

トーマス・ベイティ博士没後 50 年記念セミナー

「トーマス・ベイティ博士の業績とその再評価」

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The Commemorative Seminar for Dr. Thomas Baty

“Contributions of Dr. Thomas Baty and Their Reappraisal”

9 April 2004

University of Tokyo, Sanjo Kaikan

The Commemorative Seminar for Dr. Thomas Baty
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The Commemorative Seminar for Dr. Thomas Baty

“Contributions of Dr. Thomas Baty and Their Reappraisal”

Foreword

Dr. Thomas Baty (1869-1954) was an authority on international law, on which he published many books. From 1916 to 1941, he served as a legal adviser to the Japanese Foreign Ministry. After the war, the British Government refused to issue him a passport on the grounds that his support of the Japanese Government before 1945 was against British interests, and thus, as a "traitor", he was not permitted to return to his country. He died in distress on 9 February 1954 at his home in Ichinomiya, Chiba. This year, 2004, is the 50th anniversary of his death (see Shinya Murase, "Thomas Baty in Japan: Seeing through the Twilight", *The British Year Book of International Law*, vol. 73, 2003, pp. 315-342).

In April 2001, I was talking with Professor Vaughan Lowe of Oxford University, and we agreed that Dr. Baty's contributions and achievements should be reassessed and that a commemorative seminar would be a meaningful project. Dr. Baty was a non-orthodox scholar who was very critical of the Great Powers' attitude toward international law. He also wrote a number of articles and books on radical feminism under the pseudonym of "Irene Clyde". It should further be noted that the establishment of the Japan Branch of the International Law Association (ILA) in 1920 was a result of an initiative of Dr. Baty.

As legal advisor to the Foreign Ministry of Japan, he conducted his duties with the utmost sincerity. Because of his strong criticism of the Lytton Report on the 1931 Manchurian Incident, Dr. Baty apparently lost many of his old friends in England. While in late 1941 most of the British nationals in Japan followed the advice of their Embassy in Tokyo and left for England, Baty felt that "in our own special case, to quit would have amounted to an admission that all hopes for peace was given up", and thus remained in Japan throughout the war. When the war broke out between Japan and Great Britain, he decided that he could not continue to serve the Japanese government without compromising his loyalty to his own country, and severed his relationship with the Foreign

Ministry. True, the writings he published during the war were full of critical and sarcastic remarks about the Allied Powers, but they were written in his private capacity as an individual, and there was nothing of a traitor in him. While it was understandable that the British government should have been unhappy with him, the treatment he received after the war, as it has been said by many, was "cruel and unfair," and his honour has not yet been restored.

In spite of his devotion to Japan during the pre-war period, he was made a target of harassments by the military and police for being "a national of an enemy Power". He and his sister Ann moved to his summer house on Lake Chuzenji, where he stayed most of the time during the war. Winter at Chuzenji was severe for lack of fuel, and although the owner of the Nikko Kanaya Hotel extended help to them, Dr. Baty became all alone after Ann's death in January 1945. Ayako Sono's novel, *Umi no Ohaka* (A Grave at Sea, 1954) is an impressive story modelled on Dr. Baty in his last years.

Dr. Baty's life after the war was a difficult one, as it was for most of the Japanese, but he never abandoned his study of international law. He devoted his last years to writing his book, *International Law in Twilight*, which was published in 1954, and he finished the proof reading only a few days before his death at the age of 85. He dedicated the book to his former colleagues at the Foreign Ministry with deep gratitude and with an apology that he had not been able to render any assistance to them during the war.

Since the Meiji Restoration, there have been many who have contributed to the diplomacy of this country, but there has probably never been another man like Dr. Baty who had to pay such a heavy price for having devoted his life to Japan.

Dr. Baty is buried at Aoyama Cemetery, not in the "foreigners' section" but in the ordinary Japanese section, beside his mother and his sister. The members of the Kasumigaseki-kai have visited the grave on 9 February every year for the past five decades. A lady who met Dr. Baty because her father was his friend continued cleaning his grave for

many years. I have great admiration for these people.

On 9 April 2004, a commemorative seminar was held for Dr. Thomas Baty at the Sanjo Kaikan of the University of Tokyo. This was made possible thanks to a generous grant from the Tokyo Club, for which we are deeply grateful. The seminar was co-sponsored by the Japan Branch of the International Law Association (President: Judge Shigeru Oda) and by the Kasumigaseki-kai (President: Ambassador Kimio Fujita). More than eighty people attended the seminar, including Professor and Mrs. Vaughan Lowe, Mr. and Mrs. Martin Gornall (who have succeeded the Baty Archive) and their daughters, Erika and Elizabeth.

The present booklet is the proceedings of that seminar, which we hope to give an opportunity to reflect Dr. Baty's contributions. We would like to express our gratitude to a number of the present and former members of the Foreign Ministry, Mr. Takashi Hosomoto, Secretary-General of the Kasumigaseki-kai and Professor Kazuhiro Nakatani, Secretary of the ILA Japan Branch. Finally, our thanks go to the students at Sophia University Graduate School of Law who prepared the seminar in a most efficient way.

1 July 2004

Shinya Murase, Professor
Sophia University

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Programme of the Commemorative Seminar for Dr. Thomas Baty

Date: Friday, 9 April 2004

Venue: University of Tokyo, Sanjo Kaikan

Part I: Chair: Professor Shinya Murase, Sophia University

- 14:00-14:40 "The Place of Dr. Thomas Baty in the International Law Studies in the 20th Century" by Professor Vaughan Lowe, Oxford University
- 14:40-15:10 "Work of Dr. Baty as Legal Adviser to the Japanese Foreign Ministry" by Mr. Toshijiro Nakajima, former Justice of the Supreme Court, former Director-General of the Treaties Bureau of the Foreign Ministry, and Vice-President of ILA Japan Branch.
- 15:10-15:40 "The Life of Dr. Thomas Baty" by Mr. Martin Gornall, Successor of the Baty Archive, Oxfordshire
- 15:40-16:00 Coffee break

Part II: Chair: Professor Jun'ichi Eto, Sophia University

- 16:00-16:30 "The Place of Dr. Baty in the International Law Studies of the Inter-war Period: His Influence on the American Scholars" by Professor Hatsue Shinohara, Waseda University
- 16:30-17:15 "Thoughts on Dr. Baty" by Professor (Emeritus) Toshio Sawada, Sophia University, President of the ICC International Court of Arbitration
- 17:15-17:30 "Thoughts on Dr. Baty" by Mr. Kyoichi Usui

17:30-19:30 Reception

"Remarks" by Ambassador Chusei Yamada, Member of the UN International Law Commission

This seminar was made possible by the Tokyo Club's generous grant.

Photos of Dr. Baty brought by Mr. and Mrs. Gornall are on display at the meeting room on the second floor.

The Place of Dr. Thomas Baty in the International Law Studies of the 20th Century

Vaughan Lowe

It is a great pleasure to have been invited by Professor Murase to speak at this meeting, both because it gives me the opportunity to renew my friendship with him and with other Japanese international lawyers, and because of the rare opportunity to focus, not on abstract principles of law, but on the flesh and blood of a man who was at once a prolific scholar and a practitioner of international law at the heart of the government of one of the world's great powers, during one of the most momentous and traumatic periods of the history of international law. The older one gets, the more one is aware that it is not the influence of written texts, but rather the influence of individual men and women that is the most important channel for the transmission of the values and techniques that underpin international law, and indeed any legal system.

Thomas Baty's career was, as the studies by Shinya Murase and Martin Gornall have shown, remarkable. It would be fitting if I could give this presentation and speak of the crucial importance of his contribution to international law studies in the twentieth century. The truth, however, is that Baty's main contribution lay in the advice that he gave to the Japanese Government; and that must await analysis by another commentator. The interest of Baty lies not so much in the influence that his writings had on international law scholarship as in the intrinsic interest of those writings and of Baty the man.

There is a tale to be told of Baty's intellectual development, from the 32-year old who, already having three published books to his name, was awarded the degree of Doctor of Civil Law at Oxford to the 85-year old author of the remarkable *International Law in Twilight*, surely one of the most poignant studies on international law ever to be published. I lack the material to tell that tale. It awaits the attention of someone with access to the Japanese archives. I wish today to concentrate on the Baty's early life, and on the

perspectives on international law that he took with him when he moved to Japan in 1916.

That story could well begin in 1873, when Baty was a four year old child in the north of England. The previous year had seen the establishment of the *Alabama Claims* tribunal in Geneva. The *Alabama* was a confederate warship which had devastated Union shipping during the American civil war. It had been built in Britain, in Liverpool. The United States claimed, successfully, that this was a violation of Britain's legal duties of neutrality in the civil war, and sought damages for the consequent losses. The arbitration, which the United States won, was widely seen as heralding a new dawn, in which disputes between States were settled by litigation and not by war. The desirability of peaceful settlement was felt acutely in Europe, then only months out of the siege of Paris and the Franco-Prussian war of 1870-71.

In 1873, Mountague Bernard, the first holder of the Chichele chair in Public International Law in Oxford, proposed a resolution at the first meeting of the International Law Association, in the following terms:-

"This Conference declares that it regards arbitration as a means essentially just and reasonable,¹ for all nations, of terminating differences which cannot be settled by negotiation. It abstains from affirming that in all cases, without exception, this mode of solution is applicable, but it believes that exceptions are rare, and it is convinced that no difference ought to be considered insoluble until after a clear statement of complaints and reasonable delay, and the exhaustion of all pacific methods of accommodation."²

A parallel proposal concerned the codification of international law. Many took the view that if arbitration were to become an effective substitute for war, it would be necessary to

¹ An amendment, accepted by Bernard, inserted the words "and even obligatory" at this point.

² International Law Association, *Reports of the First Conference held at Brussels, 1873, and of the Second Conference held at Geneva, 1874*, (London, 1903), p. 39.

produce a code of international law that could be applied by arbitral tribunals.

The potential of arbitration as an alternative to war seized the imagination of a generation of lawyers and statesmen. The idea was given impetus by the success of the *Alabama Claims* tribunal, and by the perennial desire of governments to curtail military expenditure. It was pursued at the 1899 Hague Peace Conference, the most significant result of which was the adoption of the 1899 Hague Convention for the Pacific Settlement of International Disputes, which set out model rules for the mediation and arbitration of disputes, with the aim of averting armed conflict. Some successes in peaceful settlement in the following years encouraged the convening of the second Hague Peace Conference in 1907, at which the 1899 Convention was refined, and further conventions on the Laws of War—the precursors of the 1949 Geneva Conventions—were adopted.

Baty became the Joint Secretary of the International Law Association in 1905,³ having joined the Association the previous year. Meetings of the Association at that time received regular, and detailed and lengthy, reports on the progress towards arbitration from Dr W. Evans Darby. Darby, a clergyman, was the secretary of the Peace Society in London.⁴ The Peace Society was a largely protestant, mostly pacifist body, established in 1816, and in the early twentieth century opposed to the Boer War. Darby had been for a decade a vigorous, practically obsessive, proponent of arbitration.⁵ Reading between the

³ International Law Association, *Report of the Twenty-Second Conference held at Christiania, September 1st-4th, 1905* (London, 1906), p. vi, records that Baty was appointed at a meeting on November 10th, the year being apparently 1905.

⁴ And secretary of the New Theology League—"A society for the encouragement of progressive religious thought": see <<http://www.agsconsulting.com/htdbnon/r3949.htm>>.

⁵ His first publication appears to have been "International Arbitration and International Law: A Paper Read at the Conference of the Association for the Reform and Codification of the Law of Nations, at Genoa, 10th October, 1892": see the list of publications at

lines of the restrained reports of the ILA meetings, one suspects that Darby may have been regarded, at least by some members, as somewhat irritating. Certainly, he intervened frequently in debates; and his regular reports on arbitration, usually the first substantive item on the agenda, must have lost some of their freshness as the years went on.⁶ Certainly, his was not the only view on the question.

An alternative project had been proposed by Thomas Barclay at the 1901 ILA Conference in Glasgow.⁷ Barclay's scheme envisaged the creation of bilateral commissions that would be available to settle disputes. In his 1903 report on arbitration, Darby launched a strong attack on the Barclay scheme, which Darby saw as a proposal for the creation of diplomatic, rather than judicial, settlement commissions. He thought that the proposal would undermine existing progress towards arbitration in general and the Permanent Court of Arbitration, established by the 1899 Hague Convention, in particular. Darby was plainly exercised by the criticism of his own scheme for a comprehensive system of international adjudication by arbitral tribunals. It had been said of his approach that "the substitution of Arbitration for war, as the last word amongst nations, must be put

< <http://www.swarthmore.edu/Library/peace/CDGB/int.peacesociety.htm> >.

⁶ See International Law Association, *Report of the Twenty-First Conference held at Antwerp, September 29 - October 2, 1903*, (London, 1904), pp. 18 - 40; *Report of the Twenty-Second Conference held at Christiania, September 1st-4th, 1905* (London, 1906), p. 17 - 36; *Report of the Twenty-Fourth Conference held at Portland, Maine, U.S.A., August 29th - 31st, 1907* (London, 1908), pp. 10 - 26; *Report of the Twenty-Fifth Conference held at Budapest, September 21st - 26th, 1908* (London, 1909), pp. 50 - 66; *Report of the Twenty-Sixth Conference held at The Guildhall, London, August 2nd - 5th, 1910* (London, 1910), pp. 15 - 32.

⁷ International Law Association, *Report of the Twentieth Conference held at Glasgow, XXX, 1901* (London, 190XX).

aside as an idle dream."⁸

This was the world of international law into which Baty entered when he became the secretary of the ILA. It was, to put it crudely, a world polarized between Darby's internationalist idealism and Barclay's pragmatism. Baty's own sympathies are not hard to discover. At the ILA conference in London in 1910, Darby had ended his annual report on arbitration with one of his customary eulogies of universal peace:

"The more intelligent a man is, the more clearly does he see that questions of morals or law cannot be determined by force. The world is making progress in ethics as well as in intelligence, and in the study of the science of government. There is more altruism to-day than ever before, and all the great forces of the world are working towards Peace. The Hague Court is going to increase constantly in power and influence, and humanity will surely reach a time when the settlement of quarrels by War will seem as strange as the settling of questions some centuries ago by wager of battle, instead of by legal decisions as is the case in the present position of our civilisation."⁹

Shortly afterwards, at the same conference, Baty delivered his own paper. His title was "The Inadequacy of Litigation as a Protection Against Cruisers."¹⁰ The paper concerned the 1909 Declaration of London, on the Laws of Naval War,¹¹ which dealt with blockade, contraband and breach of neutrality obligations. The paper is vintage Baty; and after the overblown prose of Darby it is a delight to read. Baty begins:

"In view of the approval of the Declaration of London, root and branch, expressed by

⁸ International Law Association, *Report of the Twenty-First Conference held at Antwerp, September 29 - October 24, 1905* (London, 1906), p. 35.

⁹ International Law Association, *Report of the Twenty-Sixth Conference held at The Guildhall, London, August 2nd - 5th, 1910* (London, 1910), p. 32.

¹⁰ *Ibid.*, pp. 115 - 119.

¹¹ See 208 Consol. T.S. 338 (1909); < <http://www1.umn.edu/humanrts/instree/1909b.htm> >

so many high authorities, it is with diffidence that one hazards a contrary opinion. But a chorus of unanimous praise is always suspicious.

The inherent vice of the instrument, which runs through it from the first word to the last, is that it aims at theoretical perfection and ignores practical considerations. Like some constitutions, it contains beautiful and subtle provisions which are of no real practical use, and which are, indeed, in reality dangerous."

The main characteristics of Baty's style and approach are evident even in those four sentences. One senses a certain pleasure in the attack upon received wisdom, in rebelling against the Establishment view. One sees the belief in pragmatism and impatience with theoretical constructions, which most lawyers trained in the Common Law tradition secretly think is the indisputable mark of the superiority of their system over that of the Civil Lawyers and the drafters of codes. One sees his incisive, elegant prose, its edge sometimes blunted by unnecessary repetition and elaboration.

Two other characteristics are evident in a passage towards the end of that short paper, where Baty sums up the effects of the London Declaration in relation to the legal limitations on the rights of belligerent warships to confiscate contraband from neutral merchant ships. He said:

"What the merchant wants is reasonable safety; safety alike from confiscation and from litigation. The Declaration concedes to the cruiser power to interfere with the most innocent voyage and the most innocent cargo, - to blow the ship out of the water, and to destroy much of the relevant evidence, - and it in turn presents the merchant with the Dead Sea fruit of litigation. He may prosecute a weary suit for years, under the most disadvantageous circumstances..."

There one can see Baty's concern to look beyond even the justice of particular rules, and at the way in which the rules will actually operate in practice. And one can see also his instinctive support for the rights of the individual in the face of encroachments motivated by the convenience of the State.

Those characteristics are reflected in Baty's first major monograph on international law, published in 1909.¹² It is learned: it evidences Baty's familiarity not only with the classical writings of international law, such as Grotius and Vattel, but also with contemporary writing in French and German; and with the collections of State papers that recorded the practice of international diplomacy. It is also wide ranging, and not a study only of some specific topic within international law. But at the same time, it is very definitely not a systematic treatise of the kind that had been written by jurists such as Wheaton, Phillimore, Hall, Lorimer and Westlake, and most notably by Oppenheim, the first edition of whose *International Law*—the treatise whose successive editions were to dominate the English-speaking practice of international law throughout the twentieth century—had been published in 1905.

The chapter headings of Baty's text reveal its idiosyncratic character: 'Arbitration', 'Penetration', 'Illustration', 'Territorialism', 'Stratification', 'Federation', and finally 'the Association-State'. This is not a textbook: it is a personal statement of Baty's view of the world and its legal structure. And that view is defined as much by what it rejects as by what it affirms.

The book set out at length Baty's views on key issues. On the prospects for international adjudication, for example, he wrote of

"...the glittering proposal that emanated from North America,¹³ and obtained applause from the short-sighted, of a 'Supreme Court of the World,' which in theory enthroned Law above the nations, and in practice would have conferred that

¹² T. Baty, *International Law*, (London, 1909).

¹³ On the role of US President Ulysses S Grant, and of Andrew Carnegie, in the project for a world court, see 'The Supreme Court of the World', an address delivered by Henry B. F. Macfarland, of Washington, D.C., before the Empire Club of Canada, Toronto, October 28, 1913: < <http://www.empireclubfoundation.com/details.asp?SpeechID=662&FT=yes> >.

eminence on a board of respectable middle-aged gentlemen..."¹⁴ Baty saw little future for judicial dispute settlement procedures unless it left ultimate control in the hands of the disputing parties, as in his own model of purely voluntary *ad hoc* arbitration.¹⁵ "Genuine arbitration is a serious rival to war. Supra-national courts only excite apprehension", he wrote.¹⁶ "States, he said, cannot reasonably commit themselves in advance to arbitration before a panel of 'judges and deputy judges, first-rate and of fifth-rate powers', who may be thought quite unsuited to the disputes that actually arise before them. One wonders what Baty would have made of the popularity (if one judges by the case-load) of the International Court, the European Court of Justice, the European Court of Human Rights, the World Trade Organization dispute settlement procedure, and so on."

On the second of the great issues that preoccupied the International Law Association at that time, codification, Baty also had strong views. He was against it; for reasons of some subtlety. Baty was implacably opposed to legislation in international affairs.

"It is not by inventing arbitrary rules of union that society can be induced to crystallize, but by encouraging the natural affinities of its individual members. That cannot be done from without, by a legislative act. It would be as reasonable to try to mould the nascent crystals of silicate copper with the fingers. Such interference can retard union: and there its capacity ends."¹⁷

Those are the closing words of his 1909 book; and they are striking. But his reasons were subtle.

Baty disliked State intervention, and he distrusted large political units: "the only

¹⁴ T. Baty, *International Law*, (London, 1909), p. 9.

¹⁵ T. Baty, *International Law*, (London, 1909), ch. 1.

¹⁶ T. Baty, *International Law*, (London, 1909), p. 17.

¹⁷ T. Baty, *International Law*, (London, 1909), p. 346.

respectable patriotism is local patriotism. One must know a thing in order to love it, and it is not possible to love a thing by sample."¹⁸ He saw the future as lying in the free association of small political units. This was the idea of federation and of association canvassed at the end of his 1909 book. But the ideal depended upon the freedom of the association and the retention of sovereignty by the constituent units, because only in this way could the proper relationship between the State and the citizen be preserved. "The object of the state", he wrote, in words which it is difficult to imagine coming from the pen of a foreign ministry legal adviser today,

"...is to secure to the individual the opportunity of the fullest self-development—perhaps to the bulk of individuals, perhaps to all, perhaps to a selected class. But it always regards the culture of the individual as the proper aim of Humanity—and it regards the state as a relatively unimportant means of securing it."¹⁹

The state cannot achieve this purpose unless the rules that bind it essentially emanate from the free will of the individuals within it.

Baty spelled this out in a remarkable passage in *The Canons of International Law* in which he speaks of the collections of people in his (ideal) States:

"These perpetually renewed collections of human beings, holding together in a particularly high degree, as evidenced by the common affairs being managed within a definite area by a definite, limited body of persons, have inter-relations, which are tending constantly to increase. And the common consciousness, mainly inarticulate, of these human beings, regarding the rules which ought to regulate these relations constitutes the law of Nations."²⁰

His meaning is plain. International law is elementary, both in the sense of being a fundamental expression of human values and of being unsophisticated.

¹⁸ T. Baty, *International Law*, (London, 1909), p. 285.

¹⁹ T. Baty, *The Canons of International Law* (London, 1930), p. 12.

²⁰ T. Baty, *The Canons of International Law* (London, 1930), p. 24.

"the Law of Nations must be simple. It must embody the few broad principles upon which they can all [sc., all individuals] agree; and the plain deductions from them: International law is impatient of subtlety and of the fine-spun deductions of self-appointed prophets."²¹

Similarly, he referred to a State being "subject to the Law of Nations, implanted in the hearts of educated people throughout the world, and subject incidentally to the obligations which it has taken upon itself."²²

It is easy to see why Baty had no enthusiasm for codification. The great mystery in my mind is how someone holding those views at that time could be elected to the Institut de droit international, and why, of all the projects of the ILA in which Baty could have involved himself, he became a member of its committee on codification. Perhaps the archives of those bodies may cast some light on this.

Baty's 1909 text had little lasting influence. It is not even mentioned in Oppenheim's 1955 catalogue of treatises on international law, though Baty's 1930 study, *The Canons of International Law*, is.²³ The style of the 1909 text, no doubt thought insufficiently 'serious', is surely one reason. Another is that Baty had a remarkable ability to identify the critical questions of international law, and to propose answers to them that were often completely the opposite of the way in which international law in fact developed. That is true of his views on international courts and on codification, and also of his views on other topics.

The question of the protection of aliens is one other instance. Baty treated the

²¹ T. Baty, *The Canons of International Law* (London, 1930), p. 27.

²² T. Baty, *The Canons of International Law* (London, 1930), p. 18.

²³ H. Lauterpacht (ed.), *International Law. A Treatise by L. Oppenheim*, 8th ed., (London, 1955), pp. 99-100.

topic in his chapter entitled 'Penetration'; and he does indeed see aliens abroad as intruders: "undigested and indigestible foreigners", "a privileged excrescence, a splinter in the body politic", he calls them.²⁴ Foreigners should, he thought, take countries as they find them; and if they choose to travel to or live in States in which the population dislike and discriminate against foreigners,²⁵ or in which the government confiscates their goods, then so be it.²⁶ Baty thought that mistreatment had to rise to the level of the "capriciously cruel" in order to violate international law.²⁷ That may seem curious for a man who was to make his home in a country on the other side of the world. But perhaps it is another reflection of a temperament set on turning its back on the comfortable orthodoxies of home life, and of a man who one suspects may always have felt himself a self-reliant outsider in the communities in which he lived.

Here again, Baty misjudged the direction in which the law was to evolve. He lived long enough to see both the creation of minorities regimes by the League of Nations, and subsequently the early developments in Europe and the Americas of international human rights systems, both of which constrained the domestic policies of governments to an extent that he must have found astonishing.

Baty was not without his insights. His perception of the importance of transnational economic alliances, between workers, manufacturers and so on, was remarkably prescient. He wrote about it in his chapter entitled 'Stratification', where he contrasted it with the 'Territorialism' of traditional international law. He wrote:

"We are confronted with a coming condition of affairs, in which the force of nationality will be distinctly inferior to the force of class-cohesion; and in which

²⁴ T. Baty, *International Law*, (London, 1909), p. 25.

²⁵ T. Baty, *International Law*, (London, 1909), pp. 70-78.

²⁶ T. Baty, *International Law*, (London, 1909), pp. 84-85, 88-89.

²⁷ T. Baty, *International Law*, (London, 1909), p. 77.

classes will be internationally organized so as to wield their force with effect."²⁸ States would fragment, as the social order rearranged itself on transnational divisions of "caste" and social and economic interest. The world would arrive at a state of "suppressed anarchy": only "the coherent unity of Japan", he thought, "might hand on the conception of a Territorial Empire."²⁹

One of Baty's most trenchant observations concerned what we would now call 'failed States'. He treated this subject in the 1909 text, and in his 1934 paper in the *American Journal of International Law*.³⁰ The title of the 1934 paper, "Can an anarchy be a State?", gives more than a hint of his answer, which formed the basis of his views on the Japanese action in Manchuria. His view was summed up at the end of that paper:

"...a single responsible government is essential to the existence of a state. However weak it may be, it preserves the grand quality of being able to bind and to loose. So long as it lasts, foreign countries must keep their hands off the state ... If there is no single government in control or struggling to maintain its control, it is unreasonable to expect foreign countries to stand by and watch with folded hands the development of anarchy. There is neither precedent nor authority directing them to do so, and common sense may well forbid it."³¹

That insistence on effectiveness as an indispensable condition of statehood was not particularly radical at the time; but it was pushed to the margins of international attention—some would say abandoned—after 1945 as legitimacy took centre stage as the primary concern during the era of decolonisation and more recently during the painful restructuring of the political map of Eastern Europe and Africa—and perhaps also the Middle East.

²⁸ T. Baty, *International Law*, (London, 1909), pp. 280 - 281.

²⁹ T. Baty, *International Law*, (London, 1909), p. 283.

³⁰ 28 *AJIL* 444 - 455 (1934).

³¹ 28 *AJIL* 444, at 455 (1934). This point was developed in Chapter III ("The Decay of Dynasties: Abnormal Persistence of States: Ghost States: Recognition") of *International Law in Twilight* (Tokyo, 1954).

He was, however, acutely conscious of the dangers of his view.

"No more dangerous doctrine was ever broached than that by which modern authors justify the exercise of forcible acts by one state within the bounds of another without the excuse of war. The result of admitting it would plainly be that states would constantly carry out their own will in their neighbours' territories on the chance that the latter would not dare to resent them. We should then have an anarchic world in which states were liable to repeated casual incursions by others who traded on their weakness.

.....
...if it is once admitted that one state can, without war, carry out its will by force in the realm of another, there is an end of all law and order"³²

Quite so.

Let me draw these thoughts together. Baty was not a scholar with the intellectual power of an Oppenheim or a Lauterpacht. He was not an original political philosopher. He had neither grappled the vast subject-matter of international law into submission to his understanding, nor perceived the cold truth of international life where the gaze of others had rested on the superficial dressing of international diplomacy. Yet, reading through his work, it is difficult not to become fascinated by him. His insights and his judgment are erratic. His scholarship is eccentric. His personal life, and that of his alter ego Irene Clyde, is already attracting the attention of feminist scholars: the closing chapter of his book *International Law in Twilight*,³³ entitled 'A Lurid Dawn' — with its plea for "the dethronement of the masculine", the quelling of arrogance by "the according of world-wide acclaim to the Feminine as supereminent", and the haunting closing words, "behind the Freedom and behind the Dictators flows serenely the eternal tide of

³² T. Baty, *International Law*, (London, 1909), pp. 246, 252.

³³ Tokyo, 1954.

loveliness" — is surely the most remarkable passage to appear in any international law text. And yet here was a man who advised the foreign ministry of one of the world's great powers during the some of the most turbulent and significant periods of world history.

I may be wrong; but I suspect that one of the most profound of insights into his soul came from the pen of Thomas Baty himself, when he wrote, in 1909, of

"...they whom the Sūfi's call 'foreigners,' for in their mental attitude they are in a way strangers in their family and foreigners in the social world which surrounds them, and by virtue of their mode of thought they pass into the ideal communities which may not unfairly be called their true homes."³⁴

³⁴ T. Baty, *International Law*, (London, 1909), p. 345.

The Life of Dr. Thomas Baty (1869-1954)

Martin Gornall

One cannot possibly do justice to the life of Dr. Thomas Baty, or relate this to the momentous events of his times, in half an hour. As Professor Murase has written in *Kasumigaseki Kai Kaiho*, Thomas Baty deserves in-depth treatment. I have myself sketched the principal events and themes of Dr. Baty's life in my *Portrait*¹, to be published by the Japan Society later this year, and am currently working on a fuller account. Today, I shall consider limited aspects of this very complex person in the light of sources contained within the family archive.

In 1916, Sir Frederick Pollock² referred to Baty's book, *Vicarious Liability*, as 'ingeniously controversial' but 'wilfully paradoxical'. These serve as apt epithets for its author. Thomas Baty was at once radical and reactionary, seer and cynic, polemicist and poet, a pacifist fascinated by war. A passionate idealist, he challenged conventional modes of thought, and categories of discourse. In some ways prophetically post-modern, he sought to construct a protean identity which crosses conventional boundaries between, for instance, fact and fiction, or male and female.

The Tory sage, 'Dr. Baty', was rooted in Greek and Roman classicism, and wrote in the Eighteenth century tradition of doctors Johnson and Swift. This Baty believed in enlightened aristocracy and individual freedom within an organic society and culture. Common law was its almost mystical revelation. Nineteenth century notions of law imposed from above to advance a utilitarian agenda did not, for Baty, count as law at all.

¹ *Biographical Portraits*, vol. v, ed. Sir Hugh Cortazzi.

² *Law Quarterly Review*, vol. 32, 1916. The review of *Vicarious Liability* is signed 'F.P.'. Sir Frederick Pollock was the editor at the time.

They were merely manifestations of tyranny disguised as Parliamentary democracy.

Then there was Dr. Baty, the radical. His views on American imperialism approach a Marxist critique³, in terms of a legal superstructure erected on economic exploitation backed by force. His female persona, the novelist Irene Clyde, advances the radical utilitarian position that gender is culturally-conditioned and is not fixed by what Baty calls 'the modern god, biology'. His/her long-running magazine, *Urania*⁴, opposed what we now call 'essentialism' by celebrating lesbian relationships, spontaneous sex-changes, and other exceptions to conventional gender stereotypes.

This complex identity finds expression in a rhetorical counterpoint of the literal and metaphorical, elaborate irony and perfunctory colloquialism, extravagant lyricism and the pedantically analytical. His provocative wit could be subtle, original and searching, but was not always so.

Those who did not share Baty's protean vision found him eccentric and disconcerting. Although, kind and sociable, he could utter the most outrageous sentiments with cerebral detachment. Captain Malcolm Kennedy⁵ recalls in his diaries⁶

³ For instance, *Canons of International Law* (1930), p. 122. There, Baty attributes American demands for legal privileges in foreign jurisdictions to financial interests. By avoiding the 'facile' expression 'to satisfy the greed of capitalists', he makes it clear that that is what he means.

⁴ Produced privately by Baty during the 1920s and 1930s in association with old friends from the *Aethic Union*, a feminist organisation which he had founded before World War One to promote his views. He 'laundered' his identity through Bombay.

⁵ Malcolm Kennedy (1895-1984), Reuters Correspondent in Japan, 1925-1934, and author, among other books, of the controversial *The Problem of Japan*, 1935. His Diaries, deposited at Sheffield University, contain a detailed record of his period in Japan.

⁶ 2nd July, 1932.

an after-dinner conversation, about political refugees. Baty remarked that soldiers (such as Kennedy) were 'licensed murderers'. Kennedy wrote that he was 'damned annoyed', and added, 'He is certainly a very strange being - very generous, kindly, and hospitable, but an absolute crank.' Reviewers of Baty's legal books, while admiring his iconoclasm, regarded some opinions as intrusive and indecorous. It is rare in legal literature to find passages which are devastatingly amusing. As Baty's restless intellect ranged across conventional boundaries, he invited misunderstanding.

Thomas Baty was born in 1869, into an established cabinet-making family, at Stanwix, a genteel suburb of Carlisle. He owned the family business premises in Fisher Street, in the city's commercial centre, until his death in 1954. A connoisseur of fine craftsmanship, he expressed contempt for the machined ornamentation of American harmoniums⁷. His father William, died on Christmas Day, 1876. Thereafter, Baty and his sister, Anne, were brought up by his mother, Mary, assisted by her brothers, Joseph and William Matthews. Baty regarded his home as a microcosm of enlightened society, in such matters as gender and individual social freedom⁸. Photographs of Baty and his sister, taken in their teens, suggest that they were comfortably off. Like the Cumberland poet, Wordsworth, Baty enjoyed a close, lifetime's relationship with his sister, and it may be that he felt uneasy about the educational privileges which he enjoyed merely by virtue of gender.

Like Wordsworth, Baty was much influenced by landscape. His love of music dates from his earliest years. We still have his uncle William Matthews's piano music.

⁷ 'The Japanese...may not be anxious for harmoniums decorated with machine-stamped "carving"....' *Contemporary Japan*, October 1943, p 1262.

⁸ *Alone in Japan*, published posthumously, but mostly written in 1946, is Baty's own memoir. An eclectic mix of opinions on Japanese militarism, culture, gender, philosophy, and law with personal reminiscences, it is a rather uneven book and must be read in the context of its composition.

Baty claimed to have been precocious in reading and reasoning, but virtually innumerate. However, having studied with a Mr. Williamson, he spent eight years at Carlisle Grammar School (1880-1888), from which he gained a Hastings exhibition in mathematics to Queens College, Oxford. It was at this time that he became a vegetarian. Having transferred to law, he graduated in 1892, and then spent a year as Whewell Scholar at Trinity, Cambridge. There, he discovered Idealism and pursuit of the Absolute, which was associated with MacTaggart. This philosophy was being supplanted at Cambridge by the mathematical logic of Baty's Trinity contemporary, Bertrand Russell. Back in Oxford, now at University College, Baty received a BCL in 1895, and became Stowell Fellow. Admitted to the Inner Temple in January 1896, he was called to the Bar in November 1898. His *International Law in South Africa*, was based on lectures given during his Oxford fellowship, which lapsed in 1901.

Baty's legal outlook was a projection of his fierce individualism and belief in personal responsibility. Thus, he objected to the liability of employers for the actions of their employees. For him, domestic law represented the intricate essence of a society in free interaction. Austinian theory, based on sovereign command and coercion, was, therefore, anathema, a means of enslaving the proletariat and crushing the human spirit. Analogously, International Law emerged from free negotiation between sovereign nations. Like English Common Law, it was discoverable from precedent, and should be clear, simple, certain, but flexible. Vague notions like intention only allowed strong nations to impose doctrines like 'continuous voyage' or 'pacific blockade'. Since English domestic law had already succumbed to Parliamentary tyranny, International Law was the last repository of true law. However, Baty felt, towards the end of his life, that even that was (as he put it) in twilight.

For Baty, private international law provided a model for exploring wider philosophical issues. In *Polarized Law*⁹, he uses a spatial, mathematical metaphor to

⁹ Pub. Stevens and Haynes, London, 1914.

explore the problem of identity, of how 'the same' act is redefined in terms of overlapping territorial jurisdictions. In this, it seems to me, he anticipates the later Wittgenstein in relating 'language games' to 'forms of life'¹⁰, which, for Baty, find expression in the intricacies of law.

In the period before World War One, Baty established himself as an influential international lawyer, through lectures, books, articles, and letters to the press. As Honorary Secretary from 1905-1915, he arranged the International Law Association's conferences and reorganised its library, at his own expense. Out of gratitude, the ILA presented him with a silver loving cup. In 1909, when Baty published *International Law*, as Irene Clyde he published *Beatrice the Sixteenth*¹¹. In this novel, another, female, doctor meets with an accident in a desert and finds herself on an oblique plane of existence. She advises potentates on the conduct of war in a country uncannily like Japan and peopled almost exclusively by women. There is a subplot of lesbian 'love interest'. Barbarian children are bartered for carpets, and nurtured into conformity with Clyde's rather masculine feminine gender ideal.

Disillusioned with the failure of his involvement in anti-socialist feminism to stem utilitarian tyranny, particularly in wartime, Baty decided to leave England for the more congenial culture of Japan. His fascination with the country was, however, far from uncritical. He found during his long residence here an ingrained conformity and absence of idealism which led to an unquestioning acceptance of the material world, and made it possible for a dark undercurrent of militarism to infiltrate the Imperial ethos. Baty found the separation of genders more pronounced and deep-rooted than in England. However, he admired the stoicism of the Japanese character, which, he believed, would flourish after World War Two.

¹⁰ Language games and forms of life are explored in Wittgenstein's *Philosophical Investigations*, trans. G.E.M. Anscombe, first pub. Basil Blackwell, 1953.

¹¹ Pub. George Bell & Sons, 1909.

When he sailed to take up his position as adviser to the Gaimusho in 1916, Baty was accompanied by his mother, Mary, his sister, Anne, and his young cousin, Esther. The latter had studied at the Froebel Institute in London, and was to teach for many years at the Peers and Peeresses Schools¹². Immediately on their arrival in Japan, Dr. Baty and his family fell in love with Lake Chuzenji. There, Dr. Baty later bought a summerhouse, where the family and their guests would gather each year in a landscape reminiscent of the English Lake District. Sadly, his mother died that first summer.

During his early years in Japan, Baty's role was largely theoretical. Day-to-day business was handled by Professor Tachi, although in 1927, Baty assisted the Japanese delegation at Geneva. However, in the early 1930s, with Shidehara's internationalist agenda under increasing pressure from militarists¹³, the Gaimusho turned to Dr. Baty to provide a *post facto* apologia for Kwantung army action in Manchuria. He drafted the Five Points of October 1931, by which Japan hoped to reach a bilateral settlement with the Nationalists, and scripted Yoshizawa's thwarted speech to the League in November. In reply to the Lytton Report, Baty drafted *Japan's Observations*. This argued, quite consistently with Baty's published views on the conditions for the *de facto* continuity of states, that Japanese action was not in breach of the Nine Power Pact. After 1922, it argued, China had failed to reassert herself as an 'organised state'. She had no integrity to violate, and had never exercised authority in Manchuria.

¹² Esther Matthews married Eric Lewis at St. Andrew's Church in 1926 in a society wedding attended by Baron Shidehara and other celebrities. She taught conversational English to Prince and Princess Takamatsu, and was given a private viewing of their wedding gifts on the eve of their marriage.

¹³ For a blow-by-blow account of the Manchuria crisis, see Ian Nish's *Japan's Struggle with Internationalism: Japan, China and the League of Nations, 1931-33*, Kegan Paul International, 1993. Also *Japanese foreign policy, 1869-1942: Kasumigaseki to Miyakezaka*, Routledge & Kegan Paul, 1977.

Baty, of course, did not make the political decisions. The *International Military Tribunal Far East*¹⁴ transcript reveals that those who did, such as General Araki, were aware of Dr. Baty's private advice. This was that the use of military force to establish Manchukuo was against both treaty and customary law. Baty's view elsewhere was that Japan had legitimate interests in Manchuria, but was wrong to pursue them by force.

Socially, the Batys were well-connected in the embassies of the major powers, including, of course, Britain. Malcolm Kennedy depicts a close international community in Japan, distant from remote, mercenary, home governments. For instance, on 4th February, 1932, guests at one of the Batys' dinner parties included the British Ambassador, Sir Francis Lindley, and his wife, Baron Shidehara, Baron Hayashi, and the Belgian Ambassador, Bassompierre. At the Tokyo Club, an important venue for informal discussion, Dr. Baty would play draughts, or entertain his Japanese friends and members of the international community. This, along with his *Kohakubaikai*¹⁵ Society, promoted international understanding.

Much the same was true of Lake Chuzenji. At the Batys' lakeside house, guests would dine formally downstairs, and retire to upstairs rooms giving onto a veranda overlooking the lake. Marjorie, Baty's cousin's daughter, remembers as 'magical' these summers, at which the family, including Esther and her husband, Eric Lewis, would gather. Marjorie recalls Baty, who is known in the family as Cousin Tom, as a very kind man with a gentle manner and voice. He would lie prone on his jetty while fish fed from his hand. He had a rowing boat made for her, and would chat to her over tea while nursing his favourite cats, the ginger Kinkan, or Tatsu. Although a strict vegetarian, he would insist

¹⁴ *International Military Tribunal Far East* transcript, Vol. 77, p. 13, p. 761, Bodleian Japanese Library, Oxford.

¹⁵ 'Red and white plum-blossom society', organised social events, including jaunts into the country.

that his guests enjoyed the best cuts of veal. Idyllic days would be spent on picnics and walks, or else sailing. Dmitrii Abrikossov¹⁶, ex-White Russian diplomat, recalls in his memoirs¹⁷ this annual refuge from the pressures of life, the sunsets, solitaire, and Baty's cats. Marjorie still has one of the silver cats, dated 1933, which he presented to Baty in token of thanks each year. From Baty's yacht, *The Ark*, the two men would luxuriate in the atmospherics. The Batys entertained a number of notabilities at Chuzenji, including Sir Charles Eliot¹⁸, and Sir John Latham¹⁹. During the 1930s, neighbours among the British community included the Craigies²⁰ and the Morlands²¹. Esther was a leading light at the Nantai Yacht Club, and Marjorie won the novice's event in 1940. In 1941, the Lewises were transferred from Shanghai to Singapore. Anne wrote to Marjorie that the Morlands had borrowed her boat, *Mercury*. She looked forward to the usual gathering in the summer of 1942. There was no hint of imminent war, or that the family had spent its last summer at Chuzenji.

By the later 1930s, Dr. Baty had come to the attention of the British Foreign Office

¹⁶ Dmitrii Ivanovich Abrikossov (1876-1951) tried to co-ordinate disparate White Russian forces in Vladivostok, and remained at the Russian Embassy until 15 February, 1925, when Japan finally recognised the Bolshevik government.

¹⁷ *Revelations of a Russian Diplomat*, the memoirs of Dmitrii I. Abrikossov, ed. George Alexander Lensen, University of Washington Press, 1964.

¹⁸ Sir Charles Eliot (1862-1931), cigar-smoking scholar, diplomat and authority on Buddhism. British Ambassador to Japan 1919-26.

¹⁹ Sir John Latham (1877-1964), Australian Deputy Prime Minister and Attorney General 1932-34. Leader of Australian Eastern Mission to Dutch East Indies, China & Japan, 1934. Chief Justice of Australia, 1935-52.

²⁰ Sir Robert Craigie (1883-1959), British Ambassador to Japan, 1937-41.

²¹ Oscar (later Sir Oscar) Morland (1904-1980), a member of the Consular Service in pre-war Japan, was later appointed to the UK Liaison Mission to SCAP, and became Ambassador in Tokyo, 1959-63.

for his role over Manchuria. His eminence and integrity were not doubted, yet 'any services he has rendered have been to Japan and Japan alone, and to us he may be regarded as having done disservice rather than otherwise.'²²

After the outbreak of the war in the Pacific, other British nationals were unceremoniously expelled by ship to Lorenzo Marques. From there, Sir Robert Craigie alleged that his old neighbours had refused repatriation. However, the Batys were elderly and had no home outside Japan. Despite the protection of the Gaimusho, they were harassed by the authorities, in Tokyo and at Chuzenji. The rest of the family was lucky to escape from Singapore to Bombay. Baty wrote that he had never lost faith in peace, and that many experts, too, thought that war was unlikely. He adds that he did not hear of the ugly side of Japanese militarism until it was too late.

The last letter from Cousin Anne to Esther Lewis, in 1943, was entrusted to the British, who dutifully opened it. The Foreign Office regarded its evidence that Baty went to the Gaimusho as of use in cross-examination only. The British legal adviser, W.E. Beckett²³, had already concluded that 'there is no doubt that Dr. Baty has committed treason'. The sworn testimony of British diplomats was sufficient.

Nevertheless, in 1945, grounds cited were: that Baty had acquired Japanese nationality and refused repatriation. Unfortunately, the proof had gone astray. Baty was referred to as 'old and senile', or 'not normal', it being alleged that he dressed as a geisha in public. Attention shifted to articles under Baty's name in *Contemporary Japan*.

²² PRO: FO 371/22193. The judgement is that of Hoyer-Millar of the British Foreign Office in 1938.

²³ W.E. (later Sir Eric) Beckett (1896-1966). 2nd Legal adviser to British Foreign Office, 1929-45, Legal Adviser, 1945-53. His slim monograph, *The Question of Classification: 'Qualification' in Private International Law*, London, 1934, echoes *Baty's Polarized Law* (1914) but without acknowledgement.

The general view was reflected in MacDermot's²⁴ remark, 'I suppose old Dr. Baty is a traitor'. The only question was 'whether action should be taken against him'. Esler Dening²⁵ regarded the hanging of a 77-year-old 'abnormal type' as 'sound law but bad politics'. He wanted Baty out of Japan, but wished also to deny him 'facilities as a British subject' which would make this possible! Beckett now back-tracked and pleaded, 'As far as I know, Dr. Baty did not at any time actually try and acquire Japanese nationality.' However, he borrowed documents to pass to Sir Cecil Hurst to assist a 'purge' of the Institute of International Law.

In Japan, Oscar Morland, another old neighbour, found that 'it has been difficult to obtain evidence against Baty', who had concealed 'unmistakably treasonable statements' behind 'great subtlety' and 'much learning'. Under interrogation, Baty admitted writing articles for *Contemporary Japan*, and having received a salary. He also detailed his wartime scholarship, and the movements culminating in the death of his sister at the Kanaya Hotel, Nikko. He wished to join the family in Bombay, and to support himself by practising law. Figgess, his interrogator, observed genially, 'This seems pretty sly for an old boy of 77.' Nevertheless, Foreign Secretary Bevin was informed that Baty was a traitor.

By October 1946, there was a new legal adviser: Mr. Vallat. He stated, 'If Dr. Baty is not going to be tried for treason, he ought not to be held out to public hatred and

²⁴ Dermot MacDermot (1906-1989) after extensive Far Eastern experience in the Consular Service, was appointed to UK Liaison Mission to SCAP. As Sir Dermot MacDermot, he later became Ambassador to Indonesia (1956-59), then Thailand (1961-65).

²⁵ Esler (later Sir Esler) Dening (1897-1977), was a pre-war member of the Japan consular service, became political adviser to Lord Mountbatten during the Second World War, was Assistant Under-Secretary of State, Foreign Office, 1946-50, appointed UK Representative to SCAP, 1950-51, and then, following the Treaty of San Francisco, Ambassador to Japan 1952-57.

contempt as a traitor.' He added, 'The principle that a man who has not been convicted of a criminal offence, may nevertheless be punished by administrative action is, to my mind, unsound.' Sir Francis Vallat²⁶, a distinguished jurist now in his nineties, discussed this matter with me in September 2003. He was most emphatic that this remains his opinion. The political department found his view persuasive, but American and Australian critics had to be appeased.

In late 1946, Dr. Baty cabled the International Law Association in London, seeking its help to enable him to join his family in India. Informed that, despite his distinction, Baty was a traitor and that his passport had been withdrawn, the International Law Association accepted the situation and was quick to distance itself from him. So were old friends like John Latham and Lord Macmillan. In July 1952, its new Secretary, W. Harvey Moore, indicated to Baty²⁷ that the ILA was relenting, and asked him to help re-establish the Japan branch. However, in 1954 the *Daily Mail* reported that Baty's attempt to justify himself to the ILA had arrived the day after his death. There is no sign of this letter, or any other correspondence relating to Baty in the ILA archive, or in the private papers of its Chairman, Arthur Goodhart²⁸.

When the Gaimusho was informed, through SCAPHQ, of the British measures against Baty, Kishi Kuramatsu²⁹ wrote to Dr. Baty that they were 'stupid, foolish and

²⁶ Francis (later Sir Francis) Vallat (b. 1912), international jurist, Assistant Legal Adviser to the Foreign Office, 1945-50. He became legal adviser to the UK Delegation to the UN, 1950-54, Legal Adviser to the Foreign Office, 1960-68, and Professor of International Law at London University, 1970-76.

²⁷ Letter to Dr. Baty in Family Archive.

²⁸ In the Bodleian Library, Oxford.

²⁹ The Family Archive contains the carbon copy of SCAP information to the Gaimusho (8th October, 1946) on the measures adopted by the British Government against Baty, Mr. Kishi's covering letter, and the personal letter, dated 18th October, 1946, from Yoshida

harsh', and conveyed the support of Baron Shidehara and Yoshida Shigeru. The latter wrote personally to Dr. Baty, 'We know that you have upheld the cause of truth from a dispassionate scholarly point of view. Servant of light, as you are, it is indeed seldom, I regret to say, that such a servant receives a deserving reward.' Baty's old friend, Dmitrii Abrikosov, wrote in his own memoirs that 'there was nothing of traitor in him; his only fault having been in living in an artificial world created by his own idealism and kindness of heart, where there was no room for hate and hostility.'

The wartime articles which appeared under Dr. Baty's name in *Contemporary Japan* are problematic. Much of the material merely recycles old Baty themes, such as how 'state' came to mean territory, or, less judiciously, the pernicious effect of utilitarianism on British morale. However, some opinions diverge sharply from those expounded by Baty elsewhere, particularly after Pearl Harbour. One, *Navalism and War*, rejected the claim that the US was merely aspiring to the world role played by the British navy in the 19th Century, by denying that Britain could competently have sustained it. However, the style is harsh and clumsy. 'Lord George Hamilton' becomes 'Lord George', which is a solecism to which Baty draws attention in *Alone in Japan*. The reference is to the Dreadnought programme under Lloyd George. Split infinitives ('to effectively bottle up') and the curious English of 'had still its way to make' are not Baty. Other claims, about the 'liberation' of South East Asia, or attempts to minimise the defeat of Germany in Europe as planned and orderly withdrawal, echo the kind of crude propaganda which Dr. Baty denigrated in *Alone in Japan*.

I will close with a conjecture about this intriguing problem. In the family archive are letters to Dr. Baty from Cabot Coville. The first of these was sent in November, 1948, from the Imperial Hotel, MacArthur's headquarters. From this, it is clear that Coville was channelling financial help to Dr. Baty, and saw registration documents of Baty's lakeside cottage as unnecessary security. In late 1953, Coville

Shigeru to Baty.

advised Baty that he still had \$407 to his credit, but warned him not to convert this to pounds sterling. Coville is not mentioned in Baty's long catalogue of social contacts in *Alone in Japan*. Who was Coville, and why was he bankrolling Baty?

A recent work, *Partners for Democracy*³⁰, relates through close study of the Japanese and American archive, the preparations being made during the war years for the post-war constitution. This reveals that Cabot Coville was a key figure within Joseph Grew's State Department think-tank. He had worked under Grew in Japan before the war. Cabot Coville's seminal analysis of the manner in which the Imperial Institution had been hijacked by militarists, and could be retained to serve a peacetime purpose, is very close to Baty's position as stated succinctly in the opening chapter of *Alone in Japan*. This view was central to the settlement under MacArthur.

Within weeks of the cessation of hostilities, MacArthur and his staff were negotiating from prepared positions with their Japanese counterparts. MacArthur forced the pace, by threatening that the Far Eastern Commission, under the influence of British Commonwealth countries, would abolish the Imperial Institution altogether. Dr. Baty's friend and executor, Hasegawa Motokichi, was one of the two translators who were detained by Colonel Kades to encourage them to come up with a spontaneous Japanese Constitution which reflected American wishes!

The Council of *Contemporary Japan* included Baty's old Gaimusho friends Count

³⁰ *Partners for Democracy - Crafting the New Japanese State Under MacArthur*, by Moore and Robinson, pub. Oxford University Press, 2002. See particularly the Chapter, *Negotiated Surrender*. 'A State Department study drafted by Coville in March 1943 was the first serious effort to confront the problem of imperial sovereignty.' [p. 23.] 'He thought the emperor was an easily manipulated tool of the Japanese military.' However, 'he thought a limited constitutional monarchy would be a positive force for liberal development in postwar Japan.' [p. 24].

Ishii, Count Makino, and Shidehara Kijuro, who was to precede Yoshida Shigeru as Prime Minister. Before the war, Joseph Grew, whom the Batys knew socially, had known Kishi Kuramatsu, Dr. Baty's other executor, as a trusted Gaimusho source.

Dr. Baty, who continued to visit Tokyo until late in the war, was therefore closely associated with key figures involved in negotiations to retain the Imperial Institution as the basis of the post-war Japanese settlement. This would have been very dangerous, and suggests that a façade of propagandist orthodoxy would have been advisable. Perhaps Dr. Baty could not receive his 'deserving reward' without revealing to Britain and the FEC the basis of the settlement from which they had been pre-empted? Certainly, vilification as a traitor was a high price to pay.

Baty's defence in his Will against collaboration was consistent with his legal writings of half a century. He resisted totalitarianism of all complexions, and was fearless in asserting the right of free speech and action during war, which is these days taken for granted. Thomas Baty was a very human, yet prophetic, figure who endeavoured to live intelligently and idealistically, and to seek perfection in an imperfect world. He addressed many of the issues which have come to dominate our own times with greater urgency than ever. It is fitting that we have assembled to remember and reconsider his life and work through the generosity of those organisations which meant so much to him during his long and eventful life.

Thomas Baty: A Traditionalist in the Study of International Law in the Interwar Period

Hatsue Shinohara

I was introduced to Thomas Baty's works by his contemporary American scholars of international law, Paul Reinsch, Quincy Wright and Edwin O. Borchard. Baty was often referred to, and more importantly either criticized or acclaimed for his distinctive view of international law. In this paper I will examine his contribution to the study of international law in the interwar period with a focus on how he was received by the American scholars at that time. The reason why his works were either criticized or acclaimed lies in the very conditions of the scholarship in the United States. Since the early years of the twentieth century some scholars, Paul Reinsch for instance, began raising questions concerning the conventional approach to international law. The skeptical view became more popular after World War I started, and other younger international lawyers joined their forerunners. For younger lawyers, notably Quincy Wright, the failure of traditional international law appeared obvious, because it had not prevented the war, while older, more established lawyers, Elihu Root and James Brown Scott, maintained their belief in the importance of the traditional approach. After the war, opinions about the future of international law were divided along these lines, and the division persisted throughout the interwar years.¹ In the division Baty not only belonged to a traditionalist school, but also emerged as a vocal defender of traditional approach and an opponent of the "new" international law.

1. Paul Reinsch's Critique

Paul Reinsch, a professor at the University of Wisconsin, was not a scholar of international law in an exact sense, but he was interested in arbitration to achieve peaceful

¹ For further discussion on the scholars of international law in the interwar period, see Shinohara, "Forgotten Crusade: The Quest for a New International Law," Ph.D. diss., University of Chicago, 1996.

order in the world. In 1909 he prophesied that a time of interdependence was coming which would "gradually make national sovereignty obsolete." For Reinsch, one of the main principles of international law was upholding the "community of interests upon which the law must be based if it is to be respected."² He considered the nineteenth century a period of nationalism and saw the world moving toward internationalism, with bonds based upon internationalism already manifest in the growing number of public international unions, such as postal unions, and other administrative organs.³ He observed that internationalism was developing and this had to be further strengthened by the legal standard and institutional foundations.

Baty also recognized a changing current in world affairs, as he wrote in the preface of his book, *International Law*. "Since the Hague Conference of 1907 it has become increasingly evident that the nineteenth century conceptions of International Law must be revised. Independence is rivaled by Interdependence." However, Baty did not agree with the view that the current trend of rising interdependence would be significant enough to require a fundamental change in the development of international law. He stressed the importance of the concept of the territorial state and he wrote: "the absolute sacredness of a nation's land is the vital nerve of our present system."⁴

Baty did not endorse the idea of international society that transcended national boundaries. When he wrote a review of one scholar, who had claimed that the unification of private international law would be possible, he criticized the scholar. "Imbued by a spirit of genuine cosmopolitanism, he ceases to regard the various nations as living in separate compartments, . . ." This kind of statement makes a remarkable contrast with Reinsch's on the future obsolescence of national sovereignty. While Reinsch found a future trend toward integration and interdependence in the world, Baty held an atomistic view on

² Paul Reinsch, "International Administrative Law and National Sovereignty," *American Journal of International Law* (hereafter cited as *AJIL*) 3 (January 1909): 1-12.

³ Reinsch, "International Unions and Their Administration," *AJIL* 1 (October 1907): 579.

⁴ Thomas Baty, *International Law* (London, John Murry, 1909), vii, 245

international relations, in which each state lived in a compartment.⁵

Reinsch reviewed Baty's book, *International Law*. At the outset, he summarized the content as "for the main part, an essay upon the necessity for states to protect themselves against inroads upon their sovereignty threatened through the creation of an international judicature and through the introduction into the national territory of aliens protected by treaty rights." Reinsch noted that Baty was opposed to the tendency to normalize arbitration and to create a permanent body of judges. "The author fears that astute advocates, their mind fixed upon case winning would introduce an amount of legalism into international affairs and bring into international discussions the temper of the law court." Baty was afraid that an introduction of strict legality would make nations more reluctant to submit their disputes to a court. Reinsch found that Baty "had overlooked the supreme advantage of normalizing the process of adjusting international difficulties and of developing a body of jurists capable of dealing with such questions in a broad efficient manner." Quoting Baty's phrase, "Elastic arbitration relieves the nations from the prospect of being lawyer-ridden," Reinsch wrote, "throughout he opposed too great fixity in international institutions." In the last part of the review, Reinsch focused on Baty's dealings with "various phases of modern internationalism." According to Reinsch, Baty was pessimistic about any future for international institutions. "The author gives no attention to the world wide organization of numerous economic and scientific interests which are now going on through the formation of unions."⁶

For Reinsch, Baty's argument was impressive enough to cite his name again in another article entitled "The Concept of Legality in International Arbitration." Reinsch indicated that the concept of legality should be determined by "an international organ," and not by individual states. However, there were some scholars who opposed such a notion. "It is apprehended by many writers, among whom Mr. Baty may be cited, that the application of the concept of legality in international arbitration is inopportune and

⁵ Baty, "Modern Jus Gentium," *Juridical Review* 20 (1908-9): 110.

⁶ Reinsch, review of *International Law* by Thomas Baty, *AJIL* 5 (January 1911): 270.

dangerous, as it involves the subjection of the flexible life of the state to the rigid criteria of legal reasoning."⁷

When Reinsch wrote this review in 1911, he was a professor at the University of Wisconsin, while Baty was in England. It is interesting, however, that a few years later both Reinsch and Baty would be stationed in the Far East: Reinsch, a progressive and liberal international lawyer, in China as American minister; and Baty, who cherished the traditional notion of international law, in Japan as legal advisor to the Japanese Foreign Ministry.

2. Association with Edwin O. Borchard

After World War I the division between two schools developed more acutely and visibly. One of the issues discussed in the debate between traditionalists and reformers was how to deal with the laws of war. During World War I, some scholars became skeptical about the laws of war. After the War this tendency became stronger,⁸ as epitomized by the remark, "the preoccupation of writers and statesmen with laws of war as been a real obstacle to the progress of international law."⁹ Opponents argued that emphasis had to be shifted to the laws of peace, because maintenance of the laws of war would in effect justify the legality of war. Some even expressed the radical opinion that the laws of war were totally useless and should be stricken from the textbooks of international law.¹⁰

It was Edwin O. Borchard, a professor of Yale Law School, that defended the laws of war in the face of widespread ambivalence about their need to rebuild them. At one session of the Second Conference of Teachers of International Law and Related Subjects in 1925, Borchard referred to Baty's recent article in the *Yale Law Journal* as an example of

⁷ Reinsch, "The Concept of Legality in International Relations," *AJIL* 5 (October 1911): 610.

⁸ Kendal C. Brynes, "The Status of the Rules of War in International Law," Ph.D. diss., University of Chicago, 1952, 56.

⁹ "The League of Nations and the Laws of War," *British Yearbook of International Law* 1(1920-1921):116.

¹⁰ Jackson H. Ralston, review of *International Law and the World War* by James Wilford Garner, *AJIL* 15 (October 1921): 621.

strong opposition to the new trend to disregard the laws of war. In the article, entitled "Danger Signals in International Law," Baty had argued that the present attack on international law was not unheard of; after the Napoleonic wars the same claim of the demise of international law had been made. He stressed the significance of maintaining both the distinction between belligerents and neutrals and the systematic integrity of the laws of war.¹¹ Supporting Baty's argument, Borchard enunciated his own belief that it would be impossible to completely abolish war. He stated that "wars of this coming generation or two are very likely to occur." With that in mind, he counseled, "I think it a mistake to minimize the importance of the laws of war."¹²

Since the mid 1920's Baty and Borchard began corresponding with each other. Borchard's admiration for Baty's scholarship can be seen in his letters. Borchard wrote to Baty, "Everything you write is valuable and I regard it as a matter of good fortune that we should be the vehicle for the publication of any of your thoughts to the world,"¹³ and "Your contribution in the March *Yale Law Journal* has excited much favorable comment among my friends in the Department of State." Borchard indicated to Baty his determination to defend the traditional view. "The performance of a critical function is not always a happy one and yet I feel that within my limited capacities, and in view of the few men who are willing to do critical work, this is perhaps the most useful function that can now be performed for international law."¹⁴ On the other hand, Baty also sent long letters to Borchard. For instance, the letter dated on July 20, 1924 had eight pages, sent from Nikko during his vacation.¹⁵ Baty acknowledged that he and Borchard had similar positions on international law, writing that "I was quite thrilled to get such a long and interesting letter

¹¹ Baty, "Danger Signals in International Law," *Yale Law Journal* 34 (March 1925): 468.

¹² *Proceedings of the Second Conference of Teachers of International Law and Related Subjects* (1925): 78-81.

¹³ Borchard to Baty, February 7, 1924, Papers of Edwin O. Borchard (hereafter cited as Borchard Papers), Sterling Library, Yale University, New Haven, Connecticut, box 16, folder 202.

¹⁴ Borchard to Baty, March 31, 1925, Borchard Papers, box 17, folder 217.

¹⁵ Baty to Borchard, July 20, 1924, Borchard Papers, box 17, folder 207.

from you, so much in harmony with the positions I advanced."¹⁶ Borchard and Baty took a united front against the "new" international law.

In 1931 Baty joined the debate between reformers and traditionalists more visibly and assertively, and he did so in the *American Journal of International Law*. The issue concerned neutral rights during the war. The debate was set forth by E.G. Trimble of New York University, a student of Edwin Borchard's.¹⁷ In the article Trimble criticized the conduct of Great Britain that had violated the London Declaration.¹⁸ A year later, another reformer, James Wilford Garner of the University of Illinois, responded. He argued that the London Declaration had been merely declaratory, that Trimble was relying on an interpretation supported by nineteenth century jurists, and that thus he did not take into account the "vastly changed conditions."¹⁹ After reading Garner's article, Borchard wrote to George Finch, the managing editor of the *American Journal of International Law*, and conveyed his intention to rejoin the debate, but it was not Borchard but Baty who published an article in response to Garner's approach.²⁰

Baty argued that among international lawyers some were belligerent-minded and others were peaceful-minded. Garner certainly fell into the category of the belligerent-minded, because his argument would lead to the expansion of belligerents'

¹⁶ Baty to Borchard, February 17, 1925, Borchard Papers, box 16, folder 216.

¹⁷ Borchard sent Baty's review on Trimble's article on the *Japanese Journal of International Law and Diplomacy* to John Bassett Moore of Columbia University. Moore wrote back to him, "Baty's comment on Trimble's article is just what I should have expected, . . ." Borchard to Moore, May 20, 1930; Moore to Borchard, May 21, 1930, Borchard Papers, box 7, folder 97.

Borchard also sent other Baty's reviews from the *Japanese Journal of International Law and Diplomacy*. See Borchard to Moore, April 30, 1931, Borchard Papers, box 7, folder 98.

¹⁸ E.G. Trimble, "Violations of Maritime Law by the Allied Powers," *AJIL* 24 (January 1930): 79-99.

¹⁹ James Wilford Garner, "Violations of Maritime Law by the Allied Powers during the World War," *AJIL* 25 (January 1931): 26-49.

²⁰ Borchard to George A. Finch, February 2, 1931, Papers of the American Society of International Law, Washington D.C. I did not find any clear evidence that Borchard directly asked Baty to contribute his article to the *Journal*, however, it is possible to assume that they had some understandings about the matter. Baty wrote to Borchard regarding the article, "I am so much obliged to you for reporting this, and for the interest you have taken in the matter." Baty to Borchard, March 27, 1932. Borchard Papers, box 1, folder 14.

rights. By abolishing the distinction between belligerents and neutrals, belligerent-minded lawyers did not respect peace in the system of neutrality. Baty recognized the need for legal protection to allow countries to remain neutral in time of war and deplored the deterioration of the system. He stated, "the peaceful neutral has tended less and less to command the respect and admiration of the world." Baty then pointed out that Garner overemphasized the effects of change on international law, which ought not to be easily revised to fit new situations. Rather, he contended that change must be based on well-established cases and be universal in content.²¹

Baty's conservative view of change was also apparent in his book *The Cannons of International Law*, published in 1930. In its preface, he wrote that his purpose was "to ascertain and to reinforce certain guiding principles, the recognition of which appears to be necessary if the Law of Nations is not to degenerate into a morass of conflicting opinions, or of ukases dictated from Geneva." He viewed innovation in international law as detrimental because it destroyed law's certainty. As for the cries for change since the war, he wrote that "nobody had ever shown what were the reasons for change," and that "investigation would show the old rules were substantially applicable to the circumstances of the present." He reaffirmed his belief that if changes were easily admitted, law would come to reflect the interests of nations, not of the world.²²

After the Manchurian Incident broke out, Baty sent an interesting letter to Borchard. On the Japanese official response to the so-called Stimson Doctrine of January 7, 1932, he wrote, "Without any breach of confidence I may assure you that so far as my information goes it was written with no *arrière-pensée*, . . ." While Baty by virtue of his position was involved in helping to draft an official response to the Lytton Report, he clearly showed his doubt about the League in the letter. "From the very first I shared your skepticism about the League." He also analyzed the causes of the present situation as follows, "It seems to me that the whole root of the present difficulty lies in the want of

²¹ Baty, "Prize Law and Modern Conditions," *AJIL* 25 (October 1931): 625-41.

²² Baty, *The Cannons of International Law* (London: John Murry, 1930), vii, 28-9.

realism exhibited by the Powers." He even argued that China was responsible for the present condition. "If China had observed the Kellogg Treaty, there would have been no Manchurian Incident, and no Shanghai Affair."²³ While most of Baty's letters remained as they were in his original handwriting, the typescript version of this letter was also stored along with the original one. I would assume that Borchard had found this letter particularly important and sent it to his friends and colleagues.

Throughout 1932, Baty exchanged letters also with Quincy Wright, a professor at the University of Chicago, who presented the most progressive interpretations of the Non-Recognition Doctrine. Wright and Baty were in disagreement in many respects.²⁴

Although evidences are sporadic, Borchard seems to have continued to send Baty's views to John Bassett Moore and others in the late 1930s. On one occasion, he forwarded Baty's opinion on neutrality, which had been sent to him by a postcard, to Moore.²⁵ Even in November, 1941 when the war with Japan was imminent, Borchard sent Baty's views to his friends. Green Hackworth, then legal advisor of the State Department, wrote back comments to Borchard, "The comments of Dr. Baty, enclosed with your letter of November 11, are interesting."²⁶

3. Hans J. Morgenthau's Commendation

Although the debate between reformers and traditionalists continued, and ardent reformers like Wright did not abandon their faith in scholarship, it is true that the outbreak of hostilities in the 1930s led to criticism of the study of international law. Baty resumed his long standing attack on the reformers. This time, he was particularly critical

²³ Baty to Borchard, March 27, 1932.

²⁴ See Shinohara, "Forgotten Crusade," 157-58.

²⁵ Baty to Borchard, March 23, 1938, Borchard to Moore, April 9, 1938, box 9, folder 110.

²⁶ Green Hackworth to Borchard, November 17, 1941, Borchard Papers, box 3 folder 52.

However, with regard to the conditions in the State Department, Borchard also wrote to Moore that "But now the Quincy Wright school is in control in the Department of State, . . ." Borchard to Moore, March 22, 1941, Borchard Papers, box 10, folder 117. There existed a division over international law also among officials in the Department.

of their presentation and manipulation of the legal notions of "recognition" and "war." Baty pointed out the futility of playing with the legal notion of recognition when a state of war actually existed. If a country like Manchukuo existed in terms of its actual function and relationship with other countries, then, Baty asked, what was the meaning of legal Non-Recognition? Similarly, he argued that if a country attacked another country's territory with an armed force, war existed, whether the attacking country had intended to start it or not. He deplored the fact that the legal situation had become chaotic as a result of the notion of illegal war constructed by the legalists. Baty particularly blamed the Kellogg Pact, because it "abolished the name of war and thereby denaturalized the whole theory of international conflict."²⁷

A much more comprehensive critique of international law came from Hans J. Morgenthau, who after the war would become the founder of the realist school of international relations. Morgenthau criticized the new, post-war international law for its formalistic nature. In particular, one of the failures of the science of international law was that it had not developed a criterion for distinguishing between "seemingly and actually valid rules of international law." Some of the rules, which the new international law claimed to be legal, were merely "alleged legal rules" or "speculations." He even questioned whether the Covenant of the League was "valid international law" and argued that the Kellogg-Briand Pact and some new conceptions such as the concepts of aggression and Non-Recognition were based on speculation. In many respects, Morgenthau's views were in agreement with Baty's. In fact, Morgenthau wrote that "[an] excellent contribution to the understanding of this problem is to be found in Baty."²⁸

Morgenthau's reference to Baty was simple and short. However, this is particularly significant when we consider the possible implications of Baty's argument for realist thought. If Baty had a role in realist thinking, and if we consider the longevity of

²⁷ Baty, "The Trend of International Law," *AJIL* 33 (October 1939):653-64.

²⁸ Hans J. Morgenthau, "Positivism, Functionalism, and International Law," *AJIL* 34 (April 1940): 252-83, footnote #22.

realist arguments in the theory of international relations, we should not regard him just as a traditionalist whose views were only past-oriented, but we should try to find his legacy in a broader context. In fact, Borchard found E. H. Carr's *The Twenty Years' Crisis* (1939) extremely insightful, which was, and still has been, another widely read realist text.²⁹

Conclusion

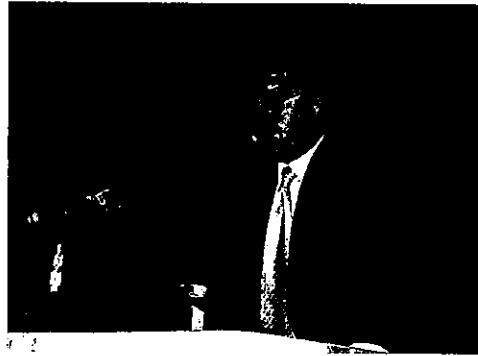
Baty's position in the debate over the future direction of international law was clear. He was not just one of many scholars on the side of the traditional approach, but an important, vocal and indispensable figure in the school. To traditionalists, Baty was definitely an invaluable asset for his position and articulate views. John Bassett Moore and Borchard had sincere respect for Baty's scholarship. Baty's writings were widely read and thus he was a well respected scholar then. Although some foreign scholars, for instance, Nicholas Politis and H. Lauterpacht, occasionally participated in the debate on the side of the reformers, Baty was far more deeply and substantially involved in this great intellectual debate.

Baty was opposed to the new international law in many respects: the system of laws of war should be kept as it had been, the Kellogg-Briand Pact and outlawry of war were more dangerous, the League of Nations was a dubious organ, the traditional notion of neutrality should not be abandoned, and some legal notions, aggression and Non-Recognition, were just speculations. Baty held those views, mainly because he did not read the direction of international affairs properly. Looking back, it is obvious that most of Baty's claim has not survived to this day. However, the world the reformers had envisioned has not been realized either and some of their legal schemes have proved incomplete in the practices of international relations. Perhaps, that is where we can find a clue to Baty's legacy.

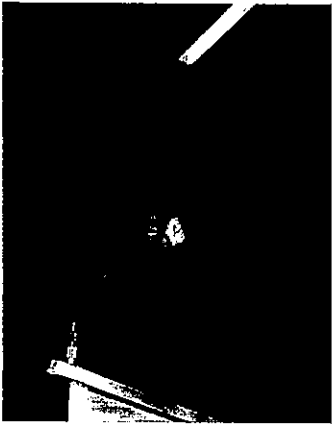
²⁹ Manley O. Hudson to Borchard, January 20, 1942, Papers of Manley O. Hudson, Harvard Law School Library, Cambridge, Massachusetts, box 97, folder 9.



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Mr. Martin Gornall



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