

**Beyond Ratification: Navigating Challenges in the Application of International
Human Rights Norms in Kenya**

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By

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
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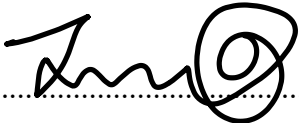
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Declaration

I, TYLER NDAULA WAMALA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

DR. JOSEPHAT KILONZO.

Abstract

This dissertation delves into the intricate dynamics of the application of international human rights norms within Kenya's domestic legal system. Against the backdrop of Kenya's rich history of independence struggles and democratic principles, the study examines the challenges and opportunities in aligning the nation's legal framework with global human rights standards. Despite constitutional commitments to uphold human rights principles, the translation of international norms into effective domestic structures faces hurdles related to cultural sensitivity, resource constraints, and the balance between national sovereignty and international obligations. Through a multidisciplinary approach drawing on legal, political, and socio-economic perspectives, the research aims to unravel the complexities of this interplay. By analyzing judicial interpretations, legislative initiatives, and challenges in application, the study seeks to offer practical policy recommendations for enhancing human rights protection in Kenya. The findings not only enrich academic scholarship on harmonizing global and domestic legal frameworks but also provide actionable insights for policymakers and legal practitioners engaged in human rights advocacy within the national context.

LIST OF ABBREVIATIONS

CEDAW *Convention on the Elimination of All Forms of Discrimination Against Women*

ICCPR *International Covenant on Civil and Political Rights*

ICESCR *International Covenant on Economic, Social and Cultural Rights*

EAC *East African Community*

EACJ *East African Court of Justice*

UDHR *Universal Declaration of Human Rights*

VCLT *Vienna Convention on the Law of Treaties*

SA *South Africa*

LIST OF LEGAL INSTRUMENTS

Domestic Legal Instruments

Kenya

Constitution of Kenya, 2010

Judicature Act (Cap 8, 2012)

Civil Procedure Act (Cap 21)

Children Act (No 8 of 2001)

Law of Succession Act (Cap 160)

South Africa

Constitution of the Republic of South Africa, 1996

International Legal Instruments

Official Secrets Act (1968) of the East African Community

Treaty for East African Co-operation Act

Vienna Convention on the Law of Treaties 1969

Universal Declaration of Human Rights 1948

International Covenant on Civil and Political Rights 1966

International Covenant on Economic Social and Cultural Rights 1966

African Charter on Human and Peoples Rights, 1981

Convention on the Elimination of All Forms of Discrimination Against Women, 1979

Treaty for the Establishment of the East African Community, 1999

LIST OF CASES

Attorney General v Karua (2024) eKLR

Beatrice Wanjiku & Another v Attorney-General & Another, Petition 190 of 2011

David Njoroge Macharia v Republic (2011) eKLR

Diamond Trust Kenya Ltd v Daniel Mwema Mulwa HCCC No 70 of 2002

East African Community v Republic (1970) EA 457

Glenister v President of the Republic of South Africa, 201 Constitutional Court of South Africa

Government of the Republic of South Africa v Grootboom (2000) Constitutional Court of South Africa

Mary Rono v Jane and William Rono, Civil Appeal 66 of 2002

Mitu-Bell Welfare Society v Kenya Airports Authority (2021) eKLR

Okunda v Republic (1970) eKLR

Pattni and Another v Republic (2001) eKLR

Peter Anyang' Nyong'o and Others v Attorney General of Kenya and Others (2007) eKLR

Re Estate of Lerionka Ole Ntutu (Deceased) [2008] eKLR

Rosemary Moraa & Another v Attorney General [2006] eKLR

Wanjiku and Another v Attorney General and 2 others (2012) eKLR

Zipporah Wambui Mathara v Republic (2010) eKLR

CHAPTER 1: INTRODUCTION

1.1 Background

Kenya has made significant strides in aligning its legal framework with international human rights standards. This alignment was notably transformed by the promulgation of the 2010 Constitution, which incorporated a progressive approach to international law. Article 2 of the Constitution explicitly integrates general rules of international law and ratified treaties into Kenya's domestic legal system¹. This marks a departure from the pre-2010 dualist model, where international law required legislative domestication to be effective. Despite this shift, challenges in harmonizing international norms with domestic legal structures remain profound.

Before 2010, Kenya operated under a dualist system where international treaties were not applicable at the domestic level unless enacted through domestic legislation. The restrictive application of international law during this period limited its influence on domestic human rights protections. Courts, while occasionally referring to international standards, did so within the narrow confines of consistency with existing statutes or for resolving ambiguities. Cases such as *Okunda v Republic* (1970) exemplify the constraints, where international law was deemed subordinate to domestic statutes under the Judicature Act.

The 2010 Constitution radically altered this legal landscape by embedding international law within the domestic framework. Articles 2(5) and 2(6) recognize general rules of international law and ratified treaties as part of Kenyan law without the need for further legislation.² This has empowered courts to reference international human rights norms directly. Landmark cases, such as *Zipporah Wambui Mathara* (2010), illustrate this shift, where provisions of the International Covenant on Civil and Political Rights were applied to override conflicting statutory provisions. Such decisions underscore the potential for international human rights law to enhance the domestic legal order³.

However, the constitutional acknowledgment of international law introduces complexities. The supremacy clause in Article 2(4) maintains that the Constitution is the ultimate law, invalidating

¹ Article 2, Constitution of Kenya 2010

² Article 2, Constitution of Kenya 2010

³ *Zipporah Wambui Mathara v Republic* (2010) eKLR

any conflicting legislation, including effect of international treaties at the domestic level.⁴ This creates a hierarchy where constitutional provisions prevail over international obligations, presenting challenges when conflicts arise. For instance, while courts have progressively interpreted constitutional rights in light of international treaties, ambiguities in the hierarchy of norms can lead to inconsistencies in judicial interpretation and application.

Additionally, Kenya faces practical challenges in the application of international human rights standards. The lack of clarity in the constitutional provisions governing the relationship between international and domestic law often hampers their seamless integration. Issues such as resource limitations, cultural sensitivities, and the balance between national sovereignty and global obligations further complicate the effective domestication of international norms. The absence of formal legislative frameworks to address these ambiguities exacerbates interpretative divergences among courts, policymakers, and other state agencies.

This study seeks to bridge the gap between theoretical commitments and practical application of international human rights norms in Kenya. By examining the pre- and post-2010 constitutional frameworks, the research aims to propose actionable solutions for overcoming the challenges in aligning Kenya's legal system with global human rights standards. In doing so, it contributes to the broader discourse on the interplay between international and domestic law, offering insights for policymakers, legal practitioners, and scholars engaged in human rights advocacy.

1.2 Statement of the Problem

Despite Kenya's ratification of numerous international human rights treaties and the constitutional incorporation of these norms under the 2010 Constitution, a significant gap remains between legal recognition and practical application. Prior to 2010, Kenya's dualist approach necessitated domestic legislation for international treaties to have legal force, creating barriers to the effective application of international human rights law. While the Constitution of Kenya 2010 marked a critical shift toward a more monist framework, allowing for the direct application of international law, challenges persist in translating these global commitments into actionable domestic practice.

⁴ Article 2, Constitution of Kenya 2010

Ambiguities in the legal hierarchy, particularly regarding the precedence of international law over domestic statutes, continue to create inconsistencies in judicial interpretation. Moreover, Kenya's legal framework struggles with balancing national sovereignty against international obligations, particularly when human rights norms conflict with local customs or existing legislation. Additionally, resource constraints and cultural sensitivities further complicate the practical enforcement of international human rights standards.

This study seeks to address these challenges by examining the evolution of Kenya's legal framework before and after the 2010 Constitution, analysing the current barriers to the effective incorporation of international human rights law. This research aims to bridge the gap between Kenya's international human rights commitments and their domestic application, fostering a more coherent and effective alignment with global human rights standards.

1.3 Statement of Objectives

This research aims to:

- I. Examine the application of international human rights law in Kenya before the adoption of the 2010 Constitution, highlighting the legal framework, challenges, and judicial approach during that period.
- II. Analyse the evolution of international human rights law application in Kenya post-2010, assessing the impact of constitutional reforms on the recognition, interpretation, and enforcement of these laws.
- III. Draw comparative insights from South Africa's experience in integrating international human rights law into its domestic legal system, identifying best practices and potential lessons applicable to Kenya.

1.4 Hypothesis

This paper proceeds on the assumption that Kenya's application of international human rights norms has been effectively and significantly shaped by the 2010 Constitution.

1.5 Research Questions

This paper primarily focuses on the subsequent questions:

- i. How were international human rights laws applied in Kenya prior to the adoption of the 2010 Constitution?
- ii. How has the application of international human rights laws in Kenya evolved following the promulgation of the 2010 Constitution?
- iii. What lessons can Kenya learn from South Africa's approach to integrating international human rights law into its legal framework?

1.6 Justification of the Study

This study is of profound importance in understanding the dynamic interplay between international human rights law and domestic legal systems, with a particular focus on Kenya. In recent decades, Kenya has made significant strides toward embedding international human rights norms within its legal framework, most notably through the 2010 Constitution. However, the challenges of harmonizing these global norms with local realities remain substantial. This research seeks to unpack these complexities, offering a nuanced perspective on the successes and limitations of Kenya's approach.

Kenya's unique position as a nation that has constitutionally embraced international law offers a valuable case study for countries navigating similar transitions. The 2010 Constitution represents a progressive step forward, yet the application of international human rights law has been met with both institutional and cultural challenges. By systematically analysing Kenya's legal and judicial practices, this study provides critical insights into the barriers that hinder the effective domestication of international norms. These include ambiguities in constitutional provisions, resource limitations, judicial inconsistencies, and the tension between national sovereignty and global obligations.

The findings of this research have practical implications for various stakeholders. For policymakers, the study will illuminate the need for legislative clarity and institutional reforms that can better align Kenya's domestic legal system with its international commitments. Legal practitioners will benefit from insights into the judicial interpretation of international norms

and the practical challenges of advocating for human rights in Kenyan courts. For scholars, the research contributes to the broader discourse on the integration of international human rights law into domestic frameworks, offering Kenya as a microcosm of larger global trends.

This study also holds relevance beyond Kenya's borders. Many nations in the Global South grapple with the dual challenge of adhering to international human rights obligations while addressing local socio-economic and cultural realities. Kenya's experience, particularly its post-2010 evolution, provides a blueprint for examining the effectiveness of constitutional mechanisms for other jurisdictions.

Moreover, the study endeavours to bridge the gap between theoretical commitments to human rights and their practical application. While Kenya's ratification of numerous international treaties signals a strong commitment to global human rights standards, the translation of these obligations into enforceable domestic norms has been inconsistent. This research underscores the critical need for practical, evidence-based solutions that address systemic barriers to application. By examining landmark cases, judicial trends, and comparative insights, the study provides actionable recommendations for enhancing the integration of international human rights law into Kenya's legal system.

Finally, this research contributes to the global conversation on harmonizing international and domestic legal frameworks. As the world becomes increasingly interconnected, the need for cohesive legal systems that respect international obligations while accommodating local contexts becomes ever more pressing. Kenya's experience offers valuable lessons on the role of constitutional frameworks, judicial interpretation, and institutional capacities in achieving this balance.

1.7 Theoretical Framework

This study adopts the theoretical framework of Legal Pluralism, which acknowledges the coexistence and interaction of multiple legal systems within a single jurisdiction. Legal pluralism recognizes that formal state law, customary law, religious law, and international legal norms can operate simultaneously, often creating a complex and layered legal landscape. In the Kenyan context, where customary and religious practices have significant social influence and intersect with formal legal systems, this framework is particularly relevant for analysing the application and enforcement of international human rights law.

Kenya's legal system is characterized by the coexistence of statutory law, rooted in colonial legal traditions, and now governed by the 2010 Constitution, and customary law, which continues to play a vital role in regulating aspects of family law, inheritance, land rights, and community governance. Additionally, Kenya's incorporation of international law, as per Article 2 of the 2010 Constitution, introduces a third layer of legal norms, complicating the relationship between global human rights standards and local practices. Legal pluralism provides a lens through which to explore the interactions, tensions, and synergies among these legal systems, allowing for a more nuanced understanding of the challenges involved in integrating international human rights norms into Kenya's domestic legal framework.

The theory of legal pluralism is essential for understanding how different legal norms international, national, and customary are applied in practice, often leading to conflicts or gaps in application. For instance, while international human rights law may prohibit certain practices, such as discrimination against women or harmful cultural traditions, these norms may clash with deeply entrenched customary or religious practices that are still widely accepted in many parts of Kenya. Legal pluralism allows us to examine these tensions, providing insights into how state actors, local communities, and the judiciary navigate competing legal frameworks. It also highlights how cultural relativism, and legal diversity can impact the application of universally accepted human rights standards.

Furthermore, legal pluralism emphasizes the role of judicial interpretation in mediating between these different legal orders. Kenyan courts, especially post-2010, are tasked with reconciling international human rights treaties with both statutory and customary law. The judicial system plays a critical role in interpreting how international norms are applied domestically and in determining their relationship to local legal practices. Legal pluralism, therefore, frames the judiciary not merely as an enforcer of law but as an active participant in shaping the relationship between conflicting legal norms.

This framework also provides an opportunity to critically analyse the role of power dynamics in the enforcement and recognition of international human rights law within pluralistic legal systems. Legal pluralism does not assume that all legal orders are treated equally. Instead, it acknowledges that some forms of law, particularly international human rights law, may be privileged in certain contexts, while customary law may dominate in others. These dynamics are influenced by factors such as resource allocation, political will, cultural resistance, and the accessibility of legal mechanisms for ordinary citizens, particularly marginalized groups.

By adopting the theoretical framework of legal pluralism, this study will explore how Kenya's legal system can better harmonize its diverse legal traditions with international human rights standards. Ultimately, this framework will guide the analysis of Kenya's legal evolution and suggest pathways to enhance the coherence and effectiveness of human rights protections within a legally pluralistic society.

1.8 Literature Review

This section reviews literature related to the application of international human rights law in domestic legal systems, with a particular focus on Kenya. It connects the discussion to the research questions and objectives, evaluates existing studies, examines methodologies used by other researchers, and identifies gaps in the literature. The chapter also critiques relevant studies to establish the need for this research.

According to Gathii, the pre-2010 Kenyan framework adhered strictly to a dualist approach, meaning that international treaties required domestic legislation before they could be enforced. This method, as he points out, created a significant gap between Kenya's international commitments and their practical implementation—as seen in landmark cases like *Okunda v. Republic* (1970)⁵.

Building on this observation, Kabau and Njoroge (2011) argue that the shift brought about by the 2010 Constitution introduced a more nuanced, harmonization approach. Their work suggests that although international law is now directly incorporated into domestic law, its application still requires careful balancing with the supremacy of the Constitution. They contend that this blended approach aims to reconcile international obligations with domestic legal principles, a necessary evolution given the complexities of Kenyan legal traditions⁶.

Osogo Ambani also contributes to the discussion by highlighting the limitations of the traditional dualist model. He notes that without proper legislative mechanisms to domesticate international treaties, the dualist approach inherently leads to inconsistencies in enforcement.

⁵ Gathii J, 'Pitfalls of Adopting International Laws' *Nairobi Law Monthly*, 2011, – <http://nairobiawmonthly.com/index/content.asp?contentId=253&isId=6&ar=1> on 14 August 2024.

⁶ Kabau T and Njoroge C, 'Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonization of the Legal System' *Comparative and International Law Journal of Southern Africa*, 2011, 293–310 – https://www.jstor.org/stable/24027054?seq=1#metadata_info_tab_contents on 14 August 2024.

His critique supports the view that moving toward a harmonized system is essential for strengthening human rights protections at home⁷.

In a similar vein, Shrome Garg's recent analysis (2023) offers an insightful comparison between monist and dualist theories. Garg argues that while the theoretical debate between these two perspectives continues, practical developments in Kenya reveal a tendency toward a harmonization model. This model effectively integrates elements from both monist and dualist approaches, thereby ensuring that international human rights norms can inform domestic jurisprudence without undermining constitutional authority⁸.

Together, these scholars provide a broader understanding of the evolution in Kenya's legal system from a rigid dualist structure to one that increasingly embraces a harmonized framework. Their combined insights underscore the need for legislative and judicial reforms that facilitate the effective translation of international commitments into enforceable domestic rights.

Similarly the 2010 Constitution of Kenya introduced transformative changes, explicitly recognizing international law as part of domestic law under Articles 2(5) and 2(6). However, ambiguities in the constitutional language, particularly regarding the hierarchy of norms, have created challenges in judicial interpretation and practical enforcement.

The reviewed literature highlights the transformative potential of Kenya's 2010 Constitution in aligning domestic laws with international human rights standards. However, challenges in judicial interpretation, legislative clarity, and practical application persist. This study seeks to address the gaps identified in the literature by offering a comprehensive analysis of Kenya's legal framework, judicial practices, and the barriers to effective application of international human rights norms.

1.9 Research Methodology

This study is doctrinal research that primarily employs a desktop research methodology, relying on information gathered from diverse sources. It utilizes primary materials, including the Constitution of Kenya 2010, alongside secondary resources such as textbooks, journal articles,

⁷ Ambani JO, 'Navigating Past the "Dualist Doctrine": The Case for Progressive Jurisprudence on the Application of International Human Rights Norms in Kenya' in Killander M (ed), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press, Pretoria, 2010, 25–30.

⁸ Garg S, 'Monist vs. Dualist Theory of International Law' *International Journal of Legal Science and Innovation*, Vol. 5, Issue 2, 2023, 60–64 – <https://doij.org/10.1000/IJLSI.111584> on 14 March 2025.

theses, and newspaper publications. Additionally, the research incorporates case law, various statutes, and relevant online sources to support the analysis.

The study also relies on comparative study on South Africa. South Africa has a Constitution that bears great resemblance to the Kenyan Constitution and expresses similar commitment to standards outlined under international human rights law. Based on this South Africa is a suitable choice for Kenya to draw lessons from.

1.10 Limitations

The study primarily depends on secondary data and existing literature, which might not capture the most recent developments or nuanced local realities in the application of international human rights law in Kenya. Additionally, the availability and accessibility of certain primary sources, such as unpublished case law or government reports, could limit the comprehensiveness of the analysis.

1.11 Chapter Breakdown

Chapter one: It gives a brief overview of the research paper. It introduces the problem and outlines the objectives the paper seeks to fulfil by the end of the study. It provides the theory the paper is based on and gives insight on the literature to be used in the paper. It concludes by giving a breakdown of the chapters the paper expounds on.

Chapter two: This chapter examines the application of international human rights law in Kenya before the adoption of the 2010 Constitution. It explores the legal framework governing international treaties, the extent to which international human rights instruments were recognized and enforced, and the judiciary's role in interpreting these laws.

Chapter three: This chapter analyses the transformative effect of the 2010 Constitution on the application of international human rights law in Kenya. It discusses the constitutional provisions that explicitly recognize international law, the judiciary's evolving approach to its application, and key case law illustrating this shift.

Chapter four: This chapter provides a comparative analysis of South Africa's approach to international human rights law, focusing on its constitutional framework, judicial interpretation, and policy application. It highlights key legal mechanisms and landmark cases

that have shaped South Africa's compliance with international human rights standards. Finally, the chapter identifies best practices and lessons that Kenya can adopt to strengthen its own application of international human rights law while considering potential obstacles to application.

Chapter five: This concluding chapter summarizes the findings of the study, drawing conclusions based on the analysis of the research questions. It addresses how the 2010 Constitution has influenced the integration of international human rights law into Kenya's legal system and the challenges that persist.

CHAPTER 2: THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN KENYA BEFORE THE 2010 CONSTITUTION

2.1 Introduction

This chapter examines the legal landscape of Kenya prior to the enactment of the 2010 Constitution, with a focus on the dualist legal approach and its implications for human rights protection. It highlights the extent to which Kenya ratified and domesticated key international human rights instruments during this period. The chapter further analyzes the approach adopted by Kenyan courts in interpreting and applying international human rights norms within the domestic legal framework and the constraints posed by the dualist system.

2.2 The Dualist Legal Approach in Pre-2010 Kenya

Kenya gained independence in 1963, leading to the adoption of the 1963 Constitution, which was negotiated between the British government and representatives of Kenya's political parties.⁹ This Constitution established a parliamentary system of governance, with executive authority vested in a cabinet-led government. Notably, it did not contain explicit provisions on the status or applicability of international treaties within Kenya's legal framework. This omission was mirrored in the Judicature Act,¹⁰ which enumerated the sources of Kenyan law but did not recognize international treaties as a direct source of law.

Between 1964 and 2009, the Constitution underwent multiple amendments and two review processes;¹¹ however, none explicitly addressed the relationship between international and municipal law. It was not until the 2009 constitutional review process that this issue was directly considered, culminating in the 2010 Constitution, which remains in force as Kenya's supreme law.

Legal scholars and courts generally agree that the absence of explicit constitutional provisions on the relationship between international and domestic law indicated Kenya's adherence to a dualist legal system.¹² Under this interpretation, international treaties and norms did not

⁹ Media Development Association and Konrad Adenauer Foundation, *History of Constitution Making in Kenya*. Nairobi, Media Development Association, 2012 - [CC BOOK FF A5.indd](#) – on 7 February 2025

¹⁰ Section 3(1), Judicature Act (Cap 8, 2012)

¹¹ Media Development Association and Konrad Adenauer Foundation, *History of Constitution Making in Kenya*. Nairobi, 32.

¹² *Beatrice Wanjiku & Another v Attorney-General & Another*, Petition 190 of 2011. See also *David Njoroge Macharia v Republic*, [2011] eKLR 15.

automatically acquire domestic legal status upon ratification.¹³ Instead, they required specific legislative enactment to be incorporated into Kenyan law and enforced by domestic courts.¹⁴ This legal position effectively limited the domestic application of international human rights norms, as courts required a formal act of Parliament before enforcing treaty provisions.

Nevertheless, under international law, states are obligated to uphold their treaty commitments irrespective of domestic legal barriers. Article 26 of the Vienna Convention on the Law of Treaties (1969) stipulates that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." Additionally, Article 27 of the same Convention prohibits states from invoking domestic law as a justification for failing to comply with treaty obligations. This principle underscores the responsibility of all states—whether dualist or monist—to fulfil their international commitments. Accordingly, even in pre-2010 Kenya, the government was legally bound to apply and uphold the treaties it had ratified, despite the absence of explicit constitutional recognition or domestic incorporation mechanisms.

2.3 Case Law Analysis: Pre-2010 Jurisprudence

Prior to the enactment of the 2010 Constitution, Kenyan courts generally exhibited judicial restraint in directly applying international human rights instruments.¹⁵ As a dualist state, Kenya adhered to the principle that international law required domestication through national legislation before it could be enforced within the domestic legal system. Consequently, courts were often reluctant to invoke international treaties as binding legal sources, even where Kenya had ratified such instruments. The pre-2010 jurisprudence demonstrates that Kenyan courts prioritized the Constitution and Acts of Parliament over international instruments in cases of conflict. International instruments were only applied where there was a lacuna in domestic law. Although courts gradually recognized international law, its application remained limited and largely discretionary. The following cases demonstrate the prevailing judicial approach to international law before the 2010 Constitution.

¹³ Brownlie I, *Principles of Public International Law*, 6th ed, Oxford University Press, 2003, 31-48. See also Shaw MN, *International Law*, 5th ed, Cambridge University Press, 2003, 120-162.;

¹⁴ Brownlie, *Principles of Public International Law*, 31-48.

¹⁵ Orago, 'The 2010 Kenyan Constitution and the hierarchical place of international law', 18.

2.3.1 **Okunda vs. Republic (1970) eKLR**¹⁶

The case involved two individuals who were charged under the Official Secrets Act (1968) of the East African Community (EAC). The Attorney General of Kenya initiated the prosecution without obtaining the consent of the Counsel to the Community, as required under Section 8(1) of the Official Secrets Act (EAC). The matter was referred to the High Court of Kenya to determine whether the Attorney General had the authority to proceed without such consent. The High Court considered the following key legal issues:

- i. Whether the requirement of consent from the Counsel to the East African Community conflicted with the constitutional powers of the Attorney General under Section 26 of the Kenya Constitution.
- ii. Whether laws enacted by the East African Community were subject to the Kenya Constitution.
- iii. Whether the term "Act of Parliament" in the Treaty for East African Co-operation Act, Section 10(3), included the Kenya Constitution.
- iv. Whether laws enacted by the East African Community were "other laws" within the meaning of Section 3 of the Kenya Constitution and thus subject to constitutional supremacy.

The High Court ruled in favour of the Attorney General, holding that there was a clear conflict between the Attorney General's constitutional powers and the requirement of consent from the Counsel to the Community. The Court held that the Kenya Constitution prevailed, meaning the Attorney General had the sole authority to prosecute offenses without requiring external approval. The Treaty for East African Co-operation was not inconsistent with the Kenya Constitution, but any laws passed by the EAC were subject to the supremacy of the Kenya Constitution. The term "Act of Parliament" in Section 10(3) of the Treaty for East African Co-operation Act did not include the Kenya Constitution. Laws enacted by the East African Community were considered "other laws" under Section 3 of the Kenya Constitution and were therefore invalid if inconsistent with the Constitution.

The High Court unequivocally held that since international law was not recognized as a source of law under the Judicature Act, it had no binding legal force within Kenya's domestic legal

¹⁶ Okunda v Republic (1970) eKLR

system. This case exemplified the strict dualist approach, emphasizing that international law required explicit legislative enactment to have any effect in domestic courts.

2.3.2 East African Community vs. Republic [1970] EA 457¹⁷

This case arose out of the ruling of the High Court in the Okunda case above. It was an appeal by the East African Community (EAC) against a decision of the High Court of Kenya regarding the prosecutorial powers of the Attorney General (AG) under the Kenya Constitution. Dissatisfied with this ruling, the East African Community (EAC) sought to appeal to the Court of Appeal for East Africa. The Court of Appeal dismissed the appeal, ruling that it was incompetent on procedural and substantive grounds.

Specifically, the Court held that the Kenya Constitution was the supreme law and any law, including those enacted by the EAC, that conflicted with it was void to the extent of the inconsistency. The Court reaffirmed Kenya's dualist approach, holding that treaties do not automatically become part of municipal law. The provisions of a treaty entered into by Kenya only become law once incorporated through an Act of Parliament. Once incorporated, if a treaty conflicted with the Kenya Constitution, the constitutional provision would prevail, rendering the conflicting treaty provision void.

This case further demonstrated the pre-2010 judicial approach to international and regional legal instruments, which prioritized constitutional supremacy over international obligations.

2.3.3 Pattni & Another vs. Republic [2001]¹⁸

This case involved Kamlesh Pattni and another applicant who filed two constitutional applications before the High Court of Kenya challenging various criminal proceedings against them. They sought constitutional redress, alleging violations of their fundamental rights under the Constitution of Kenya, the Universal Declaration of Human Rights, and the African Charter on Human and Peoples' Rights. The applicants were facing multiple criminal charges related to the Goldenberg scandal, a massive financial fraud involving the Central Bank of Kenya (CBK), Exchange Bank Ltd, and Goldenberg International Ltd. The primary allegations were embezzlement, fraud, and obtaining public funds illegally through fictitious export

¹⁷ East African Community v Republic (1970) EA 457

¹⁸ Pattni and Another v Republic (2001) eKLR

compensation claims. The applicants sought various reliefs, including declarations that their fundamental rights had been violated by the Attorney General and Commissioner of Police.

The High Court dismissed the applications, holding that Kenya's dualist legal system restricted the direct application of international human rights instruments. The applicants had invoked the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights. However, the Court ruled that international treaties were not automatically applicable in Kenya unless expressly incorporated into national law. The Court reaffirmed the decision in *Okunda v Republic* (1970) EA 453

The court reaffirmed the principle that while international law norms may have persuasive value, they could not be binding unless formally transformed into Kenyan law through statutory enactment. The ruling underscored the prevailing judicial reluctance to enforce international human rights instruments in the absence of enabling legislation.

2.3.4 Diamond Trust Kenya Ltd vs. Daniel Mwema Mulwa HCCC No. 70 of 2002 ¹⁹

The dispute arose from a civil debt where Mulwa had failed to settle a judgment debt, leading to the issuance of a warrant of arrest for his committal to civil jail. Mulwa filed a Chamber Summons application dated October 4, 2010, seeking the stay of execution of the warrant of arrest issued on September 28, 2010, and setting aside, discharge, or vacation of a consent order dated February 20, 2004. His primary argument was that the warrant of arrest was unconstitutional and violated fundamental rights and freedoms, particularly under Article 11 of the International Covenant on Civil and Political Rights (ICCPR), which Kenya had ratified.

The Court had to determine whether Article 11 of the ICCPR (which prohibits imprisonment for inability to fulfill contractual obligations) superseded Section 40 of the Civil Procedure Act. The Court noted that Article 11 of the ICCPR states that "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation." However, Section 40 of the Civil Procedure Act allows for the arrest and detention of judgment debtors who fail to pay their debts. The two provisions conflict, but since Section 40 is still part of Kenyan law, it cannot be declared unconstitutional unless repealed or invalidated by a competent court. The Judge noted that the ICCPR and Section 40 of the Civil Procedure Act conflicted. This conflict meant that there were two competing laws, requiring a reconsideration of Section 40 under Kenya's new

¹⁹ *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa HCCC No 70 of 2002*

constitutional order. The judge suggested that Kenya's legal framework should evolve to align with international human rights obligations. The High Court allowed the application, staying the warrant of arrest but allowing the Decree Holder to explore alternative means of execution.

The Court did not declare civil jail unconstitutional but noted the urgent need for legislative reform in light of Kenya's international obligations under the ICCPR. This case set a precedent for future challenges to the use of civil jail for debt recovery, paving the way for a more human rights-oriented approach to debt enforcement in Kenya.

2.3.5 Mary Rono v. Jane and William Rono Civil Appeal 66 of 2002 ²⁰

This case involved the succession and distribution of the estate of Stephen Rono Rongoei Cheron, who died intestate. The core dispute was whether the daughters of the deceased had an equal right to inheritance as the sons, or whether customary law, which favoured male heirs, should apply. The High Court ruled that daughters could inherit but awarded them less than their male counterparts, reasoning that they could acquire property through marriage. On appeal, the Court of Appeal had to determine:

- i. Whether the Law of Succession Act, Cap 160, exclusively governed the estate's distribution or whether customary law should apply.
- ii. Whether daughters had equal inheritance rights under statutory and constitutional law.
- iii. Whether the High Court erred in using customary principles to allocate a smaller portion to daughters.
- iv. Whether the exercise of discretion in estate distribution was legally sound.

The Court of Appeal overturned the High Court's decision, affirming that the Law of Succession Act applied universally, and that customary law was inapplicable in the circumstances. It emphasized that the Act does not discriminate between male and female heirs and referenced Kenya's international obligations under CEDAW and the African Charter on Human and Peoples' Rights, both of which prohibit gender-based discrimination in inheritance matters.

Despite recognizing international treaties, the court acknowledged Kenya's dualist position, reiterating that international law forms part of domestic law only when expressly incorporated.

²⁰ Mary Rono v. Jane and William Rono, Civil Appeal 66 of 2002

However, it also adopted a progressive approach, holding that international human rights norms could be persuasive where they did not conflict with national law. This ruling indicated a gradual shift towards the recognition of international law, yet confirmed the limitations imposed by Kenya's dualist legal framework.

2.3.6 Prof. Peter Anyang' Nyong'o & Others v. Attorney General of Kenya & Others [2007]²¹

The claimants challenged the process by which Kenya's nine members of the East African Legislative Assembly (EALA) were selected, arguing that the process violated Article 50 of the Treaty for the Establishment of the East African Community (EAC Treaty). They contended that the procedure adopted by the Kenya National Assembly was unconstitutional and undemocratic, as it did not involve a proper election but rather an appointment by the House Business Committee.

The court considered whether Kenya's domestic law could override its treaty obligations under the EAC Treaty, specifically whether Article 50 of the Treaty, which required elections to the EALA, could be circumvented by Kenya's internal procedural rules.

The East African Court of Justice (EACJ) held that under international law, a state cannot invoke its internal laws as justification for failing to fulfill its treaty obligations. The court relied on Article 27 of the Vienna Convention on the Law of Treaties, which prohibits states from using domestic legal provisions as an excuse for non-compliance with an international treaty. The court found that Kenya's election rules were inconsistent with Article 50 of the EAC Treaty because they did not provide for a proper election by the National Assembly but instead allowed nominees to be deemed elected without a voting process. The court ruled that this legal fiction was incompatible with the Treaty and that Kenya's internal legal framework could not override or nullify the obligations established under the Treaty. The ruling emphasized that treaty provisions must take precedence over conflicting national laws to ensure uniform application and compliance among Partner States. The court also urged Partner States to harmonize their national laws with Community obligations to prevent inconsistencies that could undermine regional integration.

²¹Peter Anyang' Nyong'o and Others v Attorney General of Kenya and Others (2007) eKLR.

2.3.7 Rosemary Moraa & Another v. Attorney General [2006]²²

The petitioners challenged the constitutionality of Section 24(3) of the Children Act, arguing that it violated the rights of children born out of wedlock by denying them equal parental responsibility from both parents, contrary to the Constitution and Kenya's international treaty obligations. Section 24(3) provides that, in cases where a child is born out of wedlock, the mother automatically assumes parental responsibility, while the father may only acquire such responsibility through a court order or a parental responsibility agreement. The core issue before the court was whether this provision unlawfully discriminated against children born outside marriage and whether it was inconsistent with Kenya's obligations under international human rights treaties.

The court upheld Section 24(3) as constitutionally valid, relying on Section 82(4) of the then Constitution, which permitted differentiation in matters of personal law, including marriage, divorce, and inheritance. It ruled that the law did not bar fathers from assuming parental responsibility; rather, it provided a structured legal process for establishing paternity. The court found this differentiation to be reasonable and justified, as it sought to balance legal certainty with parental obligations. It rejected the claim that the provision constituted discrimination, holding that the law was based on legitimate distinctions between children born within marriage, whose paternity was presumed, and those born out of wedlock, where paternity might need legal confirmation.

Furthermore, the court addressed the role of international law in Kenya's legal framework. While acknowledging Kenya's ratification of international human rights instruments, it reaffirmed the dualist doctrine, holding that international treaties do not automatically become part of domestic law unless explicitly incorporated through national legislation. It cited the Bangalore Principles, emphasizing that where there is a conflict between domestic law and international treaties, national law prevails unless the treaty has been expressly transformed into municipal law.

However, the court also recognized that conflicts between domestic and international legal obligations could create undesirable legal inconsistencies. It noted that where a domestic law was unambiguous yet inconsistent with international law, the common law approach required courts to enforce the domestic provision. At the same time, it suggested that such

²² Rosemary Moraa & Another v. Attorney General [2006] eKLR

inconsistencies should be brought to the attention of Parliament, which had the responsibility to consider whether legislative amendments were necessary to align domestic law with Kenya's international obligations.

This ruling reinforced the primacy of Kenya's legal framework over international treaties while subtly acknowledging the need for legislative reform where inconsistencies arose. It underscored the judiciary's limited role in resolving such conflicts, emphasizing that any harmonization of Kenya's legal framework with international obligations was a matter for legislative action rather than judicial intervention.

2.3.8 Re Estate of Lerionka Ole Ntutu (Deceased) [2008]²³

The case concerned the estate of Lerionka Ole Ntutu, a Maasai elder who had multiple wives and children. Upon his death, a dispute arose over the distribution of his estate, specifically whether his daughters were entitled to inherit. The male heirs (brothers and stepbrothers of the objectors) contended that Maasai customary law applied, which does not recognize daughters as heirs to their father's estate. The daughters objected to the proposed exclusion from inheritance, arguing that the Law of Succession Act (Cap 160) should apply instead of Maasai customary law, which would entitle them to inherit their father's property. The core issue before the court was whether the estate be governed by Maasai customary law, which excludes daughters from inheritance, or by the Law of Succession Act, which provides for equal treatment of male and female heirs.

The court observed that Kenyan customary law has historically discriminated against daughters, especially married women, by excluding them from inheritance. However, the Court noted that customary law must be interpreted in light of constitutional principles and cannot be applied if it is repugnant to justice and morality (Section 3(2) of the Judicature Act). The court applied international human rights principles, moving beyond strict customary interpretations. The court demonstrated its commitment to constitutional principles and international legal obligations by rejecting discriminatory customary practices. The High Court ruled in favour of the daughters, allowing them to inherit their father's property and affirming that customary law must conform to constitutional and human rights standards. This case set a precedent for future inheritance disputes, reinforcing equal rights for women in succession matters.

²³Re Estate of Lerionka Ole Ntutu (Deceased) [2008] eKLR

2.4 Conclusion

Before the 2010 Constitution, Kenya's dualist legal approach limited the direct application of international human rights norms, requiring explicit legislative enactment for treaties to have domestic effect. Courts consistently prioritized constitutional and statutory provisions, as seen in *Okunda v. Republic* and *Pattni v. Republic*, restricting the enforceability of international obligations. While some cases, like *Mary Rono v. Jane Rono*, acknowledged international treaties as persuasive, their application remained discretionary, creating legal inconsistencies.

This restrictive approach weakened human rights protection, as courts lacked the mandate to enforce treaty provisions without parliamentary intervention. The legal uncertainty also hindered the development of progressive jurisprudence, preventing courts from fully aligning domestic law with evolving international human rights standards.

CHAPTER 3: THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN KENYA UNDER THE 2010 CONSTITUTION

3.1 Introduction

The promulgation of the 2010 Constitution of Kenya introduced a significant shift in the application of international law within the domestic legal system.²⁴ Article 2(5) incorporates general rules of international law as part of Kenyan law, while Article 2(6) provides that ratified treaties and conventions automatically form part of Kenyan law without the need for additional legislation. This represents a departure from the pre-2010 dualist framework, where international treaties required legislative domestication to have legal effect.²⁵

Despite this constitutional provision, a central issue remains contentious: the practical application and legal authority of international treaties within Kenya's judicial system. Courts have struggled to reconcile international human rights commitments with constitutional supremacy, often yielding inconsistent rulings.²⁶ This chapter critically examines the hierarchical status of international law within Kenya's legal framework, scrutinizing judicial decisions that either reinforce or undermine the direct applicability of international treaties.

A key aspect of this analysis is the persistent tension between constitutional supremacy and international human rights law. While some judicial pronouncements reflect a progressive interpretation that seeks to integrate international norms within Kenya's constitutional framework, others adopt a restrictive approach, relegating international treaties to a secondary status unless expressly incorporated through domestic legislation.²⁷ This inconsistency raises profound legal and policy concerns regarding Kenya's adherence to its international obligations.

This chapter comprehensively examines the interpretative approaches taken by courts in determining the hierarchical relationship between international law, the Constitution, and domestic statutes. It explores the doctrinal debates on monism versus dualism within the

²⁴ Kabau T, 'The Application of International Law in Kenya Under the 2010 Constitution: Critical Issues in the Harmonization of the Legal System', 44(3) Comparative and International Law Journal of Southern Africa, 2011, 16.

²⁵ Kabau T, 'The Application of International Law in Kenya Under the 2010 Constitution: Critical Issues in the Harmonization of the Legal System', 16

²⁶ Orago N.S, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' 2(7) African Human Rights Law Journal, 2013, 18.

²⁷ Mathenge I.M, 'A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in Mitu-Bell Welfare Society', 6 Kabarak Journal of Law and Ethics, 2022, 1

Kenyan context, judicial trends in applying international human rights law, and the implications of conflicting jurisprudence. Furthermore, the chapter evaluates how these interpretations affect Kenya's compliance with international human rights standards and explores avenues for a more coherent and effective judicial approach.

3.2 Theoretical Approaches to the Application of International Human Rights Law in Kenya

The theoretical framework underpinning the interaction between international human rights law and Kenya's domestic legal system is central to understanding the judiciary's interpretative approach. The two dominant legal theories—monism and dualism—frame the debates on the place of international law within Kenya's legal order.

Monism suggests that international law and domestic law are part of a single legal system, allowing courts to apply international treaties directly without further legislative action.²⁸ This theory aligns with Article 2(6) of the 2010 Constitution, which states that ratified treaties automatically become part of Kenyan law. On the other hand, dualism maintains that international and domestic legal systems are separate, requiring parliamentary enactment to incorporate international treaties into national law.²⁹ Despite the constitutional recognition of monist elements, Kenyan courts have demonstrated a hybrid approach that incorporates both monist and dualist principles, often leading to inconsistencies in judicial interpretation.³⁰

A key legal principle influencing the debate on monism and dualism is Article 27 of the Vienna Convention on the Law of Treaties (VCLT),³¹ which enjoins states to fulfill their international obligations in good faith and prevents them from invoking domestic law as justification for failing to comply with treaty obligations. For dualist states, this principle implies a duty to ensure that their legal systems facilitate, rather than obstruct, treaty application. For monist states, it reinforces the notion that international law should be seamlessly integrated into the domestic legal framework without legislative barriers³². Kenya's legal position, as seen through

²⁸ Garg S, 'Monist vs. Dualist Theory of International Law', 5(3) *International Journal of Legal Science and Innovation*, Volume, 2023, 60

²⁹ Garg S, 'Monist vs. Dualist Theory of International Law', 60

³⁰ Mbugwa K, 'Dualist or Monist: Intricacies of Treaty Practice in Kenya', unpublished, University of Nairobi, Nairobi, Kenya, 2013,1

³¹ Vienna convention on the law of treaties, 23 May 1969, 1155 UNTS 331.

³² Ambani JO, 'Navigating Past the "Dualist Doctrine": The Case for Progressive Jurisprudence on the Application of International Human Rights Norms in Kenya' in Killander M (ed), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press, Pretoria, 2010

judicial interpretations examined below, remains ambivalent in fully aligning with this principle.³³

A historical perspective further contextualizes this debate. As discussed above, prior to the 2010 Constitution, Kenya operated under a strictly dualist system. The case of *Okunda v Republic*³⁴ illustrated this position, where the High Court held that an international law, not being listed under S.3 of the Judicature Act as a source of law, could not override domestic law unless explicitly incorporated by legislation. This ruling highlights the challenges Kenya faced in aligning its domestic laws with international commitments before the constitutional reform.

Globally, states vary in their adoption of monist or dualist principles. Countries such as France, the Netherlands, and Argentina adhere to a predominantly monist approach, where international treaties are self-executing and enjoy direct applicability.³⁵ Conversely, countries like the United Kingdom, Canada, and Australia follow a dualist model, requiring formal legislative enactment for treaties to have domestic effect.³⁶ However, contemporary trends indicate a growing inclination toward monism, particularly in regions emphasizing human rights protections, as seen in South Africa's post-apartheid constitutional framework.³⁷ The shift toward monism is often justified on the basis of enhancing compliance with international human rights standards and promoting legal certainty in the domestic application of treaty law.³⁸

The increasing preference for monism is driven by practical considerations, including the need for states to fulfill their treaty obligations more efficiently and avoid lengthy legislative processes that could delay human rights protections.³⁹ However, dualist states argue that parliamentary scrutiny over treaty incorporation ensures democratic legitimacy and prevents undue external influence over domestic legal systems.⁴⁰ This debate remains pertinent in

³³ Mathenge I.M, 'A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in *Mitu-Bell Welfare Society*', 1

³⁴ 1970] EA512

³⁵ Ferreira G and Ferreira-Snyman A, 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy Between Monism and Dualism' 17(4) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 2014, 1471

³⁶ Ferreira G and Ferreira-Snyman A, 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy Between Monism and Dualism' 1471

³⁷ Mutubwa W, 'Monism or Dualism: The Dilemma in The Application of International Agreements Under the South African Constitution' 3(1) *Journal of cmsd*, 2019, 27

³⁸ Mutubwa W, 'Monism or Dualism: The Dilemma in The Application of International Agreements Under the South African Constitution', 27

³⁹ Ferreira G and Ferreira-Snyman A, 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy Between Monism and Dualism' 1471

⁴⁰ Ferreira G and Ferreira-Snyman A, 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy Between Monism and Dualism' 1471

Kenya's evolving judicial practice and continues to shape the judiciary's approach to international human rights law.⁴¹

3.3 Judicial Interpretation and Conflicting Jurisprudence

The Kenyan judiciary has struggled to establish a consistent approach to the application of international human rights law, oscillating between harmonization and avoidance approaches.⁴² This inconsistency has led to a lack of doctrinal clarity and thus creating unpredictable judicial outcomes.⁴³ Courts have varied in their application of international treaties, customary international law, and jurisprudence from international courts, particularly in cases where international law conflicts with domestic statutes or constitutional provisions.⁴⁴

This section examines the harmonization, and avoidance approaches by analysing key cases, judicial reasoning, and the doctrinal implications of each approach. It also explores the reception of international court decisions and their relevance in Kenya's legal system.

3.3.1 The Harmonization Approach: Progressive Judicial Interpretations

The harmonization approach seeks to integrate international human rights law within Kenya's domestic legal system so as to ensure that Kenya's constitutional and statutory framework aligns with its international obligations.⁴⁵ This approach recognizes the transformative potential of the 2010 Constitution, particularly under Articles 2(5) and 2(6), which make general principles of international law and ratified treaties part of Kenyan law.

⁴¹ Kabau T, 'The Application of International Law in Kenya Under the 2010 Constitution: Critical Issues in the Harmonization of the Legal System', 16

⁴² Juma O. P 'The role of the Kenyan judiciary in the implementation of decisions and recommendations of African regional mechanisms on human and peoples' rights', 24 African Human Rights Law Journal, 2024, 890

⁴³ Juma O. P 'The role of the Kenyan judiciary in the implementation of decisions and recommendations of African regional mechanisms on human and peoples' right, 890

⁴⁴ ⁴⁴ Mathenge I.M, 'A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in Mitu-Bell Welfare Society', 1

⁴⁵ Kabau T, 'The Application of International Law in Kenya Under the 2010 Constitution: Critical Issues in the Harmonization of the Legal System', 16

(a) Zipporah Wambui Mathara v Republic⁴⁶

In this case, the court emphasized that once Kenya ratifies an international treaty, it automatically becomes part of the country's legal framework under Article 2(6) of the 2010 Constitution. The matter arose when the applicant sought to have the respondent imprisoned for failing to repay a debt, as permitted under the Civil Procedure Act. However, the court noted that while multiple mechanisms exist for enforcing civil debts, incarceration in a civil jail serves primarily as a punitive measure that degrades and humiliates the debtor, rather than offering a constructive resolution.

Referring to Article 11 of the International Covenant on Civil and Political Rights (ICCPR), which Kenya ratified in 1972, the court observed that international law expressly prohibits imprisonment on the sole basis of an individual's inability to fulfill contractual obligations. The court reasoned that such a penalty would not only restrict the debtor's personal liberty but also hinder their capacity to seek economic opportunities to repay the debt. Additionally, it was highlighted that the ICCPR protects fundamental freedoms, including the right to movement and the pursuit of social and economic advancement. As a result, the court dismissed the application, affirming that international legal provisions take precedence over conflicting domestic laws.

This decision illustrated a monist perspective and affirmed that international human rights law can be applied directly without additional domestic legislation. The judgment aligns with progressive interpretations that prioritize Kenya's obligations under international treaties over outdated domestic statutes.

(b) David Njoroge Macharia v Republic⁴⁷

The issue was whether the right to free legal counsel in serious criminal offences is a fundamental right that must be availed to an accused person at state expense. This right was not guaranteed under Kenya's criminal justice system at the time. The court relied on international human rights instruments, particularly the African Charter on Human and Peoples' Rights, to affirm that the right to legal representation is a fundamental right and that courts must interpret Kenyan law in a manner that aligns with international human rights norms. For purposes of the present discussion, the court acknowledged that while Kenya had

⁴⁶ Zipporah Wambui Mathara v Republic (2010) eKLR

⁴⁷ David Njoroge Macharia v Republic (2011) eKLR

historically adhered to a dualist approach in the application of international law, this stance may have shifted following the enactment of the 2010 Constitution. In reaffirming this evolution, the court revisited and endorsed the ruling in *Zipporah Wambui Mathara* case. It particularly emphasized that in that case, the court had not only found the ICCPR to be directly applicable within Kenya's legal framework but also determined that its provisions took precedence over conflicting domestic statutes.

This case reaffirmed the harmonization approach, illustrating how Kenyan courts can invoke international legal standards to expand constitutional interpretations and strengthen the protection of fundamental rights. The ruling reflected the evolving role of international human rights law within Kenya's legal system, reinforcing the judiciary's responsibility to align domestic legal principles with global human rights commitments.

(c) Application of Decisions from International Courts

Kenyan courts have occasionally referenced international judicial decisions as persuasive authorities in their rulings.⁴⁸ The African Court on Human and Peoples' Rights (ACHPR) and the European Court of Human Rights (ECtHR) have established precedents that have influenced Kenyan jurisprudence.⁴⁹

For instance, in cases concerning forced evictions,⁵⁰ Kenyan courts have drawn from South African Constitutional Court decisions⁵¹ and the UN Committee on Economic, Social and Cultural Rights' General Comment No. 7⁵² on forced evictions which reinforces the notion that international human rights standards must inform judicial interpretations.

However, courts have not been consistent in this application which has led to doctrinal uncertainty regarding the role of international case law in Kenya's legal framework.⁵³

⁴⁸ Juma O. P 'The role of the Kenyan judiciary in the implementation of decisions and recommendations of African regional mechanisms on human and peoples' right, 890

⁴⁹ Juma O. P 'The role of the Kenyan judiciary in the implementation of decisions and recommendations of African regional mechanisms on human and peoples' right, 890

⁵⁰ Juma O. P 'The role of the Kenyan judiciary in the implementation of decisions and recommendations of African regional mechanisms on human and peoples' right, 890

⁵¹ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19

⁵² CESCR General comment 7, The right to adequate housing (Art.11.1): forced evictions: 20 May 1997

⁵³ Kabau T, 'The Application of International Law in Kenya Under the 2010 Constitution: Critical Issues in the Harmonization of the Legal System', 16

3.3.2 The Avoidance Approach: Judicial Reluctance to Enforce International Law

The avoidance approach prioritizes constitutional supremacy, often limiting the enforceability of international law.⁵⁴ Courts adopting this approach argue that while international law is persuasive, it cannot override explicit constitutional or statutory provisions unless domesticated by Parliament.⁵⁵

(a) *Mitu-Bell Welfare Society v Kenya Airports Authority*⁵⁶

This case was initially brought by the Mitu-Bell Welfare Society in September 2011, seeking declaratory relief and compensation for the eviction of over 15,000 people from land adjacent to the Wilson Airport in Nairobi. One of the issues that arose was the true place of international law in Kenya.

At the Court of Appeal, the court aligned itself with Justice Majanja's interpretation in *Beatrice Wanjiku and Another v Attorney General and 2 others*,⁵⁷ affirming that the Constitution remains the supreme law and that where a general rule of international law or a treaty ratified by Kenya conflicts with the Constitution, the latter must prevail.

In its analysis, the Court of Appeal engaged with the concept of 'general rules of international law', ultimately concluding that such rules encompass customary international law, jus cogens norms, and other peremptory principles that are universally binding and allow no derogation. However, despite recognizing the peremptory nature of customary international law, the court paradoxically subordinated these norms to domestic legal provisions. This conclusion appeared internally inconsistent, as it contradicted the very nature of jus cogens, which is understood to supersede conflicting national laws. The decision introduced conceptual and practical difficulties, creating uncertainty regarding the hierarchy of international norms in Kenya's legal framework.

The issue now came before the Supreme court. Rather than resolving this ambiguity, the Supreme Court adopted a simplistic approach that failed to fully engage with the deeper jurisprudential questions raised by Articles 2(5) and 2(6) of the Constitution. Instead of

⁵⁴Kabau T, 'The Application of International Law in Kenya Under the 2010 Constitution: Critical Issues in the Harmonization of the Legal System', 16

⁵⁵ Juma O. P 'The role of the Kenyan judiciary in the implementation of decisions and recommendations of African regional mechanisms on human and peoples' right, 890

⁵⁶ *Mitu-Bell Welfare Society v Kenya Airports Authority* (2021) eKLR

⁵⁷ *Wanjiku and Another v Attorney General and 2 others* (2012) eKLR

clarifying the extent to which international law should be directly applied, the Supreme Court upheld the Majanja position, interpreting international law as a subsidiary source of law that applies only in the absence of clear constitutional, statutory, or judicial guidance. Under this framework, international legal norms remain subordinate to all contrary domestic provisions, unless courts invoke statutory interpretation principles to determine their applicability.

Moreover, the Supreme Court dismissed the traditional monist/dualist dichotomy, characterizing it as an outdated and unhelpful distinction. However, rather than offering a value-based, analytical approach to integrating international law into Kenya's constitutional framework, the court appeared to engage in a norm-elimination exercise that failed to reconcile the interpretative gaps left by the ambiguous drafting of Articles 2(5) and 2(6).

This lack of jurisprudential clarity has left the role of international law within Kenya's legal system precarious and subject to fluctuating judicial attitudes. As a result, international law remains vulnerable to restrictive interpretations, potentially diverting its intended role away from the normative expectations enshrined in the 2010 Constitution. Scholars have critiqued this ruling for undermining the transformative potential of the 2010 Constitution in strengthening human rights protections.⁵⁸

(b) Attorney General v Karua⁵⁹

In this Advisory Opinion, the Supreme Court of Kenya reaffirmed the supremacy of the Constitution over international and regional legal instruments. The case stemmed from a dispute in which the East African Court of Justice (EACJ) reviewed an election petition, prompting the Attorney General to seek clarification on whether the EACJ had appellate jurisdiction over Kenya's judicial decisions.

In its determination, the Supreme Court applied the harmonization approach, acknowledging that Article 2(6) grants international treaties direct legal effect but emphasizing that such treaties remain subordinate to the Constitution. The Court ruled that international legal obligations cannot override explicit constitutional provisions, particularly where domestic law assigns final adjudicatory authority to national courts. Accordingly, the Court found that

⁵⁸ Miyandazi V, 'Setting the record straight in socioeconomic rights adjudication: The Mitu-Bell Welfare Society Supreme Court of Kenya judgment', *Kabarak Journal of Law and Ethics*, 2022, 1—https://research-repository.st-andrews.ac.uk/bitstream/handle/10023/26358/Miyandazi_2022_KJLE_Setting_the_record_straight_CC.pdf;jsessionid=77B9C2ACE67B0A40DD090943060C6013?sequence=1 on 10 February 2025

⁵⁹Attorney General v Karua (2024) eKLR

Kenya's electoral laws fell within the exclusive jurisdiction of its domestic judiciary and that the EACJ could not assume appellate jurisdiction over Kenya's constitutional matters.

This decision reinforced the prevailing judicial stance that international law operates as a supplementary source of law, applicable only where there is no clear constitutional or statutory directive.

3.3.3 Balancing Harmonization and Avoidance: The Way Forward

The inconsistent judicial treatment of international human rights law in Kenya highlights the need for a coherent doctrinal approach. While the harmonization approach ensures compliance with Kenya's international obligations, the avoidance approach safeguards constitutional supremacy and national sovereignty.

A possible middle ground is the principle of constitutional conformity, where courts interpret domestic law in a manner consistent with international law, provided it does not explicitly contradict constitutional provisions.⁶⁰ Such an approach would: (1) Enhance Kenya's compliance with international human rights treaties; (2) Reduce unpredictability in judicial decisions regarding international law; and (3) Strengthen human rights protections by allowing courts to draw from international jurisprudence where beneficial.

In conclusion, the interpretation of international law in Kenya remains a contested and evolving issue. Courts have taken divergent positions, with some aligning with harmonization to incorporate international human rights law, while others adhere to avoidance to maintain constitutional supremacy. The challenge ahead is for the judiciary to develop a structured and principled approach that ensures Kenya meets its international obligations while respecting constitutional norms.

⁶⁰ Juma O. P 'The role of the Kenyan judiciary in the implementation of decisions and recommendations of African regional mechanisms on human and peoples' right, 890

CHAPTER 4: WHAT LESSONS CAN KENYA DRAW FROM SOUTH AFRICA?

4.1 Comparative Insights

Kenya's approach to international law under the 2010 Constitution presents both opportunities and challenges. As noted above, the constitutional provision under Article 2(6) grants international treaties automatic incorporation into domestic law, yet the supremacy of the Constitution under Article 2(4) creates doctrinal tensions regarding the hierarchy of international and domestic law. Kenyan courts have inconsistently applied international legal principles, oscillating between harmonization—direct application of international law—and constitutional supremacy, which limits international law's enforceability.⁶¹

A comparative analysis of how other monist jurisdictions have navigated similar tensions offers instructive lessons. Countries such as South Africa have grappled with integrating international law while ensuring constitutional fidelity.⁶² Its judicial, legislative, and institutional responses provide critical insights for Kenya.

4.2 South Africa: Transformative Constitutionalism and the Integration of International Law

South Africa's legal system has embraced transformative constitutionalism, requiring courts to engage with international law actively. The Constitution⁶³ explicitly mandates courts to consider international law when interpreting the Bill of Rights. This can be illustrated by the Constitutional Court decision in *Government of the Republic of South Africa v Grootboom*.⁶⁴ In this case, a group of informal settlers were evicted without alternative housing, raising issues under Section 26 of the South African Constitution, which guarantees the right to adequate housing. The Constitutional Court relied on South Africa's obligations under the International Covenant on Economic, Social, and Cultural Rights (ICESCR) to interpret Section 26. The

⁶¹ Mathenge I.M, 'A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in Mitu-Bell Welfare Society', 1; Juma O. P 'The role of the Kenyan judiciary in the implementation of decisions and recommendations of African regional mechanisms on human and peoples' right, 890

⁶² Coutsoudis A and Plessis M, 'We Are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law', *Constitutional Court Review* 2020, 2020, 155 —< <https://www.saflii.org/za/journals/CCR/2020/7.pdf>> on 12 February 2025; Cepeda M.J, 'The Internationalization of Constitutional Law: A Note on the Colombian Case' 41(1) *Law and Politics in Africa, Asia and Latin*, 2008, 61

⁶³ Section 39(1)(b), Constitution of the Republic of South Africa (1996)

⁶⁴ *Government of the Republic of South Africa v Grootboom* (2000) Constitutional Court of South Africa

court held that the government was obliged to progressively realize the right to housing, using international human rights norms as an interpretative guide.

In this case, and many others,⁶⁵ South Africa's courts have consistently interpreted international human rights obligations as binding interpretative tools, ensuring that international law strengthens domestic legal protections rather than being seen as external obligations.

4.3 Constitutional Framework and the Promise of Transformative Justice

The Constitution of the Republic of South Africa, 1996 , explicitly establishes the supremacy of the Constitution over all other laws. In its preamble and founding provisions, the Constitution declares that the new legal order must be built on democratic values, social justice, and the protection of human rights. These goals are not merely aspirational; they are supported by specific provisions that integrate international law into the domestic legal order.

For example, sections dealing with the incorporation of public international law particularly sections 231 and 232 reflect the country's innovative approach. Under section 231, treaties become binding on South Africa only after approval by Parliament and, if necessary, subsequent incorporation into domestic legislation⁶⁶. In contrast, section 232 provides that customary international law is automatically part of South African law unless in conflict with the Constitution or an act of Parliament⁶⁷. This two-tiered regime demonstrates a deliberate balance: while state sovereignty is preserved through parliamentary oversight of treaties, the direct application of customary international law underscores South Africa's commitment to the evolving norms of international human rights⁶⁸.

4.4 Transformative Constitutionalism and the Role of the Courts

The idea of transformative constitutionalism is at the heart of South Africa's legal system. As Eric Christiansen explains in his article on the creative uses of Constitutional Court authority, the Constitution was intended not only to guarantee formal rights but also to engender

⁶⁷Christiansen E, 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2010) 13 J. of Gender, Race & Justice 575 <http://digitalcommons.law.ggu.edu/pubs/436>

⁶⁶ Section 231, Constitution of the Republic of South Africa (1996)

⁶⁷ Section 232, Constitution of the Republic of South Africa (1996)

⁶⁸ Ferreira G and Ferreira-Snyman A, 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17 PER / PELJ <http://dx.doi.org/10.4314/pelj.v17i4.08>.

substantive justice⁶⁹. The Court has, over the years, increasingly interpreted constitutional provisions in light of international human rights standards.

In this respect, the landmark decision in *Glenister v President of the Republic of South Africa* is illustrative. While there remains a debate as evidenced by the minority and majority opinions in that case about whether ratified treaties acquire immediate domestic force without legislative incorporation, the majority judgment makes clear that international obligations can have domestic effect when interpreted in conjunction with the Bill of Rights⁷⁰. This approach, although not a pure monist turn, enables the Court to compel the state to take steps consistent with its international commitments, especially on matters of anti-corruption and social justice.

Furthermore, transformative constitutionalism is not solely about the rights listed in the Bill of Rights. As elaborated by Eric Kibet and Charles Fombad in their analysis, the South African Constitutional Court has repeatedly used its interpretive mandate to advance substantive justice⁷¹. By reading international law as an interpretive aid, the Court reinforces the progressive objectives of the Constitution even where explicit domestic legislative reform lags behind.

4.5 Key Case Law and Judicial Initiatives

South African case law demonstrates the practical implications of this dual approach. In *Glenister*, the Court's interpretation of section 231(2) was pivotal as it underscored the notion that once an international treaty is ratified even if not yet formally incorporated it imposes duties on the state, particularly when considered alongside section 7(2) of the Constitution⁷². This decision illustrates how the Court draws on international norms to fill gaps in domestic legislation, thereby safeguarding substantive human rights.

Other cases further highlight the transformative role of the judiciary. For instance, when the Court addresses issues of socio-economic rights, it frequently refers to international standards such as those embodied in the International Covenant on Economic, Social and Cultural Rights to support its expansive readings of the Constitution's social rights. In doing so, South Africa's

⁶⁹ Christiansen E, 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2010) 13 J. of Gender, Race & Justice 575 <http://digitalcommons.law.ggu.edu/pubs/436>.

⁷⁰ *Glenister v President of the Republic of South Africa* 2011. Constitutional Court of South Africa

⁷¹ Kibet E and Fombad C, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 African Human Rights Law Journal 340 <http://dx.doi.org/10.17159/1996-2096/2017/v17n2a1>.

⁷² *Glenister v President of the Republic of South Africa*, 2011. Constitutional Court of South Africa.

courts have set a precedent that encourages legislative bodies to align domestic law with international human rights obligations⁷³.

Moreover, the evolving jurisprudence reflects an understanding that constitutional remedies may be found not solely in statutory incorporation but also through creative constitutional interpretation. The Court's willingness to interpret ambiguous provisions in light of international law has enhanced the enforceability of rights and has contributed to what many scholars identify as a transformative shift in South African constitutional adjudication.

4.6 Balancing State Sovereignty and International Obligations

The South African model achieves an intricate balancing act between preserving state sovereignty and fulfilling international commitments. By requiring parliamentary approval for treaties while automatically incorporating customary international law, the system ensures democratic legitimacy while maintaining robust protection of human rights. This balance is also reflected in the Court's interpretative methods, which acknowledge that the full force of international law may not immediately transform into constitutional rights without the necessary legislative endorsement⁷⁴.

Nevertheless, this hybrid model is not without challenges. Ambiguities remain regarding the precise moments at which international norms should guide domestic adjudication and the extent to which courts may rely on international law in the absence of legislative incorporation. As highlighted in scholarly critiques found in both the transformative constitutionalism literature and in critical assessments by South African jurists, there is ongoing discussion about the need for clearer legislative frameworks to support judicial enforcement of international obligations.

4.7 Implications for Future Jurisprudence and Legal Reform

South Africa's experience offers valuable lessons for other nations striving for a more just and responsive legal order. The Court's creative engagement with international law as seen in transformative decisions like *Glenister* demonstrates that constitutional courts can play a decisive role in advancing substantive justice. Yet, to sustain this progress, legislative reform

⁷³ Christiansen E, 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2010) 13 *Journal of Gender, Race & Justice* 575

⁷⁴ Christiansen E, 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2010) 13 *Journal of Gender, Race & Justice* 575

is necessary. Clearer procedural guidelines on incorporating international treaties into domestic law would help mitigate judicial uncertainty and reinforce the state's commitment to international obligations.

Furthermore, the South African model of transformative constitutionalism points to the possibility of exporting such practices to other jurisdictions, particularly in Africa. Countries transitioning from repressive regimes may find in the South African example a path toward reconciling domestic legal hierarchies with the imperatives of international human rights protection.

4.8 Conclusion

South Africa's constitutional approach to international law is a testament to the power of transformative constitutionalism. Through a carefully calibrated combination of monist and dualist principles, the South African legal system has managed to integrate international norms into domestic law often through judicial ingenuity rather than through legislative fiat alone. Landmark cases such as *Glenister* and the broader jurisprudence on social and human rights illustrate both the promise and the challenges of this approach.

By establishing a legal order where international obligations inform the interpretation and enforcement of constitutional rights, South Africa offers a compelling model for balancing state sovereignty with the demands of global justice. This chapter underscores the importance of continued judicial activism, complemented by legislative reform, to ensure that the transformative promise of South Africa's Constitution is fully realized in both theory and practice.

Kenya's legal system presents a complex interplay between monism and constitutional supremacy, leading to inconsistencies in the judicial application of international law. Judicial fidelity to international law must be strengthened. South Africa provides a compelling model where courts are mandated to consider international law which ensures that domestic legal interpretations remain consistent with international human rights obligations.⁷⁵ Kenya could establish clearer judicial guidelines requiring courts to engage systematically with international law when interpreting constitutional rights.

⁷⁵ Section 39(1)(b), Constitution of the Republic of South Africa (1996); in *Government of the Republic of South Africa v Grootboom* (2000) Constitutional Court of South Africa

Institutional reforms and judicial capacity building are essential. Kenya could implement specialized judicial training programs to enhance judges' familiarity with international law to ensure that they are equipped to apply it effectively. South Africa's experience demonstrates that judicial engagement with international law can be institutionalized, creating a more consistent approach to treaty interpretation.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The study has demonstrated that the 2010 Constitution of Kenya introduced a significant transformation in the application of international human rights law by incorporating international treaties directly into domestic law. Despite this constitutional recognition, judicial inconsistencies and ambiguities regarding the hierarchy of norms have hindered the seamless application of these legal provisions.

Another critical finding is the tension between constitutional supremacy and international obligations. Courts have oscillated between embracing a monist approach, which favours the direct application of international treaties, and a dualist perspective, which emphasizes legislative domestication. The reluctance of some courts to apply international law without express statutory backing has created inconsistencies in judicial decisions. Additionally, cultural resistance and resource constraints continue to limit the full realization of international human rights standards in Kenya.

What we have seen so far from South Africa underscore the importance of judicial engagement with international law. South Africa's transformative constitutionalism provide valuable lessons for Kenya's legal framework.

5.2 Key Findings

This study unfolds through a series of chapters that together paint a comprehensive picture of the evolution and challenges of integrating international human rights law into Kenya's legal framework.

Chapter 1 laid the groundwork by introducing the historical context and the research objectives. It became clear early on that despite Kenya's strong international commitments, the disconnect between theory and practice was a major concern. The chapter set out the research questions, establishing a framework for understanding how legal transformations might better bridge the gap between international promises and domestic realities.

In Chapter 2, the focus shifted to the period before the 2010 Constitution. The analysis revealed that Kenya's dualist legal approach severely limited the domestic impact of international human rights treaties. Without legislative measures to incorporate these treaties, courts were

hamstrung by a rigid adherence to domestic laws. This chapter illustrated how the earlier legal system struggled to provide effective human rights protection despite Kenya's international obligations.

Chapter 3 examined the changes ushered in by the 2010 Constitution. Although the new constitutional provisions were designed to incorporate international law directly, the practical application has been uneven. The chapter found that courts are caught between a progressive, harmonizing approach and a more conservative stance that upholds constitutional supremacy. As a result, there remains a patchwork of judicial decisions that reflect both a willingness to embrace international norms and a hesitance to fully depart from established domestic legal principles.

Chapter 4 brought a comparative perspective by looking at how other jurisdictions, such as South Africa have managed similar tensions. This comparative review underscored the benefits of clear legislative frameworks and proactive judicial interpretation. The insights from these jurisdictions suggest that Kenya could improve its system by learning from models where international human rights law is more seamlessly integrated into the domestic legal order.

5.3 Recommendations

1. **Judicial Training and Capacity Building:** The Judiciary Training Institute should integrate comprehensive modules on international human rights law to equip judges and magistrates with the necessary knowledge to interpret and apply international legal norms effectively.
2. **Institutional Strengthening:** Human rights commissions and other oversight bodies should be empowered with adequate financial and technical resources to monitor the application of international human rights obligations in Kenya.
3. **Public Awareness and Engagement:** Civil society organizations should enhance advocacy and awareness programs to educate the public on the significance of international human rights laws in protecting fundamental freedoms and ensuring government accountability.
4. **Comparative Legal Reforms:** Kenya can adopt best practices from jurisdictions such as South Africa to refine its approach to integrating international human rights law.

Learning from these countries can help shape legal reforms that align Kenya's domestic laws with its global commitments.

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