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The Problem with Sovereignty: The Modern State's Collision with the International Law Movement

The legalization of international relations may be one of the most profound changes occurring today. Yet, "the move to law", as Goldstein, Kahler, Keohane and Slaughter call it, isn't necessarily compromising state sovereignty.

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Changing [conceptions of the modern state](#) inevitably provoke conflicting views of sovereignty. While some argue that the growing impact of cosmopolitan norms and transnationally-based governance are weakening state sovereignty, others claim that the concept is merely being redefined. Indeed, the latter group even includes proponents of global governance, who argue that state sovereignty can actually be strengthened rather than weakened by the transfer of power to the supranational level.

Regardless of which side of the fence you are on when contemplating this issue, it seems clear that increasing attempts to regulate international relations via legal means has had a contentious impact on traditional concepts of state sovereignty. To [Judith Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter](#), for example, legal instruments have indeed accrued political utility over time, but they argue this process is neither irreversible nor as ubiquitous as most of us might think. [Steven Haines](#), in contrast, claims that the international legalization of nation-state politics is not mere 'garnish on a plate'. The regulatory power of the law is indeed supplanting the sovereign power of the state, and thus points to one of the most profound changes occurring in international relations today.

Causes of International Legalization

While international legalization had its roots in a new post-1945 international order, the actual proliferation of global legal norms did not pick up true momentum until the fall of the Berlin Wall. As a result, we now have an abundance of international organizations, especially courts and tribunals such as the International Criminal Court (ICC), which develop and interpret international law relatively free from state interests. Legal internationalists, however, have not been the only impetus behind this development. The application of international law by domestic courts, as Haines points out, has also contributed to greater international legalization. So much so, in fact, that international law now "appears to be developing a mind of its own" - it is advanced by its own logic, by domestic pressures, and by a growing number of believers-practitioners.

But what do the relative decline of the American Great Sheriff and the emergence of rising global powers increasingly mean for international legalization? Will the likes of China and India use more and more legal mechanisms merely to blunt U.S. policies and norms? On the contrary, both Haines and Kahler argue. Instead, emerging powers can use international legalization to invigorate multipolarity, and therefore introduce greater equity into the international system. (In a multipolar system, after all, weaker states can instrumentalize international law in order to bind with stronger actors, and thus overcome disparities in power.)

Yet Kahler, et al, also rely upon functionalist logic to explain the development of international law. Governments properly regard international legal mechanisms as a cost-effective way of resolving problems via collective action. And as a result of this type of action, international law provides a degree of predictability in an otherwise complex and unpredictable international system. It is, in short, a form of high politics.

Consequences of International Legalization

Kahler, et al, not only describe the benefits that international legalization provides, they also identify several consequences of the state's interaction with its mechanisms. The development of international law, after all, may not only lead to greater political equity and more cost effective ways of solving problems, it may also change - to cite just one example - the very conception of state sovereignty itself. The rational part of state actors, after all, can learn to operate within the confines of the international law movement. If a state's distinct political interests have been furthered by international legalization, then it is more likely to look to these particular mechanisms to resolve other problems. The result is a "flourishing" of international courts and tribunals which 'tilt' peoples' ideas of sovereignty in far less exclusionary ways.

The Impact of Legalization on Three Notions of Sovereignty

Indeed, the "flourishing" of international legalization resonates with the idea that the concept of sovereignty remains subject to clarification and interpretation. The [Stanford Encyclopedia of Philosophy](#), for example, distinguishes between "internal" and "external" sovereignty. Whereas internal sovereignty describes the relationship between the state and its people, including the monopoly on the use of force, external sovereignty describes the relationship between several states, including the principle of non-interference. [Krasner \(1999\)](#), in turn, identifies four different conceptions of sovereignty: "interdependence sovereignty"; "domestic sovereignty", which corresponds to internal sovereignty; "international legal sovereignty" and finally "Westphalian sovereignty", which corresponds to external security.

As potentially helpful as these distinctions are, if we want to analyze the effects of international legalization on state sovereignty, it might be best to distinguish the role the latter plays in three different contexts - 1) in the context of international relations theory, for example, sovereignty is used as an analytical concept, 2) in the context of international law, sovereignty is a legal norm, which defines rights and duties of states, and 3) in the context of political debate, sovereignty is used to assess the freedom of action of a government.

To begin, sovereignty as an analytical concept is fundamental to understanding the composition of an anarchic international system. According to Waltz's theory of structural realism, state sovereignty is safeguarded because states are not subject to a higher or 'superior' authority. This allows states to act freely so long as they are not restrained by other states. So the multitude of global legal mechanisms and norms does not affect the validity of sovereignty as an analytical concept as long as legalization falls short of bringing about a world government. In fact, a stereotypical Realist would

argue that legalization does not change anything about world politics because laws only perpetuate the power of the already powerful. (Yet, one could argue that the emergence of international laws demonstrates that sovereignty is an increasingly useless concept for understanding the structure of the international system.)

Second, sovereignty as an international legal norm arose with the Treaty of Westphalia's (1648) formalized emphasis on its internal and external forms. External sovereignty, for example, safeguarded against outside interference in the internal affairs of states. Rulers were free to regulate the relationship between themselves and their people without external interference. Internal sovereignty, on the other hand, meant that a ruler enjoyed a monopoly of power. Yet the concept of sovereignty changed as monarchies were overthrown and replaced by republics and democracies. Sovereignty became conditional upon electoral processes and national consensus. But despite the transfer of sovereignty from individual rulers to whole citizenries, the concept did not lose its meaning in the process. In representative systems of government, sovereignty remains delegated to elected representatives. (By the way, a similar process seems to be underway today at the international level. States delegate certain aspects of their sovereignty to formal mechanisms of global governance. Understood in this way, sovereignty per se is not challenged by international legalization - only its meaning might be changed. Accordingly, a collision between international law and state sovereignty is not logically possible. International law established supranational conceptions of sovereignty and it can also facilitate its abolishment, should states wish to exercise this option.)

The third and final meaning of sovereignty is that of a measure of political practice. Sovereignty is about states acting independently and autonomously. Yet sovereignty in this context is difficult to quantify. Sovereignty is often used in political discourse, for example, to determine whether a state or society has gained or lost autonomy of action. Now, one can argue that while international politics is being legalized, states have lost autonomy. It would be difficult, however, to establish a causal link between legalization and loss of sovereignty in its third meaning. Is sovereignty not rather limited by the growing global interdependence which precedes the increasing density of international laws?

Societies where the rule of law is firmly established will understand that an increased density of laws can actually enhance autonomy rather than limit it. The same may be true at the international level: the legalization of international relations may actually help states regain some of the autonomy they have lost in the wake of increasing interdependence. Nevertheless, we should be prepared to hear certain actors continue to lament the loss of sovereignty. Recalling the domestic-international nexus in legalization, as pointed out by Haines, we notice that such a lament may just be indicative of a domestic actor losing power. We can be quite sure, the creators of International Organization may tell us, there is at least another one gaining.

Conclusion

Having examined the impact of international legalization, as analyzed in Goldstein, et al (2000), and Haines (2010), on state sovereignty, we find that the latter is hardly compromised by the former. The utility of sovereignty as an analytical tool in certain theories of international relations is not reduced. Neither can we talk of a collision between legalization and sovereignty in the second, legal sense of the term. The delegation of sovereignty to supranational organizations in certain areas does not abolish sovereignty per se. Thirdly, there will, of course, always be people who lament the loss of sovereignty, understood as national autonomy, in the political debate. However, a causal link between legalization and loss of national autonomy is difficult to establish. It may well be argued that the legalization of international politics gives states back some of the autonomy they have lost in the course of globalization. In other words, legalization may help states regain sovereignty.

Resources

[A Bright Future for International Law?](#) , Steven Haines, *GCSP Policy Paper*, 2010

[Rethinking the Nation-State: The Many Meanings of Sovereignty](#) , Joseph Joffe, *Foreign Affairs*, Nov/Dec 1999.

[Sovereignty](#), in the Stanford Encyclopedia of Philosophy.

[Sovereignty: Organized Hypocrisy](#) , Stephen D Krasner, 1999.

And finally, see the Summer 2000 issue of [International Organization](#) (Vol 54, No 3), which focuses on the topic of Legalization and World Politics. In particular, see the . . .

- [Introduction](#) by J Goldstein, M. Kahler, R O Keohane and A M Slaughter;
- The article on [Legalized Dispute Resolution: Interstate and Transnational](#), by R O Keohane, A Moravcsik, A M Slaughter;
- The article on [Legalization as Strategy: The Asia-Pacific Case](#), by Miles Kahler;
- And the [Conclusion: The Causes and Consequences of Legalization](#), also by Kahler.

For the rest of our content on "The State in a Globalizing World," check out our [dossier](#) on the topic.

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<http://www.isn.ethz.ch/Digital-Library/Articles/Detail?ots591=4888caa0-b3db-1461-98b9-e20e7b9c13d4&lng=en&id=135611>

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