1. Who is "*human*" in the concept of modern human rights?

For too long we have emphasized the 'rights', often times even at the expense of 'human'. We took the 'human' for granted in a hurry to grant them 'rights' and we compromised on 'duties' to the detriment of 'human rights'. This human is made of the amalgamation of biological and spiritual features, a living organism endowed with the innate potency of consciousness in space, time, empathy, abstraction and being. Thus, a human can be defined as a creature whose essence bears life endowed with intellect and will.

2. How is carried out of the protection of a right which is not regulated in the Constitution in your legal system? What kind of balancing is done when a right uncounted in the Constitution is conflicted with a constitutional right?

Chapter 4 of the Constitution of Kenya contains the Bill of Rights. This Bill is quite wide and comprehensive. It states that the rights and fundamental freedoms contained therein do not exclude other rights or fundamental freedoms that are not provided for in the Bill of Rights. These rights and freedoms not contemplated by the Bill of Rights but accepted by the Kenyan legal system are also quite ample and include those rights granted by acts of parliament, customary law and even international instruments ratified by Kenya.

Hence one can only seek recourse for a right recognized in the law, i.e. in the Constitution, an Act of Parliament, customary law, a ratified treaty, etc. At the same time, the Constitution is the supreme law of the land, thus stating a clear hierarchy of laws. Therefore, no right created or contemplated under customary law may at any time contravene or be inconsistent with the rights stated in the constitutional bill of rights. In case of contradiction, the matter is considered by the courts and treated on a case by case basis.

3. Do International Human Rights Documents applied in your country represent minimum standards that are already provided or the must-reach aims? Are there any regulations in your legal system above international human rights standards? If there are, would you please explain?

Article 2 of the Constitution of Kenya – Supremacy of this Constitution
(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
(2) No person may claim or exercise State authority except as authorised under this Constitution.

(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.
(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
(5) The general rules of international law shall form part of the law of Kenya.
(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

Article 2(5) of the Constitution incorporates the general rules of International Law in the Courts of Kenya. In *Kenya Section of The International Commission of Jurists v Attorney General & another*, the Court held that in applying International Law principles pursuant to Article 2(5) of the Constitution, the High Court in Kenya clearly has jurisdiction … under the principle of universal jurisdiction… Universal jurisdiction is the *jus cogens* obligation under international law. *Jus cogens* is defined as "a peremptory norm of general international law" accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. They render void any other peremptory rules which come in conflict with them. The Court further stated that Kenya as a state is bound by Customary International law which it cannot contravene. "Violating customary international law is intentionally violating fundamental rules of international public policy. This would be detrimental to the international legal system and how that system and the society it serves defines itself."

Further, Article 2(6) implies the transition of Kenya from being a dualist State under the repealed Constitution into becoming now a monist State. However, the Constitution failed to contain instructions on the process for signature and ratification of treaties. It neglected to define the power to ratify, which we must say, from a Constitutional practice, it is a grave omission and it makes Kenya's Constitution the first one to become monist with no instructions whatsoever on ratification. This omission also implied an unrestrained legislative power in the hands of the executive, through the principle of executive residual functions, whereby the executive could now legislate through the manipulation of the treaty making power.

Once this abeyance was in place, the gap had to be filled through subsidiary legislation as it was done by the enactment of the Treaty Making and Ratification Act, 2012. The Treaty Making and Ratification Act No. 45 of 2012 redressed this omission and put in place an appropriate process of approval prior ratification with relevant checks and balances.

However, we must point out that there has been a widespread misunderstanding of the nature of a dualism and monism. In July 2011, during the Treaties Bill discussion sessions held at the Kenya Institute of Administration in Nairobi, some participants argued that Kenya was still a dualist State and that Article 2(6) should be read in the light of Article 51(3)(b)[1]. However, this view confuses ratification of a treaty, the act of ratifying a treaty, with approval of ratification, which is an internal act. Even when Parliamentary approval may be called ratification, it should not be confused with the actual treaty ratification.

Furthermore, monism/dualism does not depend on ratification processes but rather on the manner in which incorporation or domestication of a treaty takes place. In monist systems, treaties become law of the land automatically, even if they are not always self-executing or immediately operative. Dualism, on the other hand, is not directly related to the approval the legislature usually grants before ratification, which may also be there in a monist system. Rather, it rests on the requirement of having statutory law being passed by Parliament before giving any legal internal effect to an already ratified treaty. This means that in dualists systems there is no possibility of giving internal effect to treaties unless they are translated into a statute that is passed by Parliament.

The question is then settled, not by looking at the parliamentary approvals required by the Treaty Making and Ratification Act, but rather by looking at the following fact: Does Kenya need to transform a ratified treaty into an Act of Parliament in the same fashion as it did in the past with, for example, the Geneva Conventions Act? If the answer is yes, then Kenya is dualist. If not, Kenya is monist.

We may say it in another way: Are ratified treaties, even when subjected to parliamentary approval prior ratification, part of the law of Kenya under the Constitution and therefore they need no further legislation by Parliament? If the answer yes, Kenya is monist. If not, Kenya is dualist.

In my opinion, Article 2(6) of the Constitution is clear in this regard. Any ratified treaty is part of the laws of Kenya 'under' the Constitution. Therefore, Kenya is monist and it places any ratified treaty as law of Kenya under the Constitution. There is also a relevant case, where the Court applied directly an international convention which contradicted the local Bankruptcy Act. See *Zipporah Wambui Mathara, Bankruptcy Cause* No.19 of 2010, in the matter of

[1] 51 - (3) Parliament shall enact legislation that—
(a) provides for the humane treatment of persons detained, held in custody or imprisoned; and
(b) takes into account the relevant international human rights instruments.

Bankruptcy Act Chapter 53 of the Laws of Kenya [2010] eKLR, where Justice Koome asserted that *'by virtue of the provisions of Article 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law. Thus the provision of Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of Kenyan law…' and it was applied to free Zipporah Mathara from civil jail for unpaid debts.*

It may also be important to note that the Constitutional Bill of Rights in Kenya is regarded and praised as progressive, comprehensive and people centered, with special emphasis on economic, political, social, civil and cultural rights. The Bill of Rights could be said to be at par with the highest standards of international human rights instruments.

4. In your legal system, is the jurisdiction an actor itself to move forward human rights standards? If it is, would you please explain?

Under the 2010 Constitution, the Judiciary acquired true independence, both de iure and de facto. This independence, coupled with the fact that any person in Kenya has *locus standi* for public interest matters, have made the courts quite powerful in the push for fair administrative action and discharge of public duties. The government is under the constant watch of the courts, and courts have nullified election (including presidential elections), budget decisions, expenditure projects, abuses of office, etc. There is a still a long way to go due to the fact that in several instances the government has defied court orders, but more and more we see in the courts a way to make our government accountable. Moreover, various state-created bodies move forward human rights standards. The most prominent state created body that agitates for human rights standards is the Kenya National Commission on Human Rights (KNCHR) which is an independent constitutional commission. The mandate of the Commission is quite ample. There are also hundreds of NGOs which have a recognised status and reputation. Generally, the Government respects them.

5. Are there values and issues in your country that are not covered by human rights documents but need to be protected under the concept of human rights? If your answer is yes, would you please explain?

Generally speaking, Kenya is quite compliant with international human rights standards from a legal standpoint. Certainly, there are upcoming or new generation rights (personal, environmental, etc.) which are not yet part of international customary law and therefore are also not part of the legal framework of Kenya.

6. Are there such human right regulations in the legal system of your country that is protected by the constitution but contradicts social reality and justice?

Yes, there are various rights contemplated and secured by the law but *de facto* inexistent and non-realizable due to the social underdeveloped context and the material impracticability in their achievement and implementation. For example, Kenyans have a right to the highest attainable standard of healthcare services, accessible and adequate housing, sanitation, to be free from hunger, adequate food of acceptable quality, clean and safe water in adequate quantities, social security and free education. The reality on the ground is that Kenya is still a developing country, where approximately 40% of the population live below the poverty line. This is coupled with the reality that Kenya is still a young economy where less than 40 percent of the population have access to electricity and 75 percent must dispose of their human waste in pit-latrines and another 6 percent in the bush.

7. Are there any social realities contradicting international human rights concept based on individualism?

The human person requires a social context for survival. Western ideals have focused on the individual due to the paramount interest of defending the person's dignity against historical abuses. However, more recently, the placing on the individual at the centre of the study of rights may have been erroneously seen as a contraposition or struggle against the community. This should have never been so and this has sadly developed into a furious and bitter fight between individual rights and collective rights, when both the personal and common good serve each other and are not in contradiction. Concepts based on individualism in international human rights set the human individual apart from his/her social contexts. In the African context, and so in the Kenyan one, this is not so. It is difficult and often impossible to view the person as autonomous, separate and entirely self-determining. In international human rights instruments, rights are viewed from the individual perspective; rights such as ownership of property are considered individual and often only from a man's perspective; very few international human rights address woman's rights from a community perspective. In Kenya, communal ownership of property by communities (mostly ethnicities) is one of the fabrics that hold communities together and this is jeopardised and undermined by individual ownership of land. These contextual intricacies should be taken into consideration when speaking of human rights. Yes, human rights are universal, but when projected on the society and societal relationships it must be contextualised. For example, homosexual unions may find a justification

from the point of view of individual rights and freedoms (I do what I want), but unions and more so marriage in Africa is a social concept and reality. It is not the union of two persons, but of two families and two communities. This needs to be taken into account, understood and respected; otherwise, we run the risk of jeopardising human rights application in its entirety.

8. In your legal system, are there legal mechanisms to protect human rights if fundamental rights are violated by private persons? Are these mechanisms effective?

If one alleges that a right or fundamental freedom has been breached by private persons, one may look to the courts for recourse or other alternative dispute resolutions mechanisms. The highest law in the land that gives life to the recognition of rights articulates that it is binding on all persons. The courts are effective and can provide suitable remedies with an open locus standi and wide public interest litigation. Nevertheless, we are still challenged by a slow judicial process and a huge backlog case.

9. Are there groups in your country who have their own national, ethnical, religious and linguistic identities? Could you please give some information about them (especially if you feel yourself one of them)?

National: every African tribe had a precolonization national identity. Like in Europe, every tribe was a nation with a deep and unique ethnic, customary and language identity. After the Berlin Conference of 1884-1885, the European powers brought together these small nations into one state, which lacked identification. These new entities joined hands to expel the colonizing powers, but as soon as independence was achieved the deep differences resurfaced with all their might.

Ethnic and Linguist
Kenya is a multi-ethnic state. It is inhabited by primarily Bantu and Nilotic populations, with some Cushitic, Asiatic and Arab minorities. There are over 44 tribes in Kenya, to name a few: Kikuyu, Meru Bajuni, Kamba, Kisii, Bukusu, Embu, Dholuo, Isukh, Kalenjin, Elgeyo, Kipsigis, Marakwet, Nandi, Pokot, Sabaot ,Terik, Tugen, , Kore, Kuria, Luhya, Luo, Maragoli, Marama, Maasai, Sengwer, Miji Kenda, Chonyi, Digo, Duruma, Giryama, Jibana, Kambe, Kauma, Rabai, Ribe, Ogiek, Orma, Oromo, Pokomo, Rendille, Samburu, Somali, Abasuba, Swahili, Tachoni, Taita, Taveta, Turkana, Yaaku, Makonde. Each of them has unique customs, identity, language, etc.

Religious

Kenya has numerous religions, the predominant religion in Kenya is Christianity, there also exists an Islamic and Buddhist community.

I am Kenyan national, born in Venezuela, with French grandfather and African grandmother. So, I'm united nations.

10. What is the definition of the notion "minority" according to your constitutional system? What is your opinion on this concept? Do you think that minority rights should be protected broadly by the constitutional level? Do you think that constitutional regulations that would broaden the rights of minorities will solve the conflicts between majorities and minorities?

In the Kenyan Constitution, the term 'minorities' is not explicitly used; however this bears a close correlation with the term 'marginalized group' which is provided for in the constitution. This has a socio-historical reason. Minorities here were usually privileged, for example, white settlers, the rich elite, the political class, etc. The term marginalized group was chosen as it portrays in a more accurate manner what is intended to when the world refers to minorities. Marginalized group is defined as a group of people who because of laws or practices before on or after the effective date were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4) (including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.) In Kenya, the concept of marginalised groups is important as it recognises the disadvantages faced by certain groups and the law aims to remedy such disadvantages.

11. What do you think on the notion and the concept of minority rights in international law? Could the international regulations/treatments be a response to the reality and problems of the peoples in your country? In other words, do they cover the reality in your country from the view of the state and the view of peoples?

The concept of minority rights in international law is of significant importance to the Kenyan context. It is generally accepted that there is no agreed upon definition as to which groups constitute a minority. This is treated as a question of fact derived through objective (shared language, culture, etc.) and subjective indicators (external and self-identification) of the constitution of a group.

However, the recognition of minorities in international law is quintessential for access to justice both on the national, regional and international level. This

recognition allows minorities to agitate for their rights and seek recourse where a violation has occurred. One example in Kenya was the Ndorois-Ogiek case, an ethnic minority group which was displaced from their lands around Lake Bogoria. This community took the matter to the African Commission of Human and Peoples' Rights and eventually to the Africa Court and obtained an order against the Government of Kenya for relocation.

12. What you think is the most current human rights problem in your country?

- Extra judicial killings: due to an inefficient judicial process, the police often resort to extra judicial killings of suspects.
- Refugee Rights (Dadaab and Kakuma camps) with the added complication of threats against the non-refaullment principle.
- Corruption as a violation of human rights (State responsibility for the protection and promotion of human rights). Corruption is widespread and people are often coerced to give bribes to obtain basic needs and services.

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