

## **Morocco: The Draft Organic Law on the Statute for Judges and International Law and Standards on the Independence of the Judiciary**

**June 2015**

International law and standards on the independence of the judiciary aim to ensure that matters related to the selection of judges, their appointment, training, evaluation, promotion and discipline, are free from improper influence by the other branches of government.

As explained by the UN Human Rights Committee (HRC), mandated by the International Covenant on Civil and Political Rights (ICCPR) to interpret and apply its provisions,<sup>1</sup> 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.”<sup>2</sup> To comply with article 14, the HRC affirmed that States should establish “clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.”<sup>3</sup>

The selection, appointment, training, assessment, promotion, assignment, discipline and removal from office of judges in Morocco have always rested mainly with the executive branch. For this reason, Morocco has to date consistently failed to comply fully with its obligations under international law to respect and uphold the independence of the judiciary, including as required by article 14 of the ICCPR.<sup>4</sup>

In 2011, following a series of peaceful protests, the government initiated a process of constitutional reform. A new constitution was approved by referendum in July 2011. The 2011 Constitution reaffirms the independence of the judiciary.<sup>5</sup> It establishes new institutions that have the potential to strengthen the independence of the judiciary, in particular a new body to oversee the judiciary, the *Conseil Supérieur du Pouvoir Judiciaire* (CSPJ). The Constitution also provides, in its article 112, for a Statute for Judges to be adopted by means of an Organic Law.<sup>6</sup>

---

<sup>1</sup> Morocco ratified the ICCPR in 1979.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> Morocco ratified the ICCPR in 1979. In 2004, the Human Rights Committee expressed its concern that “the independence of the judiciary is not fully guaranteed” in its Concluding Observations on Morocco, CCPR/CO/82/MAR, 1 December 2004, para. 19.

<sup>5</sup> 2011 Constitution, article 107.

<sup>6</sup> An “organic law”, common in civil law systems, is a law provided for by the Constitution to complement general provisions of the Constitution. It has a higher status than other laws and requires approval from the Constitutional Court before it is adopted.

Following a “national dialogue” on the reform of the justice system that was initiated by the Ministry of Justice, Draft Law No. 106.13 on the Statute for Judges (the Draft Law)<sup>7</sup> was drafted by the Ministry of Justice and Liberties and is currently being reviewed by Parliament. Pending adoption and promulgation of this Draft Law, Law No.1-74-467 of 1974 on the Statute for Judges remains in force.

In order to achieve meaningful reform of the justice system in Morocco, it is crucial that the law on the Statute for Judges be fully in line with international law and standards. In this paper, the ICJ analyses the Draft Law and formulates recommendations for amendments and reform that, together with sufficient political will, should help ensure the establishment of an independent, impartial and accountable judicial system that is fully committed to upholding human rights and the rule of law. The memo focuses on the selection, appointment, conduct and discipline of judges. Because under both the 1974 Statute for Judges and the Draft Law prosecutors are designated as part of the judiciary, the memo also addresses the situation of the Office of the Public Prosecutor.

## **I. Selection and appointment of judges**

According to article 7 of the Draft Law, judges are appointed, in accordance with applicable laws and decrees, from among trainee judges who successfully pass an exam at the end of their training at the Judicial Training Institute, (JTI) as well as candidates from some professional categories or from the civil service who have successfully passed the JTI entrance exam. Law professors and lawyers who possess at least 10 years of experience can also be appointed directly to the bench by the CSPJ.

The ICJ is deeply concerned that the Draft Law does not contain any provisions on the criteria and procedure for selecting trainee judges. Such provisions were provided for in previous drafts of the law but removed from the draft currently being reviewed by the Parliament.

Under the law currently in force, the procedures for the selection of trainee judges and access to the training institute are determined by and under the control of the Minister of Justice.<sup>8</sup> It is the Minister of Justice who oversees the body responsible for the training of judges, originally the National Institute of Judicial Studies and now the Higher Institute of the Judiciary.<sup>9</sup> The Institute’s Board is presided over by the Minister of Justice and (following a Prime Ministerial Decree of 2003) is composed of 21 members, including five government ministers or their representatives.<sup>10</sup>

The Board decides on the content of the training, issues relating to employees, financial and administrative issues, internal regulations, programmes and exams.<sup>11</sup> The training period lasts for a minimum of two years and includes a series of practical placements the details and timing of which are again determined by the Minister of

---

<sup>7</sup> Draft Law No. 106.13 on the Statute for Judges, available at [http://www.sgg.gov.ma/Portals/0/lois/projet\\_loiorganique\\_106-13.pdf](http://www.sgg.gov.ma/Portals/0/lois/projet_loiorganique_106-13.pdf), last accessed 11 June 2015.

<sup>8</sup> Law No. 1-74-467, article 5; Decree No. 2-05-178 of 21 April 2006.

<sup>9</sup> Decree No. 2-98-385 of 23 June 1998 on the competencies and organisation of the Ministry of Justice, article 1; Royal Decree, Law No. 09-01 on the Higher Institute of the Judiciary, 3 October 2002.

<sup>10</sup> Prime Minister Decree No. 2-03-40 made for the purpose of Law No. 09-01 of 17 September 2003, articles 1 and 2.

<sup>11</sup> Law No. 01-09 of 3 October 2002, article 6.

Justice.<sup>12</sup> At the end of the training there is another exam the conditions of which are also set out by decree. Successful candidates are eligible for, but are not guaranteed, appointment,<sup>13</sup> since the Minister of Justice can order the dismissal of those trainee judges who “do not meet the conditions to be appointed as judges”.<sup>14</sup> The law does not specify what those conditions are, and thus gives the Minister of Justice a relatively unlimited discretion to exclude otherwise eligible candidates.

This framework is inconsistent with Morocco’s obligations under international law. Under international law and standards, selection criteria for judges must be based on merit, applied in a transparent manner, and appointments should be decided by an independent body.

The UN Special Rapporteur on the Independence of Judges and Lawyers has said:

The process for appointing and selecting judges and prosecutors should be guided by objective criteria, based on merit, and clear and transparent procedures, and take place through a public competitive selection process, free from political or economic influences or other external interference.<sup>15</sup>

In reviewing States’ compliance with their obligations under article 14 of the ICCPR, the Human Rights Committee has noted with concern situations where there are a lack of independent mechanisms for the recruitment of judges needed “to prevent possible interference by the executive branch in the affairs of the judiciary”.<sup>16</sup> The UN Basic Principles on the Independence of the Judiciary provide that persons “selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of selection shall safeguard against judicial appointments for improper motives.”<sup>17</sup> The African Commission on Human and Peoples’ Rights (ACHPR) Principles and Guidelines similarly provide that the process of appointment “shall be transparent and accountable” and that the method of selection “shall safeguard the independence and impartiality of the judiciary,” with the establishment of an “independent body for this purpose” receiving particular emphasis.<sup>18</sup> The Human Rights Committee and the UN Special Rapporteur on the independence of judges and lawyers have also repeatedly recommended the use of bodies that are independent from the executive, and that are composed mainly (if not solely) of judges and members of the legal profession.<sup>19</sup>

Judicial training programmes should be run by independent authorities and should meet “requirements of openness, competence and impartiality inherent in judicial office”.<sup>20</sup> In

---

<sup>12</sup> Law No. 1-74-467, article 6.

<sup>13</sup> 1996 Constitution, articles 33 and 84; and Law No. 1-74-467, article 7.

<sup>14</sup> Law No. 1-74-467, article 7.

<sup>15</sup> Report of the UN Special Rapporteur on Independence of Judges and Lawyers, UN Doc A/67/305 (13 August 2012), para 113(j).

<sup>16</sup> Concluding Observations of the Human Rights Committee on Madagascar, UN Doc. CCPR/C/MDG/CO/3, para. 26.

<sup>17</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10.

<sup>18</sup> ACHPR Principles and Guidelines, Principle A.4(h).

<sup>19</sup> See for example: Human Rights Committee, Concluding Observations on the Congo, UN Doc. CCPR/C/79/Add.118, para. 14; on Liechtenstein, UN Doc. CCPR/CO/81/LIE, para. 12; on Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 17; on Honduras, UN Doc. CCPR/C/HND/CO/1, para. 16; on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; and on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20. Reports of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 28-29, and UN Doc. A/67/305 (2012), para 113(k). Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), article 11; Universal Charter of the Judge, article 9.

<sup>20</sup> Council of Europe, Committee of Ministers Recommendation (2010)12, para. 57.

this regard, the European Charter on the Statute for Judges proposes an independent body composed of a majority of judges, which "ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties".<sup>21</sup>

The Draft Law should therefore be amended to ensure that CSPJ is responsible for the entire process of selecting trainee judges, based on specific and objective criteria. In accordance with international standards, the criteria should include, among others, qualifications and training in law, experience, skills and integrity. Both the criteria and method of selection must safeguard against judicial appointments for improper motives, and must be substantially provided for in the Draft Law and not merely delegated to subsidiary legislation promulgated by executive officials, including decrees.

Providing otherwise would seem to be inconsistent with the 2011 Constitution, in particular article 113, which provides for the new CSPJ to ensure the application of guarantees "relating to the independence, appointment, promotion, retirement and discipline of judges."

In terms of the appointment of judges, the Draft Law provides for the CSPJ to appoint judges and prosecutors at the Tribunals of First Instance (article 11) and at the Courts of Appeal (article 12); Counsellors and Attorneys-General at the Cassation Court (article 13); Presidents and Public Prosecutors at the Tribunals of First Instance (article 14) and their First Deputies (article 16); First Presidents and Prosecutors-General at the Courts of Appeal (article 15) and their First Deputies (article 16), and the First Deputy President and the First Deputy Prosecutor-General at the Cassation Court (article 18). The Law on the CSPJ provides for the criteria and procedure for these appointments.<sup>22</sup>

Article 17 of the Draft Law on the Statute for Judges also provides for the King to appoint "the President and Prosecutor-General of the Court of Cassation for a fixed term of 5 years, renewable once. The office can be terminated before expiry of the term." The draft article does not provide for any criteria for these appointments and is silent as to the grounds and procedure for the termination of office.

The ICJ welcomes the fact that the CSPJ is exclusively competent to appoint judges and prosecutors at Moroccan courts and tribunals. However, the ICJ is concerned that this competence does not extend to include the President and Prosecutor General of the Court of Cassation. Both positions are of significant importance. The President of the Court of Cassation is also the President of the CSPJ and has, under the Draft Law on the CSPJ, wide powers in terms of the management of the career of judges. Under the Draft Law on the Statute for Judges, the Prosecutor-General of the Court of Cassation is also the head of the Office of the Public Prosecutor. The ICJ therefore believes that draft article 17 should be amended: to provide for a transparent procedure for the appointment of individuals to the posts of President and Prosecutor-General of the Court of Cassation; to ensure that their selection is made by an independent body (presumably the CSPJ) and is based on objective criteria, to include, among others, skills, knowledge, experience and integrity; to ensure that they enjoy security of tenure during their terms; and to ensure that the

---

<sup>21</sup> European Charter on the Statute for Judges, para 2.3, which refers to para 1.2 where the detailed requirements of this body are set out.

<sup>22</sup> In this regard, see ICJ memo "The Moroccan Draft Law on the High Council of the Judiciary in light of International Law and Standards", June 2015, available at <http://www.icj.org/>

grounds and procedure for any termination of their office are clearly defined in the law, meet international standards in their substantive and procedural aspects, and protect against arbitrary dismissals.

## **II. Judicial conduct and discipline of judges**

Under international standards, judges must be independent and impartial and must conduct themselves in a manner that is consistent with an established code of conduct. When judicial conduct is in line with these principles, the public's faith in the integrity of the judiciary is significantly enhanced. As the Special Rapporteur on the independence of judges and lawyers has noted, "what is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society".<sup>23</sup>

In Morocco, there is no separate code of ethics and judicial conduct. The current 1974 Statute for Judges set forth some standards for judicial behaviour. Upon taking office, judges must take an oath to faithfully discharge their duties, to keep deliberations secret and to conduct themselves as a dignified and loyal judge.<sup>24</sup> Judges are prohibited from engaging in political deliberations or demonstrations as well as any actions aimed at impeding the functioning of the courts.<sup>25</sup> (They are also forbidden from forming or joining trade unions.<sup>26</sup>)

The Draft Law perpetuates most of these provisions and further provides for judges to "respect the principles and rules provided for in the Code of Judicial Ethics,"<sup>27</sup> to be adopted by the CSPJ.

While the ICJ welcomes the fact that both the draft laws on the CSPJ and the Statute for Judges provide for the adoption of a Code of Judicial Ethics, both draft laws do not explicitly provide that, once adopted, the Code should be the basis on which judges will be held to account professionally. Indeed, in defining and providing examples of judicial misconduct, including serious misconduct, the Draft Law on the Statute for Judges makes no mention of breaches of the Code of Judicial Ethics to be considered as judicial misconduct.

Under article 88, any prejudice by judges against their professional duties, honour, finesse or dignity can be the subject of disciplinary sanctions. Article 89 provides that a judge can be immediately suspended from carrying out his/her functions if criminal proceedings are opened against him/her or if he/she is found to have committed serious misconduct. According to the article, serious misconduct includes: the failure to respect the duty of independence and impartiality; intentionally and clearly violating a procedural rule that constitutes a fundamental guarantee for the rights of the parties; violating the duty of discretion and confidentiality; intentionally refraining from recusing him/herself from the case when the law so requires; refraining collectively and in an organized manner from working; stopping or disrupting the normal functioning of hearings and tribunals; and exercising political or trade union activities or joining a political party or a professional union.

---

<sup>23</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/2004/60 (2003), para. 40.

<sup>24</sup> Law No. 1-74-467, article 18.

<sup>25</sup> Id., article 13.

<sup>26</sup> Id., article 14.

<sup>27</sup> Article 36 of the Draft Law on the Statute for Judges.

The ICJ is concerned that the wording of both articles is broad and in some cases imprecise and does not provide judges with clear notice about the types of conduct, including acts and omissions that might amount to disciplinary infractions. Similar provisions have been used in the past in a way that undermined judicial independence, including by the Minister of Justice to suspend judges or to refer judges to the disciplinary council for charges that appeared to stem from the legitimate exercise of their rights, including the right to freedom of expression.<sup>28</sup>

The ICJ is also concerned that some of the provisions of article 89 seem to either deny or limit the exercise of certain constitutional rights and freedoms by judges, including those enshrined in article 29 of the 2011 Constitution, which guarantees the rights to freedom of "holding meetings, assembly, peaceful demonstration, association, and belonging to unions."

The prohibition on judges joining a professional union or engaging in related activities runs counter to both article 89 of the Constitution and international law and standards on the exercise of the right to freedom of association. Article 9 of the UN Basic Principles on the Independence of the Judiciary, for instance, states, "Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence." The commentary to the Bangalore Principles makes clear that such language includes the right to join or form a trade union or other association of that nature.<sup>29</sup> Furthermore, any limitations on the exercise of the rights enshrined in article 89 of the constitution by Moroccan judges must be consistent with international law and standards. Such limitations must be lawful, reasonable and justifiable. In particular, any limitation must be necessary and capable of being demonstrably justified in a free and democratic society.

The draft law essentially imposes a blanket prohibition on judges to exercise the right to strike. The right to strike is enshrined in the 2011 Constitution in its article 29, and is protected by international standards. The right to strike is not absolute, and restrictions on judges' right to strike may be justified, for instance to ensure that individuals have continuous access to the courts (including in order to provide effective remedies and guarantees in relation to human rights). However, the ICJ encourages the Moroccan authorities to consider restrictions less drastic than a total prohibition on judges to exercise any element of this right, for instance considering a procedure for allowing for

---

<sup>28</sup> See, for example, disciplinary case 07/2014. In this case, the Minister of Justice referred Rachid Al-Abdellawi, a judge at the tribunal of first instance of Tangiers, to the disciplinary council on charges of "failure to comply with obligations of honour, finesse or dignity of the judicial office". The charges stem from a photo posted by the judge on social media, which showed the judge working in the hallway of the courtrooms because, even after one month of working at the tribunal, there was still no office available for the judge to work from.

[http://www.marocdroit.com/%D9%86%D8%B5-%D9%85%D8%B1%D8%A7%D9%81%D8%B9%D8%A9-%D8%A7%D9%84%D8%B3%D8%A7%D8%AF%D8%A9-%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A9-%D9%81%D9%8A-%D9%85%D9%84%D9%81-%D8%A7%D9%84%D8%A3%D8%B3%D8%AA%D8%A7%D8%B0-%D8%B1%D8%B4%D9%8A%D8%AF-%D8%A7%D9%84%D8%B9%D8%A8%D8%AF%D9%84%D8%A7%D9%88%D9%8A-%D8%A7%D9%84%D9%85%D8%AA%D8%A7%D8%A8%D8%B9\\_a5157.html](http://www.marocdroit.com/%D9%86%D8%B5-%D9%85%D8%B1%D8%A7%D9%81%D8%B9%D8%A9-%D8%A7%D9%84%D8%B3%D8%A7%D8%AF%D8%A9-%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A9-%D9%81%D9%8A-%D9%85%D9%84%D9%81-%D8%A7%D9%84%D8%A3%D8%B3%D8%AA%D8%A7%D8%B0-%D8%B1%D8%B4%D9%8A%D8%AF-%D8%A7%D9%84%D8%B9%D8%A8%D8%AF%D9%84%D8%A7%D9%88%D9%8A-%D8%A7%D9%84%D9%85%D8%AA%D8%A7%D8%A8%D8%B9_a5157.html)

<sup>29</sup> UN Office of Drugs and Crime, Commentary to the Bangalore Principles of Judicial Conduct (2007), regarding Principle 4.13 (page 116). The Commentary also states, "Given the public and constitutional character of the judge's service, however, restrictions may be placed on the right to strike."

partial work stoppages that nevertheless ensure maintenance of essential judicial services in all circumstances. The authorities should also reconsider that aspect of the draft law that appears to classify any work stoppage of any such character a serious disciplinary offence that might result in grave disciplinary sanctions, including forcing judges into retirement or removing them from office.<sup>30</sup>

In sum, the ICJ believes that that Draft Law should be amended to ensure that disciplinary offences are clearly and precisely defined within the law so that judges can know from the wording of the relevant legal provisions what acts and/or omissions would make them disciplinarily liable; the ethical standards to be applied in Morocco are consistent with international standards; and the grounds for discipline are not so broad as to facilitate their abuse as a means of interfering with the independence of individual judges for wrongful purposes. The exercise of basic human rights, including the rights to freedom of expression, association and assembly, all of which are recognized and protected by the Moroccan Constitution and international human rights law, must not constitute a disciplinary offence or be defined by the Draft Law as such.

### **III. The Office of the Public Prosecutor**

Under the Moroccan legal framework,<sup>31</sup> prosecutors are members of the judiciary. Article 3 of the Draft Law provides that the judicial corps is composed of sitting judges and prosecutors. They are subject to the same procedures relating to selection, appointment, promotion and discipline.

However, in certain key respects, sitting judges, "*magistrats du siege*", and prosecutors, "*magistrats du parquet*", do not enjoy the same guarantees relating to their security of tenure, independence and the management of their career.

Under article 108 of the Constitution, sitting judges are irremovable from office. Neither the Constitution nor the Draft Law extend this guarantee to prosecutors.

The ICJ believes that, as long as prosecutors continue to be considered as members of the judiciary in Morocco, the constitutional provisions applicable to sitting judges should apply equally to prosecutors. In order to protect them from arbitrary dismissals or proceedings when exercising their functions, in particular the investigation and prosecution of human rights violations, prosecutors should enjoy the same guarantees of security of tenure as judges.

The Draft Law should therefore be amended to clearly specify and ensure that prosecutors have guaranteed tenure that is set out in the law, that they may not be removed or suspended from office during their tenure except for misconduct on grounds and in accordance with procedures prescribed by law, that they may not be reassigned without their consent and according to procedures established by law, and that any transfers between posts should not be used as a threat or a reward.

Another source of concern under the current framework is that prosecutors are under the hierarchical authority of the Minister of Justice and can be reassigned by the Minister of Justice. Article 56 of the current Statute for Judges provides that prosecutors are "under the authority of the Minister of Justice and under the control and direction of their superiors". They can be reassigned by royal decree on the proposal of the Minister of Justice, after consulting with the Conseil Supérieur de la

---

<sup>30</sup> Article 91, Draft Law on the Statute for Judges.

<sup>31</sup> Law No. 1-74-467 on the Statute of Judges.

Magistrature (CSM), the body that currently oversees the judiciary. The Minister of Justice is not required to follow the CSM's recommendations. Prosecutors-General at the Court of Appeal are also assessed and formally assigned a rating by the Minister of Justice.<sup>32</sup> Their advancement and promotion depend on this rating. Furthermore, the Law on the Organisation of the Judiciary provides that the Prosecutor-General of the Court of Cassation can send instructions and observations to the Prosecutors-General at the Court of Appeal and First Instance and is required to report to the Minister of Justice "failings that come to his attention on the part of all prosecutors".<sup>33</sup>

For decades, these provisions have undermined the ability of prosecutors to perform their functions independently and impartially and have been used to initiate politically motivated prosecutions. They have also weakened public confidence in the ability of prosecutors to conduct effective investigations into offences, including human rights violations, and to bring perpetrators to justice.

The ICJ welcomes the fact that the Draft Law ends prosecutors' subordination to the Minister of Justice. Article 20 of the Draft Law provides for prosecutors to be under "the authority and control of the Prosecutor-General of the Court of Cassation and their hierarchical superiors." The ICJ also welcomes the fact that both the 2011 Constitution and the Draft Law provide for prosecutors to comply with instructions from their hierarchical superiors only when these instructions are written, in conformity with the law, and emanating from the authority they are subordinated to in line with the conditions and procedures established in the law.<sup>34</sup>

However, the ICJ believes that the Draft Law should be amended further to make clear that prosecutors are independent and autonomous in their decision-making and that any instructions they receive from hierarchical superiors must be consistent with established and consistent prosecution criteria and policies, follow the principles of equity and transparency and may not be politically motivated. Under international standards, which should be transposed into Moroccan law, prosecutors shall, among other things, not initiate or continue prosecutions "when an impartial investigation shows the charge to be unfounded" and must give "due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights, and other crimes recognized by international law".<sup>35</sup> The Draft Law should further generally prohibit instructions to cease the investigation or prosecution of a case, aside from well-defined exceptions consistent with international standards such as the prohibition against proceeding with unfounded charges or relying on evidence obtained in breach of human rights. It should give prosecutors the right to challenge any instruction if they deem it unlawful or contrary to professional standards or ethics.

As the UN Special Rapporteur on the independence of judges and lawyers has cautioned, "case-specific instructions to prosecutors from external organs are not desirable" and "should be formally recorded and carefully circumscribed to avoid undue interference or pressure".<sup>36</sup> Recommendation (2000)19, adopted by the Council

---

<sup>32</sup> Article 3 of Decree No. 2-75-883 of 23 December 1975 determining the conditions and modalities of rating judges and their advancement in grade and echelon.

<sup>33</sup> Law No.1-74-338, article 16.

<sup>34</sup> 2011 Constitution, article 110.

<sup>35</sup> UN Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 (1990), Guidelines 13(a) & (b); 14 & 15.

<sup>36</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 75.

of Europe's Committee of Ministers, on the role of public prosecution in the criminal justice system (CoM Recommendation (2000)19) and the Bordeaux Declaration, adopted by the Consultative Council of European Judges and the Consultative Council of European Prosecutors in 2009, both contain specific guidance on such a situation. In particular, any instructions must be in writing and in compliance both with the law and with clearly established prosecution criteria. CoM Recommendation (2000)19 further provides that any instruction *not* to prosecute should be either prohibited or exceptional.<sup>37</sup>

Particularly given the specific history in Morocco of abuse of instructions to prosecute or not to prosecute, or to otherwise interfere with the conduct of a case, for wrongful purposes, instructions impacting a case should be recorded together with the reasons for doing so, included in the case file, and made available to the other parties in the case.

The ICJ further believes that the Draft Law should be amended to ensure that judges and prosecutors have distinctly separate roles and are independent from the executive and legislative branches as well as each other.

Under international standards, "the office of prosecutors shall be strictly separated from judicial functions."<sup>38</sup> This separation aims to ensure that the criminal justice system is fair for all and the right to a fair trial is guaranteed in all circumstances. A key element for a trial to be fair is the equality of arms between the prosecution and the defence, in particular their ability to prepare and present cases under conditions of equality throughout the proceedings. Such equality is undermined when prosecutors and judges are part of the same judicial corps and exercise both prosecutorial and judicial functions.

In light of the above, the ICJ therefore calls on the Moroccan authorities, including the Government, the Chamber of Deputies, and the Chamber of Counsellors, to amend the Draft Law with a view to:

- i. Setting out fair and transparent procedures for selecting trainee judges based on specific and objective criteria including, among others, their qualifications and training in law, experience, skills and integrity;**
- ii. Ensuring that the CSPJ is fully competent to oversee the entire process of selecting and training trainee judges, and to this end, remove the Minister of Justice's wide powers on these matters;**
- iii. Ensuring that the Judicial Training Institute (JTI) is independent from the Ministry of Justice, is placed under the supervision of the CSPJ, and is exclusively competent to dispense appropriate initial and on-going training for judges;**
- iv. Amending draft article 17 to provide for a transparent and independent procedure for the appointment of individuals to the posts of President and Prosecutor-General of the Court of Cassation based on objective criteria for appointments, including qualifications, integrity, ability, efficiency and experience;**
- v. Ensuring the security of tenure of both the President and Prosecutor-General of the Court of Cassation;**

---

<sup>37</sup> CoM Recommendation (2000)19, para. 13(a)-(f).

<sup>38</sup> UN Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 (1990), Guidelines 10.

- vi. **Ensuring that the grounds and procedure for the termination of the office of the President or Prosecutor-General of the Court of Cassation are clearly defined in the law, meet international standards in their substantive and procedural aspects, and protect against arbitrary dismissals;**
- vii. **Ensuring that a sufficiently detailed and comprehensive code of ethics and judicial conduct, in line with the Bangalore Principles, is developed by the CSPJ, in close consultation with judges and their professional associations;**
- viii. **Providing for this code of ethics and judicial conduct to be established in the law as the basis on which judges will be held to account professionally;**
- ix. **Ensuring that disciplinary offences are clearly and precisely defined within the law so that judges can know from the wording of the relevant legal provisions what acts and/or omissions would make them disciplinary liable, and that the scope of grounds for disciplinary action are not overbroad as to be open to abuse or other wrongful interference with the independence of individual judges;**
- x. **Amending article 89 to ensure that the exercise of basic human rights, including the rights to freedom of expression, association and assembly, does not constitute a disciplinary offence;**
- xi. **Ensuring that any limitations on the exercise of these rights by Moroccan judges are, in accordance with international law and standards, lawful, reasonable, justifiable and justified in a free and democratic society;**
- xii. **Removing the blanket prohibition on judges to join or form professional unions;**
- xiii. **Considering alternatives to a blanket prohibition on judges' right to strike;**
- xiv. **Extending security of tenure to prosecutors, at least as long as Moroccan law designates them as part of the judiciary;**
- xv. **Defining in law the nature and scope of any power to issue written instructions to prosecutors;**
- xvi. **Including a prohibition on issuing instructions not to prosecute or requiring prosecution in a specific case, except on circumscribed grounds defined in advance and consistent with international standards, such as the prohibition against proceeding on unfounded charges or on relying on evidence obtained in breach of human rights;**
- xvii. **Specifying that the issuance of instructions shall not preclude prosecutors from submitting any legal arguments of their choice;**
- xviii. **Requiring that any instructions issued to prosecutors are formally recorded, together with the reasons for doing so, are included in the case file where they relate to a specific case, and are made available to other parties;**
- xix. **Grant prosecutors the right to challenge any instructions received, especially when they deem the instructions unlawful or contrary to professional standards or ethics; and**
- xx. **Ensure that functions of the Office of the Public Prosecutor and prosecutors are separated from judicial functions and, to this end, include specific safeguards to ensure the independence of prosecutors from the judiciary.**