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SYMPOSIUM ON ART, AESTHETICS, AND INTERNATIONAL JUSTICE

MEMORIALIZING DISSENT: JUSTICE PAL IN TOKYO

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Memorials and monuments are envisioned as positive ways to honor victims of atrocity. Such displays are taken as intrinsically benign, respectful, and in accord with the arc of justice. Is this correlation axiomatic, however? Art, after all, may be a vehicle for multiple normativities, contested experiences, and variable veracities. Hence, in order to *really* speak about the relationships between the aesthetic and international criminal law, one must consider the full range of initiatives—whether pop-up ventures, alleyway graffiti, impromptu ceremonies, street art, and grass-roots public histories—prompted by international criminal trials. Courts may be able to stage their own outreach, to be sure, but they cannot micromanage the outreach of others. And the outreach of others may look and sound strikingly different than that curated and manicured by courts. This essay presents one such othered outreach initiative: a memorial in Tokyo dedicated to Justice Radhabinod Pal of India, who authored a vehement dissent at the International Military Tribunal for the Far East (IMTFE). The IMTFE was established in 1946 to prosecute Japan's leadership in the aftermath of the Second World War. Pal would have acquitted each defendant. This essay describes Justice Pal's legal philosophy, situates his place in the currents of international law, and reflects on the broader role of memorials as discursive sites.

Justice Pal's Arc of Life

Pal's journey is remarkable in that he hailed from a poor rural family yet became a distinguished lecturer at India's premier institution of postgraduate education.[1] Pal was born on January 27, 1886, in the small village of Salimpur (Kushtia District, Bengal) in British-occupied India. Today, this village is part of Bangladesh. Pal was initially educated in local schools and later studied mathematics and law at Presidency College Calcutta (now Kolkata) and the Law College of the University of Calcutta. Pal was appointed to the IMTFE after it had begun its work to address a striking imbalance in the number of Asian judges. In November 1948, the IMTFE sentenced seven convicts to death, sixteen to life imprisonment, and two to fixed prison terms (twenty years and seven years). Pal alone would have acquitted each defendant.

Pal led a rich life in international law following his iconic dissent. From 1952 until 1966, he was a member of the UN International Law Commission (ILC). He became Chair in 1958. Pal died on January 10, 1967, at the age of 80. He had fourteen children.

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[1] Milinda Banerjee, *Does International Criminal Justice Require a Sovereign? Historicising Radhabinod Pal's Tokyo Judgment in Light of His "Indian" Legal Philosophy*, 21 FICHL Publication Series 67, 72, 76 (2014).

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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."[2] Pal was an early spark behind the *au courant* conversation about whether international law truly is international.[3] His work product contributed to postcolonial legal theory and unmasked the embeddedness of racism within the international legal order. Pal also evidences Anthea Roberts's observation that, when it comes to approaching international law, "each of us brings our biography into play."[4]

Pal's Dissent

In contrast to the International Military Tribunal at Nuremberg, several of the eleven IMTFE judges submitted separate concurring and dissenting opinions. Sir William Webb, the Australian judge who presided over the trial, posited that in sentencing the convicts the IMTFE should have taken into account that the Japanese Emperor had not been indicted. The French judge lamented procedural shortcomings. The Dutch judge, somewhat like Pal, concluded that no conspiracy existed and accordingly would have found five of the defendants innocent. The Canadian judge signed onto the majority but in private communications with his government criticized the IMTFE.[5] Delfin Jaranilla, the Filipino judge who had personally survived the Bataan death march of 1942, wanted to punish more harshly. Together with the Chinese judge (who joined the majority), Judge Jaranilla shared some of Pal's concerns with imperialism and colonialism, but saw Japan's participation in aggressive war and other crimes as utterly condemnable. He—along with the rest of the majority—emphasized the atrocities perpetrated by Japanese armed forces in territories previously subject to Western colonization.

Pal's separate opinion was the only totally dissenting one. Pal "did not in the least affirm all of Japan's past actions; he simply held that the defendants' actions were not illegal in an indictable sense."[6] In contradistinction to American prosecutor Joseph Keenan's vision of the virtuous Allies and the repugnant Axis powers, Pal gravitated towards a construction of the Pacific War as a "tragic contest" in which all sides "shared alike a common grammar of militaristic imperial aggression."[7] Pal believed the IMTFE's mandate—which covered the years 1928 to 1945—was too narrow and too convenient.[8] Pal was disturbed by an international tribunal that he took as punishing Japanese aggression in territories that had previously been seized through imperial violence, for example, by the United Kingdom in Burma and India, the Netherlands in Indonesia, and the United States in the Philippines.[9] Assuredly, Pal's approach risks seeming to justify impunity for Japanese abuses in the name of anti-colonialism, thereby effectively revictimizing people for the fact of being colonized.[10]

[2] B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AJIL 1, 6 (2018).

[3] Anthea Roberts, Is International Law International? (2017).

[4] Anthea Roberts, *Is International Law International? Continuing the Conversation*, EJIL:Talk! (Feb. 9, 2018).

[5] Timothy Brook, *The Tokyo Judgment and the Rape of Nanking*, 60 J. Asian Stud. 673, 690 (2001).

[6] Ushimura Kei, *Pal's "Dissentient Judgment" Reconsidered: Some Notes on Postwar Japan's Responses to the Opinion*, 19 Japan Rev. 215, 215 (2007).

[7] Banerjee, *supra* note 1, at 89.

[8] Brook, *supra* note 5, at 694.

[9] Robert Cryer, *The Tokyo International Military Tribunal and Crimes Against Peace (Aggression): Is There Anything to Learn?*, *in* Seeking Accountability for the Unlawful Use of Force 80, 82 (Leila Nadya Sadat ed., 2018).

[10] Immi Tallgren, *Watching* Tokyo Trial, 5 London Rev. Int'l L. 291, 304 (2017) (noting that Pal's dissent "appears insensitive to the suffering of victims").

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Pal emphasized that charges of conspiracy and crimes against peace were precarious because of retroactivity and legality. One major thread in Pal's dissent is that the time had not come for Japan to be judged criminally responsible under international law for its actions during the war. The law had not ripened and, accordingly, prosecution was a hasty, opportunistic, even ulterior act. The colonized states, newly independent, were temporal laggards and hence entered a world where the crystallization of law would happen without their participation—they became subjected to this putatively universal law. Since, from Pal's view, "no category of war became a crime in international law up to the date of the commencement of the world war under our consideration," to prosecute such crimes was "a sham employment of legal process for the satisfaction of a thirst for revenge."[11]

Pal insisted that international law could only legitimately punish if it organically emerged through and from a genuinely equal consensus of all states. For Pal, an international tribunal cannot deliver justice outside of an underlying egalitarian order among states. Pal worried that an international court or tribunal would simply transfer the power of certain states to another level. Query as to what Pal would say today, about the International Criminal Court, for example, 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.[12]

In the case of conventional war crimes, Pal found that jurisdiction existed but also determined that there was no factual nexus with the accused. Pal investigated these charges "and eventually concluded that the evidence presented to the Tribunal was not sufficient to establish the criminal responsibility of the defendants."[13] Pal questioned whether the Japanese leadership could be implicated in this violence through doctrines of command responsibility. This nexus—that of the commander to the criminal conduct—continues to vex international criminal law today.[14]

As Timothy Brook explicates, Pal "[c]ombines 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."[15]

This tension arises throughout Pal's dissent. For example, the one-sided nature of the charges rattled him in that he felt it betrayed law's need to be evenhanded. The omission of the atomic bombs at Hiroshima and Nagasaki, in particular, galled him.[16] 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.

On a different note, Pal was even less charitable than the IMTFE majority when it came to the sexual torture and enforced prostitution of many thousands of women. Pal's dissent has been lamented for its callousness regarding gender-based violence.[17] He was a skeptic, wincingly so; he was curtly dismissive and did not wish for law to enter

[11] Int'l Military Tribunal for the Far East Judgement, dissentient opinion of Judge Pal, paras. 37 & 152 [hereinafter Pal Dissent].

[12] *Id.* at para 104.

[13] Nakajima Takeshi, *The Tokyo Tribunal, Justice Pal and the Revisionist Distortion of History*, 9 Asia-Pac. J. Article ID 3627, at 3 (Issue 44, Number 3) (2011).

[14] *See, e.g.*, the 2018 acquittal in the *Bemba* case delivered by a fractured Appeals Chamber of the International Criminal Court. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08A, Judgement on Appeal (June 8, 2018).

[15] Brook, *supra* note 5, at 694 (citing the work of Elizabeth Kopelman). *See also generally* Elizabeth Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Tribunal*, 23 N.Y.U. J. Int'l L. & Pol. 373 (1990–91).

[16] Brook, *supra* note 5 at 692.

[17] Banerjee, *supra* note 1, at 96 ("Pal did (in hindsight, irresponsibly, and perhaps unforgivably) express doubts about the extent of Japanese war crimes; thus he suggested that reports of the Rape of Nanking (Nanjing) might have been exaggerated.").

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that space. In his own words, pulled from his dissent: "I might mention in this connection that even the published accounts of Nanking 'rape' could not be accepted by the world without some suspicion of exaggeration."[18] Pal's sardonic air-quotes around the word rape, intentionally introduced, speak volumes.

Pal After Tokyo

While on the ILC, Pal abstained from voting on the Draft Code of Offences against the Peace and Security of Mankind that had been proposed in 1954 and debated at the Sixth Session of the ILC in Paris. He thereby advanced his philosophical vision as articulated at the IMTFE, arguing that "given the nature of international relations at that period, a mere code of international criminal law could not bring about real justice. It might indeed have the opposite effect of giving to dominant powers, victorious in wars, an excuse to commit injustices."[19]

Pal wished to build "an international community under the reign of law. . . in which nationality or race should find no place."[20] He argued for the development of an international agency (which he called the "Super State") that "he believed would eradicate wars and overcome racial discrimination."[21] He advocated Gandhism and pacifism, and "was a believer in humanism based on the philosophy of 'dharma' from ancient India."[22]

Pal's dissent, then, and his subsequent writings connect broadly to ongoing conversations about the legacies of imperialism, evenhandedness in adjudication, the new international economic order, judicial independence, intergenerational equity, the role of dissent in the life of international criminal trials, and the place of history in discourse about law.

Pal's legal and political philosophy was complex and fluid. Accordingly, as Kirsten Sellars notes, "during the Cold War decades Pal found common ground with Japanese nationalists over pan-Asianism and anti-communism, with the non-aligned movement over anti-colonialism and self-determination, and with Western anti-militarists over American foreign policies—and was lionized by them all."[23] Pal has garnered somewhat of a cult of personality, in particular, among Japanese nationalists. At times, Pal's views expressed in his IMTFE dissent have been mischaracterized by Japanese nationalists; yet Pal himself colluded in this distortion in his postwar visits to Japan by appealing to this audience and by expressing empathy for convicted Japanese officials and soldiers.[24]

Tokyo's Pal Memorial

Pal assuredly remains a contested figure in Japan, notably among constituencies that advocate for greater redress and justice for Japanese war-time atrocities. The two memorials erected in his honor in Japan situate themselves within these political currents. One memorial is in Tokyo (completed in 2005), the other in Kyoto (completed in 1997). Very few international judges have ever been lauded in brick, imagery, and mortar. Pal's honorific memorials, therefore, are quite distinctive. As the international community increasingly welcomes commemorations and monuments as elements of reparative and transitional justice, uncomfortable sites such as the Pal memorials merit greater discussion.[25]

[18] Pal Dissent, *supra* note 11, at para. 1064.

[19] Banerjee, *supra* note 1, at 109.

[20] Takeshi, *supra* note 13, at 6 (citing Pal).

[21] *Id.*

[22] *Id.* at 7.

[23] Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EJIL 1085, 1100 (2011).

[24] *Id.* at 1099–1100 (discussing Yuma Totani's work).

[25] For example, both the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Rapporteur in the field of cultural rights have emphasized the roles of art and memorialization.

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FIG. 1: Memorial to Judge Pal. Photograph taken by the author on July 2, 2018.

Pal's Tokyo memorial[26] sits between the Yasukuni Shrine, dedicated to war dead, and Yushukan, a controversial museum—chided for its historical revisionism and nationalism—that commits itself to the Japanese military. This memorial reclines in a courtyard of statuary. On its immediate left (when one faces it) is a statue commemorating a Japanese mother, widowed, who clutches three children ("Statue of War Widow with Children"), which was erected in 1975. On the right of Pal is a monument commemorating a patrol boat and sailors; to the further right of that is an old bronze cannon. More or less across from Pal, though slightly diagonal, are three statues in a row that commemorate animals for their service in war: a dog, a horse, and a carrier pigeon.

I have elsewhere discussed what first struck me when visiting the Pal Memorial, namely, its invocation of the Confederate States of America. Jefferson Davis's words, delivered in 1888 after the South's defeat in the U.S. Civil War, are engraved on a plaque on the front of the site; Pal himself mentions Davis's words in the last line of his approximately 250,000 word IMTFE dissent.[27] I have also elaborated elsewhere on Pal's footprints beyond the

[26] *See* Fig. 1.

[27] Mark Drumbl, *Judge Pal with Jefferson Davis in Tokyo*, Opinio Juris (Mar. 23, 2019). The quote reads: "When Time shall have softened passion and prejudice, when Reason shall have stripped the mask from misrepresentation, then Justice, holding evenly her scales, will require much of past censure and praise to change places."

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memorial today: his spectral presence in how Tokyo variably remembers World War II through six museums.[28] I now hope to ask and speculate about a different question: in light of what we know of Pal's legal philosophy, what might he think about the memorial edified in his honor? Would he be flattered? Would he cringe? Would he think he deserved it?

My intuition is that one answer might lie in Pal's own vision of discursive justice. For Pal, the attainment of global equality would arise through dissensus, tension, and dialogue among transcendental ideals and ground-level struggles.[29] The memorials certainly create such spaces—physically, conversationally, and emotionally.

Another surmised answer might lie in Pal's vision of the role of the judge. Latha Varadarajan notes that "[t]he extent and virulence of Pal's disagreement was unexpected . . . . Even the newly independent Indian state distanced itself from the dissent by declaring that Pal had been chosen as 'an eminent judge in his individual capacity,' and that he was not 'India's representative' on the tribunal."[30] Pal underscored judicial independence. He lived it. General MacArthur put considerable pressure upon the IMTFE to deliver a unanimous guilty verdict. Pal resisted.[31] He eschewed the idea that there had to be a singular narrative among judges. Hence, it seems plausible that he would find the memorialization of what others have called his "radical dissent" as consistent with, rather than inimical or antithetical to, a *genuine* overarching project of international criminal justice.[32]

Conclusion

In sum, Pal's Tokyo memorial inspires as it rankles. It consoles, confronts, and confounds. It is an example of how art, from below, responds to international criminal trials implemented from above. Memorialization of law, assumed to be congenial, cordial, and victim-centric, may not be so simple. Justice Pal's memorial forms part of the aesthetics of public histories—the representations on (and from) the "street"—of courtroom accountability. Art may interface unpredictably with the self-promotional goals of international justice. Art may not always fit with the outreach efforts of international courts, nor may it merely flit by those efforts. Instead (and indeed), it might vex those efforts—discomfit them—and convect countercurrents.

[28] Mark Drumbl, *Scattered Thoughts on Art as Contrarian: Justice Pal's Memorial in Tokyo*, Art & Int'l Just. Initiative (June 26, 2019).

[29] Banerjee, *supra* note 1, at 111.

[30] Latha Varadarajan, *The Trials of Imperialism: Radhabinod Pal's Dissent at the Tokyo Tribunal*, Eur. J. Int'l Rel. 1, 6 (2014).

[31] *Id.* at 6.

[32] Neha Jain, *Radical Dissents in International Criminal Trials*, 28 EJIL 1163 (2017); Hemi Mistry, *The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice*, 13 J. Int'l Crim. Just. 449 (2015).

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