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Abstract:

Agreement exists among both scholars and critics that the International Military Tribunal for the Far East following World War II, the so-called “Tokyo Trial”, was a highly politicized victor’s justice that exerted a minimal impact on the Japanese population’s collective memory of the atrocities committed during the war. Legal scholar Mark Osiel is one such critic. Osiel has argued that war trials must act as a pedagogical means of retelling the committed atrocities to the population at large and serve as a legal commemoration for a war-torn society to induce it to transform into a liberal democracy. This paper critically engages with Osiel’s argument by illustrating the Japanese perspective towards the Tokyo Trial, and argues that while the Tokyo Trial did exert a significant impact on Japanese historical consciousness, the pedagogical potential of the Trial was grossly undermined by Cold War politics, which engendered, according to Madoka Futamura (2008), a “cynicism and apathy” among the Japanese about the “justice” allegedly introduced by the Allies. Yet, this work does not intend to defend the Japanese failure in coming to terms with its past. Rather, it argues that it is not the judgments per se that evoke public debate over the issue of coming to terms with the past, but recognition and acknowledgment of the incompleteness of the process of trial-based justice that obliges those in the present to reinterpret and retry history.

"Beyond Legal Justice: Addressing Asia's Forgotten WWII Victims"

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population at large and serve as a legal commemoration for a war-torn society to induce it to transform into a liberal democracy. This paper critically engages with Osiel's argument by illustrating the Japanese perspective towards the Tokyo Trial, and argues that while the Tokyo Trial did exert a significant impact on Japanese historical consciousness, the pedagogical potential of the Trial was grossly undermined by Cold War politics, which engendered, according to Madoka Futamura (2008), a "*cynicism and apathy*" among the Japanese about the "justice" allegedly introduced by the Allies. Yet, this work does not intend to defend the Japanese failure in coming to terms with its past. Rather, it argues that it is not the judgments *per se* that evoke public debate over the issue of coming to terms with the past, but recognition and acknowledgment of the incompleteness of the process of trial-based justice that obliges those in the present to reinterpret and retry history.

In his 1997 inquiry into deliberate attempts to employ criminal trials to construct coherent collective memories and to transform war-torn societies into liberal democracies in the aftermath of state-sponsored atrocities, Mark Osiel discussed two forms of solidarity: mechanical and discursive. The concept of "mechanical solidarity" was analyzed in depth by Émile Durkheim (1933) who argued that mechanical solidarity can be constructed through a country's common history and shared values resulting from such a trial. Because the cultural value or morality of a society cannot be empirically demonstrated, Durkheim suggests that law is to be utilized as a visible symbol of society's solidarity as well as the reflection of the consciousness of the society.

Osiel, however, argued that such a conception of mechanical solidarity can be achieved only "when virtually all members of society share a particular view of justice" (p. 36) and therefore does not represent a realistic objective. Rather, he asserts that a criminal trial should

result in discursive solidarity where disagreements and debates over the outcome of the trial, including debates over who the guilty parties are, who the implementers of justice are and what responsibility the nation should bear, freely emerge and interact with each other and with all parties respecting the retributive element of justice concerning the past acts of wrongdoing (p. 51). In sum, courts no longer serve to reaffirm the democratic values of the community, but rather become public sites where different narratives and interpretations of the past compete for legal recognition (Brook 2001, p. 675). Osiel's contention was that through this legal process, criminal trials can shape the collective memory of past crimes by acting as a pedagogical agent (p. 2).

On 3 May 1946, chief prosecutor Joseph Keenan (U.S.) opened the International War Tribunal for the Far East in Tokyo with the following statement:

We must reach the conclusion that the Japanese people themselves were utterly within the power and forces of those accused and to such extent were its victims. With the permission of the tribunal we point out that the forces of occupation, who have the full power under the terms of surrender to implement its terms in such manner as they should see fit, have given full opportunity to the Japanese people to the world to observe the fair manner in which the same is being conducted.

Keenan's statement indicated that the Tokyo Trial aimed at not only prosecuting the individual wartime leaders responsible for war crimes, but also at constructing a particular historical narrative. This narrative was to present the Japanese people, along with the Emperor, as having been "misled" by the Imperial Army into launching and waging a destructive war. The natural conclusion of such a narrative is that the Japanese people themselves were victims of the totalitarian regime. Boister Cryer (2008) has argued that, as a result, Japanese war narratives remained inchoate by virtue of the absence of any mention of the role of Emperor Hirohito and

of the experiences of Asian victims of Japanese colonialism from the official legal and historical analyses presented by the trial (p. 313).

Many scholars, therefore, claim that the Tokyo Trial failed to offer an avenue whereby reconciliation between Japan and its neighbors could be achieved (Futamura, 2008, p. 112). Oisel agreed with this interpretation. As he noted:

Had the legal narrative encompassed this much wider range of war crimes, and had been staged to maximize sympathy for its victims (such as the comfort women, whose material prospects after the war became nil), the impact on Japanese opinion might have been greater. It might even have resembled that of the Auschwitz trials. (pp. 182-183)

In sum, these scholars posit that the crucial omission of Asian victims and the failure to officially recognize the Emperor's role within the official proceedings of the Tokyo Trial prevented it from serving its pedagogical purpose of recasting the war narrative and contributing to the development of a historical consciousness among the Japanese nation.

However, the subject of Japanese collective responsibility for its aggression in Asia did appear with regularity in the editorials of Japanese newspapers following the completion of the Tokyo Trial. The 5 November 1945 edition of *Ashia Shimbun* published an editorial examining the radicalization of the Imperial Army's lines of command, a process that ultimately sealed the fate of Japan and its Asian victims. It concluded as follows:

We failed to resist such an aggressive policy during the war... Therefore, we, the Japanese nation, cannot be exempted from the guilt and the responsibility for the destructive war. (Translated by author)

The Nanking Massacre was also discussed in detail by several national newspapers, including the fact that the incident had drawn the Japanese government severe criticism from the international community; yet official responsibility for the crimes was never admitted (Honjō, p. 42).

The judgments rendered by the war trials against the 25 military leaders were also the frequent subject of discussion, as was the inescapability of Japanese *in toto* responsibility for the war. Franziska Seraphim (2008) has shown that the term and idea of “war responsibility” had become a common feature of the national conversation of the time. She notes:

War responsibility was a socio-political issue at a time when democratization embodied everybody’s hope for a new and greatly changed society. It was a moral issue dictated by the war experience and postwar devastation, and it became an intellectual issue as academics, writers and critics debated the correct approach to this complex problem. (p. 208)

What these debates among the Japanese intelligentsia indicate is that, while the Allies and their Japanese collaborators sought to construct a “true” national identity in post-war Japan by absolving Japanese collective guilt and responsibility, many Japanese were in fact calling upon the nation to accept collective guilt and responsibility for the war as a central feature of their national identity. To be sure, it was apparent in the eyes of the Japanese population that the Tokyo Trial represented *Victor’s Justice*. Yet, these same Japanese critics refused to dismiss the trials in their entirety, attempting instead to draw from them a pedagogical resource with which to reckon the Japanese nation’s political, rather than legal responsibility.

Nonetheless, the issue quickly faded from the national post-war debate. First and foremost, the growing pressures exerted by the newly emerging Cold War mentality quickly dissolved any sense of “justice” brought by the Allies. As the situation on the Korean peninsula became of great international concern, several Japanese Class A war criminals were quickly rehabilitated and returned to the political arena, while lower-ranking Japanese soldiers and civilians, who had acquiesced to their commander’s orders in the name of the Emperor, were executed by the Allies outside of Japan. The stories of this latter group became an important source of much popular literature and film, gaining wide recognition in the process. This reality

served to generate *cynicism* and *apathy* among the Japanese population towards the justice allegedly introduced by the Allies in the name of civilization and peace (Futamura, 2008, p. 79). Thus, it was not necessarily the Tokyo Trial or its Victor's Justice nature *per se* that failed to bring about discursive solidarity in Japan. Rather, the realist international politics pursued in the post-Trial period disrupted Japanese aspirations of finding a reconciliatory way of dealing with the past. Given these Cold War realities, it can be argued that the apathetic and cynical Japanese perspective that evolved towards the Tokyo Trial would have emerged even if the trial had dealt with the full range of Japanese crimes. Even worse, any acknowledgement of the severity of these atrocities would have been grossly undermined through the quick political rehabilitation of those responsible for most of these crimes.

The processes of transitional justice often lead to the construction of legitimate and illegitimate victims. The former are honored and their pain purified through the promise of a country's transition from a dark-age to a new and unified future. The latter are excluded as *abject* of history. Friedrich Nietzsche described the production of this binary history through the distinctive concepts of "monumental history" and "critical history" and argues that it is the latter that evokes the moral imperative to re-examine history as follows:

If the man who will produce something great has need of the past, he makes himself its master by means of monumental history...and only he whose heart is oppressed by an instant need and who will cast the burden off at any price feels the need of critical history, the history that judges and condemns¹.

Indeed, contemporary Japan has begun discussing the issue of war responsibility and to recognize its failure of coming to terms with the past when presented with a critical history of

¹ Friedrich Nietzsche's *The Use and Abuse of History for Life*, 1957 cited from Shoshana Felman 2000, 1.

those who had been forgotten from its monumental history. These critical histories have appeared like a ghost following the end of the Cold War.

Cho-mun San, a 26 year old Korean guard of a POW camp controlled by the Imperial Army, was executed by the Allies for his abuse of Allied POWs. According to the prosecutors, he had fed POWs poor food which had made them sick. The fact was that it was the only food available at the time, not only for the POWs but also for himself. Before he was hung, he left a will that read: *“even as a spirit, I want to drift somewhere in this world... If not, at least, I want to remain in someone’s memory...”* (Takahashi, 2005, p. 84). His will only became discovered in 1991. South Korean human rights lawyers and activists who were examining the operation of the POW camp demanded that the Japanese government acknowledge his innocence in order to restore his dignity. While the Japanese government rejected responsibility for Cho-mum’s death, his story served to inform the Japanese public that Koreans as well as Japanese had been executed for unjust reasons, evoking within the public a sense of the impossibility of achieving a historical settlement of his death. Cho-mum’s case also served to illustrate the complex situation facing colonial subjects, who while not being treated as equal human beings by their colonial master could nonetheless be charged with equal or even more severe criminal charges.

Likewise, in the Women’s International War Crimes Tribunal of 2000 in Tokyo, one former comfort woman, being at a loss for words to express her pain, suddenly pulled off her traditional Korean dress and exposed the scar on one of her breast that had been cut off by the sword of a Japanese soldier. The audiences in the court, despite their will to avert their eyes from the painful sight, were compelled to see her lost breast as signifying her incapacity to speak as well as the unrepresentability of the violence committed upon her body. Through such actions, the audience recognizes the very fact that her memory and pain cannot be conveyed through

words or names. Legal terms like “crimes against humanity” or “war crimes” only intimate in vain these traumatic experiences. The emergence of these critical histories and memories re-opens the past, disrupts our understandings of justice, law and humanity, deconstructs our conceptions of the past, and compels us to fill the gaps of what the legal processes has ignored, betrayed or failed. As Mario Di Paolantonio (2001) has noted:

The meaning of justice itself is “incomplete”, a promise to remember what was never a presence; a promise to write and attempt to right what can never fully be re-presented within the possible present protocols of understanding. (p. 470)

Viewing justice through this optic of incompleteness, rather than as a success to be achieved through the successful completion of a trial, serves to maintain the moral imperative of retrying, reinterpreting and rewriting history. Through this process, we seek to find out how and what the stories of past victims signify to us and how we can address their loss.

By its very nature, law combs through mountains of evidence, seeking to apply the most “appropriate” term for each case based upon this evidence and the precedents of previous crimes and the experiences of legal predecessors. And when it was completed this self-proscribed task within its own established protocols, it proclaims that justice has been served. Thus, law seeks the establishment of a legacy and the construction of a monumental spectacle for future use.

However, law cannot always accommodate or respond to those whose experience cannot be shaped into words because of the incommensurability, untranslatability and thus unrepresentability of their lived experience. Their memories thus do not become incorporated into the construction of monumental history because of its unrepresentable nature; nonetheless its presence never completely disappears. These memories are sensed, but ignored until such a time presents itself where they emerge suddenly and cry out for remembrance. Employing the case of Japan, this paper has argued that it is not the judgments *per se* that evoke public debate over the

issue of coming to terms with the past, but the very incompleteness of the legal justice that evokes within us a sense of responsibility to respond to those forgotten from history. Events such as the unearthing of the will of a Korean POW camp guard or the inability of a former comfort woman to express her experience trigger us to go beyond the realm of legal justice and prompt us to imagine the dead others whose memories and wills have remained unknown. Through their actions, we come to recognize the imperative of retrying and reinterpreting history by keeping history open to further interpretations, revisits and acts of mourning.

Reference

- Brook, Timothy. 2001. "The Tokyo Judgment and the Rape of Nanking" *The Journal of Asian Studies*, August 60 (3): 673-700
- Cassess, Antonio and Roling, B.V.A. 1993. *Tokyo Trial and Beyond: Reflections of a Peacemonger*, Polity Press (Cambridge U.K)
- Chang, Maria Hsia and Barker, Robert. P. 2001. "Victor's Justice and Japan's Amnesia: The Tokyo War Crimes Trial Reconsidered" *East Asia*: 55-84
- Cryer, Boister. 2008. *The Tokyo International Military Tribunal* Oxford University Press (U.K)
- Di Paolantonio, Mario. 2001. "Pedagogical Law and Abject Rage in Post-Trauma Society" *Cultural Values*, October 5 (4): 445-476
- Durkheim, Emile. 1933. *The division of labor in society*, Trans. George Simpson, Free Press
- Felman, Shoshana. 2000. "Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal meaning in the Wake of the Holocaust" *Theoretical Inquiries in Law*, 1(2): 1-43
- Futamura Madoka. (2008). *War Crimes Tribunals and Transitional Justice*, Rutledge (U.K).
- Gibney, Frank. (2006). *SENSO: The Japanese Remember the Pacific War: Letters to Editors of Asahi Sinbun* M.E. Sharpe
- Graham, Shane. (2003). "The Truth Commission and Post-Apartheid Literature in South Africa" *Research in African Literatures*: Spring 34 (1): 11-30.
- Honjō Toki. (2008). The Limits of the Tokyo Trial, and The Tokyo Trial and Historical Consciousness (Ed). Yamada Akira *The Tokyo Trial: the Root of the Problem of Historical Consciousness* 歴史認識問題の原点・東京裁判 Gakushu-no Tomo sha 学習の友社

- Kuramitsu Shigeaki. (2008). What is the Tokyo Trial? (Ed). Yamada Akira. *The Tokyo Trial: the Root of the Problem of Historical Consciousness* 歴史認識問題の原点・東京裁判
Gakushu-no Tomo sha 学習の友社
- Osiel, Mark. (1997). *Mass Atrocity, Collective Memory, and the Law*. Transaction Publishers
(New Brunswick, New Jersey)
- Seraphim, Franziska. (2008). “Negotiating War Legacies and Postwar Democracy in Japan”
Totalitarian Movements and Political Religions, June-September 9 (2-3): 203-224
- Singer, P.W. (2004). “War, Profits, and the Vacuum of Law: Privatized Military Firms and
International Law” *Columbia Journal of Transitional Law* 42 (52): 521-550
- Takahashi Tetsuya. (2005). *The War Responsibility*. 戦後責任論 Koudansha Gkujyutu-Bunko
Japan. 講談社学術文庫
- Ueno Chizuko. (1999). “The Politics of Memory: Nation, Individual and Self” *History &
Memory*: 129-152.
- Yamada Akira. (2008). The Tokyo Trial and the Emperor System. (Ed). Yamada Akira *The
Tokyo Trial: the Root of the Problem of Historical Consciousness* 歴史認識問題の原点・
東京裁判 Gakushu-no Tomo sha 学習の友社