

May 2015

The Tunisian Law on the High Judicial Council in Light of International Law and Standards

An independent and impartial judiciary is an essential element of the right to fair trial enshrined in article 14 of the International Covenant on Civil and Political Rights (ICCPR). Tunisia has been a party to the ICCPR since 1969.

For decades, however, Tunisia has failed to fully comply with its obligations under international law to respect and observe the independence of the judiciary, including under article 14 of ICCPR.¹ Despite formal recognition of the independence of the judiciary in the 1959 Tunisian Constitution, the executive in practice exercised effective control over the judiciary and the career of judges, including through the High Judicial Council (HJC).² Following the popular uprising in 2011 that led to the toppling of President Ben Ali, the HJC was suspended. In 2013, a temporary judicial body (the *Instance Provisoire de la Justice Judiciaire* (IPJJ)), was established to oversee the selection, appointment, promotion and transfer of judges.

The new Constitution, adopted in January 2014, envisages at article 114 the establishment of a new HJC to ensure the proper functioning of the judiciary and to ensure respect for its independence. Article 113 of the 2014 Constitution specifies that the HJC “shall enjoy financial and administrative independence” and “shall function independently”.

The 2014 Constitution provides for the HJC’s composition, organization and procedures to be determined by a new law. At the end of January 2015, the Ministry of Justice published a first draft of the law on the new HJC. A revised version of the draft was adopted by the Ministerial Council on 11 March 2015 and debated within the General Legislation Commission of the Assembly of People’s Representatives in April 2015. The draft was subsequently adopted by the Assembly of People’s Representatives, on 15 May 2015, as Organic Law No. 16/2015 on the High Judicial Council (the HJC Law).

The ICJ is deeply concerned that the drafting process of the law failed to meet basic principles of inclusive participation and transparency. Stakeholders, including professional associations of judges and civil society organizations, were not given the opportunity to provide inputs or to meaningfully comment on the drafts.

The ICJ is also concerned that the HJC Law that resulted from this process falls short of international standards of judicial independence, in particular the provisions relating to the composition, independence and competencies of the HJC.

¹ In 2008, the Human Rights Committee expressed its concerns over “the question of the independence of the judiciary” and the fact that “the executive branch still wields too much influence over the High Council of the Judiciary” in its Concluding Observations on Tunisia, UN Doc CCPR/C/TUN/CO/5 (23 April 2008), para. 17.

² See the ICJ’s report, “*The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*”, May 2014, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 6 May 2015.

Composition of the HJC

Under the HJC Law, the new HJC is composed of four bodies: the Judiciary Council; the Administrative Judicial Council; the Financial Judicial Council; and the Plenary Session, which consists of all the members of the other three bodies.³ The four bodies have a mixed composition. Of the 15 members of each council, 4 are members by virtue of holding another office (i.e. *ex officio*), 6 are judges elected by their peers, and 5 are independent persons chosen among specialists and elected by their peers.⁴ The *ex officio* members of the Judiciary Council are: the First President of the Cassation Court, the General Prosecutor to the Cassation Court and the President of the Property Court. As "high judicial officials",⁵ these will be individuals who were appointed to office by presidential decree, after consultation with the Prime Minister and based on a list of candidates exclusively prepared by the HJC.⁶ The other *ex officio* member is the General Prosecutor Director of Military Justice.

A new HJC composition along these lines provides some improvements compared to the composition of the former HJC. Pursuant to article 6 of Law No. 67-29 on the Organization of the Judiciary, the High Judicial Council and the Statute for Judges, the President of the Republic served as the president of the CSM. A majority of its members, 11 out of 19, were either representatives of the executive, such as the Minister of Justice who served as its vice-president, or were appointed to their positions through presidential decrees.⁷

However, the ICJ is concerned that the majority of the members of the new HJC and the councils included within it are not judges chosen by their peers. The European Charter on the Statute for Judges, for instance, states that, "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary".⁸ The UN Special Rapporteur on the Independence of Judges and Lawyers has recommended that any body mandated to exercise disciplinary or other accountability functions vis-à-vis judges, "should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable" (and that "no political representation should be permitted.")⁹

The rationale behind the appointment of the General Prosecutor Director of Military Justice as an *ex officio* member of the HJC is also unclear. As a member of the military, the General Prosecutor is appointed by decree following a proposal by the Minister of Defence

³ 2014 Constitution, article 112; and Organic Law No. 16/2015 on the High Judicial Council, 12 March 2015, article 8.

⁴ Organic Law No. 16/2015, articles 9, 10 and 11.

⁵ These "high judicial functions" are currently defined by Law No. 67-29 as the President of the Cassation Court, the Prosecutor-General of the Cassation Court, the President of the Tunis Court of Appeal, the Prosecutor-General of the Tunis Court of Appeal, the Inspector-General, the President of the Property Court, and the Prosecutor-General Director of Judicial Services.

⁶ 2014 Constitution, article 106, and Organic Law No. 16/2015, article 38.

⁷ Law No. 67-29, articles 6 and 7bis.

⁸ European Charter on the Statute for Judges, Principle 1.3. See similarly Council of Europe Committee of Ministers Recommendation (2010)12, adopted 17 November 2010, para 46; Report of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 28.

⁹ Report of the Special Rapporteur on Independence of Judges and Lawyers, UN Doc A/HRC/26/32 (28 April 2014), para 126.

and a decision by the Military Justice Council.¹⁰ The independence and impartiality of military judges in Tunisia is not adequately safeguarded owing to the procedures governing their appointment and career as well as their subordination to the general disciplinary rules and the military chain of command.¹¹ A further source of concern is the fact that the Tunisian authorities have resorted to the widespread use of military courts to adjudicate allegations of human rights violations committed by military and security personnel. These courts have often been a source of impunity.

In order to carry out its functions effectively and to protect the independence of the judiciary, the composition of the HJC must be such as to guarantee its independence. The former UN Special Rapporteur on the independence of judges and lawyers has affirmed that the composition of a judicial council "matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges."¹²

The ICJ therefore recommends that the HJC Law be reformed so as to guarantee that, at the least, the majority of the HJC members be judges who are chosen by their peers and, with a view to avoiding any risk of any political bias or interference in the work of HJC, the ICJ recommends that the office of the General Prosecutor Director of Military Justice be removed from the HJC's *ex officio* membership.

Competencies of the HJC

International standards envisage an independent authority to oversee the judiciary and to manage the career of judges, including decisions affecting the selection, appointment, promotion and termination of office of a judge. As explained by the UN Human Rights Committee, mandated by the ICCPR to interpret and apply its provisions, the requirement of an independent judiciary set out in article 14 encompasses "the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions."¹³

Article 114 of the 2014 Constitution mandates the HJC to ensure the proper functioning of the judicial system and respect for its independence. The HJC is to propose reforms and to give its opinion on draft legislation concerning the judiciary. The three councils have jurisdiction over the disciplining and career progression of judges. In addition, the HJC is to prepare an annual public report that it submits to the Speaker of the Assembly of People's Representatives, the President of the Republic, and the Prime Minister. The 2014 Constitution also guarantees the administrative and financial autonomy of the HJC and grants it the power to discuss its own budget with the relevant commission of the legislature.¹⁴

¹⁰ Law No. 2011-70, articles 1 and 2.

¹¹ ICJ report, *The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*, May 2014, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 14 May 2015.

¹² Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 28.

¹³ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

¹⁴ 2014 Constitution, article 113.

The HJC Law reinforces and expands on the HJC's competencies provided for by the 2014 constitution, including by specifying that the HJC may propose judicial reforms and issue advisory opinions on draft laws that impact on the judiciary, and is to draft a code of judicial conduct.¹⁵ The HJC is in charge of the appointment, promotion, transfer, requests for waiver of immunity, resignation, secondment, and forced retirement of judges.¹⁶ Decisions on judges' careers are to be based on the principles of equal treatment, transparency, efficiency, impartiality, and independence.¹⁷

The ICJ views the provisions of the 2014 Constitution and the HJC Law relating to the competencies of the HJC as an improvement in several significant respects, including in terms of the management of the career of judges.

However, the ICJ notes with concern that neither the 2014 Constitution nor the HJC Law include a guarantee of adequate financial resources for the judiciary as a whole. They do not specifically empower the HJC to engage with the legislature with a view to ensuring sufficient budgeting for the judiciary.

The Special Rapporteur on the independence of judges and lawyers has consistently urged that the judiciary be involved in the drafting of its own budget.¹⁸ A number of regional standards also provide that the judiciary should be consulted regarding the preparation of the budget and its implementation.¹⁹ Based on its global experience and expertise, the ICJ has likewise identified the lack of participation by the judiciary in the drafting of its budget as a factor that can undermine judicial independence and impartiality. The ICJ *Practitioners' Guide on independence and accountability of judges, lawyers and prosecutors* states, "Inasmuch as other branches of power or State institutions wield an important influence in the allocation and administration of those resources given to the judiciary, there is a real possibility of influencing the outcomes of particularly sensitive cases, which would entail an attack on the independence of the judiciary".²⁰

The ICJ is also concerned that the HJC law perpetuates some of the provisions and practices that undermined judicial independence under the former regime and during the transition period, including those relating to the transfer of judges and the role and independence of the Judicial Inspection Service.

Under Law No. 67-29, the Minister of Justice had discretionary powers to decide to transfer a judge for a "*nécessité de service*" (needs of service). Judges who spoke out on issues of judicial independence were often subject to arbitrary and punitive transfers in the name of "*nécessité de service*."

During the transition period, despite the adoption of new safeguards against the arbitrary transfer of judges, executive interference continued to constitute a threat to the independence of the judiciary in Tunisia. On 14 October 2013, the Minister of

¹⁵ Organic Law No. 16/2015, article 39.

¹⁶ Organic Law No. 16/2015, article 42.

¹⁷ Organic Law No. 16/2015, article 42.

¹⁸ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 39.

¹⁹ ACHPR Principles and Guidelines, Section A, Principle 4(v); CoM Recommendation (2010)12, para. 40.

²⁰ *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioners' Guide No. 1*, International Commission of Jurists, Geneva, 2007, p. 33 (hereafter "*Practitioners' Guide No. 1*").

Justice announced the transfer of two judges, Justice Nouri Ktiti, President of the Property Court, and Khaled Barrak, the head of the General Inspection Service (GIS), without their consent. The two judges were also members of the newly established IPJJ. The Minister of Justice took this decision unilaterally, in violation of article 14 of Law No. 2013-13, which requires the prior assent of the IPJJ for promotions and transfers.

Article 44 of the HJC Law allows the HJC to transfer judges without their consent for “*nécessité de service*” for a maximum of three years. This provision should be reformed with a view to ensuring that the conditions for the transfer of judges to other jurisdictions are clearly defined in the law, that the concerned judge is consulted and his/her consent is sought for every decision to delegate him/her to another jurisdiction. International standards provide that the consent of the judge should be sought in case of assignment and transfer decisions by the judicial authority. The Singhvi Declaration for instance states that “judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge”.²¹

The ICJ is also concerned that the HJC Law perpetuates the control of the Ministry of Justice over the GIS. A draft of the HJC Law provided for the HJC’s oversight of the GIS. This provision was removed from the final version that was adopted.

Under the current framework, including law No. 67-29, the GIS is under the direct authority of the Minister of Justice and is responsible for inspecting the functioning of the jurisdictions, services and public institutions attached to the Ministry of Justice, except for the Cassation Court.²² The GIS is headed by the Inspector-General and consists of two sections, one for inspection and one for organization, methods and archives. The inspection section itself consists of both a judicial inspection body and a financial and administrative inspection body.²³ Members of the judicial inspection body are chosen from judges of the second or third grade.²⁴ The Inspector-General is appointed by presidential decree from among judges of the third grade.²⁵ Inspectors from the GIS conduct disciplinary investigations requested by the Minister of Justice.²⁶

The HJC Law seems to maintain these powers of both the Minister of Justice and the GIS, including by providing for the Minister of Justice to refer the complaints, communications and information the Minister receives, and that might be a basis for initiating disciplinary proceedings against a judge, to the Inspector-General of the GIS for investigation. The Inspector-General can also start an investigation *proprio motu*.²⁷ Following the investigation, the Inspector-General can either close the case or refer it to the HJC.

The authority of the Minister of Justice over the GIS runs counter to international standards. As affirmed by the Consultative Council of European Judges, for instance: “The

²¹ Draft Universal Declaration on the Independence of Justice (hereafter “Singhvi Declaration”), para. 15.

²² Decree No. 2010-3152, article 24.

²³ Decree No. 2010-3152, articles 25 & 27.

²⁴ Decree No. 73-436.

²⁵ Law No. 67-29, article 7bis.

²⁶ Decree No. 2010-3152, article 26.

²⁷ Organic Law No. 16/2015, article 54.

Council for the Judiciary should supervise the organisation of the inspection service so that inspection is compatible with judicial independence.²⁸

Furthermore, while the HJC Law entrusts the HJC to draft a code of judicial conduct,²⁹ it does not specify that, once adopted, this code should be the basis on which judges will be held to account professionally. As the UN Basic Principles make clear, grounds for and decisions about discipline, including suspension or removal, should be based on established standards of judicial conduct.³⁰ As a matter of practice, this is best done through the adoption by the judiciary itself of a written code.

In light of the above, the ICJ calls on the Tunisian authorities, including the Assembly of People's Representatives, to reform the Law on the High Judicial Council, including through an inclusive and transparent process that involves all stakeholders, including associations of judges and civil society organizations, with a view to:

- i. Ensuring that the HJC consists of a majority of judges who are elected by their peers;**
- ii. Removing the inclusion, *ex officio*, of the General Prosecutor Director of Military Justice from the HJC membership;**
- iii. Requiring the Assembly of People's Representatives to involve the HJC, including through meaningful direct consultation, in determining and ensuring sufficient budgeting for the judiciary as a whole, and not only sufficient resources for the HJC;**
- iv. Ensuring that the conditions for the transfer of judges for *nécessité de service* are clearly defined in the law, that the consent of the concerned judge is sought, that the HJC is competent to review and when necessary to revoke such decisions, and that the entire process protects against arbitrary transfers and guarantees judges' individual independence;**
- v. Ensuring that the mandate of the HJC includes oversight over the appointment and functioning of members of the judicial inspection service (GIS) and over the commencement of disciplinary proceedings;**
- vi. Ensuring that the powers of the Minister of Justice and his or her subordinates, in relation to the disciplinary procedure, are rescinded, including the power to initiate disciplinary investigations and to refer matters to the GIS or the HJC;**
- vii. Ensuring that a sufficiently detailed and comprehensive code of judicial conduct, in line with the Bangalore Principles, is developed by the HJC, in close consultation with the judges and their professional associations; and**
- viii. Providing for this code of judicial conduct to be established in the HJC Law as the basis on which judges will be held to account professionally.**

²⁸ CCJE, Opinion No. 10(2007) on the Council for the Judiciary at the service of society, para. 79.

²⁹ Organic Law No. 16/2015, article 39.

³⁰ UN Basic Principles on the Independence of the Judiciary, Principle 19.