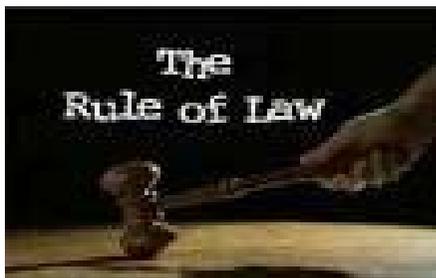




# The rule of law and human rights situation in Kenya

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# Introduction

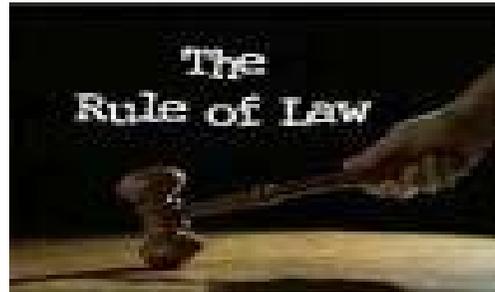
It is universally accepted that 'the rule of law' and 'respect for human rights' principles are indicators of good governance and form the foundation of a civilized society.

These concepts have crystallized internationally and regionally having been embraced by the community of states. The inclusion of these concepts in Kenya's Constitution is in itself a manifestation of their importance in modern society.

However there still remains a significant gap in relation to their full realization.



I.



Is a legal principle which requires all people and institutions including the government to act in conformity with the *law*.

The hallmarks of the rule of law include;

- a. Separation of powers i.e. Executive, Parliamentary & Judicial functions are exercised .
- b. Regularly held free and fair elections every 5yrs.
- c. Independent and impartial judiciary free of interferences from other organs of government.
- d. Free and independent and objective media, civil society and legal profession.
- e. Equality of all people before the law.



# Rule of law (Post independent Kenya)

- Kenya's post-independence record in relation to the rule of law has been varied. During the period after independence Constitutional amendments concentrated state power in the executive and weakened other state institutions creating democracy deficits e.g.
  - ✓ During single party rule by KANU 1980-1992 the proclamations by Retired President Moi was regarded as law, Single hand judicial appointments by president, monolithic parliament, prominence of Executive orders and decrees. Formation of multi-party in 1992 Amendments.
  - ✓ Elections though held regularly were not free or fair because of one party rule, mlolongo system of voting in primaries, election violence in 1992, 1997, 2002, use of state resources in campaigns, vote rigging, etc.
  - ✓ Lack of judicial independence and control of the judiciary by the Executive under Fred Apaloo (1993-94), Majid Cockar (1994-1997), Zacheus Chesoni (1997-1999) & Bernhard Chunga (1999-2003).
  - ✓ The media was controlled by the state and was often not giving independent information to the public through VOK, KBC, KTN.
  - ✓ There was vibrant and independent civil society organizations (NGOs) and opposition political parties e.g. FORD-Jaramogi & Matiba, DP-Kibaki, KSC-Anyona, etc
  - ✓ Absence of equality of all people especially in application of the law i.e. Political elite and the wealthy connected with powerful individuals violated the law with impunity e.g. Biwott, Jirongo, Gen. Mahamoud Mohammed, etc.

The upshot was democratic regression which facilitated autocracy, patrimonialism, corruption, violations of human rights, deference of state institutions to the Executive, disregard of the rule of law and, above all, the creation of a 'criminal state'.



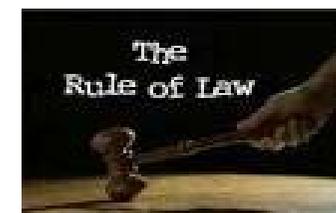
## Aftermath of rule of law under KANU regime.

The role and authority of the Judiciary declined and in some cases was usurped by other entities mainly the ruling party i.e. KANU, NARC and Grand Coalition.

Attempted coup of 1982 and detention without trial of those allegedly involved e.g. Hezekiah Ochuka & Pancras Oteyo Okumu were hanged, Raila Odinga and others detained.

Increase in nepotism, favouritism and tribalism in government appointments and promotions e.g. Ministerial, State corporations and Commissions.

Failure to guarantee and enforce the Bill of rights in the constitution resulting to torture, assassination of J.M. Kariuki -1975, Robert Ouko-1990.



# Rule of law (Post independent Kenya)

- During NARC and Grand Coalition regime.

After the 1992 repeal of Section 2(A) of the Independence Constitution multiparty politics mushroomed and enhanced democracy to create check and balances in exercise of power and rule of the law. Examples include;

- ✓ Dethroning of KANU by NARC in 2002 elections and peaceful handing of power by Moi to Kibaki was a breath of life to democracy after long clamour for change. *The question remained, Was there a real change????*
- ✓ Separation of power was enhanced between parliament and judiciary but not between judiciary and executive as Kibaki appointed Evans Gicheru as the CJ who favoured Kibaki administration and emergence of Mount Kenya Mafia.
- ✓ Elections though held regularly in 2007 and 2013 but were neither free or fair due to massive rigging claims, use of government resources and machinery by serving leaders in campaigns, vote buying and worse form of Post Election Violence in 2007-08 resulting to over 2000 killings and 300,000 people displaced and subsequent ICC indictments.
- ✓ Lack of judicial independence and control of the judiciary by the Executive leading to Ringera Report in 2003 where 5 out of 9 Appeal judges, 18 out of 36 High Court Judges and 82 out of 254 Magistrates found unsuitable to serve due to corruption, bribery, incompetence, bias and other allegations.
- ✓ Vibrant independent media like KTN, Citizen, K24 and growth of investigative journalism in Jicho Pevu & Inside Story, Case files, etc. BUT the raid and shut down of KTN in 2006 by government hired mercenaries and NTV station attack by First Lady in 2007, Royal Media signal interferences by CCK in 2009-2010.
- ✓ Reported incidences and cases of Police brutality and torture, Extra judicial killings by Police, Rise of criminal gangs like Mungiki, Kwekwe, Taliban, MRC, etc.

# Aftermath of rule of law under NARC regime.

- The role and authority of the Judiciary declined and this led to lack of faith in the judiciary and self-referral of PEV cases to ICC with Waki Inquiry envelope.
- The formation of the Grand Coalition government after the violence and dispute of 2007-08 election results.
- The promulgation of revised Constitution in 2010.
- The Waki and Krigler Commissions of Inquiry Reports on PEV.
- The formation of TJRC in 2008 to investigate and make recommendations on how to resolve historical injustices that is the cause of ethnic hatred and endemic cycle of violence in Kenya.
- Formation of inquiry tribunals e.g. Ndungu land Commission Report, Goldenberg Inquiry, Grand Regency inquiry, Tana River clashes inquiry but none of these reports have been implemented due to sectoral interests of those in power who are also adversely mentioned in the Reports.
- Increase in nepotism, favouritism and tribalism in government appointments and promotions e.g. Ministerial, State corporations and Commissions contrary to the 2010 Constitution.
- Successful handover of power from Kibaki to Uhuru Kenyatta under new Constitution in 2013.

## **Current challenges in implementing the rule of law**

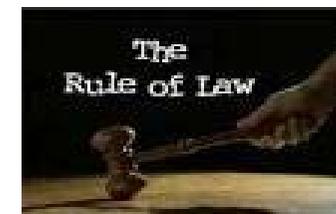
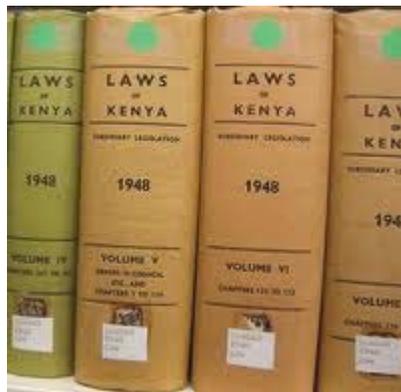
The 2010 Constitution promotes multi-party and devolved governance democracy creating remarkable shift from autocracy and central government control however many teething problems are evident through this transition period under the current Constitution.

The Judiciary has and continues to assert its independence and authority but disregard of Court decisions and orders by government is alarming.

The prevalence of corruption, impunity and bribery and lack of effective strategies to deal with the same despite sufficiency institutional framework.

The rise in poverty and competition for natural resources by neighbouring communities and continued incidences of violence.

The effect of terrorism and radicalisation of youth to participate in terror activities.



# Human rights situational analysis

Human rights is closely related to the 'rule of law' concept as an indicator of tenets of democracy and good governance.

The authoritarian regime of Kenyatta's presidency that began alienating other communities was enhanced by Moi and Kibaki regime. Though the human rights situation during the KANU governance was worse when compared to NARC/Grand Coalition regimes.

These period saw the country ruled by dictatorial tactics especially in 1982 when Kenya became a *de jure* one party state after the failed coup. Many cases of human rights violations were reported.



## The post independence human rights violations include;

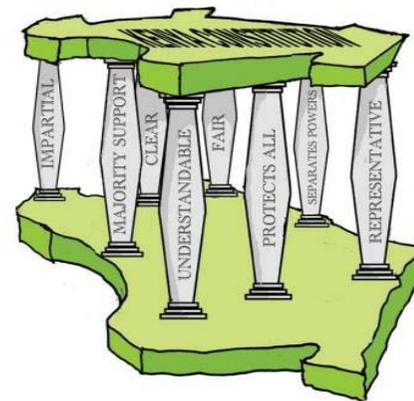
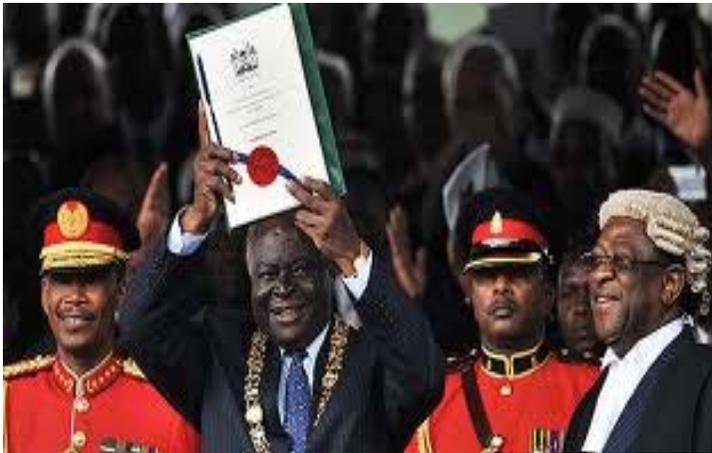
- ✓ Illegal arrests and detentions.
- ✓ Torture, inhuman and degrading treatment or punishment.
- ✓ Extra-judicial killings
- ✓ Tribal clashes
- ✓ Restrictions to freedom of speech and assembly
- ✓ Harassment and intimidation of the citizenry by law enforcement agencies.



# Scenes of human rights violations



# Post-adoption of 2010 Constitution



# Rule of law and human rights in the new Constitutional dispensation

The 2010 Constitution marked a turning point in Kenya's history as it was to radically transform the governance structure and crystallized constitutionalism while re-engineering the political, legal, social, economic and administrative structures and promoting the rule of law.



# 2010 Constitutional order

The 2010 Constitution enhances the rule of law and human rights in Kenya in the following ways:

## a. **Recognition of the Sovereignty of the People**

Article 1(1) of the Constitution, for instance, provides that ‘all sovereign power belongs to the people of Kenya and shall be exercised in accordance with this Constitution.’ In order to give effect to this principle, the Constitution provides for its supremacy and binding nature on all persons and State Organs at both the National and County levels of Government and requires them to respect, uphold and defend the Constitution.





## **b. Prescription of National Values and Principles of Governance**

The Constitution requires the Government to adhere to essential values of human rights, equality, freedom, democracy, social justice and the rule of law which bind State Organs, State Officers, Public Officers and all persons in Kenya.

## **c. Prescription of tenets of Leadership and Integrity**

One of the significant prescriptions of the Constitution is the leadership and integrity requirements for State and Public Officers. The Constitution's Chapter 6 lays the foundation for transformative and servant leadership that conforms to the tenets of integrity and good governance.

#### **d. Prescription of Broad Bill of Rights**

The Bill of Rights includes all the three generations of rights – civil and political rights; economic, social and cultural rights; and group or collective right.

The Constitution requires the State, all State Organs and other persons to observe, respect, protect, promote and fulfil the rights and freedoms in the Bill of Rights.

The Constitution has also radically changed the institutional structure of the Judiciary and its leadership and composition. It provides for vetting of proposed officers to ensure transparency and also enhances separation of powers.





# Conclusion

Based on the foregoing discourse, one may be tempted to believe that the path to the realisation of the rule of law and human rights in Kenya is without any obstacles, and that all stakeholders have embraced them.

Nothing can be further from the truth. The path to the realization of these principles has not been and will never be smooth. A number of challenges still exist and their impact is evident in Kenya.

Some of the challenges, in this regard, include failed leadership, widespread tribalism, little respect for state institutions, little appreciation of the place and role of new state organs, the culture of impunity, disregard of court orders.



We have an opportunity, individually and collectively, to lead our society towards the realisation of the rule of law and human rights.

There is no doubt that we have the capacity and capability to make a positive mark in Kenya. Let us rise to the occasion for this is the legacy that we can bequeath our society.

**Asanteni sana !!!!!!!**

