

An Emerging Liberal Theory of International Law and the Non-Enforcement of Foreign Public Laws

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A New Liberal Theory Emerges

In recent times liberalism has been invoked as a justification for the view that international relations and law are generated by the people, or more specifically the individuals and groups which constitute States. This resort to liberalism at the international level has been very much a response to the apparent failure of international relations theory to acknowledge the importance of individuals to world politics. Liberalism is seen as the generator of a new paradigm for international relations theory; a paradigm which is apt to supplant the prevailing mode of thought (namely realism), which posits political and physical power as the touchstone of international relations. This new strand of liberal theory focuses attention on the genesis of international relations and law. It aims to convince us that thinking about States in terms of the people that populate them rather than as entities in themselves gives better definition and understanding to international relations.

In light of the emergence of this new liberal theory of international relations the purpose of this paper, starting in Part I, is to examine the arguments of the new liberalism and the ramifications it will have for a theoretical understanding of international law. In Part II the application of the liberal thesis to a case study is analysed. Part III assesses the coherence of the new liberal theory and its future as a theoretical justification of international law.

I. The Liberal Thesis

The primary claim of this strand of liberal theory (like any other) is that individuals are fundamental to political action and therefore any analysis of the political action of a State must pay attention to the domestic constitution of that State. In other words, the way States behave at an international level is simply a reflection of the way a particular State has constituted itself domestically. A broad ideological claim posited in accordance with this thesis is that (liberal)

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democratic States possess domestic constitutions that make them peace loving and thus generally desirable.

The advocates of liberalism

This new (or resurrected) approach, advocating the primacy of liberalism in international relations theory, is clearly articulated in Andrew Moravcsik's "Liberalism and International Relations Theory".¹ Moravcsik explains:

The central insight distinguishing Liberal international relations theory is that States are embedded in domestic and international civil society, which decisively constrains the underlying State interest on which foreign policy is based. This concern with State-society relations permits Liberals to endogenize variation in national identity, interest and purpose within the explanations of the international behaviour of States. This insight can be restated in the form of three non utopian assumptions: (1) the fundamental actors in world politics are individuals and privately constituted groups with self interest and risk averse preferences; (2) national governments are representative institutions, whose policies reflect some subset of societal interests; and (3) State behaviour is shaped primarily by the configuration of governmental interests, rather than resources, institutions or other external political constraints.²

Moravcsik, though, makes it clear from the outset that he is not purely a liberal; his research strategy is to integrate liberalism and realism so that liberalism may account "for the variation in the configurations of state identities and substantive interests", while realism may explain "the outcomes of interstate strategic interaction that result from those configurations".³ This approach which he terms "minimal Liberalism" sees liberalism as the primary explanatory theory and it is resorted to first and foremost. Realism is given the secondary role of explaining the constraints liberalism will endure.⁴

Anne-Marie Slaughter Burley (hereinafter Slaughter) has done much of the groundwork in establishing the new liberalism as a theory of international law. For Slaughter, liberalism directs our attention to the local/domestic structure of States and the way in which interests are represented. Building on Moravcsik's basic premise that international outcomes are inherently situated amidst the political discourse of a State, she moves on to make the distinction between liberal and non-liberal States. This is a major move which Slaughter counsels is not an "us" against "them" categorisation.⁵ This may be so, but Slaughter in her writings is constantly an advocate for the liberal State which she claims is the normative position to achieve.

The liberal/non-liberal divide is earmarked by Moravcsik in his discussion of "republican liberalism". Republican liberalism finds definition in the themes of equality and participation. For Moravcsik, as for Kant before him, there is a

1 Moravcsik A, Paper No 92-6, *Working Paper Series*, The Center for International Affairs, Harvard University, Cambridge, USA, April 1993.

2 Ibid, p 3.

3 Ibid, p 5.

4 Ibid, p 45.

5 Burley A, "Towards an Age of Liberal Nations" (1992) 33 *Harvard International Law Journal* 393 at 404.

certain truth to the fact that representative democracies with a rule of law and individual rights will be less likely to initiate international aggression.⁶ Dictators and despots make international problems; they are in no sense risk-averse.

The dichotomy of liberal and non-liberal could well be a divisive one; however for Slaughter it represents a mechanism through which to better understand international relations and law. Slaughter, following Moravcsik and Kant, unashamedly takes the stance that all nations ought to be cast in the liberal mould. Thomas Franck, riding the same liberal wave, seeks an internationally recognised right to democratic governance.⁷ The liberal State is seen to be applauded from all quarters; but how exactly is it defined?

Slaughter defines the liberal State as one that has the following attributes:

- formal legal equality for all legal citizens and constitutional guarantees of civil and political rights such as freedom of religion and the press;⁸
- a representative legislature based on the consent of the people and a separation of powers;
- legal protection of private property;
- a market economy.⁹

She later adds the criteria of an independent judiciary and commitment to the rule of law.¹⁰

As a measure of persuasion Moravcsik and Slaughter suggest that the core assumptions of liberalism—that individuals are the fundamental political actors, that governments represent and are constrained by the interests at work in the State, and that State behaviour reflects the nature and configuration of State interests—are empirically supported, and to this end both rely on empirical research to support the liberal/non-liberal divide. In introducing empirical data they aim to convince the reader that liberal international relations theory is evidenced in the practice of world relations.

Liberalism then, as a theory of international law, offers to:

- change the focus from State power as the centre of international law;
- concentrate on individuals as the generators of political power and actions;
- in so doing establish the individual as an integral part of the theoretical structure underpinning international relations and law;
- provide a normative theory of the nation-State.

6 Moravcsik, n 1 above, p 27.

7 Franck T, "The Emerging Right to Democratic Governance" (1992) 86 *American Journal of International Law* 46.

8 Australia has a problem fitting this criteria because it does not have a constitutionally guaranteed bill of rights: see Charlesworth H, "The Australian Reluctance about Rights" (1993) 31 *Osgoode Hall Law Journal* 195.

9 Burley A, "Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine" (1992) 92 *Columbia Law Review* 1907 at 1915.

10 *Ibid*, p 1919.

Having asserted the basic ideas of liberal theory it is now appropriate to examine the role such a theory could have in underpinning and explaining principles of international law.

Slaughter and the Act of State doctrine

While Slaughter envisages a broad and prominent role for liberal theory in defining principles of international law, her major case study to this point has been the Act of State doctrine. Therefore it is Slaughter's application of liberal theory to the use of the Act of State doctrine in the courts of the United States of America that we must focus on in evaluating the ability of liberal theory to give theoretical justification to international law.¹¹

Slaughter suggests that the domestic courts of the United States will apply the Act of State doctrine as a conflict of laws (choice of law) rule when dealing with other liberal States. They will recognise the legal system of the other liberal State and either apply the law of that State in the zone of legitimate difference or ignore it where the difference is beyond what is acceptable to a liberal State. In this way the domestic court recognises the laws and legal system of the foreign State; subject to a finding of gross deviation from liberal norms. The law of the other State is applied so far as the law is one that a liberal State could legitimately make: the zone of legitimate difference.¹²

Where non-liberal States are concerned, Slaughter claims the Act of State doctrine is seen as a rule of judicial restraint in deference to the separation of powers and executive government. In essence the domestic Court in dealing with an Act of State of a non-liberal State chooses to repudiate the laws and legal system of the foreign State by not touching the matter and leaving the issue to be resolved through the political arms of government. The fact, then, that a State is non-liberal prevents the domestic Courts from legitimating the matter and activates the Act of State doctrine as a rule of judicial restraint.¹³ The key point, she argues, is that the domestic Courts do not want to adjudicate upon the laws of the non-liberal foreign State because this would entail recognising the validity of the foreign legal system. Instead they use the Act of State doctrine as a rule of judicial restraint advising the Court not to touch on the issue and not to legitimate the foreign legal system.

Slaughter concludes that the domestic structures of States dictate the way States behave and the respect States receive in international affairs. Amongst liberal States the Act of State doctrine is used as a mechanism for upholding rules of law created through a liberal domestic system, while in relation to non-liberal States it is used to admonish or at least ignore oppressive domestic regimes. In one sense it is a rule of comity, in the other a rule of rejection. This principle of international law is explained and justified, says Slaughter, by liberal theory.

11 Burley, n 9 above. The US Act of State doctrine is not exactly the same as that applied in Australia and England, although the High Court in *Spycatcher*, n 18 below, relied on a selective reading of US cases to describe Act of State—more in terms of judicial restraint than choice of law.

12 Ibid, pp 1941ff.

13 Ibid, pp 1950ff.

In analysing US case law on the Act of State doctrine Slaughter comes up with empirical evidence of a liberal theory of international relations at work in the mire of international law or (in light of how this issue has traditionally been classified) private international or transnational law. Having found evidence that a liberal internationalist model is descriptive she argues for the normative value of such a model. In a nutshell the liberal internationalist agenda is preferred because it promotes peace and individual freedom.¹⁴ She claims that in the case of the Act of State doctrine the differential application of the rule in terms of liberal and non-liberal States will achieve much. It opens the way for change and improvement of domestic conditions, in that non-liberal States can be forced by pressure into becoming liberal, because once the Act of State doctrine is applied in its second fashion: that is, as a principle of judicial restraint, the non-liberal State is branded as such for all the world to see and censure.

It must be reiterated at this point that Slaughter sees liberal internationalism as underpinning all public international and transnational law.¹⁵ This paper looks at just one small part of that agenda primarily because this is the area which Slaughter has explored the most. It should also be noted that Slaughter supports the notion of the State and is not out to deconstruct it (like Philip Allott¹⁶ and Fernando Tesón,¹⁷ the cosmopolitan theorists). However the sovereignty of the State is not left immune, since through liberal theory it is attacked from within. If the State is non-liberal its internal political structure is not liberal, and thus its sovereignty is reduced in value (in the predominantly liberal market place) and pressure builds from outside to change to liberalism. The sovereignty of States in practice then is not equal but rather it is differentiated. This move to differential sovereignty emanates, however, from within the existing State structure and not from a reconsideration of the State.

In relation to the Act of State doctrine Slaughter has convincingly shown how the practice of international law can be better understood in light of liberal theory. This is not to say that everything in her thesis is desirable but as it coherently explains events its claims must be taken seriously. To further explore the validity of the Slaughter thesis the next part of this paper turns to look at a case scenario emanating from an Australian court.

II. A Case Example: *Spycatcher* The Australian Chapter

Slaughter's work offers tremendous potential as a theoretical justification or underpinning for domestic adjudication and legal reasoning, especially in cases concerning international issues. In order to assess the usefulness of liberal theory to domestic adjudication this Part seeks to apply the Slaughter theory to a well known High Court case on conflict of laws.

14 Ibid, pp 1990ff.

15 Burley A, "International Law and International Relations Theory" (1993) 87 *American Journal of International Law* 205.

16 Allott P, *Eunomia* (1990).

17 Tesón F, "The Kantian Theory of International Law" (1992) 92 *Columbia Law Review* 53.

The case chosen for analysis is the Australian *Spycatcher* case: *A-G (UK) v Heinemann Publishers Australia Pty Ltd*.¹⁸ In this case the Attorney-General of the United Kingdom commenced an action in the Supreme Court of NSW against the publishing company Heinemann to restrain it from publishing Peter Wright's memoirs entitled *Spycatcher*. These memoirs were alleged to contain information that Wright had obtained while working for the British Security Service. It was asserted that the disclosure of this information in the memoirs was in breach of an obligation of confidence, amongst other things. In pursuit of this claim the British Government sought to restrain (by way of injunction) for reasons of national security, the disclosure of the relevant information through the sale of the book.

The majority approach of the High Court

As explained, the British Government's action for an injunction to restrain the sale of the memoirs was based on an alleged breach of equitable duty/ies owed by Wright to the British Government. The High Court (per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ) held that the equitable duties owed by Wright were generated by the peculiar relationship between Wright and the British Government. This led the Court to conclude that the equitable duties in question were public law as opposed to private law duties.¹⁹ Consequent upon this finding the Court had to confront the issue of whether the public law of the UK was enforceable in the domestic courts of Australia.

At the outset the majority judgment (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ) stated that there was a rule of public international or private international law stipulating that domestic courts should not enforce a foreign penal or public law.²⁰ Their Honours suggested that this rule was associated with the principle that courts will not adjudicate upon the validity of acts and transactions of a foreign State within that sovereign's own territory²¹—the Act of State doctrine. In drawing this analogy the majority judges were able to rely heavily on the Act of State doctrine, defined as a doctrine of judicial restraint,²² as persuasive justification and support for their view that foreign public laws should not be enforceable in Australia.

The rule of non-enforceability of foreign public laws as explained by the majority has its foundations in:

the notion that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government or of some one representing the public, are local in this sense, that they are only cognisable and punishable in the country where they were committed.²³

The applicability of such rhetoric in an age where constitutionalism is rapidly becoming a globally defined concept must surely be doubted. The definition of

18 (1988) 165 CLR 30; 78 ALR 449.

19 (1988) 165 CLR 30 at 38–40, 46–47.

20 Ibid, at 40.

21 Ibid, at 40–41.

22 Ibid, at 41.

23 Ibid, at 41 citing *Huntingdon v Attrill* [1893] AC 150 at 156.

criminality being an integral part of the constitution of community, it is surprising that global enforcement of criminal law is avoided.²⁴

The majority moved on to say that the issue of the enforcement of a foreign public law was a political question and furthermore that we might embarrass our neighbour if we were to enter into these issues in court. But if our neighbour is liberal that surely would require us to assess the validity of the law in terms of liberal internationalism?

The majority gave further explanation of the principle of non-enforceability by referring to the judgment of Justice Learned Hand in *Moore v Mitchell*²⁵ which reads:

To pass upon provisions for the public order of another state is or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbour...No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.²⁶

This type of reasoning in light of Slaughter's thesis is apt for deconstruction because it fails to appreciate the global nature of community which the liberal theory of international relations envisages. Furthermore the Learned Hand approach fails to acknowledge the duty of domestic courts to practice and participate in international relations and law. For Slaughter an appreciation of the global nature of community is vital to understanding why domestic courts should deal with legal issues arising within the territory of like-minded neighbours and thereby uphold the rule of meritorious liberal laws.

The majority added further direction to their reasoning by citing Kingsmill Moore J in *Buchanan Ltd v McVey*²⁷ where he said:

if the Courts had contented themselves with an option to refuse such claims instead of imposing a general rule of exclusion, the task of formulating and applying the principles of selection, would have been one, not only of difficulty, but danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in its foreign relations and even of provoking international complications. Safety lies only in universal rejection. Such a principle appears to me to be fundamental and of supreme importance.²⁸

Once again though the approach being adopted seems so out-of-date and out-of-touch. Slaughter would surely respond to such reasoning by saying that the domestic courts of one liberal State in enforcing the public law of another liberal State within the zone of legitimate difference are not dabbling in politics but rather upholding the rule of law; furthering the fundamental precepts of liberalism in a global community. This, she might suggest, is not the work of the political arm of

24 Consider the emergence in federal systems of conflict of laws principles governing criminal law: Leeming M, "Resolving Conflicts Between State Criminal Laws" (1994-95) 12 *Australian Bar Review* 107.

25 (1929) 30 F.(2d) 600.

26 *Ibid*, at 604.

27 [1954] Ir. R. 89

28 *Ibid*, at 106-07.

government but rather the role of domestic courts when considered in a discourse of liberal international theory. "Universal rejection" would amount to an abdication of the court's duty to uphold the rule of law in like-minded liberal States.

The majority said they realised that in some cases enforcement of a foreign law would be much more delicate than in other cases and pointed to the example of public law issues intertwined with the national security of a foreign State.²⁹ In this context they mused over the point as to whether it was the public interest in disclosure of the United Kingdom or Australia that would be relevant if confidentiality obligations of UK security personnel could be enforced in Australia.³⁰ The majority asked what would happen if the public interest in Australia was in favour of disclosure but the public interest in the foreign State was against disclosure?³¹ They responded saying this potential conflict of public interests could lead Australia into severe embarrassment.³² The Slaughter approach might thwart such embarrassment though, by suggesting that there is really only one public interest involved, that of liberal internationalism (of peace and freedom), and thus a conflict of public interests between liberal States would be very unlikely.

The first major principle of law emanating from this judgment, then, was that a domestic court could not competently deal with foreign public law issues, because (a) dabbling in the public law issues of a foreign State was pure and simply practising politics and (b) public laws are innately local and therefore they are more appropriately enforced in the local jurisdiction.

As suggested in the foregoing analysis Slaughter's theory would challenge these justifications in the case where the foreign public law was that of a liberal State on the basis that liberalism is a worldwide practice that should be upheld and promoted whenever possible.

In moving towards their second major holding, the majority finally had to contend with the argument that the United Kingdom and Australia have had a very special and close relationship and that therefore UK public laws should be easily enforceable in Australia. They rebutted this claim by saying "but what if a less friendly or hostile" (perhaps a non-liberal non-risk-averse aggressor, as under Slaughter's scheme liberal States are not hostile to other liberal States) "were to resort to our Courts for a similar purpose?"³³ Without a mature theory such as Slaughter's they were troubled and had no analytical tool with which to construct a discerning solution. They continued:

Our courts are not competent to determine the degree of friendliness or unfriendliness of a foreign state. There are no manageable standards by which

29 (1988) 165 CLR 30 at 43.

30 Ibid, at 45.

31 Ibid, at 45.

32 Ibid, at 45.

33 Ibid, at 47.

courts can resolve such an issue and its determination would inevitably present a risk of embarrassment in Australia's relations with other countries.³⁴

For someone like Slaughter liberal theory is the answer as it posits freedom and peace as the missing standard by which to gauge the friendliness of a foreign State. It would seem strange that a court properly briefed and conversant with the Slaughter criteria of a liberal State (listed above) could not determine which States were liberal and which were not.

The majority pronounced that this issue of friendliness should not depend on an Executive certificate describing who is good or bad for this might create embarrassment and impinge on the role of the courts as neutral non-political arbiters. Furthermore, they explained, the underlying rationale of the principle of non-enforcement does not suggest an exception to the principle for friendly nations.³⁵ The majority concluded:

The friendliness or hostility of the foreign state seeking to enforce its claim in the court of the forum has no relevant connexion with the principle.³⁶

This is exactly the opposite of what Slaughter is advocating. For Slaughter the complexion of the foreign State dictates the response it will receive in domestic courts committed to upholding the rule of law on a global basis. She suggests commitment to liberalism demands that a domestic court get involved and promote/educate/admonish friends of liberalism; domestic courts are agents for liberal internationalism and they should promote this for it is the best way ahead.

The second major principle of law espoused by the majority then was that the non-enforcement principle has nothing to do with the friendliness of the foreign State. As mooted above, Slaughter's theory would suggest this refusal to assess the complexion of the foreign State is thwarting liberal internationalism.

Interestingly, Chief Justice Street in the Court of Appeal of New South Wales had followed a Slaughter line of reasoning. He was willing to enforce the public laws of friendly (does that mean liberal?) nations and relied heavily upon the Australian Government's positive support of the United Kingdom's action. For Street CJ enforceability was an *ad hoc* decision to be made in the light of the circumstances. He clearly envisaged a liberal-type internationalism, although friendliness was his criterion and perhaps we are friendly with some non-liberal States, although Slaughter does suggest that comity arises from the common liberal foundation.

The majority were not convinced by this approach and concluded their judgment by dismissing the appeal of the Attorney-General (UK) which had sought to have the public laws enforced.

Justice Brennan's approach

Justice Brennan in a separate judgment said the question was one of refusing to enforce the foreign law on the grounds of public policy, not on the ground that

34 Ibid, at 47.

35 Ibid, at 47.

36 Ibid, at 47.

the foreign law was not recognisable by our legal system.³⁷ This classification accords more with what Slaughter advocates. For Justice Brennan there were two types of approach: (1) recognising the obligation subject to public policy and (2) not recognising the obligation.³⁸

However no attempt was made by Brennan J to distinguish between liberal and non-liberal States in either category. Perhaps this is a relevant criteria in assessing the application of each category? The critical difference between Justice Brennan and the majority is that Brennan J was willing to start with the view that public laws could be enforceable if public policy allowed³⁹ while the majority adhered to a presumption that no public law should be enforceable.

Justice Brennan held the first approach was relevant in the case at hand but concluded it was against public policy for a court to determine whether the security laws of a foreign State should be upheld.⁴⁰ He suggested that "the public policy of the law throughout Australia precludes an Australian court from enforcing a claim which is damaging to Australian security and foreign relations".⁴¹ Brennan J explained that as it was a matter purely for political appreciation, it was beyond the competence of the High Court to determine whether Australia's security and foreign relations would be furthered by disclosure of the information; therefore he held that it was not in accord with public policy to enforce the foreign public law.

The rejoinder from a Slaughter perspective must surely be that the disclosure of government information is a premise of liberalism and a liberal court anywhere in the world should be able to discern when the information is apt for disclosure in a liberal democracy. The circumstances of each case could be argued before the courts and competently dealt with in a liberal framework.

Justice Brennan was also reluctant to invoke any system of Executive certification of the obligations which could be enforced. His main concern was that such a system would lead to embarrassment of the Executive.⁴² However the Slaughter response must be that the Executive role is not important as it is for the courts to determine the liberal status or otherwise of the foreign country and act upon that finding.

The major holding then, in Justice Brennan's judgment, is that the foreign public law could not be enforced on the ground of public policy.

Justice Brennan goes close to implementing the Slaughter theory when distinguishing between cases where the domestic court does not want to recognise the validity of the law *per se* (maybe generalised as situations

37 Ibid, at 49.

38 Ibid, at 49.

39 It is not clear whether Justice Brennan would say enforcement of all types of foreign public laws is against public policy although one gets the impression that if this was his agenda he would have simply joined with the majority. His reluctance to invoke analogical reasoning in terms of the Act of State doctrine also suggests he is not making a general presumption that all foreign public laws are not enforceable.

40 Ibid, at 50.

41 Ibid, at 50.

42 Ibid, at 51.

involving non-liberal States although Brennan J's touchstone is legal validity in international law) from those where the domestic State acknowledges legal validity but will not enforce the law. That approach equates to a liberal/non-liberal divide. However Justice Brennan fails to fully implement the Slaughter charter by avoiding the enforcement of global liberalism, in the name of public policy. Brennan J starts with a Slaughter-style dichotomy but loses the impetus of such an approach just when Slaughter would be wanting to push it to its limits. In this sense, Brennan J distinguishes himself little from the majority, remembering though that he is careful to limit his views on non-enforceability to the case at hand, namely, confidence obligations regarding national security.⁴³ Nevertheless his approach does present an avenue for persuading future courts to pay attention to the liberal/non-liberal divide and its effect on law enforcement. If Brennan J's second approach of refusing to enforce laws invalid under international law equates with the Slaughter notion of laws being unenforceable because they do not uphold the aspirations of liberal internationalism then the argument becomes much stronger. Furthermore if Justice Brennan envisages an approach in which foreign public laws can be enforceable then the criterion for discerning such enforceability could be liberal international theory.

Both of the judgments remarked that it was for the legislature to decide whether the foreign law should be enforced and to legislate accordingly. Slaughter would say though that the courts must be agents of liberalism and thereby be prepared to tackle this issue. The High Court, she might suggest, is mature enough to delineate a liberal from non-liberal State, a friendly from hostile State—the former being one which is subject to this international rule of law, the latter being one that is outside the liberal zone of cooperation. The High Court would not embarrass Australia's international relations and politics as political considerations (domestic or international) are perceived by liberals to be removed from adjudication under the rule of law. Slaughter is clear and confident that courts can do this job and that embarrassment is not an issue. Deference to the Executive is only needed where a non-liberal State is concerned; where the foreign State is likely to be angered by the domestic court's approach. A foreign liberal State could not be angered if it adheres to the foundational values of liberalism. Arguments for deference to the legislature on this issue are rebutted in the same way that it has been suggested arguments for deference to the Executive can be rejected—that is, on the basis that political accountability and responsibility are not attributes required by an institution seeking to enforce the liberal internationalist's rule of law.

The role domestic courts play in the practice of international relations, as the *Spycatcher* case highlights, is a very interesting yet contentious issue. For Slaughter, domestic courts ought to take up the challenge to enforce liberal internationalism and in fact quite often do. However in the *Spycatcher* case the

43 Brennan J might be much more in line with Slaughter's theory in other areas of public law enforcement. See in support of this view n 39 above.

practice of such a theory ran into major difficulties.⁴⁴ The Judges of the High Court were not informed of this dynamic theory of liberal internationalism and therefore held that the discerning of friendly from non-friendly States was too difficult (majority) or fraught with dire political consequences (majority and Brennan J). They were most surely right in both regards: however the Slaughter thesis sets the challenge that in an era of globalisation, domestic courts, especially those as significant as the High Court, ought to be able to implement/reinforce the foundational notions of liberalism, namely peace and freedom.

The Slaughter theory then provides a fascinating tool with which to build argument on transnational legal issues before the High Court. However the Slaughter theory is not free from criticism and its liberal underpinning alone may raise doubts about its validity in an age where liberalism has been subjected to trenchant criticism. It is timely then to examine some of those criticisms and gauge the strength of Slaughter's argument.

III. Critical Responses to Slaughter's Liberal Theory

Legal theory, reflecting the influence of other social sciences, has over the last two decades evidenced a questioning of liberalism's domination of political and legal discourse.⁴⁵ This critique has focused on local/domestic issues, although writers such as Hilary Charlesworth,⁴⁶ Martti Koskenniemi,⁴⁷ Tony Carty⁴⁸ and David Kennedy⁴⁹ have generated similar ideas in relation to (State-centred) international law.

At a domestic level, the fundamental legal precepts of liberal democracy (such as social contract, rights, representative government and the rule of law) have all been subjected to close scrutiny over the last decade by the critical legal studies (CLS) movement.⁵⁰ Social contract has always been a difficult concept to explain and it is no surprise that commitment to government is now seen more in

44 The outcome of the litigation, had the Slaughter theory been applied, may have been no different. But if the theory was applied, and the outcome the same, the result would be reached on the basis that a like-minded liberal democracy had breached a fundamental element of liberal democracy by enforcing a draconian official secrets regime.

45 See Unger R, "The Critical Legal Studies Movement" (1983) 96 *Harvard Law Review* 561.

46 Charlesworth H, "Subversive Trends in the Jurisprudence of International Law" (1992) *Proceedings of the Annual Meetings of the American Society of International Law* 125.

47 Koskenniemi M, *From Apology to Utopia* (1989).

48 Carty A, *The Decay of International Law* (1986); Carty A, "Critical International Law: Recent Trends in the Theory of International Law" (1991) 2 *European Journal of International Law* 66.

49 Kennedy D, "A New Stream of International Law Scholarship" (1988) 7 *Wisconsin International Law Journal* 1.

50 In Brown-Scott W, "The Communitarian State" (1994) 107 *Harvard Law Review* 1209 at 1216, liberalism is said to have been criticised by: Marxists, postmodernists, communitarians, feminists, race-theorists and libertarians along with proponents of CLS.

communitarian terms⁵¹ even by liberal philosophers such as Ronald Dworkin.⁵² Rights have been the subject of deconstruction⁵³ while the rule of law has been seen as a cloak hiding the political dimensions of law.⁵⁴ The CLS critique has argued that the claims of formalism, neutrality and objectivity found in liberal theories of law mask the hegemonic and subjective underpinning of law. After CLS we have seen the rise of post-structuralist analyses of law where the free, willing, rational “subject” of a liberal theory of law is lampooned.⁵⁵ The perception of the individual as a rational, autonomous entity is said to ignore the construction of the subject through discourse and environment.⁵⁶ Feminist and race-theorists have also used post-structuralism to argue that the feminine subject or race-specific subject is decentred to the extent that they possess the rationality and free will that discourse and environment permits.⁵⁷

In legal theory then, the standpoint that liberal democracies throughout the world (having representative parliaments, rights, an independent judiciary and the rule of law) are the epitome of social organisation has been seriously questioned. For a number of people living in such political systems the stability, peace and fairness that such systems create is desirable; however a claim that they represent the best political system is to some extent misleading.⁵⁸

If Slaughter only wishes to prove that the people who make up States are so very important and that liberal States have traditionally not been aggressive why does she have to make the massive theoretical jump to saying that representative government based on the rationality of individuals and social contract is the ideal type? Surely the step from the primacy of the people and the good track-record of liberal States to what ought be encouraged in the future should open up the question of whether liberal States as currently constructed are desirable. If liberal States are the best form of social organisation we have, then maybe the Slaughter theory is starting in the right place. However, the domestic critiques of liberal democracy show that power structures in such democracies can be used to oppress as well as prosper the people of States.

The fact that liberal democracy is enjoyable for certain classes of people should not blind us to the fact that its quality depends very much on the context in which it operates.

51 Avineri S and de-Shalit A, *Communitarianism and the Individual* (1992). For a short summary of the communitarian versus liberalism debate see: Nino C, “Positivism and Communitarianism: Between Human Rights and Democracy” (1994) 7 *Ratio Juris* 14 at 20–23.

52 Dworkin R, *Law’s Empire* (1986), 190ff. In this book Dworkin posits the notion of associative obligations as the basis of commitment to government under law.

53 Tushnet M, “An Essay on Rights” (1982) 62 *University of Texas Law Review* 1386; cf Williams P, *The Alchemy of Race and Rights* (1991), pp 150ff.

54 See Unger, n 45 above.

55 Schlag P, “The Problem of Subject” (1991) 69 *University of Texas Law Review* 1627.

56 Davies M, *Asking the Law Question* (1993), pp 240ff.

57 Ibid, pp 193ff.

58 Otto D, “Challenging the ‘New World Order’: International Law, Global Democracy and the Possibilities for Women” (1993) 3 *Journal of Transnational Law and Contemporary Problems* 371.

A major challenge confronting the Slaughter thesis then, is for it to justify why liberal democracy should be privileged above all else. The theory might be more convincingly re-argued along the lines that what is important is the practice of States in governing people and the outcomes they achieve. There may be some measure of support amongst Western writers for a theory which endorsed States that are fair to and respectful of the people of their territory. Whether this amounts to Western hegemony and universality over cultural relativism is without doubt a major issue.⁵⁹ This raises the further question of how Slaughter justifies her admonishing of States that reject liberalism for cultural or religious reasons. What is more, even some liberal States, due to their neglect of the welfare of the people will not deserve the status they are bestowed pursuant to liberal theory. As well, the theory does not seem to acknowledge the view that State power is not the only power exercised in liberal democracies. How can the Slaughter thesis so easily ignore the impact of “private” power and its relevance to international relations? These are crucial issues which until answered inhibit the persuasiveness of the theory.

In summary, the Slaughter theory to this point has assumed much about the superiority of liberal theory. If her theory is to gain a measure of global support it will have to tackle anti-liberal views much more openly and cogently.

Internationalism, domestic courts and liberal theory

There is no doubt that Moravcsik and Slaughter have done a marvellous job in expanding the way we think about international law. In an era when the world is coming closer together geographically, if not politically, their ideas stimulate necessary debate on the relevance of the individual and domestic political structures to international relations. They highlight and articulate a justification for the increasing interdependence between domestic and international, politics and law.

The thesis maintained in this paper is that the Slaughter theory is one to embrace and applaud so long as it is modified in a way which acknowledges the defects of classic liberalism. One suggestion is that the theory be recast as one focusing on the way people are treated in States so as to determine a theory of international law and that in this project we should not unquestioningly adopt the classic notion of liberal democracy as the ideal or end state. The question of what counts as fair practice by governments with the people of a territory must be looked at more closely and rhetoric and debate over this issue should be encouraged rather than hidden. The ideal state should be argued for, not complacently accepted amidst cogent criticism.

Slaughter’s approach has started a dynamic flow of ideas which promise to give impetus to international law for many years. The future of such an approach

59 For a recent discussion of this issue in the context of the rights of children see: Alston P, “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” (1994) 8 *International Journal of Law and the Family* 1. In the context of feminist theory see: Kim N, “Towards a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism” (1993) 25 *Columbia Human Rights Law Review* 49 esp at 56–66.

as a useful tool for domestic adjudication, though, depends largely upon the degree to which it can incorporate criticisms of domestic political and legal systems including liberal democracies. As the analysis of the *Spycatcher* case showed, a theory like Slaughter's would be a useful tool in dealing with transnational legal problems. It is hoped that in the future courts pay it the attention it deserves, whilst making modifications needed to prosper the people of the world.

