Thinking with Jurisdiction

Shaun McVeigh and Sundhya Pahuja in Conversation

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This text is based on a transcription of the keynote address given at the conference 'Who Speaks International Law', held in Bonn, Germany on 4 September 2021. We (Shaun and Sundhya) participated virtually, from Melbourne, Australia. Originally, we had suggested a conversational format for our joint keynote. The organisers then requested that we also make our keynote a bit more interactive than usual. And so, we conducted a kind of experiment in which we – Shaun and Sundhya – spoke together in a stylised conversation for 20 minutes. We then paused for about 10 minutes to hear questions and comments from the audience. We gathered those questions rather than answering them, noting them down on an electronic whiteboard everyone could see, and then spoke extemporaneously for another 20 minutes in response to the questions, comments, and the themes they raised. At the end, we took another round of questions in the traditional style. What follows is an edited version of the first twenty minutes. We have presented it here as a stylised dialogue, largely maintaining the spoken tone and conversational style (and some repetition). We have added references, and in some parts, a little elaboration for clarity, drawing on the conversation that followed.

I. Sundhya

Thank you very much to the organisers for the invitation to speak. Shaun and I have both very much enjoyed the papers, and the presentations and commentary we heard yesterday. Congratulations on bringing the conference together and kudos for the thought you have given to the hybrid format.

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By way of beginning, I would like to acknowledge that Shaun and I are speaking to you not only from the jurisdiction of Australia, but from the jurisdiction of the Wurundjeri people of the Kulin nation. It is important to make this acknowledgement to pay our respects to the Wurundjeri people and their elders – but also to acknowledge their laws. This is an acknowledgement that goes to the heart of the way Shaun and I take up the concerns of this conference, about 'who speaks international law?', and the implicit questions that carries with it, of how we speak our law and how we might respond to the obligations of land and laws.

So, Shaun and I were talking this morning about what we heard in your papers yesterday, and we did wonder how to address you as an audience. Your accounts of jurisdiction are so varied and insightful that we felt we could end up simply re-stating orientations and arguments that have already been made. Because of this, we decided not to emphasise what we might think of as the systematic aspects of 'jurisdictional thinking', but to say more about the ways we think *with* jurisdiction.

For some of you, this idea – of thinking 'with' jurisdiction – might already sound wrong or odd. Perhaps you might think it would be better to say, 'thinking *about* jurisdiction', or 'thinking *of* jurisdiction'. But here the grammar gives us a clue to something about the way Shaun and I understand the term. Thinking 'with' changes jurisdiction from an object of study into a part of our thinking. Often for international lawyers, the first question of law is sovereignty. For instance, who has sovereignty, what can they do 'within' their 'sovereign' authority, or who has authority to judge in a particular situation? In that idiom, the question of who speaks the law is a second order question which takes the 'law' as given, and then raises questions of identity and inclusion/exclusion, or of procedure.

But for us, who speaks the law or *Juris-diction* – is the first question of law. We are not alone in this orientation of course. In her talk, Professor Nurfadzilah Yahaya noted that for many, the concerns of jurisdiction precede those of sovereignty.[1] For me, the priority of jurisdiction is important because in the tradition in which I am trained – that is, in an Anglo-Australian international law – whenever one speaks the law – or claims to speak the law – one is also (always) making a claim or assertion about what 'Law' is. If we start with Sovereignty and treat sovereignty as synonymous with political and legal authority *per se* – we don't think about that claim, nor do we tend to think about the ways that we practice or exercise authority.

[1] See also Nurfadzilah Yahaya, *Fluid Jurisdictions: Colonial Law and Arabs in Southeast Asia* (Ithaca: Cornell University Press, 2020).

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I'll return sovereignty in a moment. But treating 'who speaks the law' as the first question of law invites us to pay close attention to the question of law's authority. For example, how does authority become something which particular laws 'have'? What holds in place an 'exercise' of authority? Thinking with jurisdiction encourages us to slow down, and notice the way that when anyone – including a judge, a practitioner, or a scholar (or any one of us) – speaks in the name of (European) 'international' law, they – we – are not only engaging a law, and the claim to authority of that law, but contributing to – or *actualising or contesting* – the *authority* of the law in whose name we speak.

Noticing this brings the question of 'who speaks the law' together with the question of legal traditions. Thinking with jurisdiction invites us to engage actively – and jurisprudentially – with the practical inheritance of our own tradition. So, for example, to include as part of our legal research, the practices through which European or 'western' law (state law/positive law) continues to be asserted, and actualised, as the only 'proper' law. Or through which European international law is authored from within the discipline as the only – or only remaining – 'law of encounter'.[2]

In turn, this last means attending to the question of how relations of law are authorised. In other words, to pay attention to the 'lawful' ways people relate to each other, or the practices of legal relationship, including relations between peoples, and laws.

So, to draw these three strands together, for me, thinking with jurisdiction as an international lawyer has meant placing authority, tradition, and relation at the centre of my jurisprudence. In practical research terms, this has meant slowing down and trying to describe what's going on when we 'do' international law. To put it slightly differently, thinking with jurisdiction has invited me to slow down my thinking and to approach the kinds of issues I am concerned with as descriptive questions.[3] These are questions which centre on the 'how' of the matters I am interested in and to the place of law's authority in that 'how'. So, for instance, how does jurisdiction – or 'who speaks law', give shape to the practices and forms of law?

Indirectly, these descriptions help me think critically about how law gives shape to life. We could think of this as related to what some people might describe as the creative, or 'world making' power of law. Some idioms speak

2 Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', London Review of International Law 1 (2013), 63-98; Sundhya Pahuja, 'Letters from Bandung: Encounters with Another Inter-National Law' in: Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press 2017), 552-573.

3 Pahuja, 'Laws of Encounter' (n. 2), 65-67.

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of the 'constitutive dimension' of law.[4] But even when we take the point, we can't always find a way to think about exactly *how* law 'constitutes', or to *describe* the 'how'. How does law do that work of 'constituting' things – relations, institutions, entities? And how might it be distinct from other social phenomena? I have found that thinking with jurisdiction can help us to describe the *how* of law's world-making (or world-shaping) power, in ways which clarify both the 'how' and the 'law' parts of that task.

But if as jurisprudents, we are responsible for the prudence, or practical wisdom of law,[5] for international lawyers, the jurisprudential flipside of the descriptive questions are the questions of what we are doing when we 'do' international law, and how we should take responsibility for our conduct as international lawyers. Shaun will come back to the question of responsibility. But all of this may give you a sense of why, as a matter of thinking with jurisdiction, our concerns are often phrased in terms of authority, and of authorisation, but also – in terms of responsibility and relationship.

But before we go any further, let me circle back to ask you a question, Shaun. It is you who introduced me to this orientation when we became friends, now about 15 years ago when you joined the Melbourne Law School, and as I returned from London to Australia. When did you start thinking with jurisdiction, and how has it shaped your practice as a jurisprudent?

II. Shaun

As a legal scholar, I have worked primarily within national jurisdictions shaped by the common law tradition. In my professional training questions of jurisdiction were the everyday starting points for legal practice. As a critical thinker and legal scholar, however, I tended to think of jurisdictional concerns as the expression of more fundamental political, historical, and social concerns. Thinking with jurisdiction has allowed me – together with a number of other scholars – to re-focus attention on how the authority of law is expressed, performed, and arranged as a juridical and administrative activity and how relations of law are understood.

4 Anghie gives us a famous account of this. See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press 2005). Or for example, Gerry Simpson, 'International Law in Diplomatic History' in: James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press 2012), 25-46.

5 Shaun McVeigh, 'Afterword: Office and the Conduct of the Minor Jurisprudent', UC Irvine Law Review 5 (2015), 499-511.

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In Australia the relationship of the law of the Australian state to the laws of Indigenous peoples is still shaped by colonial legal ordering. This raises familiar political and legal questions. It also raises questions of how non-Indigenous jurisprudents might engage their own laws more carefully. Here we emphasise 'thinking with' as an orientation and training in how to work with questions of authority and the ways in which relations of law are authorised. I want here to offer two examples that draw out Sundhya's opening comments. One relates to legal form or the jurisdictional shape of legal forms, and the other relates to the conduct of lawful relations. Sundhya will then follow these into the international domain, in part through addressing sovereignty.

My first example relates to jurisdiction and legal form. Working with my colleague Peter Rush, we began to think about how the development of new jurisdictional arrangements enabled the expression and practice of authority of nineteenth century British Empire. Part of this thinking was historical: what legal forms and arrangement of laws were developed to order and govern a global empire? One aspect was the development of new forms and practices of government and judicial administration. Until the middle of the nineteenth century, the laws of England and Wales were pluri-jurisdictional. There were jurisdictions of place (of forests and towns as of the territorial nation), of activities (markets and fairs) and of persons (status).[6] The development of a more uniform national jurisdiction and of an Imperial and colonial administrative were linked political and juridical projects. Mid-nineteenth century jurists helped shape this transformation by re-imagining the jurisdiction of the state and what it means to engage with relations of law. This transformation can be seen in the re-characterisation of diverse body of laws of crime to a jurisdictionally expressed territorial Criminal Law. Along the way crimes ceased to be the subject – a wrong of persons, events, or places and came to be understood as an expression of a relation to a territorial state. A parallel concern can be found in the debates about the explanation and significance of the juristic engagement of the Laws of Nations and its jurisdictional transformation in International Law.[7]

Our concern with authority and jurisdiction is also a concern with conduct. Sundhya has reminded us just now that 'jurisprudents' are responsible for the prudence or practical wisdom of law. Indeed, the language of obliga-

6 See Shaun McVeigh and Shaunnagh Dorsett, *Jurisdiction* (Abingdon: Routledge 2012).

7 See Anne Orford, *International Law and the Politics of History* (Cambridge: Cambridge University Press 2021), 157-164; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (Cambridge: Cambridge University Press 2010); Ian Hunter, 'About the Dialectical Historiography of International Law', Global Intellectual History 1 (2016), 1-32.

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tion and responsibility for the offices of legal scholar are long established. But for many, they no longer carry much meaning. With Shaunnagh Dorsett and Ann Genovese, we have been concerned with how we do and should conduct ourselves in our 'office'. As Australian jurisprudents and jurists, we have inherited, benefited from, and still inhabit a colonial legal order. In our work we have emphasised the way that for us, thinking with jurisdiction has been linked to thinking about how we create, arrange, and live with specific obligations of role and place.

Here is a second example linking office (role) and jurisdiction. Working with legal historian Shaunnagh Dorsett, to take up our obligations of role and place we tried to rework accounts of jurisdiction such that non-Indigenous and Indigenous law could be thought in relation. There are many existing models of arranging the meeting of peoples and their laws. This, after all, is the subject matter of public and private international law. We can also imagine the practical techniques of engaging laws found in the disciplines of legal pluralism and comparative law that might do this as well. But because the Australian state does not recognise Indigenous polities as polities, and because 'Australian' state jurisprudence does not understand Indigenous laws as law, we argued, with many others, that the Australian context required a different set of instruments and repertoires.[8] One task is to describe the juridical arrangements that make this situation possible and meaningful. Another task is to develop the 'modes and means' – the crafts and technologies – through which to arrange a better meeting of laws and peoples. This is both a political and juristic task that has been undertaken by Indigenous and non-Indigenous jurisprudents – taken up with different roles and responsibilities.[9]

Finally, with Sundhya Pahuja – we have tried to think about some of the many complex relations of sovereignty as a practice of jurisdiction. Through that redescription of the historical practice of sovereignty and 'sovereign' relations, we have been thinking about the different engagements of international legal orders 'jurisdictionally'. For us this has become a concern of encounter and the global south. To which Sundhya will now turn.

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8 Shaunnagh Dorsett and Shaun McVeigh, 'Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking' Melbourne University Law Review 36 (2012), 470-493.

9 Christine Black, 'My Camp' in: Christina F. Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Abingdon: Routledge 2011), 3-11; Christine Black, 'Maturing Australia through Australian Aboriginal Narrative Law', South Atlantic Quarterly 110 (2011), 347-362; Mark McMillan, '*Koowarta* and the Rival Indigenous International: Our Place as Indigenous Peoples in the International', Griffith Law Review 23 (2014), 110-126; Mark McMillan, David Foster, Ann Genovese, Shaun McVeigh and Maureen Tehan, 'Obligations of Conduct: Public Law – Treaty Advice', Melbourne University Law Review 44 (2021), 602-633.

III. Sundhya

Yes, thinking about sovereignty as a practice of jurisdiction (rather than the other way round – of jurisdiction as a practice of sovereignty) has helped me to demystify sovereignty.

By this I mean that instead of trying to define, describe, or theorise sovereignty in terms of Right, or even in terms of legitimacy, thinking with jurisdiction has allowed me to see sovereignty not as 'political authority' *per se*, but as a historically specific collection of practices through which authority is exercised. So, to do this, to think with jurisdiction in this context, our primary concern is with the 'how', or the juristic practices which show us how authority is articulated, claimed, and actualised – rather than with metaphysics. These practices include technical practices, as well as 'doctrinal' or jurisprudential ones.[10] So for instance the legal theorist who writes about what sovereignty 'is' without locating it in time and place, participates in the assertion and actualisation of that form of sovereignty.

Understanding sovereignty as 'made' of particular practices, emerging from particular regions and relations, slows down the move to understanding sovereignty as 'universal'. Particularising or 'provincialising' sovereignty[11] also allows us to better describe its sticky, if not tragic dimensions for the Global South.

So – one of the first pieces Shaun and I collaborated on was a piece called *Rival Jurisdictions: Sovereignty as Promise and Loss.*[12] In that chapter, we described the way in which for the Third World, the acquisition of independence through the vehicle of sovereignty held out a promise of autonomy, but immediately involved the 'new states' accepting a particular (colonial) understanding of what law is, and an acceptance of the nation-state as the appropriate form of associational life. In other words, in decolonising through the exercise of self-determination as a nation-state, the Third world lost a key element of the capacity to decide what its law is, and what shape – or forms – its public institutional life could take.

Thinking about sovereignty as a particular jurisdictional practice then helps us to provincialise European international law too, so that we can see it historically as just one law of encounter (as Shaun and I call it) or set of

10 Andrew Fitzmaurice, 'Context in the History of International Law', JHIL 20 (2018), 5-30.

11 To borrow Chakrabarty's idea: Dipesh Chakrabarty, *Provincialising Europe: Postcolonial Thought and Historical Difference* (Princeton, NJ: Princeton University Press, 2000).

12 Shaun McVeigh and Sundhya Pahuja, 'Rival Jurisdictions: the Promise and Loss of Sovereignty' in: Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Abingdon: Routledge 2010), 97-114.

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practices and protocols by which organised groups meet (what Lauren Benton has called 'inter-polity laws').[13] Many of us are trained – implicitly and explicitly – to think that such plurality ended with the 'universalisation' of one particular international law, either during the imperial period (in the genre of lamentation) or in the era of decolonisation (in the genre of celebration). But what my research on international law and the Cold War,[14] and international law and global corporations has revealed is that a plurality of laws of encounter – or the lawful protocols by which organised groups meet – remains alive and well. Not just between East and West, nor between North and South, but also between indigenous and non-indigenous peoples, and more discretely, between company and state.

But our training – my training – blinds us to this plurality. So it is only by slowing ourselves down, suspending the assumption that there is only one international law, and staying with the prior question of jurisdiction as a space of enunciation of laws, that we can see that what are usually described from within the discipline of European international law as social, political, or economic conflicts – or as primordialism meeting modernity – might be better understood as jurisdictional rivalries.[15] This can be true for syncretic versions of international law coming from states, or for indigenous international laws, or in a different register, for global corporations.

These ideas of sovereignty as a practice of jurisdiction and of international law as a particular law of encounter, have changed the way I understand the idea of 'Development' too, both in terms of what the international development project is doing on the ground and in terms of how it relates to the authority of international law.[16] But I might leave that part for the second half if there are any questions about it.

So, together, Shaun and I have described 'thinking with' jurisdiction both in terms of an orientation and a technical practice of description. We have emphasised the place of jurisdiction within critical discourse and touched on some other ways of thinking critically with jurisdictional forms, arrangements, and practices. Shaun, in our final minutes before the questions, can

13 Pahuja, 'Laws of Encounter' (n. 2). Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law 1800-1850* (Cambridge, MA: Harvard University Press, 2016), 4.

14 Matthew Craven, Sundhya Pahuja and Gerry Simpson (eds), *International Law and the Cold War* (Cambridge: Cambridge University Press, 2019). A monograph on this is forthcoming.

15 Pahuja, Letters from Bandung (n. 2); Pahuja, 'Laws of Encounter' (n. 2).

16 Luis Eslava and Sundhya Pahuja, 'The State and International Law: A Reading from the Global South' Humanity: An International Journal of Human Rights, Humanitarianism, and Development 11 (2020), 118-138.

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you say something about how jurisdictional thinking engages the ethos of the jurist or jurisprudent and recap a little?

IV. Shaun

In this conference, many of the participants have stressed the ways in which the work of jurisdiction has shaped forms of international engagement and forms of public international life. To this we have added our own gloss: paying attention to the prudential and practical character of jurisdiction also draws attention to the conduct of office and the quality of relations of law. For us, the question of how jurisdictional engagements are practised is central to how we account for the conduct of people of law, including doctrinal, social, and critical legal scholars. And in this short presentation we have invited you to think of some aspects of jurisdictional thinking as a practice of responsibility.

In our scholarship we have both concentrated on jurisdictional practice and thought as a way to make visible the many jurisdictional forms and obligations that establish relations of law. Rather than provide a general critical theory of jurisdiction, or of international law, we have treated jurisdictional thinking as a way of authorising and crafting relations of law. Different scholars have addressed many of the same issues through quite different modes of engagement. So perhaps it is worth noting that for us, our central concerns of jurisdiction relate to institutional conduct. We have linked this conduct to obligation and responsibility for the conduct of lawful (as opposed to lawless) relations.

In trying to articulate our own place as scholars working within national universities and concerned with the movement between national, transnational, and international ordering, we have emphasised the ways that the plural jurisdictional forms also require different modes of engagement and relationship.[17] For example, there can be no account of the authority of the laws of Australia, without thinking about the authority, jurisdiction, and practice of the laws and knowledge of indigenous peoples.[18] This is an obligation that also continues to shape how we might engage what are now viewed as international jurisdictions.

But thinking with jurisdiction is not an innocent activity and not beyond analysis. There are, after all, generations of legal scholars who think about the

17 This is also a central theme in the work of Paul Schiff Berman. See Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence Beyond Borders* (Cambridge: Cambridge University Press, 2012).

18 Berman (n. 17).

craft and technologies of jurisdiction, involved in how to create and run empires and corporations, and how to organise the possession and dispossession of people, places, and events. This is a concern that Professor Tendayi Achiume took up in her presentation.[19] And for some, addressing the creation and conduct of relations of law as jurisdictional questions brings with it a displacement of the political and moral considerations of the legitimacy of law. But the restriction of focus that thinking with jurisdiction brings, can be used either to exclude political and ethical questions or to think again about the ways in which political and ethical life is understood through jurisdictional thought.

And so, in our work, jurisdictional thinking has been addressed alongside the ways in which we understand political and ethical commitments.[20] Sundhya's comments on slow reading and careful description reinforce the ways in which legal scholars might attend to ways in which we invoke and use legal forms and instruments. We have also drawn attention to the way that thinking with jurisdiction has helped us think about the conduct of the role or office of the legal scholar. For us, thinking jurisdictionally has been a part of a training in how we think of our roles as legal scholars and how we describe, analyse, and contest the world in terms of the idioms of our juristic traditions.

19 E. Tendayi Achiume, 'Racial Borders', Geo. L. J. 110 (2022), 445-508.

20 Pahuja, Letters from Bandung (n. 2); Sundhya Pahuja, 'Corporations, Universalism and the Domestication of Race in International Law' in: Duncan Bell (ed.), *Empire, Race and Global Justice* (Cambridge: Cambridge University Press 2019), 74-93; Sundhya Pahuja and Anna Saunders, 'Rival Worlds and the Place of the Corporation in International Law' in: Phillip Dann and Jochen von Bernstorff (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford: Oxford University Press 2019), 141-174; Ann Genovese, Shaun McVeigh and Peter Rush, 'Lives Lived with Law: An Introduction', Law Text Culture 21 (2016), 1-13.