

Electoral Institute for Sustainable Democracy in Africa (EISA)

&

Kenyatta University School of Law

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Legal Framework for run-off elections in Kenya

By

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Introduction

A 'run-off' election is a final election that occurs when an initial one does not produce a winner. The run-off election allows a vote between the candidates receiving the largest and second largest number of votes cast in the original balloting.

Popularity of run-off systems

The popularity of election run-off systems has risen steadily over the past decades:¹ in the 1990s 70% of the presidential elections held ended in run-offs- this compared to only 30% in the 1960s.² The growing global adoption of the run-off system is based on two justifications: run-off elections are said to be inclusive and ensure a large mandate to the winner, thereby ensuring a more democratic legitimacy and secondly, they prevent the election of a minority president; one who will serve only a section of the country. The presumption is that a run-off system produces a president who enjoys popular support.

Kenya

In Kenya's presidential election, a candidate is declared elected as president if the candidate receives more than half of all the votes cast in the election (50% plus one); and at least twenty five percent of the votes cast in each of more than half of the counties.³ If no candidate meets this threshold, a run-off election is to be held within thirty days after the previous election.⁴ In theory a run-off shall be necessary in any of the following scenarios: where the leading candidate receives 50% plus one of the votes cast but does not receive 25% of the votes cast in more than half of the counties; where a candidate receives 25 % of the votes cast in more than half of the counties but does not receive 50% plus one of the votes cast; where no candidate receives neither 50% plus one of the total votes cast nor 25% of the votes cast in more than half of the counties in the country. In this event a run-off shall be conducted between the candidate or candidates who received the

¹ Sixty-one out of ninety one countries that directly elect a president provide for a run-off: Blais A, Massicotte L and Dobrzynska A (1997) Direct Presidential Elections: A World Summary, *Electoral Studies* 16 (4) 441-455.

² Golder M (2005) Democratic Electoral Systems Around the World, 1946- 2000 *Electoral Studies*, 24, pp.103-121.

³ Article 138 (4) of the constitution

⁴ Article 138 (5) of the constitution

greatest number of votes⁵ and the candidate or candidates who received the second greatest number of votes,⁶ or all candidates who tied in the election.⁷ The candidate who receives the most votes in the run-off is declared elected president of the country. The run-off does not require a candidate to amass any specific number of votes or any precise quantity of vote representation in any percentage number of the counties.

The timelines for the run-off are predicated upon the assumption that the first round of elections shall be conducted and rested without a dispute. This, of course, is not necessarily the case. After the first presidential election, disputes may occur in any of the following situations: when the candidate who receives the highest number of votes contends that they met the threshold for election and should therefor be declared president without a run-off; where the candidate who receives the second highest number of votes disputes the tally, alleging that they should have been declared either as number one or as duly elected; or where the number three or fourth candidate contests the tally, alleging that either they should have been declared number one or two or even as duly elected president or where a voter raises any issue with the conduct of the election. A contest for the first two positions is not an idle interest. It ensures a ticket for the run-off. Indeed, in some cases, candidate number three has ended up winning the presidency.

In the event of a dispute, does the timeline for the run-off continue to run or does a dispute freeze the 30-day period within which the run-off is to be held? The constitution is not clear on this. This lack of constitutional clarity on timelines is also manifest in the absence of provisions on the resolution of disputes arising out of the first balloting. A determination of this issue is critical because it has a bearing on the necessity or want of a need to conduct a run-off.

The gaps in the legal regime were addressed in a recent opinion of the Supreme Court in which the Attorney General sought an Advisory Opinion on Judicial Jurisdiction for resolving presidential disputes.⁸ In this matter, the Attorney General raised an issue and sought the interpretation and advice of the court as to whether an unsuccessful candidate in the first round of a presidential election is or is not entitled to petition the Supreme court to challenge the outcome of that first

⁵ Article 138 (5) (a)

⁶ Article 138 (5) (b)

⁷ Article 138 (6)

⁸ Supreme Court of Kenya, Advisory Opinion No. 2 of 2012

election. The confusion in the provisions rests on the premise that the constitution only specifies the handling of a dispute of a 'president elect'.⁹ Yet if after the first election no candidate shall have satisfied the threshold for election there shall be no 'president elect'.

In its Advisory Opinion the Supreme Court admitted that there is a lacuna in the law as the constitution only addresses settlement of disputes at the final, not at the earlier stages of a presidential election. This, no doubt, is a matter of grave governance perplexity and weighty constitutional implications. After considering all the submissions urged before her, the Supreme Court took the view that the Court 'was intended to adjudicate upon all such disputes as would arise from the presidential election'. Based on this Advisory Opinion, it is now accepted that the Supreme Court shall entertain and adjudicate all presidential election disputes, including disputes from the first round of presidential elections.

A secondary issue that was determined in this Advisory Opinion was whether the period within which a run-off is to be held remains at thirty days even when a dispute has arisen on the first round of presidential elections. The Court took the view that 'the words within thirty days after the previous election should be read to mean thirty days from the date on which disputes in respect of the first round will have been resolved'. The Supreme Court Opinion did not deal with the resultant change in timelines for a run-off. This was left to be determined in a draft Supreme Court (Presidential Election Petition) Rules, 2013 presently under discussion.¹⁰ The draft, however, does not make any specific reference to the timelines for determination of a first round election petition and does not therefor provide any indications as to when the thirty days within which the run-off is to be conducted shall begin to run. In essence the thirty days shall begin to run whenever the first round petition is determined. This, in spite of the fact that the constitution is specific on a 14-day period for the hearing and determination of a petition against a president elect.¹¹ It is suggested that the Rules stipulate an unambiguous and explicit period for determination of a first round petition to allow for certainty as to when a run-off shall be conducted. A delay in the conduct of a run-off shall prolong the period during

⁹ Article 140 (1) A person may file a petition in the Supreme Court to challenge the election of the president-elect within seven days after the date of the declaration of the results of the presidential election.

¹⁰ Under Article 163 (8) of the constitution and section 31 of the Supreme Court Act, the Supreme Court is empowered to make Rules for the exercise of its Jurisdiction.

¹¹ Article 140 (2) of the constitution. Preliminaries for a first round petition (before the hearing) suggest an 18 day hiatus, a period much longer than the time it takes to file and determine a petition against a president elect.

which the incumbent president remains in office and render constitutional challenges to the operations of a parliament elected without a duly constituted executive.

On the operational side of things, it is crucial to be certain about a date for a run-off to ensure logistical preparations, availability of polling stations, voter awareness and availability, funding for run-off candidates and most importantly legitimacy of government if the election postponement leads to an unduly long period of incumbency due to non election of a new president.

This is an abridged version of a paper presented at the IEBC & Kenyatta University Conference on
lection runoffs.