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Pal's "Dissentient Judgment" Reconsidered: Some Notes on Postwar Japan's Responses to the Opinion

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Nearly six decades have passed since the International Military Tribunal for the Far East handed down its judgment, in which all the defendants were found guilty of one or more of the charges. Six out of the eleven judges submitted separate opinions, among which was the Indian justice Radhabinod Pal's totally dissentient one. Pal did not in the least affirm all of Japan's past actions; he simply held that the defendants' actions were not illegal in an indictable sense. And yet, inasmuch as the prewar and wartime picture of Japan painted by the official verdict came as a shock to the Japanese in the wake of World War Two, Pal's opinion was interpreted as another "judgment" delivered by an Asian judge and functioned as an alternative or a strong antidote for the view of the history generated by the tribunal. That is, whether approving of or refuting his opinion, one has referred to Pal's view as none other than "the argument for Japan's innocence." This essay will attempt to dissect how the post-war Japan has responded to Pal's opinion and discuss the significance of the opinion in the context of Japanese intellectual history.

Keywords: International Military Tribunal for the Far East, Tokyo War Crimes Trial, Radhabinod Pal, separate opinions of IMTFE, Pal's Dissentient Judgment, "the argument for Japan's innocence," Japanese intellectual history, postwar Japan

Introduction: How to Approach the Tokyo War Crimes Trial

The year 2006 witnessed the sixtieth anniversary of the opening of the Tokyo War Crimes Trial, officially known as the International Military Tribunal for the Far East. Some international symposiums on this unprecedented trial are being planned to be held in 2008, the sixtieth anniversary of the rendering of its verdict. In April 1946, the trial convicted twenty-eight former national leaders of Japan, political or military, and more than two and a half years later, in November 1948, sentenced seven to death, sixteen to life imprisonment, and two to shorter prison terms. During the trial, two died and one was excluded due to

mental disorder.

Based on Article Ten of Potsdam Declaration—"We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners"[1]—the tribunal was conducted as a major component of the Allied powers' occupation policies in Japan. In other words, the trial itself was constructed as a purely political and diplomatic event. However, the intellectual influence the trial exercised on the defeated nation of Japan cannot be overlooked. Functioning as one of the few sources of information for the Japanese, most of whom knew almost nothing about what had happened in the wartime period, the trial carried out the task of interpreting and providing an overview of the period. Thus, it presented the Japanese a framework for reconstructing an identity after the war. In a broad sense, the Tokyo War Crimes Trial can be regarded as an exercise in Orientalism, in Edward Said's usage of that word.[2] It enacted "a Western style for dominating, restructuring, and having authority over" Japan—and many people accepted its version of events and attributions of responsibility.

Like its Nuremberg counterpart, the Tokyo military tribunal has often been talked and written about. Until now, two main approaches have been taken, one from the viewpoint of international law, the other from modern history. These approaches are understandable and have generated such scholarly contributions as Richard Minear's pioneer work *Victors' Justice* (1971), which argued that the trial involved flagrant abuses of law and legal procedure and a highly questionable reading of Japanese history. On the other hand, it is regrettable that tribunal discussions have often been based largely on ideologies and sterile emotionalism. When an international symposium on the trial was held in Tokyo in 1983, the official pamphlet distributed succinctly sums up this deplorable situation:

> One stance stands on the side of the prosecution and the majority opinion judgement, accepting the conclusions of the tribunal without question. The other one, represented by the argument that the tribunal was victor's justice, stands on the side of the defense and totally rejects the tribunal. . . . The confrontation between these two positions is barren and unproductive.[3]

Every panelist at this symposium except the one from the Soviet Union conceded that the Tokyo trial was one-sided and flawed. No representatives from neutral countries were on the bench, let alone Japanese judges. The indictment contained charges based on "*ex post facto* law," such as "crime against peace" or "crime against humanity," together with "conventional war crimes." Also, "emphasis was placed on the hasty trial and punishment of the atrocities that had been committed by a defeated Japan."[4] As one historian observes, "consciously or unconsciously, we are all bound by this view [only Japan committed war crimes] and have not escaped its influence."[5] Some even contend that this interpretation of history leads to the "tendency to treat Japan as an 'ex-con.'"[6]

The positive side of the tribunal, however, should not be ignored. Some scholars of international law have attempted to locate its significance in the subsequent development of international law, contending, for instance, that the trial paved the way for establishing "a duty to disobey illegal orders from one's superiors." Even though one does not find the argument satisfactory, it could be said, "If there had not been a trial, there would have been

more people put to death. If there had not been a trial, there would not have been minority opinions." The best-known of those minority views is the one submitted by the Indian judge, Radhabinod Pal. This essay will discuss the significance of Pal's opinion in the context of the post-war Japanese intellectual history.

An Emergence of a Totally Dissentient Opinion

At Nuremberg, four nations—the United States, Britain, France and the Soviet Union—handed down judgments on German defendants, whereas in Japan seven other countries—Australia, New Zealand, Canada, the Netherlands, the Republic of China, the Philippines, and India—joined the "Nuremberg four." The biggest difference between the two international tribunals, perhaps, was the fact that unlike in Germany, no fewer than five separate opinions were submitted at Tokyo. The Australian judge, president of the tribunal, contended that in sentencing the defendants, the tribunal should have considered the fact that the Emperor had not been indicted. The French judge complained of procedural shortcomings. The judge of the Netherlands argued that no conspiracy existed and that five of the defendants were innocent. The judge representing the Philippines argued that several of the sentences were too lenient, not exemplary and deterrent. The other separate opinion, submitted by the Indian justice Pal, was not only voluminous—approximately 250,000 words and longer than the official judgment itself—but totally dissenting as well.

Based on his extensive knowledge of world history and international law, Pal interpreted Japan's actions in a completely different light from that of the official judgment. The essential points were that Japan fought wars to liberate Asia from Western colonialism and that all warring parties committed conventional war crimes, not only the defeated countries. In other words, Pal emphasized the necessity of considering the past actions of the Western powers prior to passing judgment on Japan. It was an interpretation unmistakably from the standpoint of a non-Westerner.

Pal's dissenting opinion consists of seven chapters: "Preliminary Question of Law," "What is 'Aggressive War'," "Rules of Evidence and Procedure," "Over-all Conspiracy," "Scope of Tribunal's Jurisdiction," "War Crimes *stricto sensu*," and "Recommendation." The judge began his opinion as follows:

> I sincerely regret my inability to concur in the judgment and decision of my learned brothers. Having regard to the gravity of the case and of the questions of law and of fact involved in it, I feel it my duty to indicate my view of the questions that arise for the decision of this Tribunal.[7]

Seeing that the International Military Tribunal for the Far East was established to try each of the twenty-odd Japanese leaders and that the tribunal found all the accused guilty, the phrase "my inability to concur in the judgment and decision of my learned brothers" might lead one to suspect that Pal found the defendants *not* guilty.

The Argument for Japan's Innocence

In fact Pal did argue that all defendants were innocent of all charges. He expressed his view in concrete words in the final chapter "Recommendation":

> For the reasons given in the foregoing pages, I would hold that each and everyone of the accused must be found not guilty of each and every one of the charges in the indictment and should be acquitted of all those charges.[8]

He thus insisted that "everyone of the accused" be found "not guilty," yet it should also be remembered that he was far from affirming wholesale all of Japan's past action. Pal only held that the defendants' actions were not illegal in an indictable sense. He simply regarded the Japanese defendants lined up in the courtroom at Ichigaya in Tokyo to be blameless for the war crimes that the Japanese military had allegedly committed at the front. Indeed, as to the war crimes committed in the Philippines, for instance, he expressly stated:

> I need not give in detail the incidents taking place since November 1944. We are given several incidents taking place during this period and certainly these were atrocious misdeeds. These are the instances of atrocities perpetrated by the Japanese Army against the civilians at different theatres during the entire period of the war. The devilish and fiendish character of the alleged atrocities cannot be denied.[9]

When the verdict was announced, very few people were able to become familiar with Justice Pal's judgment, for dissenting opinions were not allowed to be read in court or to be put into print then. During the Occupation period, the lengthy opinion was not translated into Japanese, probably because no Japanese publisher dared to negotiate with the GHQ on this matter. Consequently, the Japanese under the Occupation were provided with a very limited amount of information of the opinion. By some, Pal's dissentient view was not only received with enthusiasm, but was even interpreted as another "judgment" delivered by the Indian judge that Japan was by no means guilty. The view was thus received and approved of "selectively." Inasmuch as the prewar and wartime picture of Japan painted by the court came as a shock to the Japanese, though, such responses by Japan in the wake of the tribunal were, to some extent, natural and understandable. In other words, Pal's opinion functioned as an alternative or even as a strong antidote for the view of history presented by the tribunal.

Immediately after the Occupation ended in 1952, two condensed versions of the dissentient judgment were presented in translation in Tanaka Masaaki's 田中正明 *Nihon muzai ron: Shinri no sabaki* 日本無罪論：真理の裁き [The Argument for Japan's Innocence: Judging the Truth] (Taiheiyō Shuppansha, 1952) and Yoshimatsu Masakatsu's 吉松正勝 *Senshi o yaburu: Nihon wa muzai nari* 戦史を破る：日本は無罪なり [Refuting the History of the War: Japan was Innocent] (Nihon Shoseki, 1952), both of which sold exceedingly well. It is interesting to note that despite the fact that the original opinion by Pal did not contain the word "innocence" in its title, with only "Judgment" on the first page, each of the two compilers and translators employed the word "innocence" to try to attract the attention of potential readers.

Pal's opinion was thereby first introduced on a nation-wide scale as "The Argument for Japan's Innocence," the title seeming to imply that Pal affirmed all of Japan's past actions. As mentioned above, however, this was far from Pal's true intention. Since then the possibility that his opinion would serve as a wholesale indulgence to Japan's actions during the war has been realized in part. This trend has continued even into the present century—regrettably, in the view of this writer. In the late 1980s, for instance, Arnold Blackman wrote: "In recent

years, with the revival in Japan of nationalist sentiments, Pal has become a hero of sorts among the neo-ultras."[10]

In Pursuit of Absolute Truth

Indeed, Radhabinod Pal attempted to judge Japan independently of the one-sided view of history shared by most of the victorious nations. Still, as his condemnation of Japanese war crimes unmistakably suggested, he was far from pro-Japanese. He decided to embody his view because of his love of absolute truth, not because he was favorable to Japan. One could detect not a few examples of his brave words throughout the opinion.

As early as in the first chapter "Preliminary Question of Law," for instance, Pal criticized with bitterness the judicial basis of the tribunal:

> The so-called trial held according to the definition of crime now given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. . . . Formalized vengeance can bring only an ephemeral satisfaction, with every probability of ultimate regret.[11]

As a member of the British Commonwealth, India was on the prosecution side. It stood, that is, among the victors as the tribunal was created. This judicial setting notwithstanding, the sentences of Pal's that I have just quoted lead one to ask if he was in reality a judge representing a neutral nation. "Formalized vengeance" must have been the very first criticism of the tribunal to appear in print. In another chapter, Pal did not hesitate to criticize sharply one major country of the Allied powers:

> It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war.[12]

Although he did not explicitly name the country, with these words Pal explicitly censored the United States. It was a courageous accusation most typically expressing his contention that this tribunal was nothing but a case of unilateral "formalized vengeance," with Japan alone being subject to prosecution.

We should be wary of jumping to the conclusion that the opinion represented the collective will of his country, although he participated in the trial as a judge representing India. It is instructive to observe that the separate opinion of the Dutch judge, Bernard V. Röling, was a private production, and he fended off pressure from his home government not to release it. By no means could it be called the opinion of the Dutch government. Likewise, Pal's opinion cannot be referred to as the general view of his native country, but was truly his personal opinion.

Also, Pal rendered the verdict of innocence for all the defendants, to be sure, but should one regard the view as proof that Asia did not recognize the Tokyo tribunal or that

Asia approved of Japan's military operations against Southeast Asia as liberating colonies from the West, it would lead only to an overly simplistic conclusion. In short, one should be careful to read and treat his judgment not as the position of India or Asia but as the view of one Asian intellectual. Given this background, one can appreciate Pal's bravery all the more.

"A Courageous Shout of the Colored Races"

In the chapter entitled "What is 'Aggressive War'," Pal put forth his argument that the past actions of the Western powers should be considered before passing judgment on Japan's acts:

> I would only like to observe once again that the so-called Western interests in the Eastern Hemisphere were mostly founded on the past success of these western people in transmuting military violence into commercial profit.[13]

One could say that Pal incisively pointed out the essence of the history of the colonial domination by the Western powers. Lieutenant Commander Fuji Nobuo 冨士信夫, who attended most of the Tokyo trial as court clerk of the former Navy Ministry, was one of the fortunate few able to peruse Pal's judgment right after the pronouncement of the verdict. He said he borrowed a Japanese version from a counsel for one of the defendants and read it twice. He recalled he had got the impression, when he had read as far as the section "What Is 'Aggressive War'," that "[t]his is a courageous shout of the colored races against the white race!"[14] Fuji did not specify which part of the opinion had impressed him, but one could say that the above-mentioned citation is a case in point.

At the Tokyo trial, the racial prejudice of the Japanese was condemned by the prosecution. After quoting the gist of the prosecution's assertion, Pal presented his own view as follows:

> Much was sought to be made of what was characterized as A CHANGE IN THE JAPANESE EDUCATIONAL POLICY whereby it was designed to create in every youthful mind a feeling of RACIAL SUPERIORITY.
>
> I believe this is a failing common to all nations. Every nation is under a delusion that its race is superior to all others, and so long as racial difference will be maintained in international life, this delusion is indeed a defensive weapon. The leaders of any particular nation may *bona fide* believe that . . . the western racial behaviour necessitates this feeling as a measure of self-protection. . . . The ideal of asceticism and self-repression has not yet been adopted by any of the modern civilized nations.[15]

This observation by Pal calls to mind the following passage from Edward W. Said's *Orientalism*:

> It is therefore correct that every European, in what he could say about the Orient, was consequently a racist, an imperialist, and almost totally ethnocentric . . . human societies, at least the most advanced cultures, have rarely offered the individual anything but imperialism, racism, and ethnocentrism for dealing with 'other' cultures.[16]

Said maintains that all people in "the more advanced countries," not just Europeans, have been deeply involved in racism. Likewise, the Indian judge demonstrated that Japan was not the only modern civilized nation under the sway of ethnocentrism. Here, one can see an unmistakable coincidence between Pal and Said—between Pal's dissenting opinion, which totally disavowed the judgment of a tribunal that proved to be "a Western style for dominating, restructuring, and having authority over" Japan, and the Saidian concept of Orientalism, which criticizes the modality of non-Western domination by the West. Being an Asian, Pal thus presented a critique of Orientalism as applied to Japan.

Pal rendered the verdict of innocence for all the defendants, to be sure, but should one regard the view as proof that Asia did not recognize the Tokyo tribunal or that Asia approved of Japan's military operations against Southeast Asia as liberating colonies from the West, it would lead only to an overly simplistic conclusion.

Some Concluding Remarks

Before concluding this essay, I want to invite readers to ponder again the Japanese responses to Pal's dissentient judgment, in particular in the broader context of how Japan has accepted views of foreigners on Japan. Foreigners' interpretations of Japan sound fresh and instructive precisely because they present articulated observations and analyses of things that are taken for granted—and that thus escape detection—by the Japanese themselves. In appreciating these views, however, one need not put too much value on the background of foreign authors.

When introducing Pal's dissentient opinion, for instance, most people tend to point to his academic background, saying that Pal was the only judge in the Tokyo tribunal who specialized in international law. Not only a specialist, some go on to say, but an authority on the field as well. The truth is, however, Pal obtained his Ph.D. degree not in international law but in the philosophy of law in the Vedic age, that is, the ancient period of India. He did indeed publish a book entitled *Crimes in International Relations* (University of Calcutta, 1955), but that came out long after the closing of the Tokyo trial. In other words, in a strict sense, Pal was not a specialist in international law at the time of the trial. The significance of Pal's dissentient opinion lies not so much in his academic career but in his insightful analysis of international law and of Japan's past action in comparison to the rest of the world.

Despite the danger that Pal's opinion will always be abused by paying no heed to his real intention, the significance of the opinion in Japanese intellectual history cannot be overemphasized. It has given and will continue to give clues to ponder on the interpretations of Westerners on Japan. Radhabinod Pal should be remembered forever as one of the few pioneers who, with truly brave words, condemned not only the shortcomings of the international trial but the Orientalism toward Japan among Western countries as well.

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NOTES

1 *Tōkyō saiban handobukku* 1989, p.246.
2 Said 1978, p. 3.
3 Hosoya et al. 1986, p. 146.
4 Ibid., p. 68.
5 Ibid., pp. 103-104.
6 Ibid., p. 77.
7 Röling and Rüter 1977, p. 527.
8 Ibid., p. 1035.
9 Ibid., p. 981.
10 Brackman 1987, p. 392.
11 Röling and Rüter 1977, p. 540.
12 Ibid., p. 982.
13 Ibid., p. 627.

14 Fuji 1988, p.349.
15 Röling and Rüter 1977, pp. 759-760.
16 Said 1978, p. 204.

要旨

「パル判決」再考：戦後日本の受容の系譜を顧みる

牛村圭

東京裁判（極東国際軍事裁判）が判決を下してから間もなく６０年を閲す。日本人被告全員が有罪を宣告されたその法廷では、１１名の判事中６名が個別意見書を提出した。その中に被告全員の無罪を主張したインド代表判事ラダノビッド・パルの全面的反対意見書があった。パルは戦前戦中の日本の行為を全て是認したのではなく、起訴状の意味において被告は無罪であると断じたに過ぎなかった。しかしながら、東京法廷が描き上げた戦前戦中の日本像が敗戦直後の日本人にとり衝撃的であったため、パル意見書はアジア人判事が下したもう一つの判決と解され、法廷が提示した歴史観への強力な解毒剤として機能するにいたった。すなわち、パル意見書を肯定する側も否定する側も、パル意見書をほかならぬ「日本無罪論」と呼んできたのである。本論考は、戦後日本の思想史上でのパル意見書の意義を論じることを目指す。