

Position Paper

Tunisia - The New Draft Law on the High Judicial Council in Light of International Law and Standards

14 September 2015

The right to an independent and impartial judiciary is an essential element of international law, including the fundamental right to a fair trial.

The right to a fair trial is enshrined in article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which Tunisia has been a party since 1969, and article 7 of the African Charter of Human and Peoples' Rights, to which Tunisia has been a party since 1983.

The UN Human Rights Committee, mandated by the ICCPR to interpret and apply its provisions, has stressed that article 14 requires States to take specific 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".¹

Under the previous Tunisian regime, however, judicial independence and impartiality were undermined by the executive's undue interference in the functioning of the judiciary and its effective control over the courts and the career of judges.² To address this legacy, the Tunisian Constitution of 2014 provides for various safeguards to ensure judicial independence and impartiality, including through the establishment of a new High Judicial Council (HJC) to oversee the selection, appointment, promotion and transfer of judges.³ The 2014 Constitution provides for a new law to determine the HJC's composition, organisation, and procedures.

The Assembly of People's Representatives (APR) adopted a Law on the HJC in May 2015. It failed to include adequate guarantees and safeguards for judicial independence and impartiality. In a memorandum analysing the HJC Law, the International Commission of Jurists (ICJ) expressed serious concern that many of the Law's provisions fell short of international standards on judicial independence.⁴ Following its adoption, the HJC Law was referred to the Tunisian Constitutional Commission (*Instance Provisoire de Contrôle de la Constitutionnalité des Projets de Lois*, IPCC), to assess its conformity with the 2014

¹ 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.

² In 2008, the Human Rights Committee expressed its concern over "the question of the independence of the judiciary" and the fact that "the executive branch still wields too much influence over the High Council of the Judiciary" in its Concluding Observations on Tunisia, UN Doc CCPR/C/TUN/CO/5 (23 April 2008), para. 17. See also the ICJ's report, "*The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*", May 2014, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 17 July 2015.

³ The HJC will replace the temporary judicial body set up in 2013, the *Instance Provisoire de la Justice Judiciaire* (IPJJ). Article 113 of the 2014 Constitution provides that the HJC "shall enjoy financial and administrative independence" and "shall function independently".

⁴ Available here: <http://www.icj.org/tunisia-deeply-flawed-judicial-council-law-should-be-halted-revised/>, last accessed 17 July 2015.

Constitution.⁵ The IPCC found the Law to be unconstitutional both on procedural and substantive grounds.⁶ Consequently, the ARP voted to return the HJC Law to the General Legislation Commission (GLC), and instructed it to consider and use as the basis for its deliberations the March 2015 Draft Law (the Draft Law) that had been developed by the Ministry of Justice and adopted by the Ministerial Council.⁷ The GLC session is reviewing the Draft Law since the ARP reconvened at the end of August.

This process offers a new opportunity for the Tunisian authorities, including the GLC and the APR, to ensure that the law on the HJC is developed and adopted consistent with international law and standards.

While the ICJ acknowledges that the Draft Law provides enhanced guarantees for judicial independence, various provisions of it remain problematic and should be amended to fully comply with international law and standards.

In this memorandum, the ICJ analyses the provisions relating to the composition and competencies of the HJC and formulates recommendations for amendment and reform, including with a view to ensuring that the HJC is institutionally, financially, and organisationally independent; is the only body competent to decide on and manage all issues relating to the careers of judges; and is fully empowered to uphold the independence of the judiciary at the institutional and individual levels.

Composition and independence of the HJC

1. Composition

In order to safeguard the independence of both the judiciary as an institution and individual judges, judicial councils must themselves be independent in composition and granted the necessary powers. Thus, for example, 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”.⁸ 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”.⁹

The Draft Law provides that the new HJC will be composed of four bodies: the Judiciary Council, the Administrative Judicial Council, the Financial Judicial Council, and the Plenary Session.¹⁰ The four bodies have a mixed composition, as follows. The Judiciary Council

⁵ This body, established by Organic Law No. 2014-14 of 18 April 2014, is charged with assessing the constitutionality of new laws pending the establishment of the Constitutional Court in Tunisia.

⁶ IPCC, Decision No. 02/2015 concerning the Organic Law on the High Judiciary Council, 8 June 2015, available at: <http://www.legislation.tn/sites/default/files/news/ta20150024.pdf> (last accessed on 14 August 2015). The IPCC found articles 4, 10, 11, 12, 17, 42, 43, 60, 76, and 81 to be unconstitutional.

⁷ Tunisian Ministerial Council, Organic Draft Law concerning the High Judicial Council, 12 March 2015, available at: http://www.chambre-dep.tn/site/servlet/Fichier?code_obj=89124&code_exp=1&langue=1 (last accessed on 14 August 2015).

⁸ 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, and General Comment no. 32, paras 19 to 20.

⁹ European Charter on the Statute for Judges, Principle 1.3.

¹⁰ 2014 Constitution, article 112; and March Draft Law on the High Judicial Council, article 13.

consists of 27 members: four judges appointed *ex officio*, including the President of and the Prosecutor-General to the Court of Cassation, 14 judges elected by their peers, and 9 independent experts (five are chosen by the Bar Association among lawyers and four by Universities among law professors).¹¹ The Administrative Judicial Council consists of 21 members; 3 of whom are appointed *ex officio*, 11 are judges elected by their peers and 7 are independent experts (four lawyers and three law professors).¹² The Financial Judicial Council consists of 21 members, 3 of whom are appointed *ex officio*, 11 are judges elected by their peers and 7 are independent experts (two lawyers, three accounting experts and three university professors in the fields of public finances, taxation or accounting).¹³

Article 17 of the Draft Law provides that the plenary assembly is made up of thirty members including one of the *ex officio* members of each of the three councils, seventeen members from the elected judges, and ten independent experts. Each council will choose their members to sit at the plenary assembly either by consensus or by a majority vote. A chairman shall be elected among the judges of the highest grade and where there is a tie the oldest judge in his grade shall be chosen.

The ICJ welcomes the fact that the HJC's composition provided by the Draft Law is plural and that the majority of its members, (36 out of 69), are judges elected by their peers. This is consistent with international standards that judicial councils should indeed be composed of a majority of judges elected or selected through a process independent of the other branches of government.¹⁴ It also appears consistent with the recommendation of the UN Special Rapporteur on the independence of judges and lawyers that bodies in charge of protecting judicial independence and promoting judicial accountability should "preferably be composed entirely of judges, retired or sitting", and that although "some representation of the legal profession or academia" is an option, "no political representation should be permitted."¹⁵

The Draft Law sets out criteria for the selection and election of HJC members. In particular, Article 23 of the Draft Law requires that a judicial candidate for election to the three judicial councils be: a judge exercising his or her functions; be of sufficient seniority (at least 5 years for the candidates to the Judiciary Council); not be a member of the executive bodies of the magistrates' professional associations; and not be the subject of a disciplinary sanction. Articles 33 and 35 outline general criteria for the appointment of independent expert members (lawyers and law professors): independence, competence, neutrality, integrity and seniority.

¹¹ March Draft Law on the High Judicial Council, article 14.

¹² *Idem*, Article 15.

¹³ *Idem*, Article 16.

¹⁴ See for example Art. 9 of the Universal Charter of the Judge (Appointment of judges "should be carried out by an independent body, that includes substantial judicial representation"), approved by the International Association of Judges on 17 November 2009. See, similarly, the European Charter on the Statute for Judges, Principle 1.3 ("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") and Council of Europe Committee of Ministers Recommendation (2010)12, adopted 17 November 2010, para 46.

¹⁵ UN Special Rapporteur on the Independence of Judges and Lawyers, Report on Accountability, UN Doc A/HRC/26/32 (28 April 2014), para 126. See also Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/11/41 (2009), para. 28.

The ICJ notes that the Draft Law provides, in Articles 14, 15, 16 and 17, that “[t]he principle of gender parity should be sought in the composition of the council except in relation to *ex officio* members”. However, the ICJ is concerned that the Draft Law does not provide for any specific measures to ensure such parity in the selection and election process of the HJC members. It should therefore be amended to provide for specific measures to ensure women’s full and equal representation at the HJC as well as their full and equal participation in the whole judiciary, including at the senior level.

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 Tunisia became a party in 1985) with interpreting and applying its provisions, has emphasised that article 7 of the Convention requires States not only to remove any formal legal barriers, but also to take additional measures to ensure that in practice women actually 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”.¹⁶

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.”¹⁷ The Special Rapporteur specifically recommended that “States should encourage qualified women to occupy high-level positions within the judiciary and in the justice system in general, including by setting up temporary special measures.”¹⁸

2. Institutional, financial and organizational independence of the HJC

Under President Ben Ali, the judiciary was supervised by the Conseil Supérieur de la Magistrature (CSM), whose composition and functions were set forth in article 67 of the 1959 Constitution and Law No. 67-29 of 14 July 1967. Under this framework, the composition of the CSM was such that the executive could control its functions. Pursuant to article 6 of Law No. 67-29, the President of the Republic served as the president of the CSM. A majority of its members, 11 out of 19, were either representatives of the executive, such as the Minister of Justice who served as its vice-president, or were appointed to their positions through presidential decrees.¹⁹

The ICJ welcomes the fact that both the 2014 Constitution and the Draft law end executive control over the HJC, guarantee its institutional independence, and provide for more transparent procedures for the selection and the election of its members.

¹⁶ 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.

¹⁷ Interim report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc A/66/289, 10 August 2011, para 26.

¹⁸ Ibid, para 92. See also Report of the Special Rapporteur, UN Doc A/HRC/17/30, 29 April 2011, paras 45-58, 81, 91; UN Human Rights Council Resolution 29/6 (2 July 2015) on Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/29/L.11, para 2.

¹⁹ Law No. 67-29, articles 6 and 7bis.

Further, it is positive that the Draft Law provides in article 72 for the HJC to prepare its own budget and to discuss it with the relevant Parliamentary commission. The same article also provides that independent budget lines are to be reserved for each one of the three councils and the plenary assembly. In addition, article 1 provides for the financial autonomy of the HJC and article 5 requires the State to provide the HJC with the human resources and means necessary to carry out its work. This is consistent with international standards on the matter. The UN Special Rapporteur has said that such a body “should manage its own budget” and “have enough human and financial resources to carry out its mandate”.²⁰

However, for the reasons outlined below, in terms of the competencies of the HJC, the ICJ considers that the Draft Law should be amended to ensure that the HJC is fully involved in the preparation and administration of the budget for the entire judiciary, not only for the HJC.

In terms of enhancing the organisational independence of the HJC, while the Draft law provides some improvements over the previous CSM, certain deficiencies of the current system have not been addressed in the Draft Law. For example, under the current legal framework²¹, the General Inspection Service, (*l’inspection générale du Ministère de la Justice*, GIS), which plays a notable role in relation to managing the careers of judges, including disciplinary procedures, is under the direct authority of the Minister of Justice,²² and inspectors from the GIS conduct disciplinary investigations at the request of the Minister of Justice.²³

In this regard, the ICJ welcomes the fact that the Draft Law ends the control that the Minister of Justice formerly exercised over the judicial inspection service, in particular by providing for the HJC to supervise judicial inspections and by establishing a new body, the General Inspectorate for Judicial Affairs (GIJA), within the HJC (articles 38 and 66). However, the ICJ is concerned that the Draft Law provides, in article 69, that the GIJA is to exercise functions not only at the request of the HJC President but also at the request of the Minister of Justice. (See also related discussion below regarding article 54).

The ICJ recommends removing any reference to the GIJA undertaking work at the request of the Minister in article 69 in order to ensure that the system of judicial inspections and investigations in Tunisia is protected against executive interference, as required by international standards.²⁴

²⁰ UN Special Rapporteur on the Independence of Judges and Lawyers, Report on Accountability, UN Doc A/HRC/26/32 (28 April 2014), para 126.

²¹ Law No. 67-29. See also the discussion in the ICJ’s report, *“The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future”*, May 2014, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 17 July 2015.

²² Decree No. 2010-3152, article 24 and 26.

²³ Decree No. 2010-3152, article 24 and 26.

²⁴ The Consultative Council of European Judges for instance has recommended that: “The Council for the Judiciary should supervise the organisation of the inspection service so that inspection is compatible with judicial independence.” CCJE, Opinion No. 10(2007) on the Council for the Judiciary at the service of society, para. 79.

Competencies of the HJC

Article 114 of the 2014 Constitution mandates the HJC to ensure, among others, the proper functioning of the judicial system and respect for its independence. The HJC is to propose reforms and to give its opinion on draft legislation concerning the judiciary. The three councils have jurisdiction over discipline and the career progression of judges. In addition, the HJC is to prepare an annual public report that it submits to the Speaker of the Assembly of People's Representatives, the President of the Republic, and the Prime Minister.

The Draft Law reinforces and expands the HJC's competencies provided for by the 2014 Constitution, including by specifying, in articles 38 and 39, that the HJC may propose judicial reforms and issue opinions on draft laws that impact on the judiciary, and that it is to draft a code of judicial conduct. The HJC is also in charge of the appointment, promotion, transfer, requests for waiver of immunity, resignation, secondment, and forced retirement of judges. Further, article 38 provides for HJC oversight of the judicial training institute, which is controlled by the Ministry of Justice under current legislation.

These provisions include some significant improvements over the previous system. However, the ICJ is concerned that certain deficiencies have not been addressed in the Draft Law, including those relating to HJC oversight over the career management and disciplinary system for judges. In particular, provisions relating to the judges' security of tenure, their transfer and the disciplinary system should be amended so as to fully comply with international standards. The Draft Law should also be amended to ensure that the HJC is mandated to contribute to the preparation and implementation of the budget of the whole judiciary.

Role in relation to budget for the judiciary

As noted above, the HJC has substantial control over its own budget. However, the ICJ is concerned that the Draft Law does not provide for the HJC 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 is inconsistent with 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.²⁵ A number of regional standards also provide that the judiciary should be consulted regarding the preparation of its budget and its implementation.²⁶

The Draft Law should therefore be amended to ensure that the HJC is fully involved in the preparation of the budget for the entire judiciary, not only the HJC; to empower the HJC to administer the allocation of judicial resources; and to ensure that adequate financial resources are available for both the HJC and the judiciary as a whole.

²⁵ Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/11/41 (2009), para. 39.

²⁶ 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.

Security of tenure and transfer of judges

Security of tenure is a basic condition for judicial independence. Unless judges have long-term security of tenure, they are vulnerable to pressure from those in charge of renewing their posts or could be otherwise influenced in their decision-making even in the absence of any overt pressure and without necessarily being aware of the effects. Thus, international standards provide for judges to have guaranteed tenure until a set retirement age or the expiry of their term of office.²⁷ While security of tenure is primarily concerned with potential interference by the executive or legislative branches of government, security of tenure also guarantees the individual independence of judges against undue or irregular interference by others within the judicial hierarchy, exercised outside of formal appeal processes.

The UN Human Rights Committee has held that to meet the requirements of article 14 of the ICCPR in this regard, judges may only be dismissed: "on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law".²⁸ The UN Basic Principles on the Independence of the Judiciary further specify that, "Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties."²⁹

Article 107 of the 2014 Constitution provides that judges "may not be transferred without their consent, and they cannot be dismissed or suspended from office or be subject to disciplinary action except in circumstances and under safeguards laid down in law and by a reasoned decision of the High Judicial Council". Article 47 the Draft Law provides that a judge can be removed from office on the grounds of serious health issues or for reasons of clear professional deficiency. The decision must be reasoned by the HJC, in compliance with the law.

The ICJ is concerned that the possibility of removing a judge for 'serious health issues' or a 'clear professional deficiency' is open to much wider interpretation, and is therefore a lower threshold for removal, than "incapacity or behaviour that renders them unfit to discharge their duties". This potentially undermines the security of tenure and therefore the independence of judges. The Draft Law should be amended to establish that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties.³⁰ The ICJ further recommends that the Draft Law be amended to expressly provide that judges cannot be removed or disciplined for *bona fide* errors or for disagreeing with a particular interpretation of the law.³¹

²⁷ UN Basic Principles on the Independence of the Judiciary, Principle 12; ACHPR Principles and Guidelines, Section A, Principle 4(I).

²⁸ Human Rights Committee, General Comment No. 32, para. 20

²⁹ UN Basic Principles on the Independence of the Judiciary, Principle 18; ACHPR Principles and Guidelines, Section A, Principle 4(p).

³⁰ UN Basic Principles on the Independence of the Judiciary, Principle 18; Singhvi Declaration, para. 30; CoM Recommendation (2010)12, para. 50; ACHPR Principles and Guidelines, Section A, Principle (4)(p).

³¹ See eg the UN Human Rights Committee, Concluding Observations on Uzbekistan: "The possibility, provided by law, of taking disciplinary measures against judges because of 'incompetent rulings', exposed them to broad political pressure and endangers their independence and impartiality." U.N. Doc. CCPR/CO/71/UZB (2001), para 14. See also Inter-American Commission on Human Rights, Guarantees for the Independence of Justice Operators, OEA/Ser.L/V/II. Doc. 44 (5 December 2013), para 216: "[U]nder international law the grounds

In addition, the ICJ is concerned that the Draft Law provisions on the transfer of judges fall short of international standards. In particular, article 42 of the Draft Law allows the HJC to exceptionally transfer judges without their consent, from one jurisdiction to another and for a period of up to 3 years, where it is deemed necessary to fill urgent vacant posts, to fill posts created due to the establishment of new courts, or to support courts faced with a significant increase of their workload.³²

Given the past history of abuse of transfers as a form of interference with the independence of the judiciary in Tunisia, the ICJ recommends an amendment to article 42 to ensure that the consent of the judge is sought in all circumstances. This is not to say that judges could capriciously refuse transfer. The Singhvi Declaration, for example, 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".³³

The transfer of judges without their consent was used in Tunisia in the past by the executive as a tool to undermine judicial independence, in particular as a punishment measure against judges who advocated for judicial reform and were suspected of opposing the authorities. Under Law No. 67-29 on the Organization of the Judiciary, the High Judicial Council, and the Statute of Judges that regulated the former HJC, the Minister of Justice had discretionary powers to decide to transfer a judge for "*nécessité de service*" (needs of service). Arbitrary transfers continued during the transition period despite the adoption of new safeguards.³⁴

As such, in order to ensure the individual independence of judges and to protect them against arbitrary transfers, the Draft Law should be amended to require that the concerned judge is consulted and his/her consent is sought for every decision to transfer him/her to another jurisdiction. If, however, an exceptional power of the HJC to transfer judges without consent is retained, the Draft Law must be amended to provide that such transfers are limited to the duration and extent strictly required to deal with exceptions provided for in article 42; are subject to review by an independent and impartial body or authority with the authority to revoke, when

for disciplinary investigations and sanctions imposed on a judge should never be a legal opinion or judgment he or she wrote in a decision. It is important to understand that there are, on the one hand, the remedies of appeal, cassation, review, removal of cases to a higher court or the like, which are aimed at verifying that a lower court's decisions are correct; but on the other, there is disciplinary oversight, which is intended to assess the conduct, suitability, and performance of the judge as a public official. The distinction between these two types of procedure is essential to guaranteeing independence, such that a superior's disagreement with an interpretation must, under no circumstances, become grounds for seeking disciplinary measures." See similarly Inter-American Court of Human Rights, *Case of Apitz Barbera et al ("First Court of Administrative Disputes") v Venezuela*, Series C no 182, Judgment of 5 August 2008, para 86.

³² The French version reads: "*dans l'intérêt du service en raison de la nécessité*".

³³ Draft Universal Declaration on the Independence of Justice (hereafter "Singhvi Declaration"), para. 15.

³⁴ See ICJ Memorandum, May 2015. On 14 October 2013, the Minister of Justice announced the transfer of two judges, Justice Nouri Ktiti, President of the Property Court, and Khaled Barrak, the head of the General Inspection Service (GIS), without their consent. The two judges were also members of the newly established IPJJ. The Minister of Justice took this decision unilaterally, in violation of article 14 of Law No. 2013-13, which requires the prior assent of the IPJJ for promotions and transfers.

necessary, such decisions; and that the entire process protects against arbitrary transfers and guarantees the judge's individual independence.

Judicial conduct and the disciplinary system

The ICJ welcomes the mandate for the HJC to draft and adopt a judicial code of conduct. The adoption by the HJC of a code of conduct would contribute to the ability of the HJC and the judiciary as a whole in Tunisia to meet the standards set by the UN Basic Principles on the Independence of the Judiciary, which provides: "All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct,"³⁵ as well as the Bangalore Principles of Judicial Conduct.³⁶ Further, the description of what constitutes a disciplinary infraction, defined in article 50 of Law No. 67-29 as the "failure of the duties of the status, honour or dignity of a judge is a disciplinary offence,"³⁷ is in itself far too vague and overbroad as to give reasonable notice of what conduct is prohibited. The adoption of a judicial code of conduct should contribute to more precise definitions of the kinds of breaches that can lead to disciplinary consequences.

The current disciplinary procedure lacks sufficient guarantees to ensure fairness, in particular given the role of the Minister of Justice and his subordinates in initiating this procedure. The ICJ welcomes the fact that the Draft Law provides for better guarantees to ensure the fairness of the disciplinary procedure, but recommends further amendments.

Under article 54 of the Draft Law, complaints and notifications of conduct that might trigger a judge's disciplinary liability must be sent to the HJC President or to the Minister of Justice, and then be immediately transmitted to the GIJA with a view to carrying out the necessary administrative investigations. The General Inspector for Judicial Affairs, upon completion of the investigation (during which the judge has to be heard)³⁸, decides whether to dismiss the case or to send it to the relevant council, which will then transmit it to a disciplinary council.³⁹ Once the disciplinary council receives the file, its President appoints a rapporteur, chosen among the council members. The latter will carry out the investigation and summon the judge. The rapporteur shall hear the judge, listen to his or her explanations and receive all the documents the judge wants to put forward for his or her defence.⁴⁰ Article 58 of the Draft Law further provides for notification of the concerned judge 15 days in advance of the hearing, ensuring the judge's access to the documents pertaining to the case, and that the judge may obtain a copy of the materials before the hearing takes place. The judge can also ask for the hearing to be postponed to have sufficient time to prepare a defence. The article also provides for the rights of concerned judges to be assisted by a lawyer or a judge.

However, in addition to the concerns discussed earlier regarding article 69, the ICJ is concerned that the Draft Law maintains, in its article 54, the powers of the Minister of Justice to refer the complaints, communications and information the Minister receives, and that might be a basis for initiating disciplinary proceedings against a judge, to the GIJA for investigation. Given how this role has been used in the past to undermine judicial independence, the ICJ believes that the Draft Law should be amended: to remove the role

³⁵ UN Basic Principles on the Independence of the Judiciary, Principle 19.

³⁶ See ECOSOC resolutions 2006/23 and 2007/22.

³⁷ Law No. 67-29, article 50.

³⁸ March Draft Law, Article 55.

³⁹ Idem, Article 56.

⁴⁰ Idem, Article 57.

of the Minister of Justice in directly referring matters or other requests to the GIJA and provide instead that any complaint or other relevant information received by the Minister of Justice is referred to the HJC, who decides whether to forward it to the GIJA; and to explicitly provide that any judge suspected of misconduct is promptly informed of the allegations.

International standards make clear that any allegation of judicial misconduct must be investigated independently, impartially, thoroughly and fairly and adjudicated in the context of fair proceedings before a competent, independent and impartial body, in which a judge's rights are respected. The disciplining of judges must be based on established standards of judicial conduct. Sanctions, including disciplinary measures, suspension or removal, must be proportionate and subject to appeal before an independent judicial body.⁴¹

In this regard, the ICJ regrets that while the Draft Law provides for the HJC to draft a code of judicial conduct (article 38), it does not specify whether this code will be the basis on which judges will be held to account professionally through direct application or interpretive guidance when determining disciplinary proceedings, nor does it otherwise provide for a clear and precise definition of what constitutes a disciplinary infraction.

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

- i. Providing for specific and concrete measures to ensure women's full and equal representation at the HJC, as well as their full and equal participation in the whole of the judiciary, including at the senior level;**
- ii. Ensuring that the HJC is fully involved in the preparation of the budget for the entire judiciary, not only the HJC;**
- iii. Empowering the HJC to administer the allocation of judicial resources;**
- iv. Ensuring that adequate financial resources are available for both the HJC and the entire judiciary;**
- v. Ensuring that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties in accordance with fair procedures ensuring objectivity and impartiality, in which a judge's rights are respected;**
- vi. Ensuring that in all circumstances the consent of the judge is sought for any transfer to another jurisdiction. If however an exceptional power of the HJC to transfer judges, when consent is refused, is retained, the Draft Law should be amended to ensure that such transfers are limited to the duration and extent strictly required to deal with exceptions provided for in article 42, and are subject to an independent review process;**
- vii. Removing the reference to the GIJA undertaking work at the request of the Minister in article 69, and providing in article 54 for any referral of complaints, communications or other relevant information by the**

⁴¹ CoM Recommendation (2010)12, para. 69; UN Basic Principles on the Independence of the Judiciary, Principles 17 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q).

- Minister to be directed to the HJC rather than directly to the GIJA, with the HJC deciding whether to refer the matter onwards to the GIJA;**
- viii. Ensuring that any judge suspected of misconduct is promptly informed of the allegations against him or her, and is guaranteed adequate time and facilities to prepare a defence and is given access to all potentially exculpatory material;**
 - ix. Ensuring that a sufficiently detailed and comprehensive code of judicial conduct, in line with the Bangalore Principles, is developed by the HJC, in close consultation with the judges and their professional associations; and**
 - x. Providing clearer and more precise definitions of what constitutes a disciplinary infraction, whether by expressly specifying that the code of judicial conduct adopted by the HCJ will be the basis on which judges will be held to account professionally, or otherwise.**