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SOME TRENDS OF LEGAL THOUGHT AND NATURAL LAW STUDY IN JAPAN

It is a remarkable event in postwar Japan that jurists have taken a considerable interest in the problems of legal philosophy. Studying these problems, some jurists—only a few, but some of the more influential professors of the law schools—have turned to the principles of natural law. It is my purpose to survey this situation in Japan. Before describing it, I shall sketch the earlier systems of Japanese moral and legal thought.

I. HISTORICAL BACKGROUND

In her history Japan has received various systems of thought of foreign origin, and each is still alive as a spiritual energy in her social life. These foreign systems were added to a primary layer of traditional thought—a naturalistic and secular sentimentalism. This layer formed in the Japanese subconscious an ultranationalistic tribal patriotism. The first foreign influence was Buddhism, which became the national religion soon after its appearance in Japan and enjoyed political protection until Japan adopted a policy of freedom of religion about a century ago. With the coming of freedom of religion, Buddhism's deterministic tenets lost their moral influence, though Buddhism still appears to be alive in customs of everyday life. Confucianism, the second foreign current, was officially adopted as the national morality after the decline of Buddhism, and, with the establishment of the feudal regime, it became an authoritative morality, particularly for the ruling and the intellectual classes. The naturalistic character of its ethics, like that of Stoicism, was adaptable to the traditional sentimentalism of the Japanese. But its ethical norms, in Japan as in China, where it originated, were best suited to a feudal age. The last foreign influence was Christian morality, which was brought into Japan about four centuries ago when she began to open the door to European nations and, through the Christian missionaries, to their civilization. But until freedom of belief and of thought was recognized by the Meiji Reform, Christian morality could not have a large influence upon the people; and Christians suffered hard persecution by the Tokugawa regime. Even under such conditions, however, a few scholars, who were informed of European culture through Dutch or Portuguese traders and missionaries, wrote books concerning ethics from the viewpoint of natural law.¹

When Japan changed her diplomacy to open the door to the Christian countries after the Meiji Reform, a new situation was brought about; in order to take part in the modern civilized world, Japan began to develop modern

1. Among a very few writers who at that time adopted in part the Christian natural law idea, Ando Shoeki (1701-?) has been made well known by the work of E. HERBERT NORMAN, *ANDO SHOEKI AND THE ANATOMY OF JAPANESE FEUDALISM* (1949). For the first attempt to treat his natural law thought see Yoshinori Inagaki, *Ando Shoeki and Natural Law Thought*, 17 *ACADEMIA* (1957) [Journal of Catholic University of Nagoya (Nanzan)].

legal institutions such as constitutional law, liberating herself from the ideological and religious restraints of the ancient regime. As the result of these reforms many ideas were brought into Japan from America and Europe. In the making of the Constitution, those who desired to build up the democratic regime opposed the conservatives by standing on the notion of natural rights which had developed in Europe in the time of the Enlightenment.² At the same time, particularly in formulating the civil code, there arose a bitter controversy between proponents of English law and proponents of French law. This controversy ended with the defeat of the latter and, therewith, the natural rights ideas of French origin.³ Soon after that, proponents of German law began to flourish, and, finally, German public law was almost wholly received by Japan because it seemed most adaptable to the Meiji Regime's desire to establish a constitutional monarchy like that of the German Empire.⁴

After the final victory of German law, most of the jurists who were engaged in studying and teaching at the law schools followed the theories of the so-called

2. In Japan the dispute over the making of the Constitution was not as to whether it should be done or not, but as to whether it should be done sooner or later. The Meiji Government from the beginning had the opinion that a constitution should be drafted after due preparation; for this purpose it sent, in 1882, Hirobumi Ito to Europe, where he studied the German (Prussian) Constitution under the guidance of Professor Stein. In opposition to this, many writers and statesmen who were versed in European revolutionary thought insisted on establishing the national assembly at once in order to discuss the drafting of the Constitution. Among them, Taisuke Itagaki, Tanecomi Soejima, and Shimpei Eto were statesmen who lost political power as the result of their unsuccessful *coup d'état*. The following participated in the drafting dispute, claiming that the people's constitution should be drafted by the people's parliament: earlier, Shinichiro Tsuda, author of *TAISEI KOKUHO-RON* [Constitutions of Western Countries] (1868), and Hiroyuki Kato, author of *RIKKEN SEITAI RYAKU* [Outlines of Constitutional Government] (1868) and *SHINSEI TAI* [On True Government] (1870); and later, Edamori Ueki, the theoretical leader of the so-called "Jiyu-minken-undo Movement" [Movement of People's Government], and Kentaro Oi and Tatsui Baba, two very radical republicans.

3. As early as 1872, Shimpei Eto, a minister of the Judicial Department at that time, intended to codify a Japanese Civil Code by receiving the Code Civile as a whole, and translated it with the cooperation of Mizukuri Shinsaku. The next year, the Meiji Government invited G. E. Boissonade from France to be an adviser on legislation. Under his leadership a draft of a Civil Code (which we now call the old civil code) was completed in 1890. At that time Tokyo Law School, founded in 1871 (now Tokyo University), and Tokyo Hoogakuin, founded in 1885 (now Chuo University), taught mainly English law; and those jurists who had been taught, and were familiar with, English law strongly opposed enactment of the Civil Code draft by issuing a statement in 1889 that the draft was thoroughly biased toward French law, without consideration of the other systems of law in civilized nations. The leaders of this opposition were Masaaki Tomii and Chyu Egi. As a result of it, enactment of the draft in 1893 was postponed, and a new draft, based upon the first draft of B. G. B. (German Civil Code), was hastily made in 1897 under the leadership of Nobushige Hozumi, Kenjiro Ume, and Masaaki Tomii. A Commercial Code draft, also shaped by Boissonade, suffered from the same opposition as did the Civil Code draft, and finally the Commercial Code also was received from German law.

4. See on the Constitution: MASATSUGU INADA, *MEIJI KENPO SEIRITSU-SHI* [History of the Formation of the Meiji Constitution] (1960-1961). See on the Civil Code: TORU HOSHINO, *MINPOTEN RONSO* [On the Controversy over Codification of the Civil Code] (1949); TORU HOSHINO, *NIPPON NO HOGAKU* [History and Future of Jurisprudence in Japan] (I. Suehiro ed. 1950). See on the Criminal Code: KICHISABURO NAKAMURA, *KEIHO* [Criminal Law] (1960).

Begriffsjurisprudenz, which was the prevalent tendency among German jurists at that time. Most of them viewed legal philosophy as *Allgemeine Jurisprudenz*, similar to the Analytical Jurisprudence of Austin. Nobushige Hozumi, who founded the Chair of Legal Philosophy at the Law School of Tokyo University, explicitly declared that his legal philosophy should be properly called general — or analytical — jurisprudence.⁵ In spite of this tendency, natural law theories were cultivated by a few specialists in French law. Meanwhile, Social Darwinism gradually gained favor among the jurists, who were influenced by the social theories of Spencer and S. H. Maine.⁶ It was natural that those jurists who took such a positivistic view as that of analytical jurisprudence should adopt Darwinism in their social philosophy.

Through the first decade of the twentieth century most jurists were entirely indifferent to legal philosophy; it was their professional task, they believed, to engage solely in interpreting and collecting the rules of the given positive laws or of the cases decided in court. Beginning in 1920, however, new trends of *Freirechtsbewegung* or of *Rechtssoziologie* were imported from Germany, and the newly developed legal philosophy of Neo-Kantianism brought about a limited renaissance of legal philosophy in Japan.⁷ The theories of Lask, Stammler and Radbruch were most studied. Stammler's theory of "natural law with variable content" had not so great an influence as that of Radbruch's relativism and Kelsen's pure theory of law. The natural law theories of the French jurists, such as Charmont, Geny, and Sareille, were also given some attention. At the same time the sociological positivists began to develop under the influence of Jhering, Ehrlich, and Marx.⁸

In this confused situation, where various trends of legal thought coexisted, Dr. Kotaro Tanaka, a former professor of commercial law at Tokyo University, began his academic work based on the natural law idea, and attempted to criticize Neo-Kantianism and sociologism. Since that time, he has continually devoted himself to making the natural law idea a solid ground for not only the

5. NOBUSHIGE HOZUMI, *HOSO YAWA* [Everynight Speeches on Legal Topics] (1916).

6. Darwinism was introduced in Japan early (about 1877) by natural law scientists and philosophers who had studied in Europe and America. But the most influential Social Darwinist was a jurist, Hiroyuki Kato, who wrote *JINKEN SHINRON* [A New Theory of Human Rights] (1882), in which Tenno's supreme political power was defended by applying a doctrine of "survival of the fittest." See his more systematic writing on Social Darwinism, *DOROKU HORITSU SHINKA NO RI* [On Evolution of Morals and Law] (1894). Later, Hozumi, who was also a founder in Japan of comparative and historical study of law under the influence of Maine and Spencer, wrote *HORITSU SHINKA-RON* [Theory of Evolution in Law] (1924-1926).

7. Jurists who followed the new German philosophy were Seiichiro Ono, author of *HORIGAKU TO BUNKA NO GAINEN* [Meaning of Jurisprudence and Culture] (1928); Kyo Tsuneto, author of *HIHAN-TEKI HORITSU-TETSUGAKU NO KENKY* [Study of Kritische Rechtsphilosophie] (1924); Kaku Kuroda, author of *WIEN GAKUHA NO HORITSUGAKU TO SONO SHO-MONDAI* [Jurisprudence of the Wiener School and Its Problems] (1927).

8. The founder and leader of sociological positivism in legal study in Japan was Itsutaro Suehiro. He was the first man of *Freirechtsbewegung* in Japan and challenged the then prevalent conservative *Begriffsjurisprudentist* tendency. Eiichi Makino, a former professor of criminal law at Tokyo University, learned his sociological view of the law from French sociologists and jurists.

legal, but also the moral and cultural, life of Japan.⁹

After about 1930, however, when Japan came under the absolute despotism of the Tenno Regime, it became taboo for jurists and publicists to criticize legislation or state policy. As this taboo meant nothing but the surrender of any philosophical treatment of law or state, it led naturally to the degeneration of legal philosophy in general, except that of Hegel and of Kelsen. In Germany, Hegel's theory of state and law, it may be, contributed to the Nazis' ideology, but in Japan an irrational myth of the nation did not need any kind of state-philosophy. Hegel was thus not needed, but Kelsenism had, in a negative way, its *raison d'être* for the Japanese intellectual. Although Kelsen's theory lacked content, its subtle logical methodology could supply the external forms of a scientific system. It was utilized either as a shelter from ideological control or as a disguise for scientific construction.¹⁰

Even under such strict ideological control, Tanaka made an effort to apply and develop natural law ideas not only in the area of commercial law, but in that of legal philosophy. In 1934 he successfully completed his great work, *World Law*, which was highly thought of by all jurists, even his opponents.¹¹ This was an epoch-making work, a history of natural law which went far beyond the mere importing or digesting of theories which had originated in foreign countries.

II. NATURAL LAW STUDIES AFTER WORLD WAR II

It will be understood from the above historical survey that, although Japan succeeded in modernizing herself by receiving the Western social, political, and legal apparatus after the Meiji Reform, she could not give it life. Similarly, in the domain of legal thought no true treating of legal philosophy had been tried, and the position of legal philosophy at the law schools had not been established before the War. It is no wonder that the ideas of natural law could not inspire and attract the jurists here.

After World War II, however, Japan adopted the new Constitution and radically and broadly amended her civil and other codes to accord with it. The internal, as well as external, change had such a great influence upon the Japanese people that they could accept a new way of thinking and adopt a mental attitude common to all the world. Until the end of the War they could not give much weight to ideas beyond the ideological absolutism in which they had found their moral and legal standard. But the experience of the defeat in war with its terrible losses broke their belief in absolutism and imposed upon them the task of finding a new moral standard based upon something else than the state or the nation.

As in many countries, so in Japan, Marxist ideology sifted as a draught into the vacuum of thought immediately after the War, and some part of the intellec-

9. See KOTARO TANAKA, *HORITSU-TETSUGAKU RONSHU* [Essays on the Philosophy of Law] (vol. 1, 1942, vol. 2, 1945); TANAKA, HO TO SHUUKYO TO SHAKAI-SEIKATSU [Law, Religion and Social Life] (1927); TANAKA, KYOYO TO BUNKA NO KISO [The Basis of Culture and Civilization] (1937).

10. E.g., KISABURO YOKOTA, *KOKUSAI-HO NO HO-TEKI SEISHITSU* [Legal Nature of International Law] (1944).

11. TANAKA, *SEKAI-HO NO RIRON* [Theory of World Law], 3 vols. (1932-1934).

tual class ran radically to the extreme of criticizing and negating not only the past but also the present social and legal order of the state. Marxist political power also increased in Japan by taking advantage of the economic difficulties of the time. Yet at the same time, emancipated from the ideological domination of the myth of state or nation, the people began to find their morality in the common beliefs of all men. The newly established Constitution, founded on such beliefs, became an important factor in developing the ideas of natural law among them.

Most of the jurists, confronted with the Constitution to which the civil law had to be conformed, began to consider positive law not only from the view of mere juridical logic hitherto deemed orthodox, but also from the viewpoint of legal philosophy. This approach led naturally to the remarkable phenomenon of virtually all jurists feeling that they should have an interest in the study of legal philosophy. Under such auspicious circumstances, the Japan Legal Philosophy Association was founded in 1948. Immediately after its inauguration the Association made preparations for publishing its *Quarterly Review*. Its first volume was published under the subtitle *Natural Law and Positive Law*, a title which reflected the common concern of all jurists at that time.¹² Though before the War there had been only a few professors of legal philosophy, after the War its study attracted many young postgraduate students, who studied under leading professors such as Tanaka, Tsuneto, and Otaka. Those students are now teaching as professors at the several law schools where legal philosophy was added after the War as a necessary subject in the newly established system of legal instruction.¹³

As the new Constitution was adopted on the pattern of European and American democracy, which was ideologically based upon the idea of natural rights elaborately developed in the Enlightenment, most of the jurists and legal philosophers have had no concern except to study the idea of natural rights in Locke, Pufendorf, Rousseau and others. In 1951 there appeared an excellent work by Dr. Kojiro Wada, a professor at Waseda University, containing almost all the theories of natural law writers from Grotius to Rousseau,¹⁴ and this first attempt in Japan to read and trace their theories in the original texts was much valued. In explaining and criticizing these natural law theories, Wada adopted the view that they show the progress of the independence of man being emancipated from treatment as *ancilla Dei*. Such a view of natural law is generally accepted in Japan by almost all political and legal philosophers. For example, Kyo Tsuneto's article, "Fundamental Principles of Democracy in the Area of Public Law," takes this view.¹⁵ Tomoo Otaka's article in the same Symposium also

12. 1 HOTETSUGAKU SHIKIHO [Quarterly Review of Legal Philosophy] (1947). This volume contained four articles: K. Kimura, "Natural Law and Positive Law"; K. Tanaka, "Legal Philosophy of Solovieff"; K. Wada, "Law of Nature and Historical School of Law"; T. Otaka, "Metaphysics and Empiricism in Legal Philosophy." It also contained several book reviews.

13. E.g., Jyunichi Aomi (Tokyo Univ.), Tsuneo Hirano (Nagoya Univ.), Kazuo Amano (Ritsumeikan Univ., Kyoto), Mitsukuni Yazaki (Osaka Univ.), Seiichi Anan (Osaka City Univ.), Akira Mizunami (Kyushu Univ.).

14. KOJIRO WADA, KINDAI SHIZENHO-GAKU NO HATTEN [Development of Modern Natural Law Science] (1951).

15. In MINSHU-SHUGI NO HÔ-GENRI [Legal Principles of Democracy], edited by Tomoo Otaka. Also contained in this volume were: Otaka, *Idea of Law in Democracy*; Wagatsuma, *On Civil Law Principles*; Yokota, *On International Law Principles*.

seems to follow such a humanistic or secularized notion of natural law, while he seeks to found democracy upon the relativism of Radbruch's legal philosophy.¹⁶

As to modern natural law theories, there have appeared innumerable articles since the end of the War. Among them, the articles concerning modern natural law theories (of England by Professor Inoue, of Germany by Professor Yazaki, and of France by Professor T. Tsuneto) in the third volume of *Lectures on Legal Philosophy* should be taken as the best summaries on this theme.¹⁷ In 1953, Yazaki published a book in which the natural law theories of Pufendorf and Wolff were traced and examined with respect to the formation of modern civil society.¹⁸ At about the same time, Hegel's *Rechtsphilosophie* and *Naturrecht* were translated into the Japanese language by Hirano.¹⁹

In spite of the greater interest in natural law ideas of the modern period than in those of the Middle Ages, a small group of Catholics interested in the natural law idea had developed under the guidance of Kotaro Tanaka before the War. Under his guidance and influence, not a few jurists came to have an understanding of the Catholic natural law idea, and, it is important to note, they came to realize how it differs from the extremely rationalistic modern conceptions. As early as 1930, Tanaka wrote about the natural law theory of St. Thomas in his well-known article, "The Past History of Natural Law and its Contemporary Significance," in which he explained how the openness of St. Thomas's natural law theory could give it vitality today even when under bitter attack from positivism.²⁰ But such revaluation of Thomas's natural law has not been so much accepted by the jurists as his philosophy in general has been accepted by the philosophers.²¹

It has been more interesting for modern jurists to study St. Thomas's legal philosophy through contemporary neo-Thomistic theories of the natural law or of the state than to understand it in the original Latin text. Those who have studied French law have long used such an approach. Even before World War II, the legal theories of Renard, Hauriou, and Geny were known here, and Mari-

16. Otaka, *supra* note 15.

17. LECTURES ON LEGAL PHILOSOPHY [Hotetsugaku Koza] 8 vols., edited by Otaka, Minemura, and Kato. Since publication of the first volume in 1956, seven additional volumes have been issued, despite a delay caused by the sudden death of Dr. Otaka in 1956. The LECTURES are edited under the following plan: Vol. 1 is devoted to FUNDAMENTAL THEORY OF LAW; vols. 2-5 to HISTORICAL DEVELOPMENT OF LEGAL THOUGHT; vols. 6-8 to LEGAL PRINCIPLES IN THE AREA OF POSITIVE LAW.

18. MITSUKUNI YAZAKI, SHIZENHO [Natural Law] (1953).

19. HEGEL, SHIZENHO-RON [*Über die wissenschaftlichen Behandlungsarten des Naturrechts*] (Hirano transl., 1948).

20. Tanaka, *Shizenho no Kako oyobi sono Gendai-teki Igi*, reprinted in TANAKA, 2 ESSAYS ON THE PHILOSOPHY OF LAW (1944).

21. From year to year, the number of philosophers who study and accept Thomistic philosophy has increased, and some volumes of Aquinas's work have been translated into the Japanese language: K. KOKUBU, NINGEN-RON [Treatise on Man] (transl. of I SUMMA THEOLOGIAE, qq. 75-89) (1949); V. M. POULIOT and A. KUSAKA, YU TO HONSHITSU NI TSUITE (transl. of *De Ente et Essentia*) (1955); an earlier translation of the same work had been issued by S. Takakuwa in 1935; more recently, Y. INAGAKI, HO NI TSUITE [On Law] (transl. of *De Legibus* of II SUMMA THEOLOGIAE qq. 90-97) (1958). For a full listing of Japanese study on St. Thomas and scholastic philosophy, see SCHOLASTIC BIBLIOGRAPHY IN JAPAN, ed. by Inagaki (Catholic University of Nagoya, 1957).

tain's legal and political philosophy became widely known among the jurists after the War. Dr. Ryuzo Maitani was an early exponent of the "institution theory" of Renard and Hauriou, and he did not merely introduce it, but developed from it a unique juridical construction concerning commercial contracts. In his valuable book, *Law of Standardized Terms* (1954), he tried to reconstruct the old-fashioned individualistic contract theory by applying "institution theory" to phenomena in the area of commercial law which could not be handled merely by the free contract principles of modern civil law.

Jacques Maritain's work in the area of philosophy had been known here before the War by only a few Catholic philosophers. After the War, however, several of his works on legal and political philosophy, upon being introduced or translated, immediately attracted the eyes of all.²² The significance of his natural law theory of the state and politics was well analyzed by Kotaro Tanaka in his article, "Political Philosophy of Jacques Maritain."²³ It is interesting to consider why the legal and political philosophy of Maritain has drawn so much attention from the jurists in postwar Japan. The fact that his works cover almost all the fundamental principles of the new Constitution of Japan is, I suppose, the reason for this attentiveness, for all jurists in Japan today are trying to discover how to harmonize human rights and the common good—the two legs upon which the new Constitution of Japan stands. Excepting those who stand only on one or the other, it has seemed essential to most jurists in their judicial work concerning the Constitution to integrate these principles.

Even before the War, natural law theories in America were known here through such works as Haines' *The Revival of Natural Law Concepts* (1930), and Wright's *American Interpretations of Natural Law* (1931), and since the War, substantial attention has been paid to the remarkable growth of legal philosophy in America. In prewar Japan teachers of legal philosophy in the law schools said nothing about American legal philosophy except a few words on the pragmatist legal theory of Roscoe Pound.²⁴ After the War, Japan's legal philosophers were much interested in sociological or experimental jurisprudence as well as academic work in natural law jurisprudence. Two recent articles by Professor Hayakawa, "Pragmatism and Neo-realism" and "Development of Legal Philosophy in Postwar America," provide a good sketch of natural law tendencies in

22. MARITAIN, KINDAI-SHISO NO SENKU-SHA [*Trois Reformateurs*] (trans. by S. Iwashita, 1936); MARITAIN, KEIJIJYO-GAKU JYORON [*Introduction Générale à la Philosophie*] (trans. by Y. Yoshimitsu, 1943); MARITAIN, SHUKYO TO BUNKA [Religion and Culture] (trans. by Yoshimitsu, 1944); MARITAIN, JINKEN TO SHIZENHO [*Les Droits de l'Homme et la Loi Naturelle*] (trans. by I. Otsuka, 1948); MARITAIN, KOKYO-FUKUSHIRON [*La Personne et le Bien Commun*] (trans. by Otsuka, 1957).

23. Tanaka, *Jacques Maritain no Seiji-tetsugaku*, in TSUNETO HAKASE KANREKI KINENRONSHU [Commemorative Collections on the Sixtieth Birthday of Dr. Kyo Tsuneto] (1949).

24. Most of Pound's works had been translated into Japanese before the War: EI-BEI-HO NO SEISHIN [The Spirit of the Common Law] (1926); HORITSU-TETSUGAKU NYUMON [An Introduction to the Philosophy of Law] (1926); HO TO DOROKU [Law and Morals] (1928); HORITSU-SHIKAN [Interpretations of Legal History] (1931). After the War there appeared HO NO NINMU [The Task of Law] (1954) and SHAKAIGAKU-TEKI HOGAKU [a translation of both New Paths of the Law and Justice According to Law] (1957).

America, although Hayakawa himself is opposed to natural law, and praises the positivism of experimental jurisprudence.²⁵

German legal philosophy has drawn much attention in Japan, partly because of Japanese jurists' traditional acquaintance with it and partly because of the renaissance in postwar Germany of natural law both in Thomistic and in existentialist expressions. In particular, many debates took place concerning the conversion of Radbruch from "relativism" to "natural law."²⁶ In "Juridical Positivism and Natural Law Theories in Postwar Germany," Yazaki pointed out the causes of the so-called natural law revival in postwar Germany and concluded that Radbruch could not be an exception to the general state of mind of postwar German jurists who had experienced revulsion from the Nazis' ruthless juridical positivism.²⁷ Otaka also described Radbruch's conversion, in his article on "Natural Law Ideas in Postwar Germany,"²⁸ and his preface to the Japanese translation of Radbruch's *Vorschule der Rechtsphilosophie* is valuable and remarkable in its important conclusion that no other idea or system of thought but natural law could have been relied on by the German people as a check on the absolutist rule of the Nazis. Both Mitteis's *Naturrecht* and Coing's *Grundzüge der Rechtsphilosophie* (1950) were reviewed here soon after their publication.²⁹ Further, Fechner's *Rechtsphilosophie* drew the attention of legal philosophers. Other works of German natural law writers, such as those of Wolf, Ritter, and Welzel, are also briefly mentioned in "Contemporary Natural Law Theories" by Professor Yoshiyuki Noda.³⁰

In the field of French jurisprudence, Dr. Naojiro Sugiyama, who has been one of Japan's most influential professors of French law, recently published a voluminous collection of his articles and essays, chiefly concerning comparative jurisprudence.³¹ Although he has not directly treated the theme of natural law, he inspired both understanding and interest in it; not a few jurists, including Tanaka, became natural law adherents under his influence. Yoshiyuki Noda, a professor of French law, has written about French legal philosophers such as

25. HAYAKAWA, JIKKEN-HOGAKU NO SHUCHO NI TSUITE, 25 KIKAN HORITSU-GAKU 7 [The Quarterly Law Review] (1958); *Pragmatism and Neo-realism*, in 5 LECTURES ON LEGAL PHILOSOPHY (1958).

26. These debates began about 1951, when Radbruch's book *Vorschule der Rechtsphilosophie* became known in Japan. It was reviewed by Wada, *Radbruch no Hotetsugaku Nyumon*, 27 WASEDA HOGAKU 1 (1951). In the same year Yazaki also considered the problem of Radbruch's conversion and to a certain extent doubted it. *Radbruch Hotetsugaku ni okeru Bannen no Kadai* [Radbruch's Task as a Legal Philosopher in his Later Life], 23 HORITSU JIHO 53 (1951). In opposition to Yazaki, Otaka approved Radbruch's conversion in his Preface to Anan's Japanese translation (1955) of *Vorschule*.

27. M. Yazaki, *Sengo Doitsu ni okeru Ho-jishshoshugi to Shizenho-ron*, 4 OSAKA UNIVERSITY LAW REVIEW 47 (1952).

28. *Sengo Doitsu no Shizenho Shiso*, 71 HOGAKU KYOKAI ZASSHI 1 [Law Review of Tokyo Univ.] (1953).

29. N. KOBAYASHI, COING NO HOTETSUGAKU [Coing's *Grundzüge der Rechtsphilosophie*] (1951); M. YAZAKI, MITTEIS'S NO SHIZENHO-RON [Mitteis's *Naturrecht*] (1952).

30. 5 LECTURES ON LEGAL PHILOSOPHY, no. 2 (1959). This volume of the LECTURES deals with the trend of contemporary legal thought in Europe, America, and the Soviet Union.

31. SUGIYAMA, HOGEN TO HO-KAISHAKU [Sources and Interpretation of Law] (1957). As a professor at Tokyo University, Sugiyama was a pioneer of the study of French law in Japan and a leading Japanese exponent of natural law theories.

Geny and Sareille in *History and Idea in Law*.³² This book is still read by many as the sole Japanese academic work concerning French legal philosophies. It contains three valuable articles: "Prehistory of Contemporary Legal Thinking—Historical Background of the Development of Jurisprudence among the Glossators," "An Objective Realization of Natural Law Theory in Sareille," and "An Outline of the Natural Law Theory of Geny." Besides Maritain, the other French natural law writers have been little known here except for Roubier, Leclercq, and LeFur.

Jurists have had no less interest in more particular problems of legal philosophy. As some important political or social events brought their attention to particular themes, jurists have been seriously engaged in treating them. To begin with, the maxim *lex dura sed lex* was adopted as the common theme at the annual session of the Japan Legal Philosophy Association held in 1953.³³ At that time, somewhat reactionary attempts to amend the Constitution and the other laws were made by the Government under the pretense of reforming them in order to make them appropriate for the new situation of Japan, which had just become an independent country by the Peace Treaty.³⁴ Most jurists who joined in this symposium rejected such a positivistic view as *lex dura sed lex*, and some of them asserted radically that individuals have the natural right to resist *lex dura*. It should not be overlooked that many of these were not natural law adherents but were rather hostile to it, being positivists in their daily academic work. But when they opposed man-made law, they nevertheless appealed unconsciously to natural law ideas.

In one article in 1953 Kazuo Amano analyzed the law-reform movement of the Government from the viewpoint of Marxism; he concluded that law would necessarily become hard when legislators made it contrary to the interest of the workers, and the workers had the *ius resistendi* against such laws.³⁵ Another article, on "lex dura and Kampf ums Recht," by Wada,³⁶ differs somewhat in its conclusion from Amano's. As a criterion to judge if a law be *dura* or not, Wada depends upon justice itself. Still, as a positivist, he assumes that justice must be necessarily realized and defined through the *Kampf ums Recht* in the real world. But what he means by saying work "through *Kampf ums Recht*" is quite different from the *Klassenkampf* of Marxism as well as from what Jhering meant, for Wada clearly sets justice as the goal of the struggle.

32. NODA, HO NI OKERU REKISHI TO RINEN (1951).

33. There is no general report of the 1953 Session of the Japan Legal Philosophy Association since the Association did not begin to publish its Annual Report until 1954. Several individual commentaries were published, however; see note 35.

34. At that time the Government made preparation for setting up a committee to examine the Constitution. An important issue was whether Article 9, which describes "renouncement of war," should be amended when Japan re-arms for self-defense. For details, see Isao Sato, *Kempo Kaisei Mondai no Hatten* [The Process of Controversies on Amending the Constitution], 26 HORITSU JIHO 68 (1954).

35. Amano, *Akuho Ron* [On Lex Dura], 4 RITSUMEIKAN HO-GAKU 1 [Law Review of Ritsumeikan Univ., Kyoto] (1953).

36. Wada, *Akuho Rongi to Ho wo meguru Toso* [Controversies on Lex Dura and the Struggle for the Right], 16 KIKAN HORITSU-GAKU 1 [The Quarterly Law Review] (1953). See also N. Kobayashi, *Akuho Ron*, 71 HOGAKU KYOKAI ZASSHI 32 [Law Review of Tokyo Univ.] (1953).

Characteristic of postwar Japan has been a serious concern with the problem of peace, and the jurists also have elaborately studied war and peace. The legal aspects of war and peace were at first brought to juristic attention by the international tribunal of war crimes in which the administration of international "justice" and the application of natural law were carried out by both the judges and the prosecutors. Thus, Sheldon Glueck's book, *The Nuremberg Trial and Aggressive War*, was widely read soon after the Japanese translation was issued.³⁷ There were, of course, some jurists who opposed the legal basis of the international tribunal by appealing to the established legal principle of *nulla poena sine lege*.³⁸ But those jurists who thought that the war tribunal was legally justified controverted the former on the ground that natural law should be effectively applied to international relations in cases where the law is otherwise lacking.³⁹ No deeper attempt to give the legal-philosophical basis of the war tribunal has been carried out by the jurists than by Kotaro Tanaka. He has also written many articles or essays about the problems following the war, and a collection of them was published in the fourth volume of *Essays on Legal Philosophy* (1954) with the subtitle *Legal Philosophy of Peace*. In one of the articles, entitled "Some Legal Philosophical Considerations About Peace," which seems to me most important, he starts from a consideration of law in general as a function of peace-order and maintains that in this respect no essential discrimination should be made between national and international law; he concludes that peace will be secured through positive law only when it stands upon natural law and therefrom receives moral power.

Kelsen's work concerning peace, *Peace through Law*, was translated by Professor Nobushige Ukai in 1952 and read by many at that time; it deals with the problem of *bellum justum* without recognizing natural law. Another valuable work in this field, *War and Justice*, by Dr. Herzog, S.J., Professor of Legal Philosophy at Sophia University in Tokyo, treats mainly of the traditional theory of *bellum justum*, and uses that theory as the legal-philosophical basis for defining war crime and creating the war crime tribunal.⁴⁰

As to other particular themes of natural law, two articles about education by Tanaka, "Thoughts on Educational Right from the Viewpoint of Natural Law" and "Fundamental Problems of Legal Education," have thrown a first glimmer of light on that theme.⁴¹ In the first article he seeks to make clear why the right of education should be recognized as a natural right pertaining to the parent by holding that marriage and family life are natural functions of man.

37. Translated by K. Yokota (1948).

38. See KENZO TAKYANAGI, *SENSO-HANZAI TO KOKUSAIHOO* [Tokyo Trials and International Law] (1948).

39. See KISABURO YOKOTA, *SENSO-HANZAI-RON* [War Crime] (1949).

40. HERZOG, *SENSO TO SEIGI* (1955).

41. Tanaka, *Kyoiku-ken no Shizenho-teki Kosatsu*, 69 *HOGAKU KYOKAI ZASSHI* 1 [Law Review of Tokyo Univ.] (1951); Tanaka, *Hogaku Kyoiku*, 23 *HORITSU JIHO* 3. For reflections upon marriage and the family from the viewpoint of natural law, cf. Anan, *Naien no Hori* [On Marriage without Legal Form] in SHIHO NO RIRON [Legal Philosophical Reflections on Civil Law], ed. by Japan Legal Philosophy Association (1951); Anan, *Konin* [On Marriage — Monogamy and Indissolubility] in 8 *LECTURES ON LEGAL PHILOSOPHY* (1956).

The other article deals with the relative advantage of legal education over other kinds of education, both in case method and in lecture method, and with the need for legal philosophy in each instance to complete special techniques of legal learning.

To collect natural law studies of the past and to prepare new study on natural law, an organization was founded by the author and ten colleagues, with the aid of government funds given to the organization in 1958-1959. This organization plans to publish a *Natural Law Encyclopaedia* and to issue an *Annual Report of Natural Law Study*. Among the members of the organization there are many non- and anti-natural law jurists, but the result of their cooperative study holds great promise as they all have the serious intention of discussing the contemporary problems of natural law.⁴²

In conclusion, I must note that the general tendency among the jurists in Japan is to treat natural law as one of the theories in the history of legal thought, or as a mere ideal of legislator or of judge. Even those who affirm an important role for natural law as such will not deal with it within their jurisprudence. For, they say, the meaning of natural law is so equivocal that it cannot be used as an effective term for juridical construction, which should be an exact science. Other jurists exclude natural law because they say no real law so universal as natural law can be recognized by our experience. In these views, one of which is held strongly by the logical-positivists and the other by the sociological jurists, natural law is exposed to misleading attacks from both sides.

Considering these objections to the natural law, it seems to me an urgent task for the natural law jurist to develop his concepts of natural law in such a way as to make his ideas intelligible to its critics. For this task, I think, Messner's *Naturrecht* (translated by Professor Mizunami and others in 1958) is valuable because the writer explains natural law as the system of existential needs of human nature. But it is fundamentally necessary for the natural law jurist to develop some philosophical criticism by which the metaphysical ground of his critics' epistemology may be shown as not omnipotent and, at the same time, that of natural law may be proved true. I have attempted this task recently in my book *Contemporary Legal Philosophy: Prologue to the Metaphysics of Law* (1960).

The serious situation which the jurists of Japan face demands a legal philosophy. Yet even in the theories of so-called positivists, whether democrats or Marxists, man finds, more or less, an appeal to an idea of law which is nothing but natural law. The future of legal philosophy in Japan will give much more opportunity to the natural law jurist, for the discussion of legal philosophers in the future, it seems to me, will take place about the idea of law itself.

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42. Their results are contained in ANNUAL REPORT OF LEGAL PHILOSOPHY. (ed. by Japan Legal Philosophy Association, 1958.)