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## Book Reviews

Steven Wheatley. *The Democratic Legitimacy of International Law*. Oxford: Hart, 2010. Pp. xxiv, 400. £60.00. ISBN: 9781841138176.

The concept of global governance epitomizes transformations in the structure of political organization and highlights changes in the ways in which public authority is exercised. Times of change invite scholars to contemplate the plausibility of orthodox beliefs and doctrinal concepts. They push them towards innovation and there is indeed a strong sense among international lawyers that the terms of debate about the legitimacy of international law are shifting. A number of contributions over the past years have tried to respond to the challenges which phenomena of global governance pose to international legal scholarship.<sup>1</sup> The mounting wealth of literature now comes to speak in Steven Wheatley's book on *The Democratic Legitimacy of International Law* in which he calls on the legal profession to engage with questions of first principle, to reflect on the nature of international law, and to consider in closer detail the justification of legal constraints beyond the state.

The book's main argument is at the outset rather straightforward. Wheatley observes a proliferation of sites of norm production and argues that the delegation of authority to international or transnational actors inevitably involves a loss for democracy. To remedy this deficit, he suggests restating requirements for democratic legitimacy in terms of the deliberative ideal as it is developed in the work of Jürgen Habermas. The book claims the use of Habermas' thought as its innovative edge, and develops its core argument accordingly. '[T]he legitimate exercise of public authority through law', it claims, 'is conditioned by respect for the cardinal principles of deliberative democracy: equality and public reason' (at 2).

The book begins by taking stock of accounts suggesting that state sovereignty has lost its plausibility as an exclusive reference point in normative argument. While the grand variety of approaches under discussion converge in agreement on the facts of what is actually happening, they embrace distinct responses ranging from a renewed emphasis on state sovereignty to ideas of a world (federal) state (Chapter 1). This grand mosaic of approaches and ideas does not yield any result on how to deal with phenomena of global governance, and Wheatley thus turns to seek inspiration from a more refined understanding of what democracy is. In this endeavour he refers to Habermas' *oeuvre* (Chapter 2). The last segment of the book's beginnings then recapitulates how the reality of international law constrains the democratic state (Chapter 3). In what follows the author suggests that the concept of *jus cogens*, the idea of a normative hierarchy, and thick notions of human rights – in sum, elements of a substantive constitutionalization – further challenge the idea of state consent as a building block of legitimate order (Chapter 4). In the same vein he discusses the principle of democracy in international law (Chapter 5), and governance by non-state actors (Chapter 6). Against this backdrop, Wheatley then takes a step back and sets out to develop a concept of (international) law which may serve to pinpoint what exactly requires democratic legitimation, stating that he is concerned with the exercise of public authority through law (Chapter 7). He seeks to delineate the constituency that should be taken as a foundation and argues that authority itself defines who should have a say in its justification

<sup>1</sup> Among the variety of approaches see in particular the projects on *global administrative law* and on the *exercise of international public authority*, available at: [www.iilj.org/gal](http://www.iilj.org/gal) and [www.mpil.de/red/ipa](http://www.mpil.de/red/ipa).

(Chapter 8). The book concludes with a discussion of democracy in conditions of global legal pluralism (Chapter 9).

Wheatley is well aware of the grandeur of the aim he pursues and ploughs through a plethora of contributions on this issue, including the more intricate accounts of political and legal theory. On the way he offers insightful discussions and makes a number of noteworthy critiques as well as suggestions for advancement. For example he argues that Habermas' emphasis on the legitimating substance of human rights and peace tends to underestimate persistent disagreement when it comes to decisions in concrete situations of enforcement and implementation (at 119). Also his discussion of legal pluralism makes a helpful contribution to the thinking about borders between legal orders by introducing considerations of democratic legitimization into the equation (at 347–350). In view of the amazing challenges as well as the paucity of convincing responses to transformations in the exercise of public authority, it is not surprising that many questions are left open. The book merits credit for embarking on an unsafe journey, which does not tread beaten paths and succeeds in offering valuable suggestions for future research.

It is, however, slightly troubled by a number of tensions and does not always show clarity. In parts the unbeaten path is both obscure and of unsure direction. A preliminary problem is that the book presents a wealth of literature in a way that is not embedded in a clear structure. It sometimes wanders off (how does the discussion of constructivism in international relations theory (at 166–170) or the lengthy discussion of Operations Enduring Freedom and Iraqi Freedom (at 236–245) relate to the argument?) and sometimes repeats itself (linguistic indeterminacy is treated twice within Chapter 3 and almost the same scholarship on legal pluralism is discussed in both Chapters 7 and 9). Furthermore, paying close lip service to the respective authors, who use decisive terms quite differently, makes it difficult to see Wheatley's own conceptual framework. By giving much voice to other authors in their grand variety, it is at times simply unclear what his own position is. This problem is aggravated by the fact that many paragraphs end on quotations, thus occasionally leaving rather crucial issues hanging in the air: are good governance norms part of hegemonic imposition (at 193)? Among all the conceptions of legitimacy, which one really carries the book (at 296)? Are Goldsmith and Posner right (at 363)?

One of the main tensions relates to the use of the concept of democracy. The book claims to focus on the exercise of public authority through law and maintains that sites of norm production, which are not responsive to individual democratic states, inevitably imply a loss for democracy. Sometimes Wheatley clarifies that this argument is made from the perspective of the individual democratic state. For a number of reasons this is a surprising claim and a surprising perspective. First of all, suggestions like 'from the perspective of domestic democracy, the existing of a binding system of international law is inherently problematic' (at 133) seem to fly straight in the face of Habermas (and Kant for that matter). Habermas decidedly defends the further development of a binding international legal order against the unilateral projection of power – even if it is a democratic power which would be wonderfully responsive to the will of its people.<sup>2</sup> It is hard to see how his work (and the Kantian project more generally) can support the view that there is something *inherently* problematic. In concrete cases there may be problems, sure. But that is altogether a different matter, and when turning to real life political processes the contrary also holds true: international legal obligations may strengthen domestic democracy.<sup>3</sup> If one further considers that the post-national constellation is characterized by the fact that decisions taken by one democratic state impact on individuals in another polity, the statement

<sup>2</sup> I take this to be the main thrust of his *The Divided West* (2006).

<sup>3</sup> Compare Keohane, Macedo, and Moravcsik, 'Democracy-Enhancing Multilateralism', 63 *Int'l Org* (2009) 1.

would also not hold true from the perspective of any single state.<sup>4</sup> Wheatley does eventually take note of the view that international law may be understood as a device to alleviate this deficit (at 354). But when he finally does make this point, he lets it drop again immediately.

It appears that Wheatley does not explore this thought any further because he is of the view – asserted repeatedly – that there can be no democracy without a *demos*. But this just adds to the surprise because, contrary to what Wheatley claims, Habermas himself is not of this view and has in fact invested considerable efforts in detaching the concept of democracy from the *demos*. He ties democratic legitimation to a proceduralist notion of popular sovereignty.<sup>5</sup> This is decisive, cuts deep, and merits a moment of further reflection. While Habermas indeed writes that the democratic qualities of political processes in domestic contexts are so far unmatched at the international level, this is so not for principled or conceptual reasons, let alone because there is nothing like a *demos* in an essential sense, but because for now the social context (a functioning public sphere and a necessary feeling of solidarity) as a matter of fact only nourishes democratic processes in a meaningful way within states. In addition, in one of his more interesting moves Wheatley himself detaches the notion of *demos* from its essentialist significance and further abstracts it from any necessary social precondition of meaningful democratic processes. He argues that public authority itself constitutes a *demos*, which in his understanding includes all those affected (at 312, Chapter 8). The real reason Habermas tied democratic legitimation to the state – the necessary social and institutional context – goes astray completely in this turn.

Another point which might benefit from clarification is the exact target of his quest. In the overall course of the argument, the target seems to be moving and turns out to be rather slippery. The focus is supposed to be the exercise of public authority through law; that is, the legitimacy of international law (at 2). The problems then identified include the facts that international treaties are hard to change, the process of customary international law formation is amorphous and not responsive to the will of the democratic state, and autonomous non-state actors are engaged in norm production (while they may better be treated distinctly, Wheatley here includes both international organizations and non-governmental organizations). Wheatley contradicts himself since he holds that international law is effective only when it is also legitimate (at 320). But if illegitimate law is ineffective why should we bother about its illegitimacy? It is also hard to reconcile the initial focus on the exercise of public authority through law with the very strong view that illegitimate authority cannot make international law properly so called (at 333). The question which norms are in need of legitimation remains unanswered.

Lastly, Habermas usually tries to couch his argument in concrete legal material – in trends that meet his argument half way, so to speak. Wheatley does not heed this virtue and argues in abstraction from organizational practices or case law which might actually support his overall conclusions. While he criticizes authors like David Held for being not sufficiently concrete and too idealistic (at 64), he himself leaves his argument in the abstract. The abstract may still be enlightening if it is conceptually strong, but this is not the case with regard to the concrete material at hand.

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<sup>4</sup> This is a point strongly made by Habermas in his *The Postnational Constellation: Political Essays* (2001).

<sup>5</sup> Habermas, 'Does the Constitutionalization of International Law Still have a Chance?', in J. Habermas, *The Divided West* (2006), at 115, 128, and 144. Still more clearly see Habermas, 'Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft', in W. Brugger *et al.* (eds.), *Rechtsphilosophie im 21. Jahrhundert* (2008), at 360.