

An Evaluation of Constitutional Implementation in Kenya

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Introduction

The Kenyan political scientist and senator Peter Nyong'o observed in 2002, "Kenya seems to be going through a long transition from authoritarianism in a multi-party regime to some democratic form whose nature and contours are not yet clear"². Eight years later, on August 4th, 2010, Kenyan citizens voted for a new Constitution, taking another step towards its final democratic form.

Besides serving as a foundational legal document, the new Constitution seeks to reform Kenya in a multitude of ways, including how citizens participate in the political system. This paper seeks to find what impact Kenya's new Constitution and its implementation had on citizen political participation since promulgation.

It finds the Constitution and constitutional implementation positively affected citizen political participation in the first five years of implementation. The Constitution secured the citizens' right of participation and made citizen political participation part of most governing institutions. Constitutional implementation improved citizens access to participation in three key areas: voting, elections, and responsive institutions.

Constitutions and Citizen Political Participation in Kenya

Constitutions in Kenya

The new Constitution's reformative character and focus on citizen participation originates from Kenya's turbulent history with constitutions and citizen political participation. Scholars, such as Barkan and Holmquist in 1989³ and Throup in 1993⁴, held Kenya up as an example of successful constitutional democratization in Africa. However, some scholars have since moved away from this view, finding serious failures within Kenya's political system.

One such scholar is P.L.O. Lumumba, the former Director of Kenya's Anti-Corruption Commission. Prompted by the new Constitution's promulgation, Lumumba traced Kenya's constitutional history from independence to 2010. He attributes Kenya's two previous constitutional failures to, in part, the *dominance of the executive*⁵.

Lumumba begins his narrative in 1963, with Kenya's independence from Great Britain and the promulgation of the aptly named Independence Constitution⁶. Lumumba argues the

¹ This paper is the result of three months spent in Kenya, May-June 2015, under the guidance of Hon. Joel Onyancha, Member of Parliament for Bomachoge Borabu, and the generous hospitality of the Baker-Onyancha family. To Joel, Melissa, Amara, Thomas, Angie, Josephine, Gladys, Silas, and everyone who helped me in so many ways and took the time to talk to me, asanteni.

² Peter Anyang' Nyong'o, *The Study of African Politics: A Critical Appreciation of a Heritage* (Nairobi: Heinrich Böll Foundation, 2002), 92-93.

³ Joel D. Barkan and Frank Holmquist, "Peasant-State Relations and the Social Base of Self-Help in Kenya," *World Politics* 41 (1989).

⁴ David Throup, "Elections and Political Legitimacy in Kenya," *Africa: Journal of the International African Institute* 63 (1993).

⁵ P.L.O. Lumumba, "A Journey Through Time in Search of a New Constitution," in *The Constitution of Kenya: Contemporary Readings*, ed. Morris Kiwinda Mbonenyi et al. (Nairobi: LawAfrica, 2011).

⁶ Lumumba, "A Journey," 23.

British colonial power mostly brought about the Independence Constitution as they exited Kenya, thus it had little legitimacy with the people or the political elite⁷. Within the first six years the new Kenyan government amended the Constitution ten times⁸. In 1969, another constitutional amendment merged these changes into one document, creating a new, revised Constitution⁹.

For the most part, these amendments served to centralize power in the national government and into the hands of the executive¹⁰. For example, the Independence Constitution proposed a *majimbo*, regional, system of government, where political power would have been spread out across the country into sub-national units. The ruling party, KANU, thought this system “a conspiracy between the ethnic minorities and the colonial government” and, once in power after independence, amended the Constitution to centralize political power in the national government¹¹.

According to Lumumba, the KANU’s centralization of power created an ‘Imperial Presidency’ holding absolute power and authority¹². The constitutional amendments served to “ensure maximum control of political power, eradication of any check system and accountability mechanisms” for the executive¹³. Another amendment in 1966 did away with the Senate¹⁴, making the Parliament unicameral. In 1982, the KANU did away with multi-party politics altogether with another constitutional amendment, making Kenya into a one-party state¹⁵. This is the *dominance of the executive* mentioned earlier.

This series of amendments show that Kenya’s first two constitutions failed, in part, because they were not the law of the land. Instead, the will of the political elites, more interested in their own power than a strong constitution, was the law of the land¹⁶.

In 1991, multi-party politics returned to Kenya with the 27th constitutional amendment¹⁷ and with it calls for constitutional reform¹⁸. While the government made efforts towards reforming the Constitution, Lumumba argues the Post-Election Violence of 2007 and 2008 (PEV)¹⁹ prompted the government to pass the Constitution of Kenya Review Act in 2008, which gave the legal framework for how Kenya would arrive at its new Constitution in 2010²⁰.

Institutional Failure in Kenya

There are many schools of thought on the PEV’s underlying causes. Two of them, however, speak to the constitutional failure that Lumumba focuses on.

⁷ IBID, 23.

⁸ IBID, 31.

⁹ IBID.

¹⁰ IBID, 25.

¹¹ IBID.

¹² IBID, 26.

¹³ IBID, 23.

¹⁴ IBID, 31.

¹⁵ IBID, 33.

¹⁶ IBID, 43-44.

¹⁷ IBID, 35.

¹⁸ IBID, 37.

¹⁹ For a history of the Post Election Violence in Kenya, see Sosteness Francis Materu, *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (Springer, 2014).

²⁰ Lumumba, “A Journey,” 43.

The first is that ethnic tensions caused the PEV. Rozana Gutiérrez-Romero, for example, argues ethnicity and economic concerns were the main factors behind citizens' voting decisions and what set off the violence. A voter's ethnicity informed how they determined what they would gain from their ethnic political party winning²¹. Peter Nyong'o terms this 'national cake politics'. Every election is a chance for each ethnic group to secure a bigger slice of the 'national cake', e.g. investment, appointments, etc., for their ethnic group. People look at elected officials not as their political representative, but as the cakewinner for their particular ethnic group²². When the ethnic groups who supported Ralia Odinga felt they had won the election, and all the benefits it would bring, stolen from them by Kibaki's ethnic bloc, they turned to violence²³.

The scholars Susanne Mueller²⁴ and Mwangi Wa Githinji²⁵ exemplify the second view. They take Gutiérrez-Romero's analysis further and find institutional failure caused the violence. These institutions were meant to channel citizens' political frustrations into peaceful participation. Because these institutions failed or were non-existent, no institutional framework existed for the citizens to voice their feelings in a peaceful and meaningful way, and there was no trust that the institutions would then protect their interests if the other side won. Thus, the citizens' frustrations spilled out into violence that manifested itself along ethnic lines, because political alliances in Kenya are often drawn along ethnic lines²⁶.

Both views point to a failure of the Institution Political, the overarching political superstructure that encompasses all areas of government politics. The ethnically-informed view supported by Gutiérrez-Romero points to a failure of institutions to treat all equally in the political sphere. This is not to say that ethnically-informed politics is illegitimate²⁷, but that it manifests as a problem where there are ineffectual or no institutions at all. While politics may be about who gets what, when, and how, having it get to the point of zero-sum politics, where the winner takes all and the loser gets none, is a failure of representative, democratic government. Mueller and Githinji, obviously, point directly to institutional failure as the cause of the PEV.

This institutional failure argument is connected to Lumumba's constitutional failure argument. Without a constitutional basis or a respect for constitutionalism, the political elites' self-interest ruled Kenya's political system. This mentality traveled down to the general citizenry, manifesting itself along ethnic lines. These factors, along with others, came to head in 2007, revealing the institutional weakness of Kenya's previous Constitution.

Citizen Political Participation in Kenya

This institutional weakness also constrained citizen political participation. Karuti Kanyinga, in his report *Democracy and Political Participation*, finds the *dominance of the executive* and ethnically-informed politics constrained the citizens' ability to meaningfully

²¹ Rozana Gutiérrez-Romero, "To What Extent Did Ethnicity and Economic Issues Matter in the 2007 Disputed Kenyan Elections?," *Development Policy Review* 31 (2013).

²² Nyong'o, *African Politics*, 94.

²³ Gutiérrez-Romero, "Ethnicity and Economic Issues."

²⁴ Susanne D. Mueller, "Dying to Win: Elections, Political Violence, and Institutional Decay in Kenya," *Journal of Contemporary African Studies* 29 (2011).

²⁵ Mwangi Wa Githinji and Frank Holmquist, "Kenya's Hopes and Impediments: The Anatomy of a Crisis of Exclusion," *Journal of Eastern African Studies* 2 (2008).

²⁶ Githinji and Holmquist, "Kenya's Hopes and Impediments"; Mueller, "Dying to Win."

²⁷ Bodil Folke Frederiksen, "Mungiki, Vernacular Organization and Political Society in Kenya," *Development and Change* 41 (2010).

participate, or participate at all, in the political arena²⁸. The executive dominated the government, leaving no room for direct or representative participation; ethnically-informed politics pitted citizens against each other over political and economic incentives, delegitimizing the institutions by making political decisions be informed by ethnic loyalties, not for the good of the whole citizenry or country.

A Reformational Constitution

This is the political environment that prompted the creation of the new Constitution and it shows. In many ways this Constitution is a reformational constitution: it seeks to fix the institutions which failed in the past and reform the government to make sure the failures do not come about again.

Kenya's historical context and the previous constitutional failures informed the 2010 Constitution. It mandates an extensive reformation of the executive, puts strict limits on its powers, and institutes strong checks between the branches of government²⁹. It provides a strict code of ethics for elected officials³⁰, to combat the culture of national cake politics. The new Constitution also makes citizen participation a national value and a principle of governance³¹, and involved citizen participation in nearly every part of the government, and provides for an extensive Bill of Rights³² for citizens.

To make sure the Constitution will not fall prey to the fate of its predecessors, it provides a schedule of implementation³³, which provides the legislation needed for implementation, when Parliament should pass this legislation, and what commissions the government should create to carry out some of its reformational mandates.

Though a brief overview of Kenya's political history³⁴, this establishes the current Constitution's context. The previous constitutions failed to provide the institutions necessary to run the country in a democratic and sustainable manner because, in part, of the *dominance of the executive* and the ethnically-informed, national cake politics. The new Constitution's reformational character and focus on citizen participation come from Kenya's turbulent history with constitutions and political participation. To understand why, and to what effect, this paper turns to the theory of Robert Dahl and Neo-Institutionalism.

Robert Dahl, Neo-Institutionalism, and Kenya

The new Constitution's reformational efforts outlined above indicate a relationship between the Constitution, institutions, and citizen political participation. The Constitution's efforts toward citizen political participation are suggestive of two strains of political theory: Robert Dahl's *Polyarchy* and Neo-Institutionalist constitutionalism.

²⁸ Karuti Kanyinga, *Kenya: Democracy and Political Participation* (Nairobi: Open Society Initiative for Eastern Africa, 2014).

²⁹ Article 129-151.

³⁰ Article 75.

³¹ Article 10(2).

³² Article 19-59.

³³ 5th Schedule; 6th Schedule.

³⁴ For a more complete history, see Charles Hornsby, *Kenya: A History since Independence* (London: I.B. Tauris, 2012).

Robert Dahl

Robert Dahl in *Polyarchy* points to “the continuing responsiveness of the government to the preferences of its citizens, considered as political equals” as a main characteristic of democracy³⁵. For this to be true, citizens must have the *opportunity* “to formulate their preferences”, “to signify their preferences to their fellow citizens and the government”, and “to have their preferences weighed equally in the conduct of the government”³⁶. This paper focuses on the last opportunity, the act of direct participation by citizens in government.

For this opportunity to exist in a nation-state, “the institutions of society must provide at least eight guarantees”³⁷. These are the “freedom to form and join organizations”, the “freedom of expression”, the “right to vote”, the “right of political leaders to compete for support and votes”, access to “alternative sources of information”, “eligibility for public office”, “free and fair elections”, and “institutions for making government policies depend[ing] on votes and other expressions of preference”³⁸. These are Institutional Guarantees: institutions in society necessary for citizens to have the opportunity to effectively participate in government³⁹.

Dahl’s theory applies to the Kenyan context and Constitution because it takes a similar view on citizen political participation. It is not enough, for Dahl or the Constitution, for citizens to have the right to participate; they must also have the opportunity to, through institutions. For Dahl, these are institutions, not rights, that must be inclusively “openly available, publicly employed, and fully guaranteed”⁴⁰. This means that most citizens should have access to these institutions, and they must also have the right to legitimate opposition to the government.

The Constitution concurs with Dahl’s assessment. It both provides the right of participation and mandates that this participation must be effective in government decision making. Dahl’s theory helps explain why the Constitution might have made citizen political participation such a priority and why it mandates it should be a part of government decision making. Dahl’s theory does not, however, explain why the Constitution takes it upon itself to mandate how its mandates are to be implemented as institutions.

Neo-Institutionalism

The Neo-Institutionalist school of constitutionalism⁴¹ from the 1990s. can explain this part of the Constitution. This school of thought rose out of an interest to understand how constitutions create institutions that affect social life⁴². This body of literature takes a functionalist view of constitutions: a constitution’s function beyond its typical role as a foundational document, into the daily political life of citizens.

³⁵ Robert Dahl, *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971), 1.

³⁶ Dahl, *Polyarchy*, 2.

³⁷ IBID, 2.

³⁸ IBID, 3.

³⁹ IBID, 2.

⁴⁰ IBID, 4.

⁴¹ For a history of constitutionalism see Jan-Erik Lane, *Constitutions and Political Theory* (Manchester: Manchester University Press, 1996), 19-40.

⁴² See W. W. Powell and P.J. DiMaggio, *The New Institutionalism in Organizational Analysis* (Chicago: Chicago University Press, 1991) and Kent R. Weaver and Bert A. Rockman, *Do Institutions Matter?: Government Capabilities in the United States and Abroad* (Washington, D.C: Brookings Institution, 1993) for other examples of how constitutions create institutions that affect social life.

This is important to this paper's consideration because the Kenyan constitution is not just a foundational document, but a functional, reformational one as well. It seeks to make changes to the system and establish new institutions, rather than being a set of principles. This concept of constitutions is similar to Neo-Institutionalist literature.

The political scientist Giovanni Sartori⁴³ contributes to this school of thought. While Sartori does not cover any new ground in constitutional study, confining himself to elections and formal government institutions like the legislature and executive, he creates an innovative way to view constitutions: as machines, with different parts that move together, that create institutions, which in turn deliver specific outcomes⁴⁴, such as elections and procedures for politicians to govern the state⁴⁵. Similar to Dahl's required institutions, Sartori focuses more on the governing institutions, such as the legislature or executive, than the civil ones, like expression and organization.

The rapid regime changes around the world in the late 1980s and early 1990s might have influenced Sartori, as his stated impetus for his book was to propose,

a legislative process for adverse conditions that neither allows parliamentary obstructionism nor, at the other extreme, the kind of government by decree to which Latin American presidentialism is dangerously prone⁴⁶.

Given this context, Sartori's work is less a theoretical construct and more a blueprint for those evolving states, advising a very Western, liberal-informed view of what a government should be. However, this concept of a *constitutional engine*, one that creates institutions for specific outputs, fits with Dahl's theory.

Sartori warns against 'aspirational constitutions', ones that seek to create institutions in a state beyond the purely functional, e.g. elections and the legislature⁴⁷. He warns they will be "a deviation and an overload of constitutional capacities" that will prevent the constitution from functioning at all⁴⁸. Sartori's exclusive focus on elections and formal institutions is what Schmitter and Karl identify as the fallacy of electoralism⁴⁹. They find holding elections and having formal democratic institutions are not enough to guarantee a democratic regime. It is a case all too common that countries will hold elections and elect leaders into office, having all the appearance of a democratic regime, and then manipulate them from behind the scenes, negating any actual power these institutions might have⁵⁰.

Sartori's relationship of constitutions and outputs prompted Jan-Erik Lane in *Constitutions and Political Theory* to examine what impact constitutions might have on political, social, and economic outcomes⁵¹. Lane finds the democratic institutions created by constitutions have no direct impact on those outcomes. He also finds Sartori's outcomes model to be flawed⁵²,

⁴³ Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives, and Outcomes* (New York: New York University Press, 1994).

⁴⁴ Sartori, *Comparative Constitutional Engineering*.

⁴⁵ IBID, xi.

⁴⁶ IBID.

⁴⁷ IBID, 202.

⁴⁸ IBID.

⁴⁹ Philippe C. Schmitter and Terry Lynn Karl, "What Democracy Is...and Is Not," *Journal of Democracy* 2 (1991).

⁵⁰ Schmitter and Karl, "Democracy."

⁵¹ Jan-Erik Lane, *Constitutions and Political Theory* (Manchester: Manchester University Press, 1996), 188-208.

⁵² Lane, *Constitutions*, 208.

however, debatably this is an incorrect interpretation of Sartori's original argument⁵³. According to Lane, a constitution's true functional purpose, outside the formal political sphere, is protecting citizens' human rights and freedoms⁵⁴.

If we consider Sartori and Lane's views on a constitution's purpose in conjunction, the conclusion could be made that a constitution's purpose becomes to create institutions that 1) ensure the stability and flourishing of the democratic state, and 2) regulate the relationship between the citizens and the state with regard to citizen rights and freedoms. This paper terms this *functional constitutionalism*.

As Robert Dahl shows, democratic regimes require institutions for citizen political participation. Therefore, this paper extends *functional constitutionalism*'s understanding of constitutional outcomes to citizen political participation. With this understanding of constitutions, Kenya's new Constitution makes more sense. It creates institutions necessary for democratic governance, one of which is citizen political participation. Consequently, participation is not just a right in the Kenyan Constitution, but a necessary part of governing bodies. However, these institutions of citizen political participation in the Constitution do not automatically become reality.

Issue of Implementation

Lane's work reflects this in his two definitions of a constitution: 'written constitutions' and 'real regimes'⁵⁵. The written constitution is "a compact document that comprises a number of articles about the State, laying down rules which State activities are suppose to follow"⁵⁶, the laws of the land. The second definition, the 'real regime', is "the set of actually operating institutions that regulate state power and the relationship between government and citizens"⁵⁷. These two definitions point out an important aspect of constitutionalism: just because the Constitution has democratic principles, does not mean there are democratic institutions in practice. Much like the fallacy of electoralism, this is the fallacy of constitutionalism.

How a constitution moves from a 'written constitution' to a 'real regime' is the *issue of implementation*. As Lane argues, constitutions are only effective if they are successfully implemented, and become the rule of law⁵⁸, for "it is one thing to devise a constitution but quite another matter to implement it"⁵⁹. This is a weakness in Sartori's constitutional engineering: implementation is a difficult process. The machine has output only if it is given power to do so. Much as a machine only has output when supplied with enough power, constitutions only operate effectively when fully implemented with enough power to be effective.

Kenya Today

This is where Kenya is at the moment. As stated by Ralia Odinga, then Prime Minister, in 2010, "the task ahead is to implement the new Constitution of Kenya by making it a living

⁵³ Sartori never argues that constitutions have specific political, social, or economic outcomes in the book. What he does argue is that constitutions create strong institutions which allow for the stability and success of a democracy, which may in turn have positive socio-economic and political outcomes.

⁵⁴ IBID, 211.

⁵⁵ IBID, 9.

⁵⁶ IBID, 5.

⁵⁷ IBID, 199.

⁵⁸ IBID, 212.

⁵⁹ IBID, 198.

document and not a hollow script...our first task is to implement the Constitution”⁶⁰. Odinga concurs with Lane’s point: a constitution has no power if it is not put into action.

This is the theoretical framework of constitutions and citizen political participation that this paper will use to understand Kenya’s new Constitution and its implementation. A constitution creates institutions that enable a democratic regime, one of which is citizen political participation, but the constitution must be implemented for it to have any impact.

Methodology

This paper measures the Constitution and constitutional implementation’s impact on citizen political participation by following Dahl’s Institutional Guarantees from *de jure* rights to *de facto* institutions in the Institution Political.

As discussed above, Robert Dahl established eight Institutional Guarantees required for citizens to have the opportunity to participate in government⁶¹. This paper uses these eight criteria to define and measure citizen political participation⁶². Dahl carefully notes these will not lead to “the development of public opposition”⁶³. Rather, they are “conditions under which systems of public contestation are likely to develop and exist”⁶⁴, i.e. institutions that allow citizens to develop a system of participation where they meaningfully participate in making and oppose government policies. utilization

Implementation is the process that moves citizen participation from a *de jure* right to a *de facto* institution of its own through three stages: rights, accessibility, and utilization, as shown in *Figure 1*. These Institutional Guarantees begin as provisions in the Constitution that give citizens the right to express their preferences within the Institution Political and make it have space for that expression. The second step of this process, how participation goes from a right to being utilized, is accessibility, where the government creates the institutions citizens require to

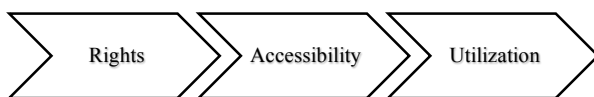


Figure 1: Implementation Process.

participate in politics. They end as fully formed and utilized *de facto* institutions. This is where the citizens fully utilize their right to participate, are allowed to do so by the government, and are fully integrated and equal members of the Institution Political. This is the stage Dahl calls polyarchy, when a regime is fully inclusive and liberalized⁶⁵.

This paper focuses on this process and understanding of how the Constitution creates institutions that, in turn, create and maintain spaces for citizens to participate and oppose government in a non-violent and sustainable way.

It first identifies how the Constitution provides for the Institutional Guarantees. Then it finds how the Constitution plans to implement them and how that implementation has gone

⁶⁰ Raila Odinga, "The New Constitution of Kenya: The Way Forward," (Nairobi: National Assembly, September 29, 2010), 7.

⁶¹ Dahl, *Polyarchy*, 2.

⁶² This paper renames the last Institutional Guarantee to Responsive Institutions for brevity’s sake.

⁶³ Dahl, *Polyarchy*, 1.

⁶⁴ IBID, 10.

⁶⁵ IBID, 6.

about, using reports from the commissions and independent bodies on the ground. Finding how well the citizens utilize these institutions is not within the scope of this paper.

Analysis of Kenya's New Constitution and Constitutional Implementation

After substantial review of the data on Kenya's citizen political participation under constitutional implementation against Dahl's eight criterion, this paper concludes the Constitution and constitutional implementation positively impacted citizen political participation in the last five years. The Constitution protects citizen political participation rights and constitutional implementation improved citizen access to the right to vote, free and fair elections, and responsive institutions.

Beyond identifying citizen political participation as a national value and principle of governance, the Constitution provides for all of Dahl's institutional guarantees as citizen rights. For the most part, each of Dahl's directly corresponds to a constitutional right. This paper takes a narrow view of constitutional rights through the lens of Dahl's theory as interpreted above. However, some of the rights it identifies as addressing Dahl's are a matter of interpretation.

Rights

1. Freedom to Form and Join Organizations

The new Constitution guarantees citizens the right to form, join, and participate in any kind of association⁶⁶, including political parties⁶⁷ and cultural organizations⁶⁸, in its Bill of Rights.

The freedom of organization is practically unlimited outside of the political sphere. However, political parties cannot have a "religious, linguistic, racial, ethnic, gender or regional basis"⁶⁹, so the cultural organizations must only be a part of civil society⁷⁰. The Constitution reserves the right for the government to regulate political parties⁷¹.

2. Freedom of Expression

The Constitution provides for the citizen's right of expression, both in the exchange of ideas⁷² and in public demonstration⁷³. Like the right of organization, the Constitution limits this right from hate speech, which extends to multiple definitions⁷⁴. Notably, it bans any speech that "constitutes ethnic incitement"⁷⁵. These restrictions on speech and organization can be thought of as originating from the issues of political culture that Kenya faces. The restrictions might aim to remove the ethnically-informed character out of politics.

3. Right to Vote

⁶⁶ Article 36(1).

⁶⁷ Article 38(1).

⁶⁸ Article 44(2).

⁶⁹ Article 91(2).

⁷⁰ Article 44(2).

⁷¹ Article 91.

⁷² Article 33(1).

⁷³ Article 37.

⁷⁴ Article 33(2).

⁷⁵ IBID.

The Constitution grants the right to vote, as well as to be registered as a voter, to every adult citizen. The citizen must be of sound mind and not been convicted of election-related crimes in five years⁷⁶.

4. Right of Political Leaders to Compete for Support and Votes

The Constitution does not directly guarantee this right, but does place several restrictions on the character of a political party⁷⁷ and on what a political party or candidate can say⁷⁸.

5. Alternative Sources of Information

The Constitution mandates that all types of media are to be free and independent. Like the right of expression, the media is prohibited from saying anything which could be interpreted as hate speech or calls for violence, among others⁷⁹.

6. Eligibility for Public Office

Each national public office carries some qualifications required to run for that office⁸⁰, which extend beyond the usual age and citizenship requirements⁸¹. The Constitution also mandates descriptive representation for women, youth, those with disabilities, and minority groups⁸² through special seats in the Parliament and quotas⁸³.

7. Free and Fair Elections

Citizens have the right to “free, fair and regular elections”, based on “the free expression of the will of the electors”⁸⁴, with universal suffrage, for any public office. Further, an independent body should carry out the elections, not the government, ensuring they are “free from violence, intimidation, improper influence or corruption”, among other things⁸⁵. Given that the failure of institutions during the 2007 election, leading to the PEV in part prompted the Constitution, it is possible this provision, along with the multitude of others relating to elections, comes from Kenya’s experience with questionable elections in 2007.

8. Responsive Institutions

The Constitution provides for this Institutional Guarantee in two ways. First, the Constitution calls for the people to elected governing institutions responsive to their will. One of the new Constitution’s major developments from the old is that it identifies the people as the source of sovereign power, not the state as the old Constitution did⁸⁶. The Constitution envisions a state where all the governing institutions are responsive to the people. The members of the legislature and executive⁸⁷ are elected by popular vote, and the members of the ministries are

⁷⁶ Article 38(3).

⁷⁷ Article 91(1).

⁷⁸ Article 91(2).

⁷⁹ Article 34(1).

⁸⁰ Article 137(1); Article 99(1-2).

⁸¹ Article 75(1).

⁸² Article 100.

⁸³ Article 27(8); Article 55; Article 54(2); Article 56.

⁸⁴ Article 38(2).

⁸⁵ Article 81.

⁸⁶ Ben Sihanya, *Constitution Implementation in Kenya, 2010-2015: Challenges and Prospects* (Nairobi: Friedrich-Ebert-Stiftung, 2012), 38.

⁸⁷ Article 136(1).

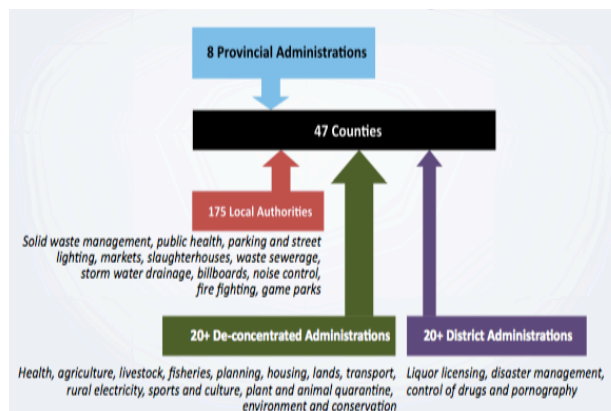


Figure 2: Kenya's Devolution, from World Bank, *Devolution Without Disruption* (Nairobi: World Bank, 2012), 14.

Dahl's Institutional Guarantees	The Constitution's Corresponding Rights
Freedom to Form and Join Organizations	Article 36(1); Article 38(1); Article 44(2)
Freedom of Expression	Article 33(1); Article 37
Right to Vote	Article 38(3)
Right of Political Leaders to Compete for Support and Votes	Article 91(1-2)
Alternative Sources of Information	Article 34(1)
Eligibility for Public Office	Article 27(8); Article 54(2); Article 55; Article 56; Article 75(1); Article 99(1-2); Article 100; Article 137(1)
Free and Fair Elections	Article 38(2)
Responsive Institutions	Article 37; Article 119(1); Article 132(2); Article 136(1); Article 174; Article 201; Article 232(1)

Figure 3: Dahl's Institutional Guarantees and the Corresponding Constitutional Rights.

nominated and confirmed by those elected bodies⁸⁸. The people also have the right to petition Parliament⁸⁹ and any other public authorities⁹⁰. Policy decisions for public finance, among others, are to be made with public participation⁹¹, and public involvement is a value of public service⁹².

The second way is through a major reformation of the government structure through devolution, see *Figure 2*. Devolution, the decentralizing the power from the central control in Nairobi to the newly created county governments⁹³, has been a major part of constitutional implementation. In 2013, the government created 47 counties, new sub-national units of government, each with their own elected governor, county executive, and county assembly⁹⁴.

Devolution attempts to make government institutions more local and give more self-governance to the people, away from the central power of the capital⁹⁵. This involves an extensive transfer of functions⁹⁶, which is on going. This paper place this under Responsive Institutions because it, among other things, makes governing institutions more local and responsive, and involves citizens more in government⁹⁷.

As shown in *Figure 3*, the Constitution liberally protects citizen rights to participation, coving all of Dahl's Institutional Guarantees. This shows the Constitution provides citizens the *de jure* right of political participation completely. Next, this paper shows how

⁸⁸ Article 132(2).

⁸⁹ Article 119(1).

⁹⁰ Article 37.

⁹¹ Article 201.

⁹² Article 232(1).

⁹³ Article 174.

⁹⁴ Centre for Devolution Studies, *Working Paper Series No. 1* (Nairobi: Centre for Devolution Studies and the World Bank, 2015), 2.

⁹⁵ Article 174.

⁹⁶ 6th Schedule, Article 15.

⁹⁷ Article 174(c).

constitutional implementation made some of these rights accessible institutions for the public.

Accessibility

The Constitution guides its implementation through its 5th Schedule, which lays out the legislation Parliament must enact to implement the constitution, and the 6th schedule, which lays out the “Transitional and Consequential Provisions”⁹⁸. This paper focuses on the 6th Schedule, which establishes the commissions in charge of taking the *de jure* constitutional provisions and implementing them into the society, making them into *de facto* institutions. Though the Constitution lays out a multitude of commissions all tasked with taking on different provisions, this paper looks at how constitutional implementation has made three of the Institutional Guarantees into accessible institutions.

The first five years of constitutional implementation focused on making three of Dahl’s Institutional Guarantees into accessible institutions: the right to vote, free and fair elections, and responsive institutions. This paper defines accessibility as participation and opposition opportunities through institutions⁹⁹.

1. Right to Vote and Free and Fair Elections

The Independent Electoral and Boundaries Commission (IEBC) covers both of these Institutional Guarantees. The Constitution created the IEBC to serve many functions, but for this paper’s purposes the important ones are “the continuous registration of citizens as voters” and “the facilitation of the observation, monitoring and evaluation of elections”¹⁰⁰. In order to fulfill its Constitutional mandate, the IEBC crafted strategic priorities. Its main mission is “to conduct free and fair elections and to institutionalize sustainable electoral processes”¹⁰¹ by, amongst other things, “[increasing] registration of eligible voters”, and “[enhancing the] efficiency and effectiveness of the Commission in the conduct of elections”¹⁰².

On March 4th, 2013 Kenyans voted for president, deputy president, members of parliament, senators, and for the first time, county governors¹⁰³. The first election since the 2007 elections and the PEV, it was also the first national election under the new Constitution and a test of its ability to create stable, functioning democratic institutions. With 81% of registered voters turning out, a large increase from 2007 at 72%¹⁰⁴, “no serious incidences of violence”, and declared free and fair by international observers¹⁰⁵, it was, by most counts, a success.

According to Freedom House, there were questions about the results, due to technical issues in the IEBC’s electronic system for counting votes and delays of ballot delivery¹⁰⁶. However, the real sign of success was the increase of the number of voters. The number of

⁹⁸ Article 262.

⁹⁹ Developed from Dahl, *Polyarchy*, 235.

¹⁰⁰ Article 88(4).

¹⁰¹ Independent Electoral and Boundaries Commission, *Annual Report 2011-2012* (Nairobi: Independent Electoral and Boundaries Commission, 2013), 8.

¹⁰² IEBC, *Annual Report 2011-2012*, 9.

¹⁰³ Mwangi S. Kimenyi, “Kenya: A Country Redeemed after a Peaceful Election,” *Brookings Institute*, April 2, 2013, accessed November 3, 2015.

¹⁰⁴ “The Online Data Analysis Tool,” Afrobarometer, accessed October 11, 2015, <http://afrobarometer.org/online-data-analysis/analyse-online>.

¹⁰⁵ Kimenyi, “Kenya: A Country Redeemed after a Peaceful Election.”

¹⁰⁶ “Freedom in the World: Kenya 2015,” Freedom House, accessed November 9, 2015.

people who could not find a polling station or were prevented from voting both fell from 1% to 0%¹⁰⁷. The number of people who felt the election was free and fair rose from 7% in 2007 to 34%, and the number of people who thought it was free and fair but with minor problems also jumped from 14% to 27%, making the number of people who thought the election was mostly a positive result 61%¹⁰⁸. The number of people who thought it was not free nor fair correspondingly fell from 42% to 18%¹⁰⁹. The number of people who feared being a “victim of political intimidation or violence” a lot fell from 37% to 25%, and not at all rose from 17% to 33%¹¹⁰.

Mwangi S. Kimenyi of the Brookings Institute attributes “the prevailing peace in Kenya” to “the many reforms that the country has undertaken to create credible institutions like the IEBC”¹¹¹. This is further evidenced by the management of the election challenge. Ralia Odinga, who won 43% of the vote, challenged the winners Uhuru Kenyatta and William Ruto in court, claiming the IEBC had failed in its duty to conduct a free and fair election¹¹². However, the Kenyan Supreme Court declared the election credible on March 31st¹¹³.

Not only did the new institution deliver a free and fair election, but the greater Institution Political withstood a challenge to the election’s legitimacy. The fact that the elections were mostly peaceful and legitimate and did not result in violence is a major milestone is somewhat attributable to the work of the IEBC and constitutional implementation.

2. Responsive Institutions

Devolution went formally underway after the 2013 elections when the Kenyan government established 47 counties, each with an elected governor, as sub-national units of government¹¹⁴. This paper uses the Kenya School of Government Center for Devolution Studies’ Working Paper Series on Devolution as its source on devolution.

Devolution aims “to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them”¹¹⁵. The Working Paper Series uses three metrics to measure “effective public engagement”, i.e. participation that actually impacts policy decisions: “Access to Information”, “Capacity Building and Civic Education”, and “Public Consultation”¹¹⁶. This paper focuses on the Public Consultation aspect of the new devolved units. This consultation would ideally occur through formal institutions of “structured engagements with the public” in the local governments¹¹⁷.

The Working Paper Series found that, after a year on implementation, citizens were participating in their local governments, “though in unstructured arrangements by both County

¹⁰⁷ “The Online Data Analysis Tool.”

¹⁰⁸ IBID.

¹⁰⁹ IBID.

¹¹⁰ IBID.

¹¹¹ Kimenyi, “Kenya: A Country Redeemed after a Peaceful Election.”

¹¹² IBID.

¹¹³ IBID.

¹¹⁴ Centre for Devolution Studies, *Working Paper Series No. 1*.

¹¹⁵ Article 174(c).

¹¹⁶ Centre for Devolution Studies, *Working Paper Series No. 5* (Nairobi: Centre for Devolution Studies and the World Bank, 2015), 3.

¹¹⁷ Centre for Devolution Studies, *Working Paper Series No. 5*, 3.

Structures established to facilitate citizen participation	Number of Counties	Percent
Information communication and technology based platforms	34	72.3
Town Hall meetings (structured meetings)	32	68.1
Budget preparation and validation fora	37	78.7
Notice boards; announcing jobs, appointments, procurement, awards and other important announcements of public interest	40	85.1
Development projects sites	33	70.2
Avenues for the participation of peoples' representatives including but not limited to members of the national assembly and Senate	35	75.5
Establishment of citizen for a at county and decentralized units (Also in section 22(1) of the Urban areas and Cities Act, 2011)	26	55.3

Figure 2: Structures Established to Facilitate Citizen Participation, from Centre for Devolution Studies, Working Paper Series No. 5, 9.

Executive and County Assembly”¹¹⁸. A table from the report, see *Figure 4*, shows that a majority, though not all, of the counties established institutions for citizen participation. Furthermore, the Ministry for Devolution and Planning found in 2014 that 95% of counties involved public consultations in the budget, and 87.5% in integrated development

planning¹¹⁹. While there were issues of citizens far away from the decision-making centers not being able to attend these meetings¹²⁰, it is still positive progress. As the report states, “it is clear that the first year of devolution in Kenya has been one of setting structures and putting systems in place”¹²¹.

The Years to Come

From this evaluation, this paper claims the constitution and constitutional implementation positively impacted citizen political participation. It secured the rights to citizen political participation in the Constitution and seeks to make it a part of daily governance. Constitutional implementation led to a peaceful election, giving citizens the opportunity to vote and have a free and fair election, which they utilized. Constitutional implementation also established local units of government that are designed to be responsive to their citizens and create space to involve them.

What will be important for the coming years is that the government and people continue to implement the constitution and make an effort to make citizen political participation an institution within the Institution Political and to encourage their citizens to utilize the spaces provided for them.

This paper's assessment is broadly optimistic about Kenya's political situation. The Kenyan political reality is still a difficult one. Corruption is near universal, and considered a norm, if an unwanted one, by the public¹²². The rule of law is still weak¹²³, and not all voices in Kenya are heard. However, the purpose of this paper is to show what the Constitution and constitutional implementation did for citizen political participation, with the hope these first steps by the Kenyan government and people will lead to a better democratic situation.

¹¹⁸ IBID, 10.

¹¹⁹ IBID.

¹²⁰ IBID.

¹²¹ IBID, 13.

¹²² “Freedom in the World: Kenya 2015.”

¹²³ IBID.

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