

Do Human Rights Challenge State Sovereignty?

Written by Daria Jarczewska

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DARIA JARCZEWSKA, MAR 15 2013

To What Extent do Universal Human Rights Encoded within International Law Challenge State Sovereignty?

Abstract

This essay will attempt to demonstrate that while universal human rights encoded within international law do challenge state sovereignty, they do so mainly at the conceptual level. In practice their capacity to interfere with states' domestic affairs or impose certain practices on it is severely limited. However, differentiating between formal, international legal mechanisms, and informal, transnational advocacy networks (Teitel, 2002), this essay also acknowledges the more indirect impact of the latter that may not question the notion of sovereignty itself, but may empower human rights advocates and foster domestic change (Donnolly, 2011, p. 507). Also, the essay attempts to argue that the perceived inability to question the state's sovereignty does not render human rights law meaningless—the processes of negotiation and dialogue, sometimes contestation on one part, between individual states and human rights advocacy movements may also lead to internal changes, on more consensual basis which is more consonant with the 'peaceful' nature of human rights. In its argumentation this essay will mainly rely on the opinions from within the academic debate, and empirical evidence, adopting the rationalist view of sovereignty (Cole, 2005, p.475).

Introduction

Human rights triumphalism of 1989 was very much successful in establishing the view that we were witnesses to the dawn of a new era where human rights were to be the criteria of the states' stance on the international arena (Reus-Smit, 2001, p.520). However alluring that vision may be, one does not have to provide an account of deplorable human rights abuses of the present day (Amnesty International, 2011; Teitel, p. 356, 2002) to prove its problematic nature. Suffice to say, international human rights law is congruent with international public law (Landman, 2008, p. 10), and that one is based on the principle of state sovereignty (Brownlie, 2003, p. 287; Reus-Smit, 2011, p. 284). For that reason, the ideal of human rights, the normative framework of the international human rights law, though antithetical to the traditional conception of state sovereignty, in practice is rather subordinate to it.

Conceptual Challenge

Prior to WW2 states' treatment of their citizens was a matter of exclusive domestic jurisdiction (Scott, 2004, p. 29-30). In half a century this perception has changed significantly with the idea of human rights legitimizing this issue as part of a global, ethical discourse (Reisman, 1990, p.869). That is contrary to the traditional aim of public international law, which is to regulate the interactions of states, as opposed to their internal practices (Teitel, 2002). Human rights (again, as an ideal) question the primacy of states in the international system, stressing the importance of individuals and non-state actors (Clapham, 2006). Human rights give individuals grounds to claim rights, goods, treatments, services, protection and opportunities of their states (Donnolly, 2011, p.507). As such, they stand in stark contrast to what is traditionally considered the black letter international law: the sovereign equality and legal supremacy of states (Cohen, 2004, p.3). Furthermore, while the principle of the jurisdiction of a state gives it authority over all persons, property and activities in its territory, airspace and waters (Scott, 2004, p.27), human rights are

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concerned with individuals regardless of which jurisdiction they belong to.

Practical Impossibilities

The nature of international human rights law is strongly paradoxical; it questions the moral omnipotence of the state (Smith, 2009, p. 27), yet it is versed in public international law which has the principle of state sovereignty at its core (Reus-Smit, 2011, p. 278). As acknowledged in disciplinary literature, international law operates in a state-based system and the sovereign equality of states is problematized in practice by the importance of power relations, which leads to there being little probability of 'states carrying equivalent weight in international law' (Scott, 2004, p. 14).

The question of states' accountability is furthermore complex as states constitute both the main actors and agents of the international law. The consent-based notion of legal obligation creates a stalemate situation where states may only be held accountable to those laws they consented to (Reus-Smit, 2011, p.284). Therefore states may not be the sole subjects of international law (Teitel, 2002, p.363; Clapham, 2006), yet they are the main decision-makers as to which laws they will be held accountable, to which laws they will internalise and to how they enforce that law (Alvarez, 2012, p.35). Whether adopting a monistic or dualistic approach with regard to domestication of international law (Starke, 1936), states either incorporate international law into domestic law or translate it into their legal system, which does not allow any sovereignty breaches.

This tension is exemplified within the Charter of the United Nations, which promotes the ideal of human rights and contains the notion of the sovereign equality of states and the principle of non-intervention (United Nations, 1945), with the latter being far more entrenched and constituting 'the basic constitutional doctrine of the law of nations' (Kamminga, 1992, p.1).

The selectiveness of international human rights agenda enforced by the legal organisational instrumentalities demonstrates the extent to which they are versed in the political context and power relations. During the Cold War the main discourse focused on the Soviet Union but failed to address Mobutu or General Ziad. The dichotomy diminished with time, but many oppressing states were still not targeted, Saudi Arabia being one of them. With the events of September 11th the ideal of universal application of a human rights standard became yet more unfeasible (Ignatieff and Meyers, 2001). As rightly pointed out by Kamminga, the UN is more likely to be concerned with violations in small, politically isolated states, than in more powerful states (Kamminga, 1992, p. 2).

Whether one considers conventional or customary international law, of which international human rights law is part of, they both gain their legitimacy from the states' practices (Brownlie, 2003). In terms of the conventional law, not only do states choose which law they are bound by, but they also choose to what extent and how. It was not a rare occurrence that the states consented to legalisation of a certain law or ratification of a certain document as they saw them as bearing little consequences (Woodiwiss, 2006, p. 32). For example, when the United States of America ratified the Convention on the Prevention and Punishment of Crime of Genocide, they did so making two 'reservations', five 'understandings' and one 'declaration' (Scott, 2004, p. 219). Thus, by legal means a state may still avoid bearing full responsibility of the law it ratifies. Similarly, the Kingdom of Saudi Arabia stated that it would not concur with the Convention on the Elimination of all Forms of Discrimination Against Women should it be in conflict with Islamic law, which in practice makes it null and void (Smith, 2009, p. 28-37).

Thus, in the consensus-based system of international law, states make the law, and states implement it. That impels the question of international monitoring mechanisms. The UN treaty-monitoring bodies are especially worth looking at. The most common methods of enforcement of those entities are reports, inter-state and individual complaints, which all come with their limitations. In most cases the reports are limited to comments and suggestions made to states. In terms of complaints, the states in question must consent to this practice, and furthermore, the processes of complaint are laborious and are often implemented in case of states that do not commit severe human rights abuses. For example, 80 per cent of individual complaints in the Committee against Torture came from Sweden, Switzerland, Canada, Australia and the Netherlands (Smith, 2010), which proves how endogenous compliance with human rights often influences a state's stance with regard to human rights treaties and international legislation (Cole, 2005, p. 475). What is more, if an individual complaint does make it through the laborious processes of its recognition, the

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committee in question is merely authorised to recognise or deny a violation. Those crude measures are in great part due to the compromise made with the notion of state sovereignty.

Therefore, much as we may witness to the emergence of globalised jurisprudence, this new political order is clearly at odds with the strong moral stance of human rights that presupposes equal moral value of each individual (Coates, 2000, p. 90) and rights being dependent on humanity, rather than nationality (Smith, 2009).

Power of a Norm

Non-state actors can no longer be marginalised in terms of their performance on the international arena with regard to human rights (Clapham, 2006, p. 29). Yet it must be acknowledged that they cannot shape customary international law, as states do, or formally enact law (Reus-Smit, 2011, p.286). What they can do, however, is influence the normative milieu that states operate within. Norms themselves, regardless of their enforceability, authorise actions of human rights advocates and empower them (Donnelly, 2011, p. 499).

Despite successful ways in which international civil society shaped political agenda, their activity must consider the state, and work with it accordingly to achieve change. Donnelly rightly argued that 'NGOs, no less than states and international organisations, must usually act through, rather than around states' (Donnelly, 2011, p. 504). Similarly, the implementation of international human rights law, even if agreed upon on the international level, relies on national implementation (Smith, 2009, p. 41; Donnelly, 2011, p. 496). Social change of any kind may only be reinforced or influenced to some extent by external factors. However, it is more probable to succeed if initiated in the domestic realm, as 'changes that have been imposed by forces outside a country are unlikely to last' (Kamminga, 1992, p. 2). Establishing human rights norms often involves identity, structural and political change (Sikkink, Risse, 1999, p.3) which no international law can guarantee without willing cooperation of a state in question and internal approval.

Thus, advocacy networks, despite being unable to directly shape human rights legislations, may be crucial in terms of constructing international agenda, providing normative grounds for domestic actors and creating conditions conducive to institutional change (ibid, p. 26), often by means of cooperation and dialogue with state actors, not in opposition to them.

An example of a successful cooperation between domestic actors and international advocacy forces could be the one that led to major changes in Kenya in the mid-1980s. International actors by the policy of 'naming and shaming' brought international attention to the human rights situation in Kenya, questioned its government's moral infallibility and impunity, empowered domestic opposition groups. That in consequence led to gradual concessions on the government's part and eventual enduring changes, as lifting in 1992 the ban on representation of Amnesty International in the country (Schmitz, 1999, p.39-63). The character of change was consensual, not imposed, and it was the effect of cooperation between transnational actors, domestic groups and state authorities.

There is also likelihood that NGOs and advocacy groups will provide a more uncompromising, more politically efficacious critique of human rights violations than international human rights legal instrumentalities. As previously argued, international human rights law is entrenched in a state-based system, and is constructed and enforced by states. As such, it is faced with limitations. The UN treaty bodies must attempt not to alienate politically certain states (Smith, 2009, p. 33) and often struggle for impossible compromises. NGOs, on the other hand, though operating mainly within states, usually have independent sources of funding and may be involved in more robust practices of 'naming and shaming' and have a more decisive stance towards international organisations and governments (Palma, 2012, p. 76).

Thus, the moral force of the ideal of human rights should not be dismissed. The international human rights encoded within international law rather than challenging state sovereignty have to reconcile itself with it and adapt to the existing political contexts. Yet the ideal of human rights that comprises the normative foundation of human rights is in itself a powerful tool, used by non-state actors, network, movements and individuals themselves.

Conclusion

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International legal human rights instrumentalities rather than challenging state sovereignty are constrained by it; their interpretation, implementation and enforcement rely on states (Donnelly, 2011, p. 496; Archibugi, 1995, p.126-127). The Universal Declaration of Human Rights may not yet be an international Magna Carta of all mankind, as envisaged by Eleanor Roosevelt (Sikkink, 1999, p. 3) and the notion of sovereignty is still the cornerstone of international public law and its practice. Still, the substantial normative foundations of the human rights ideal are the source of its strength and its potential for generating political change. Stating that the ideal of human rights would only be performative when congruent with the interest of powerful states would mean undermining its moral power and how it may be used to create normative discourse, empower human rights advocates and sustain a political milieu conducive to change. Maybe human rights do not lay siege to national borders, but they still may exert influence on states' behaviour on domestic and international levels, even if only of consensual and voluntary nature. Also, human rights groups' working through and with national states, as opposed to around them has significant benefits (Smith, 2009, p. 41). In the end, it is about ensuring that states give adequate protection to its populations and respect their rights, not undermining their authority.

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Written by: Daria Jarczewska

Written at: University of York

Written for: Chris Roger

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