

ELECTORAL PROVISIONS IN LIBYA'S DRAFT CONSTITUTION¹

EXECUTIVE SUMMARY

Libya's draft constitution includes electoral provisions for the President, for the Shura Council (House of Representatives and Senate), for provincial and local council elections and for referenda.

The draft's Article 48 includes important principles such as transparency, freedom and fairness of elections. Other principles such as secrecy of the vote and equality are found in different articles. It would be useful to include these essential electoral principles in Article 48 too. The constitution does not make explicit that the popular will exercised *inter alia* through elections is the basis of sovereignty. This could be added.

The draft suffers from some gaps, for example voting age is not specified for some elections. On other issues, such as the electoral system for the House of Representatives and for local elections, the draft may be deliberately silent because the drafters could not agree and left it for the legislator to determine these electoral systems. Many constitutions provide the basic elements related to the electoral system so that it cannot be changed easily by the majority of the day; an aspect that is particularly relevant in post-conflict countries where trust between parties tends to be low. It would therefore be useful for the constitution to clarify at least if the House of Representatives should be elected through a majoritarian, a proportional or a mixed electoral system and

provide indications about the size of electoral districts and thresholds, while leaving details to the law.

As far as presidential and Senate elections are concerned, geographical elements play a role in the electoral systems, in order to give all three historic regions some weight in representation. This is a legitimate choice given the specific conditions in Libya, the clear imbalance in population density across the country coupled with big differences in the geographical area between regions and/or districts. Similar examples are found in comparative experience, accounting also for other considerations, such as economic conditions, development rates and societal/ethnic diversity.

1. ELECTORAL PROVISIONS IN LIBYA'S DRAFT CONSTITUTION

1.1. ELECTORAL RIGHTS AND PRINCIPLES

Many constitutions include electoral rights in the form of human rights, which reflect international obligations, as well as general principles for electoral processes, such as transparency and electoral legitimacy.

With the exception of a brief reference in the preamble to "national sovereignty", the Libyan draft constitution does not refer to the sovereignty of the Libyan people. There is no

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reference to the fact that authority is derived from the people.² Such a clarification would be appropriate.

The draft constitution enshrines some universal basic rights and principles. Article 48 refers to the right to vote in referendum and to vote and be a candidate in free, fair, transparent and just elections, where all citizens are equal according to the law. Article 54 ensures the same rights to all Libyan citizens abroad.

Article 48 includes the principles of freedom, integrity, transparency and justice, as being general principles necessary for the credibility of elections. Other articles in the draft have also established the principle of “direct, secret and free universal suffrage” whether to elect the president (Article 112), members of the House of Representatives (Article 78), members of the Senate (Article 86) or members of the provincial and municipal councils (Article 157). These are important electoral principles. It would be useful to add secrecy and equality of the vote as principles. The principles are not mentioned for referenda, where they should equally apply.

It would be useful to consider articles that give concrete shape to these principles, such as guaranteeing the right to election observation, as is included for example in Morocco’s Constitution. Concrete safeguards would certainly strengthen the efficient applicability of Article 48 of the draft when it clearly states that eligible citizens may not be deprived of their electoral rights unless by a court ruling.

Articles 78 and 86 determine the minimum voting age (18 years) for electing the House of Representatives and the Senate, but no voting age is included in the Articles dealing with referenda, presidential elections (Article 112) and provincial/municipal council elections (Article 157). This should be clarified. A straightforward solution may be to include the minimum voting age for all elections in the Article on electoral rights (i.e. Article 48).

Other articles of the draft provide for rights and freedoms closely related to elections, particularly the freedom of forming political parties and the right to join or leave them without any discrimination (Article 49). Additional articles refer to the freedom of expression and publication (Article 46), freedom of press and media (Article 47), right of participation (Article 51), right of assembly, association and demonstration (Article 52) and the right to transparency and access to information (Article 55).

Article 91 gives the legislative authority, specifically the Senate, the power to promulgate or amend referendum and elections related laws. Article 93 of the draft grants the prerogative of final adoption of laws to the Senate in case the

joint committee, equally formed from both chambers, is unable to reach a consensual solution. These provisions differ from many other constitutions where usually the lower house of parliament has a stronger position (such as in Spain, France, Belgium, and Morocco). The choice made in Articles 91 and 93 shows that the drafters consider electoral legislation to be a highly sensitive matter which can only be settled by consensus between the components of the three regions, equally represented in the Senate, and not by a majority in the House of Representatives, which decisions may be based on different political considerations and interests of the majority of the day.

1.2. SPECIFIC PROVISIONS ON REFERENDUM

Although the draft constitution does not explicitly establish “the will of the people” as a basis for sovereignty, it includes matters reserved for the referendum and the cases where it should be used, namely:

- Adopting the Constitution (Article 220) or amending it (Article 216) requires a referendum. It is noteworthy that currently the draft excludes any changes to the Constitution for five years after adoption, a questionable provision that would prevent any possibility of adjusting the text if a part of it turns out not to be workable. Possible solutions include shortening this period considerably to a much shorter one that would be enough to verify the applicability of the Constitution in practice, or simply abandoning the idea of such exclusion altogether.
- Procedures for dissolving the legislative authority (Article 122), as the president may decide to submit for referendum the dissolution of the House of Representatives, the Senate or both houses, upon consultation with the constitutional court on the seriousness of the arguments that justify such dissolution. Resorting to referendum in order to dissolve the legislative authority is an indicator of the status conferred to the people by the constitution makers. This gives the Libyan people the role of supreme constitutional arbiter that settles political disputes between the legislative and executive powers.
- Final decision on the flag and national anthem of the state, as Article 217 states that this shall be submitted to referendum before the end of the second legislative period. Article 5 and 6 of the draft include a description of flag and anthem but Article 217 makes clear that these are considered an interim solution to avoid a political blockage on this point.

While the draft constitution indicates that the High National Election Commission will “manage and organise public referenda” (Article 168) many procedural aspects are not defined and would need to be included in a referendum (or general election) law. Among others, and given the impact the actual design of referendum questions usually has on the results, it would be important to clarify who holds ultimate responsibility for this. Article 216 on amendments is not entirely clear about the role of the President in cases where parliament initiates a referendum. Given that referenda in fragile states often have destabilising effects, it would be

² For comparison, Article 2 of the Moroccan constitution indicates: “Sovereignty belongs to the Nation which exercises it directly, by way of referendum, and indirectly, by the intermediary of its representatives. The Nation chooses its representatives from among the institutions elected by way of free, honest [sincere] and regular suffrage.” Article 20 of the German constitution says: “All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.”

useful to require that referenda can only be held on the basis of a referendum law which could include more procedural safeguards.³

1.3. PRESIDENTIAL ELECTIONS

According to Article 111 a Presidential candidate should be a Libyan and a Muslim. The religious requirement represents a discrimination based on religion that is at odds with its obligations under the International Covenant on Civil and Political Rights. It should be left to Libyan voters to judge and decide on the importance of the religious beliefs of candidates. The draft also includes the need for a candidate not to be married to a foreigner or shall have renounced another citizenship at least five years beforehand. These provisions create different levels of citizenship. It should be considered to drop them and let Libyan voters decide how important such factors are. The article also states that a candidate should have resided for at least 5 years in Libya. In the current context of civil war this provision may exclude many potential candidates.

Article 112 indicates that for presidential elections two criteria should be balanced, namely population and the geography and that these should be defined by law. Such a provision is legitimate to provide a broad electoral base for a president in a country with deep geographic divisions. For example in Indonesia and Nigeria, a President not only needs to win a majority of votes but he/she also needs to win a certain percentage in a determined number of regions. Considering legitimate fears voiced by many Libyans of a possible return to the past, it is important to note that these arrangements, while vesting higher legitimacy on the elected President, will result in a President with strong electoral legitimacy. This needs to be kept in mind in the design of the balance of powers/presidential powers to avoid that an elected President soon concentrates all powers in his/her office.

While Article 112 does not provide more clarity on the electoral system for presidential elections, Article 202 includes a transitional measure for the first presidential elections. This article provides that each of the three regions in the country shall be divided into four constituencies (a total of 12 constituencies) and that to become President a candidate needs to win the absolute majority of votes cast in two thirds of the constituencies or, if that majority is not achieved, an absolute majority of votes in half of the constituencies, according to the percentage of constituencies' representation as defined by law. If no candidate is able to secure the mentioned majority, a second round should be organised where only the two most geographically representative candidates and recipients of

the minimum number of votes defined by law shall participate.

1.4. SHURA COUNCIL (PARLIAMENT) ELECTIONS

The Shura Council will consist of the House of Representatives and the Senate (Article 77). The draft establishes in this respect the same principles set forth for electing the president, which is direct, secret and free universal suffrage with the consideration of population and geographic distribution. Article 78 on the election of members of the House of Representatives does not specify the electoral system. It merely indicates that geography should be taken into account while equality of the vote should be guaranteed. This proviso merely excludes some electoral systems, but it will be left for ordinary law to define the electoral system. This article does not either specify the number of members in the House of Representatives, nor it gives guidance on the matter. It would be good if such guidance is given if the constitution makers choose not to determine a closed number of members.

Article 86 on electing members of the Senate indicates that there should be 72 Senators elected and notes that "representation in the Senate shall be similar to the election of the Constituent Assembly, taking into account the geographical balance inside each electoral district". The reference to the Constituent Assembly is vague, but presumably the idea is that each of the three historic regions should be represented by 1/3 of the Senators and that in each region the equality of the vote should be respected. It would be clearer to provide for this directly in the draft constitution rather than referring to the Constituent Assembly.

The draft constitution is silent on the electoral system for the House of Representatives. To avoid that majorities of the day can change the electoral system at will it would be important for the constitution to at least include key parameters such as a majoritarian electoral system, a proportional representation system, or a mixed one, as well as an indication on the size of districts and possibly electoral thresholds. In post-conflict countries often proportional electoral systems are chosen, as they tend to be more inclusive and give emerging parties a chance of representation.

1.5. ELECTING LOCAL GOVERNANCE COUNCILS

The draft constitution states that "choosing provincial and municipal councils is achieved by a direct, secret and free universal suffrage" (Article 157). The direct election of these councils by the citizens reflects two principles enshrined by the draft; the first is related to expanded decentralisation (Article 154) and the second to free management of local governance units (Article 156).

The draft does not clarify the electoral system for the election of members to the provincial and municipal councils. The draft only refers to the principles applicable to adopting the administrative divisions that should take into account "the requirements of national security and the balance between population, size and geographical communication criteria, the needs related to social justice, peace and societal harmony,

³ The Council of Europe's Venice Commission adopted a useful code of good practice on referenda: <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29008-e>.

as well as economic and historical factors and development requirements". In the recent past, the Libyan authorities chose the first-past-the-post system.⁴ This system is the simplest among majoritarian systems, as it is used within single-member constituencies. The individual constituencies formula, which are usually small in terms of geographical area, can be used to allow each constituency to have a representative and a voice in local affairs within elected councils, especially when political parties are weak or non-existent. This may apply to Libya, at least in the upcoming transitional period, as the 3 February 2016 draft constitution stipulates in Article 204 the dissolution of all political parties and suspending its formation for four years starting from the entry into force of the Constitution.⁵

Nevertheless, in spite of its simplicity, this system may undermine the chances of political minority groups and some social groups, such as women and youth, for winning seats in these councils, although the Libyan *Law N° 59 of 2012* on local government, for example, stresses the necessity to allocate a seat, in all elected councils, for women and another one for revolutionaries with special needs (Articles 11 for the provinces and 26 for the municipalities). Some countries use the proportional representation system for electing local councils, or a mixed system for electing provincial councils, thus ensuring that all local units within the area of a province are properly represented.

The draft constitution does not explain the method of electing heads of provincial councils (Governors) and municipalities (Mayors). However, the above-mentioned *Law N° 59 of 2012*, stipulates that they shall be elected by the members of the provincial or municipal council. It would be clearer if such a system is defined in the Constitution, thus indicating what system of local governance is meant to be in place in Libya, whether a more presidential-like system or a parliamentary one at these levels of governance.

1.6. ELECTION MANAGEMENT

The Libyan draft constitution has chosen the form of an Independent and Impartial Electoral Committee, referred to in the draft as the High National Elections Commission (HNEC). Article 168 of the draft states that this body "is exclusively charged with managing and organising public referendum and general and local elections at all its stages." The second paragraph of this article refers to the way by which this Commission is managed, which is "a council of nine members, among which the legislative authority elects a president, who are mandated for one term of six years and three of them are renewed every two years". The draft does not provide more details regarding the composition of the Commission, its duties and the conduct of its proceedings, leaving all these aspects to be determined by the legislator. Libya already

established the non-permanent High National Elections Commission, which was created by the National Transitional Council in January 2012 by virtue of *Law N° 3 of 2012* (later amended by *Law N° 8 of 2013*), that supervised the election of the three main bodies: the General National Congress in 2012, the CDA in 2014 and the House of Representatives in 2014. The CDA has adopted the same model in its draft constitution.

Nevertheless, given the important role of the Elections Management Body, as well as its constitutional status, it is advisable that more clarity is provided on its composition and the mechanisms to select its members, in addition to the basic conditions that selected members should meet.

While the prerogatives of the current Commission are detailed in *Law N° 8 of 2013*, the draft constitution does not elaborate on them. In order to ensure that the Commission's exclusivity in managing elections is well defined and preserved, some countries provide for the main functions and responsibilities in their constitution. In all cases, the Constitution should not make a closed list of prerogatives, and should leave the door open for the Commission to assume additional functions, through the law, as may be needed to fulfil its constitutional mandate. Some of the main responsibilities that could be envisaged in the constitutional text, as also referred to in Article 3 of the above *Law N° 8 of 2013*, include issues like: developing regulations and procedures for implementing electoral operations; candidate and voter registration; adoption and announcement of official results; electoral campaigns regulations; adjudicating disputes; accreditation of party/candidates' agents and observers, etc.

2. RECOMMENDATIONS

- A reference to the fact that authority is derived from the people would be appropriate.
- It would be useful to consider articles that give concrete shape to the principles provided for in the draft, such as guaranteeing the right to election observation.
- It would be clearer if the minimum voting age for all elections and referenda is defined in Article 48 on electoral rights.
- It is advisable that the five years period where no changes may be made to the constitution after its adoption is considerably shortened, or simply abandoned altogether.
- It would be important to require that referenda can only be held on the basis of a referendum law which includes procedural safeguards.
- It should be considered to let Libyan voters decide on the importance of some factors established as eligibility criteria for presidential candidates, such as religion, marriage to a foreigner or period of residency in Libya.
- Strong electoral legitimacy of elected presidents should be weighed against the balance of powers/presidential powers to avoid that an elected President soon concentrates all powers in his/her office.

⁴ Law 59 of 2012 did not clarify the system of local governance and voting model, and left them to the executive regulation.

⁵ As demanded by a number of CDA members, and advised by many constitutional experts, this article seems to have been dropped from the draft after its release.

- To avoid that majorities of the day can change the electoral system (for HoR and Local Councils) at will it would be important for the constitution to at least include key relevant parameters.
- For electing members of the HoR, in post-conflict countries often proportional electoral systems are chosen, as they tend to be more inclusive and give emerging parties a chance of representation.
- While the first-past-the-post system can be used to allow local small constituencies to have a representative and a voice in local affairs within elected councils, it may undermine the chances of political minority groups and some social groups, such as women and youth, for winning seats in these councils.
- Some countries use the proportional representation system for electing local councils, or a mixed system for electing provincial councils, thus ensuring that all local units within the area of a province are properly represented.
- It would be clearer if the system for electing Governors and Mayors is defined in the Constitution, thus indicating what system of local governance is meant to be in place in Libya.
- Given the important role of the Elections Management Body (EMB), it is advisable that more clarity is provided on its composition, the mechanisms to select its members, and the basic conditions that selected members should meet.
- In order to ensure that the EMB exclusivity in managing elections is well defined and preserved, some countries provide for the main EMB functions and responsibilities in their constitution.

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