CAN INTERNATIONAL HUMAN RIGHTS TREATIES CREATE ENFORCEABLE RIGHTS IN INDIA WITHOUT DOMESTIC LEGISLATION? A DOCTRINAL RE-EXAMINATION

Akhilesh Kakade, Legal Associate, Great Mission Group Consultancy, Pune

ABSTRACT

The paper argues that while the international human rights treaties are normatively influential, they do not in India independently create enforceable rights in India without the process of legislative incorporation. Against the background of (formally) dualist constitutional structure of India, it argues that Articles 51(c) and 253 affirm the primacy of Parliament as the vital organ of law making in converting treaty obligations into justiciable municipal rights, hence there cannot be any self-executing status of treaties under domestic legal order. At the same time, the paper shows how the Supreme Court has evolved a unique hybrid practice in which unincorporated human rights treaties are used as resources in the interpretation process in order to elaborate the content of basic rights, in order to coordinate statutory interpretation with international standards, and in exceptional cases, such as Vishaka, to fill legislative silences in cases involving fundamental constitutional guarantees. Through close analysis of leading decisions, the paper draws distinctions between indirect constitutional influence and direct enforceability and argues that judicial reliance on treaties remains doctrinally mediated by constitutional text, separation of powers and parliamentary supremacy. It takes further the academic critiques of the dangers of unprincipled treaty-based reasoning that can confuse the boundaries between adjudication and legislation and the signs of emerging judicial caution favoring a more limited and text-focused use of international norms. A comparative study of the United Kingdom's Human Rights Act 1998 strengthens the argument that the best means of ensuring effective and validable enforceability of treaty-based rights is explicit legislative incorporation of the rights instead of their implication from a decision of the courts. The paper in the end suggests that India's way is not to turn away from dualism; but to complete and perfect the details of this hybrid model by having clearer legislative frameworks and more transparent judicial doctrines on treaty-referential adjudication which ensures that international human rights treaties will influence the meaning of

the Constitution, but will not become autonomous source of enforceable rights.

Keywords: International human rights treaties, Enforceability, Dualism, Fundamental rights, Judicial interpretation

I. INTRODUCTION

India has for long been involved with the international human rights system, both as a constitutional democracy and as a treaty party. It has ratified international instruments such as the International Covenant on Civil and Political Rights (ICCPR)[1], the International Covenant on Economic, Social and Cultural Rights (ICESCR)[2] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[3]. These treaties impose binding international obligations, but of course the issue is how much these international obligations translate into rights that are enforced by individuals within the domestic (municipal) political legal system in India.

At domestic level, nevertheless, the Indian Constitution does not expressly provide for the automatic incorporation of treaties into the municipal law. Instead, the constitutional structure is a formally dualist one, in that treaty commitments normally have to be transformed into law before they can generate enforceable rights for individuals. Article 253 gives Parliament the power to make laws for the enforcement of treaties while article 51(c) a Directive Principle of State Policy calls for respect of international law and treaty obligations without providing direct enforceability.[4] The lack of a self-executing clause has been usually interpreted traditionally to mean that international treaties do not, by virtue of their existence, become part of domestic law.

[1] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights
[2] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights
[3] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women; Human Rights Watch, *Yemen: HRW Letter to Ms. Arwa Othman, Chairperson of the Rights and Freedoms Working Group*(Sept. 17, 2013), https://www.hrw.org/news/2013/09/17/yemen-hrw-letter-ms-arwa-othman-chairperson-rights-and-freedoms-working-group.
[4] Aparna Chandra, *India and International Law: Formal Dualism, Functional Monism*, 57 Indian J. Int'l L. 25 (2017), https://www.researchgate.net/publication/321219195_India_and_international_law_formal_dualism_functional_monism.

Notwithstanding this formal position, Indian courts in particular the Supreme Court have evolved a consistent jurisprudence recognizing that international law may play a part in domestic adjudication. In Gramophone Co, of India Ltd. V. Birendra Bahadur Pandey[5], the Supreme Court made it clear that the rules of international law and treaty obligations can be considered as interpretive aids in construing the provisions of the domestic statutes and constitutional provisions provided there is no inconsistency with the enacted municipal law. In the landmark case of Jolly George Verghese vs Bank of Cochin[6], the Court for the first time drew attention to India's obligations under the ICCPR and stated that the domestic laws relating to personal liberty must be construed in accordance with international human rights standards wherever possible.

The judicial interaction with international human rights law grew stronger in Vishaka v. State of Rajasthan[7] where the Hon'ble Supreme Court relied on CEDAW and other international materials to set down binding guidelines on sexual harassment at workplace in absence of enacted legislation. The Court used a connection between international obligations and the constitutional guarantees of equality, dignity and personal liberty under Articles 14, 15 and 21 to justify such an approach.[8] These decisions bring out the fact that treaties are not self-executing in India, but they have had normative influence by way of constitutional interpretation and gap-filling exercises. This trend has reached a modern high point in MK Ranjitsinh vs Union of India (2024)[9] in which the Court relied on the Paris Agreement and India's international agreements on climate change to recognize a new fundamental right to be free from the adverse effects of climate change under Articles 14 and 21.

Scholarly analysis has characterized this approach as a combination of formal dualism and functional judicial engagement, which, although not directly enforceable, may, nonetheless, influence the adjudication of rights on the domestic level.[10] This changing practice raises important questions about the basis of this reliance, doctrinally and constitutionally, of judicial reliance on unincorporated international human rights treaties.

[5] *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*, (1984) 2 S.C.C. 534 (India)
[6] Jolly George Verghese v. Bank of Cochin, (1980) 2 S.C.C. 360 (India)
[7] *Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241 (India)
[8] Mohd Mustafa & Virender Sindhu, *Constitutional Protections for LGBTQIA+ Rights: A Study of Legal and Judiciary Approaches*, 30 EDUC. ADMIN.: THEORY & PRAC. 4855 (2024), https://www.kuey.net/index.php/kuey/article/download/8614/6472/16596.
[9] M.K. Ranjitsinh v. Union of India, 2024 INSC 280 (India).
[10] Aparna Chandra, supra note 4

STATEMENT OF PROBLEM

The central problem dealt with in this paper relates to the doctrinal uncertainty about the enforceability of the international human rights treaties in India in the absence of implementing legislation. While the ratification of treaties commits India at the international level, it is now questionable whether this takes the form of binding international obligations that become enforceable rights at the domestic level or serve only as persuasive and interpretive norms.

The Indian courts have taken various approaches to consider treaties as interpretive aids, as a way to strengthen constitutional values with the help of international standards, and in some cases, as a way to create enforceable norms due to legislative silence. This uncertainty gives rise to the uncertainty about the exact legal status of international human rights treaties under India's constitutional order.[11] Moreover, this judicial reliance on unincorporated treaties raises issues concerning separation of powers and democratic legitimacy, especially where courts seem to have overstepped their bounds and entered the legislative sphere in operationalizing treaty norms without parliamentary sanction.

The problem is further added to by international monitoring mechanisms, such as the Human Rights Committee, which still evaluate India's compliance with treaty obligations regardless of their domestic enforceability.[12] This disconnection between the international obligation and domestic justiciability is the need for a clear doctrinal framework in relation to the role of international human rights treaties in Indian courts.

RESEARCH OBJECTIVES

1. To examine whether, and to what extent, international human rights treaties can create enforceable rights in India in the absence of domestic legislative incorporation.

2. To analyze the doctrinal techniques employed by Indian courts when engaging with unincorporated human rights treaties, and to identify the constitutional limits of such engagement.

[11] Vayuna Gupta, *Using International Law in Domestic Indian Courts*, 54 N.Y.U. J. Int'l L. & Pol. 1077 (2022), https://www.nyujilp.org/wp-content/uploads/2022/10/Gupta.pdf.
[12] U.N. Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of India*, CCPR/C/IND/CO/4 (2024), https://www.ohchr.org/en/documents/concluding-observations/ccprcindco4-concluding-observations-fourth-periodic-report-india.

3. To draw comparative insights from the United Kingdom's model of treaty implementation under the Human Rights Act 1998 for structuring a coherent and constitutionally consistent Indian approach.

RESEARCH QUESTIONS

1. Can international human rights treaties generate enforceable rights in India without domestic legislation, and on what constitutional basis?

2. How have Indian courts relied upon unincorporated human rights treaties in rights adjudication, and where should constitutional limits be drawn?

3. What lessons does the United Kingdom's Human Rights Act framework offer for India's treaty-rights relationship?

RESEARCH METHODOLOGY

The study has adopted the doctrinal legal research methodology wherein it involves close analysis of the provisions of Constitution, jurisprudence of Supreme Court of India and International Human Rights treaties which have been ratified by India. The research involves peer-reviewed academic literature dealing with India's treaty practice and judicial application of international law.[13] A comparative approach is adopted to the analysis of the United Kingdom's approach to the Human Rights Act 1998, with a focus on the mechanisms incorporated in statute to reconcile judicial interpretation with parliamentary sovereignty.[14]

SCOPE OF THE RESEARCH

The scope of this research is limited to the international human rights treaties ratified by India and how they have fared in Indian constitutional adjudication. Particular emphasis is laid on ICCPR and CEDAW because of the repeated invocation of these in the jurisprudence of the Supreme Court. The analysis is concerned primarily with decisions of the Supreme Court because they are authoritative statements of constitutional doctrine. The comparative analysis

[13] Vivek Sehrawat, *Implementation of International Law in Indian Legal System*, 31 Fla. J. Int'l L. 87 (2021), https://scholarship.law.ufl.edu/fjil/vol31/iss1/4/.
[14] Human Rights Act 1998, c. 42 (U.K.), https://www.legislation.gov.uk/ukpga/1998/42/contents.

is confined to the United Kingdom, because of its common law heritage and express legislative incorporation of human rights treaties.

STRUCTURE OF THE ARTICLE

This article is organized as follows. Chapter I presents the background, problem, objectives, methodology, and scope of the research. Chapter II focuses on the constitutional and theoretical framework of enforceability of treaties in India. A second analysis of judicial approaches to unincorporated human rights treaties is presented in Chapter III. Chapter IV is a doctrinal re-examination of the question whether such treaties can generate enforceable rights without legislation. Chapter V offers a comparative analysis of the Human Rights Act model of the United Kingdom. Chapter VI discusses modern implications and policy considerations followed by some concluding observations.

II: CONSTITUTIONAL AND THEORETICAL FRAMEWORK OF TREATY ENFORCEMENT

A. Monism and Dualism in International Law

The relationship between international law and domestic law is traditionally explained using two ideal-type theories: monism and dualism. In a monist conception, international law and municipal law are treated as part of one normative order; in that sense, international law may be marching directly domestically (sometimes with hierarchical superiority over conflicting norms at the national level of constitution, depending upon the constitutional design).[15] Dualism, on the contrary, views the international and municipal legal systems as distinct; treaties do not become enforceable as part of domestic law unless it is transformed or incorporated by municipal legal processes of lawmaking by the State.[16]

These theories, however, are most appropriately viewed as models of analysis, not as hard and fast classifications. Modern constitutional systems often function in "hybrid" ways: even dualist states may permit the influence of international norms on domestic law through

[15] Torben Spaak, *Kelsen on Monism and Dualism* 1–3 (2013), https://www.diva-portal.org/smash/get/diva2:1248967/FULLTEXT01.pdf.
[16] Brîndușa Marian, *The Dualist and Monist Theories: International Law's Comprehension of These Theories* (2007), https://www.researchgate.net/publication/23954651_The_Dualist_and_Monist_Theories_International_Law's_Comprehension_of_these_Theories.

interpretive presumptions, constitutional values or techniques by which judges avoid conflicts with international obligations where possible.[17] This distinction is of great importance to India, because India is frequently said to be formally dualist when it comes to enforcement of treaties, but Indian courts have repeatedly sought to use international norms as persuasive or interpretive resources in the course of constitutional adjudication (particularly in rights cases), making a certain functional practice impossible to explain only using strict dualism.[18]

B. India's Constitutional Position on Treaties

India's Constitution does not have an express provision that treaties are self-executing and automatically enforceable. Instead, India's treaty practice is one that stems from the constitutional division of powers between the Executive (treaty-making/entering into international agreements as an attribute of sovereignty) and Parliament (treaty implementation by legislation). Treaty making power was reiterated by the Supreme Court as vested with the Union executive, but treaties do not by themselves change the domestic law or provide for any enforceable private rights unless supported by appropriate municipal law making where needed.

This understanding has been consistently recognized in the Indian constitutional doctrine. The Supreme Court has made it clear that international obligations can bind India at the international level, but it doesn't necessarily become a part of the domestic law unless adopted through legislations. In Gramophone Co. of India Ltd. V. Birendra Bahadur Pandey[19], the Court clearly held that rules of international law can be relied upon only to the extent that they do not run counter to municipal law, and that in case of conflict, domestic law will prevail unless the international rule has been legislatively incorporated.

Accordingly, the position of India in regard to treaties may be summarized as follows: Treaty-making is an executive function, but treaty enforcement in the sphere of domestic law is subject to legislative intervention where treaty obligations involve a change in rights, liabilities or standards of the law.

[17] Constitutional Courts and International Law: Revisiting the Transatlantic Divide, 129 Harv. L. Rev. 1362 (2016), https://harvardlawreview.org/wp-content/uploads/2016/03/1362-1383-Online.pdf.
[18] Aparna Chandra, supra note 4
[19] Gramophone Co. of India Ltd., supra note 5.

C. Article 51(c): Constitutional Value and Interpretive Guidance

Article 51(c) of the Constitution states that the State is to "foster respect for international law and treaty obligations." As a Directive Principle of State Policy, Article 51(c) has no enforceable rights; but it has an important interpretive value for constitutional adjudication.

Indian courts have relied upon article 51 (c) to justify interpretation of law in conformity with domestic law and international obligations. This interpretive technique enables courts to give preference to constructions of provisions of the constitution or statutes that are consistent with international law where the text permits such an interpretation. The Supreme Court's reasoning in Gramophone Company illustrates this approach where the Supreme Court outside of the article, the Court reasoned that international law should be considered as a persuasive interpretive aid rather than a binding source of domestic law.[20]

Scholarly analysis is consistent with this understanding, and it is pointed out that Article 51(c) is a constitutional signal that international law may provide information to judicial reasoning without displacing parliamentary supremacy or constitutional text.[21] Thus, unless Article 51(c) provides latitude for interpretive engagement, interpretation does not automatically incorporate.

D. Article 253: Legislative Power to Implement Treaties

Article 253 gives power to Parliament to enact laws for the purposes of implementing treaties, agreements, conventions and decisions taken at international conferences. This provision is an important part of India's treaty enforcement architecture in that it confirms that the legislative incorporation is the constitutionally preferred method of domestic implementation of treaty obligations.

The Supreme Court's ruling in Maganbhai Ishwarbhai Patel v. Union of India[22] forms the crux of this understanding of the scope of Article 253.[23] The Court ruled that the Parliament has the power to enact legislation to give effect to international commitments even in those subject-

[20] Id.
[21] Gupta, supra note 11, at 1089–94.
[22] *Maganbhai Ishwarbhai Patel v. Union of India*, (1970) 3 S.C.C. 400 (India), https://www.casemine.com/judgement/in/5609ab63e4b014971140c53a.
[23] V.G. Hegde, *International Law in the Courts of India*, 19 Asian Y.B. Int'l L. 63 (2017), https://doi.org/10.1163/9789004379756_003.

matter areas which would normally fall in the State List and thus to give treaty obligations primacy over the federal structure in India. Article 253 thus serves to both strengthen the dualist orientation of India and the primacy of Parliament in converting international commitments into an enforceable municipal law.

Importantly, article 253 does not require legislative action in all cases of treaty ratification, instead, it gives Parliament the constitutional power to act where compliance with the treaty involves changes to domestic law. This distinction aligns judicial interpretive space while keeping legislative supremacy on the creation of rights.

E. Separation of Powers and Parliamentary Supremacy

The constitutional restraints on the enforcement of treaties in India are ultimately based on the principles of separation of powers and parliamentary supremacy in lawmaking. While it is true that courts may be able to interpret domestic law in the light of international obligations, there is no way that they can interpret treaty obligations in a way that reverses the express legislative choice or substitutes judicial preferences for parliamentary choices.

This limitation is doctrinally rooted in Gramophone Company[24] wherein the Supreme Court emphasized that international law is relevant for the purpose of interpretation only "as far as the language of municipal law admits." Similarly, in Jolly George Verghese v. Bank of Cochin[25], the Court treated domestic law and the standards of ICCPR harmoniously but did not cross the line from interpreting to legislating the Covenant by making it independently enforceable.

The tension can be the strongest where courts are faced with legislative silence. In Vishaka v. State of Rajasthan[26], the Supreme Court relied on CEDAW and constitutional guarantees as the foundation for making enforceable guidelines to address sexual harassment in the workplace until legislation was enacted by Parliament. While Vishaka has been broadly defended as a rights-protective response to legislative vacuum, it also demonstrates the constitutional risks of judicial reliance on unincorporated treaties. Scholars have warned against such interventions,

[24] Gramophone Co. of India Ltd., supra note 5.
[25] Jolly George Verghese, supra note 6.
[26] *Vishaka v. State of Rajasthan*, supra note 7.

if not carefully justified, losing the distinction between interpretation and law-making, thereby raising the concerns of institutional legitimacy and democratic accountability.[27]

III: JUDICIAL TREATMENT OF INTERNATIONAL HUMAN RIGHTS TREATIES IN INDIA

A. Treaties as Interpretative Tools in Constitutional Adjudication

Indian courts have repeatedly recognized that international human rights norms may be determinative of the interpretation of the Constitution, especially where the provisions of the Constitution are couched in broad and open textured language. This interpretive engagement does not understand treaties as self-executing law but as persuasive material which can be used to reinforce values that are central to the constitution, such as equality, dignity and personal liberty.

In Apparel Export Promotion Council vs AK Chopra[28], the Supreme Court specifically relied on international human rights conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[29] in interpreting the content of the rights of gender equality and dignity under Articles 14, 15 and 21 of the Constitution.[30] The Court held that international conventions consistent with fundamental rights may be relied upon to expound the content of fundamental rights.

Similarly, in Githa Hariharan v Reserve Bank of India[31], the Supreme Court relied on international human rights principles relating to gender equality to re-construed Section 6(a) of the Hindu Minority and Guardianship Act, 1956.[32] By adopting an interpretation which is consistent with constitutional equality and India's international commitments, the Supreme Court avoided a construction to subordinate mothers as legal guardians.

Taken as a whole, these decisions show that Indian courts have designed a constitutionally mediated reading technique, under which international human rights standards are applied to

[27] Aparna Chandra, supra note 4
[28] *Apparel Export Promotion Council v. A.K. Chopra*, (1999) 1 S.C.C. 759 (India)
[29] CEDAW, supra note 2.
[30] INDIA CONST. art. 14, 15, 21, *available at* https://cdnbbsr.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2024/07/20240716890312078.pdf.
[31] *Githa Hariharan v. Reserve Bank of India*, (1999) 2 S.C.C. 228 (India)
[32] The Hindu Minority and Guardianship Act, No. 32 of 1956, § 6(a), INDIA CODE (1993), *available at* https://www.indiacode.nic.in/bitstream/123456789/1649/1/195632.pdf.

give additional meaning to existing constitutional rights, without being recognized as independently enforceable sources of domestic law.

B. Judicial Reliance on International Norms to Address Legislative Silences

In some cases, Indian courts have not contented themselves with interpretive aid and turned to international human rights norms to fill the lacunae in law, especially where there is a gap in law that impacts vulnerable groups or fundamental constitutional rights.

In National Legal Services Authority v. Union of India[33], the Supreme Court drew liberally on international human rights instruments in the form of the Universal Declaration of Human Rights and principles recognized in comparative jurisdictions to establish the rights of transgender persons. While the Court based its decision mainly on articles 14, 15, 19 and 21, international norms influenced the Court's interpretation of gender identity, dignity and non-discrimination to a large extent. The judgment demonstrates how international human rights law may serve as a normative point of comparison where there is inadequate or no domestic legislation.

Likewise, in People's Union for Civil Liberties v Union of India (telephone tapping case)[34], the Supreme Court relied on international standards on privacy and civil liberties in order to interpret the scope of Article 21, and to impose upon the executive procedural safeguards in the absence of detailed statutory protections. The Court justified this reliance on the ground that constitutional rights must be meaningfully protected even where legislative frameworks are under developed.

These decisions suggest that although courts are cautious, international human rights norms have sometimes been relied upon to add to the constellation of reasoning in the Constitution to make up for legislative inaction where it would undermine basic rights.

C. Doctrinal Justification and Constitutional Limits

The doctrinal basis for judicial interaction with international human rights treaties is the Court's conception of the Constitution as a dynamic instrument that may change its content through

[33] *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India)
[34] *People's Union for Civil Liberties v. Union of India*, (1997) 1 S.C.C. 301 (India)

principled interpretation. International human rights law is frequently referred to as evidence of changing standards of dignity and justice, and not as binding domestic law.

However, the Supreme Court has also expressed definite limits to such practice. In State of West Bengal v. Committee for Protection of Democratic Rights[35], the Court reiterated that the constitutional interpretation cannot be allowed to drift away from the constitutional scheme and cannot be used to circumvent any express legislative choice or structural principles such as federalism and separation of powers. Although the case did not deal directly with the enforcement of treaties, it highlights the more general insistence of the Court that the exercise of judicial creativity must not go beyond the constitutional limits.

Academic commentary backs such a restrained approach, warning that it is easy to use international norms in an unprincipled way so that judicial interpretation resembles de facto law-making.[36] The lack of an obvious doctrinal test between interpreting and creating a norm is still problematic for consistency and legitimacy in treaty-referential adjudication.

D. Emerging Judicial Caution and Institutional Restraint

In recent years, Indian courts have shown a more measured attitude towards the use of international human rights treaties especially in areas that involve complex policy considerations or comprehensive legislative schemes. Rather than making the international law the focus of attention, courts increasingly focus on statutory interpretation and constitutional text and invoke international norms where they serve the domestic reasoning process.

This is a trend which reflects judicial awareness of institutional limits as well as democratic accountability. Courts seem to be becoming more reluctant to use international treaties as a determinative source of law in the absence of legislative support, at least where Parliament has provided detailed regulatory schemes.[37] This shift implies a transfer of balance towards institutional balance, which protects the interpretative value of international human rights law in line with the primacy of domestic constitutional process.

[35] *State of West Bengal v. Committee for Protection of Democratic Rights*, (2010) 3 S.C.C. 571 (India)
[36] Prabhash Ranjan, *The Supreme Court of India and International Law: A Topsy-Turvy Journey from Dualism to Monism* (May 6, 2022), 43(3) Liverpool L. Rev. 571 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4210902.
[37] Gupta, supra note 11.

IV: DOCTRINAL ANALYSIS – ENFORCEABILITY WITHOUT DOMESTIC LEGISLATION

A. Distinction Between Direct Enforceability and Indirect Constitutional Influence

A fundamental doctrinal difference in treaty enforcement lies between direct and indirect enforceability between treaty provisions being applied by courts as an article of domestic law, and treaty norms being influential in domestic interpretation, without being operative as separate rules of decision. In systems which are constitutionally dualist in form, the courts tend to treat treaties as international obligations in the absence of legislation to the contrary but still allow treaties to function as interpretive resources especially where domestic law is ambiguous or where the text of the constitution is open-ended and capable of rights-expansive meaning.[38]

The constitutional design in India facilitates this division. While Article 253 empowers Parliament to legislate to give effect to treaties, it does not, or even does not suggest by itself that treaties become domestic enforceable rights.[39] Indian doctrinal writing on treaty practice emphasizes that the operative legal move is not in the absence of a general "treaty incorporation statute," 'treaty-as-law', but 'treaty-as-context': i.e. courts look to international obligations to justify a construction of constitutional rights or statutes that relies on domestic sources.[40]

This doctrinal posture also helps ascribe the tendency of Indian courts to often sound "internationalist" in terms of language but to be formally cautious in terms of outcome. The judiciary can accept that India is bound internationally (and that domestic law cannot be invoked internationally as justification for non-performance), whilst still holding that a litigant's domestic cause of action has to be found in the Constitution, statute or common law, not in the text of the treaty alone.[41] This is consistent with the international law principle reflected in Article 27 of the Vienna Convention on the Law of Treaties that the internal law is no excuse for breach of treaty but retains the domestic separation-of-powers commitments as

[38] Ranjan, supra note 33
[39] *Treaty-making power under our Constitution* (Legislative Department, Ministry of Law & Justice, Gov't of India) 7–10 (1989), https://legalaffairs.gov.in/sites/default/files/Treaty-making%20power%20under%20our%20Constitution.pdf.
[40] Prabhash Ranjan, *Treaties on Trade and Investment and the Indian Legal Regime: Should We Mind the Gap?*, SSRN (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601789.
[41] Ranjan, supra note 33

to who may make enforceable law.[42]

B. Whether Judicial Practice Amounts to De Facto Incorporation

A more doctrinal issue is whether the interpretive approach to treaties in rights adjudication constitutes de facto incorporation i.e., whether in practice, the judicial construction of treaties results in legal outcomes that are consistent with the treaties, to the extent that treaties have become quasi-domestic norms even without implementing legislation. Comparative scholarship refers to this drift as "interpretive incorporation", which involves treaties being not legally self-executing in the first place but gradually becoming operational as interpreted through the domestic legal rights of the courts.[43]

Indian scholarship mapping Supreme Court practice also argues that India's formal dualism has been repeatedly qualified through a pragmatic judicial technique: the Court has over time moved from a strict transformation model towards a conditional incorporation impulse, where international law is put into place when (a) domestic law is unclear, (b) there is a perceived normative "gap," and (c) the international norm is not inconsistent with domestic law.[44] This is not necessarily incoherence doctrinally but rather can be a form of mediating model: treaties do not constitute separate rights, but rather determine the content of the constitutional guarantees and statutory meaning in a way that can be outcome-determinative.[45]

However, the "de facto incorporation" claim is still arguable for two reasons. First, interpretive incorporation is necessarily parasitic on the domestic legal hooks: When the constitutional text or statute cannot plausibly have the treaty consistent meaning, courts tend to back down.[46] Second, even when the courts do refer to treaties, they tend to present them as confirmatory, persuasive or harmonizing language that indicate their non-binding status in the hierarchy of

[42] Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.
[43] Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 Colum. L. Rev. 628 (2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=934108.
[44] Ranjan, supra note 36.
[45] Vik Kanwar, *Treaty Interpretation in Indian Courts: Adherence, Coherence, and Convergence*, SSRN (book chapter) (2015), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2572432_code786892.pdf?abstractid=2572432&mirid=1.
[46] International Institute of Legal and Judicial Studies, *Self-Executing and Non-Self-Executing Treaties* 5–6 (2016), https://iilj.org/wp-content/uploads/2016/08/Self-Executing-and-Non-Self-Executing-Treaties.pdf.

norms.[47] In doctrinal terms, the treaty does not provide the rule but it provides the reason for favoring one domestic interpretation over another.

C. Critique of Judicial Approaches

The most severe doctrinal criticisms of treaty-based adjudication with no legislation are neither that the courts invoke treaties, but that they may do so without a stable test for when reliance on treaties is legitimate. There is a common thread in scholarly accounts of the treaty jurisprudence of India suggesting inconsistency: the Court's status might, in some cases, be that of a persuasive tool for international norms, but in others it might talk in stronger terms of obligation, with a very thin line between interpretation and norm-creation.[48]

A separate criticism relates to method: treaty interpretation has its own discipline - text, context, object and purpose and other interpretive canons reflected in the Vienna Convention.[49] But doctrinal studies of the engagement of Indian courts to treaty interpretation point to the fact that judicial references can be selective, and the VCLT style of analysis seems patchy across subject areas.[50] Where interpretive method is a thin one, treaty reliance risks being impressionistic - international materials are invoked for rhetorical legitimacy rather than as part of a structured process of legal reasoning.

Finally, there is an institutional critique: where parliament has failed to legislate in spite of ratification, strong judicial enforcement may be interpreted as a replacement for legislative choice with judicial preference. The critique is especially vehement in areas where there is a need for resource allocation or regulatory design. Treaty norms, particularly socio-economic rights norms, can require policy-laden choices, for which courts are ill-placed to make decisions without legislative standards, budgets and implementation mechanisms.[51]

D. Democratic Legitimacy and Institutional Competence Concerns

The legitimacy concern is often couched in terms of separation of power, in that treaties are negotiated and signed by the executive, but domestic enforceability particularly where it will create obligations and liability or justiciable entitlements implicates the lawmaking role of

[47] Kanwar, supra note 44.
[48] Ranjan, supra note 36.
[49] Vienna Convention on the Law of Treaties arts. 31–33, supra note 42.
[50] Kanwar, supra note 44.
[51] Waters, supra note 43.

Parliament.[52] Indian constitutional materials talking about treaty-making power emphasize on one hand, that the executive is the organ to conduct foreign affairs in practice, implementation of the same changing domestic rights and duties generally needs legislation, otherwise courts should be careful not to convert promises made by international treaties to domestic commands by judicial fiat.[53]

Federalism introduces another dimension. Even though Article 253 gives Parliament the legislative power to pass acts notwithstanding the distribution of legislative subjects, the decision to adopt a treaty can transform state regulatory space and administrative burdens.[54] This makes the argument for broad enforcement of treaties through Parliament the democratically safest way of implementation, which may design implementation with regard for federal distribution and institutional capacity.

At the same time, legitimacy arguments are by no means one-sided. When India has accepted treaty commitments particularly on the human rights and domestic law is silent or under-protective, the courts may deem interpretive engagement constitutionally appropriate: not enforcing treaties as treaties but enforcing constitutional rights in a manner consistent with India's international commitments.[55] Under this view, interpretive incorporation is not anti-democratic but rather is rights-protective incorporation operating in the context of constitutional adjudication and limited by the "no inconsistency with domestic law" condition as well as by judicially manageable standards.[56]

V. COMPARATIVE PERSPECTIVE - INDIA AND THE UNITED KINGDOM

A. Dualism and Treaty Implementation in the United Kingdom

The United Kingdom is a classic dualist system: treaties hold the UK internationally, once ratified, but where they are not incorporated into domestic law unless incorporated by legislation of Parliament. The House of Lords had said this in J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry[57] (the "International Tin Council" litigation) in which it

[52] *Treaty-making power under our Constitution*, supra note 39, at. 7–10
[53] Id.
[54] Id.
[55] Office of the U.N. High Comm'r for Human Rights, *View the ratification status by country or by treaty (India)*, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN
[56] Waters, supra note 43.
[57] J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry, [1990] 2 A.C. 418 (H.L.), https://www.uniset.ca/other/cs4/19902AC418.html.

held that unincorporated treaties could not create rights or duties enforceable in UK courts. This is in accordance with the constitutional principle that the executive cannot change domestic law by treaty-making; changes in domestic law require Parliamentary authority.

The same dualist logic is apparent in the later decision of the House of Lords in Regina v Lyons & Ors.[58], where the Court again reiterated that treaties do not form part of domestic law unless incorporated and domestic courts apply domestic law and not international treaty obligations as such. In doctrinal terms, the UK position is thus structurally similar to the formal approach adopted in India, in that treaty ratification is not, in itself, a source of enforceable domestic rights.

B. Treaties as Interpretive Aids Before Incorporation

Despite being dualist, the UK legislation has long accepted a limited doctrine of interpretive compatibility: where the text of an Act is ambiguous, the courts try to assume that Parliament intended to legislate in a way compatible with the UK's international obligations: treaty-consistent interpretations are preferred, where the statutory text permits. This is not enforceability in treaties; it is a domestic presumption on the meaning of the statute.

The House of Lords in R v Lyons stated that this was a "strong presumption" that domestic law should be interpreted not to place the UK in breach of an international obligation, but it was also careful to state the limit of the presumption: that the courts cannot use the presumption as a way to contravene the clear language of statute, or to treat unincorporated treaties as directly binding law.[59] The following interpretive approach, as it existed before the HRA, provides a good benchmark against which to compare Indian practice of using treaty norms as persuasive interpretive material but denying them independent enforceability.

C. The Human Rights Act 1998: A Legislative Bridge to Enforceability

The essential difference between the UK and India is that the UK adopted a rights incorporation statute the Human Rights Act 1998 (HRA) to incorporate Convention rights into the domestic law through an elaborately structured legislative mechanism, rather than judicial adoption of treaty norms.

[58] R v. Lyons, [2002] UKHL 44, https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd021114/lyons-1.htm.
[59] Id.

The HRA was expressly designed to "bring rights home" by permitting UK courts to have the benefit of Convention rights domestically whilst at the same time safeguarding parliamentary sovereignty.[60] The White Paper Rights Brought Home: The Human Rights Bill explains the constitutional design of this: Convention rights would be enforceable in UK courts but no general power to strike down Acts of Parliament would be given to courts.[61] The HRA instead relies upon two main techniques:

1. Section 3 (Interpretive obligation): courts have to interpret legislation "so far as possible" to be compatible with Convention rights; and

2. Section 4 (Declaration of incompatibility): where it is not possible to make compatible legislation, higher courts may declare legislation incompatible leaving Parliament to decide whether to amend it.[62]

This HRA model is very important on a comparative level because it translates the rights deriving from international treaties into rights of domestic law by the decision of Parliament, thus it anchors the enforceability in democratic lawmaking rather than in judicial implication.

D. Judicial Interpretation After Incorporation: The Reach and Limits of Section 3

Post-HRA case law shows both the power and the limits of incorporation.

In Ghaidan v. Godin-Mendoza[63], the House of Lords relied on Section 3 to adopt a rights-compatible interpretation that substantially adapted the operation of domestic legislation. The Court saw Section 3 as a strong interpretive obligation, while also emphasizing that Section 3 does not authorize courts to adopt interpretations which go against the "grain" of the legislation or create a wholly different scheme.

Where rights-compatibility cannot be brought about by interpretation, the HRA affords a constitutionally trammeled remedy. In the case of Bellinger v Bellinger[64], the House of Lords determined that the statutory framework was not amenable to re-reading compatibly under

[60] Human Rights Act 1998, c. 42 (U.K.), https://www.legislation.gov.uk/ukpga/1998/42/contents.
[61] Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997), https://assets.publishing.service.gov.uk/media/5a75a15040f0b67b3d5c7fd3/rights.pdf.
[62] Human Rights Act 1998 §§ 3–4, https://www.legislation.gov.uk/ukpga/1998/42/contents.
[63] Ghaidan v. Godin-Mendoza, [2004] UKHL 30, https://www.bailii.org/uk/cases/UKHL/2004/30.html.
[64] Bellinger v. Bellinger, [2003] UKHL 21, https://www.bailii.org/uk/cases/UKHL/2003/21.html.

Section 3 without effectively legislating and so made a declaration of incompatibility under Section 4 instead. This is a good example of the internal separation of powers discipline of the HRA, that is courts are free to interpret robustly but, when interpretation becomes legislation, they switch to a non-invalidating declaration and leave the final choice to Parliament.

E. Lessons and Limits of Comparative Borrowing for India

Lessons

The experience of the UK shows the importance of legislative clarity. Instead of leaving treaty reliance to the discretion of the courts on a case-by-case basis, Parliament established a stable framework that defines: (i) which rights it applies, (ii) how courts are to interpret the law (Section 3) and (iii) what courts can do in case of conflict with legislation (Section 4). This helps to reduce the unpredictability of doctrine and helps to allay legitimacy issues.

It also provides a unique remedial concept for India which is of relevance in the Indian context: The declaration of incompatibility is a mechanism which can protect rights without having to resort to judicial invalidation of primary legislation in a rights incorporation context. India's constitutional structure is different (constitutional supremacy), but the UK model is useful nonetheless as an example of institutional calibration: increasing the enforcement of rights through Parliament while designing remedies that preserve democratic choice.

Limits

At the same time, comparative borrowing must respect differences in constitutions. The UK system is organized on the basis of parliamentary sovereignty whereas in India, constitutional supremacy, with fundamental rights that are entrenched, and a different remedial structure, is the order of the day. Further, the UK's model is linked to the European Convention system and Strasbourg jurisprudence - a system of institutionalism that is not replicated for most human rights treaties that are relevant in India. Therefore, the UK model does not support the argument that treaties are enforceable in the absence of domestic legislation, but rather the opposite: that enforceability is stronger and most legitimate when the Parliament establishes a penetration of domestic legislation.

VI. CONTEMPORARY RELEVANCE AND POLICY IMPLICATIONS

A. India's Compliance with ICCPR, ICESCR, and CEDAW

India's contemporary human rights obligations are based on India's ratification of the International Covenant on Civil and Political Rights (ICCPR)[65], International Covenant on Economic, Social and Cultural Rights (ICESCR)[66] and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[67] These treaties impose on the Indian State binding international obligations; however, their domestic impact is still governed by India's constitutional framework and legislative choices.

The Indian constitution does not provide for automatic incorporation of treaties. Instead, the constitutional structure envisages treaty implementation by legislative action by virtue of Article 253, to be read with the Directive Principle in Article 51(c), which calls for respecting international law without making it enforceable.[68] Because of this, implementation of human rights treaties in India has been more about constitutional interpretation and selective statutory implementation than about treaty-based adjudication.

India's compliance with ICCPR was most recently studied by the United Nations Human Rights Committee in its Concluding Observations on the Fourth Periodic Report of India. The Committee recognized the wide scope of fundamental rights in the Constitution, as well as the function of judicial review, but raised concern at the continuing denial of guarantees of the Constitution and of effective implementation, especially as they related to the matters of preventative detention, custodial violence, freedom of expression and the accountability of public authorities.[69] The Committee's observations highlight the fact that in the absence of comprehensive implementing legislation, the obligations of the ICCPR are to operate indirectly within the domestic legal order.

With regard to ICESCR, India's involvement is institutionally limited. While India has ratified the Covenant in 1979, the domestic realization of economic and social rights has been entirely achieved by judicial interpretation of Article 21 rather than through legislative incorporation of

[65] ICCPR, supra note 1.
[66] ICESCR, supra note 2.
[67] CEDAW Supra Note 3.
[68] Constitution of India, arts. 51(c), 253, https://cdnbbsr.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2024/07/20240716890312078.pdf
[69] Human Rights Comm., supra note 14.

the Covenant.[70] This judicial expansion has brought domestic law in line with the values of the ICESCR, but it has also increased the reliance of treaty compliance on judicial discretion, rather than statutory entitlement.

The situation with CEDAW is no different. Although India has committed itself to international obligations for the elimination of discrimination against women, domestic implementation has followed an issue-based approach, relying on both issue-based legislation and constitutional jurisprudence of equality, rather than direct treaty norm dependency.[71] In all three of the treaties, India's model of compliance has been constitutionally mediated and legislatively selective, not incorporation based.

B. Impact of Rights-Based Legislation and Judicial Adjudication

In recent years, India has adopted a number of legislations which indicate a substantive level of convergence with international human rights standards, even though they are not couched in terms of treaty-implementing legislation.

The Rights of Persons with Disabilities Act, 2016 makes statutory rights enforceable based on the principles of dignity, equality, and non-discrimination, indicating a shift away from welfare-based approaches towards rights-based approaches to governance.[72]

The Mental Healthcare Act, 2017 recognizes autonomy, informed consent and access to mental health services as legal entitlements, which has a significant impact on the relationship between the State and persons with mental illness.[73]

Similarly, the Transgender Persons (Protection of Rights) Act, 2019 affirms the identity-based protections and outlaws' discrimination in the major areas of social life.[74]

These enactments show that India has therefore sought to engage in sectoral domestication of

[70] Constitution of India, art. 21, https://cdnbbsr.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2024/07/20240716890312078.pdf
[71] ICCPR, supra note 1.
[72] The Rights of Persons with Disabilities Act, 2016, No. 49 of 2016 (India), https://www.indiacode.nic.in/bitstream/123456789/15939/1/the_rights_of_persons_with_disabilities_act%2C_2016.pdf.
[73] The Mental Healthcare Act, 2017, No. 10 of 2017 (India), https://www.indiacode.nic.in/bitstream/123456789/2249/1/A2017-10.pdf.
[74] The Transgender Persons (Protection of Rights) Act, 2019, No. 40 of 2019 (India), https://www.indiacode.nic.in/bitstream/123456789/13091/1/a2019-40.pdf.

human rights norms, as opposed to wholesale treaty incorporation. International standards contribute to the content of legislation, but enforceability of rights becomes a matter of domestic legislation-and not of treaty status.

Judicially, the Supreme Court has remained very much at the forefront of the process of converting human rights principles into constitutional doctrine. In cases like Jolly George Varghese v Bank of Cochin[75] and Gramophone Co of India Ltd. v Birendra Bahadur Pandey[76], the Court recognized international human rights norms as interpretive tools, although it confirmed that treaties do not necessarily generate enforceable domestic rights.9 More recently, constitutional adjudication has been based on concepts like dignity, proportionality and privacy as is the case with Justice K.S. Puttaswamy v Union of India[77] in order to extend the ambit of fundamental rights.

While this rights-based adjudication has created greater normative protection, the effectiveness of this adjudication process is still dependent on legislative and administrative follow-through.

C. Policy Implications for Treaty-Based Human Rights Protection

The modern perspective on treaty-based human rights protection in India raises some important policy issues. Reliance on judicial interpretation alone runs the risk of patchy and patchy enforcement, because the constitution is interpreted on a case-by-case basis and relies heavily upon compliance by the executive. At the same time, the lack of legislative clarity on the domestic status of treaties leaves the courts, administrators and rights-holders alike guessing.

The example of India shows that normative alignment without institutional clarity can weaken long-term compliance. While constitutional adjudication has succeeded in bringing domestic law into congruence with international human rights values, it has failed to create a coherent scheme of treaty implementation. This gap has special significance in areas where sustained policy intervention is needed as well as resource allocation and regulatory coordination functions that courts are institutionally ill-equipped to perform.

[75] Jolly George Verghese, supra note 6.
[76] Gramophone Co. of India Ltd., supra note 5.
[77] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1

D. Legislative Clarity or Structured Judicial Engagement

From a forward-looking perspective, two broad policy pathways emerge.

First, the Parliament could adopt framework legislation or targeted implementing legislation with regards to clarifying the domestic role of the human rights treaties ratified. Such legislation need not make treaties directly enforceable, but it could set out interpretative obligations, institutional responsibilities and remedial limits to make the treaties more predictable and democratic.

Second, in the absence of legislative action, the courts may take a more structured approach to treaty engagement, making explicit when international norms may be used as interpretive aids and much more explicit as to the limits of judicially crafted remedies. Decisions such as Vishaka v State of Rajasthan[78] are an example of how judicial reliance on international norms is both a potential and a constitutional sensitivity, in the absence of legislation.

Absent such institutional clarification, international human rights treaties will remain in India as persuasive but non-binding influences, and as influences on the meaning of the Constitution but not as independent rights that can be enforced.

VII. CONCLUSION

This paper set out to examine a deceptively simple but constitutionally significant question: Can international human rights treaties give rise to rights which are enforceable in India without any domestic legislation? The doctrinal analysis made in the preceding chapters results in the definite and consistent answer they cannot, at least not as independent sources of enforceable rights within the constitutional order of India.

India's constitutional framework is still formally dualist as far as treaty enforcement goes. The Constitution does not provide for the automatic incorporation and self-executing status of international treaties. Articles 51(c), and 253, in the context of each other, mean that a deliberate design of the constitution exists in creating treaties and that the conversion of treaty obligations into a domestic law enforceable by the courts is primarily a matter for Parliament. Ratification

[78] Vishaka v. State of Rajasthan, Supra Note 7

does nothing to create justiciable rights for individuals in the municipal system of law.

At the same time, this paper has indicated that India's practice cannot be explained in the terms of a rigid dualism alone. Indian courts most notably the Supreme Court have developed a hygrometer distinctive form of approach. International human rights treaties, although not incorporated, have had considerable influence by a process of interpretation of the constitution, especially in the adjudication of fundamental rights. Treaties have been used to inform constitutional values, the interpretation of statutes and in exceptional cases, the gaps in legislation where the statute's silence would defeat basic rights.

This judicial engagement however has been carefully qualified. Courts have always held that international treaties do not supersede the domestic laws, and that international treaties do not establish enforceable rights in the absence of incorporation by legislation. Even in landmark decisions like the one in the case of Vishaka, the enforceability of the norms was finally based on the constitutional guarantees itself, with international law acting as a reinforcing and justificatory resource of authority, rather than as a source of authority per se. The doctrinal distinction between treaty-as-law and treaty-as-interpretive-context has thus remained core to Indian constitutional jurisprudence.

The results of comparative analysis with the United Kingdom strengthen this conclusion. The UK experience under the Human Rights Act, 1998 suggests that enforceability of treaty-based rights is strongest, is most legitimate and most coherent when it flows from legislative incorporation as opposed to judicial implication. The UK model does not undermine the argument for dualism, on the contrary, it emphasizes the role of parliamentary authorization and institutional design in the process of domesticating international obligations in the form of rights.

Taken together, the doctrinal and the comparative findings confirm that India has borrowed from a hybrid model; a model that retains legislative supremacy in the formulation of enforceable rights but allows for courts to interact in a meaningful way with international human rights norms as part of the exercise of constitutional interpretation. This model gives India the opportunity to meet its international obligations without disturbing the balance between the executive, the legislature, and the judiciary in the constitution.

The constitutional challenge confronting us in the future is not whether courts should engage

with international human rights law that they already do but how such engagement should be structured and limited. Without clarity from legislation, judicial reliance on treaties runs the risk of inconsistency and unpredictability and the concern of democratic legitimacy. On the other hand, a total disengagement of the judiciary from the international is something that would pauperize the interpretation of constitutional law and undermine the protection of rights.

The answer, therefore, lies not in giving up India's dualist foundations, but in calibrating the hybrid model either by more specific and targeted legislative frameworks to clarify the domestic role of treaties, or in more principled and transparent judicial doctrines of treaty-referential adjudication. Until such clarity emerges, the role of international human rights treaties in India will remain that of shaping the meaning of the Constitution in a powerful but unenforceable manner until they are incorporated by legislation.

This conclusion reaffirms the central claim of this paper, that international human rights treaties do not, and constitutionally cannot, create enforceable rights in India in the absence of domestic legislation but they nonetheless occupy a significant, constitutionally mediated space within Indian rights adjudication.