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Book Reviews

Steven R. Ratner. ***The Thin Justice of International Law: A Moral Reckoning of the Law of Nations***. New York: Oxford University Press, 2015. Pp. 496. $85. ISBN: 9780198704041.

In his book *The Thin Justice of International Law*, Steven Ratner claims that the relationship between global justice literature and international law scholarship is underdeveloped. Both disciplines, he argues, have tended to ignore each other in their theoretical approaches to world order. *Thin Justice* suggests a methodological bridge for the gap between the utopian dreams of global justice scholarship and the tough realities of international law. It empirically distils a standard of 'thin justice' from international law and subsequently applies this standard in order to evaluate the justice or injustice of particular norms and to make reform proposals on the basis of this evaluation. A rather short theoretical part (at 64–99) is followed by an extensive discussion of practical examples and applications in current international law (at 103–379).

Ratner's call for interdisciplinarity is based on a specific view of the different roles political philosophy and law play in academic scholarship. In Ratner's view, the lack of cooperation between them points to a problem. He claims that '[t]he discipline refuses to see the obvious – that so many choices confronting international actors involved in prescribing, interpreting, and enforcing international law are *ethical choices*. Without ethics, the law of global justice is ad hoc or at best a matrix of bargains' (at 2). On the one hand, traditional positivist reasoning ignores the moral connotation of international law. On the other hand, global justice scholarship does not take international lawyers' views seriously in their pursuit of an ideal conception of justice. In response, Ratner claims that legal reasoning needs to become more moral in character and political philosophy more contextual. The objective of *Thin Justice* is thus to construct a (according to Ratner's definition) non-ideal theory that bridges the gap. It aims at a view of international law and justice that takes into account core realities of international law while, at the same time, being able to offer reform proposals for its most problematic aspects. The core of *Thin Justice* is a concept of justice 'tailored to international law' (at 5, n. 6).

The book's premise with the two different aspects it entails – one empirical, the other normative – deserves some scrutiny. With respect to the empirically diagnosed lack of mutual cooperation, the argument seems slightly reductionist. Depicting a narrow positivism as international law's mainstream methodology ignores the broad theoretical turn in international legal scholarship that has taken place during the last 20 years. Moreover, and as Robert Howse has noted, the assumption that the discourse on global justice tends to ignore international lawyers' insights in the construction of a just world order only holds true if one considers political philosophy to begin with John Rawls.[1] For more than 500 years, international legal thinkers have been trying to make sense of the complex relationship between international law and morality. The separation, in contrast, is a comparably recent phenomenon.

Even if one shares Ratner's view of a widening gap between both disciplines, there might be normative reasons for upholding such a distinction. Is it necessarily desirable to offer 'a concept of justice tailored to international law'? Should a concept of justice be like a tailored dress,

[1] Howse, 'Response to Ratner: An International Lawyer Has Got to Dream: It Comes with the Territory', EJIL: Talk!!, available at www.ejiltalk.org/response-to-ratner-an-international-lawyer-has-got-to-dreamit-comes-with-the-territory/ (last visited 9 November 2016).

perfectly fitting the (sometimes imperfect) circumstances, concealing some of its problematic aspects? Or should a concept of justice rather be inconvenient, highlighting the contradictions of today's world, including international law? I tend to think that Ratner's argument overstates the advantages of more contextuality.

Similarly, the separation of international law and moral concerns might not simply be the result of a blinkered discipline. One central argument for such a distinction is itself moral. At the beginning of positivist theory, with Jeremy Bentham, stands the intention to be able to subject the law to moral critique. Through this move, positivism retains some critical distance to the state.[2] Ratner, by contrast, holds the view that international lawyers should recognize that *lege lata* are inextricably connected with *lege ferenda*. As Jean D'Aspremont observes, this implies a methodological return to the natural law tradition.[3] In evaluating Ratner's proposal, one should at least remain conscious that the distinction between law and political philosophy is not merely a result of scholarly ignorance but also that weighty philosophical reasons support the separation of law and morality.

Ratner's central argument – that morality needs to be integrated into international law and *vice versa* – thus implies a claim against a specific tradition of conceptualizing the relationship between law and political philosophy, one that views justice as an inconvenient corrective rather than a tailored dress and one that attributes importance to the distinction between law and morality. Ratner's argument against this tradition boils down to a claim of effectiveness. Adapted and contextual concepts of law and justice might generate reasons for obedience since '[w]hen governments, citizens or scholars question the justice of international law … the result is reduced respect for it' (at 3). Good reasons are required to convince the international audience to use international legal tools rather than brute power: '[W]e need to give international actors – from presidents and prime ministers to ordinary citizens, from business tycoons to leaders of rebel movements – good reasons to respect [international law] and develop it' (at 3, emphasis omitted). Translated in the tailor's language, this means making a concept of law look attractive so that the actors choose to wear it. In short, the conformity of international norms with standards of justice provides additional reasons for compliance and, as a result, increases their effectiveness.

This objective of effectiveness situates *Thin Justice* in a disciplinary genre that is not so new after all. Rather, this work appears as the flipside of a coin bearing the portrait of Ratner's intellectual mentor, W. Michael Reisman. The New Haven School's policy-oriented jurisprudence sketched an anti-formalist concept of law tailored to concerns of international justice understood in an individualistic way. As Reisman noted, 'a public order of human dignity is defined as one which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect and rectitude'.[4] The New Haven School, in other words, offers a concept of law that takes into account the core realities of the international system paired with a liberal–welfarist normativity to improve the effectiveness of the international legal order. *Thin Justice* thus contributes to a normative project that is closely related to a specifically American tradition of international legal thought. The question whether one considers *Thin Justice*'s argument convincing will depend to a large extent on whether one accepts the implicit conceptual claims detailed above.

In this conceptual framework, *Thin Justice* undertakes two main steps to strengthen the cooperation between international law and global justice scholarship. First, the book empirically

[2] See, e.g., Murphy, 'The Political Question of the Concept of Law', in J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript of 'The Concept of Law'* (2001) 372, at 387–388.

[3] D'Aspremont, 'International Law's Empirically Generated Justice: Natural Law Theory Reinvented', EJIL: Talk!, available at www.ejiltalk.org/international-laws-empirically-generated-justice-natural-law-theory-reinvented/ (last visited 9 November 2016).

[4] Reisman, 'The New Haven School: A Brief Introduction', 32 *Yale Journal of International Law* (2007) 575, at 576.

assesses the justice that international law has to offer, highlighting peace and basic human rights as its central aspects. The central question here is whether the core norms of different issue areas promote peace and human rights protection. Second, the book offers reform proposals for international law on the basis of prioritizing this (thin) concept of justice. The idea here seems to be that it is preferable to have a consistent but thin frame of justice compared to the thicker standard in constituted political communities like national states. This view is pessimistic with respect to the chances of realizing human rights guarantees in the international arena that surpass the narrow concept of thin justice. While more ambitious human rights guarantees may be appropriate in the national context, *Thin Justice*'s argument suggests they turn into an incoherent set of utopian normative claims outside national constitutional frameworks. One important aim of Ratner's project is to clarify which normative claims precisely are to be included in a thin standard of justice.

Ratner illustrates the appropriate thin justice standard for international law with a two-pillar approach, in which peace and human rights are the constitutive principles. In Ratner's words, '[u]nder this standard, international law rules will be deemed just if and only if they (a) advance international and intrastate peace, and (b) respect, in the sense of not interfering with, basic human rights' (at 64). The idea of the research project 'is to show how these two very general *ideas or values* already in the public culture can be distilled into more concrete *principles* of justice that are justified through the logic of appropriateness. Once this is done, the principles can then be deployed in the form of a critical appraisal of the justice of rules of international law' (at 65, emphasis in original). A thin notion of justice, according to Ratner, can be constructed using only two types of normative principles – peace and basic human rights.

With respect to the pillar of peace, Ratner argues that an appreciation of its normative meaning should not stop at national borders – peace comprises inter-state and intra-state peace. Yet peace should not be understood as the absence of conflict. Rather, in a world where interests collide, one should not expect that 'the lion lies down with the lamb' (at 66). Peace means the absence of violence but not of conflict. The pillar of human rights includes only those rights 'of greater global concern than others' (at 76), comprising not only the body of norms that is considered *ius cogens* but also a selection of social and economic rights, such as the right to a workplace and representative government. This catalogue seems to spell out the definition of the broad category of human dignity that was central for the New Haven School's policy-oriented jurisprudence. In line with *Thin Justice*'s claim for more realism in dealing with human rights guarantees, its standard is significantly lower than the one set out by the comprehensive human rights treaties (at 74). Since Ratner 'take[s] human rights to be a *moral* concept even as we give that concept some content by reference to its political role and legal codification in the world', the pillar of human rights has little to do with the legal codification or the concept of right (at 74, emphasis in original). Notwithstanding their legal codification, *Thin Justice* appeals to the moral dimension of the idea of human rights.

The justice test that *Thin Justice* suggests looks at the interplay between peace and human rights. The result is a test with a binary output: a norm is just if it survives scrutiny under both pillars – that is, if it advances peace and does not interfere with basic human rights – and it is unjust if it does not (at 84). If a norm fails under the peace pillar, 'it can only be defensible if the norm is needed to create a state of affairs characterized by respect for human rights and even in that case must do so with minimal disruption to peace'. If a norm fails under the human rights pillar 'it will be necessary to explore alternatives that satisfy the second pillar but do so in a way that causes minimal disruption to the first pillar' (at 84). Despite or perhaps precisely because of the simplicity of this approach, I remain unpersuaded that it can provide more than a rule of thumb in complex cases. According to Ratner, '[t]hin justice answers many important questions insofar as those norms that pass scrutiny under its pillars respond to key ethical imperatives in the world today and are, generally speaking, deserving of respect' (at 406). What precisely these key ethical imperatives are, however, remains largely obscure.

For example, the interplay between both pillars can lead to difficulties in deciding on the justice or the injustice of a given norm. What if norms collide that both deserve respect, such as the right to self-determination and the rules on statehood in cases of secession? One can hardly disagree with Ratner arguing that '[j]ust as that rule [total ban of secession] sacrifices thin justice for the sake of simplicity, the alternative rule [general permission of secession] sacrifices feasibility for the sake of a thicker notion of justice. It relies on institutions that are not equipped to implement the test they propose' (at 169). *Thin Justice* seems to convey the message that it is impossible to generalize difficult cases. More contextuality in assessing concepts of law and justice, a crucial part of *Thin Justice*'s academic promise, would have proven helpful in order to decide conflicts between two countervailing principles. This would have required to dive into the details and to discuss the contexts of norm application instead of focusing on single norms. The fine-tuning that quite frequently marks the difference between justice and injustice is likely to depend on the context and on the particular way in which two equally important norms are balanced against each other.

A related concern addresses the choice of international legal rules submitted to the justice test. From a meta-theoretical perspective, it seems almost paradoxical that Ratner's original argument starts with an attack on positivism as a supposedly reductionist methodology, eclipsing the motivations of actors, while, at the same time, the focus of the justice test remains on rules rather than on the actions and processes of norm application. All these might be narrow-minded remarks that fail to do even thin justice to the impressive frame of argument that Ratner delivers, yet they should be addressed by an approach that starts with a broadside on two academic disciplines.

One of the strengths of the book is the detailed practical illustration of its theoretical claims. Ratner shows an impressive familiarity with almost all practical areas of international law, from the law of the use of force to investment and trade law. In all of these fields, Ratner applies his thin justice test to draw conclusions as to the justice of international legal rules. I found much of the practical discussions interesting and worth reading. As has already been noted, at the heart of *Thin Justice* stands a balancing exercise. One of the central purposes of Ratner's theory is to provide a 'way to move beyond legal analysis centred on the internal coherence of the international legal system to one that can contribute directly to a just international legal order' (at 3). *Thin Justice*, however, relies crucially on internal coherence. It constructs an internal standard from a selection of international law *lata* and applies this standard to other rules of international law.

This approach is particularly effective in diagnosing the contradictive nature of the international law architecture. Discussing the law of the Security Council, Ratner argues that while it seems reasonable to concentrate discussions in a special subgroup of nations, the current distribution of roles suffers from historical asymmetries. While the veto power can be important in some circumstances, it does more harm when it prevents the Council from acting effectively against systematic human rights violations (at 248–252). All of this is important, and Ratner's reflections deserve to be read, particularly because he develops them from an internal systematic reading of international law. Unfortunately, Ratner's discussion of reform proposals remains fairly limited. As concerns Security Council reform, for example, the problem is to find a political compromise in a complex negotiation context rather than a diagnosis of justice or injustice. *Thin Justice* does not suggest any pathways to compromise. Rather, it might serve as a useful *ex-post* tool to evaluate a compromise once it has been found.

While *Thin Justice* is unlikely to shed a completely new light on international law's most debated problems, it successfully illustrates the variety of areas in which claims to justice are made and discussed. For this reason, it should be read – it highlights in a cross-cutting way the complexities of an impressive number of sub-fields and their relationship when it comes to balancing peace and human rights. While one may quarrel with some of Ratner's theoretical

claims, it is a further merit of the book that it points to many of the complexities in the relation between international law and global justice scholarship. Ratner's appeal to the latter to take the separate value of peace into account is a welcome suggestion for a largely utopian contemporary literature.

Whether the framework of *Thin Justice* will convince practitioners and mitigate concerns of disobedience seems questionable. International law's injustice is hardly the central reason for non-compliance; rather, it seems that some actors just do not care about normative arguments. The success of an interdisciplinary project bringing together law and ethics crucially depends on the possibility of a mediation between different concepts. Here, *Thin Justice* might initiate a dialogue across the variety of beliefs and concepts. As such, it seems a promising start. Sometimes, however, it might be enough to mind the gap between different concepts and understandings, rather than trying to close it.

David Roth-Isigkeit

Goethe University Frankfurt
Email: Roth-Isigkeit@jur.uni-frankfurt.de

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Arnulf Becker Lorca. ***Mestizo International Law: A Global Intellectual History 1842–1933***. New York: Cambridge University Press, 2015. Pp. 420. US $134 (paperback US $41.99). ISBN: 9780521763387.

One of the more fundamental contemporary shifts in the discipline's understanding of international law and its history is a refined sense of the plurality of its object. Not in the somewhat outworn sense of the governance literature's use of plurality or pluralism in order to conceptualize diverse norm-making entities and (transnational) legal sources in times of economic globalization but, rather, as the idea of a selective imposition and diverging application of international legal rules. The many recent attempts to explore such a plurality seem to be driven by an increased awareness of what is commonly referred to as 'biased' or 'hegemonic' rule making and interpretation or so-called 'double standards'.

This refined sense for plurality comes with two principal assumptions: first, the idea that international law is perceived and conceptualized very differently in various regions and places and that national traditions and economic preferences matter and determine the behaviour of policy making and academic elites[1] and, second, that for a long time, if not up until today, the application of general international law, behind a unified façade, is, in practice, dependent on the affiliation of legal subjects to a certain category of states or nations, with the result that some nations in practice are less equal than others. In more concrete terms, basic distinctions, such as the ones between 'civilized' and 'non-civilized', 'centre' and 'periphery', function as fundamental background distinctions with massive inclusive or exclusionary implications in a seemingly universalized legal practice.[2]

While Arnulf Becker Lorca's sophisticated book *Mestizo International Law* is clearly rooted in this intellectual tradition, it explores a new and highly ambivalent historical dimension of the plurality of international law. Rather than reconstructing late 19th and early 20th century international law as a one-way European imposition on Asian, Eastern European and Latin

1 M. Koskenniemi, *The Gentle Civilizer of Nations* (2001).

2 G. Gong, *The Standard of Civilization in International Society* (1984); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), at 56ff.