

Isabelle Ley. ***Opposition im Völkerrecht: Ein Beitrag zur Legitimation internationaler Rechtserzeugung [Opposition in International Law: A Contribution to the Legitimation of International Law-Making]***. Heidelberg: Springer, 2015. Pp. 452. \$99. ISBN: 9783662444511.

The democratic pedigree of international law has always been suspect. Much international law has always been made in less than fully transparent dealings through diplomatic channels. Parliaments would sometimes be informed and sometimes even consulted, but informing and consulting them was always done with considerable reluctance. For many years, the opinion prevailed that foreign policy was best left to diplomats and experts; after all, speed and flexibility were deemed essential, and parliaments (and others) were obstacles to both.<sup>1</sup> If, in this classic form, this particular opinion is no longer generally seen as acceptable, it nonetheless lingers on in claims about the usefulness of concluding political agreements and engaging in soft law. Here too, parliaments and other voices are largely cast aside, typically portrayed as nosy and noisy interlopers who do not know what they are doing.<sup>2</sup>

Arguably, this was not much of a problem as long as international law was merely limited to arranging for the co-existence of states<sup>3</sup> and as long as the law could not enter domestic legal orders without further acts, but the rise of international regulatory law and of monist thought have made the democracy deficit highly visible. This is hardly a novel observation – in recent years, it has given rise, on the one hand, to calls for ‘compensatory constitutionalism’ or ‘dual democracy’<sup>4</sup> and, on the other hand, to calls for enhanced democracy and enhanced representativeness,<sup>5</sup> perhaps even an emerging right to democratic governance.<sup>6</sup>

Isabelle Ley, in her exemplary dissertation defended at Humboldt University, takes the emergence of regulatory international law as her starting point and aims to investigate how its democratic legitimacy could be enhanced. For her, democracy is not just a matter of particular institutions or practices but, rather, of open and possibly oppositional politics. Building on the work of Claude Lefort and, in particular, Hannah Arendt, she develops a framework for discussing democracy in international law conceptualized as the possibility for opposition. A democratic polity is one where every participant has the possibility of helping to take care of the common world, as Arendt might have put it, and presupposes open politics. This politics is, so to speak, politics for the sake of politics or politics in the Olympic spirit: what matters is not so much winning but taking part; what matters is not so much which policies will be adopted but the political process itself. Following Aristotle, taking part in public affairs is viewed as the most salient manifestation of human excellence: man being a political animal, he can do no better than take part in the political process – this is where individual happiness is achieved and, therefore, the ultimate justification of democracy.<sup>7</sup>

<sup>1</sup> The classic statement in Dutch is A.A.H. Struycken, *Het bestuur der buitenlandse betrekkingen* (1918); a response is offered by M. Nincic, *Democracy and Foreign Policy: The Fallacy of Political Realism* (1992).

<sup>2</sup> For a critique, see J. Klabbers, *The Concept of Treaty in International Law* (1996).

<sup>3</sup> This borrows from W. Friedmann, *The Changing Structure of International Law* (1964).

<sup>4</sup> See, e.g., Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, 19 *Leiden Journal of International Law* (2006) 579; Peters, ‘Dual Democracy’, in J. Klabbers, A. Peters and G. Ulfstein (eds), *The Constitutionalization of International Law* (2009) 263.

<sup>5</sup> See, e.g., A. Kuper, *Democracy beyond Borders: Justice and Representation in Global Institutions* (2004).

<sup>6</sup> T. Franck, ‘The Emerging Right to Democratic Governance’, 86 *American Journal of International Law* (1992) 46.

<sup>7</sup> Arendt’s political philosophy has remained somewhat scattered throughout her work, but many of its themes radiate from H. Arendt, *The Human Condition* (1958). For an overview of the relevance of Arendt’s work for legal studies, see M. Goldoni and C. McCorkindale (eds), *Hannah Arendt and the Law* (2012).

Ley further fleshes this out with the help of the notions of 'alternativity' (*Alternativität*) and 'revisibility' (*Reversibilität*). The international law-making process can be considered politicized, and, therewith, endowed with some democratic legitimacy, if proposals can be countered, in a meaningful way, by alternative proposals and if the law can be revised. This may sound somewhat wishy-washy, but it is not: it transposes the basic idea behind democracy (open and participatory politics as the highest manifestation of human flourishing) to the international plane without having to insist on the reproduction of state-embedded democratic institutions. This allows Ley to separate democracy from parliamentary institutions and explore alternative avenues through which democracy can, in one way or another, be manifested. Eventually, for Ley, democracy in international affairs can take the shape of parliamentary scrutiny, but it can also take other forms.

The final part of the study is devoted to an analysis of three such forms. The first of these is, indeed, the role of international parliamentary assemblies, exemplified by the parliamentary body of the Council of Europe. This body proves not merely to be the driving force behind a lot of normative output from the Council but also plays something of a controlling role – however minimal – with respect to other international organizations, including the European Bank for Reconstruction and Development (EBRD) and the World Health Organization (WHO). With respect to the EBRD, Ley reminds the reader that it was under pressure from the Council of Europe's Assembly that Jacques Attali, the bank's first president, resigned in the early 1990s (at 283), and, as others have also noted, the Assembly has been instrumental in scrutinizing the WHO's response to the outbreak of the swine flu in 2009.<sup>8</sup>

However, since democracy is not just a matter of parliaments, Ley also looks elsewhere. Her second case study relates to World Trade Organization (WTO) waivers, on the theory (following Isabel Feichtner's excellent work on the topic<sup>9</sup>) that waivers allow for politics to be interjected into legal frameworks. WTO law contains a number of rules considered quite fundamental, but those rules can be left without application in order to allow for contrary practices to be given priority – the waiver concerning the trade in so-called blood diamonds is a case in point. Waivers can even be used semi-permanently and, therewith, manifest, for all practical purposes, a change in the law. Ironically, however, this may generate a democracy deficit of its own: changing the existing legal rules by a process that does not amount to a formal amendment may result in circumventing domestic parliamentary control.

Ley's third set of examples relates to the possibility of countering existing legal frameworks by creating new, opposing ones.<sup>10</sup> Again taking her cues from the WTO, she presents two examples: the 2000 Cartagena Protocol on Biosafety and the 2005 UN Educational, Scientific, and Cultural Organization (UNESCO) Convention on Cultural Diversity.<sup>11</sup> Both can be read as attempts by large groups of states to rewrite WTO law so as to include concerns about food safety and cultural products, if only through the rule of systemic integration laid down in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.<sup>12</sup> This allows for any relevant

<sup>8</sup> See Deshman, 'Horizontal Review between International Organizations: Why, How and Who Cares About Corporate Regulatory Capture', 22 *European Journal of International Law* (2011) 1089.

<sup>9</sup> See I. Feichtner, *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law* (2011).

<sup>10</sup> See similarly S. Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (2014).

<sup>11</sup> Cartagena Protocol on Biosafety 2000, 39 ILM 1027 (2000); Convention on Cultural Diversity 2005, available at <https://en.unesco.org/creativity/convention/what-is/convention-text> (last visited 2 September 2015).

<sup>12</sup> Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

rules of international law applicable between the parties to be taken into consideration when interpreting a treaty. It is possibly no coincidence that a WTO panel decided to give this phrase a very restrictive meaning not so long after the conclusion of the UNESCO Convention: the law applicable between the parties must be law that is applicable to all WTO members, which is an impossibly tall order by most accounts.<sup>13</sup>

Ley has written a fine study around an original proposition: the idea that democracy can be accomplished not just by parliamentary bodies and that there are other mechanisms by which international law can allow groups to be heard and interests to be represented. With this in mind, it is somewhat regrettable that she does not make her normative claim with greater force – the work of more or less Arendt-inspired political theorists such as Dana Villa<sup>14</sup> or Bonnie Honig<sup>15</sup> could have helped her develop her thesis as a matter of political theory. As it is, the work sometimes suffers from coming across as a student's work, containing lots of things to show examiners that many relevant materials have been studied and digested, but they come at the expense of the full development of the argument – yet it is precisely in this argument where the value of the study resides.

For it is important to realize that democracy is not limited to a specific set of institutions, as is perhaps all too often loosely assumed. In the Arendtian tradition, democracy has a lot to do with debate and discussion, with grassroots initiatives and with the possibility of assuming responsibility for our common world. Parliaments may well play a role here, but so can other institutions, and Arendt's reflections on revolution suggest that at least initially the spirit of democracy might be more relevant than the institutions of democracy.<sup>16</sup> It is much to Isabelle Ley's credit that she has taken this line of thought and has given it some concrete hands and feet with respect to international law and global governance.

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<sup>13</sup> See WTO, *EC – Approval and Marketing of Biotech Products*, 29 September 2006, WT/DS291, 292 and 293.

<sup>14</sup> See, e.g., D.R. Villa, *Arendt and Heidegger: The Fate of the Political* (1996).

<sup>15</sup> See, e.g., B. Honig, *Democracy and the Foreigner* (2001).

<sup>16</sup> See H. Arendt, *On Revolution* (1963).