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TUNISIA: DISSOLUTION OF TOP JUDICIAL BODY THREATENS HUMAN RIGHTS

President Kais Saied's decision to dissolve Tunisia's top independent judicial body and to replace it with an institution in whose work he can intervene has obliterated the last significant institutional check on his authority following a power grab in July 2021 and given him control over judiciary similar in breadth to that of former dictator Zine El Abidine Ben Ali. This is a serious threat to the rule of law and human rights in Tunisia, Amnesty International said today.

Decree-Law 2022-11, issued by Saied on 12 February 2022, dissolves Tunisia's High Judicial Council (HJC) - a body of mostly elected magistrates and experts that was set up after Tunisia's 2011 revolution to administer the judiciary and shield it from government influence - and replaces it with the Temporary High Judicial Council (THJC), giving the president considerable control over the appointment, career tracks, and dismissal of judges and prosecutors. The THJC will remain in place indefinitely until the creation of a permanent body to replace it.¹

The timing for such far-reaching changes to the judiciary could not be worse. Since last 25 July, President Saied has suspended parliament and most of the Constitution and granted himself the power to rule by decree in almost every area of governance and public life. Decree-Law 2022-11 further consolidates presidential power by weakening the independence, integrity, and ability of the judiciary to act as a check on the executive branch.

Over the past few months President Saied has launched repeated rhetorical attacks on the judiciary - including the HJC - which he has accused of corruption, bias, and of failing to respond swiftly to allegations of corruption and terrorism. On 5 February, he [announced his intention](#) to dissolve the body by decree.² The following day, police [deployed outside the council's office](#), barring entry to its members.

According to a 12 February statement on the president's official Facebook page, Saied said that his decision to replace the HJC with the THJC was necessary to end what he described as impunity for injustice, and pledged to respect judicial independence.³ However, Decree-Law 2022-11 grants the president powers to impede and potentially reverse many of the council's decisions, and to initiate the dismissal of magistrates.

Under the decree-law, the president will appoint nine of the THJC's 21 members from among retired judges, with the remaining 12 being senior sitting judges.⁴ In case of vacancies, the President may appoint "whomever he sees fit who meets the conditions stipulated in this decree."⁵ He may also oppose the nomination, appointment, promotion, or transfer of any magistrate by the THJC, which must then propose an alternative candidate. If the THJC does not do so within 10 days, the president appoints any person of his or her choosing who meets the requirements for the position.

¹ Decree-Law 2022-11, Article 29

² Facebook post, Official Facebook page of the Tunisian President's Office, 5 February 2022. Available online at: <https://www.facebook.com/Presidence.tn/videos/330334598837172/>

³ Facebook post, official Facebook page of the Tunisian President's Office, 12 February 2022. Available online at: <https://www.facebook.com/Presidence.tn/posts/312042767620997>

⁴ Decree-Law 2022-11, Articles 3, 4, and 5. The Temporary High Judicial Council is divided into three inner councils: 1) the Temporary Council of Judicial Magistrates (First Presiding Judge of the Court of Cassation, General Prosecutor of the Court of Cassation, General Prosecutor who is director of judicial services, Presiding Judge of the Real Estate Tribunal, and three retired magistrates named by presidential decree); 2) the Temporary Council of Administrative Magistrates (First Presiding Judge of the Administrative Tribunal, Longest-serving presiding judge of a cassation chamber provided that her or she is not also Deputy First Presiding Judge, Longest-serving General Commissioner of State, Longest-serving presiding judge of an appeals chamber, and three retired magistrates named by presidential decree); 3) the Temporary Council of Financial Magistrates (First Presiding Judge of the Court of Audit, General State Prosecutor, Deputy Presiding Judge, Longest-serving presiding judge of an appeals chamber, and three retired magistrates named by presidential decree).

⁵ Decree-Law 2022-11, Articles 6, 8 and 19

The president may also request - summarily and outside disciplinary procedures – that the THJC dismiss any judge that the president deems to be “breaching professional duties” - a vague and overly broad term that is not defined in the decree-law, and which exposes magistrates to potential pressure or retaliation.⁶ Under international law, judges should face dismissal only for serious misconduct or incompetence and following a fair and impartial procedure.

In addition, Article 9 of the decree-law imposes a blanket ban on magistrates from carrying out strikes or “any organized collective action that may cause disorder or disruption in the functioning of court work.” This effectively restores a Ben Ali-era prohibition and wipes out an expansion of freedom of expression and association rights that magistrates gained after his ouster.⁷ Given President Saied’s current concentration of powers and record of issuing far-reaching decrees [without public debate](#), Article 9 also cuts off magistrates entirely from an increasingly important means for Tunisians to voice their opinions on law and policy.

The United Nations’ Basic Principles on the Independence of the Judiciary state that “members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly” provided “they conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.” The same principles are included in the Principles and guidelines on the right to a fair trial and legal assistance in Africa.

The right to a fair trial before an independent and impartial court is guaranteed by international law as a bedrock for the protection of human rights. Amnesty International calls on President Saied to reinstate the High Judicial Council immediately and refrain from any further measures that threaten the independence, authority, or effectiveness of the judiciary.

Background on the High Judicial Council

Under Ben Ali, who ruled Tunisia from 1987 until he was toppled by revolution in 2011, the president appointed all magistrates in Tunisia based on nominations by the previous HJC and presided over it himself, while the justice minister served as the HJC’s vice-president. Under a 2005 law, the president also chose nine of the HJC’s 19 members, so that the executive branch comprised or controlled a majority of the council.

After Ben Ali’s ouster, post-revolution authorities suspended the HJC in 2011, and an interim elected legislature set up a provisional judicial council in 2013. In 2014, Tunisia adopted a new constitution that included articles guaranteeing the independence both of the judicial branch in general and specifically of the HJC in fulfilling its constitutional mandate to ensure “the sound functioning of the justice system and respect for its independence.”⁸ In 2016, the country’s new parliament established a new HJC to replace permanently the Ben Ali-era council.⁹

Under the 2014 constitution and the 2016 law creating the new HJC, two thirds of the council’s members were magistrates of whom a majority were elected by their peers. The remaining third of the HJC’s members were elected legal, financial, tax, and accounting experts. There was no role in the council for any member of the executive or legislative branches of government.¹⁰

On 25 July 2021, President Saied suspended parliament and dismissed then-Head of Government Hichem Mechichi, claiming emergency powers that he said were granted to him by the constitution. On 22 September he issued Presidential Decree 2021-117, which suspends all but the preamble and first two chapters of the Constitution, and grants him the

⁶ Decree-Law 2022-11, Article 20

⁷ Decree-Law 2022-11, Article 9. Previously, magistrates had been barred from going on strike or carrying out any other organized action that served to “disrupt, impede, or halt” the functioning of the court system under Article 18 of Law 1967-29 (1967). That article had been added to Law 1967-29 by Organic Law 1985-79 (1985).

⁸ Constitution of the Tunisian Republic, 2014, Articles 102, 113 and 114

⁹ Organic Law 2016-34

¹⁰ Constitution of the Tunisian Republic, 2014, Article 112 ; Organic Law 2016-34, Articles 7, 10, 11, and 12

exclusive power to govern by decree.¹¹ The decree also dissolved a temporary body mandated to vet the constitutionality of laws and bars anyone from overturning decree-laws via Tunisia’s administrative court.¹²

International standards on judicial independence

As a result of Decree-Law 2022-11, Tunisian courts will fall short of the country’s fair trial obligations under international law.

Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which Tunisia has ratified, guarantees a fair, public trial before a competent, independent, impartial tribunal established by law. According to guidance from the United Nations’ Human Rights Committee (HCR) – experts who provide the definitive interpretation of the ICCPR - judicial independence means, in particular, that judiciary be independent in deciding the appointment, promotion, transfer, and dismissal of judges.

Furthermore, the HCR guidance states that “[j]udges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.”¹³

The integrity and independence of the judiciary is essential for respect for human rights.

The UN Basic Principles on the Independence of the Judiciary states that the independence of the judiciary “shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”¹⁴

Article 4 of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, by the African Commission on Human and Peoples’ Rights, states that “All judicial bodies shall be independent from the executive branch” and that “Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.” The Principles and Guidelines are official guidance on fulfilling fair trial obligations under the African Charter on Human and Peoples’ Rights, to which Tunisia is a state party.

¹¹ Presidential Decree 2021-117, Articles 4, 5, 8, 11, 12, and 20

¹² Presidential Decree 2021-117, Articles 7 and 21

¹³ United Nations’ Human Rights Council, General Comment 32, Section 20

¹⁴ United Nations’ Basic Principles on the Independence of the Judiciary, Article 1