

Traversing the Divides: Remembering Deborah Cass

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This collection celebrates the life and work of Deborah Cass (1960–2013).¹ Both an international and public lawyer, Deborah² studied and/or taught at the University of Melbourne, Harvard Law School, The Australian National University (ANU) and the London School of Economics. Deborah was a significant presence in all the institutions with which she was connected, as well as being a wonderful spirit in the lives of her family and friends.

I encountered Deborah when she was an undergraduate law student at Melbourne University. I recall our first meeting vividly. I turned up for work on my first day as a junior lecturer in 1987, rather nervous and uncertain about where I should report for duty. Deborah greeted me on the steep Law Faculty staircase, saying, ‘You must be the new lecturer, let me show you your room’. She marched me to my rather dingy office and counselled that I might think of asking for something better. Deborah then introduced me to the Law Faculty office staff and left me with them, saying she would call in again to see how I was settling in. I assumed that she was a very friendly colleague and looked forward to her continuing advice on navigating the Law Faculty. Deborah dropped in a few days

1 There is strong feminist philosophical reasoning for referring to femme-identifying academics by their full names, and this collection uses Deborah Cass’s full name in referring to her academic work. This enforces an acknowledgement of the unique standpoint from which femme-identifying academics are thinking and writing from, and complements the sort of work Deborah was trying to achieve in her work on gender equality throughout her career. See Ulrike Schultz, Gisela Shaw, Margaret Thornton and Rosemary Auchmuty (eds), *Gender and Careers in the Legal Academy* (Hart, 2020).

2 Conversely, when referring to Deborah in a personal capacity, this collection will refer to her by her first name alone. This acknowledges the constant traversing of this book between the public and the private sphere, as well as Deborah’s vibrancy in both of them.

later with a draft of her article in the *Melbourne University Law Review*, which Margaret Young's chapter in this collection discusses, and it was only then I realised she was a student.

Deborah's generosity of spirit and eagerness to steer people in the right direction was a hallmark of her personality. From that first meeting on, I was the beneficiary of her advice, support, insight, her friendship, her loyalty and her love. A highlight for me was moving her admission to legal practice in the Supreme Court of Victoria: I felt proud to be introducing a candidate of such integrity and creativity into the legal profession. We overlapped later at ANU in Canberra, where Deborah taught for almost four years. She was not only a superb colleague, a dedicated teacher and a great catalyst for ideas, but she also greatly improved the Law Faculty's fashion sense. Deborah indeed took me in hand in the style stakes, once observing that she could not determine whether my outfit was cool and retro or just plain frumpy.

Deborah was always practical – not for her woolly expressions of emotion; she would rather knit, bake or cook to show her interest and concern. Even when she was very ill, Deborah would turn the conversational tables around to check up on me, my parents and my family, and to offer insights and advice, or to recommend recipes and readings.

While devoting fine attention to the stuff of everyday life, Deborah Cass was also a brilliant scholar. Although the deep sense of loss and sadness at Deborah's death remains, it is wonderful to have her writings as a continuing source of inspiration and consolation. In them, we continue to hear Deborah's firm, clear voice, her appreciation of language, her seriousness, her curiosity, her sensitivity and her wry humour.

Reading her work, and recalling seminars and talks I heard Deborah Cass give over the years, I am reminded again of her penetrating, inquiring mind. She was not one for intellectual short cuts, and would reprimand me kindly but firmly when she found me doing this. As this collection shows, Deborah had broad academic interests. She was a gifted constitutional lawyer, a path-breaking international lawyer and a shrewd critic of legal theory. Within the field of international law, unlike many of us, Deborah Cass ranged over many areas, becoming an internationally recognised expert on areas as diverse as natural resources, self-determination, international institutions and international trade law.

Deborah Cass had a rare capacity to analyse the trajectories of legal ideas and movements. She could discern trends and contradictions without getting bogged down in the conventional legal fascination with particular instances. This talent is on elegant display in an article published in 1996, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’.³ The article is a sympathetic but rigorous study of the critical school in international law – pioneered by David Kennedy at Harvard and Martti Koskenniemi at the University of Helsinki. Deborah Cass had encountered the ‘New Approaches to International Law’ (NAIL) school while a graduate student at Harvard and was friendly with many of its proponents. Her intellectual fearlessness did not allow her to pull her punches, however.

NAIL scholars positioned themselves as a Newstream challenging the mainstream of international law, primarily concerned with rules and institutions. The traditional account was that international law could deliver an objective answer to any international dispute through the application of legal rules. NAIL scholars challenged this claim in a variety of ways. Koskenniemi, for example, identified two contradictory tendencies in international legal practice. First, the understanding of legal practitioners that the doctrines of international law do not have a stable meaning, with the result that the prevailing rule or principle in any particular dispute is dependent on the preferences of the arbiter.⁴ Second, the power of the utopian sensibility in international legal thinking, enshrined in concepts such as ‘global justice’. Koskenniemi regarded international law as an essentially argumentative practice, and reasoned that the function of legal advisers to decision-makers in this context was ‘to enable the retreat of the decision-maker from the existential *Angst* of the decision to the comforting structures of the law’.⁵

Deborah Cass took on the role of a supportive critic of NAIL in her article, explaining the movement’s significance, but calling also on ‘Newstreamers’ to lift their game. Her article remains a valuable description of three techniques favoured by the Newstream: using polarities to construct arguments; invoking the device of a personal quest to explain

3 Deborah Cass, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’ (1996) 65 *Nordic Journal of International Law* 341, doi.org/10.1163/15718109620294924.

4 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, reissue, 2005) Epilogue, doi.org/10.1017/cbo9780511493713.011.

5 Koskenniemi (n 4) Preface. See also David Kennedy, ‘A New Stream of International Legal scholarship’ (1988) 7 *Wisconsin International Law Journal* 1, 6.

a disenchantment with international law; and a specific focus on language.⁶ Deborah Cass observed the ‘stultifying’ nature of the disdain for critical approaches expressed by the international legal mainstream, and warned that it was preventing ‘the development of a more nuanced and responsive international legal theory’.⁷ At the same time, she castigated Newstream scholars for failing to exploit the potential of their critique by ducking out of ‘explicit evaluative choices’, and for conceiving of international law as nothing more than ‘a variable set of argumentative possibilities’. A further critique was of the ‘condescending and reductive tone’ of Newstream writings, and ‘its occasionally derivative and abstract theorizing’.⁸

Deborah Cass argued that the critical call for the integration of politics with law was not ‘sufficiently problematised’. ‘The call’, she wrote reprovingly,

is a commendable ambition but doubts remain. There is a tendency in some Newstream work for an apparently radical critique to conclude with a facile or reductive call for a move to politics, yet the political is as contested and enigmatic as the legal. While concepts such as sovereignty are being denigrated as too incoherent to underpin the legal system, a radically pluralistic politics seems an inauspicious place to find a new normative consensus.⁹

Deborah Cass placed her own critique at the borderline between the mainstream and the Newstream, ‘in the hope that it will enable both sides to explore each other’s territory’.¹⁰ Over 20 years later, this article remains an astute account of NAIL: prescient about its journeys and current in its identification of the movement’s strengths and weaknesses. The article highlights Deborah Cass’s distinctive academic characteristics as a translator and communicator of legal thought, a bridge-builder between intellectual traditions, a generator of reconstructive ideas and a confident and generous traverser of divides.

This collection explores some of Deborah Cass’s contributions to the fields of international and public law. It also includes reflections on Deborah, the person rather than the scholar, by family, friends and colleagues. As you will find, the range of topics covered in the book signal just how

6 Cass, ‘Navigating the Newstream’ (n 1) 362–77.

7 Ibid 343.

8 Ibid.

9 Ibid 379.

10 Ibid 343.

broad her interests were. The collection is also a cartography of Deborah's scholarly style and preoccupations. The pieces illustrate her interest in legal doctrine and her insightful and critical eye, celebrating her extraordinary ability to experiment with ideas in order to present a fresh perspective on familiar debates. These meditations on Deborah Cass's work remind us what a path-breaking scholar she was: everything she wrote helped shape an intellectual field. The title of this collection captures a particular quality of Deborah Cass's scholarship – her capacity to cross disciplinary and subject boundaries. Indeed, the title is borrowed from an article by Deborah Cass on the vexed relationship between international law and Australian constitutional law.¹¹

Part 1 of the book deals with some of Deborah Cass's work in constitutional law. Kim Rubenstein revisits an article she and Deborah wrote jointly in 1995 on the representation of women in the Australian Constitution.¹² Deborah was passionate about equality for women and she addressed it in all aspects of her life, personally, politically and professionally. Kim recounts how the writing project came about and the way that the article was later used in advocacy about the representation of women in the 1998 Australian Constitutional Convention. Kim's chapter extends the analysis of the earlier article by considering how job-sharing for parliamentarians could enhance the system of representative democracy. She argues that this is a practical way in which the work of care could be made more equal, further enhancing the quality of our democracy.

Part 2 covers natural resources and the principle of self-determination, areas of international law in which Deborah Cass made important interventions. Margaret Young considers Deborah's first published academic article, on the impact in the Pacific of provisions of the 1982 Convention on the Law of the Sea (UNCLOS) relating to fisheries.¹³ In that article, Deborah Cass had applauded what she saw as UNCLOS' grant of complete discretion to coastal states with respect to foreign access to fisheries, in what were termed their 'exclusive economic zones'. She suggested that this would be particularly significant in the Pacific, where predatory fishing practices by foreign fleets had diminished the fisheries

11 Deborah Cass, 'Traversing the Divide: International Law and Australian Constitutional Law' (1998) 20 *Adelaide Law Review* 73.

12 Deborah Cass and Kim Rubenstein, 'Representation/s of Women: Towards a Feminist Analysis of the Australian Constitutional System' (1995) 17 *Adelaide Law Review* 3.

13 Deborah Cass, 'A Quiet Revolution: The Exclusive Economic Zone and Foreign Fishing Access in the Pacific' (1987) 16 *Melbourne University Law Review* 83.

of island states. Margaret compares Deborah Cass's arguments about the likely impact of the exclusive economic zone provisions of the Convention with later judicial interpretations. She notes the prescience of Deborah Cass's observation of the significance of coastal states' rights, but suggests that she may have placed too much faith in the capacity and willingness of coastal states to achieve sustainable fisheries.

Deborah Cass worked with Tony Anghie on an international commission of inquiry into the worked-out phosphate lands of Nauru in the late 1980s. The government of Nauru had established this commission to investigate liability and compensation for the devastation of Nauru's environment by the states that had administered Nauru as a mandated territory under the League of Nations, and then as a trust territory under the United Nations, these states being Australia, New Zealand and the UK. The chair of the commission was a distinguished international lawyer, Professor Christopher Weeramantry, then at Monash University, and later a member of the International Court of Justice (ICJ). The report of the commission laid the foundation for a case Nauru brought against Australia in the ICJ. Tony's chapter in the book reflects on the principle of self-determination at the heart of Nauru's claim, and the subject of an article of Deborah Cass's, published in 1992.¹⁴ He examines the legacy of the Nauru case both in international law and in Australia's complex imperial history. In Australia's understanding of Nauru as part of an Australian Empire, Tony examines the way that it deflected claims of self-determination. He also points to the situation of Nauru in 2018, perceptively observing how Australia is reproducing its own colonial origins as a penal colony there.

Part 3 turns to Deborah Cass's work on the World Trade Organization (WTO), the subject of her prize-winning book, *The Constitutionalization of the World Trade Organization* (Oxford University Press, 2005). Deborah challenged the prevailing wisdom that the WTO was engaged in constitutionalisation, or a process of developing structured constraints on institutional activity, through the separation of powers. While rejecting claims that traditional forms of constitutionalisation were emerging in the WTO, Deborah Cass did not want to give up on the notion itself. She ended the book calling for a radical rethinking of the concept of constitutionalisation to encompass 'trading democracy', which would entail economic development and redistribution. Kerry Rittich's chapter in

14 Deborah Z Cass, 'Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories' (1992) 18 *Syracuse Journal of International Law and Commerce* 31.

this book lucidly provides a context to appreciate the richness of Deborah Cass's work. Kerry emphasises in particular Deborah Cass's imaginative analysis and her focus on the network of beliefs and commitments that structured the WTO.

The book continues in Part 4 (before concluding with reproductions of Deborah Cass's original articles in Part 5) with reflections on Deborah by her brother, Daniel, and husband, Gerry Simpson. They remind us that, apart from being a brilliant academic, Deborah was a warm, funny, wise and compassionate person. She did not do anything by halves and forged an unconventional path into the law and academia. It is unsurprising that her and Gerry's two daughters, Hannah and Rosa, have inherited Deborah's sense of adventure and generosity of spirit.

This text is taken from *Traversing the Divide: Honouring Deborah Cass's Contributions to Public and International Law*, edited by Kim Rubenstein, published 2021 by ANU Press, The Australian National University, Canberra, Australia.