International Rule of Law and Domestic Courts: A Few Concerns

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Abstract

The manifestation of the international rule of law appears as one of the possible paths to check the rule of power and establish an egalitarian system. Many international organizations have emphasized on the international rule of law in their objectives and mandates and have called the states to act in their service. The domestic courts have resonated with the call by exhibiting internationalism in their decisions. The international norms have been domesticated by the courts by adopting several incorporation and interpretation methods. The domestic courts, therefore, have been called as the 'agents' in the service of international law and protectors of international rule of law. The contribution of domestic courts is opined to be valuable in the evolution and development of international law (vide Article 38 ICJ Statute). However international rule of law is argued by the Global South scholarship to be limited to the rules of international law rather than being democratic and egalitarian. The paper examines the internationalist approach adopted by the domestic courts in the light of the above argument. It also questions if the domestic courts give due consideration

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to the formative process and historical roots of international norms while incorporating them.

The rule of law has been the most revered principle of the domestic legal system. The rule of law in the domestic legal system centres on the principles of supremacy of law, equality before law and predominance of legal spirit.[1]This domestic conceptualization of rule of law and its principles have been drawn into international levels, considering their relevance extremely important to establish unity in the international order. The nature of normativity in the international legal system has changed from being outward obligations to inward-looking norms,[2] requiring the states to observe international law through domestic compliance. Especially in fields as diverse as human rights, environment protection, investment and trade or the secondary law of international organization are becoming increasingly 'inward looking' in that they demand a state to take, or refrain from, certain conduct within the domestic jurisdiction, often within specific parameters.[3]

Though the means of domestic compliance falls exclusively within the state jurisdiction pursuant to principles of sovereignty, international law stipulates that the states may not invoke domestic law as a justification for non-performance of international obligation.[4] The

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[1] A.V. DICEY INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 107 (Liberty Classics edition, Macmillan London 1915).

[2] Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 (1) LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW REVIEW 138 (2011).

[3] Saida El Boudouhi, *National Judge as an Ordinary Judge of International Law? Invocability of Treaty Law in National Courts*, 28 LEIDEN JOURNAL OF INTERNATIONAL LAW 301(2015).

[4] Article 27 of Vienna Convention Law of Treaties 1969. This provision however is subject to condition of Article 46. For primacy of laws see Akhila Basalalli, *Debating the Interface between International Law and Municipal Law: A Few Concerns Regarding the Relevance of the Traditional Debate, Primacy of Law and Integration of the Legal Systems*, 8(1) KARNATAKA STATE LAW UNIVERSITY JOURNAL *205* (2020).

international rule of law (ILR) discussed *infra,* has been mostly inward-looking, and requiring domestic level compliance to its principles by the states to secure the objective of peaceful global order. However, the paper identifies through the critical third world studies, that the construction of ILR is limited. For a just and egalitarian global order, the ILR has to venture beyond the confinements of national construction to address the disparities inherent in the international legal order. The expectations from the domestic judiciaries to act as agents in service of international law to protect the ILR is superfluous since ILR is not independent of asymmetries of the international legal order.

Theorizing and Formation of International Rule of Law

The ILR aspiring to possess greater value and normative superiority in the international legal order is expected to serve as a beacon of justice by ensuring that the international legal discourse is structured on the premises of fairness and equality. The manifestation of these ideals has been subjected to limitation by its diminishing scope and controlled definition describing it as an extension of domestic rule of law. The task of defining ILR is said to have completed by externalizing the core components of rule of law into the international level by fulfilling the parameters by identification of treaties as the normative source, states as legal actors and the International Court of Justice as its adjudicative body.[5] This is posited on the following grounds of universalization of international law; the normative character of the treaties imposing legal obligations on the state; principles of international law emphasizing sovereign equality, and independence and impartiality of the ICJ and

[5] Stephane Beaulac, *An Inquiry into the International Rule of Law* , EUI WORKING PAPERS, MWP, 2007/14, European University Institute, *available at* https://cadmus.eui.eu/handle/1814/6957 (Last visited 15 June 2021).

judicial process being accessible to all.[6] However, Chimni argues that the analogy of domestic rule of law cannot be extended to the international level for reasons like (i) international legal order is decentralised in character as compared to domestic law; and (ii) procedure of creating international law is diffused as it is not through the world elected legislature.[7] The rule of law at the domestic level is aimed at protecting rights for individuals and their autonomy and the same ought not to be constructed in the international level to protecting sovereign states and their freedoms.[8]

The core elements of rule of law appear to possess the eligibility of international application so long as international legal order is perceived through positivist paradigms, but with an expansive understanding of international law through its association with the social process and experience of the third world, the objective of ILR outweighs its constraints. The normative character of treaties is presented analogous to the supremacy of law within a domestic legal system but the very legitimacy of the treaty process is contested by the TWAIL[9] scholarship. It is argued the treaties are often a bargain in the word of uneven resources and opportunity costs, and non-accommodation of the participatory democracy essentially resulting in the exclusion of the

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[6] *Id*; See also Robert Goodin, *Towards, International Rule of Law: Distinguishing International Law- Breakers from World-be-Law- Markers*, 9 JOURNAL OF ETHICS 225(2005); Ernst Petersmann, *How to Promote the International Rule of Law*, 25 JOURNAL OF INTERNATIONAL ECONOMIC LAW (1998).

[7] Chimni, B.S., *Legitimating the International Rule of Law*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 292 (James Crawford and Martti Koskenniemi eds. 2012).

[8] Machiko Kanetake ,*The Interfaces between the National and International Rule of Law: A Framework Paper* in THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE 11-41 (Machiko Kanetake and Andre Nollkaemper eds. 2016) .

[9] Third World Approaches to International Law.

concerns of subaltern class.[10] The second element concerning the sovereign equality among the states has manifested through several instruments but the debate of equality among the states in terms of their social and economic conditions is well worn. Needless is to mention the disparities inherent in the international institutions. The last component being the dispute resolution through ICJ is not devoid of power politics. The scope ICJ is subject to the sovereignty of states through compulsory jurisdiction, which basically is not compulsory in nature.[11] Further, the non-compliance of the decisions of ICJ by the state parties to the disputes is another impediment faced in the area of dispute resolution, for instance, *Nicaragua,*[12]*La Grand,*[13]*Avena,*[14]to name a few. These arguments rule out the exposition of externalizing domestic rule of law to the international level.

The formation and concretization of ILR also call for speculation for the reasons namely, the very formation of the international rule of law is not independent of the clutches of existing international normative structure, and the very rule of law that is to serve as the as a beacon for its guidelines and check for the unjust laws in the international legal order is itself subjected and governed by international law. As Chesterman rightly observes "if the rule of law is understood in the core, formal sense used here, it might be questioned whether the process of

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[10] Chimni, B.S. *An Outline of a Marxist Course in Public International Law,* 17 LEIDEN JOURNAL OF INTERNATIONAL LAW 20 (2004).

[11] Article 36 of the Statute of ICJ; See Alexandrov Stanimir, *The Compulsory Jurisdiction of the International Court of Justice: How Compulsory is it?* 5(1) CHINESE JOURNAL OF INTERNATIONAL LAW 29 (2006).

[12] Republic of Nicaragua v. United States of America 1986 ICJ 14.

[13] Germany vs. United States of America, (2001) ICJ Rep 466 www.icj-cij.org/docket/files/104/7736.pdf (Last visited on 17June 2021) .

[14] Mexico vs. United States of America, (2004) ICJ Rep 12, www.icj-cji.org/docket/files/128/8188.pdf (Last visited on 17June 2021).

international rulemaking can itself be said to be governed by laws."[15] The resolutions of the UN General Assembly (discussed *infra),* which are the outcomes of deliberations on the rule of law are recommendatory in nature thereby lacking the capacity to impose legal obligations.[16] The obscurity of ILR is seen as it neither possesses the character of imposing legal obligations for the states to follow nor is it devoid of the influence of international law.

Locating International Rule of Law

The explicit reference to rule of law is though not found in the UN Charter, the principles and ethos of rule of law are narrated to have their reflection in the Charter. As Fassbender describes this situation quoting Shakespeare 'what is in a name? That which we call a rose/by any other name would smell as sweet?'[17] The Charter in its very purposes and principles[18] stresses on maintenance of peace and security, emphasis on the right of self-determination and human rights, domestic non-interference, peaceful settlement of international disputes, respect to international law which are considered as essential manifestations of rule of law at international level. One of the preliminary explicit mentions of rule of law is found in the Preamble of the Universal Declaration of Human Rights 1948 adopted by the UN General Assembly. The texts of the Preamble states that "it is essential if a man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and

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[15]Simon Chesterman, *An International Rule of Law*, 56(2) AMERICAN JOURNAL OF COMPARATIVE LAW 357(2008).

[16] UN Charter articles 10-14, 1945.

[17] Bardo Fassbender, *What is in a name? The International Rule of Law and the United Nations Charter*, 17 (3) CHINESE JOURNAL OF INTERNATIONAL LAW 763 (2018).

[18]United Nations Charter, 1945, Chapter I: Purposes and Principles, https://www.un.org/en/about-us/un-charter/chapter-1 (Last visited on 17June 2021).

oppression, that human rights should be protected by the rule of law."[19] The UNGA Resolution of 1970, regarding the Declaration on Principles of International law concerning Friendly Relations and Cooperation among the States, 1970 lays down the promotion of rule of law among nations as paramount importance to the UN Charter.[20] The United Nations identifying the transformations in the political, social and economic conditions in the modern society has emphasized the need for collective response guided by the rule of law as it is the foundation for friendly and equitable relations between the states and base of fair societies.[21] This necessitates the inward-looking character of ILR. The UN further regards rule of law as fundamental to international peace and security and political stability; to achieve economic and social progress and development; and to protect people's rights and fundamental freedoms.[22] From the United Nations Millennium Declaration (55/2) two decades ago that resolved to 'strengthen respect for the rule of law in international as in national affairs'[23], the UN has through its resolutions determined the importance of rule of law. The 2005 World Summit Outcome, adopted by UN General Assembly acknowledges that good governance and the ILR are essential for sustained economic growth, sustainable development and eradication of poverty and hunger.[24] Rule of

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[19] Universal Declaration of Human Rights 1948, Preamble.

[20] Declaration on Principles of International law concerning Friendly Relations and Cooperation among States 1970, Preamble, https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2625(XXV) (Last visited on 17June 2021).

[21] United Nations and Rule of Law, available at https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ (Last visited on 17June 2021).

[22] *Id.*

[23]United Nations Millennium Declaration 55/2 para 9 https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_55_2.pdf (Last visited on 17June 2021).

[24]U. N. GAOR 60/1 -2005 World Summit Outcome https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf (Last visited on 17June 2021).

law associated with human rights was regarded as one of the four focus areas of the World Summit Outcome where the members were to commit themselves to actively protecting all human rights, the rule of law and democracy and recognise that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations. [25]

The General Assembly Resolution 61/39, the Rule of Law at the National and International Levels 2006 is regarded as the starting point from which the United Nations began to engage with rule of law on an international basis. This Resolution linked rule of law to all the areas that are pertinent in international legal order like maintenance of international peace and security, realization of human rights, elimination of hunger and poverty, importance of sustainable development and sustained economic growth, emphasis and observance of peaceful co-existence and cooperation and respect for jurisdiction of International Court of Justice.[26] The subsequent thirteen resolutions within the Sixth Committee of the General Assembly 62/70[27], 63/128[28], 64/116[29], 65/32[30], 66/102[31],

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[25] *Id.* Also see *Supra* 17

[26] U.N. GAOR, 61th Sess., 64th plen. mtg. U.N. Doc. A/RES/61/39 (Dec. 04, 2006), https://www.un.org/ruleoflaw/files/A-RES-61-39.pdf (Last visited on 17June 2021).

[27] U.N. GAOR, 62nd Sess., 62nd plen. mtg. U.N. Doc. A/RES/62/70 (Dec. 06, 2007), https://undocs.org/en/A/RES/62/70 (Last visited on 17June 2021).

[28] U.N. GAOR, 62nd Sess., 67th plen. mtg. U.N.Doc. A/RES/63/128 (Dec. 11, 2008) , https://undocs.org/en/A/RES/63/128 (Last visited on 17June 2021).

[29] U.N. GAOR, 64th Sess., 64th plen. mtg. U.N.Doc. A/RES/64/116 (Dec. 16, 2009) , https://undocs.org/en/A/RES/64/116 (Last visited on 17June 2021).

[30] U.N. GAOR, 65th Sess, 57 plen. mtg U.N. A/RES/65/32 (Dec. 06, 2010), https://undocs.org/en/A/RES/65/32 (Last visited on 17June 2021).

[31]U.N. GAOR, 66th Sess., 82nd plen. mtg. U.N.Doc. A/RES/66/102 (Dec. 09, 2011) https://undocs.org/en/A/RES/66/102 (Last visited on 17June 2021)

67/97[32], 68/116[33], 69/123[34], 70/118[35], 71/148[36], 72/119[37], 73/207[38] and 74/191[39] have further elaborated the scope and the ambit of rule of law adding additional areas like strengthening domestic implementation of international obligations, enhancing capacity-building and technical assistance, commitment towards fullest implementation of the 2030 Agenda for sustainable development, promotion of multilateral and bilateral treaty process that advance rule of law, emphasis on programme of assistance on the teaching, study, dissemination and wider application of international law in furtherance of the UN rule of law programmes and activities, encouraging the participation of women in rule of law activities, strengthening rule of law in national context specially taking into account its legal, political, socio-economic, cultural, religious and other local conditions, commitment towards good governance by providing access to justice for all and registering births, refugees, stateless persons, migrants, asylum seekers to name a few. The 74/191 also added 'measures to prevent and combat corruption' as provisional

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[32] U.N. GAOR, 67th Sess., 56th plen. mtg. U.N.Doc. A/RES/67/97 (Dec. 14, 2012) https://undocs.org/en/A/RES/67/97 (Last visited on 17June 2021).

[33]U.N. GAOR, 68th Sess., 68th plen. mtg. U.N. Doc. A/RES/68/116 (Dec. 16, 2013) https://undocs.org/en/A/RES/68/116 (Last visited on 17June 2021).

[34]U.N. GAOR, 69th Sess., 68th plen. mtg. U.N.Doc. A/RES/69/ 123 (Dec. 10, 2014) https://undocs.org/en/A/RES/69/123 (Last visited on 17June 2021).

[35] U.N. GAOR, 70th Sess. 75th plen. mtg. U.N.Doc. A/RES/70/118 (Dec. 14,2015) https://undocs.org/en/A/RES/70/118 (Last visited on 19June 2021).

[36] U.N. GAOR, 71st Sess., 62nd plen. mtg. U.N.Doc./A/RES/71/148 (Dec.13, 2016) https://undocs.org/en/A/RES/71/148 (Last visited on 19June 2021).

[37] U.N. GAOR, 72nd Sess., 67th plen. mtg. U.N.Doc./A/RES/72/119 (Dec. 07, 2017) https://undocs.org/en/A/RES/72/119 (Last visited on 19June 2021).

[38] U.N. GAOR, 73rd Sess., 62nd plen. mtg. U.N.Doc./A/RES/73/207 (Dec. 20, 2018) https://undocs.org/en/A/RES/73/207 (Last visited on 19June 2021).

[39] U.N. GAOR, 74th Sess., 51st plen. mtg. U.N.Doc. A/RES/74/191 (Dec. 18, 2019) https://undocs.org/en/A/RES/74/191(Last visited on 19June 2021).

agenda for 75th session 2020.[40] The Resolution 75/141,[41] of the 75th session 2020 has invited governments to submit their best national practice in order to exchange the practice and dialogue in strengthening rule of law.

The rule of law has been used by Security Council in 1996 in the Resolution 1040 where the Security Council has expressed its support for the Secretary- General's effort to promote 'national reconciliation, democracy, security and rule of law' in Burundi.[42] A new paradigm in peacekeeping and peace-building with emphasis on rule of law has been mandated by the Security Council in the Brahimi Report on Peacekeeping,[43] requiring the support of rule of law in future operations, special political missions and installing transnational justice in conflict and post-conflict societies. The Security Council underscored that sustainable peace requires an integrated approach based on coherence between political, security, development, human rights, including equality and rule of law and justice activities.[44]

Despite the development in the global platform by the initiatives of the General Assembly and Security Council, there is persistent ambiguity in the conceptualization. The idea of ILR is equated with the 'rule of international law' that requires faithful observance of international law.[45] It emphasizes the domestic compliance of

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[40] *Id* Para 23 .

[41] U.N. GAOR, 75th Sess., 45th plen. mtg. U.N.Doc. A/RES/75/141 (Dec. 15, 2020) https://undocs.org/en/A/RES/75/141 (Last visited on 19June 2021).

[42] United Nations and the Rule of Law, Security Council, https://www.un.org/ruleoflaw/security-council/ (Last visited on 20 June 2021).

[43] Comprehensive review of the whole question of peacekeeping operations in all aspects; A/55/305 and S/2000- Report of the Panel on United Nations Peace Operations, https://www.un.org/en/ga/search/view_doc.asp?symbol=A/55/305 (Last visited on 20 June 2021).

[44] UN and Rule of Law- Security Council.

[45] *Supra* note 17 at 784.

international law, initiatives for the promotion of international law and governance at the domestic levels. The ILR is neither characterized to hold hierarchical superiority nor operate as a lodestar in the international legal order.

Domestic Courts as Independent Agents for the Protection of International Rule of Law

The Permanent Court of International Justice was the first judicial body to be named as an agency of international law. The concept of agency can be applied to all participants contributing to the process of legal development, including domestic courts. The term 'agent' is used in a broad sense denoting a capacity to influence processes of legal development. O'Connell observes that "almost every case in a municipal court in which a rule of international law is asserted to govern the decision raises the problem of the relationship of international law and municipal law."[46] Despite, the jurisprudential basis for the application of international law in municipal law, the undeniable fact is that international law is today applied in municipal courts with more frequency than in the past. The courts rarely question the theoretical explanation for their recourse to international law.[47] The domestic courts are regarded as the trusted mouthpieces and agents of international law as local divisions of the great High Court of Nations.[48] Agents can be

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[46] Hisashi Owada, *Problems of Interaction between the International and Domestic Legal Orders*, 5 ASIAN JOURNAL OF INTERNATIONAL LAW 249(2015).

[47] John Dugard on the incorporation of public international law into municipal law and regional law against the background of the dichotomy between Monism and dualism, Ferreria G. and Ferreira Snyman A, (17)4 PER/PELJ 1471(2014).

[48] Antonios Tzanakopoulos, and Christian J. Tams, *Introduction: Domestic Courts as Agents of Development of International Law*, 26 LEIDEN JOURNAL OF INTERNATIONAL LAW 533-534 (2013).

powerful or weak and their strength may vary across areas as in indeed the case with respect to domestic courts.[49]

The international legal order requires the domestic courts more than any other organ of the state, to apply and give force to international law in order to promote ILR. Although silent about the modes of implementation, international legal order holds the primacy of international laws over domestic laws. It stipulates that a state's domestic legal arrangements cannot be taken as a defence to a violation of their obligations under international law, thus creating some pressure to incorporate those obligations into domestic law when appropriate.[50] In such circumstances, to prevent a violation of international law, the domestic courts are expected to give effect to international law either by applying it directly or by reading domestic law in accordance with international law, when the executive fails to abide by its international commitments or the legislature remains ambiguous as to whether it wishes to comply with the State's international obligations.[51]

Falk argues that the courts have to develop an ability to withstand internal political influence when confronted with an issue of international law. The inference is that when the domestic courts construe the rules of international law in consonance with the national values, the courts become politicized by their own independent action. This attitude of the courts to give more value to the domestic values creates a sense of scepticism in the foreign parties to expect and receive unfair treatment in a domestic court. The judicial outcome thereby represents the national values than the uniform rules of international law on the issue. From the perspective of the international system, a court is expected to apply rules

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[49] *Id.*, at 538.

[50]Frederic Megret, *International Law as Law,* in CAMBRIDGE COMPANION TO INTERNATIONAL LAW 70 (James Crawford and Martti Koskenniemi eds. 2012).

[51] Veronika Fikfak, *International Law before English and Asian Courts: Finding the Judicial Role in the Separation of Powers*, 3 ASIAN JOURNAL OF INTERNATIONAL LAW 271(2013).

of international law as independently and consistently as it does to the rules arising from any other source of law. Domestic courts are in a position to develop international law, to manifest respect for international law, and to demonstrate that normal standards of judicial independence are just as operative in an international law case as in a domestic case.[52] He further fragments the judiciary into two types; the autonomy of the judicial institutions within the framework of the domestic political system and the autonomy of the rules of international law within the law applying context.[53] Falk lists out some of the qualities domestic courts may imbibe for the effective implementation of international law:

1. Purely international tribunals are not conveniently available for the litigation of disputes about international law.
2. Respect for the claims of international law as a legal system is lost if adjudication is made subservient to diplomacy
3. Domestic courts have an excellent opportunity to develop international law if they will be allowed to operate as independent tribunals.
4. The domestic location of the forum should normally not be treated as an essential aspect of the controversy.
5. The independence of the judiciary in international law cases is one way to shatter the illusion that sovereignty allows a state to reconcile its obligation to uphold international law with the promotion of its national interest.

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[52] Richard A. Falk, *Role of Domestic Courts in the International Legal Order*, 39(3) INDIANA LAW JOURNAL, 436 (1964). The author arrives at this argument after the case Banco Nacional de Cuba vs. Sabbatino Receiver, et al. (376 U S 398) which was filed before the Court of New York. The Court categorically dismissed the case on the ground that the expropriation by the sovereign state is not subject to the jurisdiction of the US Courts under the doctrine of 'Act of State' even if it violates the customary principles of international law.

[53] *Id.,* at 431.

6. The awareness by the general community of states of the independence of the judiciary will by itself mitigate many of the burdens that such independence imposes on the executive. Part of the need for executive control arises from the illusion abroad.
7. An independent judiciary preserves a private sector of international transaction that is not vulnerable to government control and thereby resists the trend towards totalization of the exercise of control over human activity by the modern state.
8. Domestic courts are in a better position in part because of their visibility and discipline mode of operation, to resist domestic pressures to apply international law in a partisan manner.
9. Domestic courts can educate the public about the character and importance of international law by writing opinions in this area, particularly if these opinions manifest a non-political approach to the interpretation and application of rules of international law.
10. The dangers of the nuclear age make it desirable to take risks, even to make sacrifices in order to promote the growth of world legal order.[54]

The expectation of the domestic courts to operate in compliance with international law owing to the principle of independence of judiciary and separation of powers are well-founded intent of ILR. Several multilateral instruments have emphasised the importance of an independent judiciary. The United Nations Basic Principles on the Independence of the Judiciary (Basic Principles) adopted by the General Assembly in 1985 and 1990 establish a series of model institutional arrangements.[55] Under the Basic Principles, judicial independence includes both individual and institution components. Governments are

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[54] *Id.*, at 440- 442.

[55] Basic Principles, www.un.org/ruleoflaw/blog/document/basicprinciples-on-the-independence-of-the-judiciary/(Last visited 23 June 2021).

encouraged to incorporate these institution arrangements directly into their domestic law and the UN proposes that it "offers models for lawmakers everywhere who are encouraged to write them into their national constitutions and enact them into law."[56] The Human Development Report 1992 issued by the UN Development Program, suggested five possible indicators of which independent and impartial judiciary forms an integral part.[57]

Another significant initiative towards this mission is the Beijing Statement of Principles of the Independence of the Judiciary which was adopted by the Asia-Pacific Region. These principles originated from a statement of principles formulated by the LAWASIA[58] Human Rights Committee and judges of the Asia-Pacific region. The Beijing Principles reflect an agreement between the Chief Justices from a range of countries throughout the Asia-Pacific Region on the minimum standard necessary to secure judicial independence in their respective countries. About 38 states in this region have subscribed to the Beijing Principles.

The Declaration of Delhi 1959 adopted by the International Congress of Jurists is a significant milestone in the promotion of rule of law and independence of the judiciary. About 185 judges, practising

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[56] *Id*.

[57] The other principles are: fair and public hearings in criminal cases; the availability of legal counsel; provision for review of convictions in criminal cases; and whether government officials or pro-government forces are prosecuted when they violated the rights and freedoms of other persons, hrd.undp.org/sites/default/files/reports/221/hdr_hdr_1992_en_complete_nostats,pfd. (Last visited on 23 June 2021); UDHR 1948 goes on to enumerated specific rights such as prohibiting arbitrary deprivation of liberty requiring fair trials by independent and impartial tribunal and protecting equality before the law. These protections broadly correspond to the three aspect of the core definition adopted here with the qualification that independence of the judiciary is only part of what is implied by supremacy of the law.

[58] LAWASIA is the acronym of the Law Association of Asia and Pacific. It was founded in 1966 and is an association of lawyers, law teachers and judges. Its objective is to protect human rights and maintain the rule of law by an independent judiciary. David K. Malcolm *The Independence of the Judiciary in the Asia-Pacific Region,* 10th Conference of Chief Justices of Asia and the Pacific , (2003) http:/reserachonline.nd.edu.au/law_conference/5 Last visited on 24/June 2021.

lawyers and teachers from 53 countries assembled in New Delhi in 1959, to discuss freely and frankly the Rule of Law and the administration of justice throughout the world.[59] The Congress with President Justice Vivian Bose examined the rule of law under four divisions namely legislative, executive, criminal process and judiciary and legal profession. The Declaration highlighted the independence of the judiciary and the legal profession as essential to maintain rule of law and proper administration of justice. It observed the primary responsibility of the jurists is not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions.[60]

The independence of judiciary is the essential attribute that connects the domestic courts to international law. The international legal order yearningly expects the domestic courts to apply international law, devoid of the political influence of the other state organs. The international legal order fails to capture the scenario of the judiciary worldwide, as it is observed that about one-third of the countries in the world lack an independent judiciary.[61] Since generalizing the independence of the judiciary is a contested reality, the call for the domestic courts to act independently from the other state organs appears to be redundant. Yet for optimization of ILR, the domestic courts are to function as independent agents of international law.

Judicial Response

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[59] Declaration of Delhi on Rule of Law in a Free Society, https://www.icj.org/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf (Last visited on 24/June 2021).

[60] *Id*.

[61] David Sloss, *Treaty Enforcement in Domestic Courts: A Contemporary Analysis* in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 2 (David Sloss ed. 2009).

International law requires a court to apply its rules as independently and as consistently as it does concerning rules arising from any other source of law, in order to promote ILR. Courts have complied by considering themselves as international actors by actively engaging with international law. They exhibit an eagerness to respond to cases involving elements of international law. As national courts act as agents of international law, they exercise dual roles, one at the national level as domestic courts and the other at the international level. Goldonis calls the domestic court servant of two masters since it attempts to appeal to both domestic and international audiences.[62] According to Scelle "national courts have the potential to fulfil dual roles, as either national actors operating within the national order or international actors enforcing international law on behalf of the world community."[63] Cassese opines that some of the issues are considered to be of primary importance like maintaining peace and security, protection of human rights, meeting the individualist concerns among others which have to be persevered and enforced by the domestic courts. He argues that the domestic courts do and should 'play a weighty role as instruments for safeguarding the international legal order,' which requires them to take into account 'meta-national considerations[64] (protection of human rights, need to repress terrorism, need to implement international standard etc.) rather than being motivated by national short-term interest'.[65] This has been

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[62] Philipp Helmut Aust, Alejandro Rodiles and Peter Staubach *Unity or Uniformity? Domestic Courts and Treaty Interpretation* 27 LEIDEN JOURNAL OF INTERNATIONAL LAW 76 (2014).

[63] Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law,* 60 (1) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 68(2011).

[64] Cassese considers the meta- national interest of a state to be of primary concerns which have to be met by the domestic judiciary though the national interest proves otherwise.

[65] *Supra* note 63 at 68.

followed in *People's Union for Civil Liberties vs. Union of India*,[66] where the Indian Supreme Court has acknowledged, "anti-terrorism activities in the global level are mainly carried out through bilateral and multilateral co-operation among nations. It has thus become our international obligation also to pass necessary laws to fight terrorism. In the light of global terrorist threats, collective global action is necessary".[67] The Indian Court supported this statement with a reference to Lord Woolf's assertion in *A vs. Secretary of State for the Home Department*, that "where international terrorists are operating globally, a collective approach to terrorism is important."[68]

The decisions from the domestic courts generally form the evidence of state practice. They are relevant to the interpretation of treaties and the existence of custom under article 38(1)(a) and (b) of the ICJ statute.[69] When a court decision is consistent or does not contradict the views of the legislature and executive, it will represent strong evidence of state practice.[70] As evidence of state practice, relevant to the interpretation of treaties and formation of custom (where domestic judgements play a role in law creation) and as a subsidiary means of determining the existence and content of international law (where domestic judgement can be characterized as law enforcement).[71] It is argued that only the domestic judgments of the western courts are involved in the creation of international norms. There is hardly any instance where a decision of a domestic court of a third world state has qualified as a custom. The role of domestic courts relates to the increasing participation in world affairs of nations with diverse normative

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66 (2004) 1 LRI 1.

67 *Id*., para 10.

68 *Id*, para12.

69 *Supra* note 63 at 62.

70 *Id*

71 *Id.,* at 62.

traditions. It is generally acknowledged that international law as a dynamic system suffers from its historical attachment to European culture. Falk argues that "if the law is to bring increased stability to international relations, then it must progressively liberate itself from its somewhat provincial past. This requires a respect for diversity more than an agreement upon universal standards."[72]

The domestic courts generally chose either to comply with international law or adopt techniques to avoid compliance. One of the predominant methods of compliance is the method of direct effect. By the method of direct effect, the courts apply international law like they apply any other domestic law. However, to avoid implementation, the courts may look for many excuses.[73] Aust describes that the "avoidance method is referred either to a bundle of judicial techniques designed to prevent a court's engagement in the pitfalls of international relation or to general concepts applied to this effect."[74] There is no guarantee that incorporation leads to the direct applicability of international law by the domestic courts, as domestic courts have devised a variety of avoidance techniques. Some of them are non-justiciability where one might include the political question doctrine, the act of state doctrine, denial of standing and the doctrine of non-self-executive of treaties, sovereign immunity among others.[75]. Kanetake explains that specific techniques and grounds under which domestic courts avoid and contest the decisions of international institutions vary depending on whether those decisions are rendered by political or judicial institutions, whether states have monist

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[72] FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER, 66 (Syracuse University Press, Syracuse1964).

[73] For justification regarding non- compliance of international law by US See Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE JOURNAL OF INTERNATIONAL LAW 189 (2006).

[74] *Supra* note 62 at 76.

[75] International Law Association, *Preliminary Report, Study Group: Principles on the Engagement of Domestic Courts with International Law* 7 (2012).

or dualist traditions, the kind of treaties involved and the wider political and judicial climate surrounding the judges and instances of the avoidance methods are illustrated by the author as follows:[76]

1. Domestic courts may deny the domestic applicability of a particular decision in the first place. In a monist state in which international agreement automatically acquires domestic validity, domestic courts encounter the question of whether or not particular international treaties are directly applicable. A well-known case in this regard is *Medellin vs. Texas*[77] in which the US Supreme Court observed that ICJ decisions were not automatically enforceable as domestic law.
2. Judges can also interpret international law as more favourable to domestic law and political interest. The US Supreme Court in *Sanchez-Llamas vs. Oregon*[78] interpreted Article 36(2) of the Vienna Convention on Consular Relations as requiring the conformity of the treaty provision with domestic law and regulation.
3. The third method is the principle of separation of power at the domestic level. Domestic courts may avoid or contest the specific decision of international institutions by leaving the political branches to decide whether or not the rules can be given effect in the domestic legal order.

The other very popular means of compliance is through methods of interpretation i.e. method of consistent interpretation. This method is

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[76] *Supra* note 8 at 24-26.

[77] 552 U.S. 491 (2008), https://supreme.justia.com/cases/federal/us/554/759/ Last visited on 24 June 2021.

[78] 548 U.S. 331 (2006), https://www.law.conell.edu/supct/html/4-10566.ZS.html Last visited on 24 June 2021.

also known as the 'Charming Betsy' doctrine. This interpretation directs the court in situations of two possible interpretations, to adopt the ones that give effect to international law. It is however argued that the 'transplant effect' in harmonization treaties where single texts are interpreted in diverse ways that often undermine the very point of harmonization.[79] It then appears that a large number of domestic courts from formally dualist legal systems resort to the theory of consistent interpretation in a way that is much more favourable to international law than many of the judges belonging to monist systems.[80]The assessment of the technique of consistent interpretation shows that most 'internationalist' judges do not always come from monist systems.[81] For instance, the Indian Supreme Court highlighted the harmonious interpretation in *Additional District Magistrate, Jabalpur vs. S. Shivakant Shukla,*[82]

> Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If however, two constructions of the municipal law are possible. The Court should lean in favour of adopting such construction as would make the provisions of the municipal law in harmony with the international law or treaty obligations.[83]

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[79] Arvind, T.T *The Transplant Effect in Harmonization*, 59(1) INTERNATIONAL COMPARATIVE LAW QUARTERLY, 65(2010).

[80] *Supra* note 3 at 293.

[81] *Id.,* at 301.

[82] AIR 1976 SC 1207.

[83] *Id.,* at 1259, para 169.

Another method of incorporation is reflected through the citing of consubstantial norms. This may be the unconscious interpretation and application of the substance of international law by the domestic court. The consubstantial norms are norms that happen to exist both at the international and at the domestic level and provide for the same substantive norm. For instance, in *T. N. Godavarman Thirumulpad vs.Union of India and others,*[84] the Court declared that the national legislations like Bio-Diversity Act 2002, Environment Protection Act 1986 were to be interpreted in the light of international environmental instruments conventions like Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES) and the Convention of Biological Diversity 1992 (CBD).[85] Further, the Indian Courts have interpreted the constitutional provisions in the light of international instruments when there is a void in the legal system. They have derived the source and interpretation from the international instruments in expanding the ambit of the constitutional provisions. The *Vishaka and others vs. State of Rajasthan and others*,[86] where the Supreme Court interpreted the right to life of Article 21 to include right against sexual harassment in the light of CEDAW. It held that,

> International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee….The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency

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[84] T. N. Godavarman Thirumulpad vs.Union of India and Others, http://judis.nic.in/supremecourt/imgs1.aspx?filename=39078 (Last visited on 24 June 2021).

[85] *Id*., para 18.

[86] AIR 1997 SC 3011.

> between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms from construing domestic law when there is no inconsistency between them and there is a void in the domestic law.[87]

The Indian Courts have developed new principles of jurisprudence on the basis of international instruments. The Indian environmental jurisprudence has been greatly influenced by the international environmental instruments which have been read into judicial decisions. Some of them are even based on informal international instruments. The decision in *Vellore Citizens Welfare Forum vs. Union of India & Others*,[88] the Court has introduced the principles of polluter pays, precautionary, sustainable development, inter-generational equity from the Bruntland Report.

> We have no hesitation in holding that 'sustainable development' as a balancing concept between ecology and development which has been accepted as a part of the customary international law. Some of the salient principles of sustainable development, as culled-out from Brundtland Report and other international documents are inter-generational equity, use and conservation of natural resources, environmental protection, the precautionary principle, polluter pays principle, obligation to assist and cooperate, eradication of poverty and financial assistance to the developing countries.

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[87] *Id.,* at 3014, para 8.

[88] AIR 1996 SC 2715.

The unusual method of incorporation by the domestic courts is by referring to the un-ratified international instruments as customary international norms. The customary international norms entail direct application. For instance, the Indian Courts reliance on the Convention against Torture 1984 and the Convention on Status of Refugee 1951 as customary international law. Further, the Court provided entry to Vienna Convention on Law of Treaties 1969 in *AWAS Ireland v Directorate General of Civil Aviation*[89] and drew reference to Article 26, 27 and 31 of the VLCT holding them applicable in the Indian legal system despite India not being a party to the Convention. The Court explained that these Articles has been crystallised into customary principles of international law and thereby are to be treated as law of the land. The engagements between Indian courts and international law have changed over the years with the development of sectorial regimes. The Courts now adopt a host of other incorporative and interpretative techniques during their engagement with international law. This argument holds good for most of the common law traditions that have been engaging more frequently with international law deviating from the strict dualist stance.[90] Domestic compliance towards international law which is one of the objectives of ILR seems to be achieved with the increased implementation of international norms since the domestic courts have never debated the legitimacy of the international legal order.

Conclusion

During the initial perception of ILR, the obvious and reasonable expectation of the Global South from ILR was the creation of a

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[89] MANU/DE/0832/2015.

[90] A study by Waters examines sample of ninety-two judicial opinions on human rights from the Australia, Canada, New Zealand and the United States to trace the trends in integration. Melissa A. Waters, *Creeping Monism: The Judicial Trend Towards Interpretive Incorporation of Human Rights Treaties* 107(3) COLUMBIA LAW REVIEW 653 (2007).

normative structure on just and egalitarian principles. The core expectations of the 'Third World' states are well encapsulated by Baxi as "continual fuller respect for the principle of equal sovereignty of all states, non-aggressive international relations limiting the use of force by a state or a coalition of states firmly within the discipline of the United Nations Charter and global justice via the progressive development of international law, its structures and processes". [91] But ILR mostly addressed the peripheral aspects rather than focussing on the inherent disparities. For instance, ILR proposes the initiatives to be taken to eradicate poverty and hunger but disregards the causes for such socio-economic inequalities. Though the ambit of ILR is subject to expansion with every new resolution by the UN, the fact remains that they are limited to being 'rules of international law' rather than being 'international rule of law'. The ILR to achieve its highest normative value and legitimacy has to devoid itself from the hegemonic modes of thinking and practices.[92]

The ILR with the increased emphasis on domestic compliance and observance is facilitating the dissolution of sovereignty. The domestic courts are responding by deserting their affiliations with their national systems and moving towards internationalization through several domestication techniques. Chimni observes that there is now a global network of legislators, judges, bank officials and police officials trying to collectively address common global problems and such networks are the first step in aggregating the functional processes necessary for the formation of a global state.[93] The pressure on observance and compliance of international law, fullest commitment towards bilateral and multilateral instruments, respect to international dispute settlement

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[91]Upendra Baxi *What may the 'Third World' expect from International Law?* 27(5) THIRD WORLD QUARTERLY 713(2006).

[92]*Supra* note 7 at 293.

[93] *Supra* note 10 at 20.

mechanisms, dissemination of applications of international law through initiatives, are camouflaged as objectives of ILR, in order to achieve unity and universalization. Consequently, this will further facilitate the growing socio-economic disparity among the states, with international law being precarious and unequal. An ideal ILR must aim at creating a world order by restructuring international law on the democratic, pluralist and socialist principles and such ILR must subject international law to its regulation rather than the contrariwise.