

Editorial: The Paradox of Cosmopolitan Right and the Modern State

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This Special Issue of *In-Spire* emerges from a Roundtable seminar held at Keele University in November 2007. The theme of that Roundtable discussion was established by Professor Anne Orford's presentation 'The "Cosmopolitan Turn" of International Law' (2007). In that paper, Orford suggests that Kant was one of the first thinkers to explore what happens when the subject and the state meet their limits under the conditions of modern political life. She explored the Kantian vision of a global cosmopolitan order, and what this means for the theory and practice of cosmopolitan international law today, as particularly evident in debates about humanitarian intervention, human rights and refugee laws. Her presentation drew from her recent article 'Bio-politics and the Tragic Subject of Human Rights' (2006). This paper starts from the premise that the global institutions and discourses of international law provide structures for legitimating violence by the sovereign state upon its subjects. International human rights law presents a means by which the law may mediate such violences. Orford argues however, that human rights provides only a limited means of resistance for the subject in countering the power of the state; and may in fact limit our vision of the possible because of the way in which "acting as if we are confronting an omnipotent sovereign authority helps to make it so" (2006: 223). Orford instead argues for the possibilities suggested by an openness of politics and community, and the importance of critical challenges to a governmentality that seeks to constrain this in the name of 'security'.

In the cross-disciplinary spirit of *In-Spire*, the Roundtable respondents and discussant explored these themes, with contributions drawn from their respective disciplines of politics, international relations, criminology and international human rights law. The richness of this cross-disciplinary inquiry is evident in the articles below. The importance of it perhaps deserves a few words. As a scholar of international law, I am acutely aware of the limitations of the discipline, borders inherent in our disciplinary imagination, "academic territories" if you like (Paasi, 2002: 463). International lawyers, however, are increasingly interested in exploring the conceptual borders of international law, the ways in which the discipline defines and limits the parameters of international law by giving prominence to traditional, state-centric frameworks. Part of the processes of identifying these borders is to acknowledge the value of cross- and inter-disciplinary inquiries for understanding law; part of this is the necessity of examining the ways in which we talk to each other and to others outside the discipline, and how this dialogue can be challenging for our understandings of international law. A key feature of our endeavours, therefore, must be exploring how to have conversations that are both cross- and inter-disciplinary (as well as intra-disciplinary - transcending the categories and compartments of international law). Each of the following articles demonstrates the importance of these conversations, demonstrates the growth in knowledge that results from working at these borders of disciplinary imagination (Huber and Morreale, 2002). It is clear from the contributions in this Special Issue that we need a rich cross- and inter-disciplinary array of tools if we are to understand and facilitate, as Orford (2006: 223) hopes, how individual subjects may confront the all-powerful state apparatus in alternative ways that preserve the openness of politics and community.

The first featured article, authored by Anne Orford and entitled 'International Law and the Making of the Modern State: Reflections on a Protestant Project' explores state-making as a project of international law. Orford highlights the paradox many international lawyers face: in writing or practising in contemporary international law, even in the areas of international law that seek to restrain the power of the state (such as human rights), one relies on the foundation stone of the international order as being the state. States and state power are at the centre of the international legal order, and as Orford points out, the authority of the state is accepted as a fact. Orford situates this paradox that international lawyers face in a broader discussion of the relationship between state authority and the freedom of individuals to resist that authority, providing introductions to themes that pervade this *In-Spire* Special Issue. Orford presents an analysis of the political theories of Hobbes and Kant in relation to the relationship between the sovereign power and subjects. She explores the ways in which these two theorists struggled with debates on the role and limits on power on the state and the degree to which individual subjects owe obedience to the state. In particular, Kant's principles of international and cosmopolitan right as constraining the power of the state are highlighted as important concepts that continue to pervade international legal debates. In doing so, Orford draws

attention to the importance of considering the origins of these debates on the proper limits of authority, which as we see in the articles that follow, remain very contemporary.

The following articles are based on the papers presented by the respondents and discussed at the Roundtable seminar. The second article, authored by Marijana Sevo, entitled 'The Subject of Resistance and the Problem of Excess: Dayton Peace Accords and Legitimation of Violence', further develops the themes of resistance to the authority of the state, and the connection of this resistance to the limitations placed on state authority, in the context of violence, security, threat and intervention by the international community of states. She explores the way that contemporary violent practices within and between states are framed as 'exceptional', serving to normalise and stabilise particular political processes and to define corresponding practices of resistance or peace-making. Sevo situates her analysis in the context of the Dayton Peace Accords, and highlights how the persistence of territorial border constructions and assumptions about national and religious identities continue to construct the possibilities for peace by authorising violence to defend sovereignty. She explores how the continuance of borders, particularly the nationalist understanding of borders, has dominated contemporary conflicts and peacekeeping operations, and likewise influenced debates on regionalism. In this way, Sevo's paper illustrates the continued focus (of scholarship and practice), as Orford identifies, on the state – the territorial borders, the sovereign authority, and the effect that this has on principles and practices of non-interference and intervention. In contrasting the debates on the importance or otherwise of borders between normative security theorists and cosmopolitan moral theorists, Sevo identifies the usefulness of the concept of 'ontology' for providing an understanding of the linkages between identity and territory, and thus producing a rich understanding of places and borders, 'ontologically conditioned' by human reality. Might this provide a possible basis, as Orford hopes, on which to build future responses to conflict, which transcends a focus on state borders and sovereignty, and in doing so, assists theorising resistance away from the dominant practices of power embodied in the state?

The third article here, authored by Gavin Bailey and entitled 'The Killing of Jean Charles de Menezes: Risk, the "Innocent", and Looking Guilty', continues the themes of the proper limits of state authority, protection of citizens by the state, and the obedience of citizens to the authority and laws of the state. Bailey explores how this debate is manifesting itself in a contemporary British society, where discourses of security dominate, through a discussion of the killing of Jean Charles de Menezes, a Brazilian electrician working in London who was mistaken for a suicide bomber by the Metropolitan Police Service. Through an analysis of the investigations into the conduct of the police in this killing, Bailey highlights how the police and media justifications for this conduct illustrate common features of the 'risk-based techniques' prevalent in contemporary security discourses. He outlines how these justifications focus on the necessity of weighing potential risk of harm to society against the limitation on the freedom of individuals within society, on societal and state characterisations of 'threats' to security, particularly the kind of appearance or behaviour society regards as a potential security risk, and those groups in society that are judged as 'guilty' as a result. In doing so, he draws attention to the dangerous ways in which these discourses shape our views of 'innocence' and 'guilt', and thus shape societal acceptance of changes to the limits of state authority and corresponding changes to the limits on individual freedoms.

The fourth article, authored by Jane Krishnadas, entitled 'Encountering Human Rights: Redrawing the Lines of Engagement; Relocating the Sites of Governance' extends the themes of the special issue through application of her understanding of rights as a site of encounter between the subject and the state. Krishnadas explores the paradox of how, in each of the articles above, the distance (both in terms of geographical distance, but also in terms of political and economic constraints) between the subject of rights and the sovereign state presents a stark contrast to the "bodily proximity of violations of rights by the state in the subject's 'just', 'civil' or actual death" (p32). Drawing on her previous analysis of rights and gender in post-earthquake reconstruction processes undertaken by the United Nations, and through application of this work to the articles above, Krishnadas demonstrates how the international legal framework of rights, which she argues is "hierarchical, dominant and distant" (p33), tends to construct the rights subject as an individual 'other', the 'stranger', entitled to rights only as determined by this legal framework. Such a framework does not capture or facilitate an understanding of the context of rights as experienced by subjects in their everyday lives. Krishnadas argues, however, that a more useful understanding of rights is "as a site of encounter where the subject and state intersect at different spatial scales of governance" (p32). At these intersections, she argues, rights can be understood as transformative strategies, and the

distance between subject and sovereign state can be eroded to present a challenge to the legitimacy, material determination and location of modern statehood in international human rights law. In doing so, Krishnadas presents a hopeful way forward, moving away from the “overwhelming and often paralysing distance” (p36) between the subject and the state in international human rights discourse. She argues, in a way that seems to echo Sevo’s concept of ‘ontopology’, that identifying the many sites of encounter between subject and state provides sites of engagement “within reach and with the possibility of change” (p36).

The review essay of Nivedita Menon’s *Recovering Subversion: Feminist Politics Beyond the Law* by Dania Thomas, further extends the themes of this Special Issue by drawing attention to not only the relationship between citizens and the state (as mediated by law) as the previous articles have done, but also by highlighting the way in which economic liberalisation shapes and distorts this relationship. Menon’s critique of a contemporary feminist politics that looks to the law as a way through which to further its emancipatory goals focuses on the “paradox of constitutionalism” (Thomas, 2008: 40). Menon presents a critique of the project of constitutionalism (to safeguard the autonomy of the individual) that draws upon the universalising language of human rights. Menon’s radical political agenda focuses on replacing universal categories with local, specific and particular categories, formed through political practice within communities, as an alternative to the state and legal hegemonies. However, Thomas draws attention to the dangers that a radical feminist politics might face from market liberalisation and from the “proliferation of specific, local and particular” (p46) market transactions. She argues that it is imperative that a radical politics re-engage with the law, to engage with and address the impact that privatisation and commodification have. In doing so, Thomas proposes an alternative reading to Menon’s critique of constitutionalism, though an analysis of the law on abortion in India. Thomas argues that illegal abortions, reduced maternal health and the declining female to male child sex ratio can be linked to the ongoing project of economic liberalisation in an analysis of the law that also questions the “supposed gender neutrality of the legal foundations of the market economy” (p42). In doing so, Thomas highlights the instrumentality and sacrificiality of women’s bodies in achieving the broader state and societal goals of population control. She argues for the necessity of a radical politics that not only engages with the law, while mobilising local, specific and particular subjectivities, but addresses the oppression that is normalised both by social practice and market exigencies.

The issue concludes with four book reviews, which highlight a number of ways in which the contemporary themes of this Special Issue are being considered in different forms elsewhere. Lawrence Rosen’s *Law as Culture: An invitation* (reviewed by Esther Abin) outlines the instrumentality of the law in constructing and legitimising particular social and moral orders, and in maintaining power. In making connections between the disciplines of law and anthropology however, Rosen highlights how this instrumentality of law is allowed to dominate, but also how we must view law as impermanent and uncertain, open to interpretation and change. Anne Orford’s edited collection *International Law and its Others* (reviewed by Rohee Dasgupta) further demonstrates the strength there is in an inter-disciplinary inquiry of law, and particularly emphasises the connections between international law and politics. The collection seeks to highlight the historic and continuing violences and injustices of international law while at the same time remaining in quest of the cosmopolitan commitment of international law. The collection highlights the importance of international lawyers continuing to recognise the importance of both undertakings. Heidi Nast’s *Concubines and Power: Five Hundred Years in a Northern Nigerian Palace* (reviewed by Saheed Aderinto) is the product of another inter-disciplinary inquiry, where insights from women and gender studies, history (political, economic, social), geography and anthropology are used to explore where the power of the state was located in sixteenth century Nigeria. Nast identifies the royal concubines’ wombs as practically and symbolically representing the location of the power of the state, such were the importance of children in maintaining the aristocracy; presenting a marked contrast to the discussion of the autonomy and consent of women’s bodies for the Indian state project of population control in Thomas’ review essay above. Sherilyn MacGregor’s *Beyond Mothering Earth: Ecological Citizenship and the Politics of Care* (reviewed by Donna Knapp van Bogaert) echoes themes of the interactions between the state, the market and society, and how these interactions shape the participation (and identities) of citizens in public life, particularly in terms of women’s participation as citizens in the public, specifically environmental, spheres.

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