

Morocco: Judicial Conduct and the Development of a Code of Ethics in Light of International Standards

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The right to an independent and impartial judiciary is a cornerstone of the rule of law and the protection of human rights. This right and the right to a fair trial are guaranteed by the Constitution of Morocco and article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which Morocco is a State party.¹ The authorities in Morocco are thus required by the Moroccan Constitution and national law as well as the ICCPR to respect and protect the independence and impartiality of the judiciary.

The independence of the judiciary not only requires the clear separation of executive, legislative and judicial functions and laws establishing objective criteria for the appointment, and ensuring adequate remuneration, and security of tenure; it also requires that the judiciary as a whole, and judges individually, maintain the integrity of the profession, and that judges be held accountable for misconduct in the course of their duties. Indeed, public confidence in the integrity of the judicial system is an essential element of the rule of law, and this confidence comes notably from the knowledge that judges act independently, without any improper influence or pressure, threats or other interference, for any reason whatsoever, and that they will be held accountable if they act in violation of certain standards of judicial conduct when carrying out their judicial functions.²

Grounds, procedures, and institutions for judicial accountability must be clearly defined in order to ensure that accountability mechanisms work to bolster – and not hinder – the independence of judges: “In establishing judicial accountability mechanisms, it is important to define the concept of judicial accountability and clearly establish the actions for which justice operators should be held accountable, to whom they should be accountable and through which processes”.³

In other words, to ensure the independence and impartiality of the judiciary, judges should act in accordance with established standards of judicial conduct that are consistent with international law and standards. All disciplinary proceedings, in particular those that could result in suspension or removal of a judge, must be determined in accordance with such standards.⁴ In this regard, numerous international standards affirm that professional standards for judges in the discharge of their duties that are consistent with international standards should be developed by judges and set down in law or a code of conduct.

In Morocco, the Constitution, adopted in 2011 guarantees the independence of the judiciary.⁵ In terms of judicial standards of conduct and accountability mechanisms, the recently adopted organic Law No. 100.13 on the High Judicial Council (*Conseil supérieur du pouvoir judiciaire*, CSPJ) and organic Law No. 106.13 on the Statute for Judges provide the legal framework in Morocco. In particular, both the law on the CSPJ and the law on the Statute for Judges call for the adoption of a “Judicial Code of Ethics”. Until this Judicial Code of Ethics is adopted, judicial disciplinary proceedings in Morocco appear to be solely based on the provisions of these two laws, some of which fall short of international standards safeguarding the independence of judges.

¹ Morocco has been a State party to the ICCPR since 1979, and, as such, is obligated to implement to its provisions.

² UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability (2014), UN Doc. A/HRC/26/32, para. 19. See also ICJ, *Practitioners’ Guide No. 13: Judicial Accountability* (2016) [ICJ Practitioners’ Guide No. 13], available at: <http://icj2.wpengine.com/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>.

³ UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability, (2014), para. 55.

⁴ 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 [UN Basic Principles on the Independence of the Judiciary], Principle 19.

⁵ Constitution of Morocco, articles 1 (separation of powers) and 107 (independence of the judicial power).

The development of the Judicial Code of Ethics is currently the subject of important discussions in Morocco. Judges' associations, in particular, are leading the dialogue with a view to drafting a code that is in line with Morocco's international obligations. In this context, the ICJ is of the view that this is an important opportunity to ensure that the independence of Morocco's judiciary is reinforced through the adoption of clear, transparent and detailed standards of conduct, which both reflect Morocco's reality and its international obligations.

This memorandum therefore aims to contribute to the efforts to develop a Judicial Code of Ethics and legal provisions on judicial accountability, which are consistent with international standards. In order to achieve this, it should be ensured that national professional standards for the judiciary and sanctions for misconduct are consistent with international standards, that disciplinary offences are clearly and precisely defined within the law, and that the grounds for discipline not be defined in terms so broad as to facilitate their abuse as a means of interfering with the independence of individual judges for wrongful purposes.

I. The Judicial Code of Ethics: standards of conduct and the Judicial Ethics Board

International standards relating to the professional conduct of judges are all based on the fundamental premise that judges must perform their duties in an **independent and impartial** manner. The integrity of the judiciary, and of its judges individually, both depends on, and is a further guarantee of, this independence and impartiality. Judicial integrity must be secured by accountability mechanisms which themselves respect the independence and impartiality of individual judges and the judiciary as a whole. The UN Special Rapporteur on the independence of judges and lawyers has stated:

The principle of the independence of the judiciary is not aimed at benefitting judges themselves, but at protecting individuals from abuses of power and ensuring that court users are given a fair and impartial hearing. As a consequence, judges cannot act arbitrarily by deciding cases according to their own personal preferences. Their duty is the fair and impartial application of the law. Judges must therefore be accountable for their actions and conduct, so that the public can have full confidence in the ability of the judiciary to carry out its functions independently and impartially.⁶

In order to prevent abuse of power and improper influence over judges individually and the judiciary as a whole, "a clear set of standards must be established".⁷ In this regard, numerous international standards affirm, and the ICJ recommends, that professional standards for judges in the discharge of their duties that are consistent with international standards should be developed by judges and set down in law or a code of conduct.⁸

⁶ UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability, (2014), para. 59.

⁷ UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability, (2014), para. 48.

⁸ See e.g. ICJ Practitioners' Guide No. 13, p. 25; Judicial Integrity Group, Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010), paras 1.1-2.2, 15.1-15.8; UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability, (2014), paras 72, 78, 210; Human Rights Council, Resolution 29/6: Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers (2015), para. 3; UN Office on Drugs and Crime, *Resource Guide on Strengthening Judicial Integrity and Capacity* (2011), pp. 127-131, 134. See also UN Basic Principles on the Independence of the Judiciary, Principle 19.

Codes of judicial ethics or conduct can help guide judges and resolve questions of professional ethics, inform the public about the standards of conduct they are entitled to expect from judges, and contribute to public confidence in the independent and impartial administration of justice. National judiciaries often have a choice whether to adopt separate instruments and institutions to, on the one hand, codify and enforce disciplinary offences that lead to suspension, removal or other penalties or remedies, and on the other hand, set out ethical guidance that is not necessarily, in itself, intended to give rise to enforceable penalties or remedies. Sometimes these two purposes are combined in a single instrument. While national systems have some discretion in how to achieve these objectives, international law and standards make clear that there must be some means of ensuring that judges who are responsible for corruption or human rights violations are subject to fair procedures that can impose appropriate penalties and remedies, while at the same time, the disciplinary and ethical grounds and mechanisms adopted at the national level must not be of a character that improperly restricts judicial independence or impartiality or the human rights of judges. If disciplinary grounds and ethical guidance are combined in a single instrument, compliance with international human rights and rule of law standards necessitates that the boundaries of the two aspects be distinctly and precisely defined within the document. The ICJ addresses the requirements for sanctionable professional conduct in section II below.

When speaking of “standards of judicial conduct”, international standards generally refer to the Bangalore Principles of Judicial Conduct, which were developed by the Judicial Integrity Group, a group of Chief Justices and Superior Court Judges from around the world. These Principles – which have been repeatedly endorsed by United Nations bodies⁹ – provide an internationally recognized overview of key elements of judicial ethics and are designed to “provide guidance to judges and to afford the judiciary with a framework for regulating judicial conduct.”¹⁰ Clear and precise standards of judicial conduct that are consistent with international standards, including the UN Basic Principles on the Independence of the Judiciary and the Bangalore Principles on Judicial Conduct, must be therefore be established to guide judges in the behaviour that is appropriate to their judicial functions and preserving the integrity of the judiciary.

As noted in the Introduction, both the law on the CSPJ and the law on the Statute for Judges provide for the adoption of a Judicial Code of Ethics in Morocco. Article 44 of the law on the Statute for Judges states that judges must abide by the principles and rules contained in the “judicial code of ethics”, and the respect, knowledge and maintenance of judicial traditions.

Article 106 of the law on the CSPJ provides that the CSPJ shall, following consultations with professional associations of judges, draft a “Judicial Code of Ethics” that guarantees the values, principles and rules to which judges are subject in the exercise of their professional functions and judicial responsibilities, in order to:

- preserve the independence of judges and their capacity to exercise their judicial duties in full impartiality, objectivity and responsibility;
- safeguard the prestige of the judicial system, the observance of the noble ethics of judicial work, and the obligation of effectively implementing the rules of justice;

⁹ See Commission on Human Rights Resolution 2003/43, UN Doc. C/CN.4/2003/L.11/Add.4, and UN Economic and Social Council (ECOSOC), Strengthening Basic Principles of Judicial Conduct, UN Doc. E/RES/2006/23. For the drafting history of the Bangalore Principles, see UN Office on Drugs and Crime, Commentary on the Bangalore Principles of Judicial Conduct (2007) [Commentary on the Bangalore Principles]. See also e.g. resolutions of the Human Rights Council: Resolution 29/6 (2015) on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, Preamble; Resolution 30/7 (2015) on Human Rights in the administration of justice, including juvenile justice, Preamble; Resolution 31/2 (2016) on Integrity of the judicial system, Preamble.

¹⁰ Commentary on the Bangalore Principles, p. 36.

- protect the rights of the litigants as well as of all judicial facilities, and make sure they are well treated in the framework of the full respect of the law;
- guarantee the continuity of judicial facilities and work to ensure their proper functioning.

This provision also adds that the CSPJ shall form a Judicial Ethics Board “to watch over and observe the commitment” of the judges to the Judicial Code of Ethics. The functions and composition of the Board, however, are not specified.

i. Standards of conduct

The ICJ welcomes the fact that both the law on the CSPJ and the law on the Statute for Judges provide for the adoption of a Judicial Code of Ethics. To ensure the highest degree of respect for judicial independence, international standards recommend that judicial codes of ethics or conduct be developed either by the judiciary itself, or at a minimum in close consultation with the judiciary.¹¹ The ICJ therefore also welcomes the fact that the law on the CSPJ specifies that this Code must be drafted by the CSPJ, following consultations with professional associations of judges.

With regard to what the standards of conduct in question should include, the ICJ recommends that in Morocco, like elsewhere, the development of the Judicial Code of Ethics be based in whole or in large part on the internationally recognized Bangalore Principles of Judicial Conduct, i.e. **independence, impartiality, integrity, propriety, equality, and competence and diligence**. The ICJ also recommends that the Commentary on the Bangalore Principles of Judicial Conduct (hereafter the Commentary on the Bangalore Principles or “the Commentary”) be recognised as a guide for the drafting and interpretation of the national Judicial Code of Ethics.¹² The Commentary was drafted and adopted by the Judicial Integrity Group and an international inter-governmental group of experts, to serve as an explanatory memorandum to the Bangalore Principles. The Commentary clarifies the rationale for the six values and principles incorporated in the Bangalore Principles, and provides concrete examples.

The recommendations provided below, based largely on the Bangalore Principles of Judicial Conduct and Commentary on the Bangalore Principles, and supplemented by other international standards, aim to provide a general overview of the principles and issues that the Moroccan judges who are developing the Judicial Code of Ethics should include and address.

Independence

The principle of the independence of the judiciary must be incorporated and clearly safeguarded in the Moroccan Code of Judicial Ethics. Judicial independence is guaranteed in the Moroccan Constitution¹³ and the ICCPR, to which Morocco is a party. The Bangalore Principles of Judicial Conduct emphasize: “Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.”¹⁴ This requires both the judge individually and the judiciary

¹¹ Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised by the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002 [Bangalore Principles of Judicial Conduct], para. 8 of the Preamble (“WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.”); see also International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, Geneva, 2011, p. 211.

¹² Commentary on the Bangalore Principles, para. 17.

¹³ Constitution of Morocco, article 109.

¹⁴ Bangalore Principles of Judicial Conduct, Value 1: Independence. See also, e.g., Canadian Judicial Council, *Ethical Principles for Judges*, “Judicial Independence”, p. 7; Code of Conduct for United States Judges, Canon 1: A Judge Should Uphold the Integrity and Independence of the

as a whole to be independent. At the heart of this principle is the idea that the judge has "the complete liberty [...] to hear and decide the cases that come before the court."¹⁵

As such, and in line with the principle of the separation of powers, the judge is not beholden to the government or any other external actor, and neither must he or she be (or be perceived to be) anything but independent.¹⁶ This contributes to the public perception that judicial decision-making is not subject to inappropriate external or internal influences.

A judge must therefore be subjected to the ethical obligation of exercising his or her functions in accordance with the principle of independence.¹⁷ This requires, for example:

- that a judge make decisions that are not improperly influenced by outside opinion and that he or she actively reject direct and indirect attempts to influence his or her decision-making;¹⁸
- that a judge neither be too susceptible nor too fragile in the face of criticism, as freedom of expression and the democratic discourse require that criticism of public office and of all exercise of public power be permitted;¹⁹
- that a judge also act independently of other judges;²⁰
- that a judge exhibit and promote high standards of judicial conduct, in particular the observance of the minimum guarantees for a fair trial.²¹

Impartiality

As noted above, in addition to independence, the right to an impartial tribunal one is a cornerstone of the rule of law and the right to a fair trial, as enshrined in Article 14 of the ICCPR and other international and regional standards, including those related to judicial ethics.²² The Moroccan Constitution also states that a judge must act in conformity with his or her duty of impartiality.²³

The impartiality of a judge can be defined as the absence of bias, animosity or sympathy towards either of the parties. However, there are cases in which this bias, animosity or sympathy will not be manifest but only apparent. Impartiality is therefore assessed by means of both a subjective test (is the judicial officer *actually* impartial?) and an objective test (would a *reasonable observer*, viewing the matter realistically and practically, apprehend a lack of impartiality in the judge?).²⁴ The

Judiciary; High Judicial Council (France), Compendium of the Judiciary's Ethical Obligations, A. Independence, p. 1.

¹⁵ Commentary on the Bangalore Principles, para. 22.

¹⁶ Commentary on the Bangalore Principles, para. 37.

¹⁷ Article 3(1) of the Code of Judicial Ethics of the International Criminal Court, for example, provides, "Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence."

¹⁸ Commentary on the Bangalore Principles, paras. 27-30. In some cases, particularly if attempts at influencing the judge are repeated, a judge should report an attempt to influence him or her to the proper authorities.

¹⁹ Commentary on the Bangalore Principles, para. 30.

²⁰ Commentary on the Bangalore Principles, paras. 39-40. See also, e.g. Judicial Council (Jordan), Code of Judicial Conduct, article 2, available here: <http://www.jc.jo/sites/default/files/img-320095204-0001-1.pdf>.

²¹ Commentary on the Bangalore Principles, para. 46.

²² UN Basic Principles on the Independence of the Judiciary, Principle 2; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 [African Fair Trial Principles], Section A.5; Committee of Ministers of the Council of Europe, Recommendation No. R(94)12 [CoM Recommendation R(94)12], Principles I(2)d) and V(3)(b). See also Human Rights Committee, Communication No. 387/1989, *Arvo O. Karttunen v. Finland*, UN Doc. CCPR/C/46/D/387/1989 (1992), para. 7.2.

²³ Constitution of Morocco, article 109.

²⁴ Commentary on the Bangalore Principles, para. 56. See also, e.g., International Criminal Court, Code of Judicial Ethics, article 4(1).

European Court of Human Rights, like other Courts around the world, has ruled that the answer to both of these tests of impartiality must be yes, in order to fulfil the requirement of judicial impartiality.²⁵

The Commentary on the Bangalore Principles contains guidelines on what kind of behaviour could result in either subjective or objective partiality, both inside and outside the courtroom. Such guidelines address, for example:

- the verbal or physical manifestation of bias, e.g. judges should both avoid demeaning expressions, slurs, epithets, etc., and exercise caution with their facial expression when addressing parties, lawyers, jurors or the media;²⁶
- contempt powers, which enable a judge to control the courtroom and maintain decorum, but which, when abused and used in retaliation, become a manifestation of bias;²⁷
- what may constitute bias or prejudice. However, "a judge's personal values, philosophy, or beliefs about the law may not constitute bias. The fact that a judge has a general opinion about a legal or social matter directly related to the case does not disqualify the judge from presiding."²⁸
- and more.

Similarly, the Judicial Code of Ethics should be sure to define and include provisions on the duty of judges to recognize and to avoid *conflicts of interest*. Conflicts of interest arise when "the personal interests of the judge (or of those close to him or her) conflict with the judge's duty to adjudicate impartially".²⁹ The Code should clarify that judges are under an obligation to minimise the risk of conflicts of interest as well as an obligation to withdraw or recuse themselves when faced with actual or potential conflicts of interest. In explaining the scope of the principle of Impartiality, and with a view to minimizing the risk of conflicts of interest, the Bangalore Principles clarify that "[a] judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases."³⁰

It is equally important that the content of the Judicial Code of Ethics assist judges in weighing the "actual conflicts between the judge's own interest and the duty of impartial adjudication, and the circumstances in which a reasonable observer would (or might) reasonably apprehend a conflict."³¹ The Judicial Code of Ethics should provide examples of scenarios where recusal is necessary as a result of a conflict of interest, that include personal involvement in the case, but also personal connections (both friendships and animosities) to the parties and conflicts of interest related to money, such as those involving the judge having financial interest in the outcome of a case, or financial dealings with one of the parties or conflicts occasioned by stocks owned by judges.³²

²⁵ Commentary on the Bangalore Principles, para. 53. See also, e.g., European Court of Human Rights, *Gregory v. United Kingdom* (1997), 25 EHRR 577.

²⁶ Commentary on the Bangalore Principles, para. 58.

²⁷ Commentary on the Bangalore Principles, para. 59.

²⁸ Commentary on the Bangalore Principles, para. 60.

²⁹ Commentary on the Bangalore Principles, para. 67.

³⁰ Bangalore Principles of Judicial Conduct, para. 2.3.

³¹ Commentary on the Bangalore Principles, para. 67.

³² For some examples of conflicts of interest that may be helpful to include in the Judicial Code of Ethics, see e.g. Code of Conduct for United States Judges, Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently, (C) Disqualification; Canadian Judicial Council, Ethical Principles for Judges, "Impartiality", E. Conflicts of Interest, p. 44. See also African Fair Trial Principles, Section A.5(d). This provision clarifies that the impartiality of a judicial body is undermined when:

- (i) a former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;
- (ii) a judicial official secretly participated in the investigation of a case;

Integrity

The Judicial Code of Ethics should include provisions on judicial integrity, which is generally described as honesty and judicial morality. To maintain judicial integrity judges must act "in a manner befitting the judicial office, be free from fraud, deceit and falsehood, and be good and virtuous in behaviour and in character."³³ The requirement of integrity demands that judges' conduct be above reproach in the view of a reasonable observer.³⁴ This requirement applies to both judges' private and public life.

Judges are expected to be honourable, honest and to refrain from engaging in conduct that would bring the judicial system into disrepute. Judges are also expected to abide by, enforce and uphold the law; however it would be wrong to understand this obligation as referring to national laws only. The situation is more complex when a judge is confronted with a national law the application of which will clearly violate, for instance, international human rights law or international humanitarian law. In such circumstances, international law and international judicial standards may require the judge to refrain from perpetrating or becoming complicit in the violation that would thereby occur. The judge, exercising powers of the State, otherwise would become the instrument of the State's breach of international law. In fact, where judges fail to uphold human rights law and humanitarian law, they may and indeed in some instances must be held personally liable for misconduct (this is addressed in more detail in section II(ii) below). At minimum, it seems arguable that a judge would be ethically justified in declining to apply national law in a way that would result in the judge acting unlawfully as a matter of international law.

More generally, the Commentary on the Bangalore Principles recommends the following test be applied when inquiring into the appropriateness of judicial conduct in view of the requirement of integrity:

(...) the proper inquiry is not whether an act is moral or immoral according to some religious or ethical beliefs, or whether it is acceptable or unacceptable by community standards (which could lead to arbitrary and capricious imposition of narrow morality), but how the act reflects upon the central components of the judge's ability to do the job for which he or she has been empowered (fairness, independence and respect for the public) and on the public perception of his or her fitness to do the job. Accordingly, it has been suggested that in making a judgment on such a matter, six factors should be considered:

- (a) The public or private nature of the act and specifically whether it is contrary to a law that is actually enforced;
- (b) The extent to which the conduct is protected as an individual right;
- (c) The degree of discretion and prudence exercised by the judge;
- (d) Whether the conduct was specifically harmful to those most closely involved or reasonably offensive to others;
- (e) The degree of respect or lack of respect for the public or individual members of the public that the conduct demonstrates;
- (f) The degree to which the conduct is indicative of bias, prejudice, or improper influence.³⁵

(iii) a judicial official has some connection with the case or a party to the case;

(iv) a judicial official sits as a member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body.

³³ Commentary on the Bangalore Principles, para.101.

³⁴ Bangalore Principles of Judicial Conduct, para. 3.1. See also, UN Basic Principles on the Independence of the Judiciary, Principle 10; African Fair Trial Principles, Section A.4(i) and (k); and Canadian Judicial Council, Ethical Principles for Judges, "Integrity", Principle 1, p. 13: "Judges should make every effort to ensure their conduct is above reproach in the view of reasonable, fair minded and informed persons".

³⁵ Commentary on the Bangalore Principles, para. 106.

The Commentary on the Bangalore Principles, taking into account the evolving nature of mores and values, cautions against the adoption of standards for a judge's conduct in his or her private life that are too prescriptive, or those that would allow for censuring or penalizing a judge "for engaging in a non-conformist lifestyle or for privately pursuing interests or activities that might be offensive to segments of the community".³⁶

It is, on the other hand, possible to adopt more rigid standards for judges' conduct in a courtroom. A judge must not only respect the law, but also ensure his or her appropriate conduct with the parties, witnesses and public. Judges should "seek to be courteous, patient, tolerant and punctual and should respect the dignity of all".³⁷ Judges must not discriminate, nor tolerate discrimination, arising from various grounds, including but not limited to "race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes".³⁸ Standards of judicial conduct should also make clear that judges should not communicate privately with appellate courts or appellate judges about cases the judge has ruled that are being appealed, during the appeal.³⁹

Propriety

Maintaining propriety and the appearance of propriety are key to the performance of the activities of a judge.⁴⁰ It requires that judges "always conduct [themselves] in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary."⁴¹ Propriety not only requires that a judge act in an appropriate manner, but also that a reasonable observer *perceive* his or her ethics to be appropriate. In fact, the Commentary on the Bangalore Principles emphasizes, "[w]hat matters more is not what a judge does or does not do, but what others think the judge has done or might do".⁴² The Commentary recommends that the test for judicial impropriety should be:

[...] whether the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality, independence and competence, or whether it is likely to create in the mind of a reasonable observer, a perception that the judge's ability to carry out judicial responsibilities in that manner is impaired.⁴³

In this regard, due to their professional role and their duty to maintain theirs and the profession's independence, impartiality, integrity and propriety, judges must accept that they may be the subject of constant public scrutiny and comment, and may be required to accept certain restrictions on their activities and contacts.⁴⁴ The Bangalore Principles and the Commentary include several pages and examples illustrating what these restrictions might be.⁴⁵ The common thread is that any restriction must demonstrably serve the real purpose of helping a judge maintain his or her propriety, and must not be used to constrain his or her right to the freedoms of expression and association.

³⁶ Commentary on the Bangalore Principles, paras 103-105.

³⁷ Judiciary of England and Wales, "Guide to Judicial Conduct", para. 4.2. This is sometimes considered as a component of the 'Competence and Diligence' standard, see Bangalore Principles of Judicial Conduct, art. 6.6.

³⁸ These are called "irrelevant grounds" in the Bangalore Principles of Judicial Conduct and are listed under article 5.1.

³⁹ Commentary on the Bangalore Principles, para. 107.

⁴⁰ Bangalore Principles of Judicial Conduct, Principle 4.

⁴¹ Bangalore Principles of Judicial Conduct, para. 4.6.

⁴² Commentary on the Bangalore Principles, para. 111. See also, e.g. Code of Conduct for United States Judges, Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities.

⁴³ Commentary on the Bangalore Principles, para. 112.

⁴⁴ Commentary on the Bangalore Principles paras 113 and 114

⁴⁵ Commentary on the Bangalore Principles, paras 111 to 182.

Equality

The right to equality and non-discrimination is firmly entrenched in international law. Article 14 of the ICCPR provides that, "All persons shall be equal before the courts and tribunals". Article 26 guarantees that, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law" and specifies that, "In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 2 requires States to respect and ensure these and all other rights under the ICCPR "without distinction of any kind", including on the grounds set out in Article 26. The Human Rights Committee has specified that the right to equality before courts and tribunals also includes the principles of "equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination".⁴⁶

The principle of equality and non-discrimination is also enshrined in several provisions of the Moroccan Constitution, including article 6, which provides that all are equal before the law.⁴⁷ Therefore, judges must ensure that the fundamental principle of equality of the parties is respected, and should avoid manifesting bias or discrimination towards any of the parties. This also requires that judges attempt to remain informed on issues and developments related to discrimination.⁴⁸

In particular, the Value 5 of the Bangalore Principles affirms that, "Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office." In this regard, the Bangalore Principles further specify, among other things, that: "A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ('irrelevant grounds')"⁴⁹; and that "A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds."⁵⁰

The Judicial Code of Ethics should remind judges that they have a duty to respect and protect the rights to equality, equal access, equality of arms, and ensure that the parties to the proceedings are treated without any discrimination, including on the grounds mentioned in the ICCPR and in the Bangalore Principles. This requires not only that judges treat each party equally, but also that they be cognizant of how their behaviour toward each of the parties may be perceived. Generally, the Judicial Code of Ethics should remind judges to be aware of not only their spoken words, but also their gestures, expressions and other behaviour that may reasonably be interpreted as showing insensitivity or disrespect. This includes behaviour towards lawyers, litigants, witnesses, and also court staff members since all of these interactions affect the public perception of a judge.⁵¹

The principle of equality also holds particular significance in regards to gender-based discrimination, and judges must avoid any behaviour or speech that could be interpreted as discriminatory towards women or perceived as stereotypical.⁵²

Competence and diligence

⁴⁶ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007) [Human Rights Committee, General Comment No. 32], para. 8.

⁴⁷ See also the Preamble and articles 19, 31, 32, and 35.

⁴⁸ Commentary on the Bangalore Principles, para. 186: "[Judges] should attempt, by appropriate means, to remain informed about changing attitudes and values in society, and to take advantage of suitable educational opportunities [...]"

⁴⁹ Bangalore Principles of Judicial Conduct, para. 5.1.

⁵⁰ Bangalore Principles of Judicial Conduct, para. 5.2.

⁵¹ See, e.g. Canadian Judicial Council, Ethical Principles for Judges, "Equality", pp. 23-26,

⁵² Commentary on the Bangalore Principles, para. 185.

International standards relating to judicial competence and diligence require that “the judge must diligently and efficiently perform his or her duties without any delay”⁵³ and state that these principles are “prerequisites to the due performances of judicial office”.⁵⁴

To achieve the appropriate degree of competence and diligence, judges should take reasonable steps to maintain and enhance the knowledge and skills necessary to perform their duties,⁵⁵ keep themselves informed about the latest international law developments, especially in relation to human rights instruments,⁵⁶ and take advantage of potential training opportunities.⁵⁷ Moreover, professional competence should not be seen as limited to judicial work in court but should also include the performance of functions related to judicial administration.⁵⁸

Additionally, judges must give precedence to their judicial duties over all other activities.⁵⁹ This in turn means that they should not “engage in conduct incompatible with the diligent discharge of such duties”.⁶⁰ Cases should also be managed within a reasonable time⁶¹ and judges should also avoid abusing the process.⁶²

For each of these principles, the Judicial Code of Ethics should clearly set out the standards of conduct and give examples of good and poor practice, to illustrate the proper implementation of the ethical principles contained therein. This will help inform the public about the proper functioning of the judiciary, and about what they should expect of independent and impartial judges. A formal document that contains such examples will also help to guide judges, should they feel that outsiders (whether members of the public or other government officials) are attempting to influence the judge’s decision and compromise the independence of the justice. Therefore the ICJ recommends that the Moroccan Judicial Code of Judicial Ethics include practical guidance as to how judges should behave to maintain their independence and give examples of proper or improper conduct.

While the Moroccan Judicial Code of Ethics or conduct need not be an exact copy of the Bangalore Principles, the ICJ is of the view that any departure from these principles must be closely scrutinized and formulated in a manner that ensures full compliance with the requirements of judicial independence and impartiality as well as the human rights of judges (on the latter, see section II(iii) below). Indeed, the ICJ emphasizes that restrictions placed on the conduct of judges in their private capacities, such as standards of behaviour to ensure propriety or integrity, must be kept to a demonstrably justified minimum in order to ensure the rights to freedom of

⁵³ Universal Charter of the Judge, approved by the International Association of Judges (IAJ) on 17 November 1999, article 6 (Efficiency).

⁵⁴ Bangalore Principles of Judicial Conduct, Value 6: Competence and Diligence. See also, e.g. International Criminal Court, Code of Judicial Ethics, article 7; Canadian Judicial Council, Ethical Principles for Judges, “Diligence”, pp. 17-22.

⁵⁵ Bangalore Principles of Judicial Conduct, para. 6.3. See also England and Wales Judiciary, Guide to Judicial Conduct, para. 6.1.

⁵⁶ Bangalore Principles of Judicial Conduct, para 6.4.

⁵⁷ Commentary on the Bangalore Principles, para. 199, finding that taking training opportunities is as much a right as a duty.

⁵⁸ Bangalore Principles of Judicial Conduct, para. 6.2.

⁵⁹ Bangalore Principles of Judicial Conduct, para. 6.1.

⁶⁰ Bangalore Principles of Judicial Conduct, para. 6.7. See also Judiciary of England and Wales, “Guide to Judicial Conduct”, para 6.1.

⁶¹ Committee of Ministers of the Council of Europe, Recommendation Rec(2010)12 [CoM Recommendation Rec(2010)12], para. 62. Paragraph 6.5 of the Bangalore Principles of Judicial Conduct also recommends that judges be efficient and deliver decisions with “reasonable promptness”.

⁶² Commentary on the Bangalore Principles, para. 193.

expression and association of judges, and this should be made clear in the Judicial Code of Ethics.⁶³

ii. Judicial Ethics Board

The ICJ notes that the law on the CSPJ provides that a Judicial Ethics Board shall be formed to monitor judges' commitment to the Judicial Code of Ethics. While the composition and precise remit of this body (that had yet to be established in December 2016) are unclear, it appears that it is intended to be distinct from the adjudicator of disciplinary matters for judges (that fall under the competence of the CPSJ, with the assistance of judicial inspectors).⁶⁴

On this topic, the Consultative Council of European Judges (CCJE), for example, "encourages the establishment within the judiciary of one or more bodies or persons having a consultative and advisory role and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge".⁶⁵ The CCJE recommends that such bodies be "separate from and pursue different objectives to existing bodies responsible for imposing disciplinary sanctions".⁶⁶

The ICJ recommends that the composition, role and functions of the Judicial Ethics Board be clearly defined in the Judicial Code of Ethics. Consistent with its distinct role and the recommendations of the CCJE, the ICJ considers that this body, could usefully play a consultative and advisory role for judges.

Additional guidance on the process of establishment, structure, and role of judicial accountability mechanisms is set out in the ICJ 2016 *Practitioners Guide No. 13: Judicial Accountability*.⁶⁷

In light of the above, the ICJ calls on the CSJP, in the development of the Judicial Code of Ethics, to:

- (a) Ensure that, in accordance with the laws on the Statute for Judges and on the CSPJ, the Judicial Code of Ethics is elaborated in close consultation and with a diverse representation of the Moroccan judiciary, in including associations of judges;**
- (b) Base the content of the Moroccan Judicial Code of Ethics on the UN Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct and, to that end:**
 - (i) Ensure that the principles of independence, impartiality, integrity, propriety, equality, and competence and diligence, are clearly incorporated in the Judicial Code of Ethics in a manner consistent with international standards, including but not limited to:**
 - How judges must conduct themselves to remain *independent* from all outside actors, be it**

⁶³ UN Basic Principles on the Independence of the Judiciary, Principles 8 and 9. See also International Bar Association, Minimum Standards of Judicial Independence (adopted 1982), art. 41 and 42; Bangalore Principles of Judicial Conduct, para. 4.13 ; Commentary on the Bangalore Principles, paras 8 and 9; and African Fair Trial Principles, Section A.4(t).

⁶⁴ Law on the CSPJ, articles 85 and following. See also ICJ, "The Moroccan Draft Organic Law on the High Council of the Judiciary in light of International Law and Standards", June 2015, pp. 15-18, available here: <http://icj2.wpengine.com/wp-content/uploads/2015/06/Morocco-Memo-on-the-CSPJ-Advocacy-Briefing-paper-2015-ENG.pdf>.

⁶⁵ Consultative Council of European Judges, Opinion No. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, 2002 [CCJE, Opinion No. 3], para. 29.

⁶⁶ CCJE, Opinion no. 3, para. 29.

⁶⁷ ICJ Practitioners' Guide No. 13, available at: <http://icj2.wpengine.com/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>.

- executive, legislative, other judges, or even the public or the media;
 - How judges must conduct themselves to be both objectively and subjectively *impartial*, and to avoid situations of conflict of interest;
 - How judges must demonstrate *integrity* by remaining free from any fraudulent, dishonest, or deceitful behaviour, and how they must see their duty to enforce the law;
 - How judges must maintain *propriety* and the appearance of propriety, both in their professional and private lives, while retaining their fundamental rights and freedoms;
 - How judges must ensure that the fundamental principle of *equality* of all participants involved in or affected by proceedings before them is respected, and how they must avoid manifesting bias or discrimination;
 - How judges must see to it that the law is properly applied and cases are dealt with fairly and efficiently through proper *competence and diligence*;
- (ii) Include practical guidance as to how judges should conduct themselves in accordance with these principles;
- (c) Ensure that any differences between the content of the Judicial Code of Ethics and the Bangalore Principles are consistent with international standards on independence of the judiciary and the rights or role of judges, and in this regard:
- (i) Ensure that the Judicial Code of Ethics does not infringe upon the independence of judges and their ability to exercise their rights and fulfil their roles;
 - (ii) Ensure that the Judicial Code Ethics is consistent with and respects judges' rights, including the rights to freedom of expression and association, and that its provisions do not authorize disciplinary sanctions based solely on the exercise of these rights.
- (d) Clearly define the composition and functions of the Judicial Ethics Board, in particular with regard to its role. In this regard, and taking into account the existence of a distinct disciplinary adjudicator, consider giving the Board a consultative and advisory role for judges whenever they have questions regarding proper conduct or the proper application of the Judicial Code of Ethics.

II. Types of judicial misconduct liable to disciplinary action

In some jurisdictions, codes of judicial ethics may primarily serve as non-binding guidance. At the same time, independence and impartiality cannot be preserved solely through non-binding ethical codes. Statutory and procedural rules, and professional culture, also have an important role with regard to the discipline of judges. In accordance with international standards, when it comes to formal disciplinary proceedings and sanctions of suspension or removal, such proceedings and sanctions must "be determined in accordance with established standards of judicial conduct".⁶⁸

As a public institution, the judiciary must be held accountable to the public and society it serves.⁶⁹ Judicial accountability may take several forms.⁷⁰ The right of

⁶⁸ UN Basic Principles on the Independence of the Judiciary, Principle 19.

⁶⁹ UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability, (2014), para. 55.

victims of human rights violations, and of serious violations of international humanitarian law, to an effective remedy and reparation – including the right to truth⁷¹ – is as applicable to violations perpetrated by or with the complicity of judicial officials, as it is for the acts and omissions committed by other State officials.⁷² Moreover, the State may be held responsible for all acts and omissions of judicial officials that are carried out in the judge's official capacity, whether the wrongful act exceeded the person's authority or was lawful under the State's domestic law.⁷³ Judges must also remain criminally liable for committing ordinary crimes that are not related to the content of their orders and judgments (subject to those ordinary crimes themselves being properly defined in accordance with human rights).⁷⁴

In the framework of this memorandum, the ICJ addresses more specifically grounds and procedures for disciplinary sanctions, including removal from office.

International standards uniformly recognize that individual judges are subject to disciplinary proceedings and penalties, up to and including removal from office, for sufficiently serious misconduct.⁷⁵ Some latitude is left to national judiciaries to determine the definition and scope of what could constitute misconduct serious enough to be punishable, and the sanctions applicable. However, this disciplinary framework must remain in conformity with international law and standards and respect the principle of legality. As such, in all circumstances, disciplinary procedures must be fair and expeditious, "[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties", and "[a]ll disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."⁷⁶

In this regard, there are certain forms of judicial conduct for which international law requires that judges be held accountable – including at the disciplinary level – such as judicial corruption and judicial violations of human rights and of international humanitarian law; and certain conducts for which they should never be punished, i.e. the legitimate exercise of their fundamental rights.

⁷⁰ For a more in-depth look into all forms of judicial accountability, see ICJ, Practitioners' Guide No. 13, pp. 17-32.

⁷¹ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, article 22(b).

⁷² UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability, (2014), paras 97-105, 130. The right to an effective remedy and reparation is provided for in several international instruments, including: Universal Declaration of Human Rights, article 8; ICCPR, article 2(3); Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, articles 13 and 14; etc.

⁷³ Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly Resolution 56/83 (2001), articles 1-4 and 7; Human Rights Committee, General Comment No. 31: Nature of the general legal obligation on State Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 4; UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability, (2014), paras 97-105, 130.

⁷⁴ See, e.g., CoM Recommendation Rec(2010)12, para. 68 (excepting cases of malice); CCJE, Magna Carta of Judges (Fundamental Principles), article 20; CCJE, Opinion No. 3, para. 75(ii); CCJE, Opinion No. 18: The position of the judiciary and its relation with the other powers of state in a modern democracy (2015), para. 37. See also ICJ, International Commission of Jurists, Legal Commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Geneva, 2011, p. 213: "Judges should enjoy 'limited functional immunity' which should cover arrest, detention and 'other criminal proceedings that interfere with the workings of the court'. A wider immunity, however, would not be justifiable."

⁷⁵ UN Basic Principles on the Independence of the Judiciary, articles 17-20; African Fair Trial Principles, Sections A.4(p),(q) and (r); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, articles 22-28.

⁷⁶ UN Basic Principles on the Independence of the Judiciary, articles 17-20.

In Morocco, article 109 of the Constitution provides that judges have the obligation to perform their duties with independence and impartiality, and that any breach of this obligation constitutes “a grave professional fault”. The new laws on the CSPJ and on the Statute for Judges, adopted in 2016, establish a new system regulating the nomination, careers, ethics and discipline of judges. These new laws, particularly the one on the Statute for Judges, contain significant provisions relating to the conduct of judges, some of which are, as will be described later, inconsistent with international standards.

In accordance with the law on the Statute for Judges, upon appointment, judges must swear the following oath: “I swear to God Almighty that I shall exercise my functions with impartiality, sincerity and dedication, and that I shall maintain the qualities of respectability and dignity and the secret of deliberations, as well as the prestige and independence of the judiciary, and that I shall commit myself to the fair application of the law, and adopt the conduct of an honest judge”. Any breach of the obligations contained in this oath is considered a breach of professional duties.⁷⁷

Article 96 of the law on the Statute for Judges provides that “[a]ny breach by judges of their professional duties, honour, respectability or dignity” is liable to disciplinary sanctions.

Article 97 of the law on the Statute for Judges specifies that is considered a “*serious misconduct*”:

- The serious violation of a procedural rule that constitutes a fundamental guarantee for the rights or freedoms of the parties;
- The serious violation of a law in force;
- Unjustified and repeated negligence or delay at the beginning or during the procedures or during the hearing, in the course of the exercise of the judge’s judicial duties;
- The violation of professional confidentiality and disclosure of secret deliberations;
- Intentionally refraining from recusing himself or herself from a case when the law so requires;
- Refraining collectively and in an organized manner from working;
- Stopping or disrupting the normal functioning of hearings and tribunals;
- Adopting a political position⁷⁸; and
- Exercising political or trade union activities or joining a political party or a professional union.

i. Professional misconduct other than corruption or violations of human rights or humanitarian law

As was mentioned earlier, international, regional and national standards can address a wide range of potential ethical or professional conduct issues beyond human rights or humanitarian law violations and corruption, and national judiciaries have some latitude in defining and applying such standards at the national level. However, in all such circumstances, disciplinary procedures must be fair and expeditious; judges may only be subject to suspension or removal for reasons of “incapacity or behaviour that renders them unfit to discharge their duties”; and all disciplinary, suspension or removal proceedings must be determined in accordance with established standards of

⁷⁷ Law on the Statute for Judges, article 40.

⁷⁸ A previous draft of the law on the Statute for Judges included, in the list of serious misconduct, “making a political statement”. This was deemed unconstitutional by Morocco’s Constitutional Council, in a decision rendered on 15 March 2016, which considered that while adopting a political position is incompatible with a judge’s obligation of independence and impartiality, making a political statement could not be considered to be misconduct severe enough to justify the immediate suspension of a judge. See the decision of the Constitutional Council, available here (in Arabic): http://www.conseil-constitutionnel.ma/AR/Decision/detail_recherche.php?mot=sdfsdfsdf&id_discour=2016/992.

judicial conduct. The specific grounds for discipline must be clearly and precisely defined in the national legal framework.

The ICJ observes that neither the law on the CSPJ nor the law on the Statute for Judges specifies the role that will be held by the provisions of the Judicial Code of Ethics, once adopted. In particular, neither of the two laws provides that alleged breaches of the provisions contained in the Judicial Code of Ethics would render the judge liable to disciplinary proceedings. Therefore, unless and until the Judicial Code of Ethics is adopted and specifically purports to constitute a basis for disciplinary liability, judicial disciplinary proceedings in Morocco appear to be solely based on the provisions of the law on the Statute for Judges and of the law on the CSPJ.

The law on the Statute for Judges clearly states that judges in Morocco must conduct themselves with independence, impartiality and dedication, and commit themselves to the full application of the law. The law specifies that judges are subject to disciplinary sanctions if their conduct leads to a breach of their professional duties, honour, respectability or dignity. Possible sanctions are prescribed in article 99 of the law on the Statute for Judges and described in section III on the sanctions, below.

However, disciplinary infractions are not clearly defined by the law on the Statute for Judges. Under article 96 of the law, judges may be subject to disciplinary sanctions for 1) breach of honour, respectability or dignity, and 2) breach of professional duties.

With regard to the first category, disciplinary liability will depend entirely on the interpretation of the terms "honour", "respectability" or "dignity". The used wording is broad and imprecise, and does not provide judges with clear notice about the types of conduct that may amount to disciplinary infractions. The ICJ notes that similar provisions have, in the past, been used by Moroccan authorities, including by the Minister of Justice, in a way that undermined judicial independence, to suspend judges or refer them to the disciplinary council for charges that appeared to stem from the legitimate exercise of their rights, including the right to freedom of expression.⁷⁹

As for the second category, the law does not precisely define "breaches of professional duties". Some information is contained in article 40 of the law on the Statute for Judges, which provides that a breach of the obligations contained in the oath that must be sworn by judges upon their appointment is considered a breach of professional duties. Once again, however, disciplinary liability relies on such broad terms as "respectability", "dignity", and expressions such as "adopt the conduct of an honest judge". While these are important ethical guidelines, they are not clear enough to give judges an accurate idea of the specific types of actual conduct that may subject them to disciplinary proceedings. This means that judges could be sanctioned arbitrarily for other unspecified acts or omissions in the course of their duties. While it is to be expected that judges swear an oath such as the one provided for in article 40, disciplinary liability cannot rest on the vague wording of this oath alone.

The wording of article 96 of the law on the Statute for Judges is therefore inconsistent with the requirement of legal precision, thereby allowing for arbitrary abuse of disciplinary powers over judges; consequently, in its current form, article 96 improperly undermines judicial independence. The ICJ therefore urges Moroccan

⁷⁹ For example, in disciplinary case 07/2014, the Minister of Justice referred Judge Rachid Al-Abdellawi, from the tribunal of first instance of Tangiers, to the disciplinary council on charges of "failure to comply with obligations of honour, finesse or dignity of the judicial office". The charges stemmed from a photo posted by the judge on social media, which showed the judge working in the hallway of the courtrooms because, even after one month of working at the tribunal, there was still no office available for the judge to work from. See also ICJ, "Morocco: The Draft Organic Law on the Statute for Judges and International Law and Standards on the Independence of the Judiciary", June 2015, p. 6, available at: <http://icj2.wpengine.com/wp-content/uploads/2015/06/Morocco-Memo-on-Statute-for-Judges-Advocacy-Briefing-paper-2015-ENG.pdf>.

authorities to ensure that provisions be adopted which would clearly and exhaustively define disciplinary infractions, in a manner that would allow judges to know exactly what types of behaviour or conduct might render them liable to disciplinary sanctions. The clearest way of doing so would be to amend article 96 of the Law on the Statute for Judges itself. If however disciplinary grounds are instead defined by means other than amending article 96, for instance through secondary legislation, this secondary legislation should explicitly declare that its definitions are exhaustive and that no judge shall be subject to disciplinary measures under article 96 for any conduct not included within the definitions.

ii. Judges' accountability for human rights violations and corruption

International standards generally provide that judges should benefit from personal immunity from ordinary civil damages proceedings, and that criminal prosecutions should be subject to substantial procedural protections to prevent their abuse.⁸⁰ At the same time, the UN Special Rapporteur on the independence of judges and lawyers has stated, "total immunity would only nourish distrust among the public towards the justice system as a whole".⁸¹ It is incumbent on all States to take the necessary measures to combat impunity for human rights violations, judicial corruption, and similar such misconduct, both at the criminal and disciplinary levels.⁸²

Indeed, for the purposes of international law, the acts of a judicial official are considered acts of State, similarly to all other State officials. Therefore, where judges perpetrate or are complicit in the perpetration of violations of international human rights, they – as well as the State in which they serve⁸³ – must be held accountable. This is the case even where the judge's conduct was "lawful" under domestic law. In such a case, for example, the Commentary on the Bangalore Principles states that a judge might be obligated to "resign the judicial office", rather than compromise between his or her duty to enforce a law, and his or her obligation to uphold and respect human rights.⁸⁴

Moreover, the Human Rights Committee has recommended that States should take measures to eradicate corruption by investigating, prosecuting and punishing alleged perpetrators, including judges.⁸⁵ The UN Special Rapporteur on the independence of judges and lawyers stated:

Judicial corruption erodes the principles of independence and integrity of the judiciary; infringes on the right to a fair trial; creates obstacles to the effective and efficient administration of justice; and undermines the credibility of the entire justice system.⁸⁶

Morocco is party to the UN Convention against Corruption⁸⁷, article 11(1) of which provides as follows:

⁸⁰ See ICJ, Practitioners' Guide No. 13, pp. 17 to 30, 41 to 42, and 76 to 79.

⁸¹ UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability (2014), para. 52.

⁸² See Human Rights Committee, Concluding observations on Yemen, UN Doc. CCPR/C/YEM/CO/5, para. 17.

⁸³ Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly Resolution 56/83 (2001), articles 1-3; Vienna Convention on the Law of Treaties, 1155 UNTS 331, article 27.

⁸⁴ Commentary on the Bangalore Principles, para. 108.

⁸⁵ See, for example, Human Rights Committee, Concluding observations on Turkmenistan, UN Doc. CCPR/C/TKM/CO/1 (2012), para. 13; and Cape Verde, UN Doc. CCPR/C/CPV/CO/1 (2012), para. 15.

⁸⁶ UN Special Rapporteur on the independence of judges and lawyers, Report on judicial corruption and combatting corruption through the judicial system, UN Doc. A/67/305 (2012), para. 108.

⁸⁷ UN Convention against Corruption, 2349 UNTS 41.

Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

The ICJ observes that the law on the Statute for Judges does not include offences related to judicial corruption or judicial complicity in violations of international human rights or humanitarian law in its list of serious offences under article 97. While certain provisions exist in the Code of Civil Procedure regarding offences of corruption committed by judges⁸⁸, and in the Code of Criminal Procedure prohibiting judges from ordering or knowingly tolerating arbitrary detention⁸⁹, these are not sufficient. Provisions concerning accountability of judges for violations of international human rights or humanitarian law and serious judicial corruption must also be instituted at the disciplinary level.

The Moroccan legal framework should therefore include clear provisions prescribing the acts and omissions that could engage disciplinary responsibility for judicial corruption, and judicial perpetration or complicity in human rights violations, war crimes, crimes against humanity and other crimes under international law. In this regard, international human rights law, international humanitarian law and various instruments on corruption list a number of conducts that should be sanctioned through fair and transparent disciplinary proceedings.

“Violations of human rights” committed by judges typically include for example (but without limitation):

- arbitrarily ordering detention or arbitrarily sentencing of persons to imprisonment or death;
- convicting persons following trials that have failed to satisfy the minimum guarantees of fairness and due process;
- enforcing discriminatory domestic laws or applying laws in a discriminatory manner;
- exercising or failing to exercise their authority in a manner that conceals or facilitates violations perpetrated by the military or law enforcement agents, such as arbitrary detention, torture, extra-judicial executions, or enforced disappearance, or protecting the perpetrators from facing punishment or depriving the victims from effective remedy and a reparation.⁹⁰

In cases of certain violations of human rights, in particular, international law requires that judges be personally held responsible for their actions and that States take measures to ensure that this is so. The Human Rights Committee has stated:

Where the investigations [...] reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. [...] These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6).⁹¹

⁸⁸ Code of Civil Procedure, articles 391 and 392.

⁸⁹ Code of Criminal Procedure, article 148.

⁹⁰ See ICJ, Practitioners' Guide No. 13, pp. 8-11.

⁹¹ Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on State Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 18.

Similarly “gross” violations can also be understood to include, for example, genocide, slavery and slavery-like practices, summary or arbitrary executions, prolonged arbitrary detention, and violations of economic, social and cultural rights of a particularly serious scale or severity of impact.⁹²

Judges should also be held liable for perpetrating or being complicit in the perpetration of crimes under international law, including international humanitarian law in situations of armed conflict or violations of international criminal law, such as war crimes or crimes against humanity. Such offences could include, for example, “wilfully depriving a protected person of the rights to a fair and regular trial”, which the 1949 Geneva Conventions and 1977 Additional Protocol I expressly list as a “grave breach” giving rise to criminal responsibility.⁹³ Another example could be the judge being complicit in the unlawful deportation of population, which is considered a crime against humanity under the Rome Statute of the International Criminal Court.⁹⁴

With regard to corruption, while there is no universally agreed upon definition, the Special Rapporteur on the independence of judges and lawyers cites the informal definition used by Transparency International, a leading anti-corruption NGO, i.e. “the abuse of entrusted power for private gain”.⁹⁵ Further indications can be found in the UN Convention against Corruption, which requires States to criminalize certain acts that are implicitly considered to be forms of corruption including bribery⁹⁶, and embezzlement and misappropriation or other diversion of property by a public official.⁹⁷ The Convention also requires States to consider criminalizing additional acts, including abuse of functions or position.⁹⁸

The range of sanctions available for each of these acts or omissions should also be clearly provided, and should go up to removal from office in serious cases. There should be a requirement that sanctions be proportionate to the misconduct in question. At a minimum, judicial perpetration or complicity in gross human rights violations, war crimes, crimes against humanity and other crimes under international law, or serious judicial corruption, should meet the threshold for removal from office (on sanctions, see section III below).

iii. Respect for judges’ human rights

Principle 8 of the UN Basic Principles on the Independence of the Judiciary recognizes that “members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve

⁹² See, e.g., Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 30; Geneva Academy of International Humanitarian Law and Human Rights, *What amounts to a ‘serious violation of international human rights law?’*, August 2014.

⁹³ See, e.g. 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War, article 130; 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, article 147; 1977 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, article 85(4)(e). This is also considered a “war crime” under article 8(2)(a)(vi) of the Rome Statute of the International Criminal Court.

⁹⁴ Rome Statute of the International Criminal Court, article 7(1)(d).

⁹⁵ UN Special Rapporteur on the independence of judges and lawyers, Report on judicial corruption and combatting corruption through the judicial system, UN Doc. A/67/305 (2012), para. 109.

⁹⁶ UN Convention against Corruption, article 15(b): “[S]olicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”

⁹⁷ UN Convention against Corruption, article 17.

⁹⁸ UN Convention against Corruption, article 19.

the dignity of their office and the impartiality and independence of the judiciary”.⁹⁹ Additionally, principle 9 provides that judges “shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence”.¹⁰⁰ The Commentary on the Bangalore Principles makes clear that such language includes the right to join or form a trade union or other association of that nature.¹⁰¹

No restrictions to these rights may be imposed other than those permitted by the articles 18 to 22 of the ICCPR.¹⁰² Such limitations must among other things be lawful, proportionate, and demonstrably justified in a free and democratic society.

Article 29 of the Moroccan Constitution provides that the freedoms of association and of trade union and political membership are guaranteed and that the law establishes the conditions of the exercise of these freedoms. The right to strike is also guaranteed by this provision. However, the Constitution specifies, “Magistrates enjoy freedom of expression, in compatibility with their obligation of reserve and of judicial ethics. They may join associations or create professional associations, in line with the obligation of judicial impartiality and independence and in accordance to the conditions provided by law. They may not join political parties or trade unions”.¹⁰³

The law on the Statute for Judges similarly provides that judges may form professional associations and join associations that are legally founded and that seek legitimate objectives. Both entitlements are to be exercised with due consideration for and respect for the obligations of judicial reserve, judicial ethics, impartiality and independence, and preserve the dignity and sanctity of the judiciary. However, the law prohibits judges from establishing or managing any institution or entity other than a professional association.¹⁰⁴ It also prohibits judges from joining political parties or trade unions, or to undertake any individual or collective work assignment that may lead to a halt or disruption of hearings or of the normal functioning of the courts.¹⁰⁵ Article 97 categorizes a judge’s joining a professional union or engaging in trade union activities as “serious misconduct”.

To justify such limitations affecting the freedom of association and expression of judges, Morocco would need to demonstrate they are necessary and proportionate to legitimate objectives.¹⁰⁶ While the rights to freedom of association and expression,

⁹⁹ These rights are set out for example in the Universal Declaration of Human Rights, articles 18, 19 and 20, and ICCPR, articles 18, 19, 21 and 22. See also article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), concerning the right to form trade unions and the right to strike. As with the ICCPR, Morocco has been a party to the ICESCR since 1979.

¹⁰⁰ See also CoM Recommendation Rec(2010)12, para. 25; and European Charter on the Statute for Judges, 1998, para. 1.7.

¹⁰¹ Commentary on the Bangalore Principles, para. 176. The Commentary also states, “Given the public and constitutional character of the judge’s service, however, restrictions may be placed on the right to strike.”

¹⁰² See e.g. Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (2011). This is apart from the exceptional possibility for States to implement certain specific temporary derogating measures, “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed” under article 4 of the ICCPR: see Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004).

¹⁰³ Constitution of Morocco, article 111.

¹⁰⁴ Law on the Statute for Judges, article 38.

¹⁰⁵ Law on the Statute for Judges, article 46.

¹⁰⁶ In accordance with its obligations under article 22 of the ICCPR, Morocco must ensure that any limitations on a judge’s right to freedom of association are lawful, necessary, reasonable and justifiable. In particular, any limitation must be prescribed by law, necessary in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights of others, and demonstrably justifiable in a free and democratic society. Furthermore the limitation must be proportionate to the justifiable and lawful aim. See Human

including the right strike as guaranteed under international law, are not absolute and can, in some circumstances, be some restricted, the ICJ encourages the Moroccan authorities to reconsider the broad terms of the prohibitions in article 97, and consider narrower restrictions that are less drastic than exposing judges to sanction by suspension, for exercising virtually any aspect of the right to form trade unions or exercise collective work action. For example the authorities could consider recognising a procedure for allowing partial work stoppages that nevertheless ensure maintenance of essential judicial services.

The law on Statute for Judges should also be amended to ensure that such collective action is not automatically classified as serious misconduct punishable by suspension or otherwise characterised or sanctionable as a disciplinary offence, and consideration of the actual impact and context of any such action should be a key element. For instance, in some circumstances it would be wholly inconsistent with the spirit of the international standards on the independence of the judiciary and the rule of law, to punish the judiciary for collectively seeking to raise legitimate concerns about threats to their independence or impartiality, or their ability to effectively administer justice. As previously mentioned, Article 9 of the UN Basic Principles on the Independence of the Judiciary provides that "Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence"; such associations of judges should have some effective means available to them actually advance these purposes.

The ICJ also recommends that, in line with international standards, including the UN Basic Principles on the independence of the judiciary and Bangalore Principles, which explicitly recognize judges' rights to the freedoms of expression and association¹⁰⁷, provisions be included in the Judicial Code of Ethics to further enshrine these rights.¹⁰⁸ If limitations to these rights are to be instituted, these limitations should be explained in these provisions and should be consistent with international law and standards.

In light of the above, the ICJ calls 1) on the Moroccan authorities, including the Government, the Chamber of Deputies, and the Chamber of Counsellors, to amend the law on the Statute of Judges where necessary, and 2) on the CSPJ to adopt the necessary provisions in the Judicial Code of Ethics, in order to:

- i. Ensure that the law clearly and precisely defines the forms of misconduct that may lead to a judge's discipline and, in this regard:**
 - (a) Ensure that all disciplinary offences are clearly and precisely defined within statutory provisions so that judges can know from the wording of the relevant legal provisions the acts and/or omissions that could render them liable to disciplinary action;**
 - (b) Ensure that the scope of grounds for disciplinary action are not overbroad as to be open to abuse or other wrongful interference with the independence of individual judges;**
- ii. Provide for the disciplinary liability of judges for perpetration of or complicity in violations of human rights, humanitarian law and for judicial corruption and, in this regard clearly prescribe the offences that could give rise to disciplinary liability for such acts or omissions, in line with international law and standards;**

Rights Committee General Comment No. 31, para 6; Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and association, UN Doc. A/HRC/26/29 (2014), para 21.

¹⁰⁷ Bangalore Principles of Judicial Conduct, principle 4.6.

¹⁰⁸ Bangalore Principles of Judicial Conduct, principle 4.13.

- iii. **Ensure, in defining grounds for disciplinary action, that the fundamental rights and freedoms of judges are upheld and respected and, additionally in this regard, consider less drastic alternatives to the current blanket prohibition on the right to strike and current disciplinary liability for judges who engage in any work-related collective action that carries a risk of disruption.**

III. Disciplinary sanctions

Upon discovery of a judicial misconduct and following fair and transparent disciplinary proceedings, disciplinary sanctions may range from simple warnings, to suspension and removal from office. It is essential, however, that disciplinary sanctions be applied – in law and in practice – in proportionality with the gravity of the offence committed, degree of fault and impact of the misconduct.¹⁰⁹

Furthermore, disciplinary sanctions must not be applied arbitrarily, as this would undermine security of tenure. The principle of security of tenure is an essential component of judicial independence; it requires that judges not be subject to removal from office during their term of appointment except in narrowly defined circumstances.¹¹⁰ Therefore, international standards universally recognize that the threshold for misconduct justifying removal of a judge from office must be set at a very high level, e.g. “incapacity or behaviour that renders them unfit to discharge their duties”¹¹¹; “serious misconduct or incompetence”¹¹²; or “gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties”.¹¹³

As mentioned above, judicial perpetration or complicity in gross human rights violations, war crimes, crimes against humanity and other crimes under international law, or serious judicial corruption, would meet the threshold for removal from office. By contrast, judges should never be subject to removal or punishment for *bona fide* errors or for disagreeing with a particular interpretation of the law.¹¹⁴

Furthermore, it is important to keep in mind that disciplinary sanctions must also in themselves respect the principle of judicial independence. For example, geographic transfer would generally not be appropriate as disciplinary punishment given that if a judge is found to have committed misconduct serious enough to warrant a disciplinary sanction, simply transferring the judge to continue his or her duties in another place – where the judge might repeat his or her misconduct – does not fulfil the obligations of a State to ensure transparency, individual responsibility and effective remedy. In order not to undermine the independence of judges, international standards require that any such transfer normally be subject to the prior consent of the judge in question.¹¹⁵

¹⁰⁹ See, e.g., UN Special Rapporteur on the independence of judges and lawyers, Report on guarantees of judicial independence, UN Doc. A/HRC/11/41 (2009), paras 58, 98; CoM Recommendation Rec(2010)12, para. 69; CCJE Opinion No. 3, paras 73-74; Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators* (2013), para. 249, recommendation 24.

¹¹⁰ See e.g. UN Basic Principles on the Independence of the Judiciary, Principle 12; African Fair Trial Principles, Section A.4(I); Draft Universal Declaration on the Independence of Justice (“Singhvi Declaration”), article 16(b).

¹¹¹ UN Basic Principles on the Independence of the Judiciary, Principle 18; Commonwealth (Latimer House) Principles on the Three Branches of Government (2003), art. IV.

¹¹² Human Rights Committee, General Comment No. 32, para. 20.

¹¹³ African Fair Trial Principles, Section A.4(p).

¹¹⁴ See e.g. UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability (2014), paras 84, 87; CoM Recommendation Rec(2010)12, para. 66; Inter-American Commission on Human Rights *Guarantees for the independence of the justice operators* (2013), para. 249 recommendation 22.

¹¹⁵ Draft Declaration on the Independence of Justice (“Singhvi Declaration”), article 15; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, article 30;

i. Disciplinary sanctions under article 99 of the law on the Statute for Judges

Article 99 of the law on the Statute for Judges lists the possible sanctions that may be handed down upon the finding of judicial misconduct. The provision does not indicate that these sanctions are applicable only in the cases of "serious misconduct" listed in article 97; this leaves open the possibility that article 99 authorizes such sanctions for any breach of professional duties as provided for in article 96 of the law on the Statute for Judges, which would heighten the concern that the vagueness of article 96 enables the potential for abuse of disciplinary measures through their arbitrary or otherwise improper abuse.

Under article 99, there are three levels of sanctions of varying severity. The level of the sanction must be applied in proportionality with the misconduct found to have been committed. At the *first level*, the sanctions are:

- Warnings;
- Rebukes;
- Delay in promotion to a higher grade for a period not exceeding two years;
- Omission from a list of eligibility¹¹⁶ to a certain post for a period not exceeding two years.

These sanctions *may be* accompanied by an automatic transfer.

At the *second level*, the sanctions are:

- Temporary suspension for a period not exceeding six months, with the deprivation of all wages with the exception of family benefits;
- Demotion by one grade.

These two sanctions *are* automatically accompanied by a transfer.

Finally, at the *third level*, the sanctions are:

- Automatic referral to retirement, or suspension from work if the judge does not have the right to pension;
- Dismissal.

While this article provides that sanctions must be applied in proportionality with the offence committed, it does not specify how the sanction should be applied to the acts of misconduct according to these levels of severity and gravity.

It is essential that, at the very least, the law provide that judges may only be suspended or dismissed for reasons of incapacity or behaviour that renders them unfit to discharge their duties, on grounds of serious misconduct or incompetence, in accordance with fair procedures before an independent body ensuring objectivity and impartiality set out in the constitution or the law.¹¹⁷ The law should protect judges from the possibility of being removed or subject to other sanction for *bona fide* errors or simply for disagreeing, in good faith, with a particular interpretation of the law preferred by the executive, legislature, or other non-judicial entities.¹¹⁸

For the reasons previously mentioned, the transfer of judges as a punitive measure

Statute of the Iberoamerican Judge, article 16; UN Special Rapporteur on the independence of judges and lawyers, Report on Mission to Indonesia, UN Doc. E/CN.4/2003/65/Add.2. para. 84.

¹¹⁶ In accordance with article 32 of the law on the Statute for Judges, promotions from one grade to a higher grade are only possible following registration in a list for promotions. See also articles 33 to 35 for modalities regarding the establishment of these lists.

¹¹⁷ See Human Rights Committee, General Comment No. 32, para. 20; ICJ, Practitioners' Guide No. 13, pp. 22-27.

¹¹⁸ ICJ, Practitioners' Guide No. 13, pp. 24, 30.

should also be removed from the law.¹¹⁹

ii. *"Immediate suspension" under article 97 of the law on the Statute for Judges*

Article 97 of the law on the Statute for Judges provides that a judge can be *immediately suspended* from carrying out his/her functions if criminal proceedings are opened against him/her¹²⁰ or if he/she is found to have committed serious misconduct. The ICJ notes that the law on the CSPJ includes a similar provision and clarifies that immediate suspension – in cases of serious misconduct or where criminal proceedings are brought against a judge – is ordered by the Delegate President of the CSPJ, after consultation with the commission established pursuant to article 79.¹²¹ The suspension order states whether the salary of the concerned judge will be paid during the suspension period.¹²²

Article 114 of the Constitution and articles 101 and 102 of the law on the CSPJ provide that individual decisions of the CSPJ and of its Delegate President are subject to review for "abuse of power" by the highest administrative court. Individual complaints can be submitted to the administrative chamber of the Cassation Court within 30 days of notification of the decision. The review by the administrative court does not automatically suspend the execution of decisions against individual judges. However, the court itself can decide, "exceptionally", to suspend the execution of individual decisions if the concerned judge "expressly" requests such suspension.

The ICJ is concerned that article 97 of the law on the Statute for Judges poses a risk of undermining judges' security of tenure, as it appears to set the bar for judicial misconduct sanctionable by suspension lower than that set out in the international standards set out above ("Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties", UN Basic Principle 18).

In order to protect judges from arbitrary disciplinary action, to bolster judicial independence and uphold security of tenure, and to conform to international standards, the ICJ recommends that article 97 of the law on the Statute for Judges be amended to explicitly provide that the possibility of immediately suspending judges is a measure reserved solely for cases of alleged incapacity or conduct that would, if proven, render a judge unfit to perform his or her duties.

The ICJ is also concerned that article 97 neither expressly requires nor makes reference to other provisions requiring and affording due process to the judge concerned. In accordance with international standards such suspension must be a temporary measure pending a prompt full and fair and expeditious trial before a competent, independent and impartial body, in which a judge's rights to due process, and to fully challenge the allegations against him or her and to present a defence, are respected. Such initial proceedings should be kept confidential unless the judge

¹¹⁹ Judicial Integrity Group, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), article 13.5; Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), article 15; Statute of the Iberoamerican Judge, article 16.

¹²⁰ According to article 98 of the law on the Statute for Judges, the criminal prosecution of a judge does not prevent disciplinary action.

¹²¹ Law on the CSPJ, article 92. See on this issue ICJ, "The Moroccan Draft Organic Law on the High Council of the Judiciary in light of International Law and Standards", June 2015, pp. 15-18, available at: <http://icj2.wpengine.com/wp-content/uploads/2015/06/Morocco-Memo-on-the-CSPJ-Advocacy-Briefing-paper-2015-ENG.pdf>, pp. 16-17.

¹²² These provisions perpetuate some of the practices of the old disciplinary system provided for by the previous law No. 1-74-467 of 1974, which stipulated that in cases of serious professional misconduct or criminal prosecution, the judge could be "immediately suspended by order of the Minister of Justice" (article 62). The power to order immediate suspension did not require any prior consultation with the "Conseil supérieur de la magistrature" (what is now the CSPJ) and was exercised in the past in a way that undermined judicial independence.

concerned decides otherwise. The determination of the case must be based on established standards of judicial conduct that are consistent with international standards.

Furthermore, the ICJ is concerned that the review of "individual decisions" of the CSPJ or of its Delegate President by the highest administrative court is limited to cases of "abuse of power". Judges should have the ability to challenge any decision – whether interim or final – in disciplinary, suspension or removal proceedings, through a prompt and fair process of review and their pay should be maintained during the suspension period.¹²³

The ICJ recommends that the law be revised to ensure that the administrative chamber has authority to consider the merits of a decision in a particular case, not only a review restricted to possible abuse of power. The review should be capable of addressing and remedying errors in relation to the procedure followed by the CSPJ, in relation to the sufficiency of the evidence, in relation to the CSPJ's decisions on any questions of law, and as to the appropriateness of the sanction. Moreover, the pay of the judges in question should be maintained during the suspension period, until a final and fully justified decision of suspension or removal is reached.

In light of the above, the ICJ calls 1) on the Moroccan authorities, including the Government, the Chamber of Deputies, and the Chamber of Counsellors, to amend the Statute of Judges where necessary, and 2) on the CSPJ to adopt the necessary provisions in the Judicial Code of Ethics, in order to:

- i. Ensure that disciplinary sanctions are clearly established and commensurate to the character and gravity of the offence committed and, consistent with international standards:**
 - (a) Ensure that articles 97 and articles 99 of the law on the Statute of judges are amended and specify that a judge may only be suspended or removed from office for incapacity or behaviour that renders the judge unfit to discharge his or her duties;**
 - (b) Ensure that the possibility of immediately suspending judges from carrying out their functions is applied only as a temporary measure pending a prompt, full and fair trial by an independent and impartial body that renders its decision expeditiously. The salary and other benefits of the concerned judge should be maintained during the suspension period;**
 - (c) Ensure in such cases, and in all other cases of alleged judicial misconduct that the law requires that a judge accused of incapacity or misconduct is notified of the allegations against him or her, and has the opportunity to fully challenge the allegation and defend himself in fair proceedings before an independent and impartial body in which his or her due process and defence rights have been respected. The law should provide that initial examination of the allegations be confidential unless otherwise requested by the judge concerned. The determination must be based on established standards of judicial conduct that are consistent with international standards. Decisions to sanction a judge, including to**

¹²³ Principles 17-20 of the UN Basic Principles on the Independence of the Judiciary. See also CoM Recommendation Rec(2010)12, para. 69; African Fair Trial Principles, Section A.4(q); Inter-American Commission on Human Rights, Guarantees for the independence of justice operators (2013), para. 249 recommendation 25.

- suspend or remove a judge, among others, must be subject to an independent review;**
- (d) Remove from the law the geographic transfer of a judge as a possible sanction for judicial misconduct.**

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