

Cambridge University Press

978-0-521-76585-5 - Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism

Jean L. Cohen

Excerpt

[More information](#)

Introduction

Developments associated with globalization challenge the way we think about sovereignty, rights, legitimacy, and international law. We have been told for quite some time that state sovereignty is being undermined. The transnational character of risks from ecological problems, economic interdependence, burgeoning illegal immigration, and terrorism, highlight the apparent loss of control by the state over its territory, borders, population, and the dangers its citizens face. The proliferation of new threats to peace and security seem increasingly to come from civil wars, failing states, grave domestic human rights violations, and the risk that private actors will acquire weapons of mass destruction (WMD). Today belligerency and violent aggression requiring international regulation appears to be caused by anarchy and tyranny within states rather than anarchy between them.¹ Global governance and global law seem to be the necessary response to the problems generated by but not resolvable within the old framework of an anarchical international society of sovereign states.²

Indeed, key political and legal decisions are being made beyond the purview of national legislatures. Alongside other globalizing systems, we seem to be witnessing the emergence of a global political system in which multiple supranational actors bypass the state in the generation of hard and soft law. The apparent decoupling of law from the territorial state and the proliferation of new, non-state transnational and supranational legal orders and sources of law suggest that the former has lost legal as well as political sovereignty. The general claim is that the world is witnessing a move to global (for some, cosmopolitan) law, which we will not perceive or be able to influence adequately if we do not abandon the discourse of sovereignty.³ Apparently a new world order is emerging, in which global law based on consensus is, in key domains, replacing international law based on state consent.⁴ In the twenty-first century, the very category “international” appears outdated.

Viewed from a geopolitical perspective, the imperative of size, which first triggered the emergence and expansion of the international state system, has apparently re-emerged. It seems that the nation-state, as the city-state before it, is now too small to provide security and welfare. It is ironic that as soon as the international system of sovereign nation-states was universalized in the

Cambridge University Press

978-0-521-76585-5 - Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism

Jean L. Cohen

Excerpt

[More information](#)

aftermath of decolonization and the collapse of the Soviet Empire it apparently became an anachronism. Hence, in response to geopolitical and economy-related pressures, the effort to form ever more integrated regional polities and hence the tendency of international organizations to become global governance institutions (GGIs) making binding decisions and global law that intrude deeply into what was once deemed the “domaine reserve” of states, in order to provide collective security, peace, and welfare and solve collective action problems generated by interdependence.⁵ The UNSC is the key global governance institution in the global political system, and it now invokes the norms of the “international community” while drawing on its pre-existing public authority to engage in new and unanticipated forms of legislation and administration of populations and territory that directly (and at times, adversely) affect individuals and their rights yet which claim supremacy over domestic constitutional laws and other treaties.

Accordingly, the organizing principle of international society entrenched in public international law and in the UN Charter system – the sovereign equality of states – with its correlative concepts of non-intervention, domestic jurisdiction, self-determination, and so forth, seems outdated. It is alleged that the concept of sovereignty is useless as an epistemological tool for understanding the contemporary world order and that it is normatively pernicious. Indeed more than a few legal cosmopolitans argue that we are witnessing a constitutionalization of the international legal system in tandem with the replacement of the “statist” model of international society by a cosmopolitan, global political and legal community.⁶ They point to the key changes in the international system mentioned above to ground their claim of a fundamental shift in its underlying principles. Cosmopolitan legal and moral theorists invoke human rights discourse as the basis for arguing that “sovereignty” as an international legal entitlement and the legitimacy of governments should be contingent on their being both non-aggressive and minimally just. A radical idea is at stake: that the international community may articulate and enforce moral principles and legal rules regulating the conduct of governments toward their own citizens (when their human rights are at stake). By implication, the neutrality of international law toward domestic principles of political legitimacy is being (or should be so the argument goes) abandoned.

Although much debated, some view the transformation of the aspirational discourse of human rights into hard international law, its apparent merger with humanitarian law, and its deployment as justification for departures from the hitherto entrenched norm of non-intervention (except as a response to aggression or threat to international peace), as an indication of the constitutionalization of international law. Similarly, the discourse of constitutionalization is being applied to the expanding reach of GGIs.⁷ Since the end of the Cold War, the global political system centered in an increasingly

Cambridge University Press

978-0-521-76585-5 - Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism

Jean L. Cohen

Excerpt

[More information](#)

INTRODUCTION

3

activist UN Security Council now identifies and responds to the proliferation of the “new” threats mentioned above. The dangers these threats pose to “human security” – the term of art meant to displace the old focus on state security – also seem to indicate the necessity to transcend the state-centric, sovereignty-oriented paradigm of international relations and international law. Indeed there are now impressive global measures backing up the increased juridification of the “international” system including UN-sponsored “humanitarian interventions,” UN-authorized transformative “humanitarian” occupation regimes, UNSC terrorist blacklists and targeted sanctions against individuals whose names appear on them, among other global security measures made or authorized by an increasingly activist and legislative Security Council.⁸ These developments also seem to render the idea of unitary autonomous state sovereignty in a system of sovereign states useless for understanding the new world order characterized by global risks, global politics, and global law. In its place, we are offered a functionalist conception that disaggregates “sovereignty” into a set of competences and legal prerogatives which can be granted serially by the international community, conditioned on the willingness of states to meet cosmopolitan moral standards of justice, comport with human rights law, as well as demonstrating administrative capability (control).⁹ This disaggregated functionalist approach underlies the cosmopolitan notion of the international community’s “responsibility to protect.”¹⁰ It also informs attempts to replace the organizing principle of the post-World War Two international legal order – the sovereign equality of states and international law based on state consent – with a new international “grundnorm” – human dignity – allegedly informing the new types of consensual global law-making by the organs of the international community.

There is, however, another way of interpreting the changes in the international system since 1989. From a more disenchanted and critical political perspective, it seems that the organizing principle of sovereign equality with its correlatives of non-intervention, self-determination, domestic jurisdiction, consent-based customary and treaty law, is being replaced not by justice-oriented cosmopolitan law, but rather by a different bid, based on power politics, to restructure the international system. Relentless attacks on the principle of sovereign equality coupled with the discourse about “rogue” and “failed” states, “preventive war,” the “war on terror,” “unlawful enemy combatants,” etc., are useful for neo-imperial projects of great- or super-powers interested in weakening the principles that constrain the use of force and deny them legal cover or political legitimacy when they violate existing international law.¹¹ From this optic, the discourses and practices of humanitarian or democratic intervention, transformative occupations, targeted sanctions, terrorist blacklists, and the dramatic expansion of its directive and legislative powers by the Security Council in its fight against global terrorism (all driven by the US since 1989), are mechanisms which

Cambridge University Press

978-0-521-76585-5 - Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism

Jean L. Cohen

Excerpt

[More information](#)

foster the deformalization of existing international law, and enable the very powerful (the US predominant among others) and/or those states aspiring to become twenty-first-century great powers (Russia, China), to create self-serving global rules and principles of legitimacy, instead of being new ways to limit and orient power by law.¹²

Accordingly, the morphing of international organizations into global governance institutions does not herald a global rule of law or a global constitutionalism that tames sovereignty. Rather it involves the instrumentalization of the legal medium and of the authority of existing international organizations for new power-political purposes. “Global governance” and “global law” tend, on this reading, to authorize new hierarchies and gradations of sovereignty, and to legitimate depredations of political autonomy and self-determination in ways that are distinct from but disturbingly reminiscent of those created in the heyday of nineteenth-century imperialism.¹³ Sovereignty in the classic, absolutist (predatory) sense remains alive and well, but only for very powerful states – including those controlling global governance institutions (the P5: the permanent members of the UNSC) – while new technologies and practices of control are created through the innovative use of unaccountable and legally unconstrained power accumulating in those institutions – something the functionalist discourse of gradations of sovereignty and neo-trusteeship plays into. The direction of the new world order is, in other words, toward hierarchy not sovereign equality, and the appropriate concepts are not cosmopolitan constitutionalism but “grossraum,” regional hegemony, neo-imperialism, or empire.

This book is meant as an intervention in the debates and politics over the nature and possible future of the current world order. The stakes are quite high and the need to rethink the concept of the sovereign state and its relation to the globalizing international legal and political system has become pressing. Although I acknowledge that there are important changes wrought by globalization, this book rejects the notion that we have entered a cosmopolitan world order without the sovereign state. I argue that we are in the presence of something new but that we should not abandon the discourse of sovereignty or the ideal of sovereign equality in order to conceptualize these changes. Yet I do not thereby embrace a “state-centric,” sovereigntist or power-political reductionist conception of the shifts in the international system. Nor do I accept the futility of devising normatively compelling projects for the legal regulation of (and constitutionalization that limits) new global powers. I seek instead a middle way appropriate to the unavoidable dualisms between norms and facts, principle and power in this domain. I am critical of approaches that too quickly characterize our current world order as cosmopolitan and constitutionalist thanks to their anti-sovereigntist enthusiasm about international human rights, international juridification, and global governance. Such analyses overlook the ways global legal and political institutions can be

Cambridge University Press

978-0-521-76585-5 - Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism

Jean L. Cohen

Excerpt

[More information](#)

INTRODUCTION

5

the creatures of imperial ambitions of powerful states. But I am also critical of those motivated solely by the hermeneutics of suspicion, and focused exclusively on providing genealogical analyses which always and only portray law as an instrument or medium of power technologies, and which aim always and only to unmask new constellations as new power relations. For these approaches overlook the ways in which law and normative order fashions and constrains power, and the ways in which new political formations, in conjunction with political struggle, can enhance and not only restrict freedom.

In contrast to both approaches, this book will defend three theses. The first is that it is empirically more accurate and normatively preferable to construe the changes in the international system as involving the emergence of a *dualistic world order*. Its core remains the pluralistic segmentally differentiated international society of sovereign states creating consent-based international law (via custom and treaties). Superimposed on this are the legal and political regimes and GGIs of the functionally differentiated global subsystems of world society, whose institutional structures, decision-making bodies, and binding rules have acquired an impressive autonomy with respect to their member states and one another.¹⁴ My focus is the relation of the international society of sovereign states to the global political and legal subsystem with its referent, the “international community,” of which states are, along with the UN, the key organs. My second thesis is that within this dualistic structure, a *new sovereignty regime* is emerging, redefining the legal prerogatives of sovereign states.¹⁵ It is true that states no longer have the monopoly of the production of international/global law, and consensus operates on key levels of this system (regarding *jus cogens* norms in international society and within key global governance institutions such as the UN Charter organs, based on forms of majority voting). But states continue to play the key role in the production of international law. Moreover, the jury is still out on the nature and legal source of sovereign prerogatives and on the appropriate way to reconceive sovereignty, not to mention the prerogatives GGIs ascribe to themselves. On the one hand, the post-World War Two commitment of the international legal order to sovereign equality, territorial integrity, self-determination, and the non-use of force, is still very powerful. On the other hand, the increased commitment to human rights, and since the 1990s, to their global enforcement, as well as to the creation of global law and global governance informed by cosmopolitan principles, is also striking. I argue that the concept of changing sovereignty regimes is preferable to the discourse of a cosmopolitan world order for the former allows one to see the complexity, messiness, power relations, and contested character of the contemporary dualistic system. But I also argue that it is time to reflect anew on the concept of sovereignty itself. The functionalist approach to reconceptualizing (disaggregating) sovereignty is only one highly contested political alternative and I shall present another one in the first chapter of this book.

Cambridge University Press

978-0-521-76585-5 - Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism

Jean L. Cohen

Excerpt

[More information](#)

My third thesis is that the “further constitutionalization” of international law and global governance is the right approach but much depends on how this project is construed. The idea of the progressive constitutionalization of international law gained a foothold in theoretical discussions thanks to the new willingness of the Security Council to sanction grave domestic human rights breaches and the development of supranational courts to enforce the “values of the international community” regarding international criminal law – thus apparently indicating that the basic rights of all individuals would be protected even if their own states fail to do so. But the somewhat arbitrary and selective framing of certain domestic rights violations as threats to international peace and security meriting outside intervention, and the self-ascription by the UNSC of deeply intrusive legislative and quasi-judicial “global” governance functions unforeseen by the Charter and apparently not subject to judicial oversight or legal restrictions (some of which can themselves be rights violating such as the SC’s terrorist blacklists), have created a new legitimization problematic. Loose talk about “constitutional moments” is irresponsible in such a context.

The assumption of certain “global governance” functions by the UN, the premier GGI in the global political system, is unavoidable. Its further constitutionalization must be guided in part by cosmopolitan principles. In this book I will restrict my discussion of global constitutionalism to the UN Charter system. However, and this is crucial, unlike most theorists of global constitutionalism I argue that this project must be conceived on the basis of a *constitutional pluralist* rather than a legal monist perspective. Indeed, I will argue for the constitutional pluralist approach as the theoretical analogue of the sociological concept of a dualistic sovereignty regime. There now exists alongside the domestic constitutional law of each sovereign state an increasingly autonomous legal order coupled to the global political system. The constitutionalist character of the global political system in general, and of the UN Charter system in particular, however, is rudimentary, to say the least. It is a *vérité à faire* rather than a *fait accompli*. But given the heterogeneous character of a still pluralist and deeply divided international society of sovereign states, a monistic conception of the project of constitutionalization of the global legal order, whether one locates it in the UN Charter or not, is a bad idea. The risk is “symbolic constitutionalism” – the invocation of the core values and legal discourse of the international community to dress up self-serving regulations, strategic geopolitical power plays, and morally ambivalent military interventions and impositions, in universalistic garb.

This does not mean we must abandon the concept of global constitutionalism in favor of a disordered global pluralism of normative, legal, and political orders. I will argue instead, that the concept of a dualistic sovereignty regime based on the principles of sovereign equality and human rights, and the stance

Cambridge University Press

978-0-521-76585-5 - Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism

Jean L. Cohen

Excerpt

[More information](#)

INTRODUCTION

7

of constitutional pluralism given an appropriately reformed UN Charter system could be an important barrier to symbolic constitutionalism. I will, in addition, reconsider the theory of federation, on the intuition that a federal frame might be helpful for thinking through the puzzles of legal and political supranationalism. As the book will show, taken together these concepts may provide for legal, political, normative, and institutional bulwarks against the proliferation of neo-imperial projects and regional attempts at “grossraum” ordering (annexation or direct control of neighboring polities by a local great power) that invoke human rights, democracy, or human security concerns and global law while de facto undermining them. Chapters 1 and 5 will take up these theoretical and empirical issues.

If there are to be humanitarian interventions, transformative occupations, and Security Council legislation, these must be regulated and constrained by clear legal rules, appropriate, representative decision-making procedures adequate to the principles of sovereign equality and human rights, and there must be global bodies able to police constitutional limits. Ever since 1945, sovereign equality and human rights have become the two core legal principles of the dualistic international system, and both are needed in order to construct a more just version of that system. Given their global governance functions, it is now necessary to bring powerful international institutions and not only sovereign states under the rule of law, through political, institutional, and legal reform. They too must become legally and politically accountable in order to remain legitimate. Given the Janus face of law we must be aware that juridification can entail the authorization of new power hierarchies as well as normatively desirable constructions and limits of public power. But we cannot simply transpose domestic conceptions of legitimacy, democracy, or constitutionalism, to the global political system. We must maintain the distinction between internal and external principles of legitimacy when speaking of human rights and political legitimacy even while searching for acceptable and effective functional equivalents for ordering GGIs.¹⁶ The constitutional pluralist approach and the federal frame are crucial for preserving the principles of political autonomy expressed in the still compelling idea of sovereign equality while addressing the plural levels of the globalizing legal and political international order and their interrelation. Political institutional and legal reform along the lines of further constitutionalization is thus part of the counter-project to empire, neo-imperialist, and/or grossraum ordering.

This book is thus an exercise in international political theory. It will operate on two levels: empirical-diagnostic and normative-prescriptive. By bringing together normative political theory, legal analysis, constitutional theory, and a critical diagnostic approach toward shifts in the international political system since 1989, I will attempt to clarify the dilemmas and propose some solutions to the paradoxes generated by the astonishing pace of regulation

Cambridge University Press

978-0-521-76585-5 - Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism

Jean L. Cohen

Excerpt

[More information](#)

and juridification on the global level. I do so in three case studies framed by two theoretical first chapters and a conclusion.

Overview

Chapter 1 addresses the theoretical issues involved in the reconceptualization of sovereignty and its relation to international law in the context of globalization. I begin with a brief reconstruction of the traditional absolutist conception presupposed by many global constitutionalists as well as legal pluralists who argue for abandoning the concept. Doing so will enable me to dispense with the distractions of the old canard of the incompatibility of sovereignty with international law. I will distinguish between the *concept* of sovereignty and various *conceptions*, to lay the conceptual groundwork for the idea of changing sovereignty regimes.

Briefly, the concept of sovereignty involves a claim to supremacy of the authority and exclusive jurisdiction of the state within a territory and over a population, signifying the coherence, unity, and independence of a territorially based legal system and political community. The correlative of domestic supremacy is external independence, i.e. the political autonomy and self-determination of the domestic constitutional order and political regime vis-à-vis outsiders (foreign powers). However, the absolutist conception linked the analytic concept of sovereignty to a positive set of competences including the competence to decide its own competence; to the necessity of organ sovereignty (i.e. the locus of unified sovereign powers within a specific organ of the state); and to the command theory of law (the notion that positive law and the unity of a legal system depends on tracing it back to the will of an uncommanded commander: a legislator whose legislative and constituent power is by definition *legibus solutus*: legally illimitable).¹⁷ The dilemma that a sovereign state cannot be bound or bind itself yet must be able to act as a legal person in international law in order to be recognized as sovereign and hence to bind itself and be bound by that law followed from this absolutist conception. This led to the assumption of the incompatibility of sovereignty with international law (and indeed with constitutionalism domestically).

The next section of the chapter discusses the challenges to this version by theorists in the early twentieth century focusing on Hans Kelsen's reconceptualization of sovereignty as legal concept, instead of as a fact of power or as a set of material competences. This will allow us to see that the real dilemma of sovereignty is not that it cannot be self-binding, but that it seems to entail the impossibility of two autonomous valid legal orders operative within the same territory, or regulating the same subject matters and persons. Kelsen believed that the existence of a mature international legal system requires abandonment of the doctrine of sovereignty. I will present the Kelsenian argument, and some criticisms of it.

Cambridge University Press

978-0-521-76585-5 - Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism

Jean L. Cohen

Excerpt

[More information](#)

OVERVIEW

9

The third section of Chapter 1 addresses the re-emergence of this idea in the current context. The significant changes in the substantive rules and sources of positive international law that have been characterized by some as constitutional moments, apparently confirm the Kelsenian approach – i.e. the monist interpretation of the increasingly autonomous global legal order seen as post-sovereign. But this view is deeply contested. Against those who mobilize the discourse of constitutionalization to characterize the increased juridification and regulatory reach of regimes of international law and governance, legal pluralists insist on the multiplicity of sites of law-making and rule. They point out that there is no overarching meta-rule for regulating interaction or conflicts among or within these globalizing legal and political orders. The hierarchy of authority among global, international, and domestic law is and should remain unresolved. But they too reject state sovereignty as a relevant discourse or as an answer to this question.

What are the stakes of this dispute? The former see the constitutionalization of public international law as the way to tame the bellicose power politics and imperialist tendencies of nation-state sovereignty by constraining actors to solve their disputes through law while protecting human rights. The latter insist that the heterogeneity of international society and the pluralism of the international political system (along with the proliferation of international legal regimes within it) is a desirable antidote to hegemonic imposition that too often occurs in the name of “universalist” global law. This assessment expresses sensitivity to the asymmetry among global powers and to the emergence of new types of hegemony or imperial formations, not to mention the diversity of a still deeply divided international society. From this perspective, global constitutionalist discourse appears naive if not apologetic. The discourse and project of constitutionalism with respect to the emergent global political system is rejected out of hostility to the leveling (*gleichschaltung*) of the autonomy of the multiple legal and political orders that would apparently have to go with it. It is seen as a strategy of power aiming at putting claims to final authority beyond contestation and at suppressing alternative policies or ways of ordering. Legal pluralists argue that the diversity of legal-political orders increases the avenues of contestation and protects domestic autonomy and local democracy, while also making the legitimacy of global law a question rather than a given. But the constitutionalists counter that accepting the multiplicity of orders as is leaves the issue of coordination, authority, and hierarchy for the powerful to resolve.

As just indicated, the really hard question today concerns the compatibility of sovereignty not with international law (long resolved) but with autonomous supranational legal orders that allegedly have constitutional quality and claim supremacy and jurisdictional reach that penetrates the black box of the territorial state. How can we conceptualize state sovereignty within the framework of a supranational polity like the European Union (EU) or a globalizing

Cambridge University Press

978-0-521-76585-5 - Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism

Jean L. Cohen

Excerpt

[More information](#)

political and legal order like the UN Charter system? Is the concept of state sovereignty useless for understanding the globalizing world order? Or are the principles of sovereignty and sovereign equality, along with human rights, as I argue, central to such a project?

I take up the theoretical debates surrounding these issues in the fourth and fifth sections of Chapter 1. I follow a different route in reconceptualizing sovereignty than that of the global constitutionalists many of whom either abandon it altogether or opt for the functionalist disaggregation of the concept (ultimately another way to abandon it). I adopt Kelsen's insight that the concept of sovereignty is ultimately a negative one that must entail the unity, supremacy, and autonomy of a legal system although very few specific positive competences follow from this.¹⁸ Conceptions of sovereignty along with the content (prerogatives) entailed by it are various depending in part on the nature and structure of the international order and the existing sovereignty regime. But sovereignty is not only a legal concept; it is also a political one: autonomy of a sovereign state has to mean internal political self-determination of the political community. These aspects of the "negative" concept of sovereignty cannot be "disaggregated." It is true, however, that international/global law and legal conceptions of sovereign prerogatives are, in part, the expression of a concrete political order, of a *nomos*.¹⁹ The shape of the new "nomos of the earth" is at stake in the contestation over the way to rethink sovereignty, rights, global governance, and the constitutionalization of globalizing international law.

In the subsequent two sections I challenge the monist theoretical basis of the neo-Kelsenian assumption that global constitutionalism involves the abandonment of sovereignty, by presenting and defending the competing conceptual approach of constitutional pluralism. This approach was first developed in order to theorize the changing sovereignty regime in the EU, once the latter developed an autonomous legal system claiming supremacy over and direct effect within domestic legal orders of sovereign member states which also claim autonomy and supremacy.²⁰ I reflect on its theoretical coherence with a view toward its relevance to the changes that have occurred and should occur in the global political system. As already indicated, I see the constitutional pluralist approach as an alternative, based on my reconception of sovereignty and my idea of a dualistic world order, to the false choice between monistic hierarchical constitutionalization and pluralist disorder.

Any discussion of constitutionalism beyond the state, however, must perforce confront the question of whether there exists at the supranational level an object capable of being constitutionalized. It must, in short, confront the issue of political form. This is especially pressing with respect to global governance institutions. I take up these issues in Chapter 2. I do so because I share the discomfort expressed by some analysts with the contemporary discourse of constitutionalization that seems to equate it with juridification