المجلس الوطني لحقوق الإنسان
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Conseil national des droits de l'Homme

The organic law relating to The exception of unconstitutionality

Memorandum

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MEMORANDUM ON THE THE ORGANIC LAW RELATING TO THE EXCEPTION OF UNCONSTITUTIONALITY

EXPLANATORY STATEMENT

1. In fulfilment of the provisions of the second paragraph of Article 25 of Dahir (Royal Decree) No. 1-11-19 of 25 Rabii I 1432 A.H. (1 March 2011) establishing the National Human Rights Council (CNDH), the Council shall "***contribute to promoting democracy-building, 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 provisions of international human rights conventions and international humanitarian law which the Kingdom [of Morocco] has ratified or to which it has acceded, as well as with the concluding observations and recommendations of UN treaty bodies on the reports submitted to them by the Government***."

In accordance with Article 24 of the same law, the CNDH submits to His Majesty the King "proposals and issue-specific or thematic reports on all matters that contribute to the optimal protection of human rights."

2. Being aware of the significant impact a larger access to constitutional justice will have 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 in the issue of constitutional justice[1] .This interest is further justified by the Council's "***human rights-based approach***" which is explicitly mentioned in the explanatory statement of its founding Royal Decree.

3. Considering the strategic importance of enshrining the right to access to justice in the first paragraph of Article 118 of the Constitution.

4. Taking into account the positive impact of the provisions of Article 133 of the Constitution which will allow litigants before a court to contribute to producing "***constitutional standards***" through the exception of unconstitutionality.

5. Considering the National Dialogue on the reform of the judiciary as a 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 in the High Authority for National Dialogue on Reform of Judiciary, seeks to contribute to the public debate on this reform through this memorandum on the organic law relating to the exception of unconstitutionality.

6. 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 conditions of access to constitutional justice in several democratic countries to bring its proposals into closer alignment with the good practices applied in these countries.

7. The reference standards and declarations that the CNDH has considered in drafting this memorandum 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[2], particularly paragraph 6[3], and General Comment No. 32[4], in particular paragraphs 8[5], 11[6], 18[7] and 19[8], taking into account the specificities of the constitutional justice;
- ***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[9];
- ***The recommendations of the Special Rapporteur on the Independence of Judges and Lawyers***, Gabriela Knaul[10], 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[11] 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.

8. The CNDH also took into account all relevant works produced by the Venice Commission in order to develop "appropriate technical solutions" in terms of individual access to constitutional justice[12]. The same approach applies to other issues which the Venice Commission has largely addressed, mainly the relationship between the Constitutional Court and other courts[13], the effects of Constitutional Court's decisions[14], the strengthening of the interpretative function of the Court[15] and ways to strengthen the protection of human rights by the Court[16].

9. In the same vein, the Council conducted a comparative study of laws governing terms of access to constitutional justice in several democracies, namely:

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

The CNDH proposals on the organic law relating to the exception of unconstitutionality are presented below.

10. Proposals related to the definition of some concepts

To expand the scope of the exception of unconstitutionality, the CNDH proposes a broad definition of the "***rights and freedoms guaranteed by the Constitution***", taking into consideration the range of these rights and freedoms in the light of the concept of constitutional corpus[25] (which is being developed in the current national normative context). This broad definition makes it possible to integrate universal rights and freedoms, including those enshrined in the different human rights instruments which Morocco has ratified[26] and acceded to.

Regarding the "parties to the proceedings", the CNDH, keen to broaden access to constitutional justice, proposes that the definition of this term should refer to the proper parties and the additional parties as well as the intervening parties and the third parties.

11. Proposals about the founding principles of the exception of unconstitutionality

Analysing Article 133 of the Constitution from a human rights-based approach perspective, we can conclude that the mission assigned to the Constitutional Court goes beyond the mere protection of the objective constitutional order, by introducing mechanisms to ensure the protection of fundamental individual rights by the Constitutional Court. As such, the Court has become competent to deal with a plea of unconstitutionality raised during a lawsuit, when one of the parties claims that the law upon which the outcome of the case depends violates the rights and freedoms guaranteed by the Constitution.

It is therefore possible to set at least three targets that should be achieved through the exception of unconstitutionality, namely to give a new right to the parties to the proceedings by allowing them to assert the rights derived from the Constitution, repeal the unconstitutional provisions and ensure the supremacy of the Constitution in the internal normative order.

Based on this vision, the analysis of the wording of Article 133 leads to the following conclusions:

- The exception of unconstitutionality is an indirect means of access to constitutional justice;
- The plea of unconstitutionality is a means to support a claim in a lawsuit;
- Only the parties to the proceedings can raise a plea of unconstitutionality, and the judge cannot raise/initiate an exception of unconstitutionality himself/herself;
- The exception of unconstitutionality may be raised at any stage of the proceedings, once the parties take cognizance of the laws applicable to the dispute;
- The parties must raise the exception of unconstitutionality before the submission of any plea or substantive defence.

12. In a bid to ensure balanced access of litigants to constitutional justice and in order to provide effective remedies, the CNDH proposes two procedures for the exception of unconstitutionality, in the form of two scenarios:

- The first scenario proposes a procedure for the exception of unconstitutionality with a prior screening for admissibility by the Constitutional Court;
- The second scenario proposes a dual examination for admissibility.

The first scenario, which the CNDH prefers, has the advantage of facilitating access to constitutional justice. It allows both individuals and legal professionals to easily assimilate the procedure relating to the exception of unconstitutionality. This scenario is the closest indirect mode of access to the logic of individuals' direct access to constitutional justice[27]. It guarantees their right, under a lawsuit, to have their claim mentioned in Article 133 of the Constitution heard by the Constitutional Court.

There is a risk however that the lawyers acting for the parties misuse this procedure, which might cause an increase in the number of procedures of unconstitutionality raised before the various courts and then generate a work overload for the admissibility committee at the Constitutional Court.

The second scenario has the advantage of regulating the flow of exceptions of unconstitutionality, through a procedure that ensures the distribution of the flow on the different levels of jurisdiction. The screening for admissibility, based on a limited number of eligibility criteria that in no way interfere with the control of constitutionality, allows the Constitutional Court to focus on its core mission of controlling constitutionality. Under this scenario, it is possible to expect that the filing of exceptions of unconstitutionality will be adjusted and rationalized in the medium term, improving therefore the quality of access to constitutional justice.

Nevertheless, this scenario has several disadvantages. Its procedure is cumbersome and may create intermediate steps between individuals and constitutional justice. Also, the time of the procedure may impact pending cases and make it difficult for individuals to access to constitutional justice.

The CNDH believes that it is up to the legislator to assess the advantages and disadvantages of each scenario.

A) First scenario: the procedure for the exception of unconstitutionality with a prior examination of admissibility by the Constitutional Court

The CNDH proposes the following procedure:

a) The plea alleging that a law on which the outcome of the case depends infringes the rights and freedoms guaranteed by the Constitution must be submitted in a separate reasoned written motion signed by a lawyer at the Moroccan Bar, failing which it should be inadmissible. The written motion must also contain the information and particulars set out in Article 32 of the Code of Civil Procedure. It is proposed to exempt this motion from court fees.

b) If the public prosecutor is neither a proper party nor an additional party, the case shall be referred to him/her once the plea is raised so that he/she can give his/her opinion about it.

c) The court forwards the plea to the Constitutional Court within 48 hours.

d) An admissibility review committee[28] (created in the Constitutional Court and chaired by a member appointed by the President of the Court) shall examine the admissibility of the claim of unconstitutionality within 10 days[29] after the date of receipt of the referral decision.

e) The Committee shall declare the exception of unconstitutionality to be admissible when the following conditions are met:
1. If the challenged provisions are applicable to the dispute or the proceedings;
2. If they have not been declared in conformity with the Constitution in the operative part and statement of reasons of a decision of the Constitutional Council or the Constitutional Court, unless circumstances change[30];
3. The issue raised by the exception is new and valid.

f) The Constitutional Court shall then examine the plea of unconstitutionality which has been declared admissible, under the same terms and conditions as the assessment of conformity to the Constitution, within two months[31] after the date of admissibility.

g) The Constitutional Court shall immediately notify the Head of Government, the Speaker of the House of Representatives and the Speaker of the House of Councillors of the admissible exception of unconstitutionality, so that they can file their comments thereon to the Constitutional Court.

h) The parties may submit their comments and the Court hearings shall be public, except in some special cases CNDH proposes to be defined in the Rules of Procedure of the Constitutional Court.

i) When a court refers a plea of unconstitutionality to the Constitutional Court, it shall suspend the proceedings until it receives the decision of the Constitutional Court. The inquiry process, however, shall not be suspended and the court may take any necessary interim or protective measures. However, it is proposed to provide for exceptions to this rule when the person concerned is deprived of liberty or in pre-trial detention because of the case under consideration itself or when the claim is designed to put an end to deprivation of liberty.

The court may also rule without awaiting the decision on the plea of unconstitutionality if the law provides for a ruling within a specified period or urgently. Another exception should be provided for: proceedings should not be suspended if this could lead to irreparable or clearly excessive consequences on the rights of a party.

j) The decision of the Constitutional Court shall be notified to the parties and forwarded to the Court of Cassation and the court in which the plea of unconstitutionality was raised.

B) Second scenario: the procedure for the exception of unconstitutionality with a dual examination of admissibility

This procedure can be described as follows:

■ Concerning the exception of unconstitutionality raised before the courts of first instance and the courts of appeal, the CNDH proposes the following procedure:

a) The plea alleging that a law on which the outcome of the case depends infringes the constitutional rights and freedoms must be submitted in a separate reasoned written motion signed by a lawyer at the Moroccan Bar, failing which it should be inadmissible. The written motion must also contain the information and particulars set out in Article 32 of the Code of Civil Procedure. It is proposed to exempt this motion from court fees.

b) If the public prosecutor is neither a proper party nor an additional party, the case shall be referred to him/her once the plea is raised so that he/she can give his/her opinion about it.

c) The court shall issue without delay a reasoned decision on the referral of the plea to the Court of Cassation. This referral should not be undertaken unless the following conditions are met:
1. If the challenged provisions are applicable to the dispute or the proceedings;
2. If they have not been declared in conformity with the Constitution in the operative part and statement of reasons of a decision of the Constitutional Council or the Constitutional Court, unless circumstances change[32];

d) When an exception of unconstitutionality is raised, the court must first decide on the referral of the plea to the Court of Cassation. To this end, the decision to refer the plea shall be forwarded to the Court of Cassation within eight days after the ruling, alongside the pleadings or submissions of the parties. It shall not be subject to appeal. The refusal to refer the claim of unconstitutionality can be challenged only under an appeal against a decision relating partially or wholly to the subject matter of the dispute.

e) When a court refers an exception of unconstitutionality to the Court of Cassation, it shall suspend the proceedings until it receives the decision of the Court of Cassation or the Constitutional Court, when the plea is referred to the latter. The inquiry process shall not be suspended and the court may take any necessary interim or protective measures. However, it is proposed to provide for exceptions to this rule when the person concerned is deprived of liberty or in pre-trial detention because of the case under consideration itself or when the claim is designed to put an end to deprivation of liberty.
The court may also rule without awaiting the decision on the plea of unconstitutionality if the law provides for a ruling within a specified period or urgently. Another exception should be provided for: proceedings should not be suspended if this could lead to irreparable or clearly excessive consequences on the rights of a party.

f) If an application for appeal has been filed with the Court of Cassation while the judges ruled without awaiting the decision of the Court of Cassation or the Constitutional Court, when the plea is referred to the latter, the decision on the appeal should be suspended until a ruling is rendered on the claim of unconstitutionality. It is proposed to provide for an exception to this rule when the person concerned is deprived of liberty because of the case under consideration and when the law stipulates that the Court of Cassation shall rule on the case within a specified period.

■ With regard to the claim of unconstitutionality raised before the Court of Cassation and the decision to refer it to the Constitutional Court, the CNDH proposes the following procedure:

a) The Court of Cassation shall decide, within one month after the receipt of the referral, on referring the plea of unconstitutionality to the Constitutional Court. The plea of unconstitutionality shall not be referred to the Constitutional unless the conditions proposed in point (c) of the preceding paragraph are met and if the issue raised by the exception is new and valid[33].

b) The claim that a law on which the outcome of the case depends infringes the constitutional rights and freedoms may be raised, including for the first time before the Court of Cassation. Under penalty of inadmissibility, the plea must be submitted in a separate reasoned motion in the same manner proposed in point (a) of the preceding paragraph. This claim cannot be initiated/raised by a judge upon his/her own initiative.

c) Once it receives the aforementioned plea, the Court of Cassation must first decide whether to refer it to the Constitutional Court.

d) The Court of Cassation should rule within one month from the date of submitting the plea. The exception of unconstitutionality shall be referred to the Constitutional Court when the conditions proposed in point (c) of the previous paragraph are met and if the issue raised by the exception is new and valid.

e) When the Court of Cassation refers an exception of unconstitutionality to the Constitutional Court, it shall suspend the proceedings until the Constitutional Court rules on the plea. However, the CNDH proposes to provide for exceptions to this rule when the person concerned is deprived of liberty because of the case under consideration and when the law stipulates that the Court of Cassation should rule on the matter within a specified period.

f) The Court of Cassation shall file to the Constitutional Court its reasoned decision to refer the plea thereto alongside the pleadings or submissions of the parties. The CNDH proposes that the Constitutional Court should receive a copy of the reasoned decision by virtue of which the Court of Cassation decides not to refer the plea of unconstitutionality. If the Court of Cassation does not rule within the deadline proposed in point (d) of this paragraph, the exception of unconstitutionality shall be considered admissible and shall automatically be referred to the Constitutional Court.

g) The decision of the Court of Cassation shall be notified to the parties within eight days of the ruling.

13. Proposals concerning the examination of the exception of unconstitutionality by the Constitutional Court

The CNDH proposes the following:

a) The Constitutional Court, once it receives a claim of unconstitutionality, shall immediately notify the Head of Government, the Speaker of the House of Representatives and the Speaker of the House of Councillors, so that they can file their comments thereon to the Constitutional Court.

b) The Constitutional Court shall rule within one month from the date of referral. The parties may submit their comments. The hearing shall be public except in special cases to be defined in the Rules of Procedure of the Constitutional Court.

c) The decision of the Constitutional Court shall be notified to the parties and communicated to the Court of Cassation as well as the court before which the plea of unconstitutionality was raised in the first place, as appropriate.

Finally, the CNDH notes that in both scenarios the organic law on the exception of unconstitutionality should include the provisions of the first paragraph (second subparagraph) of Article 134 of the Constitution, which provides that "a provision, declared to be unconstitutional on the basis of Article 133 of the Constitution [i.e. following an exception of unconstitutionality] shall be rescinded as of the date stated in the Court decision."

Enshrining this provision in the organic law will help preserve the legal positions of the parties.

However, in order to promote the emergence of a clear course of action with regard to the time effects of the unconstitutionality rulings based on Article 133, the CNDH recommends that the future Constitutional Court should set, in its early decisions on the exception of unconstitutionality, a clear judicial doctrine in this area.[34]

Endnotes

1- Justice that 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- "Consolidating constitutional control of laws and independent regulatory decrees issued by the executive branch, and enunciating in the constitution the right to claim an exception on the grounds of the unconstitutionality of a law, while referring the matter to the Constitutional Council for a final decision, and to lay down detailed conditions for that, so as to avoid too many claims of unconstitutionality of laws issued by parliament being referred to the Constitutional Council;" Equity and Reconciliation Commission, Final Report, Vol. IV, "The Components of Reform and Reconciliation", Chapter III: Recommendations, p. 79.

12- See:
- Study on individual access to constitutional justice, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010).
- Conference on "Access to the court - The applicant in the constitutional jurisdiction" (Riga, Latvia, 6 November 2009).

13- See:
- Seminar on "Interrelations between the constitutional court and ordinary courts" (Baku, Azerbaijan, 9-10 November 2006).
- Seminar on "The limits of constitutional review of the ordinary court's decisions in constitutional complaint proceedings" (Brno, Czech Republic, 14-15 November 2005).

14- See:
- Conference on "Execution of the decisions of constitutional courts: a cornerstone of the process of implementation of constitutional justice" (Baku, Azerbaijan, 14-15 July 2008).
- Seminar on "The effects of the constitutional court decisions" (28-29 April 2003, Tirana, Albania).

15- See conclusions of the Workshop on "Principles of constitutional control, techniques of constitutional and statutory interpretation" (Kyiv, Ukraine, 5-6 June 1998).

16- See:
- Conference on "Justiciability of social rights in courts of constitutional jurisdiction and the European Court of Human Rights" (Batumi, Georgia, 11-12 July 2009).
- Conference on "The protection of electoral rights and the right to political associations by the constitutional court" (Tbilisi, Georgia, 10–11 February 2006).

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 Law No. 87/1953.

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

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

25- It explicitly includes the preamble of the Constitution.

26- This is a conceptual clarity that only sheds light on the CNDH position on the scope of the rights and freedoms guaranteed by the Constitution, and not a definition to introduce in the body of the organic law.

27- It should be noted that the Constitution does not provide for this option.

28- This mechanism is based on the provisions of articles 51-62 of the Rules of the European Court of Human Rights (September 2012).

29- This time period is proposed by way of an incentive.

30- In order to clarify the scope of the change in circumstances, the CNDH recommends to use the definition given by the French Constitutional Council when examining the Organic Law of 10 December 2009 (3 December 2009, Decision No. 2009-595 DC), whereby it considered that the "change in circumstances" means "the changes that have occurred since the previous decision in the applicable constitutional standards or in the de jure or de facto circumstances affecting the scope of the criticized legislation".

31- This time period is proposed by way of an incentive.

32- In order to clarify the scope of the change in circumstances, the CNDH recommends to use the definition given by the French Constitutional Council when examining the Organic Law of 10 December 2009 (3 December 2009, Decision No. 2009-595 DC), whereby it considered that the "change in circumstances" means "the changes that have occurred since the previous decision in the applicable constitutional standards or in the de jure or de facto circumstances affecting the scope of the criticized legislation".

33- The risk of abuse in assessing the substance of the claim of unconstitutionality is reduced because the Court of Cassation acts as a collegial body.

34- See for example the strategy adopted by the French Constitutional Council in modulating the time effects of unconstitutionality decisions under the QPC (priority preliminary ruling on constitutionality):

■ Decision No. 2010-1 QPC of 28 May 2010 (Mr and Mrs L. – Pensions)
"... The repeal of Article 26 of the Act of 3 August 1981, of Article 68 of the Act of 30 December 2002 and Article 100 of the Act of 21 December 2006 is designed to place all foreign nationals, other than Algerians, holding military retirement or pension in a situation of inequality due to their nationality as a result of the provisions prior to the coming into effect of Article 68 of the Act of 30 December 2002. In order to enable Parliament to remedy the finding of unconstitutionality made by the Council, the repeal of the aforementioned provisions shall take effect as of 1 January 2011. In order to preserve the usefulness of this decision for cases pending, it is firstly incumbent upon courts to stay their ruling until 1 January 2011 in cases where the outcome depends on the application of provisions found to be unconstitutional, and secondly incumbent upon Parliament to provide for an application of the new provisions to such cases pending at the date of this decision."

■ Decision No. 2010-6/7 QPC of 11 June 2010:
"… The prohibition of entry of the name of the offender on the electoral roll laid down by Article L.7 of the Electoral Code is intended in particular to inflict a heavier punishment for certain acts when committed by persons vested with public authority, in charge of a public service mission or holders of elective public office. This punishment imposes an incapacity for holding elective public office for a period of five years. It is thus a measure which constitutes a punishment. This punishment, which deprives the offender of the right to vote, automatically accompanies various criminal convictions without the judge who decides on such measures having to expressly impose the same. He cannot vary the length of the period involved. Even if the offender may, in the conditions set out in paragraph 2 of Article 132-21 of the Criminal Code, see all or part of this prohibition immediately lifted, this possibility is not as such sufficient to ensure compliance with the requirements which derive from the principle of the tailoring of punishments. Article L.7 of the Electoral Code thus fails to comply with this principle as must he held to be unconstitutional;
The repeal of Article L.7 of the Electoral Code will enable those involved to ask for their name to be entered on the electoral roll in the conditions provided by statute as from the date of the publication of this decision.

HELD
Article 1: Article L.7 of the Electoral Code is unconstitutional."

المجلس الوطني لحقوق الإنسان

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Conseil national des droits de l'Homme

THE ORGANIC LAW RELATING TO THE EXCEPTION OF UNCONSTITUTIONALITY

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