MONISM/DUALISM OR SELF EXECUTORY: THE APPLICATION OF HUMAN RIGHTS TREATIES BY DOMESTIC COURTS IN AFRICA

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1 INTRODUCTION

Modern States, including those in Africa, become parties to human rights treaties for different reasons. These range from their desire to be regarded as promoters of human rights; their prominent participation in the treaty making process; response to historical injustices suffered by members of its society; the aftermath of collective pressure brought on by civil society, to the fact that such treaties may only serve to reaffirm already existing obligations within their respective legal systems.¹

However, the ultimate aim of international human treaties is to set minimum standards for States in respect of their human rights obligations towards their citizens, which are enforceable within their respective legal systems, and to hold them accountable for failure to uphold such standards. It follows therefore that a necessary condition for the effectiveness of international human rights law, is the ability of these citizens to have access to remedies from their domestic courts for the enforcement of these rights and reparation in case of their breach.

Two principles of international law relating to the domestic application of treaties symbolise this. First, is the provision of Article 27 of the Vienna Convention on the Law of Treaties, which prohibits States from invoking its domestic law as justification for failure to perform treaty obligations. The other is Article 8 of the Universal Declaration of Human Rights and Fundamental Freedoms, which declares that everyone is entitled to an effective remedy by the competent national tribunal, for violations of fundamental rights granted by the constitution or law.² The ‘exhaustion of local remedies’ rule applied by international³ and regional⁴ human rights bodies alike, is further confirmation of the fact that ideally, ‘international human rights treaties should apply directly and immediately in the domestic legal order and allow individuals seek and obtain remedies at the domestic level’.⁵

In domestic law on the other hand, the prevailing legal system, either civil law or common law, which usually translates to monism and dualism respectively, appears to be the decisive factor in the determination of the status and importance given to international law in relation to domestic law. In most cases, this is embodied in Constitutional provisions which prescribe the procedure for the

³ Article 41 (C) International Covenant on Civil and Political Rights.
⁵ General Comment 9, note 2 above, paragraph 4.
ratification and enforcement of international treaties and in some cases, the supremacy of domestic
law or international law over the other in cases of conflict between the two.

There are those that argue that successful reliance on international human rights treaties is
determined by whether or not a treaty is self executing. Rather than focus on the monist/dualist
debate, some assert that it is legislative sovereignty, which operates to limit the scope within which
international law is applicable and distinguishes between ‘domestic applicability’ i.e. treaties which are
immediately and directly applicable and ‘domestic validity’, those requiring further legislative
implementation to be applicable.\(^6\)

This essay is thus concerned with a consideration of how domestic courts, particularly those in Africa,
have responded to applications by individuals for the enforcement of international human rights law.
This will be attempted by a consideration of a variety of constitutional provisions and jurisprudence of
states, to ascertain whether the traditional theories of monism and dualism or the nature of the treaty
in question as either self executing or otherwise is the decisive factor in the enforcement of
international human rights law at the domestic level.

2 TRADITIONAL THEORIES ON THE RELATIONSHIP BETWEEN INTERNATIONAL AND
DOMESTIC LAW

2.1 MONISM

The origin of monism is traceable to the medieval philosophical conception of the world as a single
hierarchically organised legal system. In ancient Judaism, the law was universal, communicated to the
people by God.\(^7\) This was equally true of the ancient Greek and Roman philosophy of law, in which
‘law represented precepts of reason embedded in nature, the latter being created by God and
organised harmoniously with laws that have universal validity’.\(^8\)

For monists like Kelsen\(^9\) and Verdoss, international and municipal law though essentially different, are
manifestations of a single conception of law.\(^10\) Kelsen’s, belief in the primacy of international law is the

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\(^6\) Craven, M.C.R ‘The Domestic Application of the International Covenant on Economic, Social and Cultural
Rights. 1993, NILR, 367 – 404. See also Iwasawa, Y.’ The Doctrine of Self Executing Treaties in the United
States’ 1986, 26 Virginia Journal of International Law, 627.

\(^7\) Friedrich, C.J ‘The Philosophy of Law in Historical Perspective’, 2\(^{nd}\) Edition, Chicago University Law Press, 8
– 12.

\(^8\) As above, 27.

result of his "basic norm" of all law. This basic norm is that 'states should behave as they customarily have behaved'. As a consequence, international law represents a higher legal order and is thus supreme, because is derived from the practice of States, while domestic law is derived from the State, as established in international law. Lauterpacht, on the other hand, adopting a natural law approach, regards international law as a superior, because it offers the best guarantee for the human rights of individuals. He believes in the hierarchy of legal orders, i.e. natural law, international law, and lastly domestic law.\textsuperscript{11}

The monist theory asserts that domestic and international law are two components of a single body of knowledge called ‘Law’.\textsuperscript{12} Thus the main features of this theory are the unity of the international and domestic law, the automatic incorporation of international law into domestic law, and the supremacy of international law over domestic law in cases of conflict between the two. Generally, it is the Constitution of States that prescribes the manner in which the international law is automatically incorporated into the domestic law and for the primacy of international law over domestic law.

Various reasons have been given for the monist principle of primacy of international law over domestic law. A prominent one is that in the aftermath of the Second World War, there was hope that compliance with international law by domestic courts will prevent a similar occurrence in the future.\textsuperscript{13} Furthermore, it is believed that the increased human rights awareness during this period which paved the way for the establishment of the United Nations and other international human rights bodies and instruments, led to the incorporation of human rights principles into Constitutions providing for their binding force and supremacy over national laws.\textsuperscript{14}

\subsection*{2.2 DUALISM}

Dualism is historically rooted in the doctrine of separation of powers and in the English positivist school of the seventeenth and eighteenth century, which rejected the monist belief in the unity of domestic and international law in favour of a distinction of domestic from international law on the basis of the sovereignty of nations.\textsuperscript{15}

\begin{thebibliography}{9}
\bibitem{10} Dugard, J. International Law A South African Perspective, $3^{rd}$ edition, 2005 Juta, 47.
\bibitem{14} As above.
\bibitem{15} Walters, M. ‘Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights
\end{thebibliography}
Dualists regard international law and domestic law as two completely different systems of law. According to Malenovsky, international and municipal law are based not only on different jurisdictions and sanction bodies, but also on different subject matter and sources.\(^\text{16}\) While international law governs the relationship between states, domestic law governs the rights and obligations of individuals within states,\(^\text{17}\) and while International law originates from custom, domestic law, is a product of legislation.\(^\text{18}\) Furthermore, dualists assert that while international law is founded on the common willingness of several states, domestic law depends exclusively on the unilateral willingness of one State. Thus, international law creates rights and duties among States, which each individual State must determine the manner in which it complies with.\(^\text{19}\) The result of this is that international human rights norms ratified by dualist states are not enforceable until they have been incorporated or transformed into domestic law.\(^\text{20}\)

The debate on the difference and supremacy between international law and municipal law by monist and dualist has been characterised by Fitzmaurice as ‘unreal, artificial and beside the point’.\(^\text{21}\) For him, since both systems of law do not operate in a common field, there can be no conflict because any apparent conflict in the domestic field would be solved by the conflict of law rules of the forum,\(^\text{22}\) while that of international field will be solved by international law. He likens the relationship between international and domestic law to the relationship of two sovereign countries, where there is conflict, the conflict of law rules determine how it is settled before the relevant national court. According to him, ‘it is useless to discuss the supremacy of international law’, it is supreme because ‘it is the only law there is’ in that field.\(^\text{24}\)

**3 METHODS OF IMPLEMENTING TREATIES**

There are three main methods by which states implement treaties,\(^\text{25}\) associated with the monist and dualist theories, they are; adoption, incorporation and transformation.

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\(^{16}\) Dixon, note 12 above.

\(^{17}\) As above.

\(^{18}\) Vereshchetin, note 13 above, 255.


\(^{20}\) As above.

\(^{21}\) Vereshchetin, note 13 above.

\(^{22}\) Also known as private international law.

\(^{23}\) The law of the place where an action is instituted.

\(^{24}\) Vereshchetin, note 13 above.

3.1 ADOPTION
In accordance with the monist theory, adoption or ‘automatic incorporation’ of international law as part of domestic law, renders a treaty automatically applicable in domestic law as provided by the Constitution. Some Constitutions however require legislative implementation for certain treaties to be applicable e.g. France, Spain, Belgium Netherlands, United States of America. Others like Germany and Italy, require in addition an ‘order of execution’ before ratification, i.e. prior legislative approval, often referred to as quasi-automatic incorporation, which authorises the government to commit to treaty obligations and incorporating or transforming the treaty into the domestic legal system.

3.2 INCORPORATION AND TRANSFORMATION
These are procedures usually adopted in dualist countries. Incorporation involves enacting implementing legislation and appending to the text of the Act or its accompanying schedule, the relevant treaty. Once incorporated, international treaties are accorded a higher status than domestic law, superseded only by the Constitution. In Abacha v. Fawehinmi, the Supreme Court of Nigeria, held that where there is a conflict between the African Charter and any other statute, the Charter will prevail, because it is presumed that the legislature did not intend to breach an international obligation, thus the Charter ‘possesses a greater vigour and strength than any other domestic statute’.

In Registered Trustees of Constitutional Rights Project v President of the Federal Republic of Nigeria and Two Others, the court declared invalid a decree ousting the jurisdiction of the courts to entertain matters, on the grounds that the African Charter which preserved the jurisdiction of courts prevailed over the decrees of the then federal military government. Similarly in Oshevire v British Caledonian Airways, the Court of Appeal held that any domestic legislation in conflict with international conventions is void.

The Ghanaian government in its 2000 report to the CERD Committee stated, Internal domestic laws do not change automatically, and must be amended to conform to the instruments. However, where domestic law and ratified instruments clash, the ratified international instrument takes precedence and may be applied above domestic law.

Transformation involves amending, supplementing existing legislation or without necessarily referring to the treaty. In Nigeria for example, whilst section 12 of the Constitution explicitly requires

26 Craven, note 6 above.
27 As above.
28 (2000) 6 NWLR part 660,
29 (1990) 7 NWLR part 163, 519-520.
implementation of treaties by incorporation, it is only the African Charter on Human and Peoples’ Rights that has thus far been incorporated. The practice has been to enact or amend existing legislation without reference to human rights treaty obligations i.e. transformation.

In reality, the only difference between an incorporated treaty and an adopted treaty, is the form it takes in domestic law, the substance being the same. Thus adoption, which allows for automatic application of human rights treaties by monist countries, is heavily reliant on the attitude of courts. In the same vein, incorporation and transformation which inevitably lead to enactment of legislation, is not necessarily devoid of obstacles, as it is the willingness of the court to apply principles of international law and not merely its enactment into domestic law that determines its enforcement at the domestic level. Thus, adherence to the monist or dualist theories makes little difference for the individual seeking to enforce non self executing provisions of a human rights treaty. Once a treaty is none self – executing, it must be accompanied by implementing legislation otherwise it cannot be invoked in any court of law.

4 AFRICAN STATES: MONIST OR DUALIST?

The traditional distinction between monism and dualism and the consequent characterisation of states as either monist or dualist, has been criticised as inflexible, since many countries have elements of both in their legal system and therefore practice both to varying degrees. The provisions of modern constitutions reveal that neither monism nor dualism in its pure form is adhered to in most legal systems in Africa.

For example, as opposed to the pure monist position that treaties once ratified are automatically applicable and superior to other domestic law, the constitution of ‘monist African states’, require international treaties to be published in order to be enforceable. This requirement of publication, though not specified in dualist constitutions, is a common requirement in dualist countries for the validity of any Act of parliament. In Nigeria for example, it is only the ‘gazetted’ copy of any statute that can be relied upon in a court of law. The result therefore is most African states, whether monist or dualist require the publication of ratified international human rights treaties to be enforceable, albeit in varying degrees.

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31 Articles 190 Rwandan Constitution, 147 Benin Constitution, 85 Cote D’ivoire Constitution,
In addition many monist states require the ratification of treaties by their respective parliament, either in specific circumstances or in all cases. Special circumstances include ‘treaties concerning the well being of persons’, 32 ‘treaties relating to the condition of individuals’, 33 ‘treaties which relate to the status of individuals and human rights’. 34 In Cote D’ivoire, a treaty, concerning international organisations or which modifies the internal law of the state, ‘may only be ratified as the result of a law’. 35 This lends credence to the dualist idea of legislative sovereignty as a basis for the requirement of legislative involvement in the implementation of treaties.

On the other hand, contrary to dualist practice, in Ghana, ratification of a treaty may be by a simple majority vote of parliament, without the need for legislation incorporating it into domestic law. 36 In South African, while, an international agreement becomes law only when it is enacted into law by the national legislation, a self executing provision of an agreement that has not been approved by parliament is law unless it is inconsistent with the Constitution or an Act of parliament. 37

Furthermore, the principle of constitutional sovereignty, characteristic of dualist systems, which declares the Constitution supreme and any other laws inconsistent with it void to the extent of its inconsistency, is often regarded as subjecting the application of international law to the constitution. 38 However, whilst the constitutions of some monist African states proclaim the supremacy of international law, at the same time, they contain provisions requiring the amendment of the constitution for international agreement contrary to the constitution to be enforceable. 39 Moreover, Constitutions of countries monist or dualist, usually incorporate international human rights treaties in their preambles and Bill of Rights, making it rare for them to be inconsistent with human rights norms. 40

Another factor that has blurred the distinction between monist and dualist states, is the application of unincorporated treaties, by some dualist states. The Ghanaian Supreme Court in New Patriotic Party v IGP, 41 notwithstanding that no law had been passed giving effect to the African Charter on Human Rights and the Freedoms, 1981. 42

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32 Article 220, Chadian Constitution.
33 Article 115, Malian Constitution.
34 Article 138, Togolese Constitution.
36 Article 75(2) Ghanaian Constitution.
37 Section 231(4) South African Constitution.
38 See Section 1 Nigerian Constitution, Section 4 Gambian Constitution, Section 3 Zimbabwean Constitution.
39 Section 146 Benin Constitution, Article 44 Cameroonian Constitution.
40 An exception is the Ugandan Constitution prohibiting homosexuality.
41 [1993-94] 2 GLR, 459. See also NPP V A-G, per
and Peoples’ Rights, held that the violation of the right to freedom of assembly in article 11 of the Charter could still be relied on as a cause of action, in addition to article 21 of the Constitution, which equally recognises such right.

While monist states tend to accord a higher status to international law over domestic law and dualists equal status, in reality, the question of which system of law, domestic or international takes precedence in many legal systems, is often a function of two factors; the precise question asked and whether the court or tribunal before it is asked is international or domestic, rather than the divergence theoretical approaches by States. While for example, the question asked is of a political nature, there is a tendency for domestic courts to decide in favour of the government.

The yet unsuccessful attempts to try former Chadian leader Hissene Habre in Senegal, epitomises the politics factor in the domestic enforcement of international human rights. Though a monist country with a Constitution which espouses the supremacy of international law over domestic law following publication, In Guengueng and Others v Hissene Habre, the Senegalese Court of Cassation, found that while its Criminal Code had been amended to incriminate the acts covered by the Convention Against Torture, its Criminal Procedure Code had not been so amended to allow for the trial of a foreigner for acts of torture committed outside its territory. Consequently, it found that article 79 of the Constitution which stipulates that international treaties are directly applicable within the Senegalese legal order and can accordingly be invoked directly before Senegalese courts, cannot be applied where the enforcement of a Convention requires further legislative measures.

The extent of the politics involved in this case, is highlighted by the fact that whilst a motion by Hissene Habre for the dismissal of the indictment was pending in the Appeals Court, the judge who issued the indictment was transferred to another investigation and the President of the Appeals Court promoted. It was not until 31 January 2007, seven years later, that the Senegalese Parliament adopted a law paving the way for the possible prosecution of the former Chadian leader.
In Zimbabwe, where the anti-gay utterances of its president is well documented, in *S v Banana* the Zimbabwean Supreme Court, in ruling on the constitutionality of the crime of sodomy, held that the “social norms and values of Zimbabwe did not push the Court to decriminalise consensual sodomy”. The Court also held that, “it was important to bear in mind that what was forbidden by Section 23 of the Zimbabwe Constitution was discrimination between men and women and not between heterosexual men and homosexual men”.

According to Benvenisti, there is a tendency for the judiciary to allow deference to the government in 3 stages of the application of international norms.

‘First, courts tend to interpret narrowly those articles of their national constitutions that import international law into the local legal systems, thereby reducing their own opportunities to interfere with governmental policies in the light of international law. Second, national courts tend to interpret international rules so as not to upset their governments' interests, sometimes actually seeking guidance from the executive for interpreting treaties. Third, courts use a variety of ‘avoidance doctrines’, either doctrines that were specifically devised for such matters, like the act of state doctrines, or general doctrines like standing and justiciability, in ways that give their own governments, as well as other governments, an effective shield against judicial review under international law.’

In respect of the second factor, the International Court of Justice for example has found that, domestic law is a question of fact to be proved before it. An international tribunal is bound to hold that international obligation may not be avoided due to contradiction with the domestic law. A domestic court on the other hand, when faced with the same question is usually more inclined to apply its domestic law which it is more familiar with. Also, judges in domestic courts tend to have limited knowledge of international law, and some others though aware of its precepts make efforts to locate the basis of their decisions within familiar principles of their domestic law.

5 SELF EXECUTING AND NON SELF EXECUTING TREATIES

A distinction is often made between treaties which are self-executing and those which are not, in determining the effect of a treaty in domestic law. A self-executing treaty is one ‘which of its own force

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*2000 (3) SA 885 (ZS)
Craven, note 6 above.*
furnishes a rule of municipal law for the guidance of municipal courts in deciding cases involving the rights of individuals or which "can be carried into effect by administrative authorities, or which create a rule for the courts, or more broadly, those which can be implemented by the executive branch itself without recourse to congressional action".

The concept was created by the former United States Chief Justice Marshall in *Foster v Neilson*, were he stated,

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective powers to the instrument.

Three categories of self executing treaties have been identified in the United States; those addressed to administrative authorities not individuals and capable of being implemented without legislative action, those relevant to the relationship between public authorities and private individuals i.e. having 'vertical effect' and those relevant to relations between individuals.

### 5.1 WHEN IS A TREATY SELF EXECUTING?

The fact that it is up to domestic courts to determine whether a treaty is self executing has meant no uniform standard is applied by states. In general, courts have looked at the intention of State Parties when drafting the treaty.

In *Sei Fujii v California*, it was stated that 'in order for a treaty provision to be operative without the aid of implementing legislation, and to have the effect of a statue, it must appear that the framers of the treaty intended to prescribe a rule that standing alone, would be enforceable in the courts'. However, it is difficult to ascertain intention from the words of a treaty or from its purpose whether it was intended to be self-executing.

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54 27 U.S. (2 Pet.) 253, 314 (1829)
56 Craven, note 6 above, 384.
57 (1952) 242 P.2d 617.
Other factors considered include whether the treaty indicates that implementing legislation is necessary, the subject matter of the treaty, and whether the treaty creates negative obligations.\textsuperscript{58} The above criteria are subject to criticism and can be used by states to create obstacles to the implementation of human rights treaties.

While certain treaties like the Geneva Conventions, the statutes of the ICTY, ICTR and the ICC explicitly require implementing legislation, in many cases, it is up to individual states to take an audit of its domestic legislation to ascertain the necessary adaptations needed. For example, in South Africa where socio-economic rights are provided for by the Constitution and implementing legislation have been put in place, provisions of the ICESCR on legislative measures for the implementation of the rights to health, or housing in the Convention, would not render it non-self executing, while for a State like Nigeria, it would. Reliance on negative obligations contained in a treaty in determining its self-executing nature is arbitrary, as legislation will still often be required to prohibit and impose sanctions for their breach. For example, the prohibition of torture under international law would require the implementation of legislation by individual states imposing punishment for its breach, to be effective. Likewise, the subject matter of a treaty will only in few cases be an adequate yardstick for determining its self-executory nature. For example the fact that CEDAW is a based on preventing discrimination against women, is insufficient to found a decision on its self-executory nature.

Perhaps the strongest argument against the self-executory ‘doctrine’ is the manner in which it has been used by the US to avoid the implementation of human rights treaties. Though article VI of the US Constitution declares that ‘treaties are the supreme law of the land’, with time the provision has come to be understood as ‘self executing treaties are the supreme law of the land’. To prevent the application of international human rights treaties in the US, successive governments have sought to declare all international human rights Conventions signed as non self executing.\textsuperscript{59} In its signing of the ICCPR, the US several reservations, understandings and declarations, one of which recognises the treaty as ‘not self executing’.\textsuperscript{60} Since the ratification in June 1992, no steps have been taken to enact legislation allowing its enforcement.\textsuperscript{61}

\textsuperscript{58} As above, p 384-395
\textsuperscript{59} Note 43 above, 161.
\textsuperscript{61} As above.
6 DOMESTIC APPLICATION BY AFRICAN STATES OF INTERNATIONAL HUMAN RIGHTS NORMS

There are a wide variety of cases in which domestic courts have applied international human rights norms. In all of the cases discussed below, emphasis was on the substance of the violation of human rights norms and not whether the system was monist or dualist or the treaty in question, self executing or non self executing.

6.1 Interpretation of Constitutions

The South African Constitution, has progressive constitutional provisions that has allowed its Constitutional Court apply international human rights law extensively. Section 233 requires courts when interpreting any legislation, to prefer a reasonable interpretation that is consistent with international law, over one that is inconsistent. More importantly where the Court is called upon to interpret the Bill of Rights, the Court must consider international law. International law has been interpreted broadly by the Constitutional Court, to include binding and non binding law, which apart from customs and treaties may include, “decisions of tribunals dealing with comparable instruments such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court on Human Rights, the European Commission of Human Right, the European Court on Human Rights and in appropriate cases, reports of some specialised agencies, such as the International Labour Organisation...”

Thus, the Constitutional Court has considered the General Comment 3 of the Committee on Economic, Social and Cultural Rights in cases like Government of South Africa and Others v Grootboom and Others and Treatment Action Campaign v Minister of Health and Others, to determine the minimum core obligations of governments in implementing socio-economic rights provided by the Constitution, though the Covenant has not been ratified by the South African Parliament.

Article 33(5) of the Ghanaian Constitution also explicitly creates room for enforcement of human rights, using international human rights law by stating that: ‘the rights, duties, declarations and guarantees relating to fundamental rights and freedoms’ specifically included in the Constitution, shall

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62 Section 39 (1) (b) of the Constitution
63 S v Makwanyane 1995 (3) SA (CC), 313-314.
64 2000 (11) BCLR 1169 (CC).
65 2002(5) SA 721 (CC).
not be regarded as excluding others not specifically mentioned, but ‘considered inherent in a democracy and intended to secure the freedom and dignity of man’.\footnote{\textsuperscript{66}}

Clarifying the scope of this provision, the Supreme Court in \textit{Adjei-Ampufor v A-G},\footnote{\textsuperscript{67}} held that the ‘others not specifically mentioned’ in article 33(5) refers to those rights and freedoms that have: ‘crystallised into widely or generally accepted rights, duties, declarations and guarantees through treaties, conventions, international or regional accord, norms and usages’. In line with this interpretation, the Ghanaian Supreme Court has consistently held that international human rights treaties are applicable even where they have not been ratified or domesticated, so long as they are in consonance with the Constitution.\footnote{\textsuperscript{68}}

In \textit{Standard Chartered Bank Zambia Limited v. Peter Zulu and 118 Others},\footnote{\textsuperscript{69}} the Supreme Court of Zambia held that though Article 14(2) of the Constitution which prohibits forced labour, defines forced labour, situations may arise in future, where it may be necessary to look into Conventions to which Zambia is a member for guidance.

Also in \textit{Catholic Commission for Justice and Peace in Zimbabwe V. Attorney – General} \footnote{\textsuperscript{70}} the Supreme Court of Zimbabwe, applying again international human right treaties and precedents, held that delay in the execution of prisoners amounted to torture and was therefore unconstitutional.

\subsection*{6.2 Interpretation of Domestic Legislations}

In \textit{Decision No. 009/11.02/02}, the Constitutional Court Chamber of the Rwanda found that the fact that a decree established the statutes of the judiciary was incompatible with a state authorities law, which provided that the statutes of the judiciary were to be laid down by law, contravened article 14(1) of the ICCPR.

In \textit{Attorney General v Dow} \footnote{\textsuperscript{71}} the Botswana Court of Appeal applied the Declaration of the Rights of the Child 1959 and the UN Declaration on the Elimination of Discrimination Against Women 1967, in

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\textsuperscript{66} A similar provision is contained in article 45 of the Ugandan Constitution.  
\textsuperscript{67} [2003-04] SCGLR, 411, at 418-419.  
\textsuperscript{68} Per Atuguba JSC, in \textit{NPP v A-G (CIBA Case)}, n 66.  
\textsuperscript{69} 1996, No 59, Supreme Court of Zambia.  
\textsuperscript{70} [1993] 19(3) C.L.B. 1393  
\textsuperscript{71} 1992 BLR 119 (CA)
striking down a citizenship law which it considered discriminatory against women, though Botswana had not ratified CEDAW, the Conventions emanating from these Declarations.

In *NPP v A-G (CIBA Case)*, the Ghanaian Supreme Court held that the monitoring of the Council of Indigenous Business Associations (CIBA) was unjustified interference in the council’s affairs, in violation of the right to freedom of association. Consequently, Sections 3(b) and 4(1) of PNDCL Law invoked to justify the monitoring, were struck down as null and void.

**6. 3 APPLICATION OF TREATY BODY 'DECISIONS'**

In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, the South African Constitutional Court, made reference to the Human Rights Committee decision in *Toonen v Australia*, in holding that the common law offence of sodomy, and domestic legislation outlawing it such as Section 20A of the Sexual Offences Act 23 of 1957, was inconsistent with the Constitution and invalid.

In *Rattigan and others v Chief Immigration Officer, Zimbabwe, and Others* The Zimbabwean Supreme Court declared that failure to permit alien husbands from residing in Zimbabwe with their Zimbabwean wives was a contravention of Section 22(1) of the Constitution of Zimbabwe, guaranteeing the right to freedom of movement. In reaching this conclusion, the Court relied on Article 17 of the ICCPR and article 8(1) of the European Convention on Human Rights as well as the decision of the Human Rights Committee in *Aumeeruddy-Cziffra and Others v Mauritius*.

**7. FROM BANGALORE TO BANGALORE: CREEPING MONISM?**

The expression ‘creeping monism’ refers to the changing attitude of commonwealth courts from a strict dualist approach, to one which supports the emerging internationalist outlook to human rights. Between 1988 and 1998, a series of eight judicial colloquia, organised by INTERIGHTS and the British Commonwealth Association where held for Constitutional Court and lower court judges of the commonwealth. In the first held in Bangalore, India, titled ‘The Domestic Application of International

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72 [1996-97] SCGLR 729 at 761
74 1995 (2) SA 187 (ZS):
human Rights Norms’, the major focus of the colloquia was the use by common law judges of international human rights to shape domestic law, with emphasis on how to handle treaties yet to be incorporated into domestic law. The outcome of their discussions was summarised into concluding statements.

The 1988 Bangalore Principles, acknowledging the guidance international human rights instruments give in human rights cases, noted the “growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.” This tendency they said was welcome because it: “respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community”.

They acknowledged that “It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law”. However, where national law is clear and inconsistent with the international obligation of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

At a subsequent colloquia at Balliol, it was concluded that: “In democratic societies, fundamental rights and freedoms, are more than mere paper aspirations. They form part of the law. And it is the special province of the judges to see to it that the undertakings are realised in the daily life of the people.”

Continuing in the spirit of Balliol statement, the Bloemfontein Statement “affirmed the importance of both international human rights instruments and international and comparative case law as essential

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77 As above, 643-644.
79 As above, para; 4.
80 As above, para; 5.
81 As above, para; 7.
82 Paragraph 6.
points of reference for the interpretation of National Constitutions and legislation, and the development of the common law."\(^{83}\)

By the last of these colloquia, again held in Bangalore, India in 1998, titled ‘Making Human Rights a Practical Reality’,\(^{84}\) the tone and message of the concluding statement had changed. It was stated that it is the duty of the judiciary to apply national constitutions and legislation: ‘in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law’, and that “even where human rights treaties have not been ratified or incorporated into domestic law, they provide important guidance to law-makers, public officials and the courts.”\(^{85}\) It was further stated that though human rights norms may: “find expression in constitutional and legal systems throughout the world,” but “they are anchored in the international human rights codes to which all genuinely democratic states adhere”.

On the role of judges, it said “Fundamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of judges to see to it that the law’s undertakings are realized in the daily life of the people”. They further asserted that “[the universality of human rights derives from the moral principle of each individual’s personal and equal autonomy and human dignity. That principle transcends national political systems and is in the keeping of the judiciary.”

According to Waters, “The implication, then, is that the international law of human rights is the primary, authoritative source for human rights norms: Domestic legal sources are merely derivative of international human rights law. Moreover as “keepers” of the fundamental principles of universal human rights, it is therefore the “vital duty” of judges to harmonize subordinate domestic law with international human rights treaty law—regardless of the formal legal status of treaties within the domestic legal system.”\(^{86}\)

The impact of the Bangalore Principles within the commonwealth countries is evident in the changing attitude of the courts as reflected by their judicial proceedings. In some cases, the Bangalore

\(^{83}\) Paragraph 4.


\(^{85}\) Waters, note 76 above.

\(^{86}\) Quoted in n 16 above, at 648.
Principles have been specifically mentioned, while in others it has influenced the development of human rights jurisprudence. In *Punch Nig. Ltd. & Anor v. Attorney-Gen. & Ors*, the Federal High Court in Nigeria, relied on the Bangalore Principles, in a case concerning the treatment of journalists during state of emergency stated that “it is at such times that fundamental human rights are most at risk and that courts must be especially vigilant in their protection”.

Similarly, in *N I N Munuo Ng’uni v. Judge in Charge High Court, Arusha & Anor*, the Tanzanian High Court, cited the Bangalore principles, and other international human rights instruments, in deciding that a lawyer could not be compelled to provide legal aid services.

8. CONCLUSION

From the above, it is clear that neither the traditional theories of monism and dualism, nor the distinction between self executing and none self executing treaties, provide the best framework for the enforcement of human rights at the domestic level. The ultimate responsibility for implementation of international human rights treaties lies with the judiciary. The change in attitude of commonwealth courts brought about by the series of judicial colloquia, has brought to the fore, the fact that domestic law should in all circumstances be applied in accordance with international human rights law, and not the technicalities of monism/dualism or self executing/non self executing which often create barriers to the enforcement of human rights. This is the path which must be followed.

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87 As above.
88 High Court Civil Case No. 3 of 1993.
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