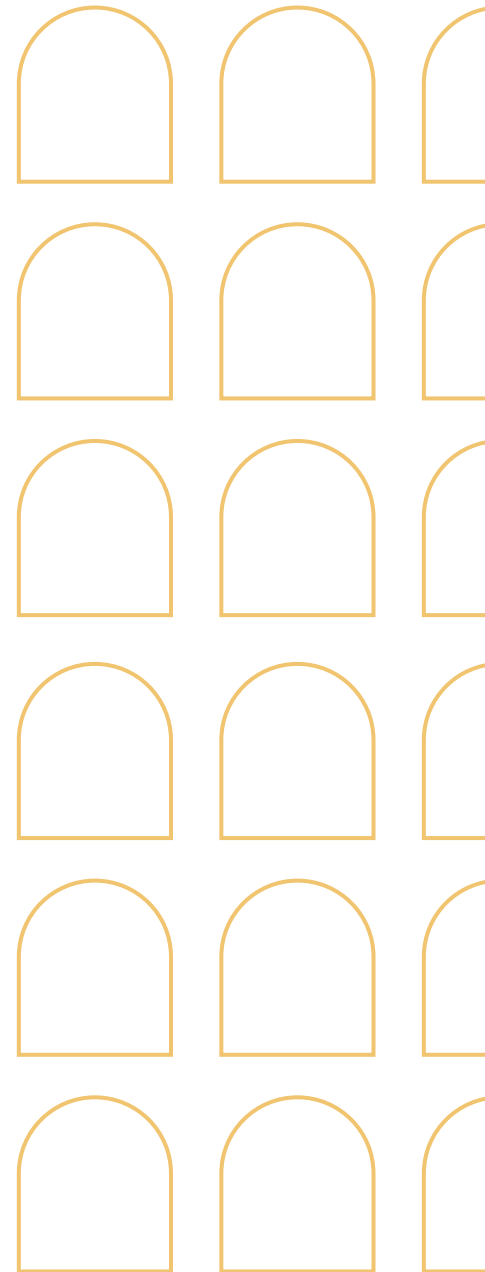


# POLICY BRIEF

## Libya's Elections without a Constitution: A Risky Gamble

### Abstract

Since the resumption of a political dialogue in November 2020, Libyans have failed to agree on a constitutional and legal framework for the general elections planned for 24 December 2021. With the polls now a few days off, this political deadlock raises doubts about whether the elections can restore the political legitimacy and stability that Libya so badly needs. The lack of an agreed constitutional formula and the lack of regulation for future political authorities risks jeopardizing not only the legitimacy of the electoral process. There is also the management of the post-election period at stake. While the constitutional debate has seen political struggle and instrumentalization, this paper argues that there are also objective risks to holding elections in the absence of an agreed constitutional standard. The author provides some suggestions on how to handle this issue. The crucial importance of reaching a definitive agreement on the core issues that have fuelled conflict for a decade and on the fundamental values that unite Libyans is also set out.



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## Introduction

The roadmap adopted by the Libyan Political Dialogue Forum (LPDF) upon the resumption of the political negotiations in November 2020, under the aegis of the United Nations Support Mission in Libya (UNSMIL), had sought to drag Libya out its institutional crisis and to restore political legitimacy through the holding of general elections on 24 December 2021. To that end, the roadmap provided for the setting up of a new unified executive and highlighted the importance of agreeing upon “a constitutional basis” for Libya’s next general elections.<sup>1</sup> This brought the constitutional question back to the table after several years of deadlock on this issue.

Nevertheless, while the selection of the Government of National Unity (GNU) in February 2021 went relatively smoothly, the constitutional negotiations failed to achieve their intended objectives. In spite of this, local and international pressure has been mounting to hold the elections as planned. New elected authorities would, it has been argued, have more legitimacy for addressing constitutional issues. The absence of a consensual constitutional basis and persistent disagreement over the legal framework that will govern the forthcoming elections, however, raise serious questions about whether the elections can restore political legitimacy, institutional unity and overall stability to Libya.

Downplaying the importance of unresolved constitutional questions could indeed be risky. The lack of an agreed constitutional definition and regulation of future political authorities threatens not only the legitimacy of the forthcoming polls, but also jeopardises the management of the post-election period. However, discussing the Libyan constitutional process and providing an objective analysis of this issue has become increasingly difficult due to its politicisation and instrumentalisation by the contending parties.

It is, then, more important than ever to reflect on some of the following questions: How to ensure

some degree of consensus on the legal and constitutional framework that will govern the polls and which could prevent any disruption of the electoral process? How to guarantee the legitimacy of the electoral process and preclude the risks of a renewed political crisis after the elections? What place will the constitutional process have in the post-election period?

## The LPDF’s unsuccessful experience

Set up as the main instrument of the UN-led political dialogue, the seventy-five-member LPDF was tasked, among other essential missions, with solving the country’s constitutional deadlock. Libya had found itself in an impasse since the constitution-making process, initiated in the aftermath of 2011 uprising, had stalled.

Elected in 2014, the Constitution Drafting Assembly (CDA) was in charge of elaborating a permanent constitution for Libya. After three challenging years, marked by heated negotiations, controversies and boycotts, against a backdrop of political division and a civil war, the CDA adopted its final draft in July 2017. However, the text still entails controversial provisions and continues to be contested by various groups today. The failure to submit the draft to a popular referendum for approval by the concerned authorities, and the resumption of armed conflict with Marshal Khalifa Haftar’s assault on Tripoli in April 2019 eventually left the constitution-making process in limbo.<sup>2</sup>

With the ceasefire in 2020 and with the resumption of political dialogue, the LPDF was thus envisioned as an alternative. It would, it was hoped, provide the constitutional basis on which the elections should be held.

1 UNSMIL, “Roadmap for the Preparatory Phase of a Comprehensive Solution” (Final), November 2020: [https://unsmil.unmissions.org/sites/default/files/lpdf\\_-\\_roadmap\\_final\\_eng.pdf](https://unsmil.unmissions.org/sites/default/files/lpdf_-_roadmap_final_eng.pdf)

2 A more detailed account of the Libyan constitution-making process and the remaining conflicting points in the draft constitution can be found in Cherif, N., “Libya’s constitution: between conflict and compromise”, MEDirections, Research Project Report, 2021/02, March 2021: <https://cadmus.eui.eu/bitstream/handle/1814/70538/QM-09-21-057-EN-N.pdf?sequence=3>

## An arduous and contested process

Agreeing on this constitutional basis proved particularly challenging. The roadmap envisioned that the “institutions concerned with the constitutional process [namely the House of Representative (HoR) and High State Council (HSC), later defined as the ‘constitutional committee’]<sup>3</sup> shall agree to accomplish the constitutional arrangements within a period not exceeding 60 days”. After that, if these institutions could not reach an agreement, the LPDF would take over.

This approach prompted criticisms, particularly from among CDA members. Many, indeed, believed that the constitutional committee was doomed to fail, because of divisions between HoR and HSC members, who had “hardly reached any agreement between them over the last few years” and could hardly do so in the 60 days set aside.<sup>4</sup> Consequently, this would leave the LPDF with the very great responsibility of deciding Libya’s constitutional fate. The LPDF, though, was perceived, from the outset, as lacking legitimacy, as it had been appointed by UNSMIL on an unclear basis.<sup>5</sup>

There was, indeed, room for disagreement over the composition of the LPDF. UNSMIL had sought to set up an inclusive body that could represent Libya’s diversity and involve groups that had been excluded from previous dialogues. Nevertheless, the lack of clear criteria on which the choice of the members was made, and the appointment of unknown figures having few

local ties, while more prominent ones were being sidelined, led to suspicion. The exclusion of CDA members in particular excited attention, as the drafters were the most knowledgeable on constitutional matters.

One of the additional weaknesses of the LPDF was that it reproduced the existing political divisions, as a number of HSC and HoR members gained a seat in the Forum.<sup>6</sup> Many observers were thus quick to predict the LPDF’s failure.<sup>7</sup> The CDA experience had shown the difficulties involved in reaching an agreement that could satisfy most of Libya’s diverse political, ideological and cultural components. The LPDF, which seemed to mirror the diverging interests of Libya, thus appeared doomed. Moreover, allegations of corruption and bribery, in particular during the LPDF’s election of a new executive, further tarnished the already fragile image of the Forum.<sup>8</sup> Over the following months of negotiations, it increasingly came to be perceived as representing partisan interests rather than the reality on the ground.

The arduous debates on the constitutional basis also led to criticism against the UN-designed process. This process was seen as being unwieldy and was perceived by some Libyans as an attempt by UNSMIL to sideline the draft constitution by searching for alternative constitutional bases for the elections. Incomprehension and resentment were especially strong among CDA members, who denounced what they saw as UNSMIL’s efforts to “manipulate the constitutional path and the people’s will”.<sup>9</sup> In their opinion, the UN mission

3 The Libya Political Agreement (LPA) that was reached in Skhirat, Morocco in December 2015 following UN-led negotiations to solve Libya’s civil war and institutional divisions, had provided for the establishment of a High State Council (HSC) composed in large part of former members of the General National Congress (GNC; Libya’s first post-revolution parliament), alongside the elected House of Representatives (HoR).

4 Author phone interview with a CDA member, January 2021.

5 “Nadia Omran: al-bahtha al-umamiya shakalat lajnat al-75 doon ‘asas wadhah [Nadia Omran: The UN mission established the 75-committee without a clear basis], *Libya 24 TV*, 28 December 2020: <https://www.218tv.net/> <https://libya24.tv/news/369806>. See also “Jadal al-’asma wa al-tamthil fil hiwar mo’adhala tolahaq al-bahtha [“Controversy over the names and representation in the dialogue: a dilemma that pursues the (UN) mission”], *218TV*, 6 November 2011: <https://www.218tv.net/>

6 Author phone interview with a former UN Advisor, September 2021. This choice of members was far from what Libyans had suggested to UNSMIL in preparatory meetings, namely a Forum composed of independent and consensual personalities able to access the whole territory and able to reach out to various political, social and cultural groups.

7 “Nadia Omran tatawafa’ fashal al-hiwar al-siyasi [Nadia Omran expects a failure of the political dialogue], *Yes Libya*, 16 December 2020.

8 Pack, J., “Allegations of bribery, conspiracy and lack of legitimacy “pause” the UN Libya dialogue, *Middle East Institute Blog*, 16 November 2020: <https://www.mei.edu/blog/allegations-bribery-conspiracy-and-lack-legitimacy-pause-un-libya-dialogue>

9 Author phone interview with several CDA members, December 2020-January 2021. See also CDA member D. Al-Mansuri’s interview in Ben Jeddou, N., “Dostorna jahaz lil astafta’... wa nastaghrab bi mobadarat Kais Saied [Our constitution is ready for the referendum... And we are surprised by Kais Saied’s initiative]”, *Al-Shourouq*, 4 August 2020.

should rather have supported the holding of a popular referendum on the constitution draft. This, they deemed, would have been the most legitimate way out of Libya's constitutional deadlock and it was the legitimate right of Libyan citizens to express their opinions.

## Failure of the process

Detractors of UNSMIL's approach seemed to be proven right with the eventual failure of negotiations. At first, the HoR/HSC constitutional committee appeared to have made progress on the constitutional basis, initially retaining the option of a referendum on the CDA's draft (Hurghada meeting, 19-22 January 2021). But it backtracked in a successive meeting, arguing that practical difficulties may prevent the organisation of the referendum before the December elections.<sup>10</sup> The priority, it was made clear, would be the elections were it to prove impossible to hold the referendum in time (Hurghada meeting, 9-11 February 2021).

The HoR however failed to endorse this proposal with a parliamentary vote. This was due to the lack of a quorum caused by its internal divisions, and the apparent lack of support among members, including the Speaker, for the CDA's draft and the referendum. The 60-day period expired then without a legally approved solution.

Taking over the constitutional issue, the LPDF and in particular its Legal Committee envisioned a number of alternative options to the CDA's draft.<sup>11</sup> The holding of a constitutional referendum indeed seemed increasingly unworkable with the election date getting closer; it was also not the preferred option of a number of political actors who opposed the draft. The objective that quickly came to prevail was thus a temporary constitutional framework. This would allow for

the holding of the elections on time, while the adoption of a permanent constitution would be deferred to a later date.

The last proposal that the Legal Committee submitted to the LPDF plenary in May 2021 envisioned that the December elections would be based on an amended version of the Interim Constitutional Declaration. The new legislative authorities would, instead, be in charge of completing the referendum on the draft constitution. The terms of the proposal did not, however, provide sufficient guarantees that a permanent constitution would emerge in quick order.

Other provisions directly linked to the elections, such as their sequencing, the criteria for candidates running for parliament and for the presidency, and the direct/indirect election of the president, also raised heated debates among the Forum's members. Aiming to resolve these remaining points of controversy and find common grounds among the various members' views, the last LPDF meeting (Geneva, 28 June-2 July 2021) took place amidst heightened tensions and ended in failure.<sup>12</sup>

## UNSMIL's lost credibility

This last failure further undermined the credibility of the UN mission. While Libyan negotiators certainly have an important share of responsibility for the breakdown of the dialogue, UNSMIL was also roundly criticised for its "leadership's inability to keep the talks on track".<sup>13</sup> The difficulties of Special Envoy Ján Kubiš in imposing his authority after the relative success of his predecessor, his overall management of the negotiations, and the mission's internal dysfunction combined with external pressure and international disagreement on the role of

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10 Zaptia, S., "Holding referendum on draft constitution could delay election date beyond 24 December 2021", *Libya Herald*, 10 February 2021: <https://www.libyaherald.com/2021/02/10/holding-referendum-on-draft-constitution-could-delay-election-date-beyond-24-december-2021/>

11 For details see "LPDF's Legal Committee Presents 7 Proposals on the Constitutional Rule and Elections", *Al Marsad*, 14 January 2021: <https://almarsad.co/en/2021/01/14/lpdfs-legal-committee-presents-7-proposals-on-the-constitutional-rule-and-elections/>

12 "UN-backed Libya talks fail to reach consensus on elections", *The Arab Weekly*, 3 July 2021: <https://thearabweekly.com/un-backed-libya-talks-fail-reach-consensus-elections>

13 LPDF member Ilham Saudi quoted in "UN-backed Libya talks fail...", op. cit.

the mission,<sup>14</sup> all seriously damaged UNSMIL's standing among Libyans.

There is a widespread perception among Libyans today that UNSMIL is largely responsible for the “political confusion” in which the country finds itself.<sup>15</sup> The mission's choice of a complex and “senseless” approach to solve the Libyan conflict – i.e. the creation of a new structure (the LPDF) and roadmap – is now regarded as having been a waste of time and energy. The right decision, it is argued, would have been to attempt to solve disagreements on the CDA's draft and to ensure that a referendum was held. This could have led to greater institutional stability and would have ensured a clear basis for elections.<sup>16</sup>

Kubiš and the broader international community's continuous push for elections to be held on time, regardless of the absence of a broad political consensus, has also become an issue. Doubts have been raised about the real intentions of the UN in Libya and about its actual willingness to ensure a lasting solution. More recently, its support for the electoral laws unilaterally issued by the HoR after the failure of the dialogue has been received with criticism. The UN's enthusiasm was seen, if not as a bias of the mission in favour of one side, at least as a headlong rush to reach elections ‘at any cost’, regardless of the possible consequences for the country.

The latest blow has been Kubiš' resignation, which was perceived as desertion from a rudderless ship. This now raises the question of the UN's role in the coming period, especially if troubles occur during the electoral process and its aftermath or if elections are postponed. The return of former Acting Special Representative Stephanie Williams, the architect of the LPDF, as the UN Secretary General's Special Adviser, was supposed to reinforce the UN's efforts in Libya, but it has been received with mixed reactions by Libyan stakeholders.

## 2. The risk of holding elections now: between political instrumentalisation and legitimate concerns

The LPDF's failure paved the way for the HoR to set its own legal framework for the elections. It moved unilaterally with the adoption of electoral laws for both the president (9 September) and parliament (4 October). This, however, triggered fierce reactions on the Libyan scene. Not only was the content of both documents controversial, but the procedures used to pass the laws were also largely decried as an infringement of both the Libyan Political Agreement and the HoR's rules of procedures. The HSC, in particular, felt it had been side-lined and reacted by issuing its own constitutional and legal framework for the elections (19 September). Therefore, Libya now has two competing legal frameworks, each side arguing for the legitimacy of its own proposals. What was envisioned as an attempt to move the electoral process forward has now turned into a new controversy that might hinder the holding of the elections.

### Designing tailor-made elections or preventing elections being held?

Overall, the real problem is more political than technical or legal. Contentious issues in both electoral frameworks can be brought down to a limited number of points. These include: the sequencing of elections; the direct/indirect election of the president; his/her prerogatives; the conditions set on running for the presidency; and the prohibition on parties running for parliament. Importantly though, most of these points are similar to what led to the failure of the LPDF. These were also blocking points of negotiations within the CDA, meaning that fundamental political issues have still not found a definitive solution. Rather these issues have been continuously circumvented.

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14 Disagreement between member states of the UN Security Council was visible in particular during the Council's vote to renew UNSMIL's mandate that expired on 15 September 2021. See for instance E. M. Lederer, “UN divided over Libya mandate ahead of elections”, Associated Press, 15 September 2021: <https://apnews.com/article/europe-middle-east-africa-russia-elections-837355c7f3d831a57bb7eac3c27386d2>

15 Political analyst Ismail Mhidi in the TV program “Al-'intikhabat bayna ta'anat Aguila Saleh wa tasrihat Al-Mnefi [The elections between Aguila Saleh's intransigence and Al-Mnefi's statements]”, Al Tanasuh TV, 27 September 2021: <https://tanasuh.tv/>

16 Author phone interview with a CDA member (January 2021), with an LPDF member (September 2021) and with a boycotting member of the HoR (October 2021).

With their legal manoeuvres, both the HoR and the HSC want to show that they are committed to the elections. But in the context of mistrust that largely prevails in Libya, the reasons advanced by both sides in supporting their positions, which could be considered as legitimate in normal circumstances, are looked at with suspicion. In particular, each side accuses the other of the political manipulation of the legislation to hamper the elections so as to extend its time in power. Or, it is claimed, they have designed provisions aimed at preventing the candidacy of specific members from the opposite camp.

The HoR increasingly presents itself as the sole institution having provided a solution to the LPDF's blockage and the sole institution legally entitled to do so.<sup>17</sup> It also argues that its legal framework has been designed to avoid excluding any candidate but leaving the final choice to Libyan voters. It dismisses its opponents' accusations that the laws have been tailor-made for specific candidates, including HoR Speaker Aguila Saleh.

On the constitutional front, in view of the failure of both the CDA and the LPDF processes – to which it largely contributed – the HoR considers that the elections could easily be held in the framework of the Interim Constitutional Declaration. There is, the argument goes, no need to search for an alternative constitutional basis.

The HSC, instead, wants to seem both respectful of and committed to consensus and to previous agreements, while accusing its opponents of acting individualistically. As such, its steadfast demand that a constitutional basis be in place before any elections is supported by the argument that Libya “should not place the cart before the horse”.<sup>18</sup> But it also claims that a constitutional basis for the elections is an essential condition of the roadmap. The HSC's repeated calls to postpone the elections, until a constitutional

solution can be found,<sup>19</sup> is, however, read by its opponents as a delaying tactic and one that allows present HSC members to stay in power.

Other Libyan political forces remain divided along these lines, according, again, to their own interests. Libyan citizens, more generally, have expressed doubts that the relevant actors want elections to happen at all. In their view, the legal dispute is only a cover for both sides' “agreement to hamper the elections”.<sup>20</sup> In particular, there is a widespread belief that the HoR has produced contestable electoral laws on purpose so that the HSC rejects them. In this way the HoR can blame any delay of the elections on its political adversaries. Likewise, it was understood that the election date would be reached without a consensual solution. At that point the framework issued by the HoR would be the only option, thus creating a *fait accompli* and forcing the elections to take place on the HoR's preferred legal basis.

Beyond these concerns and criticisms, which are certainly supported by partisan interests and calculations, more objective risks to holding elections without a constitutional basis can also be identified.

### **Objective risks of the absence of a constitutional basis**

The persistent political disputes around the legal framework and the perception by the proponents of the elections that any discourse on the constitutional issue is a sham of their adversaries to delay or prevent the holding of the polls tends to overlook the real risks of holding general elections (and in particular the country's first ever presidential elections) without a clear and widely approved constitutional framework; whether a permanent constitution or a temporary constitutional solution endorsed by all or most stakeholders:

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17 It is important to note, however, that severe divisions shape the HoR, whose current decisions mainly represent the will of its leadership and some of its supporting members.

18 Author phone interview with a boycotting member of the HoR (October 2021).

19 Emad, M., “Al-Mishri Calls to Postpone Libya's December Elections”, *Libya Review*, 22 November 2021: <https://libyareview.com/18889/al-mishri-calls-to-postpone-libyas-december-elections/>

20 President of Al-Tajdeed Party Suliman Albayoudi in the TV program “Barnamaj al-bilad: Hal satosharak al-'ahzab fi 'intikhabat 24 dicember [Program Al-Bilad: Will parties take part in the 24 December elections]”, 218TV, 3 October 2021: <https://www.youtube.com/watch?v=uk2dBXwGt5w>

- **Risks for the legitimacy of the electoral process and its results:** Maintaining the current disputed laws without a broader consensus could result not only in several actors boycotting the polls and/or preventing their holding in some localities. It could also mean that the results are contested, through judicial appeals, but also possibly with violence. Election-related tensions have already been observed, with several demonstrations being held against some presidential candidates, including Khalifa Haftar and Seif Al-Islam Qadhafi. Several polling centres have also been closed in some Western municipalities,<sup>21</sup> and armed confrontations have taken place between supporters of different sides.<sup>22</sup> Similar disruptive behaviour might occur during voting, as many Libyans deem the elections illegitimate. The consequence is that the elected authorities will be deprived, from the outset, of their long-sought-for legitimacy.
- **Risks for the management of powers after the elections:** The lack of a clear definition and division of prerogatives between the branches of powers raises questions about the future functioning of state institutions. There is also the danger of conflict between them or renewed institutional division.

The list of presidential prerogatives provided by the HoR's electoral law (art. 15) not only insufficiently details the relation between the various branches of power (except for some references made to the HoR). It also fails to make up for the absence of a constitutional definition of the presidential function. Moreover, if only presidential elections are held in December with unclear or extended prerogatives granted to the president as in the current HoR law, he/she could decide to indefinitely postpone parliamentary elections. The president could then become a new authoritarian ruler in the absence of any checks-and-balances.

Neighbouring Egypt has already shown the risks of holding general elections before a permanent constitution is in place. In Egypt (2011-2012), this resulted in a power struggle and a clash between President Morsi and the Supreme Council of the Armed Forces. They fought over general legitimacy and the definition of constitutional prerogatives and the control of the constitution drafting process that was still underway at the time. This eventually led to the collapse of the whole transition process and a return to authoritarian rule. Libyans would be well advised to learn from the Egyptian experience before heading down this dangerous path.

- **Risks for any future progress on the constitutional issue after the elections:** If the newly elected authorities decide to engage in a constitutional process (whether revising the CDA's draft or elaborating a new constitution), they will certainly be reluctant to constrain themselves and limit their own powers. Therefore, they may design a new constitution-making process and a constitution that would meet their own needs and interests rather than those of the people.

Scholars have warned that elections preceding constitution-making could give the upper hand to one political group, who would, then, have little incentive to negotiate or compromise.<sup>23</sup> For constitution-making to be dependent on an election thus runs the risks that the balance of power at the time of the elections be reflected in the constitutional process and the final constitution.

This was precisely the reason behind the choice to elect non-political figures to the CDA in 2014. Independents, it was thought, would be more committed to Libya's interests and less keen to engage in partisan politics during the constitution-drafting process. Re-subjecting Libya's constitutional future to narrow political considerations would thus

21 "Several polling stations closed in Western Libya", *Libyan Express*, 16 November 2021: <https://www.libyanexpress.com/several-polling-stations-closed-in-western-libya/>

22 "Tension in south Libya as Gaddafi and Haftar prepare to face off in elections", *The Libya Observer*, 23 November 2021: <https://www.libyaobserver.ly/news/tension-south-libya-gaddafi-and-haftar-prepare-face-elections>

23 Ghai, Y. & Galli, G., "Constitution-Building Processes and Democratization: Lessons Learned", in Large, J. & Sisk, T.D., *Democracy, Conflict and Human Security: Further Readings, Vol.2*, International IDEA Handbook, 2006, p. 237.

be a step backward. All the more so that the new authorities may decide to continue ruling the country within the current shallow constitutional order and sweep away any serious debate around a permanent constitution, thus maintaining the country in a state of legal instability.

Despite these risks, a number of international and Libyan actors are now resigned to accept the *fait accompli*. They consider the continuous disagreement and legal infringements around the election laws as a small price to pay for what they consider to be essential elections. Nevertheless, the choice to move forward with a non-consensual electoral framework and with the absence of an agreed constitutional basis is a gamble. Electing authorities without a clear definition of their prerogatives and mandates equates to running into the unknown rather than to restoring political legitimacy and institutional stability, the very thing that the elections were supposed to achieve.

Moreover, this would push the country into a new transitional phase, a situation that Libyans had been hoping to avoid after having experienced more than a decade of provisional rule. This raises the question of when and, indeed, whether Libya's constitutional future would eventually be seriously addressed, in order to turn the page on transition and move the onto a more stable footing.

### 3. What place for the constitution in the post-election period?

A few weeks from the planned polls, the situation has become more uncertain than ever. Deteriorating security conditions and rising political tensions, further fuelled by controversies around prominent presidential candidates, are now raising doubts that the elections can be held on time.

Whether the elections will take place on time or later, going to the polls without a minimum consensus on the prerogatives of the victors and the management of the post-election period could prove, as noted above, highly risky. But the absence of common ground and an agreed

definition of what unites Libyans and to where they want to drive their country will also be problematic for Libya's stability in the longer run. The lack of a clear vision for Libya's future is visible today in the electoral debate, with none of the presidential candidates having displayed a clear program for a unified Libya. Instead, under the current rules and conditions, the elections are becoming a struggle of personalities and partisanship for political power and resources. This could very easily drive Libya into renewed division.

Therefore, whatever the scenario (elections held on time, partly or fully postponed, successful or contested), a serious reflection and discussion on the constitutional future of Libya is needed. This is necessary for (re-)building a stable and sustainable state in Libya, as the absence of agreement on the rules of the political game has decisively contributed to the political instability and institutional division.

Depending on the timing of the elections, various steps could be taken to ensure not only that elections are held within a relatively acceptable legal framework, but also that Libya's constitutional future will be seriously taken into consideration in the aftermath of the elections.

With the growing prospect of postponement, **defining a clear strategy and timeframe** to negotiate and achieve a framework acceptable to all contenders will be essential. Indefinitely delaying the polls without a set plan but waiting for a hypothetical consensus to be reached, could only be detrimental for Libya.

- **If elections are held on 24 December:** The remaining few days will most likely prove insufficient to bring the debate on the constitutional basis back to the table and to reach an agreement. However, a minimum consensus could be achieved on a **preliminary agreement, pact ('mithaq') or roadmap for the post-elections period** between the contending parties, in order to ensure a smooth handover of power. This agreement should, in particular, explicitly stipulate that the constitutional process would be a **priority for the next authorities**, whoever is elected. It should also provide for



a clear **format** (return to the CDA, experts committee, parliament; use of the CDA's draft as the basis or any other constitutional document, etc.) and a clear **timeframe** for the constitutional process. In this regard, the proposal prepared by the LPDF's Legal Committee could be usefully used as a starting point but it would need to be improved.

Preparing such a document needs not be time-consuming: a number of parties and civil society organisations have already worked on this issue and have prepared relevant documents, some of which have already been circulated to Libyan and international stakeholders.<sup>24</sup> What is required (and currently missing) is some political willingness from the contending actors to sit around the same table, leave aside their differences and reach a solution that could reduce the level of mistrust and tension ahead of the elections. In particular, a preliminary agreement on the essential steps and immediate priorities of the next authorities would reassure those who are currently opposing the elections. A constitutional basis is, after all, one of their main demands,<sup>25</sup> and this could convince them to take part in the elections or at least avoid any spoiling behaviour.

- **If elections are postponed:** The likelihood of this scenario is growing by the day and the HNEC itself has not excluded the possibility of postponement in view of the mounting tensions on the ground. While postponing the elections would certainly serve the interests of the status quo forces, this additional time could also prove an opportunity. Libyan stakeholders could use it to agree (or reach a minimum of consensus) on a constitutional basis for the elections and the management of the post-election period.

In this regard the CDA's draft could be used as a temporary basis (as has been suggested on various occasions) or, alternatively, the LPDF's last proposal with some adjustments could be wheeled out. The LPDF has repeatedly demanded its reactivation and its members believe that it constitutes the best (and possibly the sole) alternative in view of the failure of other institutions, notably the HoR and HSC, to find a solution to the current deadlock.<sup>26</sup>

Giving the Forum a second chance despite its internal divisions, by putting strengthened international pressure on all actors to reach an agreement, might have positive results. This would require coordinated efforts by the foreign parties involved in Libya, which have so far neglected the legal and constitutional dimension of the electoral process, and going beyond mere expressions of goodwill.

A successful outcome of the UN-led political dialogue could improve UNSMIL's image among Libyans, which has been tarnished in particular by its perceived support for the HoR, despite that institution's failings. It would also demonstrate that other foreign actors genuinely support a return to political legitimacy and institutional stability in Libya, and are not targeting the elections in and of themselves.

An agreement on the peaceful management of the post-elections period would also limit the risks that foreign countries (and notably European neighbours) would have to deal with a new crisis after the elections, something which could only undermine their own interests. It would also be preferable to pushing for contested elections that could be marred by fraud and violence, and having to accept their results afterwards.

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24 See for instance the Social Contract initiative launched by the Libyan Peacemakers and in particular the latest recommendations of its political dialogue held in Tunis, 25-27 October 2021: <https://www.facebook.com/Soc.Cont.ly/>; also the proposal for a National Pact issued by Al-Tajdeed Party: <https://www.facebook.com/>. As well Alharathy, S., "Political and Social Forces demand consensus before elections", *The Libya Observer*, 30 November 2021: <https://www.libyaobserver.ly/>

25 See Assad, A., "High Council of State denounces holding elections on unsound basis", *The Libya Observer*, 18 November 2021: <https://www.libyaobserver.ly/inbrief/high-council-state-denounces-holding-elections-unsound-basis>; Golden, R., "Protest held outside HNEC office against elections without a constitution", *The Libya Observer*, 30 November 2021: <https://www.libyaobserver.ly/inbrief/protest-held-outside-hnec-office-against-elections-without-constitution>.

26 Author phone interview with an LPDF member, October 2021. See also Assad, A., "46 LPDF members urge UN envoy to Libya to hold emergency session", *The Libya Observer*, 26 September 2021: <https://www.libyaobserver.ly/news/46-lpdf-members-urge-un-envoy-libya-hold-emergency-session>

Should no consensus be reached during this additional period of time, at least an agreement on the above-mentioned ‘*mithaq*’ would offer an alternative and a minimum reassurance to those concerned about holding elections without a constitutional basis. This is even more essential that a postponement of the elections – not a cancellation – may imply that the electoral laws will be maintained in their current shape, as amending them at this advanced stage of the electoral process would be difficult. In this scenario, it would be essential to provide alternative guarantees to appease those who oppose the electoral laws and incentives for them to join the elections.

Both options, agreeing on a constitutional basis or on the above-mentioned ‘*mithaq*’, could ensure not only that the elections would take place on more solid legal grounds (thus avoiding future contestation). They would also help reduce mistrust between the various contenders and thus limit or prevent spoiling behaviour and insecurity around the polls.

A number of questions, however, remain. This includes, in particular, the type of incentives that could encourage the various stakeholders, and especially the status quo stakeholders, to (re-) engage into the constitutional process (either before or after the elections). There is also the question of who could act as a guarantor of the parties’ commitment to address the constitutional issue in the near future. Most Libyan and international actors are perceived either as being biased or as lacking the credibility and resources to force the stakeholders to respect their commitments. Without strong guarantees to reassure Libyans who have lost trust in agreements signed on paper and infringed almost immediately, achieving a constitutional consensus in Libya might very well remain an unattainable chimera.

## Conclusion

After a decade of transition, the successive failures to establish a permanent constitution in Libya have complicated the country’s path to institutional stability, while continuous disregard for legal documents and political agreements have led to a large extent to the current political blockage. As noted by a Libyan analyst, “there is nothing about Libya’s current political system that is fully legal or constitutional”.<sup>27</sup> Instead, weapons, money and international sponsorship have defined the rules of the game in Libya over the last years and have taken the place of constitutional legality and political legitimacy.

So far, all approaches to solve the Libyan conflict have consisted in political tinkering to rebuild governments, without addressing the core issues of the conflict. The current controversy over the legal framework for the forthcoming elections, far from being a punctual issue, is a direct consequence of Libyans’ inability to reach an agreement and a commonly shared definition of the foundations of the Libyan state. This includes its identity, its political regime, its system of governance and the management of its resources. Failing to boldly address these issues will continue to hamper any efforts to restore peace and stability in the country.

Libya crucially needs a ‘political reset’ today, of which many Libyans hope the forthcoming elections will help. This cannot happen, though, without a solid and widely approved constitutional framework that could restore legitimacy to state institutions and define the fundamental values that unite Libyans.

Held in the current conditions, elections are a gamble that could offer, at best, the start of a new transitional stage. At worst, they will mean further legal uncertainty, institutional division and a possible return to armed conflict.

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27 Zaptia, S., “Hiding behind a pretence of constitutionality, HSC continues to indirectly resist holding of elections”, *Libya Herald*, 6 November 2021: <https://www.libyaherald.com/2021/11/06/hiding-behind-a-pretence-of-constitutionality-hsc-continues-to-indirectly-resist-holding-of-elections/>.

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