened once more to throw Japan into turmoil.

The Right of Conquest in Modern Japanese and World-Historical Context

The second half of 1947, when Kumazawa Hiromichi began his nationwide campaign to reclaim the imperial title, was especially perilous, because during that year the fate of the Shōwa Emperor hung in the balance. Gen. Douglas MacArthur, who was contemplating a Republican bid for the presidency, was under considerable political pressure in the United States to put the emperor on trial, even to execute him.[11] The new kingmaker of Japan wore pressed khakis

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[9] Kumazawa Hiromichi, "Mihappyō: 'Kumazawa tennō' kaikoroku," *Jinbutsu Ōrai: Tokushū: Ranse bushō hiroku* (Nov., 1958), 134-35.

[10] See Endō Akiko, "Nanbokuchō no nairan ga kindai ni nokoshita fu no isan: Nanbokuchō seijun ronsō towa nan datta noka," in *Rekishi Real Nanbokuchō: Futatsu no chōtei ga heiritsu shita ijō jitai wa naze okita no ka* (Tokyo: Yosensha, 2017), 100-103.

[11] See Nanchō shiryō chōsakai, Yūfūsha, *Kaikin sareta Makkāsā ākaibuzu: saikō subeki Kumazawa tennō mondai* (2014: no further publication information available).

and smoked a corncob pipe, but in respect of his sway over the Imperial Household he was the virtual reincarnation of Ashikaga Takauji. MacArthur had to contend with an entirely different set of circumstances, to be sure, than did his shogunal predecessors. But in many ways MacArthur's challenges had been Ashikaga's, too. Both men had to weigh a host of complications and possible repercussions, whether the decision was to keep the imperial status quo or overturn it. But there was a key difference. Popular sentiment, and the certainty of being blamed if another civil war broke out in the wake of a badly made decision on the emperor's status, weighed much more heavily in MacArthur's mind than it had in Takauji's.

But in the twentieth century as in the fourteenth, the honor of monarchs must needs contend with the machinations of generals. Amid the fraught interplay of the Imperial Household, the American Occupation, the new constitution devised to keep Japan in perpetual vassalage to the Washington hegemon, and the security arrangement between the United States and Japan which made the latter a policy adjunct of the Pentagon, we must go deeper to get at the heart of the issue raised by Kumazawa. What had changed, and not changed, in respect of the right of conquest?[12] The crux of the several narrative planes—Kumazawa, the Meiji Emperor, Emperor Go-Daigo, Emperor Go-Kameyama, and the Shōwa Emperor whose fate it was to run the most treacherous gauntlet in Japanese history—is the conquering force of warriors, and the ways in which the justifications for conquest have shifted over time.

The right of conquest is virtually unheard-of today—a relic buried in the distant past, perhaps, when kings and empires waged war for booty and plunder, but no longer applicable in the age of the United Nations, the Geneva Convention, and the Kellogg-Briand Pact. But in appealing to Gen. Douglas MacArthur, the Supreme Commander of the Allied Powers, an American warrior who ruled Japan by virtue of victory in violent conflict, Kumazawa Hiromichi was tacitly acknowledging that the right of conquest was still very much at work in the world. It is highly significant that, while Kumazawa Hiroshika appealed to the Meiji Emperor, Kumazawa Hiromichi and other postwar pretenders to the throne appealed, not to the Shōwa Tennō, but to a man born in Arkansas, educated in Texas, and dispatched by a government wedged into reclaimed swampland between Maryland and Virginia. By dint of having won a war, the Americans had acceded to ruling legitimacy. And the American turn at straddling the globe like a colossus shows that the right of conquest had come to be couched in very different language than before. When Mr. Izumo, the exasperated letter-writer whose remarks appeared in the *Jiji Shimpo* in 1947, pointed out that Kumazawa was being laughed at by "the people," he was unwittingly rehearsing the very logic of popular endorsement (whether real or manufactured) that had underwritten the Americans' entire foray into the forging of empire: might makes right if there are elections which follow tidily in might's train.

In order to understand Kumazawa's appeal to Gen. MacArthur and the American Occupation of Japan overall, then, we must understand the right of conquest. What is the right of conquest, and how, if at all, has it changed? The best summary source remains Sharon Korman's 1996 monograph *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*. The title is slightly misleading. Korman's thesis is that the right of conquest as understood today is about both territorial acquisition (she gives a wide range of examples, such as the United States' acquisition of the Philippines, Israel's annexation of the Golan Heights, and Indonesia's appropriation of East Timor), but also, and much more importantly, how territorial acquisition has given way to ideological justifications for warfare. It may be technically illegal for states to wage "aggressive war" now, but that has clearly not prevented them from doing just that. Therefore, the right of conquest now encompasses something very different from "the acquisition of territory by force". It has, in the twenty-first century, much more of an ideological than a territorial valence, and has been moving increasingly in this direction for nearly two hundred and fifty years.[13]

Whereas princes of the past could point to their own territorial ambitions as cause for invasions of others'

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[12] "Perhaps nothing is more indicative of the social and psychological revolution now in progress in Japan than the changed status of the Imperial Family. This change has been wrought in two years and is so drastic that if any one [sic] in Japan had even suggested it before the war, he would have paid for his rashness with his life. [...] First to feel the effects of the revolution was the Emperor himself. [...] The new constitution removed the Emperors [sic] sovereign rights and conferred them on the people. The nation—its land and its people—which hither to [sic] had been the private property of the Emperor, was given to the people. The freedom to decide their own destiny, think as they pleased, and govern themselves was granted to all subjects, who became citizens. [...] The Emperor lost all political power and remained a symbol of the nation and the people's unity. He retains his empty title of 'Emperor' but has no empire over which to reign. The Japanese Empire has fallen and the so-called Emperor is reduced to a colorless, powerless, little King who reigns, but does not rule, over four small islands which are called Japan." *MacArthur Archives, Classified GHQ Intelligence Reports on the History of the Chrysanthemum Throne*, "Part 3: Imperial Family Loses Status," dated both 13 and 15 December, 1947, found in *Declassified Documents from the MacArthur Archives,* in *Kaikin sareta Makkāsā ākaibuzu*, op. cit.

lands, governments today must claim some other reason—"security," "preemptive action," "maintaining the rule of law," "counterterrorism," and "making the world safe for democracy" have all been cited by warring rulers of recent memory—for taking military action against rival states. Before crossing the tiny Rubicon River in 49 BC, provincial governor and Roman general Julius Caesar told his armies that it was his drive for power that compelled him to transgress the traditional frontier of Rome proper and do battle against his homeland. His legions, convinced, followed him across the sacred dividing line between home and abroad and into civil war. The will of princes remained the soul of the law until at least the time of Frederick the Great, whose transparently fatuous justifications for invading Silesia in 1740—justifications concocted at his direction by his hapless ministers of "justice"—belied whatever veneer of international law jurists might have been able to apply to European *realpolitik*.

Gradually, however, such kinetic machismo fell out of favor. Even some crowned heads of Europe were shocked by Frederick the Great's naked ambition, and a consensus began to emerge among scholars of law that abrupt maneuvers by covetous monarchs—such as Frederick's, which touched off the Seven Years War, the first truly world war in history—had to be tucked under the cover of international law and somehow contained. As the "Enlightenment" ideas of John Locke, Immanuel Kant, and Jean-Jacques Rousseau gained traction in Europe, concepts, and not the will to power, became the preferred screen for acts of ambition. The trend toward ideological justification for preemptive strikes has continued apace, such that, today, it is rare for any state to admit that territorial aggrandizement or unprovoked aggression is justified by the sovereign's will to power. When the CIA, FBI, and other agencies of the United States federal government orchestrated a coup against President Donald Trump, for example, they claimed to be acting to "preserve the sanctity of the democratic process".[14] Few men would dream of failing, as Caesar had, to try to sanction his play for power with an "Enlightenment" trope. Such appeals to ideologies—the universal solvent of responsibility in the modern world—are *de rigueur* in the twenty-first century.

The key tension in the evolution of the right of conquest, as Korman makes clear, is between practical necessity and theoretical nicety. In theory, *ex injuria jus non oritur*: "rights cannot arise from a wrong or unjust act".[15] I cannot commit a crime and then claim that I have derived a benefit from my actions. If I rob a bank, for instance, or trespass on someone's private property, I cannot claim that the money or the property is rightfully mine, just because I was strong or clever enough to take it. Ostensibly, rights and jurisprudence are rooted in substantial due process and the rule of law.

In practice, however, states often *do* recognize the wanton acts committed by other states.[16] In fact, the mutual recognition of acts of aggression was long a bedrock principle of international law. As Korman explains:

> Prior to the twentieth century, positive international law did not distinguish between just and unjust causes of war, nor did it prohibit the use of force for territorial aggrandizement, so that the seizure of territory by an aggressor involved no *injuria* and the maxim [of *ex injuria jus non oritur*] did not apply. It was only after the First World War, when international law prohibited the acquisition of territory by conquest, that the conflict between conquest and the *ex injuria jus non oritur* principle became important; and even then the problem did not arise in respect of the validity of the fruits of past aggression, because of the applicability in such cases of the principle of intertemporal law—namely, that the legal validity and effects of events have to be judged by reference to the law in force at the time they occurred.[17]

There is thus a basic contradiction at the heart of international law, a contradiction which undermines the discipline even as states appeal to it for justification for their own actions. Weaker states claim that rights do not arise out of unjust actions. However, the fact is that rights can and do arise out of injustices, and have very often arisen out of even the grossest violations of territorial sovereignty and the worst infringements on basic human rights in the past.

At the same time, this contradiction, while seeming to invalidate international law tout court, simultaneously bolsters it, too, because the moral component of state-to-state interaction does not disappear, no matter how many times it is dispensed with.

Prior to the twentieth century, there were numerous

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[13] See Noam Chomsky, with Edward Said, *Acts of Aggression: Policing "Rogue" States* (New York: Seven Stories Press, 1999) and Carl Schmitt, tr. George Schwab, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2006).

[14] See Jason Morgan, Let Us Now Praise Famous G-Men, *Chronicles*, July, 2019.

[15] Korman, 12

[16] This is essentially the argument deployed by Naramoto Tatsuya in dismissing Kumazawa's claims. See Naramoto Tatsuya, ed., *Tadashii Nihonshi* (Tokyo: Kawade Shinsho, 1955), 81-84.

[17] Korman, 12

> instances in which the threat or use of force to acquire territory was regarded as unjust, even though the threat or use of force to acquire territory was not illegal. This was a consequence of the fact that under the traditional international system, states considered themselves subject to moral restrictions on their right to resort to war, even if they were not also subject to legal restrictions in that respect. It was, therefore, precisely this lack of correspondence between the requirements of international morality, which disapproved of wars fought for an unjust cause and of conquest resulting from such wars, and the requirements of international law, which did not, which appeared on the political plane to prevent the operation of the principle that from a wrong or unjust act, no rights could arise.
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> Moreover, even from the standpoint of legal theory—independently, that is to say, of any moral or political considerations—there was an undeniable incongruity inherent in an international legal system which recognized the unrestricted right of states to resort to war and conquest.[18]

It was therefore a perennial challenge to the seeming lawlessness of sovereigns that conquest required some kind of explanation beyond the mere fact of princely ambition.

Indeed, this challenge is also at the core of international law. As Yoram Dinstein explains:

> the freedom to indulge in war without thereby violating international law seemed to create an egregious anomaly. It did not make much sense for the international legal system to be based on respect for the sovereignty of States, while each State had a sovereign right to destroy the sovereignty of others. On the one hand, it was incumbent on every State to defer to a plethora of rights accorded to other States under both customary and conventional international law. On the other hand, each State was at liberty to attack any other State whenever it pleased.
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> This state of affairs yielded the paradoxical consequence that under traditional international law a new *status quo* could legally originate in the destruction of the legal rights of others. It is precisely this phenomenon, reflected in the regular sanctioning in international law of territorial change brought about by force, and of peace treaties imposed upon the defeated, which has led Robert W. Tucker to identify as a characteristic feature of the traditional international system 'the virtually unrestricted operation of the principle *ex injuria jus oritur*, and thus ... the near equation of law with power'—notwithstanding the fact that the use of force to acquire territory was not technically an *injuria* under that system.[19]

This "paradox" required a repair, and the binding eventually chosen to seal the breach between theory and practice was ideology. The watershed separating the older paradigm of right of conquest coexisting uneasily with moral sanction, to the new, and current, paradigm of right of conquest operating under cover of ideological justification, was the French Revolution.

Democratic Ideology as Sublimation of the Right of Conquest

Before the French Revolution, so-called "Enlightenment" thinkers such as John Locke and Jean-Jacques Rousseau had begun to espouse a theory of government based upon the consent of the governed. Most famously, Rousseau's *Social Contract* implied that governments enjoyed the sanction of those under their control. If governments lost this sanction, then they lost legitimacy, and populations had the right to revolt and replace the government which had broken the social contract.[20] "The doctrine of the self-determination of peoples,"

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[18] Korman, 13

[19] Korman, 14, citing Michael Akehurst, *Lectures on Modern History* (London: Macmillan, 1926), P.P. Shafirov, *A Discourse Concerning the Just Causes of the War between Sweden and Russia: 1700-1721* (1717) (Dobbs Ferry, NY: Oceana Publications, 1973), Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977), Malcolm N. Shaw, *International Law*, 3rd Ed. (Cambridge: Grotius Publications, 1991), and Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Grotius Publications, 1988).

[20] Korman asserts that the new "Enlightenment" view, and especially that of Emer de Vattel (1714-1767), "tempered" previous centuries' conceptions of absolute monarchy. Korman finds that "the indiscriminate nature of the laws of war (and thereby of the right of the victor) was itself a function, partly, of the conception of war which prevailed at the time (as it had also prevailed in antiquity and the Middle Ages) before the modern state had fully developed, according to which war was a contention between the whole populations of belligerent states. This conception implied that 'every subject of one belligerent, whether an armed and fighting individual or not, whether man or woman, adult or infant, could be killed or enslaved by the other belligerent at will.' Korman, 30, citing Lassa Francis Lawrence Oppenheim, *International Law*, 1st ed. (London: Longmans, Green, 1905-06), 59. However, it is dubious whether this "all-population belligerency" really improved after Rousseau. Cf., e.g., Dresden, My Lai, the Moros, Nagasaki, and Wounded Knee.

Korman states,

> which became in 1789 the ideology of the French Revolution, had, by the time of Napoleon's defeat in 1814, spread across Europe to an extent that made it impossible for the patrimonial principle [of *imperium* seen as coterminous with *dominium*] to be restored or incorporated as it had previously been into international law or morality. [...] The logical corollary was that the right of conquest [...] could itself no longer be part of international law. For if the principle of self-determination applies, then a victor cannot have a right to rule by virtue of *conquest*, but only by virtue of the people's *consent*.[21]

In other words, the physical fact of territorial conquest no longer sufficed to justify aggression. Under the new Lockean/Rousseauan scheme, the consent of "the people" had to be consulted before any military action could be considered to have effected a permanent change in the geopolitical landscape.

The "self-determination of peoples" was just one thread in the ideological tapestry which was being woven de novo between 1789 and the Congress of Vienna (1814-1815). But this self-determination came with an important condition. Not all self-determination was to be treated equally. As Rousseau, the intellectual godfather of the Terror, had argued, "sometimes people must be forced to be free".[22] True to their roots, the French ideologues:

> took an active interest in the right to intervention [in other countries' internal affairs], arguably to ensure freedom and human rights, in reality to extend French hegemony. [...] War thus assumed the character of a crusade and made the unwritten laws governing the 'controlled' conduct of war a thing of the past.[23]

The French Revolution thus confirmed and amplified the "Enlightenment" trend of seeking cover for geopolitical realities in the plebiscite and not in the will of the monarch or emperor. In actual practice, however, plebiscites were new wineskins for the old wine of aggression. The only difference was semantic; the facts of conquest remained as before.

While as late as the latter days of the British Empire England largely hewed to the older doctrine of right of conquest,[24] the United States eventually came to embody the spirit of the Congress of Vienna and of the French Revolution in its own expansion and conquest. From the beginning, the young American country justified its expansion—indeed, its very birth—in ideological terms. The American Founding Fathers, in high-flown language cribbed largely from John Locke and rinsed liberally in the rhetoric of Rousseau, argued not that England had no title to the American colonies (title was a given—the Americans did not question that the English had appropriated title from the Native Americans by virtue of Lockean notions of development of natural materials and liberal notions of inherent cultural superiority), but that it had no *right* to govern them. And that right had been forfeited by failure to adhere to emerging Thermidorian ideologies *avant la lettre*. The most vociferous American colonists claimed that England's having abrogated a now-familiar list of ideological platitudes that the colonists accepted as axiomatic facts rendered null and void the English title to the New World. What the English had taken by force, in other words, the Americans now claimed in the name of ideas. While violence was also the method by which the colonies separated from the mother country, of course, the United States was seen, from the beginning, as an experiment, a swelling ideological tide, not won by the old ways of conquest but granted due to a surfeit of Rousseauan rectitude.

This ontological priority of ideology is on display from before 1776 until the present hour.[25] Supreme Court Justice John Marshall, for example, famously referred to Indian tribes as "domestic dependent nations," a decision in keeping with Robert Phillimore's assessment that "it has become a cardinal maxim of [the United States Supreme Court's] public jurisprudence that the system under which the United States were settled has been that of converting the *discovery* of the

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[21] Korman, 37, italics in original. The French National Assembly proclaimed the French Revolution to be "a new international law. ... Hitherto only states had possessed legality; men followed the soil as it was conquered or ceded. On May 22, 1790, the Constituent Assembly formally renounced the right of conquest, declaring that man's will, freely expressed, was to determine the destiny of the soil." Georges Lefebvre, trans. Elizabeth Moss Evanson, *The French Revolution: From Its Origins to 1793* (London: Routledge and Kegan Paul, 1962), 196, cited in Korman, 121.

[22] Jean-Jacques Rousseau, *The Social Contract* (1762), Book I, Ch. 7, "The Sovereign".

[23] Heinz Duchhardt, "From the Peace of Westphalia to the Congress of Vienna," in Bardo Fassbender and Anne Peters, eds., *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), 649.

[24] See Rudolf Dolzer, "Falkland Islands (Malvinas)," *Encyclopedia of Public International Law* 12 (1990), cited in Korman, 105.

[25] The contrast between the new American nation and the old British formulation of colonial rule is striking in hindsight. See, for example, Parliamentary debates over the Quebec Act of 1774, Korman, 33 ff., citing, inter alia, William Harrison Woodward, *A Short History of the Expansion of the British Empire, 1500-1930* (Cambridge: Cambridge University Press, 1931).

country into *conquest*".[26] The idea, that is, was prior to the business of pacifying physical resistance by the benighted natives. Like the *Grande Armée* invading Spain, American colonists and militias pushed westward secure in the sense that forcing the aboriginal tribes to be free was the prerogative of a people which had discovered the gnostic formula of political fulfillment.

[26] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); Robert Phillimore, *Commentaries upon International Law*, 2nd ed., (London: Benning, ca. 1855), 873, cited in Korman, 64.