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# INCORPORATION OF INTERNATIONAL HUMAN RIGHTS TREATIES INTO DOMESTIC LEGAL SYSTEMS: INDIA AND BEYOND

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## I. ABSTRACT

*Because of the spread of the international human rights law, scholars and courts have puzzled about whether, and how, a treaty obligation is incorporated into the domestic law. The classic debates between monist and dualist theories argue that either the treaty norms become part of the state's legal order automatically or they need to be translated to be incorporated into the legal order. A dualist system, in which Parliament has to turn treaties into law before they are enforceable, is generally followed in India, given that it has a written constitution, a federal structure and a history of colonial law. However, the Supreme Court applies and applies international conventions to interpret constitutional guarantees, mainly in absence of domestic laws. This paper examines the incorporation of human rights treaties in India in comparison with the constitutional mechanisms in monist, mixed or directive approaches countries like the Netherlands, South Africa, Argentina and Tanzania. It relies on doctrinal analysis of constitutional text (like Article 253 of the Indian Constitution, Article 75(22) of the Argentine Constitution, Section 231-233 of the South African Constitution, Article 93 and 94 of the Dutch Constitution and Article 9 of the Tanzanian Constitution) and some characteristic Supreme Court decisions (e.g., Vishaka, National Legal Services Authority, Makwanyane, Simón and Ephrahim v. Pastory) India has a dualist system and the paper contends that it has been democratically legitimised through its incorporation of treaties in Parliament, but judicial invocation of unincorporated treaties has consecrated the extension of rights, thereby eroding a strict dualism. Comparative analysis indicates that the explicit incorporation in the constitution, as in the case of the Netherlands and Argentina, does not necessarily result in an effective domestic mechanism. One important factor to consider is the independence of the*

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*courts and their interpretative powers. The paper ends with suggestions to strengthen India's treaty implementation in other jurisdictions.*

## II. KEYWORDS

International law; human rights treaties; constitutional law; monism; dualism

## III. INTRODUCTION AND RESEARCH PROBLEM

Under public international law, so-called fundamental norms (e.g. equality, non-discrimination and due process) are codified in international human rights treaties, and states are apparently bound by such treaties. How treaty commitments impact at home, however, varies greatly. In monoist, the act of ratification is enough for domestic use, while in dualist, internal use of treaties requires legislative act of transformation. Another distinction is between self-executing and non-self-executing treaties, self-executing is those that can be directly applied, non-self-executing require implementing legislation.<sup>3</sup> The incorporation of international human rights treaties into domestic law is a core issue that this paper responds to by exploring the question of the medium of incorporation under various constitutional regimes and what can be learnt from comparative practice on this.

The case of India is interesting. Even though its Constitution mandates that the State “foster respect for international law” under Article 51, it does not have a self-executing treaty obligation, and Article 253 provides for Parliament to enact legislation to fulfil treaties.<sup>4</sup> However, unincorporated treaties have been the means by which the Supreme Court has broadened fundamental rights. To appreciate the dualism – judicial creativity approach in India, one must look at case law and a comparative model also. The importance of this research problem is in relation to the protection of human rights and separation of powers.

### A. Research Objectives

1. To analyse the constitutional provision and judicial practice for incorporation of international human rights treaties in India and to identify

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<sup>3</sup> Ian Brownlie, *Principles of Public International Law* 31–34 (James Crawford ed., 8th ed. 2012).

<sup>4</sup> Malcolm N. Shaw, *International Law* 127–129 (9th ed. 2021).

whether India is adopting a purely dualist approach or an evolving mixed approach to fulfil the obligations of international human rights treaties.

2. To compare the approach of India to the incorporation of international human rights treaties with selected approaches of various jurisdictions, namely the Netherlands (monist model), South Africa (directive and transformative model), Argentina (constitutional incorporation model) and Tanzania (directive incorporation model), in order to see structural differences, similarities and practical results that come out of them.
3. To assess the effectiveness of various models of constitutional incorporation of international human rights standards (explicit, implicit and statutory) for the domestic implementation and realization of international human rights standards.
4. To craft recommendations to lawmakers, judges, policymakers and scholars that would help enhance the implementation, interpretation and enforcement of international human rights obligations in the Indian legal framework, and other comparable frameworks.

## **B. Research Questions**

1. What are the views on monism and dualism on the relationship between international law and domestic law and which is followed in the case of India?
2. What steps has taken the Netherlands, South Africa, Argentina and Tanzania to make human rights treaties a part of their legal systems and what are the practical results of those schemes?
3. What obstacles are there to good domestic practices of compliance with human rights treaties and what changes can help with good compliance in India and elsewhere?

## **C. Research Hypotheses**

1. H1 though with qualification. India remains formally dualist because treaties ordinarily require legislative implementation through Parliament before they become directly enforceable in domestic law. However,

decisions such as *Vishaka v State of Rajasthan, Chairman, Railway Board v Chandrima Das* and *National Legal Services Authority v Union of India* demonstrate that Indian courts have used unincorporated international human rights norms as interpretive aids while expanding constitutional guarantees. India may therefore be described not as purely monist, but as a dualist system with a judicially developed hybrid or interpretive dimension.

2. H2 is also confirmed with qualification. The Netherlands and Argentina show that express constitutional recognition of treaties strengthens the normative authority of international human rights law. Articles 93 and 94 of the Dutch Constitution permit treaty provisions binding on all persons to operate domestically after publication and to prevail over inconsistent statutory rules, while Article 75(22) of the Argentine Constitution gives constitutional hierarchy to several human rights instruments. However, the effectiveness of such incorporation still depends on judicial willingness, institutional independence, the clarity of treaty provisions, and the availability of remedies. Constitutional incorporation is therefore a powerful enabling mechanism, but it does not, by itself, guarantee effective enforcement.
3. H3 is confirmed. South Africa illustrates that interpretive mandates can meaningfully improve domestic engagement with international law. Section 39(1)(b) of the South African Constitution requires courts to consider international law when interpreting the Bill of Rights, and Section 233 requires courts to prefer any reasonable interpretation of legislation that is consistent with international law over an inconsistent interpretation. These provisions preserve parliamentary authority while directing courts to harmonise domestic law with international obligations. The hypothesis is nevertheless qualified to the extent that interpretive mandates are most effective when supported by judicial independence, doctrinal clarity and institutional capacity.

#### **D. Research Methodology**

This research is carried out with a doctrinal approach and comparative legal approach. It examines the international human rights treaties which have been incorporated at the national level under the Constitution, statutes, and jurisprudence. The study has also used scholarly literature, books and reports for critical evaluation. A comparative method has been used to analyse the difference between India and the other countries like the Netherlands (monist), South Africa (transformative), Argentina (constitutional incorporation) and Tanzania (directive incorporation). The analysis is mainly directed toward an evaluation of the effectiveness of these systems and methods for implementing international human rights obligations in domestic law.

#### **E. Literature Review**

Treaty incorporation literature covers constitutional law, comparative studies and human rights jurisprudence. Instead of giving the general background, mention at least five academic works in the style of the given model. Each one points to the authors and year and offers a summary of the major findings or arguments. Quotations are used appropriately and citations direct the reader to the sources of information used.

During his research, A. Rao & Chandrasekhara (1993) examined international law within the Indian constitutional framework in *The Indian Constitution and International Law*. He contended that the Indian approach is largely dualist, as international treaties are not ordinarily domesticated into municipal law unless implemented through legislation enacted by Parliament. The author also noted that Articles 253 and 51 of the Constitution provide the framework for giving effect to India's international obligations while preserving parliamentary authority.<sup>5</sup>

The authors of *Principles of Public International Law*, C. Brownlie, Ian (2008) briefly discussed the Theories of Monism and Dualism of Public International Law.

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<sup>5</sup> INDIA CONST. arts. 51, 253; Vayuna Gupta, 'Using International Law in Domestic Indian Courts' (2022) 54 *NYU Journal of International Law and Politics* 1077, 1078-79.

International human rights treaties rely heavily on the constitutional organisation of States and their National counterparts' willingness to accept and facilitate their compliance with the international norms, according to Brownlie. He emphasized the importance of remember that domestically implementation was the biggest contribution to fulfilling the obligations under international conventions.<sup>6</sup>

D. Koh, Harold Hongju (1997) in his seminal essay "Why Do Nations Obey International Law?" (Yale Law Journal), claimed that states obey international law because of a process of interaction, interpretation and internalisation. He emphasized the vital role of domestic courts turning international standards into law and the importance of judicial involvement in international law, which further reinforces the legitimacy of human rights protections.<sup>7</sup>

E. Shelton, Dinah (2015) in *Advanced Introduction to International Human Rights Law* looked at the way in which international human rights standards become part of the domestic legal system. She noted three main ways for treaties to apply in the country - Constitutional incorporation, legislative application and judicial interpretation. The author emphasized that, in addition to incorporation, there is a need of mechanisms and commitment from the institutions to enforce it.<sup>8</sup>

G. Chimni, B. S. (2004) in *International Law and World Order: A Critique of Contemporary Approaches* critically examine the use of the international law in the developing world. Political, economic and institutional factors affect the domestic implementation of international norms, he argued. The author stressed that in addition to ratifying, there must also be strong institutions within their country to implement international standards to make the protection of human rights effective.<sup>9</sup>

## **F. Background**

The background provides information on the legal theories and history that are important to know how human rights treaties get in domestic legal systems. There are

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<sup>6</sup> Ian Brownlie, *Principles of Public International Law* 31-34 (James Crawford ed., 7th ed. 2008).

<sup>7</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 *Yale L.J.* 2599, 2646-59 (1997).

<sup>8</sup> Dinah Shelton, *Advanced Introduction to International Human Rights Law* 71-79 (2015).

<sup>9</sup> B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* 381-402 (2d ed. 2004).

two main theories: monism, which holds that international law and domestic law are united and that treaties are directly binding; and dualism, which holds that international law and domestic law are distinct and that treaties must be incorporated into the domestic law. Also, the distinction between self-executing and non-self-executing treaties has a relevance: self-executing ones can be judicially applied without any new laws, the other needs implementing laws.

The Indian Constitution embodies dualist views as it provides that any resolution must be enacted by legislation through Parliament (as in Article 253) and it also encourages respect for international law (as in Article 51).<sup>10</sup> Some other countries use a different approach: In the Netherlands, there exists a monist view, held in Articles 93 and 94, which specify that the treaties are binding once they are published and that treaties can even take precedence of domestic statutes; In South Africa, a mixed constitutional approach is followed: international agreements generally require parliamentary approval, while self-executing treaty provisions may have domestic legal effect where approved and not inconsistent with the Constitution.

More importantly, the interpretive use of international law is governed by Section 39(1)(b), which requires courts, tribunals and forums to consider international law when interpreting the Bill of Rights, and Section 233, which requires every court, when interpreting legislation, to prefer any reasonable interpretation consistent with international law over one that is inconsistent with it; Argentina incorporates some human rights treaties into the Constitution with constitutional rank; and in Tanzania, Article 9 reflects directive principles requiring state policy to respect human dignity and human rights, although treaties are not generally self-executing.<sup>11</sup> Insight into these frameworks gives the necessary foundation for the comparative analysis succeeding.

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<sup>10</sup> Vayuna Gupta, 'Using International Law in Domestic Indian Courts' (2022) 54 *NYU Journal of International Law and Politics* 1077, 1078-79.

<sup>11</sup> Malcolm N. Shaw, *International Law* 123-129, 159-165 (9th ed. 2021); Dinah Shelton, *Advanced Introduction to International Human Rights Law* 71-79 (2015).

## IV. RESEARCH & ANALYSIS

### A. Comparative Overview Table

The following table summarises key aspects of treaty incorporation across the jurisdictions studied. Each row identifies the country, the overarching approach to treaty incorporation, salient constitutional provisions and notable cases where courts considered or applied human rights treaties.

Country	Approach	Key constitutional provisions	Notable cases
<b>India</b>	Dualist with judicial innovation	Article 51 & Article 253	Vishaka, Chandrima Das, National Legal Services Authority
<b>Netherlands</b>	Monist	Articles 93 & 94 of the Constitution	Important distinction between self-executing and non-self-executing the provisions of treaties applied by courts.
<b>South Africa</b>	Mixed/directive	Section 231-233 of the Constitution	Socio economic rights cases - S v Makwanyane
<b>Argentina</b>	Constitutional incorporation	Article 75(22) of the Constitution	Simoon v. Amnesty laws are under attack in the Argentine State, and in other cases as well.
<b>Tanzania</b>	Dualist/directive	Article 9 and treaty ratification provisions	Ephrahim v. Pastory, bail cases that make reference to UDHR

## B. Monist and Dualist Approaches: A Comparative Overview

There are two competing theories of treaty incorporation, namely monism and dualism; most legal systems, however, fall somewhere on a spectrum between the extremes of the two theories. With monist systems stand in contrast to above that the international law is not subordinated to the national law, by other words an international law has above the national law. It's just as is the case in the Dutch Constitution, which contains provisions that by and large are applicable to the provisions of treaties (Articles 93 and 94 of the Constitution of the Kingdom of the Netherlands).<sup>12</sup> Dualist systems believe that international and domestic laws are distinct, and that in order to be binding on individuals, a treaty requires “translation” into domestic law. Articles 253 of the Constitution of India empowers Parliament to give effect to treaties and in the absence of such action by Parliament, treaties do not have domestic effect in India and the same is true of Tanzania. In Tanzania, treaties also need to be ratified by the National Assembly and given Presidential assent before they become a part of national law.<sup>13</sup>

There are degrees of latitude between these extremes that categorize a combination or directive approach. Section 231(2) of the South African Constitution states that treaties only become binding after they are approved by the Parliament, whilst self-executing provisions of treaties may take effect automatically if they are approved by the Parliament and not inconsistent with the Constitution (section 231(4)). Both parts 39 and 232 and 233 make reference to international law and require that the court take it into consideration when deciding on interpretation, thereby providing a basis to include international law into the process of constitutional interpretation.<sup>14</sup> In Argentina, it is a more radical one due to the constitutional reform of 1994, where the constitutional status of human rights treaties is conferred. Mixed models conclude that

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<sup>12</sup> Grondwet [Const.] arts. 93–94 (Neth.); Malcolm N. Shaw, *International Law* 123–129 (9th ed. 2021).

<sup>13</sup> INDIA CONST. art. 253; Malcolm N. Shaw, *International Law* 123–129 (9th ed. 2021); Constitution of the United Republic of Tanzania, 1977, art. 63(3)(e).

<sup>14</sup> S. Afr. Const., 1996 §§ 39, 231–233; Malcolm N. Shaw, *International Law* 159–165 (9th ed. 2021).

any kind of methodology that views monism / dualism cannot grasp the complexity of today's constitutional practice.<sup>15</sup>

### C. India: Dualism with Judicial Innovation

India's constitutional position illustrates the tension between democratic control over treaty obligations and judicial willingness to harmonise domestic fundamental rights with international human rights norms. Formally, India follows a dualist approach because treaties ordinarily require legislative implementation by Parliament under Article 253 before they become directly enforceable in municipal law. However, the Supreme Court has considerably softened this strict dualist position by using international instruments as interpretive aids in constitutional adjudication. In *Vishaka v State of Rajasthan*, *Chairman, Railway Board v Chandrima Das* and *National Legal Services Authority v Union of India*, the Court referred to instruments such as CEDAW, the UDHR and the ICCPR while expanding the content of fundamental rights. This development was significantly strengthened in *Justice K S Puttaswamy v Union of India* (2017) 10 SCC 1, where a nine-judge bench recognised the right to privacy as a fundamental right under Part III of the Constitution.<sup>16</sup> The Court expressly situated privacy within India's international human rights commitments, referring to Article 12 of the UDHR and Article 17 of the ICCPR as recognising protection against arbitrary interference with privacy, family, home and correspondence. The judgment is especially important because it did not treat international norms as independently enforceable treaty law but used them to illuminate the scope of Articles 14, 19 and 21 of the Constitution. *Puttaswamy* therefore materially strengthens the argument that India has moved beyond strict dualism into a hybrid model in which unincorporated human rights norms influence constitutional meaning through judicial interpretation, while formal treaty incorporation remains within the legislative domain.

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<sup>15</sup> Constitución Nacional [Const. Nac.] art. 75, § 22 (Arg.); Dinah Shelton, *Advanced Introduction to International Human Rights Law* 71-79 (2015).

<sup>16</sup> INDIA CONST. art. 253; *Vishaka v State of Rajasthan* (1997) 6 SCC 241; *Chairman, Railway Board v Chandrima Das* (2000) 2 SCC 465; *National Legal Services Authority v Union of India* (2014) 5 SCC 438; *Justice K S Puttaswamy v Union of India* (2017) 10 SCC 1; Vayuna Gupta, 'Using International Law in Domestic Indian Courts' (2022) 54 NYU Journal of International Law and Politics 1077.

#### **D. Netherlands: Strong Monist Framework with Judicial Gatekeeping**

In the Netherlands we have a strong monist Constitution. Articles 93 and 94 make provisions of treaties “of a generally binding nature” directly applicable and give them precedence over conflicting statutes. Individuals can thus enter ratified human rights treaties into Dutch courts, which will then decide whether these are sufficiently self-executing (precise, clear and unconditional) to be enforceable.<sup>17</sup> This gatekeeping guarantees legal security and legal certainty and maintained the participation of the national Parliament, while enabling the international norms to be in place without the need for further legislative steps.

#### **E. South Africa: Transformative Constitutionalism and Judicial Implementation**

International law is incorporated in the post-apartheid South African Constitution through its ‘transformative’ provisions. Section 39 stipulates that courts must take account of international law in the interpretation of the Bill of Rights and Section 233 instructs courts to lean towards interpretations which facilitate international obligations. Treaties, if approved by Parliament and containing self-executing measures have direct effect if they are approved by Parliament.<sup>18</sup> This paved the way for the Constitutional Court to make reference to international covenants with a view to ending the death penalty and to make reference to the norms in various socio-economic cases. South Africa is consequently a “quasi monist” system working with international law as a guide to domestic adjudication.

#### **F. Argentina: Constitutional Rank for Human Rights Treaties**

Several of the main human rights documents, including the Universal Declaration of Human Rights, ICCPR, ICESCR and CEDAW, have been made part of the Constitution, as has the 1994 Argentine amendment to it, which gives preference to the documents. This has been the backdrop for considering and striking down amnesty laws and recognising new rights by the Supreme Court. But judicial

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<sup>17</sup> Grondwet [Const.] arts. 93–94 (Neth.); Malcolm N. Shaw, *International Law* 159–162 (9th ed. 2021).

<sup>18</sup> S. Afr. Const., 1996 §§ 39(1)(b), 231, 233; Malcolm N. Shaw, *International Law* 162–165 (9th ed. 2021).

independence and judicial understanding and clarity of the complementary clauses are still necessary to achieve effective protection.

### **G. Tanzania: Directive Approach and Judicial Discretion**

Tanzania basically follows a directive approach. Article 9 of its Constitution lays down principles, which are non-binding, based upon respect for human dignity and the spirit of the UDHR.<sup>19</sup> Treaties must be ratified and incorporated to be law. However, judges have on rare occasions relied on these guidelines and international standards to rule on discriminatory customs and bail conditions, showing how international standards can impact judgment in dualist systems.

## **V. COMPARATIVE ANALYSIS: EFFECTIVENESS OF INCORPORATION MECHANISMS**

Comparative analysis shows that the domestic effects of human rights treaties are shaped by interplay of constitution, judicial practice and political culture. In strong Monist States (e.g. the Netherlands and Argentina) treaties have direct effect or constitutional status, thus providing individuals with both a direct and an indirect foundation for invoking and claiming rights. But even then, courts serve as gatekeepers, determining if treaty provisions are ready to self-execute and determining whether a provision is too programmatic or vague for the court to apply. Furthermore, when treaties are entered into that require no normal legislation by Parliament, and are acting as obligations, then the question of democratic legitimacy arises, and there is a demand for more parliamentary control of treaties.

In directive or transformative systems such as South Africa, the constitution does not automatically include treaties but gives the courts the power to interpret the national law in the light of the international law, and to self-executing treaty provisions direct implementation once approved. This would ensure that the international standards are incorporated in the domestic jurisprudence and, at the same time, parliamentary control is maintained. The socio-economic rights jurisprudence in South Africa

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<sup>19</sup> Constitution of the United Republic of Tanzania, 1977, art. 9(1)(f); Malcolm N. Shaw, *International Law* 165–167 (9th ed. 2021).

illustrates the way such interpretative directives can impact on the domestic legal framework and enhance it with global human rights standards.<sup>20</sup>

In dualist systems (e.g., India and Tanzania), preference is accorded to legislatures, and legislative modification is required for the treaties. However, in India the use of unincorporated treaties has been toned down by judicial activism, with the courts themselves regularly treating the treaties as a guide. Not a strong judiciary system and not much judiciary independence in Tanzania coupled with these with partisan politics, Tanzania has rarely applied international rules and directive principles are generally aspirational. These differences indicate that unless these are coupled with judicial independence and political will and civic mobilisation, constitutional provisions can be of little value for implementation.<sup>21</sup>

Comparing the results generally, trade-offs have been found for each model. Monist systems offer clarity and accessibility, mixed systems balance the role of parliament and judiciary, dualist systems maintain sovereignty but stand a risk of not being implemented if the legislature is slow to incorporate treaties. Effective incorporation of treaties, therefore, will not be achieved without the help of robust institutions, learning and communication.

## **VI. LANDMARK JUDICIAL PRONOUNCEMENTS**

Key cases in all the jurisdictions examined illustrate how international human rights conventions have been used to affect domestic laws. In India, where no harmful legislation existed to tackle sexual harassment, the Supreme Court did this by "using" the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and other treaties. In the case of *Chairman Railway Board v. Chandrima Das*, the Court gave the interpretation of Fundamental rights incorporating the general principles of the UDHR and that of CEDAW and adjudicating a case of the

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<sup>20</sup> S. Afr. Const., 1996 §§ 39(1)(b), 231, 233; Gov't of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC); Malcolm N. Shaw, *International Law* 162–165 (9th ed. 2021).

<sup>21</sup> *Vishaka v State of Rajasthan* (1997) 6 SCC 241; Vayuna Gupta, 'Using International Law in Domestic Indian Courts' (2022) 54 *NYU Journal of International Law and Politics* 1077, 1080–84; Constitution of the United Republic of Tanzania, 1977, art. 9(1)(f); Malcolm N Shaw, *International Law* 165–167 (9th edn, Cambridge University Press 2021).

foreign Rape victim, took into account the general principle of the CEDAW. The Court further invoked international conventions to recognise transgender rights in *National Legal Services Authority v. Union of India*.<sup>22</sup>

No one case in the Netherlands can be regarded as a constitutional landmark nor have there been any cases where judicial interpretations of the non-discriminatory wording have been responsible for the autonomous operation of the convention; there have however been many cases where self-executing rules and/or covenants of conventions have been invoked and which demonstrates the courts practice of deciding whether or not a rule and/or covenant of a convention is sufficiently precise and unconditional to be put in force without the interference of the courts.<sup>23</sup> This process of gatekeeping by the judiciary cannot but have an effect that makes international norms directly function in its domestic legal order.

The South African Constitutional Court has in the past, invoked international and regional human rights conventions in resolving epochal cases. The Court in *S v. Makwanyane* (1995) abolished the death penalty, using the international norm and covenants on the right to life to inform the interpretation of this right. Other socio-economic cases have also made use of international covenants to bring duties of the state into force, including housing, health care and social assistance.

In Argentina, the Supreme Court's decision in *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*, Fallos 328:2056, decided on 14 June 2005, is a leading authority on the constitutional effect of incorporated human rights treaties. The case concerned criminal accountability for crimes against humanity committed during the military dictatorship, and the Court declared the Full Stop Law and the Law of Due Obedience unconstitutional, holding that such impunity measures were incompatible with Argentina's obligations under constitutionally recognised human rights

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<sup>22</sup> *Chairman, Railway Board v. Chandrima Das*, (2000) 2 S.C.C. 465, 31-36; *Nat'l Legal Servs. Auth. v. Union of India*, (2014) 5 S.C.C. 438, 51-66.

<sup>23</sup> *Grondwet [Const.] arts. 93-94 (Neth.)*; André Nollkaemper, *The Netherlands*, in *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* 326, 331-38 (Dinah Shelton ed., 2011).

instruments.<sup>24</sup> Even in relation to social and gender rights, constitutionalised treaties have continued to play a role in the Court's decisions.

Courts in Tanzania have, from time to time, referred to international norms, such as the UDHR, to interpret directions contained in the constitution. A customary law that disallowed women inheriting property was overturned by the High Court in *Ephrahim v. Pastory* (1990). The dualist framework also is an example of how internationally accepted principles have been applied to issues of bail and due process.<sup>25</sup>

All of these cases highlight the creativity of the judiciary in the enforcement of treaty obligations.

#### **H. Challenges in Implementing Human Rights Treaties**

1. The complete balance between the sovereignty of Parliament and judicial dependence on international human rights norms is still a challenge in implementing treaties.
2. The institutional capacity and expertise of judges, lawyers and policymakers in applying the treaty obligations are limited.
3. The process of implementing legislation tends to be time-consuming and, if there is a delay, the treaty obligations tend to have a symbolic nature rather than enforceable rights.
4. General awareness of the public and civil society's engagement is limited, and the mobilisation of treaty-based rights is not very effective.

### **VII. SUGGESTIONS AND RECOMMENDATIONS**

1. Adopt enabling laws conforming with the ratified human rights treaties that give them proper effect within your country.

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<sup>24</sup> Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, Fallos 328:2056, Supreme Court of Argentina, 14 June 2005; Constitución Nacional [Const Nac] art 75(22) (Arg).

<sup>25</sup> *Ephrahim v. Pastory*, [1990] L.R.C. (Const.) 757 (High Ct. Tanz.); Constitution of the United Republic of Tanzania, 1977, art. 13; Y.P. Ghai & Jill Cottrell, *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* 148–52 (2004).

2. Improve the capacity of justice, legislative and administrative actors, issue-specific training on international human rights law.
3. Introduce directives for courts to interpret domestic law in a way compatible with international human rights obligations.
4. Give due consideration to transparency, public participation and the role of civil society in treaty negotiations, adoption and implementation.

## VIII. CONCLUSION

Constitutional design, attitudes of the judiciary and political will all influence the incorporation of international human rights treaties into national law. India's dualist approach based on Article 253 upholds the sovereignty of parliament and that does not prevent the courts from interpreting the laws in the light of a treaty. The comparative analysis demonstrates that while explicit constitutional incorporation, such as in the Netherlands and in Argentina, offers strong normative authority it does not necessarily ensure effective enforcement which depends on the independence and clarity of the judiciary, and the treaty wording.

In between dualism and monism, there are also two other approaches, namely interpretive mandates as in South Africa and Tanzania, which means that courts can be given the flexibility to align local laws with international norms. Implicit interpretive clauses, legislative enforcement and judicial capacities would make the implementation of the human rights obligations more effective in India. At large the treaty incorporation is not about transferring international norms into domestic law, but about giving these international norms a significance in the domestic law that will also promote universal values of human rights.

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