

SYMPOSIUM ON THEORIZING TWAIL ACTIVISM

INHERITING A TRAGIC ETHOS: LEARNING FROM RADHABINOD PAL

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This terrible thing we're witnessing now is

Not unique; you know it happened before

Or something like it.

We're not at a loss how to think about it

We're not without guidance...

Anne Carson, *Antigonick* (2012).

International law can, and times has, involved the performance of another way of living with, of accepting, uncertainty...

Anne Orford, *The Destiny of International Law* (2005).¹

Introduction

We in the postcolony currently inhabit times constituted by the aftermaths of the catastrophic failures and tragic reversals of countless projects of global redemption and by the bereavement of their promised futures.² As Simon Critchley observes, the experience of disorientation produced by such tragedies acutely raises the problem of action: “[E]xpressed in one bewildered and repeated question . . . what shall I do?”³ This essay takes this problem as its central concern by asking specifically how international lawyers should act in these “tragic times.”

In seeking to respond to this problem, Third World Approaches to International Law (TWAIL) scholars have often turned to the conduct of third-world international lawyers’ past. These TWAIL scholars have attempted to narrate the modes of authorization (authority being the idiom of action for lawyers) displayed by

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¹ Anne Orford, *The Destiny of International Law*, 17 LEIDEN J. INT’L L. 441, 476 (2004).

² See David Scott, *Tragedy’s Time: Postemancipation Futures Past and Present*, in *RETHINKING TRAGEDY* 199 (Rita Felski ed., 2008).

³ Simon Critchley, *Tragedy’s Philosophy*, *BYU HUMANITIES LECTURE SERIES* (Feb. 21, 2014).

ancestral figures in order to fashion and train their own authorizing conduct in the present.⁴ Very much within this tradition, this essay singles out an exemplary and overlooked figure of a previous generation of third-world international lawyers, Judge Radhabinod Pal (1886-1967). In narrating how Pal conducted himself in response to his “tragic times,” I argue that he offers contemporary international lawyers a training for our own. I seek to show how acting as an international lawyer in “tragic times” requires the cultivation of a “tragic ethos,” an ethos that entails an openness towards plurality, an embrace of acting amidst temporal uncertainty, and a suspicion of claims of sovereign mastery and the achievement of some utopian order beyond conflict.

Pal was born in 1886 in British India and was appointed as a judge in the Calcutta High Court in a period during which the British Empire faced a mounting challenge from the anticolonial nationalist movement.⁵ In 1946, at the end of the Second World War, he was appointed to the International Military Tribunal for the Far East (Tokyo Tribunal), where he was one of the two Asian judges determining the responsibility of high-ranking Japanese officials for Japan’s initiation and conduct of the war. By 1948—when he delivered his dissenting judgment that found all defendants “not guilty” on all counts—he was representing an “independent” India. His is therefore a judgment written amidst “the ruins of Empire.”⁶ However, those in the colonial world struggling for decolonization did not always experience the event of decolonization and the eventual “overcoming” of the colonial/imperial order as being inevitable, nor as an entirely unambiguous achievement.⁷ This was especially true for someone like Pal, who in his native state of Bengal closely witnessed the fratricidal violence of the partition that birthed the formally independent nation-state of India—an inaugural violence that simultaneously produced “autonomous” citizen-subjects *and* monsters.⁸ His, like ours, was very much a “tragic time.”

Apart from passing references to his Tokyo Tribunal dissent, however, Pal has been largely ignored in international legal scholarship,⁹ although he went on to become one of the longest serving Indian members of the International Law Commission, from 1952 to 1966.

A Tragic Ethos for International Lawyers

Pal demonstrated a “tragic ethos” in his persistent suspicion of assertions of a “universal” “international community” in whose name a “new” truly “universal” international law was sought to be authorized.¹⁰ In the wake of the Second World War, numerous “Western” international lawyers employed this mode of authorizing international law in various sites of law-making.¹¹ Their interventions represented the “international community” as the ultimate stage in the development of the global order, in which state sovereignty had given way and

⁴ See Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT’L L.J. 353 (1998); Antony Anghie, *C.G. Weeramantry at the International Court of Justice*, 14 LEIDEN J. INT’L L. 829 (2001); Vasuki Nesiiah, “*The Law, this Violent Thing*”: *Dissent Memory and Democratic Futures*, COLOMBO TELEGRAPH (2013). See also scholarship orientated towards “conduct of office”: Ann Genovaese & Shaun McVeigh, *Nineteen eighty three: A jurisographic report on Commonwealth v Tasmania*, 24 GRIFFITH L. REV. 68 (2015); Sundhya Pahuja, *Letters from Bandung: Encounters with another Inter-national Law*, in BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES (Vasuki Nesiiah et al. eds., forthcoming) (on file with author).

⁵ Ashis Nandy, *The Other Within: The Strange Case of Radhabinod Pal’s Judgment on Culpability*, 23 NEW LITERARY HIST. 45, 54 (1992).

⁶ PANKAJ MISHRA, *FROM THE RUINS OF EMPIRE: THE REVOLT AGAINST THE WEST AND THE REMAKING OF ASIA* (2012).

⁷ See David Scott, *The Tragic Vision in Postcolonial Time*, 129 PMLA 799, 801 (2014).

⁸ On the partition, see Veena Das, *Language and Body: Transactions in the Construction of Pain*, in SOCIAL SUFFERING 67 (Arthur Kleinman et al. eds., 1997).

⁹ For important exceptions, see GERRY SIMPSON, *LAW, WAR & CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW* (2007); Elizabeth S. Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 NYU J. INT’L L. & POL. 373 (1990-1991).

¹⁰ See RADHABINOD PAL, *CRIMES IN INTERNATIONAL RELATIONS* (1955).

¹¹ See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

a homogeneous “international community” authored a truly “universal” international law.¹² This international law pierced through and denuded the multiple authorities at the global level represented by the system of sovereign statehood. The achievement of this post-sovereign stage just as colonized peoples were poised to claim the status of independent sovereign nation-states was extremely *untimely* (or *timely*, depending on one’s historical location).

Pal resolutely rejected these claims of imminent deliverance from state sovereignty, crucially perceiving that they operated as a new mechanism of imperialism and promoted the interests of particular imperial nations in the name of the “universal.”¹³

In his Tokyo Tribunal dissent, Pal argued that in a world that was still very much under imperial control, the Tribunal’s effort to authorize the outlawing of “aggression,” while undertaken in the name of the “universal,” would ultimately operate to preserve the imperial status quo by criminalizing any anti-imperial revolt.¹⁴

Pal’s basic point was that in a deeply unequal and unjust international society there could be no “shared norms” that were declared by that society itself, speaking as a homogenous community. In such a society, the only source of binding international law lay in prior sovereign consent. And thus, for something approaching such a “shared norm” to be achieved, the basic requirement was “not only a moral consensus about what was just but also a willing abrogation of sovereignty on the part of all state actors.”¹⁵ However, surveying the practice of the Tokyo Tribunal itself, Pal discerned a troubling inconsistency, for as Latha Varadarajan notes: “[W]hile it was true that the tribunal demanded such an abrogation from the vanquished, the victors zealously guarded their right. Their actions were not only considered beyond the purview of the tribunal, but also, in fact, evoked as being crucial to the creation of this ‘common humanity.’”¹⁶

Historical Time and the Dominant Mode of Authorization

We might ask why this mode of authorizing law in the name of the “international community” and the force of this mode did not simply dissipate, given the stark inconsistency in practice, exhibiting what Judith Shklar would later term “hypocrisy on such a scale”¹⁷ that it could only inspire disgust. How did it become a dominant mode of authorizing international law, well beyond the Tokyo Tribunal?

I would argue that Pal’s “temporal suspicions’ and critique help us unearth a powerful dualist structure operating under the surface of this apparent contradiction between articulating the law in the name of the “universal” “international community” and practicing discrimination in the application of that “universal” international law. The “universal” community was simultaneously posited as *already* achieved (and hence authoritatively pronouncing law) for some, and a project that *promised* its achievement for others by way of their redemptive transformation through the “universally” authorized actions of those who had already attained such a status.¹⁸

This dualist structure is premised upon what Dipesh Chakrabarty has called a stagist conception of history—as linear, progressive, hierarchical, and ineluctable—with each successive stage denoting an improvement on what came before.¹⁹ Furthermore, this staging is not globally simultaneous but instead maintains a “denial of

¹² See C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* (1958).

¹³ Gerry Simpson, *Writing the Tokyo Tribunal*, in *BEYOND VICTOR’S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED* 23, 27 (Yuki Tanaka et al. eds., 2011).

¹⁴ *Id.*

¹⁵ Latha Varadarajan, *The trials of imperialism: Radhabinod Pal’s dissent at the Tokyo tribunal*, 1 EUR. J. INT’L REL. 8, 12 (2014).

¹⁶ *Id.* at 12–13.

¹⁷ JUDITH N. SHKLAR, *LEGALISM: AN ESSAY ON LAW, MORALS AND POLITICS* 162 (1964).

¹⁸ See Sundhya Pahuja, *Laws of Encounter: A Jurisdictional Account of International Law*, 1 LONDON REV. INT’L L. 63, 74–81 (2013).

¹⁹ See DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000).

coevalness,²⁰ whereby different groups and societies in the world occupy different stages of history. The colonized groups, understood as occupying the lower stages of this hierarchy, were thus deemed to occupy a distinct temporal location, while those from the “West” were deemed to occupy the universal *telos*, a future that the temporal laggards had yet to reach. The operation of this temporal technology, and the project of universalization it enables, displace plurality, create a hierarchy of difference and posit an ineluctable future horizon in which difference stands fully erased.²¹

This technique and the dualist structure of the “universal” it posits thus allowed for the Tokyo Tribunal majority, and its prosecutor, to preserve the colonial status quo by outlawing aggression while simultaneously hailing the progressive achievement of a new universal stage for the global order, represented by the setting up of the Tribunal itself. This was an order in which any violence deployed by those deemed to be “not fully developed” was construed as regressive and irrational acts against a “community” wisely guiding them towards their future.²²

From within this frame, both colonial rule and its violence, and even the nuclear bombings of Hiroshima and Nagasaki, as well as these one-sided international criminal trials, appear to share the same logic and goal—and are authorized in the name of the same “universal.”

Pal's Alternative Mode of Authorization

By reading Pal as responding to this problematic frame, we can better grasp Pal's own mode of authorization.

Even as Pal challenged the positing of an allegedly universal “international community” as perpetuating unequal imperial rule, he also suggested the possibility that this unequal order could be overcome in a “potential international community.”²³ However, he refused to convert this possibility into a mechanical certainty, a foundational ground, if you will, that had always already been achieved by some. Instead, he asserted that struggle and effort were required on the part of *everyone* to achieve a genuine international community.²⁴ Unlike the stagist conception of historical time, Pal's conception of temporality, premised in struggle, recognizes possible impediments and reversals.²⁵ For him, acknowledging these uncertain grounds of action meant courageously refusing *both* the hubristic delusions of self-certainty and the paralysis of nihilism. He observed:

The twentieth century no doubt has refuted the dreams of the earlier centuries in the most tragic terms . . . Certainties of yesterday have been found dissipated by the realities of to-day (sic) . . . Yet there would be no justification for capitulation to any crisis mentality. The supremacy of reason can be maintained only by emphasising the reasonable grounds for hope in the future of human efforts.²⁶

This approach is evident in Pal's construal of imperialism, understood as “domination of a nation by another against the will of that nation,”²⁷ as itself being a crime. For him, recognizing imperialism as a crime should form a basic “shared norm” of a future “international community.” The fostering of this norm, through struggle and the creation of a normative consensus in international society, could actually contribute to the possible

²⁰ See JOHANNES FABIAN, *TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT* (1983).

²¹ Sundhya Pahuja identifies the international institutionalization of the temporalization of “colonial difference” as occurring in this historical moment. Pahuja, *supra* note 18, at 80–81.

²² Varadarajan, *supra* note 15, at 15.

²³ Radhabinod Pal, *Renunciation of Force in Inter-State Relations*, 16 INDIA Q. 349, 349 (1960).

²⁴ Radhabinod Pal, *The International Law in a Changing World*, ALL INDIA REPORTER, 91, 103 (1961).

²⁵ Nandy, *supra* note 5, at 63; Pal, *supra* note 23, at 356.

²⁶ Radhabinod Pal, *Presidential Address: Universal Declaration of Human Rights*, in LECTURES ON UNIVERSAL DECLARATION OF HUMAN RIGHTS 3, 21 (Radhabinod Pal et al. eds., 1965).

²⁷ PAL, *supra* note 10, at 119.

achievement of a future “international community” by helping to dismantle a key impediment to its realization.²⁸ There is here a powerful reversal between promised futures as fixed grounds for authorizing action, which Pal critiqued, and his own mode of authorization in which *acts* of struggle produce *possible* futures.

This mode of authorization also takes a form that acknowledges and values a plurality of authorities, rather than positing an absolute authority that seeks to transform all difference. Thus, the struggled for future “international community” does not assume the form of a future in which all difference is overcome.²⁹ Rather, as Ashis Nandy observes, Pal’s “latent concerns push him toward a plural concept of the human future. Given this intrinsic plurality, law has to take into account cultural diversities and, presumably, cultural rights. For cultural diversity and not cultural unity represents a higher stage of social development.”³⁰

In other words, this future was not “closed”: Its creation did not simply entail the rest simply becoming the “West” or the reproduction of a particular contemporary configuration of authority on a global scale. Rather, in the future Pal envisaged, the present colonial order needed to be overcome and that demanded a fundamental transformation of very relationship between the colonizers and the colonized.

Coda

In many ways, Pal’s cautious optimism in the achievement of a future truly universal “international community” foreshadowed and reflected the broader aspiration contained in the “Third World Project.”³¹ The project also formulated the need to attend first to the lingering legacy of formal colonialism and to overcome the massive material inequalities amongst the different formally equal states composing the international society of the time, before there could follow a progressive and uniform dilution of the exclusive sphere of sovereignty and a truly universal “international community” could be upon us.³²

However, in the decades that followed, in the conduct of those associated with the “Third World Project,” this caution was displaced by a “romantic certainty” in the achievement of this future horizon, anchored in what Sundhya Pahuja has called “the promise of development as economic growth” and the development discourses claim that “Man,” assuming the qualities of a deity, could “speed up the course of history through the application of technology.”³³ This teleological promise of development proceeded to authorize massive interventions into and transformations of third-world societies by the emergent “international development apparatus,” along with the “domestic” interventions of the concomitantly emergent “developmentalist post-colonial state” and its drive to modernize and catch up with the “West.” What is crucial to note in this transformation is the “closing up” and confinement of the Third World Project’s “future horizons,” in contrast to Pal’s temporal plurality, and also the growing internalization by third-world representatives of a temporal lag

²⁸ This of course does not preclude the violent anti-imperial struggle previously discussed. *Id.* As Simpson has noted, Pal’s approach here served as a “partial inspiration” in the following decade or so for the third-world efforts in the UN to “dismantle” formal colonialism. SIMPSON, *supra* note 9, at 96.

²⁹ Radhabinod Pal, *Future Role of the International Law Commission in the Changing World*, 9 UN REV. 29, 43-44 (1962).

³⁰ Nandy, *supra* note 5, at 62.

³¹ For many this project was inaugurated amongst gathering waves of decolonization at the Bandung conference in 1955. For representative texts, see *ASIAN STATES AND THE DEVELOPMENT OF UNIVERSAL INTERNATIONAL LAW* (R.P. Anand ed., 1972).

³² It should be kept in mind that very much in keeping with Pal’s vision, this aspired for future “international community” retained an openness to plurality, for as Pahuja has recently observed: “The role imagined for an inter-national law in this—Third—World is not to effect the transformation of the others in the name of an idealised version of one way of life, but to allow different peoples and nations, with different laws, to meet with dignity.” Pahuja, *supra* note 4.

³³ Pahuja, *supra* note 18, at 79.

vis-à-vis these (now “developing”) societies.³⁴ What had initially emerged as a disruption of the legitimation of the operations of the global imperial order thus eventually ended up tragically authorizing such transformative interventions into the third-world societies, with the absolute grounds of achieving “economic growth” transforming the sovereign state into the sole or rightful authority that displaced all other possible sites and sources of lawful authority “domestically.”³⁵ In many ways, this reversal is the tragedy we have inherited.

As we grope for responses to this reversal and the widespread suffering left in its wake, we would do well to learn from Pal and how he responded to “tragic times” past. This inheritance too was bequeathed to us.

³⁴ The certainty of the achievement of this fixed future also acted as a fixed foundation for the authority of these postcolonial states, steadily displacing a more restless authorization by way of democratic accountability with one grounded upon the overarching concern of delivering the promise of development. See SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW* (2013).

³⁵ The point sought to be made here is not simply that there was no contradiction between the “Third World Projects” strategy of challenging imperialism and embracing plurality in the “external” plane and pushing for homogeneity and erasure of plurality “domestically” as part of the developmentalist “nation-building project” but rather that these approaches became progressively connected and mediated by the discourse of state-led development. For the argument that they were not contradictory see Pahuja, *supra* note 4.