

PRELIMINARY ASSESSMENT LIBYA'S DRAFT ELECTION LAW FOR THE GENERAL NATIONAL CONGRESS¹

ACCORDING TO LIBYA'S CONSTITUTIONAL DECLARATION, ELECTIONS TO THE 200 MEMBER GENERAL NATIONAL CONGRESS (GNC) WILL BE HELD BY JUNE 2012. THESE WILL BE THE FIRST COMPETITIVE ELECTIONS LIBYA HAS HELD. THE GENERAL NATIONAL CONGRESS (GNC) WILL BE IN CHARGE OF THE UPCOMING POLITICAL TRANSITION, MAKING THE ARRANGEMENTS FOR THE PROCESS OF ADOPTING A NEW CONSTITUTION AND THE ELECTION OF A PERMANENT LEGISLATIVE BODY, EXPECTED TO BE HELD IN LATE 2013.²

ON 2 JANUARY 2012, THE HIGH ELECTION COMMISSION OF LIBYA (HEC) PUBLICLY RELEASED A DRAFT OF THE LAW ON THE ELECTION OF THE GENERAL NATIONAL COUNCIL. IN A WELCOME INITIATIVE, IT INVITED LIBYAN CITIZENS TO SUBMIT COMMENTS ON THE DRAFT ELECTION LAW BEFORE IT FINALISES THE TEXT BY MID-FEBRUARY.³

ANALYSIS

Democracy Reporting International has analysed the degree to which the draft law complies with standards for genuine elections to which Libya is a party, most notably the International Covenant on Civil and Political Rights (ICCPR).⁴

¹ This commentary is based on a publicly available translation of the draft law: <http://www.scribd.com/doc/77216247/Unofficial-English-Translation-of-the-Draft-Libyan-Electoral-Law-2012> DRI does not attest to the accuracy of this translation and errors in understanding could arise due to inaccurate translation.

² See "Libya's Transition, the Constitutional Declaration: a Basis for Democracy?", Democracy Reporting International, December 2011, http://www.democracy-reporting.org/files/bp_22_constitutional_declaration_libya.pdf

³ The draft law ought to be read in conjunction with the law on the formation of the High Election Commission (HEC). However, the text of this law was not available at the time of writing this commentary.

⁴ Libya ratified the ICCPR in 1976

DRI concludes that while the proposed framework may, with good faith, be sufficient to ensure genuine election though in its current form it lacks sufficient detail, leaving many important facets to be determined through subsequent HEC regulations. Nevertheless, it contains a number of shortcomings in the text and the process for its adoption that ought to be addressed before the law is finalised, including:

- Absence of genuine public debate on the election system prior to releasing the draft election law;
- Absence of clear criteria for forming electoral districts (constituencies);
- Lack of clarity as to how the 10% quota for women's representation can be achieved within the proposed first-past-the-post election system;
- Restricting election observation to Libyan civil society groups and the UN Mission;
- Prohibiting Libyan CSOs that engage in election observation from receiving foreign funding, a provision which could stifle the development of the national CSO landscape;
- Some restrictions on the right of individuals to seek election appear at odds with Article 25 of the ICCPR;
- Lack of clarity regarding how restrictions on the right to seek election will be applied in practice and specifically whether the application will respect citizens' due process rights;
- Lack of sufficient regulation of voting, vote counting and result announcement;
- A reference to 'judicial supervision' of polling which is not elaborated elsewhere and could have significant implications for the organisation of the poll

In early January 2012, the Interim Transitional National Council (ITNC) repealed a 1972 law making the formation of political parties a criminal offence. However, despite the fact that elections are scheduled for June 2012, Libya has yet to adopt a Law on Political Parties. Given the crucial role of political parties in a democracy, and that candidate registration could possibly begin as early as April 2012, the adoption of a political party law that fully respects the right to political association should be one of the ITNC's urgent priorities.

ANALYSIS OF THE DRAFT ELECTION LAW

DRI has identified 22 issues that should be addressed before the Election Law is finalised. The first five issues are considered as the major weaknesses of the draft law. The remainder, although less significant, still merit attention.

1. THE ELECTORAL SYSTEM

Article 26 states: "The member of the General Council is chosen after (a) voter hands in his single vote in favour of a candidate, and the candidate that gets a majority of valid

votes wins the seat". This implies that Libya will use the 'first-past-the post' or 'plurality-majority' method for the election.⁵ Experience elsewhere, for example Tunisia, has shown that a proportional representation election system can produce legislative chambers which are more representative and inclusive of the newly established political spectrum than those elected under the majoritarian FPTP system proposed here.

Article 15 provides that "The High Electoral Commission will establish the electoral districts based on population density and geographical area. Establishing the districts' borders shall be decided by the HEC."⁶ The text does not clearly provide that election districts (constituencies) ought to have a broadly equal population size, which is required according to standards for genuine elections.⁷

The draft law (article 1) establishes a 10% minimum quota for women in the General Council should the number of women elected fail to reach this figure. However, the manner in which the quota will be applied within the framework of an election based on single mandate electoral districts is unclear.⁸

RECOMMENDATIONS

The electoral system to be used should be clearly stated in the law. Any election system will have a major influence on the overall composition of an elected assembly. Hence, it is advisable to consider all alternatives and to open the issue for public debate before selecting the system. While the choice of an election system is a sovereign decision for the country concerned, the election system should comply with the requirement that the 'voting weight' of each vote is equal i.e. that constituencies have a broadly equal population size.

Within the proposed election system, the manner of applying the quota for female candidates should be clearly set out and ought to respect the principle that those with the highest number of votes are elected, while simultaneously not unreasonably restricting the right of citizens of either gender to stand for election in all of the 'regular' constituencies. In

⁵ Article 26 requires the elected candidate to receive a 'majority' of the votes. However the law does not foresee a second round of polling, and it appears that the intention of the law is simply to require that the winning candidate requires a plurality of the vote i.e. the most votes.

⁶ The English translation of the article in the text used by DRI for this commentary appears to be incorrect. The text quoted above, is a more accurate translation of the article.

⁷ Paragraph 21 of General Comment 25 on Article 25 of the International Covenant on Civil and Political Rights states that: "The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another".

⁸ International experience shows that quotas work best in PR election systems. A quota can be applied in a majoritarian system, but this is usually done by establishing a specific number of reserved seats before the election takes place and by establishing additional constituencies from the totality of the country's territory. This means that voters would be given two separate ballot papers.

other words it would be problematic to designate regular constituencies as 'women candidate only'.

2. ELECTION OBSERVATION

Definition of terms and article 52: the law limits electoral observation to members of the United Nations Mission and 'civil society organisations'. This would appear to preclude observation by international organisations including the Arab League, the African Union and the European Union.

While the law does not specifically preclude observation by international CSOs, article 52 stipulates that "it is forbidden for any civil society organisation wishing to observe the voting process to be funded by a foreign country or entity". This implies that only Libyan CSOs are eligible to observe the election process.

RECOMMENDATIONS

The law should explicitly allow for electoral observation by both, Libyan and international CSOs as well as inter-governmental organisations with a demonstrated track record. Consideration should be given to relaxing the restriction on foreign funding – at least until these organisations become well-established - as all organisations (whether governmental or non-governmental) often require foreign funds for their activities, and there may be a shortage of Libyan funds for electoral observation. The absence of election observers would lessen transparency, which in turn could lessen public confidence in the process.

3. CANDIDATE NOMINATION

The requirements for candidate nomination (article 16) include many 'non-standard' restrictions on the right to seek election, a number of which appear at odds with article 25 of the International Covenant on Civil and Political Rights regarding exercising suffrage rights e.g. paragraph 3 (which prohibits Libyans from seeking election if they have a pending felony charge)⁹ and paragraph 4 (which requires candidates to hold a professional qualification).¹⁰

The majority of restrictions contained in article 16 are aimed at prohibiting officials, collaborators and other persons associated with the Gadaffi regime from seeking election. Experience from other countries has shown that the process of holding former officials to account (lustration) can be a long-term undertaking. Most paragraphs of article 16 do not stipulate that the restriction of suffrage rights is based on a court ruling (or another form of due process), and hence the

procedures for applying these provisions are not clear. Moreover, some restrictions are vaguely worded. These factors mean that the provisions are potentially open to arbitrary application.

RECOMMENDATIONS

Restrictions on candidacy set out in paragraphs 7-20 should only be applied to persons who have been convicted for their activities during the previous regime by a court of law or another procedure of transitional justice which guarantees due legal process.

4. POLLING PROCEDURES

The law leaves it to the HEC to determine the voting procedures (article 28). This is unusual; almost all election laws contain at least minimal levels of information on the polling procedures.

Article 30 permits blind or other voters who require assistance to "read out their decision to a member of the voting committee who then votes on his behalf". This procedure could compromise the secrecy of the ballot as required under article 25 of the ICCPR.

Other than article 32 – which stipulates that the counting process starts immediately after the closing of voting – the law contains no details on the crucially important vote counting procedures. It is completely silent on the procedures and deadlines for publicly announcing electoral results other than article 42 which implies that election results will only be announced after the expiry of the complaints and appeals periods; thereby creating an 'information vacuum' during the immediate post-election period.

RECOMMENDATIONS

The law should set out in more detail voting and counting procedures and provide for a meaningful voter awareness campaign on the arrangements. Provisional polling results should be announced publicly immediately after the results have been tabulated by the district election committees. The results of all polling stations should be compiled and made available as soon as possible on the HEC's website. For voting by persons with a disability, it is better practice to allow a person of the voter's choice (i.e. someone who they know and trust) to assist them with voting, rather than require a member of the polling committee to fulfil this function.

5. JUDICIAL SUPERVISION

The draft law does not set out which category of persons is eligible to serve on polling committees. Article 14 refers to judicial supervision of polling, although no other references are found in the text. The recent Egyptian elections took place under judicial supervision but were held over several phases because of an insufficient number of judges to conduct the poll on one day. Phased elections are not ideal because results from one phase can affect voter intentions and

⁹ This would appear to run counter to the legal principle that a person is innocent until proven guilty by a court of law.

¹⁰ This appears to run counter to paragraph 15 of General Comment 25, which states that "Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education".

participation in subsequent phases. Not announcing the election results promptly is not a good option to address this problem because it lacks transparency. Experience elsewhere has shown that a lack of publicly available information on election results can heighten political tensions.

RECOMMENDATIONS

The law should specify who will administer polling and how they are selected. The final text should also clarify the degree to which the judiciary 'supervise' the election and ideally phased polling should be avoided to avoid the problems noted above.

1. Article 3: Naturalised Libyan citizens must wait ten years before exercising the right to vote. Potentially this is at odds with the UN Human Rights Committee's General Comment 25 on suffrage rights.¹¹

This provision should be reconsidered.

2. Article 4: Persons who are 'incarcerated' are not eligible to vote. However, the term 'incarcerated' could be applied to persons who are detained but have not been sentenced to any penalty or are not subject to a court order.

Such persons should not be deprived of their suffrage rights.

3. Article 4 also removes all suffrage rights from persons "proven by judicial order to have been involved in the corruption of political life under the Gaddafi regime." Denying the right to seek election may be acceptable if it is for a limited period, but restricting the right to vote indefinitely is questionable.

Consideration should be given to setting a time period for the restriction on the right to vote.

4. The draft election law is vague concerning the composition of voter registration committees (article 5), district sub-committees (article 6) and the timeframe for voter registration (within the overall electoral timeframe of activity). In most jurisdictions the law would establish a deadline after which the voter register is closed and cannot subsequently be amended e.g. 30-60 days prior to election day or before candidate registration commences.

Consideration should be given to establishing a clear timeframe for voter registration.

5. The law permits Libyan citizens residing abroad to vote outside Libya (article 9). Embassies and consulates will undertake the registration. Given the apparent majoritarian election system embassies/consulates may be required to manage 200 different types of ballot paper, which could present significant organisational challenges. While Out-of-Country voting enhances suffrage, it can raise significant

organisational challenges in an election that already faces numerous obstacles.¹²

6. Article 11 - which appears in the section dealing with voting by non-resident citizens - allows for the use of 'new voting technologies with an emphasis on security and confidentiality'. No further details are provided. The timeframe for the election (June) precludes setting aside much time to design and test the robustness of any new voting technology.¹³

The authorities should only consider utilising new voting technologies which guarantee the integrity of the process and ensure the secrecy of the ballot. Consideration should be given to postponing the utilisation of new technology should there be insufficient time to ensure the necessary guarantees.

7. The draft law does not appear to establish any requirement for candidates to demonstrate a minimum level of support (e.g. by depositing a given number of signatures from those who support the nomination) or provide for a financial deposit. Hence, there appears to be no means to deter less serious candidates from nominating themselves. This could lead to the registration of a very high number of candidates per constituency.

Consideration should be given to instituting a system of financial deposits or gathering of supporting signatures for candidates. These should not be set at levels, which constitute an unreasonable barrier to candidacy.

8. Appeals against candidate registration decisions may be filed by a specific deadline (3 days after the decision), but there is no indication of the length of the candidate nomination period and there are no deadlines for issuing the preliminary or final candidate lists (see articles 17 - 19).

The timeframe for candidate registration and finalising candidate lists should be set out in the law and should ensure candidates have sufficient time to nominate themselves and that the candidate registration phase is sufficiently well in advance of the election day to enable appeals to be heard before election day and for candidates to campaign.

9. The law provides no details on how a candidate would be determined as the official candidate of a political party - although this could subsequently be set out in the HEC's regulation on candidate nomination or in the Political Party Law.

¹¹ Paragraph 3 of General Comment 25 states "Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility with article 25".

¹² See DRI's Briefing Paper 23, December 2011, „Out-of-Country Voting: Principles and Practices. http://www.democracy-reporting.org/files/dri_bp_23_out-of-country_voting_principles_and_practices.pdf

¹³ See DRI's Briefing Paper 11, April 2011: "Electronic Voting Machines: The Promise and Perils of a new Technology", http://www.democracy-reporting.org/files/dri-briefing_paper_11_-_electronic_voting_machines.pdf

10. *The law should contain details of how a candidate is able to register as the official candidate of a political party.*
11. Article 20 provides that if there are no candidates registered in a district, the HEC may 'appoint candidates'.¹⁴ This is highly usual.
Consideration should be given to allowing for an extension of the candidate nomination period or by holding a by-election.
12. The deadline for candidate withdrawal is seven days before the election day (article 21). This is quite close to polling day and could cause operational difficulties with printing and distributing the ballot papers. Moreover, the length of the period between the close of candidate registration and polling day it is not clear from the draft law.
Consideration should be given to setting the candidate withdrawal deadline further way from the election day.
13. While the law permits *candidates* to use mass media to campaign (article 35), it does not contain a provision allowing political parties which are fielding above a given number of candidates, the right to access national media.
Given the absence of political pluralism over a long period, consideration should be given to allowing the candidates of emerging parties an opportunity to pool their airtime in order to present the party's political programme.
14. Article 35.6.f prohibits candidates from using their campaigns to "defame or attack other candidates". This provision could be used to stifle legitimate commentary on, or criticism of, a rival candidate's political programme, which is not in the interest of open political debate.
The law should be re-worded to enable candidates to comment on or criticise the political platforms of their rivals.
15. Article 39 allows legal appeals to be filed with the Electoral Complaints Commission. However, this appears to relate only to appeals regarding polling.
It would be beneficial if the law contained a specific provision setting out the procedures to appeal against any action or inaction of any electoral body in the period prior to elections and afterwards and sets out specific procedures to appeal a decision of the HEC.
16. Article 40 requires those filing election petitions to pay a sum of LYD 500. This could serve as an unreasonable deterrent to filing a petition.
This provision should be reconsidered so that there are no unreasonable barriers to securing effective remedy.
17. Article 41 requires that the court of first instance in which a polling station is located hears objections regarding the entire process with a possible appeal to the circuit

appeals court, the decision of which is final. *In cases which could affect the election outcome, consideration should be given to allowing a final appeal to a High Court.*

18. Positively, article 56 requires that the HEC is responsible for "the complete transparency of elections".
The law would however benefit from requiring the HEC to publish in full all its decisions and regulations, instructions etc in an official publication and on its website.

ABOUT DEMOCRACY REPORTING INTERNATIONAL

Democracy Reporting International (DRI) is a non-partisan, independent, not-for-profit organisation registered in Berlin, Germany. DRI promotes political participation of citizens, accountability of state bodies and the development of democratic institutions world-wide. DRI helps find local ways of promoting the universal right of citizens to participate in the political life of their country, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

¹⁴ This also applies to article 22