

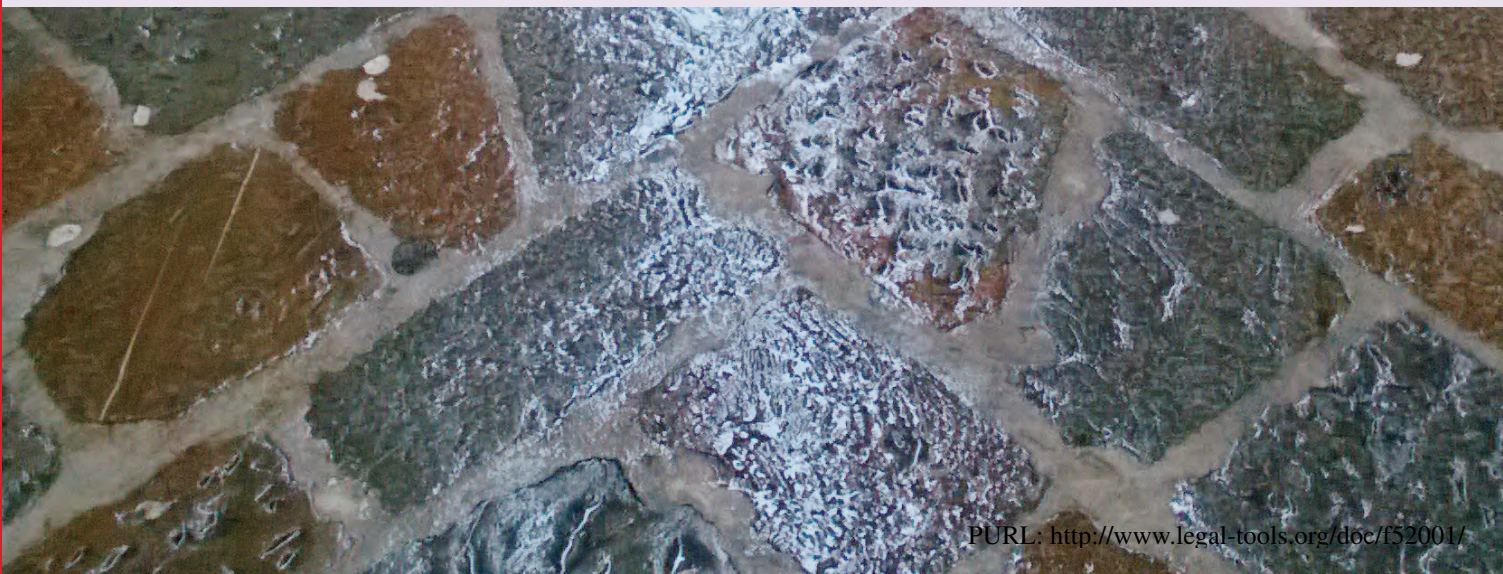
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Does International Criminal Justice Require a Sovereign? Historicising Radhabinod Pal's Tokyo Judgment in Light of his 'Indian' Legal Philosophy

Milinda Banerjee*

23.1. Introduction

The objective of this chapter is to explore the perspectives of the Indian (Bengali) judge Radhabinod Pal (1886–1967) on legal philosophy and history and the impact these ideas had on his landmark dissenting Judgment at the International Military Tribunal for the Far East ('IMTFE' or 'Tokyo Trial') (1946–1948)¹ as well as, more generally, on his later evaluation of this famous war crimes trial and of international criminal law. Earlier historians have noted the markedly anticolonial nature of Pal's Judgment in Tokyo (and some have alleged that the Judgment was too naively pro-Japanese). Indeed, Pal's Judgment is widely noted as a pioneering anticolonial contribution to debates on international criminal law and justice.² However, in this context scholars have rarely interrogated

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¹ International Military Tribunal for the Far East, *United States of America et al. v. Araki Sadao et al.*, Judgment of The Hon'ble Mr. Justice Pal, Member from India ("Pal Judgment") (https://www.legal-tools.org/en/go-to-database/ltfolder/0_29521/).

² For scholarship on Radhabinod Pal and the Tokyo Trial, see, for instance, Richard Minear, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, NJ, 1971; Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*, University of Texas Press, Austin, 1979; Elizabeth S. Kopelman, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial", in *New York University Journal of International Law and Politics*, 1990/91, vol. 23, pp. 373–444; Ashis Nandy, "The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability", in *New Literary History*, 1992, vol. 23, no. 1, pp. 45–67; Ushimura Kei, *Beyond the "Judgment of Civilization": The Intellectual Legacy of the*

Pal's voluminous writings on classical Indian legal philosophy and history (with their extensive inter-textual references to Sanskrit sources)³ or historically contextualised his perspectives in light of contemporaneous Indian (including significant Bengali-language) debates on sovereignty and associated political theology. I argue that a focus limited to his Tokyo Judgment, to the almost total exclusion of his other juridical writings (both before and after the trial) as well as the broader Indian discursive context, has obscured Pal's remarkably nuanced vision of global justice.

In contrast, by offering a more polyglot reading of Pal, I wish to present some broader arguments about the relationship between anticolonial politics and the emergence of international criminal law, while also presenting arguments demonstrating the contributions that extra-European theoretical perspectives on legal philosophy can make to

Japanese War Crimes Trials, 1946–1949, The International House of Japan, Tokyo, 2003; Ushimura Kei, "Pal's 'Dissentient Judgment' Reconsidered: Some Notes on Postwar Japan's Responses to the Opinion", in *Japan Review*, 2007, vol. 9, pp. 215–24; Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, Routledge, New York, 2008; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford, 2008; Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, Cambridge, MA 2009, especially pp. 218–45; Nakajima Takeshi, "Justice Pal (India)", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice?: The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011, pp. 127–46; Ashis Nandy, "Justice Radhabinod Pal and India–Japan Relationship: The Voices of Asian Intellectuals", India–Japan Dialogue, the Japan Foundation Lecture, 2012–13; Kirsten Sellars, *'Crimes against Peace' and International Law*, Cambridge University Press, Cambridge, 2013. I have not been able to consult Japanese-language scholarship on Pal; the review of the scholarly literature throughout this chapter therefore excludes this corpus. There is a significant recent Japanese-language biography on Pal: Nariaki Nakazato, *Paru Hanji: Indo nashonarizumu to Tokyo Saiban*, Iwanami Shoten, Tokyo, 2011; an English translation is due to appear in 2015. I am indebted to Francesco Rosada of Heidelberg University for stimulating discussions on European-Christian understandings of natural law.

³ In fact, strictly speaking, the term "Sanskrit" cannot be used for many of the ancient Vedic textual passages that Pal cites; this language is often described today as "Vedic Sanskrit". In this chapter Sanskrit is used as shorthand for the language used in the Vedic corpus as well as in later post-Vedic Sanskrit literature. Nandy is the only one who acknowledges the "Indian" legal-philosophical background of Pal, but he analyses Pal in an essentialist and sketchy manner as being the product of a "Hindu" mythic worldview, instead of academically interrogating Pal's writings. Nandy dismisses the latter as "mainly narrations of who said what and when, with a rather pallid attempt to cast the narrative in a social evolutionist frame"; Nandy, 1992, p. 60, see *supra* note 2.

debates on international criminal justice. Taking a cue from Pal's writings, I suggest that concepts of international criminal justice can be refined if dissociated from conceptions of "sovereignty", not only from the sort of sovereignty exercised by states but also from the authority of non-state political communities, of inter-state coalitions or even of fixed legal norms. Since debates on international criminal justice often tend to become polarised between those who uphold the sovereignty claims of states (often non-Western states) and those who champion international "humanitarian" interventions (often under the aegis of Western powers), Pal's critique of both Western and non-Western forms of power structure and sovereignty can help us to transcend this polarisation.

Pal's Tokyo Judgment may be accused of being flawed in many ways. But in his different writings, Pal offered incisive arguments about the relation between caste hierarchy and governance in India, and the analogous manner in which racial and religious-monotheistic oppression have influenced the structuring of Western global governance. I argue that Pal's view on governance thus emanated from a very critical perspective about the dependence of sovereignty on social stratification and hierarchical command. Any conceptualisation of international criminal justice can benefit from such a perspective in attempting to combat Western as well as non-Western forms of exploitation and sovereign violence. Indeed the very dichotomy of "West" and "non-West" gets destabilised when one sees the transnationally connected as well as locally instantiated effects of hierarchical regimes of oppression. Pal's position on global justice emanated from a concern with attacking these connected narratives of power, which he categorised under the overarching term of "sovereignty".

In Pal's view, as the chapter will show, what was needed was not only international criminal justice, but rather a concept of global justice which could transcend the divisions of race and nationality. Impartial justice meted out by an international court of criminal justice was (as he notes in his Tokyo Judgment) a possible option, provided both victor and vanquished nations after a war submitted to this court. Behind Pal's passionate quest for an impartial global justice lay, I argue, a philosophical genealogy rooted in his excavation of ancient Indian concepts and especially that of an overarching cosmic-moral order described in Vedic texts as *rta*. The fundamental tenet of Pal's worldview was this principle of *rta* and its relation to historically flexible laws (Pal

used another Vedic concept, *vrata*, to describe these shifting laws, as argued in the next section).

In contradistinction to some dominant strands in scholarship on Pal's Tokyo Judgment, I suggest that Pal was not a simple positivist who upheld the sovereignty claims of non-European states against the claims of natural law championed in the context of the Tokyo Trial by the US Chief Prosecutor, Joseph B. Keenan (1888–1954), or the Australian President of the IMTFE, William Webb (1887–1972).⁴ Pal was not a total opponent of natural law arguments, nor did he altogether discount the possibility of a world in which some form of global justice would supersede the laws of sovereign states. In contrast to earlier scholars who have suggested that Pal was primarily a defender of extra-European sovereignty against colonialism, I suggest that his dissenting Judgment was in the first place an attack on (imperial) sovereignty claims, and only secondarily, a defence of (non-European) sovereignty. It is important to appreciate Pal's ambiguity about sovereignty because it can help us understand better why many Indians who were otherwise very critical of Western-origin concepts of state sovereignty, nevertheless fell back upon the idea of the sovereign postcolonial state as the only possible defence against empire. Anticolonial Indians were often half-hearted champions

⁴ For a typical appraisal of Pal as a positivist see, for example, Kopelman, 1990/91, *supra* note 2. Though Kopelman does admit that Pal had broader moral (anticolonial) considerations, she still thinks there was a basic positivistic basis to his legal formulations. Most famously perhaps, Judith N. Shklar has noted that during the Tokyo Trial, Keenan, Webb and (more ambivalently) the French judge Henri Bernard referred to natural law, while Pal attacked the natural law argument. See Judith N. Shklar, *Legalism: An Essay on Law, Morals and Politics*, Harvard University Press, Cambridge, MA, 1964, pp. 181–90. For more nuanced arguments, see Robert Cryer, "The Doctrinal Foundations of International Criminalization", in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. 1: *Sources, Subjects and Contents*; Martinus Nijhoff, Leiden, 2008, p. 112; Robert Cryer, "The Philosophy of International Criminal Law", in Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law*, Edward Elgar, Cheltenham, 2011, pp. 242–43, as well as Boister and Cryer, 2008, pp. 285–91 see *supra* note 2. Cryer admits the presence of a moralistic tone in Pal's Judgment which comes close at times to a naturalistic position; similar arguments can be found in Boister and Cryer, 2008, see *supra* note 2. Sellars, 2013, see *supra* note 2 also emphasises the radical (anti-colonial) ethical content of Pal's arguments. But neither Cryer nor Sellars interrogates Pal's Hindu law writings. In contrast, by examining these writings, I demonstrate Pal's naturalist self-positioning clearly and show how and where he differed from Keenan and Webb. The naturalist stance of these latter two have received scholarly attention in the different books and essays cited in this chapter, and especially in the works of Shklar, Kopelman, Boister and Cryer, and Sellars (see this footnote and *supra* note 2).

of national sovereignty; many of them saw national sovereignty as merely a necessary evil to be embraced in the fight against colonialism because the sovereign state was the only allowed political form in the Western-dominated international system. To suggest that anticolonial activism was only about mimetically replicating the European-origin nation-state model would thus constitute an error in historical understanding even though such a view has often prevailed in scholarship.⁵

Taking a cue from existing scholarship, and through detailed intellectual-historical analyses that go further than earlier research, I will show that one significant Allied position in the Tokyo Trial was to argue that natural law had to be enforced through the sovereignty of the Allied Powers. From this perspective, the enforcement of natural law did not imply a simple abrogation of state sovereignty (through the establishment of superiority of natural law over positive law) but rather the enforcement of one sort of sovereignty (that of the Allied Powers as the mouthpiece of international opinion) against another (that of Japan). Indeed, Keenan wished to gradually convert natural law into positive law in order to provide a basis for international criminal law. Sovereignty was not to be entirely annulled in the process of this conversion, but was to be (partially) displaced to the remit of a supra-state, working on an international political-legal level. In reaction to such a worldview, Pal's championing of the Japanese during the trial was less a simple exculpation of Japanese war crimes and more a strategic championing of the sovereignty of non-European states against the more powerful sovereignty of the victorious Allied Powers legitimating itself in the name of moral order. This chapter therefore also questions whether international criminal law, even when underpinned by natural law arguments, really refutes positive law-oriented sovereignty claims, and whether there is any necessarily clear-cut structural dichotomy between natural law and positive law positions. While existing scholarship on the Tokyo Trial has paid some attention to the legal philosophical debates there, I take conceptual lessons from Pal's Hindu law writings to offer a broader theoretical argument that problematises conventional European-origin binary distinctions between natural and positive law.

⁵ For a celebrated account which suggests that non-Europeans by and large wished to replicate Western-origin models of national sovereignty, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso, London, 2006 [1983].

As my conclusion, I want to offer some preliminary thoughts about the manner in which the search for international criminal justice should attempt to divorce itself from the naked exercise of sovereign violence and other forms of exploitative power. A study of the Tokyo Trial can sensitise us to the pitfalls of identifying international criminal justice too easily with any particular form of so-called sovereign authority, even if exercised by a league of powers. Justice would thus lie not in the translation and implementation of some fixed norms or laws (natural or positive, and this dichotomy, as I shall show, is to some extent, an artificial one), and even less in the sovereign command of some state or coalition of states. It would have to be envisaged in a more complex manner, through a grappling with myriad everyday power relations, acts of injustice and exclusion, as well as acts of welfare. It has to be conceptualised from below through just acts or judgments that have to be continually negotiated and renegotiated to take into account changing social-historical realities even if a reference to a cosmic juridical order remains on the horizon.

23.2. Is Justice Possible Without Sovereignty? Pal's Conceptualisation of "Hindu Law"

In order to understand Pal's severe denunciation of Allied sovereignty claims at the Tokyo Trial, it is important to underline the manner in which he attempted to conceptualise an alternative model of justice and law that could exist without the violent sanctions of a sovereign state or any sovereign political community. In writings published both before and after the trial, Pal excavated and interpreted "Hindu law" as a model of moral order, justice and legality that could act independently of state sovereignty, even if it did not always function as such in practice. These works also help us trace the remarkable journey of Pal from a poor family background in rural Bengal, where he had acquired Sanskrit education in a traditional school (*tol*) from a Muslim teacher, to the metropolitan world of Calcutta where he gave lectures at the University of Calcutta (colonial India's premier institution of postgraduate education) on the philosophy and history of Hindu law, before ultimately rising to the post of a Judge in the Calcutta High Court in 1941 and the Vice Chancellor of the University

of Calcutta in 1944.⁶ Pal's position of "subalternity" as well as his Sanskritic training enabled him ultimately to become a pioneer anticolonial critic of international law and a champion of global justice.

To understand Pal's interventions on Hindu law, one needs to understand the impact of British rule on South Asian legal-political worlds. Modern academic research suggests that in precolonial India there was no homogenous state-backed code of law; what governed legal life were moral norms and local customs, sometimes supplemented by governmental orders. There were enormous heterogeneities in the realm of norms and customs. But most historians today concur that the norms among literate gentry groups tended to be more oriented to hierarchy, including *varna-jati* (loosely and inaccurately translated as "caste") stratification and patriarchal authority.⁷ By contrast, among the vast

⁶ Radhabinod Pal, *The Hindu Philosophy of Law in the Vedic and Post-Vedic Times Prior to the Institutes of Manu*, Biswabhandar Press, Calcutta, 1927(?); Radhabinod Pal, *The History of Hindu Law in the Vedic Age and in Post-Vedic Times Down to the Institutes of Manu*, Biswabhandar Press, Calcutta, 1929(?), enlarged edition, University of Calcutta, Calcutta, 1958; Nandy, 1992, see *supra* note 2. The dating of the first two books is somewhat approximate; in the case of the first book, there was no publication date on the book itself, but the date of accession was given as 20 October 1927 in the copy that I used (of Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht, Berlin). In the case of the second book (used from the collection of the Heidelberg University Library), the book again does not mention any publication date; the cover page only says "intended for Tagore Law Lectures, 1929". According to the 1958 edition, the lectures were in fact delivered in 1932. 1927 and 1929 may therefore be taken as approximate dates.

⁷ For this analysis see, for instance, Nicholas B. Dirks, *The Hollow Crown: Ethnohistory of an Indian Kingdom*, Cambridge University Press, Cambridge, 1987; C.A. Bayly, *Indian Society and the Making of the British Empire*, Cambridge University Press, Cambridge, 1988; Kumkum Sangari and Sudesh Vaid (eds.), *Recasting Women: Essays in Indian Colonial History*, Rutgers University Press, New Brunswick, NJ, 1990; Bernard Cohn, "Law and the Colonial State in India", in *Colonialism and its Forms of Knowledge: The British in India*, Princeton University Press, Princeton, NJ, 1996, pp. 57–75; David Washbrook, "From Comparative Sociology to Global History: Britain and India in the Pre-history of Modernity", in *Journal of the Economic and Social History of the Orient*, 1997, vol. 40, no. 4, pp. 410–43; Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India*, Oxford University Press, Oxford, 1998; Dirk H.A. Kolff, *Naukar, Rajput and Sepoy: The Ethnohistory of the Military Labour Market in Hindustan, 1450–1850*, Cambridge University Press, Cambridge, 2002; Susan Bayly, *Caste, Society and Politics in India: From the Eighteenth Century to the Modern Age*, Cambridge University Press, Cambridge, 2005; Nicholas Dirks, *Castes of Mind: Colonialism and the Making of Modern India*, Permanent Black, New Delhi, 2006; Wael B. Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, New York, 2009; Werner F. Menski, *Hindu Law: Beyond Tradition and Modernity*, Oxford University Press, New York, 2010;

majority of South Asia's peasant, forest-dependent, pastoral-nomadic and artisanal groups, local legal customs tended to be less hierarchical and less patriarchal. From the late eighteenth century, colonialism introduced a radical transformation since the British sought to subjugate, demilitarise and tax South Asian peasant, forest-oriented, pastoral and artisanal populations, and simultaneously to select their allies from the literate gentry groups. The norms of the latter were homogenised and hybridised with British norms to produce state-backed codes of Anglo-Hindu and Anglo-Muslim (civil) law, displacing the heterogeneous customs prevalent earlier, and thereby also vastly accentuating many aspects of social hierarchy. Simultaneously, reforms in criminal law also homogenised this domain, albeit in a more Westernising manner; nevertheless, these criminal law reforms also aimed at strengthening the sovereign apparatus of the colonial state.

There was, however, little consensus among the British, and among Europeans in general, about the nature of South Asian legalities. Some administrators and scholars affirmed the historicity of Hindu law, comparing it to European types of law. In the course of the nineteenth and early twentieth century, and with the gradual popularity of "Aryan" race theory among Europeans, some of them affirmed that Brahmanical "Hindu" norms derived in the ultimate instance from ancient Indo-European or "Aryan" norms, even as Aryan-origin "upper caste" Indians ruled over "non-Aryan" "lower castes". Indian *varna-jati* hierarchies were thus inaccurately interpreted by Europeans, and gradually by many Indians too, through the lens of race theory. Others, especially from the late nineteenth century, gave greater emphasis to local customs than to Brahmanical values as the truest sources of legal life in South Asia. Still others suggested that Indians, like other Asiatic peoples, did not know true rule of law, being habituated to slavish obedience to "Oriental despotisms".⁸ That such racist views were not moribund even in the mid-1940s can be seen from the way in which the chief American prosecutor at Nuremberg, Robert H. Jackson, in the opening address of the International Military Tribunal ('IMT'), compared the notion of

Timothy Lubin, Donald R. Davis Jr, and Jayanth K. Krishnan (eds.), *Hinduism and Law: An Introduction*, Cambridge University Press, Cambridge, 2011.

⁸ Apart from the works cited in note 7, see also Thomas R. Metcalf, *Ideologies of the Raj*, Cambridge University Press, Cambridge, 1995; Thomas R. Trautmann, *Aryans and British India*, University of California Press, Berkeley, 1997.

'Führerprinzip' to a "despotism equalled only by the dynasties of the ancient East".⁹ Even more proximately, in the context of the Tokyo Trial, Keenan and his associate, Brendan F. Brown, while explaining war crimes and especially those committed by the Japanese, blamed "[p]atriotism, or political motives, or adherence to the tenets of an Oriental theology which exalts the State to the level of divinity and makes the will of the State the ultimate moral measure".¹⁰

Pal's conceptualisation of "Hindu Law" can be seen as a response to all these above trends. Against the European view that precolonial Indians did not know true law, he offered detailed investigations of ancient Indian legal philosophy and history. He refuted the views of the British civilian J.H. Nelson (articulated in 1877) about the absence of "real" law in traditional India.¹¹ To establish parity between Indian and European legal philosophy, he cited the German philosopher of law Fritz Berolzheimer (1869–1920) about the common origins of ancient Indian and European legal ideas, though his interpretation of Vedic concepts went far deeper and in more radical directions than outlined in Berolzheimer's very brief analysis.¹² Responding to the question raised by the British politician and former Secretary of State for India, the Marquess of Zetland (1876–1961), about whether rule of law and representative institutions could survive in India after the demise of British rule, Pal took the example of ancient Indian history to argue for the organic roots of legal-democratic traditions in India. Pal quoted (and aligned himself with) Indian historians like K.P. Jayaswal (1881–1937) who legitimated the anticolonial struggle in India by suggesting that India had not been traditionally governed by "Oriental despotism"; rather Indian history had been characterised by different popular and representative institutions and sometimes even by republican polities. Therefore, in the opinions of Pal, Jayaswal and others, India did deserve

⁹ *United States. The Department of State Bulletin*, 1945, vol. 13, p. 850.

¹⁰ Joseph Berry Keenan and Brendan Francis Brown, *Crimes Against International Law*, Public Affairs Press, Washington, DC, 1950, pp. 137, 213, referencing International Military Tribunal for the Far East, *United States of America et al. v. Araki Sadao et al.*, Transcript of Proceedings, 4 June 1946, p. 463 ("Tokyo Trial transcripts") (<http://www.legal-tools.org/doc/436390/>).

¹¹ Pal, 1958, pp. 1–2, see *supra* note 6.

¹² Pal, 1927, pp. 1–2, see *supra* note 6; Pal, 1958, pp. iv, 109–10, see *supra* note 6; see also Fritz Berolzheimer, *The World's Legal Philosophies*, The Lawbook Exchange, New Jersey, 2004 [1912], pp. 37–38.

to develop into a free and democratic country.¹³ However, I would argue that Pal's most important distinctiveness lay in his conceptualisation of the relation between justice, law and sovereignty. Refuting Nelson's argument, mentioned above, that sovereignty was essential to law, and that Indians lacked real law in the Austinian sense because they had traditionally lacked such sovereignty, Pal suggested that ancient Indian law was in fact better than modern European law precisely because it had lacked such a sovereign centre.

Pal's suspicion towards sovereignty was a suspicion towards state power; but it was also hostility towards any form of organised power. There was a significant domestic Indian context for this. Pal came from a "lower caste" (potter) background. In his writings we seldom find any celebration of Brahmanical *varna-jati* values of the kind that we would detect in many 'upper caste' Indian intellectuals of the late nineteenth and early twentieth century. Pal did wish, from an anticolonial standpoint, to emphasise the organic unity of a Hindu-Indian legal tradition rooted in the Vedic texts,¹⁴ and establish its commonality with ancient European legal philosophy. He was similar in this regard to other nineteenth and early twentieth century Indian reformers and nationalists like Rammohun Roy (1772/4–1833) and Dayanand Saraswati (1824–1883) who saw in the Vedic texts the roots and base of Indian tradition. However, while making

¹³ Pal, 1929, pp. 11–12, see *supra* note 6; Pal, 1958, pp. 86–110, see *supra* note 6. The work of K.P. Jayaswal which Pal cites is *Hindu Polity: A Constitutional History of India in Hindu Times* (2 volumes in 1), Butterworth & Co., Calcutta, 1924. K. P. Jayaswal (1881–1937) was an Indian nationalist historian whose research in the late 1910s and early 1920s played a critical role in legitimating Indian nationalist demands for devolution of governmental power to Indians. Jayaswal argued that ancient India had evolved republican and constitutional-monarchic forms of governance. Indian nationalists argued that republicanism and constitutionalism were thus embedded in Indian history and tradition, challenging British colonial arguments that India had always been ruled by despotic monarchies and therefore did not deserve liberal-constitutional forms of government in the present. For a political use of Jayaswal, see the Dissenting Minute of Sir C. Sankaran Nair, the only Indian member in the Viceroy's Council during the discussions centring on the Government of India Act of 1919. See House of Commons, Parliamentary Papers. East India (Constitutional Reforms). Letter from the Government of India, dated 5 March 1919, and enclosures, on the questions raised in the report on Indian constitutional reforms. Minute of Dissent by Sir C. Sankaran Nair, dated March 5, 1919. Sankaran Nair (1857–1934) was a famous lawyer and judge, who became a President of the Indian National Congress in 1897, and became a Member of the Viceroy's Council in 1915.

¹⁴ In doing this, one of the models for Pal was the Roman jurist Gaius's attempt to provide a historical genealogy and foundation for Roman law; see Pal, 1929, p. 1, *supra* note 6.

such an archaeological effort, Pal made flawed arguments about monolithic differences between “Aryan” and “Semitic” theologies.¹⁵

Though his reading of history was thus inflected by colonial-origin discourses of race theory and race conflict (as between “Aryans” and “non-Aryans” in India; here his views were shaped by European scholarship on Indian history), he was not an Aryan supremacist. He acknowledged that non-Aryan cultures, in India and elsewhere, possessed their own civilisational standards; some of the Dravidian peoples “might have been quite as civilized as the Aryans even if less warlike”.¹⁶ He wrote about the degradation caused to “non-Aryan” inhabitants of India by “Aryan” incomers, and of the tragic connections between the victimisation of “non-Aryans” and the victimisation of women.¹⁷ As can be seen from his Tokyo Judgment (discussed below), he found the Nazi leaders to be “war criminals” because of the way in which they waged war in a ruthless and reckless way. In general Pal denied visions of race supremacy:

It is further to be remembered that the racial explanation of differences in human ability and achievement is a deliberate and cold-blooded piece of deception in which the differentiating effects of upbringing and education are mendaciously ascribed to pre-existing differences of a racial order and this with the calculated object of producing certain effects in the practical field of social and political action.¹⁸

In a related manner, Pal was critical towards caste hierarchies, particularly as enunciated by Manu, a mytho-historical ancient Indian writer of a text that expressed the most brutal Brahmanical perspective towards lower castes and women. As early as 1929, he saw Manu's religion as “a body of externals”, “without any deeper meaning”, meant only “to minister to the supremacy of the established government”, and “expressive of the manifestation of the devotion of the subjects to the sanctioned power of State”.¹⁹ Citing a verse in the Rgveda attributed to Manu, Pal saw in it a dangerous tendency towards proclaiming the unlimited power of gods, which went against the more common Vedic

¹⁵ Pal, 1927, pp. 11–12, see *supra* note 6; Pal, 1958, p. 116, see *supra* note 6.

¹⁶ Pal, 1958, p. 44, see *supra* note 6.

¹⁷ *Ibid.*, p. 344, and *passim*.

¹⁸ *Ibid.*, pp. 271–72.

¹⁹ Pal, 1929, p. 34, see *supra* note 6; also Pal, 1958, p. 247, see *supra* note 6.

idea of the subjection of gods to a higher law.²⁰ In his view, Manu had ultimately placed “sovereignty above law”, going against the earlier Vedic tradition of placing law above sovereignty.²¹

By 1958 Pal saw race, caste, imperialism and state power to be related manifestations of injustice. The German thinker Friedrich Nietzsche (1844–1900) had cited Manu to suggest that Indian caste ideals could provide to modern Europeans the model of how a master people would rule over those lower than him. Pal referred to this to argue that ancient as well as modern concepts of justice, when they became linked to the exercise of organised power, committed brutal injustices against the weak, such as against conquered races, the poor, the lower castes and women. Pal refuted the idea that there could be hereditary transmission of special aptitudes, which was the common justifying rationale for both race and caste hierarchy. Pal’s critique of Nietzsche (and of Manu) lay above all in the fact that Nietzsche had not concerned himself with the self-development of the majority of humanity.²² The reason why Pal romanticised the Rgveda might have been because he found little trace of caste stratification in the text (except in the isolated Purusha Sukta, widely considered as a later interpolation).²³

Pal’s critique of sovereignty can thus be seen as a response to the processes through which the colonial sovereign state in South Asia had heightened the power of Brahmanical groups, as race and caste theories came together to legitimate the exercise of power by British and Indian elites. By contrast, Pal’s position was to ask for justice that would simultaneously attack all such formats of organised power. To Pal it seemed that race, class, caste and patriarchy were alike elements in the

²⁰ Pal, 1927, p. 72, see *supra* note 6.

²¹ Pal, 1927, p. 73, see *supra* note 6; Pal, 1958, p. 157, see *supra* note 6.

²² Pal, 1958, p. 13, 226–69, see *supra* note 6.

²³ *Ibid.*, p. 70: “In the Rigveda, with the single exception of the Purusha Sukta, there is no clear indication of the existence of caste in the proper Brahmanical sense of the word. This caste system was only introduced after the Brahmans had finally established their claims to the highest rank in the body politic; when they sought to perpetuate their social ascendancy by strictly defining the privileges and duties of the several classes, and assigning to them their respective places in the graduated scale of the Brahmanical community”. The Rgveda is generally regarded as the earliest part of the Vedic corpus, the hymns in it being composed in the second millennium BC. The core Vedic texts were composed between the second and first millennium BC.

exercise of power, often acting in conjunction with state authority, whether such authority was ancient or modern.

Indeed till now the story everywhere seems to have been one of ruthless fight for wealth with little regard for the rights or welfare of 'inferior races'. Even today two-thirds of the world's population live in a permanent state of hunger. Even now all but a tiny fraction are condemned to live in degrading poverty and primitive backwardness even on a continent rich with land and wealth, with all human and material resources.²⁴

Everywhere we witness lust for power to dominate and exploit; we witness contempt and exploitation of coloured minorities living among white majorities, or of coloured majorities governed by minorities of white imperialists. We witness racial hatred; we witness hatred of the poor.²⁵

Hence Pal described the state (by which he meant any form of organised governance), as "immorality organized".²⁶ To locate the genealogies of sovereign oppression, Pal went back to ancient Indian sources (such as Manu) and also to Hebraic-Christian monotheism; he identified these, and especially the latter, as the source of concepts of divine despotism and therefore as a distant predecessor of modern forms of state sovereignty, where law was conceptualised as the despotic will of the sovereign.²⁷ Christian doctrines about God's righteous indignation, according to him, influenced Westerners to justify their wars and atrocities.²⁸

The idea of authority again has made its appearance at different times in different forms. The earliest form in which it enters the arena is in that of a belief in a divinely ordained or divinely dictated body of rules; while in its latest form it is a dogma that law is a body of commands of the sovereign power in a politically organized society, resting ultimately on whatever might be the basis of that sovereignty. In either of these forms it puts a single ultimate unchallengeable

²⁴ *Ibid.*, p. 269.

²⁵ *Ibid.*, p. 274.

²⁶ *Ibid.*, p. 269.

²⁷ Pal, 1927, pp. 7, 11–12, 27, see *supra* note 6.

²⁸ Pal, 1958, p. 246, see *supra* note 6.

author behind the legal order, as the source of every legal precept whose declared will is binding simply as such.²⁹

This critique of monotheism or divine “despotism” and divine sovereignty as leading to the growth of racially-charged imperialistic drives was in fact a common strand in anticolonial Bengali discourses, and can be found in the writings of many intellectuals and political leaders, including Vivekananda (1863–1902) and Bipin Chandra Pal (1858–1932).³⁰ I would argue that such a view could be seen as a marked contrast to the arguments of the famous German jurist Carl Schmitt (1888–1985) with his emphasis on the genealogies of monistic state sovereignty in divine monotheism.³¹ By rejecting this sort of monotheistic will, Pal and others among his Indian contemporaries were rejecting the choice of untrammelled sovereignty altogether since such sovereignty (they felt) would lead to state violence, racism, and colonialism. To quote Pal (from his Hindu law book of 1958):

There is little fundamental difference between the law viewed as the will of the dominant deity and the law viewed as the will of the dominant political or economic class. Both agree in viewing law as a manifestation of applied power. As

²⁹ Pal, 1927, p. 7, see *supra* note 6.

³⁰ See, for example Vivekananda, “The Soul and God”, in *The Complete Works of Swami Vivekananda*, vol. 1, Advaita Ashrama, Calcutta, 1972, pp. 489–502; “Maya and the Evolution of the Conception of God”, in *The Complete Works of Swami Vivekananda*, vol. 2, Advaita Ashrama, Calcutta, 1976, pp. 105–117; “The Way to the Realisation of a Universal Religion”, in *The Complete Works of Swami Vivekananda*, vol. 2, Calcutta, 1976, p. 364; “First Public Lecture in the East”, in *The Complete Works of Swami Vivekananda*, vol. 3, Advaita Ashrama, Calcutta, 1973, pp. 112–13; “The Mission of the Vedanta”, in *The Complete Works of Swami Vivekananda*, vol. 3, 1973, pp. 185–86; “India’s Message to the World”, in *The Complete Works of Swami Vivekananda*, vol. 4, Advaita Ashrama, Calcutta, 1972, p. 310; Bipin Chandra Pal, “Shivaji-Utsava o Bhavanimurti”, in *Vangadarshana (Navaparyaya)*, 1313 BS (1906–07), vol. 6, no. 6, pp. 296–305.

³¹ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, MIT Press, Cambridge, MA, 2005 [1922], see for example p. 36: “All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure”. See also Carl Schmitt, *Political Theology II: The Myth of the Closure of Any Political Theology*, Polity Press, Cambridge, 2008 [1970].

we shall see, the Vedic view of the basis of law was not the divine *will* but the divine *reason*.³²

While ancient concepts of natural law had also often served as an excuse to carry out acts of oppression, Pal suggested that it was in modern times that oppression had revealed itself in its most naked form, in the format of state sovereignty, and without even any fig leaf of some superordinate moral ideal. Moving away from divine sovereignty, modern Europeans, from Jean Bodin (1530–1596) and Thomas Hobbes (1588–1679) to John Austin (1790–1859), had emphasised state sovereignty; the state was thereby justified to exercise its power in an unrestricted way, subject to no sanction. Even the perspectives of John Locke (1632–1704) and Jean-Jacques Rousseau (1712–1778) were tainted with the doctrine of sovereignty, with Rousseau merely replacing the ruler with the nation as the locus of sovereignty. Pal found this obsession with sovereignty to be responsible for the eruption of organised state violence in modern times, in particular for the hypocritical use of a democratic-nationalist idiom by the ruling classes to keep the ruled in thrall, and behind the militancy of European imperialism.³³ Deification of race or nation appeared to him to be a false idolatry.³⁴

Again, such a view stemmed from broader anticolonial Bengali/Indian discourses, for example as articulated by Rabindranath Tagore (1861–1941), which saw an ineradicable relation between nation-state sovereignty, racist-nationalist imperialism and political idolatry.³⁵ There are also similarities between Pal's views and those of Aurobindo Ghose (1872–1950) about the dangers inherent in the translation of monarchic sovereignty to popular-national state sovereignty.³⁶ Given his critical attitude to ancient, medieval, as well as modern legal traditions, it is difficult to see Pal as a simple nationalist, nostalgic for some legal

³² Pal, 1958, p. v, see *supra* note 6.

³³ *Ibid.*, pp. 2–6, 219–21.

³⁴ *Ibid.*, p. 271.

³⁵ See, for example, Rabindranath Tagore, *Nationalism*, Book Club of California, San Francisco, 1917, and in general his Bengali and English writings, especially from the 1910s onwards.

³⁶ See, for example, Aurobindo Ghose, “*The Ideal of Human Unity*” (first published in *Arya* between 1915 and 1918, then published as a book in 1919, then revised in the late 1930s and again in 1949, with the revised edition published in 1950), in *The Complete Works of Sri Aurobindo*, vol. 25, Sri Aurobindo Ashram Publication Department, Pondicherry, 1997, pp. 293–99, 372–82, 443–50.

golden age. Instead, Pal wished to recover certain aspects of ancient Indian (and European) legal philosophy that could be made usable in modern times. For instance, Pal praised the concept of *ahimsa* or non-violence, a concept rooted partly in precolonial Indian traditions. Mahatma Gandhi (1869–1948) gave this concept of *ahimsa* a radical anticolonial political turn. In upholding *ahimsa*, Pal was careful to make clear that he did not share Gandhi’s romanticised evaluation of preindustrial civilisation.³⁷ Like the lower caste ideologue B.R. Ambedkar (1891–1956), Pal also saw Buddhism as a praiseworthy religion because of its supposedly pacifist bent (in contrast to Christian religious wars and inquisition) and because the Buddha had proclaimed “the equality of men at the time when inequality was strongly felt”. Indeed, Pal interpreted Manu as attempting to suppress the Buddhist revolution.³⁸

When it came to the world of law, it was to the ancient Indian (Vedic) ideal of *rta* or cosmic-moral order that Pal harped back. He found this ideal of “natural and human order” to be cognate to the Roman and Christian concepts of *ratio*, *naturalis ratio*, *pax*, *lex aeterna* and *ratio in Deo existens*, thereby establishing homologies between Vedic concepts and those outlined in Roman, early Christian and Scholastic philosophy (St. Augustine being directly referred to by Pal in this regard, and St. Thomas Aquinas more obliquely).³⁹ Pal found attractive the idea prevalent among “Greek sages, Roman Philosophers and juris-consults, and mediaeval thinkers of the natural law school” which emphasised “the law as based on reason, as ultimately discoverable by a due application of the rational instinct in man”.⁴⁰ However, Pal was very selective and interpretative in using European natural law concepts. He rejected many elements of it associated with overt theology and colonialism, keeping only those strands that could be made to conform with (and translate for Western audiences) his understanding of Vedic cosmic-moral justice (especially *rta*).

Citing the seer Aghamarsana in the Rgveda, Pal saw *rta* as that which existed before the universe diversified into parts; in this view, he also found “a naturalistic conception of the universe and the emphasis laid

³⁷ Pal, 1958, pp. 245–46, 396–97, see *supra* note 6.

³⁸ *Ibid.*, pp. 242, 245–46.

³⁹ Pal, 1927, pp. 1–2, 52, see *supra* note 6; Pal, 1958, pp. iv, 109–110, 144, see *supra* note 6.

⁴⁰ *Ibid.*, p. 76; also, Pal, 1958, p. 160, see *supra* note 6.

on the eternal existence of law and order in the same".⁴¹ Quoting the sage Madhucchanda, Pal suggested that in the worldview of the Rgveda, even "the gods, powerful as they were, were subject to this eternal order, *rta*". The purpose of *rta*, this cosmic order, was to work for the benefit of human beings. Therefore the gods who were subject to this law could not function as despots, but had to uphold universal welfare, as was the nature (*svadha*) of the *rta* order: "*svadha* is the order or constitution of nature". The movements of the sun and the moon, of day and night, and of nature as a whole were thus also governed by *rta*.⁴² The seer Dirghatamas also subscribed to this view: law, which was above the gods, could alone ensure a society's all-round welfare.⁴³ To the sage Gritsamad, even the creator god *rtavan*, was "subject to law".⁴⁴ According to Pal, Vedic law was related to divine essence and divine reason, the will to do good; law did not emanate from the arbitrariness of divine will. *Rta*, as both the governing order of nature and the governing order of justice, aimed at benefit and welfare.⁴⁵ Pal found Vedic law to be similar in some ways thus to principles of modern Utilitarianism.⁴⁶ And this *rta* was also identical in the Vedas with truth (*satya*).⁴⁷ Quoting the Brhadaranyaka Upanishad, Pal suggested that this law was the power over power, the "*kshatrasya kshatram*", and through it "even a weak man rules a stronger with the help of the law, as with the help of a king".⁴⁸

The author of the Upanisad declares law to be the *kshatra* of *kshatra*, more powerful than the power itself. In his opinion law exists without the sovereign and is above the sovereign [...]. This ancient philosopher is thus opposed to the absolutist doctrine of the unlimited power of the state. Nay, he even seems to oppose the doctrine of its self-limitation. The power of the sovereign, the power of the state, is limited not by itself, but by some inherent force of law.⁴⁹

⁴¹ *Ibid.*, pp. 15–17 (quote from pp. 16–17); Pal, 1958, pp. 112–14, see *supra* note 6.

⁴² *Ibid.*, pp. 17–20 (quotes from pp. 17 and 20); Pal, 1958, pp. 114–16, see *supra* note 6.

⁴³ *Ibid.*, pp. 40–42; Pal, 1958, pp. 135–36, see *supra* note 6.

⁴⁴ *Ibid.*, p. 73.

⁴⁵ *Ibid.*, pp. 76–77, 89, 107, 138–39; Pal, 1958, pp. vi–vii, 160, see *supra* note 6.

⁴⁶ *Ibid.*, p. 80.

⁴⁷ *Ibid.*, p. 100.

⁴⁸ *Ibid.*, pp. 112–13, see *supra* note 6; Pal, 1958, pp. vii, 84, 180.

⁴⁹ *Ibid.*, p. 113, see *supra* note 6; also Pal, 1958, p. 180.

For Pal, even the Indian doctrines of salvation were, in a sense, juridical. Citing the sage Yajnavalkya, he argued that the main aim of the self was to improve itself, and since this would happen only if the self pursued justice, the perfection of the self and the achievement of justice were twin acts. As Pal writes, “the command of nature, ‘perfect thyself’, is at once a direction for physical and moral self-development and the fundamental principle of justice”.⁵⁰ Such a quest for being just need not issue from any divine command; they proceeded from the self’s own desire. This ideal stems from the maxim, “do not do to another what you would not have another do to you”, which Pal located as being attributed to Yajnavalkya and as also present in the works of German philosophers Christian Thomasius (1655–1728) and Immanuel Kant (1724–1804).⁵¹ While Pal acknowledged that the principle of acting justly had often been used to legitimate social hierarchy (such that everyone was advised to act in the way supposedly ordained by their birth status), nevertheless counter-voices emphasising “equality” could also be found in ancient India, not only in Upanishadic literature but also in Buddhist texts like the Dhammapada.⁵²

Ultimately, what Pal insisted upon was that Vedic texts enjoined one to avoid dogmatism, to acknowledge the limitations of one’s knowledge and action. The pursuit of justice could not take place if one dogmatically tried to enforce one’s own beliefs and egotistic interests on others: “to make one’s ego absolute is to dogmatize in action as well as in thought [...] Injustice originates in this practical dogmatism, in this blind absolutism”.⁵³ The perfect structure, in his view, was one “where everyone will only do that which at the same time enures to the benefit of all else”.⁵⁴ Pal affirmed that human beings had the right to life, liberty and pursuit of happiness on equal terms with all.⁵⁵ The notion of “rights of man” had thus to co-exist with duties towards the other. In Pal’s interpretation of Vedic discourses, justice would become functional when one curbed one’s egotistic will in the face of the other, recognising the

⁵⁰ *Ibid.*, pp. 119–25 (quote from p. 121); Pal, 1958, pp. 185–87, see *supra* note 6.

⁵¹ *Ibid.*, pp. 121–22; Pal, 1958, p. 187, see *supra* note 6.

⁵² *Ibid.*, pp. 134–35; Pal, 1958, p. 194, see *supra* note 6.

⁵³ *Ibid.*, pp. 97–99 (quote from p. 99).

⁵⁴ Pal, 1958, pp. 170–72 (quote from p. 171), see *supra* note 6.

⁵⁵ *Ibid.*, p. 282.

sacredness of the other, and bowed to the demands imposed by justice while acting towards the other:

Justice is indeed a mutual limitation of wills and consciousness by a single idea equally limitative of all, by the idea of limitation itself which is inherent in knowledge, which is inherent in our consciousness as limited by other consciousnesses. In spite of ourselves we stop short before our fellow man as before an indefinable something which our science cannot fathom, which our analysis cannot measure, and which by the very fact of its being a consciousness is sacred to our own.⁵⁶

Pal detected in Vedic literature a constant tension, as well as attempts at reconciliation, between the immutability of law and the changeability of law, and between fixed conceptions of moral order on one hand, and the evolution of society, and the growth in diversity and heterogeneity on the other. The difference between the Vedic concepts of *rta* and *vrata*, the latter being interpreted by Pal as specific and changeable applications of *rta*, was one way to conceptualise the binary between the immutability of a just legal-moral order and the flexibility of specific and diverse laws which would change as society transformed. Pal here used one particular hymn (Rgveda, 8.25) dedicated to the gods Mitra and Varuna.⁵⁷ Such a template which Pal detected in the Vedas can help us understand better also his attitude to international criminal justice and especially his insistence that the abstract moral order had to realise itself through flexible and changing laws that could combat global asymmetries in power. Sovereignty, in fixing justice to a particular power structure (such as one based on monotheism, monarchy, racial nationalism or caste hierarchy), was an obstruction to true justice or *rta*. Therefore, Pal noted that

the Vedic Rishis generally place law even above the divine Sovereign. The law according to them exists without the Sovereign, and above the Sovereign; and if an Austin or a Seydel tell them that 'there is no law without a sovereign, above the sovereign, or besides the sovereign, law exists only through the sovereign', they would not believe him. Nay, they would assert that there is a rule of law above the

⁵⁶ *Ibid.*, p. 172.

⁵⁷ Pal, 1927, pp. 6–10, 55–60, see *supra* note 6; Pal, 1958, pp. 146–48, see *supra* note 6.

individual and the state, above the ruler and the ruled; a rule which is compulsory on the one and on the other; and if there is such a thing as sovereignty, divine or otherwise, it is limited by this rule of law.⁵⁸

23.3. An Ambivalent Signifier of Non-European Sovereignty: Japan in Indian Nationalist Discourses

In spite of maintaining a fairly consistent anti-sovereignty attitude in his 'Indian' legal philosophical vision throughout his career, in the Tokyo Trial, Pal performed in some ways a volte-face. As mentioned earlier, from a critic of sovereignty, he appeared to become a champion of Japanese sovereignty and a champion of legal positivism. To understand this complex alleged turn, I want to focus now on Indian nationalist ambivalences about the possibility of anticolonial sovereignty and the role of Japan in this construction. My argument here is that Indian nationalist discourses through the late nineteenth and early-mid twentieth century demonstrated a constant ambivalence about the issue of state sovereignty. On one hand, many Indian nationalists wanted a strong nation state as a bulwark against colonial economic exploitation and racism and, on the other hand, many of them were simultaneously suspicious that all forms of state sovereignty, including nation-state ideals, were tainted by an innate aggressive drive that resulted in imperialism. No consensus ever developed in Indian nationalist circles about whether Western forms of state sovereignty were indeed unalloyed good; the anticolonial struggle in India remained much more complex than a simple quest for sovereignty. I would argue that nowhere was this ambivalence more clear than in discussions on Japan. Japan served as a horizon of hope as well as of alarm about the possibilities and dangers of a non-European society emulating a Western model of nationalist state sovereignty.

Indian (and especially Bengali) nationalist circles had been in close contact with Japan since the 1900s. For many Bengali nationalists, including Rabindranath Tagore, Aurobindo Ghose, Bipin Chandra Pal and Pulin Bihari Das (1877–1949), Japan had managed to integrate its Eastern traditions with the best elements of Western economic strength, and the Japanese nation state was thus an ideal exemplar of non-European sovereignty. Sometimes, politicians outside Bengal, such as Gopal

⁵⁸ *Ibid.*, pp. 72–73.

Krishna Gokhale (1866–1915), also offered similar perspectives. The Japanese political theology of legitimating the nation through a sacralised emperor cult proved particularly attractive to many prominent Bengalis in conceptualising a future national executive in India. This, however, was not (unlike what Keenan imagined) a traditional assertion of “Oriental despotism”; it was a very modern construction of national sovereignty through the legitimation of the national leadership in theological terms.⁵⁹

The first decade of the twentieth century coincided with Japanese victory in the Russo-Japanese War (1904–1905) as well as with growing anticolonial nationalist agitation in India, with Bengal being the epicentre of rebellion. Naturally, this provided a favourable climate for Bengali Japanophilia. There were also personal contacts forged between Bengalis and Japanese, with the visit to India of the pan-Asianist Okakura Kakuzō (1862–1913) being especially important in this regard.⁶⁰ Pal's favourable attitude to Japanese sovereignty (as demonstrated by his dissenting Judgment) was undoubtedly related to his pan-Asianist feelings.⁶¹ In his

⁵⁹ For some representative primary sources see, for example: Rabindranath Tagore, “Svadeshi Samaj”, in *Ravindracharanavali*, vol. 13, Government of West Bengal, 1990, pp. 49–50, 52–53, 55; Bipin Chandra Pal, 1906–07, pp. 296–305, see *supra* note 30; Aurobindo Ghose, *The Complete Works of Sri Aurobindo*, vols. 6 and 7, Sri Aurobindo Ashram Publication Department, Pondicherry, 2002, pp. 86, 223–39, 265–67, 308–9, 455, 722, 1093–106; H.A. Salkeld, “Report on the Anushilan Samiti, Dacca”, 10 December 1908, para. 5, in *Home Political Proceedings of the Government of India*, April 1909, n. 2, part I, National Archives of India, cited in Sumit Sarkar, *Swadeshi Movement in Bengal, 1903–8*, People's Publishing House, New Delhi, 1973, p. 401; Gopal Krishna Gokhale, *Speeches of Gopal Krishna Gokhale*, G.A. Natesan and Co., Madras, 1916, pp. 821, 1069.

⁶⁰ Steven Marks, “Bravo, Brave Tiger of the East! The War and the Rise of Nationalism in British Egypt and India”, in John W. Steinberg, Bruce W. Menning, David Schimmelpenninck van der Oye, David Wolff and Shinji Yokote (eds.), *The Russo-Japanese War in Global Perspective: World War Zero*, Brill, Leiden, 2005, pp. 609–28; Rustom Bharucha, *Another Asia: Rabindranath Tagore and Okakura Tenshin*, Oxford University Press, New Delhi, 2009; Carolien Stolte and Harald Fischer-Tine, “Imagining Asia in India: Nationalism and Internationalism (ca. 1905–1940)”, in *Comparative Studies in Society and History*, 2012, vol. 54, no. 1, pp. 65–92; Satadru Sen, “Benoy Kumar Sarkar and Japan”, in *Economic and Political Weekly*, 2013, vol. 48, no. 45, pp. 61–70.

⁶¹ As Ashis Nandy has noted, Pal's message at the dedication of the Pal-Shimonaka Memorial Hall, engraved there in Bengali and English says, “For the peace of those departed souls who took upon themselves the solemn vow (*mantradiksita*) at the salvation ceremony (*muhtiyajna*) of oppressed Asia”. The message then goes on to quote from a classical Sanskrit text: “*Tvayarsikesardisthitenayathaniyukto'smitathakaromi*” [O Lord, Thou being in my heart, I do as appointed by you]. See Nandy, 1992, p. 54, see *supra* note 2.

Judgment, as we shall see later, he laid the responsibility for much of Japanese imperialism on the prior colonial aggression and racist policies of Western powers. I would argue that his decision to absolve the top Japanese leadership of direct culpability in war atrocities (in contrast to his accusation against the Nazi top brass of being direct war criminals) also needs to be understood in the context of this decades-long Bengali admiration for the Japanese political leadership which produced a powerful and sacralised sovereignty for an independent Japan.

Even more proximately, in the early 1940s, the Bengali-origin nationalist leader Subhas Chandra Bose (1897–1945) had allied with Japan to form an Indian National Army (‘INA’), recruited primarily from former British Indian troops and from Indian expatriates in Southeast Asia, which attacked the colonial state of India from the northeastern frontier. Defeated by the British, the INA gained lasting fame through the INA trials held between November 1945 and February 1946. Although Congress politicians were initially ambivalent about their stance towards Bose, the INA and the issue of Japanese collaboration, they nevertheless wished to tap into popular anticolonial resentment during the prelude to the central and provincial elections of late 1945 and early 1946. Prominent Indians, including the future Prime Minister, Jawaharlal Nehru (1889–1964), defended the INA accused. Sympathy for the INA was widespread among Indian publics, cutting across religious lines.⁶² This too provided an immediate context for Pal’s Tokyo Judgment.

On the other hand, and this has not been sufficiently underscored in existing scholarship, there was also a running thread of concern among Indian nationalists that Japan, by replicating the Western model of the sovereign state, would reproduce colonial forms of violence. Tagore, initially a Japan enthusiast, made a remarkable turnaround as early as the 1910s, criticising the aggressive nationalism and state-worship that he saw in Japan as well as the insensitive reproduction of industrial technocracy.⁶³ Even Bose criticised Japan (in 1937) for its colonial

⁶² M.J. Alpes, “The Congress and the INA Trials, 1945–50: A Contest over the Perception of ‘Nationalist’ Politics”, in *Studies in History*, 2007, vol. 23, no. 1, pp. 135–58; Sugata Bose, *A Hundred Horizons: The Indian Ocean in the Age of Global Empire*, Harvard University Press, Cambridge, MA, 2006, chapter 4.

⁶³ Rabindranath Tagore, “Japan-yatri” (1919), in *Ravindracharanavali*, vol. 12, Government of West Bengal, 1989, pp. 189–90; Rabindranath Tagore, “India and Japan”, in *The Modern Review*, August 1916, pp. 216–17; for Tagore’s 1916 visit to Japan and the

aggression on China, warning India not to emulate this path of nationalist self-aggrandisement and imperialism,⁶⁴ though he later strategically allied with Japan in order to free India from British rule. Gandhi regarded Japanese imperialism, German Nazism and British (more broadly, Western) imperialism to be three manifestations of the same militaristic aggressive drive that needed to be condemned. Gandhi had sympathised with Japanese political-cultural regeneration in his younger years, and was even inspired by Japanese victories against Russia; his contacts with Japanese Buddhist monks also influenced his positive attitude to the country. In line with this, Gandhi also condemned racist anti-Japanese attitudes and immigration policies in the US and in Australia. However, on the critical question of Japanese aggression on China, Gandhi turned against this colonialism; he refused to exculpate it merely because Japan was an Asian power. He refused to support Bose's alliance with Japan.⁶⁵

Gandhi's unequivocal condemnation of Japanese imperialism was undoubtedly more radical and forthright than Pal's. However, there are fundamental similarities in the way in which both Pal and Gandhi saw the Second World War not as a Manichean struggle between "good" Allied Powers and "evil" Axis Powers (which underpins, for example, Keenan's vision), but as a tragic contest in which Allied and Axis Powers shared alike a common grammar of militaristic imperial aggression. This similarity also shows why, like Pal, Gandhi also offered a straightforward denunciation of the American bombing of Hiroshima and Nagasaki.⁶⁶

A similar ambivalence towards Japan can be seen in Nehru. Nehru recollected in his writings that he had sympathised with Japan in his youth, but became increasingly critical as Japan invaded China; his sympathy lay with China rather than with Japanese imperialism. Congress organised demonstrations in support of China, a medical mission was sent from India to China in 1938 and Nehru visited the country in 1939. All

controversies caused there by his criticism of nationalism, see Prasanta Kumar Paul, *Ravijivani*, vol. 7, Ananda Publishers, Calcutta, 1997, pp. 176–99, 244–46.

⁶⁴ Subhas Chandra Bose, "Japan's Role in the Far East (19 September 1937)", in *The Essential Writings of Netaji Subhas Chandra Bose*, Oxford University Press, New Delhi, 1997.

⁶⁵ This reading is based on discussions on Japan, scattered throughout *The Collected Works of Mahatma Gandhi*, vols. 1–100, Government of India (Publications Division), New Delhi, 1999.

⁶⁶ *Ibid.*, vol. 84, 1981, pp. 393–94; vol. 85, 1982, p. 371; vol. 90, 1984, p. 522.

these represented a growing Indian political solidarity with China against Japanese aggression, and a partial reversal of earlier Indian Japanophilia. In spite of his vast ideological differences with Gandhi, Nehru also saw British imperialism in India, the Japanese invasion of China, Nazism and Italian imperialism in Ethiopia to be multiple facets of the same trajectory.⁶⁷ As such, he refused to condone Japanese imperialism since he felt that “[i]mperialism shows its claws wherever it may be, in the West or in the East”.⁶⁸ In fact, as Prime Minister, Nehru displayed a marked ambivalence towards the Pal Judgment. In a cable sent in November 1948 to the Governor of West Bengal, Kailash Nath Katju (1887–1968), Nehru wrote:

Have consulted colleagues. We are unanimously of opinion that you should not send any telegram to General MacArthur. He is mere mouthpiece of other Governments and has no discretion. Apart from this any such move on our part would associate us with Justice Pal’s dissenting judgment in Tokyo trials. In this judgment wild and sweeping statements have been made with many of which we do not agree at all. In view of suspicion that Government of India had inspired Pal’s judgment, we have had to inform Governments concerned informally that we are in no way responsible for it. Any statement sent by you might well create great difficulties for us without doing much good to anyone else.⁶⁹

This cable assumes special significance given that Katju had been (along with Nehru) on the defence committee in the INA trials. While Nehru and Katju could come to a common platform in defending the accused Indians

⁶⁷ Jawaharlal Nehru, *Towards Freedom: The Autobiography of Jawaharlal Nehru*, The John Day Company, New York, 1941, pp. 29–30, 358–359, 367, 397, 411, 433; also Jawaharlal Nehru, *China, Spain and the War: Essays and Writings*, Kitabistan, Allahabad, 1940, (the relevant points are scattered throughout the work, so I have not given specific page numbers); Jawaharlal Nehru, *The Discovery of India*, Jawaharlal Nehru Memorial Fund, New Delhi, 1992 [1946], pp. 421–422, 449–450, 467, 469; Jawaharlal Nehru, *Glimpses of World History*, Jawaharlal Nehru Memorial Fund, New Delhi, 1988 [1934–35], pp. 401, 440–41, 464, 498, 961–62.

⁶⁸ Nehru, 1941, p. 411, see *supra* note 67.

⁶⁹ S. Gopal (ed.), *Selected Works of Jawaharlal Nehru*, vol. 8, Jawaharlal Nehru Memorial Fund, Teen Murti House, New Delhi, 1989, p. 415. Nehru’s views on the Pal judgment have been discussed by A.G. Noorani, “The Yasukuni ‘Hero’”, in *Frontline*, 2007, 24, p. 21. However my interpretation differs from Noorani’s negative appraisal of Pal’s Judgment which Noorani describes as “a disgracefully perverse document”.

who had attempted to free India with Japanese help, the cable nevertheless shows underlying differences between these two leaders about the manner of communicating the Indian official governmental position on Japan. In a letter sent to the Premiers (Chief Ministers) of the provincial governments of India on 6 December 1948 Nehru further clarified:

In Japan the sentence of death passed on Japanese war leaders has met with a great deal of adverse criticism in India. The Indian judge on that Commission, Justice Pal, wrote a strong dissentient judgment. That judgment gave expression to many opinions and theories with which the Government of India could not associate itself. Justice Pal was of course not functioning in the Commission as a representative of the Government of India but as an eminent judge in his individual capacity. Nevertheless most of us have felt that it is unfortunate that death sentences should be passed at this stage on war leaders. We have felt however that an official protest would not do any good either to the persons concerned or to the cause we have at heart, and therefore we have not intervened officially.⁷⁰

Nehru's letters to the Chief Ministers can be considered as semi-official statements, since although

addressed to the Chief Ministers, these letters had a much wider circulation and were read by Nehru's colleagues at Delhi, by senior officials throughout the country, and by all India's ambassadors and high commissioners [...] and are invaluable today for the insight they provide into the evolution both of Nehru's thought and of official policy.⁷¹

It is noteworthy that in this semi-official statement on Pal, Nehru did not associate himself with the Judgment, but at the same time articulated Indian criticism of death sentences passed on Japanese leaders. Perhaps surprisingly, even at this late hour, Nehru continued to express some qualified admiration for Japanese policies of economic growth and national regeneration.⁷² He thought it morally wrong as well as

⁷⁰ G. Parthasarathi (ed.), *Jawaharlal Nehru: Letters to Chief Ministers (1947–1964)*, vol. 1 (1947–1949), Jawaharlal Nehru Memorial Fund, Teen Murti House, New Delhi, 1985, pp. 234–35.

⁷¹ Editorial note in *ibid.*

⁷² *Ibid.*, pp. 436, 444–45.

impractical to suppress the Japanese completely; they had to be helped to rebuild their economy, albeit on a more democratic and non-militaristic basis.⁷³ It is on this same note of latent empathy that Nehru publicly objected in 1951 to the Anglo-American draft treaty with Japan because, in his opinion, the treaty ignored the concerns of the Soviet Union and the People's Republic of China: "The proposal to continue foreign bases and foreign troops in Japan not only means a diminution of Japanese sovereignty but is bound to be considered as a direct threat to China".⁷⁴ What Nehru desired was that "Japan should function as a free and independent country",⁷⁵ and simultaneously, the region should not fall under Western hegemony. This caused some tension between the governments of India and the US, though Nehru suggested that the Indian decision was welcomed by the Japanese people as well as the Japanese government. Above all it would be proof of India's attempt to steer clear of both the Western and the Soviet blocs.⁷⁶ Instead of attending the San Francisco Peace Treaty Conference in 1951, Nehru ultimately proceeded with negotiating a separate bilateral treaty between India and Japan, which was signed in 1952 and was notably favourable to Japan, for example because it waived all reparations claims against the country.⁷⁷

23.4. An Attack on Sovereignty? Reading Pal's Tokyo Judgment Against the Grain

Most conventional discussions on Pal's dissenting Tokyo Judgment see his position as a positivist attack on the naturalist position of the prosecution; indeed as a defence of Japanese sovereignty against the

⁷³ Interview in *The New York Times*, 15 August 1948, in S. Gopal (ed.), *Jawaharlal Nehru, Selected Works of Jawaharlal Nehru*, vol. 7, Jawaharlal Nehru Memorial Fund, Teen Murti House, New Delhi, 1988, p. 674; Minutes of the Third Meeting of the Commonwealth Prime Ministers, London, 12 October 1948, in Gopal, 1989, p. 277, see *supra* note 69.

⁷⁴ G. Parthasarathi (ed.), *Selected Works of Jawaharlal Nehru: Letters to Chief Ministers (1947–1964)*, vol. 2 (1950–1952), Jawaharlal Nehru Memorial Fund, Teen Murti House, New Delhi, 1986, pp. 465–66; see also pp. 483–84, 486–88, 494–95.

⁷⁵ *Ibid.*, p. 465.

⁷⁶ *Ibid.*, pp. 486–88, 494–95; see also Robert J. McMahon, *The Cold War on the Periphery: The United States, India, and Pakistan*, Columbia University Press, New York, 1994, pp. 106–8, on US–India tensions over the peace treaty with Japan.

⁷⁷ Treaty of Peace between Japan and India, 9 June 1952; see also P. Narasimha Murthy, "India and Japan", in *International Studies*, 1987, vol. 17, pp. 613–15.

Allied attempt to find Japanese leaders guilty and impose on them punishments deriving their sanction from international criminal law, with significant underpinnings of the latter in naturalist and humanitarian visions of justice.⁷⁸ While such a reading is persuasive enough, it is not complete, and the aim of this section is to read Pal's dissenting Judgment against the grain, to argue that it can be read as much as a significant attack on the idea of sovereignty as a defence of it. To the extent that the delivery of international criminal justice is predicated on the championing of justice against sovereignty claims, Pal, I suggest, need not be seen as a hostile critic of such attempts but as a complex interlocutor, if not outright ally, albeit from his own independent premises.

Pal's ambiguous position on sovereignty was also structural: he came from a country which was not quite sovereign when he arrived in Japan. As a country that had taken a substantial military part in the Second World War and had also suffered a large number of military casualties, India wished to be represented at Tokyo.⁷⁹ Given this difficult

⁷⁸ Apart from the views of Shklar and Kopelman already cited above, as well as the more nuanced views of Cryer and Boister (see *supra* note 6), one can also mention the appraisal of Pal by Totani, 2009, see *supra* note 2, and by Sellars, 2013, see *supra* note 2, who provides a recent critical reading of the naturalist arguments offered by the prosecution (Keenan and Brown) and by Webb and their connections with global-imperial power asymmetries.

⁷⁹ In fact, India, though still under British rule, had gradually been made part of the Allied policy structure at least since 1945, when it gained entry to the Far Eastern Advisory Commission (later, Far Eastern Commission), with the agreement of the US and Britain. India was represented in the Commission by Sir Girja Shankar Bajpai, Indian Resident General in Washington. Bajpai exerted pressure (against initial US objection) that an Indian should be made one of the judges in the planned Tribunal for trying the Japanese accused. The British government also agreed in 1945 that the Government of India should be represented, communicating this in December 1945 to the US. The US too realised that Indians would not look favourably on a practically all-white panel. Subsequently, the Charter of the IMTFE specifically mentioned that India would send a judge to the Tribunal; it was this that led to the entry of Pal to Tokyo. Pal was probably viewed as a harmless Indian option, someone with impeccable qualifications but who was not known for any controversial or dissenting opinions during his career as a judge. See: *United States. The Department of State Bulletin*, 1945, vol. 13, pp. 545, 728, see *supra* note 9; Kopelman, 1990/91, pp. 383–834, see *supra* note 2; IMTFE Charter; Totani, 2009, pp. 28, 223, 269, 294, see *supra* note 2; United States Department of State, *Foreign Relations of the United States: Diplomatic Papers*, 1945, vol. 6, p. 983; Yuki Takatori, "America's War Crimes Trial? Commonwealth Leadership at the International Military Tribunal for the Far East", in *Journal of Imperial and Commonwealth History*, 2007, vol. 35, no. 4, pp. 549–68.

position, Pal's initiative at Tokyo to pioneer an anticolonial juristic subjectivity needs to be appreciated in all its complexity. It might seem extremely counter-intuitive to suggest that he was (like Keenan or Webb) making a statement against sovereignty in Tokyo, but in fact such a position becomes clear when we examine some of the introductory sections of his Judgment. Pal's commencing argument was that there was nothing in the surrender of Japan

to vest any absolute sovereignty in respect of Japan or of the Japanese people either in the victor nations or in the supreme commander. Further there is nothing in them which either expressly or by necessary implication would authorize the victor nations or the Supreme Commander to legislate for Japan and for the Japanese or in respect of war crimes.⁸⁰

The Allied Powers, neither as separate nations nor as a multi-state alliance, had gained sovereignty over Japan. As Pal stated in his Judgment, "I believe, even in relation to the defeated nationals or to the occupied territory, a victor nation is not a sovereign authority".⁸¹ Victor states (in this case the Allied Powers) had no right to claim themselves as sovereign entities representing the sovereignty of the international community.

A victor state, as sovereign legislative power of its own state, might have right to try prisoners of war within its custody for war crimes as defined and determined by the international law. But neither the international law nor the civilized world recognizes any right in it to legislate defining the law in this respect to be administered by any court set up by it for the purpose of such trial. I am further inclined to the view that this right which such a state may have over its prisoners of war is not a right derivative of its sovereignty but is a right conferred on it as a member of the international society by the international law. A victor nation promulgating such a Charter is only exercising an authority conferred on it by international law. Certainly such a nation is not yet a sovereign of the international community. It is not the sovereign of that much desired super-state.⁸²

⁸⁰ See Pal Judgment, p. 29 (underlining in the original) (<http://www.legal-tools.org/en/go-to-database/record/712ef9/>), *supra* note 1.

⁸¹ *Ibid.*, p. 57.

⁸² *Ibid.*, p. 55 (underlining in the original).

Pal's fear of the sovereignty of an international tribunal obviously derived from his colonial origins. After all, in India, the British had established their claim to sovereignty precisely on the basis of conquest. Pal undoubtedly feared that Western-dominated tribunals were multi-state mechanisms for establishing sovereignty over defeated non-Western nations.

It is obvious that mere conquest, defeat and surrender, conditional or unconditional, do not vest the conqueror with any sovereignty of the defeated state. The legal position of the victor prior to subjugation is the same as that of a military occupant. Whatever he does in respect of the vanquished state he does so in the capacity of a military occupant. A military occupant is not a sovereign of the occupied territory.⁸³ [...]

I would only like to observe once again that the so-called Western interests in the Eastern Hemisphere were mostly founded on the past success of these western people in "transmuting military violence into commercial profit". The inequity, of course, was of their fathers who had had recourse to the sword for this purpose. But perhaps it is right to say that "the man of violence cannot both genuinely repent of his violence and permanently profit by it".⁸⁴

In fact, Pal's dissenting opinion in Tokyo can be read in two different ways: as a championing of the sovereignty of the decolonising nations (and also of Japan) against a Western-dominated international order, or as the radical denunciation of the possibility of international sovereignty embedded in a multi-state tribunal. In either case, this was an "unhappy" view of sovereignty; sovereignty as a concept resulting in state (including multi-state) violence which needed to be resisted, but simultaneously sovereignty as a form of protection against imperialism, a kind of necessary evil.

The federation of mankind, based upon the external balance of national states, may be the ideal of the future and perhaps is already pictured in the minds of our generation. But until that ideal is realized, the fundamental basis of international

⁸³ *Ibid.*, pp. 60–61.

⁸⁴ *Ibid.*, p. 279.

community, if it can be called a community at all, is and will continue to be the national sovereignty.⁸⁵

I, myself, am not in love with this national sovereignty and I know a strong voice has already been raised against it. But even in the post-war organizations after this Second World War national sovereignty still figures very largely.⁸⁶

“I, myself, am not in love with this national sovereignty”: this is a crucial sentence in the Tokyo Judgment whose import, I think, has not yet received recognition. If Pal was not suffering from schizophrenia, then his championing of *rta* over *kshatra* was also functional in Tokyo: he wished to champion an anticolonial interpretation of cosmic juridical-moral order over Allied sovereignty claims staked on military success. In doing this, if defending Japanese sovereignty was the only way out, then he would do it, but this defensive reaction was only of secondary importance. Pal, like many other anticolonial Indians (including Tagore and Gandhi), saw the nation state only as a penultimate stage and a necessary evil. In an imperial world which recognised no authority except sovereignty, the claims of anticolonial political communities had to be masked and packaged through the claim of sovereignty. Pal was a believer in cosmic-natural law (*rta*) forced into the position of a positivist; an anti-sovereignty advocate forced to speak the language of sovereignty.

Pal did (in hindsight, irresponsibly, and perhaps unforgivably) express doubt about the extent of Japanese war crimes; thus he suggested that reports of the Rape of Nanking (Nanjing) might have been exaggerated. Pal’s suspicion stemmed from his belief that the Allied Powers, like British colonialism, might use these atrocities to support their authority.⁸⁷ However, this colonial background cannot justify the manner in which he papered over Japanese atrocities. To his credit, however, while talking of exaggerations and distortions, Pal did not exculpate the Japanese of atrocities of “devilish and fiendish character”.⁸⁸

⁸⁵ *Ibid.*, p. 125.

⁸⁶ *Ibid.*, p. 186 (underlining in the original).

⁸⁷ *Ibid.*, pp. 1062–64. Pal refers in his Judgment to British use of false rumors to mobilise anti-German feelings among Indians and Egyptians in the context of the First World War. He may have also had at the back of his mind the way in which the British regularly invoked anti-British “atrocities” allegedly committed by Indians (such as during the Black Hole incident of 1756 and during the Indian Rebellion of 1857) to legitimate their own rule.

⁸⁸ *Ibid.*, pp. 1070, 1089.

He did not deny that many war crimes had taken place; in spite of the inadequate nature of the evidence in a wartime scenario, "it cannot be denied that many of these fiendish things were perpetrated".⁸⁹ Particularly since most of these atrocities were committed against Asian populations, including against Indians (especially during the Japanese conquest of the Andaman and Nicobar Islands, but also in other parts of Southeast Asia such as Borneo),⁹⁰ Pal did not wish to entirely minimise the horror of these crimes, though he blamed the immediate military perpetrators rather than the high-level Japanese leaders accused in the Tokyo Trial itself. He thus distinguished the Tokyo Trial from the Nuremberg Trial where the high-level leaders, he felt, had given direct command for perpetrating war atrocities. The crimes committed by Nazi leaders, according to Pal, were thus similar to the way in which the Kaiser Wilhelm II had been directly responsible for atrocities during the First World War, and the way in which the Allied leadership was responsible for the dropping of the atomic bombs on Hiroshima and Nagasaki. But in the case of the Japanese top leadership, they were only performing governmental functions and were part of the broader governmental machinery, but they were not directly responsible for the commission of the actual war crimes.⁹¹ This shifting of blame from the Japanese national leadership to the lower rungs of the hierarchy can also be explained as a measure to protect Japan from Allied sovereignty claims; it did not imply a defence of the war crimes themselves.

Pal did not see the Second World War in Asia as a mere episode in inter-state rivalry, as a series of episodes of violence normal in international relations. He saw it, much like Keenan, as an outburst of evil. But unlike Keenan, he did not see this evil as stemming only from Axis efforts; rather, to Pal it was part of the evolution of modernity. Like Gandhi, Pal had, in some ways, a melancholic understanding of modernity. To him it seemed, as to Gandhi or Tagore, that modernity accentuated human propensity to violence, that state power and industrialisation created the global conditions for unremitting war. Pal subscribed to a tragic vision which embedded the violence of warfare in the violence of modernity itself. As he noted in his Judgment: "The

⁸⁹ *Ibid.*, p. 1089.

⁹⁰ For murder of Indians in the Andaman and Nicobar Islands, and atrocities against Indians in Borneo, *ibid.*, pp. 1077–78.

⁹¹ *Ibid.*, pp. 9, 137–38, 1089–90.

totalitarian character of war thus is not the result of any design by any particular individual or group of individuals. It is the modern character of war itself. This is the enormity in which the evil of warfare has been fatally transformed by the combined impact of democracy and industrialism”.⁹² His dissenting Judgment at Tokyo can be read as a foundational critique of “modernity”, understood by him and many others as a political-ontological category inseparable from organised sovereign violence.

Pal’s critique of violence also translated into a critique of “just war” theory. The doctrine of the “just war”, with its specifically Christian grounding, had been invoked by Jackson in the opening address of the IMT, when he declared that there was a difference between just and unjust wars. Jackson rooted this definition, especially of unjust wars, in the teachings of “early Christian and international-law scholars such as Grotius”.⁹³ As Elizabeth Kopelman has argued, this position on “just war” also set the context for the trial at Tokyo.⁹⁴ In contrast, Pal felt that seeing the Second World War in Asia as a just war was problematic, especially as “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’”.⁹⁵ This position against Western (and specifically American) Christian-influenced “just war” rhetoric had an indigenous Bengali context as well. For example, Vivekananda had earlier taken a similar position to criticise the way in which Christian preachers had mobilised American public opinion for war against the Philippines (1899–1902).⁹⁶ Given that the war against the Philippines was one of the first major and overt manifestations of American colonialism (in Asia) rooted in Christian legitimation,⁹⁷ Vivekananda’s critique may be taken as a

⁹² *Ibid.*, p. 736.

⁹³ *United States. The Department of State Bulletin*, 1945, vol. 13, p. 855, see *supra* note 9.

⁹⁴ Kopelman, 1990/91, p. 396–401, see *supra* note 2.

⁹⁵ See Pal Judgment, p. 70, *supra* note 1.

⁹⁶ Vivekananda, “The Way to the Realisation of a Universal Religion”, 1976, p. 364, see *supra* note 30.

⁹⁷ For a recent evaluation of this landmark importance of the war from the perspective of American political theology in prefiguring later Cold War tropes, see William Inboden, *Religion and American Foreign Policy, 1945–1960: The Soul of Containment*, Cambridge University Press, New York, 2008, pp. 7–8.

predecessor of Pal's. In his Judgment, Pal in fact cited the British historian Arnold Toynbee (1889–1975) to suggest that European powers, and especially the English-speaking Protestants, had invoked the Bible to present their colonial conquests as God-ordained righteous wars comparable to the ones waged by ancient Israelites against the Canaanites to “recover” the Promised Land; hence non-European peoples would either be subjugated or exterminated. The conquest of India by the British was also, according to Toynbee (as cited by Pal in his Judgment), motivated by such religiously-legitimated racial feelings,⁹⁸ Pal's critique of “just war” theory thus stemmed from his broader indictment of colonial theology.

In Pal's eyes, Japanese nationalism was also, in a large measure, a defensive reaction to Western racist policies. If non-Western nations like Japan cultivated racial-national feelings it was because “the western racial behaviour necessitates this feeling as a measure of self-protection”.⁹⁹ Pal did not wish to justify racism; as he noted:

“Race-feeling” has indeed been a dangerous weapon in the hands of the designing people from the earliest days of human history. Right-thinking men have always condemned this feeling and have announced that the so-called racial explanation of differences in human performance and achievement is either an ineptitude or a fraud; but their counsel has never been accepted by the world.¹⁰⁰

Pal's explanation of Japanese racial nationalism was not an exculpation of it, but an attempt to argue that non-Western societies were often forced to accentuate such feelings to defend themselves against Western racism. More concretely, Pal suggested that Japanese politics was in part a reaction against Euro-American domination in the world as well as the threat of Soviet hegemony in the region, especially due to the growth of Communism in China. Specific anti-Japanese measures cited by Pal included also measures taken by the US (Immigration Acts of 1917 and 1924), Australia, and others to exclude non-white immigrants and to deny them equality with whites. The way in which Japanese efforts to introduce a racial equality provision in the convention being drafted for the League

⁹⁸ See Pal Judgment, pp. 570–71, *supra* note 1.

⁹⁹ *Ibid.*, p. 570.

¹⁰⁰ *Ibid.*, p. 572.

of Nations was shot down by the British in their colonial interest, also convinced Pal that the League and other international organisations were not serious in ending racial discrimination. This too, in his eyes, had provoked Japan in its militaristic efforts.¹⁰¹

The question nevertheless remains that if Pal was indeed something of a naturalist, in the sense of being a believer in a natural-cosmic legal-moral order as more legitimate than sovereignty, why then did he refuse to subscribe to the Western-Christian naturalist interpretation that we find in Keenan and Webb? Of course, Pal's position in his Judgment was self-consciously constructed in opposition to Keenan's opening statement at the trial where Keenan described the law on which the indictment was based as rooted in what was variously known as "common law", "general law", "natural law" or "international law".¹⁰² In his Judgment, Pal recognised the importance of natural law, but refused to accept that the Allied Powers could claim to be the true interpreters of natural-moral law.¹⁰³

I should only add 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. A community life has not even been agreed upon as yet. Such an agreement is essential before the so-called natural law may be allowed to function in the manner suggested. It is only when such group living is agreed upon, the conditions required for successful group life may supply some external criteria that would furnish some standard against which the rightness or otherwise of any particular decision can be measured.¹⁰⁴

Furthermore, Western powers had legitimated their claim over newly discovered territories "as a right derived from natural law and justified by the fiction of the territorium nullius, territory inhabited by natives whose

¹⁰¹ *Ibid.*, pp. 136, 485–87, 558, 573–78, 761–68.

¹⁰² *Ibid.*, pp. 24–25. (For the statement of Keenan which Pal counteracts here, see the Tokyo Trial transcripts, pp. 405–6, *supra* note 10.)

¹⁰³ *Ibid.*, pp. 147–51.

¹⁰⁴ *Ibid.*, p. 151.

community is not to be considered as a state".¹⁰⁵ The denial of statehood and sovereignty to non-White parts of the world thus went in tandem with the use of natural law to establish Western sovereignty over the non-West. Hence Pal was critical towards any Western imperialistic use of natural law to abrogate the sovereignty claims of non-Western societies/states. Indeed, I would argue that Pal's major critique of sovereignty as political theology (as articulated in his writings on Hindu law) comes alive also in his Judgment when he castigates Allied attempts to project their own political will, indeed their own political sovereignty, as a neutral international criminal justice. To Pal this amounted to the propagation of "substitute religions in legal wrappings".¹⁰⁶ The Allied Powers, by claiming that their way of giving laws would establish a peaceful and democratic world, were subscribing to a false juristic and legislative theology: in Pal's view, they were constructing themselves as a supreme and Godlike lawgiver.

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 effective peaceful changes. Thus then there can hardly be any justification for any direct and indirect attempt at maintaining, in the name of humanity and justice, the very status quo which might have been organized and hitherto maintained only by force by pure opportunist "Have and Holders" and, which, we know, we cannot undertake to

¹⁰⁵ *Ibid.*, p. 342 (underlining in the original).

¹⁰⁶ *Ibid.*, p. 104.

vindicate. That part of the humanity which has been lucky enough to enjoy political freedom can now well afford to have the deterministic ascetic outlook of life, and may think of peace in terms of political status quo. But every part of the 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.¹⁰⁷

This does not mean that Pal did not share a view in an idea of justice that could transcend the barriers of state sovereignty and be global in scope; as we have already seen, such a notion of supra-sovereign law was fundamental to his viewpoint. However, where he differed from Keenan or Webb was in refusing to identify this supra-state legal-moral order with the power of the Western nations, or with a Western-dominated tribunal composed of states. I would suggest that such a tribunal seemed to him to merely transfer the problem of sovereignty and state violence from the level of individual states to the level of a particular multi-state coalition. International criminal law would not have transcended sovereignty but merely replicated it at the level of a multi-state alliance. That is what his experience with the IMTFE, dominated by the Western powers, convinced him of.

At a more concrete level, Pal equivocated about the legitimacy of the IMTFE. He endowed the tribunal with some amount of legitimacy given that the judges were there in their personal capacities even if they came from the different victor nations. However, while citing the jurist Hans Kelsen (1881–1973), Pal suggested that an impartial court to whose judgments both victor and vanquished nations would be made subject would have been a better option.¹⁰⁸ Pal was sympathetic towards the idea of an international criminal law court:

Regarding the Constitution of the Court for the trial of persons accused of war crimes, the Advisory Committee of Jurists which met at The Hague in 1920 to prepare the

¹⁰⁷ *Ibid.*, pp. 238–39 (underlining in the original).

¹⁰⁸ *Ibid.*, pp. 10–15.

statute for the Permanent Court of International Justice expressed a "voeu" for the establishment of an International Court of Criminal Justice. This, in principle, appears to be a wise solution of the problem, but the plan has not as yet been adopted by the states.¹⁰⁹

Pal's principled support for an impartial international court of criminal justice went hand in hand with denunciation of the IMTFE's operation; the conclusion of his dissenting Judgment clearly accuses the majority Judgment of victors' bias.¹¹⁰ Pal was against Allied sovereignty masquerading as impartial justice; he was not against the idea of international criminal justice itself. And the supreme goal of this justice would be to protect and uphold the rights of individuals. Aligning himself with the jurist Hersch Lauterpacht (1897–1960), Pal declared:

I believe with Professor Lauterpacht that it is high time that international law should recognize the individual as its ultimate subject and maintenance of his rights as its ultimate end [...] This certainly is to be done by a method very different from that of trial of war criminals amongst the vanquished nations.¹¹¹

Pal's philosophy, even in his Tokyo Judgment, was thus indeed hospitable to principles of international humanitarian law and international criminal law. Such a conception of justice, Pal suggests in his Tokyo Judgment, would not merely be "international" justice but something more, since the concept of "nation" would have been subsumed under a standard more global in nature. "I doubt not that the need of the world is the formation of an international community under the reign of law, or correctly, the formation of a world community under the reign of law, in which nationality or race should find no place".¹¹² Though Pal fulminated against the Allied use of natural law arguments, ranging "from Aristotle to Lord Wright", also via the US Declaration of Independence and the Hague Convention of 1907,¹¹³ he did not wish to abandon the idea of natural law itself; he did not want to throw the baby out with the bathwater. As he noted in his Judgment:

¹⁰⁹ *Ibid.*, p. 11.

¹¹⁰ *Ibid.*, pp. 1231–35.

¹¹¹ *Ibid.*, p. 145 (underlining in the original).

¹¹² *Ibid.*, p. 146.

¹¹³ *Ibid.*, pp. 147–48.

The war against natural law, which many have declared in our day, is a reaction against the errors and omissions of the philosophical systems of the past... It would certainly be unjust and irrational, if, under the pretext of correcting errors and omissions, this hostility is carried to the destruction of the very object of these systems.¹¹⁴

23.5. Natural Law and Positive Law: An Inadequate Dichotomy?

Any discussion on the legal philosophical positions in Tokyo ultimately tends to fall back upon one primeval dichotomy: that between natural law and positive law. But I would suggest that this dichotomy is, in a sense, an inadequate one. Discussions that emphasise the polarity between them obfuscate their structural complementarity in philosophical, political, as well as social terms. Natural law, in some ways, is only positive law which has not yet found a human sovereign; if such a sovereign is located, then natural law need not be a challenge to the existing social-political order (as advocates of natural law often emphasise) but only a champion of it. Realising this secret complicity between natural law and sovereignty will help us appreciate the complexities of Pal's dissenting Judgment. As he noted here:

We must not however forget that this doctrine of natural law is only to introduce a fundamental principle of law and right. The fundamental principle can weigh the justice of the intrinsic content of juridical propositions; but cannot affect their formal quality of juridicity. Perhaps its claim that the realization of its doctrines should constitute the aim of legislation is perfectly legitimate. But I doubt if its claim that its doctrines should be accepted as positive law is at all sustainable. At any rate in international law of the present time such ideal would not carry us far.¹¹⁵

Pal was critiquing here the attempt to convert natural law into positive law; or to phrase this more clearly, he was arguing against the attempt to declare some particular legal ideas (claimed to be "natural law" ideas and hence of universal validity) as also having the force of positive law. Pal was not against the idea of natural law *per se*. What he was against, I would argue, is the attempt to label certain legal provisions as (firstly)

¹¹⁴ *Ibid.*, p. 149.

¹¹⁵ *Ibid.*, p. 72 (underlining in the original).

being founded on natural law and hence of unquestionable and global validity, and (secondly) attempting to translate these so-called natural law provisions into positive law in the course of the Tokyo Trial. I would argue that this in turn was related to an even more fundamental difference between Pal on one hand, and Keenan or Webb on the other, a difference which has not been noticed in existing scholarship. Whereas Pal, embedded in his excavated Vedic texts, saw moral-juridical order (*rta*, loosely translated by Pal for Western audiences as *ratio naturalis*, *lex aeterna*, *ratio in Deo existens*, etc.) as the fundamental foundation of justice, he made a difference between this transcendental order and the immanent world of laws which had to be flexible and ever-changing in relation to shifting historical realities (*vrata* was one way he conceptualised this more flexible legality). In contrast, Keenan and Webb tended to collapse the overarching concept of natural law or justice with specific legalities; for them all that needed to be done was to translate justice, inscribed in unchanging and eternal natural law ideas, into specific positive laws. The opening statement of the prosecution,¹¹⁶ Keenan's jointly authored book with Brown,¹¹⁷ and Webb's draft judgments¹¹⁸ as well as final Judgment¹¹⁹ bear witness to their passionate attempt to delineate a tradition of natural law which stretched from the Graeco-Roman world through the medieval Christians to the early modern and modern world, while arguing at the same time that these natural laws had also been accepted as something like positive law in the early-mid twentieth century in international law.

The agent for translating natural law into positive law would be Allied sovereignty: thus Keenan noted that the Tokyo Charter "was promulgated by an executive order, ultimately in the name of international sovereignty".¹²⁰ "General MacArthur, the Supreme Commander for the

¹¹⁶ See Tokyo Trial transcripts, *supra* note 10.

¹¹⁷ See generally, Keenan and Brown, 1950, *supra* note 10.

¹¹⁸ Papers of Sir William Webb, 3DRL/2481, Box 3, Australian War Memorial, "The Natural Law and International Law", "International Law Based on Customs and Agreements", box 8, "The Jurisdiction, Powers and Authorities of the International Military Tribunal for the Far East: Reasons for Judgment of the President and Member from Australia". I am indebted to Kirsten Sellars for bringing these drafts to my attention.

¹¹⁹ IMTFE, *United States of America et al. v. Araki Sadao et al.*, Separate Opinion of the President, 1 November 1948, ("President's Separate Opinion") (<http://www.legal-tools.org/en/go-to-database/record/1db870/>).

¹²⁰ Keenan and Brown, 1950, p. 55, see *supra* note 10.

Allied Powers in the Pacific, acted in behalf of world society in accepting the delegation of authority to implement the Instrument of Japanese Surrender, and in exercising the power he received".¹²¹ The close nexus between a naturalist view and imperial sovereignty claims is also visible in Webb's Judgment, where the judge quoted the argument of Caleb Cushing (1800–1879) as the Attorney General of the US: "By the law of nations *occupatio bellica* in a just war transfers the sovereign powers of the enemy's country to the conqueror".¹²²

I would argue that the natural law that was upheld by Keenan and Webb was not so different from positive law: to them, natural law was only positive law waiting to be functionalised. This was especially true in international relations, as Keenan argued in the Tokyo Trial by citing Lord Wright, Chairman of the United Nations War Crimes Commission.¹²³ Later, in their book, operating through the conceptual binary of *jus* and *lex*, Keenan and Brown essentially suggested that the conversion of natural law into positive law in international relations had to proceed in the manner of the translation of *jus* into *lex*, as had historically happened in Europe as tribal societies gradually developed into more formal societies. Thus the legal codification that had taken place in European municipal law would now take place in international law.

The Prosecution maintained that in the meantime, while the international community is making the transition from a relatively primitive and tribal state to the acme of formalistic development, the administration of international penal law must rely upon *jus*, as well as upon *lex*. In discovering *jus*, predetermined by norms of moral, juridical and legal justice, which constitute the plan for living with respect to man in international society, judges must be trusted to use their discretion wisely. During the infancy of national civilization, before the dawn of statutory law, faith in judges proved to be warranted. Centuries from today, it is hoped that men will turn their gaze backward to the twentieth century and conclude that the confidence which was imposed in judges of international tribunals and others to whom was entrusted

¹²¹ *Ibid.*, p. vi.

¹²² See the President's Separate Opinion, *supra* note 119, p. 12.

¹²³ Tokyo Trial transcripts, pp. 407–8, see *supra* note 10.

the quasi-judicial process by world society was completely justified.¹²⁴

Their perspective shows that natural law need not be thought of as a sharp contrast to positive law; the difference between them can be overdrawn. Despite Keenan's repeated claims (for example in his book *Crimes against International Law*) that natural law would defeat the violence carried out by sovereign states by challenging the principle of sovereignty, I would argue that his understanding of natural law was secretly complicit with sovereignty. Natural law, from this perspective, was only positive law in waiting, anticipating a sovereign. And (as noted by scholars on the Tokyo Trial, especially Kirsten Sellars), at the hands of the Allied Powers as conceived by Keenan and Brown, natural law would function as a guarantee of international inequality. To quote Keenan and Brown from their book:

But self-defense does not consist in protecting one's self against the inequality which evolution and historical accident have created in the natural and physical resources of the various nations. It is plain that some nations live in more healthy and salubrious parts of the earth than others. Some have more extensive physical areas, richer lands, more beautiful scenery, more agreeable climate, and greater mineral wealth than others. This has been determined in large measure by an almost unlimited chain of factors, which include the temperament and success of ancestors, as well as their ethnical, biological, environmental and cultural conditions. But this does not afford any justification for a nation which now has an unfavorable position to have recourse to war, as an instrument of national policy, just to obtain a more favored position [...] The world's geographical status quo in relation to peoples and the lands they occupy has become more and more defined and settled in consequence of the appropriation of specific parts of the earth's surface by peoples who have made permanent and lasting contributions, in virtue of their developed and matured cultures and civilizations [...] Modification of present land titles among the nations is now reasonably possible only on slow, evolutionary basis. If an attempt is made to alter those titles suddenly by the instrument of war,

¹²⁴ Keenan and Brown, 1950, p. 56, see *supra* note 10.

jungle rule, based on physical power, will ensue. Civilization, as it now exists after the efforts of many centuries, will disappear, and world anarchy will prevail.¹²⁵

Keenan's manifesto was to conceive of (the Christian) God as a sovereign whose representative on earth were the Western powers. By 1950, as the Cold War began to be felt, especially through the Korean War, the ideal sovereign was not the Allied Powers, but only the Western bloc led by the US.

In the light of the decisions reached at the Tokyo and Nuernberg war crimes trials there can be no question but that the Communist Koreans are waging a criminally unjust war [...] Today the chief threat to the spiritual and material prosperity, the happiness, the well being and the future security of the human family lies in the division of international society into communistic and democratic nations.¹²⁶

The lesson offered was that Communism was “incompatible with the Christian-Judaic absolutes of good and evil which were the foundation of the Tokyo and Nuernberg Trials”.¹²⁷ Citing Cicero, Gratian, St Augustine and St Thomas Aquinas, Keenan and Brown noted: “Wagers of unjust wars acted contrary to the Divine Will, as well as the reason of man”.¹²⁸ The political theology which had been articulated by the prosecution at the Tokyo Trial, and which was also consonant with the philosophical vision of the President of the Tribunal, found its culmination in this Cold War manifesto against Communism and other forms of non-Western or non-Christian threat to Western hegemony. Both Keenan and Pal, in their very efforts to challenge sovereignty, had ended up supporting two contrasting visions of sovereignty: one championing Western (more specifically, American) sovereignty, and the other the sovereignty of the postcolonial nation state. Sovereignty had proved too cunning for both naturalists.

¹²⁵ *Ibid.*, p. 62. See Sellars, 2013, pp. 206–9, *supra* note 2 for an incisive analysis of the asymmetrical-imperial underpinnings of Keenan and Brown's naturalist position and the way in which it ideologically legitimated a conservative status quo.

¹²⁶ *Ibid.*, p. v.

¹²⁷ *Ibid.*, p. vii.

¹²⁸ *Ibid.*, p. 67.

23.6. After Tokyo: Decolonisation and Cold War

While Pal always gets his share of limelight in discussions on Tokyo, his later career largely remains unmentioned. As I showed before, his final writing on Hindu law was published in 1958. Indeed my argument would be that his interpretation and excavation of ancient Indian texts continued to animate his vision of justice even in these late years. Pal remained an active legal participant in the 1950s and 1960s. He abstained from voting on a draft code of international criminal law (Draft Code of Offences against the Peace and Security of Mankind) in 1954 that was debated at the 6th session of the United Nations International Law Commission, held in Paris. His argument, as outlined in that session, was 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. A more comprehensive transformation in international relations was needed which had to be worked out through history; otherwise a mere code could not help humanity to “escape from the guilt of history”. Pal’s advice was that “in the name of building for justice we must not unwittingly build a suffocating structure for injustice”.¹²⁹ Such a critical attitude, however, did not prevent Pal from becoming Chairman of the International Law Commission in 1958 and in 1962. In 1962 he was nominated to the International Court of Justice. He was also National Professor of Jurisprudence in India from 1959 to 1967.¹³⁰ If we are to understand Pal’s position at the Tokyo Trial as well as in the International Law Commission and later, in the late 1940s, 1950s and 1960s, the changing political scenario in Southeast and East Asia needs also to be understood. Important insights about this can be gained from his book, *Crimes in International Relations*, published by the University of Calcutta in 1955.¹³¹

In Tokyo (as indeed in Nuremberg) the Soviet jurist Aron Trainin’s (1883–1957) perspective on the need for international criminal law had had a powerful resonance. This perspective was in turn grounded in a

¹²⁹ Radhabinod Pal, *Crimes in International Relations*, University of Calcutta, Calcutta, 1955, pp. iii–ix (quotes from pp. viii and ix).

¹³⁰ Gopal, 1989, p. 415, see *supra* note 69.

¹³¹ Pal, 1955, see *supra* note 129

kind of Soviet-Communist internationalism. But Communist incursions in China and, later, Soviet and American partition of Korea, made Pal very sceptical towards this Communist vision of legality. Speaking of the Partition of Korea, Pal sarcastically commented in his book that this was the type of “liberation” that came to the Koreans as a result of the benevolent Moscow Declaration of Trainin.¹³² American participation in the Korean War, and use of napalm bombs and other weapons, was also severely criticised by Pal. To him, Soviet as well as American rhetoric of “liberation” appeared hollow when seen in the concrete context of Korean politics and the mass suffering caused to Korean populations, in terms of civilian casualties, as well as long-term economic damage and political-military subjugation.¹³³

Simultaneously, in the Dutch East Indies and in French Indochina, the European colonial powers were aiming to re-establish and legitimate their power by invoking their supposed moral superiority in the Second World War. Against them, local nationalists had started waging violent anticolonial campaigns, sometimes with the earlier complicity of the Japanese. Pal feared that a Western-dominated imposition of international criminal law would criminalise these anticolonial movements. American and Soviet passivity towards the re-occupation by the Dutch and the French, and sometimes even active military-political complicity in the re-establishment of colonialism, made Pal sceptical of the universalistic promises of the new order. The new order’s message of emancipation seemed like a re-structuring of the old colonial civilising mission.¹³⁴ Pal’s suspicion towards the indictment of Japan and the imposition of international criminal law was therefore concretely grounded in his anxieties about the re-imposition of colonialism in Southeast Asia as well. Again there was a broader Bengali/Indian context for this. Not only had Bengali intellectuals been engaging closely with Southeast Asian cultural-political life since the interwar years, but the alliance between Nehru and Sukarno (1901–1970), the first Indonesian President, had also become a primary building block of the Non-Aligned Movement. In the next decades, Ho Chi Minh (1890–1969) and the Vietnamese liberation

¹³² *Ibid.*, p. 46, see *supra* note 129.

¹³³ *Ibid.*, pp. 44–47.

¹³⁴ *Ibid.*, pp. 49–52.

movement would also become mascots of left radicalism in India, especially in Bengal.

Two of Pal's last writings, in the 1960s, go back to the issues of global justice, which I have argued, haunted him throughout his career. The first is a United Nations Law Commission Report from 1962, which Pal authored in his role as Observer for the Commission at the 5th Session of the Asian-African Legal Consultative Committee held in Rangoon, Burma. I would argue that this report should be interpreted as one of Pal's final meditations on how global justice could be achieved. It would happen, he felt, through the meeting of people from different parts of the world who were driven by a sense of injustice and who shared, in spite of the differences between them, a common longing for justice. It would emerge through tension and conversation between normative-transcendental ideals and ground-level struggles against oppression, linking the universalism of justice with the concreteness of ever-changing historical realities.¹³⁵

Very similar ideas animate a lecture written for a meeting of the United World Federalists in Japan in 1966. In this lecture, Pal affirmed his "firm faith" in the role of global law in bringing about global peace.

I have a firm faith in the mission of law in the matter of world peace. If we are sincerely cherishing a desire for creating a peaceful world-order, we must look to law. Such a world-order will be possible only if we succeed in bringing the world society under the reign of law, – under the might of that most reasonable force which alone can check the fatal unhinging of our social faculties. Law alone is entitled to claim recognition as the most reasonable of the forces which can help shaping the human society in the right form.¹³⁶

But simultaneously Pal cautioned against all "pretension to finality"; rules of international law had evolved over time, and they needed to be continuously changed according to changing realities.¹³⁷ Furthermore, if a world community had to emerge, then community power in the

¹³⁵ Report on the Fifth Session of the Asian–African Legal Consultative Committee (Rangoon, January 1962) by Mr. Radhabinod Pal, Observer for the Commission, pp. 153–54.

¹³⁶ Radhabinod Pal, *World Peace Through World Law*, United World Federalists of Japan, 1967, p. 1.

¹³⁷ *Ibid.*, p. 1.

international field would have to ensure that authority was “exercised with the active concurrence of the governed”; that is, people would come together, overcoming their differences, to create “a democratically controlled planned community life for the world”.¹³⁸ But this in turn could only happen if they did not imagine their own beliefs and interests to be the final one. The individual, as well as history as a whole, had to continuously strive to change and not sanctimoniously uphold their own ideas as the final word.¹³⁹

23.7. Conclusion: The Search for Justice without Sovereignty?

I have argued in this chapter that Radhabinod Pal’s attitude to international criminal law and justice has been inadequately understood till now. Scholars have concentrated mainly on his Tokyo Judgment; in contrast, Pal’s voluminous writings on Hindu law or his other writings on global justice have rarely been studied. Neither has Pal been contextualised within broader Indian (and more specifically, Bengali) public discussions about sovereignty and related political theology. His English writings have not been related to his extensive Sanskrit citations or the Bengali-language discussions among his predecessors and contemporaries.

In contrast, I have attempted to capture the multiple Anglophone, Sanskritic and Bengali worlds of legal-political debate that Pal operated through, and have suggested that Pal was not a simple champion of extra-European sovereignty against Western power. In fact, “sovereignty” for him was an overarching negative category for designating all attempts at imposing the power of ruling groups over the ruled, whether through techniques of racial, religious, class, caste or gender oppression. His Tokyo Judgment too did not amount to a simple exculpation of Japanese war guilt. He acknowledged the brutality of Japanese war crimes, but held that these had occurred at the instigation of lower-level functionaries and not due to any instructions given by the top leaders. Here he differentiated the Japanese case from three distinct cases as described earlier: the German Nazis, where he felt that the Nazi leaders were themselves personally responsible for the crimes, the earlier case of Kaiser Wilhelm II, and the case of American bombing of Hiroshima and Nagasaki, where

¹³⁸ *Ibid.*, p. 19.

¹³⁹ *Ibid.*, pp. 19–20.

too the leadership was personally responsible. However flawed and problematic this Judgment was, I have argued that Pal's primary concern was not to champion Japanese militant nationalism but to prevent the establishment of Allied sovereignty in Asia. Pal feared, justifiably, that the Allied Powers would use the post-Second World War trials to legitimate the re-assertion of their control in Asia, whether in the form of US or Soviet hegemony, or through attempts to re-establish old style colonialism, as in British India, Dutch Indonesia or French Indochina. That Pal, like many other Indians, had to fall back upon the defence of non-European sovereignty as a necessary evil, as the only measure of protection against colonial or neocolonial sovereignty allowed by the international order, was a trick of history which explains why many of these anticolonial activists, though acutely aware of the violence inherent in sovereignty and statehood, nevertheless felt compelled to legitimate the rise of non-European nation states. That decolonisation did not result in a removal of state sovereignty but only in its replication in Asia or Africa was the ironic consequence.

Pal's errors (especially in exculpating Japanese leaders of direct war crimes) mean that we should treat him and his writings with caution. While he condemned many of the Japanese atrocities in his Judgment in strong language, his sometimes ambiguous juristic-historical phraseology (in suggesting that Japanese imperialism was ultimately provoked and over-determined by Western colonialism) has left him open for appropriation by right-wing Japanese politicians.¹⁴⁰ There are also debates among Japanese historians about whether Pal continued to subscribe to problematic pan-Asianist Japanophile ideologies even after Tokyo, or whether he advised the Japanese to renounce militarism.¹⁴¹ In spite of his many excesses and flaws as outlined above, I have used Pal to draw some conceptual resources which might be useful for imagining international criminal justice beyond the concrete example of the Tokyo Trial. Pal believed in the necessity of an impartial international court of criminal justice to which victor and vanquished states alike would submit after a war. He felt that such a court, by trying to transcend racial and national limits, would actually make a kind of global (and not merely inter-

¹⁴⁰ This last point is most cogently made by Takeshi, 2011, see *supra* note 2.

¹⁴¹ Much of this debate rests on reportage of Pal's speeches and activities in Japan and the problems inherent in these source materials; for two opposing interpretations, see generally Totani, 2009, and Takeshi, 2011, *supra* note 2.

national) justice functional, a world community under the sign of law. Till his death Pal never lost faith in the possibility of some form of global justice. However, he felt that the operation of justice had to be deepened democratically, by operating through the consent of the governed, and especially of those disenfranchised populations which had been under colonial servitude for a long time. Mere judicial acts would not suffice in this regard even though they would also have a vital role to play. Pal stressed that justice ultimately had to be dissociated from sovereign dominance. A just juridical body would thus have to function without being tied to the interests and authority of a state, a religion, a community hierarchy, or even a coalition of states claiming (as Keenan did about the Allied Powers) to act as the mouthpiece of international sovereignty.

Despite the problematic nature of his dissenting Judgment at Tokyo, this chapter argues that one can make use of Pal's broader imaginary about cosmic-moral justice to denounce the atrocities and oppression carried out by non-European governments (in the name of national sovereignty or "traditional" values) as much as the oppression carried out by dominant Western powers. Since debates on international criminal justice often tend to get polarised between those who defend the sovereignty of nation states and those who support international intervention, it is good to think with Pal about the common origins of all oppression and atrocity. Pal's "Third World" perspective should not be used to defend non-Western oppressive power structures (his critique of caste-oriented governance as a form of "bad" sovereignty is instructive here). But he can probably also sensitise us against too easy a correlation between Western power and the interests of humanity as such. His criticism of Allied sovereignty thus functions as a critique of colonial or neo-colonial exploitative structures masquerading as benevolent "civilising" order.

Furthermore, this chapter has underlined the connected nature of localised as well as transnational forms of oppressive governance and the bearing this has on conceptualising war crimes and international criminal justice. The manner in which British colonialism accentuated and universalised many aspects of social hierarchy in India, or the way in which European racial nationalism provoked and intensified aggressive Japanese militarism, or the manner in which modern forms of transnational capital operate by engaging with and intensifying local forms of class and gender oppression, demonstrate these myriad

connections. When atrocities resulting from these connections need to be tackled, attempts at enforcing global justice have to negotiate the multiple nodes of sovereign violence; isolating a particular society or state as aggressor and exculpating other societies or states is generally not adequate in ensuring justice and the empowerment of the disenfranchised victims. One has to locate the regionalised as well as globalised forms of oppression that need to be combated through complex and multi-nodal forms of global justice, including criminal justice.

In any trial, the historical-epistemological perspectives of the judges and other legal actors involved are of crucial importance in determining the judicial outcome. My reading of Pal offers a kind of juristic epistemology, one predicated on a search for what I would refer to as "bare justice". This justice does not lie in any positive law, nor even in any fixed formulation of natural law, understood in the way that Keenan or Webb did. These latter, resorting to Christian-European vocabularies, thought that there existed some form of fixed body of rules, natural laws, which could be just translated into positive law (in the world of international relations), a *jus* which could be translated into *lex*. Taking a cue from Pal's writings and from the Tokyo Trial debates (including the long scholarly aftermath of trying to grapple with Tokyo's legacy), I have questioned whether there is necessarily any structural opposition between natural law and positive law positions, given that natural law arguments also often fall back for support on a sovereign: a 'divine lawgiver' to legitimate their claims as universal, and a human one to enforce them. The formal structure of natural law appeared to Keenan, Brown, and Webb to be similar to that of positive law: only natural law, inscribed in cosmic-divine rules, had not yet become completely functional in the realm of human law. For Keenan and Brown, human authority (the Allied Powers) could act as the agent for translating natural law to positive law in the field of international (criminal) law, supported by the cumulative growth of international treaties and jurisprudence.

This study has argued that an epistemology of translation of natural law into positive law ignores the ever-changing nature of social relations. The debate between Pal and Keenan, however, suggests that justice cannot be conceptualised as the mere implementation of already-known laws (positive or natural), even less as the sovereign fiat of some political community claiming to represent the universal interest or the common good. Justice is more adequately imagined as a horizon, as a universalistic

standard to which one can aspire, but which can never be completely clear to us, and therefore never completely translatable into a fixed corpus of rules and governmental apparatus. Justice, in this view, cannot be imagined as inscribed in some pre-given natural law order. One can however attempt to understand justice by attempting to understand better social-historical realities and by trying to remove biases effected by self-interests masquerading as final truths; this element of self-reform is repeatedly emphasised by Pal. It is the ground-level, ever-transforming, contingent nature of fighting oppression through shifting legal norms and judgments which need to be connected to the horizon of justice. To cite Pal, such a striving for justice also needs to be based on recognising the “sacred” nature of the Other.¹⁴² Being inherently sacred, the Other demands from us nothing less than justice; the just act is therefore one which attempts to will the universal good, even if such an act necessarily remains circumscribed by the actor’s limitations.

Juristic epistemology was also related in Pal’s mind to a juristic cosmology and a juristic soteriology. Citing a famous hymn of the Rgveda (10.129, popularly known as the Nasadiya Sukta), Pal noted how the seer Prajapati Parameshthin had discerned the evolutionary and transforming nature of the world from a single unity (*eka*), and how the hymn highlighted the importance of relativising existing knowledge given the horizon of the unknowable (*na veda*). What Pal says about the seer can equally be taken as a comment on his own worldview: “The sage seems at times to be given to Scepticism, and yet we find him already conscious of the need of faith and as such tending to Mysticism”. Given the hymn’s complex narrative of the creation of the world from a unity, it also gave Pal an account of the world created not by “a whimsical wilful being” but by the unity underlying the world and its “nature” (*svadha*) to evolve.¹⁴³ It was ultimately cosmological unknowability, the expanse of the “inconceivable”, which “supplied the metaphysical basis of duty and ultimate guarantee of right”.¹⁴⁴ Pal’s citation of Yajnavalkya (discussed above) enabled him to relate this pre-theological cosmology to a soteriology; the attempt to acknowledge one’s limits and simultaneously to strive for greater justice was also a process of achieving perfection.

¹⁴² Pal, 1958, p. 172, see *supra* note 6.

¹⁴³ Pal, 1927, pp. 24–27 (quotations from p. 27), see *supra* note 6; also, Pal, 1958, pp. 119–22, see *supra* note 6.

¹⁴⁴ Pal, 1958, p. 122, see *supra* note 6.

Pal's search for justice was ultimately neither a quest for positivism nor one for divinely-dictated theologically-oriented natural laws, even if his deceptive juridical language lulls us into thinking in turns that he is a positivist or a naturalist.

In conclusion, I would argue that dissociated from alliance with sovereignty and power, the quest for international criminal justice can strive to be (even if it is never completely successful) a public process in which judges and other legal-political actors functioning through an impartial court attempt to find out and enforce what is just. At the same time, the search for justice still remains a personal act through which one attempts to be just, relying not on fixed norms or power structures, but on conscientious readings of changing "historical" realities even as one strives to peel away one's own ingrained prejudices. From this perspective, every decision, every act of judgment, is an act for bettering oneself, an ethical act. Since there are no pre-given norms, scriptures, ideologies or sovereign laws that are *a priori* just, every attempt to enact a just act, to judge justly, is also a substitute cosmological act (to take a hint from Pal), an act of crafting the world in the absence of "a valiant god",¹⁴⁵ in the epistemological gap left by the missing 'divine lawgiver'. The debates in Tokyo stemmed in part from dissonances in thinking about political-legal theology in relation to international criminal justice. From the viewpoint of this study, justice cannot be conceptualised as a sacred Nomos standing above and beyond profane history. Rather, the unknown horizon of justice (or *rta*) invites us to wade through (what Pal referred to in 1955 as) "the guilt of history".¹⁴⁶ The present historical essay has aimed at drawing attention to this uncomfortable historicity of justice.

¹⁴⁵ See Pal Judgment, pp. 238–39, *supra* note 1.

¹⁴⁶ See Pal, 1955, *supra* note 129.

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Historical Origins of International Criminal Law: Volume 2

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further develop this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

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