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# **The Application and Reconstruction of International Law by Domestic Courts**

**An Analytical Framework for the Judicial  
Mediation of a Cosmopolitan and Emancipatory  
International Law**

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## ABSTRACT

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The end-goal of this study is to promote a bottom up reconstruction of international law. This implies, first, that reconstruction is necessary, and, second, that such reconstruction has substantive merit.

As humanity heads into the future in 'Lifeboat Earth', a number of global storms are brewing, ranging from catastrophic environmental degradation to an economic meltdown and political instability, accompanied by grave human suffering – all of which can be addressed only through ecumenical cooperation at a global level. This, in turn, presupposes a global system of regulation. Thus far, the only regime available has been international law. Hence, it is imperative that it is (or becomes) justifiable, persuasive and relevant for all its participants and recipients. The study construes this to mean that international law must be cosmopolitan, that is, globally relevant and counter-hegemonic, and thereby emancipatory, which signifies a normative order wherein human potential can flourish.

In maintaining that reconstruction is necessary, I position myself alongside scholars who contend that many aspects of international law represent the imposition of western norms and values on the rest of the world. It is therefore deficient, and not the 'universal' order it purports to be.

To give voice to those who have been disenfranchised by the top down operation of international law, I argue that the regime must be reconstructed from the bottom up, to include, in Justice Weeramantry's spirit, the collective wisdom of the world. Three questions now present themselves: Does the nature of international law allow it to be reconstructed in this manner? If so, by whom and how?

I argue that international law is indeed sufficiently supple and value laden to be reconceptualised as cosmopolitan and emancipatory, and that the judiciary in domestic courts is in a commanding position – one that allows it to mediate a reconstruction 'from below' that is responsive to both global and local needs. As to *how* this can be accomplished, I develop an analytical framework for the cosmopolitan and emancipatory application of international law in domestic courts, whereby its ultimate reconstruction can be triggered. Finally, I substantiate my argument, and in particular the effectiveness of the framework, with case studies from four continents.





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***Keiskamma Guernica* tapestry 7.8mx3.5m**

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## **ABBREVIATIONS**

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ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDHA	Centro de Derechos Humanos y Ambiente (Centre for Human Rights and Environment)
CISG	United Nations Conventions on Contracts for the International Sale of Goods
CRC	Convention on the Rights of the Child
EC	European Community
ECHR (also ECtHR and ECtHR)	European Court of Human Rights
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
IMF	International Monetary Fund
LGBT	Lesbian, Gay, Bisexual, Transgender
NGO	Non-governmental organisation
OAS	Organisation of American States
OHADA	Organisation for the Harmonisation of Business Law in Africa
SADC	Southern African Development Community
TWAIL	Third World Approaches to International Law
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
WB	World Bank
WTO	World Trade Organisation



## INTRODUCTION

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*Good art can achieve common ground between different cultures ... [and] shows how an idea can survive translation and become a potent expression in a different context.*<sup>1</sup>

If the present study could be represented by a picture, that picture would be the *Keiskamma Guernica* tapestry, which was woven by a group of women from the Eastern Cape Province in South Africa. The work is a searching 'translation' of Picasso's famous painting *Guernica*, into an African context. At first glance, the depiction is very similar to the original; its universal message, however, is reconstructed to have relevance in the local setting.<sup>2</sup>

In corresponding manner, the present study focuses on the aspirational reconstruction of international law in a way that renders it relevant in local contexts around the world. I argue that such reconstruction is attained through the 'cosmopolitan' and 'emancipatory' application of international law by the judiciary in domestic courts.

The immediate question is why such reconstruction is needed in the first place. The simple answer lies in the conclusion that international norms and values have become part of the mesh of exigencies linked to the survival of living things on this planet, 'Lifeboat Earth'.<sup>3</sup> Or, expressed differently, it is found in the wisdom of the 'chthonic' idiom: *umuntu ngumuntu ngabantu*, 'I am because we

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<sup>1</sup> Jo Noero quoted in the *Monday Paper*, Newspaper of the University of Cape Town, 1-14 October 2012, on the *Keiskamma Guernica* tapestry, which was exhibited at the 2012 Venice Biennale.

<sup>2</sup> Ibid. '[I]f the original is about the tragedies of war, the *Keiskamma Guernica* tackles AIDS/HIV and its impact on South Africa.'

<sup>3</sup> This evocative term was coined by O'Neill, discussed in Twining *Globalisation and Legal Theory* (2000) 69. See Singer *One World: The Ethics of Globalization* 2 ed (2004) for a comprehensive account of the issues facing humanity at present, and the need for 'one law'. Also, Koskenniemi 'The fate of public international law: Between technique and politics' (2007) 70(1) *Modern Law Review* 1 at 30, on international law as 'a placeholder for the vocabularies of justice and goodness, solidarity, responsibility and – faith'; Merry *Human Rights and Gender Violence* (2006) 231.

are'.<sup>4</sup> Hence, if we do not protect and steer our lifeboat in a spirit of solidarity, it may no longer remain serviceable. In this, it appears that cooperation at a global level is strictly necessary, which implies the need for some form of ecumenical transnational regulation.

The foregoing therefore ties in with the instant contention that law, and international law in particular, must firstly be 'cosmopolitan', that is, globally relevant and counter-hegemonic, and secondly, that it must be 'emancipatory', in other words, a normative regime allowing human potential to 'flourish'.<sup>5</sup>

This in turn, demands the 'aspirational development [of international law] ... according to a particular utopian vision', in other words, its reconstruction to manage the 'job' of global regulation in a manner that is acceptable to all its stakeholders.<sup>6</sup> It is equally clear that its participants are no longer found only at state and inter-national levels, but include supranational entities, substate communities and even individuals.<sup>7</sup> This means that the *effect* of international law must be both cosmopolitan and emancipatory, not only when viewed from an international perspective, but also from the standpoint of the multiplicity of national and local stakeholders. Failure to persuade these local participants and recipients will result in the rejection of international law, thus reducing its efficacy

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<sup>4</sup> Menski *Comparative Law in a Global Context* (2006) 427, quoting Ayittey; Mapaire 'Reinvigorating African values for SADC: The relevance of traditional African philosophy in a globalising world of competing perspectives' 2011 *SADC Law Journal* 149 at 165. I borrow the word 'chthonic' from Glenn *Legal Traditions of the World* 4 ed (2010) 61ff and Menski id 393ff. See Glenn id 63, who describes the term as referring to 'people who live ecological lives ... in or in close harmony with the earth' and whose (chthonic) traditions have existed 'for hundreds of thousands of years'.

<sup>5</sup> Santos *Toward a New Legal Common Sense* 2 ed (2002) 471, who maintains that that the 'thick conception of emancipation entails not just human survival but human flourishing ...'.

<sup>6</sup> Santos (n 5) 439-496 on the development of law in general; also Twining (n 3) 244; and see Twining id 75 for a description of Llewellyn's 'Law-Jobs Theory'.

<sup>7</sup> See for example Merry (n 3) 20-21, 50-55, 229 in the context of international human rights law. Also Twining (n 3) 51-52; Santos (n 5) 200-312 for an extensive overview of non-state paradigms.

to that of a 'legal irritant', something that is alien and incompatible with the relevant normative context.<sup>8</sup>

Paradoxically, even a cursory examination will indicate that international law, as we know it, is neither cosmopolitan, nor emancipatory, nor a 'universal' legal panacea for everyone on the planet.<sup>9</sup> I consequently endorse the views of scholars of Third World Approaches to International Law (TWAIL), who reject the claim that international law is globally valid, and who argue that it greatly instantiates a specifically western hegemony.<sup>10</sup> Hence, the need for its cosmopolitan and emancipatory application is amplified.

By the same token, the hegemony referred to in this work is not confined to western hegemony. Rather, it stands for any kind of oppression, stemming from any type of source, which might be countered by cosmopolitan and emancipatory adjudication in domestic courts. Therefore, the counter-hegemonic application of international law refers to the judicial processes that will unlock its cosmopolitan and emancipatory potential for all participants.

Consequently, I do not reject international law, nor its ability to serve the needs of the global community, because, in a rather sophist manner, despite 'all its flaws, it is the best we have'.<sup>11</sup> As noted however, I do contend that international law is in dire need of – but is nevertheless capable of –

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<sup>8</sup> See Teubner 'Legal irritants: Good faith in British law or how unifying law ends up in new divergences' (1998) 61(1) *Modern Law Review* 11 on 'legal irritants' and resistance to norms from foreign sources in general.

<sup>9</sup> For example Weeramantry 'International law and the developing world: A millennial analysis' (2000) 41 *Harvard International Law Journal* 277 on the 'dismal story' of international law and the need to renew it; Obiora 'Toward an auspicious reconciliation of international and comparative analyses' (1998) 46 *American Journal of Comparative Law* 669 at 673-674,677; Coombe 'Culture: Anthropology's old vice or international law's new virtue?' (1999) 91 *American Society of International Law and Procedure* 261 at 268; and see the works in n 10 below.

<sup>10</sup> See for example Falk et al (eds) *International Law and the Third World* (2008); Anghie et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003).

<sup>11</sup> Merry (n 3) 231; Singer (n 3) 12-13, on international human rights law as the 'only viable political arena and discourse that commands sufficient legitimacy and respect ...'.

cosmopolitan and emancipatory reconstruction. This is the project of the present study.

The project entails a number of distinct steps. They culminate in the development of an analytical framework for the reconstruction of international law, which is founded on specific processes of judicial mediation. For the sake of conceptual rigour, I employ the metaphor of a journey, namely the judicial navigation between global and local planes. Hence, signposts, maps and navigational tools are needed.<sup>12</sup> The study progresses as follows.

In the first chapter, important theoretical signposts are established. They point to the nature and role of law, and the impact of globalisation on law and legal processes. Further signposts are provided by a number of jurisprudential methods and theories, which inform various analyses in subsequent chapters.

Chapter II explores the nature of international law itself and its potential to be applied and reconstructed in a cosmopolitan and emancipatory manner by domestic courts. Additionally, this analysis presupposes and examines the importance of the nation-state in relation to international law.

Chapter III investigates the concept of domestic courts as mediators in the application and reconstruction of international law, as opposed to being mere 'engines of compliance'.<sup>13</sup> It also outlines various competences and limitations implicit in the judicial role.

Chapter IV, which is the fulcrum of the study, constructs the proposed analytical framework for the cosmopolitan and emancipatory application and

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<sup>12</sup> These metaphors are not new, but they remain exceedingly helpful. For example, both Santos (n 5) and Twining (n 3) use the metaphor of a map extensively. Örucü frequently uses the metaphor of navigation. See for example Örucü 'Judicial navigation as official law meets culture in Turkey' (2008) 4(1) *International Journal of Law in Context* 35.

<sup>13</sup> Knop 'Here and there: International law in domestic courts' (2000) 32 *New York University Journal of International Law and Politics* 501 at 501-503, 529.

reconstruction of international law, through distinctive processes of judicial mediation. In reliance on the metaphor of a journey, the chapter describes, first, the analytical procedures, or 'tools', and then, the jurisprudential map of the normative terrain. The terrain proves to be three-dimensional, since it is triangulated between international, national and subnational domains. These in turn, constitute the composite context, within which courts must mediate between local and global interests. Additionally, the framework provides a 'compass' according to which judicial navigation takes place, namely that of global ethics.

The theory thus developed states that international law can be applied in domestic courts in a manner that renders it cosmopolitan and emancipatory. Cosmopolitanism means that its application is counter-hegemonic and that courts are receptive to divergent realities at international, national and subnational levels. In turn, emancipatory jurisprudence achieves substantive justice and facilitates human 'flourishing' within a given domestic context – but takes into account that this context is nevertheless part of a global continuum. Thus, international law is translated, in the same way that the global message is translated in the *Keiskamma Guernica*, to be relevant and compelling at global *and* local levels.

The next leg of the theory speaks to the more comprehensive reconstruction of international law, which is accomplished with specific reference to 'bottom up' judicial processes. Initially, such bottom up reconstruction is contingent on the foundation provided by the cosmopolitan and emancipatory application of international law in different domestic contexts.<sup>14</sup> Next, through an array of 'transjudicial' processes, courts trigger the flow of these locally embedded translations of international law to travel back and forth between local

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<sup>14</sup> Of course, the opposite is also true. If courts apply international law in a hegemonic and oppressive manner, the bottom up effect will also be hegemonic and oppressive – hence, the concentrated focus of the study on cosmopolitanism and emancipation in the domestic application of international law.

and global normative dimensions.<sup>15</sup> Hence, by means of judicial mediation, a network of cross-cultural constructions of international law takes shape, which over time solidifies into a reconstruction that is relevant to the tenets of cosmopolitanism and emancipation.<sup>16</sup>

The final chapter is the laboratory wherein the framework is tested. It consists of an exploration of judgments from Africa, the Americas, Asia and Eastern and Western Europe. The judgments show that the tools and the three-dimensional map find practical application, and permit successful judicial navigation toward cosmopolitan and emancipatory international law. In addition, many of these judgments illustrate the bottom up processes that are activated by domestic courts.

Picasso's *Guernica*, as a chilling reminder of the 'abhorrence' of war and human brutality, has become a universal symbol of peace and hope.<sup>17</sup> In turn, the *Keiskamma Guernica* shows that a global message can be translated into a specific, local context. That very translation however, reconstructs the message, whereby it expands its potential to speak yet more compellingly to audiences in other contexts.

Such locally embedded, multi-dimensional reconstruction of international law is the aspirational project of the present study. The underlying rationale is the need to re-establish international law as a symbol and system of peace,

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<sup>15</sup> See Slaughter 'Judicial globalization' (1999-2000) 40 *Virginia Journal of International Law* 1103 on transjudicialism in general; Knop (n 13); Grove 'The international judicial dialogue: When domestic constitutional courts join the conversation' (2001) 114 *Harvard Law Review* 2049, who elaborate on these judicial processes.

<sup>16</sup> See Weeramantry (n 9) 284-286; Obiora (n 9) 678-679.

<sup>17</sup> In the words of Picasso, 'I clearly express my abhorrence of the military caste which has sunk Spain in an ocean of pain and death', quoted in *The Guardian*, 29 April 2006. See Escalona, on the painting's 75th anniversary, who calls it 'a cultural icon that speaks to mankind not only against war but also of hope and peace'. Available at: [http://www.huffingtonpost.com/alejandro-escalona/75-years-of-picassos-guernica-\\_b\\_1538776.html](http://www.huffingtonpost.com/alejandro-escalona/75-years-of-picassos-guernica-_b_1538776.html) last accessed 27-05-2013.

emancipation and hope for the global community that is found, not only in the great centres of the world, but also in the remote peripheries of the earth.



## CHAPTER I

### THEORETICAL AND PHILOSOPHICAL SIGNPOSTS TO THE PRESENT STUDY: MAPPING THE NATURE AND ROLE OF LAW

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## 1. Introduction: Maps, cosmopolitan law and emancipation

The purpose of the present study is to advance the cosmopolitan and emancipatory application of international law *in* domestic courts, and its reconstruction *by* these courts. Hence, the key concepts of cosmopolitanism and emancipation are analysed and developed throughout this work.<sup>1</sup> For the sake of conceptual clarity however, I offer descriptions of these terms below:<sup>2</sup>

'Cosmopolitanism' means a transnational orientation and signals a stance of openness toward a plurality of divergent realities, ideologies and cultural experiences. This orientation may counteract both hegemonic universalism and oppressive relativism.<sup>3</sup>

<sup>1</sup> See in particular Chapter IV and 7(b) below.

<sup>2</sup> In this, I place substantial reliance on the work of Santos *Toward a New Legal Common Sense* 2 ed (2002).

<sup>3</sup> See Santos (n 2), for example, at 172, 180, 233, where he offers various descriptions of cosmopolitanism. Although similar phrases may be used here, their present meaning is not identical to that of Santos, as will become apparent in subsequent sections.

'Emancipation' in the application of international law in domestic courts means a cosmopolitan orientation, which offers release from and facilitates the possibility of transforming oppressive conditions. It is achieved by means of an equitable balancing in ethical-practical rationality, of the interests of all stakeholders.<sup>4</sup>

The cosmopolitan and emancipatory application and reconstruction of international law however, cannot be carried out in isolation and requires a preliminary exploration of the relevant theoretical underpinnings, or signposts, pertaining to the study. Identifying these signposts is the focus of the present chapter. The task is best described as detailing the 'legend' of the 'map', which is needed for judicial navigation. Therefore, next, is an explanation of how the chapter is structured and situated within the broader study.

The dominant argument states that the cosmopolitan and emancipatory application of international law, which pre-empts its eventual reconstruction, is possible, both in theory and in practice. Accordingly, the hypothesis initially calls for the adoption of a particular theoretical stance with respect to international law. I maintain that this means redrawing the boundaries of international law in terms of a 'cosmopolitan legal theory'.<sup>5</sup> In other words, the jurisprudential map of international law must be sufficiently generous, or cosmopolitan, to accommodate the interests of all its participants and recipients.

Hence, the present chapter first identifies the signposts needed to place the study within such cosmopolitan parameters. These flow from an understanding of the significance of normative plurality, which takes into account

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<sup>4</sup> Santos (n 2) 3 describes emancipation as 'expanding the possibilities of social transformation beyond a given regulatory boundary'.

<sup>5</sup> Santos (n 2), for example, 172, 228-237, 257-300. The term 'cosmopolitan legality' is used by Santos in a manner that contrasts it with an approach that endorses the top-down, hegemonic imposition, or 'monotonic instrumentalism' of law; namely, as an approach that places the emphasis on contextual diversity, informed by an understanding of legal plurality, 'interlegality' and the need to construct cross-cultural theories in order to find solutions that are congruent within diverse socio-legal cultures. See 7(b) below.

the legal labyrinth created by different, possibly opposing, normative constructs found at all levels of regulation, whether international, national or subnational.

Since normative plurality refers to a burgeoning range of elements, a point of reference is established in the chapter, which is the analysis of perceptions and realities about the nature of law in general, and its role in society. This first step therefore recognises the manner in which law intermingles with other elements in the socio-cultural continuum of which it is a part.

Second, the chapter considers the meaning of legal 'systems' and their taxonomy, and asks where non-mainstream regimes of customary and religious law fit into the general understanding of law. It also analyses the impact of globalisation on law, and on international law in particular. Next, the chapter explores a number of methodological approaches and theories which serve as signposts for the next stages of the judicial navigation toward cosmopolitan and emancipatory jurisprudence.<sup>6</sup>

It must also be noted that the stated hypothesis must be substantiated with reference to actual cases, and hence, the study relies, at the relevant stages on a comparative analysis. Therefore, certain principles and difficulties associated with the comparative enterprise are dealt with in this and other chapters.

Thus, apart from merely identifying the relevant signposts, this chapter establishes a theoretical substructure pertaining to the study's most salient themes, which are addressed in later chapters. As explained, these concern the reconceptualisation of international law, the mediatory role of the judiciary, and the all-important construction of the analytical framework for the application and reconstruction of international law.

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<sup>6</sup> See in particular Chapter IV, which deals with these further processes.

Lastly, since international law speaks to weighty matters affecting the entire human race, it has become, in the words of Koskenniemi, ‘a kind of secular faith’.<sup>7</sup> This is because the global community needs a ‘vocabulary with a horizon of transcendence’ whereby it can deal with the global and transnational challenges confronting it, some of which may threaten the survival of humans and our ‘Lifeboat Earth’.<sup>8</sup> Within this conceptualisation, the ‘job’ of international law cannot only be described in bald theoretical terms.<sup>9</sup> I therefore argue that cosmopolitan and emancipatory navigation must take place according to the ‘compass’ of global ethics, as described in this chapter and elaborated upon in subsequent chapters.<sup>10</sup>

For present purposes, the debate about the nature and potential of international law as an instrument for emancipation is preceded by questions about the nature and limitations of law itself. Albeit in broad strokes, this is therefore the logical point of departure for the present exercise in legal mapping.

## 2. Cosmopolitan law: But what is law?

*[T]here is simply no universally agreed definition of law.*<sup>11</sup>

*The law never simply ‘is’. It is always ‘becoming’.*<sup>12</sup>

*[T]he most self-conscious, intentional, goal-directed, professionally-wrought piece of rule-making is part of a much larger socio-economic development that is*

<sup>7</sup> Koskenniemi ‘The fate of public international law: Between technique and politics’ (2007) 70(1) *Modern Law Review* 1 at 30.

<sup>8</sup> Ibid. This evocative term was coined by Onora O’Neill. See the discussion in Twining *Globalisation and Legal Theory* (2000) 69.

<sup>9</sup> This term is borrowed from Karl Llewellyn’s ‘Law-Jobs Theory’. See Twining (n 8) 75ff, and Twining ‘Two Works of Karl Llewellyn—II. The Cheyenne Way’ (1968) 31 *Modern Law Review* 165.

<sup>10</sup> See Chapter IV 10.

<sup>11</sup> Menski *Comparative Law in a Global Context* 2 ed (2006) 595.

<sup>12</sup> Editors’ comments in *Schlesinger’s Comparative Law* 7 ed (2009) 177.

*not in anyone's conscious control, and ... may not even be fully perceived by the actors.*<sup>13</sup>

*[Law] was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out*<sup>14</sup>

*Law is an important aspect of state hegemony ... none the less ... law [is a] defense of subordinate groups ... [and] against tyranny.*<sup>15</sup>

It is trite that the legal theorist's perception of the nature of law will greatly influence the outcome of his or her analysis. For instance, is law only to be explained in terms of the Kelsenian, statist model, favoured by positivists?<sup>16</sup> Or, can law be understood as polycentric and pluralistic in nature, to include non-statist norms? Can law have universal application or is it always embedded in a specific legal tradition or legal culture? Is law a tool of oppression or freedom? Is law merely a 'game'?<sup>17</sup>

Moreover, even before one arrives at the concept of law per se, there are preliminary questions and assumptions to consider about the roots of law, and the fundamental elements which create it. Thus, for example, distinctions can be drawn between laws, rules, values and principles, and whether these emanate

<sup>13</sup> Moore *Law as Process: An Anthropological Approach* (1978) 6.

<sup>14</sup> Thompson *The Poverty of Theory* (1995) 130.

<sup>15</sup> Harris (ed) *Inside and Outside the Law* (1996) 8.

<sup>16</sup> This approach is followed for example by Zweigert and Kötz *An Introduction to Comparative Law* 3 rev ed (1998). See comments in Santos (n 2) 191-193; Özüçü *The Enigma of Comparative Law* (2004) 46-47; Capps 'Sovereignty and the identity of legal orders' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) 30-41, 53-63 where he gives a thorough overview of Kelsenian theory and counter-theory; and Twining (n 8) 108-126 for a historical analysis of positivism.

<sup>17</sup> Bybee *All Judges are Political – Except When They are Not* (2010) 90-91.

from the state, or not.<sup>18</sup> Therefore, one must ask whether non-state rules, or customary and cultural norms can in fact be classified as law. Many of these issues fall outside the scope of this study and, for present purposes, the enquiry will be confined to the relevance or otherwise of the socio-cultural context that shapes legal norms. Accordingly, the impact that the presence of other norms, such as religious or customary rules, has on the operation of legal norms, is of particular interest.

The first observation is that contemporary jurisprudential awareness appears to concede that the premise that law emanates exclusively from the state and exerts its influence only in a top down fashion is unsustainable.<sup>19</sup> Rather, the reality is that there are many layers of state and non-state, official and unofficial laws. These are intricately interwoven to provide a pluralistic matrix of different norms and legal orders to regulate society.<sup>20</sup> Legal rules are mere 'elements of a cultural part-order', meaning that there is only 'partial rule by rules'.<sup>21</sup> Law must therefore be construed not only from an instrumentalist, top down perspective (for example, as a tool for social engineering), but also as an anabatic, bottom up process. Thus, legal regimes are not necessarily the orderly 'systems' described by theorists; they can just as easily be depicted as 'jungles' or 'bazaars'.<sup>22</sup>

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<sup>18</sup> See for example Legrand 'The impossibility of "legal transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111 at 112-120 on different interpretations of what constitutes a 'rule'; and 2(a) and 2(b) below.

<sup>19</sup> For one example among many, see Teubner 'Legal irritants: Good faith in British law or how unifying law ends up in new divergences' (1998) 61(1) *Modern Law Review* 11 at 15-16. In this, however, one does not have to draw only on jurisprudential opinion, since many social studies have provided evidence to support the contention. See for example An-Na'im *Universal Rights, Local Remedies* (1999) 47-49, 58-59; and see the references in note 20 below.

<sup>20</sup> See 2(a) and 2(b) below. Allott *The Limits of Law* (1980) 121 states that '[l]aw is only one normative system among many'; Merry *Human Rights and Gender Violence* (2006) 133; Editors' comments in *Schlesinger* (n 12) 42 noting that it is possible to discern a multitude of non-state normative orders that regulate society daily. See Besson 'Sovereignty in conflict' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) 138-139, and note her well-substantiated contention that '[state] sovereignty is therefore ... an essentially contested concept' since inter alia the state is not the sole fount of law.

<sup>21</sup> Moore (n 13) 4-5.

<sup>22</sup> Twining (n 8) 253; Singh 'The potential of international law: Fragmentation and ethics' (2011) 24 *Leiden Journal of International Law* 23 at 45.

In order to describe the complexity of law for purposes of this study, the concept of legal and normative pluralism, discussed below, will be employed as a form of shorthand to explain how various regulatory orders supplement each other, compete and intermingle, and ultimately impact on the way in which communities, from small to global, are regulated. In turn, the conceptualisation of law as plural informs the analyses in subsequent chapters, which describe the processes unfolding at the interface of international and national law, that is, when domestic courts have recourse to international law in various ways.

### **(a) Legal and normative pluralism**

*[L]egal pluralism is the fact, legal centralism is a myth, an ideal, a claim, an illusion.*<sup>23</sup>

*The law is constantly in communication with the social, political and cultural orders, which are in turn all interconnected, both at the local and at the international level.*<sup>24</sup>

*Interlegality*<sup>25</sup>

Twining defines legal pluralism as a species of normative pluralism and discusses the ontological difficulties arising from an attempt to draw a clear distinction between the two categories.<sup>26</sup> For many reasons, it remains conceptually problematic to distinguish legal phenomena from non-legal, and laws and legal systems from other normative orders, which are based on, for example, cultural or religious tenets. Santos offers this rather vague explanation:

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<sup>23</sup> Griffiths cited in Örüçü 'Diverse cultures and official laws: Multiculturalism and Euroscepticism?' (2010) 6(3) *Utrecht Law Review* 75 at 77.

<sup>24</sup> *Schlesinger* (n 12) 217, where the editors offer the above as a 'broad definition of law' and in explanation of legal 'diffusion' through time and space.

<sup>25</sup> Santos (n 2) for example 89, 437.

<sup>26</sup> Twining (n 8) 82-90 for a general discussion of legal and normative pluralism; Santos (n 2) 85-98.

'As there is a literary canon that establishes what is and what is not literature, there is also a legal canon that establishes what is and what is not law.'<sup>27</sup>

Nonetheless, various attempts have been made to delineate the differences between legal and social norms, for example, in terms of their general ability and efficacy to induce compliance. Moore discusses the views of a number of the great theorists in this regard, some of whom consider the element of physical coercion, or the threat thereof, as decisive, while others regard the criterion of 'sanction' as sufficient, the latter thus pointing to a 'multiplicity of legal levels in society, which range from the family to the state'.<sup>28</sup>

Moore herself is of the opinion that 'there is an advantage in preserving the conventional distinction between rules potentially enforceable by the government, and rules enforceable by other organizations or agencies'.<sup>29</sup> However, she proves empirically that routine conformity to norms in most societies is exacted not through physical coercion or the threat thereof, but through an array of other societal processes and pressures, which are highly effective.<sup>30</sup>

Reisman, in his fascinating analysis of queuing as a micro-legal system, emphasises that that which imbues this practice with 'legal' force is the availability of social sanctions for queue-breaking. He argues that, for example, expressions of indignation, even when mild, will usually put an end to attempts at queue-jumping, thus bringing the principles which govern queuing within the ambit of that which constitutes a legal system.<sup>31</sup>

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<sup>27</sup> Santos (n 2) 438.

<sup>28</sup> Moore (n 13) 15-18, where she discusses the theories of Hoebel and Pospisil.

<sup>29</sup> Id 17.

<sup>30</sup> Id 19-20; also 56-64 for a discussion of various compliance mechanisms found in private organisations and industry. See the rest of this section, Chapter III 6(a) and (b); also Allott (n 20) 45; Palmié in Harris (ed) *Inside and Outside the Law* (1996) 184ff for a pertinent case study of normative conflict.

<sup>31</sup> Reisman 'Lining up: The microlegal system of queues' in *Schlesinger's Comparative Law* 7 ed (2009) 141-144, but note the editors' comment that all norms carry some form of social sanction.

If the element of social sanctioning suffices to distinguish a social norm from a legal norm, one might well ask whether it is at all necessary to draw a distinction between the two.<sup>32</sup> Twining maintains that any general definition of law ought to be rejected as such definitions are 'unnecessary and misleading, because the indicia ... are more like a continuum'. He proves that normative pluralism, or the 'agglomeration' of norms, is ubiquitous and affects every aspect of our lives, and that people are attuned to it and accept it, on the road, at the workplace, in the family, and so forth.<sup>33</sup> However, from a western, mainstream position, the notion of legal pluralism tends to elicit resistance and, in general, distinctions are drawn between that which is 'law' and other norms which are considered somehow 'not really law'.<sup>34</sup>

What then is the substantive difference between a legal norm and a social norm? There is clearly no simple answer to the question, and for that reason I shall use the terms normative pluralism and legal pluralism interchangeably, unless the context indicates otherwise. At the same time, it must be borne in mind that the way in which the question above is analysed has important ramifications, not only in terms of a jurisprudential enterprise, but also because a given approach may entrench prejudice.

To illustrate, historically, the very idea that law is 'law' only when it is written, professionalised, formal, statist and monist, had licensed the geopolitical North to foist its laws onto other cultures and societies, notably those in the South, in the hubristic belief that the laws of 'the other' were either wholly lacking, or that 'they' were without law and 'uncivilised'.<sup>35</sup> It is therefore with

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<sup>32</sup> Id 144.

<sup>33</sup> Twining (n 8) 231.

<sup>34</sup> Ibid.

<sup>35</sup> See for example Menski (n 11) 383-390; 468-469. The point is well illustrated in the account rendered by Twining (n 8) 75-76 of Llewellyn's 'Law-Jobs' theory, which was born out the need to counter the scepticism met by the anthropologist Adamson Hoebel in his quest to study the law of the Plains Indians in the 1930s. At the time it appeared impossible to study a system that had no courts or centralised sanctions, and was devoid of abstract, generalised rules, and hence not 'law

circumspection that one should approach pedantic definitions of law, yet nonetheless be cautious of excessive broadness, which renders meaningful analysis impossible.<sup>36</sup>

**(b) Pluralism: Multi-dimensional in content and context**

*We inhabit a world of 'multi-multilateralism' ...*<sup>37</sup>

*A legal system is more or less sedimented terrain, a geological construct made of different laws composing different layers ...*<sup>38</sup>

Legal systems do not consist of rules only, but also contain 'higher order understandings, received teachings, constellations of values, ideologies and shared ways of perceiving reality, which are pervasive, often subtle, and themselves deeply layered'.<sup>39</sup> Moreover, many of these 'constellations are not comfortably contained within national boundaries. This phenomenon is predominantly subsumed under the notion of 'legal pluralism', which, in its extended sense, refers to all situations where official state law is augmented, modified, challenged, reinterpreted or subverted by unofficial, non-state rules and norms – 'living law'. Hence, pluralism is not one-dimensional, but is a 'diffusion of law through time and space'.<sup>40</sup>

Two forms of pluralism can be observed. 'Deep' or 'strong' pluralism stands in contradistinction to its 'weak' version, which refers to the officially

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properly so-called', but equally, an 'example of the disastrous influence of Austinian analytical jurisprudence'. Note must also be taken of the fact that legal imperialism is not something of the past. See for example Chimni 'Third world approaches to international law: A manifesto' in Anghie, Chimni et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) 53; 2(e) and 3(c) below; and Chapter II 4(b).

<sup>36</sup> For example Koskenniemi (2007) (n 7) 23; Twining (n 8) 87.

<sup>37</sup> Leebron quoted in Paulus 'The emergence of the international community and the divide between international and domestic law' in Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007) 231.

<sup>38</sup> Santos (n 2) 418.

<sup>39</sup> Editors' comments in *Schlesinger* (n 12) 253; and note the reference to the term 'legal sensibilities' coined by Geertz.

<sup>40</sup> *Id* 217.

sanctioned co-recognition of personal, religious or indigenous norms within national systems.<sup>41</sup> Weak pluralism is found, for instance, in the constitutional recognition of customary laws that must be applied by courts under the relevant circumstances.<sup>42</sup> However, since a 'link to statehood has never been a prerequisite for the existence of a legal system', state-sponsored pluralism is only one aspect of the much more nuanced picture of normative plurality.<sup>43</sup>

Deep pluralism is evident in the way in which sub-state national groups, tribal entities, and even smaller units of indigenous family groups regulate themselves. Santos sees legal plurality as different 'legal spaces' which are 'superimposed and interpenetrated' and '*mixed in our minds and actions*', therefore a dynamic process, which he calls 'interlegality'.<sup>44</sup> Due to the multi-dimensional nature of legal plurality, Örucü suggests that legal comparatists should work from the 'bottom-up', 'looking backwards, sideways and forwards at all times'.<sup>45</sup> Despite their unofficial, off-the-grid nature, non-state orders often compete vigorously with their official counterparts, and legislators ought to pay

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<sup>41</sup> See for example the discussions in Örucü (2004) (n 16) 123-126; Örucü (2010) (n 23) 75-78; Örucü 'Judicial navigation as official law meets culture in Turkey' (2008) 4(1) *International Journal of Law in Context* 35 at 60, and note the observation that a 'society can only remain healthy if diversity does not threaten unity of purpose. There can be only room for "qualified legal pluralism"'.  
<sup>42</sup> Section 211(3) of the Constitution of the Republic of South Africa is an example of 'state sponsored' pluralism. The Bolivian Constitution of 2009 provides in article that 1. ... 'Bolivia is founded in plurality and political, economic, juridical, cultural, and linguistic pluralism within the integrating process of the country.' See also Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 375 for references to the Polish system which 'consists of multiple components/elements'.

<sup>43</sup> Örucü (2004) (n 16) 48-49; Sarfaty 'International norm diffusion in the Pimicikamak Cree Nation: A model of legal mediation' (2007) 48 *Harvard International Law Journal* 441 at 446-449 with specific reference to the interplay between the indigenous laws of the Pimicikamak Cree Nation of Manitoba and official Canadian law; Hinz *In Search of Justice and Peace* (2010) 6-11.  
<sup>44</sup> Santos (n 2) 437.  
<sup>45</sup> Örucü (2004) (n 16) 48-49; Glenn *Legal Traditions of the World* 4 ed (2010) 362-365, on 'internal' and 'lateral' traditions. See also Twining (n 8) 138-139, where he provides a succinct list of the 'levels of law', and cites Ireland as an example of a system with a 'multiplicity of legal orderings'. He also gives examples of instances where non-state laws govern marginalised peoples, such as 'gypsies', 'native North Americans', and 'Maoris'. See also Weyrauch and Bell 'Autonomous Law-Making: The Case of the "Gypsies"', on the flourishing subnational legal system of the Vlax Roma Gypsies in *Schlesinger's Comparative Law* 7 ed (2009) 136-141.

keen attention to the many disastrous outcomes, past and present, of situations in which the reality of normative pluralism had been ignored.<sup>46</sup>

Another instance of pluralism, namely a diachronic version, can be found in the identification of various layers of 'systems of command' which have been superimposed onto each other. In many African countries, for example, the various layers are reasonably distinct. In historical order, these may typically be: traditional customary law; religious law, notably Islamic law; superseded by formal colonial legal orders; followed by post-independence formal law; and in some countries another layer of socialist law.<sup>47</sup> Finally, one can discern the layer imposed by the 'economic approach to law' as dictated by the World Bank and International Monetary Fund by way of conditions and 'structural adjustment programmes'.<sup>48</sup> In addition, attempts at modernisation and law reform have been taking place for several decades, and continue to be achieved to a great degree through the direct importation of western laws and the borrowing of foreign legal ideas and ideologies.<sup>49</sup>

However, mere cognisance of the fact that a multiplicity of legal systems coexists within a particular jural society does not account for the profound implications inherent in the normative bricolage of competing orders and part orders, which may elicit untoward social responses due to conflicting loyalties towards different regimes.<sup>50</sup> Thus, an appreciation of legal plurality raises

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<sup>46</sup> One salient example is that of the 2004 French law banning headscarves in public schools. It meant that Muslim schoolgirls had to make the unenviable choice between obeying their religious laws or state laws. See Fourmeret 'France: Banning Legal Pluralism by Passing a Law' in *Schlesinger's Comparative Law* 7 ed (2009) 248-252. See also Loenen 'Freedom of religion versus sex equality and state neutrality: The difference the method of review can make' in Brems (ed) *Conflicts between Fundamental Rights* (2008); Palmié in Harris (n 30); Sarfaty (n 43), especially 478-479, note again how the indigenous laws of the Cree Nation of Manitoba successfully displaced formal law; and (e) and 3(c) below.

<sup>47</sup> *Schlesinger* (n 12) 255-258; An-na'im (1999) (n 19) 41, 44-45, 47-49; and see also note 45 above for additional examples.

<sup>48</sup> Editors' comments in *Schlesinger* (n 12) 257.

<sup>49</sup> See for example An-Na'im (1999) (n 19) 42-43 on the fact that most African constitutions 'mimic' western ones. Merry (n 20) 19-21, 224-225 on the production, spread, appropriation and assimilation of western human rights ideas across the globe in different cultural settings.

<sup>50</sup> See for example Merry (n 20) 184-188; Moore (n 13) 78-81.

questions inter alia about the desirability of transplantations, and the imposition of foreign norms and values, especially when these ignore context-specific realities and the generative processes which mould individual systems.<sup>51</sup>

It is important to note that pluralism is manifestly not confined to non-western, 'underdeveloped' legal systems. Every legal system contains competing 'other', sub-state normative orders, as testified by many quintessentially positivistic legal traditions, for example, in Europe and the United States.<sup>52</sup> Moreover, anthropologists have long recognised that pluralism is not contained within national borders, and that normative orders and 'semi-autonomous social fields' per se do not have distinct geopolitical boundaries.<sup>53</sup> Rather, there are complex interactions of reinforcement and conflict, whereby different orders influence each other transnationally.

Menski is another theorist who delves deeply into the pluralistic nature of law, with particular reference to the legal systems of Africa and Asia.<sup>54</sup> Legal pluralism is succinctly explained by means of his theoretical scheme which illustrates the interaction between different lawmaking and rulemaking systems, or legal 'formants'.<sup>55</sup> Law, according to Menski, is created by society, the state, and prevailing values and ethics (including religion).

These three major contributors to the lawmaking process are constantly interacting or competing, and stand in different proportions to each other, depending on the nature of the norm and the socio-legal system itself. In turn,

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<sup>51</sup> See 2(e) on law and social change below; Merry (n 20) 3; Wa Mutua 'The politics of human rights: Beyond the abolitionist paradigm in Africa' (1995-1996) 17 *Michigan Journal of International Law* 591 at 609; Fleming 'Trading in ambiguity: law, rights and realities in the distribution of land in northern Mozambique' in Harris (ed) *Inside and Outside the Law* (1996) 56ff; Editors' comments in *Schlesinger* (n 12) 257-258.

<sup>52</sup> Editors' comments in *Schlesinger* (n 12) 136.

<sup>53</sup> Moore (n 13) 85-86. For a discussion of 'semi-autonomous fields' see section 2(e) below. Note again the term 'interlegality' coined by Santos which illustrates these processes well.

<sup>54</sup> Menski (n 11).

<sup>55</sup> This concept was developed by Sacco 'Legal formants: A dynamic approach to comparative law' (Instalments I and II) (1991) 39 *American Journal of Comparative Law* 1 and 343.

these 'formants' are in themselves compound or plural. For example, official state law may have been covertly influenced by social or religious norms, or conversely, ethical norms may be delimited by state laws.<sup>56</sup> All of this confirms that 'legal pluralism is the fact' and that law is multi-dimensional and ambiguous, and that legal and social reality is not to be found in a narrow, state-based model of law.<sup>57</sup>

### **(c) The ambiguities of law: Practical and theoretical implications**

The 'fact' of normative plurality means inter alia that a degree of ambiguity is always inherent in law, which in turn presupposes shifts between cores, peripheries and boundaries of that which is deemed lawful (or moral) – depending on which system is favoured or obeyed.<sup>58</sup> Furthermore, the ambiguity of law exists on many levels and in many different guises, some of which come about for reasons other than normative plurality and simply relate to the anomalous nature of law itself.

Thus, for example, law may serve the hegemony of the state or of dominant cultures or nations, but equally it becomes a defence against them and may be the only means whereby subordinate groups can vindicate their rights. In other words, law reinforces state power and yet also provides the mechanisms for constraining it.<sup>59</sup> Despite these and other conundrums, for purposes of the present chapter, I confine the inquiry to a consideration of the ambiguities attendant to normative pluralism per se. The reason for this is that the application

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<sup>56</sup> See for example Harris (n 15) 7-10; Gulbrandsen 'Living their lives in courts: the counter-hegemonic force of the Tswana *kgotla* in a colonial context' in Harris (ed) *Inside and Outside the Law* (1996) 56ff.

<sup>57</sup> Menski (n 11) 103-128; 183-190; 600-612. He draws on the 'social fields' theory developed by Moore and the theories of legal pluralism developed by Allot, Griffiths and Chiba. See Mapaure 'Reinvigorating African values for SADC: The relevance of traditional African philosophy in a globalising world of competing perspectives' (2011) *SADC Law Journal* 149 at 168-172 for a discussion of Menski's 'triangular model of jurisprudence' and 'tetrahedron theory of law'.

<sup>58</sup> Palmié in Harris (n 30); Merry (n 20) 5, 25.

<sup>59</sup> See Harris (n 15) 5, 8; Merry (n 20) 231; Falk et al (eds) *International Law and the Third World* (2008) 17; An-Na'im 'Why should Muslims abandon *Jihad*? Human rights and the future of international law' in Falk et al (eds) *International Law and the Third World* (2008) 82-83.

of international law in domestic courts always triggers normative plurality in one form or another, be it in the conjoining of international and national, or even subnational norms, or in the interfacing of global and local value systems.

Nonetheless, one might well ask whether the concept of normative pluralism and its attendant ambiguities are of academic interest only, devoid of practical value, or whether, due to the complex processes whereby law is imbued with social and cultural norms and values, it is best addressed by sociologists and anthropologists, and left well alone by lawyers.

Twining concludes that it would be 'dangerous' for lawyers and legal theorists to adopt this stance.<sup>60</sup> On one hand, there are many pragmatic reasons relating to globalisation, such as the expansion of international trade and a surge in the transnational movement of people and goods – all of which have a pluri-legal dimension. On the other hand, he notes the clearly visible pluralistic layering of regional regulatory systems due to the expansion, both in importance and volume, of EU law and other regional laws, in addition to a growing awareness globally of multiculturalism and indigenous law.<sup>61</sup> Among others, these phenomena provide a strong signal that it is incumbent upon legal scholars and practitioners to take the implications of normative plurality seriously.

Conversely, Teubner sounds a warning to the over-enthusiastic 'plurality conscious', postmodern legal scholar, who 'love[s] pluralism', which according to him means that the 'crucial question of how to reconstruct ... the connections between the social and the legal fields finds a highly vague answer' and leaves us with 'ambiguity and confusion'.<sup>62</sup>

Furthermore, as the tide turns toward a deeper consciousness and appreciation of 'other' lego-cultural regimes and paradigms, the tendency to

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<sup>60</sup> Twining (n 8) 86.

<sup>61</sup> Ibid.

<sup>62</sup> Teubner quoted in id 87.

romanticise legal pluralism is much in evidence.<sup>63</sup> Yet, it must be borne in mind that legal and normative pluralism is simply 'a fact of life'. It is not necessarily good or bad, noble or ignoble, and despite the discomfort created by its ambiguity, is 'central to the understanding of law from a global perspective.'<sup>64</sup>

According to Twining, there is at present insufficient theory to address complex global developments, including normative pluralism. He suggests that what is needed is 'a jurisprudence that can transcend jurisdictions and cultures, so far as that it is feasible and appropriate ...[h]owever, "thick description" of local particulars ... will be as important as ever in the development of a healthy discipline of law in a more integrated world.'<sup>65</sup> Santos maintains that the purpose of recognising and describing the existence of plurality within legal orders is not merely to add to the list of legal and normative loci.<sup>66</sup> In contrast, he understands pluralism as 'structured and relational', and stresses the need to develop theories and 'maps' to explain the complexities and interrelatedness of orderings.<sup>67</sup>

Consequently, the present study is one such endeavour aimed at mapping a specific pluralistic landscape, namely, one featuring both the global and the local, and which is composed of international, national and subnational elements. The contours of pluralism however, cannot be drawn without understanding the connection between law and its socio-cultural embeddedness, which is the next 'signpost' on the map.

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<sup>63</sup> Koskenniemi 'The fate of public international law: Between technique and politics' (2007) 70(1) *Modern Law Review* 1 at 23 who maintains that 'theorists are so enchanted by the complex interplay of regimes and a positivist search for an all-inclusive vocabulary that they lose the critical point of their exercise', in for example, 'the habit of collapsing the distinction between law and regulation...'; Paulus 'International law after postmodernism: Towards renewal or decline of international law?' (2001) 14 *Leiden Journal of International Law* 739-740 on the problems created by 'radical subjectivity'.

<sup>64</sup> Twining (n 8) 83; 86; 243; Santos (n 3) 89-91.

<sup>65</sup> Twining (n 8) 49.

<sup>66</sup> Santos (n 2) 89-98.

<sup>67</sup> *Ibid*; see also Twining (n 8) 237-238.

**(d) Law and social processes: Law as culture – culture as law**

*[E]ach manifestation of the law – each rule ... must be apprehended as ... a complete social fact.*<sup>68</sup>

*[T]he rule becomes the unknowing articulator of a cultural sensibility.*<sup>69</sup>

*Law minus culture cannot be good law: it ignores the factual basis of global legal pluralism and shuts the reformer's eyes to reality.*<sup>70</sup>

*[T]he nice thing about culture is that everyone has it. Unfortunately however, not everyone is equally able to convince others of this fact!*<sup>71</sup>

In this section, I use the term 'culture' as a generic concept to describe a particular socio-cultural regime or context, which sets it apart from others. Coombe offers a good working definition of culture, namely, that it is "a dynamic process of self-understanding" among peoples across the globe.<sup>72</sup> It is evident that such self-understanding is expressed in many ways, and includes an expansive array of normative orders and part-orders.

As indicated, the reality of regulatory pluralism highlights the dilemma of attempting to draw crisp distinctions between legal, social and cultural norms. All of these are blurred in lay terminology, and merely point to some form of societal ordering. Hence, many normative orders can be loosely described as 'cultural' orders, and it will be demonstrated that what is 'culture' to some, is 'law' to others, and vice versa.<sup>73</sup> This contention further supports the view that law and

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<sup>68</sup> Legrand (n 18) 116.

<sup>69</sup> Ibid.

<sup>70</sup> Mapaire (n 57) 172.

<sup>71</sup> Coombe 'Culture: Anthropology's old vice or international law's new virtue?' (1999) 91 *American Society of International Law and Procedure* 261 at 268.

<sup>72</sup> Coombe (n 71) 266.

<sup>73</sup> Subsumed under the term 'culture' are the various religions and belief systems, and their associated norms. Religious rules, such as those of Islam, clearly illustrate the two-way flow

its cultural context are intricately interwoven, despite the 'impoverished' western penchant for a strict conceptual division between the two.<sup>74</sup>

The term culture itself, however, is highly problematic and contested.<sup>75</sup> In the present context the term is used to describe socially distinct systems of organisation founded on the customs, traditions, religion or ideology of various communities ranging from small units to entire nations, transnational alliances and groups of nations across the globe. For purposes of the study, culture denotes identifiable practices and usages, which characterise the methods through which these various communities regulate themselves, and reflect the shared values which bind a particular community together. It is important to note that the terms culture, tradition and custom are employed to apply equally to all communities wherever they may be located, and whatever the tenets of their culture may be.

In other words, the term is not used to describe something 'out there', typically in Africa or Asia, and which, according to some descriptions, may be viewed as somewhat 'primitive'.<sup>76</sup> It can consequently be said that the West is steeped in a particular culture founded on individualism, capitalism, democracy and the other values it holds dear, and equally, that socialism, communism and certain forms of fundamentalism represent a particular socio-political culture.

Similarly, the different legal systems found worldwide, nationally and transnationally, are rooted in one or other socio-cultural substructure. In this manner, international human rights law for example can be conceptualised as a separate *culture* premised on (inter alia) 'secular transnational modernity' which

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between law and culture: law could be culture, or culture could be law; and it may be impossible to differentiate between the two. See for example An-na'im (2008) (n 59).

<sup>74</sup> Legrand (n 18) 113; conversely, Gulbrandsen in Harris (n 56) on the lack of distinction and overlap between the customs and laws of the Tswana nation.

<sup>75</sup> For example Merry (n 20) 6-12.

<sup>76</sup> Id 10-11.

serves a global community whose members are allied within the ambits of this particular culture.<sup>77</sup>

Examples of law as culture, or culture as law, are evident on many levels. This overlap occurs when cultural practices and usages exert normative bindingness and exact compliance. At the non-state level, and often with reference to cohesive, self-governing subnational communities, cultural normativity may exist in highly structured forms, with well developed, fully ascertainable norms and efficient compliance mechanisms. Therefore, under these regimes 'traditional justice systems would actually be formal justice systems.'<sup>78</sup>

Nonetheless, an appreciation that law and culture are deeply connected is at times evident at the level of national legal systems. In the United States for example, the so-called 'cultural defense', although not formalised, is available. It is usually invoked by the defendant in order to excuse or mitigate criminal culpability, on the basis that he or she 'acted according to the dictates of his or her "culture"; and therefore deserves leniency'.<sup>79</sup> Mattei et al make the ingenious observation that the concept of the common law 'reasonable person', which is highly culture-specific, may be construed as a type of Anglo-Saxon 'cultural' defence.<sup>80</sup>

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<sup>77</sup> Id 90. See also Marks *The Riddle of all Constitutions* (2000) on international law (and democracy) as ideology, which for present purposes is closely allied to an inclusive reading of the term culture, that is, a distinct legal culture.

<sup>78</sup> Hinz (n 43) 3. Included are the regimes which govern autonomous, subnational groups like the Khoe/Khwa (San or Bushmen) of Southern Africa and the Vlax Roma Gypsies. See Thomas *The Old Way: A Story of the First People* (2006); Workman *Heart of Dryness* (2009); particularly at 239-241 where he discusses the ethics which govern the lives of the Khoe/Khwa; Weyrauch and Bell (n 45). Also of interest however, are the subnational microlegal orders, which successfully regulate and exact compliance, and which are moreover culture specific. Reisman *Law in Brief Encounters* (1999); Reisman (n 31) 141-144.

<sup>79</sup> Volpp '(Mis)identifying culture: Asian women and the "cultural defense"' in *Schlesinger's Comparative Law* 7 ed (2009) 132-136; Dan-Cohen *Harmful Thoughts* (2002) 163-164. Note also, that due to the conflation of religious and cultural norms, many freedom of religion cases can equally be construed as cultural defences, see for example Palmié in Harris (n 30) 194-195. See in addition Bennett 'The cultural defence and the custom of *thwala* in South African law' (2010) 10 *Botswana Law Journal* 3-26.

<sup>80</sup> Editors' comments in *Schlesinger* (n 12) 136.

Those, mentioned above, are but a few examples to support the contention that the idea of law as a positivistic and monolithic construct provides a barren and misleading account of the nature of law. I argue in subsequent chapters, that recognition of the interconnectedness of law and culture is relevant at both national and international levels, because it is 'culture', in its many guises that acts as either a catalyst or irritant at the interface of various legal layers. In other words, it is the socio-cultural context within which international law migrates to domestic systems that determines whether it will resonate with the latter or not.

Various legal theorists have attempted to describe the law-culture continuum. Rodolfo Sacco developed the theory of legal 'formants' to explain the different processes at work to create 'living law'. He demonstrates how multiple formants, some explicit, some non-verbalized, operate either in tandem or in conflict, in the establishment of legal concepts and rules.<sup>81</sup> Örucü makes the further observation that just as there are multiple legal formants, there are also other non-legal, 'contextual formants' which influence the development of legal formants. By necessary implication, some formants, whether legal or non-legal, are rooted in 'culture'.<sup>82</sup>

Other significant observations are made by Cossman and Moran. Cossman shows how 'transnational culture flows...shape the constitutional landscape within which rights [are] articulated'.<sup>83</sup> Moran describes the 'complex migration' of values, and how these traditionally non-binding, essentially cultural elements, increasingly evidence a 'type of mandatory effect'.<sup>84</sup>

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<sup>81</sup> Sacco (n 55).

<sup>82</sup> Örucü (2004) (n 16) 48.

<sup>83</sup> Cossman 'Migrating marriages and comparative constitutionalism' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 209-228. She describes the 'transnational culture flow' in the context of the transformation of traditional views about same-sex marriages, which in turn has changed the legal landscape.

<sup>84</sup> Moran 'Inimical to constitutional values: Complex migrations of constitutional rights' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 233-255.

The abovementioned examples show that law and culture are conceptually and ontologically closely allied, and they point to the hazards encountered when the cultural permeations and foundations of legal systems are ignored. At the same time, it is particularly difficult to examine and determine the effects of cultural imprints on the law in particular contexts and even more so in comparative studies. In part, these difficulties arise because the living culture or law is often ritualistic and unwritten. Therefore, literature and legislation alike rely predominantly on essentialised constructions of various legal and regulatory phenomena, which generally lack the nuances of the living version.<sup>85</sup>

At the same time, law is not always deterministically the 'mirror image' of 'felt social needs', or one could add, of culture.<sup>86</sup> There are many other reasons, such as various internal and external pressures and demands, or even trends, and convenience, which account for the creation or transformation of law.<sup>87</sup>

Consequently, it is for good reason that legal scholars tend to be uncomfortable with crossing the boundaries between various social, cultural and legal fields. Often, concepts such as Santos's 'interlegality' are portrayed as 'confusion of the mind', and legal pluralism as 'messy'.<sup>88</sup> It is clear that if the definition of law becomes too general and attempts to incorporate every possible stakeholder and locus, it will become meaningless. Nevertheless, the reality is that neither a conceptual, nor actual separation of law and its socio-cultural context, or, of law and 'culture' in general, is possible.

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<sup>85</sup> See Nyamu 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?' (2000) 41(2) *Harvard International Law Journal* 381 at 393; Merry (n 20) 8-9; Wa Mutua (n 51) 596-597.

<sup>86</sup> Editors' comments in *Schlesinger* (n 12) 241.

<sup>87</sup> Teubner (n 19) 22 'Contemporary legal discourse is no longer an expression of society and culture *tout court*; rather it ties up closely only with some of its areas ... ', also the editors' comments in *Schlesinger* (n 12) 241-242, 248 on the reasons for legal transplants which include 'blackmail', 'dependency' and 'aesthetics'.

<sup>88</sup> Menski (n 11) 129, 184, 392.

**(e) Law, culture, society and social change**

*[L]aw can be a reactor to social change or its initiator.<sup>89</sup>*

*[I]mportant aspects of the connection between law and social change emerge only if law is inspected in the context of ordinary social life.<sup>90</sup>*

*[I]ndigenous knowledges are presupposed to be bounded and inextricably connected to some isolable "cultural context" until disaggregated by the interpretive activities of ethnographers.<sup>91</sup>*

*[R]esistance to change is high when law is tightly coupled in binding arrangements to other social processes.<sup>92</sup>*

*Culture provides a good excuse for failure.<sup>93</sup>*

A brief reflection on colonialism, the spread of socialism, communism, capitalism and other isms, indicates that over the centuries, ruling elites, dominant nations and conquerors have deemed societies capable of both conscious control and covert manipulation. Under these circumstances, law is, and has been, regarded as a tool for social engineering and for bringing about social change.<sup>94</sup>

On the other hand, law and society do not exist independently of each other, and it is equally trite that society controls law in important ways.<sup>95</sup> Moore explains this reality and the processes whereby conformity to norms is exacted

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<sup>89</sup> Örucü (2010) (n 23) 77.

<sup>90</sup> Moore (n 13) 78.

<sup>91</sup> Coombe (n 71) 267.

<sup>92</sup> Teubner (n 19) 19.

<sup>93</sup> Merry (n 20) 95, in the context of international human rights law.

<sup>94</sup> I discuss these aspects throughout this and following sections.

<sup>95</sup> See for example Santos (n 2) 420, 'law and society are mutually constitutive; Teubner (n 19) 18-19, '[R]eferences of law to social norms work as extra-legal rule-making machines. They are driven by the inner logics of one specialised social domain and compete with the legislative machinery...'

by developing the concept of 'semi-autonomous social fields'.<sup>96</sup> 'Social fields' relate to the different levels of 'law' or normative orders which operate simultaneously in every society, whether complex or simple, urban or rural. These fields are independently able to generate rules and customs and foster compliance through coercion or inducement, and yet at the same time, they are impinged upon by other laws and forces from the outside world.<sup>97</sup>

The operation of these semi-autonomous social fields explains why legislation, that is intended to change social arrangements and institutions, often fails to do so. As indicated above, this happens because the intended recipients may regard a social, religious and cultural order as more binding upon them than official laws.<sup>98</sup>

The spectacular failure of the 'law and development movement' of the 1960s and 1970s, is a stark reminder of the fact that, when law is imposed arrogantly or dismissively of traditional norms in order to compel social change and 'development', it is, at best, a resounding disappointment, and at worst, has ruinous consequences for those upon whom it is foisted.<sup>99</sup> Another example, among many, is provided by Kelley who writes about the harm that ensued from an 'aggressive program of legal westernization' in the Republic of Niger, resulting

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<sup>96</sup> Moore (n 13) 18, 54-59.

<sup>97</sup> Ibid.

<sup>98</sup> See Teubner (n 19) 19 and 2(d) above. A clear example is the bindingness of religious law, but there are many others. For instance, legislation that aims to regulate the economy is often thwarted, because there are other powerful social incentives at work, such as the tendency to pursue economic opportunity, which is more profitable, rather than compliance. See also Moore (n 13) 56; and Flemming in Harris (ed) *Inside and Outside the Law* (1996) regarding a similar scenario with respect to land rights in Mozambique.

<sup>99</sup> Much literature is available. See for example Rajagopal 'Counter-hegemonic international law: Rethinking human rights and development as a Third World strategy' in Falk et al *International Law and the Third World* (2008) 71-76 where he considers the highly politicised nature of 'hegemonic development' and its links with colonialism; Chua 'Markets, democracy, and ethnicity: Toward a new paradigm for law and development'; and the related discussion and further articles in *Schlesinger's Comparative Law* 7 ed (2009) 270-278. See also Udombana 'The Third World and the right to development: Agenda for the next millennium' (2000) 22 (3) *Human Rights Quarterly Review* 753; Tamanaha 'The lessons of law-and-development studies' (1995) 89 *American Journal of International Law* 470; Bradlow 'Differing conceptions of development and the content of international development law' (2005) 21 *South African Journal of Human Rights* 47-85.

in the misconstruction of land tenure laws.<sup>100</sup> The new laws, coupled with a flawed understanding of the position of 'slaves', deprived these 'contemporary slaves' of the traditional protection and access to land which they had enjoyed prior to the reform.<sup>101</sup>

Moore illustrates how semi-autonomous social fields affect the interplay between objective and general rulemaking when it encounters subjective and relative 'transactional complexes', and just how resilient the latter rules may prove to be.<sup>102</sup> She investigates, for example, the issue of land tenure as perceived by the Chagga in Tanzania, and establishes how new legislation, intended to have universal application, affected only certain categories of persons in limited circumstances. For the great majority, their traditional ways of exercising rights to land had not been changed.<sup>103</sup>

It can therefore be argued that 'universality is often a myth' and that 'all legal rights and duties are aspects of social relationships'.<sup>104</sup> By further implication, law can only effect social change if it takes cognisance of underlying social structures, and is able to change the existing patterns which underlie social relationships and processes.<sup>105</sup> In other, particularly perspicuous, words:

It is in their close links to different social worlds that we can see why legal institutions resist transfers in various ways. The social discourse to which they are tightly connected will not respond to the signals of legal change. It obeys a different internal logic and responds only to signals of change of a political,

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<sup>100</sup> Kelley 'Unintended consequences of legal westernization in Niger: Harming contemporary slaves by reconceptualizing property' in *Schlesinger's Comparative Law* 7 ed (2009) 126-130. See also n 104 below.

<sup>101</sup> *Ibid.*

<sup>102</sup> Moore (n 13) 78-81; see also Gulbrandsen in Harris (n 56) on the enduring influence of the traditional Tswana *kgotla* (courts) in the face of the imposition of colonial legal systems.

<sup>103</sup> Moore (n 13) 68-70.

<sup>104</sup> *Ibid.* See Nyamu (n 85) especially at 395ff on the effect of individualisation and commodification of land tenure, which has weakened the position of many women in Africa in relation to their traditional rights to land.

<sup>105</sup> See Merry (n 20) 185-191, with reference to the 'subject position' or 'location' in terms of gender identity, which may militate against reliance on human rights provisions.

economic, technological or cultural nature. Transfer will be effectively excluded without a simultaneous and complementary change in the other field.<sup>106</sup>

In summary, the 'tight coupling' of law to its socio-cultural context, and its imbrication with 'culture', cannot it be brushed aside by a stroke of positivism. Consequently, the nature of such coupling corresponds to the success or failure of normative regulation in a particular context. Hence, the interplay between legal and other normative elements greatly affects the potential of international law to transform local regimes, whether national or subnational.

#### **(f) Concluding remarks: Law and its signposts to emancipatory jurisprudence**

This section explored the nature of law, and described its plural and ambiguous character, and its close allegiance to the relevant socio-cultural context. It was explained that the introduction of foreign norms, such as international law, could therefore elicit resistance if they are incongruent in the particular context. These considerations thus point to the importance of a liberal construal of the meaning of 'law', that is, as socio-culturally constructed.

Nonetheless, the nagging difficulty is to decide how wide the boundaries of 'law' must be drawn. For present purposes I shall confine the matter to Moore's comment, that 'on the point of melting it all together as "law", this is a question of what one is trying to emphasize for analysis'.<sup>107</sup> The strategic analysis at this juncture is to provide a signpost that places the application of international law in domestic courts within a paradigm of normative pluralism – relative to a distinct context. Moreover, for international law to have emancipatory application, the frame of reference must embrace both national and subnational dimensions.

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<sup>106</sup> Teubner (n 19) 22.

<sup>107</sup> Moore (n 13) 81.

The next signpost points to the fact that the meaning of law is also situated within a wider legal context, namely within particular legal 'families' or traditions. This, in turn, has implications for the application of international law.

### 3. Law as families and traditions: The taxonomy of legal systems

*There is no pure legal system ... All legal systems are mixed.*<sup>108</sup>

*A single scientific classification of legal systems is impossible.*<sup>109</sup>

*[T]he criteria used ... to classify legal families would tell us more about the ideology of Eurocentric comparative law than about the ideology of the different legal families ...*<sup>110</sup>

The grouping of various legal systems, deemed to share distinctive features, is regarded as an important analytical tool that promotes a clearer understanding of law and facilitates proper comparison of legal systems and their institutions. It has however, also been a highly contested enterprise, fraught with problems such as the identification and selection of the relevant criteria for such grouping.<sup>111</sup>

Through the efforts of great comparative scholars, a classic taxonomy has emerged, which is often considered to be a prerequisite for meaningful

<sup>108</sup> Örucü (2004) (n 16) 138, 161.

<sup>109</sup> Twining (n 8) 146.

<sup>110</sup> Santos (n 2) 192.

<sup>111</sup> See Twining (n 8) 165-178. The following are considered the most seminal works on comparative law in general (including the establishment of selection criteria): David and Brierley *Major Legal Systems in the World Today* 3 ed (1985); Zweigert and Kötz (n 16). Although these works are remarkable in terms of their exposition of theory and methodology, they are however, also examples of a clearly western-centric paradigm. In contrast, note the inclusive approach adopted by Derrett (ed) *An Introduction to Legal Systems* (1968), Menski (n 11) and Glenn (n 45). See Örucü (2004) (n 16) 41-45, 171-172; Curran 'Dealing in difference: Comparative law's potential for broadening legal perspectives' (1998) 46 *American Journal of Comparative Law* 657 at 659-663, on some of the difficulties which may be encountered. Editors' comments in *Schlesinger* (n 12) 260-270, where other types of taxonomy are described.

comparison.<sup>112</sup> Despite many shortcomings and the lack of objectivity, theorists continue to rely on traditional categorisations, perhaps encouraged by the onerous practical constraints that attend any investigation of the unknown.<sup>113</sup> Hence, Twining maintains that proceeding from the 'familiar and mainstream' is helpful in order to comprehend issues that are 'bewildering in their range, complexity, and pace of change'.<sup>114</sup>

In the next section, I describe the traditional approach in terms of its usefulness as a jurisprudential tool, yet wary of its tendency to promote an impoverished understanding of law.<sup>115</sup>

#### **(a) Traditional classifications: The civil law and common law systems and families**

*The dichotomy between common law and civil law probably provides as useful a categorical framework as any from which to start mapping the legal systems of the world.*<sup>116</sup>

*Almost every legal system presently in existence has at least some of its professional characteristics, more or less closely, with one or the other (and sometimes both) of these two groups.*<sup>117</sup>

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<sup>112</sup> See n 111 above and the following section.

<sup>113</sup> Comparisons based on the classic taxonomies tend to rely on stock interpretations of many key concepts, which are, however, not uniform in all jurisdictions. See Sacco (n 55) 10-21; Reimann 'Beyond national systems: A comparative law for the international age' in *Schlesinger's Comparative Law* 7 ed (2009) 14-15, who argues that pivotal ideas such as the 'rule of law' and 'good governance' are not neutral concepts; Örüçü (2004) (n 16) 161-169; Twining (n 8) 14, who, because of the difficulties, deliberately adopts a 'cautious and conservative' strategy.

<sup>114</sup> Twining (n 8) 3, 11-14, quote at 14; Kennedy 'The mystery of global governance' (2008) 34 *Ohio Northern Law Review* 827 at 836.

<sup>115</sup> It is trite that the manner in which things are defined and categorised, powerfully shape our perception of these and the world in general, law being no different. See for example Curran (n 111) 658; Marks (n 77) 121 'What you hold to be true about the world depends on what you take into account, and what you take into account depends on what you think matters.'

<sup>116</sup> Editors' comments in *Schlesinger* (n 12) 260.

<sup>117</sup> *Ibid.*

The official legal systems of most modern states fall into very few categories of legal families, with the majority being founded on either the common law or the civil law.<sup>118</sup> Every historical survey will indicate that colonisation is one of the major reasons for the pervasiveness of these two traditions through time and space.<sup>119</sup> Colonisation has also configured the world according to one type of political organisation, namely, the territorial state, which, as noted, is traditionally perceived as having a monopoly on law-making.<sup>120</sup>

The result is that various incarnations of the civil law and common law are found right across the globe, and their 'duopoly' over modern legal systems continues unabated, as many states aspire to model their systems on one of these families.<sup>121</sup> Furthermore, as a result of enduring cultural and economic ties, many former colonies remain in a state of neo-colonial dependency, and in this climate, civil and common law characteristics have contrived to leave a discernible imprint on post-independence state law.<sup>122</sup>

With its roots in colonialism (and neo-colonial overtones), the classic common law–civil law division can be criticised for good reason.<sup>123</sup> Its unapologetically occidental and positivistic bias effectively denies the existence of other major legal traditions from Africa and Asia. Furthermore, the omission of

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<sup>118</sup> An-na'im (1999) (n 19) 41-45; Editors' comments in *Schlesinger* (n 12) 230.

<sup>119</sup> For example An-Na'im (1999) (n 19) 41, 44-45.

<sup>120</sup> See Chapter II section 4(c)(ii) on the relationship between the state and international law; Twining (n 8) 51-52, 209 who aptly refers to the occidental and statist construction of law as the 'Country and Western Tradition', which has dominated legal studies for many decades, and which Twining argues must change in the face of globalisation.

<sup>121</sup> *Ibid*; Editors' comments in *Schlesinger* (n 12) 223-227, 238-239; Örucü (2004) (n 16) 143. Direct borrowing and general or constitutional legal modelling are prime examples. Many examples show the borrowing to be from countries with either a strong common law or civil law tradition, e.g. the Ethiopian Constitution of 1994 is an 'American-patterned rhetoric of rights ...'. The South African Constitution is modelled to an appreciable degree on the Canadian. The Turkish codes borrow heavily from the German, Italian, French and Swiss. Japan has borrowed from the German Civil Code.

<sup>122</sup> Editors' comments in *Schlesinger* (n 12) 230, 256; Coombe (n 71) 264.

<sup>123</sup> See Twining (n 8) 51-52, 209; Editors' comments in *Schlesinger* (n 12) 260-261; Örucü (2004) (n 16) 148.

these 'other' systems implies that they cannot be regarded as 'proper' sources of law, or that they are 'backward' and lacking in fundamental ways.<sup>124</sup>

Furthermore, traditional definitions and categories of law, which describe it as systems of black letter rules derived from a dominant 'parent' system, ignore the specific socio-legal culture in which legal systems are rooted.<sup>125</sup> Equally problematic is the fact that the mainstream approach inevitably leads to over-generalisation and superficiality since it conceptually confines legal systems to a statist context, thus ignoring the plural nature of law, and its 'diffusion' across national *and* subnational *and* transnational borders.<sup>126</sup>

Nonetheless, the classic, albeit deficient, classification of legal systems cannot be ignored completely, since it frequently lays the foundations for comparative and other jurisprudential enterprises.<sup>127</sup> Therefore, for purposes of this study the civil law-common law analysis retains merit as an historical and comparative datum and as *one* signpost in the process of conducting a nuanced, plurality conscious exploration.

As indicated above, within every legal system there is a profusion of interconnected normative orders, many of which relate to extra-state regimes at subnational and international levels. There are, however, also entire legal

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<sup>124</sup> See in general 2 above; and for example Merry (n 20) 225-226; Menski (n 11) 452; Santos (n 3) 191-193; Reimann (n 113) 13-15 argues that the purpose of comparative law has become to identify what is 'lacking' in other, typically non-western societies, and to reconstruct or reform these systems, or to supply what is deemed lacking, thereby aligning these societies more and more with western capitalist ideology and institutions.

<sup>125</sup> See Legrand (n 18); and 2(a) and (b) above for a detailed discussion of pluralism which addresses the issues raised here.

<sup>126</sup> See Twining (n 8) 149-152; who provides an account of the difficulties of the geographical 'mapping' of legal systems; see also Chapter II 4(c)(ii) on the imponderability of linking law and state sovereignty; and 6 (b) below on the 'diffusion' of law.

<sup>127</sup> In this respect, it is noteworthy that many of the very authors, who decry the traditional mode of classification, time and again employ its classic division as a point of departure. For example, Menski (n 11) 447-449, who, throughout his superlative work, challenges western hegemony in any form, is compelled to rely on the division in a number of analyses. Örucü (2004) (n 16) 133-145, who at first blush criticises and rejects outright the traditional classification, reverts to the division for purposes of her 'family tree' model.

systems, which, at state level, are conglomerations of different legal traditions. They are the so-called mixed or hybrid systems, discussed next.

### **(b) Mixed and hybrid systems**

*The starting point is appreciation of the fact that all legal systems are overlaps and mixes to varying degrees.*<sup>128</sup>

*[A] world of contaminations...*<sup>129</sup>

Örücü convincingly outlines the proposition that at a substantive level all legal systems are mixed across a spectrum of ‘cross-diffusion’ which has taken place throughout history, resulting in various ‘overlays’ and ‘underlays’.<sup>130</sup> As legal transplanting, migration, borrowing and the like continue, the mixing continues. Thus, ‘every legal system contains imported elements...and [is], to some extent mixed; no legal system has been constructed out of purely indigenous materials’, resulting in the observable ‘diffusion’ of law.<sup>131</sup> In this sense, the EU legal system is a prominent model of a ‘mixed’ system, although it is not often called that.<sup>132</sup>

From a different perspective, this means that notions of legal superiority, based on assumptions of the purity and autochthonous development of a particular regime, are countered by the simple reality of the composite, mixed nature of all systems. Thus for example, ‘realist’ and ‘isolationist’ approaches, exemplified by nationalist judges in the United States, can be challenged on the

<sup>128</sup> Örücü (2004) (n 16) 138.

<sup>129</sup> Monateri in Örücü (2004) (n 16) 138.

<sup>130</sup> Örücü (2004) (n 16) 138-139, 149-161. A pertinent example is the legal system of the Seychelles. See Twomey ‘The parts that make a whole? – The mixity of the laws of Seychelles’ (publication pending as at May 2013) available at SSRN: <http://ssrn.com/abstract=2156807>.

<sup>131</sup> Editors’ comments in *Schlesinger* (n 12) 177-278, and especially 240. The editors devote an entire chapter to the ‘diffusion’ of law, citing many informative examples and providing important insights. Similar to Örücü’s use of the term ‘mixing’, however, they subsume both the universal type of ‘diffusion’ and the more technical ‘mixed system’ under the same term.

<sup>132</sup> See Walker ‘The migration of constitutional ideas and the migration of *the* constitutional idea: the case of the EU’ in Choudhry (ed) *The Migration of Constitutional Ideas* (2006); Örücü (2004) (n 16) 137-139; 149-161; Besson ‘Sovereignty in conflict’ in Warbrick and Tierney (eds) *Towards an ‘International Legal Community’?* (2006) 151-160.

grounds that the legal system of the United States is greatly indebted to, and in its formative years, had drawn extensively from many sources, including English and Continental models.<sup>133</sup>

It must be noted, however, that the abovementioned pervasive, often spontaneous, 'mixing' that takes place between systems through both time and space, must be distinguished from a more technical understanding of the terms 'mixed' or 'hybrid' which pertain to a distinct family of legal systems. In order to maintain this distinction, I shall use the term 'hybrid', as opposed to 'mixed', to describe this family.

The general characteristics of hybrid systems are briefly summed as follows. First, they are founded upon both the civil law and the common law, in a manner that makes it possible for the provenance of constituent elements to be identified. Second, the mechanics of the process involve an underlay of civil law, mostly brought about by European colonisation of a particular country, and a subsequent overlay of Anglo-American law, particularly in terms of court and judicial processes. In South Africa for example, English common law was imposed upon the existing Roman-Dutch civil law system, whereas in Louisiana, a French civil system was overlaid with American common law.<sup>134</sup> Other hybrid jurisdictions include Israel, the Philippines, Quebec and Scotland, which is also the oldest such system.<sup>135</sup>

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<sup>133</sup> For example, the institutional framework within which the judiciary operates and the concept of judicial independence, was derived from English common law, whereas French civil law transmitted the idea of universal individual rights. See Koh 'International law as part of our law' (2004) 98 *American Journal of International Law* 43 at 45-47; Santos (n 2) 280; *Schlesinger* (n 12) 66-68.

<sup>134</sup> See Van Wyk et al *Introduction to Comparative Law* (2004) 82-83.

<sup>135</sup> Palmer *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001); Örucü (2004) (n 16) 149-161: The common law-civil law split is usually along the lines of public law and private law, in that order. Other superimposed Anglo-American principles include the separation of powers, independence of the judiciary, judicial review, and many important criminal procedural principles.

The internal functioning of hybrid systems has particular significance for programmes, as those in the EU, aimed at legal integration and harmonisation.<sup>136</sup> They are truly ‘laboratories for comparative lawyers’, since the ‘mixedness is itself the culture’, and thus present an empirical opportunity to enhance understanding of, and uncover general principles, which underlie national and transnational mixed and mixing systems.<sup>137</sup>

The identification of a system as hybrid, however, is only one part of the much bigger picture of ‘mixing’. As indicated, all systems are ‘mixed’ and plural, and hybrid systems do not merely contain civil law and common law elements, but also other overlays and underlays of, for example, indigenous law and transnational law.<sup>138</sup> The label ‘hybrid or mixed system’ is therefore somewhat misleading. It nevertheless remains a useful model that attests to the inherent plurality of all legal systems and the fact that such plurality need not be chaotic or unmanageable.

Thus, hybrid systems prove that different normative phenomena can coexist in harmony, and thereby signal the possibility that ‘other’, non-mainstream orders can validly mould the normative landscape, alongside their orthodox counterparts.

### **(c) ‘Other’ systems of law and their bearing on cosmopolitan and emancipatory jurisprudence**

*Comparative law by definition deals with and analyses the other, the different.*<sup>139</sup>

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<sup>136</sup> Örüçü (2004) (n 16) 157-159.

<sup>137</sup> *Id* 153.

<sup>138</sup> Moreover, as the drive toward constitutionalism is gaining momentum, an increasing number of states are abandoning the common law model of public law based on parliamentary sovereignty, thereby diluting the classic hybrid model. South Africa, Nigeria, Uganda and a number of other African countries are examples.

<sup>139</sup> Curran (n 111) 657.

*[T]here are no well established criteria for distinguishing major from minor traditions, in law or in any other field of endeavour.*<sup>140</sup>

Despite the sagacity of the abovementioned quotations, legal theory has to a large extent remained a North-versus-South construct.<sup>141</sup> As noted above, a most unfortunate corollary to the solipsistic classifications of legal systems is that those, which do not fall into the conventional categories, are ignored, neglected or simply lumped into one category of 'other'.<sup>142</sup> Consequently, most mainstream scholars have not attempted to be rigorously inclusive, and have disregarded 'other' major systems, such as those in Africa and Asia, despite the fact that they are powerfully in evidence across vast continents.<sup>143</sup>

For purposes of the present study, however, the concept of 'other systems' does not refer exclusively to large families of law, such as the Islamic, Hindu or Talmudic, as evident in the transnational or macro-legal sphere. Rather, the inquiry is directed towards the ancillary effect that these important systems have at national and subnational levels. For example, religious and indigenous law systems predominantly find their expression at the subnational level, where they may function in tandem, or in competition with the official national system.

In terms of the present study, the significance of these 'other' systems is amplified when their norms flow up from the subnational sphere and into the national domain, and in particular, when they feature in domestic adjudication. The reason is that, in domestic courts, these 'other' norms and values bring

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<sup>140</sup> Glenn (n 45) 361.

<sup>141</sup> See the foregoing sections, and for example Merry (n 20) 224-226 and Dembour 'Human rights talk and anthropological ambivalence: the particular context of universal claims' in Harris (ed) *Inside and Outside the Law* (1996) 20-21 on the western-centric production of international human rights law. See however Glenn (n 45) 33-34 ff, on a change in perceptions taking place, which puts 'western thought beside, and not above, other forms of thought'.

<sup>142</sup> For example the classifications of David and Brierley (n 111) identifies only three major groups, namely the common law, civil law and socialist; Zweigert and Kötz (n 16) make only brief reference to indigenous African systems.

<sup>143</sup> See however, the works of Menski (n 11); Derrett (n 111); Glenn (n 45), which are noteworthy for their inclusiveness. Glenn for example distinguishes the Chthonic, Talmudic, Islamic, Hindu and Confucian legal traditions in addition to the Civil - and Common Law traditions.

judges face to face with normative pluralism and 'challenge entrenched categorizations and fundamental assumptions in one's own and others' legal cultures.<sup>144</sup>

These aspects inform many of the pivotal themes of this study and provide scaffolding for the cosmopolitan and emancipatory application and reconstruction of international law. Therefore, I consider below the signposts relative to the impact of 'other', subnational elements in domestic courts, and possible correlative judicial responses thereto.<sup>145</sup>

It was explained earlier that cosmopolitan and emancipatory jurisprudence can only take place within a particular socio-cultural context. This entails a nuanced evaluation by the court of the 'interlocking set of transactional complexes', which is a result of ever-present normative plurality.<sup>146</sup> Accordingly, in the first place, the 'local' context is understood to include both national and subnational elements, which moreover, may fall well outside the conventional categories of law.<sup>147</sup>

The second point is that appropriate judicial contextualisation and 'plurality consciousness' cannot serve a merely decorative or 'feel-good' purpose. The dominant reason is that the effectiveness and legitimacy, actual or perceived, of any law hinges precariously on acceptance by the intended recipients thereof.<sup>148</sup> Thus, for example, it has been argued that it is 'impossible' to transplant a legal phenomenon from one socio-cultural context to another, since the 'meaning

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<sup>144</sup> Curran (n 111) 658.

<sup>145</sup> For present purposes, this is the first step, namely a description of the 'signposts'. Subsequent chapters provide more detailed accounts of the interaction between the subnational, national and international. See in particular Chapter IV.

<sup>146</sup> Moore (n 13) 80; and see 2(a) and (b) above on legal and normative pluralism. Chapter III deals, inter alia, with questions pertaining to the role of judiciary and legitimacy of sources.

<sup>147</sup> See Merry (n 20) 6-9 on the importance of local context in the human rights discourse.

<sup>148</sup> Allott (n 20) 11, 121; Dan-Cohen (n 79) 44 on the notion of 'acoustic separation', that is, when certain 'normative messages' do not 'register' with one or other group; Obiora 'Toward an auspicious reconciliation of international and comparative analyses' (1998) 46 *American Journal of Comparative Law* 669 at 676; Teubner (n 19) 22.

invested into [a] rule is...culture-specific', and is therefore 'never displaced because it always refers to an idiosyncratic semio-cultural situation'.<sup>149</sup>

This means that whenever international law is 'transplanted' into the pluralistic constellation of official and unofficial law which constitutes a particular domestic context, it becomes 'one normative system among many which compete for the attention and the allegiance of those to whom they are addressed'.<sup>150</sup> Hence, its success or failure, and whether it merely becomes a legal 'irritant', depends on its proper contextualisation, or indigenisation.<sup>151</sup>

Third, it is not possible to arrive at contextualised adjudication, without a firm commitment to the realisation that 'greater receptivity to underlying differences among legal cultures has become appropriate and desirable in the context of contemporary societies committed to an ethics of inclusion and non-discrimination'.<sup>152</sup> In practical terms, such ethical commitment means that judges will respect the existence of other systems, and take seriously the impact that different norms have on people's lives.<sup>153</sup>

The fourth signpost highlights the fact that non-state systems, both subnational and supranational, contain wisdom and potential solutions that can invigorate official systems.<sup>154</sup> Importantly, and in direct correspondence to the purpose of the study, it signals that international law itself can be transformed

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<sup>149</sup> Legrand (n 18) 117.

<sup>150</sup> Allott (n 20) 121. There are many everyday examples where courts employ one form of contextualisation or another, such as in their reliance on reasonableness, public policy, *boni mores* and so forth, all of which are highly culture-specific. See Chapter IV 4(b) on these processes of contextualisation.

<sup>151</sup> Obiora (n 148) 676. The aspect of indigenisation or particularisation is discussed at length in Chapter IV 8. See also Merry (n 20) 3 on the importance of law to become 'embedded in everyday social practices, shaping the rules people carry in their heads'; Allott (n 20) 97 'consensus law is effective law'. See again Teubner (n 19) on legal 'irritants'.

<sup>152</sup> Curran (n 111) 658.

<sup>153</sup> See Chapter IV 10 on the role of ethics.

<sup>154</sup> See for example Chapter IV 3 on the jurisprudence of Justice Christopher Weeramantry.

from the bottom up through judicial processes, which take cognisance of such wisdom.<sup>155</sup>

Immediately however, the question arises of how such pluralism can legitimately be accommodated in the application of international law. To this end, the present thesis develops an analytical framework that promotes the inclusion of other normative systems within an adjudicative paradigm of cosmopolitanism and emancipation.<sup>156</sup>

Consequently, the framework ventures into the conceptual minefield pertaining to the global-local and objective-subjective interfaces. These, in turn, have a direct bearing on the processes of contextualisation, since the latter entails judicial navigation across the spaces between potentially opposing extremes of global and local interests. Accordingly, the signposts developed in this section serve to direct judicial navigation and mediation toward an emancipatory jurisprudence that spans the spectrum of international, national and subnational dimensions.<sup>157</sup>

A further observation is that, although these domains are in certain respects increasingly triangulated, they have, at the same time, been brought closer by the forces of globalisation.<sup>158</sup> Some of the thorny debates around globalisation are addressed below.

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<sup>155</sup> See Chapter IV 9(e) on bottom up international law; and for example Obregón 'Between civilisation and barbarism: Creole interventions in international law' in Falk et al (eds) *International Law and the Third World* (2008). The quest to find enduring solutions to environmental challenges, for example, is one area where the 'chthonic legal tradition' can supply potential solutions which could be more effective than those currently provided by national and international regimes. See Glenn (n 45) 61-95 for a general overview of the chthonic legal tradition, which is 'to recycle the world'; Workman *Heart of Dryness* (2009); Chikozho and Latham 'Shona customary practices in the context of water sector reforms' International workshop on '*African Water Laws*' January 2005, Johannesburg, on local solutions for the international water crisis.

<sup>156</sup> See Chapter IV; also Chapter III on the role of the judiciary.

<sup>157</sup> See Chapter IV.

<sup>158</sup> For example Santos (n 2) 163-310 for an in depth analysis of the different forces and effects associated with globalisation.

#### 4. Globalisation, universalism, culture relativism and international law

*Think global, focus local*<sup>159</sup>

*Globalisation does not imply homogenisation. One of the key challenges to contemporary jurisprudence is to accommodate the implications of globalisation with the facts of ethical and cultural pluralism.*<sup>160</sup>

*[P]artial cultures [are defined] as global cultures, thereby setting the agenda for political domination under the guise of cultural globalization.*<sup>161</sup>

*But if the dynamic of international law is thus a process of the universalization of the particular, it is also a process of the particularization of the universal.*<sup>162</sup>

Many issues discussed thus far, such as the pluralistic nature of law, the diffusion of law, the mixing or convergence of systems and volatile debates about cultural hegemony can often be attributed, at least to some degree, to the pervasive forces exerted by globalisation.<sup>163</sup> It is therefore not surprising that it occupies centre stage in many legal studies.

Thus for example, *Schlesinger's Comparative Law* apports almost three hundred pages to 'the nature of global legal problems', including the current 'transformations' and 'diffusion' of law on a global scale.<sup>164</sup> Santos, in an in depth analysis of the processes of globalisation, places the prospect of an

<sup>159</sup> Editors' comments in *Schlesinger* (n 12) 252.

<sup>160</sup> Twining (n 8) 89.

<sup>161</sup> Santos (n 2) 172.

<sup>162</sup> Knop 'Here and there: International law in domestic courts' (2000) 32 *New York University Journal of International Law & Politics* 501 at 527-528.

<sup>163</sup> The implications of globalisation, the buzzword of the late twentieth and early twenty-first centuries, has generated an immense volume of literature. For an overview of the 'globalization project' and the concomitant social responses see for example McMichael *Development and Social Change: A Global Perspective* (1996) 176-239; Santos (n 2) 163-310.

<sup>164</sup> Editors' comments in *Schlesinger* (n 12) 2-279.

emancipatory role for law firmly within the ambits of global developments.<sup>165</sup> Twining devotes an entire book to the ramifications of globalisation as it plays out in the area of legal theory.<sup>166</sup>

His vision of the way forward is aligned with that of Santos, in that the 'implications of globalisation ... require a revival of general jurisprudence and a rethinking of comparative law from a global perspective as key elements in cosmopolitan legal studies.'<sup>167</sup> He stresses the need to take the theoretical problems associated with globalisation more seriously, and views with disdain the paucity of methodological rigour exhibited by traditional comparatists such as Zweigert and Kötz, whose methods he describes as 'hardly [fitting] today's needs'.<sup>168</sup>

In his essays on the construction of a general legal theory in the era of globalisation, Twining tries to make sense of the anomalies inherent in a world where the universal and the particular are orthogonally placed, often competing with each other. I consider similar questions, such as whether there is a point of counterpoise, where the general and specific might be balanced, and whether it is possible to resolve the tensions between globalisation and fragmentation, and homogenisation and cultural diversity. The maxim, 'think global, focus local', is therefore exceedingly apt and is shorthand for the idea that globalisation does not have to ignore the importance of the local, but that it may require the local to be construed in a broader cosmopolitan and historical context. This calls for the adoption of, not only the dominant, top down perspective of legal systems, but specifically also a bottom up, 'worm's eye' perspective.<sup>169</sup>

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<sup>165</sup> Santos (n 2) 163-311 devotes a lengthy chapter to globalisation and its effect on the legal field.

<sup>166</sup> Twining (n 8).

<sup>167</sup> *Id* 189.

<sup>168</sup> *Id* 189-193.

<sup>169</sup> *Id* 136-139, 253, and note the expansive list of the many 'levels of law' discernible in most legal systems, which illustrates the fact that a bottom up, multi-tiered viewpoint is required to accommodate these layers. Obiora (n 148) 677-679; Obregón in Falk (n 155) on the way in which Latin America 'could produce universal principles from its particular experiences'.

For purposes of this study, the emphasis of the inquiry falls on the connection between international law and globalisation, and in particular, whether the latter helps or hinders judicial navigation towards the emancipatory reconstruction of international law. To that end, I first consider globalisation and international law as candidates for the establishment of a universal order, and ask whether universalism is tenable as a jurisprudential model.

Universalism and international law have in common the search for overarching norms and values. In this sense, many conceive international law as being subsumed under the term 'universal', and thus both the applause and the criticisms levelled against various forms of universalised homogenisation, could apply with equal force to international law.

Consequently, as a logical precursor to these questions, the assumption, that international law stands for universal norms, must be questioned. In this regard, it is immediately noted that the notion of the universal nature of international law is highly contested and considered by many to be a false debate or a 'myth' – despite numerous initiatives to the contrary.<sup>170</sup>

For example, the harmonisation of law on a transnational level have been pursued vigorously over the past few decades in all fields of law, notably international human rights law, but also in international trade, criminal and environmental law. Many consider the universalization of such transnational and international laws as the only way to safeguard human rights effectively, to

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<sup>170</sup> For example Santos (n 2) 271-273; Moore (n 13) 1-6 there is only 'partial rule by rules'; McCorquodale 'International community and state sovereignty: An uneasy symbiotic relationship' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) 243-244 on the fact that law, which includes international law is relational; Merry (n 20) 3-5; Dembour in Harris (n 141) 22-24; and see n 171 and 172 below.

ensure mutually beneficial economic participation, to curb international crime and terrorism, and to prevent degradation of the planet.<sup>171</sup>

On the other hand, universalist ideals come with baggage. They are tainted with a history steeped in colonialism and oppression, with the result that modern international law is still perceived by many as having ‘the same discriminatory effect’.<sup>172</sup> Hence, universalism is associated with hegemony, cultural imperialism and economic domination, and is therefore rejected by those who fear that their cultures and traditions might be suppressed and devalued, or swallowed up altogether.<sup>173</sup>

The search for commonality is therefore susceptible to having two possible outcomes. First it could mean that cultural differences are denied or suppressed.<sup>174</sup> Alternatively, the quest for commonality and ‘threads of connection’ may also provide the means of transcending differences and discovering shared values.<sup>175</sup>

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<sup>171</sup> See for example King-Irani ‘Exiled to a liminal legal zone: Are we all Palestinians now?’ in Falk et al (eds) *International Law and the Third World* (2008) 226-231; An-na’im (2008) (n 59) 82-83; Singer *One World: The Ethics of Globalization* 2 ed (2004) 150ff; Marks (n 77) 48; Bassiouni ‘Universal jurisdiction for international crimes: Historical perspectives and contemporary practice’ (2001) 42(1) *Virginia Journal of International Law* 81; Baruah ‘Human capabilities and gender justice: A South Asian perspective’ in Anghie, Chimni et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) 23.

<sup>172</sup> Schneiderman (here quoting Knop) ‘Constitution or model treaty? Struggling over the interpretive authority of NAFTA’ in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 308; Mgbeoji ‘The civilised self and the barbaric other: Imperial delusions of order and the challenges of human security’ in Falk et al (eds) *International Law and the Third World* (2008); Chimni ‘Third world approaches to international law: A manifesto’ in Anghie, Chimni et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) 49, 53; Bowring ‘Ideology critique and international law: Towards a substantive account of international human rights’ in Warbrick and Tierney (eds) *Towards an ‘International Legal Community’?* 206ff.

<sup>173</sup> See for example An-Na’im (2008) (n 59); Knop (n 162) 522-523; 532-533; at 527: ‘what international law presents as universality is, in fact, based on a white Western male view of the world’; and see notes 175-179 below for examples.

<sup>174</sup> For example Wa Mutua (n 51); Nyamu (n 85) on abolitionist approaches to indigenous law.

<sup>175</sup> Weeramantry ‘International law and the developing world: A millennial analysis’ (2000) 41 *Harvard International Law Journal* 277 at 281-286; Koh (n 133) 56; Obiora (n 148) 669; Örüçü (2004) (n 16) 80-83; at 193-194 see her comments with regard to the important role of comparative law in the EU context as a tool for integration and a means to transcend nationalism, whilst leaving room for diversity. See also the discussion of the ‘common core’ hypothesis in 5(d) below.

Nevertheless, the question remains whether it is both feasible *and* desirable to generalise about law, given the many socio-cultural, historical, political and economic divergences.<sup>176</sup>

Hence, even the widely-held opinion that the development and spread of international human rights law is one of the most valuable and important projects of our times, can be, and has been, challenged.<sup>177</sup> For example, in her insightful article on the practice of female circumcision, Grande questions the double standards inherent in 'hegemonic human rights', which are premised on western perceptions and constructions of African women as 'the other'.<sup>178</sup>

Grande maintains that truly universal human rights, which are not based on such double standards, can only be achieved by working from a broad comparative basis which includes both the 'us' and 'them', insider and outsider perspectives – in contrast to the oppressive stance of routinely judging western practices as acceptable, whilst condemning non-western practices as unacceptable or 'uncivilised'.<sup>179</sup> Despite certain reservations, on the whole, Grande's argument should be heeded if history is not to repeat itself. These very perceptions about the 'lack of civilisation', based on certain practices and

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<sup>176</sup> I address this issue in greater detail in Chapter II 5.

<sup>177</sup> For example Baxi 'Operation enduring freedom: Towards a new international law and order?' in Anghie, Chimni et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003); Chimni 'Third world approaches to international law: A manifesto' in Anghie, Chimni et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003); Bowring 'Ideology critique and international law: Towards a substantive account of international human rights' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006); Merry (n 20) 225-228; and see the discussion in note 179 below.

<sup>178</sup> Grande 'Hegemonic human rights and African resistance: The issue of female circumcision in a broader comparative perspective' in *Schlesinger's Comparative Law* 7 ed (2009).

<sup>179</sup> *Ibid.* She emphasises the need for a critical and comprehensive understanding of both western and African practices involving the modification of sexual organs, before an evaluation is made. This would include questioning western practices such as breast augmentation and male circumcision. Furthermore, it is important to understand female circumcision in a socio-cultural context, where it serves the purpose of social integration, and to establish gender identity and improve self-image – in much the same way as breast augmentation does in western cultures. See also Coombe (n 71) 268, for other, different examples of double standards in terms of 'the economic exploitation of local environmental resources'.

traditions, have in the past provided the 'justification for colonizing, looting and plunder'.<sup>180</sup>

Thus, questions about the desirability of homogenisation and the universalization of standards are actually questions about *which* culture or ideology is deemed legally relevant for such purposes, and consequently questions about *who* has the monopoly on such culture or ideology.

Equally, when relativists demand tolerance of differences, they usually refer to 'cultures as wholes', that is, essentialised, homogenous and consensual, when in fact cultures are 'hybrid and porous' and predominantly serve to legitimise existing structures of power and authority.<sup>181</sup> Thus, paradoxically, the relativist argument itself proceeds from an (unfounded) 'universalistic claim'.<sup>182</sup>

Accordingly, it is self-evident that any study of international law, and particularly one centred on its domestic application, cannot discount the material concerns arising from tensions between universalism and relativism. However, '[r]ather than seeing universalism and cultural relativism as alternatives which one must choose, once and for all, one should see the tension between the positions as part of the continuous process of negotiating ever-changing and interrelated global and local norms'.<sup>183</sup>

The conundrum which thus presents itself is: what is the true nature of international law, if it is not universal? Furthermore, by what legerdemain can it negotiate and accommodate relativities without jettisoning its own usefulness? These questions are the projects of following chapters.

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<sup>180</sup> Id 123.

<sup>181</sup> Merry (n 20) 8-9.

<sup>182</sup> Id 8.

<sup>183</sup> Id 9 (quoting Cowan, Dembour and Wilson).

For purposes of developing the jurisprudential framework of this study, the present signpost of the non-universal nature of international law calls for a fresh look at various methodological processes. Of particular relevance are those that can accommodate the multi-dimensional interface of international, national and subnational orders. Additionally, comparative processes are needed to describe not only one such interface in a particular jurisdiction, but also how it, in turn, is linked to similar dynamics in other jurisdictions. Relevant methods of analysis are considered below.

### **5. Toward cosmopolitan and emancipatory jurisprudence: A few useful analytical processes from comparative law**

*For some, the greatest value of comparative law is as a mirror held up to ourselves...*<sup>184</sup>

In this section and the next, the methods and processes identified, and challenged, when necessary, serve to supply a theoretical structure for the present mapping of law, with a view to 'build up a total picture of law-in-the-world', or, a map of globally relevant cosmopolitan law.<sup>185</sup> Thus they ultimately contribute to the development of the analytical and reconstructive framework of the study.

Furthermore, through case studies of actual court practice, the study also supplies evidence that the thematic framework is jurisprudentially sustainable. Comparisons must accordingly be drawn between the ways in which international law is applied in different national courts. In its simplest form, comparison seeks out similarities and differences which translate into the broad categories of integrative and contrastive comparison, discussed below. Furthermore, to sustain the integrity of the framework, not only must analogies and divergences be

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<sup>184</sup> Knop (n 162) 531.

<sup>185</sup> Twining (2000) (n 8) 189-193 quote at 190.

noted, they must also be accounted for. However, with approximately one hundred and ninety six national jurisdictions worldwide, and many more subnational systems, the task of comparing all of these is patently unmanageable.<sup>186</sup>

On the other hand, the objectives of the comparative enterprise will govern the choice of methods to a large degree. Aims could range from broad description to analytical understanding and interpretation. At the same time, for purposes of a so-called 'meaningful' comparison, a haphazard list of objects, from which similarities or differences are extracted, will not produce a valid analysis or serve to increase knowledge.<sup>187</sup> For this reason, certain well preferred methods, aimed at defining the relevant and necessary criteria, are utilised in comparative studies.

These typically include the overarching distinction between macro- and micro-comparison, different analytical approaches, such as functionalism and contextualism, as well as the many theories, which attempt to explain how legal norms are formed and how they 'migrate' across boundaries. Below, I offer a condensed account of some of these methods and theories.

### **(a) Macro- and micro-comparison**

*What law is about is much the same the world over. How it does its work, both in principle and in detail, is an unexpectedly diversified story.*<sup>188</sup>

The emphasis in this section is on whether, or to what extent, the implementation of some of the following comparative methods can support a more inclusive,

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<sup>186</sup> See Curran (n 111) for an interesting analysis of ways in which comparatists may deal with diversity. She writes in the context of the United States.

<sup>187</sup> See for example Örüçü (2004) (n 16) 19-32; Editors' comments in *Schlesinger* (n 12) 69ff; also Venter *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (2000) 17-18, 37-45, who writes in the context of comparative constitutionalism.

<sup>188</sup> Derrett (n 111) vii.

globally relevant paradigm of law, than the ones which have held sway for many decades.

Practically speaking, macro- and micro-comparisons are generally treated as serving two conceptually different purposes. It has been noted however, that they overlap on many levels.<sup>189</sup> Furthermore, there exists a distinct relationship between these methods, in that 'micro-comparison presupposes macro-comparison'.<sup>190</sup> In view of the present chapter's purpose of sketching a broadly inclusive map of law, some of these concepts are conflated as parts of the 'legend' of the map.

At the macro level of comparison, the units of comparison are large, and pertain to major legal systems, families, and traditions. On a pragmatic level, one of the greatest challenges to macro-comparison is the issue of which criteria to employ for purposes of differentiation and categorisation. Various comparatists have identified a number of possible criteria, such as, the sources of law, substantive, internal characteristics, race, legal technique, ideology, style, and patterns of social organisation.<sup>191</sup>

René David for example, uses ideology as the central criterion, maintaining that the underlying religious, philosophical, political, economic and social structures determine to which family a legal system belongs.<sup>192</sup> Zweigert and Kötz classify systems on the basis of legal 'style'.<sup>193</sup> They use a comprehensive scheme, which combines five different criteria in order to

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<sup>189</sup> Twining (n 8) 178, 184.

<sup>190</sup> *Ibid.*

<sup>191</sup> Santos (n 2) 191-192; Van Wyk et al (n 134) 77-79.

<sup>192</sup> David and Brierley (n 111). Despite this auspicious start, in the end the classification hinges on three major families, namely the Romanistic-German family, the common law family, and the socialist family. Other major groupings, such as Islamic law, Hindu law, and the laws of Asia and Africa, are subsumed under the imprecise heading of 'other systems'. Santos (n 2) 191-192; Van Wyk et al (n 134) 77-81.

<sup>193</sup> Zweigert and Kötz (n 16); Santos (n 2) 192.

determine the definitive features of a particular legal style, which sets apart the legal family.<sup>194</sup>

Twining judges their categorisation as perhaps the 'least unsatisfactory', yet nonetheless criticises it as 'strange' and lacking in theoretical rigour.<sup>195</sup> He finds it replete with possible dangers of arbitrariness, reductionism and generalisation, and thus deems it inadequate for purposes of developing a general jurisprudence.<sup>196</sup> Nevertheless, he points to the difficulty, or even, impossibility of finding a sound basis for classification if, for example, non-state law and subnational systems were to be included in the enterprise.<sup>197</sup>

As discussed earlier, a long list of possible criticisms can therefore be levelled against the standard classifications of the twentieth century. In line with their underlying occidental, Eurocentric ideology, these divisions are postulated along national and political boundaries.<sup>198</sup> This approach, however, is fundamentality flawed since it disregards entire layers of law. First, it ignores the reality that systems, such as the *lex mercatoria*, many religious, indigenous and customary laws do not respect national boundaries.<sup>199</sup> Second, it does not accommodate substate systems, many of which are localised forms of transnational systems.<sup>200</sup> Moreover, the units of comparison, generally referred to as 'systems', 'families', 'traditions' and 'cultures' are constructed according to the western model of 'monotonic instrumentalism', when they are in fact plastic,

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<sup>194</sup> The eight legal families thus identified are however, not fully representative of the world's legal systems, Africa for one, having been left off the standard list. The different 'styles' are: historical background, predominant mode of legal reasoning, legal institutions, nature of legal sources, and ideology. See Twining (n 8) 178-184; Santos (n 2) 192; Van Wyk (n 134) 78.

<sup>195</sup> Twining (n 8) 179.

<sup>196</sup> *Id* 178-184.

<sup>197</sup> *Ibid*, and see Santos (n 2) 193 who finds their classification, based on a complex of criteria, to be a 'starting point', which '[i]n spite of its Eurocentric bias ... has greater openness than other classifications.

<sup>198</sup> Örüçü (2004) (n 16) 23, 49-50; Santos (n 2) 192-193.

<sup>199</sup> In general Kennedy (n 114) 830-835, 840-841 on the inadequacies of 'inherited maps' of the world order, the changes and shifts taking place globally on every level and the rejection of traditional categorisations; Twining (n 8) 181.

<sup>200</sup> Twining (n 8) 181-182.

imprecise and variable in content.<sup>201</sup> Furthermore, geopolitical transformation and upheaval continue to reshape the legal landscape, and this places additional strain on the conventional macro-comparative scheme.<sup>202</sup>

It is therefore clear that the traditional macro-comparative model is in need of fundamental reconceptualisation in order to accommodate, in the first place, the global changes sweeping through all legal systems. On one hand, these include new levels of homogenisation and integration, and, on the other, resistance to such changes. These shifts therefore challenge legal theory to promote greater respect and tolerance of differences, and hence, of legal pluralism, and to reject hegemonic assimilation.<sup>203</sup>

Consequently some, who have baulked at the traditional categorisations, have developed models, which attempt to straddle the divides militating against a globally relevant, ecumenical paradigm.<sup>204</sup> Nonetheless, one comprehensive macro-comparative model that holds true in both theory and reality, and fully accomplishes the task of embracing the diversity and plurality of legal systems across the globe, has in this writer's view not been developed.

Thus, the question remains of how to compare the world's legal systems in a meaningful manner that takes into account the relevant similarities and differences in a spirit of cosmopolitan inclusiveness. For purposes of the present study, this question is not only of academic interest, since the overriding concern is to construct a theoretical model that will corroborate the contention that international law can potentially be applied in a cosmopolitan and emancipatory

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<sup>201</sup> Santos (n 2) 192. For instance, these terms are not at all instructive when discussing, say, the Canadian, Islamic and Tswana legal systems because these are not 'systems' (or 'families', 'traditions' or 'cultures') in analogous ways. See also Menski (n 11) 383-391, on the reasons why African laws cannot be forced into a western paradigm; and Twining (n 8) 181-182.

<sup>202</sup> A good example is the collapse of many socialist legal systems, which considerably changed the macro-comparative landscape, and notions about the dominant legal 'families'. See Van Wyk et al (n 134) 79-80.

<sup>203</sup> See Menski (n 11) 5-7; Curran (n 111) 665-668.

<sup>204</sup> See for example Menski (n 11) 103-128, 610-613; Santos (n 2), in particular 417-493; Glenn (n 45); Derrett (n 111).

manner. In the absence of a suitable model, however, the study accommodates different legal systems, from diverse jurisdictions, on a case by case basis, thereby validating the theoretical framework in a bottom up manner, rather than with reference to a particular macro-comparative scheme. In addition, the comparative method, pertaining to the study, is given cohesion by a substructure consisting of the theoretical signposts described throughout this, and other chapters.

The next important comparative process, micro-comparison, entails the comparison of particular legal phenomena as they manifest themselves in different legal systems.<sup>205</sup> It is mainly through the micro-comparative method that harmonisation and law reform can be accomplished. In this respect, a seemingly endless number of comparative devices have been suggested and used.<sup>206</sup>

Nonetheless, a restrictive 'ideal model' of micro-comparison is clearly identifiable in most mainstream comparative works, which Twining aptly calls it the 'Country and Western' model. As noted earlier, it is centred on the official law of states, specifically western, capitalist states, and is often conducted on the basis of the common law-civil law distinction.<sup>207</sup> Additionally, it focuses mainly on legal doctrine in the area of private law, providing description and explanation, yet it invariably avoids evaluation.<sup>208</sup>

The traditional model can therefore readily be criticised on the grounds that it is 'narrowly conceived', 'artificially isolated', 'out of date' and 'under-theorised', and that therefore, the 'jobs of jurisprudence are not being adequately

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<sup>205</sup> Twining (n 8) 184.

<sup>206</sup> See Örüçü (2004) (n 16) 51-64. One that stands out is the functionalist approach, as advocated by Zweigert and Kötz, which could be useful for avoiding the misconstruction of foreign institutions sounding or appearing deceptively similar, since it first seeks to establish the purpose of an institution and purports not to rely on technical phraseology. See 5(b) below on functionalism.

<sup>207</sup> Twining (n 8) 185-189. As indicated above, the 'country and western' underpinnings of this model are also evident in macro-comparative work, for example that of Zweigert and Kötz, who concentrate their efforts on western systems. See also Menski (n 11) 6.

<sup>208</sup> *Ibid.*

performed for comparative and cosmopolitan legal studies'.<sup>209</sup> Despite these and other criticisms, Twining nevertheless expresses the opinion that this model has not been replaced by any other equally cogent theory, and that, 'like classical music is to music', it is still the best one available.<sup>210</sup>

It is rather incongruous, however, to assert that a comparative model can be the 'best', and all at the same time, be overtly inadequate. One also has to question the view that there are no other suitably coherent theories to challenge the traditional model. This is after all, precisely what Santos and Menski have done, and they have moreover succeeded in developing theories, which although not complete in every respect, are to a great degree globally relevant.<sup>211</sup>

In conclusion, the standard approaches to macro- and micro-comparison reveal a rather blinkered worldview, which is transposed into a formulaic method of comparison. Whether as theory or method, traditional models are patently deficient as a foundation for cosmopolitanism and emancipation, and must be rejected outright as globally relevant. At best, they provide but one comparative scheme of many, and at worst, are ethnocentric and oppressive.

### **(b) Functionalism**

The 'functional' or institutional approach is based on the idea that law is a social response to the common needs and problems found in most societies.<sup>212</sup> The functionalist method determines what function is performed, or what purpose is served by a legal rule or institution in a particular legal system, and then finds and compares it to its functional equivalent in another system. Accordingly, the

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<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*

<sup>211</sup> Also see again the theories developed by Moore, Allot, Chiba and Griffiths discussed in Menski (n 11) 104-128, which have relevance at both macro- and micro- comparative levels.

<sup>212</sup> See Van Wyk et al (n 134) 46-47; Örucü (2004) (n 16) 24-32; Tushnet 'Some reflections on method in comparative constitutional law' in Choudhry *The Migration of Constitutional Ideas* (2006) 72-74.

'only things which are comparable are those which fulfil the same function.'<sup>213</sup> The legal solutions found in various systems, which pertain to the same concrete problem or question, are therefore the only comparators. This approach has great merit in terms of micro-comparison, since it minimises the dangers of misconstruing institutions, for example because they are homophonous, or are direct translations, which nonetheless have different scopes or even meanings.<sup>214</sup>

Functionalism is thus premised on an 'agenda of sameness', which is also its great weakness, since it restricts comparison to systems which are similar, thereby entrenching traditional ideas about the nature of law.<sup>215</sup> As such, it is constrained by a narrow focus on generalities at the expense of deeper contextual considerations. Consequently, it does not allow for the '[net to be cast] as wide as possible to include ... the extraordinary ... and different.'<sup>216</sup> Thus, Tushnet deems this method 'flawed' as it operates on 'too high a level of abstraction', which does not properly accommodate complex value-laden concepts within their social and cultural contexts.<sup>217</sup>

### **(c) Contextualism and expressivism**

Tushnet explains that contextualism 'emphasises the fact that ... law is deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation ...', which means that a 'doctrine or institution' cannot be analysed 'without appreciating the way it is tightly linked to all the contexts within which exists'.<sup>218</sup>

<sup>213</sup> See the discussion in Örucü (2004) (n 16) 30, quoting Zweigert and Kötz.

<sup>214</sup> See for example the editors' comments in *Schlesinger* (n 12) 154-160 for numerous examples, one of the most pertinent being that in many languages there is only one word which denotes both 'law' and 'right', making it difficult to find suitable equivalents in these languages; Örucü (2004) (n 16) 166.

<sup>215</sup> Örucü (2004) (n 16) 27.

<sup>216</sup> *Ibid.*

<sup>217</sup> Tushnet (n 212) 74. See Reimann and Zimmermann (eds) *Oxford Handbook of Comparative Law* (2006) 245-247, 308, 328 on functionalism.

<sup>218</sup> Tushnet (n 212) 76 in the context of constitutional contextualisation. See also Teubner (n 19) 18-21; Waters 'Creeping monism: The judicial trend toward interpretive incorporation of human rights treaties' 107 *Columbia Law Review* (2007) 628 at 672-679 on contextualism as an 'interpretive incorporation technique'.

Expressivism in turn, is 'a different, perhaps even more comprehensive, version of contextualism'<sup>219</sup> Hence, both comparative methods hark back to the culture-law interchange discussed earlier, and therefore raise similar questions about the meaning and scope of the socio-cultural context in legal analyses.

For example, expressivism 'suggests that a nation *has* a (single) self-understanding that its constitution expresses'.<sup>220</sup> Yet, '[t]oday's society does not present itself to law as the mystical unity of a nation, culture and society ... but rather as a fractured multitude of social systems'.<sup>221</sup> The problem is therefore to understand what exactly is meant by 'context', before one can begin to 'contextualise'. It must also be clear that a given context cannot be demarcated with perfect precision, and moreover, that it fluctuates in tandem with the social processes it epitomises.

Within the framework of the study, 'context' assumes even greater complexity, because the introduction of international law into a domestic environment adds another dimension to the relevant context. It was therefore explained at the outset that, for purposes of this study, 'context' is compound and three-dimensional, since it consists of international, national and subnational elements.

Furthermore, it was asserted that a positivistic incorporation of international law into domestic contexts, coupled with assumptions of its acultural and universal nature, is responsible for many of the accusations of hegemony levelled against its operation. I consequently maintain that the mitigation of such hegemonic application of international law hinges on ascertaining the relevant

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<sup>219</sup> Tushnet (n 212) 79. For present purposes, I do not draw a sharp distinction between the two methods.

<sup>220</sup> Tushnet (n 212) 81, and in general 79-82, and note the examples of Canada that according to him has an 'outward-looking' self-understanding and America that is 'inward-looking'.

<sup>221</sup> Teubner (n 19) 22.

(three-dimensional) context, and on the proper contextualisation of international law within the particular domestic environment.<sup>222</sup>

From the perspective of comparative legal theory, contextualism is linked to the idea that law cannot be understood properly, or achieve its purposes, if the context is not appreciated.<sup>223</sup> Regarding the latter, Tushnet observes that a fact often overlooked is the inclusion in 'context' of various institutional arrangements whereby norms are implemented.<sup>224</sup> He therefore argues that norms have both a 'doctrinal context' and an 'institutional context', and that the latter will greatly affect the profile and ambit of the former.<sup>225</sup>

Contextualism is also an expression of post-modernism, and the recognition of the polycentric and pluralistic nature of law.<sup>226</sup> The historical shift in comparative law can clearly be seen in the rejection of the 'old black letter tradition known as *Legislation Comparé* (Comparative Legislation)', which has been replaced by theories and injunctions that underline the importance of the contextual embeddedness of legal rules.<sup>227</sup>

A further implication of contextualism calls for the translation or particularisation of norms, which impinge vertically from the international plane onto the domestic.<sup>228</sup> Hence, Knop argues that the processes relevant to international law in domestic courts ought to make it 'strange', namely to treat it as foreign law.<sup>229</sup> In this way, the principles of comparative law will apply, which operate horizontally, 'between' cultures and therefore '[stake] out the ground of

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<sup>222</sup> See Chapter IV 4 which provides an analysis of the importance of contextualisation and its role in terms of cosmopolitan and emancipatory jurisprudence.

<sup>223</sup> See 2 above on the nature of law; and for example Legrand (n 18).

<sup>224</sup> Tushnet (n 212) 76-79.

<sup>225</sup> Tushnet (n 212) 76-78; he illustrates this point with reference to the way in which criminal law enforcement may be centralised (e.g. provincially in Canada) or decentralised (e.g. in each district in the USA), and how this may impact significantly on the reach of substantive provisions.

<sup>226</sup> Menski (n 11) 103-104.

<sup>227</sup> Editors' comments in *Schlesinger* (n 12) 63.

<sup>228</sup> For a discussion of the terms translation and particularisation see Chapter III section 7(c) and for their important function in the reconstruction of international law see Chapter IV 8 and 9.

<sup>229</sup> Knop (n 162) 525.

cultural understanding', as opposed to the vertical model which depicts international law as '[striving] to construct an order that stands above cultures'.<sup>230</sup>

In terms of the domestic application of international law, therefore, contextualism and expressivism recognise that there are 'local life forms' of international law brought into existence by legislative incorporation, and importantly, by its particularisation in domestic courts.<sup>231</sup> Consequently, the processes of contextualism reject the assumption of 'automaticity of interpretation' which merely renders 'courts as engines of compliance and convergence'.<sup>232</sup>

Thus, and in line with Knop's comparative law approach to the application of international law, contextualism and expressivism suggest that 'the domestic interpretation of international law necessarily involves art and invention', and that such understanding 'places ethical as well as intellectual demands on judges'.<sup>233</sup>

Clearly, such responsiveness to context renders both the judicial and the comparative endeavour a great deal more complex and onerous.<sup>234</sup> Nonetheless, Tushnet maintains that 'contextual challenges are not fatal to the comparative enterprise'.<sup>235</sup> He echoes the views of other theorists mentioned throughout the study, who endorse a pluralistic and contextual approach.

Even so, very few comparatists and legal theorists have presented a pragmatic and cogent scheme for dealing with the contextual translation of international law, and hence, the implementation of contextualism remains a

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<sup>230</sup> Id 526, where she refers to the work of David Kennedy.

<sup>231</sup> Knop (n 162) 528.

<sup>232</sup> Id 529.

<sup>233</sup> Ibid.

<sup>234</sup> See Knop (n 162) 533, where she reasons that 'since domestic decisions are a secondary source of international law, their multiplication of meaning complicates meaning in international law generally'.

<sup>235</sup> Tushnet (n 212) 83.

daunting task.<sup>236</sup> Notwithstanding these challenges, the framework developed in the study utilises contextualism as one of the foundational elements in the judicial reconstruction of international law, for the simple reason that cosmopolitan and emancipatory jurisprudence is always context-specific.<sup>237</sup>

**(d) Integration, unification and harmonisation<sup>238</sup>**

*[A] fear of otherness ... has manifested itself in the impetus to discover and proclaim sameness.*<sup>239</sup>

*New dissonances from harmonisation!*<sup>240</sup>

A brief glance at the dominant themes of a great many law conventions, and the research agenda of various institutions around the world, reveal the extent to which emphasis is placed on the integration and harmonisation of diverse systems and subsystems of regulation.<sup>241</sup> These projects are in essence comparative explorations, which seek the homogenisation of different orders with reference to each other and/or to trans- or international regimes.

Legal integration and/or harmonisation are typically viewed as top down, official exercises, aimed at moderating divergence at international or regional levels. For example, in the area of trade law, through diligent comparative study, organisations such as the United Nations Commission on International Trade

<sup>236</sup> For example, Twining repeatedly calls for more theory and a sound global jurisprudence, but does not offer much by way of a solution to the practical problems encountered when attempting to conceptualise law within various contextual and pluralistic settings. Twining (n 8) for example 189-190, 237-242.

<sup>237</sup> In Chapter IV 4 contextualism is described as one of the 'tools' that must be used for judicial mediation in cosmopolitan and emancipatory jurisprudence.

<sup>238</sup> These terms have specialised meanings, but for purposes of this section they will be used in a generic and interchangeable manner.

<sup>239</sup> Curran (n 111) 666.

<sup>240</sup> Teubner (n 19) 20.

<sup>241</sup> In the African context, for example, titles such as 'SADC Law: Building Towards Regional Integration in Southern Africa' (2012) and 'Trade Governance: Integrating Africa into the World Economy through International Economic Law' (2013) abound. See Merry (n 20) for example at 19-21, 26-27 on the processes of homogenisation in international human rights law.

(UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT) attempt to extract general principles from national systems in order to standardise various international transactions on a global scale.<sup>242</sup> In terms of criminal law, the establishment of the International Criminal Court in 2002 has meant that international criminal law is in the initial stages of undergoing global integration.<sup>243</sup>

The ongoing integration taking place in the EU, the effect of which is readily observable in trade and criminal law, is a prime example of the strenuous efforts deemed necessary to achieve regional conformity.<sup>244</sup> In addition, through its jurisprudence, the European Court of Justice is creating a body of European law by way of 'judicial integration', in spite of political resistance.<sup>245</sup> Furthermore, even when treaty rules are not directly applicable, the principle of conforming interpretation ensures that national laws are interpreted in conformity to Community rules whenever possible.<sup>246</sup>

In contrast to the abovementioned forms of official integration, there is also evidence of another process, so-called functional integration, which refers to

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<sup>242</sup> Booyesen *Principles of International Trade Law as a Monistic System* (2003) 159-163, who includes notes on the programmes of the International Chamber of Commerce at 199-201, and at 580ff a detailed discussion of the Convention on the International Sale of Goods (CISG) which is aimed at harmonising international trade law.

<sup>243</sup> For an overview, Dugard *International Law - A South African Perspective* 3 ed (2005) 174-198.

<sup>244</sup> Regional harmonisation is, however, not in any way limited to the EU. Other initiatives in trade law include UEMOA, the Union Economique et Monetaire Quest Africaine (West African Economic and Monetary Union), MERCOSUR (Common Market of the Southern Cone), NAFTA (North American Free Trade Agreement) and OHADA (Organisation for the Harmonisation of Business Law in Africa). See for example Coetzee and De Gama 'Harmonisation of sales law: An international and regional perspective' *Vindobona Journal of International Commercial Law & Arbitration* (2006) 15, on the latter.

<sup>245</sup> Van Dijk, Van Hoof et al (eds) *Theory and Practice of the European Convention on Human Rights* 4 ed (2006), for example at 26-28; Editors' comments in *Schlesinger* (n 12) 69-73. Thus for example, in the seminal case *Van Gend & Loos* (case 26/62 ECR [1963]1) the court affirmed the direct application of EC treaty provisions, namely the conferring of rights and obligations directly upon individuals before national courts. See the editors' comments in *Schlesinger* (n 12) 76-78.

<sup>246</sup> *Schlesinger* (n 12) 73-89; see also the cases mentioned and the editors' comments to these. See Paulus 'Germany' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 209-221, 225-228, on some of the practical implications in this regard and the approach of courts in dealing with potential conflict, in the German context.

the bottom up, factual existence of integration at a non-formal level. Or, viewed from a different perspective, some say there is a 'common core' of principles shared by most legal systems, which creates an underlying framework of concurrence between various systems. Its existence has been the focus of common core researchers, past and present, who have produced a vibrant body of work, which seeks out such congruencies.<sup>247</sup>

On the other hand, critics have pointed out that common core studies are only reasonably straightforward and viable when western, professionalised systems are considered, and hence, that the danger exists that the common core approach appears to 'exhaust the legal universe' and render non- or less professionalised systems – which include the majority of systems in the world – 'informal' or 'lacking'.<sup>248</sup> Nonetheless, it is also claimed that traditional tools and methods, such as the common core analysis, although imperfect, are still helpful, even necessary, and 'can be upgraded to capture the more nuanced sensitivity of current times.'<sup>249</sup>

The practical usefulness in legal practice of common core comparative research is further evident in the quest to discover the 'general principles of law', often relied upon in the drafting of both international treaties and private agreements. In similar fashion, the principles of the *lex mercatoria* can be ascertained by way of common core research.<sup>250</sup>

More profoundly, such 'general principles' may constitute a binding source of international law, according to Article 38 of the Statute of the International

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<sup>247</sup> Van Wyk et al (n 134) 44, 47-48 and note the practical applications of common core research; Editors' comments in *Schlesinger* (n 12) 98-100, for the general background. Note again the example of the concept of commitment to 'rule of law' which may appear to be common to most modern systems, but is conceptualised differently in various jurisdictions.

<sup>248</sup> Editors' comments in *Schlesinger* (n 12) 95-96; Curran (n 111) 666, on the dangers of stereotyping.

<sup>249</sup> Editors' comments in *Schlesinger* (n 12) 95-96.

<sup>250</sup> For example Obiora (n 148) 680; Booysen (n 242) 9-15 on the sources of the *lex mercatoria* in general; Editors' comments in *Schlesinger* (n 12) 112.

Court of Justice, which renders 'general principles of law recognized by civilized nations' as one of these sources.<sup>251</sup> On yet a deeper level, some researchers suggest that the identification of common core elements in legal systems around the world may provide the foundations of a new *ius commune*.<sup>252</sup>

### (e) Contrastive comparison

As the term indicates, contrastive comparison focuses on, and analyses differences between legal systems in order to gain a better perspective. Deep-seated divergences are found not only between systems that are obviously dissimilar, such as professionalised and non-professionalised regimes, but also between systems which display corresponding structures and ideologies.<sup>253</sup> One of the great advantages of looking at how other systems deal with issues, is that lessons can be learnt from the costly mistakes, or successes of others, thereby facilitating effective law reform, or helping practitioners gain a more profound understanding of their own system.<sup>254</sup>

Notwithstanding the benefits of learning from the differences found among systems, analysing with a contrastive mindset, which polarises the comparison between 'us' and 'them', may well encourage a self-congratulatory attitude when the comparatist finds apparent shortcomings in other systems.<sup>255</sup> Moreover, misconceptions about other systems may be fuelled by the ever-present danger of relying on secondary accounts, which exclude the benefit of having proper regard for the contingent realities that shape the operation of particular rules

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<sup>251</sup> Editors' comments in *Schlesinger* (n 12) 109-112; see also Dugard (n 243) 38-40 and especially at 35-36 on 'general principles' as a source of international law.

<sup>252</sup> Örucü (2004) (n 16) 170-185; Obiora (n 148) 678-679 who suggests that the comparative method might be used to find a common core of values that may apply cross-culturally, even universally. Editors' comments in *Schlesinger* (n 12) 3.

<sup>253</sup> For example Legrand (n 18) 114-115; Teubner (n 19); Curran (n 111) 659-663.

<sup>254</sup> See Curran (n 111) 659-661; Editors' comments in *Schlesinger* (n 12) 145-153 for helpful examples.

<sup>255</sup> Curran (n 111) 663-665.

within different regimes.<sup>256</sup> At the same time, however, certain unpleasant realities about one's own system may remain occulted.<sup>257</sup>

Furthermore, the reality of the 'heterogeneity (even incommensurability) of moralities' means that value-laden precepts and constructions, law being one of them, are to a superlative degree audience-specific and fluid in content.<sup>258</sup> Since contrastive comparison negotiates differences, it therefore enters the recondite spaces, which 'identify and define the individuality of each development', and thus, by design or as a by-product, it challenges universalist claims, whether of morality or law, by its acknowledgement of the particular.<sup>259</sup>

When considering international law in domestic courts, both contrastive and integrative comparative methods – despite certain shortcomings – provide a valuable framework for navigating the interstices between the local and global.<sup>260</sup> On one hand, contrastive comparison produces a keen awareness of differences between international and national systems, and thus it might be able to shield subjective contexts from the unfettered, top down imposition of norms from the international sphere. On the other, integrative comparison is well-suited to seek out congruencies and a 'common core' in apparently disparate systems, should these be present.<sup>261</sup> As with any method, the success of utilising these processes depends on how they are employed.

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<sup>256</sup> Legrand (n 18), for example at 119-120.

<sup>257</sup> Hence, it may be rather easy to spot corruption or the 'lack of rule of law' elsewhere, or to apply what is perceived to be a universal standard, too broadly and inappropriately. See the editors' comments in *Schlesinger* (n 12) 165 for a discussion of Palmer and Levendis 'The Louisiana Supreme Court in question: An empirical and statistical study of the effects of campaign money on the judicial function' (2008) 82 *Tulane Law Review* 1291, which indicates how the practice of donating campaign money to potential judges, a practice, which in other systems might appear highly questionable, skews the outcome of trials, and yet goes largely unchallenged.

<sup>258</sup> Obiora (n 148) 678.

<sup>259</sup> Weber quoted in Legrand (n 18) 111.

<sup>260</sup> See Knop (n 162) 525-535.

<sup>261</sup> See Obiora (n 148) 669ff.

## **6. A further step toward cosmopolitan and emancipatory jurisprudence: Important theoretical signposts**

In this section, I consider a number of theoretical constructions that have been proffered to explain the dynamic flow of legal norms and concepts across the globe. The purpose is not to provide an exhaustive account of different theories, but rather to highlight some of the difficulties associated with the present enterprise, and to identify appropriate signposts which will demarcate the parameters of cosmopolitan and emancipatory jurisprudence with greater accuracy.

The flow of legal (and other) ideas, which sometimes gushes, and at others trickles from one locus to another, can be conceptualised as a network of two-way transfers within a three-dimensional grid. For example, international law norms may move vertically down to national systems, but at the same time, elements from national systems travel up to the international plane. Or, there can be horizontal movement between domestic orders. Additionally, elements from subnational regimes, such as systems of personal law, can flow up, or across to other systems, while they are correlatively impinged upon by various regimes. Moreover, besides this real-time 'diffusion' of norms, diachronic and historical flows, which impact on present-day configurations, are also discernible.<sup>262</sup>

Before theorising about the flow or migration of legal phenomena, however, it is useful to consider aspects of the germinal principle of such flows, namely the creation of legal norms, in order to understand subsequent processes better.<sup>263</sup> I do this with reference to Sacco's theory of 'legal formants'.

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<sup>262</sup> See the discussion of the 'diffusion of law' in (b) below.

<sup>263</sup> See Choudhry *The Migration of Constitutional Ideas* (2006) 19-22 on 'migration' as a metaphor.

### (a) Legal formants

Sacco developed the sophisticated concept of 'legal formants', which is most helpful as a didactic and conceptual tool when attempting to fathom the dynamic creation of legal norms.<sup>264</sup> He examines the nature of the 'legal rule' and points to the fallacy inherent in the construction of individual rules as unitary absolutes or as having only one meaning. For example, a legal rule may exist in the form of a statutory rule, but it may also present itself as a constitutional rule or a judicial rule, or morph into a scholarly doctrine.<sup>265</sup> Thus, 'the legal rule' in its different guises does not have 'an identical content'.<sup>266</sup>

This is borne out by the fact that courts may claim to apply a particular instantiation of a rule, such as a constitutional rule, yet tacitly enforce another manifestation of 'the rule', which is typically the rule as developed by the courts, and therefore not the same, 'single rule' it purports to be.<sup>267</sup> Sacco terms the distinct elements, which thus constitute the legal rule, 'legal formants' and he observes that these multiple formants do not necessarily operate in harmony.<sup>268</sup>

Hence, he stresses the importance of a factual, empirical comparative methodology, which establishes the actual outcome by means of the judicial application of a rule, as opposed to reliance on a purely dogmatic reading of the nature and application of rules.<sup>269</sup> Bussani and Palmer comment on Sacco's analysis as one which 'allows us to ascertain the factors that affect solutions,

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<sup>264</sup> Sacco (n 55).

<sup>265</sup> Id 21-23.

<sup>266</sup> Id 21.

<sup>267</sup> Id 21-27, and note the examples. One of which is of the requirement of *cause* (per se) for the formation of a contract in the French and Italian Codes, but that the case law 'rule', which is the one that is applied, has expanded the ambit of *cause* to mean a non-liberal cause. This illustrates the different formulations of the rule, namely the one in the Code, and the other in the courts.

<sup>268</sup> Ibid.

<sup>269</sup> Id 27-30. He also notes how this approach dovetails with common core research.

making it clear what weight interpretive practices ... have in moulding outcomes.<sup>270</sup>

One of the most important challenges confronting legal research is the fact that many formants are not explicitly formulated, but are the tacit, so-called 'cryptotypes' identified by Sacco.<sup>271</sup> Cryptotypes refer to mind maps and/or practices that are taken for granted, and hence, dialectically unsubstantiated and simply accepted as 'this is the way it is'.<sup>272</sup> Clearly, the existence of tacit, apparently inviolable paradigms, which lurk below the consciousness and shape legal outcomes, could mean that questionable practices, and any correlative denial of justice, may go unnoticed.

The theory of legal formants thus adds another dimension to the already convoluted movement of normative ideas, both within and between legal systems. Furthermore, the analysis highlights the proclivity of the judiciary to succumb to subjective imperatives in decision making.<sup>273</sup> These issues are most relevant to the present study, since they have a direct bearing on the manner in which domestic courts are responsible for moulding their application of

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<sup>270</sup> Bussani and Palmer 'Preliminary Remarks of Methodology' in *Schlesinger's Comparative Law* 7 ed (2009) 220-222. In their practical application of Sacco's theory, they devise a three tiered scheme. First, they identify 'operative rules' which are the basic applicable rules at national level. Second, are the 'descriptive formants' which are the reasons given in support of the 'operative rules', and they note the importance at this level of ascertaining whether the formants are 'concordant' from an 'internal and diachronic point of view', and also whether solutions are derived from other branches of law, such as procedural or constitutional law. On the third level are the 'meta-legal formants', namely other elements which impinge on the operative and descriptive levels, such as socio-political factors, values, and the operational structure of the legal process. Practical issues which must inform the comparative or analytical process include the fact that formants within different sources are competing; and that the dynamics of the relationship between formants and the way in which certain formants dominate, is particular to specific systems. For example, a distinction can be drawn between the interactions of formants within the civil law on one hand, and common law on the other. See Sacco (n 55) 27-34, 348-387.

<sup>271</sup> Sacco (n 55) 27-34, 348-387.

<sup>272</sup> *Ibid*; Editors' comments in *Schlesinger* (n 12) 222-223, where a few everyday examples are given. For instance, the French do not question why they eat cheese after dinner, just as the English do not question why they first have dessert and then cheese; neither do the Italians wonder why they do not drink cappuccino after dinner. The point is that similar subconscious processes are at work within legal systems and adjudication.

<sup>273</sup> Sacco (n 55), for example at 23-24, Dan-Cohen (n 79) 5, 28-42 for a remarkable analysis of the judicial role.

international law. Here, the tensions created by the abovementioned elements are amplified, due to the polarisation of local and global 'formants' and 'cryptotypes'. I return to these important signposts in the construction of the analytical framework.

### **(b) The 'diffusion of law'**

It was observed earlier that law is always in flux and being transformed, it is always 'becoming', in part because, in a globalising world, geographical and jurisdictional borders are permeable, allowing for the flow of norms and ideas, whether legal, political or ideological.<sup>274</sup> Legal systems are thus better understood as open, 'complex aggregates of laws' existing across space and time.<sup>275</sup> Mattei et al use the generic term 'diffusion' to describe this phenomenon. They maintain that such diffusion entails an inquiry into both legal history and legal geography.<sup>276</sup>

One example is the diffusion of law permeating from the political ideology underlying Marxist and Soviet law. Traces of these can be identified in many systems, and it is equally noteworthy that many socialist inspired reforms have spilled over to the West.<sup>277</sup> Another example is the way in which many systems retained indigenous and religious laws alongside systems of official law, resulting in a dynamic mix of historical and contemporaneous 'cross-fertilisation'.<sup>278</sup> It is

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<sup>274</sup> Editors' comments in *Schlesinger* (n 12) 177.

<sup>275</sup> *Id* 177-178.

<sup>276</sup> *Ibid*.

<sup>277</sup> Berman 'Justice in the U.S.S.R.: An interpretation of Soviet law' in *Schlesinger's Comparative Law* 7 ed (2009) 214-216; and note the comments on the influence of socialist law reform in many areas as diverse as labour law, family law and criminal law. Clearly, the encroachment on and diffusion of (any) political ideology into legal systems, exert a powerful force in their shaping. Another example, noted above, is how normative diffusion took place due to the spread of the common law and civil law traditions, either as a consequence of colonialism, or through the importation and mimicking of various western models.

<sup>278</sup> See Slaughter 'Judicial globalization' (1999-2000) 40 *Virginia Journal of International Law* 1116-1119; Ford 'International and comparative influence on the rights jurisprudence of South Africa's Constitutional Court' in Du Plessis and Pete (eds) *Constitutional Democracy in South Africa 1994-2004* (2004) 49-51, for comments on, and examples of 'cross-fertilisation'.

important to note that both historical and geopolitical shifts and tensions are responsible for the diffusion of law.

Moreover, 'the law is constantly in communication with the social, political and cultural orders, which are in turn all interconnected, both at the local and at the international level.'<sup>279</sup> Thus among other things, the diffusion and 'mixedness' of law means that it is conceptually not possible to defend the 'purity' of one or other legal system against 'contamination' from another, be it national or international, and that, as noted earlier, nationalistic hubris of legal superiority is misplaced.<sup>280</sup>

The important question raised here is therefore not, whether the diffusion of law *ought* to take place, but rather *how* it takes place, particularly with reference to the migration of international law and its mixing with domestic systems, and next, whether there are ecumenical aspects that can be harnessed to render international law emancipatory.<sup>281</sup>

### **(c) Legal transplants**

Another theory, developed by Alan Watson, namely that of 'legal transplants', seeks to explain the transfer of legal norms and why it is that the same rules are apparently found all over the world within disparate systems of law and vastly different socio-cultural contexts.<sup>282</sup> The concept is broadly postulated on the observation that weaker legal systems tend to borrow from, or copy stronger ones. It is claimed that some of the greatest developments in legal systems, whether ancient or modern, voluntary or coercive, have been brought about by

<sup>279</sup> Editors' comments in *Schlesinger* (n 12) 214-219; Charlesworth, Chiam et al 'International law and national law: Fluid states' in Charlesworth, Chiam et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) 2-10, Dan-Cohen (n 79) 2-5.

<sup>280</sup> For example Öricü (2004) (n 16) 153-154 on the '*mixité*' of law; Koh (n 133), countering the nationalist argument; Editors' comments in *Schlesinger* (n 12) 238: 'In most times and places, legal culture has been transnational in character ... . The notion of hermetically-sealed national legal systems is largely a product of nineteenth-century positivism and nationalism.'

<sup>281</sup> See Chapters II and IV where these issues are addressed.

<sup>282</sup> Watson *Legal Transplants: An Approach to Comparative Law* 2 ed (1993); Editors' comments in *Schlesinger* (n 12) 223.

'transplants'.<sup>283</sup> A pertinent example of the prevalence of legal transplants can be found in the creation of new constitutions in countries undergoing democratic transformation.<sup>284</sup>

Some of the reasons given for the phenomenon include factors ranging from 'prestige', 'aesthetics' and 'seductiveness', to 'blackmail', 'legal imperialism' 'power' and 'psychological dependency'.<sup>285</sup> Thus, particularly in cases of coercive or manipulative transplanting, transplants may pose serious problems when there is a dissonant fit with the receiving legal system and its related socio-cultural preponderances.<sup>286</sup> From a lego-technical perspective, there are further problems associated with the description and analysis of transplants, such as where to place them in the historical and hierarchical continuum, and whether to view them prospectively, as part of the system to which they were transplanted, or retrospectively, as part of the system of origin.<sup>287</sup>

The theory of legal transplants is a useful analytical tool to explain certain phenomena. Nonetheless, its superficiality, which reduces law to rules and denies its link to society, prevents the theory from being the smooth, neutral process described by Watson.<sup>288</sup> Nonetheless, transplants and borrowing occur in everyday situations and need to be accounted for in comparative and other

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<sup>283</sup> Editors' comments in *Schlesinger* (n 12) 223, 237.

<sup>284</sup> *Ibid* and 239. See also Mattei 'The new Ethiopian Constitution: First thoughts on ethical federalism and the reception of western institutions' in *Schlesinger's Comparative Law* 7 ed (2009) 223-227; on the Ethiopian constitution as an attempt to introduce the 'rule of law'. According to Mattei it does not contain much that is 'new', since it is dominated by American constitutional phraseology, with the emphasis on individual rights, and that conversely, it contains almost nothing to show that the constitution relates specifically to Ethiopia. The author is of the opinion that in Africa, rights assertiveness is 'particularly dangerous' if misdirected, since it is the antithesis of the traditional decentralised society rooted in a culture of mediation, unanimity and peacekeeping.

<sup>285</sup> Editors' comments in *Schlesinger* (n 12) 241-2, 248.

<sup>286</sup> Legrand (n 18) for example at 124. This aspect highlights one of the recurring themes of the present study. There is a burgeoning body of work which alerts those who subscribe to the idea of legal transplants, that such transplants could act as 'irritants' and hence elicit resistance. See Teubner (n 19) on 'legal irritants'; and for example Merry (n 20) 131, 178.

<sup>287</sup> Editors' comments in *Schlesinger* (n 12) 227-230.

<sup>288</sup> For example Legrand (n 18) 112-114.

jurisprudential analyses, including those that explain the impact of international law on domestic systems.<sup>289</sup>

**(d) Law, legal systems and ‘the messy complexities of human relationships’**

*[T]here appears to be only a tenuous connection between our stock of general theories and standard accounts of actual legal systems.*<sup>290</sup>

The brief survey of various methodological schemes outlined in the present section, shows that there is indeed no single method that can serve as a comprehensive ‘map’ that accurately depicts the intricacies and the paradoxical nature of law and legal systems, but rather, that different mental blueprints are required for different analytical journeys.

As explained, Twining notes the difficulties associated with the ‘profiling’ of legal systems, and calls for the development of a more systematic account of their analysis.<sup>291</sup> He maintains that legal comparison can learn much from the techniques of institutional analysis, and even from ‘bureaucratic rationalism’, but likewise stresses the fact that there are a multitude of different perspectives and ways of examining legal systems.<sup>292</sup>

Much depends on the epistemological stance adopted, whether preferred or imposed by necessity.<sup>293</sup> Hence, Twining sketches an attractive analogy that depicts legal systems as cities, which illustrates the tension between ‘geometric rationality and the messy complexities of human relationships’, precisely as one

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<sup>289</sup> See Choudhry (n 263) 19-21 on the inaptness of both ‘transplants’ and ‘borrowing’ as metaphors. Nonetheless, the point here is that, no matter the term used, the transfer of legal ideas does take place in a number of different ways.

<sup>290</sup> Twining (n 8) 167.

<sup>291</sup> *Id* 165-168.

<sup>292</sup> *Ibid* and 127-133; Glenn (n 45) 361-362.

<sup>293</sup> Glenn (n 45) 361-362.

would find in both a city and a legal system.<sup>294</sup> In other words, some might see 'systems' and 'organised diversity', while others see 'muddles' or 'jungles', when in fact, neither stance is incorrect, nor are these positions mutually exclusive.<sup>295</sup>

More difficult than various conceptualisations however, is finding the analytical tools to navigate these multidimensional spaces, which, for purposes of this study, is the one found at the interface between the 'muddle' of international law and the 'jungle' of various national and subnational regulatory schemes.

From the foregoing, it is also clear that any jurisprudential enterprise cannot be conducted in isolation; rather, it must take place within the wider superstructure of general legal principles. These, in turn, are invariably moulded by social, political, ideological or economic theories and their contingent realities, or vice versa. Thus, certain contours of the landscape to be mapped demand an approach of 'epistemological pluralism' and multiple road signs.<sup>296</sup>

Furthermore, and as discussed previously, legal theory, whether general or specific, is inexorably tied up with the sweeping forces of globalisation. The labyrinth of legal theories must therefore be placed against this backdrop in order to understand the tensions between the global and local more fully.

Additionally, as I explain below and in subsequent chapters, an epistemology that is more profound than clinical legal theory is necessary to forge a meaningful course toward emancipatory jurisprudence. I maintain that this additional dimension to legal theory is found in ethics.

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<sup>294</sup> Twining (n 8) for example 167-172.

<sup>295</sup> Twining (n 8) 167-172; Koskenniemi (2007) (n 7) 25; Kennedy (n 114) 848: 'Our picture will need to have room for all this disorder.'

<sup>296</sup> I thank Luwam Dirar for directing my attention to this concept.

## 7. 'One world': Law and ethics

*A global ethic should not stop at, or give great significance to, national boundaries.*<sup>297</sup>

In his penetrating book, *One World*, Peter Singer provides us with a salient, yet fundamentally axiomatic reminder of the interconnectedness of the world as 'one', interdependent community, wherein nations and individuals are not insulated against the bad, and presumably also the good, of what is happening elsewhere on the planet.<sup>298</sup>

Therefore, while traditional theories of macro-comparison and the western, statist model of micro-comparison might once have served important purposes, in a globalising world, where it is incumbent upon legal scholars to embrace a more inclusive, cosmopolitan perspective, new theories and constructs are required.<sup>299</sup> Apart from having to deal with law on a scale much larger than the Euro-American world, a more nuanced appreciation of the nature of law is called for in order to account for the realities within and without geopolitical boundaries, as notions of neatly monolithic statist law are no longer feasible.<sup>300</sup>

From within, as a result of various pressures and a greater awareness of cultural diversity, statist systems are increasingly competing with subnational

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<sup>297</sup> Singer (n 171) 148, on the possibilities of 'one law' based on ethics.

<sup>298</sup> Singer (n 171).

<sup>299</sup> See 4 and 5(a) above; Kennedy (n 114) 829, on the need to look beyond parochial borders: 'professionalization of academic knowledge has rendered us blind to what people in other places know'. Twining (n 8) 178-189, on the shortcomings of traditional macro- and micro-comparative models.

<sup>300</sup> See 2 above.

normative orders.<sup>301</sup> From without, legal phenomena from global and transnational levels are encroaching heavily upon the terrain of state law.<sup>302</sup>

Apart from these changes in the mapping of legal landscapes, endogenous and exogenous forces relating to economic, political and environmental survival are reshaping fundamental ideas about state sovereignty, which in turn, challenge the law-making capacity of states.<sup>303</sup>

Consequently, legal theory has to look beyond traditional jurisprudential frameworks in order to accommodate the complexities, rapid changes, confusion and normative conflict associated with the world order. What is needed is a supple, non-reductionist methodology, and above all a legal theory that is underpinned by 'cosmopolitan legality', as explained below.<sup>304</sup>

From a pragmatic point of view, a legal theory should offer certain 'standard services'.<sup>305</sup> Peter Singer however, points out that more is needed in our 'one world' where it has become necessary 'to justify our behaviour to the whole world', which demands 'a new ethic that will serve the interests of all those who live on this planet'.<sup>306</sup> Therefore, a globally valid, cosmopolitan legal theory will be transcendent and, in concurrence with Singer, ethically justifiable at both 'objective' international and 'subjective' domestic levels. It will ultimately give rise to emancipation, which, according to its definition in this study, is founded upon 'ethical-practical rationality'.

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<sup>301</sup> For example Tierney *Constitutional Law and National Pluralism* (2004).

<sup>302</sup> See for example Besson 'Sovereignty in conflict' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006); Capps 'Sovereignty and the identity of legal orders' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) on the challenges to state sovereignty; and Santos (n 2) 165-170; 178-182 on the impact of globalisation.

<sup>303</sup> See Chapter II 4(c)(ii).

<sup>304</sup> Santos (n 2) 458-494; and 7(b) below.

<sup>305</sup> Twining (n 8) 242-244, according to whom it should for example provide a coherent overview, explore and clarify seminal concepts, develop general normative principles and define and assess values, and generate hypotheses and working theories.

<sup>306</sup> Singer (n 171) 12.

Accordingly, an ethics based legal theory is not positivistic, and coherently explores dialectical and even metaphysical questions about 'good' and 'bad', while not ignoring the socio-political realities which shape the world.<sup>307</sup> Much of the applicable scholarship is substantially beyond the scope of this study. Therefore, in this section, I only focus on one of the most significant of these, namely the ethical, cosmopolitan and emancipatory legal framework developed by Santos.

In order to situate the cosmopolitan theory however, the postmodern movement must be considered, since it is congruent with my argument and encourages flexible and innovative theoretical structures.

Thereafter, I consider the tenets underlying a cosmopolitan and emancipatory theory, and propose working definitions, which will be used throughout the rest of the study. Finally, I turn to the question of the appropriateness of an ethical *Überbau* in the conceptualisation and development of legal theory.

### **(a) Postmodernism**

*[S]implifying it in the extreme, 'postmodern' is to be understood as the disbelief towards metanarratives.*<sup>308</sup>

According to Twining, two variants of post-modernism, namely 'imaginative post-modernism' and 'irrationalist post-modernism', can be distinguished.<sup>309</sup> The former concedes the 'elusiveness of reality' and 'fallibility of what passes for established knowledge', and espouses a multi-layered perspective. The latter is

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<sup>307</sup> Santos (n 2) 353-416 on the 'modes of production of law and social power'.

<sup>308</sup> Paulus 'International law after postmodernism: Towards renewal or decline of international law?' (2001) 14 *Leiden Journal of International Law* 727 at 731.

<sup>309</sup> Twining (n 8) 195-196.

founded upon 'scepticism, anti-rationalism, and irrealism', thus endorsing a strong version of cultural relativism and epistemological cynicism.<sup>310</sup>

It is therefore not surprising that in terms of legal theory, postmodernism has been associated with vagueness and ambiguity, and held responsible for stimulating romanticised and imaginary notions of reality, and even 'despair'.<sup>311</sup> Hence, similar criticisms have been levelled against the postmodern sentiments extolled by Santos, such as his 'paradigmatic transition' to a 'communitarian legal and political order', and a Utopian vision for the global emancipation of marginalised cultures based on a 'paradigm of prudent knowledge for a decent life'.<sup>312</sup>

Notwithstanding the condemnation of postmodernism, it may also serve as an acceptable starting point to devise a globally valid, multidimensional perspective of law and legal systems.<sup>313</sup> By raising consciousness of the anomalies and complexities involved in the conceptualisation of law, a postmodern ethos prompts questions about certain preconceived ideas regarding the nature and purposes of law. In its contention that new modes of analysis are required, it provides the necessary philosophical scaffolding within which to explore, and possibly ease, the tensions created by the traditional model of universal-relative bifurcation.<sup>314</sup>

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<sup>310</sup> Ibid. On a superficial level, postmodernism is a rejection of modernity and espouses scepticism towards, and is a reaction against claims of objectivity and universal standards and/or truths. See for example Paulus (2001) (n 308) 731-733.

<sup>311</sup> Ibid; Paulus (2001) (n 308) 734-735 on postmodernism in international law theory; also Twining (n 8) 204-206, for a discussion of Susan Haack's criticism of, and her efforts to debunk 'irrational' postmodern reasoning. She develops the concept of 'innocent realism', which unlike the postmodern rejection of objective truth, describes something as 'true if [it] is So...whether you or I, or anybody, think it is true or not'.

<sup>312</sup> See Twining (n 8) 197-204.

<sup>313</sup> For example Paulus (2001) (n 308) 748.

<sup>314</sup> In this regard, the work of Santos is clearly a salient example, and Twining's analysis of 'imaginative' postmodernism is useful, as it avoids certain undesirable tenets of 'irrational' postmodernism. Note however, the argument of Paulus (2001) (n 308) 753-755 generally, who illustrates the necessity of 'steering a course between normativity and contextuality', and the importance of 'minimum rules'.

### **(b) Cosmopolitan and emancipatory legal theory**

As noted, I place substantial reliance on the legal theory developed by Santos, with the difference that the principles of cosmopolitanism and emancipation are applied directly to the application and reconstruction of international law by domestic courts.

Santos follows a postmodern, 'newstream' approach, but moves far beyond the bald deconstruction normally associated with postmodernism. 'Cosmopolitan legality' articulates a global vision for the future development of law in a manner that will render it emancipatory, that is, not oppressive, but counter-hegemonic.<sup>315</sup> The theory thus formulates a mental map of law and legal systems, which it is intricately nuanced and much wider than, for example, Menski's 'globally valid plurality-conscious methodology'.<sup>316</sup>

With particular reference to the competing forces exerted by globalisation, Santos situates the complex 'constellations' of law within the protean socio-political 'world system', its values and power relationships.<sup>317</sup> Due to the centrality of globalisation in the theoretical design, he constructs a taxonomy, which demonstrates that the 'nature and direction' of globalisation fall into two categories or 'readings', namely 'paradigmatic' and 'sub-paradigmatic' – the latter holding the seeds for 'the propitious inauguration of a new era of global or even cosmic egalitarian solidarity'.<sup>318</sup>

Consequently, Santos vividly describes the top down processes involved in globalisation, which among others, manifest themselves as 'globalized

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<sup>315</sup> Santos (n 2). See especially his final chapter 'Can law be emancipatory?' at 439-495. Note that Santos is not the only legal theorist who has used the term 'cosmopolitan' with reference to law. See for example Twining (n 8) 248 in this regard.

<sup>316</sup> Menski (n 11) 596-613, who also reveals postmodern foundations in his description of a graphic scheme for the conceptualisation of legal pluralism.

<sup>317</sup> Santos (n 2), especially chapters 3 and 5 in his work.

<sup>318</sup> *Id* 172-177, quote at 175. Santos also maintains that there are other 'forms' or processes of globalisation as well as seven 'specific types' of legal globalisation. See the discussion and references below.

localisms' and 'localized globalisms'.<sup>319</sup> The most valuable contribution of his theory however, is the identification of bottom up transformative and 'counter-hegemonic' processes associated with globalisation, upon which an 'emancipatory' legal theory can be constructed. He terms these processes and coalitions 'subaltern cosmopolitanism' and the 'common heritage of humankind'.<sup>320</sup>

'Subaltern cosmopolitanism' refers to the opportunity for, and manner in which subordinate groups and entities, ranging from states to social groups and NGOs, organise themselves globally to countervail hegemonic forms of globalisation. Examples include the contribution made by international human rights- and other organisations which advocate 'non-imperialist' values, and South-South dialogue and co-operation.<sup>321</sup> The 'common heritage of humankind' is related to international law precepts, which are concerned with issues of a global nature, such as the sustainability of life and the environment.<sup>322</sup>

With reference to the counter-hegemonic processes described above, Santos proposes the construction of a multicultural, 'hybridised' human rights regime, which promotes both individual and collective rights. In heuristic manner, the 'most comprehensive and emancipatory conceptions' found in the human rights regime and in various traditions around the world, are to be identified for a cross-cultural – in other words, cosmopolitan – reconstruction of human rights, which is able to bridge the divide between local perspectives and transnational sentiments, and at the same time remain relevant to both.<sup>323</sup>

In reliance on this analysis, and relative to the reconstruction of international law, I offer the following definition of cosmopolitanism:

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<sup>319</sup> Id 179.

<sup>320</sup> Id 180-182.

<sup>321</sup> Id 180-186, 458-471, 494-495.

<sup>322</sup> Id 181-186; 494-495.

<sup>323</sup> Id 474-475. He uses, for example, the concept of human dignity, which is found in various forms on local and transnational levels, and agitates for a setting aside of 'dominant perceptions of reality' and for the discovery of 'other realities'.

*Cosmopolitanism means a transnational orientation and signals a stance of openness toward a plurality of divergent realities, ideologies and cultural experiences. This orientation may counteract both hegemonic universalism and oppressive relativism.*<sup>324</sup>

It is explained in subsequent chapters that the concept of cosmopolitanism contains seminal elements, which can be applied by courts to reconstruct international law from the bottom up.<sup>325</sup> Such reconstruction has emancipation as its goal, and hence, there is a conceptual link between cosmopolitanism and emancipation.

In turn, emancipation is directed towards freedom from oppressive situations, wherein human potential cannot flourish.<sup>326</sup> Thus, where an oppressive situation prevails, emancipation means challenging the status quo and facilitating, or engineering the necessary transformation.<sup>327</sup> In the context of this study, I define emancipation as follows:

*Emancipation in the application of international law in domestic courts means a cosmopolitan orientation, which offers release from and facilitates the possibility of transforming oppressive conditions. It is achieved by means of an equitable balancing in ethical-practical rationality, of the interests of all stakeholders.*<sup>328</sup>

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<sup>324</sup> Santos (n 2), for example at 172, 180, 233, where he offers various descriptions of cosmopolitanism. I note that although similar phrases may be used, the present meaning is not necessarily identical to that of Santos.

<sup>325</sup> See Chapter IV 9(e) on bottom up international law and Chapter V for relevant case studies.

<sup>326</sup> See Santos (n 2) 471.

<sup>327</sup> Id 2-3, where Santos contends that the 'logic' of emancipation '[expands] the possibilities of social transformation beyond a given regulatory boundary'.

<sup>328</sup> For present purposes, 'oppressive conditions' include oppressive regulation and 'faceless oppression'. See n 329 below. Rationality is used in the sense of intellectual logic as opposed to religious or emotional compunction. Santos (n 2) 3 explains it differently and not in the specific context of international law, namely that the 'pillar of emancipation is constituted by three logics of rationality', one being the 'logic' of 'moral-practical rationality of ethics and the rule of law...[which expands] the possibilities of social transformation beyond a given regulatory boundary'.

In a nutshell, a cosmopolitan and emancipatory legal theory for the application and reconstruction of international law is one that is relevant worldwide and capable of accommodating both global and local interests. It ensures that international law is applied and reconstructed in a way that will render it counter-hegemonic and beneficial to all its participants and recipients. A cosmopolitan and emancipatory legal theory thus envisages international law as both shield and sword in the struggle against oppression of any kind.<sup>329</sup>

Lastly, a sanguine element, that I wish to thread throughout the present study, is Santos's unwavering optimism that cosmopolitan and emancipatory jurisprudential models may indeed be viable and offer solutions to some of the challenges facing humanity. I maintain however, that such emancipatory theory must be buttressed by a philosophical framework of practical ethics.

### **(c) Ethics and legal theory**

*A much better case against cultural imperialism can be made from the standpoint of a view of ethics that allows for the possibility of moral argument beyond the boundaries of one's own culture.*<sup>330</sup>

In this section, I suggest that, in a manner similar to a roadmap, legal theory as a map must be orientated along a particular compass point, which determines the ultimate direction in which the journey is to proceed. I propose further that for important reasons, some of which are mentioned below, the 'North' of the legal theory map should be ethics.<sup>331</sup>

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<sup>329</sup> It must be noted that 'oppression' does not refer to a human rights context only, but to any situation which renders the 'flourishing' of human potential difficult. Hence, it includes, for example, issues relating to the environment, crime and even trade. Clearly, it also includes the hegemony of international law, which might affect entire nations. See Chapter II 4(b), Chapter V 2(c).

<sup>330</sup> Singer (n 171) 140.

<sup>331</sup> For present purposes, an untrammelled version of ethics is referred to, namely one that is broadly utilitarian and denotes the attainment of the 'Greatest Happiness', or what I call the 'greatest compound benefit'. See Chapter IV 10; Twining (n 8) 89-91. In terms of legal theory, it

The first point to be made about legal theory is that, since law 'acts as a site of ideological refraction of deeply embedded cultural dispositions', theories about law are seldom neutral and objective, and hence, that every theory runs the risk that it will merely perpetuate existing power structures and hegemony.<sup>332</sup> Even if it purports to be epistemologically and culturally neutral, every theory remains embedded in one or other socio-cultural and ideological framework, which will inexorably imbue it with its own bias.<sup>333</sup>

On the other hand, a positivistic and abstract theory, which, in addition to being thus biased, spurns the role of ethics and morality in law, is greatly limited in its ability to be emancipatory and cosmopolitan. This is because a solipsistic theory severs the potential link between law and the 'quest for a good society', and may, for example, result in some of the dissonant and oppressive consequences associated with ill-conceived reform and development programmes.<sup>334</sup>

Paying lip-service to ethical considerations however, does not necessarily translate into ethical outcomes. Twining is therefore critical of rights theorists who pontificate about human rights abuses but fail to address issues of duty and the allocation of responsibility.<sup>335</sup> Consequently, a globally valid, emancipatory theory

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therefore strengthens the ideal of law that is emancipatory and benefits all its stakeholders and the environment. It must also be noted that the separation between law and ethics or morality is an occidental and positivistic construction. There is namely no such separation in customary orders. See for example Mapaire (n 57) 150-153. Note again Singer (n 171), who describes the relationship between ethics and globalisation with deep insight. Also note that, for present purposes, the meaning of ethics and morality is conflated.

<sup>332</sup> Legrand (n 18) 122.

<sup>333</sup> To illustrate: Santos points out that the mere raising of questions about law (in this instance, whether it can be emancipatory) 'makes a number of assumptions that are specific to Western culture and politics. It presupposes that there is a social entity called 'law' susceptible of being defined in its own terms and of operating autonomously'. See Santos (n 2) 443-445.

<sup>334</sup> Santos (n 2) 439, where he argues that law can be 'emancipatory' and lead to a 'better society'. See 2(e) above for notes on law and social change.

<sup>335</sup> Twining (n 8) 89-91, who maintains that some of Bentham's ideas based on the utilitarian 'Greatest Happiness Principle' could be adapted and harnessed to accommodate current issues of globalisation and legal pluralism. He ingeniously expands on Bentham's utilitarian philosophy,

would, for example, define and strengthen 'claim-rights' which impose a correlative duty upon another to act, as opposed to mere 'privilege-rights' which do not allocate responsibility.<sup>336</sup> In cosmopolitan spirit, it will bring into relief recognition of moral duties that transcend geopolitical boundaries and extend to the far corners of the earth.<sup>337</sup>

Although conceptions about ethics and morality are self-consciously user- and time-related, questions pertaining to these concepts are not of academic interest only. Going back to the nineteen-sixties, Derrett suggests that 'besides the ultimate requirements of morality all such [religiously predicated] law is dwarfed, and in this conclusion it seems that Christians, Muslims, Hindus and Jews are agreed'. He is of the opinion that all persons possess an 'inborn quality' which guides them to know when a law or judgment is just or unjust; and that beyond laws is a 'standard, which is *just*'.<sup>338</sup> Whether one endorses this view or any other type of natural law ideology, law and by extension legal theory, cannot be separated from the substratum of justice and ethics upon which it is postulated.

Perplexing as definitions of ethics, morality and justice may be, no person would willingly choose to be subjected to laws which are manifestly devoid of these elements.<sup>339</sup> I therefore contend that, since law must be seen to be just and ethical, these values must correspondingly be validated by legal theory. Additionally, a cosmopolitan legal theory has the further requirement that it must encapsulate or build on ethical principles that are common to, or transcend local and national standards of morality and justice.

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which includes the dimension of *extent*, as possibly competent to resolve conundrums such as 'who is my neighbour?' and 'who is responsible for helping?'

<sup>336</sup> *Ibid.*

<sup>337</sup> *Id.* 66-69 and n 335 above. Note Twining's discussion of Singer's approach founded on practical, utilitarian ethics, and particularly his important contribution in terms of the duty to prevent famines; and also the discussion of Onora O'Neill's 'Lifeboat Earth' and her argument about global responsibility for 'extreme evils'.

<sup>338</sup> Derrett (n 111) xviii, xix.

<sup>339</sup> See Thompson *Whigs and Hunters* (1975) 263.

In summary, the model legal theory seeks to address global problems common to all communities in a purposive, ethical manner, and has as its goal a beneficial use-value. It must seek to obviate intrinsic bias and explore the possibility of finding 'cross-cultural constructs that mutually appeal in the name of justice to inform ideals which rest on foundations that are autonomous from the rules of positive law'.<sup>340</sup>

## 8. Conclusion

There is a great atlas of general and specific legal theory, all of which is conceived in an attempt to make sense of the socio-legal ordering that each person alive is subject to and participates in – to his or her benefit – or detriment.

In this chapter, some of these theories were considered in order to gain insight into the nature and role of law, and the dynamic interaction between different normative orders. The purpose of the exercise was to lay the foundations for the construction of the proposed analytical legal framework for the cosmopolitan and emancipatory application and reconstruction of international law through the mediation of domestic courts. Consequently, the framework relies on guidelines and signposts for the judicial navigation of the interstices between international, national and subnational regimes, particularly when they are brought into a potentially agonistic relationship within domestic courts.<sup>341</sup>

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<sup>340</sup> Obiora (n 148) 678.

<sup>341</sup> In brief summary, the framework (Chapter IV) consists of a 'map' which describes the pluri-legal, three-dimensional interface between international, national and subnational normativity. This terrain is the 'context', within which domestic courts must navigate toward the end goal of the cosmopolitan and emancipatory reconstruction of international law. To this end, the framework provides three analytical tools, namely contextualism, proportionality and the particularisation of international law, and additionally, an ethical 'compass'.

The first signposts underscore the contention that law and legal systems are plural and polycentric, and are imbricated with socio-cultural norms and values, which emanate from local and global spheres. This understanding of law is not purely descriptive. It stresses the need for a globally relevant cosmopolitan legal theory, which endorses normative pluralism and rejects occidental positivism.<sup>342</sup>

The effect of globalisation on law and legal theory is another signpost. It ties in with theories about cosmopolitanism and the debate about universal and relative normativity.

Further signposts are provided by some of the methodological processes derived from comparative legal studies, and other scholarly analyses relating to the formation and diffusion of legal concepts through time and across geopolitical boundaries.

This chapter provides a final signpost that situates the proposed analytical framework within a wider ethical landscape, one which takes into account the energies of globalisation and its impact on current legal development. The signpost of global ethics relies on the work of Peter Singer, and serves to describe the 'compass' needed for the judicial mediation of conflicting interests at local and global levels.<sup>343</sup>

In conclusion, the study utilises the theoretical signposts, which signify the 'legend' of the mapping of law, described in this chapter, to trigger a specific jurisprudential strategy. This strategy finds expression in the thematic framework for the application and reconstruction of international law.

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<sup>342</sup> The sojourn into Santos's cosmopolitan legal theory showed that the development of such a theory is plausible. Cosmopolitanism therefore, first, underscores a particular legal theory, and second, is an aspirational goal, along with emancipation, for the application and reconstruction of international law. Cosmopolitanism pre-empts emancipation however, since the latter cannot be attained without it.

<sup>343</sup> See Chapter IV 10.

By definition however, the framework contains two vital components, namely international law itself, and the judiciary, which is responsible for its application and eventual reconstruction. Therefore, the following two chapters position these, as prominent features, within the socio-legal landscape that must be traversed to reach the goal of cosmopolitan and emancipatory jurisprudence, as envisaged in the study.<sup>344</sup>

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<sup>344</sup> Chapter II deals with international law, and Chapter III with the judiciary.

## CHAPTER II

### TOWARD COSMOPOLITAN AND EMANCIPATORY INTERNATIONAL LAW: PEERING INTO THE 'MIND' OF INTERNATIONAL LAW

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## 1. Introduction

*The fate of international law is ... [a matter] of re-establishing hope for the human species.<sup>1</sup>*

*[T]he past [of international law] is a dismal story but the future is one of hope.<sup>2</sup>*

*We are stuck in the 'international', with no guarantee that this would be beneficial.<sup>3</sup>*

In the foregoing chapter I considered the phenomenon of normative pluralism, which includes legal pluralism, and the manner in which it challenges conventional ideas about the nature of law. It was illustrated how law and socio-cultural norms are in a dynamic interplay, which affects the application of law and shapes legal outcomes. The aim was to set the stage for the conceptual approach adopted throughout the study with respect to the meaning of 'law'. It was established, for example, that law displays great normative plasticity, much more so than it is given credit for by positivistic theories.

I consequently argue that this understanding of the complex nature of law has a distinct bearing on how legal adjudication and research should be conducted, and that the relevant socio-cultural context, within which these processes are rooted, cannot be ignored. It is therefore important to note that the nature of law provides compelling reasons for courts to concern themselves with the contextualisation of their judgments.

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<sup>1</sup> Koskenniemi 'The fate of public international law: Between technique and politics' (2007) 70 *Modern Law Review* 30.

<sup>2</sup> Weeramantry 'International law and the developing world: A millennial analysis' (2000) 41 *Harvard International Law Journal* 278.

<sup>3</sup> Koskenniemi (2007) (n 1).

In this chapter I build on the concept of the social embeddedness of law with reference to international law itself, and thereby align myself with those who question perceptions about its universal and objective nature. The purpose of the chapter is to describe different parameters for international law, and to sketch the possibility of its nuanced, context-specific application in domestic forums, which leads to its eventual cosmopolitan and emancipatory transformation. To that end, I ask what happens, not only at the international-national interface, but also at the international-subnational interface, when global norms impinge on local normative contexts.<sup>4</sup>

For the sake of clarity, it must be emphasised that what is meant by 'international law' is broadly inclusive of every aspect thereof, and that the term denotes all aspects of supranational normative ordering which have an effect on national and subnational normative systems. For this reason, and apart from obvious areas of focus such as international human rights law, also included are various aspects of soft law, the *lex mercatoria*, regional and transnational systems and so forth. All of these constitute higher order regimes which may encroach on domestic domains. Hence, classic public international law does not feature prominently, save for instances where it impacts directly on national or subnational systems.

It was previously explained that the present study derives its aspirational impetus from the 'chthonic' principle 'I am because we are', as seen from a global perspective.<sup>5</sup> It means that we need to think 'international' in a literal sense, because, as Singer poignantly writes, we live in 'one world'.<sup>6</sup> We should therefore consider questions such as the one posed by the ancient Chinese philosopher

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<sup>4</sup> For a further explanation of 'subnational' see Chapters III 2(c) and IV 9(c).

<sup>5</sup> Menski *Comparative Law in a Global Context* 2 ed (2006) 427, quoting Ayittey.

<sup>6</sup> Singer *One World: The Ethics of Globalization* 2 ed (2004).

Mozi: 'What is the way of universal love and mutual benefit?', and perhaps even more so his answer, which is 'to regard other people's countries as one's own'.<sup>7</sup>

Pursuing this line of thought, a central question raised in this chapter is therefore, whether international law can contribute substantively to the well-being, prosperity and even the survival of living things and the earth, by bridging or transcending national and cultural barriers, where these hamper solutions to mutual problems. Critically important to the present study, however, is the issue of whether this task can be accomplished without hegemony and without the violation or obliteration of relative interests at national and subnational levels. These concerns, in turn, lead to issues such as the capacity and ability of international law to prescribe international conduct for the benefit of *all* stakeholders, and importantly, its authority and legitimacy to do so.

By stakeholders I mean collective stakeholders at every level, namely humanity itself as the overarching participant, and also nations, and supra- and subnational cultural or religious groupings. All these, however, are ultimately composed of individuals, and thus individuals are stakeholders, whether indirectly, or directly (as the human rights paradigm suggests). Nonetheless, for purposes of developing the analytical framework, the present study focuses to a greater degree on collective users and recipients at national and subnational levels. Such emphasis is pertinently directed at large and small communities, even nations, such as those of the Third World, which may have been disenfranchised by the operation of hegemonic international law favouring First World interests.

Under discussion in this chapter therefore is the nature of international law and the manner in which it has been created and used, its development and fragmentation, and the 'law job' that it should accomplish. I consider, in particular,

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<sup>7</sup> Id 196.

the crucial issue of whether the contextual application of international law in (pluralistic) domestic settings is theoretically possible, given the nature and history of international law.<sup>8</sup>

In addition, the chapter describes the problematic relationship between international law and state sovereignty. Lastly, I explore the prospect of a reconstructed, cosmopolitan and emancipatory international law.

## **2. Aspects of the nature of international law: A loose aggregation of rules and principles operating between states, or more?**

*International law is ... above all, a network of connections between the events, the people, and the things of the world.*<sup>9</sup>

*[International law] ... is the law of affective symbiosis based on substantive connections between the members of the international community.*<sup>10</sup>

*[I]nternational law ... is ruled by polarized preferences.*<sup>11</sup>

The previous chapter established the highly complex nature of all law, and that it is apparently impossible to define the term successfully.<sup>12</sup> As noted, one reason for its complexity lies in the plural, polycentric and contextual nature of law as a social phenomenon. Similarly, international law is a socio-political process, and a convolution of customs, treaties, principles and values, subsumed under the

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<sup>8</sup> The importance of contextualisation lies in the fact that it is the first step toward the cosmopolitan and emancipatory reconstruction of international law, which is explained in greater detail in subsequent chapters. See in particular Chapter IV, which develops the analytical framework for such reconstruction.

<sup>9</sup> Knop 'Here and there: International law in domestic courts' (2000) 32 *New York University Journal of International Law and Politics* 507.

<sup>10</sup> Tsagourias 'International community, recognition of states, and political cloning' in Warbrick and Tierney (eds) *Towards an International Legal Community* (2006) 220.

<sup>11</sup> Singh 'The potential of international law: Fragmentation and ethics' 2011 *Leiden Journal of International Law* 42.

<sup>12</sup> See Chapter 1 2.

rubric of a 'legal system' – by which the international community is deemed to regulate itself.<sup>13</sup> Notwithstanding the epithet of 'legal system', the constitutive processes and institutions of international law manifest themselves in vastly different ways to those pertaining to national 'systems'.

Consequently, in comparison with the latter, international law has been labelled a 'weak and primitive system of law' with 'rudimentary' institutions.<sup>14</sup> For example, it lacks conventional legislative and executive support structures, and hence its application remains uncertain and its enforcement mechanisms are poorly developed.<sup>15</sup> Tritely put, without a hierarchical legislative order or a police force, international law, as Koskenniemi says, amounts to an indeterminate 'balancing of interests', and 'defers to the politics of expertise', which reduces questions of law to 'management problems'.<sup>16</sup>

From a different perspective however, it seems equally logical that realities found at global level, such as the ever-present sovereignty of nation-states, and the diverse and asymmetrical composition of the international community, demand a legal system that serves different purposes and has different characteristics than a national system.<sup>17</sup> Thus for instance – and despite

<sup>13</sup> See McCorquodale 'International community and state sovereignty: An uneasy symbiotic relationship' in Warbrick and Tierney (eds) *Towards an International Legal Community* (2006) 264-265, on international law as a social process; Singh (n 11), on the fragmentation and deformalization of international law, which indicate its lack of cohesion as a 'system'.

<sup>14</sup> Harris *Cases and Materials of International Law* 6 ed (2004) 3, 4; Koskenniemi (2007) (n 1) 1-2, 30. The debate whether international law is a 'system' or otherwise will not be pursued here. The term 'legal system' is applied as a generic term. See for example Singh (n 11) who questions the notion that international law is a system. On the other hand the International Law Commission's Report (A/CN.4/L.682) on fragmentation in Singh (n 11) 27-35, affirms a conceptualisation of international law as a coherent system.

<sup>15</sup> See for example Dugard *International Law: A South African Perspective* (2005) 2-10; Harris (n 14) 4, 5.

<sup>16</sup> Koskenniemi (2007) (n 1) 9-15, where these issues are subsumed under the concept of the 'deformalization' of international law, which is discussed in greater detail in 4(c)(i) below.

<sup>17</sup> I address the question of which entities constitute the 'international community' subsequently. For present purposes it is merely noted that it is increasingly recognised that states, apart from no longer being regarded as the sole actors on the international playing field, are experiencing the progressive erosion of sovereignty, which in turn fortifies the position of other players in the global arena. See for example Besson 'Sovereignty in conflict' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006).

decades of attempts by legal scholars to corset law in this fashion – the Austinian model, with its obvious bias toward a western, statist paradigm, cannot reasonably be transposed without further ado onto the international and transnational legal landscape. In the same manner that Austinian theory does not fit non-mainstream normative systems, such as indigenous and religious regimes, it accordingly does not necessarily fit the model required by the international community.<sup>18</sup>

On the other hand, and by some obscurantist side-stepping of numerous theories, it could simply be argued that the nature of international law is contingent on the international community's need that a particular 'law job' be accomplished.<sup>19</sup> From a pragmatic perspective, the job of international law has evolved in response to perennial difficulties, which affect states collectively and individually, and the need to promote peaceful cooperation among states.<sup>20</sup> In this regard it has been observed that, '[international law] has not failed to serve the purposes for which states have chosen to use it; in fact it serves these purposes reasonably well ...'.<sup>21</sup>

The nature of international is also shaped by the manner in which it exacts compliance. Important to note is that, for whatever reasons and despite breaches, '[i]nternational law is observed and honoured every day' and '[o]n the whole it is probably observed as much as municipal law is in some societies'.<sup>22</sup> Thus, the binding nature of international law is found somewhere other than in

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<sup>18</sup> For example Capps 'Sovereignty and the identity of legal orders' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006), on the legal identity and authority of international law, which, according to him, are derived from the internal perspective adopted by the international community as a whole, and therefore legal identity and authority are not founded solely on the processes of legitimation derived from the concept of state sovereignty or linked to statist legal regimes.

<sup>19</sup> For a discussion of Llewellyn's 'Law Jobs' theory see Twining *Globalisation and Legal Theory* (2002) 75-79.

<sup>20</sup> Note again that the term 'international community' is used loosely, and here defines all stakeholders and actors on the international plane. See Tsagourias (n 10) on his understanding of an 'international community' as opposed to an 'international society', and on the role of non-state entities.

<sup>21</sup> In Harris (n 14) 5.

<sup>22</sup> Dugard (n 15) 9; also Harris (n 14) 6-9, commenting on the 'law habit'.

the fear of sanction. This in itself, points to a very different conceptualisation of international law as a 'system' of law.<sup>23</sup>

In the first place, one can surmise that the consensual nature of international law plays a great part in its observance.<sup>24</sup> So too, does the fact that 'international law is in fact just a system of customary law' that has relatively recently been supplemented by treaty law, which in itself is often the codification of customary rules.<sup>25</sup> Consequently, as is typical of customary systems, compliance is exacted not primarily through fear of sanction, but through the operation of moral or ethical injunctions and social, rather than legal compulsion.<sup>26</sup> At the other end of the spectrum, international law is observed for less noble reasons. Compliance may simply be the result of expediency and the need to survive in the 'global village', or even because of 'blackmail', 'legal imperialism or 'psychological dependency' and the like.<sup>27</sup>

From the above, it appears that, on a superficial level, international law *qua* legal system is generally recognised as legitimate. It ostensibly serves its general purpose, and states tend to observe it as law – or at least pay lip service to such observance.<sup>28</sup> Therefore, taking the obscurantist reasoning a step further, one might argue that international law hardly needs to justify its existence since it

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<sup>23</sup> See for example Dugard (n 15) 10. See also Orakhelashvili *Peremptory Norms in International Law* (2006) 7-11, who considers the binding nature of peremptory norms.

<sup>24</sup> Orakhelashvili (n 23) 9.

<sup>25</sup> Harris (n 14) 3; Dugard (n 15) 29-38, for a general discussion of customary international law, and 41-42 on codification; see also Koskenniemi (2007) (n 1) 1-3, for a brief historical overview of the international law 'project'.

<sup>26</sup> See for example Menski (n 5) (2006) 421-431 and 439 on African customary law as a 'self-controlling system', and where he points out that compliance is the result of a 'holistic perspective' and part of a social process. I maintain that there are distinct parallels in this regard between customary law in general and international law as a customary system.

<sup>27</sup> I borrow these last terms from the theories of legal transplants, discussed by Mattei et al (eds) *Schlesinger's Comparative Law* 7 ed (2009) 241-242; An-Na'im 'Why should Muslims abandon Jihad? Human rights and the future of international law' in Falk et al *International Law and the Third World* (2008) 85, on self-interest and fear of retaliation as reasons for compliance.

<sup>28</sup> See for example Coombe 'Culture: Anthropology's old vice or international law's new virtue?' (1999) 91 *American Society of International Law and Procedure* 261 at 270; and Merry *Human Rights and Gender Violence* (2006) 231 on the continued respect commanded by international human rights law as the only system of its kind.

constitutes that, which through an apparently global consensus, is the only legal tool of its kind available to the international club of nation-states.<sup>29</sup> This reasoning would readily support a positivistic description of international law as an aggregation of rules, which governs state conduct. It does not however, account for the fact that 'international law is a part of social relations that change over time', and which I maintain, includes non-state and substate social relations.<sup>30</sup>

Neither can the restrictive 'dominant legal doctrine', namely, that international law is exclusively the domain of sovereign states, adequately explain the current changes evident in the creation, development and enforcement of international law.<sup>31</sup> In this regard, it has been argued that the idea of the state is nothing more than an artificial construction and legal fiction.<sup>32</sup> To illustrate, there are no *state* actions and there is no *state* conduct, since the state itself cannot act. Rather, so-called state actions are performed by an elitist group of influential *individuals* who are in control of decision-making processes.<sup>33</sup> Moreover, it is increasingly recognised that, although states are the pivotal actors on the international scene, there are many other non-state stakeholders and actors, who are not merely passive bystanders, but who, to varying degrees, participate internationally in a number of significant ways.<sup>34</sup>

The realities considered above defy a statist episteme of international law and exemplify the reasons for redrawing the contours of its nature and purpose. Nevertheless, the mere acknowledgement, for example, that international law challenges traditional theories, that it is socially embedded, and that it has a multiplicity of participants, still does not adequately define its purpose or nature.

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<sup>29</sup> An-Na'im (2008) (n 27) 83 'there can be only one system of international law in the present globally integrated, and interdependent world.'

<sup>30</sup> McCorquodale (n 13) 243-244.

<sup>31</sup> Ibid; see also Stevens 'Recreating the state' in Falk et al (eds) *International Law and the Third World* (2008).

<sup>32</sup> McCorquodale (n 13) 245; also Marks *The Riddle of all Constitutions* (2000) for example 98-99, who criticises the idea that a 'democratic community is a nationally defined community'.

<sup>33</sup> McCorquodale (n 13) 245.

<sup>34</sup> Id 253-265; Santos *Toward a New Legal Common Sense* 2 ed (2002) for example 192-193 read together with 437-439 and 474-494; An-Na'im (2008) (n 27) 84-85.

To illustrate, an instrumentalist analysis might describe how the rules of international law operate, and amongst whom, but it does not explain why international law has in recent years progressively been strengthening and flexing its moral and ethical muscle as a *value*-laden normative system.<sup>35</sup> This is perhaps why John Dugard maintains that 'the mind of international law is more difficult to comprehend'.<sup>36</sup>

The leitmotif of the present study is that it is possible for international law to be conceived as greater than a set of rules, and that it can be reconstructed as a transcending ethical and value-based system within which the international community, which includes all its participants and recipients, can forge its wellbeing.<sup>37</sup> Consequently, in view of the elusive nature of international law discussed above, a more profitable question might be to ask, what its ultimate *task* must be, and how this will be accomplished. In other words, how can international law fulfil the 'job' of becoming cosmopolitan and emancipatory?

For purposes of the present study, both the nature and task of international law is closely allied to the manner in which it is applied in domestic courts. The reason is well expressed in the contention that 'justice is a local, not universal ideal', which means that it is the *effect* law has on its users that is important.<sup>38</sup> Hence, to benefit all its stakeholders, international law must be relevant and just within national, and, I argue, subnational contexts, where its users or intended beneficiaries often find themselves.<sup>39</sup> Correspondingly, international law cannot be cosmopolitan and emancipatory in the abstract, but

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<sup>35</sup> See 4(a) and 5 below for an examination of this phenomenon, and concepts of a 'new natural law' founded on the prescripts of legal idealism and justice.

<sup>36</sup> Dugard (n 15) 15.

<sup>37</sup> See An-Na'im (2008) (n 27) 82, who strives to 'affirm and promote the legitimacy and efficacy of international law as the indispensable means for realising universal ideals of peace, development and the protection of human rights, everywhere'; Harris (n 14) 5-8 on the paradox, namely, that despite criticisms against law (and international law), for example, that it merely serves political or sectoral interests, or clashes with local values, there nevertheless 'remains a sense of the transcendental value of law' and that despite being associated with state hegemony, it is also a 'defense of subordinate groups ... and against tyranny'.

<sup>38</sup> Beatty *The Ultimate Rule of Law* (2004) 167.

<sup>39</sup> See Chapter I, especially sections 2, 6 and 7 where this aspect is analysed.

only with reference to a particular context. It is therefore essential to analyse what is meant by international law, as it is deployed within the halls of participating domestic courts.

### **3. The many faces of international law in domestic courts and the ‘Trojan horse’ effect**

What does international law ‘look’ like in domestic courts? Is it found only in recognisable norms or values contained in customary international law and in international instruments? How does international law get to the domestic forum in the first place and what happens afterwards? The present section deals with these questions.

In answer to ‘how’ it enters the domestic environment, I describe the two-stage journey of international law, as it moves from the international plane to the domestic, more fully in subsequent chapters. For present purposes, the first part pertains to the rather technical ‘invitation’ stage, whereby international law is given legislative authorisation to be used in national courts. This permission usually includes an indication of the extent to, and manner in which it can be applied.<sup>40</sup> It will be shown, however, that these processes are by no means clear cut, and that there are various back roads, whereby international norms and values are invited into the domestic arena, often with the help of the judiciary.<sup>41</sup>

The second stage involves the judicial translation or particularisation of international law, once it has landed on local shores. This refers to the manner in which it is adjusted to the domestic context, much like a stage play is adapted for

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<sup>40</sup> See Chapter III 6(c).

<sup>41</sup> Chapter III 5. Much of this back road diffusion takes place through activist judicial interpretation. See Moran ‘Influential authority and the estoppel-like effect of international law’ in Charlesworth et al (eds) *The Fluid State, International Law and National Legal Systems* (2005), Waters ‘Creeping monism: The judicial trend toward interpretive incorporation of human rights treaties’ (2007) 107 *Columbia Law Review* 628, Cossman ‘Migrating marriages and comparative constitutionalism’ in Choudhry (ed) *The Migration of Constitutional Ideas* (2006).

a local audience.<sup>42</sup> Knop calls these the 'local life forms' of international law.<sup>43</sup> In devising the analytical framework of the study, I develop the concept of particularisation to show that it is an invaluable 'tool' for the attainment of cosmopolitan and emancipatory international law.<sup>44</sup>

Consequently, two faces of international law seem to present themselves in domestic courts. The first is its public face, which it shows when invited into local domains, and the other is its local manifestation. In both instances, courts are conscious of the fact that they are dealing with norms that have migrated from somewhere else, and are therefore sensitised to issues of bindingness and legitimacy.<sup>45</sup> Hence, they assume the role of 'gatekeeper' and ensure that, as 'organs of the National State and not organs of international law, [they] must perforce apply national law if international law conflicts with it'.<sup>46</sup>

There is however, another method whereby international law enters domestic courts, with the difference that, in this guise, the judiciary simply opens the gates widely to let it in. Hence, I call this the 'Trojan horse' effect of international law. What it means is that international law lies hidden within the domestic legal system, with the result that its compatibility with domestic regimes is not given any critical consideration.

National constitutions, incorporating legislation and certain types of borrowed legislation typically constitute such Trojan horses. This is the case when these laws rely on, or devolve from the regime created by international law. Constitutions in particular, and despite assertions that they epitomise the national

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<sup>42</sup> See Chapter IV 8; Knop (n 9) 530-535.

<sup>43</sup> Knop (n 9) 528.

<sup>44</sup> Chapter IV 8.

<sup>45</sup> See Chapter III 5.

<sup>46</sup> Jayawickrama 'India' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 245, quoting Justice Chinnappa Reddy; Paulus 'Germany' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 213, 241, on the role of courts as gatekeepers.

identity, often resemble blueprints of international instruments.<sup>47</sup> Or, when constitutions do not rely directly on international law, they borrow so heavily from others that do, that they resemble copy-paste versions of the latter.<sup>48</sup> As Mattei points out, there is very little that is 'new' or 'truly original' in most constitutions, and it appears that many countries, 'in a more or less conscious attempt' construct their constitutions from 'old imported bricks', most of which were originally honed by international law principles.<sup>49</sup>

Although there might be some degree of indigenisation by the legislature, the fact is that often the most important provisions in both incorporating legislation and constitutions appear to entrench international norms in a mechanistic fashion, neither questioning their origins nor their impact on the domestic system.<sup>50</sup> This, perhaps, can be attributed in part to the widely held, but fallacious, belief that international norms are 'universal'.<sup>51</sup>

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<sup>47</sup> See Peters 'The globalization of state constitutions' in Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007); Grove 'The international judicial dialogue: When domestic constitutional courts join the conversation' (2001) 114 *Harvard Law Review* 2049 at 2059, on the matter that 'courts seem to view their domestic constitutions as part of a family of foreign and supranational documents, each of which serves as a source of general legal norms'; Hirschl 'On the blurred methodological matrix of comparative constitutional law' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 61; Tushnet 'Some reflections on method in comparative constitutional law' in Choudhry *The Migration of Constitutional Ideas* (2006) 81-83, which includes his criticism of the idea that constitutions express a single national 'self-understanding'.

In addition to the channels mentioned here, there are even more indirect routes, which are not central to the present study, such as when governments fearing the loss of aid, agree to draconian WTO, WB or IMF measures to 'combat poverty' or foster 'development'. Agreements aimed at such reform must be upheld by domestic courts, whether they are hegemonic or not, and moreover, punish those who try to thwart them. See Elver 'International environmental law, water and the future' in Falk et al (eds) *International Law and the Third World* (2008) on WB and IMF demands to privatise water, and note the Bolivia/Bechtel clash, being a case in point. Clarke 'China's legal system and the WTO: Prospects for compliance' in *Schlesinger's Comparative Law* 7 ed (2009).

<sup>48</sup> See Mattei 'The new Ethiopian Constitution: First thoughts on Ethnical Federalism and the reception of Western Institutions' in *Schlesinger's Comparative Law* 7 ed (2009) 223-227, with specific reference to the American model that served as blueprint for the Ethiopian constitution of 1994. See also Hook and McCormack *Japan's Contested Constitution* (2001) 3-5; An-na'im (ed) *Universal Rights, Local Remedies* (1999) 42-43; Tsagourias (n 10) 235, who argues that the 'international society and international community are agents that manipulate the constitution of states'; and the references in note 47 above.

<sup>49</sup> Mattei (n 48) 224.

<sup>50</sup> For example Sloss 'Treaty enforcement in domestic courts: A comparative analysis' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 18; Rothwell 'Australia' in Sloss

For whatever reason, the reality is that international law is well ensconced in the Trojan horse of constitutions and various statutes, and it obviously does not remotely raise red flags when the judiciary employs them.<sup>52</sup> The catch is, however, that Trojan horse-type legislation might not actually reflect domestic sentiments appropriately, if at all.<sup>53</sup>

Moreover, through judicial precedent, international norms are further entrenched – and their relatively unmodified content in particular, is thus absorbed by the national regime. In addition, from years of immersion in human rights and other international law debates, many international norms are firmly embedded in the judicial psyche. Furthermore, as ordinary citizens, judges are constantly exposed through the daily media to international law issues, ranging from terrorism to environmental matters, to humanitarian intervention, and so

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(ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 159, where it is noted that the legislature may contextualise international provisions. With reference to Australia for example, if a treaty text 'is not suited to simple transportation into Australian law ... legislation will seek to adapt the international instrument to Australian conditions'. The perfunctory adoption of abolitionist provisions on the basis of international instruments is a good example of the way in which legislation incorporates international norms, without reference to their local relevance. See Wa Mutua 'The politics of human rights: Beyond the abolitionist paradigm in Africa' (1995-1996) 17 *Michigan Journal of International Law* 591. Examples include instances where it is simply assumed that polygamy is *contra bonos mores* and in violation of the dignity of women on the basis of international instruments. Note CEDAW general recommendation no. 21 on Equality in Marriage and Family Relations and see for example the South African case *Ismail v Ismail* 1983 (1) SA 1006 (A).

<sup>51</sup> See Chapter I 4, and 6 below.

<sup>52</sup> Koh 'International law as part of our law' (2004) 98 *The American Journal of International Law* 43 at 57, who says of the American system, but which applies to most, if not all, others: 'like it or not, both foreign and international law are already part of our law'.

<sup>53</sup> There is an overabundance of examples in this regard. Note again the 1994 Ethiopian Constitution, with its 'fashionable' human rights provisions, which have devolved from international law provisions. Mattei (n 48) 226, comments that the 'rhetoric of individual rights, of individualism and of competition ... could not be more foreign to the African mentalité ... [and] can have a very destabilizing impact on the Ethiopian society'. Also note again Hook and McCormack (n 48) 3, on the Japanese Constitution of 1947, which was based on 'non-negotiable demands imposed by the war's victors', including the international law (and western) principle of popular sovereignty. See also Örucü 'Judicial navigation as official law meets culture in Turkey' (2008) 4(1) *International Journal of Law in Context* 35 on the laic, and essentially international law based, constitutional system in Turkey, where ninety-eight percent of the population adheres to the Islamic faith. Her article clearly outlines the incongruous results that obtain when national laws, based on alien concepts derived from international and foreign sources are not synchronised with local realities.

forth. No doubt, their opinions are shaped to some extent by the dominant discourse.<sup>54</sup>

All of the above point to the fact that, international law in domestic courts does not always present a face that is easily recognisable. Rather, it often lies concealed in a Trojan horse constructed by legislation, which through subsequent judicial precedent and practice is further embedded in the domestic host.

If anything, the Trojan horse effect greatly complicates the task of reconstructing a cosmopolitan and emancipatory international law. First, because its hegemonic effect will usually go unnoticed, and second, because, once embodied in a statute, it simply is 'the law' and cannot be challenged by the judiciary. These difficulties, however, provide added grist to the mill of a project aimed at the reconstruction of international law. They show how essential it is to achieve cosmopolitanism and emancipation at the international level, in order that the norms and values, which flow back into domestic realms, are not tainted by hegemony.

Nevertheless, the primary question, which I pose in this chapter, still has to be answered. Does the 'mind' of international law in fact allow it to be construed as cosmopolitan and emancipatory? A full answer, first of all, requires an evaluation of some of the current features of international law that are related to the manner in which it has acquitted itself of past and present 'jobs'.

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<sup>54</sup> See for example Cossman (n 41); Dan-Cohen *Harmful Thoughts* (2002) 5, on the 'constituted' 'self', which applies also to judges: 'Other people's attitudes and states of mind can accordingly affect a person's identity all by themselves, without the mediation of action or expression'.

#### 4. Accomplishing the international 'law job': Trends and difficulties

##### (a) The value-laden paradigm of international law

*[International law] is better imagined as a cultural practice ... [It] produces culture by developing general principles that define problems and articulate normative visions of a just society.*<sup>55</sup>

In general terms, it appears that the law job being accomplished by international law contains both real and metaphysical elements, since, as explained below, international norms and values are invoked to provide both normative and ethical guidance to the international community. On one hand, international law contains prescriptive rules which guide (mainly) state conduct, and on the other, rather fuzzy-edged principles and values which, according to some, mould both state and non-state subjects into a 'genuine' international community, 'with its own sense of identity, values, vision and solidarity'.<sup>56</sup>

Despite its ring of liberal optimism, there is nonetheless evidence that the latter 'job' is progressively being accomplished. For example, although international law is regarded as pre-eminently consensual, concepts associated with the international public order, certain systemic norms (such as *pacta sunt servanda*), the notion of *obligatio erga omnes* and, in particular, *jus cogens* norms are binding upon states without the need for their formal consent.<sup>57</sup> Although these concepts are inherently binding, they are not black letter rules,

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<sup>55</sup> Merry (n 28) 228-229. I take the liberty of substituting 'the human rights legal system' with 'international law', by judging the former as sufficiently synecdochic for present purposes. I discuss the constituent parts of international law, and how these are interlinked, below and throughout.

<sup>56</sup> Kritsiotis quoted in McCorquodale (n 13) 264.

<sup>57</sup> For example, Orakhelashvili (n 23) 36-66; 268-270, who finds that the 'parallel between peremptory norms and *erga omnes* obligations is clear'.

and moreover, they are infused with value-laden elements and assessments, thereby adding an ethical, even moral dimension to the law job.

Significantly, not only states are pulled into the metaphysical net of international values and principles, but also individuals. For instance, on the basis of the concept *hostis humani generis*, originally rooted in the revulsion against piracy and the slave trade, *individuals*, through the mechanisms of international law, can be held accountable for wrongs committed against their fellows.<sup>58</sup> Hot on the heels of this extended application of international law is the notion of universal jurisdiction, and its corollary *aut dedere aut judicare*. In principle, these principles sanction states to exercise jurisdiction over individuals for the commission of international crimes, notwithstanding the absence of the usual jurisdictional nexuses. According to Bassiouni, this means that '[i]n the exercise of universal jurisdiction, a state acts on behalf of the international community in a manner equivalent to the Roman concept of *actio popularis*.'<sup>59</sup>

Modern developments therefore confirm that the 'mind' of international law contains a value-laden paradigm, which cannot merely be attributed to an overly idealistic *Weltanschauung*. Furthermore, international law contains a subtle dialectical apparatus for deciding, or at least investigating ethical 'rights' and 'wrongs' on a global level. Both states and non-state entities are expected to conform to what can loosely be termed, 'international standards' or the 'international consensus'. The reach of such international standards however, is not limited to an ad hoc targeting of isolated actors within the international domain.

For example, according to Tsagourias, a more profound 'forging [of] structural and normative bonds with other like-minded entities', based upon a 'shared political consciousness [which reinforces] relationships of affective

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<sup>58</sup> Harris (n 14) 458-459; McCorquodale (n 13) 260.

<sup>59</sup> Bassiouni 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' (2001) 42(1) *Virginia Journal of International Law* 81, quote at 88.

solidarity and partnership', is underway within the international community.<sup>60</sup> He illustrates this convincingly by way of an analysis of the practice relating to the recognition of states, which he maintains, effectively results in the 'political cloning' of the recognising members. That is, prior to recognition, 'candidate' states must conform to, or must adopt measures to ensure conformity to a specific state model, which is constructed upon the shared identity of, and the values and standards espoused by, the author community.<sup>61</sup> Thus, the entrenchment of discernible value-driven patterns locks international actors into a particular code of conduct, perhaps unwittingly or even unwillingly. It proves that the values and principles enshrined in international law, as promoted by dominant author states, exert a great deal of influence and mould the character of the international community.

As noted previously, however, the principal difficulty with an international value system is prefaced by the prickly question of *whose* values create the benchmark for the global community.<sup>62</sup> Instructive in this regard is the postmodern critique of traditional international law that rejects the meta-narrative and exposes the fallacy of so-called neutral and objective standards, pointing to the western *eidōs*, and gender and racial biases contained in allegedly universal international norms.<sup>63</sup> Is the question about the values esteemed and promoted in international law therefore simply a question of *whose* relativism and *whose* subjectivity count? To what extent is the purpose and job of international law linked to this other, covert facet, namely the manipulation of subordinate state

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<sup>60</sup> Tsagourias (n 10) 212; note again the distinction he draws between the 'international society' and 'international community'.

<sup>61</sup> Ibid 231-237; note especially the example given of the EC Guidelines on Recognition which contain substantive criteria, which '[imply] a particular State model and membership requires peer review'.

<sup>62</sup> See Chapter I 2 on the plurality of competing normative regimes and the social embeddedness of all law; also Chapter 1 4 on relativism and universalism.

<sup>63</sup> See Chapter I 4; and for example Paulus 'International law after postmodernism: Towards renewal or decline of international law?' (2001) 14 *Leiden Journal of International Law* 727 on postmodernism; Merry (n 28) 224-226 on the uneven power relations which dictate the production of international human rights law, and how its spread resembles the introduction of imperial law during nineteenth- and early twentieth century colonialism; Al Attar and Miller 'Towards an emancipatory international law: the Bolivarian reconstruction' (2010) 31(3) *Third World Quarterly* 347 at 348-351, 358, on western hegemony.

and non-state entities, through a dominant ideological superstructure which serves the interests of the rich and powerful?<sup>64</sup>

Is such a disturbing rendition of international law fatal to its usefulness, its legitimacy, or even its existence? I suggest that the answers to these questions are at best inconclusive and contestable. Hence, the aim of this chapter is to suggest a response that does not render international law redundant or perforce oppressive.<sup>65</sup> In this, I share the sentiments of Andreas Paulus who holds the view that:

...neither external developments nor the internal critique render international law helpless or superfluous. ... [T]he fact that international law may be in need for a reconceptualization ... does not mean that [it] is less useful, and less necessary, for both the development of new modes of inter-cultural and inter-individual understanding and for the limitation of the ends and means of political action.<sup>66</sup>

Before exploring theories and mechanisms that could be deployed to neutralise, or at least mitigate, the oppressive impact that international law might have, it is necessary first to identify the hegemonic forces at work in the international arena.

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<sup>64</sup> Paulus (2001) (n 63) 729; Tsagourias (n 10) 235. See also Falk et al (eds) *International Law and the Third World* (2008); and Anghie et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) for Third World perspectives of international law.

<sup>65</sup> There are a number of important theories which underscore this contention, notably the one developed by Santos (n 34) of the counter-hegemonic role of international law and the possibility of law as 'emancipatory', which was described previously in Chapter 1 7(b) and is explored further in subsequent parts of the chapter and throughout the study; Merry (n 28) 231 '[Law] serves those in power but it is always in danger of escaping its bounds and working in a genuinely emancipatory way.

<sup>66</sup> Paulus (2001) (n 63) 729.

**(b) External manipulation: The sins of oppressive western hubris, hegemonic human rights and double standards**

*The use of international law to further imperial policies...is a persistent feature of the discipline.*<sup>67</sup>

*[T]he 'war on terror'...with its willingness to use pre-emptive force...resembles in many ways a much earlier imperial venture.*<sup>68</sup>

*[T]he human rights discourse is part of the problem of global hegemony and the absence of global justice.*<sup>69</sup>

Koskenniemi makes the point, that simply 'to believe that commitment to "law" would be an automatically progressive choice ... [is] crude'.<sup>70</sup> This analysis could hardly describe the history of international law more aptly. It is no secret that for many decades international law has been a tool of oppression. Justice Weeramantry describes it thus:

This pursuit [in international law] of definiteness, precision, and objectivity tended to cloud out consideration of the seminal issues of the *rightlessness* of subject peoples and the lack of justification for the power assumed over them by their conquerors. International law became a discipline that served the needs of the powerful.<sup>71</sup>

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<sup>67</sup> Anghie 'The evolution of international law: Colonial and postcolonial realities' in Falk et al (eds) *International Law and the Third World* (2008) 47.

<sup>68</sup> Anghie (n 67) 46.

<sup>69</sup> Rajagopal 'Counter-hegemonic international law: Rethinking human rights and development as a Third World strategy' in Falk et al (eds) *International Law and the Third World* (2008) 64 (quote), 65-71, who analyses the imperialist tendencies of the USA which go under the banner of humanitarian intervention, and hence go unchecked, and are therefore legitimised by major human rights movements. Also noted are the links between the use of force and cultural and economic power and imperialism, which are bolstered by 'hegemonic human rights'.

<sup>70</sup> Koskenniemi 'The politics of international law – 20 years later' (2009) 20(1) *European Journal of International Law* 7 at 17.

<sup>71</sup> Weeramantry (n 2) 278-279.

Unfortunately however, many sins of the past have morphed into sins of the present, which appear to fall into a number of broad categories of globalised hegemonic law. One of these is international security law, or the 'war on terror'.<sup>72</sup> One aspect thereof – its hegemonic and imperialist nature – is perhaps not too difficult to identify.<sup>73</sup> Another form of hegemony, but less easily recognised as such, incubates under the auspices of 'universal' and 'objective' standards, notably those associated with the human rights regime.<sup>74</sup>

In brief, the objective model includes the chase to secure human rights and the rule of law for everyone, everywhere, in a one-size-fits-all manner.<sup>75</sup> It also mandates the implementation of international economic and/or environmental prescriptions aimed at 'development' and 'upliftment'.<sup>76</sup> As noted, despite its benign appearance, the universalist rendition of international law lends itself to covert imperialism and fosters oppression.<sup>77</sup> Thus, for example, rather than being eliminated, the causes of inequality in the Third World have not been properly addressed. In this respect, the 'manipulation of foreign aid, new colonialism, the destruction of cultures, double standards of equality and freedom...the strains of legal systems suddenly called upon to cope ... in a Western-orientated form' continue to serve dominant international actors.<sup>78</sup>

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<sup>72</sup> See for example Mandel 'Opinion: Illegal wars and international criminal law' in Anghie et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003); Baxi 'Operation enduring freedom: Towards a new international law and order?' in Anghie et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003).

<sup>73</sup> See Scheppele 'The migration of anti-constitutional ideas: The post-9/11 globalization of public law and the international state of emergency' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006); Chimni 'Third World approaches to international law: A manifesto' in Anghie et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) 46-47; Baxi (2003) (n 72), who reminds us again of the 'Self-Other' dichotomy which animates much of what takes place internationally.

<sup>74</sup> See Chapter I 4.

<sup>75</sup> For example Rajagopal (n 69); An-Na'im (2008) (n 27); Amr Shalakany "'I heard it all before": Egyptian tales of law and development' in Falk et al (eds) *International Law and the Third World* (2008) on the rule of law.

<sup>76</sup> Singer (n 6) 51-65; Baxi 'What may the "Third World" expect from international law?' in Falk et al (eds) *International Law and the Third World* (2008).

<sup>77</sup> See below and for example Merry (n 28) 20-21, 224-225, 231 who traces in detail how 'universal' ideals shape knowledge production and action in the context of women's rights.

<sup>78</sup> Weeramantry (n 2) 279; Santos (n 34) 167-170.

Previously, a number of examples were given of the grievous results ensuing from the imposition of western norms and ideals on 'the Other'.<sup>79</sup> I shall therefore focus in this section, not on more instances of hegemony and suppression, but on certain critiques propounded by various writers, and in particular those that point to the underlying reasons and causes for the dismal performance of international law to bring about the just and emancipatory transformation of the human experience at a global level.

At the outset, the present issue, persistently raised by scholars and activists alike, is that the very perception of the objective, neutral and universal nature of international law is no more than a convenient myth.<sup>80</sup> As noted, the deleterious insistence that international law is founded on universal precepts – when in fact, it is dominated by a western *topos* – means that, among other shortcomings, it 'prescribes rules that deliberately ignore the phenomena of uneven development in favour of prescribing uniform global standards'.<sup>81</sup> Insistence on universality and conformity, however, has repercussions beyond those of denying the Other agency and voice.

One such consequence is that, by deferring to an occidental idiom to define the 'universal' meaning of concepts like law, morality and justice, international law has also impoverished itself through its failure to recognise the intrinsic worth of, and the possible solutions found in a great number of non-

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<sup>79</sup> See Chapter I for example 2(d), (e), 3(c), 5(e), the immediately preceding footnotes, and in particular n 103 below. See also Gathii 'Third World approaches to international economic governance' in Falk et al (eds) *International Law and the Third World* (2008); on 'how the rules of the international trading regime disempower some of the most vulnerable members of the international economic order ... '.

<sup>80</sup> The recognition of the non-universal nature of international law is an important tenet underlying TWAIL theory and methodology. See for example Al Attar and Miller (n 63) 347-350. Also see Moore *Law as Process: An Anthropological Approach* (1978) 1-10; Koskenniemi (2007) (n 1) 18: 'It may be natural for international lawyers to think of their specialisation as "general". But it is equally unsurprising that other lawyers see it as a particularly exotic craft relevant mainly for the quaint traditions of diplomacy.' Note also the argument about fragmentation and the attendant 'regime conflict' between, for example, the human rights regime and law of diplomatic immunities, and at 21, on Julius Stone, 'the idea of the completeness of international law was a counterproductive piece of legal utopianism'. See also Stevens (n 31) 60; and n 103 below.

<sup>81</sup> Chimni 'Third world approaches to international law: A manifesto' in Anghie et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) 49.

mainstream realities, norms and values.<sup>82</sup> Another predictable result is therefore that international law, apart from its geopolitical and racial bias, also comes replete with a distinct gender bias.<sup>83</sup>

Consequently, condemnation of these biases from various subjective perspectives has challenged the legitimacy of international law, notably through the channels of critical race theory and the feminist critique.<sup>84</sup> Thus, a door was opened for disenfranchised groups and communities to call for a rightful place upon the international law stage as participants and not merely as recipients.

These have been welcome developments, but they often do not address the two quintessential problems underlying any regime that purports to be international. The first one, as discussed, is the impossibility of its universality and objectivity. The second, which is the natural corollary of the first, therefore asks, how can international law, if it is not universal, transcend competing, relative part-orders, without swallowing them up in its wake? Or, how can it be cosmopolitan and emancipatory?

For example, by merely shifting attention from, for argument's sake, West to East, or male to female, it once again, simply raises the question of 'whose subjectivity is the good one?'<sup>85</sup> As Andreas Paulus argues: 'Why choose say, the Third World over the First, women over men, the human rights activist over the white (or black) supremacist, or even the superpower over the terrorist?'<sup>86</sup> Perhaps it is as Koskenniemi maintains, always a matter of strategic choice in the 'struggle for hegemony'.<sup>87</sup>

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<sup>82</sup> There is a superabundance of literature in this regard. See for example Chapter I 3(c); Santos (n 34) 21-82; Menski (n 5) 594-612; Paulus (2001) (n 63) 731-734.

<sup>83</sup> See for example Chinkin and Charlesworth 'Building women into peace: The international legal framework' in Falk et al (eds) *International Law and the Third World* (2008) 238-239.

<sup>84</sup> For a brief overview see Paulus (2001) (n 63) 732-733.

<sup>85</sup> Paulus (2001) (n 63) 741.

<sup>86</sup> *Ibid.*

<sup>87</sup> Koskenniemi (2009) (n 70), quote at 12. Also Koskenniemi (2009) (n 70) 9: 'Because 'human rights', like any legal vocabulary, is intrinsically open-ended, what gets read into it (or out of it) is a matter of subtle interpretative strategy',

Therefore, presuming that the transcendence of subjectivity, without its obliteration, proved possible, a pivotal focus of the international 'law job' would be to devise a strategy of *how* to achieve the foregoing. Nonetheless, if international law is to be rendered cosmopolitan and emancipatory, what is demanded of it is precisely that – to triangulate itself successfully between the global and the local, the objective and the subjective – the project of the present study.

In addition, the idea that international law is a power play of strategic choices means that it is a political tool par excellence. Rather than ignore this fact, proponents of, for example, the realist movement, and writers such as Koskenniemi and Kennedy have argued for the unabashed 'politicization' of law, which, they reason, would result in finding specific and acceptable solutions to problems, rendering law a tool for social transformation and the lawyer a 'conscious social actor'.<sup>88</sup> This view of course simply pre-empts, yet again, the question of 'whose law, whose preference, and whose culture' will thereby be promoted.

Koskenniemi takes the matter one step further and shows that the choices thus made, particularly those contingent on the current fragmentation and specialisation in international law, go hand in hand with specific structural and institutional biases and '[t]his is why much about the search for political direction today takes the form of jurisdictional conflict, struggle between competing expert vocabularies, each equipped with a specific bias'.<sup>89</sup>

He illustrates the effect that such choice of legal regimes has. For example, the decisions reached by various tribunals are delimited and shaped by

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<sup>88</sup> Paulus (2001) (n 63); Koskenniemi (2007) (n 1); (2009) (n 70).

<sup>89</sup> Koskenniemi (2009) (n 70), quote at 9; Koskenniemi (2007) (n 1) 4-9, on how fragmentation in international law has resulted in these biases and a 'struggle for hegemony'.

the particular regime-bias adopted by a tribunal, such as whether a matter is a human rights issue, an environmental issue, or a security issue.<sup>90</sup>

These are valuable insights, but they further sharpen doubts about the role of international law as a transcendental mechanism, with sufficient determinacy, that will serve the *summum bonum* and aid the resolution of humanity's shared problems in a spirit of cosmopolitanism and emancipation. If there is no 'meta-regime, directive or rule', international actors are not performing on the same stage, in the same play, and the story unfolds differently for various participants in various plays.<sup>91</sup> The great difficulty with this scenario is that participants are directly affected by the outcome of a particular 'play', and more specifically the innate power-play it represents. Thus in a 'play' with a human rights motif the person who had been incarcerated for months without being charged, goes free, but when the play is about national or international security, that same person remains firmly incarcerated.<sup>92</sup>

Others analyse the role of international law with reference to the apparent global consensus endorsing the promotion of democracy and human rights. The world's human rights project and the furtherance of democracy are often lauded as the resounding victories of international law, which through its seminal instruments has served these endeavours well. In response to these dynamics, countries everywhere have sought to emulate these 'new' values, if not in practice, at least on paper.<sup>93</sup>

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<sup>90</sup> Koskenniemi (2007) (n 1) 4-9, for examples of cases, and the way in which certain legal principles which have developed in certain regimes, do not apply to others, e.g. the 'precautionary principle' of international environmental law, which has not become binding under the WTO regime.

<sup>91</sup> Koskenniemi (2007) (n 1) 6.

<sup>92</sup> *Ibid.*

<sup>93</sup> McCorquodale (n 13) 260 'Incredibly, every single State in the world has ratified at least one human rights treaty that imposes legal obligations on them.' A brief look at the prolific number of international and regional human rights instruments, and the number of signatories to these further endorses this point.

Consequently, various theories have been propounded about the strong trend to constitutionalise fundamental rights, and the concomitant 'power-diffusing measures' of judicial review and other democratic checks, most of which are associated with western liberal values or a sense of egalitarianism.<sup>94</sup> Some of the reasons given for the vigorous advancement of constitutional reform include theories relating to a 'pre-commitment' of states to the limitation of their powers to prevent future abuses, a 'democratic proliferation' in response to World War II, a functionalist approach for restricting discretionary state powers and theories which recognise the impact of underlying political and economic pressures.<sup>95</sup>

Nevertheless, according to Hirschl, these theories do not analyse 'the political vectors behind any of the actual constitutional revolutions of the past two decades'. He argues that the global trend to constitutionalise rights is the manifestation of 'self-interested actions taken by hegemonic, yet threatened, socio-political groups fearful of losing their grip on political power'. He thus formulates his 'hegemonic preservation thesis', which seeks to explain that such a 'strategic, counter-intuitive self-limitation' is based on the notion that constitutionalisation places greater limitations on rival elements than on the elite groups who are striving to secure their own position and further their own interests.<sup>96</sup> It could therefore be argued that the 'international society and international community are agents that manipulate the constitution of states'.<sup>97</sup>

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<sup>94</sup> McCorquodale (n 13) 260; Besson (n 17) 160-162 where she notes that there are new rules of *ius cogens* and a 'universal human rights code, which apply to all sovereign states, whether they accept them or not', and which has become a 'constitutive element of internal sovereignty'. Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004) Hirschl 'On the blurred methodological matrix of comparative constitutional law' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 58. Discussed here is domestic constitutionalism. There is also however the trend to cognise certain elements of international law as having constitution-like effect. The idea of international constitutionalism is discussed further below.

<sup>95</sup> *Id* (2006) 59.

<sup>96</sup> *Id* 60-63. He gives a most interesting historical account of the 'constitutional revolution' in several countries, which do not fit any of the prevalent theories. Note also the references to Hirschl (2004) (n 94).

<sup>97</sup> Tsagourias (n 10) 235.

Alford also asks why the 'democracy promotion' is so ubiquitous, and whether it is due to altruism, the search for peace or because it is conducive to economic growth.<sup>98</sup> Conversely, he considers whether it is simply the unwitting hegemony of imposing one's own ideals on others, or, whether the explanation is to be found in *realpolitik*, namely that the promotion of democracy is practical for fighting political battles and constitutes a good way to advance and safeguard western interests in other countries.<sup>99</sup> Thus, the promotion of democracy becomes an effective tool for self-interested global sub-groups. Additionally, he takes a closer look at the ethical implications of democracy promotion, and the effect on both those at the 'receiving end' and those at the 'transmitting end', noting the dearth of ethics in many instances.<sup>100</sup>

A further caveat raised in connection with the advancement of democracy is that much about democratic reform hinges on a 'utilitarian and economically driven paradigm' with its focus on efficiency, which identifies law with technology, rather than understanding its 'broad, richly textured and highly contextualised' nature.<sup>101</sup> In this regard it has been argued that law should be construed in terms of legal cultures, 'as extremely delicate and deeply grounded aspects of social organization.'<sup>102</sup> These perceptions may explain why democratic reform, even if it appears to be endorsed by the global community, does not necessarily transform all societies in a positive manner, nor lead to the attainment of the panacea – a better life for all.<sup>103</sup>

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<sup>98</sup> Alford 'Exporting the pursuit of happiness' in *Schlesinger's Comparative Law* 7 ed (2009) 37-40. See also Marks *The Riddle of all Constitutions*, for an incisive critique of the ideology of democracy.

<sup>99</sup> Alford *ibid.*

<sup>100</sup> *Id* 40.

<sup>101</sup> Editors' comments in *Schlesinger* (n 27) 41.

<sup>102</sup> *Ibid.*

<sup>103</sup> From a comparative law perspective, the relationship between international law and 'hegemonic human rights' takes on interesting dimensions. See again, for example, Grande 'Hegemonic human rights and African resistance: The issue of female circumcision in a broader comparative perspective' in *Schlesinger's Comparative Law* 7 ed (2009) 118-124. If a comparative scheme focuses only on the differences between the proverbial 'us' and 'them', underlying similarities will be missed, and could lead to a 'construction of inferiority of the "other"' on the basis of a 'lack of civilization'. 'Integrative' approaches such as the common core will expose similarities, which must be acknowledged, thus avoiding ethnocentrism and positional

Yet another facet of international democratic and human rights reform is the existence of a disproportionate urge to intervene and effect reform in Third World countries, when in fact similar problems may exist in western countries.<sup>104</sup> Accordingly, the odds are that the desire to 'help' others in what are perceived to be deficient conditions, could simply be a claim to ethnic or ideological superiority, masquerading as the 'universal' rules of international law.

Furthermore, it was previously discussed that the 'general principles' of international law are apparently derived from common elements found in the majority of legal systems around the world, but that such apparent consensus is no more than that found within the most dominant legal systems.<sup>105</sup> Should this be the sum of the commonality and consensus, 'civilised' or otherwise, upon which international law is constructed, it follows that the proclaimed universality of its peremptory norms, and other overarching norms, is not beyond question. Yet, imperatives, such as the concept of *obligatio erga omnes*, and notably that of *jus cogens*, come with the added sting, that in theory, they bind all states, irrespective of their formal consent.<sup>106</sup> Therefore, even the supposed trump cards of the 'international community', which might point to its cohesiveness and like-mindedness, must be just another manifestation of strategic or ideological bias.

With its gender and racial biases, with its occidental hubris, does international law serve merely to legitimise existing superstructures of power and

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superiority. As noted, the tension between culture relativism and so-called universalism, which in reality is ethnocentric, is well illustrated in the questions raised about various practices involving the modification of sexual organs, including western practices of breast augmentation and male circumcision, which are not generally challenged.

<sup>104</sup> Mgbeoji 'The civilised self and the barbaric other: Imperial delusions of order and the challenges of human security' in Falk et al (eds) *International Law and the Third World* (2008) 152, on the North which is 'seen as an overworked nanny, constantly at pains to supervise the "development" of a delinquent, infantilised group of people ...'; Editors' comments in *Schlesinger* (n 27) 42. 'We probably do not feel morally compelled to open an NGO or "to do something" on the issue of alcoholism or of women abuse, say, in Sweden.'

<sup>105</sup> See Chapter I 4; and for example *Schlesinger* (n 27) 124.

<sup>106</sup> See Orakhelashvili (n 23) for a most comprehensive study of peremptory norms; Dugard (n 15) 43-46; Lowe *International Law* (2007) 58-60.

dominance?<sup>107</sup> Furthermore, 'global transformations have enormously accelerated a pattern of unsustainable economic development' and environmental degradation.<sup>108</sup> If these charges against it are true, international law should certainly not be called upon to endorse legitimate international intervention or pronounce on what constitutes a 'failed' state. It should also not determine the substantive content of buzzwords like 'transformation' and 'sustainable development', let alone global human rights advancement.

Many of the objections to international law, however, do not strictly speaking point to its deficiencies as a legal system per se, but rather to iniquities wrought by strong and influential actors, who use and abuse the system to pursue particular ideologies or outcomes. Conversely, some objections point to the sins of idealists, who similarly use international law to promote yet other ideologies or outcomes, although purportedly with a purer motive.<sup>109</sup> It is therefore important, for purposes of assessing the merits of international law as a candidate for cosmopolitanism and emancipation, to draw a clear distinction between its manipulation by various powerful actors on one hand, and its inherent systemic weaknesses on the other.

Although it is vital to expose and interrogate abuses, it would be counter-productive and illogical to eschew the possible potential of international law to serve the 'greater good' on a global level, because it has led to hegemony and oppression by a select group of states and institutions. This would be rather like banning the sale of hammers, useful as they may be, because they have been used to harm people. And yet, much of the criticism against, and rejection of international law hinges on this type of specious reasoning. In order to clarify the

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<sup>107</sup> See Gramsci *The Antonio Gramsci Reader: Selected Writings 1916-1935* (2000), and Althusser *On Ideology* (2008) for classic formulations of these ideas.

<sup>108</sup> Editors' comments in *Schlesinger* (n 27) 41.

<sup>109</sup> See Thompson *Whigs and Hunters: The Origin of the Black Act* (1975), for one of the most intriguing accounts of the use of law as a tool by both the oppressive 'ruler' and those who are 'ruled', and ultimately of the rule of law triumphing as 'an unqualified human good'.

distinction, I therefore briefly turn to specifically endogenous and systemic problems associated with international law as a system.

### **(c) Systemic problems immanent in international law**

*This is the difficulty with formal, universal rules. Any rule with a global scope will almost automatically appear as either over-inclusive or under-inclusive ... Thus the failure of international efforts to find universal 'criteria'... .<sup>110</sup>*

This section is aimed at identifying certain internal features, which appear to be problematic fault lines, within the structure of international law. Again, the purpose is to understand its 'mind' better, and to ascertain its ability to be reconstructed in accordance with cosmopolitan and emancipatory principles. I have singled out two recurring issues, namely the fragmentation and delegalization of international law, and its uneasy position in relation to state sovereignty.

#### **(i) Fragmentation and delegalization**

Ostensibly, a crucial element of the 'law job' of international law must be, by definition at least, to fulfil the needs of the global community for a regulatory framework. Therefore, it would seem logical that its ambit will encompass matters of global significance, on a global scale, in a comprehensive and congruent manner. Yet, the increasing fragmentation and delegalization of international law means that this simple premise must be re-examined.

Starting with the concept of fragmentation, I rely on Koskenniemi, who has written with great perspicacity about the phenomenon and its implications.

Briefly, fragmentation exposes international law to 'contextual *ad hocism*'.<sup>111</sup> According to this analysis, international law, instead of creating a

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<sup>110</sup> Koskenniemi (2007) (n 1) 9-10.

formally binding, interconnected and organised whole, is fragmented into sharply demarcated specialisations, and coupled with its deformalization, exerts only flaccid and inconclusive influence, as opposed to legal or normative force.

Accordingly, fragmentation is 'the normative disaggregation or conflict resulting from the continuous functional specialization of international law. It is the normative effect of the emergence of special regimes.'<sup>112</sup> In simple terms, it therefore refers to the specialised fields which have developed in international law and which are acquiring increasingly distinct profiles, such as international human rights law, international environmental law, international criminal law and so forth.

The most obvious problem associated with fragmentation is that, as a result of the conflict between various regimes, it might rob international law of any claim to unity or cohesiveness. Or, as Koskenniemi argues, it represents the 'struggle for institutional hegemony', which is fought along the lines of 'the unilateral assumption of jurisdiction by experts' and 'problems of expert knowledge'.<sup>113</sup> The question therefore becomes not how *international law* will be applied to solve a problem, but which *specialised field* of international law is granted preference to solve the problem. This in turn, depends on which technical and expert regime has the strategic advantage under the circumstances.

Closely following on the heels of fragmentation is deformalization, which can be described as 'the deferral of law to the politics of the relevant expert'.<sup>114</sup> This is because 'little about ... [international] decision-making can plausibly be seen in terms of employing a *legal* vocabulary of rules and principles ... [i]nstead,

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<sup>111</sup> See Koskenniemi (2007) (n 1) 4-9 (quote at 9); (2009) (n 70). See also Singh (n 11), who discusses the International Law Commission Report on the Fragmentation in International Law of which Koskenniemi was the Chairman, and see further the conclusions reached by Singh.

<sup>112</sup> Singh (n 11) 24-25.

<sup>113</sup> Koskenniemi (2007) (n 1) 8.

<sup>114</sup> Singh (n 11) 25.

the relevant considerations always seem to require technical expertise ...'.<sup>115</sup> What this means is that there has been a shift in 'our thinking from the normative to specialized and identifiable cognitive areas'.<sup>116</sup>

Consequently, international law loses its rule-making force, and is reduced to being the facilitator of negotiated compromises in international situations, as articulated by the relevant 'experts'. Examples abound, in every type of instrument and dispute-settlement arena, of the 'balancing' of various interests, 'proportionality', 'reasonableness' and the need to attain 'equitable' or 'optimal' outcomes, in line with the conceptualisation of the international discourse as case-specific and contextual.<sup>117</sup> A corollary to the cognitive formulation of international issues is that the focus shifts from rights and obligations, and specific sanctions to 'softly formulated objectives' and ' "non-adversarial" non-compliance procedure', wherein parties are instructed to negotiate their own outcome – invariably based on the say-so of technical experts.<sup>118</sup>

Important as it may be to recognise and understand the implications of fragmentation and deformalization, one gets a sense however, that these phenomena are neither new nor strange to many normative orders, including international law. It is deemed after all, to be a rather rudimentary type of legal system, more closely related to customary regimes, which tend to be casuistic, than to (western) domestic systems, which tend to be abstract.<sup>119</sup>

Furthermore, under most customary systems, rules are likely to be more fluid, and, importantly, emphasis is placed, not on formulistic ideas about what is 'right', but on that which enhances conciliation, consensus and harmony within a

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<sup>115</sup> Koskenniemi (2007) (n 1) 10.

<sup>116</sup> Singh (n 11) 25.

<sup>117</sup> Koskenniemi (2007) (n 1) 9-12, where he provides an instructive overview of factual examples of deformalization. See also Koskenniemi (2009) (n 70) on the problems of increasing 'managerialism' and the 're-interpretation of general legal vocabularies' and 'new expert languages' to gain control over specific situations. Quotes at 7 and 9.

<sup>118</sup> *Id* 12-15, where he again provides concrete examples of the issues raised.

<sup>119</sup> See 2 above, which describes the customary nature of international law.

given community.<sup>120</sup> Are these not exactly the reasons why fragmentation and deformalization are taking place, namely to reconcile the vastly divergent interests of an eclectic and disparate world community? Moreover, one could ask, whether this is necessarily a bad thing.

In other words, international law, which has ostensibly developed as a necessary response to the needs of the international community, is ultimately directed towards the promotion of efficient cooperation and peaceful relations within such community. Furthermore, as noted, the composition of the group of international law's key participants has changed dramatically in recent years, and defies a homogenous and statist conception of the world order. The rules of international law must therefore be sufficiently flexible, and I suggest pragmatic, to accommodate the divergent interests of all members of the community as far as possible. Hence, I suggest further that the fragmentation and deformalization of international law into sub-regimes can foster such accommodation to a greater degree.

In addition, the fragmentation of international law should come as no surprise in a world of increasing specialisation. A case in point is the prototypical domestic system, which has been obsessively compartmentalised, or fragmented, into specialist branches for decades, without being challenged as to whether it is a proper system of law. The apparent fragmented 'chaos' of international law into separate disciplines, therefore actually appears to be a normal process in the development of legal systems.<sup>121</sup>

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<sup>120</sup> Note again the principles of customary law systems as discussed by, for example, Menski (n 5), for instance at 421-431, 439; Glenn *Legal Traditions of the World* 4 ed (2010), in particular 61ff on the characteristics of 'chthonic' legal traditions.

<sup>121</sup> See for example Moran 'Shifting boundaries: The authority of international law' in Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007) 163-165 on the 'spatialized model' of private law which is deemed to consist of 'bodies [of law] – distinct and mutually exclusive. The relation between these ... is thus rendered as a series of boundary disputes ...'.

The final observation is that much of the emphasis in international law on the balancing of interests and the indeterminacy of the global dialogue harks back to its central Gordian knot, namely, the interplay between state sovereignty and the supranational order. Rules which operate between *sovereign* states have to accommodate this reality, which has relentlessly shaped the international landscape and international law itself. Despite the duly noted diffusion and erosion of sovereign power due to various internal and external forces, most scholars admit that, for better or for worse, the nation state is not about to disappear from the equation for some time.<sup>122</sup>

Thus, to obtain a better picture of the 'mind' of international law, I consider the omnipresence of the state and its effect on the creation, development and enforcement of international law in the next section.

## **(ii) International law and state sovereignty – Uneasy bedfellows**

*As long as international law accommodates the nation [state], [it] will remain ... an arena for a competitive and deadly game ... with no hope for the disbanding of enemy camps ...*<sup>123</sup>

*State law is the paradigmatic form of law in both the international and domestic systems ... The idea of unified norms will always be moderated through a particular conception of the state.*<sup>124</sup>

*National sovereignty has no intrinsic moral weight.*<sup>125</sup>

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<sup>122</sup> Tierney 'Questioning authority: the normative challenge in forging an international community' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) 16: 'The age of the state is clearly not over.' Falk 'International law and the future' in Falk et al (eds) *International Law and the Third World* (2008) 23ff; Stevens (n 31) 51ff.

<sup>123</sup> Stevens (n 31) 53.

<sup>124</sup> McLean 'Problems of translation: The state in domestic and international public law and beyond' in Charlesworth and Chiam et al (eds) *The Fluid State* (2005) 221.

<sup>125</sup> Singer (n 6) 148.

As noted, a major challenge to international law and any would-be universalist claim is the perennial issue of state sovereignty. The very nature of international law prompts its most 'classic problem': 'How is law between sovereign states possible?'<sup>126</sup> At the same time however, 'public international law and external [state] sovereignty imply each other'.<sup>127</sup> Additionally, another element which comes into play is the realisation that, although the concept of state sovereignty is certainly not obsolete, there are many forces impinging upon it, and weakening its dominant legal and political position at both national and international levels.<sup>128</sup> The conceptual and factual shifts taking place in relation to the nature and powers of the nation state, territorial boundaries and state sovereignty have attracted much debate, some of which is considered in this section.

Besson traces the history of sovereignty from the absolutist Westphalian model characterised by a strict territorial delimitation of power and the principle of non-intervention, to its contemporary manifestation. The latter includes elements of disaggregation, indeterminacy, the transfer of competencies, and the pooling or sharing of sovereignty – and reaches the conclusion that sovereignty is an 'essentially contestable concept'.<sup>129</sup> She notes the distinction between internal sovereignty, namely national, and external sovereignty, that is, sovereignty as it pertains to international issues and relations between states, and finds that both forms are detrimentally exposed to 'power transfers'.<sup>130</sup>

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<sup>126</sup> Koskenniemi (2007) (n 1) 25.

<sup>127</sup> Besson (n 17) 144.

<sup>128</sup> For example Besson (n 17) especially 131-135; Stevens (n 31); McCorquodale (n 13); Tladi 'South African lawyers, values and a new vision of international law' *South African Yearbook of International Law* 33 (2008) 167, at 171: 'It is apposite to add that this new, rule-based system encapsulating a human rights tradition is also in opposition to the state-centered system of traditional international law based on the preservation of sovereignty'. Singer (n 6) 70-75 on how the operation of the WTO diminishes state sovereignty.

<sup>129</sup> Besson (n 17) especially 139-168 and note 144-147. The 'essentially contestable concept' refers to a (contested) normative concept, the correct application of which is open to contestation, i.e. its normative content as well as its application or correct use are inconclusive and may be disputed. See also Kennedy 'The mystery of global governance' (2008) 34 *Ohio Northern Law Review* 827 at 858.

<sup>130</sup> Besson (n 17) 143-144.

Of course, at a most basic level, state sovereignty has always been limited through the operation of international law, and public international law in particular.<sup>131</sup> However, in the wake of economic and legal globalisation, states increasingly transfer power to international and transnational organisations and actors, including 'new' ones, such as various NGOs and multinational corporations.<sup>132</sup> Furthermore, sovereignty is curtailed by the operation of a number of principles which are endorsed, or even enforced by the international community, regardless of whether a particular state had consented to be bound by them or not. As noted, such principles are, for example, those underlying *ius cogens* and humanitarian intervention, and theories about adhering to what is referred to by some as the 'constitution' of the international community.<sup>133</sup>

Although developments such as these have gained considerable momentum in the present century, it must be acknowledged that they have not reached the tipping point necessary for a metamorphosed, non-Westphalian world order, but that they have at most produced a 'post-Westphalian' regime.<sup>134</sup> Falk describes the latter as providing the 'building blocks for desirable and attainable forms of ... world order', and one in which law is less bonded to the behaviour and dominance of states.<sup>135</sup>

Thus, as an essentially contestable concept, the overall effect of sovereignty in defining the world stage fluctuates and changes, yet, the continuity

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<sup>131</sup> Paradoxically, international law not only challenges state power, but also reinforces it. See for example Merry (n 28) 5.

<sup>132</sup> Besson (n 17) 133; and for example, Merry (n 28) 20-21, 50-55, 229 for a comprehensive account of the role of NGOs in the production of women's rights conventions and institutions.

<sup>133</sup> Besson (n 17) 133, 143, 151-153; Singer (n 6) 148, 'the international law regarding the limits of sovereignty is itself evolving in the direction of a stronger global community'. See also Teubner 'Legal irritants: Good faith in British law or how unifying law ends up in new divergences' (1998) 61(1) *Modern Law Review* 11 at 16: 'globalising processes have created one world-wide network of legal communications which downgrades the laws of the nation states to mere regional parts of this network ...'.

<sup>134</sup> Falk (n 122) 31-32.

<sup>135</sup> *Ibid.*

of the concept remains.<sup>136</sup> What are therefore the implications of both its fluctuations *and* its continuity, for law in general, and specifically for international law? How does the erosion of state sovereignty relate to the issue of which norms and values will trump the other – national or international, and importantly, will the outcome help or hinder the reconstruction of international law?

For example, under transnational regimes, notably the EU, a gradual integration of domestic law with EC/EU law may be taking place. This can be seen in the various mechanisms and policies developed by the European Court of Justice (ECJ), such as its confirmation of the principle of the primacy of EC/EU law, and its establishment of the principle of 'conforming interpretation', both of which subordinate domestic law, even constitutional law, to the transnational.<sup>137</sup> In addition, economic globalisation has been one of the principal processes inimical to the exercise of state sovereignty, and a number of developments in international trade challenge the state as sovereign, and curb its legal and political control, even in its own territory. These include initiatives to advance free trade and the establishment of transnational trade blocks, the powerful influence of international trade organisations such as the IMF and WTO, and the growing autonomy of large multi-national corporations, as well as the internet, which defies state regulation.<sup>138</sup>

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<sup>136</sup> Besson (n 17) 136, 139. See also Charlesworth et al (eds) *The Fluid State, International Law and National Legal Systems* (2005), for a collection of contributions in this regard, aptly summed up at 16, as pertaining to the 'influences that prevent states from having fixed or static identities', which render them 'malleable and fluid'.

<sup>137</sup> Editors' comments in *Schlesinger* (n 27) 85-89, note the leading cases cited and the effect of the 'remarkable activism' of the ECJ. The jurisprudential principles established by the ECJ were incorporated in the text of the European Constitution Treaty of 2004 (amended by the Treaty of Lisbon, see n 139 below), placing limitations on national laws and requiring the 'approximation' of national laws of member states to EC/EU laws. See also Paulus (2009) (n 46) on the position in Germany. Another example is the developments in South America, where, through membership of MERCOSUR, a treaty creating a common market among a number of South American states, some states are showing signs of being more willing to cede certain sovereign powers to transnational bodies established in its wake. See the editors' comments in *Schlesinger* (n 27) 89-94.

<sup>138</sup> See Booyen *Principles of International Trade Law as a Monistic System* (2003) 20-23, 87-93, 106-117.

Notwithstanding the various limitations on state sovereignty noted above, much resistance to integration and especially the subordination of national regimes to transnational and international regulatory structures can also be observed.<sup>139</sup> For instance, Kersch fears that a type of revolutionary conspiracy is taking place, namely, that a broad political and intellectual project to rethink nation-state sovereignty, in a move towards global governance, is underway.<sup>140</sup> He claims that 'geopolitical conditions which stimulated belief in a perceived global imperative in the 1940s are remarkably similar to those conditions perceived today'.<sup>141</sup> He lays much of the blame at the door of the judiciary, and specifically any form of transnational judicial discourse and 'judicial cosmopolitanism' in which it may engage. This, he argues, results in the 'transfer of governing authority to a new regime of global governance'.<sup>142</sup> Whether one agrees or not, the point is that any resistance to the perceived infringement of state sovereignty by global forces, including the operation of international law, is an indication of present shifts in power and authority structures.

By the same token, sovereignty is 'not an entity' ... Rather, [it] is in the relationship between entities'.<sup>143</sup> Sovereignty, thus being 'relational', is also dynamic. I therefore suggest that the contestable, dynamic and relational nature of all manifestations of sovereignty, whether it is the sovereignty of states or the sovereignty of transnational and international law regimes, gives rise to concomitant effects and side-effects, which shape the development and nature of international law. Principles of sovereignty furthermore, seem to account for much of what appears to be problematic in international law, such as its

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<sup>139</sup> For example, the supremacy provision on the priority of EU law over conflicting Member State law contained in the European Constitution Treaty (n 136 above) was deleted from the main text of the Treaty of Lisbon (which entered into force on 1 December 2009), due to resistance from certain countries. Additionally, it contains a binding rule on the priority of the constitutional law of certain Members over EU law. See Besselink 'National and constitutional identity before and after Lisbon' (2010) 6(3) *Utrecht Law Review* 36; and editors' comments in *Schlesinger* (n 27) 88.

<sup>140</sup> Kersch 'The new legal transnationalism, the globalized judiciary and the rule of law' (2005) *Washington University Global Studies Law Review* 345ff

<sup>141</sup> *Id* 378.

<sup>142</sup> *Id* 377-379.

<sup>143</sup> McCorquodale (n 13) 247.

indeterminacy and deformalization. I suggest that these phenomena are linked to sovereignty, because, on one hand, they serve to appease states in the exercise of their powers, and on the other, ensure a measure of control by international law.

The fluctuating impact exerted by state sovereignty, does not merely affect the scope of application of existing law, but also the creation of law, both domestic and international. As discussed earlier, states have long been regarded as the only entities capable of creating international law. Nevertheless, the consequential role played by non-state contributors to the actual transformation of international law must be noted.<sup>144</sup>

Clearly, the concept of the state and its sovereignty has undergone significant metamorphosis since the Westphalian era, and as illustrated above, its law-making capacities have been curtailed in a number of areas. Apart from the questions I raised in this regard, what needs to be investigated further is the extent to which the erosion of state sovereignty has created pockets of empty 'middle spaces' which can best be filled by transnational or international laws.<sup>145</sup>

For present purposes, the processes unfolding at the national-international interface, which affect the vigour of sovereign state powers, have a direct bearing on the law job to be accomplished by international law in relation to domestic law. For example, sociologist Philip McMichael points to the paradox that '[t]he opportunity for political renewal...lies in the weakening of the nation-state by

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<sup>144</sup> McCorquodale (n 13) 243-244, 253-261; Tsagourias (n 10) 239; Falk et al (n 64) 4, noting the theme of the 'structuring role of resistance in shaping international law doctrines and institutions'; Baxi (2008) (n 76) 15-17. Falk (n 122) 23-24 gives a pertinent example namely that international terrorism has changed the idea that wars are fought between sovereign states only, and that such wars are now fought by, and against non-state actors. This has necessitated correlative changes in international law.

<sup>145</sup> I borrow the idea of 'middle spaces' from Kennedy (n 128) 834. For purposes of the study, the middle spaces between international, national and subnational normative domains are of vital interest, and the relevance of these interstitial spaces in terms of the application of international law in domestic courts is fully analysed in following chapters.

globalisation'.<sup>146</sup> This means that among others, the erosion of state sovereignty provides the necessary stimulus for 'new forms' of internationalist social organisation.<sup>147</sup> Thus, not only do global forces in certain instances erode state sovereignty, they can also create a stochastic interplay between national and international regulation, which may defy traditional boundaries and patterns of lawmaking.

In this regard, it therefore appears that another important task of international law could be to act as a safety net, or to fill regulatory lacunae. This need will arise when first, due to the globalised nature of a matter, the individual state proves incompetent to produce proper regulatory mechanisms, or, when national laws do not exist for novel situations, are deficient, or ineffectual in particular areas.

Second, the need to provide a legal framework and safety net is important for the development of 'new forms' of social organisation on a global scale, which, without international law norms, would struggle to exist in a legal no-man's land. Consequently, the disaggregation of state sovereignty reveals that international law has a much greater task than merely serving the interests of, and regulating relations between nation-states.

At this juncture, the question is once more, to what extent must, and can international law be transformed to accommodate its 'new' non-state masters and beneficiaries, and whether the immense diversity of these participants requires it, counter-intuitively, to be less 'universal', and more 'relative' and contextual.

#### **(d) Divergent readings: A summary of the law job**

In summary of this section, the analysis of the law job of international law produces a diacritical result in terms of its prospects to be reconstructed as

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<sup>146</sup> McMichael *Development and Social Change: A Global Perspective* (1996) 238-239.

<sup>147</sup> *Id* 239.

cosmopolitan and emancipatory. On one hand, one finds the serious impediments of hegemony and statist manipulation, and on the other, power shifts on the international plane, such as globalisation and the erosion of state sovereignty, which have created new opportunities and blank normative 'middle spaces', wherein a 'new' international law can develop. In short, 'contemporary' international law 'has extended its scope, loosened its link to state consent, and strengthened compulsory adjudication and enforcement mechanisms'.<sup>148</sup>

Furthermore, international law was shown to possess a value-driven dimension, which, among others, has furthered laudable ideals associated with the human rights paradigm. Many have argued however, that by parading its values as universal, international law has merely served to entrench western ideologies and bias. Any claim to universality and objectivity has also categorically been rejected by postmodern scholars.

Where do these discrepant readings lead to, and what happens after the deconstruction of international law?

### **5. After deconstruction: Despair or regeneration?**

*[A] critique that is not followed by construction amounts to an empty gesture.*<sup>149</sup>

*[W]hen every unifying deep-structure has been subjected to demystifying deconstruction what will be left is the demystification deconstruction as the great unifying myth.*<sup>150</sup>

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<sup>148</sup> Kumm 'Democratic constitutionalism encounters international law: Terms of engagement' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 256.

<sup>149</sup> Chimni (n 81) 72.

<sup>150</sup> Koskeniemi (2007) (n 1) 25.

*[I]t needs to be recognised that contemporary international law also offers a protective shield, however fragile, to the less powerful States in the international system.*<sup>151</sup>

**(a) Restatement of the international law problem: The subjective-objective bifurcation**

Although one might not be as cynical as Koskenniemi in the second quotation, it was noted earlier that the tarnished past of international law has resulted in its repudiation by many important participants, in what appears to be a logical and justifiable reaction. A perfunctory rejection of international law, however, does not mean that the world is left with better solutions to shared problems. No matter how proper a critique may be, it does not necessarily translate into reconstruction.<sup>152</sup> Equally, the mere 'celebration of subjectivity and diversity does not lead to new designs [in devising feasible political solutions]'.<sup>153</sup>

Consequently, one could be left with a void wherein international law is rendered 'useless' or 'dead'.<sup>154</sup> Paulus describes this as a situation of 'despair', since a lack of authoritative legal rule and response paves the way to 'unfettered, unprincipled politics' culminating in 'brute power'.<sup>155</sup> He further maintains that answers and solutions cannot be found in the realms of relativism and subjectivity: 'Without any claim to inter-subjective and general principles or rules, every subjective evaluation can be countered with the opposite subjective statement.'<sup>156</sup> Thus, according to this view, the rejection of the bindingness of

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<sup>151</sup> Chimni (n 81) 72.

<sup>152</sup> See Koskenniemi (2009) (n 70) 7, where he calls his initial approach, based on the assumption that mere critique will result in change, 'naïve'. At 8: 'A demonstration that 'it all depends on politics' does not move one inch towards a *better* politics.' See also Chimni (n 81) 72: '[W]e need to guard against the trap of legal nihilism through indulging in a general and complete condemnation of contemporary international law ... a critique that is not followed by construction amounts to an empty gesture.'

<sup>153</sup> Paulus (2001) (n 63) 736.

<sup>154</sup> Id 734-735.

<sup>155</sup> Id 735.

<sup>156</sup> Id 742, 743. Paulus illustrates the point with reference to the activist who, although challenging or even rejecting the legitimacy of universal norms, has to harness that very legitimacy of

international law results in a legal stalemate. When there are no binding and authoritative rules, 'there seems to be no possibility of bridging the gap between different subjectivisms'.<sup>157</sup>

The logic of this argument appears compelling. A demonstration from the relativist perspective of the incoherent nature and indeterminacy of international law does not fortify the position of the oppressed, for it stifles debate about the relevance and bindingness of precisely those norms that marginalised groups and individuals rely on. That is, the very people who are perceived to be the beneficiaries of the critique - whatever form it may take - through a debunking of the neutrality and objectivity of international law, are rendered defenceless and powerless from a legal point of view. In similar vein, Anghie maintains that the rejection of international law is 'not a feasible option', since it would 'leave open the field ... to imperial processes', instead of allowing it to perform many vital functions which counter hegemony.<sup>158</sup>

If this line of reasoning is maintained, then similarly, debates about the fragmentation and deformalization of international law, or the contention that it is merely a political project, and other critiques, have no great merit from the perspective of those who depend on the bindingness of international law – for purposes ranging from realising the ideal of human dignity, to saving the planet, to fighting international crime. For these and other reasons, there has thus been a fervent call from many corners for a 'new', reinterpreted international law.<sup>159</sup> On what basis however, should such reconstructed international law be founded?

On one hand, international law as we know it cannot simply be disavowed, but neither can its claims to universal, objective validity be accepted. On the

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international law norms in order to 'convince others [e.g. judges] ... of the legal quality of [his or her] argument' in order to succeed.

<sup>157</sup> *Id* 742.

<sup>158</sup> Anghie (n 67) 48.

<sup>159</sup> See for example Rajagopal (n 69); Weeramantry (n 2) 278, 284-285 on how international law can achieve justice for the Third World; Paulus (2001) (n 63) 747, 752-755; Kennedy (n 128) 835-844, for an overview of the major projects to re-imagine international law.

other hand, the relative and subjective provide no, or inconclusive answers. Therefore the general and obvious route followed by many legal theorists has been one of accommodation of both the universal and the relative – a 'middle-of-the-road' strategy which steers a course 'between positivist objectivism and...subjective responsibility...'<sup>160</sup> Accordingly, exhortations such as 'minimum rules are not the end of inter-cultural debate but its beginning', are apt.<sup>161</sup>

In this vein, Justice Weeramantry, former Vice-President of the International Court of Justice, traces lesser-known facts about the multicultural origins of international law back to ancient Arabic jurisprudence of eight hundred years before Grotius, the precepts of which eventually filtered through into European legal writings – thus illustrating that 'international law is not a monocultural construct, nor a purely Western construct'.<sup>162</sup> He makes the following impassioned plea:

So let us look upon international law not as a Western construct, but rather, as a global construct. It is the product of many civilizations and many traditions, and that fact should dissipate some of the antipathy for it that might be felt in some quarters.<sup>163</sup>

The issue seems clear: International law must attain credibility and validity as a *globally* relevant normative system, one that serves the North and the South, the First World and the Third World, the international winners and losers, without favour or prejudice. In so doing, it also has to manage the difficult juggling act with state sovereignty successfully. Therefore, international law must be construed according to a normative map that will accommodate both the general and the particular, states and other stakeholders, in a cogent manner. This might seem fatally idealistic and highly improbable, and yet, it is what is

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<sup>160</sup> Paulus (2001) (n 63) 727,753, and note the references to Korhonen who holds the view that subjectivism and objectivism are both 'inconclusive'.

<sup>161</sup> Id 753.

<sup>162</sup> Weeramantry (n 2) 280-281.

<sup>163</sup> Id 281; Santos (n 34) 280.

required. Discussed below are a number of philosophical insights and theories that have been advanced in this regard, and in addition I consider a practical, working example.

**(b) Transcending relativities and bridging the gap between subjectivities without devouring them**

*[A]ny interpretation of an outside norm is hybrid and ... in this hybridity may lie the potential to elude the politics of polarity.*<sup>164</sup>

As explained in previous sections, much of the criticism against international law refers to the manner in which it has been manipulated to serve the needs of hegemonic nations and institutions. However, just as international law has been abused by powerful segments of the global society, it has the potential to be used by other international actors, whose voices are becoming increasingly strident, to further counter-hegemonic and cosmopolitan interests.

The immediate problem faced by cosmopolitan and emancipatory international law relates therefore to a duality of concerns. In the first place, it has to transcend local-global, or objective-subjective polarities, that is, take locally embedded interests into account, without perforce obliterating or assimilating them. In the second place, to have purchase as a globally relevant normative regime, it must mediate between potentially irreconcilable interests existing in various relative and local contexts. To gain perspective, I consider a few propositions below, which illustrate that it is possible to transcend, yet celebrate and deploy, subjectivity within the global project.

Justice Weeramantry asks how it might be possible for international law to achieve justice for the Third World.<sup>165</sup> He suggests a return to the humanistic, natural law and philosophical roots of international law, and calls for a rejection of

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<sup>164</sup> Knop (n 9) 532.

<sup>165</sup> Weeramantry (n 2) 284.

positivism. His vision is to build on the idealism of international law, and specifically to 'broaden' and enrich it by exploiting the wisdom and traditions from all cultures including the 'best and wisest' from the West.<sup>166</sup>

Aware of the difficulties confronting the international lawyer and the indeterminacy of his approach, Paulus, nonetheless adopts an 'intermediate position' by 'steering a course between normativity and contextuality'.<sup>167</sup>

Menski argues that the 'globalising uniformisation', or universal assimilation that is presumed to characterise international law, is in fact 'pluralistic glocalisation', namely the negotiation of plurality, which construes localisms within a global context.<sup>168</sup> He bases this conclusion on the observation that 'local and global elements of law are always involved in visible and invisible dynamic interaction', which results in such 'pluralistic glocalisation'.<sup>169</sup> This understanding is therefore another way of conceptualising the place of both the local and the global in legal analysis.

On the other hand, certain global problems cannot be addressed at national and local levels, and require measures having an international reach. For example, to counter environmental destruction, 'there is a need of more global law rather than less to tackle this millennium emergency'.<sup>170</sup> Nevertheless, Mattei et al caution against global law that stems from current authoritative sources and abstract theory, suggesting that there is a need for a 'catalogue of

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<sup>166</sup> Id 284-286.

<sup>167</sup> Paulus (2001) (n 63); quote at 755, but note however, Paulus quoting Koskenniemi, who challenges this eclectic position as being an 'incoherent doctrinal structure' and 'vulnerable to the charge of being either utopian or apologist'.

<sup>168</sup> Menski (n 5) 596.

<sup>169</sup> Ibid.

<sup>170</sup> Editors' comments in *Schlesinger* (n 27) 41-42; also Koskenniemi (2007) (n 1) 11 on the need for global solutions for the protection of the world's natural resources; and Elver 'International environmental law, water and the future' in Falk et al (eds) *International Law and the Third World* (2008) 181ff, on the difficulty of addressing problems associated with the conservation and management of shared natural resources, such as water, which are not contained within geopolitical boundaries.

historically 'best legal practices' of local success stories to build from the bottom-up a new legal civilization.<sup>171</sup>

Similarly, Santos calls for a 'bottom-up' cosmopolitan legality, which is embedded in subaltern and cross-cultural structures; maintaining that the universal-relative debate is a 'false debate'.<sup>172</sup>

Others describe the development of the international legal regime in terms of a constitutional order, suggesting that 'the threshold to a constitutional structure has long been crossed', and that a norm such as '*jus cogens*' is not a form of customary international law, but a form of international constitutional law

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The attractiveness of this proposition is that it steers away from positivistic universalism, and introduces a higher-level legal regime imbued with ethical and moral principles, which will presumably safeguard the rights of subordinated nations, minorities, and even individuals.

Above are but a few of the theories in circulation, which suggest answers and solutions to the universal-relative dilemma. Nonetheless, it may be necessary to look beyond theory in order to ascertain how viable these postulations are in reality. To this end, it is important to investigate whether there are any existing structures, which could verify whether the 'mind' of international law can negotiate plurality through accommodation rather than assimilation,

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<sup>171</sup> Editors' comments in *Schlesinger* (n 27) 42.

<sup>172</sup> Santos (n 34), especially chapter 9 at 439ff; and see 271-273 where he makes the point that all cultures are relative – and hence all law, as a socio-cultural construct, is relative – which fact renders the relative-universal debate 'false'.

<sup>173</sup> Orakhelashvili (n 23) 10 and note 12; Coombe (n 28) 268 who uses the terms 'new global bargain' and 'transnational contract'; Weinrib 'The postwar paradigm and American exceptionalism' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 98. Conversely, Kennedy (n 128) 841-842, 847-848, who is also highly sceptical about this construction of global governance and international law; as is Koskeniemi (2007) (n 1) 15-19.

particularly with reference to the confluence of global and local elements in a specific context.

I consider this by asking, whether or not, the pragmatic configuration of a system such as international trade law could offer workable insights. In this respect, it has been noted that international law, and notably international trade law, has 'rules of a public and private law nature', meaning that both rules which do not originate in any particular domestic system, but in international sources, as well as rules which originate in national systems, find application internationally.<sup>174</sup> Furthermore, not only does international trade law have public entities as subjects, but it also governs private subjects.<sup>175</sup> In fact, the majority of international trade contracts do not have a public law nature. Rather, the *lex mercatoria*, which is generally applicable to international contracts, has, unlike public international law, evolved autonomously from (mainly private) trade customs.<sup>176</sup> In addition, international trade law affords the individual reasonably sound protection when contracting with states, thus accommodating the interests of both public and private entities in one forum.<sup>177</sup>

Another important aspect of international trade law is that, apart from manoeuvring with relative ease between public and private spheres, it efficiently supplements black letter regimes with overarching principles.<sup>178</sup> For instance, the UN Convention on Contracts for the International Sale of Goods (CISG) cannot, on its own, be the governing law of an internationalised contract, since its rules do not cover every contractual aspect. Consequently, it is augmented by principles such as *pacta sunt servanda* and the international *ordre public* to

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<sup>174</sup> Booyesen (n 137) 16.

<sup>175</sup> Id 206, 784. Note the argument that some rules, such as the rule of party autonomy in contractual relations, apply directly to individuals. For example, the UNCITRAL Arbitration Rules which 'may be regarded as international dispositive law' and yet may govern contracts between individuals, confirm that international law indeed has a private dimension.

<sup>176</sup> Santos (n 34) 208-211, on the origins and elements of *lex mercatoria*; Booyesen (n 137) 9-13, 496-503.

<sup>177</sup> Booyesen *ibid*.

<sup>178</sup> See Santos (n 34) 211-212, on *lex mercatoria* and the 'world system'; Teubner (n 132) 11-12 on the principle of good faith in international commercial law.

determine the validity of the contract or the validity of a commercial custom respectively.<sup>179</sup>

One can be forgiven for asking why the supple, multi-dimensional regime pertaining to international trade law, cannot inform other areas of international law, and thereby serve to instantiate ideas about a less hierarchical and more cosmopolitan international law regime.<sup>180</sup> Perhaps the time has come to stop unprofitable debating about exactly where to draw state-individual and objective-subjective boundaries, and simply to realise that all these elements are simultaneously embraced by international law. Correspondingly, it should be clear that local and global elements are not locked in constant combat, but rather, as in the case of international trade law, may co-exist and overlap in a cogent and mutually beneficial manner.

Expanding on the international trade law example, it is important to recognise that certain facets of regularisation are completely independent of states, and that some are created through subjective customs which, because of their usefulness, gain universal appeal.<sup>181</sup> This also illustrates that, what works in practice sometimes defies theory, and that the abstract universal-relative debate is at best flawed. Moreover, international trade law points to the interplay of guiding principles in addition to formal rules, which serve to fill gaps and augment existing legal norms, thus endowing the system with a measure of flexibility.<sup>182</sup> I explain subsequently, how such flexibility is part of all legal systems, and makes

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<sup>179</sup> Booysen (n 137) 586-587. Note also how the CISG can 'co-exist' with other harmonisation initiatives, notably regional systems. See for example Coetzee and De Gama 'Harmonisation of sales law: An international and regional perspective' (2006) *Vindobona Journal of International Commercial Law and Arbitration* 15 on the relationship between CISG and OHADA (Organisation for the Harmonisation of Business Law in Africa).

<sup>180</sup> There are of course, other examples and theories about international or transnational regimes, which are focussed to an appreciable degree on cooperative and 'heterarchical' principles. See Besson (n 17) 158-160 who discusses the EU as a pertinent example.

<sup>181</sup> This concept is key to understanding the 'bottom up' reconstruction of international law, which I explore subsequently as part of the framework proposed in the study. See Chapter IV 9(e).

<sup>182</sup> I do not pursue the debate about the differences between laws, rules, principles and so forth, in this study. However, the examples above from trade law, containing both rules and overarching principles such as *pacta sunt servanda* and *ordre public*, illustrate their differences and interdependence in practice.

the contextualisation of international law in domestic courts possible, which in turn, is crucial to its ultimate reconstruction.<sup>183</sup>

Judging by the suppleness and success of international trade law, it seems possible, both in theory and in practice, to recognise a symbiosis of the (so-called) universal and relative, the public and private. Next, therefore, and with reference to the theories noted above, I reconfigure certain ideas about the 'mind' of international law along these lines.

## 6. The 'mind' of international law: Redrawing its boundaries

*But if the dynamic of international law is thus a process of the universalization of the particular, it is also a process of the particularization of the universal.*<sup>184</sup>

*These are all powerful reconceptualizations [of the global legal order]...each has hold of one piece of the elephant ... But they are also each proposing a different elephant.*<sup>185</sup>

*Our picture will need to have room for all this disorder.*<sup>186</sup>

*What from one angle looks like a terribly chaotic image of something, may from another appear just as a finely nuanced and sophisticated reflection of a deeper unity.*<sup>187</sup>

In the section above, various vexed questions about the nature of international law, and its relationship to domestic law and other local and subjective normative systems, were considered. What is clear is that preconceived ideas about the

<sup>183</sup> See Chapter IV 4 on contextualism.

<sup>184</sup> Knop (n 9) 527-528.

<sup>185</sup> Kennedy (n 128) 844, in summary of an historical overview of the most important projects concerning the reinvention and reimagination of the global legal order.

<sup>186</sup> *Id* 848.

<sup>187</sup> Koskenniemi (2007) (n 1) 25.

objectivity and universality of international law have to be rejected in favour of its conceptualisation as indeterminate and relational. These attributes flow from its inherent plurality and polycentricity, which it shares with all legal systems, and because 'international law is part of social relations that change over time.'<sup>188</sup> Accordingly, David Kennedy suggests that the 'disorderliness' of international law must simply be acknowledged, seeing that 'it is not at all clear the situation would be improved by a net reduction in the plurality of law', or apparently in any other way.<sup>189</sup>

### **(a) Inchoate, non-universal and 'new' international law**

Rather than seeing chaos and disorder, another description of international law is to view it as simply incomplete or inchoate. This triggers a different perspective which may be explained as follows. As a starting point, Santos reasons that 'universalism as a philosophical posture is wrong.'<sup>190</sup> He writes within the context of culture, reasoning that all cultures are relative and incomplete, and that therefore, the prevailing '*topos*' of any particular culture is defective.<sup>191</sup> If this can be said of culture, it holds true for law, including international law, since law, as established previously, is a socio-cultural construct.

It follows that, if international law is inchoate, its 'international' cannot *mean* 'universal', just as we know that it most certainly *is* not universal with reference to every factual situation.<sup>192</sup> Rather, it is a legal culture that has

<sup>188</sup> McCorquodale (n 13) 243.

<sup>189</sup> Kennedy (n 128) 848-849.

<sup>190</sup> Santos (n 34) 271.

<sup>191</sup> *Id* 271-276. He explains this with reference to the 'procedural solution' provided by 'diatopical hermeneutics'. For example, the defectiveness of the western human rights *topos* (seen from the Hindu *topos* of *dharma*) is that it fails 'to establish the link between the part (the individual) and the whole [the entire society, the entire cosmos]; and the defectiveness of *dharma* (seen from the human rights *topos*) is that 'due to its strong undialectical bias in favour of harmony ... it is unconcerned with ... freedom and autonomy [thereby occulting injustices]'. This illustrates that all cultures are *reciprocally* incomplete.

<sup>192</sup> See Chapter 1 4 and 4 above. As noted throughout, the so-called universality of international law is challenged on numerous grounds, notably those that contend that it is simply some form of cultural hegemony. Also Moore (n 80) 69-70, on the myth of universality, and that rights and duties are aspects of social relationships; Bowring 'Ideology critique and international law:

gradually developed in the wake of various attempts to regulate the world community, and, although its reach extends beyond territorial boundaries, it is not a universal 'culture', but one that is as incomplete, inchoate and oftentimes, as defective as any other. There is, as Moore explains only 'partial rule by rules', since law is always part of a wider cultural order consisting of any number of 'semi-autonomous social fields' which regulate societies and nations.<sup>193</sup> There is also no reason why this analysis should not hold true for international law.

Consequently, a more attenuated boundary of international law must be drawn, one which takes into account the missing pieces, and the narrower parameters of a *non-universal international law*. It is nonetheless a system which provides a degree of guidance, some answers and some remedies, in the same way that national systems do, notwithstanding the fact that they are also incomplete. I ask again however, whether this means that international law has no coherence or integrity, and that it is merely a conglomeration of various legal bits and pieces. Or, is its cohesiveness to be found elsewhere?

In explanation, if international law were an electronic system, we would be speaking in present terms of 'new generation' rules and applications. 'New generation' international law is a more pliant and value-laden system that has discarded some, but not all, of its state-centred positivism.<sup>194</sup> Guiding values and principles, and a strong dose of idealism are some of its ingredients, which may (or may not) signal the return to a new generation of natural law or *ius commune*.<sup>195</sup>

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Towards a substantive account of international human rights' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) 201-207.

<sup>193</sup> Moore (n 80) 1-4, 54. See also Twining 'Two works of Karl Llewellyn—II. The Cheyenne way' (1968) 31 *Modern Law Review* 165 at 169-170, who comments with reference to the work of Llewellyn on ' "normative ambiguity" – the co-existence of sets of norms which conflict or which at least have opposing tendencies'.

<sup>194</sup> See 4(a) above; Koskenniemi (2009) (n 70); Tladi (n 127) 174.

<sup>195</sup> For example Weeramantry (n 2) 284-286; Özüçü *The Enigma of Comparative Law* (2004) 137, 179-184; Schlesinger (n 27) 346-348.

Thus, as indicated, the present version of international law underscores the fact that not only hard and fast, black letter rules find application, but that a legitimate, even mandatory, 'application' of values and principles is apparent.<sup>196</sup> There has furthermore been a shift in 'reasoning templates', in the sense that international law is moving away from a strictly consensual to a mandatory system in certain areas.<sup>197</sup> It is noteworthy that many of these innovations are premised on the perception of globally 'shared values' and a 'shared remedial project' which, in turn, is imputed to all players.<sup>198</sup>

Could it be that international mores, by mimicking norm-like status, and by typifying a 'shared' global project, provide the necessary cohesiveness sought by international law? Moreover, certain branches of international law, such as international trade law and international environmental law, already subscribe to this type of structure, and, rather than eschew the importance of values and principles, they routinely rely on them to flesh out existing norms, or importantly, to act as surrogate, soft law, where dispositive norms are absent.<sup>199</sup> This configuration of international law dovetails with the conceptualisation of law as socio-culturally embedded and multi-layered, as opposed to being a set of positivistic rules. It also comes however, with the stubborn caveat that values and principles thus relied on, could simply be other names for bias or solipsism.

Hence, and in reappraisal of the central theme of the present study, it needs to be determined whether the extant shortcomings of international law

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<sup>196</sup> Moran (2005) (n 41); Moran 'Inimical to constitutional values: Complex migrations of constitutional rights' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 233, 255 on the 'mandatory' and 'estoppel-like effect' of 'non-binding sources'.

<sup>197</sup> For example Romano 'The shift from the consensual to the compulsory paradigm in international adjudication: Elements for a theory of consent' (2007) 39 *New York University Journal of International Law and Politics* 791; Scheppele (n 73) for a pertinent example. I borrow the expressive term, 'reasoning templates' (here simply used descriptively) from Gaudreault-Desbiens 'Underlying principles and the migration of reasoning templates: A trans-systemic reading of the *Quebec Secession Reference*' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006).

<sup>198</sup> Kumm (n 147); Weinrib (n 172), quote at 89.

<sup>199</sup> See Dugard (n 15) 391-405 on international environmental law. See the latter part of section 5(b) above on international trade law.

render it incapable as a source of cosmopolitan and emancipatory justice, or whether a less agnostic view can be adopted. I suggest below that, based on an inventory of its 'accomplishments', in addition to the ecumenical prospects of the 'new generation' international law, a more generous view of its reconstruction is possible.<sup>200</sup>

### **(b) The role of values, principles and ethics**

The survey of various theories and practical examples considered previously, served to examine whether international law has the potential to negotiate both local and global contexts successfully. It was concluded that there is indeed such potential, and that the international regime appears capable of accommodating, and not only assimilating, subjectivities. However, it must yet be ascertained, whether the overall potential for 'good' outweighs the 'bad', namely whether the 'mind' of international law is equipped to defy its history of oppression.

A logical start is Rajagopal's observation that international law contains both hegemonic and counter-hegemonic elements.<sup>201</sup> He shows that the counter-hegemonic elements are feeble and poorly developed, and, as noted, that much of human rights law and the development discourse, which both proclaim to be counter-hegemonic, are a part of, and often legitimise hegemonic injustices.<sup>202</sup> This highlights the need to reformulate international law and strengthen its counter-hegemonic structures. Within the ambit of the study, it means that the mechanistic *imposition* of international law in domestic courts must be resisted. Correspondingly, there is a need for the contextual application of international law, which implies 'inside' agency, as opposed to outside interference, to accomplish its reconstruction.<sup>203</sup>

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<sup>200</sup> See Baxi (2008) (n 76) 17-19 for a list of 'accomplishments' and the 'normative expectations' fostered by these, with specific reference to the Third World. I suggest that the relatively long list of the good achieved by international law points to the conclusion reached here.

<sup>201</sup> Rajagopal (n 69) 64.

<sup>202</sup> *Id* 65-77.

<sup>203</sup> Okafor 'Poverty, agency and resistance in the future of international law: An African perspective' in Falk et al (eds) *International Law and the Third World* (2008) 100-101. I return to

Next, and in concert with others, I suggest that a transformational severance from the present hegemonic paradigm does not require more laws, but more ethics.<sup>204</sup> For example, Kennedy concludes that an unqualified pursuit of better global administrative law, would be as senseless as 'improving the machinery of government ... if scoundrels rule'.<sup>205</sup> This means that improved procedures and more law might simply reproduce or legitimise existing injustices, if ethics were lacking. Thus, Singh argues that 'what is required is a project that elucidates international law as ethics', and alludes to its 'spirituality', urging lawyers to remember this aspect and to 'embrace a considered ethical responsibility'.<sup>206</sup>

Justice Weeramantry, as noted, calls for a return to the idealistic, humanistic, natural law and philosophical roots of international law, not only 'beautifully stated in the books' but also in practice.<sup>207</sup> He makes the salient observation that, in order to achieve justice, especially for the Third World, there has to be substantive reliance on the 'principles' of international law. This is due to the fact that many legal problems do not have black-letter-rule solutions, and that judicial decisions are therefore appropriately informed by principles.<sup>208</sup>

Others consider the practical concerns relating to the implementation of an ethics-founded international law.<sup>209</sup> In this regard, Twining notes that rights theories often do not address the issue of allocating responsibility, since they tend to focus on 'privilege-rights', in contrast to 'claim-rights', which place a

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the importance of contextualism in Chapter IV 4, and argue in Chapter III that the judiciary is strategically positioned to accomplish this task from the 'inside'.

<sup>204</sup> For present purposes, I refrain from drawing any sharp distinctions between morality, ethics and justice. These terms are given a broad, mutually inclusive and lay meaning.

<sup>205</sup> Kennedy (n 128) 856.

<sup>206</sup> Singh (n 11) 43, whose argument is based on the Kantian analysis suggested by Koskenniemi.

<sup>207</sup> Weeramantry (n 2) 285.

<sup>208</sup> *Ibid.* He refers specifically to the jurisprudence of the International Court of Justice of which he was a former Vice-President.

<sup>209</sup> Singer (n 6), who is noted for his practical, utilitarian ethics; Twining (n 19) 66-69, who endorses Bentham's utilitarian philosophy. See also Chapter I 7.

correlative duty on an identifiable actor.<sup>210</sup> Thus, for international law measures to be empirically and not merely theoretically viable, they must be appropriate in a given context and formulated with a view to achieve an emancipatory outcome – all the more so, since international law can seldom rely on coercive measures to accomplish its tasks.<sup>211</sup>

Furthermore, as with all legal systems, counter-hegemonic international law has to compete with a plurality of other norms, which may include its own hegemonic rules. Hence, I argue that the trump cards of emancipatory international law include a value-system founded on realisable cosmopolitan ethics, such as the allocation of responsibility, which will potentially lend it credibility on a global scale. In terms of the framework for the application of international law developed in this study, the ethical dimension comes into even sharper relief at the international-national-subnational interface, where it informs the particularisation and contextual application of international law, as well as the equitable balancing of competing interests at these different levels.<sup>212</sup>

In this respect, the non-universal nature of international law is again acknowledged and points to the fact that, the worth of its principles and values is found, not so much in their ability to establish top-down, overarching coherence, but in their ability to provide cohesion between the 'middle spaces', that is, the conceptual and normative gaps in, and between international, national and other regulatory orders.

In a perfect world, international values will resonate harmoniously with domestic values, and vice versa – something that clearly does not happen in reality. The greater the resonance, however, the more likely it is that international

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<sup>210</sup> Twining *ibid.*

<sup>211</sup> In the words of Llewellyn: 'The jobs, therefore, get themselves done after some fashion always – or the group simply is no more. Hence if the officially announced imperatives fail to put themselves over, one must look elsewhere for the doing the jobs ... ', quoted and discussed in (1968) 180.

<sup>212</sup> See Chapter IV which provides the refinement of these issues.

law will facilitate actual, counter-hegemonic transformation, and ultimately, emancipation. Thus, I conclude that the boundaries of the 'mind' of international law must be drawn in a way that accommodates pragmatic, 'user-friendly' ethics.<sup>213</sup>

This means that to benefit all its participants, the boundaries of international law cannot be represented by a two-dimensional sketch, which only accommodates the abstract relationship between international and national legal systems. Rather, it must also take into account a third dimension or 'depth vector', namely the socio-cultural context relevant to its end-users and recipients, in order to be persuasive and ethically acceptable to these participants.<sup>214</sup> It is only when international law is perceived to be thus, that it can succeed in being emancipatory.

### **(c) An oblique argument: Ethical, emancipatory international law and evolutionary biology?**

The circular reasoning patterns encountered when one attempts to formulate globally relevant paradigms of law, justice and ethics, have been repeatedly conceded throughout this study. The circuitous question is namely, whether anything with 'global relevance' (including ethics) will not, yet again, be premised on a particular solipsistic bias, notably that of dominant cultures. It therefore becomes important to determine, if there are other accounts, different to the ones based on theories of hubris and hegemony, which explain, for example, the current international culture of human rights and the pursuit of other, outwardly ethical objectives.<sup>215</sup> That is, why does it appear that there are powerful counter-

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<sup>213</sup> See Chapter IV 10 on the role of ethics.

<sup>214</sup> See Chapter IV 9 for a detailed discussion of the three dimensional nature of the application of international law.

<sup>215</sup> The insistence on ethical conduct embraces virtually every modern human endeavour, from sports to medicine to politics and business. See for example Shouler *Understanding Philosophy* (2008) 282-287. Note for example the work of Transparency International, a 'global civil society organisation leading the fight against corruption'. See [www.transparency.org](http://www.transparency.org) last accessed 16-07-2013

hegemonic forces at work worldwide, which are notionally founded on a sense of justice, ethics and morality?<sup>216</sup>

The answers to these questions are unlikely to be found in legal text books, and hence I suggest that a divergence into the realms of ethics and morality from a non-legal perspective might be necessary. I suggest, but with a necessary circumspection, that the most objective evaluation of the human sense of ethics and morality, and one that detaches their causality from inherent and/or conditioned bias, is an examination based on research in the field of evolutionary biology.

The contribution made by Dawkins in this area of science has been significant. He asks the pertinent question: 'Does our moral sense have a Darwinian origin?'<sup>217</sup> From the evolutionary standpoint of the 'selfish gene', which militates against the idea of a moral or ethical duty towards others, he describes the four core impulses for the human sense of altruism as follows.

First, is *kinship*, which infers a 'statistical likelihood that kin will share copies of the same gene'. Second, *reciprocity* suggests that, 'if I help you, you will help me'. Third *reputation* is necessary, because it is important to have a reputation as a good reciprocator. Lastly, the *Potlatch effect*, or 'the benefit of conspicuous generosity' constitutes an advertisement of dominance or superiority.<sup>218</sup>

Hence, it appears that the primitive wiring of our brain, which drives us to be altruistic and kind is determined, rather selfishly, by the symbiotic relationships described above, which enhance the chances of survival of the

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<sup>216</sup> The phenomenal advancements in terms of human rights have been noted. These have come about not only through the operation of international law, but also through innumerable projects conducted by NGOs, multinationals and individuals. However, all across the globe counter-hegemonic forces are also evident in the way civil society resists oppressive governments and institutions. See for example Santos (n 34) 180-182.

<sup>217</sup> Dawkins *The God Delusion* (2006) 245-254.

<sup>218</sup> *Id* 247-252.

'selfish gene'. Dawkins argues however, that these explanations do not account for displays of goodness and kindness in the modern world where we no longer live in small communities and interact with, and depend on the same people throughout our lives.<sup>219</sup> Rather, in today's world, we frequently tend to do good to persons who we will never meet, or who cannot reciprocate our generosity.

The explanation provided by Dawkins is that we do not have cognitive awareness of these survival strategies, but that evolutionary selection primarily favours 'rules of thumb', which may produce 'misfiring' or 'by-products' that could result in 'a strong urge that exists independently of its ultimate rationale'.<sup>220</sup> For present purposes, this assessment underscores the fact that, regardless of the underlying evolutionary dictates, humans possess a hard-wired sense of ethics and altruism, quite independent from who they are or where they live. Therefore, if a sense of ethics is indeed so intrinsically linked to humanity, it follows that normative systems, including international law must accommodate this reality.

There is another important corollary to the idea that humans were wired by evolutionary processes to act with a sense of morality, namely, that this might indicate the existence of moral or ethical absolutes which pre-date cultures and religions. In this regard, Dawkins draws on the anthropological research conducted by biologist Marc Hauser and philosopher Peter Singer. This work, which is based on extensive statistical data, appears to underscore the existence, across cultural, societal and religious barriers, of perceptions about what is ethically correct and just.<sup>221</sup>

Furthermore, from a legal perspective the conclusion that humans appear to possess a sense of ethics and/or justice transcending different cultures, seems

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<sup>219</sup> Id 252; Singer (n 6) 141-143.

<sup>220</sup> Id 252-254. Examples include the instinct to comfort a weeping child, who is not in any way related to us, and sexual desire which exists independently of its ultimate purpose of procreation.

<sup>221</sup> Id 254-258, and note 255: '[T]he interesting thing is that most people come to the same decisions when faced with these [moral] dilemmas, and their agreement over the decisions themselves is stronger than their ability to articulate their reasons.' See also Singer (n 6) 141-143.

to be supported by 'common core' research, discussed previously.<sup>222</sup> The so-called common core of legal systems points to certain fundamental legal precepts found diachronically in all societies. One such is the sanctioning of theft, which is condemned in every society, on both moral and legal grounds.<sup>223</sup>

The scope of the present work does not permit a detailed consideration of the possibility of an evolutionary reason, or any other, for the human sense of ethics and justice. The preceding discussion, however, demonstrates that an attempt to allot all that is associated with international law – good and bad – to a western-centric, hegemonic paradigm, is not entirely accurate. It is possible that there are other forces at work, which cannot simply be explained in terms of power structures and politics, and furthermore, that certain of these forces may not be as sinister as some would argue.<sup>224</sup>

In summary, redrawing the boundaries of the 'mind' of international law means in the first place, that, although international law is not 'universal', it may plausibly contain rudimentary elements of morality and ethics shared by many, if not most, societies.<sup>225</sup> However, both as a normative and as a value system, it remains inchoate, and has to be augmented by other regimes.<sup>226</sup> These 'other regimes', as used here, do not refer to national legal systems only, but include both normative and value systems, which have their origin in supranational, national as well as subnational spheres.

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<sup>222</sup> Chapter I 5(d).

<sup>223</sup> Editors' comments in *Schlesinger* (n 27) 98.

<sup>224</sup> See Cole 'An unqualified human good: EP Thompson and the rule of law' (2001) 28(2) *Journal of Law and Society* 177 on the work of Thompson, especially with respect to the rule of law as an 'unqualified human good'.

<sup>225</sup> Obiora 'Toward an auspicious reconciliation of international and comparative analyses' (1998) 46 *American Journal of Comparative Law* 669 at 670: 'That it is not possible to base universal rights on an empirical verification of the prevalence of their equivalence in differing realms does not mean that there are no valid grounds for devising a system of accountability with a global reach. After all, it is not certain that universals are the only grounds on which such a system can be justified.'

<sup>226</sup> Weeramantry (n 2) 286, in addressing international lawyers, especially from the 'developing world' on the 'obligation to contribute to the enrichment of international law by using the traditions, learning, and wisdom of your various countries'.

The conceptualisation of the 'mind' of international law described above, thus gives rise to a more restricted circumscription, since it is incomplete, rather than universal and complete. At the same time, however, it is also deeper and richer on account of the imbrication of its norms with values and ethical tenets. The presence of these attributes has not come about adventitiously. They are there, because the needs of the international community – and arguably humanity per se – are such that it requires its legal system to be contingent upon an ethical substructure, or at least upon the perception of it being thus founded.<sup>227</sup>

Consequently, a two-way flow of values takes place at this deeper layer of international law. From the bottom, the ethics and morals of nations, groups and subgroups, which comprise the international community, diffuse into the realms of international law, and, conversely, value-laden international norms and principles exert their influence on members of the community.<sup>228</sup>

The attenuated, but deeper conceptualisation of the 'mind' of international law has important ramifications for the domestic application and reconstruction of international law, and hence for the present study. As a consequence, these redrawn boundaries directly inform the development of the proposed analytical framework for such domestic application and reconstruction.<sup>229</sup>

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<sup>227</sup> See Thompson (n 108) 263: 'The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just.'

<sup>228</sup> These 'reverse flows', which trigger 'bottom up' international law, are discussed at length in Chapter IV 9(f). The reciprocity involved in the exchange is partly due to the relational character of law, which implies change in accordance with the needs of those involved in the relationship. For example, shifts in what is perceived to be 'equitable' have resulted in new concepts in international law such as 'intergenerational equity', which, as it becomes entrenched can move from a bottom-up to top-down position. See McCorquodale (n 13) 243-244, 25; Baxi (2008) (n 76) 11 on the 'compossibility of authorship' of international law.

<sup>229</sup> See Chapter IV.

## 7. Conclusion

It is unlikely that the world order and international law itself will soon undergo elemental change, sufficient to dislodge present asymmetrical, hegemonic power structures. Despite many valiant efforts at various levels to shake off the shackles of western domination by the Third World, despite the denouncement of occidental ideologies which underpin international human rights and virtually every other facet of international law, and notwithstanding dilution of the Westphalian model of state sovereignty, truly cosmopolitan and emancipatory international law is, at this point, still a dream.

This does not mean, however, that actors on the international law stage should succumb to fatalistic, 'lazy reasoning' that results in the proverbial, 'doing nothing'.<sup>230</sup> Rather, legal scholars and practitioners, and, as I argue, the judiciary in particular, can, and must, be sensitised to, and reject bias, thereby bringing about, even if incrementally, the regeneration of international law.

International law has an immensely important 'job' to fulfil. Just as everything in nature is delicately balanced and intertwined, so too is human existence interconnected, and international law is one network amongst many connecting strands. There are hegemonic, destructive connections, but also virtuous connections. We need to strengthen and build upon the latter, potentially, as a matter of survival. Presently and albeit fragmented, there is but one system of international law that tenuously holds states accountable, provides some recourse to those whose rights have been violated, and establishes a framework for global human interaction and endeavour. Koskenniemi elegantly describes the essence of international law in the following words:

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<sup>230</sup> Santos (n 34) 494-495.

I often think of international law as a kind of secular faith. When powerful states engage in imperial wars, globalisation dislocates communities or transnational companies wreak havoc on the environment, and where national governments show themselves corrupt or ineffective, one often hears an appeal to international law. International law appears here less as this rule or that institution than as placeholder for the vocabularies of justice and goodness, solidarity, responsibility and – faith.<sup>231</sup>

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<sup>231</sup> Koskenniemi (2007) (n 1) 30.



## CHAPTER III

### COURTS AS MEDIATORS BETWEEN CENTRALITIES AND PERIPHERIES, THE INTERNATIONAL AND THE LOCAL: HOW CAN THE UNCHARTED MIDDLE-SPACES BE NAVIGATED?

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## 1. Introduction

*We spend far too little energy understanding what happens in between – the conveyor belts by which centers and peripheries are brought into proximity ...*<sup>1</sup>

*International law operates ... at every level: international and national; economic, political and social; private and public. And it is in all these arenas that it is now imperative to understand the operations of imperialism and how they might be opposed and overcome.*<sup>2</sup>

This chapter outlines a crucial step in the exploration of the application of international law in domestic courts. It is aimed at understanding the role of the judiciary in relation to applying and reconstructing a cosmopolitan and emancipatory international regime. At the heart of the enterprise is the present contention, namely, that this law must first be rendered counter-hegemonic and emancipatory in its domestic employment. This, in turn, depends on various mediatory judicial processes. I explain subsequently that these processes are centred on proportionality and the context-sensitive and particularised application of international law by domestic courts.<sup>3</sup>

The previous chapter dealt with the nature of international law, and its potential to be renewed in order to benefit all its stakeholders, and in particular,

<sup>1</sup> Kennedy 'The mystery of global governance' (2008) 34 *Ohio Northern Law Review* 827 at 833.

<sup>2</sup> Anghie 'The evolution of international law: Colonial and postcolonial realities' in Falk et al (eds) *International Law and the Third World* (2008) 48.

<sup>3</sup> See Chapter IV 4, 5, 6 and 8 on contextualism, proportionality and particularisation.

those who traditionally have been disenfranchised by its operation. In this regard, it was shown that international law contains discernible elements which support the contention that renewal is possible. In other words, I maintain that a reconstructed international law can accommodate contextual application, whereby relativities and subjectivities are not absorbed or eradicated by an instrumentalist imposition of international norms.

In line with this analysis, the present chapter is concerned with the related question of agency in bringing about such reconstruction of international law. I argue that, although there are numerous institutions, movements and initiatives that may be construed as capable facilitators and agents, none is as optimally placed as the judiciary to mediate effective and legally relevant transformation.

The reasons for this assertion are outlined in the chapter. They include competencies such as the institutional advantages enjoyed by the judiciary, and its strategic position as principal gatekeeper at the interstices, or 'middle-spaces', between international, national and other normative regimes present in the domestic mix.<sup>4</sup> The main point here is that, at the interface of these regimes, the judiciary is the one organ that can mediate a contextual and particularised application of international law. Or, in restatement, the contextualisation of judgments is the first step, and the method par excellence, whereby international law can be rendered counter-hegemonic at the point of impact, namely in domestic courts.

In the section below, I clarify the key concepts analysed in this chapter, in order to establish the meanings and parameters of the term 'judiciary', its role, and the constraints and the challenges it faces when applying international law. Since this discussion touches on previous, as well as subsequent chapters, a certain amount of repetition is unavoidable.

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<sup>4</sup> See Paulus 'Germany' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 213.

## 2. Establishing the parameters of key areas

### (a) The meaning of 'judiciary'

It is important to consider the definition I attach to the term judiciary, since there are several very different models of the institution. The political appointee model for example, allows the judiciary a great deal less autonomy than the institutional independence envisaged for its counterpart in a modern constitutional democracy. For purposes of the present study, the latter institution is infinitely better suited to the transformative role proposed in this chapter. Nonetheless, a few of the case studies, which are considered in a following chapter, indicate that even systems that are not very independent, allow, at least to some extent, room for judicial discretion.<sup>5</sup> Thus, most courts across the globe potentially have a certain amount of jurisprudential space in which to manoeuvre, while remaining within the parameters of their particular system.<sup>6</sup>

Hence, what is meant by the term 'judiciary' does not refer only to those found in a constitutional *Rechtsstaat*, although the latter is the principal model under consideration in this study. This choice is clearly a limiting feature of the analysis. There are, however, a number of practical and conceptual reasons for not casting the net wider. One such is that most other models, for example

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<sup>5</sup> For example, judges invariably have to interpret statutes, constitutions, treaties and so forth, and in so doing enjoy a certain amount of discretion. See for example Legrand 'The impossibility of "legal transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111 at 114-116, who discusses a number of issues relating to the act of interpretation. See also n 6 below.

<sup>6</sup> Examples include the following: Paulus (2009) (n 4) 230 on the way in which courts in Europe, notably the Constitutional Court in Germany, are able to harmonise domestic and European human rights law on the basis of the 'European Court's margin-of-appreciation doctrine, which leaves member states some discretion in choosing how to implement the rights enshrined in the Convention [ECHR]'; Pentassuglia 'Towards a jurisprudential articulation of indigenous land rights' (2011) 22(1) *European Journal of International Law* 165 at 188-190ff on the role of courts to expand indigenous rights regimes. See also the Supreme Court of Malawi case *R v Khoviwa* [2010] MWSC: 'We also agreed that *the trial judge must at all times possess discretion* in relation to the gravity of sentence which must be imposed, even in cases where the defendant is convicted of murder', (my emphasis) which prior to 2006 carried a mandatory death penalty. See also the discussion in 3 below.

traditional courts, do not entertain international law in the first place. Another, which is discussed in greater detail below, is that the western/statist construal of the judiciary is to a large degree ubiquitous, which means it offers one of the more efficient judicial vehicles for transformation. Therefore, this type, which in theory enjoys institutional freedom and independence, is the typical vehicle for carrying out the proposed scheme for the cosmopolitan and emancipatory application of international law. As noted, as model, it is not confined to courts in the 'North'. Thus, I include courts from the 'South', which, although perhaps not as independent as, for argument's sake, courts in western Europe, may nevertheless emulate the constitutional model.<sup>7</sup>

Moreover, for purposes of the study, atypical court structures (from a mainstream perspective) are the real laboratories in which the present argument can be tested. There are two principal reasons. First, courts in the South and Third World often operate in culturally heterogeneous and plural societies, the reality of which may, or may not, be mirrored in the official legal system.<sup>8</sup> The resultant constellation of normative and legal pluralism challenges the judiciary to confront and balance conflicting interests in a spirit of cosmopolitanism, perhaps in the face of political opposition, or public disagreement.<sup>9</sup> In some countries, the

<sup>7</sup> Here one can include a long list of courts in Africa, for example South Africa, Botswana, Kenya, Nigeria; and also Turkey and India.

<sup>8</sup> By way of state sponsored (weak) legal pluralism for example, as well as through the entrenchment of the rights to culture and religion, legal recognition may be given to personal or customary law systems. The South African Constitution is a good example. It guarantees the right to culture (sections 30 and 31) and provides for the application of customary law by courts under certain circumstances (section 211(3)). Additionally, South African legislation recognises traditional leaders and customary marriages, including the particular customary rules associated with these institutions. On the other hand, there are many normative orders that are not officially recognised, but which none the less compete vigorously with official systems, that is, so-called strong pluralism. See Chapter 12 on legal and normative pluralism.

<sup>9</sup> In Chapter V see *Comunidad Mapuche Paichil Antreao y otro c/Provincia del Neuquén s/ Acción de Amparo* (Expte. 15.320 - Año 2003) available at <http://odhpi.org/wp-content/uploads/2012/07/amparo-paichil-JUNIN.pdf> (in Spanish) where the court confronted the state and big business; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) where both the state and public held a different view to the Court on the death penalty. In *Smit NO and Others v King Goodwill Zwelithini Kabhekuzulu and Others* (10237/2009) [2009] ZAKZPHC 75, a case which dealt with *ukweshwama*, the ritualistic killing of bulls, which animal rights groups sought to prevent, the court, in a delicate balancing of interests, took the view that tolerance of cultural diversity should prevail.

judiciary, more or less en masse, embraces the task, in others, individual cases attest to the tenacity of some judges to bring about equitable transformation.<sup>10</sup>

Second, many of these jurisdictions have been the ill-fated recipients of hegemonic international law, as the examples in previous chapters indicate.<sup>11</sup> Hence, there is a particular need in these courts to oppose, and turn the tide of the oppressive use of international law. Furthermore, it is important to determine how judges, who engage in this challenge, go about creating a cosmopolitan and emancipatory paradigm for the application of international law.

A further consideration, related to the meaning attached to the term 'judiciary' in this study, is the emphasis that falls on national courts. For reasons of brevity and internal integrity, the thesis does not include traditional or community courts. The operation of these however, is by no means irrelevant. What happens in these courts is inexorably linked to the broader context in which judgments in national courts are situated.

Furthermore, the point was made earlier that traditional or customary systems have often been relegated to categories of non-law, or are viewed as rules that do not constitute 'proper' law.<sup>12</sup> In so doing, the wisdom and knowledge contained in these systems have been subordinated to western legal hubris. I suggest that these factors should be harnessed, first, to flesh out particular contexts, and second, to render domestic adjudication cosmopolitan, that is, 'open' to divergent realities. I subsequently explain that overlapping values and

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<sup>10</sup> See Chapter V for cases, which verify the latter; and for example Rothwell 'Australia' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) on the jurisprudence of (Australian) Justice Kirby, who despite resistance, explores every option available to ensure that the interests of justice are served. An example of a judiciary, that as a whole is most transformational, is that of the South African Constitutional Court. See Dugard 'South Africa' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009).

<sup>11</sup> See Chapters I 2(e) and II 4(b).

<sup>12</sup> Chapter I 3(c).

principles from different cultures can provide salutary guidance to augment one another and transcend normative relativity.<sup>13</sup>

Although the judiciary appears to be a natural choice for the role of mediator and agent for the renewal of international law, there are many difficulties which could frustrate this idea. The present chapter highlights both inherent and exogenous problems which may hamper the process of reconstruction.<sup>14</sup> An important consideration in this regard is that, for purposes of the study, the judiciary is construed in the abstract, as an official organ. It is not always possible, however, to separate it from the people who comprise it, and especially from some of the problems, which stem from the personal idiosyncrasies of individual judges.

Furthermore, the crucial adjudicative processes of contextualisation and particularisation, once again bring into relief questions about the nature of law, normative conflict, the bindingness of various norms, and tensions between

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<sup>13</sup> See Weeramantry 'International law and the developing world: A millennial analysis' (2000) 41 *Harvard International Law Journal* 277; and Chapter IV 9(c) and 9(e). To illustrate: the South African courts, especially the Constitutional Court, have repeatedly made use of transcending principles such as the interrelatedness of the customary principle *ubuntu* and human dignity, in for example, the locus classicus *S v Makwanyane and Another* (n 9). See especially para 308 where *ubuntu* is defined as encompassing fundamental values of respect and human dignity premised on conciliation rather than conflict. Other principles which have been used to encourage greater respect for all in the community, include *batho pele* – people first, and *morena ke morena ka batho* – a chief is a chief by the people. See Mokgoro J in *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 (CC) at [62]: 'In the context of a contemporary democratic public service like ours, where the principles of batho pele, coupled with the values of ubuntu, enjoin the public service to treat people with respect and dignity and avoid undue confrontation...'. Bennett 'Comparative law and African customary law' in Reimann and Zimmermann (eds) *Oxford Handbook of Comparative Law* (2006) 647 and 651, explains another time-honoured customary law principle, which is the corollary of the previous ones, namely that for those in authoritative positions, their role is one of responsibility and the emphasis is not on powers and rights.

A further example, of a unique principle that transcends relativities, is the traditional macrocosmic conceptualisation of law found in indigenous systems. This sees humans and the environment as one, and as such, may provide a valuable perspective in terms of combating environmental challenges. See Menski *Comparative Law in a Global Context* 2 ed (2006) 410; Glenn *Legal Traditions of the World* 4 ed (2010) 61ff.

<sup>14</sup> Inherent problems typically include forms of judicial bias and preconception, and external problems relate, for example, to institutional constraints upon the judiciary, such as those imposed by doctrines like the separation of powers and act of state. See 5 below.

global and local interests – all of which place many obstacles in the way of judicial mediation.

This chapter therefore suggests a counter-narrative that confronts and attempts to overcome some of these hurdles. In tandem with the previous chapter, it creates a theoretical foundation which endorses the submission that both international law as a system and the function of the judiciary as mediator and agent are responsive to an emancipatory construction.

### **(b) The ‘cosmopolitan and emancipatory *application*’ of international law**

Another key concept, repeatedly encountered, is the term 'application' (of international law). In its broadest sense, it means the use or deployment of international law by judges in domestic courts to resolve various matters. Hence, subsumed under the term is direct, indirect and interpretive application. In other words, whenever courts have recourse to international sources, whether they are formally binding or otherwise, all such uses are included under the term 'application'.<sup>15</sup> Consequently, its norms, values and principles, which include soft law, are referred to. Instances of the ‘Trojan horse effect’ of international law, namely, as contained in constitutions, national legislation and precedent, are also relevant.<sup>16</sup> I likewise include oblique references to what are, in effect, bottom up versions of international law, which are garnered from comparative references to foreign judgments. This concept, which has particular significance for the development of the analytical framework of the present study, is detailed in the following chapter.<sup>17</sup>

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<sup>15</sup> See Moran ‘Shifting boundaries: The authority of international law’ in Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007) 167, who draws a distinction between application and having 'recourse' to international sources. I do not employ this distinction here.

<sup>16</sup> See Chapter II 3 for an explanation of the 'Trojan horse effect'.

<sup>17</sup> Chapter IV 9(d) and (e).

In addition, 'application' is centred on the pivotal ideals of cosmopolitanism and emancipation. These concepts are closely interrelated, and, for present purposes, are deemed to imply that, through its cosmopolitan (which presupposes its counter-hegemonic) application, international law can be rendered emancipatory, that is, beneficial to all those nations and communities, and even individuals, who are affected by its operation.<sup>18</sup>

Accordingly, if one considers the normative elements that converge in domestic courts, namely, the national, subnational and international, it is important to understand that hegemony and oppression can occur at any one of these levels. Thus, the counter-hegemonic application of international law may mean that after due consideration has been given to the relevant socio-cultural context, the most beneficial or emancipatory application may be that of the international norm, even if it conflicts directly with the local norm, or, conversely, that the international norm is interpreted in a way that is congruent with the local.<sup>19</sup> A third possibility is that the local norm trumps the international, whether it is explicitly called 'international law', or is present in a domestic guise.<sup>20</sup>

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<sup>18</sup> For the sake of clarity, I repeat the definitions provided in Chapter I: 'Cosmopolitanism' means a transnational orientation and signals a stance of openness toward a plurality of divergent realities, ideologies and cultural experiences. This orientation may counteract both hegemonic universalism and oppressive relativism. 'Emancipation' in the application of international law in domestic courts means a cosmopolitan orientation, which offers release from and facilitates the possibility of transforming oppressive conditions. It is achieved by means of an equitable balancing in ethical-practical rationality, of the interests of all stakeholders.

<sup>19</sup> See *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC), which construed the right to equality of women within an indigenous context of tribal leadership. A number of examples where international law was *not* applied in an emancipatory manner have been given throughout, but for the sake of completion, I shall again refer to the example of immovable property laws with respect to many Third World communities. In various cases, international law norms which demand individual title to land, or (western styled) law reform based on these, are imposed without regard for the local property regime, which usually incorporates various categories of rights of usage. When, for example WTO standards are foisted upon communities, many vulnerable groups lose their rights because traditional safeguards are negated. It is in cases such as these where a contextual enquiry would allow a nuanced application of international norms that would not deprive persons of their rights under indigenous law. See for example Nyamu 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?' (2000) 41(2) *Harvard International Law Journal* 381; Kelley 'Unintended consequences of legal westernization in Niger: Harming contemporary slaves by reconceptualizing property' in *Schlesinger's Comparative Law* 7 ed (2009) 126-130.

<sup>20</sup> See for example *Smit NO v King Goodwill Zwelithini* (n 9).

The point is that, whether the application, or at times, the non-application of international law is emancipatory depends on a specific context, and above all, does not mean that the international law norm is automatically the most just or emancipatory in a given context. International law can therefore be rendered counter-hegemonic and emancipatory in a number of ways, whether through its top down or bottom up applications, or even its non-application – provided that the context was fully taken into account and that the interests of all parties were balanced accordingly.

The domestic application of international law, as described above, therefore correlates to the compound, 'three-dimensional' normative context noted earlier.<sup>21</sup> These dimensions refer to the relationship between international law and the relevant national system, the relationship between international law and the relevant subnational system(s), and, in addition, the comparative relationship between different national systems. The emancipatory resolution of tensions existing between the dimensions thus depends on the quality of judicial mediation. Consequently, 'application' implies navigation of contextual middle spaces, mediation and the balancing of interests.

### **(c) International law and 'subnational' regimes**

The final term to be clarified at this point is that of 'subnational' norms and orders. By this I mean the norms pertaining to various identifiable indigenous, cultural and religious or quasi-religious groups, which adhere to recognisable and established normative regimes. These regimes are distinguished from others, because, whether through actual or moral sanction, they exert significant compliance, sufficient to dislodge national laws.<sup>22</sup> In other words, by 'subnational' I refer to the relative, 'semi-autonomous social fields' which may compel

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<sup>21</sup> See however, Chapter IV 9 for a detailed analysis.

<sup>22</sup> See Sarfaty 'International norm diffusion in the Pimicikamak Cree nation: A model of legal mediation' (2007) 48 *Harvard International Law Journal* 441 for a very good example of indigenous laws trumping national legislation.

adherents to defy national or international laws and standards, or at best, to find themselves torn between different systems which demand observance.<sup>23</sup>

The term subnational is nevertheless misleading. Although cultural and religious groups and their laws are perceived as subnational from a statist perspective, and may even enjoy a certain amount of recognition and protection from the state, many subnational normative orders are in fact transnational or global phenomena, such as, Islam and other families of religion, or cultural and linguistic communities that are not contained within geopolitical borders. Nonetheless, since this study focuses on aspects pertaining to domestic courts, these entities present themselves as 'subnational' for purposes of domestic adjudication. In turn, they contribute, whether as sub- or supranational expressions, to the context within which international law is applied.

### **3. A vision for the role of national courts in the application of international law**

*Courts are the great adjusters of law to social realities; they perform their work of adjustment with or without the licence of the legislator.*<sup>24</sup>

*In line with more systemic developments in international and comparative litigation, domestic courts seem to be gradually emerging as real or potential partners with international judicial and quasi-judicial bodies in a dynamic jurisprudential process of (human rights) law-interpretation and application.*<sup>25</sup>

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<sup>23</sup> The prohibition on the wearing of headscarves by Muslim women, which has cropped up in a number of countries, is a case in point. See for example Fournieret 'France: Banning legal pluralism by passing a law' in *Schlesinger's Comparative Law* 7 ed (2009). See also Amien 'Muslim personal law (MPL) in Canada: A case study considering the conflict between freedom of religion and Muslim women's right to equality' in Brems (ed) *Conflicts between Fundamental Rights* (2008). The frequently mentioned concept of 'semi-autonomous social fields' was developed by Moore *Law as Process: An Anthropological Approach* (1978).

<sup>24</sup> Allott *The Limits of Law* (1980) 101.

<sup>25</sup> Pentassuglia (n 6) 190.

*[T]he formal legal system ... performs a balancing act. At times it tries to maintain a firm stance, at other times it allows the traditionalist views to be heard ... This is mostly achieved by the navigational skills of the judge.<sup>26</sup>*

*[W]hile there is no such thing as objective judgment, it is nevertheless possible, indeed important, to strive for good judgment.<sup>27</sup>*

The potentially hegemonic nature and application of international law were previously investigated. This section deals, in particular, with the question of which agent has the ability to spearhead the reconstruction of international law toward cosmopolitanism and emancipation.

The 'awakening' of civil society, and its resistance of oppressive forces in general, certainly plays an important part.<sup>28</sup> Nevertheless, although civil resistance and public pressure on a large scale are increasingly achieving shifts in power flows and structures (as evidenced by the Arab Spring), such hard-won victories often come at great cost to those individuals who are struggling for change. Recent history is marred by the loss of life of rebels and reformers alike, and testifies to the hardships wrought by social and economic dysfunction or even collapse, which often accompany resistance. Moreover, civil resistance is seldom a speedy process, and any change that might eventually result usually takes an agonisingly long time to bear fruit.<sup>29</sup> Even so, across the globe, the

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<sup>26</sup> Örucü 'Judicial navigation as official law meets culture in Turkey' (2008) 4(1) *International Journal of Law in Context* 35 at 59, in the context of Turkey, with a strictly laic legal system which often contradicts religious and socio-cultural norms and traditions.

<sup>27</sup> Knop 'Here and there: International law in domestic courts' (2000) 32 *New York University Journal of International Law and Politics* 501 at 531.

<sup>28</sup> See for example Okafor 'Poverty, agency and resistance in the future of international law: An African perspective' in Falk et al (eds) *International Law and the Third World* (2008), and Elver 'International environmental law, water and the future' in Falk et al (eds) *International Law and the Third World* (2008) 192-194.

<sup>29</sup> From a general perspective, the 'Arab Spring' of 2011 well illustrates the serious repercussions following popular uprisings. More specifically in terms of international regularisation, the 'Occupation Movement' of 2011 indicated the fierce resistance to the WTO and related agencies. Other such movements are well documented, and a great number of internet sites are devoted to these, e.g. [www.huffingtonpost.com/2009/11/28/geneva-wto-protests-2009](http://www.huffingtonpost.com/2009/11/28/geneva-wto-protests-2009); last accessed 27-11-2011 <http://toronto.mediacoop.ca/blog/moira-peters/3668> last accessed 27-10-2011; see also the

agency of non-state actors and civil society appears to be bringing about incremental, yet profound change in international law structures, and is likely to increase in vigour.<sup>30</sup> On the other hand, counter-hegemonic advocacy can come from other sources.

This study focuses one such possible agent, the judiciary, which, as the following argument shows, is strategically placed to spur counter-hegemonic emancipation. I maintain that, in a number of significant respects, the judiciary enjoys substantial advantages as a mediator and facilitator of transformation over political and civil advocates.<sup>31</sup>

The thrust of the argument is that, nebulous criticisms against the hegemony of international law, which demand that it is reconstructed counter-hegemonically, find concrete expression in domestic courts. In these, the interlacing of international, national and subnational elements, amplifies the potential for normative conflict that may result in the oppressive, top down imposition of international law. Hence, a good opportunity presents itself to the judiciary to negotiate the cosmopolitan and emancipatory application international law in a manner that will render it less intrusive, and more congruent with the socio-cultural and legal environment pertaining to the host.

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world-wide petition by AVAAZ ([www.avaaz.org](http://www.avaaz.org)) to effect changes to the exclusive nature of the G20 summit in Cannes, 2011. Singer *One World: The Ethics of Globalization* 2 ed (2004) 52 is prompted to ask 'Has any non-criminal organization ever been so vehemently condemned on such wide-ranging grounds by critics from so many different countries...?' The question that remains, however, is how successful these initiatives really are. See also Allott (n 24) 93-96 on the limited effect of popular involvement in law-making; McMichael *Development and Social Change: A Global Perspective* (1996) 211-238 on social responses to hegemonic globalisation in general.

<sup>30</sup> Baxi 'What may the "Third World" expect from international law?' in Falk et al (eds) *International Law and the Third World* (2008) 11, on the 'compossibility of authorship of international law'; but see Charlesworth et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) 15: 'There remains, however, little role for non-state entities in the development and application of international law.'

<sup>31</sup> For example, Kumm 'Democratic constitutionalism encounters international law: Terms of engagement' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 268-270, on possible advantages of the judicial process over political initiatives in certain areas.

There are, however, many challenges facing the judiciary in this regard. They are compounded by the fact that international law, because it is deemed 'universal', is not construed in a manner that bridges the gaps between local and global contexts, let alone between different subjectivities. Similarly, the judiciary does not have well-developed mechanisms to deal with diversity and normative plurality, and so, together with international law, becomes 'a part of the problem and not of its solution'.<sup>32</sup> Yet equally, I contend that resistance against the possible hegemonic impact of international law in domestic legal environments cannot be carried out as effectively and authoritatively as by the judiciary, situated, as it is, exactly at the intersection of local and global dimensions.

The domestic court, rooted within a particular socio-cultural context, not only presents a platform for the articulation 'other' realities; it is also the forum where inherent biases and hegemony can be challenged, and wherein the 'other' might be heard and vindicated.<sup>33</sup> This requires the judiciary to interrogate dominant paradigms, by respecting and taking local contextual realities into account. In the words of Marks, courts should recognise and act upon the fact that '[w]hat you hold to be true about the world depends on what you take into account, and what you take into account depends on what you think matters'.<sup>34</sup>

The advantage of domestic courts as mediator therefore lies therein that they present a conceptual space in which judges can negotiate between competing interests at various levels. It may, however, be a general pre-condition that ingrained bias, whether institutional or personal, must be neutralised before

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<sup>32</sup> Koskeniemi 'The fate of public international law: Between technique and politics' (2007) 70(1) *Modern Law Review* 1 at 23; and see Chapter II 4(b).

<sup>33</sup> Thus the 'other' here would typically refer to non-mainstream groups, who might adhere to a different normative or moral code. See Okafor (n 28) especially 100-104; Kennedy (n 1) 829. Bias is a multifaceted phenomenon, in that it occurs on many levels and in many guises. Although, the personal bias of individual judges can play a considerable part in judicial outcomes, the focus here is on institutional, political and academic bias and/or tradition which shape the outlook of the judiciary as a whole. See Koskeniemi 'The politics of international law – 20 years later' (2009) 20(1) *European Journal of International Law* 7 at 9-12; Koskeniemi (2007) (n 32) 4-9; Bybee *All Judges are Political – Except When They are Not* (2010), for a realist perspective.

<sup>34</sup> Marks *The Riddle of all Constitutions* (2000) 121.

the contextual and cosmopolitan application of international law becomes possible. Clearly, of its own accord, no theory about judicial practice can obviate such bias. Hence, the weakness of any model for agency lies in the fact that it requires the necessary will on the part of the prospective agent to assume the designated role.

Even so, as the many cases analysed in a subsequent chapter illustrate, the potential exists for judges to do just that. It appears that even if a 'judgment is not about objective truth-claims, neither is it merely a matter of subjective preference.'<sup>35</sup>

The surpassing potential for judicial mediation is well documented in a study of indigenous land rights conducted by Pentassuglia, who notes that, the cases under consideration,

exemplify the direct or indirect role of domestic courts in reducing or even bridging the gap between specialized instruments and domestic law, in circumstances in which no regional judicial or quasi-judicial human rights body is available. There are also national courts which themselves have proved influential on other national jurisdictions, and can provide protective models for international courts and court-like bodies, as appropriate.<sup>36</sup>

His study is a comparative one, and the argument relies on the jurisprudence developed in a number of different domestic jurisdictions. Thus for example, with reference to Aboriginal title, Australian courts 'have taken a dynamic approach to customs and traditions to allow for a degree of change in the content of practice since colonization.'<sup>37</sup>

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<sup>35</sup> Knop (n 27) 531-532.

<sup>36</sup> Pentassuglia (n 6) 123.

<sup>37</sup> Pentassuglia (n 6) 193.

I maintain that, similarly, with a broad spectrum of cases from many different jurisdictions, sufficient synecdochic evidence of emancipatory judicial mediation can be established.

At this juncture, it is useful to consider the distinction between the meta-operation of international law globally, and its operation and impact at national level. The broad production and influence of international law at the global level is not the focus of this study, but rather the material effect it has on particular domestic systems. However, these two spheres are interconnected, and thus much of the global narrative about international law may be transposed to illuminate various processes unfolding at national level. This is because the international and national are not sealed units, but rather constitute a proverbial two-way street, wherein both spheres exert reciprocal influence on each other.<sup>38</sup> In addition, both systems experience parallel exigencies, such as those relating to the environment, terrorism, international criminal activities, economic pressures, and the like.<sup>39</sup>

Consequently, in order for international law to be counter-hegemonic and emancipatory at local level, it must, above all, be that at global level. And there are compelling reasons for it to accommodate and promote local agency, and to interrogate the continued denial of Third World and other non-mainstream agency.<sup>40</sup> The reason, and one that has been emphasised throughout, is plain: unless law, whether national or international, resonates with local realities, it will

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<sup>38</sup> For example Charlesworth et al (n 30) 8.

<sup>39</sup> Kennedy (n 1) 831 'It is hard to think of a legal problem which does not cross ... national boundaries.'

<sup>40</sup> See Okafor (n 28) 100-104.

become an 'irritant', elicit resistance and ultimately suffer rejection.<sup>41</sup> It will become 'helpless or superfluous'.<sup>42</sup>

In order to have local currency, international law must therefore be attuned to finding and giving effect to locally relevant solutions. It cannot merely rely on the ready-made, one-sided solutions promoted by international regimes, such as the WTO or international human rights law institutions. As McCorquodale says, a 'different' but 'vibrant story' of international law, based 'contemporary reality and not historical fiction', must be told.<sup>43</sup>

Therefore, the meta-structures of international law must continue to be challenged, especially on a transnational level, in order to dislodge global hegemonic patterns effectively.<sup>44</sup> The hegemony manifested within a given domestic domain, must likewise be targeted.<sup>45</sup> Yet, the point was made that despite many voices clamouring for local change, transformation is often modest and sluggish.<sup>46</sup>

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<sup>41</sup> Teubner 'Legal irritants: Good faith in British law or how unifying law ends up in new divergences' (1998) 61(1) *Modern Law Review* 11, on the concept of legal irritants. See An-Na'im 'Why should Muslims abandon *Jihad*? Human rights and the future of international law' in Falk et al *International Law and the Third World* (2008) 87; Özücü *The Enigma of Comparative Law* (2004) 98-99; on the rejection of norms that are alien within a particular context. See Allott (n 24) 121ff on the exclusion of law by other normative systems.

<sup>42</sup> Paulus 'International law after postmodernism: Towards renewal or decline of international law?' (2001) 14 *Leiden Journal of International Law* 727 at 792.

<sup>43</sup> McCorquodale 'International community and state sovereignty: An uneasy symbiotic relationship' in Warbrick and Tierney (eds) *Towards an International Legal Community* (2006) 265.

<sup>44</sup> Okafor (n 28) 104-107 on different opinions about resistance to the problem of domination and the possible reconstruction of international law.

<sup>45</sup> Beatty *The Ultimate Rule of Law* (2004) 167, succinctly sums it up as '...justice is a local, not universal ideal'.

<sup>46</sup> In this respect, I single out only one scenario, which is a good example of the way in which transformation is often not attained, despite great effort. I draw on personal experiences and note Workman *Heart of Dryness* (2009), on the plight of the Khua/Khoe or San (Bushmen) in and around the Central Kalahari Game Reserve in Botswana. For many years, powerful international NGOs have either challenged, or attempted to ameliorate the government's egregiously oppressive and discriminatory policies. Additionally, smaller NGOs, private initiatives and the media from all over the world have attempted to bring about change. Sadly, very little has changed. See [www.survivalinternational.org/tribes/bushmen](http://www.survivalinternational.org/tribes/bushmen) last accessed 07-06-2013.

Transformational agency therefore implies not only the will, but the capacity and capability to accomplish a certain task more purposively than the mere voicing of opinions.<sup>47</sup> It is therefore not surprising that, in the long run, many reformists turn to the courts to bring about substantive change.<sup>48</sup>

In summary, key to the authorship of this different 'story' of international law, whereby local imperatives are respected in the face of the 'universality' of international law, is the judiciary, both as gatekeeper and as mediator between global and local dimensions. Furthermore, as explained later, domestic courts not only have the ability to safeguard local interests, they can also elevate these to the global plane as legitimate communitarian concerns.<sup>49</sup> In so doing, courts trigger upward flows of cosmopolitan and emancipatory international law, which can ultimately lead to its reconstruction.<sup>50</sup>

#### **4. The judiciary as mediator of reconstruction: More about why and how**

*[T]he domestic interpretation of international law necessarily involves art and invention. This recognition places ethical as well as intellectual demands on judges ...*<sup>51</sup>

David Kennedy, in his assessment of 'the mystery of global governance', maintains that we know too little and continue to ask the wrong types of questions about the flows of power. This is because knowledge 'clumps in the centers', while little is known about the 'networks of informal spaces', and yet historically, 'the middle spaces [away from the centres] were crucial midwives to

<sup>47</sup> See Okafor (n 28) in particular 100-104.

<sup>48</sup> Judicial intervention was accordingly how the plight of the Khua/Khoe (n 46) was eventually eased. See the detailed discussion of the landmark *Sesana* case (52/2002) [2006] BWHC1 in Chapter V.

<sup>49</sup> For example, through various transjudicial processes explained in Chapter IV 9(d). See also Slaughter 'Judicial globalization' (1999-2000) 40 *Virginia Journal of International Law* 1103.

<sup>50</sup> See Chapter IV 9(e).

<sup>51</sup> Knop (n 27) 529-530.

new institutional and political reforms' – and I argue that they still are.<sup>52</sup> As noted above, the role of domestic courts is paramount to finding the cusp between various social and normative forces at work, and in resolving issues which are pulled asunder by different ideological stresses in the 'middle spaces' between the local and global. I suggest below how courts could deal with some of these challenges.

**(a) The judiciary, 'strategic sensitivity' and 'critical distance'**

The first obvious step in the mediatory judicial process is that of awareness and acuity. Koskenniemi emphasises the importance of scrutiny and awareness in relation to the forces which shape the international landscape. 'One is to examine more closely the strategic choices' by 'adopting a more nuanced attitude to the jurisdictional conflicts and the attendant choices ... This demands increasing sensitivity for strategic choices ... Only strategic sensitivity and the pursuit of critical distance can be recommended.'<sup>53</sup>

Contrary to searching for suitable answers in the politicisation of law, as does Koskenniemi, I have argued that the domestic judiciary is optimally positioned, and constitutes perhaps the only viable group of actors capable, not only of adopting such 'strategic sensitivity' and 'critical distance', but of facilitating emancipatory outcomes to reconstruct international law from the bottom up.<sup>54</sup> In the face of its indeterminacy, on one hand, and the assortment of systemic biases afflicting international law on the other, what is needed is precisely its

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<sup>52</sup> Kennedy (n 1) 833-834, see also for example *Elver* (n 28) 192-194, on the effect of popular resistance, as 'midwife' to reform of, for instance, World Bank and IMF initiatives.

<sup>53</sup> Koskenniemi (2009) (n 33) 12-14.

<sup>54</sup> I note again that judges and the judiciary in many parts of the world are severely constrained by, for example political or religious structures. However, across the globe the very act of judging assumes the exercise of discretion, which in turn suggests at least a limited amount of judicial freedom. See 1(a) and 3 above, and the cases in Chapter V.

well-deliberated particularisation, from a (theoretically) apolitical institution with an authoritative voice.<sup>55</sup>

Although arguing from a different perspective, Koskenniemi expresses the idea of reform from a neutral position as follows. 'There is much to be said in favour of critical voices staying *outside regular administrative procedures*, as critics and watchdogs, flagging the interests and preferences of those who are not regularly represented in international institutions.'<sup>56</sup>

Even if courts are not in themselves those 'critical voices', they constitute the fora where these are most likely to be heard, and where polemical issues are concretised. As noted above, the mere articulation of issues does not automatically translate into transformation, but, in reality, further steps are required to harvest the fruits of critical and reformist dialogue. In domestic settings, such sequels often take place in the courtroom, where reform agendas, including legislative provisions, are tested and given substance.<sup>57</sup> Thus, the judiciary is in many ways the fulcrum of both the process and of the reification of transformation. As such, it has surpassing potential for forging change, and more so in view of its institutionally entrenched neutrality and independence.<sup>58</sup>

This is not to say that judges are per se politically neutral and have been scoured clean of any form of ideology.<sup>59</sup> Neither does it mean that 'commitment

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<sup>55</sup> See Chapter II 2 and 4(c) on some of the difficulties afflicting international law; Chapter IV 8 on the particularisation or translation of international law when it is adapted to a particular domestic setting.

<sup>56</sup> Koskenniemi (2009) (n 33) 14.

<sup>57</sup> In this regard, one pertinent example is the critical role played by courts in fleshing out and determining the parameters of constitutional rights provisions. Without the further jurisprudential step, fundamental rights, say, to equality or dignity, would be hollow 'paper' rights. See for example Paulus (2009) (n 4) 212-213.

<sup>58</sup> The point here is that in constitutional systems, most courts are at a minimum 'officially' or 'theoretically' neutral and independent, which provides a well-structured basis from which to proceed.

<sup>59</sup> See for example, Bybee (n 33) 5: '... the modern judicial process really is an uneasy mix of legal and political factors.'

to "law" is automatically progressive', or that law is inherently emancipatory.<sup>60</sup> To the contrary, judges, law and domestic legal systems are acutely susceptible to ideological bias and political manipulation, and judges are not immune to the pursuit of strategic preferences. Since law is not abstract, but contextually embedded, it is relational, and can therefore not offer an objective solution to every problem.<sup>61</sup> However, the institutional and political independence of courts, at least in theory, afford these a better chance of objectivity in the pursuit of justice. That is, when judges display the necessary will to remain sensitive to the choices they make, and recognise the seductive pull of deeply ingrained preferences, they might avoid some of the pitfalls associated with ideological and institutional biases.

In an interesting assessment, Singh builds on the Kantian notion of international law as an 'ethical project'.<sup>62</sup> He calls for the rejection of 'the core corrupting developments', notably deformalization and managerialism which have accompanied the fragmentation of international law, leading to a 'reduction of the individual', in as much as the 'law applier becomes the bureaucrat'.<sup>63</sup> Contrary to Koskenniemi's return to formalism, albeit 'atypical', he argues that the answer lies in focusing the attention on the 'centrality of the legal professional'.<sup>64</sup> In this, I concur and maintain that the 'legal professional' *a fortiori* includes the judge. According to Singh, the legal professional ought to function with 'existentialist freedom', 'embracing subjectivity, endorsing inclusivity, and resisting solipsism'.<sup>65</sup>

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<sup>60</sup> Koskenniemi (2009) (n 33) 17.

<sup>61</sup> Allott (n 24) 121 'Law is only one normative system among many.' See also Kennedy (n 1) 848-849; Singh 'The potential of international law: Fragmentation and ethics' (2011) 24 *Leiden Journal of International Law* 23 at 35.

<sup>62</sup> Singh (n 61) especially 35-43. He focuses in particular on the way in which the concept is explored by Koskenniemi.

<sup>63</sup> *Ibid*; quotes at 26 and 39.

<sup>64</sup> *Id* 42-43.

<sup>65</sup> *Id* 42. He sees these values as embodying Koskenniemi's interpretation of the Kantian 'moral politician'. Unfortunately however, anyone looking for a robust resolution to the argument will be disappointed, as Singh conspicuously circumvents the *how*.

The merit of Singh's reasoning therefore lies in the observation that agency in the form of the legal professional is needed – on one hand, to resist 'corrupting developments' in international law which reduce him or her to a technician and managerialist, and, on the other, to affirm an ethical and moral 'culture of inclusiveness' which transcends bias and polarisation in international law.<sup>66</sup> His call is for a return by international legal professionals to 'spirituality' and 'ethical responsibility' in a manner suggested by Foucault, and for the disavowal of the present 'universal unbrotherliness'.<sup>67</sup>

These laudable ideals find resonance in the present analysis of the role played by the judiciary in exploring ethical, emancipatory and cosmopolitan nuances at the 'middle spaces' between global and local contexts. With reference to the framework developed in this study, I suggest further that the navigation of such intermediate spaces requires a jurisprudential 'map' and 'tools', which help to avoid various forms of ideological polarisation associated with the judicial role.

First however, it is necessary to consider existing jurisprudential models to sketch some of the possibilities already available to the judiciary.

### **(b) More about how: Pointers from the feminist inspired jurisprudential model**

*Feminist and critical race theory have focused on how to reconcile concepts of justice and equality with the recognition of differences within and among communities whose needs may appear to be mutually irreconcilable.*<sup>68</sup>

Further to how some of the above might be attained, different conceptual frameworks have been developed in other areas. These fields, such as those

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<sup>66</sup> Id 41-42.

<sup>67</sup> Id 43.

<sup>68</sup> Curran 'Dealing in difference: Comparative law's potential for broadening legal perspectives' (1998) 46 *American Journal of Comparative Law* 657 and note references to important contributions by Minow, MacKinnon and Colker.

relating to gender equality, might aptly be termed 'middle spaces'.<sup>69</sup> On the basis of gender classification, men and women represent two different subnational groups, which in many parts of the world stand in stark power asymmetry to each other. Dominant paradigms and institutions frequently entrench this asymmetry.<sup>70</sup> International human rights law and dialogue, feminist movements and constitutionalism in many countries have sought to address gender hierarchy and the suppression of women, often with a modicum of success, but equally often without any such.<sup>71</sup>

At the tip of the trajectory toward equality, is the judiciary, where it must give concrete effect to hard-won legal reform. It also finds itself in the invidious position of overcoming myopic bias through the reinterpretation, or striking down of oppressive provisions, which had previously escaped censure. In this regard, the South African Constitutional Court, among others, has shown its mettle in a number of significant judgments.<sup>72</sup>

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<sup>69</sup> The topic is extremely wide and the literature is superabundant. See for example Merry *Human Rights and Gender Violence* (2006); Paulus (2001) (n 42) 740-743; Beatty (n 45) 76-80 for a brief overview of feminist jurisprudence; Nyamu (n 19) for an overview of different approaches and in particular that of 'critical pragmatism'; Chinkin and Charlesworth 'Building women into peace: The international legal framework' in Falk et al (eds) *International Law and the Third World* (2008). Equality and non-discrimination theories and official practice in areas of race, religion, sexual orientation and so forth, also point to maps for the judicial navigation of middle spaces between centralities and peripheries. I single out feminist theory simply because gender discrimination is the biggest 'middle space' imaginable, cutting the entire human race into two sectors.

<sup>70</sup> For example Chirwa *Human Rights under the Malawian Constitution* (2011) 226-227; Beatty (n 45) 80-98; *Attorney-General v Dow* 1994 (6) BCLR 1 and see the discussion of *Dow* and other cases dealing with gender equality in Chapter V.

<sup>71</sup> Again, there is much literature. See for example McMichael (n 29) 226-233; Merry (n 69) with reference to gender violence.

<sup>72</sup> See for example *Daniels v Campbell NO and Others* [2003] 3 All SA 139 (C) and *Daniels v Campbell and Others* 2004 (5) SA 331 (CC) where the Constitutional Court held that the words 'spouse' and 'survivor' in the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 respectively, include the spouses and survivors of monogamous Muslim marriages who were previously prevented from benefiting from their husbands' estates; and *Bhe and Others v Magistrate, Khayelitsha, and Others* 2005 (1) BCLR 1 (CC) where the rule of male primogeniture in the customary law of succession, which hinders women and extra-marital children from inheriting property, was declared to be inconsistent with the Constitution and invalid, since *inter alia* it 'violated the equality rights of women and was an affront to their dignity', per Langa DCP para 95.

Much can be learnt from the jurisprudence thus developed about the role of the judiciary in securing justice for non-dominant groups. First, the gender debate has proved that the judiciary is adept at rejecting obdurate allegiance to existing power relations. Second, it has shown that entrenched biases can shift, not only on paper, but also by way of legal remedies.<sup>73</sup> I suggest that in a manner similar to gender related jurisprudence, courts can be facilitators of justice and emancipation for other marginalised groups.

In practice it means that, judges are to take cognisance of, and engage in cross-cultural dialogues. They can develop a non-hegemonic, contextual understanding of the 'other', particularly in cases dealing with subnational entities. In terms of international law, it can be argued that some form of 'cross-cultural dialogue' is *always* necessary when international law is transposed onto the pluri-legal domestic landscape in order to establish a harmonious 'fit', particularly where international law is perceived to be in conflict with the local context.

Nyamu, in response to gender hierarchy, describes the process of cross-cultural dialogue as the 'pursuit of a global consensus' which interprets the 'relationship between international human rights and local culture as "a genuinely reciprocal global collaborative effort".<sup>74</sup> She also calls attention to the process of 'internal discourse' that goes hand in hand with cross-cultural dialogue. It entails 'active deliberation on such issues as: recognizable standards of cultural legitimacy ... [and] allowable action and reaction to divergent and competing views'.<sup>75</sup> Judges who understand that their role entails the conscious and emancipatory navigation of these cross-cultural spaces will ensure that they do not, in the name of justice, glibly substitute their own judgment and vision for

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<sup>73</sup> See Jayawickrama 'India' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) especially 257-261, on the proactive approach adopted by courts in India.

<sup>74</sup> Nyamu (n 19) 394.

<sup>75</sup> *Ibid.*

those of others – who are equally capable of constructing their own identity, judgment and vision.<sup>76</sup>

In terms of its value to the judiciary, I suggest that, first, the merit of the feminist approach lies in the promotion of 'lateral' thinking, whereby accepted norms can be re-evaluated critically and with sufficient scepticism to challenge their perceived 'rightness'. Second, it fosters a purposive approach, as opposed to one that amounts to theoretical atticism.<sup>77</sup> Thus, the feminist methodology and its resultant successes over the years, in and out of the courtroom, present judges with a counter-narrative and a map – not only of how to navigate between different contingent realities, but a map of how to formulate *and* activate meaningful solutions which transcend hegemonic preconceptions. This entails the rejection of reductionist positivism in favour of a more textured – contextual and emancipatory – understanding of the connections between law, society and social structures.<sup>78</sup>

Nevertheless, the mobilisation of the judiciary, as an advocate for the emancipatory application and transformation of international law, comes replete with onerous limitations. As the case studies in a subsequent chapter illustrate, on one hand, the operation of contemporary international law, coupled with the independent nature of the judiciary in a contemporary *Rechtsstaat*, supports the realisation of a reconstructed and emancipatory international law. On the other hand, these significant positives have their attendant negatives, which curtail such reconstruction.<sup>79</sup> A number of weighty impediments pertaining to the envisaged judicial processes are considered in the following sections.

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<sup>76</sup> Id 395.

<sup>77</sup> See again Jayawickrama (n 73) 257-260, and note that the court went as far as devising binding and enforceable guidelines to be observed in the workplace to prevent sexual harassment, until such time as legislation would be implemented; Beatty (n 45) 80-98 for judicial approaches which brought about far reaching advances in gender equality.

<sup>78</sup> See Chapter I 2(d) and (e); Allott (n 24) 99ff.

<sup>79</sup> For example Hirschl 'On the blurred methodological matrix of comparative constitutional law' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 56-57, on how courts are 'institutionally constrained in their efforts to bring about social change...'; Allott (n 24) 161-236.

## 5. Institutional constraints and thorny questions about the legitimacy and authority of sources<sup>80</sup>

*Judges are rarely free, either legally or morally, to develop their constitutions as they see fit. They are not 'statesmen' ... .*<sup>81</sup>

*It is now conventional wisdom that there is no disinterested perspective that is not embedded in and contaminated by some personal or political view.*<sup>82</sup>

*[W]e must not be seduced by humanitarian claims to a spurious acceptance of a false source of law.*<sup>83</sup>

*We need to question the assumption or aspiration of domestic interpretation as uniform both because it is too simple analytically and because it obscures the possibility that domestic interpretation might help to legitimate international law through a process of particularization and justification.*<sup>84</sup>

In speaking about the domestic application of international law and the role of the judiciary in the reconstruction of a 'new' cosmopolitan and emancipatory international law, it seems to imply that international law is used freely and unreservedly by courts as a matter of course.<sup>85</sup> Such a superficial perception of

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<sup>80</sup> I use the terms legitimacy and authority interchangeably. For an overview of the central tenet of this section see Moran (2007) (n 15).

<sup>81</sup> Goldsworthy 'Questioning the migration of constitutional ideas: Rights, constitutionalism and the limits of convergence' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 141.

<sup>82</sup> Beatty (n 45) 37.

<sup>83</sup> Perreau-Saussine 'Foreign views on eating aliens: The roots and implications of recent English decisions on customary international law as a source of common law limits on executive power' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) 117 quoting Laws LJ in the *Roma Rights Case*.

<sup>84</sup> Knop (n 27) 535.

<sup>85</sup> From a technical perspective, the official status of international law within different national systems depends largely on whether a monist or dualist approach is followed. See a brief discussion in 6 below. However, as Sloss 'Treaty enforcement in domestic courts: A comparative analysis' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 8, points out, comparative research has shown that 'there does not appear to be any significant correlation

international law and the judicial role played in its application would be far from the truth. Rather, the niche and status assigned to international law within national settings, in both monist and dualist systems, may vary – from it being viewed with reverence, to being viewed with 'a mixture of contempt and indifference'.<sup>86</sup> The perceived legitimacy, or otherwise, of any application of international and foreign sources by domestic courts may therefore oscillate between routine acceptance and suspicious rejection, amidst fears that courts could be turned into 'agents of outside powers'.<sup>87</sup>

In certain jurisdictions, overt 'friendliness' to international law may have prompted some writers to conclude that the nature of international law elevates it to a higher-level system of law, which enjoys almost automatic legitimacy, since it appears to have crossed 'the threshold to a constitutional structure'.<sup>88</sup> However,

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between the monist-dualist dichotomy and the actual practice of domestic courts'. For purposes of this study, I refrain from engaging in the monist-dualist debate, but rather concern myself with the actual jurisprudence developed by courts, nonetheless taking cognisance of these approaches whenever necessary.

<sup>86</sup> Sloss in preface and 'United States' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009), on the approach taken by judges in the United States, at xxv, 509-514 and 552-554. See also Chapter II 2, 3 and 6 for different approaches to, and perceptions of, international law. Another example of 'contempt' for international law can be found in the referendum held in Oklahoma in November 2010, aimed at banning the use of international and foreign law in State Courts, available at:

<http://kluwerarbitrationblog.com/blog/2010/11/03/international-law-banned-in-oklahoma-state-courts/> last accessed 26-04-2012.

<sup>87</sup> The (official) *legitimacy* of using international or foreign sources is readily conflated with the *appropriateness* (i.e. the moral or ethical 'legitimacy') of such use, and there is indeed some overlapping. I shall attempt to separate these concepts, but admit to some recalcitrance in this regard, since the point here is that the concept of 'legitimacy' is multi-dimensional, as discussed below. See Choudhry 'Migration as a new metaphor in comparative constitutional law' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 1-13, quote at 8, for an entertaining discussion of these polarised viewpoints; Knop (n 27); Weinrib 'The postwar paradigm and American exceptionalism' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) who argues for an expansive view of foreign and international sources and against exceptionalism; Kersch 'The new legal transnationalism, the globalized judiciary and the rule of law' (2005) *Washington University Global Studies Law Review*, who fears that a conspiracy to undermine state sovereignty through judicial activism is underway. Equally valid are the views of Third World writers, although their views tend to be based on the appropriateness of using international law in Third World contexts, rather than its official legitimacy at national level. See the collections in Falk et al (eds) *International Law and the Third World* (2008); and Anghie et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003).

<sup>88</sup> See for example Sloss (n 85) for court practice which reflects an expansive view of the application of international law in countries such as Germany, India, The Netherlands, Poland and South Africa. Orakhelashvili *Peremptory Norms in International Law* (2006) 10 n 12.

despite these and other, starkly divergent views, the judiciary is never completely absolved from justifying the application of international law, whether it functions within a democratic *Rechtsstaat* or any other type of political order.<sup>89</sup> Within the former, for instance, it needs to adhere to principles such as the separation of powers and the rule of law, which militate against unrestrained judicial activism.<sup>90</sup>

In the light of these and other constraints, how then can the judiciary be an agent for transformation?<sup>91</sup> I suggest that it can be, without necessarily overstepping the boundaries of its role or violating democratic principles. As noted previously, it may be necessary, however, for judges to adopt a more critical view of the map they use for the domestic application of international law, and of the tools needed to manage various constraints and difficulties.

What is argued here is not that the adoption of a 'critical view' necessarily means that more (international law) is better, or that the application of international law must be less circumscribed in domestic settings. To the contrary, what is called for is a more judicious and nuanced application international law, which fully takes the domestic context into account. Thus the concept 'legitimacy' presently under consideration is construed more expansively by recognising that, apart from formal jurisprudential legitimacy, there is also the idea of culture-specific legitimacy. This type of legitimacy, which refers to the question of whether the recipients of law will accept a particular norm as appropriate and binding upon them, is particularly important in the case of competing norms and values endogenous to international, national and subnational regimes respectively.<sup>92</sup>

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<sup>89</sup> See Choudhry (n 87) 5.

<sup>90</sup> For example Beatty (n 45) 5.

<sup>91</sup> The common law act of state doctrine, for example, severely curtails the judiciary under certain circumstances in a number of countries. To illustrate see *The Queen v Seven Named Accused* 127 ILR; *El-Shifa Pharmaceutical Industries Co v US* (2009) 48 ILM 829; *Swissborough Diamond Mines and Others v Government of RSA and Others* 1992 (2) SA 279 (T); *Van Zyl and Others v Government of the RSA and Others* 2008 (3) SA 294 (SCA).

<sup>92</sup> Choudhry (n 87) 18-19 for a brief outline of the different views held for example by Legrand and Whitman in the context of 'legal transplants', and here one can include the transplantation of international law into culture-specific, domestic contexts. Wa Mutua 'The politics of human rights:

Nationally and locally embedded norms, notably constitutions, 'shape and refine a people's self-understanding...in specific cultural contexts'. Thus, the borrowing or migration of legal phenomena from one normative system to another, including the international system, may give rise to 'perverse consequences' when the recipient order is influenced in culturally inappropriate ways through the imposition of 'foreign' values and norms that conflict with those at domestic or local levels.<sup>93</sup> Particularly difficult is normative conflict between international and locally embedded cultural or religious norms, which often do not receive official recognition. In order to mediate such conflict, courts might therefore have to adjust or moderate their own understanding of the criteria for the so-called legitimacy of sources and materials.

Consequently, the question of legitimacy arises at two levels. The first concerns the legitimacy of importing international and foreign norms into the official national system. The second concerns its perceived legitimacy within the relevant national and subnational socio-cultural context, which relates to the manner in which authority is ascribed to different, possibly competing norms. Relevant issues are analysed below in an attempt to formulate active, yet legitimate judicial agency in the development of cosmopolitan and emancipatory international law. Under consideration will be the notion of legitimate judicial practice in relation to judicial activism, the bindingness of various normative sources, and the democratic deficit adhering to the judiciary as organ.

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Beyond the abolitionist paradigm in Africa' (1995-1996) 17 *Michigan Journal of International Law* 591 at 597 n 26, on the concept of cultural legitimacy in the work of An-Na'im.

<sup>93</sup> Walker 'The migration of constitutional ideas and the migration of *the* constitutional idea: The case of the EU' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 316ff at 336-337, with specific reference to the 'migration' of 'constitutional ideas' but which argument can readily be made with respect to the impact of international law on domestic systems.

### **(a) Judicial activism and dialogue versus exceptionalism<sup>94</sup>**

*[T]he existence of international human rights law and other alternative communities of judgment makes additional perspectives available to us and thereby enables us to judge better, even against our own community.<sup>95</sup>*

The dissection of the modern world into sovereign nation-states poses a particular hurdle to the adoption of an all-embracing, cosmopolitan, 'one world' view, not only to politicians, but also to the judiciary.<sup>96</sup> One reason is that national interests are often juxtaposed rather chauvinistically against those of other states and the world at large. Insistence on the 'us' and 'them' configuration of the world has meant that, in some countries, the judiciary is narrowly solipsistic, rejecting what is perceived to be 'foreign' norms and values, regarding these as corrupting and 'un-' this or that nation.<sup>97</sup>

The glaring flaw in this reasoning is quite simply that it ignores the borderless nature, and knock-on effect of many of the world's problems. These problems range from stateless or faceless concerns like the threat of international terrorism or climate change, to problems that may be state-specific, but spill over into others, like poverty and famine, which have an impact on trade and the global economy.<sup>98</sup> Moreover, it obscures the ineluctable fact that legal systems are not hermetically sealed units, and that law in any national regime

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<sup>94</sup> See Weinrib (n 87) for an exposition of the term 'exceptionalism'; Beatty (n 45) 159-160, for general notes on judicial activism.

<sup>95</sup> Knop (n 27) 532.

<sup>96</sup> Singer (n 29). See Chapter II 4(c)(ii) on the problems associated with state sovereignty in relation to the operation of international law.

<sup>97</sup> Weinrib (n 87) cites the United States as a prime example; Alford 'Misusing international sources to interpret the Constitution' (2004) 98 *American Journal of International Law* 57, which typifies the exceptionalist mindset. See also Sloss (n 85). This comparative collection graphically illustrates the different approaches adopted by courts in terms of the enforcement of treaty-based rights in different countries. Note particularly the reluctance of courts in Russia, Israel and the United States in this regard. The jurisprudence developed in South Africa during the apartheid era is another prime example.

<sup>98</sup> Singer (n 29) for example at 7.

consists of a diachronic and contemporaneous diffusion of norms from many sources.<sup>99</sup>

At the other end of the spectrum one finds the wholesale, uncritical judicial 'incorporation' of foreign and international material, apparently because they *are* 'foreign' or 'international'.<sup>100</sup> Apart from blurring the distinction between binding and non-binding sources, this approach obscures the national context into which these norms are inserted, and may result in a hegemonic top down imposition of international or foreign norms. As noted above, the problem here is that if the 'fit' is too poor or tenuous, the international law norm becomes an 'irritant' within the local legal system, and will eventually be expurgated.<sup>101</sup> Or, as Allott puts it, 'the recipients of *Law* ... are the all-important people in legal communication'.<sup>102</sup> Therefore, if the recipients cannot be persuaded to accept something as law, it will have little force or effect.<sup>103</sup>

Hence, there is a need for a balanced approach. On one hand, it is becoming urgent that, when necessary, the judiciary must reconceive or even alter its understanding of what 'national interests' and the 'national consensus' really are. That is, these concepts must be construed within the context of global realities, such as climate change or the competing and unsustainable demands

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<sup>99</sup> Koh 'International law as part of our law' (2004) 98 *The American Journal of International Law* 43 at 47, 53-57; see also Chapter I 6(b), on the 'diffusion' of law; Paulus 'The emergence of the international community and the divide between international and domestic law' in Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007) on the effect of 'the emergence of the international community' on the domestic legal landscape and particularly on judgments.

<sup>100</sup> Waters 'Creeping monism: The judicial trend toward interpretive incorporation of human rights treaties' (2007) 107 *Columbia Law Review* 628; Sloss (n 85) for examples of the judicial practice in countries which are overtly 'friendly' to international law such as Germany, the Netherlands and, to some extent, India.

<sup>101</sup> Teubner (n 41) on 'legal irritants'; Johns 'International law-national law: Thinking through the hyphen' in Charlesworth and Chiam et al (eds) (2005) particularly at 191-194, for case studies of different approaches to judicial activism, seen by some as a danger and corrupting influence, yet by others as beneficial. See also Örucü (2004) (n 41) 146,195.

<sup>102</sup> Allott (n 24) 10-11.

<sup>103</sup> See for example Dan-Cohen *Harmful Thoughts* (2002) 44, on what he calls 'acoustic separation', which occurs when 'certain normative messages are more likely to register with one ... group' rather than with another.

on natural resources. Furthermore, when there is doubt, the judiciary is often the final arbiter in defining the scope of a state's international obligations and has the responsibility to demand state compliance with these. This might necessitate resisting national sentiments or national 'community standards' on certain contentious issues and giving judgments that are aligned with international norms, in what some term the 'civilising' role of courts.<sup>104</sup>

On the other hand, national interests, including the prevailing socio-cultural milieu, cannot simply be subordinated to the 'international' in a mechanistic, universalist manner. An overly partisan acceptance of the 'civilised consensus', that international law is deemed to express, might result in what Menski calls 'uniformising globalism', which is hegemonic and will potentially elicit resistance, as opposed to the textured process of 'pluralistic glocalisation' which is advocated here.<sup>105</sup> For present purposes, this simply means that instead of attempting to squeeze all legal systems into a uniform, globalised mould, plural and local elements which render different systems unique are not summarily ignored or discarded. Instead, they are construed within a cognitive framework which respects both local and global interests and endeavours to give them recognition to the fullest degree possible within a given context. Such an optimising framework is precisely what the present study seeks to develop.

In sum, the extent to which reconstructive judicial activism can legitimately be exercised does not have a perfect answer, and will depend on many factors. Nonetheless, for judges to effect a transformation that is both locally and globally relevant, they have to cultivate a sense of cosmopolitan ecumenism that is rooted in 'socio-legal plurality consciousness', and furthermore they must ascribe the requisite weight to interests at both global and local levels.<sup>106</sup>

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<sup>104</sup> Editors' comments in *Schlesinger's Comparative Law* 7 ed (2009) 64-65; and see for example the South African case *S v Makwanyane* (n 9) where the Constitutional Court abolished the death penalty despite the apparent divergence from public opinion, see paras 87-89 on the role of public opinion.

<sup>105</sup> Menski (n 13) 596-597; see also Chapter I 4.

<sup>106</sup> *Id* 15-18.

### **(b) The binding-non-binding dilemma – Revisiting 'legal authority'**

For international law to be applied legitimately in domestic courts, it needs to be recognised as a 'law' that is potentially applicable in a particular domestic context. In theory, of course, only binding sources of law enjoy such applicability. A less facile explanation however, might be required to obtain a better understanding of what really happens at the domestic-international interface. Dunworth argues that the binary approach, namely, that international norms are either binding or not at domestic level, must be rejected.<sup>107</sup> She advocates a more 'fluid' approach based on the notion of the 'pedigree' or 'influential authority' of international norms.<sup>108</sup> Such an approach has the advantage of addressing the wider issue of the *appropriateness* of international law being received into, or exerting influence over domestic systems, not only the question of whether it is officially legitimate or binding.<sup>109</sup>

In a similar vein, Moran, in a detailed account of various cases, examines how certain norms, because they embody 'mandatory values', exert 'influential authority' and thereby have an 'estoppel-like effect' on legal systems, even though they are traditionally non-binding.<sup>110</sup> She provides a convincing account of how courts formulate public policy in a legally defensible manner on the basis of sources, such as constitutionally embedded value systems, which strictly speaking have no 'force'.<sup>111</sup> She reasons that 'to command respect the

<sup>107</sup> Dunworth 'Lost in translation: Customary international law in domestic law' in Charlesworth et al (eds) *The Fluid State, International Law and National Legal Systems* (2005).

<sup>108</sup> *Id* 150-155. Drawing from examples of court practice in different countries, she finds that the 'pedigree approach' is evidenced by the hierarchical importance assigned to different norms of international law, in that, some norms characteristically trump domestic law, while others do not. She borrows the concept 'influential authority' from Mayo Moran. See Moran 'Influential authority and the estoppels-like effect of international law' in Charlesworth et al (eds) *The Fluid State, International Law and National Legal Systems* (2005); Waters (n 100) for a detailed analysis of court practice which highlights the different ways in which common law courts have recourse to international instruments.

<sup>109</sup> Dunworth (n 107) 136-143,150-155 contends that the debate about the use of international law masks the deeper underlying issue, namely the desirability and/or legitimacy of courts relying on international law sources per se. See also Merry (n 69) 228-229 with reference to the appropriateness of the values embodied in human rights law.

<sup>110</sup> Moran (2005) (n 108); Moran (2007) (n 15).

<sup>111</sup> Moran (2005) (n 108).

justifications must engage the mandatory values of the legal system', and in so doing, courts 'draw on the values of international law – binding or not – as a crucial source of mandatory values.'<sup>112</sup>

These accounts indicate the importance and tenacity of non-binding 'value systems' in defining legal systems, whether overtly or covertly, and point to the fact that judges in many parts of the world do not follow the narrow path prescribed by positivism, but are regularly guided by values. Moreover, judges cannot ignore the intermeshing of prevailing values, locally and globally, and therein, are able to avail themselves of a significant and legitimate opportunity to mould the application of international law in a contextually congruent manner, by aligning international and national values where they intersect.<sup>113</sup>

### **(c) Democratic deficit and the counter-majoritarian issue**

*I regret the contemporary loss of faith in the old democratic ideal of government by ordinary people, elected to represent the opinions and interests of ordinary people.*<sup>114</sup>

*[I]n various respects, an unincorporated treaty, left in that state, may be invoked in various ways in the conduct of domestic affairs.*<sup>115</sup>

This section highlights the divergent views held by those who favour the use of international and foreign sources by courts, as opposed to those who reject such external influence as undemocratic interference in domestic matters. These two camps are often described as 'transnationalist' and 'nationalist' respectively, and this terminology offers a useful point of reference for the present study.<sup>116</sup> The

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<sup>112</sup> Id 186.

<sup>113</sup> For example Paulus (2007) (n 99).

<sup>114</sup> Goldsworthy (n 81) 121.

<sup>115</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 (2003) 195 ALR 502 para 100.

<sup>116</sup> See Sloss (n 85) 509-514. These terms are often used with reference to the debate taking place in the United States.

important issue is how these viewpoints might affect the legitimacy, or otherwise, of judicial practice in view of the democratic deficit adhering to the judiciary as an unelected body.<sup>117</sup> Briefly, the arguments are as follows.

Among others, Roger Alford voices grave concerns about the 'misuse' of international sources by domestic courts in the United States, noting the 'international counter-majoritarian difficulty' as exemplifying such misuse.<sup>118</sup> His argument is that under certain circumstances the use of international sources by courts lacks democratic legitimacy, since it substitutes the 'national consensus' with the 'international consensus', thereby '[thwarting] the will of the people'.<sup>119</sup> According to this view, 'international standards cannot serve as community standards unless they reflect our own national experience'.<sup>120</sup>

These 'nationalist' sentiments are, in turn, rejected by proponents of 'transnationalism', like Harold Koh, who holds that 'through [the] transnational legal process ... interlinked rules of domestic and international law develop'.<sup>121</sup> The transnationalist approach is founded on the supposition that various legal systems, including international law, contain parallel rules and shared values, not only because of the inherently transnational nature of certain norms, but also because of a 'common legal heritage, tradition, and history'.<sup>122</sup> Thus it is argued, there are powerful reasons why courts should consider foreign and international precedent to shed 'empirical light' on various issues.<sup>123</sup>

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<sup>117</sup> See Paulus (2009) (n 4) 235-240 on the tension between democracy and international law.

<sup>118</sup> Alford (n 97), see also Kersch (n 87), Goldworthy (n 81).

<sup>119</sup> Alford (n 97) 58-61.

<sup>120</sup> Id 59. Similar arguments played themselves out fervently during the apartheid era in South Africa. See Dugard *International Law – A South African Perspective* 2 ed (2000) for example 23-24; 237-240.

<sup>121</sup> Koh (n 99) 56; see also Sloss (n 85) 36, 'United States' 509-514 in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) on nationalist and transnationalist approaches and strategies.

<sup>122</sup> Koh (n 99) 45-47.

<sup>123</sup> Ibid.

The counter-majoritarian debate however, raises questions which reach deeper than whether it is important and illuminating for judges to look beyond parochial borders in a spirit of cosmopolitan accountability, or whether to insist on exalting the 'national consensus'. More profoundly, the debate is conflated with two pivotal concepts, namely, 'democracy' and 'community' or 'community standards'. It therefore follows that, if the issue is about the subversion of the 'democratic will of the people', and the imposition of alien standards on the 'community' contrary to its own standards, then a more rigorous scrutiny of these concepts is required. A full analysis of this matter, however, falls outside the scope of the present study. Nevertheless, for present purposes, the analyses offered by Harold Koh, Susan Marks and others provide workable insights.

Koh traces the historical imperatives which had originally influenced courts in the United States to look beyond national borders. He notes that they drew on international law 'as part of [the] law' of the country, and furthermore that foreign and international views were not 'imposed' on Americans, but rather that they 'self-consciously *appealed* to those views in order to win global legitimacy ...'.<sup>124</sup> Shared histories, and 'parallel' norms and values mean that courts can use 'the experience of other nations ... as laboratories to test workable solutions ...'.<sup>125</sup> If this assessment is true, it means more – it means that the idea of 'the community' as a point of reference is much wider, and includes relevant communities beyond national borders.

Simply put, the idealistic picture of a harmonious community contained tidily within national borders, conflicts with obvious realities. First, it ignores the composite and disparate nature of national communities, exemplified by the existence of subnational communities, which, if put together, might well produce a different 'community standard' to the one touted. Second is the fact that, often, our sense of 'community' is not bridled by geopolitical borders. Everyday

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<sup>124</sup> *Id* 44-47, quote at 47.

<sup>125</sup> *Id* 46-47.

examples in all areas of human endeavour, from internet and expert 'communities' to religious communities, attest to the interconnected and interdependent world in which we live.<sup>126</sup>

Nonetheless, the notion of a nationalist, monolithic 'community standard' is supported by the obdurately prevalent construction of 'democracy' as strictly statist. Marks reasons that the 'reification' of democracy means that it is 'figured [metaphorically] as a place', namely the geopolitical state, which acts as the only legitimate 'container' of democracy.<sup>127</sup> From this perspective, nationalist lawyers and judges may well have cause to defer excessively to the 'democratic will of the community'. If the ideological underpinnings of statist geopolitical 'democracy' are successfully challenged, however, a very different agenda could emerge. This is precisely the challenge Marks undertakes with her elegant critique of ideology, whereby she dislodges current preconceptions. It is done by linking international law to democracy through 'reasserting and reclaiming the ideals on which [democracy] turns', on the basis of the 'principle of democratic inclusion'.<sup>128</sup> She reasons that such inclusiveness holds the potential for emancipatory, cosmopolitan and global democracy as opposed to attenuate statist democracy.<sup>129</sup>

This analysis is also a reminder that, in the context of EU supranational constitutionalism, the meaning of democracy is contested and that 'different conceptions of the optimal balance of ... virtues' associated with democracy, such as, autonomy, participation, equality and fairness, are evident.<sup>130</sup> Hence, there may be divergent solutions and consequences, which are not necessarily

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<sup>126</sup> See again Singer (n 29) on the fact that we live in 'one' world; Koskenniemi (2007) (n 32) 27, where he maintains that nationalism is 'transmitted through a cosmopolitan culture industry', and that it is not possible to distinguish the national from the cosmopolitan. He argues that the concept of 'national interest' is not 'natural', but 'subject to constant political (de)construction.'

<sup>127</sup> Marks (n 34) 95-98, quote at 98.

<sup>128</sup> *Id* 119.

<sup>129</sup> *Id* 100-120.

<sup>130</sup> Walker (n 93) 331.

'undemocratic'.<sup>131</sup> Moreover, certain problems may require 'more emphasis on other fundamental virtues of governance ... and other output-oriented and effectiveness-centred values'.<sup>132</sup>

The EU with its 'absence of a strong *demos*' therefore gives credibility to the arguments raised above that 'community' and 'democracy' can survive, albeit in a mutated form, in a wider, transnational context.<sup>133</sup> The EU, although displaying the most extensive form of regional integration, is not unique. Regional integration in Africa and the Americas, through vehicles such as the African Union (AU), the Southern African Development Community (SADC) and the Organisation of American States (OAS), is an indication that traditional perceptions about democracy and community are making way for others that are more inclusive. It is therefore feasible that the 'international' counter-majoritarian argument, although important, need not pose an insurmountable obstacle to the legitimacy of the application of international law by domestic courts, even in cases where the 'democratic will of the people' is presumed to be different.<sup>134</sup>

But what about another argument raised by Alford, namely, that at times empirical research points to a consensus shared by the national *and* international community, which is nevertheless ignored by courts through their 'haphazard' misuse and 'interpretive bricolage' of international sources?<sup>135</sup> He points to widespread anti-gay and lesbian sentiments that have '*not* been rejected by the

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<sup>131</sup> *Ibid.*

<sup>132</sup> *Id* 333; see also Wa Mutua (n 92) 600 on 'variations of liberal democracy'.

<sup>133</sup> Walker (n 93) 333; McCorquodale 'International community and state sovereignty: An uneasy symbiotic relationship' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) for example at 250, on the notion of 'community' which means different things to different people.

<sup>134</sup> This is further borne out by the jurisprudence of courts, especially in constitutional matters, in terms of the 'domestic' counter-majoritarian question, which to a large extent overlaps with the international debate. For example, judicial scrutiny of the constitutionality of the death penalty is usually subjected to the 'community standard' test. However, many, if not most courts see it as incumbent upon them to look beyond such an open-ended, malleable standard, particularly when it conflicts with constitutional values. See for example *Makwanyane* (n 9) at para 88: 'If public opinion were to be decisive there would be no need for constitutional adjudication'. See also Koh (n 99) 54-57, on the role of the judiciary and the views expressed by US Justice Breyer in this regard.

<sup>135</sup> Alford (n 97) 66.

civilized world'.<sup>136</sup> He argues that instead of overturning judgments that entrench discrimination, courts should take a 'more restrained approach' by entrusting 'the matter to the democratic laboratory', which according to worldwide statistics, affords little support for gay and lesbian rights.<sup>137</sup>

This argument, which seems to rely, not on the notion of a national standard, but on one that is global, is flawed in a number of ways. First, it rubbishes the role of the judiciary, which is to uphold the constitution of a particular country, and not merely 'to give expression to majoritarian impulses'.<sup>138</sup> By and large, constitutions serve 'to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process'.<sup>139</sup> Why should the judicial mandate be thwarted on the basis of the chauvinism of citizens in other countries – even when this appears to coincide with the relevant domestic 'majoritarian impulses'?

Second, clearly discernible 'evolving standards' have resulted in the shedding of many ingrained prejudices, as seen in the fact that the death penalty, for instance, for witchcraft and adultery, is no longer deemed just or acceptable.<sup>140</sup> These changing standards have shielded many hitherto oppressed and exploited groups from the harm inflicted by majority views of justice and fairness, so-called.<sup>141</sup> If Alford's logic is maintained *ad absurdum*, standards ought not to evolve unless a global majority consensus has been attained – which means we could still be burning offenders on the pyre.

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<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.* In a number of countries, for example Kenya, Nigeria, Sudan and Uganda homosexuality may be punished with life sentences or the death penalty. See Beatty (n 45) 76-113, for case studies which show that in many parts of the world the advancement of gay and lesbian rights lag behind dramatically when compared to women's rights for example.

<sup>138</sup> Koh (n 99) 55. Chirwa (n 70) 137 points out that international human rights constitute 'a bulwark against the vicissitudes of majoritarian politics'.

<sup>139</sup> *Makwanyane* (n 9) para 88.

<sup>140</sup> See Koh (n 99) 46, 54.

<sup>141</sup> Chirwa (n 70) 137.

I thus suggest that the broader question is *why* the majority view sometimes lags behind legislative and judicial intervention, which is often informed by standards set in international and regional instruments. This is perhaps an issue that is more appropriately dealt with by sociologists and psychologists than lawyers.

Nonetheless, a non-expert reading of the prevalence of anti-homosexual and other discriminatory attitudes could simply be that deep-seated prejudice is highly resistant to 'ethical-practical rationality', and to change, and hence, what Alford's argument promotes is merely the condoning, indeed, the entrenchment of tenacious prejudice. Misogyny, racism, bullying, and other such practices, are rife in many communities. The fact, however, that certain, even most members of a given community may succumb, or even subscribe to bigotry and discrimination, does not elevate these injustices to an acceptable 'community standard', to be upheld by courts.<sup>142</sup>

It can be concluded that Alford's argument, instead of vindicating his stance, highlights its most glaring flaw, namely the precarious and transient nature of public opinion. As such, it may amount to nothing more than perennial injustice, in which case, it *should* be tempered by the judicial enforcement of constitutional, legislative and treaty provisions. Moreover, unjust biases must not be encouraged by the apathy of a judiciary that equates intolerance, even if it reflects the 'community standard', with the underlying values associated with democracy.<sup>143</sup>

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<sup>142</sup> For example, would Alford and other nationalist jurists use the same argument in an attempt to justify discrimination against women? Probably not, since the fact is, standards *have* changed, and it is now accepted as 'wrong', even unlawful, to discriminate against women. However, the 'evolved' standard itself has not resulted in changing age-old, grassroots male chauvinism, which means that globally, women are still discriminated against. Does this mean that legislation must be changed to what it was previously in order to accommodate the popular 'consensus'? Similarly, since drug abuse is on the rise (annual report of UN Office on Drugs and Crime 2011, statistics quoted in Mail & Guardian Jan 6-12 2012, p 3), should courts be more tolerant of drug trafficking and abuse because that is what a large portion of the community wants?

<sup>143</sup> Case studies, especially from young democracies, such as South Africa, bear testimony to the crucial role played by courts in aligning public sentiment with international and newly 'evolved'

**(d) In brief restatement of the legitimacy requirement**

The multifaceted problem posed by the question of what constitutes 'legitimate' judicial activity and 'legitimate' reliance on various sources at different hierarchical levels, is of great importance to the judiciary in its role as agent for the transformation of international law. The reason, as noted, is that reconstruction and emancipation cannot be achieved within existing, largely positivistic structures, and require cognisance to be taken of plural and often competing normative constellations, which present themselves to the judiciary.

Consequently, in order to steer away from dominant patterns of hegemony, a cosmopolitan, trans-systemic interchange of norms and values must take place. This means that, on one hand, international law needs to be regenerated through its contextual interpretation, informed by national and subnational norms and values. On the other hand, for international law to be emancipatory, its own inherent cosmopolitan values and norms must be applied in a non-instrumentalist manner to counter hegemony and prejudice at national level. Additionally, cosmopolitanism requires the judiciary to look beyond its own borders, and consider what is happening to international law in other jurisdictions.

The question of legitimacy therefore takes on a three-dimensional quality, in line with the three-dimensional contextual map on which the study centres its analytical framework. Vertically, the application of international law in a particular domestic court must be legitimate, in that its deployment must be officially sanctioned. It was noted however, that its authority as a legitimate source of law is not limited to black letter rules, but includes its values. Next, international law, as applied by the court, must be perceived as legitimate and binding on local recipients. This depth aspect of legitimacy is achieved through the proper contextualisation and particularisation of international norms within the domestic

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constitutional standards, and show that democracy means more than mere 'public opinion'. See for example Dugard (n 10).

domain. Horizontally, courts must be able to justify to other courts that their recourse to international law is legitimate from the perspective of the greater, global community.

This section thus sought to establish that the navigation of these multi-dimensional legal spaces requires the challenging, and if necessary rejection, of traditional platitudes about legitimacy, and its confinement to a narrow nationalist scheme.<sup>144</sup>

Before issues of legitimacy arise however, international law must travel from the international plane to domestic realms. For the sake of completion, these processes are briefly described below.

## **6. The processes of the migration of international law to domestic systems**

It is useful at this point to consider how it comes about that international law travels or 'migrates' to domestic courts in the first place.<sup>145</sup> This part of its journey, described as the 'invitation stage' in the previous chapter, refers to the vertical transfer of international norms, and has a direct bearing on the parameters of judicial agency.<sup>146</sup> Despite some overlapping, the processes involved in the migration, or the bringing together of international and domestic law, must not be confused with the next stage, namely the particularisation or

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<sup>144</sup> Peters 'The globalization of state constitutions' in Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007) 307 on the need to adopt a 'flexible approach' to the hierarchy of laws, wherein 'international law and State constitutions find themselves in a fluent state of *interaction* and *reciprocal influence*'. She notes the potential for certain '*problematic* consequences' however, in terms of concepts such as the rule of law, democracy, and 'social elements'.

<sup>145</sup> I borrow the term 'migration' as an apt metaphor from Choudhry (n 87) 19-21, and use 'reception' with reluctance because it tends to conflate the two stages, namely first, migration, and second, particularisation or translation, discussed in the next chapter.

<sup>146</sup> See Chapter II 3.

translation of international law, which adjusts it to the socio-legal and cultural context of the domestic environment.<sup>147</sup>

Hence, there is a distinction between the mechanisms for the initial entrance of international law onto the domestic scene, and its subsequent contextual embedding. Even so, the two stages are often conflated in academic writing. The present section therefore differentiates between them, and deals only with the more technical aspects of the migration of international law to domestic systems. It offers a point of reference for the subsequent judicial navigation toward cosmopolitan and emancipatory international law.

Certain theories and legislative constructions, such as monism, which is linked to the incorporation theory, and dualism, linked to the transformation theory, provide for some of the methods whereby international law migrates to the national.<sup>148</sup> These methods ensure that transfers are effected in an orderly and legitimate manner, such as through proper legislative transformation or incorporation. At other times, however, ideas have a general appeal, and, like Coca-Cola, fizz through national-international boundaries. The human rights discourse is a prime example.<sup>149</sup> Whether orderly or otherwise, there is a constant flow of norms and ideas taking place between national and international realms, and traditional accounts of, for example, monism and dualism provide a

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<sup>147</sup> This concept is the focus in Chapter IV 8. Another form of migration is the bottom up flow from domestic orders to the international plane, which is examined in Chapter IV 9(d) and (e).

<sup>148</sup> There is a burgeoning literature on these theories. See for example Capps 'Sovereignty and the identity of legal orders' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006); Sloss (n 85) 6-8; Dunworth (n 107). Briefly, monism (and the incorporation theory, with reference to treaties) means that international law is automatically part of the domestic legal system. Dualism (and the transformation theory, with reference to treaties) holds that international law and the state legal order are two separate systems and therefore some form of domestic incorporation is necessary before international law becomes part of domestic law. Additionally, rules, different to those which apply to treaties, may regulate the status of customary international law and other sources of international law, such as *ius cogens*.

<sup>149</sup> See Chapter I 6(b), and note again Moran (2005) (n 108) where she describes how international law values can exert 'influential authority' sometimes with 'mandatory' and 'estoppel-like effect', illustrating how norms and values are 'transposed across traditional jurisdictional and doctrinal boundaries'. Also see Cossman 'Migrating marriages and comparative constitutionalism' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 220.

singularly monochromatic view of the initial reception of international law.<sup>150</sup> Therefore I briefly outline certain traditional, or obvious, as well as less obvious mechanisms of migration.

As far as traditional mechanisms are concerned, legislation, usually in tandem with the constitution of a country, determines the status of treaties and customary international law within the domestic context.<sup>151</sup> Thus for example, the South African Constitution makes it mandatory for courts to 'consider' international law when interpreting the Bill of Rights. In addition, it provides, with certain provisos, that most treaties must be incorporated in order to have domestic effect; that customary international law 'is law in the Republic'; and that legislation must be interpreted in conformity with international law.<sup>152</sup> Often constitutional provisions are not this explicit, and it may be up to the courts to circumscribe the nature of the relationship between international law and domestic law, or to determine the status of the former within the national legal system.<sup>153</sup> Nevertheless, the *extent* to which international law finds direct or indirect application, whether legislative provisions are clear or sketchy, is usually dependent on judicial mediation.<sup>154</sup>

<sup>150</sup> As noted, the focus here is on processes that facilitate the one-way flow of norms from the international to the national sphere, and not those bringing about the reverse flow of national norms which mould international law.

<sup>151</sup> Sloss (n 85) for a comparative collection analysing the effect of legislation on the role of international law in a number of countries; Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007) for various analyses of the 'divide' between national and international law, which offer many useful insights into this topic.

<sup>152</sup> Constitution of South Africa ss 39(1)(b), 231(4), 232 and 233 respectively.

<sup>153</sup> For example, Sloss (n 85) 582-615. The Botswana Constitution is one example among many of a constitution that lacks international law provisions. See the reasoning of the court in *Macheme v Ndlovu* (CACL 035/08) [2009] BWCA 49 (30 January 2009), where the court had to decide whether to retain the common law rules relating to rights of fathers of children borne out of wedlock or apply the international 'best interests of the child' standard in the absence of clear guidelines.

<sup>154</sup> For example, Nollkaemper 'The Netherlands' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 369, concerning a change in the approach to the application of human rights treaties in the Netherlands. He notes that '[t]he Constitutional background was stable – what changed was the attitude of courts toward the treaties'. (My emphasis). Lacey 'The judicial use of unincorporated international conventions in administrative law: Back-doors, platitudes and window-dressing' in Charlesworth et al (eds) *The Fluid State, International Law and National Legal Systems* (2005).

A mechanism that is not overtly traditional, yet widely used, is officially sanctioned legal integration. It resembles incorporation to some extent, since it may involve the direct borrowing of foreign or international materials, or it may employ the processes of harmonisation and unification to integrate national, international and/or regional systems.<sup>155</sup> Everyday examples abound in areas such as trade law and criminal law, since states routinely seek to align their laws with important agreements in these areas, for instance, WTO trade treaties and UN conventions and initiatives, aimed, for example, at fighting drugs and crime.<sup>156</sup> Other examples include regional integration in the EU which, coupled with the 'judicial integration' of the ECJ through which EU treaty provisions are given 'direct effect', are seen to be creating a body of European law.<sup>157</sup>

In addition, there are processes associated with so-called 'functional integration', which also play a part in the less obvious transfer of international (and foreign) norms and principles to domestic systems. Functional integration assumes that integration already exists, based for instance on the fact that various national and international systems may have a 'common core'.<sup>158</sup> Thus

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<sup>155</sup> See Chapter I 5(d) for notes on integration and harmonisation. It is important to note the role of foreign sources that are in themselves incorporations of international law, and which therefore, in terms of the 'Trojan horse' effect of international law, exemplify the latter and cause international, rather than national law, to spread. See Chapter II 3.

<sup>156</sup> For example the editors' comments in *Schlesinger* (n 104) 69-73; see Booyen *Principles of International Trade Law as a Monistic System* (2003), for a detailed account of the many agreements and institutions aimed at the harmonisation of international trade law, such as the GATT, GATS, CISG and ICC. See also initiatives by The UN Office on Drugs and Crime, [www.unodc.org](http://www.unodc.org) last accessed 13-06-2013.

<sup>157</sup> A great body of work exists in this regard. See for example Van Dijk and Van Hoof et al (eds) *Theory and Practice of the European Convention on Human Rights* 4 ed (2006) 26-28; Paulus (2009) (n 4) 210; Editors' comments in *Schlesinger* (n 104) 73-89. As noted, the 'direct effect' is the conferring of rights and obligations on individuals in terms of European treaty provisions.

<sup>158</sup> See Chapter I 5(d) and 6(b) on the 'common core'. See Editors' comments in *Schlesinger* (n 104) 109-118 where the common core in legal practice is explained as paraphrased here: Both treaties and private agreements often refer to the application of Article 38 of Statute of International Court of Justice, which renders 'general principles of law recognized by civilized nations' as one of the sources of international law. In order to uncover these general principles, common core comparative research is required. The same idea of normative commonality underlies the *lex mercatoria* and serves to ascertain the 'applicable law' in trade agreements and in dispute resolution situations. A good example of common core application in litigation is the analysis that cooperation with the Nazi regime constitutes a violation of international law, based on the principle of good faith which was, and is almost universally recognised, even if it is not

for example, 'general principles of law' such as good faith and *pacta sunt servanda*, which are common to most systems in one form or another, can be discerned. These may be applied in appropriate circumstances, without being regarded as foreign to the system applying the principle.<sup>159</sup>

It was noted that other forces draw international law more covertly into the domestic domain, such as the sweeping energy of globalisation. At times, these forces create desirable outcomes, and, at others, they are hegemonic and detrimental to the national fabric or the well-being of specific individuals and groups.

The picture would not be complete, however, without noting that not only normative ideas jump global-local legal borders, but that even cultural strongholds are not impervious to 'trans-national culture flows'.<sup>160</sup> As seen above, values migrate on the basis of having 'estoppel-like effect', 'authoritative force', and 'influential authority', and are 'transposed across traditional jurisdictional and doctrinal boundaries'.<sup>161</sup> In this way, values and 'cultural' elements associated with the international law regime filter down, either directly, or by becoming entrenched in the local socio-cultural context from whence they are eventually absorbed into the domestic legal system.

Lastly, depending on applicable legislative mandates, judicial practice, for example, in the use of unincorporated treaties, can be either a conventional method for the transfer of international law or not. It was noted that, the legitimacy of the judicial use of various international sources including that of

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explicitly part of a particular (civil) code. Note also references to the Lando Commission on European contract law and UNIDROIT on the harmonisation of private law.

<sup>159</sup> See n 60 above, and Teubner (n 41), who however, questions this practice.

<sup>160</sup> Cossman (n 149).

<sup>161</sup> See again Moran 'Inimical to constitutional values: Complex migrations of constitutional rights' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 233-234; and Moran (2005) (n 108). The UDHR is a pertinent example of a non-binding instrument that nonetheless has enormous authoritative influence.

unincorporated treaties is hotly contested.<sup>162</sup> To some it amounts to 'backdoor incorporation' which violates the separation of powers and the traditional role of the judiciary, and to others the act of ratification confirms the existence of various norms which are already inherent in the domestic environment.<sup>163</sup> In yet other scenarios, settled judicial practice, or the legislative framework of a particular country may be conducive to the frictionless flow of international standards and ideas, and judges may be accustomed to, or mandated to consult these sources, even in the absence of incorporation.<sup>164</sup>

The brief survey above indicates that there are a number of modes of migration of international law to national systems. It is clear that the judiciary is poised at the interface of, and has to mediate the processes, notwithstanding the provisions of the relevant national legislative framework. One of the most interesting aspects of the national-international continuum is the porosity of the boundaries separating the local from the global, and how this fact gives rise to the complex *modus vivendi* adopted by the judiciary in its role as gate-keeper.

Moreover, it should come as no surprise that the migration of international law is not an orderly affair. I emphasise again, that after all, 'international law is part of social relations that change over time'.<sup>165</sup> Additionally, the judiciary as a body is not necessarily an objective gatekeeper, since it is composed of judges, who are not neutral arbiters, but who can be motivated or swayed by a gamut of

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<sup>162</sup> See 5 above.

<sup>163</sup> Waters (n 100); Lacey (n 154) 82-83, and see the discussion of the separate judgment by Gaudron J in the Australian case *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 273 para 107. See also 5(b) above.

<sup>164</sup> As noted above the South African Constitution in ss 39(1)(b), 232 and 233 respectively, provides that courts 'must consider' international law when interpreting the Bill of Rights; and with certain provisos, that customary international law 'is law in the Republic'; and that legislation must be interpreted to conform with international law. Another example is the activist jurisprudence developed by Canadian courts, despite the dualistic common law nature of its legal system. See for example Gaudreault-Desbiens 'Underlying principles and the migration of reasoning templates: A trans-systemic reading of the *Quebec Secession Reference*' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006); Örüçü (2004) (n 41) 89; Tierney *Constitutional Law and National Pluralism* (2004) 254-281.

<sup>165</sup> McCorquodale (n 133) 243 (quote), 264-265.

influences ranging from personal preferences and beliefs to political and social pressures.<sup>166</sup>

Central to the present study however, and discussed subsequently, is not the migration or invitation of international law into the domestic system, but rather how the judiciary can successfully translate or particularise it to have an emancipatory effect within relevant domestic contexts.<sup>167</sup> Nonetheless, in seeking to delineate a place for judicial advocacy in the reconstruction of international law, it is important to take cognisance of the cumulative effect of all the factors associated with the middle spaces between the national and international.

Next, I consider further difficulties confronting the judiciary when it mediates the spaces between these polarities.

## **7. Demons and dilemmas faced by courts when navigating uncharted middle spaces**

This section deals with a number of obstacles which regularly confront the judiciary. They are problems, which are particularly onerous when the court assumes a mediatory role at the intersection of national, subnational and international interests, where their impact is exponentially greater. A number of institutional constraints were explored above. Here, the issues relate to the nature of international law and law in general, and the mesh of competing legal and socio-cultural norms at different hierarchical levels.<sup>168</sup> Some of these difficulties tend to be intellectual dilemmas which lend themselves to logical resolution, whereas others are proper legal demons which are unfathomable and go beyond legal or intellectual debate. The aim of this section is to draw attention

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<sup>166</sup> Bybee (n 33) 90-91; Tierney (n 164) 278-283. See Dan-Cohen (n 103) 2-5, 199ff, for a more profound philosophical view of the socially constructed nature and boundaries of self, which, *inter alia*, affect the individual's, and therefore the judge's notion of legal responsibility.

<sup>167</sup> See Chapter IV 8.

<sup>168</sup> See Chapter I 2 for a discussion of the nature of law and legal and normative pluralism.

to these hurdles, in preparation of the study's analytical and reconstructive framework, which is developed in the next chapter.

### **(a) The dilemma of legal pluralism**

*The wider the law grasps, the weaker its normative force ... [L]egal pluralism may be descriptively powerful. But its accuracy occasions the same response as constitutionalism did: 'So what?'*<sup>169</sup>

*A society can only remain healthy if diversity does not threaten unity of purpose. There can be only room for 'qualified legal pluralism'.*<sup>170</sup>

Legal pluralism, a subspecies of normative pluralism, was considered in a previous chapter.<sup>171</sup> Its acknowledgement is assumed to promote awareness and tolerance of different forms of normative regulation and may reveal, and therefore moderate or counteract, inherent biases in the mainstream institution or system. Conversely, it is said that 'theorists are so enchanted by the complex interplay of regimes and a positivist search for an all-inclusive vocabulary that they lose the critical point of their exercise', in for example, 'the habit of collapsing the distinction between law and regulation ...'.<sup>172</sup>

One cannot however, simply dismiss the phenomenon with 'so what?' The fact that law is rooted in a multiplicity of sources is relevant to how a particular 'law job' is accomplished and relates directly to its success or failure. Equally, it does not mean that legal pluralism is 'automatically good, progressive or emancipatory'. Rather, it is simply a fact, but nevertheless an important one.<sup>173</sup> Or, explained differently,

<sup>169</sup> Koskenniemi (2007) (n 32) 23.

<sup>170</sup> Örucü (2008) (n 26) 60.

<sup>171</sup> See Chapter I 2(a).

<sup>172</sup> Koskenniemi (2007) (n 32) 23.

<sup>173</sup> Menski (n 13) 14, 115.

Constitutionalism and pluralism are abstract responses to the emergence of multiple legal regimes ... two tendencies in a single set of problems: the need for centralism and control on the one hand, diversity and freedom on the other. In practice, they often converge in intermediate forms: federalism, limited autonomy, interpretations reconciling the particular with the general – 'systemic integration'.<sup>174</sup>

Pluralism taken to extremes will quite literally result in a state of lawlessness or at least a situation where the law cannot be ascertained with any amount of certainty.<sup>175</sup> Therefore, a persistent dilemma facing judges at the intersection of the global and local is that they must find the balance – or compromise – between competing and possibly conflicting norms which originate at subnational, national, or international level, without jeopardising their duty to uphold and administer 'the law'.

#### **(b) The demons attendant to culture relativism and normative plurality**

*[T]o expand toward universality, one must penetrate deeper into subjectivity...*<sup>176</sup>

*We should reject moral relativism.*<sup>177</sup>

*In a modern unitary nation state of the Western type, the accommodation of cultural diversity and multiple normative orders can only be brought about by the judge, who is the tuner, or navigator and steersman of the law.*<sup>178</sup>

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<sup>174</sup> Koskenniemi (2007) (n 32) 24.

<sup>175</sup> The 2009 Bolivian Constitution is possibly an example of pluralism 'gone mad'. (Quoting from a conversation with Prof Thomas Bennett.) Article 1 provides that 'Bolivia is founded in plurality and political, economic, juridical, cultural, and linguistic pluralism within the integrating process of the country.' Some of the issues are highlighted in: <http://breakingviewsnz.blogspot.com/2012/03/mike-butler-bolivian-constitution-model.html> last accessed 06-05-2012.

<sup>176</sup> Singh (n 61) 39.

<sup>177</sup> Singer (n 29) 140.

<sup>178</sup> Özücü (2008) (n 26) 60.

*In plural contexts, responses to cultural legitimization of gender hierarchy must take account of the symbiotic relationship between formal law and culture and the role of formal institutions in the shaping of culture.*<sup>179</sup>

Legal pluralism, considered above, is complex enough, but it is only part of the greater challenge posed by normative plurality. In broad strokes, normative plurality refers to a multiplicity of regulatory orders, which exist at all levels, and in all societies. It is a natural corollary to the 'cultural', and here I include ideological and religious, differences pertaining to various communities.<sup>180</sup> The term culture is therefore problematic, since it can refer to many diverse concepts.<sup>181</sup>

As a general concept denoting various customs, traditions and ideologies, differences in culture occur right across the demographic grid, ranging from its biggest to its smallest sectors. Groups, from transnational entities to small family units, may all exhibit a unique 'culture' that can spawn its own regulatory system. In practical terms, how can the judiciary deal with such complexity, notably in the presence of entrenched rights to culture, or freedom of religion and belief? Or, how can it accommodate all these interests in context-sensitive and emancipatory adjudication? These matters pose the proverbial Gordian knot even at the national-subnational interface. They are amplified, however, at the intersection of the international, national and subnational, where the potential for normative conflict exists at all three levels.

The issue of normative plurality is compounded by the 'diffusion' or 'cross-pollination' that takes place between various normative systems, making it impossible to compartmentalise different normative expressions of culture. This

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<sup>179</sup> Nyamu (n 19) 417.

<sup>180</sup> See Chapter 12.

<sup>181</sup> Thus according to Chimni 'Third world approaches to international law: A manifesto' in Anghie et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) 60: 'International law ... represents a culture ...'

point is well illustrated by Nyamu, with reference to title to land in Kenya.<sup>182</sup> She highlights the fact that formal laws and regulations interact with tradition to entrench gender inequalities.<sup>183</sup> For example, some 'governments use culture as the formal explanation for gender inequality' and at the same time insulate cultural practices from constitutional safeguards.<sup>184</sup> Thus, by branding culture as the scapegoat, governments can exonerate themselves from blame whilst simultaneously strengthening abusive cultural norms. In other words, it cannot be said that formal and traditional systems can simply be disentangled for purposes of adjudication, since they *do* interlock and impact on each other in various ways.<sup>185</sup>

In dealing with the complexities associated with diverse and competing cultures, the judiciary has a number of options. There is the easy, but specious option considered above, which is for the judges to distance themselves from all matters labelled 'culture' or 'tradition'. Apart from the cognitive impossibility of such severance, more importantly, this approach stifles healthy debate, by simultaneously shifting blame and responsibility away from the judiciary for any injustices that might accrue, or be perpetuated, as a result of its stance.

Alternatively, the court (or the legislature) could be overzealous in attempts to abolish customary norms, which are considered offensive or 'backward', in a top down, hegemonic manner.<sup>186</sup> This approach would typically encourage non-compliance or even spark resistance, since it negates the cultural identity of participants and the tenacious embeddedness of many cultural precepts.<sup>187</sup> Yet another option, albeit it one fraught with many of the difficulties

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<sup>182</sup> Nyamu (n 19).

<sup>183</sup> *Id* 403.

<sup>184</sup> *Id* 401-403.

<sup>185</sup> See also Örüçü (2008) (n 26), who, from the perspective of the judiciary, analyses the conflict and interplay between secular law, tradition and religious law in Turkey.

<sup>186</sup> See for example Wa Mutua (n 92); Merry (n 69) 5-10, 26-28; Menski (n 13) 452, 513-514; also Chapter I 2(d) and (e).

<sup>187</sup> For example Teubner (n 41) 17-19; Okafor (n 28) 100-104; Merry (n 69) 224; An-Na'im (n 41) 87.

under discussion, would be to recognise and respect the pluralistic normative landscape and the interplay between different cultural orders.<sup>188</sup>

Clearly, in a courtroom, overindulgence in normative inclusiveness would be as detrimental to the administration of justice as riding roughshod over the beliefs and traditions of others in the name of law.<sup>189</sup> The task before the court is therefore to use its discretion wisely and cautiously in matters of counterpoised cultural interests, in order to establish an equitable balance between them. A further aspect of such mediatory balancing is the reconciling of correlative cosmopolitan elements into an emancipatory jurisprudence, which ascertains 'cross-cultural constructs that mutually appeal in the name of justice'.<sup>190</sup> The question to be explored further is – *how?*<sup>191</sup>

This question is more appropriately dealt with in the following chapter, and at this stage, I only tender a few positional markers to unpack it. The first pointer is recognition that views about the 'unity and plurality' of law are 'preferences' or 'matters of narrative perspective', in that they are relative to a particular context or cognitive stance.<sup>192</sup> Furthermore, just because something is underwritten by one or other 'culture', whether international, western, indigenous or religious, does not mean it is imbued with moral value per se, and the 'mere speciality or generality of a rule or a regime gives no conclusive reason to prefer it'.<sup>193</sup> In the same manner, '[t]he fact that [the rules and institutions of international law] are

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<sup>188</sup> Dan-Cohen (n 103) 163-164, on some of the options available in cases of normative cultural conflict, and see the discussion in the following section, with reference to the particularisation of international law. Obiora 'Toward an auspicious reconciliation of international and comparative analyses' (1998) 46 *American Journal of Comparative Law* 669 at 680.

<sup>189</sup> See Paulus (2001) (n 42) 739-740 on the problems created by 'radical subjectivity'.

<sup>190</sup> Obiora (n 188) 678.

<sup>191</sup> See for example the South African Constitutional Court cases *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) and *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC), which are good examples of how courts are able to accommodate various cultural differences.

<sup>192</sup> Singh (n 61) 42; Koskenniemi (2007) (n 32) 25.

<sup>193</sup> Koskenniemi (2007) (n 32) 18.

"international" is no proof of their moral value'.<sup>194</sup> A third line of reasoning is that all normative systems, including those that are dominant, are inchoate and imperfect, both inherently and vis-à-vis one another.<sup>195</sup>

I maintain that the contemplation of these three tenets will allow courts to appraise and balance different cultural norms with greater objectivity and tolerance in the knowledge that ideological or cultural rectitude, including their own, is a relative concept which often turns on subjective preference. At the same time, courts must nevertheless avoid an unprincipled applause of plurality.

Does this mean, as Koskenniemi claims, that in pluralist settings the judge is merely a 'regime-manager' searching for 'a balance between 'efficiency' and 'legitimacy'?<sup>196</sup> This is certainly a possibility, but one that holds more promise of the accommodation of different cultures than one which disavows 'the authenticity of the other' outright.<sup>197</sup> The judge who defines his or her role in terms of regime-coordination exhibits a deeper insight into the contextual mosaic created by normative pluralism than one who inhabits a positivist legal world of binary choices. I would therefore suggest that the concept of regime-coordination lends a pragmatic angle to, and hints at the possibility of the contextual application of international law, despite its tone of clinical cynicism.

On the other hand, Peter Singer makes a case for the adoption of an approach based on ethics to counter cultural imperialism, instead of one that relies on moral relativism.<sup>198</sup> According to Singer, ethics animates respect for diverse cultures, including recognition and preservation of the wisdom contained in them.<sup>199</sup> Most importantly, ethics based on rationality heralds the promise of establishing an independent datum for the critical examination of one's own

<sup>194</sup> Koskenniemi (2007) (n 32) 30.

<sup>195</sup> Santos *Toward a New Legal Common Sense* (2002) 271-274 on the inchoate nature of all regulatory and cultural orders; see also Chapter II 5(b).

<sup>196</sup> Koskenniemi (2007) (n 32) 24.

<sup>197</sup> Obiora (n 188) 680.

<sup>198</sup> Singer (n 29) 140ff.

<sup>199</sup> *Ibid*; Weeramantry (n 13).

culture in order to ensure the impartial treatment of different cultural norms.<sup>200</sup> Hence, in the next chapter and for purposes of the study's analytical framework, I explore the idea of ethics as such a datum or 'compass', which guides the judicial balancing and accommodation of different cultural precepts.

From the above, the need to go beyond the mere recognition of differences is clearly apparent. To that end, what is needed are 'minimum understandings and background rules that enable cross-cultural dialogue.'<sup>201</sup> It is also equally important to note that '[e]very regime is already connected with everything around it'.<sup>202</sup> Thus, to subdue the demon of normative pluralism and culture relativism, the judiciary must, in the first place, engage with, and respect the immanent worth of other, subnational and supranational cultural regimes, which are relevant to the adjudicative process. It must however, go a step further and explore the interconnectedness of all such norms and values, and purposively and ethically build on shared elements with a view to emancipation.<sup>203</sup>

**(c) Dilemmas relating to the mechanisms of application: Translation and particularisation of international norms within the domestic environment**

A marked degree of resonance exists between international law and (most) domestic systems, as a result of the considerable amount of shared elements and recurring themes evident in both spheres.<sup>204</sup> However, no matter how eager some are to proclaim the prospects of a seamless integration of international law into domestic systems, there are times when the two systems are just that: two systems.<sup>205</sup>

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<sup>200</sup> Ibid.

<sup>201</sup> Paulus (2001) (n 42) 730.

<sup>202</sup> Koskenniemi (2007) (n 32) 27.

<sup>203</sup> Weeramantry (n 13) 281; Obiora (n 188) 678; Wa Mutua (n 92) 613.

<sup>204</sup> For example, McLean 'Problems of translation: The state in domestic and international public law and beyond' in Charlesworth and Chiam et al (eds) *The Fluid State* (2005), on the sharing and 'permeability' of norms.

<sup>205</sup> Id 216-219, on 'the limits of coordinating norms'.

Furthermore, the mere fact that one system is national and the other international, perforce calls for the 'translation' or 'transposition' of international law in order to be aligned to the domestic recipient.<sup>206</sup> Noted throughout is the contention that, if the international norm is inimical to the domestic system, it acts as an 'irritant', and may even have to be 'reconstructed', not merely attuned.<sup>207</sup> Teubner explains that such 'irritation' occurs because, '[i]t is in their close links to different social worlds that we can see why legal institutions resist transfers in various ways.<sup>208</sup> Accordingly, when international law attempts to undo 'tight couplings' of law to social realities, it needs to be adapted to the latter.

This study capitalises on the very idea that judges should not simply 'apply' or 'enforce' international law in a positivistic manner, but that they must fully acknowledge the recipient context. This analysis harks back to the problems associated with judicial activism, the legality of sources, and normative pluralism and culture relativism discussed in the preceding sections. Above all, it highlights the crucial role played by the courts in navigating the unknown spaces between the subnational, national and international. Assuredly, each case is unique, which means that the mechanics of translation have to be re-engineered to a greater or lesser extent within the context of each case. There are however, principles which could serve as navigational signposts to the judiciary. They have been analysed throughout the study and will be highlighted in the next chapter.

The present discussion fits in with the previous inasmuch as difficulties experienced during the particularisation of international law often relate to the capricious nature of the relative and plural 'context' within which adjudication takes place. The important point here is that the domestic application of

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<sup>206</sup> Knop (n 27) 504-507, 516, 528 ff on translation and particularisation; Örucü (2004) (n 41), especially at 79 ff, 93-104 on transposition and related concepts.

<sup>207</sup> Teubner (n 41); Legrand (n 5), for a concurring analysis on the specificity of socio-cultural and legal contexts; Örucü (2004) (n 41) 98-99; An-Na'im (n 41) 87.

<sup>208</sup> Teubner (n 41) 22.

international law *always* entails plural and cross-cultural elements, simply because one is dealing with two distinct legal systems.<sup>209</sup>

Relevant to the particularisation of international law, I consider Dan-Cohen's argument, which refers to cross-cultural moral (and one can also read normative) assessments in general, to be applicable. He notes that these assessments usually follow one of three routes, namely that of imperialism, relativism, or tolerance.<sup>210</sup> Imperialism implies that the assessment takes place according to the dominant paradigm, 'ignoring as irrelevant the different norms of the assessed culture'.<sup>211</sup> Countervailing imperialism is relativism, whereby the assessment is made according to the norms of the assessed culture.<sup>212</sup> Somewhere in between is tolerance, whereby the assessment takes place according to the dominant norm, but the assessor does not take action on that basis in the belief that the 'assessed culture has a "right to be wrong" '.<sup>213</sup>

Analogous to the preceding discussion concerning different judicial approaches to normative plurality, the scenario above paints a bleak picture of hegemony on one hand, and turning a blind eye on the other. It is also one where none of the options allow for responsive and responsible engagement with the moral or ethical content of either the international or the local norm in question. Dan-Cohen duly proposes a fourth option based on a 'morality of dignity', which means that the assessment itself is premised on the 'dignity principle', 'and yet crucially depends on the meaning assigned by [the assessed] culture to those

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<sup>209</sup> Chimni (n 181) 60: 'International law represents ... a *culture* that constitutes the matrix in which global problems are approached, analysed and resolved.' Similarly, national systems represent unique legal cultures, and hence the need to understand the 'cross-cultural' implications when international law is applied by domestic courts.

<sup>210</sup> Dan-Cohen (n 103) 163-164. He addresses the matter from a criminal law perspective with specific reference to the so-called 'cultural defense'. His analysis could however, apply to any other pluralistic context.

<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

actions [or as I argue, norms]'.<sup>214</sup> Thus the social context becomes central to the assessment of the morality of all the relevant norms or actions.

Consequently, the instant argument is that the mechanisms of translating international law in an emancipatory manner means that its own norms too, must be subjected to scrutiny in terms of the dignity principle or another type of moral or ethical enquiry.<sup>215</sup> It is therefore not merely a case of the domestic recipient being assessed according to international norms.

Apart from jurisprudential, moral and ethical dilemmas which dog the transposition of international law, there are also problems of a more technical nature, such as those of interpretation, language and translation.<sup>216</sup> In part, these have prompted the criticism that international law is a 'grab-bag' of rules, which render compliance a matter of subjective, politically motivated choice, since it is open to different interpretations depending on time and place, and 'capable of eliciting different views from reasonable people'.<sup>217</sup> Hence, it is not unusual to find that both sides of a contested issue claim that they are correctly applying international law principles.<sup>218</sup>

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<sup>214</sup> Id at 150-151 and 164. Dan-Cohen describes the dignity principle as 'the view that the main goal of the criminal law (and I suggest other laws and norms) is to defend the unique moral worth of every human being.' This formulation works well for conflicts between international human rights norms and cultural or religious practices. Furthermore, as I argue in the next chapter, the principles of dignity and respect are the most reliable values to inform an ethical guide to emancipatory jurisprudence in all areas of international law, even in areas such as trade law and environmental law. See Chapter IV 10.

<sup>215</sup> For example Chimni (n 181) 60-61, saliently observes that international law is very much part of the 'knowledge production' driven by the North, through which it legitimises its 'vision of the world order' which is one of imperialism and moral condemnation of the South. Hence, it ought to be challenged on those counts.

<sup>216</sup> See for example Gatti 'Third World approaches to international economic governance' in Falk et al (eds) *International Law and the Third World* (2008) on the problems associated with translation and the interpretation of historical documents in the *Kasikili/Sedudu Island Case* 1999 ICJ Rep 4 (Judgment of 13 December 1999) before the ICJ; Perreau-Saussine (n 83) 115,122-127, on the *Roma Rights Case* where the outcome hinged on the technical meaning of the phrase 'refugee at the frontier', while at the same time, many pertinent international law principles were side-stepped by the court.

<sup>217</sup> Charlesworth et al (n 30) 11, quoting Australian Judge Callinan.

<sup>218</sup> Ibid, for example, both the pro-war and anti-war protagonists during the 2003 Iraq war relied on international law.

Further problems which arise at the point of the translation of international law are its fragmentation and deformalization, discussed in the previous chapter, which may give rise to 'regime conflict' at various stages of the legal process.<sup>219</sup> An earlier example showed that, a court can resolve a case of detention without trial of a suspect, on the basis that it is a human rights issue, or it can regard the matter as one concerning state security. The construction thus chosen could dramatically affect the outcome.<sup>220</sup>

In terms of deformalization and the 'emergence of anti-formal expert regimes', the 'legal problem' becomes a regime 'management problem'.<sup>221</sup> Adjudication therefore amounts to a *negotiated* balancing of the parties' interests, underscored by technical or economic considerations.<sup>222</sup> Again, the analytical mechanism employed, for example, the type of expert opinion relied on, will have a marked effect on the manner of the translation of the international norm in the domestic context.

All of the above attest to the plethora of potential complications which may arise during the particularisation of international law, in order to fit (or not), into a given local constellation of normative orders and part-orders.<sup>223</sup> I argued previously that, certain of these dilemmas nevertheless contain within them the seeds of opportunity to reconstrue the role of international law.<sup>224</sup> Prickly issues, such as the potential for protean interpretation and regime conflict, are indications of a degree of plasticity inherent in the nature of international law. Do

<sup>219</sup> Koskenniemi (2007) (n 32) 6; and see Chapter II 4(c)(i).

<sup>220</sup> *Ibid.* Note the reference to the case of *Hilal Abdul-Razzaq Ali Al-Jedda* Judgment of 12 August 2005, Case No CO/3673/2005, [2005] EWHC 1809.

<sup>221</sup> *Id.* 9, 14-15. He writes in the context of public international law, where the problem is exacerbated. The example serves, however, to highlight some of the difficulties and the possibility that 'traditional international law is pushed aside by a mosaic of particular rules and institutions, each following its embedded preferences'. (My emphasis)

<sup>222</sup> *Id.* 14.

<sup>223</sup> Equally trite, however, is to note that many of these issues adhere to the judicial enterprise per se. Cross-cultural dilemmas and pluralism also occur at national level, rendering national laws as unpalatable in certain cultural contexts as international law. This too, would call for judicial sagacity in the balancing of interests.

<sup>224</sup> Chapter II 5.

these 'problems' not demonstrate that international law is capable of malleable interpretation and application in a specific context?

Although this very malleability creates negative press for international law and may assuredly lend itself to abuse and uncertainty, it need not be seen as a fatal flaw. Flexibility presumes that an element of legitimate choice is available to the judiciary, which can potentially be harnessed in the interests of emancipatory justice.

In conclusion, judges are ineluctably confronted by choice – at which point personal or political bias and preference often tend to be the default positions – unless they assume a 'detached role', whereby the choice made is not simply a predetermined reaction, but one centred on critical evaluation.<sup>225</sup> Hence, I have argued that the judicial process of weighing up the choices brought into relief by multi-culturalism, normative pluralism, regime conflict and the like, can simultaneously become the process through which international law can be rendered counter-hegemonic, cosmopolitan and emancipatory.<sup>226</sup>

## 8. Conclusion

*While there is no such thing as objective judgment, it is nevertheless possible, indeed important, to strive for good judgment.*<sup>227</sup>

In this chapter I have proposed a vision for the role of the judiciary as agent for the emancipatory reconstruction of international law, through the creation of a counter-tradition to orthodox instrumentalism. This proposition requires engagement with some of the numerous obstacles in the way of renewal, many of which, upon further investigation, are revealed to be somewhat Janus-faced.

<sup>225</sup> See Dan-Cohen (n 103) 29-33 on judges and role distancing. These concepts are analysed in Chapter IV 10, in particular (e).

<sup>226</sup> See again Knop (n 27) 525-534 who advocates an approach to the translation of international law in domestic courts in accordance with the principles of comparative law.

<sup>227</sup> Knop (n 27) 531.

There are instances when a perceived impediment contains precisely those elements needed to counter top down homogenisation, or validate cosmopolitan sensibilities.<sup>228</sup>

Nevertheless, sketching possibilities, no matter how brightly, serves only to imagine *possibilities*. Thus, concretisation of the argument hinges on another crucial factor, namely actual, cosmopolitan and emancipatory navigation across the subnational-national-international interstices. This process involves the judicial will to interrogate its own dialectical biases, and self-consciously to seek out the most emancipatory choices.<sup>229</sup> This means that courts must neither denigrate the emancipatory role of international law, nor be seduced by promises of the universality of its justice and morality.

Throughout this chapter and others, I have therefore grappled with the question of how – in practical and theoretical terms – the judiciary can constitute itself as mediator of reconstruction. Whereas the foregoing chapters drew the contours, features and peculiarities of the terrain, the following chapter, by way of a conceptual map and analytical tools, is dedicated to plotting the actual journey projected toward the cosmopolitan and emancipatory reconstruction of international law. In turn, the final chapter, which is a survey of case studies from around the world, seeks and finds practical application of the framework thus developed.

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<sup>228</sup> For example, it was argued in Chapter II 4 and 5 that, inter alia, regime-conflict in international law holds the potential for making emancipatory choices, and in 5 above, that more expansive, cosmopolitan interpretations of concepts such as 'democracy' and 'community' are possible.

<sup>229</sup> Note again Dan-Cohen (n 103) 5: 'A self that is constituted by meanings is also susceptible to change in them.'



## CHAPTER IV

### NAVIGATIONAL TOOLS AND MAP: A THREE-DIMENSIONAL ANALYTICAL AND RECONSTRUCTIVE FRAMEWORK FOR THE EMANCIPATORY DEPLOYMENT OF INTERNATIONAL LAW IN DOMESTIC COURTS

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## 1. Introduction

The question in this chapter is *how* to apply international law in a counter-hegemonic and emancipatory manner in domestic courts. That is, what methods

can be used to accomplish the task, particularly in view of the many inherent difficulties discussed throughout previous chapters? This chapter suggests a methodology that comprises a map of the jurisprudential terrain, as well as a number of adjudicative 'tools', which are needed to navigate between local and global normative domains.

In turn, the theme of the chapter and the methods described, create an interactive connection to the ultimate destination of the study, namely the judicial reconstruction of international law from the bottom up, that is, from national and subnational levels. Such reconstruction is aimed at rendering international law cosmopolitan and emancipatory, and hence globally relevant and advantageous to all its participants and recipients.

Consequently, the chapter describes a conceptual framework for judicial navigation through the difficult terrain created by different normative regimes, which moreover, stand in hierarchical relationship to each other. It is both aspirational and propositional and serves, first, to raise consciousness of, and second, to activate the distinct tasks confronting the judiciary.

The complexity of the journey is exacerbated by factors such as normative plurality, the contentious nature of law, and, hence, of international law itself, and institutional and other limitations adhering to the judicial role. These key concepts were analysed in the foregoing chapters and are briefly summarised in the following section.

In overview, the framework described in this chapter, rests on four tenets. First, it accounts for the three-dimensional nature of the interface between local and global regulation, which constitutes the 'map'.<sup>1</sup> Second, in order to render the application of international law emancipatory, the interests of all the

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<sup>1</sup> The normative interchange between these levels is described as vertical, horizontal and depth dimensions or vectors respectively. In turn, these give rise the so-called 'three-dimensional analytical framework' formulated in the chapter.

stakeholders must be balanced according to principles of proportionality. Third, such balancing is preceded by conscious contextualisation at every level, which allows the particularisation of international law in domestic contexts. Fourth, in the balancing of interests, the judiciary must be guided by purposive ethical principles. These processes point to the 'tools' needed for the dual task of rendering international law emancipatory in its application *in* domestic courts, as well as in its reconstruction *by* domestic courts.

In addition, the chapter elaborates on the key concepts of cosmopolitanism and emancipation, which are the end-goals.

## **2. The map thus far: Theoretical pointers along the road toward the reconstruction of international law**

### **(a) The nature of law**

In Chapter I, the nature of law was analysed. It was established that law does not fit into the black-box paradigm assigned to it by positivist legal theory, and that law is contextually embedded and innately plural.<sup>2</sup> Ideas about what constitutes binding sources of law can accordingly be challenged. Pluralism also means that no legal system, whether national or international, is hermetically sealed from all others.<sup>3</sup>

These factors have a direct bearing on the application of international law in domestic courts and its potential to act in either hegemonic or emancipatory ways through any of its different domestic guises<sup>4</sup>.

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<sup>2</sup> Chapter I 2.

<sup>3</sup> Chapter I 6(b).

<sup>4</sup> See Chapter II 3 where the 'domestic guises' of international law are explained. These include constitutional provisions and enabling legislation, through which international law, like a Trojan horse, enters the domestic domain unobserved. See also Chapter V 7 for two examples from case studies.

### **(b) The reconceptualisation of international law**

Since the study concerns itself with the aspirational reconstruction of international law, its nature and parameters had to be established. In Chapter II, it was shown that international law is much wider than public international law, that states are not its only actors and that it is a flexible, value-driven system.<sup>5</sup> Importantly, it was demonstrated that international law is sufficiently nuanced to accommodate diverse socio-cultural relativities.<sup>6</sup>

Ultimately, it was shown that international law can be reconceptualised as 'cosmopolitan' and globally relevant law'.<sup>7</sup>

### **(c) The role of the judiciary**

Chapter III pointed out that there are various channels through which international law can be reconstructed.<sup>8</sup> The spotlight, however, fell on the judiciary. In its capacity as gatekeeper between international and national regimes, it is in a commanding position to translate international law into norms that accord with domestic needs, or, more profoundly, to render it emancipatory.

Furthermore, since national judicial decisions are a secondary source of international law, there is a real and immediate link between the judiciary and the interpretation, and hence, the potential reconstruction, of international law.

I suggest that the next step in establishing how the judiciary can go about this task is to analyse a superlative example. One such example is the jurisprudence of Justice Weeramantry.

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<sup>5</sup> Chapter II 2, 4, 5.

<sup>6</sup> Chapter II 6. This aspect is further borne out by the many case studies in Chapter V.

<sup>7</sup> See for example Mapaire 'Reinvigorating African values for SADC: The relevance of traditional African philosophy in a globalising world of competing perspectives' 2011 *SADC Law Journal* 149 at 151, 155.

<sup>8</sup> Santos *Toward a New Legal Common Sense* 2 ed (2002) for example 180-182, 458-474.

### 3. An aspirational example: Reflections on the jurisprudence of Justice Christopher Weeramantry

The present chapter endeavours to formulate a structured approach to the application and reconstruction of international law. In practical terms, the framework is aimed at activating, through judicial mediation, the reconciliation of legal and socio-cultural interests at the international, national and subnational levels.

In order to reify these abstract ideas, I consider the work of Justice Christopher Weeramantry.<sup>9</sup> His visionary and cosmopolitan approach to law and the judicial process exemplifies the necessary responsiveness to subjective contexts, the inherent plurality of legal systems, and the need to bridge 'the gap between different subjectivisms'.<sup>10</sup>

For purposes of the present study, of particular importance is his approach to international law, and his 'vocation as a Third World judge' which nurtured his 'preoccupation to ensure the construction of an international law that reflects and incorporates the riches of the world's civilizations rather than continuing its established tradition of reflecting Western values'.<sup>11</sup> Through his numerous separate and dissenting opinions for the ICJ, Justice Weeramantry has effectively demonstrated that it is possible to conceive of, and develop truly cosmopolitan law, that does not favour the wisdom and culture of one group, but of all groups, equally.

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<sup>9</sup> Anghie 'GC Weeramantry at the International Court of Justice' (2001) 14 *Leiden Journal of International Law* 829. After a career as an advocate, judge and academic, Justice Weeramantry served as judge, and later as Vice-President of the International Court of Justice (ICJ) from 1990 to 2000. For more detailed biographical notes, see id 829-833.

<sup>10</sup> Anghie (n 9) 832; 839-843. One reason for his sagacity can no doubt be attributed to his quest for justice within the highly diverse and pluralistic society of his native Sri Lanka. This background 'effectively required [Weeramantry] to become a comparative lawyer' due to the array of religious and customary norms which shaped, and were intertwined with the official (notably hybrid) legal system. See Paulus 'International law after postmodernism: Towards renewal or decline of international law?' (2001) 14 *Leiden Journal of International Law* 727 at 742, on the difficulties of 'bridging the gap between different subjectivisms'.

<sup>11</sup> Anghie (n 9) 833-834; 844-846.

He therefore anticipates an international regime that might speak to the human race as a whole and bring justice and dignity to all its peoples.<sup>12</sup> In this, he offers a concrete demonstration of the steps, which other jurists might take, to develop a globally and locally relevant application of international law in their own courtrooms. Hence, I suggest that an analysis of his work could be used as a type of checklist for other judges who grapple with issues relating to the application of international law within subjective and plural domestic contexts.

I suggest that the transposition of jurisprudential wisdom from an international tribunal to domestic courts is possible, because Justice Weeramantry's vision is based on an understanding of international law as evincing the customs and fundamental principles of human conduct generated within domestic and local spheres. Moreover, his vision embraces these aspects 'not so much by the abstraction of the state, but through the practices and beliefs of people developed in the course of their everyday lives.'<sup>13</sup> International law is therefore understood to be an integrated body, wherein the 'international' is infused with locally embedded norms.

A number of incisive themes emerge from the work of the Judge, which point the way toward the reconstruction of international law at the hands of other judges who are sensitive to the choices and challenges presented by the quest to apply international law in an emancipatory manner. These themes are summed up as follows:

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<sup>12</sup> See for example Gathii 'Geographical hegelianism in territorial disputes involving non-European land relations: an analysis of the case concerning *Kasikili/Sedudu Island* (Botswana/Namibia) in Anghie, Chimni et al *The Third World and International Order* (2003) 86-87; 94, where he analyses the *Case Concerning Kasikili / Sedudu Island* (Botswana / Namibia) 1999 ICJ Rep 4 (Judgement of 13 December 1999) with particular reference to the Dissenting Opinion of Justice Weeramantry, who adopts a different construction of the 'relationship between European and non-European subjectivity ... '. He does this by challenging the 'Myth of the Dark Continent' underlying the majority decision and by 'giving non-European subjectivity some long deserved agency' in his recognition of the probative value of evidence of the traditional use and occupation of the island by the Masubia tribe.

<sup>13</sup> Anghie (n 9) 834.

(i) Customs emanating from national *and* sub-national communities, past and present, are woven into the fabric of international law.<sup>14</sup>

(ii) International law is not a recent invention or merely the 'expression of an abstract state will and consent, [it] is the *expression of fundamental moral and social values which may be identified through a study of the practices of communities based on the normative principles they have developed over centuries and which have enabled them to survive and prosper.*'<sup>15</sup> Therefore, international law is 'part of the heritage' of the Third World as well.<sup>16</sup>

(iii) Without discarding conventional sources and materials, there is shift in emphasis from the so-called 'principles of law recognized by civilized nations' which notion is premised on the pre-eminence of the nation-state, to an emphasis on 'civilizations'. The latter view endorses not only black letter law but also customs and beliefs found across the globe, many of which are ancient, originating in the pre-nation-state.<sup>17</sup>

(iv) Non-state actors can be given their due recognition when judges draw on the richness and wisdom of the global community, including that of peripheral societies.<sup>18</sup>

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid (my emphasis), and 846.

<sup>16</sup> Id 845.

<sup>17</sup> Id 834 and 845. This vision has important implications for defining the 'sources of international law', and also their legitimacy which is discussed further below. See also Chapters II 3 and III 5; Gathii (n 12), on how the typically western-centric construction of the 'state' can result in the fact that international law may 'undervalue and under-account for non-European subjectivity...'. The approach adopted by Justice Weeramantry attempts to counter this rendition of international law. See especially at 107-108. See also Pentassuglia 'Towards a jurisprudential articulation of indigenous land rights' (2011) 22(1) *European Journal of International Law* 165 at 188-190ff for specific examples of how courts have accomplished this.

<sup>18</sup> Anghie (n 9) 835. Sarfaty 'International norm diffusion in the Pimicikamak Cree nation: A model of legal mediation' (2007) 48 *Harvard International Law Journal* 441 for an example of the effect of indigenous laws on national legislation.

(v) The link between law and the society it serves must be established and preserved.<sup>19</sup>

(vi) International law ought to serve a wider social purpose through the promotion of peace, dignity, equality and freedom for all, and not merely as these pertain to the relationship between states.<sup>20</sup>

(vii) The legitimacy of international law and the degree to which it is esteemed are linked to its correspondence with social and cultural practices and ordering at the domestic level.<sup>21</sup>

(viii) In order for international law to be cosmopolitan, the applicability of cultural and religious principles which have guided the world's civilisations must be *studied and used* to resolve international problems.<sup>22</sup>

I argue that, armed with the wisdom contained in the principles detailed above, judges around the world are enabled to develop a jurisprudence of 'enormous inclusiveness and generosity'.<sup>23</sup> The importance of Justice Weeramantry's vision lies not only in its conceptualisation, but in its purposive application to actual, weighty situations, coupled with a fearless pursuit of justice and dignity for the wide spectrum of societies and civilisations that make up the human race.

It acknowledges that wisdom and guidance flow, not merely from North to South, or First World to Third World, but in both directions, as well as diachronically. Such wisdom and guidance, apart from offering suitable

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<sup>19</sup> Anghie (n 9) 835.

<sup>20</sup> Ibid; note again Singer *One World: The Ethics of Globalization* 2 ed (2004) 150-195 on the world as 'one community'.

<sup>21</sup> Anghie (n 9) 836.

<sup>22</sup> Id 846; also the views of Baxi 'What may the "Third World" expect from international law?' in Falk et al (eds) *International Law and the Third World* (2008) 11.

<sup>23</sup> Anghie (n 9) 847.

responses to immediate international issues, may ultimately be linked to the survival of living things on the planet.<sup>24</sup>

Next, the key elements, contained in the abovementioned principles, are isolated and analysed in constructing the three-dimensional framework. The first important concept or 'tool', contextualism, is discussed below, followed by the tools of proportionality and particularisation in subsequent sections.

#### 4. Contextualism as an adjudicative tool

*Law operates in a context; it does not exist in a vacuum ... the Law has its own macro-context, the social and physical environment in which it is to operate.*<sup>25</sup>

*[T]he connection between law and social change emerge only if law is inspected in the context of ordinary social life.*<sup>26</sup>

The rationale behind the tool of contextualism is a need to even out the terrain traversed by the judiciary when it considers matters that span international law and domestic law. The first objective of contextualism is to mediate between different or competing regimes, the second is to lay a foundation for the application of the other tools, which are, proportionality and particularisation.

For purposes of the study, the term 'context' assumes its everyday meaning, namely, the 'surrounding circumstances' of any particular situation. This apparently simple definition nevertheless contains a minefield of possibilities. 'Circumstances', for example, could refer to facts, causes,

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<sup>24</sup> In this spirit I quote Stevens 'Recreating the state' in Falk et al (eds) *International Law and the Third World* (2008) 61, 'It is not certain that the Earth will not cease to exist, but it is certain that each of its inhabitants will and, if there is to be one delusion, then respect for the potential immortality of this world seems one that is good as well as useful.'

<sup>25</sup> Allott *The Limits of Law* (1980) 99.

<sup>26</sup> Moore *Law as Process: An Anthropological Approach* (1978) 78.

occurrences or conditions, which in turn, are dependent on, or relative to, a particular time-space continuum.

Nonetheless, in the present analysis, context is narrowed down to a particular legal context, that is, it involves a consideration of circumstances which impact on the law as applied by domestic courts.<sup>27</sup> Therefore, in terms of the ambit of the study, the context of each case has three dimensions, namely the normative context provided by international, national and subnational regulatory systems.<sup>28</sup> Hence, the proper context of a case consists of three interlinked 'contexts'.

This means that the relevant context in a specific case can be wide or narrow, since it can encompass anything from major global concerns to the private concerns of individuals. Axiomatically, there is substantial potential for conflict between the interests of various participants.

Furthermore, it has been emphasised throughout this study that laws and norms are always embedded in a greater socio-cultural context and are therefore 'culture-specific'.<sup>29</sup> Thus, if there are conflicting interests, these could be exacerbated by the incompatibility of deeply entrenched socio-cultural values

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<sup>27</sup> For an interesting discussion of how courts employ the technique of contextualisation, see Waters 'Creeping monism: The judicial trend toward interpretive incorporation of human rights treaties' (2007) 107 *Columbia Law Review* 628 at 672-678. Note however, that the term is used in a technically specific manner, which is narrower than the present definition.

<sup>28</sup> These three dimensions which constitute the judicial 'map' are analysed in detail in section 9 below. See also Teubner 'Legal irritants: Good faith in British law or how unifying law ends up in new divergences' (1998) 61(1) *Modern Law Review* 11 at 15-16 in a discussion of Alan Watson's legal transplant theory: 'The primary unit is *no longer* the nation which expresses its unique spirit in a law of its own as a cultural experience which cannot be shared by other nations with different traditions.' (My emphasis.) Whether one agrees with the theories advanced in the article or not, this statement is a good indication of the fact that 'context' is much wider than the national regime.

<sup>29</sup> For example Legrand 'The impossibility of "legal transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111 at 117; Tushnet 'Some reflections on method in comparative constitutional law' in Choudhry *The Migration of Constitutional Ideas* (2006) 76, contextualism in terms of national constitutions 'emphasises the fact that constitutional law is deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation...', therefore a 'doctrine or institution' cannot be analysed 'without appreciating the way it is tightly linked to all the contexts within which it exists'.

which underlie a particular situation. 'Context' and 'culture' therefore coalesce, and one depends on the other.

In consequence, the relevant legal context, at all three levels, is plural because even within them, various regulatory regimes interlock or collide. For example, in a child custody matter, the contextual dimensions might constitute a plurality of religious norms at subnational level, a particular legal regime at national level, and additionally a framework created by international law.<sup>30</sup> These, however, are not neatly compartmentalised, and there may be internal divergences of either norms or values within each dimension.<sup>31</sup>

The overriding concern of emancipatory jurisprudence is therefore to balance the various contextual aspects, which goes far beyond applying one or other set of legal rules.

In summary, contextualisation means that a judge closely considers the prevailing socio-cultural matrix – which includes legal, political and economic factors – pertaining to the international, national and subnational context(s) within which a specific case is embedded. It is the first step in the process toward the cosmopolitan and emancipatory application of international law in domestic courts.

To be effective, contextualisation requires an incisive and conscious engagement with all three contextual dimensions.<sup>32</sup> Only when the given contexts are each afforded their due weight, is the judge in a position to balance competing interests. Ultimately, the goal is to 'mediate between extreme

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<sup>30</sup> See for example *M v P* Court of Appeal, Civil Appeal No 11 of 1979 at Nairobi April 17 1980 discussed in Chapter V.

<sup>31</sup> In the present illustration for example, national constitutions would typically protect both freedom of religion and the rights of children, which could create conflict based on a plurality of applicable norms.

<sup>32</sup> See 9 below.

positions', in order to distil transcending norms and values, which are emancipatory.<sup>33</sup>

As a tool in adjudication, contextualisation provides the judiciary with the necessary foundation to conduct a three-dimensional proportionality inquiry, based on respect for the interests of all parties concerned.<sup>34</sup>

### **(a) Inherent difficulties and limitations of contextualism**

*[T]he law reacts to external pressures ...*<sup>35</sup>

*[I]ndigenous knowledges are presupposed to be bounded and inextricably connected to some isolable "cultural context" until disaggregated by the interpretive activities of ethnographers.*<sup>36</sup>

The mere act of contextualisation does not guarantee that a judgment will be just or emancipatory. Rather, it depends on the manner in which judges negotiate the interstices between different contextually embedded interests. Hence, difficulties and limitations arise at the level of the judiciary itself, and also in terms of 'context' as a concept. One could question, for example, the extent to which 'context' can be ascertained, firstly, because judges can never completely escape their own subjectivity and social distance from the site of dispute, and, secondly, because of the unstable nature of every context itself, as it fluctuates in response to external and internal stimuli.

A distinct difficulty is that courts, in order to determine the factual context, ordinarily have to rely on evidence adduced by council, witnesses, experts and so forth. The quantity and quality of such evidence will clearly have a marked

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<sup>33</sup> Hinz (ed) *In Search of Justice and Peace* (2010) 1.

<sup>34</sup> Proportionality is discussed in 6 below.

<sup>35</sup> Teubner (n 28) 16, on Watson's criticism of contextualism.

<sup>36</sup> Coombe 'Culture: Anthropology's old vice or international law's new virtue?' (1999) 91 *American Society of International Law and Procedure* 261 at 267.

impact on how the court establishes the content and parameters of a given context. Consequently, questions, about whose and what evidence is led, have significant consequences for the process of contextualisation. It is, however, a vast topic falling outside the scope of this study, which focuses on the role of the judiciary itself. As such, courts have the task of filtering and weighing the available evidence, and, if appropriate, calling for additional evidence. Hence, the judiciary is able to use its powers and discretion to optimise the evidentiary aspect of contextualism, and, I argue below, a responsibility to determine that proper and sufficient evidence is obtained.<sup>37</sup>

In respect of the judicial task, it must be clear that any particular normative context can generate hegemony and oppression. Therefore, proper contextualisation eschews stereotypical readings of a context by the court. For example, it will reject the view that traditions and indigenous norms are per se irrelevant or oppressive, and, conversely, that international standards are 'civilised', and hence automatically beneficial.<sup>38</sup>

Similarly, the imposition of norms from one context to another can have a hegemonic effect, and what might seem just in one context, may be oppressive in another.<sup>39</sup> There is furthermore much evidence of judicial inconsistency and double standards, which go unheeded (because they are so deeply contextually embedded) and which skew the process of contextualism itself.<sup>40</sup>

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<sup>37</sup> See for example *Smit NO and Others v King Goodwill Zwelithini Kabhekuzulu and Others* (10237/2009) [2009] ZAKZPHC 75; *Sesana and Others v Attorney General* (52/2002) [2006] BWHC1

<sup>38</sup> See Chapter 1 2 and 3(c).

<sup>39</sup> For example Fourneret 'France: Banning legal pluralism by passing a law' in *Schlesinger's Comparative Law* 7 ed (2009). In one context, the banning of headscarves might seem perfectly justifiable, in another, a heinous imposition of foreign values. A court ruling on this issue will have to consider the relevance of both contexts. Note again, Legrand (n 29) on the 'impossibility' of legal transplants from one context to another.

<sup>40</sup> This is well summed up in the following quote by palaeontologist Stephen Jay Gould (1941-2002): 'The most erroneous stories are those we think we know best – and therefore never scrutinize or question.' A good example is the western conceptualisation of terrorism, which is always seen as the iniquitous actions of others, never self. Yet, it can be argued that 'human suffering is perpetrated by the terrorists as well as by those who engage in arbitrary and indiscriminate retaliation which in fact reinforces and legitimises the distorted logic of terrorism in

Therefore, at the outset, the problem of inherent judicial subjectivity and the distortions of reality created by the cognitive stance of individual judges, may scupper effective contextualisation.<sup>41</sup> The latter may for example be instilled by the judge's immersion in a particular legal system, because 'legal identity is subjective according to the balance of reasons accepted by an individual.'<sup>42</sup> Or, a particular context, notably one at a subnational level, such as a religious regime, could be completely foreign to the judge's frame of reference, rendering proper contextualisation very difficult.

These factors can nevertheless be mitigated by way of a two-stage approach. First, the court must be willing to engage in a conscious negotiation of the contextual parameters of the case. Such negotiation entails having the necessary respect for 'the other', and it may call for an investigation and additional research of, for example, the relevant customary or religious context.<sup>43</sup> Next, the contextual inquiry must be conducted in tandem with the other adjudicative tools of proportionality, particularisation and the ethical 'compass' of the three-dimensional framework, which are explained below.

Further difficulties relate to the concept of 'context' itself, one being that a given context can be either very wide or very narrow. As the cases in the next chapter show, it can relate to a small slice of the personal lives of individuals, or

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the name of combating it', in An-Na'im 'Why should Muslims abandon *Jihad*? Human rights and the future of international law' in Falk et al (eds) *International Law and the Third World* (2008) 90 (my emphasis). At 91, his view is substantiated by the 'grossly disproportionate and aggressive foreign policy of the USA after 9/11'.

<sup>41</sup> See 9(c) below and Capps 'Sovereignty and the identity of legal orders' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) 68-69 who explains the significance of, for example, internal or external points of view, or first order, as opposed to second order accounts.

<sup>42</sup> Capps (n 41) 68-69.

<sup>43</sup> For example in *Smit NO and Others v King Goodwill Zwelithini Kabhekuzulu and Others* (n 37), where it appeared to be a foregone conclusion that the traditional Zulu ritual of bull-killing (*Ukweshwama*) amounted to grave cruelty to animals. The court however, upon careful analysis of expert evidence relating to the tenets underlying the ritual and factual evidence presented in support thereof, concluded that the ritual was not conducted in a manner that amounted to cruelty to animals. In its investigation, the court found that the evidence produced in support of the alleged cruelty, was in fact greatly biased.

to matters affecting the whole world, such as the peace and security of the international community. It is not uncommon for these contexts to overlap, especially in matters containing an international law dimension, which gives rise to perplexing, though inescapable, choices.

In the above, the limitation thus lies in the court's ability or inability to reconcile contradictory interests. It is furthermore logical that courts will not always succeed in finding the middle ground wherein competing rights and concerns can be accommodated. Hence, the judiciary's adroitness in resolving these problems in 'ethical-practical rationality' will determine the degree to which a judgment can be emancipatory.

Another difficulty, which adheres directly to the concept of context, is its porosity. Like 'culture', 'context' cannot be isolated or fixed and its content may be contested.<sup>44</sup> For example, if one considered the 'national constitutional context', it 'suggests that a nation *has* a (single) self-understanding that its constitution expresses'.<sup>45</sup> This reading can clearly not be sustained, since modern nations tend to be remarkably diverse and multi-cultural. Hence, constitutional norms and values may be inimical to the ones held by certain segments of the nation.<sup>46</sup> Furthermore, 'context', in concord with culture, is a 'dynamic process' that changes over time.<sup>47</sup>

Thus, 'context' is not a homogenous field with a distinct border. Instead, it is rather like a join-the-dots picture, and it is important to determine which 'dots' constitute a particular context. Here, Teubner's metaphor of 'tight and loose

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<sup>44</sup> See Coombe (n 36) 267.

<sup>45</sup> Tushnet (n 29) 81.

<sup>46</sup> One reason is the fact, as previously noted, that modern constitutions mimic each other closely. This means that norms and values which are embedded in western cultures underlie, for example, most African constitutions. Hence, the 'constitutional context' in a specific country may not necessarily be aligned with national and subnational 'contexts'. See An-na'im (ed) *Universal Rights, Local Remedies* (1999) 42-45.

<sup>47</sup> See Coombe (n 36) 266, 270; Merry *Human Rights and Gender Violence* (2006) 6-10.

coupling' is again most useful.<sup>48</sup> It recognises that legal and cultural ties to society are selective, and that some ties are 'tight' and almost unbreakable, whilst others are 'loose' and can be disengaged more easily. In order to draw the contours of a particular context, judges are therefore required to evaluate which are the 'tightly coupled' elements, so as to gear the balancing process toward accommodation according to the relative importance of different interests.

There is another caveat to contextualism, namely, that instead of fostering inclusiveness, it may reinforce binary preferences.<sup>49</sup> For example, if relative, subnational contexts are given preference over all others, there can be no proportionality in ascribing relative weight to competing interests. Similarly, if stark choices are seen as the only option in cases of apparent conflict between international and subnational regimes, the international norm may be imposed on these in a hegemonic manner. The same holds true for any other uneven configuration.

The purpose of contextualism, to find the 'golden thread' that mediates uniformly between opposing interests, is therefore paramount.<sup>50</sup> Needless to say, the greatest degree of reconciliation can only be made possible through a contextual inquiry that avoids bias, thereby evening the playing field for all stakeholders.

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<sup>48</sup> Teubner (n 28) 18-21.

<sup>49</sup> This fact is a criticism that could be levelled against some TWAIL writers, who for example, tend to reinforce the North/South dichotomy albeit from a Third World perspective. See Al Attar and Miller 'Towards an emancipatory international law: The Bolivarian reconstruction' (2010) 31(3) *Third World Quarterly* 347. Weeramantry, on the other hand, emphasises inclusivity. See Weeramantry 'International law and the developing world: A millennial analysis' (2000) 41 *Harvard International Law Journal* 277.

<sup>50</sup> See the judgment of Justice Mokgoro in *S v Makwanyane and Another* 1995 (3) SA 391 (CC), especially para 307.

### (b) Examples of contextualism in everyday jurisprudence

*[E]ach manifestation of the law ... must be apprehended as a 'fait social total', a complete social fact.*<sup>51</sup>

There are other examples of socially responsive judicial practices, although perhaps, less vibrant than those of Justice Weeramantry, which support the view that the contextual application of international law is possible. These practices confirm that contextual jurisprudence is neither new nor foreign to everyday adjudication. Below, I list a number of unrelated examples to illustrate both the usefulness, and prevalence, of contextualism as an adjudicative tool.

On one level, courts are in effect engaging in a process of contextualisation every time they consider the moderating influence of 'public policy' and 'boni mores' on their judgments.<sup>52</sup> The reason is that these abstractions are neither neutral nor objective, and the judiciary must deal with the tensions created by the very subjectivity of these and other related concepts (such as 'community standards' or 'the reasonable person'). All of these have no intrinsic meaning, apart from their reference to a particular context.<sup>53</sup>

An interesting example from criminal law, provided by Dan-Cohen, is that of self-defence, as approached from different contextual perspectives.<sup>54</sup> He considers what the implications would be of a law which demands that a person

<sup>51</sup> Legrand (n 29) 116. See again the criticisms in Teubner (n 28) 16-17.

<sup>52</sup> See Moran 'Influential authority and the estoppel-like effect of international law' in Charlesworth et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) especially 167-186, on the 'influential authority' exerted by constitutional and international law values in shaping the notion of 'public policy';

<sup>53</sup> For example Moran 'Shifting boundaries: The authority of international law' in Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007) especially 190, noting, with reference to *De Klerk v Du Plessis* 1996 (3) SA 850 (CC) that the South African Constitutional Court 'points to the importance of related open-textured value terms in the common law, including public policy and reasonableness, as an important means of fashioning the relationship between constitutionalized human rights and private law'. See Chapter III 5(c) that deals inter alia with the concept of 'community standard'.

<sup>54</sup> Dan-Cohen *Harmful Thoughts* (2002) 75. For present purposes, I use the example illustratively and in a more superficial manner than the author in his highly complex analysis.

retreats whenever possible instead of using deadly force.<sup>55</sup> The example, however, places this law in the context of a community standard which prescribes that 'the manly thing is to hold one's ground'.<sup>56</sup> Here, the apparent fairness, or otherwise, of punishing a person for aligning his or her conduct to prevailing standards, or, of placing the emphasis on compassion rather than on crime prevention, create tensions which only arise due to the specificity of a particular context. Thus, courts are routinely engaged in dealing with context when they weigh up such options.

Similarly, certain common denominators based on values and principles, for example, those of equality and respect for human dignity are readily invoked, to the point where they are granted 'legal priority' – this, despite their lack of a strict legal pedigree.<sup>57</sup> However, the concepts of dignity, freedom and equality are the chameleons of culture, and indeed mean different things in different contexts.<sup>58</sup>

In this regard, one merely has to reflect on the plasticity of these concepts in relation to the treatment of women under various legal, cultural and religious systems. It is clear that even the interpretation ascribed to dignity, freedom and equality by women themselves is firmly embedded within a specific existential context.<sup>59</sup> It follows that, when courts refer with enthusiasm to 'common' or 'universal' values, they are nonetheless engaging in some form of

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<sup>55</sup> Dan-Cohen (n 54) 75.

<sup>56</sup> Dan-Cohen (n 54) 75, 93.

<sup>57</sup> Weinrib 'The postwar paradigm and American exceptionalism' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 89. She notes that dignity and equal citizenship rights are 'the basic components of personhood in the modern constitutional state', and that a 'substantive content, special legal status, and transnational dimension' can be identified in the 'postwar rights revolution'.

<sup>58</sup> See Chapter II 4 and 6, on the lack of universality in international law, which includes its values and principles.

<sup>59</sup> For example Nyamu 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?' (2000) 41(2) *Harvard International Law Journal* 381 at 394-395.

contextualisation.<sup>60</sup> In reality, the meaning and validation of these 'universal' values are derived from a dominant social context.<sup>61</sup>

The need for contextualisation may also occur in a number of less obvious situations, such as when courts have to determine what the 'applicable law' is in cases where conflict of laws rules are applied. As I explain below, this could happen in the area of international trade law, when doubt exists, for example, because the parties have not agreed on the law which governs their contract.

For instance, various instruments, such as the UNCITRAL model law provides that, not only must the terms of the contract be taken into account, but also the trade usage applicable to the transaction.<sup>62</sup> Similarly, the CISG places much emphasis on usage, both subjective and objective, and it contains a presumption that the relevant trade usage is impliedly made applicable by the parties.<sup>63</sup> In essence, such emphasis on usage calls for a contextual analysis, because without ascertaining the parameters of the relevant trade context, the applicable usage cannot be established.

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<sup>60</sup> It is clear that when 'universal' values are enshrined in national constitutions, they assume at least some national flavour. Furthermore, courts may be mandated (see for example the Constitution of South Africa 1996 section 211(3)) to apply customary or indigenous laws when applicable. This means they must first ascertain the contents of the relevant cultural context pertaining to the rights of the litigants. The so-called 'cultural defence' is another example of courts consciously engaging with the relevant cultural context, which means that certain 'universal' norms are construed subjectively. See Dan-Cohen (n 54) 163-166; Bennett 'The cultural defence and the custom of *thwala* in South African law' (2010) 10 *Botswana Law Journal* 3-26.

<sup>61</sup> For example Knop 'Here and there: International law in domestic courts' (2000) 32 *New York University Journal of International Law and Politics* 501 at 527, 'what international law presents as universality is, in fact, based on a white Western male view of the world.' This criticism can be levelled against all other western legal systems.

<sup>62</sup> See Booyen *Principles of International Trade Law as a Monistic System* (2003) 773-775 on the United Nations Commission on International Trade Law (UNCITRAL) UN-Doc A/RES/72 of 11 December 1985. This instrument may have domestic application. Also see 779-780 on the importance of usage in the European Convention on International Commercial Arbitration of 1961.

<sup>63</sup> Booyen (n 63) 580-581, 588-589 on the United Nations Conventions on Contracts for the International Sale of Goods (CISG) 1 January 1988, which may find domestic application.

Contextualisation also takes place on international and transnational planes. At the transnational level, the 'margin of appreciation' doctrine of the European Court of Human Rights is a good indication of the contextual embeddedness of human rights concepts. The doctrine provides that member states have a certain amount of discretion in the implementation of the ECHR rights provisions, because of national contextual variations.<sup>64</sup>

On the international plane, the deformalization of international law has meant that instead of the uniform application of standardised rules amongst states, these rules have become a series of 'negotiated compromises' between states.<sup>65</sup> Such compromises are based, in the main, on typically contextual factors relative to the states involved, and include the 'balancing' of various interests, 'proportionality', 'reasonableness' and the need to attain 'equitable' or 'optimal' outcomes.<sup>66</sup> In other words, the international regime is adjusted to accommodate case-specific and contextual exigencies.

From the eclectic range of examples above, it is apparent that it is practically impossible to ignore contextual factors in adjudication of any type. Usually some form of judicial construction, be it of legislation, documents, the circumstances of the litigants or public policy, requires the exploration of one or other context. Stock themes such as 'reasonableness', the 'intention' of the parties or legislator, or the 'spirit of the law', say, in reality, that the court is contextualising its judgment.

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<sup>64</sup> For example Van Dijk et al (eds) *Theory and Practice of the European Convention on Human Rights* 4 ed (2006) 340,349; Knop (n 61) 527; Paulus 'Germany' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 230.

<sup>65</sup> Koskenniemi 'The fate of public international law: Between technique and politics' (2007) 70(1) *Modern Law Review* 1 at 10; Singh 'The potential of international law: Fragmentation and ethics' (2011) 24 *Leiden Journal of International Law* 23 at 25.

<sup>66</sup> Koskenniemi (2007) (n 65) 9-12, where he provides an incisive overview of factual examples of deformalization. See also Koskenniemi 'The politics of international law – 20 years later' (2009) 20(1) *European Journal of International Law* 7 at 14-18, on the problems of the 're-interpretation of general legal vocabularies' and 'new expert languages'.

The examples illustrate how firmly rules are intertwined with their relative context, and yet, the significance of this fact usually passes without much critical scrutiny right ‘under the judicial radar’.<sup>67</sup> Nevertheless, the flexible nature of contextualism, despite its apparent randomness, affords courts a critical space wherein they can evaluate alternatives and exercise their discretion. I argue below, that through a less arbitrary and conscious engagement with this process, its intrinsic pliability may be harnessed to render judgments more emancipatory.

## 5. Jurisprudential navigation: From contextualism to emancipation

*[Law] serves those in power but it is always in danger of escaping its bounds and working in a genuinely emancipatory way.*<sup>68</sup>

### (a) The link between emancipation and context

It was indicated above, that contextualisation is a means to an end, the ultimate goal being the emancipatory application and reconstruction of international law. There are however, a number of steps, involving additional tools, between contextualism and the attainment of the goal. They are considered below. The present section focuses on the manner in which the meaning of emancipation is welded to a particular context, as my description of emancipation indicates.

*Emancipation in the application of international law in domestic courts means a cosmopolitan orientation, which offers release from and facilitates the possibility of transforming oppressive conditions. It is achieved by means of an equitable balancing in ethical-practical rationality of the interests of all stakeholders.*<sup>69</sup>

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<sup>67</sup> See Chapter V section 2(c) on the ad hoc manner in which contextualisation usually takes place.

<sup>68</sup> Merry (n 47) 231.

<sup>69</sup> I note again that ‘oppressive conditions’ include oppressive regulation and ‘faceless oppression’, that is, oppression without direct human agency. Rationality is used in the sense of intellectual logic as opposed to religious or emotional compunction. Or, according to Santos, emancipation means ‘expanding the possibilities of social transformation beyond a given

Emancipation thus denotes some form of relief from oppressive circumstances, or 'contexts', which impinge on the dignity and freedom of persons or hinder the realisation of human potential in some other way.<sup>70</sup> Hence, emancipation can mean relief from the deleterious effects of state abuse, from the hegemony of law, including that of international law, or from intolerant public opinion.<sup>71</sup> It can also simply provide relief from the harsh realities of life, or from outdated laws and practices, which impede justice or hinder progress.<sup>72</sup> In addition, emancipation can relate to issues which concern the 'greater good', such as the prevention of international crime or protection of the environment.<sup>73</sup>

In consequence, because hegemony not only relates to individual human rights scenarios, so emancipation may also refer to a wide spectrum of subjects and situations, including matters as diverse as trade and environmental issues, all of which may affect anyone, whether individuals or humanity as a whole.

Emancipatory jurisprudence correspondingly depends first and foremost on determining the relevant contextual factors pertaining to the international, national and subnational dimensions, with a fair degree of accuracy. In turn, the other judicial processes, which advance emancipation a step further, flow from such contextualisation.

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regulatory boundary'. This definition too, flags the link between emancipation and a particular context, since 'regulatory boundaries' are deeply contextual. See Santos (n 8) 3.

<sup>70</sup> See also Chapter V section 2(c).

<sup>71</sup> Chapter V provides case studies of different instances of emancipation. See the following cases respectively: *Mapuche* (Expte. 15.320 - Año 2003) available at: <http://odhpi.org/wp-content/uploads/2012/07/amparo-paichil-JUNIN.pdf>; *Waldschlösschen* BVerfG, 2 BvR 695/07 of 29-05-2007 available at: [http://www.bverfg.de/entscheidungen/rk20070529\\_2bvr069507.html](http://www.bverfg.de/entscheidungen/rk20070529_2bvr069507.html); and *In Re: The Adoption of Children Act CAP 26:01; In Re: CJ A Female Infant* (Msca Adoption Appeal No. 28 of 2009) [2009] MWSC 1 (*Adoption of CJ*) available at <http://www.malawilii.org/mw/judgment/supreme-court-appeal/2009/1>; *Makwanyane* (n 50); *Ngwenyama* [2012] ZASCA 94 (1 June 2012).

<sup>72</sup> Chapter V, see the following cases respectively: *Adoption of CJ* (n 71) and *Dow* 1994 (6) BCLR 1.

<sup>73</sup> Chapter V, see *Lufuno* 2009 (4) SA 529 (CC) and *Mapuche* (n 71) respectively.

### **(b) Towards emancipation: The judicial tasks of balancing and mediation**

After contextualisation, the next step is to weigh and balance the relevant contextual factors. Clearly, this cannot mean a comprehensive incorporation of every contextual element, but it will necessitate the equitable selection of factors. I suggest (in agreement with Santos) that this process, like all others, takes place within a framework of ethical-practical rationality.<sup>74</sup> Importantly however, the spirit underlying such choice is not centred on a competitive analysis of, let us say, international versus indigenous norms, but on one which affirms complementarity and seeks mediation between rival normative contexts.

As Örucü succinctly explains, ‘when elements from two interpretive models combine, one drawing its understanding from culture, tradition and religion and the other from official law, they might be able to tap into each other and mesh, bringing “cultural conversation” and creating a “fit” in a wider narrative’.<sup>75</sup> Or, one can envisage the process as a ‘cross-cultural reconstruction ... recognising difference and linking local embeddedness and grassroots relevance to translocal intelligibility and emancipation’.<sup>76</sup>

Balancing and mediation therefore provide a direct conduit to emancipatory cosmopolitan law, which signifies an ‘openness’ toward divergent realities, whether they are normative or socio-cultural in nature.<sup>77</sup> Cosmopolitan law however, does not merely accommodate plurality; it is also aimed at achieving the greater good of the global community. Yet, if it is emancipatory, this

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<sup>74</sup> See Chapter I 1 and 5(a) above. Section 10 below provides an explanation of the ethical dimension involved in such balancing.

<sup>75</sup> Örucü ‘Judicial navigation as official law meets culture in Turkey’ (2008) 4(1) *International Journal of Law in Context* 35 at 59.

<sup>76</sup> Santos (n 8) 439, 474-475.

<sup>77</sup> See Chapter I 7(b); Chapter V 2(a). As indicated, I build on Santos’s definitions of cosmopolitanism, See Santos, for example at 172, 180, 233.

goal is pursued without the automatic sacrifice of relative interests and identities at local levels.<sup>78</sup>

Consequently, once the multi-faceted, local-global context has been established, the principal difficulty is how to ascribe *proper* weight to various components, especially in the case of conflicting claims. I maintain that this task must be performed according to the established juridical principles of proportionality. Thus, the balancing task also necessitates value judgments and mediation, which go beyond abstract legal theory.

Mediation in turn requires conscious agency, the rejection of 'lazy reasoning', and hence, an appraisal of the consequences of judicial decisions within a framework of ethical-practical rationality.<sup>79</sup>

As a precursor to the discussions on proportionality and ethics, a few of the difficulties adhering to the judicial task of contextualisation and mediation are briefly re-examined below.

### **(c) Concluding remarks about obstacles and solutions on the road to emancipation**

As indicated, before a court can commence its task of mediation, and long before emancipation is realised, a number of logistical problems are immediately apparent. Many of these relate to specific aspects of the context, such as the fact that it is plural and not isolable or fixed. Furthermore, the context, in cases involving international law, is compound, three-dimensional and hierarchical, since it contains international, national and subnational elements.

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<sup>78</sup> For example *Waldschlösschen* (n 71) in Chapter V; Örüçü *The Enigma of Comparative Law* (2004) 48-59.

<sup>79</sup> Santos (n 8) 439, 494. According to Santos, 'lazy reasoning' is the view that 'the future will happen anyway, regardless of what we do', and hence nothing is done, which reinforces the social patterns created by dominant groups who are 'absorbed in sequences of social destruction and social creation'.

This confusing mosaic of plural norms and values elicits questions about, *whose* interpretation of a norm applies in a specific context, and *what* the content is of that norm.<sup>80</sup> Hence, to what lengths should judges go to ascertain what the relevant contextual factors are, especially when examining contexts with which they are unfamiliar?

In practical terms, these difficulties mean that, for any number of reasons, a court may simply choose the context within which it decides locate a judgment. The negotiation of alternatives however, contributes to the processes whereby law can be rendered either hegemonic or emancipatory.<sup>81</sup>

Once the three-dimensional context has been established, the next set of obstacles relate to the equitable balancing of interests and the particularisation of international law, dealt with in following sections.

In summary, although there is no standard solution to many of the questions raised, it is logical that the adjudicative processes should involve the conscious navigation, balancing of, and mediation between relevant contextual dimensions. To this end, the 'three-dimensional' analytical framework, which is developed in this chapter, proposes a conceptual basis for such judicial navigation and mediation.

The next tool, proportionality, is most significant, since it delivers well on the earlier promise of providing an objective method, or at least, a more concrete way of balancing dissonant interests.

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<sup>80</sup> For example, does the official version of the norm or the 'living law', the prevailing or evolving standard apply? I discuss these questions in greater detail in 9 below.

<sup>81</sup> It is noted again that the question of the quality and quantity of evidence available to the court is exceedingly important. It is proposed in this study that courts have a considered duty to obtain sufficient relevant evidence to acquit themselves properly of the task of contextualisation in a spirit of 'ethical-practical rationality'. Some of the issues pertaining to the choices available to judges and the correlative dangers of judicial subjectivity are highlighted above, as well as in the next section.

## 6. Proportionality as an analytical tool for the attainment of emancipation

*[Proportionality is a] formal principle that is capable of being used anywhere in the world ... it is multicultural [and integrates] the real and the ideal, the local and the universal.*<sup>82</sup>

This section shows that the principles of proportionality provide a sound framework to support the equitable weighing of competing interests at different hierarchical levels. I argue further that the concept, if applied prudently, is a most effective tool for combating some of the jurisprudential hazards described above, and furthermore, that it can be applied 'three-dimensionally' to protect, reconcile or balance interests at international, national and subnational levels.

### (a) The proportionality approach in constitutional jurisprudence

*Pragmatism, like proportionality, privileges the perspectives of those who are actually party to a dispute.*<sup>83</sup>

The pragmatic proportionality or 'toleration' approach has its roots in constitutional jurisprudence.<sup>84</sup> In broad terms, it entails an inquiry into the rationality and necessity of a limitation of rights. It asks whether the means adopted are rationally suited to accomplish the purpose of the law, and demands that if less intrusive means are available to achieve the purpose, these have to be used.<sup>85</sup> Thus, there are two aspects to the equation. On one side are factors such as the purpose, importance and extent of the infringement, which are

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<sup>82</sup> Beatty *The Ultimate Rule of Law* (2004) 168.

<sup>83</sup> Beatty (n 82) 184.

<sup>84</sup> It is applied particularly when the issue involves the limitation of a right. See Currie and De Waal *The Bill of Rights Handbook* 5 ed (2005) 176-178, on how the South African Constitutional Court has developed the concept. Beatty (n 82) 59 on 'toleration', akin to proportionality, which is 'crucial to a democracy based on pluralism'. (Quoting Israeli Judge Aharon Barak.)

<sup>85</sup> Grimm 'Proportionality in Canadian and German constitutional jurisprudence' (2007) 57(2) *University of Toronto Law Journal* 383. He notes that there are different models of the test, in for example, Germany (where the concept originated) and Canada, but that the end results are comparable. Beatty (n 82) 163.

balanced on the other side against the extent of, and overall impact of a limitation on the party whose rights have been infringed.<sup>86</sup>

The South African Constitutional Court explained that, '[t]he more substantial the inroad into fundamental rights, the more persuasive the grounds for justification must be'.<sup>87</sup> Hence, proportionality requires a rational nexus between the contending elements described above, which in turn, allows the equation to balance disparate interests evenly and justly.

David Beatty juxtaposes proportionality testing, whereby rights are limited, with subjective 'interpretative' methods. He describes the former as '[p]ractical, fact-specific reasoning, rather than interpretative insight'.<sup>88</sup> On the other hand, when a subjective interpretive approach is followed '[e]ach judge is expected to address every case from their [sic] different conceptions of justice and morality'.<sup>89</sup> Due to the judge's 'huge discretion in deciding how broadly constitutional principles should be formulated', the result is subjective and not a principled resolution of the particular matter.<sup>90</sup>

Among other examples, Beatty uses those of the German, Irish and Israeli courts in religious freedom cases, which involve a conflict of competing rights. The German *Bundesverfassungsgericht* for instance, 'conceives its task as having to strike a balance' between competing rights, through the application of the principle of 'practical concordance'.<sup>91</sup> This principle refers to the 'optimization of the conflicting interests, which means that 'conflicting values must be harmonized in a way that will preserve as much of each of them as possible'.<sup>92</sup>

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<sup>86</sup> Currie and De Waal (n 84) 177, for cases and an explanation of these factors based on the jurisprudence of the South African Constitutional Court. It must be noted that the South African Constitution (in s 36) outlines a detailed proportionality test in its limitation clause.

<sup>87</sup> *S v Bhulwana* 1996 (1) SA 388 (CC) para 18.

<sup>88</sup> Beatty (n 82) 46, with reference to the jurisprudence of the German *Bundesverfassungsgericht* in deciding whether religious freedom had been violated or not.

<sup>89</sup> *Id* 31, with particular reference to the United States Supreme Court.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Id* 46.

<sup>92</sup> *Ibid*.

Thus the court ascribes weight to the respective interests in matters concerning fundamental rights on the basis of general principles, which are applied similarly, 'objectively and impartially' to all cases involving a conflict of rights.<sup>93</sup> In practical terms, it means that the court engages in 'a factual inquiry about the good and bad effects of specific acts of the state'.<sup>94</sup>

By contrast, the interpretive approach followed by courts in the United States is focused on 'historical inquiries and textual exegesis', as opposed to general principles and the investigation of facts.<sup>95</sup> This may force a court to invent 'horrible hypotheticals', instead of considering the 'most pertinent questions about [the] necessity, utility, and adverse effects' of laws and regulations, and one could add, of judgments.<sup>96</sup>

After an extensive survey of cases from many different jurisdictions, Beatty concludes that pragmatic proportionality 'does a better job'.<sup>97</sup> This is because, in the first place, it counteracts judicial subjectivity, by obviating reliance on a personal sense of morality.<sup>98</sup> Secondly, because proportionality is logical and rational, it can 'solve conflict between fundamentally antagonistic moral values in a way that shows equal concern and respect to everyone involved'.<sup>99</sup>

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<sup>93</sup> Id 45, 46-47. Another way of describing it is, once more, with reference to the German Constitutional Court's 'principle of practical concordance' which means that 'no one of the conflicting legal positions be preferred and maximally asserted, but that all given as protective as possible an arrangement', in *School Prayer* (1979) 52 BverfGE in Beatty id 46.

<sup>94</sup> Id 49, 182.

<sup>95</sup> Id 48.

<sup>96</sup> Id 88, 95. Justice Antonin Scalia is singled out by the author for his 'horrible hypotheticals'. For example in concluding that women should be excluded from a specific military institution, 'he speculated that the admission of women would not only destroy a historic military institute, it would presage the death of all single-sex educational institutions in the whole of the United States'. See Beatty id 84-88.

<sup>97</sup> Id 49, 51. In terms of cases involving religious liberty, he shows conclusively that the 'interpretive approach has certainly not worked to the advantage of religiously minded people in the United States', 'leaving them isolated and exposed'.

<sup>98</sup> Hence, it limits the 'enormous discretion' that each judge has and prevents that 'the constitution is what the judges say it is'. See Beatty id 42, where he quotes Chief Justice Hughes.

<sup>99</sup> Id 170.

Since proportionality depends on the specific circumstances of each case, which ensures a factual investigation, it means that the inquiry must be contextualised. In cases involving constitutional rights jurisprudence, the composite context is – at face value – two-dimensional, that is, it involves interests at state or national level, and interests at a subnational or individual level.<sup>100</sup>

By implication, I therefore suggest that the proportionality approach is suited to an analysis of multi-dimensional and hierarchical contexts, and particularly at the interchange between international, national and subnational regimes. I explore this possibility and the potential of proportionality for the attainment of emancipatory international law jurisprudence in the following section.

### **(b) Adaptation of the principles of proportionality for purposes of the three-dimensional framework**

*[The standard of proportionality] serves as an optimizing principle ...*<sup>101</sup>

From the factors mentioned above, the concept of proportionality, as applied in constitutional jurisprudence, appears to encapsulate all the necessary elements for the balancing of competing interests on a larger scale. As a conceptual paradigm in constitutional reviews, it accommodates a wide spectrum of needs, ranging from very specific interests, such as the religious beliefs of minority

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<sup>100</sup> Here, one has to distinguish between the classic vertical application of constitutional rights, that is, between state and individual, and their horizontal application, or *Drittwirkung*, which is the applicability of rights between individuals or private entities. See for example Currie and De Waal (n 84) 50-55 with reference to the South African context. Nonetheless, even in terms of the latter, the context remains (at least) two-dimensional, since the state retains an interest in the matter, namely that constitutional norms are rendered effective. On the other hand, constitutional jurisprudence is usually three-dimensional, because international law is often invoked for purposes of interpretation. Furthermore, most constitutions have an inherently strong international component, by virtue of, what I call, the Trojan horse effect, which renders constitutional jurisprudence, by and large, three-dimensional. See Chapter II 3.

<sup>101</sup> Beatty (n 82) 163.

groups, to general, overarching interests which affect a particular nation or the state directly.

Additionally, international human rights instruments, by implication, call for proportionality in their application, and the deployment of the concept has also been extended to balance interests at transnational level, for example by the European Court of Human Rights.<sup>102</sup> These factors suggest that proportionality has superlative value in assisting courts, wherever they are situated, to balance interests at different levels of the local-global spectrum.<sup>103</sup>

For purposes of the study, the relevant proportionality principles which promote emancipatory international law are summarised as follows. First, the emphasis on rationality, in concert with the justification and defensibility requirements, correlates to, and amplifies the ethical-practical rationality component of emancipation.

Second, proportionality implies that 'all judgments are contextual and contingent and relative to the particular circumstances in which they are made'.<sup>104</sup> This means that judges 'think things not words'.<sup>105</sup> Hence, the *factual effect* of the manner in which international norms are applied, is considered in every case – with reference to the actual parties, and not with reference to abstract concepts or hypothetical situations.<sup>106</sup>

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<sup>102</sup> Van Dijk et al (2006) (n 64) 334-342; Beatty (n 82) 162,166. See also Koskenniemi (2007) (n 65) 9-12 on the 'equitable balancing' that takes place in international law.

<sup>103</sup> There is of course an immediate link between constitutional proportionality testing and 'bottom up' international law, which comes about through the mediation of national courts. See 9 below.

<sup>104</sup> Beatty (n 82) 184.

<sup>105</sup> Holmes quoted in Beatty id 72.

<sup>106</sup> See for example the Malawian case *Adoption of CJ* (n 71) in Chapter V, where the court focuses on the actual circumstances of the child and the enormous benefits - to the child - that would flow from the adoption. In contrast, the court a quo in 'inventing horrible hypotheticals', denied the adoption, inter alia on grounds that it might open the door for foreigners to traffic with Malawian children.

Third, the balancing of interests denotes 'equal concern and respect to everyone involved'.<sup>107</sup> Thus, because the judgment does not rest on abstract legality or vague morality, but focuses pragmatically on the impact that a decision will have on the parties, they are placed on an equal footing. Consequently, for purposes of the proportionality analysis, the type of right and the number of persons involved do not enjoy 'any special status'.<sup>108</sup>

Fourth, since proportionality is rooted in the equality of the parties and respect for their particular circumstances, it implies that judges will have to 'listen more carefully to the other [side]', thereby upholding the dignity of the parties.<sup>109</sup> Hence, minorities will be treated with respect, and their interests, which may seem offensive to other sectors of society, will not forthwith have to make way for the majority opinion.<sup>110</sup>

As an example of the abovementioned principles, Beatty investigates the judicial treatment of abortion, which overtly lends itself to judgments based on moral or religious preference. He points to the efficacy of the proportionality approach as evidenced in *Roe v Wade*, wherein the 'trimester solution' was formulated.<sup>111</sup> The judgment is rationally based on the reality that the state and

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<sup>107</sup> Beatty (n 82) 170.

<sup>108</sup> Id 171. See also 172 where the author notes that proportionality is not 'value free', but that 'equality underlies the principle'. 'It is able to evaluate the intensity of people's subjective preferences objectively, [therefore] it can guarantee more freedom and equality than ... rival theories'.

<sup>109</sup> See the *Mapuche* case (n 71) in Chapter V; Beatty (n 82) 187.

<sup>110</sup> See *Church of the Lukumí Babalu Ayé v City of Hialeah* (1993) US Supreme Court Case 91-948, 508 U.S. 520 (1993) in Palmié 'Which centre, whose margin? Notes toward an archaeology of US Supreme Court Case 91-948, 1993 (Church of the Lukumí vs City of Hialeah, South Florida' 184ff in Harris (ed) *Inside and Outside the Law* (1996). In this case, through a straightforward proportionality analysis, the court overturned city ordinances prohibiting the ceremonial sacrificing of animals by the Santería religious group. The weight of the evidence convinced the judges that animal sacrifice is such an integral part of the religion that it 'cannot be deemed bizarre or incredible' to the adherents, and that although 'abhorrent to some', the importance to the Santería was such that it deserved First Amendment protection. In other words, proportionate to the grave implications that a ban would have for the church, the squeamishness of members of the public did not carry sufficient weight.

<sup>111</sup> *Roe v Wade* (1973) 410 US 113, where the court ruled that a woman had the right to terminate her pregnancy within the first trimester. See Beatty (n 82) 186-187. This pragmatic approach of the court provides a balanced solution, which affords the necessary respect to, and

society had never accorded foetuses the same rights as born humans. For instance, death certificates are not issued to miscarried foetuses, even when fully developed, and illegal abortion is not punished in the same way as murder.<sup>112</sup> Thus, it was found that it would be unreasonable for a court to expect women to adhere to a 'stricter definition of human life'.<sup>113</sup>

When these principles are applied at the international-national-subnational interface, it is clear that the scale expands. Now at stake, are not only the values and interests of the nation and the state which must be balanced against those of local communities, minorities or individuals, but all of these must in turn be balanced against global exigencies and the interests of the international community as a whole.

Nevertheless, in a manner that corresponds to constitutional proportionality investigations, the case studies in the next chapter indicate that the proportionality method can be applied successfully to cases which involve such a three-dimensional context. This would suggest that the optimisation principle, namely that 'conflicting values must be harmonized in a way that will preserve as much of each of them as possible', applies across local and global boundaries.<sup>114</sup>

Optimisation that encompasses such a wide array of interests must be more nuanced than a binary cost/benefit evaluation. As illustrated by the jurisprudence of Justice Weeramantry, discussed above, emancipation calls for the optimisation of interests on *both* sides of the scale, not on one side or the other. Such optimisation can only be achieved through active judicial mediation between contexts.

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takes into account the interests of both the mother and the foetus at different stages of pregnancy, rather than 'take sides on the intractable moral question of when life begins'.

<sup>112</sup> Beatty (n 82) 186.

<sup>113</sup> Id 186-187.

<sup>114</sup> Id 46.

Hinz therefore reasons that focusing on 'the *mediating positions* between the extremes' is more relevant since it is ultimately only this stance that produces 'jurisprudential answers'.<sup>115</sup> Accordingly, he calls for soft relativism and weak universalism or, 'relativism within reason', which is in reality a practical way to describe the optimising principle of proportionality.<sup>116</sup>

In sum, by rooting the adjudicatory process within the relevant multi-dimensional context and by equalising and optimising all interests, proportionality provides the means to attain the widest possible continuum of justice and emancipation for all participants. In essence, this principle is consonant with the fact that 'justice is a local, not universal ideal'.<sup>117</sup> Within the expanded framework of humanity as a whole, however, the latter's 'local' is also 'global'. In this respect, the effect of globalisation on emancipatory jurisprudence cannot be disregarded.

## 7. Emancipation and globalisation

*[G]lobalization is the story of winners as told by the winners.*<sup>118</sup>

Prior to a further analysis of the processes and tools that help to construct emancipatory international law, a slight detour must be taken, namely one that places emancipation explicitly within a global context.

It was argued that emancipatory international law must be cosmopolitan and globally relevant, which by inference means that the forces of globalisation must be taken into account. The principal question is whether globalisation helps or hinders the envisaged reconstruction of international law.

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<sup>115</sup> Hinz (n 33) 16. Extreme positions mean for example that human rights are given 'uncompromised priority' or that 'different worlds [are left] as they are'.

<sup>116</sup> Id 16, 17-18. In terms of these concepts he draws extensively on the work of the anthropologist Michael Brown.

<sup>117</sup> Beatty (n 82) 167.

<sup>118</sup> Santos (n 8) 178.

Santos, with reference to law in general, considers this subject at length. He makes the salient observation that what 'we call globalization is always the successful globalization of a given localism'.<sup>119</sup> This means that global trends, conditions and entities originated in some locality, from where they extended their influence to the rest of the world. Therefore, 'globalisms' have 'a specific source of cultural embeddedness'.<sup>120</sup>

If one accepts Santos's version of globalisation, it means that the initial process is generated by a bottom up flow. The next step is the return flow of various elements from the global plane back to local spheres, where the former exert influence over, and transform the latter.<sup>121</sup> I suggest that these countermarching processes of globalisation can either constitute a means of reconstruction or one of deconstruction.

This is further borne out by Santos, who concludes that there are different types of globalisation, namely hegemonic and counter-hegemonic.<sup>122</sup> The important point is therefore, that globalisation is not a neutral process, but one whereby contextually embedded norms, values and ideas are transferred in a two-way flow between local and transnational spheres across the globe.

These interconnecting strands can nevertheless serve to promote not only the interests of dominant nations and alliances, the 'winners', but also those of hitherto marginalised societies. Accordingly, in Weeramantrian spirit, one can envisage the globalised recognition of a 'flexible Afrocentric' approach, steeped

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<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Id* 179. He describes the first phase as 'globalized localisms', such as the spread of the English language and American fast foods, and the next phase as 'localized globalisms', for example the imposition, as dictated by global demands, of 'structural adjustment' programmes in agriculture or economics. See also Chapter I 4 on globalisation.

<sup>122</sup> *Id* 172-182, 458-461.

in values such as *ubuntu*, which emphasises reconciliation, dignity and respect for fellow humans.<sup>123</sup>

The substance of the argument is that globalisation is not an inevitable trajectory of the hegemonic spread of dominant discourses. Rather, it can also support the propagation of different world views, from which courts around the world can derive wisdom in the pursuit of emancipation. Importantly, the forces of globalisation may be harnessed for the emancipatory bottom up reconstruction of international law.<sup>124</sup>

At the same time, the divisive forces of globalisation must be properly gauged. Hence, it is not a question of a diacritical preference for, let us say, the African world view over the American, which will merely reinforce the existing North/ South dichotomy – albeit from a Third World angle.<sup>125</sup> Rather, as noted above, the pressing task in the face of globalisation is to explore ‘mediating positions’ and the multicultural ‘golden threads’ that may run between seemingly irreconcilable perspectives.

Once more, this judicial task, which is one of optimisation, depends on the meticulous and proportional balancing of local and global interests, which vie with each other within the composite three-dimensional context, which is generated by an application of international law in domestic courts.

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<sup>123</sup> Mapaire (n 7), for example 156-159. See *Makwanyane* (n 50) in Chapter V for an example and description of *ubuntu* in court practice.

<sup>124</sup> For example, much can be learned from noting the parallels between globalisation and the tenets of African macro-cosmology, which emphasise aspects such as the interconnectedness and interdependence of all things. Or, the balancing of interests at local and global levels can be given greater perspective through a consideration of the wisdom contained in African natural law, which places individual interests within a framework of community interests. This aspect is contained, for example, in the often repeated chthonic maxim *I am because we are*. See Menski *Comparative Law in a Global Context* 2 ed (2006) 410-412; Mapaire (n 7) 160-162, 165. See also 9(e) below.

<sup>125</sup> See again for example Al Attar and Miller ‘Towards an emancipatory international law: The Bolivarian reconstruction’ (2010) 31(3) *Third World Quarterly* 347, who are merely dismissive of the West, an approach that is not helpful either.

What is more, emancipatory jurisprudence recognises, that in spite of globalisation, and a degree of homogenisation, when extraneous normative elements, such as international law, impinge on national and subnational regimes, the former must be adapted or ‘particularised’ to have meaning and relevance in the new environment. This process, also referred to as ‘translation’ and ‘transposition’, is discussed below.

## **8. The judicial tool of the translation and particularisation of international law in domestic socio-legal systems**

*Transplanting [international] institutions and programmes involves appropriation and translation.*<sup>126</sup>

*Translation also involves justification.*<sup>127</sup>

*[R]esistance to change is high when law is tightly coupled in binding arrangements to other social processes.*<sup>128</sup>

In previous sections, the methods of contextualism and proportionality were analysed, and were found to be effective judicial tools in the pursuit of emancipatory jurisprudence. They are nonetheless, general methods which can be used in almost every type of adjudication. On the other hand, the next tool – translation or particularisation – is very specific to the application of international law in domestic courts, and hence, invaluable to both its emancipatory application and ultimately its reconstruction.<sup>129</sup>

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<sup>126</sup> Merry (n 47) 135.

<sup>127</sup> Knop (n 61) 530.

<sup>128</sup> Teubner (n 28) 19.

<sup>129</sup> Knop (n 61) 532-533 on ‘particularization’.

**(a) The difference between the migration of international law to domestic jurisdictions, and its translation and particularisation within local contexts**

In Chapter III, the technical aspects of the 'migration' of international law to the national domain were considered, that is, the mechanics whereby international law is transferred from the international sphere to the domestic.<sup>130</sup> For example, national constitutions may sanction its direct or indirect application in their courts.<sup>131</sup> It was indicated however, that through constitutional provisions and enabling legislation, international law can also surreptitiously enter the domestic arena, much like the Trojan horse, and transform national systems from within.

In this section, I examine the metamorphosis of international law, once it has entered the national domain, in other words, its contextual transposition or particularisation.<sup>132</sup>

The first observation is that through the processes and forces which give rise to transposition, some form socio-legal contextualisation takes place. This is because 'the meaning invested into a rule is itself culture-specific' and therefore, its meaning in one context, 'does not survive the journey from one legal system to another'.<sup>133</sup> Therefore, within a new domestic context, the meaning ascribed to an international rule will undergo change, or particularisation.

Furthermore, the outcome of such transposition may be either hegemonic or counter-hegemonic, since the transfer of international norms (or any other norm) from one legal system or cultural domain, to another, is never purely

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<sup>130</sup> See Chapter III 6.

<sup>131</sup> For example the South African Constitution section 39(1)(b) and the Malawian Constitution section 11(2)(c).

<sup>132</sup> I borrow the metaphor 'transposition' from Örüçü, to denote the conceptual changes that international law must undergo to become embedded in the national system – just as a music score can be adapted, or 'transposed' for different instruments. See Örüçü (2004) (n 78), for example at 93-104.

<sup>133</sup> Legrand (n 29) 117. See also Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 18, 159, where it is noted that the legislature also contextualises international provisions. This aspect, however, is not explored in the present study.

mechanical.<sup>134</sup> Rather, it is contingent on the degree of 'tight and loose coupling' of law and social processes, mentioned earlier.<sup>135</sup> Hence, in cases where law is 'tightly' connected to the deep social structure of a community, any harsh imposition of an incongruous norm from another normative regime will act hegemonically and may elicit resistance.<sup>136</sup>

On the other hand, if the international norm is transposed in a manner that resonates with the relevant socio-cultural context, it will not cause normative friction and can be employed to advance the goal of emancipation. Thus, Knop emphasises that the application of international law in domestic courts demands persuasion and justification, that is, it must be particularised and made 'relevant for and compelling to a given community'.<sup>137</sup>

Since transposition and particularisation are bound up with the attainment of emancipation, they deserve closer scrutiny. This becomes all the more important when one considers the potential reverse flow of particularised international law back to the international sphere, either by way of comparative jurisprudence or as a subsidiary source of international law.<sup>138</sup>

### **(b) The processes and effects of transposition and particularisation of international law within domestic environments**

A cursory view of court practice indicates that the application of international law often ranges from a strict top down imposition of international norms, wherein personal and local interests are not accommodated, or even abolished, to the opposite end of the spectrum where custom or culture is used as an excuse to thwart rights.<sup>139</sup> When courts adopt either of these extreme positions, they are

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<sup>134</sup> Teubner (n 28) 16-19.

<sup>135</sup> *Ibid* on tight and loose coupling, and 4(a) above.

<sup>136</sup> *Id* 19-20.

<sup>137</sup> Knop (n 61) 524, also 504-507.

<sup>138</sup> See 9(d) and (e) below on the former, and the Statute of the ICJ Article 38(1)(d) on the latter.

<sup>139</sup> See Wa Mutua 'The politics of human rights: Beyond the abolitionist paradigm in Africa' (1995-1996) 17 *Michigan Journal of International Law* 591; Nyamu (n 59) 391-393, on abolitionist

unable to find the necessary mediatory solutions to endorse emancipation and dispel hegemony.<sup>140</sup>

The judicial conciliation of polarities has accordingly been advocated throughout this study. This in turn, dovetails with the transposition of international law which is aimed at aligning interests at both ends of the spectrum to the greatest degree possible, or optimally, according to the principles of proportionality, discussed above.

It was also indicated that international law may in fact be concealed in a Trojan horse provided by national constitutions and enabling legislation that could create the assumption that international norms thus entrenched have already been adapted to local needs. This premise however, is simply false.

In the first place, national constitutions, notably bills of rights, tend to borrow heavily, even directly, from existing constitutions elsewhere, which in turn, are predominantly an expression of (westernised) international sentiment.<sup>141</sup> Next, and often without establishing its domestic compatibility, international law is used extensively by courts as an interpretative tool of constitutional provisions, and domestic legislation that gives effect to a country's international obligations.<sup>142</sup> Moreover, courts have a discernible and regrettable tendency to conceptualise international law as a universal standard, which translates into its perfunctory application, without questioning its local relevance or

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approaches. Examples include cases where it is simply assumed that polygamy is *contra bonos mores* and in violation of the dignity of women on the basis of international instruments. Note CEDAW general recommendation no. 21 on Equality in Marriage and Family Relations and see for example the South African case *Ismail v Ismail* 1983 (1) SA 1006 (A). On the opposite side of the scale one finds examples of lenient sentencing and /or the refusal of courts to adjudicate 'private' matters or those involving personal law. See for example Nyamu (n 59) especially 398-406 on 'culture as the formal explanation of gender inequality'; Örucü (2008) (n 75) especially 43, 54, 55, 57; Guerreiro 2011 UNDP Assessment of Guinea Bissau.

<sup>140</sup> Hinz (n 33) 16.

<sup>141</sup> See for example An-Na'im (1999) (n 46) 42-43.

<sup>142</sup> See the collection in Sloss (n 133) for an overview of court practice in a number of jurisdictions; Waters (n 27) 628.

persuasiveness.<sup>143</sup> Finally, in jurisdictions where judicial precedent is the rule, precedents further cement these potentially incongruous international norms into the domestic system.

It is imperative therefore not to restrict the judicial task of transposition to cases where international law is applied in name only. Rather, courts need to be aware of the potential misalignment of norms with international origins relative to the local context.

As noted, there are also other features associated with the entrenchment of international norms. One such is the phenomenon that courts have recourse to international values and principles, as opposed to black letter rules, in a manner suggesting their legitimacy, and even 'mandatory' authority.<sup>144</sup> There are also discernible shifts in 'reasoning templates' which may result in the subtle readjustment of the domestic legal tradition in various ways.<sup>145</sup> What is more, international law is seen by some to be mutating in certain areas from a strictly consensual to a mandatory system, even if this is premised on the perception of 'shared values' and a 'shared remedial project'.<sup>146</sup>

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<sup>143</sup> Merry (n 47) 3-5; Dembour 'Human rights talk and anthropological ambivalence: the particular context of universal claims' in Harris (ed) *Inside and Outside the Law* (1996) 33, who both (amongst many others) challenge the idea that international law is universal.

<sup>144</sup> See Chapter III 5(b); Moran 'Inimical to constitutional values: Complex migrations of constitutional rights' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 233, 255 on the 'mandatory effect' of 'non-binding sources'.

<sup>145</sup> See for example Gaudreault-DesBiens 'Underlying principles and the migration of reasoning templates: A trans-systemic reading of the *Quebec Secession Reference*' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006); also Justice Twomey 'The parts that make a whole? The mixity of the laws of Seychelles' (publication pending as at May 2013) on the shifts between civil law and common law institutions in Seychelles.

<sup>146</sup> For example Kumm 'Democratic constitutionalism encounters international law: Terms of engagement' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006); Weinrib (n 57) 89-90; Romano 'The shift from the consensual to the compulsory paradigm in international adjudication: Elements for a theory of consent' (2007) 39 *New York University Journal of International Law and Politics* 791; Bassiouni 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' (2001) 42(1) *Virginia Journal of International Law* 81, on universal jurisdiction.

If these trends are reliable indicators, it means that international values and principles have become, even if it is through the proverbial backdoor, substantive ingredients in adjudicative processes.<sup>147</sup> Without assessing the merits and demerits of these arguments, they nonetheless demonstrate that the judiciary may avail itself of an apparently extended array of sources or influential materials when accomplishing the law job of dispensing justice.<sup>148</sup>

Alternatively, unquestioning reliance on such values and principles, which may be discordant in a given socio-cultural context, could hinder the attainment of justice and emancipation for the parties concerned.

In other words, there are a number of hazards as well as certain interesting options available to the judiciary when an international law dimension, in whatever guise, is added to the local normative environment. Adding another hierarchical layer demands a difficult balancing act somewhere between the extremes of hubristic 'nationalist strategies' and obsequious 'transnationalism'.<sup>149</sup> Furthermore, there is the ever present danger that judges will abuse their discretion and simply 'decide for themselves which definitions, doctrines, rules, etc to apply and, accordingly, what the parameters ... will be'.<sup>150</sup>

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<sup>147</sup> For example Lacey 'The judicial use of unincorporated international conventions in administrative law: Back-doors, platitudes and window-dressing' in Charlesworth et al (eds) *The Fluid State, International Law and National Legal Systems* (2005); Teubner (n 28) 22.

<sup>148</sup> See Chapter III 5 on the question of the legitimacy of the judicial use of various materials.

<sup>149</sup> See 9(d) below, in particular n 236-241 where these concepts are summarised. Sloss 'Treaty enforcement in domestic courts: A comparative analysis' in Sloss (ed) (n 133) 35-36, on how transposition can be manipulated. He notes that for example, in the United States and Israel, the 'presumption of compatibility' (called the *Charming Betsy Canon* in the USA) which is used extensively in many jurisdictions to harmonise domestic law with international obligations, as well as the canon of good faith in treaty interpretation (that is, according to the internationally agreed understanding of terms), are ignored in certain predictable situations. According to the study, in the USA these usually concern cases involving vertical relations between the state and private actors, and in Israel, usually cases involving the Occupied Territories. Thus, 'transnationalist' jurisprudence makes way for 'nationalist strategies'. Also Koh 'International law as part of our law' (2004) 98 *The American Journal of International Law* 43; and see the discussion in Chapter III 5(c).

<sup>150</sup> Beatty (n 82) 42, in the context of the treatment of religious liberty in the USA by the Supreme Court. 'Because there is more than one "dictionary" from which they can choose ... each judge has an enormous discretion.'

In trite terms, transposition, in order to avoid the potential hegemony of both nationalist and transnationalist ideologies, must hinge on proportionality and balance. It means that judges must be alive to the impact of public policy, *boni mores*, and other principles and values which are uniquely bound up with the domestic identity, and at the same time, they must value the perspectives and wisdom derived from the transnational discourse.<sup>151</sup> The exercise of affording all these elements from different normative regimes their proper weight, harks back to the themes discussed earlier, such as cosmopolitanism, contextualism and proportionality.

The theme of cosmopolitanism also fits in with Knop's argument that courts must approach the introduction of international law into the domestic domain according to comparative law principles, which means the conceptualisation of international law as 'foreign'.<sup>152</sup> This comparative method will sensitise judges to the need to adapt and render international law relevant to local conditions.

Hence, from a comparative law angle, cosmopolitanism and translation triggers both integrative and contrastive comparison, since it is both inward and outward looking.<sup>153</sup> It recognises the presence of legal and normative plurality at international, national and subnational levels. At the point of particularisation, cosmopolitanism takes note of the differences, but with a view to reconciling these to the greatest degree possible.

This task of reconciliation is not an abstract calculation, but is founded on the reality that 'every legal system contains imported elements...and [is], to some extent mixed; [and] no legal system has been constructed out of purely

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<sup>151</sup> See again Knop (n 61) for example 531-533; Koh (n 149) on salient reasons for courts to consider foreign and international opinion.

<sup>152</sup> Knop (n 61) 525-535.

<sup>153</sup> See Chapter I 5(d) and (e) on these different comparative models, also 9(d) below.

indigenous materials'.<sup>154</sup> Hence, reconciliation can tap into these commonalities and the inherent 'transnational character' of legal cultures.<sup>155</sup> On the other hand, no matter how 'mixed' systems are, it is a fact that whenever international law engages with domestic law, some form of adaptation takes place.<sup>156</sup>

The issue raised in this section, however, is to determine how transposition can avoid hegemony and be emancipatory. The case studies in the next chapter show how courts go about this task and how they are indeed able to mediate between local and global (or transnational) regimes.<sup>157</sup> The cases also support the contention that the emancipatory particularisation of international law cannot take place in a vacuum; another principle, contextualisation sits at the heart of the process.<sup>158</sup> Therefore, when courts particularise international law, they should resist adopting an instrumentalist approach or one that simply reacts to external pressures.<sup>159</sup>

A significant corollary to the process of transposition and particularisation is that it triggers the bottom up creation of international law, which in turn, can lead to its emancipatory reconstruction. For example, when courts articulate the

<sup>154</sup> Editors' comments in *Schlesinger's Comparative Law* 7 ed (2009) 240.

<sup>155</sup> *Id* 238, and further that the 'notion of hermetically-sealed national legal systems is largely a product of nineteenth-century positivism and nationalism'. These insights are further enhanced by the reasoning of Justice Weeramantry, namely that the values and principles which underlie international law spring from many different civilisations across time and space, which make them a part of the heritage of the Third and First Worlds alike. See again Anghie (n 9) 838, 845. See also the editors' comments in *Schlesinger* (n 154) 50-51, for a historical perspective in light of the *ius commune* which was a transnational construction comprising many different elements from all over Europe.

<sup>156</sup> See again Legrand (n 29), Teubner (n 28), on the difficulties of 'transplanting' norms from one context to another.

<sup>157</sup> See Chapter V; also the editors' comments in *Schlesinger* (n 154) 73-89 for pertinent examples from the EU, where courts regularly deal with the balancing of national and transnational systems.

<sup>158</sup> It is clear that the importance of context-specific transposition extends beyond the international and national interface. Rather, the dynamics of particularisation also involve the subnational normative context. The same principles of contextualisation and proportionality which govern the former, also apply to the latter. These aspects are dealt with in section 9(c) below.

<sup>159</sup> External factors include 'prestige', 'blackmail', 'legal imperialism' or 'psychological dependency', or 'aesthetics and seductiveness', see editors' comments in *Schlesinger* (n 154) 241-242, 248. These descriptions are used in the context of Watson's 'legal transplant' theory. I noted earlier that they are, however, exceedingly apt in terms of the ways in which courts are seen to apply international law, which acts as a type of 'transplant' in domestic systems.

'local life forms' of international law, such 'references of law to social norms work as extra-legal rule-making machines, and 'are driven by the inner logics of [a] specialised social domain'.<sup>160</sup> Accordingly, every time courts particularise an international norm, they entrench a more nuanced, locally embedded version thereof, thereby contributing to the bottom up regeneration of the norm.<sup>161</sup>

In summary, the transposition and particularisation of international law refers to the end-product, that is, the form and meaning which international law assumes after its migration to the domestic sphere, and specifically after it has been diffracted through the domestic jurisprudential prism.

This process could signal either the emancipatory adaptation of international norms, or their hegemonic imprint on the local regime. I have therefore argued, that, first, the process of particularisation should be clearly distinguished as an independent comparative task, as proposed by Knop. Second, the justification and relevance of the application of international norms must conform to the principles of contextualism and proportionality. In so doing, domestic courts become the channel whereby the reconstruction of international law is made possible.<sup>162</sup>

The following section, namely the formulation of the three-dimensional map for the domestic application of international law, describes the terrain that must be covered for such bottom up, emancipatory reconstruction.

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<sup>160</sup> Teubner (n 28) 18-19.

<sup>161</sup> See 9(e) below.

<sup>162</sup> This process is greatly amplified when courts are in 'dialogue' with one another, that is, when they refer to foreign judgments. See section 9(d) and (e) below on the creation of bottom up international law through 'transjudicialism'.

## **9. Formulation of the three-dimensional conceptual map for the emancipatory application of international law in domestic courts**

This section deals with specific aspects of the terrain that the judiciary must navigate in the application and reconstruction of international law. Three of the analytical tools needed – contextualism, proportionality and particularisation – have been examined. The final tool or ‘compass’, which consistently points toward cosmopolitan ethics, is analysed in the following section. Together, these elucidate the judicial choices and tasks associated with the journey.

In this section, I describe the multi-dimensional contours of the map, and outline the contingent and dynamic relationship between its normative dimensions (the ‘middle spaces’). I then describe the jurisprudential navigation and mediation, aided by the relevant analytical tools, whereby reconstruction can be attained.

### **(a) The structure of the map**

I have already argued that bringing international law to bear on domestic systems creates a three-dimensional interface, since it triggers an interplay between regulation at international, national and subnational levels. The fact that a subnational dimension comes into play is well explained by the contemporary legal theory of pluralism.<sup>163</sup>

Furthermore, it is self-evident that each normative dimension is embedded in a particular context.<sup>164</sup> Acting in tandem, these considerations constitute the composite context of all cases involving international law. Thus, the composite context is three-dimensional, as well as hierarchical. Additionally, because law is

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<sup>163</sup> See Chapter 12, especially (a) and (b).

<sup>164</sup> See Chapter 12 and 4 above.

relational, the contextual dimensions are not static or isolable. Rather, there is an active two-way flow between regimes.<sup>165</sup>

The conceptual map, which combines all these facets, can therefore be visualised as a three-dimensional geometrical structure, comprising vertical, horizontal and depth vectors. 'Vertical' denotes the relationship between international and national spheres, horizontal, the relationship between different national regimes, and depth, refers to the plurality of regimes at the national and subnational levels. I use the term 'vector' to describe the dynamic interaction between the dimensions.<sup>166</sup>

### **(b) The relationship between international law and national law – The vertical vector**

*Neither a complete integration nor complete separation of the international and domestic legal spheres would do justice to the diverse ways in which international norms enter domestic law, but also are limited by it.*<sup>167</sup>

*The courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, more so when there is no inconsistency between them and there is a void in domestic law.*<sup>168</sup>

*[T]he existence of international human rights law and other alternative communities of judgment makes additional perspectives available to us and thereby enables us to judge better, even against our own community.*<sup>169</sup>

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<sup>165</sup> See Chapter I 6.

<sup>166</sup> In physics and mathematics, 'vector' stands for a quantity having both magnitude and direction.

<sup>167</sup> Paulus 'The emergence of the international community and the divide between international and domestic law' in Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007) 228.

<sup>168</sup> Chief Justice Anand in the Supreme Court of India in *Apparel Export Promotion Council v Chopra* [2000] 1LRC 563 at 576-577. See Jayawickrama 'India' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 258-260.

<sup>169</sup> Knop (n 61) 532.

For purposes of the conceptual analysis, national law represents the official domestic regime. Although not strictly the 'depth vector' referred to later, it has incontrovertibly its own 'depth' dimension, since national law, as a powerful expression of the national identity, is deeply embedded in a particular socio-cultural context.<sup>170</sup> In turn, the norms and values at national level may harmonise, clash or compete with those in the international sphere. This interplay is the focus of the present discussion.

The relationship between domestic law and international law is often understood in terms of a conflict, wherein the operation of the one excludes that of the other.<sup>171</sup> In building on the foregoing sections, however, I posit that the two spheres stand in a relation of symbiosis to each other – they may create, overlap, augment, clarify or justify each other. The interface between national and international law, in a similar way to their context(s), is therefore not a straight boundary line, but an undulating field that contracts and expands according to variances in, for example, the nature of the judicial approach taken or the problem at hand.

Furthermore, there is a discernible 'two-way street' in the exchange of norms and principles between the two legal systems.<sup>172</sup> Hence, Fleur Johns wants us to apprehend the hyphen in national law-international law as an action which connects the concepts in 'active engagement'.<sup>173</sup> Thus, on one hand, courts are able to 'domesticate' international law norms, and at the same time,

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<sup>170</sup> See for example Tushnet (n 29). Furthermore, due to the effects of normative plurality, the domestic system is also influenced by, and includes elements from the subnational plane, and hence some overlapping with the 'depth vector' (in (c) below) is at times discernible. In addition, I note again that the 'national identity' is not homogenous.

<sup>171</sup> For example Charlesworth et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) 16.

<sup>172</sup> *Id* 8.

<sup>173</sup> Johns 'International law-national law: Thinking through the hyphen' in Charlesworth et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) 189.

find international validation for the content of those domestic norms, through an evidentiary process of 'norm reinforcing'.<sup>174</sup>

In addition, despite many technical constraints on the application of international law, such as the requirement that it must be 'binding' in a particular jurisdiction, judges often, through various techniques and for a variety of reasons, allow non-binding international law to jump the legitimacy gap.<sup>175</sup>

In all of the above, international law is described as something 'out there'. But, by way of the Trojan horse metaphor, it was explained that international law also embeds itself in the domestic arena in other, covert ways. These include constitutions, enabling legislation and judicial precedent.<sup>176</sup>

The pressing concern of this vector, however, is not the vigorous movement of international law to the national plane, whether explicit or by stealth, but rather the effect it has on its domestic recipient. Hence, as explained above, at the point where international law is particularised, judges need to take careful note of socio-cultural imperatives in the national (and subnational) sphere.<sup>177</sup> They need to consider the 'implications for the institutional transfer from one legal system to another', and the degrees of socio-cultural embeddedness of subjects, which determine the extent to which an alien norm might be accepted or resisted.<sup>178</sup>

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<sup>174</sup> McLean 'Problems of translation: The state in domestic and international public law and beyond' in Charlesworth et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) 216.

<sup>175</sup> See the detailed discussion in Chapter III 5; also for example Waters (n 27); Jayawickrama (n 168) 264ff, on the effect of unincorporated and unratified treaties in India.

<sup>176</sup> See Chapter II 3. Other examples of the Trojan horse effect are direct borrowing from foreign sources which faithfully mimic the international norm and academic writing. See also Grove 'The international judicial dialogue: When domestic constitutional courts join the conversation' (2001) 114 *Harvard Law Review* 2049 at 2049, 2059, on the matter that 'courts seem to view their domestic constitutions as part of a family of foreign and supranational documents, each of which serves as a source of general legal norms'.

<sup>177</sup> Note again that the vertical vector focuses on the relationship between international law and official national law, but that there is some overlap with the subnational 'depth' vector.

<sup>178</sup> Teubner (n 28) 19.

The operation of the vertical vector, however, brings into sharp relief the role of international law as an expression of the norms and values of the international community.<sup>179</sup> Judges are therefore precariously positioned at the intersection between local demands, and the need or desire to 'affirm and promote the legitimacy and efficacy of international law as the indispensable means for realising universal ideals of peace, development and the protection of human rights, everywhere'.<sup>180</sup>

In Chapter II, the important 'job' of international law was considered, and how it can act as both sword and shield in order to benefit states, individuals and humanity as a whole.<sup>181</sup> These factors, together with an understanding of how national and international systems relate within broader hierarchical and historical frameworks, come into play in the vertical dimension.<sup>182</sup> The role of the judiciary is therefore to place all these local and global elements on the scale, and to determine the proportionate weight and potential effect of each.

Lastly, courts need to take cognisance of various institutional and logistical limitations, including the still pivotal role of the nation-state, which were analysed previously.<sup>183</sup> Hence, the judiciary must recognise that its role in bringing about social change and emancipation is limited, and that the effectiveness of its decisions may depend on various extra-judicial or political factors and structures.<sup>184</sup>

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<sup>179</sup> See Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) for an overview of important issues relating to the 'international community'.

<sup>180</sup> An-Na'im (2008) (n 40) 82.

<sup>181</sup> For example Singer (n 20) 12-13; Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007) 132; Merry (n 47) 231.

<sup>182</sup> See the editors' comments in *Schlesinger* (n 154) 227-230, on the importance of historical factors.

<sup>183</sup> Chapters II 4(c)(ii) and III 5.

<sup>184</sup> Hirschl 'On the blurred methodological matrix of comparative constitutional law' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 54-58, on courts as political institutions and the role of 'support structure for legal mobilization'.

In summary, the conceptualisation of the vertical vector serves to distinguish the separate forces and interests which impact on judicial processes when international law is brought into the domestic law environment. It should prompt an awareness of the distinct tasks incumbent on the judiciary to determine the composite context, to particularise international law within such context, and to balance all the relevant elements proportionately according to their purpose, importance and effect in the 'vertical' context.

It was indicated that the official national system generates its own socio-cultural depth aspect, yet often, the national framework is deemed to represent a homogenous, 'official' national identity.<sup>185</sup> In reality however, the national identity is greatly fragmented and is composed of many competing and conflicting elements, which give rise to deep, or 'strong' normative plurality.<sup>186</sup> This aspect is described below as the paradigmatic 'depth' vector.

**(c) The relationship between international law and sub-national, non-state law and socio-cultural norms – The depth vector**

*In many cases ... traditional justice systems would actually be formal justice systems...*<sup>187</sup>

*[I]ndividuals are deliberative equals whose views are entitled to a respectful hearing in all moral discussions about how universal standards should apply in each instance.*<sup>188</sup>

*[J]ust how 'other' must others be to be appreciated as having culture?*<sup>189</sup>

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<sup>185</sup> The *Waldschlösschen* case (n 71), discussed in Chapter V, is a good example of the official national identity at work, in this case, by way of the national conceptualisation of democracy. Even at the national level however, many plural elements can be distinguished, for example in the official recognition of systems of personal law.

<sup>186</sup> See Chapter I 2.

<sup>187</sup> Hinz (n 33) 3.

<sup>188</sup> Ignatieff quoted in Beatty (n 82) 171, in the context of proportionality analysis.

<sup>189</sup> Coombe (n 36) 268.

Under the surface of what appears to be a uniform national legal system, lie various normative orders, such as religious and customary law, which may be at great variance with the official, statist version of 'law'. These 'semi-autonomous social fields' give rise to a web of normative plurality, wherein the addition of international law adds to the 'mixedness' of the particular legal regime.<sup>190</sup>

In domestic courts, therefore, international law interacts with, and is filtered by the domestic environment in two stages, first, at the national level, and second, at the deeper level of the subjective, socio-cultural context. Hence, I call this interface the depth dimension and vector.<sup>191</sup>

The depth vector brings together the (so-called) universal and relative, the global and the substate local. Since these positions are frequently polarised, it is in this dimension, as opposed to the vertical, international-national dimension, that the greatest degree of particularisation – apparently – has to take place. This is partly due to the much repeated fact that many national constitutions are slanted towards the 'international consensus' and borrow directly from international law sources or foreign models, which are in turn founded on these.<sup>192</sup> Thus, in order to comply with constitutional demands, many national laws, as applied by domestic courts, reinforce international norms, which could reduce the possibility of friction at the national-international intersection.

In contrast, the greatest disparity between local and global is often found at the substate level, where religious and cultural norms, which may not have

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<sup>190</sup> Note again Chapter I 2 for the discussion of Moore's 'semi-autonomous social fields' theory; Örüçü (2004) (n 78) 149-161 on the 'mixedness' of legal systems.

<sup>191</sup> The subnational depth vector encompasses a very wide range of different 'semi-autonomous social fields' ranging from seemingly inconsequential systems of regulation such as Reisman's microlegal system of queues (in *Schlesinger* (n 154) 141-144), to the effective and comprehensive, albeit subnational, systems which regulate large sections of society. Turkey is an example of the latter, where the national legal system is secular, but where the vast majority of the population lives according to the tenets of Islam. See Örüçü (2008) (n 75) 35. For present purposes, I refer mainly to the broad categories of customary, cultural and religious regimes.

<sup>192</sup> See Peters 'The globalization of state constitutions' in Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007).

been aligned with international norms, fully exert their power. Paradoxically, this dimension also constitutes the impact zone for many international norms which are intended to have grassroots relevance and effect, especially those in the area of human rights. For example, among the most obvious of intended beneficiaries of the right to equality, are precisely those women who live under traditional religio-cultural systems where the right might be denied.<sup>193</sup>

For the judiciary, the depth dimension presents a minefield of jurisprudential hazards, not least because, traditionally, the plural substratum has not featured in mainstream legal theory or jurisprudence.<sup>194</sup> It is however, an aspect that cannot be brushed aside. Judicial recognition and respect for deep pluralism and cultural relativism is crucial to emancipatory jurisprudence, and, moreover, for the bottom up reconstruction of international law.<sup>195</sup> This is so, because such judicial regard prevents the hegemonic imposition of international 'irritants' on local regimes, precisely where the friction between different normative regimes is often at its greatest.

From a practical perspective, when judges are responsive to these normative substructures, they are immediately confronted with a number of polemical questions. For example, at what stage do socio-cultural or religious norms acquire sufficient relevance to be taken into account for purposes of adjudication?<sup>196</sup> Or, what is the relevant content of a norm at subnational level? Is it to be found in an essentialised or official version produced by state actors

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<sup>193</sup> For example Chirwa *Human Rights under the Malawian Constitution* (2011) 231. The international norm may operate in tandem with the relevant national constitution, but even if a right is constitutionally entrenched, it could still be infringed at subnational level.

<sup>194</sup> See Chapter III 7(a) and (b), on the problems faced by the judiciary in terms of normative plurality and cultural relativism, and also Chapter I 2 and 3.

<sup>195</sup> The latter is explained in (e) below.

<sup>196</sup> See again Örucü (2008) (n 75) 60 '[S]ome fundamental questions would have to be resolved. How do we recognize cultural practices and how is culture to be measured? What should be the criteria of proof and who should carry the burden of proof? Who represents culture? Do the diverse communities have internal governance structures to pronounce authoritatively upon internal rules?'

(whether legislative or judicial), or must a 'living law' be ascertained?<sup>197</sup> Despite their significance, these topics cannot be addressed in the present study.

Important to the present analysis is the concern that judges must guard against either under- or over-sensitivity in their approach.<sup>198</sup> This means, for example, that subnational cultural regulation must neither be labelled mechanistically as the problem in a given situation, nor be simply transplanted by 'better' national or international rules. Rather, the adjudicative model must at all times be one of mediation.<sup>199</sup>

The point of engaging with the depth dimension is therefore not to prove the superiority of systems based on either international norms or cultural and/or religious norms. Nor is the point about delineating areas of conflict. On the contrary, the question is whether there are intersecting elements and overlapping spaces which create congruity.

In terms of human rights law, An-Na'im argues that apparent conflict is 'about where to draw the line between the proper and improper *application* of one human right or another, and not about disputing any of those competing rights'.<sup>200</sup> Thus, challenging the manner in which some exercise their rights 'should be seen

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<sup>197</sup> There has been much debate on this topic, and much criticism has been levelled against judicial reliance on essentialised versions of customary law. See for example Panel 4 Report 'Traditional and Informal Law in Africa' of the Inaugural Methodology Workshop of the Centre for Comparative Law in Africa, University of Cape Town, October 2012, obtainable from the Centre (<http://www.comparativelaw.uct.ac.za>). Ishida 'Legal pluralism and human rights in a Kenyan court: An analysis of dowry claim cases' in Hinz (n 33), but also note the author's defence of codified customary law, at 162-164. The problem is exacerbated by the fact, as noted, that customary and religious laws seldom feature in mainstream legal scholarship as proper subjects of study. See for example Menski (n 124) 6, 105-106, 425.

<sup>198</sup> For example Amien 'Muslim personal law (MPL) in Canada: A case study considering the conflict between freedom of religion and Muslim women's right to equality' in Brems (ed) *Conflicts between Fundamental Rights* (2008) 419, on approaches to Muslim personal law.

<sup>199</sup> See 5(b) above on judicial mediation.

<sup>200</sup> An-Na'im (2008) (n 40) 89-90 (my emphasis). He writes in the context of a disrespectful cartoon portrayal of the Prophet of Islam in many newspapers during 2005 and 2006, which was gravely offensive to the Muslim community around the world. His point is that the Muslim community did not deny the right to freedom of speech but rather its proper limits. This argument is most relevant to the balancing of any type of interest or norm.

as part of the process of defining and exercising human rights, not a negation or repudiation of those rights or their foundation on international legality'.<sup>201</sup>

Instead of hastily adopting an abolitionist approach to cultural norms which appear to conflict with international standards, emancipatory jurisprudence will consider the deeper social context and relevance of non-state norms.<sup>202</sup> It will shift perspective when necessary, and not construe these norms solely through the prism of the national and/or international discourse. Judges therefore need to take cognisance of the limitations and advantages of the particular perspective that they adopt.<sup>203</sup> Above all, judgments should not be about 'personal preference', but should take into account 'the perspectives of others'.<sup>204</sup>

A number of helpful lessons are provided by general and comparative legal theory, which could assist courts to determine the relative importance of various elements that should be taken into consideration for purposes of the depth dimension.<sup>205</sup> Accordingly, a rational understanding of the contested and plural nature of law highlights the fact that it means different things in different contexts and that solutions can also be found in other, 'semi-autonomous' non-state forms of regulation.<sup>206</sup>

For example, upon due deliberation, a court may recognise that women's rights exist in local customary law and practice, and it may resist interference

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<sup>201</sup> *Id* 90.

<sup>202</sup> See 8(b) above, and note again the arguments raised by Grande 'Hegemonic human rights and African resistance: The issue of female circumcision in a broader comparative perspective' in *Schlesinger's Comparative Law* 7 ed (2009).

<sup>203</sup> Twining *Globalisation and Legal Theory* (2000) 127-133, where he describes the different vantage points from which law can be approached, most notably the different perspectives obtained by adopting an 'internal' or 'external' point of view, and those of 'participants' and 'observers'. Another perspective, borrowed from the social sciences, is that of the participant-observer, who participates to observe in order to gain a better vantage point. This issue also overlaps with the ability of judges to contextualise matters properly. See 4(a) above.

<sup>204</sup> Knop (n 61) 532.

<sup>205</sup> See Chapter I 5 and 6, which analyses various theoretical models pertaining to the nature and role of law.

<sup>206</sup> See Obiora 'Toward an auspicious reconciliation of international and comparative analyses' (1998) 46 *American Journal of Comparative Law* 669 at 678, and 'semi-autonomous' is (of course) borrowed from Moore.

with them, rather than attempting to modernise or abolish these rules.<sup>207</sup> Or courts may understand and respect the 'formal' and binding nature, on a community, of the decisions of traditional tribunals, and not perforce disregard them.<sup>208</sup>

Additionally, various methods derived from comparative law, such as those which distinguish integrative and contrastive comparison, provide analytical tools for the judicial mediation between disparate normative orders. As noted before, mediation ultimately calls for an integrative, as opposed to a contrastive or homogenising approach.<sup>209</sup> This means that courts are sensitive to constructive cross-cultural dialogue, which may reveal a common core of justice and ethics in seemingly incompatible normative orders.<sup>210</sup>

Where there is an apparent irreconcilability, a mediatory comparative method means 'framing the issue in terms of transforming attitudes and values', which is 'more constructive than simplistic assertions of ... compatibility or incompatibility'.<sup>211</sup> This formulation contrasts with a bifurcation of 'us' and 'them', which renders the customs and beliefs of 'the other' as bizarre or irrational, simply because they are different.<sup>212</sup>

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<sup>207</sup> See again Nyamu (n 59) in terms of the customary rights of women to land. See also Kelley 'Unintended consequences of legal westernization in Niger: Harming contemporary slaves by reconceptualizing property' in *Schlesinger's Comparative Law* 7 ed (2009) for another example of the traditional protection of rights.

<sup>208</sup> Note for example, the 'collaboration' between courts and traditional justice authorities in Guinea-Bissau. See Guerrerio 'Access to Justice in Guinea-Bissau Assessment: Regions of Cacheu and Oio and Bissau Autonomous Sector' UNDP report in partnership with the State of Guinea-Bissau (2011) 31. Also, Hinz 'Traditional courts in Namibia: Part of the judiciary?' in Hinz (n 33), on some of the problems in this respect.

<sup>209</sup> Chapter I 5(d) and (e), where these different comparative methods are discussed.

<sup>210</sup> See 10 below, where the issue of ethics is analysed. Also, Obiora (n 206) 677-681.

<sup>211</sup> An-na'im (2008) (n 40) 87, in the context of 'Islam and human rights which take both sides of this relationship in static essentialist terms'. He suggests 'transform[ing] the understanding of Muslims' about certain aspects of *Shari'a* rather 'than to confront them with a stark choice between Islam and human rights', which will 'result in the rejection of the human rights paradigm...'

<sup>212</sup> For example Rautenbach 'Umkhosi Ukweshama: Revival of a Zulu festival in celebration of the universe's rites of passage' in TW Bennett (ed) *Traditional African Religions in South African Law* (2011), for examples of how religious rites might be conceptualised and how South African courts have dealt with these.

Once again, the abovementioned aspects indicate the relevance of contextualisation and proportionality in the judicial approach to the depth dimension. Proportionality ascribes the correct weight and value to relative concerns at grassroots level.<sup>213</sup> In combination with contextualism, it makes 'the perspectives of the parties the vantage point from which courts judge each case', which has merit in that 'no particular philosophy or moral vision is privileged over any other.'<sup>214</sup>

In the present analysis, 'the parties' are stakeholders in international, national and subnational spheres. The purpose of the depth vector is to accent needs and interests in areas that have often been neglected in the formal dispensing of justice, which tends to focus on the national and international dimensions. Consequently, the depth analysis rejects the public/private dichotomy in matters of culture and religion, and renders these 'private' domains justiciable and relevant to emancipatory jurisprudence.<sup>215</sup>

In conclusion, as a conceptual model, the depth dimension allows judges to engage with the plural nature of law. It accords dignity and respect to local socio-cultural norms and values. It emphasises, however, that the subnational is one dimension of three, and it must be in equilibrium with the others.

On one hand, the depth vector challenges the judiciary to question bias. On the other, based on the principles of proportionality, it cautions that accommodation must not 'deteriorate into cultural or religious relativism'.<sup>216</sup>

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<sup>213</sup> See 4 and 6(b) above. Beatty (n 82) 167.

<sup>214</sup> Beatty (n 82) 168.

<sup>215</sup> The private/public divide can easily result in a miscarriage of justice, especially if courts deploy it to avoid adjudicating complex social issues. See for example Nyamu (n 59) 391-393.

<sup>216</sup> Rautenbach (n 212) 87; Örucü (2004) (n 78) 129.

Above all, justice and emancipation, even when apparently rooted in the norms and values of international law, can be rendered 'local'.<sup>217</sup>

Finally, it must be pointed out that, as with the other dimensions, the depth dimension is not static and isolable, but is a vector. This term implies movement and the active interchange of elements between international, national and subnational normative regimes. Hence, there is also a 'feedback loop' from the latter to the national and international dimensions.<sup>218</sup> The aspect of the reverse flow of norms is discussed in a subsequent section.<sup>219</sup>

#### **(d)The dialogue between national courts and the diffusion of international law norms between national systems – The horizontal vector**

*For some, the greatest value of comparative law is as a mirror held up to ourselves...*<sup>220</sup>

*Comparing the international and domestic approaches to a legal problem may lead to the recognition of differences and alternatives within domestic law, thereby promoting engagement with diverse internal perspectives on the problem.*<sup>221</sup>

*At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.*<sup>222</sup>

If there is one theme that consistently runs through every analysis of cases dealing with international law, it is the following: Courts, in construing

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<sup>217</sup> Beatty (n 82) 167. Note again the description of proportionality as a 'formal principle that is capable of being used anywhere in the world ... it is multicultural' and integrates 'the real and the ideal, the local and the universal' through the 'fundamental principle of distributive justice'.

<sup>218</sup> Sarfaty (n 18) 450.

<sup>219</sup> See (e) below.

<sup>220</sup> Knop (n 61) 531.

<sup>221</sup> Ibid.

<sup>222</sup> Justice Sandra Day O'Connor in *Roper v Simmons* 543 US 551 [2005] 575, 1215 quoted in Paulus (2007) (n 167) 239.

international norms, often rely more heavily on foreign judgments than on international law itself.<sup>223</sup> Furthermore, they habitually do this without the necessary 'licence'.<sup>224</sup>

Especially in novel or difficult cases courts can be found turning to foreign decisions for help.<sup>225</sup> In particular, since domestic decisions are secondary sources of international law, the result is that their 'multiplication of meaning complicates meaning in international law generally'.<sup>226</sup> The question is therefore, whether this practice enhances the application of international law in domestic courts, or whether it reduces it to parochial forms of 'middle-brow replication'.<sup>227</sup>

In answer, Knop suggests that the metaphor of translation is instructive, as is the metaphor of 'transposition', explained above.<sup>228</sup> Translation can be likened to the local productions of a famous play that embed the play in 'time and place', without the play becoming a 'second rate', 'provincial production'.<sup>229</sup> Rather 'every local production might be seen to change the meaning of the play'.<sup>230</sup> Consequently, the 'local productions' of international law in domestic courts refer to a multiplicity of particularised versions of international law.

With reference to individual jurisdictions, the importance of the translation and particularisation of international law was explained above.<sup>231</sup> These processes serve to justify and render international norms relevant and persuasive in specific domestic contexts. Within the horizontal dimension

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<sup>223</sup> See for example *Bruker* [2007] 3 SCR 607, 2007 SCC 54 in Chapter V; Grove (n 176) 2049.

<sup>224</sup> Grove (n 176) 2051; Waters (n 27), for example at 704-705 and the 'trick' used by courts to have recourse to foreign and international sources without any justification.

<sup>225</sup> See for example *Bruker* (n 223), *Dow* (n 72) and *Makwanyane* (n 50) in Chapter V.

<sup>226</sup> Knop (n 61) 533.

<sup>227</sup> *Ibid.*

<sup>228</sup> See 8 above. 'Transposition' is borrowed from music and refers to the adaptation of a music score for different instruments and keys. See Örüçü (2004) (n 78) for example at 93-104.

<sup>229</sup> Knop (n 61) 533-535.

<sup>230</sup> *Id* 533.

<sup>231</sup> See 8 above.

however, these local 'productions' and meanings, in a seemingly 'messy process', are all thrown onto one stage.<sup>232</sup>

Nonetheless, there is a distinct advantage in having access to different renditions of international law: they provide a 'source of alternatives that helps other domestic courts to particularize international law in a way that makes sense to them'.<sup>233</sup> Other practical benefits are immediately apparent. For example, by way of 'judicial dialogue' and the 'comity' between domestic courts, international norms can become more stable and predictable in their application around the world.<sup>234</sup> Or, norms relating to important goals of international law, such as the prevention of crime, can be enforced with greater consistency and with equal force in different jurisdictions, which will increase their efficacy.<sup>235</sup>

Despite the apparent logic and benefits adhering to the flow of international concepts between domestic courts, this horizontal movement immediately rings the alarm bells for 'nationalists', who resist the use of foreign and international sources for interpreting constitutional provisions. Their argument is that when these are 'foisted upon the governed ... it thwarts the will of the people and undermines the values of the prevailing majority'.<sup>236</sup> Hence, the judicial dialogue is viewed as undemocratic, and gives rise to the so-called counter-majoritarian difficulty.<sup>237</sup>

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<sup>232</sup> Slaughter 'Judicial globalization' (1999-2000) 40 *Virginia Journal of International Law* 1103 at 1104, who refers to these processes as 'judicial globalization', and note that she concludes that such 'globalization' involves both vertical and horizontal relationships. My own analysis of the vertical and horizontal vectors is somewhat different.

<sup>233</sup> Knop (n 61) 533.

<sup>234</sup> Slaughter (n 232) 1112-1115.

<sup>235</sup> Grove (n 176) 2050 and Parts II-III for the full study of developments in international criminal law.

<sup>236</sup> Alford R (2004) 59. The United States courts are known for their nationalism and 'exceptionalism'. See Weinrib (n 57). See the entire argument of Alford (2004) id; also Kersch 'The new legal transnationalism, the globalized judiciary and the rule of law' (2005) *Washington University Global Studies Law Review*, who both subscribe to the nationalist paradigm, which rejects judicial reliance on foreign and international sources except in narrowly defined contexts. Kersch, in particular, rejects the transjudicial dialogue. See also Chapter III 5(a) and (c) for a more detailed discussion.

<sup>237</sup> I discuss this difficulty and counter arguments in Chapter III 5(c).

As discussed previously, these arguments might be more persuasive if national jurisdictions were constructed as hermetically sealed units, isolated from the rest of the world. But, nations and their legal systems are not isolated monads.<sup>238</sup> The fact is that national courts do rely on and benefit from their engagement with other courts, and 'like it or not, both foreign and international law are already part of our law'.<sup>239</sup> Moreover, the interpretive use of foreign sources is only one dimension in the multi-faceted account of the influence, whether direct or indirect, that foreign and international law exerts on domestic systems. Consequently, in the application of the three-dimensional framework, the impact of the horizontal vector is checked by the ameliorating effect of the vertical and the depth vectors, which emphasise domestic and 'nationalist' interests and values.

Conversely, the horizontal vector has much greater significance than the type of judicial tea party described by Slaughter, albeit a most instructive practice.<sup>240</sup> My argument is as follows. At the outset, one of the important reasons why courts refer to foreign judgments relates directly to the need to justify the domestic application of international law, since it confirms that the interpretation of a specific norm is well-founded and correct under the circumstances – both in the eyes of the nation *and* of other nations. In so doing, it becomes apparent that a further level of justification and persuasion must be taken into account, namely, the realm of the international community.

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<sup>238</sup> Note again Singer's argument that we live in 'one world'. Singer (n 20).

<sup>239</sup> Koh (n 149) 57, with reference to the United States. The ongoing 'diffusion', across all jurisdictions, of normative elements through both time and space, has been discussed throughout. See Chapter I 6(b). Of course, courts also engage with each other in a number of other 'transjudicial' ways, such as through transnational judicial colloquia and various initiatives aimed at regulating judicial conduct. A good example is the 'Bangalore Principles of Judicial Conduct', which are intended to establish standards for the ethical conduct of judges, based on the six core values of independence, impartiality, integrity, propriety, equality, competence and diligence. See: [www.unodc.org/pdf/corruption/corruption\\_judicial\\_res\\_e.pdf](http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf) (last accessed 27-06-2013). Another example is the Judicial Integrity Group, founded by senior justices from around the world, to ensure 'the integrity of the global judiciary'. See: <http://www.judicialintegritygroup.org> (last accessed 27-06-2013).

<sup>240</sup> See Slaughter (n 232), in particular 1120-1124.

The reason for this assertion is that counter-intuitively, 'international' law does not necessarily mean it reflects the values and promotes the interests of the 'international community' as a whole.<sup>241</sup> Many aspects of international law, particularly because it purports to be founded on custom and consensus, continue to require justification at a global level. In fact, its very misalignment with the needs of its participants and intended beneficiaries, and its hegemony, are so well recorded that, among many others, they have prompted the present study.<sup>242</sup>

The dissonance between international law and many of its stakeholders can be attributed, in part, to the fact that the international community has been transfigured from a conceptual replica of western states, to a much more heterogeneous and cross-cultural model, which also includes a wide range of non-state participants.<sup>243</sup> In many instances however, the law, which is to serve the needs of the international community does not reflect the current paradigm, and therefore lacks purchase for certain sectors of the world community.<sup>244</sup>

Hence, the essence of both the international community and its laws are contested. For that matter, the international community is 'not tangible'.<sup>245</sup> Yet, when domestic courts refer to foreign decisions as examples which should be

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<sup>241</sup> The concept of an 'international community' is fraught with difficulty. Nonetheless, as Paulus (2007) (n 167) 218, points out, 'every theory of international law involves, explicitly or implicitly, a concept of international community or society'. From the postmodern perspective adopted in the study, 'community is not possible without exclusion and suppression of "the other" ... [and] may be used as an ideological construct for the maintenance of structures of power'. Postmodernists however, 'will not be opposed to the use of "communitarian" concepts in the domestic legal order by courts, but they will not accept the invocation of a "global consensus"', in Paulus id 225, 227.

<sup>242</sup> See Chapter II section 4(b).

<sup>243</sup> See Twining (n 203) 7-10, 51-51; Merry (n 47) 20-21, 50-55; also the collection in Warbrick and Tierney (n 179) for a comprehensive overview of the 'international legal community'; Chapter II 2 and 4.

<sup>244</sup> This contention is clearly reflected in the approach adopted by TWAIL scholars. See for example Baxi 'Operation enduring freedom: Towards a new international law and order?' in Anghie et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003); Chimni 'Third world approaches to international law: A manifesto' in Anghie et al (eds) *The Third World and International Order: Law, Politics and Globalization* (2003); Baxi (2008) (n 22); Gatti 'Third World approaches to international economic governance' in Falk et al (eds) *International Law and the Third World* (2008).

<sup>245</sup> Paulus (2007) (n 167) 249.

emulated, they establish a fresh normative benchmark in a particular area, and, furthermore, add their own contextual dimension to the meaning of the norm in question. This process develops the norm one step further, making it more compelling to a wider national and/or international audience.

Therefore, at this stage, two important things happen. First, by means of 'transjudicial' processes, courts are convincing other courts of the relevance of a particular conceptualisation of an international norm. Second, because participating courts formulate a more concise and representative definition of the norms and values of a correspondingly broader spectrum of international players, they give greater substance to the identity of the international community itself. In this way, they become active members of the world community and participate in its evolution.<sup>246</sup>

There are however, other reasons why courts consider the jurisprudence of foreign courts. Some unapologetically want to be part of, and 'prove their status' in the international community, or 'increase their influence over the creation of international norms.'<sup>247</sup> Others have simply developed a 'tendency ... to rely on foreign decisions all too eagerly'.<sup>248</sup> Whatever the reasons, 'judicial dialogue' of this nature also contributes to establishing the character of the international community.

Hence, among other caveats, 'courts must be vigilant when dealing with foreign case law to ensure that they do not adopt interpretations from constitutional arrangements that are fundamentally different from [their own] constitutional framework'.<sup>249</sup> It is consequently crucial to balance the horizontal vector with the vertical and depth vectors, in order that jurisprudential mutualism

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<sup>246</sup> See id 248-249. A chicken-or-egg difficulty is evident in this analysis. What comes first, the international community that creates norms and values, or is it created by these norms and values? The horizontal vector, as described both here and in the following section, suggests movement in both directions.

<sup>247</sup> Grove (n 176) 2061.

<sup>248</sup> Chirwa (n 193) 32.

<sup>249</sup> Ibid.

does not result in a full-scale homogenisation or assimilation of domestic legal cultures.<sup>250</sup>

In summary, this section indicated that the horizontal vector, namely judicial cooperation by means of the process of comparative jurisprudence, serves to justify and establish the persuasiveness of international norms, at both local and global levels. On one hand, references to similar judgments from other jurisdictions provide judges with greater perspective and act as an endorsement of the correctness and legitimacy of the domestic interpretation. On the other, the judicial dialogue legitimises the international norm at the level of the international community.

The horizontal dimension does more however. Through each particularisation of a norm, in concert with other foreign particularisations, this vector helps to define the character of the international community more clearly, but also more inclusively. It therefore enhances the establishment of a community that is 'not universal' but 'transcendental', because it 'transcends the singular and particular', without obliterating them.<sup>251</sup>

The horizontal vector serves yet one other, most crucial, purpose. Since it speaks directly to the identity of the international community, and especially to the manner in which it regulates itself, it provides a commanding position for the long-term reconstruction of international law. The following section deals with the contribution of all three vectors to such reconstruction.

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<sup>250</sup> See Coombe (n 36) 796-797, who holds the view, however, that 'globalisation ... and the interdependence of societies has not led to homogenization, but rather to a proliferation of new legalities and juridical sensibilities at the intersections of legal cultures and legal consciousness as new juridical norms are generated in their interstices'.

<sup>251</sup> Tsagourias 'International community, recognition of states, and political cloning' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) 213.

**(e) Rethinking the vectors: Bottom up international law**

*If the particularization of international law by one domestic court thus begins a dialogue ... with another domestic court, it also begins a dialogue with international law as a whole.*<sup>252</sup>

*We need to question the assumption or aspiration of domestic interpretation as uniform both because it is too simple analytically and because it obscures the possibility that domestic interpretation might help to legitimate international law through a process of particularization and justification.*<sup>253</sup>

The foregoing sections dealt with the three-dimensional context, which is the inevitable by-product of the deployment of international law in domestic courts – whether in its own name or as one of its ‘local life forms’. As noted, the composite context is embedded in the relevant international, national (including foreign national) and subnational dimensions, each of which constitutes its own context. Notwithstanding the certainty of the existence of such a composite context, the manner in which the judicial tasks of analysing and balancing these dimensions is carried out, is highly uncertain.

Hence, by way of the three-dimensional framework devised in this chapter, I hope to raise awareness of the middle spaces between global and local dimensions, and to suggest the methods whereby they can be conceptualised and traversed by domestic courts.

This section deals with one such middle space, activated by judgments, that is, the reverse flow of international concepts, once they have been particularised and indigenised. The potential impact of this flow – whether hegemonic and oppressive or counter-hegemonic and emancipatory – is inescapably linked to how a particular court carries out the task of proportionately

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<sup>252</sup> Knop (n 61) 533.

<sup>253</sup> Id 535.

balancing the different interests in the international-national-subnational context.<sup>254</sup> The progression of events can be explained as follows.

Previously, I explained the bond forged between domestic courts *inter se*, and between these and the international community as a whole.<sup>255</sup> In this symbiotic relationship, norms and values are both shared and shaped. Consequently, once an international norm has been particularised by a domestic court, its next life stage is its reabsorption, through the processes of transjudicialism, into the normative constellation belonging to the international community. In turn, the world community exerts its influence in many different ways on the development of these and other international norms.<sup>256</sup>

At this juncture, it must be apparent that the inverse response also follows a three dimensional pattern. Thus, with courts acting as the fulcrum, there is feedback to the international plane from individual national and subnational domains, as well as from the horizontal, transjudicial plane. It is important that these reverse flows are manifestly from 'below'.

Furthermore, the trajectory followed by various norms and values, can originate in either the international or in a domestic realm.<sup>257</sup> The decisive factor for purposes of bottom up international law is that there are mechanisms available to facilitate the migration of norms between local and global contexts, regardless of where the movement was originally activated.

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<sup>254</sup> Reverse flows are not only generated by courts, as some of the examples below will indicate. For purposes of the study however, the role of courts remains the focus.

<sup>255</sup> 9(d) above.

<sup>256</sup> Of course, the formal generation of international law is still largely in the hands of states. Although they clearly form part of the international community, the community of states represents a more attenuated version of the world community at large, as was pointed out earlier. See again Twining (n 203) 7-9, 51-52; Merry (n 47) 20-21, 50-55, on the role of non-state actors in the international law arena.

<sup>257</sup> The latter is related to Santos's concept of 'globalized localism(s)'. Note again his contention that everything ultimately had a local origin. Santos (n 8) 178-179.

In this respect, the EU configuration is a most useful prototype for the way in which a supranational system 'overlaps' and 'interlocks' with national systems, with the result that 'the general principles underpinning Community law... [are] inspired by the constitutional traditions held in common by the member states'.<sup>258</sup> I illustrate below how these principles might operate in practice.

A clear example of a 'localism' that became a 'globalism' is proportionality analysis itself. It is a home grown, pre-constitutional German principle, dating back, in the main, to the Prussian administrative courts of the late nineteenth century.<sup>259</sup> Later, it was systematically developed by the German Constitutional Court from the late 1950s onwards.<sup>260</sup> From Germany it 'radiated' 'to most other European countries with a system of judicial review, and to a number of jurisdictions outside Europe'.<sup>261</sup>

It did not, however, end there. The proportionality test was subsequently adopted by the European Court of Human Rights and the European Court of Justice, from where it was received 'back' by other national systems, thus completing a full circle.<sup>262</sup> It is also 'an essential part of all ... international human rights instruments'.<sup>263</sup> Today, it is so widely used that even courts, which did not

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<sup>258</sup> Walker 'The migration of constitutional ideas and the migration of *the* constitutional idea: The case of the EU' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 318, 323-327. The 'interlocking' is strengthened by ECHR jurisprudence which evidences 'reverse feedback' since the Convention has established a two way flow between national and international law, in that states must make laws which are compatible with Community norms, but in turn, these common principles and standards are seen to have derived from principles and norms recognised by most member states. The ECHR therefore may refer to national laws as an 'expression of a coherent doctrine'. See also Örüçü (2004) (n 78) 89.

<sup>259</sup> Grimm 'Proportionality in Canadian and German constitutional jurisprudence' (2007) 57(2) *University of Toronto Law Journal* 383, 384-385. Grimm explains that, originally, the principle of proportionality served as check on police action. It demanded that 'the action required a lawful purpose' and that 'the means adopted by the police *vis-a-vis* the citizen had to be suitable to reach the purpose of the law. If a less intrusive means to achieve the end of a law was available, this means had to be applied.'

<sup>260</sup> Grimm (n 259) 384-385.

<sup>261</sup> Beatty (n 82) 45; Grimm (n 259) 384.

<sup>262</sup> Van Dijk et al (n 64) 334-342; Grimm (n 259) 384; Beatty (n 82) 83-85, 162.

<sup>263</sup> Beatty (n 82) 166.

traditionally employ the test, such as the United States Supreme Court, are adopting the method, albeit not always by name.<sup>264</sup>

The example of the feedback loop travelled by the principle of proportionality is also instructive because it hints at the possibility of an upward flow from a normative order which lies deeper than the national. Although the principle, as developed by the highly respected *Bundesverfassungsgericht*, has come to be a hallmark of the national legal identity of Germany as a whole, it had its roots in the less famous, parochial environment of the Prussian administrative courts. In other words, through judicial mediation, a local principle moved all the way from a subnational sphere to the national and up to the global, and from there back again to other domestic domains.

The cycle described above instantiates the development of bottom up international law. It is precisely in this way that international law can be reconstructed to be counter-hegemonic and emancipatory – because it will be assembled from autochthonous elements, which have acquired both local and global relevance.

This argument culminates however, in the contention that the most profound reconstruction of international law springs from subnational ‘life-worlds’, or as I call it, the depth vector.<sup>265</sup> The twofold reason being that many national laws, in particular national constitutions already closely mimic current international provisions, which also limits their capacity to reconstruct it per se. Second, since both national and international law may offend or act oppressively toward subnational sensibilities, reconciliation achieved at this level can initiate cathartic reconstruction and the highest degree of cosmopolitan emancipation.

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<sup>264</sup> Other courts which rely on the proportionality principle include Australia, Canada, Hungary, Israel, Japan and South Africa. Beatty (n 82) 37-44, 48-49, 162; Grimm (n 259) 384.

<sup>265</sup> Santos (n 8) 38.

With reference to an important study of the Pimicikamak Cree Nation by Galit Sarfaty, I illustrate in more detail how bottom up transformation might emanate from a subnational normative dimension. The study, as explained below, also highlights the vigorous interplay of norms and reciprocal influence at the intersection of an autonomous subnational system and national and international regimes.<sup>266</sup>

Sarfaty points out that paradoxically, when indigenous groups seek recognition of their customs and indigenous laws, although they may resist national and international regimes, they also have recourse to these very systems in order to achieve reform and recognition.<sup>267</sup> In turn, reform initiatives bring indigenous peoples into contact with international and transnational institutions. 'But local groups do not just absorb international norms or redeploy them against states; they are also transformed by these norms in a variety of ways'.<sup>268</sup>

There is however, another important corollary, namely that 'local actors deploying or resisting national or international norms may well subvert or transform them, and the resulting transformation is sure to seep back "up" so that, over time, the "international" norm is transformed as well'.<sup>269</sup> Thus, while indigenous communities negotiate the meaning of various norms within their own

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<sup>266</sup> Sarfaty (n 18). This is a pertinent case study of 'legal mediation' with reference to the Cree Nation, an indigenous people living in Cross Lake, Manitoba, Canada. Sarfaty argues that 'the process of legal mediation is an especially apt model for indigenous communities because of their status as self-governing, culturally cohesive peoples prior to their subjection to processes of colonization in their own territories'. One of the issues highlighted concerns the Cree's Election Law (1999) which directly replaced section 74 of the Indian Act, and was therefore not recognised by the federal government. After concerted efforts, Canada finally recognised the Cree Election Law. Sarfaty (n 18) 478-479.

<sup>267</sup> Id 450.

<sup>268</sup> Id 441, 472-474. The Cree have for example recognised the authority of the Canadian Charter and have adopted new laws to protect individuals within their community, including the rights of women. 'This is a radical step for the Cree who, like other indigenous peoples, have often focused on the protection of group rights rather than individual rights'.

<sup>269</sup> Id 450.

context, they are also negotiating the meaning of norms in national and international contexts.<sup>270</sup>

Moreover, as the study illustrates, national courts are often involved in one or more of the stages of such negotiation, and through their mediation between indigenous and national systems, courts adapt or refine domestic rules. Thus, the Cree's Election Law (1999) that contravened section 74 of the Indian Act (which denied voting rights to off-reserve residents) was eventually recognised at national level.<sup>271</sup>

Another pertinent example showing how transformation can flow up, with the help of national courts, is that of the procedural changes established in *Delgamuukw v British Columbia*.<sup>272</sup> Here, the Canadian Supreme Court accepted oral history as an admissible form of legal evidence to prove aboriginal title to land. In further examples, domestic courts, like the South African Constitutional Court, seek out congruency between indigenous and national or international norms, such as in its classic construction of the interrelatedness between *ubuntu* and human dignity.<sup>273</sup>

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<sup>270</sup> See for example Lenzerini 'Reparations for indigenous peoples in international and comparative law' in Lenzerini (ed) *Reparations for Indigenous Peoples* (2008) on shifts in attitudes and meanings in relation to the protection of indigenous rights.

<sup>271</sup> For example, the Canadian Supreme Court in *Corbiere v Canada* [1999] 2 S.C.R. 203 (Can.) had declared the Indian Act's denial of voting rights unconstitutional. This provided a solid basis from which change could be initiated. After intense pressure from various groups, Canada finally recognised the Cree Election Law. Sarfaty (n 18) 478-479.

<sup>272</sup> *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010 (Can.) in Sarfaty (n 18) 452. Also note how the native Sami people of Norway have influenced court procedures and federal law, so that Norwegian courts are now obliged to use the Sami language in prosecution and when taking evidence. Sarfaty (n 18) 453.

<sup>273</sup> *S v Makwanyane* (n 50). See especially para 308 where *ubuntu* is defined as encompassing fundamental values of respect and human dignity premised on conciliation rather than conflict. See also *Koyabe and Others v Minister for Home Affairs and Others* 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC) para 62, where another indigenous value, *batho pele* (people first) is considered: 'In the context of a contemporary democratic public service like ours, where the principles of *batho pele*, coupled with the values of *ubuntu*, enjoin the public service to treat people with respect and dignity and avoid undue confrontation...'.

In turn, as explained above, other courts, both national and transnational, are able to join in the 'dialogue'. The result is that subnational elements can be propelled further up to the international plane, sometimes due to specific juridical mediation, but at other times organically, through the diffusion of norms initiated by 'transjudicialism'.<sup>274</sup>

The Cree example also shows how direct appeal to international institutions by substate communities may have far reaching effects.<sup>275</sup> Through their petitions to the UN, its Committee on Economic, Social, and Cultural Rights concluded that "policies which violate aboriginal treaty obligations and ... rights" are a human rights concern emerging out of the International Bill of Human Rights', and that a country doing this 'would be considered [in] breach of its U.N. treaty obligations'.<sup>276</sup>

In turn, the world community, which includes the globalised judiciary, takes note, and gradually nascent ideas are entrenched – and become norms and values – in different domains, whether national or international.<sup>277</sup> Therefore, steadily, through the 'intervention' of 'particular experiences', bottom up international law takes shape.<sup>278</sup>

The rest of the Cree account, however, is equally compelling and reveals a further inverse response. Sarfaty explains that 'the Cree are appropriating rights language to secure not only external legitimacy for their incipient

<sup>274</sup> See Chapter I 6(b) on the 'diffusion' of law and 9(d) above on transjudicialism.

<sup>275</sup> It must be pointed out however, that usually by the time indigenous matters reach the international or transnational level, the particular community would have had to exhaust domestic remedies, according to the principles governing the right of individuals to have recourse to transnational courts. See for example Buergenthal et al *International Human Rights* 3 ed (2002) 144, 156-161, 248-249. This means that domestic courts would already have been exposed to, or even have been influenced by the relevant indigenous, or other substate, norm(s) in question.

<sup>276</sup> Sarfaty (n 18) 465.

<sup>277</sup> Note how some of these processes take place, in Lenzerini (ed) *Reparations for Indigenous Peoples* (2008), for a comprehensive collection on indigenous rights (with the focus on reparation). Also note again how various ancillary transjudicial processes, by strengthening the reach of a globalised judiciary, could act as conduits for transformation. See n 239 above.

<sup>278</sup> See Obregón 'Between civilisation and barbarism: Creole interventions in international law' in Falk et al (eds) *International Law and the Third World*, quote at 121.

government but also its acceptance *within* the community'.<sup>279</sup> In other words, indigenous customs and aspirations are correspondingly moulded by international norms, for example, in the innovation that their traditional, community centred rights are augmented by rights which protect individuals, as in the case of the Cree.<sup>280</sup> Hence, a new cycle starts.

A final point is that the important bottom up flow of subnational (or national) elements refers not only to human rights norms. Rather, it was shown previously that international trade law, for example, is very much a bottom up construction.<sup>281</sup> In addition, ranging from environmental to criminal matters and more, the relevance of local wisdom to provide solutions to difficult problems is increasingly being recognised in many diverse areas.<sup>282</sup>

In this section, I set out to illustrate in practical terms how the subnational sphere can generate – in particular, through the mediation of domestic courts – an upward movement of norms and values that can serve to reconstruct international law from the (very) bottom up. The examples also showed the complexity of the different 'feedback loops' and the way in which they change direction. Or, to put it differently, there are ways in which indigenous and other

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<sup>279</sup> Sarfaty (n 18) 477 (my emphasis). He gives the interesting example of the wording of an election poster: "Vote Nelson Miller for strong *self-determined* PCN [Pimicikamak Cree Nation] governance and *human rights*" (emphases added by author).

<sup>280</sup> Sarfaty (n 18) 441, 472-474, and see n 268 above.

<sup>281</sup> See Chapter II 5(b).

<sup>282</sup> For environmental issues see for example Chikozho and Latham 'Shona customary practices in the context of water sector reforms' International workshop on '*African Water Laws*' January 2005, Johannesburg; Workman *Heart of Dryness* (2009); and for criminal law innovations, see for example Sarfaty (n 18) 454, where he notes that Denmark has incorporated the customary law of the Greenlandic Inuit in the Greenland Criminal Code, wherein sanctions are based not on the gravity of the crime but on the offender's personal circumstances. Like most other indigenous systems the Inuit system focuses on the elimination of conflict and the restoration of peace in the community rather than the imposition of punishment.

Interesting approaches are also increasingly adopted by civil groups, like the South African Ubuntu Foundation (<http://www.saubuntu.co.za>) established by prominent social figures to promote the values of *ubuntu* in civil society.

subnational norms and values can be 'glocalised'.<sup>283</sup> Baxi calls this the 'authorship of the people'.<sup>284</sup>

I conclude that international law can become emancipatory if it is infused with subnational and relevant national norms and values. This concept also resonates with principles and realities relating to globalisation, and, is in line with various theories, such as Santos's cosmopolitan law and Sacco's legal formants.<sup>285</sup> Therefore, both empirical evidence as well as legal theory support the contention that international law can be reconstructed from the bottom up.

Interestingly, the outside parameters of the reconstructive process take place beyond the direct reach of the state as legislator, being as they are subnational and supranational configurations. In this respect, a possible 'weakening of the nation-state' may provide the necessary stimulus for new forms of social organisation, one of which could be reconstructed, bottom up international law.<sup>286</sup>

In brief review of the foregoing, the current chapter mapped out the three dimensional terrain of the adjudicative journey between the international, national and subnational. It also described the analytical tools of contextualism, proportionality and particularisation, which are necessary for its negotiation. Both map and tools however, are not of much use without an indication of the direction in which the map should be orientated. The following part is therefore devoted to the 'compass' by which the judiciary can navigate.

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<sup>283</sup> Mapaire (n 7) 155, 'glocalisation' is the globalisation of localisms.

<sup>284</sup> Baxi (2008) (n 22) 12-15.

<sup>285</sup> See Chapter I 4, 6(a) and 7(b) on globalisation, legal formants and cosmopolitan law respectively.

<sup>286</sup> McMichael *Development and Social Change: A Global Perspective* (1996) 238-239, and note the role of (bottom up) 'cosmopolitan localism'.

## 10. Directing the adjudicative processes towards emancipation and reconstruction: The compass of global ethics

*A much better case against cultural imperialism can be made from the standpoint of a view of ethics that allows for the possibility of moral argument beyond the boundaries of one's own culture.*<sup>287</sup>

*[R]ights are open to misappropriation and abuse ... provoke counter-claims and invite exceptions, and ... are linked to unjust conceptual structures ... [T]his is not a cause for quitting the terrain of law or renouncing the effort to win recognition of rights.*<sup>288</sup>

*It is now conventional wisdom that there is no disinterested perspective that is not embedded in and contaminated by some personal or political view.*<sup>289</sup>

*To form a judgment ... we must transcend our private idiosyncrasies, and we do this by testing our perspective against those of others.*<sup>290</sup>

*Our values are in conflict and in reconciling them we must compromise.*<sup>291</sup>

The relationship between ethics and legal theory, and ethics and emancipation was previously deliberated.<sup>292</sup> It was established, inter alia, that since law 'acts as a site of ideological refraction of deeply embedded cultural dispositions', one cannot assume that theories about law will be neutral and objective.<sup>293</sup> Rather, every legal theory runs the risk that it will merely perpetuate existing power

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<sup>287</sup> Singer (n 20) 140.

<sup>288</sup> Marks *The Riddle of all Constitutions* (2000) 145.

<sup>289</sup> Beatty (n 82) 37.

<sup>290</sup> Knop (n 61) 532.

<sup>291</sup> Dan-Cohen (n 54) 76.

<sup>292</sup> See Chapter I 7(c), and 5 above. According to my definition, emancipation is 'achieved by means of an equitable balancing in ethical-practical rationality, of the (contextually embedded) interests of all stakeholders'.

<sup>293</sup> For example Legrand (n 29) 122; and see Chapter I 2.

structures and hegemony. In this section, I therefore advance an ethical *Überbau* that is aimed at transcending moral subjectivity as far as possible, and one that can act as a jurisprudential compass pointing toward greater objectivity and emancipation.

### **(a) Ethics, ‘universal’ standards and the subjective-objective debate**

The importance of a (relatively) neutral yardstick lies in the fact that, in the courtroom, as in life, everyone’s sense of morality and justice is subjective, and is embedded in the respective socio-cultural context pertaining to each actor.<sup>294</sup> Hence, the challenge hinges on whether the judiciary can overcome inherent moral hubris or prejudice and bring about counter-hegemonic and emancipatory justice that transcends these subjective contexts.

International law was traditionally touted as the universal standard that would provide such overarching justice for all. Its postmodern deconstruction, however, brought an abrupt end to these assertions.<sup>295</sup> In turn, its users were left in a barren new landscape – one without absolute standards against which to measure the relevance of either subjective or objective claims.<sup>296</sup>

It has therefore become much more difficult to distinguish what are rightfully called emancipatory standards from those that are merely overbroad, and that might sanction cultural atrocities (which can spring from both western and non-western cultures) in the name of respect for cultural diversity.<sup>297</sup> Predictably, there have been many attempts to solve the riddle presented by the universal-relative dichotomy, with most scholars opting for some form of balance and compromise between the extremes.<sup>298</sup>

<sup>294</sup> For example Beatty (n 82) 37; Dan-Cohen (n 54) 28-42; Knop (n 61) 531-532.

<sup>295</sup> See for example Paulus (2001) (n 10); Chapter II 5.

<sup>296</sup> For example Koskenniemi (2007) (n 65) and (2009) (n 66); Kennedy ‘The mystery of global governance’ (2008) 34 *Ohio Northern Law Review* 827.

<sup>297</sup> See Dan-Cohen (n 54) 150-157.

<sup>298</sup> I discussed a number of these theories in a previous chapter. See Chapter II 5(b) and 6.

Notwithstanding scholarly efforts, this impasse is the point where stark legal theory becomes less helpful, and where 'rationality alone does not lead to the solutions of inter-cultural (or even inter-civilizational) conflicts'.<sup>299</sup> Hence, this is also the starting point of the deliberation on ethics. I consider ethics to provide as good a solution as one can hope to find when confronted with the subjectivity-objectivity and relativity-universality oppositions.

In defence of the deployment of ethics in a legal context, it must be noted that the separation between law and ethics (or morality) is a positivistic and occidental innovation. In most traditional systems, there is no such separation, because law and morality are seen as part of a single continuum.<sup>300</sup>

Conversely, ethics, as a jurisprudential compass, is by no means without its share of challenges. According to its ordinary dictionary meaning, ethics is conflated with morality, or specifically with morally correct conduct.<sup>301</sup> This immediately begs the perennial question – *whose* morality? – which propels it back to the realms of subjectivity. For this reason, and without adopting any particular philosophical stance, I draw a tentative distinction between ethics and morality.<sup>302</sup>

### **(b) Global ethics in the present context: Practical and purposive**

In an attempt to avoid some of the pitfalls of subjectivity and unfettered relativism, I describe ethics in roughly hewn utilitarian terms, namely as an extended cost-benefit analysis, available to courts, particularly when they are

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<sup>299</sup> Paulus (2001) (n 10) 729.

<sup>300</sup> See for example Menski (n 124) 413-421; Mapaire (n 7) 150-153. Also note how the concept of ethics dovetails with *ubuntu*, discussed above.

<sup>301</sup> The OED 12<sup>th</sup> ed defines it as 'the moral principles governing or influencing conduct'.

<sup>302</sup> In lay terms, morality appears to be closely allied to the typically subjective concepts of right and wrong, and it may also have strong religious connotations, both of which I attempt to avoid. Ethics, for example, because of its applicability in the areas of law, sports, medicine, science and finance, apparently has a more secular nature.

confronted with invidious choices.<sup>303</sup> Consequently, ethics is not to be understood as an ethereal concept which produces an uncertain sense of what is 'good' or 'bad'. Rather, it is to be understood as a cognitive orientation toward finding the most beneficial (overarching) solution among all the relevant alternatives available. This construction of ethics relies to a large extent on Bentham's 'Greatest Happiness' principle.<sup>304</sup>

Additionally, in what I shall call 'purposive' utilitarian ethics, issues of duty and the allocation of responsibility are addressed, for example, by calling on judges to consider the use-value and effect of judgments with reference to the actual interests at stake.<sup>305</sup> It is also cosmopolitan, since it recognises that ethical duties may transcend geopolitical boundaries and may embrace the smallest of communities or the entire human race.<sup>306</sup>

Peter Singer reasons that ethics means that, as humans, we have developed the need to justify our behaviour, rationally, to our particular group. Therefore, if our 'group' is the global community, we may have 'to justify our behaviour to the whole world'.<sup>307</sup> He concludes that this calls for a 'new ethic that will serve the interests of all those who live on this planet'.<sup>308</sup> From this perspective, ethics provides the desired orientation that will direct judges toward cosmopolitan and emancipatory jurisprudence.

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<sup>303</sup> In this respect I do not engage directly with the philosophical complexities of utilitarian ethics, or any other school of ethics. For a description of utilitarian ethics, see for example Shouler *Understanding Philosophy* (2008) 282-286; and for criticisms of utilitarianism, see for example Dan-Cohen (n 54) 151, 157.

<sup>304</sup> Twining (n 203) 89-91, who maintains that some of Bentham's ideas based on the utilitarian 'Greatest Happiness Principle' could be adapted and harnessed to accommodate current issues of globalisation and legal pluralism. I diverge however, from a strict reading of Bentham, as indicated below.

<sup>305</sup> See Twining (n 203) 89-91.

<sup>306</sup> Id 66-69. Note again the discussion of Singer's approach founded on practical, utilitarian ethics, for example, his important contribution in terms of the duty to prevent famines; and also the discussion of O'Neill's 'Lifeboat Earth' and her argument about global responsibility for 'extreme evils'.

<sup>307</sup> Singer (n 20) 12.

<sup>308</sup> *Ibid.*

### (c) Constructing the ethical compass

In line with the contention that ethics is not an ethereal concept, I maintain that the analytical scaffolding provided by some aforementioned concepts and processes, such as contextualism and proportionality, further buttress the ethical paradigm proposed here. In addition, there are well-developed principles and values, notably human dignity and equality, which give substance to ethics as a cognitive compass.

On one hand, contextualism and proportionality direct the judicial inquiry to the concrete facts of a case. They also accommodate a realistic balancing of competing interests according to the relative impact of the different elements, and, in particular, the overall effect that the judgment will have.<sup>309</sup> To this, a purposive ethical orientation will add fundamental concern for the well-being of the parties.<sup>310</sup> Ethics ultimately demands that the judgment can be justified on grounds that – qualitatively and not necessarily quantitatively – it has achieved the greatest, compound benefit.

On the other hand, this goal can only be realised fully by tapping into the foundational values of human dignity and equality. These values have consistently guided judges around the world, particularly in constitutional matters.<sup>311</sup> Dignity is ‘the highest value’ signifying ‘the free self-determination of the individual’, and at the same time reflecting ‘the distinctive and supreme value of our common humanity’.<sup>312</sup> Equality ‘accepts everyone’s equal moral status as

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<sup>309</sup> See 4 and 6 above on contextualism and proportionality respectively. Also, Beatty (n 82) 73: ‘Facts have a certainty, predictability, and reality about them that allows for more precise measurement and analysis. Factual claims can be tested ... Definitions cannot.’

<sup>310</sup> Beatty (n 82) 168: ‘Making the perspectives of the parties the vantage point from which courts judge each case means no particular philosophy or moral vision is privileged over any other.’ Ethics is bolstered by proportionality in that the latter is a ‘formal principle that is capable of being used anywhere in the world ... it is multicultural’ and integrates ‘the real and the ideal, the local and the universal’ through a ‘fundamental principle of distributive justice’.

<sup>311</sup> See Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012). Laurie Ackerman is a retired justice of the South African Constitutional Court.

<sup>312</sup> Beatty (n 82) 45, in the context of German constitutional law, but this analysis has equal relevance in other contexts; Dan-Cohen (n 54) 158-160, who questions the ‘dominant trend’ of

a self-governing individual'.<sup>313</sup> I maintain that these values express a qualitative and independent judicial standard, which in turn, can inform an ethical analysis of that which constitutes the 'greatest benefit' with sufficient certainty.<sup>314</sup>

In further explanation, Dan-Cohen argues that 'a morality [or ethic] of dignity' reaches beyond first person perspectives of welfare and autonomy and is therefore 'not limited to the importance that each person assigns to his or her own interests'.<sup>315</sup> This means that it is not 'meaning-dependent', but an autonomous foundational value that 'allow[s] us to insist on law's enforcing a substantive morality while leaving ample yet not infinite room for cultural variation'.<sup>316</sup>

Therefore, instead of trying to find ethics 'out there', judges have all the parts needed to construct an ethical compass, if they are guided by the values of dignity and equality and construe the relative weight of these by contextualising them and placing them on the scale of proportionality. The result is that, when judges orientate their judgments according to the rational and purposive ethical template of achieving the 'greatest good', they 'may be able to cope with moral and cultural diversity'.<sup>317</sup> They will consequently be in a position to bring about substantive justice by maximising the conditions necessary for human flourishing. This is what the three-dimensional framework is all about.

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conflating dignity and individual autonomy. He argues that 'respecting people's dignity' is not the same as 'respecting their autonomy', rather that the 'real subject of dignity is the person, not her autonomy'.

<sup>313</sup> Beatty (n 82) 45 (quoting Kommers), 175.

<sup>314</sup> It must be noted that these values are always contextually embedded and therefore never completely objective. They are however, to a large degree jurisprudentially ascertainable, which I maintain, render them sufficiently neutral to support an ethical inquiry. Also note Dan-Cohen's argument in the text and note 315 below.

<sup>315</sup> Dan-Cohen (n 54) 154-157,160,164. Hence, slavery, even if it concerns the 'happy slave', whose well-being and autonomy might be respected, is still heinous because it is 'an affront to human dignity'.

<sup>316</sup> *Id* 150-151, 157.

<sup>317</sup> *Id* 151.

#### **(d) Applicability of the ethical compass**

This topic addresses the applicability of ethics in relation to the wide spectrum of fragmented fields covered by international law. The inquiry also questions the applicability of the principle of proportionality and the values of equality and dignity in these areas. For example, in what way are ethics, proportionality, dignity and equality relevant to international environmental or trade law? The answer appears to be either very complicated or quite simple. I suggest the latter.

In the first place, the principles of 'applied' ethics are routinely invoked in virtually every area of human endeavour, from sports, to medicine, to business and so forth.<sup>318</sup> Second, according to Beatty, and as the cases in the following chapter illustrate, the concept of proportionality is neutral and can be used in any context.<sup>319</sup> Third, dignity and equality, which seem inextricably linked to the human rights paradigm, ultimately come down to displaying respect for humanity as a whole, and equal respect for each individual's rightful place as part thereof.<sup>320</sup>

Respect for humanity however, recognises and takes account of the interconnectedness and interdependence of everything on 'Lifeboat Earth'. Hence, by showing respect for the earth and all its life forms, one is at the same time showing respect for the dignity and equality of all humans, who depend on a healthy environment for their well-being and survival.<sup>321</sup> Equally, respect for

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<sup>318</sup> For example Shouler (n 303) 282-287.

<sup>319</sup> Note again Beatty (n 82) 168, on proportionality as a 'formal principle that is capable of being used anywhere in the world'.

<sup>320</sup> The term 'respect' is loaded with highly complex philosophical meaning and connotations, all of which fall well outside the scope of the study. I refer here to its ordinary meaning of having due and equal regard for the rights and interests of all other humans. The link between respect and morality, or ethics, as I suggest, is noted by Dan-Cohen (n 54) 151, and see the references to Ronald Dworkin on the topic.

<sup>321</sup> I am not suggesting however, that the earth and its fauna and flora are not worthy of protection in their own right, and subscribe to the idea that speciesism should also be countered by ethical considerations. See Singer *Animal Liberation: A New Ethics for our Treatment of Animals* 1 ed

humanity and the individuals who compose it, means showing respect for competitors in business and sport, for example, by adhering to ethical practices, which recognise the equal rights and interests of all participants.

For present purposes, ethics thus simply refers to compounding the greatest benefit *for* and *between* individuals and communities, of whatever nature or size the latter may be. By following this train of reasoning, the ethical compass can be applied in all areas where international law is applied in domestic courts.

### **(e) The role of duty and responsibility in using the ethical compass**

Practical, purposive ethics can thus provide great impetus to the attainment of cosmopolitan and emancipatory international law in courts around the world. Despite this, a final question remains, namely why should judges *want* to ponder an ‘uplifting fantasy’ based on theory and philosophy?<sup>322</sup> Why should judges, for instance, want to forfeit the comfort of their apparently well founded subjective opinions, or the ease of resorting to ‘horrible hypotheticals’ – all of which can also accomplish the judicial task?

In this regard, I shall only offer the most preliminary thoughts, which relate to the duty and responsibility of judges to go beyond their own instinctive and conditioned *reaction* to a matter, and in its stead to follow a rational course of *action* in the matter.<sup>323</sup> Similar to pilots steering a course, the difference can be likened to flying by ‘visual flight rules’ or ‘instrument flight rules’. The latter requires the pilot to resist visual impulses, and only to trust his or her

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(1975) 2 ed (1990); Stevens (n 24) 61: ‘[I]f there is to be one delusion, then respect for the potential immortality of this world seems one that is good as well as useful’.

<sup>322</sup> Dan-Cohen (n 54) 1 on the Kantian notion of the ‘uplifting fantasy of the Kingdom of Ends’.

<sup>323</sup> The term ‘duty’ has a strong association with Kantian deontological ethics, which however, is not applicable to the present argument in its strict sense. Shouler (n 303) 181-184.

instruments, even when this ‘feels wrong’ – because it will prevent a serious accident due to pilot error.<sup>324</sup>

In addition, to a call for action rather than reaction, duty and responsibility of any kind adhere to specific roles, and therefore the role paradigm within which the judiciary functions must be clear. Dan-Cohen explains that there is often no ‘role distance’ between the person and the judge, ‘because her judicial views *are* her personal views’.<sup>325</sup> This is the ‘Dworkinian’ model, ‘marked by sincerity’ and the judge’s ‘genuine vision’.<sup>326</sup> He proves, nevertheless, that in certain judicial actions, the paradigm shifts to one of ‘role distance’, which is ‘strategic’ and ‘success orientated’, and thus serves an organisational function.<sup>327</sup>

Although Dan-Cohen also associates coerciveness and bureaucracy with role distance, I suggest that, when the judge is ‘detached’ from the judicial role, an opening is presented for the pursuit of ‘ethical-practical rationality’, wherein reason, as opposed to sentiment, can flourish. This is because the subjective expression of the judge’s ‘personal views’, which is a *reaction*, is suppressed by detachment, and hence, the judge must rely on other impulses, which trigger *action*. Therefore, the judge is given the space to adopt a conscious strategy, based on the mandates of duty and responsibility.

Accordingly, this is the point where the pilot realises that, for the sake of safety, she has a duty to stop relying on visual cues and must only trust the instrument panel. For judges it means realising that they have a considered duty and responsibility to move beyond their subjective preferences to judge according to a more objective standard. I contend that the relevant ‘instrument’

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<sup>324</sup> For instance, pilots who unwittingly fly into cloud, testify to the fact that ‘up’ seems ‘down’ and vice versa, and of the difficulty of trusting the instruments when their instincts are telling them something else. See for example Thom *Human Factors and Pilot Performance* (1997) 32-40.

<sup>325</sup> Dan-Cohen (n 54) 15, 29.

<sup>326</sup> *Id* 29.

<sup>327</sup> *Id* 16, 30. He contrasts the ‘strategic communication’ of a judge (when litigants are presented with the findings, wherein only compliance ‘accompanied by a threat of force’ is at issue) with the ‘interpretive soliloquy’ when the judge communicates from a non-detached position.

by which to judge is the ethical compass, underscored by proportionality, dignity and equality, as explained above.

Ethicists, like Singer, assign us duty and responsibility for our fellow humans, wherever they are on the planet, which demands strict impartiality and the justification of our actions – potentially to the entire world.<sup>328</sup> Consequently, when judges assent to these duties and responsibilities, they acquire the necessary stimulus to act in a certain manner, which, if directed according to an ethical compass, will provide them with the means to forge the optimal, compound benefit in the relevant context, with ethical purpose and objectivity.

### **11. Conclusion: Toward cosmopolitan and emancipatory international law – An aspirational vision for the application of the three-dimensional framework**

*We must all honour our mutual responsibilities for our shared human vulnerabilities.*<sup>329</sup>

Falk argues that the future of the world depends on the deployment of international law to meet the 'daunting moral and intellectual challenge' of developing a new, post-Westphalian order of suitable global governance.<sup>330</sup> This process, he reasons, must take place pragmatically and incrementally, and he notes that some of the building blocks are already available.<sup>331</sup> Deciding whether broad global governance is feasible, desirable and truly our only hope, is beyond the scope of this study.

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<sup>328</sup> Singer (n 20) 12,150-195, where he develops the ethics relating to the human race as 'one community'. Note also however, that our duties and responsibilities extend to the earth and its creatures. See Singer (n 20) 14-50; and Singer *Animal Liberation* (n 321).

<sup>329</sup> An-Na'im (2008) (n 40) 90.

<sup>330</sup> Falk 'International law and the future' in Falk et al *International Law and the Third World* (2008) 30-32.

<sup>331</sup> *Ibid.*

It should be clear however, that international law will serve the needs of the global community only if it is applied and harnessed in a cosmopolitan and emancipatory manner, by 'actors with the vision and capacity to produce change without inducing chaos and catastrophe'.<sup>332</sup> Within the ambit of this study one important group of actors has been identified, namely, the judiciary in domestic courts.

Whether one endorses reform within the Westphalian model or otherwise, effective judicial agency does much more than merely 'apply' international law in an emancipatory manner. The present chapter explained the decisive role of the judiciary in the bottom up reconstruction of international law.

Hence, the purpose of this chapter was to map out the terrain that must be covered by courts, that is, the three-dimensional context which stretches between international, national and subnational domains. It also provided some of the tools needed for the judicial navigation between global and local normative spheres. These are contextualism, proportionality and particularisation. Additionally, I proposed that all these elements must be oriented according to the compass of purposive ethics, which directs the journey toward the attainment of the greatest, compound benefit, as it proportionately accrues to individuals, communities, nations or humanity at large.

The final destination is, of course, cosmopolitan and emancipatory international law, whether through its deployment *in* domestic courts, or its aspirational reconstruction *by* domestic courts – and like the local reconstruction of *Guernica* – it thereby becomes more relevant and persuasive to its audience.<sup>333</sup>

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<sup>332</sup> Id 30.

<sup>333</sup> See the discussion on the *Keiskamma Guernica*, a reconstructed or translated version of Picasso's famous *Guernica*, in the Introduction to the study, of which it was said that it 'shows how an idea can survive translation and become a potent expression in a different context'. Jo Noero quoted in the *Monday Paper* of the University of Cape Town, 1-14 October 2012.

This chapter concludes the main part of the study, which consists of the theoretical aspects involved in the domestic application of international law, as outlined in previous chapters, and concluding with the development of the conceptual and analytical framework presented in this chapter.

The next chapter explores the practical implications of the theory thus developed, through a consideration of cases from a range of jurisdictions. These cases, or important facets of them, serve as examples of the most important theoretical structures developed or discussed in the study. They are not exhaustive, and may not necessarily be the best examples available. I have nevertheless chosen each one for a number of valid reasons, but primarily to illustrate the following main points.

- (1) All the cases involve the three-dimensional normative terrain, containing elements of an international (although perhaps 'hidden' within the national system), national and subnational nature, which must be navigated by the judiciary.
- (2) Throughout the cases, such navigation involves judicial engagement with the multiple contexts of these three levels of regulation, which is accomplished by using the analytical tools (contextualisation, proportionality and particularisation) described above – although seldom by name.
- (3) The judicial navigation entails a mediatory and reconciliatory approach to normative plurality, which neutralises the hegemony of any one system over another.
- (4) Ultimately, the cases underscore the contention that international law has the potential to be applied in a cosmopolitan and emancipatory manner.

With reference to the last point, the cases illustrate the cosmopolitan aspects of international law with reference to the multiple contexts and interests canvassed, and its emancipatory potential in that the greatest compound benefit appears to have been derived for the domestic participants. This also implies that

the relevant court has thwarted oppression or hegemony, either through the manner in which it applied international law, or, as a few cases show, by refusing to give it strict application with reference to the elements of the case.

## CHAPTER V

### FROM THEORY TO COURT PRACTICE: AN ANALYSIS OF COSMOPOLITAN AND EMANCIPATORY JURISPRUDENCE FROM AROUND THE WORLD

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## 1. Introduction

In this chapter, the central theme of the study, both as hypothesis and as working model, will be given substance through an analysis of judgments from a wide range of jurisdictions.

One aim of this study is to address the charge that international law is a hegemonic system, constructed by western interests, and, as such, violates relativities existing in local contexts. I have therefore argued that it should be reconceptualised to find cosmopolitan and emancipatory application, specifically in domestic courts. Or, to paraphrase Santos, I hope to encourage a 'cross-cultural reconstruction' of international law that will recognise difference and link 'local embeddedness and grassroots relevance to translocal intelligibility and emancipation'.<sup>1</sup>

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<sup>1</sup> Santos *Toward a New Legal Common Sense* 2 ed (2002) 439, 474-475.

This aspirational cross-cultural reconstruction of international law implies the need for a globally valid methodology, which excludes neither the North nor the South. Rather, it seeks to find wisdom and solutions in all corners of the earth, including those already encapsulated in international law. Therefore, the choice of cases presented in this chapter spans many divergent geo-political jurisdictions, some western and powerful, others Third World and perhaps lesser known – in the quest to establish a thread throughout the judgments which demonstrates that domestic courts can be successful in unlocking the cosmopolitan and emancipatory power of international law.

In practical terms, this means that international law is applied in a manner that counters, not only its own hegemony, where this is present, but all other forms of oppression, in order to have an emancipatory effect at local level. I note again, that such an outcome is predicated neither on the uncritical endorsement of international norms, nor on their automatic rejection. Rather, emancipation is achieved by contextualising the application of international law at international, national and subnational levels, with a view to balancing these different interests.

For purposes of the present study, the judiciary is taken to be responsible for such reconstruction. That is, through judicial mediation, domestic courts may have recourse to international law in a manner that does not vitiate national and/or subnational norms and values. This counter-hegemonic process, however, must extend beyond neutral, non-hegemonic application to an ‘emancipatory’ application and reconstruction, which is aimed at bringing about substantive justice and transformation.

The present chapter serves to prove that both the hypothesis and the framework, developed in the previous chapter, are viable in actual courts. It shows that judges who adopt a cosmopolitan outlook, coupled with the proper contextualisation of issues, are equipped to balance interests at local, national and global levels.

The difficulty is that judges do not simply say that they will employ a contextual approach, or take cognisance of the socio-cultural impact of normative pluralism inherent in such an approach. Rather, judges who deliver emancipatory judgments, devise different ways of aligning their judgments according to the dictates of substantive justice and social, political, economic and even environmental realities, at both global and local levels. Sometimes a direct route is followed, but more often the approach is circuitous.<sup>2</sup> These paths of the judicial process are given close attention in the analysis of the judgments presented in this chapter, and they relate directly to the key concepts that underlie the study. These are therefore briefly summarised in the following section.

## 2. Overview of key concepts

Thus far, Chapter I provided a number of jurisprudential signposts, which elucidated important and recurring themes. Chapters II and III analysed the crucial ingredients in the reconstructive model, namely international law and the judiciary respectively. The formulation of the three-dimensional framework was addressed in Chapter IV. With specific reference to the cases in this chapter, the main concepts are reviewed below.

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<sup>2</sup> See for example *The Adoption of CJ* in the Malawi Supreme Court Adoption Appeal No. 28 of 2009, found at <http://www.malawilii.org/mw/judgment/supreme-court-appeal/2009/1>, accessed 18-01-2013 below, which takes such a circuitous route. It must also be noted that it is not only the content of a particular judgment that is emancipatory (or otherwise). Factors such as the enforcement (or non-enforcement) of laws, and/or the nature of the sentencing are also relevant. Thus for example, although there are strict laws against murder in Turkey, the courts, by relying on gaps in the previous Penal Code, tended to be lenient in sentencing male family members for 'honour killings' in deference to 'the social and cultural structure, and the ethical values of the country'. See Örcü 'Judicial navigation as official law meets culture in Turkey' (2008) 4(1) *International Journal of Law in Context* 35 at 48-50. On the other hand, 'arguments of tradition and culture' have not prevailed in the sentencing of a family member for rape. Örcü (2008) (n 2) 50. These factors are noted, but not included in the present analysis.

### **(a) International law and cosmopolitan law**

The nature of international law was described as sufficiently flexible to cater for a wide spectrum of national, subnational and regional regimes, as well as being able to accommodate non-state actors. I therefore contend that international law has the potential to be reconceptualised and applied as cosmopolitan law.<sup>3</sup>

A cosmopolitan judgment, in turn, is one wherein the court engages in a consideration of the relevant legal, socio-cultural and, if necessary, economic and scientific regimes at local and global levels. For example, in environmental matters, or in the fight against transnational criminal activities, it is particularly important that courts look beyond national borders and consider the wider implications of their judgments.<sup>4</sup> On the other hand, for present purposes it is equally important to be 'open' to local relativities.

### **(b) 'Application' of international law and bottom up international law**

International law is a fluid concept, and in its widest sense, simply denotes law that transcends national boundaries. The term is used here in this extended sense as the generic term for regional, trans- and supranational law. Equally, 'law' refers to various forms of regulation, which includes soft law and the principles and values contained in international law.<sup>5</sup>

I argued that the standard description of the direct or indirect 'application' of international law is too attenuated when it refers to the overall *effect* of international law on national and/or subnational regimes.<sup>6</sup> In Chapter II a number

<sup>3</sup> See Chapter II, in particular 5 and 6.

<sup>4</sup> See below, for example, *Chinnappa Writ Petition (civil) 202 of 1995*, judgment of 30/10/2002, available at <http://www.indiankanoon.org/doc/282585/>, *Mapuche* (Expte. 15.320 - Año 2003) available at <http://odhpi.org/wp-content/uploads/2012/07/amparo-paichil-JUNIN.pdf> and *Hackl* Seychelles Court of Appeal SCA 10 of 2011, respectively.

<sup>5</sup> See Chapter II, in particular 2 and 6; Chapter III 5.

<sup>6</sup> See for example Moran 'Shifting boundaries: The authority of international law' in Nijman and Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007) on the 'influential authority' of international law in courts, as opposed to its overt bindingness. For this reason she rejects the term 'application' and uses 'having recourse to' in its

of alternative vehicles and covert routes, whereby courts access and ‘apply’ international norms, were highlighted. I called this the Trojan horse effect of international law and its presence is evident in a number of cases below.<sup>7</sup>

Courts also give effect to international law by relying on its principles via the comparative lens of foreign judgments.<sup>8</sup> Many cases in this chapter will show that courts often appear less constrained in their use of foreign sources than of international law itself.<sup>9</sup> Foreign judgments, in turn, ordinarily endorse the international standard in question, and in this way, international law spreads and evolves from the bottom up.<sup>10</sup>

### **(c) Contextualism, proportionality, cosmopolitanism and emancipation**

Chapter IV described the jurisprudential tool, contextualism, as a vital precursor to counter-hegemony, cosmopolitanism and emancipation. Nevertheless, the process is often conducted in a rather ad hoc manner.<sup>11</sup> Moreover, contextualisation frequently depends on the proverbial ‘what the judge had for breakfast’, particularly in terms of the weight ascribed to various contextual

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stead. See in particular 167. I continue to use the term ‘application’ in the general sense of ‘use’ and synonymous with, for example, ‘having recourse to’ and ‘deployment’. See Chapter III 2(b).

<sup>7</sup> See for example *Mapuche* (n 4) and Chapter II 3 on the Trojan horse effect.

<sup>8</sup> As the cases will show, internationally recognised academic writings are also at times heavily relied on. What is referred to here, however, is not the meaning given to national judgments and academic writing as secondary sources of international law according to article 38.1 of the Statute of the ICJ, but rather another indirect route whereby international law exerts influence in municipal courts.

<sup>9</sup> See for example *Attorney-General v Dow* Court of Appeal, Lobatse, 3 July 1992 (No 4/91) 1994 (6) BCLR 1 (Judgment by Amisah JP), available at <http://www.chr.up.ac.za/index.php/browse-by-subject/214-botswana-attorney-general-v-dow-2001-ahr/99-bwca-1992.html> (last accessed on 28/01/2013); *Bruker v Markowitz* [2007] 3 SCR 607, 2007 SCC 54; *Adoption of CJ* (n 2).

<sup>10</sup> See Chapter IV 9(d) and (e). The term ‘bottom-up’ international law is used in a number of ways by different authors. I use the term to denote both the ‘subaltern’ version, that is, international law evolving through the actions of non-state and substate actors, and also, as in the present case, evolving by virtue of its operation within national legal systems and in particular via court practice. See Santos (n 1) 180-182 and 465-471 on the former. I also note that bottom up international law is not in itself counter-hegemonic or emancipatory, but, as is the case with the application of every instantiation of international law, it depends greatly on whether courts contextualise conventional and unconventional usages to render it such. To illustrate the point, see the difference in approach in the main and dissenting judgments in *Bruker* (n 9).

<sup>11</sup> See for example the lack of contextualisation by the court a quo as highlighted in *Ngwenyama* [2012] ZASCA 94 (1 June 2012) discussed below.

factors.<sup>12</sup> For purposes of this study, however, contextualism calls for engagement with the relevant three-dimensional context in 'ethical-practical rationality'. For example, protection of the environment is a three-dimensional concern, because it has a global dimension, but also directly affects individuals, who live in threatened environments. In addition, it often involves socio-economic interests at national level.<sup>13</sup>

Judicial mediation of this terrain is supported by the process of proportionality, which optimises the benefits that accrue to each party, no matter whether at local or global level.<sup>14</sup> In turn, contextualism and proportionality inform the domestic particularisation of international law.<sup>15</sup>

Emancipation, the ultimate goal of the study, denotes freedom from an oppressive situation, wherein human potential cannot flourish.<sup>16</sup> Hence, where an oppressive situation prevails, emancipation means challenging the status quo and facilitating, or engineering the necessary transformation.<sup>17</sup> As the cases show, in practical terms, this means that the court will first consider all the relevant contextual facts present in all the vectors, and then subject them to a proportionality test. Clearly, these steps are not always flagged by the court.

<sup>12</sup> See for example *Sesana and Others v Attorney General* (52/2002) [2006] BWHC1 available at <http://www.saflii.org/cgi-bin/disp.pl?file=bw/cases/BWHC/2006> last accessed 24/01/2013 below, where one judge took traditional and cultural aspects of the right to inhabit ancestral lands very seriously, while two others ignored it; *Adoption of CJ* (n 2), for the wide, possibly inconsequential reference to various contextual factors (such as that the appellant came from a 'god-fearing family') in order to bolster the judgment.

<sup>13</sup> See *Mapuche* (n 4) below, where all these interests collide, in addition to the religious and cultural interests of the Mapuche community in the matter.

<sup>14</sup> See Chapter IV 6 on proportionality.

<sup>15</sup> See Chapter IV 8 on the particularisation or translation of international law.

<sup>16</sup> See Santos (n 1) 471.

<sup>17</sup> Id 2-3, where Santos contends that the 'logic' of emancipation '[expands] the possibilities of social transformation beyond a given regulatory boundary'. Axiomatically, oppression is contextual and can arise at many levels. Its range spans from global to local as exemplified by state excesses, parochial traditions and societal bigotry which affect nations, communities and individuals. For examples from the cases in this chapter: *Waldschlösschen* BVerfG, 2 BvR 695/07 of 29-5-2007, on the potential hegemony of international law; *Mapuche* (n 4), on state abuses, *Makwanyane* 1995 (3) SA 391 (CC) and *Ngwenyama* (n 11) on oppressive societal attitudes, *M v P* Court of Appeal, Civil Appeal No 11 of 1979 at Nairobi April 17, 1980; and *Bruker* (n 9), on oppressive religious traditions.

Therefore, whether the quality of the balancing adhered to the 'optimising' criterion can only be seen in the compromises reached and the actual effect that the judgment produces – namely whether it has an emancipatory result, or, yields the greatest compound benefit.

It was emphasised that the oppression-emancipation calculation does not relate exclusively to individual human rights issues. Entire nations could be held to ransom by international financial institutions, or they could be manipulated by the superpowers.<sup>18</sup> Oppression can be faceless, such as in the case of poverty and other harsh realities of life.<sup>19</sup> Even outdated law, by stifling human endeavour and wellbeing, can be a faceless oppressor.<sup>20</sup> Or, the threatened state of the environment, international crime, terrorism and warfare can be 'oppressive' and detrimental to human flourishing.

The equitable and proportionate balancing of various interests implies the existence of parameters. For the judiciary, parameters are overtly established by the various regulatory boundaries found in a particular legal context. Because the context here referred to is plural and three-dimensional, the regulatory boundaries themselves are multi-faceted. Despite the tensions existing between emancipation and regulation, this aspect implies flexibility and holds out the possibility of emancipatory judicial intervention.<sup>21</sup>

Lastly, I have argued that courts will only be successful in the application and reconstruction of international law when they navigate according to an ethical compass based on prudence or 'common sense'.<sup>22</sup> I suggest that the

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<sup>18</sup> See for example Singer *One World: The Ethics of Globalization* 2 ed (2004), in particular chapters 1 and 3; Mebeoji 'The civilised self and the barbaric other: Imperial delusions of order and the challenges of human security' in Falk et al (eds) *International Law and the Third World* (2008); Chapter I 4; Chapter II 4(b).

<sup>19</sup> For example below, *Adoption of CJ* (n 2) and *Mapuche* (n 4) respectively.

<sup>20</sup> See *Dow* (n 9) (family law) below, and *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) (trade law) below.

<sup>21</sup> See also Santos (n 1) 1-4, 21-39 regarding this tension.

<sup>22</sup> See Chapter IV 10; Santos (n 1) 37-38.

cases in this chapter give substance to my contention. It must be noted, however, that apart from referring to the ethical-practical component of emancipation as a concept, I have consciously refrained from drawing conclusions on the basis of the ethical value of a judgment, and only mention it in two cases. It is therefore the task of the reader to judge this matter.

#### **(d) The reconstruction of international law**

The overarching and aspirational purpose of the study is to describe one way whereby some of the emancipatory potential of international law can be unlocked, that is, through ethical-practical judicial mediation in domestic courts. The judgments in this chapter attest to the fact that international law can be reconceptualised, ultimately to be reconstructed in a way that benefits all its stakeholders, which even includes the earth.<sup>23</sup>

### **3. The logistics of analysing and comparing the judgments**

In the first chapter, reference was made to certain methods, theories and difficulties relating to comparative law. The present study employs relevant comparative law principles and methods of analysis to gain better insight into the nature of law, thereby providing a discursive framework for the present enquiry.

In this chapter, certain logistical processes derived from comparative law also have relevance, such as the principles of proper case selection.<sup>24</sup> These are

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<sup>23</sup> Merry *Human Rights and Gender Violence* (2006) 231: 'Despite drawbacks in the way [international law] has been developed and used, it is still the only global vision of social justice currently available. With all its flaws, it is the best we have. It provides at least some constraint on the operation of markets and offers a potentially powerful tool to those who learn to use it. Like the language of law itself, it serves those in power but is always in danger of escaping its bounds and working in a genuinely emancipatory way she refers specifically to international human rights.' I take the liberty of extending the reference to international human rights law to its logical conclusion.

<sup>24</sup> See Hirschl 'On the blurred methodological matrix of comparative constitutional law' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) who emphasises the importance of adhering to the logic of proper case selection principles for purposes of theory testing and as a source from which inductive inferences may be drawn. He distinguishes the following types of

not, however, the focus of the enterprise. Rather, in the survey of cases below, the emphasis is on providing a 'globally relevant' overview of emancipatory judicial practice. The cases are therefore not intended as (comparative law) counterpoints to one another, but as independent examples from relatively disparate jurisdictions, which jointly underscore the most prominent aspects of contextualisation, proportionality, particularisation, cosmopolitanism, and ultimately emancipation.<sup>25</sup>

The overall purpose of the analysis, namely to illustrate the emancipatory possibilities of international law, requires a broadly descriptive, yet synecdochic compilation of examples. For this reason, the comparative model relies in the main on the principles of 'prototypical' case selection, which means that the cases display the key elements contained in the study's three-dimensional analytical framework.

'Prototypical cases' are deemed to embody a common standard which is representative of other similar cases. This is because they exhibit characteristics which are shared by, or seem analogous to, a wide range of potentially relevant cases. Thus, by analogy, 'the applicability of the findings derived from prototypical cases to other, similarly situated cases' may be assumed.<sup>26</sup>

This is clearly a most valuable and effective principle for managing and analysing vast amounts of data from many different jurisdictions. It is equally clear, however, that making broad assumptions and drawing conclusions based

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cases: 1. 'Most similar cases': the comparators share most of their characteristics which are not central to the study. 2. 'Most different cases': the comparators differ in most of their non-central characteristics, but they produce 'similar readings on the [key] dependent variable'. 3. 'Prototypical cases' embody a common standard which is deemed representative of, or analogous to other, similar cases. 4. 'Most difficult cases' are premised on the idea that, should a given hypothesis hold true for the most challenging, unlikely case, it can logically be assumed to be valid. 5. 'Outlier cases' probe the credibility of novel theories and new explanations.

<sup>25</sup> See again Menski *Comparative Law in a Global Context* 2 ed (2006) 6, 18, who agitates for a 'plurality-conscious globally valid methodology' which promotes respect for and appreciation of the intrinsically plural nature of law, as contemplated within a global context. He rejects outright the eurocentrism associated with dominant conceptions of law.

<sup>26</sup> Hirschl (n 24) 53-55.

on analogous reasoning is a hazardous undertaking, because the analogy might be skewed, inapt, forced, or simply not valid for any number of reasons. For instance, based on convention, or for the sake of convenience, the selection could be biased towards dominant legal systems, thereby obscuring the relevance of non-mainstream, 'other' systems.

In view of the embedded and context-specific nature of legal systems, a selection skewed in this manner could imply that apparent similarities are superficial, or that analogous 'findings' simply obscure the true nature and/or significance of judgments from lesser known jurisdictions. Nonetheless, it would be an insurmountable task to conduct an in-depth study of each and every legal system, and generalisations derived from prototypical findings are unavoidable.

I have purposively, however, adopted a global perspective in the choice of cases, one that supports a definition of law that is sufficiently wide to accommodate subnational systems, which are often invisible to mainstream legal theory.<sup>27</sup> Moreover, the approach emphasises the highly contextualised and plural nature of law, with a view to escape the 'intellectual cage of the western lawyer's thinking', and instead to suggesting 'cosmopolitan legal scholar[ship]'.<sup>28</sup>

Furthermore, due to the wide range of jurisdictions under consideration, the cases fall into other comparative categories, such as 'most different' and 'most difficult' cases.<sup>29</sup> An apparently straightforward human rights case may, for instance, follow the pattern of the three-dimensional framework, but because it hails from Uganda, a jurisdiction with a very poor human rights culture, it is a

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<sup>27</sup> Note again Menski (n 25) 383-404, where he highlights the historical denial of a system of 'African law', because it does not fit neatly into a western paradigm; Ruskola 'Legal orientalism' in *Schlesinger's Comparative Law 7 ed* (2009) 43-47, on the perception that China and Japan lack 'real' law; Twining *Globalisation and Legal Theory* (2000) 150, who illustrates how the 'parent families' construction, based mainly on the common law and civil law traditions, 'still dominates comparative law today'.

<sup>28</sup> Editors' comments in *Schlesinger's Comparative Law 7 ed* (2009) 13; Menski (n 25) 18.

<sup>29</sup> See n 24 above for a description of these terms.

'most difficult', or unlikely case study.<sup>30</sup> It could also be a 'most different' case when compared to cases from other common law jurisdictions, because it differs in many of its non-key characteristics (for purposes of the study) from examples of, let us say, Canadian jurisprudence.<sup>31</sup>

Some cases, however, are 'different' because they are concerned with the different branches of international law, such as trade, criminal and environmental law, but they nevertheless follow the same pattern as described in the three-dimensional framework. Conversely, the balance of cases reflects the large number of human rights matters that reach constitutional and other courts, which are therefore 'most similar' in the sense of subject matter. This means that they 'hold non-key variables constant, while isolating the explanatory power of the key independent variable'.<sup>32</sup>

One further comparative element, used in the analysis, is the internal comparison in the discussion of various cases, when, for example, references are made to the judgment of the court a quo or another related judgment, such as a dissenting judgment.

In summary, the comparative model used in the present chapter, is one of descriptive explication of the theoretical framework advanced in the study. It is therefore aimed at providing proof that the reconstructive application of international law is possible in jurisdictions from all corners of the earth, notwithstanding the eclectic array of their legal cultures and socio-cultural contexts. Furthermore, the diversity of the cases means that both the hypothesis and the framework can be tested with sufficient rigour in terms of the comparative law methods outlined above.

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<sup>30</sup> See Hirschl (n 24) 55-58.

<sup>31</sup> Id 51-53.

<sup>32</sup> Id 48-51; quote at 50. He explains by way of research conducted, how this principle is especially useful to 'diachronic, cross-time' comparisons within the same jurisdiction. Its usefulness is however not confined to this type of study.

#### 4. Cases from around the world

There are many difficulties associated with any comparative study, but these are amplified when the range of examples is wide and explores lesser known territories. Problems include the danger of superficiality, which may be the result of resource constraints, the very real possibility of misinterpreting foreign law, lack knowledge of foreign languages and problems associated with translations in general.<sup>33</sup>

Notwithstanding these issues, because the aim is to investigate actual court practice as it manifests itself in a particular case (and not to micro-compare specific legal institutions or doctrines) I am confident that my background research on each case has been adequate and sound. Moreover, there is a common denominator, international law, and, whether used explicitly or implicitly, it constitutes a relatively monochromatic backdrop against which the processes of adjudication can be examined. This aspect, too, narrows down the possibility of serious misreading.

In the selection of cases, my aim was to find a blend of ordinary, complex and milestone cases to illustrate the jurisprudential processes from various angles. The cases have also been chosen to demonstrate different aspects of the impact of international law at national level. For example, the human rights related judgments are noticeably variable in the way in which international law filters down, or up, such as through constitutions and enabling legislation, or through comparative jurisprudence or even through the intervention of NGOs.<sup>34</sup>

Needless to say, there have been numerous time and resource constraints in obtaining cases from distant places. Factors such as language, a

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<sup>33</sup> See Moses 'International legal practice' in *Schlesinger's Comparative Law* 7 ed (2009) for many interesting examples of misreading.

<sup>34</sup> *Sesana* (n 12) (down), *Bruker* (n 9) (up) *Mapuche* (n 4) (down and up). The latter is also an example of the role of NGOs.

dearth of law reports or lack of electronic availability, and a general problem of where-to-start when confronted with a completely foreign legal system, have proved to be considerable hurdles. Consequently, it has sometimes been necessary to make expedient choices. For example, in the selection of cases from developing countries, the bulk comes from southern Africa, rather than from, say, South America or Eastern Europe.<sup>35</sup> Nonetheless, I am satisfied that the spectrum of jurisdictions under consideration is sufficiently comprehensive to validate the theoretical and practical significance of the three-dimensional framework.

In the survey that follows, a simple alphabetical order is employed with respect to both continents and countries. Thus, Botswana is alphabetically the first country to be considered. Both cases referred to are prototypical of the general pattern followed in many jurisdictions with respect to the use of international law. Therefore, and in order to illustrate the application of the three-dimensional framework, I analyse these cases with detailed reference to its operation.

Subsequent cases from other jurisdictions thus follow a very similar pattern to the prototype, and each point will not be restated with the same detail. Additional or significant aspects, however, will be fully examined.

Before delving into the cases, one has been singled out as an overall example, because it instantiates most of the principles which this thesis attempts to define.

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<sup>35</sup> See 6 below, which gives additional reasons for the general relevance in comparative studies of cases from Africa.

## 5. An instructive example: *S v Makwanyane*<sup>36</sup>

*S v Makwanyane*, the iconic death penalty test case of the South African Constitutional Court, offers a conceptual blueprint of how the three vectors of the proposed analytical framework might be balanced to arrive at a just and emancipatory outcome. The judgment reflects cosmopolitan values, yet is self-consciously directed at the needs of a tender constitutional democracy. The complexity of the socio-cultural context is not only acknowledged, but fully embraced by the judiciary. The following is a brief gloss of how the court mediates between the vertical (international), horizontal (foreign), and depth (local) vectors, balancing these in a proportionate manner.

In the principal judgment, Justice Chaskalson is diligent in giving effect to the new constitutional mandate to 'have regard to' international law and foreign law when interpreting provisions in the Bill of Rights.<sup>37</sup> He devotes an entire section to establish the role of 'international and foreign comparative law', and throughout the judgment, delves deeply into the relevant sources, including decisions by international tribunals.<sup>38</sup> In itself, this element of the judgment is unique in view of the reluctance showed by courts under the apartheid regime to use international sources in human rights cases.

An important point, showing the court's openness and sensitivity to international law, and setting the stage for many future decisions, is the conclusion reached by Justice Chaskalson that even *travaux préparatoires* and nonbinding sources may be used as 'tools of interpretation'.<sup>39</sup>

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<sup>36</sup> *S v Makwanyane* (n 17).

<sup>37</sup> See s 35 of the 'Interim' Constitution 1993, which provides that under certain conditions courts 'shall have regard to public international law' and 'may have regard to comparable foreign case law'. These provisions are now contained, in more flexible fashion, in s 39(1)(b) of the 1996 Constitution. The position of customary international law is governed by s 231 and s 233 in the respective Constitutions.

<sup>38</sup> See paras 33-39 and for example 68-86, 109.

<sup>39</sup> Paras 16, 17, 35.

Yet, despite the comprehensive consideration given to the international and foreign law vectors, Justice Chaskalson strongly endorses the importance of the contextual depth vector. He holds that 'international human rights instruments and municipal bills of rights may differ from the South African equivalents, and judgments giving content to the specific rights in both international and municipal instruments must be read within their respective contexts'.<sup>40</sup>

He analyses the South African context from various angles, which include an acknowledgement of how social realities are often *not* sufficiently taken into consideration.<sup>41</sup> Hence, he takes cognisance of everyday considerations, such as the unacceptably high crime rate and the need to contain it, as well as public opinion, which appears to support the death penalty.<sup>42</sup>

These considerations are in turn weighed up against other important factors, which have come to define a nation that has chosen the new path of a constitutional democracy founded on human rights. For example, life and dignity are to be valued above all other rights and must inform any limitation of rights.<sup>43</sup> Another contextual factor, intricately linked to the South African nation, is the value placed on reconciliation, which is opposed to hatred and revenge.<sup>44</sup>

These, however, are abstract principles. Justice Chaskalson, and four other justices – Langa, Madala, Mohamed and Mokgoro – explore the depth vector by meshing these concepts into one transcendent, indigenous value, *ubuntu*, which denotes humaneness, humanity and morality.<sup>45</sup> Not only do the

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<sup>40</sup> Para 39.

<sup>41</sup> See paras 50-54 where he notes that 'poverty, race and chance play roles in the outcome ... as to who should live and who should die', and that the subjectivity of judges - in other words, a lack of appreciation of all these contextual factors - further promotes arbitrariness.

<sup>42</sup> Paras 117-120 and 87-89 respectively.

<sup>43</sup> Para 144 also 94, 98-109 on the limitation clause and proportionality test.

<sup>44</sup> Paras 129-130.

<sup>45</sup> Relevant are the judgments of Justice Langa especially at paras 222-227, Justice Madala at paras 241-245, 250, 260, Justice Mohamed at para 263 and Justice Mokgoro's entire judgment from para 300. Mokgoro J at para 308 defines *ubuntu* thus: 'While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective

justices consider the correlation between *ubuntu* and constitutional values and principles, but also its correspondence to international values and principles. *Ubuntu* thus becomes the fulcrum that connects all three vectors, and ‘the golden thread across cultural lines’.<sup>46</sup>

In her socially responsive judgment, Justice Mokgoro maintains that, ‘when our courts promote the underlying values of an open and democratic society ... when considering the constitutionality of laws, they should recognise that indigenous South African values are not always irrelevant nor unrelated to this task’.<sup>47</sup>

Importantly however, she is by no means suggesting a parochial approach, but one founded on ‘a cohesive set of values’, ‘[common to] human rights protection the world over’.<sup>48</sup> She crosses the perceived chasm between a local indigenous value system based on *ubuntu* and the vast international rights regime in the following terms.

In international law, on the other hand, human dignity is generally considered the fountain of all rights. The International Covenant on Civil and Political Rights (1966)...in its preamble, makes references to “the inherent dignity of all members of the human family” and concludes that “human rights derive from the inherent dignity of the human person”. This, in my view, is not different from what the spirit of *ubuntu* embraces.<sup>49</sup>

From Justice Mokgoro’s analysis I draw two important conclusions. First, it shows that many of the foundational values in international human rights law are not unique to it as a system. Rather, there can be significant points of resonance

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unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.’

<sup>46</sup> Mokgoro J para 307.

<sup>47</sup> Para 300.

<sup>48</sup> Para 302.

<sup>49</sup> Para 309 with reference to the International Covenant on Civil and Political Rights (1966) G.A. Res 2200 (XXI), 21 U.N. GAOR, SUPP. (No, 16) at 52, U.N. DOC. A/6316 (1966).

between systems which, at first glance, may not appear to be compatible, such as international law and indigenous law. *Umunthu* is an outstanding example of one such point of resonance, specifically because it has such close correlation to the values underlying human rights law that, as Justice Mokgoro indicates, it is in essence 'no different'. The important point is, however, that the justices of the Constitutional Court do not simply assume that international norms and values are universal and automatically relevant in the South African context, they actively engage with the domestic context to establish whether there is indeed such a 'fit'.

Second, this form of active judicial navigation between different layers of normativity instantiates how the aspirational purpose of the study's theoretical framework can be brought to life. That is, in order to build international law from the bottom up, judges have the important task to find, acknowledge and utilise the relevant points of resonance in a substantive manner. In other words, the approach in *Makwanyane* shows how courts are able to assume a mediatory position between different normative and contextual 'vectors', rather than disassociate them or reject some in favour of others.

In summary, the judgments of the abovementioned justices, and notably that of Justice Mokgoro, demonstrate that courts can have recourse to international law without perforce sacrificing the norms and values embedded in the national or local socio-legal system.

In the first instance, these judgments show that international law has the potential to be cosmopolitan. In other words, as a normative value system, it is sufficiently nuanced to accommodate divergent socio-cultural realities and ideologies. It can therefore be applied counter-hegemonically, since its norms and values need not be foreign or western, but may resonate with those in the domestic sphere. Hence, instead of a potentially hegemonic top down imposition of international law, local elements flow upwards and may be harmonised with

the international. Significantly, international law can be emancipatory within a particular context, when it brings about social transformation 'beyond a given regulatory boundary'.<sup>50</sup>

Next, I turn to cases from various other states, which reinforce the abovementioned conclusions derived from the reading of *Makwanyane*.

## 6. Judgments from Africa

Africa is truly a test site for normative pluralism, and socio-cultural, religious, language and political diversity.

From the perspective of legal pluralism, many layers of different legal systems and orders are readily evident in most countries and these often have a direct bearing on national laws. For example, the common law or civil law, or both, were superimposed on customary and religious systems, and subsequently superseded, but only in part, by post-independence regimes. The latter frequently borrow heavily from foreign, typically western systems, which in turn are influenced by international law tenets. Many 'new' regimes, however, also attempt to accommodate customary or religious laws.<sup>51</sup> Thus on an ordinary court day, a judge in Africa might have to deal with a constitutional matter that touches on the country's international obligations under various treaties, the relevance of foreign decisions, questions about whether a certain common law provision is still relevant and/or whether indigenous law is applicable, and if so, to what extent to apply or accommodate it.<sup>52</sup>

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<sup>50</sup> In *Makwanyane* the death sentence was declared unconstitutional. This judgment was profoundly emancipatory, particularly since it went against the grain of general public opinion. In so doing it encouraged deep transformation in line with the 'new' values of dignity, equality and freedom in a spirit of reconciliation. See also Chapter II 2 and 6 which refers to the consonance between international law and customary systems. Such correspondence applies to values, such as *ubuntu*, and also to certain processes and dispute settlement mechanisms.

<sup>51</sup> See Chapter I 2(a)(b) and 6(b), on pluralism and the 'diffusion' of law.

<sup>52</sup> For example *Attorney-General v Dow* (n 9) below.

### **(a) Botswana: When courts remedy a dearth of human rights**

Although the next two cases follow the previously explained 'prototypical' pattern to a large extent, they have nonetheless been ground-breaking in the human rights history of Botswana. It is most instructive to note that in both cases Unity Dow appears as a central figure. Her determined human rights advocacy has been all the more important in a country like Botswana with its poor human rights record.<sup>53</sup>

In the first case she is the respondent, and in the second she is a judge. In her capacity as judge, she shows how the contextualisation of a judgment can have exponentially far-reaching consequences. Her judgment brought immediate relief to the most severely oppressed group of people in the country and laid the foundation for the next landmark case, which literally brought survival to many of these peoples.<sup>54</sup>

#### **(i) *Attorney-General v Dow (BwCA 1992)***<sup>55</sup>

This appeal on constitutional grounds concerns the statutory differentiation, namely denial of citizenship, accorded to children of mothers who are citizens and married to non-citizen fathers, in contrast to children born to male citizens and non-citizen females, or children born out of wedlock to female citizens.<sup>56</sup> 'Sex' is omitted from the categories of equality and non-discrimination mentioned in the definition in s 15(3) of the Constitution. The appellant argued that 'the omission was deliberate and intended to exclude sex-based discrimination' in

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<sup>53</sup> For example, Botswana staunchly defends the death penalty and homosexuality is criminalised. Apart from that, its government-driven persecution of indigenous peoples has sparked worldwide condemnation. See the *Sesana* case (n 12) below and <http://www.survivalinternational.org/tribes/bushmen> last accessed 11-02-2013.

<sup>54</sup> See *Sesana* (n 12) below.

<sup>55</sup> See n 9.

<sup>56</sup> The Citizenship Act of 1984 s 4 and 5. Section 4 denied citizenship to her two younger children, because their father was not a citizen of Botswana.

order to preserve the patrilineal and 'male orientated' structure of Botswana society.<sup>57</sup>

In other words, not only national legislation, but also the Constitution may be in conflict with the international law standard, in addition to being in conflict with the standard accordingly adopted in many jurisdictions around the world. On the next level, international law certainly appears to be at variance with customary law and traditions accepted by Botswana society. The court therefore considers and weighs all three vectors of normative regulation, which impact on the national regime.

In terms of establishing the vertical, international law vector, the judge notes that sections 3 and 15 of the Constitution are apparently contradictory and may suggest discrimination on the basis of sex.<sup>58</sup> In having recourse to international law he opines that '[w]hat we have to look at when trying to determine the intentions of the framers of the Constitution is the ethos, the environment, which the framers thought Botswana was entering into by its acquisition of statehood, [namely that] [t]he comity of civilised nations was the international society into which Botswana was about to enter at the time its Constitution was drawn up'.<sup>59</sup>

He therefore endorses the approach adopted by the court a quo and holds that, although unincorporated international instruments are not formally binding, 'Botswana is a member of the community of civilised states which has undertaken to abide by certain standards of conduct, and ... it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken'.<sup>60</sup> This 'permissible' use of international law 'adds reinforcement to the view that the intention of the framers

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<sup>57</sup> For example paras 44, 79.

<sup>58</sup> Para 101.

<sup>59</sup> Paras 102,103.

<sup>60</sup> Para109 with specific reference to the Universal Declaration of Human Rights and the African Charter of Human and Peoples' Rights.

of the Constitution could not have been to permit discrimination purely on the basis of sex'.<sup>61</sup>

As further examples from Africa and elsewhere will show, and in particular those that historically have roots in the common law or are hybrid, the approach adopted here (and by the court a quo) is very typical of many jurisdictions. Courts readily draw on non-binding international law sources as an interpretive guide, and although cautious of their lack of authority, they are nevertheless enthusiastic about finding ways of giving effect to international norms.

In terms of the horizontal vector, the court makes extensive use of foreign judgments when developing each of its central arguments. Many of these judgments relate directly or indirectly to the question of the ambit of international law standards of non-discrimination vis-à-vis the local patriarchal regime.<sup>62</sup> In general, the court simply accepts that it is sufficiently justified in having recourse to such foreign sources.<sup>63</sup> With reference to constitutional interpretation, Justice Amisshah nevertheless concedes that,

With such pronouncements from our own Court as guide, we do not really need to seek outside support for the views we express. But just to show that we are not alone in the approach we have adopted in this country towards constitutional interpretation, I refer to similar dicta of judges from various jurisdictions...<sup>64</sup>

This rather uncritical approach to foreign case law proves to be the norm in many jurisdictions discussed in subsequent sections. Moreover, it must be noted that the court frequently refers to and quotes at length from foreign

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<sup>61</sup> Ibid.

<sup>62</sup> There are approximately 35 references to foreign case law from many different jurisdictions, often accompanied by extensive quotations from these judgments, for example in paras 89, 103, 115 and 118.

<sup>63</sup> With reference to s 24 of the Interpretation Act.

<sup>64</sup> Para 24 where he makes reference to no less than eight foreign cases from Canada, Namibia, the United Kingdom, the United States and Zimbabwe.

academic writing, without offering justification for its use or establishing the bindingness or otherwise of the source.<sup>65</sup>

Nevertheless, as explained previously, foreign dicta, and even academic writings, are profoundly important sources of cosmopolitan and bottom up international law, and constitute an indirect route whereby its principles diffuse into municipal court practice.

Justice Amissah approaches issues relating to the socio-cultural context as follows:

Our attention has been drawn to the patrilineal customs and traditions of the Botswana people to show, I believe, that it was proper for Parliament to legislate to preserve or advance such customs and traditions. Custom and tradition have never been static. Even then, they have always yielded to express legislation. Custom and tradition must a fortiori, and from what I have already said about the pre-eminence of the constitution, yield to the Constitution of Botswana. A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read so as to conform to the constitution. But where this is impossible, it is custom not the constitution which must go.

It seems to me that the argument of the appellant was to some extent influenced by a premise that citizenship must necessarily follow the customary or traditional systems of the people. I do not think that view is supported by the development of the law relating to citizenship. Botswana as a sovereign republic dates from 30 September 1966.<sup>66</sup>

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<sup>65</sup> See for example paras 53, 56, 58, 59, 80, 92, 116, 132.

<sup>66</sup> Paras 49, 53. In the court a quo, *Dow v Attorney General* (1991: 245) in the High Court of Botswana, Justice Horwitz, after extensive reference to international instruments, put the matter even more forcefully:

'I do not think that I would be losing sight of my functions or exceeding them sitting as a judge in the High Court, if I say that the time that women were treated as chattels or were there to obey the whims and wishes of males is long past and it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was framed deliberately to permit discrimination on the grounds of sex.'

The matter of custom or tradition is thus dealt with strictly according to the most obvious interpretation afforded to constitutional provisions, which in turn is based on prevailing international sentiment, both in terms of international law instruments and foreign judgments. The court refrains from engaging in a balancing of potentially conflicting constitutional rights. By analogy to the 'evil' of racial discrimination, Justice Amissah draws a clear boundary to indicate how far the court is prepared to accommodate custom and tradition, which in this case is not very far.<sup>67</sup>

When it comes to taking into account the context in terms of day-to-day realities, however, the court adopts a more flexible approach. Justice Amissah describes the difficulty relating to standing and he reasons thus:

...for a person to attack the Act he or she must be shown to be a person who did not enjoy the rights of citizenship, not one, like respondent who was enjoying full rights of citizenship. In this case, the respondent's children might, according to the argument, have been affected by the Citizenship Act, not herself. But the Citizenship Act, although defining who should be a citizen, has consequences which affect a person's right to come into, live in and go out of this country, when he likes. Such consequences may primarily affect the person declared not to be a citizen. But there could be circumstances where such consequences would extend to others. In such circumstances, *the courts are not entitled to look at life in a compartmentalised form, with the misfortunes and disabilities of one always kept separate and sanitised from the misfortunes and disabilities of others.* [121] The argument that a mother's relationship to her children is entirely emotional and *that an emotional feeling cannot found a legal right does not sound right to me.*<sup>68</sup> (Emphasis added.)

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<sup>67</sup> See paras 89-90.

<sup>68</sup> Paras 120-121.

### **Relevance of the case and its correspondence to the analytical framework**

From the facts of case outlined above, the three regulatory dimensions (international, national and subnational), as described in the framework, are clearly evident and apparently at odds. The question is whether the court can resolve the matter in a counter-hegemonic and emancipatory manner. On one hand, there is the danger that the court will impose the international norms of non-discrimination hegemonically onto the traditional patrilineal regime. On the other, if the court does not intervene, these traditions and cultures may act oppressively toward the respondent and other women in the same position. In this conflict the court must find an emancipatory outcome that will bring about the greatest overarching benefit. The court approaches the task by pertinently engaging with each vector and by using the tools of contextualisation and proportionality. The steps taken are as follows.

In order to give full effect to the main issue, namely statutory discrimination on the basis of sex and gender, the court had to clear the way, which was somewhat impeded by the respondent's lack of standing, as described above. It did this by the contextualisation and proportionate balancing the facts of the case, with reference to the human and emotional exigencies caused by the discriminatory provisions contained in the Citizenship Act. The court took particular note of how they would impact on the realisation of other rights of the respondent in her position as a mother.<sup>69</sup>

Through this process, the court does not apply international law as something extraneous and foreign. It is used as a set of relevant principles, which stands in direct correlation to the subjective context of personal and family needs, as well as the greater issue of discrimination against women in general, vis-à-vis the prevailing customs. These customs are also construed within their relevant context, namely that they are not immutable and that the Constitution

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<sup>69</sup> See paras 128-131.

has created new expectations at local level in line with international sentiment. Thus, the local/relative contexts of both parties, and the national and international contexts are considered in terms of their relative importance.

The case is therefore a good example of how local norms compete with those of international law, and ultimately of the role of the court in navigating between different contexts and contingent realities. The court mediates the international-national interstice with due consideration of the different conflicting norms and values. In its balancing of the competing interests, the court gives more weight to international law, and the respondent's relative interests, than patriarchal traditions. Yet, the ultimate effect of the application of international law is not hegemonic, but context-specific and proportionate, resulting in emancipatory relief for the respondent.

Needless to say, for those who want to preserve the patrilineal regime, the decision could be viewed as the hegemonic imposition of international law on local traditions. However, in this case as with the others, the analysis places hegemony and oppression on the opposite end of the spectrum to emancipation, which, according to its definition, means achieving the greatest compound benefit under the circumstances. Given the extent of discrimination against women in general, I suggest that the court's insistence to curb it in this specific instance, tips the scales in favour of a reading that the effect of having recourse to international provisions is emancipatory, according to the principles of proportionality.

**(ii) *Sesana and Others v The Attorney General*<sup>70</sup>**

Background: In the course of 2002 in particular, the Botswana government had used various means, deprivation of water being the most serious, to induce the

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<sup>70</sup> See n 12.

Khua/Khoe (Basarwa, San or Bushmen)<sup>71</sup> of the Central Kalahari Game Reserve (CKGR) to abandon this reserve, their ancestral land, by 'consenting' henceforth to live in a number of resettlement villages so designated by the government.<sup>72</sup> The principle issue was that those of the Khua/Khoe who wanted to continue to live in the CKGR were not afforded their right to do so.

In the following discussion, all comments are based on the judgment delivered by Justice Dow, unless otherwise indicated. It must be noted that the unsympathetic judgment delivered by Justice Dibotelo differs in almost every respect. The stark contrast between the judgments is most instructive in that it highlights the emancipatory potential contained in contextualised adjudication. The latter reaches beyond technicalities and assumes a dimension of 'moral-practical rationality'.<sup>73</sup>

With regard to the horizontal and vertical vectors, the court refers to the relevant international law instruments and foreign judgments.<sup>74</sup> As for the depth vector, the following section highlights the main points made by Justice Dow in her separate judgment. These firmly contextualise her arguments and have contributed to making her judgment one of the most significant in the history of

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<sup>71</sup> There has been much debate about the correct collective term to use for the First Peoples of the Kalahari and other areas in Southern Africa, traditionally called the Bushmen. In Botswana they are generally called Basarwa, which, although a derogatory term, is widely accepted by the peoples themselves. In conversation with various members of the Gana tribe in 2011, I was told that they do 'not like' the term Bushmen, but accepted it and preferred it to San. I was further told that the term Khua/Khoe has been suggested by researchers at the University of Botswana, and that many people found it the most acceptable of all the terms. Most however, still refer to themselves as Bushmen and Basarwa.

<sup>72</sup> The extent of the persecution of the peoples of the Kalahari becomes clear throughout the three judgments, which amount to nearly 400 pages. That of Justice Unity Dow is particularly condemnatory of the government's actions. The harrowing tale of the hardships endured, even the loss of life due to lack of water, food, medical supplies as well as through torture, is fully documented in Workman *Heart of Dryness* (2009).

<sup>73</sup> Santos (n 1) 3.

<sup>74</sup> For example paras H.1.e and f. 'Botswana has been a party to The Convention of the Elimination of All Forms of Racial Discrimination since 1974.' 'The Race Committee adopted Recommendation XXIII, which requires of state parties to: "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".' Foreign judgements are referred to, for example in paras H.1.h. and H.6.

Botswana jurisprudence. Most importantly, through a considered balancing of all the relevant interests at subnational, national and international levels, this judgment brings the relief envisaged in international instruments to the lives of the intended beneficiaries.

In the first instance, Justice Dow does not apply the international standard of the right to land in the abstract, and not without a careful investigation into the content of the right in the particular instance. She gives attention to what the right encompasses for the applicants, recognising their 'special relationship to their land', which is 'deeply spiritual' and 'has a great many deep-seated implications'.<sup>75</sup> She furthermore considers what the right to liberty means for the applicants in 'view of [their] special situation'.<sup>76</sup>

Second, cognisance is taken of the family structure and the importance of social ties in the lives of the appellants, and what the implications of relocation are within this context.<sup>77</sup> Additionally, and in contrast to the other judgments, Justice Dow is sensitive to the strong overtones of racial discrimination and notes that 'in terms of their ethnicity, their literacy levels and [lack of] political and economic clout ... common sense dictated that the Respondent acknowledged and addressed the relative powerlessness of the Applicants'.<sup>78</sup>

A scathing view is taken of the government's unyielding stance, which is at variance with international law and corresponding foreign sentiment: 'The Government can be as irritated and/or annoyed as it wants to be at what it

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<sup>75</sup> Paras H.1.f.1.2 and 1.3. In stark contrast to Justice Dow's approach is that of Justice Phumaphi at para131: 'They may have said what they felt and believed about their relationship with the land, but their feelings and beliefs cannot dictate the nature of their legal claim.'

<sup>76</sup> Paras H.1.h. and i.

<sup>77</sup> Para H.9.2 where she notes:

'This was not a relocation of people living in an apartment building in New York or Block 8 in Gaborone. This was a relocation of people linked together by blood, marriage, mutual-cooperation and general inter-dependence. And true consent by anyone to relocate could hardly be obtained unless the family, the compound and in some instances the whole settlement was taken as a unit.'

<sup>78</sup> Para H.9.3.

considers outside interference in its affairs, but it cannot, it should not, in response to such irritations disadvantage its own people.<sup>79</sup>

### **Relevance of the case and its correspondence to the analytical framework**

This case is an instructive model of how the tools of contextualisation, particularisation and proportionality can animate international human rights law principles. It also signals a cosmopolitan and emancipatory approach in its balancing of subnational interests against those of the state. The balancing takes place within the ambits of the three-dimensional framework, through an invocation of international and foreign law aimed at resolving the national-subnational clash. From the Dow and Phumaphi judgments, one could argue that the court embraced the issue from an ethical perspective, by insisting on justice rather than pleasing the government. Another important aspect of the case is that, through its particularisation of international rights law, it initiates a bottom up flow, albeit small, of certain international norms. I expand on these points below.

In the judgments of Justice Dow and to a large extent those of Justice Phumaphi, contextualisation is very specific. The justices consider and duly recognise the socio-cultural and religious context pertaining to the applicants. In so doing, they investigate the oppression suffered by the applicants and their need for relief within the framework of their particular culture – which the judges recognise as being different from that of Botswana citizens at large. International human rights law principles relating to indigenous peoples and non-discrimination on racial grounds are employed to bring substantive justice to the applicants, while remaining within the national regulatory boundaries.

The immediate and tangible effect of the (combined) judgment is emancipatory in real terms.<sup>80</sup> Members of the community who had previously

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<sup>79</sup> Para H.9.3.16.

been arrested and tortured, (some having lost their lives) for attempting to visit sick family members, or to take water and foodstuffs into the CKGR, could henceforth enter with supplies, or return to live on their ancestral land.<sup>81</sup>

In *Sesana*, the court weaves an international normative context into the subjective context of the Khua/Khoe as a subnational group with distinct needs. This 'openness' to subnational cultural realities is therefore an instance of cosmopolitanism at work within the depth vector. Furthermore, the court per Justice Dow, employs the historical context to highlight the effects of discrimination, and notes with disdain, the government's unreasonable loathing of any 'foreign interference', which has further prejudiced the community. These factors serve to produce a fully rounded contextual perspective to tilt the balance in favour of the appellants.

The judgment exemplifies a spirit of ethical and pragmatic rationality, which assists the two judges balance the interests of the Khua/Khoe against those of the state, ultimately holding the state accountable for its abuses, and restoring the rights of the community to live in and have access to their ancestral lands.

Another consequence of the ruling was that it set the stage for the next important case, wherein the court places substantial reliance on *Sesana*, holding for example, that it is 'entitled to have regard to [the] international consensus on the importance of access to water', and that deprivation thereof amounted to

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<sup>80</sup> It is generally agreed that the forceful judgment of Justice Dow predisposed Justice Phumaphi in favour of the applicants. See Workman (n 72) 229-233. Dibotelo J dissented on all principal points.

<sup>81</sup> See Lenzerini 'The trail of broken dreams: The status of indigenous peoples in international law' in Lenzerini (ed) *Reparations for Indigenous Peoples* (2008) 96 note 118; Workman (n 72) 171-216, 234 who details the atrocities perpetrated by the Botswana government in its attempts to force the Khua/Khoe out of the CKGR. Eventually it appears that only a handful of individuals were left. However, after the ruling many began to return, soon about 150 individuals were living in CKGR again. This, in spite of the strict rules laid down by the government for re-entry into the CKGR in a further attempt to keep out residents. See Udombana 'Reparations and Africa's indigenous peoples' in Lenzerini (ed) *Reparations for Indigenous Peoples* (2008) 403.

degrading treatment.<sup>82</sup> In this respect, one can discern the seeds of the bottom up reconstruction of international law. In other words, through the court's further application of the contextualised and particularised version of international law, as developed in *Sesana*, its cosmopolitan and emancipatory principles are strengthened from the bottom up.

## **(b) Kenya: Everyday pluralism**

### **(i) *Senior Resident Magistrate's Court at Maûa Civil Case No. 109 of 1997***<sup>83</sup>

This ordinary civil case in a magistrates' court might seem like a peculiar choice, since it does not set an important precedent, nor has it attracted much debate.<sup>84</sup> Moreover, the relevant context is very subjective, since it relates to one aspect in the lives of a traditional family, namely the dowry payment. Notwithstanding all these factors, the case provides a rare glimpse of the possibility of emancipatory jurisprudence at grassroots level.

This case and others form part of an anthropological study over a period of ten years conducted by Shin-ichiro Ishida. In all the cases recorded in the study, the relevant magistrate applies accepted and (reasonably) standardised customary laws pertaining to dowry claims, but nevertheless takes into account the surrounding circumstances, with reference to the existing traditional framework, in order to obtain justice between the parties.<sup>85</sup> A standard form of

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<sup>82</sup> *Mosethanyane and Matsipane v The Attorney General* case no CACLB-074-10, judgment of 27 January 2011. See for example paras 19-22, which include references to the 'international consensus', based on a report in 2003 by the United Nations Committee on Economic, Social and Cultural Rights; and a call by the United Nations General Assembly in 2010. This case re-established the right of the Khua/Khoe to recommission and/or drill new boreholes.

<sup>83</sup> *Senior Resident Magistrate's Court at Maûa Civil Case No. 109 of 1997* in Ishida 'Legal pluralism and human rights in a Kenyan court: An analysis of dowry claim cases' in Hinz (ed) *In Search of Justice and Peace* (2010) 161-162.

<sup>84</sup> It is recorded in a study, conducted by Ishida, of 25 dowry claim cases that came before magistrates' courts at Maûa from 1995 to 2005. Ishida (n 83).

<sup>85</sup> *Ibid*, see in particular 147-162. For example, the court uses a standard format which lists the dowry items usually paid (or owed) and their values, according to the laws and customs of the Îgembe. See at 136.

contextualisation is therefore usually discernible.<sup>86</sup> Instances of further contextualisation pertain to a particular magistrate's understanding and application of customary laws, including the acknowledgement of the relevance of traditional authorities.<sup>87</sup>

*Case 109 of 1997* largely follows the set pattern. As the only case of this nature, it differs, however, in that Magistrate Njirû adds a further dimension, which links the ruling to international human rights standards. Although international instruments are not mentioned by name, the circumstances of the case prompt him to draw on their purport.<sup>88</sup> He chides the plaintiff, the father of the woman whose dowry payment is in dispute, for 'interfering with her marriage by trading her for more goats' and notes significantly that '[w]omen are not commodity for trade'.<sup>89</sup>

Moreover, he contextualises the abovementioned principles for the benefit of the plaintiff's daughter, saying, that she 'does not seem to understand her rights ... and she seems helpless and wants to comply'.<sup>90</sup> Magistrate Njirû therefore advises that she 'should have refused to be made a commodity to be traded for goats', and to the plaintiff that he 'should not disrupt the life of his daughter and the defendant'.<sup>91</sup> These dicta are all the more significant, since a wife is not considered a party to dowry proceedings.

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<sup>86</sup> See for example Civil Case No. 127 of 1996, 153-158.

<sup>87</sup> Ibid and see Civil Case No. 128 of 1995, 159-160.

<sup>88</sup> This is also a good example of the Trojan horse effect of international law, since international norms have embedded themselves into the domestic realm, through for instance, the Kenyan Constitution. Article 27(3) states: 'Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.'

<sup>89</sup> Id 162.

<sup>90</sup> Ibid. Although Magistrate Njirû might be criticized for his paternalistic tone, it can equally be said that he was showing an understanding of the 'lived' realities of the parties, which is another form of contextualisation, which, contrary to insistence on correctness, may have missed the point. The overall gist of his ruling however, shows that he regards women as autonomous.

<sup>91</sup> Ibid.

### **Relevance of the case and its correspondence to the analytical framework**

In the sense of the three-dimensional framework, the magistrate mediates directly between different normative systems, while formulating what amounts to an international standard (in the treatment of women) in a manner that is not abstract but contextual and therefore relevant to the parties. The ruling offers practical, emancipatory relief to both the husband and wife from the oppressive financial burden upon them.<sup>92</sup> It also has the potential for further emancipatory value at the wider local level, in that the parties have been made aware of their rights and those of others, and because it speaks directly to the rights of women in general. This wisdom from the magistrate may provide the seeds of release from oppression in future situations.

Although this case brings together the subnational (and to a smaller degree the national) and international vectors, it does not use the analytical tools in a marked way, simply because international law is not explicitly part of the judgment. This very fact, however, makes this case all the more interesting, because it shows how international principles manage to seep into the national domain and filter right down to local levels, where, as in this case, it may have an emancipatory, as opposed to hegemonic effect.

#### **(ii) *M v P* Court of Appeal, Civil Appeal No 11 of 1979 at Nairobi April 17 1980<sup>93</sup>**

In this case the court has to weigh up the international standard of the best interests of the child, as contained in the Guardianship of Infants Act, against the Muslim personal law to which the parties adhere. Although the court endorses the best interests criteria, Justice Madan carefully considers the provisions

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<sup>92</sup> Ibid. Consequently the claim is reduced by more than half.

<sup>93</sup> Available at:

[http://www.kenyalaw.org/family/cases\\_search\\_results2.php?casParties=&casSubject=international&casNumber=&casCourt=&casJudges=&casType=&casAdvocates=&casCitation=&casYear=&check\\_submit=1&submitter=SEARCH+»](http://www.kenyalaw.org/family/cases_search_results2.php?casParties=&casSubject=international&casNumber=&casCourt=&casJudges=&casType=&casAdvocates=&casCitation=&casYear=&check_submit=1&submitter=SEARCH+») last accessed 30-01-2013.

contained in the personal law of the parties, and balances these against the detailed facts of the case in order to establish the actual best interests of the child.<sup>94</sup>

The court's contextualisation is in stark contrast to the approach taken by the court a quo. In that instance, the judge dismissed the mother's claim to take her child out of the country on the basis that Muslim personal law applied to the matter, and that the court would therefore not interfere.

### **Relevance of the case and its correspondence to the analytical framework**

This is another good example of the way in which international law (here, the best interests of the child criterion) makes its presence felt in domestic courts and competes with local systems, such as the subnational religious regime in question. In this case, international law has entered the domestic arena and has been translated by means of the Trojan horse created by the Guardianship of Infants Act. Its presence gives the judgment its multi-dimensional normative quality. The court mediates between the different dimensions through thorough contextualisation and the proportionate balancing of the conflicting interests. By using these tools, the judgment is elevated above that of the court a quo, which merely avoids the issue.

This is a 'difficult' case in which a norm rooted in international law and foreign to the religious norms pertaining to the parties, must be weighed up against the latter. Although Justice Madan is firm about the fact that 'the court need not look further than the welfare of the child', he does not 'irritate' the religious system with the blunt imposition of the best interests norm, but seeks to find some correlation between the opposing regimes. He thus notes that, just as it is an 'accepted principle under Mohammedan law, it is also in the best interest of a child of tender age to be with his mother who has greater affection for him

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<sup>94</sup> Justice Madan takes note for example of the father's disinterest in obtaining custody, better opportunities for schooling if the child accompanies its mother, and the financial implications for the mother.

than any other person including the father who in this case had not even sought custody'.<sup>95</sup>

In this case, emancipation lies, not in the hegemonic challenge of a religious norm that is oppressive in the particular context of the mother (who is almost destitute, because she cannot leave Kenya with her young child to find employment in her own country), but in finding and utilizing points of resonance between the systems.<sup>96</sup> Furthermore, emancipation results from applying the provisions of the Guardianship of Infants Act, the regulatory boundary, in a manner that does not relegate the present matter to the realms of unjusticiable personal law, yet still takes considered note of the normative religious context.

**(c) Malawi: When the letter of the law does not favour the interests of justice**

***In Re: CJ A Female Infant (Adoption of CJ)***<sup>97</sup>

This case concerns the adoption of a child by a foreigner. The court a quo rejected the application on the grounds that the applicant was not 'resident' in the country, as prescribed by the Adoption of Children's Act (26:01).

Chief Justice Munlo refers to the relevant international instruments, noting that '[a]ll these provisions compliment and amplify the Act'.<sup>98</sup> The difficulty raised by the 'residency' criterion however, is not easy to overcome. The judge engages in an in depth, diachronic comparative analysis of many foreign judgments to clarify the meaning of the concept, noting the changes it has undergone.

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<sup>95</sup> Item 4 of the judgment.

<sup>96</sup> As noted previously, the Trojan horse effect of international law, however, equally has the potential to be applied hegemonically in its domestic guise.

<sup>97</sup> Malawi Supreme Court Adoption Appeal No. 28 of 2009, found at <http://www.malawilii.org/mw/judgment/supreme-court-appeal/2009/1> accessed 18-01-2013.

Please note that this electronic version contains no paragraph or page numbers.

<sup>98</sup> Convention on the Rights of the Child (CRC) which Malawi ratified in 1991 and the African Charter on the Rights and Welfare of the Child (ACRWC).

In the final analysis, however, the court has to rely on the contextualisation of the matter before it in order to achieve justice. In this respect, the Chief Justice goes to great lengths to establish the correct context through a careful and frank analysis of the circumstances and prospects of the child, as well as the circumstances and character of the appellant. Based on these factors, he grants the application.

### **Relevance of the case and its correspondence to the analytical framework**

This case illustrates the vertical vector well. It highlights the tension that exists when national laws are at variance with international sentiment, either as expressed in international conventions, or foreign judgments (reflecting the international consensus), or even constitutional provisions which mimic international law. In order to resolve the tension, the court explores not only vertical (international) and horizontal (comparative) vectors, but also uses the national depth vector as a contextual reference to construe the problematic legislation in a just manner. The depth vector referred to here concerns the national value system and not a separate subnational order, as in many of the other cases in this chapter. Thus, as explained below, the international principles governing the rights of children are particularised, and given further substance through the use of the other tools, contextualisation and proportionality.

The judgment offers a glimpse of how the regulatory boundary can be 'expanded' to permit justice according to the definition of emancipation, by using the framework. It also pertinently illustrates the difference between judging according to black letter rules, as the court *a quo* did, and giving emancipatory effect to the rights of children to attain to their full potential as envisaged in the relevant international instruments.

In the abstract however, these principles do not reflect the contextual divergences implicit in the needs of children and their right to develop fully. Consequently, the judge gives substance to these concepts with reference to both the actual and potential circumstances of the child, within a framework of values which resonate with Malawians.<sup>99</sup> Consequently, he is not content, as was the court a quo, with the fact that the child was cared for in an orphanage. Based on the reasoning in the Indian case *Lackshmi Kant Pandey v Union of India*,<sup>100</sup> Munlo CJ emphasises the importance, for the development of a child, of belonging to a family and receiving love within a family, as well as enjoying the material benefits and opportunities that will flow from this particular adoption.<sup>101</sup>

This case is therefore a good example of the 'moral-practical rationality' and emancipation that flows from pursuing a cosmopolitan and contextual approach. The cosmopolitan stance taken in the judgment reflects openness to both international and foreign norms and attitudes. Emancipation is found in avoiding the potential hardships visited on the child as a result of a strict application of the regulatory provisions. It is the product of extending the contextual depth vector beyond the overt interests of the state, down to the particular context of the child.

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<sup>99</sup> For example, he notes the charitable nature, work ethic, tack record as an adopting parent and sound financial position of the appellant. Oblique reference is also made to underlying Christian values. It must be noted however, that this form of contextualisation is the proverbial two-edged sword, because it can, and has been used to justify discrimination and other human rights violations on the basis of public and/or religious sentiment. Note for instance how the violation of gay rights and the retention of the death penalty have been justified in this manner in many jurisdictions, such as Botswana and Uganda. See for example Beatty *The Ultimate Rule of Law* (2004) 98-113.

<sup>100</sup> *Lackshmi Kant Pandey v Union of India* AIR 1984 SC 469 per Bhagwati J.

<sup>101</sup> Note the similar reasoning in *In Re: David Banda* (Adoption Cause No. 2 of 2006) [2008] MWHC 3, where the judge refers to the child's need to develop physically, emotionally and spiritually.

**(d) Seychelles: A vibrant, mixed jurisdiction as a member of the international community<sup>102</sup>**

***Hans Josef Hackl v The Financial Intelligence Unit and The Attorney General*<sup>103</sup>**

This case deals with the statutory forfeiture of assets in Seychelles, as a consequence of criminal conduct outside its jurisdiction. The criminal offences committed, however, were not offences in the Seychelles at the time of their commission.<sup>104</sup> The case therefore deals with matters that concern ‘public, national and international interests’.<sup>105</sup>

In other words, the immediate context of this case is very wide, since the crime directly or potentially affects the security of many other members of the international community. Justice Twomey considers the international context by way of an analysis of the ‘emerging global trend [of using civil procedures to deal with “criminal assets”] in the battle against crime’.<sup>106</sup>

A similar analysis is conducted with respect to the Appellant’s challenge on the basis of the double jeopardy principle, as applied to forfeiture proceedings.<sup>107</sup>

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<sup>102</sup> I wish to express my most sincere thanks to Justice of Appeal, Mathilda Twomey, who kindly supplied me with the original transcripts of cases, drew my attention to and supplied me with the *Hackl* case, permitted me to make use of an (as at May 2013) unpublished article, and for ongoing support while I researched court practice in Seychelles.

<sup>103</sup> *Hans Josef Hackl v The Financial Intelligence Unit and The Attorney General Seychelles* Court of Appeal SCA 10 of 2011.

<sup>104</sup> The offence is the supply of heavy duty graphite to Iran, for the use in nuclear weapons, for which the Appellant was sentenced to 6 years’ imprisonment in Germany.

<sup>105</sup> Para 14.

<sup>106</sup> Para 6, where she considers ‘models’ used in the USA, UK, Ireland, Australia and South Africa.

<sup>107</sup> Paras 19-23.

### Relevance of the case and its correspondence to the analytical framework

In this case the vertical and horizontal vectors are the most prominent features of the framework, since the interests at stake concern the global community. An important question is therefore whether the weight of the international context will overpower the domestic context, or whether the latter will be given sufficient recognition in terms of a proportionality analysis. As shown below, however, the judgment illustrates that interests at different levels can overlap in cosmopolitan manner, and that the three contextual vectors can be linked. In addition, the case instantiates a further step in the bottom up development of an international norm. It is also an interesting case in terms of the type of oppressive condition that the court must resist, namely international crime.

In view of the salience of the international context, Justice Twomey makes a number of pertinent comments which highlight the position of international law in the domestic context vis-à-vis other important, possibly competing interests. She also notes that the context is a determining factor in weighing up competing principles. She maintains that,

We have also had to consider in this context whether there are permissible limitations to the principle of sovereignty...In this context we state that the rule of law and international human rights law may well override a state's claim to sovereignty. Each case must be decided on its own facts ... The present case concerns the export of components for nuclear warheads and the public, national and international interest far outweighs the principle of sovereignty.<sup>108</sup>

This dictum might be an indication that domestic interests will have to make way for those at international level. Next, however, the court carefully correlates the vertical and horizontal vectors with national interests, or the depth aspect.

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<sup>108</sup> Ibid.

First, Justice Twomey examines relevant constitutional provisions and ascertains that, in this instance, the limitation of the constitutional right to property is both necessary and proportionate, notwithstanding the fact that the 'laws of civil forfeiture are modern and may well introduce novel concepts that are alien to the classic understanding of the boundaries between criminal and civil law'.<sup>109</sup>

Second, she reasons that, although the crimes were committed in Germany, '[i]t is not in the public interest that persons be allowed to transfer money and freely invest in, buy or enjoy property in Seychelles when such money derives from their nefarious activities. It does not serve the good name or reputation of Seychelles'.<sup>110</sup> Justice Twomey then aligns the international interest with that of Seychelles, by establishing that 'Seychelles has an interest in suppressing the conditions likely to favour the reward of crime...'.<sup>111</sup>

This well-reasoned case illustrates how global and local interests can be successfully balanced and harmonised, and how the potential for wide-ranging 'oppressive conditions', in the form of international crime (or even of eventual regional conflict), may be thwarted. It is also a good example of the progressive bottom up development of a 'modern' and 'novel' concept in international regulation and cooperation through domestic judicial intervention.

#### **(e) South Africa: A question of boundaries**

Background: Due to its history, its modern and innovative Constitution, and its robust judiciary, South Africa has developed a rich 'plurality-conscious'

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<sup>109</sup> Para 34.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

jurisprudence.<sup>112</sup> The active judiciary has also been sensitive to the highly nuanced socio-cultural context, which prevails in such a multicultural society.

One of the best examples of a singularly cosmopolitan and emancipatory judgement, *S v Makwanyane*, was discussed above. It is however, not unique to South Africa in terms of its emancipatory jurisprudence, or in terms of the proper contextualisation of a matter in order to accommodate hitherto peripheral norms and values. The question that now arises is how far judges must go to accommodate this plurality of orders. The first case below, which is one of a burgeoning body of jurisprudence, is a good example of how courts navigate the middle spaces between international law and the normative plurality of cultures.

The second case deals with aspects of international trade law. Courts have recognised that South Africa has been eager 'to take its rightful place in the family of nations' not only in its commitment to human rights, but also as an economic force in the global arena.<sup>113</sup> After years of sanctions, the country needed to adapt swiftly to new economic imperatives. One way was to align itself with international trade law and conventions.<sup>114</sup> The question is to what extent are courts to defer to international norms, and how they can accommodate different regimes at national, regional and international levels to attain the greatest degree of economic efficiency.

**(i) *Ngwenyama v Mayelane and Another***<sup>115</sup>

The issue in this case, about the validity of a customary marriage, is whether a second marriage is valid where the husband failed to apply to a court for the

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<sup>112</sup> Section 211(3) of the Constitution provides for the judicial application of customary law under certain circumstances. This is the indirect, but official recognition of normative pluralism, in other words an example of 'weak' state sponsored pluralism.

<sup>113</sup> Quoting from the Preamble of the 1996 Constitution.

<sup>114</sup> For an overview see Bethlehem 'International economic relations' in Dugard *International Law: A South African Perspective* 3 ed (2005).

<sup>115</sup> *Ngwenyama v Mayelane and Another* (n 11).

approval of a contract regulating the matrimonial property regime of both marriages.<sup>116</sup>

The context therefore stretches across international, national and subnational spheres of interest. The importance of the manner in which the Supreme Court of Appeal deals with the contextual depth vector lies in the relative weight afforded to deeply embedded, potentially conflicting, social norms. This aspect becomes more apparent when the judgment is compared to that of the court a quo. The case also provides a stark reminder of the ever present danger of judicial subjectivity.

In the court a quo, a narrow interpretation is given to the Act, and the marriage is found to be void *ab initio*. This ruling was overturned by the Supreme Court in the instant case.<sup>117</sup>

Justice Ndita, who writes the principal judgment, centres his decision on the fact that statutes 'must be interpreted in the light of their context', which includes the scope, purpose and to some extent, the background of the legislation.<sup>118</sup> He establishes the context, and hence the underlying purpose of the Act, with reference to the constitutional right to equality and provisions contained in international instruments, against the backdrop of the historical inequalities endured by women in polygynous (polygamous) unions.<sup>119</sup>

Justice Ndita thus finds that the Act, supported by the relevant international instruments, seeks to restore the dignity of women in polygynous

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<sup>116</sup> Section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 (the Act) provides for such a contract in the event of subsequent marriages, in order to safeguard the rights of every wife to the marriage.

<sup>117</sup> Reported as *MM v MN and Another* 2010 (4) SA 286 (GNP) per Bertelsmann J.

<sup>118</sup> Para 14.

<sup>119</sup> Paras 19-25 with specific reference to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which was ratified without reservation by South Africa, and the (Maputo) Protocol to the African Charter.

marriages and to ensure that every wife in such a marriage enjoys equal rights.<sup>120</sup>

### **Relevance of the case and its correspondence to the analytical framework**

This case is most important in explicating the emancipatory power of international law, in reverse, so to speak, by invoking its principles to vindicate the rights of women in polygynous marriages, while giving effect to the regime governing polygyny as a customary institution, as well as the domestic regime governing these marriages. Thus, the vertical vector strengthens the depth vector and the contextual interests represented by both vectors are protected, despite a formal clash on the face of the matter. The judgment is therefore also a flawless example of the particularisation of international law, which could, in turn, establish a point of reference for other courts facing similar issues.

In explanation and upon closer reading, the case is not merely about the interpretation of the relevant Act. It also touches on deeply ingrained beliefs about marriage and family life. In essence, the court a quo favoured the first wife, although it was not disputed that the second customary marriage had validly taken place, and despite the fact that the existing matrimonial property regime remained unchanged for the first wife. Conversely, the ruling, if upheld, would bring great hardship to the second wife, who would lose her rights and status as a married woman, and whose children would be born out of wedlock. It also flies in the face of the core purpose of the Act, as the Supreme Court ruling established.

I suggest that the decision in the court a quo in fact shows a clear preference for monogamous marriages, as evidenced in its favourable treatment of the first wife. It seems to indicate that the rights of the second wife were somehow not as important as those of the first. The court relies on the letter of

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<sup>120</sup> Para 25.

the law, and not its spirit, in the same manner that it pays mere lip service to international law.

In contrast, the Supreme Court took full cognisance of the realities of polygynous marriages and the need to preserve the dignity and equality of every wife, whether in a monogamous or polygynous marriage.

A significant and emancipatory aspect of the judgment is the counter-hegemonic particularisation of international law by the court, which is very necessary, since international instruments by and large promote monogamy.<sup>121</sup> Instead of succumbing to the unsubtle promotion of monogamy, and a correlative disavowal of polygyny, as did the court a quo, the Supreme Court is clear in its purpose to give full effect to the polygynous marriage. At the same time, it does not disregard international law, but relies on its principles and values to obtain justice *within* the relevant customary context of polygynous marriages, thus balancing all three contextual dimensions.

**(ii) *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another***<sup>122</sup>

This is an application for leave to appeal to the Constitutional Court brought in connection with a private arbitration award. The court has to decide whether the matter involved a constitutional issue in terms of s 34 of the Constitution, and furthermore, to what extent the Constitution impacts on the terms of a private arbitration agreement, and what powers the court has to scrutinise and intervene in private arbitration.

As the main judgment reveals, the context has a distinctly international character. The term 'international' in this instance refers to trade law, trade

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<sup>121</sup> For example, the CEDAW Committee (General Recommendation 24) urges the prohibition of polygamy. Even the Maputo Protocol to the African Charter, which appears ambivalent about the matter, nonetheless provides in article 6(c) that states 'shall enact appropriate national legislative measures to guarantee ... that monogamy is encouraged as the preferred form of marriage'.

<sup>122</sup> See n 20.

practice and commercial activities, at both supra- and interstate levels, thus adding a layer of foreign trade law to the mix. Furthermore, the specific context includes a constitutional dimension, in addition to the framework created by the exiting regime, which has a Roman-Dutch law foundation. Hence, the task before the court entails navigating between all these regimes.

Throughout the majority judgment, Justice O'Regan draws extensively on foreign and international sources to establish the correct international context for private arbitration.<sup>123</sup> She relies on these sources for guidance in reaching her conclusions about the significance, purposes and benefits of private arbitration worldwide.<sup>124</sup>

To establish the local context, the court considers South African precedent, but highlights the relevance of the approach taken by the European Court of Human Rights (ECHR), which was a key factor in the South African cases under consideration.<sup>125</sup>

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<sup>123</sup> For example paras 196-197 and see n 5 in the judgment for references to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL Model Law). In addition, she refers to important academic works of internationally recognised authors. See n 5, 6, 8 in the judgment.

<sup>124</sup> *Ibid.* These sources assist the court in coming to the conclusion that the advantages of private arbitration lie in its flexibility and cost effectiveness, in addition to defining its 'twin hallmarks', namely that it is based on consent and that it is private.

<sup>125</sup> Paras 202-207. The judgement contains extensive quotes from *Suovaniemi and Others v Finland* ECHR Case No 31737/96 (23 February 1999) (n 20 in the judgment), wherein the ECHR found that Article 6(1) of the European Convention on Human Rights (the Convention) applies to private arbitration. However, it was also found that certain rights under Article 6(1) may be waived. The South African cases which refer to *Suovaniemi* are *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA)(Pty) Ltd and Another* 2002 (4) SA 661 (SCA); and *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA). Of relevance to the court's harmonising of national interests with those of international and foreign regimes and institutions are the principles underlying international trade law as discussed in Chapter II 5(b), such as the *ordre public*. This means – and it is also provided for in the New York Convention – that the court can refuse to enforce an arbitral award on grounds of public policy or of non-arbitrability. I express again my contention that the inherent flexibility of international trade opens up many possibilities for rendering international law counter-hegemonic and emancipatory, as it may serve as a model for other systems of transnational regulation.

The court determines that, on interpretation of ECHR jurisprudence, the fact that parties may waive their right to an impartial and independent procedure, supports the conclusion that s 34 of the Constitution does not apply directly to private arbitration.<sup>126</sup> The rationale for this lies in the description in s 34 of tribunals and forums, as 'independent and impartial', and also in the requirement that hearings must be public, both of which do not necessarily apply to arbitration proceedings.<sup>127</sup>

Furthermore, the court does not follow the construction of the waiver of rights employed in the *Suovaniemi* and *Telcordia* cases to which it refers.<sup>128</sup> Justice O'Regan views the effect of choosing private arbitration as a choice by the parties not to exercise their rights under s 34, and not as a waiver of these rights.<sup>129</sup>

Next, the court investigates the overall relevance of the Constitution in relation to private arbitration agreements. It notes that fairness was an implied condition in Roman-Dutch Law and that this 'fits snugly with modern constitutional values'.<sup>130</sup> The court places the fairness requirement into a wider perspective with reference to the approach taken in the United Kingdom and the UNCITRAL Model Law.<sup>131</sup>

The Constitution, including section 34, may also be indirectly applicable, through section 39(2), 'which requires courts when interpreting statutes or

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<sup>126</sup> In *Suovaniemi* it was held that the parties could knowingly consent to proceedings conducted by an arbitrator who may not be entirely independent, i.e. the parties waved their right to impartiality of proceedings under the Convention. See paras 205-207 and see below for comments on the constitutional aspect.

<sup>127</sup> Para 213, where O'Regan calls this 'a general lack of fit' between arbitration proceedings and those envisaged by s 34. However, it does not mean that the Constitution has no relevance to arbitration agreements. For example para 220.

<sup>128</sup> *Suovaniemi* (n 125); *Telcordia* (n 125).

<sup>129</sup> Paras 213-218 and n 29 and 30 in the judgment.

<sup>130</sup> Para 221.

<sup>131</sup> Para 222 and n 37 in the judgment.

developing the common law or customary law to promote the “spirit, purport and objects” of the Constitution’.<sup>132</sup>

In the coalescence of all these elements, Justice O’Regan concludes that it is ‘recognised in jurisdictions around the world’ that the nature of arbitration proceedings may be determined by the parties themselves.<sup>133</sup> She makes the further point that fairness in proceedings depends ‘firmly’ on the context, which in the present case is remarkably multidimensional.<sup>134</sup>

In this judgment, international and foreign sources, which explicate international trends, are considered in a purposive and systematic manner.<sup>135</sup> These sources are not used superficially, as labels, to endorse a particular viewpoint, or slavishly to become the final answer in every matter.<sup>136</sup> Moreover, the principles extracted are not viewed in isolation, but instead against the background of South African precedent and current developments, such as recommendations made by the Law Reform Commission.<sup>137</sup> Thus, the court

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<sup>132</sup> Para 215.

<sup>133</sup> Para 223 and see n 39 in the judgment.

<sup>134</sup> *Ibid.*

<sup>135</sup> Nonetheless, by merely regarding it as ‘background’, the court can be criticised for not giving clear recognition to the important place of binding international law in relation to South Africa’s international obligations. Furthermore, the court can be criticised for its failure to draw a clear distinction between international law, which it is constitutionally mandated to consider and use as an interpretative tool (s 39(1)(b) and s 233), and foreign law which it ‘may consider’ (s 39(1)(c)). In so doing, the respective weight of sources, for purposes of providing guidance and establishing principles could have been determined with greater accuracy and could have been more fully aligned with constitutional dictates.

<sup>136</sup> Regarding the latter, O’Regan challenges for example, the construction of a waiver of rights by the ECHR in relation to fundamental rights. See para 216.

<sup>137</sup> See n 37 in the judgment. In contrast, the dissenting judgment by Justice Kroon, tends to use references to international law (and foreign law) ‘decoratively’ to enhance a particular point, without sufficient consideration of the context. For example, the judge focuses on the fact that in *Suovaniemi* the ECHR held that Article 6(1) of the European Convention on Human Rights is applicable to private arbitration, and proceeds to stretch this analogy to fit a finding that s 34 of the Constitution applies to private arbitration, without noting the differences, or fully analysing the implications of the outcome of the decision (contrary to the approach adopted in the main judgment, at paras 204-218), coupled with a failure to take proper cognisance of the difference between private and statutory arbitration (as pointed out by O’Regan at para 233).

endorses international and comparative sources with reference to their domestic relevance.<sup>138</sup>

The court therefore creates a platform which supports the development of the country's mercantile regime in line with international law and practice. At the same time, it does not merely import the latter, but also establishes congruency between the national and international. It takes overarching principles, such as fairness, into account and establishes its relevance within the South African context. Although it is concerned with aspects of trade law, the judgment is both cosmopolitan and emancipatory, since it accommodates different regimes harmoniously and facilitates the necessary transformation.

#### **(f) Uganda: An uneasy fit into the human rights mould<sup>139</sup>**

It is generally understood that the poor human rights history of Uganda did not end abruptly in the post Amin-era. There are many well-publicised examples, such as the continued criminalisation of homosexuality and intense discrimination against LGBT persons.<sup>140</sup> Furthermore, from a sample of cases read, it appears that Ugandan courts are particularly deferential to the executive and legislative branches and correlatively soft on human rights issues.<sup>141</sup> The following case is therefore a fitting example of a different and notably emancipatory approach - all the more so, since it overturns a decision by the Constitutional Court.

<sup>138</sup> Also for example, with reference to the United Kingdom model, it is noted that it is an 'open and democratic society within the contemplation of section 39(2) of our Constitution' at para 235. Relevance is also established, for example in pointing to the fact that South Africa is a party to the New York Convention, at para 235.

<sup>139</sup> I wish to express my most sincere thanks to Livingstone Sewanyana, Executive Director, Foundation for Human Rights Initiative, Uganda, and PhD candidate University of Cape Town (2013), for his surpassing assistance in supplying me with copies of cases, many of which are not available electronically or in any other format that I could access, and for drawing my attention to various relevant issues. Also Timothy Kyepa, Makerere University, Uganda for the cases he sent.

<sup>140</sup> See the Penal Code Act (1950) sections 145, 146 and 148, which provides that male homosexuals may face life imprisonment. Furthermore, the Constitutional Amendment Act of 2005 provides for the addition of article 31(2)(a) which prohibits same sex marriages.

<sup>141</sup> For example *Centre for Health and Human Rights & Development and Others v Attorney General* [2012] UGSC 4, where the Constitutional Court refused to entertain a petition aimed at improving the standard of maternal health care to prevent the high death rate among pregnant women, mothers and babies.

***Charles Onyango Obbo and Another v Attorney General***<sup>142</sup>

This is an appeal against a decision of the Constitutional Court, concerning the constitutionality of section 50 of the Penal Code Act of 1950 which criminalizes the publication of a 'false statement, rumour or report'. The appellants, two journalists, were charged on two counts of the offence.

Justice Mulenga, who writes the main judgment, first places the constitutional right to freedom of speech and expression within a historical context.<sup>143</sup> Next, he surveys the wider international law context, with reference to the African Charter on Human and Peoples' Rights, including the guiding principles adopted by the African Commission on Human and Peoples' Rights, as well as the International Covenant on Civil and Political Rights.<sup>144</sup> In addition, Justice Mulenga considers Canadian case law, and adds a bit of spice by quoting from a pertinent article in a popular journal.<sup>145</sup>

In refutation of the Constitutional Court ruling, he thus concludes that the constitutional right to freedom of expression is 'indivisible' and does not place expressions into different categories. It does not therefore distinguish between false and true statements.<sup>146</sup> He reasons that the purpose of protecting all expressions, including those that may be false, would not be to 'uphold falsity', as the court *quo implied*, but to 'avoid the greater danger of "smothering alternative views" of fact or opinion'.<sup>147</sup>

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<sup>142</sup> *Charles Onyango Obbo and Another v Attorney General* [2004] UGSC 1 (Constitutional Appeal No 2 of 2002).

<sup>143</sup> Pages 5-6 of the judgment. The right is contained in article 29 of the Constitution. The judge provides background with reference to the wording of the provision in the previous (1962) Constitution.

<sup>144</sup> At page 6. He refers to the Declaration of Principles on Freedom of Expression in Africa, adopted at the 32<sup>nd</sup> ordinary session of the Commission in 2002.

<sup>145</sup> At page 7.

<sup>146</sup> At pages 6-7.

<sup>147</sup> At page 7.

Justice Mulenga refines the context of the right, by exploring its crucial role in a democratic society, such as Uganda.<sup>148</sup> The link between freedom of expression and democracy is substantiated with references to the European Convention on Human Rights, a judgment of the European Court of Human Rights and Canadian case law.<sup>149</sup>

This link is also pivotal in circumscribing any limitation of the right, since the limitation clause provides that '[p]ublic interest ... shall not permit any limitation ... of the [right] ... beyond what is acceptable and demonstrably justifiable in a free and democratic society'.<sup>150</sup> Justice Mulenga aptly calls this a 'limitation upon the [general] limitation'.<sup>151</sup> He reviews in detail the principles relating to the justifiable limitation of rights in the light of Ugandan and foreign case law.<sup>152</sup>

Taking all these factors into account, the court thus determines that section 50 of the Penal Code is not an acceptable and justifiable limitation in a free and democratic society, and that it is consequently unconstitutional and void.<sup>153</sup>

### **Relevance of the case and its correspondence to the analytical framework**

This judgment demonstrates how international law (here, the principles underscoring freedom of speech, democracy and the limitation of rights) can bolster constitutional rights, guide judges and help them justify their stance in cases where they have to confront powerful state engines. In the present case the court relies on a detailed exploration of the vertical and horizontal vectors, but

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<sup>148</sup> At pages 8-9.

<sup>149</sup> *Ibid.*

<sup>150</sup> Article 43(2)(c) of the Constitution.

<sup>151</sup> At page 9.

<sup>152</sup> At pages 9-19.

<sup>153</sup> At page 19.

contextualises the norms, values and principles distilled from international and foreign sources to harmonise with the domestic depth vector, thus ensuring their counter-hegemonic application in the domestic environment. Thus, both contextualisation and particularisation feature prominently as judicial tools.

Since the case deals with the limitation of rights, it naturally lends itself to a vigorous proportionality inquiry. Here, the balancing of interests extends to the international community's defence of democratic principles, the state's concerns to limit these in the national interest, and the individual's rights that are at risk.

In this case, hegemony and oppression can be triggered at both international and state levels. However, by using the analytical tools available, the court is able to ensure that international norms are not imposed hegemonically on the domestic system, and at the same time, that national laws and oppressive state policies do not conspire to rob individuals of their rights. By all counts, the effect of the application of international law by the court is therefore emancipatory, as explained in more detail below.

Freedom of expression and any justifiable limitation thereof are pre-eminently contextual. The content of the right and its necessary boundaries are fluid and intimately connected to the socio-cultural norms and values of a particular society.<sup>154</sup> The context is even more restrictive when, as in the present case, political factors weigh in, which may include deep-seated reverence or even fear of the relevant political powers.

It appears from the judgment that the court a quo placed such value on these narrow contextual issues, that it lost sight of the core principles and wider context animating the right.

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<sup>154</sup> Thus, in a sad corollary to the present case, the right of freedom of expression rang hollow when a producer who staged a play with a homosexual theme, was deported after five days of imprisonment. <http://www.channel4.com/news/deportation-crazy-says-uganda-gay-play-producer-video> last accessed 19-02-2013.

Conversely, the Supreme Court, situates the enquiry in a wider perspective, notably that of a 'free and democratic society'. In order to establish the underlying purposes of the right, it was therefore necessary to look well beyond a parochial insistence on, for example, the true-false dichotomy of protected speech. Hence the court turns to the jurisprudence of other democracies, which assists in placing international and regional laws in their proper perspective. In so doing, Justice Mulenga woke the Ugandan courts up from their deferential slumber and gave a judgment that could be considered transformative and emancipatory, particularly in the Ugandan context.

## 7. Judgments from the Americas

### (a) Canada: Normative plurality and bottom up international law

The Canadian judiciary has been described as 'fairly aggressive' in the application of international treaties and 'fairly active' in having recourse to unincorporated treaties.<sup>155</sup> What is more, customary international law is deemed to have the force of law.<sup>156</sup> Canada prides itself in its local and global promotion of human rights, which includes the vigilant protection of the rights of women and minorities, and it has therefore ratified the most important human rights instruments.<sup>157</sup>

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<sup>155</sup> Sloss 'Treaty enforcement in domestic courts: A comparative analysis' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 24. For a detailed overview see Van Ert 'Canada' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009).

<sup>156</sup> De Mestral and Fox-Decent 'Rethinking the relationship between international and domestic law' (2008) 53 *McGill Law Journal* 573 at 583-588.

<sup>157</sup> See for example the official website of the Department of Foreign Affairs and International Trade especially at <http://www.international.gc.ca/rights-droits/women-femmes/equality-egalite.aspx?view=d> last accessed 24-02-2013. See also the works in n 155 and 156 above. For example, Canada has ratified the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination Against Women.

Surprisingly however, it has not incorporated many of these into domestic legislation.<sup>158</sup> Nonetheless, 'the *Canadian Human Rights Act* and the *Charter* draw some of their language directly from the *ICCPR*'.<sup>159</sup> This means however, that in Canada's highly dualistic regime, an anomalous situation might arise, where reliance cannot be placed directly on important international instruments.<sup>160</sup>

In the *Bruker* case analysed below, many of the abovementioned complexities come sharply to the fore.<sup>161</sup> It is a case that calls for a difficult balancing of rights, namely, those of freedom of religion on one hand, and the equality of women in marriage and divorce on the other. Hence, the court is also dealing incidentally with the doctrine of the separation of church and state. At the same time, it cannot draw directly on important international instruments such as the *ICCPR* for guidance.<sup>162</sup>

My reading of the case therefore starts with the observation that it is not so much about any of the traditional ways in which courts can have recourse to international law, as it is about the development of international law and international law 'in action' from a bottom up perspective. This is also the reason for the choice of a case that hardly refers to international law. The rationale is as follows.

<sup>158</sup> Van Ert (n 155); De Mestral and Fox-Decent (n 156).

<sup>159</sup> De Mestral and Fox-Decent (n 156) 624, 627 where they note that 'in the *Charter* the limitation clause in section 1, the legal rights in sections 7-14, and the right to equality in section 15 were all derived from similar provisions in the *ICCPR*' and 'the Canadian constitutional principle that requires protection of minorities resonates with a host of international treaties that Canada has ratified'. These examples also illustrate the Trojan horse effect of international law.

<sup>160</sup> For example, *Ahani v Canada (A.G.)* (2002), 58 O.R. (3d) 107, 208 D.L.R. (4th) 66 (C.A.). See De Mestral and Fox-Decent (n 156) 623-624 where they explain that in *Ahani*, the Court of Appeal for Ontario 'denied Mr. Ahani's request to remain in Canada, primarily on the basis that neither the ... *ICCPR* ... nor its Optional Protocol ... was incorporated into Canadian law'.

<sup>161</sup> *Bruker* (n 9). Note that in this case, the husband finally granted the *get*, and the court merely has to deal with the consequences of his refusal (and not the question of specific performance), for which the appellant is claiming damages.

<sup>162</sup> *ICCPR* article 23 protects *inter alia* the right to marriage, which is relevant to the case.

Of necessity, international law principles tend to be broadly formulated. Thus, the problem in *Bruker*, namely the consequences of a husband's refusing to give his wife a Jewish divorce or *get*, is not specifically addressed in international instruments, which contain only general provisions.<sup>163</sup> The court has to find a solution that on one hand does justice to the woman, who had been unable to re-marry according to her faith for fifteen years, and, on the other, does not interfere with the religious freedom of the husband.<sup>164</sup>

Both sides involve deeply entrenched rights at international and regional levels. In addition, in most countries, both the right of women to dignity and equality and the right to freedom of religion are inextricably embedded in the domestic legal order, by way of the Trojan horse of constitutional and legislative provisions. Hence, in a system like that of Canada, where these rights are fully developed, a court arguably has little need to find support for its decisions in the international *lex generalis*.

Nonetheless, the court in *Bruker* needs to be innovative in the application of the relevant principles in order to avoid the pitfalls, which the conflicting rights present. If it cannot turn to international law itself or to satisfactory domestic precedent, the only other solution is to consider foreign judgments, which is exactly what the court does.

### ***Bruker v Marcovitz***<sup>165</sup>

In an appeal from the Appeal Court in Quebec, the Supreme Court must decide whether a matter concerning the granting of a religious Jewish divorce was justiciable. The refusal by the respondent to grant such divorce was in breach of

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<sup>163</sup> See however, De Blois 'Religious law versus secular law: The example of the *get* refusal in Dutch, English and Israeli law' (2010) 6(2) *Utrecht Law Review* 93 at 113: '[T]he CEDAW, ECtHR and HRCtee all tend to lean towards the conclusion that international human rights law is opposed to religious law, especially when its requirements may interfere with the equal rights of women. Article 12 ECHR, Article 23 ICCPR and Article 16 CEDAW. These treaty provisions all stress the equal rights of men and women in the field of marriage and divorce.'

<sup>164</sup> The details are discussed below.

<sup>165</sup> See n 9.

a contractual provision contained in a civil divorce agreement, for which damages are claimed. The further questions are therefore whether the agreement to grant a religious divorce was valid, and whether the respondent could rely on his right to freedom of religion to avoid the consequences of his breach.

This matter is by no means clear-cut, as is evidenced by the conflicting rulings in the trial court, the Court of Appeal and two dissenting judgments in this appeal.<sup>166</sup>

From the start, the majority, per Justice Abella, adopts the approach that 'Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism'.<sup>167</sup> Unlike the dissenting justices however, this does not mean that as long as a person's civil rights remain intact, inroads made by such tolerance on his or her religious life can be ignored.<sup>168</sup> Rather, differences are to be protected on all levels. An important point is that persons have 'the right to integrate into Canada's mainstream *based on and notwithstanding* these differences [which fact] has become a defining part of [the] national character'.<sup>169</sup>

Thus, amid diversity and pluralism, tolerance implies the balancing of competing rights. Conversely, tolerance and the protection of differences cannot mean that differences are simply ignored. Justice Abella calls this balancing 'a complex, nuanced, fact-specific exercise that defies bright-line application'.<sup>170</sup>

One aspect of this complex 'exercise' is the appellant's right to equality in matters of divorce. Under Jewish law however, the husband must grant the

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<sup>166</sup> In essence, the dissenting justices held that only religious rules were at issue and that the matter must therefore be resolved by religious authorities and not the courts. For example paras 102, 122-132.

<sup>167</sup> Para 1.

<sup>168</sup> For example at para 131 for the dissenting view that the appellant's civil rights were not challenged or infringed.

<sup>169</sup> Paras 1-2 (my emphasis).

<sup>170</sup> Para 2 and see paras 70-78 on how to balance religious freedom against the rights of others and matters of public policy and democratic values.

religiously valid repudiation or *get*. If he does not, the wife is effectively denied 'the ability to remarry and get on with her life in accordance with her religious beliefs'.<sup>171</sup>

For guidance, Justice Abella considers the practice developed by the European Commission on Human Rights.<sup>172</sup> Thereafter, foreign judgments from France, the United Kingdom, Australia, the United States and notably from Israel, are analysed at length.<sup>173</sup> The judgments referred to all find that the husband's freedom of religion was not violated and that the wife ought to be awarded compensatory damages for breach of contract, where there was a contract compelling the husband to provide the *get*. The Australian court made it clear that it would be contrary to 'all notions of justice' to allow the possibility [that a husband could refuse a divorce] to arise in a court, and to say that the court can do nothing'.<sup>174</sup>

Justice Abella concludes that the 'international perspective reinforces the view that judicial enforcement of an agreement to provide a Jewish divorce is consistent with public policy values shared by other democracies'.<sup>175</sup>

The court also engages in a proportionality exercise by weighing the respondent's claim against the "democratic values, public order and the general well-being of the citizens of Québec" stipulated by s.9.1'.<sup>176</sup> It correspondingly

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<sup>171</sup> Para 82.

<sup>172</sup> Paras 83-84. The court refers to *D v France*, Application No. 10180/82, December 6, 1983, D.R. 35, p 199, where a husband had been ordered by a French court to pay his ex-wife damages for his refusal to grant her a *get*. With the result that the 'husband applied to the Commission, arguing that his right to freedom of conscience and religion under the *European Convention on Human Rights* was violated by this award of damages. The Commission rejected his application...'.<sup>173</sup>

<sup>173</sup> Para 85 where a French tribunal found that since a *get* did not require any special form of worship, it 'deemed that the husband's refusal to provide the *get* was a delictual fault and the wife was awarded substantial damages'; para 86, where a UK court held that 'inability to remarry within one's religion represents a serious compensable injury'; and further at paras 87, 88, 89 respectively.

<sup>174</sup> Para 87.

<sup>175</sup> Para 90.

<sup>176</sup> Para 78.

finds that in weighing the different interests, 'any harm to the husband's religious freedom in requiring him to pay damages for unilaterally breaching his commitment, is significantly outweighed by the harm caused by his unilateral decision not to honour it'.<sup>177</sup>

The abovementioned balancing requires an engagement with 'the complex, nuanced, fact-specific territory' referred to earlier in the judgment. Thus, the issues are contextualised with reference to the religious beliefs of the parties and their personal circumstances, and what is more, the matter is situated in the greater national and international context.<sup>178</sup>

### **Relevance of the case and its correspondence to the analytical framework**

The *Braker* case touches on a number of central themes explored in the study, and offers an interesting example of the analytical framework, since the vertical vector is constructed largely by international law that is hidden in a legislative and constitutional Trojan horse. In addition, a cosmopolitan reliance on relevant foreign judgments plays a major role. It means that the court is not so much particularising international law for itself, as it is using the particularised versions of other courts to accomplish the task – an instance of the bottom up development of international law. I elaborate on this point further below.

Another intriguing, and complicating, factor is that the interests represented by the depth vector, in terms of the subnational religious regime involved, affects both litigants, but in opposing and competing ways. The court balances these interests through careful contextualisation and a meticulous proportionality inquiry. As I explain subsequently, the finding of the court, which at first glance might appear as a hegemonic victory for international law over

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<sup>177</sup> Paras 17, 93.

<sup>178</sup> Para 78.

religious law, has, in fact, an emancipatory effect, which strengthens the appellant's enjoyment of her right to religious freedom.

It was noted above that, from the international law perspective, a trend seems to be developing, which is that religious freedom is gradually making way for the rights of women.<sup>179</sup> At the domestic level, however, courts are still ambivalent and cautious about interfering in religious matters.<sup>180</sup> Therefore the issue is presented as a contractual (or delictual) problem, which the Supreme Court – as well as the foreign courts compared - attempts to separate from religious doctrine.

Nonetheless, judging from the examples, a pattern appears to be emerging in domestic courts themselves, and significantly, one that is aligned with the international law position on the right of women to equality and dignity.<sup>181</sup> The court practice surveyed indicates greater sensitivity to the plight of a woman who is chained to a marriage that has already been dissolved, than the alleged infringement of religious freedom.<sup>182</sup> Hence, Justice Abella holds that: '[a]ny infringement of Mr. Marcovitz's freedom of religion is inconsequential compared to the disproportionate disadvantaging effect on Ms. Bruker's ability to live her life fully as a Jewish woman in Canada.'<sup>183</sup>

I therefore suggest that, in *Bruker*, one is witnessing international law in the making, and specifically from the bottom up. It is a case wherein international law principles are applied, but via a detailed comparative analysis of foreign

<sup>179</sup> See notes 162, 163 and 172 above.

<sup>180</sup> See De Blois (n 163) and note again the different conclusion reached in the court a quo.

<sup>181</sup> See paras 80-82, 92. Even the dissenting judgment is instructive in this regard. Although Deschamps J maintains that the comparative exercise is not germane to the Canadian situation, he concedes after an exceptionally lengthy perusal of foreign cases at para 155: 'This review leads me to conclude that, in the countries whose law is most similar to ours, the *get* issue is governed by internal private law rules. The solutions that have been adopted are quite varied.' These 'solutions' nevertheless point to a degree of uniformity in their outcome.

<sup>182</sup> See para 89 where the court quotes with emphasis from an Israeli judgment: 'The object of the relief applied for is to indemnify the wife for significant damages caused her [sic] by long years of *aginut*, loneliness and mental distress that were imposed on her by her husband.'

<sup>183</sup> Para 93.

judgments. *Bruker* is a particularly good example of bottom up international law through the processes of transjudicialism, precisely because of its minimal reference to international law per se. Notwithstanding this fact, the judgment follows the same trajectory plotted by international law provisions dealing with non-discrimination.

It must also be stressed that, particularly in difficult cases, the pattern of reliance on comparative jurisprudence is very frequently observed.<sup>184</sup> Issues of legitimacy and bindingness of sources aside, it makes sense that, when a court cannot find, or cannot directly apply the relevant international law provision, it looks over its shoulder for help from other courts.<sup>185</sup>

A further question in *Bruker* is whether this judicial practice covertly encourages the hegemony of international law, in this case by disregarding aspects of the Jewish faith. It can certainly be argued that the bottom up deployment of international law principles can be hegemonic, in the same way that its top down imposition can be hegemonic, particularly when it overrides important contextual relativities, like religion.

*Bruker* however, instantiates two perspectives of freedom of religion, and as I argue below, of the right not to be discriminated against on grounds of belief or religion.

It was pointed out in the dissenting judgment of Deschamps J, that the appellant was legally divorced and could remarry at any time.<sup>186</sup> As a woman professing the Jewish faith however, she could not. It is therefore a rather callous disregard of her rights to hold that, her religious beliefs do not carry much weight in relation to her civil rights, since these remained intact.

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<sup>184</sup> See Chapter IV 9(d), and for example, *Makwanyane* (n 17) above, and many of the other cases discussed in the present chapter, which also show such strong reliance on foreign judgments.

<sup>185</sup> See also Chapter III 5 on judicial activism and the question of the authority of various sources.

<sup>186</sup> For example para 131.

The contention that the ‘instant case is one in which the religious and civil worlds collide’ and that the ‘problem is a matter for Hebrew law’, is not helpful in allowing the appellant to live according to *her* religious convictions and not merely some abstract idea about freedom of religion in general, which favours the male-friendly status quo.<sup>187</sup>

The majority alludes to this distinction when it upholds the appellant’s right to ‘live her life fully as a *Jewish woman* in Canada’, on the basis that persons have ‘the right to integrate into Canada’s mainstream *based on and notwithstanding* [their] differences’.<sup>188</sup> These are not top down, hegemonic sentiments that ignore religious imperatives, but ones that show regard for the interests of both parties in the expression of their faith.

The court can come to its decision only through a multi-dimensional contextual enquiry, which informs a threefold proportionality test, which involves the respective rights of the parties concerned. Such an enquiry includes the rights of *both* parties to express their religious convictions, in addition to a broader analysis which places the issues within both national and international contexts respectively. This having been done, the judgment represents one that is cosmopolitan and emancipatory, and one that is an example of bottom up, counter-hegemonic international law.

### **(b) Argentina: Indigenous rights, the environment, and the role of non-state actors in international law**

Argentina is remarkable for its robust constitutional recognition of ‘the ethnic and cultural pre-existence of indigenous peoples’, which includes the recognition of

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<sup>187</sup> Para 183. The potential for injustice in the adoption of an abstract, de-contextualised approach, is further borne out by the fact that the rights of the children of the divorced parties might be affected. If no *get* is obtained, children from a subsequent marriage are designated as *mamzerin*, who are socially disadvantaged. See De Blois (n 163) 113, and also para 125.

<sup>188</sup> Para 93 (my emphasis) and para1 (my emphasis)

'the community possession and ownership of the lands they traditionally occupy'.<sup>189</sup> These constitutional guarantees were the culmination of various legislative initiatives, including the implementation of the ILO Convention on indigenous and tribal rights in 1992.<sup>190</sup>

The Constitution also recognises the right to the protection of the environment in a highly specific manner, which resonates with the most important, even novel protections provided in international environmental law.<sup>191</sup>

Against this background, the following case is a luminous example of a multi-dimensional legal context imposed on a multi-dimensional socio-cultural and economic context. In addition, it highlights the important role played by non-state actors in the promotion of international standards.

In similar vein to a number of other judgments in this chapter, international law is a strong, but underlying force in the present matter. This is mainly due to explicit enabling legislation – and, as noted, the Constitution – in addition to the intervention of the Centre for Human Rights and Environment (Centro de Derechos Humanos y Ambiente: CEDHA).<sup>192</sup> CEDHA promotes socially inclusive and environmentally sustainable development in various ways, including its

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<sup>189</sup> The National Constitution of Argentina 1994 article 75 (17). See Rosti 'Reparations for indigenous peoples in two selected Latin American countries' in Lenzerini (ed) *Reparations for Indigenous Peoples* (2008) 345.

<sup>190</sup> ILO Convention No 169 on Indigenous and Tribal Peoples in Independent Countries. See Rosti (n 189) 345-348 for the historical background.

<sup>191</sup> Article 41 states: All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law. The authorities shall provide for the protection of this right, the rational use of natural resources, the preservation of the natural and cultural heritage and of the biological diversity, and shall also provide for environmental information and education. The Nation shall regulate the minimum protection standards, and the provinces those necessary to reinforce them, without altering their local jurisdictions. The entry into the national territory of present or potential dangerous wastes, and of radioactive ones, is forbidden. The Constitution is available at:

<http://www.senado.gov.ar/web/interes/constitucion/english.php> last accessed 26-02-2013.

<sup>192</sup> See the official website <http://wp.cedha.net/?lang=en> last accessed 26-02-2013.

advancement through litigation, wherein the NGO places great reliance on international and regional instruments.<sup>193</sup>

Apart from its multi-dimensional nature, the *Comunidad Mapuche Paichil Antreao*<sup>194</sup> case is remarkable in a number of other ways. It is not the usual land dispute brought by (or against) indigenous people, but rather their plea for the protection of the environment by way of an action of *amparo*.<sup>195</sup> One complication is that 'the local government delayed the recognition of the community's legal status'.<sup>196</sup> This means that, firstly, the standing of the community and CEDHA to bring the action is challenged by the respondent, the Province of Neuquén.

The next hurdle is that the court must reject the dismissive and often oppressive approach regularly adopted by courts in indigenous matters, notwithstanding the constitutional and legislative protection of indigenous peoples at national level.<sup>197</sup> The reason for this is that, in many instances, these safeguards have not filtered down to local and provincial levels, where draconian and outdated regulations remain in force and are applied with judicial vigour.<sup>198</sup> Moreover, in 'most of the legal cases, the indigenous are the defendants or accused parties of the trial'.<sup>199</sup>

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<sup>193</sup> At [http://wp.cedha.net/?page\\_id=6271&lang=en](http://wp.cedha.net/?page_id=6271&lang=en) 'Our work centers on promoting greater access to justice and guarantee [sic] human rights for victims of environmental degradation, or due to non-sustainable management of natural resources, and to prevent future violations.'

<sup>194</sup> See n 4.

<sup>195</sup> The Constitution in article 43 provides for actions of *amparo*, which are summary proceedings aimed at safeguarding constitutional guarantees, empowering the judge to rule on the constitutionality (or otherwise) of an act or omission. See Rosti (n 189) 355.

<sup>196</sup> Andía 'Disadvantaged groups, the use of courts and their impact: A case study of legal mobilization in Argentina' (2011) *Law and Public Policy Dissertations* Paper 1, 173. <http://hdl.handle.net/2047/d20001004> last accessed 27-02-2013.

<sup>197</sup> Andía (n 196).

<sup>198</sup> *Ibid*, and for example 24-26.

<sup>199</sup> Id 169, 170-179 which describes forced evictions by judicial decree, and in the absence of prior consultations, some against the Paichil Antreao community itself; 179ff where examples of criminal trials against indigenous peoples are given.

***Comunidad Mapuche Paichil Antreao***<sup>200</sup>

The community, assisted by CEDHA, contends that irreversible damage is being done to the forest and the soil substructure by ‘massive’ logging operations and the mining of volcanic sand over an area of 625 hectares, as well as through construction and road-building. The native forest felled contains ‘cypress, ñires, radales and coihues’ some of which are rare and around 200 years old. The community argues that there is a duty on the State to protect and conserve the forest, which has intrinsic value.<sup>201</sup>

Apart from the devastation of the natural environment, the community is also deeply concerned about the sacredness of the land, where religious rites have been performed since time immemorial. Both the environmental and cultural aspects must therefore be assessed by the court.

First, the court finds that in terms of article 43 of the Constitution, locus standi should be construed broadly.<sup>202</sup> Second, it holds that the rights contained in articles 41 and 43 determine that CEDHA is ‘duly entitled’ to petition the court.<sup>203</sup> The same articles guarantee the community’s autonomous standing to bring the *amparo* action. Apart from having a ‘classic subjective right’ as victim of a wrongful act, it also has a legitimate public and collective interest in the protection of the environment.<sup>204</sup>

Next, the court considers the evidence of the environmental degradation as a consequence of logging, extraction of sand and construction, and takes into account the fact that the Province failed to have had an environmental impact

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<sup>200</sup> See n 4. Available at <http://odhpi.org/wp-content/uploads/2012/07/amparo-paichil-JUNIN.pdf> (in Spanish) last accessed 25-02-2013. I relied on an electronic translation service and the reference works referred to in n 189 and 196 to gain an understanding of the case.

<sup>201</sup> Page 1 of the judgment.

<sup>202</sup> Page 3 of the judgment.

<sup>203</sup> *Ibid.* In this respect, the court notes the objectives of the CEDHA, inter alia to represent victims of human rights abuses in matters of environmental protection at ‘national, regional and international’ levels.

<sup>204</sup> Pages 3-4 of the judgment.

assessment carried out.<sup>205</sup> Since the Province did not act 'according to the relevant regulations', the court finds its actions 'illegitimate'.<sup>206</sup>

An important point is that the court places the matter into the wider national (and arguably international) context, stating that the 'eradication of forests decreases biodiversity and destroys the lungs that help regenerate the land', which in turn results in the deterioration of soil and the decimation of species in the country.<sup>207</sup> The failure of the Province to act according to the relevant environmental regulations is therefore deemed to affect not only the constitutional right to a 'healthy' and 'balanced' environment of the Mapuche community, but of the 'Province of Neuquén and the whole country'.<sup>208</sup> The judge also refers to the constitutional duty to preserve the environment for future generations.<sup>209</sup>

Hence, the court finds in favour of the Mapuche community and CEDHA, and orders that logging and extraction of sand cease within ten days.<sup>210</sup>

### **Relevance of the case and its correspondence to the analytical framework**

The main reason for the inclusion of this case is to illustrate how international and subnational orders can overlap and work in tandem, in this instance, to protect the environment and indigenous rights. In the terms of the framework, there is therefore no suggestion of a hegemonic vertical application of international law at variance with the subnational depth vector. The judgment goes further, however, and uses the principles established by international law for the protection of the environment, as well as those for the protection of the rights of indigenous peoples, to vindicate these interests at subnational level, and

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<sup>205</sup> Page 5 of the judgment.

<sup>206</sup> Page 6 of the judgment.

<sup>207</sup> Page 5 of the judgment.

<sup>208</sup> Page 6 of the judgment.

<sup>209</sup> *Ibid.*

<sup>210</sup> At page 7 of the judgment, where the court also makes a favourable cost award to the plaintiffs.

bring emancipatory relief. In this example, an oppressive situation is created by state hegemony, which results in the degradation of the living environment and cultural heritage of the Mapuche.

As detailed below, for the application of the abovementioned international principles to have emancipatory effect requires the court to map out the relevant socio-economic and cultural contexts pertaining to both parties, and to balance starkly divergent interests at national and subnational levels. In so doing, the court is tasked with the unenviable task of weighing up the rights of a small community and the protection of the environment, against those of the state and compelling economic advantage.<sup>211</sup> Notwithstanding the unlikelihood of success, due to the factors noted above, the community and CEDHA came armed with significant constitutional rights.

First, the constitutional protection of indigenous rights is consonant with international law, which provides for the holistic protection of cultural and linguistic diversity, and, in addition to the recognition of 'pre-existing' communal rights of ownership, the often sacred relationship of indigenous peoples to their traditional land is also recognised.<sup>212</sup>

Second, the environmental safeguards contained in the Constitution are extensive and mirror contemporary international tenets, which include principles such as sustainable development, the polluter pays and intergenerational

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<sup>211</sup> Nevertheless, it appears that the court could also adopt a narrow approach, which would circumvent any difficulties it might have had, by simply denying standing to the community and/or CEDHA. As noted, the community (consisting of only 25 families), was not recognised as a legal entity, and did not have 'personería jurídica inscrita' (registered legal personality). See Rosti (n 189) 355 and Andia (n 196) 173.

<sup>212</sup> Article 75 of the Constitution. See Lenzerini (n 81) 73-116, for an overview of the international law provisions for the protection of indigenous rights. See Andia (n 196) 169-170, '[O]wnership rights involve a collective meaning and a special relationship that the indigenous people have with their territory. The indigenous people derive not only the material resources to live but also their identity, culture and spirituality from the communal possession. Their whole life style and worldview includes their relationship with the land'. Rosti (n 189) 349-350.

justice.<sup>213</sup> In addition, the state has a specific constitutional mandate to preserve biodiversity as well as the country's natural and cultural heritage.<sup>214</sup>

In sharp contrast (at the time of the judgment) to the prevailing, narrow and oppressive approaches adopted by local courts in similar matters, in *Mapuche Paichil Antea* the court embraces the broader context, as envisaged by the Constitution, in both indigenous and environmental matters.<sup>215</sup> It firmly and swiftly disposes of the matter of the standing of the community and CEDHA, and then gives substance to the constitutionally entrenched environmental safeguards in a meticulous and dynamic manner.

Since the constitutional provisions are expansive and parallel international law principles in every area concerned, and since CEDHA had brought the latter to the notice of the court, it appears that nothing would be gained from a reiteration of international norms.<sup>216</sup> Yet, despite the lack of direct reference to international law, the court makes it clear, that the environmental issues raised have a ripple effect, and that a wider context is indicated, which cannot be dealt with in a parochial and deferential manner.

The court thus endorses the cosmopolitan values embodied in international law for the protection of both the environment and indigenous rights. It is a transformative judgment that is emancipatory in the subjective context of the small Mapuche community, but also in the wider, objective context of the environment as a whole.

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<sup>213</sup> Article 41. See Kotzé and Paterson (eds) *The Role of the Judiciary in Environmental Governance* (2009) 239-240, which, although in the Canadian context, illustrates the potential challenges faced by the judiciary in terms of (novel) ethical principles in environmental law.

<sup>214</sup> Article 41.

<sup>215</sup> See the introduction to this section and n 191 above for the constitutional provisions.

<sup>216</sup> This is therefore another example of the Trojan horse effect.

## 8. Judgments from Asia

### (a) India: The cosmopolitan judge

In theory, India adheres to a strictly dualist approach to international (treaty) law, which means that treaties require legislative implementation to acquire the force of law in domestic courts.<sup>217</sup> Customary international law, however, is deemed automatically applicable, provided it does not conflict with municipal law.<sup>218</sup>

Nevertheless, courts are also guided by 'Directive Principles of State Policy' contained in the Constitution, which include the injunction in article 51 to 'foster respect for international law and treaty obligations'.<sup>219</sup> Although the Principles are not directly enforceable, article 51 'has been considered not only relevant but also highly influential in determining the impact of treaties on the domestic legal system'.<sup>220</sup>

On the basis of this overarching principle and through its jurisprudence, the Supreme Court has developed a number of identifiable principles pertaining to the role of unincorporated international treaties in the courts of India.<sup>221</sup> In a jurisdiction such as this, where judicial precedent is legally binding, the practice of the Supreme Court is therefore an indirect way of transferring norms from the international plane to the national.

Moreover, the unapologetic judicial activism of the Indian courts has resulted in a number of ground breaking decisions which have reverberated

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<sup>217</sup> See Jayawickrama 'India' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 244-245.

<sup>218</sup> *Ibid.*

<sup>219</sup> Constitution of India Part IV article 51(c) available at:

<http://india.gov.in/my-government/constitution-india> Last accessed 21-06-2013.

<sup>220</sup> Jayawickrama (n 217) 245-247.

<sup>221</sup> *Id* 247-264. The author, citing a vast body of case law, identifies six principles, for example those relating to conforming interpretation, the clarification of ambiguous legislation and the development of the common law, which are per se quite similar to those applied in other dualist jurisdictions. The scope of application in Indian courts however, is much broader as will be shown below.

through to other jurisdictions, faced with similar challenges.<sup>222</sup> Hence, the jurisprudence of these courts has manifestly facilitated the making of bottom up international law, and has proved to be pivotal from a Third World perspective.<sup>223</sup>

From the perspective of the present study, India represents an Aladdin's cave of jurisprudential treasures. There are many weighty cosmopolitan and emancipatory judgments, and singling out one has been a difficult task. The following environmental case is important however, because it addresses a number of different interests, which intersect at local, regional, national and international levels. It is also important for Justice Pasayat's vibrantly cosmopolitan, intergenerational approach, which seeks to place the different elements in their cultural and historical context. The judgment is therefore multidimensional in both time and space.

### ***Chinnappa v Union of India***<sup>224</sup>

Kudremukh National Park was declared a national park in 1987 in terms of section 35(1) of the Wildlife (Protection) Act of 1972. Nonetheless, mining activities, which caused encroachment on the forest and pollution of the Bhadra River, continued on the basis of an agreement for 'temporary working permission' issued by the relevant state government. This was in violation of the statutory protection afforded national parks, and contrary to a previous court order.<sup>225</sup>

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<sup>222</sup> For example in the celebrated case of *Visaka v State of Rajasthan* [1997] 3 LCR 361, the court 'had no hesitation in relying on these international initiatives for the purpose of construing the nature and ambit of the constitutional guarantee of gender equality in the Constitution' and going so far as to 'lay down specific guidelines and norms for due observance at all workplaces and other institutions until legislation was enacted for the purpose', quoting Jayawickrama (n 217) 256-264, who includes a number of other important decisions. See n 223 below for other jurisdictions.

<sup>223</sup> See for example the cases in this chapter from Botswana, Malawi, Seychelles and Uganda, which have relied on Indian precedent.

<sup>224</sup> *Chinnappa v Union of India and Ors* Writ Petition (civil) 202 of 1995. Judgment of 30/10/2002 available at <http://www.indiankanoon.org/doc/282585/> last accessed 05-03-2013.

<sup>225</sup> See pages 1-3 of the judgment for the general background.

Justice Pasayat notes that in the present case 'the alleged victim is the flora and fauna in and around Kudremukh National Park' and that its forests 'are among 18 internationally recognized "Hotspots" for bio-diversity conservation in the world'.<sup>226</sup> On the other hand, the mining company contends that it is earning 'valuable foreign exchange', and that it conducted its activities strictly according to environmentally friendly procedures, and further, that cessation of its activities would result in a great number of job losses.<sup>227</sup>

According to Justice Pasayat, the 'seminal' issue is thus 'whether the approach should be "dollar friendly" or "eco friendly"'.<sup>228</sup> In balancing these conflicting interests, the judge seems to address not only the small audience having direct interests in the case. Already in his introduction, he seems to be speaking to a global audience, warning it not to commit 'matricide' of 'Mother Earth'.

Logically, Justice Pasayat shuns a contracted framework and places environmental concerns into a global context. He does more, however, and establishes the intertemporal dimension associated with the environment, as well as its relevance in matters of religion and culture.

In so doing, he refers to the timelessness of the statement by 'the wise Indian Chief of Seattle', which contains 'the wisdom of the ages'.<sup>229</sup> Similar wisdom is found in the history of environmental law in India, wherein religious tenets provided important safeguards for the protection of the environment.<sup>230</sup>

International environmental principles are projected against a backdrop of ancient and contemporary wisdom and science. This contextual setting extends

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<sup>226</sup> Page 1 of the judgment.

<sup>227</sup> Page 4 of the judgment.

<sup>228</sup> Page 5 of the judgment.

<sup>229</sup> The statement (circa 1854) is quoted in full at pages 5-7 of the judgment, where the Chief challenges the idea that land (typifying the environment) can simply be bought and sold.

<sup>230</sup> Page 9 of the judgment. For example, '[f]ouling of the water of a river was considered a sin and it attracted punishments of different grades'.

from Pythagoras<sup>231</sup>, the King Asoka<sup>232</sup> and modern philosophers, to article 48 of the constitutional Directive Principles, as well as scientific data which indicate that 'environmental questions have become urgent ... and have to be properly understood'.<sup>233</sup> Also under discussion is literature on environmental law, and details about the menace of development initiatives that override conservation principles and do not take the needs of future generations into account.<sup>234</sup>

Accordingly, Justice Pasayat places great emphasis on the Stockholm Declaration of the United Nations Conference on Human Environment of 1972, which alerts nations to the need to take urgent steps to save the earth, noting that these injunctions were reaffirmed at the Rio Earth Summit in 1992.<sup>235</sup> He also refers to the directives of the European Economic Committee, and quotes at length from the decisions taken at the Convention on Biological Diversity of 5 June 1992.<sup>236</sup>

Case studies add another dimension to the judgment, particularly those that emphasise the common law public trust principle, which the court applies to the state as a trustee of the country's natural resources and which therefore places it under legal obligation to protect them.<sup>237</sup>

Justice Pasayat notes the 'laudable' objectives contained in the National Forest Policy of 1988. Although these have been 'confined in papers containing

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<sup>231</sup> Ibid 'For so long as man continues to be the ruthless destroyer of lower living beings, he will never know health or peace.'

<sup>232</sup> Page 11 of the judgment, who declared that certain animals were not to be killed and forests were not to be burned. Also noted is that the 'trees, water, land and animals had gained important positions in the ancient times. As Manu VIII ... says different punishments were prescribed for causing injuries to plants. Kautilya went a step further and fixed the punishment on the basis of importance of the part of the tree.'

<sup>233</sup> Pages 8 and 12 of the judgment.

<sup>234</sup> Pages 11-14 of the judgment.

<sup>235</sup> Pages 7, 9 and 15 of the judgment, quoting inter alia Principle 3 of the Stockholm Declaration, which refers to the 'solemn responsibility to protect and improve the environment for present and future generations'.

<sup>236</sup> Pages 13-14 of the judgment, which highlight important principles such as sustainable development and the precautionary principle.

<sup>237</sup> Pages 5, 11, 12 of the judgment.

[them], and not much has been done to translate them into reality', they are nevertheless, an indication of the government's intention to protect the environment.<sup>238</sup> Therefore, 'in the absence of any inconsistency between the domestic law and the international conventions, the rule of judicial construction is that regard must be had to international conventions and norms even in construing the domestic law' – which is indeed what the court does.<sup>239</sup> The court notes further that it is 'necessary for the Government to keep in view its international obligations while exercising discretionary powers under the Conservation Act'.<sup>240</sup>

Justice Pasayat finally expresses his frustration with the central and state governments for not being 'very consistent in their approach about the period for which the activities can be permitted', noting that 'it was but imperative that due application of mind should have been made before taking a particular stand'.<sup>241</sup>

### **Relevance of the case and its correspondence to the analytical framework**

In addressing, what could well be the global community on the importance of environmental protection, Justice Pasayat transforms environmental treaty law into cosmopolitan and emancipatory international law, that is, international law that transcends national boundaries and is directed at achieving ethical and globally relevant transformation. On this level, it is therefore a good example of what the proposed framework seeks to accomplish. The tools of contextualisation, proportionality and particularisation are clearly evident, and from the tone of the judgment, the justice is deeply concerned with the ethical and spiritual facets involved in the protection of the environment. These matters unfold as follows.

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<sup>238</sup> Page 15 of the judgment.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

The court draws on timeless principles which have a corresponding content in many different cultures, past and present, in a manner analogous to the jurisprudence of Justice Weeramantry, which 'incorporates the riches of the world's civilizations'.<sup>242</sup> Accordingly, the judgment is a journey through different epochs and different civilisations, which share beliefs about the importance of protecting the environment for present and future generations.

One would therefore expect a forceful vindication of environmental protection that possibly results in the immediate shutting down of the mine. Justice Pasayat, however, is more pragmatic. He considers it 'proper to accept the time period fixed by the Forest Advisory Committee constituted under Section 3 of the Conservation Act' (which allowed mining until the end of 2005).<sup>243</sup> This means that 'the weathered secondary ore available in the already broken area' would be exhausted.<sup>244</sup>

Although this ruling appears to be a volte-face which is disappointingly out of step with the thrust of rest of the judgment, there are two important qualifiers to consider. First, the mining company is not given any further rights to extend its operations (for which it had applied), and the mining of 'weathered secondary ore' would be contained in the 'already broken area'.<sup>245</sup> Second, and most important, further mining operations are made 'subject to fulfilment of the recommendations made by the Committee on ecological ... aspects', and the relevant 'modalities ... shall be worked out ... under the supervision and guidance and monitoring of the Committee'.<sup>246</sup>

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<sup>242</sup> See the discussion of the jurisprudence of Justice Weeramantry in Chapter IV 3. For example Anghie 'C.G. Weeramantry at the International Court of Justice' 14 *Leiden Journal of International Law* (2001) 829 at 832 on his 'preoccupation to ensure the construction of an international law that reflects and incorporates the riches of the world's civilizations rather than continuing its established tradition of reflecting Western values'.

<sup>243</sup> Page 17 of the judgment.

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*

With respect to the proviso, it is important to note that the Committee's recommendations are aimed at the 'winding up' of the mining operations, and entail onerous duties of rehabilitation and 'eco-restoration' to be conducted under the supervision of a Monitoring Committee, as well as the payment of monetary compensation.<sup>247</sup>

It appears therefore, that the court struck a fine balance between a 'dollar friendly' and 'eco friendly' outcome. By allowing the mining company to exhaust the remaining, previously exposed, oxidised ore in an area already despoiled, it could fulfil its contractual obligations, avoid penalties, and keep its workforce employed. At the same time, the company had to rehabilitate, reclaim and restore the area, and presumably, since extraction could continue, it would have sufficient funds for these projects.

The judgment is therefore interesting in two different ways. First, as noted above, it is both cosmopolitan and intergenerational in scope, and establishes a timeless, cross-cultural basis for the need to protect the environment. It is also emancipatory in that it challenges the existing status quo pertaining to the instant matter. It expands the ambit of the judgment however, by calling for transformation and challenging – in a global context – the perplexing issue of development needs versus environmental protection.

Second, and notwithstanding any criticism it may attract, the judgment appears to have a pragmatic rationality about it, which achieves a fair and proportionate balance between the different interests at stake.<sup>248</sup>

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<sup>247</sup> The recommendations are listed at pages 2-3 of the judgment. The amounts for 'monetary compensation' are additional to the funds that the company had to make available for rehabilitation and restoration, and were to be set aside for research and the protection of the park and other protected areas in the state.

<sup>248</sup> I note again the court's dissatisfaction with both the central and the state governments for their inconsistent allocation of timeframes for the continuation of the mining activities. See page 17 of the judgment. It can only be surmised that this impasse may also have influenced the judgment.

**(b) Japan: A 'heavy dose of Europeanization and Americanization' and the 'faithful' observance of international law<sup>249</sup>**

The dispensation under the present Japanese Constitution is far removed from the feudal regime under its forerunner, the Meiji Constitution, which placed sovereign power in the hands of the Emperor, who was believed to rule by divine right.<sup>250</sup> By swift and radical postwar intervention, Japan was catapulted from its 'mythical and historical past', wherein the Emperor was 'viewed with great awe' and 'worthy of the total self-sacrifice of each of his subjects', to an epoch of popular sovereignty founded on respect for fundamental human rights.<sup>251</sup>

The difficulties associated with a rights based Constitution, imposed by foreign victors, and without local deliberation, is highlighted by the much debated contention that the very concept of individual 'rights', and their assertion, conflict with the socio-cultural structure of Japanese society.<sup>252</sup> Notwithstanding this idea, the Constitution, and subsequent legal reform, neither created the concept of rights, nor instilled for the first time an understanding of their value. It nevertheless formalised and strengthened rights and afforded Japanese citizens

<sup>249</sup> Feldman 'Legal reform in contemporary Japan' (2007) *University of Pennsylvania Law School, Public Law and Legal Theory Research Paper Series* 3; available at: <http://papers.ssrn.com/abstract=980762> last accessed 22-06-2013.

Article 98 of the Constitution of Japan provides that 'treaties concluded by Japan and established laws of nations shall be faithfully observed'.

<sup>250</sup> For example Hook and McCormack *Japan's Contested Constitution* (2001) 4; Itoh and Beer (eds) *The Constitutional Case Law of Japan* (1978) 3-7.

<sup>251</sup> Itoh and Beer (n 250) 4; Hook and McCormack (n 250) 5. According to article 1 of the Constitution, the Emperor became 'the symbol of the state ... deriving his position from the will of the people with whom resides sovereign power'.

<sup>252</sup> Editors' comments in *Schlesinger* (n 28) 47; Feldman (2007) (n 249) 6-8, who notes that this idea was borne out by the fact that the Japanese language lacked the characters to describe the western meaning of 'rights'. Therefore, a new word, *kenri*, was created by nineteenth-century legal scholars. He points out, however, that it is erroneous to believe that concepts of rights and rights assertion were absent in the Japanese system, but rather that rights were and are asserted in different ways, many of them informal or negotiated, as opposed to having recourse to litigation. See Feldman *The Ritual of Rights in Japan* (2000). See Hook and McCormack (n 250) 5, on the historical data that the Japanese Constitution 'was born of a week's intensive brainstorming by a specially appointed panel at the direction of General MacArthur, and incredibly, that [n]ot one Japanese was on this committee'.

the opportunity to ‘articulate’, ‘reconceptualise’ and ‘assert’ these through new or different channels.<sup>253</sup>

For present purposes, the pertinent issue relates to how the Japanese courts have dealt with the conceptual shift from ‘imperial absolutism’ and ‘feudal notions of “loyalty”, service, and bureaucratic right’, to one founded on the international rights regime.<sup>254</sup>

To show that even a conservative and deferential judiciary is nevertheless able to effect emancipation, I have chosen the classic *Nakamura* case, wherein the transformation envisaged by the Constitution is mediated through contextualisation and proportionality testing.<sup>255</sup> It is a remarkable case, because it is the first time that the Supreme Court held a prospective law to be unconstitutional, and in so doing, it overturned its own precedent in two cases, delivered a mere two years previously.<sup>256</sup> This meant that some of the judges amended their previous judgments.<sup>257</sup>

### ***Nakamura et al v Japan***<sup>258</sup>

In this case, the Supreme Court must rule on whether the *jōkoku* appeal, that is an appeal by the accused, challenging the constitutionality of a previous judgment, can be entertained. The appeal against the judgment is based on the

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<sup>253</sup> Feldman (2007) (n 249) 7. I consider this argument, which centres more specifically on recent legal reform, to be germane to the present discussion of the reform ushered in by the Constitution, as alluded to by Feldman.

<sup>254</sup> Hook and McCormack (n 250) 18 and 22. They note in this regard that, ‘certain fundamental principles ... have been only partially realized’ and ‘the worthy sentiments of the constitution ... were heavily constrained’. This ‘weakness of the constitution at official or bureaucratic level in protecting human rights’ contrasts sharply with the fact that Japan has ratified all the major international conventions and is a member of the UN Commission on Human Rights.

<sup>255</sup> Id 20 on the judiciary. *Nakamura et al v Japan* (1962) 16 *Keishū* 11, Supreme Court, Grand Bench, 28 November 1962, in Itoh and Beer (n 250) 58-73.

<sup>256</sup> The previous precedent was set by the Supreme Court in *Ōmachi et al v Japan* (14 *Keishū* 1574, 19 October 1960) and *Kiyonaga v Japan* (14 *Keishū* 1611, 19 October 1960), in Itoh and Beer (n 250) 61.

<sup>257</sup> Itoh and Beer (n 250) 18. See the concurring separate judgments of Justices Toshio Irie and Katsumi Tarumi, wherein they explain their change of view, in Itoh and Beer (n 250) 62-67.

<sup>258</sup> *Nakamura* (n 255).

alleged unconstitutionality of article 118(1) of the Customs Law, namely the confiscation of ships or planes used in the commission of a crime, which was duly enforced by a lower court. The problem in the present case is that the ship thus confiscated belonged to a third party, who did not have any knowledge that a crime was being committed. It is therefore alleged that articles 29 and 31 of the Constitution were violated, which provide respectively that, property rights are inviolable, and that a person will not be subjected to any criminal penalty 'except according to procedure established by law'.<sup>259</sup>

The great difficulty (at the time of the trial) is that, from a procedural point of view, it is not possible for an accused to allege the unconstitutionality of a provision by invoking the constitutional rights of another.<sup>260</sup> Here, the 'dilemma is therefore derived from [the] absurdity' that the criminal law deprives the accused merely of possession of the confiscated property, while it deprives the third party, who is not joined in the proceedings, of his right to ownership, which 'would mean neither punishment nor education to the criminal'.<sup>261</sup> This is overtly 'extremely unreasonable and cannot be tolerated by the Constitution', all the more so because the third party has no immediate recourse, since he is not given 'notice or an opportunity for explanation or defense'.<sup>262</sup>

The court thus rules that article 118(1) of the Customs Law violates both articles 29 and 31 of the Constitution.<sup>263</sup> Doing some clever legal footwork, which circumvents the procedural dilemma, the court holds further that an accused may bring the *jōkoku* appeal, since the confiscation is 'an additional penalty against him', and that he 'obviously has an interest in the outcome because he is

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<sup>259</sup> Id 60.

<sup>260</sup> Id 66, where Justice Katsumi Tarumi explains the principle with reference to the practice of the Supreme Court of the United States, which, here, is similar to that of Japan. Also id 70-71, for a similar analysis in the dissenting opinion.

<sup>261</sup> Id 67.

<sup>262</sup> Id 60, in the majority judgment.

<sup>263</sup> Ibid.

deprived of his possession ... or because he is exposed to a possible claim for damages by the third party'.<sup>264</sup>

### **Relevance of the case and its correspondence to the analytical framework**

Dating back to the early 1960s, this case appears to be an unusual choice for substantiating the analytical framework. Yet, apart from being a striking milestone in Japanese legal history, the essence of the problems faced by the court is timeless, and similarly, its approach and solution remain timeless and highly instructive. Furthermore, as the discussion will show, the case provides perhaps one of the best examples of contextualisation and proportionality testing available, since, in the absence of legislative, or, apparently, constitutional remedies, they are the only means available to the court to achieve justice. It therefore demonstrates that these tools can be applied in the most diverse of situations and that they do not lose their usefulness over time.

There is another reason why the case is so instructive. At the time of the judgment, the international human rights norms encapsulated in the foreign Constitution were already hegemonically at odds with the local regulatory regime. As noted above, the imposed system had in fact replaced the existing one on paper, but not in the hearts of the nation. Therefore, the court's invocation of these principles (it had hitherto resisted) to achieve emancipation and justice, signals the potential for a counter-hegemonic application of international law (in whatever guise it assumes). The explanation is as follows.

*Nakamura* clearly illustrates the tension between an overarching rights regime, as demanded by 'the fundamental principles of Constitutions in modern democratic states', and a deeply entrenched tradition of bureaucratic rights and

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<sup>264</sup> Id 60-61.

privilege, as evidenced in the dissenting opinion and the precedent set in the two previous cases, which dealt with a similar matter.<sup>265</sup>

The separate opinions show that the court is torn between the 'immediate attention' required by the matter, which means 'meeting the demands for justice and equity to resist deprivation of a third party's ownership by an unconstitutional procedure', and the danger of delivering an 'abstract judgment on dubious arguments in anticipation of the future'.<sup>266</sup> The dissenting opinion holds that the approach adopted by the majority 'is completely a formalism' (sic) and does not provide 'reasonable grounds' for a sound constitutional theory.<sup>267</sup> Since both sides produce cogent arguments, how can the divergent outcomes be explained? Closer analysis suggests that the difference of opinion is rooted in contrasting approaches to contextualisation and proportionality analysis. The argument is as follows.

The dissenting opinion holds that the present appeal cannot be brought by the accused, who did not 'allege or prove that they have suffered actual concrete detriment'.<sup>268</sup> Moreover, it is not 'necessary to make a constitutional judgment', since the third party owner 'may institute an administrative lawsuit against the state claiming return of the confiscated thing'.<sup>269</sup> The opinion therefore focuses on the legalistic technicalities of the matter, and does not contextualise the facts of the case with reference to the actual situation of the parties. It suffices that justice is 'out there', and can be sought in the abstract. Hence, with reference to the affected party, there is no consideration of proportionality, such as questioning the reasonableness of, or logical nexus (or lack thereof) between the provision for confiscation and its purpose.

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<sup>265</sup> Id 62. *Ōmachi et al v Japan* (14 *Keishū* 1574, 19 Oct. 1960) and *Kiyonaga v Japan* (14 *Keishū* 1611, 19 October 1960) at id 61. See Hook and McCormack (n 250) 18 on the tight hold of the bureaucracy on the country.

<sup>266</sup> Id 67, the concurring opinion of Justice Katsumi Tarumi; and id 69, the dissenting opinion of Justice Masuo Shimoizaka.

<sup>267</sup> Id 72.

<sup>268</sup> Id 72.

<sup>269</sup> Id 72.

In contrast, the majority judgment and concurring opinions, centre the argument on the dictates of justice, equity and reasonableness within the given context.<sup>270</sup> Purposive contextualisation finds that to require the owner to institute a separate lawsuit is inappropriate, since it will require ‘much energy, money, and time’, and because ‘fair procedural rules ... may not be actually operable’.<sup>271</sup> Consequently, the justices note that the disproportionate hardship imposed by the Customs Law on the third party, cannot be ‘tolerated by the Constitution’, and furthermore, that an imbalance is created by the correlative lack of ‘punishment [and] education’ relative to the accused.<sup>272</sup> Hence, the provision and previous precedent fail the proportionality test.

This case therefore demonstrates how the court mediates, with emancipatory results, between the international rights system, as imposed by the (imposed) Constitution, national tradition and precedent, and the subjective context of affected persons. It does this by being open to divergent realities, and, in particular, through effective contextualisation and the proportionate balancing of interests. The judgment is beyond doubt emancipatory, not only as far as the aggrieved third party in this case is concerned, but also because ‘the Diet promptly passed a law providing a third party to a crime with notice and hearing before confiscation’.<sup>273</sup>

## 9. Judgments from Europe

The potential for normative conflict between international, national and subnational regimes underlies every aspect of the present study, and highlights the need to develop a framework for dealing with such conflict and the correlative balancing of triangulated interests. In the European, notably EU, context

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<sup>270</sup> For example, id 67.

<sup>271</sup> Id 65.

<sup>272</sup> Id 60 and 67.

<sup>273</sup> Itoh and Beer (n 250) 19.

however, many of the difficulties, which arise at any confluence of competing and hierarchically situated orders, are compounded by the introduction of an additional hierarchical level of EU law.

Hence, both the contextualisation of a matter, and the proportionate balancing of interests at various levels become more complex, because these processes must often accommodate the EU dimension.<sup>274</sup> Furthermore, in the face of the transnational EU layer of regulation – one that is imbued with great authority and directly affects the relevant national systems – issues such as the preservation of state sovereignty and cultural identity, become even more convoluted and contentious.<sup>275</sup> By the same token, EU law shows strong allegiance to the greater body of international law, which strengthens the authority and effectiveness of the latter, thus placing further strain on national and subnational identities.<sup>276</sup>

It is also noteworthy that the EU web extends to countries, such as Turkey, which are bidding for accession to the EU, and therefore strive to harmonise their national laws with EU law.<sup>277</sup> This further multiplies the overall plurality of normative orders and increases the potential for conflict, and also for the hegemonic imposition of transnational norms.<sup>278</sup>

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<sup>274</sup> On the issue of proportionality in the European context, see for example Van Dijk et al *Theory and Practice of the European Convention on Human Rights* 4 ed (2006) 334-342. See in general Kumm 'Democratic constitutionalism encounters international law: Terms of engagement' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 265-266.

<sup>275</sup> See Besson 'Sovereignty in conflict' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) 151-177, on the implications for state sovereignty in particular; Kumm (n 274) 64-268, 280-284, on the principle of subsidiarity; Walker 'The migration of constitutional ideas and the migration of the constitutional idea: The case of the EU' in Choudhry (ed) *The Migration of Constitutional Ideas* (2006), for an assessment of the many problems associated with EU integration; and see n 278 below.

<sup>276</sup> See for example Kumm (n 274) 281-291.

<sup>277</sup> Tzagourias 'International community, recognition of states, and political cloning' in Warbrick and Tierney (eds) *Towards an 'International Legal Community'?* (2006) 232-237, on the 'cloning' or replication of a 'model state', which is required from states wanting to accede to EU membership. See the discussion of Turkey in (b) below.

<sup>278</sup> For example Örüçü 'Diverse cultures and official laws: Multiculturalism and Euroscepticism?' (2010) 6(3) *Utrecht Law Review* 75; see also Teubner 'Legal irritants: Good faith in British law or how unifying law ends up in new divergences' (1998) 61(1) *Modern Law Review* 11, on the

To get a picture of how courts accommodate national and subnational interests within a supraprstate framework consisting of both transnational and international orders, I have chosen cases from two countries at almost opposite ends of the political EU spectrum, Germany and Turkey. One is an economic and political powerhouse, while the other is still striving to be fully embraced by the community of EU members. These factors may have a bearing on their respective approaches to international law as discussed below.

**(a) Germany: ‘Friendliness’ to international law even when it strains the domestic legal identity?**

The German legal system leans strongly toward monism, since ‘the general rules of public international law ... take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory’.<sup>279</sup> Additionally, on the interpretation of article 59 of the Constitution, ‘duly ratified treaties are part of German law and enjoy the same status as federal statutes’.<sup>280</sup> Courts are also tasked with rendering judgments in conformity with the international obligations of the country.<sup>281</sup> In this, the courts diligently fulfil their ‘special role ... in ensuring the observance of international law by the Federal Republic of Germany’.<sup>282</sup>

Therefore, and contrary to the situation in many other jurisdictions, in Germany, the question is not whether courts can, or ought to place reliance on international and regional instruments and decisions. The question is rather, to what extent these should be allowed to dominate the domestic legal system and the expression of Germany’s national identity.

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‘infecting virus’ of foreign elements entering the domestic domain (here: British law) in consequence of EU law.

<sup>279</sup> Article 25 of the Constitution (*Grundgesetz*).

<sup>280</sup> Paulus ‘Germany’ in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 209.

<sup>281</sup> Paulus (n 280) 209-212, which includes a discussion of the additional complexities of conformity to European Community law and further complications relative to questions of regime supremacy.

<sup>282</sup> Paulus (n 280) 222-223.

The Federal Constitutional Court (*Bundesverfassungsgericht* / BVerfGE) confronted this issue squarely in the well-known *Maastricht* case, which addresses the balancing of the respective competencies of Germany and the EU.<sup>283</sup> In so doing, it carved out a distinct niche for Germany's national identity and legal regime.<sup>284</sup> The court established the important principle that when EU law extended beyond its competences, such law might be nonbinding in Germany.<sup>285</sup>

In the following case, the BVerfGE had to concretise the abovementioned parameters with reference to the standard of democracy adopted in Germany. In particular, the court had to weigh up the constitutional standard of democracy against the possible domestic effect of an international treaty.

### **The *Waldschlösschen* case**<sup>286</sup>

The Dresden Elbe Valley was declared a World Cultural Heritage site in 2004 by the World Heritage Committee, established under the UNESCO Convention for the Protection of the World Cultural and Natural Heritage.<sup>287</sup> In 2006, however,

<sup>283</sup> BVerfGE 89, 155 Decision of the German Federal Constitutional Court of October 12, 1993 *In Re Maastricht Treaty*. English translation available at: [http://www.judicialstudies.unr.edu/JS\\_Summer09/JSP\\_Week\\_1/German%20ConstCourt%20Maastricht.pdf](http://www.judicialstudies.unr.edu/JS_Summer09/JSP_Week_1/German%20ConstCourt%20Maastricht.pdf) last accessed 02-03-2013.

<sup>284</sup> For example at page 24 (of the translated judgment), the court determined that it is member states themselves, who 'through the Treaty [of Maastricht], provide the means and set the objectives for the Union'; and at pages 32-33 (of the translated judgment) the court finds that the underlying principle of reasonableness 'includes a fundamental prohibition of excess', which protects 'the national identity of the Member States and the responsibilities and powers of their parliaments against excessive European regulation'.

<sup>285</sup> For example at page 32 (of the translated judgment): '... the fact that the Maastricht Treaty draws a basic distinction between the exercise of limited sovereign powers and amendment of the Treaty will have to be taken into consideration. Thus interpretation of such standards may not have an effect equivalent to an extension of the Treaty; indeed, if standards of competence were interpreted in this way, such interpretation would not have any binding effect on Germany.' See also Paulus (n 280) 213, 223.

<sup>286</sup> BVerfG, 2 BvR 695/07 of 29-5-2007 available at: [http://www.bverfg.de/entscheidungen/rk20070529\\_2bvr069507.html](http://www.bverfg.de/entscheidungen/rk20070529_2bvr069507.html) (in German, own translation) last accessed 01-03-2013.

<sup>287</sup> Convention of 16 November 1972 1037 UNTS 153 which was ratified by Germany, but it was not deemed the type of treaty that needed Parliamentary approval. See Paulus (n 280) 240. See in general, Zacharias 'The UNESCO regime for the protection of world heritage as prototype of an

as a consequence of plans to build a bridge across the Elbe River, the so-called Waldschlösschen Bridge, the site was placed on the list of endangered sites, since it was deemed that the construction of the bridge would cause irreversible damage to the cultural heritage.<sup>288</sup> Continuation of the project would result in the delisting of the valley as a heritage site.

In a preliminary hearing, the Constitutional Court must decide on the admissibility of a complaint by the City of Dresden, through which it attempts to prevent construction of the bridge. At issue was a legally binding referendum by citizens in 2005, who had voted in favour of the construction of the bridge, and specifically whether this outcome should prevail over Germany's obligations at international law.<sup>289</sup> The matter therefore touched on one of the cornerstones of the German constitutional identity, democracy. This is because democracy is one of the 'basic' constitutional principles upon which the Federal Republic is founded.<sup>290</sup> Along with important principles such as human dignity, any constitutional amendments purporting to change it, and other 'basic' principles, 'are inadmissible'.<sup>291</sup>

In balancing the weight of direct democracy at regional level against the broad international framework created by the Convention, the court endorses the referendum as a valid expression of the democratic will of the citizens.<sup>292</sup> It reasons that the Convention assumes an international dimension, which

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autonomy-gaining international institution' (2008) 9(11) *German Law Journal* 1833 and in particular 1863-4 concerning the present matter.

See the reasons for inclusion of the valley as a heritage site at:

<http://whc.unesco.org/en/list/1156> last accessed 02-03-2013, for example, 'the Dresden Elbe Valley is an outstanding cultural landscape, an ensemble that integrates the celebrated baroque setting and suburban garden city into an artistic whole within the river valley ... The area is characterized by its cultural values, but it has also valuable natural features and protected biotopes.'

<sup>288</sup> Paras 2 and 3-4 for the general background.

<sup>289</sup> Paras 4 and 18, where the court refers to the duty of all state organs to display 'international law-friendly conduct' ('[die] Pflicht zu völkerrechtsfreundlichem Verhalten').

<sup>290</sup> Article 20 of the Constitution.

<sup>291</sup> Article 79 of the Constitution.

<sup>292</sup> Para 35.

recognises the sovereignty of state parties, and that these parties are first and foremost responsible for the protection of sites of cultural and natural heritage.<sup>293</sup> On the other hand, the Convention, in its overall scheme and wording does not absolutely preclude changes to the registered sites.<sup>294</sup>

Against this backdrop, the court reasons that, from a constitutional perspective, it is possible that the democratic will of the citizens will prevail in the development of heritage sites.<sup>295</sup> The court therefore ruled that it will not entertain the constitutional complaint, and that this fact consequently disposed of the application for a temporary injunction.<sup>296</sup>

### **Relevance of the case and its correspondence to the analytical framework**

This case illustrates a vital point in terms of the framework. As noted repeatedly, the aim of the framework is to ensure that the ultimate *effect* of international law in a particular case is cosmopolitan and emancipatory. This means that by using the principles of international law, the court in question resists hegemony and oppression of *any* kind. Importantly, such hegemony could include that of international law, in which case the court must resist its oppressive features. In practical terms, this might require the non-application of international law in certain instances. Yet, the framework also cautions against the proverbial ‘throwing the baby out with the bathwater’, and advocates that the cosmopolitan and emancipatory features of international law be retained and strengthened to ensure its ultimate reconstruction.

In isolating hegemonic elements, international, national and subnational contexts will play a decisive role. Moreover, apart from contextualising a matter, the court must also ascribe the correct relative weight to the various interests at

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<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid.*

<sup>296</sup> Para 41.

each level, as emphasised in the framework. As I explain next, in this judgment, the court uses these tools self-consciously to prevent the international regime (the Heritage Convention) from subverting domestic interests, yet it is careful to leave sufficient room for the non-hegemonic rationale behind the international provisions to be preserved.

As noted above, German courts, through their jurisprudence and in line with constitutional provisions, adopt an open and 'friendly' approach to international law and international imperatives in general.<sup>297</sup> Thus, in a conflict between national and international interests, there may be the danger that courts would automatically bow to the dictates of international and regional regimes.<sup>298</sup>

The *Waldschlösschen* case is therefore a pertinent example of a court resisting unbridled conformity to international treaty law, by having proper regard for the nation's legal identity and its foundational principles. Even so, the court does not simply reject the applicability or importance of the Convention, nor does it side-step the duty of all organs of state to display 'international law-friendly conduct'.<sup>299</sup> Instead, the court carefully weighs the interests at stake. It does not subscribe to a binary choice between domestic and international concerns, but, as noted above, attempts to delimit the sphere of operation of the Convention in such a way that it remains relevant at national level, although its authority does not necessarily extend to regional level.<sup>300</sup>

The court says forthrightly that its decision could have potential disadvantages, notably the Dresden Elbe Valley's loss of its heritage status and reputation. While the court pragmatically holds that such eventuality must be accepted, this outcome is tolerated on the basis that a compromise could not be

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<sup>297</sup> See for example the Preamble to the Constitution, and article 25; para 18 of *Waldschlösschen* (n 17); Paulus (n 280), and n 298 below.

<sup>298</sup> See Paulus (n 280) 209-211 on the potential for conflict, but that the task of courts 'is to allow Germany to fulfil its international obligations by faithfully interpreting German law in accordance with Germany's international obligations, in particular treaty obligations'.

<sup>299</sup> See n 289 above.

<sup>300</sup> Para 35.

found through the negotiation processes which preceded the hearing.<sup>301</sup> In other words, the court decision was taken after a long line of intervening circumstances and reasons had been taken into account.

Hence, in this particular balancing act, the court does not allow a generally worded international treaty to make inroads into the constitutional niche reserved for the defining principle of democracy. Yet, it also does not detract from the importance of the Convention at national and international levels. In essence, the court guards simply against any potentially hegemonic application of international law. It nevertheless takes all three levels, international, national and local, into account.

#### **(b) Turkey: Complex navigations**

Turkey has frequently been referred to in this study, because of its intriguing socio-cultural and legal divide. Ninety-eight percent of the population adheres to the Islamic faith, and is predominantly 'rural and has a traditional outlook'.<sup>302</sup> The domestic legal system is nevertheless a secular, westernised model that borrowed voluntarily and extensively from Swiss, German, French and Italian sources.<sup>303</sup> Thus, 'the indigenous socioculture is not related to the sociocultures of the source laws', which places the judiciary in the invidious position of mediating between the official legal system and the culturally embedded living law, which are often at variance with each other.<sup>304</sup>

Cases dealing with the traditional family structure, such as those concerned with the position of the wife, are particularly problematic. For example, should the court acknowledge that, in terms of prevailing 'Turkish realities', the wife is *not* in the 'equalised and modernised' position envisaged by legislation,

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<sup>301</sup> *Ibid.*

<sup>302</sup> Örucü (2008) (n 2) 41.

<sup>303</sup> *Id* 40.

<sup>304</sup> *Ibid.* See *id* 43-59 and Örucü *The Enigma of Comparative Law* (2004) 108-123, for many pertinent examples of certain very difficult cases.

the strict application of which might be very detrimental to her?<sup>305</sup> In view of this, should the court therefore 'protect' 'illiterate women who would sign any piece of paper under threat from their husbands', which could raise the presumption that courts treat women as 'less intelligent and less capable'?<sup>306</sup>

Thus, the courts in Turkey have become greatly skilled at dealing with the implications of normative plurality, and at mediating between (presumably) objective, 'monolithic law' and socio-normative reality.<sup>307</sup> As noted however, the matter does not end here, since Turkey, apart from having to fulfil its international obligations, is also striving to harmonise its approach with the EU transnational regime. The following case illustrates how the Constitutional Court (*Anayasa Mahkemesi*) strikes a balance between 'cultural exceptionalism' and homogenisation of this nature.<sup>308</sup>

### **Primary Education Case Number 1997/62<sup>309</sup>**

In this case the *Anamuhalefet Refah Partisi* (main opposition Welfare Party) challenges a law, which increases the duration of primary school education from five to eight years, on the basis that it interferes with the religious education of young children.<sup>310</sup> The appeal is based on, inter alia, the argument that it is

<sup>305</sup> Örucü (2008) (n 2) 56.

<sup>306</sup> Ibid.

<sup>307</sup> Ibid and id 35-36. Note how the Constitutional Court (*Anayasa Mahkemesi*) deals with the abovementioned issues, by recognising that a wife might act under her husband's influence, and that a provision aimed at protecting women, served also 'to protect the unity of the family and [was] in the public interest'. The particular provision in question was however, subsequently 'modernised'. The issue of normative plurality goes even deeper, in that the population, although predominantly Muslim, adheres to different sects. See Örucü (2008) (n 2) 41.

<sup>308</sup> Id 53-54.

<sup>309</sup> 1997/62; 1998/52; 16.9.1998 *Resmi Gazete* 24206. Available at:

[http://www.anayasa.gov.tr/index.php?l=manage\\_karar&ref=show&action=karar&id=1420&content=refah%20partisi](http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=1420&content=refah%20partisi) (in Turkish) last accessed 18-04-2013.

It proved singularly difficult to obtain a copy of the case and I wish to thank Harun Şahin of the Constitutional Court for providing me with the link. A translation proved considerably more difficult to obtain and ultimately I had to make use of an electronic translation of regrettably poor quality. It nevertheless provided the gist of the matter, which, in conjunction with Prof. Örucü's analysis, I regard as sufficiently instructive for present purposes. Please note that there are no page or paragraph numbers.

<sup>310</sup> Örucü (2008) (n 2) 54 and Part I.B of the judgment.

unconstitutional and in contravention of the European Convention on Human Rights (ECHR).<sup>311</sup>

The court considers the matter from the many different angles presented to it by the appellant, but centres its reasoning on the characteristics of the national order created by the Constitution.<sup>312</sup> One key attribute of the Turkish state is its respect for human rights, and hence the court considers the 'supranational' order created by important instruments at the international level, such as the Universal Declaration of Human Rights (UHDR), and at the European level, the ECHR.<sup>313</sup> The court specifically notes the strong correlation between the Turkish Constitution and the legal order created by it, and the human rights principles and requirements of democracy and the rule of law contained in the abovementioned supranational instruments.<sup>314</sup>

Notwithstanding the rapport between the national and supranational, the court places great emphasis on the need to preserve the integrity of the constitutional order, by construing individual rights and freedoms (and their limitations) in a way that balances and harmonises them within the greater constitutional system.<sup>315</sup>

Next, the court analyses other core principles underlying the Turkish state, notably democracy and secularism.<sup>316</sup> It determines that democracy requires a balancing of majority and minority interests, which means that minority rights and

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<sup>311</sup> With particular reference to ECHR articles 9, the right to freedom of thought, conscience and religion, and 10, the right to freedom of expression, and article 2 of Protocol I, the right to education, which provides for the 'right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'. See Van Dijk et al (n 274) 751-771, 773-816, 895-910 respectively.

<sup>312</sup> Part I.A of the judgment, where the court determines that the decision will involve the six main attributes of the State as defined by the Constitution, three of which I discuss below.

<sup>313</sup> Part I.A.2 of the judgment.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

<sup>316</sup> Parts I.A.3 and 1.A.4 respectively.

hence, pluralism, are respected, and that tolerance for different ideas is a basic requirement.<sup>317</sup>

Insofar as Turkey is a secular state, which implies the separation of religion and state, the state is required to be neutral in matters of religion and worship, but is nevertheless to recognise and protect freedom of religion and conscience.<sup>318</sup>

After an in depth analysis of the relevant constitutional provisions, the court rules that the contested legislation is not unconstitutional, and that the rights entrenched in the ECHR have not been violated, since the law does not interfere with religious freedom, and 'there is no limitation or prohibition on the choice parents have on the child's religious education'.<sup>319</sup>

### **Relevance of the case and its correspondence to the analytical framework**

A prominent and welcome feature of this case is the court's explicit and step-by-step explanation of the importance of proportionality, and of showing how it goes about balancing interests, which here, exist at four levels of regulation – international, regional, national and subnational, representing four layers of socio-cultural concerns and values. It is also a particularly noteworthy example of how a court may navigate a situation where a deeply entrenched subnational regime vies with other levels of regulation.

In this balancing exercise, the court particularises supranational elements and harmonises them with the national context. It does this by not merely rubberstamping the applicability of international and regional law. Rather, the overarching national interest, as encapsulated in the Constitution, is the deciding factor.

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<sup>317</sup> Part I.A.3.

<sup>318</sup> Part I.A.4.

<sup>319</sup> Örüçü (2008) (n 2) 54, quoting from the case.

Yet, although the court bases its decision on the constitutional provisions which define the Turkish state, it harmonises them with other layers of regulation by exploring their correspondence with both international and European 'supranational' regimes, which have become 'part' of the fabric of Turkish law.<sup>320</sup> On the other hand, the court acknowledges that, despite the secular nature of the state, the vast majority of the population is Muslim, and that its religious freedom must be protected.<sup>321</sup>

At this convergence of systems-within-systems, the court explicitly recognises its mandate to balance and harmonise opposing rights and freedoms. In fact, the court says that one of the reasons for its *existence* is precisely to provide such balance.<sup>322</sup> Thus, the court does not simply give way to the 'tidal wave' of regulatory demands from the EU.<sup>323</sup> For the reason that it insists on deciding the matter in a cosmopolitan way that does not disturb the integrity of the national system, and verifying that subnational, religious interests have not been disregarded, the court ensures that the application of supranational rules is non-hegemonic.<sup>324</sup>

Thus, the court uses all the tools, that is, contextualisation, proportionality and particularisation to mediate in an ethical-practical manner between the different normative layers, before endorsing the transforming legislation. It can be argued that the effect of the judgment is emancipatory, since it protects the development of a sound educational system, yet keeps it within the relevant contextual boundaries.

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<sup>320</sup> Part I.A.2.

<sup>321</sup> Part I.A.3 and 4.

<sup>322</sup> Part I.A.3.

<sup>323</sup> Özüçü (2008) (n 2) 54.

<sup>324</sup> Part I.A.2.

## 10. Conclusion

The present chapter has been a journey through cases that instantiate the key concepts examined throughout the study, and it serves to give substance to, and prove the validity of the three-dimensional framework, which has been the research project of this thesis.

The chapter's main purpose was therefore to test the feasibility of the two-part theory. It states that, first, through proper domestic judicial mediation, international law can be applied in a cosmopolitan and emancipatory manner, and that, second, by means of such application, it can be reconstructed from the bottom up. Hence, the selection of cases provided correlative examples of how the judiciary might deal with issues of competing interests and normative conflict at different hierarchical levels of regulation. The main points established by the survey are the following.

It was apparent that courts adopt various approaches to accommodate the transfer of norms and values from the international to the (pluralistic) domestic sphere, which, as explained, creates a three-dimensional context. The cases showed that, because justice and emancipation are inescapably rooted in such a context, judgments, which successfully balance opposing interests, depend initially on the quality of the contextualisation, after which, courts are able to weigh the relevant interests and particularise international norms.

From the present perspective, the mediatory role envisaged for courts therefore implies the balancing of contradictory contextual positions in a spirit of ethical cosmopolitanism, instead of one that reduces adjudication to binary

choices.<sup>325</sup> The chapter established that courts are in fact able to achieve such emancipatory mediation, specifically by employing the jurisprudential 'tools' (although often not by name) of contextualisation, proportionality and particularisation. Furthermore, the jurisprudence of these courts is underscored by ethical-practical rationality, as advocated in this thesis.

On the basis of actual court practice, I therefore conclude that international law can indeed be applied and reconstructed in a cosmopolitan and emancipatory manner by domestic courts. This means that, in specific cases, domestic courts have the ability to achieve the greatest compound benefit with reference to all the relevant participants at international, national and subnational levels. I conclude further that the functionality of the three-dimensional framework, which, as demonstrated by the cases, promotes such application and reconstruction, has thereby been validated.

Lastly, the survey attests to the capacity of the three-dimensional framework to serve as a jurisprudential model for a comprehensive, aspirational bottom up reconstruction of international law as a system. This process is initiated through the cosmopolitan and emancipatory jurisprudence developed in individual domestic courts, such as those examined here, which flows up and across, to meld with similar judgments from other courts, thereby creating a body of 'new', cosmopolitan and emancipatory international law.

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<sup>325</sup> See for example Hinz *In Search of Justice and Peace* (2010) 16. Also Örucü (2008) (n 2) 59, on Turkey, where the official legal system 'performs a balancing act' between maintaining a 'firm stance' and allowing 'traditionalist views to be heard'.

## CONCLUSION

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*The embrace of diversity need not end in dissolution of international law, but may enrich its contribution to international society.*<sup>1</sup>

*[P]ause before judging ... listen before speaking, and ... widen one's views before narrowing them.*<sup>2</sup>

Can international law be reconstructed to be truly cosmopolitan and emancipatory? Whether it will in fact become sufficiently 'new' to embrace the rich diversity of humanity is unknown. That international law *must* become more just and representative is certain. The pressures of globalisation and the nature of globalised problems are such that a western- (or any other-) centric construction of the world order is simply untenable, if not ultimately disastrous for the survival of humans and other living things.

This study consequently sought to establish that international law, as we know it today, contains the seeds, necessary for its reconstruction in a manner that would justify the claim that it is 'international'. I argued that many of its perceived shortcomings represent fertile middle spaces from which new normative configurations can emerge. I maintained further that, the value system encoded in international law permits its cosmopolitan and emancipatory application and reconstruction. Correspondingly, the study supports the conclusion that, just as international law can be hegemonic and oppressive, it can also be counter-hegemonic, cosmopolitan and emancipatory.

But, will the judiciary seize the opportunity to apply it thus? Will the judiciary take its ethical responsibility to promote cosmopolitan and emancipatory international law seriously, and thereby facilitate its reconstruction? The proposed three-dimensional framework examined the theoretical soundness of

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<sup>1</sup> Paulus 'International law after postmodernism: Towards renewal or decline of international law?' (2001) 14 *Leiden Journal of International Law* 727 at 753.

<sup>2</sup> Hinz (ed) *In Search of Justice and Peace* (2010) 17, quoting the anthropologist Michael Brown.

such a possibility, and substantiated by the survey of case studies, show that this outcome is feasible.

For purposes of the study the judiciary is construed in the abstract. Thus, as an institution, and reified as 'the court', the judiciary is deemed to act as a unified body. Nevertheless, one cannot forget that the domestic system is also greatly exposed to the will and whim of individual judges who constitute it. The thesis does not deal with this aspect, which is better suited to another, possibly cross-disciplinary, inquiry. It must be noted, however, that individual judges can greatly help or hinder the processes of reconstruction, first, through their adoption of a particular ideological or political stance, and, second, through their influence outside their given domestic jurisdictions.<sup>3</sup>

Judges are mobile. They serve on panels, committees and commissions, and may act as judges in regional and international courts. They write books and give lectures. In all this, they infuse their work with a particular philosophy that can create a ripple effect in respect of the emancipatory reconstruction of international law, or, conversely, in respect of its hegemonic stagnation. The point is, however, that such judicial activity has the potential to reinforce cosmopolitanism and emancipation at a global level – and all the more so, if

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<sup>3</sup> Justice Richard Goldstone is a good example of both aspects mentioned. As a judge under the apartheid era (and later as Constitutional Court judge), he sought to achieve justice from within the system, similar to the aspirational role for domestic courts described in the present study. Goldstone famously said, 'in my view, if a judge is to err, it should be on the side of defending morality'. See Bass *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2002) Princeton University Press 220. He maintained that 'judges have a duty to act morally, and if they're dealing with laws which have an unjust effect, I think it's their duty – if they can, within the powers they've got legitimately – to interpret the laws and give judgments which will make them less harsh and less unjust'. See:

<http://www.nytimes.com/1993/03/08/world/cape-town-journal-in-a-wary-land-the-judge-is-trusted-to-a-point.html> last accessed 30-06-2013.

Apart from his emancipatory contribution to the South African justice system he has been most influential at international level. For example, he taught as a visiting professor in a number of different law schools; from 1994 to 1996, he was the chief prosecutor of the UN International Criminal Tribunals for the former Yugoslavia and Rwanda; and he was a member of the committee appointed by the UN Secretary-General to investigate allegations concerning the Iraq 'Oil for Food Program. In 2009, he led the important and controversial UN Fact Finding Mission on Gaza. See for example:

<http://www.law.virginia.edu/lawweb/Faculty.nsf/FHPbl/2386597> last accessed 01-07-2013.

judges view their contribution in the light of their ethical responsibility to achieve the optimal compound benefit at national, subnational and international levels, as explained in the study.

On the other hand, (whether as institution or as a group of individual judges) the judiciary is a branch of the state machinery, and is both empowered and delimited by national law and national constitutions. Thus, the domestic court is always subjugated to a statist paradigm. In this regard, it was pointed out that state sovereignty is conceptually and uncomfortably at odds with international law, and even more so with a Utopian vision of global solidarity. The state might therefore continue to pose one of the greatest hurdles to the reconstruction of international law.

Furthermore, the concept of a sovereign nation-state, fortifies the idea that social structure is inexorably linked to a geopolitical place. In this way, ideologically, democracy and its various (apparently) noble features, such as participation, representation and accountability – which are, paradoxically, encouraged by international law – are also construed within statist parameters.<sup>4</sup> Thus, the geopolitical and mental boundaries created by the state, and related notions about sovereignty and democracy, are essentially inimical to cosmopolitanism and hence, to the cosmopolitan and emancipatory reconstruction of international law.

Yet, clearly, the 'story' of international law and the state does not end there. Just as democratic states, and even not-so-democratic ones, circumscribe the reach of international law, they also self-consciously ascribe value to it, whether of necessity, or as a 'kind of secular faith' and as 'placeholder for the vocabularies of justice, goodness solidarity [and] responsibility'.<sup>5</sup> Even states, like

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<sup>4</sup> See Marks *The Riddle of all Constitutions* (2000) on democracy, the state and international law.

<sup>5</sup> Koskeniemi 'The fate of public international law: Between technique and politics' (2007) 70(1) *Modern Law Review* 1 at 30.

the United States and Russia, which tend to resist the influence of international law in domestic matters, are quick to use it to justify their actions.<sup>6</sup>

The state is the quintessential Pygmalion of international law. It has created the regime and has chiselled most of its features. Nevertheless, international law has assumed a life and energy of its own. States may not always be pleased with their creation, but they also cannot ignore its importance. With so many reasons for states to participate globally, whether founded on need, hope, fear or guilt, the relevance and scope of international law is bound to increase. Thus, one can perhaps predict that, if not lured by the beauty of an egalitarian and Utopian world order, states, including their courts, might be compelled by global tensions and looming disasters to accept that a cosmopolitan and emancipatory reconstruction of international law must be accomplished.

What might be inimical to such reconstruction, however, is the apparent built-in hubris present in human nature itself, as manifested in discrimination on the archetypical grounds of race, sex, religion, and not to be forgotten, nationality. National pride is usually construed in a positive light. It can nevertheless simply be an excuse for bigotry, which stifles cosmopolitanism and the will to create a peaceful world order. Although there seems to be little cure for 'the artifice of kinship and its fantasies of primordial connections', the recent history of international law has proved two things in this regard.<sup>7</sup>

First, regardless of any ingrained exclusionary traits, states, communities and individuals everywhere rely on the promise of a transcending good represented by international law. They employ it as sword and shield against injustice, and appeal to it to ward off global ills. Second, notwithstanding overt

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<sup>6</sup> See Butler 'Russian Federation' 410-447 in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) and Sloss 'United States' 504-554 in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009).

<sup>7</sup> Stevens 'Recreating the state' in Falk et al (eds) *International Law and the Third World* (2008) 54.

handicaps, international law can deliver, and has delivered, much good to its participants and recipients, even in the face of their conflicting interests.<sup>8</sup> It has filled regulatory lacunae, and has proved to be a safety net to a fragmented spectrum of beneficiaries.

As to the future of international law, I therefore do not place reliance on imponderables, such as the dismantling of the nation-state, or a new epoch in human development, wherein we shed our nationalist, racial and cultural arrogance. Instead, I propose in this study, that we utilise the known paradigms, which – much like the rays of light in both renditions of *Guernica* – could support a Utopian reconstruction of international law, for the attainment of justice and emancipation in honour of, and in spite of, diversity.

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<sup>8</sup> See Baxi 'What may the "Third World" expect from international law?' in Falk et al (eds) *International Law and the Third World* (2008) 17-18 on the beneficial 'accomplishments' of international law.



## TABLE OF CASES

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### NATIONAL COURTS

#### Argentina

Comunidad Mapuche Paichil Antreao y otro c/Provincia del Neuquén s/ Acción de Amparo (Expte. 15.320 - Año 2003) available at <http://odhpi.org/wp-content/uploads/2012/07/amparo-paichil-JUNIN.pdf> (in Spanish)

#### Australia

Minister for State for Immigration and Ethnic Affairs v Teoh [1995] HCA 20; (1995) 183 CLR 273

Re Minister for Immigration and Multicultural Affairs; Ex parte Lam [2003] HCA 6; (2003) 195 ALR 502

#### Botswana

Attorney-General v Dow 1994 (6) BCLR 1

Macheme v Ndlovu (CACLB 035/08) [2009] BWCA 49 (30 January 2009)

Mosetlhanyane and Matsipane v The Attorney General Case No CACLB-074-10, judgment of 27 January 2011

Sesana and Others v Attorney General (52/2002) [2006] BWHC1, available at <http://www.saflii.org/cgi-bin/disp.pl?file=bw/cases/BWHC/2006>

#### Canada

Ahani v Canada (A.G.) (2002), 58 OR (3d) 107, 208 DLR (4th) 66 (C.A.)

Baker v Canada [1999] 2 SCR 817

Bruker v Marcovitz [2007] 3 SCR 607, 2007 SCC 54

Corbiere v Canada [1999] 2 SCR 203 (Can)

Delgamuukw v British Columbia [1997] 3 SCR 1010 (Can)

#### France

D v France, Application No. 10180/82, December 6, 1983, D.R. 35

#### Germany

Waldschlösschen BVerfG, 2 BvR 695/07 of 29.5.2007 available at [http://www.bverfg.de/entscheidungen/rk20070529\\_2bvr069507.html](http://www.bverfg.de/entscheidungen/rk20070529_2bvr069507.html)

#### India

Apparel Export Promotion Council v Chopra [2000] 1 LRC 563

Lackshmi Kant Pandey v Union of India AIR 1984 SC 469

Visaka v State of Rajasthan [1997] 3 LCR 361

### **Japan**

Kiyonaga v Japan (14 Keishū 1611, 19 October 1960)

Nakamura et al v Japan (1962) 16 Keishū 11, Supreme Court, Grand Bench, 28 November 1962

Ōmachi et al v Japan (14 Keishū 1574, 19 October 1960)

### **Kenya**

M v P Court of Appeal, Civil Appeal No 11 of 1979 at Nairobi 17 April 1980

Senior Resident Magistrate's Court at Maúa, Civil Case No. 109 of 1997

### **Malawi**

R v Khoviwa [2010] MWSC

In Re: The Adoption of Children Act CAP 26:01; In Re: CJ A Female Infant (MSCA Adoption Appeal No 28 of 2009) [2009] MWSC 1 ('Adoption of CJ')

In Re: David Banda (Adoption Cause No 2 of 2006) [2008] MWHC 3

### **Seychelles**

Hans Josef Hackl v The Financial Intelligence Unit and The Attorney General Seychelles Court of Appeal SCA 10 of 2011

### **South Africa**

Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae) 2005 (1) BCLR 1 (CC)

Daniels v Campbell and Others 2004 (5) SA 331 (CC)

Daniels v Campbell NO and Others [2003] 3 All SA 139 (C)

Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC)

Ismail v Ismail 1983 (1) SA 1006 (A)

Koyabe and Others v Minister for Home Affairs and Others 2010 (4) SA 327 (CC)

Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC)

MEC for Education: Kwazulu-Natal and Others v Pillay 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC)

MM v MN and Another 2010 (4) SA 286 (GNP)

Pillay v KwaZulu-Natal MEC of Education [2006] ZAKZHC 8 (5 July 2006)

S v Makwanyane 1995 (3) SA 391 (CC)

Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC)  
 Smit NO and Others v King Goodwill Zwelithini Kabhekuzulu and Others (10237/2009) [2009] ZAKZPHC 75  
 Swissborough Diamond Mines and Others v Government of RSA and Others 1992 (2) SA 279 (T)  
 Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA)  
 The Citizen 1978 (Pty) Ltd and Others v McBride (CCT 23/10) [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC)  
 Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another 2002 (4) SA 661 (SCA)  
 Van Zyl and Others v Government of the RSA and Others 2008 (3) SA 294 (SCA)

### **Turkey**

Primary Education Case Number 1997/62 1997/62; 1998/52; 16.9.1998 Resmi Gazette 24206. Available at [http://www.anayasa.gov.tr/index.php?l=manage\\_karar&ref=show&action=karar&id=1420&content=refah%20partisi](http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=1420&content=refah%20partisi) (in Turkish) last accessed 18-04-2013

### **Uganda**

Centre for Health and Human Rights & Development and Others v Attorney General [2012] UGSC 4  
 Charles Onyango Obbo and Another v Attorney General [2004] UGSC 1 (Constitutional Appeal No 2 of 2002)

### **United Kingdom**

R v Immigration Officer at Prague Airport and Another ex p European Roma Rights Centre and Others (2004) UKHL 55, (2005) 2 WLR 1  
 The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence Judgment of 12 August 2005, Case No CO/3673/2005, [2005] EWHC 1809

### **United States**

Church of the Lukumí Babalu Ayé v City of Hialeah (1993) US Supreme Court Case No 91-948, 508 US 520 (1993)  
 Roe v Wade (1973) 410 US 113  
 Roper v Simmons 543 US 551 [2005] 575

**INTERNATIONAL AND REGIONAL TRIBUNALS****European Court of Human Rights**

Suovaniemi and Others v Finland ECHR Case No 31737/96 (23 February 1999)

**European Court of Justice**

*Van Gend en Loos v Nederlandse Administratie der Belastingen*) No 26/62 ECR [1963]

**International Court of Justice**

Case Concerning Kasikili / Sedudu Island (Botswana / Namibia) 1999 ICJ Rep 4 (Judgment of 13 December 1999)

University of Cape Town

## BIBLIOGRAPHY

---

- Ackermann L** *Human Dignity: Lodestar for Equality in South Africa* (2012) Juta
- Agbakwa S** 'A line in the sand: International (dis)order and the impunity of non-state corporate actors in the developing world' in Anghie A, Chimni B, Mickelson K and Okafor O (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) Martinus Nijhoff Publishers
- Al Attar M and Miller R** 'Towards an emancipatory international law: The Bolivarian reconstruction' (2010) 31(3) *Third World Quarterly* 347
- Alford R** 'Misusing international sources to interpret the Constitution' (2004) 98 *American Journal of International Law* 57
- Alford W** 'Exporting the pursuit of happiness' in *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press
- Allott A** *The Limits of Law* (1980) Butterworths
- Althusser L** *On Ideology* (2008) A Verso Book
- Amien W** 'Muslim personal law (MPL) in Canada: A case study considering the conflict between freedom of religion and Muslim women's right to equality' in Brems E (ed) *Conflicts between Fundamental Rights* (2008) Intersentia
- Andía M** 'Disadvantaged groups, the use of courts and their impact: A case study of legal mobilization in Argentina' (2011) *Northeastern University Law and Public Policy Dissertations Paper* 1, 173 at <http://hdl.handle.net/2047/d20001004> last accessed 27-02-2013
- Anghie A, Chimni B, Mickelson K and Okafor O (eds)** *The Third World and International Order: Law, Politics and Globalization* (2003) Martinus Nijhoff Publishers
- Anghie A** 'C.G. Weeramantry at the International Court of Justice' 14 *Leiden Journal of International Law* (2001) 829

- Anghie A** 'The evolution of international law: Colonial and postcolonial realities' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish
- Anghie A** 'Finding the peripheries: Sovereignty and colonialism' in *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press
- An-Na'im A** (ed) *Universal Rights, Local Remedies* (1999) Interights, Afronet and GTZ
- An-Na'im A** 'Protecting human rights in plural legal systems of Africa: A comparative overview' in An-Na'im A (ed) *Universal Rights, Local Remedies* (1999) Interights, Afronet and GTZ
- An-Na'im A** 'Why should Muslims abandon *Jihad*? Human rights and the future of international law' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008)
- Baruah A** 'Human capabilities and gender justice: A South Asian perspective' in Anghie A, Chimni B, Mickelson K and Okafor O (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) Martinus Nijhoff Publishers
- Bass G** *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2002) Princeton University Press
- Bassiouni C** 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' (2001) 42(1) *Virginia Journal of International Law* 81
- Baxi U** 'What may the "Third World" expect from international law?' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish
- Baxi U** 'Operation enduring freedom: Towards a new international law and order?' in Anghie A, Chimni B, Mickelson K and Okafor O (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) Martinus Nijhoff Publishers
- Beatty D** *The Ultimate Rule of Law* (2004) Oxford University Press

- Bekker J, Labuschagne J et al** (eds) *Introduction to Legal Pluralism in South Africa Part 1* (2002) Lexis Nexis Butterworths
- Bennett T** *Customary Law in South Africa* (2004) Juta
- Bennett T** 'Comparative law and African customary law' in Reimann M and Zimmermann R (eds) *Oxford Handbook of Comparative Law* (2006) Oxford University Press
- Bennett T** 'The cultural defence and the custom of *thwala* in South African law' (2010) 10 *Botswana Law Journal* 3-26
- Berman H** 'Justice in the U.S.S.R.: An interpretation of Soviet law' in *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press
- Besselink L** 'National and constitutional identity before and after Lisbon' (2010) 6(3) *Utrecht Law Review* 36
- Besson S** 'Sovereignty in conflict' in Warbrick C and Tierney S (eds) *Towards an 'International Legal Community'?* (2006) British Institute of International and Comparative Law
- Booyesen H** *Principles of International Trade Law as a Monistic System* (2003) Interlegal CC
- Bowring B** 'Ideology critique and international law: Towards a substantive account of international human rights' in Warbrick C and Tierney S (eds) *Towards an 'International Legal Community'?* (2006) British Institute of International and Comparative Law
- Bradlow D** 'Differing conceptions of development and the content of international development law' (2005) 21 *South African Journal of Human Rights* 47
- Brems E** (ed) *Conflicts between Fundamental Rights* (2008) Intersentia
- Buergenthal T, Shelton D, Steward D** *International Human Rights* 3 ed (2002) West Group

- Bussani M and Palmer V** 'Preliminary remarks of methodology' in *Schlesinger's Comparative Law* 7 ed (2009)
- Butler W** 'Russian Federation' in Sloss D (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) Cambridge University Press
- Bybee KJ** *All Judges are Political – Except When They are Not* (2010) Stanford University Press
- Capps P** 'Sovereignty and the identity of legal orders' in Warbrick C and Tierney S (eds) *Towards an 'International Legal Community'?* (2006) British Institute of International and Comparative Law
- Charlesworth H, Chiam M** et al 'International law and national law: Fluid states' in Charlesworth H, Chiam M et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) The Federation Press
- Charlesworth H, Chiam M** et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) The Federation Press
- Cheadle H** 'Reception of international labour standards into domestic law in dualist legal systems' *Mont Fleur Colloquium* 3 May 2011
- Chikozho C and Latham J** 'Shona customary practices in the context of water sector reforms' International workshop on '*African Water Laws*' January 2005, Johannesburg
- Chimni BS** 'Third world approaches to international law: A manifesto' in Anghie A, Chimni B, Mickelson K and Okafor O (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) Martinus Nijhoff Publishers
- Chinkin C and Charlesworth H** 'Building women into peace: The international legal framework' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish
- Chirwa D** *Human Rights under the Malawian Constitution* (2011) Juta
- Choudhry S** (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press

- Choudhry S** 'Migration as a new metaphor in comparative constitutional law' in Choudhry S (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press
- Chua A** 'Markets, democracy, and ethnicity: Toward a new paradigm for law and development' (1998) 108 *Yale Law Journal* 1
- Clarke D** 'China's legal system and the WTO: Prospects for compliance' in *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press
- Coetzee J and De Gama M** 'Harmonisation of sales law: An international and regional perspective' (2006) *Vindobona Journal of International Commercial Law and Arbitration* 15
- Cole D** 'An unqualified human good: EP Thompson and the rule of law' (2001) 28(2) *Journal of Law and Society* 177
- Coombe R** 'Culture: Anthropology's old vice or international law's new virtue?' (1999) 91 *American Society of International Law and Procedure* 261
- Cossman B** 'Migrating marriages and comparative constitutionalism' in Choudhry S (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press
- Curran V Grosswald** 'Dealing in difference: Comparative law's potential for broadening legal perspectives' (1998) 46 *American Journal of Comparative Law* 657
- Currie I and De Waal J** *The Bill of Rights Handbook* 5 ed (2005) Juta
- Dan-Cohen M** *Harmful Thoughts* (2002) Princeton University Press
- David R and Brierley J** *Major Legal Systems in the World Today* 3 ed (1985) Stevens
- Dawkins R** *The God Delusion* (2006) Black Swan
- De Blois M** 'Religious law versus secular law: The example of the *get* refusal in Dutch, English and Israeli law' (2010) 6(2) *Utrecht Law Review* 93

**De Mestral A and Fox-Decent E** 'Rethinking the relationship between international and domestic law' (2008) 53 *McGill Law Journal* 573

**Dembour M-B** 'Human rights talk and anthropological ambivalence: The particular context of universal claims' in Harris O (ed) *Inside and Outside the Law* (1996) Routledge

**Derrett D** (ed) *An Introduction to Legal Systems* (1968) Sweet and Maxwell

**Dugard J** *International Law: A South African Perspective* 3 ed (2005) Juta

**Dugard J** 'South Africa' in Sloss D (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) Cambridge University Press

**Dunworth T** 'Lost in translation: Customary international law in domestic law' in Charlesworth H, Chiam M et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) The Federation Press

**Elver H** 'International environmental law, water and the future' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008)

**Falk R, Rajagopal B, Stevens J** (eds) *International Law and the Third World* (2008) Routledge-Cavendish

**Falk R** 'International law and the future' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish

**Feldman E** 'Legal reform in contemporary Japan' (2007) *University of Pennsylvania Law School, Public Law and Legal Theory Research Paper Series* 3; available at <http://papers.ssrn.com/abstract=980762> last accessed 22-06-2013

**Feldman E** *The Ritual of Rights in Japan* (2000) Cambridge University Press

**Flemming S** 'Trading in ambiguity: Law, rights and realities in the distribution of land in northern Mozambique' Harris O (ed) *Inside and Outside the Law* (1996) Routledge

- Ford J** 'International and comparative influence on the rights jurisprudence of South Africa's Constitutional Court' in Du Plessis M and Pete S (eds) *Constitutional Democracy in South Africa 1994-2004* (2004) LexisNexis Butterworths
- Fourneret J** 'France: Banning legal pluralism by passing a law' in *Schlesinger's Comparative Law 7* ed (2009) Foundation Press
- Gall S** *The Bushmen of Southern Africa* (2002) Pimlico
- Gatthi J** 'Geographical hegelianism in territorial disputes involving non-European land relations: An analysis of the case concerning *Kasikili/Sedudu Island* (Botswana/Namibia) in Anghie A, Chimni B, Mickelson K and Okafor O (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) Martinus Nijhoff Publishers
- Gathii J** 'Third World approaches to international economic governance' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish
- Gaudreault-Desbiens J-F** 'Underlying principles and the migration of reasoning templates: A trans-systemic reading of the *Quebec Secession Reference*' in Choudhry S (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press
- Glenn P** *Legal Traditions of the World 4* ed (2010) Oxford University Press
- Goldsworthy J** 'Questioning the migration of constitutional ideas: Rights, constitutionalism and the limits of convergence' in Choudhry S (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press
- Gramsci A** *The Antonio Gramsci Reader: Selected Writings 1916-1935* (2000) New York University Press
- Grande E** 'Hegemonic human rights and African resistance: The issue of female circumcision in a broader comparative perspective' in *Schlesinger's Comparative Law 7* ed (2009) Foundation Press
- Grimm D** 'Proportionality in Canadian and German constitutional jurisprudence' (2007) 57(2) *University of Toronto Law Journal* 383

- Gross O** "Control Systems" and the migration of anomalies' in Choudhry S (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press
- Grove T** 'The international judicial dialogue: When domestic constitutional courts join the conversation' (2001) 114 *Harvard Law Review* 2049
- Guerreiro S** (Team Leader) 'Access to justice in Guinea-Bissau assessment: Regions of Cacheu and Oio and Bissau Autonomous Sector' UNDP report in partnership with the State of Guinea-Bissau (2011)
- Gulbrandsen Ø** 'Living their lives in courts: The counter-hegemonic force of the Tswana *kgotla* in a colonial context' in Harris O (ed) *Inside and Outside the Law* (1996) Routledge
- Harris D** *Cases and Materials on International Law* 6 ed (2004) Sweet and Maxwell
- Harris O** (ed) *Inside and Outside the Law* (1996) Routledge
- Hinz M** (ed) *In Search of Justice and Peace* (2010) Namibia Scientific Society
- Hinz M** 'Justice for justice and justice for peace: Legal anthropological observations on traditional and informal justice systems' in Hinz M (ed) *In Search of Justice and Peace* (2010) Namibia Scientific Society
- Hinz M** 'Traditional courts in Namibia: Part of the judiciary?' in Hinz M (ed) *In Search of Justice and Peace* (2010) Namibia Scientific Society
- Hirschi R** *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004) Harvard University Press
- Hirschi R** 'On the blurred methodological matrix of comparative constitutional law' in Choudhry S (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press
- Hook G and McCormack G** *Japan's Contested Constitution* (2001) Routledge

- Hovell D and Williams G** 'A tale of two systems: The use of international law in constitutional interpretation in Australia and South Africa' 2005 *Melbourne University Law Review* 95
- Ishida S** 'Legal pluralism and human rights in a Kenyan court: An analysis of dowry claim cases' in Hinz M (ed) *In Search of Justice and Peace* (2010) Namibia Scientific Society
- Itoh H and Beer L** (eds) *The Constitutional Case Law of Japan* (1978) University of Washington Press
- Jayawickrama N** 'India' in Sloss D (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) Cambridge University Press
- Johns F** 'International law-national law: Thinking through the hyphen' in Charlesworth H and Chiam M et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) The Federation Press
- Kelley T** 'Unintended consequences of legal westernization in Niger: Harming contemporary slaves by reconceptualizing property' in *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press
- Kennedy D** 'The mystery of global governance' (2008) 34 *Ohio Northern Law Review* 827
- Kersch K** 'The new legal transnationalism, the globalized judiciary and the rule of law' (2005) *Washington University Global Studies Law Review* 345
- King-Irani L** 'Exiled to a liminal legal zone: Are we all Palestinians now?' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish
- Knop K** 'Here and there: International law in domestic courts' (2000) 32 *New York University Journal of International Law and Politics* 501
- Koh H** 'International law as part of our law' (2004) 98 *The American Journal of International Law* 43
- Koskenniemi M** 'The fate of public international law: Between technique and politics' (2007) 70(1) *Modern Law Review* 1

**Koskenniemi M** 'The politics of international law – 20 years later' (2009) 20(1) *European Journal of International Law* 7

**Koskenniemi M** 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law', Report of the Study Group of the International Law Commission, finalised by M Koskenniemi, A/CN.4/L.682 reference in (2011) 24 *Leiden Journal of International Law* 24

**Kotzé L and Paterson S** (eds) *The Role of the Judiciary in Environmental Governance* (2009) Wolters Kluwer Law and Business

**Kumm M** 'Democratic constitutionalism encounters international law: Terms of engagement' in Choudhry S (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press

**Lacey W** 'The judicial use of unincorporated international conventions in administrative law: Back-doors, platitudes and window-dressing' in Charlesworth H, Chiam M et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) The Federation Press

**Legrand P** 'The impossibility of "legal transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111

**Lenzerini F** (ed) *Reparations for Indigenous Peoples* (2008) Oxford University Press

**Lenzerini F** 'Reparations for indigenous peoples in international and comparative law: An introduction' in Lenzerini F (ed) *Reparations for Indigenous Peoples* (2008) Oxford University Press

**Lenzerini F** 'The trail of broken dreams: The status of indigenous peoples in international law' in Lenzerini F (ed) *Reparations for Indigenous Peoples* (2008) Oxford University Press

**Llewellyn K** *The Cheyenne Way* (with E Adamson Hoebel) (1941) University of Oklahoma Press

- Loenen T** 'Freedom of religion versus sex equality and state neutrality: The difference the method of review can make' in Brems E (ed) *Conflicts between Fundamental Rights* (2008) Intersentia
- Lowe V** *International Law* (2007) Oxford University Press
- Mandel M** 'Opinion: Illegal wars and international criminal law' in Anghie A, Chimni B, Mickelson K and Okafor O (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) Martinus Nijhoff Publishers
- Mapaure C** 'Reinvigorating African values for SADC: The relevance of traditional African philosophy in a globalising world of competing perspectives' 2011 *SADC Law Journal* 149
- Marks S** *The Riddle of all Constitutions* (2000) Oxford University Press
- Mattei U, Ruskola T, Gidi A** (eds) *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press
- Mattei U** 'An opportunity not to be missed: The future of comparative law in the United States' in *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press
- Mattei U** 'The new Ethiopian Constitution: First thoughts on ethnical federalism and the reception of western institutions' in *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press
- McCorquodale R** 'International community and state sovereignty: An uneasy symbiotic relationship' in Warbrick C and Tierney S (eds) *Towards an International Legal Community* (2006) British Institute of International and Comparative law
- McLean J** 'Problems of translation: The state in domestic and international public law and beyond' in Charlesworth H, Chiam M et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) The Federation Press
- McMichael P** *Development and Social Change: A Global Perspective* (1996) Pine Forge Press

- Meerschaut K and Gutwirth S** 'Legal pluralism and Islam in the scales of the European Court of Human Rights: The limits of categorical balancing' in Brems E (ed) *Conflicts between Fundamental Rights* (2008) Intersentia
- Menski W** *Comparative Law in a Global Context 2 ed* (2006) Cambridge University Press
- Merry S Engle** *Human Rights and Gender Violence* (2006) University of Chicago Press
- Mgbeoji I** 'The civilised self and the barbaric other: Imperial delusions of order and the challenges of human security' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish
- Moore S Falk** *Law as Process: An Anthropological Approach* (1978) Routledge and Kegan Paul
- Moran M** 'Influential authority and the estoppel-like effect of international law' in Charlesworth H, Chiam M et al (eds) *The Fluid State, International Law and National Legal Systems* (2005) The Federation Press
- Moran M** 'Inimical to constitutional values: Complex migrations of constitutional rights' in Choudhry S (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press
- Moran M** 'Shifting boundaries: The authority of international law' in Nijman J and Nollkaemper A (eds) *New Perspectives on the Divide between National and International Law* (2007) Oxford University Press
- Moses F** 'International legal practice' in *Schlesinger's Comparative Law 7 ed* (2009) Foundation Press
- Munalula M** 'SADC Protocol on Gender and Development: Road map to equality?' (2011) *SADC Law Journal* 189
- Ng'ong'ola C** 'Replication of WTO dispute settlement processes in SADC' in (2011) *SADC Law Journal* 35
- Nijman J and Nollkaemper A** (eds) *New Perspectives on the Divide between National and International Law* (2007) Oxford University Press

- Nollkaemper A** 'The Netherlands' in Sloss D (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) Cambridge University Press
- Nyamu C** 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?' (2000) 41(2) *Harvard International Law Journal* 381
- Obiora A** 'Toward an auspicious reconciliation of international and comparative analyses' (1998) 46 *American Journal of Comparative Law* 669
- Obonye J** 'The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A critical appraisal' (2012) 4(5) *Journal of African Studies and Development* 142
- Obregón L** 'Between civilisation and barbarism: Creole interventions in international law' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish
- Okafor O** 'Poverty, agency and resistance in the future of international law: An African perspective' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish
- Orakhelashvili A** *Peremptory Norms in International Law* (2006) Oxford University Press
- Örücü E** *The Enigma of Comparative Law* (2004) Martinus Nijhoff Publishers
- Örücü E** 'Judicial navigation as official law meets culture in Turkey' (2008) 4(1) *International Journal of Law in Context* 35
- Örücü E** 'Diverse cultures and official laws: Multiculturalism and Euroscepticism?' (2010) 6(3) *Utrecht Law Review* 75
- Palmer V and Levendis W** 'The Louisiana Supreme Court in question: An empirical and statistical study of the effects of campaign money on the judicial function' (2008) 82 *Tulane Law Review* 1291

**Palmer V** *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001) Cambridge University Press

**Palmié S** 'Which centre, whose margin? Notes toward an archaeology of US Supreme Court Case 91-948, 1993 (Church of the Lukumí vs City of Hialeah, South Florida)' in Harris O (ed) *Inside and Outside the Law* (1996) Routledge

**Paulus A** 'International law after postmodernism: Towards renewal or decline of international law?' (2001) 14 *Leiden Journal of International Law* 727

**Paulus A** 'The emergence of the international community and the divide between international and domestic law' in Nijman J and Nollkaemper A (eds) *New Perspectives on the Divide between National and International Law* (2007) Oxford University Press

**Paulus A** 'Germany' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) Cambridge University Press

**Pentassuglia G** 'Towards a jurisprudential articulation of indigenous land rights' (2011) 22(1) *European Journal of International Law* 165

**Perreau-Saussine A** 'Foreign views on eating aliens: The roots and implications of recent English decisions on customary international law as a source of common law limits on executive power' in Warbrick C and Tierney S (eds) *Towards an 'International Legal Community'?* (2006) British Institute of International and Comparative law

**Peters A** 'The globalization of state constitutions' in Nijman J and Nollkaemper A (eds) *New Perspectives on the Divide between National and International Law* (2007) Oxford University Press

**Rajagopal B** 'Counter-hegemonic international law: Rethinking human rights and development as a Third World strategy' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish

**Rautenbach C** 'Umkhosi Ukweshama: Revival of a Zulu festival in celebration of the universe's rites of passage' in Bennett TW (ed) *Traditional African Religions in South African Law* (2011) UCT Press

- Reimann M and Zimmermann R** (eds) *Oxford Handbook of Comparative Law* (2006) Oxford University Press
- Reimann M** 'Beyond national systems: A comparative law for the international age' in *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press
- Reisman M** *Law in Brief Encounters* (1999) Yale University
- Reisman M** 'Lining up: The micro legal system of queues' in *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press
- Roach K** 'The post-9/11 migration of Britain's Terrorism Act 2000' in Choudhry S (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press
- Romano C** 'The shift from the consensual to the compulsory paradigm in international adjudication: Elements for a theory of consent' (2007) 39 *New York University Journal of International Law and Politics* 791
- Rosti M** 'Reparations for indigenous peoples in two selected Latin American countries' in Lenzerini F (ed) *Reparations for Indigenous Peoples* (2008) Oxford University Press
- Rothwell D** 'Australia' in Sloss D (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) Cambridge University Press
- Ruskola T** 'Legal orientalism' in *Schlesinger's Comparative Law* 7 ed (2009)
- Sacco R** 'Legal formants: A dynamic approach to comparative law' (1991) 39 *American Journal of Comparative Law* (Installments 1 and 2) 1 and 343
- Santos B de Sousa** *Toward a New Legal Common Sense* 2 ed (2002) Butterworths LexisNexis
- Sarfaty G** 'International norm diffusion in the Pimicikamak Cree nation: A model of legal mediation' (2007) 48 *Harvard International Law Journal* 441
- Scheppele K Lane** 'The migration of anti-constitutional ideas: The post-9/11 globalization of public law and the international state of emergency' in

Choudhry S (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press

**Schlesinger R** 'The past and future of comparative law' in *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press

**Schneiderman D** 'Constitution or Model Treaty? Struggling over the interpretive authority of NAFTA' in Choudhry S (ed) *The Migration of Constitutional Ideas* (2006) Cambridge University Press

**Shalakany A** "I heard it all before": Egyptian tales of law and development' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish

**Shouler K** *Understanding Philosophy* (2008) Adams Media

**Singer P** *Animal Liberation: A New Ethics for our Treatment of Animals* 1 ed (1975) 2 ed (1990) Random House

**Singer P** *One World: The Ethics of Globalization* 2 ed (2004) Yale University Press

**Singh S** 'The potential of international law: Fragmentation and ethics' (2011) 24 *Leiden Journal of International Law* 23

**Slaughter A-M** 'Judicial globalization' (1999-2000) 40 *Virginia Journal of International Law* 1103

**Sloss D** (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) Cambridge University Press

**Sloss D** 'United States' in Sloss D (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) Cambridge University Press

**Sloss D** 'Treaty enforcement in domestic courts: A comparative analysis' in Sloss D (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) Cambridge University Press

**Stevens J** 'Recreating the state' in Falk R, Rajagopal B, Stevens J (eds) *International Law and the Third World* (2008) Routledge-Cavendish

- Tamanaha B** 'The lessons of law-and-development studies' (1995) 89 *American Journal of International Law* 470
- Teubner G** 'Legal irritants: Good faith in British law or how unifying law ends up in new divergences' (1998) 61(1) *Modern Law Review* 11
- Thom T** *Human Factors and Pilot Performance* (1997) Airlife Publishing
- Thomas E Marshall** *The Old Way* (2006) Farrar, Strauss and Giroux
- Thompson EP** *Whigs and Hunters: The Origin of the Black Act* (1975) Allen Lane
- Thompson EP** *The Poverty of Theory and Other Essays* (1978) Merlin Press
- Tierney S** *Constitutional Law and National Pluralism* (2004) Oxford University Press
- Tierney S** 'Questioning authority: The normative challenge in forging an international community' in Warbrick C and Tierney S (eds) *Towards an 'International Legal Community'?* (2006) British Institute of International and Comparative Law
- Tladi D** 'South African lawyers, values and new vision of international law' (2008) 33 *South African Yearbook of International Law* 167
- Tsagourias N** 'International community, recognition of states, and political cloning' in Warbrick C and Tierney S (eds) *Towards an 'International Legal Community'?* (2006) British Institute of International and Comparative Law
- Tushnet M** 'Some reflections on method in comparative constitutional law' in Choudhry S *The Migration of Constitutional Ideas* (2006) Cambridge University Press
- Twining W** *Globalisation and Legal Theory* (2000) Butterworths
- Twining W** 'Two works of Karl Llewellyn—II. The Cheyenne way' (1968) 31 *Modern Law Review* 165

**Twomey M** 'The parts that make a whole? The mixity of the laws of Seychelles' (publication pending as at May 2013), available at <http://ssrn.com/abstract=2156807>

**Udombana N** 'The Third World and the right to development: Agenda for the next millennium' (2000) 22(3) *Human Rights Quarterly Review* 753

**Udombana N** 'Reparations and Africa's indigenous peoples' in Lenzerini F (ed) *Reparations for Indigenous Peoples* (2008) Oxford University Press

**Van Dijk P, Van Hoof G** et al (eds) *Theory and Practice of the European Convention on Human Rights* 4 ed (2006) Intersentia

**Van Ert G** 'Canada' in Sloss D (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) Cambridge University Press

**Van Wyk CW** et al *Introduction to Comparative Law* (2004) Unisa

**Venter F** *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (2000) Kluwer Law International

**Volpp L** '(Mis)identifying culture: Asian women and the "cultural defense"' in *Schlesinger's Comparative Law* 7 ed (2009) Foundation Press

**Walker N** 'The migration of constitutional ideas and the migration of the constitutional idea: The case of the EU' in Choudhry S (ed) *The Third World and International Order: Law, Politics and Globalization* (2003) Martinus Nijhoff Publishers

**Warbrick C and Tierney S** (eds) *Towards an 'International Legal Community'?* (2006) British Institute of International and Comparative law

**Weeramantry C** 'International law and the developing world: A millennial analysis' (2000) 41 *Harvard International Law Journal* 277

**Wa Mutua M** 'The politics of human rights: Beyond the abolitionist paradigm in Africa' (1995-1996) 17 *Michigan Journal of International Law* 591

**Waters M** 'Creeping monism: The judicial trend toward interpretive incorporation of human rights treaties' (2007) 107 *Columbia Law Review* 628

- Watson A** *Legal Transplants: An Approach to Comparative Law* 2 ed (1993)  
University of Georgia Press
- Weinrib L** 'The postwar paradigm and American exceptionalism' in Choudhry S  
(ed) *The Migration of Constitutional Ideas* (2006) Cambridge University  
Press
- Weyrauch W and Bell M** 'Autonomous law-making: The case of the "gypsies"' in  
*Schlesinger's Comparative Law* 7 ed (2009) Foundation Press
- Workman J** *Heart of Dryness* (2009) Walker Company New York
- Zacharias D** 'The UNESCO regime for the protection of world heritage as  
prototype of an autonomy-gaining international institution' (2008) 9(11)  
*German Law Journal* 1833
- Zimmermann R** 'Savigny's legacy: Legal history, comparative law and the  
emergence of a European legal science' 1996 *Law Quarterly Review* 576
- Zweigert K and Kötz H** *An Introduction to Comparative Law* 3 rev ed (1998)  
Clarendon Press