



Ready or Not?

Notes on the Two Round System of Elections

Discussion Paper by Erastus Wamugo

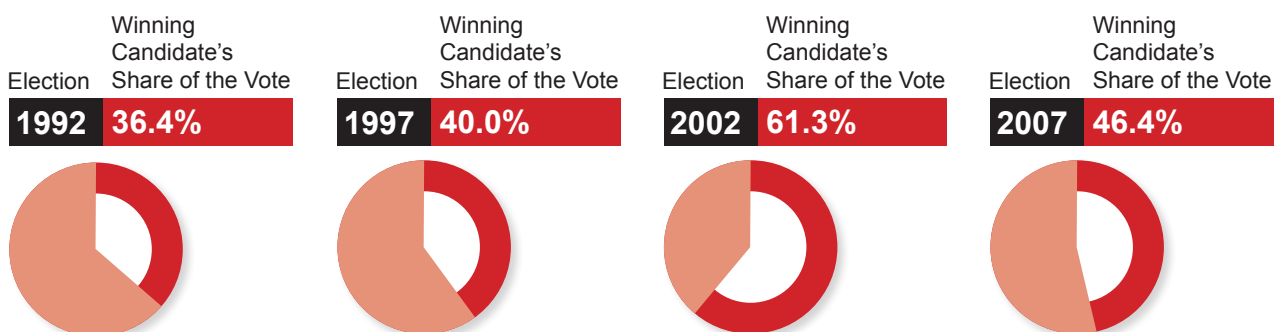
Foreword

This publication is part of a series of discussion papers on the next general elections, assessing the country's readiness to hold peaceful and credible general elections, highlighting key issues and making recommendations to mitigate the risks and problems identified. A comprehensive analysis of the substantive issues regarding preparations for the next elections will be published shortly.

Introduction

Since the re-introduction of multi-party politics in 1991, Kenya has had four general elections which have included presidential elections. Except for the 2002 election in which the victorious presidential candidate enjoyed an absolute majority, the other three were won through relative majority as illustrated by the charts below.

Presidential Election Winning Majorities



Source: Electoral Commission of Kenya (ECK)

Abbreviations

ECK – Electoral Commission of Kenya
 CDC – Congress for Democratic change
 IEBC – Independent Electoral and Boundaries Commission

KPTJ – Kenyans for Peace with Truth and Justice
 NDC – National Democratic Congress
 NEC – National Electoral Commission

NPP – New Patriotic Party
 TR – Two Rounds
 TRS – Two Round System

All these elections were held under the old constitution which had a Two Round System (TRS) that permitted relative majority. Had the same elections been held under the new constitution 2010 then three of them – 1992, 1997 and 2007, would have triggered an automatic run-off.

Since the last presidential election, various opinion polls have been carried out by different pollsters on the likely voting patterns in a presidential election. None of these polls has produced a candidate with an absolute majority. Indeed successive numbers for the leading candidate as a percentage of those polled have mainly been in the range of the thirties for most of the polls.

If one takes into account the previous voting patterns, current polling maps and the changes brought under the new constitution, and further takes the country's culture of political mistrust and fragile political parties, it is not out of place to state that a second round is a highly probable outcome of the next presidential election.

An Outline of the Two Round System

The Two Round System (TRS) is rooted in the principle that a person should have majority support in the constituency in which he or she is elected. The need for majority support is itself defended on the value of democratic fairness. TRS is therefore a device employed to achieve absolute, as opposed to relative, majority in an election. TRS is a simplified variation of the multiple ballot which operates by eliminating the candidate with the lowest votes at each successive round until a winner eventually emerges. The multiple ballot is still employed in the election of a Pope. Modern societies are, however, far more complex than the slender catchment of a cardinals' conclave.

TRS is used both in legislative – usually lower house in bi-cameral parliaments - and in presidential elections. In presidential elections TRS works by having the top two candidates going for a run-off where no single candidate scores over 50% of the vote in the initial round. There are variations in different electoral systems regarding the vote thresholds that may trigger a second round.

Beyond advancing the value of fairness, the advantages of the TRS are also said to include the promotion of the politics of compromise and co-operation, thus enhancing moderation in the political culture. The necessity to build alliances is said to generate parties and politicians that center on particular electoral demographics or geographic areas.

On the other side of the ledger, a number of entries are made against TRS. The most obvious being the enormous costs involved in delivering it and the demands placed on voters which may lead to fatigue and low turn-outs in the second round. By creating political incentives for alliance building from the very outset, TRS may also encourage the erosion of hard party identities and ideological differences. In the Kenyan context such a tendency contains the very real danger of reinforcing ethnic division as the basis for political competition.

Kenya's Experience with the TR System

The 1988 amendments to the old constitution introduced changes to the electoral rules governing the election of a president. Henceforth a candidate was required to fulfill three rules, to be declared elected as president. The candidate had to have the highest number of votes in the presidential poll, receive at least 25% of votes in a minimum of 5 provinces, and finally be elected as a Member of Parliament. Where no candidate meets these three requirements then a run-off was to be held between the two candidates with the highest votes. Strangely, the provisions of the old constitution required that for a candidate to be declared victorious in the second round, he or she needed to satisfy the three requirements of the first round. This oddity in constitutional circularity was never tested since in all the elections held under these electoral rules, (1992, 1997 and 2002) a winner emerged in the first round.

The new Constitution brought a number of changes in areas affecting presidential elections. First the power map was considerably altered. Geographically, the provinces – all 8 of them – were erased and new units called counties – 47 of them – were created.

The new requirements for presidential elections are set in the Constitution as follows:

138 (4) A candidate shall be declared elected as President if the candidate receives-

- (a) more than half of all votes cast in the election; and
- (b) at least twenty-five per cent of the votes cast in each of more than half of the counties

Where no candidate is elected under these requirements then a second round election will be held within thirty days from the first election pitting the two candidates with the highest number of votes against each other.

The requirements must be met at the same time by a candidate for him or her to be declared elected.

Where one or both of the requirements fail to be met by a single candidate then a run-off will be held. The scenarios contemplated by the two requirements are set out in the table below.

Table 1. Election Scenarios

Does a candidate meet the two requirements?			
	25% County Rule	More than 50% Vote Rule	Outcome
Scenario 1	Yes	Yes	President-elect
Scenario 2	No	No	Run-off
Scenario 3	Yes	No	Run-off
Scenario 4	No	Yes	Run-off

Comparative Experiences

TRS is well known in Francophone Africa. France herself is traditionally studied as a country that has widely and historically employed TRS. However, it may be instructive to look at examples from Anglophone Africa since Kenya shares with them both common law origins in the legal sphere and similar political institutions, if not culture.

1. Ghana

During the last presidential election held in Ghana, there was no outright winner in the first ballot carried out on 7th December 2008. The candidate of the ruling New Patriotic Party (NPP) got 49.13% of the vote while his leading opponent from the National Democratic Congress (NDC) received 47.92% of the vote. The balance of the vote was distributed among the other six minor candidates.

In the run-off, NPP received 49.17% of the vote while the opposition (NDC) received a winning share of 50.23%. Despite these razor-thin margins, the outcome was respected and the opposition candidate took power peacefully. Perhaps Ghana's relatively strong culture of holding credible elections and the minor role played by ethnic identity in politics led to this outcome.

2. Liberia

In the Liberian presidential election held on 11th October 2011, the leading candidate from the ruling Unity Party received 43.9% of the vote while the main challenger, from the Congress for Democratic Change (CDC), received 32.7%. Since no candidate won an absolute majority as required, a run-off was

held on 8th November of the same year. Before the run-off was held the CDC candidate withdrew from the election citing fraud on the part of the National Electoral Commission. A letter issued by the NEC had indicated a reversed outcome between the UP and CDC candidates. NEC clarified that the figures were erroneously typed. In the end the head of NEC resigned after firing his head of communications. The Office of the Prosecutor issued a cautionary statement advising against violence.

In the end the UP candidate won in the run-off, being the only contestant, but the voter turn-out fell by almost 50%. Liberia is still relatively stable but it is not yet clear what the long-term effects arising from this episode will be.

Electoral Disputes

The new constitutional architecture has established (and in some cases refurbished) elaborate electoral dispute resolution mechanisms. With regard to presidential elections, the new Supreme Court has been clad with the jurisdiction to determine the validity of presidential elections. This jurisdiction, however, arises only where a person has been declared the winner of a presidential election and this declaration is challenged through a petition. It does not touch on disputes that may arise after the first round where there is no outright winner. An aggrieved candidate is left with alarmingly inadequate opportunities for redress and even less time since the second round must be held within thirty days of the first round. This silence or gap in the law is a matter that needs urgent treatment.

Conclusion and Recommendations

Political Parties

The Political Parties Act 2011, has created a regulatory environment which encourages two tendencies that are in tension with one another. The first tendency is the support for distinct and independent political parties with individual constitutions, a requirement that each maintains branches across the country, keeps updated membership registers and develops policies and programs. The reward for these efforts is that the party will continue to participate in political life and especially in elections. Parties are, importantly, entitled to draw public funds proportionate to electoral strength from the Political Parties Fund.

The second tendency being encouraged by the law is the formation of coalitions and mergers. Mergers are more likely to happen among small parties facing existential threats. Coalition agreements however are attractive vehicles for enhancing the coalition partners' electoral prospects and capacity to be effective in legislative institutions

How will this regulatory framework impact on TRS? It is most likely that parties will feel compelled to offer presidential candidates (maximize share in Political Parties Fund) and hope to strike alliances after the election. An increase in the number of presidential candidates especially those that can surpass the 5% vote threshold will likely push the presidential race to the second round. Before and during elections informal bargains are the likely outcomes.

Campaign Expenses

TRS is inherently costly to the Government and also to parties. Presidential candidates must make provision for possible extra campaign costs as must the IEBC. The pending law on campaign financing should have regard for this possible increment on the part of presidential election.

Civic education and Mobilization

There is a broad need to enlighten citizens on the nature of TRS and animate them to participate in a second round if one materializes. This is the work of IEBC as well as other stakeholders in the electoral process. Citizens should also be educated to view political bargains as what they are – pursuit of political influence, and not forms of 'betrayal'.

Political Stability

In the event of a run-off, the period between the two rounds is extremely sensitive. The candidates excluded from the second round need to accept the outcome of the process and where grievances exist these should be addressed comprehensively, fairly, and expeditiously. The second round should not be viewed as an opportunity for causing mischief. Nevertheless the danger lingers.

Rules on media regulation should also ensure fairness at such a critical period. In particular whether the publication of opinion polls should be allowed in-between the two rounds is a matter for debate.

Above all the impartiality of Government, the incumbent regime and public institutions is vital for maintaining political stability during a second round.

KENYANS FOR PEACE WITH TRUTH & JUSTICE (KPTJ) is a coalition of citizens and organisations working in the human rights, governance and legal areas that came together after the crisis over the disputed results of the 2007 Presidential Election and the Violence that followed thereafter. Members include: Africa Centre for Open Governance (AfriCOG), Bunge la Mwananchi, Centre for the Development of Marginalised Communities (CEDMAC), Centre for Law and research International (CLARION), Centre for Multiparty Democracy (CMD), Centre for Rights, Education and Awareness for Women (CREAW), The Cradle - the Children's Foundation, Constitution and Reforms Education Consortium (CRECO), East African Law Society (EALS), Fahamu, FIDA-Kenya (Federation of Women lawyers), Foster National Cohesion (FONACON), Gay and Lesbian Coalition of Kenya (GALCK), Haki Focus, Hema la Katiba, Independent Medico-Legal Unity (IMLU), Innovative Lawyering, Institute for Education in Democracy (IED), International Commission of Jurists (ICJ-Kenya), International Centre for Policy and Conflict, Kenya Human Rights Commission (KHRC), Kenya Leadership Institute (KLI), Kenya National Commission on Human Rights (KNCHR), Kituo cha Sheria, Mazingira Institute, Muslim Human Rights Forum, The National Civil Society Congress, National Convention Executive Council (NCEC), RECESSPA, Release Political Prisoners Trust, Sankara Centre, Society for International Development (SID), The 4 Cs, Urgent Action Fund (UAF)-Africa, Youth Agenda.

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