# Constitution and Constitution Making

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# What is A Constitution?

A constitution can be defined in a number of ways:

1. A set of agreed principles and rules which state the structure and power of a government and the relationship between the governor and the governed
2. Scheme by which a country is governed
3. Basic political principles by which a country is governed
4. Fundamental principles and rules that govern a state
5. Set of agreed principles, values, rules which act as a guide to the social conduct of a group of people
6. Body of principles and rules written or unwritten, that enables people within a country to live in order and harmony.

# Factors that determine the form/type of a Constitution in a country

1. Geographical factors e.g. USA which comprises many states or Japan (made up of several islands)
2. Religious beliefs of the people e.g. use of Islamic law in some countries
3. Historical background of a country e.g. colonization
4. Racial composition e.g. the apartheid racial regime in South Africa.

# Features/Components of a Constitution

**It Spells out the:-**

1. Duties and rights of the citizens
2. The formal structure of the government
3. Rules partaining to the head of state, his power and prerogatives
4. Composition, functions and powers of parliament
5. Composition, functions of the cabinet and civil servants
6. Duties and powers of the judiciary
7. Relationship between the government and its citizens
8. Fundamental human rights.

## Characteristics of a good Constitution

1. Must be able to protect the fundamental rights and freedoms of citizens
2. Must be comprehensive and cover all aspects of government. Thus it should address as many components of state as it can and as clearly as possible
3. Must be definite and its contents clearly defined
4. Must be durable, elastic and not easily tampered with
5. Must be flexible and hence address the changing needs of the society
6. Should have a provision and a procedure for its amendment.

# Types of Constitutions

**Written constitution**

**Definition:**

- It is one whereby the basic principles and rules of a country are contained in a formal document.
- Examples of written constitutions
  - USA — written in 1787
  - France— 1791
  - Germany— 1949
  - African countries e.g. Kenya

## Advantages of a Written Constitution

1. Readily available for ease of reference and application
2. Made with careful deliberation and thorough consideration
3. Simple, clear, precise and consistent
4. Can readily be consulted in case of doubt or discipline
5. Has laid down procedures of amendment and hence politicians and other influential personalities cannot alter it or tamper with it.
6. Creates harmony since it sets out clearly the powers and relationship between different organs of government
7. It safeguards the freedoms of the individual
8. Protects the interests of all including minorities in multi-racial nations
9. Useful in young growing nations as it enables them to grow in an orderly and organized manner unites all people in a nation.

## Disadvantages of Written Constitutions

1. As it is rigid, it is difficult to alter
2. Does not respond adequately and satisfactorily to changing circumstances
3. Too detailed and uses complex language therefore its rarely understood by ordinary citizens
4. It overpowers the judiciary (the organ that interprets the constitution)
5. Procedure for amending the constitution is slow and costly and causes delays and obstacles that may lead to civil disorder and unrest in a country.

**Unwritten Constitution**

Definition:

- It is one in which the fundamental rules and principles do not exist in one single written formal document.

- Instead, it is derived from several sources such as customs of the people and scattered documents.

An Example is the British constitution

**British constitution**

*Sources of the British Constitution*

- Statutes/acts of parliament
- Law of precedent — whereby judges may n if the law based on their decisions in fresh cases
- Customs e.g. procedures of the House of Commons and House of Lords and successions
- customs
- Conventions — behaviour and attitudes considered right and normal by the society
- Publications written by scholars i.e. law political thinkers, statesmen, the press
- The Hansard i.e. official report of British parliamentary proceedings
- Historical documents e.g.
  - ✓ Magna Carta (1215A.D)
  - ✓ The petition of Rights (1628 A.D)
  - ✓ The Bill of Rights (1689 A.D)
- The Reform Act (1832 A.D)
- The Parliamentary Acts (1911,1949)
- The British Nationality Act (1981).

**Advantages of an Unwritten Constitution**

1. Flexible and adaptable to changing conditions in the society
2. Simple to amend
3. Provides continuity with a country's traditional
4. Indigenous and thus well suited

## Disadvantages of an Unwritten Constitution

1) Unclear, indefinite and imprecise
2) Can easily be manipulated by those in power
3) Does not provide efficient protection for d rights of citizens
4) Gives the courts a lot of power
5) Unsuitable for young nations. It operates more efficiently in countries with a long uninterrupted history.

# Importance of a constitution

1. Regulates the power of government as well as the relationship between the government and the citizens of the country
2. Helps to ensure peace, order and stability without which there would be chaos or anarchy
3. Defines and stipulates the formal structure of government and functions and powers of the different organs of government The constitution provides a framework within which laws are formulated
4. Spells out the rights and duties of citizens and the consequences of the violation of these rights. It therefore protects the individual against the encroachment or infringement of their rights.

**Constitution making process in Kenya in pre-colonial, colonial, and post-colonial eras Pre-Colonial Kenya**

# CONSTITUTIONAL DEVELOPMENTS/MAKING PROCESS IN KENYA

## Pre-colonial Era

- Prior to the coming of the colonial masters, Kenyan communities had unwritten constitutions that provided guidance in political, social, cultural and economic affairs. They were governed by rules and regulations made and enforced by the councils of elders.

## Colonial Era

Constitutional developments in Kenya can be divided into several stages:

- Annexation of Kenya, 1885-1905
- European settler's struggle for power, 1905-1923
- Constitutional development, 1923-1954
- Multi-racism, 1954-1960
- Independence constitution, 1960-1962
- Constitutional change 1980s-2010

# Annexation of Kenya, 1885-1905

- Kenya became a British protectorate in 1885 and in 1888, IBEAC, was granted a royal charter with wide ranging powers. For example,
- To maintain law and order
- Appointing administrators for dispensing justice
- Eradicating slave trade
- Promoting legitimate trade
- Levying and collecting taxes

The administration of the protectorate was enhanced through several enactments which included:

- **East Africa Order in Council 1897-**this was the first step towards the establishment of government authority in Kenya. The order led to the establishment of the office of the commissioner responsible for the establishment of the systems of administration, for example, administrative bodies, make laws, and set up law courts.

- **East Africa Order in Council 1902-** this act empowered the commissioner to divide the country into provinces and districts for the purpose of administration. In 1902, the commissioner, created a number of government departments e.g. Forestry, customs, works, trade, judiciary, post office, agriculture, treasury, and the medical department.

- In order to place the administration of the railway under one protectorate, western Kenya, which was till then part of Eastern province of Uganda, was curved into Western province of East Africa protectorate on 5th March 1902.

- From 1903, European settlers were invited from South Africa, England and even New Zealand to settle in Kenya to enable the protectorate pay for the railway expenses and other administrative coasts.

**European settlers struggle for power 1905-1923**

- 1902, they formed the Colonialists Association (CA) to fight for their rights. Led by lord Delamere and Colonel Grogan, they advocated for the increase of the Governor's powers and a reduction of the powers of the secretary of state and a leeway to make settler rules.
- In 1905 the East Africa Order in Council was enacted, thus marking an important stage in constitutional development. The title of the commissioner was changed to "Governor and Commander in-Chief" with wide ranging powers. He could appoint judicial officers including high court judges.
- In response to the pressure from European settlers, in 1907, a legislative council was established in Kenya, comprising the governor and other appointees of the crown. Its major responsibility was to make laws.

- The governor was the speaker and made all the standing orders and other regulations.
- Arising from the 1905 Order in Council, an executive council was also created and together with the Legco, they became the forerunners of the current National Assembly and the cabinet.
- Soon settlers demanded nominated reps and later, elective reps in Legco. Consequently, in 1919, through the Legislative Council Ordinance, the settlers were allowed to have reps in Legco. The Ordinance provided for only seven electoral areas and universal adult franchise for Europeans of British origin, and three nominated members. Of the three nominees, two were to rep the Asians and one Arab community.

- Unhappy with the pace of reforms, the white settlers founded in 1920, the Reform Party with the sole aim of pressuring the government to have a cabinet picked from Legco rather than the Executive Council.
- In 1920 the British East Africa protectorate was declared a colony, thus effectively changing the name t Kenya- through the Kenya (Annexation) Order in Council.
- The misunderstandings between the Asians and the white settlers over the privileges given to the Europeans led to the Devonshire white paper of 1923, which aptly recognized that the majority of Kenya's population is African. The paper marked the end of the second phase of the constitutional history of Kenya.

**Constitutional developments 1923-1954**

A. In 1925, official representation in Legco increased to include:
B. Governor as the president
C. 10 nominated members
D. The life of Legco was three years.
E. In 1948, Royal instructions were issued which provided for the increase of reps in legco as follows: 18 officials comprising the governor, the speaker, seven ex-officio and nine nominated members, bringing the number of ex-officio to 22. These comprised 11 Europeans, 5 Indians, and 1 Arab. In addition, there were to be five nominated ex-officio members, 4 representing Africans and 1 to rep Arab interests.
F. Thus, in 1948, Kenya acquired unofficial majority in legco for the first time. In 1952, the number in legco rose to 26 in contrast to28 unofficial members.

## African struggle for representation

- Due to the assumption that Africans were unable to represent their interests effectively in legco, a missionary was appointed to rep them. Unfortunately, the views of the missionary and that of the Africans were not the same. Africans began therefore to press for their own reps in legco. This eventually led to the formation of early political associations, for example, KCA, which demanded representation in legco.
- However, it was not until 1944 that the first African, Eliud Mathu, was nominate to legco to rep African interests. In 1946 the second African, Walter Odede, was nominated to legco. In 1948, African reps increased to 4 and 6 by 1952 representing six constituencies i.e. Nairobi, central, coast, Rift Valley, South Nyanza and North Nyanza. All these Africans were not elected but nominated.
- By 1946, Africans formed Kenya African Union (KAU), which by 1952 was demanding for independence.

## Multi-racialism 1954-1960

- Due to unfair locking out of African voices in the running of their government, there arose heightened agitation for independence, for example the Mau Mau uprising. This led to further constitutional changes as in the case of Lyttelton constitution of 1954 which recommended:
- that all races should participate in the government
- Establishment of council of ministers to take over from the executive council
- Election of African reps to legco
- First direct elections took place in 1957. The six constituencies represented included, Nairobi (Tom Mboya), North Nyanza (Masinde Muliro), Central Nyanza (Oginga  Odinga), South Nyanza (Lawrence Ogunda), Coast (Ronald Ngala), Rift Valley (Daniel Moi) Central (Bernard Mate) and Ukambani (James Mailu).

- Elected members however, demanded greater number of elected members and refused to take up their seats in the council of ministers. This led to yet again, another new constitution in 1958, Lennox Boyd, which:
- Increased African reps to 14
- Recommended nomination of 12 members
- Council of minister’s number rose to 16
- Created a council of state to watch against racial or segragative legislation.
- AEMO members made more demands, especially a constitutional conference where the future of the country had to be discussed by all the parties. Lancaster conference was therefore held in 1960.

## 1st Lancaster House Conference 1960

- The colonial secretary, Ian Macleod, suggested legco should have 53 elected members. 20 seats were set aside as a safeguard for minority groups out of which Europeans would have 10, Asians 8 and Arabs 2.
- Provision was also made for a bill of rights that gave an individual a wide range of rights and freedoms.
- The period following the Lancaster conference witnessed a lot of differences not only among the immigrants, but also among Africans. Thus in 1960, African elected members met in Kiambu and formed KANU. In the same year at Ngong town, another group of Africans met and formed KADU. KANU favored unitary government while KADU wanted federalism. The differences led to the convening of the second Lancaster conference in 1962 to resolve the differences.
- The 1962 conference made constitutional proposals which provided for a federal structure with strong central government. This 1962 constitution ushered Kenya into independence in 1963.

## Key Issues in The process of constitution making in Kenya

The process was governed by the constitution review act of 2001 which enabled the formation of CKRC. The new constitution followed the following stages:

1. **Civic education**- enabled awareness among the public on the current constitution and thus allowed them to make suggestions on constitutional changes they wanted
2. **Writing of the reports by CKRC**- visited all the constituencies gathering information on the intended changes from the public and prepared a draft constitution
3. **Printing of the publication and circulation of the drafts-**CKRC circulated the draft in print form to the public for further comments

5. **Feed back**- CKRC visited the provinces in order to get the feedback on the intended constitution
6. **National constitutional conference**- attended by MPs, all commissioners, 3 delegates from each district and other stakeholders met to discuss the draft and made further changes/recommendations to be included in the re-drafted constitutional bill
7. **Referendum** –draft is taken to the people within 2 months after the conference where they either vote for or against it
8. **Presentation to the AG**- chairman of CKRC presents the re-drafted bill to the AG for legal analysis and for presentation to parliament for debate
9. **Presidential Assent**-finalized/debated/approved bill is presented to the president for assent and gazettement and the draft constitution becomes operational

**Aspects of independence constitution/Features of independence constitution (1962)**

1) Provided for multiparty system in which the party with majority formed government
2) Provided for a regional/ Majimbo govt. Each region had  a regional assembly and the president
3) Had a  bicameral parliament consisting of the senate and the house of representatives/ upper and lower house
4) The prime minister was to be the head of government and the queen the head of state represented by the governor general
5) Contained bill of rights  which protected individual interests

6) Stipulated procedure for the composition of the National Assembly
7) Addressed the issues of government income and expenditure
8) Provided regulations on land regulations
9) Provided for an independent electoral commission not subject to the control of any person
10) Provided for an independent and impartial judicial service commission to ensure justice
11) Provide for the public service commission to recruit, promote, dismiss, or transfer civil servants
12) Provided for citizenship status of people in the country in which all indigenous communities automatically became citizens
13) Provided for the power sharing between KANU and KADU under a coalition government

**Constitutional changes since independence up to August 2010**

1. A constitutional amendment requires 2/3 or 65% of the vote to be effected.
2. The main constitutional amendments since independence include:-
3. Amendment to Act 28, November 1964 making Kenya a republic with:
4. The first amendment, Act 28 of November, 1964. In which Kenya became a republic with the executive president i.e. Head of government and state and the commander in chief of the Armed forces.
   - Laid down the criteria to be met by the presidential candidate i.e. must have been a member of the lower house with at least 1000 registered voters nominees and have support from the lower house.

5. Provision of a vice-president appointment by the president from among MPs who was the principal assistant to the president.
6. Act 38 of 1965 (published December 17) in which Central government denied the regions financial powers to enable them perform their duties effectively thus weakening them.
7. Act 14 of 1965, (published on June 8, 1965) in which parliamentary approval for the declarations of state of emergency could be done with simple majority rather than the previous 65% and above.

8. Extended the duration within which parliamentary resolution had to be sought over the declaration of emergency from 7 to 21 day.
9. Regional assemblies were renamed provinces or provincial councils and parliament had power to give them functions.
10. Supreme Court title was renamed Kenya Court of Appeal.
11. Removed the provisions over the control of agricultural land.
12. Act 16 of 1966, (published on 12, April) which made commonwealth citizens eligible for Kenya citizenship.

13. Act 17 of 1966 (published on 30th April1966), provided that an MP who resigns from the sponsor party the parliament to forfeit his/her seat and seek re-election. (This amendment was done within 48 hours hence the name KPU amendment.)
14. Act 18 of June 1966 published 7th June 1966, in which the president was empowered to detain a citizen without trial if he/she was a threat to the security of the state.
15. Also President was given power to control the freedom of the press
16. Act 40 of 1966, (published 4th January 1967) which provided for the merger of lower and upper houses to create a unicameral legislature.

17. Act 4 of 1967 (published on 31st March 1967) to the section 42 A of constitution where one's actions could be interpreted to mean actions he/she had forfeited a parliamentary seat by virtue of supporting a different party.
18. Act of 1968, (published on 12th April, 1968) which abolished the regionalism i.e. provincial and district boundary councils Act 45 of 1968 (published on 12th July 1968) which provided that the president be elected directly by the electorate.

19. All candidates in general election to be nominated by a political party thus every political party to nominate a presidential candidate and ballot papers to bear names of the presidential and parliamentary candidates from the same party.
20. The V.P should serve as acting president with the assistance of the cabinet for 90 days and seek approval of cabinet in public security, appointment and dismissal of ministers.
21. It provided for 12 nominated MP in parliament to be done by the president to represent various interest.
22. Act 50 of 1969 in which all Electoral Commissioners to be appointed by the president from the previous format where the speaker chaired the Electoral Commission.
23. Act 2 of 1974 which lowered the minimum voting age from 21 to 18 years and that of an aspiring presidential candidate from 40 to 35 years.

24. The 13th amendment of 1974 in which Kiswahili was made the official language of the National Assembly from the previous use of English.
25. The 14th amendment of 1975 in which legislative and financial reports were to be drafted and quoted in English though could be debated in Kiswahili.
26. The 15th amendment of 1975 in which the president could pardon any election offender at his discretion.
27. The 16th amendment Act of 1977 which established the Court of Appeal following the collapse of EAC and the EA Court of Appeal.

28. Chief justice was made a High court judge and a judge of the Court of Appeal.
29. The 17th amendment Act of 1977, in which English was made an alternative language to Kiswahili in parliament.
30. Provided that future MP's should be proficient in both Kiswahili and English in order to qualify for elections.
31. The 18th amendment Act of 1979 in which public officers had to resign 6 months before he/she vie for parliamentary seat

32. The 19th Amendment Act of 1982 in which section 2A of the constitution was repealed and made Kenya become a one party state by law “De-jure”.
33. Creation of the office of the chief secretary as the head of public service which lasted up to 1987 when it was abolished and replaced by the office of the secretary of the cabinet. Jeremiah Kiereini became the head of public service until 1983 and Simon Nyachae took over until 1987.
34. The 20th amendment Act of 1985 provided the High Court with power to act as Kenya Court of Appeal in listening to Election petitions concerning the MPs.

35. Public service commission membership was increased to 15 including chairman and vice-chairman.
36. The 21st Amendment Act of 1985 which repealed section 89 of the constitution which limited any one born after December 11, 1963 from automatically acquiring Kenya citizenship.
37. The 22nd Amendment Act of 1986 which removed the security of Tenure of the offices of A-G, the controller and auditor general and the chief secretary. (Thus president could dismiss them at will this received a lot of criticism from LSK, NCCK and Episcopal Conference of Catholic Bishops.)

38. In 1988 Amendment Act which removed the security of tenure of the High Court judges and the chairman of the public service commission.
39. Also amendment gave the police power to hold a suspect in custody for up to 2 weeks before he/she was taken to court of law if the crime constituted a criminal offence. Before then, suspects had to be presented in court within 24 hours In 1990, Amendment Act, parliament reinstated the security of Tenure of the offices of A – G, and the controller and Auditor – General.

40. 1991 Amendment Act, section 2A was repealed which reverted Kenya to multiparty state consequently many political parties were formed e.g. the first party under revised multiparty state was Forum for the Restoration of Democracy (FORD), DP, SDP etc.
41. 1991 Amendment Act which limited the term of the president in office to 2, five – years.
42. 1997 Amendment Act in which IPPG – Inter party parliamentary group was passed which aimed at giving equal opportunity to political parties so that they could fairly contest for elections.
43. 1998 Amendment Act which provided that a new constitution would be based on principles of democracy, accountability, human rights, people's participation and social justice.

44. In October 2000, parliament entrenched a bill enhancing the Constitution of Kenya Review Commission.{CKRC} headed by Pro. Yash Pal Ghai into the independence constitution. The constitution making process gained legal backing from the National assembly.

45. In 2005 parliament amended the Constitution of Kenya Review Act which alloed the Attoney general to review the Ghai Draft and come up with the proposed new Copnstitution (Wako Draft). The Wako Draft mutilated the Bomas Draft and therefore failed to meet the expectations of Kenyans. It was rejected in the 2005 referendum.

46. In 2007 an attempt was made by parliament to revive the drafting of a new constitution by publishing the Constitution of Kenya Review Bill(2007), which proposed the establishment of the Council of Reference. The results of the 2007 elections were disputed and this plunged the country into a political crisis leading to loss of life, property and displacement of thousands of people. It took the effort of eminent persons, under the leadership of Kofi Annan as the Chief Mediator, to end the crisis and restore peace in the country. This resulted to a constitutional amendment that entrenched the National Accord and Reconciliation Act(2008) into the Kenyan Constitution on 28th February 2008.

47. On 18th March 2008, parliament amended the Constitution and adopted the Legislation to give a legal force to the Agreement. The National Accord and Reconciliation Act of 2008 enacted in the constitution legalized the coalition government.

48. The constitution of Kenya Review Act (2008) was set up to serve as a mechanism for achieving a new constitution. Under it a Committee of Experts {CoE} was established to drive the constitution review process. The Committee prepared Kenyans for the referendum held on 4th August 2010, in which 65% of those who voted approved the constitution by voting in its favour. The Promulgation of the New Constitution of Kenya on 27th August 2010 was a constitutional Landmark.

# The National Accord of 2008 under the Grand Coalition.

The National Accord was set up in February 2008 and had four main Agendas as follows

1) To stop violence
2) Reconciliation
3) Delivering a New Constitution
4) Historical issues

The key Constitutional changes in the New Constitution of Kenya {2010}

1) Reduction of Presidents executive powers
2) Devolution of power to regions by the creation of national and county governments
3) Creation of the Senate. The Senate and the Assembly constitutes the Parliament
4) Establishment of Judicial Service Commission (JSC) which shall promote and facilitate the independence and accountability of the Judiciary; ensure efficient, effective and transparent administration of Justice; and establish other judicial offices as may be necessary.
5) Citizenship- birth and registration are the only recognizing ways of attaining Kenyan citizenship while dual citizenship is constitutionally recognized.

6) Creation of Land Commission which will ensure effective land use and settle land disputes in Kenya. The Constitution stipulates that Land in Kenya will be held, used and managed in a manner that is equitable, efficient, productive and sustainable.
7) Recognition of Kadhis courts as subordinate courts in the Judicial court system.
8) Expansion of the citizens' bill of rights to guarantee equal representation for either gender in all governance structures and increased citizens' participation in democratic governance.

## Features of the Constitution of Kenya

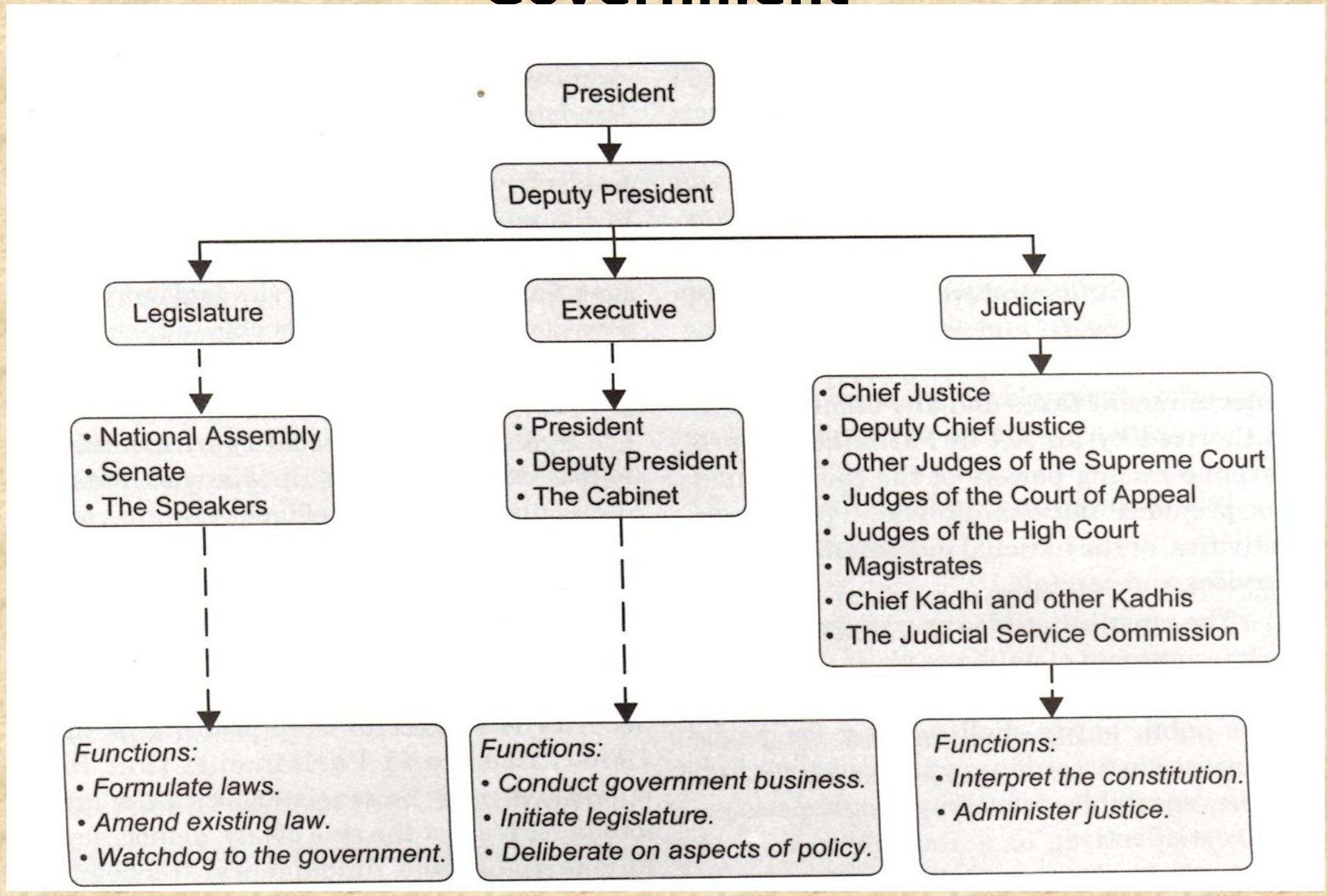
Some of the features of the new constitution include the following:-

1) Provides for the supremacy of the constitution
2) Provides for a central and devolved government with shared responsibilities
3) Provides for national values, principles and goals
4) General principles of citizenship-retention, acquisition, citizenship and marriage, children found in Kenya, dual citizenship, deprivation etc

5) Recognition and respect of culture
6) Enhanced bill of rights including human rights and gender commission
7) Provides for land and property regulation rights
8) Principles and obligations on the environment and natural resources
9) Provides for leadership and integrity principles
10) Provides for an independent electoral and boundaries commission
11) Provides for a bicameral parliament consisting of the senate and the house of representatives/ upper and lower house

12) Provides for regional and county governments complete with assemblies
13) Provides for the position of the president and deputy president
14) Provides for public finance and revenue management
15) Provides for independent public service commission’s- psc, tsc  and kcs
16) Establishes the national security organs
17) Establishes commissions and independent offices

# The Structure of the Kenyan Government



# KCSE SAMPLE QUESTIONS

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