Strasbourg, 26 October 2015

CDL-AD(2015)024
Or. fr.

Opinion No 817/2015

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT INSTITUTIONAL LAW ON THE CONSTITUTIONAL COURT

OF TUNISIA

Adopted by the Venice Commission
at its 104th Plenary Session
(23-24 October 2015)

On the basis of comments by

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Mr Guido NEPPI MODONA (Substitute Member, Italy)

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I. Introduction

1. By letter dated 7 August 2015, the Tunisian Foreign Ministry requested an opinion on the draft Institutional Law on the Constitutional Court of Tunisia (CDL-REF(2015)029, hereafter, "the draft law").

2. The Venice Commission asked Ms Slavica Banić and Mr Neppi Modona to act as rapporteurs for this opinion.

3. On 28 May 2015, Ms Banić, Mr Neppi Modona and Mr Schnizer, accompanied by Ms de Broutelles, had held an exchange of views in Tunis with the members of the Justice Ministry's Committee on the drawing up of the draft Institutional Law on the Constitutional Court of Tunisia. They discussed in particular issues relating to the composition, powers and effects of the decisions of constitutional courts.

4. Due to time constraints, it was not possible to organise a visit to Tunisia to discuss the final draft of the law to which this opinion relates. Accordingly, this opinion had to be drawn up on the basis of the rapporteurs' written comments only.

5. This opinion was sent to the Tunisian authorities as a preliminary opinion and published on 14 August 2015. It was adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015).

II. General remarks

6. At the request of the Speaker of the Tunisian National Constituent Assembly, the Venice Commission adopted, at its 96th plenary session (Venice, 11-12 October 2013), an opinion on the final draft Constitution of Tunisia (CDL-AD(2013)032). In this opinion, the Commission welcomed the establishment of an independent Constitutional Court.

7. The Constitution as adopted, which sets out clear and precise principles on the composition and election/appointment of the members of the Constitutional Court, forms a sound basis for the law on the Constitutional Court.

8. This opinion was drawn up on the basis of the French translation of the draft institutional law produced by the Secretariat. It may therefore contain errors resulting from translation issues.

III. Remarks article by article

A. Chapter I: General provisions

9. **Article 5** sets out the rules governing the adoption of decisions and opinions of the Constitutional Court. Except in certain cases where decisions are adopted by a two-thirds majority, the general rule is adoption by an absolute majority of members, that is a majority of seven votes.

10. Article 5 makes a distinction between "decisions" and "opinions". However, the official translation of the Constitution[1] makes no provision for "opinions" of the Constitutional Court. This could be due to a translation issue.

[1] Official Gazette of the Tunisian Republic of 20 April 2015 (see CDL-REF(2015)030).

11. The draft law does not specify when the decisions and opinions of the Constitutional Court enter into force. (Only Article 57, on review of the constitutionality of laws, stipulates that the Court must specify the legal effects of its findings of unconstitutionality – on this point, see below). The Court should be able to defer the effect of its findings of unconstitutionality, so as to avoid a legal gap following the repeal of a law or of provisions within a law. By deferring such a repeal, the Court can ensure that the Assembly of the Representatives of the People has sufficient time to pass a new law which complies with the Constitution. If the law does not provide for it, the Court can develop itself the effects of its decisions in its case-law.

B. Chapter II: Composition of the Constitutional Court

12. Article 118 of the Constitution provides that the President of the Republic, the Assembly of the Representatives of the People and the Supreme Judicial Council shall each appoint four of the 12 members of the Court, three quarters of whom must be specialists in law. This system ensures involvement by the various organs of the state.

13. By providing that a quarter of the members are not necessarily legal specialists, this system makes it possible for members of the civil society other than judges to play a role in the Court.

14. On this basis, **Article 6** of the draft law stipulates that all candidates must have at least 20 years' experience in their field. With regard to candidates who are legal specialists,[2] university lecturer/researchers must hold the position of professor, judges must hold the highest grades for judges, barristers must be registered with the Court of Cassation for barristers, and other legal professionals coming under the category of "legal specialists" must have published scientific reference works. In its opinion on the draft Constitution, the Venice Commission had recommended that the term "legal specialist" be defined more precisely.[3] The draft law provides a more precise definition. Although the criterion of having published scientific works is unusual, on the whole these conditions are satisfactory.

15. Equivalent conditions are laid down for non-legal specialist candidates who must hold a doctorate or equivalent qualification and have at least 20 years' experience in their field of specialisation. This is also satisfactory.

16. The minimum age of 45 years laid down in **Article 7** seems high, especially in a new democracy, but may be a result of the constitutional requirement[4] of 20 years' professional experience.

17. However, the criterion whereby candidates must not have been a member of a political party for at least ten years seems too strict, given that political involvement, including as a member of a political party, is an important component of democracy. A constitutional court has a specific constitutional legitimacy enabling it to repeal legislation passed by parliament, the representative of the sovereign people. In order to enjoy this legitimacy, a specialist constitutional court is often composed in a balanced way, reflecting the composition of society. In this context, requiring candidates for the post of judge in the Constitutional Court not to have been a member of a party for ten years before their appointment seems excessive.[5]

18. Lastly, it is incomprehensible why members of the provisional authority for the review of constitutionality are excluded from the new Constitutional Court. Their experience could prove

[2] It should be specifically pointed out that the second paragraph refers to the criteria applicable to specialists in law.
[3] CDL-AD(2013), § 166
[4] Article 118.1 of the Constitution.
[5] CDL-STD(1997)020 The Composition of Constitutional Courts – Science and Technique of Democracy, No. 20 (1997), p. 15-16.

invaluable. While one can understand that members of the former Constitutional Court should be excluded, it does not seem appropriate to exclude members of the provisional authority which was established by the new democratic Constitution.

19. **Article 8** provides that the President of the Republic is the last to appoint members of the Court. In this way, the President, who is the symbol of the unity of the state and oversees compliance with the Constitution, is able to rebalance[6] the composition of the Court resulting from the election of the first eight judges, in terms of both political tendencies and professional experience.

20. As the Constitution contains no provision in this respect, **Articles 9 and 10** of the draft law stipulate that the Assembly of the Representatives of the People and the plenary session of the Supreme Judicial Council elect the judges of the Court by a two-thirds qualified majority. This is a very satisfactory solution which ensures a broad consensus and at the same time should make it possible to establish a Court whose composition will be balanced[7] and whose judges will be highly qualified.

21. Admittedly, it can be difficult to reach a qualified two-thirds majority and this may on occasion lead to deadlock, particularly where there is no culture of sufficient democratic compromise among the political forces. In order to avoid such situations, "anti-deadlock mechanisms",[8] should be introduced, such as, for example, a lowering of the required majority to three-fifths following the third unsuccessful vote, and/or the nomination of candidates by other neutral bodies after several unsuccessful votes.

22. Contrary to the procedure in the Supreme Judicial Council (Article 10), the procedure in the Assembly of Representatives of the People (Article 9) lays down no deadlines. In addition, it would be helpful for the Assembly to have a committee to examine the eligibility of candidates.

23. In accordance with Article 9, each parliamentary group or each seven members of the Assembly not belonging to a parliamentary group may propose four candidates, three of whom must be legal specialists. Does this mean that the Assembly elects the four candidates simultaneously? It would be a pity to opt for such an election system. It may be that within one group of four candidates there are some who are highly qualified and others less so. There should be a means of avoiding the election of less qualified candidates because they are elected at the same time as the highly qualified candidates or, conversely, that highly qualified candidates are not elected because they were nominated at the same time as less qualified candidates. There needs to be a procedure whereby the Assembly can freely choose its four candidates among all the candidates proposed by the parliamentary groups or groups of seven members of the Assembly.

24. In any event, the law should specify a clear and simple election procedure.

25. **Article 12** provides that members of the Constitutional Court are appointed by decision of the President. Even if this is a mandatory power, this rule entails the risk that the President could prevent the candidates elected by the two other organs from fulfilling their term of office (for example by challenging their merit). Consequently, the election of candidates by the two other organs should be followed directly by the taking of the oath, without the need for a decision of the President.

26. **Article 13** sets out the judges' remuneration and "advantages". In order to guarantee the independence of the Court, there should be no form of "bonus" which would depend on the

[6] CDL-STD(1997)020, p. 29 et seq.
[7] *Ibid.*
[8] CDL-AD(2013)028, § 6-8.

other powers. Advantages such as official cars should be covered by the budget of the Court itself.

27. **Article 14** provides that the members of the Constitutional Court take an oath before the President of the Republic. This also provides the President with the opportunity to prevent or delay the members of the Court taking up their office.[9] Alternatively, candidates could take an oath before the organ which elected them.

28. The text of the oath set forth in Article 14 refers to the confidentiality of "negotiations" and not "deliberations". This is most probably a translation issue.

29. The exception provided for in **Article 19.2**, stipulating that judges of the Court may engage in scientific, artistic and literary activities, is welcome in view of the values to which Articles 31, 33 and 42 of the Constitution refer. To avoid any contradiction with Article 119 of the Constitution this Article should specify that such activities are non-remunerated.

30. The provisions of **Article 22** on challenging (and self-recusal) are incomplete. To avoid giving an exhaustive list of cases where a judge may be challenged or where he or she should recuse him or herself, the draft law could refer, by analogy, to the challenge procedure set out for the Administrative Court. Another solution would be for the law to stipulate that the Court's internal regulations shall deal with these matters. This would make a distinction between the procedural rules, intended for the parties, and the internal regulations dealing with the internal organisation of the Court. **Article 4** could make provision for both these texts, which would, however, be adopted by the Court itself.

31. At any event, there should be a provision stipulating that a judge may abstain. It might also be helpful to provide for mechanisms to avoid situations where, following multiple challenges or abstentions, the Court is unable to rule, in the absence of a quorum.[10]

32. **Article 24** seems to mix up situations where there are vacancies and cases of dismissal. Both require a level of control but to varying degrees. In cases of "absence from three successive hearings without justification", "loss of eligibility to sit" and failure to fulfil obligations, there should be provision for an adversarial procedure during which the rights of defence are guaranteed.

33. Furthermore, dismissal "on the grounds of negligence" should be defined more strictly, for example "serious and repeated failure to fulfil the obligations associated with the office of judge".

34. It would appear that **Article 25.2**, in providing that the member appointed to fill a vacancy "may not submit his or her candidacy to be a member of the Court" means that this person can fulfil the duties of judge only until the end of the term of office of the member he or she is replacing, i.e. less than nine years. Such a limitation does not seem logical. Why should a member, who fulfils all the criteria, be appointed for a shortened term of office? In addition, a full

[9] This problem has arisen in Ukraine where parliament's refusal to accept the oath of elected judges prevented the Court from sitting for over a year, on account of there being no quorum. See the recommendations of the Venice Commission to avoid this problem: CDL-AD(2006)016 Opinion on possible Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine adopted by the Venice Commission at its 67th Plenary Session (Venice, 9-10 June 2006).

[10] CDL-AD(2006)006, Opinion on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the Constitutional Court of Romania adopted by the Commission at its 66th plenary session (Venice, 17-18 March 2006).

term of office for the "replacement" judges would make a positive contribution to the partial rotation referred to in Article 75 and Article 118.3 of the Constitution.

C. Chapter III: Organisation and administration of the Constitutional Court

35. **Article 26** refers to the "auxiliaries attached to the Court", but it is not specified who these are, who appoints them or what their duties are. They may be judges' assistants or clerks, such as university researchers, law officers, etc. This matter should be dealt with by the Court's internal regulations.

36. The draft law grants the government supervisory powers over the Constitutional Court, which could threaten its independence. The government's powers to appoint (even if on the proposal of the President of the Court) the Secretary General (**Article 28**), to specify the rules governing the organisation of the Secretariat (**Article 27.2**) and the appointment, by the Finance Minister of a public auditor (**Article 32**) carry the risk of placing the Court under the supervision of the government:[11] the Secretary General and the public auditor should be directly appointed by the Court or its President, without any government interference.
Moreover, the reference in Article 19 to the government order stipulating the specific robes to be worn by the judges of the Court should be deleted.

D. Chapter IV: Jurisdiction and procedures of the Constitutional Court

37. **Article 33** lays down the principle that the "hearings" (*audiences* in French) of the Court are secret. The use of this term is not clear. This may be due to a translation problem. With regard to the Court's jurisdiction to rule on maintaining the implementation of exceptional measures, Article 80.3 of the Constitution makes specific provision for a public hearing. The law cannot stipulate that hearings will be secret, at least in this case.

38. In general, the Constitutional Court must be able to count on the confidence of the public and to that end, the general principle should be that the Court's hearings are public, except where the public nature of a hearing would endanger the security of the state or public order.

39. However, in order to avoid overloading the Court, it should be able to decide to meet without a public hearing, in chambers, when the constitutional matter being dealt with is manifestly unfounded or where a constitutional appeal is manifestly inadmissible. By way of example, the Italian Constitutional Court must rule in a public hearing where individual parties apply to the judge because the case is of particular interest, i.e. in roughly 10% of cases.

40. Obviously, the deliberations between the judges, following the hearing, take place in camera and the confidentiality of deliberations applies.

41. **Article 33** could also be the right place to introduce the possibility of issuing separate opinions – dissenting or concurring. The experience of many countries is that dissenting opinions enhance the Court's transparency[12] and credibility. The fact that there are dissenting opinions obliges the majority of judges to give more detailed reasons for their judgment. As a result, judgments are more balanced and explained more clearly, and accordingly are more readily accepted by the public and the other authorities.

42. **Article 35** provides that there will always be at least two rapporteurs (at least one of whom is a member who is a legal expert) responsible for studying the questions submitted to the

[11] CDL-AD(2009)014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), § 42.
[12] CDL-AD(2014)033, § 41.

Court; this procedure is unusual. It means that there is a need for a procedure to enable the Court, if there is a disagreement between the rapporteurs, to take account of the different proposals made.

43. With regard to the order of the sections in Chapter IV, it would be more logical to follow the order of competences set out in the list appearing in Article 120 of the Constitution. The draft law follows a different order.

44. **Articles 37-39** deal with the procedure for reviewing the constitutionality of amendments to the Constitution. Articles 143 and 144 of the Constitution lay down this procedure. Under Article 143, the initiative for an amendment may come from the President of the Republic or from a third of the members of the Assembly.

45. In accordance with Article 144, the Speaker of the Assembly shall submit all proposed amendments to the Constitution to the Constitutional Court to verify that such proposals do not affect any provisions for which no amendments are possible. The Assembly shall first decide by an absolute majority on the principle of the amendment, and then the amendment must be approved by a two-thirds majority of the members of the Assembly. Following this approval, the President of the Republic may submit the amendment to a referendum.

46. In addition to the mandatory review of the initiative provided for in Article 144.1 and Article 120.1.2 of the Constitution, Article 39 provides that the Speaker of the Assembly shall submit initiatives to amend the Constitution to the Constitutional Court to verify compliance with the amendment procedures. This provision concerns the procedure followed, not the merits.

47. Article 144 of the Constitution makes no mention of the possibility for the Assembly to amend the text of the initiative submitted by the President of the Republic or a third of the members of the Assembly. Consequently, it would appear that the Assembly does not have the right to amend this text, for otherwise any amendment to the initiative would bypass the verification by the Constitutional Court of compliance with the unalterable articles of the Constitution (verification of the procedure at the request of the Speaker of the Assembly would not be able to rectify this shortcoming).

48. **Article 37** provides that the President of the Republic and the Head of Government shall inform the Speaker of the Assembly of the initiative to amend the Constitution. However, Article 143 of the Constitution provides that only the President and a third of the members of the Assembly are entitled to submit a proposed amendment to the Constitution. The Head of Government does not have this right. Accordingly, the reference to the Head of Government in Article 37 should be deleted.

49. Under Article 144 of the Constitution, the Constitutional Court is competent to verify that the amendment does not relate to the unalterable provisions of the Constitution.[13] However, in relation to this question, **Article 38** provides for an opinion by the Constitutional Court which gives only an indication of the "extent to which the initiative relates to the provisions to which the Constitution has prohibited any amendment".

50. These opinions on the "extent" of the relationship of the initiative with the unalterable articles of the Constitution are clearly inadequate to protect those articles. To avoid a situation in which the Constitution is amended in violation of the unalterable articles, the Constitutional Court must decide whether or not the initiative interferes with those articles. The law should provide that

[13] "… to verify that such propositions do not affect any article to which the Constitution has prohibited any amendment." (Article 144, unofficial translation).

where such is the case, the procedure in the Assembly must come to an end. The Assembly must not be able to approve such an initiative.

51. **Articles 40 and 41** provide that the Constitutional Court is competent to review the constitutionality of treaties, but does not set out the procedure to be followed. The effects of the decision should be specified.

52. **Article 45** sets out general rules on the recording of written evidence which should apply to all procedures and not only a review of the constitutionality of laws.

53. The reduced time-frame provided for in **Article 48** in urgent cases is, at best, excessive. It is Article 121 of the Constitution which lays down the 45-day deadline and the law cannot make an exception to this deadline set forth in the Constitution.

54. **Article 49.4** and **Article 50.2** provide that if the Constitutional Court declares a provision in a law to be unconstitutional, the Court may decide whether it is possible to remove it from the rest of the law which will then be promulgated by the President of the Republic. This gives the Court broad discretion. It may be that the Assembly would prefer to pass a revised law, taking the Court's decision into account, rather than see a law enter into force which, without the unconstitutional decision, could be misinterpreted and produce undesired effects. It would be preferable to have the law sent back to the Assembly.

55. **Article 51** which provides for a preliminary request by an ordinary court to the Constitutional Court should ideally be improved. A preliminary request should be opened to the "parties" without them necessarily being "opposing" parties. Furthermore, the possibility of a preliminary request should be available in any proceedings before a court, even in non-contentious cases and/or where there is only one party.

56. It is unfortunate that neither the Constitution nor the law provide that the court can raise a preliminary request of its own motion, which would mean that the ordinary courts were not obliged to apply norms which they considered unconstitutional. Each court and each judge should be able to dialogue directly with the Constitutional Court and submit to it questions relating to compliance with the Constitution.

57. In any event, a judge who refers a preliminary request to the Constitutional Court, in application of Article 51, should be not only authorised, but also obliged by the Institutional law to give his or her opinion on the constitutionality of the provision in question. Such an obligation is in conformity with Article 120 of the Constitution which provides for the jurisdiction of the Constitutional Court to rule on preliminary requests "in accordance with the procedures established by law".

58. It is difficult to understand why an appeal based on a plea of non-conformity with the Constitution presented by the parties must be reasoned and drawn up by a lawyer at the Court of Cassation (**Article 52**), and not directly by the lawyer dealing with the case. Such an obligation makes it more difficult, more complex and more costly to raise questions of constitutionality.

59. **Article 56** provides for a "special committee" to determine the admissibility of cases. To avoid overloading the Constitutional Court, the powers of this committee should be strengthened: this committee should not only make proposals to the President of the Court but it should act as a genuine filter, having the authority, if it decides unanimously, to declare definitively that the matter referred to it is manifestly ill-founded or manifestly inadmissible.

60. So that the exclusion of non-legal experts from this committee does not raise problems of constitutionality, it could be provided that it be composed of three legal specialists and one member not from the legal profession.

61. **Article 57** provides that the Court must specify the legal effects of the "suspension" of the challenged provisions. First, the term "suspension" is not clear because the unconstitutional provisions should be anulled. This may be a problem of translation. As concerns the determination of the effects, the flexibility provided for in the law comprises a risk of both overloading the Court and of giving it too great a discretionary power. The law should define the principal effects of a decision – *inter partes, erga omnes,* and also, for example, that the law that has been found to be unconstitutional shall cease to apply[14] the day following publication of the Court's decision in the Official Gazette of the Tunisian Republic, and that the effects (conviction, enforcement of the judgment) of a final decision of a criminal court based on a provision declared to be unconstitutional must cease. Furthermore, provisions should detail how the Court will deal with referrals relating to a matter that has already given rise to a decision.

62. The Court must also be competent to declare, as a consequence, which other related provisions of the challenged laware unconstitutional.

63. With regard to the procedure for the removal from office of the President of the Republic, **Article 63** refers to the President's "substitute" who must respond to the Constitutional Court. However, the Constitution makes no provision for the removal from office of the substitute. If this article concerns solely the removal from office of the President, it should be specified that the substitute "responds on behalf of the President" (who may be absent).

64. **Article 64** grants the Court too broad a discretionary power in providing that it "may take all decisions and measures it deems necessary to deliver its judgment".

65. The Institutional Law, the internal regulations or separate procedural rules,[15] could specify the different decisions of the Court. The Italian Constitutional Court, for example, has a broad range of decisions: decisions of admissibility, dismissal for lack of foundation; interpretative ruling of rejection on the ground that the law can be interpreted in conformity with the Constitution; interpretive unconstitutionality ruling because the law (living law) is interpreted in a way which is contrary to the Constitution; manipulative ruling, substitutional ruling, additive ruling; warning to the legislature before delivering an unconstitutionality ruling, etc.

66. The first sentence of **Article 65** is not clear "The Court shall deliver a judgment ordering the removal from office of the President of the Republic in the event of confirmation of the conviction." Who has already convicted the President before the case comes before the Court?

67. Article 84.1 of the Constitution provides "In the event of the position of President of the Republic becoming temporarily vacant for reasons that prevent the President of the Republic from delegating his/her powers, the Constitutional Court shall promptly meet and declare the temporary vacancy of the office and the Head of Government shall immediately be invested with the responsibilities of the President of the Republic. The period of temporary vacancy may not exceed sixty days." In this particular case, the Constitution does not provide for any referral; it simply states that the Court "shall […] meet", in other words it acts ex officio. However, **Article 66** of the draft law stipulates that the Court shall meet on receipt of a referral from the

[14] As provided for by Article 123.2 of the Constitution which stipulates that if the Constitutional Court decides that a law is unconstitutional, the application of that law is suspended within the limits specified by the Court. The law should include this effect of the Court's decision.
[15] See above, under Article 22.

Speaker of the Assembly or half of its members. Such a procedure which restricts the Court's possibility of meeting would appear to be contrary to the Constitution.

68. Similarly, **Article 67** requires a referral to the Court in the event of permanent vacancy, contrary to the provisions of Article 84 of the Constitution.

IV. Conclusions

69. In general, the draft Institutional Law on the Constitutional Court of Tunisia complies with the rules and principles laid down in the Constitution and with international standards; it should help ensure that the Court functions effectively.

70. Nonetheless, the draft law, the internal regulations and the procedural rules should specify in greater detail the organisational and functional structure and the specific procedures corresponding to the competences of the Court. Certain provisions should be improved, and in particular:

1. The Constitutional Court should not depend on the government for the appointment of its Secretary General, for the rules governing the organisation of the Secretariat and for the appointment of a public auditor.
2. Judges of the Constitutional Court should be entitled to adversarial proceedings guaranteeing the rights of the defence before being dismissed for unjustified absence, loss of eligibility to sit or failure to fulfil their obligations.
3. The law should set forth the principle that the Court's hearings are public but the Court should be able to deliberate in camera for cases without any major public interest.
4. The main effects of a decision must be defined in the law; they should not be left totally to the discretion of the Constitutional Court.

71. The Venice Commission remains at the disposal of the Tunisian authorities for any further assistance they may need.