SPECIAL SECTION: LEGAL IMAGINARIES

EDITORIAL

THINKING THE UNTHINKABLE: BEYOND INTERNATIONAL LAW'S IMAGINARIES?

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Every discipline is composed of a set of restrictions on the imagination.[1] The very notion of a legal discipline, with its codes and perimeters, avoids, forbids, and represses the use of other conceptual apparatuses, vocabularies, and styles. It is inherent to the idea of discipline – to train oneself and others to obey, contribute to, follow, to fit in to an ever-unfolding and therefore ever-reinforcing orthodoxy. Shared imaginaries are often a key element that distinguishes one discipline from another.

As a result, multiple phenomena, because of limited conceptual apparatuses, vocabularies, and styles, remain invisible to international legal thought. For instance, the limited spatial imaginary of international law tends to direct inquiries towards questions such as: 'are borders still relevant?'; 'if global governance processes no longer rely on a legal geography centered around state territories, are states declining in significance?'[2]; 'is international law, a state-territorial order, being displaced?' or 'if the legal order is no longer

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1 Hayden White, *Tropics of Discourse: essays in cultural criticism* (Johns Hopkins University Press 1985) pp. 126-127. See also Jean d'Aspremont, "Critical Histories of International Law and the Repression of Disciplinary Imagination" (2019) 7 London Review of International Law 89.

2 Saskia Sassen, 'The State and Economic Globalization: Any Implications for International Law What's Wrong with International Law Scholarship' (2000) 1 Chicago Journal of International Law 109, 109.

territorially ordered, what is the new ordering principle?'. It is easy to find evidence of such inquiries in international law scholarship.[3] That is not to say these inquiries are wrong or have no use, just that sticking to dominant imaginaries of international law inevitably shapes and limits the questions we ask and prevents us from accounting for different dynamics, such as, I argue elsewhere, reterritorialisation(s).[4]

The group of essays in this special issue stems from an Emerging Voices workshop 'Thinking the Unthinkable: Beyond International Law's Imaginaries' organised by the Women in International Law Network (WILNET) in Manchester in April 2022 in collaboration with colleagues at the TMC Asser Instituut and Koç University.[5] With this event, our aim was

[3] Oscar Schachter, 'The Decline of the Nation-State and Its Implications for International Law' (1997) 36 Columbia Journal of Transnational Law 7, 7; Heike Krieger and Georg Nolte, 'The International Rule of Law: Rise or Decline? – Points of Departure', *KFG Working Paper Series, No. 1. October 2016* (2016) <https://ssrn.com/abstract=2866940> accessed 21 February 2017; Cedric Ryngaert and Mark Zoetekouw, 'The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2523354 <https://papers.ssrn.com/abstract=2523354> accessed 5 March 2020; Daniel Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25 European Journal of International Law 9; David S Koller, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem' (2014) 25 European Journal of International Law 25; Ian R Douglas, 'Globalisation and the End of the State?' (1997) 2 New Political Economy 165; Roman Kwiecień, 'Does the State Still Matter? Sovereignty, Legitimacy and International Law' [2012] Polish Yearbook of International Law 45; Barry Buzan and Richard Little, 'Beyond Westphalia? Capitalism after the "Fall"' (1999) 25 Review of International Studies 89; '"Spaces beyond Sovereignty: International Law Outside of Territorial Jurisdiction" 28th Annual SLS/BIICL Workshop on Theory in International Law' (2019) <https://www.biicl.org/event/1395/28th-annual-slsbiicl-workshop-on-theory-in-international-law> accessed 4 April 2019.

[4] Gail C. Lythgoe, 'Distinct Persons; Distinct Territories: Rethinking the Spaces of International Organizations' *International Organizations Law Review* 19 (2022) 2, 365-390,

[5] Emerging Voices Workshop 2022 https://sites.manchester.ac.uk/wilnet/2022/04/21/emerging-voices-workshop-2022/

to foster a space for woman-identifying scholars at an early career stage to showcase the research they were undertaking to help rethink international legal imaginaries. Scholars used a variety of approaches, including doctrinal, theoretical, critical, empirical, and historical perspectives, and either explored international legal imaginaries, or critically reflected on the very ambition and prospects of going beyond dominant established beliefs, languages, and ways of thinking in international law.

As organisers, we chose to discuss and think about imaginaries because they create the conditions of the possible powerfully opening up or closing off avenues of research and practice. Imaginaries are not just key but constitutive to thinking legally and applying law. In other words, what is even thought of as law that is possible to apply in the various framings already collectively shared by the majority of the discipline, but also key to reframing and rethinking what is potentially possible. But what is more, examining imaginaries requires a closer look at the 'imaginer' – it is more personal, and thus we cannot avoid thinking of our own biases, however these have been accumulated, unlike a focus on theories or methods, which can be much more externalised to the legal thinker.[6] Whereas a theory or a method can also open up or close off avenues of inquiry, they are to a greater extent external to the writer; chosen, often cynically or simply because they suit a research project, and do not sit so close to home. The self is always involved in constituting the imaginaries. Questioning our imaginaries is therefore an effort to be 'more self-conscious of our interpretative constructs'[7] and not always an easy task.

Law is by now widely understood to play a particularly powerful role in constituting our social lives. Law constructs everything from the international 'order' to the family. The foundational imaginaries of law are therefore one avenue of research worth interrogating. One such imaginary

[6] Pierre Schlag, *Laying Down the Law: Mysticism, Fetishism and the American Legal Mind* (New York University Press, 1996), 69.

[7] Ibid, 95.

is that of how law applies and operates: a central assumption of non-lawyers, law students and practicing lawyers alike, is to imagine law as applying to or regulating something. The imaginary here is a mental picture of a relationship of law applying to an object, whether that be oceans, land, people, technologies, natural resources, data, or property. For instance, this past semester, teaching a course on International Law, Technology and Security, the theme that came up most when talking to students was that they wanted to understand 'how law can better regulate AI' or another such technology. This is imagined as a relationship such as:

Law → Object.

A related but different imaginary is that law governs the relationship between a person and their property or a state and their territory. The mental picture sees law as the link between person and object:

Legal Person $\xrightarrow{\text{law}}$ Object.

Both these mental images present a false picture. Law structures social relations. Thus, the imaginary might be better understood as:

Legal Person $\xrightarrow{\text{law}}$ Legal Person.

Law is not in a relationship between it and an object. Nor does law describe the relationship between a person and their house or car, or a state and its natural resources. It is never about law applying to new technologies or the seabed but about regulating rights between legal persons of access, use, etc. Perhaps of an object such as the seabed. Law orders relations between people. This is a basic legal realist insight about law, which for some reason continues to elude the popular imaginaries of law. Legal realists re-interpreted the relationship in the likes of property law not as between the individual and 'their' property but between the particular right-holder and all others, i.e., those against whom the rights can be enforced, those who have duties to the right holder, etc. Property *consists of legal relationships*

between different actors rather than 'ownership of things or relationships between owners and things."[8] Law is entirely relational.

A more useful and productive thinking of law is as creating, sustaining, changing, enforcing, legal relationships. The power of this insight was to undo the perception that law applies passively, neutrally to some object, but structures social hierarchies and exposes the politics of doing law and thinking legally. As such, the foundational imaginary of how we even perceive the application of law has a profound effect.

There are more imaginaries at work, informing the legal imaginary and informed by the legal imaginary. I understand these to be entangled processes, but processes it is possible to trace and 'disentangle'. By this I mean that law is framed by other discourses, and in turn these discourses are co-produced by law. One cannot discuss 'the family', especially in western societies, in ethnographic, anthropological, or sociological works, without also recognising the role of law in constituting ideas about the family and its individual relations. In the same vein, one cannot understand 'the environment', without it being informed by socially produced legally constituted spaces and imaginaries. What is more, our imaginaries are always spatially informed. We are always imagining some object in our minds as above, below, related, at distance, closer, near, inside, outside, connected, disconnected, ruptured or continuous. This means that our legal imaginaries are also always informed by our assumptions about space. As Philippopoulos-Mihalopoulos argues, our understanding of space has been produced by and are mediated by our understanding of law: 'Ideas of space as representation, text, abstraction, system and closure ... all come from a juridical understanding of space. Not only does law understand space in the above ways, but also, this specifically legal way of understanding space affects the

[8] DR Johnson Reflections on the Bundle of Rights' (2007) 32 Vermont Law Review 247, 249.

way other disciplines understand space as well'.[9] Interrogating our imaginaries is key to understanding, unpacking, challenging and rethinking how 'law and space are folded into each other: they are co-emerging, co-constituting and co-evolving'.[10] These two are therefore mutually implicated and therefore a vital part of the process of rethinking law is to rethink our imaginaries of law.

The reason for exploring 'thinking the unthinkable' as part of the workshop, was that sometimes discussing what may at first seem 'impossible' or very much outside the box or discipline, can be productive in exploring the conditions of the already possible as well as finding new avenues to research. Inspired by the idea that 'unlearning vindicates reform and re-imagination,'[11] we also recognised the political nature of either repeating or challenging orthodox imaginaries. We wanted to unsettle orthodox thinking(s) about international law, and include research projects that might present themselves as unconventional. It was therefore, or at least we hoped, an open and reflexive topic.

Inhabiting different spaces and perspectives during this process of rethinking, changes the modalities chosen. As such, rethinking can be conducted while one is working internal to a discipline or external to it. But these are not two points on a map. Perhaps it is more useful to imagine a scale where one is either more fully internal or external to the discipline that is primarily the object of rethinking. Moreover, how we employ and fold two, three, or more disciplines, methods, or theories together in our rethinking can differ greatly. One discipline can be a 'bridge' into another discipline; one method borrowed from one discipline and applied to a second or original discipline can operate as a different lens and focus the gaze on a

[9] Andreas Philippopoulos-Mihalopoulos 'And For Law: Why Space cannot be understood without Law' (2018) 17 Law Culture and the Humanities 620–639, 627.

[10] Ibid, 630.

[11] Jean d'Aspremont, *International Law as a Belief System* (Cambridge University Press 2018), 119.

particular concept or subject, offering a new insight; or one can adopt a 'trans-disciplinary' perspective to more wholly 'transform' an insight, method, concept, or subject. The perspective can be static, or it can constantly shift. For example, one strand of rethinking that is always fruitful is to (re)visit other disciplines and apply critiques, different framings, concepts, and tools that have been developed in the likes of semiotics, Marxist theory, security studies, or sociology. There are some who might argue that transdisciplinary perspectives are the only way to tackle global problems given their complexities. Another strand is to entirely de-centre state-made law and state-legal thinking and instead apply critical insights from the likes of indigenous legal thought or inhabit the perspective of a different actor such as a corporation or a city. Such strategies can all be employed to different extents depending on how radically one embraces the un- and re-learning process. Frequently considered to be the least radical method of rethinking is one which involves utilising the tools, concepts, and theories already present within one's discipline. The choice as to which method to adopt largely depends on the scale of the problem identified and the solution of subjective interest to the researcher in question. It also depends on who as thinkers we are wanting a particular piece of writing to speak to. If our audience is other legal scholars, then employing the same concepts and vocabularies can make this process easier – opting for a vocabulary that is very different can be alienating for some and of no use to others. Where there is a shared disciplinary vocabulary and conceptual framework, the risk of the authors' meaning to get lost or (mis)(re)interpreted decrease. Finally, of course, the author of the rethinking exercise is a determining factor as to the method adopted. Those who were trained first in one discipline before retraining as lawyers, may feel more comfortable swapping between imaginaries and intellectual frameworks. However, this need not always be the case. Many, when 'thinking legally', will find it necessary or even just comforting to think within just one discipline and sometimes the best legal thinkers are those who recognise and regulate their performance of the boundaries between disciplines in terms of

concepts, practices, and vocabulary. It can at times boil down to how lost we want to get, for rethinking fundamentals can be an uncomfortable process, but a necessary discomfort in order to radically challenge and rethink one's imaginary.

What is clear however is that embarking on an exercise of rethinking is a process, not a one-off event, and not necessarily one with an end in sight – beyond the line that we may each need to draw to publish an idea in an article or a book. Moreover, the process of re-imagining is also continuous not only on the level of the individual, but as a systemic whole. We are each always building on already existing re-imaginings. There is solidarity in rethinking, and there is ultimately something inspiring about this thought.