

The Tunisian Draft Law on the Constitutional Court in light of international law and standards

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1. An independent and impartial Constitutional Court with broad jurisdiction, which individuals can access without undue restriction, is essential to strengthen the rule of law and to protect and realize human rights and freedoms in Tunisia, including those recognized by the Constitution.

2. The 2014 Constitution provides for the establishment of a Constitutional Court and requires the promulgation of an organic law to set forth the organization and functioning of the Court, its Rules of Procedure and the security of tenure of its judges (arts. 65 and 124). The Constitution contains clear provisions regarding the independence and composition of the Court (art. 118), competencies and access (art. 120), as well as the binding nature of its decisions (art. 121).

3. A draft law on the Constitutional Court was elaborated by the Ministry of Justice and adopted by the Council of Ministers on 1 July 2015 (draft law no. 48/2015, hereinafter the Draft Law).¹ The General Legislation Commission (GLC) of the Assembly of People's Representatives (ARP) is currently reviewing this Draft Law, including by proposing amendments before it is submitted to the ARP plenary session for discussion and adoption.²

4. Under the rule of former President Zine El Abidine Ben Ali, a Constitutional Council was established by Presidential Decree in 1987.³ However according to the 1959 Constitution it was not constituted as a court, nor was its composition, structure, and functions in line with international standards on independence, notably because of the executive's control over its composition.⁴ As a result, the Constitutional Council was unable to effectively act as a guarantor of human rights and freedoms protected by the Constitution.

5. Given the key role an independent and impartial Constitutional Court can play in ensuring enhanced respect for the rule of law and human rights, the International

¹ The Draft Law on the Constitutional Court no. 48/2015, available in Arabic at: http://www.legislation.tn/sites/default/files/syg_nhyy_lmshrw_lqnwn_lssy_lmtlq_blmhkm_ldstwy_7_jwyly2015.pdf, last accessed 29 October 2015.

² Seventeen members of the ARP had proposed another draft law on the Constitutional Court on 3 June 2015; it was, however, withdrawn on 30 September 2015.

³ The Constitutional Council was governed by articles 72 to 75 of the 1959 Constitution as well as organic law No. 2004-52 of 12 July 2004.

⁴ The Constitutional Council mainly had power to examine the constitutionality of draft laws *ex ante*, before their promulgation, and its access was restricted to the President, including by automatic referral for certain types of laws or with regard to questions the President could ask on the organization and functioning of the institutions. Following the uprising that toppled the former President, the Constitutional Council was dissolved by Law-Decree No. 2011/14 of 23 March 2011.

Commission of Jurists (ICJ) has actively followed the development of the Draft Law. The ICJ is hopeful that the following comments and recommendations on the Draft Law, submitted as part of its work to promote the independence of the courts and the judiciary, will be a helpful contribution to ongoing efforts in Tunisia to enhance respect for and the protection of human rights.

6. While the ICJ welcomes the significant improvements to the mechanisms and procedures for constitutional review extant that existed prior to the adoption of the 2014 Constitution, the ICJ is concerned that in certain key respects, the Draft Law, if adopted, would establish a Court that falls short of international standards. Although the Constitution and the Draft Law use the term "members of the Constitutional Court", given their role and their mandate, the ICJ views such members as judges and the Constitutional Court as a judicial body to which international standards on judicial independence apply. Thus, if passed without amendments, the Draft Law would undermine the capacity of the future Court to effectively protect human rights and fundamental freedoms and to guarantee the separation of powers.

7. This memorandum therefore analyses provisions of the Draft Law, particularly relating to the composition of the Court, the conditions and security of tenure of its judges and other guarantees of independence, the competencies of the Court and access to the Court, in light of international standards which aim to safeguard judicial independence and ensure the effective right to remedy for human rights violations. The ICJ offers recommendations for amendments and reform of the Draft Law, notably on the procedure and criteria for appointment of judges, the security of tenure of judges, the competencies of the Court, and access to the Court, with a view to ensuring that it fully complies with international standards, in particular on judicial independence.

1) Independence of the Constitutional Court

8. International standards governing the independence of the judiciary are contained in a number of sources, including article 14 of the International Covenant on Civil and Political Rights (ICCPR), a treaty to which Tunisia is a State Party and thus bound to comply with, and the UN Basic Principles on the Independence of the Judiciary (hereinafter the UN Basic Principles). Article 14 of the ICCPR effectively obliges states parties to the treaty to ensure that trials and hearings, whether criminal or civil in character, are conducted by an independent, impartial and competent tribunal established by law. The scope and content of the article 14 ICCPR obligations have been authoritatively clarified by the UN Human Rights Committee, the body of independent experts mandated by the treaty to monitor its implementation, in its General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial. The Human Rights Committee explained 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".⁵

9. Furthermore, the UN Basic Principles, which set the general and universal standards for safeguarding the independence of the judiciary provide:

"The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all

⁵ 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.

governmental and other institutions to respect and observe the independence of the judiciary”;

“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”⁶

10. In addition, the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (hereinafter the African Union Principles), adopted by the African Commission on Human and Peoples’ Rights, a body of the African Union, of which Tunisia is a Member State, also contain standards on the independence of the judiciary.

“The independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities”;

“Judicial bodies shall be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner”.⁷

11. Standards governing the independence of the judiciary are applicable to all judicial bodies, including constitutional courts. As the conclusions of the 1959 New Delhi Congress on the Rule of Law clearly established, the requirement of independence bears on all courts: ordinary civil and criminal courts but also administrative and constitutional courts.⁸ This is because independence is inherent to the judicial function. The former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities highlighted that, “The principles of impartiality and independence are the hallmarks of the rationale and the legitimacy of *the judicial function* in every State”.⁹

12. That independence and impartiality are required of all judges, including those ruling on constitutional issues, leaves no room for doubt and was restated by the Inter-American Court of Human Rights who affirmed that “under the rule of law, the independence of *all judges* must be guaranteed and, *in particular*, that of constitutional judges, owing to the nature of the matters submitted to their consideration.”¹⁰

13. Consistent with these standards, the 2014 Constitution of Tunisia itself reaffirms the independence of both the judiciary as a whole and of judges individually (art. 102) and explicitly includes the Constitutional Court as part of the judicial power (Title V). Furthermore the Constitution and the Draft Law rightly identify the Constitutional

⁶ United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁷ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the African Commission’s activity report at 2nd Summit and Meeting of Heads of State of the African Union, Maputo, 4 -12 July 2003.

⁸ Conclusions of the Second Committee of the International Congress of Jurists, New Delhi, India, 1959, Chapter V, Clause V.

⁹ Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1985/18, para. 75 (emphasis added).

¹⁰ Inter-American Court of Human Rights, Case of the Constitutional Court v. Peru, Judgment of January 31, 2001, para 75 (emphasis added).

Court as an independent judicial body (respectively art. 118 and art. 1), in light of its judicial functions.

14. The requirement of independence includes, among others, the institutional, financial and administrative independence of the Constitutional Court, as well as the independence of all members of the Constitutional Court. Such independence is safeguarded among other things by the separation of powers, which protects the judiciary and judges from undue external influence or interference from other branches of the government; the composition of the body responsible for the appointment of judges; the methods and criteria for appointment; the conditions of service and safeguards of tenure of judges; and the existence, independence and fairness of accountability mechanisms.

a) *Individual independence*

15. Article 21 of the Draft Law specifies that members of the Constitutional Court shall refrain from any conduct that prejudices their independence, impartiality and integrity and that they shall not, during their term, adopt any public position or state any opinion or offer a consultation pertaining to issues that fall within the Constitutional Court's competencies. Article 19 prohibits members from performing any other work or task in addition to their membership of the Constitutional Court.

16. The Draft Law also sets out provisions on the appointment and the security of tenure of the Court's members.

b) *Appointment*

17. According to the 2014 Constitution, the executive and the legislature each appoint 4 out of 12 members of the Constitutional Court, and the High Judicial Council (HJC) appoints the remaining 4 members. The Constitution also specifies that three quarters of its judges must be legal experts (defined in art. 6 of the Draft Law), with at least 20 years of experience (see "Criteria" section below, for an analysis on the criteria for appointment). All of the 12 judges are to serve a single (non renewable) term of nine years.¹¹

18. It is notable however that, at present, the HJC has yet to be established (see box below). Given the role entrusted by the Constitution and the Draft Law to this body in the appointment of members of the Constitutional Court, the latter could only be established once the HJC is created. Furthermore, the ICJ has previously expressed concerns that the current draft law on the HJC fails to fully comply with international standards on judicial independence.¹²

The 2014 Constitution provides for the creation of a new HJC to be established to oversee the selection, appointment, promotion and transfer of judges. It replaces the temporary judicial body set up in 2013, the *Instance Provisoire de la Justice Judiciaire*.¹³ The law, which was to determine the HJC's composition, organisation, and procedures, was adopted in May 2015 but it failed to include adequate guarantees and safeguards for judicial independence and impartiality as required by international standards.¹⁴ It was declared unconstitutional by the Tunisian Provisional Commission to Review the

¹¹ 2014 Constitution, article 118.

¹² Available here: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/Tunisia-Final-HJC-Draft-Law-Advocacy-Position-Paper-2015-ENG.pdf>, last accessed on 13 October 2015.

¹³ Article 113 of the 2014 Constitution states that the HJC "shall enjoy financial and administrative independence" and "shall function independently".

¹⁴ Further information is available here: <http://www.icj.org/tunisia-deeply-flawed-judicial-council-law-should-be-halted-revised/>, last accessed on 13 October 2015.

Constitutionality of Draft Laws, the *Instance Provisoire de Contrôle de la Constitutionnalité des Projets de Loi* (IPCC).¹⁵ The IPCC found articles 4, 10, 11, 12, 17, 42, 43, 60, 76, and 81 to be unconstitutional) and, as a result, the version of the draft law as adopted by the Tunisian Ministerial Council, was returned by the ARP to the GLC.¹⁶

19. The Constitution provides that the detailed procedures for the organization of the Court, its procedures and the guarantees of its members shall be prescribed by law,¹⁷ pursuant to which the Draft Law under discussion has been elaborated.

20. Articles 9, 10 and 11 of the Draft Law unevenly detail the procedure to be followed by each of the three institutions (the executive, the legislature, and the HJC) in appointing the 12 members of the Constitutional Court.

21. In accordance with the draft provisions, with respect to the ARP, each parliamentary bloc or a group of seven "independent" representatives may suggest four candidates to the general plenary. The four to be appointed shall be elected after a secret ballot with a two-thirds majority vote by the plenary.

22. In relation to the appointment of members of the Constitutional Court by the HJC, the Draft Law provides that the Head of the HJC must declare an open period for nominations that lasts 21 days. A special committee of the presidents of the three councils within the HJC should be formed to assess the eligibility of the candidates. The general plenary of the HJC shall vote for four candidates, three of whom must be legal experts, through a secret ballot to reach a two-thirds majority.¹⁸

23. Finally, article 11 of the Draft Law specifies that three of the four Constitutional Court members to be appointed by the President of the Republic must be legal experts. The article however contains no details of any procedure to be followed.

24. The ICJ is concerned that the appointment process described in the Constitution and the Draft Law is inconsistent with international standards on the independence of the judiciary.

25. To safeguard the independence of the judiciary, equality before the law and equal access to the profession, international standards on appointment state that judges should be appointed through an open process on the basis of prescribed criteria based on merit and integrity, and without discrimination.¹⁹ Furthermore the African Union Principles stress:

"The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence

¹⁵ 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 13 October 2015.

¹⁶ 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.

¹⁷ 2014 Constitution, article 124.

¹⁸ Draft Law, article 10.

¹⁹ Principle 10 of the Basic Principles on the Independence of the Judiciary. See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (2007), para. 19.

and impartiality of the judiciary.”²⁰

26. The UN Special Rapporteur on the Independence of Judges and Lawyers has repeatedly expressed concerns at the risk of politicization when legislative or executive authorities select and appoint members of the judiciary. In order to ensure the independent selection and appointment of judges, the Special Rapporteur has recommended creating special independent and impartial bodies responsible for the creation of courts and has recommended that the substantial majority of this body should be judges.²¹

27. A number of regional international instruments provide guidelines reflecting the optimal means of reinforcing the principle of independence in the appointment process. For instance, the European Charter on the Statute of Judges provides for, “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, ... the intervention of an authority independent of the executive 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.”²² The standards of the Committee of Ministers of the Council of Europe also provide that “The authority taking the decision on the selection and career of judges should be independent of the government and the administration” and that “in order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules”.²³

28. While there is no single universal model that States must adopt in respect of the appointment process, any procedures and criteria for appointment must fall within the international framework governing the independence of the judiciary, notably be carried out through a fair, open, transparent process, without discrimination, and on the basis of specific criteria. Furthermore, the selection and appointment process itself should serve to guarantee the independence of the institution and of the individual judges.²⁴

29. The ICJ considers that the fact that a majority of the judges of the Constitutional Court are not to be selected by their judicial peers poses a significant risk of undermining judicial independence. The political branches play an outsized role in the appointment of the Court’s judges as compared with the judiciary in this process.

30. The legislation enacted to govern the appointment process could establish appointment procedures for the selection and the appointment of the Court’s members, including those appointed by the President, that ensure a clear, transparent, fair and inclusive procedure based on objective criteria that include legal qualifications, training and personal integrity, exclude discrimination, ensure the appointment of women and ensure that the composition of the Court is representative of the diversity of the population of Tunisia.

²⁰ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the African Commission’s activity report at 2nd Summit and Meeting of Heads of State of the African Union, Maputo, 4 -12 July 2003, Section A (4)(h).

²¹ Report of the Special Rapporteur on Independence of Judges and Lawyers, A/HRC/11/41 (24 March 2009), paras 23-34, 97. See also European Charter on the Statute for Judges, doc. cit., operative paragraph 1.3.

²² European Charter on the Statute for Judges, Principle 1.3.

²³ Recommendation No. R (94) 12, doc. cit, Principle I.2.c.

²⁴ Recommendation No. R (94) 12, doc. cit, Principle I.2.c.

31. Articles 9 and 11 of the Draft Law fail to do so. Instead, neither articles 9 or 11 (relating to the appointment of members of the Constitutional Court by the Legislature and President respectively) require open, transparent, fair or inclusive procedures and appointment based on objective criteria of training, merit and integrity or the involvement or advice of the judiciary. Nor do either of these draft provisions or the draft provision relating to appointments by the HJC, require that the criteria for appointment be objective and focus on legal qualifications, training, merit and personal integrity, prohibit discrimination and aim to ensure that the composition of the Constitutional Court includes women and is also representative of the diversity of the population of Tunisia.

32. The ICJ therefore recommends that articles 9 and 11 be amended in line with the models recommended by the Special Rapporteur on the Independence of Judges and Lawyers and the Council of Europe, whereby an independent and competent authority, the majority of whose members are drawn from the judiciary and are chosen by their peers, is authorized to make recommendations of candidates for appointment, which the Legislature and the President follow in practice.²⁵ Furthermore articles 9, 10 and 11 should mandate that the procedures of the relevant authority are transparent, open, fair and non-discriminatory, and that decisions are based on transparent and objective procedures and criteria. Best practice would see the HJC or another independent pluralistic body composed mainly of judges be mandated to screen candidates and select or make binding recommendations on individuals for appointment as members of the Constitutional Court so that political considerations do not play any role in the selection process.

c) Criteria for appointment

33. The Constitution provides few details about the requirements and criteria for the appointment of members to the Court. It does provide that the Court is to be independent and that members are chosen from among competent persons with 20 years of experience, with 9 of them having a legal specialisation.²⁶ It also explicitly prohibits members of the Court from holding any other function or position.²⁷

34. Article 6 of the Draft Law provides more details about the requirements for the selection and appointment of the Court's members, including competence, independence, impartiality and integrity.

35. This draft provision also states that three-quarters of the members must be legal experts, with 20 years of experience on the date of appointment. According to article 6, legal experts are: judges of the highest grade, lawyers with an accreditation to practice before the Cassation Court, academic scholars who have the grade of professor in the higher education system, or any other law expert with a track record of publications in well-recognized journals and periodicals. Furthermore, with regard to the appointment of non-legal experts, article 6 states that they must be experts who hold at least a PhD or have an equivalent diploma and experience of not less than 20 years in their field of specialization.²⁸

²⁵ Report of the Special Rapporteur on Independence of Judges and Lawyers, A/HRC/11/41 (24 March 2009), paras 23-34, 97; European Charter on the Statute for Judges, doc. cit., operative paragraph 1.3; and Council of Europe Committee of Ministers Recommendation (2010)12, adopted 17 November 2010, para. 47.

²⁶ 2014 Constitution, article 118.

²⁷ 2014 Constitution, article 119.

²⁸ Draft Law, article 6.

36. Article 7 of the Draft Law also provides that each member shall be a Tunisian national, be at least 45 years old, and enjoy all civil and political rights. This article also bars anyone who has belonged to a political party in the past ten years or who was a member of the Constitutional Council or the Provisional Commission to Review the Constitutionality of Draft Laws (*Instance Provisoire de Contrôle de la Constitutionnalité des Projets de Loi*, (IPCC)).

37. Thus, articles 6 and 7 of the Draft Law provide for certain objective criteria for the selection and the appointment of the members of the Constitutional Court.

38. The fact that the Draft Law does not require that all members of the Constitutional Court have training or qualifications in law and does not include personal integrity as a requirement are among the reasons that articles 6 and 7 are inconsistent with international standards.

39. The UN Basic Principles provide that "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory."²⁹ Furthermore, to ensure that the composition of the judiciary essentially reflects the population and to combat discrimination, steps should be taken to ensure the appointment of qualified women and members of minority communities.³⁰ The Council of Europe recommendation also stresses that "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency."³¹

40. Furthermore, the African Union Principles stipulate that judges should be selected for "reason of integrity, appropriate training or learning and ability."³² Those principles also detail the requirements for appointment as follows:

"i) The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability. j) Any person who meets the criteria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. However, it shall not be discriminatory for states to: (i) prescribe a minimum age or experience for candidates for judicial office; (ii) prescribe a maximum or retirement age or duration of service for judicial officers; (iii) prescribe that such maximum or retirement age or duration of service may vary with different level of judges, magistrates or other officers in the judiciary; (iv) require that only nationals of the state concerned shall be eligible for appointment to judicial office. k) No person shall be appointed to

²⁹ Principle 10 of the UN Basic Principles on the Independence of the Judiciary.

³⁰ Special Rapporteur on the independence of Judges and Lawyers, Report to the General Assembly, A/66/289 (2011), paras. 22-33, 92; Committee on the Elimination of Racial Discrimination, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, A/60/18 (pp. 98-108) (2005), para. 5(d).

³¹ Recommendation No. R (94) 12, doc. cit, Principle I.2.c.

³² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, paragraph 4(i) and (k).

judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions.”³³

41. The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (hereinafter the Beijing Statement of Principles) recalls that “To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence” and that therefore “The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.”³⁴

42. The ICJ is deeply concerned that the lack of specific criteria for the appointment of non-legal experts could result in the appointment of members who have no relevant legal qualifications or who are not competently trained in law. As noted above, it is important that judges are appointed based on clear and transparent criteria.³⁵ The UN Human Rights Committee has expressed its concern when judges are not selected “primarily on the basis of their legal qualifications.”³⁶

43. In addition, while it is appropriate that judges may be prohibited from participating in certain forms of political activity while on the bench, in order to ensure their independence and impartiality, the exclusion from article 7 of the Draft Law of people who have belonged to a political party for the past 10 years as candidates for members of the Constitutional Court undermines the rights to freedom of association and political participation. The provision effectively imposes a penalty for the exercise of these rights. Moreover, barring as members of the Constitutional Court individuals who have been members of the IPCC or former members of the Constitutional Council also risks unduly undermining the process of identifying qualified persons with potentially relevant experience to sit on the Constitutional Court.

44. Furthermore the ICJ is concerned at the lack of any provision in the Draft Law that ensures that there is no discrimination in the selection process and that aims to ensure that the composition of the Court essentially reflects the population, including by ensuring qualified women and members of minority communities are among its members.³⁷

45. This runs counter to international standards.

46. Principle 10 of the UN Basic Principles states that “in the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status.”³⁸

³³ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the African Commission’s activity report at 2nd Summit and Meeting of Heads of State of the African Union, Maputo, 4 -12 July 2003, Section A (4)(h).

³⁴ Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, principles 11 and 12.

³⁵ ICJ, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Geneva, 2007, p. 41.

³⁶ Concluding Observations of the Human Rights Committee on Sudan, CCPR/C/79/Add.85, para. 21.

³⁷ Special Rapporteur on the Independence of Judges and Lawyers, Report to the General Assembly, A/66/289 (2011), paras. 22-33, 92; Committee on the Elimination of Racial Discrimination, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, A/60/18 (pp. 98-108) (2005), para. 5(d).

³⁸ Principle 10 of the UN Basic Principles on the Independence of the Judiciary.

As noted above, the African Union Principles stress that “[t]he sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity; appropriate training or learning and ability.” The Principles and Guidelines highlight that discrimination on any ground is prohibited, while noting that it shall not be discriminatory for states to prescribe a certain age or experience or that only nationals shall be eligible for judicial office.³⁹

47. The prohibition of discrimination in the selection and appointment of judges stems from the general obligation of States to ensure human rights are recognized without distinction of any kind contained for example in article 2 of the ICCPR, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Grounds of discrimination also include sexual orientation and gender identity as highlighted in the Beijing Statement of Principles.⁴⁰

48. The UN Human Rights Committee has recommended that “measures should be taken to improve the independence and technical competence of the judiciary, including the appointment of qualified judges from among women.”⁴¹ In 2011, the UN Special Rapporteur on the Independence of Judges and Lawyers, stressing the large underrepresentation of women in judicial office throughout the world, “in particular in the highest-level positions”, insisted on the need for States to ensure better representation of women in the judiciary.⁴² The UN Human Rights Committee similarly recommended that States should “take necessary steps towards achieving an appropriate representation of women [particularly at senior levels of the executive and judiciary].”⁴³

49. Moreover, the Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), highlights that “The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.”⁴⁴ Referring to this instrument, the UN Special Rapporteur on the Independence of Judges and Lawyers clearly identified the fair representation by the judicial system of the pluralistic nature of society and the communities they serve, by reflecting their diversity, as a condition to “preserve and improve public trust and confidence in its credibility, legitimacy and impartiality.”⁴⁵

50. The ICJ therefore recommends that the Draft Law be amended to ensure that judges are selected based on objective criteria, including those closely connected to the judicial function such as their legal qualifications, competence and personal integrity. It also recommends including a provision to provide for gender representation and ensuring that the composition of the Constitutional Court is determined by objective criteria that accurately reflects the pluralistic nature of Tunisian society. The provisions of the Draft Law excluding as candidates individuals

³⁹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, paragraph 4(h)-(j).

⁴⁰ Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, principle 13.

⁴¹ Concluding Observations of the Human Rights Committee on Sudan, CCPR/C/79/Add.85, para. 21.

⁴² UN Special Rapporteur on the Independence of Judges and Lawyers, Interim Report, A/66/289 (10 August 2011), para. 23.

⁴³ Concluding Observations of the Human Rights Committee on the United Kingdom, CCPR/CO/73/UK (2001), para. 15.

⁴⁴ Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), article 11(a).

⁴⁵ UN Special Rapporteur on the Independence of Judges and Lawyers, Interim Report, A/66/289 (10 August 2011), para. 26.

who have belonged to a political party for the past 10 years, members of the IPCC or former members of the Constitutional Council should be deleted.

d) *Security of tenure*

51. Security of tenure is a fundamental condition for judicial independence and impartiality. Thus, international standards provide for judges to have guaranteed tenure until a set retirement age or the expiry of their term of office.⁴⁶ While security of tenure protects primarily against potential interference by the executive or legislative branches of government, security of tenure also guarantees the individual independence of judges against inappropriate interference by others within the judicial hierarchy, exercised outside of formal appeal processes.

52. Article 118 of the Constitution provides that each member of the Constitutional Court shall serve a nine-year term, which is non-renewable.

53. Article 16 of the Draft Law confirms the tenure of members as one nine-year term.

54. Under international standards, judges' tenure must be long enough to safeguard their independence. The UN Principles on the Independence of the Judiciary state that "[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."⁴⁷ Some instruments provide for tenure for life,⁴⁸ however, international standards acknowledge that fixed term tenure is preferred in some jurisdictions. The UN Human Rights Committee has recommended, with regard to such tenure, that governments "revise its laws to ensure that judges' tenure is sufficiently long enough to ensure their independence, in compliance with the requirements of article 14, paragraph 1."⁴⁹ Fixed term tenure must comply with general conditions of tenure in order to ensure the independence of judges.⁵⁰ The Universal Charter of the Judge stresses that "[a] judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered."⁵¹

55. Article 13 of the Draft Law provides that the President of the Constitutional Court shall have the same privileges as a government minister and that the rest of the members of the Court will enjoy the same privileges as State secretaries. It further provides that they will have salaries from the budget allocated to the Court. However, it does not define the details of those privileges.

56. International standards refer to additional guarantees for independence and impartiality to be provided during fixed term tenure, such as guarantees relating to salary and retirement. For example, the African Union Principles stress that "The tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and

⁴⁶ UN Basic Principles on the Independence of the Judiciary, Principle 12; ACHPR Principles and Guidelines, Section A, Principle 4(I).

⁴⁷ UN Principles on the Independence of the Judiciary, Principle 12; Council of Europe's Recommendation No. R (94 12), Principle I.3.

⁴⁸ Latimer House Guidelines, doc. cit., Guideline II.1.

⁴⁹ Concluding Observations of the Human Rights Committee on the Republic of Moldova, CCPR/CO/75/MDA, para. 12.

⁵⁰ Latimer House Guidelines, doc. cit., Guideline II.1.

⁵¹ Universal Charter of the Judge, doc. cit., article 8.

other conditions of service of judicial officers shall be prescribed and guaranteed by law."⁵²

57. The ICJ recommends that the Draft Law provides further details regarding other guarantees of independence such as salary, retirement and pension rather than merely referring to the privileges of existing high ranking governmental positions.

58. While the 2014 Constitution contains general provisions on guarantees for the security of judges' tenure (article 107) and on responsibility (article 103), there is no specific provision on the conditions of the tenure of the Court's members. The Draft Law envisages a vacancy on the Court for the following reasons: death, permanent incapacity, resignation, unjustified absence from three consecutive hearings, and exemption in case a candidacy criterion is no longer met or in case of a breach of the obligations prescribed by the current law.⁵³ Article 24 further provides that the Constitutional Court shall look into cases of permanent vacancies and take a decision based on a two-thirds majority vote.

59. The ICJ is concerned that these provisions fall short of international standards. The UN Basic Principles specify that, "[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties."⁵⁴ Similarly, the UN Human Rights Committee has held that to meet the requirements of article 14 of the ICCPR, 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".⁵⁵

60. International standards also 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 procedures for complaints against judges and their discipline, including removal, should be prescribed by law. Furthermore, the removal or disciplining of judges must be based on established standards of judicial conduct, such as those set out in the Bangalore Principles of Judicial Conduct.⁵⁶ Sanctions against the Court's members, including disciplinary measures, suspension or removal, must be proportionate and subject to appeal before an independent judicial body.⁵⁷

61. In this regard, the Draft Law does not seem to distinguish between vacancy, removal, and dismissal on disciplinary grounds. It also does not limit the grounds for suspension or removal to reasons of incapacity or behaviour that renders them unfit to discharge their duties.

62. Further, the exemption in case a candidacy criterion is no longer met or in case of breach of the obligations prescribed by the current law is too vague and overbroad as to give reasonable notice of what conduct would lead to disciplinary measures.

⁵² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, paragraph 4(m).

⁵³ Draft Law, article 24.

⁵⁴ UN Basic Principles on the Independence of the Judiciary, Principle 18; ACHPR Principles and Guidelines, Section A, Principle 4(p).

⁵⁵ Human Rights Committee, General Comment No. 32, para. 20.

⁵⁶ See Bangalore Principles of Judicial Conduct; International Bar Association Minimum Standards of Judicial Independence, paras 35-42.

⁵⁷ 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(p- r).

63. Despite the content of article 107 of the Constitution, which states that the law shall regulate the cases and guarantees for judicial disciplinary sanctions handed out following a reasoned decision by the HJC, the Draft Law is also silent as to the details of the procedure to be followed in determining whether a breach of the obligations has occurred and contains no guarantees for the fairness of such proceedings. Furthermore it does not require that decisions on sanctions be consistent with accepted standards of judicial conduct, including international standards, or require sanctions to be proportionate and findings and sanctions subject to appeal before an independent judicial body.

64. In order to ensure consistency with the requirements of independence and impartiality, the draft law should thus be amended to set forth the conditions of tenure, including the grounds and procedures for termination of office, in particular suspension and removal.

65. 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.⁵⁸

66. Consistent with international standards, and the Constitution, the Draft Law should be amended so that it requires that the removal and discipline of a member of the Constitutional Court result only following fair proceedings conducted by an impartial and independent body established by the HJC that guarantees due process.

67. To this end, provisions should also be added that require the HJC to establish an impartial and independent body composed of judges to preside over fair proceedings that guarantee due process and ensure rights of the judge to notice, to counsel, to challenge the evidence and present a defence, to a reasoned decision and to appeal before a fully independent and impartial judicial body.

68. The ICJ also recommends that the law stipulates that the disciplining of judges must be based on established standards of judicial conduct, preferably a code of ethics that is consistent with international standards and has been drafted primarily by judges and members of the legal profession. The legislature should require that the sanctions, including disciplinary measures, suspension or removal, are proportionate and subject to appeal before an independent judicial body.

e) *Financial and administrative independence*

69. Unless each of the members of the judiciary and the judiciary as an institution have enough resources to perform their functions, the judges may be vulnerable to external pressure and interference that might undermine the judiciary's independence, including from other branches of the government, and judges' impartiality. Furthermore the fair administration of justice and the right of people to access justice throughout the country, without discrimination, may be compromised.

70. The ICJ is concerned that the provisions of the Draft Law do not guarantee that the judiciary will have adequate financial resources.

71. The ICJ notes that article 29 of the Draft Law states that: "[t]he Constitutional Court shall enjoy administrative and financial independence."⁵⁹

⁵⁸ 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).

72. Article 30 states that the Constitutional Court drafts its own budget. The Draft Law also provides for a dedicated chapter within the national budget of the State to be allocated to the Constitutional Court and that the Constitutional Court will discuss its budget's full components with the Legislative Authority.⁶⁰ However, neither the Constitution nor the provisions of the Draft Law indicate that the Court is to consult the HJC when drafting its budget.

73. The ICJ welcomes the provisions contained in the Draft Law in that they reflect international standards that emphasize the importance of judicial participation in the elaboration and the implementation of its own budget. The Inter-American Commission on Human Rights has considered that the institutional autonomy of the judiciary – including management, administration and financial matters – “are essential and indispensable for maintaining the necessary balance of power in a democratic society.”⁶¹ A further requirement regarding financial autonomy dictates that the Court should be free to decide how to allocate its resources. In this regard, all other institutions must refrain from interfering with the way the judiciary disposes of the resources allocated to it.

74. However, the ICJ recommends that article 30 of the Draft Law be amended to provide that the Constitutional Court shall be able to draft and prepare its own budget,⁶² in consultation with and with the agreement of the HJC, consistent with the ICJ's previous recommendations that the HJC draft law be revised: 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.⁶³

75. International standards also clarify that “[i]t is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.”⁶⁴ The Latimer House Guidelines also stipulate that: “[s]ufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.”⁶⁵

76. Thus the ICJ recommends that article 29 be amended to emphasize the need for allocating sufficient funds to the Court.

2) Competencies of the Constitutional Court

⁵⁹ Draft Law, article 29.

⁶⁰ Draft Law, article 30.

⁶¹ Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Peru, OAS document OEA/Ser.L/V/II.106 Doc. 59 rev., Chapter II “Administration of justice and Rule of law,” para. 13.

⁶² Draft Law, article 30.

⁶³ Available here: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/Tunisia-Final-HJC-Draft-Law-Advocacy-Position-Paper-2015-ENG.pdf>, p. 6, last accessed on 13 October 2015.

⁶⁴ UN Basic Principles on the Independence of the Judiciary, doc. cit., Principle 7; see Section A(4)(v) of the ACHPR Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.

⁶⁵ Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, adopted on 19 June 1998, Guideline II.2.

77. According to article 120 of the 2014 Constitution, the Constitutional Court, in addition to other areas of competence, is granted exclusive competence to rule on the constitutionality of:

- draft laws before their promulgation, following a referral by the President of the Republic, the Head of the Government, or 30 members of the ARP;
- constitutional draft laws submitted by the President of the ARP or in the context of ensuring compliance with procedures to revise the Constitution;
- treaties submitted by the President of the Republic prior to the signature of the law approving those treaties;
- laws, on their submission by courts, where one of the parties to a case raises a claim of unconstitutionality, in accordance with the procedures prescribed by law;
- the rules of procedure of the ARP, submitted by the President of the ARP.

78. The Constitutional Court's power of review thus includes both the *ex ante* review of draft laws and the *ex post* review of legislation after promulgation.

79. The Constitution also prescribes, as a general rule, that the Constitutional Court has 45 days to decide upon the constitutionality of laws and regulations, and that its decisions, which are to be reasoned and taken by the absolute majority of its members, are binding upon all authorities.⁶⁶

80. Other areas of the Constitutional Court's competence provided for in the Constitution include cases of impeachment of the President of the Republic in case of grave violation of the Constitution⁶⁷, disputes over competencies between the President of the Republic and the Prime Minister,⁶⁸ and control over whether "exceptional circumstances" necessary to the declaration of a state of emergency are continuing.⁶⁹

81. For example, articles 70 and 71 of the Draft Law specify the procedure for the Constitutional Court to determine whether the "exceptional circumstances" necessary to declare a state of emergency continue to exist. The draft provisions state that the Court may be seized, upon the request of the President of the ARP or at least 30 members of the ARP to review this situation. According to the draft provisions, the Constitutional Court is to issue its decision publicly, within 5 days of the receipt of the request. In case the Court decides that the "exceptional circumstances" cease to exist, the draft provision states that President of the Republic shall issue a public statement declaring the termination of the state of emergency.

82. The ICJ welcomes the provisions of the Draft Law providing for a referral by courts and tribunals following a constitutionality challenge by a party in a case and making such referral mandatory and without possibility of appeal. However, while the Draft Law provides more details about the Court's competencies in some cases, the ICJ is concerned that it leaves other competencies that are set out in the 2014 Constitution unaddressed and that some provisions of the Draft Law define the Court's competencies too restrictively.

83. With regard to the control of constitutionality of laws and the challenge of constitutionality in the context of litigation, relevant articles only refer to reviewing "laws", without specifying whether decrees and other regulations issued by the

⁶⁶ 2014 Constitution, article 121.

⁶⁷ 2014 Constitution, article 88.

⁶⁸ 2014 Constitution, article 101.

⁶⁹ 2014 Constitution, article 80.

executive fall within the scope of the Constitutional Court's ambit of review. Considering that the Constitution does not specify that the competencies of the Constitutional Court which it lists are exhaustive, the ICJ recommends that the Draft Law contain a provision making it clear that the scope of the constitutionality review extends to decrees promulgated by the executive and other regulations and measures adopted by executive bodies, and to include detailed procedures in this regard.

84. The ICJ also considers that the Draft Law should ensure that the scope of the Constitutional Court's review about the persistence of exceptional circumstances with regard to a state of emergency include review of the lawfulness, necessity proportionality, non-discriminatory and demonstrably justified character in a democratic society of the declaration of emergency itself and of the measures adopted pursuant to that declaration. Tunisia is required to ensure such a review as a party to the ICCPR.⁷⁰

85. Another important element relating to the effectiveness of constitutional review is the effect of the Constitutional Court's decisions. In order to uphold the rule of law and the principle of legal certainty, decisions of the Constitutional Court should be binding and final and must be enforced by public authorities. The 2014 Constitution provides in its article 121 that the decisions of the Constitutional Court are binding on all authorities. However, neither the Constitution nor the Draft Law explicitly refer to the requirement for public authorities to enforce the decisions of the Constitutional Court, which is a necessary corollary to their binding nature and a crucial requirement for the realization of rights and freedoms in practice. The Draft Law therefore should make this clear and to this end, unequivocally affirm that the decisions of the Constitutional Court are final, cannot be subject to any form of review or appeal and are binding on, and must be enforced by, all public authorities.

3) Access to the Constitutional Court

86. As noted above (in the section on the Court's competences), according to article 120 of the 2014 Constitution, a court may refer a question of the constitutionality of a law to the Constitutional Court for a decision, if one of the parties to a dispute claims that the law is unconstitutional. The Constitution also indicates that the procedures for such cases are to be established by law.

87. The Draft Law includes provisions about such procedures in chapter 4.⁷¹ Article 52 of the Draft Law requires a challenge of unconstitutionality to be included in a separate document that shall be submitted by an accredited lawyer before the Cassation Court. Article 52 further prescribes that the submission to the Constitutional Court should contain the reasons justifying the challenge and shall specify the provisions of the law being challenged. The Draft Law also provides that where a challenge is made, the concerned court must immediately refer the constitutional challenge to the Constitutional Court.

88. In addition, article 53 provides that a court's decision to refer a matter concerning the constitutionality of a law raised during litigation to the Constitutional Court is not subject to appeal, even before the Cassation Court. Furthermore, article 55 of the Draft Law stipulates that the case and its related deadlines shall be

⁷⁰ Human Rights Committee, General Comment No. 29, article 4: State of Emergency Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 31 August 2001.

⁷¹ Chapter 4 of the Draft Law (articles 51-58) and chapter 4 of the MPs Draft Law (articles 55-61).

suspended following the referral decision until the Constitutional Court issues a judgement.

89. While the ICJ welcomes the mandatory character of the referral by the lower court and the absence of appeal, it expresses concerns at the condition of accreditation. This condition could result in situations where the lawyer representing the party challenging the constitutionality of a law might not be eligible to file the submission. The ICJ considers that any such impediment would be disproportionately restrictive.

90. Under articles 56 and 57 of the Draft Law, upon a decision by the President of the Constitutional Court, a committee of three members, who are legal experts, shall be established to review the grounds and procedures of the challenges. Following the presentation of the committee's recommendation to the President of the Constitutional Court to either accept or refuse the challenge, the Constitutional Court shall take its decision within three months; the timeframe may be extended once for a maximum of another three months.

91. The Constitution does not provide for direct access by individuals to the Constitutional Court. Allowing individuals who claim that their rights and freedoms have been violated to directly challenge the constitutionality of a law (or a draft law) that infringes on their rights would, however, have strengthened their right to an effective remedy.

92. Under international law, States have an obligation to provide victims of human rights violations with an effective and available remedy in order to redress such violations, as well as to take measures to remove barriers for full access to justice. This right must also be understood within the wider set of States' obligations under international human rights law. This body of norms, including article 2 of the ICCPR, which is binding on Tunisia, requires the State to ensure, secure or guarantee the effective enjoyment of human rights. This obligation not only requires the State to prevent violations but also to respect, protect and fulfil human rights. States must adopt all necessary legislative and other measures to give effect to the rights guaranteed in international law and must ensure that everyone whose human rights are violated has an effective remedy.

93. In addition to the Universal Declaration of Human Rights (UDHR),⁷² numerous international and regional treaties to which Tunisia is a party specifically recognize and require Tunisia to respect and ensure the right to a remedy.⁷³ The right to a remedy applies to all violations of civil, cultural, economic, political and social rights, though the specific modalities for remedy may vary depending on the right in question and the character of the violation.⁷⁴

⁷² UDHR, article 8.

⁷³ See for example the International Covenant on Civil and Political Rights (ICCPR), article 2(3); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 6; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), articles 13 and 14; the Convention on the Rights of the Child (CRC), article 39; the International Convention for the Protection of all Persons from Enforced Disappearance (ICPED), articles 8(2), 17(2)(f), 20(2) and 24; and the African Charter on Human and Peoples' Rights (ACHPR), article 7(1)(a).

⁷⁴ In addition to sources cited above, see for example Committee on Economic, Social and Cultural Rights, General Comment No.9, E/C.12/1998/24 (1998), para. 2. See also General Comments No. 12, E/C.12/1999/5 (1999), paras. 32-35; No. 14, E/C.12/2000/4 (2000), paras. 59-62; No. 15, E/C.12/2002/11, paras. 55-59; No.18, E/C.12/GC/18 (2006), paras. 48-51; and No. 19, E/C.12/GC/19 (2008), paras. 77-81; and for the Committee on the Elimination of Discrimination Against Women, General Recommendation No.28, CEDAW/C/GC/28 (2010),

94. It is therefore necessary that provisions regulating indirect access by individuals to the Constitutional Court to challenge the constitutionality of laws are amended so as not to be unduly restrictive. For example, the requirement that only lawyers accredited before the Cassation Court can raise an exception of unconstitutionality should be removed. The procedure should be simplified and guarantee the right of the concerned parties to a fair hearing.

95. Furthermore, the draft law should be amended so as to expressly provide for the possibility of individuals and groups, including Non-Governmental Organizations, to join proceedings as interested parties and to permit the Constitutional Court to accept briefs as *amicus curiae*. This would be in line with the practice of national constitutional courts. *Amici curiae* are a standard feature in many common law systems. The US Supreme Court has a long history of accepting *amicus curiae* interventions,⁷⁵ as does the Supreme Court of Canada, the Supreme Court of the United Kingdom and the Constitutional Court of South Africa.⁷⁶ Constitutional civil law jurisdictions have also accepted *amicus curiae* and third party interventions. The Brazilian Constitutional Court has received amici briefs since 1999.⁷⁷ The submission of such briefs are also possible in Peru and Argentina.⁷⁸ The Czech Constitutional Court also allows third party intervention.⁷⁹

Recommendations

In light of the above, the ICJ calls on the Tunisian authorities, including the Assembly of People's Representatives, to amend the Draft Law on the Constitutional Court, with a view to:

- **Guaranteeing the independence both of the Constitutional Court as an institution and of its individual judges;**
- **Ensuring an independent and competent authority, the majority of whose members are drawn from the judiciary and are chosen by their peers, such as the HJC, is authorized to screen candidates and select or make binding recommendations of candidates for appointment as judges to the Constitutional Court, which the legislature and the President follow in practice;**
- **Including provisions which require that the procedures of the relevant authority be transparent, open, fair and non-discriminatory, and that decisions be based on transparent and objective procedures and criteria to ensure that political considerations do not play a role in the selection proceedings;**
- **Ensuring that the selection and the appointment of all of the Court's members, including those appointed by the President, is made**

paras. 17, 32, 34 and 36. See also General Recommendations No.19 (11th session 1992) para. 24; No.25 (13th session 2004), para. 7; No.26 (42nd session 2008) para. 26; and No.27 (47th session 2010) paras. 33-34.

⁷⁵ Rules of the Supreme Court of the United States, adopted: 19 April 2013, effective: 1 July 2013, Rule 37.

⁷⁶ Canada: Rules of the Supreme Court of Canada (SOR/2002-156), Rule 92; South Africa: Rules of the Court, Part V, Rule 10; UK: Supreme Court Rules 2009, Rule 26(1).

⁷⁷ Decreto No. 9.868, de 10 de novembro de 1999, art. 7, § 2.

⁷⁸ Steven Kochevar, 'Amici Curiae in Civil Law Jurisdiction' (2012-2103), 122 Yale Law Journal 1653.

⁷⁹ It accepted an intervention in the review of a constitutionality case for the first time in 2006, (Intervention from the European Roma Rights Centre); Judgment of 26 April 2006, Pl. US 37/04, no 419/2006 Coll.) (Cited in Michal Bobek, "Comparative Reasoning in European Supreme Courts", Oxford: Oxford University Press, 2013, p. 53).

through a clear, transparent, fair and inclusive procedure based on objective criteria that include legal qualifications, training and personal integrity, exclude discrimination and ensure the appointment of women and that the composition of the Court is representative of the diversity of the population of Tunisia;

- Removing the provision barring membership of the Constitutional Court for members of the IPCC or former members of the Constitutional Council;
- Removing the provision barring membership for those who have been members of a political party during the previous ten years;
- Providing further details regarding other guarantees of independence for members of the Court, including their salary, retirement and pension, rather than merely referring to the privileges of existing high ranking governmental positions;
- Setting forth the conditions of tenure for members of the Constitutional Court, including the grounds and fair procedures before the HJC or any other independent pluralistic body, composed mainly of judges, preferably chosen by their peers, which respects the rights of the judge, for termination of office, in particular removal, as well as suspension or other disciplinary measures and requiring a reasoned decision for any disciplinary procedure;
- Adding provisions that require the HJC to establish an impartial and independent body to preside over fair disciplinary proceedings that guarantee due process and ensure the rights of judges to notice, to counsel, to challenge the evidence and present a defence, to a reasoned decision and to appeal before a fully independent and impartial judicial body;
- Stipulating that the disciplining of judges must be based on established standards of judicial conduct, preferably a code of ethics that is consistent with international standards and has been drafted primarily by judges and members of the legal profession, and requiring that sanctions, including disciplinary measures, suspension or removal are proportionate and subject to appeal before an independent judicial body;
- Specifying that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties;
- Providing that the Constitutional Court shall be able to draft and prepare its own budget, in consultation with and agreement of the HJC, consistent with ICJ's previous recommendations that the HJC Draft Law be revised: to ensure that the HJC is fully involved in the preparation of the budget for the entire judiciary, not only the budget of 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;
- Providing that sufficient resources shall be allocated to the Court and that the Court should be free to decide how to allocate its resources;
- Making it clear that the scope of the review of the constitutionality of laws in the context of litigation extends to decrees promulgated by the executive and other regulations and measures adopted by executive bodies and to include detailed procedures in this regard;
- Ensuring that the scope of the Constitutional Court's review about the persistence of exceptional circumstances with regard to a state of emergency includes the review of the lawfulness, necessity, proportionality, non-discriminatory and demonstrably justified character in a democratic society of the declaration of emergency

itself and of the measures adopted pursuant to that declaration, as required by the ICCPR;

- **Unequivocally affirming that the decisions of the Constitutional Court are final, cannot be subject to any form of review or appeal and are binding on and must be enforced by all public authorities;**
- **Ensuring that the provisions regulating indirect access by individuals to the Constitutional Court to challenge the constitutionality of laws are amended so as not to be unduly restrictive, in particular by removing the requirement that only lawyers accredited before the Cassation Court can raise an exception of unconstitutionality, and by simplifying the procedure and guaranteeing the right of the concerned parties to a fair hearing;**
- **Expressly providing for the possibility of individuals and groups, including Non-Governmental Organizations, to join proceedings as interested parties and for the Constitutional Court to accept briefs as *amicus curiae*.**