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Indian Justice Radhabinod Pal's Presence and Impressions in Japan's Memory: The 1946–1948 Tokyo Trial in Retrospect

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Justice Radhabinod Pal (1886–1967) was an eminent Indian jurist who, in a famed brush with his professional destiny, forever etched his name in post-World War II history's momentous milestone, at least in Japan's memory. He was a member of the United Nations' International Law Commission from 1952 to 1966, and one of the three Asian judges appointed to the International Military Tribunal for the Far East (IMTFE). On January 19, 1946, General Douglas MacArthur, Supreme Commander for the Allied Powers, issued a special proclamation that announced the establishment of the IMTFE. The Tokyo trial, as it was commonly referred to, was conducted by justices from 11 countries. Representing as an Indian judge from British India at this Military Tribunal and as a member of the tribunal of judges officiating at the Tokyo trial in 1946, Justice Radhabinod Pal, in his dissenting opinion, comprehensively disagreed with all aspects of the trial, finding all defendants not guilty of the charges leveled against them. He dissented from the majority judgment and filed a statement for his reasons for such dissent. Notwithstanding the many questions raised in Pal's dissent about criminality, power, justice, wars of aggression and imperialism whilst being caught in a specific moment of history, questions which remain far from settled, this paper revisits Justice Pal, the trajectory of his life, impressions, and his famous tryst with Japan's destiny at the end of World War II.

Contemporary Political Memory of Justice Pal in Japan and India

Justice Pal, to this day, is remembered in India across the political spectrum. India's External Affairs Minister during the first term of the Narendra Modi government, Sushma Swaraj, addressed the Indian community in Japan during her visit in March 2018 and referred to the historical linkages that Japan shares with India.

In the years before, during and immediately after World War II, modes of communication to faraway lands were limited and not so accessible. Despite these constraints, people traveled from Japan to India and vice versa. In her Tokyo address, Swaraj stated that three Indian names automatically crossed minds when thinking of Japan and India, namely, Justice Radhabinod Pal, Netaji Subhash Chandra Bose[1] and Rash Behari Bose. "To date people in Japan have immense respect for these three figures of Indian history," said Swaraj.[2]

Earlier, in December 2006, Indian Prime Minister Manmohan Singh delivered a speech in the Japanese Diet wherein he alluded to the "principled judgment" of Judge Radhabinod Pal after the war that is remembered even today in Japan. Singh stated that these events reflected the depth of India's friendship with Japan, and the fact that the two nations have stood by each other at critical moments in their history.[3] Prior to that, in April 2005, Prime Minister Singh in his remarks at a banquet in New Delhi, in honor of then visiting Japanese Prime Minister Junichiro Koizumi, stated that, though India and Japan had gone through various phases in their relationship, the two nations had notably stood by each other in times of difficulty. Importantly, Singh recalled that India refused to attend the San Francisco Peace Conference in 1951 and signed a separate peace treaty with Japan in 1952. India's Prime Minister Jawaharlal Nehru felt that this provided Japan with a proper position of honor and equality among the community of free nations. In that peace treaty, India waived all reparation claims against Japan. Indian Prime Minister Manmohan Singh underlined that the dissenting judgment of Judge Radhabinod Pal was well known to the Japanese people and would always symbolize the affection and regard Indians have for Japan.

Subsequently, during a visit to India in August 2007, Japan's Prime Minister Abe Shinzo paid tribute to Justice Pal while he addressed the Indian Parliament and said, "Justice Pal is highly respected even today by many Japanese for the noble spirit of courage he exhibited during the International Military Tribunal for the Far East."[4] Thereafter, Abe, Japan's first prime minister to have been born after World War II, traveled to the eastern Indian city of Calcutta to meet Pal's octogenarian son, Prasanta Pal, to pay tribute to the latter's father, whom Japan remembers and honors even today. At the meeting, Pal showed Abe a picture of his father during a 1966 visit to Japan with Abe's grandfather, former Prime Minister Nobusuke Kishi, who admired Justice Pal immensely. In response, Abe said, "Your father is still respected by many in Japan".[5]

Indeed, postwar Japan's nationalist political leadership and thinkers have long upheld Judge Pal as an idol, wherein he has remained a touchstone of the culture wars surrounding the Tokyo trial.[6] The floor for debate is still open for

1 For further reading and detailed references on Netaji Bose, the Indian National Army and Japan, see, Monika Chansoria, *Japan, Hikari Kikan, and Subhash Chandra Bose's Indian National Army: The Defining Yet Unfinished 1940s Connect,* Policy Brief, The Japan Institute of International Affairs, Tokyo, February 5, 2021, available at https://www.jiia-jic.jp/en/policybrief/pdf/PolicyBrief_Chansoria_210205.pdf

2 Remarks by Indian External Affairs Minister, Sushma Swaraj, Embassy of India, Tokyo, March 29, 2018.

3 "Prime Minister Shinzo Abe's visit: Pinnacle of India-Japan Relations," *Indian Ministry of External Affairs Public Diplomacy*, January 22, 2014, available at https://mea.gov.in/in-focus-article.htm?22762/Prime+Minister+Shinzo+Abes+visit+pinnacle+of+IndiaJapan+relations

4 As cited in Norimitsu Onishi, "Decades After War Trials, Japan Still Honors a Dissenting Judge," *The New York Times*, August 31, 2007.

5 "Abe risks ire by meeting son of Indian judge," *Reuters*, August 23, 2007, available at https://www.reuters.com/article/topNews/idINIndia-29108320070823?edition-redirect=in

6 Onishi, n. 4.

why the US and Britain appointed Justice Pal, who was known for strongly sympathizing with the ongoing anti-colonial struggle in India at that time. General Douglas MacArthur attributed this to the US State Department having a change of mind and deciding to address the striking imbalance in the number of Asian judges while constituting the list of justices for the tribunal. They thought it prudent that a few more Asian judges join the trial and thus the Allied Powers decided to add a judge from India and one from the Philippines.

Radhabinod Pal's Journey of Life

Radhabinod Pal was born in 1886 in the high noon of the British Empire in a small remote village of Taragunia, in the Kushtia District of erstwhile Bengal, British India. Today, this village is part of Bangladesh. Born into a family of potters, which commanded inferior status socially, Radhabinod was the only son of his parents and went through an unstable family life and economic difficulties during his formative years. His father renounced the world and deserted the family, leaving it to his mother to fend for the family. That early intense relationship with his traditional mother defined much of Pal's emotional and intellectual life. All through his life, he retained a sharp sensitivity to the interrelationships between morality, vocation, and tradition.[7] He remained aware throughout his life that his mother had reared him and his sisters at enormous physical strain and personal sacrifice, and she became the final authority and source of moral legitimacy for him as long as she survived. Her ambition and confidence in her only son were especially unbounded, as if she were determined to prove correct Sigmund Freud's belief that such ambition and confidence contribute to the success and creativity of such sons.[8]

Pal was initially educated in local schools and later studied mathematics and law at Presidency College, Calcutta and the Law College of the University of Calcutta. Alongside teaching, Pal also practiced law at the Mymensingh Bar, and later amplified his legal qualifications by obtaining an LLM degree (1920) from Calcutta University. The British Government of India appointed Pal as a legal advisor in 1927. Thereafter, Pal moved to Calcutta to build a legal career in the High Court and subsequently became a judge of the Calcutta High Court in 1941. From 1952–1966, he was a member of the UN International Law Commission.

Pal often symbolized colonized India as an ever-suffering, victimized, widowed mother often in the form of expressions used to describe the politics and arts of Bengal by the mid-19th century.[9] In this reference, the 60-year old Indian appointee to the Tokyo trial court had been a backer of nationalist Indian war hero Netaji Subhash Chandra Bose. Given his background, Pal's concern surrounding imperialism were not surprising. A jurist at the Calcutta High Court when he was thrust into the international spotlight, Pal presumably had nationalist leanings that questioned and critiqued colonialism.[10]

Arguments Shaping Justice Pal's Dissent

Pal's dissentient judgment offers critical insights into the equations between imperialism and the development of international law. His brush with nationalism overlapped with strands of anti-imperialism prevalent in India during

7 For details see, Ashis Nandy, "The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability," *New Literary History,* vol. 23, no. 1, Versions of Otherness, (The Johns Hopkins University Press, Winter, 1992) p. 55.

8 Ibid.

9 Ibid.

10 For related reference and reading see, J Ryall, "Revealed: Blunder that allowed dissenting judge to sit on Japanese war crimes tribunal," *South China Morning Post*, October 15, 2009.

those years–a connect that was felt most in Pal's home state, colonial Bengal. Less than a month after the US bombing of Hiroshima and Nagasaki, the Japanese government signed the Instrument of Surrender, recognizing the Allies' right to mete out "stern justice" to war criminals.[11] A memo drafted by the US State-War-Navy Coordinating Committee set the guidelines for the ways in which the various charges spelled out by the Nuremberg Charter (crimes against peace, war crimes, and crimes against humanity) would be prosecuted. The proposed Tokyo tribunal was designated to focus on the most pressing charge, the crime of conspiring and engaging in an aggressive war.[12] The overall responsibility of setting up the various tribunals, appointing judges, and prescribing the rules of procedure was assigned to General MacArthur, the de facto ruler of occupied Japan. In his capacity as the Supreme Commander for the Allied Powers, General Douglas MacArthur instituted the Tokyo trial in January 1946 by enacting a charter that outlined three categories of war crimes:

a) Crimes against Peace, more frequently referred to as Crimes of Aggression
b) Conventional War Crimes
c) Crimes against Humanity

The IMFTE was a select team of fine jurists tasked to create history, sharing a great responsibility of carefully considering and treading a fine line between justice and revenge. When the Tokyo tribunal was inaugurated by presiding judge William Webb from Australia on May 3, 1946, he declared that justice would be administered "according to law and without fear, favor or affection." As individual judges in their own countries, the members of the tribunal were to decide the fate of others on issues that were extremely complex, requiring collective skill and experience. In discussions on atrocities, there was a view put forth that these crimes should be adjudicated as conventional war crimes and not be categorized as crimes against humanity. On this subject, Justice Radhabinod Pal maintained his argument that there was a need to deliberate on the 'crimes of aggression' charge. He asserted that there was still a motion on the table to rule out waging of aggressive war as a crime, arguing that the crimes of aggression had not existed prior to, or at any time throughout, the conflict in the Pacific. Pal was highly critical of the prosecution's use of the legal concept of conspiracy in the context of pre-war decisions by Japanese officials, maintaining that the tribunal should not retrospectively apply (*nulla poena sine lege*) the new concept of Class A war crimes while waging an aggressive war.

Pal dissented from the tribunal's verdicts of guilt in the cases of defendants charged with Class A war crimes. His reasoning also influenced the judges representing the Netherlands and France, and all three of these judges issued dissenting opinions. This in no way implied that Justice Pal condoned the atrocities. For that matter "Pal was very hard on Japan, though he, of course, [also] spoke very severely of the United States…"[13] However, Pal wanted to avoid applying a law that did not exist at the time the actions for which the men responsible were standing on trial took place.

To this argument Pal was informed that the charter of the Tokyo trial governed its duties and that it had been agreed that the charges stood as per the charter and that any dissenting opinion would stay in the discussion room. Pal objected to this, stating that the 'agreement' being cited was 'not unanimous' and that he was not present in the room when 'they' decided. Pal believed that Japan had committed conventional

11 For details see, Y Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, (Cambridge, MA: Harvard University Press) p. 7.
12 Ibid., p. 22.
13 Onishi, n. 4.

war crimes for which Japanese officers were tried in local courts and sentenced. His position continued to remain that there were no legal grounds for the charge of crimes of aggression, as he kept returning to his primary question: on what legal grounds can the Japanese be charged? The tribunal could not arbitrarily impose new international laws, and progress in law/international law must not be achieved in haste. On the Tokyo Charter, Pal averred:

> My reading of the Charter is that it does not purport to define war crimes; it simply enacts what matters will come up for trial before the Tribunal, leaving it to the Tribunal to decide, with reference to the international law, what offense, if any, has been committed by the persons placed on trial .... I believe the Tribunal, established by the Charter, is not set up in a field unoccupied by any law. If there is such a thing as international law, the field where the Tribunal is being established is already occupied by that law and that law will operate at least until its operation is validly ousted by any authority. Even the Charter itself derives its authority from this international law. In my opinion it cannot override the authority of this law and the Tribunal is quite competent, under the authority of this international law, to question the validity or otherwise of the provisions of the Charter. At any rate unless and until the Charter expressly or by necessary implication overrides the application of international law, that law shall continue to apply and a Tribunal validly established by a Charter under the authority of such international law will be quite competent to investigate the question whether any provision of the Charter is or is not *ultra vires*. The trial itself will involve this question.

In his book, *Hirohito and the Making of Modern Japan*, Herbert Bix described Justice Pal as the 'most politically independent of the judges' refusing to let the political concerns and purposes of the Allied Powers, let alone the charter, influence his judgment in any way.[14] Significantly, Pal went on to question whether the 1928 Pact of Paris (Kellogg–Briand Pact; officially, the General Treaty for Renunciation of War as an Instrument of National Policy) provided legal grounds for criminalizing war. Moreover, the Pact did not suggest any penalties, and certainly did not say anything about the responsibility of officers or politicians as individual perpetrators. Continuing on about the Pact of Paris, Pal argued:

> I must say there has already come into existence a formidable array of literature relating to the question. In interpreting the Pact, we must not in any way be influenced by the fact that we are called upon to interpret it in a case against a vanquished people. Our interpretation must be the same as it would have been had the question come before us prior to any decisive war. With international law still in its formative state, great care must be taken that the laws and doctrines intended to regulate conduct between state and state do not violate any principles of decency and justice. History shows that this is a field where man pays dearly for mistakes. Those who feel interested in these trials, not for retaliation, but for the future of world peace, should certainly expect that nothing is done here which may have the effect of keeping the hatefire burning. The function of law is to regulate the conduct of parties by reference to rules whose formal source of validity lies, in the last resort, in a precept IMPOSED FROM OUTSIDE.

Within the community of nations, this essential feature of the rule of law is constantly put in jeopardy by the conception of the *Sovereignty of States* which deduces the binding

14 For details see, Herbert P. Bix, *Hirohito and the Making of Modern Japan*, (New York: Harper Collins, 2000) pp. 595-596.

force of international law from the will of each individual member of the international community, stated Justice Pal, and he continued:

> There is certainly a great deal of difficulty in reconciling the uncompromising claims of national sovereignty in international relations with the growing necessities dictated by political developments in international relations and by demands of the growing public consciousness and opinion of the world. But the solution of this difficulty does not lie in staging trials of this kind only. In international law, unlike municipal law, the general justiciability of disputes is no part of the existing law; it is in the nature of a specifically undertaken and restrictively interpreted obligation. Accordingly in international law, when the question arises whether any actual dispute is justiciable or not, the proper procedure is necessarily to inquire whether the contesting states have in regard to that particular dispute undertaken to accept the jurisdiction of an international tribunal.
>
> Nations do not seem to have behaved as if war after 1928 became an illegal thing. At least they preferred to recognize belligerent rights even in the case of a war in violation of the Pact. As I shall show later, both the U.S.A. and the U.K. entertained this view of the incidents of belligerency attaching to such a war. On February 27, 1933, Sir John Simon, discussing in the House of Commons the embargo on the shipments to China and Japan spoke of Great Britain as a "neutral government", and of the consequent necessity of applying the embargo to China and Japan alike. So, at that time Japan's war in China was not considered to be an illegal thing.

Justice Pal was of the view that, given the way countries and societies continued to act against each other, the Pact of Paris was more of an idealistic pledge and that laws should not be made at will. Pal was of the belief that law has the power to guide mankind and thus its principles must be upheld. On the observations made in connection with international law, Pal said:

> In our quest for international law are we dealing with an entity like national societies completely brought under the rule of law? Or, are we dealing with an inchoate society in a stage of its formation? It is a society where only that rule has come to occupy the position of law which has been unanimously agreed upon by the parties concerned. Any new precedent made will not be the law safeguarding the peace-loving law-abiding members of the Family of Nations, but will only be a precedent for the future victor against the future vanquished. Any misapplication of a doubtful legal doctrine here will threaten the very formation of the much coveted Society of Nations, will shake the very foundation of any future international society. Law is a dynamic human force only when it is the law of an organized society; when it is to be the sum of the conditions of social co-existence with regard to the activity of the community and of the individual. Law stems from a man's reasonableness and from his innate sense of justice. But what is that law? And is international law of that character?

Pal continued to maintain that this is why they must acquit all the defendants on the charge of crimes of aggression, for this was a law that did not truly exist yet. He ruled:

> It seems to be generally agreed that no war became crime in international life, though it is sometimes asserted that a distinction between "just" and "unjust" war had always been recognized. It may be that international jurists and philosophers sometimes used these distinctive expressions in their learned discourses. But international life itself never recognized this distinction

> and no such distinction was ever allowed to produce any practical result. At any rate an "unjust" war was not made "crime" in international law. In fact any interest which the western powers may now have in the territories in the Eastern Hemisphere was acquired mostly through armed violence during this period and none of these wars perhaps would stand the test of being "just war".

Upon hearing his stance and differing views, it was suggested to Pal that he might consider returning to Calcutta, to which he replied that he had not travelled all the way from a country, India (then under Britain's colonial rule), that was struggling to gain its independence, to have his arguments discarded or to be told to go home. Sitting in Tokyo, Pal said in the present scene they were talking about justice in the modern world, and yet there was a substantially large part of Asia that still remained colonized by the West. These regions were conquered with violence, and their indigenous people were being exploited, with inequality and racism existing and prevailing at large. Tumultuous conflicts and violations were still taking place throughout the world. In his judgment, Justice Pal referred to Quincy Wright's writing in 1925 on "The Outlawry of War"[15] which said:

> Under present international law "acts of war" are illegal unless committed in time of war or other extraordinary necessity but the transition from a state of peace to a "state of war" is neither legal nor illegal. A state of war is regarded as an event, the origin of which is OUTSIDE of international law although that law prescribes rules for its conduct differing from those which prevail in time of peace. The reason for this conception, different from that of antiquity and the Middle Ages, was found in the complexity of the causes of war in the present state of international relations, in the difficulty of locating responsibility in the present regime of constitutional governments and in the prevalence of the scientific habit of attributing occurrences to natural causes rather than to design. In so far as wars cannot be attributed to acts of responsible beings, it is nonsense to call them illegal. They are not crimes but evidences of disease. They indicate that nations need treatment which will modify current educational, social, religious, economic, and political standards and methods in so far as they affect international relations.

Pal as a proto-ideologue to, and ancestral voice in, the third world approach to international law offers perhaps the best explanation for his judgment to Western scholars. Pal's anti-colonial roots in Bengal led him to locate despotism.[16] His prolonged tryst with India's traditional laws merged with a sense of Asian camaraderie in the backdrop of the larger Afro-Asian context of Indian nationalism served as key influencers.[17] Pal rejected all forms of hierarchy (race, caste, class, gender) as the very basis of the imperial order of states, one that was incapable of rendering true justice. In doing so, Pal's embrace of sovereignty suggested adopting the necessary evil in order to effectively counter colonial institutions and

15 For details and further reference see, Quincy Wright, "The Outlawry of War," *American Journal of International Law*, vol. 19, no. 1, 1925, pp. 76-103.

16 Rohini Sen and Rashmi Raman, "Retelling Radha Binod Pal: The Outsider and The Native," in Frédéric Mégret and Immi Tallgren, eds., *The Dawn of a Discipline: International Criminal Justice and its Early Exponents*, (Cambridge University Press, 2020) p. 257; also see, Swami Vivekananda, "The Soul and God," in *The Complete Works of Swami Vivekananda*, vol. 1, (Advaita Ashram, 1972) pp. 489–502; and see, "Maya and the Evolution of the Conception of God," in *The Complete Works of Swami Vivekananda*, vol. 2, (Advaita Ashram, 1976) pp. 105–117, cited in Sen et al.

17 Nandy, n. 7, p. 54.

practices.[18]

B.S. Chimni, writing in the *American Journal of International Law* in 2018, worried that "the non-availability of the state practice of third world countries, and also the paucity of scholarly writings on the subject, allows the identification of rules of [customary international law] primarily on the basis of state practice of advanced capitalist nations and the opinions of their scholars."[19] Pal was an early spark behind the *au courant* conversation about whether international law truly is international.[20] This unmasked the embeddedness of racism within the international legal order. When it comes to approaching international law, Anthea Roberts further observes that "each of us brings our biography into play"–suggesting that international lawyers are often not as cosmopolitan as one would like to think. On the political level, it raises awkward questions about the implications that might flow from different understandings of and approaches to international law in light of changing geopolitical power.[21]

One wonders what Pal would say today about the International Criminal Court, in light of his view that the international community has not as yet developed into "the world commonwealth" and perhaps as yet no particular group of nations can claim to be the custodian of "the common good". International life is not yet organized into a community under the rule of law.[22] Pal investigated the charges "… and eventually concluded that the evidence presented to the Tribunal was not sufficient to establish the criminal responsibility of the defendants" and questioned whether the Japanese leadership could be implicated in this violence through doctrines of command responsibility.[23] The nexus, that of the commander to criminal conduct, continues to vex international criminal law today.[24]

Justice Radhabinod Pal's Dissentient Judgment: Key Facets

The final arguments and proceedings of the tribunal came to a close in April 1948 after two and a half years, with 419 witnesses appearing in 818 court sessions and 779 affidavits and depositions being presented. The International Military Tribunal for the Far East rendered its judgment November 4–12, 1948, by means of a 1,218-page judgment. Unlike at the vaunted Nuremberg trials, the judgment of the Tokyo tribunal was not unanimous. Justice Radhabinod Pal wrote a separate dissenting opinion and, unsurprisingly, refused to sign the "joint

18 For details see, Milinda Banerjee, "Does International Criminal Justice Require a Sovereign? Historicizing Radhabinod Pal's Tokyo Judgment in Light of His 'Indian' Legal Philosophy," *Historical Origins of International Criminal Law*, vol. 2, 2014, pp. 67–117.

19 B.S. Chimni, "Customary International Law: A Third World Perspective," *American Journal of International Law*, vol. 112, no. 1, 2018, pp. 1-46.

20 Anthea Roberts, "Is International Law International? Continuing the Conversation," *Blog of the European Journal of International Law*, February 9, 2018, available at https://www.ejiltalk.org/is-international-law-international-continuing-the-conversation/

21 Ibid.

22 See Radhabinod Pal, *International Military Tribunal for the Far East: Dissentient Judgment* (Calcutta: Sanyal, 1953); and Radhabinod Pal, *Crimes in International Relations* (Calcutta, 1955); and see, *International Military Tribunal for the Far East: Dissentient Judgment of Justice Pal*, (Kokusho-Kankokai, Inc., Tokyo, 1999) pp. 1-703.

23 Mark A. Drumbl, "Symposium on Art, Aesthetics, and International Justice; Memorializing Dissent: Justice Pal in Tokyo," *American Journal of International Law*, no. 114, 2020, p. 113.

24 Ibid.

affirmation to administer justice fairly."[25] The President of the Tribunal, Justice William Webb of Australia, stated that the member judge of the tribunal from India had dissented from the majority judgment and had filed a statement of his reasons for such dissent. Such was also the case with the member judges from France, Justice Henri Bernard, and The Netherlands, Justice B. V. A. Röling, both of whom had dissented, in part, and filed their reasons for such dissent.

Judge Röling of the Netherlands found nothing objectionable in Emperor's Hirohito's immunity, for he believed the latter to have been a complete figurehead. Röling based his dissent instead on the imperfections of the charter, whose validity he had questioned from the outset. He rejected the notion of "aggression" as a crime under international law.[26] Justice Röling argued that war is a policy executed by a sovereign state. If so, then how can it legally determine the level of guilt or punishment for each individual in that state? Justice Röling was of the view that the autonomy of every judge on this trial should come before all else, and that as jurists they needed to be objective. Waging an aggressive war was clearly not a crime when Japan went to war, Röling argued.

The American occupation of Japan ended in 1952, following the signing of the San Francisco Peace Treaty by Japan and its accepting of the Tokyo trial's verdict. The end of the occupation simultaneously lifted the ban on the publication of Justice Radhabinod Pal's 1,235-page dissent. Upon completion of the trial, and finding evidence of atrocities perpetrated, Pal produced a judgment questioning the legitimacy of the tribunal and its rulings. He held the view that the legitimacy of the tribunal was questionable because the spirit of retribution, and not impartial justice, was the underlying criterion for passing the judgment. Pal noted that questions of law were not to be decided in an intellectual quarantine area in which legal doctrine and the local history of the dispute alone are retained and all else forcibly excluded, maintaining that one could not afford to be ignorant of the world in which disputes arose.

As Timothy Brook explicates, Pal "... combines a conservative legal positivism that refuses to innovate beyond existing law with a radicalism that regards the politics within which a court operates relevant to the adequacy of its findings."[27] This tension recurs throughout Pal's dissent. For instance, the one-sided nature of the charges rattled him, in that he felt it betrayed the law's need to be evenhanded. The omission of the atomic bombings of Hiroshima and Nagasaki, in particular, galled him.[28] Pal mordantly noted that any claims that the breaches of shared humanity should be criminally punished "were non-existent" when another state decided to deploy atomic weaponry.[29] He further held the belief that the exclusion of Western colonialism and the use of nuclear weapons by the United States from the list of crimes, as well as the exclusion of judges from the vanquished nations on the bench, signified the "failure of the Tribunal to provide anything other than the opportunity for the victors to retaliate."[30] Pal in his judgment ruled:

> The part of humanity which has been lucky enough to enjoy political freedom can now well afford to have the deterministic

25 For further reference see, Arnold Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (William Morrow & Co., 1987) pp. 92 and 344.
26 Bix, n. 14, p. 610.
27 Timothy Brook, *The Journal of Asian Studies*, vol. 60, no. 3, August 2001.
28 Ibid.
29 Drumbl, n. 23.
30 Cited in Brook, n. 27.

ascetic outlook of life, and may think of peace in terms of political status quo. But every part of humanity has not been equally lucky and a considerable part is still haunted by the wishful thinking about escape from political dominations. To them the present age is faced with not only the menace of totalitarianism but also the ACTUAL PLAGUE of imperialism. They have not as yet been in a position to entertain a simple belief in a valiant god struggling to establish a real democratic order in the Universe. They know how the present state of things came into being. A swordsman may genuinely be eager to return the weapon to its scabbard at the earliest possible moment after using it successfully for his gain, if he can keep his spoil without having to use it anymore. But, perhaps one thing which you cannot do with weapons like bayonets and swords is that you cannot sit on them.

For that matter, Pal significantly referred to the trial as a "…sham employment of legal process for the satisfaction of a thirst for revenge". On the debate surrounding aggressive war, he ruled:

> It may be easy for every nation to determine for others what is aggression. Perhaps every nation will say that war against what it considers to be its interest is aggressive. No term is more elastic or more susceptible of interested interpretation, whether by individuals, or by groups, than aggression. But when a court is called upon to determine the question it may not always be so easy for it to come to a decision. In my opinion in international life as at present organized it is not possible "By the simple aid of popular knowledge" to find out which category of war is to be condemned as aggressive. The duty of definition in such a case is obvious; it would not only make the matter clear but would also give it its true place in the scheme of knowledge showing its origin and connection with other cognate facts and determining its essentials. The so-called "simple popular" idea in a case like this would not be sufficient and we must not make confusion between the idea entertained by a particular group and the real popular idea of the entire international community. It is a question of a clear agreement of the different nations as to the measures which they would deem to be aggressive. The question involves further difficulty in view of the fact that the fundamental basis of these trials has been declared to be the organization of international life on the footing of humanity, but as a matter of fact there are still nations under the domination of another nation. The question would naturally arise whether the term aggressive would have reference to the interest of the dominated nation as distinct from that of the dominating power, or whether it would only have reference to the status quo.

Pal wrote that the Tokyo trial was an exercise in victor's justice and that the Allies were equally culpable in acts such as strategic bombings of civilian targets, deeming it appropriate to dissent from the judgment of his 'learned brothers' to embody his love for absolute truth and justice. Pal's judgment at Tokyo referred to the use of nuclear weapons and the fire-bombing of Japanese cities by the Allied powers, and weighed these acts against the accusations of immoral disregard for civilian lives by the Japanese wartime leadership, when he stated:

> The atom bomb during the Second World War, it is said, has destroyed selfish nationalism and the last defense of isolationism more completely than it razed an enemy city. It is believed that it has ended one age and begun another the new and unpredictable age of soul. "Such blasts as levelled Hiroshima and Nagasaki on August 6 and 9, 1945, never occurred on earth before-nor in the sun or stars, which burn from sources that release their energy much more slowly than does Uranium" so said, John J

O' Neill, the Science Editor in *The New York Herald Tribune*. "In a fraction of a second the atomic bomb that dropped on Hiroshima altered our traditional economic, political, and military values. It caused a revolution in the technique of war that forces immediate reconsideration of our entire national defense problem". Perhaps these blasts have brought home to mankind "that every human being has a stake in the conduct not only of national affairs but also of world affairs".

Pal's judgment, declaring all the defendants not guilty on all charges, was unique and in no way representative of the Indian or any other Asian government.[31] From the standpoint of legal theory, Pal denied (as did Röling, whose views were close to Pal's) the criminality of launching and waging war as a sovereign right of the state. The international legal order as it had existed in the 19th century could not be developed and expanded. The concept of "aggression" remained legally undefined. The Nuremberg and Tokyo tribunals, having exceeded the framework of international law as it existed before World War I, were illegal; ergo, the defendants were not in violation of law.[32] According to Indian political and social theorist Ashis Nandy, Justice Pal pointed out the larger political and economic forces released by the nation-state system, by modern warfare, by the dominant philosophy of international diplomacy, and by the West's racial attitude to Japan, all of which helped produce the political response of the accused.[33] The West had to acknowledge that wartime Japan wanted to beat the West at its own game, that a significant part of Japanese imperialism was only a reflection of the West's disowned self.[34] While recording his dissent, Justice Radhabinod Pal delivered his judgment on the culpability of the Japanese leaders accused of war crimes:

> …. in the foregoing pages, I would hold that each and every one of the accused must be found not guilty of each and every one of the charges in the indictment and should be acquitted of all of those charges... As a judicial tribunal we cannot behave in any manner which may justify the feeling that the setting up of the tribunal was only for the attainment of an objective which was essentially political, though cloaked by a juridical appearance... The name of Justice should not be allowed to be invoked only for the prolongation of the pursuit of vindictive retaliation. [Radhabinod Pal, *Crimes in International Relations* (Calcutta, 1955), pp. 193-94]

Going strictly by legal terms, Pal opined that the Japanese could be tried only for conventional war crimes and any other means might itself violate international law. He said:

> The Instrument of Surrender which provides that the Declaration of Potsdam will be given effect imposes the condition that conventional War Crimes, as recognized by international law at the date of the Declaration (26th July, 1945) would be the only crime prosecuted. (CIR 170-71) Under international law, as it now stands, a victor nation or a union of victor nations would have the authority to establish a tribunal for the trial of war criminals, but no authority to legislate or promulgate a new law of war crimes. (CIR 188)

The judgment presumed that the accused were prisoners of war who enjoyed protection under international law against arbitrary acts of

31 For an interpretive perspective located in the South, see, Richard Falk, "Telford Taylor and The Legacy of Nuremberg," *Columbia Journal of International Law*, vol. 37, no. 3, 1999, p. 697.

32 Bix, n. 14, p. 611.

33 Nandy, n. 7, p. 65.

34 Ibid.

placing prisoners on trial. Pal repeatedly said, "… only for breach of recognized laws of war"; the victors could not establish new crimes and new definitions and punish prisoners according to them.[35] Borrowing from Lord Maurice Hankey's 1950 book, *Politics, Trials and Errors*,[36] Pal affirmed:

> I shall once again quote what Lord Hankey says is a Pagan Pronouncement [note the capitals], but sets a standard that the Allies never even approached in the Second World War. The pronouncement is: "For the purpose with which good men wage wars is not the destruction and annihilation of the wrongdoers, but the reformation and alteration of the wrongful acts. Nor is it their object to involve the innocent in the destruction of the guilty, but rather to see that those who are held to be guilty should share in the preservation and elevation of the guiltless." The standard set in this pronouncement has perhaps been too high for the modern nations since the First World War.[37]

When Pal granted himself the right to judge, he was being both an Indian and a Victorian, trying to transcend the moral dichotomy of the age. Culpability, Pal sought to argue in his Tokyo judgment, could never be divisible, and responsibility, even when individual, could be, paradoxically, fully individual only when seen as collective and, in fact, global.[38] On imposing the death penalty, Justice Pal held that each and every one of the accused *must not be found guilty*. There will always be strong and weak nations. War remained an inevitable evil and the international community had not reached a stage where war could be considered a crime. Justice Pal completed his dissenting opinion in early August, and had asked Justice Webb to have the entire text read in open court, according to Indian practice. However, at the end of the Tokyo trial, only the majority judgment was read out in open court, which captured the majority of public attention across the world. Richard Minear pointed out that only a very diligent reader of the judgment would find that the judgment was not unanimous.[39] The end of the Second World War spawned a large number of writings that sought to apportion blame, their tone prosecutory and judgmental at the same time. In that intellectual and political atmosphere, Pal's judgment could not but be seen as an oddity.[40]

In Conclusion

Many years later, Radhabinod Pal was invited by Calcutta University to deliver the 'Tagore Lectures in Law'. In 1951, he was again invited to deliver the postponed Tagore Lectures for 1938, where Justice Pal spoke on crimes in international relations. By this time, he was a famous man in the field of international law. His full Tokyo judgment had not yet been published but its gist was widely known, and he used the lectures to review the judgment and its legal and philosophical justifications. These justifications, in fact, often come out more sharply in the lectures than in the judgment itself.[41]

Pal's dissent revealed critical insights into the relationship between imperialism and the development of international law. According

35 Radhabinod Pal, n. 22, p. 53; see also, pp. 64, 68, 215.
36 For further details and reference see, Maurice Hankey, *Politics, Trials and Errors*, (Lawbook Exchange, Ltd., 1950).
37 Pal, n. 22, p. 399.
38 Nandy, n. 7, p. 66.
39 For details and further reference see, Richard Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton, 1973).
40 Nandy, n. 7 p. 48.
41 Ibid., p. 58.

to Ashis Nandy, whatever people might say of Justice Pal while introducing him in public meetings, his main claim to fame was his IMFTE membership. Most Calcuttans whom Nandy knew admired Pal for his 'unconventional' views and dissenting judgment at Tokyo.[42] Literate Bengalis called it the first Asian victory over a European imperial power. Also, some years before World War II, Rash Behari Bose (1886-1945), a Bengali freedom-fighter, had escaped to Japan from India and founded an Indian National Army (INA) there. Bose married a Japanese lady and settled down permanently in the country, neither of those being a small step in those times.[43] The INA later was led and galvanized by Netaji Bose, the erstwhile president of the Indian National Congress who had broken away ideologically from MK Gandhi. Bose dramatically escaped from India in 1940 to go first to Germany and then to Japan.[44]

The eventual political trajectory undertaken by Pal thus can be seen not as an aberration but as the logical culmination of tendencies revealed in his dissent. Nevertheless, his analysis of the imperialist logic of global politics remains insightful, revealing something fundamental about the nature of the post-war settlement and what would follow from it.[45] The imperialism he experienced—intellectually and politically—took the form of colonial rule. Yet, Pal seemed to be aware of the possibility of the continued existence of imperialism even without direct rule over vast territories.[46] Pal did not pursue this analysis in a systematic manner. However, given his intuition on this matter, it is perhaps not surprising that, despite the vocal anti-colonial position of the US, Pal remained a strident critic of US militarism, both in the lead-up to and immediate aftermath of World War II.[47] Pal directly accused Roosevelt of hypocrisy for his anti-colonial stance, and Secretary Hull of pushing for war through US interventions in the Far East more broadly, and economic strangulation of Japan in particular. The prominent participation of the US in the post-war tribunals was, for Pal, hardly a sign of a new world order that would be fundamentally different from the past. These efforts represented, in his opinion, a conscious attempt to manufacture a particular narrative that would justify the logic and continuation of imperialist policies, particularly on the Asian continent.[48]

Pal's analysis focused on the past actions of the Western powers and their colonial history before turning its gaze onto Japan. It was distinct, both in its form and content, and was unmistakably the view of a non-Westerner.[49] The questioning of the one-sidedness of the trial was not, however, synonymous with pro-Japan sentiments or nationalism. Rather, it reflected a concern that "… formalized vengeance can bring only an ephemeral satisfaction, with every

42 Ibid., p. 46.
43 Ibid., pp. 53-54.
44 For further reading and reference see, Chansoria, n. 1.
45 Latha Varadarajan, "The Trials of Imperialism: Radhabinod Pal's Dissent at the Tokyo Tribunal," *European Journal of International Relations*, vol. 21, no. 4, 2015, p. 808.
46 Ibid.
47 Ibid; also see, Pal, n. 22, p. 124.
48 Pal, n. 22, pp. 124–129; see also ES Kopelman, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial," *New York University Journal of International Law and Politics*, vol. 23, no. 3, 1991, p. 408; and see, R Minear, *Victors' Justice: The Tokyo War Crimes Trial,* (Princeton, NJ: Princeton University Press, 1971), pp. 15, 48, cited in Varadarajan, n. 45.
49 Kei Ushimura, Beyond the *"Judgment of Civilization": The Intellectual Legacy of the Japanese War Crimes Trials, 1946–1949*, (The International House of Japan, 2003) cited in Sen, et al., n. 16.

probability of ultimate regret."[50] In rejecting the legality of the IMTFE, Pal identified imperialism and colonialism as crimes far bigger than aggression. His anti-colonial sentiments were strong and clear as he looked to decimate the imperial status quo. Pal's questioning of the status quo was reproduced in the radical form of *Third World Approaches to International Law* that inherited Pal's suspicions of colonial institutions and mandates. He recalled the prosecuting powers' history of violence in Asia, and warned that they might deploy the charge for their own self-interests, such as maintaining 'the very status quo which might have been organized and hitherto maintained' only by force by pure opportunist "Have and Holders."[51] For Pal, restraint in the anti-colonial struggle was simply unacceptable, for the colonized "cannot be made to submit to eternal domination only in the name of peace."[52]

Notwithstanding its many limitations, the questions raised in Justice Pal's dissent about criminality, power and justice, while situated in a specific historical moment, remain far from settled.[53] The disciplinary scholarship on the role of international law in global politics has, by and large, found it quite easy to ignore the question of imperialism.[54] It is true that the contemporary international order is not characterized by the presence of vast colonial holdings directly ruled by powerful state actors. However, understood correctly, imperialism has never been strictly about colonial acquisitions. The quest for secure markets, resources, and profits could be conducted by other means and, for Justice Pal, this was the fundamental function and significance of institutions like the Tokyo tribunal. It is in this context that a critical retrieval and re-engagement with the content of his dissent is a necessary task for politically responsible scholarship.[55] Despite being considered quite incendiary at that time, Pal's dissenting opinion has been largely ignored by international relations scholarship analyzing the development of legal norms and institutions in global politics,[56] a subject on which Justice Pal in his own words said:

> We need not stop here to consider whether a static conception of peace is at all justifiable in international relations. I am not sure if it is possible to create 'peace' once for all, and if there can be status quo which is to be eternal. At any rate in the present state of international relations such a static idea of peace is absolutely untenable. Certainly, dominated nations of the present day status quo cannot be made to submit to eternal domination only in the name of peace. International law must be prepared to face the problem of bringing within juridical limits the politico historical evolution of mankind which up to now has been accomplished chiefly through war. War and other methods of SELF-HELP BY FORCE can be effectively excluded only when this problem is solved, and it is only then that we can think of introducing criminal responsibility for efforts at adjustment by means other than peaceful. Before the introduction of criminal responsibility for such efforts the international law must succeed in establishing rules for effecting peaceful changes.

50 Sen, Ibid., and see, Pal, n. 22, p. 112; also see, Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo," *European Journal of International Law*, vol. 21, no. 4, 2010, pp. 1085–1102.
51 Pal, n. 22, p. 115.
52 Ibid., cited in Sen, et al., n. 16, p. 259.
53 Varadarajan, n. 45.
54 Ibid., p. 809.
55 Ibid., p. 810.
56 Ibid.

For Japan, this Indian judge, remembered by fewer of his own countrymen more than 50 years after his demise, the name Radhabinod Pal from India and his role echoes to this day. A memorial at Tokyo's Yasukuni Shrine has been dedicated to Justice Pal for authoring his vehement dissent at the post-World War II International Military Tribunal for the Far East. In addition, the Pal-Shimonaka Memorial Hall at Hakone near Tokyo serves as a temple and memorial to Pal and renowned Japanese publisher Yasaburo Shimonaka as a witness to Pal's historic judgment. His message at the dedication of the Pal-Shimonaka Memorial Hall, engraved in Bengali and English, says, "For the peace of those departed souls who took upon themselves the solemn vow (*mantradiksita*) at the salvation ceremony (*muktiyajna*) of oppressed Asia." The message then goes on to quote from a classical Sanskrit text, *tvaya rsikesa rdisthitena yatha niyukto'smi tatha karomi* (O Lord, Thou being in my heart, I do as appointed by you). All this served as a backdrop to Pal's juridical verdict.[57] Pal lived the last twenty years of his life in independent India and visited Japan for the last time in 1966 when in a speech he stated how much he admired Japan from an early age for being the "only Asian nation that stood up against the West". Justice Radhabinod Pal breathed his last on January 10, 1967 in Calcutta, leaving behind a portrait of his legacy that continues to be respected, and debated, in Japan and India, even now.

57 Nandy, n. 7, p. 54.