CONSTITUTIONAL LAW II LLB I

Part 1 is taught by Prof Ben Sihanya; Part 2 by Dr Kiarie Mwaura (as indicated in the relevant sections)

Prof Ben Sihanya, JSD (Stanford)
Scholar, Intellectual Property, Constitutionalism, and Education.
University of Nairobi Law School
Parklands Law Campus, Room B10
Box 1313, Sarit Centre, 00606 Nairobi, Kenya
Telefax (+254-20)2128272; +254 726020082 (O)
Email: sihanya@innovativelawyering.com; sihanya@sihanyamentoring.com (use both)
url: www.innovativelawyering.com

1. **Title of Course:** Constitutional Law II

2. **Contact Hours:** 45hrs

3. **Objectives of the Unit:**

Constitutional Law II intends to impart skills, knowledge, attitudes and values (SKAV) in three major areas. These include:

1. Constitutional, social and political theory, values and principles with specific reference to Kenya; and the role of constitutional theory, principles, doctrines, and law or rules in political, social, cultural and economic organization, as well as in nationhood and development in Kenya.
2. Knowledge of the rules of law – especially constitutional and related judicial rules including the Bill of Rights;
3. Knowledge of the constitutional and related administrative law regarding the machinery of government- including the organization and operation of the Executive, Parliament, Judiciary; as well as Constitutional Commissions and independent offices; political parties; administrative agencies, quasi-judicial tribunals, relevant civil society organizations (CSO’s) and non governmental organizations (NGO’s)…

4. **Expected Learning outcome(s)**

1. That at the end of the semester students appreciate Constitutional, social and political theory, values and principles with specific reference to Kenya;
2. That the students acknowledge and appreciate the significance of the rules of law – especially constitutional rules;
3. That the students appreciate the role of constitutional theory, principles, doctrines, and law or rules in political, social, cultural and economic organization, as well as in nationhood and development in Kenya.
4. That students be in a position to critically analyze and interrogate the role of constitutional and related administrative law regarding the machinery of government (the organization and operation of the Executive, Parliament, Judiciary; as well as Constitutional Commissions and independent offices; political parties; administrative agencies, quasi-judicial tribunals, relevant civil society organizations (CSO’s) and non governmental organizations (NGO’s)…

5. Course content
The following are some of the themes and topics that constitute the content of the Constitutional Process curriculum –

1. Defining constitutional process
2. Constitutional values, principles and safeguards in Kenya: issues in political analysis of constitutional systems:
   (a) What are constitutional values? Safeguards?
   (b) Democracy and constitutionalism
   (c) Representative government and democracy;
   (d) The basic division of powers: horizontal separation of powers; two-tier Parliament; devolution of powers; independence, impartiality, accountability, and competence of the Judiciary.
   (e) The rule of law;
   (f) Fundamental rights, liberties and freedoms (the Bill of Rights)
   (g) Equal protection: nationality and citizenship; race, ethnicity, class and gender.
   (h) Autochthony: What is an autochthonous Constitution? How can a constitution be home grown? Legitimate? The people, and their values; wananchi, “Wanjiku, Amina, Akinyi, Naliaka, Mwikali, Chemutai …,” The myth of Africanity, etc
   (i) Law in development; law and rights; access to and control of resources: finance, land, technology (IP and innovation in constitutionalism);
   (j) Academic freedom: academics, students and the social and political process. Democracy: the politics of the constitution, and quest for (political and social) legitimacy and autochthony.
3. Separation or division of powers or functions, and checks and balances [limited or efficient/facilitative government?]
4. Machinery of Government; the machinery of governance; the formulation, interpretation and implementation (or execution) of law; service delivery; the administration & governmental process; separation of powers; checks and balances in practice
5. Executive power of the Kenyan State
   - The presidency
   - The premiership
- The Vice President
- The Cabinet
- The Administrative Bureaucracy
- The Commissions and Independent Offices

6. Decentralisation of executive, administrative and parliamentary powers under the Constitution 2010

7. Legislative power of the state

8. Judicial power

9. Bill of Rights, constitutional applications and references, judicial review, ordinary litigation, and prosecution(s); original and appellate jurisdiction, etc

10. Constitutional breakdown; cf. failed states

11. Control of Public Powers: interagency checks and balances; CIOC; Commissions: (CIC, PSC, JSC, TSC, KACA/KACC, EACC)

12. Beyond the three arms of government: – political parties, coalitions, NGOs, tribunals, commissions of inquiry, etc...

6. Learning and teaching methods
The learning and teaching methods include class lectures, discussions; Lecturer-student(s) consultations; use of teaching materials and notes; further research by students and lecturer outside class work; blog spot...

7. Instruction materials and equipment
These include:

1. Verbal communications in class- lectures
2. Course outlines (annotated)
3. Syllabus of issues
4. Use of notices
5. Direct lecturer-students communications (verbal)
6. Use of letters and advisory notes
7. Books, articles, cases and casebooks, CD’s and DVD’s. See also core texts (item 8 below).

The equipment and facilities include, black/chalk boards; white boards; LCD projectors; laptops; extension cables; internet; cell phones…

8. Mode of assessment
1. Continuous Assessment Tests (CATs) through course work assignments
2. In class assessment
3. End of semester examinations
9. Core texts

NB: A summarized list of core reference and reading materials, books, articles are provided in every topic as per the course outline.


8. Further reference and reading materials

NB: A summarized list of further reference and reading materials, books, articles are provided in every topic as per the course outline.


4) Mary Adhiambo Mbeo & Oki Ooko Ombaka (eds) (1989, 1997) *Women and Law in Kenya: Perspectives and Emerging Issues* Public Law Institute, Nairobi (feminist perspectives on constitutional law, etc)


23) Kathleen Sullivan & Gerald Gunther (2003) *Constitutional Law* Foundation Press, New York (This is a major text on American constitutional law. See also latest edition)


32) S. E. Finer (1979) *Five Constitutions* Penguin, Harmondsworth (UK)


Prof Ben Sihanya, JSD (Stanford)
Scholar, Intellectual Property, Constitutionalism, and Education.
University of Nairobi Law School
Parklands Law Campus, Room B10
Box 1313, Sarit Centre, 00606 Nairobi, Kenya
Telefax (+254-20)2128272; +254 726020082 (O)
Email: sihanya@innovativelawyering.com; sihanya@sihanyamentoring.com (use both)
url: www.innovativelawyering.com
CONSTITUTIONAL PROCESS COURSE OUTLINE AND TEACHING MATERIALS
LLB I, Second Semester, 2011/12 Academic Year
Revised June 29, 2012

Prof Ben Sihanya, JSD (Stanford)
Scholar, Intellectual Property, Constitutionalism, and Education.
University of Nairobi Law School
Parklands Law Campus, Room B10
Box 1313, Sarit Centre, 00606 Nairobi, Kenya
Telefax (+254-20)2128272; +254 726020082 (O)
Email: sihanya@innovativelawyering.com; sihanya@sihanyamentoring.com (use both)
url: www.innovativelawyering.com

Revised March 2012
TABLE OF CONTENTS

Course Description (summary)
A. Lectures

B. Basic Course work and sample questions
   B.1 Preparation of Coursework Essays
      B.1.1 Rules of Law
      B.1.2 Identifying Relevant Issues
      B.1.3 Depth of Analysis
      B.1.4 Use of the Works of Others
      B.1.5 Format of Essays

C. BASIC READING MATERIALS

D. BASIC WORKS OF REFERENCE
   D1 Basic Books
   D2 Constitutional and statutory materials
   D3 International and regional instruments with constitutional significance in
      Kenya, the UK and the US
   D4 UK constitutional instruments
   D5 Political party and other constitutions
   D6 Constitutional instruments from other countries
   D7 Coalition Government instruments- Kenya
   D8 Constitutions of pressure groups and relevant social welfare groups
UNIVERSITY OF NAIROBI LAW SCHOOL

CONSTITUTIONAL PROCESS: COURSE OUTLINE AND TEACHING MATERIALS,
LLB March 2012 (Semester II)

1. COURSE DESCRIPTION (summary)

This course focuses on Constitutional Process. In the first semester you studied Constitutional Theory. The two are closely linked, and the articles cited or distributed in the First semester are still very relevant. We intend to impart skills in four major areas. These include:

5. Constitutional, social and political theory, values and principles with specific reference to Kenya;
6. The significance of the rules of law – especially constitutional rules;
7. The role of constitutional theory, principles, doctrines, and law or rules in political, social, cultural and economic organisation, as well as in nationhood and development in Kenya.
8. The constitutional and related administrative law regarding the machinery of government (the organisation and operation of the executive, legislature, judiciary; political parties; as well as CSOs, NGOs, administrative agencies, quasi-judicial tribunals, relevant civil society organizations, etc)

In drafting this Course Outline and Reading List I have benefited from the work of Justice (Prof) J.B. Ojwang who for long taught the subject and who now sits on the Supreme Court Bench.

Abbreviations and Acronyms (some common ones)

A-G Attorney-General
CAJ Commission on Administrative Justice
CEO  Chief Executive Officer
CIC  Commission for Implementation of the Constitution
CIOC  Constitutional Implementation Oversight Committee
CJ  Chief Justice
CKRC  Constitution of Kenya Review Commission
COMESA  Common Market for Eastern and Southern Africa
CRA  Commission for Revenue Allocation
CS(O)  Civil Society (Organisation)
DPP  Deputy Public Prosecutor
DPP  Director of Public Prosecutions
EACC  Ethics and Anticorruption Commission
EALS  East African Law Society
E-LSRCC  Expanded Legal Sector Reform Coordinating Committee
GJLOS  Governance, Justice, Law and Order Sector
GNP  Gross National Product
ICJ Kenya  Kenyan Section of the International Commission of Jurists
IEBC  Independent Electoral Boundaries Commission
IPPG  Inter Parties Parliamentary Group (Kenya)
J  Judge
JA  Justice of Appeal
JSC  Judicial Service Commission
KACA  Kenya Anti Corruption Authority (defunct)
KACC  Kenya Anti-Corruption Commission (defunct)
KANU  Kenya African National Union
KLRC  Kenya Law Reform Commission
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>KNHREC</td>
<td>Kenya National Human Rights and Equality Commission</td>
</tr>
<tr>
<td>KNHRC</td>
<td>Kenya National Human Rights Commission</td>
</tr>
<tr>
<td>KUDHEIHA</td>
<td>Kenya Union of Domestic, Hotel, Educational Institutions, Hospitals, and Allied Workers</td>
</tr>
<tr>
<td>LSK</td>
<td>Law Society of Kenya</td>
</tr>
<tr>
<td>LSRCC</td>
<td>Legal Sector Reform Coordinating Committee</td>
</tr>
<tr>
<td>MP</td>
<td>Member of Parliament</td>
</tr>
<tr>
<td>NARA</td>
<td>National Accord and Reconciliation Act, 2008</td>
</tr>
<tr>
<td>NARC</td>
<td>National Rainbow Coalition</td>
</tr>
<tr>
<td>NCC</td>
<td>National Constitutional Conference</td>
</tr>
<tr>
<td>NCIC</td>
<td>National Cohesion and Integration Commission</td>
</tr>
<tr>
<td>NGO</td>
<td>Non Governmental Organisation</td>
</tr>
<tr>
<td>PA</td>
<td>Provincial Administration</td>
</tr>
<tr>
<td>PSC</td>
<td>Public Service Commission</td>
</tr>
<tr>
<td>PSC</td>
<td>Parliamentary Service Commission</td>
</tr>
<tr>
<td>SRC</td>
<td>Salaries and Remuneration Commission</td>
</tr>
<tr>
<td>TI (Kenya)</td>
<td>Transparency International (Kenya)</td>
</tr>
<tr>
<td>TI</td>
<td>Transparency International</td>
</tr>
<tr>
<td>TJRC</td>
<td>Truth, Justice and Reconciliation Commission</td>
</tr>
<tr>
<td>TRC</td>
<td>Truth and Reconciliation Commission</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>UNTESU</td>
<td>Universities Non Teaching Staff Union</td>
</tr>
</tbody>
</table>

**A. LECTURES**
One lecture a week is the norm; but an exception could be made where necessary. The lecture sessions give the lecturer an opportunity, first, to bring to the attention of the students the substance of the material that forms the core of the courses; and second, to apprise the students of relevant analytical perspectives. From these presentations the most topical or compelling issues will readily suggest themselves. The lectures are accompanied by class discussions to afford the students an opportunity to follow up such issues.

B. COURSEWORK AND SAMPLE QUESTIONS

I have designed model questions which should guide discussions, and for coursework submittal. Please note the importance of coursework, for your overall assessment at the end of the course. One failing to submit coursework, will have to be assessed solely on the basis of the formal examination. A course work or a sitting CAT will be administered as occasion demands.

B. 1 Preparation of Coursework Essays

B. 1.1 Rules of law

The main focus of most of the questions will be legal and institutional. The first principle to be observed is that of relevance. The question must be well understood, and all discussion must be relevant to its primary concern. It is not possible to analyse a rule of law unless one knows and states the rule itself. Once this has been clearly and concisely stated, one may then proceed to explain its various facets and to bring out any ambiguities, obscurities, contradictions or potential difficulties – insofar as these are demanded or necessitated by the question itself.

However, it must at the same time be remembered that a rule of law operates in reality. It works within the framework of important institutions and policies. These are to be concisely set in place, according to the nature of the question and its specific demands. But, it should be noted that one will have failed to do a proper or acceptable legal analysis, if all one did was to address oneself to political, economic or other general issues (which are better understood in other disciplines such as political economy; and which have their scholastic requirements not to be over-looked), without also saying what the relevant constitutional or legal position is, or how it fits into the broadest societal context. The analysis would then not be a constitutional or legal
analysis, because it would be saying little about the constitutional or legal question to which one is expected to address oneself.

**B.1.2 Identifying relevant issues**

Whenever a problem-type question is to be answered, or an essay is to be written, the first task is to identify the main issues which must have been contemplated by the examiner. If a question would entail some remarkable ambiguity or absurdity, this must also be identified, before an answer is attempted. The answer, in a situation where ambivalence, an ambiguity or absurdity exists, should respond in a manner that suits the situation posed by the ambiguity or absurdity.

In carrying out the discussion, one should follow some systematic (or “natural”) course. For example, something that falls before another in historical sequence should be discussed in the order – unless some other mode of classification has consciously been adopted. Discussion could also follow an arrangement by logical themes; or it could follow the order of importance – in terms of the ultimate argument of the study. At any rate, the more fundamental matters should be discussed before the relatively minor ones. Once a clear framework of discussion has been conceived, it is desirable to commit oneself to it, and to avoid wandering tendencies.

An effective presentation centres on the more eminent ideas and situations, as nobody wants to spend long periods perusing a whole lot of inconsequential details which have usurped the place of the real issues. It is desirable, therefore, to be selective on examples, once a uniform framework and background have been laid. The definitely trifling facts and details should be overlooked and those which may have some significance, albeit marginal, should be footnoted. The logical flow of the argument should not be interrupted by ill-planned graftings, nor by abrupt downgrading of important material from text to footnote.

**B.1.3 Depth of analysis**

As far as possible, each issue, once identified, should be exhaustively dealt with. It is desirable that all ideas should be expressed simply and clearly, but with imagination and originality. All general principles and all reflections should be brought down to specific illustration, using concrete case law, fact-situations or anecdotes in the context of the three key types or methodology of authorities: Constitutional or statutory text, case law or judicial decisions or authority, and academic or juristic authority. In case analyses, it is instructive to use the methodology of Issues, Facts, Law, Analysis and Conclusion approach (IFLAC).

**B.1.4 Use of the works of others**

It is expected that students will make it their most basic scholastic duty to familiarise themselves with all the authoritative works in the discipline in general, and on the specific topic involved in their subject. If they do not do this, their “knowledge” will be only insecure and general; the relevant material which sets the art will not have formed part of them, and they will be unable to relate to it.
It follows that students, in the course of preparing their written work, will have to make reference to the important works that address their subject and their topic of research. It is tempting, and indeed is a common pitfall among students, to use a writer’s work without having the modesty or decency to cite the source, or to acknowledge the intellectual indebtedness. Such conduct is known as plagiarism and is the most serious scholastic offence a person can ever commit. It also constitutes copyright infringement, which is a civil wrong and a criminal offence. Not only does it take away the validity of the study being offered; it also shows the person concerned as intellectually inept, dishonest and parasitic.

Students should adopt the culture of intellectual honesty and courtesy. When you use someone else’s work, for example by extracting a part of it, or paraphrasing from it, you have a duty to cite the source of your facts, or of the inspiration for the argument you are proffering.

It should also be noted that long quotations of other people’s works will not make an effective essay. Any quoted source must be used only as an aid to your independent assessment and commentary.

As a related point you should note that, since the question formulated for you will presuppose original thinking, chunks of a text-book or other material which will not adjust to suit the expectation of the examiner are unlikely to furnish an effective answer. Hence quotations, in their length, must be as sparing as possible.

B.1.5 Format of essays

The question must be answered in all its parts. Presentation must be clear and concise, not exceeding the indicated pages in length. This may include your reference section (i.e.) footnotes), which can be as detailed as may be necessary. All sources of references used must be fully documented in footnotes with all citations in standard form. Careful preparation must precede the writing-up. The essay must be neatly planned. Writing must be legible. And presentation must be in good grammatical form.

C. Basic reading materials (see also course outline and readings prepared for Comparative Constitutional Law, revised 28/2/2012)

The following are essential materials which all students should acquire for their own use, or have ready access to –

(a) Constitution of Kenya 2010
(b) 1969 Constitution of Kenya with all amendments to date.
(c) Constitution of Kenya (Amendment) Act 2008
(d) National Accord and Reconciliation Act, 2008
(e) Constitutions of the registered political parties.
(f) National Assembly Booklet.
(g) Statutes relating to National and Civic elections.
(h) Statutes relating to Political Parties, e.g. Political Parties Act 2011(also 2009), Societies Act, etc. (cf. Political Parties Bill, 1995 ….)
(i) Elections Act, 2011; IEBC Act 2011; National Assembly and Presidential Elections Act, Cap. 7 (repealed and replaced)
(j) Constitution of Kenya Review Act, Cap. 3A

D. Basic works of reference

Certain works of reference have a relevance to the basic core of the course, which requires that students should have ready access to them. The following list (which does not pretend to be exhaustive) may serve as a guide:

D1. Basic books and Articles

No single textbook adequately addresses the issues in this course. Students should consult those in the following list, and especially Ghai & McAuslan (1970), Ojwang (1990), Nwabueze (1973), Nwabueze (1974), Nwabueze (1977), Paul Craig (2008; 2010) and Paul Jackson & Patricia Leopold (2001) (No. 20 below). Some important readings, including those cited in the various sections, are available in the Law Library, as well as in the boxes and files bearing the following names: Okoth-Ogendo, J.B. Ojwang, Githu Muigai, Ben Sihanya (see Ben Sihanya: Constitutional Studies), etc.

Below we cite some of the key materials. We have cited other materials and indicated in the Course Outline where some of these books are absolutely important.


**Other Reference Materials**


48) Mary Adhiambo Mbeo & Oki Ooko Ombaka (eds) (1989, 1997) *Women and Law in Kenya: Perspectives and Emerging Issues* Public Law Institute, Nairobi (feminist perspectives on constitutional law, etc)


67) Kathleen Sullivan & Gerald Gunther (2003) *Constitutional Law* Foundation Press, New York (This is a major text on American constitutional law. See also latest edition)


See also materials and statutory instruments cited in Ben Sihanya, “The quest for legality, validity, and legitimacy in Kenya’s constitutional review, 1964-2010,” working paper presented at the Kenyan Section of International Commission of Jurist’s (ICJ’s) Public Lecturer on Constitutional Review March 14, 2004, The Grand Regency Hotel, Nairobi, etc.

**D 2 Constitutional and statutory materials (endeavour to study them)**

**Constitutions and Constitutional Instruments**


Constitution of Kenya, Act No. 5 of 1969 (Consolidating amendments from 1964)


Constitution of Kenya (Amendment) Act No. 1 of 2008

National Accord and Reconciliation Act, 2008 (NARA)

Judicature Act, 1967, Cap 8

**Statutory materials**

Commissions of Inquiry Act, Cap 102


Constitution of Kenya Review Act, Cap 3A (as amended)

Constitution of Kenya, 1963 (the Independence of Constitution)

Draft Constitution by the Law Society of Kenya, launched March 16, 2004
Draft Constitution by the Ufungamano Group, January 2004
Election Offences Act, Cap. 66 (repealed and replaced)
Interpretation and General Provisions Act, Cap 2
Judicature Act, Cap 8
Kenya Law Reform Commission Bill, 2002
Law Reform Commission Act, 1982, Cap 3
National Assembly Standing Orders (Kenya) (Revised Edition 1998) (as amended up to and including November 10, 1997)
National Assembly Remuneration Act, Cap. 5
National Assembly (Powers and Privileges) Act, Cap. 6
National Assembly and Presidential Elections Act, Cap 7 (repealed and replaced)
Parliamentary Pensions Act, Cap. 196
Statutes of the University of Nairobi, and Rules and Regulations of the Faculty of Law – especially relating to admission, registration, examinations, and discipline (suspension, expulsion, disciplinary proceedings…)
University of Nairobi Act, Cap 210
See also the integrity or anti corruption legislation (which regulate the exercise of public power)
Public Officer Ethics Act, 2003
Anti Corruption and Economic Crimes Act, 2003; 2011
National Cohesion and Integration Act 2008
Truth, Justice and Reconciliation Act 2008
Anti-Counterfeit Act 2008
Kenya Communication Act 2008
Political Parties Act (2011) (replaced PPA 2007)

Constitutional amendments and reform 2008-2012
Constitution of Kenya Amendment Act 2008
National Accord and Reconciliation Act 2008
Constitution of Kenya Review Act 2008
Any other? Consider proposed amendments to the 2010 Constitution on election date; on the one third gender rule.

D 3 International and regional instruments (with constitutional significance in Kenya, the UK and the US)

Amsterdam Treaty (European integration)
AU Charter (formerly AU; and other AU instruments)
Common Market for Eastern and Southern Africa (COMESA) agreement
East African Community (EAC) Treaty
European Constitution (due June 2004?)
International Covenant on Civil and Political Rights, 1966
International Covenant on Economic, Social and Cultural Rights, 1966
Maastricht Treaty (European integration)
Montevideo Convention on the Rights and Duties of States, 1933.
Treaty of Rome (European integration); Amsterdam; Maastricht etc.
UN Charter, 1945
Universal Declaration of Human Rights (UDHR), 1948
World Trade Organisation (WTO) Agreement incorporating the Agreement on Trade Related aspects or Intellectual Property (TRIPs)
African instruments on democracy, electoral justice, human rights….

D 4 UK Constitutional Instruments (Some have come from the European Union; also see statutes which devolved powers to Scotland and to Wales)¹
Act of Settlement, The, 1701 (UK)
Act of Union, The, 1707
Bill of Rights, The, 1698 (UK)
Magna Carta, The, 1215 (The Great Charter) (UK)
Petition of Right, 1628
Human Rights Act 1998
Instruments devolving power to Scotland and Wales

D 5 POLITICAL PARTY AND OTHER CONSTITUTIONS
Alliance Party of Kenya (APK)
Democratic Party (DP)
Forum for Restoration of Democracy Kenya (FORD-K)
Ford People
Grand National Union (GNU)
Kenya African National Union (KANU)
Labour Party of Kenya (LPK)
Liberal Democratic Party (LDP)
National Rainbow Coalition (NARC-K)
New FORD-Kenya
National Party of Kenya (NPK)
National Vision Party (NVP)
Party of Action (POA)
Party of National Unity (PNU)
Orange Democratic Movement (ODM)
United Democratic Forum (UDF)
United Democratic Movement (UDM)
United Republican Party (URP)
Wiper Democratic Movement (formerly ODM-Kenya)

¹ Discussed in Jackson & Leopold’s O’Hood Phillips and Jackson’s Constitutional and Administrative Law
Cf. Political Parties are required to register and comply with the Political Parties Act by April 30, 2012. After this date, a full list of all the officially recognised political parties should be available.

**D 6 CONSTITUIONAL INSTRUMENTS FROM OTHER COUNTRIES**

US Constitution, 1789
Declaration of Independence, 1776
German Basic Law (as amended)
Constitution of South Africa 1996
Constitution of Egypt (amended 2011)
Constitution of Ivory Coast
Grand Coalition Instruments (UK, Germany, Kenya)
Constitution of Nigeria 1999
Constitution of Uganda 1995; as amended
Constitution of Zambia, 1996

**D 7 Coalition government instruments- Kenya**

MoU among Ford-K, DP, and NPK, etc (NAK MoU) (see also NAK, NPK constitutions)
MoU between LDP and NAK (NARC MoU)
National Rainbow Coalition (NARC)
ODM/PNU Grand Coalition 2008

**D 8 CONSTITUTIONS OF RELEVANT PRESSURE GROUPS & SOCIAL WELFARE GROUPS**

*(and the related social norms of communities)*

You may wish to consult the constitutions of the following entities:

1. Trade unions eg. the Universities Academic Staff Union (UASU), University Non Teaching Staff Union (UNTESU), Kenya Union of Domestic, Hotel, Educational Institutions, Hospitals, and Allied Workers (KUDHEIHA), and Kenya National Union of Teachers, (KNUT));

2. Students’ union constitutions (eg KLSS, SONU, KUSA, MUSO);

3. Non-Governmental Organisations (NGOs) Constitutions, etc.; Constitutions and Charters of intergovernmental organisations, eg International Centre for Inspect Physiology and Ecology (ICIPE), African Centre for Technology Studies (ACTS), etc.

**E. The course outline**

**E 1 Basic content**
The unitisation of the Constitutional Law Course has broken it into two separate (but interdependent) units for purposes of instruction. These are:

(i) Constitutional Theory, and
(ii) Constitutional Process

The first unit is intended to introduce students to the theory of constitutions, i.e. the coherent sets of propositions and fundamental principles that go into the making and operationalisation of the various types of constitutions in use. The second unit, that is Constitutional Process, is intended to familiarise students with the operational institutions and structures of the constitutional order, and their modes of operation.

The following are some of the themes that constitute the content of the Constitutional Process curriculum –

13. Defining Constitutional process
14. Constitutional values and safeguards
15. Constitutional Founding of the Kenyan State
16. Separation or division of powers or functions, and checks and balances [limited or efficient/facilitative government?]
17. Machinery of Government; the machinery of governance; the formulation, interpretation and implementation (or execution) of law; the administration & governmental process; separation of powers; checks and balances in practice
18. Executive Power of the State
19. Decentralisation of Executive, Administrative and Parliamentary powers under the Constitution 2010
20. Legislative Power of the State
22. Bill of Rights, Constitutional applications and references, judicial review, ordinary litigation, and prosecution(s); original and appellate jurisdiction, etc
23. Constitutional breakdown; cf. failed states
24. Control of Public Powers: interagency checks and balances; CIOC; Commissions: (CIC, PSC, JSC, TSC, KACA/KACC, EACC)
25. Prospects for a wider institutional base in governance – parties – coalitions – NGOs etc
26. Constitutional values and safeguards: issues in political analysis of constitutional systems:
   (g) What are constitutional values? Safeguards?
   (h) Democracy and constitutionalism
   (i) Representative government and democracy;
   (j) The basic division of powers: horizontal separation of powers; two-tier Parliament; devolution of powers
   Independence, impartiality, accountability, and competence of the Judiciary
   (k) The rule of law;
   (l) Fundamental rights, liberties and freedoms (the Bill of Rights)
   (g) Equal protection: nationality and citizenship; race, ethnicity, class and gender.
Autochthony: What is an autochthonous Constitution? How can a constitution be home grown? Legitimate? The people, and their values; wananchi, “Wanjiku, Amina, Akinyi, Naliaka, Mwikali, Chemutai …,” The myth of Africanity, etc]

Law in development; law and rights; access to and control of resources: finance, land, technology (IP and innovation in constitutionalism);

Academic freedom: academics, students and the social and political process. Democracy: the politics of the constitution, and quest for (political and social) legitimacy and autochthony

1. INTRODUCTION
   - Lecturer’s and Students’ expectations;
   - Syllabus of issues; readings: books; articles;
   - Constitution; constitutional instruments; statutes and regulations; case law: anecdotes, policy

2. INTRODUCING CONSTITUTIONAL PROCESS IN KENYA
   - Conceptualizing and theorizing Kenyan constitutional process:
   - Constitutional concepts & doctrines e.g. constitution, state, society, community, nation, nation State, state nation, nationalism, government, executive, parliament, judiciary, President, PM, V-P, DP, cabinet
   - Administration bureaucracy… (Under the relevant Kenyan constitutional provisions & laws).

Readings


3. CONSTITUTIONAL FOUNDING OF THE KENYAN STATE:
   - The conquest state; the protectorate; the colony (Constitutional & legal provisions…)

26
- Kenya under colonialism (including the boundary changes under colonialism, the Maasai agreements: constitutional & legal provisions; *Ole Njogo* case).
- Kenya’s independence struggle (The radicals v. constitutionalists or liberals):
- Various revolts and movements against colonialism (Nandi resistance, *Dini ya Msambwa, Piny Owacho* etc); some arguments on Mau Mau.
- The Lancaster process. Kenya as post or neo-colonial state;
- Various constitutions since 1895; statutes: case law.

**Readings**


**4A. Executive I**

- Government Structure, system & processes
- Constitutional values, principles and safeguards under Constitution 2010
- Values and principles in general
- Values and principles on Executive; values on public services & resource(s) e.g. public finance; values on admin justice
• Government mandate, values, principles; structure, systems & processes
• Constitutional Implementation (key issues, key institutions, key timelines (especially relating to executive)

**Separation of powers; checks and balances in and under Constitution 2010**

**The basic division of powers and separation of powers**

• Indivisibility and non-hierarchical nature of Government; Functional and operational division of power; What is the impact of 2008 and the 2010 Constitutions, the Accord, and *Njaya v. A-G* on the basic division of powers between the Judiciary, on the one hand, and the Executive, and Parliament on the other?
• Separation of powers, checks and balances under Constitution 2010
• Constitutional Commissions under Constitution 2010, (cf. independent offices)

• Decentralization of Executive, Admin. and Parliamentary powers under Constitution 2010 (see devolution, class 7A)

**Readings (also for decentralisation or “devolution” class 7A)**


J.B. Ojwang (1990), q.v. Chap. 1, “Introduction”


**Essential cases**


**Constitutional Commissions under Constitution 2010**

- Constitutional implementation
- Key institutions
- Key timelines (especially relating to executive)

**Readings**


Hamis R. Gray *the Sovereignty of Parliament Today*


Y.P. Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya* OUP, Nairobi, 1970, Chap. 6


Hamis R. Gray; *The Sovereignty of Parliament Today*


**4B. Executive II**

- Mandate (powers) & functions;
- Life, resources, liberty, admin process and justice
- Public finance and taxation, procurement, and public administration
- Jobs: creation, employment, discipline, dismissal
- Public service(s) & service delivery (health, food, education, security)
- Infrastructure
- Constitutional provisions; case law.
Readings


- Y.P. Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya* OUP, Nairobi, 1970, Chap. 6

5A. Executive III

- President; presidential elections; election date; assumption of office; powers, rights, privileges, immunity
- PM, Presidential and premier politics in constitutional process, 1963-2012
- Key themes and trends on presidency; Kenyatta, Moi, Kibaki assumption of office, powers, functions and performance, record (?); life, liberty & land (property)
- Structure of government
- The quest for ethnic, class, youth and gender inclusion in the Kenyan political economy
- Historical injustices under Agenda 4 and the Constitution 2010

Readings

P. Anyang’ Nyong’o “State and Society in Kenya: The Disintegration of the Nationalist Coalition and the rise of Presidential Authoritarianism 1963-78”


**Essential cases**

*John Harun Mwaau & Others v. A-G and Others* HC Constitutional Petition No. 65 of 2011 consolidated with Petition No. 123 of 2011 and 185 of 2011 (per Lenaola, Ngugi & Mjanja JJ; delivered 13/1/2012)


Nyangai & Another v. Moi & Others (2008) 1 KLR (EP); Akweya v. Moi & 8 others (2008) 1 KLR (EP); Orengo v. Moi & 12 others; Matiba v. Moi 1 KLR (EP); Kibaki v. Moi, etc.

Mwangi Stephen Muriithi v. AG 1983 KLR 1-50

Mwangi Stephen Muriithi v. Daniel Toroitich Arap Moi [2011] eKLR. (1 & 2)

Muslims for Human Rights (Muhuri) & 2 others v. Attorney General & 2 others [2011 EKLR

High Court at Mombasa Petition 7 of 2011.


Azanian Peoples Organization (AZAPO) and others v. President of the Republic of South Africa and Others (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996)

Executive Council of the Western Cape Legislature v. President of the Republic of South Africa 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289.

Hugo v. President of the Republic of South Africa & another 1996


National Director of Public Prosecutions v. Zuma (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA) (12 January 2009)

Samuel Kaunda and Others v. The President of the Republic of South Africa and others (2004)
Jacob Gedleyihleskisa Zuma & Michael Hulley v. The National Director of Public Prosecutions & Others (2008)…

Executive IV
- Premier Kenyatta & Odinga: appointment, powers & functions; performance

Executive V
- Vice-President, Deputy President, DPMs, Cabinet
- Assistant Ministers
- Secretary to the Cabinet, Principal Secretaries, Secretaries, Directors and equivalents under the 1969, 2008, 2010 constitutions

Readings
BA Ogot My Footprints in the Sands of Time

5B. Executive VI
- The administrative bureaucracy (the civil service; provincial administration; national security).
- Health, food rights & security, security
- Administration process & justice

Readings


6A. Executive VII: Administering and regulating security and criminal justice

- Typology of security
  - Security of the person – including in the workplace
  - Security of property
  - Security of the home
  - Security in society generally

- Security administration in Kenya: Government security agencies
  - NSIS
  - Kenya Police Service
  - Administration Police (AP)
  - General Service Unit (GSU)
  - Kenya Defence Forces (KDF)
  - Provincial Administration

- Efficiency of National Security System in Kenya
  - The emergence of (tribal) gangs, vigilantes and militia; mungiki, sungu sungu, mwakenya, Sabaot Land Defence Force (SLDF), Mombasa Republican Council (MRC) etc
  - Inter-ethnic clashes and feuds
  - Electoral violence
  - Emergence of drug trafficking
  - Territorial invasion: Al-Shabaab, Merille bandits invasion and other militia
  - Emergence of private security firms; security in institutions, homes, etc
Deterioration of public confidence in security system

- The role of the government in provision of security services.
- National Security Administration and Regulation under the 2010 Constitution.
  - Constitutional Reforms
  - Administrative reforms
  - Security Administration and Regulation at the County
  - Relationship between county security system and National security system.
- Security administration and regulation during transition and elections
- Security issues during presidential, parliamentary and civic elections
  - Electoral fraud, manipulation and related electoral offences
  - Political violence before, during and after elections
- Role of the Kenyan state in electoral violence and insecurity
- Who has been responsible for security in during transition?
- Reforming administration of security in elections
- History, present and future of Kenya’s security system, administration and regulation
  - under Kenyatta
  - under Moi
  - under Kibaki
  - upon progressive and full implementation of 2010 Constitution

**Essential readings**


Bonn International Center for Conversion (2005) “Security Sector Reform in Kenya,” Inventory of security sector reform (SSR) efforts in partner countries of German development assistance,


Essential cases
Biwott’s case regarding Akiwumi Commission
ICC Pre-trial Chamber II (2012) The Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute.

Government reports


6B. Executive VIII
- Power arrangements in the National Accord
- Transition in the executive (presidency & administration) under the Constitution 2010 and NARA.

6C. Executive IX (see also class 4A&B)
- Constitutional Commissions under Constitution 2010
- Constitutional implementation (key issues, key institutions, key timelines (especially relating to executive))

Readings

Jelvas Musau (2005) “Limitation of executive powers: delinking the civil service from


**7A. DEVOLUTION (see also separation of powers class 4A)**
- Devolution as separation of powers; checks and balances
- Key issues in devolution: relationships between national and county government, among county governments.
- Devolution issues: Human resource development and management or administration; the question of financial devolution; restructuring of the provincial administration.

**Readings**


7B. REPRESENTATION & PARTICIPATION: PARTIES, ELECTIONS

- Political parties; profile, structure, elections, internal democracy;
- Elections Act 2011, Independent Elections and Boundaries Commission (IEBC Act 2011); party constitutions

Political party history in Kenya: in the beginning: district, ethnic-based political parties or movements; at independence, the colonial administration reduced or removed restrictions.

Political party profile, 1963-64 multi- or dual-party state; 1964-66 de facto single party; 1966-69 dual party de facto; 1969-1982 de facto single party; 1982-91 de jure multi-party; 2002 coalition of parties registered and wins elections …; 2004: Constitutionality of coalition of parties in 2012; “Gov’t of national unity” – what’s the role of parties in it? In Parliament in this context?; 2007 Political Parties Act; 2006/07 party reorganization; 2008 to date: Grand coalition Government - which party is in the opposition? PAC, PIC etc... 2010 Constitution, Political Parties Act, Elections Act 2011 & IEBC Act on political parties. Role of Registrar of Political Parties (RPP); Number of parties in 2012?

Role of party recruitment of President, DP, Cabinet, Governors, Senators, MPs, County Assembly Members, Women’s Representatives under the 2010 Constitution; MPs, President, Cabinet, councillors … s. 34, s. 40 and constitutional questions; cf. Under 2010 Constitution; s.17(5) of Cap. 7 (National Assembly and Presidential Elections Act)

Kenyatta and the inactive KANU (party matters discussed in the Parliament and subject of constitutional amendments); Shikuku, Seroney, Anyona: you want to kill Parliament the way you killed KANU (1975) – detained cf. NA Powers and Privileges Act. Rise of presidential authoritarianism in politics and in the Constitution led to decay of independent institutions (checks and balances…)

Moi and the ubiquitous centrally controlled KANU;
Kibaki and coalition politics, or is it political paralysis and atrophy of parties? Back to Kenyatta/Moi era, cooptation and personal rule to kill parties and organised politics; “parties obsolete”;) “Government of National Unity.”

Outstanding party questions: regulating internal democracy, accountability, and funding; clubs? Constitutionality of nomination rules; regulating and managing party coalitions ….

**Elections:**
- Gubernatorial, MPs, Senate, County Assembly, Womens’ Representative
- Qualifications for nomination; nomination procedures and process
- Election: process and who is elected
- Administration of elections: IEBC, returning officers, poll clerks, security, transport
- Electoral disputes and petitions
- Electoral violence (cf. Class on Administering Safety, Security and Criminal Justice)
- Closure in elections

**Electoral Law, regulations, processes and procedures**
Political parties Act 2007 (repealed), 2011
IEBC Act 2011
Constitution of Kenya 2010

**Readings**


8. A NOTE ON THE READINGS

(a) Although these readings are as comprehensive as possible, they do not claim to be exhaustive; they do not include all that is relevant, and students should feel free to look outside them.

(b) The readings, however, offer a framework for independent work by students, and a good grasp of the material, within the framework, should give a fair direction capable of leading to a good understanding of the subject.

(c) Some of the materials included in the readings, which are not primarily legal in character, will be found in the main University Library, on the open shelves, or in the *East African Collections*, in the periodicals Section, or on reserve. Students should adopt the habit of using the main Library (The Jomo Kenyatta Memorial Library) as much as possible.
(d) Some of the materials listed in the readings will be found in the Law Library, or through the library system.

(e) For materials published in International Journals, for which the Law Library has no subscription, it is likely that the reserve will be holding several special copies. Students should confirm this with the Law Librarians.

(f) It is not expected that students will be able to read each and all of the materials listed; but they should endeavour to read as many of them as possible. I will indicate mandatory readings.

(g) I will provide the essential readings which are not available in the Library(ies).

17. REVISION OR TRIAL QUESTIONS, OR ASSIGNMENTS

1. Define the term “Executive” and identify its operational form in Kenya’s constitutional set-up.

2. Discuss, in a historical perspective, the law relating to the election of a President in Kenya.

3. Critically discuss presidential powers under the 2010 Constitution.

4. Consider, in a historical perspective, the place of political party constitutions in the general operation of Kenyan constitutional law.

5. Critically discuss some of the key presidential liberties, rights, privileges and immunity under the 2010 Constitution.

6. What are prerogatives, and to what extent are they part of the constitutional law of Kenya?

7. Compare and contrast the general profile of executive power in the colonial and the post-colonial period in Kenya.


9. Describe the machinery of implementation of the Executive’s decisions in Kenya.

10. What powers facilitate the functioning of such machinery, and to what extent are such powers subject to control (rationalisation, legitimation, limitation)
11. “Constant experience has shown that every man invested with power is liable to abuse it, and to carry his authority as far as it will go ..., to prevent this abuse, it is necessary from the very nature of things that one power should be a check on another ...” – Montesquieu, *De L'Esprit des Lois, livre XI, (The Spirit of the Laws)*, Chap. VI.

12. Assess the relevant provisions of the Kenya Constitution 2010 regarding the Executive’s role in the National Assembly in the light of the above remark.

13. Section 24 of the 1969 Constitution of Kenya provides:

“Subject to this Constitution and any other law, the powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment, shall vest in the President.”

At the same time s. 107(1) of the 1969 Constitution states:

“Subject to this Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission ....”

Using appropriate illustrations, attempt to reconcile the two provisions set out below – with regard to appointment, discipline and dismissal in the Public Service. Focus on how the 2010 Constitution deals with the issue.

14. Assess, in historical perspective, the degree of preparedness for the task of executive power control of the Kenya Parliament.

15. Set out the range of powers entrusted to the President of Kenya, in relation to the Judiciary.

16. What do you see as the merits or shortcomings of the conferment of such powers – and what remedy would you propose?

17. In what circumstances would it be open to a person to challenge in Court the election of a President? Under the law, what procedures would the challenger have to follow?

19. Discuss the appellate system in the Kenyan judicial system, indicating whether you think it is an efficient device for the redress of grievances.

20. How far, in your view, does Chapter Four of the Constitution of Kenya provide a safeguard for individual rights?

20B. (a) Do political parties in Kenya have any power of constitutional significance?

(b) What are the implications of such power for the liberty of the individual?

21. To what extent do non-governmental institutions play a role in the exercise of public power in Kenya?

22. Describe the institution of Ombudsman (or ombudsperson) and consider its possibilities as a device of power control, with reference to one or more African countries.

23. To what extent, in your view, does the Kenya Constitution 2010 provide an effective formula for balancing the powers of the three branches of Government.

24. The political party, in a one-party or dominant party state, assumes so much power that it can be regarded as a fourth department in the constitutional structure. In what ways is Kenya’s new multi-party system changing this situation?

25. In what circumstances could it be open to a person to challenge in court the election of the President or an MP? What procedures would such a challenge have to follow?

26. In your view, what are the positive and negative implications of allowing Presidential and Parliamentary candidates to vie independently without affiliation to a particular party?


28. What is the constitutional basis for the proposal that the next presidential or general elections be held in:
   (a) August 2012?
   (b) December 2012?
   (c) March 4, 2013? Or any other date after 2012?

29. Who has the power to dissolve Parliament? What does it mean to say that Parliament has to go to its full term? What is the constitutional basis for this under the 2010 Constitution?
30. Compare and contrast the presidencies of Daniel T. Arap Moi and Mwai Kibaki with regard to freedoms of assembly and association as well as the relationship between the State and religious organizations.

31. Critically analyze how the Constitution of Kenya 2010 has reconstructed the powers and functions of the President vis-a-vis the other organs or officials of the Government.

32. “Ethnic and regional inequality in Kenya have reached crisis proportions. Kenya’s post-colonial Governments of Presidents Jomo Kenyatta, Daniel Arap Moi, and Mwai Kibaki are responsible for this, albeit to varying degrees of responsibility. Briefly discuss appropriate constitutional and legal measures for securing ethnic and regional equity in the allocation of, and access to, public resources, appointments, and tenders or contracts in Kenya.

33. How has the Constitution of Kenya 2010 addressed the previously existing limits to judicial power?

34. What is the role of political parties in Kenya’s constitutional process under the 2010 Constitution and the relevant law?

35. How can Kenya ensure safety and internal security of the person, the home, the workplace, and public places under the Constitution of Kenya 2010?

36. “Electoral insecurity has been a major challenge since 1969, or before.” Critically assess how the Constitution of Kenya 2010 has guaranteed or reformed security in the electoral process. How does the Constitution of Kenya 2010 guarantee criminal justice for victims, the general public, and the four suspects in the International Criminal Court cases? What is the role of the Government of Kenya?

*** FINIS*** Thu tinda!™ Wish U Success™

....the discourse continues....

Prof Ben Sihanya, JSD (Stanford), revised June 29, 2012
Email: sihanya@sihanyamentoring.com; sihanya@innovativelawyering.com
URL: www.innovativelawyering.com

---

2 In “USA” this means I have told my story; may you grow tall (in wisdom) like the trees at my uncles'
Constitutional Process

Dr Kiarie Mwaura
School of Law
University of Nairobi

TITLE OF THE COURSE: CONSTITUTIONAL LAW II

Course Code: GPR 110
Lecture Hours: 45
Pre-requisites: Constitutional Law 1

Purpose of the Course:

To gain an understanding of basic constitutional principles and their relationship with government, to develop an appreciation of the process of constitution making and constitutional change, to understand how public power is exercised and the controls and limits imposed upon it by law and political practice.

Learning Outcomes:

By the end of the course, the learner should be able to:

1. Critically examine the different modes of constitutional design processes, their foundational assumptions, actors involved and activities engaged in;
2. Identify the conceptual issues involved in understanding constitution-making and how outcomes relate to process, including the concept of public participation and its linkage to outcomes;
3. Explain the concept of due process, amendment and ratification processes;
4. Assess constitutional practices in the various constitutional models (Parliamentary and Presidential);
5. Understand the different electoral systems as well as the role of Parliament and the judiciary.
6. Understand the nature of judicial review and human rights law and some of their limitations.
7. Develop an awareness of key themes of democratic control, transparency, and accountability

Course Content:
Origins and nature of the modern state; process of constitution making and constitutional change; machinery of government; separation of powers; executive power of the state; legislative power of the state; judicial power and judicial review; judicial and constitutional breakdown; control of public powers; prospects for a wider constitutional base in governance; human rights; Constitutional Law I is a prerequisite.

Mode of Delivery:
Lectures, Group discussions, Tutorials and student-centered practical exercises that involve written work, group discussion and role play alongside audio and visual presentations.

Institutional Materials and Equipment:
Text books, journal articles, handouts, bills, law reports, official gazettes, government reports, parliamentary reports, e-journals (LexisNexis, heinonline, JSTOR).
White boards, flip charts, LCD projector and screen, laptop, LAN, DVDs, CDs

Assessment:
Type: Weighting
Continuous assessment. 30%
Examinations: 70%
Total 100%

Core Reading Materials


Recommended Reference Materials:

Class 8

Parliament
This session will focus on Parliament as an institution of government and will examine: the role of Parliament in making laws and holding the executive to account; composition of Parliament; the doctrine of parliamentary sovereignty; separation of powers; ingredients of an effective electoral system; and the different types of electoral systems.

Questions:

1. What are the functions of Parliament?
2. Does the legislature control the executive or vice versa?
3. What is the purpose of a second/upper chamber?
4. What is the rationale for having cabinet secretaries who are not MPs?
5. To what extent does the electoral system under the Constitution of Kenya 2010 satisfy the requirements needed for an electoral system to be effective?
6. Make a case for and against the first past the post system of election.
7. To what extent is Parliament democratic?

Required reading

Class 9

Judiciary

This session will reflect on the issues of judges and the judicial role, independence of the judiciary, rationale of the criteria for appointment of judges, the suitability of judges taking political decisions, judicial activism, general principles of judicial review, and judicial review in action.

Practical exercise

Discuss the problem below and come to class prepared with arguments supporting Wekesa and others supporting the Nairobi City Council. All arguments should be supported with solid legal authorities. The lecturer will pick groups at random and assign them to present opposing arguments in the case.

Problem

Nairobi City Council has certain licensing powers under the (fictitious) Street Traders Licensing Act 2007 (‘the Act’). Under s. 12 of the Act, Nairobi City Council can licence a ‘street trader’ to ‘sell goods’ in ‘pedestrianised areas delineated by the Council’. The Act also sets out certain types of permissible ‘street trader’ in s. 13(a), which are: ‘purveyors of fruit and vegetables; meat; haberdashery items; artistic products; books and other written materials’. S. 13(b) states that the list in s. 13(a) is ‘non-exhaustive’. By s. 14(a) of the Act the licences are valid for one year only and renewable at the discretion of the Council. There is no appeal process built into the Act.
Additionally, under the (fictitious) Tourist Promotion Act 2010, Nairobi City Council has a duty under s. 1(a), ‘to promote tourism within its jurisdiction’. S.2 (a) permits the council to promote activities that, ‘draw attention to the particular artistic and historical attractions of the area’. Under s. 2(a), Nairobi City Council launches a campaign to make Nairobi an ‘African Town of Culture’ in 2013.

Wekesa has run a bookstall within Nairobi for the last 3 years, the licence being renewed annually. Last year, Wekesa started specialising in the works of John Mutembei. On 2nd January 2012, Nairobi City Council refused Wekesa’s application to renew his licence on the grounds that he had been engaged in activities that undermine the Council’s bid to make Nairobi an ‘African Town of Culture’, drawing particular attention to the special offer Wekesa was offering on copies of Mutembei’s poem ‘Nairobi’, which starts:

Come fiery bombs and fall on Nairobi!

It isn't fit for humans now,

There isn't grass to graze a cow.

Swarm over, Death!

Advise Wekesa.

Questions

1. How are judges appointed in Kenya?
2. What criteria should guide the selection of judges? Should the judiciary be representative of society?
3. Is it possible to have a completely independent judiciary?
4. Carl Schmitt once quipped that in the “politicisation of law, politics had nothing to gain and law had everything to lose”. Would Brice Dickson agree?
5. To what extent should judges have the power to make law or shape constitutions?
6. Debate the proposition that “In cases of national security, the judiciary should defer to the democratically accountable branches of government.”
7. Critically assess the various factors affecting the independence of the judiciary.
8. What is judicial review?
9. What do we mean when we say that judicial review is a review not an appeal? What are the consequences of this?

10. Why do you think it is necessary to limit the scope of judicial review in such a way?

11. Who can bring an application for judicial review? What is the test for bringing an action? Do you agree with this?

12. What bodies are amenable to judicial review? What is the test?

13. What were the grounds for review outlined by Lord Diplock in the ‘GCHQ’ case? Was this an open or closed list?

**Required Reading**

- Order 53 Civil Procedure Code.


- Associated Provincial Picturehouses v Wednesbury Corporation [1948] 1 K.B. 223


- The sections on judicial review (grounds for review), from any Public Law or Administrative Law textbook, (Barnett, O. Hood Phillips and Jackson; de Smith; Craig; Wade & Bradley; Turpin etc.).

**Class 10**

**Human Rights**

One of the predominant features of the rash of constitution-making around the world in the last two decades of the twentieth century (especially in Africa, Asia and Eastern Europe) has been a stress on including fundamental human rights protections in the constitution. Most countries have come to the conclusion that human rights cannot be left entirely to the actions of
politicians but need to be clearly established in law and enforced by the courts. This week, we will examine how human rights are protected and enforced in Kenya and the relevance of international human rights law.

**Practical exercise**

Come to class prepared with an answer to the following questions: “To what extent is abortion allowed under the Constitution of Kenya 2010?” The lecturer will pick groups at random and assign them to present opposing arguments in the case.

**Questions**

1. What are human rights? Why are they important? Who grants human rights? What are the origins of human rights?

2. How are human rights protected in Kenya? Is the method of protection different from that of the UK?

3. What are the different classes of human rights?

4. What are the differences between proportionality and the doctrine of unreasonableness?

5. When are derogations from human rights legally permissible? What is the rationale for this?

6. Should courts defer to the political authorities during times of national security?

7. Should Justice Ombija have deferred to the executive on whether President Al Bashir should be arrested if he comes to Kenya?

8. What is the role of the Kenya National Human Rights Commission?

**Required Reading**

• The Kenya Section of the International Commission of Jurists v A G & Minister of State for Provincial Administration and Internal Security (President Al Bashir’s Case) [2011] eKLR http://kenyalaw.org/CaseSearch/view_preview1.php?link=22777365484203679712203


