Buchbesprechungen

***Ackermann, Laurie*: Human Dignity: Lodestar for Equality in South Africa.** Claremont: Juta Law Publisher (2013). ISBN 9780702199011. xlvi, 416 S. R 595,-

This is a most impressive treatise on human dignity and equality written by one of the most influential Constitutional Court judges of the early period of this Court in South Africa. It is particularly impressive how the author deals with comparative constitutional law, to a considerable extent with German constitutional law as well as with Canadian constitutional law.

The book contains six Chapters. After an Introduction Chapter two deals with the "Theoretical background to human dignity, equality and non-discrimination as constitutional legal concepts". Chapter three is concerned with "Human Dignity (Human Worth) under the Constitution". Chapter four treats "Equality under the Constitution". Chapter five is concerned with "Dignity's role in the horizontal operation of the right to equality and non-discrimination" and Chapter six is called "Restitutionary or remedial equality".

The Introduction underlines that the legal concept of human dignity must be seen in a relation to equality. The author indicates that the apartheid pathology was the extensive and sustained attempt to deny the majority of the South African population the right of self-identification and self-determination. This inflicted, as the author calls it, human indignity and trauma (p. 9). The author stresses that it was his own personal realization and full acceptance of *Kant's* concept of human worth as the absolute and hence equal worth of all human beings, that led him to the total rejection of apartheid in all its transmogrifications and to resign from the Transvaal High Court in 1987 and to accept appointment to the newly established Harry Oppenheimer Chair in Human Rights Law at Stellenbosch University, which he held until the beginning of 1993 when he was first reappointed to the Cape High Court and then in August 1994 by President *Mandela* at the newly created Constitutional Court. As far as I am aware *Laurie Ackermann* was the only high judge who took the decision to resign because of the apartheid injustice. I met him for the first time in January 1989 before things started to change in South Africa. It is, therefore, of great interest how he deals with the relationship between equality on the one hand, and human dignity on the other.

In the second Chapter the theoretical background to human dignity, equality and non-discrimination as constitutional legal concepts is explained. The author puts the question as to equality with regard to what

human beings are equal. He sees the need to clarify what he calls the criterion of reference or attribution for equality. He then refers to the different theological and philosophical understandings of human equality and dignity for constitutional interpretation. He explains the background in Judaism, Christianity and Islam (p. 26-45) and discusses the secular philosophical perspectives (p. 46 et seq.) where *Kant* plays a fundamental role (p. 54-62). In this context *Louis Henkin*, *Ronald Dworkin* and *John Rawls* as well as the African notion of "Ubuntu" are being dealt with.

Chapter three concentrates on human dignity which is also called human worth under the South African Constitution. Section 10 of this Constitution reads: "Everyone has inherent dignity and the right to have their dignity respected and protected." It is hard to overlook the influence of the German Grundgesetz concerning this formula. The author gives some important examples of the case-law by the South African Constitutional Court dealing with the meaning of this notion of human dignity. In a lengthy part of this Chapter he then explains human dignity under the German basic law (p. 115 et seq.). It is most impressive how the author deals not only with literature but also with case-law of the German Constitutional Court in that context. One may say that this is one of the most important contributions to the English literature based on German constitutional developments. In this context the fundamental role of *Günter Dürig* is explained (p. 138). In the same Chapter a Section deals with dignity under Canadian law (p. 163 et seq.). *Ackermann* concludes that the German and the South African treatment of human dignity in the constitutional context presents a rich, meaningful and jurisprudentially highly functional picture of human dignity (p. 169). According to him the background of the *Kantian* inspired *Objektformel* is always present (p. 171).

In this context he also refers to the South African situation where human dignity is subject to the provision which deals with the limitation of rights (Section 36). This is an important difference compared with the German situation. The Chapter is concluded by a most impressive appeal: "When regard is had to the threats posed by nuclear proliferation, globalisation, economic instability, poverty and environmental deterioration, it is obvious that the challenges go well beyond the capacities of the law. They also challenge in the broadest sense the fields of theology, education, international relations, economics, as well as the biological and environmental sciences. But the law has its own particular role to play, and play it it must. I can see no other option but to focus on human dignity, and to do everything possible to achieve as broad an agreement as possible as to its content. We may not be able to prove human dignity, and its very outer contours may prove

to be elusive, but we are fully aware of the human disasters that occur when human dignity is sacrificed" (p. 179 s.).

After this fundamental groundwork concerning human dignity the author deals with equality under the Constitution in Chapter four. According to Section 9 of the South African Constitution: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms … (3) The state may not unfairly discriminate directly and indirectly against anyone on one or more grounds, including …" The author explains that the Constitutional Court has generally given a narrow meaning to this Section, the only requirement being that the differentiation in question must "bear a rational connection to a legitimate government purpose" (p. 182). He underlines that the Constitutional Court has consistently used human worth (dignity) as a criterion of attribution for human equality. According to him human worth is the aspect or feature, or quality of humankind in respect whereof all human beings must be treated equally for purposes of Section 9 and in respect whereof human beings may not be unfairly discriminated against. The Court has done so in unmistakably *Kantian* terms (p. 182).

Turning to some specific cases he refers to *Hugo's* case where the Court held that unfair discrimination principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity (p. 183). In this context the author also deals extensively with the German developments (p. 202 et seq.) and underlines rightly that the German Constitutional Court has not explicitly adopted human worth or dignity as a *tertium comparationis* with regard to which equality is to be measured (p. 222). However he correctly explains that Art. 3 § 3 of the German equality provision cannot be understood without taking into account human dignity (p. 226 s.). He also explains that in Canadian law human dignity plays an important role when applying the rules concerning discrimination (p. 250).

In his conclusion of this important Chapter he mentions that in German literature human dignity as criterion of attribution for equality and non-discrimination plays an important role. He does not understand the prohibition against arbitrary differentiation (Willkürverbot) as contradicting this conclusion (p. 251).

Chapter five turns to dignity's role in the horizontal operation of the right of equality and non-discrimination. The South African Constitution contains a specific Section 8 which deals with the horizontal application. According to Section 8 § 2 a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into ac-

count the nature of the right and the nature of any duty imposed by the right. In this context the author deals with the State action theory developed in the United States as to horizontal application (p. 269 et seq.). The approach of the South African courts to horizontal application is being explained in some detail (p. 288 et seq.). He underlines that there is an area of privacy, freedom and property right that is sacrosanct and should not be invaded by the law even on the basis of human dignity. According to him there is no simple mantra that will define this area and how its lines are to be drawn. This will have to be determined on a case by case basis (p. 315).

The author then turns to the German development of *mittelbare Drittwirkung* (p. 316 et seq.). He deals with the difficult development of German law on that basis as well as with the Canadian developments (p. 329 et seq.). In the vertical context the State is opposed to the private agents and the State's general interest opposed to the agents' constitutional rights. The private agent has an inherent dignity and flowing therefrom inherent freedom. The State does not. In the horizontal context right is opposed to right (p. 339). And he concludes basing himself on German and US dicta that one can start with the proposition that an agent's right to freedom and privacy would trump the others' right to equality and non-discrimination in the horizontal sphere. However, there may be a limit to it. Where private social power becomes more predominant, the infringement of human dignity involved in discrimination will become more severe and reach a point where, when evaluated proportionally, will trump opposing rights of freedom and privacy (p. 340 s.).

The comparatively short last Chapter six deals with the restitutionary or remedial equality, of great importance in countries as South Africa. Section 9 § 2 of the South African Constitution contains the important rule: "To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken." What is called affirmative action in the United States is formally justified here. The author deals with the difficulties arising in that context. He explains that the idea of unjust enrichment can be seen as underlying rules which apply in this context (p. 348 et seq.). The jurisprudence of the South African courts in that context is discussed (p. 353 et seq.). He finds it necessary to establish a principle which can define the limits for measures of affirmative action in that context. A tax imposed exclusively on advantaged persons in order to further the primary and secondary education of disadvantaged persons is seen as not impinging in any real sense on the human worth of the advantaged provided the tax was reasonable and employed effectively to secure the remedial goal and

met other proportionality requirements (p. 361). On the other hand a remedial measure which has the effect of permanently disqualifying a person from qualifying for or practicing a particular career or any other form of employment would have the most profound impact on the advantaged person's human dignity and could hardly pass constitutional muster (p. 361). Again in this context German and Canadian insights are referred to (p. 368-385).

Concluding the author points out that a proportionality principle as illustrated by the jurisprudence of Germany should be applied also in this context: first, whether the restitutionary measure will achieve its proper end or goal, secondly whether there is another possibility, and thirdly, the inquiry has to find out the nature and degree of the measures' impact on the human dignity of those sought to be advanced and those disadvantaged by the measure. In the case of the former it will be an evaluation and weighing up of the positive impact on the human dignity of the former, as against the negative impact on the human dignity of the latter.

The book "Human Dignity: Lodestar for Equality in South Africa" is a fundamental contribution not only to South African constitutional law but to the understanding of human dignity on the one hand and equality on the other in constitutional systems in general. One can only admire the author's expertise with comparative constitutional law.

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***Bungenberg, Marc/Herrmann, Christoph* (Hrsg.): European Yearbook of International Economic Law. Special Issue: Common Commercial Policy after Lisbon.** Heidelberg/Berlin: Springer Verlag, 2013. ISBN 978-3-642-34254-7. 243 S. € 106,95

***Bungenberg, Marc/Reinisch, August/Tietje, Christian* (Hrsg.): EU and Investment Agreements.** Baden-Baden: Nomos, 2013. ISBN 978-3-8487-0250-3. 200 S. € 59,-

***Braun, Tillmann Rudolf*: Ausprägungen der Globalisierung: Der Investor als partielles Subjekt im Internationalen Investitionsrecht.** Baden-Baden: Nomos, 2012. ISBN 978-3-8329-7480-0. 354 S. € 89,-

***Schernbeck, Andrea*: Der Fair and Equitable Treatment Standard in internationalen Investitionsschutzabkommen.** Baden-Baden: Nomos, 2013. ISBN 978-3-8329-8008-5. 166 S. € 44,-

***Schicho, Luca*: State Entities in International Investment Law.** Baden-Baden: Nomos, 2012. ISBN 978-3-8329-6516-7. 249 S. € 59,-

In der sich immer stärker segmentierenden Völkerrechtsordnung (vgl. *M. Koskenniemi*, Report of the Study Group of the International Law Com-

mission, Fragmentation of International Law, A/CN.4/L. 682, 13.4.2006) gewinnt das Internationale Wirtschaftsrecht zusehends mehr an Autonomie. Der erwähnte Segmentierungsprozess macht aber auch hier nicht halt und innerhalb dieses Rechtsgebietes gewinnen einzelne Teilbereiche immer deutlicher einen autonomen Charakter. Dies gilt insbesondere für das "Internationale Investitionsrecht". Die über 2.800 bilateralen Investitionsschutzabkommen sowie die ständig steigende Zahl an Investor-Staat-Schiedsverfahren, die auf dieser Grundlage in die Wege geleitet werden, vermitteln dieser Materie eine ungeheure Dynamik. Die große praktische Relevanz, die dieser Rechtsmaterie zukommt, schlägt sich auch in der Wissenschaftsliteratur nieder. Die Zahl der Monographien, Sammelbände und Fachzeitschriften, die sich dieser Thematik widmen, wächst in atemberaubendem Maße. Wie in vielen Sektoren des internationalen Rechts ist dabei der angloamerikanische Raum führend. Mittlerweile ist dazu aber in der deutschsprachigen Region ein Gegengewicht geschaffen worden, das einen seiner bedeutendsten Kristallisationspunkte in der bei Nomos (und unter abwechselnder Beteiligung weiterer Verlage wie Dike, Facultas und Hart) herausgegebenen Schriftenreihe "Studien zum Internationalen Investitionsrecht" findet. Die Herausgeber *Marc Bungenberg*, *Stephan Hobe*, *August Reinisch* und *Andreas Ziegler* sind ausgewiesene Experten des Internationalen Wirtschaftsrechts im Allgemeinen und des Internationalen Investitionsrechts im Besonderen. Einer dieser Herausgeber, *Marc Bungenberg*, hat auch den Sonderband des "European Yearbook of International Economic Law" betreffend die "Common Commercial Policy after Lisbon" mitherausgegeben (gemeinsam mit *Christoph Herrmann*) und mit diesem Band soll diese Rezension beginnen.

Die grundlegenden Änderungen, die der Vertrag von Lissabon für die Gemeinsame Handelspolitik erbracht hat, stehen in diesem Band im Mittelpunkt. Da dabei die Ausdehnung der ausschließlichen Zuständigkeit der EU auf den investitionspolitischen Bereich ein zentrales Reformelement darstellt, wird in diesem Werk auch das Thema des internationalen Investitionsrechts immer wieder in den Vordergrund gerückt.

Das Einführungskapitel zum Thema "Towards a Common External Economic Policy of the European Union" wurde von *Thomas Cottier* von der Universität Bern verfasst. *Thomas Cottier* gelingt es dabei, einen sehr überzeugenden Abriss der abwechslungsreichen Entwicklung der Gemeinsamen Handelspolitik zu liefern und dabei im Dreiecksverhältnis EU – Mitgliedstaaten – WTO sehr klar die Bestimmungsfaktoren herauszuarbeiten, die diesen schwierigen Prozess begleitet haben. Wer nach einer kurzen und einprägsamen Einführung in dieser Thematik sucht, wird hier bestens bedient

werden. Die weiteren Beiträge leuchten eine Vielzahl von Einzelfacetten in diesem komplexen Verhältnis aus. So enthalten die Abhandlungen von *Jörg Philipp Terhechte* und *Wolfgang Weiss* eine kritische Analyse der *Lissabon*-Entscheidung des Bundesverfassungsgerichts (BVerfGE 123, 267), in dem auch die neu geschaffene Kompetenz im investitionsrechtlichen Bereich tangiert worden ist.

Mit einer besonders heiklen Thematik beschäftigt sich *Markus Krajewski* in seinem Beitrag mit dem Titel "New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy". Es geht hierbei um die Frage, inwieweit die Aufwertung der Rolle des Europäischen Parlaments bei der Ausformulierung der Gemeinsamen Handelspolitik zu einer Demokratisierung dieses Politikbereichs geführt hat. *Krajewski* begrüßt grundsätzlich diese Entwicklung und vergisst dabei aber auch nicht, die Probleme anzusprechen, die mit der Politisierung der Außenwirtschaftsbeziehungen verbunden sind (vgl. dazu auch den Beitrag dieses Rezensenten, The "Politicization" of the EU Common Commercial Policy – Approaching the "post-Lockean" era, in: M. Cremona et al. (Hrsg.), Reflections on the Constitutionalization of International Economic Law, Brill 2014).

Hans-Georg Dederer setzt sich mit dem schwierigen institutionellen Kräfteverhältnis zwischen Kommission, Rat, dem Hohen Vertreter und dem Europäischen Auswärtigen Dienst bei der Ausformulierung und der Umsetzung der gemeinsamen Handelspolitik (GHP) auseinander.

Ein eigener Abschnitt ist ganz der Investitionspolitik als Teil der GHP gewidmet. Dabei beschäftigen sich *Steffen Hindelang*, *Nikolaos Lavranos*, *Davide Rovetta* und *Andreas Ziegler* u. a. mit der Investor-Gaststaat-Schiedsgerichtsbarkeit als spezieller Herausforderung für die EU-Investitionspolitik.

Ganz zentral der neuen investitionspolitischen Kompetenz der EU gewidmet ist hingegen der Band mit dem Titel "EU and Investment Agreements" von *Bungenberg/Reinisch/Tietje*. Bekanntlich ist nunmehr auf der Grundlage von Art. 207 AEUV die EU an die Stelle der Mitgliedstaaten bei der Aushandlung und dem Abschluss von Investitionsschutzabkommen getreten. Welche Konsequenzen dies nach Maßgabe des noch in der Diskussionsphase befindlichen neuen EU-Investitionsschutzabkommens insbesondere für die Streitbeilegung haben wird, untersuchen *Colin Brown*, *Ilmars Naglis* und *Stephan W. Schill*. Der zuletzt genannte Autor spricht dabei auch das Verhältnis der Schiedsgerichte zum EuGH an, das sich angesichts der bekannten Tendenz des EuGH, seine Prärogativen hartnäckig zu

verteidigen, nicht unproblematisch gestalten könnte. *Schill* zeigt aber auch auf, dass sich Konflikte in diesem Bereich vermeiden lassen, wenn beide Seiten mit Augenmaß handeln.

Wer Natur und Reichweite der EU-Kompetenz im investitionsrechtlichen Bereich verstehen will, der sollte auch den Entwicklungsprozess kennen, durch welche sich diese – nunmehr umfassende – Zuständigkeit herausgebildet hat. Dazu liefern *Frank Hoffmeister* und *Günes Ünüvar* einen hervorragenden Beitrag "From BITS and Pieces towards European Investment Agreements". Weitere Beiträge beschäftigen sich mit speziellen investitionsschutzrechtlichen Beziehungen (so bspw. *Wenhua Shan* und *Sheng Zhang*, "The Potential EU-China BIT: Issues and Implications" und *Céline Lévesque*, "The Challenges of 'Marrying' Investment Liberalisation and Protection in the Canada-EU CETA").

Nikos Lavranos, der Erfahrungen in diesem Bereich sowohl als Wissenschaftler als auch als "practitioner" sammeln konnte, liefert einen Beitrag, der sowohl rechtswissenschaftlich als auch rechtspolitisch von großer Bedeutung ist. In seiner Abhandlung "The Remaining Decisive Role of Member States in Negotiating and Concluding EU Investment Agreements" zeigt er auf, dass die Mitgliedstaaten, entgegen der landläufigen Meinung, bei der Aushandlung und dem Abschluss der EU-Investitionsschutzabkommen eine sehr bedeutende sein wird, und zwar allein schon deshalb (aber nicht nur), da diese Abkommen voraussichtlich als gemischte Abkommen geschlossen werden. Die weiteren Beiträge beschäftigen sich mit der Investitionsversicherung aus EU-rechtlicher (*Angelos Dimopoulos*) und mitgliedstaatlicher (*Joachim Steffens*) Perspektive.

Wer somit nach einem Update zu den aktuellen Bemühungen betreffend die konkrete Aktivierung der neuen investitionspolitischen Kompetenz der EU sucht, wird in diesem Buch eine wertvolle Hilfestellung finden.

Besondere Hervorhebung verdient auch das Werk von *Tillmann Rudolf Braun* über den "Investor als partielles Subjekt im internationalen Investitionsrecht". Man muss nicht die Schlussfolgerung des Autors, wonach das internationale Investitionsrecht den Investor zu einem partiellen Völkerrechtssubjekt aufgewertet habe, mittragen. Man muss auch nicht jedem rechtspolitischen Gedankenspiel des Autors (bspw. was die Sinnhaftigkeit oder überhaupt die Möglichkeit der Einräumung eines Klagerechts der WTO vor den Streitbeilegungsinstanzen oder das Auftreten von privaten Akteuren vor diesen Gremien anbelangt, S. 307) zustimmen. Und dennoch wird man bei der aufmerksamen Lektüre dieses Werkes zu dem Ergebnis gelangen, dass es sich hierbei um eine ausgezeichnete Dissertation handelt, mit welcher sich der Autor einer umstrittenen Thematik mit einer sehr nu-

ancierten Argumentation nähert. Zudem liefert *Braun* auch gleich ein Gesamtsystem des internationalen Investitionsschutzrechts mit, wodurch er seine Belesenheit in dieser Materie nachdrücklich unter Beweis stellt. Ein empfehlenswertes Buch!

Andrea Schernbeck beschäftigt sich in ihrer Dissertation mit dem "Fair and Equitable Treatment Standard in internationalen Investitionsschutzabkommen", den sie als "wohl wichtigsten materiellen Schutzstandard im Bereich des Investitionsschutzrechts" bezeichnet. Sehr deutlich arbeitet die Autorin die verschiedenen Ausprägungen dieses Schutzstandards heraus, so wie er sich durch die Praxis der Investitionsschutzabkommen herauskristallisiert hat. Sie zeigt auf, dass dieser Standard kein einheitlicher ist. Er äußert sich vielmehr über unterschiedliche Konstellationen an Rechten, die in den einzelnen Abkommen unterschiedlich ausgeprägt sein können. Die Beschneidung dieser Entwicklung durch eine Anknüpfung dieses Standards an das Völkergewohnheitsrecht (das in seiner Entwicklung eine geringere Dynamik aufweist als das Vertragsrecht) sieht sie als problematisch und plädiert stattdessen für eine vertragliche Klärung dieses Standards im Detail und im Hinblick auf die noch offenen Rechtsfragen. Die Struktur dieser Dissertation ist grundverschieden von jener *Brauns*: *Schernbeck* arbeitet punktuell ein spezifisches Thema auf 125 Seiten ab. Für den Leser kann dies einen sehr nützlichen Zugang zu einer sehr spezifischen Materie darstellen, wenngleich auch hier einzelne Prämissen weiter problematisiert werden könnten, wie etwa die Aussage, dass sich der Entschädigungsstandard der "Hull-Formel" auch im Fremdenrecht bereits durchgesetzt hätte und dass Enteignungsverbot und Entschädigungsstandard der Internationalen Investitionsschutzabkommen normativ dem Völkergewohnheitsrecht entsprächen (S. 31). Auch gibt es für die – zutreffende – Aussage, wonach laut Völkergewohnheitsrecht "[f]remdes Eigentum nur aus Gründen des öffentlichen Wohles und gegen Gewährung einer Entschädigung enteignet werden" dürfe (S. 33) wohl bessere Belege als den Verweis in der Fußnote auf den "Entwurf eines Abkommens über die Staatenverantwortlichkeit für die Schädigungen der Personen und des Vermögens fremder Staatsangehöriger" der Deutschen Gesellschaft für Völkerrecht, veröffentlicht in der Zeitschrift für Völkerrecht aus 1930.

Luca Schicho beschäftigt sich schließlich mit der besonderen Rolle der öffentlichen Unternehmen im internationalen Investitionsrecht. *Schicho* betont zu Recht, dass sich diese Unternehmen in einer Grauzone zwischen dem öffentlichen und dem privaten Sektor bewegen und dass diese sich gleichzeitig hervorragend dazu eignen, das Investitionsklima durch staatliche Maßnahmen zu beeinflussen. Für eine eventuelle Festlegung einer staat-

lichen Verantwortung für die Aktivitäten dieser Unternehmen ist der Aspekt der Zurechnung entscheidend. *Schicho* argumentiert in diesem Zusammenhang sehr überzeugend, dass diese komplexe Thematik über den Artikelentwurf der ILC aus 2001 angegangen werden sollte, der große Autorität genießt und die Entwicklung gesonderter Zurechnungsschemata erübrigt.

Alles in allem ist der Leser bei den hier vorgestellten Werken mit einer beachtlichen intellektuellen Leistung konfrontiert, die erheblich dazu beiträgt, das sich äußerst dynamisch entwickelnde Feld des Internationalen Investitionsrechts in überzeugender Form zu konturieren. Das junge Team, das diese Schriftenreihe sowie das European Yearbook of International Economic Law herausgibt, steht gemeinsam mit den Autoren für einen pragmatischen, praxisorientierten Zugang zum Internationalen Investitionsrecht (bzw., im weiteren Sinne, zum Internationalen Wirtschaftsrecht), der die deutsche internationalrechtliche Literatur in diesem Bereich mit jener des angloamerikanischen Raums zusammenführt.

Die abwechselnde Verwendung der deutschen und der englischen Sprache ermöglicht einerseits einen weltweiten Austausch, andererseits aber auch die Pflege der deutschen Rechtssprache im internationalen Bereich, wodurch auch eine große Tradition weiter gepflegt werden kann. Es bleibt zu hoffen, dass die Wissenschaftler, die hinter diesen beeindruckenden Publikationen stehen, auch weiterhin so kraftvoll und erfolgreich ihre Bemühungen fortsetzen mögen.

Peter Hilpold, Innsbruck

***Venzke, Ingo*: How Interpretation Makes International Law – On Semantic Change and Normative Twists.** Oxford: Oxford University Press, 2012. ISBN 978-0-19-965767-4. 352 p. £ 74,-

Dr. *Ingo Venzke*, Associate Professor (tenured) at the Department for International and European Law, University of Amsterdam, has published a timely study on the normative effect of interpretation in international law. It is an impressive and thought-provoking book for scholars and practitioners alike, as it addresses key-issues of interpretation in a way that, until now, has remained more or less unexplored, namely by considering the question of the semantic authority of international institutions in the ultimately law-making exercise of interpretation. (For other studies published on the topic of Interpretation in International law see e.g. *C. F. de Casadevante Romani*, Sovereignty and Interpretation of International Norms, 2007; *R. Gardiner*, Treaty Interpretation, 2008; *R. Kolb*, Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit

international public, 2006; *U. Linderfalk*, On the Interpretation of Treaties. The Modern Law as expressed in the 1969 Vienna Convention on the Law of Treaties, 2007; *A. Orakhelashvili*, The Interpretation of Acts and Rules in Public International Law, 2008; *I. van Damme*, Treaty Interpretation by the WTO Appellate Body, 2009. See also the book-review Essay by *M. Waibel*, Demystifying the Art of Interpretation, EJIL 22 (2001), p. 571 et seq.) *Venzke's* book is an attempt to describe the emergence of international norms beyond the will of States and, as such, beyond the established sources of international law.

In his first Chapter, *Venzke* gives a short introduction to the object and "agenda" of his study, but before doing so, he sets out its limitations, which are twofold:

First, he explains that he does not wish to provide a theoretical framework of the reasons of change by interpretation. Instead, his aim is to "understand and show *how* the practice of interpretation makes international law" (*I. Venzke*, How Interpretation makes International Law, 2013, p. 14). In order to do so, he applies linguistic methods to analyse international lawmaking through interpretation; a somewhat novel approach that seems to be gaining some popularity among legal scholars. (*P. Liste*, Völkerrecht-Sprechen: Die Konstruktion demokratischer Völkerrechtspolitik in den USA und der Bundesrepublik Deutschland, 2012, reviewed together with *Venzke's* book by *J. Klabbers* in EJIL 24 (2013), p. 718 et seq.)

The second limitation is that the application of customary law is excluded from the study, which focuses on the examination of treaty law.

There is much to be said concerning these choices. Suffice it here to say that they are understandable: the reasons for a change of a norm by way of interpretation might indeed be too diverse, and thus difficult to assess with certainty; and the "interpretation" of customary law is a much more complex exercise than the interpretation of treaty law, as can be seen from the seminal works produced on the subject by the most respected authorities. (Cited in *Venzke's* are notably *O. Schachter*, *B. Simma* and *P. Alston*.)

In the author's words: "The book approaches the question of how the practice of interpretation makes international law in three big strides. The first stride recalls the common narrative of legitimacy in international law which is reflected in its doctrine. … The theoretical perspective paves the way for analysing two concrete cases of international lawmaking through the interpretative practice of international institutions in the second stride. … In view of these concrete cases, the third big stride then turns to the normative implications of lawmaking by way of interpretation under the spell of international institutions' semantic authority." (p. 14).

At this early stage, the author comes to the core of his argument, namely that, in his view, "interpreters need to be guided by a sense for respective spheres of authority and by the possibilities for democratic governance in the post-national constellation." (p. 14).

Chapter Two, on the practice of interpretation, gives a comprehensive overview of the existing legal literature on that practice, and recalls the main judicial techniques of interpretation and the most influential legal theories in the field. The author then skilfully introduces his approach of linking the semantic authority with the normative, an approach which simultaneously raises the issue of legitimacy of authority. *Venzke* seems to be uncomfortable with the thought that too much normative power at the international level could be given to what are arguably illegitimate institutions, leaving states and non-state actors, affected by the newly created norms, at the doorstep of law-making procedures.

Chapters Three and Four provide two persuasive case-studies, the first concerned with the interpretative practice of the UNHRC, the second with that of the GATT/WTO Appellate Body.

Chapter Three describes the interpretative approach taken by the UNHCR, as an institution/bureaucracy, and incorporates a very useful historical overview concerning the interpretation of the Statute of the UNHCR, as well as of the 1951 Convention Relating to the Status of Refugees. It is a thoroughly researched and detailed account of how the UNHCR's interpretative practice has evolved over the years, how it has adapted to new needs and demands, and how the organization has extended the scope of its activities while the foundational texts remained unchanged. It is argued that the semantic change with regard to the definition of a refugee "subtly influenced the contents of the legal commitments that states entered into as parties to the Refugee Convention".

But it could also be argued that, if states still remain parties even though their legal obligations have been altered by a bureaucracy that has not been properly mandated to do so, in all probability they tacitly agree with the semantic and material change of refugee law that has occurred in this way. Hence, the bureaucracy's interpretative practice is arguably being endorsed by States Parties to the Convention, and is not as inappropriate as *Venzke* wants us to believe. He admits this only in passing but does not develop this point (p. 109 and p. 134).

In the Fourth Chapter, the author then turns to examining the question of the interpretative practice of adjudicatory institutions, with a special focus on the practice of the Appellate Body of the WTO (on that issue, see also *I. van Damme*, Treaty Interpretation ...) with regard to Article XX of

GATT, and the notion of exceptions contained therein. *Venzke* briefly recalls the history of international adjudication in general before turning to the specific, again very thorough, analysis of the GATT/WTO interpretation of Article XX and in particular the notion of "necessity". This is a well-chosen example for the issue the author wishes to demonstrate, namely that GATT/WTO adjudicators have altered the normative content of Article XX without having the law-creating authority to do so and, hence, beyond the will of (the Member) States.

In Chapter Five, the last chapter, *Venzke* recapitulates his findings and draws the conclusion that the current practice of interpretation of international legal norms by international actors should lead to the re-evaluation of their attitude towards the legitimate authors of such norms.

It should be noted that the author does not express any negative judgment on the substantial merits of treaty interpretation; rather he addresses the question of procedural adequacy, and the legitimacy of the interpreters of norms. It may in fact be said that whether or not the substantial developments made by bureaucracies or adjudicators are to be seen as "positive" or "progressive" ones is almost wholly beside the point, in *Venzke's* approach. He does not deny that institutions and adjudicators are faced with challenges that the initial treaties could not have foreseen. Nor does he advocate that international actors should be "walking with the dinosaurs", or should have a "Jurassic Park approach" (both expression are used by *M. Evans*, Walking with Dinosaurs: The Optional Protocol to the United Nations Convention against Torture, the Vienna Convention on the Law of Treaties and State Responsibility, in: M. Craven/M. Fitzmaurice (ed.), Interrogating the Treaty, Essays in the Contemporary Law of Treaties, 2005) to treaty law.

There is here at least an implicit acknowledgement that, once ratified treaties take up their own lives, they are evolving instruments, and that interpreting them sometimes turns out to mean so much more, namely changing their initial meaning into something more adapted to current situations and challenges. *Venzke* does not seem concerned by these questions, which have been treated extensively by others; and, at least as far as international courts are concerned, *Hersch Lauterpacht* put the point in the frankest terms: "Judicial legislation, conceived as a process of changing the existing law, is not a legal term of art. … A system of law sanctioning judicial legislation would be a contradiction in terms. At the same time, the fact remains that judicial law-making is a permanent feature of administration of justice in every society", including in the international legal society. (*H. Lauterpacht*, The Development of International Law by the International Court,

1958, p. 155; *Venzke* refers to the earlier work of *Lauterpacht* on the development of international law by the Permanent Court of International Justice, 1934, making the same point, p. 142.)

Venzke's main concern is a lack of legitimacy, rather than whether or not the outcome of interpretation-exercises is a positive one for those concerned. (Taking *Venzke's* approach one step further, it has been argued that one could apply different standards of legitimacy to situations where individuals directly benefit from law-making interpretation or where the interpretation concerns solely states. See *R. Wolfrum*, Final Remarks and Conclusions, in: International Dispute Settlement: Room for Innovations?, 2012, p. 445.) Some might argue that this approach is unworldly or even dogmatic, that it does not seem to be fitting any of the strictly legal categories of study, but the reality is that the questions raised by *Venzke* are fundamental for legal practitioners and scholars alike.

Given the "agenda" of *Venzke's* book as just set out, it is thus surprising that only little is said on procedural issues, and on the make-up or composition of the two institutions that he has chosen to examine.

His claim seems to be that it is an inherent quality of any legal system that semantic change through practice may have normative power, but that this phenomenon is of "amplified importance and gives rise to particular concerns" for the international legal order; one could therefore have expected more detailed analysis of the procedural aspects of what appears to be a growing authority of international institutions and the absence of any parallel increase in control thereof by the "original" creators of international norms.

One reviewer has applauded *Venzke's* approach as "eclectic" (*J. Klabbers,* EJIL 24 (2013), p. 718 et seq.), because he does not "lose himself in a strict theoretical framework". One could also apply that term in a more critical sense, on the ground that he constructs his own theoretical framework on the basis of too wide a variety of elements from semantics, sociology, political science and other areas. Readers will be pleased to learn that not only *Wittgenstein*, *Laclau*, *Habermas*, *Bourdieu* and *Foucault*, but also *Goethe* and the ubiquitous *Lewis Carroll* have something to say on interpretative practice of international bureaucracies and adjudicators. This might give the impression that *Venzke* has framed his selection of authorities to be "tailored" to suit his needs.

Legal "science" has been described as encompassing three aspects: the study of the validity of rules, the study of the fairness of rules and the study of the efficiency of rules.

According to *Bobbio's* proposed criteria of legal scholarship, the first would be the requirement of examination whether a norm is valid or invalid by looking at the appropriate procedures and the authorised organ that implemented or created the norm.

The second criterion would be whether a norm or legal development is just or unjust, using moral and ethical standards in order to assess the fairness of law.

The third criterion, is the assessment of the efficiency of a legal norm, trying to ascertain whether the law achieves the results that it is intended to achieve. (*N. Bobbio*, Teoria generale del diritto, 1993, p. 23 et seq.; referred to by *S. Villalpando*, L'emergence de la communauté internationale des Etats, p. 38, note 96.)

Ingo Venzke's approach to international legal studies fits none of these patterns, and this does not seem to be a matter that causes him any particular concern. Instead his approach is the study of the political legitimacy of rules, a sociological rather than purely legal approach to international law, and, one should add, a much needed one.

However, it is not clear how *Venzke* would respond to his own claim of illegitimate law, in terms of procedure. If there is a need for more legitimacy by increased participation of non-state actors or, as the author calls it, "cosmopolitanism", in the decision-making of international bureaucracies and courts or tribunals, how can the legal world respond to that need?

The questions raised in the work under review are highly relevant to current legal scholarship in international law, and they should be kept in mind by practitioners when shaping decisions. Regrettably, the author leaves the reader alone in the quest for answers, when he might have offered more guidance. One would have wished to know how the idea of cosmopolitanism might be translated in terms of procedure, for instance: what can lawyers in international institutions and courts, in their respective rules of procedure, do to accommodate the demand for more participation and cosmopolitanism? Is it sufficient to invite *amici curiae* to intervene in proceedings before a court or tribunal? And if this were to be accepted, a more incisive question would be, who then represents the cosmopolitan citizen, the "Weltbürger"? If this role were allotted to the individuals affected by a decision, it would be simply impracticable to hear them all, or to provide them with an appropriate forum. On the other hand, it is well known that NGOs have their own agenda; further, there is a considerable number of NGOs of every kind: how do you choose the one that best represents the affected individuals? Besides, NGOs are quite often not democratically structured themselves, and one cannot be sure that they represent any of particular cit-

izens or their interests. These therefore suffer from an even more substantial lack of legitimacy than some international bureaucracy or adjudicating body.

In short, the reader may well feel dissatisfied with the inherent subjectivity of the notion of cosmopolitanism, so long as it is not clearly translated into legal and procedural terms.

Another factor that could be taken into account is the composition and selection of members of international institutions, bureaucracies and adjudicating bodies, as well as their respective operating methods. Lack of legitimacy might be a more sensitive issue when the nomination procedures and the interpretative practice are obscure; the issue might be less acute when, as is the case, for example, of the International Court of Justice, Members of the Court are elected at the highest level, with due regard to geographical distribution, and the method of work is such that drafting is made collectively, rather than it being left to a single *juge rapporteur,* or even to the Secretariat as is the case in other adjudicating bodies.

Legal scholars of a more orthodox school may find this book to be a study of political science rather than law – they might indeed argue that it is simply in the nature of legal texts that their meaning is altered by decision-makers of every kind, according to the needs of the time and the system. It is almost inherent in any means of expression, whether in arts, music or language, that they give rise to different interpretations, valid in the eyes of some, perplexing in the eyes of others … What *Venzke* has discovered may well not be a new category of sources of international law: what he describes is the development, and hence, the normative change, that probably every primary norm suffers in its lifetime, once it has been created. But that may perhaps not be the relevant question; discovery of a new category of sources of international law was not on *Venzke's* agenda.

Readers of *Venzke's* book will find it the work of a talented writer and lawyer – a truly enjoyable read, and this being backed by solid research and well-structured arguments, the whole is a brilliantly executed piece of work.

Last not least, *Venzke* also succeeds in building a bridge between legal theory and what is sometimes too pedestrian – the practitioner's perspective; both kinds of reader can benefit from reading this book.

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***Williams, Sarah*: Hybrid and Internationalised Criminal Tribunals.** Selected Jurisdictional Issues. Oxford and Portland, Oregon: Hart Publishing (2012). ISBN 9781841136721. 520 S. UK£ 78,-/US$ 156,-

The last twenty years have seen the emergence of a number of criminal tribunals which are described as "hybrid" or "internationalised" because they include a mix of both international and national elements. Despite their role in securing accountability for international crimes, these mixed jurisdictions have long resisted comparative analysis, as they are usually crafted to the specific circumstances of a single post-conflict country. *Sarah Williams'* admirable book has gone a long way in filling this gap in the literature on international criminal law, and it is a welcome and long overdue contribution to this field of scholarship.

The starting point for *Williams* is the question of whether it is accurate to speak of a separate category of mixed jurisdictions, encompassing both hybrid and internationalised tribunals, and if so, what its distinguishing features are. In doing so, she seeks to formulate a comprehensive definition of this category of tribunals, and to diagnose how they are distinct from other international and national criminal tribunals. *Williams'* book aims not only to provide an academic analysis of past or existing mixed tribunals, but also to serve as a manual for practitioners designing the statutes of future tribunals. In her own words: "This study aims to assist those designing such tribunals in the future, and the judges and personnel appointed to them, to consider these issues more carefully and … to ensure clear and consistent decision-making" (p. 8). As a result, *Williams* engages with a number of seemingly heterogeneous topics, ranging from immunities and amnesties to cross-border cooperation between national criminal authorities. The study's overarching goal is to situate hybrid and internationalised criminal tribunals in the evolving framework of international criminal justice, and to explain why they may remain an effective tool for combating impunity in the twenty-first century.

The book can be divided into two distinct Parts: Chapters 1-3, which are mainly descriptive, and Chapters 4-6, which are analytical.

Williams begins with a succinct and useful introduction to the field of international criminal justice in the first Chapter, where she focuses on several key themes, in particular the interplay between national and international prosecutions of core crimes. The second Chapter carefully examines the seven tribunals which have been classified as either hybrid or internationalised for the purpose of this study: the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the International Judges and Prosecutors Programme in Kosovo, the East Timor's Special Panels for Serious Crimes,

the War Crimes Chamber for Bosnia and Herzegovina, the Iraqi High Tribunal, and the Extraordinary Chambers in the Courts of Cambodia. Chapter three then examines several institutions with international elements, which fail to meet *Williams'* criteria of either hybrid or internationalised (most notably the Serbian War Crimes Chamber and the Lockerbie Court), as well as a number of prospective institutions among others in Burundi, the Sudan, the Democratic Republic of the Congo, Kenya and Liberia.

The first three Chapters introduce the political and legal developments surrounding the establishment of (or, as in Chapter three, the blueprints for) these tribunals as well as their key legal and jurisdictional features. *Williams'* examination of the prospective tribunals is especially valuable, as she has amassed and synthesised a wealth of information about these, as yet, not functioning jurisdictions. The reader will be surprised to learn how often the mixed model has been contemplated in post-conflict settings, and how much variety there is among the different proposals. The book's focus on prospective tribunals also foreshadows one of *Williams'* more interesting theses, namely that these types of mixed jurisdictions will continue to play an important role in combating impunity despite the establishment of the International Criminal Court.

The prospect of establishing mixed tribunals is a recurrent theme in the book's second, analytical part. *Williams* begins by asking why there is a need for hybrid and internationalised tribunals, and what distinguishes them from other similar criminal jurisdictions. It is clear that she is unsatisfied with the fact that "[t]here has been little substantive academic engagement as to whether or not there is a definition of a hybrid or internationalised tribunal, or indeed whether they are in fact a single category" (p. 188). In trying to go beyond the oft-repeated but fairly trite observation that hybrid courts are a mix of international and national elements, *Williams* assesses the tribunals surveyed in the earlier Chapters against almost a dozen factors, in particular their duration, location, funding mechanisms, jurisdictional bases, legal powers, or the involvement of international and national staff. Despite undertaking a rigorous and thorough analysis of these and other issues, *Williams* finishes by acknowledging that her "study of practice reveals that there is no comprehensive definition of a hybrid or internationalised tribunal" (p. 249). This seemingly unambiguous capitulation detracts from *Williams'* other, far more interesting, conclusions, which alter our understanding of the role that mixed courts play in the international criminal sphere.

First, *Williams'* comparative assessment allows her to propose a "sliding scale" of international and national mechanisms for international criminal

justice, along which there is a clear demarcation between hybrid tribunals on the one hand and internationalised tribunals on the other. Hybrid tribunals are a "true blending of the national and international in one institution" (p. 250), operating directly on the basis of international law. By contrast, internationalised tribunals are "essentially domestic institutions", operating with the assistance of international organisations or other states.

Second, *Williams* isolates six key features of hybrid and internationalised tribunals, of which the one defining characteristic separating them from other international criminal tribunals is the possibility of the participation of international judges sitting alongside their national counterparts. Third, contrary to what has frequently been asserted about hybrid and internationalised tribunals, there appears to be no requirement of mixed material jurisdiction in their statutes. Thus it is possible for their jurisdictional bases to contain only domestic crimes, though – in that case – the crimes are of concern to the international community as a whole (for instance, terrorism in the Statute of the Special Tribunal for Lebanon). At the other end of the spectrum are those statutes which contain only international crimes criminalised as a matter of domestic law (for example, at the Specialised Chambers for the Democratic Republic of Congo). These and other incisive observations in Chapter four compensate for the absence of a definition, though it is somewhat unclear why *Williams* chooses to emphasise the quest for a definition so often. The Chapter even carries the tantalizing subtitle "In Search of a Definition," which makes her subsequent failure to devise one all the more anticlimactic.

This awkward denouement dissipates as the narrative moves forward in Chapters five and six, which prove to be the book's strongest. On the basis of her analysis of the legal and jurisdictional bases of the above tribunals, *Williams* proposes a tripartite classification distinguishing between internationalised tribunals, which are always established by domestic legislation, and hybrid tribunals, which can be created either by an international treaty or a UN Security Council resolution.

Williams carefully considers the statutes and supporting documents of the existing tribunals, and draws her own conclusions about the legal rationales and ramifications underlying their establishment and operations. In doing so, she critically engages with the scholarship and, in particular, the tribunals' jurisprudence (p. 300, p. 315, p. 319). It is worth reiterating that *Williams* is not engaging in academic critique for its own sake; her purpose is also to explain and propose coherent legal rationales for future tribunals, such as the Extraterritorial Piracy Tribunal or the Special Court for the Trial

of Habre (this tribunal was established after the book came out, rendering some of *Williams'* conclusions inapplicable to that case study).

The forward-looking and practice-oriented aspect of the study is most visible in Chapter six, which builds on the book's findings about the legal and jurisdictional bases of hybrid and internationalised tribunals. *Williams* examines a number of practical legal barriers to the exercise of jurisdiction, including statutes of limitation, the *ne bis in idem* principle, the principle of legality, immunity under international law, amnesty, and cooperation between mixed tribunals, states, and other international and domestic courts.

She also assesses the untested relationship between mixed tribunals and the International Criminal Court's complementarity regime. *Williams* concludes that only hybrid courts established under Chapter VII of the UN Charter could in theory fall outside the scope of the ICC's jurisdiction, which would then create competing cooperation obligations on the part of state institutions. These observations appear particularly timely as the international community debates whether and how to ensure accountability for international crimes in Syria.

In conclusion, *Williams* has performed a Sisyphean task by synthesising so much material about so many – existing and prospective – mixed tribunals, and examining such a wide range of legal issues relating to this subset of criminal jurisdictions. However, it is also the audacity of the project that can, at times, leave the reader overwhelmed. While the first Chapters provide a useful overview of the more than twenty tribunals included in and excluded from the study, the descriptions remain fragmentary because of how much material is covered.

This and the narrow focus on purely legal and jurisdictional issues carry with it the risk that the bigger picture surrounding hybrid and internationalised tribunals is lost. As *Williams* acknowledges (p. 5-6), a variety of other issues also impacts upon the legality and legitimacy of these tribunals, and yet problems such as the fairness of proceedings or the impartiality of such institutions are purposely excluded from the study.

The last observation should in no way take away from the extraordinary analytical work performed by *Williams*. The breadth and heterogeneity of the subject-matter make her book a truly remarkable achievement and a must-read for anyone who wants to study hybrid and internationalised tribunals.

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