

Kenya Harmonised Draft Constitution Companion

Helping to understand the harmonized draft

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November 2009

Disclaimer: the author is not a legal professional – just a Kenyan trying to understand and simplify the legal language. This document is intended to make reading the draft easier, not as a substitute or comprehensive summary. Readers should check the information presented here against the actual draft. Please send factual corrections to: njerigakonyo@yahoo.com . Thanks.

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-
- Note: CoE means Committee of Experts

Structure of government

Institutional overview

Kenyan state

Kenyan people

The people of Kenya exercise their sovereignty only through the Constitution (Chapter 1)

**Kenya
Constitution**

Legislature

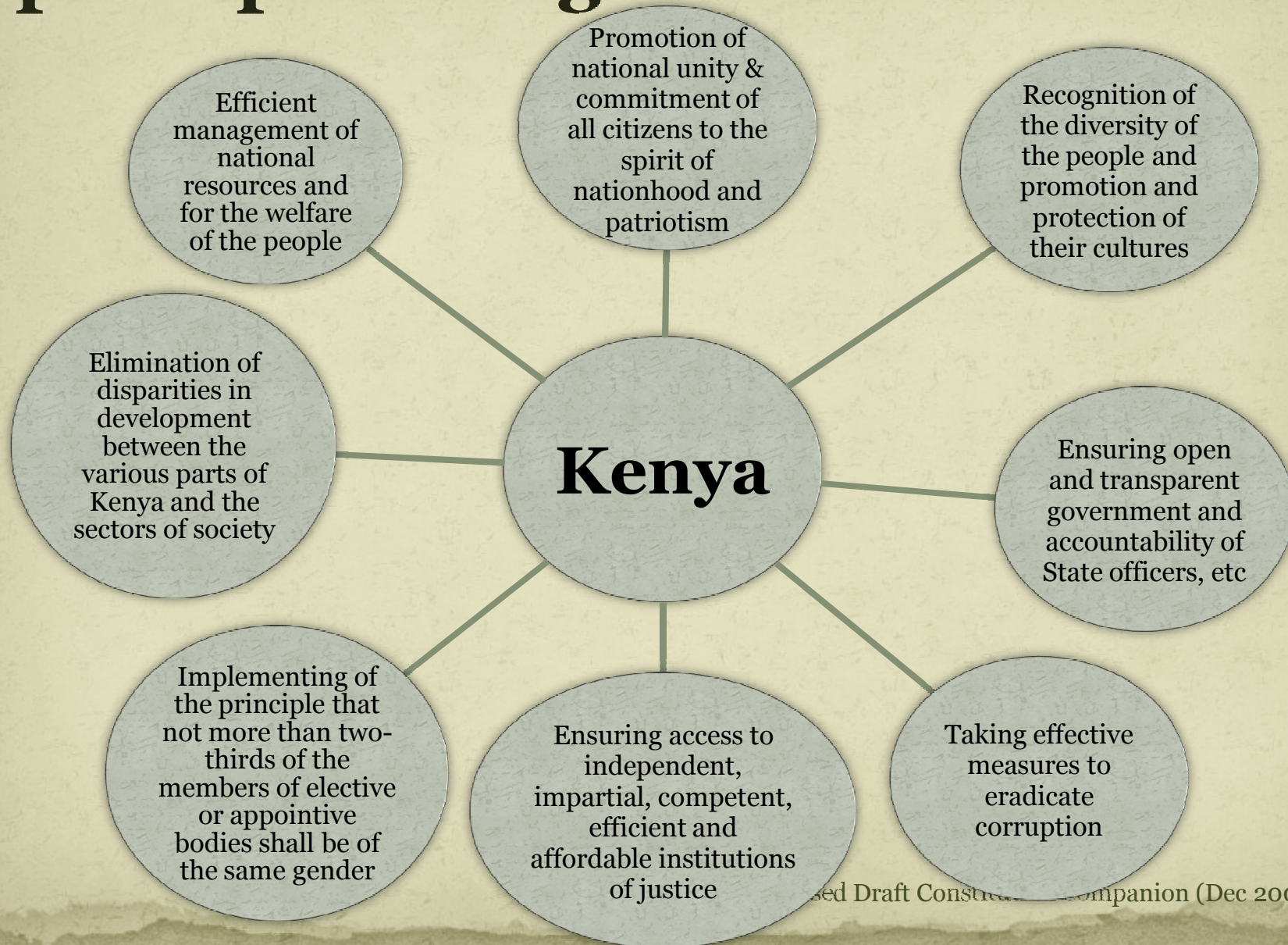
Executive

Judiciary

National values and The Bill of Rights

Areas the bill covers

Chapter 3: Selected national values, principles and goals



Personal

- Right to life
- Freedom & security of the person
- Human dignity
- Privacy
- Freedom of conscience, religion, belief & opinion
- Freedom from discrimination

Groups

- Gender
- Older members of society
- Youth
- Children
- Persons living with disabilities
- Minorities and marginalized groups

Processes

- Fair administrative action
- Access to justice
- Rights of arrested persons
- Fair hearing
- Rights of persons held in custody

The Bill of Rights (Chapter 6) *Selected sections*

Socio-economic

- Freedom of trade, occupation & profession
- Protection of right to property
- Labour relations
- Social security
- Health, education, housing, food, water & environment
- Consumer rights

Information, association & movement

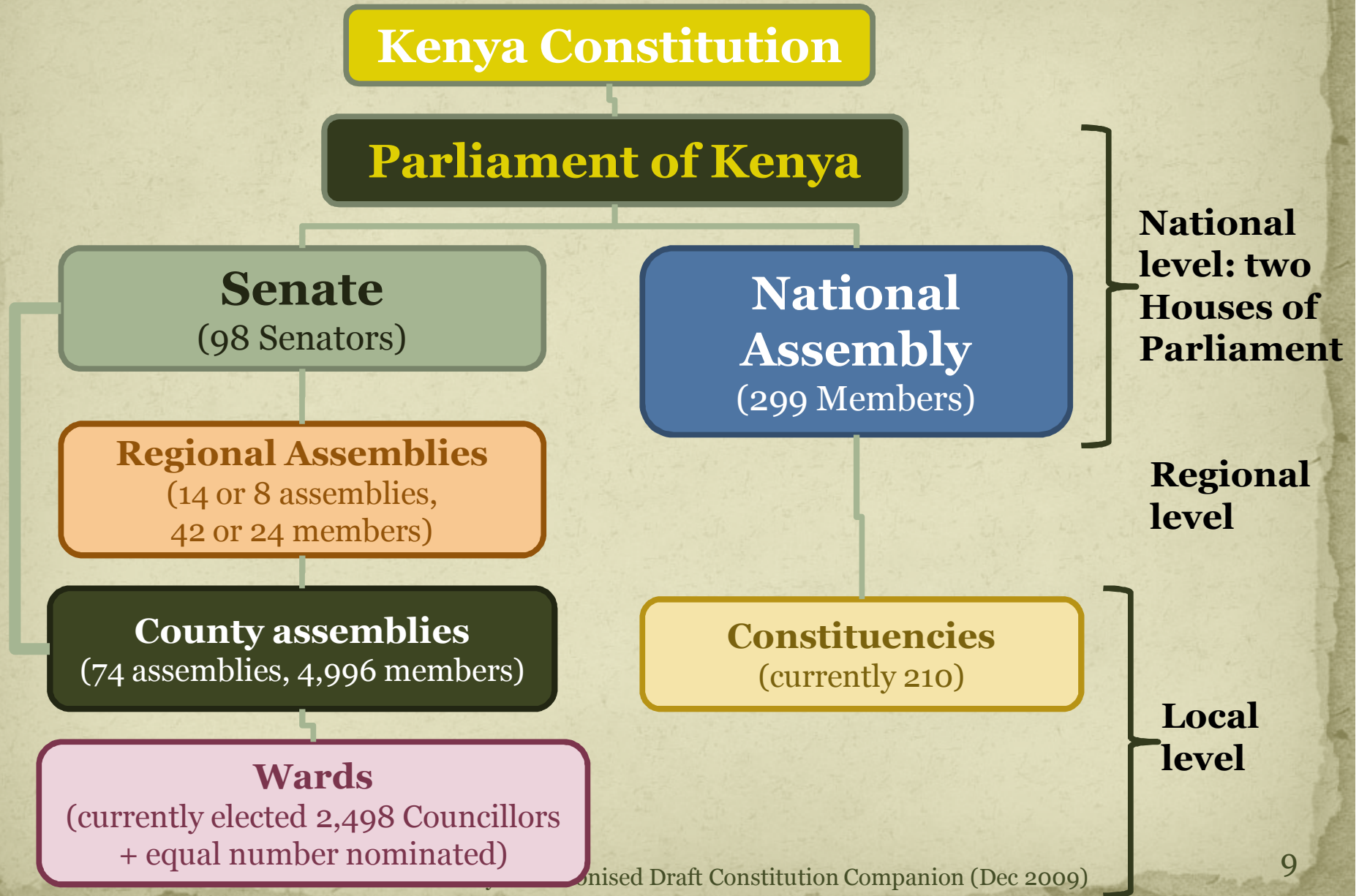
- Freedom of expression
- Freedom of the media
- Access to information
- Assembly, demonstration, picketing and petition
- Political rights
- Freedom of movement & residence

Note: this is the author's grouping of the rights. These headings are not found in the draft constitution

Chapter 11: The Legislature

Representative, law-making bodies

The Legislature .../1



Senate

- One elected by each county assembly but not a member of the assembly
- Two women from each region elected by the regional assemblies
- One disabled person or youth from each region
- Speaker – an ex officio member
- Total number: $74 + (2 \times 8) + 8 + 1 = 98$ Senators)

Regional Assemblies (8)

- Three members from each county
- Governors & Deputy Governors elected from assembly members

County assemblies (74):

Rift Valley – 19 + Eastern – 13 +
Nyanza – 12 + Western – 8 +
Coast & Central – 7 each +
North Eastern & Nairobi – 4 each
Each county with members who are
Councillors from each ward

Wards

- Councillors elected
- Political parties nominate an equal number to those elected
- Total number: currently 2,498 elected Councillors + equal number nominated = 4,996

National Assembly

- One from each constituency (at least 210)
- One woman from each county (each county comprising a single member constituency)
- 7 members – persons with disabilities; with no more than 4 of the same gender (one term only)
- 7 members elected by marginalized communities, groups and workers (one term only)
- Speaker – an ex-officio member
- Total number: (currently $210 + 74 + 7 + 7 + 1 = 299$ Members)

Constituencies (currently 210)

The Legislature

.../2

Legislature structure: some pluses & concerns heard thus far

Pluses

- Increased grassroots participation
- Devolved units have representation at national level
- The cost of the devolved governments may be high but:
 - There are financial instruments we can consider using to fund the system
 - The opportunity cost of not devolving may be higher: if people do not feel represented, the resulting instability would be very costly
- Devolved government appointment procedures are defined at a national level so we will have minimum standards for everyone

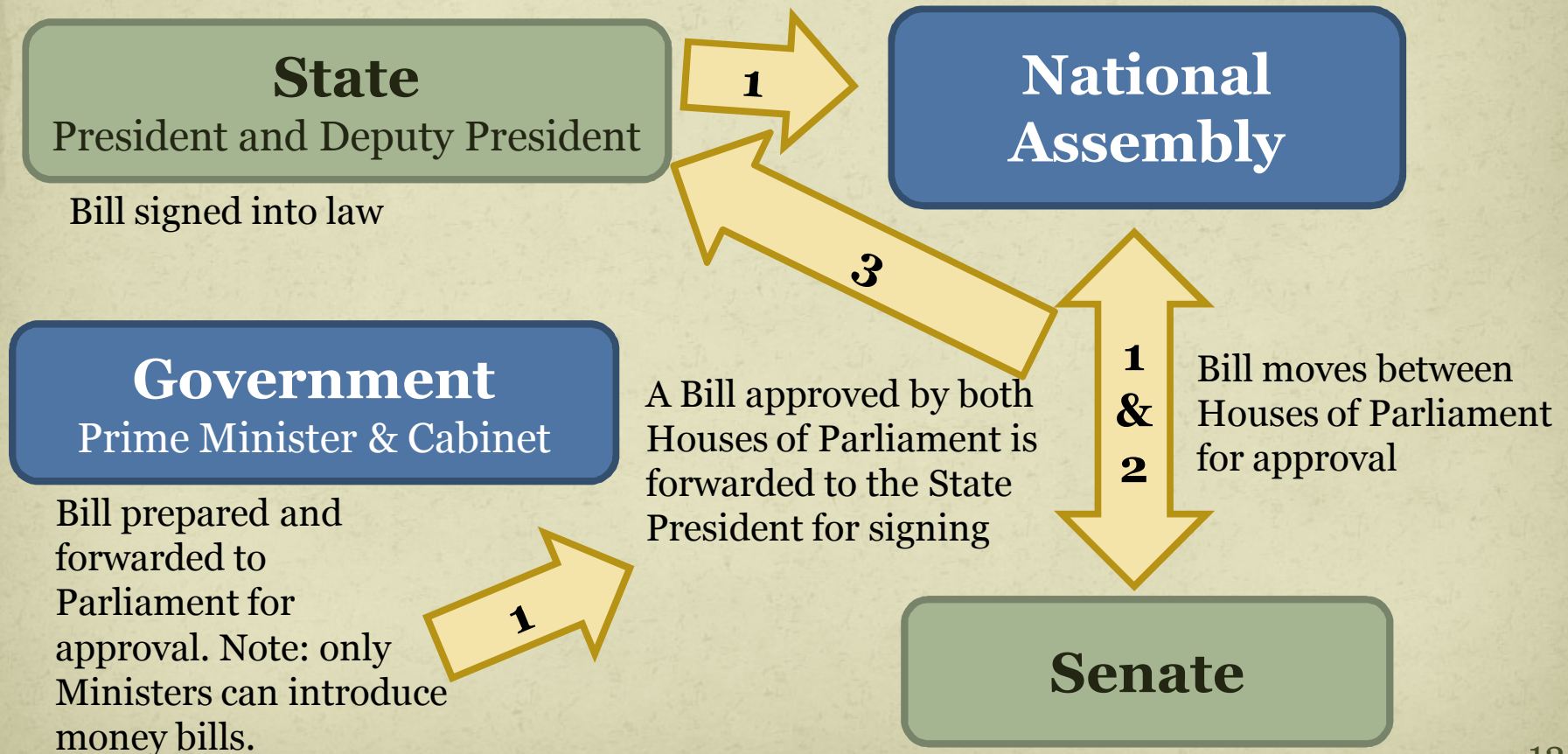
Concerns

- Multiple layers mean decision-making gridlock
- Cost of implementing and maintaining such a huge structure is too high
- Financing could be very problematic:
 - Regional assemblies do not have power to raise revenue
 - Counties can borrow – but who bails them out when they can't repay?
- Lack of clarity: 8 regions or 14?
- We are at risk of creating ethnic balkans – powerful, self-governing regions whose boundaries largely follow ethnic concentrations
- We must ensure that we attain international-standard governance ideals e.g. genuine citizen participation and real accountability at all levels

Legislative process

Executive

Legislature



Chapter 12: The Executive

Implementing laws and policies

The Executive

National Executive

State

President and Deputy President

President

- Head of State
- Commander-in-Chief of the Kenya Defence Forces
- Chairperson of the National Security Council
- Symbol of national unity

President

- Elected through direct adult suffrage by secret ballot
- Not required to be member of a party

Government

Prime Minister & Deputy PM

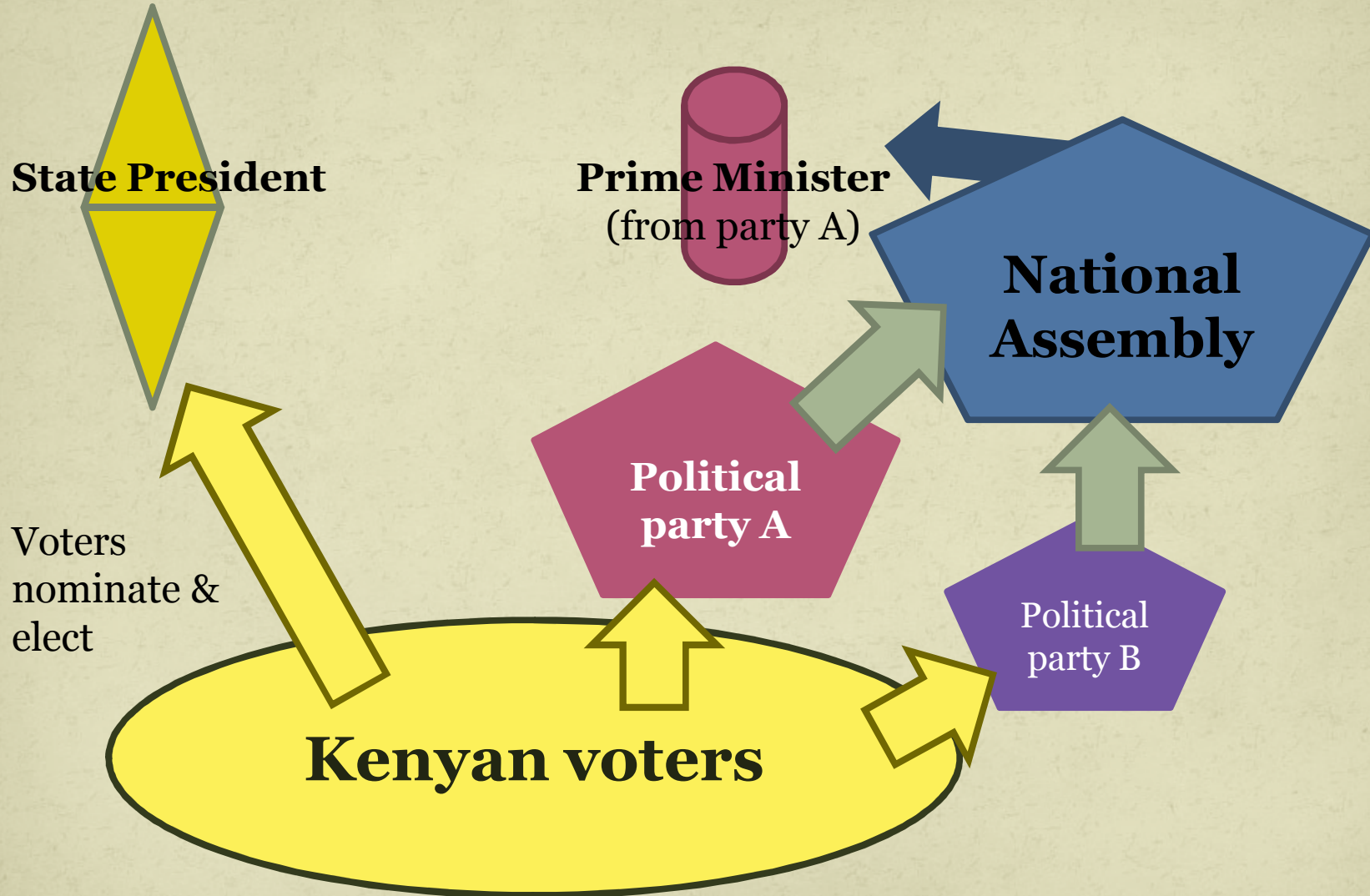
Prime Minister

- Head of Government
- Directs and coordinates work of the ministries (between 15 & 20) and the preparation of legislation
- Responsible to Parliament
- Presides over Cabinet meetings

Prime Minister

- State President appoints the leader of the largest political party or coalition of parties represented in the National Assembly (NA). NA confirms.

The executive: selection

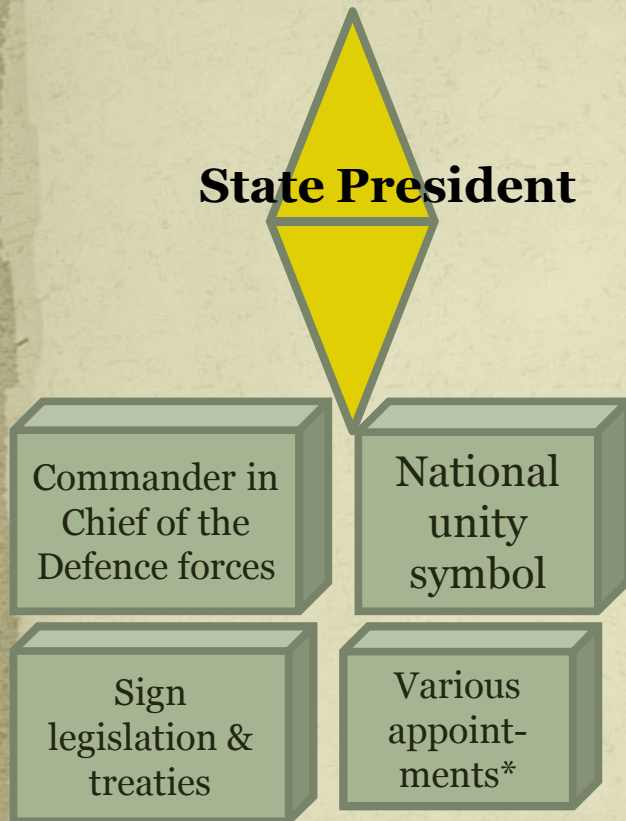


Note: the State President does not have to be a member of a party & should not be a Member of Parliament

The executive: power sharing

State President

Prime Minister



***Includes:**

- The Cabinet: PM, DPM, Ministers and Deputy Ministers
- Judges of superior courts
- President approves after parliamentary or other approval

***Note:**

- Cabinet: minimum of 15 and maximum of 20
- Cabinet can include not more than 10 non-parliamentarians

Executive: some pros & cons heard thus far

Pros

- The all-powerful presidency is no more
- This arrangement is real power sharing
- Kenya needs a president who will be a true national symbol, not hung on party politics
- The system improves accountability: we watch what goes on in Parliament on TV but State House is opaque to us
- The parliamentary system should strengthen political parties and help to ensure discipline since the PM will want to pass legislation, etc
- The President is analogous to a Chairman of a company who is elected during an AGM while the PM is like the CEO. Running a party, making it successful and keeping it together are not easy to do, contrary to popular belief

Cons

- The PM is now too powerful
- The State President gets a huge mandate from the popular vote and peanuts by way of real power
- The runner-up in a presidential election falls out of the picture because he/she cannot even be an MP
- A popularly elected President in charge of defence who disagrees with the PM could destabilise the country
- This section seems too focused on the current leaders

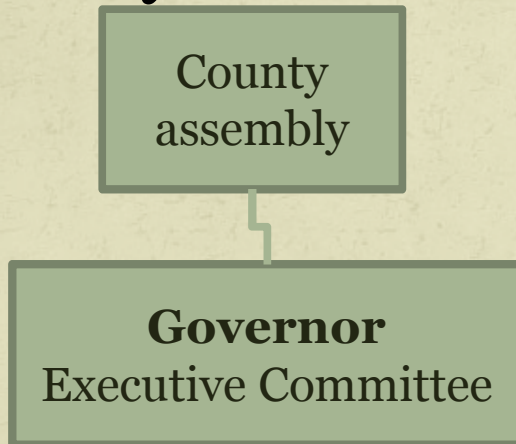
Fiscal matters

Central Government



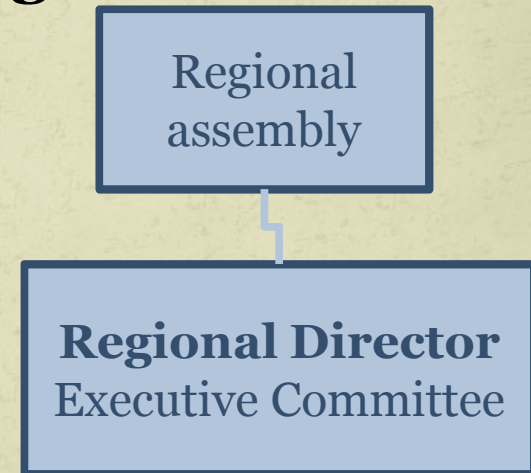
*Central government can levy taxes
and borrow*

County Government



*Counties can tax, borrow and
guarantee loans for investors*

Regional Government

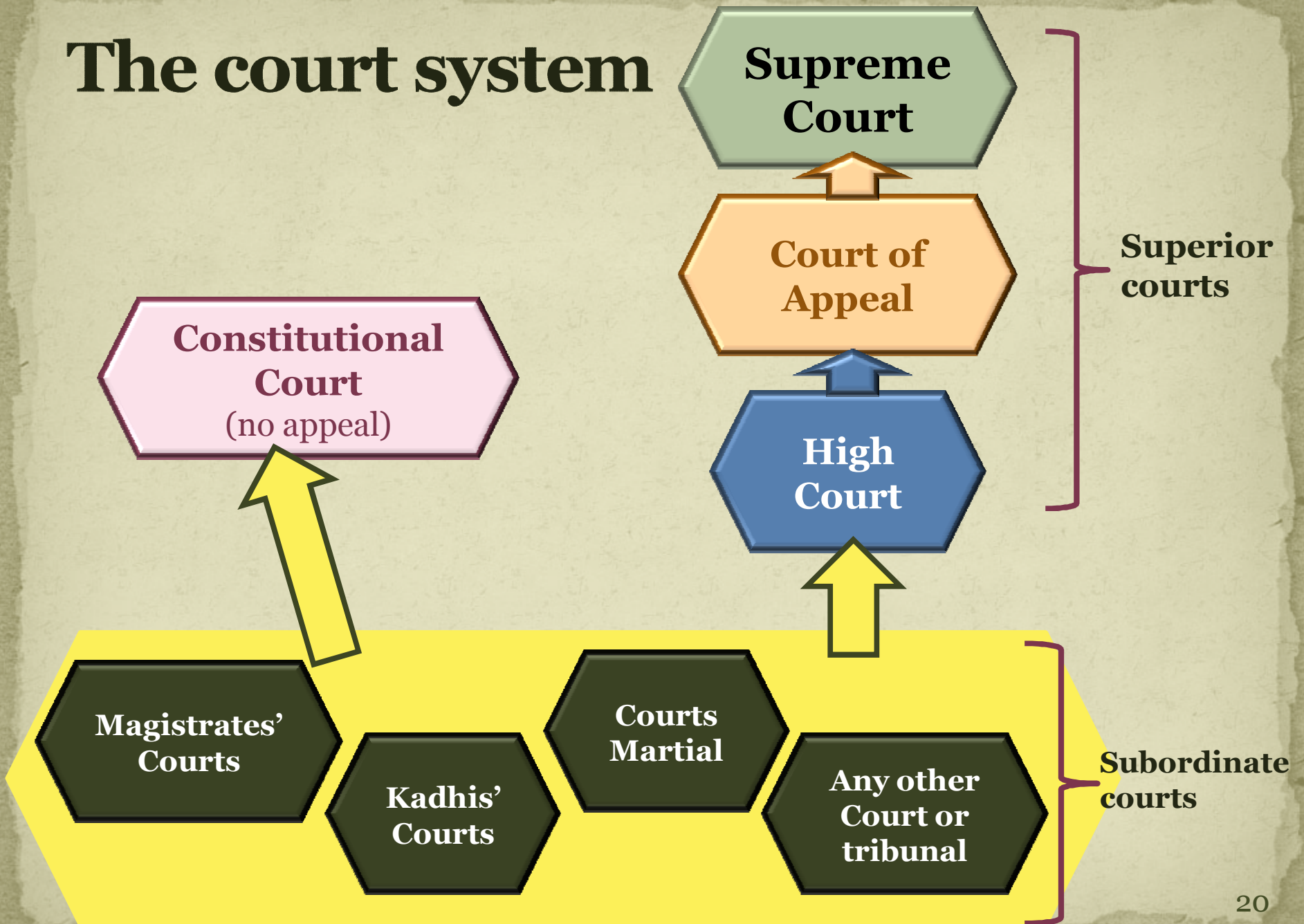


*Regions not empowered to tax
but can borrow*

Chapter 13: The Judiciary

Courts and legal system

The court system



The Judiciary

Supreme Court .../1

- Chief Justice is President of the Court
- Deputy Chief Justice is Vice President of the Court
- At least 5 but no more than 7 other judges

Supreme Court .../2

- Proceedings require at least 5 judges
- Sits in Nairobi
- Only the Supreme Court can hear State President impeachment cases

Constitutional Court

- An autonomous court
- No fewer than 5 judges
- Chief justice appoints the Principal Judge
- There is no appeal beyond this court

Court of Appeal

- Not fewer than 12 judges
- Act of Parliament determines the actual number of judges
- Chief Justice appoints the President of the court

High Court

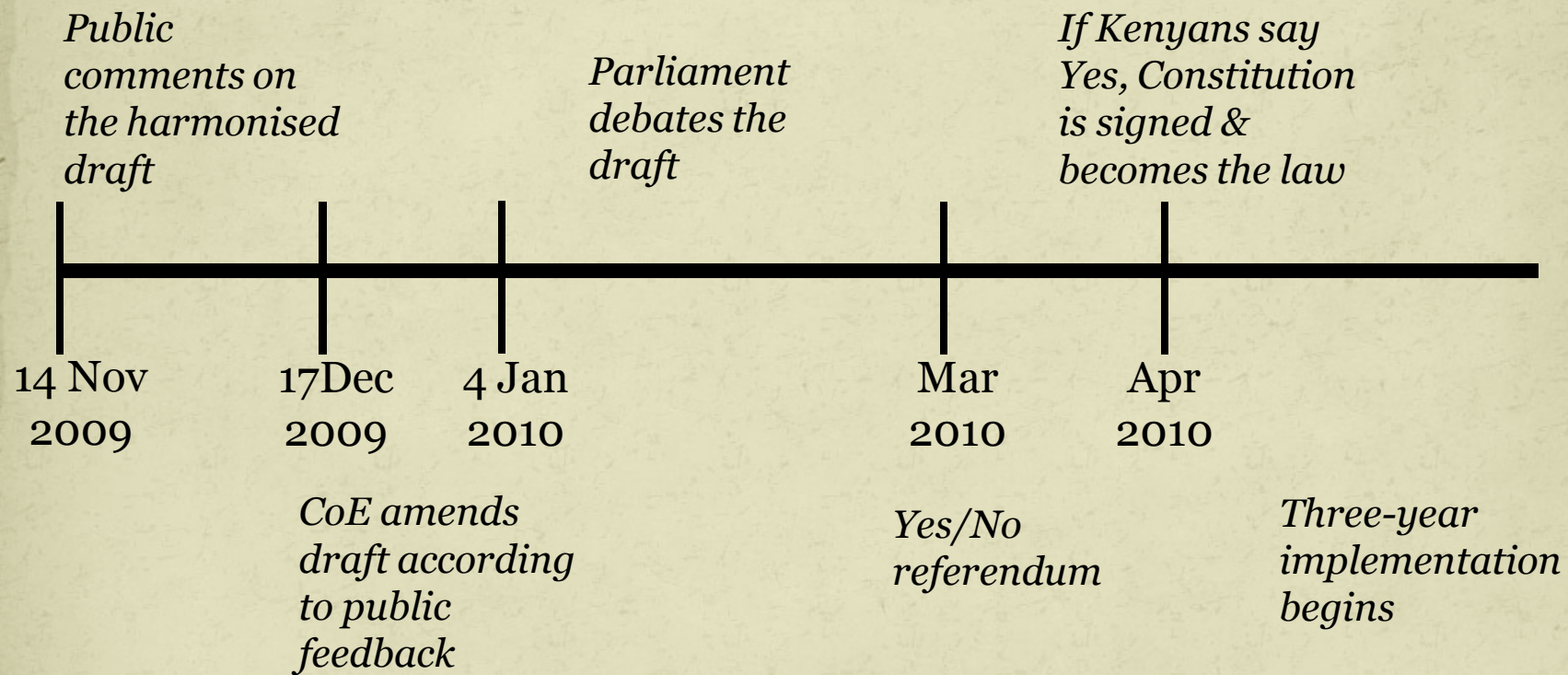
- Act of Parliament determines the number of judges
- Chief Justice appoints the Principal Judge

Next steps and implementation

Coming milestones

- Window for comments closes on 17 December
- Committee of Experts (CoE) amends draft according to public feedback (21 days)
 - CoE hands over the draft to the Parliamentary Select Committee on the Constitution
- Parliament debates the document
- Referendum in March 2010
 - A referendum law is needed first
 - Yes or No to the entire document
- If Yes, the document is passed into effect in April 2010

Constitution timelines



Implementation

- The CoE have set a strict three-year timetable to fully implement the Constitution
 - It is contained in the legal schedule of the draft
- A Commission to oversee implementation will be established immediately the Constitution is enacted
- Parliament can only delay the schedule once
 - With a two-thirds majority
- If unauthorised delays occur, the Constitutional provisions require that the Chief Justice recommends dissolution of Parliament to the State President