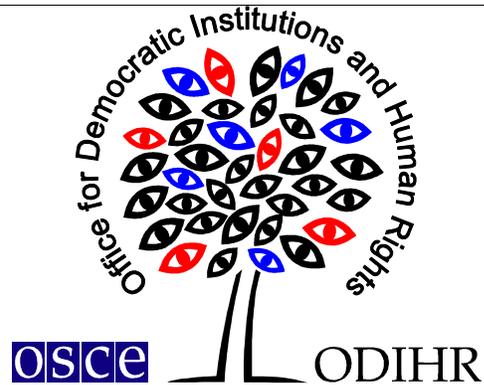


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**OPINION**  
**ON THE LAW 29/1967**  
**CONCERNING THE JUDICIAL SYSTEM,**  
**THE SUPREME COUNCIL OF THE JUDICIARY, AND**  
**THE STATUS OF JUDGES IN TUNISIA**  
**(AS AMENDED UP TO 12 AUGUST 2005)**

**Based on an unofficial English translation of the Law**

*This Opinion was prepared by OSCE/ODIHR and has benefited from a peer-review by  
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**Annex 1: Law 29/1967 concerning the Judicial System, the Supreme Council of the Judiciary, and the Status of Judges in Tunisia**

***OSCE/ODIHR Opinion on the Law concerning the Judicial System, the Supreme Council of the Judiciary, and the Status of Judges in Tunisia***

**I. INTRODUCTION**

1. *As part of an OSCE/ODIHR project on promoting democratic structures among OSCE/ODIHR's Mediterranean Partners for Co-operation, the OSCE/ODIHR offered to Tunisian authorities to review their existing legislation for compliance with international standards in the first half of 2012.*
2. *Following an exchange of letters in March and April 2012, and consultations between the OSCE/ODIHR and the Head of the Tunisian Permanent Mission to the United Nations Office and International Organizations in Vienna, the OSCE/ODIHR was requested to review Tunisian legislation pertaining to the human dimension.*
3. *During an assessment visit to Tunisia at the end of August 2012, OSCE/ODIHR met with relevant counterparts from Tunisia, including the Ministry of Justice, which expressed a great interest in an Opinion on draft and existing legislation pertaining to the Status of Judges in Tunisia. In a confirmation letter to the Head of the Permanent Mission to the United Nations Office and International Organizations, the OSCE/ODIHR Director confirmed his Office's willingness to provide support on existing and draft legislation pertaining to, inter alia, the judiciary.*
4. *In subsequent discussions with representatives of the Ministry of Justice, it was agreed to limit the Opinion to the current Law 29/1967 concerning the Judicial System, the Supreme Council of the Judiciary, and the Status of Judges in Tunisia (as amended up to 12 August 2005), and that OSCE/ODIHR would seek to cooperate with the Council of Europe's European Commission on Democracy through Law (hereinafter "the Venice Commission") and its experts.*
5. *On 4 December 2012, an OSCE/ODIHR delegation met with representatives of the Ministry of Justice to discuss preliminary main findings on Law 29/1967. This meeting was also attended by a Member of the Venice Commission from Italy, Professor Guido Neppi Modona, and by a representative of the Venice Commission's Secretariat.*
6. *This Opinion is provided in response to the above-mentioned request and ensuing discussions, with a view to assisting the Tunisian authorities in undertaking requisite judicial reforms.*

**II. SCOPE OF REVIEW**

7. *The scope of the Opinion covers only the above-mentioned Law 29/1967 concerning the Judicial System, the Supreme Council of the Judiciary, and the Status of Judges in Tunisia (hereinafter, the Law), submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation regulating the judiciary in Tunisia.*
8. *The Opinion raises key issues and indicates areas of concern. The ensuing recommendations are based on relevant international norms, as well as*

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regional standards such as OSCE standards and good practice, and Council of Europe instruments and recommendations. In the interests of concision, the Opinion focuses on problematic areas rather than on the positive aspects of the Law.

9. This Opinion is based on an unofficial translation of the Law. Errors from translation may result.
10. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to the Law or related legislation that the OSCE/ODIHR may make in the future.

**III. EXECUTIVE SUMMARY**

11. The OSCE/ODIHR finds that the Law would benefit from significant revisions. In particular, in order to ensure the Law's full compliance with international standards relevant to the organization and functioning of judiciaries, it is recommended as follows:

***1. Key Recommendations***

- A. to specify in the Law which provisions apply to judges seconded to non-judicial institutions, and which shall not; [pars 13 and 41]
- B. to amend Article 2 of the Law by specifying that courts shall be established not by decree, but by Law; [par 15]
- C. to delete from the Law all provisions granting the executive undue influence on the judiciary as such, including on the Supreme Council of the Judiciary and disciplinary proceedings; [pars 19, 24-25, 30-31, 44 and 47]
- D. to diversify membership of the Supreme Council of the Judiciary to represent judges from all levels, and also include, e.g., representatives of the Bar Association, and/or from academia; [par 21]
- E. to limit the immunity of judges to actions performed within their judicial functions; [par 26]
- F. to include in the Law basic criteria for the selection of candidates for the judiciary; [pars 30 and 33]
- G. to change the provisions on disciplinary procedure so that the disciplinary council will be an independent council featuring a representative participation of judges from all levels, and that appeals against its decisions are made to regular independent courts of law; [pars 48 and 51]
- H. to include in the Law provisions pertaining to case assignment, based on objective pre-established criteria; [par 52]

***2. Additional Recommendations***

- I. to further elaborate the notion and value of independence of the judiciary in the Law; [pars 14 and 40]
- J. to clarify, in Article 1, the existence and nature of military courts; [par 16]
- K. to ensure that Articles 2 and 3 are consistent in that all aspects of courts' jurisdiction shall be prescribed by Law; [par 17]
- L. to specify, in Article *7bis*, the existence and nature of a nomination procedure for high judicial officials; [par 20]
- M. to include in the Law a separate provision listing the functions, tasks and competences of the Supreme Council of the Judiciary, while distinguishing between its decision-making and advisory functions; [pars 22 and 27]
- N. to clarify in Article 15 that prosecutors shall enjoy autonomy during court hearings; [par 23]
- O. to consider removing the probationary period for judges under Article 31 of the Law, or define more clearly which functions judges on probation may undertake, and which they could not; [par 28]
- P. to ensure that candidates for judicial posts are selected by an independent body, that should reflect the composition of the population as a whole, and that the appointment of judges is limited to those candidates previously selected; [pars 31-32]
- Q. to specify in the Law that judges are appointed for life; [par 32]
- R. to clarify the term "dismissal" (in French *licenciement*), and in which circumstances it shall apply; [par 34]
- S. to amend Article *7bis* to ensure transparency with regard to the appointment of court chairpersons and chief prosecutors; [par 35]
- T. to revise the system of performance evaluation by ensuring that an assessment by the president of the court is not the only source of evaluation, and that the system as a whole is devised to allow for a proper evaluation by a variety of sources, based on clear and objective criteria, while maintaining the independence of the judiciary and providing the possibility to appeal against evaluation decisions; [pars 36-38]
- U. to include in the judicial oath references to the independence of the judiciary, and foresee, as an alternative option, a non-religious version of the oath; [pars 39 and 40]
- V. to incorporate, in pertinent legislation, provisions setting judges' remuneration at an adequate level, and abolish, or outline in greater detail, criteria and procedures for awarding bonuses and privileges; [par 42]

- W. to delete Article 39 par 2 restricting the travel of judges abroad; [par 44]
- X. to rephrase and clarify Articles 24 and 50; [pars 45-46]
- Y. to transfer the current powers of the Minister of Justice in disciplinary proceedings to an independent inquiry commission; [par 47]
- Z. to grant all fair trial rights to judges accused of disciplinary offences; [par 49]
- AA. to amend Article 59 so that hearings *in absentia* are only permissible in exceptional cases, and retrial is possible upon request; [par 50] and
- BB. to include, at least by references to other legislation, provisions on the allocation of adequate resources, and retirement pensions. [par 52]

#### **IV. ANALYSIS AND RECOMMENDATIONS**

##### **1. Preliminary Comments**

12. The Law deals with judges as well as prosecutors, both professions being considered as part of the “[j]udicial corps” (Article 12 of the Law). This reflects similar arrangements in European countries such as France and Italy. Throughout the text, most provisions cited as referring to “judges” or “the judiciary” will thus also refer equally to prosecutors or the prosecution service in general.<sup>1</sup>
13. What is less common, however, is the fact that also under Article 12, judges seemingly working in administrative functions in ministries and similar bodies, are likewise included in the judicial corps. This may refer to judges seconded to the Ministry of Justice for a certain time period. For these cases, the necessity of treating these people the same as other judges, rather than the same as other public servants working in the executive, should be debated. In any case, it would be advisable to specify in the Law which provisions apply to judges who are seconded to non-judicial institutions, and whether there are any that do not..
14. It also transpires from the Law that the executive may have a significant influence on the judiciary, including on matters pertaining to selection and appointments, performance evaluations and disciplinary proceedings (see below). The notion and value of independence of the judiciary needs to be further elaborated in the Law. Currently, this term only appears once throughout the entire Law, namely in Article 16 par 2, and even then in the rather conspicuous context of judges being allowed to engage in teaching and other activities which do not affect [...] “the independence of the judiciary”. It should be emphasized that the independence of the judiciary is a prerequisite for the rule of law and a cornerstone of democratic societies; as such, it finds

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<sup>1</sup> The French version of the text speaks of “magistrats”; this term covers both judges (*magistrats de siège*), and prosecutors (“*magistrats du parquet*”).

reflection in all relevant international treaties.<sup>2</sup> Furthermore, according to international standards, the independence of the judiciary must be clearly set out in both the Constitution and in law.<sup>3</sup>

## **2. Detailed Analysis of the Law**

### ***2.1 Courts' Establishment and Jurisdiction***

15. Part I of the Law provides a general overview of the Tunisian judicial system. Following the presentation of the 5-tier court system, set forth in Article 1, Article 2 prescribes that “[c]ourts shall be established by decree, and the headquarters and area of jurisdiction thereof shall be specified by decree”. This provision is not in line with international standards, which require that courts be “established by law”, rather than by decree or other such executive acts (Article 14 par 1 of the International Covenant on Civil and Political Rights (hereinafter, ICCPR), which was ratified by the Republic of Tunisia in March 1969). The purpose behind the guarantee of having courts established by law is to ensure that the organization of the judiciary is regulated by law emanating from the Parliament, and is thus not dependant on the discretion of the executive.<sup>4</sup> It is therefore strongly recommended to provide that all courts shall be established by law.
16. It is noted that the list of courts in Article 1 appears to be exhaustive, which would seem to suggest the absence of military courts. This point should ideally be clarified in Article 1.
17. There also appears to be a slight contradiction between Article 2 and Article 3 of the Law, in so far as the former provides that courts’ “area of jurisdiction [...] shall be specified by decree”, while the latter, that the “[j]urisdiction of courts shall be set forth by Law of Procedures”. The term jurisdiction, in its general understanding and without any specification, as employed in Article 3, would normally also subsume the concept of territorial jurisdiction (jurisdiction *rationae loci*), referred to in Article 2<sup>5</sup>. It is therefore advised to clarify this apparent contradiction between the two articles, and to prescribe that all aspects of courts’ jurisdiction shall be prescribed by law.

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<sup>2</sup> See, for instance, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 par. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). See also paragraph 5.12 of the OSCE Copenhagen Document (1990), and paragraph 19 of the OSCE Moscow Document (1991).

<sup>3</sup> UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders (26 August – 6 September 1985), Article 1, and Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, Article 7. See also the Venice Commission’s Report on the Independence of the Judicial System – Part I: The Independence of the Judiciary, CDL-AD (2010)004, par 22.

<sup>4</sup> See, instead of others, the ECtHR judgment in the case of *Fruni v. Slovakia*, of 21 June 2011, application no. 8014/07, par 134. See also *Zand v. Austria*, application no. 7360/76, European Commission on Human Right report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80.

<sup>5</sup> In codes of criminal procedure, there may be other jurisdictional links, such as the domicile of the defendant or victim, or the nature of the crime.

***2.2. Judicial Self-Government***

18. Part II of the Law describes the composition and functioning of the Supreme Council of the Judiciary (hereinafter, SCJ). In this context, it bears recalling that judicial self-government bodies, such as Judicial Councils,<sup>6</sup> are crucial tools for supporting the independence of the judiciary, for instance through dealing with administrative issues (such as disciplinary proceedings, performance evaluations etc.) and also for representing the interests of the judiciary as a whole, in particular before the executive and legislative powers.<sup>7</sup> Furthermore, such independent bodies should consist of a substantial amount of judges, elected by their peers.<sup>8</sup>
19. The composition and functioning of the SCJ might appear prone to undue influence from the side of the executive. Thus, based on Article 6 of the Law, the President of the Republic is the Chairman of the Council; this is significant in so far as the Chairman holds the casting vote in the event of a tie in the voting procedure of the SCJ (Article 8 of the Law). Moreover, the President of the Republic directly appoints the officials holding the high administrative posts in the judiciary, e.g. President and the Attorney General of the Cassation Court, who are at the same time members of the SCJ (Articles 6 and *7bis* of the Law). With respect to these officials, the President of the Republic therefore effectively controls who can become a member of the SCJ. It has been noted, and welcomed, however, that in the ongoing reform constitutional reform process, other methods of appointing a chairman of such a body appear to have been explored.
20. At the same time, it is noted that Article *7bis* of the Law does not specify whether the appointment of such high judicial officials by the President through decree is preceded by a nomination procedure, and if so, which body is competent to nominate candidates for these high posts. It would enhance transparency of the Law if this were outlined in more detail.
21. From Article 6 it is clear that it is mainly the presidents of the highest courts and the chief prosecutors (attorneys general) that are members of the SCJ, with few exceptions, such as the two female judges who are appointed at the proposal of the Minister of Justice. Such composition is not ideal for representing the judiciary as a whole, and may lead to a bias towards the interests of the chief judges/prosecutors, and by extension the executive power, as mentioned above. In order to truly represent the whole of the judiciary and not just the court chairpersons or judges in higher courts (who might also be more closely tied to the executive power because of the

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<sup>6</sup> See, as a regional example, the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 2. See also the Venice Commission's Report on the Independence of the Judicial System – Part I: The Independence of the Judiciary, CDL-AD (2010)004, par 32.

<sup>7</sup> See, for the Council of Europe area, Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, Article 26.

<sup>8</sup> See, for the Council of Europe area, the European Charter on the Statute for Judges (1998) (DAJ/DOC (98) 23), Article 1.3. Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, Article 27.

appointment procedure), it is recommended to diversify the membership of the SCJ so that it consists of judges of all levels.<sup>9</sup> In this context, one may also consider the inclusion of a representative of the Bar Association, or similar body, or from academia in the SCJ. This could add a certain level of external, more neutral control to the SCJ, which is otherwise only exercised by representatives of the executive.

22. As regards the powers of the SCJ, Article 9 would appear to suggest that these are merely advisory. On the other hand, other provisions such as Article 10 on the nomination of judges, Article 14, or Article 20 on the reassignment of judges, or Article 22 on lifting immunity of judges, could be interpreted as stating otherwise<sup>10</sup>. Generally, a high judicial council should have authority to decide, or to at least have decisive influence over, certain issues, such as appointments.<sup>11</sup> On other matters which can be vested with the executive power, e.g. the financing of the judiciary, the powers of the judicial self-governing bodies might be more limited and thus only advisory.<sup>12</sup> The Law would be more transparent in this respect if it would include a separate provision listing all functions, tasks, and competences of the SJC, while distinguishing the areas where it has decision-making powers from those where it is held to make recommendations or proposals.

### ***2.3 Rights and Duties of Judges and Prosecutors***

23. Article 15 provides that public prosecutors, during court hearings, “shall enjoy complete freedom of speech”. It bears recalling that freedom of speech, or expression, is never absolute (or “complete”), but rather carries with it duties and responsibilities and may therefore be subject to certain restrictions, as prescribed by international law.<sup>13</sup> For example, propaganda of war, or the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, fall outside the protection of free speech, and must in fact be prohibited by law.<sup>14</sup> Perhaps what is actually meant by Article 15 is that public prosecutors shall enjoy autonomy during court hearings, and may not be given instructions as to how to proceed during a trial. This point should be clarified in the quoted part of Article 15; perhaps this

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<sup>9</sup> See, as a regional example, OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 7. See also the Venice Commission’s Report on the Independence of the Judicial System – Part I: The Independence of the Judiciary, CDL-AD (2010)004, par 32.

<sup>10</sup> The same is true for other parts of the Law, e.g. Article 20 on the reassignment of judges, Article 22 on lifting judges’ immunity, Article 33 on preparing the roster of qualified judges, or Article 55 on taking disciplinary measures.

<sup>11</sup> See the Venice Commission’s Report on the Independence of the Judicial System – Part I: The Independence of the Judiciary, CDL-AD (2010)004, par 32.

<sup>12</sup> Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, Article 40.

<sup>13</sup> See Article 19 par. 3 ICCPR, and Article 10 par. 2 ECHR.

<sup>14</sup> See Article 20 ICCPR.

provision could be enhanced by stating that no Ministry or other outside body has the right to instruct the prosecutor not to, or how to, prosecute.<sup>15</sup>

24. Under Article 16, “[a]ctive judges may not hold any other public positions and may not engage in any public or professional or remunerated activities”. Under Article 16 par 2, the Minister of Justice may, on a case by case basis, authorize judges to engage in teaching activities. This provision lacks clear criteria as to which teaching activities would be deemed “detrimental to the dignified status of the judge or the independence of the judiciary”, and which would be permissible, and places the determination of this matter entirely in the hands of the Minister of Justice. This concentration of discretionary power in the executive may well jeopardize the independence of the judiciary.
25. Article 21 raises similar concerns, as it gives the Minister of Justice the power to permit judges, on an individual basis, to reside outside the district to which they have been appointed. In light of the principle of the separation of powers, and bearing in mind the need to preserve the independence of the judiciary, this provision should be revisited.
26. Article 22 prescribes judicial immunity, and provides that legal procedures against judges, in connection with felonies or misdemeanors, may only be instituted with the permission of the SCJ, except in cases of hot pursuit which warrant the immediate arrest of the judge. Such level of immunity from prosecution is rather excessive compared to what is recommended by good practices. It is therefore advised to consider limiting the immunity of judges to actions performed within the exercise of their judicial functions (i.e., functional immunity), with the exception of intentional crimes.<sup>16</sup>

#### ***2.4 The Appointment of Judges and End of Tenure***

27. Under Article 10 of the Law, judges are appointed by presidential decree based upon SCJ nominations. Candidates for judicial appointment are selected from among graduates of the Higher Institute for the Judiciary (Article 29 of the Law), with the Minister of Justice apparently playing an instrumental role in the procedure, first by determining the requirements, procedures and programs for the competition for admission to the Institute, and later by referring the personnel files of the graduated candidate judges to the SCJ and the President of the Republic (Article 31 of the Law). Under Article 31 of the Law, judges are initially appointed on a probationary basis, and undergo a one-year in-service training (it is not clear whether this in-service training actually constitutes the probationary period), which, if successfully completed, leads to the confirmation of their appointment as judges, in consultation with the SCJ. In this context, it would be advisable to clarify which body confirms

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<sup>15</sup> See the Venice Commission’s Report on European Standards as Regards the Independence of the Judicial System, Part II: The Prosecution Service, CDL-AD (2010)040, par 30. For a general overview and discussion on the status and independence of prosecutors, see also the last report of the UN Special Rapporteur on the independence of judges and lawyers, A/HRC/20/19, presented at the twentieth session of the UN Human Rights Council, 7 June 2012.

<sup>16</sup> See the Venice Commission’s Report on the Independence of the Judicial System – Part I: The Independence of the Judiciary, CDL-AD (2010)004, par 61.

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their appointment as judges, and to clarify the role that the SCJ plays in this process.

28. Generally, probationary periods are problematic from the viewpoint of judicial independence, as judges may then feel under pressure to decide in a certain way.<sup>17</sup> If a probationary period is seen as indispensable, at least the nature of this period should be more clearly defined; in particular, it is not apparent whether during the probationary period, the candidates already perform judicial functions, and if so, what kind of functions. It is, however, also possible that during this period, they are merely “candidate judges”, who do not yet take judicial decisions. Such a system would be preferable.<sup>18</sup>
29. Should judges on probation perform judicial functions during their probationary period, then it should be born in mind that they then would not have the same protection in their positions as judges that have been appointed on a permanent basis. This would make such candidate judges more prone to outside influences.<sup>19</sup> While appointing judges on probation may help screen individuals for their ability to perform judicial functions at an early stage, it is noted that such assessment can also be done without the institution of a probationary period.
30. Moreover, the selection and appointment procedure described in the Law is rather at odds with international standards and good practices, which require that the selection and appointment of judges be made in accordance with clear and objective criteria (e.g. merit, qualifications, skills), defined in law or other public regulation;<sup>20</sup> and that executive powers not have a decisive influence over the selection and appointment process.<sup>21</sup> Neither Article 29, nor other parts of the Law specify the criteria based on which the graduate candidates from the Higher Institute for the Judiciary are selected by the Minister of Justice, the SCJ or the President of the Republic (the entrance to the Higher Institute for the Judiciary is regulated by the Minister of Justice). The Law should provide at least the basic criteria for such selection, such as graduate marks, personal qualifications, professional skills etc., or make reference to a more detailed regulation containing such relevant and objective criteria. The current reading of the Law appears to allow the Minister of Justice unfettered discretion in choosing candidates, which could lead to abusive practices and nepotism.

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<sup>17</sup> See the Venice Commission’s Report on Judicial Appointments, CDL-AD (2007)028), par 40.

<sup>18</sup> *Ibid.*, par 43.

<sup>19</sup> For this reason, the Norwegian Supreme Court, for instance, held that temporary judges were incompetent to adjudicate on certain disputes to which the state or any of its organs were parties.

<sup>20</sup> Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, Article 44, OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 21. See also the Venice Commission’s Report on the Independence of the Judicial System – Part I: The Independence of the Judiciary, CDL-AD (2010)004, par 27..

<sup>21</sup> See Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, Article 46,

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31. Furthermore, the mere fact that the executive power has such a strong influence on the selection procedure is detrimental to the development of judicial independence, or the appearance thereof. It is therefore recommended that an independent commission or similar body, or alternatively a reformed SCJ, have the authority to select, or at least propose for nomination, candidates for judicial positions.<sup>22</sup> In this context, it should be noted that in order to ensure that the judiciary reflects the composition of the population as a whole, the Law should foresee measures to encourage underrepresented groups, such as women or minorities, to acquire the necessary qualifications for being a judge.<sup>23</sup>
32. Even if the final appointment of a judge is with a State President or the Minister of Justice, the discretion to appoint should be limited to the candidates nominated by the selection body.<sup>24</sup> Any refusal to appoint such candidate may be based on procedural grounds only, and must be reasoned; in this case, the selection body should re-examine its decision, or it may even be given the power to overrule a presidential/ministerial veto by qualified majority vote.<sup>25</sup> It is also recommended that the law clearly prescribe that judges who successfully complete the initial in-service training are thereupon appointed for life.<sup>26</sup>
33. Article 32 of the Law provides that professors and lecturers of law, and lawyers with ten years of practice, can be appointed as judge at any level. In general, providing access to judicial posts also to other legal practitioners, is commendable as it can create a more diversified judicial corps.<sup>27</sup> At the same time, it is recommended that the law also set a criterion of requisite professional experience, in terms of years of service, for professors and lecturers of law – for instance, 10 years, i.e. similar to the requirement which is set for lawyers. This would help ensure that only qualified and experienced members of the academia join the judicial ranks.
34. According to Article 44 of the Law, the tenure of judges may end upon their resignation, retirement, or upon being dismissed (*licenciement* or *revocation*). While the latter (*revocation*) would appear to be a disciplinary measure imposed by the Disciplinary Council under Article 52, it is not clear in which circumstances the other form of dismissal (*licenciement*) would be possible.

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<sup>22</sup> See the European Charter on the Statute for Judges (1998) (DAJ/DOC (98) 23), Article 3.1. See also the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), pars 3, 4, 21, and 23, and the Venice Commission's Report on the Independence of the Judicial System – Part I: The Independence of the Judiciary, CDL-AD (2010)004, par 32.

<sup>23</sup> See the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par. 24. See also the recommendations of the UK Advisory Panel on Judicial Diversity, founded in 2009, under: <http://www.judiciary.gov.uk/publications-and-reports/reports/diversity/advisory-panel-recommendations>.

<sup>24</sup> See the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 23

<sup>25</sup> *Ibid.*

<sup>26</sup> See the Venice Commission's Report on the Independence of the Judicial System – Part I: The Independence of the Judiciary, CDL-AD (2010)004, par 38.

<sup>27</sup> OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 17. See also the European Network of Councils for the Judiciary EN CJ, Development of Minimal Judicial Standards II, Report 2011-2012, par 2.9 on page 12.

Furthermore, it is not explicitly stated which body is competent to dismiss judges. Presumably, in the case of a *revocation*, it would be the Disciplinary Council, which raises concerns given the strong influence of the Ministry of Justice in disciplinary proceedings. Generally, the dismissal of judges should in all cases be undertaken only following disciplinary proceedings before an independent body made up of judicial peers. This should be clarified in the Law.

### ***2.5 The Appointment of Court Chairpersons and Chief Prosecutors***

35. Article 7*bis* provides that the President of the Republic shall appoint, from among judges who hold the third rank, the presidents of the higher courts and the senior attorneys general. In addition to the lack of clarity with regard to the nomination procedure outlined in par 18 *supra*, it is also unclear how the court chairs in other courts are appointed. This is not in line with international standards, which underline that it is important to have a transparent and open selection of court chairpersons.<sup>28</sup> In general, it is preferable that the judiciary itself has a decisive influence over the appointment of the court chairs<sup>29</sup> and in this case there appears to be little, if any, such influence. It is therefore suggested to revise the relevant provisions of the Law. The Law also does not specify the tenure of court chairpersons; it is recommended that their tenure as chairpersons be limited in time.<sup>30</sup>

### ***2.6 Performance Evaluation***

36. According to Article 34, trial judges, including those who are still on probation, shall be subject to performance evaluation by the President of the Court of Appeal, after consultations with the public prosecutor, and on the basis of observations by the President of the Court at which the judge is serving. This system is questionable for several reasons. First, allowing the President of the Court to make observations in this regard might uphold internal pressure within the judicial system and foster a system whereby ordinary judges are unduly consulting the President in specific cases, rather than making their own independent decisions.<sup>31</sup> Although the involvement of court presidents in evaluating judges is quite common, it is advisable to ensure that this is not the only source of evaluation. In addition, the fact that evaluation is conducted by the President of the Court of Appeal may contribute to developing a practice whereby trial judges consult appeal court judges on cases before them before taking decisions.<sup>32</sup> Secondly, the role

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<sup>28</sup> OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 16.

<sup>29</sup> *Ibid.*

<sup>30</sup> OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 15.

<sup>31</sup> For a more in-depth discussion on the internal independence of judges, also vis-à-vis their court presidents, see the Venice Commission's Report on the Independence of the Judicial System – Part I: The Independence of the Judiciary, CDL-AD (2010)004, pars 71-72.

<sup>32</sup> *Ibid.*

played by the public prosecutor raises concerns, as it might create incentives for prosecutorial bias in adjudication.

37. These comments and concerns of “vertical discipline” are equally valid for the performance evaluation of judges active in administrative positions under Article 36 of the Law.
38. It is noted that the Law does not prescribe any principles according to which the performance of magistrates shall be evaluated. It is recommended to include in the text of the Law at least some general guidelines in that respect<sup>33</sup>, or otherwise make reference to a law or regulation specifying such criteria, namely sources of information, the manner of gathering it, and procedural issues such as a right to appeal<sup>34</sup>, so as to ensure that the evaluation is carried out in an objective and fair manner based on public and objective criteria<sup>35</sup>, rather than arbitrarily. Such procedure should also provide judges with the right to express their views on the assessment of their activities, and to challenge such assessments before an independent authority or court.<sup>36</sup>

### ***2.7 The Status of Judges***

39. Article 11 of the Law provides that all judges must take a judicial oath before the confirmation of their appointment. The judicial oath cited in Article 11 raises several issues. First, it pledges allegiance to “Allah Almighty”, and is thus directly linked to the Muslim faith, which could be interpreted to imply that all judges are (or must be) of the Muslim faith. This would breach internationally guaranteed principles of freedom of religion and anti-discrimination.<sup>37</sup> It is therefore recommended to provide, as an alternative option, the possibility to take a judicial oath which makes no reference to any religion.
40. Moreover, it is noted that the pledge does not contain any reference to the *independence* of the judiciary (although it does mention impartiality). As was mentioned in the Preliminary Comments section of this Opinion, judicial independence is a most fundamental principle governing all matters pertaining to the judiciary. Judicial *independence* is commonly understood as meaning that courts must be free from influence or pressure coming from the legislative and executive bodies of the State, and as such it is distinct from the concept of judicial *impartiality*, which relates to judges being free from influence from, or bias towards, the parties in a given case. It is therefore recommended to explicitly recognize the core value of judicial independence, alongside that of impartiality, in key articles of the Law, such as in the text of the judicial oath, as well as in Article 23 on the administration of justice, Article 50 on disciplinary action, and others.

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<sup>33</sup> See the UN Basic Principles on the Independence of the Judiciary, Article 13 (on promotion criteria).

<sup>34</sup> OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 31.

<sup>35</sup> See the Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, par 58.

<sup>36</sup> *Ibid.*

<sup>37</sup> See Articles 18 and 26 of the ICCPR.

41. Under Article 12 of the Law, the Judicial Corps is composed of “trial judges, public prosecutors, judges associated with the Central Administration of the Ministry of Justice, judges associated with institutions that are subject to the jurisdiction of the Ministry of Justice, and judges that are seconded to non-judicial institutions”. The Judicial Corps thus entails not only officials performing judicial or prosecutorial functions, but also “judges” who are apparently working as officials, or *fonctionnaires*, in the administration. If in the performance of their duties such “seconded” judges are subject to strict administrative hierarchy, and if no separation is retained between judicial and administrative functions, then the independence of the judicial corps could very well be negatively affected. The Law should therefore specify whether judges are, during these periods of time, considered (temporarily) as public officials, and not as judges. As indicated in par 13 *supra*, the Law should specify which provisions of the Law apply also to these judges.

### ***2.8 Conditions of Work***

42. Article 37 of the Law states that judges shall be remunerated by basic salary and allowances, set by decree. However, it is not clear how such funding shall be secured, nor how the level of compensation shall be determined. International standards stress that providing judges with an adequate salary is an important measure to counter pressure against them and promote independent decision-making,<sup>38</sup> and that it is important for the independence of the judiciary that the level of remuneration is set at a level securing an adequate standard of living.<sup>39</sup> It is recommended that these principles are incorporated in the pertinent regulation of judges’ remuneration. At the same time, bonuses and privileges should be abolished in line with raising judges’ salaries<sup>40</sup>; while they still exist, they should only be awarded on the basis of pre-determined criteria and a transparent procedure.<sup>41</sup> Court chairs shall not have a say on bonuses and privileges.<sup>42</sup>
43. According to Article 38, courts have an “annual vacation” from July 16 to September 15, and under Article 39, active judges are entitled to an annual leave of two months, to be taken normally within the period of judicial vacation. Although judges are also allowed to take parts of their annual leave outside the annual vacation period (if they work during this time), such detailed regulation of leave times would not appear to be necessary. Even if

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<sup>38</sup> The European Charter on the Statute for Judges (1998) (DAJ/DOC (98) 23), Article 6.1.

<sup>39</sup> UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders (26 August – 6 September 1985), Article 11 and Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, Article 54.

<sup>40</sup> OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 13; see also the Venice Commission Report on the Independence of the Judicial System, Part I: The Independence of Judges; adopted at the 82<sup>nd</sup> Plenary Session (12-13 March 2010), par 50.

<sup>41</sup> OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 13.

<sup>42</sup> *Ibid.*

the courts are closed during the annual vacation period, it is presumed that relevant procedural laws provide for arrangements allowing deadlines to be observed, and international obligations to be met.

44. Under Article 39 par 2, judges are not allowed to travel abroad without a permit from the Minister of Justice. If correctly understood, this amounts to an unacceptable and unwarranted infringement in the freedom of movement of judges, and should therefore be deleted. Especially during the annual vacation mentioned under Article 38, there is no reason why judges would need to be available.

### ***2.9 Disciplinary Proceedings***

45. Article 24 of the Law provides that judges “may not carry out actions or engage in conducts that are deemed detrimental to the reputation of the judiciary”. This provision is rather vague and broad, and would benefit from being reformulated in a more precise fashion, in the interests of legal clarity and foreseeability.
46. Disciplinary procedures are set forth in Articles 50 – 61 of the Law. Judges are subject to disciplinary sanctions if they engage in conduct that is “deemed unethical or dishonorable or otherwise detrimental to the impartial and dignified discharge of judicial duties” (Article 50). Again, the grounds for disciplinary action could perhaps be prescribed with greater precision; also, such provisions could be complemented by reference to a judicial code of conduct or another such set of principles. Generally, disciplinary actions are initiated for instances of professional misconduct that are gross and inexcusable, bringing the judiciary in disrepute.<sup>43</sup> However, disciplinary responsibility should not extend to the content of rulings or verdicts, differences of legal interpretation among courts, judicial mistakes, or criticism of courts.<sup>44</sup>
47. It is noted that the Minister of Justice plays a rather prominent role in the course of disciplinary proceedings: he/she may issue warnings (Article 51), suspend judges (Article 54), and file claims of judicial misconduct before the Disciplinary Council (Article 56). Such outstandingly strong powers of the executive over the judiciary could be misused to control judges and curb their independence. To avoid this, it is recommended that these powers are removed from the competence of the Minister of Justice and transferred to some form of an independent inquiry commission. In general, it should be borne in mind that bodies that adjudicate cases of judicial discipline should be separate from the bodies that initiate them, and may not be influenced by or have as members persons who initiated such proceedings.<sup>45</sup>

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<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, par 25, see also Opinion No. 3 of the Consultative Council of European Judges, established under the Council of Europe, which notes that “criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions”. As for civil liability, the Consultative Council notes that this “should lie in an appropriate system of appeals”, par 75.

<sup>45</sup> OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 26. See also Venice Commission Opinion on the Law on

***OSCE/ODIHR Opinion on the Law concerning the Judicial System, the Supreme Council of the Judiciary, and the Status of Judges in Tunisia***

48. The composition of the Disciplinary Council, described in Article 55 of the Law, raises further concerns. The Council mainly consists of chief judges and prosecutors, and as such it could potentially be used to reinforce a hierarchical system of control within the judiciary, with lower-rank judges feeling subordinate to higher-rank judges. It would be a better alternative to have an independent council, preferably selected or at least proposed by an independent SCJ (if changes are made in accordance with above-stated), and featuring a representative participation of judges from all levels.<sup>46</sup>
49. In proceedings before the Disciplinary Council, judges are granted access to the evidence against them, and are provided with legal advice (Article 58). This is commendable. It is advised that other fair trial rights are similarly guaranteed to judges, such as for example the right to adequate time and facilities to prepare their defence, in order to ensure the fairness of the disciplinary procedures.<sup>47</sup>
50. Article 59 provides that “[i]n the event that the summoned judge fails to appear before the Disciplinary Council, in person or by legal representation, as per the writ of summons, the Disciplinary Council may proceed to decide to adjudicate the claims of misconduct in the light of the documents deposited in the enquiry file”. The right to be present at one’s disciplinary hearing is a crucial safeguard for their fairness, and for that reason it is recommended to resort to *in absentia* hearings only in exceptional circumstances, such as when the judge *unjustifiably*, or *repeatedly*, fails to appear. It is recommended to introduce such qualifiers into the respective provision under Article 59. Also, in cases where decisions are rendered *in absentia*, re-trial should be granted upon request of the summoned judge. Generally, disciplinary hearings should also be public and transparent.<sup>48</sup>
51. Appeal procedures against decisions of the Disciplinary Council are prescribed in Article 60, and once again it is the senior judges that form the Appeal Committee (of note, many of those judges also sit on the SCJ). It would be preferable to have an appeal before a regular, independent court of law<sup>49</sup>, or a committee that is selected by the SCJ (after this body is reformed as recommended above). International standards provide that decisions in disciplinary proceedings against a judge should be subject to an independent review.<sup>50</sup>

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Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, adopted at its 70<sup>th</sup> Plenary Session (16-17 March 2007), CDL-AD(2007)009, par 33

<sup>46</sup> See OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), pars 5 and 26, for additional good practices in disciplinary proceedings.

<sup>47</sup> UN Basic Principles on the Independence of the Judiciary, Article 17.

<sup>48</sup> See OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (June 2010), par 26.

<sup>49</sup> See the Venice Commission’s Report on the Independence of the Judicial System – Part I: The Independence of the Judiciary, CDL-AD (2010)004, par 43.

<sup>50</sup> UN Basic Principles on the Independence of the Judiciary, Article 20.

***2.10 Other Issues***

52. It can further be noted that certain important issues are not touched upon in the law, such as case assignment (which should follow objective pre-established criteria to prevent corruption and undue influence on the judiciary),<sup>51</sup> allocation of adequate resources to the judiciary,<sup>52</sup> or retirement pensions for judges (this will be linked to the question of life tenure of judges). Should these matters be regulated in other legislation, then it is recommended to consider introducing them to this Law, or at least to include references to such other legislation.

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<sup>51</sup> Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, Article 24. See also the Venice Commission's Report on the Independence of the Judicial System – Part I: The Independence of the Judiciary, CDL-AD (2010)004, par 81.

<sup>52</sup> Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, Article 33.

## **Annex 1:**

### **Law 29/1967 of July 14<sup>th</sup> 1967<sup>53</sup> Concerning the Judicial System, the Supreme Council of the Judiciary, and the Statute of the Judges<sup>54</sup>**

In the Name of the People,

We, Habib Bourguiba, President of the Tunisian Republic, after approval of the National Assembly, do hereby promulgate the following Law:

#### **Part I**

#### **The Judicial System**

##### **Article 1 (new) <sup>55</sup>**

Courts of justice shall include:

- i. The Court of Cassation which shall have the headquarters thereof in the capital,
- ii. Courts of Appeal,
- iii. Housing courts,
- iv. Courts of First Instance, and

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<sup>53</sup> The Official Gazette of the Republic of Tunisia, issue No. 30 published in July 14th 1967

<sup>54</sup> As amended and supplemented by the following Laws:

- Law 30/1976 dated 5 August 1967 – the Official Gazette of the Republic of Tunisia N° 34, 8 August 1967
- Law 5/1969 dated 24 January 1969 – the Official Gazette of the Republic of Tunisia N° 4, 28 January 1969
- Law 19/1971 dated 3 May 1971 – the Official Gazette of the Republic of Tunisia N° 20, 30 April 1971
- Law 48/1973 dated 2 August 1973 – the Official Gazette of the Republic of Tunisia N° 29, 31 July 1973
- Statute 1/1977 dated 7 March 1977 – the Official Gazette of the Republic of Tunisia N° 15, 1 March 1977
- Law 79/1985 dated 11 August 1985 - the Official Gazette of the Republic of Tunisia N° 59, 16 August 1985
- Statute 72/1986 dated 28 July 1986 – the Official Gazette of the Republic of Tunisia N° 43, 1 August 1986
- Law 14/1987 dated 10 April 1987 – the Official Gazette of the Republic of Tunisia N° 27, 14 April 1987
- Statute 73/1988 dated 2 July 1988 – the Official Gazette of the Republic of Tunisia N° 47, 8 July 1988
- Law 113/1988 dated 27 October 1988 – the Official Gazette of the Republic of Tunisia N° 74, 1 November 1988
- Statute 9/1991 dated 25 February 1991 – the Official Gazette of the Republic of Tunisia N° 17, 1 March 1991
- Statute 81/2005 dated 4 August 2005 – the Official Gazette of the Republic of Tunisia N° 64, 12 August 2005

<sup>55</sup> As amended by Statute 79/1985 dated August 11<sup>th</sup> 1985

v. District Courts.

**Article 2**<sup>56</sup>

Courts shall be established by decree, and the headquarters and area of jurisdiction thereof shall be specified by decree.

**Article 3**

Jurisdiction of courts shall be set forth by Law of Procedures.

**Article 4**<sup>57</sup>

The President of each court and the President of Public Prosecution thereof shall be responsible for organizing all the proceedings established therein.

**Article 5**<sup>58</sup>

Each court shall have a Registry which shall be managed and supervised by a Registrar under the authority of the President of the Court and the President of Public Prosecution thereof. The Registry associated with District Courts shall be subject to the direct authority of the District Judge.

**Part II - The Supreme Council of the Judiciary (SCJ)**

**Article 6 (new first paragraph)**<sup>59</sup>

The Supreme Council of the Judiciary (hereinafter referred to as SCJ) shall be presided over by the President of the Republic and shall be composed of:

- The Minister of Justice Deputy Chairman,
- First President of the Court of Cassation Member
- The Attorney General of the Court of Cassation Member
- The Attorney General who holds the position of "Director General of judicial Departments" Member
- Inspector General of the Justice Department Member

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<sup>56</sup> As amended by Statute 81/2005 dated August 4<sup>th</sup> 2005

<sup>57</sup> As amended by Statute 81/2005 dated August 4<sup>th</sup> 2005

<sup>58</sup> As amended by Statute 81/2005 dated August 4<sup>th</sup> 2005

<sup>59</sup> As amended by Statute 81/2005 dated August 4<sup>th</sup> 2005

- President of the Housing Court Member
- First President of the Court of Appeal of the Capital Tunis Member
- First President of a Court of Appeal outside the Capital Tunis who shall be elected, for three years, by judges who are placed on the Roster of "First President of the Court of Appeal outside the Capital" and shall be substituted by an elected judge from the same roster when required. Member
- The Attorney General of the Court of Appeal of the Capital Tunis Member
- The Attorney General of a Court of Appeal outside the Capital Tunis who shall be elected, for three years, by judges who are placed on the roster of Attorneys General of the Court of Appeal outside the Capital Tunis and shall be replaced by an elected counterpart from the said roster when required. Member
- Two female judges who shall, at the proposal of the Minister of Justice, be appointed by decree for three years Two Members

The Attorney General, Director General of the Judicial Departments shall be appointed as the Rapporteur of the SCJ and shall undertake the responsibility of work organization and filing documents deposited therewith.

The Minister of Justice Procedures shall, by decree, set forth the procedures for electing representatives of the judges in the SCJ.

**Article 7 (new)<sup>60</sup>**

SCJ shall meet at the invitation of the Chairman thereof or the Vice Chairman with permission of the Chairman.

– **Article 7 bis<sup>61</sup>**

The President of the Republic shall, from among judges who hold the third rank, appoint by decree the First the President of the Court of Cassation, the Attorney General of the Court of Cassation, the (Attorney General) Director General of the Judicial Departments, the Inspector General of the Justice

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<sup>60</sup> As amended by Statute 79/1985 dated August 11<sup>th</sup> 1985

<sup>61</sup> As amended by Law 79/1985 dated August 11<sup>th</sup> 1985

Department, the President of the Housing Court, the First President of the Court of Appeal of the Capital Tunis, and the Attorney General of a Court of Appeal outside the Capital .

#### **Article 8**

Decisions of SCJ shall be adopted by majority vote, and the Chairman or, as required, the Vice Chairman shall, in the event that the voting results in a tie, have the casting vote.

#### **Article 9**

SCJ may be consulted on all issues pertaining to the Statute of the Judges and shall undertake the responsibilities entrusted therewith by the present Law.

### **Part III - The Statute of the Judges**

#### **Chapter I - General Provisions**

#### **Article 10**

Judges shall, based on nominations made by SCJ, be appointed by presidential decrees.

#### **Article 11 (new)**<sup>62</sup>

Nominated judges shall, before the confirmation of the appointment thereof, take a judicial oath prescribed as follows:

"I do solemnly swear by Allah Almighty that I will I faithfully and impartially discharge and perform all the duties incumbent upon me as Judge, refrain from disclosing the deliberations during my judicial tenure and thereafter, and will behave myself justly, honestly and faithfully in the office of judge."

The oath shall be administered in the Court of Cassation during a public hearing which shall be presided over by the First President of the Court of Cassation or the Vice President of the Court of Cassation, and attended by the most senior presidents of court circuits, Attorney General of the Court of Cassation or Assistant Attorneys General of the Court of Cassation.

#### **Article 12**<sup>63</sup>

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<sup>62</sup> As amended and supplemented by Law 81/2005 dated August 4<sup>th</sup> 2005

<sup>63</sup> As amended and supplemented by Law 81/2005 dated August 4<sup>th</sup> 2005

The Judicial Corps shall be composed of trial judges, public prosecutors, judges associated with the Central Administration of the Ministry of Justice, judges associated with institutions that are subject to the jurisdiction of the Ministry of Justice, and judges that are seconded to non-judicial institutions.

**Article 13 (new)**<sup>64</sup>

The Judicial Corps shall be composed of three ranks and the seniority steps in each rank shall be arranged by decree.

The tripartite ranking system shall be regulated as follows:

First rank:

- Trial judges of Courts of First Instance and the Housing Court, and
- Assistant Attorneys General of the Republic.

Second rank:

- Justices of the Courts of Appeal, and
- Assistant Attorneys General of the Courts of Appeal.

Third rank:

- Justices of the Court of Cassation, and
- the Attorney General of the Court of Cassation.

In absence of the President of the Court, the most senior trial judge shall Law in the place and stead thereof.

The promotion in rank of judges shall be organized by decree and the duties carried out by any of the judges who hold the above-stated ranks shall be organised by decree.

**Chapter II - Rights and Duties of judges**

**Article 14 (new)**<sup>65</sup>

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<sup>64</sup> As amended by Law 79/1985 dated August 11<sup>th</sup> 1985

SCJ shall consider the reassignment of judges before the beginning of the annual judicial vacation and the Minister of Justice, may, during the judicial year, approve the reassignment of judges to fulfil work needs, and shall refer the case to SCJ at the first meeting thereof.

Trial judges shall be supervised by the presidents of the courts they serve.

The phrase "work needs" shall, for the purposes of the present Law, mean the need to to fill vacant positions, make appointments required in for the implementation of new judicial plans, lighten the heavy caseload in a given court, or provide the judicial staff required for newly established courts.

**Article 15 (new)** <sup>66</sup>

Public prosecutors shall be subject to the authority and supervision of the direct managers thereof and shall be subject to the authority of the Minister of Justice, except during court hearings where they shall enjoy complete freedom of speech.

**Article 16**

Active judges may not hold any other public positions and may not engage in any public or professional or remunerated activities.

Notwithstanding the present provision, the Minister of Justice may, on case by case basis, authorise judges to teach subjects relevant to the area of expertise thereof or to carry out functions or activities that are deemed not detrimental to the dignified status of the judge or the independence of the judiciary.

Judges may, without prior authorization, undertake scientific, literary or artistic activities.

**Article 17**

Judges may not run for parliamentary elections.

**Article 18 (new)** <sup>67</sup>

Members of the judiciary may not organise strikes or any such collective action that would negatively paralyse or slow down or disrupt the functioning of courts.

**Article 19**

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<sup>65</sup> As amended by Law 81/2005 dated August 4<sup>th</sup> 2005

<sup>66</sup> As amended by Law 81/2005 dated August 4<sup>th</sup> 2005

<sup>67</sup> As amended by Law 79/1985 dated August 11<sup>th</sup> 1985

Apart from the provisions of the Criminal Code and the Law of Procedures, judges acting in their judicial capacity shall be protected against all forms of threats and attacks during the discharge of the duties thereof.

The state shall, under the applicable pensions laws, compensate judges for any damages suffered in the course of discharging the judicial duties.

**Article 20**<sup>68</sup>

Judges shall not be assigned non-judicial duties that are beyond the job description of the judicial position thereby held, with the exception of the compulsory military service.

Judges may not carry out duties in circuit courts other than the circuit court they serves, unless otherwise is authorised by the Minister of Justice to meet certain work needs, for a maximum period of three months .

**Article 20(bis)**

Judges shall not, before concluding five years in the current position, be reassigned without the prior consent thereof.

Without prejudice to the provisions of the present paragraph judges may be reassigned in cases that involve:

- promotion;
- implementation of a final disciplinary decision,
- recognition of certain work needs, as defined in the last paragraph of Article 14 of the present Law.

Judges who are reassigned by the SCJ to fulfil work needs may, under the last item of the preceding paragraph or Article 14 of the present Law, appeal against the reassignment decision.

Objections shall be lodged with SCJ within a maximum period of eight days from the date of publishing the decision in the Official Gazette of the Republic of Tunisia and the appeal shall be adjudicated within a maximum period of one month.

**Article 21**

Each district judge shall reside in the district for which he is appointed, unless otherwise is authorised by the Minister of Justice on individual basis.

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<sup>68</sup> As amended by Law 81/2005 dated August 4<sup>th</sup> 2005

## **Article 22**

Legal procedures may not, without the permission of SCJ, be pursued against judges in connection with felonies or misdemeanors, except in cases of hot pursuit which warrant the immediate arrest of the concerned judge, and in such cases SCJ shall be forthwith notified.

## **Article 23**

Judges shall administer justice impartially, consider cases referred thereto without respect to persons or interests. Judges shall not decide cases on the grounds of personal knowledge thereof, and shall refrain from pleading in behalf of others verbally or in writing, including by way of counseling, except in lawsuits where judges have direct personal involvement.

## **Article 24 (new)**<sup>69</sup>

Judges may not carry out actions or engage in conducts that are deemed detrimental to the reputation of the judiciary.

## **Chapter III - Order of Precedence, Protocols and Dress Uniforms**

### **Article 25 (new)**<sup>70</sup>

The Order of precedence applicable in the judicial corps shall be arranged as follows:

- The Court of Cassation
- Courts of Appeal
- The Housing Court
- Courts of First Instance sitting in the premises of the Courts of Appeal.
- Courts of first instance sitting in the premises of the Courts of Appeal
- District Courts sitting in the premises of Courts of First Instance.
- District Courts

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<sup>69</sup> As amended by Law 81/2005 dated August 4<sup>th</sup> 2005

<sup>70</sup> As amended by Law 79/1985 dated August 11<sup>th</sup> 1985

**Article 26 (new)** <sup>71</sup>

The order of precedence applicable to each Judicial officer shall be specified as per the function and rank thereof.

The order of precedence among judges who hold the same rank or position shall be determined on the grounds of the the order of precedence applicable to the courts they serve.

Subject to the preceding paragraph, the order of precedence applicable to judges who hold the same rank shall be determined on the grounds of the seniority step within the rank. In cases where two or more judges have been appointed on the same date, the order of precedence shall be determined on the grounds of age seniority.

**Article 27**

Judges shall wear the prescribed dress uniform during public hearings and official ceremonies headed by the President of the Republic.

The Minister of Justice shall, by a decree, regulate the implementation of the present Article.

**Article 28**

Judicial officers shall, during civil and military ceremonies, enjoy civil ceremonial courtesies, as per the applicable protocols.

**Chapter IV – Judicial Mandate**

**Article 29 (new)** <sup>72</sup>

Judges shall be appointed from among graduates of the Higher Institute for the Judiciary (HIJ).

The Minister of Justice shall, by decree, specify the requirements, procedures and programs of the competition for admission to HIJ.

**Article 30**

The present Article has been repealed by Law 48/1973 of August 2<sup>nd</sup>, 1973.

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<sup>71</sup> As amended by Law 19/1971 dated May 3<sup>rd</sup> 1971

<sup>72</sup>As amended by Law 79/1985 dated August 11<sup>th</sup> 1985

**Article 31 (new)** <sup>73</sup>

The Minister of Justice shall, to SCJ, refer the personnel files of the candidate judges who have graduated from HIJ for consideration, and shall thereafter refer the same to the President of the Republic to make the probationary judicial appointment. The appointed candidate judges shall attain the first seniority step of the first rank, and shall undergo in-service training for a period of one year from the actual date of the judicial probationary appointment thereof.

After the candidate judges complete the above-stated training, the judicial appointment thereof shall be confirmed, in consultation with the SCJ.

**Article 32** <sup>74</sup>

The following figures may be appointed as judges and hold any rank without entering the judicial competition:

- i. professors and lecturers at the Faculty of Law , Faculty of Economic Sciences and the Higher School of Law, and
- ii. lawyers with ten years of actual working experience in the field, including the period of the pre-service internship.

The Minister of Justice shall, by a decree, regulate the implementation of the provisions of the present article.

**Chapter V - Performance Evaluation and Promotion**

**Article 33 (new)**

Judges who are not placed on the Roster of Qualified Judges shall not be promoted to the higher rank. The Roster of Qualified Judges shall, by SCJ, be prepared and arranged in alphabetical order and revised on annual basis.

Judges may not attain the second judicial rank before holding the first one for a minimum period of ten years, subject to the provisions of Article 31 of the present Law.

Judges may not attain the third judicial rank before holding the second one for a minimum period of six years.

**Article 34** <sup>75</sup>

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<sup>73</sup>As amended by Law 79/1985 dated August 11<sup>th</sup> 1985

<sup>74</sup>As amended by Law 19/1971 dated May 3<sup>rd</sup> 1971

<sup>75</sup>As amended by Law 81/2005 dated August 4<sup>th</sup> 2005

Trial judges, including judges who are on probationary status, shall undergo performance evaluation and shall be rated and given scores by the President of the Court of Appeal, after consulting with the public prosecutor, and after consideration of the observations made by the President of the Court, after consulting with the public prosecutor.

**Article 35**<sup>76</sup>

Public prosecutors shall undergo performance evaluation and shall be rated and given scores by the Attorney General of the Court of Appeal after consulting with the President of the Court and after consideration of the observations made by the Attorney General of the Republic, after consulting with the President of the Court.

**Article 36 (new)**<sup>77</sup>

Active judges in the Housing Court, the Central Department of the Ministry of Justice, and institutions under the authority of the Ministry of Justice shall undergo performance evaluation and shall be rated and given scores by immediate supervisors thereof.

**Chapter VI - Remuneration, Judicial Vacations, Leaves, Inactive Status, Extension of Active Status and Termination of Tenure**

**Article 37**

The remuneration payable to judges shall include basic salary and allowances.

The remuneration payable to judges shall be determined by decree.

**Article 38 (new)**<sup>78</sup> -

Courts shall have an annual vacation from July to 16 September 15.

The judicial year shall commence on September 16 and end in September 15 of the following year.

**Article 39**

Active judges shall be entitled to a remunerated annual leave for two month, after completing the first year of the actual judicial tenure.

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<sup>76</sup> As amended by Law 81/2005 dated August 4<sup>th</sup> 2005

<sup>77</sup> As amended and supplemented by Law 81/2005 dated August 4<sup>th</sup> 2005

<sup>78</sup> As amended by Law 79/1985 dated August 11<sup>th</sup> 1985

Judges shall take the leave entitled thereto during the judicial vacation and may not travel outside the Republic without a permit from the Minister of Justice. Judges who continue work during the judicial vacation may use the entitled annual leave during the judicial year, without detriment to the work needs.

#### **Article 40**

Each judge shall have one of the following statuses:

- i. Active status,
- ii. secondment outside the judiciary for a non-renewable period that may not exceed five years,
- iii. inactive status, and
- iv. carrying out compulsory military service .

#### **Article 41**

Transferring judges to one of the four statuses specified in Article 40 of the present Law shall be regulated by decree.

#### **Article 42 (new)** <sup>79</sup>

Public service rules on leaves, secondment, transfer to inactive status, and permanent non-practicing status shall apply to other judges, without prejudice to the provisions of the present Law.

Judges shall be subject to the provisions of Law 12/1985 of March 5<sup>th</sup>, 1985 concerning the public system of civil and military retirement pensions and survivor benefits, and texts that supplemented or amended the said Law.

#### **Article 43 (new)**

The present Article has been repealed by Law 73/1988 of July 2<sup>nd</sup>, 1988.

#### **Article 44**

Subject to the provisions of Article 74 of the present Law, the tenure of a judge may be terminated and consequently the judge shall be stripped of the judicial status and removed from the list of judicial officers in one the following cases:

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<sup>79</sup> As amended by Law 79/1985 dated August 11<sup>th</sup> 1985 and supplemented by Law 73/1988 dated July 2<sup>nd</sup> 1988

- i. acceptance of resignation thereof under the proper legal procedures,
- ii. transfer to retirement or, in the case of judges who are not entitled to retirement pension, obtaining the senior non-practicing status under the proper legal procedures,
- iii. exemption, and
- iv. removal from office.

**Article 45**

Judges who seek to resign shall submit a resignation letter, and the resignation shall not be effective before the President of the Republic signs a letter of approval specifying the date of entry into force of the resignation.

The resignation shall, upon approval thereof, be deemed irreversible and shall not prevent, the establishment of a disciplinary action against the resigned judge, if warranted.

**Article 46**

In the event of exemption, severance package shall, to the exempted judge, be payable with an amount equivalent to the full monthly salary multiplied by the years of service with a maximum of six months.

**Article 47**

Judges may, after twenty years of service, be granted emeritus status corresponding to the rank they hold, and may, on exceptional basis, be granted an Emeritus status corresponding to the higher rank.

**Article 48**

Judges Emeritus shall remain associated with the court they served and shall continue to enjoy the special courtesies and privileges associated with Emeritus status they hold, and may attend official ceremonies in the dress uniform prescribed for the judges, and shall be seated, in the same places as Active judges of the same rank.

## **Article 49**

Judges emeritus shall maintain the dignity of the Emeritus status they enjoy.

The status emeritus, once acquired, may not be withdrawn from the holding judge except under such disciplinary proceedings as are set forth in Chapter VII.

## **Chapter VII – Disciplinary Procedures**

### **Section I - General Provisions**

#### **Article 50**

Judges shall, grounds of misconduct, be subject to a disciplinary action if they engages in conduct that is deemed unethical or dishonourable or otherwise detrimental to the impartial and dignified discharge of the judicial duties incumbent thereon.

#### **Article 51**

The Minister of Justice may issue warning to judges apart from the outcome of any disciplinary procedures.

#### **Article 52 (new)**<sup>80</sup>

The Disciplinary Council may impose penalties on grounds of misconduct as follows:

- i. reprimand recorded in the personnel file of the judge,
- i. disciplinary reassignment,
- ii. excluding the judge from the promotion roster or roster of qualified judges.
- iii. demoting the judge to the lower step of seniority,
- iv. suspending the judge for a maximum period of nine months, and
- v. removal from office.

#### **Article 53**<sup>81</sup>

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<sup>80</sup> As amended by Law 81/2005 dated August 4<sup>th</sup> 2005

<sup>81</sup> As amended by Law 81/2005 dated August 4<sup>th</sup> 2005

Any misconduct that warrants disciplinary measures may not be subject to more than one penalty, without prejudice to Paragraphs 3 of the preceding Article which provide for disciplinary reassignment as a complementary penalty.

**Article 54**<sup>82</sup>

The Minister of Justice may suspend a judge upon receiving a complaint thereagainst that warrants disciplinary measures or upon being notified thereof beyond reasonable doubt, and in such cases the Disciplinary Council, within a maximum period of one month, initiate and conclude the disciplinary procedures.

The suspension may be associated with total or partial withholding of the remuneration thereof, and the punitive measures may not be publicized, and in such cases the disciplinary procedures shall be concluded within a maximum period of three months.

Any judge who undergoes a procedure of withholding the remuneration thereof shall be entitled to recover the withheld remuneration in cases where the relevant disciplinary council doesn't take any disciplinary measures thereagainst or take disciplinary measures other than suspension or removal from office.

Section II

**The Disciplinary Council**

Article 55 (new)<sup>83</sup>- SCJ shall have sole competence to take disciplinary measures against judges and shall, as a disciplinary council, be composed of:

- Chairman, - First President of the Court of Appeal of Tunis
- Member, - Attorney General of the Court of Appeal of Tunis
- Member, - First President of a Court of Appeal outside the Capital Tunis who serves as elected member in the Council
- Member, - Attorney General of the Court of Appeal outside the Capital Tunis who serves as elected member in the Council
- Member, - The less senior of the two elected members of the Disciplinary Council who hold the same rank as the judge referred to the Disciplinary Council
- Member, - The less senior of the two judges who sit in the Disciplinary Council in substitution of the two elected judges who hold the same rank as the judge referred to the Disciplinary Council

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<sup>82</sup> As amended and supplemented by Law 81/2005 dated August 4<sup>th</sup> 2005

<sup>83</sup> As amended and supplemented by Law 81/2005 dated August 4<sup>th</sup> 2005

The quorum of the Disciplinary Council shall be established by a minimum of four members including at least one of the two elected judges.

**Article 56**

The Disciplinary Council shall conduct enquiries into claims of misconduct brought by the Minister of Justice against judges.

**Article 57**

The Chairman of the Disciplinary Council shall, from among the Council members, appoint Rapporteur and shall, therewith, deposit the relevant corroborating documentation.

The appointed Rapporteur shall, if deemed necessary, conduct an enquiry and shall inform the judge of the enquiry initiated thereagainst and the claims made thereagainst, and shall hear the defense and receive the supporting documents. The Rapporteur may delegate a judge to carry out duties pertaining to the required enquiry, and may make any such investigations as are deemed relevant. The Rapporteur shall write a detailed report about all the above-stated procedures to be referred to the Council with the file including the corroborating documentation.

**Article 58 (new)**<sup>84</sup>

The Disciplinary Council shall summon the judge to appear therebefore no later than eight days from the date of acknowledging the receipt of the summon letter. The summoned judge shall be granted access to the corroborating documentation without copying the documents contained therein, and shall have access to the report submitted by the Rapporteur and any documents that are deemed relevant to the enquiry.

Judges who are referred to the Disciplinary Council shall be entitled to legal representation by an attorney at law who is admitted to plead before the Court of Cassation and in such cases the attorney at law shall be granted access to the documents mentioned hereinbefore.

**Article 59 (first paragraph new)**<sup>85</sup>

The Disciplinary Council shall, on the scheduled summons day and after reciting the report, listen to the judge who is the subject of the disciplinary procedure and, when deemed necessary, the representing attorney at law. The Disciplinary Council shall consider the enquiry file in an in camera meeting and shall support the decision with legal justifications.

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<sup>84</sup> As amended by Law 79/1985 dated August 11<sup>th</sup> 1985

<sup>85</sup> As amended and supplemented by Law 81/2005 dated August 4<sup>th</sup> 2005

In the event that the summoned judge fails to appear before the Disciplinary Council, in person or by legal representation, as per the writ of summons, the Disciplinary Council may proceed to decide adjudicate the claims of misconduct in the light of the documents deposited in the enquiry file. Decisions of the Disciplinary Council shall be adopted by majority vote, and the Chairman thereof shall, in the event that the voting results in a tie, have the casting vote.

**Article 60 (new)** <sup>86</sup>

Appeals against disciplinary measures shall be deposited with the Appeals Committee associated with SCJ which shall be composed of:

- Chairman, - The First President of the Court of Cassation:
- Member, - The Attorney General of the Court of Cassation
- Member, - The Attorney General the Director of Judicial Departments
- Member, - The President of the Housing Court
- Member, - The more senior of the two elected members of the Supreme Council for the Judiciary who hold the same judicial rank as the judge who is subject to disciplinary procedures
- Member, - The more senior of the two judges who sit on the Supreme Council for the Judiciary in substitution of the two elected members of the same judicial rank as the judge who is subject to disciplinary procedures

The quorum of the Appeals Committee shall be established by a minimum of four members including at least one of the two judges elected to represent Judges who hold the same rank as the appealing judge and shall issue a final decision that may not be subject to a further appeal before by any means including by the Court of Cassation or establishing a lawsuit claiming overuse of power.

**Article 60 bis**

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<sup>86</sup> As amended by Law 81/2005 dated August 4<sup>th</sup> 2005

A Judge who undergoes the disciplinary procedures may, in person or by legal representation, to the First President of the Court of Cassation in the capacity thereof as Chairman of the Appeals Committee, appeal against the disciplinary measures within a maximum period of one month from the date of being notified of the disciplinary measures taken thereagainst.

Appeals against disciplinary measures shall be subject to the provisions set forth in Articles 58 and 59.

**Article 61 (first paragraph new)<sup>87</sup>**

The President of the Republic may, upon consultation with SCJ, lift disciplinary penalties against judges after five years from the date of becoming irrevocable. Disciplinary penalties against any judge shall not be lifted in the event that the judge has been dismissed upon conviction with a crime that is deemed detrimental to the reputation and dignity of the judiciary.

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<sup>87</sup> As amended and supplemented by Law 81/2005 dated August 4<sup>th</sup> 2005