

**IEAT working paper # 1:  
ELECTORAL LAW AND ELECTORAL MODALITIES**

1. The approval of the Provincial Powers Law has paved the way for the discussions on the draft electoral law for the provincial, district and sub-district council elections. As per the current procedures, an initial draft is proposed by government – that is, the Prime Minister’s Office (PMO) prepares a draft, the Council of Ministers reviews and approves it and then it goes to the Council of Representatives (CoR) for discussions and eventual approval. It is known, however, that as the preparations for the discussion on the electoral law advance, different political entities are themselves preparing their own drafts.
2. The legal framework for the elections defines the rules of the electoral race and reflects the fundamental political agreements reached among the concerned players. Drafting of a law is a legal/technical exercise. What is important, then, are the political agreements that the law should reflect. Currently, there is no explicit discussion among the different political entities on the major issues that the electoral law must address. Given the lack of political consensus, it is widely believed that the discussions on the draft law could be lengthy as the draft documents will be dissected in great detail with little attention paid to the key electoral modalities that have yet to be resolved. This is of concern since the timetable for the electoral process is ticking. The IHEC has advanced as much as possible the preparations for the update of the voter registry, but without political agreement on the major issues to be addressed by the electoral law preparations can only be advanced so far – and without a law, it will be difficult to stick to the agreed electoral time frame.
3. This is a critical juncture: if there is no political consensus on the major electoral modalities, it will be difficult to have an electoral law. Without an electoral law approved in a timely manner, the IHEC will not be able to continue its electoral preparations. In this context, it would be helpful to identify the basic issues that require political agreements among the major parties, so that they can serve as a politically agreed basis for the draft law. These basic issues are known as the “basic electoral modalities”.
4. To discuss a complete draft law instead of concentrating on specific fundamental modalities for the elections, clouds the major issues and adds quite a bit of unnecessary detail to the negotiations, complicating the discussions and misplacing priorities. On the contrary, once consensus on the basic modalities is achieved, the actual draft law could be produced relatively quickly. This was the procedure followed, under UN assistance, for the 2004 electoral laws.
5. For these elections, there are three basic and inter-related electoral modalities to be agreed upon: a) the electoral system; b) eligibility of voters and contestants and; c) representation of women and minorities. Particular issues in these categories can include:
  - a) *Electoral system*: the electoral formula, the basis of representation and the ballot structure;
  - b) *Eligibility of voters and candidates*, including residency requirements and the issue of IDPs;

c) **Representation of women and minorities:** mechanisms to ensure women and minorities participation in various systems, reserved seats, etc.

6. **Electoral system.** “Electoral system” refers to the manner in which leaders and representatives are chosen. An electoral system has a number of parts, but the most important are the manner in which votes are translated into seats or results (the “electoral formula”), the division of the people into groups to be represented (the “basis of representation” or electoral districts), and the ballot structure (candidate vs. parties, closed, open, free lists, how many preferences for the voter, etc).
7. **Electoral formula.** The “electoral formula” takes the specific results in terms of the number of votes and converts it to a specific number of seats. There are two primary ways of doing this: by “majority” (the candidate or party that wins the most votes wins all the available seats), or “proportional” (parties win seats in proportion to the number of votes they win). There are also a number of variants of each method, including systems (“mixed systems”) which combine majority elections with proportional elections.
8. **Basis of representation.** The “basis of representation” establishes how people are represented - whether by where they live (a district, with all groups in the district treated equally) or what category they fall into (a specific group of people, no matter of where they live). An electoral district is a geographic area from which political representatives are elected. Districts could have a single representative or multiple representatives, depending on the system chosen and the size of the district.
9. **Ballot structure.** Ballot structure determines whether, in the system chosen, a) the voter votes for a candidate, for various candidates or for a party, and whether b) the voter makes a single choice or if he is entitled to make several choices. Ballot structure decisions would also determine whether a list system would use “closed” or “open” lists. In party-list elections, each party presents a list of candidates, generally with up to as many candidates as there are seats to fill. Voters vote for a party, and the seats are divided among the parties that receive more votes than the “electoral quota”. Generally, it is the parties that decide the order of candidates on their list, thus determining the probability that a particular candidate will be elected (a “closed list”). In some places, though, voters want more control over which individuals are elected. Some countries allow voters to change the order of all of the candidates within a party’s list. In other places, voters can vote for one or more candidates on a party’s list – therefore, there are a number of different options for an “open list” system.
10. **Eligibility.** The definition of eligibility criteria of the participants (voters and contestants) is a fundamental element in the negotiations leading to the establishment of an electoral framework. The criteria for the entitlement to vote include a number of elements. Besides age (agreed as 18 years, but when?), the most substantial eligibility criteria concern the issues of “residence” (because of the electoral constituency issues and the regional/governorate level elections). Immediately this introduces the issues of internally displaced people (IDPs) and how to ensure their right to vote. Residence is also a major element when defining the eligibility to run for office.

11. **Representation of women and minorities.** Fair representation of women and minority groups has been a constant concern in the design of Iraqi electoral systems since 2004. The Transitional Administrative Law (TAL) established that the electoral system chosen should be designed “to achieve the goal of having women constitute no less than one-quarter representation of the members of the National Assembly and of having fair representation of all communities in Iraq”, including the Turkomans, ChaldoAssyrian and others. These concerns have been maintained in the Iraqi Constitution and clauses have been included in the electoral laws to strive for adequate representation of women and minorities. While clearly mechanisms to guarantee representation of women and minorities depend largely in the electoral system chosen, this matter has been highlighted to stress the awareness of the sensitivity and importance of this issue.
  
12. Finally, it should also be pointed out that a legal and regulatory framework for the elections requires more than just an electoral law. In the first place, the overall framework must incorporate a number of regulatory measures at different levels, from the electoral law all the way down to electoral regulations, procedures, and operational guidelines. It has often been the case that electoral laws containing too much procedural detail are overly restrictive, denying the electoral authority the flexibility required to conduct the process effectively, particularly in transitional situations and under tight timeframes (as is certainly the case in Iraq today). There is no doubt that it is the CoR’s responsibility to establish the law, but many of the additional and necessary regulations and procedures are best left for the IHEC to determine. It would then be extremely beneficial if the electoral law concentrates on the basic electoral modalities and discussions do not focus on procedural and operational issues.

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