



MURANG'A UNIVERSITY COLLEGE

(A CONSTITUENT COLLEGE OF JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY)

DEPARTMENT OF LIBERAL STUDIES

2015/2016 ACADEMIC YEAR:

END OF SEMESTER ONE EXAMINATIONS

UNIT CODE: HCOB 2506

UNIT TITLE: CONSTITUTION AND GOVERNANCE

CLASSES: BCOM Y3 S1 TC

MAIN EXAM

DATE: 26TH APRIL 2016

TIME: 2 HOURS

INSTRUCTIONS

ANSWER QUESTION ONE AND ANY OTHER TWO

QUESTION ONE (COMPULSORY)

- a) Define the term constitution (3marks)
- b) Briefly explain the importance of constitution (6marks)
- c) Differentiate flexible from rigid constitution (7marks)
- d) Outline and describe the qualities of a good constitution (6 marks)
- e) State and briefly explain four differences between written and unwritten (8marks)

QUESTION TWO

The bill of rights in the Kenyan constitution is described as the most progressive in Africa. Describe five major provisions in the chapter on the bill of rights. (20 marks)

QUESTION THREE

- a) What are the requirements for one to be eligible for election as a member of a county assembly? 6marks
- b) State the reasons that may lead to a person being disqualified from being elected a member of national assembly. 14marks

QUESTION FOUR

QUESTION FIVE

Explain the five phases that characterize Kenya's Constitution Making History from 1890-2010 (20 marks)



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HCOB 2506: CONSTITUTION AND GOVERNANCE

APRIL 2016

CLASS BCOM YR3 S1, TC

SUPPLEMENTARY EXAM

TIME: 2 HOURS

INSTRUCTIONS

ANSWER QUESTION ONE AND ANY OTHER TWO

QUESTION ONE (COMPULSORY)

- a Briefly explain the importance of a constitution :(6 mks)
- b) Differentiate the following terms :(6 mks)
 - enacted constitution
 - evolved constitution
- c) Identify and briefly describe the three arms of government that manifest the separation of powers (12 marks)
- d) Outline three merits and three demerits of a rigid constitution (6mks)

QUESTION TWO

- a) Explain with examples difference between parliamentary and federal governments. (10 marks)
- b) Describe the advantages and disadvantages of a presidential system of government. (10mks)

QUESTION THREE

Discuss the notion of separation of powers as espoused in the constitution of Kenya 2010

QUESTION FOUR

Briefly explain the advantages and disadvantages of the following types of leadership styles

Autocratic, Democratic, Laissez faire

QUESTION FIVE

Describe the contents of the first two chapters of the Kenya constitution 2010 highlighting their importance.

HCOB 2506: CONSTITUTION AND GOVERNANCE

MARKING SCHEME ONE

A **constitution** is a set of fundamental principles or established precedents according to which a state or other organization is governed. These rules together make up, i.e. *constitute*, what the entity is. When these principles are written down into a single document or set of legal documents, those documents may be said to embody a *written* constitution; if they are written down in a single comprehensive document, it is said to embody a *codified* constitution

Constitution enjoys supreme importance in the state because:

1. It reflects the sovereign will of the people.
2. It lies down of the aims, objectives, values and goals which the people want to secure. .
3. It contains description and guarantee of the fundamental rights of the people.
4. It gives a detailed account of the organization of the government. The organization, powers and functions of its three organs of the and their interrelationship.
5. In a federation, the Constitution lays down the division of powers between the central government and the governments of the federating states/provinces. It is binding upon both the centre and the state governments.
6. It specifies the power and method of amendment of the Constitution.
7. It lays down the election system and political rights of people.
8. It provides for independence of judiciary and rule of law.
9. The constitution governs all and no one can violate its rules.

Flexible constitution

A Flexible Constitution is one which can be easily amended. Several political scientists advocate the view that a flexible constitution is one in which the constitutional law can be amended in the same way as an ordinary law. Constitutional amendments are passed in the same manner by which an ordinary law is passed.

British Constitution presents a classic example of a most flexible constitution. The British Parliament is a sovereign parliament which can make or amend any law or constitutional law by a simple majority. Laws aiming to affect changes in a constitutional law or in any ordinary law are passed through the same legislative procedure i.e., by a simple majority of votes in the legislature. Similarly, a Constitution is flexible when the procedure of amending it is simple and the changes can be made easily.

The Rigid Constitution is one which cannot be easily amended. Its method of amendment is difficult. For amending it, the legislature has to pass an amendment bill by a specific, usually big, majority of 2/3rd or 3/4th. For passing or amending an ordinary law, the legislature usually passes the law by a simple majority of its members.

A rigid constitution is considered to be the most fundamental law of the land. It is regarded as the basic will of the sovereign people. That is why it can be amended only by a special procedure requiring the passing of the amendment proposal by a big majority of votes which is often followed by ratification by the people in a referendum.

The Constitution of United States of America is a very rigid constitution.

Qualities of a Good Constitution:

1. Constitution must be systematically written.
2. It should incorporate the constitutional law of the state and enjoy supremacy.
3. It should have the ability to develop and change in accordance with the changes in the environment and needs of the people.
4. It should be neither unduly rigid nor unduly flexible.
5. It must provide for Fundamental Rights and Freedoms of the people.
6. It should clearly define the organization, powers, functions inter-relations of the government of the state and its three organs.
7. It must provide for the organization of a representative, responsible, limited and accountable government.
8. It must provide for:
 - (i) Rule of Law
 - (ii) De-centralization of powers
 - (iii) Independent and powerful Judiciary

- (iv) A system of Local self-government
 - (v) A Sound Method of Amendment of the Constitution
 - (vi) Process and Machinery for the conduct of free and elections
9. The Constitution must clearly reflect the sovereignty of the people.
10. The language of the constitution should be simple, clear and unambiguous

Difference between Written and Unwritten Constitutions:

- (1) A written constitution is written in the form of a book or document, whereas an unwritten constitution is not written in such a form.
- (2) A written constitution is made and enacted by a constituent assembly of the people. An unwritten constitution is the result of a gradual process of constitutional evolution. It is never written by any assembly.
- (3) A written constitution is usually less flexible than an unwritten constitution. An unwritten constitution depends mostly on unwritten rules or conventions which do not require any formal amendment.
- (4) A written constitution is definite. Its provisions can be quoted in support or against any power exercised by the government. An unwritten constitution cannot be produced in evidence. It has to be proved by quoting its sources and practices.

However, the difference between written and unwritten constitutions is not organic. A written constitution has written parts in majority. Along with these, it also has some unwritten parts in the form of conventions. In an unwritten constitution, most of the parts are unwritten and are not written in the form of a book. However some of its parts are also found written in some charters and other documents.

QUESTION TWO

The Bill of Rights

The Bill of Rights contains a list of rights listed under 26 different articles, (Articles 26-51). It has been called one of the most progressive Bills of Rights globally. The major provisions include

1. The right to life (Article 26)

This is one of the most hotly-debated Articles in the draft Constitution. For avoidance of contention, Article 26 states:

26. (1) Every person has the right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

Subsection (3) seems to allow capital punishment to continue, as current laws allow it.

- The document states that life begins at conception, and then states that a person shall not be deprived of life intentionally.
- As stated by the PSC Chairman Mr Abdikadir Mohammed during his closing remarks on the Constitutional debate in parliament, the Constitution specifically states that “Abortion is not permitted.” However...

2. Assembly, demonstration, picketing and petition (Article 37)

Article 37 states:

Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

3. Protection of right to property (Article 40)

Article 40 allows any citizen to own property anywhere in Kenya (foreigners may not own land with leases of longer than 99 years as per Article 65). It further says that Parliament cannot enact a law to arbitrarily deprive a person of property. The State cannot deprive a person of property of any description unless that property has been legally acquired, or the deprivation is for a public purpose or in the public interest. Where the latter is the case, the person so deprived of property must be promptly and justly compensated in full, and the person so deprived is allowed to contest the deprivation in a court of law.

QUESTION THREE

Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person--

- (a) is registered as a voter;
- (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution

or an Act of Parliament; and
(c) is either--

- (i) nominated by a political party; or
- (ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

b) A person is disqualified from being elected a member of Parliament if the person--

- (a) is a State officer or other public officer, other than a member of Parliament;
- (b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;
- (c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;
- (d) is a member of a county assembly;
- (e) is of unsound mind;
- (f) is an undischarged bankrupt;
- (g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or
- (h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.

QUESTION FOUR

The 12 principles for good governance

Principle 1 - Fair Conduct of Elections, Representation and Participation

- Local elections are conducted freely and fairly, according to international standards and national legislation, and without any fraud.
- Citizens are at the centre of public activity and they are involved in clearly defined ways in public life at local level.
- All men and women can have a voice in decision-making, either directly or through legitimate intermediate bodies that represent their interests. Such broad participation is built on the freedoms of expression, assembly and association.
- All voices, including those of the less privileged and most vulnerable, are heard and taken into account in decision-making, including over the allocation of resources.
- There is always an honest attempt to mediate between various legitimate interests and to reach a broad consensus on what is in the best interest of the whole community and on how this can be achieved.
- Decisions are taken according to the will of the many, while the rights and legitimate interests of the few are respected.

Principle 2 - Responsiveness

- Objectives, rules, structures, and procedures are adapted to the legitimate expectations and needs of citizens.
- Public services are delivered, and requests and complaints are responded to within a reasonable timeframe.

Principle 3 - Efficiency and Effectiveness

- Results meet the agreed objectives.
- Best possible use is made of the resources available.
- Performance management systems make it possible to evaluate and enhance the efficiency and effectiveness of services.
- Audits are carried out at regular intervals to assess and improve performance.

Principle 4 - Openness and Transparency

- Decisions are taken and enforced in accordance with rules and regulations.
- There is public access to all information which is not classified for well-specified reasons as provided for by law (such as the protection of privacy or ensuring the fairness of procurement procedures).
- Information on decisions, implementation of policies and results is made available to the public in such a way as to enable it to effectively follow and contribute to the work of the local authority.

Principle 5 - Rule of Law

- The local authorities abide by the law and judicial decisions.
- Rules and regulations are adopted in accordance with procedures provided for by law and are enforced impartially.

Principle 6 - Ethical Conduct

- The public good is placed before individual interests.
- There are effective measures to prevent and combat all forms of corruption.
- Conflicts of interest are declared in a timely manner and persons involved must abstain from taking part in relevant decisions.

Principle 7 - Competence and Capacity

- The professional skills of those who deliver governance are continuously maintained and strengthened in order to improve their output and impact.
- Public officials are motivated to continuously improve their performance.

- Practical methods and procedures are created and used in order to transform skills into capacity and to produce better results.

Principle 8 - Innovation and Openness to Change

- New and efficient solutions to problems are sought and advantage is taken of modern methods of service provision.
- There is readiness to pilot and experiment new programmes and to learn from the experience of others.
- A climate favourable to change is created in the interest of achieving better results.

Principle 9 - Sustainability and Long-term Orientation

- The needs of future generations are taken into account in current policies.
- The sustainability of the community is constantly taken into account.
- Decisions strive to internalise all costs and not to transfer problems and tensions, be they environmental, structural, financial, economic or social, to future generations.
- There is a broad and long-term perspective on the future of the local community along with a sense of what is needed for such development.
- There is an understanding of the historical, cultural and social complexities in which this perspective is grounded.

Principle 10 - Sound Financial Management

- Charges do not exceed the cost of services provided and do not reduce demand excessively, particularly in the case of important public services.
- Prudence is observed in financial management, including in the contracting and use of loans, in the estimation of resources, revenues and reserves, and in the use of exceptional revenue.
- Multi-annual budget plans are prepared, with consultation of the public.
- Risks are properly estimated and managed, including by the publication of consolidated accounts and, in the case of public-private partnerships, by sharing the risks realistically.
- The local authority takes part in arrangements for inter-municipal solidarity, fair sharing of burdens and benefits and reduction of risks (equalisation systems, inter- municipal co-operation, mutualisation of risks...).

Principle 11 - Human rights, Cultural Diversity and Social Cohesion

- Within the local authority's sphere of influence, human rights are respected, protected and implemented, and discrimination on any grounds is combated.
- Cultural diversity is treated as an asset, and continuous efforts are made to ensure that all have a stake in the local community, identify with it and do not feel excluded.
- Social cohesion and the integration of disadvantaged areas are promoted.
- Access to essential services is preserved, in particular for the most disadvantaged sections of the population.

Principle 12 - Accountability

- All decision-makers, collective and individual, take responsibility for their decisions.
- Decisions are reported on, explained and can be sanctioned.
- There are effective remedies against maladministration and against actions of local authorities which infringe civil rights.

QUESTION FIVE

HISTORY OF THE KENYAN CONSTITUTION

Kenya's Constitution Making History: 1890-2010 Kenya's search for a new constitution can be traced back, as long back, as 1890 when the British started settling in Kenya after the IBEA Company had navigated the country. ***In 1920, the British declared Kenya a protectorate and a colony: a colony in the interior parts of Kenya and a protectorate at the 10-miles coastal strip that was under the reign of the sultan of Zanzibar.*** When one looks at that history, one is able to discern the issues that have made Kenyans clamour for change, including the issue of reduced power at the centre; some communities seeking to get out of their marginalized status; and some others wishing to secede and so on. Below is an analysis of the five phases of Kenya's search for a new order that is built on justice, equality and common good.

PHASE 1: 1890-1960

In this phase, marked by subordination and subjugation of the local people by colonizers, there was an undying need for freedom. Colonial rule was by decree, ordinances and also was marked by dictatorship of the colonial governor, who represented the queen of Great Britain. Africans were clamouring for freedom and land, which had been taken away since Kenya was declared a settler colony.

By the time 1944 approached, there was some level of consciousness among Africans and some of them were elected to the Legislative Council (LEGCO). More representation in both the executive council and the LEGCO was fought for by the emerging African leaders. Further, while there were some elements of constitutional law towards the end of the phase, especially through the Lyttleton and Lenox Boyd Constitutions (of 1954 and 1958 respectively), it was emerging that Africans wanted more: total representation in all organs of government and also freedom to rule their own country. This led to the second phase discussed below.

PHASE 2: 1960-1962

This phase was marked by emerging constitutional moments. In this phase, three conferences were organized in London to draft Kenya's new constitution. Moreover, there were new political parties pitching for two systems of government. KADU pitched for a federal state, and was backed by minority groups including the then settlers. KANU on the other hand pushed for a centralized system akin to how colonialists administered Kenya, and also favoured a parliamentary system similar to the one in United Kingdom. In summary, by the time 1962 came, an independence constitution was drafted largely ignoring the issues of marginalization and freedom of northern peoples and coastal protectorate; ignored the question of African administrative structures that had existed prior and during colonialism; and also ignored the claims about land. However, the drafters and parties present agreed that right to own property be constitutionalized; agreed on citizenship can be acquired after birth or through other processes; agreed on an independent judiciary; a parliamentary system; and also agreed that the prime minister and governor co-exist together among other things. All these were to change in the next phase.

PHASE 3: 1963-1991

Kenya became independent partially by having self-government under a prime minister, then later full independence but still with the governor as head of state representing the queen. But before one year was over, the first amendment was passed to abolish this latter post, and equip the same powers to the prime minister. The rain, as it goes, started beating Kenya on this material day.

Numerous amendments that wrecked havoc to institutionalism and constitutionalism were hurriedly done to the extent that by 1969, ten amendments had been made. The independence constitution was totally modified to suit the power hungry elite, who equipped so much power in the presidency – a president who was never elected by anyone in the first place. That was the first type of amendments: amendments to destroy the constitutional infrastructure cited in phase two above.

The second type of amendments consisted of changing the constitution but later MPs realizing the folly and going back to the state as it was then. Such amendments included the change of parliamentary language from English to Kiswahili and later on reverting to both; or the amendment that removed security of tenure for constitutional office holders only to return to status quo at a later date; or even the amendment to create a de jure one party state and later on return Kenya into multipartyism. The later concluded this phase as the 27th amendment of 1991.

PHASE 4: 1992-2002

Within this phase, three critical steps were taken. First was to forge a common ground for reforms, within the Ufungamano Initiative. Second was to organized and push for legislative framework to govern the process. And third, was the push for further constitutional amendments under the IPPG, which somehow stole the chance to rewrite the country's constitution in 1997. The fourth issue that could have helped steer the process did not happen. That was the

convocation of Bomas, consisting of MPs, was to meet before the 2002 elections but Moi dissolved parliament thereby blowing the last candle that Kenya could get a constitution before the 2002 elections. But within this phase, as it ended, something critical happened: Moi and KANU lost elections to a promising opposition which had been key advocates of constitutional and institutional reform. They were to steer the process once in power.

PHASE 5: 2003-2010

In Kenya's history, this is the most promising phase in the search of a new order. But alas, Kenyans squandered the opportunity. Kenyans were however led by a querulous government in 2003 whose formation combined both anti- and pro- reformists; to a divisive referendum in 2005; and, to a post-election debauchery in 2008. This is where Kenya's dream search for that new order remained still that: a dream. Within this phase, three critical things happened: first, the current president Kibaki and his henchmen and women refused to fully implement the pre-elections MoU that could have saved this country from the quarrels of government and the stalemate at Bomas. Second, within parliament, there was no agreement on the draft that would be taken to the referendum, as two opposing forces emerged and Kenyans followed suit. And third, Kenyans did not allow objective civic education to take place and each followed their own ethnic lineage to vote for or against the draft