

ORIGINAL ARTICLE

“Let the Commander Respond”: The Paradox of Obedience in the Imperial Japanese Armed Forces

Danny Orbach¹ and Ziv Bohrer²

¹Departments of History and Asian Studies, Hebrew University of Jerusalem, Jerusalem, Israel and ²Faculty of Law, Bar Ilan University, Ramat-Gan, Israel

Corresponding author: Danny Orbach; Email: dannyorbach@gmail.com

Abstract

Between 1870 and 1945, the Imperial Japanese Army and Navy provided uniquely broad legal protection to subordinates who perpetrated crimes under the orders of military superiors. Legal immunity was provided not only to soldiers who obeyed orders contrary to international law, but also to those who under orders violated domestic standing legislation of the Japanese Army. This gave rise to a so-called “paradox of obedience”: while disobedience among officers was rampant, their subordinates were expected to unquestionably obey their orders, even in rebellion against the Japanese government. This mix of blatant disobedience to the system at large on the one hand, and blind obedience to immediate superiors on the other, was a remarkable feature of the Imperial Japanese armed forces. Drawing on legal codes, court cases and juridic writings, we analyze how this “paradox of obedience” encouraged mutinies as well as atrocities, especially in the 1930s and during the Asia-Pacific War.

On September 17, 1945, following Japan’s unconditional surrender, the Army Ministry in Tokyo prepared a memorandum on Japanese mistreatment of allied POWs (prisoners of war). Anticipating the impending war crime prosecutions, they recommended advising the Allies that the Japanese Army had adhered to an absolute superior orders defense. Therefore, soldiers who had mistreated allied POWs under orders should not be prosecuted, whatever their rank. Even in extreme cases, only those who gave the orders should be held criminally liable.¹

¹ Yoshito Kita, “Nihon Rikugun to meirei fukujū kankei [On Obedience to Orders in the Japanese Army],” *Rikusen Kenkyū* 49, no. 572 (2001): 1–20 [hereafter “On Obedience to Orders” [1]], 49, no. 573: 23–48 [hereafter “On Obedience to Orders” [2]].

There was indeed an obvious interest in presenting this claim to the Allies—not only to protect as many subordinates as possible, but also to protect the national image and preserve imperial legitimacy, which would be tarnished by mass trials of soldiers. However, absolution from war crimes committed under orders was no Japanese innovation. Until 1944, even British and American law-of-war manuals maintained that soldiers committing war crimes under orders were eligible for legal immunity.² The Japanese approach was unique in other ways. Japanese military regulations gave soldiers absolute immunity not only when infringing upon international law under orders, but also when domestic laws, or even military directives, were violated in obedience to military commanders. Indeed, this protection also extended to soldiers who killed Japanese civilians, illegally harmed the military, or even mutinied against the government in Tokyo on the orders of immediate superiors—including when those superiors (by rank or seniority) were not in their chain of command.

The repercussions of this approach, unique in its extremity among modern armies, are the subject of the present paper. We will focus on how this ideology of absolute obedience paradoxically encouraged widespread disobedience, including such resulting in atrocities or other crimes, going as far as to provide immunity to the order-violating soldiers. We will call this “the paradox of obedience.”

State of the Field

Our discussion is rooted in two distinct spheres of historical writing on modern Japan: the problem of Japanese military disobedience, and the sources of rampant Japanese war criminality throughout the Asia-Pacific War (1937–1945). The two issues were already linked by Maruyama in his analysis of ultranationalism, disobedience, and atrocities in Imperial Japan.³ But their historiographical paths have since greatly diverged. Our goal is to reintegrate these two discussions by utilizing the new prism of “the paradox of obedience.” Kita’s pioneering survey of obedience-related legislation and case law will aid us in our endeavor.⁴

Several authors have already noted that despite the cliché of unconditional obedience, the Imperial Japanese military actually suffered from rampant disobedience, especially among its officers.⁵ Building on previous scholarship about specific rebellions,⁶ as well as on the Imperial Army’s sociology and

² Hiromi Satō, *The Execution of Illegal Orders and International Criminal Responsibility* (Heidelberg/New York: Springer), 15–29.

³ Masao Maruyama, *Thought and Behavior in Modern Japanese Politics*, trans. Ivan Morris (Oxford: Oxford University Press, 1969), 1–84.

⁴ Kita, “On Obedience to Orders,” [1], 1–48.

⁵ Danny Orbach, *Curse on this Country: The Rebellious Army of Imperial Japan* (Ithaca, NY: Cornell University Press, 2017), 2.

⁶ Richard Storry, *The Double Patriots: A Study of Japanese Nationalism* (Boston: Houghton Mifflin, 1957); Ben-Ami Shillony, *Revolt in Japan: The Young Officers and the February 26, 1936 Incident* (Princeton, NJ: Princeton University Press, 1973).

rebellious groupings,⁷ Orbach ascribed the proliferation of disobedience and political violence in the modern Imperial Japanese Army (and to a lesser extent, Navy) to deep-rooted structural and organizational flaws, as well as to the violent tradition of the *Shishi* (warriors of high aspiration) that arose from the *Meiji* Restoration, and its influence on military education.⁸ Others have traced these phenomena to 1920s factionalism,⁹ domain cliques withering,¹⁰ flawed military education and promotion systems,¹¹ fundamentalist *Shintōism*,¹² the emperor system's nature,¹³ and more recently, to the influence of emperor-centrist ideology on law enforcement efforts to repress such violent disobedience.¹⁴ However, none of these studies systematically addresses military law's own contribution to the very disobedience it aimed to combat. As we shall demonstrate, fixating on absolute obedience not only failed to curb soldierly disobedience, it ended up furthering it.

Our research will also add a new layer to the ongoing conversation on Japanese war criminality during the Asia-Pacific War. That criminality consisted of numerous crimes, including mass rapes, wholesale massacres, and many other forms of mistreatment of POWs and civilians. Existing scholarship offers a wealth of (nonexclusive) reasons for this abundance of crimes. Some studies blame: “*Bushidō*” ideology, fanatical religion, Japanese fascism, militarism, the emperor system, or even a supposed innate cruelty.¹⁵ Others focus on the conditions of the Asia-Pacific War, pointing to racism,¹⁶ brutalization, violent military training, rape culture, ignorance of international law, disdain for POWs (for supposedly forfeiting their honor by surrendering), violent drunkenness culture that encouraged generous alcohol distribution,¹⁷ and

⁷ Kiyotada Tsutsui, *Shōwaki Nihon no kōzō: sono rekishi shakaigakuteki kōsatsu* [The Structure of Japan in the Showa Period: A Social Scientific Inquiry on its History] (Tokyo: Yūhikaku, 1984).

⁸ Orbach, *Curse on this Country*, 257–65; Danny Orbach, “Pure Spirits: Imperial Japanese Justice and Right-Wing Terrorists, 1878–1936,” *Asian Studies* (Azijske študije) 6, no. 2 (2018): 129–56.

⁹ Leonard A. Humphreys, *The Way of the Heavenly Sword: The Japanese Army in the 1920's* (Stanford, CA: Stanford University Press, 1994).

¹⁰ Ryōichi Tobe, *Gyakusetsu no guntai* [Soldiers of Paradox] (Tokyo: Chūō Kōron, 1998).

¹¹ Tsutsui, *Japan in the Showa Period*, 112–14.

¹² Walter A. Skya, *Japan's Holy War: The Ideology of Radical Shintō Ultranationalism* (Durham: Duke University Press, 2009).

¹³ Akira Fujiwara, *Tennōsei to Guntai* [The Emperor System and the Soldiers] (Tokyo: Aoki Shoten, 1986).

¹⁴ John Person, “Between Patriotism and Terrorism: The Policing of Nationalist Movements in 1930s Japan,” *The Journal of Japanese Studies* 43, no. 2 (2017): 289–319; John Person, *Arbiters of Patriotism: Right-Wing Scholars in Imperial Japan* (Honolulu: University of Hawaii Press, 2020), 88–121.

¹⁵ Kiyoshi Inoue, *Tennō no sensō sekinin* [The Emperor's War Responsibility] (Tokyo: Gendai Hyōronsha, 1975); Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (New York: Penguin Books, 1997); Katsuichi Honda, *The Nanjing Massacre: A Japanese Journalist Confronts Japan's National Shame*, trans. Karen Sandness (Armonk, NY: M.E. Sharpe, 1999); Skya, *Japan's Holy War*.

¹⁶ John Dower, *War without Mercy: Race and Power in the Pacific War* (New York: Pantheon Books, 1986).

¹⁷ Yoshito Kita, “Nihongun ni yoru sensō hanzai no gen'in ni kan suru ikkōsatsu [An Inquiry into the Causes of War Crimes Committed by the Japanese Army],” *Nihon Hōgaku* 64, no. 3 (1998): 132–53; Janice Matsumura, “Combating Indiscipline in the Imperial Japanese Army,” *War in History* 23, no. 1 (2016): 79–99.

military logistics breakdowns toward the war's end.¹⁸ Additionally, an ongoing project at the Free University of Berlin has been analyzing the Japanese military judiciary's failure to thwart, and even occasional contribution to, war crime perpetration.¹⁹

While doctrines of absolute military obedience have been cited as a reason for wartime criminality, especially in works on the postwar trials, such existing scholarship neglects the many criminal violations of the army's own regulations.²⁰ We will demonstrate how the absolute obedience doctrine triggered a disciplinary breakdown that motivated additional criminality, even when military legislation or orders from high command dictated otherwise. In sum, historical analysis of Japanese military obedience doctrines may contribute to existing scholarship by providing an integrated explanation for both mutinies and war crimes, tying together these two key aspects of modern Japanese military history. To achieve this, we (among other things) analyze military legislation on subordinates' response to illegal orders, as well as court cases that—though perhaps addressed in other contexts—were hardly examined in the context of crimes of obedience.

The Paradox of Obedience in the Imperial Japanese Forces

In August 1936, a commander of a reserve draft center in Aichi prefecture conducted an experiment. He asked his unit of reservists if they would obey a “mistaken order” to murder the Japanese prime minister. Receiving a mixed response, the commander reprimanded those who had responded negatively, emphasizing that they must obey all orders unconditionally and without question, even treasonous, “mistaken” orders. When obeying, he emphasized, they would never bear any criminal responsibility.²¹ This survey was no mere thought experiment. Just six months previously, a cabal of officers in Tokyo had mobilized 1400 soldiers and attempted to overthrow the government. What we know indicates that even soldiers who disagreed with the rebels' ideology, for the most part obeyed. At least one survey implied that even soldiers unacquainted with the rebel officers, would have obeyed their treasonous orders.²²

This is unsurprising, given how military coups and assassinations were almost normalized in early 1930s Japan.²³ Recalling this time, Kido Kōichi,

¹⁸ Sarah Kovner, *Prisoners of the Empire: Inside Japanese POW Camps* (Cambridge, MA: Harvard University Press, 2020), 3, 57, 65, 201, 209.

¹⁹ Urs Mathias Zachmann et al., “Law without Mercy,” ERC [European Research Council] research project (2019–2024).

²⁰ Kita, “On Obedience to Orders” [1], 17; Cheah Wui Ling, “The Superior Orders Defence at the Post-war Trials in Singapore,” in *Trials for International Crimes in Asia*, ed. Kirsten Sellars (Cambridge: Cambridge University Press, 2015), 106, 108, 114; Yuma Totani, *Justice in Asia and the Pacific Region, 1945–1952: Allied War Crimes Prosecutions* (New York: Cambridge University Press, 2015), 83.

²¹ Kentarō Awaya and Yūji Otobe, eds., *Niniroku jiken zengo no kokumin dōin* [Citizens' Mobilization after the February Incident], Shiryō Nihon Gendaishi, vol. 9 (Tokyo: Ōtsuki Shoten, 1984), 311–13.

²² Kita, “On Obedience to Orders” [2], 44; Awaya and Otobe, *Citizen's Mobilization*, 311.

²³ Orbach, *Curse on this Country*, 234.

one of the emperor's closest advisors, denounced during the Tokyo Trial the "defiance of the superior by the subordinate: a deplorable tendency in the fighting services, which proved to be the curse on this country, inviting the misery of today."²⁴ Kido's testimony referenced both the frequent coups of the 1930s, and the way the army leveraged them politically. Already, we see "a paradox of obedience": while disobedience among officers was rampant, their subordinates were expected to obey them without question, even in rebellion against the government. This mix of disobedience to the system at large on the one hand, and blind obedience to immediate superiors on the other, was a remarkable feature of the Imperial Japanese armed forces.

As we shall see, the Japanese Army sought to enforce obedience at all costs by adopting an extreme version of the "superior orders defense." This version obligated soldiers to obey all orders, legal and illegal, even when the commander exceeded his legal authority and even if issued to promote the commander's private aims. This policy enabled junior officers and NCOs (noncommissioned officers) to utilize their troops to further their personal interests. Their men followed them in this, just as they followed them in enforcing a brutalization culture in the barracks and in perpetrating crimes against occupied civilians and POWs.²⁵

How did this doctrine, so dangerous to Japan's institutions and ruling elites, become so entrenched in Japan's military and judicial system? The answer lies in the legal and theoretical background of the doctrine itself.

The Superior Orders Defense: Legal and Theoretical Background

How should a legal system address scenarios in which subordinate soldiers receive illegal orders from their superiors? Condemning obedience to such orders might diminish military discipline, while condoning it harms the rule of law. In response to this conflict, three groups of legal approaches have emerged: (1) approaches condemning all crimes of obedience (absolute liability); (2) conditional liability approaches, condemning some crimes of obedience, while condoning others; and (3) approaches condoning all such crimes (absolute obedience-defense).²⁶

Absolute liability approaches categorically demand of soldiers to only obey legal orders. Accordingly, the fact that the crime was committed under orders cannot be an exonerating factor. At most, it constitutes a mitigating factor in

²⁴ *International Military Tribunal for the Far East*. Record of proceedings, Tokyo, Japan: The United States of America [et al.] against Araki, Sadao ... Tojo, Hideki [et al.], accused/official court reporters, Jack Greenberg, Chief ... [et al.]. Chicago: Microfilm Reels, Center for Research Libraries. Reel 23, 30723.

²⁵ Fumia Shiromaru and Yoshinobu Endō, "Guntai kyōiku to kokumin kyōiku: Guntai Naimusho no kenkyū [Military Education and National Education: A Study on the 'Book of The Interior Administration and Discipline in The Barracks'] [2]," *Chiba Daigaku Kyōikugakubu Kenkyū kiyō* 24, no. 1 (1975): 86, 88, <https://opac.ll.chiba-u.jp/da/curator/900025281/KJ00004298588.pdf>.

²⁶ Massimo Scaliotti, "Defences Before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility—Part 1," *International Criminal Law Review* 1, no. 1 (2001): 127–28.

establishing the soldier's responsibility.²⁷ Regarding domestic crimes, strong support for such approaches can be found in English common law.²⁸ Regarding war crimes, support for such approaches appears in many of the post-World War II trials, including those of the Nuremberg and Tokyo international tribunals.²⁹

Of the conditional liability approaches, we shall present only two. The first is the "actual knowledge" approach, maintaining that the subordinate's liability for obedience to orders depends upon his actual knowledge regarding its illegality. If he knew it was illegal, but obeyed nonetheless, he would not receive a superior orders defense. If, however, he obeyed the order without knowing of its illegality, he will be protected.³⁰ The German Military Penal codes of 1872 and 1940, for example, adopted such an approach.³¹

The second conditional liability approach is the "actual knowledge with a residual test of constructive knowledge" approach. Unlike the previous approach, this approach does not categorically accord a defense to all acts of ignorant obedience. Instead, an additional test of reasonable knowledge is applied, whereby the unknowing subordinate is protected only if the court rules that he could not have been reasonably expected to know of the order's illegality. Arguably, this approach is the most popular today, colloquially associated with the phrase "manifestly unlawful orders."³² In the nineteenth century, support for this approach can be found, for example, in certain common law sources.³³

The "absolute obedience-defense" approaches expect soldiers to obey all their superiors' orders, even illegal ones. The main approach of this sort is the *respondeat superior* approach (Latin: "let the commander respond"). Obedient subordinates are always protected from criminal liability by a superior orders defense while, as its name suggests, their commanders are the ones held responsible. The punishment of the commanders, supporters claim, sufficiently addresses rule-of-law concerns.³⁴ Regarding domestic crimes, *respondeat superior* was, for example, the prevalent approach in nineteenth-early-twentieth-century France.³⁵ Regarding war crimes, this approach

²⁷ Ziv Bohrer, "The Superior Orders Defense in Domestic and International Law—A Doctrinal and Theoretical Revision" (PhD diss., Tel Aviv University, 2012), 12; Leslie C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 2000), 308.

²⁸ Bohrer, "The Superior Orders Defense," 23–31. Note that support for other approaches can also be found in English common law.

²⁹ Paola Gaeta, "The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law," *European Journal of International Law* 10 (1999): 178–88.

³⁰ Bohrer, "The Superior Orders Defense," 13.

³¹ Michael A. Musmanno, "Are Subordinate Officials Penally Responsible for Obeying Superior Orders Which Direct Commission of Crime," *Dickinson Law Review* 67, no. 3 (1963): 232.

³² Mark J. Osiel, "Obeying Orders: Atrocity, Military Discipline, and the Law of War," *California Law Review* 86, no. 5 (October 1998): 973–78.

³³ James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 1 (London: Macmillan and Company, 1883), 206.

³⁴ Nico Keijzer, *The Military Duty to Obey* (Amsterdam: Thesis vrije Universiteit Amsterdam, 1977), 73–74, 151–52, 196.

³⁵ *Ibid.*, 201–3.

was adopted in the British and American law-of-war manuals at the beginning of World War I, where it remained until late into World War II.³⁶

While a principal aim of *respondeat superior* is to further the benefits that a state attains from military discipline, in practice it can sometimes have the opposite effect. This occurs when soldiers receive illegal orders detrimental to the state's own interests: for instance, orders to mutiny, or orders given only to serve the commander's own private interests. Leading nineteenth-century English jurist, J. F. Stephen, observed in this regard: "The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior."³⁷

To counter this danger, some countries adopted a supplementary rule, which we shall call the "misuse of authority" exception. This rule denies a superior order defense where the relevant illegal order was clearly not meant to further military goals, clearly exceeded the commander's authority, or mandated treasonous acts. One version of this rule denies that such an instruction even constitutes a military order.³⁸

But the Japanese military adopted an extreme version of the *respondeat superior* approach, lacking such a "misuse of authority" exception. Its justice system did occasionally flirt with the "misuse of authority" exception, and even with conditional liability approaches. Even so, defendants were almost always acquitted. Additionally, since Japanese law gave relatively little weight to precedent anyway, these juridical reasonings "hidden" within rulings had little influence. In practice, the military justice system maintained an extreme version of *respondeat superior*, paving the way for misuses of authority, rebellions, atrocities, and more. The coexistence of unconditional obedience in theory with rampant disobedience in practice is the source of the Imperial Army's "paradox of obedience." This paradox is rooted in the formative years of Meiji Japan and would prove difficult to untangle, as Japan transformed into a modernized power and faced new challenges.

Absolute Obedience in Theory, Disobedience in Practice: The Superior Orders Defense in Japanese Military Legislation, 1870–1895

In the 1870s, the new imperial military was rife with mutiny and disobedience. These forces were replete with warriors from former feudal domains, and old hierarchies were frequently at odds with the new chain of command. Formerly high-ranking warriors served as rank-and-file soldiers, and the idea of obeying superiors from other domains or of lesser status was not a trivial one. When military courts were established, judges were often afraid to chastise

³⁶ Gary Solis, "Obedience of Orders and the Law of War: Judicial Application in American Forums," *American University International Law Review* 15 (2000): 510.

³⁷ Stephen, *A History of the Criminal Law of England*, 205.

³⁸ Osiel, "Obeying Orders," 997–99, 1003–6.

transgressors with political influence in former feudal domains, so punishments were rarely enforced.³⁹ Modern Japan's first military campaign abroad, the 1874 Taiwan Expedition, was also rife with disobedience from the ground up.⁴⁰ The 1870s also witnessed several samurai uprisings, with the 1877 Satsuma Rebellion, coming close to expanding into a civil war. Having crushed that rebellion, The Imperial Government faced another uprising by Imperial Guard soldiers, who resented not being paid their bonuses.⁴¹

Almost all these rebellions utilized what we shall call "the *shishi* exception." The so-called *shishi* (warriors of high aspiration) were groups of samurai guerilla fighters who were first in challenging the old Tokugawa regime, paving the way for the 1868 *Meiji* Restoration. In assessing one's political behavior, the *shishi* gave great weight to one's purity of motives, sincerity, and spontaneous desire to commit violence in the name of the emperor. The young *Meiji* state enshrined several deceased *shishi* fighters as gods, making them role models.⁴² The *shishi* ideal was engraved in public memory and taught at military institutions. As a result, Japanese officers tended to sympathize with disobedient behavior, if it was subjectively based on pure motives, sincerity, and loyalty to the throne. Predictably, many rebels used this "*shishi* exception" to justify their mutinies as patriotic uprisings in the name of the emperor. To them, their actions were not against the throne, but for the throne, to counteract "traitorous" officials who were "distorting the imperial will."⁴³

To remedy this chaotic reality, early army legislation stressed unconditional military obedience.⁴⁴ In 1870, the Army Department published the first legal code for the Army, adopting a *respondeat superior* approach, like France (the primary model, at that time, for the Imperial Japanese Army).⁴⁵ However, the various rebellions during the 1870s demonstrated to the army chiefs that their legal code was ineffective. In response, they reinforced obedience with the emperor's own authority. The Imperial Rescript for Soldiers and Sailors, promulgated in 1882 and canonized as the Imperial Army's seminal document, stipulated that a superior's order is equivalent to a command from the emperor himself ("inferiors should regard the orders of their superiors as issuing directly from Us").⁴⁶ By implication, an order could not be illegal, since it

³⁹ Kita, "On Obedience to Orders" [1], 7.

⁴⁰ Danny Orbach, "'By Not Stopping': The First Taiwan Expedition (1874) and the Roots of Japanese Military Disobedience," *The Journal of Japanese Studies* 42, no. 1 (2016): 42–50.

⁴¹ Orbach, *Curse on this Country*, 54–86.

⁴² Yūsuke Takata, "Meiji Ishin 'shishi'-zō no Keisei to Rekishi Ishiki" [Formation and Historical Consciousness of the Image of Shishi in the Meiji Restoration], *Rekishi Gakubu Ronshū: Bukkyō Daigaku Rekishi Gakubu* 2 (2012): 43–52, 67–68.

⁴³ For analysis of legal cases where the *shishi* exception was used by defense lawyers and judges as a consideration in mitigating punishment of rebels and political assassins see: Orbach, "Pure Spirits," 132–39; Orbach, *Curse on This Country*, 23–25, 30–32, 198. The most famous case is the trial of the conspirators of the May 1932 incident, also analyzed by David A. Sneider, "Action and Oratory: The Trials of the May 15th Incident of 1932," *Law in Japan* 23 (1990): 1–67.

⁴⁴ Shiromaru and Endō, "The Education of Soldiers [2]," 86–87.

⁴⁵ Kita, "On Obedience to Orders" [1], 5–6.

⁴⁶ Theodore McNelly, ed., *Sources in Modern East Asian History and Politics* (New York: Appleton-Century-Crofts, 1967), 55.

was rooted in the emperor's supreme religious authority.⁴⁷ This principle was further emphasized in the *Tokuhō*, an oath of allegiance all soldiers recited upon recruitment.⁴⁸ Here, too, absolute obedience rhetoric coexisted with a mutiny-rife reality. In the early 1880s, Japan experienced deflation, anti-governmental liberal agitation, and peasant uprisings, all of which were believed to instigate uprisings among the rank-and-file.⁴⁹

The Army Penal Code of 1881, modeled on the French code, punished not only disobedient soldiers, but also commanders who abused their power. It stipulated, for example, that “when a commanding officer has engaged in combat after having received notification of an armistice or peace, he shall suffer death”; “When a commanding officer has arbitrarily moved troops against orders or outside of the scope of his authority, except in cases when this is unavoidable, he shall suffer death.”⁵⁰ How to treat subordinates who obeyed such delinquent commanders, however, remained unaddressed.

In 1888, a code known as the *Guntai Naimusho* (roughly translated as the “Book of Interior Administration and Discipline in the Barracks”) was published as a unified book of regulations for all land army branches. Article 5 of chapter 2 (on obedience) endorsed the *respondeat superior* approach. A soldier must obey orders irrespective of their propriety, reasonableness, or morality. If an order was illegal, only the commander bore criminal responsibility.⁵¹ This principle

⁴⁷ The term “religious” requires some clarification. According to Shimazono Susumu, the “religious nature” of the Imperial institution was intertwined with State *Shintō*, an endeavor by the Japanese state to mobilize the population for state building projects through an organized system of rites and myths. Prior to the *Meiji* Restoration, Japan was a culturally diverse country, characterized by numerous feudal domains and a multitude of identities, religious beliefs, and local cults. State *Shintō* sought to systematize many of these religious rites, practices, and myths in a hierarchical structure, with the sun goddess and her descendent, the emperor, at the pinnacle. The emperor's sanctity, so the ideology said, gives Japan its unique character as the “land of the gods.” The Imperial institution, whom everybody should serve with utmost loyalty, unifies the various identities existing in Japan into a cohesive whole. Therefore, in this context, “religion” encompassed a system of government propaganda and official mythology designed for spiritual mobilization, while for many individuals, it defined their loyalty to the emperor and formed the core of their Japanese patriotic feelings, above and beyond any local identity. In essence, State *Shintō* is “a form of nationalism connected with a religious tradition.” See, Susumu Shimazono, “State Shinto and the Religious Structure of Modern Japan,” *Journal of the American Academy of Religion* 73, no. 4 (2005): 1088–93.

⁴⁸ Kita, “The Causes of War Crimes,” 149; Ling, “The Superior Orders Defence,” 108; Jinzaburō Mazaki, “Guntai Naimusho meirei fukujū to sekinin no kankei ni tsuite [About Obedience to Orders and Responsibility in the *Guntai Naimusho*],” in *Niniroku Jiken kenkyū shiryō* [Sources for Research on the February 26 Incident], ed. Matsumoto Seichō (Tokyo: Bungei Shunjusha, 1976), 456; Shiromaru and Endō, “The Education of Soldiers [2],” 90, 92.

⁴⁹ Roger Bowen, *Rebellion and Democracy in Meiji Japan: A Study of Commoners in the Popular Rights Movement* (London: University of California Press, 1980), 49–60, 90–125; Orbach, *Curse on This Country*, 91.

⁵⁰ *Rikugun Keihō* [Army Penal Code] (1881), National Diet Library—Digitized Contents, <http://dl.ndl.go.jp/info:ndljp/pid/794418>, art. 69, 70; Yale Maxon, *Control of Japanese Foreign Policy: A Study of Civil-Military Rivalry, 1930–1945* (Westport, CT: Greenwood Press, 1973), 37–38.

⁵¹ *Guntai Naimusho* (1888), National Diet Library—Digitized Contents, <https://dl.ndl.go.jp/info:ndljp/pid/843511>.

was cemented in 1889 by the *Meiji* Constitution. Article 32 stipulated that “each and every one of the provisions contained in the preceding articles of the present chapter [rights and duties of subjects], that are not in conflict with the laws or the rules and discipline of the Army and Navy, shall apply to the Army and Navy officers and men.”⁵² Namely, military obedience extended even to orders contradicting the *Meiji* Constitution itself.

As tumultuous Meiji-era modernization led Japan to extend its influence over its neighbors, unforeseen ramifications arose. Ideological, ambitious, or merely adventurous Japanese military personnel on the ground exploited flaws in the system, to drive by means of violence the Japanese national policy in directions and at timings unsupported by the Government in Tokyo, and to subsequently escape punishment.

A Lost Opportunity to Limit *Respondeat Superior*: The Queen Min Assassination Affair

In 1895, following the First Sino-Japanese War, the Japanese military justice system got an opportunity to test the *respondeat superior* doctrine in an actual legal case. On October 8, a gang of Japanese officers, soldiers, and civilian adventurers, led and instigated by Miura Gorō, the Japanese minister in Seoul, assassinated Queen Min, a consort of the Korean King and the most influential mistress at the Seoul court. Miura, a former general, was irritated by the Queen’s pro-Russian policy. Since the assassination was perpetrated without the Japanese government’s knowledge, the participants were afterward returned to Japan to be prosecuted: the non-military partakers (including Miura) in civilian proceedings (where they were promptly acquitted on the basis of insufficient evidence),⁵³ and the officers involved before a court martial.⁵⁴

The court martial verdict lengthily addressed the superior orders defense, and even came close to embracing a conditional liability approach. All defendants carried out their commanders’ orders, and by extension, those of Minister Miura. However, the court martial ruled that subordinates were criminally liable when the order they followed was manifestly illegal and unjust (*chomei sehō fusei*), interpreting that benchmark in a manner reminiscent of the actual knowledge with a residual test of constructive knowledge approach. The ruling stated that subordinates were culpable, either (a) if they knew the order violated Japanese law or exceeded the commander’s authority, or (b) even if they lacked such knowledge in case the order was manifestly unlawful.

⁵² McNelly, *Sources in Modern East Asian History*, 60.

⁵³ Orbach, *Curse on this Country*, 101–29.

⁵⁴ Genji Takahashi to Suzuki Shigemoto, 8.10.1895. In *Inoue Kaoru Kankei Monjo* [Papers of Inoue Kaoru], vol. 58 (National Diet Library, Modern Japanese Political History Materials Reading Room, Tokyo), 25; Keiichirō Hara and Yamamoto Shirō, *Hara Kei o meguru Hitobito* [People around Hara Kei] (Tokyo: Nihon Hōsō Shuppan Kyōkai, 1981), 152–53; Sadatsuchi Uchida, to Hara Kei, 1.11.1895. In *Nikkan Gaikō Shiryō: Kankoku Ōhi Satsugai Jiken* [Sources on Japanese–Korean Diplomacy: The Incident of the Assassination of the Korean Queen], vol. 5 (1953), ed. Ichikawa Masaaki (Tokyo: Hara Shobō), 206.

But even with this revised doctrine, the court martial still acquitted everyone involved. It ruled that the soldiers, given the circumstances, could reasonably have believed that the orders they received (to guard the palace and subdue Korean resistance) were legal, and within the boundaries of Miura's authority, whereas the officers, in carrying out their legitimate duty, did not kill the queen or instigate others to do so.⁵⁵ In other words, since the individuals who slew the queen could not be identified, no soldier or officer was convicted, as all other orders were deemed not manifestly unlawful. Thus, despite the theoretical adoption of a conditional liability approach, in practice the ruling had little effect. First, note that the court interpreted the reasonableness benchmark very leniently. Thus, it rendered that element of the approach mostly irrelevant. Second, due to the tendency of Japanese jurisprudence not to treat past rulings as binding legal precedents, this judgment's embrace of conditional liability was soon forgotten. It would be almost thirty years before the *respondet superior* doctrine was seriously challenged again.

Movement toward Liberalization: Attempts to Limit Military Obedience, 1908–1921

In 1908 the *Guntai Naimusho* was amended in an effort to curtail the *respondet superior* approach. Army command decided to revise the code in response to increased levels of disobedience and draft avoidance during and after the Russo–Japanese War.⁵⁶ The 1908 version's preamble, besides the usual emphasis on military obedience, stated that soldiers should obey “legitimate orders” (*seitō na meirei*), and that superiors should follow the law so that they could serve as examples for sincere, true-hearted obedience.⁵⁷ This may have been a concession to growing liberal tendencies in Japanese society, but the actual articles addressing obedience to orders remained almost exactly the same. Articles 1, 2, and 3 of chapter 2 (obedience) still obliged soldiers to obey not only their direct commanders, but all higher-ranked and older equally ranked soldiers (disregarding how such a broad obedience duty could lead to contradictory orders and tangle the chain of command). Moreover, as in the 1888 version, subordinates were forbidden to question any order (other than unclear ones), but rather only permitted to complain of an order which seemed unreasonable or illegitimate to them, *ex post*, after carrying it out. Nevertheless, the preambular note that soldiers should obey “legitimate orders” could be interpreted as a legislative endorsement of the “misuse of authority exception,” mentioned in the earlier theoretical survey.⁵⁸

⁵⁵ Verdict of the Court Martial, Hiroshima 5th Division, 1895, In *Nikkan Gaikō Shiryō: Kankoku Ōhi Satsugai Jiken* [Sources on Japanese–Korean Diplomacy: The Incident of the Assassination of the Korean Queen], vol. 5 (1953), ed. Ichikawa Masaaki (Tokyo: Hara Shobō), 211.

⁵⁶ Kita, “On Obedience to Orders” [1], 13; Shiromaru and Endō, “The Education of Soldiers [2],” 94; Masaharu Honma, “Shisō no hensen ni kangamite gunki to heifuku to o ronzu” [Discussion on Discipline and Military Obedience in Light of the Changes in Thought], *Kaikōsha Kiji* 550 (1920): 45.

⁵⁷ *Guntai Naimusho* 1908(, National Diet Library—Digitized Contents, <https://dl.ndl.go.jp/info:ndljp/pid/904580/121>.

⁵⁸ *Ibid.*, ch. 2.

That same year (1908), the Army and Navy both issued revised penal codes, based on contemporary German codes. Predictably, the scope of the superior orders defense was debated. To clarify that soldiers must obey all orders, including potentially illegal orders, the Army Ministry proposed an article (no. 42) stipulating that “a soldier is not criminally liable for an act ordered by a superior.” That, however, encountered strong opposition within the committee. Some argued that article 35 of the civilian penal code already determined that a Japanese subject would not be punished if he behaved according to laws and ordinances (*hōrei*), or if he committed an act as a part of a legitimate duty (*seitō na gyōmu*). This provided a rather weak defense (narrower than the full-fledged *respondeat superior*), as it potentially did not cover obedience to illegal orders that were not part of a “legitimate duty.”⁵⁹ Some were further concerned that the definition of an “order” was too vague, for not clarifying whether an order which exceeded the commander’s legal authority, was in fact an “order.” Nonetheless, it was deemed unwise to clearly define the scope of military authority, to avoid undermining discipline and the emperor-related religious nature of obedience. Due to these disagreements, the drafting committee eventually decided to scrap the proposed article 42. They also left the regulation of obedience to illegal orders under the purview of the ambiguous article 35 of the civilian penal code.⁶⁰ In 1908, given the ambiguity of both the *Guntai Naimusho* and the Army Penal Code, it remained unclear when a soldier committing a crime under orders was exempt from punishment. Conversely, a soldier refusing to obey illegal orders could not know if he would be charged for disobedience.

By the early 1920s, many army leaders, including Army Minister (and future prime minister) General Tanaka Giichi, believed that military obedience should somehow be brought in line with contemporary liberal currents in Japanese society. Thus, the committee that revised the *Guntai Naimusho* in 1921 endeavored to shift from blind obedience to obedience based on understanding, “obedience from the heart,” building on the previous changes from the 1908 version. Japanese military writers openly maintained that armies emphasizing blind obedience, such as those of Germany and Russia, had imploded in the wake of World War I under communist instigation, and Japan must adjust accordingly. The Army leadership wanted to strengthen “military spirit” to prepare the troops for the challenges of modern and possibly total war. In such wars, soldiers should understand what they were doing and take independent initiative instead of being mere automatons.⁶¹

⁵⁹ *Keihō* [Criminal Code] (1908), In *Keihō Zenshū* [Full Collection of Criminal Codes]. National Diet Library—Digitized Contents, <https://dl.ndl.go.jp/info:ndljp/pid/1703724>; Kita, “On Obedience to Orders” [1], 15–16.

⁶⁰ Mazaki, “About Obedience to Orders,” 457–59; Teruhisa Kumagai, *Nihongun no seishin kyōiku: gunki fūki no jiji taisaku no hatten* [The Spiritual Education of Japanese Soldiers: Development of Measures to Maintain Military Discipline and Morale] (Tokyo: Kinseisha, 2012), 15, 18–19.

⁶¹ Honma, “Discussion on Discipline,” 35–43; Shiromaru and Endō, “The Education of Soldiers [2],” 94–95; Giichi Tanaka, “Kaku-heikadantaichō oyobi sanbōkai dōseki-jō kaisei Guntainaimusho kōryō ni kan suru Rikugun Daijin no kōen tekiryō” [An Outline of the Army Minister’s Lecture in the Joint Conference of Army Branches Commanders and Staff Officers about on the Summary of

In the new *Guntai Naimusho*, soldiers could complain about mistreatment, as well as politely share their opinions with their commanders “based on a genuine desire” to help them. They were also asked to obey standing legislation in addition to orders. In addition, superiors were forbidden to employ soldiers as servants, as well as to prevent them from complaining to higher authorities. However, the revised code removed the “legitimate orders” qualification from the introduction. In addition, the committee rejected a proposal allowing soldiers to complain regarding illegal orders, arguing that such a regulation was incongruent with Japanese notions of absolute obedience. In effect, unconditional obedience to *all* orders, without any “authority misuse” exception, was reinstated.⁶²

When Japan assumed international obligations that might have generated legal conflict with this approach, events transpired to thwart that possibility. The 1922 Washington Treaty, signed by Japan, the United Kingdom, The United States, France, and Italy, prohibited submarine attacks against civilian and neutral vessels, as well as the use of poisonous gas, while stating that subordinates violating the treaty, even under orders, were criminally liable. In other words, the treaty explicitly deprived soldiers of the superior orders defense. However, France, another country which embraced a *respondeat superior* approach (though arguably with an authority misuse exception), refused to ratify the treaty, rendering it null and void for all signatories, including Japan.⁶³ Consequently, Japanese military legislation retained an unchallenged *respondeat superior* approach, without any contradictory international obligations.

The Amakasu Affair

This unreserved *respondeat superior* approach was soon tested again. On September 16, 1923, during the havoc following the Great Kantō earthquake, military policemen led by Captain Amakasu Masahiko murdered the anarchists Ōsugi Sakae and Itō Noe, along with Munekazu, Ōsugi’s seven-year-old nephew.

During their trial, Amakasu and his men grounded the murder in the *shishi* exception: the ideals of spontaneity, sincerity, and pure motives. Using this exception, Amakasu’s lawyers argued that national law notwithstanding, the decision to kill the traitors Ōsugi Sakae and Itō Noe was not blameworthy as it spontaneously arose from an irresistible urge to protect the country. Even

the Revised *Guntai Naimusho*], *Kaikōsha Kiji* 560 (1920): 25–26; “Guntai Naimusho kaisei riyūsho,” [An Explanation Document on the Revision of the *Guntai Naimusho*], *Kaikōsha Kiji* 560 (1920): 2.

⁶² *Guntai Naimusho* (1921), National Diet Library—Digitized Contents, <https://dl.ndl.go.jp/info:ndljp/pid/912570>, 7, 13–15; “Guntai Naimusho kaisei riyūsho,” 4; Yutaka Yoshida, *Nihon no guntai: Heishitachi no kindaiishi* [Japan’s Soldiers: A Modern History of Military Men] (Tokyo: Iwanami Shoten, 2002), 147–48; Kita, “On Obedience to Orders” [1], 14–15.

⁶³ Eiichi Fukatsu and Kita Yoshito, “Jōkan meirei no kōben’ ni kan suru kokusai hōtenka o meguru sho-mondai: dainiji sekai taisen izen no sagyō,” [On Various Problems Related to the International Codification of the “Plea of Superior Orders”: The Work Prior to WWII], *Hōgaku Kiyō* 34 (1992): 188–90.

the child killing could be justified, as it was done for the public good, not for personal reasons.⁶⁴

The circumstances surrounding Munekazu's murder, and their judicial interpretation are particularly noteworthy. According to the verdict, Amakasu and his sergeant, Mori Keijirō, decided to kill the child to cover up the other murders, but neither wanted to do the deed. So, they delegated this task to their subordinates, military policemen Kamoshita Yasugorō and Honda Shigeo. Which MP (military policeman) killed the child, or whether they did it together, was never discovered. A third MP, Hirai Toshikazu, served as a lookout, and was tried as an accessory. All three MPs argued that they were just obeying orders and had no time to consider said orders' legality.⁶⁵

The prosecutor argued that the order to kill Munekazu exceeded military authority and was therefore non-binding. Even if soldiers had to obey orders and were immune from criminal responsibility in doing so, the task they had been given was not an order in the military sense, as their superiors had no authority to order infanticide. Additionally, Amakasu and Mori were not "superiors" according to the Army Penal Code and *Guntai Naimusho*, being neither the direct commanders of the MPs, nor assigned to duty together. Therefore, no proper "command relationship" existed to protect them. The defendants should be condemned as common criminals, not granted immunity. In other words, the prosecutor applied the "authority misuse" exception.⁶⁶

The judges sentenced Amakasu to ten years and Mori to three years of penal servitude. Mori was convicted despite him being Amakasu's subordinate, as he was close enough to understand the nature of the crime (i.e., to have criminal intent). Conversely, the court acquitted Kamoshita and Honda, the MP soldiers who killed the child (as well as Hirai the lookout).⁶⁷ The court ruled that Kamoshita and Honda were unaware that the orders were illegal ("operating in the extraordinary circumstances of martial law without having any clue that this was a criminal act"), and thus lacked criminal intent.⁶⁸ Unlike the prosecutor, who advocated for the "authority misuse" exception to the *respondet superior* approach, the judges favored the "actual knowledge" approach. And yet, the fact that all the subordinates (except Mori) were acquitted, diminished the public impact of the ruling. With the system giving little weight to precedents, it was soon forgotten. What really mattered was that three soldiers who obeyed heinously illegal orders were acquitted. The ramifications of this impunity would be felt in the years to come, as extremist officers utilized their soldiers' obedience to violently undermine the state's authority.

⁶⁴ Sakae Wagatsuma *et al.*, eds., 1968–1970, *Nihon Seiji Saiban Shiroku: Taishō* [Historical Records of Japanese Political Trials—Taishō and Early Shōwa] (Tokyo: Daiichi Hōki Shuppan), 428–29.

⁶⁵ Kita, "On Obedience to Orders" [2], 23–25.

⁶⁶ Kita, "On Obedience to Orders" [2], 25–26.

⁶⁷ *Ibid.*, 28–29.

⁶⁸ Wagatsuma, *Japanese Political Trials*, 435.

The Growth of Disobedience in the 1920s–1930s and the February Incident

In the late 1920s and early 1930s, the gap between the rhetoric of absolute obedience and reality widened, as officers repeatedly defied their superiors using the *shishi* exception. In June 1928, a group of officers in the Kwantung Army successfully assassinated Zhang Zuolin, the warlord of Manchuria and a major powerbroker in China. The commander-in-chief of the Kwantung Army, his chief of staff, the general staff in Tokyo, and the civilian government, all knew nothing of the plot, which had far-reaching political consequences. Nevertheless, Prime Minister Tanaka Giichi's attempts to court-martial the ringleader, Kōmoto Daisaku and his henchmen, failed. The Army, reluctant to expose the endemic disobedience festering within its ranks, preferred to secretly retire Kōmoto and some others, while adamantly opposing a public court martial. Then in September 1931, Kwantung Army officers again defied orders when they occupied large swaths of northeastern China against the explicit instructions of the Prime Minister and the chief of the general staff, presenting a fait accompli to the civilian and military leadership.⁶⁹

This violent disobedience within the Army soon struck at home as well. In March and October 1931, a faction within the military, named "The Cherry Blossoms Society" (*Sakura-kai*), plotted to overthrow the government in a violent coup d'état. The plans were leaked in advance to the authorities and were therefore forestalled, but the failure to punish such a brazen mutiny incentivized younger, more radical officers to try again. In May 1932, a group of Army and Navy officers assassinated Prime Minister Inukai Tsuyoshi, and other mutinous plots soon followed.⁷⁰ In most such cases, punishments were slow and feeble. Military courts tended to show leniency toward offenders driven by "pure motives" such as patriotism and love of the emperor, i.e., anybody who was smart enough to deploy the *shishi* exception.⁷¹

It is clear, however, that by the mid-1930s this leniency had rendered all the Japanese Army's multiple laws regarding absolute obedience a laughingstock among officers, as they could always count on sympathy once the *shishi* exception was used. But these incidents, terrible as they were, still did not raise the issue of the superior orders defense. The informal "etiquette" of Japanese military rebels saw mutinies as acts of personal heroics by officers, ready to sacrifice their lives for their country. It was therefore considered improper to involve subordinates in such acts, abusing their obedience to break the law. Endangering others instead of oneself was deemed cowardly and insincere. This unwritten rule, however, was violated on February 26, 1936, when a group of mutinous officers mobilized more than 1400 soldiers in Tokyo for a full-blown coup d'état. Before being crushed, the rebels murdered four senior statesmen and wounded several others.⁷²

⁶⁹ Orbach, *Curse on this Country*, 162–63, 189–90.

⁷⁰ Orbach, *Curse on this Country*, 193–238.

⁷¹ Orbach, "Pure Spirits," 147–51.

⁷² Orbach, *Curse on this Country*, 225–57; Shillony, *Revolt in Japan*, 151; Hisashi Fujii, *Niniroku Teito Heiran: Gunjiteki Shiten kara zenmenteki ni minaosu* [The February 26 Military Rebellion in the Imperial Capital: A Comprehensive Revision from a Military Perspective] (Tokyo: Sōshisha, 2010).

It is doubtful whether any of the mutinous soldiers were aware that one year prior to the rebellion, the Army Inspector General of Military Education, General Mazaki Jinzaburō, had declared that soldiers might escape punishment when disobeying illegal orders. But such awareness would have been almost meaningless anyway. Even according to Mazaki, only soldiers disobeying solely because of the order's illegality, without any ulterior motive, might be acquitted from the disobedience charge. Conversely, the inspector general also explicitly stated that soldiers would not be punished for obeying even the most egregious illegal orders, including murdering a Japanese child as in the Amakasu incident.⁷³ Ironically, Mazaki himself was involved in the instigation of the February incident and ended up as a defendant at the trial, demonstrating again the gap between the rhetoric on obedience and reality.⁷⁴ In any case, almost none of the soldiers involved refused the blatantly illegal orders to kill the country's own civilian and military leaders.

Besides the coup ringleaders, twenty-six of the 1360 soldiers and seventy-four out of eighty-nine noncommissioned officers who participated were also charged. Common soldiers who had not used their weapons were granted immediate pardons. Hence, these proceedings again brought the superior orders defense to the fore: if a superior orders a soldier to murder the Japanese Prime Minister, is the subordinate criminally liable?⁷⁵ If so, then maybe there were other illegal orders which would not endow subordinates with the superior orders defense? Where and how was the boundary to be set? As we saw in the Amakasu trial, even when adopting an actual knowledge approach, three subordinates were still acquitted, despite murdering a Japanese child, because they had no subjective awareness that it was illegal.

To address the issue, the Army Ministry Legal Bureau published a memorandum on the 1936 attempted coup. In it, they maintained that the incident was unprecedented, almost impossible to judge according to normal rules, because the rebel officers' orders were sacrilegious, faux orders, issued not in accordance with the emperor's will. These claims essentially embraced the "authority misuse" exception. However, the document added an actual knowledge test to that exception. It maintained that many soldiers believed that they were bound to follow the orders of their superiors and were thus not criminally liable. Only those who knowingly helped the conspirators by sharing their ideology—should be criminally liable.⁷⁶ This test of actual knowledge, it should be noted, incorporated the known *shishi* exception, in that criminal liability

⁷³ Mazaki, "About Obedience to Orders," 457; Kyōiku Sōkanbu [Inspector General of Military Education], *Seishin kyōiku yori mitaru guntai naimu* [Internal Army Life as Seen from the Perspective of Spiritual Education], National Institute for Defense Studies, Tokyo, Chūō, guntai kyōiku kyōiku shiryō-237 (1935), 410–11.

⁷⁴ Shillony, *Revolt in Japan*, 203; Jinzaburō Mazaki, 1981 *Mazaki Jinzaburō Nikki* [Diary of Mazaki Jinzaburō], vol. 1, ed. Itō Takashi (Tokyo: Yamakawa Shuppansha, 1981), 327, 335; Shigeru Hayashi, ed., *Niniroku Jiken Hiroku*, vol. 2 (Tokyo: Shōgakkan, 1971), 217.

⁷⁵ Kita, "On Obedience to Orders" [2], 31–33.

⁷⁶ Seichō Matsumoto and Fujii Yasushige, eds., *Niniroku Jiken kenkyū shiryō* [Sources for Research on the February 26 Incident], vol. 1 (Tokyo: Bungei Shunjū, 1976), 451; Kita, "On Obedience to Orders" [2], 33.

required a soldier to not only have knowledge of illegality, but to also possess impure motives (the rebels' ideology). Finally, in the trial preparations, the commanders of the Army Ministry Investigation Section and of the powerful Military Affairs Bureau openly declared that notwithstanding the incident, the absolute nature of military obedience was still more important than upholding the country's laws.⁷⁷

During the trial, the prosecutors argued for the "authority misuse" exception to the *respondeat superior* approach. Namely, they maintained that although soldiers do have to obey all orders unconditionally, a mutiny order was no order at all.⁷⁸ The prosecution's argument resembles an interpretation raised by Japanese defense lawyers in some postwar crime trials, according to which a soldier had to obey all orders, legal and illegal, as long as such orders *could* have possibly been issued by the emperor. As the military command hierarchy was based on imperial authority, an order that could not have been issued by the emperor was not an order at all.⁷⁹ That was, however, a very weak argument, as in modern Japan almost all rebellions were launched in the name of the emperor and against the so-called "traitors around the throne."⁸⁰

Especially striking, in this regard, was an exchange between a prosecutor and Sergeant Watanabe Seisaku. The latter said that a military revolt, ostensibly for the emperor and against the "traitors around the throne," seemed for him to be completely legitimate. If at all, only those who gave the orders should give themselves up and presumably be regarded as patriots, not traitors (i.e., the *shishi* exception).⁸¹

The prosecution's interpretation of military law also seemed strange to other defendants. Corporal Aizawa Jisaku told the prosecutor that a military order transcends state law. As a soldier, he did not need to consider whether it was good or ill. When asked what he would do if his platoon commander ordered him to shoot a higher officer, the corporal answered yet again that one must unconditionally obey all orders. At that point, the tribunal president intervened. He praised this corporal's adherence to the obedience principal but emphasized that shooting a high-ranking officer by orders of one's direct superior would be "improper" for the chain of command.⁸²

Sergeant Dōgomori Kiichi said that assassinating Japanese leaders may be strange, but that he nevertheless participated because he trusted his platoon commander's assertion that these leaders were evil.⁸³ Other defendants, like Sergeant Kanda Minoru, maintained that although they knew the order violated the constitution and the law, it was still legitimate and they had to obey it (i.e., they evoked an unreserved *respondeat superior*

⁷⁷ Kita, "On Obedience to Orders" [2], 33–34.

⁷⁸ *Ibid.*, 40.

⁷⁹ British National Archives, WO 235/820 (8.2.1946) Trial of Okamura Hideo, Defense council's address, 4.

⁸⁰ Orbach, *Curse on this Country*, 31, 239, 250, 254, 285; Hayashi, *Niniroku Jiken Hiroku*, vol. 3, 142.

⁸¹ Hayashi, *Niniroku Jiken Hiroku*, vol. 3, 142.

⁸² Hayashi, *Niniroku Jiken Hiroku*, vol. 3, 189.

⁸³ *Ibid.*, 180.

approach).⁸⁴ Such defendants, because they recognized the order's illegality, should have been convicted even by the Amakasu ruling lax standard. The rank-and-file soldiers' testimonies were strikingly like that of their NCOs in their perception of military obedience in rebellion.⁸⁵

The eventual ruling again stressed the absolute nature of military obedience, rejecting the prosecution's view that certain illegal orders were altogether not orders.⁸⁶ It only convicted defendants who knew that the orders were illegal, and nonetheless participated in the revolt, while consciously sharing the rebels' ideology (*dōshi kankei*); namely, an "actual knowledge" conditional liability approach, mixed with the *shishi* exception and designed to convict as few defendants as possible. Defendants who sincerely believed their orders were legitimate, based on their military education emphasizing absolute obedience, were acquitted for want of criminal intent. The court further ruled that even if they were aware of the illegality, their military education had numbed their judgment of the situation, further mitigating their responsibility. The court emphasized that even if some orders were illegal, obedience was a holy duty. Had soldiers paused to reflect on their orders' legality, the religious meaning of military obedience would be lost, and with it, officers' authority and the Japanese Army command system, connecting it with the divine emperor (*tōsui*). In this context, the term "religious" (*shūkyōteki*) referred to the absolute, god-like authority of the emperor, acting as the linchpin that unified the entire Japanese polity. It is striking, how even when the state and its leaders were in danger of being overthrown, the military justice system still clung to the absolute superior orders defense, because it was deemed intertwined with values of fundamental importance to the Japanese Empire.⁸⁷

In subsequent years, the absoluteness of military obedience and of the superior orders defense was even further solidified. After the February incident, an internal study authored by the judges stipulated that enlisted men were inculpable even when executing mutinous orders such as in February 1936. This reinforced the rejection of the "authority misuse" exception. The study also emphasized that soldiers (and even NCOs), having been taught to obey unconditionally, could not be blamed for behaving accordingly.⁸⁸

In 1943, the *Guntai Naimusho* underwent one final substantial revision, making obedience entirely unconditional. All references to a soldier's duty to obey legal norms other than their commanders' orders were removed. As before, a soldier was not allowed even to inquire about an order's reasons, let alone question its legality. Instead, obedience to military orders, akin to imperial orders, was deemed a religious duty. In sum, Japan adopted an extreme version of the *respondeat superior* approach, just one year before its Western enemies,

⁸⁴ *Ibid.*, 147–48.

⁸⁵ Kita, "On Obedience to Orders" [2], 37.

⁸⁶ *Ibid.*, 40.

⁸⁷ Hayashi, *Niniroku Jiken Hiroku*, vol. 3, 163–64, 193–94, 225–26; Kita, "On Obedience to Orders" [2], 38–43. Another term used in the verdict to refer to the sanctity of orders was "shinsei."

⁸⁸ Matsumoto and Fuji, *Sources for Research*, 437–39.

the United States and the United Kingdom, replaced *respondeat superior* (concerning war crimes) with the opposite, absolute liability, doctrine.

Thus, the few constraints which might have ameliorated abuses were dismantled, precisely as masses of Western POWs and East Asian civilians fell under the power of Japanese soldiers.

Atrocities and the Paradox of Obedience

The case can be made that the “paradox of obedience” that incentivized mutinies, also contributed to the proliferation of atrocities during the Asia-Pacific War. This is in addition to existing explanations for Imperial Japanese war crimes (mentioned in the article’s beginning). In a survey conducted by allied authorities in 1951, among 1023 Japanese military personnel accused in POW-related crimes, 623 (55.5%) attributed their actions to superior orders.⁸⁹ Such claims may have been exaggerated and self-serving but should not be discounted altogether.

The causal connection between the Japanese absolute obedience doctrine and war crimes became evident already in 1929, during the discussions on the Geneva POW convention. Japan signed the convention but dragged feet in ratifying it. The matter dragged on for years, due to opposition from the armed services. In 1934, the Vice Navy-Minister explained these objections in a letter to his Foreign Ministry counterpart. He warned (among other things) that compliance with the convention would force the Navy to alter its penal codes, in a way that may undermine the principle of absolute obedience.⁹⁰ Yielding to the opinion of its armed forces, Japan declined to ratify the convention. Later, in January 1942, the Imperial Government agreed to observe it *mutatis mutandis* (as conditions allow), a much weaker commitment.⁹¹

In rejecting the POW Convention, the Vice Navy-Minister referred of course to the Japanese *respondeat superior* doctrine. Note that the Japanese military embraced an unreserved *respondeat superior* approach not only regarding orders contrary to the international laws of war, but also regarding orders to commit domestically illegal acts, including those infringing upon the Imperial Army’s own legal norms. If soldiers escaped punishment for obeying superiors’ orders to murder a Japanese child, as in the Amakasu case, or to shoot Japanese leaders, as in the February incident of 1936, it only stood to reason that soldiers would likewise obey orders by immediate superiors to maltreat POWs or civilians of enemy nations, even in defiance of official military regulations that reflected the Army’s own interests and policy. Hence, Japanese soldiers, under the unreserved *respondeat superior* doctrine, become disinclined to disobey atrocious orders, even when such orders flew in the face of military necessity, or contradicted not only international law, but also *Japanese* military

⁸⁹ Kita, “The Causes of War Crimes,” 148.

⁹⁰ Vice Navy Minister to Vice Foreign Minister, “Furiyo Jōyaku ni tai suru iken” [An Opinion Regarding the POW Convention] 15.11.1934, Japan Center for Asian Historical Records, Reference no. B041225086004.

⁹¹ Kovner, *Prisoners of the Empire*, 96–97.

rules or higher echelons orders.⁹² Japan's embrace of an unreserved *respondereat superior* doctrine, provided all Japanese commanders with absolute power, regardless of their rank or the higher echelons' position; they could expect that their subordinates would automatically obey any criminal order they utter. This also enabled not just officers (staff and junior officers included) and NCOs, but anyone who had some formal or informal command powers in a unit, to wield absolute authority within his "realm."⁹³

For instance, Army Minister Tōjō and the General Staff indeed issued orders that demanded forcing POWs to work in brutal conditions in violation of the Hague and Geneva Conventions, yet they also repeatedly ordered soldiers to treat their prisoners humanely and avoid abuses. But the latter kind of orders had little effect.⁹⁴ In fact, the death rate of British and American POWs in Japanese custody (27%) was shockingly high compared to the death rate of POWs from those same countries in German and Italian hands (4%).⁹⁵ Among other reasons, the absence of any criminal liability for obedient subordinates, meant that the orders of camp commandants and officers on the ground outweighed any order of higher-ups, including Army Minister decrees. A postwar Japanese governmental report, on POW forced labor in the Burma-Siam Railway Project (the Railway of Death), ascribed the staggering POW death rates not only to the tight construction schedule, but also to the fact that Japanese troops acted "in strict obedience to orders which they characteristically regarded as imperative."⁹⁶ Army Ministry orders to treat POWs humanely simply did not penetrate camp commandants' "realm" and were therefore irrelevant.

Enforcement of barracks discipline also heavily relied on informal barracks norms backed by informal physical punishments by NCOs and older enlisted soldiers, a practice that the army never successfully uprooted.⁹⁷ Throughout the Asia-Pacific War, the primary internal disciplinary mechanism encouraged violence against enemy civilians and POW, *even where commanders did not explicitly order atrocities*, as part of the internal disciplinary system. Thus, for example, testimonies cite "tremendous peer pressure among the camp guards, not so much to protect the prisoners of war as to mistreat them."⁹⁸ Guards and commanders who strove to improve POW's conditions, or protect them from brutality, clearly went against the grain.⁹⁹

Things, however, were even worse due to the paradox of obedience, as the crimes deriving from obedience and neglect were joined by those bred by disobedience. As a military psychiatrist testified on soldiers' behavior in April 1938: "They carouse and act indecently with low-class prostitutes, brandish their swords for no reason and injure people, discharge their pistols, eat,

⁹² Kita, "The Causes of War Crimes," 150; Totani, *Justice in Asia*, 149, 151–53.

⁹³ Ling, "The Superior Orders Defence," 106; Kovner, *Prisoners of the Empire*, 28.

⁹⁴ Kita, "The Causes of War Crimes," 133, 139, 143, 147; Totani, *Justice in Asia*, 63, 66–67, 69.

⁹⁵ Kita, "The Causes of War Crimes," 132.

⁹⁶ Totani, *Justice in Asia*, 83.

⁹⁷ Shiromaru and Endō, "The Education of Soldiers [2]," 86, 88.

⁹⁸ Totani, *Justice in Asia*, 88.

⁹⁹ *Ibid.*

and drink without paying [in restaurants], and act in ways so regrettably contrary to the expectations of those back home in Japan. In truth, Shanghai has become the Japanese army's city of crime and Nanjing can hardly be any better. Truly, this only speaks of the decline of the Japanese army."¹⁰⁰

Yuge's research shows that infractions among enlisted troops had increased every year during the Asia-Pacific War.¹⁰¹ And yet, even when soldiers killed or mistreated prisoners and enemy civilians without orders, military courts and higher commanders tended to avoid punishing them, because they knew how difficult it was to control the troops' frustration. Seeking to maintain the faux image of absolute obedience, they were forgiving of crimes that gave vent to such frustrations.¹⁰² Leniency toward crimes was a compromise to maintain morale and group cohesion in an army plagued by violent disobedience. In this sense, a mechanism akin to the *shishi* exception is evident, forgiving subordinates' crimes against POWs and civilians, even if committed without orders or against them, out of reverence to the perpetrators' "patriotism."

But why did the rampant disobedience, and the leniency toward it, fail to bring about refusals to commit atrocities ordered by superiors? The answer lies in the fact that the absolute obedience demand was only one element in a larger military culture. Other important elements condoned illegal actions committed out of "patriotic" motivations (the *shishi* exception), while also promoting violence, brutalization, racism, and disdain toward POWs. Against that backdrop, it is comprehensible how both ordered and unordered atrocities and rebellions came to be seen as patriotic, while leniency toward POWs and civilians whether in accordance or against orders as unpatriotic.

To summarize, Japanese soldiers unflinchingly perpetrated atrocities both under orders, without orders and contrary to (mainly standing and high command) orders. If they acted under orders, they were protected by the *respondeat superior* approach, even if they violated the army's standing legislation. If there were no clear orders, then soldiers often committed atrocities by following their NCOs and the informal norms of barracks life. And when they acted against direct orders, a mechanism akin to the *shishi* exception nevertheless excused them if they had still acted in a supposedly "patriotic" way and against perceived enemies of the nation. The Japanese Military thereby encouraged atrocities, formally and informally, regardless of its written rules and regulations.

Conclusions

Recall Stephen's cautionary tale, according to which the *respondeat superior* approach might not only open the flood gates for atrocities but might even

¹⁰⁰ Matsumura, "Combating Indiscipline," 92.

¹⁰¹ Kin'ya Yuge, "Taitōsasensōki no Nihon Rikugun ni okeru hanzai oyobi hikō ni kan suru ikkōsatsu" [An Inquiry into Crime and Delinquency in the Japanese Army during the Great East Asian War], *Senshi Kenkyū Nenpō* 10 (2007): 42–62.

¹⁰² Edward J. Drea, "In the Army Barracks of Imperial Japan," *Armed Forces & Society* 15, no. 3 (1989): 329–48.

be counter-effective to its own declared aim, bringing about results detrimental to military discipline. Indeed, it is difficult to find a better real-life demonstration of that tale than the history of Japanese military obedience laws. Just as Stephen warned in theory, Japanese history demonstrates in practice that embracing the *respondeat superior* approach encourages subordinates to favor the aims of their direct superior (expressed in those superiors' orders), over the aims of the system at large, going as far as to obey mutinous orders, including assassination of political and military leaders. Indeed, as Franklin observed, in the wake of World War II (while having German law in mind): "this absolutism defeats its very purpose under circumstances of attempted coup d'état. Like all inflexible conceptions, the theory of the absolute defense of superior command thus becomes a contradiction."¹⁰³

The outcome of the Japanese system was to empower immediate superiors, everybody who could give oral orders, on the expense of the system *in toto*. This aggravated the general human inclination, studied extensively in psychological research, to unreflectively obey orders, even when they are clearly wrongful.¹⁰⁴ This inclination is stronger when the commander is nearby. Furthermore, the inclination tends to intensify in emergency situations, because in such threatening situations, people seek a source of authority, which can provide them with a sense of order amidst the chaos. For soldiers, this authority source will usually be the immediate commander.¹⁰⁵

In light of the above, one can understand why military education for strict discipline and legislation categorically demanding obedience to all orders did not achieve their stated intention, but rather created an odd mix of both blatant disobedience to the system at large and blind obedience to direct superiors ("the paradox of obedience"). It also especially helps in explaining why such strict military education and *respondeat superior* law gave rise to such "a paradox of obedience" in Japan, where such an education and legislation had existed against the backdrop of a cultural sentiment of perpetual war.¹⁰⁶

The question arises as to why established military elites and institutions did not vigorously seek to reform legislation and military education which ultimately threatened their own position and very lives. In short, one cannot comprehend this seemingly irrational failure without referring to the *shishi* heritage of Meiji Japan, the genuine belief, passed on from generation to generation, that motives were the yardstick for judging actions. Add to this the inherent flaw of a system whose legitimacy was entirely based on the myth

¹⁰³ Mitchell Franklin, "Sources of International Law Relating to Sanctions against War Criminals," *Journal of Criminal Law and Criminology* 36, no. 3 (October 1945): 164.

¹⁰⁴ Stanley Milgram, "Behavioral Study of Obedience," *The Journal of Abnormal and Social Psychology* 67, no. 4 (October 1963): 376–78; Herbert C. Kelman, and V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven: Yale University Press, 1989), 146–66.

¹⁰⁵ Nico Keijzer, *Military Obedience* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978), 61–64; Natasha Gonzalez, "Moral Monsters or Ordinary Men Who Do Monstrous Things?" (PhD diss., Widener University, 2004), 121–27.

¹⁰⁶ Paul D. Barclay, "Imperial Japan's Forever War," *The Asia-Pacific Journal* 18, no. 4 (September 2021): 1–24.

of the emperor's divinity. Questioning this myth, and by implication any legislation or norms deriving from it, including the absolute obedience principle, was taboo, and state officials who saw themselves as "the emperor's servants" found it psychologically difficult to judge harshly those claiming to act in his name.¹⁰⁷

Nonetheless, the Japanese military justice system attempted, however inconsistently, to counter the anti-state side-effects of the *respondeat superior* rule, and thus address the paradox of obedience. Prosecutors tried, almost always unsuccessfully, to complement it with an "authority misuse" exception. Judges preferred, as in the Amakasu affair and in the February 1936 incident, to substitute that rule with the "actual knowledge" conditional liability approach, or even, as in the Queen Min affair, with the "actual knowledge with a residual test of constructive knowledge" approach. But those attempts failed. The low premium Japanese law placed on judicial precedents kept those rulings from effecting meaningful change. Furthermore, the actual punishments rendered in those rulings tended to be extremely lenient, and it is well established that the bottom-line result of a judicial ruling tends to have a stronger influence on the general public than the legal norms it adjudges.¹⁰⁸

Worst of all, the Japanese legal system demonstrated that its capability to change and reform itself in this regard was close to nil, even over decades. Already in 1882, the Imperial Rescript for Soldiers and Sailors tied the absolute obedience principle, and hence the unreserved *respondeat superior* approach, with the religious sanctity of the emperor and the imperial institution. To quote the judges of the February incident trial, this had made that legal approach "religious" and therefore change resistant. Along with the *shishi* exception that permitted disobedience out of "pure motives" and "loyalty to the emperor." The sanctification of absolute military obedience opened the way to both mutinies and atrocities that forever tarnished the image of the Imperial Japanese Armed Forces.

Danny Orbach is an associate professor of history and Asian studies at the Hebrew University of Jerusalem.

Ziv Bohrer is a senior lecturer at Bar Ilan University Law Faculty and researcher in Begin-Sadat Center for Strategic Studies.

¹⁰⁷ Wagatsuma, *Japanese Political Trials*, 453–63; Person, "Between Patriotism and Terrorism," 290.

¹⁰⁸ Julian V. Roberts, Loretta J. Stalans, David Indermaur and Mike Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford: Oxford University Press, 2002), 29–31.

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