What are the Consequences of Globalization for Public and for Private Transnational Legal Orders?

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Globalization has far-reaching empirical consequences for transnational legal orders as well as important conceptual and normative consequences for international legal theory and practice, many of which are still unrecognized. This essay will examine the explosive growth in public and private transnational legal fora and the empirical creation of interlegality before arguing that this growth creates a need for new conceptualizations of international law that are not bound by assumptions of Westphalian sovereign states or the classic liberal separation of private and public. The final section of the essay reconnects with the empirical by providing a theoretical framework that is able to include deterritorialized, public-private hybrid types of legal orders and is therefore better suited to examine the consequences of globalization on transnational legal orders.

I. Empirical Consequences of Globalization for Transnational Legal Orders

The enormous movement of products, people, and ideas across borders which is the key constitutive element of globalization created demand for legal orders that could also span borders. Therefore, the growth in globalization provided the foundation and the incentive for the tremendous growth in transnational legal orders. Growth in transnational legal orders is the obvious consequence of increasing globalization, but legalization does not always follow from globalization. Globalization has led to an increase in institutionalization, which is often accompanied by legalization, but not always. For instance, ASEAN has institutionalized many practices and integrated in many ways, but remains without legalized institutions. Governments choose legalized institutions because they solve particular problems of commitment or collective action, increasing the prospective benefits from cooperation (Kahler 2000 663). Most intergovernmental institutions have chosen to legalize certain practices, and this legalization has been characterized by increased precision in legal language with less clear increases in obligation and delegation (Kahler 2000 662). Intergovernmental treaties and institutions provide the backbone of public international legal orders, which is only a fraction of the growth in transnational legal orders from globalization.

Multi-national corporations have been leading agents in globalization, which makes it logical for them to also be leading agents in the development of private global legal orders. Indeed, MNC demand has driven most of the explosive growth in private courts and in particular MNC demand has encouraged development of global institutions of commercial arbitration. Arbitration is a method of dispute resolution that has become enormously popular with globalized corporations because it can offer technical expertise, privacy, confidentiality, and extreme flexibility. Globalization has led to a 'market of institutions for international commercial dispute resolution for private parties' (Mattli 2001: 920) and corporations or other actors can choose the forum they feel is best suited to a case off what is basically a global a la carte menu of justice. Private actors can also choose how they would like their justice served since arbitrators can 'dispense with legal formalities and may apply whatever procedural rules and substantive law best fit a case' (ibid). Private courts are demand driven and the demanders of international law are often the same [corporate actors] as the suppliers, but this has not created an entirely separate private legal order, because states and public actors are inevitably consulted about or present in any transnational legal order.

The growth of public and private transnational legal orders has created a web of international law and an

environment of 'legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassing' between private and public organizations and orders. This situation is described as interlegality, or a legal life constituted by an intersection of different legal orders (Santos 1987: 299). Most globalization proceeded under a liberal or neoliberal ideology which promoted the idea that public and private were separate spheres and designed legal orders accordingly; however, this division is more ideological than material and globalization brings the private sphere into continually overlapping orbit with the public sphere. International relations theorists have largely ignored the extent to which states are involved in the regulation of transnational business, but state behavior regarding the creation of binding obligations and legalized intergovernmental institutions to coordination regulation makes dismissing this issue increasingly difficult. Realists argue that legalization changes very little about state behavior, because compliance or non-compliance is still determined by national interest. In many areas states have been reluctant to create binding public transnational law; for example despite significant global coordination, 'sensitivity to sovereignty costs continues to preclude dense hard law in this [monetary policy] area' (Simmons 2000: 274). However, in other areas states have been willing to limit their sovereignty by creating public transnational tribunals with teeth: for instance, in trade policy, 'the cost of noncompliance would simply be too high to allow domestic administrative processes real freedom to deviate from a WTO decision' (Krisch and Kingsbury 2006: 4). This apparent inconsistency in the willingness of states to submit to public transnational law is explained by constructivists using normative evolution and domestic political consequences. Constructivists usually take the view that normative effects dominate the institutional effects of legalization and that more legalization generates more compliance by states because it embeds norms and increases the costs of non-compliance. In the eyes of both realists and constructivists 'legalization strengthens commitment' (Simmons 2000: 275). For policymakers, domestic political consequences remain paramount and legalization creates a stronger commitment to abide by the norm as well as something concrete for key norm-favoring constituencies to monitor. Therefore, constructivists point to the mutually reinforcing role that normative evolution and legalization can play through soft law, which simultaneously documents that status of an international norm at a particular point in time and strengthens it in the future. Despite the disagreement as to how the entangling legalization between states and private business should be theorized, the empirical evidence shows that states are involved in shaping private legal orders and corporations are involved in shaping public transnational orders.

II. Conceptual and Normative Consequences for Transnational Legal Orders

The growth in transnational public and private legal orders was not preceded or accompanied by a shift in normative or theoretical approaches to law, and the normative consequences of the changing practices of international law have not been adequately theorized. As new transnational legal orders come under scrutiny, the only consensus consequence seems to be that 'the basis of legitimacy in international law is increasingly in doubt' (Krisch and Kingsbury 2006: 1). What is abundantly clear is that the liberal separate between public and private spheres is no longer a meaningful distinction between legal tribunals. Almost any discussion of the contemporary legal environment brings up 'the question whether any distinction between public and private law should be maintained in the global order' (Krisch and Kingsbury 2006:7). An examination of the empirical evidence of state intervention in private law and corporate intervention in state policy shows that 'the distinction operates most significantly at a symbolic level' (Klare qtd. in Cutler 2203:53). Globalization has empowered transnational corporations in ways that 'seriously challenge the state's monopoly over legislative and adjudicative functions in international commerce' (Cutler 2003: 22). The reality that corporations have become a source as well as a subject of international law challenges not only the conceptual divide between public and private, it challenges the assumptions on which most international law is based.

Traditionally, theories of international law were premised on consent by sovereign states; the assumption that completely sovereign states exist and are powerful enough to create or destroy international legal orders is inadequate and unhelpful in the contemporary world. Even if public transnational legal orders were artificially separated out of the global milieu this assumption is untenable, since consent is no longer required for international public law to be binding and enforceable. As examples of unwilling states forced into legal proceedings from the ICJ and ICSID illustrate, 'the role of consent dwindles as domestic ratification and implementation lose importance in global regulation' (Krisch and Kingsbury 2006: 11). When state consent is no longer the basis for international law, then classical accountability mechanisms are useless because even effective domestic feedback mechanisms

cannot channel dissent to the international level. The assumption that state consent or even the consent of civil society matters is even more untenable when private transnational legal orders are considered. In reality, a consequence of the growth of private transnational law is the erosion of civil society or democratic power in favor of a rule by legal elites: 'global administrative law might shrink the space for politics in favor of juridifed mechanisms, limiting democracy and establishing a juristocracy instead' (Krisch and Kingsbury 2006: 9). The idea that norms arise through society or discourse and are legitimated by democratic or at least accountable public bodies is not reflected in the practice of private transnational law, since for the most part 'legalized international institutions reflect the professional norms of lawyers' (Kahler 2001: 667). Globalization and the accompanying demand-driven growth in private law were driven by the same powerful constituencies: the legal profession and businesses engaged in the rapid expansion of international trade and investment (ibid). These powerful constituencies form what Krisch and Kingsbury call the 'juristocracy' and Cutler calls the 'mercatocracy', the elite mix of public and private authority that has shaped transnational legal orders. Since the institutional features of dispute-resolution methods can often be convincingly linked to the needs or demands of private parties, it is reasonable to assume the 'spaghetti bowl' of codes and organizations that exist today are more beneficial for these constituencies than a public, consent-legitimated system of international law. International legal theory has not been able to recognize the power of these constituencies because for the most part the contemporary 'spaghetti bowl' is eschewed by theorists who prefer to work within the traditional categories of public and private law.

There is an acute need for legal theorists to adopt assumptions that reflect the contemporary reality of transnational legal orders. Instead of relying on state consent to legitimate codes and institutions, legitimacy should in theory and in practice derive from accountability, which can be defined as requiring public transparency and the capacity of the affected public to disempower political agents (Krisch and Kingsbury). Instead of focusing on the politics between states, theorists should look at the politics within states and the powerful constituencies that operate to build and use legal orders across national boundaries. Theorists using interests to explain behavior should consider the actions of leaders in terms of the leaders self-interest as well as the leaders national interest, since public international forums can be a means of political problem solving for vote-maximizing politicians (Kahler 2001: 668). Constructivist theorists could examine how hard and soft laws operate differently and reflect the different power arrangements and how different types of power operate in issue areas. Before theorists can pursue any of the fruitful avenues of inquiry into transnational legal orders, assumptions must be reconciled with the main normative and conceptual consequences of globalization for transnational legal orders. Assumptions need to adapt to the two main consequences discussed earlier, specifically that the divide between public and private is dead and that states are not sovereign entities powerful enough to legitimate international legal orders with their consent. Once theorists adopt assumptions that incorporate these realities, meaningful conceptual progress can be made and the important normative consequences of globalization in transnational legal orders can be better examined and theorized.

After the faulty assumptions about sovereign states and public/private spheres are dissolved, the consequences of globalization become clearer and theorists can grapple with the deterritorialization of legal orders and tandem rise of neoliberal globalization and a corresponding ideological approach to law. The deterritorialization of law is a consequence of globalization as well as a driving force for it: 'transnationalization of the legal field is a constitutive element of globalization' (Santos qtd in Cutler 2003: 19). The endogeneity between globalization and transnationalization of legal orders is fundamental to the continued growth and development of both since in many ways they are dependent on each other for survival as well as being mutually reinforcing and mutually legitimating. Additionally, as mentioned earlier, economic globalization and the transnationalization of legal orders are driven by the same constituencies: the business and legal elites powerful in multiple domestic orders. Typically these elites and the policies they promote have worked to subordinate domestic policy concerns to neoliberal market discipline and to insulate dominant economic forces (typically, themselves) from popular or democratic pressures. (Cutler 2003: 29). These policies were typically wrapped in neoliberal ideology which encouraged competition among states for investment, spurring a drive to create investor-friendly legal climates. Of globalization's many important consequences for legal orders, arguably the most important and most commonly ignored consequence is the spread of a competitive mindset among policymakers to create the easiest or most pliable legal order possible to attract investors. The idea of a global marketplace for justice is completely contrary to traditional formulations of justice being delivered through a single authoritative legal order, but as legal orders were globalized, neoliberal ideology was discursively linked to liberal theory through the role of constitutions and the image of separate private and public

spheres. The separation of private and public spheres has never been real and interaction between the two always tolerated in neoliberal practice, since the private sphere or international markets are the ultimate authority and are needed to discipline 'bloated' states. Furthermore, international and transnational legal organizations were developed to support the adoption of Anglo-American corporate law throughout the world that created a ripple of ideological consequences with the globalization of 'Western' legal norms. The global spread and entrenchment of norms and legal practices associated with 'Western multinational' corporate practice is the most important consequence of globalization for legal theory. These practices make a mockery out of the idea that transnational legal orders are legitimated by state consent as well as the idea that frameworks with a 'constitutionalist character' are adequate for analysis. In the context of global governance, a pluralist heterarchical model would be more adequate for theorizing and analysis of both public and private transnational legal orders (Krisch and Kingsbury). Essentially, the changes in legal practice that accompanied globalization invalidated traditional assumptions in legal theory, but new conceptual models have yet to be formulated to critically analyze the normative impacts of neoliberal thinking on legal orders.

Globalization revolutionized the power and authority of transnational business and legal actors. Empirically, private and public transnational legal orders grew and adapted in response to the demands of these new actors and the role of the state in legitimation and legal proceedings changed enormously. More interestingly, these empirical changes triggered by globalization cemented the collapse of theoretical constructs like state consent or the divide between public and private. While operating with the faulty assumptions of sovereign states and separate spheres, legal theory was unable to appreciate the immensity of globalization's impact on legal orders; if these assumptions are updated, legal theorists can evaluate the normative consequences of the neoliberal ideology employed to legitimate the emerging 'globalized' legal order.

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Written at: Oxford University
Written for: Dr R.B. Hall
Date written: 2007

About the author:

The author/s of this content have been verified by E-international Relations, but wish to remain anonymous.