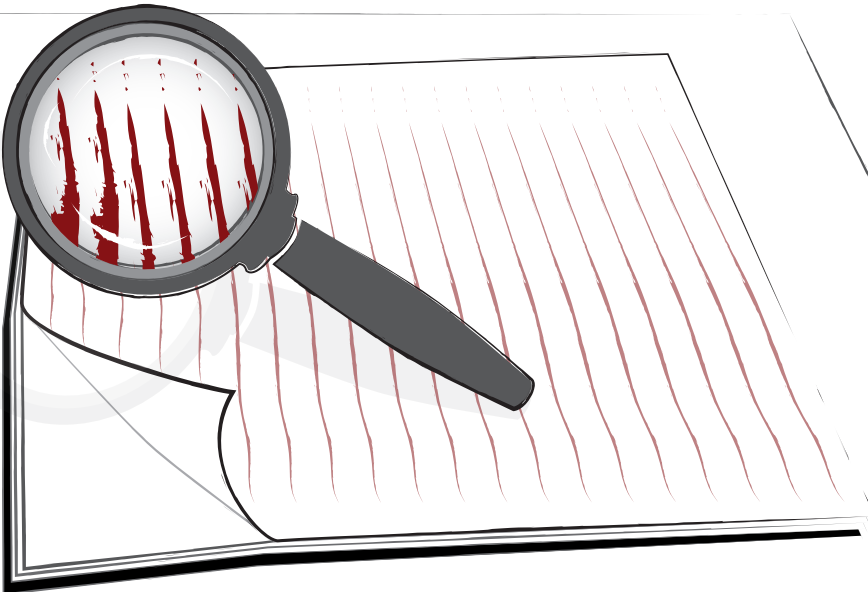




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Conseil national des droits de l'Homme

# The Organic Law Relating to the Constitutional Court

Memorandum









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# MEMORANDUM ON THE ORGANIC LAW RELATING TO THE CONSTITUTIONAL COURT

## EXPLANATORY STATEMENT

1. Under the second paragraph of Article 25 of Dahir (Royal Decree) No. 1-11-19 of 25 Rabi' I 1432 A.H. (1 March 2011) on the creation of the National Human Rights Council (CNDH), the Council contributes to *"strengthening the building of democracy by fostering broad-based social dialogue and developing any relevant tools and mechanisms to that end"*.

The CNDH, pursuant to Article 13 of the said Royal Decree, also examines the compatibility of *"laws and regulations in force with the international treaties relating to human rights and the international humanitarian law which the Kingdom has ratified or acceded to, as well as with the concluding observations and recommendations made by UN bodies on the reports submitted thereto by the Government"*.

In accordance with Article 24 of the same law, the CNDH submits to the High Appreciation of His Majesty the King *"proposals and thematic reports on all matters that can contribute to better protection and defence of human rights"*.

2. Recognizing the significant impact of an increased access to constitutional justice on the protection, promotion and realization of human rights, the CNDH, as part of the proposals it puts forward to support the process of drafting organic laws, devotes particular and legitimate interest to the issue of constitutional justice<sup>1</sup>. This interest is further justified by the Council's *"human rights approach"* explicitly mentioned in the explanatory statement of the Royal Decree establishing the CNDH.

3. As the National Dialogue on Justice Reform is an historic opportunity to build, on a collaborative basis, the fundamental principles governing organic and ordinary laws relating to access to justice, the National Human Rights Council, a national institution sitting on the High Committee for the National Dialogue on Justice Reform, seeks to contribute to public debate on this reform through this memorandum on the Organic Law relating to the Constitutional Court.

4. The proposals put forward in this memorandum draw on different national and international reference standards and declarations. The National Human Rights Council has also carried out a comparative study of laws governing the constitutional court of several democratic countries to bring its proposals into closer alignment with good practice in these countries.

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5. The reference standards and declarations that the CNDH considered are as follows:

- **The Constitution**, in particular the Preamble and Articles 10, 19, 44, 55, 59, 61, 69, 73, 75, 79, 85, 96, 104, 129, 130, 131, 132, 133, 134 and 174;
- Article 14 of **the International Covenant on Civil and Political Rights**, as interpreted by the Human Rights Committee in its General Comment No. 13<sup>2</sup>, particularly paragraph 6<sup>3</sup>, and General Comment No. 32<sup>4</sup>, in particular paragraphs 8<sup>5</sup>, 11<sup>6</sup>, 18<sup>7</sup> and 19<sup>8</sup>, taking into account the specific nature of the Constitutional Court;
- The Basic Principles on the Independence of the Judiciary, adopted by the United Nations General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, in particular points 8 to 20;
- **The Bangalore Principles of Judicial Conduct**, adopted by the Judicial Group on Strengthening Judicial Integrity on 26 November 2002;
- Resolution 67/1 adopted by the UN General Assembly on 24 September 2012, as part of the High-Level Meeting on the Rule Of Law, in particular paragraphs 11 and 14<sup>9</sup>;
- **The recommendations of the Special Rapporteur on the independence of judges and lawyers**, Gabriela Knaul<sup>10</sup>, especially those on the adequate representation of women in the judiciary;
- **The relevant recommendations of the Equity and Reconciliation Commission**, in particular Recommendation No. 5<sup>11</sup> included in the first axis on the consolidation of constitutional guarantees for the protection of human rights;
- **The European Charter on the Statute for Judges**, adopted by the Council of Europe on 10 July 1998;

6. The CNDH also took into account all relevant work produced by the Venice Commission in order to develop “appropriate technical solutions” to improve the management of litigation relating to the election of members of the House of Representatives and the House of Councillors<sup>12</sup> and redefine the role of the Constitutional Court’s Secretariat<sup>13</sup>. The same approach applies to other issues in which considerable use was made of the literature of the Venice Commission. These questions mainly include the control of the conformity of laws with ratified treaties<sup>14</sup>, the independence of judges and the rules on incompatibility<sup>15</sup>, and the strengthening of the interpretative function of the Court<sup>16</sup>.



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**7.** In the same vein, the Council conducted a comparative study of the laws governing constitutional courts in several democracies, namely:

- The Rules of the Constitutional Court of South Africa<sup>17</sup>;
- The Constitutional Court Act (Austria)<sup>18</sup>;
- The Special Act on the Constitutional Court, as modified and amended (Belgium)<sup>19</sup>;
- Ordinance No. 58-1067 of 7 November 1958 establishing the Organic Law on the Constitutional Council, as amended and supplemented (France)<sup>20</sup>;
- The Law on the Federal Constitutional Court (Germany)<sup>21</sup>;
- The Laws governing the Constitutional Court (Italy)<sup>22</sup>;
- The Organic Law on the Constitutional Court (Spain)<sup>23</sup>;
- The Constitutional Court Act (Portugal)<sup>24</sup>;
- The Laws governing constitutional justice (Egypt).

It should finally be noted that given the overriding interest it attaches to the question of access to justice as a matter organically linked to human rights, the CNDH puts forward in this opinion only proposals with direct impact on the above question as well as on the strengthening of the responsive capacity of the Constitutional Court and the achievement of some constitutional goals such as parity.

The CNDH proposals on the Organic Law relating to the Constitutional Court are presented below.

## **8.** Proposals for the selection of members elected by the Parliament

The CNDH considers that any proposal concerning the procedure for the selection of the Constitutional Court members elected by the Parliament must be based on the provisions of Articles 10 and 130 of the Constitution. It is also proposed that this procedure be incorporated in the rules of procedure of both Houses of Parliament. In this context, the CNDH puts forth two scenarios described as follows:

### 1. Stages of the first scenario:

- The Speaker of each House of Parliament issues a call for nominations.
- Candidates file their nominations at the Bureau of each House.
- The Bureau screens candidates based primarily on the qualifications required by Article 130 of the Constitution.
- The Bureau interviews the selected candidates.
- The successful candidates are elected (at a ratio of 3 candidates for each seat) by a 2/3 majority in accordance with Article 130 of the Constitution.
- In the event of a tie, it is proposed to introduce rules to decide between the candidates by age or draw.

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- The same procedure is applicable where a member is seeking re-election.
2. The second scenario is identical to the first one, except for the first stage where the CNDH proposes that applications be submitted by the parliamentary groups and groupings<sup>25</sup>.

In both scenarios, it is proposed to reserve, in the first election, at least one seat for women for each House of Parliament.

## 9. Proposals concerning the organization of the Constitutional Court

Given the approach adopted in the preparation of this opinion, the CNDH makes only a few proposals focused mainly on reshaping the system of incompatibilities based on two parameters:

- The increase in the number of cases of incompatibility resulting from the constitutionalization of the institutions responsible for the protection and promotion of human rights, good governance, regulation, promotion of sustainable human development and participatory democracy;

- The need to take into account parliamentary incompatibilities (provided for in Organic Law No.27. I I) as a threshold at which it is proposed to reform the system of incompatibility relating to the Constitutional Court members.

Based on the above parameters, the CNDH proposes that membership of the Constitutional Court should be incompatible with:

- Membership in the Government, the House of Representatives, the House of Councillors, the High Council of the Judicial Power, the Economic, Social and Environmental Council, and the institutions responsible for the protection and promotion of human rights, good governance, regulation, promotion of sustainable human development and participatory democracy;

- Any other public function or elective public office, any waged employment in companies more than 50% of whose capital is owned by one or more legal entities governed by public law, any other function in a public limited company (société anonyme) more than 30% of whose capital is owned directly or indirectly by the state or one or more legal entities governed by public law, and any other function in companies and corporations in which the state, public institutions or local governments have, separately or jointly, directly or indirectly, an overriding authority in the decision-making process;

- Non-elected paid positions for a foreign state, an international organization or an international non-governmental organization;

- Membership of the legal profession.

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The CNDH proposes that Constitutional Court members may pursue, on a voluntary basis, teaching and research activities which are, in the opinion of the Court, not inconsistent with the obligation of confidentiality. This proposal aims to allow the Court members to contribute to enhancing legal theory, developing case law through academic research and promoting the teaching of constitutional law.

## 10. Proposals on the functioning of the Constitutional Court

In keeping with the strategy of expanding access to constitutional justice, and after a comparative study of several experiences<sup>26</sup>, the National Human Rights Council proposes that the hearings of the Constitutional Court should continue to be held behind closed doors. However, hearings devoted to examining exceptions of unconstitutionality should be public, unless warranted by particular circumstances to be defined in the rules of procedure of the Constitutional Court.

The second proposal is to provide the Constitutional Court with tools to better manage the challenges associated with the interpretive implementation of the Constitution. The purpose of this proposal is to enable members of the Constitutional Court to publish their individual opinions<sup>27</sup>.

Regarding the implementation of this proposal, the CNDH suggests the publication of individual opinions in an annual compendium published by the Constitutional Court.

## 11. Proposals on the powers of the Constitutional Court

The CNDH has identified a “set of inherited” powers that should be assigned to the Constitutional Court in accordance with the Constitution. Indeed, the Court should be competent to decide on the compliance of laws with the Constitution (namely organic laws, ordinary laws and the rules of procedure of the two Houses of Parliament), the cases provided for in Article 73 of the Constitution, the grounds for inadmissibility under Article 79 of the Constitution, parliamentary election disputes, the loss of membership of the Parliament and the validity of the referendum process.

The CNDH also notes that new powers have been vested in the Constitutional Court, namely deciding on the exception of unconstitutionality and controlling the validity of constitutional revision by the Parliament.

In order to ensure the constitutional compliance of the acts of institutions created by organic laws (e.g. the National Council for Languages and Moroccan Culture, and the Economic, Social and Environmental Council) as well as the rules of procedure of the High Council of Security, the CNDH proposes to explicitly assign this competence to

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the Constitutional Court in its organic law. It is worth noting that Article 37 of Organic Law No. 60-09 stipulates that the Rules of Procedure of the Economic and Social Council must be submitted to the Constitutional Council to ensure their compliance with the Constitution and the Organic Law on the Economic and Social Council.

Aware that extending constitutionally protected rights is a strategic opportunity to establish “constitutional objectives” that will constitute vectors for the production of legislation, through the creative dynamics of constitutional case law, the CNDH proposes to extend the scope of constitutionality decisions to “unconstitutional omissions”. The aim is to ensure the effectiveness and implementation of the constitutional provisions setting the above objectives<sup>28</sup>.

## **12.** Proposals on the administrative organization of the Constitutional Court

In order to manage the high demand for constitutional justice, the CNDH proposes the creation of a staff of assistants to the Constitutional Court members, following the example of the law clerks of the Belgian Constitutional Court<sup>29</sup> and the letrados (legal advisors) of the Spanish Constitutional Court<sup>30</sup>. This proposal also builds on the current practice under Article 41 of the Organic Law on the Constitutional Council, which provides for the possibility of placing judges and civil servants on secondment to the Constitutional Council.

In the same way and so as to strengthen management support for the administration of justice, the CNDH proposes to enhance the role of the Secretariat General of the Constitutional Court, particularly as regards the management of petitions filed with the Court.

## Notes

1. Justice has become a decisive criterion for the rule of law in the last two decades.
2. General Comment No. 13 was adopted at the 21st session of the Human Rights Committee (13 April 1984).
3. Paragraph 6: "The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public."
4. General Comment No. 32 was adopted at the 90th session of the Human Rights Committee (9-27 July 2007) CCPR/C/GC/32, 23 August 2007.
5. Paragraph 8: "The right to equality before courts and tribunals, in general terms, guarantees ... [the principles] of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination."
6. Paragraph 11: "Similarly, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under Article 14, paragraph 1. In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them."
7. Paragraph 18: "The notion of a "tribunal" in Article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature."
8. Paragraph 19: "The requirement of competence, independence and impartiality of a tribunal in the sense of Article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist ... It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."

**9.** Paragraph 11 recognizes the importance of “national ownership” in rule of law activities, strengthening justice and security institutions that are accessible and responsive to the needs and rights of all individuals and which build trust and promote social cohesion and economic prosperity.

Paragraph 14 emphasizes the right of equal access to justice for all, including members of vulnerable groups, and underlines state commitment to take all necessary steps to provide transparent, effective and non-discriminatory access to justice.

**10.** Human Rights Council: A/HRC/17/30; 29 April 2011

Paragraph 81: “The Special Rapporteur ... encourages the judicial power to take all necessary steps to ensure that women and men are equally represented in the judicial systems at all levels.”

**11.** “Strengthening constitutional control of laws and independent regulatory decrees issued by the executive branch, and enshrining in the Constitution the right to claim before the courts an exception on the grounds of the unconstitutionality of a law with the matter being referred to the Constitutional Council for a final decision, while laying down conditions for the exercise of this right in order to avoid abuses and guarantee the right of the parliamentary minority to refer to the Constitutional Council laws passed by the Parliament which it considers unconstitutional;” Equity and Reconciliation Commission, Final Report, Vol. I “Truth, Equity and Reconciliation”, Chapter III: Recommendations, p. 79.

**12.** See International Conference on Law and Fact in Constitutional Jurisprudence (30 June - 1 July 2005, Vilnius, Lithuania), report on “Law and facts in cases pertaining to electoral complaints”.

**13.** See Fourth Conference of Secretaries General of Constitutional Courts and Courts of Equivalent Jurisdiction (Ankara, Turkey, 1-2 October 2009).

**14.** See:

- Seminar on the Competence of the Constitutional Court to Control the Conformity of Laws with Ratified Treaties (Podgorica, Montenegro, 3 November 2009).
- Seminar on the Role of the Constitutional Court in the Implementation of International Law (1998).

**15.** See conclusions of the Workshop on “Judicial Independence and Incompatibilities of the Office of Judge with Other Activities” (Bishkek, Kyrgyzstan, 20-21 April 1998).

**16.** See conclusions of the Workshop on “Principles of Constitutional Control, Techniques of Constitutional and Statutory Interpretation” (1998).

**17.** Promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003.

**18.** Constitutional Court Act 1953 – VfGG.

**19.** Special Act of 6 January 1989 on the Constitutional Court.

**20.** Amended by Ordinance No. 59-223 of 4 February 1959 and the organic laws No. 74-1101 of 26 December 1974, 90-383 of 10 May 1990, 95-63 of 19 January 1995, 2007-223 of 21 February 2007, 2008-695 of 15 July 2008, 2009-403 of 15 April 2009, 2009-1523 of 10 December 2009, 2010-830 of 22 July 2010, 2011-333 of 29 March 2011 and 2011-410 of 14 April 2011.

**21.** Federal Constitutional Court Act (Bundesverfassungsgerichts-Gesetz, BVerfGG), in the version published on 12 March 1951 (Federal Law Gazette I p. 243) as published on 11 August 1993 (Federal Law Gazette I p. 1473), as last amended by the Act of 16 July 1998 (Federal Law Gazette I p. 1823).

**22.** Constitutional Law No. 1/1948, Constitutional Law No. 1/1953 and Ordinary Law No. 87/1953.

**23.** Organic Law No. 2/1979 on the Constitutional Court, of 3 October 1979, as amended by Organic Laws 8/1984, of December 26 1984; 4/1985, of June 7 1985; 6/1988, of June 9 1988; 7/1999, of April 21 1999; 1/2000, of January 7 2000; 6/2007, of May 24 2007; 1/2010, of February 19 2010, and 8/2010, of November 4 2010.

**24.** Law No. 28/82 on the Constitutional Court, of 15 November (modified by Law No. 143/85 of 26 November 1985, Law No. 85/89 of 7 September 1989, Law No. 88/95 of 1 September 1985 and Law No. 13-A/98 of 26 February 1998).

**25.** Parliamentary groupings consist of no less than 4 MPs and no more than 19 MPs, in accordance with Article 29 of the Rules of Procedure of the House of Representatives.

**26.** See for comparison Article 23.10 of the French Organic Law No. 2009-1523 of 10 December 2009 relating to the Priority Preliminary Ruling on the Issue of Constitutionality (QPC).

**27.** Several comparative experiences provide for this possibility:

Portugal's Constitutional Court Act (Article 42, paragraph 4): "The judges of the Constitutional Court have the right to table their reasons for a dissenting vote."

Spain's Organic Law 2/1979 on the Constitutional Court, of 3 October 1979 (Article 9, paragraph 2): "The President and the Judges of the Court may express their disagreement in the form of a dissenting opinion, where such opinion was expressed in the course of the deliberations, concerning either the judgement or its grounds. Dissenting opinions shall be included in the ruling and, in the case of judgements, reasoned orders (autos) or declarations, shall be published with them in the Official State Gazette."

German's Federal Constitutional Court Act (Article 30, paragraph 2): "A judge holding a dissenting opinion on the decision or the reasons during deliberations may have it recorded in a separate vote; the separate vote shall be appended to the decision. In their decisions the panels may state the number of votes for and against. The details shall be laid

down in the rules of procedure.”

**28.** See for example the Constitutional Court Acts of Germany (Article 93), Portugal (Article 3) and Spain (Articles 43-44).

While conscious that the definition of constitutional objectives can only be established in a phased manner and through constitutional case law, the CNDH presents a few examples of these objectives, such as achieving parity (Article 19 of the Constitution), ensuring legal protection of the family and the child (Article 32), securing equal opportunities for all (Article 35) and enabling persons with disabilities to enjoy their rights and freedoms which must be facilitated by the public authorities (Article 34).

**29.** The qualifications of the Belgian Constitutional Court's law clerks (Articles 35-39): graduate diploma in legal studies, recruited by competitive examination as trainees for 3 years and may be eligible as members of the Constitutional Court.

**30.** The qualifications of the Spanish Constitutional Court's legal advisors (letrados): graduate diploma in legal studies, recruited by competitive examination and placed on secondment (if civil servants). The Secretary General of the Court is appointed from among them.











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