The application of international law in Kenya under the 2010 Constitution: critical issues in the harmonisation of the legal system

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Abstract

Under the 2010 Constitution, international law is deemed to be part of the Kenyan legal system, indicating a shift from the former dualist approach. Although international law is deemed to have direct application without the necessity of domestic legislation, there are problematic issues and ambiguities that have an implication for the extent to which international law may be applicable. It is necessary to examine these critical issues in order to provide a framework for a coherent understanding and application of international law in Kenya.

There is, for instance, the question of whether the relationship is of a monistic nature, with international law having a normative precedence over *all* conflicting national laws including the Constitution, or reflects a harmonising approach which subordinates international law to the Kenyan Constitution. Formal legislation is essential in order to avoid interpretative differences by courts and state agencies. The supremacy of international law in its relationship with Kenyan statutes is necessary in the light of the progressive nature of the international human rights regime. In addition, the involvement of parliament in the making of international agreements requires to be balanced against the flexibility that is necessary for the effective performance of international obligations by government agencies.

INTRODUCTION

The adoption of the 2010 Constitution[1] represented a shift from a dualist approach to the application of international law within the Kenyan legal

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[1] Constitution of Kenya (2010) at: http://www.kenyalaw.org/Downloads/The%20Constitution% 20of%20Kenya.pdf (last accessed 18 June 2011).

system.[2] While it has been opined that Kenya has effectively adopted a monist approach,[3] even with suggestions that international law supersedes the Constitution,[4] in this article we argue that the Kenyan approach is a case of harmonisation of the international and domestic legal systems. International law will interact with the Kenyan Constitution, statutory provisions, and African customary law on different levels in the legal hierarchy, with varying outcomes. For example, article 2(5) of the 2010 Constitution provides that the 'general rules of international law' shall be part of Kenyan law. Customary international law, therefore, is deemed to be part of Kenyan law. In addition, article 2(6) of the Constitution provides that treaties and conventions that have been ratified form part of Kenyan law, even in the absence of any domestic legislation. However, in article 2(1) the Constitution provides that it is the supreme law of the land. Furthermore, article 2(4) provides that any law that is inconsistent with the Constitution is invalid to the extent of the inconsistency.

As we observe later, although international law – and especially the more progressive international human rights regime – is of great significance in the interpretation of similar constitutional provisions, the Constitution prevails over inconsistent international law obligations. The Kenyan situation requires harmonisation of the legal order in a manner that ensures that Kenyan citizens enjoy maximum benefits from the direct operation of international law in the country, while at the same time safeguarding the smooth and democratic operation of government organs. For example, the progressive nature of the international human rights regime necessitates a greater application of international law, positioning it higher in the legal hierarchy than Kenyan domestic law. In addition, adherence to the doctrine of the separation of powers requires parliament's involvement in the conclusion of treaties, by authorising the executive to ratify international agreements. In the absence of such a procedural requirement, the executive, although not the formal law-making organ under the Constitution, may make binding laws on a wide range of issues by concluding international treaties. Some of those treaties may have negative implications for Kenyan citizens, especially on issues of trade and commerce.

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2 In the case of *David Macharia v Republic*, the court noted that Kenya had previously adopted a dualist approach, and therefore treaty provisions did not, as a general rule, have a direct effect in domestic laws and courts. *David Njoroge Macharia v Republic* [2011] eKLR 15.

3 James Gathii, 'Pitfalls of adopting international laws' *Nairobi Law Monthly* (2 March 2011) at: http://nairobilawmonthly.com/index/content.asp?contentId=253&isId=6&ar=1(last accessed 15 April 2011). See also, Commission for the Implementation of the Constitution, 'Understanding Article 2(6) of the Constitution' at: http://cickenya.org/content/understanding-article-26-constitution (last accessed 6 July 2011).

4 Gathii n 3 above.

The 2011 Ratification of Treaties Bill seeks to establish an Act of parliament that will provide the legal and institutional framework for parliament's involvement in the negotiation of treaties before their ratification,[5] in addition to other relevant issues in parliament's participation in treaty making.

Before proceeding to examine the various issues in respect of the direct operation of international law within the Kenyan legal system, it is important to clarify the theoretical basis of the Kenyan approach, which has an implication for the extent to which international law will be directly applicable. Before the promulgation of the new Constitution on 27 August 2010, the Kenyan approach was dualist.[6] The dualist doctrine is premised on the view that domestic and international legal orders comprise of two distinct and independent legal systems.[7] Therefore, to apply in the domestic sphere, international law must be legislated into domestic law.[8] On the other hand, a monist approach is premised on the view that both international law and domestic law are part of a unified legal system.[9] The monist doctrine, however, has two approaches with respect to the supremacy of either domestic or international law. The first approach in the monist construction of legal obligations holds that international law enjoys supremacy over domestic law, while the second approach is based on the view that domestic law has primacy over international law.[10]

Despite the direct application of international law within the Kenyan legal system, it seems that the relationship between international law and domestic law is not monist. Labeling it as such would amount to a failure to take into account the discordance that exists in the relationship between the two interdependent legal systems. For example, while article 2(4) of the Constitution provides for constitutional supremacy over any other inconsistent law, including international law, international obligations may supersede a conflicting Kenyan statute.[11] The Kenyan situation seems to suggest that international law and domestic law will 'overlap and penetrate each other, leaving no room for the concept of clear-cut supremacy of one

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5 Ratification of Treaties Bill, 2011 (7 May 2011) at: http://cickenya.org/sites/default/files/bills/Ratification%20of%20Treaties%20Bill%2011.05.11.pdf (last accessed 12 July 2011).

6 *David Njoroge Macharia v Republic* n 2 above at 15.

7 Antonio Cassese *International law* (2ed 2005) 214.

8 *Ibid*.

9 See Hans Kelsen *Principles of international law* (2ed 1967) 569.

10 *Ibid* 580. See also Cassese n 7 above at 213–215.

11 For instance, in the post-2010 Constitution case of *Zipporah Mathara*, the Court held that the provisions of the International Convention on Civil and Political Rights superseded those of Kenyan statutory provisions. See *Re the Matter of Zipporah Wambui Mathara* [2010] eKLR 4.

single set of legal norms over all others'.[12] To an extent, even proponents of monism have been compelled to acknowledge that it may be impossible for a state to apply the entire body of international law directly within its domestic courts,[13] or even have such rules supersede basic domestic law such as state constitutions. These realisations have contributed to the conception of the harmonisation theory which institutes qualifications to the monist doctrine, to the effect that where a conflict arises between domestic and international law, the domestic judge is to be guided by his own jurisdictional rules.[14] The doctrine of harmonisation is based on the perception that international law is part of domestic law and, therefore, directly available for utilisation by a domestic judge, provided that in the exceptional case of a conflict between the two systems, the judge is obliged to revert to his jurisdictional rules.[15]

APPLICATION OF INTERNATIONAL LAW UNDER THE FORMER DUALIST APPROACH

Despite the previous dualist concept, Kenyan courts had gradually adopted a progressive practice of directly applying international law, albeit restrictively. International law was not formally recognised as part of the national legal system either under the previous Constitution or under the Judicature Act.[16] There had, however, been a gradual progression from the strictly dualist approach exemplified in the 1970 case of *Okunda v Republic*.[17] In the *Okunda* case, the High Court held that as international law was not included as a source of law under the Judicature Act, it did not have legal force within the state.[18] Kenya therefore adopted a *superficial* dualist approach, permitting direct application of international law in a restrictive sense, provided it was not inconsistent with either the Kenyan Constitution or statutory provisions. In *Rono v Rono* the court argued that the practice that had evolved within the common law theory, which is predominantly dualist, was that, even in the absence of domestic legislation, both ratified treaties

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12 Rett R Ludwikowski 'Supreme law or basic law? The decline of the concept of constitutional supremacy' (2001) 9 *Cardozo Journal of International and Comparative Law* 253, 254.

13 John Dugard *International law: a South African perspective* (3ed 2005) 47.

14 *Id* 47–48.

15 Daniel P O'Connell 'The relationship between international law and municipal law' (1960) 48/3 *Georgetown Law Journal* 431, 440.

16 Section 3 of the Judicature Act, Chapter 8 of the Laws of Kenya. Sources of Kenyan laws enumerated under the Judicature Act include the Constitution, Acts of Parliament, common law, doctrines of equity, statutes of general application in force in England on 12 August 1897 and African customary law.

17 *Okunda v Republic* [1970] EA 512.

18 *Ibid*.

and customary international law could be applied directly within domestic courts in the absence of conflicting municipal laws.[19]

In *RM and Another v Attorney General,*[20] the court, however, observed that where there was no ambiguity in the domestic law which was also inconsistent with an international law provision, the common law approach obliged the domestic court to enforce the domestic law. The court pointed out that in such a situation, the best it could do was to 'draw such inconsistencies to the attention of the appropriate authorities, since the supremacy of the national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.'[21] The court's suggestion implied that a notification be made to the Kenyan parliament concerning the undesirable inconsistency, so that appropriate domestic legislation or amendments to existing statutes could be effected. In *Re Estate of Lerionka Ole Ntutu,*[22] the court revisited and endorsed the reasoning in the *Rono* case, noting that in the earlier case, the court had cited principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms as a basis for supporting direct application of undomesticated treaties. The Bangalore Principles were compiled by a colloquium of Commonwealth judges who evaluated the application of international law in the domestic courts of Commonwealth states.[23] Principle 7 of the Bangalore Principles provides that domestic courts may refer to international obligations, whether there is domesticating legislation or not, in order to remove ambiguity from the state constitution, legislation or common law.[24]

Despite the progressive approach that Kenyan courts had adopted even under the previous dualist regime by directly applying international law in certain circumstances, the role of international law in Kenyan courts was still highly restricted. The previous position of international law was lower than that of the Constitution, subordinate to statutory provisions, and would only be relied upon where there was no specific statutory provision on the issue, or for purposes of removing uncertainty from domestic legislation.[25]

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19 *Rono v Rono* [2005] KeCA 16.

20 *RM and Another v Attorney General* [2006] eKLR 12.

21 *Ibid*.

22 In *Re Estate of Lerionka Ole Ntutu (Deceased)* [2008] eKLR 6.

23 See Chairman's Concluding Statement, 'Conclusions of Judicial Colloquia and Other Meetings on the Domestic Application of International Human Rights Norms and on Government under the Law' at: http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BA2407AAC-A477-491D-ABA4-A2CADF227E2B%7D_BANGALORE%20PRINCIPLES.pdf (last accessed 14 May 2011.

24 *Ibid*.

25 J Osogo Ambani 'Navigating past the 'dualist doctrine': the case for progressive jurisprudence on the application of international human rights norms in Kenya' in

SIGNIFICANT ISSUES IN THE DIRECT APPLICATION OF INTERNATIONAL LAW

This section explores critical issues in the relationship between international law and Kenyan laws, including the Constitution and statutory provisions. It begins by elucidating why formal legislation by parliament would be the most appropriate mechanism for addressing uncertainty in the harmonisation of international law and domestic law within the Kenyan legal order. Without explanatory legislation or a clear jurisprudential framework, there are likely to be interpretative differences in the courts. The newly established Supreme Court[26] can contribute in issuing jurisprudential guidelines on the legal hierarchy through an interpretation of the Constitution and relevant statutes. However, beyond the courts, the relationship between domestic laws and international obligations has an implication for various decision makers within the executive and public service.

Therefore, although issues of the relationship will feature predominantly within the courts, it will still have an influence on some members of the executive, policy makers, and public officials, especially where quasi-judicial functions are involved. Such decision makers may occasionally find themselves required to execute responsibilities that arise from both domestic laws and international law, but with differing obligations arising from the two legal systems. The most appropriate approach would therefore be a formal clarification of the hierarchy of laws by parliament. The value of legislation is that while quasi-judicial institutions and policy makers often refer to statutes and relevant international treaties, they often do not consider judicial precedents and where they do, they may have difficulty in analysing and deciphering the courts' jurisprudence.

International law and Constitutional provisions

Article 2(1) of the 2010 Constitution provides that the Constitution is the supreme law within the state. Article 2(4) of the Constitution further provides that any law that is inconsistent with any of its provisions is void to the extent of the inconsistency. The clause establishes no exemption and, therefore, would appear to include international law. Despite the failure to expressly exempt any system of law from invalidation on the basis of inconsistency, it has been submitted that international law supersedes a conflicting constitutional provision. It has been opined that:

> [i]n the now infamous 1970 case Okunda v Republic, the High Court ruled that the Constitution superseded a statute of the East African

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Magnus Killander (ed), *International law and domestic human rights litigation in Africa* (2010) 25, 30.

[26] Under art 163 (4) (a) of the 2010 Constitution, the Supreme Court may resolve issues concerning the interpretation or application of the Constitution.

> Community...Does this position hold under the 2010 Constitution? Certainly not … Okunda v Republic is a relic of the past … Kenya is under the new Constitution a monist State.[27]

The above statement seems to conclude that an international treaty can now supersede an inconsistent provision of the Constitution in the Kenyan domestic sphere. It also seems to justify that view on the basis of the monist theory. However, in this article, we argue that despite international law having direct force in Kenya, where the issue of inconsistency between international law and the Constitution arises within the Kenyan domestic context, the Constitution prevails. It should be noted that the position may be different when a similar issue is submitted before an international court or tribunal, which may give preference to international obligations rather than conflicting provisions of the Kenyan Constitution. Despite elucidating the basis for the supremacy of the Constitution over conflicting international law, in this article we do not advocate the subordination of international obligations, especially in their relation to ordinary Kenyan law, including statutory provisions and African customary law. Earlier in this article, we noted that international law may supersede a Kenyan statute, and that is a desirable approach due to the progressive nature of the international human rights regime.

The supremacy of the Constitution over international law is affirmed by a number of factors that require further consideration. First, the supremacy clause of the 2010 Constitution does not exempt any legal regime applicable in Kenya from subordination. Second, as we have already observed, Kenya cannot be classified as a monist state in the pure sense. Rather, it represents an example of the harmonisation of the international and national legal orders in terms of which the two systems may interact on various levels. Third, it has been credibly opined by leading monist proponents such as Hans Kelsen, that even in a monist context, if there is a conflict between the two legal systems, the determination of which law prevails can only be made with reference to the domestic law of a state.[28] Kelsen proceeds to argue that if interpretation or construction of legal obligations commences from the specific domestic legal order, then the validity of international law within that state is dependent upon the domestic laws, and is actually part of the domestic law.[29] According to Kelsen, a state's constitution may be the basic norm that establishes the validity of all other laws within the legal system.[30]

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27 Gathii n 3 above.

28 Kelsen n 9 above at 565–566.

29 *Id* at 580.

30 H Kelsen 'General theory of law and state' (1946) *reprinted* in MDA Freeman *Lloyd's introduction to jurisprudence* (8ed 2008) 336.

The validity of the laws within the state will, therefore, be based on whether they have been adopted in accordance with its constitution.[31]

Based on these observations, it would be wrong to assume that the validity of the 2010 Constitution arises from international law, and therefore that international law may supersede conflicting constitutional provisions. It is the 2010 Constitution that established the validity of international law, including undomesticated treaties, in Kenya, allowing them to be applied directly. This should not, however, be interpreted to mean that reference may not be made to international law to remove ambiguities surrounding rights provided under the 2010 Constitution. International law, through its direct applicability, will have a significant role in helping to clarify ambiguous constitutional provisions, especially on human rights matters. Problems arise when an international law provision is in clear conflict with an express clause in the 2010 Constitution. Some states do, however, provide for the supremacy of international law in relation to all domestic laws, including the constitution. For example, article 45 of the Cameroonian Constitution *expressly* provides that ratified treaties and international agreements supersede domestic laws once they have been published.[32] In Cameroon, the conflict between international law and the Constitution is, however, avoided by requiring that where the Constitutional Council is of the view that a treaty is likely to conflict with a constitutional provision when ratified, the ratification of the treaty is deferred until the Constitution has been amended as appropriate.[33]

We have already pointed out that international law may significantly promote the interpretation of rights established under the 2010 Constitution in a progressive manner. Most of the rights established under international treaties, especially the human rights regime, have equivalent provisions in the Constitution.[34] Often, the question before the courts is not whether to apply an international human rights provision directly, but rather, how the court should interpret a constitutional right to ensure that it is also affirmed

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31 *Id* at 336. Kelsen explains that the basic norm creation does not require a legal procedure for it to be valid, as its validity is presupposed. *Ibid* 337. It therefore follows that the basic norm may arise out of political actions. Further, Kelsen advances the view that the basic norm may be changed in a manner not provided or anticipated by it, for instance, by a revolution, and the new order will establish a valid norm. The test of whether the basic norm has changed and a new one assumed its place is based on whether the new order is effective. *Id* at 337–338. Article 2(3) of the 2010 Constitution provides that its validity is not challengeable before any court or organ of the state.

32 Constitution of the Republic of Cameroon at: http://confinder.richmond.edu/admin/docs/Cameroon.pdf (last accessed 14 May 2011).

33 *Id* at art 44 . See also, Magnus Killander & Horace Adjolohoun, 'International law and domestic human rights litigation in Africa: an introduction' in Killander n 25 above at 3, 5.

34 *Id* at 17.

in the international human rights regime.[35] Ratified treaties, resolutions, international case law, and general comments by relevant international institutions, should inform the Kenyan courts[36] when interpreting a constitutional provision with a treaty equivalent. Some states expressly require that the courts be guided by international law while interpreting certain provisions of the constitution. For example, article 39 of the South African Constitution provides that a court or tribunal that is interpreting the Bill of Rights *must* consider international law, in addition to other requirements.[37] The Kenyan situation is even more progressive by having international law apply directly, apart from also serving as an interpretative tool.

It should also be noted that a different position on the supremacy of the Constitution may be arrived at if a Kenyan matter is submitted before an international tribunal, such as the East African Court of Justice, and there is a conflict between a clause in the Kenyan Constitution and the East African Community treaty provision. The East African Court is likely to uphold provisions of the East African treaty, finding that they supersede a conflicting clause in the Kenyan Constitution. Within international courts and tribunals, where there is a conflict between international law and national legal obligations, it has consistently been held that duties under international rules prevail.[38] The validity of international law outside of the Kenyan legal system is not dependent on the Kenyan Constitution, and an international court or tribunal is likely to seek guidance from the basic norms of international law and relevant international agreements. The validity of international law in the international sphere is premised on the basic norm that may be articulated as follows: 'States ought to behave as they have customarily behaved'.[39] This norm establishes customary international law, which is regarded as the first point in the international legal order.[40] The second stage of the international legal order is based on the norms establishing treaties, and the validity of treaties is dependent upon the principle of *pacta sunt servanda* (itself being a norm of the first stage, that is, customary international law).[41]

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35 *Ibid*.

36 *Ibid*.

37 Constitution of the Republic of South Africa, No. 108 of 1996 at: http://www.info.gov.za/documents/constitution/1996/a108–96.pdf (last accessed 26 April 2011).

38 Eileen Denza 'The relationship between international and national law' in Malcolm D Evans (ed) *International law* (3ed 2010) 411, 413.

39 Kelsen n 9 above at 564.

40 *Ibid*.

41 *Ibid*. Article 26 of the Vienna Convention on the Law of Treaties reaffirms the principle of *pacta sunt servanda*. It provides that a 'treaty in force is binding upon the parties to it and must be performed by them in good faith'. Vienna Convention on the Law of

There are attempts to eliminate issues of conflict between the Constitution and international law, for instance, in relation to the immunity of the President. Article 143(4) of the Constitution provides that the President's immunity from prosecution does not extend to crimes established under a treaty to which Kenya is signatory, and which proscribes such immunity. The provision is in conformity with article 27 of the Rome Statute which prohibits the application of official immunity to all persons, including the Heads of State, who are charged with the crimes established under the Statute.[42] This allows such persons to be held criminally liable for their actions.

International law and Kenyan statutes

There are three possible ways in which international law may relate to Acts of parliament. First, it may supersede any conflicting provisions in an Act of parliament. Second, international law may operate on the same level as Kenyan statutes in the legal hierarchy. Some states afford international law applied within the domestic legal order equal treatment as domestic legislation originating from domestic sources.[43] Consequently, the general rules applicable to laws of the same status apply in situations of conflict.[44] For instance, prior legislation is superseded by subsequent legislation, a special law overrides a general law, while subsequent general legislation should not derogate from previous special law.[45] Therefore, a prior rule of international origin may at any time be repealed by parliament.[46] The third possibility is that Kenyan statutes may be placed at a higher level in the legal order, whereby they would supersede conflicting international obligations. Such an approach is, however, not desirable. This article argues that it is necessary and beneficial to place international law at a higher level than Acts of parliament within the Kenyan legal hierarchy just below the Constitution. This is based on the progressive nature of international human rights law, one of the significant factors that necessitate the direct application of international law within the domestic legal order.

As we have already observed, international law was, in practical terms, directly applicable under the previous dualist approach, but restrictively so and only when it did not conflict with a Kenyan statute. This approach resulted in the 'relegation of the often fairly progressive international human rights instruments'.[47] It would be retrogressive to the promotion and

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Treaties (adopted 22 May 1969, entry into force 27 January 1980) 1155 UNTS 331.

42 Rome Statute of the International Criminal Court (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS 90.

43 Antonio Cassese n 7 above at 222.

44 *Ibid*.

45 *Ibid*.

46 *Ibid*.

47 Ambani n 25 above at 25.

protection of human rights if the practice of directly applying international law in Kenya, but only where it is not in conflict with a Kenyan statute, were retained. Practically, there would be no progress from the former dualist approach. There are states that expressly subordinate national statutes to international law. For example, article 55 of the French Constitution provides that treaties and agreements that have been ratified and published supersede Acts of parliament.[48] Article 94 of the Netherlands Constitution also provides that statutory regulations shall not apply if in conflict with provisions of treaties and resolutions of international organisations which are binding within the state.[49]

The progressive nature of the international human rights regime

It has been convincingly observed that the state is often distrusted as an effective agent for protecting human rights, and that even international law 'is ultimately concerned with the conduct and welfare of individuals'.[50] International law is often regarded as better equipped to act as a moderator of human rights.[51] It seems credible to argue that the international human rights regime has always been more progressive and dynamic than the Kenyan domestic human rights system. Over the past years, Kenya has made progress in its human rights regime through domestication of international treaties.[52] In addition, it is becoming more apparent that even individuals within states are direct bearers of rights and duties under international law, without a state intermediary – as in the case of international crimes, or the right to petition international bodies.[53] It has therefore been astutely noted that international law is progressing into a *civitas maxima*, that is, 'a human commonwealth encompassing individuals, States, and other aggregates' that transcends the boundaries of states.[54]

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48 Constitution of 4 October 1958 at: http://www.assemblee-nationale.fr/english/8ab.asp (last accessed 14 May 2011).

49 Constitution of the Kingdom of the Netherlands at: http://www rijksoverheid nl/ (last accessed 14 May 2011).

50 Ian Brownlie *Principles of public international law* (7ed 2008) 32.

51 *Ibid*.

52 For instance, the 2001 Children Act lists, in its introductory part, its purposes as including the implementation of Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. See Children Act 8 2001; Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990) 1577 UNTS 3; African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entry into force 29 November 1999) CAB/LEG/24.9/49 (1990).

53 Cassese n 7 above at 217. It has been observed that international law is continually infiltrating matters that were previously regarded as internal issues of a state, and is now regulating interactions between the government and its citizens, supported by the evolving international human rights and international crimes regimes. Anne-Marie Slaughter & William Burke-White 'The future of international law is domestic (or, the European way of law)' (2006) 47/2 *Harvard International Law Journal* 327, 327.

54 Cassese n 7 above at 217.

However, despite the more progressive nature of the international human rights regime, the international law system lacks effective protection and enforcement mechanisms when compared with a domestic system. We refer here to the capacity of a domestic regime to penalise and hold individuals accountable for their actions or omissions that result in violations of human rights. It has been noted that the national system is capable of supplementing the power of coercion that is usually absent in the international legal system.[55] National courts and authorities are often the best mechanisms for ensuring that international law obligations are enforced.[56] Therefore, for Kenyans to reap greater benefits from the more progressive human rights regime, national authorities, including the courts, must be ready to enforce international law more vigorously. The Kenyan parliament should also proceed to institutionalise and preserve the greater role of international law within the Kenyan legal order as a way of avoiding interpretative differences.

Subsequent practice by Kenyan courts

A jurisprudence of granting international law normative precedence over statutory provisions is already emerging through judicial harmonisation. It is an emerging progressive approach by the Kenyan courts that deserves commendation. In the 2010 case of *Zipporah Wambui Mathara*,[57] the court pointed out that international treaties ratified by Kenya were part of the Kenyan law by virtue of article 2(6) of the 2010 Constitution. In this case, the applicant had sought to have the respondent committed to civil jail for failure to settle a debt, which is one of the options provided under the Civil Procedure Act.[58] The court, however, observed that there were various options for enforcing a civil debt, but an 'order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity', and was contrary to the International Convention on Civil and Political Rights (ICCPR).[59] The court pointed out that article 11 of ICCPR, ratified by Kenya in 1972, was part of Kenyan law on the basis of article 2(6) of the 2010 Constitution.[60] Article 11 of the ICCPR provides that nobody should be 'imprisoned merely on the ground of inability to fulfill a contractual obligation'.[61] The court observed that imprisoning such an individual would curtail his freedom to seek ways of repaying the debt. In addition, the court pointed out that ICCPR 'guarantee parties' basic freedoms of movement and of pursuing economic, social, and cultural development' which would be

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55 Karen Knop, 'Here and there: international law in domestic courts' (2000) 32 *New York University Journal of International Law and Politics* 501, 516.

56 *Ibid*.

57 *Re the Matter of Zipporah Wambui Mathara* n 11 above at 3–4.

58 *Id* at 2.

59 *Id* at 4. See, International Covenant on Civil and Political Rights (16 December 1966, entry into force 23 March 1976) 999 UNTS 171.

60 *Re the Matter of Zipporah Wambui Mathara* n 11 above at 3–4.

61 International Covenant on Civil and Political Rights n 59 above.

curtailed, and, therefore, the court proceeded to dismiss the application.[62] International law was, therefore, held to supersede conflicting provisions of a Kenyan statute.

In the more recent case of *David Macharia v Republic*,[63] the court stated that although Kenya had traditionally followed the dualist approach, the position may have changed under the 2010 Constitution. The court specifically revisited and approved the decision in *Zipporah Wambui Mathara* case, noting that besides finding the ICCPR directly applicable, the court had proceeded to rule that ICCPR provisions superseded those of a Kenyan statute.[64] Despite the above progressive approach being adopted by courts, parliament should enact appropriate legislation to effectively institutionalise and protect the normative precedence of international law over statutory legislation by amendments to article 3 of the Judicature Act,[65] or through other legislative measures. Appropriate legislation would prevent any future uncertainty on the position of international law within the Kenyan legal hierarchy, and safeguard against possibilities of judicial manipulation or interpretative differences.

This article has already pointed out that some states have *expressly* provided for the normative superiority of international law over statutory provisions. Such provisions eliminate any ambiguity in the relationship between international and domestic laws, in addition to pre-empting any possibility of interpretative differences.

PARLIAMENTARY CONSENT TO THE RATIFICATION OF TREATIES

If treaties are to apply directly in Kenya without the necessity of domesticating legislation, then the involvement of the Kenyan legislature in their ratification is necessary in order to uphold parliament's constitutional law making function, in addition to safeguarding the doctrine of the separation of powers in governance. Article 94(1) of the 2010 Constitution grants the Kenyan parliament legislative authority on behalf of the people. Article 94(5) of the Constitution further provides that, with the exception of parliament, no other body or person 'has the power to make provision having the force of law in Kenya' unless the Constitution or legislation provides

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62 *Re the Matter of Zipporah Wambui Mathara* n 11 above at 4.

63 *David Njoroge Macharia v Republic* n 2 above at 15.

64 *Id* at16.

65 The Judicature Act does not include treaties and customary international law as a source of law in Kenya while establishing the Kenyan legal order. See, s 3 of the Judicature Act (n 16). Osogo Ambani has also highlighted the need to amend the Judicature Act in order to include international law within the Kenyan legal hierarchy, and has proposed a superior position for international law. Ambani n 25 above at 32.

such a law making mandate. Article 94(5) of the 2010 Constitution therefore prohibits the ratification of a treaty without the prior consent of parliament,[66] or with the exception of situations where there is legislation that dispenses with that requirement. According to the past Kenyan practice, negotiation, signing, and ratification of treaties had predominantly been the role of the executive, without parliament's participation.[67] However, article 94(5) of the 2010 Constitution preserves the direct application of previously ratified treaties, in addition to general rules of international law, by providing for constitutional and legislative exceptions to the sources of law. Articles 2(5) and 2(6) of the 2010 Constitution are such an exception, permitting for application of general rules of international law and treaties respectively. The provisions permit direct application of previous treaties that were ratified without the participation of the Kenyan parliament under the preceding constitutional framework.

The Ratification of Treaties Bill (2011) is aimed at implementing article 94(5) of the Constitution by establishing the legal and institutional framework for the negotiation and ratification of treaties.[68] Although the Bill is yet to be debated in parliament, and therefore, some changes to the current provisions may be undertaken by the time it becomes law, it indicates the general direction being adopted in connection with the negotiation and ratification of treaties. Among the significant provisions of the Bill is the requirement, in section 4(6), that the executive shall not ratify treaties on specified issues without prior authorisation by parliament. Section 4(1) of the Bill defines the various types of treaty whose ratification it shall regulate once enacted into law, meaning that prior approval by parliament shall be necessary in such matters. They include treaties dealing with 'the security of Kenya, its sovereignty, independence, unity or territorial integrity'. In addition, agreements concerned with the 'rights and duties of individuals' or 'the status of Kenya under international law' are also regulated. Further, the Bill is applicable to any treaty that deals with 'the relationship between Kenya with any international organization or similar body'.

The conclusion of treaties internationally, and their implementation domestically, is the point at which the conflict between parliament as the

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66 Commission for the Implementation of the Constitution n 3 above.

67 The signing of a treaty is different from its ratification. Signature does not indicate a state's consent to be bound. Ian Brownlie n 50 above at 610. It authenticates the text of the treaty, and permits the signatory state to proceed to ratification. *Ibid*. Ratification expresses a state's intention to be legally bound by the international agreement. Cassese n 7 above at 172. Unless 'instrument of ratification is drawn up, signed, and exchanged with other parties, or deposited with one of them or with an international organization, and the minimum number of ratifications required for the entry into force of the treaty is reached,' a participating state is not bound by the treaty. *Ibid*.

68 Ratification of Treaties Bill n 5 above.

legislator and the executive as the body charged with international diplomacy emerges. Although it is the executive that often discharges diplomatic functions and participates in the making of international agreements, article 94(5) of the 2010 Constitution and the Ratification of Treaties Bill have the effect of requiring the direct participation of parliament. This is necessary to prevent the executive from bypassing parliament, and then having such international rules apply directly within the state, without having undergone parliamentary debate procedures.[69]

The constitutional requirement of parliament's involvement in treaty making has both theoretical and practical significance in relation to democratic governance. The concept of separation of powers is an essential constitutional theory that establishes a distinction between 'institutional structures of free societies from those of non-free societies'.[70] It is important that the three branches of government (the legislature, the executive, and the judiciary) do not unconstructively encroach on the responsibilities of one another, and that each branch is permitted to perform its core functions.[71] It is, however, practically impossible to reproduce 'a pure Montesquian model of three distinct organs independently exercising power' within the institutional framework of the modern state.[72] Since it is not possible to implement the concept of separation of powers in the purest sense, it is important that any encroachment be constructive, with statutory and institutional guidelines that check against its misuse. In the case of Kenya, it can be argued that the executive will continue with its traditional duty of diplomacy and international engagements on behalf of the state, while parliament checks against any misuse of the treaty making power. In addition, parliament is not discharged from its core function of law making, by ensuring that treaties, which have a force of law in Kenya, are ratified with the legislature's prior consent. As international agreements will directly regulate numerous issues, including trade and economic matters, and some of the agreement may have undesirable implications on Kenyan citizens on some issues, parliament's participation is critical. It has astutely been observed that 'the entire series of treaties Kenya entered into in the Uruguay Round of world trade talks in 1994, now form part of domestic law even though institutionally and otherwise, the country is ill-equipped to fully meet many of these obligations.'[73]

The scope of the Ratification of Treaties Bill is wide and comprehensive. The Bill does not expressly refer to treaties on significant issues such as

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69 Antonio Cassese n 7 above at 223.
70 MJC Vile *Constitutionalism and the separation of powers* (1967) 9.
71 *Id* at 13.
72 Eoin Carolan *The new separation of powers: a theory for the modern state* (2009) 18.
73 Gathii n 3 above.

commerce, trade, and environment, as requiring the prior consent of parliament before ratification. However, such issues are implied in some of the expressly provided instances, and therefore international agreements on such matters require prior approval by the legislature. For instance, individuals have a right to a healthy environment, which is often categorised as a group or third generation right,[74] rendering section 4(1)(b) of the Bill (on treaties affecting rights of individuals) directly applicable. In addition, section 4(1)(b) of the Bill is applicable to international agreements on commerce and trade as they translate to economic and social rights of individuals. Further, agreements on trade and commerce often establish intergovernmental organisations for their implementation, rendering section 4(1)(c) of the Bill (which deals with issues that affect the relationship between Kenya and such organisations) applicable.

There is uncertainty over whether resolutions and declarations, such as those adopted in the meetings of intergovernmental organisations such as the United Nations, the African Union, and the East African Community, are deemed to amount to treaties, rendering prior parliamentary consent mandatory. Section 2 of the Bill broadly defines a treaty as an 'international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.' This is a replication of the definition adopted in article 2(a) of the 1969 Vienna Convention.[75] The definition of what constitutes a treaty may have an implication on flexibility in the performance of Kenya's international obligations if resolutions and declarations are deemed to be part of treaty making. Such declarations and resolutions, often adopted under the auspices of intergovernmental organisations, are also international agreements. However, only a treaty requires ratification before it becomes binding upon parties, and such an international agreement may variously be referred to as a 'pact,' 'act,' 'convention,' 'charter' or 'protocol'. Section 2 of the Bill defines ratification as the point at which a state expresses its consent to be bound by a treaty.[76]

The question arises whether, by broad interpretation, international resolutions and declarations are part of the treaty definition under the Bill, requiring parliament's prior consent on issues specified in the Bill, since they

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74 George Mukundi Wachira 'A critical examination of the African Charter on Human and Peoples' Rights: towards strengthening the African human rights system to enable it effectively to meet the needs of the African population' in Frans Viljoen (ed) *The African human rights system: towards the co-existence of the African Commission on Human and Peoples' Rights and African Court on Human and People's Rights* (Kenyan Section of the International Commission of Jurists, Nairobi 2006) 3, 8.

75 Vienna Convention on the Law of Treaties n 41 above.

76 See also, Brownlie n 50 above at 610; Cassese n 7 above at 172.

are also forms of international agreements, and establish rights and duties. A broad interpretation would be problematic as it would eliminate the flexibility required by the executive while engaging in international engagements. Such instances include the meetings of intergovernmental organisations where resolutions and declarations are often adopted while implementing various rights and obligations established in the treaty forming the respective organisation. It would not be practically possible for the executive, or the government representative at the international forum to revert to parliament before binding the state.

On the other hand, a restrictive definition of what constitutes treaties under the Bill (and the subsequent Act of parliament it will establish) would be helpful by exempting international agreements in the form of resolutions and declarations from its application, as they do not require ratification to be binding upon the members. Such an approach would grant government representatives the desirable flexibility in their engagements in international forums. As the objective of the Bill (and the subsequent Act of parliament) is to regulate the ratification of treaties, as stipulated in section 3 of the Bill, it would not be deemed to apply to any international agreement for which ratification is not necessary. In addition, if resolutions are deemed to be outside the issues regulated by the Bill, rendering the prior consent of parliament unnecessary, they would still have a force of law in Kenya once adopted by virtue of section 4(8) of the Bill. This section permits the relevant agencies of the Kenyan government to execute all other international instruments for which section 4(1) of the Bill does not apply. Article 4(1) of the Bill uses the phrase 'treaty.' Therefore, it can be argued that international engagements that do not amount to 'treaty making,' are exempted from the necessity of prior approval by parliament.

Another significant provision in the Bill is that it renders withdrawal from the specified treaties a rigid affair. Under section 5 of the Bill, at least two-thirds of the members of parliament must approve withdrawal from any treaty on issues enumerated in section 4(1). The clause enhances certainty that Kenya will uphold its international obligations, and that any withdrawal will be on convincing grounds, and in deserving cases. In addition, the transition clause in section 13 of the Bill safeguards direct application of treaties adopted before its entry into force.

Overall, the Bill is well drafted and is a welcome development. Although the Bill is yet to be debated in parliament and, therefore, there may be some changes by the time it becomes law, it is indicative of the general direction being taken. The Bill safeguards the doctrine of separation of powers by ensuring that parliament is not discharged from its law making functions, and that the executive is not rendered an unrestrained legislator through international treaties. It will also permit exhaustive reflection and debate on

various issues before Kenyans are bound both internationally and locally. However, as pointed out, an interpretation of what amounts to a treaty requires to be balanced with the necessity for flexibility in the conduct of international engagements by agents of the Kenyan government, especially with respect to participation in intergovernmental meetings and the adoption of relevant resolution.

CONCLUSION

From a theoretical perspective, this article has demonstrated that the direct application of international law within the Kenyan legal system amounts to harmonisation of both the international and national legal regimes. International and domestic law will interact at different levels of the Kenyan legal order, with differing outcomes. While the Kenyan Constitution will supersede conflicting international obligations, international law may prevail over inconsistent provisions of Kenyan statutes and African customary law. The supremacy of the Kenyan Constitution over inconsistent international obligations is, however, only in respect of issues within the Kenyan domestic sphere. International tribunals and courts are likely to find that international obligations supersede conflicting clauses of the Kenyan Constitution, based on the principle of *pacta sunt servanda*. It is necessary that the existing uncertainty on the relationship between international law and Kenyan statutes and African customary law be resolved. This would be helpful in institutionalising a coherent understanding and application of international law within the Kenyan legal system. While the Kenyan courts have begun to provide a harmonisation jurisprudence, resolving the uncertainty requires legislative measures in order to avoid interpretative differences, and as a way of providing unambiguous guidelines to quasi judicial bodies.

The requirement that the Kenyan parliament participates in the ratification of treaties (which are directly applicable as law) is significant in preserving the democratic principles of separation of powers between the organs of the Kenyan government. The 2011 Ratification of Treaties Bill, which seeks to establish a framework for the participation of parliament in the making of international agreements, is comprehensive, covering all critical areas of treaty making. However, international agreements that are deemed to constitute a treaty need to be interpreted in a restrictive manner. Such a restrictive interpretation of treaty making will grant government agencies the required flexibility in the adoption of relevant resolutions in international forums, such as those of international organisations.