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Not to save, but to encounter: Fitzpatrick as transnational jurist

Sundhya Pahuja*

Professor of Law, Director, Institute for International Law and the Humanities, University of Melbourne, Australia

*Corresponding author. E-mail: s.pahuja@unimelb.edu.au

Abstract

This essay sketches the lineaments of the relationship between international law and the jurisprudence of Peter Fitzpatrick. It argues that Fitzpatrick was a model ‘transnational jurist’ who accepted responsibility for the ongoing conduct of lawful relations, even as he offered a thoroughgoing critique of occidental law. For the occidentally trained international lawyer, Fitzpatrick’s work offers a way to take up that responsibility by reimagining international law through its historical roots as a parochial law of encounter.

Keywords: imperialism; international law; universality; office; encounter

Although he might have been surprised to hear himself described as a ‘transnational jurist’, Peter Fitzpatrick was a model for how a transnational jurist of the common-law tradition might conduct themselves well (McVeigh *et al.*, 2021). His exemplarity did not reside primarily in a list of qualities (though one could compile an embarrassingly long list with ease). Instead, it can be found in the way Peter thought and wrote about law from within a humanist tradition, ‘caring for the conduct of law’ (McVeigh *et al.*, 2021, pp. 21–35), whilst responding to the obligations created by the imperial history and foundations of modern law. For Peter as jurist, the obligations that this inheritance entails include attending critically to law’s authority, tracking its ‘modes of authorisation’ (Dorsett and McVeigh, 2012, p. 33) and critically redescribing the material formations so authorised, all without transcending law or escaping it through critique. To escape to ‘the political’, for example, would be to disavow responsibility for the lawful conduct of life, and for the forms of practice through which lawful relations take place (*ibid.*).

This is thinking and writing grounded in responsibility. Peter was fond of recalling the ‘archaic’ spelling, ‘responsibility’, because it reminds us that responsibility is, above all, responsive. For him, law, like love (Auden, 1939/2010; Fitzpatrick, 2001a), ‘responds’ to the world, in both its fixity and its change. And so too should the jurist. Fitzpatrick’s ‘responsibility’, emplaced, yet expansive, oriented towards justice, yet attentive to empire, both cleaves to the best and acknowledges the ‘worst’. Three books written by Peter make this clearer than I could. Each of them appears regularly in my own reading, teaching and writing. Together, the books tell a story of the colonial and post-colonial journey of modern law, its violent institution and stabilisation in the colony (Fitzpatrick, 1980a); its mythic dimensions (Fitzpatrick, 1992); and foundation-less grounds (Fitzpatrick, 2001b). But the archaic spelling gestures as well to the idea that we have forgotten about responsibility altogether, our senses made drowsy by the narrative of progress. In terms that resonate deeply with the argument that Peter makes in *Mythology*, Norgaard argues that

‘the modern belief in progress was so strong during the nineteenth century that Western and westernised peoples lost much of their sense of responsibility for the Earth and for future generations. We believed that progress through Western science would solve everything and thus that responsibility entailed accelerating the advance of science.’ (Norgaard, 1994, p. 44)

In the twentieth century, that ‘progress’ took shape in endless growth, carried by the development project. Like its Enlightened parent, the narrative of development ‘makes an expansive claim to exclusive rationality, with its arrogation of a universal and uniform knowledge of the world, and with its affirmation of universal freedom and equality ... sets a fateful dimension’ (Fitzpatrick, 1992, p. 65) for both humanity and for Earth. Throughout this historical trajectory, we find the other, abject, yet resistant (Fitzpatrick, 2008), ‘constituted’ by modern law, but always in excess, endlessly cast out, but critical to the self-grounding of modern law’s authority (Fitzpatrick and Tuitt, 2003). For Peter, ‘[e]nlightenment creates the very monsters against which it so assiduously sets itself. These monsters of race and nature mark the outer limits, the intractable “other” against which Enlightenment pits the vacuity of the universal’. The other is ‘critical’ because it is only in this opposition that Enlightenment gains content: ‘Enlightened being is what the other is not. Modern law is created in this disjunction’ (Fitzpatrick, 1992, p. 45).

But behind and beyond the projection, those who people the occident’s ‘other’ are, in Peter’s hands, never mere objects of scholarship, but among those to whom the ‘responsibility’ is owed. And so, although his engagement with modern law is always critical, this is no scorched-Earth jurisprudence in which no green shoots of law may be found – not for Fitzpatrick a critical dialectic and its transcendence, nor a displacement from bad ‘law’ to a good ‘political’. Instead, he always reminds us that ‘Law is We’ (Auden, 1939/2010): just as there can be no law without community, there can be no community without law. The task of the occidentally trained jurist is to find, and take up, what is good and what is just in occidental law.

And yet, at the same time, Peter’s work whispers with each breath that ‘justice is impossible’. The ‘community’ that joins us can also mark a limit, a line of decision, about who is inside and who may be kept out – who must be sacrificed. This community-as-colony can ‘justify elimination’ (Fitzpatrick, 2021, pp. 75–88). Peter’s early work drew out this genocidal tendency of modern law precisely in the context of the colony and settler-colony, but also in that of the nation state in general. In a piece called ‘Really rather like slavery: law and labour in the colonial economy in Papua New Guinea’, for example, Peter details the neocolonial dimensions of the Australian administration of Papua New Guinea, tracing its structures, including legal structures, to colonial systems of indentured labour, and follows the way in which state-making indigenises an exploitative form (Fitzpatrick, 1980b). As Brecht remarked, ‘those who are certain to gain by the offering, demand a spirit of sacrifice’.¹ The historical and the theoretical are deftly interwoven in that early work to reveal both the technologies of occidental imperial domination and the jurisprudential practices that authorise and sustain them.

Peter often joked that he knew nothing about international law. And yet, in retrospect, it seems that it was always only a matter of time before international law came to know him. The door may at first have been opened by sovereignty – a term central to Peter’s work and, as I read him, treated as both technology and concept. In earlier works, sovereignty was positioned as the pivot between history and theory. Later, he showed it to be the pivot between nation and inter-nation. In theoretical terms, sovereignty was for him famously ‘surpassing’ (Fitzpatrick, 2012). With this term, Peter was trying to capture the way in which modern state sovereignty had to replicate a theological structure in secular form, fusing two contradictory dimensions without recourse to transcendence, or God. In other words, Peter showed us the way in which sovereignty had to be something fixed and determinate – the avatar of the nation of blood and soil – while continually adaptable to change, to meet and absorb the forces that required its ongoing reconstitution, endlessly ‘surpassing’ both its challengers and itself. For Peter, this surpassing was not so much about power as an intimation of sovereignty as an ultimate ‘nothing’. This ‘nothing’, or ‘incipient vacuity’, as Peter often put it, was where the work of imagination – and resistance – could take hold. This necessarily ‘empty’ dimension revealed that what seemed so powerfully fixed – what could be more fixed than modern state sovereignty after all? – necessarily held within itself the secret that it could always be otherwise.

¹This is the epigram of Fitzpatrick (1980b).

It was at this point for me that Peter's jurisprudence met international law most explicitly (Fitzpatrick, 2003). The theological dimensions of a putatively secular law, the need for a transcendent referent to secure modern (international) law's grounds, the false opposition between universality and particularity, the centrality of race and civilisation to modern law's claims to authority – all were yet to become familiar ideas within the canon of international law.

I think it was roughly at this point in the chronology of his work that I became Peter's PhD student. My training until then had largely been in how to take up the office of cosmopolitan bureaucrat, learning the rituals and rites of those who would save the post-Cold War world with free trade and human rights. I began to gain a sense that there might be different traditions available, and different worlds to be made, during my LLM at UBC under the guidance of a dream team for a young scholar of international law.² But it was Peter who trained me to think of international law as part of a humanist tradition. And Peter who modelled for me most profoundly the jurist schooled in the 'humanities inflected jurisprudence of the common law tradition' (McVeigh, 2019, pp. 183–204). For the international jurist, the responsibilities of office in this tradition must be understood as being owed not only to those within a community, but also to those whom the community must encounter, and with whom it must treat. But, against my cosmopolitan training until that point, I learned from Peter that this responsibility is not to save, but to encounter. It is not deific, but mundane. There is no 'view from nowhere' (Jasanoff, 2005, p. 266).

For me, one element of Peter's interest in international law lay in the absence of an overarching sovereign. The idea of a law that does not transcend maintained its fascination right to the end of Peter's scholarly life (Fitzpatrick, 2021). But if international law has no cohering authority, yet we Occidentals struggle to find the 'inter', or between. 'Infused with a negative universal reference', the 'between' itself levitates and threatens to transcend. It seems that we have never been modern (Latour, 1993). And the 'new' international law, like the 'new imperialism' (Eldridge, 1996), claims to speak on behalf of humanity³ (Fitzpatrick, 2007). But there is no transcendent humanity, no sacred law upon which we can rely. Despite its claims, Europe has no direct line to the gods, not even the god of progress. Several pieces distil these lessons. Most poetic, perhaps, is a piece that Peter wrote in 2014 for the *London Review of International Law* called 'Taking place: Westphalia and the poetics of law' (Fitzpatrick, 2014). In that piece, Peter engages with the myth of Westphalia as originating both international law and the modern state in order to draw out the recursive relationship of those two forms to each other, and their mutual grounding.

But, even in Peter's revelation of groundless grounds, there is still no Earth scorched of law. For, although international law may be the child of empire, we may yet encourage its oedipal tendencies (Fitzpatrick, 2006; 2011). So we were trained by Peter not to have faith in law, but to show fidelity to it⁴ – not to solve law's mysteries, but to find in them the 'generative mythos' (Fitzpatrick, 2017) of law's capacity to be other than what it is. We learned that our responsibility as jurists must include an attention to history and to the material, and to have a sense of place. We must be vigilant against the tendency of law to declare itself just, of justice to declare itself right and of community to become colony. Our duty is not to save the other with (our) law, or (our) knowledge, but to meet lawfully with those who live by other laws.

But, lest this sounds rather dry, these abstract lessons were accompanied by more embodied and prosaic practices of training. In the rather liturgical secularity of Peter's supervision, we learned to read slowly and with care. And, after the combative rituals of frank intellectual exchange, ceremonies of conviviality were always held.⁵ It was in this combination of the intellectual and the embodied,

²Karin Mickelson, Ruth Buchanan, Wes Pue, John Borrows, Susan Boyd, Claire Young.

³This is Fitzpatrick paraphrasing Schmitt: 'he who speaks on behalf of humanity, cheats.'

⁴In practical terms, this training in the profane was always rather liturgical. This was its pleasure. The ritual of the reading group and ceremony of conciliation afterwards: the journeys to Sturry and the beauty of the Kentish-Brazilian garden.

⁵Drinks at the pub, of course.

seriousness and lightness, erudition and humility, that Peter exemplified the jurisprudent who both cares for the conduct of law and was infinitely responsive to those in his care.

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References

- Auden WH** (1939/2010) *Law Like Love*. In Kader D and Standford M (eds) (2010), *Poetry of the Law: From Chaucer to the Present*. Iowa City: University of Iowa Press, pp. 108–109.
- Dorsett S and McVeigh S** (2012) *Jurisdiction*. Abingdon: Routledge.
- Eldridge CC** (1996) *Disraeli and the Rise of a New Imperialism*. Cardiff: University of Wales Press.
- Fitzpatrick P** (1980a) *Law and the State in Papua New Guinea*. London: Academic Press.
- Fitzpatrick P** (1980b) Really rather like slavery: law and labor in the colonial economy in Papua New Guinea. *Contemporary Crises* 4, 77–95.
- Fitzpatrick P** (1992) *The Mythology of Law*. London: Routledge.
- Fitzpatrick P** (2001a) Law like poetry – Burnt Norton. *Liverpool Law Review: A Journal of Contemporary Legal and Social Policy* 23, 285–288.
- Fitzpatrick P** (2001b) *Modernism and the Grounds of Law*. Cambridge: Cambridge University Press.
- Fitzpatrick P** (2003) ‘Gods would be needed ...’: American empire and the rule of (international) law. *Leiden Journal of International Law* 16, 429–466.
- Fitzpatrick P** (2006) Latin roots: imperialism and the making of modern law. *CLAVE: A Counter-disciplinary Journal of Race, Culture and Power* 2, 1–18.
- Fitzpatrick P** (2007) Is humanity enough? The secular theology of human rights. *Law, Social Justice, and Global Development* 1, 1–14.
- Fitzpatrick P** (2008) *Law as Resistance: Modernism, Imperialism, Legalism*. Burlington: Ashgate.
- Fitzpatrick P** (2011) Latin roots: the force of international law as event. In Johns F, Joyce R and Pahuja S (eds), *Events: The Force of International Law*. Abingdon: Routledge, pp. 43–54.
- Fitzpatrick P** (2012) Surpassing sovereignty. In Evans J *et al.* (eds), *Sovereignty*. Honolulu: University of Hawai’i Press, pp. 181–195.
- Fitzpatrick P** (2014) Taking place, Westphalia and the poetics of law. *London Review of International Law* 2, 155–165.
- Fitzpatrick P** (2017) Still not being modern: law and the insistence of myth. *Australian Feminist Law Journal* 43, 232.
- Fitzpatrick P, with Pahuja S et al.** (2021) A training in conduct. In Chalmers S and Pahuja S (eds), *The Routledge Handbook of International Law and the Humanities*. Abingdon: Routledge.
- Fitzpatrick P and Tuit P** (eds) (2003) *Critical Beings: Law, Nation and the Global Subject*. Burlington: Ashgate.
- Jasanoff S** (2005) *Designs on Nature: Science and Democracy in Europe and the United States*. Princeton: Princeton University Press.
- Latour B** (1993) *We Have Never Been Modern*, Porter C (trans.). Cambridge, MA: Harvard University Press.
- McVeigh S** (2019) Critical approaches to jurisdiction and international law. In Allen S *et al.* (eds), *The Oxford Handbook of Jurisdiction in International Law*. Oxford: Oxford University Press.
- McVeigh S, with Genovese A and McMillan M** (2021) Modus vivendi: office of transnational jurisprudent. In Chalmers S and Pahuja S (eds), *The Routledge Handbook of International Law and the Humanities*. Abingdon: Routledge.
- Norgaard R** (1994) *Development Betrayed: The End of Progress and a Co-evolutionary Revisioning of the Future*. London: Routledge.

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