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." 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 1989 and Throup in 1993, 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.

Lumumba begins his narrative in 1963, with Kenya’s independence from Great Britain and the promulgation of the aptly named Independence Constitution. Lumumba argues the
British colonial power mostly brought about the Independence Constitution as they exited Kenya, thus it had little legitimacy with the people or the political elite\(^7\). Within the first six years the new Kenyan government amended the Constitution ten times\(^8\). In 1969, another constitutional amendment merged these changes into one document, creating a new, revised Constitution\(^9\).

For the most part, these amendments served to centralize power in the national government and into the hands of the executive\(^10\). 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 government\(^11\).

According to Lumumba, the KANU’s centralization of power created an ‘Imperial Presidency’ holding absolute power and authority\(^12\). The constitutional amendments served to “ensure maximum control of political power, eradication of any check system and accountability mechanisms” for the executive\(^13\). Another amendment in 1966 did away with the Senate\(^14\), 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 state\(^15\). 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 land\(^16\).

In 1991, multi-party politics returned to Kenya with the 27\(^{th}\) constitutional amendment\(^17\) and with it calls for constitutional reform\(^18\). 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 2010\(^20\).

**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.
\(^20\) 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 winning. 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 cake winner for their particular ethnic group. When the ethnic groups who supported Raila 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 violence.

The scholars Susanne Mueller and Mwangi Wa Gĩthĩnji 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 lines.

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 treated all equally in the political sphere. This is not to say that ethnically-informed politics is illegitimate, 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 Gĩthĩnji, 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

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22 Nyong’o, African Politics, 94.
23 Gutiérrez-Romero, “Ethnicity and Economic Issues.”
26 Gĩthĩnji and Holmquist, "Kenya's Hopes and Impediments"; Mueller, "Dying to Win."
participate, or participate at all, in the political arena. 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 reformative 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 government. It provides a strict code of ethics for elected officials, to combat the culture of national cake politics. The new Constitution also makes citizen participation a national value and a principle of governance, and involved citizen participation in nearly every part of the government, and provides for an extensive Bill of Rights for citizens.

To make sure the Constitution will not fall prey to the fate of its predecessors, it provides a schedule of implementation, 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 reformatory mandates.

Though a brief overview of Kenya’s political history, 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 reformative 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 reformative 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.

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29 Article 129-151.
30 Article 75.
31 Article 10(2).
32 Article 19-59.
33 5th Schedule; 6th Schedule.
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 democracy. 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". 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”. 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”. These are Institutional Guarantees: institutions in society necessary for citizens to have the opportunity to effectively participate in government.

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”. 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 explains 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 constitutionalism 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 life. 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.

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37 Ibid, 2.
38 Ibid, 3.
39 Ibid, 2.
40 Ibid, 4.
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 Sartori 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 outcomes, such as elections and procedures for politicians to govern the state. 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 prone.

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 legislature. He warns they will be “a deviation and an overload of constitutional capacities” that will prevent the constitution from functioning at all. Sartori’s exclusive focus on elections and formal institutions is what Schmitter and Karl identify as the fallacy of electoralism. 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 have.

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 outcomes. Lane finds the democratic institutions created by constitutions have no direct impact on those outcomes. He also finds Sartori’s outcomes model to be flawed.

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44 Sartori, Comparative Constitutional Engineering.
45 IBID, xi.
46 IBID.
47 IBID, 202.
48 IBID.
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 Satori’s original argument. According to Lane, a constitution’s true functional purpose, outside the formal political sphere, is protecting citizens’ human rights and freedoms.

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’. The written constitution is “a compact document that comprises a number of articles about the State, laying down rules which State activities are supposed to follow”, 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”. 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 law, for "it is one thing to devise a constitution but quite another matter to implement it". 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

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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. 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 government. This paper uses these eight criterions to define and measure citizen political participation. Dahl carefully notes these will not lead to “the development of public opposition” Rather, they are “conditions under which systems of public contestation are likely to develop and exist”, i.e. institutions that allow citizens to develop a system of participation where they meaningfully participate in making and oppose government policies.

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 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 liberalized.

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

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62 This paper renames the last Institutional Guarantee to Responsive Institutions for brevity’s sake.
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 association\(^{66}\), including political parties\(^{67}\) and cultural organizations\(^{68}\), 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 society\(^{70}\). The Constitution reserves the right for the government to regulate political parties\(^{71}\).

2. Freedom of Expression

   The Constitution provides for the citizen’s right of expression, both in the exchange of ideas\(^{72}\) and in public demonstration\(^{73}\). Like the right of organization, the Constitution limits this right from hate speech, which extends to multiple definitions\(^{74}\). 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

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\(^{66}\) 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 years.\textsuperscript{76}

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 party\textsuperscript{77} and on what a political party or candidate can say\textsuperscript{78}.

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 others.\textsuperscript{79}

6. **Eligibility for Public Office**

Each national public office carries some qualifications required to run for that office, which extend beyond the usual age and citizenship requirements.\textsuperscript{80} The Constitution also mandates descriptive representation for women, youth, those with disabilities, and minority groups through special seats in the Parliament and quotas.\textsuperscript{83}

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”, 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 things.\textsuperscript{85} 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 did.\textsuperscript{86} The Constitution envisions a state where all the governing institutions are responsive to the people. The members of the legislature and executive are elected by popular vote, and the members of the ministries are

\textsuperscript{76} Article 38(3).
\textsuperscript{77} Article 91(1).
\textsuperscript{78} Article 91(2).
\textsuperscript{79} Article 34(1).
\textsuperscript{80} Article 137(1); Article 99(1-2).
\textsuperscript{81} Article 75(1).
\textsuperscript{82} Article 100.
\textsuperscript{83} Article 27(8); Article 55; Article 54(2); Article 56.
\textsuperscript{84} Article 38(2).
\textsuperscript{85} Article 81.
\textsuperscript{87} Article 136(1).
nominated and confirmed by those elected bodies\textsuperscript{88}. The people also have the right to petition Parliament\textsuperscript{89} and any other public authorities\textsuperscript{90}. Policy decisions for public finance, among others, are to be made with public participation\textsuperscript{91}, and public involvement is a value of public service\textsuperscript{92}.

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 governments\textsuperscript{93}, has been a major part of constitutional implementation. In 2013, the government created 47 counties, new subnational units of government, each with their own elected governor, county executive, and county assembly\textsuperscript{94}.

Devolution attempts to make government institutions more local and give more self-governance to the people, away from the central power of the capital\textsuperscript{95}. This involves an extensive transfer of functions\textsuperscript{96}, which is ongoing. This paper place this under Responsive Institutions because it, among other things, makes governing institutions more local and responsive, and involves citizens more in government\textsuperscript{97}.

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 \textit{de jure} right of political participation completely. Next, this paper shows how

\begin{table}[h]
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\begin{tabular}{|l|l|}
\hline
\textbf{Dahl’s Institutional Guarantees} & \textbf{The Constitution’s Corresponding Rights} \\
\hline
Freedom to Form and Join Organizations & Article 36(1); Article 38(1); Article 44(2) \\
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Freedom of Expression & Article 33(1); Article 37 \\
\hline
Right to Vote & Article 38(3) \\
\hline
Right of Political Leaders to Compete for Support and Votes & Article 91(1-2) \\
\hline
Alternative Sources of Information & Article 34(1) \\
\hline
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) \\
\hline
Free and Fair Elections & Article 38(2) \\
\hline
Responsive Institutions & Article 37; Article 119(1); Article 132(2); Article 136(1); Article 174; Article 201; Article 232(1) \\
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\end{tabular}
\caption{Dahl’s Institutional Guarantees and the Corresponding Constitutional Rights.}
\end{table}

\textsuperscript{88} Article 132(2).  
\textsuperscript{89} Article 119(1).  
\textsuperscript{90} Article 37.  
\textsuperscript{91} Article 201.  
\textsuperscript{92} Article 232(1).  
\textsuperscript{93} Article 174.  
\textsuperscript{95} Article 174.  
\textsuperscript{96} 6th Schedule, Article 15.  
\textsuperscript{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." 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 institutions.

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.” 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" by, amongst other things, “[increasing] registration of eligible voters”, and "[enhancing the] efficiency and effectiveness of the Commission in the conduct of elections.”

On March 4th, 2013 Kenyans voted for president, deputy president, members of parliament, senators, and for the first time, county governors. 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%, “no serious incidences of violence”, and declared free and fair by international observers, 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 delivery. However, the real sign of success was the increase of the number of voters. The number of

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98 Article 262.
99 Developed from Dahl, Polyarchy, 235.
100 Article 88(4).
people who could not find a polling station or were prevented from voting both fell from 1% to 0%. 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%. The number of people who thought it was not free nor fair correspondingly fell from 42% to 18%. 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%.

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”. This is further evidenced by the management of the election challenge. Raila 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 election. However, the Kenyan Supreme Court declared the election credible on March 31st.

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 government. 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”. 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”. 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 governments.

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..."
Executive and County Assembly." 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 planning. While there were issues of citizens far away from the decision-making centers not being able to attend these meetings, 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.”

**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 public. The rule of law is still weak, 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.

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