

# Sovereignty and International Law

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Two recent events demonstrate shortcomings in traditional notions of sovereignty. In 1991 the United Nations—an organization whose General Assembly stated that “no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State”<sup>1</sup>—allowed a group of nations to intervene in the internal affairs of the state of Iraq to aid the Kurdish people. In 1991 in the hope of ethnic self-determination a number of regions of Yugoslavia declared independence; however, the government of Yugoslavia still claimed sovereignty over these lands and foreign states were reluctant to recognize these new states. Both Donat Pharand in his article “Perspectives on Sovereignty in the Current Context: A Canadian viewpoint” and Ruth Lapidoth in her article “Sovereignty in Transition” state that changes in international law and technological and economic developments call for a more flexible notion of sovereignty; however, the authors disagree on whether these changes constitute an erosion of the sovereign state system. Lapidoth, a professor of international law at the faculty of law and the department of international relations at the Hebrew University of Jerusalem and member of the Permanent Court of Arbitration, asserts that sovereignty—the total and indivisible power of states—has been eroded by these changes.<sup>2</sup> Pharand maintains that despite limitations of sovereignty brought about by these changes sovereignty remains the corner stone of international law.<sup>3</sup>

Ruth Lapidoth’s thesis in “Transition of Sovereignty” is that the classic connotation of sovereignty as the total and indivisible power of states has been eroded by modern technical and economic advancements and by new limitations of international and constitutional law. This thesis is clearly stated in the conclusion and is also stated in the second paragraph of the

article. Lapidoth divides her discussion of sovereignty into four sections: The Traditional Notion of Sovereignty, Limitations on the Monolithic Character of Sovereignty, The Decline or Metamorphosis of Sovereignty in Present Times, and Sovereignty and Self-determination. Lapidoth's main points are that technology and commerce have blurred the borders of states and created an interdependence among nations, the rise of democratic and federal systems has dispersed sovereignty with states, changes in international law governing the ability to wage war and intervention into domestic affairs of states have eroded the power of states. She also sees self-determination as being a threat to sovereignty.

In the first section of the article, The Traditional Notion of Sovereignty, Lapidoth provides a short discussion of the history of the notion of sovereignty and then discusses the implications of sovereignty. Her history of sovereignty analyses the subject at an individual level. She examines the concept of sovereignty as stated by authors such as Jean Bodin, Hobbes, Georges Scelle, Hans Kelsen, Charles Rousseau, James Rousseau, Max Huber, Francis Harry Hinsley, Rudolf Bindschedler, Joseph Kunz and Alfred Verdross. In this section the notion of two aspects of sovereignty is introduced: internal sovereignty and external sovereignty. The internal aspect of sovereignty is the power a state has over internal matters that is not subject to any foreign law other than international law. The external aspect of sovereignty stipulates that all states are equally accountable to international law. From this discussion, Lapidoth arrives at three main elements of sovereignty: a sovereign state is a subject of international law, a sovereign state is not controlled by any other state, and a sovereign state is able to exercise an amount of state power. Both realism and idealism are used in this discussion of sovereignty. Lapidoth mentions

authors such as Hobbes and Hegel that have taken a realist approach to sovereignty by claiming that there is no power higher than the state. Lapidoth also mentions authors such as Scelle and Kelsen that have stressed the importance of international law over sovereignty and, in doing so, taken an idealistic stance on sovereignty.

After the discussion of the history of sovereignty, Lapidoth discusses the implications of sovereignty. The first of these implications is the sovereign equality of states. She quotes from a 1970 declaration by the United Nations General Assembly that states that sovereign equality entails that all states are judicially equal, all states enjoy all the rights of full sovereignty, each state must respect other states, the territory and political independence of states are not to be violated, each state is free to choose its own course of development, and each state has the duty to comply with international law and live in peace. Lapidoth also states that participation in international law and compliance to international law does not interfere with sovereignty because this does not place the state under the control of another. Another implication is non-intervention; this means that states cannot interfere with the affairs of another state. Exclusiveness is another implication, meaning the state alone has jurisdiction over its territory. Other implications are that a state's powers need not be enumerated, that a state cannot be forced to accept arbitration without its consent, and that states are free to wage war. Lapidoth also sees the positivist theory of international law as an implication of sovereignty. She concludes this section by stating that the notion of absolute sovereignty has generally been rejected, and instead a notion of sovereignty limited by international law has replaced it. Lapidoth sees that the modern notion of sovereignty is still one which sees it "as an

indivisible and all-embracing quality [;]" however, she believes that this view of sovereignty has changed.<sup>4</sup>

In the section entitled *Limitations on the Monolithic Character of Sovereignty*, Lapidoth addresses what she sees as the divisibility of sovereignty. Her point is supported by a number of examples including the dual sovereignty of the United States federal system in which both the union and component states have sovereignty. Lapidoth examines this issue on the state level by using the experiences of the United States, Canada, and the former Soviet Union as examples; these examples also use the diplomatic-historical method of analysis because they examine the actual historical events and their outcome. She also analyses the division from the individual level by mentioning the thoughts of Leon Duguit, H. Hugo Krabbe and Harold J. Laski on the subject. The effect divided sovereignty has on international law is "that two or [more] authorities may have limited, relative, differential or functional sovereignty over certain areas, groups or resources."<sup>5</sup>

In the section entitled *The Decline or Metamorphosis of Sovereignty in Present Times*, Lapidoth examines the impact of the interdependence of states and changes in international law on the notion of sovereignty. Lapidoth points out that states are interconnected technologically and economically in such a way that they have become interdependent. She claims that developments such as ballistic missiles have reduced the relevance of borders, and free trade zones eliminate the idea of self-contained economic systems. Interdependence has eliminated any hope for sovereign equality of states. She also points out that international law as agreed on by the members of United Nations now prevents the waging of war except in self-defence. Modern international law

also allows the intervention into the domestic affairs of states for the purposes of humanitarian aid or preserving world peace. These two changes in international law remove two of the former rights of sovereign states: the right to wage war and the right to non-intervention.

In the section entitled Sovereignty and Self-determination, Lapidoth claims that the possibility of some groups being able to gain self-determination threatens the sovereignty of states. On this point she defeats her own argument by acknowledging that the same UN declaration that established self-determination as international law also provided for the protection of the sovereignty of all states and the preservation of territorial integrity; however, she is correct in stating that if all groups were allowed self-determination in all circumstances many problems would arise.

Lapidoth's conclusion that sovereignty has changed in nature from being indivisible to being divisible and restricted by international law is well founded. Through the course of this article she utilizes the systematic level of analysis by examining the entire system of sovereign states and by examining the actions of groups of states through organizations such as the UN. She also uses the diplomatic-historical method of analysis by examining past events and their outcomes. She also takes a positivist view of international law by claiming that international law is created and agreed upon by states. Her primary source of international law is the United Nations. For United Nations declarations to become international law they must be agreed upon by the system of states.

Donat Pharand, a professor of law at the University of Ottawa, Canada, in the article "Perspectives of Sovereignty in the Current Context: A Canadian viewpoint" agrees with Lapidoth that the nature of sovereignty has changed due to modern events; however, Pharand's thesis is that state

sovereignty remains as the corner stone of international law, in spite of important limitations. This thesis is clearly stated in the second paragraph. Pharand sees international law as limiting sovereignty in two ways: the removal of some immunity from foreign courts and the allowance of intervention for humanitarian purposes.

Like Lapidoth, Pharand begins this article by giving an overview of the concept of sovereignty. Pharand mentions theorists such as Bodin and Hobbes. Unlike Lapidoth, Pharand mentions that the accepted beginning of the modern sovereign state system was at the Peace of Westphalia in 1648. Pharand also mentions that the contemporary view of sovereignty is that it consists of two aspects: internal and external. Pharand claims that it is obvious that state sovereignty is relative and not absolute because if it were otherwise international law would not exist. For Pharand, “the difficulty is in determining, in precise terms, the limitations imposed by international law.”<sup>6</sup> Pharand examines the history of sovereignty on the individual level—by discussing the opinions of individuals on the meaning of sovereignty—and systematic level—by discussing the groups of states that worked together at the Peace of Westphalia. The analysis of the Peace of Westphalia is also an example of the diplomatic historical method of analysis.

Pharand also examines the sovereign equality of states, territorial integrity, political independence, and principle of non-intervention. Each of the examples of international law Pharand provides is an agreement between countries such as United Nations declarations or the Charter for the Organization of American States, there for Pharand employs a positivist view of international law. Pharand analyses the issue non-intervention from a state level by analysing the actions of the United States in Nicaragua. All of

these subjects are also analysed on the systematic level since international law is an agreement between all nations.

Pharand asserts that sovereignty is now limited by two changes to international law. These two changes are restriction of immunity from foreign courts and the allowance of intervention in some circumstances. Pharand's point that states no longer have complete immunity from foreign courts is backed up by two Canadian court examples: one which involved the United States Navy and another that involved the government the Congo Republic. This change came about after World War II "when states began to engage more in extensively in commercial activity."<sup>7</sup> What this change means for international law is that when a state becomes involved in commercial activity within another state it is then accountable to the host states jurisdiction. Pharand analyses this topic at both the state and systematic level. He analyses the actions of states of Canada, the United States, and the Congo, and he uses the systematic level of analysis by examining the systematic acceptance of restrictive immunity. Pharand also uses the diplomatic-historical method of analysis by examining when and how states like Canada accepted and interpreted the law.

Pharand also contends that new international laws governing humanitarian intervention have restricted sovereignty. He first examines international law governing relief organizations such as the Red Cross. According to Pharand, laws governing these non-governmental organizations does not effect sovereignty because the involved parties or parties must consent to their entry; however, sovereignty has been restricted when it comes to intervention by states. Pharand points out that the interpretation by the Internal Court of Justice is that for intervention to occur it must be with the goal of helping all afflicted parties and not just one faction. He uses

the example of the United States and Nicaragua to prove this point. International law now allows intervention on the part of states or groups of states into the other states for humanitarian purposes. He uses a number of examples including the UN intervention in Iraq to aid the Kurdish people.

Pharand supports his thesis that sovereignty is still important to international law by first listing a number of rights of states still have and then discussing those that have changed. Like Lapidoth, Pharand uses international law as written by international government organizations such as the United Nations and Organization of American States; this a positivist view of international law. Pharand's main method for analyses in this article is diplomatic-historical. From the Peace of Westphalia to the UN intervention in Iraq, Pharand examines past events and their significance in international relations.

Both Pharand and Lapidoth make it clear in their articles that modern events have changed the notion of sovereignty. These articles demonstrate the conflicting opinions that can arise from similar events. Pharand presents a view where sovereignty is still the most important aspect of international law, while Lapidoth rejects old idea of sovereignty all together. Whether or not either author is correct in his or her assessment of the extent of changes of sovereignty, both authors make their point clear: the definition and implications of sovereignty must be re-examined. The nature of sovereignty will continue to change as long as the people who define it advance technologically and politically.

# Works Cited

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(1994): 19-37.

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<sup>1</sup> Ruth Lapidoth, "Sovereignty in Transition," Journal of International Affairs 45.2 (1992): 330.

<sup>2</sup> Lapidoth 325.

<sup>3</sup> Donat Pharand, "Perspectives on Sovereignty in the Current Context: A Canadian viewpoint," Canada—United States Law Journal 20 (1994): 19.

<sup>4</sup> Information for this paragraph is taken from Lapidoth 325-331.

<sup>5</sup> Lapidoth 332

<sup>6</sup> This information and quotation comes from Pharand 11-13.

<sup>7</sup> Pharand 15