

# Morocco: Remove Obstacles to Access to the Constitutional Court

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## INTRODUCTION

The 2011 Moroccan Constitution establishes a Constitutional Court.<sup>1</sup> On 13 August 2014, law No. 066.13 organising this Court came into force. Under both the Constitution and law No. 066.13, the Constitutional Court is competent to rule on: the validity of parliamentary elections and referenda; the constitutionality of all organic laws prior to their promulgation; the internal regulations of the houses of Parliament prior to their implementation; and the constitutionality of laws referred prior to their promulgation by the King, Prime Minister, the President of the House of Representatives, the President of the House of Counsellors, one-fifth of the members of the Chamber of Representatives or one-fourth of the members of the Chamber of Councillors.<sup>2</sup>

Importantly, Article 133 of the Moroccan Constitution of 2011 provides for the Constitutional Court also to be competent to review challenges:

raised in the course of a litigation, when it is maintained by one of the parties that the law on which the issue of the litigation depends, infringes the rights and freedoms guaranteed by the Constitution.

On 21 July 2016, Draft Organic Law (No. 86.15) on the conditions and criteria for the implementation of Article 133 of the Constitution (hereafter referred to as the "Draft Law") was referred to the House of Representatives' Committee on Justice, Legislation and Human Rights. On 8 August 2017, the House of Representatives approved the Draft Law. The Second Chamber of the Parliament, the House of Counselors, approved the Draft Law on 16 January 2018. Before its promulgation, the Draft Law is due to be reviewed by the Constitutional Court to assess its compliance with the Constitution.

Under the Draft Law, a request to challenge the constitutionality of a law can only be introduced in the context of litigation. The judge refers the request to the Cassation Court after reviewing it and confirming that the formal and legal requirements set out in the Draft Law are met. The Cassation Court shall then assess the challenge and refer it to the Constitutional Court if deemed "serious".

The International Commission of Jurists (ICJ) believes that while ensuring indirect access to the Constitutional Court is a positive step towards enhancing access to justice and the protection of fundamental rights and freedoms in Morocco, the procedure provided for by the Draft Law should be strengthened in accordance with international standards and best practices.

The ICJ has conducted two missions to Morocco in May and December 2017, and it has gathered from meetings with senior State officials, including the Minister of Justice, that they believe that allowing for a simplified procedure relating to Article 133 would lead to a situation in which the Constitutional Court will be overburdened by a high number of inadmissible cases and/or unfounded complaints.

However, the ICJ is of the view that there is ample room to make the Constitutional Court process more accessible while addressing any such concerns through the adoption of clear admissibility criteria and the establishment of an admissibility chamber or mechanism within

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<sup>1</sup> Moroccan Constitution of 2011, Title VIII (Articles 129-133).

<sup>2</sup> Moroccan Constitution of 2011, Article 132.

the Constitutional Court itself. The authorities' concerns must not be used as an excuse to prevent rights holders from gaining access to the Constitutional Court through unduly restrictive procedures.

In light of the above, the following memorandum analyses the Draft Law in light of international and standards and best practices, including those relating to the right to an effective remedy and to access to justice. It identifies obstacles that might hinder individuals' access to the Constitutional Court and, ultimately, highlights concern that the currently proposed procedure would make the Court less able to effectively fulfill its role in upholding human rights and the rule of law. The memorandum also proposes other avenues to enhance access to the Constitutional Court. The memorandum outlines recommendations for amendments and reform that would help, together with sufficient political will, in ensuring that the procedure on access to the Constitutional Court is strengthened in accordance with international standards and best practices.

## **I. International Law And Standards**

Under the Universal Declaration of Human Rights: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."<sup>3</sup>

The International Covenant on Civil and Political Rights (ICCPR), to which Morocco is a party, requires each State "to ensure that any person whose rights or freedoms (...) are violated shall have an effective remedy".<sup>4</sup> Other international and regional treaties to which Morocco is a party also recognise the right to a remedy, including the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention for the Protection of all Persons from Enforced Disappearance (ICPED), and the Convention on the Rights of the Child (CRC).<sup>5</sup> The UN has also adopted a set of 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,<sup>6</sup> Article 12 of which provides that:

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. ... Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

...

(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

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<sup>3</sup> Universal Declaration for Human Rights (UDHR), Article 8.

<sup>4</sup> ICCPR, Article 2. 3 (a).

<sup>5</sup> International Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 6; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), articles 13 and 14; the Convention on the Rights of the Child (CRC), article 39; the International Convention for the Protection of all Persons from Enforced Disappearance (ICPED), articles 8(2), 17(2)(f), 20(2) and 24.

<sup>6</sup> Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

(c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

Morocco has not yet ratified the African Charter on Human and Peoples' Rights (ACHPR), but it has ratified the Constitutive Act of the African Union, which affirms in article 4(m) the principle of "respect for democratic principles, human rights, the rule of law and good governance" and in article 3(h) the objective to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments". Article 7(1)(a) of the ACHPR affirms that, "Every individual shall have the right to have his cause heard" and that this comprises, among other things, "The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force." This right is further elaborated upon in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which provide that:<sup>7</sup>

(a) Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.

(b) The right to an effective remedy includes:

1. access to justice; ...

(c) Every State has an obligation to ensure that:

1. any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body; ...

And that:

States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination.<sup>8</sup>

As well as that:

(a) States shall ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind, such as discrimination based on race, colour, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

(b) States must take special measures to ensure that rural communities and women have access to judicial services. States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with the special needs and requirements of women.

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<sup>7</sup> Adopted in 2005 by the African Commission on Human and Peoples' Rights, Part C "Right to An Effective Remedy".

<sup>8</sup> Part E "Locus Standi".

(c) In countries where there exist groups, communities or regions whose needs for judicial services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, States shall take special measures to ensure that adequate judicial services are accessible to them.

(d) States shall ensure that access to judicial services is not impeded including by the distance to the location of judicial institutions, the lack of information about the judicial system, the imposition of unaffordable or excessive court fees and the lack of assistance to understand the procedures and to complete formalities.<sup>9</sup>

The procedures for access to the Constitutional Court appear to be a primary means by which Morocco has chosen to give effect within its domestic law to the right to an effective judicial remedy. It is therefore necessary that provisions regulating individuals' indirect access to the Constitutional Court are amended so as not to be unduly restrictive and to enable the Court to fulfil its role in this regard.

## **II. Procedure on Access To The Constitutional Court in Morocco**

### *a. The Draft Law framework*

The Draft Law establishes two procedural steps for determining admissibility: the first before lower courts and the second before the Cassation Court.

#### *First stage: constitutionality challenge before lower courts*

Article 5 of the Draft Law details the criteria for admissibility of a constitutionality challenge before lower courts as follows:

- The challenge must be submitted in a separate memorandum;
- It must be signed by the relevant party to the litigation or by a lawyer who is registered in one of Morocco's Bar associations;
- The legal fee, as determined by the law in force, must be paid, unless the concerned party is exempted from such a fee under the judicial aid system;
- The challenge must specify the legal provision considered to be in violation of the applicant's rights or freedoms guaranteed by the Constitution;
- The challenge must explain how the provision undermines or violates or deprivation of the abovementioned rights and freedoms;
- The challenged legal provision must be a provision that the seized court applied or means to apply in the case or procedure, or constitutes a basis for the prosecution, depending on the case;
- The challenged provision was not previously declared (by the Constitutional Council or the Constitutional Court) to be in conformity with the constitution, unless the basis upon which that declaration was made has changed.

The seized court assesses these requirements within 8 days.<sup>10</sup> Under the law, if the criteria are satisfied the court must refer the challenge to the Cassation Court. The court's decision on whether the constitutionality challenge can proceed is not itself subject to review

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<sup>9</sup> Part K "Access to Judicial Services".

<sup>10</sup> Article 6 of the draft-law.

by a higher court, but the same challenge may be raised again before the courts of appeal or the Cassation Court.<sup>11</sup>

Second stage: constitutionality challenge before the Cassation Court

If the challenge is accepted by the lower courts, these courts shall refer it to the Cassation Court.<sup>12</sup> A panel appointed by the First President of the Cassation Court shall, within three months, assess whether the challenge is "serious".<sup>13</sup> If the challenge is raised before the Cassation Court for the first time on appeal, the panel assesses the requirements provided for in Articles 5 as well as the seriousness of the challenge.

Within that three-month period, the Cassation Court shall issue a reasoned decision on the challenge. If accepted, the Court shall refer it, along with the parties' submissions and conclusions, to the Constitutional Court.<sup>14</sup> If the three-month period expires without the issuance of the Cassation Court's decision, the challenge will be automatically referred to the Constitutional Court.<sup>15</sup>

*b. Assessment in light of international standards*

Direct access to courts, including Supreme and Constitutional courts, for the protection of fundamental rights and freedoms from unconstitutional acts or actions through "*juicio de amparo*" or "*writ of amparo*" is a common feature of the Latin American constitutional tradition.<sup>16</sup> In Europe and Africa, several countries have adopted a system of individual constitutional complaints, including Germany,<sup>17</sup> Spain,<sup>18</sup> Poland,<sup>19</sup> and South Africa.<sup>20</sup>

The Morocco 2011 Constitution and the Draft Law do not provide for individuals to petition the Constitutional Court directly. Creating a procedure by which anyone who claims that their rights and freedoms have been violated can directly challenge the constitutionality of a law or action that infringes on their rights would have been a direct means of implementing individuals' right to an effective remedy and access to justice. Instead, the Draft Law allows for lower courts and the Cassation Court to serve as the gatekeepers applying a number of factors, some of which are relatively objective but others that are vague and potentially highly subjective.

In its previous publications, the ICJ has warned that "having lower courts act as gatekeepers increases the likelihood that some laws and provisions may never be subjected to constitutional review."<sup>21</sup> The ICJ has researched and documented situations in which lower courts serve as gatekeepers and that resulted in litigants being frequently blocked in their efforts to challenge the constitutionality of the laws before constitutional courts. In the specific

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<sup>11</sup> Article 6 of the draft-law.

<sup>12</sup> Article 6 of the draft-law.

<sup>13</sup> Article 11 of the draft-law.

<sup>14</sup> Article 11 of the draft-law.

<sup>15</sup> Article 13 of the draft-law.

<sup>16</sup> Mexico's Constitution, Article 103 and 107, Political Constitution of Chile, Article 20 (*recurso de protección*), Colombian Constitution of 1991 (*acción de tutela*) Article 86; Costa Rica's Political Constitution, Article 48 and Law on Constitutional Jurisdiction, Article 18; Argentina's Code of Constitutional Procedure, Article 35.

<sup>17</sup> German Basic Law, Article 93 Sec. 1 Nr. 4a (*Verfassungsbeschwerde*).

<sup>18</sup> Spain's Constitution, Articles 42-43

<sup>19</sup> Poland's Constitution, Article 79

<sup>20</sup> South Africa's Constitution, Article 167

<sup>21</sup> ICJ, Egypt's Judiciary: Tool of Repression, lack of effective guarantees of independence and accountability, September 2016, p. 113.

case of Egypt, for example, the lower courts have consistently rejected constitutional challenges against repressive laws that undermine human rights.<sup>22</sup>

The ICJ is concerned that the existence of a two-layered admissibility assessment prior to referral to the Constitutional Court put undue burden on the litigants and might undermine their right to an effective and accessible judicial remedy to address violations of their constitutional rights.

The proposed procedure increases the likelihood that some laws and provisions may never be subjected to constitutional review, and that litigants may be blocked in their efforts to ensure the review of the constitutionality of the laws, particularly given that some of the criteria to be applied at the first and second stages of review are vague and highly subjective.

Article 5 of the Draft Law for instance provides for a constitutionality challenge to be inadmissible if the challenged provision was previously declared to conform to the constitution, unless the basis upon which that declaration was made have changed. The Draft Law is silent as to the scope and meaning of the “changed basis” requirement and the decisions of the previous Constitutional Council, the Constitutional Court or the Cassation Court do not give guidance. Subsequent cases, even if similar, may present evidence or arguments that are stronger and more convincing than those raised in a previous unsuccessful case. A subsequent victim should not be deprived of access to an effective remedy simply because an earlier challenge was poorly presented or argued. It is not clear whether the Courts will interpret the “changed basis” requirement as including such circumstances. If given a narrow reading, then, the “changed basis” requirement could deprive an individual who credibly alleges to have been a victim of a Constitutional and human rights violation access to an effective remedy.

The Draft Law also does not clarify the scope and meaning of the “seriousness” test that will be applied by the Cassation Court when assessing the constitutionality challenges. This wording is very broad and highly subjective, and the ICJ is concerned that it seems likely to result in conferring the judges of the Cassation Court such a broad discretion over the referral of cases to the Constitutional Court as to make the process arbitrary and potentially resulting in denial of victims of human rights violations access to an effective remedy.

These concerns that other courts may unduly restrict access to the Constitutional Court are heightened by the particular historical context in Morocco. Until the adoption of the 2011 Constitution, constitutional review was limited to the *ex ante* review of laws by a Constitutional Council. The Council was not mandated or competent to review the constitutionality of legislation after promulgation (*ex post* review). In addition, there was no possibility for individuals to directly or indirectly petition the Constitutional Council regarding an alleged prospective or retrospective violation of the Constitution.<sup>23</sup> The Council was competent to rule on the constitutionality of laws, prior to promulgation, that were referred by the King, the Prime Minister, the President of the House of Representatives, the President of the House of Counsellors or one-fourth of the members of either House.<sup>24</sup>

Because of the limited scope of such constitutional review, and the limited number of stakeholders who were authorized to refer cases to the Constitutional Council, very few Moroccan laws were subjected to constitutional review. As a result, numerous pieces of legislation continue to contain provisions that are not consistent with the provisions of the

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<sup>22</sup> ICJ, Egypt’s Judiciary: Tool of Repression, lack of effective guarantees of independence and accountability, September 2016, p. 112.

<sup>23</sup> ICJ, *Reforming the Judiciary in Morocco*, November 2013, p. 69

<sup>24</sup> 1996 Constitution, Article 81

2011 Constitution, and that, in many instances, violate Morocco's obligations under international human rights law.<sup>25</sup>

In addition, because of the civil-law traditions, Moroccan judges have a limited role of applying the law to the case in hand without assessing its compliance with the Constitution. Article 237 of the Morocco Penal Code specifically provides for judges to be deprived of their civil rights "if they interfere in the work of the legislative branch of government," or "if they obstruct or suspend the application of the law."

This, compounded by the fact that Courts' decisions on constitutionality challenges, including those of the Cassation Court, are final and not subject to any form of review, would limit the opportunities for constitutionality challenges to be reviewed by the Constitutional Court itself and so prevent the process by which higher judicial review might otherwise be able to gradually counter-act unduly restrictive screening by the lower courts.

The ICJ therefore calls on the Moroccan authorities to ensure that all the admissibility criteria are clearly defined in the law, and that the procedure for accessing the Constitutional Court is not unduly restrictive. Inspiration can be found in the positive example of Tunisia where, by virtue of Article 56 of the Law on the Constitutional Court, "the ordinary judge must refer the matter immediately to the Constitutional Court" and without being subject to any form of review by higher courts, i.e the Appeal Courts and the Cassation Court.<sup>26</sup>

### ***III. Third-Party Interventions, Class Actions And Public Interest Litigation***

#### *a. The Draft Law framework*

Article 2 of the Draft Law confines the parties in litigation to: every plaintiff and respondent in case before a court, and every defendant or civil rights plaintiff or civil representative in a public case.

According to Article 111 of the Moroccan Code of Civil Procedure, which is applicable to the proceedings on the constitutionality challenge,<sup>27</sup> interventions may be submitted by those who "have interest in the litigation".

#### *b. Assessment in light of international standards*

Article 133 of the Moroccan Constitution states that a constitutionality challenge must be raised by one of the parties in litigation. The Constitution does not explicitly dismiss the possibility that other parties, not originally in litigation, may join or intervene through amicus curiae briefs or expert opinions.

While the Code of Civil Procedure provides for the possibility of third-party interventions, the ICJ is concerned that the burden to prove an "interest in the litigation" in the context of constitutionality challenges might be narrowly construed. A third-party may be interested in the general constitutionality question without necessarily being directly interested in the litigation itself. The Draft Law should therefore explicitly provide that a third party's interest in

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<sup>25</sup> See for example ICJ report, Reform the Criminal Justice System in Morocco: Strengthen Pre-trial Rights, Guarantees and Procedures, April 2017

<sup>26</sup> Law No. 50 of 2015 on 3 December 2015 related to the Constitutional Court; see also ICJ, Tunisia Draft Law on the Constitutional Court in light of international law and standards, November 2015, p. 16.

<sup>27</sup> Article 4 of the draft-law.

the constitutionality of the challenged provision or action is itself a sufficient 'interest in the litigation' for the purposes of third-party intervention.

The ICJ has constantly highlighted the importance of granting access to individuals and other entities, such as NGOs, to join proceedings as interested parties or to submit *amicus curiae* briefs, as well as third party interventions and expert opinions.<sup>28</sup> The Moroccan National Council for Human Rights also supported this position in its memorandum on the Draft Law.<sup>29</sup>

In a previous publication on the Tunisian Constitutional Court, the ICJ has cited several examples of national jurisdictions that adopt a long-standing access to third parties through the submission of *amicus curiae*.<sup>30</sup> For example, the rules of the Constitutional Court of South Africa provide for the possibility to submit *amicus curiae* briefs for "any person interested in any matter before the Court (...)," with the consent of the parties in the case. If the written consent has not been secured, any person who has an interest in any matter before the Court "may apply to the Chief Justice to be admitted therein as an *amicus curiae*, and the Chief Justice may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine."<sup>31</sup> Under Article 36 of the European Convention on Human Rights, addressing similar procedures for interventions before the European Court of Human Rights, "the President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings **or any person concerned** who is not the applicant to submit written comments or take part in hearings."

The ICJ has also previously highlighted the importance of instituting a procedure for class actions and public interest cases, in order to guarantee access for individuals or groups of individuals who have neither the political power nor the financial means to persuade the parliament for example to refer a potentially unconstitutional law before the Constitutional Court.<sup>32</sup>

In light of the above, the Moroccan authorities should remove all the barriers that might impede the access of marginalised groups to the Constitutional Court. Inspiration can be found in several jurisdictions.<sup>33</sup> For instance, in India, Section 38 of the Indian Constitution states that "the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."<sup>34</sup> This provision was interpreted by Supreme Court judgments in a way that effectively lessened the rules and procedures of

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<sup>28</sup> International Commission of Jurists, *Reforming the Moroccan Judiciary*, 2013, p.73; see also ICJ, *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court*, 2015, pp. 6, 7, 26-28.

<sup>29</sup> Loi organique relative à l'exception d'inconstitutionnalité, Mémoire, Conseil National des droits de l'Homme, March 2013, para. 10.

<sup>30</sup> ICJ, *Tunisia Draft Law on the Constitutional Court in light of international law and standards*, November 2015, p.18; referring to US: Rules of the Supreme Court of the United States, adopted: 19 April 2013, effective: 1 July 2013, Rule 37; Canada: Rules of the Supreme Court of Canada (SOR/2002-156), Rule 92; South Africa: Rules of the Court, Part V, Rule 10; UK: Supreme Court Rules 2009, Rule 26(1); Brazil: Decreto No. 9.868, de 10 de novembro de 1999, art. 7, § 2.

<sup>31</sup> South Africa, Rules of the Court, Promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003, Rule 10.

<sup>32</sup> See ICJ, *Accès à la Justice: les recours contre les violations des droits sociaux au Maroc*, October 2013, p.38.

<sup>33</sup> This includes the simplified "amparo" procedure in Spanish-speaking countries. See XXX above.

<sup>34</sup> Constitution of India, Section 38.

the Court and allowed any individual or group to bring a Supreme Court action for themselves or on behalf of others, even by posting a letter,<sup>35</sup> or a telegram.<sup>36</sup>

#### **IV. Access To The Constitutional Court And Legal Aid**

##### *a. The Draft Law framework*

Under Article 5 of the Draft Law, the constitutionality challenge must be submitted by either a party to a litigation or a lawyer acting on his or her behalf and registered in one of Morocco's Bar Associations.

The lengthy procedure provided for by the Draft Law- that could potentially involve introducing a constitutionality challenge before a Tribunal of First instance, an Appeal Court, and the Cassation Court prior to referral to the Constitutional Court- pose a significant financial burden on those claiming their constitutional rights.

While it is positive that the Draft Law provides for situations in which the concerned party may be exempted from court fees under the judicial aid system, the Draft Law is silent as to providing free legal aid. The right to effective legal counsel is determinant in ensuring the quality of constitutional challenges. However, such legal representation has a financial cost, in particular when procedures are complicated and long. Failure to cover such a cost through the legal aid system would heavily hinder access to the Constitutional Court and undermine the right to equality before the courts.

##### *b. Assessment in light of international standards*

The Moroccan Constitution provides for the general right of equality before the law.<sup>37</sup> However, it only guarantees the right to "legal assistance" to "any detained person".<sup>38</sup> Unfortunately, neither the Constitution nor the Draft Law addresses the specific issue of free legal assistance in the context of constitutional challenges.

Article 14 of the International Covenant on Civil and Political Rights provides that "all persons shall be equal before the courts and tribunals". The Human Rights Committee has elaborated that "the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way."<sup>39</sup>

Legal assistance should not be limited to criminal cases before an ordinary court, but should include other cases such as constitutional review.<sup>40</sup> The Human Rights Committee also added that "the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant."<sup>41</sup> The UN Basic Principles and Guidelines also recognise the need for legal and other forms of assistance for those seeking an effective remedy.

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<sup>35</sup> *Fertilizer Corporation Kamgar Union, Sindri v Union of India* (1981) ISC 568, 586.

<sup>36</sup> *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161.

<sup>37</sup> Moroccan Constitution of 2011, Articles 6 and 19.

<sup>38</sup> Moroccan Constitution of 2011, Article 23.

<sup>39</sup> Human Rights Committee, General Comment No. 32: "Article 14: Rights to equality before courts and tribunals and to a fair trial", 23 August 2007, CCPR/C/GC/32, para. 10.

<sup>40</sup> Human Rights Committee, General Comment No. 32: "Article 14: Rights to equality before courts and tribunals and to a fair trial", 23 August 2007, CCPR/C/GC/32, para. 10.

<sup>41</sup> Human Rights Committee, General Comment No. 32: "Article 14: Rights to equality before courts and tribunals and to a fair trial", 23 August 2007, CCPR/C/GC/32, para. 10; see also Communications No. 377/1989, *Currie v. Jamaica*, para. 13.4; No. 704/1996, *Shaw v. Jamaica*,

On the regional level, the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa also highlight the importance of providing legal assistance to an accused or a party to a civil case if they do not have the sufficient means to pay.<sup>42</sup>

The ICJ encourages the Moroccan authorities to provide sufficient resources to ensure that an effective legal aid system is provided for so that free legal assistance is available to individuals unable to pay when challenging the constitutionality of laws, and that the assigned lawyers are of experience and competence commensurate with the nature of the issues at hand.

**In light of the above, the ICJ calls on the Moroccan authorities to refrain from signing into law the Draft Law on access to the Constitutional Court until it is amended with a view to strengthening it in compliance with international standards and best practices, including by:**

- i) Ensuring that the procedure on access to the Constitutional Court is not unduly restrictive;**
- ii) Providing for lower courts to immediately refer constitutionality challenges to the Constitutional Court, and for the latter to establish a chamber or mechanism within the Court itself to decide on the admissibility of such challenges;**
- iii) If lower courts are to serve as gatekeepers, ensuring that their review is limited in scope and procedures, and does not involve a double-layer system of admissibility before lower courts and the Cassation Court;**
- iv) Ensuring that such review is based on well-established criteria that are clearly defined in the law and, to that end, remove, or clarify the scope and the meaning of, the “changed basis” requirement and the “seriousness” of the constitutionality challenge;**
- v) Ensuring that any decision to deny access to a constitutionality challenge is subject to independent judicial review;**
- vi) Clarifying that a demonstrated interest in the constitutionality of the law or action being challenged can be sufficient to demonstrate the ‘interest’ of third-party interventions;**
- vii) Providing for other avenues of access to the Constitutional Court, including for individuals and NGOs to join proceedings as interested parties or to submit information as amicus curiae or through expert opinions;**
- viii) Ensuring that the Court is competent to invite any concerned person to submit written comments or to take part in hearings;**
- ix) Instituting a procedure for class actions and public interest cases with a view to guaranteeing access for individuals or groups of individuals who otherwise would lack means to bring cases before the Constitutional Court;**
- x) Removing procedural and financial barriers that might impede the access of marginalised groups to the Constitutional Court;**
- xi) Extending free and competent legal assistance to those unable to pay when challenging the constitutionality of laws.**

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para. 7.6; No. 707/1996, Taylor v. Jamaica, para. 8.2; No. 752/1997, Henry v. Trinidad and Tobago, para. 7.6; No. 845/1998, Kennedy v. Trinidad and Tobago, para. 7.10; see also Human Rights Committee, General Comment No.31, 29 March 2004, CCPR/C/21/Rev.1/Add., para.15.

<sup>42</sup> Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (hereinafter the African Union Principles), adopted by the African Commission on Human and Peoples’ Rights, Principle G(a).