

The Rule of Law and the Limits of Functional Analogy in International Legal Discourse

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Abstract

This presentation seeks to draw out certain consequences from a prevalent tendency amongst international lawyers to conceptualise the international legal order by reference to a standard of legality derived from domestic legal experience. On this basis, international law is held up in comparison to a kind of Rule of Law ideal, according to which law should exist not merely as an instrumental gloss upon the realities of political action, but as an overarching, and in that sense autonomous, legal order capable of pre-empting available political choices. Conceived in this way, the decentralised structures of the international legal order inevitably appear deficient – an observation which has fuelled much scepticism over the years as to the efficacy, if not the reality of international law. In order to respond to this scepticism international lawyers have sought to explain how, notwithstanding the *formal* differences between international and domestic legal orders, international law can be understood to *function* as an autonomous legal order in the sense described. Commonly, this involves accounting for how the institutional features of a developed legal order – law-making, adjudication and enforcement – can be carried out in a decentralised legal order.

In this presentation, I engage critically with many of these functional readings, arguing that at best they distort reality, and at worst provide a legitimising vocabulary for otherwise illegitimate conduct. Ultimately, these efforts undermine the necessary formality of law implicit in the Rule of Law ideal which inspired them in the first place. Accordingly, I argue for the adherence to international law's necessary formalities as a counterweight to these de-formalising trends. A meaningful Rule of Law in international affairs will depend for its coherence upon retaining formal criteria to differentiate the legal from the non-legal. Whilst the way in which we conceptualise international law may seem irrelevant to its function, I argue – with reference to recent case law on the limits of institutional competencies – that such conceptualisations play an integral part in responding to Rule of Law concerns.

Biography

Dr Richard Collins is a lecturer in law at the University of Sheffield, where he teaches in the areas of public law, international law and legal theory. The above lecture is based on his PhD thesis, defended in September 2011. His other published work focuses on the theory and institutional structure of the international legal order, particularly in light of recent “constitutionalist” debates, as well as the role of international organisations in international law. Most recently he co-edited (with Prof. Nigel D. White) and contributed to the book, *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Abingdon: Routledge, 2011).