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The role of the Kenyan judiciary in the implementation of decisions and recommendations of African regional mechanisms on human and peoples' rights

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Summary: *Africa's human rights mechanisms, such as the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, have made significant strides in interpreting the content of human rights guaranteed under the African Charter on Human and Peoples' Rights and setting standards on the implementation of state obligations thereto. These standards may be derived from various mechanisms, including the African Commission's decisions on individual communications, its resolutions, Concluding Observations on reports of state parties, guidelines on various human rights and General Comments. This article seeks to consider how the Kenyan judiciary has contributed to the implementation of the decisions of Africa's human rights mechanisms generally. However, more focus*

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is placed on the recommendations of the African Commission. In this regard, the article considers two types of recommendations: those that are targeted to Kenya and those that are not specific to the country. In addressing these issues, both domestic and continental decisions and recommendations of the mechanisms are analysed. The article concludes that since the promulgation of Kenya's Constitution 2010, the courts have largely adopted an avoidance approach towards decisions and recommendations of African human rights mechanisms. As a result, the value of continental decisions and mechanisms has been greatly diminished.

Key words: *African Commission decisions; approaches; domestic law; interpretation; Kenya*

1 Introduction

Judicial authority in Kenya is provided for under article 159 of the Constitution of Kenya (Constitution).[1] Article 159 establishes the composition, powers and functions of the judiciary. Apart from the Constitution, courts are also influenced by the country's cultural, social and political environment. This means that, generally, courts in Kenya are a product of the country's polity.

Often, when adjudicating disputes before them, Kenyan courts rely on both domestic and international law. The Constitution under article 2(6) has radically altered the position of international law in the Kenyan domestic legal system. Under the provision, treaties or conventions ratified by Kenya form part of Kenyan law. This means that with the promulgation of the Constitution, the recommendations of the African Commission on Human and Peoples' Rights (African Commission) and other continental mechanisms pertaining to ratified treaties are part and parcel of the Kenyan domestic legal system.[2] This is known as the monist approach. The opposite is the dualist system, which requires the legislature to enact a statute to incorporate the treaty into domestic law.[3] In practice, however, Kenyan courts defer to the political branches before applying international and regional treaties.[4] The challenge facing Kenyan courts at the moment, and which is the main focus of this article, is how the decisions of the

1 Constitution of Kenya, 2010.
2 Art 2(6) Constitution.
3 D Sloss 'Domestic application of treaties' in D Hollis (ed) *The Oxford guide to treaties* (2012) 370.
4 *David Njoroge Macharia v Republic* (2011) eKLR para 45.

African Commission should be interpreted, especially in relation to ratified African human rights treaties, and the hierarchical status that should be given to the decisions.

Against this background, this article examines domestic reception of the African Commission's decisions by the Kenyan judiciary. After this brief introduction, the article in part 2 discusses the domestic importance of continental mechanisms, such as the African Commission's recommendations, particularly in the interpretation of rights and fundamental freedoms. Part 3 undertakes an overview of the functions of the Kenyan judiciary in the implementation of the decisions and recommendations of African human rights mechanisms, while part 4 analyses the approach adopted by Kenyan courts in relation to these decisions. Part 5 deals with the challenges and prospects of implementing the decisions in Kenya, which is followed by a conclusion. In this article, recommendations and decisions refer to case law of the African Commission and other regional mechanisms, such as the African Court on Human and Peoples' Rights (African Court), resolutions, General Comments, principles and guidelines on thematic issues, among other soft law instruments adopted by the African Commission.

2 Importance of the African regional human rights mechanisms in the promotion and protection of rights and fundamental freedoms

The core functions of Africa's regional human rights mechanisms, such as the African Commission, include promoting and ensuring the protection of human and peoples' rights in line with the African Charter on Human and Peoples' Rights (African Charter).[5] Since its establishment, the Commission has made great strides in interpreting the human rights guarantees in the African Charter and setting human rights standards for state parties to the Charter through its various decisions. For instance, it has defined the content and import of the right to life and freedom from torture and ill-treatment through recommendations in communications and General Comments.[6] Soft law documents, such as the Principles on

5 Organisation of African Unity (OAU) African Charter on Human and Peoples' Rights adopted 27 June 1981, entered into force 21 October 1986; (1981) 1520 UNTS 217 art 45.

6 See, eg, General Comment 3: The right to life (art 4), adopted during the 57th ordinary session of the African Commission on Human and Peoples' Rights, held from 4 to 18 November 2015 in Banjul, The Gambia; and General Comment 4 on the African Charter on Human and Peoples' Rights: The right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment (art 5) adopted 4 March 2017.

the Decriminalisation of Petty Offences in Africa[7] and the Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa,[8] have also provided an important basis for advocacy on law reform at the national level.

While the steps taken by the African Commission are important for the advancement of human rights, they may only serve the purpose of reflecting what an ideal situation should look like, unless they are fully implemented at the domestic level. Given that the African Commission has no means of enforcing its decisions at the national level, it is critical that state parties to the African Charter develop mechanisms to implement the decisions of the African Commission at the domestic level. In this regard, national courts play a particularly important role in implementing the Commission's decisions. This role can be played mainly through reliance on the Commission's recommendations in the interpretation of human rights and obligations at the domestic level, thereby enhancing their jurisprudential value. In addition, where the recommendations are adopted by courts at the domestic level, national enforcement mechanisms for judicial decisions can be applied. This in turn would fill the enforcement gap. Consequently, how Kenyan courts approach the African Commission's recommendations and the value they attach to these have implications for implementation of the decisions at the national level.

3 Conceptual framework of the implementation function of domestic judicial organs

The term 'function' in the judicial sense may take various forms depending on the context. This means that it can be defined from either a descriptive or a normative point of view. Alternatively, it may also be viewed from the lens of domestic or international law. The term may also be analysed from a sociological, psychological or legal perspective. The latter can be done by highlighting the duties and obligations of judicial institutions under state laws.[9] Overall, the term 'function' may differ depending on the source, norm and substantive area of international law under scrutiny. In this case, scholarship addressing the 'function' of domestic courts in the interpretation of

7 Principles on the Decriminalisation of Petty Offences in Africa, adopted during the 63rd ordinary session of the African Commission held in October 2018 in Banjul, The Gambia.

8 Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017), adopted at the 21st extraordinary session of the African Commission held from 23 February 2017 to 4 March 2017 in Banjul, The Gambia.

9 O Ammann *Domestic courts and the interpretation of international law: Methods and reasoning based on the Swiss example* (2020) 135.

the African Commission's decisions may be likened to the proverbial thicket that is hard to penetrate.[10] In this article, the functionalist approach or functionalism as an epistemic method focuses on the role or purpose Kenyan courts serve in relation to the decisions of the African Commission.[11]

Scholars have enumerated several modes of engagement between domestic courts and regional law and the range of 'functions' that the courts fulfil when interpreting such regional laws and decisions. According to Sloss and Van Alstine, the primary question that Kenyan courts should confront before applying any international or regional norm is whether the said norm has passed from the realm of politics to law.[12] In particular, in order for an international norm to be

> legalised, it must contain three essential attributes, each of which, according to Abbott, is 'a matter of degree and gradation'.[13] These attributes are (1) 'obligation' – the extent to which the norm is legally binding on a state or other actor; (2) 'precision' – the extent to which the norm unambiguously defines the required, authorized or proscribed conduct; and (3) 'delegation' – the extent to which third party institutions (especially domestic courts, independent agencies and international courts) have authority 'to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules'.[14]

The ultimate effect of the 'judicialisation' of regional laws such as the African Commission decisions is to 'shift … the balance of power between law and politics [to] favour judicial institutions over representative and accountable institutions'.[15] To achieve this shift, courts have developed various techniques towards the decisions of the African Commission, which include harmonisation and avoidance techniques. These approaches as used by Kenyan courts are discussed next.

10 The legal effect of domestic rulings in international law 135, https://brill.com/display/book/9789004409873/BP000007.xml (accessed 4 August 2023).
11 P Jessup *The functional approach as applied to international law: Proceedings of the Third Conference of Teachers of International Law* (1928).
12 D Sloss & M van Alstine 'International law in domestic courts' in W Sandholtz, JA McCone & CA Whytock (eds) *Research handbook on the politics of international law* (2017) 81.
13 KW Abbott and others 'The concept of legalisation' (2000) 54 *International Organisation* 404.
14 As above.
15 RA Miller 'Lords of democracy: The judicialisation of "pure politics" in the United States and Germany' (2004) 61 *Washington & Lee Law Review* 590.

4 Harmonisation and avoidance: Approaches of Kenyan courts to the implementation of recommendations of the African human rights mechanisms

In Kenya there have been two broad trends when it comes to the implementation of the recommendations of the African Commission and other continental human rights mechanisms. These are the avoidance and harmonisation techniques. The cases discussed in this part have been classified as either harmonising or avoiding the recommendations of continental mechanisms such as the African Commission, beginning with the former.

4.1 Harmonisation approach

The function of harmonisation covers a wide variety of practices employed by Kenyan courts to give effect to the African Commission's decisions in the county's domestic legal system.[16] In several instances, the Kenyan judiciary has found certain African Commission decisions applicable in the domestic legal system. The harmonisation technique was explained by the Supreme Court of Kenya in the case of *Mitu-Bell Welfare Society (Mitu Bell)*.[17]

Mitu-Bell concerned the unlawful eviction and demolition of the homes of more than 3 000 families residing in an informal settlement on public land known as Mitumba Village, located near Wilson Airport in Nairobi. The informal settlers had lived there for over 19 years. The forced eviction took place without due notice and despite a court order prohibiting government authorities from conducting the evictions pending the hearing of an application with respect to the matter. The trial court's decision was positive as it recognised that forced evictions without relocation or compensation negatively affected the equal enjoyment of the right to housing by vulnerable groups. However, for largely procedural reasons, the Court of Appeal overturned the High Court's entire decision. According to the Appeal Court judges, the High Court erred in delivering a judgment and then reserving outstanding matters to be dealt with by the Court. This procedure violated the *functus officio* principle which requires that upon delivery of judgment, a court ceases to have authority

16 Preliminary Report: Principles on Engagement of Domestic Courts with International Law (ILA Study Group 2013) 6-9.

17 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa* (*amicus curiae*) Petition 3 of 2018 [2021] KESC 34 (KLR) (11 January 2021) (Judgment).

to further act on the matter.[18] It then proceeded to hold that the application of supervisory orders is 'unknown to Kenyan law'.[19]

With regard to international law, the Kenyan Supreme Court in *Mitu-Bell* held that articles 2(5) and (6) of the Constitution embraces both international custom and treaty law. It stated that the provisions are both outward and inward looking. By outward looking, it means Kenya, as a state, is committed to conducting its international relations in accordance with its obligations under international law. In this sense Kenya, as a member of the international community, is bound by its obligations under customary international law and its undertakings under the treaties to which it is a party.[20] Despite this proclamation, the Court did not apply any regional or international law when making its determination on the issue of the right to housing by the claimants. Instead, it purported to apply the supremacy clause and rejected, for example, the application of United Nations (UN) Guidelines on Evictions on the grounds that they were not general rules of international law.[21] As a result, the decision originated neither expressly nor by implication from any recommendations of the African Commission.

Prior to *Mitu Bell,* which was decided in 2021, there were other cases that sought to employ the harmonisation approach to the recommendations by the African Commission. These cases gave effect to regional treaties of the African Commission that had been formally ratified by the country. During this period, Kenyan courts applied decisions of the African Commission indirectly as a guide to interpreting domestic statutory or constitutional provisions. For example, in *CORD*[22] the High Court cited article 14 of the African Charter and article 3 of the Organisation of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa[23] in order to determine the constitutionality of the Security Laws (Amendment) Act (SLAA).[24] The SLAA had amended the provisions of 22 other Acts of Parliament concerned with matters of national security in Kenya. The petitioners raised four fundamental questions relating to the process of the enactment of SLAA as well as its contents.

18 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others* Court of Appeal paras 72 & 142 (*Mitu-Bell*).
19 *Mitu-Bell* (n 17) para 71.
20 *Mitu-Bell* (n 17) para 131.
21 *Mitu-Bell* (n 17) paras 141-142.
22 *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya &10 Others* [2015] eKLR (*CORD*).
23 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, May 2019.
24 Security Laws (Amendment) Act of 2014.

The first question concerned the extent to which the Court may inquire into the processes of the legislative arm of government and, in particular, whether the Court could interrogate parliamentary proceedings. The second question concerned the nature and scope of the constitutional obligation of the legislature to facilitate public involvement and participation in its legislative processes, and the consequences of the failure to comply with that obligation. The third question was whether the amendments to various Acts of Parliament contained in SLAA that were impugned by the petitioners limited or violated the Bill of Rights or were otherwise inconsistent with the Constitution of Kenya.

Apart from making a finding on limitation, violation or inconsistency, the Court also determined whether the limitation was justifiable in a free and democratic society. The last issue was whether or not the prayers sought in the petition should be granted. In the end, the Court found sections 12, 16, 20, 26, 34, 48, 64 and 95 to be unconstitutional for violating the rights to freedom of expression and the media guaranteed under articles 33 and 34 of the Constitution, the rights of accused persons under article 50 of the Constitution, and the principle of *non-refoulement* as recognised under the 1951 UN Convention on the Status of Refugees, which is part of the laws of Kenya by dint of articles 2(5) and (6) of the Constitution.

In some instances, the courts have given effect to decisions of the African Commission that do not formally qualify as domestic law. This is what the Kenyan Supreme Court in *Mitu Bell* meant when it held that articles 2(5) and (6) of the Constitution is inward looking because it requires Kenyan courts to apply international law (both customary and treaty law) in resolving disputes before them, as long as they are relevant, and not in conflict with the Constitution, domestic legislation, or final judicial pronouncement. According to the Court, where a trier of fact is faced with a dispute, the elements of which require the application of a rule of international law, due to the fact that there is no domestic law on the same, or there is a lacuna in the law, which may be filled by reference to international law, the court must apply international law, because it forms part of the law of Kenya. In other words, articles 2(5) and (6) of the Constitution recognise international law (both customary and treaty law) as a source of law in Kenya. By the same token, a court of law is at liberty to refer to a norm of international law, as an aid in interpreting or clarifying a constitutional provision.[25]

25 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* SC Advisory Opinion 2 of 2012 (eKLR) para 132.

In this vein, courts have given effect to unincorporated treaties, resolutions, Concluding Observations on reports of state parties, guidelines on various human rights and General Comments. Courts have also applied interpretive presumptions to ensure that there is conformity between domestic statutes and regional law, decisions and norms. This means that courts in this category will be inclined to special 'friendliness' towards the African Commission decisions. They aim at ensuring a fertile ground for the development of domestic law in existing and even developing rules of international and regional law. For example, in the High Court case of *Okuta*[26] Justice Mativo relied on Resolution 169 on Repealing Criminal Defamation Laws in Africa[27] of the African Commission before declaring the offence of criminal defamation in Kenya unconstitutional. The matter dealt with the constitutionality or otherwise of the offence of criminal defamation created under the provisions of section 194 of the Penal Code.[28] In particular, the petitioners questioned whether or not criminal defamation is a ground on which a constitutional limitation on the rights of freedom of expression could be legally imposed. It also addressed the issue of whether defamation law in Kenya infringed the people's right to freedom of expression as guaranteed under the Constitution, or whether it was one of the reasonable and justifiable limitations in an open democratic society. The Court allowed the petition and found the offence of criminal defamation to be unreasonable and unjustifiable in a democratic society. It held that criminal sanctions on speech ought to be reserved for the most serious cases particularised under articles 33(2)(a) to (d) of the Constitution whose aim is to protect public interest.

In cases where domestic law is silent or inadequate in relation to a particular issue, Kenyan courts have relied on international law, including decisions of the African Commission. For instance, in *Satrose Ayuma*[29] the High Court of Kenya considered the question of forced evictions and the right to adequate housing. In interpreting what a 'forced eviction' meant and its human rights implications, the Court looked to the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) and the African Commission. It referred to the ESCR Committee's UN Basic Principles and Guidelines on Development-Based Evictions and Displacements (2007) and the African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in

26 *Jacqueline Okuta & Another v Attorney General & 2 Others* (2017) eKLR.
27 Resolution on Repealing Criminal Defamation Laws in Africa ACHPR/Res.169(XLVIII)10.
28 Penal Code Cap 63 Laws of Kenya.
29 *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others* High Court Petition 65 of 2010.

the African Charter. The Court went on to state that the African position on the right to housing was aptly outlined by the African Commission in *SERAC*,[30] where the Commission, while addressing the question of the homelessness of the Ogoni people caused by the military operations of the Nigerian military, stated the following:[31]

> The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs … Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies … The right to shelter extends to embody the individual's right to be let alone and to live in peace, whether under a roof or not.

The African Commission also emphasised that the right to adequate housing as implicitly protected under the African Charter also protected against forced evictions. In *Satrose Ayuma* the High Court recognised that at the time of hearing the case, Kenya did not have a law governing evictions.[32] Consequently, the Court sought guidance from international law, including the decisions of the African Commission and the ESCR Committee. The Court specifically stated that where Kenyan laws are silent or inadequate in relation to a particular issue, it is good practice to rely on international law.[33] Having noted that the petitioners' right to adequate housing, among other rights, had been violated, and cognisant of the fact that in the absence of a proper legal framework more violations would occur, the Court directed the government of Kenya to establish 'an appropriate legal framework for eviction based on internationally acceptable guidelines'.[34] The Evictions and Resettlement Procedures Bill, 2012 was developed during the pendency of the case, although it was never enacted. Still, the principles in *Satrose Ayuma*, drawn from the decisions of the African Commission and the ESCR Committee, continue to provide fundamental guidance on the right to housing and protection from forced evictions in Kenya.

30 *Social Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*).
31 *SERAC* (n 30) para 61.
32 *Satrose Ayuma* (n 29) para 79.
33 As above.
34 *Satrose Ayuma* (n 29) para 109.

The *Endorois* case[35] has also been an important reference point for Kenyan courts adjudicating on issues touching on evictions. The case concerned the Kenyan government's eviction of the indigenous Endorois community from their traditional lands around the Lake Bogoria area in the Rift Valley in order to pave the way for the establishment of a game reserve. After unsuccessfully pursuing redress at the national level, CEMIRIDE and MRG, on behalf of the Endorois Welfare Council, lodged the case with the African Commission, alleging the violation of their freedom of religion, right to development, right to property and right to culture, among other rights. The African Commission agreed with the complainants and found that the Kenyan government had breached its obligations under the African Charter by violating the said rights of the members of the Endorois community.

This landmark case has since been relied upon severally by Kenyan courts, especially when interpreting various issues touching on the rights of indigenous people, including who indigenous people are,[36] the impact of evictions on their rights,[37] and their meaningful participation in decisions affecting them.[38] For instance, in *CEMIRIDE* the High Court cited and relied upon the *Endorois* definition of who indigenous people are, linking it to the Constitution of Kenya's provisions on marginalised groups, and proceeded to affirm that protection of the marginalised is one of the national values and principles of governance espoused in the Constitution. As with *Endorois*, where the African Commission determined the question of effective involvement of the Endorois in shaping policies or decisions that affect them,[39] the High Court also affirmed that marginalised people had the right to be represented in public policy formulation and implementation.[40] *CEMIRIDE* concerned the Kenyan government's development and use of a web application called the integrated political parties management system (IPPMS) to manage political party records. The complainants argued that the implementation of the IPPMS would amount to a breach of the political rights of indigenous and marginalised groups, especially because they had no access to internet services and there was no sufficient legislative framework dealing with the rights of such groups. The High Court held that there was no sufficient statutory or

35 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) *(Endorois*).
36 *Simion Swakey Ole Kaapei & 89 Others v Commissioner of Lands & 7 Others* [2014] eKLR.
37 *Satrose Ayuma* (n 29).
38 *Centre for Minority Rights Development (CEMIRIDE) & 2 Others v Attorney General & 2 Others* Petition E002 of 2022 [2022] KEHC 955 (KLR) (*CEMIRIDE*).
39 *Endorois* (n 35) paras 281-282.
40 *Endorois* (n 35) paras 135, 137-138.

regulatory regime dealing with the rights of the marginalised groups or indigenous communities in Kenya and that the government had failed to uphold the rights of these groups. Further, the Court held that the government had failed to conduct effective and meaningful public participation among the marginalised and indigenous groups.

Yet another landmark case that Kenyan courts have adopted is the case of *African Commission on Human and Peoples' Rights v Republic of Kenya* (*Ogiek*).[41] The case was referred to the African Court by the African Commission and concerned the eviction of members of the Ogiek community from the Mau Forest by the government of Kenya. The Ogiek community had been living in the forest since time immemorial, a fact of which the government was aware but which was ignored. The government also refused to recognise the Ogiek as an indigenous community, in spite of the guidance the government had already received in the earlier *Endorois* case where the African Commission defined who indigenous people were. In a final decision on the merits, the African Court found that the government of Kenya had violated the rights of the members of the Ogiek community to land, to disposing of the wealth and natural resources of their land, their right to religion and their right to culture. The failure by the government to recognise the Ogiek as an indigenous community that requires special protection was also found to be a violation of their freedom from discrimination. Kenya was subsequently ordered to pay to the Ogiek compensation for the harm suffered, and to take all necessary measures to identify Ogiek ancestral land and to grant them collective title to such land.

This case provided a strong foundation for the High Court of Kenya in *Keny,*[42] which concerned the eviction of members of the Ogiek community from the South West Mau Forest that they had inhabited since time immemorial. Their houses were also razed down. The complainants had alleged that the eviction violated their rights to human dignity, property, equal benefit of the law, fair administrative action and access to justice. The High Court recognised that the same issues had already been addressed by the African Court in *Ogiek* and that the African Court's decision was binding by virtue of article 2(6) of the Constitution of Kenya 2010.[43] This was a particularly important affirmation of the decision of the African Court and it has since been

41 *In the Matter of the African Commission on Human and Peoples' Rights v Republic of Kenya* Application 6/2012 (*Ogiek*).
42 *John K Keny & 7 Others v Principal Secretary Ministry of Lands, Housing and Urban Development & 4 Others* [2018] eKLR (*Keny*).
43 *Keny* (n 42) para 42.

cited in other cases touching on the rights of members of the Ogiek community.

The recommendations of the African Commission in relation to the freedom of association have also proved pivotal in protecting the right, especially with respect to minorities. For instance, in *EG*[44] the High Court of Kenya lay emphasis on the state obligation not to interfere with the free formation of associations. In this case, the petitioners, who had been prohibited from registering an organisation for gay and lesbian people, alleged a violation of their freedom of association. The High Court recalled that the right to freedom of association was a critical right that had been jealously guarded in various judicial forums, including the African Commission. The Court proceeded to cite various decisions[45] of the African Commission and its Resolution on the Right to Freedom of Association. In the Resolution the Commission emphasised that 'authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international human rights standards'[46] and that 'the regulation of the exercise of the right to freedom of association should be consistent with state's obligations under the African Charter'.[47]

The harmonisation approach was also used in *Federation of Women Lawyers-Kenya*[48] where the petitioners sought to enforce the rights of persons who were internally displaced during the 2007-2008 post-election violence in Kenya. In addition, they had sought but had been denied certain information from the state pertaining to the investigations around the cases. In addressing the question of the right of access to information, the Kenyan High Court made reference to the African Commission's Declaration of Principles on Freedom of Expression in Africa[49] which, according to the Court, 'gave an authoritative statement on the scope of article 9 of the African Charter'. The Court fully adopted the Commission's view that the right of access to information held by public bodies and

44 *EG v Non-Governmental Organisations Co-ordination Board & 4 Others* [2015] eKLR (*EG*).
45 Eg, *Dawda Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999); *Law Office of Ghazi Suleiman v Sudan* (II) (2003) AHRLR 144 (ACHPR 2003); *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995).
46 Resolution on the Freedom of Association ACHPR/Res.5 (XI) 92 para 1.
47 Resolution on the Freedom of Association (n 46) para 3.
48 *Federation of Women Lawyers-Kenya & 28 Others v Attorney General & 8 Others* (2015) eKLR.
49 The Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights 32nd session, 17-23 October, 2002, Banjul, The Gambia.

companies enables greater public transparency and accountability, good governance and democracy.[50]

Admittedly, in certain instances courts have 'silently' applied recommendations of other regional mechanisms, such as the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) without mentioning the sources. This may mean that the state has accepted, from its conduct, to engage with the recommendations of the African Children's Committee.[51] For instance, the High Court of Kenya 'silently' applied the provisions of General Comment 2 on article 6 of the African Charter on the Rights and Welfare of the Child (African Children's Charter): The right to a name, registration at birth, and to acquire a nationality in the case of *LNW*.[52] The case concerned the insertion of the name of the biological father in the birth certificate of a child born outside wedlock. The Court declared that all children born out of wedlock have a right to have the names of their fathers entered in the country's birth registers. As a result, the Court declared unconstitutional section 12 of the Registration of Persons Act,[53] which required the name of the father of a child born outside of marriage to be entered in the register of births upon the joint request of the father and mother, or upon proof of marriage.

According to the Court, section 12 denied children born out of wedlock identity and the right to have a name, which is stipulated by paragraph 5.1 of General Comment 2 on article 6 of the African Children's Charter. The Court found that the situation discriminated against both the children and their mothers, which is contrary to Kenya's transformative Constitution. The implication of this case is acquiescence or tacit recognition by the courts to the effects of the provisions of General Comment 2 on article 6 of the African Children's Charter. In such a situation, the state may be precluded through estoppel from changing its position on the rights of children born out of wedlock to have the names of their fathers entered in the register of births without the latter's consent.[54]

50 *Federation of Women Lawyers-Kenya* (n 48) para 16.
51 JS Carvalho 'The powers of silence: Making sense of the non-definition of gender in international criminal law' (2022) 35 *Leiden Journal of International Law* 984.
52 *LNW v Attorney General & 3 Others* (2016) eKLR.
53 Registration of Births and Deaths Act Cap 149.
54 *Case Concerning the Temple of Preah Vihear* (Cambodia/Thailand) (Merits) [1962] ICJ Rep 131, 62.

4.2 Avoidance approach

The avoidance approach refers to a range of contrasting techniques used by some courts in Kenya so as 'to by-pass otherwise … applicable international legal provisions'.[55] Some of these courts relegate claims founded in international law to politics or diplomacy.[56] These courts have recognised a 'political question' and 'ripeness' doctrines for issues with particularly important or sensitive foreign policy implications.[57] These doctrines may be used to oust the jurisdiction of Kenyan courts when interpreting the Constitution, especially with regard to the effect of African Commission's resolutions, declarations, General Comments and guidelines and their norm-generating quality in international law. According to the Kenyan Supreme Court, such resolutions, declarations and Comments do not ordinarily amount to norms of international law.[58] However, the Supreme Court also conceded that in certain instances, regional declarations and resolutions can ripen into norms of customary international law, depending on their nature and history leading to their justiciability in courts.[59]

Some courts also have afforded deference to the executive branch in interpreting international and regional legal norms. Courts may avoid matters on grounds of separation of powers or the fact that they lack jurisdiction, which means that neither the ordinary courts nor any other court can consider the dispute.[60] In Kenya, the Supreme Court has cautioned against judicial overreach. It has urged that when issuing orders, courts must be realistic and avoid the temptation of judicial overreach, especially in matters of policy.[61] This was also the holding in *Small Scale Farmers Forum*.[62] In this case the High Court of Kenya emphasised the doctrine of separation of powers as follows:

> Firstly, it has to be borne in mind that this court is not called upon to carry out an appraisal of the impugned agreement or negotiations to satisfy itself whether or not they are good for Kenya. Those are matters

55 Sloss & Van Alstine (n 12) 81.
56 E Benvenisti 'Reclaiming democracy: The strategic uses of foreign and international law by national courts' (2008) 102 *American Journal of International Law* 242.
57 *Baker v Carr* (1962) 369 US 186.
58 *Mitu-Bell* (n 17) para 141.
59 As above.
60 *Presidency of the Council of Ministers v Markovic* [2002] 85 Rivista di diritto internazionale 799 ILDC 293 (IT 2002) (*Markovic*) para 5.
61 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa* (*amicus curiae*) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) para 122.
62 *Kenya Small Scale Farmers Forum & 6 Others v Republic of Kenya & 2 Others* Petition 1174 of 2007.

> of policy of which this court is not best suited to handle. The dissenting decision of the Supreme Court in *US v Butler*, 297 US 1 [1936], is apposite in this regard that 'courts are concerned only with the power to enact statutes, not with their wisdom ... For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.'

The role of the legislature, executive and judiciary is to make, implement and interpret laws and policies.[63] These functions take seriously concerns relating to checks and balances, accountability, participation, responsiveness and transparency. However, from the above paragraph, it may be concluded that the doctrine of separation of powers as a component of the avoidance technique may be used by judicial officers to oust the application of international law in the country.

Additionally, courts in some instances apply the doctrine of 'non-self-executing' treaties as an avoidance technique. In *Mitu Bell* the Supreme Court elaborated on this issue as follows:[64]

> Having dealt with this issue, we must conclude by stating that article 2(5) and (6) of the Constitution has nothing or little of significance to do with the monist-dualist categorisation. Most importantly, the expression 'shall form part of the law of Kenya' as used in the article does not transform Kenya from a dualist to a monist state as understood in international discourse. As already demonstrated, the phrase was in fact first embraced by the pioneer dualist states, ie the United Kingdom and the United States. At any rate, given the developments in contemporary treaty making, the argument about whether a state is monist or dualist, is increasingly becoming sterile, given the fact that, a large number of modern-day treaties, conventions, and protocols are non-self-executing, which means that they cannot be directly applicable in the legal systems of states parities, without further legislative and administrative action.

In other words, before a court can invoke article 2(5) of the Constitution, it must be satisfied that the rule of international law being invoked is a general rule of international law and not simply a rule of international law. Accordingly, regional bodies such as the African Commission are neither a supplementary nor complementary legislature for Kenya. It means that the African Commission does not legislate for Kenya. Therefore, it is impermissible to use articles 2(5) and (6) of the Constitution as a basis to justify any or all rules and principles of international law as part of the laws of Kenya.

63 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others* [2016] eKLR.
64 *Mitu-Bell* (n 17) para 133.

In other avoidance techniques, courts will refuse to uphold the decisions of the African Commission if those decisions are in conflict with the Constitution. For example, in *East African Community v Republic*[65] the Court of Appeal for East Africa in 1970 stated that any law, including treaties ratified by Kenya, which is in conflict with the Constitution of Kenya, is void to the extent of the conflict.

This means that the decisions of the African Commission will only be applicable in Kenya if they are founded on provisions that are in compliance with the Constitution.[66] This approach is more complex compared to other models such as monism and dualism. Although it regards the state to be somewhat constrained by international law and obligated to set up domestic political and legal institutions so as to ensure compliance, it aims to rank international human rights norms contained in ratified international human rights treaties at a hierarchically-lower position than national legislation. In other words, the approach aims to subject international law to the authority of domestic legislation.[67] It emphasises nationalism, whose aim is to progressively give more prominence to the country's domestic law at the expense of international human rights law. This, in turn, may not generate the much-needed 'compliance pull' whose aim is to improve the possibility of international law and norms in changing state behaviour.[68]

In some cases the courts have been silent in instances where they could have contributed to the implementation of the decisions of the African Commission. For example, in *Nubian Rights Forum*[69] the petitioners had argued that the implementation of an integrated digital civil registration system would further the discrimination and exclusion of members of the Nubian community in Kenya. Among the orders sought was 'a declaration that the state must implement the decisions of the African Commission on Human and Peoples' Rights and the African Committee on the Rights and Welfare of the Child in the cases of, respectively, *Nubian Community v Kenya* and *Children of Nubian Descent v Kenya*'. While the High Court allowed the petition, it did not at all address the prayer concerning the

65 *East African Community v Republic* (1970) EA 457.
66 *Beatrice Wanjiku & Another v Attorney General & Others* High Court Petition 190 of 2011 [2012] eKLR.
67 M Kumm 'The legitimacy of international law: A constitutionalist framework of analysis' (2004) 15 *European Journal of International Law* 928.
68 T Kabau & C Njoroge 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonisation of the legal system' (2011) 44 *Comparative and International Law Journal of Southern Africa* 296.
69 *Nubian Rights Forum & 2 Others v Attorney General & 6 Others; Child Welfare Society & 9 Others (Interested Parties)* [2020] eKLR.

implementation of the African Commission's decisions in respect of the Nubian community in Kenya.

5 Prospects and challenges of implementing recommendations of the African Commission and other continental mechanisms in Kenya

Generally, Africa's human rights mechanisms, such as the African Commission, have no follow-up mechanisms to ensure the implementation of their decisions. The system is designed with significantly limited enforcement capacity.[70] As a result, the observance and implementation of the decisions of the African Commission differ from country to country. Some states have continuously neglected to submit reports to the Commission as required by article 62 of the African Charter. Other African Charter member states are so adamant and unwilling or lack adequate infrastructure to enforce the recommendations of the African Commission.

Kenya is a party to several human rights treaties in Africa. However, this ratification largely applies in principle and not in practice. This has been very frustrating especially to successful parties who have to pursue the execution of the decisions on their own behalf. Since there has generally been little pressure from the African Commission on states to ensure that its recommendations are implemented, countries such as Kenya have a tendency of disregarding and avoiding victims' pleas for compliance with the resolutions of the African Commission. The lack of implementation may be due to various reasons. For example, the vagueness in the definition of rights under the African Charter may have provided an escape route to state parties in the fulfilment of their obligations.

Where the executive arm of government sets out to implement the Commission's decisions, they can be easily implemented through various ways, including through administrative actions of government departments that do not require lengthy and resource intensive processes to be put in place. However, where the willingness to implement is absent, and parliamentary oversight over the executive also is inadequate, the judiciary can be the arm of government that gives meaning to the Commission's decisions. Kenya has an independent judiciary, which is capable of 'judicialising' or 'legalising' the recommendations of the African Commission.

70 The African Commission's Rules of Procedure, eg, do not provide for enforcement mechanisms.

They play an important role in the implementation of the African Commission's decisions by issuing authoritative judgments in litigated disputes. Using the African Commission's decisions to build the will and capacity of the government of Kenya to act domestically offers great opportunities to enhance the overall effectiveness of the African human rights system. Domestic institutions will grow stronger, and their strength can be harnessed in pursuit of regional objectives. The Kenyan government can thus respond to its human rights obligations more effectively and efficiently.

A key role of the decisions of the African Commission is to assist domestic courts in interpreting constitutionally-recognised rights, especially given that these decisions are based on regional treaties that have influenced the constitutions of many African countries, including Kenya. The decisions of the African Commission may offer a more robust jurisprudence than what is available from domestic precedent, allowing for more expansive interpretations and firmer defence of progressive principles.

One of the criticisms against the use of the African Commission's decisions in Kenya is the potential of abuse by the government of this newfound power.[71] Kenya has a strong constitutional framework, transparent political process, and embedded systems of checks and balances that are least likely to appropriate the decisions of the African Commission for their own purposes. In this environment, Kenyan domestic courts can easily prevent government abuse by counter-balancing the strength of the other arms of government. Nevertheless, there are a number of challenges that stand in the way of the implementation of these decisions.

According to Murray and Mottershaw, political factors have a greater bearing on compliance with decisions of the African Commission than legal factors.[72] Thus, while the judiciary plays an important role in the implementation of the Commission's decisions, the role of the executive and legislature arguably is even more important. Additionally, the political environment created by these two arms of government can influence the attitudes of the judiciary towards the application of the African Commission's decisions in the interpretation of rights and obligations. In Kenya, there has been limited engagement with the African Commission's decisions by

71 WW Burke-White & A Slaughter 'The future of international law is domestic (or, the European way of law)' (2006) 47 *University of Pennsylvania Carey Law School* 348.

72 R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 356.

the executive and legislative branches of government. A review of 15 sampled government policies revealed that only one had relied on principles developed by the African Commission to reinforce rights.[73] In an environment where there is little or no political will to implement the decisions of the African Commission, the value of such decisions certainly is diminished regardless of whether or not courts adopt them.

Another challenge has been the issuance of conflicting decisions or interpretations of the place of the African Commission's decisions under Kenyan law. While some judges rely on and fully adopt the decisions in their interpretation of rights (for example, the High Court in *Satrose Ayuma* discussed above), others (for instance, the Supreme Court in *Mitu-Bell* cited above) attach little value to the decisions and emphasise that such decisions play a persuasive role and are secondary to decisions by Kenyan courts. Given that the highest Court in Kenya (the Supreme Court) has taken an approach to international law that places them below all domestic laws in Kenya, including decisions of Kenyan courts, it is expected that courts that would otherwise have attached a high jurisprudential value to the African Commission's decisions may no longer do so.

Yet another challenge has been the general limited awareness about the decisions. Regardless of how consequential the Commission's decisions are, their impact would be low if there is limited knowledge about them among both judicial officers and other court users. To address this challenge and improve the prospects of its decisions being implemented by courts at the national level, the African Commission needs to enhance its engagements with justice actors of member states to the African Charter with a view to encouraging key actors, such as judiciaries, to establish internal mechanisms for enhancing incorporation of human rights standards in the African human rights system into national standards. For instance, judiciaries can systematically track developments within the African human rights system, assess the extent to which they incorporate the Commission's decisions, and develop ways of incorporating these in the matters before them. While this may not necessarily entail implementing specific decisions of the Commission, the adoption of the decisions in the adjudication of disputes before them will increase their jurisprudential value.

73 Republic of Kenya, Ministry of Lands, Eviction and Resettlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements (2009), https://www.refworld.org/pdfid/5b3e2eb44.pdf (accessed 16 August 2023). The Guidelines make reference to the decision of the Commission in *SERAC* (n 30) and emphasised that forced evictions contravened the African Charter.

Another step that can be taken to enhance reliance on the African Commission's decisions is the development and wide dissemination by the Commission of thematic case digests on cases with which the Commission has dealt. Apart from creating greater awareness on the Commission's cases, such a digest can equally enable the Commission to enhance consistency in decision making, thereby enhancing the strength of its own decisions. The digests can also act as useful guides for both judicial officers and legal practitioners who can rely on them to adjudicate human rights disputes before national courts. In time, there would be more reliance on the Commission's decisions and the principles and standards drawn from the decisions can be entrenched in national practice.

6 Conclusion

The future of the African Commission is domestic. By virtue of being a party to the African Charter, the Kenyan government must accept the responsibilities of membership flowing from their ratification of the African Charter. Noting that the executive and legislative arms of government hardly ever implement the Commission's recommendations, the 'judicialisation' of the decisions by Kenyan courts presents an opportunity for the norms and standards developed by the Commission to have effect at the domestic level. The enforcement mechanisms for judicial decisions at the national level can act as powerful tools through which the African Commission can influence domestic socio-political and legal outcomes. As discussed above, whether or not this happens depends on the will of national governments, and the appreciation by the judiciary of their role in implementing the Commission's recommendations. The seemingly emerging trend of the Kenyan judiciary hardening its avoidance approach and adopting a hierarchical approach that reduces the value of the African Commission's recommendations points to a bleak future for the Commission's recommendations in Kenya.