Buchbesprechungen


The present book, a doctoral thesis defended at the Humboldt University in Berlin, is concerned with the problem of the legitimization of public international law against the background of a number of developments which, in the eyes of the author, compromise the traditional legitimization of international law: An ever expanding international law regulates more and more issues which in the past were part of the domaine réservé of States, thus abolishing the traditional divide between the “inside” and the “outside” of a State, depriving the national legislator of its decision-making power, and depoliticizing the law-making process by removing the need to justify and defend a particular legislative act against the parliamentary opposition.

To Isabelle Ley, “politicization” (Politisierung) has an empirical and a normative side. Empirically, it creates a public dimension which allows a critical discussion of a certain political project. Normatively, it denotes the contingency of law-making by a representation and discussion of alternatives and options, thus constituting the openness of the procedure and, ultimately, the political freedom of those participating in the law-making process (p. 3). In that context, “opposition” is the institution which embodies those alternatives and the possibility of change and reversibility. Since such an opposition is largely missing in the international law-making process (both on a national and an international level), the work under review (“Opposition in International Law”) could also have been given the title “International Law without Opposition”. The author consequently raises the question of what this absence means for international law, and whether it is possible to install in the international legal order some form of the dialectic of “government” and “opposition” that would politicize the creation of international law and thereby legitimize the so created rules.

Following an introduction (chapter 1), the book is divided into three main parts, entitled “exposition” (chapters 2-6), “theory” (chapters 7-11) and “practice” (chapters 12-17). The last chapter (18) is devoted to concluding remarks, and followed by a summary in English. In the first part, the author lays out the problem of a legitimatory deficit of international law as she sees it. She first turns to history, explaining why the classical model of consensual international law-making could largely go without a parliamentary legitimization. She then describes the recent changes in international
law sketched out above, emphasizing the increasing weakening of the principle that a State can only be bound by its own free will, and characterizes the ensuing Legitimationsproblematik with the four notions of depoliticization, juridification (Verrechtlichung), shortage of representation (Repräsentationsdefizit) and fragmentation. In the last chapter of part 1, the author discusses several theories which at least partly address the problems encapsulated in those notions, such as cosmopolitanism, deliberative democracy, global constitutionalism, legal pluralism, global governance and global administrative law.

The second part ("theory") can be seen as the centerpiece of the book in which the author develops her own theoretical approach: "legitimization [of law] through politicization", as the title of chapter 8 reads. Isabelle Ley here draws on the work of Hannah Arendt and the French philosopher Claude Lefort (1924-2010) on the nature and substance of democracy as contrasted with totalitarianism. She extracts from that work a "pluralist" notion of politics which she defines as follows: "Politics is a constant public process among equals which allows different views, ideas and perspectives concerning the common good legitimately to be expressed, and which, as 'organized freedom', aims at a necessarily contingent self-determination of a subject seeking legitimation (Legitimationssubjekt)" (p. 144, translation by the reviewer). Accordingly, law is seen as the result of processes in which diverging views can be expressed and freely discussed (affirmed or contested), with some of those views eventually being made binding on all: "law creates a common space of communication and inter-action, a platform making possible an encounter of what is different" (p. 148). After having again exposed the lack of a "political-legal legitimation of international law" (chapter 9), the author explains the importance of an "institutionalized opposition" for her theory of legitimation (chapter 10). She identifies three main functions of such an opposition (the ideal type of which being represented by parliamentary opposition): politicization, representation, and support of the political system as a whole.

If therefore opposition is an indispensable element of a legitimization not only of domestic but also of international and transnational law, the question arises how such opposition, or "contestability", can be realized in the inter- and transnational processes of law-making, with the aim of ensuring both the alterativity and the reversibility of normative decisions. In order to answer that question, the author by way of example analyzes, in the third part of her monograph, different mechanisms of international law-making with a view to their specific potential for an institution and articulation of "opposition". She first takes a look at forms of international parliamentar-
ism, focusing on the Parliamentary Assembly of the Council of Europe and the International Parliamentary Union (chapter 12). The result of that analysis is a "mixed balance sheet" (p. 254): Parliamentary assemblies increase the representativity and politicization of international legal institutions (more so on a regional than on a universal level) but cannot compensate for the continuing dominance of intergovernmentalism in the creation and application of international law. In the following chapter, the author examines whether conflicts between separate regimes in international law (for instance World Trade Organization [WTO] law and United Nations Educational, Scientific and Cultural Organization [UNESCO] law) can lead to an increased politicization and thus legitimation of international law, so that the often lamented "fragmentation" of international law could be seen in a positive light. Her answer is positive but cautious: The ideas of opposition and contestation can be transferred to the relationship between different functional interests pursued in different regimes if there is a possibility of mutual monitoring and reaction (p. 268). "What is necessary are institutional arrangements which allow representatives of different functional regimes and interests to meet and to enter into an open political process, to formulate alternatives and to change or reverse legal acts adopted in the past" (p. 268 et seq.).

On that basis, the author presents three case studies – the first about the interaction of the Parliamentary Assembly of the Council of Europe with other international organizations, the second about the instrument of a "waiver" in the law of the WTO (understood as a mechanism disclosing and politicizing conflicting interests and treaty regimes), and the third about treaties specifically concluded in order to counter certain rules of the law of the WTO as interpreted by WTO bodies (the main examples being the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions). In all three cases the author confirms a certain, albeit limited contribution to a politicization of the law in question.

Isabelle Ley wrote a highly impressive book which with very good reason was honored with one of the Otto-Hahn-Medaillen of 2013 for the academic junior staff of the Max Planck Society. In an original and innovative way, the author identified and seized a topic which as such had not been dealt with before: the importance of institutionalized opposition in the process of international law-making. She looked at this topic from various angles, combining insight from political theory, international relations and international legal theory, thus representing the plurality of contemporary
international legal thought in her book. Taking into account a wealth of material, she aptly developed, on the basis of Arendt's and Lefort's work, the idea of a politicization of the international law-making process as a prerequisite of a legitimate international law, and devised the notions of alternativity and reversibility to test the degree of politicization of a certain process. At the same time, the book addresses fundamental issues of the present international legal order, in particular the question who should be entitled to have a say in the process of making or amending international law. The work is characterized by a clear style, a stringent argumentation and the author's readiness critically to reflect upon and, if necessary, to adjust her approach in the course of her analysis.

In view of the broad range of issues covered by the book, it is inevitable that some questions remain. In the context of "de-parliamentarization", the author briefly mentions the participation of parliaments in the ratification of treaties and explains that the politicization achieved here remains far behind that in traditional domestic law-making (p. 2). These remarks seem to underestimate the influence exerted by national parliaments on the treaty-making of their respective States. Consider, for instance, the crucial role played by the United States Senate according to Art. II, Sec. 2 of the U.S. Constitution which makes "the Advice and Consent of the Senate" a prerequisite of a ratification of a treaty by the President. The Senate may, and does, impose conditions to its consent. It may insist that U.S. obligations under the treaty be modified, for example by entering a reservation to the treaty. In many other countries, parliaments in recent years have successfully sought to enhance their influence on foreign affairs, including the development of international law (for Germany, see the overviews by T. Puhl, Entparlamentarisierung und Auslagerung staatlicher Entscheidungsverantwortung, in: Handbuch des Staatsrechts der Bundesrepublik Deutschland, 3rd ed., Vol. III, 2005, § 48, pp. 642 et seq., and C. Callies, Auswärtige Gewalt, in: Handbuch des Staatsrechts der Bundesrepublik Deutschland, 3rd ed., Vol. IV, 2006, § 83, pp. 602 et seq., 616 et seq.). In some States, the constitution expressly provides for a right of parliament to participate in the shaping of foreign policy (see, e.g., Art. 166 para. 1 of the Swiss Federal Constitution of 1999). In federal States, the parliamentary organ entrusted with representing the rights and interests of the individual States (like the German Bundesrat) can also oppose a particular treaty planned or negotiated by the government.

On the other hand, the author seems to overestimate the legitimizing effects of the traditional parliamentary legislative procedure and, in particular, the respective role of the parliamentary opposition. Clearly, law-making
today is dominated by the executive power which generally is way ahead of parliament in terms of information and expertise. There is "a structural predominance of the government over the opposition", enhanced by the close relations between government and the parliamentary majority (P. M. Huber, Regierung und Opposition, in: Handbuch des Staatsrechts der Bundesrepublik Deutschland, 3rd ed., vol. III, 2005, § 47, p. 633). Very often, the opposition is unable even to engage the majority's interest in any meaningful discussion of a draft bill introduced by the government. While some of the law and political science literature critically analyzing the limits of present-day parliamentarism is mentioned in the book's bibliography (including Carl Schmitt's famous essay Die geistesgeschichtliche Lage des Parlamentarismus of 1923), the author does not go into that critique. Her trust in the working and legitimacy of the traditional system of political parties and of the parliaments dominated by those parties is unimpaired.

Behind that trust seems to stand an even less questioned belief in the universal worth and validity of Western ideas and values of democracy, legitimacy, separation of powers, plurality, the rule of law, freedom of expression, deliberation, parliamentarism and institutionalized opposition. It is taken for granted that universal international law will and should evolve along those lines into some form of a Western-style constitutional system. But is there really a sufficient universal support of those ideas and values? I am afraid that the Western concept of international law, which for centuries was backed up by Western economic, military and political power, is under severe pressure (see B. Fassbender, Völkerrecht, in: Leitgedanken des Rechts: Paul Kirchhof zum 70. Geburtstag, 2013, § 45, pp. 493 et seq.).

To mention a last point, a politicization of international law and law-making in the sense proposed by the author, a political contestation of international legal rules and an opposition to such rules is today mainly initiated and sustained not by parliamentary assemblies of international organizations or States but by international civil society. The International Committee of the Red Cross, for example, critically discusses certain norms of international humanitarian law, Amnesty International seeks to improve international human rights standards, Greenpeace opposes certain treaties addressing pollution or climate change for their lack of effectiveness, etc. Groups of citizens rally across Europe against the Transatlantic Trade and Investment Partnership (TTIP) treaty which the European Union is negotiating with the United States. All these widely publicized initiatives and statements are carefully analyzed in the legal departments of the foreign ministries and thus have an influence on the development of international law. International legal science also is a source of critique and opposition in
international law. Organizations like the Institut de droit international or the International Law Association prepare on a regular basis draft conventions which seek to improve and develop certain areas of international law. All these forms of "opposition in international law" are absent from the work of Isabelle Ley. They are excluded because of their "insufficient representativity" - "NGO's and private associations do not speak for a 'universality' (Allgemeinheit) established through general and inclusive procedures but only for their respective membership" (p. 86). However, it is not clear why a political party constituting a parliamentary opposition is more representative and less biased than, let's say, the International Law Association (ILA) with about 3500 members throughout the world who have joined to promote "the study, clarification and development of international law, both public and private" (ILA Constitution).

Isabelle Ley's book is characterized by temperance, a gentle optimism and a belief in reason and progress which has become rare in the theorectically more sophisticated international law literature. In that regard, it is modern, and not post-modern, in the best sense of the word. I wish she were right.

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