

Constitutional Incorporation of International Human Rights Standards: An Effective Legal Mechanism?

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Abstract

The proliferation of international human rights law and conventions has transformed international law and led to robust international legal mechanisms to promote human rights. However, countries have often skirted their human rights obligations to their citizens by ignoring international legal standards. This Comment analyzes the range of ways that constitutions tend to incorporate human rights. It creates a unique classification scheme to highlight the notable trends in international law for each category. It then selects four countries with varying sets of constitutional schemes and analyzes how each country's domestic judiciary has implemented international human rights standards based on the constitutional weight of those standards. It considers whether the constitutional weight of international human rights standards makes any meaningful difference in the enforcement of human rights, or if efforts would be better spent elsewhere to develop other legal mechanisms to enforce human rights domestically. It argues that the success of the method of incorporation of human rights conventions into constitutions does not produce the results one would expect, but hinges on whether the construction is able to strike a balance between ensuring that the judiciary implements international human rights standards while still leaving the judiciary with meaningful independence and agency.

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Table of Contents

I. Introduction	116
II. Analysis of Constitutional Incorporation of Human Rights Treaties	117
A. Broad Nods to Human Rights Conventions	117
B. Instructions for Construing Domestic Law and International Human Rights Conventions	118
C. Reference to International Tribunals	119
D. Explicit Incorporation of Particular Human Rights Conventions	119
III. The Impact of Constitutional Schemes in Practice	120
A. Argentina	120
B. Tanzania	123
C. South Africa	124
D. Russia	125
IV. Conclusion.....	128

I. INTRODUCTION

Since the conclusion of the Second World War, there has been a rapid proliferation of human rights guarantees through treaties and new constitutions that reflect a shifting world order.¹ As one scholar posits, “[h]uman rights are the idea of our time, the only political-moral idea that has received universal acceptance.”² With the creation of the United Nations (U.N.), a centralized body emerged to compile and affirm sets of human rights that member states believed to be fundamental to people’s existence and communities’ stability.³ Conventions arising from the U.N., such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), were pivotal in the dissemination of human rights into domestic constitutions.⁴ The constitutions that have been amended or adopted since the UDHR’s enactment in 1948 reflect a wide range of views on the status of international law and the role of international human rights conventions within their domestic frameworks.⁵

The choice to incorporate international human rights provisions into constitutional frameworks is puzzling at first glance because it binds countries to international standards that would otherwise be nonbinding. One explanation for this trend is that this was simply an organic and almost inevitable result of globalization and the post-World War II world order.⁶ Elkins, Ginsburg, and Simmons, on the other hand, describe a more active kind of convergence of international and constitutional law.⁷ They argue that “constitutional incorporation may also provide institutional supplements: for developed countries, domestic constitutions are usually seen as being enforced by well-regarded professional judges, who may be better able to monitor the government than could the more distant international machinery.”⁸ Additionally, there is also the more concerning possibility that international commitments are merely lip service intended to signal commitments that states have no intention of implementing.⁹ The international community may be less likely to police the

¹ Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 201, 201 (2013).

² *Id.* (citing LOUIS HENKIN, *THE AGE OF RIGHTS* xvii (1990)).

³ *Human Rights*, U.N., <https://perma.cc/DZD4-LUTS> (last visited Mar. 28, 2023).

⁴ Elkins et al., *supra* note 1, at 203.

⁵ Robert F. Smith, *Book Review: Constitutions and Constitutional Trends Since World War II*, 10 SMU L. REV. 338 (1956).

⁶ Elkins et al., *supra* note 1, at 202 (quoting David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1306–07 (2008)).

⁷ *Id.* at 223.

⁸ *Id.*

⁹ *Id.*

actions of states that have incorporated robust, internationally accepted human rights provisions into their constitutional schemes because of the belief that their judicial systems will enforce these norms on their own.¹⁰

This Comment explores these potential rationales by analyzing whether the method of incorporation of human rights conventions into constitutions affects the jurisprudence of domestic courts regarding the incorporated conventions. Part II surveys and categorizes the ways that national constitutions incorporate human rights conventions into domestic constitutions. Part III samples how different methods of incorporation play out in domestic courts through four case studies. Part IV analyzes the impacts of the constitutional schemes of Argentina, Tanzania, South Africa, and Russia, concluding that the success of the method of incorporation may hinge upon the independence of the domestic court's judiciary.

II. ANALYSIS OF CONSTITUTIONAL INCORPORATION OF HUMAN RIGHTS TREATIES

Even though many countries are parties to binding international legal obligations, many still choose to incorporate human rights conventions in their constitutions. This Part identifies distinct categorical patterns of constitutional incorporation of human rights treaties and provides examples of constitutional language in each category.

A. Broad Nods to Human Rights Conventions

Some countries take a relatively weak approach to incorporating human rights treaties into their constitutional frameworks. While their constitutions refer to human rights conventions and treaties, these references are merely nods to the constitution's general commitments to human rights. They do not appear to have the same weight as other constitutional provisions. For example, the preamble of Algeria's constitution states that

[t]he Algerian people express their complete commitment to human rights as specified in the [UDHR] of 10 December, 1948, the International Covenant on Economic, Social and Cultural Rights and the [ICCPR] (both issued on 16 December 1966), the African Charter on Human Rights and Peoples' Rights of 27 June 1981, and the Arab Charter on Human Rights of 23 May 2004.¹¹

Bangladesh's and Niger's constitutions provide comparable examples.¹² Their constitutions reflect a commitment to the human rights standards outlined

¹⁰ *Id.*; see also Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588, 588 (2007).

¹¹ CONST. OF ALGERIA pmb1.

¹² See CONST. OF BANGL. pmb1.; CONST. OF NIGER pmb1.

in particular conventions and charters.¹³ The preamble of Bangladesh's constitution affirms that the country will respect the principles outlined in the U.N. Charter and uphold the rights of every person.¹⁴ Similarly, Niger's constitution's preamble proclaims its commitment to the UDHR; the International Pact Relative to Civil and Political Rights; the International Pact Relative to the Economic, Social and Cultural Rights; and the African Charter of the Rights of Man and of Peoples.¹⁵ Neither constitution uses language that specifies the legal status of these agreements or the legal recourse for alleged violations of the rights contained in them.

B. Instructions for Construing Domestic Law and International Human Rights Conventions

Other constitutions go one step further and state that domestic law should be construed in favor of the listed human rights conventions. While such provisions do not expressly elevate these conventions to the status of constitutional law, they give the listed conventions considerable weight in the country's legal scheme.

Spain's constitution is one example of this arrangement.¹⁶ It states that "provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the [UDHR] and international treaties and agreements thereon ratified by Spain."¹⁷ Even though the constitution itself does not explicitly state that human rights treaties have a constitutional status, the country's courts have treated them as if they do.¹⁸

More broadly than Spain's constitution, South Africa's constitution mandates that courts consider international law when construing rights provisions.¹⁹ The South African constitution stipulates that "when interpreting the Bill of Rights, a court, tribunal, or forum . . . *must* consider international law."²⁰ International law appears repeatedly throughout this constitution as a constraining mechanism on the government.²¹

¹³ See generally CONST. OF BANGL.; CONST. OF NIGER.

¹⁴ CONST. OF BANGL. pmb.

¹⁵ CONST. OF NIGER pmb.

¹⁶ CONSTITUCIÓN ESPAÑOLA, Dec. 29, 1978 (rev. 2011).

¹⁷ *Id.* art. 10(2).

¹⁸ Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 217 (1998).

¹⁹ S. AFR. CONST., 1996 (rev. 2012).

²⁰ *Id.* art. 39(1) (emphasis added).

²¹ *Id.* arts. 37, 198, 200.

C. Reference to International Tribunals

A third set of constitutions includes those that refer to particular tribunals with respect to the adjudication of human rights abuses. For example, Russia's constitution guarantees the right to appeal domestic court orders pertaining to "the protection of human rights and freedoms" to an international court.²² Few constitutions follow the Russian approach of explicitly referring to international tribunals, perhaps to avoid the perception of relinquishing power to an international body.

D. Explicit Incorporation of Particular Human Rights Conventions

The rarest category includes constitutions that explicitly adopt certain human rights conventions *as* constitutional law. The most notable example is Argentina.²³ Argentina's constitution is the most expressive constitution in the world with respect to the incorporation of human rights treaties into constitutional law.²⁴ When Argentina amended its constitution in 1994, it incorporated numerous human rights treaties and conventions.²⁵ In general, the constitution is supreme over international law,²⁶ except for certain treaties that are stipulated to be on par with constitutional law. Article 75, section 22 lists ten human rights treaties and conventions, including the American Convention on Human Rights and the major U.N. human rights treaties, including the two International Covenants on Human Rights and the U.N. Racial Convention, all of which are on par with constitutional law.²⁷ The provision stipulates that these treaties and conventions "stand on the same level as the Constitution, [but] do not repeal any article in the First Part of this Constitution, and must be understood as complementary of the rights and guarantees recognized therein"²⁸ The provision goes on to note that these conventions and treaties may only be denounced by the National Executive Power after approval of two-thirds of the members of each legislative chamber.²⁹

²² KONSTITUTSIJA ROSSIĬSKOĬ FEDERATSII [KONST. RF] art. 46 ("Everyone shall have the right in accordance with international treaties of the Russian Federation to appeal to interstate bodies for the protection of human rights and freedoms if all available internal means of legal protection have been exhausted.").

²³ CONSTITUCIÓN NACIONAL [CONST. NAC.].

²⁴ MARY ELLEN O'CONNELL ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 218 (8th ed. 2022).

²⁵ *Id.*

²⁶ CONST. NAC. art. 31.

²⁷ *Id.* art. 75(22).

²⁸ *Id.*

²⁹ *Id.*

III. THE IMPACT OF CONSTITUTIONAL SCHEMES IN PRACTICE

This Part considers the practicalities of the different methods of incorporating international human rights law into domestic constitutions. As one scholar argues, “enforcement by domestic courts and other institutions [of the norms reflected in the UDHR] depends almost exclusively on the general approach to the reception of international law by their respective constitutional systems.”³⁰ This Part explores that premise by examining a selection of countries that give human rights treaties varying constitutional weight. It further considers how the domestic judicial systems interact with their constitutional frameworks to enforce human rights.

A. Argentina

Argentina is a natural place to start this analysis because its constitution is the most extreme example of a constitution adopting human rights treaties into constitutional law.³¹ As previewed above, Argentina’s 1994 constitutional amendments incorporated a host of human rights conventions, giving them the status of constitutional law.³² The effects of adopting these treaties are evident in the kinds of cases that domestic courts have jurisdiction to hear and how those courts approach the challenge of adjudicating human rights issues.

For example, following the “dirty war” period in Argentina,³³ the legislature passed the Full Stop and Due Obedience laws that stayed any punishment for crimes committed by the state (or under the direction of the state) between 1975 and 1983 in order to uphold social peace.³⁴ In 2005, the Supreme Court of Argentina found that these laws were unconstitutional because of the constitution’s incorporation of human rights conventions. The Court noted that “inasmuch as every amnesty tend[s] to induce ‘forgetfulness’ of gross violations of human rights, they are contrary to the ruling of the American Convention on Human Rights and of the [ICCPR], and become therefore, constitutionally intolerable.”³⁵ Through this opinion, the Court directly acknowledged that under Article 22 of the

³⁰ Michael Van Alstine, *The Universal Declaration and Developments in the Enforcement of International Human Rights in Domestic Law*, 24 MD. J. INT’L L. 63, 67 (2009).

³¹ *Id.*

³² O’CONNELL ET AL., *supra* note 24, at 218; *see* CONST. NAC. art. 31.

³³ The “dirty war” period in Argentina refers to a period between 1976 and 1983 in which the right-wing government purged the country of left-wing “subversives” using violent tactics and cover-ups.

³⁴ *See* María José Guembe, *Reopening of Trials for Crimes Committed by the Argentine Military Dictatorship*, 3 SUR INT’L J. ON HUM. RTS. 2 (2005), <https://perma.cc/C8AT-YLWF>.

³⁵ *Id.* (emphasis added) (quoting Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, “Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.,” causa no. 17.768, ¶ 16).

constitution, which incorporated these conventions, the contents of the conventions dictated the legal analysis.

Even before Argentina's 1994 constitutional reform that expressly incorporated a host of human rights conventions, the Court held that international law trumped domestic law.³⁶ Though this might suggest that the 1994 constitutional reform had no real effect on the Court's jurisprudence, the reform in fact stabilized contradictory and unsettled caselaw. For example, in 1992 the Court found a right of reply based on the American Convention of Human Rights in *Miguel A. Ekmekdjian v. Gerardo Sofovich*.³⁷ In doing so, the Court nodded to the jurisprudence of the Inter-American Court of Human Rights.³⁸ In cases following *Ekmekdjian* and preceding the 1994 constitutional reforms, courts seemed to have conflicting and unclear interpretations of the status of international law. In *Fibrica Constructora SCA c/ Comisión Técnica Mixta de Salto Grande*, the Court ruled that international treaties' supra-statutory status did not place them on par with the constitution.³⁹ It then complicated this ruling in *Hagelin* by confirming that international law is supreme over domestic law.⁴⁰ However, it also pondered that this supremacy may only come into play when there is a genuine legal conflict between the two "such that the conflicting laws must be significantly, if not completely, congruent and the underlying purposes behind the laws must be similar."⁴¹ Following the 1994 constitutional reforms, the Court acted as an "energetic soldier" in implementing the newly incorporated rights treaties.⁴²

More recently, however, the Court has used Article 75(22), the provision that incorporated the human rights conventions, to twist international law against petitioners, rather than actually comply with international law. For example, the Court used a 1989 Inter-American Commission on Human Rights opinion that stated that local judges should be the arbiters of the reasonableness of pretrial detentions to find that a three-year pretrial detention period was both reasonable and constitutionally justified.⁴³ Similarly, in *Sixto Celestino Chocobar*, the Court looked to Article 75(22) itself to justify ignoring international human

³⁶ See O'CONNELL ET AL., *supra* note 24, at 1184.

³⁷ CSJN, 7/7/1992, "Ekmekdjian, Miguel Ángel c/ Sofovich, Gerardo y otros s/ recurso de hecho," Fallos 315:1492.

³⁸ *Id.* ¶ 21.

³⁹ CSJN, 7/7/1993, "Fibrica Constructora SCA c/ Comisión Técnica Mixta de Salto Grande s/ recurso de hecho," Fallos 316:1669.

⁴⁰ See DINAH L. SHELTON & PAOLO G. CAROZZA, REGIONAL PROTECTION OF HUMAN RIGHTS 277 (2d ed. 2008)

⁴¹ *See id.*

⁴² *Id.* at 324.

⁴³ *Id.* at 326.

rights standards.⁴⁴ The Court noted that, based on the constitutional language, none of the treaty provisions should “curtail the rights or guarantees provided in the Constitution . . . and should be understood as complementing the rights and guarantees provided for therein.”⁴⁵ The Court then interpreted its prior decisions on constitutional law to qualify as “rights and guarantees” to which international law must bow.⁴⁶

Though it is beyond the scope of this Comment to analyze every single case in which Argentinian courts have considered the implications of constitutionally incorporated human rights conventions, it is important to note that, in Argentina’s case, amending the constitution to include a wide range of conventions did not bind the courts to international standards of human rights. Instead, it gave the courts an “out.”⁴⁷ While for a brief moment the incorporation of those conventions in the constitution helped clarify the state of international law, it did not succeed in binding the judiciary to international standards of human rights. Instead, the judiciary was able to use its own jurisprudence and standards to determine what counted as “constitutional standards” to avoid following the jurisprudence of the Inter-American Court. One scholar, in describing the challenge facing the courts, stated that

if Argentina bends to accommodate the Inter-American Court’s ruling, then it risks undermining the budding legitimacy of its own court system [T]he domestic courts are the key transnational actors in Argentina’s bid to internalize international law and yet they have been notoriously weak, corrupt, and effective.⁴⁸

By incorporating so many human rights conventions into its framework, Argentina’s constitution has placed its courts in a tricky position. On the one hand, they are legally bound to ensure that domestic law conforms to international human rights law. On the other hand, this incorporation sweeps in a whole body of judicial interpretation done by international courts that domestic courts may not agree with in practice. They may be tempted to reject the interpretations of international bodies in order to assert their own supremacy over domestic law. To do so, they would use methods of interpretation that, on the surface, appear to cede to international law, but in fact misconstrue international standards to fit with the judiciary’s view of the proper outcome of a case.

⁴⁴ CSJN, 27/12/1996, “Chocobar, Sixto Celestino c/ Caja Nacional de Previsión para el Personal del Estado y Servicios Públicos s/ reajuste por movilidad,” Fallos 319:3241.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 331.

B. Tanzania

The Tanzanian constitution falls into the category of constitutions that require national actors to construe domestic law in favor of human rights conventions. Article 9 of this constitution incorporates the UDHR, stating that “the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring . . . that human dignity is preserved and upheld in accordance with the spirit of the [UDHR].”⁴⁹

One of the first cases in which courts interpreted Article 9 was a Court of Appeal decision in *Director of Public Prosecutions vs. Ally Haji Ahmed and 10 Others*.⁵⁰ The Court of Appeal considered whether the High Court of Tanzania (the lower court) had jurisdiction to grant bail pending trial to those accused of economic crimes in violation of the Economic Crimes Control Act.⁵¹ The case raised issues of equality under the law, particularly given that the UDHR was incorporated into the constitution.⁵² The Court construed the Act in favor of Article 13 of the constitution, which guarantees equality under the law, and in light of the relevant provisions of the UDHR per Article 9(1)(f).⁵³ It ultimately concluded that denying the High Court jurisdiction would in fact create equal protection issues.

Similarly, in 1990, the High Court of Tanzania referred to Article 7 of the UDHR, which guarantees equal protection, to overturn a norm in Tanzanian customary law that discriminated against women.⁵⁴ The High Court found that the customary law prohibiting women from selling clan land discriminated against women on the basis of sex. The law, therefore, violated the Convention on the Elimination of All Forms of Discrimination Against Women, the African Charter on Human and People’s Rights, the ICCPR, and the Tanzanian Constitution.⁵⁵

Though there is limited literature available on trends in the Tanzanian judiciary’s willingness to uphold UDHR provisions, these two cases display a

⁴⁹ CONST. OF TANZ. art. 9(f).

⁵⁰ See Palamagamba J. Kabudi, *The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms*, 24 VERFASSUNG UND RECHT IN ÜBERSEE [CONST. & L. OVERSEAS] 271, 277 (1991) (citation omitted).

⁵¹ *See id.*

⁵² *See id.* at 278.

⁵³ *See id.*

⁵⁴ See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 297 (1996). The respondent, Ms. Pastory, had inherited clan land from her father in a valid will. She sold the land to a man who was not a member of her clan. The appellant sued the next day seeking a declaration that the sale of the land was void under a customary law that a woman does not have power to sell clan land. *See Ephrahim v. Pastory and Kaizingele*, LEGAL INFO. INST., <https://perma.cc/UGY4-UQKE>.

⁵⁵ *See Ephrahim v. Pastory and Kaizingele*, *supra* note 54.

willingness to honor the constitution's mandate to uphold the "spirit" of the UDHR, even though the language of that provision is relatively weak and leaves ample room for courts to avoid implementing the provisions of the Declaration. This kind of approach is more akin to the Argentinian courts' implementation of international law before the 1994 constitutional reforms—namely, courts opting to construe domestic law in favor of human rights conventions. In both the Tanzanian cases, a constitutional scheme that left the courts with more discretion on how to incorporate international law promoted their willingness to make a good faith effort to ensure that domestic law conformed with international legal principles.

C. South Africa

South Africa's constitution belongs to the category of constitutions that instruct courts on how to construe domestic law with respect to international law. Article 39 mandates that courts interpreting the bill of rights must promote human dignity and consider international law.⁵⁶ Article 232 establishes that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."⁵⁷ Lastly, Article 233 instructs that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."⁵⁸

The strength of these provisions was tested in the seminal case *The State v. T. Makwanyane and M. Mchunu*. The Constitutional Court heard this case to determine whether the imposition of the death penalty pursuant to the Criminal Procedure Act was consistent with the country's constitutionally based human rights commitments.⁵⁹ The Court considered the constitution's emphasis on international principles and the value of human life.⁶⁰ The Court explained that international and foreign sources of law are useful "because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. . . . They may also be considered because of their relevance to section 35(1) of the Constitution."⁶¹ Article 35 stipulates the rights of arrested, detained, and accused persons. Here, the Court acknowledged that its interpretation of a purely domestic provision of the

⁵⁶ S. AFR. CONST. art. 39 ("When interpreting the Bill of Rights, a court, tribunal or forum (a) *must* promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must* consider international law") (emphasis added).

⁵⁷ *Id.* art. 232.

⁵⁸ *Id.* art. 233.

⁵⁹ *See* O'CONNELL ET AL., *supra* note 24, 1243.

⁶⁰ *See id.*

⁶¹ *Id.*

constitution should be informed by international and foreign sources of law. The Court ultimately held that the death penalty was incompatible with the values of the constitution and took the dramatic step of overruling the criminal code that legalized the death penalty.⁶²

While this is only one case among many, it seems to be representative of the South African Constitutional Court's seriousness about its constitutional mandate to "consider international law" under Article 39.⁶³ The Court has also repeatedly considered treaties that South Africa has signed but not ratified, such as the European Convention on Human Rights, to guide its decision-making.⁶⁴ In its opinions, it has even considered non-binding soft law instruments such as General Comments of U.N. treaty bodies and U.N. reports on human rights issues.⁶⁵ For example, in *S v. Williams*, the Court ruled that corporal punishment was illegal.⁶⁶ The court reached that conclusion based on

the jurisprudence of the U.N. Human Rights Committee and the European Commission and Court on human rights after acknowledging that "[i]n common with many rights entrenched in the Constitution, the wording of the section conforms to a large extent with most international human rights instruments."⁶⁷

It is remarkable that the Court went so far as to consider the jurisprudence of the European Commission even though South Africa is not a signatory to the Commission's founding treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁶⁸ This reflects Court's willingness to consider an expansive set of international law principles when interpreting its bill of rights. From these cases, it is evident that the Court repeatedly turns to a wide range of international law sources because of its mandate to consider international law when deciding domestic cases.

D. Russia

Russia's constitution provides another interesting case study because it explicitly incorporates international law into constitutional law. However, Russia has repeatedly and expressly violated its obligations under international law

⁶² *Id.* at 1243, 1250.

⁶³ Dire Tladi, *Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Basbir Saga*, 16 AFR. HUM. RTS. L.J. 310, 310 (2016).

⁶⁴ See Satang Nabaneh, *The Use of International Law in Interpreting the South African Bill of Rights* (Mar. 2, 2021), <https://perma.cc/M3VM-EJUZ>.

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *Id.* (alteration in original) (citation omitted).

⁶⁸ For a list of signatories to the Convention, see *Convention for the Protection of Human Rights and Fundamental Freedoms*, U.N. TREATY COLLECTION, <https://perma.cc/R9P6-44GE>.

(including those obligations not constitutionally incorporated), the invasion of Ukraine being a prime example.⁶⁹

Article 15 of Russia's 1993 constitution states that "[u]niversally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system."⁷⁰ The same provision places international law at a higher status than domestic law.⁷¹ Additionally, Article 46 provides a right of appeal to international bodies, stating that "[e]veryone shall have the right in accordance with international treaties of the Russian Federation to appeal to interstate bodies for the protection of human rights and freedoms if all available internal means of legal protection have been exhausted."⁷² Last, Article 79 states that

[t]he Russian Federation may participate in interstate associations and transfer some of its powers to those associations in accordance with international treaties provided that this does not entail restrictions on human and civil rights and freedoms and does not conflict with the basic principles of the constitutional order of the Russian Federation.⁷³

This provision creates a dual, almost competing, set of obligations to align with human rights standards while ultimately having to conform with the constitution.

Russia's human rights commitments expanded shortly after the adoption of its constitution. The country joined the Council of Europe in 1996 and ratified the European Convention on Human Rights (ECHR) in 1998.⁷⁴ Russia therefore undertook the obligation under Article 1 of the ECHR to "secure to everyone within [its] jurisdiction the rights and freedoms defined in Section 1 of [the] Convention."⁷⁵ This provision was generally understood as providing Russian citizens the right to appeal to the European Court of Human Rights (ECtHR) any human rights abuses committed by the Russian government.⁷⁶ In addition to creating a right of appeal, the ECHR (and other human rights conventions) can also endeavor to create human rights standards that should be enforced

⁶⁹ See John B. Bellinger III, *How Russia's Invasion of Ukraine Violates International Law*, COUNCIL ON FOREIGN RELATIONS (Feb. 28, 2022), <https://perma.cc/JJN3-2P95>.

⁷⁰ KONST. RF art. 15(4).

⁷¹ *Id.*

⁷² *Id.* art. 46(3).

⁷³ *Id.* art. 79.

⁷⁴ See ANTON BURKOV, *THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON RUSSIAN LAW: LEGISLATION AND APPLICATION IN 1996–2006* 19 (2007).

⁷⁵ European Convention on Human Rights art. 1, Sept. 3, 1953, 213 U.N.T.S. 222.

⁷⁶ BURKOV, *supra* note 74, at 20.

domestically.⁷⁷ The Russian constitution incorporates this goal by requiring national courts to treat the ECHR on equal footing with national statutes.⁷⁸

This accession to the Council of Europe had mixed results domestically. One scholar, Anton Burkov, has explored “whether the protection of human rights given by the [ECHR]’s direct implementation in Russia is effective and not merely symbolic.”⁷⁹ Through a detailed examination of the ECHR-related jurisprudence from 1996 to 2006, he concluded that the Convention had an unsatisfactory impact on the Russian legal system.⁸⁰ Rather, Burkov identified a phenomenon of courts trying to signal their commitment to human rights on the surface to avoid scrutiny from the ECtHR.⁸¹ He noted that lower courts, however, were more willing to consider the ECHR, ultimately reflecting “a better understanding of the spirit and purpose of the Convention.”⁸² While Burkov’s analysis only extended through 2006 (and there have of course been significant developments since then), it provides an important example of how some courts were willing to follow their constitutional mandate to implement international human rights standards into domestic law.

Recently, however, there has been a significant shift in Russian constitutional law following the adoption of constitutional amendments originally proposed by President Vladimir Putin in 2020. The amendments were approved by popular referendum in July 2020.⁸³ One of these amendments altered Article 79 to explicitly reject any obligation for Russia to comply with decisions of international tribunals that are contrary to the constitution: “Decisions of interstate organs, made on the basis of international treaties of the Russian Federation in their interpretation, contradicting the Russian Constitution, are not executed in the Russian Federation.”⁸⁴ As this change weakened the status of such decisions with respect to Russia’s constitution, opponents to the amendment argued that it promotes the subordination of international law to Russian national law.⁸⁵

⁷⁷ *See id.*

⁷⁸ *See id.*; KONST. RF art. 15.

⁷⁹ BURKOV, *supra* note 74, at 21.

⁸⁰ *Id.*

⁸¹ *Id.* at 84 (“the jurisprudence of the Supreme Court and the Supreme Arbitration Court to a greater or lesser extent resembles an attempt to *demonstrate* to the Council of Europe that the Convention is being applied rather than to *implement* the Convention in fact”) (emphasis in original).

⁸² *Id.*

⁸³ *See* Sergei Belov, *The Content of the 2020 Constitutional Amendments*, IACL-AIDC BLOG (Apr. 1, 2021), <https://perma.cc/DTV6-KLP6>.

⁸⁴ *Id.*

⁸⁵ *Id.*

The amendment appears to have been an attempt to secure more freedom to ignore the voices of international organs under Russian domestic law. The push to amend the constitution raises the question whether the old constitutional construction was indeed playing a meaningful role in promoting certain human rights and general legal standards, since Putin felt the need to amend the constitution to discard those commitments. The courts' unwillingness to consistently implement those provisions could have stemmed from a fear of negative recourse for relying on international standards too much. But despite the pattern of domestic courts failing to implement the standards of international human rights law (as required by the text of the constitution), perhaps they were implementing these standards more than Putin would have liked. This could explain the desire to amend the constitution. Perhaps, as with South Africa or Argentina in the years preceding and immediately following their constitutional reforms, human rights-related constitutional provisions in fact gave courts some leeway to implement international human rights standards.

IV. CONCLUSION

These case studies illuminate an important pattern: how a constitution incorporates human rights conventions can impact the enforcement of those conventions to the extent the judiciary is empowered to follow international law that conflicts with the constitution. This results in some counterintuitive implications. One might expect that constitutions containing the most stringent requirements for the implementation of international human rights standards may be the most effective legal mechanisms to ensure consistent enforcement. However, as the Argentina case illustrates, this type of stringent directive places courts in a situation where they risk their own legitimacy by becoming mere puppets of the jurisprudence of international courts. Constitutional provisions that so explicitly bind the judiciary to a host of international conventions leave courts with little room to preserve their own reputation domestically. This outcome may lead to citizens perceiving their domestic courts as removed from the population they are meant to serve.

In contrast, the cases of South Africa, Tanzania, and Russia present constitutional provisions that, while less explicit than Argentina's, still affirmatively incorporate human rights standards through the interpretation of domestic law. Although lower courts in Russia (prior to the 2020 amendments) likely faced a host of external pressures that limited their discretion, they were still willing to implement the ECHR from time to time in accordance with the constitution. In Tanzania, courts have displayed a very strong willingness to oppose age-old customs in favor of international standards based on the constitution's directive that courts act pursuant to the spirit of the UDHR. The South African constitution seems to have struck a strong balance between

incorporating international standards while still preserving enough judicial independence for the courts to have the autonomy needed to maintain credibility. By requiring courts to consider international law but not necessarily follow it, the South African Constitution allows courts to meaningfully engage with international law and justifiably defer to international standards. They concurrently maintain the agency and constitutional backing to reject international standards if they do not fit well within the existing domestic legal framework. In so doing, the South African judiciary can be a powerful force that is less likely to be perceived as completely constrained by the international community.

In a world that is constantly challenging the bounds of human rights standards, the incorporation of international law into domestic constitutional frameworks may be the best way to uphold human rights. This Comment has explored the impact of the method of incorporation on domestic courts' latitude to honor international human rights commitments. It has sought to identify the notable trends in how constitutions treat international law and human rights conventions in order to build a framework with which to identify the impact of such constructions. By classifying and analyzing four notable case studies, this Comment posits that the ideal constitutional construction is one that affirmatively incorporates international human rights law into constitutional law but still provides courts with meaningful discretion to decide when and how to apply international standards in domestic cases. When constitutions preserve this judicial independence, judges have less of an incentive to disingenuously apply international standards to try to preserve their own legitimacy. Rather, they have an opportunity to meaningfully engage with international jurisprudence within their domestic legal context. Hopefully, this Comment's framework and case studies can provide a jumping-off point for further research.