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# LIBYA'S TRANSITION THE CONSTITUTIONAL DECLARATION: A BASIS FOR DEMOCRACY?

## EXECUTIVE SUMMARY

In August 2011, the Interim Transitional National Council (ITNC) of Libya published a 'Constitutional Declaration'<sup>1</sup> establishing key principles for governance until the adoption of a permanent Constitution, the election of representative bodies and the timeframe for the transition. The text was adopted under the conditions of the ongoing conflict. The ITNC had to secure agreement from the disparate groups fighting the Gaddafi regime, and as such its adoption has been an achievement in itself. The Declaration is also important as a reference point for the country's transition.

At the same time, there are serious doubts whether the transitional structures succeed in a context where numerous armed groups question the ITNC's legitimacy. The Declaration's vagueness on some issues and its numerous gaps, in particular regarding the composition and functioning of the ITNC have contributed to a lack of transparency, which has weakened acceptance of the ITNC. The ITNC needs to remedy these shortcomings and greatly increase the transparency of its work. In addition to the ITNC, the Constitutional Declaration created an 'executive office', a quasi-government, while the ITNC's function is more akin to a parliament. This quasi-parliamentary set-up may allow the inclusion of more political players into the ITNC, making it a more representative body.

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<sup>1</sup> Available in Arabic at:  
<http://www.ntc-media.net/Decisions/TempConstitution.pdf>  
and in English (unofficial translation, contains inaccuracies) at:  
[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=246953](http://www.wipo.int/wipolex/en/text.jsp?file_id=246953)

The Constitutional Declaration appears to envisage a significant law-making role for the ITNC that goes beyond the immediate necessities of the transition. This could raise concerns if the ITNC is seen to pre-empt fundamental, substantive choices regarding Libya's State and society, which should be left to the democratically elected bodies to decide at a later date.

As far as the substantive provisions are concerned, the Constitutional Declaration makes positive references to democracy and human rights but it provides no guarantee of equal rights for women. The protection for freedom of religion and conscience, freedom of expression, and freedom of association, among others, should be strengthened.

The text establishes Shari'a as the main source of legislation, while making the people 'the source of powers'. This combination, which is common in muslim-majority countries, leaves many open questions as to what it means in practice.

The declaration provides a detailed framework for the transition, potentially stretching over two years. It foresees the election by universal suffrage of a 200-member National Public Conference (NPC) within eight months. It anticipates that the NPC will take over the conduct of the transition from the ITNC. The NPC election will be vital to end the interim period and to create democratic legitimacy, yet eight months appears to be a highly ambitious timeframe for the election administration and political forces to prepare for the elections.

The Constitutional Declaration foresees the designation by the NPC of a 'Constituent Power' to draft a new constitution in 60 days. This is an excessively short timeframe, which will not allow for proper public consultations to take place. Public consultation will be important to create understanding and broad acceptance of a new constitution. This is particularly important in Libya given that the Constitutional Declaration requires an approval by 2/3 of the voters in a referendum for the new constitution to be enacted.

The absence of provisions on the composition and decision-making of the Constituent Power raises questions on the inclusiveness of the drafting process. The text announces the creation of a National Commission for Elections, but the electoral process seems to remain at least partly in the hands of the NPC and of the Government, and the text is silent on the commission's composition and guarantees of independence.

## I. BACKGROUND

In August 2011, the Interim Transitional National Council (ITNC) of Libya circulated the 'Draft Constitutional Charter for the Transitional Stage – The Constitutional Declaration'. The

Declaration, dated 3 August 2011 and comprising 37 articles,<sup>2</sup> was produced when ITNC forces were still engaged in fighting the Gaddafi regime. The ITNC had to secure agreement from the disparate groups fighting the Gaddafi regime, and as such its adoption has been an achievement in itself. Yet there are serious doubts whether the transitional structures succeed in a context where numerous armed groups question the ITNC's legitimacy.

The document is divided into two main parts. The first part contains provisions regarding the nature of the State and includes a list of human rights. The second half has a more practical purpose, outlining the functioning of state bodies during the transition period and setting out a timeframe for the transition. The text includes provisions of a very different nature: some are programmatic - envisioning the successive steps of the transition period, some are immediately applicable, while others constitute general commitments. Subsequently, no new or additional constitutional document has been adopted.

This briefing paper assesses the Declaration as a basis for transition to democracy.

## II. GENERAL PROVISIONS

Article 1 of the Constitutional Declaration seeks to define the nature of the State. It first proclaims that "Libya is an independent Democratic State". It does not contain references to pan-Arabism as found in the constitutions of several Arab countries and in Libya's 1969 Constitution.<sup>3</sup>

Article 1 includes a reference to Islam as the religion of the State, and to the Shari'a as "the principal source of legislation". Such provisions, in different forms, are common in Muslim-majority countries. Their precise legal and political implications differ from country to country. Among the key questions are which schools of Shari'a are applied and which body is in charge of interpreting or applying Shari'a principles. The Constitutional Declaration does not provide detailed answers to these questions. Indeed in many countries the issue is often left vague to gloss over significant differences in opinions on Shari'a questions.

The Constitutional Declaration refers to the people as "the source of powers", but is comparatively weak in the way it articulates the principle of popular sovereignty. Other constitutions are more forthright and reassuring in proclaiming the principle that power belongs to the people, who exercise it directly or through its representatives. Generally the Constitutional Declaration would benefit from a

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<sup>2</sup> The Constitutional Declaration adopted in 1969 after the overthrow of the Libyan monarchy also had 37 articles.

<sup>3</sup> Libya Constitution 1969, article 1, available at: <http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004643.pdf>

more firmly established protection of fundamental rights and the rule of law.

In this context, the Constitution of Iraq<sup>4</sup> offers an example, which provides references to Islam, democracy and human rights alike. It refers to Islam as a foundation of legislation (article 2). It also provides that “no law may be enacted that contradicts the established provisions of Islam. No law may be enacted that contradicts the principles of democracy. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.” The Constitution of Iraq also provides (article 5) that “The law is the sovereign.”

### III. A LIMITED FRAMEWORK FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

The human rights language of the Constitutional Declaration is positive but it should be strengthened.

Article 6 provides that “Libyans shall be equal before the law.” This provision is complemented by a principle of non-discrimination on the basis of “religion, confession, language, wealth, gender, kinship, political opinion, and social status, tribal or or familial belonging”.

The Constitutional Declaration does not include some terms frequently used in the international context in the list of grounds on which a person may not be discriminated against, such as colour or national origin as listed in article 2 of the International Covenant on Civil and Political Rights (ICCPR)<sup>5</sup>. While the absence of these principles may raise concerns, the national context as well as limitations of translation ought to be considered.

Article 7 places an obligation on the State to respect human rights and basic freedoms, and contains a commitment to join international and regional human rights instruments. It is important to note that Libya has already acceded to the major international human rights instruments,<sup>6</sup> thus the challenge lies in implementation of obligations rather than accession to new instruments.

4 For an in-depth analysis, see: Ayelet Banai, *Sharia and Egypt's Constitution: an Iraqi blueprint*, openDemocracy.net, 29 June 2011, available at: <http://www.opendemocracy.net/ayelet-banai/sharia-and-egypt%E2%80%99s-constitution-iraqi-blueprint>

5 The principles mentioned in the ICCPR are “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (ICCPR, art. 2). Full text available at: <http://www2.ohchr.org/english/law/ccpr.htm>

6 Libya has ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (both in 1970), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (in 1968), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (in 1989), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (in 1989), the Convention on the Rights of the Child (CRC) (in 1993), and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) (in 2004). For details see: Human Rights Index for the Arab Countries, (UNDP-POGAR), available at: <http://www.arabhumanrights.org/en/index.aspx>

The Constitutional Declaration puts a strong emphasis on the inviolability of homes, private life and correspondence, dedicating articles 11, 12 and 13 to their protection.

Article 14 provides that “Freedom of opinion and expression for individuals and groups, freedom of scientific research, freedom of communication, liberty of the press, printing, publication and mass media, freedom of movement, freedom of assembly, freedom of demonstration and freedom of peaceful strike shall be guaranteed by the State in accordance with the law.” Beyond the need for restrictions to be based in law, the article should clarify criteria for legitimate restriction, such as ‘in conformity with the law and necessary in a democratic society’ (article 21 ICCPR).

The right to freedom of thought, conscience and religion as protected under article 18 of ICCPR is missing from the Constitutional Declaration<sup>7</sup>, and this again raises concerns in view of the principles contained in article 1. Moreover, while some elements of freedom of expression are reflected in article 14, it falls short of providing adequate protection in line with article 19 of the ICCPR,<sup>8</sup> which includes in particular the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers...”

Article 15 provides that “the State shall guarantee the freedom of forming political parties, societies and other civil society organisations and a law shall be promulgated to regulate same.” The wording appears to be more limited than the guarantees required under article 22 ICCPR<sup>9</sup> and would also benefit from clarifying what would constitute legitimate restrictions.

Laws on political parties and associations are vital pieces of legislation in a transition, given that parties need to be allowed to form quickly in view of the condensed electoral calendar. Therefore the laws should not introduce overly complex, burdensome or costly requirements and should

<sup>7</sup> Though Article 1 of the Declaration states that the state shall guarantee for non-muslims the freedom of religious practice, following the statement that Islam is the religion of the state.

<sup>8</sup> ICCPR, article 19:

1. Everyone shall have the right to hold opinions without interference.  
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;  
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

<sup>9</sup> ICCPR, article 22:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

introduce a registration system based on the 'no objection' approach with short deadlines given to the registration body/bodies to approve applications.

## IV. FUNCTIONING OF THE ITNC AND NEXT STEPS OF THE TRANSITION

Part three of the text deals with the institutional aspects of the transitional stage. It first provides some framework for the powers of the ITNC, and secondly a schedule for the successive phases of the transition.

### LEGISLATING DURING THE INTERIM PERIOD

Article 17 provides:

“The Interim Transitional National Council is the supreme power in the State of Libya and shall undertake the works of the supreme sovereignty including legislation and laying down the general policy of the State. The Transitional National Council shall be deemed as the sole legitimate representative of the Libyan people and it shall derive its legitimacy from the Revolution of February 17th. The Transitional National Council shall be entrusted to guarantee the national unity, the safety of the national territory, to embody and circulate values and morals, to ensure the safety of citizens and expatriates, to ratify the international agreements and to establish the bases of the civil constitutional democratic state.”

These provisions deem the ITNC the sole holder of state powers. Post revolutionary situations often result in transitional powers whose legitimacy derives from the revolution. In such a context the powers of the state are often temporarily organised in a manner that does not reflect the fundamental democratic principle of separation of power. Yet an interim power should restrict its law-making to the necessities of governance during the transition period, and avoid pre-empting fundamental choices regarding the shape and functioning of the state. These choices are for legitimate and democratically elected bodies to make once the transition period is over.

In the Libyan context, the repealing on the basis of Shari'a of the existing legislation banning polygamy, and a declaration of ITNC leader Mustafa Abdel Jalil on 23 October that “any law that contradicts the principles of Islam is legally nullified”, indicates that the ITNC may intend to enforce Shari'a during the transition period with retroactive effect on the existing

legislation.<sup>10</sup> Moreover, article 35 of the text provides that “All the provisions prescribed in the existing legislations shall continue to be effective in so far as they are not inconsistent with the provisions hereof until they are amended or repealed.” It is uncertain how the ITNC intends to proceed on this issue.

### PROVISIONAL FUNCTIONING OF THE STATE

Article 18 deals with the structure and membership of the ITNC. The number of ITNC members is not known. Article 18 provides that the ITNC should be comprised of “representatives for the local councils” and that the local councils are to be composed according to the “population density and the geographic criteria of the city or area” which they represent, but is silent on the method of nomination, leaving the door open for selective appointments from upper levels. In addition, the ITNC can decide to elect ten additional members itself.

The ITNC is to have “its own statutes which shall regulate the method of work therein and the manner to exercise the duties and functions thereof” (article 20). The provision does not specify how such a text is to be elaborated and approved. Should it have already been adopted since the Constitutional Declaration was issued in August 2011, it would be essential that such a text be publicly available as a matter of transparency underpinning the rule of law.

Given the extraordinary powers held by the ITNC during the transitional period, it is crucial to address the existing opacity surrounding ITNC membership and decision-making as a matter of priority; even more so, since the legislative activities of the ITNC are to include setting the framework for the future elections, and adopting a law on political parties and NGOs (article 15) among others. Indeed the lack of ITNC's transparency is being credited as a major obstacle to its acceptance by a wide range of armed groups and local authorities.<sup>11</sup>

Only the election of the ITNC President and vice-Presidents is defined in the Constitutional Declaration. It is required to be conducted by relative majority of the present members (article 18) which could, depending on the circumstances, allow the President to be elected by a small fraction of the ITNC membership. An election by absolute majority (50% +1) of the full membership could ensure a more inclusive election process.

<sup>10</sup> In contrast, in Egypt the Supreme Constitutional Court established a doctrine of “non-retroactivity” in a 1985 ruling, whereby it would not hear challenges regarding legislation adopted prior to the introduction of Shari'a in the Constitution. See: Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 Am. U. Int'l L. Rev. 379-435 (2006)

<sup>11</sup> International Crisis Group, *Holding Libya Together – Security Challenges After Qadhafi*, 14 December 2011.

Article 21 lists a number of incompatibilities with ITNC membership, including a prohibition on combined membership of ITNC and local councils. It is understood that representatives of local councils designated to become members of the ITNC would have to forfeit their local mandate.

The ITNC is to appoint an Executive Office or Interim Government, which in turn is responsible to the ITNC, which can dismiss it by a two thirds majority (article 24); a mechanism which evokes parliamentarianism. Article 26 involves the Executive Office or Interim Government in the preparation of draft laws to be approved by the ITNC. While articles 24 to 28 use the phrase 'Executive Office or the Interim Government', article 30 only refers to an 'Interim Government'; it is understood that these are in essence one and the same body, with the 'Executive Office' becoming 'Interim Government' and being reconstituted after the liberation is proclaimed. The quasi-parliamentary set-up may allow the ITNC to include more political players, increasing its legitimacy through inclusiveness.

Overall, the functioning of state organs during the transition is strikingly under-regulated. In comparison, the Egyptian Constitutional Declaration provides many more details on these questions, as does the text which governed the transition period in Tunisia until the election of a National Constituent Assembly in October 2011.<sup>12</sup>

## TRANSITION TIMELINE

Article 30 of the Constitutional Declaration details the framework of the transition and provides a schedule for it. It announces the election of a National Public Conference (NPC) of 200 members within eight months. Once the first meeting of the NPC is held, the ITNC is to be dissolved and the transition should be overseen by the newly elected NPC.

The timeline starts from the date of the 'announcement of liberation'. This announcement was made by the ITNC leadership on 23 October 2011, following their victory over Gaddafi loyalists. On this basis, the following timeline can be anticipated with reasonable precision until the election of the NPC.

Event	Official deadline	Approximate Date
Form an interim Government	Within 30 days	End November 2011
Promulgate a law on electing the National Public	Within 90 days of the announcement of the liberation	End January 2012

Conference (NPC)		
Appoint the National High Commission for elections	Within 90 days of the announcement of the liberation	End January 2012
Publication of the Election Schedule	Within 90 days of the announcement of the liberation	End January 2012
Election of the NPC	Within a period of 240 days of the announcement of the liberation	End June 2012

Further steps after the first meeting of the NPC can be estimated with less precision.

Event	Legal deadline	Date (Estimate)*
First meeting of the NPC	No deadline	<i>Early September 2012</i>
Dissolution of the ITNC	Upon NPC's first meeting	<i>Early September 2012</i>
NPC appoints a Constituent Power to draft a constitution	Within 30 days of NPC's first meeting	<i>Early October 2012</i>
NPC appoints PM who appoints other ministers	Within 30 days of NPC's first meeting	<i>Early October 2012</i>
Draft constitution submitted to the NPC	Within 60 days of Constituent Power's first meeting	<i>Early November 2012</i>
NPC to approve the draft constitution	No deadline	<i>December 2012</i>
Constitutional referendum	Within 30 days of NPC approval	<i>January 2013</i>
NPC to adopt election law	Within 30 days of Constitution approval	<i>February 2013</i>
Legislative elections held	Within 180 days of the adoption of the election law	<i>August 2013</i>
NPC approves and announces the election results	Within 30 days of the results	<i>September 2013</i>
Legislative authority holds first session	Within 30 days of the results	<i>October 2013</i>

*\* With elections held at the end of June 2012, and the month of Ramadan 2012 starting approximately on 20 July and ending around 18 August, there is a possibility that the first meeting of the NPC could take place end August, early September 2012.*

<sup>12</sup> Décret-loi n°2011-14 portant organisation provisoire des pouvoirs publics, 23 March 2011, in Journal Officiel de la République Tunisienne N° 20 – 2011, dated 25 March 2011, available at: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=245405](http://www.wipo.int/wipolex/en/text.jsp?file_id=245405) (unofficial french version)

## TRANSITION FRAMEWORK

### *Election of a National Public Conference*

The aim of holding the NPC elections within eight months shows a positive intention not to protract the interim period, and to vest a legitimately elected body with responsibility for completing the transition. Yet this deadline may seem extremely ambitious in view of the steps to accomplish prior to the deadline. Holding elections will require at least designating and developing an election management body and creating a voter register. The time needed to conduct these two lengthy operations may vary depending on the resources available, the shape and accuracy of population registers and ID documents registers, and the degree of law and order achieved. It seems obvious in any case that the ITNC will need massive international support for this undertaking.

The conduct of elections within these tight deadlines raises additional challenges including the need for the formation of political parties, the development of independent media and the preparation of election observation.

The NPC is to elect its President and Vice-Presidents “by direct, secret balloting by relative majority”. The text should clarify whether this is the relative majority of the members present or of all the NPC members. Moreover, it can also be argued that election by absolute majority of the total membership would provide greater inclusiveness and legitimacy to the election. Finally, the NPC is also to appoint an Interim Government, and to act as transitional legislative power; in particular, it is to adopt new election legislation once a constitution is adopted by referendum.

### *Constitutional process*

The NPC is to designate a ‘Constituent Power for Formulating the Constitution’. The text is silent regarding the number of members of the Constituent Power, method of appointment, membership requirements, and decision-making process of the Constituent Power. It is possible that its members would emanate from amongst the members of the NPC, although the text does not say this explicitly. Given the silence of the text on these matters, it will be up to the newly elected NPC to decide all these rules, a process which could be complex, contentious and protracted. It may be useful to consider adapting the current framework to clarify these points beforehand. In particular it should take into account the need for the Constituent Power to reflect the diversity of society and political opinion in its composition.

Within 60 days of the Constituent Power’s first meeting, it is to submit a draft constitution to the NPC. A 60-day timeframe to prepare a draft constitution seems unrealistic, unless the drafting is expedited in a manner, which does not allow for proper consultation and inclusiveness. In comparison, the Egyptian Constitutional Declaration (article 60) gives six months to prepare a draft, and the Tunisian Constituent Assembly has no legal deadline for it.

The Constitutional Declaration provides that the draft constitution shall be approved by the NPC and submitted to a referendum. The fact that the NPC is given no deadline for approval could allow some time for consultation, discussion and revision of the draft at that stage. The Declaration does not specify how the NPC is to approve the draft constitution. A method of adoption by a qualified majority (2/3 for example) would seem important to enhance the inclusiveness and legitimacy of this process, and avoid the tyranny of the majority.<sup>13</sup>

The constitutional referendum is to be organised within 30 days from the date of the approval of the draft by the NPC. Again this 30-day period seems a very short deadline for holding the referendum. Preparations for the referendum would need to start earlier in the process than the earliest possible approval date by the NPC, ideally as soon as the NPC is elected.

The constitution must be approved by two thirds of the Libyan voters. This requirement risks the failure of a referendum. In addition, it is assumed that the majority requirement is 2/3 of the voters who voted and not 2/3 of the registered voters. Curiously, article 30 requires the constitution to be approved by the Constituent Power and the NPC after it is approved by popular referendum.

### *Developments after the adoption of a constitution*

Article 30 includes provisions for the period following the adoption of the constitution. It provides for the NPC to adopt within 30 days a law on ‘public elections’ that reflects the constitution, and to hold these elections within 180 days after that law is promulgated “under the supervision of the National Judicial authority, the United Nations and the international and regional organizations”. It is assumed that by ‘public elections’ it is meant legislative elections. A subsection of article 30 states that the newly elected ‘legislative power’ should hold its inaugural meeting within 30 days of the announcement of results of the parliamentary elections. The text does not seem to envisage the possibility that the constitution would include a directly elected President.

The Declaration foresees the creation of a National Commission for Elections, but the electoral process seems to remain at least partly in the hands of the NPC and of the Government. Article 30 states, “Both the National Public Conference and the interim government shall oversee the preparation of all the requirements of conducting the election process in a democratic and transparent manner”. It also states that the results of the parliamentary elections are announced by the NPC, not by the National Commission for Elections. Furthermore, the text is silent on the election

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<sup>13</sup> For more on this issue, see: ‘Promoting Consensus: Constitution-Making in Egypt, Tunisia, Libya’, DRI Briefing Paper No. 19, November 2011, available at: [http://www.democracy-reporting.org/files/dri\\_supermajorities\\_bp\\_19\\_formatted\\_final.pdf](http://www.democracy-reporting.org/files/dri_supermajorities_bp_19_formatted_final.pdf)

commission membership requirements and appointment mechanism.

These points would need to be clarified in the election law; however it might be useful from the outset to clearly spell out a number of principles, in particular that the entire election process should be under the responsibility of the election commission, that it operates independently and accountably.

## V. THE JUDICIARY

Part IV of the text is dedicated to the judiciary. In a context where legislative and executive powers are not clearly demarcated, the judiciary could play an important role in upholding the rule of law. In this regard, the provisions of part IV are encouraging, but could be strengthened.

Article 31 provides that: “There shall be no crime or penalty except by virtue of the text of the law. Any defendant shall be innocent until he is proved guilty by a fair trial wherein he shall be granted the guarantees necessary to defend himself. Each and every citizen shall have the right to recourse to the judiciary authority in accordance with the law.” The wording contains some of the principles protected under article 11 of the Universal Declaration of Human Rights,<sup>14</sup> notably the principle of legality, presumption of innocence and right to a fair trial.

Part IV proclaims the independence of the judiciary in its article 32, without specifying how such independence should be ensured. It seems unrealistic to expect a thorough reform of the judiciary during the transition period. Yet the independence of the judiciary in relation to the other public authorities could be enhanced already at this stage. Notwithstanding the established practice of Libyan courts in this regard, principles regarding the work of judges, notably that trials and court rulings are public, that the legal basis and reasoning of the judgements must be provided, and that a system of appeals must be in place should be included in the text. It should provide that the system of courts should include a court of final appeal, with cassation or annulment powers.

## VI. CONCLUSION

The Constitutional Declaration of August 2011 is a useful document providing a roadmap for Libya’s transition. However, the document is vague on many important aspects related to the set-up and functioning of the transitional

authorities. The lack of clarity and transparency has undermined the ITNC’s legitimacy and consequently, its authority. Its role is challenged by a myriad of armed groups and local political actors. Hence, the ITNC needs to greatly enhance the transparency of its decision-making, including the publication of its internal procedures. Furthermore, the ITNC being set up as a quasi-parliament may be an opportunity to broaden its membership to more political forces. Inclusion may serve to increase its legitimacy.

As far as the Constitutional Declaration’s roadmap to elections and the creation of new institutions is concerned, it is highly ambitious and probably unrealistic in its timeframe. According to the Declaration, elections would be held within eight months, and after the elections, a constitution-making body would write a constitution within two months. A rushed transition is not likely to generate the broad political engagement and consensus that is necessary to create democratic stability.

The Constitutional Declaration includes a number of positive human rights provisions, but these could be greatly strengthened and clarified.

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<sup>14</sup> Universal Declaration of Human Rights, article 11:

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.