Abstract

The ‘socio-legal’ has always been a vigorously contested space in International Law theory. The ‘legal’ has been consigned to near-irrelevance by realist international relations theory on the one hand, and lauded as a remarkable achievement of modernity on the other – a civilising enterprise aspiring to the preservation of peace by the State under the rule of law.

The instrumental role of International Law in achieving the peace is now being re-oriented by liberal institutionalists such as Anne Marie Slaughter. This theory postulates a regime of international, or at least transnational, law formulation through the interaction of networks of non-state actors such as domestic courts, regulatory agencies, executives, NGO’s and other discursive communities. There is a ‘thicker’, more diverse set of international relations which erodes the sovereignty of State from without and within. Globalisation can be characterised as a context and a vehicle for this new liberal-cosmopolitan project. The theory is not limited to procedural innovation, however, for it carries within it the specific telos of liberal internationalism, or in its strongest form a liberal millenarianism which aspires to something like a Kantian peace in an expanding zone of liberal law.

If there is an ongoing tension in International Law theory between the theory and the practice then this new liberal institutionalist approach at least has the virtue of claiming to describe practice. However, its teleological claim must bear closer scrutiny from perspectives of both theory and practice. Is it really ‘new’ or just a light shone more brightly on old practices? Is there such a fundamental shift as to amount to a disaggregation of the State and an undermining of the centrality of the State in the global order? Do these networks represent something authentically ‘liberal’ or are they merely opaque, unaccountable, self-selecting elites? Are they really just a kind of vulgar interest-group liberalism or do they represent an embryonic civil society? Finally, can or even should liberalism make any claim to a post-historical space that leaves the non-liberal world mired in ideological backwaters?
‘Socio-legal currents in International Law Theory’ (Work in Progress)

‘…the function of a theory is to formulate or guide practice; to provide a relatively abstract framework for the understanding and determination of action’¹

Introduction

The ‘governance’ dilemma both within states and in the international order comes from the tension between the need for institutions and rules which can deliver collective benefits and the danger they pose to liberty.² We need more government yet fear it. Thus in International Law the tension is between Sovereignty and Global Governance. The model of International Law / International Relations theorised by Anne-Marie Slaughter aspires to realize the benefits of cooperation within a regulatory framework that does not import an ‘oppressively coercive global authority’.³

Realist images of International Law

The post-1930’s Realist vision of international relations theory sees states as (overwhelmingly) the primary actors in international relations. They are characterised as egoistic (in that they are solely concerned with pursuing self-interest), rational (pursuing maximum self-interest) and unitary (in manifesting a single directing mind). They are opaque (one cannot and need not look behind them) and functionally identical (equally endowed with aspects of international personality). International Law is seen as epiphenomenal, a mere by-product, and reflection of the power relations of dominant states. It ‘hovers’ above the international order but is not instrumental in behaviour. The theory is essentially empirical – ‘what happened’, not ‘what should have happened’; how the world really works not how it should.

Note that although it claims that no moral justification is required to justify states’ behaviour, arguably the choice of interests upon which to base policy is a normative act reflecting a particular world view (e.g. Koskiennemi).⁴ Realism may be said to reflect the actual aggregated preferences of citizens in a utilitarian sense or alternatively in a communitarian sense of reflecting some deeply held values and beliefs that may or may not coincide with community preferences at a given

³ Ibid.
historical moment.\(^5\) (eg US action in Iraq is arguably infused with assumptions about liberal democracy; the overthrow of Allende in Chile was not). This argument echoes those of Constructivists, who say that each state embodies a set of values and identity which is prior to the formulation of its interests, that is to say state actors are constituted by deep norms which are a product of their history, culture and circumstances. For example, the United States can be seen as embodying notions of popular sovereignty – of power emanating from, and legitimised by, its people, and not (for example) from foreign institutions. Hence its predilection for unilateralism (when it can get away with it). The point is that a more reflective view of Realism suggests that state actions themselves are motivated by, and infused with, ideology and normative content so that hegemonic liberal democratic states, for example, will inevitably export those values through their actions. Others see an ‘idealist’ strain in Realism’s support for the intrinsic value of sovereignty, or more specifically of self-determination.\(^6\) But such actions may nonetheless produce immoral outcomes, such as human rights violations in other states, and so the normative content of Realism is incomplete.

Generally the Realists say that the international order is essentially anarchic, International Law is auto-interpretive with remedies lying in self-help, and states are constantly preparing for war.\(^7\) The movement was especially strong after World War II and during the Cold War, though it had no explanation for the peaceful dissolution of the former Soviet Union. International courts, like international law itself, are unable to restrain the exercise of state power but rather reflect it.

**Liberal Institutionalist images of International Law**

These theorists tend to agree with the Realist image of states as rational maximisers of self-interest but say that there is more going on than this – that this image does not take sufficient account of the co-operative behaviours of states as influenced by international institutions. It includes notions of regime theory wherein institutional norms and rules evolve out of given subject matter areas such as human rights, climate change, trade, etc. Law clarifies and stabilizes expectations and reduces the risk of defections.

Thus as well as looking to state actors this theory looks as well to their institutional contexts as significantly determining behaviour. It includes principles of state consent, and of states in turn deriving legitimacy from the consent of their citizens. Domestic political structures are important in explaining state behaviour, particularly in the empirical observation that seems to bear out Kant’s prediction

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\(^6\) Anderson, supra note 1 at 1260-61.

that republican (ie representative) or liberal democratic states would not wage war with other as their citizens would not permit it.  

*Slaughter’s re-conception of a ‘new world order’*

Slaughter and others (eg Teson …) go behind the images of states and institutional contexts to the individuals and privately constituted groups who increasingly shape International Law and International Relations. There is a move away from a state-centered account to one that sees governments as representative of various segments of domestic society whose interests determine state policy. Historical conceptions of statehood and sovereign equality are impediments to the dynamic which drives the ‘real’ world of transnational networks. Domestic ‘politics’ become the focus. The primary actors are individuals and groups acting domestically and transnationally in dense transgovernmental networks. Examples include the technocratic and epistemic communities animating climate change policy, or transnational frameworks of criminal law for the control of drug trafficking and terrorism, securities regulation, banking and insurance supervision (a favourite example being the Basle Committee on Banking Supervision).

The new order she postulates is one of sub-state actors – legislative, judicial, regulatory, bureaucratic, private – whose persuasive (‘soft power’) discourses shape international relations and international law in effectively nationalizing international law. Legal actors – legislators, judges, regulators – are of particular importance. She looks to the ‘disaggregated’ state which lies behind the ‘veil of sovereignty’. Between liberal states these disaggregated components will interrelate in dense networks. Of particular significance for her is the evolution of a transnational legal order – ‘a network of municipal courts applying a complex array of domestic and transnational laws, legitimised by their democratic origins, with global implications’. Where consistency in interpretation and application are required, for example in respect of treaties, a supranational court would ideally be established. She cites the European Court of Justice and the European Court of Human Rights as paradigmatic examples.

But generally domestic courts will be more important than international courts and tribunals in regulating and enforcing a transnational law informed by common issues and their resolution in other liberal democracies. There will be horizontal dialogue between municipal courts and vertical dialogue with supranational courts. In this scepticism toward the ability of international courts to deal effectively with

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8 Kant’s ‘perpetual peace’ was to depend on states having a ‘republican’ constitution, the presence of a ‘pacific federation’ among states, and extensive ‘international commerce’ underpinned by ‘cosmopolitan law’, said by some to approximate the modern liberal democratic state (Marks, supra note 12 [?] below at 464).

9 Koskienniemi, supra note XXX at 33.


11 Ibid. at 3.
politically charged issues she has something in common with Realists like Morgenthau.

Slaughter does not articulate any explicitly normative content to this new order, but it is clearly animated by a liberal democratic ideology and ultimately premised on, and legitimated by, faith in a Kantian peace, wherein liberal states do not wage war with each other. She defines liberal democracies in terms of their institutional arrangements as including:

- Some form of representative democracy secured by the separation of powers
- Constitutional guarantees of civil and political rights
- An independent judiciary dedicated to the rule of law
- A market economy based on private property rights

She is hostile to utopian ambitions of ‘world government’, or a liberal internationalist ideal, on both practical grounds (irreconcilably different values and cultures) and normative grounds (threats to individual liberty). The ambition is toward global governance, not global government. But she is anti-pluralist in postulating a liberal democratic world order, postulating a world of liberal universalism rather than one of realist difference and its associated risks of war.\(^{12}\)

(Examples: Neil’s transnational criminal law (drugs, terrorism). Climate change (driven initially by networks of scientists?)

Globalisation ‘…state sovereignty has been parcelled both upwards (to international institutions such the WTO and Bretton Woods institutions) and downwards (to market actors and NGO’s)\(^{13}\)

Liberal democracy a product of modernity …secular, democratic ideals, liberty, rule of law,
Postmodern? …freewheeling, loose-jointed, always tentative/ ad hoc / contextual [?] …though still infused with grand narrative / deep structure of liberalism)

With respect to the usefulness of Slaughter’s model, we can say that

- It takes account of the complexity and multi-level nature of transnational and international interactions ie it is a useful descriptive and predictive account incorporating flexible and decentralized options (it is dynamic) and both high and low politics. International Law and International Relations are portrayed as polycentric.
- It incorporates and gives substance to globalising influences such as communications technologies, cultural practices, a new cosmopolitanism,

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\(^{12}\) Marks, supra note 12 [?] at 469.

\(^{13}\) Rajagopal article “IL and social movements …” (?)
though the impacts of globalisation are already being incorporated into the international order and international law

- It offers a transformative agenda for international relations, albeit a totalising one grounded in a particular liberal democratic conception of culture

**Critique of Slaughter**

There are variety of fairly obvious critiques of Slaughter’s model of a new world order. For example:

- It is not necessarily empirically accurate\(^\text{14}\) eg it arguably exaggerates the level of cooperation and harmony between liberal states (eg US unilateralism) and understates cooperation with illiberal states. It assumes that consensus rather than conflict will emerge. (NZ example re reluctance of courts to incorporate native rights jurisprudence from Canada; willingness to breach commitments under Convention to Eliminate All Forms of Racial Discrimination …simply pick and choose what suits political agenda)

- It is internally inconsistent, for example in risking illiberal outcomes whereby communities no longer control their own legal systems and where there is no consensus as to the common good ie is undemocratic!

- There is a more obvious democratic deficit in the nature of the transnational networks themselves. They may occasionally be legislators but more often regulators, judges and private groups and individuals who at best are one remove from representative government and more often not even that. It might be more accurate to characterise the policy influence of such groups as mere interest-group liberalism\(^\text{15}\) with elected governments at best doing unprincipled mediation of the self-interested demands of contesting groups.

- Loss of accountability, transparency and checks and balance with respect to domestic courts

- Her model (disingenuously) eschews normative theory but it implies totalising, universalising assumptions about the superiority of liberal democratic cultures, including for example controversial issues like free market economies. By implication it marginalises ‘illiberal’ states.\(^\text{16}\) She assumes the triumph of liberal democracy in a ‘market place of ideas’, ignoring the role of power inequalities. Her model is teleological, with history moving toward modernist values of rationality and freedom.\(^\text{17}\)

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\(^\text{16}\) Slaughter’s suggested reforms include amending UN Charter Article 2(7) (‘Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state’) to permit intervention in order to strengthen democratic institutions (eg US in Iraq?). A stronger version is found in Teson, who advocates democracy as pre-condition for sovereignty, including membership of the UN.

• It also assumes too much homogeneity among liberal democracies. For example, New Zealand does not have constitutionally entrenched individual rights, but tends toward a utilitarian rather than a Kantian liberalism. The forms of liberalism are themselves contestable. As with above, her model is implicitly ‘anti-pluralist’.  

• It is very ‘messy’. It has no explicit motivating ideology other than a crudely implied liberalism, few mechanisms for the pursuit of consistency in both procedural and substantive norms, and in all likelihood unstable. Its ad hoc networking has a satisfying postmodern resonance but given the stakes in international relations that may not be enough – market places (of ideas and commodities) offer no assurance of appropriate or even desirable outcomes, particularly if power rather than ‘merit’ continues to dominate.

• Koskienniemi: calls for an interdisciplinary integration (with international relations) mean a shift away from formalism (and an embrace of sociology and ethics) which dilutes the international lawyer’s motivating enquiries as to what is ‘valid’ law …” …[it] leads lawyers to contemplate an agenda that is posed to them by an academic intelligentsia that has been thoroughly committed to smoothening the paths of the hegemon”.

Summary

Slaughter’s conception of a ‘new world order’ seeks to articulate a new ‘transnational space’, a ‘cluster of disaggregated, liberal states’ for the integration of international law and international relations. International Law has arguably been marginalised and under-theorized by its relegation to the role of an afterthought to International Relations and its commitment to Realism in the second half of the twentieth century. The concern, however, is that its motivating spirit of liberal democracy will serve to shift those discourses closer to the hegemonic influence of the United States through its ability to generate consensus on shared beliefs but underwritten by power. The risk is of ‘just wars’ and ‘neo-colonial adventures’ (such as Iraq).

‘…a call to increase ‘collaboration’ between international lawyers and international relations theorists, together with the sociology of the end-of-State (as we know it) and the political enthusiasm about the spread of liberalism, constitutes an academic project that cannot but buttress the justification of American hegemony in the world’. Martii Koskienniemi, “Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations” in Michael Byers (ed) The Role of Law in International Politics (OUP, 2000) 17, 30.