

FACULTY OF LAW CATHOLIC UNIVERSITY OF EASTERN AFRICA



DEPARTMENT OF PUBLIC LAW

CLS 102 CONSTITUTIONAL THEORY

COURSE OUTLINE

Course description

This course introduces the participants to the theoretical foundations of Constitutional Law. Accordingly the course explores basic concepts in constitutional, social and political theory and relates those concepts to normative constitutional provisions. The Constitution of Kenya 2010 is used as a case study but consistent with the CUEA philosophy of a regional orientation to the study of law, there will be generous comparison with the constitutions of the states that form the East African Community. The province of constitutional law is defined to provide clarity and scope; various concepts in constitutional law, political and social science are discussed with sufficient detail and their practical application through normative constitutional provisions as interpreted by the courts is analyzed. The history of the constitution of Kenya is traced to its colonial origins; the various amendments to the independence constitution are reviewed and lessons learnt from these amendments are distilled. The course ends with a discussion of the various approaches to the interpretation of the constitution and links these approaches to interpretation with various legal theories such as natural law, legal positivism and legal realism. These issues under discussion are illustrated through an examination

of relevant provisions of the Constitution of Kenya 2010, the jurisprudence from the courts , the views of text writers and opinions expressed on current issues on the constitution by academics, politicians and commentators .

Course Objectives

At the end of the course, it is expected that the participant should be able to

- **Discuss** the various constitutional theories , concepts, values and principles
- **Purposively interpret** various provisions of the constitution informed by those theories concepts, values principles
- **Use** those concepts ,values and principles to evaluate normative provisions of a constitution
- **Identify** the generally agreed best practices in constitutional making, architecture and content
- **Contribute** meaningfully to a discussion on constitutional issues

Teaching Methodologies:

Lectures, tutorials, group discussions, projects and seminars

Instructional Materials

Core text books, handouts, statutes, law reports

Equipment:

Whiteboard, overhead projectors and sound equipment

Course Assessment:

Student Performance

Assignments, continuous assessment tests, term paper, end of semester examination.

Academic staff performance

Student evaluation, HOD evaluation, self-evaluation, peer evaluation, informal feedback from students etc.

Textbooks and Journals for the Course:

Essential

1. Mwaura, Charles Principles of constitutional law: An Introduction to the constitution of Kenya with cases and Materials. LawAfrica, Nairobi, Kenya 2014.
2. Ghai, Y.P & McAuslan (1970). *Public law & Political change in Kenya*. London: Oxford University Press.

Textbooks and Journals for Further Reading:

1. Kiwinda Morris Mbondenyei & John Osogo Ambani “*The New Constitution of Kenya: Principles, Government and Human Rights*”.
2. Kanyeihamba, G.W. (1975). *Constitutional Law and Government in Uganda*. Nairobi: East African Literature Bureau.
3. Kivutha Kibwana, (1996). “*Sowing the Constitutional Seed in Kenya*”. Clairpress Ltd.
4. Kivutha Kibwana, (1997): *Paralegal Handbook 4: An Introduction to the Constitution of Kenya*. Claripress Ltd.
5. Kivutha Kibwana, (1998). “*Readings in Constitutional Law and Politics in Africa: A Case Study of Kenya*” (Faculty of Law, University of Nairobi)
6. K. Kibwana, C. M. Peter and J. Oloka-Onyango, (1996). “*In search of Freedom and Prosperity: Constitutional Freedom in East Africa*”. Claripress Ltd.
7. Srivastava, B.P. (1977). *The Constitution of the United Republic of Tanzania* . Dar es Salaam: University of Dar es Salaam.
8. Wanjala S., Akivaga S. K and Kibwana K, (2002). “*Yearning for Democracy: Kenya at the Dawn of a Century*” . Clairpress Ltd.
9. Okondo P. H., (1995). “*A Commentary on the Constitution of Kenya*”. Phoenix Publishers Ltd.
10. Ojwang, J.B. (1990). *Constitutional Development in Kenya*. Nairobi: Acts Press.
11. Srivasta I.B.P, “*The Constitution of United Republic of Tanzania 1977 – Some Salient Features and Riddles*”. East Africa Law Review 73.
12. Murphy Walter F., “*An ordering of Constitutional Values*” (1980) 53 Southern California Law Review.

13. Nwabueze (1973). *Constitutionalism in the Emergent States*. London: Enugu.
14. Shivji G., “*The State of the Constitution and Constitution of the State*” (1978) Eastern Africa Law Review.
15. De Smith: *The New commonwealth & its institutions* (1964). London: Stevens.

Course Content

Week 1	Lesson 1	Reading	Tasks
	<p data-bbox="439 592 801 703">The jurisprudential foundations of constitutional law</p> <ul style="list-style-type: none"> <li data-bbox="488 746 786 778">• Definition of law <li data-bbox="488 815 786 890">• Classification of laws <li data-bbox="488 927 763 959">• Theories of law <li data-bbox="488 995 748 1027">• Legal systems <li data-bbox="488 1064 786 1139">• The functions of law <li data-bbox="488 1176 748 1251">• Limitations of law 	<p data-bbox="824 523 954 555">Reading</p> <ul style="list-style-type: none"> <li data-bbox="869 592 1576 703">• University of London Teaching Module: Chapter 3 Imperative or command theories of law <li data-bbox="869 719 1536 831">• University of London Teaching Module: Chapter 4 Classical and modern natural law theory <li data-bbox="869 847 1581 1050">• H.L.A. Hart, “Positivism and the Separation of Law and Morals,” in his <i>Essays In Jurisprudence and Philosophy</i> (Oxford: Clarendon Press, 1983), First published 71 <i>Harvard Law Review</i> 593(1957) . http://www.umiacs.umd.edu/~horty/courses/readings/hart-1958-positivism-separation.pdf <li data-bbox="869 1187 1585 1347">• Leslie Green Positivism and the Inseparability of Law and Morals www.law.nyu.edu/sites/default/files/upload_documents/LG_inseparability_4.3.pdf <li data-bbox="869 1362 1487 1394">• Fuller, Lon L. (1958). "Positivism and 	<p data-bbox="1615 592 1935 916">Participants discuss the different theories of law, identify their central thesis, their proponents and determine their strengths and weaknesses</p>

		<p>Fidelity to Law — A Reply to Professor Hart". <i>71 Harvard Law Review</i> 630. 71 (4): 630–67</p> <ul style="list-style-type: none"> • Entick v Carrington (1765), 19 St Tr 1029; (1795) 95 ER 807 [1765] EWHC KB J98 	
Week 2	<p>Lesson 2</p> <ul style="list-style-type: none"> • What is a constitution? • The concept of constitutionalism • Functions of a constitution • Characteristics of a good constitution • Types of constitutions 	<p>Reading</p> <ul style="list-style-type: none"> • Nwabueze (1973). <i>Constitutionalism in the Emergent States</i>. London: Enugu. • Kanyeihamba, G.W. (1975). <i>Constitutional Law and Government in Uganda</i>. Nairobi: East African Literature Bureau. • H.W.O. Okoth-Ogendo, (1999) "Constitutions without constitutionalism: reflections on an African political paradox," in Issa Shivji (ed) (1991) <i>State and Constitutionalism: An African Debate on Democracy</i>, Southern Africa Political Economy Series (SAPES) Trust, Harare, pp. 3-26. • Walter Murphy (1993) "Constitutions, constitutionalism and democracy," in Douglas Greenberg, Stanley N. Katz, Steven C. Wheatley, & Melanie Beth Oliviero (1993) <i>Constitutionalism and Democracy: Transitions in the Contemporary World</i>, 	<p>Participants characterise the CoK 2010</p> <p>Participants identify the strengths of the CoK 2010</p> <p>Participants identify constitutionalism in the CoK 2010 and in the Kenyan Society</p>

		<p>Oxford University Press New York, pp. 3-7.</p> <ul style="list-style-type: none"> • H.W.O. Okoth-Ogendo (1999) “The quest for constitutional government,” in Goran Hyden, Dele Olowu & H.W.O. Okoth-Ogendo (1999) African Perspectives on Governance, Africa World Press, Trenton, pp. 33-60. • R v Malmo-Levine; R v Caine [2003] 3 S.C.R. 571, 2003 SCC 74, • Lawrence v. Texas, 539 U.S. 558 (2003 • Roe v. Wade, 410 U.S. 113 • Wisconsin v. Yoder, 406 U.S. 205 (1972), • Harmelin v. Michigan, 501 U.S. 957 (1991) • Kokkinakis vs Greece 1993 ECHR 20 • Roe vs Wade • R v Malmo-Levine; R v Caine [2003] 3 S.C.R. 571, 2003 SCC 74, • Jacqueline Okuta & another v Attorney General & 2 others Petition No. 397 Of 2016 [2017] eKLR • Aids Law Project v Attorney General & 3 others [2015] eKLR 	
Week 3	<p>Lesson 3</p> <ul style="list-style-type: none"> • Kelsen’s theory of the Grundnorm 	<p>Reading</p> <ul style="list-style-type: none"> • Hopton T.C Grundnorm and Constitution: The Legitimacy of Politics http://www.lawjournal.mcgill.ca/userfiles/other/6042331-hopton.pdf 	<p>Participants make presentations and discuss the cases</p>

		<ul style="list-style-type: none"> • Herman Hahlo R The Privy Council and the Gentle Revolution • Madzimbamuto vs Ladner Burke [1969] 1 AC 645, [1968] 3 • Rhodesia: Judgment Of Appellate Division of High Court In Ndhlovu and Others v. The Queen (Constitutional Position of Rhodesia) International Legal Materials Vol. 7, No. 6 (NOVEMBER 1968), pp. 1340-1363 Published by: American Society of International Law http://www.jstor.org/stable/20690438 • Uganda vs Commissioner of Prisons Ex parte Matovu 1966 EA 514 	
Week 4	<p>Lesson 4</p> <ul style="list-style-type: none"> • The concept of the constituent power of the people • The making of the constitution • History of our constitution • The Road to the CoK 2010 	<p>Reading</p> <ul style="list-style-type: none"> • Jackton B. Ojwang (1990) Constitutional Development in Kenya: Institutional Adaptation and Social Change African Centre for Technology Studies (ACTS), Nairobi • Okoth-Ogendo, H.W.O. (1972) "The politics of constitutional change in Kenya since independence, 1963-1969" Vol. 71 No. 282 African Affairs (January) 9-34 • Lumumba PLO, A journey through time in search of a constitution. The Constitution 	<p>Participants make presentations on selected cases</p>

		<p>of Kenya : Contemporary Readings Lumumba P.L.O Mbondenyei M. K. Odero S.O (eds) 2013 Law Africa Chapter One pp 13-43</p> <ul style="list-style-type: none"> • Ben Sihanya (2013) “Public participation and public interest lawyering under the Kenyan Constitution: theory, process and reforms,” Vol 9 (1) (2013) Law Society of Kenya Journal 1 – 32 • Njoya & Anor vs Republic [2004] 1 EA 194 	
Week 5	<p>Lesson 5</p> <ul style="list-style-type: none"> • The rule of law • Governance • Democracy 	<p>Kamau Mwaura Charles, Principles of Constitutional Law 2014 Law Africa Nairobi Kenya PP 27-39</p> <p>Dicey, A.V. (1952) <i>Introduction to the Study of the Law of the Constitution</i>, London</p> <p>Dicey, A.V. (1952) <i>Introduction to the Study of the Law of the Constitution</i>, London</p> <p>Lon Fuller, <i>The Morality Of The Law</i>, REV. ED. (1977).</p> <p>Issa Shivji (ed) (1991) <i>State and Constitutionalism: An African Debate on Democracy</i>, Southern Africa Political Economy Series (SAPES) Trust, Harare, pp. 3-26</p>	<p>Participants identify application of the rule of law in Kenya</p>

		<p>Louw Leon, What is the Rule of Law? Paper presented at the African Regional Meeting of the Mont Pelerin Society Nairobi, 2007</p> <p>https://www.montpelerin.org/wp-content/uploads/2015/12/Leon-Louw.pdf</p>	
Week 6	<p>Lesson 6</p> <ul style="list-style-type: none"> • Separation of powers • Independence of the judiciary • Supremacy of the constitution • Judicial review 	<p>Reading</p> <ul style="list-style-type: none"> • Kamau Mwaura Charles, Principles of Constitutional Law 2014 Law Africa Nairobi Kenya PP 41-67 • Madbury vs Madison 1803 I Cranch • De Souza vs Tanga Town Council 1961 EA 377 • Re Maangi 1968 EA 637 • El Mann vs R 1969 EA 357 • Okunda vs R 1970 EA 459 • Margaret Magiri Nguu vs R NRB HCC CR APP NO 59 of 1985 • Shah Vershi Devshi and Co LTD VS The Transport Licencing Board 1971 EA 289 • Madhwa vs City Council of Nairobi 1968 EA 406 • R vs Kadhi of Kisumu Exparte Nasreem 1973 EA 153 • Ogola vs R 1973 EA 277 • Njoya and 6 ors vs AG 2008 2 ECLR EP 	<p>Participants analyze various cases on Separation of powers. Judicial review and independence of the judiciary in Kenya</p>

		<ul style="list-style-type: none"> • Peter O. Ngoge v Francis Ole Kaparo & 4 others [2007] EKLR High Court Nairobi J.G. Nyamu, R. Wendo & G.A. Dulu, JJ December 7, 2007 • Jayne Mati & another v Attorney General & another [2011] eKLR • Coalition for Reform & Democracy(CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng'ang'a v Republic of Kenya & another Petition No.628 of 2014 • Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others Civil Appeal NO. 21 OF 2014 [2014] eKLR • Jacqueline Okuta & another v Attorney General & 2 others PETITION NO. 397 OF 2016 [2017] eKLR • Luco Njagi & 21 others v Ministry of Health & 2 others Nairobi Constitution and Human Rights Division Petition NO. 218 OF 2013 [2015] eKLR • Patricia Asero Ochieng & 2ors vs AG &Anor HC Petition No. 409 OF 2009 • Aids Law Project v Attorney General & 3 others [2015] eKLR • Geoffrey Andare vs AG and DPP & Anor HC Petition NO 149 of 2015 	
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Week 6	SIT IN CAT	SIT IN CAT	
Week 7	Lesson 7 <ul style="list-style-type: none"> • Devolution 	Reading <ul style="list-style-type: none"> • Othieno Nyanjom Devolution in Kenya's new Constitution www.sidint.net/docs/WP4.pdf • Devolution In Kenya Prospects, Challenges and the Future https://www.africaportal.org/dspace/articles/devolution-kenya-prospects-challenges-and-future • Final Report of the Task Force on Devolved Government: A Report on the Implementation of Devolved Government in Kenya, A report of the Ministry of Local Gov't's Task Force 	Participants analyze the progress of devolution in Kenya
Week 8	Lesson 8 <ul style="list-style-type: none"> • Constitutional Values, Principles and Safeguards • Preambular provisions and directive 	Readings <ul style="list-style-type: none"> • Kamau Mwaura Charles, Principles of Constitutional Law 2014 Law Africa Nairobi Kenya PP 69-113 • Preambular Provisions; Excerpts from Wiki Pedia(HO) • Ambani and Kibwana; (2005) The case for constitutional articulation of directive principles of state policy in Kenya (HO) 	Participants determine the case for directive principles of state policy in the CoK 2010 Participants present on their experience with the implementation of

	<p>principles of state policy</p> <ul style="list-style-type: none"> National values and principles of governance in the constitution of Kenya 2010 Other constitutional values, principles and safeguards in the constitution of Kenya 2010 	<ul style="list-style-type: none"> Morrison v. Olson 487 U.S. 654 (1988) Preamble, Article 10 (national values and principles of governance, Chapter 4 (Bill of Rights, Chapter 6(Leadership and Integrity) Article 81 (principles of the electoral system) Article 91 Basic principles for political parties, Chapter 12 (principles of public finance) chapter 13(principles of public service) and constitutional provisions on the rule of law, independence of the judiciary, separation of powers, right of recall, affirmative action, minority rights, governance, sovereignty and public participation 	<p>constitutional values</p>
Week 9	Lesson 9	<p>Reading</p> <ul style="list-style-type: none"> Motola and Ramaphosa (2002) pp. 13- 126 (HO) Muthoni Thiankolu (2007)Landmarks from El Mann to the Saitoti Ruling(HO) Phillip Kichana; The High Court judgment in the Timothy Njoya and others versus CKRC and the AG((HO) Ongoya Z E; Patrick Ouma Onyango and 12 others vs. The Honorable Attorney 	<p>Participants present on and discuss selected cases interpret various provisions of the constitution</p>

		<p>general and 2 others: a classical case of misapplying and dis-applying jurisprudence?</p> <ul style="list-style-type: none"> • El Mann vs. AG [1969] E.A. 357 • Githunguri vs. R 1986 KLR 1 • Felix Njagi Marete -vs.- The AG [1987] KLR 690, • Joseph Maina Mbacha and 3 ors vs. AG HC Misc 385 of 1989 • Matiba -vs.- The Attorney -General Misc. Application No. 666 of 1990 • Crispus Njogu vs. AG (H.C. CR. Application No. 39 of 2000) • Charles Onyango Obbo vs Uganda Constitutional Appeal NO. 2 OF 2002 (SC Uganda) • Misc APP No 302 of 200 Stephen Mwai Gachiengo • Mary Ariviza v Interim Independent Electoral Commission of Kenya & another [2010] EKLK • CREAM and 6 ors vs. AG HC Petition NO 16 OF 2011 • Jesse Kamau & 25 others v Attorney General [2010] EKLK • Timothy Njoya and Others -Versus- CKRC and The Attorney General and Others, Misc. Civil Application No. 82 of 2004 (
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		<p>2004 1 KLR 261)</p> <ul style="list-style-type: none"> • Patrick Ouma Onyango and 12 others vs. The Honorable Attorney general and 2 others HC Misc 667 of 2005 (2005 EKLK) • Ndyanabo vs. R 2001 EA 485 (TZ) • Makwanyane vs S 1995 (6) BCLR 665 (CC) • Du Plessis and ors vs De Klerk and ors 1996 (5) BCLR 658 (CC) • Larbi-Odam and ors vs.MEC for Education and anor. 1997(12) BCLR 1665 (CC) • National Coalition for Gay and Lesbian Equality and ors vs Minister for Home and ors 200 (1) BCLR 39 (CC) • Transvaal Agricultural Union vs. Minister of Land Affairs & anor. 1997(2) SA 621 • S vs. Zuma 1997 (2) SA 621 CC • McCulloch vs. Maryland 17 US 316 • Madbury vs. Madison 5 US 1 (Cranch) 137.1803 • Morrison vs. Olson 487 US 654 • Brown v. Board Of Education, 347 U.S. 483 (1954) 347 U.S. 483 • NYT vs. Sullivan 376 U.S. 254 (1964). • Lochner vs. New York 198 US 45 • Scott vs. Sanford 60 US 393 • Plessy v. Ferguson 163 US 537 (1896) • Scott vs. Emmerson 15 Mo 576 	
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		<ul style="list-style-type: none">• Roe vs. Wade 410 US 113• IPP vs Casey 505 U.S. 833 (1992)	
	WEEK 10	REVISION AND EXAMS	

CHARLES B G OUMA

LECTURER CONSTITUTIONAL LAW

FACULTY OF LAW, CUEA

19TH JUNE 2017

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