

The Radhabinod Pal Dissident Judgment and Nationalism in Post-War Japan

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The Radhabinod Pal Dissident Judgment and Nationalism in Post-War Japan

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1. Introduction

Since the middle of the 1990s, Japan has been witnessing the rampancy of right-wing forces. This rightward tilt is seen across Japanese society, in education, culture and politics, as manifested respectively in the activation of Japanese Society for History Textbook Reform, the best-selling *War Theory* by cartoonist Yoshinori Kobayashi, and the establishment of Shinzō Abe and Tarō Asō cabinets that emphasized “conservatism.”

In this tilt, Japanese historical revisionists have contrasted themselves with what they term the “Tokyo Trial view of history” and the “masochistic view of history.” These revisionists regard as “masochistic” any characterization of Japan’s military advances in Asia during the pre-World War II period as an “invasion.” And they claim a “spell” lingering from the Tokyo Tribunal of War Criminals underlies this “masochistic view of history.” Arguing that the Tokyo Tribunal created and developed a false perception of the Greater East Asia War as “the war in which the liberal Allies defeated a fascist Japan,” the revisionists stress that denouncing and denying the tribunal is the key to shaking off this “masochistic view of history.”

In their discourse on the denial of the tribunal, revisionists frequently invoke the so-called “Pal’s Judgment.” An Indian judge participating in the Tokyo Tribunal, Radhabinod Pal, issued a dissentient opinion paper titled *Dissentient Judgment of Justice Pal*, and asserted that all Japanese Class-A defendants at the trials were criminally innocent. Since the tribunal’s language department omitted the word “dissentient,” the paper became widely known in Japan as “Pal’s Judgment.”

However, the Judgment is often presented without a thorough examination of its content. Instead, only the decontextualized conclusion—that the Japanese suspects are not guilty—is singled out. In 2007, the author of this paper published *Judge Pal: Criticism of the Tokyo Trial and Absolute Pacifism* [Hakusui-sha, Tokyo] in order to draw attention to misreadings of “Pal’s Judgment.” While the book was well received, it also became a target of historical revisionists, such as Yoshinori Kobayashi, and was subjected to their severe bashing.

Based on the author's book, the object of this paper is to analyze the bones of Pal's theory in his judgment and to examine the philosophy behind it. The author also introduces an overview on how Pal's Judgment first became misinterpreted by Japanese historical revisionists, in order to explain how current revisionist discourse on the judgment was shaped.

2. Theory of Pal's Judgment

Based on the principle of non-retroactivity of law, Judge Pal, first of all, explicated his criticism of the tribunal's *ex post facto* legislation in his dissentient opinion. He affirmed that the alleged "conventional war crimes" by the Japanese defendants came within the jurisdiction of the tribunal because they were already classified as crimes in pre-existing international law. However, Pal opposed "crimes against peace," and "crimes against humanity" defined in the tribunal charter because these crimes had no previous grounds in international law. If the defendants would be found guilty of the crimes not existing in international law when the alleged acts were actually executed, Pal said, then "the tribunal will not be a 'judicial tribunal' but a mere tool for the manifestation of power."¹ He argued the difference between judiciary and politics, and severely criticized the control of the trial by statesmen's political intentions.

Pal objected to the introduction of an *ex post facto* law at the tribunal because he believed that by ruling on *ex post facto* law, international society would not be bound by a common understanding against wars, instead it would subscribe to an understanding that the victors of wars were entitled to judge the defeated while disregarding the rules of international law. Thus, he argued that if the Tokyo Tribunal invoked an *ex post facto* law it would eventually foment the expansion of wars of aggression and a breakdown of the foundation of international order, rather than lead toward the eradication of wars. He stressed the importance of genuine legal processes and the establishment of the rule of law as follows:

Such a trial [a tribunal with an *ex post facto* legislation] may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair; an essentially political objective having thus been cloaked by a juridical appearance. Formalized vengeance can bring only an ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through genuine legal process alone may contribute substantially to the re-establishment of order and decency in international relations.²

He questioned the Charter of the International Military Tribunal for the Far East (CIMTFE), which was promulgated on January 19, 1945 and defined the setup of the tribunal. In adding to "con-

1 The Research Committee on Tokyo Trial 1984a, p. 268.

2 Ibid., pp. 268–269.

ventional war crimes,” the charter upheld new crimes that did not have a foundation in pre-existing international law: “crimes against peace” and “crimes against humanity.” Pal denounced this sort of charter largely as a transgression on the fundamental rules of international law. He said an international court, irregardless of who set it up or manned it, “does not define the crime but only specifies the acts the authors whereof are placed under the jurisdiction of the Tribunal.”³ He explained that the charter ought to merely decide what matters would come up for trial before the tribunal and whether or not these acts constituted any crime was left open for determination by the tribunal with reference to the appropriate law. From this point of view, he strongly condemned the charter of the Tokyo Tribunal as widely derogating from the fundamental rule of jurisdiction.

According to Pal, the victors had the right to set up a special court, and therefore the establishment of a charter itself was not problematic; however the civilized world did not recognize the victors’ right to legislate the creation of new crimes in international law.

He also said that judges of the tribunal were “competent to investigate the question of whether any provisions of the charter is or is not *ultra vires*”⁴ in the reflection of international law, because the charter of the tribunal itself derives its authority from international law.

As a judge of the tribunal, Pal concluded that the “crimes against peace” and the “crimes against humanity” were seen as an *ex post facto* law and invalid to the non-retroactivity law in international law. Further, Pal examined the historical process on the “overall conspiracy” which was explained by the prosecution as a premise of the alleged “crimes against peace,” and criticized the prosecutors’ arguments. He intended to prove that so-called “crimes against peace” were invalid both from jurisprudence and historical views.

Pal, however, did not deny the whole tribunal. He affirmed and supported the value of examining the alleged acts for “conventional war crimes” that would come to the court. “A war,” he said, “whether legal or illegal, whether aggressive or defensive, is still a war to be regulated by the accepted rules of warfare. No pact, no convention has in any way abrogated *jus-in-bello*.”⁵

Pal’s viewpoint on the Tokyo Tribunal was reflected in how he structured his dissentient opinion paper. “Pal’s Judgment” consists of seven chapters: Part I Preliminary Question of Law; Part II The Definition of Aggressive War; Part III Rules of Evidence and Procedure; Part IV Overall Conspiracy; Part V Scope of Tribunal’s Jurisdiction; Part VI War Crimes *Stricto Sensu* and Part VII Recommendation. An important point to note here is that he placed “Scope of Tribunal’s Jurisdiction” after the chapter about the alleged “overall conspiracy.” In Part IV, which occupies the largest volume in the paper, he explained that the “overall conspiracy,” that was given as a premise of “crimes against humanity” by the prosecution, was not established as a crime in international law, therefore, the indictments themselves

3 Ibid., pp. 278–279.

4 Ibid., pp. 300–301.

5 Ibid., p. 244.

were invalid before the judgment on the question of innocence or guilt.

The only alleged acts by the Japanese defendants he saw triable by the tribunal from a genuine judicial point of view were “conventional war crimes,” because these crimes were defined in pre-existing international law at the time the alleged acts were carried out. Whether the accused were guilty or not would be open to the court, so he found no conflict in hearing the alleged acts at the tribunal. This was the reason Pal clarified the scope of the tribunal before the section on “conventional war crimes,” and defined the scope as after the Sino-Japanese War.

In Part VI, “War Crimes *Stricto Sensu*,” he examined the establishment of criminality in what he called the “atrocities” conducted by the Japanese Imperial Army. Regarding the Nanjing Massacre, although he premised that wartime propaganda from hostile sources was blended in with the evidence submitted to the court, and therefore it may not be safe to accept the entire story, he concluded that the fact that the “atrocities” were executed by the Imperial Army was unshakable. He said as follows:

Keeping in view everything that can be said against the evidence adduced in this case in this respect and making every possible allowance for propaganda and exaggeration, the evidence is still overwhelming that atrocities were perpetrated by members of the Japanese armed forces against the civilian population of some of the territories occupied by them, and also against prisoners of war.⁶

Whatever that be, as I have already observed, even making allowance for everything that can be said against the evidence, there is no doubt that the conduct of the Japanese soldiers at Nanking [Pal’s spelling] was atrocious and that such atrocities were intense for nearly three weeks and continued to be serious for a total of six weeks as was testified to by Dr. Bates.⁷

Pal then continued to investigate whether the facts supporting the accusation that the Class-A War Crime-accused defendants ordered, authorized and permitted others to commit those acts, and such persons actually committed them; and if the facts supported that the Class-A accused committed foul acts, in other words, that they deliberately and recklessly disregarded their legal duty to take adequate steps to prevent the commission of such criminal acts.

On the first point, while saying that the alleged atrocities were characterized as “devilish and fiendish,” he concluded that no evidence of any alleged order, authorization or permission was found. He judged that the atrocities including the Nanjing Massacre were determined and executed by the Army soldiers on the ground, and the people who were responsible for the acts had already been executed as Class B and C war criminals.

It should be remembered that in the majority of cases “stern justice” has already been meted out

6 The Research Committee on Tokyo Trial 1984b, p. 556.

7 Ibid., p. 600.

by the victor nations to the persons charged with having actually perpetrated those atrocious acts along with their immediate superiors. We have been given by the prosecution long lists of such convicts.⁸

But those who might have committed these terrible brutalities are not before us now. Those of them who could be got hold of alive have been made to answer for their misdeeds mostly with their lives.⁹

On the issue of foul acts, for which the defendants would be found guilty if it were proven that the atrocities by Japan became intense and were carried out on a larger scale due to the defendants' "intention" or "negligence," Pal said, "these commanders [the Japanese defendants] were legally bound to maintain discipline in the army and to restrain the soldiers under their command from perpetrating these atrocities," and continued as follows:

It is true that a commanding officer is not liable for the acts of those in his command merely because he is their superior officer; but, because of his great control over them, he should be responsible for such acts of theirs which he could reasonably have prevented. He had the duty to take such appropriate measures as were in his power to control the troops under his command.¹⁰

However, Pal concluded that the evidence submitted to the court was not sufficient to prove the alleged cases of acts or the accused as criminally responsible for the cases.

It is a fact that Pal strongly condemned the atrocities by the Japanese Imperial Army including the Nanjing Massacre as determined by facts. However, he concluded that the Japanese A-Class suspects' criminal responsibility for the atrocities could not be proven due to a lack of evidence.

Pal next took up Japan's "maltreatment of prisoners of war." In examining the alleged offences, he spent many pages on the cases of the Bataan Death March in the Philippines and the construction of the Burma-Thai Railway. He strongly denounced both cases and acts committed by the Army.

Regarding the Bataan Death March, he said it was "really an atrocious brutality" and "I do not think that the occurrence was at all justifiable."¹¹ Regarding the employment of prisoners of war for the Burma-Thai Railway construction, which directly related to the Japanese war operation, he said this was "inhuman," and that the accused Hideki Tōjō, Japan's Prime Minister from October 1941 to July 1944 was fully responsible.

He continued, though, by saying that the March was "an isolated instance of cruelty"¹² and the railway construction was a "mere acts of states,"¹³ and eventually concluded that the evidence did not

8 Ibid., p. 566.

9 Ibid., p. 590.

10 Ibid., p. 613.

11 Ibid., pp. 671–672.

12 Ibid., p. 672.

13 Ibid..

satisfy him that the alleged acts were conducted under the order, authorization, or with foul acts by the accused. In other words, he concluded that the accused could not be found criminally liable due to the lack of evidence.

A point that should be noted is the difference in his argumentations for “crimes against peace” and “conventional war crimes.” Regarding “crimes against peace,” he presented his view that the crimes’ nature was an *ex post facto* law first and foremost. Additionally, the “overall conspiracy” which the prosecution tried to establish as a premise for “crimes against peace” was not found. Therefore, the indictment for “crimes against peace” itself was fundamentally not established. On the other hand, in the matter of the alleged offenses of “conventional war crimes,” wherein Pal approved the grounds in international law and approved of hearing by the tribunal, Pal investigated the alleged crimes in accordance with international law and eventually concluded that the evidence at court was not sufficient to establish the criminal responsibility of the defendants for the accused acts.

3. Pal's View on History and His Opinion on Legislation

In Part IV of his dissentient judgment, Pal examined the alleged “overall conspiracy.” The prosecution claimed that the defendants had conspired, and that the accused crimes were part of Japan’s overall plot to occupy Manchuria, the whole of China and eventually the entire world. While he criticized Japan’s acts allegedly executed under the “overall conspiracy,” including the Chang Tso-lin Assassination Incident and Manchurian Incident in Japan’s steps toward the Sino-Japanese War, Pal pointed out that Japan was an imitator of Western Imperialism and argued that both Japan and the Allied countries were morally responsible for their actions.

Firstly, he took up the Chang Tso-lin Assassination Incident by the Japanese Kwantung Army, on June 4, 1928. The incident was plotted by Kwantung Army officer Colonel Daisaku Komoto, and the leader of Fengtian Army warlord Chang was killed. Kawamoto had planned to conquer Manchuria by taking advantage of the confusion that would have occurred after the incident. However, this failed as the chiefs of staff of the Kwantung Army were not informed of his plan, and the Fengtian Army did not respond to this provocation. In the Tokyo Tribunal, the prosecution claimed that the incident was the first act in the defendants’ “overall conspiracy” in which they consistently and carefully planned and prepared acts or wars of aggression such as the Manchuria Incident, the Sino-Japanese War, up to and including the Greater East Asia War.

Pal disagreed with their claim. He said, “Chang Tso-lin’s murder was planned and executed by a certain group of Kwantung army officers. There is absolutely nothing to connect this plan or plot with the alleged conspiracy.”

He continued, “Planning any murder and executing the same are certainly reprehensible by themselves. But we are not now trying any of the accused for that dastardly act of murder. We are to see

what connection this story has with any relevant issue before us.”¹⁴

He described the Chang Tso-lin Assassination Incident as a “dastardly act of murder,” and said Kawamoto and others who were involved in it were “reprehensible.” However, from the legal point of view, he stressed the necessity of proof to show the “dastardly act” by the Army officers was a part of the “overall conspiracy” by the accused Japanese leaders. After examining the evidence, he came to the conclusion that although it was true that many officers in the Kwantung Army “intended to occupy Manchuria” at that time, the Incident was planned and executed by a limited group of people and the evidence given in the court failed to establish that there was an “overall conspiracy” behind the incident. He said the alleged “crimes against peace” could not be established simply by connecting irrelevant cases to “the whole story.”

What should be confirmed here is that although he argued the incident was not a part of “conspiracy,” he did not give his approval to the incident itself.

He next addressed the Manchurian Incident. He first discussed the Mukden Incident [or the Liutiaogou Incident] which occurred at the outset of the Manchurian Incident, and argued that it was difficult to determine from the evidence that the Mukden Incident was a conspiracy among the Japanese defendants. He said:

Even accepting the evidence of Tanaka and Okada that the Mukden Incident of 18 September, 1931, was planned by some young officers of the Kwantung Army, I do not find any substantial evidence to connect any of the accused with that clique. The position in my opinion still remains as was found by the Lytton Commission. The incident might have been the result of a design on the part of some unknown army officers, yet those who acted on the strength of the incident might have acted quite bona fide.¹⁵

The gist of his logic here is same as with the Chang Tso-lin Assassination Incident—Although the Mukden Incident might have been a plot by particular officers of Kwantung Army, the connection between them and the accused leaders was not clear, as a consequence it was difficult to view the incident was a part of an alleged “overall conspiracy.”

Again this does not mean Pal was uncritical regarding the incident or the Kwantung Army. “The military developments in Manchuria after September 18, 1931, were certainly reprehensible. Despite the unanimous opinion of the Cabinet that the operation must cease immediately, the expansion continued.”¹⁶

He determined the Manchurian Incident was “reprehensible” and saw the actions of the Army

14 The Research Committee on Tokyo Trial 1984a, pp. 700–701.

15 Ibid., pp. 749–750.

16 Ibid., p. 793.

ignoring the Japanese Cabinet order and initiating the incident as a problem. Still, he kept his opinion that the circumstances did not prove a conspiracy among those accused. “No one would applaud such a policy. No one would perhaps justify such a policy. Yet this need not drive us to a theory of conspiracy,” said Pal.¹⁷

In this Chapter, he further discussed the Western powers’ political and military acts in the international community at that time. While presenting the view that the Kwantung Army and the Western countries were companions in crime, he condemned the Western powers for launching accusations against Japan while ignoring their own responsibility for committing acts that were similar to those of the Japanese Army.

First, he criticized Japan’s establishment of Manchukuo, calling it an “elaborate political farce,” forced upon the Chinese people by Japan’s military occupation of Manchuria.

The power to play the farce of ‘Manchukuo’ on the Manchurian stage, as well as the power to seize control over Manchuria had been acquired by the Japanese military. As has been observed in the Review of International Affairs, the military conquest and occupation of Manchuria by the Japanese Army was the real foundation of the Japanese position in Manchuria in 1932; and the whole world was aware that this was the fact. The Japanese were apparently prepared to defy the world’s opinion and to risk the consequences of the world’s disapproval in order to keep their ill-gotten gains.¹⁸

Then, however, he asked why Japan did not simply proclaim the annexation of Manchuria instead of persisting in a farce. Pal saw the answer in the process of Japan’s modernization itself, which was a continuous imitation of the West. “It is considered probable that it might be attributed in part to an anxiety to imitate Western behavior—an anxiety had become an *idée fixe* in Japanese minds since the beginning of the Meiji era,”¹⁹ he said.

Pal then critically examined Western Imperialism, which, he asserted, Japan had imitated. Quoting *the International Affairs* by the International Affairs Research Center in Britain, he turned the target of the criticism toward the colonial policies of Western powers.

Was it not Western Imperialism that had coined the word ‘protectorate’ as a euphemism for ‘annexation’? And had not this constitutional fiction served its Western inventors in good stead? Was not this the method by which the Government of the French Republic had stepped into the shoes of the Sultan of Morocco, and by which the British Crown had transferred the possession of vast tracts of land in East Africa from native African to adventitious European hands?

For Pal, Japan’s “farce” was nothing but the result of imitating Western fashions of imperialism. From this point of view, he questioned why only Japan’s establishment of Manchukuo could be assessed as an “aggression.” Weren’t Western countries morally guilty as well in practicing colonialism?

17 Ibid., 1984a, p. 803.

18 Ibid., p. 805.

19 Ibid., p. 806.

If the acts of aggression by Western countries were not charged as crimes, why was the establishment of Manchukuo by Japan?²⁰

Pal said:

Though the Japanese failed to make the most of these Western precedents in stating their case for performing the farce of ‘Manchukuo,’ it may legitimately be conjectured that Western as well as Japanese precedents had in fact suggested, and commended, this line of policy to Japanese minds.²¹

By saying, “it may not be a justifiable policy, justifying one nation’s expansion in another’s territory,” he emphasized that both Japan and the Western countries were morally responsible for the colonization of other nations. Pal explained that Japan was at that time possessed with a “delusion” and believed that the country would face death and destruction if it failed in acquiring Manchuria. Pal regarded this as the reason for Japan’s attempts to establish interests which it saw as necessary for its very existence. Pal said that carrying out a military operation driven by “delusion” was not unique to Japan as it had been repeatedly practiced on a large scale by Western countries for many years. Saying, “Almost every great power acquired similar interests within the territories of the Eastern Hemisphere and, it seems, every such power considered that interest to be very vital,”²² Pal argued that Japan had the “right” to argue that the Manchuria Incident was necessary for the sake of “self defense.” Japan claiming national “self-defense” in regard to its territorial expansion in China was in step with international society at the time, Pal said, and thus Japan’s actions stemmed from the “imitation” of an evil practice of Western imperialism. Based on this premise, he concluded, “The actions of Japan in Manchuria would not, it is certain, be applauded by the world. At the same time it would be difficult to condemn the same as criminal.”²³

The important thing to notice here is that Pal did not mean to indicate that he saw Japan’s actions as justifiable. As early mentioned, he criticized the Manchurian Incident as “reprehensible,” and the establishment of Manchukuo as an “elaborate political farce” based on “delusion.” But at the court Pal strove to show his disapproval of the prosecution’s intention to treat Japan’s actions as if they were carried out under an alleged “overall conspiracy,” by presenting the complexity in the reasons why Japan pushed herself forward to the occupation of Manchuria.

From his historical point of view, Pal saw the fundamental cause for Japan’s acts of aggression as rooted in colonialism by Western countries. He questioned whether the visit by the US Navy’s Commodore Matthew Perry and the conclusion of unequal treaties with Western powers such as United States

20 Ibid.

21 Ibid., p. 807.

22 Ibid., pp. 858–859.

23 Ibid., p. 761.

of America, Russia, Great Britain, France and Holland in the late Edo Era was a fundamental cause for Japan's imperialism, and he argued that Japan's steps toward imperialism were not "blameworthy."

Pal said:

Then follows Japan's struggle for getting revision of their treaties. This struggle continued till the year 1894. During this period, Japan made every effort to master the great contributions of Western thought and science. Perhaps Japan also realized that in the world in which she had been thus forced to appear, right and justice were measured in terms of battleships and army corps. The Japanese efforts to get these treaties revised were certainly not blameworthy.²⁴

He argued that Japan endeavored toward rapid modernization and Western methods and thoughts in order to address the revision of unequal treaties with the Western powers. Japan also built up its military power during the process by "imitating" the Western power's imperialism. While Pal did regard the manner in which Japan proceeded with its modernization as problematic, he also questioned whether the Western powers could really condemn Japan's imitating them if the purpose in doing so was revising the unequal treaties. "We cannot ignore the possible effects upon Japan of this long struggle for the revision of such treaties,"²⁵ said Pal.

This observation can be seen in Pal's argument on the Sino-Japanese and Russo-Japanese Wars. He saw these as a part of a power struggle among superpowers instead of unilateral "aggressions" by Japan. For Pal, it was hypocritical for the Western countries to one-sidedly criticize Japan's actions, which were merely an "imitation" of their own, as a crime. "After the Russo-Japanese war, Japan seemed to follow closely the precedents set by Europe in its dealings with China,"²⁶ said Pal in reference to Japan's steps toward expansion of colonial territories after the Sino-Japanese and the Russo-Japanese Wars. He said that if Japan's manner of colonialism was seen as problematic, then all colonialism by the Western powers ought to be similarly regarded. However, he pointed out, Western powers did not criticize Japan's actions as "aggression" while the acts were ongoing. He said, "Great Britain renewed and strengthened the Anglo-Japanese Alliance at that time and the contemporary powers did not condemn Japan's action as aggressive."²⁷

Following World War I, Japan, as a faithful ally, rendered valuable assistance in an hour of serious and very critical need to the Allied Powers during the First World War. The Allied Powers were helped by support from Japan. His question was how these Western countries could blame the steps taken by Japan.

Pal presented the following view of history:

24 The Research Committee on Tokyo Trial 1984b, p. 230.

25 Ibid., p. 231.

26 Ibid., p. 249.

27 Ibid., p. 261.

Japan was a country without any material resources of her own. She started on her career when “Western society had come to embrace all the habitable lands and navigable seas on the face of the planet and the entire living generation of mankind.” The Japanese emulated the Western powers in this respect but unfortunately they began at a time when neither of the two essential assets, “a freehand” for their ability and a world-wide field was any longer available to them. The responsibility for what Japan was thinking and doing during the period under our consideration really lies with those earlier elder statesmen of Japan who had launched her upon the stream of Westernization and had done so, at a moment when the stream was sweeping towards a goal which was a mystery even to the people of the West themselves.²⁸

Looking back at the path of Japanese modernization, Pal cast sharp criticism and a caustic view on the Western countries. By presenting this sort of paradoxical irony, he intended to criticize Western colonialism and to assert that the Western countries and Japan were in cahoots.

Regarding the start of the war between Japan and the United States, Pal blamed the direction of diplomatic policy in the United States more than the Japanese. In his view, the United States’ diplomacy as represented especially in the Hull Note, eventually cornered Japan. He said, “The evidence [submitted to the court] convinces me that Japan tried her utmost to avoid any clash with America, but was driven by the circumstances that gradually developed into the fatal steps taken by her.”²⁹

In his dissentient judgment, Pal repeatedly quoted International Affairs by British Research Center for International Affairs, the British historian Arnold J. Toynbee, and professor of international law at the University of London Georg Schwarzenberger. He tried to break the one-side accusations by the prosecution against Japan by highlighting that even some in the Western world had accused the Western superpowers.

Regarding the Hull Note in his dissentient judgment, Pal quoted *Memoirs of a Superfluous Man* by Albert Jay Nock, published in 1943, as follows:

Even contemporary historians could think that ‘as for the present war, the Principality of Monaco, the Grand Duchy of Luxembourg, would have taken up arms against the United States on receipt of such a note [Hull Note] as the State Department sent the Japanese Government on the eve of Pearl Harbor.’³⁰

While condemning the move of the United States, Pal also argued on Japan’s problematic diplomacy:

28 Ibid., p. 348–349.

29 Ibid., p. 461.

30 Ibid., p. 441.

There I pointed out why I could not accept the prosecution charge of treacherous conduct of the Japanese statesmen concerned. No doubt preparation for war was going on while the diplomatic negotiations were being held. But such preparations were being made by both sides. If the Japanese side “had little confidence that the Kurusu-Nomura negotiations would achieve their purposes,” I do not feel that the American side entertained any greater confidence in the diplomatic achievement.³¹

Japan prepared for war against the United States while diplomatic talks between the two countries were ongoing. Pal claimed this “treacherous design” on the part of Japan was a serious matter. But he pointed out a similar “treacherous design” was also seen on the U.S. side, therefore both Japan and the United States were equally responsible for the war. Regarding the prosecution’s accusations of a conspiracy, he argued that neither plan nor conspiracy existed behind the start of the war. He regarded Japan’s decision to make war against the United States as not made in advance as a part of the alleged “overall conspiracy,” but rather made only during Japan’s diplomatic negotiations with the United States, after which it merely executed the decision.

In summarizing Part IV, Pal said, “The statesmen, diplomats and politicians of Japan were perhaps wrong, and perhaps they misled themselves. But they were not conspirators. They did not conspire.”³²

Pal described Japan’s actions following the Chang Tso-lin Assassination Incident as “not justifiable,” and applied this assessment to Western colonialism as well. However, on the matter of an alleged “overall conspiracy,” he argued that each “isolated” act by Japan had been purposefully framed by the prosecution to assert an “overall conspiracy,” as if Japan had managed the acts as part of a policy of aggression.

Also, Pal stressed that Japan should not be seen in the same way as Nazi Germany. According to his view, Tōjō and his group “might have done many wrong things; but, so far as the public of Japan is concerned, certainly by their behavior toward them, they did not succeed in reducing them to a position of terror-stricken tools without any free thinking or free expression. The population of Japan was not enslaved as in Hitler’s Germany.”³³ He claimed that Japan did not have a dictator such as Hitler. During the indictment period of the tribunal, he said, “it was not a moment in the life of Japan when power was considered to be of any consequence to any individual or group of individuals.”³⁴ The wars in the modern era were not “the result of any design by any particular individual or group of individuals,”³⁵ said Pal. He explained that the “evil of warfare” was transformed by a combination of factors.

31 Ibid., p. 533.

32 Ibid.

33 Ibid., pp. 471–473.

34 Ibid., p. 100.

35 Ibid., p. 179.

As mentioned earlier, Pal criticized Japanese statesmen, diplomats and politicians with value judgment terms such as “mistake,” “wrong,” or “wrong things.” Still he argued that as long as the claimed “overall conspiracy” was not established from the evidence at the court, the alleged acts in the indictment could not be found criminal. His argument was never “Japan was innocent” or “affirming the Great East War.” Moreover, what should be noted here is that if he absolved the suspects’ criminal responsibility he did not dismiss the moral responsibility of Japan. He strongly criticized Japan’s war crimes and analyzed Japan’s historical process after the Manchuria Incident as critically as he did the colonization of Western countries. Therefore it is obvious that the logic of right-wingers to infer “Japan’s innocence” or “an affirmation of the Greater East Asia War” from Pal’s dissident judgment is an obvious misreading as well as a tremendous jump in logic.

The author will examine Pal’s thoughts in the following part.

4. Pal’s Thoughts

In his dissident judgment, Pal repeatedly expressed the importance of and hope for the establishment of a system of “international cooperation.”

He said:

I doubt not that the need of the world is the formation of an international community under the reign of law, or correctly, the formation of a world community under the reign of law, in which nationality or race should find no place.³⁶

For the strict practice of international law, the establishment of “international society under a rule of law” was necessary. Pal strongly advocated the emergence of what he termed the “Super State,” which he believed would “eradicate wars and overcome racial discrimination.”³⁷

Obviously he did not believe the idea of “the world commonwealth” would be embodied in immediate future, he rather thought that the international social system ought to be transformed unconventionally toward the ideal “the world of commonwealth.” He regarded the first step to “the world of commonwealth” as the establishment of an international agency with national sovereignty as its premise. He said that such an international agency was not yet fully established therefore the practice of international law faced serious difficulties. In other words, without a Super State, there could exist no concrete and executive power, and whether international war would be executed or not would after all be determined by the international affairs and power relations of the time. This was the reason why he stressed the importance of the early introduction and establishment of an international agency for the observance and execution of international law. And, he believed a “widening sense of humanity” to develop the inter-

36 The Research Committee on Tokyo Trial 1984a, p. 385.

37 Ibid., p. 289.

national agency into the ideal “world commonwealth” would stabilize the order of international society.

Pal was a believer of humanism based on the philosophy of “dharma” from ancient India. He advocated Gandhism, and dreamt of the day that human beings would establish ideals based on the ultimate pacifism.

On his visit to Japan in 1952, Pal, asked to make speeches at different places in Japan, stressing that Japan should introduce unarmed neutralism in the world during the Cold War. Strongly opposed to Japan’s remilitarization corresponding to the will of the United States, he passionately advocated the teachings of Gandhism. Pal showed his resentment and disappointment to a Japan which had been strengthening its dependence on the United States, and he strongly criticized Japan as indifferent to the discussions in the Tokyo Tribunal and uncritically following the United States’ will.

It was when he visited the Atomic Bomb Memorial in Hiroshima that he clearly showed his bitterness toward Japan.

On seeing the memorial’s inscription, “Let all the souls here in peace. For we shall not repeat the evil,” Pal said as follows:

Obviously, the subject of ‘we’ is Japanese. I do not see clearly what ‘the evil’ means here. The souls being wished to rest here are the victims’ of the Atomic Bomb. It is clear to me that the bomb was not dropped by Japanese and the hands of bombers remain bloodstained. [...] If not repeating the mistakes means not possessing weapons in the future, I think that is a very exemplary decision. If Japan wishes to possess military power again, that would be a defilement against the souls of the victims we have here in Hiroshima.³⁸

His anger toward the mentality of Japanese people in the post-war era was expressed in his remark. He condemned Japan’s remilitarization corresponding to the will of the United States, in light of the U.S. responsibility for the Atomic bombing of Japan.

5. Misappropriation of Pal's Dissident Judgment by Historical Revisionists

As explained in the introduction of this paper, Japanese post-war historical revisionists have ignored the kernel of Pal’s argument and his thoughts outlined above, and instead repeatedly evoked his judgment to support their positions. They have distorted some parts of Pal’s dissident judgment and applied it to their right wing discourse, such as “Japan’s innocence” and “the affirmative argument on the Great East War,” “criticism on the Tokyo Tribunal,” and “criticism on the masochistic view of history.” The serial arguments for example of Masaaki Tanaka, who advocates a reading of Pal’s arguments as “Japan is not guilty,” were especially influential and became a foundation for further misreadings of Pal which continue to the present.

38 *The Chūgoku Shimbun*, 4 November 1952.

A writer and social activist, Tanaka was born in 1911, and developed his activities under the influence of ultra-nationalists such as Yasaburō Shimonaka and Takeyo Nakatani in the pre-war period. In 1933, Tanaka joined the newly-established Greater East Asia Association that had Iwane Matsui (who was later executed for a class-A war crimes) as chairman. Tanaka was involved in editing the organization's paper, "Greater East Asianism." Tanaka also served as Matsui's secretary and was active as Matsui's right arm until Matsui was appointed Commander of the Japanese Expeditionary Forces sent to China in 1937.

In April 1952, soon after the lifting of media censorship by the U.S. occupation forces, Tanaka published *On Japan's Innocence: The Truth on Trial* in which he inserted his interpretation of Pal's dissentient judgment. In his book, Tanaka quoted Pal's arguments in a generally accurate way then added his commentary. For example, on the Nanjing Massacre, he faithfully quoted Pal's opinion then said, "it is a plain fact that the Japanese military committed the atrocity."³⁹

However, it should be addressed that his book title is not appropriate. It obviously deviated from the purport of Pal's argument. Firstly, since the object of Pal's judgment was only "the criminal responsibilities of class-A accused," the object in the book title ought to be "On class-A Innocence." It is also noted that Pal found criminal responsibility in the cases of class-B and -C accused of conventional war crimes. He did not discount all of Japan's alleged criminal actions.

Secondly, the term "innocence" should be clarified in that Pal found the Japanese accused "innocent" only in terms of international law. As quoted in this paper earlier, Pal said, "Tōjō and his group might have done many wrong things," and "The statesmen, diplomats and politicians of Japan were perhaps wrong, and perhaps they misled themselves," and found moral responsibility in the Japanese leaders. Therefore it is not accurate to say that Pal found no responsibility with the Japanese leaders for the acts by the Japanese army, or that they had no moral responsibility. From these points, the title should have been "On Class-A War Criminals Innocence," at the most.

Apart from the misleading title, I say the essential part of Pal's argument was addressed generally accurately in Tanaka's book. Although some problems are recognized, neither arbitrary deletions nor the interpretations by Tanaka were presented in his first book.

However in Tanaka's next book, *Justice Pal's Discussion on Japan as not Guilty*, published in 1963 (and the best selling book of the year), there are obvious misreadings, falsifications, phrases that induce readers' misunderstanding, intentional omissions of or obvious deviations from Pal's arguments.

For example, although in his dissentient judgment Pal said, "the hostility which commenced between China and Japan on 7th July 1937 cannot be denied the name of 'war,'" and said that Japan's acts after the Sino-Japanese War should be examined at the tribunal; Tanaka claimed in his book that it was said in Pal's dissentient judgment that the scope of the tribunal ought to be limited to the period

39 Tanaka 1952, p. 28.

between December 7, 1941 and Japan's surrender.⁴⁰

This is an obvious misreading or a falsification that seriously distorts Pal's argument. Furthermore, Tanaka completely ignored Pal's condemnation of the Chang Tso-lin Assassination Incident, the Manchuria Incident, and the establishment of Manchukuo. He also ignored the fact that Pal had confirmed the Nanjing Massacre and Japan's atrocities in the Philippines as facts and strongly criticized them. The sections in which Pal criticized these actions were among the most important in the development of his argument. Therefore, omitting these severe criticisms of Japan's actions, which Pal termed "devilish and fiendish," is a serious problem.

It was at this time that Tanaka began presenting his argument denying the Nanjing Massacre. Tanaka later became a main polemicist of the massacre deniers in 1980. Because *Justice Pal's Discussion on Japan as not Guilty* had arbitrary interpretations, omissions and misreadings of Pal's argument in favor of Tanaka's political intentions, the book influenced similar arguments around Pal's dissentient judgment.

In 1964, a year after the publication of *Justice Pal's Discussion on Japan as not Guilty*, literature scholar Fusao Hayashi published his book *Affirming the Greater East Asia War*, which was exposed to much criticism. Hayashi presented his view of "the one hundred years war of East Asia" in the book. Hayashi re-defined Japan's period from the end of the Edo Era to the end of the Greater East Asia War as a "history of resistance" of Japan and Asian countries against Western Imperialism. Hayashi used a chapter of his book to introduce Pal's Judgment with quotations from Tanaka's *Justice Pal's Discussion on Japan as not Guilty*. Hayashi closed the chapter as follows:

It is needless to talk about the Greater East Asia War again. Japan lost beautifully. Future historians would write and leave Japan's gallant fight, its brave spirit and its fate as a heroic chapter of the 20th century.⁴¹

Quoting Tanaka's commentary in *Justice Pal's Discussion on Japan as not Guilty*, "As long as Japanese people are indoctrinated by the sense of guilt that 'Japan was the country who carried out embarrassing aggressive wars to face the world,' Japan will never have its true glory," Hayashi discussed the value of Pal's judgment to favor his thesis of the war as just. He especially highlighted Pal's view on the outbreak of war between Japan and the United States to assert the Greater East Asia War as legitimate.

Facing an onslaught of revisionist interpretations of Pal's argument striving to justify the Greater East Asia War, it was historian Saburō Ienaga who responded. Ienaga published his paper, "The Fifteen-year War and Pal's Judgment," in 1967. "Pal's Judgment is being implemented as a perfect weapon to

40 Tanaka 2001, p. 165.

41 Hayashi 2006 (1964), p. 341.

strengthen a social atmosphere supporting the Greater East Asia War justifying theory which has become increasingly dominant due the coordinated push of political power and civil forces,” wrote Ienaga in the paper, pointing out the inaccuracy of the term “Japan’s innocence” and criticizing the superficial and arbitrary use of Pal’s Judgment. He also said that the judgment was written based on anti-communist ideology and its argument was “full of extremely distorted views.”⁴² [This argument was responded to critically by Richard Minear, and Ienaga and Minear debated the issue.]

However, arguments that used Pal’s Judgment in support of the right wing’s discourse continued to appear, and this trend actually increased, especially from the late 1990s when Japan’s rightward drift became pronounced.

In 1997, a memorial monument to Judge Pal was erected at Kyoto Gokoku Shrine. It was established by the Committee for the Establishment of Judge Pal’s Memorial Monument; whose chairman was Ryūzō Sejima, a former Kwantung Army Staff Officer and former Supreme Adviser of Itochū Corporation; and had Governor of Kyoto Teiichi Aranamaki and Kyoto City Mayor Yorikane Masumoto as members.

The establishment of the monument was followed by a similar monument at Yasukuni Shrine. Toshiaki Nambu, the shrine’s Chief Priest said at the unveiling ceremony, “It is my earnest wish that the drift of masochism will end, and the day when the spirits of war dead may rest in peace comes as early as possible.” In 2002 at Yūshūkan, a Japanese military and war museum within Yasukuni Shrine, Pal’s pictures and his remarks on his visit to Japan in 1952 were displayed in the context of criticizing “the view of the Tokyo Tribunal” and “masochistic view of history.” A 1998 movie titled “Pride—The Moment of Destiny,” directed by Shunya Itō, pushed criticism of the “unjust” Tokyo Tribunal to the forefront. By arbitrarily evoking Pal’s words and his dissentient judgment, the director presented a vision wherein Hideki Tōjō kept his pride. Fantasies and interpretations that were not based on historical truth were featured in the movie, and it became influential in developing right wing discourse in contemporary Japanese society along with the enchantment of the movement of the Japanese Society for History Textbook Reform. Pal also appeared in the cartoon *On War* by Yoshinori Kobayashi in the same year. In the cartoon, Pal’s argument was quoted in the context of justifying Japan’s Greater East Asia War. For example, Kobayashi drew a balloon from the cartoon of Pal’s face, which said, “All defendants are not guilty!” and included commentary as follows:

In the war / the United States / had absolutely no justice / Japan / had justice / of self-defense / furthermore of protecting the whole of Asia from the Western powers!

While the author of this paper does not examine the legitimacy of Kobayashi’s argument here, his use of Pal’s argument above was inaccurate. Kobayashi, though, continued to develop his position.

42 Ienaga 1973, p. 23–43.

In 2008, he published *The True Arguments of Pal*. In this cartoon, he put his criticism to the earlier-mentioned author's book *Judge Pal: Criticism of the Tokyo Trial and Absolute Pacifism* as an axis for his coercive implementation of Pal's judgment as meaning "Japan was not guilty."

As explained, Pal's judgment has been evoked in Japanese historical revisionists' discourse to justify the Great East War or to discredit the Tokyo Tribunal. Pal's position has been employed in attempts to give legitimacy to the history view of Japanese right-wingers beyond Pal's true thinking and intention.

The author explained the philosophy of Judge Pal as well as how Pal's opinions came to be misinterpreted and continue to be used with misleading readings.

The revisionists ignore the fact that Pal critically assessed Japan's invasions of Asia after the Manchurian Incident. They deliberately close their eyes to Pal's severe condemnation of Japan's war crimes. They, furthermore, do not mention Pal's passionate call for the establishment of an international agency, unarmed neutrality, and his opposition to Japan's remilitarization, and keep stretching selected elements of Pal's judgment to strengthen their discourse.

The crucial matter now is freeing Pal's dissentient judgment from the false framework built by the right wing, and reexamining its position academically. This effort will directly connect to building a platform for the people who oppose the promotion of baseless historical revisionism and the pervading rightward tilt in contemporary Japan.

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