



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

The Organic Law Establishing **The Statute for Judges**

Contribution to Public Debate Series - No.2

- Additional Memorandum -

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CONTRIBUTION TO PUBLIC DEBATE THE ORGANIC LAW ESTABLISHING THE STATUTE FOR JUDGES

Based on articles 13, 24 and 25 of the Royal Decree (Dhahir Shareef) No. 19.11.1 issued on Rabia I 25, 1423 (March 1st, 2011) establishing the National Council for Human Rights;

Given its memorandum on the draft organic law establishing the Statute for Judges, adopted at the Council's fifth regular session held on July 20, 2013;

And after reviewing the draft organic law establishing the Statute for Judges in its version of December 25, 2013;

The Council presents this additional Memorandum relating to the Draft Organic Law establishing the Statute for Judges.

This additional memo focuses on the following points:

The Modalities Relating to Provision of Communication of Penal Policy Guidelines by the Minister of Justice (Article 5 of the draft organic law)

1. Article 5 of the Draft Organic Law enshrines the independence of judges by placing them under the authority of the General Prosecutor of the King at the Court of Cassation, and under the control and direction of their superiors, while putting the Minister of Justice in charge of communicating, in writing, the provisions of the penal policy to the General Prosecutor of the King at the Court of Cassation.

2. While noting that the wording of this Article generally meets the recommendations contained in its memorandum¹ relating to the judges' statute, the CNDH proposes to clarify, in the same article, the legal mechanism by which these provisions shall be communicated. In this respect, the CNDH recommends to add in Article 5 a provision stating that the orientations of criminal policy are communicated through the issue of general circulars addressed by the Minister of Justice to the Attorney General of the King at the Court of Cassation. The Council also stresses the importance of including a provision that explicitly refers to the principle of hierarchy of norms enshrined in Article 6 of the Constitution.

3. The proposed formula, while having the advantage of reducing the risk of «personalizing» the orientations of criminal policy, draws on comparative experiences that have opted for institutional and mutual accountability of those involved in criminal policy and public action.

4. The CNDH also points out that Recommendation Rec. (2000) 19 of the Committee of Ministers to Member States of the Council of Europe on the role of public prosecution in the penal justice system² states respectively in paragraphs 13 (c) and 14 that «where government gives instructions of a general nature, such instructions must be in writing and

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published in an adequate way» and that “14. In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law.» Furthermore, in its opinion, issued on June 27, 2013 with regard to the Bill on the prerogatives of the Minister of Justice and Public Prosecutors in criminal policy and implementation of criminal proceedings, the French National Consultative Commission on Human Rights (CNCDH), on the same legal issue, confirms that it does not object «to the power of the Minister of Justice to define and coordinate the criminal policy. However, this power should not have as effect to constrict the discretionary power of the prosecution, in disregard of the principles of discretionary prosecution and individualization of sentences.» Based on this position of principle, the CNCDH recommended that «the terms of the general instructions of the penal policy be abandoned in favor of those of general guidelines circular. It would then be for attorneys general and prosecutors to clarify, adapt and implement these guidelines taking into account the proper context of their jurisdiction.»

Proposals for Certain Acts of Appointment

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5. After analysis of Articles 9-13 of the draft organic law, the CNDH notes that certain acts of appointment closely related to the implementation of Articles 107 and 113 of the Constitution do not fall within the competence of the Supreme Council of the Judiciary. To this end, the CNDH reiterates its proposals for the nomination of officers and noncommissioned officers (NCOs) appointed to serve as judges in military courts³ as well as the nominations to local boards of taxation and the National Commission of Tax Appeal (Articles 225 and 226 of the General Tax Code). The Council reiterates, in the same context, its recommendation of providing the CSPJ with the nominating competence for the abovementioned functions. Regarding the officers and NCOs appointed to serve as judges in the military court, the Council recommends that the selection criteria for this category of judges are aligned with those applicable to civil Judges, and suggests, in addition, that they benefit from an additional training of six months at the Higher Institute of the Judiciary. The Council also stresses that the implementation of these recommendations requires the insertion of two additional paragraphs in Article 13 of the draft organic law, and to bring Articles 225 (II) -A, 226 (I) of the Tax Code and Article 21 of Dahir No. 1-56-270 of Rabia II 26, 1376 (November 10, 1956) forming Code of the Military Justice (as amended and supplemented), in line with Article 13 mentioned above.

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Proposal for the Recruitment of Judges

6. In terms of recruitment of judges, the CNDH reiterates its proposal made in its memorandum on the statute for judges, which consists of opening the trainee judges' exam to the graduates of the Master of Legal Studies degree. This formula allows to cover the two main branches of legal studies in the national academic curriculum namely private law and public law⁴. The CNDH also points out that comparative experiences presented in its thematic report, especially the German, Belgian, Spanish, Italian, Dutch and Portuguese experiences are part of the logic of the above proposal. For the above reasons, the CNDH recommends to amend paragraph 6 of article 16 of the draft organic law in order to remove the condition between parentheses (private law).

7. The same arguments justify the proposal of the CNDH consisting of deleting the requirement of teaching a private law course under section 28 of the bill while maintaining the overall condition of teaching a legal studies course.

Proposals on the Modalities for the Elaboration of Regulations Provided for in Articles 18, 33, 41, 84, 85, 86 and 87 of the Draft Organic Law

8. The CNDH points out that the 11th paragraph of the Basic Principles of the Independence of the Judiciary⁵ provides that the «appropriate compensation» for judges as well as their «pensions» shall be “guaranteed by law.”

9. Similarly, Recommendation CM/Rec (2010) 12 of the Committee of Ministers to member states of the Council of Europe on Judges: Independence, Efficiency and Responsibilities⁶ provided in paragraphs 54 and 53 that the main rules for the compensation plan of professional judges should be determined by law and that judges' remuneration should be commensurate with their role and responsibilities, and should be sufficient to shelter them from any pressure to influence their decisions and that specific legal provisions should be introduced to guard against a reduction in remuneration aimed specifically at judges.

10. The analysis of the above two paragraphs shows that the recommendation logically binds the issue of judicial compensation to their independence. This conclusion is confirmed by the provisions of Opinion No. 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe

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on the Council of the Judiciary at the service of society⁷. This opinion recommends in its paragraph 87, which defines the contours of the advisory functions of Superior Councils for the Judiciary in the countries of the Council of Europe, that «All draft texts relating to the statute for judges, the administration of justice, procedural law and more generally, all draft legislation likely to have an impact on the judiciary, e.g. the independence of the judiciary... should require the opinion of the Council for the Judiciary before deliberation by Parliament.»

11. In the same comparative approach, the European Charter on the Statute for Judges⁸ advocates in principle I.8 to involve judges “through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.” Reading this principle in light of Articles 113 and 111 of the Constitution allows to highlight the role of CSPJ as a space for consultation on the legislative and regulatory framework for the financial situation of judges.

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12. For the abovementioned reasons, the CNDH, while recognizing that the definition of remuneration and allowances of judges falls, in the national legal context, under the regulatory arena, recommends to amend articles 18, 41, 84, 85, 86 and 87 of the draft organic law to allow the CSPJ to give its opinion on draft decrees relating to remuneration and allowances of judges.

13. The same logic applies, in the Council’s opinion, to the decree regulating the rhythms of advancement by level, provided under section 33 of the draft organic law.

Proposals for Certain Acts Relating to the Management of Exams for Judges’ Recruitment

14. Regarding Articles 17 and 29 of the draft organic law, the CNDH reiterates its proposals contained in its thematic report on the statute for judges.

The first proposal concerns certain acts of the management of the exam, which should, in the opinion of CNDH, be attributed to the CSPJ Deputy Chairman upon deliberation of the Board. These acts are:

1. The appointment of the jury of the exam for trainee judges;
2. The appointment of the deputy president and members;

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3. The appointment of assistant examiners to the jury;
4. The appointment of the Supervisory Committee;
5. The appointment of members of the jury for the final examination of trainee judges, currently appointed by the Minister of Justice and Liberties (Decree No. 2-05-178).

15. The second proposal concerns the revision of the composition of juries and the supervisory committee so that the representatives of the Ministry of Justice and Liberties are no longer part of these structures, on which currently sits the Director of Civil Affairs for the juries and the Head of the Division of judges, the head of the Department of Management of the Administrative Situation of Judges and the Manager of the Department of Judges' Deployment for the oversight committee.

16. Based on these considerations, the CNDH proposes to amend Articles 17 and 29 of the draft organic law to assign, in an explicit way, the Deputy Chairman of CSPJ competence to appoint, by order, members of the juries and the Supervisory Committee.

Proposal on the Alignment of Article 83 of the Draft Law on the Basic Guarantees of the Civil Service

17. To bring the draft organic law into line with the common guarantees in the general statute for the function, the CNDH proposes to insert in Article 83 of the draft organic law, a formula similar to the last paragraph of Article 20 of the general statute of the function that provides that no «notation of political, religious or philosophical opinions of the person concerned can be included,» while taking into consideration the propositions of Article 111 of the Constitution in all transposition of this principle,.

18. In the same context, the CNDH points out the 17th fundamental principle of the United Nations on the Independence of the Judiciary, which provides that «Any charge or complaint made against a judge in the exercise of their judicial and professional capacity must be heard expeditiously and fairly under an appropriate procedure. The judge has the right to respond, his cause must be heard fairly. The initial phase of the case must be kept confidential unless the judge requests otherwise.» The implementation of this principle requires, in the opinion of the Council, adding a provision to Article 83 of the draft organic law to include in the personal file of the judges only those complaints that have resulted in final disciplinary decisions.

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Proposal Regarding Professional Associations of Judges (Articles 90-96)

19. The CNDH notes with satisfaction the positive development of the legal regime of professional associations of judges through the successive versions of the draft organic law. The CNDH particularly notes that the new wording of Article 92 of the draft organic law allows professional associations to immediately operate in accordance with the intended purpose in their statutes and this on the date of the deposit of the declaration of its establishment, which represents, in the opinion of the Council, a strong guarantee of the judges' right of association. In the same context, the CNDH notes with satisfaction that the minimum number of judges required for the establishment of a professional association of judges is the same as provided in Article I of Dahir No. I-58-376 of Jumada I 3, 1378 (November 15, 1958) regulating the right of association i.e. namely two people.

20. The CNDH considers these choices, which are part of the implementation framework of Article 111 of the Constitution, compatible with the ninth fundamental principle of the United Nations on the Independence of the judiciary⁹ as well as with the ninth guiding principle of the United Nations applicable to the role of prosecutors¹⁰. The Council also notes that the provisions of articles 90-96 of the draft organic law are based largely on the provisions of Article 401 of the Spanish Organic Law of the Supreme Council of the Judiciary considered by the National Human Rights Council as a good practice in the right of association of judges.

21. As a complement to these choices, the CNDH recommends specifying in Article 94 of the draft organic law the rights inherent to the status of association-interlocutor of CSPJ, particularly in terms of the possible participation of these associations in the consultative processes that will be conducted by the CSPJ without excluding the least representative professional associations from the abovementioned consultative processes. The CNDH also recommends to reduce the percentage of 10% provided in Article 94 of the draft organic law for the acquisition of the status of interlocutor of CSPJ to 5% without any condition as to members' territorial deployment, and to provide in the bylaws of the CSPJ a mechanism allowing for the annual census of judges who are members of professional associations in order to update the list of associations with the status of interlocutor of the Council. This recommendation is justified by the current size of the judiciary. The Council points out, by analogy alone, the jurisprudence of the Committee on Freedom of Association of the ILO Governing Body, and in particular paragraph 356 of its book published in 2006 which states that «the fact of establishing in the legislation a percentage to determine the electoral threshold of organizations and grant certain privileges to the most representative organizations (in particular for collective bargaining purposes) poses

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no difficulty to the extent that they are objective, precise and predetermined to avoid any possibility of partiality or abuse»¹¹.

Proposal Regarding Disciplinary Offenses Under Article III of the Draft Organic Law

22. In its memorandum on the organic law establishing the statute for judges, the CNDH proposed to consider a disciplinary offense any serious violation by a judge of a procedural rule that constitute an essential guarantee of the rights of the parties, established by a justice decision that became final¹². The Council reiterates its proposal recommending to predict this fault, which is a fundamental violation of the right to fair trial in Article III of the bill.

23. The Council points out to justify the above proposal, that the European Court of Human Rights considered in its *Kulikowski v. Poland* judgement, in May 19, 2009, that the failure of a court to inform the accused that they had a new deadline to lodge an appeal after the refusal of their court-appointed lawyers to assist them violates Article 6 of the European Convention on Human Rights concerning the right to a fair trial.

24. The Council also considers that the provision of Article III of the draft organic law, which provides for the possibility to immediately prohibit a judge to exercise if he commits a serious disciplinary offense, is incompatible with principles 19 and 20 of the Basic Principles on the Independence of the Judiciary¹³. The Council also proposes as an alternative to this measure, a procedure that allows judicial officials, in case of an emergency, to refer to the CSPJ facts appearing likely to be characterized as serious misconduct subject to the principle of proportionality. The Superior Council of the Judiciary, shall decide in this case, in a relatively short period and giving all disciplinary guarantees to the judge in question, issues a temporary suspending decision, taken in the interest of the service until a final decision on disciplinary proceedings is reached.

Notes

- 1.** Adopted by the Committee of Ministers, October 6, 2000, at the 724th meeting of the Ministers' Deputies.
- 2.** NCCHR: Opinion on the Independence of Justice, adopted at the plenary of 27 June 2013 and published in the French Official Gazette No. 0176 of July 31, 2013 No. page text 102.
- 3.** This proposal is part of the logic of the recommendations made by the CNDH in its memorandum on the Dahir No. 1-56-270 of Rabia 6, II 1376 (November 10, 1956) forming Code of Military Justice (as amended and supplemented)
- 4.** For public law, the holders of masters in administrative law, public finance, constitutional law and public international law have, according to national educational standards, prerequisites to apply the competition trainee judges.
- 5.** Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from August 26 to September 6, 1985 and confirmed by the General Assembly in its 40/32 resolutions of November 29 1985 and 40/146 of December 13, 1985.
- 6.** Adopted by the Committee of Ministers November 17, 2010, at the 1098th meeting of the Ministers' Deputies.
- 7.** Adopted by the CCJE at its 8th meeting (Strasbourg, 21-23 November 2007).
- 8.** The European Charter on the Statute for Judges, Strasbourg, July 8-10, 1998.
- 9.** The judges are free to form associations of judges or other organizations, and to join unions to defend their interests, to promote their professional training and to protect the independence of the judiciary.
- 10.** Guidelines on the Role of Prosecutors. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from August 27, to September 7, 1990.

«9. Prosecutors are free to form and become members of professional associations or other organizations to represent their interests, promote their professional training and to protect their statute.»
- 11.** Freedom of Association: Digest of Decisions and Principles of the Committee on Freedom of Association of the ILO Governing Body; Geneva, International Labor Office, 5th revised edition, 2006 (p 80).
- 12.** By way of comparison, the French Constitutional Council stated in its decision No. 2010-611 of July 19, 2010 that a similar provision in the organic law on the application of Article 65 of the Constitution is consistent with constitutional requirements.
- 13.** Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from August 26 to September 6, 1985 and confirmed by the General Assembly in its resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985.

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