

The Statesman

Kolkata, India, 3 January 2012

Special Article

Judgment of dissent

The Abiding Importance Of Radha Binod Pal

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The basic flaw of these tribunals (Nuremberg and Tokyo) was that the requirement of the separation of powers could not be met in a set-up that was derived from the uneven relationship between Victors and Vanquished. ~ Hans Kochler

THE two Indians who are revered the most in Japan are Mahatma Gandhi and Justice Radha Binod Pal (1886-1967). The latter is remembered chiefly because of his dissenting judgment in the Tokyo Trial which was set up in 1946 after the Second World War. The trial convicted Prime Minister Tojo but excluded Emperor Hirohito. Seven of the 28 accused were sentenced to death, 16 to life imprisonment and two were awarded shorter and lighter prison terms. During the course of the trial, two died and one was excluded on grounds of insanity. The trial was ordered by the occupation forces led by General McArthur and was based on Article Ten of the Postdam Declaration (1945), which stated that the aim of the victorious powers was not to enslave a race or to destroy a nation but mete out 'stern justice to all criminals, including those who have visited cruelties upon our prisoners'. The fact that the king was excluded confirms that it was both a diplomatic and political trial.

The Nuremberg trial was held to try the German leaders for their war crimes. The judges were drawn from the USA, Britain, France and the former Soviet Union. In the Tokyo Trial, the judges were from the countries mentioned and also from Australia, New Zealand, Canada, the Netherlands, China, the Philippines and India. A major difference between these two trials was that in Nuremberg, there was a marked unanimity among the judges. In the Tokyo Trial, however, as many as five separate observations were pronounced.

The Australian judge, who presided over the Tribunal, questioned the wisdom of the exclusion of the Emperor. The French judge mentioned the procedural shortcomings. The judge from the Netherlands dismissed the charge of conspiracy and found five defendants innocent. The judge from the Philippines considered the judgment neither too strict nor one that would serve as a deterrent.

The other separate judgment was advanced by the Indian judge, Radha Binod Pal. It was a lengthy 250,000-word verdict, longer than the official judgment and the most controversial because of its dissent. Pal called the judgment unfair and partisan ~ only a 'victor's justice'. On the basis of his understanding of world history and international law, Pal disagreed totally with the official judgment. He spelt out his verdict in six chapters: (1) Preliminary question of law; (2) What is aggressive war; (3) Rules of evidence and procedure, (4) Overall conspiracy, (5) Scope of the Tribunal's jurisdiction, (6) War Crimes stricto sensu and recommendation. Justice Pal observed: "Having regard to the gravity of the case and of the questions of law and of fact involved in it, I feel it my duty to indicate my views of the questions that arise for the decision of this Tribunal". According to him, all the defendants were innocent of all the charges on the basis of which the trial was conducted.

Pal's dissenting judgment is one of the classics in international law pertaining to war and has a bearing on history, law, double standards of nations, and racism.

Pal questioned the non-retroactive law that was used as the major foundation of the Tokyo Trial. The category of conventional war crimes came under the jurisdiction of the Tribunal as these were in 1946 a well-established part of international law. However, the prosecution for 'crimes against peace' and 'crimes against humanity' as defined in the Tribunal's charter were new concepts and could not be used retrospectively. As such the Tribunal could not be called a 'judicial tribunal'; it was in reality intended to demonstrate the might of the victorious nations. For a fair trial, a proper distinction between justice and politics has to be made. And this was missing in this trial.

Pal approved the setting up of the special court but questioned the incorporation of the new crimes by the victors and these were indefensible in terms of law and history. As such, the charge of 'overall conspiracy' as the basis of 'crime against peace' was untenable under international law. Pal accepted the fact that the Japanese army had perpetrated atrocities against civilians and prisoners of war, but contended that the evidence submitted was insufficient to fix criminal responsibility to the accused.

In the context of the prosecution's claim that Japan had planned to occupy Manchuria, Pal contended that Japan could not be singled out as it sought to follow Western imperialism. In his reckoning, Japan's phase of modernisation, beginning with the Meiji restoration, was an attempt to imitate the West. While challenging the partisan accusations against Japan, Pal quoted from *International Affairs*, published by the British Royal Institute of International Affairs, historian Toynbee and Georg Schwarzenberger, a renowned scholar on international law. Thus was he able to defend his point of view. He blamed both Japan and the USA for being responsible for the war. He was critical of the use of atomic bombs for killing civilians in Hiroshima and Nagasaki.

Pal also criticised Japanese statesmen, diplomats and politicians for their misconceptions. He never claimed that Japan was innocent and drew a distinction between criminal and moral responsibility. He found Japan to be guilty of the latter. He turned down the main argument of the prosecution regarding an 'overall conspiracy' as one that could not be established. He stressed the need for 'a system of international cooperation' with the emergence of an international community based on the rule of law and not on race or nationality. The three basic contentions in Pal's judgment were: (1) Prosecution was weak; (2) Prisoners could only be tried for well-established and recognised crimes under international law; and (3) Victors could not establish new crimes, new definitions and punish. The Tribunal, he contended, was structurally defective; its primary compulsion was to protect the interests of the permanent members of the UN rather than truly become an international body. It is difficult to disagree with Pal's brilliant analysis in the Tokyo Trial. He asserted that it was a battle between two rights or two wrongs and the defeated cannot be singled out in a victor's justice. It was based on logic, historical facts and on law itself. The rule of law was the basis of law; and this was missing in international relations in 1946. This has been vindicated even today. No victor, even if it imposes a war on a weaker nation on false charges, has ever been tried or convicted. Some commentators have compared Pal's argument to Said's Orientalism. However, Pal provides a modified criticism of Orientalism as applied to Japan. He envisaged a yardstick to judge what is right and what is wrong in the conduct of international relations. Herein lies the seminal importance of his dissenting judgment.

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