



Cornell International Law Journal Online

Comparing the Role of International Law in South Africa and Kenya

by Justice Alfred Mavedzenge *

The role of international law in African states continues to grow. In line with this trend, the Republics of South Africa and Kenya have undertaken constitutional reforms that have strengthened the role of international law in their domestic legal systems. The end of apartheid in South Africa in 1993 was marked by the introduction of an interim constitution in 1993 and the country's final constitution in 1996. Following the political crisis of 2009, Kenya successfully went through a drafting and revision process that resulted in the new, 2010 Constitution of Kenya. Both countries' constitutions include a role for international law within the country. However, the way in which international law is used is different. This article compares the role of international law in the South African and Kenyan constitutions.

SOUTH AFRICA

Sections 39(1)(b), 231(4), 232 and 233 of South Africa's 1996 constitution establish the role of international law in the domestic context.¹ International law plays the dual role of being an interpretative aide and, in some circumstances, applying in the same manner as domestic law within South Africa. In terms of section 39(1)(b), South African courts are obliged to consider international law when interpreting provisions under the Bill of Rights.² The international law referred to under this section includes customary international law and international agreements to which South Africa is a party, whether they have been ratified or not.³ In addition, under section 233 of the constitution, South

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¹ See S. AFR. CONST., 1996.

² See *id.* § 39(1)(b) ("When interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law . . ."); *Glenister v. President of South Africa*, 2011 (3) SA 347 (CC) at para. 97 (S. Afr.).

³ See *S v. Makwanyane*, 1995 (3) SA 391 (CC) at para. 35 (S. Afr.).

African courts are obliged to prefer an interpretation of domestic statutes that is consistent with international law over one that conflicts with it.⁴

This interpretive role is important. To see why, consider the South African Supreme Court's 1995 decision in *State v. Makwanyane*, which declared capital punishment unconstitutional. In making its decision, the Court heavily relied on sources of foreign and international law.⁵ Moreover, international law may also play a future role in interpreting the freedom of expression, should South Africa's controversial "Secrecy Bill" go into effect.⁶

Apart from playing an interpretive role, the application of international law in South Africa can also be more direct. An international agreement that South Africa has ratified can apply as domestic law. However, under section 231(4), the agreement must either be self-executing or enacted into domestic legislation.⁷ Similar to the rule under American law,⁸ self-executing provisions must not be in conflict with any domestic legislation.⁹ For agreements that are not self-executing, there are two distinct stages: ratification and enactment as legislation. For an example of this process, consider the Rome Statute of the International Criminal Court. The Rome Statute, which now applies as part of domestic law in South Africa, was first ratified by the legislature and later was enacted into legislation through the promulgation of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.¹⁰

In addition to international agreements, customary international law also applies directly as part of domestic law.¹¹ These rules do not require any approval by parliament and take precedence over the common law.¹² However, they must be consistent with the South African constitution and must not conflict with any domestic legislation.¹³ Here, it is important to make the distinction between interpretation and application. While under section 233, courts are required to prefer an *interpretation* of domestic legislation that is

⁴ See S. AFR. CONST., 1996 § 233 ("When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."); *Glenister*, 2011 (3) SA 347 (CC) at para. 97.

⁵ See *Makwanyane*, 1995 (3) SA 391 (CC) at paras. 34–109.

⁶ See Byron Crowe II, *Secrecy in South Africa: Chilling the Press*, 1 CORNELL INT'L L.J. ONLINE 72, 76 (2013) ("If the law comes before the Constitutional Court of South Africa in Johannesburg, the issues will largely turn on the Bill's impact on the right of access to information and the freedom of expression. . . .").

⁷ See S. AFR. CONST., 1996 § 231(4).

⁸ See Ronald C. Slye, *International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law*, 2 CHI. J. INT'L L. 59, 67 (2001).

⁹ See S. AFR. CONST., 1996 § 231(4).

¹⁰ Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (S. Afr.), available at <http://www.justice.gov.za/legislation/acts/2002-027.pdf>.

¹¹ S. AFR. CONST., 1996 § 232.

¹² See *Slye*, *supra* note 8, at 67.

¹³ S. AFR. CONST., 1996 § 232 ("Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.").

consistent with international law, the *application* of domestic legislation is nevertheless accorded a superior status over customary international law under section 232.¹⁴

KENYA

The most important provisions relating to the role of international law in Kenya are sections 2(5) and 2(6) of the 2010 constitution.¹⁵ Section 2(6) deals with the application of international agreements and states that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution.”¹⁶ Under this section, international agreements apply as part of Kenya’s domestic law provided they have been ratified. Ratification of international agreements, in turn, is regulated by the Treaty Making and Ratification Act No. 45 of 2012. Under the Act, which applies to all multilateral and some bilateral treaties, the national executive is responsible for initiating the treaty-making process as well as negotiating and ratifying treaties.¹⁷ However, the cabinet and parliament must approve all treaties before they are ratified.¹⁸ Once an agreement is ratified, it has a dual effect: the agreement binds Kenya in relation to other state signatories, and its provisions become authoritative law within the country.

Section 2(5) of Kenya’s constitution provides that “the general rules of international law shall form part of the law of Kenya.”¹⁹ However, the exact meaning of this provision is yet unclear. There are two competing schools of thought on how to interpret “general rules.”²⁰ One school holds that it refers to the rules of customary international law.²¹ The other holds that “general rules” means the general *principals* of international law, which could refer to customary law, to the general principles of law under Article 38(1) (c) of the Statute of the International Court of Justice, or more generally to any logical proposition that is an extension of preexisting international law and based on judicial reasoning.²²

COMPARISON

¹⁴ See *id.* See also *Azanian Peoples’ Org. v. President of South Africa*, 1996 (4) SA 672 (CC) at para. 27.

¹⁵ See CONSTITUTION (2010) (Kenya).

¹⁶ *Id.* § 2(6).

¹⁷ See The Treaty Making and Ratification Act No. 45 (2012) §§ 3(2), 4(1) (Kenya).

¹⁸ *Id.* § 12(1).

¹⁹ See CONSTITUTION, § 2(5) (2010) (Kenya).

²⁰ See E. Oluoch Asher, *Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya*, 3 INT’L J. HUMAN & SOC. SCI. 266, 267 (2013).

²¹ *Id.*

²² *Id.*

There are two important differences²³ between the role of international law under the Kenyan and South African constitutions: the requirement of domestication and the treatment of customary international law.

Although the current constitution of the Republic of Kenya borrowed quite a lot from South Africa's constitution,²⁴ international agreements apply differently in Kenya than they do in South Africa. Whereas the Constitution of South Africa requires domestication of ratified international agreements, the Constitution of Kenya requires only ratification.

Which approach is preferable is up for debate. Kenya's monistic approach to international law means greater consistency between the country's stance on domestic and international issues and a simplified procedure for applying international law. However, it also has the potential effect of complicating the negotiation and drafting process. Because international agreements have domestic implications, the national executive must carefully draft the language of international agreements to ensure they do not have unintended consequences. This could leave Kenya with less flexibility when negotiating the provisions of a particular agreement.

The constitutions also differ in their treatment of customary international law. South Africa's constitution clearly lays out the role of customary international law in the domestic legal scheme. Kenya's section 2(5), on the other hand, is ambiguous as to whether customary international law applies and, if it does, whether it takes precedence over domestic statutes. While there are arguments for and against the different interpretations of section 2(5), one thing is clear: Kenya's wording anomaly does not add any value to its constitutional scheme. Thus, while it is difficult to say that either country has a preferable treatment of customary international law on policy grounds because Kenya's treatment is unclear, South Africa certainly did a better job of ensuring the treatment it intended.

²³ There are also other differences, including international law's interpretive role. However, due to the space constraints of this essay, I only (briefly) discuss these two.

²⁴ The Kenya's constitution has mirrored many of the provisions of the South African constitution, especially those under its Bill of Rights and the chapters on spheres of government and public administration.