

**AN ANALYSIS OF THE CHALLENGES OF IMPLEMENTATION THE RULE OF
LAW IN EAST AFRICAN COUNTRIES**

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ABSTRACT

The East African Community (EAC) comprises of the following Countries Kenya, Uganda, Rwanda, Tanzania, Rwanda, Somalia, Democratic Republic of Congo and Burundi. For a country to be admitted to the EAC, it must subscribe to the universal principles of good governance, democracy, and the rule of law.¹ This paper outlines the definition of the rule of law and the elements of the rule of law. It also seeks to highlight the factors undermining the implementation of the rule of Law across the EAC. The term 'rule of law has attracted different meanings and corollaries, however, for purposes of this paper, a definition that encapsulates the primacy, gist and spirit of the rule of law is "a set of principles, or ideas, for ensuring an orderly and just society." The paper concludes that despite the entrenchment of the concept of the rule of law in the Constitutions of most East African Countries less has been done to promote its implementation. This paper explores some of the legal, ethical and practical challenges facing the implementation of the rule of law in East African Countries.

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¹ Art. 3, East African Community Treaty.

INTRODUCTION

The *locus classicus* concept of the Rule of Law as coined by the British Jurist, A V Dicey incorporates distinct meanings of the rule of law. First, it acknowledges the absolute power of the law, dominance and its supremacy.² Furthermore, it provides for equality before the law whereby the ordinary rule of law administered applies to all persons irrespective of one's caste. Finally, the concept provides for the spirit of legal sovereignty. The rule of equality before the law implies that governance should be conducted within a framework of recognized rules and principles restricting discretionary powers while that of sovereignty underscores the independence of the judiciary and the supremacy of the courts.

Under the rule of law, no person is above the law; everyone is accountable to the same laws. Furthermore, laws are clear laws and the processes of enforcing laws; an independent judiciary and human rights are guaranteed for all.” The principle of legality, within which public deeds unfurl according to the procedures laid down, forms the heart and soul of the rule of law.³ The duty to obey the law by all individuals and institutions forms the cornerstone of the rule of law and the administration of justice.⁴

In a sitting in Geneva (1959), the International Coalition of Jurists highlighted the indicators of the rule of law in a setting. The indicators include [1] the existence of government representatives who are democratically elected by the people, [2] existence of a government that is guided by rules and laws, [3] Equality of persons before the law, [4] Independence of the judiciary, [5] protection and observance of Human Rights, [6] supremacy of the Constitution, [7] Observance of International Laws, [8] Social Justice for individuals, [9] Fair Criminal Process, [10] Existence of a strong effective government.⁵

² <https://www.legalserviceindia.com/article/I459-Rule-of-law.html> <accessed 12 October 2023>.

³ International Institute for Democracy and Electoral Assistance, ‘Challenges to the Rule of Law; Workshop Report,’ (2016) Student Paper Submitted to Kenyatta University.

⁴ *Hon. Martin Nyaga Wambora & Another v Justus Kariuki Mate & Another* [2014] eKLR.

⁵ International Community of Jurists: The Rule of Law in a Free Society: A Report on the International Congress of Jurists, New Delhi, India January 5-10, 1959

CHALLENGES OF IMPLEMENTATION OF THE OF THE RULE OF LAW IN EAST AFRICA.

A. Transnational Organized Crimes (“TOC”) and Violence

Transnational Organized crimes in East Africa manifest in various forms including human and narcotics trafficking, arms trafficking, smuggling in flora and fauna, piracy, cybercrime, the existence of criminal markets-financial crimes, Widespread violence in the form of riots, demonstrations accompanied by violence and mutiny insurrection undermine the rule of law.⁶ There is an eruption of hybrid criminal groups engaging in transnational organized crime and armed conflicts in the fragile East African Countries. Groups engage in organized crimes for profit or financial gains.

Cases of drug trafficking are heightening in Kenya making the country a critical transit and destination point for narcotics, including heroin and cocaine.⁷ Drug trafficking has corrupted Kenya's politics thus undermining the country's peace building as drug kingpins are elected into power. This creates a leeway for the commission of crimes like small arms trafficking, wildlife poaching, cattle rustling and charcoal trafficking. Drug trafficking in Kenya is being encouraged by the lack of patrol at the coastline, and the convergence of political crime and illicit businesses. Terrorist groups like Al-Shabaab thrive through the commission of transnational organized crimes such as the illicit trafficking of charcoal to the Persian Gulf countries. According to the report authored by the Global Initiative Against Transnational Organized Crime (GI-TOC), criminal markets such as human trafficking and weapons trafficking have seen an increase throughout the continent over the past five years.⁸ Further, the report indicates that from 2021 to 2023, East Africa's resilience has experienced a slight decline, which can be attributed primarily to the persistent instability in the region. Notably, Eritrea, Somalia, and South Sudan are some of the least crime-resilient areas in the African continent.

In summary, TOC weakens the rule of law. Furthermore, TOC reinforces the concatenation between corruption and insecurity.

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⁷ Simone Haysom, Peter Gastrow, and Mark Shaw “The Heroin Coast: A Political Economy along the Eastern African Seaboard,” *ENACT*, no 4 (June 2018), <https://enact-africa.s3.amazonaws.com/site/uploads/2018-07-02-research-paper-heroin-coast.pdf> <accessed on 12th December, 2023>.

⁸ <https://adf-magazine.com/2023/12/sobering-report-links-governance-failures-to-growth-in-organized-crime/> <accessed on 12th December, 2023>

B. Regular, Violent and Fraudulent Elections

Elections in East African countries are accompanied by fraud and violence which includes the death of electoral officials.⁹ In Burundi elections are abetted with intimidation, violence and widespread impunity which consequently weaken the role of the media, opposition parties and civil society.¹⁰ Pending tensions and pre-election violence unnerved the return of refugees to Burundi in 2020.¹¹ The opposition parties in East Africa have been harassed and violence perpetrated against them before or after elections while journalists and media personalities are methodically oppressed, threatened and intimidated by the ruling governments across East Africa.

In Kenya Election Violence remains a major challenge despite the various attempts made to end it. Several citizens within East Africa do not cast their votes as they flee their own countries just before elections for safety reasons.¹² In Tanzania, Presidential elections cannot be challenged in a court of law.

C. Challenges of Poverty, Culture and Illiteracy-Inequalities?

In Africa, the rule of law is hindered by a mixture of underlying factors culture, colonial-era laws, and religious practices. Gender inequality is profound in matters of land in East Africa. According to the patriarchal African culture, women are not allowed to own property. Despite the establishment of several legislations on succession matters providing for inheritance of estates to all children including women, culture has not allowed that to happen. This has perpetuated poverty among women thus disadvantaging them. Further, most women do not know their legal rights.

⁹ Christopher Musando, head of Information, Communication and Technology in the IEBC was killed just before the elections were conducted; see <https://www.brookings.edu/articles/kenya-presidential-elections-and-the-rule-of-law>. Accessed 30 November 2023.

¹⁰Burundi Report 2022, available at <https://bti-project.org/en/reports/country-report/BDI>. Accessed 28 October 2023.

¹¹ *ibid*

¹² According to the UNHRC, there were approximately 314, 523 Burundian Refugees in Tanzania, Rwanda, Burundi and DRC at the end of 2020. See Burundi Report 2022.

While cases of government officials acting *ultra vires* contrary to the rule of law are rampant, a larger percentage of the population in East African Countries have no idea that they can hold their governments responsible. The citizenry's lack of knowledge creates a leeway for governments to act *ultra vires*. Further, most illiterate individuals lack awareness of their human rights. The poor populations are unable to afford the exorbitant court legal fees thus a hindrance to their access to justice.

D. Corruption

According to the United Nations Convention Against Corruption, "corruption is an insidious plague that undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crimes, terrorism and other threats to human security to flourish."¹³

Corruption in the Eastern Africa Region forms the greatest hindrance to the implementation of the rule of law; it feeds inequality and injustices contributing to marginalization and radicalization. Corruption is an affront to access to justice. Most government officials in East Africa do not have the interests of the citizenry in their hearts. As such, they always find a way to sidestep the rule of law by acting contrary to law provisions.

Cases of individuals bribing judges and advocates to drop cases or rule in their favour are on the rise.¹⁴ The EAC is largely comprised of 3rd World countries which implies that a large segment of the population is unable to afford finances to pay judges and lawyers who are on sale. This limits their ability to access courts to rightfully seek justice. In addition, some court cases may take over a decade before they are heard. The dearth of availability of courts in rural areas where a great percentage of citizens reside leads to the creation of angry and impoverished populations incapable of making any impactful development since marginalized groups like women are severely excluded from inheritance in land disputes.

¹³ United Nations Convention Against Corruption, Foreword.

¹⁴ How the Kenyan judiciary has contributed to undermining the rule of law: DEXTER ADAKI. <https://theplatform.co.ke/how-the-kenyan-judiciary-has-contributed-to-undermining-the-rule-of-law/> <accessed on 30th November, 2023>

In Kenya, the illegal grabbing of land by corrupt cartels is being faithfully and diligently supported by the set laws.¹⁵ This defeats access to equity and social justice which is a core value of the rule of law.

E. Politics Pressures and Intimidation on the Judiciary and the Media

In East Africa, Executive dominance makes it hard for the weak judicial systems to implement laws and policies. Judicial independence is being interfered with by intimidation and political pressures imposed on the judiciary and the media. While most laws in East Africa are a manifestation of the rule of law, their implementation is hindered by intimidation and political pressures.

Some governments view the laws enacted as obstacles to the attainment of their self-interests and hence have successfully circumvented them. The force of law has been weakened by systematic impunity and lawlessness.¹⁶ The judiciary cannot effectively enhance access to justice as Judicial Officers are inappropriately pressured to drop cases.

While the media is putting effort into exposing corruption incidences, the right to press is limited by certain laws. In Uganda, the civil society and media face both legal and extralegal harassment. This hampers the ability of the media to effectively work on eliminating corruption. Incidences of harassment faced by journalists in the hands of police and politicians are never investigated to bring the perpetrators into the hands of courts for the administration of justice to victims.

In some countries, the process of appointing and dismissing judges is illegitimate or is influenced by politics thus encouraging political partisanship among judges. Judicial democracy is undermined by the lack of legal capacity to engage in the technicalities of securing the law.¹⁷

F. Violations of the doctrine of separation of powers

¹⁵ Roger Southall, 'The Ndung'u Report: Land and Graft in Kenya,' *Review of the African Political Economy* 32, no. 103 (March 2005) (Reviewing the Report of the Commission of Enquiry on the illegal/irregular allocation of public land in Kenya.)

¹⁶ Kenya Justice Sector and the Rule of Law by Patricia Kameri Mbote and Migai Akech.

¹⁷ International Institute for Democracy and Electoral Assistance: "Challenges of the Rule of Law in Africa" Workshop Report 12-13 April 2016 Pretoria South Africa.

The rule of law provides for the doctrine of separation of powers whereby the three arms of government are deemed to be distinct and separate. The implementation of this doctrine has proved challenging in East Africa for instance in Uganda where individuals have been appointed to serve dual purposes ie that of the executive and the judiciary at the same time. The process of appointing judges of the High Court and those of the Courts of Appeal is neither transparent nor competitive. Executive dominance in judicial systems has interfered with the process of appointing judges. The existence of political tensions has created divisions among members of the Judiciary thus depressing the judicial system.

The lack of integrity in the electoral process has hampered the Judiciary's role; an effective platform has not been created where citizens can seek accountability from their leadership on issues of underperformance and misuse of power.

On one part judicial procedures are violated regularly and on the other part victims' rights are threatened in the course of seeking justice.¹⁸

G. Contempt of court

According to the Black's Law Dictionary Contempt of Court denotes "conduct that defies the authority or dignity of a court or legislature." Non-adherence to court orders is so common in East Africa and courts are reluctant to take any action¹⁹. As it has been noted before, the disobedience of court orders creates an array of anarchy bringing the judicial system's administration into scorn.²⁰ Ultimately, it destroys society since each person may opt to take the law into his own hands.²¹ Contempt of court stripes off the court's power to deliver its constitutional mandate. The contempt of court challenges the supremacy of the law by obstructing the administration of the law hence a hindrance of access to justice. Jurisprudence has held that the rule of law is un-

¹⁸ <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-11/key-issues/3--the-right-of-victims-to-an-adequate-response-to-their-needs.html> <accessed on 3rd November, 2023>

¹⁹ Patricia Kameri Mbote and Migai Akech, *ibid*.

²⁰ *Canadian Metal Co. Ltd v Canadian Broadcasting Corp (No.2)* [1975] 48 D.L.R (30).

²¹ *Ibid*.

dermined by the disobedience of court orders.²² The courts within East Africa seem not to have the force to enforce court orders.²³

H. ABUSE/MISUSE OF POWER-IMMUNITY OF GOVERNMENT OFFICIALS

Cases of both governments and government agencies acting *ultra vires* are on the rise in East Africa.²⁴ The immunity granted to some specific government officials for instance heads of state makes it easier for these officials to act in ways that benefit them.

Abuse of power through the interference of other organs in the activities has led to the violation of the rule of law in East African Countries. A good example can be derived from the case of *Uganda v Bisigye*, where the Defendant was granted bail by the court and upon orders issued by the executive, the military surrounded the court to re-arrest Kiiza Bisigye to be tried in court martial.²⁵ This is a clear violation of the doctrine of the independence of the judiciary which is an element of the rule of law.

Despite the existence of laws meant to protect citizens from arbitrary state actions, the human rights and civil liberties of citizens are in some cases violated as people are arrested and jailed for no good reason. This is so common, especially for the members of the LGBTQI community who have been harassed by the police, and subjected to body examinations as "proof" of gay sex.²⁶ They have faced insults openly on social media platforms and in public spaces. The fact that this happens when constitutions for East African States provide for the need to protect all citizens and to endorse their constitutionally enshrined rights. In Uganda, gay and lesbian arrangements have been criminalized.

²² *Abbeybarn Limited v Infinity Gemstones Limited* [2000] KLR 220.

²³ Patricia Kamore Mbote & Migai Akech, *Kenya Justice Sector & the Rule of Law, Discussion Paper* (Open Society Initiative For Eastern Africa 2011).

²⁴ Misuse of power with impunity is prevalent in Burundi.

²⁵ *Uganda v Kiiza Bisigye*, High Court Criminal Case No. 95 [2005].

²⁶ "Kenya Wrong to ban LGBT rights group from registering- Supreme Court- BBC News" <<https://www.bbc.com/news/world-africa-64491276.amp>>: www.rsisinternational.org <accessed on 2nd September, 2023>

State agencies such as the police departments have exhibited brutality and impunity at their highest in Kenya and Uganda. Furthermore, unprecedented police violence is also another vein of acting ultra vires by the police. This is evident in Kenya where during demonstrations by citizens over the high cost of living, the Police unreasonably deployed and attacked the demonstrators with live bullets and ammunition leading to the loss of innocent lives actions that have been condemned by human rights groups.²⁷ This happened despite the recognition of the various human rights including the right to life, peaceful assembly, association and freedom and freedom of expression by the Kenyan Constitution, and international treaties like the African Charter on People and Human Rights as well as the International Convention on Civil and Political Rights.²⁸

CONCLUSION

In conclusion the rule of law should be implemented in its proper context and in accordance with its aspirations. Comprehensive and Coordinated efforts through the governments, civil society and International Organizations are need to strengthen measures of addressing the challenges discussed herein. Combined effort is required to strengthen the aforesaid entities and to enhance legal frameworks, and promote a culture of accountability and respect for the rule of law.

²⁷ “Africa News |Kenya: Opposition holds vigil for Victims of Police Violence” <https://www.africanews.com/amp/2023/07/27/Kenya-opposition-holds-vigil-for-victims-of-police-violence/> <accessed 2nd Sepetmber 2023>

²⁸ “Kenya: End Abusive Policing of Protests |Human Rights Watch” <https://www.hrw.org/news/2023/05/31/kenya-end-abusive-policing-protests> <accessed on 12th December, 2023>

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- United Nations Convention Against Corruption.

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