EURO-MEDITERRANEAN HUMAN RIGHTS NETWORK

RÉSEAU EURO-MÉDITERRANÉEN DES DROITS DE L'HOMME

الشبكة الأوروبية ـ المتوسطية لحقوق الإنسان

Tunisia

The Independance and Impartiality of the Judiciary

2008 - EMHRN REPORT

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Copenhagen
January 2008
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Bibliographic information
Title: The independence and impartiality of the judiciary- The case of Tunisia
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Corporate Author: Euro-Mediterranean Human Rights Network (EMHRN)
Publisher: Euro-Mediterranean Human Rights Network (EMHRN)
Date of first publication: January 2008
Pages:
Original language: French
Translation into English: Anita Goh and Pia Drzewinski
Proofreading, editing and lay out: Sana Ben Achour, Houcine Bardi, Mokhtar Trifi, Aurélie Grenet, Fabrice Liebaut, Marc Degli Esposti
Index terms: justice, law, human rights, judiciary, judicial system
Geographical terms: Mediterranean countries, North Africa, Tunisia, European Union

The report is published with the generous financial support of the European Commission and the Swedish International Development Cooperation Agency (Sida).

GENERAL INTRODUCTION

A- The Euro-Mediterranean Human Rights Network and its working groups

The Euro-Mediterranean Human Rights Network (EMHRN) was created in 1997 by a number of human rights organizations, from both north and south of the Mediterranean, in response to the establishment of the Euro-Mediterranean Partnership. Based in Copenhagen with branch offices in Brussels, Rabat and Amman, the EMHRN currently comprises approximately 80 member organizations and individual members from more than 30 countries. The EMHRN's mission is to promote and strengthen human rights and democratic reform within the framework of the Barcelona process and EU-Arab cooperation. The Network seeks to develop and strengthen partnerships between NGOs in the EuroMed region by facilitating the development of human rights mechanisms and disseminating the values of human rights.

To achieve its goals, the Network has established six working groups in order to address specific human rights issues in the EuroMed region: Justice; Freedom of Association; Women's Rights and Gender; Migrants, Refugees and Asylum Seekers; Palestine, Israel and the Palestinians; Human Rights Education and Youth. Each of the working groups comprises the member organisations most active in the field concerned, chosen following a call for participation and a selection process based on a series of qualitative criteria. The task of each working group is to design and implement specific policies and programmes, to advise the EMHRN executive bodies within their respective fields of expertise and to ensure the effective delivery of the EMHRN's mandate and agenda.[1]

B- The EMHRN's Working Group on Justice

The EMHRN's Working Group on Justice was first created in 2002 and re-established in 2006 following a call for participation to all EMHRN members[2]. In order to gain an overview of the situation of justice in the Euro-Mediterranean region, in 2003 the working group entrusted two legal experts[3] with the task of researching the main problems and challenges faced by the judiciaries of the region. This process led to the publication in 2004 of a comprehensive report entitled *Justice in the South and East of the Mediterranean Region*.[4]

In 2006, building on the conclusions and recommendations of this regional report, the working group launched a regional project focusing specifically on the issue of the independence and impartiality of the judiciaries in the EuroMed region. In its first phase (2006-07), this project focused on four of the region's countries: Morocco, Tunisia, Lebanon and Jordan. In each of these countries, the EMHRN organised a two-day seminar to assess and discuss the main problems affecting the independence and impartiality of the judiciary as well as the challenges to come and the reforms which have been – or still need to be – undertaken in order to strengthen the independence of the judiciary.

The seminar on the Tunisian judiciary took place in Paris, France, on 8 and 9 September 2007. Unlike previous EHMRN seminars on Morocco, Jordan and Lebanon, which were held in these respective countries and benefited from the participation and support of the local authorities, including the Ministry of Justice, the seminar on the Tunisian judiciary could not be organized Tunisia. The Tunisian authorities have indeed been hostile towards such an event, as shown by the lack of any answer to the invitation sent to the Ministry of Justice as well as by the refusal to grant travel authorization to the judges invited by the EHMRN. [5] Despite these obstacles,

1 Detailed information on the EMHRN and its Working Groups is available at www.euromedrights.net.

2 The EMHRN Justice Working Group comprises Wadih al-Asmar (Solida, Lebanon); Raed Al-Athamneh (Amman Centre for Human Rights Studies, Jordan); Dolores Balibrea Perez (Federacion de asociaciones de defensa y promocion de los derechos humanos/Catalan Human Rights Institute, Spain); Houcine Bardi (Comité pour le respect des libertés et droits de l'Homme, Tunisia); Noureddine Benissad (Ligue algérienne de défense des droits de l'Homme, Algeria); Khawla Dunya (Damascus Centre for Theoretical and Civil Rights Studies, Syria); Karim El Chazli (Cairo Institute for Human Rights Studies, Egypt); Mohammed El Haskouri (Association marocaine des droits humains, Morocco); Abdellah El Ouallad (Organisation marocaine des droits de l'Homme, Morocco); Naoimh Hughes (Bar Human Rights Committee of England and Wales, UK); Mohammed Najjar (Palestinian Human Rights Organisation, Lebanon); Mokhtar Trifi (Ligue tunisienne de défense des droits de l'Homme, Tunisia); Michel Tubiana (French League for Human Rights, France) as well as following inividual members : George Assaf (Lebanon); Madjid Benchikh (Algeria/France); Anna Bozzo (Italy); Jon Rud (Norway) and Caroline Stainier (Belgium). The details are available at www.euromedrights.net under 'Themes/Justice'.

3 Mohammed Mouaqit and Siân Lewis-Anthony.

4 Available in English, French and Arabic at www.euromedrights.net under 'Publications'.

5 The Tunisian authorities' persistent refusal to submit the Justice issue - a public interest dossier - for a contradictory

the seminar gathered a certain number of Tunisian lawyers, representatives of local NGOs, international organizations and institutions and several EU Member States. [6] Following the seminar, the author has been finalising the drafting of this national report dealing with the issue of the independence and impartiality of the Tunisian judiciary taking into account, amongst other sources, the conclusions of the seminar.[7]

C- Report on the Independence and Impartiality of the Moroccan Judiciary

Background and goals

The report on the Independence and Impartiality of the Tunisian Judiciary aims to describe the main features of the judiciary with particular focus on the problems and circumstances affecting its independence and impartiality. The examples mentioned in the report illustrate the serious consequences that a lack of independence and impartiality within the justice system can have on the rights of citizens. Following a description of the reforms which have already been accomplished, the report includes a series of detailed recommendations concerning the constitutional, legal and administrative changes that are required in order to achieve a level of judicial independence in accordance with international standards. The recommendations are primarily directed towards the Tunisian authorities who are requested to demonstrate the political will that is required in order to achieve real and substantial progresses. Other recommendations are directed towards external actors and donors, including the European Union, as well as towards civil society.

It is hoped that this report will become a useful tool not only for members of the Tunisian judiciary, but also for Tunisian civil society organizations which whish to engage actively in the process of promotion and strengthening of the judiciary's independence. These organizations have been involved both to the seminar in Paris and the drafting of this report and it now expected that they will continue to actively promote the reform process.

Methodology

To conduct his research, the author of the present report took into account the debates and conclusions of the Paris seminar of September 2006, organised by the EMHRN, and existing reports and literature in the field, in addition to resorting to his own experiences as a lawyer and human rights activist.

The Tunisian Human Rights League (*Ligue tunisienne de défense des droits de l'Homme* – LTDH) and the Committee for the Respect of Freedoms and Human Rights in Tunisia (*Comité pour le respect des libertés et droits de l'Homme en Tunisie* – CRLDHT), both members of the EMHRN working group on Justice, were also involved in the drafting process, as the report was completed and improved on the basis of their comments and suggestions.

The report was drafted in French, and then translated into Arabic and English. The three versions are available online on the EMHRN website.[8]

debate is illustrated by the many obstacles paving the way for any independent work on this issue, as shown by what happened to the author of this report, Mr. Ayachi Hammami, a barrister from Tunis. A few days before the EHHRN seminar in Paris, where he was due to present his preliminary findings, Mr. Hammami's chambers were vandalised; his computer was destroyed and much of the chambers burned down – with the clear aim of preventing him to go on with his task. This act was condemned by most international human rights organisations; see the press file on this case on the EMHRN website at http://www.euromedrights.net/pages/415.

6 The minutes of the seminar (in Arabic, French and English) as well as the programme are available at www.euromedrights.net.

7 A similar work has been undertaken in Morocco and Jordan. The national reports on these two countries are also available at www.euromedrights. The report on Lebanon will be published in the course of 2008. A similar report is expected to be drafted in Egypt, and possibly in Algeria, in the period 2008-09.

8 www.euromedrights.net

Introduction

The present report deals with the independence and impartiality of the judiciary. As a component of the State justice, divided into two jurisdictional orders[9] - the administrative order[10] and the judicial order –, the judiciary is a complex architecture involving a great number of actors. Judicial experts, bailiffs, notaries, clerks, agents of the administration, lawyers and magistrates, all participate in their own ways to the realisation of justice. Each of these actors can claim that his participation is necessary to the good functioning of the judiciary. Still the main role is entrusted to the magistrate, a law man or woman, who has the power to "say the law".

The Tunisian judiciary has been examined here in the light of the principles of independence and impartiality of the judiciary. The objective is to deal with those issues from both a practical and a legal perspective: focus will be given to the organisation and functioning of the judiciary but also to the status of magistrates. The point is thus to assess the effectiveness of the principle of independence based on and with regard to international law principles and rules applicable in this field, principles that the Tunisian State endorsed by ratifying certain conventional instruments.

Part One of this study recalls the international legal standards binding the Tunisian State in accordance with the obligations it voluntarily undertook. The domestic legal framework, which defines the judicial power, organises its structures and establishes its functioning mechanisms, will then be studied in detail. The organisation of the judiciary is addressed in Part Two. Part Three is dedicated to the status of magistrates under the Constitution and the legislation, the role of the High Judicial Council as well as the magistrates' experiences of associations and evidences how the importance of the fight they led for the independence of the judiciary was only equalled by the heavy tribute they had to pay both professionally and personally. Finally the last Part recounts and assesses the "judicial reforms" that were led in the past years by the Tunisian State. What is the goal of those reforms? Are they aimed at guaranteeing the independence of the judiciary, or rather at reiterating the supremacy of politics, under the cover of a bureaucratic modernisation?

Historically, the modernisation of the Tunisian judiciary followed authoritarianism. Though the foundations of the institution were already laid in the second half of the 19th century, in an era of institutional reform (*islah*) with the erection of a Nation State[11], it became a secular State judiciary under the colonial protectorate. Between 1881 and 1955, the country experienced a *de facto* judicial pluralism with the cohabitation within the same territory of a prevailing French judiciary with an intrusive material and personal jurisdiction[12], and a Tunisian judiciary with Sharia (Muslim), rabbinical and secular branches[13]. The latter (*al-âdlya)*, also called modern judiciary, was for a long time organised under the principle of "withheld justice"[14].

9 At the time of independence, Tunisia chose the French model of duality of jurisdictions (Constitution of 1959). This system was implemented little by little, with the creation of the Court of Auditors in 1968 and of the administrative tribunal in 1972. In reality, it was not yet a proper jurisdictional order at the time. Indeed, that was only achieved in 1996, with the introduction of different levels of administrative courts and the creation of a Council for conflicts of jurisdiction, a body settling conflicts of jurisdiction between the two jurisdictional orders. The jurisdictional review of the administrative action endured for a long time the prohibition of *ultra vires* appeals against regulatory decrees of the Head of State (1972). Their immunity was only lifted in 2002, with some procedural accommodations (obligation of a preliminary administrative appeal and of the presence of a lawyer). By reason of multiple reforms and revisions of the Constitution, the Head of State has an autonomous general regulatory power.

10 Allocation of jurisdiction between the judicial courts and the administrative order is set in the Organic law No 96-38 of 3 June 1996 as amended by Act No 2003-10 of 15 February 2003. The latter made the transfer of certain liability actions under the jurisdiction of judicial tribunals possible, while acknowledging the administrative tribunal's jurisdiction to decide on liability actions against the administration and prohibiting the judicial judge "*to decide on complaints aiming at the annulment of administrative decisions or at ordering any measure of a nature to hamper the action of the administration or the continuity of the public service"*. The administrative tribunal is currently organised in three cassation chambers, one advisory chamber, six appeal chambers, six first instance chambers, and two advisory sections (D. 2007-982 of 24 April 2007). With regard to the Court of Auditors, in addition to its Tunis seat, it has three county chambers in Sousse (2001), Sfax (2003) and Gafsa (2005).

11 Under the reign of the Husseinite dynasty, the Fundamental Pact of 1857 (*âhd al aman*) and the State Constitution of 1861 (*qanun al Dawla*), established the principle according to which "*the offices of magistrates at civil and criminal tribunals and at the review tribunal are irremovable. Those who are appointed at these offices can only be destituted if they have committed a crime determined before a tribunal"*.

12 The jurisdiction of French tribunals had extended to all nationals of European countries (1883) for all disputes where a European was a party either as a complainant or as a defendant (1884 -1885) but also for certain reserved matters: real estate property under the land registration regulations (1885), administrative disputes (1888), companies and labour disputes.

13 The jurisdiction of Muslim and rabbinical tribunals was progressively limited to personal status and inheritance cases. Petition and *habous* (mortmain goods) actions were reserved to Muslim tribunals. Secular tribunals heard civil, commercial and criminal in the case of disputes "*exclusively brought between natives non subject of or non protected by the non Muslim powers*" (civil and commercial procedure code of 1911).

14 In the "withheld justice" system, the power to deliver justice, considered as a sovereign power, belonged to the Head of State and justice was delivered in his name. Since the

The reforms that restructured its apparatus and mechanisms kept it under a strong administrative dependence and organised its submission to the political authority. The Tunisian magistrates and the modern judge "*hakim*" sprang from it.

The reforms of the judiciary in Tunisia only became official in 1967 with the adoption of the Act on the organisation of the judiciary, the High Judicial Council and the general status of magistrates (Act No 67-29 of 14 July 1967)[15]. The processes of unification and nationalisation of the judiciary, that started after independence with the suppression of Sharia tribunals (1956), the integration of certain sections of their personnel within the new judiciary, the suppression of rabbinical tribunals (1957) and the suppression of French tribunals (9 March 1957 Convention), were brought to completion by this Act. Led with an iron hand under an authoritarian philosophy, the 1967 reform foreshadowed the future of the judiciary. Forty years later, in a context marked by the lockdown of freedoms, the postponement of democracy and the rise of identity feelings, the issue of the independence of the judiciary is still on the agenda. It will take a particular turn with the promulgation of the 2005 Organic Law on the organisation of the judiciary, the High Judicial Council and the status of magistrates.

THE NORMATIVE BACKGROUND

A. International standards

The Tunisian state did not remain indifferent to the defence of human rights. This issue is now crucial at the international level and the voices of associations for the defence of human rights and fundamental freedoms, trade unions, opposition political parties, etc can be heard at the domestic level. Elevated to the rank of «minimum standard» to which the international community as a whole is bound, human rights, as proclaimed in conventional and non-conventional international instruments cannot have a purely international existence. To be effective, they need to be received and incorporated in the domestic legal orders of States.

These international law standards are important for two main reasons. First, they provide a certain number of principles and criteria both contributing to the setting of a legal content to the principle of the '"independence of the judiciary". Second, they bind States, not only as conventional standards stating their international obligations *vis-à-vis* other states, but also as standards received in domestic legal orders through various mechanisms. Formally, the principle of supremacy of treaties over domestic legislation has been constantly upheld in Tunisian law. However, whereas the constitution of 1 June 1959 originally simply provided that "*treaties duly ratified have a higher authority than that of laws*", the current version provides that "*treaties ratified by the President of the Republic and approved by the Chamber of Deputies have a higher authority than that of laws*" (new Article 32 of the Constitution). Thus, in reality, the Constitution only confers supremacy over laws to a specific type of international conventions: the treaties "*ratified by the President of the Republic and approved by the Chamber of Deputies*". Therefore, there is now a distinction between treaties that need the approval of the Chamber (that is to say, its authorisation for ratification) and those with different forms and adoption procedures, such as simplified form treaties. Still, in any case, the constitutional provision in question implies the supremacy of treaties over previous laws, the modification of laws in accordance with international law, as well as their application by tribunals. What was the Tunisian judge answer?

Although it is yet still difficult to systematise, the tendency of the judge appears to be mixed: sometimes he denies that treaties form part of the sources he should examine, sometimes he builds his decision on the principle of the supremacy of treaties, such as in the decisions below:

- Concerning laws prior to the treaty: Court of Cassation, Joint Chambers, 10 December 1991, No 43, "*In case of conflict, provisions of the treaty will be automatically applied for they are superior to domestic laws".*
- Concerning laws posterior to the treaty, in the present case, the International Covenant on Civil and Political Rights: Administrative Tribunal (*ultra vires* appeal), Case No 3643 of 21 May 1996, LTDH/ Home Office Minister, *"Whereas Article 32 provides that international treaties duly ratified have a higher authority than that of laws, this implies for the judge, whose mission is to apply the law, to ensure the respect of such supremacy".*

There is no international convention specifically addressing the issue of the independence of the

Head of State "withheld" that power, judgements could not be executed until they were signed by him.

15 Act No 67-29 of 14 July 1967 on the organisation of the judiciary, the High Judicial Council and the general status of magistrates, Official Gazette of the Republic of Tunisia (*Journal officiel de la République tunisienne*, *JORT*), 14 July 1967, p. 932.

judiciary. Still, criteria for the independence and impartiality of the judiciary do exist in general international human rights law instruments and constitute a legally binding "international procedural standard". Tunisia thus has ratified the following main instruments:

- The International Covenant on Civil and Political Rights of 12 December 1966 ;
- The UN Convention on the Elimination of all forms of Discrimination Against Women of 18 December 1979 ;
- The Convention on the Rights of the Child of 20 November 1989 ;
- The UN Convention Against Torture and other cruel, inhuman or degrading treatment or punishment of 10 December 1984 ;
- African Charter on Human and People's Rights of 26 June 1981;

Summary table

Treaties	Signature		Reservation
International Covenant on Civil and Political Rights (ICCPR)	30.04.1968	18.03.1969	X
First Optional Protocol to the ICCPR	x	X	
Second Optional Protocol to the ICCPR	x	X	
Convention on the Rights of the Child	26.02.1990	30.01.1992	Articles 2 and 7
Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)	24.07.1980	20.09.1985	Articles 9/2, 16 c), d), f), g) and
Optional Protocol to the CEDAW	X	X	
Convention on the Elimination of All Forms of Racial Discrimination	12.04.1966	13.01.1967	X
Convention Against Torture and other cruel, inhuman or degrading treatment or punishment	26.08.1987	23.09.1988	X
Optional Protocol to the CAT	X	X	
International Covenant on Economic, Social and Cultural Rights	30.04.1968	18.03.1969	X
Arab Charter on Human Rights[1]		X	
African Charter on Human and People's Rights		16.03.1983	

1. The International Covenant on Civil and Political Rights

Adopted in 1966, the International Covenant on Civil and Political Rights (ICCPR) was ratified by Tunisia in 1968[16], but only published in 1983[17]. To date, it has not been followed by the accession to the two additional Protocols[18]. The Covenant comprises a range of principles relating to the conditions of detention and security of individuals, the course of a trial and the safeguards provided for it. Two articles develop the set of criteria for an impartial judiciary guaranteeing the rights of the citizen as litigant.

Article 9 of the ICCPR provides:

- the right of everyone to liberty and security of person ; the right not to be subjected to arbitrary arrest or detention and not to be deprived of his liberty, except on such grounds and in accordance with such procedure as are established by law.
- the right of anyone who is arrested to be informed, at the time of arrest, of the reasons for his arrest and to be promptly informed of any charges against him.
- the right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or to be tried within a reasonable time or released, the general rule should not be that persons awaiting trial shall be detained

16 Act No 68-30 of 29.11.1968 on the ratification of the International Covenant on Civil and Political Rights, JORT, of 29 November 1968, p. 1260.

17 Publication by decree No 83-1098 of 21 November 1983, JORT, of 6 December 1983, p. 3143.

18 The first one, adopted in 1966, allows the Human Rights Committee to receive and review communications from individuals who claim that any of their rights enumerated in the Covenant has been violated and who have exhausted all available domestic remedies; the second one, which came into force on 12 July 1991, provides that "*each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction*".

in custody, however release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement.

- the right of anyone arrested to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- the right of anyone who has been the victim of unlawful arrest or detention to compensation.

Article 14 of the ICCPR provides:

- equality of all persons before the courts and tribunals.
- The right for everyone to be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law that will determine any criminal charge against him, or of his rights and obligations in a suit at law ; the press and the public can only be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice;
- publicity of any judgement rendered in a criminal case or in a suit at law, except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
- The right to be presumed innocent until proven guilty according to law for anyone charged with a criminal offence ;
- The respect of the following minimum guarantees for anyone charged with a criminal offence, in full equality:
    - To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
    - To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
    - To be tried without undue delay;
    - To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
    - To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
    - To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
    - Not to be compelled to testify against himself or to confess guilt.
- In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
- The right for everyone convicted of a crime to have his conviction and sentence being reviewed by a higher tribunal according to law.
- The right for everyone convicted of a criminal offence by a final decision to be compensated when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice;
- The right for anyone to not be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

2. The UN Convention on the Elimination of all forms of Discrimination Against Women

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) was ratified by Tunisia in 1985[19], however it was followed by reservations[20] and one general declaration[21].

19 Act No 85-68 of 12 July 1985, JORT, No 54, 1985, p. 919.

20 See summary table.

21 The reservations surely provoked a debate on their validity with regard to the law of treaties and questionings about the reason for Tunisia's opposition. Indeed, after first having signed and ratified treaties and conventions without any substantial reservation (Convention on the Political Rights of Women (1967), Convention on the Nationality of Married Women (1967), Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1967), International Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights (1968)), the government rediscovered the blocking potential of Article 1 of the Tunisian Constitution and presented a general declaration against certain provisions of the Convention on the Elimination of all forms of Discrimination Against Women, according to which "*the Tunisian government declares that it*

The Convention requires the States Parties to abide by a certain number of rules, notably:

- To condemn discrimination against women in all its form and to pursue by all means and without delay a policy eliminating discrimination against women by undertaking to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institution the effective protection of women against any act of discrimination (Article 2).
- To take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.
- Amongst those measures, the Convention mentions the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment.

In reality, justice, even after national independence, has always been a male justice; a justice of the *qadis* "faith and lawmen", but also of the new magistrates whose features and model were imposed by colonial France. Nowadays, women have more access to judiciary professions. The female breakthrough within the Tunisian judiciary took place in 1967-1968 with the first female graduate and continued so as to represent 28% of the personnel in 2005, with 470 women out of a total of 1.698[22]. Similarly, notarial work, long closed to women on the basis of traditional discriminatory considerations, was accessed, not without difficulties, by women[23].

In the present case, women's access does not refer to the quantifiable balance in favour of women – these being a minority in all cases - but to their sociological presence in the judiciary. In her study published in 1995 on female magistrates in Tunisia, Elise Hélin reached that conclusion: *"it is unlikely that women's access to the judiciary in Tunisia, as well as their quantifiable presence, can be challenged in the mid and even in the long term. This presence appears to be a long-lasting acquis, enjoying the support from public authorities, and the mechanisms of careers development themselves ensure a relative durability to this presence"*[24]. Despite this long-lasting *acquis*, "*the presence of female judges appears today to be "fragilised" : first, by the "de-legitimization" that affects the power apparatus as a whole and its repressive and judicial systems in particular, besmirched by numerous scandals that have marked history of their renunciations, then, by the political monopoly of women issues by the State power. Indeed, state feminism, which is obviously constant in the Tunisian State's policy, used as part of its tutelary action but also of the authoritarianism of its political regime, eventually resulted in the instrumentalisation of women issues making Tunisian women the debtors of politics*[25]*. At the same time, one has to acknowledge that*

shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of Article1 of the Tunisian Constitution which provide : Tunisia is a free, independent and sovereign state, its religion is Islam, its language is Arabic and its type of government is the Republics ." (24 July 1985). Reservations apply to the following three articles of the Convention: Article 9 para.2, Article 16 para. c, d, f, g, h and Article 29 para.1. The one that is of particular interest to us is the reservation according to which "*The Tunisian Government considers itself not bound by article 16, paragraphs (c), (d) and (f) of the Convention and declares that paragraphs (g) and (h) of that article must not conflict with the provisions of the Personal Status Code concerning the granting of family names to children and the acquisition of property through inheritance*". In reality, the evocation of Islam to block the reception of conventional law has no legal logic, and is much more the reflection of a political instrumentalisation of the identity issue in the context of the power struggle between the government and society. Reservations are used to exclude or modify the legal effect of the implementation of certain treaty provisions by the State which expressed them. From an international law perspective, a reservation can only be made: if it is not prohibited by the treaty, or, where the treaty provides that only specific reservations may be made, if it is included in such reservations, and if it is compatible with the object and purpose of the treaty (Article 19 of the International Convention on the Law of Treaties, ratified by Tunisia on 23 June 1971). At its end, the Convention on the Elimination of all forms of Discrimination Against Women provides in its Article 28 that "*a reservation incompatible with the object and purpose of the present Convention shall not be permitted; reservations may be withdrawn at any time by notification to this effect addressed to the S.G of the UN, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received".*

22 Ministry of Justice and human rights – General inspection (booklet), *Statistiques 2005*, Statistics of the judicial year 2004-2005.

23 This is still a topical issue. The Administrative Tribunal had to decide in 1998 on the legality of an examination for the notarial profession, which a young woman passed successfully. The appeal for annulment was submitted by an unfortunate candidate on the ground, *inter alia*, of the contrast between the results (admission of a woman) and Sharia dictates on female testimony and its value. The chamber rejected that ground in application of the constitutional principle of equality of citizens before the law. Administrative Tribunal, 1st instance, No 14232, 10 March 1998, Amamou *v* Ministry of Justice.

24 Élise Hélin, "Female magistrates in Tunisia: professional presence and social integration", *Droits et cultures*, No 30, 1995/2, The judge in the Arab world, p. 105 (in French)

25 This was evidenced by the case of the female magistrates supported by the Association of Tunisian Magistrates (AMT- *Association des Magistrats Tunisiens*) congress about holding managerial positions. Only six months after their election at the executive board and at the administrative commission (10th congress), at the height of the August 2005 crisis between the Minister and the courthouse, four of them were assigned to inland courts, which alienated them from their association as well as from their homes. They were Kalthoum Kannou, secretary general of the AMT assigned as investigating judge to the first instance tribunal of Kairouan, Wassila Kaâbi, member of the executive board of the AMT, assigned to the first instance tribunal of Gabes, Essia Laâbidi,

the "competencies of Tunisian women", appear to have gained ground in the public sphere and to enjoy a real social consideration"[26].

3. The Convention on the Rights of the Child

Adopted on 20 November 1989, the Convention on the Rights of the Child was ratified by Tunisia on 29 November 1991[27]. It states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (Article 3).

It provides a certain number of obligations binding the State Parties[28], notably to recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society by ensuring that:

- No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
- Every child alleged as or accused of having infringed the penal law has at least the guarantees to be presumed innocent until proven guilty according to law; to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence; to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; not to be compelled to give testimony or to confess guilt; if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; to have the free assistance of an interpreter if the child cannot understand or speak the language used; to have his or her privacy fully respected at all stages of the proceedings (Article 40).

4. Convention Against Torture and other cruel, inhuman or degrading treatment or punishment

This convention, adopted by the General Assembly of the United Nations in 1984, came into force in 1987 and was ratified by Tunisia in 1988[29]. The Optional Protocol, adopted in 2002, entered into force on 22 June 2006. The Convention requires States Parties:

- To take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
- To ensure that all acts of torture are offences punishable by appropriate penalties which take into account their grave nature under its criminal; and ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate

member of the administrative commission of the AMT, assigned to the first instance tribunal of Kasserine, Leila Bahria, member of the administrative commission, assigned to Kasserine. Finally, Noura Hamdi, a simple active member of the AMT, was assigned to Medenine. See the conflicts of the AMT with the political authorities in Part Three of the present report "The supervision of the freedom of association of magistrates".

26 Ben Achour Sana, "Feminization of the judiciary between political authoritarianism and emancipation", *La revue du Maghreb*, 2007 (in French).

27 Act No 91-92 of 29 November 1991 on the ratification of the UN Convention on the Rights of the Child, JORT, No 82, 3 December 1991, p. 1890. In 2002, Tunisia adhered to two optional protocols to the Convention concerning the involvement of children in armed conflict and the sale of children, child prostitution and child pornography (Act No 2002-42 of 07 May 2002, JORT, No 37 of 7 May 2002).

28 The Convention notably requires States Parties to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected, and a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

29 Act No 88 -79 of 11 July on the ratification of the UN Convention against Torture, JORT, No 48 of 12-15 July 1988. , p. 1035. Decree No 88-1800 of 20 October 1988 ensured its publication on JORT of 25 October 1988, p. 1475.

compensation.

- To ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings

However, these principles do not seem to be guaranteed by the Tunisian criminal procedure. The code of criminal procedure does not provide any procedural sanction for the violation of those rules. The judges continue to base their decisions on "confessions" that are often obtained by force from the accused, who yet declare at the hearing that they were obtained under torture, with torture marks that are often still visible. At their end, public prosecutors keep refusing to investigate complaints from victims of torture and file them with no preliminary investigation.

It was not until 2 August 1999 that the Tunisian legislator adopted Article 101 bis of the criminal code which punishes those facts, with still only an eight-year maximum sentence for the material author of acts of torture, regardless of their gravity. How about the instigator or the one who expressly or tacitly consented to those acts?

5. The African Charter on Human and Peoples' Rights

Adopted on 26 June 1981 by the 18th summit of the OAU and entered into force on 21 October 1986, the African Charter on Human and Peoples' Rights was ratified by Tunisia on 16 March 1983. A protocol creating the African Court of Human and Peoples' Rights was envisaged in 1998. The Charter provides to any individual the right to liberty and security (Art. 6), the right to a fair trial (Art. 7); which includes the access to a competent justice, defence rights, presumption of innocence, the individualization of punishment and the impartiality of the judiciary.

6. Non-binding standards

In addition to those international conventions and treaties, which are, by definition, binding instruments, the Tunisian state adhered to certain declarations of principles which, although lacking any binding legal force, have nonetheless an important moral force. That is the case of the Universal Declaration of Human Rights of 1948 of which Articles 8, 9, and 11 guarantee to every citizen in full equality the access to a fair justice and the right to be presumed innocent. We can also mention:

- The Basic Principles on the Independence of the Judiciary, adopted by the UN 7th Congress on the Prevention of Crime and the Treatment of Offenders (Milan, 26 August- 6 September 1985) and endorsed by the General Assembly of the UN in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, and which enshrine, inter alia, the principle of irremovability of judges ;
- The Basic Principles on the Role of Lawyers adopted in 1990 by the UNGA, which guarantees that the competent authorities inform all persons of their right to be assisted by a lawyer upon arrest or detention or when charged with a criminal offence and ensure lawyers access to all the documents and files in their possession or control.
- The Guidelines on the Role of Prosecutors, adopted by the UN 8th Congress on the Prevention of Crime and the Treatment that was held in Havana (Cuba) from 27 August to 7 September 1990.
- The final Declaration and Action Plan of the 8th Summit of the International Organisation of the Francophonie[30] (IOF), of which Tunisia is a Party, proclaimed the attachment of all present States "*to the independence of their judiciary and [their] will to strengthen the national judicial systems and promote the diffusion of law (...) and to privilege in particular the support of national judicial reform action plans ensuring that the emphasis is put on juvenile justice in all its different components (policies of youth integration and prevention of juvenile crime, organisation of juvenile justice, repressive policies, prison dimension)*".

Thus, the Tunisian State shall:

- Incorporate the principles and norms he has ratified in its national legislation and create the structures capable of ensuring their implementation ;
- Provide human and material resources in order to make them effective;
- Guarantee an adequate training of actors of the judicial system (judges, lawyers, police officers, prison personnel, etc.).

30 This summit was held from 3 to 5 September 1999 in Moncton, Canada.

B. Domestic norms

1. Constitutional safeguards for the independence of the judiciary

Neither the proclamation of Tunisia's independence on 20 March 1956, nor the promulgation of the Constitution of the young Republic was a synonym of independence of the judiciary[31]. Despite the multiple revisions and successive amendments, the Constitution left the provisions on the organisation of the judiciary and the status of magistrates as they were.

In its Preamble, the Constitution promises to establish a democracy founded on the sovereignty of the people and characterized by a stable political system "*based on separation of powers (…) to proclaim the will of the people, who freed themselves from foreign domination thanks to their strong cohesion and their fight against tyranny, exploitation and regression"*. However neither this Constitution, nor the posterior amendments enshrine a separation of powers. If the chapter of the Constitution is pompously entitled "*The Judicial Power*", its four articles only mention a "*judicial authority"*, and focus, in reality, on the High Judicial Council:

- Article 64 : "*Judgements are delivered in the name of the People and carried out in the name of the President of the Republic*" ;
- Article 65 : "*The judicial authority is independent. In exercising their functions, judges are subject only to the authority of the law*" ;
- Article 66 : "*Judges are appointed by Presidential decree upon the recommendation of the High Judicial Council.. The modalities of their recruitment are set by law"* ;
- Article 67 : "*The High Judicial Council whose composition and powers are defined by law, ensures the respect of the guarantees granted to judges regarding their appointment, promotion, transfer and discipline*".

The Constitution leaves it up to the law to organise the judiciary. The status of magistrates is thus governed by Organic law No 67-29 of 14 July 1967 on the organisation of the judiciary, the High Judicial Council and the status of magistrates, last amended on 04 August 2005. This delegation is at the origin of the standardization of the successive regimes of legislative limitation and "legal derogations" to the principle of the independence of the judiciary.

2. Constitutional review and its limits

The Constitutional Council, created by a regulation (Decree No 1414 of 6 December 1987), is an advisory body of the Head of State and under his authority. In 1990, pursuant to Act No 90-39 of 18 April 1990, it obtained a legislative status, without, however, gaining more freedom. As an administrative public body (*établissement public à caractère administratif*), its opinions are still simply advisory and, moreover, confidential. In 1995, the Council reached the constitutional rank in accordance with Constitutional Law No 95-90 of 6 November 1995, which added a Chapter Nine to the Constitution. Later on, the constitutional revision (Constitutional Law No 98-76 of 2 November 1998) made its opinions binding on all public authorities except where the organisation and functioning of the constitutional institutions were at stake. Finally, in 2004, Organic Law No 2004-52 of 12 July 2004 provided that its opinions were publishable.

The composition and the terms and conditions of the Constitutional Council's functioning are governed by Organic Law No 26 of 1st February 1996. The Council essentially exercises an *a priori* review on a certain number of bills before their transmission to the Chamber of Deputies. Such referral is mandatory for organic law drafts, bills under Article 47 of the Constitution and those relating to the general terms and conditions of the application of the Constitution, to nationality, to personal status, to obligations, to the determination of offences and crimes and the sentences incurred, to the procedure before the different jurisdictional orders, to pardon, as well as to the fundamental principles of ownership, education, public health, labour law and social security.

Opinions of the Constitutional Council must be

31 This first Constitution established a presidentialist regime under which the President of the Republic, elected by universal suffrage (Art. 40), is at the same time the Head of State (Art. 37), the Head of the executive power (Art. 38) and the Commander of Armed Forces (Art. 46). Reduced to 64 articles, after several versions, it now starts with the proclamation of a certain number of rights and freedoms, of which it guarantees the full exercise under the terms and conditions provided by the law, while specifying that "*the exercise of these rights can be limited only by laws enacted to protect the rights of others, the respect of public order, national defense, the development of the economy and social progress*" (Art. 7). These rights are the inviolability of the human person, the freedom of conscience, the free practice of religious beliefs (Art. 5), the equality of citizens before the law (Art. 6), the freedoms of opinion, expression, press, publication, assembly and association, trade union rights (Art. 8), the right of free movement within the country, to leave it and to take up residence (Art. 9), the right of ownership (Art. 14).
The Constitution underwent several revisions, more or less substantial, which resulted in the strengthening of presidential powers. The last revision in 2002 suppressed the limitation of the number of mandates for the Head of State, thus reestablishing the presidential power in the long term and aggravating the unbalance between powers, within the executive between the president, the prime minister and its government, but also between the president and the legislative body.

reasoned. They bind all public authorities except if they deal with issues on the organisation or the functioning of institutions.

Apart from mandatory referral cases, only the President of the Republic can refer to the Constitutional Council. He appoints himself the nine members of the Council and sets, by decree, their status and remuneration. The budget for the functioning of the Council is part of the presidency's budget. The Council presents an annual report on its activities to the President of the Republic.

Thus, the Constitutional Council, which is directly under the President of the Republic's authority, does not enjoy the necessary independence. Since its creation, its opinions have not shown any attempt to free itself from its subordination to the political power. Besides, its review of the constitutionality of laws is limited – and only partial – to those posterior to November 1995. Yet, most of the laws relating to public freedoms and fundamental rights, which are often contrary to Article 8 of the Constitution on public freedoms and to the provisions of international conventions ratified by Tunisia, are prior to that date. As a matter of fact, since Tunisian judges refuse to review the constitutionality of the laws they apply, this legislation avoids any type of constitutional review.

ORGANISATION OF THE JUDICIAL SYSTEM

The organisation of the Tunisian judicial system, inspired from the French system, relies on a duality of jurisdiction. As such, the Constitution establishes a distinction between the judicial power and the Council of State (*Conseil d'État*) (administrative order).
This system is comprised of:

- Judicial courts
- The Council of State (*Conseil d'État*)
- The Council for conflicts of jurisdiction
- Exceptional courts.

A. Judicial courts

The law provides that courts are created by decree. Its seat, jurisdiction and composition are equally set by decree. The President of the Republic thus remains in complete control over the judicial map. Judicial courts are established according to a pyramidal structure.

1. District tribunals (*tribunaux cantonaux*)

Composed of a single judge, they have jurisdiction to hear civil matters the value of which does not exceed 7.000 dinars (3.977 €). They also decide on alimonies, possessory actions, with the possibility of an appeal before the first instance tribunal. The district judge also has jurisdiction on criminal matters in exceptional cases. He decides on petty offences and offences sentenced to a maximum of a year imprisonment. The district tribunals are located in the administrative centre (*chef-lieu*) of a delegation (*délégation*). A delegation covers a part of the territory of a governorate (*gouvernorat*). The territorial jurisdiction of a district tribunal extends to the territory of a delegation or of several of them if they are geographically unified. Representation by counsel is not required.

2. First instance tribunals

First instance tribunals are established according to the governorate geographical repartition. They are composed of civil, commercial and correctional chambers. First instance tribunals where a court of appeal sits are also granted criminal chambers, in application of a reform of 17 April 2000 establishing the principle of a right of appeal in criminal matters.

There are specialised first degree chambers: the *Conseil des prud'hommes* (for employment disputes), the tax chamber and the personal status chamber. Certain specialised single judges are assigned to first instance tribunals: the juvenile judge, the civil status judge, the guardianship judge, the business judge, the social security judge and the registrar office judge. Besides, a *juge des référés* (judge responsible for urgent interlocutory proceedings) is assigned to each first instance tribunal.

3. Appeal courts

At the request of any party to the disputes, decisions delivered by first instance tribunals can be appealed before the court of appeal, which is responsible for delivering a final judgement. The court of appeal is divided into chambers (civil, commercial, correctional, *prud'homales*, etc.), composed of three judges (one president and two councillors). Only the criminal chamber comprises five magistrates. There are currently ten courts of appeal in Tunisia.

4. The Court of cassation

On top of this judicial organisation, there is the Court of cassation, sitting in Tunis. This Supreme Court has jurisdiction over disputes at last resort. As a Supreme

Court, it is its interpretation of the law and not that of lower tribunals that establishes precedents.

5. The housing court

In land titling cases, the housing court – a unique court with territorial sections – delivers decisions that cannot be appealed, except for judicial review proceedings provided by the real rights code.

B. Le Council of State (*Conseil d'État*): administrative court

The Council of State, established by the Tunisian Constitution of 1959, is composed of two specialised jurisdictional bodies: the administrative tribunal and the Court of Auditors.

1. The administrative tribunal

Act No 40-1972 of 1 June 1972 on the creation of the administrative tribunal underwent several amendments (notably the Acts No 39 of 3 June 1996, No 66 of 2 August 1991 and No 67 of 21 July 1983). The administrative tribunal is composed of first instance chambers, appeal chambers, cassation chambers and one plenary assembly.

The tribunal has jurisdiction for administrative disputes and therefore it decides on claims involving the administration. Administrative judges decide on *ultra vires* appeals against abuse of power, and appeals against administrative decisions (appeal for annulment). The administrative tribunal also decides on contract and on liability matters in disputes opposing individuals to the administration (*contentieux de plein droit*).

2. The Court of Auditors

The Court of Auditors, second branch of the Council of State, was created by the 8 April 1968 Act. As a financial monitoring tribunal, the Court of Auditors has jurisdiction over account auditing and financial management of the state, local government and public companies cases. The auditors-judges exercise a jurisdictional and administrative review towards public authorities. Besides, a Court of financial discipline was established by the 20 July 1985 Act. It is responsible for incriminating and judging managerial abuses committed by civil servants.

C. The Council for conflicts of jurisdiction

The risks of negative or positive jurisdictional disputes between judicial tribunals and the administrative tribunal needed the creation of a Council for conflicts of jurisdiction. Established by Act No 38 of 3 June 1996, this Council is referred to decide in case of doubt on jurisdiction matters. The State's Head of litigation, the Court of Cassation or the plenary assembly of the administrative tribunal can refer to the Council. It can also be referred to by a chamber of the judicial tribunal or by a chamber of the administrative tribunal.

D. Exceptional courts

The Tunisian jurisdictional system is also comprised of exceptional courts granted with particular jurisdiction.

1. The High Court of Justice

Established by Article 68 of the Constitution, the High Court of Justice is responsible for judging cases where a member of the government is accused of high treason. As a political court, the High Court was in charge of certain well-known trials in Tunisia, notably the trial of former minister of Economy Ahmed Ben Salah in 1970 and that of Home Office Minister Driss Guiga in 1984.

2. Military tribunals

There are three military tribunals in Tunisia: in Tunis, Sfax and in al-kaf. They decide on certain criminal offences committed by militaries or security forces. They also decide on certain offences committed by civilians.

3. The State Security Court

At the end of the 1960s, the Tunisian jurisdictional system experienced the creation of the State Security Court, responsible for prosecuting political and unionist opposition. Several political trials were judged by this court, before it was suppressed by the 29 December 1987 Act. Political trials still exist nowadays in Tunisia but they have been brought before ordinary courts (of ordinary law).

FRAMEWORK AND LIMITS OF THE INDEPENDENCE OF MAGISTRATES

A. The status of magistrates

1. Statutory derogations to the independence of the judiciary

The status of magistrates is governed by Organic Law No 67-29 of 14 July 1967 on the organisation of the judiciary, the High Judicial Council and the status of magistrates. It was last amended on 04 August 2005.

Magistrates are appointed by presidential decree upon proposal of the High Judicial Council. For their first appointment, which is generally a position at a first instance tribunal or at the housing court, the new magistrates take oath before the appeal court of Tunis before starting their office.

The hierarchy of the judicial corpus comprises three grades.

1st grade	▪ Judges of the first instance tribunals and housing court ▪ Deputy of the Public Prosecutor
2nd grade	▪ Councillor of the court of appeal ▪ Deputy of the Prosecutor General at the court of appeal
3rd grade	▪ Councillor at the Court of cassation ▪ Advocate General at the Court of cassation

Grade advancement is not automatic. The lack of automaticity and of objective and transparent criteria convert this advancement either into a reward for zealous judges, or into a sanction against those that are criticised, who thus remain at the same grade. Automatic grade advancement based on objective criteria is thus one of the long standing demands of magistrates representatives, whether by the Association of Young Tunisian Magistrates (*Association des jeunes magistrats tunisiens)* at its time or, later, by the Association of Tunisian Magistrates (*Association des magistrats tunisiens)*[32].

Duties performed by magistrates are defined by decree No 73-436 of 21 September 1973 on the office hold by magistrates of the judicial order.

Under presidential decree, magistrates are either in activity, or assigned to another court for a non-renewable period of less than five years, on-call, or serving under the flag. They receive a remuneration fixed by presidential decree that entails basic salary and allowances.

Any magistrate in activity is entitled to two weeks of paid holidays per year of service if he has completed at least one year of effective service. Magistrates can enjoy their holidays during the period of vacation of tribunals. Magistrates working during the vacation enjoy their annual holiday during another period of the year, depending on the needs within the organisation. Rules applicable to civil servants with regard to leave, assignment, on-call, extension of activity, cessation of function are also applicable to magistrates unless they are contrary to the provisions of the said Organic Law No 67-29 of 14 July 1967 on the organisation of the judiciary, the High Judicial Council and the status of magistrates.

The definitive cessation of a magistrate's office, which entails the striking off the magistrates' roll can result from:

- A resignation from the interested party. However, it is only valid once accepted by the President of the Republic and thus only comes into force at the date set by the presidential decree of acceptance. Acceptance of the resignation renders it irrevocable. It does not impede a disciplinary action, where applicable;
- Compulsory retirement or acceptance of the cessation of office;
- Attaining the retiring age of magistrates, set at sixty years as for other civil servants;
- Dismissal. In that case, the interested party enjoys a dismissal allowance equal to a month of its total remuneration per year of service, without it exceeding six months of remuneration;

The law provides that the judicial corpus comprises sitting magistrates, standing magistrates and magistrates under the supervision of the administration (chancellery). Sitting magistrates

32 For further details, see Part Three of the present report.

are under the supervision of the president of the court where they have been assigned. Standing magistrates are under the instruction and control of senior magistrates and under the supervision of the Ministry of Justice. They have free speech at hearings.

Sitting magistrates, including deputy judges, are graded by the president of the appeal court, after the Advocate General's and the Public Prosecutor's opinions, taking into account the assessment of the president of the tribunal. Standing magistrates are graded by the head of prosecution of the appeal court, after the opinions of the president of the appeal court and of the president of the tribunal, taking into account the assessment of the Public Prosecutor.

The office of magistrate is incompatible with the exercise of any public function, any other professional activity or paid employment, and any elective office. However, some individual derogations can be issued to magistrates by the Minister of Justice to teach their field of competence or to exercise any duties or activities that are not likely to affect the dignity of the profession. Besides, they can undertake scientific, literary or artistic research without any authorisation if these do not affect their independence and dignity.

The law prohibits the judicial corpus to take any concerted action of a nature that would stop or hamper the functioning of the courts[33]. Thus, not only the right to strike is prohibited but "any concerted action", which leaves the door open to any kind of interpretations. In practice, it is purely and simply prohibited to Tunisian magistrates to form trade unions or to join political parties. This interdiction however violates one of the rights, which is enshrined in the Constitution without limitation, in particular its Article 8 which states that: "*the freedoms of opinion, of expression, of the press, of publication, of assembly and association are guaranteed and exercised subject to conditions established by law. The right to form and join trade unions is guaranteed. (...)*". Besides, it contradicts the Basic Principles on the Independence of the Judiciary (UN, 1985) which state : Principle 8 – "*In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly ; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to so preserve the dignity of their office and the impartiality and independence of the judiciary*" and Principle 9 - "*Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence".*

Besides magistrates are under the obligation to reside at the seat of the court they belong to. Individual derogations can be issued by the Minister of Justice. This constraint renders the situation of many judges, subject to unrequested transfers, precarious. Family ties are often jeopardized.

Finally, no Tunisian magistrate can leave the territory of the Republic, even during the annual vacation period, without the authorisation of the Minister of Justice, who does not hesitate to refuse or remain silent to, without any justification, the authorisation requests of judges[34].

No magistrate can, without a preliminary authorisation of the High Judicial Council, be prosecuted or arrested for an offense or a crime. However a magistrate can be arrested in case of a flagrant offense. According to the criminal procedure code, officers of the judicial police have exclusive power to find flagrant offenses (Article 11). In such a case, the High Judicial Council is immediately informed.

Magistrates must deliver justice in an impartial manner, with no bias as to the individual or interest considerations. They cannot decide on the basis of any personal information they might have on a case. They cannot be involved, even in an advisory manner and not even orally, in other cases than the ones they have to judge.

2. Recruitment and training of magistrates.

a. Historical background

After independence, the *zeitounien* (Koranic) education was replaced by a modern education, of which the public Tunisian university was the jewel. In 1966, courses of Tunisian law were incorporated in the curriculum of the Superior College of Law and the Tunisian law diploma became a "licence"

33 Article 18 of the new status of magistrates "*It is formally prohibited to members of the judiciary to strike or to take any concerted action of a nature of disturbing, hampering or affecting in any other way the functioning of the courts*", Organic Law 85-79 of 11 August 1985.

34 At the occasion of its seminar held in Paris on 8 and 9 September 2007 on the independence and impartiality of the Tunisian judiciary, the EMHRN invited certain magistrates representing the legitimate bodies of the ATM; none of them obtained the authorisation for leaving the country.

(degree)[35], earned in four years of study. Courses within the Superior College of Law were then taught in Arabic, and the school thus became in a few years an exutory for the unilingual arabist youth. This experience ended in 1973 notably after the modification of the rules for becoming a magistrate.

The 1967 Act on the organisation of the judiciary initiated a new change by keeping as one of the conditions to pass the magistrates' examination the holding of a *licence* in law (*al ijaza fil huquq*). By way of the examination, graduates from the Superior College of law were little by little excluded of the system where biculturalism or bilingualism became a necessary condition to access state positions[36]. Through that breach a young generation with modern education background penetrated the Tunisian judiciary. This new generation, more rebellious *vis-à-vis* the powers that be, initiated, a few years later, a two-day strike (10 and 11 April 1985), which gathered more senior judges but also young lawyers, and also caused retaliation from the political authorities for breach of public order and ignorance of *"the prohibition made to the members of the judiciary to take any concerted action of a nature of stopping or hampering the functioning of the courts"*[37]. The political sanctions and disciplinary measures applied put the young rebellious magistrates down, and for long: dissolution of the Association of Young Magistrates (*Association des jeunes magistrats*)[38], appearance of the "trouble-makers" before the High Judicial Council and sanctions going from suspension (from a few months to three years) to being definitively struck-off the magistrates' roll[39].

b. The Superior Institute of Magistrates

The repressive measures against magistrates were accompanied by substitution and bypass measures. In record time, the government in power first modified the 1967 Act on the status of magistrates and second established new entry procedures to access the judicial profession, mostly controlled by the Ministry of Justice.

Both derogatory and authoritarian, the legislative amendments confirmed exceptional measures granting the President of the Republic the power of direct appointment regarding certain functional positions, openly prohibited union rights as well as the right to strike[40] to magistrates, strengthened the disciplinary power of the High Judicial Council, controlled by the political authorities, and postponed the retirement age for certain functional positions[41].

The new training institute, which was originally a demand from the young magistrates, was created in this context. Its goal was to redirect the intellectual ties of future young magistrates by putting their training in the hands of the Ministry of Justice and by clearly putting some distance between the university and the judicial system. Although it was decided in 1985, the Superior Institute of Magistrates waited six years before coming into existence.

35 Decree No 66-249 of 21 June 1966 on the creation of a Superior College of Law (*Ecole supérieure de droit*) *JORT*, 21-24 June 1966, pp. 971-977.

36 The new sociological configuration of the judiciary thus happened thanks to two impulses: the opening of the examination with no sex discrimination (1967) and the riddance of the linguistic obstacle, the drafting language (Arabic or French) being now left at the discretion of the candidate during the written examinations of civil, commercial and criminal law and criminal procedure – thus ending the monopoly of the arabising students at the Superior College of Law (1969).

37 The magistrates' strike surprised the political authorities, already weakened by the bread riots of January 1984, the latent fights for the succession of the president, the institutional obstacles to pluralism, the blocking of the university and the violence on the campus between politicised groups.

38 Decree of the Prime Minister, Home Office Minister of 15 April 1985 dissolving the Association of Junior Magistrates (*Association des jeunes magistrats*). Here is the statement of reasons: "*Whereas striking is prohibited to magistrates under Article 18 of the status of magistrates which provides «is prohibited to members of the judiciary to take any concerted action of a nature of disturbing or hampering the functioning of the courts" ; whereas by calling magistrates to strike and ensuring the observance of the strike the Association of Junior Magistrates established itself as a professional trade union despite the provisions of the labour code and the provisions of its own statutes as well as in violation of the provisions of Article 18 of the status of magistrates; therfore the actions of this association have become contrary to the public order (ordre public)*", JORT No 32 of 23/4 /1985. See on this issue Part Four of the present report dedicated, *inter alia*, to the Association of Junior Tunisian Magistrates' experience.

39 See. Press file, Centre de Documentation Nationale "Association des jeunes magistrats "(116/01). See in particular, the articles: "Magistrates on the accused bench", *Réalités* of 26 April 1985 and of 7 June 1985, "The dissolution of the Association of magistrates: a warning for the others" (in Arabic) *al Sabah* of 22 April 1985, "Between the government and the magistrates: let the Constitution settle the case" *al Ray'* of 19 April 1985.

40 Article 18 of the new status of magistrates "*It is formally prohibited to members of the judiciary to strike or to take any concerted action of a nature of disturbing, hampering or affecting in any other way the functioning of the courts*", Organic law 85-79 of 11 August 1985.

41 The Bill modifying the 1967 Act on the organisation of the judiciary, the High Council of the Judiciary and the general status of magistrates was discussed by the Chamber of Deputies during both its sessions of 29 and 30 July 1985 and adopted with only five votes against and two abstentions, Gazette of the debates of the Chamber of Deputies, (*Journal des débats de la chambre des députés)* (*mudawalat majliss al nuwab*) No 43, 29 and 30 July 1985, p. 2134.

Since then, access to the magistrates' profession is subject to examinations, in particular to the entry examination to the Superior Institute of Magistrates. As an administrative public body (*établissement public administratif*) under the authority of the Ministry of Justice[42], who has control over the content of the courses and the choice of professors, this institute ensures the "formatting" of the *auditeurs de justice* at the end of their traineeship. Thus, the professionalisation of magistrates finally resulted in a greater isolation of magistrates and a greater submission to the administrative power.

c. Examinations' rules

Junior magistrates are recruited through a national examination process to undertake a two-year traineeship at the Superior Institute of Magistrates, which is under the supervision of the Ministry of Justice.

Candidates to the examination must fulfill the following conditions:

- Hold the Tunisian nationality for at least five years;
- Be 22 years old at least and 30 years old at most on 1st January of the year of the competition;
- Enjoy all civil rights;
- Hold a *licence* in law;
- Be physically capable of performing judicial duties within the entire territory of the Republic;
- Be of good morals.

The rules governing education, examinations, the programme, theoretical courses and internships as well as the conditions of the national examination have only been decided in 1991[43]. The examination process, its terms and conditions and its programme are under the complete control of the Minister of Justice. The latter appoints professors among the designated categories (magistrates, academics) as well as the examination panel, without being subject to any objective criteria. He enjoys discretion for establishing "the list of candidates authorised to take the examination". In this regard, an *ultra vires* appeal against abuse of power was submitted before the administrative tribunal against the decision of the Minister of Justice prohibiting a candidate "considered physically incapable" of taking the magistrates examination. The decision was annulled by the administrative tribunal, which decided that the "*physical disabilities of certain candidates do not legally justify their exclusion of the public service, provided that those disabilities do not constitute an obstacle to the normal functioning of the public service*"[44]. Finally, the Minister of Justice is the one who establishes the files of the candidates admitted to take the examination.

B. The High Judicial Council

1. Composition

a. Members

The HJC is composed of nineteen members:

- The President of the Republic, president of the HJC
- The Minister of Justice, vice-president
- The first president of the Court of cassation
- The Prosecutor General at the Court of cassation
- The General inspector of the Ministry of Justice
- The Prosecutor General Head of Judicial Affairs
- The first president of the court of appeal of Tunis
- The Advocate General at the court of appeal of Tunis
- The president of the housing court
- The first president of a court of appeal other than the one at Tunis, elected for three years by the first presidents of all courts of appeal except the one in Tunis
- An Advocate General at a court of appeal other than the one at Tunis, elected for three years by the Advocates General of all courts of appeal except the one in Tunis
- Two female magistrates appointed by decree for three years, upon proposal of the Minister of Justice
- Six magistrates (two for each of the three grades), elected among themselves for three years.

42 Act 85-80, 11 August 1985, creating the Superior Institute of Magistrates.

43 Appointment of the director of the Superior Institute of Magistrates, JORT No 21 of 29 March 1988; Decree of 5 November 1988 on the programme and conditions for the ISM entry examination, JORT, No 77 of 15 November 1988, p. 1570; Decree of 17 January 1989 on the courses on the ISM education and internship programme, JORT No 6 of 27 January 1989, p. 124 ; Decree of 27 May 1991 on the programme and conditions for the ISM entry examination.

44 Administrative tribunal, 9 May 1983, Ahmed Belmkadem *v* Minister of Justice, Rec. 1982-1983-1984. It is worth noting the little margin of independence enjoyed by the administrative judge in the Tunisian jurisdictional system. The last expression of this independence dates back to December 2006: the TA annulled an administrative decision expelling a veiled professor on the ground of the unconstitutionality of the circular (9 December 2006, Case No 1/10976).

Out of the nineteen members composing the HJC, thirteen of them are therefore either representatives of the executive power, or directly or indirectly appointed by the executive power. Only six members are directly elected by magistrates. Further, when the HJC meets to deal with cases regarding magistrates belonging to one of the three grades, only members that have been elected for that grade can sit, which reduces the number of elected magistrates to two.

The High Judicial Council meets upon convocation of its president – the President of the Republic – or, where applicable, of its vice-president - the Minister of Justice. The Prosecutor General Head of Judicial Affairs is the rapporteur of the Council. He drafts its works and ensures the conservation of its archives.

b. Elective methods

The executive power, itself closely monitored by the President of the Republic, directly appoints 4/5 of the HJC members, and thus, can also remove them at any time.

The elective method of the six elected magistrates, entirely under the Ministry of Justice's control, is not transparent. Elections are ruled by a decree of the Minister of Justice of 9 January 1973, which classifies magistrates into three categories, corresponding to the three grades of the judiciary, and sets the terms and conditions of the election. Paragraph 2 of this decree prohibits members of the HJC to be candidates or voters for these elections. Members are elected for three years, two for each category. The mandate is renewable. The vote is done by post. Within minimum five days and maximum a month from the date set for the election, envelops containing the ballot papers are opened, after checking the names of voters against the electoral list established by categories. A commission composed of a representative of the Minister of Justice, a magistrate of the Judicial Affairs and two representatives of magistrates' personnel, appointed by the Minister of Justice, then proceed to the counting of votes.

The result of these elections is decided by a simple majority of the votes cast. For each category, elected individuals are classified according to the number of votes they got. The two magistrates on top of the list are called to sit at the HJC for cases concerning agents of their category. The personnel is informed of the results of the scrutiny by a circular.

Any magistrate with the right to vote can challenge the validity of election of the delegates from his category. Claims shall, under penalty of nullity, be transmitted to the Minister of Justice by registered letter within eight days from the notification of the challenged election. The Minister of Justice decides on the claims. The announced elected magistrates exercise their mandate until the claims have been decided.

This kind of quasi-secret elections, where the Minister of Justice has complete control over the process and the remedies, provokes numerous criticisms and mistrust from magistrates[45].

The Association of Tunisian Magistrates (*Association des magistrats tunisiens* (AMT)) always included among its demands the review of elective processes within the HJC in order to guarantee transparency and neutrality of the electoral operation[46]. To that effect, it approved the challenge appeals submitted against the results of the 2005 elections. These appeals, a first in the history of Tunisia, were submitted by six magistrates, who thus activated a remedy that was obsolete until then[47].

2. Powers

Apart from the powers it was granted by the 1967 Act[48] regarding the management of magistrates' careers, the Council can be consulted on any issue related to the status of magistrates. Two issues need to be highlighted concerning the implementation of the HJC's powers: the issue of quasi arbitrary transfers of certain judges, in contradiction with the principle of security of tenure, and the disciplinary procedure, used as a weapon against demands for

45 In a country where, besides, each legislative and presidential election gets results superior to 97% (or rather between 99 and 100%).

46 *A dear and costly independence*, document of the executive board and administrative committee of the Association of Tunisian Magistrates (*Association des magistrats tunisiens* (AMT)), 2006, published online on the EMHRN website at www.euromedrights.net. See also Houcine Bardi, *A will for independence: the Association of Tunisian Magistrates facing the yoke of public authorities* 2006, CRLDHT publications, pp. 79-83.

47 An appeal submitted by Mrs K. Kannou, secretary general of the AMT, before the administrative tribunal on 24 June 2005, challenging the validity of the HJC elections a couple of months before, is particularly worth noting. In this unsuccessful appeal, the complainant stated a number of revealing grounds, to say the least: the late communication of the date of the elections, the change to an earlier date without notice; the participation of members of the HJC to the elections in flagrant violation of the ministerial decree; lack of transparency in the counting of votes (no list of voters, no counting of null ballots, non-communication of the results to non elected candidates), etc. See. Houcine Bardi, op.cit. p. 81-83.

48 See B. The status of magistrates above.

the independence of magistrates.

a. Punitive transfers of magistrates

The possibility of being transferred constituted for any Tunisian magistrate a real Damocles' sword, given that this option is often used to sanction magistrates considered to be uncooperative, thus allowing the executive power to control the system.

The High Judicial Council examines each year, before the judicial vacation, the transfers of sitting magistrates.

The Minister of Justice can decide during the judicial year the transfer of a magistrate to address a need within the organisation and refer the matter to the High Judicial Council at its first meeting. The notion of "a need within the organisation" covers: the need to provide for a vacant post, the appointment to a senior position, a way of addressing overload of work in another tribunal, a way of providing for posts when new courts are created. As such, the content and the limits of this notion of "a need within the organisation" are not clearly defined.

Following the amendments of 04 August 2005, the organic law No 67-29 on the organisation of the judiciary, the High Judicial Council and the status of magistrates now grants the right to magistrates to request their transfer. That same law of 2005 also introduces the possibility for a magistrate to "*challenge his transfer by an appeal*". Surprisingly, that appeal has to be submitted before the High Council, author of the transfer (new Article 20 bis). It then has to decide within a month and its decision is final. Therefore, that procedure constitutes an equitable relief with no jurisdictional remedy.

Given those elements, it seems justified to conclude to the inexistence, in practice, of the principle of security of tenure of magistrates in Tunisia.

b. Discipline

Pursuant to organic law No 67-29 on the organisation of the judiciary, the High Judicial Council and the status of magistrates, the High Judicial Council is the Discipline Council of magistrates. To avoid HJC's decisions on disciplinary matters being quashed by the administrative tribunal (since there is only one administrative court in Tunisia, its members are *de facto* irremovable and therefore more independent than magistrates from the judicial order), the August 2005 amendment locked the procedure by impeding the possibility of any appeal for annulment of illegal or coercive disciplinary measures, notably before the administrative tribunal. To that effect, the HJC was divided into two bodies of first and last resort: the Discipline Council and the "Appeals Committee". The HJC thus became judge and party in the "disciplinary trial", and the administrative judge can no more review the legality of the sanctions.

When sitting as Discipline Council, the High Judicial Council is composed of four appointed members and two elected members:

- The first president of the appeal court of Tunis, sitting as president of the Discipline Council;
- The Prosecutor General at the appeal court of Tunis ;
- The elected first president of an appeal court (other than the Tunis one) ;
- The Advocate General elected by his fellow colleagues at the appeal courts (others than the Tunis one) ;
- The magistrate with lowest seniority elected among the magistrates of same grade than the magistrate summoned before the Discipline Council;
- The magistrate with lowest seniority elected deputy among the magistrates of same grade than the magistrate summoned before the Discipline Council.

The Discipline Council can only deliberate if four members are present, including one of the two elected members.

When sitting as the Appeals Committee, the HJC is composed of four appointed members and two elected members:

- The first president of the Court of cassation, sitting as president of the Committee;
- The Advocate General at the Court of cassation ;
- The Prosecutor General Head of Judicial Affairs;
- The president of the housing court;
- The magistrate with highest seniority elected among the magistrates of same grade than the magistrate summoned before the Discipline Council ;
- The magistrate with highest seniority elected deputy among the magistrates of same grade than the magistrate summoned before the Discipline Council.

The Appeals Committee can only sit if four of its members are present, including one of the elected

members. Its decisions are final and cannot be appealed at the cassation level or by an *ultra vires* appeal against abuse of power.

Magistrates can be brought before the Discipline Council for "*any dereliction of a magistrate of the duties of his office, of honour or of dignity*". The law does not establish a list of wrongdoings, their gravity and the corresponding sanctions: such vagueness leaves the door open to arbitrariness[49].

The Minister of Justice is omnipotent in the disciplinary procedure:

- He has the power, apart from any disciplinary sanction before the HJC, to issue warnings to magistrates.
- He can refer wrongdoings attributed to a magistrate to the Discipline Council.
- In case of urgency, he can ban the magistrate subject to an investigation from holding his office until the final decision of the disciplinary procedure before the HJC. The Discipline Council must, in that case, be referred to within a month. This temporary ban can be accompanied by the loss of his right to remuneration partly or in full. If the interested magistrate has been subject to a disciplinary measure other than suspension or dismissal, he will be entitled to receive his remuneration in full.

The disciplinary measures that can be issued by the Discipline Council are :

- Reprimand with a notation on the magistrate's personal file;
- Compulsory transfer;
- Being struck off the promotion table or ability list with the possibility of a compulsory transfer;
- Step downgrading with the possibility of a compulsory transfer;
- Suspension for less than nine months with the possibility of a compulsory transfer;
- Dismissal.

Proceedings before the Discipline Council: referred to by the Minister of Justice, the president of the Council appoints a rapporteur among its members. He provides him with all the elements supporting the facts justifying the disciplinary proceedings. The rapporteur launches, if need be, an investigation. He informs the magistrates of the proceedings against him, and their grounds and receives his explanations and any document that he wants to present for his defence. The Minister can, for the needs of the investigation, assign a magistrate.

Depending on what happens at that first stage, a detailed report is drafted and transmitted to the Council, with the case file. The Council summons the magistrates and gives him eight days from the day of the summoning to access the investigation file within the premises, the report drafted by the rapporteur and the elements that will be used during the proceedings. The magistrate brought before the Discipline Council can be assisted by a lawyer, who can access the same documents. On the day set by the summoning, and after reading the report, the Council hears the magistrate and, where applicable, his lawyer; it decides in camera. Its decision must be reasoned. If the magistrate does not come in person or is not represented by his lawyer, the Council can get past it and decide on the basis of the elements of the case. The decision is taken by the majority of votes. The president has a casting vote in the event of there being an equality of votes.

Proceedings before the Appeals Committee: the magistrate sanctioned by the Discipline Council can challenge its decision before the Appeals Committee within a month from the date of the Council's decision. He is summoned within eights days, under the same conditions than those applicable before the Council. The decision of the Committee is final. It is added to the personal file of the interested magistrate. Five years after the sanction has been made final, the President of the Republic can, after deliberation of the HJC, annul the disciplinary sanction.

The Mokhtar Yahyaoui case

Mokhtar Yahyaoui, judge at the tribunal of first instance of Tunis, president of the 10th civil chamber, unknown to the general public and with no previous associative history addressed on 6 July 2001 an open letter to the president of the HJC, the President of the Republic Mr. Zine el-Abidine Ben Ali. In that letter, he denounced the lack of independence of Tunisian magistrates in the exercise of their duties and the fact that the judiciary is subservient to the political authorities:

"*Mr. President, I send you this letter to inform you of my condemnation of the catastrophic state which the Tunisian justice system has reached. Things have come*

49 On the contrary, the collective agreements of the private sector in Tunisia, known for being less restrictive on employers than the public sector, specify the wrongdoings, their gravity and the corresponding sanctions.

to such a point the judicial authority and judges have been stripped off their constitutional prerogatives and are no longer performing their responsibilities in the service of justice as an independent institution of the Republic (…).Tunisian judges at all levels are frustrated and exasperated by their forced duty to deliver verdicts which are dictated to them by the political authorities and which are not open to impartial thought or criticism. This practice results in judicial decisions which, more often than not, reflect nothing but the interpretation of law that political authority wishes to impart. Subject to interference and harassment, Tunisian judges no longer have any room to perform their duties. Treated with arrogance and working in a milieu of fear, suspicion and paid informants, members of the judiciary are confronted with means of intimidation and coercion that shackle their will and prevent them from voicing their true convictions. Their dignity is insulted daily and their negative image in the heart of public opinion is mixed with fear, arbitrariness and injustice, to the point that the sole fact of belonging to our profession is degrading at the eyes of the oppressed and people of honour. The Tunisian justice system is subject to the implacable tutelage of a class of opportunists and courtiers who have come to constitute a veritable parallel system of justice, one that is located outside all legal norms and that has bought out the High Judicial Council, as well as the majority of sensitive positions in various tribunals (…). This has engendered a true feeling of disgust among the truly impartial judges (…). This class of bought judges does a brisk trade with its allegiance, imposing a spirit of dependence and submission, running against all ideas of change and creative adaptation, and zealously identifying itself with the regime currently in power. Their objective is to systematise the conflation of the current regime and the state, corrupting all institutions". Following the publication of this open letter, Mokhtar Yahyaoui was suspended of his office without remuneration by Mr. Béchir Tekkari, Minister of Justice, and summoned before the Discipline Council on 2 August 2001. However, thanks to an important movement of national and international solidarity, arising from the fact that this unknown judge had "set a precedent" in the Tunisian judiciary history, he was at first allowed to return to his office on 1 August 2001, and his case was adjourned *sine die* by the Discipline Council. Everyone thought that the case had been closed; that was forgetting the retaliation of the political power. On 29 December, once the solidarity movement waned and on the eve of the year-end holidays (on 20 December 2001), Mokhtar Yahyaoui was again summoned before the Discipline Council for "dereliction of professional duties" and "infringement to the honour of magistrates". Despite the date, the case sparked off important mobilisation. One hundred and twenty lawyers mobilised to assist Mokhtar Yahyaoui. Numerous public figures from the Tunisian civil society who had come to support him were prevented access to the building of the Court of Cassation where the hearing was to take place, the latter being surrounded by cohorts of plainclothes police officers. The NGOs *Avocats sans frontières-Belgique*, *Observatoire pour la protection des défenseurs des droits de l'homme*, *Association syndicale des magistrats* (ASM, Belgium), *Syndicat de la magistrature* (SM, France) and *Magistrats européens pour la démocratie et les libertés* (MEDEL) sent their representatives to Tunis. During the hearing, the Discipline Council rejected the request presented by the defence to adjourn the hearing in order for lawyers to access the case file with a reasonable amount of time. The lawyers, who had not a satisfactory knowledge of the case, could not plead, even in a perfunctory manner, as the decision was already known by everyone. Mokhtar Yahyaoui was revoked and struck off the Tunisian magistrates' roll.

C. The supervision of the freedom of association of judges

The protection of the freedom of association constitutes a recurring theme in the fight for freedoms in Tunisia. The Associations Act, at the service of the political power, has been for forty years the instrument for the "objectification" of repression. It is notably used to control the freedom of association of Tunisian magistrates.

1. The continuing debate on the Associations Act

Combined to the other Acts that control freedoms, particularly the press code and the other texts on reunion and assembly, the Associations Act[50] works as a barrier to the expression of social pluralism: prohibition of reunions and assemblies, non issuance of the visa pursuant to the declaration of the association, non issuance of the receipt for publications and other types of media, express refusal of incorporation and publication, dissolution, judicial liquidation, interpellation, etc.[51]
Several groups have – up to now – endured those

50 Organic law No 59-154 of 7 November 1959, amended several times, in particular by Organic laws of 2 August 1988 and 2 April 1992.

51 For further information on the situation of freedom of association in Tunisia, see *Freedom of Association in the Euro-Mediterranean region,* EMHRN, December 2007, online on www.euromedrights.net. A detailed report on *Freedom of Association in Tunisia*, Khémaïs Chammari, September 2007 is available at http://www.euromedrights.net/usr/00000019/00000077/00000079/00001873.pdf (in French)

restrictions : the *Ligue tunisienne pour la défense des Droits de l'Homme* (LTDH) which crisis in 1992 was the result of the measures on associations of a general nature (*associations à caractère général*)[52], the *Association tunisienne des femmes démocrates* (ATFD) subject to censorship, to media blocking and misinformation campaigns[53], the Tunisian section of Amnesty International, which long awaited a visa[54], the *Forum démocratique pour le travail et les libertés* which incorporation was suspended because of the silence of the administration for eight years[55], the *Rassemblement pour une alternative internationale de développement* (RAID, Tunisian section of ATTAC), support committees for political prisoners, hunger strikers, victims of repression, the *Association contre la torture*, the *Centre pour l'indépendance de la justice*, the "Tounes al-Khadhra" party, and many others, which activities were deemed contrary to the law[56]. The *Conseil national pour les libertés en Tunisie* (CNLT), created in December 1998, sumitted an appeal against a decree of the Home Office Minister of February 1999 refusing to issue its legal visa – to date the case is still pending before the administrative tribunal.

The issue of the constitutionality of the Associations Act, raised by the defence through a collateral challenge of the Act (*voie d'exception*) in numerous cases, constituted an essential starting point for the debate on freedom of association and, more generally, on the issue of the jurisdictional review of the constitutionality of laws in Tunisia.

The jurisdictional review of the constitutionality of laws was first rejected by the State Security Court, and then accepted by the Kairouan and Sousse tribunals on the ground of the principle of hierarchy of norms and constitutional supremacy. Eventually, it was again ruled out by the Court of Cassation in 1988[57]. Nonetheless, the question of the unconstitutionality of the Associations Act reappeared in 1992 before the Constitutional Council[58] while it was examining the new provisions on associations of a general nature. It was at the occasion of the application of these new provisions to the *Ligue tunisienne des droits de l'Homme*, which the Home Office Minister decided should be governed by the special rules on associations of a general nature[59], and of the request for the suspension of its execution that it presented before the administrative tribunal, that the debate on unconstitutionality was launched again, mobilising, over the course of the jurisprudence[60], the public opinion. While the request was presented by the LTDH on 10 June 1992, the decision annulling the classification was delivered four years later, that is to say, on 21 May 1996. The judge agreed with the defence and found that defence rights were violated, such classification being a "dangerous act".

2. The Tunisian judges' experience of

52 Dissolved for not complying to the new order of the 1992 Act on associations of a general nature, the LTDH presented before the administrative tribunal a request for suspension of execution (*sursis à exécution*) which was first rejected – Administrative tribunal, LTDH *v* Home Office Minister, *sursis à exécution* No 529, of 4 July 1992. Some time later, a second request was presented and granted - LTDH *v* Home Office Minister, *sursis à exécution* No 595 of 26 March 1993 ; see *Recueil des décisions et arrêts du Tribunal administratif* (1991-1992-1993), Tunis, ENA, CREA, 1998, p. 497.

53 The *Association tunisienne des femmes démocrates* obtained a visa on 6 August 1989, after a refusal of the Home Office Minister (decree of 22 February 1989). In May 1991, it was subjected to censorship measures: seizure at the printing-house of posters for the awareness campaign against violence towards women and, later, of the reports of the seminar organised on the same topic. See news release of the ATFD of 8 May 1999 (association archives).

54 The Tunisian section of Amnesty International only obtained the agreement after a long wait, the file being submitted on 18 August1981.

55 The Forum incorporated itself in April 1994 after the legislative elections of March 1994, after observing the period of four months from the date of the submission of its application by post, which remained unsuccessful until the end of 2002.

56 Several committees were *de facto* incorporated, in the absence of any legal acknowledgement, to support political prisoners: the *Comité des 18* for the defence of political prisoners, the support committees in Khemais Ksila, Taoufik Ben Brik, Jellal Zoghlami, Mouman Bel Anes, Sihem Ben Sedrine, Radhia Nasraoui, Hamma al Hammami, and many others that are never mentioned by the national press.

57 The issue of a constitutionality review was first raised before the State Security Court, exceptional court established in 1968 to judge on offences and crimes against internal and external security, at the occasion of a case concerning the Perspective group (name given to the *Groupe d'étude et d'action socialiste tunisien*), then in 1974 in the "*El amel al-tunisy*" case and, in 1977, in the "*Mouvement de l'unité populaire*" case. The discussion extended to other courts of the judicial order, notably at the first instance tribunal of Kairouan in 1987 and at the Sousse court of appeal in 1988 before ending its course, the same year, before the Court of cassation. On this issue, see *Constitutional justice (La justice constitutionnelle)*, Open discussion of 13-16 October 1993, Tunisian Association of constitutional law (*association tunisienne de droit constitutionnel*), Tunis, CERP, 1995.

58 The 1992 review of the associations of a general nature Bill created such a crisis within the Council that two of its members had to resign, Deans Amor Abdelfattah and Yadh Ben Achour, both law professors, and plunged the Council into a crisis in confidence.

59 Home Office Minister decree of 14 May 1992 classifying the Ligue tunisienne des droits de l'Homme under the associations of a general nature category.

60 See supra No 53.

associations

Associations' laws are also used to better control the independence attempts of Tunisian magistrates, who at a very early stage voiced their demands through their representatives. Indeed, the Tunisian judges' experience of associations is not new. It started after World War II while Tunisia was under the French protectorate. The main steps of this experience are recounted below, with a special attention to the development of Tunisian magistrates' demands.

a. The "*Amicale des juges*" Association (1946-1990)

After World War II, following the example of the French judges who had just created the Federal Union of judges, certain Tunisian judges established a temporary committee. They demanded equality of remuneration between judges of Tunisian origin and fellow judges of French origin and of certain bonuses (technicality, cassation, investigation, and seniority bonuses). The project of an association of judges of Tunisian origin was transmitted to the government, with duly drafted statutes, and, was accepted in 1946. On 6 December 1946, the first general assembly was held, which proceeded to the election of the Judges Association Council.[61]. The objectives of the association was to voice material demands, favour mutual aid between judges, promote a better organisation of judicial services and carry out cultural and scientific activities[62]

Originally, the statutes of the Association did not mention the necessity to demand the independence of the judiciary, nor the necessary "immunity" of judges, since, at the time, these matters were considered to be political issues. However, from 1954, the Association demanded the establishment of a status of magistrates. Political authorities only took this demand into account in 1967, eleven years after independence.

On 7 November 1959, an organic law on associations[63] was promulgated and existing associations had to put their statutes in accordance with the new legislative provisions. The Association took advantage of this opportunity to change its statutes and add to its object the will to "*act for the realisation of the independence of the judiciary, of the judge and its dignity*". It also changed its name to "*l'Association amicale des magistrats*". In 1961, the Association became a member of the International Union of magistrates (UIM - *Union internationale des magistrats*).

From the independence in 1956 until the mid 1960s, the Association experienced a period of stagnation which, for some, was due to the importance of the tasks assigned to judges in the development of the Tunisian judicial system after independence, notably with its restructuration through the unification of its structures and the "Tunisification" of its staff. According to others, it resulted of the total control of the Ministry of Justice over judges, unable of opposing the single party system established by the regime in power. Between the mid 60s and the mid 70s, the Association developed cultural actions and tied again relations abroad, notably with the UIM. It also developed actions to voice its demands. In 1990, the Association was reborn under the Association of Tunisian Magistrates (*Association des magistrats tunisiens*) (see 3. below).

b. The creation of the Association of Young Magistrates (*Association des jeunes magistrats*)

Given the unification of the Tunisian judicial system and the creation of new tribunals, one could feel the need for recruiting new judges since the early 60s. Many of these numerous junior magistrates, graduating from the post-independence Tunisian university, where freedom of expression was real, were in favour of a reform of the judiciary. Further, at the time, recruitment of magistrates did not depend on political criteria.

These junior magistrates considered the Association to be too fainthearted and asked it to support the creation of an association of independent junior magistrates. It was however agreed that the Association would not take responsibility for any of the actions taken by this new association.

The *Association des jeunes magistrats tunisiens* (AJMT) successfully got the legal authorisation required by the Associations Act and held its 1st Elective General Assembly on 12 November 1971 in Tunis. The electoral process resulted in the election on

61 Composed of Mrs. Mohamed Ouertatani (president), Moussa Ben Achour, Mohamed Malki, Sadok Jaziri, Amor Ben Abdelkader, Hédi Mhirsi, Lamine Ben Abdallah, Mohamed Hlioui, Habib Zitouna, Abdelbaki Boufayed and Hédi Al Madani, all judges of Tunisian origin.

62 From the end of 1947, the board of directors of the Association published the journal "*La justice tunisienne*" (The Tunisian judiciary), however there were only seven issues essentially due to material constraints. In 1959, the Ministry of Justice took it over under the title "La revue de la justice et de la législation" (The Journal of the judiciary and legislation), which is still published nowadays.

63 See supra No 51.

10 December 1971 of the first board of directors of the AJMT, composed of five magistrates, and of the secretary general, Mr Bechir Essid, current president of the Tunisia Bar.

The AJMT demands became more and more detailed as its activities were carried out. Its main demands – most of which are still topical – were the following:

- Respect judges' neutrality, notably with regard to any political obedience; by ensuring that judges do not participate to activities unrelated to their status, such as the monitoring of political parties' internal elections (that is to say of the party in power) ;
- Respect the dignity and the immunity of judges;
- Have a truly independent judiciary ;
- Create an independent body responsible for the review of the constitutionality of laws, composed of lawmen known for their objectivity and neutrality with regard to political obedience;
- Draft laws prohibiting any intervention in justice affairs, be it from individuals or groups;
- Develop the status of magistrates so as to establish objective criteria for recruitment, promotion and discipline;
- Respect of the principle of irremovability ;
- Provide all necessary means and adequate proceedings to the judiciary to ensure the execution of judgements;
- Forbid any extension of office after the retirement age, a process used by public authorities to keep judges used by political authorities to control the judiciary;
- Establish an electoral process to appoint all members of the HJC and grant the HJC powers relating to the management of magistrates' careers (recruitment, promotion, transfer and discipline);
- Enshrine the judiciary as an independent constitutional power.

Following the election of a new board of directors at the end of December 1983, the mobilisation of junior magistrates kept on developing, as they observed that political authorities did not take into considerations the demands of an association that already existed for twelve years. The confrontation took place at the occasion of the magistrates' strike of 10 and 11 April 1985[64]. That strike, which was considered a success, however resulted in an immediate repression by political authorities. Certain judges were revoked by the High Judicial Council, a body so many times criticised by the junior magistrates for its lack of independence. Defence rights were violated, verdicts and sanctions being known in advance. On 15 April 1985, the Home Office Minister pronounced the dissolution of the AJMT by decree, thus putting an end to the experience[65].

c. The Association of Tunisian Magistrates (*Association des magistrats tunisiens*)

The Association of Tunisian Magistrates (*Association des magistrats tunisiens* (AMT)) is the legal successor of the *Amicale des juges tunisiens* and an attempt of disguised reincorporation of the AJMT.

On 30 June 1990, the *Amicale des juges tunisiens* held its last general assembly. The day before, the resigning board had submitted the modified statutes of the association to the public authorities, notably providing that the association would from then on be called the "*Association des magistrats tunisiens*". Legally, the AMT thus constituted the legal successor of the *Amicale*, which had Authorisation No 4020 of 20 October 1971 (at the time, an express authorisation from the Home Office Minister was legally required for the incorporation of an association). In practice, however, the new board of the AMT, constituted by the Elective General Assembly of June 1990, had to wait three months before noting that the Home Office Minister did not oppose the statutory changes (Article 4 of the organic law on associations).

Operational since October 1990, the AMT comprises all magistrates, all from different backgrounds, and notably those with the experience and activist

64 At the time, Tunisia was undergoing an economical and political crisis. The rise of demands resulted, *inter alia*, in the coercive repression the General Tunisian Labour Union (*Union générale tunisienne du travail* (UGIT)) and the imprisonment of scores of trade unionists. Besides the events of 3 January 1984, subsequent to the doubling of bread's price, were still vivid: the political authorities had then repressed demonstrators in blood, causing scores of deaths and hundreds of injured. Numerous trials had been organised, some resulting in death sentences that, eventually, were not enforced.

65 Decree of the Prime Minister, Home Office Minister of 15 April 1985 dissolving the *Association des jeunes magistrats*, JORT No 32 of 23 April 1985 ; see supra No 39.

background of the AJMT. Their demands are altogether material, professional and moral ones and also directly concern the independence of the judiciary, notably:

- Modify the status of magistrates, according to a project drafted by the AMT aimed at establishing an independent judiciary;
- Reinstore judgeship of judges sentenced to disciplinary measures when the AJMT was dissolved, taking into account remuneration and seniority ;
- Establish a pension scheme specific to magistrates;
- Incorporate bonuses to basic salaries.

The final motion of the congress founding the AMT of June 1990 insisted on the need for the independence of magistrates. It can notably be read: "*the sine qua non condition for the protection of human rights is to first ensure the impartiality and autonomy of the judiciary and then ensure that the means allowing the effectiveness of any judicial intervention are provided*". During the later elective general assemblies, magistrates insisted on the need to review the composition and the elective methods of the High Judicial Council, proclaim and concretise the principles of irremovability and automatic promotion to the superior grade and establish a remuneration method specific to magistrates which would take into account the fact that judges constitute an independent power.

Since1990, the AMT thus has proposed a project for the reform of the status of magistrates and of the HJC. That first project, ignored by the government, has, since then, been modified and completed.

In July 2004, while the government was preparing a draft amendment of the status of magistrates, the authorities forbad a press conference organised by the AMT to announce the unsuccessful negotiations with the Ministry of Justice regarding the professional demands of magistrates. In an exhaustive research on the judicial movement, the executive board of the AMT demanded the election of an independent commission among the members of the High Judicial Council, with the participation of elected members, to elaborate a shift project within the HJC. This project would have been discussed by all the members before being submitted for final approval of the HJC. In addition, it requested the elaboration of objective criteria for promotion and appointment to judicial positions. Concerning transfers of magistrates, the AMT, which noted the grave repercussions of transfers on the independence of the judiciary, as well as on family and social situations of magistrates, demanded to enshrine the principle of irremovability and, to that effect, to take into consideration the consent of the judge and his family and any social situation before taking a transfer decision.

The situation became an open crisis in December 2004 at the 10th congress of the AMT, held under the motto "Strengthening the independence of the judiciary, the cornerstone of justice". On that occasion, the AMT voted a resolution insisting on the fundamental demands of magistrates, i.e. establish a status strengthening both the personal position of the judge and the independence of the judiciary as an institution, as well as the need to revise the bill in accordance with the aspirations of Tunisian magistrates. While openly upholding its position, the executive board of the AMT stigmatised the governmental draft modifying the status of the magistrates of the judicial order, as in its opinion it did not take into account the concerns or the needs (notably the improvement of their moral and financial situation) of magistrates for several reasons:

- The majority of the provisions of the bill (seven out of ten articles) related to disciplinary matters;
- The bill contained no substantial modification regarding the composition of the High Judicial Council;
- Provisions relating to the transfer of judges were in contradiction with the principle of irremovability;
- Disciplinary safeguards were weakened by the prohibition of *ultra vires* appeals against abuse of power before the administrative tribunal, replaced by an internal remedy within the HJC.

The Bill was nevertheless voted on 30 July 2005 by deputies and the new law was promulgated on 4 August 2005[66].

The conflict between the AMT and public authorities then worsen, as the AMT notably approved the challenge appeals submitted against the results of the 2005 HJC elections[67] and then took a stance against the violation of the defence rights and the breach of the inviolability of the judicial sphere at the occasion of Mr Mohamed Abou's trial in March 2005.

During the following months, the noose was tightening round the AMT, as its decision-making

66 For the very first time in Tunisia, the vote comprised 16 objections and 13 abstentions from deputies.

67 See pp. 28-29.

bodies noted – and publicly denounced – the following facts:

- The logistical means of tribunals, under direct authority of the Minister of Justice, were exploited to mobilise a group of magistrates (mainly constituted of prosecutors general, public prosecutors and presidents of tribunals) to arrange a meeting taking place in the same location as the AMT's national council on 2 June 2005, thus resulting in the cancellation of that meeting.
- The execution of a certain number of illegal acts such as: the request made to some magistrates to sign blank sheets to then annex those signatures to a text, drafted on behalf of the Tunisian magistrates, calling for the disavowal of the executive board of the AMT; the convening of an extraordinary elective congress on 4 December 2005; the appointment of a temporary committee for the management of AMT's affairs and preparation of a "putsch congress".
- The refusal by the majority of Tunisian newspapers to publish the motion of the AMT's general assembly on 3 July 2005 and the dissemination by a certain number of them of false information aimed at supporting the decision made by the Ministry of Justice of appointing a temporary committee to manage AMT's affairs.

Finally, on 31 August 2005, political authorities ordered the *manu militari* shutdown of the association's headquarters, and put them at the disposition of a temporary substitute committee presided by Khaled Abbes. On 4 December 2005, a "putsch congress" took place which resulted in the appointment of Khaled Abbes as president. Without a break, the authorities issued sanctions against the main legitimate head officers of the association:

- Abusive transfer of two members of the executive board in order to paralyse its activity;
- Transfer of 15 out of the 38 members that composed the administrative committee in order to create a structural vacuum;
- Abusive transfer of 9 members of that committee and of a certain number of simple active members (more than 20 magistrates). The reasons invoked to justify these transfers were linked to their freedom of expression, their activities within the association and the actions they led for the realisation of its objectives[68] ;
- Use of proceedings leading to strangling the activities of the legitimate executive board (police controls, removal of news releases placed in front of the AMT headquarters, cut of communication means, interdictions to travel[69], etc.).

A certain number of legal actions were launched against the illegitimate take over of the AMT's decision-making bodies, but also against some of the imposed punitive transfers. None of these actions was successful, thus demonstrating the extreme instrumentalisation of the Tunisian judiciary by political authorities.[70]

Today, despite the pressures and the immense difficulties caused by the transfers they were subject to, the representatives of the AMT's legitimate bodies keep on resisting, notably by addressing declarations to the public opinion. They thus try to raise awareness among magistrates about the importance of the fight for the independence of the judiciary, in particular with regard to the effects of the current system on their professional situation and on litigants' rights[71].

68 Kalthoum Kannou, secretary general of the AMT, Wassila Kaâbi, member of the executive board, Essia Laâbidi, member of the administrative commission, and Leila Bahria, member of the administrative commission, were notably assigned to remote courts, which obliged them to live apart from their families.

69 See supra No 35.

70 Not less than five cases are concerned, including two requests urgent interlocutory proceedings and one appeal on the merits before the tribunal of first instance of Tunis and two *ultra vires* appeal against abuse of power before the administrative tribunal; for further details, see Houcine Bardi, *A will for independence: the association of Tunisian magistrates facing the yoke of public authorities*, 2006, CRLDHT publications.

71 The question of the participation of the AMT to the *Union internationale des magistrats* has not yet been decided. The UIM should convene the two parties soon in order to decide whether the AMT will be represented by legitimate head officers or, as it is the case currently, by the "putchist" bodies.

THE LIMITS OF THE REFORMS

Although no major reform directly linked to the independence of the judiciary has ever been envisaged, and even less undertaken, by the Tunisian authorities, a number of reforms of a strictly technical character, pertaining to the mapping and organisation of courts, as well as to certain special procedures, have been implemented in the past years, some of which with a positive effect[72]. In this context however, the enactment of the Law on terrorism and money laundering of 10 December 2003, which was unanimously criticized by the Tunisian civil society because of its repressive character and its provisions breaching the principles of a fair trial and the basic rights and guarantees of the defence, is seen as a step backwards

A. Overhaul of the country's court system

With respect to the organisation of the judicial system, the reforms undertaken have extensively modified the court system. New jurisdictions and structures were created and others modified. These reforms were undertaken in a unilateral manner, without seeking the opinion of legal professionals.

The overhaul of the court system translated into:

- A generalization of the courts of first instance with the introduction of such courts in each of the 24 governorates. In July 2007, it was decided to establish a second court of first instance in Tunis, Sousse and Sfax;
- The creation of new courts of appeal in Bizerte, Nabeul, Gabès and Médenine;
- The creation of new cantonal courts;
- The creation of a Council for conflicts of jurisdiction between administrative and ordinary courts (Law No 38 of the year 2006, 3 June 2006);
- The creation of new judicial bodies attached to tribunals or courts of appeals:
  - Tax chambers;
  - A judge for social security matters attached to the courts of first instance (Law No 15-2003 of 15 February 2003);
  - A judge in charge of the enforcement of court sentences (*juge d'exécution des peines*) (Law No 2007-77 of 31 July 2000, modified by Law No 2002-92 of 29 October 2002);
  - A Competition Regulatory Authority (Law No 42-95 of 24 April 1995);
  - Commercial chambers attached to certain courts of first instance (Law No 95-43 of 2 May 1995); criminal chambers of appeal, consecrating the right to judicial review in criminal cases (Law No 2000-43 of 17 April 2000);
  - A juvenile court;
  - A family court judge;
  - Appeal chambers within the administrative court, introducing the right to judicial review in administrative matters (Law No 2002-11 of 4 February 2002);
- Overhaul of the composition of some judicial bodies :
  - Labour courts (Law No 2006-18 of 2 May 2006) are henceforth presided over by a second-grade magistrate acting as vice-President of the court of first instance.
  - Appeals against decisions adopted by the labour courts are no longer reviewed by the court of first instance but by the court of appeal.
  - Advancement in grade for judges in criminal chambers, first instance or appeal, was established by Law No 2006-34 of 12 June 2006. The same applies to juvenile court judges when ruling on a case falling under criminal law (law No 2006-35 of 17 June 2006)

72 In this context, The European Union has recently decided on the implementation of a 22 million € Programme to Support the Modernisation of the Tunisian Judiciary. This programme, which was signed in 2005, but then delayed, is expected to start in the course of 2008. The project comprises several components related to computerisation of courts (main component of the project); capacity building of all actors (training of judges, judicial officers and lawyers); provision of information desks in each court room; creation of a website for the Ministry of Justice and associated professions, including lawyers, notaries, and bailiffs; support to the land register tribunal.
From the outset, this Programme has been strongly criticised by the NGO community, both inside and outside Tunisia, for focusing too much on "non sensitive" issues, such as computerisation of courts and provision of equipment, and thus for not taking sufficiently into consideration the substantive changes in legislation and practice required to start a process towards an increased independence of the judiciary. In a context where Tunisian judges are systematically instrumentalised by the regime, the training component of the project - the only one that might offer some opportunities to deal with key issues - was subject to long and difficult negotiations with the authorities, apparently without success. Some controversy has also surrounded the proposal to include training for lawyers, owing to the fact that the government wanted the training to be provided through the Institut Supérieur de la Profession d'Avocats (ISPA), i.e. without the involvement of the Tunisian Bar Association.

It is difficult to make an overall assessment of these new structures because of a lack of information. The Ministry of Justice does not carry out any assessment, or at least does not publish its findings or its conclusions. Furthermore, it would be premature to assess some of these structures given their recent creation.

B. Reform of the professional status and working conditions of lawyers.

1. Legislative reforms

Since the adoption of Law No 87 of 7 September 1989 pertaining to the organisation of the lawyers' profession, the authorities have carried out a legislative policy aimed at restricting the room for intervention of lawyers in ongoing conflicts, adding to the precarity most lawyers currently face.

Moreover, a number of provision undermining the rights of the defence have been adopted, with the aim of stripping lawyers from their role of free defenders of the rights of persons facing trial, and making them servile cogs of the judicial administration. One such provision is article 46 of the Law on the organisation of the lawyers' profession, which creates the offence of "courtroom misbehaviour". Under this article, any lawyer can be arrested during a court hearing and immediately judged by a chamber of a different composition for a contempt of court in the course of his/her defence speech.

Article 22 of the Law of 10 December 2003 against terrorism and money laundering simply suppresses professional secrecy by making it an offence "*not to immediately denounce to the relevant authorities all information pertaining to the committal of a crime or an offence under this law*". This offence is punishable by one to five years of imprisonment and applies to all persons, regardless of their profession. In 2004, with a view to combatting illegal migration, a crime of criminal association and a related offence of "*failing to immediately denounce to the relevant authorities any information pertaining to the committal of a crime or offence under this law*" were added to Law No 40 of 14 May 1975 relative to passports and travel documents. Under this amendment[73], this offence is punishable by one to three years of imprisonment and applies to all persons, regardless of their profession.

Since the entry into force of the law of 1989 and subsequent texts on its implementation, lawyers have relentlessly called for the repeal of those retrograde provisions, and for reform to allow them to freely practice their profession and defend their clients with serene and free minds and means. Until today, the authorities have remained deaf to these claims.

As of today, lawyers still do not benefit from health insurance. The state refuses to publish a decree of implementation to legally confirm the decision taken by professional lawyers' associations to create a health insurance fund (as provided for in the law of 1989), on the grounds that a minority of lawyers voted against this provision at the extraordinary assembly. Such refusal by the authorities, although surprising considering the potential benefit for the state finances of the creation of the health fund, appears to be a means of harassing a profession seen as refractory.

Whereas the country witnesses an important increase in the number of unemployed graduates, the first sector to employ law graduates is the profession of lawyer. Efforts made by the Bar Association to employ young graduates go way beyond those of the Ministry of Justice for the recruitment of judges: at least five times more young graduates become lawyers each year. In spite of those efforts, the government continues to render the lawyers' material situation more precarious. This sometimes leads to unfair competition between lawyers and irregular exercise of the trade, which are then used and publicized by the pro-government press to tarnish the image of this profession in the public opinion.

The creation of a training institute for lawyers was the only 'significant' reform requested by lawyers' representative bodies and accepted by the authorities, although its actual implementation goes against the whishes expressed by those bodies.

2. High Training Institute for Lawyers.

Since 1991, the Bar Association has been demanding the creation of a training institute, devoted to educate future lawyers, meaning those who passed the Bar examination. According to the Bar Association's project, the institute was to deliver adequate training based on a practical approach of the law, and meet the following criteria:

- The Bar Association should exercise control over the management of the institute
- The Institute should be of a non-administrative character

73 Law No 6 of 3 February 2004 amending Law No 40 of 14 May 1975 on passports and travel documents.

- The Institute should be headed by a lawyer appointed by the Bar Association
- The Board of Directors of the Institute should contain a majority of lawyers nominated by the Bar Association.

Several negotiating meetings were held in the framework of a special commission made up of representatives from the Ministry of Justice and the Bar Association, but led to no result. Eventually, the government unilaterally forced a vote on the Law of 15 May 2006, which amends and supplements Law No 87 of 7 September 1989 on the organization of the profession, and creates the High Training Institute for Lawyers (ISPA). In practice, none of the lawyers' suggestions were taken into account, despite several protests and demonstrations to amend the bill.
As the law stands, it seems that ISPA will have the status of a public administrative body and will be under the direct control of the Ministries of Justice and Higher Education. In practice, lawyers will just have a few stools within a scientific committee stripped of all serious and effective powers. The Ministry will keep a high hand on the way training is delivered and on the future lawyers' chances of obtaining their diploma.

C. Reforms on the guarantees of the rights of the defence

According to a well-established practice, on the occasion of each official event, the Tunisian Head of State announces reforms to reinforce the protection of Human Rights, the Rule of Law and civil liberties. Steadfast pressure by national and international NGOs influences such announcements of progress, although the Tunisian authorities do not acknowledge this influence. Several reforms have thus been carried out in the field of the rights of the defence.

1. Reinforcement of the right to judicial review (appeal)

Law No 2001-79 of 24 July 2001 introduces the right to judicial review of the decision of administrative tribunals. It establishes appeal chambers within administrative tribunals. These chambers have authority to give rulings on:

- Appeals made against rulings given by the chambers of first instance of the administrative tribunal;
- Appeals against decisions and orders of interim relief in administrative matters;
- Appeals formed against first degree rulings made by judicial courts in administrative matters;
- Appeals against first instance decisions in cases of abuse of power (ultra vires actions) in administrative decisions regarding the status of civil servants.

Law No 2000-46 of 17 April 2000 introduces the right to appeal against decisions and rulings under criminal law.

These reforms brought about additional guarantees for those facing trial. In practice, the right to judicial review made it possible for many to assert their rights more efficiently.

2. Introduction of a limited obligation of legal representation

Obligatory legal counsel was introduced:

- In tax disputes and restitution requests before the tax chambers in first instance and appeal (Law n. 2006-11 of 6 March 2006). However, this provision only applies to a minority of cases, i.e. those in which the matter in dispute is worth over 25.000 dinars (roughly 14.204 €). Such cases are generally filed by lawyers in any case.
- In penal matters. However, the obligation to be represented by a counsel is limited to cases of crimes referred to the Court of Cassation. The new Law No 2007-26 of 7 May 2007 only imposes a lawyer's intervention in a referral to the Court of Cassation in a cases of crimes, which only represents a minimal amount of penal disputes before this court. Consequently, as cases of simple offence do not require obligatory representation by a lawyer, such limitation enshrines the inequality of citizen to benefit from the rights of the defence according to their financial resources. Indeed, citizens cannot present their legal defence before the Court of Cassation which only rules on the law; only a lawyer can present conclusions.

3. Legal representation before the judicial police

The recognition of the right of accused persons to seek the assistance of a lawyer during interrogation by the judicial police has always been a claim for lawyers and Human rights defenders.

Under the new article 57 of the Penal Code, amended by law n. 2007-17 of 12 March 2007, in cases where the letters rogatory requires a hearing of the suspect, judicial officials must inform the

suspect of his/her right to be represented by the counsel of his/her choice ; this is recorded in the minutes. In such cases, the hearing takes place in the presence of a lawyer who has the right to have access to the file in advance, unless the suspect expressly renounces his/her right to be assisted by a lawyer or does not appear on the date fixed; this is also recorded in the minutes.

Accompanied by a large public campaign and propaganda, the adoption of law n. 2007-17 was presented as a major progress in the protection of human rights. However, the number of rogatory commissions is very limited in Tunisian judicial practice compared with the high number of criminal cases which do not require the intervention of an investigating judge. Furthermore, the lawyer's presence remains 'neutral', as he/she is a simple observer. He/she does not sign the minutes of proceedings, does not ask questions, does not make requests or observations, and can only observe and listen without having the right to react. In addition, the judicial official who drafts the minutes can refuse the presence – even passive – of the lawyer with his/her client without facing any sanction. On top of this, the law does not provide the possibility for such act of procedure to be declared null and void.

RECOMMENDATIONS

It should be recalled that the independence of the judiciary can only be achieved through substantive constitutional and legislative reforms, together with the political will to ensure that such guarantees are then implemented and respected in practice. The 2004 EMHRN report *Justice in the South and East of the Mediterranean Region* includes a series of general recommendations which are still valid and which it would be of benefit to repeat here:[74]

"*The independence of the judiciary (vis-à-vis the political system, religious denominations and all other powers) must be expressly stated and recognised in the Constitution. The status of judges must form the object of an organic law to guarantee that it complies with the Constitution.*

Above and beyond this institutional recognition, members of the judiciary must enjoy specific guarantees:

- *Judges must be recruited in conditions of equal access to posts through competitive examinations and appointed exclusively on the basis of their competence.*
- *They must be remunerated by the state at a satisfactory level.*
- *Their careers must be managed by an independent body consisting of fellow judges, but also of persons not from the judicial system and without any interference from the legislature or the executive.*
- *Judges must enjoy the benefits of further training and education, and should have the right to form or join trade unions.*
- *Ordinary judges must be irremovable, except in the event of disciplinary measures taken by an independent body.*
- *Judges in the Public Prosecution Office must have the same independent status as ordinary judges. They must be subject to rules which ensure the proper application of criminal procedures launched by the executive power.*

These requirements entail the abolition of all courts with exceptional jurisdiction, either by virtue of their composition or the rules applicable to them.

Since there can be no proper justice without an effective and independent defence, the training of lawyers should at least be identical to that of judges, and the independence of lawyers and of their professional associations should be legally recognised and protected.

Finally, a fair system of justice develops under the scrutiny of society. The role of civil society should therefore be recognised and promoted."

Keeping in mind these general recommendations, we make the following specific recommendations to the Tunisian judiciary:

RECOMMENDATIONS TOWARDS THE TUNISIAN AUTHORITIES

A- Concerning the legal standards

1- International standards

- To publish in the Official Gazette of the Tunisian Republic all Human Rights international instruments ratified by Tunisia.
- To ensure the full respect, both in the legislation and in the practice, of all Human Rights international instruments ratified by Tunisia.
- To consider lifting Tunisia's reservations to certain human rights conventions, including the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination against Women*.
- To respect, both in the legislation and in the practice, the standards and principles adopted by the United Nations bodies, in particular the *Basic Principles for the Independence of the Judiciary (1985)*, the *Basic Principles on the Role of Lawyers (1990) and the Guidelines on the Role of Prosecutors (1990)*.

2. Constitutional reform

- To enshrine in the Constitution the principle of security of tenure for judges.
- To deeply reform the Constitutional Council's composition, functioning and the criteria and conditions for referring a law to its review, in order to ensure its full independence especially from the Executive as we as real constitutional review proceedings ;

B. Legislative reform

- To deeply amend the *Organic Law n° 67-29 of 14 July 1967 on the Judicial Organisation, the High Judicial Council and the Status of Judges*, including :

74 Available at www.euromedrights.net.

The High Judicial Council (HJC)

- To reform the status of judges as well as High Judicial Council's composition, competences and internal working rules in order to prevent for any interference from the Executive, taking into consideration the recommendations made by the Tunisian judges' associations; it is therefore recommended:
  a. To increase the number of HJC members elected by their colleague judges so that elected members represent the majority of all HJC members.
  b. To require that the elected members must always represent the majority of the HJC members regardless of which formation is convened (plenary, Disciplinary Council, Appeal Committee, etc).
  c. To abolish the current election rules for HJC members and adopt new rules that ensure the freedom of candidacy, the secrecy of vote and the transparency of the vote counting.
  d. To establish judicial remedies against HJC's decisions, including in particular the possibility to appeal against its disciplinary rulings to the administrative courts.
  e. To abolish all the powers of the Minister of Justice related to the organisation of the elections of the HJC members as well as to disciplinary matters.

The career of judges

- Ensure the automatic advance of judges from one grade to the next in order to limit any possibility to exert pressure on them.

Training of judges

- To reform the High Institute of the Judiciary in order to increase its autonomy from the Minister of Justice, including by associating the main actors (High Judicial Council, Bar association, human rights ONGs, other professionals) to its management ;
- To give the High Institute of the Judiciary - and no longer the Minister of Justice - the responsibility of organising the programme, the modalities and the supervision of the admission test to the Institute.
- To incorporate in the judges's training curriculum the study of the international human rights instruments ratified by Tunisia as well as the international standard related to the judiciary.

Respect of the judges' fundamental freedoms

- To amend all provisions of Org*anic Law n° 67-29 of 14 July 1967 on the Judicial Organisation, the High Judicial Council and the Status of Judges*, in particular its Article 18, that limit the judges' right to organise and freedom of association ; mention explicitly in the law, in conformity with *Basic Principles 8 and 9 for the Independence of the Judiciary* (United Nations, 1985), that judges are free:
  - to form trade unions or professional associations to represent their interests, to promote their professional training and to protect their judicial independence.
  - to exercise their freedom of expression and assembly, which can only be limited in order to preserve the dignity of their office and the impartiality and independence of the judiciary.
- To abolish the obligation made to judges wishing to travel abroad to request an authorisation and thus to respect judges' freedom of movement.
- To abolish the obligation made to judges to live within the jurisdiction of their court and thus to state that judges are free to live where they wish to do so.

- To decentralise the administrative courts by establishing regional administrative courts.
- To consult with and associate the representatives of the judicial professions, including the national and local bar associations, to any reform of the Tunisian judicial map.
- Review the law establishing the High Institute for the Training of Lawyersand associate the representatives of the laywers to the drafting of the new law.

C. The practice of the authorities and its relations with civil society and human rights activists

- To recognise, with all their rights, the legitimate bodies of the *Association des magistrats tunisiens* (AMT) and to reinstate in their former positions all the judges who were transferred due to their functions

within or in favour of the AMT's legitimate bodies.

- To reinstate judge Mokhtar Yahyaoui in his former position.
- To stop any interferences and harrasment measures towards judges' or lawyers' associations.
- More generally to stop repression, harassement, public diffamation campagnes and any other actions, including the freezing of funds, aimed at intimidating organisations working for the promotion and respect of human rights.

RECOMMENDATIONS TO THE EUROPEAN UNION

The ENP EU-Tunisia Action Plan, operational since 2006 refers to the "*pursuit and consolidation of reforms which guarantee democracy and the rule of law*". Actions envisaged to consolidate the independence and efficiency of the judiciary include:

- *Strengthen the efficiency of judicial procedures and the right of defence;*
- *Consolidate existing initiatives in the area of penal reform;*
- *Improve detention and prison conditions, in particular for the holding of minors, and ensure prisoners' rights; train prison staff; develop alternatives to incarceration; training and reintegration into society;*
- *Pursue and support reforms to the justice system, notably with regard to access to justice and to the law and modernisation of the justice system.*

Although these planned - and jointly agreed - actions should have provided room for activities aimed at strengthening the independence of the Tunisian judiciary, this has not been the case; in their relations with the EU, the Tunisian authorities have opposed or hampered any initiatives that would have effectively dealt with this issue, be it under the MEDA Programme or the EIDHR. [75]

Within this context, the European Union, in its relation with Tunisia, should:

A- Reinforce the respect of legal standards

- Highlight the common reference to universal human rights standards by notably emphasising on the need for Tunisia to fully respect the international human rights conventions it has ratified.
- Urge Tunisia to revise its Constitution in order to improve the status and the safeguards for the independence of the judicial power as an institution and of magistrates individually, in particular by giving constitutional expression to the principle of security of tenure for judges.

B- Encourage public authorities to establish the conditions for a global and integrated reform

The European Union should encourage Tunisian public authorities:

- To implement a global reform of the legal provisions regulating the status of judges as well as the High Judicial Council's composition, competences and internal working rules in order to reach a level of independence in conformity with international standards.
- To recognise the judges' right to freely form or join unions or associations, in conformity with the international standards, in particular the *Basic Principles for the Independence of the Judiciary (United Nations, 1985)*.
- To recognise the right for judge's associations and unions to cooperate with and affiliate to other associations, federations or unions, both nationally and internationally.
- Similarly, to recognise the judges' right to freedom of expression, as stated by the international standards, including the *Basic Principles for the Independence of the Judiciary*, as well as their right freedom of movement.
- To consult with and associate the representatives of the judges, lawyers and other judicial professions to any reform related to the judiciary.

C. Integrate the issue of the independence of the judiciary in the implementation of the EU Programme supporting the modernisation of the Tunisian judiciary

75 The European Commission noted in its late 2006 Progress Report on Tunisia: "*Preparations by the Subcommittee on Human Rights and Democracy are still focused on its rules of procedure [the first meeting of the Subcommittee was held in November 2007]. A start should be made on implementing the modernisation programme for the justice system, which was signed at the end of December 2005. Civil society projects with the EU have so far proved problematic, especially as regards implementation of the Tunisian League of Human Rights projects*" ; see the Action Plan and Progress Report at http://ec.europa.eu/world/enp/documents_en.htm#2.

In spite of the limitations related to the content of this programme, the European union should:

- Ensure that the training component of the programme will include the implementation of the human rights international standards, in particular those related to the independence and impartiality of the judiciary,
- Ensure that the training activities directed to lawyers, if they are to be carried out, will be defined and implemented following consultation and in agreement with the Tunisian Bar Association.

C. Support the civil society

The European Union should:

1. Engage in regular consultations and dialogue with the Tunisian organisations most involved in human rights issues, in particular those working on Justice related issues or promoting judicial reform.
2. Financial support to justice-related projects emanating from or implicating local NGOs with the aim of increasing their professional, networking and lobbying capacities and assisting them in becoming influential independent actors in the field of judicial reform.
3. Support organisations, in particular those representing judges and lawyers, that are facing repression or harassment measures by the authorities.
4. In situations where the implementation of EIDHR projects is blocked or severely hampered by the Tunisian authorities, or where human rights activists are harassed because of their activities related to an EIDHR funded project, the European Union should condition the implementation of other assistance or cooperation programmes with Tunisia on the lifting of the obstacles and/or the immediate end of the harassment measures.

RECOMMENDATIONS TO THE CIVIL SOCIETY [76]

Tunisian civil society organisations should :

- Consult with each other and coordinate their positions in accordance with the international standards related to the judiciary and agree on common objectives
- Contribute to stenghtening the role of the Tunisian Bar Association in supervising the independance and impartiality of the judiciary, in particular through the publication of annual reports on Justice and encouraging lawyers to resort to human rights international standards in their work.
- Elaborate joint actions aimed at raising awareness amongst the general population about the issue of the independence and impartiality of the judiciary and at promoting the independence of the judiciary as an essential tool to protect the rights and freedoms of all individuals.
- Call for the drafting of an international convention specifically related to the independence of the judiciary.

76 See first the general recommendations addressed to the civil society organisations of the EuroMed region contained in the report *Justice in the South and East Mediterranean Region,* EMHRN, 2004, pp. 18-19.

REFERENCES

(French language litterature)

Observation. The documents listed below do not include the general introductory and specialised teaching materials on Tunisian law or doctrinal Arab language literature. The list only refers to most recent publications from 1997 to 2007.

- **(2007) ABDELLATI Ibtissem,** *Les garanties de l'indépendance des magistrats*, Master thesis, Master in Public and Finance Law, Tunis, Law and Political and Social Sciences Faculty, 2007, (122 p.).
- **(1997) Colloquium Proceedings,** *La réforme de la justice administrative* (under the supervision of Fadhel Moussa), Tunis, Law and Political and Social Sciences Faculty, Centre de publication universitaire, 1997, (Bilingual, 320 p. in Arabic / 155 p. in french).
- **(2006) Colloquium Proceedings,** *L'évolution contrastée du contentieux administratif*, Tunis, Law and Political and Social Sciences Faculty, 5-6 March 2004, CPU, 2006.
- **(2004) ASSOCIATION DES MAGISTRATS TUNISIENS,** Collection, declarations, press releases, October-December 2004 (*sijil al-mawaqif*).
- **(2006) BARDI Houcine,** *Une volonté d'indépendance : l'association des magistrats tunisiens face au joug des autorités*, Foreword by Michel Tubiana, CRLDHT publications.
- **(2000) BARTEGI Brahim,** *Organisation des contentieux et bonne administration de la justice,* Study on procedural law, PhD in Law, Law and Political and Social Sciences Faculty, Law, Economy and Management University, 2000 (521 p. incl, references).
- **(2007) BEN ACHOUR Sana,** *La féminisation de la magistrature en Tunisie, entre émancipation féminine et autoritarisme politique*, in l'Année du Maghreb edition 2007, Dossier, La Justice au Maghreb, Edition 2007.
- **(2007) BEN ACHOUR Sana,** *Juges et magistrats dans l'ordre colonial*, Mélanges en l'honneur du Doyen Yadh Ben Achour, Tunis, CPU, to be publiished in 2008.
- **(1997) CENTER FOR LEGAL AND JUDICIAL STUDIES**, Ministry for Women and Family Affairs, Annuaire des magistrats femmes tunisiennes, Tunis, June 1997.
- **(2007) CHEKIR Hafidha**, *Justice politique en Tunisie* in Yadh Ben ACHOUR and Eric GOBE (dir), Justice politique et société en société en Afrique du Nord, L'Année du Maghreb Edition 2007, Paris, CNRS, pp. 141-153.
- **(2003-2004) DHOUIB Wassim,** *L'indépendance de la justice*, Master thesis, Master in Public Law and International Business, Sfax Law Faculty, 2003-2004.
- **(2007) GOBE Eric and AYARI Mikhaël Bechir,** *Les avocats dans la Tunisie de Ben Ali : une profession politisée* in Yadh Ben ACHOUR and Eric GOBE (dir), Justice politique et société, L'Année du Maghreb Edition 2007, Paris, CNRS, pp.105-132.
- **(1996) ZARROUK Myriam,** *Les conseils supérieurs de la magistrature et des juridictions du Conseil d'État*, Law and Political and Social Sciences Faculty, Master in Public and Finance Law, 1996.

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