

## The Moroccan Draft Organic Law on the High Council of the Judiciary in light of International Law and Standards

June 2015

A fundamental condition of an independent and impartial judiciary is respect for the principle of separation of powers. The right to an independent and impartial judiciary is part of international law, including the right to a fair trial under article 14 of the International Covenant on Civil and Political Rights (ICCPR). Morocco has been a party to the ICCPR since 1979.

The UN Human Rights Committee, mandated by the ICCPR to interpret and apply its provisions, has explained: "A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal".<sup>1</sup> The Committee further noted that article 14 imposes on States the obligation to take measures guaranteeing the independence of the judiciary "through the constitution or adoption of laws establishing 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>2</sup>

For decades, however, Morocco 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.<sup>3</sup> Despite constitutional guarantees of judicial independence and separation of powers, the Ministry of Justice has comprehensive and effective control over the entire judiciary, including the *Conseil Supérieur de la Magistrature* (CSM), the career of judges and judicial administration.<sup>4</sup>

In 2011, following a series of peaceful protests, the Moroccan government initiated a process of constitutional, institutional and legal reform. A new constitution was approved by referendum in July 2011, establishing new institutions that have the potential to enhance the rule of law and the independence of the judiciary (the 2011 Constitution). In particular, the 2011 Constitution requires the adoption of four organic laws on the Statute for Judges, the High Council of the Judiciary, and the Constitutional Court.<sup>5</sup>

The provisions of the 2011 Constitution on the judiciary constitute an important step towards ending the executive's control over the judiciary and interference in judicial matters, in particular by providing for the establishment of a new body to oversee the judiciary, the *Conseil Supérieur du Pouvoir Judiciaire* (CSPJ). Under article 113 of the 2011 Constitution, the new CSPJ is to ensure the application of guarantees relating to the independence, appointment, promotion, retirement and discipline of judges. Article 116 of

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<sup>1</sup> Human Rights Committee, General comment No. 32, article 14: Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para. 19.

<sup>2</sup> *Id.*

<sup>3</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>4</sup> See the ICJ's report, "Reforming the Judiciary", November 2013, pages 16-18, 27-30 and 37-39, available at <http://www.icj.org/morocco-judicial-reform-must-be-comprehensive-and-meaningful/> last accessed 27 March 2015.

<sup>5</sup> 2011 Constitution, articles 112, 116, 131, and 133.

the 2011 Constitution affirms that an organic law will set “the election, organization and functioning of the *Conseil Supérieur du Pouvoir Judiciaire*, as well as the criteria concerning the management of judges’ careers and the rules of disciplinary proceedings.”<sup>6</sup>

In line with the Constitution’s provisions on the CSPJ, and following a “national dialogue” on the reform of the justice system that was initiated by the Ministry of Justice, Draft Law No. 100.13 on the CSPJ (the Draft Law) was presented by the Minister of Justice and Liberties to the Cabinet, which adopted the text on 18 September 2014. The Draft Law is currently being reviewed by Parliament.

In order to achieve meaningful reform of the justice system in Morocco, it is crucial that the organic laws relating to the judiciary are fully in line with international law and standards. In this memo, the ICJ analyses the Draft Law in light of international law and standards and formulates recommendations for amendments and reform that, together with sufficient political will, may help to 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 composition, independence, organization, and competencies of the CSPJ.

### **Composition of the CSPJ**

According to article 115 of the Constitution and article 5 of the Draft Law, the CSPJ is presided over by the King and is comprised of:

- i. the First President of the Court of Cassation, who will be the Delegate President of the CSPJ;
- ii. the Prosecutor-General to the Court of Cassation;
- iii. the President of the First Chamber of the Court of Cassation;
- iv. four representatives of the judges of the Courts of Appeal, elected from among them;
- v. six representatives of the judges of the Courts of First Instance, elected from among them;
- vi. the Ombudsman;
- vii. the President of the National Human Rights Council; and
- viii. five persons nominated by the King who are known for their competence, impartiality, integrity and for their contribution to the independence of justice and the rule of law. One of the five will be nominated by the Secretary General of the High Council of Muslim Scholars.

Thus, among the 20 members of the CSPJ, 13 will be judges, including the Prosecutor-General to the Court of Cassation,<sup>7</sup> of whom 10 will be judges elected by their peers. The

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<sup>6</sup> See also Draft Law No. 100.13 on the *Conseil Supérieur du Pouvoir Judiciaire* adopted by the Cabinet on 18 September 2014, article 1. Available at: <http://www.justice.gov.ma/forumLegislation/Docs/AvantProjets/%D9%85%D8%B4%D8%B1%D9%88%D8%B9%20%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D8%AA%D9%86%D8%B8%D9%8A%D9%85%D9%8A%20%D8%B1%D9%82%D9%85%20100.13%20%D9%8A%D8%AA%D8%B9%D9%84%D9%82%20%D8%A8%D8%A7%D9%84%D9%85%D8%AC%D9%84%D8%B3%20%D8%A7%D9%84%D8%A3%D8%B9%D9%84%D9%89%20%D9%84%D9%84%D8%B3%D9%84%D8%B7%D8%A9%20%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A6%D9%8A%D8%A9.pdf>, last accessed 27 May 2015.

<sup>7</sup> Under Moroccan law, prosecutors are part of the judicial corps.

persons appointed by the King, either directly to the CSPJ or to posts that lead to CSPJ membership *ex officio*, make up 10 of the 20.<sup>8</sup>

With respect to the ten judges who are elected, the number of women judges elected must be proportionate to the total number of women in the judicial corps as a whole.<sup>9</sup> The Delegate President of the CSPJ determines the number of elected women judges.<sup>10</sup>

The election procedure for the ten elected judges of the CSPJ is detailed in the Draft Law. In order to stand for election, candidates must: have at least five years of experience; to be a judge sitting on one of the Courts of Appeal or Tribunals of First Instance; not to have been subject to a disciplinary sanction unless the concerned judge was rehabilitated; and not to be on mid or long-term sickness absence.<sup>11</sup> The Delegate President of the CSPJ draws up the list of eligible voters,<sup>12</sup> reviews whether the candidates' applications meet the requirements, and establishes the final list of candidates.<sup>13</sup> Candidates can challenge both the rejection of their application and the results of the vote before the administrative chamber of the Cassation Court.<sup>14</sup>

Four judges from the appeal courts and six judges from first instance tribunals are elected by the members of the judiciary by secret ballot and relative majority.<sup>15</sup> The elected members cannot sit as judges in any jurisdiction during their term on the CSPJ.<sup>16</sup> Moreover, the elected judges cannot be members of the executive board of a professional magistrates' association or of any association working on the justice system or any of its branches.<sup>17</sup> Finally, elected judges can serve on the CSPJ for only one term of five years, while those members appointed by the King can have their mandate renewed for a second term.<sup>18</sup>

As regards the members of the CSPJ who are appointed by the King, article 7 of the Draft Law excludes all those who are members of the Government, the Parliament, the Constitutional Court, the Court of Auditors, the Economic, Social and Environmental Council and the other bodies established by Title XII of the Constitution.<sup>19</sup>

According to the Draft Law, a CSPJ member's mandate can be terminated before the expiration of his or her term in the following cases: mandatory retirement of the elected judge, approval by the CSPJ of the resignation of a member, and dismissal from the

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<sup>8</sup> Pursuant to article 17 of the new Draft Organic Law on the Statute for Judges, the King appoints the President and Prosecutor-General of the Court of Cassation. The Ombudsman and the President of the National Council for Human Rights are appointed to their offices by royal decree (Article 2 of Royal Decree No. 1-11-25 of 17 March 2011 on the establishment of the Ombudsman, Article 34 of Royal Decree No. 1-11-19 of 1 March 2011 on the establishment of the National Council for Human Rights).

<sup>9</sup> 2011 Constitution, article 115; Draft Law No. 100.13, article 5.

<sup>10</sup> Draft Law No. 100.13, article 20.

<sup>11</sup> Draft Law No. 100.13, article 24.

<sup>12</sup> Draft Law No. 100.13, articles 23 and 25.

<sup>13</sup> Draft Law No. 100.13, articles 27 and 28.

<sup>14</sup> Draft Law No. 100.13, articles 27 and 45.

<sup>15</sup> 2011 Constitution, article 115; and Draft Law No. 100.13, articles 34 and 35.

<sup>16</sup> Draft Law No. 100.13, article 6.

<sup>17</sup> Draft Law No. 100.13, article 6.

<sup>18</sup> Draft Law No. 100.13, article 12.

<sup>19</sup> Title XII of the Constitution details the bodies in charge of the protection and promotion of human rights, such as the National Human Rights Council and the Ombudsman, the regulating bodies such as the High Authority for Audio-Visual Communication and the anti-corruption body, and the advisory councils for education, family and childhood, youth and associative action.

CSPJ.<sup>20</sup> Dismissal can be pronounced by the CSPJ for breach of the obligations set out in the organic law, the exercise of an activity or acceptance of a position or elective office incompatible with membership of the CSPJ, or permanent physical disability making it impossible to carry out the functions of a member of the CSPJ.<sup>21</sup> The Draft Law is silent on the procedure to be followed by the CSPJ with a view to pronouncing dismissals, including the guarantees of the rights of the concerned CSPJ member to challenge the grounds for the dismissal decision and to have the decision reviewed.

The provisions of the Constitution and the Draft Law establishing the composition of the CSPJ provide some improvements in comparison to the composition of the CSM, including the fact that the Minister of Justice no longer sits as Vice-President.

It is positive that 13 of the 20 members will be judges, including the Prosecutor-General to the Court of Cassation. However, it may have been preferable to have a majority of the CSPJ members be judges elected by their peers.

Judicial councils should be independent bodies consisting of a majority of judges. 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." While the Special Rapporteur recommended a "genuinely plural composition", he also noted that "in many cases it is important that judges constitute the majority of the body so as to avoid any political or other external interference."<sup>22</sup> In so far as the CSPJ conducts disciplinary proceedings concerning judges, it is also worth noting that the current Special Rapporteur has recommended that the independent body responsible for judicial accountability "should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable. No political representation should be permitted."<sup>23</sup>

It is good practice to ensure that at least half of the members of judicial councils are judges chosen by their peers. The European Charter on the Statute for Judges 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".<sup>24</sup>

In the Moroccan context, there is a long history of executive interference in the judiciary, including the Minister of Justice using his involvement in and powers over the CSM as a means to control the career of judges, thereby undermining individual and institutional independence. As such, in order to ensure the independence of the judiciary in Morocco,

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<sup>20</sup> Draft Law No. 100.13, article 13.

<sup>21</sup> Draft Law No. 100.13, article 13.

<sup>22</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 28. See also Art. 9 of the Universal Charter of the Judge (Appointment of judges "should be carried out by an independent body, that include substantial judicial representation"), approved by the International Association of Judges on 17 November 2009.

<sup>23</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc A/HRC/26/32 (28 April 2014), para 126.

<sup>24</sup> 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.

the ICJ recommends that the Draft Law be amended to provide that the majority of the CSPJ members be judges who are chosen by their peers. In addition, the Draft Law should be amended to set out detailed and objective criteria for the appointment of the five members to be named by the King. In particular, the ICJ considers that most if not all of these five individuals should be drawn from representatives of the legal profession, including practicing lawyers and law professors.

Additionally, the Draft Law should be amended to ensure that the Prosecutor-General and President of the Court of Cassation are each appointed to these offices in an independent manner, through a transparent procedure that is based on objective criteria which include, among others, skills, knowledge, experience and integrity. The King, as a matter of a constitutional practice, appoints both the President and Prosecutor-General of the Cassation Court to their offices. Article 17 of the new Draft Organic Law on the Statute for Judges 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 Law is silent as to the grounds and procedure for such termination.

The ICJ believes that if the appointment procedure of the President and Prosecutor-General of the Court of Cassation is not improved, not only will this undermine the perceived independence of their offices, it will undermine the perceived and perhaps the actual ability of the CSPJ to function as an independent body. This is particularly important because of the sweeping powers that the First President of the Cassation Court, who is *ex officio* Delegate President of the CSPJ, is vested with by the Draft Law.

Further, it is of crucial importance that the mandate of the members of the CSPJ is secured until the end of the term unless for reasons of incapacity or behaviour they are rendered unfit to discharge their duties. The term of office of both the elected and appointed members of the CSPJ should be the same. The grounds and the procedure for their dismissal should be clearly defined and set out in the law, guarantee the rights of the concerned CSPJ member to a fair and transparent procedure, and protect against arbitrary dismissal.

**In light of the above, the ICJ 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. Ensuring that the CSPJ consists of a majority of judges who are elected by their peers;**
- ii. Setting out new procedures for the appointment of individuals to the posts of President and Prosecutor-General of the Court of Cassation that ensure the selection is made in an independent manner and through a transparent procedure that is based on objective criteria, which include, among others, skills, knowledge, experience and integrity;**
- iii. Including objective criteria and qualifications for the five members of the CSPJ to be appointed by the King. Such criteria should ensure that all or most of the five individuals are members of the legal profession, including practicing lawyers and law professors;**

- iv. **Enhancing the requirements for candidates seeking election with a view to including, among other things, integrity, independence, impartiality and competence;**
- v. **Ensuring that all members of the CSPJ have the same term of office, and that their mandate is secured until the end of this term, except in cases of incapacity or behaviour that renders them unfit to discharge their duties; and**
- vi. **Clearly defining and establishing the grounds and the procedure for dismissal of members of the CSPJ and ensuring that this procedure is fair, transparent and protects the rights of the concerned member, including against arbitrary dismissal.**

### **Independence of the CSPJ**

The bodies in charge of overseeing the judiciary must be truly independent and granted the necessary authority to promote the efficient functioning of the judiciary and to safeguard its independence. Judicial councils must be both able to act independently and they must have the ability to ensure that the judiciary as a whole as well as each judge is truly independent. The Human Rights Committee has recommended the establishment of "an independent body charged with the responsibility of appointing, promoting and disciplining judges at all levels".<sup>25</sup> The European Charter on the Statute for Judges envisages an authority "independent of the executive and legislative powers" for every decision "affecting the selection, recruitment, appointment, career progress or termination of office of a judge".<sup>26</sup>

In Morocco, judicial independence depends in large part on ensuring the institutional, financial and administrative independence of the CSPJ; enhancing its powers to oversee all issues relating to the judiciary, including judicial administration and the career of judges, and adopting and enforcing fair and transparent procedures to be followed by the CSPJ in the exercise of these functions.

Under article 3 of the Draft Law, "the CSPJ exercises its function in an independent manner, in conformity with articles 107-113 of the Constitution." To this end, the article requires the State to "make available the necessary human and material resources" to the CSPJ. Under both article 116 of the Constitution and article 4 of the Draft Law, the CSPJ is to have legal personality and administrative and financial autonomy. With respect to the financial autonomy of the CSPJ, article 59 of the Draft Law affirms that the Council has its own budget, which is included in the State budget as a separate chapter. The budget is drafted and implemented by the Delegate President of the CSPJ. The organic law also provides that at the beginning of its functioning, the State will make available to the CSPJ any movable or immovable asset, as well as the human resources and the monetary funds necessary until the elaboration of a specific budget for the CSPJ.<sup>27</sup> Under both article 46 and 47 of the Draft Law, the CSPJ establishes its internal regulation. This regulation determines the administrative and financial structures of the CSPJ, their number, competencies and organization and the management of them. The internal regulation must be submitted to the Constitutional Court for review.<sup>28</sup>

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<sup>25</sup> Concluding Observations of the Human Rights Committee on Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 17. See also Concluding Observations of the Human Rights Committee on Honduras, UN Doc. CCPR/C/HND/CO/1, para. 16.

<sup>26</sup> European Charter on the Statute for Judges, Principle 1.3.

<sup>27</sup> Draft Law No. 100.13, article 110.

<sup>28</sup> Draft Law No. 100.13, article 111.

At article 47, the Draft Law provides for the establishment of a General Secretariat, composed of judges, officers from public administration bodies and institutions, and other administrative and technical staff. A Secretary General will be appointed by royal decree following a proposal of the Delegate President of the Council after consultation with the other members of the Council. The Secretary General will be chosen from among the judges and prosecutors of '*grade exceptionnel*' or higher.<sup>29</sup> According to article 47 of the Draft Law, the Secretary General performs his or her duties under the authority of the Delegate President of the CSPJ.<sup>30</sup>

Although the guarantees for the CSPJ's institutional independence provide some improvements over the CSM, certain deficiencies of the current system have not been addressed in the Draft Law. With a view to enhancing the institutional independence of the CSPJ, the Draft Law should be amended, as mentioned above, to ensure that the majority of the CSPJ members are judges elected by their peers and that clear, detailed and objective criteria and independent and transparent procedures are set out for the appointment of the First President and Prosecutor-General to the Court of Cassation as well as the five members of the CSPJ who will be appointed by the king.

With regard to financial independence, the ICJ believes that the Draft Law should be amended: to ensure that the CSPJ is directly involved in the preparation of the budget for the entire judiciary, not only the CSPJ; to empower the CSPJ to administer the allocation of judicial resources; and to ensure that adequate financial resources are available for both the CSPJ and the judiciary as whole. The ICJ is concerned that the current Draft Law does not provide for the authorities to ensure effective means and adequate resources for the judiciary. The ICJ is also concerned that the current Draft Law does not provide for the CSPJ to be consulted directly by the Parliament or the Government in setting the budget for the judiciary or to be meaningfully involved in its management.

This runs counter to international standards on the matter. 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.<sup>31</sup> A number of regional standards also provide that the judiciary should be consulted regarding the preparation of the budget and its implementation.<sup>32</sup>

In terms of enhancing the organizational independence of the CSPJ, the ICJ believes that because of the extensive powers conferred on the CSPJ Secretary General by the Draft Law, including in terms of the administrative management of the CSPJ as well as issues pertaining to the career of judges, amendments should be introduced to ensure that the CSPJ Secretary General is appointed by and reports to the CSPJ, not only to its President.

**In light of the above, the ICJ 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:**

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<sup>29</sup> Draft Law No. 100.13, article 47.

<sup>30</sup> Draft Law No. 100.13, article 47.

<sup>31</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 39.

<sup>32</sup> African Commission on Human and Peoples' Rights (ACHPR) Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section A, Principle 4(v); Council of Europe Committee of Ministers Recommendation (2010)12, adopted 17 November 2010, para. 40.

- i. **Ensuring that the CSPJ is institutionally and organizationally independent including by:**
  - a. **Ensuring that the procedures for the election and nomination of the CSPJ members protect against the executive's undue or unwarranted interferences in judicial matters;**
  - b. **Providing that the members of the CSPJ appoint and oversee the work of the Secretary General of the CSPJ and other members of the General Secretariat;**
  - c. **Guaranteeing adequate operational and administrative resources for the CSPJ; and**
  - d. **Ensuring that the CSPJ exercises full control over these resources;**
- ii. **Requiring Parliament to involve the CSPJ, including through meaningful direct consultation, in determining the budget for the judiciary; and**
- iii. **Empowering the CSPJ to administer the allocation of judicial resources.**

### **Organization of the CSPJ**

Some of the provisions of the Draft Law relating to the organization and functioning of the CSPJ have the potential to undermine judicial independence.

Article 51 of the Draft Law establishes a coordinating Committee between the CSPJ and the Ministry of Justice, charged with "coordination in the field of judicial administration, under the joint supervision of the Delegate President of the Council and the Minister of Justice, each one in his area of competence and in a way which will not run contrary to the independence of the judiciary."<sup>33</sup>

The composition and the competencies of the coordinating body will be determined by a joint decision of the Delegate President and the Ministry of Justice.<sup>34</sup>

The ICJ is concerned that, in the absence of any details about the composition and the competencies of the coordinating Committee, the joint decision might formally, or as a matter of practice, purport to provide both the Delegate President of the CSPJ and the Minister of Justice with far-reaching powers in the area of judicial administration and court management that could potentially undermine judicial independence at the institutional and individual level.

It is critical that issues pertaining to judicial administration are clearly defined in the law and are dealt with in a manner that both respects the independence of the judiciary and protects against undue or unwarranted interference from the executive. The Singhvi Declaration for instance provides that "the main responsibility for court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role."<sup>35</sup> The UN Special Rapporteur on the independence of judges and lawyers has affirmed that decisions relating to judicial administration should protect against undue interference, including from within the judiciary itself. For example, the Special Rapporteur pointed to practices of allocating court cases hampering the independence of judges,

<sup>33</sup> Draft Law No. 100.13, article 51.

<sup>34</sup> Draft Law No. 100.13, article 51.

<sup>35</sup> Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), para. 32.



noting that the "assignment of court cases at the discretion of the court chairperson may lead to a system where more sensitive cases are allocated to specific judges to the exclusion of others."<sup>36</sup>

Another source of concern is the fact the Draft Law is silent as to the composition and the competencies of the General Inspection Service of the judiciary, established under article 50 of the Draft Law, within the Council. The General Inspection Service will assess and report to the CSPJ regarding the performance of individual judges (this is distinct from disciplinary proceedings initiated in response to specific complaints, discussed later in this document). The General Inspection Service will be headed by a General Inspector who is appointed by royal decree on a proposal of the Delegate President after consultation with the other members of the CSPJ. The General Inspector will be chosen among the judges and prosecutors belonging to categories of '*grade exceptionnel*' or higher.

Under the current framework, the Judicial Inspection Service, which is under the direct authority of the Ministry of Justice, assesses the performance of members of the judiciary.<sup>37</sup> According to the Organization of the Judiciary Law of 1974, the Minister of Justice appoints the inspectors from either the judges of the Court of Cassation or those judges who work in the Central Administration of the Ministry of Justice.<sup>38</sup> Judges appointed as inspectors have general powers of "investigation, verification and control" and can specifically summon judges, hear their testimony and review all relevant files.<sup>39</sup> The inspection reports are sent immediately to the Minister of Justice with conclusions and recommendations for action.<sup>40</sup>

While the ICJ welcomes the fact that the Draft Law ends the Ministry of Justice's control over the Judicial Inspection Service, the ICJ is concerned that the Draft Law refers to subsidiary, ordinary law to set out the composition, competencies, and areas of intervention of the General Inspection Service of the judiciary. This seems to run counter to article 116 of the Constitution, which provides that on disciplinary matters experienced inspector-judges assist the CSPJ and that the rules for disciplinary procedure will be determined by an organic law.

Under the Moroccan legal system, organic laws, such as the law on the CSPJ, are subject to a mandatory, a priori review of conformity with the Constitution by the Constitutional Court. Ordinary laws are not subject to the same procedure.

**In light of the above, the ICJ 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) Ensuring that if the coordinating committee between the CSPJ and the Ministry of Justice is to exist, its competencies and composition are clearly defined in and provided for by the organic law;**

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<sup>36</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para.47.

<sup>37</sup> Decree No.2-98-385 of 23 June 1998 on the functions and organization of the Ministry of Justice, article 1.

<sup>38</sup> Law No.1-74-338, article 13.

<sup>39</sup> Law No.1-74-467, article 17(3).

<sup>40</sup> Law No.1-74-467, article 17(4).

- ii) **Ensuring that the scope and exercise of these competencies does not undermine the independence of the judiciary or the individual independence of judges;**
- iii) **Empowering the CSPJ to oversee all issues pertaining to judicial administration;**
- iv) **Ensuring that the organic law on the CSPJ sets out the composition, competencies, and areas of intervention of the General Inspection Service of the judiciary; and**
- v) **Detailing objective criteria and a transparent procedure for assessing the work of judges by the Judicial Inspection Service. Assessment procedures must be uniform, impartial and fair, include discussions with the judge concerned and guarantee the right of the judge to challenge assessments before the CSPJ.**

### **Competencies of the CSPJ**

#### ***i. Management of the career of judges***

Under article 113 of the 2011 Constitution, the new CSPJ is to ensure the application of guarantees relating to the independence, appointment, promotion, retirement and discipline of judges. The Draft Law on the CSPJ affirms that “the Council oversees the implementation of guarantees provided for judges. In order to do this, the CSPJ is responsible for managing their career on the basis of the principles of equal opportunities, merit, competence, impartiality and the quest for equality.”<sup>41</sup> Article 62 of the Draft Law provides that all decisions relating to judges’ careers rendered by the CSPJ or its Delegate President must be reasoned.<sup>42</sup>

The Draft Law further requires the CSPJ to take into account the following general criteria when overseeing judges’ careers: standards relating to the description of tasks and qualifications; skills and professional qualifications; professional ethics and commitment to judicial values; scientific and intellectual skills; specialized training and scientific interests; participation in training programmes; family stability; and judges’ social and health conditions.<sup>43</sup> The CSPJ must also consider the performance assessment reports,<sup>44</sup> the reports of the General Inspection Service and the reports of the hierarchical supervisors of

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<sup>41</sup> Draft Law No. 100.13, article 62.

<sup>42</sup> Draft Law No. 100.13, article 62.

<sup>43</sup> Draft Law No. 100.13, article 63.

<sup>44</sup> As provided by articles 46-47 of the Draft Law on the Statute for Judges, a judge’s performance is assessed once per year by his or her direct superiors according to the following system: the First President of the Cassation Court evaluates the performance of Cassation Court judges and Presidents of the Appellate Courts; the Prosecutor-General at the Cassation Court evaluates the performance of prosecutors at the Cassation Court and of Public Prosecutors at Appellate Courts; the Presidents of Appellate Courts evaluate Appellate Court judges and the Presidents of First Instance Tribunals; the Prosecutors General at Appellate Courts evaluate their deputies and prosecutors at First Instance Tribunals; the Presidents of First Instance Tribunals evaluate First Instance Tribunal judges; the Public Prosecutors at First Instance Tribunals evaluate their deputies; and judges who are seconded to the General Inspection Service or to the administration of the CSPJ, the Cassation Court or the Ministry of Justice are evaluated by their hierarchical supervisors.

judges.<sup>45</sup> As regards prosecutors, according to article 116 of the Constitution, the CSPJ also takes into account the assessment reports of their hierarchical authority.<sup>46</sup>

## **ii. Appointments**

In terms of the appointment of judges, article 64 of the Draft Law affirms that the CSPJ is competent to appoint new judges, as well senior judicial officials (i.e. the First President of an Appeal Court, Prosecutor-General of an Appeal Court, First President of a First Instance Tribunal, and the Public Prosecutor).<sup>47</sup> The appointments are approved by royal decree.<sup>48</sup> New judges are appointed to their positions on the basis of: the needs of the tribunals following promotions and transfers, the assessment records from the judges' training institute, their ranking according to the results of the final exam, the social situation, and the wishes they expressed in terms of the courts they would prefer to be appointed to.<sup>49</sup>

Senior judicial officials are appointed for a fixed term of 4 years, renewable once.<sup>50</sup> Security of tenure is not granted for these positions.<sup>51</sup> The Delegate President of the CSPJ, assisted by the Secretariat, establishes the list of vacancies for senior judicial functions, the conditions to be met by candidates, and the deadline for the submission of applications.<sup>52</sup> The CSPJ examines the applications on the basis of the following criteria: standards relating to the description of tasks and qualifications; ability to manage the responsibilities; ability to communicate and educate; aptitude to organize, supervise and manage; aptitude regarding decision making; competence in judicial administration; and any wishes expressed in terms of the courts they would prefer to be appointed to.<sup>53</sup> The CSPJ is also to take into consideration reports prepared by the Minister of Justice concerning the performance of the persons holding senior judicial functions with regards to their oversight of the management and of the administrative direction of tribunals.<sup>54</sup>

The ICJ welcomes the fact that both the Constitution and the Draft Law empower the CSPJ to oversee the appointment of judges. The criteria set out in the Draft Law for the appointment of judges represents a significant improvement from past practices. To enhance the safeguards against judicial appointments for improper motives, however, the ICJ believes that the Draft Law should be amended to ensure that selection criteria for judges must be based on training, qualifications, ability and integrity and applied in a transparent manner,<sup>55</sup> as well as clearly prohibit any form of discrimination in the selection process.

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<sup>45</sup> According to article 5 of the Draft Law on the Statute for Judges, the senior judicial functions ("*responsables judiciaires*") are: First President of an Appeal Court, Prosecutor-General of an Appeal Court, First President of a First Instance Tribunal, and Public Prosecutor.

<sup>46</sup> 2011 Constitution, article 116; Draft Law No. 100.13, article 63; Draft Law on the Statute for Judges, article 46.

<sup>47</sup> Article 5 of the Draft Law on the Statute for Judges.

<sup>48</sup> Draft Law No. 100.13, article 65.

<sup>49</sup> Draft Law No. 100.13, article 66.

<sup>50</sup> Draft Law No. 100.13, article 67.

<sup>51</sup> Draft Law No. 100.13, article 67.

<sup>52</sup> Draft Law No. 100.13, article 68.

<sup>53</sup> Draft Law No. 100.13, article 69.

<sup>54</sup> Draft Law No. 100.13, article 69.

<sup>55</sup> See generally ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section A, Principle 4(i) (noting that the "sole criteria" shall be the suitability of a candidate "by reason of integrity, appropriate training or learning and ability"); Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: independence, efficiency and responsibilities, para. 44; European Charter on the Statute for Judges, para. 2.1. See also *International principles on the independence and accountability of judges, lawyers and*

Under international standards, the UN Basic Principles on the Independence of the Judiciary state 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>56</sup> The African Commission on Human and Peoples' Rights 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."<sup>57</sup> Both instruments prohibit discrimination in the selection of judges, whether on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status.<sup>58</sup>

The Draft Law should also provide for specific measures to ensure women's full and equal participation in the judiciary, including at the senior level. UN human rights bodies recommended that qualified judges should be appointed from among women and minorities.<sup>59</sup>

The Committee for the Elimination of Discrimination against Women, mandated by the Convention on the Elimination of all forms of Discrimination against Women (to which Morocco became party in 1993) with interpreting and applying its provisions, has emphasised that article 7 of the Convention requires States not only to remove any legal barriers, but also to take additional measures to ensure that women in practice truly enjoy equal opportunities to participate in the judiciary. These may include temporary special measures such as "recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary".<sup>60</sup>

As noted by the UN Special Rapporteur on the independence of judges and lawyers, "since a primary function of the judiciary is to promote equality and fairness, the composition of courts and other judicial offices should reflect the State's commitment to equality. The judicial system should also demonstrate a fair representation of the pluralistic society and communities they serve, by reflecting their diversity, so as to preserve and improve public trust and confidence in its credibility, legitimacy and impartiality."<sup>61</sup>

In terms of the appointment of senior judicial officials, the ICJ welcomes the fact that it is the CSPJ who decides on these appointments. At the same time, the ICJ is concerned that such decisions are based on, among other things, consideration of reports by the Minister

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*prosecutors: Practitioners' Guide No. 1*, International Commission of Jurists, Geneva, 2007, p. 41.

<sup>56</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10.

<sup>57</sup> ACHPR Principles and Guidelines, Section A, Principle 4(h).

<sup>58</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A.4(j).

<sup>59</sup> Concluding Observations of the Human Rights Committee on Sudan, UN Doc. CCPR/C/79/Add.85, para. 21; Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 34.

<sup>60</sup> Committee on the Elimination of Discrimination against Women, General recommendation No. 23: Political and public life (1997), UN Doc HRI/GEN/1/Rev.9 (Vol.II), para 15; see also para 5.

<sup>61</sup> Interim report of the Special Rapporteur on the independence of judges and lawyers, A/66/289, 10 August 2011, para 26.

of Justice appraising and reviewing the exercise by senior judicial officials of their functions relating to judicial administration.

Historically, both directly and through the Judicial Inspection Service, the Minister of Justice has had extensive powers over the careers of judges, including the promotion and appointment of judges to senior positions.<sup>62</sup> The ICJ therefore believes that any mandate under the Draft Law for the Minister of Justice to prepare reports on how senior judicial officials exercise their functions relating to judicial administration should be removed. It is the view of the ICJ that the CSPJ should oversee all issues pertaining to judicial administration.

### ***iii. Promotions and transfers***

In relation to the promotion of judges, the Draft Law provides for a promotion roster to be established by the Delegate President.<sup>63</sup> Only judges who are on the roster can be promoted. Judges can request the Delegate President to amend the list. The Decisions of the latter can be challenged before the administrative chamber of the Cassation Court.<sup>64</sup>

Article 71 of the Draft Law lists the criteria to be taken into account by the CSPJ when deciding on the promotion of judges as: their seniority in the judiciary and within their grade, their commitment to delivering judgments within a reasonable time, the quality of their judicial decisions, their ability to organize and manage cases, their preparation of cases, their utilisation of new technologies, their ability to communicate and their ability to supervise and educate.<sup>65</sup> Decisions on the promotion of prosecutors, in addition to the above criteria, include their implementation of the general focus of criminal justice policy, their implementation of written instructions and the quality of their requests.<sup>66</sup>

Judges can also ask to be transferred on the basis of a vacancy list established by the General Secretariat of the CSPJ.<sup>67</sup> With regards to the transfer of judges, the criteria considered by the CSPJ are: the wishes expressed by judges, the needs of the tribunals, geographical proximity, and the social situation.<sup>68</sup> Further conditions are to be detailed in the CSPJ's internal regulation.

In case of necessity and if there is the need to fill a vacant position, judges can be delegated to a different jurisdiction, in accordance with the conditions set out in the Law on the Statute for Judges.<sup>69</sup> The judges can be delegated by the President or General

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<sup>62</sup> The current system is governed by Law No.1-74-467 and Decree No.2-75-883 of 23 December 1975 determining the conditions and modalities of rating judges and their advancement in grade and echelon. Article 23 of the law provides that no judge can be promoted to a superior grade if he or she is not on the promotion roster. Article 7 of the Decree provides that "the list is set up and adopted by the Minister of Justice following a proposition by the CSM".

<sup>63</sup> The draft law on the Statute for Judges provides, at article 26, that judges are entitled to be placed on the promotion roster if they have either 5 or 6 years of experience in their grade. The number of years required depends on the level of their seniority.

<sup>64</sup> Draft Law No. 100.13, article 70.

<sup>65</sup> Draft Law No. 100.13, article 71.

<sup>66</sup> Draft Law No. 100.13, article 71.

<sup>67</sup> Draft Law No. 100.13, article 72.

<sup>68</sup> Draft Law No. 100.13, article 73.

<sup>69</sup> Draft Law No. 100.13, article 74. According to articles 64 to 66 of the Draft Law on the Statute for Judges, judges can only be delegated in cases of emergencies and when there is the need to fill a vacant position. When a judge is delegated, the following elements should be taken into account: the agreement of the senior judicial official, geographic proximity, and the

Prosecutors of the Court of Appeal, in relation to the courts under their authority, and the President or Prosecutor-General of the Cassation Court, in relation to the Court of Appeal.<sup>70</sup> The delegation is temporary and can be ordered without the judge's consent. Judges can, according to article 74 of the Draft Law on the CSPJ and article 69 of the Draft Law on the Statute for Judges, ask the Council to review the decision regarding the delegation. At their request, judges can be placed on leave of absence; seconded outside the judiciary while still being affiliated to it and enjoying their rights to promotion and pension; and seconded to public bodies, institutions and administrative bodies while still being affiliated to the judiciary and enjoying their rights to a salary, promotion and a pension.<sup>71</sup> Decisions on requests from judges relating to these matters are taken by the Delegate President of the CSPJ after consultation with a special commission established pursuant to article 75 of the Draft Law and appointed by the CSPJ. The commission comprises the Prosecutor-General at the Cassation Court, two elected members, and two non-judge members.

Under international standards, the promotion of judges should be based on objective criteria, such as "ability, integrity and experience".<sup>72</sup> The Singhvi Declaration states: "Promotion of a judge shall be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law."<sup>73</sup> The European Charter on the Statute for Judges stipulates a system of promotion "based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned".<sup>74</sup>

International standards are also clear that assignment and transfer decisions should be decided by judicial authorities and that the consent of the judge should be sought. The Singhvi Declaration states the assignment of a judge to a post "shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist".<sup>75</sup> The Singhvi Declaration further 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".<sup>76</sup>

The Draft Law should therefore be amended with a view to ensuring that the conditions for the delegation 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; that the CSPJ is competent to review, and when necessary to revoke such decisions, and that the entire process protects against arbitrary transfers and guarantees the judge's individual independence.

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"social condition" of the judge. The delegation cannot exceed three months and can only be renewed once with the agreement of the concerned judge. A judge cannot be delegated more than once in five years without his consent. The judge subject to the delegation can appeal the delegation decision to the CSPJ.

<sup>70</sup> Article 65 of the Draft Law on the Statute for Judges.

<sup>71</sup> Draft Law No. 100.13, article 75.

<sup>72</sup> UN Basic Principles on the Independence of the Judiciary, Principle 13; see also ACHPR Principles and Guidelines, Principle A.4(o); Singhvi Declaration, para. 14.

<sup>73</sup> Singhvi Declaration, para. 14.

<sup>74</sup> European Charter on the Statute for Judges, Principle 4.1.

<sup>75</sup> Singhvi Declaration, para. 13.

<sup>76</sup> Singhvi Declaration, para. 15.

The Draft Law should also be amended to ensure that decisions relating to the secondment of judges protects against arbitrary, undue or unwarranted interference in judicial matters and ensures judges' individual independence. The power to second judges to non-judicial functions has a potential for abuse and could be used to undermine judicial independence, in particular when seconded positions offer possible lucrative financial and non-financial benefits. If the secondment process continues to exist, decisions must be taken based on objective criteria, through transparent procedures and by the CSPJ itself, not only by the CSPJ Delegate President as provided for in article 75 of the Draft Law.

#### ***iv. Disciplinary proceedings***

The Draft Law also establishes the disciplinary system for judges. A judge's misconduct can be reported to the Delegate President pursuant to a procedure that will be set out in the CSPJ's internal regulation.<sup>77</sup> According to article 81 of the Draft Law, disciplinary proceedings can only take place once the necessary initial investigations have been undertaken. For such investigations, the CSPJ is assisted by experienced judicial-inspectors who act under the supervision of the Inspector General.<sup>78</sup> The Delegate President presents the results of the initial investigation to the CSPJ, which then decides whether to dismiss the case or to appoint a judge as rapporteur for a full investigation.<sup>79</sup>

Where the CSPJ decides to appoint a rapporteur, the Delegate President notifies the concerned judge of the allegations against him/her and the name of the judge rapporteur appointed to his/her case.<sup>80</sup> The latter conducts further research and investigations, including hearing the concerned judge.<sup>81</sup> Finally, the rapporteur submits his/her conclusions to the CSPJ, which then decides whether to dismiss the case or, if the allegations are serious, to initiate disciplinary proceedings.<sup>82</sup> In cases involving criminal prosecution or serious misconduct, as defined in article 89 of the Draft Law on the Statute for Judges,<sup>83</sup> the Delegate President can suspend the judge concerned after consulting with the commission established pursuant to article 75 of the Draft Law.<sup>84</sup>

The judge subject to the disciplinary procedure has the right to be assisted by a lawyer or a judge. The judge or his/her legal representative can access and make a copy of the case file, including the report of the rapporteur.<sup>85</sup> The judge has a right to a hearing before the CSPJ and is given eight days' notice prior to the hearing.<sup>86</sup> The CSPJ must take a decision

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<sup>77</sup> Draft Law No. 100.13, article 80.

<sup>78</sup> 2011 Constitution, article 116; and Draft Law No. 100.13, article 81.

<sup>79</sup> Draft Law No. 100.13, article 82.

<sup>80</sup> Draft Law No. 100.13, article 83.

<sup>81</sup> Draft Law No. 100.13, article 83.

<sup>82</sup> Draft Law No. 100.13, articles 83 and 84.

<sup>83</sup> 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, a 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>84</sup> Draft Law No. 100.13, article 86.

<sup>85</sup> Draft Law No. 100.13, articles 87 and 88.

<sup>86</sup> Draft Law No. 100.13, article 90.

on a judge's case within 4 months from the referral of the case. Following a reasoned decision, the CSPJ can renew the 4 month term once.<sup>87</sup>

Article 114 of the Constitution and articles 95 and 96 of the Draft Law provide that individual decisions of the CSPJ and of its Delegate President are subject to review for "abuse of power" by the highest administrative court. Individual complaints can be submitted to the administrative chamber of the Cassation Court within 30 days of notification of the decision. The review by the administrative court does not automatically suspend the execution of decisions against individual judges. However, the court itself can decide, "exceptionally", to suspend the execution of individual decisions if the concerned judge "expressly" requests such suspension.

The ICJ welcomes the fact that the Draft Law provides for better guarantees for the fairness of disciplinary proceedings for judges, including the rights to defence and to challenge the CSPJ's decisions before the administrative chamber of the Cassation Court. Under the current system, the decisions of the CSM are not subject to any form of review and a judge subject to disciplinary proceedings does not have a right to access all the case files, including, in particular, the report of the judge rapporteur.

The current system is clearly inconsistent with international standards. Principle 20 of the UN Basic Principles on the Independence of the Judiciary and Principle A.4(q) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that decisions in disciplinary, suspension or removal proceedings should be subject to "an independent review". The UN Special Rapporteur on Independence of Judges and Lawyers has also emphasized that "the right to have disciplinary decisions reviewed by a higher judicial tribunal" is "crucial" in order "to avoid the improper use of accountability mechanisms".<sup>88</sup>

However, the ICJ remains concerned that the review of "individual decisions" of the CSPJ by the highest administrative court is limited to cases of "abuse of power". The ICJ recommends that the Draft Law be revised to ensure that the administrative chamber has authority to consider the merits of a decision in a particular case, not only a review restricted to possible abuse of power. The review should be capable of addressing and remedying serious errors in relation to the procedure followed by the CSPJ, in relation to the sufficiency of the evidence, in relation to the CSPJ's decisions on any questions of law, and as to the appropriateness of the sanction. The independence of the reviewing body, the administrative chamber of the Cassation Court, also risks being compromised by the fact that the chamber is part of the Court of Cassation, whose President sits as the Delegate President of the CSPJ.

Therefore, measures aimed at safeguarding the right to an independent, impartial and fair review of decisions of the CSPJ should be enhanced in the organic law.

The ICJ is also concerned that the Draft Law perpetuates some of the practices of the old disciplinary system provided for by Law No. 1-74-467 of 1974. Under this law, in cases of serious professional misconduct or criminal prosecution, the judge may be "immediately suspended from office by order of the Minister of Justice".<sup>89</sup> This immediate suspension does not require any prior consultation with the CSM and the Minister of Justice has

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<sup>87</sup> Draft Law No. 100.13, article 91.

<sup>88</sup> Report of the Special Rapporteur on Independence of Judges and Lawyers, UN Doc A/HRC/26/32 (28 April 2014), paras 72 and 129.

<sup>89</sup> Law No. 1-74-467, article 62.



discretion to decide which acts or omissions constitute serious misconduct. These powers have been exercised in the past in a way that undermined judicial independence, including the suspension of judges by the Minister of Justice or the Minister's referral of 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>90</sup>

A similar provision is made in the Draft Law, which provides at article 86 that in cases in which criminal proceedings are brought or in other cases involving allegations of serious misconduct a judge may be immediately suspended from carrying out his or her duties by an order of the CSPJ Delegate President, after consulting with the commission established pursuant to article 75. The suspension order states whether the salary of the concerned judge will be paid during the suspension period. The CSPJ is informed of the suspension decision at its next meeting "with a view to taking appropriate measures".

The ICJ is concerned that decisions on immediate temporary suspension are taken by the Delegate President only and not the CSPJ as a whole. The ICJ is also concerned that there is no appeal against these decisions. Judges should have the ability to challenge the suspension through a prompt and fair process of review. Their pay should be maintained during the suspension period.

In addition, although article 89 of the Draft Law on the Statute for Judges defines serious misconduct, the wording of this article is not precise. For example, the CSPJ Delegate President will have discretionary powers to decide what constitutes a failure to comply with obligations of independence and impartiality. Such powers could be used to undermine the independence of judges and expose them to improper political pressure. The provision of the Draft Law that allows judges to be suspended without pay has the potential to exacerbate such pressure.

Under international standards, any allegation of judicial misconduct must be investigated independently, impartially, thoroughly and fairly. Any decisions concerning suspension or removal, should only be made by an independent body and following a fair procedure that protects the rights of the concerned judge. Recommendation (2010)12 of the Council of Europe's Committee of Ministers provides that disciplinary proceedings "should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction".<sup>91</sup>

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<sup>90</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%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%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>91</sup> Council of Europe, Committee of Ministers Recommendation (2010)12, para. 69.

Removal and suspension decisions, even temporary suspension, should be made on the basis of established standards of judicial conduct. According to international standards, the ethical standards that judges are required to meet in the discharge of their professional duties should be set down either in law or codes of conduct.<sup>92</sup> However, the ICJ is concerned that while the Draft Law entrusts the CSPJ to draft, in consultation with the judges' associations, a Code of Judicial Conduct containing the values, principles and rules judges must comply with in the exercise of their functions,<sup>93</sup> the Draft Law does not specify that, once adopted, the Code of Judicial Conduct should be the basis on which judges will be held to account professionally.

#### **v. Other competencies**

Both the Constitution and the Draft Law, affirm that the CSPJ should function as a guardian of the individual independence of judges and provide the CSPJ with the competence to receive referrals submitted by judges relating to their individual cases whenever they consider that their independence is threatened.<sup>94</sup> According to article 98, the CSPJ can receive judges' referrals "every time that there is an attempt to influence the judge in an unlawful manner, and proceed, if the circumstances so require, to the inquiries and investigations needed, including hearing the judge concerned and all persons whose hearing is considered useful." In these cases, the CSPJ will take the measures it considers necessary or will refer the case to the prosecution service if the act is of a criminal nature.<sup>95</sup>

In addition, the CSPJ will draft on its own initiative reports on the situation of the justice system and will elaborate recommendations aimed at, among other things, a better functioning of the justice system and stronger protections for the independence of the judiciary.<sup>96</sup> The CSPJ can also receive reports on the state of the justice system from the First President of the Cassation Court, the Prosecutor-General of the Cassation Court, the Minister of Justice, the General Inspection Service, the National Human Rights Council, professional associations of judges and civil society organizations.<sup>97</sup>

Finally, upon the request of the King, the Government or the Parliament, the CSPJ is mandated to issue advisory opinions on issues related to justice, "provided that this respects the principle of separation of powers."<sup>98</sup> Notably, the issues submitted to the opinion of the CSPJ are to include: draft laws on the situation of the judiciary and of the justice system, strategies and suggested reforms of the justice sector.<sup>99</sup>

The ICJ welcomes the fact that both the Constitution and the Draft Law provide for judges to refer to the CSPJ threats against their independence and attempts at undue influence. This procedure, together with the powers of the CSPJ to investigate such threats and attempts and, when necessary, to refer them to the prosecution service should contribute

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<sup>92</sup> Council of Europe, Committee of Ministers Recommendation (2010)12, para 73; International Bar Association Minimum Standards of Judicial Conduct, para 29(b); Singhvi Declaration, para. 27.

<sup>93</sup> Draft Law No. 100.13, article 99.

<sup>94</sup> 2011 Constitution, article 109; Draft Law No. 100.13, article 97.

<sup>95</sup> Draft Law No. 100.13, article 98.

<sup>96</sup> Draft Law No. 100.13, article 101.

<sup>97</sup> Draft Law No. 100.13, article 103.

<sup>98</sup> Draft Law No. 100.13, article 105.

<sup>99</sup> Draft Law No. 100.13, article 105.

to protecting judges' individual independence and to enhancing the guarantees of judicial independence.

The ICJ is concerned, however, that the Draft Law does not provide for meaningful avenues for the CSPJ to report on all matters relating to the judiciary and to contribute to judicial reform processes, including legislative reforms, on its own initiative. The CSPJ's competencies on these matters are instead advisory in nature and limited to answering formal requests by various stakeholders.

The ICJ believes that all authorities, in particular the Parliament and the Government, should be required to consult the CSPJ and consider its opinion on all matters relating to the judiciary, including judicial reforms, and that the CSPJ should be explicitly empowered to report on such matters independently of all other branches of State and expressly given the discretion to decide on the format of and whether to submit such a report.

**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) Establishing fair and transparent procedures for selecting trainee judges and appointing judges, including senior judicial officials;**
- ii) Specifying objective criteria for appointments, including qualifications, integrity, ability, efficiency and experience, and excluding discrimination on any ground;**
- iii) Ensuring that powers to appraise and review the exercise by senior judicial officials of their functions relating to judicial administration are removed from the Minister of Justice and placed under the oversight of the CSPJ;**
- iv) Ensuring that the procedure for promoting judges is fair, transparent and based on objective criteria, such as ability, integrity and experience;**
- v) Ensuring that assignment and transfer decisions are decided by the CSPJ and that the consent of the judge is sought;**
- vi) Ensuring that the conditions for the delegation of judges to other jurisdictions are clearly defined in the law, that the consent of the concerned judge is sought, that the CSPJ 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;**
- vii) Ensuring that if the ability to second judges to non-judicial functions continues to exist, decisions on secondments are taken by the CSPJ based on objective criteria and through fair and transparent procedures that protect against arbitrary, undue or unwarranted interferences in judicial matters and that guarantee and preserve judges' individual independence;**
- viii) Ensuring that a sufficiently detailed and comprehensive code of ethics, in line with the Bangalore Principles, is developed by the CSPJ, in close consultation with the judges and their professional associations;**
- ix) Providing for this code of ethics to be established in the organic law on the CSPJ as the basis on which judges will be held to account professionally;**
- x) Ensuring that the disciplinary procedure for addressing complaints against judges for alleged breaches of the code of ethics is set out in law, does not undermine the independence and impartiality of**

**the judiciary, and guarantees judges the right to a fair hearing before an independent and impartial body and to due process guarantees, as well as the right to have decisions and sanctions reviewed by a higher, independent, impartial and judicial body in line with international standards, including by ensuring:**

- a) the prompt, independent, impartial, fair and expeditious determination of the complaint;**
  - b) the right to consult and be represented by legal counsel;**
  - c) a reasonable amount of time and adequate facilities to prepare a defence, including the provision of all relevant information relating to the complaint;**
  - d) the authorities not disclose the complaint or charges to the general public until a decision is made, unless the judge concerned decides otherwise;**
  - e) the right of the judge to appeal against any disciplinary decision or sanction to an independent higher tribunal not institutionally linked or subordinated to the Delegate President of the CSPJ;**
  - f) that the review of individual decisions of the CSPJ concerns all the grounds and merits of a particular case, not only those relating to abuse of power;**
  - g) that the review extends to the disciplinary decision and the sanction, both on the basis of the sufficiency of the evidence and of the law;**
  - h) that decisions on immediate suspension must be based on clear and objective grounds and subject to a prompt, fair and transparent review procedure that protect the rights of the concerned judge. The salary and other benefits of the concerned judge should be maintained during the suspension period; and**
- xi) Providing that all authorities, in particular the Parliament and the Government, must consult the CSPJ and consider its opinions on all matters relating to the judiciary, including judicial reforms, and that the CSPJ may on its own initiative report on such matters independently of all other branches of State and has the discretion to decide on the format of and whether to submit such a report.**