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International Law and Democracy Revisited: Introduction to the Symposium

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The *European Journal of International Law* was founded in 1989, coinciding with the fall of the Berlin Wall and the attendant excitement encapsulated by that well-known optimistic/hubristic End of History phraseology. Many predicted or expected that liberal democracy would become regnant in the world and a New International Legal Order would replace the old First World/Second World/Third World distinctions.

Thirty years later, at the occasion of EJIL's 30th birthday, EJIL's Scientific Advisory and Editorial Boards considered it opportune to revisit the question of international law and democracy: in 2019, the state of democracy, whether liberal or social or any other variant, seemed to be far from sanguine. In many regions of the world, democracy seemed under assault. The stakes are high. What is the state of the scholarship on international law and democracy? What has happened to that once seemingly overcrowded bandwagon? Who is still on it? Is it still moving? And if so, in which direction? What are those who are thinking about international law and democracy concerned with?

In organizing this Symposium, we did not follow the classical design of a predetermined set of topics and invited scholars. Instead, in the spirit of democracy perhaps, we issued a call for papers so as not to be locked into our preconceptions of what is important and who is important, but let the field speak for itself.

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1 The First Wave of International Law and Democracy Scholarship: Two Strands

If one takes a bird's eye view of the last three decades of scholarship, one can identify two principal strands.

One of these strands, of which Franck's famous 1992 article is a good signpost, has explored the extent to which, if at all, there is a positive norm of international law that requires democracy and, if so, in what circumstances and with what regime of responsibility.¹ Those who tend to see the half-full part of the glass point out the remarkable spread of democracy, notably after the end of the Cold War.² Others point to the hollowness of the democratic character of many states that are counted as part of that alleged success story.³

The second strand, some components of which interestingly predate the first, investigates the democratic credentials of the international legal system itself. This perennial discussion was invigorated by the 'turn to governance' as a way of conceptualizing international law (which inevitably forced the question back on to the agenda) and somewhat later by the discovery of an important subset of that issue, namely Global Administrative Law (GAL), which eschewed somewhat direct democracy speak and replaced it with legitimacy or accountability speak.⁴ Here, too, the half-full crowd has pointed to meaningful changes in the accountability, transparency and other allegedly legitimating features of the international legal system,⁵ whereas the half empties have pointed out an even worse stronghold of money and power (of the few) in a globalized world.⁶

¹ Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 46.

² See, e.g., Franck, *supra* note 1; Fox, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law* (1992) 539; Crawford, 'Democracy and International Law', 64 *British Yearbook of International Law* (1993); Fox and Nolte, 'Intolerant Democracies', 36 *Harvard International Law Journal* (1995) 1; Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?', 27 *NYU Journal of International Law and Policy* (1995) 289.

³ See, e.g., Roth, 'Democratic Intolerance: Observations on Fox and Nolte', 37 *Harvard International Law Journal* (1996) 235; Marks, 'The End of History? Reflections on Some International Legal Theses', 8 *European Journal of International Law* (1997) 449; Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2000); Knippers Black, 'What Kind of Democracy Does the "Democratic Entitlement" Entail?', in G.H. Fox and B.R. Roth (eds), *Democratic Governance and International Law* (2000) 517.

⁴ Kingsbury, Stewart and Krisch, 'The Emergence of Global Administrative Law', 68 *Law & Contemporary Problems* 15 (2005); Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *Yale Law Journal* (2006) 1490; S. Cassese *et al.* (eds), *Global Administrative Law: The Casebook* (3rd ed., 2012).

⁵ See, e.g., Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation and Responsiveness', 108 *American Journal of International Law* (2014) 211; Marxsen, 'The Promise of Global Democracy – The International Impact of Civil Society', *NYU Journal of International Law and Politics* (2015) 719.

⁶ See, e.g., Steffek and Ehling, 'Civil Society Participation at the Margins: The Case of the WTO', in J. Steffek, C. Kissling and P. Nanz (eds), *Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit?* (2008) 95; T. Macdonald, *Global Stakeholder Democracy: Power and Representation Beyond Liberal States* (2008).

2 International Law and Democracy Scholarship Today: What 200 Abstracts Suggest

Where, then, is the focus of those still concerned with international law and democracy? The collection of abstracts that we received in response to our call for papers on the topic 'International Law and Democracy Revisited' can give an impression.⁷ It is *an* impression, not an exact capture of the state of the field: many scholars working on international law and democracy may not be represented here. But the mosaic emerging from the more than 200 abstracts that we did receive suggests at least four things.

First, democracy and international law discourse has spread widely through the arteries of international law: the abstracts submitted covered all areas of international law, from investment law and trade law, to human rights law and climate change law. They also included case studies from Asia to Latin America, from Hungary to Kenya. Questions of democracy can be found in almost every area of international law and every jurisdiction, which could be a reflection of democracy having become a truly central concern of the discipline.

Second, the abstracts tell us something about the burning anxieties and, to a more limited extent, audacious hopes of our times. Particularly fashionable topics were democracy in the digital age; the rise of 'illiberal democracy'; and modes of participation in decision-making. What democracy as a substantive norm may have lost in attention – possibly in part due to critiques of the Global North imposing norms on the Global South – has been gained by its procedural aspects, in particular practices of participation, possibly for precisely the same reason.

And yet, and this is the third observation, while democracy discourse may be found everywhere, it seems to have lost its voice. Many of the abstracts implied that it was self-evident that democracy had something to do with the paper's explicit area of concern, whether the paper was about human rights, the rule of law, self-determination, women's participation in public life.... Democracy as in the first strand of scholarship, that of democracy as an international legal norm, seems to have taken a significant step back. It no longer appears as a specific theme of international law, as it did in the 1990s. In the second strand of scholarship, democracy may have never reached the limelight in the first place, perhaps because it is not easy to translate the vocabulary of democracy into the reality of the international legal (governance) system. Democracy has always been premised on the existence of a *demos* and the existence of bounded political communities (nowadays typically states), yet both these two foundational – indeed ontological – building blocks are missing beyond the state.

What we see in the abstracts is that democracy has become the carrier for other, seemingly more vocal, contemporary concepts: human rights, accountability, equality. That also means, though, that those other, more dominant concepts shape which aspects of democracy are highlighted. For instance, the abstracts showed remarkably

⁷ See the call for papers at <https://www.ejiltalk.org/ejil-call-for-papers-international-law-and-democracy-revisited-the-ejil-30th-anniversary-symposium/>.

little, if any, interest in the *demands* of democracy. Democracy, one might think, presupposes a fairly informed electorate that takes its responsibilities seriously, ultimately electing those who will govern for a while. And it demands legal structures that enable the exercise of the right to vote in a meaningful way. Quite a few of the abstracts expressed concern about foreign intervention in elections, but none wondered why the electorate is apparently so receptive to foreign intervention. The underlying conception of a rather passive individual, someone who needs to be protected, rather than an active participant in public affairs, corresponds with the conception of the individual that prevails in much of the human rights discourse.

Finally, and perhaps for that reason, the binary division between scholarship on the international legal status of democracy and scholarship on the democratic credentials of international law or global governance is no longer as useful as in the past. Several of the abstracts straddled both strands of scholarship, without fully entering either. And yet, in the synopsis in the next section we still use this binary as an organizational starting point, precisely to show both continuity and change.

3 The Ensuing Symposium: International Law and Democracy Revisited

Given the need to make (painful) choices from among the plethora of proposals we received, our selection cannot truly capture this vast pluralism in democracy and international law discourse. In making our selection we aimed more at showing a diversity of concerns than representativeness of the amount of attention topics receive. In the issue before you, we spread our selection – 10 articles – across EJIL's traditional categories (general articles, critical review of governance and critical review of jurisprudence). The 10 articles indicate several of the directions in which international law and democracy scholarship has gone.

Most closely connected to the classic international law and democracy scholarship of the 1990s is the debate between *Akbar Rasulov* and *Brad Roth*. Indeed, Rasulov revives the first strand of scholarship, namely that on the 'democratic entitlement' thesis à la Thomas Franck, by challenging all those who have critiqued it as a doctrinally unfounded wishful thought on the part of overly enthusiastic international lawyers. Rasulov argues that this view has become 'received wisdom' but reflects a deeply flawed epistemological and ideological approach pervasive among international law scholars, which upholds political conservatism in the name of methodological rigour.

In reply to Rasulov, Roth questions the assumption that the dismissal of the democratic entitlement thesis has been accepted as conventional wisdom, pointing to the persistent influence of the international law and democracy narrative. More fundamentally, Roth argues that rather than reflecting conservative political tendencies, the methodological scepticism towards the democratic entitlement thesis is animated by the opposite political concern, namely, that the right to democratic governance might serve as pretext for Western neo-colonialism in a new guise.

Erika de Wet, too, takes her cue from Thomas Franck. At the heart of Franck's understanding of the right to democratic governance lay the principle of free and fair elections. De Wet argues that this principle has shaped the African Union's (AU) formal legal responses to military coups and other forms of unconstitutional change of governance. She notes, however, that in practice the AU has implemented these responses, which include condemnation, suspension and other sanctions, in a restrained, incoherent and inconsistent manner and that democratic governance has not yet become a binding legal norm in the AU.

With *Dmitry Kurnosov*, we stay with the elections aspect of democracy, but move from Africa to Europe. Critically reviewing election cases of the European Court of Human Rights (ECtHR) decided between 1987 and 2020, he finds that the Court gives states wide leeway with respect to the domestic regulation of political competition and the substantive resolution of election disputes. At the same time, however, the Court is increasingly willing to exercise procedural oversight of how the domestic regulation is adopted and applied.

Matthew Saul, too, critically evaluates ECtHR case law relevant to democracy, but focuses on the domestic effects of the Court's oversight of national regulation processes. He hypothesises that by checking the quality of domestic decision-making processes, the Court can incentivize domestic institutions to enhance these processes and become more active in fulfilling the objectives of the European Convention on Human Rights. To test this 'active subsidiarity' hypothesis, he analyses the implementation of the ECtHR decision in *Lindheim and Others v. Norway* by the Norwegian government.

It is not just supranational courts that steer the course of democracy at the domestic level. So does supranational economic law, argues *Giacomo Tagiuri*. The populist claim is that supranational economic integration undermines democracy by disabling national responsiveness to the particular economic and cultural preferences of 'the people'. Such claims have led to what Tagiuri calls 'rearguard regulation': measures through which states try to insulate their domestic markets from the effects of supranational economic law, in particular European Union law. According to Tagiuri, however, supranational economic law can have a pluralizing emancipatory effect that contributes to democracy, not least because it forces governments to accommodate a wider range of economic and cultural preferences than the ones existing within their societies.

A final article in the strand of scholarship concerned with international law and democracy at the domestic level is that by *Deborah Whitehall*. With her, we sail back in time, to before Thomas Franck identified the emergence of an international right to democracy, indeed to before democracy's victory in World War II. She takes us to New York, to a community of French scholars in exile, to show how they flexibly interpreted international norms concerning statehood and state recognition to keep French democracy alive, while France, the territory, was occupied by Nazi Germany. Their France, their national existence, drew its legitimacy directly from the free will of the people, rather than from the ability of the people to govern a certain territory.

In the second strand of international law and democracy scholarship, we can consider those articles that are concerned with norms, concepts and practices aimed at improving the democratic legitimacy of contemporary global governance. One key norm to that effect is that of ‘participation’. *Jochen Von Bernstorff* traces the evolution of two conceptions of civil society participation in international institutions over the past century and a half. Until the late 20th century, so he argues, the dominant conception was functionalist, drawing on the input of selected private actors and non-governmental organizations (NGOs) to advance the purported ‘common interests of the international community’. In recent decades, the functionalist logic has given way to a democratization narrative, according to which broad civil society participation representing a wide variety of interests can enhance the democratic legitimacy of supranational governance. The most recent offshoot of this democratization rationale has been the replacement of classic NGOs with a new type of civil society organization representing the particular interests of those ‘most affected’ by international institutions.

Participation is also the focus of *Ayelet Berman*. She critically reviews the World Health Organization’s 2016 Framework of Engagement with Non-State Actors (FENSA) as a possible model for regulating non-state actor participation in international rule-making. In particular, she examines whether it can prevent the risk of capture by private-sector participants. Her conclusion is that FENSA-like standards can only have limited success, if any, in mitigating capture. This prediction has to do not only with the specific weaknesses of FENSA, which could arguably be addressed in future standards, but also with structural limitations, such as limited resources and lack of enforcement, which are shared by most international organizations and are unlikely to be overcome.

Speaking of capture by the private sector, entire areas of modern transnational governance are in the hands of private actors, as for instance is the case with social media. *Barrie Sander* contends that international human rights law can mitigate the accountability deficits characteristic of social media platforms. In order for this to happen, he argues, we must adopt a structural conception of human rights that is open to state intervention in the private market as a means to counter power imbalances and to safeguard pluralism and diversity, and reject the marketized conception that emphasizes the negative obligation of states to refrain from unjustifiable interferences with human rights.

4 International Law and Democracy Today: Half Full and Half Empty

Together, the articles illustrate that, while the debate on the existence of a universal legal norm on democratic governance may seem dead or hibernating, scholarship on concepts that are considered aspects of democracy (accountability, participation, human rights) is thriving. The half fulls could emphasize that the abstracts and

articles epitomize a contemporary sensibility on international law and democracy that resonates with the particular concerns of our times. The half empties are likely to respond that the scholarship fails to get to the heart of 'the crisis of democracy', 'democratic backsliding' and deep democratic deficits. But these developments may in turn inspire the half-full crowd to search for new democratic modalities associated with the rise of social protests and movements worldwide. Let the debate continue ... democratically.