

# IN SEARCH OF LOST LEGITIMACY: THE CONSTITUTIONAL PROCESS IN LIBYA

*Legal Analysis and Review  
of the Possible Constitutional Basis  
for Future Elections in Libya*

**Policy Brief**

## Context

For over two years the political dialogue that took place as part of the implementation of the United Nations Action Plan, and other meetings in Paris, Abu Dhabi or Palermo, failed to provide a clear roadmap on the electoral process, or to specify what would be the constitutional basis of future elections. The constitutional process led by the Constitutional Drafting Assembly (CDA), which should have remained a legitimate and generally accepted track, was progressively marginalized, and hence became prone to political manipulation. What should have remained a strictly legal process turned into a political topic and a subject of heated disagreement.

Notwithstanding the current conflict, important legal and political challenges remain for the Constitution to be passed to a referendum. Opposition to the 2019 Referendum Law and the 2017 CDA Proposal itself remains strong on all sides of the conflict:

→ **Key areas of concern in the 2017 Constitutional Proposal include:** the lack of constraints on presidential power, the conditions defined for running for public office, inadequate protection of minorities' and women's rights, the role of religion, weak decentralization measures, and procedural concerns over the way the Proposal was adopted by the CDA in July 2017;

→ **Key areas of concern in the 2019 Referendum Law include:** the division of Libya into three electoral districts, the scenarios in case the Proposal is rejected, as well as the very way the law was elaborated and adopted by the House of Representatives (HoR) in the absence of consensus with the High State Council (HSC).

The fact that the Constitution cannot be amended for five years once it is ratified render these concerns even more pressing, and encouraged more spoilers to interfere. Eastern factions, Federalists, but also minorities and other political actors, have blocked progress on a constitutional referendum despite the adoption of the law by the House of Representatives in November 2018. In the absence of strong political will and international backing, the constitutional file has been prone to politicization, and ended up frozen.

However, most Libyan stakeholders continue to agree that a permanent Constitution is the only way to put an end to the years of political turmoil, transition, and legal confusion that has affected all of Libya's institutions since the 2011 revolution, and which ended up calling into question each of these bodies' legitimacy. While a permanent Constitution will be key to restoring political legitimacy in Libya, in order to do so the constitutional process in Libya should be treated in an objective and rational way, removed from ideological or political debates, and put back on track through an inclusive dialogue that includes the House of Representatives and the High State Council, key powerbrokers on the ground, as well as a unified international community. A new Constitution should serve to promote national unity and reconciliation, not accentuate divisions.

## A Constitutional Framework... But Which One? And How?

Due to the lack of progress on the constitutional referendum track, and faced by its growing politicization, various plans have been unveiled over the past months calling for elections to be organized before a durable Constitution is put in place, either through another amendment to the Constitutional Declaration, or through a National Charter adopted during the UN-led National Conference and endorsed by a UN Security Council Resolution.

These options have their values, but also their risks, both in terms of their content and how they are adopted:

→ The first challenge is to determine which institution will have the required legitimacy to endorse a new constitutional framework ahead of the general elections, in the absence of a referendum, and to amend to Constitutional Declaration accordingly. Since 2014, the HoR has been the institution responsible for amending the Constitutional Declaration. However, the 2014 Supreme Court ruling against the 7th Amendment has challenged its legitimacy in doing so, and since then, the Constitutional Chamber of the Supreme Court has been closed. In the absence of clear national mechanisms to endorse that new constitutional framework, strong international support and a UN Security Council Resolution could be the only way to give it real legitimacy.

→ The second challenge is to identify what this constitutional framework should include, and on which basis. The main options are analysed throughout this report: returning to the 1951 Constitution or its 1963 amended version; adopting the February Committee Proposal of 2014; or adopting just parts of the 2017 Constitutional Proposal. Whatever the basis may be, proceeding to elections without a prior agreement on the constitutional framework will be dangerous for Libya. Holding elections without restrictions on the power of the Parliament and the President, without clear mandates, or based on a document that does not reflect wide national consensus and a clear legal basis, could only trigger renewed conflicts.

Based on a detailed analysis of various constitutional options on the table, and on a series of semi-structured interviews with key stakeholders, this report is intended as a technical tool and knowledge basis for the international community, donors, and anyone interested in this complex but important matter for Libya's democratic transition. The report proposes a two-fold roadmap, and formulates a series of technical and legally based recommendations to the international community, meant to put an end to the transitional period and finally restore political legitimacy in Libya.

## Option 1 - The referendum track

This option appears as the most “natural” one, given the current formulation of the Constitutional Declaration and the existing Constitutional Proposal of the CDA. However, procedural flaws in the CDA process, substantial concerns about the Proposal, delays and disagreements around the HoR referendum law, have all contributed to marginalizing it and calling into question its legitimacy. The international community until now did not express a clear support for this track. In fact, the August 2019 Secretary General report on Libya states that the goals of the National Conference were to “adopt a roadmap aimed at concluding the transitional period through parliamentary and parliamentarian elections, which would include recommendations on how to address the constitutional proposal.” This phrasing hints that the referendum is no longer considered as the legal and legitimate way, and that other options to “address it” could be considered. In the current state of affairs, several steps would be needed to conduct the constitutional referendum in adequate conditions:

① **Modify the Referendum Law through consensual discussions between the HoR and the HSC, in line with the Libyan Political Agreement, possibly with support from the LPD and review the 10th Constitutional Amendment accordingly, especially to clarify the division in three electoral constituencies and the scenario should the Proposal be rejected.**

### WHY?

*The Referendum Law issued by HoR in November 2018 was immediately met with wide criticism, especially from the HSC, which claimed that it was not consulted on its elaboration, and that the process was therefore contrary to the LPA. In particular, the two bodies disagreed on the requirement to explain the reason in case of a no vote, on the role of the HoR in case the draft is rejected, as well as on the division of Libya into three electoral districts - Tripolitania, Cyrenaica and Fezzan. Many argued that this provision was against the Constitutional Declaration, which states the principle of equal citizenship. Eastern stakeholders, however, supported this electoral division and considered the holding of a referendum based on a single electoral district as anti-democratic due to demographic imbalance between the three regions.*

### HOW?

To overcome these obstacles, dialogue committees could be created in both institutions to review the Referendum Law in a more consensual manner, in line with the LPA provisions. Past efforts of the HSC and HoR to agree on restructuring the Presidency Council in 2018 show that such cooperation can be possible, when both parties have common interest. International support, however, will be key to the process.

**② Build political support for this amended Referendum Law through a National Conference, and encourage buy-in for the referendum process with main political stakeholders in the National Charter.**

**WHY?**

*High-level political agreement, such as the one that the National Conference could bring, is necessary prior to the referendum to prevent or mitigate legal challenges and any contestations on the results of the vote. Experience shows repeatedly that democratic majority in Libya is not enough to bring legitimacy to electoral results. A split outcome in the referendum could reignite political violence, if significant social forces and institutions reject it.*

**HOW?**

The National Conference should be primarily focused on building this strong social political support for the constitutional process, more than on fostering national reconciliation. The National Charter, adopted in the Conference, should serve to set the conditions for the Constitutional Referendum and, thereby, for elections themselves, providing it with the necessary political and social backing. Participants to the Conference should be chosen with this objective in mind, and be limited to include committees of the HoR, HSC, CDA, as well as key power brokers on the ground.

**③ Include the National Charter in the Constitutional Declaration to protect its provisions from future legal challenges, and support it with a United Nations Security Council Resolution.**

**WHY?**

*The Constitutional Declaration remains Libya's legal framework until a new Constitution is adopted. Integrating the National Charter in the Constitutional Declaration would provide it both legitimacy and legality, preventing possible future challenges in courts, especially if the National Charter includes references to the Referendum Law. Otherwise, any outcome from the National Conference could easily be legally contested.*

**HOW?**

Including the National Charter in the Constitutional Declaration can be done through a new Constitutional Amendment voted by the HoR. However, this could be legally problematic given the position of the Supreme Court on the HoR since 2014. Technically, it will be difficult to have the HoR reach the necessary quorum to pass any amendments, given the current divisions. As an alternative, as with the HoR election itself, future decisions made at the National Conference and enshrined in the National Charter could be considered legally valid through international recognition, with support from a UN Security Council Resolution.

④ **Organize a referendum on the CDA 2017 Constitutional Proposal in a timely manner, once sufficient outreach has been conducted and when security conditions allow. The scenarios in that case are multiple:**

→ The Constitution is accepted by the Libyan people, ratified by the CDA and endorsed by the HoR through a fair and transparent process.

OR

↳ The Constitutional Proposal is accepted in a context of insecurity and with a low participation. In this case the vote would not be considered legitimate, it can lead to renewed violence, and even partition if the vote demonstrates large regional disparities.

OR

↳ The Constitutional Proposal is rejected and goes back to the CDA for review and amending controversial articles. However, this may be difficult given that the Referendum Law does not request voters to explain which articles they reject. The CDA may find it hard to reach another consensus in that case, and it will be difficult to reach a quorum. Furthermore, the current referendum law does not clearly empower the CDA to review the draft, and could be interpreted as mandating the HoR instead. A new Proposal from the CDA could thus be rejected or legally contested. Lastly, there is no guidance for what would happen should the draft be rejected twice.

OR

↳ The Constitutional Proposal is rejected and goes back to the HoR to form a committee to elaborate a new draft and propose it for referendum. This option seems to be implied in the current Referendum Law. However, it can also be challenged because it implies that the CDA is dissolved, which could be considered to be against the LPA. A national consultation would also be necessary to understand which articles were rejected.

## Option 2: The “other document” track

If no agreement on the Referendum Law can be found, including through the National Conference, or if the Proposal is rejected, the UN and the international community could move to the second option, and support Libyan stakeholders to adopt another basis for holding elections in the absence of a permanent Constitutional framework, and to secure its legal basis through a Constitutional Amendment and/or a UN resolution, while also giving it wider social legitimacy through the National Conference.

This new temporary basis for elections can be adopted through three different mechanisms:

■ **Through a Constitutional Amendment voted by the HoR**, but with the risk that this vote, if it can ever take place in the current context of divisions, will be constitutionally challenged since the Supreme Court 2014 ruling on the 7th Amendment;

■ **Through the National Charter**: Adopted during the National Conference, supported by a UN Security Council Resolution and international recognition, the National Charter would also have to be integrated in the Constitutional Declaration through an amendment. This, however, can be difficult given the HoR’s present divisions. If that were to be impossible, a UN Resolution could be needed to enshrine the National Charter as the roadmap for elections, without amending the Constitutional Declaration, and to confer it international legitimacy.

■ **Through activating article 64 of the Libyan Political Agreement (LPA)**, and recalling the Libyan Political Dialogue (LPD) after having observed violations to the LPA. While this option can be seen as a duplication of the National Conference, it has the advantage of reinforcing the LPA as the sole framework of Libya’s transition. The composition of the LPD, however, would have to be revised to reflect current realities. Decisions of the new LPD could serve as a basis for future elections.

Once the mechanism is agreed upon, the options, analysed in depth in the report, include the following.

**1 The 1951 Constitution, amended in 1963.** This option would please the Federalists and Monarchists, as well as some Eastern components, but it would raise also important challenges from an international law and human rights perspective, given the legal shortcomings of the document.

#### ANALYSIS

The 1951 Constitution has a special place in Libyan history, as the first legislation that formally codified the rights of all Libyan citizens. Drafted with strong international support, the 1951 Constitution established a federal system with three sub-national governments, each with specific executive and legislative branches, and even with the authority to collect taxes. The Constitution of Independence was elaborated in a way that allows for amendment, the most significant one being made in 1963, when the State's political system changed from a federation to a centralized state. Due to this ability to change and evolve, some analysts have argued that this Constitution could be the basis of Libya's new, post-revolutionary democratic system, and that the references to a monarchic system of government could be easily removed through similar amendments in the future. Others even argued that this Constitution is, in fact, still legally valid, since Gaddafi's coup in 1969 only disrupted the application of the Constitution, replacing it with the Green Book until the 2011 revolution - but did not cancel it.

While the validity of this argument can be challenged, the practical question remains of how provisions related to the monarchy in the 1951 Constitution could be replaced by a presidential democratic system. Furthermore, and most importantly, the Constitution of Independence does not account for fundamental changes in the Libyan political and social landscape for the past 60 years. It created an imbalance of power and failed to provide for the fair distribution of wealth among all three regions. After years of civil conflict,

a strictly federalist system could further entrench the fragmentation of Libya and fail to bring national unity. The 1951 Constitution also leaves the door open for the abrogation of rights protection in a situation of emergency, provides for weak judiciary guarantees, and does not specify relations with international law and conventions. To that extent, it appears unsuited for Libya's current needs, rights, democratic aspirations and international obligations.

**2 The February Committee Proposal.** Adopted by the General National Congress through the 7th Constitutional Amendment, in 2014, the February Committee Proposal sets clear mandates, oversight mechanisms and division of powers. Although it was ruled out by the Supreme Court 2014 Decision, the February Committee Proposal could still serve as a basis and inspiration for future elections, should the referendum fail to take place in the near future. Adoption through the National Conference or the Libyan Political Dialogue (LPD) could provide it with the required legitimacy.

#### ANALYSIS

The Constitutional Declaration remains the ruling Constitution of Libya, and benefits from international support and recognition. The Libyan Political Agreement (LPA), signed in Skhirat in 2015, reiterates its "full commitment to the Constitutional Declaration, and to the political process that is based on the principles of democracy and peaceful transfer of power." Article 30, the largest and most controversial of the thirty-seven articles of the Constitutional Declaration, provides a roadmap for the transitional stage until a permanent Constitution is written and ratified, and until the new authorities are elected based on the permanent Constitution. In 2014, the February Committee, a group of legal and constitutional experts created through the 6th Constitutional Amendment, was tasked to elaborate a new transitional roadmap. The February Committee Proposal, comprising 57 articles, calls for



a newly elected "House of Representatives" to replace the GNC, as well as for an elected president to serve as head of State. However, in November 2014 the Supreme Court ruled Paragraph 11 of the 7th Amendment, adopting the February Committee Proposal, null and void, out of procedural violations. This decision led to interpretations that the HoR was therefore defunct as well, and that the GNC thus remained the only legitimate authority. Others interpreted the effects of the Supreme Court decision differently, arguing that as long as the electoral law, which was the basis of the HoR election, was uncontested, the HoR would continue to be legitimate because it is based on this law, not on the 7th Amendment. The UN and the international community, notwithstanding the 2014 Supreme Court Decision, seem to have adopted that point of view, repeatedly giving the HoR international recognition and legitimacy until now.

While the February Committee proposal cannot be defined as a Constitution as such, since it does not include any protection on fundamental rights and freedoms or judicial guarantees, it provides clear guidelines for defining the mandate and relations of the main State institutions and powers. The proposal establishes a semi-presidential system, with a strong Parliament and a separate government, which could be a thoughtful solution to Libya's current turmoil. Adopting it, however, would require overturning the 2014 Supreme Court decision.

**3 The full integration of the LPA in the Constitutional Declaration and reactivating of the Libyan Political Dialogue (LPD).** While the LPA formally expired in December 2017, it remains, along with the Constitutional Declaration, the current framework for Libya's political transition and was given strong international support. The HoR finally partly integrated the LPA in the Constitutional Declaration through the 11th Amendment, in November 2018, but only indirectly, in order to

be able to restructure the Presidential Council (PC) from 9 to 3 members. Article 64 of the LPA could provide an interesting exit to the current institutional crisis, by reviving the Libyan Political Dialogue. This solution is particularly interesting should the National Conference fail to take place in the near future.

#### ANALYSIS

The LPA expired in December 2017, and opposition to its Article 8, according to which the head of the PC is the head of the Libyan Army, remains strong - especially in the HoR and in the East more generally. This explains why the HoR has not clearly and fully endorsed the LPA, nor fully integrated it in the Constitutional Declaration, until now. Some have argued that, besides the temporal expiration, the LPA has been rendered de facto null and void due to multiple breaches and violations, including the fact that four members of the PC have either boycotted or resigned from it. However, the UN and other international parties still consider the LPA as the only legitimate political framework, as was recently reiterated in the September 2019 Security Council resolution prolonging the mandate of UNSMIL. Resorting to the mechanisms of the LPA could serve to form a Presidential Council with 3 members to oversee the transition until elections can be organized. This option was attempted by UNSMIL in 2017, as part of the UN Action Plan, and then again by the HoR and HSC alone in 2018, but the process was blocked due to the difficulties in finding consensual personalities to form this new executive power. The Legitimacy of this new PC, which would not emanate from a popular vote, would also be likely questioned.

While the legitimacy of the LPD and its members is contested, and reconvening them after so long could be problematic in the eyes of the Libyan people, the UN or the National Conference could suggest a new composition to the group, adding new legitimate stakeholders who reflect realities on the ground. Decisions

of the LPD would thus gain more weight and legitimacy. A UN Security Council Resolution could help to support this option.

**4 A national referendum on some parts of the 2017 Constitutional Proposal only, for instance on those related to the organization of executive and legislative powers, to allow for the organization of election, while the rest of the text will be decided upon by a newly elected and more legitimate Parliament. This was recommended by some participants to the National Conference preparatory process, and is currently advocated by various CDA members themselves.**

#### ANALYSIS

This option has the advantage of taking the process forward, while leaving controversial points to be decided upon at a later stage when security and political conditions allow, and once more support is built for the process. However, it can be legally problematic, as nothing in the Constitutional Declaration states that the work of the CDA can be divided in parts, or how to do so. The Constitutional Declaration, and the LPA, would therefore have to be revised to allow this option to proceed. There will also be complex legal and political debates about which parts to put to vote, and which ones to discuss later. The 2017 Proposal would have to be legally “withdrawn” from the HoR as well.

Opening a new debate on the CDA Proposal, to amend it or choose specific parts of it for referendum, is currently being suggested by some CDA members, and could indeed lead to a more consensual version that would get more political support for passing it to a referendum. Minorities and Federalists, among others, remain strongly opposed to this Proposal and continue to argue that the CDA vote in July 2017 was not legal. They will continue to block the referendum, fearing that, due to majority rules, their views will not be reflected. A revision of the Proposal could lead to modifying some controversial parts, including with regards to the conditions for running for presidency, decentralization, or the rights of minorities. However, it is not clear that this revision is legally possible, once the Proposal has already been submitted to the HoR. Nothing indeed in the Constitutional Declaration plans for the possibility of withdrawing the draft after its adoption by the CDA and the HoR.

There is no perfect solution. But the analysis provided in this report shows that a clear constitutional and legal basis that enjoys the full support and agreement of Libyans is a necessary prerequisite for any future elections. It is crucial that neither the constitutional basis of the election nor its outcomes are subject to any strong doubts about their legitimacy, and can be accepted by the clear majority of the population.

Should none of the options above be adopted, conducting presidential or parliamentary election presents important risks, and similar challenges.

### » Parliamentary elections first

According to the Constitutional Declaration's 9th Amendment and the LPA, the HoR remains the only legitimate legislative body until a new Constitution is adopted. As a consequence, electing a new Parliament in the absence of a Constitution would require amending both the Constitutional Declaration and the LPA. An electoral law would also need to be adopted through consultations between the HoR and the HSC. These steps would have to be carefully thought through. Indeed, as witnessed in 2014, parliamentary elections can be a source of conflict, especially in the current political context. Electing a new Parliament without a constitutional basis would only prolong the transitional period for an indefinite time, potentially exposing Libya to new security challenges.

### » Presidential elections first

The risks are even bigger for presidential elections, which, more than any others, require a clear definition of the terms, mandate and responsibilities of the elected candidate. So far, these can be found in the February Committee proposal, which would have to be reactivated to allow for presidential elections to take place before the Constitution is adopted. But this reactivation of the February Committee Proposal can raise legal and practical challenges since it was annulled by the Supreme Court decision on the 7th Amendment, and after the 8th Amendment conferred all presidential powers to the HoR. Voting districts would also have to be clarified to ensure a geographical balance between each region and avoid electing a President by one region only, which could trigger more violent conflict.

## Conclusions

Elections in a democracy are meant to facilitate non-violent transfer of power. They structure political contests among opposing forces through pacific means. However, they need to be supported by a coherent institutional framework to ensure a fair, transparent and open voting process. In the absence of a legal framework to establish the rules of the electoral game, including the term limits and the mandate, elections can prove to be a source of conflict.

Holding elections that might produce a body without checks on its powers, which fails to adhere to rules and procedures of states and institutions, is highly dangerous in Libya. No “blank cheque” should be handed to any future elected body. A constitutional basis that enjoys the full support and agreement of Libyans is a prerequisite for any future elections.

The analysis conducted throughout this report has shown that such consensus is very hard to find, and that legality and legitimacy in Libya have become elusive at best. To exit the current crisis and find lasting peace, Libya urgently needs to find a new source of political legitimacy.

*The views in this report are those of its writers, and do not reflect those of the ABA or the USAID.*

