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Tanaka Kōtarō, Korea, and the Natural Law

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ABSTRACT

Tanaka Kōtarō 田中耕太郎 (1890–1974) was one of the most important jurists of modern Japan. A widely travelled globalist intellectual, he is generally seen as culturally oriented toward the West. Yet his own contribution to international jurisprudence, his theory of World Law, is essentially globalist and critical of the Western imperialism implicit in the dominant strain of modern international law. In spite of the globalist implications of Tanaka's jurisprudence, there has been no attention to his relationship with Korea. This paper pioneers a study of Tanaka and Korea, focusing on two visits he made there in 1932 and in 1943. Outlining Tanaka's key ideas on world law and the Natural Law, the subjects of lectures he gave at Keijō Imperial University, it raises the question about whether Tanaka might have influenced faculty and students of law at Keijō Imperial University and possibly laid the groundwork for Korea's greatest Natural Law theorist Hwang Sandōk 黄山德 (1917–1989). It also introduces, through Tanaka's ideas on World Law, an alternative to the "colonialist/nationalist" paradigm that influences much of historical writing about the Korean-Japanese historical relationship.

Keywords: Tanaka Kōtarō, Hwang Sandōk, Nishihara Kan'ichi, World Law, Natural Law, *minzoku*, *kokka*, Keijō Imperial University, jurisprudence

Tanaka Kōtarō 田中耕太郎 (1890–1974) was without doubt one of the most consequential of twentieth-century Japan's globalist intellectuals. Awarded the Imperial Silver Watch for graduating at the top of his class of the Faculty of Law at Tokyo Imperial University, he went on to become Dean of the Faculty of Law at his alma mater and, after World War II, Minister of Education, Diet member, Chief Justice of the Japanese Supreme Court, and a judge at the International Court of Justice. He is the only Japanese to have held a position in each of the three branches of government. A prolific and polyglot scholar, he was also a globe-trotter who spent significant time in Europe and South America during the first half of the century, and continued his frequent travels around the world in the second half. He is known for his contribution to the modernization of Chinese civil law, but there has never been any attention to his experience in, or potential influence on, Korea. Yet, he made two trips to Korea before the end of World War II and continued his relationship with important Koreans in the postwar period. Tanaka's relation to Korea deserves attention, and all the more since he was the first Japanese to use the term "cultural imperialism" as a criticism of Japan's policies during the 1930s. Yet,

in all the voluminous secondary work on Tanaka, there is no mention of Korea. Below, I have tried to reconstruct a history of Tanaka's relationship with Korea and his possible influence on Korean legal thought. But the argument I make below must necessarily remain largely a provisional one, based mostly—although not entirely—on circumstantial evidence; it should be considered as an invitation for later studies that may verify, revise, or extend its findings. In any case, it draws attention to a hitherto unexplored aspect of the thought of one of the greatest jurists of the twentieth century: its relevance for twentieth-century Korea.

Reconsidering the Possibility of Natural Law Theory in Colonial Korea

If Tanaka's ideas had any influence in Korea, it would be his signature theory, the Natural Law. Yet there is broad consensus among experts on Korean law that Natural Law theories had practically no influence in Korea after annexation. Marie Kim has argued that from 1906 to 1910 Ume Kenjirō had tried to imbue modern Korea's legal system with principles based on the Natural Law (Kim 2008, 10). After 1910, however, the civil code was framed by Historical School scholars who had defeated advocates for the Natural Law in the debates over the Japanese Civil Code as early as 1892. Kim argues that the Historical School, with its emphasis on *Volksgeist*, still provided some room for Korean difference at the level of customary law (Kim 2009, 212). But she concludes that the influence of Natural Law theory in Korea largely died with Ume in 1910. Chongko Choi (Ch'oe Chonggo) makes an even more extreme claim: "The disgraceful annexation of Korea by Japan on August 29, 1910, drove Korean jurisprudence and legal culture into separation from the world" (Choi 1981, 161). Even so, it is not clear how deeply committed even Ume was to the Natural Law as opposed to a theory of natural rights. When G.E. Boissonade drafted a civil code for Meiji Japan within the general framework of the Natural Law, it set off a bitter controversy between advocates of the French Natural Law tradition and the English school. Ultimately, the French Natural Law faction lost out, and Boissonade's draft civil code was rejected and replaced by a new draft based on the German Civil Code compiled under the direction of Hozumi Nobushige, Tomii Masaaki, and Ume Kenjirō (Anan 1962, 100, note 3). It would seem then that there was no Natural Law tradition in colonial Korea, and therefore no influence from Tanaka Kōtarō, whose jurisprudence was inseparable from the Natural Law.

Natural Law is said to have begun in Korea through Hwang Sandōk's 黃山德 *Legal Philosophy* from 1950 and continued through several later essays by Hwang, ending with "My Legal Philosophy."¹ In his preface to *Legal Philosophy*, Hwang noted his indebtedness to his teacher Odaka Tomoo (1899–1956), who was born in Pusan, graduated from Tokyo Imperial University Law faculty in 1923 and again in 1926 from Kyoto Imperial University, where he took an advanced degree in

¹ Since I do not read Korean, I am drawing from Japanese translations by Suzuki Keifu. Suzuki has translated a section of the 1985 fourth revised edition of Hwang's *Lectures on Legal Philosophy* (法哲学講義) and the essay "My Legal Philosophy" (私の法哲学) which in 1989 was included in a volume dedicated to the memory of Hwang 『石隅黃山德博士追慕論文集: 法哲學叫刑法諸問題』. For the bibliographical details of Suzuki's Japanese translation, see Hwang 2005 and Hwang 2006.

philosophy under the direction of Nishida Kitarō and Yoneda Shōtarō (1873–1945). Odaka later went to Europe and the US, where he studied under Hans Kelsen and Edmund Husserl. On return, Odaka was a professor of law at Keijō Imperial University from 1928 until 1944 when he joined the Tokyo Imperial University Law faculty.

The problem with crediting Odaka for any Natural Law influence on Hwang is two-fold: first, as one can discern from those scholars he studied under, Odaka was not under any influence from Natural Law theory while he was on the faculty of Keijō Imperial University, when he had the most opportunity to influence Hwang. Odaka's skeptical view of the Natural Law from the position of positivism is well expressed in his wartime review of Tanaka Kōtarō's defense of the Natural Law, when Odaka raised the question of whether "the Natural Law even as an ethical ideal needs to be considered from the position of the state" (Odaka 1942, 71). Secondly, even Odaka's Natural Law jurisprudence when it finally emerged in the early postwar period was not really very "Natural Law" in substance and retained a secular character that would not have been fully acceptable to Hwang, who was a rather devout Buddhist. As Seiichi Anan has pointed out in his magisterial survey of Japanese Natural Law jurisprudence, "Tomoo Otaka's [sic] article in the same [1949] Symposium also 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" (Anan 1962, 113–14). Odaka did take a more positive position on Natural Law after 1951, a shift that seems to have paralleled Gustav Radbruch's own 1946 conversion from neo-Kantianism to the Natural Law in light of the powerful resistance it had offered against Nazi legal positivism (116).² But it was too late in coming to have been the source of Natural Law influence on Hwang during the critical wartime years at Keijō Imperial University or even on his 1950 *Legal Philosophy*.

In contrast, Hwang's *Lectures on Jurisprudence* (法哲学講義 Hō tetsugaku kōgi) shows stronger conceptual similarities with Tanaka's jurisprudence, including Tanaka's signature distinction between the Natural Law of Greek, Roman, and Medieval Thought and the modern Natural Law of the Enlightenment. But most telling is Hwang's reference to the Latin maxim, *ubi societas ibi ius* (wherever there is society, there is law) (Hwang 1985, 261). This maxim is so closely associated with Tanaka's legal philosophy that it is tantamount to his signature. *Lectures on Jurisprudence* was also first published in 1950 (and revised multiple times over subsequent decades), right at the height of Tanaka Kōtarō's influence (he was appointed Chief Justice of the Japanese Supreme Court that year and remained in that position throughout the 1950s) and the popularity of Natural Law in Japan. Hwang himself has admitted that when he was a student at Keijō Imperial University he was a follower of Odaka and his Kelsenian jurisprudence and that his conversion from being "an opportunistic Kelsenian" to an advocate of the Natural Law began while he was a war refugee in Pusan and was completed by 1955. Must we conclude then that Hwang's appreciation of the Natural Law was

² Gustav Radbruch died in 1949, so this was a late conversion for him.

wholly a product of the postwar period, that there was no wartime influence that might have predisposed him to regard the Natural Law in a positive light? There is a presumption in the field of Korean legal studies, indeed even more broadly in the field of Korean history, that no theory that respects human dignity could have been influential during the colonial period because the institutional structures of colonization were proof enough of its absence. Certainly Marie Kim is right that the dominant legal structures in colonial Korea were based on a rejection of the principles of the Natural Law—as they were in Imperial Japan. However, that does not mean that there was not a counter-hegemonic theory of the Natural Law in colonial Korea, just as we know it existed (largely through Tanaka) in Imperial Japan. Tanaka was appointed to the Imperial Academy of Scholars in 1941 and to the Scientific Research Institute in 1944, even though he was a frequent target of the extreme right wing, an open opponent of the militarists, and was even involved in secret efforts to bring the war to an end. He had published prolifically on the Natural Law since his first book, *Law, Religion and Social Life* (法と宗教と社会生活 *Hō to shūkyō to shakai seikatsu*, 1927) in both scholarly and popular journals and newspapers and was a well-known public advocate for Catholic values and human rights throughout the war. While Tanaka was certainly a minor counterforce to the dominant strains of law and power in Imperial Japan, he was not without influence even at the height of the war.

Tanaka's First Trip to Korea, 1932

Tanaka's conduit of influence in colonial Korea, such as it was, mainly came through his former student, Nishihara Kan'ichi (1899–1976).³ In 1926 Nishihara graduated from the Tokyo Imperial Law Department where he had taken Tanaka's courses. Nishihara was introduced to Tanaka by Mitani Takamasa, a Christian and follower of Uchimura Kanzō (Tanaka had been Uchimura's leading disciple until his break from Uchimura's Protestantism in 1924). On Tanaka's recommendation in 1928, Nishihara was appointed by President Matsuura Yasujirō to the Law and Literature faculty of Keijō Imperial University. Christian influence at Keijō Imperial University was notable. The first president of the university, Ariyoshi Chūichi was a Christian, and the leading Christian intellectual Abe Yoshishige taught in the faculty of Law and Literature there from 1926 to 1940.

Tanaka's influence in getting Nishihara his position on the Keijō Imperial University faculty was key. President Matsuura was an alumnus of First Higher School and the Tokyo Imperial University Faculty of Law (as was Tanaka), and had worked for the Ministry of the Interior briefly (as Tanaka had). Undoubtedly, Nishihara was grateful to Tanaka for his influence in securing a position as professor of law at a prestigious imperial university. Nishihara recounts that from 1928 to 1930, when he was responsible for the introductory courses on commercial law, his lectures generally followed Tanaka's thoughts on the subject (Nishihara 1977, 250). In 1931, Yamada Saburō (1869–1965), one of the most influential Japanese scholars

³ I would like to thank Professor Lee Yongsang of Woosong University for drawing my attention to Nishihara Kan'ichi and his relationship to Keijō Imperial University and Tanaka Kōtarō.

of international law and a close friend of the Tanaka family, was appointed President of Keijō Imperial University, a position he held until 1936. In the fall of 1932, just months after Nishihara had returned to Keijō Imperial University from a research trip to Europe, he asked President Yamada to invite Tanaka to give a special lecture at a ceremony commemorating the university's founding. Of course, President Yamada agreed to invite his protégé, and Tanaka accepted the invitation from his mentor. As Nishihara later recalled, "the topic of the Special Lecture was on World Law. It adroitly summarized and elucidated the general features of [Tanaka's] immortal work, the three volume *Theory of World Law* (1932–1934) which later won the Asahi Prize. It made a deep impression on everyone in attendance. No one could feel anything but great admiration for Tanaka's strongly articulated scholarly conviction that, even when extreme militaristic thinking was running amuck, there was both the possibility and the necessity of a World Law that, based on historical, social, and Natural Law foundations, transcended both the nation and state borders" (Nishihara 1977, 250–51).

While a transcript of the speech that Tanaka gave at Keijō Imperial University in 1932 has not been discovered, there is circumstantial evidence for the content of his remarks, or at least for his ideas in the early 1930s on World Law, the subject he addressed in his Keijō University lecture. First of all, we have Nishihara's personal testimony above that the speech generally outlined Tanaka's ideas on a World Law as transcending both the nation (*minzoku* 民族) and the state (*kokka* 国家). Below, I will turn to what Tanaka was writing at that time and on that topic in his *Theory of World Law*. But first, it may be helpful to see how Tanaka had articulated his idea of World Law just five years earlier in his *Law, Religion and Social Life*. In that work, he outlined the need for an international private law based on World Law, and he connected this form of international law directly to the situation in Taiwan and Korea. Under the heading, "World Law and the System of Law," he wrote that

the problem of World Law is not limited to the mere problem of the unification of law, that is, a law that has a common content across the world. The latter problem is merely an extremely small part of the former. World Law is ultimately a problem that concerns the entire system of law (*hō no taikei* 法の体系). If I may be permitted a bold conjecture, once we view all law sociologically, that is, liberated from sovereignty, and at the same time consider law in conceptual terms, isn't it possible that the way in which we have constructed the comprehensive system of law up to now will have to be completely changed? . . . That is because when law is understood, not as the commands of the sovereign [John Austin's theory], but as something that arises directly from society itself, each society in the world will have its own law, and theoretically will be considered as something that does not necessarily conflict with the laws of other societies, and the task of world private law will only be the discovery of a law that regulates those legal relations independent from State sovereignty. . . . When scholars of private and commercial law explain the area of application of law, they have accepted the principle that private and commercial law applies throughout the entire Japanese country (*Nihon zenkoku*) and that the existence of special rules for colonies like Taiwan and Korea are to be considered exceptional. But I have my doubts

about that. If we accept that the Civil Code applies in the homeland (*naichi* 内地) but that a private law seasoned with old local customs may be applied in Taiwan, the relationship of both laws to the area of application must be exactly the same. Is this not a consequence that flows naturally from the principle of the relativity of law? The establishment of a general private law that is valid across the entire Japanese country is a separate question, but is it not conceptually inaccurate to maintain that simply wherever sovereignty reaches private law also must reach? . . .

In this line of thought, when we consider the matter as separate from the concept of a conflict of sovereignty, we have to say that international private law is the substantive body of private law that ultimately regulates the mutual private law relations of all the people in the world, and that the term “international private law” is not necessarily mistaken or inappropriate as a certain group of scholars has maintained, insofar as it signifies private law throughout the world. . . .

The point is that the problem of World Law is a problem that takes us back to the fundamentals even more so than [Ernst] Zitelmann was aware, a problem that is not merely concerned with the unification of laws but cannot help touching on the problem of the nature of law itself. In this sense, [Rudolf] Stammler’s essay “Law in a Region without a State” gets to the fundamental issue at hand, but this is not the place to introduce or criticize that work. By clarifying the theory of World Law in the meaning suggested above, what I am thinking of is nothing less than a Copernican Revolution in the system of law or in the scholarship of the law—there is a great difference in what one concludes based on whether one sees the law as centered on the sovereignty of the State (*kokka*) or on the ethnic nation (*minzoku*) or whether one sees the law as centered on the whole of human society. I also think it will be a great help in advocating for a reality-based internationalism and globalism, and I want to inspire an interest in, and concrete research agendas on, this problem among specialists. (Tanaka 1927, 240–46)

This was the general orientation of Tanaka’s thinking on world law when he first outlined his thoughts on the matter in 1927. Five years later, when he came to Keijō University to give the keynote address on World Law, he was deeply involved with the publication of his three-volume masterpiece, *A Theory of World Law* (世界法の理論 *Sekai hō no riron*), and from it we can discern what Tanaka was thinking closer to the date of his Keijō Imperial University speech about a World Law that transcended both the nation (*minzoku*) and the state (*kokka*). Although eventually *A Theory of World Law* would comprise three thick volumes, by the fall of 1932 when he gave the lecture at Keijō Imperial University, only Volume One had been published (on February 10). Volume Two would not come out until October 1933 and Volume Three was not published until October 1934. But that does not mean Tanaka had not written much of the three-volume work by 1932. He had. As he wrote in the preface to Volume Two, “Chapter Six on Natural Law and World Law is merely a summary of my thinking as it relates to the Natural Law which I presented to the public on the basis of two or three manuscripts in the last two or three years” (Tanaka 1933, 1). Chapter Six is the most likely candidate for a manuscript of his fall 1932 lecture at Keijō Imperial University; at least, it is as close as we are likely to come to finding a written source of his thoughts on the subject.

Chapter Six is composed of two separate essays, “The Re-Birth of the Natural Law” and “The Natural Law as the Basis of World Law.” On close inspection, it seems that the second section is the one that Tanaka most likely delivered as his speech at Keijō. But it is not out of the realm of possibility that he incorporated aspects from “The Re-Birth of the Natural Law,” particularly the first section that summarizes his main argument in *A Theory of World Law*. So that is the source for the ideas I present below in trying to recover what Tanaka told the audience at Keijō Imperial University in late 1932.

First, since Nishihara has noted that Tanaka’s lecture “summarized and adroitly explained” his argument in *A Theory of World Law*, let’s hear Tanaka’s own summary of Volume One of that work that had just been published earlier that year:

In Volume One, first I liberated the concept of law from the concept of the state, that is to say, I clarified that the former is something that should not be conceptualized as having a necessary relationship to the latter (Chapter Two). Next, I liberated the concept of law from the concept of the ethnic nation (*minzoku*), in particular by considering the cultural factors in law in the context of the degree of importance of their position among all the various cultures of a single ethnic nation, which is to say that they do not play an important subservient role in ethnic national characteristics or ethnic national consciousness (Chapter Three). Extending from that point, I next discussed various tendencies in the globalization of society, the reality of a global society and particularly a global economy, and the existence of legal norms that regulate as well as challenge their systematization (Chapters Four and Five). The research carried out in Volume One was a sociological and economic investigation. It was no more than an effort to explain more deeply the old saying, *ubi societas ibi ius*. In other words, wherever there is a society, there is law, and therefore I claimed that a society that is global in scope, that is to say, a world society, also must have its own law, which is world law. All I was doing in that volume was pointing out this fact in sociological terms. (Tanaka 1933, 1–2)

Whether or not these exact words are the ones Tanaka used in his lecture at Keijō Imperial University, they capture succinctly what he had written on for over five hundred pages in Volume One of *A Theory of World Law*. To that extent, they serve well as the summary of that work, of which only Volume One had been published at the time of the lecture. Next, I will turn to the second section of Chapter Six, whose title of “The Natural Law as the Basis of World Law” echoes closely Nishihara’s memory of what the Keijō Imperial University lecture was about.

In arguing for the Natural Law as the basis of World Law, Tanaka focused on nine points: (1) the Function of the Natural Law; (2) The Spiritual Basis for the Unification of Law; (3) Scholastic Natural Law; (4) St. Thomas’s Argument that the State is under God; (5) the Relationship of Canon Law to World Law; (6) The Fusion of Roman Law and Christian Natural Law; (7) Natural Law and International Law after the Reformation; (8) Current Global Trends and the Return of Natural Law (in Commercial and Maritime Law); (9) Prospects for the Realization of World Law.

On the first point, Tanaka drew from Sir Frederick Pollock’s *Essays in the*

Law (1922) to demonstrate the Natural Law even functioned in post-Reformation England where it was seen analogously with the Chancellor's equity or the Roman praetor's jurisdiction (Tanaka 1933, 33). But it was in the area of international law that the function of the Natural Law was most evident (and also where it was likely of most interest to Tanaka's audience in Korea). Here, Tanaka essentially paraphrased the following lines from Pollock: "As to the body of doctrine known under the head of Conflict of Laws or Private International Law, its authority was originally founded on consideration of natural justice, for so much at least is implied in the fact that, although it is not *ius inter gentes*, it has always been deemed to belong to the law of nations in the wider and more ancient sense of *ius gentium*" (Pollock 1922, 73; Tanaka 1933, 34–35). Tanaka added, from Pollock, that the ideal of Private International Law remains "cosmopolitan," even as actual laws are often national in character (Tanaka 1933, 36n2). Tanaka followed Pollock closely, in particular in asserting that the function of the Natural Law was to provide a common foundation for universal concepts of justice and equity in the context of a plurality of local national laws, even within empire. Where he did not follow Pollock was in the argument that the Natural Law "had been the means of effecting a large importation of English ideas and principles" in its colonies (Pollock 1922, 74). Tanaka understood the Natural Law in more universal terms than Pollock did, as he rejected the kind of cultural imperialism implicit in Pollock's remark about exporting "English ideas and principles." Indeed, it is worth noting that Tanaka's use of the term *bunka-teki teikokushugi* 文化的帝国主義 (cultural imperialism) in 1934, a mere two years after his visit to Korea, was one of the earliest instances of this term in Japan, if not in the world (Shibasaki 2010, 33).

Tanaka traced what he called "the spiritual basis" for the unification of law to the Natural Law which was the foundation for World Law. Surprisingly, perhaps, as he himself was Christian, he did not trace the spiritual basis of the Natural Law to Christianity but centuries earlier to the cosmopolitanism of the Greek Stoics. From there, he outlined Cicero's theory of Natural Law, and particularly the role of *ius gentium* in Roman law as a law applicable to all peoples, not merely to Roman citizens. Throughout, he noted, the provisions of the Natural Law were "from ancient times under the protections of the gods" (Tanaka 1933, 49), emphasizing the compatibility of non-monotheistic societies with the Natural Law—a historical lesson that, coming from Tanaka, neither Japanese nor Koreans could simply dismiss as "English ideas or principles."

Nonetheless, it was with the medieval period that the issue of Natural Law comes front and center, and it was now deeply enmeshed with monotheism, particularly Catholicism. The key theorist was of course Thomas Aquinas. In discussing Aquinas's contribution to Natural Law theory, Tanaka made a statement of particular importance to Japanese-Korean relations in the 1930s. He pointed out that while Aquinas held that the general principles of the Natural Law are necessarily applicable everywhere by their very nature, regardless of man-made laws, they are also made clear through the positive laws of the various states. Therefore, Tanaka concluded, "this type of law is called the *ius gentium*, that is law applicable to all ethnic nations (*minzoku*). . . . That which determines the

details of the Natural Law must defer to the municipal law and thus there are possible differences in the determination of the content of the Natural Law among various ethnic nations (*minzoku*), and this is what is called the *ius civile*" (Tanaka 1933, 59). Tanaka discerned within Aquinas's concept of *ius gentium* a foundation for international law centuries before the birth of Grotius, the so-called "Father of International Law." The point was not merely chronological, however, but substantive. The Scholastic understanding of the Natural Law was different both from the earlier Roman form and from the later Grotius type of International Law. Tanaka explained the difference clearly: "St. Thomas's view of international law holds that just as an individual is a member of a state, each state is a member of a [higher] state that encompasses all mankind, a state that, with God as its head, is under the rule of natural moral principles, that is to say, the Natural Law" (Tanaka 1933, 62). But it was a line Tanaka took from B. C. Kuhlmann's study of Thomas Aquinas that would have interested the scholars of law at Keijō Imperial University most. Tanaka wrote that "Kuhlmann suggested that since the university is an institution for general and trans-regional education, it was not an appropriate place to take up the study of regional law but had to move toward World Law which insists on a universal validity in all countries" (Tanaka 1933, 67). Tanaka stressed that the medieval period's contribution to legal studies was in fact to breathe Christian ethics (based on the Natural Law) into Roman Law (the *ius gentium* in particular) and to give concrete manifestation to a world law based on the canon law of the Church, which was an existing world society. Surely, it was this emphasis on the investing of an earlier Roman "amoral" law with a moral and ethical coloring (Tanaka 1933, 69–73) that also resonated in the ears of Tanaka's Korean audience.

In contrast, the link between the Natural Law and World Law was "extremely difficult to discover" in the history of early modern legal thought (Tanaka 1933, 73–74). Tanaka argued that the main reason was, with the Reformation's breakup of the medieval unity of culture and spiritual life, subjective and arbitrary arguments predominated in philosophy and jurisprudence, so that even if a scholar argued for a Natural Law justification for certain positive laws, it was now deemed merely a matter of that person's opinion; Natural Law itself had lost its earlier World Law character. Politically, national antagonisms shaped relations among states so that in general positive law became a matter of the laws of a certain State and Natural Law arguments remained no more than the opinion of certain scholars. Tanaka gave due respect to the roles of Grotius, Pufendorf and the like in maintaining the discourse on Natural Law during the early modern period. But the error of that time "was to conceive of the Natural Law as part of international law, especially as a kind of positive law" (Tanaka 1933, 79).

The turning point came in the period between the late nineteenth and early twentieth centuries. Because of the increased global commerce and communications during this period, there was a remarkable effort to compile a unified legal code in such areas of private law as laws on bills of exchange, commercial law, and civil law in general. Tanaka saw this as evidence of the victory of the Natural Law. In any event, he found in these material needs of an increasingly interconnected world, the rise of World Law through the movement for unification of laws. This

is “a fact that must be noted in the cultural history of mankind. And we must not forget that it was Natural Law philosophy that was the latent spiritual foundation for the international work that brought about the realization of World Law through treaties and the work of the compilation of legal codes” (Tanaka 1933, 88). Tanaka pointed these words at those many scholars who “were keen on the realization of World Law but were not converted to the Natural Law” (89). He very well might have had Yamada, Nishihara, and other law faculty at Keijō Imperial University in mind. They generally were interested in World Law and globalist movements, but stood with Hans Kelsen’s amoral technical approach against the Natural Law. But Tanaka took a more indirect line of argument, drawing on both World Law scholars like Ernst Zitelmann who were not followers of the Natural Law, and Scholastic philosophers of the Natural Law who showed little interest in World Law. He also identified several European scholars who were interested in both the Natural Law and World Law.

Tanaka also showed prudence in stepping back from the narrow point about the relationship of World Law to the Natural Law, an argument he was not likely to win at Keijō, and to emphasize instead the fundamental point: “the interest in that which is universally human in contemporary legal philosophy” (Tanaka 1933, 90). He characterized the study of comparative law as a theoretical proof of the possibility of World Law and as a tool for bringing it into reality. But he did not go into detail, merely noting that while this is an area that he himself had not worked on in much detail, he remained an advocate of World Law and its relationship to the Natural Law.

Tanaka’s conclusion is precisely the sort of thing that would have greatly interested his audience in Korea. In it, he explicitly related the problem of national sovereignty to international law, pointing out that with the rise of modern trends such as the Historical School and the Positivists, international law had been reduced to the will of the state and in the process, the legal nature of international law had been greatly diminished. “International Relations,” he bemoaned, “have fallen to the level of relations of Realpolitik” (Tanaka 1933, 92). Part and parcel of that trend had been the modern tendency to consider the legal relations of private international law as merely concerned with the conflict of laws, “with the premise that the content of the laws of various states are different in substance and, to the extent that a single legal community might exist among the various nations (*kokumin* 国民), . . . it should be extinguished” (92–93). Modern international law, in keeping with general social trends of the day, had been rendered subordinate to the state. But Tanaka found some grounds for optimism. There were also transnational phenomena rooted in global exchange and a common human rationality. “It is still the case,” he concluded, “that World Law has the capacity to bring about justice in the legal intercourse among all the people of the world. . . . There are still many places where injustice and discord occur. World Law shows best that the mission of law is to reconcile men with each other and thereby to bring about social peace” (Tanaka 1933, 94).

Gauging the influence of Tanaka’s remarks in his fall 1932 special lecture at Keijō Imperial University is even more difficult than ascertaining what he actually

said there. We know that in 1929 there were 147 Japanese students and 81 Korean students in the Faculty of Law and Literature of Keijō Imperial University; of those, students in jurisprudence numbered 85 Japanese students and 37 Korean students (Keijō Imperial University 1929, 81). If the number of students enrolled at Keijō increased through 1932 at the same rate it had been growing, there may have been as many as 278 Japanese students and 157 Korean students at the University in 1932 when Tanaka gave his lecture, and of those students, the projected number of students in jurisprudence is 155 Japanese students and 73 Korean students. It is important neither to overestimate nor underestimate Tanaka's influence. Generally, a one-time lecture, even a prestigious special lecture, will have less influence on a student than a sustained relationship with a professor on the faculty. But we should focus not on the quantity of students who may have heard Tanaka's lecture, but the quality or, perhaps better, the future influence of these elite law students. In fact, law students at Keijō Imperial University taking the higher civil service exam outnumbered students from other imperial universities and they also enjoyed a higher success rate in the exam as well (Tsūdō 2008, 78). From this evidence, we can conclude that, at the very least, Korean law students at Keijō Imperial University who were exposed to Tanaka's arguments for the Natural Law in 1932 constituted an elite that was likely to be in a good position to implement those ideas in future policy, and Tanaka's ideas on the Natural Law were sure to appeal to those living under a colonial regime that was justified by legal positivism and historicism, the theories most opposed to the Natural Law.

At the same time, we should not discount the influence of Korea on Tanaka. Nishihara and his wife guided Professor and Mrs. Tanaka around Korea during his visit, and they particularly focused on special scenic areas in the south and east of the peninsula. Thanks to financial support from Tanaka's younger sister's husband, a Mr. Ueno who was a director of the Chōsen Shokusan Bank, the four were able to enjoy their travels in Korea in considerable comfort. Their main destination was the scenic Mount Kūmgang Range south of Wōnsan. They visited the quiet and secluded Inner Kūmgang 内金剛 area, the majestic Outer Kūmgang 外金剛, and the spectacular Sea-coast Kūmgang 海金剛. From there they visited the ancient capital of Silla, Kyōngju and its eighth century Pulguksa 佛國寺 Temple, where they reflected on ancient history, before arriving at their final destination, Pusan. After a day spent seeing the sights of Pusan, Nishihara and Tanaka got up early the next morning to go fishing. With a local guide, they rented a boat and went out beyond the bay, deep-water fishing using small shrimp as bait. While Nishihara caught some unimpressive fish, Tanaka caught two large sea bream, whereupon he punned on the old Japanese saying about "catching sea bream with shrimp" (*ebi de tai wo tsuru* 海老で鯛を釣る; meaning, to harvest much with little effort). Nishihara recalls Tanaka enjoying himself greatly in Pusan (Nishihara 1977, 251).

After Tanaka's visit and his lecture on the Natural Law, a group of law professors at Keijō Imperial University published a Japanese translation of the first volume of Rudolf von Jhering's *Der Geist des römischen Rechts* (The Spirit of Roman Law), Jhering's signature work that sought to counter Savigny and the Historical School by revivifying the Natural Law tradition (Yamaguchi 1991, 46–47). The

publication was too late for the book to have influenced Hwang, since the work was published between 1941 and 1943, and Hwang had left Keijō University in 1941. But one cannot rule out the possibility that Hwang was exposed to the work in an earlier manuscript form. His mentor Odaka was one of the nine scholars responsible for the translation, but of the nine it was Nishihara who was the most open to the Natural Law tradition. And since Hwang's concentration was in civil, particularly commercial law (the specialization of Nishihara and Tanaka), it is inconceivable that he did not take courses under Nishihara. So, while the Japanese translation of Jhering's *Der Geist des römischen Rechts* may also be included in what I am calling the "submerged Natural Law" tradition of colonial Korea, it is not clear what influence it may have had, given that it was published rather late in the colonial period. But we cannot overlook the possibility that Hwang was exposed to Tanaka's ideas on the Natural Law through the preparation of this translation, if not in his study of commercial law under Nishihara, Tanaka's disciple.

Tanaka's Second Trip to Korea, 1943

Tanaka's influence on legal thought in Korea did not cease in the early 1930s. He visited Keijō Imperial University a second time, after taking part in an official delegation to survey legal customs in China between March and May of 1943. On his return trip to Japan, he stopped off in Korea with his Tokyo Imperial University law colleague Suzuki Takeo. Nishihara got Tanaka to take time from his busy schedule and come to Keijō University to give a special lecture on "The Essence of Law, with Particular Reference to the Natural Law" (Nishihara 1977, 251). While the exact dates of Tanaka's visit to Seoul are not known, it is known that he met with Bishop Ro Kinam (No Kinam) in Seoul on May 7.⁴ We can therefore assume that the lecture was given on or around that day. Once again, no transcript of this second lecture has been found. But the topic is remarkably similar to a section of an article Tanaka had published originally in 1930 and which he was at that very time preparing for republication in a new work, *Hōritsu tetsugaku ronshū* (法律哲学論集 A Collection of Essays in Legal Philosophy, 1944). Section 12 of the article "Shizen hō no kako oyobi sono gendai-teki igi" (自然法の過去及び其の現代的意義 The Past of the Natural Law and Its Contemporary Significance) was called "The Basic Problem of Law and the Natural Law" and it provides a very good window on how in the early 1940s Tanaka still saw the Natural Law as intimately linked to the most basic questions about what law itself is—the subject of his second Keijō Imperial University lecture.

Like Jhering, Tanaka railed against the Historical School of Law that took law to be relative to time and place and rejected the idea of a trans-temporal, trans-cultural legal order based on the Natural Law. This was a point that surely resonated among Korean scholars of law, as it was the historicist approach that provided the legal justification for depriving Koreans of their basic human rights. Tanaka went on to note that since the Historical School rejected the claim of the

⁴ My thanks to Jieun Han for research help that discovered the date of Tanaka's meeting with Bishop Ro.

Natural Law School that there was a legal content with universal applicability, they had to content themselves with merely the form of law as universal. They found the neo-Kantian Rudolf Stammler's position, derived from the relativism of legal positivism, appealing in this regard. Stammler's famous solution, what he called *Naturrecht mit wechselndem Inhalt* (the Natural Law with changeable content), was a paradoxical conclusion that resulted from his adhering to Kantian formalism in terms of the concept or ideal of law while trying to offer some form of jurisprudence that might be of value in setting actual policy. On this point, Tanaka contrasted Gustav Radbruch to Stammler. Radbruch had tried to respect all different world views and their various claims while developing a single consistent position that would offer concrete policy implications. In Tanaka's analysis, Radbruch had clarified the logical relationship of other worldviews to their positions on law but because he wanted to avoid the Natural Law, he ended up relegating the question of which worldview one should adopt to a matter of *Bekennnis* (faith), resulting in an attitude of agnosticism and relativism in terms of what the particular task of jurisprudence is. Note that Tanaka, a former Protestant who had converted to Catholicism, saw clear parallels between Radbruch's neo-Kantian emphasis on *Bekennnis* and Luther's notion of *sola fide* (faith alone). Both essentially discarded universal reason in favor of the personal choice of *Bekennnis*. This position distinguished Tanaka from other Japanese Christian professors at Keijō Imperial University who were Protestant and shared this neo-Kantianism.

Tanaka was relentless in criticizing both Radbruch and Stammler for failing to find in law anything that might address actual social problems—another point sure to interest his Korean audience. Stammler failed because he began and ended with formalism; he had nothing of legal content to offer. Radbruch failed because he ultimately reduced the question of which legal content should be adopted to a matter of an individual following the judgment of his personal conscience. Radbruch could provide no objective or even social standard beyond that of individual choice. Tanaka held that, overall, neo-Kantian jurisprudence was unable to provide any positive response to the social, intellectual, political, and economic crisis of the Second World War, and merely ran the risk of being used by moral relativists “like those who run for cover like Pilate” (Tanaka 1944, 160). The moral abscondence of neo-Kantian jurists, Tanaka argued, was the natural consequence of their avoiding the Natural Law. “We are enthralled more with faith in the actual power of the Natural Law than in the impotence of the social philosophy of neo-Kantians” (Tanaka 1944, 160). Tanaka may have originally written these words in the context of the crisis of the Great Depression. But in reiterating them in 1943–1944, he was directing them at the new “social, intellectual, political and economic crisis” of the war. Specifically, he was most likely directing his searing criticism of neo-Kantian jurisprudence at Odaka Tomoo, who in 1943 was finishing his last year on the faculty of Keijō Imperial University before moving to Tokyo Imperial University Law faculty. In fact, Odaka and Tanaka had a vigorous, if friendly, debate over the validity of the Natural Law until Odaka's untimely death in 1956.

While Tanaka appreciated Rudolf von Jhering as a modern legal scholar who saw the limits to the Historical School, he was fully aware that Jhering was

not so much an advocate of the Natural Law as simply someone who dismissed the Natural Law from the bias of “*Catholica sunt, non leguntur*” (we don’t read Catholic things). Tanaka recognized that many critics of the Natural Law rejected it as too binding, an effort to predetermine every complex aspect of life by one inflexible measure, but he noted that this was simply a caricature of the Natural Law. Citing Aristotle and Aquinas, he argued that the Natural Law is only a *Grundprinzip* (basic principle), and that relativism has to be employed when developing the *Regeln, nähere Bestimmungen* (rules, more detailed provisions) that govern the particulars of actual social life (Tanaka 1944, 161). Here, again, was a point that would have resonated with Korean legal scholars. Tanaka’s legal universalism, based on the Natural Law, was not a cover for imperialism. It found appropriate expression for the particularities of Korean social life without surrendering on the basic legal principles of universal respect for human rights.

How much of this exact argument Tanaka delivered at Keijō Imperial University in early May 1943 must remain a matter of speculation. But we can be assured that his speech on “The Essence of Law, with Particular Reference to the Natural Law” closely followed the arguments he was preparing at that time for publication in “The Basic Problem of Law and the Natural Law.” Moreover, it is well-known that Tanaka never changed his position on law and the Natural Law from his first major publication in 1927 to his death in 1974. He was a universalist who resisted both the right-wing militarists and the left-wing communists in the prewar period, and maintained his strong anti-communist position in the postwar after the demise of the militarists. In August 1943, just months after returning to Tokyo from Korea and China, and in the wake of the meeting of the Friendship Society of Japanese and Overseas Catholics that was held on April 29 under the auspices of Diet member Inabata Katsutarō and Colonel Horii San’ya of the Showa Trading Company, Tanaka published the following reflections on what Catholics in Greater East Asia should see as their mission:

What is most necessary in this instance is a feeling of respect and love for other ethnic nations (*minzoku*). In order for the ethnic nations of East Asia to cooperate with each other and work towards their goal in this moment of world historical crisis, they must have relations of mutual love and respect, that is, relations built on a firm spiritual unity. But opening the way to this relationship must be the noble mission entrusted to all the Catholic faithful of East Asia. (Tanaka 1943, 13; originally written July 26, 1942)

To understand the significance of this statement, it is important to note that Tanaka wrote it on July 26, 1942 but did not publish it until August 1943, after he had met Bishop Ro Kinam in Seoul and after the convening of the Friendship Society of Japanese and Overseas Catholics. In emphasizing the necessity of mutual love and respect among ethnic nations as the real task of Catholics in the region, Tanaka was criticizing the militarists’ effort to enlist Japanese Catholics in subduing the nations of East Asia. On September 27, 1943 Bishop Ro came to Japan and stayed long enough to meet with Japanese Catholic clerics in Tokyo on October 4. There is no record of him meeting with Tanaka, but given their prior meeting on May 7, an

informal meeting between the two that autumn cannot be ruled out. The likelihood of their meeting again in the fall of 1943 is enhanced by the fact that they stayed in touch later in the postwar years, as we will see below.

Coda: Tanaka and Korea during the Cold War

Tanaka's relation with Korea in the postwar period, in both speech and act, was framed in the context of the Cold War against communism and Korea's key role in that struggle. Neither his anti-communism nor his anti-militarism had changed. In March 1946, he wrote that "we call for a true order that can now replace the order of the militaristic, extreme statism" (Tanaka 1946, 199). And in 1952, in an argument against advocates of peace at all costs, Chief Justice Tanaka wrote, "We wonder whether Japanese exponents of such a theory mean to claim that the Japanese people or South Korea ought to have meekly suffered enslavement at the hands of the Tojo militarists or Red imperialism" (Tanaka 1952, 73).

Of course, Tanaka often encountered Korean diplomats posted in Tokyo during the 1950s, when he and his wife were major celebrities among Japan's most prominent members of high society. For example, on March 11, 1952 Tanaka attended a reception at the Imperial Hotel hosted by Danish diplomat Lars P. Tillitse that Kim Yongju 金龍周, former chief of the Korean diplomatic mission, also attended. There were more than three hundred in attendance, and there is no record that Tanaka and Kim actually met at the reception. But it is not unreasonable to assume that Kim and Tanaka did speak. Kim had an interest in a case that Tanaka would soon preside over, the appeal of twenty-nine Koreans and one Taiwanese convicted of war crimes who on June 14, 1952 filed for release from Sugamo prison on the grounds that they no longer held Japanese nationality. On September 9, 1953, Tanaka attended a luncheon given at the Hotel Teito in honor of Lt. General K. S. Thimayya, chairman of the Neutral Nations Repatriation Commission for Korea. Again, there is no record of any meeting between Tanaka and a Korean at the luncheon, which was hosted by the Indian Ambassador M. A. Rauf. It is much more likely that Tanaka spoke with Kim Yongshik 金溶植 who attended a dinner gathering of twenty-two diplomats at the Imperial Hotel on March 5, 1954. Mrs. Tanaka and Mrs. Kim also attended. It seems reasonable to assume that at this meeting, Kim would have tried to convince Tanaka to release the ethnic Korean war criminals from Sugamo prison. If he did, his efforts were in vain. On April 26, 1954, the Tanaka Court dismissed the habeas corpus appeal, finding that Article 11 of the San Francisco Peace Treaty obligated the Japanese government to uphold their convictions (Schmidt 1999, 235). Tanaka and Kim may have met again a year later when both were present at a large farewell reception for the UN Deputy Economic Coordinator for Korea, Joseph J. Caputa that was held at the Tokyo Officer's Open Mess on March 2, 1955. Unfortunately (or perhaps fortunately), there is no record of whether they met on that occasion or what they might have said to each other.

In spite of the Supreme Court decision on the Korean war criminals, Tanaka's support for Koreans in their struggle against communism did not end with the Korean War, nor was it limited to rhetoric. In 1957, Augustine Ch'oe

Sōmyōn 崔書勉 was spirited out of Korea, disguised as a Catholic nun and flown by U.S. military plane to Tokyo where he showed up at Tanaka's home, seeking his help (Ikehara 2011, 107). The details behind this event likely will never be completely known. But some circumstances surrounding it are known. Ch'oe was arrested in connection with the 1949 assassination of Peter Kim Ku 金九, the most prominent political opponent of Syngman Rhee, and sentenced to life in prison. Although Ch'oe only served a year and a half before he was released, he converted to Catholicism (Kim Ku's faith) while in prison and through his new faith, he came into contact with Bishop Ro and the Catholic John Chang Myōn (Chang Myon), serving as Chang's personal secretary during his second term as prime minister from 1951 to 1952. Chang had served as Korean Ambassador to the United States, so he certainly had a network of contacts among American military officers. But so did Tanaka. By late 1956, Tanaka had been in correspondence with both Lt. General Earl W. Barnes who had just become Chief of Staff, Far East Command and with General L. L. Lemnitzer, Commander-in-Chief for the Far East Command. These two men would have been essential to any plot to fly Ch'oe secretly out of Korea to Japan on an American Air Force plane. Bishop Ro's cooperation would have been valuable in disguising Ch'oe as a Catholic nun and such support would have been likely, given the close relationship between Ro and Ch'oe and his mentor Chang. Keep in mind that Tanaka had met Bishop Ro in Seoul in 1943 and may have seen him subsequently in Tokyo. Moreover, Tanaka was well-known to the Americans as a leading anti-communist Catholic Japanese. In any event, someone (likely, a high-level US Air Force officer such as Lt. General Barnes) must have guided Ch'oe Sōmyōn to Tanaka's home, where Tanaka told Ch'oe that if he would turn himself into authorities, Tanaka would serve as his sponsor for a residence permit. He did, permission was granted, and he stayed in Tokyo where he established the International Institute for Korean Studies in 1969.

Tanaka's other Korea connection did not emerge until the final years of his life. In 1968, his life-long friend and fellow Catholic Kanayama Masahide was appointed Japan's Ambassador to South Korea. Kanayama had been a student of law at Tokyo Imperial University and sat in on a few of Tanaka's classes. But he got to know Tanaka mostly through the university's Catholic Club and, while in the foreign service, in Geneva and Chile when Tanaka visited those countries. Kanayama recounts that, as Ambassador, he invited Tanaka to South Korea, but by then Tanaka was finishing his term as a judge of the International Court of Justice at The Hague and was eighty years old and in increasingly poor health. He declined the invitation. But in a fitting conclusion to Tanaka's relationship with Korea, one day in 1972, after his term as Ambassador to South Korea had ended, Kanayama called on the elderly Tanaka at his home, bringing with him Bishop Ro, Ch'oe, and a lawyer from Hawaii named Miho [Katsugo?]. Kanayama said Tanaka was delighted to talk about the board game *go*, but he provides no further details on what they spoke about on that occasion (Kanayama 1977, 448). Nonetheless, it is not hard to imagine that Bishop Ro and Ch'oe had come simply to offer words of gratitude to the aging Tanaka, a fellow Catholic who had been such a good friend to Korea both during the colonial period and after.

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