



**THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS**

**STUDY  
OF STATE ACTORS IN  
THE TUNISIAN HUMAN  
RIGHTS SYSTEM**

The Danish Institute for Human Rights carried out this “Study of State Actors in the Tunisian Human Rights System” as part of its activities in the Middle East and North Africa.

The team behind this study includes Stéphanie Lagoutte, researcher, and Annali Kristiansen, advisor, from the Danish Institute for Human Rights, who were responsible for parts 1 and 4 of the study, as well as for producing the final draft.

The study was carried out with the support of academics from the Faculty of Legal, Political and Social Sciences of Tunis, Carthage University. It would not have been possible without the advice of Ghazi Gherairi, teacher in Public Law. Salsabil Klibi and Jinen Limam, teachers at the Faculty, edited the first draft of parts 2 and 3 of the study of the study respectively. Wahid Ferchichi, Professor in Public Law at the Faculty, contributed to this study in the final stage of its preparation.

The study was produced in French. It was proofread by A Propos. The company International Translation and Interpretation Service provided the translation into Arabic. We would like to thank Diya Shaqqura, student assistant on projects in Tunisia, for checking the Arabic version of the study. Jesse Kirkwood provided the translation into English.

The DIHR has made every effort to ensure that all references are correct and that the points of view expressed are as objective as possible.

Funding: Danish Arab Partnership Programme

ISBN 978-87-93605-24-4, English digital version

ISBN 978-87-93605-25-1, English printed version

Typesetting: SMILE

printing: by Toptryk in 250 copies

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Wilders Plads 8K, DK - 1403 Copenhagen K, Denmark

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## ABBREVIATIONS

<b>Abbreviations</b>	<b>English</b>	<b>Français</b>
<b>ARP</b>	The Assembly of Representatives of the People (Parliament)	L'assemblée des représentants du peuple
<b>CSDHLF</b>	The Higher Committee on Human Rights and Fundamental Freedoms	Le Comité supérieur des droits de l'Homme et des libertés fondamentales
<b>CSM</b>	the Supreme Judicial Council	Le Conseil supérieur de la magistrature
<b>EPU</b>	Universal Periodic Review	Examen Périodique Universel
<b>HAICA</b>	The High Independent Authority for Audio-visual Communication	Le Haute autorité indépendante pour la communication audiovisuelle
<b>IBGLCC</b>	the Good Governance and Anti-Corruption Instance	l'Instance de la bonne gouvernance et de la lutte contre la corruption
<b>ICCPL</b>	Provisional Instance to Review the Constitutionality of Draft Law	L'instance provisoire de contrôle de constitutionnalité des projets de loi
<b>ICI</b>	independent constitutional bodies	les Instances indépendantes constitutionnelles.
<b>IDH</b>	Human Rights Instance	l'instance des droits de l'homme
<b>INDH</b>	National Human Rights Institution	Institution national des droits de l'Homme
<b>INPT</b>	National Authority for the Prevention of Torture	l'Instance nationale de prévention contre la torture
<b>IPPCP</b>	Instance for Protection of Personal Data	l'instance de la protection des données à caractère personnelle
<b>ISIE</b>	The higher independent commission for elections	l'instance supérieure indépendante pour les élections
<b>IVD</b>	Truth and Dignity Commission	Instance Vérité et Dignité
<b>SNDH</b>	National Human Rights System	Système national des droits de l'Homme
<b>UN</b>	The United Nations	Les Nations unies



# 1. INTRODUCTION

The institutional landscape for human rights protection in Tunisia has undergone numerous adjustments and extensive reorganisation since 2011. Tunisia's postcolonial experience consisted of two autocracies marked by political violence and systematic attacks on human rights.<sup>1</sup> The regime change of 2011 and the adoption of the new Constitution of the Tunisian Republic of 27 January 2014 have been the occasion for a profound debate on the institutional reform necessary to establish a Tunisian democracy – that is, a political system that constitutionally guarantees the existence of power and counterbalances to that power, and ensures human rights protection for the entire population.

The break with the old regime enabled the establishment of competent independent human rights actors prior to the adoption of the 2014 Constitution, such as the Truth and Dignity Commission<sup>2</sup> and the National Authority for the Prevention of Torture.<sup>3</sup> From 2014 onwards, the normative framework formed by these independent institutions continued to be developed pursuant to the Constitution. In the past few years, several bills have been proposed and in certain cases passed, such as the laws on the Constitutional Court, on the Code of Criminal Procedure, on the Supreme Judicial Council, on violence against women, or on the Good Governance and Anti-Corruption Instance.<sup>4</sup> Draft laws, such as the bill on the Human Rights Instance, are currently being examined.

Currently, the institutional landscape consists of various types of actors, which are either independent or under government supervision and have varied mandates that are directly or indirectly linked to the protection and promotion of human rights. The transformation of the state actor landscape into a genuine system for the protection of human rights is underway. A balance must be sought in this transformation between the necessary degree of continuity and the need to correct the most problematic situations, for example by strengthening the role of the national human rights institution and meeting the new requirements of United Nations bodies (on torture and persons with disability) without creating any overlap between individual mandates and roles.

This study aims to present a mapping and analysis of the state and institutional foundations for the protection and promotion of human rights in Tunisia.

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1. Under President Bourguiba (1956-1987) and then President Ben Ali (1987-2011).
  2. Organic law no. 2013-53 of 24 December 2013 on the installation and organisation of transitional justice (JORT no. 105, 31 December 2013) which establishes the Truth and Dignity Commission.
  3. Organic law no. 2013-43 of 21 October 2013 on the National Authority for the Prevention of Torture (JORT no. 85, 25 October 2013). This body is the national mechanism for the prevention of torture, instituted following Tunisia's accession to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, decree-law no. 2011-5 of 19 February 2011 adopted by the interim president.
  4. Organic law no. 2015-50 of 3 December 2015, on the Constitutional Court; organic law no. 2017-58 of 11 August 2017, on the elimination of violence against women; organic law no. 2017-59 of 24 August 2017, on the Good Governance and Anti-Corruption Instance.

## 1.1 Conceptual framework of the study: the national human rights protection system and its state actors

This study seeks to enable a better understanding of the Tunisian human rights system as a whole and of the central role of the state infrastructure for human rights protection: its actors, its normative framework, and the various processes implemented at national level.

Human rights are universal legal obligations that states have undertaken to guarantee in their Constitution, their legislation and through their international commitments.<sup>5</sup> A national human rights system is one in which the state guarantees the respect, protection and promotion of the rights of all. This guarantee is provided when all the state actors in the national human rights system respect, protect and promote these rights, thus ensuring their effective implementation at national level. The non-state actors in the national human rights system, such as non-governmental organisations, the media, unions, private businesses etc. also participate in this action by respecting and promoting human rights.

This definition is based on a number of documents produced by the United Nations to attempt to define and promote the implementation of a national human rights protection system.<sup>6</sup> Thus, according to the definition proposed by the Office of the High Commissioner for Human Rights, a “national human rights protection system” consists of legal frameworks, institutions, procedures and actors.<sup>7</sup> The European Union similarly describes the main elements of a “national human rights protection system” as i) institutions, i.e. mainly government and independent state institutions at national and local level, ii) the domestic law applicable in this area, iii) policies on human rights and iv) civil society and human rights defenders.<sup>8</sup> In both these approaches, the national human rights “protection” system also encompasses respect for and promotion of rights by the actors concerned.

These initial attempts to define the national human rights system also highlight that national human rights institutions (NHRIs) have a role as catalysts for the protection of the rights of all by every actor concerned.<sup>9</sup> To summarise these definitions, a national human rights system will be considered to include the following elements: actors, a normative framework, and procedures and processes for the protection and promotion of human rights.

5. The second chapter of the 2014 Constitution is devoted to the protection of rights and freedoms. Further, article 20 declares that international agreements approved and ratified by the Tunisian parliament have a status superior to that of laws and inferior to that of the Constitution.
6. Office of the UN High Commissioner for Human Rights: Strengthening of the United Nations: an agenda for further change, Report of the Secretary-General of the United Nations, 9 September 2002, A/57/387; Action Plan 2: Strengthening Human Rights-Related UN Action at Country Level: National Human Rights Promotion and Protection Systems”, 2002, [un.org/events/action2/](http://un.org/events/action2/). See also Ramcharan, Bertrand G., “National Responsibility to Protect Human Rights”, *Hong Kong Law Journal*, Vol. 39:2, 2009, pp. 361-400.
7. Strengthening of the United Nations: an agenda for further change, 2002, op. cit.
8. Manuel destiné aux ambassades des États membres de l’UE : Renforcement des systèmes nationaux de protection des droits de l’Homme, Human Rights Division of the Dutch Ministry of Foreign Affairs, Czech Presidency of the European Union, 2009.
9. Speech by the High Commissioner for Human Rights, Louise Arbour, at the 19th session of the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights (ICC), 21 March 2007, where she considers national human rights institutions to be the keystone of a strong national human rights protection system, in which they play a central role (not published).

It is the responsibility of the state, as a whole and acting via its institutions and agents, to establish and maintain the fundamental elements of the system – laws, courts, parliaments, law enforcement etc. Consequently, for a national human rights system (NHRS) to function, certain state actors, procedures and processes, policy and legal frameworks must be in place and function in compliance with human rights standards. We refer to this as the “state human rights infrastructure”. All state bodies have a responsibility to respect, protect and promote human rights in their respective spheres of action.

In general, the national human rights system consists of several types of state actor:

- The independent state bodies that are directly or indirectly responsible for the protection and promotion of human rights, such as national human rights institutions, independent constitutional bodies, or independent administrative authorities;
- The relevant government agencies (ministries, human rights focal points, interministerial coordination organs, etc.)
- The courts and tribunals, including the prosecution service;
- Law enforcement and security services (police, prisons, intelligence services and military);
- The parliament, and especially its human rights committee;
- Local governments and administrations.

The national human rights system also includes all the roles played in practice by all these actors for the drafting, adoption and implementation of policies, laws and regulations that are directly or indirectly concerned with human rights issues. This means considering how the above-mentioned actors participate in the:

- Integration of international, regional and domestic human rights standards in laws passed (or revised) by the parliament;
- Adoption of specific laws where necessary (protection of the rights of certain categories of vulnerable persons);
- Institutional reforms;
- Adoption of action plans and policies, including specific policies on, for instance, human rights education, gender equality, etc.

Finally, the actors and normative framework of state human rights action are complemented by a number of processes in which state actors participate, for example:

- Monitoring human rights implementation;
- Reporting to international and regional human rights bodies and follow-up to recommendations from supranational bodies (United Nations, regional organisations<sup>10</sup>);
- Continuous dialogue with non-state actors (NGOs, media, academics);

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10. An organic bill for the approval of the Republic of Tunisia's accession to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was submitted to the Assembly of the Representatives of the People (ARP) on 7 July 2017 for consideration. <http://www.legislation.tn/fr/content/projet-de-loi-organique-portant-approbation-de-ladh%C3%A9sion-de-la-r%C3%A9publique-tunisienne-%C3%A0-la-ch> (retrieved 5 November 2017).

- Dealing with inconsistencies and gaps in the implementation of human rights; and
- Complaint handling and redress mechanisms for human rights violations.

Recently, an obligation to establish bodies to implement and monitor human rights at the national level has become a feature of international treaties. Thus under article 3 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, each state must set up a national mechanism for the prevention of torture.<sup>11</sup> Similarly, the Convention on the Rights of Persons with Disabilities provides for states to designate points of contact within their administration in order to ensure the implementation of the Convention. It also provides for the designation of an independent public mechanism to monitor the application of the convention. This mechanism must be based on the Paris Principles on national human rights institutions<sup>12</sup>. The Convention also holds that the state should include civil society in this monitoring role.<sup>13</sup>

Understanding the functioning of the national human rights system therefore means understanding the mandates and missions of each actor, their roles in practice, and the interactions between state and private actors (including NGOs etc.), and national and supranational actors, and any areas of competition between state actors.

## 1.2 Timing of the study

The development of the institutional framework for the protection and promotion of human rights involves a certain number of challenges relating to Tunisia's transitional status since 2011. These challenges concern the establishment of new constitutional bodies, the proliferation of public human rights institutions, or extreme confusion as to the scope of intervention of various institutional actors.

During this transitional period, certain institutions began to play a role even though the 2014 Constitution provided for their replacement by other institutions. Thus, Tunisia's national human rights institution has itself been undergoing profound change: the Higher Committee on Human Rights and Fundamental Freedoms which existed formally under the Ben Ali regime without fulfilling its role as a guardian of human rights is attempting to reform itself while also needing to adjust to the establishment of the Human Rights Instance pursuant to the 2014 Constitution. Similarly, certain

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11. Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 18 December 2002, which entered into force on 22 June 2006 and was ratified by Tunisia on 29 June 2011, art. 3: "Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism)."
  12. Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights, Recommendations approved by the Human Rights Instance on March 1992, (Resolution 1992/54) and by the General Assembly (Resolution A/RES/48/134 of 20 December 1993).
  13. Convention on the Rights of Persons with Disabilities, 2006, art. 33

institutions with a specific human rights mandate, such as the Truth and Dignity Commission (for transitional justice) or the Authority for the Prevention of Torture (which is the national torture prevention mechanism), both dating from 2013, will need to establish mechanisms for cooperation with the new Human Rights Instance, which has an enlarged mandate for the protection and promotion of human rights.

This study of state human rights actors in Tunisia thus serves a double purpose. On the Tunisian side, it features a rational and holistic assessment of these actors at a time when their legislative framework is being established or modified. It also provides a practical, although in places only preliminary, overview of the role played by these Tunisian state actors in the protection and promotion of human rights, by analysing the implications and actions of the national human rights system (NHRS) in practice. This study thus presents and documents a number of specific examples of the action of Tunisian state actors.

As far as the Danish Institute for Human Rights is concerned, this study is the result of collaborative research carried out in partnership with Tunisian academics.

#### BOX - 1

This study was carried out with the support of academics from the Faculty of Legal, Political and Social Sciences of Tunis, Carthage University.

It was made possible through the advice of Ghazi Gherairi, Teacher in Public Law. Salsabil Klibi and Jinen Limam, teachers at this Faculty, edited the first draft of parts 2 and 3 of the study respectively.

Wahid Ferchichi, Professor in Public Law at this Faculty and Chairman of the Collective for Individual Freedoms, contributed to this study in the final stage of its preparation.

Stéphanie Lagoutte, researcher, and Annali Kristiansen, adviser, from the Danish Institute for Human Rights (Copenhagen, Denmark) prepared the final version of the study.

This study also seeks to illustrate, document and analyse in depth the mandates and actions of state actors for the protection and promotion of human rights, which lie at the heart of the work done by the Institute. In addition to the indicators used to measure the results of capacity-building projects for state actors for the protection and promotion of human rights, it is important to engage in more in-depth analysis of the concrete work done by these actors in the various contexts where international sponsors, as well as other parties involved in developing human rights structures and actions, fund and implement their activities. This study also forms part of the efforts of the Danish Institute for Human Rights over the past two years to conceptualise the principal components of the national human rights system (actors, normative framework and processes) and to develop the required methodological tools to strengthen these. Finally, this study of state human rights actors in Tunisia may serve as a model for similar studies in other contexts where it will also be necessary to understand the mandates and roles of all actors in the national human rights system before planning actions to strengthen them.

### 1.3 Objective and methodology

The objective of this study is to provide a general overview of the Tunisian human rights system as a whole and to enable an improved understanding of the central role of the state infrastructure for the protection and promotion of human rights (actors, normative framework and process). The study therefore seeks to map and analyse this state infrastructure, and to identify its potential while also posing a certain number of questions concerning the challenges and difficulties arising in the Tunisian context, with a view to developing a pragmatic and well-documented discussion of the Tunisian human rights protection system.

Certain studies have already provided a map of the actors in the Tunisian human rights system prior to the implementation of the 2014 Constitution.<sup>14</sup> However, this map of the actors and mandates requires updating with an analysis of more recently introduced laws, draft legislation, doctrinal sources, reports on Tunisian public institutions, etc. This mapping process must also be supported by a more in-depth analysis of the practice of these actors, in order to understand their roles and the relationships and interactions that exist, or should exist, between these state actors and private actors (civil society organisations) and with international human rights mechanisms.

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14. See the studies published by the Al-Kawakibi Democracy Transition Centre: Structures publiques des droits de l'Homme en Tunisie – Quelle évolution? Novembre 2013 – Novembre 2014, by Dr Wahid Ferchichi with the participation of Ahmed Aloui, Tunis, Al-Kawakibi Democracy Transition Centre, 2015; Structures publiques des droits de l'Homme en Tunisie, compiled by Dr Wahid Ferchichi with a contribution from Monia Ammar, Tunis, Al-Kawakibi Democracy Transition Centre, 2013. See also: Kaddour, Souheil: "La gouvernance des droits de l'Homme en Tunisie post-révolutionnaire: état des lieux, difficultés et opportunités", La Revue des droits de l'Homme [online], vol. 6, 2014 (retrieved 4 December 2014) and Les acteurs en droits humains en Tunisie, Amor Boubakri, 2014.

This study is based on, among others, the methodology developed by the Danish Institute for Human Rights (DIHR). The aim of this methodology is to identify, document and analyse the mandates and roles of the state actors in the national human rights system and the shortcomings and obstacles encountered in the state human rights infrastructure. Such an approach is used to establish a map and integrated analysis of several or all the state actors in the national human rights system, their missions/mandates, their role in practice, and the interactions that exist between these state actors, and with other actors from the national and international human rights system (civil society organisations, state and non-state human rights actors at the international and regional level, private enterprises, etc.). This study also focuses on the role played by these actors in maintaining and implementing a human rights framework and their participation in human rights processes. This documented analysis seeks to identify the shortcomings and obstacles that the state human rights infrastructure must overcome.

It was therefore necessary for the authors of this study to review the various legal texts and documents under which these actors are established and organised, as well as a number of more general texts concerning the protection and promotion of human rights. This legal arsenal consists of the Tunisian Constitution, which constitutes the highest-level norm within the national legal order, the various international human rights treaties ratified by Tunisia, and the most important laws relating to the exercise of these rights and the establishment of the institutions being analysed. A review of doctrine provided an insight into how researchers, as well as state or private actors concerned by human rights, view the status of such actors in Tunisia, both in the law and on the ground. Finally, empirical data was used to supplement the information obtained from the review of doctrine. This data was gathered through interviews conducted with various state actors on the subject of how they view their mutual relationships and their positioning in the area of protecting and guaranteeing human rights.

This study seeks to contribute to an informed discussion of the state actors in the Tunisian human rights system, with a view to ensuring the continued development and strengthening of the respect, protection and promotion of human rights in Tunisia.

## **1.4 Structure of the study**

This study examines the mandates and roles of state actors in the Tunisian human rights system by distinguishing two categories of state actor: independent or unsupervised actors on the one hand (part 1), and government actors or actors under administrative supervision on the other (part 2). The study focuses on state actors with a national mandate. Public authorities with either a more specific role, such as law enforcement agencies or prison authorities, or a local or decentralised mandate (local authorities) are excluded from this study. This is because it is difficult, at present, to analyse the protection and promotion

mandate of these actors in Tunisia on account of the numerous changes and challenges affecting their organisation (the process of decentralisation is ongoing)<sup>15</sup> and operations (the police and prison authorities face huge human rights challenges).<sup>16</sup>

The third part of this study focuses on the insertion of these various actors into the new institutional human rights landscape in Tunisia, whether in terms of the interactions between state actors or their cooperation with private actors (NGOs, etc.) in the national human rights system.

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15. Organic bill no. 23-2016 of 11 May 2016 on local authorities (<https://majles.marsad.tn/2014/fr/docs/57a320d0cf44126c17c5e1a1>); Draft organic law no. 48-2017 of 5 May 2017 on the promulgation of the local authority code (<https://majles.marsad.tn/2014/fr/lois/591dbe75cf4412226ec753d9/texte>).
  16. See for example paragraphs 25 to 38 (the right to life, freedom and personal security) in Compilation on Tunisia. Report of the Office of the United Nations High Commissioner for Human Rights, presented as part of the Universal Period Review (UPR), 20 February 2017, A/IDH/WG.6/27/TUN/2.



## 2. INDEPENDENT STATE ACTORS

Today, the institutional landscape formed by the actors responsible for the respect, protection and promotion of human rights in Tunisia is rich, diversified and polymorphous. New actors have joined those that were already in place before 2011. What has changed considerably in this institutional landscape is not so much the number or nature of the actors forming it as their status and the powers available to them, and therefore the relationships that will develop between them from now on. The shift from a dictatorial regime to a democratic state has given existing actors a freedom to act, and also to inform the public about the state of freedom in the country, that did not exist before 2011. This is largely the case with civil society. However, this transition has also given state actors a new degree of independence. This increased independence is not merely an effect of regime change; it is also enshrined in the Constitution.

This is particularly the case with the judiciary, which under the 2014 Constitution has primary responsibility for protecting human rights. The Constitution declares the independence of this branch of the state and establishes mechanisms to guarantee this independence. As new state actors, the independent constitutional bodies herald the arrival of a new system of checks and balances, and bode well for the restrained exercise of power and the strengthening of a constitutional state characterised by the rule of law. All these actors, whether old or new, state or non-governmental, supervised or independent, are united by a common mission: the protection and promotion of human rights.

However, it should be noted that the existence of a plurality of institutional actors tasked with protecting human rights in Tunisia was not an issue before 2011. These state institutions, just like the Administrative Mediator (*médiateur de la République*) or even the courts, were under the stranglehold of the executive, and more specifically the President of the Republic. They therefore operated at the behest of a single authority, whose policies they were happy to implement. Conflicts and clashes between these institutions with no real autonomy were rare since it was the executive, in particular the head of state, which determined how much scope they each had to manoeuvre.

The problem of optimising the institutional landscape and the functioning of its various actors only really becomes relevant when they have genuine independence and freedom of action. The task of optimising these actors' actions is all the more important given that these actions take different forms. A sequenced approach is therefore possible, whereby these actors intervene in a certain order and act in a coordinated manner, by complementing and supporting each other rather than duplicating each other's actions or even coming into conflict.

This section focuses on independent state actors – that is, state actors that, under the new Constitution, have institutional independence from the executive. These include the Constitutional Court, justice institutions and the new independent constitutional bodies. We have also included the parliament, which holds the legislative power and, together with the judiciary, constitutes a counterbalance to the third branch of the state formed by the executive. These independent state actors are not subject to any formal or informal supervision by the executive.

The independence of state bodies is central to the protection and promotion of human rights. It is a complex idea which combines:

- statutory independence, institutional independence, and independence of the personnel employed at these institutions,
- financial autonomy with respect to the state budget and the budgetary choices made by the government and parliament,
- and the political will (expressed via constitutional, legislative, regulatory and budgetary choices) to ensure the state has the means to fulfil its obligations regarding the respect, protection and promotion of human rights.

This independence is therefore based both on a formal foundation, guaranteed in the Constitution or in organic laws, and on continued practice of this independence by the relevant actors.

In this section, we consider the following one by one: the Assembly of the Representatives of the People – the parliament (2.1), the Constitutional Court (2.2), the justice institutions (2.3) and the independent constitutional bodies created by the 2014 Constitution (2.4).

## **2.1 The Assembly of the Representatives of the People (parliament)**

All parliamentary activity, whether in its legislative, budgetary, or supervisory capacities, has effects on all types of human rights (political, civil, economic, social or cultural). In order to enable the state to meet its obligations to respect, protect and promote human rights, parliament must carry out certain key tasks:

- participating in the process of ratifying international human rights treaties and incorporating them in domestic law;
- ensuring that new laws or bills comply with international human rights norms;
- attending to the creation and implementation of specific laws and policies (on both a general and a thematic level) in relation to the protection of human rights and ensuring that an adequate budget is allocated for their implementation;

- ensuring that recommendations from the United Nations treaty bodies or other human rights mechanisms are followed up;
- initiating or participating in the creation of human rights institutions (for example, national human rights institutions – NHRIs) and other mechanisms in society to protect human rights;
- raising specific human rights violations in parliament, including in relation to the protection of persons;
- setting up special parliamentary committees on human rights<sup>17</sup>.

This section addresses the role of the Tunisian parliament in protecting and guaranteeing human rights and the structures in place within the Assembly of the Representatives of the People (ARP) to safeguard this role.

It is a widely recognised feature of contemporary democracies that parliament is competent to establish regulations on the exercise of rights and freedoms. By virtue of the procedure for its adoption, the law is the product of deliberation between the various political formations representing various elements of society. This process of deliberation not only enables arguments to be set out, but also provides an outlet for disagreements between political actors. Most importantly, deliberation is also a way of ensuring that these actors publicly disclose, and thereby become answerable for, their opinions and positions on human rights issues. Parliament is thus not only the institutional locus of the exercise of social freedom, but also a place where a common opinion on this freedom may be formed.

It should be noted that in Tunisia, the role of the ARP in relation to human rights is specifically addressed by article 65 of the Constitution: the reservation of law, which involves creating a protected domain of intervention for the legislature. However, article 70 of the Constitution also provides for the possibility of parliament's legislative power being delegated to the executive, in the matters specified for this purpose in the Constitution. This delegation is subject to procedural precautions both before and after its exercise, as well as material precautions.<sup>18</sup>

### 2.1.1 The internal organisation of parliament

The internal work of parliament is organised in such a manner as to ensure its optimisation, enabling it to carry out its duties – whether this means examining, debating and passing laws or scrutinising the actions of the executive – in as rapid and coordinated a manner

17. Manuel SNPDPH 2019, op. cit. p. 91.

18. Under article 70 of the Constitution, the implementation of this delegation is strictly limited to two scenarios. The first is the dissolution of parliament. In this case, the head of state can legislate via a government decree issued in agreement with the head of government. The second scenario is where parliament itself chooses, via a law approved by three-fifths of its members, to authorize for a specific period not exceeding two months, and for a specific purpose, the head of government to issue decree-laws of a legislative character.

as the collegial structure of a body of this size allows. Thus, in addition to the general provisions of the Constitution in this area,<sup>19</sup> which focus on the establishment of various types of committee, the by-laws of the Assembly of the Representatives of the People address the internal structure of parliament and how it functions.<sup>20</sup>

The general structure of parliament consists of a Speaker,<sup>21</sup> a Bureau,<sup>22</sup> and three types of committee. Section V of the ARP's by-laws is devoted entirely to these committees, and specifically their nature, composition, role and operational procedures.<sup>23</sup> Article 63 of the by-laws states that the ARP shall create permanent and special committees, and may also form committees of enquiry. There are nine permanent committees.<sup>24</sup> One is dedicated to general legislation, and another to rights, freedoms and foreign relations. Realising the possibility of overlaps and therefore disagreements between the committees in relation to their area of competence, the deputies included an article<sup>25</sup> in the by-laws providing that, in the event of a dispute between the committees on a specific issue, the dispute is referred to the Speaker of the Assembly, who then submits it to the Bureau. It is the responsibility of the Bureau of the ARP to settle the dispute.

The Committee on Rights, Freedoms and Foreign Relations is tasked, as its name indicates, with examining bills affecting rights and freedoms. It is important to note that the internal regulations firstly state that committee sessions are public unless otherwise decided by the committee itself via a majority vote.<sup>26</sup> Secondly, they give the committee the option of obtaining an expert opinion from any person able to provide assistance or shed light on the committee's work on a particular matter. Most importantly, however, the by-laws state that the committees work to interact with civil society, which is invited to make proposals either in written form or by attending committee meetings.<sup>27</sup>

The Committee on Rights, Freedoms and Foreign Relations consists of 18 members from a variety of professions. Pursuant to article 46 of the Constitution, which declares that the state works to attain parity in elected assemblies, it features an equal representation of men and women.

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19. Article 59 of the Constitution: "The Assembly of the Representatives of the People shall form permanent and special committees. Their composition and the sharing of responsibilities within the committees shall be determined on the basis of proportional representation. The Assembly of the Representatives of the People may form committees of enquiry. All authorities shall assist such committees of enquiry in undertaking their tasks."
  20. The ARP's by-laws, adopted at the plenary session of Monday 2 February 2015. An unofficial translation into French is provided by the Centre for Security, Development and the Rule of Law (DCAF) and published on the database of Tunisian security-sector legislation (<http://legislation-securite.tn>)
  21. Under art. 59 of the Constitution, the Speaker of the Assembly of the Representatives of the People is elected by its members in its first session.
  22. The by-laws of the ARP, Title III, art. 53 to 59, on the Bureau of the Assembly of the Representatives of the People.
  23. *Idem*, Title V, art. 63 to 100, includes a section on the permanent committees, another on the special committees, and a third on the committees of enquiry.
  24. According to art. 87 of the by-laws, the principal task of these committees is to contribute to the legislative activity of the Assembly.
  25. *Idem*, art. 91.
  26. *Idem*, art. 75.
  27. *Idem*, art. 80.4

The Committee is tasked with examining bills, draft laws, proposals and questions concerning:

- Public freedoms and human rights;
- General amnesty and transitional justice;
- Religious matters;
- Civil society and the media;
- Foreign relations and international cooperation.<sup>28</sup>

The Committee on Rights, Freedoms and Foreign Relations is tasked with examining bills before they are presented at a plenary session of the ARP. The committee thus examines numerous bills concerning foreign relations, such as organic bill no. 31-2015 on approval of the framework agreement on commercial and economic cooperation between the government of the Tunisian Republic and the South American common market (Mercosur).<sup>29</sup> In the area of rights and freedoms, the committee examined organic bill no. 60-2016 on the elimination of violence against women, tabled on 27 July 2016 and passed on 26 July 2017, and organic bill no. 42-2016 on the Human Rights Instance, tabled on 17 June 2016.<sup>30</sup> Concerning the latter bill, in June 2017 the Committee organised a seminar for its members with the objective of clarifying and discussing the role and responsibilities of such a body, and the content of the bill.

Finally, it is important to note that Tunisia has granted full constitutional status to the political opposition within the ARP, and has guaranteed it rights to ensure that it is a genuine political actor. Thus, article 60 of the Constitution holds that the opposition is an essential component of the Assembly of the Representatives of the People and enjoys rights enabling it to undertake the duties necessary for it to carry out its representative role. The presence of the opposition, and its constitutionally recognised rights, ensure that its voice is heard and its opinion taken into account when laws are being drafted and in particular discussed. This applies not only to legal considerations, such as the constitutionality of laws, but also and above all to the issue of political appropriateness.

### 2.1.2 Accomplishments of the ARP

The ARP has achieved a great deal since taking up its duties. In the area of human rights, it has passed major organic laws required to consolidate the national human rights system. This work has been accompanied by occasionally turbulent discussion and debate. Here we will briefly outline these important laws, before returning to them later in this first section.

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28. See information on the website of the Marsad Observatory and the section concerning Majles, i.e. the ARP. <https://majles.marsad.tn/2014/fr/assemblee/commissions/54e3118312bdaa29f8df503a> (retrieved 12 September 2017).

29. *Idem.*

30. *Idem.*

Firstly, the ARP passed organic laws on the Constitutional Court<sup>31</sup> and the Supreme Judicial Council (Conseil supérieur de la Magistrature, CSM).<sup>32</sup> These two laws were closely linked, since the CSM needed to be in place to appoint four of the 12 members of the Constitutional Court.

The ARP later approved two substantive laws, one on reforming the Code of Criminal Procedure in 2016<sup>33</sup>, and the other on violence against women in 2017.<sup>34</sup>

Pursuant to Title VI of the Constitution on independent constitutional bodies, the ARP has sought to establish a common framework for these bodies and to pass organic laws for their creation. Thus in 2017, the ARP established the Good Governance and Anti-Corruption Instance.<sup>35</sup> This Instance was created prior to the adoption of the organic law establishing the common framework for independent constitutional bodies, which has led to a degree of confusion.<sup>36</sup> The common framework for these bodies<sup>37</sup> was passed by the Assembly of the Representatives of the People on 5 July 2017, then examined by the Provisional Instance to Review the Constitutionality of Draft Laws (IPCCPL) which announced its decision on 8 August 2017. At the time of writing (October 2017), the ARP has not yet re-examined the planned framework in light of the IPCCPL's decision. Finally, organic bill no. 42-2016 on the Human Rights Instance (IDH) was submitted by the Tunisian Government to the Assembly of the Representatives of the People on 17 June 2016. This bill has not yet been examined by the specialist committees within the ARP.<sup>38</sup>

## BOX - 2

An organic law is the constitutive act or enabling statute of bodies and instances. The organic law helps define the mandate and powers of these bodies and instances, such as the Constitutional Court or the Good Governance and Anti-Corruption Instance, and can also include procedural aspects.

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31. Organic law no. 2015-50 of 3 December 2015 on the Constitutional Court, JORT no. 98, 8 December 2015, p. 2926 (official version in French). See section 2.2 below on the Constitutional Court.
  32. Organic law no. 2016-34 of 28 April 2016 on the Supreme Judicial Council, JORT no. 35, 29 April 2016, p. 1395 (official version in French for information purposes).
  33. Organic law no. 2016-5 of 16 February 2016, amending and supplementing certain provisions of the Code of Criminal Procedure, JORT no. 15, 19 February 2016, p. 487 (official version in French for information purposes).
  34. Organic law no. 2017-58 of 11 August 2017 on the elimination of violence against women, JORT no. 65, 15 August 2017, p. 2586 (version *in Arabic*, the official version in French has not yet been published. However, a translation by DCAF is available at: [www.legislation-secure.tn](http://www.legislation-secure.tn).)
  35. Organic law no. 2017-59 of 24 August 2017 on the Good Governance and Anti-Corruption Instance, JORT no. 61, 1 August 2017, p. 2475 (Arabic version. As of 24 September, the official French version has not yet been published). See 2.4.6 below on the Good Governance and Anti-Corruption Instance.
  36. See 2.4.6 below on the Good Governance and Anti-Corruption Instance.
  37. Organic bill no. 30-2016 on the common provisions for constitutional bodies. See 2.4.1 below on the general normative framework for independent constitutional bodies.
  38. See 2.4.2 below on the Human Rights Instance.

## 2.2 The Constitutional Court

The Constitutional Court plays a fundamental role in the protection of rights and freedoms. Rights and freedoms are not only threatened by the actions of the executive. They may also be threatened by the representatives of the people, who constitute the legislature. It has long been held that the law is able to achieve a balance between the necessary authority of an enlightened power and the promotion of freedom, by placing trust in the legislature as the interpreter of the will of the people.<sup>39</sup> However, parliaments in the past have passed laws prejudicial to rights and freedoms, even when these were guaranteed by the Constitution. In response, judicial scrutiny of the constitutionality of laws was introduced and then spread in the second half of the twentieth century, helping to mitigate this tendency of the representatives of the people to ignore the constitution. In every country the establishment of constitutional justice, and the resulting restriction of parliamentary sovereignty, are not achieved without difficulty, in particular due to fierce political resistance.

The initial text of the Constitution of 1 June 1959 made no provision at all for reviewing the constitutionality of laws in Tunisia, merely recognising that “The President of the Republic is the guarantor... of respect of the Constitution” (art. 41). However, beginning in 1987, two key events have indicated increased scrutiny of constitutionality. Firstly, while the ordinary courts (first-instance and appeal) recognised their jurisdiction over this matter, the Court of Cassation handed down, in record time, a judgment prohibiting the ordinary courts from ruling on the issue.<sup>40</sup> Secondly, by decree of the President of the Republic, a Constitutional Council was established in a consultative role, providing an opinion on the constitutionality of bills at the President’s request. This advisory role was the subject of a 1992 law and then constitutionalised in 1995.<sup>41</sup> Under the amendments of 1995 and 2002,<sup>42</sup> Chapter IX of the Tunisian Constitution of 1959 was devoted to the Constitutional Council, which from then on was required to report to the President of the Republic on the constitutionality of a wide range of bills.<sup>43</sup> This change did not make the Constitutional Council a genuine court, since it only reviewed the constitutionality of bills and not the constitutionality of laws passed by the Tunisian parliament.

39. On this subject, see J. Krynen, *L’État de justice. France, XIIIème, XXème siècle, tome II, L’emprise contemporaine du juge*, Paris, Gallimard, 2012, in particular chapter VII on the emergence of constitutional justice.

40. The first-instance decision was handed down by the Kairouan Court of First Instance on 24 December 1987, recognising the competence of the court to review the constitutionality of laws. This decision was upheld by the Sousse Court of Appeal on 11 April 1988. However, in decision no. 2797 of 1 June 1988, the Court of Cassation quashed the decision of the Court of Appeal, ruling that the judiciary should limit itself to applying the laws, without being responsible for examining their constitutionality. This decision was upheld a few weeks later by the same court (Court of Cassation, decision of 23 June 1988).

41. Constitutional law no. 95-90 of 6 November 1995.

42. Constitutional law no. 2002-51 of 1 June 2002, ratified by the referendum of 26 May 2002.

43. According to article 72 of the Constitution of 1 June 1959: “It is mandatory to submit to the Council bills for organic laws, bills specified in article 47 of the Constitution, and bills regarding the general methods of application of the Constitution, nationality, personal status, obligations, definition of crimes and misdemeanours and the applicable sentences, procedures before the different orders of courts, amnesty, and the basic principles of the system of ownership and real rights, education, public health, labour law and social security...”. It was also mandatory to submit to the Council treaties concerning the Arab Maghreb Union. The Council ruled on appeals concerning elections and the regularity of referenda. Similarly, the Constitutional Council was required to certify the definitive vacancy of the Presidency of the Republic (Constitution of 1 June 1959, Art. 57.)

In Tunisia, following the events of 2011, the Constitutional Council was dissolved, as were the two chambers of parliament.<sup>44</sup> Three years later, the new Constitution established a Constitutional Court<sup>45</sup> and entrusted the legislature with the task of passing a law on its organisation. Organic bill no. 48-2015 on the Constitutional Court was submitted to the ARP by the Ministry for Justice, Human Rights and Transitional Justice on 7 July 2015.<sup>46</sup> Organic law no. 2015-50 of 3 December 2015 on the Constitutional Court was passed by the ARP.<sup>47</sup>

As of October 2017, the Constitutional Court is still not in place.

The drafters of the constitution were aware that the establishment of the Constitutional Court would take time. They were also aware of the considerable number of laws that needed to be passed to apply the Constitution, including the electoral law, the law on the Supreme Judicial Council, and the law on the Constitutional Court itself, just to mention the laws directly affecting rights and freedoms. In the temporary provisions of the Constitution, they therefore provided for the creation of a Provisional Instance to Review the Constitutionality of Draft Laws (IPCCPL).<sup>48</sup> This body, established in 2014,<sup>49</sup> consists of six members.<sup>50</sup> Its role has remained limited for various reasons. Its members are not appointed on a full-time basis<sup>51</sup> and continue to carry out their other duties after being appointed to the body.<sup>52</sup> Further, a bill can only be referred to this body by the President of the Republic or by 30 deputies<sup>53</sup>: while this is not an especially large number (30 out of the 217 members of the ARP), it has often been difficult to obtain such a quorum. In a great many cases, laws have been promulgated and published without being referred to the IPCCPL. Further, the IPCCPL only rules on bills and does not examine the constitutionality of laws already in effect.<sup>54</sup>

However, the IPCCPL has handed down some important decisions and will leave a body of precedent that may be of use to the future Constitutional Court.<sup>55</sup> Examples in this area include decisions relating to:

- organic law no. 2014-16 of 26 May 2014 on elections and referenda<sup>56</sup>;

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44. This dissolution occurred pursuant to article 2 of decree-law no. 2011-14 of 23 March 2011.

45. Constitution, Part II of Title V on the judiciary is devoted to the Constitutional Court.

46. See 2.4.6 below on the Good Governance and Anti-Corruption Instance.

47. JORT no. 98, 8 December 2015, p. 2926 (official version in French). This law has not been appealed at the ICCPL (October 2017).

48. Constitution, art. 148 (7).

49. Law no. 2014-14 of 18 April 2014, JORT no. 32, 24 April 2014.

50. *Idem*, art. 4: the first presiding judge of the Court of Cassation, the first presiding judge of the Administrative Court and the first presiding judge of the Revenue Court, and three other members appointed respectively by the Speaker of the National Constituent Assembly, the head of state and the head of the government from among the jurists.

51. Law no. 2014-14, art. 16.

52. *Idem*, art. 5.

53. Law no. 2014-14, art. 18.

54. *Idem*, art. 3.

55. The IPCCPL handed down 9 decisions in 2014, 4 decisions in 2015, 7 decisions in 2016 and, as of 24 September 2017, 7 decisions in 2017.

56. This law, passed by the ARP on 1 May 2014, resulted in four decisions on 19 May 2014. The appeals were in relation to male/female parity, the delineation of electoral constituencies, electoral litigation and the financial guarantee required from candidates for presidency of the Republic. Further, article 6 of this law prohibits the police and military from voting. This appeal led to the case being referred to the President of the Republic, in a letter addressed to him by the IPCCPL on 20 May 2014, on the basis of the final paragraph of article 23 of law no. 2014-14 which states that "if the deadline provided in article 21 (ten days, extendable once by one week) expires without the authority rendering its decision, it must immediately refer the bill to the President of the Republic". The law was promulgated on 26 May 2014.



- the law on the Supreme Judicial Council <sup>57</sup> ;
- organic law no. 2017-59 of 24 August 2017 on the Good Governance and Anti-Corruption Instance <sup>58</sup> ;
- Organic bill no. 30-2016 on the common provisions for constitutional bodies <sup>59</sup>.

## 2.2.1 Composition of the Constitutional Court

The Constitution and Law no. 2015-50 define the Constitutional Court as an independent judicial authority whose decisions and opinions are binding on all the powers.<sup>60</sup> The 2014 Constitution specified the nature of the Constitutional Court, its composition and the appointment of its members,<sup>61</sup> its mandate and the referral of cases, deadlines and procedures, and the limits of its intervention.<sup>62</sup> Article 124 of the Constitution refers to an organic law regulating the organisation of the Court, the procedures it should follow, and the guarantees enjoyed by its members. It was under this article that law no. 2015-50 of 3 December 2015 on the Constitutional Court was adopted.

The Court consists of 12 members, who function as judges once nominated; they serve a 9-year, non-renewable term.<sup>63</sup>

The members of the Constitutional Court are appointed by three separate authorities, representing the legislative, executive and judicial branches of the state.<sup>64</sup> The 12 members of the Constitutional Court, three quarters of whom must be legal specialists, are therefore appointed as follows:

- The ARP elects 4 members (3 of whom must be legal experts) by a two-thirds majority from the 4 nominees presented by each faction or group of deputies (not belonging to the factions);
- The Supreme Judicial Council (CSM) elects 4 members (3 of whom must be legal experts) by a two-thirds majority from the 4 nominees presented by each council constituting the CSM;

57. IPCCPL, decision no.1/2016 of 22 April 2016, (*in Arabic*) not published in the JORT. This decision reads as follows: "The Provisional Instance to Review the Constitutionality of Draft Laws has decided to refer to the President of the Republic the bill on the Supreme Judicial Council in the form approved by the Assembly of the Representatives of the People at its plenary session of 23 March 2016, due to the impossibility of obtaining the majority of votes required by the law of 18 April 2014 on the Provisional Instance to Review the Constitutionality of Draft Laws."

58. IPCCPL, decision no. 7/2017 of 8 August 2017 on the bill on the Good Governance and Anti-Corruption Instance, JORT no. 67 of 24 August 2017, p 2709 (*in Arabic*): conformity. See 2.4.6 below on the Good Governance and Anti-Corruption Instance.

59. IPCCPL, decision no. 4/2017 of 8 August 2017 on the bill implementing common provisions for independent constitutional bodies, JORT no. 65, 15 August 2017, p. 2579 (*in Arabic*): non-conformity. See 2.4.1 below on the common normative framework for independent constitutional bodies.

60. Constitution, art. 118, and law no. 2015-50, art. 5 para. 4.

61. *Idem*, art. 118, and law no. 2015-50, art. 18. To ensure continuity in the Court's work, one third of its members are renewed every three years, taking into account the relevant areas of specialisation.

62. *Idem*, art. 118 to 124.

63. Constitution, art. 118, and law no. 2015-50, art. 18. To ensure continuity in the Court's work, one third of its members are renewed every three years, taking into account the relevant areas of specialisation.

64. Article 10 of Law no. 2015-50 provides that "the members of the Constitutional Court are appointed respectively by the Assembly of the Representatives of the People, the Supreme Judicial Council and the President of the Republic..."

- The President of the Republic appoints 4 members, 3 of whom must be legal experts.<sup>65</sup>

This appointment method helps to ensure the Court's independence, since the recruitment of its members is not in the hands of only one branch of the state. The members of the Court must also be "competent, independent, neutral and honest".<sup>66</sup>

As far as the independence and neutrality of the judges of the Constitutional Court are concerned, the Constitution guarantees the independence of the Court as a whole and also provides that: "Combining membership in the Constitutional Court with any other function or task is prohibited".<sup>67</sup> This not only ensures that the judges work at the Court full-time, which is a precondition for their work to be effective, but also helps to avoid conflicts of interest that might affect the neutrality of the judges and the independence of the Court.

As far as the criteria for selecting candidates are concerned, article 118 of the Constitution only specifies the requirements of competence and experience (20 years). Law no. 2015-50 also emphasises the competence of the members of the Court (experience and qualifications)<sup>68</sup> and adds an age-related criterion (members must be at least 45 years old), which appears compatible with the requirement in the Constitution for them to have 20 years of experience.

It should be noted that article 8 of law no. 2015-50 particularly emphasises the fact that judges must be independent from political parties. It states that members of the Court must not have "taken on any responsibility within a political party, whether at the national, regional or local level, nor have been the candidate for a party or coalition for legislative, presidential or local elections within the ten years preceding their appointment to the Court". This condition, unique to Tunisia, is nonetheless justified in a country that has no tradition of scrutinising the parliament that represents the sovereign people and is therefore supposed to express its will, and also a country that is still undergoing democratic transition. As the Constitutional Court is required to review bills, i.e. laws being adopted by a political majority still in power, the existence of judges from political parties may compromise their neutrality. Additionally, and most importantly, even if the judges show wisdom and restraint in terms of their political affinities when assessing the bills submitted to them, the fact that they belong to political parties may undermine their authority and the public's trust in the institution as a whole as a reliable actor for guaranteeing and protecting people's rights and freedoms.

Further, article 10 of law no. 2015-50 points to the criterion of male-female parity enshrined in article 46 of the Constitution.<sup>69</sup>

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65. Constitution, art. 118, and law no. 2015-50, art. 11.

66. Law no. 2015-50, art. 8.

67. Constitution, art. 119.

68. Law no. 2015-50, art. 8: "the member of the Constitutional Court must - Have had Tunisian nationality for at least the preceding 5 years - Be at least 45 years old - Have at least 20 years of experience."

Art. 9 adds the following requirements for the members who are legal experts: " - Academic teacher-researchers with at least 20 years experience and the rank of professor of higher education - Top-level judge with at least 20 years experience - Lawyer at the bar for at least 20 years, listed on the bar roll at the Court of Cassation - At least 20 years experience in the legal field, and holding a doctorate. - The non-legal expert members must hold a doctorate or equivalent."

69. 2014 Constitution, art. 46: "The state works to attain parity between women and men in elected Assemblies".

Finally, while the Constitution makes no reference to this, law no. 2015-50 provides safeguards by granting the members immunity during the exercise of their duties.<sup>70</sup> Note that law no. 2015-50 grants the presiding judge of the Constitutional Court the pay and benefits of a minister, while the members receive benefits equivalent to those of a secretary of state. A member of the Court may only be dismissed when the member no longer meets one of the requirements to be a candidate for the Constitutional Court and this has been declared by a two-thirds majority of members.

### 2.2.2 Competence of the Constitutional Court

The Constitutional Court is firstly the guarantor of the supremacy of the Constitution. This is set out in article 102 of the Constitution, which declares that the judiciary, of which the Constitutional Court is an integral part, “is an independent power that ensures (...) the supremacy of the Constitution and (...) the protection of rights and freedoms.” This role is also set out in organic law 2015-50, the first article of which states that “the Court is an independent legal authority. It ensures the supremacy of the Constitution and protects (...) rights and freedoms.”

#### BOX - 3

Article 118 of the Constitution and law no. 2015-50 recognise 4 areas of competence:

- Reviewing the constitutionality of bills (laws, treaties and constitutional laws): bills are referred to the Court by the President of the Republic or thirty deputies (art. 45 and following), bills for constitutional laws are referred by the Speaker of the ARP (art. 40) and treaties are referred by the President of the Republic (art. 43);
- Reviewing the constitutionality of laws by way of exception: laws whose constitutionality is in question are referred by the courts for a preliminary question procedure at the request of the parties, by a lawyer at the Court of Cassation (art. 54 and following);
- Dismissal of the President of the Republic (art. 65 to 68) and official declaration of the vacancy of this office (art. 69 and 70),
- Settling conflicts of jurisdiction between the President of the Republic and the head of government (art. 74 to 76).

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70. Law no. 2015-50, art. 22.

The Court reviews draft constitutional laws, i.e. bills for an amendment to the constitution. This review process is vital to the protection of human rights, since article 49 of the Constitution holds, in its final paragraph, that “no amendment may undermine the human rights and freedoms guaranteed in this Constitution.” This represents an enshrinement of the principle of non-retrogression for rights and freedoms. The function of the Constitutional Court is to supervise parliament to prevent it from contravening this principle in exercising its legislative power or its derived constituent power when amending the Constitution. Not only does the Constitution require a special procedure for its amendment, distinct from the procedure for ordinary laws; it also protects a number of issues against the intentions of political actors, even when they have an enhanced majority.<sup>71</sup> The protection of rights and freedoms is one of these areas of “immunity”.

### 2.2.2.1 Review of bills, or a priori review

This refers to the Court's review of bills approved by parliament but not yet promulgated by the President of the Republic, and therefore not yet in force. To this effect, it is competent under article 120 of the Constitution<sup>72</sup> to examine appeals against bills submitted to it by the head of state, the head of government, or thirty deputies.

The important role of parliament in organising the exercise of rights and freedoms – in particular their limitation where appropriate as provided by article 49 of the Constitution – means that its intervention must be subject to an a priori review, in order to prevent laws that infringe on these rights and freedoms from being introduced into the legal order

### 2.2.2.2 Review of existing laws, or a posteriori review

The establishment of a priori review of the constitutionality of laws, i.e. before their promulgation and entry into force, is not sufficient to prevent the legislature from infringing on rights and freedoms. Firstly, only political bodies may submit laws to the Court for review, and they may choose not to do so for reasons of political opportunity, or find themselves unable to do so, when the opposition is not numerically large enough to trigger this submission, since the above-mentioned article 120 of the Constitution requires at least thirty deputies for bills to be submitted to the Court.

Finally, the unconstitutionality of a law, and in particular the way it may infringe on rights and freedoms, can sometimes be difficult to determine when examining the law in the abstract, and the prejudice it may cause to rights and freedoms may only become evident when the law enters into force and begins to have an effect.

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71. Under article 144 of the Constitution, a constitutional law for amendment to the Constitution can only be adopted by a majority of two-thirds of the members of the Assembly of the Representatives of the People.

72. Constitution, art. 120, first paragraph.

For these reasons, the only way to ensure that the Constitutional Court can effectively intervene to protect rights and freedoms is if it is able to review laws after they have entered into force, and in particular if the parties concerned, i.e. the persons whose rights and freedoms are infringed on by a law, are themselves able to refer a law, in contrast to the a priori review of bills, which can only be requested by political bodies. In view of this, article 20 of the Constitution also provides for appeals by individuals during legal proceedings to which they are a party and during which they may invoke a claim of unconstitutionality against the law to be applied.<sup>73</sup> The procedure for implementing a claim of unconstitutionality is set out in the law on the Court.<sup>74</sup>

The conditions and procedure for such appeals offer numerous opportunities for individuals to defend their rights and freedoms against the political power embodied by the parties represented in parliament and which therefore create the laws. Thus a claim of unconstitutionality can be invoked in any court, whether ordinary (civil, criminal or social) or administrative, first- or second-degree, by any person who is a party to the litigation in which the claim is invoked. In addition, the court where the claim of unconstitutionality is invoked is obliged to immediately refer it to the Constitutional Court so that it can examine it, and the referral decision cannot be appealed.<sup>75</sup> This means that the judge for the trial in which the claim of non-constitutionality is raised has no power to assess the validity of the claim, and therefore is unable to become an obstacle or act as a brake on the appeal process to the detriment of the complainant seeking the protection of the Constitutional Court.

This type of control in protecting rights and freedoms is effective because the decision on the unconstitutionality of the law challenged by a plea has an erga omnes effect, i.e. it is enforceable against all, not just the parties to the proceedings.<sup>76</sup> In addition, law no. 2015-50 states that the Constitutional Court must report its decision not only to the court where the claim of unconstitutionality was invoked, but also to the President of the Republic, the head of government, and the Speaker of the Assembly of the Representatives of the People. Informing the trial court of the decision on the unconstitutionality of the law being challenged is vital, since this court must decide the outcome of the trial on the basis of the Constitutional Court's decision. However, informing the other three political actors is important, because they are also the three authorities with legislative initiative, who must therefore draw conclusions from the Constitutional Court's decision to expel from the legal order a law that it has declared unconstitutional. Informing them of this decision amounts to urging them to create another law, which this time must meet the requirements of the constitution.

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73. Constitution, art. 120 (4): the Court is competent to oversee "laws referred to it by courts as a result of a request filed by a court, in the case of the invocation of a claim of unconstitutionality by one of the parties in litigation, in accordance with the procedures established by law".

74. Law no. 2015-50, section IV, articles 54 to 61.

75. *Idem*, art. 56.

76. Law no. 2015-50, art. 60.

### 2.2.2.3 Current shortcomings of the law

The mandate of the Constitutional Court as defined in the Constitution is comparable to the mandate of the constitutional courts of major democracies. It does not suffer from the inadequacies in vetting constitutionality that existed from 1987 to 2017 in Tunisia. However, certain shortcomings can still be observed.

Firstly, the only laws that are automatically referred to the Court for review are constitutional laws and the by-laws of the ARP. All other laws (bills for ordinary or organic laws, international treaties) must be submitted for review by the President of the Republic or 30 deputies. As we have seen, the IPCCPL's experience between 2014 and 2017 has demonstrated that it is often difficult to gather the 30 signatures from deputies. It is therefore regrettable that there is no obligation for all bills for organic laws, or any bill affecting human rights, to be referred for review. This obligation existed under the 1959 Constitution, following its amendments in 1995 and 2002.

Further, the Constitutional Court rules on the constitutionality of laws already in effect only through preliminary question procedures. Appeals are prepared by lawyers at the Court of Cassation and referred by the ordinary courts prior to ruling on the substance of the law. Thus, a choice was made not to offer individuals the possibility of asking the ordinary (and administrative) courts or the constitutional court to rule directly on questions of constitutionality. While this solution reduces the number of appeals, it also deprives citizens of a means of directly defending their rights.

Finally, the absence of any automatic referral to the Court is regrettable. When drawing up its annual report to be submitted to the President of the Republic, the head of government and the Speaker of the ARP, the Court could include these recommendations to improve how it functions and how it reviews the constitutionality of laws and bills.

In conclusion, the Constitutional Court is the body that determines, in the last resort, the meaning of the constitution and, thereby, the substance and scope of rights and freedoms, the responsibility of the authorities in protecting them, and the limits that must be adhered to when they provide for the exercise or limitation of these rights and freedoms. The Constitutional Court thus plays a vital role in the national human rights system, which may explain the slow and cautious approach that seems to have characterised the implementation of the Court in the past two years. As of the publication of this study, the Constitutional Court has not yet been established and its members have not been appointed.

## 2.3 The justice institutions

The Constitution proclaims the judiciary, as a whole and in its constituent parts, to be the guarantor and protector of rights and freedoms. Thus, article 49 brings the section on rights and freedoms to a close by declaring that “judicial authorities ensure that rights and freedoms are protected from all violations.” Article 102, which begins the section on the general and common principles for the entire judicial organisation,<sup>77</sup> declares in its first paragraph that “the judiciary is independent. It ensures the administration of justice, the supremacy of the Constitution, the sovereignty of the law, and the protection of rights and freedoms.”

In Tunisia, the judiciary itself is a multifaceted actor. The Tunisian justice system is based on a duality of judicial orders, with an ordinary (civil, criminal and social) branch and an administrative branch, each independent from the other. This structure is designed to enable disagreements as to how the question of rights and freedoms is apprehended. While there is no specific mechanism to harmonise the positions of the ordinary courts and the administrative courts on questions relating to rights and freedoms, the Constitutional Court is likely to fulfil this role once established.<sup>78</sup>

In this section we examine, in turn, the role of the courts and tribunals within the ordinary and administrative branches of the justice system.

### 2.3.1 The ordinary justice system

International<sup>79</sup> and national<sup>80</sup> human rights norms set out the principles of equality before the law, the presumption of innocence and the right to a fair trial and public hearing by a competent, independent and impartial court. Thus the organs of the judiciary are both the guarantors and the subjects of human rights.

The independence of the courts and other legal actors makes it possible to assess the extent to which a state respects human rights and gives individuals the opportunity to exercise their rights. The ordinary justice institutions thus have an essential role to play in ensuring that guilty parties are made to answer for their actions, in tackling impunity, and in enabling remedy for the victims of human rights abuses. The ordinary courts are thus traditionally perceived as the natural guardian of individual freedoms, not only in relation to the right of property, but also against arrests, arbitrary detention or physical violence.

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77. Constitution, art. 102 to 105.

78. See 2.2 above on the Constitutional Court.

79. Universal Declaration of Human Rights (1948) and International Covenant on Civil and Political Rights (1966).

80. Constitution, preamble, Title II – Rights and Freedoms (art. 21 on equality before the law, art. 27 on the principle of innocence) and Title V – The Judicial Authority, first part –The Ordinary, Administrative and Financial Justice System (art. 108 on fair trials and access to justice).

It is difficult to give an overview of all the decisions handed down by the ordinary courts with an impact on the respect and promotion of human rights.

However, some examples can be cited here to demonstrate that the courts within the ordinary branch (civil, criminal or social) can play a mixed role when it comes to protecting human rights, for example (1) by referring to international human rights instruments in their judgments, (2) by punishing criminal policing practices, but also (3) by ratifying laws that are problematic in relation to Tunisia's international commitments.

1. In a 2013 decision, the Tunis Court of Appeal affirmed that freedom of movement (in this case the freedom to travel) is guaranteed by article 10 of the Constitution of 1 June 1959, whose provisions on rights and freedoms remain in effect, because by virtue of their nature (1959 Constitution in effect in 2013) they could not be annulled. The Court added that this freedom is also guaranteed by article 12 of the 1966 International Covenant on Civil and Political Rights, which Tunisia acceded to under law no. 30 of 29 November 1968.<sup>81</sup>
2. In 2014, in a case that received widespread media coverage, the ordinary courts addressed the rape of a young woman by two policemen. The case was distinctive and of interest partly because rape is very rarely the subject of legal complaints or actions, paradoxically due to the frequent stigmatisation of the victims, and partly because of the involvement of policemen. In this case, two policemen out on patrol accosted a young woman in a vehicle with her fiancé. After threatening to take her to the station for indecency, they raped her; they also attempted to intimidate her fiancé and extort money from him under the same pretext. Following the complaint filed by the couple, in March 2014 the Court of First Instance in Tunis sentenced the two policemen to seven years' imprisonment.<sup>82</sup> This decision angered many civil society organisations and a large swathe of the population, who considered that the involvement of the police had softened the decision of the first-instance judge. The victim appealed and on 20 November 2014 the Tunis Court of Appeal sentenced the two policemen to 15 years' imprisonment.<sup>83</sup> The very fact that the victims stood firm and went to court to demand that the two criminals be sentenced, despite the fact that they were policemen, demonstrates firstly that the police are no longer feared as they were before, and secondly that the victims had sufficient confidence in the system to obtain justice.
3. In their recent annual reports, the international NGOs Amnesty International and Human Rights Watch reported on judgments from Tunisian ordinary courts sentencing men accused of having sexual relations with other men.<sup>84</sup> These judgments<sup>85</sup> continued to consider the forced anal examinations to which the accused were submitted as evidence to sentence them for sodomy under article 230 of the Penal Code, even

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81. Tunis Court of Appeal, decision of 5 February 2013, case no. 43429.

82. (Unreferenced decision, reported by Salsabil Klibi in her analysis.)

83. (Unreferenced decision, reported by Salsabil Klibi in her analysis.)

84. See the Amnesty International report on Tunisia, 2016-2017, published at [www.amnesty.org](http://www.amnesty.org) and the Tunisia summary published on the Human Rights Watch website ([www.hrw.org](http://www.hrw.org)), dated January 2017.

85. The annual Amnesty International report cites, among others, a December 2015 judgment from the Court of First Instance in Kairouan and a March 2016 decision from the Sousse Court of Appeal (unreferenced).



though the Committee Against Torture condemned the use of such examinations in its latest report on Tunisia.<sup>86</sup>

The ordinary courts are not the only courts for addressing rights and freedoms. The administrative courts also play an important role in this area.

## 2.3.2 The administrative justice system

Tunisia has opted for a dual court system where administrative matters are handled by separate courts from those dealing with individuals.<sup>87</sup> As with administrative branches of the justice system in other countries,<sup>88</sup> the case law of the Tunisian administrative tribunal has gradually gained a reputation as a guardian of legality, or even constitutionality.<sup>89</sup> The tribunal has thus established itself as the guarantor of rights and freedoms in dealing with abuses by the executive.

The “abuse of power” appeal is the defining tool of administrative litigation: it enables the annulment of administrative decisions that infringe on rights and freedoms that are constitutionally and/or legally enshrined, and therefore guaranteed.

### 2.3.2.1 Abuse of power appeals

Changes in Tunisian administrative law concerning abuse of power appeals<sup>90</sup> have led to all elements of the executive being subject to supervision by the administrative court.<sup>91</sup> Further, a 1996 reform made it possible for decisions in abuse of power appeals

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86. United Nations Committee Against Torture, Final Observations on the third periodic report from Tunisia, CAT/C/TUN/CO/3, June 2016, para. 41 and 42.

87. Today, the organisation of the administrative justice system is primarily provided by the Constitution, in particular its article 116. Previously it functioned on the basis of the law of 1 June 1972, as amended, in particular by laws no. 38 and 39 of 3 June 1996 and law no. 79 of 24 July 2001.

88. For example in France, Belgium, Greece, Sweden, Algeria or Egypt.

89. Prior to 2011, the subjects of the judgments handed down by the administrative courts included freedom of movement (e.g. decision of the Administrative Tribunal in 1986 (not accessible, but reported by Salsabil Klibi in her analysis) annulling a decree establishing a competitive examination for the position of university lecturer that required admitted candidates to reside in their place of employment, which constituted a violation of the freedom of movement guaranteed by article 10 of the Constitution of 1 June 1959) and religious freedom (decision of the Administrative Tribunal of 25 June 2002, no. 10976/1, annulling a decision by the Minister of Education and Professional Training in which a female teacher was dismissed for wearing a hijab, on the grounds that circular no. 102 of 1986, banning public sector employees from wearing hijabs, violated article 5 of the 1959 Constitution guaranteeing religious freedom). After 2011, a decision handed down by the Administrative Tribunal on 15 December 2013 (unreferenced decision, reported by Salsabil Klibi in her analysis) annulled a decision by the Minister of Defence dismissing a soldier after he was referred to the Disciplinary Council for sympathising with the Salafist movement. The administrative court annulled the decision to dismiss the soldier, finding that the administration had been unable to provide any evidence to justify its disciplinary decision or the subsequent dismissal.

90. The Administrative Tribunal law of 1 June 1972 establishes the procedure for abuse of power appeals (new art. 17 and new art. 19).

91. The reform introduced by organic law no. 2002-98 of 25 November 2002 made it possible to challenge the actions of the President of the Republic, in particular regulatory decrees, via an abuse of power appeal.

to be appealed in a higher court.<sup>92</sup> The administrative courts also provided an extensive interpretation of standing in abuse of power appeals.<sup>93</sup>

However, despite these reforms, which helped widen the competence of the administrative courts in supervising the executive and thereby protect rights and freedoms against its excesses, abuse of power appeals are still only relatively effective. When such an appeal is brought before the administrative courts, this does not suspend the execution of the decision infringing on rights and freedoms. Given the average time taken to process cases up to delivery of judgment, the annulment of a decision can end up serving no purpose relative to the effects that may have been generated, in particular since the annulment has no retroactive effect.

For this reason, a stay of execution has been introduced, for which the decision lies with the first presiding judge of the Administrative Tribunal. The Tunisian administrative courts, acting via the first presiding judge of the Administrative Tribunal, are therefore able, before making a judgment on the substance of appeals against administrative decisions considered by the complainants to infringe on their rights and freedoms, to suspend their execution if they consider that the abuse of power appeal is well-grounded and the effects of the execution of the decision may be irreversible.<sup>94</sup>

### 2.3.2.2 Limits on the action of the administrative justice system: decentralisation

The revision of the Administrative Tribunal law of 1 June 1972 provided, pursuant to law no. 2001-79 of 24 July 2001, for the possibility of creating first-instance courts, falling under the Administrative Tribunal at the regional level.<sup>95</sup> This decentralisation of administrative justice is now enshrined in the Constitution, thereby formally completing the administrative branch of the justice system.<sup>96</sup>

However, no appeal court or first-instance court has yet been created in the regions. This means that the administrative justice system is still centralised and essentially amounts to the administrative tribunal located in the capital. This situation has a double impact on the effectiveness of the administrative courts in protecting rights and freedoms. Firstly, it causes congestion in the administrative tribunal,<sup>97</sup> leading to delays in processing appeals and dispensing justice. This sluggishness of the administrative justice system can sometimes render the court's decision entirely useless to the complainant due to

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92. Art. 17 (new) and 19 (new) of the law of 1 June 1972, as amended under the organic law of 3 June 1996.

93. Decision of the Administrative Tribunal of 14 May 2013 (Unreferenced, but reported by Salsabil Klubi in her analysis) regarding a stay of execution on the decision to extend the application deadlines at the Independent High Electoral Instance.

94. Law no. 72-40 of 1 June 1972, new art. 39.

95. Art. 15, paragraph 3 of the Administrative Tribunal Law of 1 June 1972 as amended by law no. 2001-79 of 24 July 2001.

96. Constitution, art. 116, paragraph 1.

97. According to a statement by the judge Imed Ghabri to the Tunisian newspaper *Le Maghreb* on 6 October 2016, the number of cases brought before the administrative tribunal increased from 5,000 in 2011 to more than 11,000 in 2016, while the number of judges only rose from 120 to 160 over the same period.

the irreversibility of the prejudice suffered or the impossibility of making up for a loss of income. Further, the distance of the administrative tribunal from the complainant's place of residence can disadvantage the latter, or even prohibit them from taking legal action due to the extra cost of travelling to and sometimes even staying in the capital.

These two factors mean that the potential of the administrative courts as the protector of rights and liberties can only be fully realised once institutional reform has been completed. However, it should be recognised that such reform will take time and that significant financial and human resources are required for the correct administration of justice. To guarantee rights and freedoms effectively, it is necessary for the courts tasked with supervising them be given adequate human and material resources.

### 2.3.2.3 Limits on the action of the administrative justice system: non-enforcement of administrative court decisions

The issue of the non-enforcement of legal decisions is particularly acute when it comes to those of the administrative tribunal. These decisions usually annul an administrative decision, or order a legal entity governed by public law to compensate for injury caused to others. There are no statistics on the number of unenforced administrative court decisions. This is because, once it has handed down its decision, the administrative tribunal does not provide any support to the complainant benefiting from the decision and thus loses track of them. However, we do know that a large number of decisions are not enforced, in particular those connected to the reinstatement of public sector employees who were unlawfully dismissed.<sup>98</sup>

While the Constitution prohibits any attempt to impede the execution of a court decision,<sup>99</sup> it does not specify any precise penalty for such an action, which in any case does not constitute an offence. In view of the failure to enforce the decisions of the administrative courts in particular, article 10 of the law of 1 June 1972 on the administrative tribunal defines the deliberate non-enforcement of decisions of the tribunal as a serious breach, for which the responsible administrative authority incurs liability. This qualification enables the complainant to appeal to the administrative tribunal to secure a sentence for the authority that refused to enforce the initial judgment. However, in reality, such appeals are entirely deprived of any usefulness or effectiveness. The resulting court decision raises the same problem in terms of its execution, since it is targeted at the administration. Further, such a decision does not strictly speaking constitute an injunction against the administration to execute the judgment.

Currently, the administrative justice system requires a complete overhaul of its organisation and functioning, at least in view of the elements present in the new Constitution, whether in relation to the status of the courts or the scope and limits of their power. A bill to overhaul

98. Unreferenced decisions, reported by Salsabil Klibi in her analysis.

99. Constitution, art. 111.

administrative litigation is currently being prepared, and has not yet been debated or adopted by the ARP. This bill must take into consideration new requirements to guarantee the rights and freedoms set out in the Constitution, in particular the requirements of the right to access justice and those of a fair trial. It must also take into consideration the new actors in the legal landscape, in particular the Constitutional Court, in reorganising the competence of the administrative courts.

## 2.4 Independent constitutional bodies

New independent constitutional bodies were enshrined in the 2014 Constitution. A draft framework law establishes their common institutional and organisational features. However, there are pronounced differences between these bodies both in terms of the powers granted to them and the level of their role in protecting and guaranteeing human rights. There are five such bodies: the Human Rights Instance (IDH), the Independent High Electoral Instance (ISIE), the Independent High Authority for Audiovisual Communication (HAICA), the Instance for Sustainable Development and the Rights of Future Generations, and the Good Governance and Anti-Corruption Instance. Only one of these has a mandate directly linked to ensuring respect for human rights; the other four carry out this task in an incidental manner due to their role, which intersects with the issue of human rights.

These independent constitutional bodies are complemented by other independent state bodies playing a role in the protection and promotion of human rights: the Authority for Personal Data Protection, the Truth and Dignity Commission (IVD), and the Authority for the Prevention of Torture (INPT).<sup>100</sup>

A number of these institutions came into being before 2011 with a different status and in a different context; this is the case, for example, of the Higher Committee on Human Rights and Fundamental Freedoms. Some of them, such as ISIE, HAICA and the other state bodies mentioned above, appeared or gained in status during the democratic transition, and in some cases were subsequently granted constitutional status. It is therefore important to understand that, depending on the body in question, these bodies are currently undergoing a period of more or less radical transition or even replacement.

These bodies form part of a new system of checks and balances. They represent an attempt to strengthen democracy and limit the power of the executive, which has been bloated since the 1950s. However, these bodies raise numerous problems when it comes to defining their legal nature or their position within the institutional landscape. If they constitute independent bodies located outside the umbrella of the executive, to whom are they accountable, and how?<sup>101</sup>

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100. See 2.4.7 below on the other independent state bodies.

101. Paul R. Verkul, "The purpose and limits of independent agencies", *Duke Law Journal*, Vol. 1988, pp. 257-280.

We will successively examine the general normative framework for independent constitutional bodies (2.4.1), the Human Rights Instance which will become Tunisia's national human rights institution (2.4.2) and the other constitutional and independent institutions (2.4.3 to 2.4.7) by examining the competence assigned to them and their links with the traditional branches of the state, in particular the legislature and the executive.

## **2.4.1 The general normative framework for the independent constitutional bodies**

The authorities had two options when establishing these bodies. They needed either to directly adopt a law providing for the organisation of each body, or to begin by passing an intermediate law, or “framework law”, to set out the general principles of their organisation and functioning, which would be common to all the bodies. The second option was chosen, and a draft framework law was therefore drawn up for this purpose. This choice was justified by the fact that there are numerous such bodies and it is necessary to subject them to a minimum degree of common regulation to ensure their independence, improve their visibility within an already complex institutional landscape, and most of all give them a common status, particularly in terms of procedures for responsibility and accountability.

### **2.4.1.1 The Constitution**

Title VI of the Constitution is devoted to independent constitutional bodies. It opens with an article applicable to all of them, article 125, which sets out the general principles on which these new institutions are based:

“The independent constitutional bodies act in support of democracy; and all institutions of the state must facilitate their work. These bodies shall enjoy a legal personality and financial and administrative independence. They are elected by the Assembly of the Representatives of the People by a qualified majority and submit an annual report to it, discussed for each independent constitutional body in a special plenary session of the Assembly. The law establishes the composition of these bodies, representation within them, the methods by which they are elected, their structure, and the procedures for insuring their accountability.”

The legitimacy of these bodies is exclusively drawn from the representatives of the people, since their members are elected by them via an enhanced majority. Their election by parliament contributes to their independence from the executive. This independence of bodies is reinforced by the recognition of their legal personality, which enables them to be full-blown legal actors. It is also reinforced by the recognition of their financial and

administrative autonomy, which enables them to self-organise and, most importantly, to have complete independence in determining their programmes and policies for action. They can only be held responsible before the Assembly of the Representatives of the People. Finally, their election by parliament requires an enhanced majority, which the Constitution does not define precisely. This provides a minimum safeguard against a single party or political force gaining a stranglehold over these bodies, since the enhanced majority usually requires the opposition to be involved in the decision to be made or the choice of individuals to be elected.

#### 2.4.1.2 The framework law on independent constitutional bodies

Bill no. 30-2016 on common provisions for independent constitutional bodies (instances constitutionnelles indépendantes, ICI) was submitted by the Tunisian government to the Assembly of the Representatives of the People, which debated and passed it in a plenary session on 5 July 2017. This bill was the subject of a claim of unconstitutionality, prepared and submitted by 30 deputies to the Provisional Instance to Review the Constitutionality of Draft Laws (IPCCPL).<sup>102</sup> The IPCCPL examined the bill and gave its decision declaring the unconstitutionality of article 33 of the law, which was referred to the ARP for re-examination.<sup>103</sup> At the time of writing (November 2017), the Assembly has not yet re-examined the bill in light of the IPCCPL's decision.

The bill forms part of the implementation of Title VI of the Constitution and details the rules on organisation and functioning, budgets and accounts, and the rules on accountability.

This bill was drawn up by a technical committee within the Ministry for Human Rights, and was presented to the public and consulted on by this Ministry from 2016 onwards.<sup>104</sup>

##### **(1) Rules on organisation and functioning**

Each body shall consist of a council and an administrative apparatus. Two sections of bill no. 30-2016 are therefore devoted to the organisation of the council and its administrative apparatus.

The Council: articles 6 to 11 of the bill define the principles governing the members of the body, who are the members elected by the ARP via a two-thirds majority, for a single and non-renewable 6-year term (art. 6). The members are appointed by presidential decree, and they swear an oath before the President of the Republic.

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102. The appeal was lodged with the IPCCPL on 12 July 2017. The IPCCPL announced its first decision concerning this appeal on 27 July 2017, JORT no. 61, 1 August 2017, p. 2475 (*in Arabic*). In this first decision, the IPCCPL simply decided to prolong its deliberations by a week.

103. IPCCPL, decision no. 4/2017 of 8 August 2017 on the bill on common provisions for independent constitutional bodies, JORT no. 65, 15 August 2017, p. 2579 (decision published only *in Arabic*).

104. Prior to its submission to the Council of Ministers. See 2.4.2.2 on the Human Rights Instance and 3.2.3 on the work accomplished by the Ministry, below.

At its first meeting, the Council, chaired by its oldest member and youngest member, elects its chair and deputy chair. In a desire for parity, the bill specifies that the chair and deputy chair must be of different genders. The chair and deputy chair carry out their duties on a full-time basis. They are strictly prohibited from holding a public office or carrying out a professional activity. Members from the public sector will be on secondment for the period of their term of office at the body (art. 7). Their fees and compensation will form the subject of a government decree (art. 8).

The members have a duty of integrity, honesty, and discretion, as well as an obligation to declare all their property and assets in advance, and their situation must not present any conflict of interest (art. 9). The members of the council are also granted immunity against criminal prosecution: members can only be prosecuted once the ARP has voted to lift their immunity via an absolute majority (art. 10).

In the event of a vacancy following a dismissal, withdrawal of confidence, death, incapacity or resignation, the body's council declares the vacancy and refers the matter to the ARP, which then elects a new member via an identical procedure to the initial one (art. 11). This provision, combined with article 33 of the bill, was judged to be unconstitutional by the IPCCPL in its decision of 8 August 2017 (see below).<sup>105</sup>

Finally, to replace vacant positions within the body, the bill proposes using the same procedure as for the initial selection. Certain civil society organisations<sup>106</sup> contend that, given the experience of replacing the members of certain bodies, in particular the Truth and Dignity Instance (IVD) since 2015 and more recently the Independent High Electoral Instance (ISIE) since 25 July 2017, in order to save time and avoid impeding or even preventing the functioning of the body, vacancies should be automatically filled by candidates previously selected during the initial procedure.

**The administrative apparatus:** articles 12 to 16 establish the principles governing the body's administrative apparatus. This apparatus is headed by a director, elected by the members of the body's council unanimously, or failing this by a two-thirds majority, and dismissed by the same process. They are governed by the same rules and principles as the members of the body's council. They act as the superior of the body's administrative officials. They attend the meetings and participate in the debates of the council but are not permitted to vote (art. 12 to 14).

The body's officials are also obliged to comply with the rules and principles governing public money (art. 16). The bill provides for the enactment of a general status for the officials of constitutional bodies, and for each body to be able to adopt a specific status for its officials based on its specific requirements (art. 15).

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105. See (3) below on the rules on the accountability of the bodies and claims of unconstitutionality.

106. See, for example, the recommendations of the NGO Solidar Tunisie in their 7 June 2017 newsletter, available at: [www.solidar-tunisie.org](http://www.solidar-tunisie.org).

In the claim of unconstitutionality submitted by deputies against this bill, one of the grounds concerned the unconstitutionality of the entire section on the administrative apparatus, and in particular the prerogatives of the director as the superior of the officials. Concerning the first ground, the IPCCPL responded by suggesting that article 125 of the Constitution refers to a law that establishes the rules of the organisation of the constitutional body and that consequently, the rules for its administrative functioning must be specified.<sup>107</sup> Concerning the director's prerogatives, the IPCCPL ruled that since the director is chosen and appointed by the body's council, and exercises his or her duties under its supervision, the prerogatives specified in the bill do not breach the Constitution.<sup>108</sup>

## **(2) Rules on budget, accounting and transparency**

Two sections of bill no. 30-2016 cover these rules (art. 17 to 28).

**Budget:** the bill states that the independent constitutional body prepares its own budget, which it then submits to the government by the legal deadline. In the event of disagreement between the body and the government over the budget, the ARP's special committee arbitrates between the two parties. The body's budget consists of allocations from the state budget, donations, legacies and unconditional subsidies. These resources must be included in the body's budget, which must be accompanied by its annual programme of activities (art. 17 to 20).

**Budgetary and accounting rules:** the bill provides for a degree of flexibility with regard to accounting for independent constitutional bodies. However, article 24 of the bill gives the ARP the power to withdraw its confidence from the body's committee as a whole, from part of the committee, from a member or from its chair, in the event that the body fails to comply with the budgetary and accounting rules. This involves the combination of articles 24 and 33, the latter of which refers to the withdrawal of confidence.<sup>109</sup>

Concerning contracts, the bill gives the bodies the option of providing, in their respective laws, for a degree of flexibility to enable them to avoid the rules governing contracts for public undertakings (art. 28).

**Transparency:** the bill requires each independent constitutional body to periodically update its website and enable a right of access to information. Each body is thus responsible for publishing on their website information about the various declarations of property and assets made by members of the body, its by-laws, minutes, contracts and agreements, financial and activity reports, etc. The bodies are also required to organise meetings and debates with elements of civil society (art. 29 to 31).

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107. See 2.4.1.1 below on the Constitution.

108. IPCCPL, decision no. 4/2017 (independent constitutional bodies), cited above.

109. See (3) on the rules on the accountability of the bodies and claims of unconstitutionality.



**(3) Rules on accountability**

Title VI of bill no. 30-2016 is devoted to the accountability of the independent constitutional bodies (art. 32 and 33).

Article 32 is based on article 125 of the Constitution and states that the body submits an annual report to the ARP and that this report is discussed in a plenary session held for this purpose.

Further, the bill provides for two types of procedure to remove a member of the council or the chair of the independent constitutional body from office. The first procedure is dismissal via a decision by the body's council (art. 11 and 24), while the second involves the withdrawal of confidence by the ARP. Article 33 of the bill thus states that "at the request of one third of the members of the ARP, the ARP can approve by a two-thirds majority the withdrawal of confidence from the body's entire committee, part of its members, one member, or the chair..", on the grounds of a serious breach, failure to observe its operational principles (honesty, integrity, discretion, conflict of interest) or failure to comply with the budgetary and accounting rules. This withdrawal of confidence is also referred to in articles 11 (which provides for vacancy situations) and 24 (budgetary and accounting rules) of the bill.

This article has prompted criticism and opposition to these provisions.<sup>110</sup> In their claim submitted to the IPCCPL on 12 July 2017, the deputies raised the question of the unconstitutionality of these provisions of article 33 of the bill. In its decision on 8 August 2017, the IPCCPL upheld this allegation and declared article 33, and its effects on articles 11 and 24 of the bill, to be unconstitutional.<sup>111</sup> In its decision, the IPCCPL stressed that this procedure (the withdrawal of confidence) conflicted with the principle of independence for the constitutional bodies.<sup>112</sup> However, it should be noted that the IPCCPL declared the procedure for dismissal via a decision by the body's Committee to be constitutional, and only ruled that the procedure for withdrawal of confidence was unconstitutional.<sup>113</sup> The IPCCPL's position was that dismissal is an internal (sovereign) decision by the body, within its committee, which does not affect its independence, whereas the withdrawal of confidence, to be decided by the ARP, is an external decision that directly affects the body's independence.

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110. In particular, a major campaign was mounted against this law and the law on the Good Governance and Anti-Corruption Instance, by civil society and in particular the current president of the Anti-Corruption Instance, Chawki Tabib. Tabib considers the laws as "a betrayal of the spirit of the Constitution and unconstitutional" (see "Chawki Tabib dénonce la nouvelle loi fondamentale relative aux instances constitutionnelles indépendantes", [www.tunisienumerique.com](http://www.tunisienumerique.com), 13 July 2017; see also: "Chawki Tabib, la loi sur l'Instance de bonne gouvernance et de lutte contre la corruption réduit ses pouvoirs", [www.directinfo.webmanagercenter.com](http://www.directinfo.webmanagercenter.com), 21 July 2017). Similarly, the Popular Front, the main opposition block within the ARP, openly considered this law to be unconstitutional and led a campaign with the other opposition blocks to lodge a challenge to this law with the IPCCPL (see: "Pour le FP, la loi sur l'Instance de bonne gouvernance et de lutte contre la corruption est inconstitutionnelle", [www.Directinfo.webmanagercenter.com](http://www.Directinfo.webmanagercenter.com), 27 July 2017).

111. This was the only ground that was upheld by the IPCCPL.

112. IPCCPL, decision no. 4/2017 (ICBs), cited above.

113. *Idem*.

## 2.4.2 The National Human Rights Institution: The Human Rights Instance

The Human Rights Instance (Instance des droits de l'Homme, IDH) provided for by article 128 of the Constitution is not yet in place. Pending the establishment of this new body, the Higher Committee on Human Rights and Fundamental Freedoms established in 2003 currently fulfils part of the role of a national human rights institution conferred by the Constitution on the Human Rights Instance.

### 2.4.2.1 The Higher Committee on Human Rights and Fundamental Freedoms

The Higher Committee on Human Rights and Fundamental Freedoms (Comité supérieur des droits de l'Homme et des libertés fondamentales, CSDHLF) was created by a 2003 law, amended in 2008.<sup>114</sup> It is also governed by a 2009 decree relating to its organisation and by-laws.<sup>115</sup> Created under President Ben Ali, the Committee suffered the same fate as every institution established in that period. These bodies were presented as the mechanisms of a constitutional state, but in practice were at the disposal of the President of the Republic who, in the case of the Constitutional Council for example, had the exclusive right to refer matters to this body.<sup>116</sup>

The CSDHLF was created for reasons typical under dictatorships – that is, in response to pressure from international actors whose aid to Tunisia was conditional on its commitment to a minimum level of respect for human rights. This institution was also designed as a tool intended to improve the image of a police state,<sup>117</sup> and as a means of bypassing the rare civil society organisations that dared to engage in the battle for human rights and carried out monitoring and reporting in this area, in particular the Tunisian Human Rights League. The Committee did not have the necessary independence to fulfil its oppositional role and therefore to act as an effective protector of human rights, in particular against abuses of power by the executive. Neither the method for selecting its members, who were all appointed by the President of the Republic, nor the financial and logistic resources available to the Committee enabled it fulfil this role.

After the events of 2011, the Committee has encountered certain difficulties: no less than three different chairs have presided over it, several resignations have occurred among its members, and it has had almost no visibility among the public. The Committee faces several institutional challenges. It consists of a board and a council with 40 members–

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114. Law no. 2008-37 of 16 June 2008 on the Higher Committee on Human Rights and Fundamental Freedoms.

115. Decree no. 2009-1767 of 9 June 2009 on the approval of the organisational rules of the Higher Committee on Human Rights and Fundamental Freedoms and the procedures for its operation and management, and of its internal regulations.

116. See 2.2 above on the Constitutional Court.

117. On this subject, see L. Chouikha and E. Gobe, "Les organisations de défense des droits de l'Homme dans la formule politique tunisienne, de l'opposition au faire-valoir du régime" in *L'Année du Maghreb*, vol V, 2009.

a high number that reduces the effectiveness of its action and the smoothness of its deliberations. Further, the 40 members of the Committee's council are appointed on a voluntary basis and are therefore occupied by their professional occupations. Finally, the small number of people in the secretariat also hinders the pace and intensity of work within the Committee, thus considerably limiting its effectiveness.

On 16 February 2016, the President of the Republic appointed new members of the Committee by decree. The Committee is required to carry out its work until the constitutional body is established. While the law that created and implemented the Committee does not assign it the same powers as those the Constitution confers on the future Human Rights Instance, its competences can be interpreted in a broad sense in the light of new human rights norms set out in the new constitution. Under present Tunisian law, the Committee thus remains a state actor tasked with monitoring state human rights policy.

It should be noted that at the international level, the CSDHLF is considered a national human rights institution established in accordance with the Paris Principles. However, it has not received full recognition, having been assigned only "B" status in 2009.<sup>118</sup>

#### 2.4.2.2 The Human Rights Instance: constitutional enshrinement and bill

According to article 128 of the Constitution:

"The Human Rights Instance oversees respect for, and promotion of, human freedoms and rights, and makes proposals to develop the human rights system. It must be consulted on bills that fall within its mandate. The Instance conducts investigations into violations of human rights with a view to resolving them or referring them to the competent authorities. The Instance shall be composed of independent and impartial members with competence and integrity, who undertake their functions for a single six-year term."

Organic bill no. 42-2016 on the Human Rights Instance (IDH) adds detail to the provisions of the Constitution in terms of the composition, powers and responsibilities of the Commission. This bill was submitted by the Tunisian government to the Assembly of the Representatives of the People (ARP) on 17 June 2016. It has not yet been examined by the special committees within the ARP.

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118. The Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights, Recommendations approved by the Human Rights Instance on March 1992. (Resolution 1992/54) and by the General Assembly (Resolution A/RES/48/134 of 20 December 1993). See also: Global Alliance of National Human Rights Institutions (GANHRI): Accreditation of 17 May 2017 (<http://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20.pdf>).

The bill went through a fairly extensive consultation process. It was drawn up by a technical committee within the Ministry for Human Rights, with logistical and technical support and national and international expertise,<sup>119</sup> and then presented, discussed and improved following national and regional consultations.<sup>120</sup>

This bill forms part of the implementation of the provisions of the Constitution (art. 125 and 128) and seeks to achieve conformity with the Paris Principles on national human rights institutions adopted by the United Nations.<sup>121</sup>

### 2.4.2.3 Composition and functioning of the Human Rights Instance

Like all the independent constitutional bodies, the IDH consists of a council and an administrative apparatus.

#### **(1) Limited and ex officio membership**

The council of the IDH consists of 9 members, as provided in the Constitution.<sup>122</sup> Bill no. 42-2016 specifies the profile of the members and the procedure for selection and appointment.

It focuses on the members' qualifications: two judges (one from the ordinary branch and the other from the administrative branch), one lawyer, one specialist each from the fields of psychology, sociology, economics and child protection, and two representatives from human rights associations.<sup>123</sup> This composition, which gives priority to child protection over other areas of human rights, could be criticised. Similarly, assigning three seats to the legal profession may cause an imbalance in the profiles. As for the age of the members of the IDH's council,<sup>124</sup> the bill opted for a minimum age of 23 and thus does not discriminate against young people, unlike a large number of such bodies.<sup>125</sup>

Concerning the appointment of members,<sup>126</sup> applications are submitted on a personal basis to the selection committee within the ARP. The committee establishes a selection

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119. From the Higher Committee on Human Rights and Fundamental Freedoms, the Centre for Legal and Judicial Studies, Tunisian academics, as well as the Office of the United Nations High Commissioner for Human Rights (OHCHR); the United Nations Development Programme (UNDP), Democracy Reporting International and the Danish Institute for Human Rights.

120. The national consultations took place in Tunis on 29 February and 25 March 2016. The regional consultations took place in Beja (North) on 8 March 2016, Sousse (Centre) on 11 March 2016, and in Gabes (South) on 18 March 2016.

121. See 2.4.1.1 above on the Constitution and 2.4.2.1 on the Higher Committee on Human Rights and Fundamental Freedoms. For more information about national human rights institutions (NHRIs), see: [http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI\\_fr.pdf](http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_fr.pdf).

122. Constitution, art. 128.

123. Bill no. 42-2016, art. 31 and 32.

124. The bill considers the Instance's council to be the members elected by the ARP, to distinguish them from the Instance's administrative apparatus.

125. For example, the law on the Truth and Dignity Commission imposes a minimum age of 35 for members (law no. 2013-53, art. 21); the law on the Good Governance and Anti-Corruption Instance imposes a minimum age of 30 (law no. 2017-59, art. 30, 24 August 2017); the law on the Constitutional Court imposes a minimum age of 45 (law no. 2015-50, art. 8).

126. Bill no. 42-2016, art. 33 to 36.

procedure which it publishes in the Official Journal. It draws up a shortlist of 8 candidates for each profile, adhering to the rule of parity, and sends this to the ARP, which appoints the 9 members of the IDH by vote. Candidates who are not shortlisted or do not make the final selection have the option of contesting the decision.

This project complies with the Paris Principles by separating those who draw up the shortlist (the ARP's selection committee) from those who make the appointment (the ARP). However, this separation appears to be mainly formal in nature, since the selection committee is formed so as to represent the various parties and factions in the ARP. The majority party or faction in the ARP (which makes the appointment) will therefore also have a majority in the special committee (which draws up the shortlist), with the result that the shortlisting and selection of members becomes politicised.

## **(2) Organisation and functioning**

The members of the IDH elect their chair and deputy chair, and select the chairs of committees. The bill requires the IDH to consist of at least the following committees: children's rights committee, civil and political rights committee, disabled persons committee, anti-discrimination committee, and economic, social and cultural rights committee (art. 45).

The IDH may establish local branches within Tunisia (art. 44). An administrative apparatus will be chosen and implemented by the IDH's council (art. 48 to 51).

## **(3) Guarantees of correct functioning**

The bill gives the IDH the legal means to ensure that it functions correctly.

**Prerogatives:** The bill grants the IDH a range of prerogatives that render it a public authority. In particular, it can make unannounced inspections, without prior notice or any prior information about the inspections, of any public place (art. 8). It also has the right to access the data of all state structures, including those relating to security and defence (art. 9), and the right to inspect private establishments after giving notice (art. 10).

**Rights and immunity of members:** The members of the IDH's council and its administrative officials are considered state officials as defined in article 82 of the penal code. They thus benefit from the legal protection granted to state officials (art. 56). Similarly, the members of the IDH benefit from immunity in carrying out their duties. The immunity can be lifted at the request of the member in question or the judicial authorities, subject to an absolute majority vote by the ARP (art. 52). Similarly, a member of the IDH (or its chair) can only be dismissed in response to a duly motivated request signed by two-thirds of the members of the IDH, and the dismissal requires a two-thirds majority vote by the members of the ARP.<sup>127</sup>

127. See 2.41.2 (3) above on the framework law for independent constitutional bodies and the rules on the body's accountability.

#### 2.4.2.4 Scope of intervention of the Human Rights Instance

As a national human rights institution, under bill no. 42-2016 the IDH is granted a broad sphere of intervention in material, territorial and personal terms, in accordance with the Paris Principles.

In terms of its material sphere of intervention, the IDH is competent in relation to any violations of human rights, as well as civil, political, economic, social, cultural and environmental rights, as provided for in the Tunisian Constitution and the international treaties duly ratified by Tunisia (art. 6). Human rights are considered here to be universal, comprehensive, inalienable and complementary (art. 7).

On the territorial level, the IDH has jurisdiction over any human rights violations against any natural or legal person within national territory (art. 5).

In terms of the personal sphere of intervention, the IDH intervenes on behalf of any person located within Tunisia who complains about a violation by a state structure or body, groups or individuals acting on behalf of the state or under its protection, or any natural or legal person or group of persons (art. 6).

This broad mandate makes it necessary to provide the IDH with the human, material and financial resources required to carry out its mission. Failing this, the IDH will become congested, reducing its effectiveness and potentially negatively affecting its image and people's trust in this body.

Similarly, the sphere of intervention overlaps and intersects in certain areas with the mandates of other actors in the Tunisian human rights landscape, for example the Authority for the Prevention of Torture, the Authority for the Prevention of Human Trafficking, the Authority for Access to Information, the Anti-Corruption Instance etc. As provided by article 4 of the bill, the IDH will therefore need to draft agreements for cooperation and partnership with these various organisations.<sup>128</sup>

#### 2.4.2.5 Responsibilities of the Human Rights Instance

Article 128 of the Constitution specifies three key areas of responsibility for the Human Rights Instance. These are detailed in bill no. 42-2016.

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128. See 4.1 below.

## BOX - 4

### Responsibilities of the Human Rights Instance:

1. Overseeing respect for human freedoms and rights;
2. Strengthening human freedoms and rights;
3. Investigating human rights violations.

### (1) Overseeing respect for human rights

The IDH is responsible for observing and making visits; in accordance with its mandate, it receives complaints and requests, examines them, intervenes to resolve disputes and implement settlements and arbitrations, submits cases to the courts, refers matters to the political and administrative authorities,<sup>129</sup> informs public opinion, and publishes an annual report as well as special or thematic reports.<sup>130</sup>

This oversight role means ensuring respect for human rights by the State both in the “negative” sense, i.e. by ensuring that no action that may violate or undermine these rights in any way has been carried out, and in the “positive” sense, i.e. by ensuring that actions have been taken to materialise and implement these rights in practice.<sup>131</sup>

This oversight may be exercised over any person or any state or private institution<sup>132</sup>. Articles 8 and 10 of bill no. 42-2016 list the institutions that may be inspected without warning in order to ensure that human rights are being guaranteed and respected. In particular, these include prisons and other detention centres, which in principle are state institutions, as well as accommodation centres for vulnerable individuals such as the elderly, children or persons with disability, educational, training or cultural bodies, and economic or social organisations, which may be either state or private institutions.<sup>133</sup>

### (2) Strengthening and promoting human rights

This role is provided for in articles 13 and 14 of bill no. 42-2016. The IDH undertakes studies and research in this area, and gives its opinion on human rights reports drafted by the Tunisian state, whether this means the Universal Periodic Review (UPR), special reports to the Charter and treaty bodies of the United Nations, or reports to be submitted to the African Commission on Human and People’s Rights. The IDH also makes

129. The President of the Republic, the Speaker of the ARP, the head of government, the ministers, the directors and chairs of various state organisations and bodies, and legal entities governed by private law.

130. Bill no. 42-2016, art. 7 to 12.

131. Bill no. 42-2016, art. 7: “The Commission shall examine any issue relating to the respect and protection of human rights and freedoms in their universality, comprehensiveness, interdependence and complementarity, in accordance with international covenants, declarations and treaties. It shall observe the degree of application and implementation of these rights and freedoms on the ground. It shall carry out the necessary investigations into all matters brought to its knowledge in relation to human rights violations, regardless of the nature of this violation or its origin.” (Translation by Jinan Limam).

132. *Idem*.

133. Bill no. 42-2016, art. 7.

recommendations for the strengthening of human rights in every area, including those of training and education. Finally, the IDH gives its opinion on bills relating to human rights, and has a period of one month in which to give its opinion on such bills submitted to it. This deadline is kept short in order to avoid slowing down the legislative process. However, since many laws have a connection with human rights, in practice the IDH will be consulted for a large number of laws. It therefore needs to be equipped with the human, financial and technical resources to respond to such requests within this relatively short period of time.<sup>134</sup>

The IDH therefore contributes to both the legal and social strengthening of human rights. The process of legal strengthening involves the Instance's role in urging the authorities either to adopt the laws required to implement constitutional human rights safeguards, or to revise the existing legislation so that it meets the new constitutional standards, and in urging the same authorities to adhere to additional international conventions, treaties, covenants and protocols on human rights. In a complementary manner, the social strengthening of human rights involves creating and spreading a human rights culture throughout society by engaging in actions at educational establishments of all levels, developing educational and training programmes, and working with civil society to raise awareness and spread knowledge of these issues.

### **(3) Investigating human rights violations**

Article 128 of the Constitution declares that the Instance “conducts investigations into violations of human rights with a view to resolving them or referring them to the competent authorities”.<sup>135</sup> This is without doubt the most important role, due to the powers that it ascribes to the Instance. This role is also likely to create friction between the Instance and the judiciary, even if both Constitution and bill alike have clearly determined the investigative role for the body so as to avoid this type of conflict.

The bill provides more detail on this investigative role, which is the subject of an entire section, and specifies the relevant procedures. There are two specific procedures by which this investigative power may be exercised. The first, which might be termed the ordinary procedure, is outlined in the bill, which states that details thereof will be found in the by-laws to be established by the Instance. The second is the emergency investigation procedure.

For the ordinary procedure, the bill states that the Instance carries out all investigations and inquiries into violations of human rights with a view to taking the necessary legal measures to deal with them.<sup>136</sup> The Instance can refer the matter to itself in the event of a human rights violation, with a view to carrying out the necessary investigation, or it can be requested to conduct an investigation by any natural or legal person that is a victim of

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134. Bill no. 42-2016, art. 13 and 14.

135. Constitution, art. 128, paragraph 2.

136. Bill no. 42-2016, art. 16



such violations, or any assignee. Further, the bill enables associations and organisations to refer such violations to the Instance on behalf of the victims. This will provide a firmer guarantee of human rights and promote their effectiveness, in particular for vulnerable persons and groups who themselves are unable to demand that their rights and freedoms be respected or that the violations committed against them cease.<sup>137</sup>

As for the emergency procedure, the law provides for it to be triggered in the event of a serious violation of human rights, without defining what constitutes a “serious violation”. The Instance has discretionary powers to assess this type of case, and therefore to evaluate the seriousness of the situation. Unlike for the ordinary investigation, here the bill provides details of the procedure to be followed. The Instance’s council is summoned immediately in order to appoint two of its members, who are tasked with investigating the case. However, the procedure to be followed for the investigation by the two members does not differ from the ordinary procedure, other than the requirement for prompt delivery of the report by the members tasked with the investigation. This significantly undermines the “exceptional” nature of the urgent procedure. The members are required to deliver their report to the council as quickly as possible, together with their recommendations, to enable the council to take the necessary actions.<sup>138</sup>

Additionally, the bill holds that it is not possible to assert professional secrecy, including medical confidentiality, as a reason for blocking an investigation by the Instance, except in the exceptional cases provided for by the law on the right of access to information. However, the information possessed by certain professionals, such as doctors or lawyers, can only be provided to the Instance if the persons concerned give their written consent. In the case of children or vulnerable individuals, however, written consent is no longer required.<sup>139</sup> This wide-ranging power available to the Instance in fulfilling its role and responsibilities should also be considered in relation to the other obligations imposed by the bill, whereby all public and private bodies must provide the Instance with all files and information relating to the ongoing investigation.<sup>140</sup>

Finally, bill no. 42-2016 clarifies the links between the future IDH and the current Higher Committee on Human Rights and Fundamental Freedoms (CSDHLF), and with the other independent bodies such as the Truth and Dignity Commission (IVD) and the Authority for the Prevention of Torture.<sup>141</sup>

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137. Bill no. 42-2016, art. 14.

138. *Idem*, art. 18.

139. *Idem*, art. 20.

140. *Idem*, art. 19.

141. See 4.1.4 below on the relations of the IDH with the other independent bodies.

### 2.4.3 The Independent High Electoral Instance<sup>142</sup>

The Independent High Electoral Instance (Instance supérieure indépendante pour les élections, ISIE), provided for by article 126 of the Constitution, is responsible for ensuring the regularity, integrity and transparency of the election process. It is a key institution for safeguarding democracy and political rights, in particular the right to vote and the right to be a candidate for political office.

The ISIE precedes the 2014 Constitution, but meets the criteria for the establishment of bodies set out therein. The first Independent High Electoral Instance was created in 2011 by the decree-law of 18 April 2011. This body was responsible for organising and supervising the elections for the National Constituent Assembly, and for ensuring democratic, pluralistic, transparent and fair elections. Today, the ISIE has legal personality together with administrative and financial independence, in accordance with the norms set out in the Constitution,<sup>143</sup> and also in accordance with organic law no. 2012-23 of 20 December 2012, which created it.<sup>144</sup> Its members are elected by an enhanced majority, as provided in the Constitution, and more precisely by a two-thirds majority of the members of the Assembly.

The ISIE oversaw the smooth conduct of the 2014 presidential and legislative elections. Certainly, some appeals were lodged with the competent courts in relation to irregularities observed by the various actors in the election process, as noted by the observers of the elections. However, the courts in question ruled that these irregularities had no decisive impact on the general pattern of the results; all political actors accepted the results of the 2011 and 2014 elections. The ISIE is currently preparing to organise and supervise the local elections planned for 2017. Due to the confidence it has managed to inspire, the ISIE was also asked to organise and supervise the elections of the Supreme Judicial Council, which took place on 23 October 2016.

### 2.4.4 The Independent High Authority for Audiovisual Communication<sup>145</sup>

In its current configuration, the Independent High Authority for Audiovisual Communication (Haute autorité indépendante pour la communication audiovisuelle, HAICA) is a provisional institution tasked with regulating the audiovisual sector, pending the establishment of the permanent body to be created under article 127 of the Constitution.

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142. The official website of this body can be viewed at <http://www.isie.tn>.

143. Constitution, art. 125 applicable to all five bodies.

144. Organic law 2012-23 of 20 December 2012 on the creation of the ISIE, JORT no. 101, 21 December 2012, p. 3276.

145. The official website of this body can be viewed at <http://haica.tn/fr/contact/>.

Freedom of expression and communication is distinctive in that it is simultaneously a right and a means of guaranteeing other rights. Freedom of expression and communication is now guaranteed by the Tunisian Constitution,<sup>146</sup> and by the international commitments that Tunisia has entered into.<sup>147</sup> Following the transition to democracy, any control of the means of mass communication or censorship is prohibited. The regulation of a sector such as audiovisual communication is, however, necessary for the very protection of freedom of communication and to guarantee a pluralistic and diversified audiovisual sector that not only meets the ethical and professional standards of the industry, but also respects human rights. This is why the audiovisual authority was set up by decree-law no. 2011-116 of 2 November 2011 on freedom of audiovisual communication and officially established on 3 May 2013, on World Press Freedom Day. As part of its regulatory mission, HAICA has imposed sanctions on television channels that have breached the provisions of decree-law no. 116 on the audiovisual sector, in particular for incitement to violence,<sup>148</sup> or for violation of children's rights.<sup>149</sup>

The role of HAICA is not limited to regulating the audiovisual sector itself or guaranteeing freedom of expression and communication alone; the High Authority also has responsibilities in relation to guaranteeing free, democratic and transparent elections. In this sense it shares a mandate with ISIE in terms of supervising elections. This is why it published a communiqué on monitoring the media during the election period.<sup>150</sup> This mandate also generated a disagreement between HAICA and ISIE, despite the existence of a joint HAICA-ISIE decision of 5 July 2014 setting out the rules and procedures for coverage of the election campaign in the audiovisual media.<sup>151</sup> This disagreement was referred to the administrative tribunal.<sup>152</sup>

HAICA has encountered a great deal of resistance. Initially, it had disagreements with the executive regarding the appointment of individuals as the heads of public media outlets. In a communiqué, it pointed to its advisory powers in the matter and urged the authorities to implement a consultation process for such appointments, in order to ensure the success of the transition process.<sup>153</sup> More significantly, a conflict arose with the professionals themselves, who refused to submit to regulations drawn up by an independent body. The publication of the conditions for granting television and radio licences resulted

146. Constitution, art. 31: "Freedom of opinion, thought, expression, information and publication shall be guaranteed. These freedoms shall not be subject to prior censorship." Art. 32: "The state guarantees the right to information and the right of access to information." The state acts to guarantee the right of access to communication networks.

147. International Covenant on Civil and Political Rights, ratified by Tunisia on 18 March 1969.

148. See the HAICA decision: <http://haica.tn/fr/2014/08/arret-de-lemission-ness-nessma-de-la-chaine-nessma-tv-pendant-un-mois-en-raison-dune-incitation-a-la-violence-et-a-la-guerre/>

149. <http://haica.tn/fr/2016/10/decision-de-suspension-de-lemission-andi-ma-nkollek-pour-trois-mois/>

150. See the HAICA decision: <http://haica.tn/fr/2015/01/le-pluralisme-dans-les-medias-audiovisuels-pendant-les-elections-legislatives-et-presidentielles/>.

151. Joint HAICA-ISIE Decision of 5 July 2014 setting out the rules and procedures for coverage of the election campaign in the audiovisual media: ISIE considers that it has competence to apply articles 70 and 172 of the election law on the prohibition of election polls during the campaigns and election periods. Further, while HAICA claims that the ban on publishing exit polls ends once the last polling station in Tunisia has closed, ISIE claims that it is the last polling station abroad that should be taken into account.

152. Decision of the Administrative Tribunal no. 417830 of 17 December 2014.

153. See the HAICA communiqué: [://haica.tn/fr/2013/08/la-haica-invite-le-gouvernement-a-la-revision-immediate-des-nominations/http](http://haica.tn/fr/2013/08/la-haica-invite-le-gouvernement-a-la-revision-immediate-des-nominations/http).

in loud protests from television channel owners. In particular, the conditions prohibit a licence holder from having partisan responsibilities, or from being the head of a polling organisation or an advertising agency. Further, they cannot simultaneously be in charge of more than one radio station and one television channel. The conditions also lay down a number of directives on the protection of human rights.<sup>154</sup>

Faced with these difficulties, it must be hoped that the authority and increased legitimacy resulting from its constitutional status will enable the future body to assert itself as the regulator of this highly sensitive and significant sector in order to guarantee human rights.

### 2.4.5 The Instance for Sustainable Development and the Rights of Future Generations.

The mandate of the Instance for Sustainable Development and the Rights of Future Generations (Instance du développement durable et des droits des générations futures) centres around economic and social rights.<sup>155</sup>

Unlike article 128 on the IDH, article 129 of the Constitution envisages the Instance for Sustainable Development and the Rights of Future Generations solely as an advisory body that must be consulted on any bill that falls within its mandate. The obligation to consult the body on bills falling within its mandate means that, as with the other bodies, failure to consult the body may cause the bill to be invalidated by the Constitutional Court on a technicality. However, this is a purely advisory body without any investigative powers like those of the Human Rights Instance<sup>156</sup> and the Good Governance and Anti-Corruption Instance,<sup>157</sup> or regulatory powers like those of HAICA<sup>158</sup> and ISIE.<sup>159</sup> Of the five independent constitutional bodies, then, this appears to be the weakest in terms of the mandate and powers assigned to it.

This body has another distinctive feature, which relates to the conditions that must be met by individuals who apply to be its members. While the other four bodies require, in addition to competence and integrity, independence and neutrality from those applying to become members, the Instance for Sustainable Development and the Rights of Future Generations only requires competence and integrity. This reinforces the notion that this body is an advisory institution devoted to supporting the Assembly of the Representatives of the People in its legislative role rather than an actor whose role is to guarantee and protect human rights.

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154. <http://haica.tn/fr/espace-professionnels/cahiers-de-charges>.

155. Constitution, art. 129.

156. *Idem.*, art. 128.

157. Constitution, art. 130.

158. *Idem.*, art. 127.

159. Constitution, art. 126.

Of course, this does not prevent this body from working together with the Human Rights Instance, in particular by providing it with the information it requires for its work in overseeing respect for human rights in the economic and social domain. The role of the Instance for Sustainable Development and the Rights of Future Generations in this area remains very limited.

## 2.4.6 The Good Governance and Anti-Corruption Instance

Organic law no. 2017-59 of 24 August 2017 on the Good Governance and Anti-Corruption Instance (Instance de la bonne gouvernance et de la lutte contre la corruption, IBGLCC) was passed by the ARP on 19 July 2017.<sup>160</sup> This was the subject of a claim of unconstitutionality, signed and submitted by 40 deputies on 26 July 2017 to the Provisional Instance to Review the Constitutionality of Draft Laws (IPCCPL). The IPCCPL examined the claim and gave its decision on 17 August 2017,<sup>161</sup> finding that the bill did not breach the Constitution. The law was promulgated on 24 August 2017.<sup>162</sup>

The adoption of the law on good governance and anti-corruption measures is due to be replaced as part of a process of developing anti-corruption mechanisms initiated on 13 January 2011 and continued via the implementation of the provisions of the Constitution of 27 January 2014. This was the first organic law promulgated as part of the implementation of article 125 of the Constitution.

In his last speech on 13 January 2011,<sup>163</sup> the former President of the Republic Ben Ali announced the establishment of 3 commissions to undertake major reforms, including an Anti-Corruption Commission, created the day after the fall of the regime by decree-law no. 2011-7 of 18 February 2011. On 19 February 2011, the interim President of the Republic appointed the chair<sup>164</sup> of this National Commission to Investigate Corruption and Embezzlement, for which the mandate covered the period 7 November 1987 to 14 January 2011. This commission has received 11,000 cases. It has examined almost 5,300 of them, and has investigated around 5,200; roughly 2,400 cases have been referred to the various state ministries and organisations concerned, and 400 major cases to the courts.<sup>165</sup>

160. See 2.1.2 above on the accomplishments of the ARP.

161. IPCCPL, decision no. 07/2017 of 8 August 2017 on the Good Governance and Anti-Corruption Instance bill, JORT no. 67 of 24 August 2017, p. 2709 (*in Arabic*).

162. Law no. 2017-59 of 24 August 2017, JORT no. 61, 1 August 2017, p. 2475 (*in Arabic*, dated 24 September 2017, the official version in French has not yet been published). This law was passed following the adoption of law no. 2017-10 of 7 March 2017 on reporting corruption and protecting informants, JORT no. 20 of 10 March 2017, p. 765 (*in Arabic*, dated 24 September 2017, the official version in French has not yet been published).

163. The day before the fall of President Ben Ali's regime.

164. Decree no. 2011-235 of 19 February 2011 appointing Abdelfattah Amor, Chair of the Commission.

165. The Commission submitted and published its report on 11 November 2011, and submitted a bill for a decree-law on measures to combat corruption and embezzlement. The decree-law was adopted and promulgated on 14 November 2011 (framework decree-law no. 2011-120 of 14 November 2011 on measures to combat corruption and embezzlement, JORT no. 88, 2011, *in Arabic*). The death of the Chair of the Commission on 2 January 2012 caused it to cease operations until the entry into effect of the framework decree-law in April 2012 and the appointment of a new chair (the lawyer and former Director of the Institute of the Bar Association, Samir Annab) who was replaced in 2015 by the current chair of the Commission (the lawyer and former Chair of the Bar, Chawki Tabib).

During the debates on the drafting of the Constitution (December 2011-January 2014), the various elements of the National Constituent Assembly were united on the issue of measures to combat corruption and embezzlement. To consolidate the principles of transparency, integrity and responsibility, the Good Governance and Anti-Corruption Instance was enshrined in the Constitution. Article 130 establishes the mandate, duties and composition of this body. Under this article and article 125 of the Constitution<sup>166</sup> (the article applicable to all the constitutional bodies), organic law no. 2017-59 was drafted, passed and finally promulgated on 24 August 2017.

### **(1) The Instance's mandate and prerogatives**

This body is responsible for ensuring good governance as well as anti-corruption measures. It has the standard mandate assigned to the bodies: observing and documenting (art. 5 and 8), drafting studies and research, proposing reforms (art. 7) and promoting a culture of good governance and fighting corruption (art. 6 and 7).

Further, the legislature has granted this body a range of prerogatives (art. 16 to 18) that enable it to conduct inquiries, investigate cases, summon the persons concerned and refer matters to the courts where necessary. The Instance is therefore an authority equipped with the powers of the judicial police. However, these powers are exercised by the Instance under the oversight of the judiciary. Thus, in order to conduct inquiries, searches or investigations, or refer matters to the courts, it must first obtain the authorisation of the Public Prosecutor (art. 19). The same applies to protective measures (travel bans, asset freezes): the Instance must request that the judicial authorities intervene and take this kind of measure (art. 25). This control of the Instance's activities and powers in advance was the subject of a claim of unconstitutionality lodged by the deputies. In this claim, the deputies raised the question of the Instance's independence from the judiciary. They also claimed that the law breaches the provisions of the Constitution on the autonomy of the Instance and the separation of powers. In its response, the Provisional Instance to Review the Constitutionality of Draft Laws found that "the powers of the judicial police form part of criminal proceedings that affect fundamental rights and freedoms, and the Constitution entrusts this task to the judiciary (under articles 27, 49, 102 and 108)". Therefore "the partial subjection of the agents of the IBGLCC to oversight by the judiciary is entirely justified and does not constitute a breach of the Constitution, and [...] the principle of the separation of powers relates exclusively to the legislative, executive and judicial powers".<sup>167</sup>

### **(2) Composition and functioning of the Instance**

The council: under law no. 2017-59, the Commission's council is formed of 9 members including 4 representatives from the legal profession (an ordinary judge, an administrative judge, a financial judge and a lawyer); two representatives of professions related to taxation and accounting (a specialist in auditing and inspecting accounts, a specialist in

166. See 2.4.1.1 above on the Constitution.

167. IPCCPL, decision no. 07/2017 of 8 August 2017 on the Good Governance and Anti-Corruption Instance bill, JORT no. 67 of 24 August 2017, p. 2709 (decision published only *in Arabic*).

taxation or administrative and financial oversight) and a specialist in the social sciences, a communications specialist and finally a representative of associations working to combat corruption and promote good governance (art. 35).

The election of members follows a two-stage procedure. Applications are freely submitted. The ARP's Selection Committee receives the applications and proceeds to sort and rank candidates according to a selection procedure that is established in advance and published. It shortlists 4 men and 4 women for each profile and refers the shortlisted applications to the ARP, which then votes in a plenary session, in accordance with the rule of parity "wherever possible" (art. 40). Parity under law no. 2017-59 is therefore not an obligation but a principle that must be followed as far as possible, or an "obligation of means" rather than an "obligation of result".

The members swear an oath before the President of the Republic (art. 42). At its first meeting, the council, chaired by its oldest member and youngest member, elects its chair and deputy chair. To ensure parity, the law specifies that the election of the chair and deputy chair must comply with the rule of parity "wherever possible" (art. 41). Here, law no. 2017-59 is at odds with the organic bill on common rules for constitutional bodies, which specifies that the chair and deputy chair must be of different genders (art. 6).

The council's members carry out their duties on a full-time basis. They are strictly prohibited from holding a public office or carrying out a professional activity (art. 54) The members have a duty of integrity, honesty, and discretion, as well as an obligation to declare all their property and assets in advance, and their situation must not present any conflict of interest (art. 55 and 56).

In the event of a vacancy following a dismissal, withdrawal of confidence, death, incapacity or resignation, the Instance's council declares the vacancy and refers the matter to the ARP, which then elects a new member via an identical procedure to the initial one (art. 47). This provision is ambiguous and may pose problems in the future. The article specifies withdrawal of confidence as one of the methods resulting in a vacancy. However, no details of such a situation are provided in the other provisions of the law. The law on this body refers to the law on common provisions for constitutional bodies, the draft of which was examined by the IPCCPL, which declared the provision on withdrawal of confidence to be unconstitutional.<sup>168</sup> In its decision, the IPCCPL stressed that this procedure (the withdrawal of confidence) conflicted with the principle of independence for the bodies.<sup>169</sup> With this provision having been declared unconstitutional, the reference to withdrawal of confidence in law no. 2017-59 no longer makes sense. It would therefore be prudent to adopt an amending law to remove the phrase "withdrawal of confidence" from the text of law no. 2017-59.

168. IPCCPL, decision no. 4/2017 of 8 August 2017 on the bill on common provisions for independent constitutional bodies, JORT no. 65, 15 August 2017, p. 2585 (decision published only *in Arabic*).

169. *Idem*.

The administrative apparatus: articles 48 to 53 of law no. 2017-59 refer to the principles governing the body's administrative apparatus. This apparatus is headed by an executive director, chosen by consensus among the members of the board, or failing this by a two-thirds majority, and dismissed in the same manner. They are governed by the same rules and principles as the other members of the Council. The law provides for the establishment of two departments: one tasked with ensuring good governance and the other with fighting corruption. The law refers to the Instance's by-laws in relation to the organisation of these departments (art. 51 and 52). In this regard, it should be recalled that one of the claims made by deputies against this law concerned the unconstitutionality of the entire section on the administrative apparatus. The IPCCPL responded by arguing that article 125 of the Constitution refers to a law that establishes the rules of the organisation of the Instance and that consequently, the rules for its administrative functioning must be specified. The IPCCPL therefore rejected this claim.<sup>170</sup>

It should finally be noted that the law on the IBGLCC does not give details of rules on the Instance's budget, accounting, transparency or accountability. All these issues must be addressed by the future law on common provisions for independent constitutional bodies.<sup>171</sup>

## **2.4.7 The other independent state bodies**

Here we consider three independent state bodies with an important role to play in protecting and promoting human rights: the Authority for Personal Data Protection, the Truth and Dignity Commission (IVD), and the Authority for the Prevention of Torture. These bodies were created before or after 2011 and their status and mandate have been developed to include additional mechanisms to guarantee their independence.

### **2.4.7.1 The Authority for Personal Data Protection**

The National Authority for Personal Data Protection (Instance de protection des données à caractère personnel) was created by law no. 2004-63 of 27 July 2004 on the protection of personal data.<sup>172</sup> The Authority has legal personality and financial autonomy. Its budget falls under the budget of the Ministry of Relations with Constitutional Bodies, Civil Society and Human Rights. The Authority has experienced a renewal since 2011. It now has its basis in article 24 of the Constitution which grants it a role in protecting privacy and the protection of personal data.<sup>173</sup>

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170. IPCCPL, decision no. 07/2017 (IBGLCC), cited above.

171. See organic bill no. 30-2016 on the common provisions for independent constitutional bodies.

172. Organic law no. 2004-63 of 27 July 2004 on personal data protection, JORT no. 61 of 30 July 2004, page 1988.

173. Constitution, art. 24: "The state protects the right to privacy and the inviolability of the home, and the confidentiality of correspondence, communications, and personal information."



The law provides as follows: “all individuals have the right to protection of personal information relating to their private life [and this is] one of the fundamental rights guaranteed by the Constitution [...] [This information] can only be processed in a transparent and fair manner, with respect for human dignity, and in accordance with the provisions of this law”.<sup>174</sup> The same law provides a definition of personal information<sup>175</sup> and specifies the individuals that this law protects against any identification that may infringe on the inviolability of their person and privacy.<sup>176</sup>

The law grants significant powers to the body established to ensure the protection of personal data. Firstly, the Authority has the ability to conduct investigations at any location where personal data is processed other than places of residence. The law provides the Authority with sworn officers from the Ministry of Communication Technologies or legal experts to carry out the required investigations. Professional secrecy cannot be used to block such investigations. The law then requires the public prosecutor with local jurisdiction to be informed of any breach revealed by the investigations and hearings carried out by the Authority.<sup>177</sup>

#### BOX - 4

Under article 76 of law no. 2004-63, the Authority for Personal Data Protection is primarily responsible for the following tasks:

- authorisations and declarations relating to the processing of personal data;
- receiving and handling complaints;
- drawing up rules and codes of conduct as well as providing opinions and conducting research into personal data protection issues.

The right of access to information, now guaranteed under organic law no. 2016-22 of 24 March 2016, is also limited by the right to personal data protection. In section IV of this law, which covers exceptions to the right to access information, article 24 provides as follows: “the body in question can only refuse a request for access to information if it is likely to threaten public safety, national defence, international relations, the rights of others, the protection of privacy, personal data and intellectual property.”<sup>178</sup> This body is therefore

174. Organic law no. 2004-63, art. 1.

175. *Idem*, art. 4: “For the purposes of this law, personal information means any information, regardless of its origin or format, that directly or indirectly enables the identification of a natural person or makes them identifiable, with the exception of information related to public life or considered as such by the law.”

176. *Idem*, art. 5: “Identifiable means that a natural person can be identified, directly or indirectly, by means of various facts or symbols relating to his identity and to his physical, physiological, genetic, psychological, social, economic or cultural characteristics.”

177. *Idem*, art. 77.

178. Translated by Jinen Limam.

responsible for protecting personal data but must also ensure balance between two laws that may come into conflict: the right of access to information on one hand and protection of privacy and personal data on the other hand.

The Authority for Personal Data Protection is currently working on draft organic law no. 62-2016, amending and supplementing law no. 1993-27 of 22 March 1993 on identity cards, which seeks to introduce a biometric identity card.<sup>179</sup> In this regard, on 1 November 2016 the Authority published a communiqué in which it denounced the violation, via the preparation of the bill, of article 76 of law no. 2004-63 which requires all questions relating to personal data protection, including draft laws and decrees, to be submitted to the Authority for its opinion. It goes on to issue a warning about the serious repercussions of the bill on the privacy of citizens and their right to protection of their personal data, both in terms of the information contained on this new identity card and in terms of the procedures for its creation and management, particularly in view of the possibilities offered by new technologies for processing and communicating data.

To the extent that the Authority for Personal Data Protection is thus established as an actor within the human rights protection system, mechanisms for coordination with other actors have been provided. For example, concerning relations with the judiciary, the law establishes an obligation for the Authority to refer any violation discovered during an investigation or hearing to the competent public prosecutor. In addition, the law requires the Authority to include among its members a member of the Higher Committee on Human Rights and Fundamental Freedoms<sup>180</sup> to provide the Committee with the necessary expertise and information in an area as specialised as the impact of new information and communication technologies on human rights. This provision was not renewed in relation to the composition of the Human Rights Instance.<sup>181</sup>

#### 2.4.7.2 The Truth and Dignity Commission

According to article 148 of the Constitution, “The state undertakes to apply the transitional justice system in all its domains and according to the deadlines prescribed by the relevant legislation. In this context the invocation of the non-retroactivity of laws, the existence of previous amnesties or pardons, the force of *res judicata*, and the prescription of a crime or a punishment are considered inadmissible.” This provision does not include any fundamental guarantees on the right to legal security in the field of transitional justice. This choice by the drafters of the constitution, which conflicts with Tunisia’s international commitments, is very worrying, since it is likely to undermine the authority and credibility of a process that is intended to repair the injustices and human rights violations committed under the dictatorship, but which in fact is infringing those very rights.<sup>182</sup>

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179. The organic bill was examined by the ARP’s Committee on Rights, Freedoms and Foreign Relations, which debated it from May to July 2017.

<https://majles.marsad.tn/2014/fr/lois/57ce8ac9cf44123b7174acee/texte> retrieved on 5 November 2017.

180. Organic law no. 2004-63, art. 78.

181. See 2.4.2.3 above on the composition and functioning of the Human Rights Instance.

182. This issue was not addressed in the Tunisia’s Universal Periodic Review in September 2014.

Transitional justice is provided for by organic law no. 2013-53 of 24 December 2013 on the establishment and organisation of transitional justice. This law created the Truth and Dignity Commission (Instance Vérité et Dignité, IVD).

Its mission is to bring to light all the human rights violations<sup>183</sup> committed from 1955 until the date of the promulgation of the law on transitional justice.<sup>184</sup> The Commission is set to disappear at the end of its mandate, but the fact remains that the wide range of responsibilities and powers granted to it by the law provide certain systems for coordinating and harmonising its action with other actors working in the domain of human rights protection.

Firstly, there is an obligation for the judicial and administrative powers, state bodies, or any natural or legal person to communicate any documents or information they hold to the IVD. The Commission also has the right to access ongoing cases at judicial bodies, and the judgments or decisions they hand down.<sup>185</sup>

Once the IVD has established the responsibility of persons who have committed abuses of power and human rights violations, these persons are handed over to the ordinary and administrative courts, where there are special chambers for handling such cases.<sup>186</sup> Nonetheless, organic law no. 2013-53 provides for an arbitration mechanism for those responsible for human rights abuses and violations: if a case being examined by the judicial authorities is referred to the Commission's arbitration committee, created for this purpose, they shall suspend examination of the case. The IVD therefore has priority over the judiciary in handling cases.

Finally, an application for conciliation may be submitted to the IVD's arbitration committee at the request of the National Anti-Corruption Instance.<sup>187</sup> This is the only explicit referral to another independent public authority mentioned in this law.

The IDV has a four-year mandate from the date on which its members are appointed. This mandate may be extended by one year only at the duly justified request of the Commission itself, submitted to the Assembly of the Representatives of the People. The current Commission was established in 2013: the end of its mandate is scheduled for 2017 unless it requests a one-year extension and this is approved by the ARP. This means its duties will cease and it will disappear from the institutional landscape in 2018 at the latest.

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183. Organic law no. 2013-53 of 24 December 2013 on the establishment and organisation of transitional justice, JORT no. 105 of 31 December 2013, art. 3: "For the application of this law, a violation is any serious or organised breach of human rights committed by the organs of the state or groups of or individuals acting in its name or under its protection, even if they did not have the capacity or powers to act. It also includes any serious and organised breach of human rights committed by organised groups."

184. Organic law no. 2013-53, art. 17.

185. Organic law no. 2013-53, art. 40.

186. *Idem*, art. 8.

187. Organic law no. 2013-53, art. 46.

### 2.4.7.3 The Authority for the Prevention of Torture <sup>188</sup>

The establishment of this body by organic law no. 2013-43 of 23 October 2013 has its origins in an international obligation of the Tunisian state, pursuant to article 3 of the Optional Protocol to the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. According to this article: “Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).”<sup>189</sup>

The responsibilities assigned to the National Authority for the Prevention of Torture (Instance de prévention contre la torture) overlap broadly with those of the current Higher Committee on Human Rights and Fundamental Freedoms (and the future Human Rights Instance). Both these bodies are granted identical rights in relation to inspecting any sites of imprisonment or detention. The same applies to the receipt of complaints, their consultative role on bills related to their area of work, awareness-raising and research into torture-related issues, etc. However, certain differences do exist: unlike the CSDHLF and the IDH, the INPT does not have the power to take the initiative to examine cases of alleged torture.

#### BOX - 6

Organic law no. 2013-43 of 23 October 2013 on the National Authority for the Prevention of Torture, article 3:

“The Authority has the following principal duties:

1. Carry out periodic and regular inspections, as well as unexpected and unannounced inspections at any time, at detention centres where individuals deprived of their freedom are or may be located.
2. Ensure the existence of specific protection for disabled persons located in the reception centres mentioned in article 2 above of the present organic law.
3. Ensure the absence of torture or other cruel, inhuman or degrading treatment or punishment in detention centres and verify that the conditions of detention and enforcement of the punishment conform to international human rights norms as well as national legislation,

188. Organic law no. 2013-43 of 23 October 2013 on the National Authority for the Prevention of Torture, JORT no. 85 of 25 October 2013.

189. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, and Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 18 December 2002, which entered into force on 22 June 2006 and was ratified by Tunisia on 29 June 2011.

4. Receive complaints and notifications concerning any cases of torture and other cruel, inhuman or degrading treatment or punishment at detention centres, investigate such cases and refer them, as applicable, to the competent administrative or legal authorities,
5. Issue its opinion on draft laws and regulations relating to the prevention of torture and degrading treatment that it receives from the competent authorities,
6. Issue recommendations in order to prevent torture and participate in overseeing their implementation,
7. Adopt, in coordination with the relevant parties, the general directives on the prevention of torture and other cruel, inhuman or degrading treatment or punishment in detention centres and the mechanisms to detect these,
8. Create a database while also collecting data and statistics so that the database can be used in carrying out its assigned tasks,
9. Contribute to the spread of social awareness about the risks of torture and other cruel, inhuman or degrading treatment or punishment, through awareness-raising campaigns, organising conferences and seminars, creating publications and guides, organising training sessions and overseeing training programmes that fall within its sphere of competence,
10. Prepare and publish research, studies and reports on the prevention of torture and degrading treatment and support other bodies in preparing these,
11. Submit an annual report to the President of the Republic, the head of government and the Speaker of the assembly entrusted with legislative power, and publish this report on the website and in the Official Journal of the Tunisian Republic.”

We are therefore in a situation where a specialist body (prevention of torture) and a more generalist body (human rights) have very similar mandates.

The law establishing and organising the body for the prevention of torture and inhuman and degrading treatment in no way specifies that it has exclusive competence in this domain. In this regard, article 3 (7) of organic law no. 2013-43 provides for coordination of the INPT with the other relevant actors. Further, article 16 of the Human Rights Instance bill provides for the coordination of its actions in this area with the Authority for the Prevention of Torture.<sup>190</sup>

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190. See 4.1.4 below on the relations between the constitutional bodies and the other independent bodies.

Finally, it should be noted that although the Authority for the Prevention of Torture was established in 2013, it only began functioning in 2017. Recent developments are due to the efforts of the Ministry for Human Rights<sup>191</sup> in 2016 to accelerate the process of drawing up laws to establish its administrative and financial organisation. As a result of the Ministry's efforts, and those of the Truth and Dignity Commission and certain civil society organisations, the members of the INPT were finally appointed in 2016. The law organising the Authority was passed in May 2017, and the Authority was able to start its work.<sup>192</sup> In July 2017 the chair of the INPT, Hamida Dridi, resigned from her post but remained a member. On 14 July 2017, the former education minister Fathi Jarray was elected chair of the National Authority for the Prevention of Torture.<sup>193</sup>

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191. See 3.2 below on the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights.

192. Interview with Hamida Dridi, chair, Tunis, 25 May 2017.

193. [https://www.observatoire-securite.tn/fr/marsad\\_actors/instance-nationale-pour-la-prevention-de-la-torture/](https://www.observatoire-securite.tn/fr/marsad_actors/instance-nationale-pour-la-prevention-de-la-torture/)

### 3. GOVERNMENTAL ACTORS AND SUPERVISED INSTITUTIONS

#### Introduction

The place of governmental actors and supervised institutions acting to implement, oversee and apply human rights laws and policy continues to be the subject of much debate. Before 2011, the state human rights actors in Tunisia essentially acted as a rubber stamp for President Ben Ali's policies. In reality, they had almost no legitimacy or activity, and the oversight and promotion of human rights was essentially the province of civil society organisations. However, human rights require a strong state commitment, both at the international level and, most importantly, at the national level. Thus, on the basis of the obligation of states and their governments to respect human rights, the United Nations (UN) and its member states form part of a system for the protection and promotion of human rights that connects States and their administrations (national level) to international (and regional) human rights protection organisations (international level).<sup>194</sup>

Governmental structures are part of the executive and are governed by the principles of specialisation and hierarchical organisation. These include both political organs (the government) and administrative organs (the central administration). As for the supervised bodies, they are subject to government oversight of both their personnel and their actions. Unlike hierarchical power, supervision is not acquired as of right, and a law specifying the scope of the supervision is necessary.<sup>195</sup> However, for the supervised bodies working in the area of human rights in Tunisia, this supervisory control has traditionally been very strict.

In 2017, several supervised bodies play a role in protecting and promoting human rights in Tunisia, in particular the Ministry for Human Rights, the Interministerial Commission, human rights offices or focal points within ministries, and advisory councils specialising in this area.

During the transition, these human rights bodies developed in an uneven manner. As well as a degree of instability in terms of the administrative organisation of the ministries, there were also certain changes made to the supervised bodies. The operations of some of these bodies have slowed down; others have been restructured, transferred from one ministry to another, or gained increased autonomy.<sup>196</sup> This unstable situation is affecting the work done by these structures, in particular in terms of their accessibility and openness to citizens, observation, documentation and the preparation of reports.<sup>197</sup> The economic

194. See 1.1 above, the introduction to this study, on national human rights systems.

195. Principle of administrative law according to which there is no supervision without an accompanying law.

196. See, for example, the National Authority for Data Protection, 2.4.7.1 above.

197. W. Ferchihi, *Les organismes officiels des droits de l'Homme en Tunisie*, Al Kawakibi Centre for Democratic Transition, Tunis, 2014 (updated version), p. 6.

situation in Tunisia and the political decision to strengthen independent bodies, such as the independent constitutional bodies or the Truth and Dignity Commission, have perhaps limited the possibilities for significant investment in these governmental infrastructures.

The purpose of this second part of the study is to analyse and assess the role of the various governmental actors and supervised bodies in relation to the implementation, oversight and application of human rights policy. We will therefore examine in turn each of the governmental actors and supervised institutions/organisations playing a significant role in the protection and promotion of human rights.

### **3.1 The Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights.**

In the late 1990s, Tunisia created a ministry for human rights, communications and parliamentary relations. Since then, successive governments have shown limited consistency in terms of the emphasis placed on a centralising “direction” for the government’s actions in the area of human rights. In 2002, human rights were attached to the Ministry of Justice, which became the Ministry of Justice and Human Rights. Despite the criticism directed at it under the former regime, this ministry continued to exist in the first government formed after the elections of 23 October 2011. Decrees no. 2012-22 and no. 2012-23 of 19 January 2012 established the Ministry for Human Rights and Transitional Justice and determined its powers.<sup>198</sup> Finally, this “nomadic portfolio” was assigned sometimes to the Ministry of Justice, sometimes to the Ministry of Transitional Justice; it is now attached to the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights.

Between the 2013 elections and the creation of the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights,<sup>199</sup> the human rights portfolio was assigned to a minister under the head of government<sup>200</sup> via a letter of appointment from the head of government in May 2015.<sup>201</sup> The choice of proceeding via a “letter of appointment” is unusual. This may have been simply a pragmatic move by the authorities, but is nonetheless problematic since this is an internal action which will not be recorded in the JORT, thus negatively affecting the creation of this new ministerial department and its visibility. This structure may also have been inspired by a report published in 2013, which stated that “the involvement of the executive should be limited

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198. Decrees no. 2012-22 and no. 2012-23 of 19 January 2012, JORT no. 6 of 20 January 2012, p. 383 et 384.

199. Government decree no. 2016-465 of 11 April 2016 on the creation of the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights, establishing its prerogatives and responsibilities, JORT no. 30, 12 April 2016; Government decree no. 2016-662 of 30 May 2016 establishing the organisation of the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights.

200. Presidential decree no. 2015-35 of 6 February 2015 on the appointment of the head of government and its members, JORT no. 12, 10 February 2015, p. 428.

201. Letter of appointment of the Minister for Relations with Constitutional Bodies and Civil Society, not published.



to fundamental questions relating to coordination between the various official actors in the area of human rights. This is why, if necessary, a general human rights coordinator should be appointed and assigned to the head of government".<sup>202</sup>

The duties assigned to this minister for the head of government therefore centre on human rights. Via its relations with independent constitutional bodies, the ministry's work addresses the civil, political, economic, social and cultural rights covered by these bodies. In addition, the duties of the ministry involve coordination between the various ministries and state actors and civil society organisations working in the area of human rights with a view to drawing up legislation, strategies and action plans to promote the human rights system.

Finally, the minister has been assigned the task of implementing a permanent national mechanism to serve as a vehicle for cooperation between Tunisia and international human rights mechanisms. In 2016, a structural and functional change took place when a fully fledged ministry was created and the ministry's mandate expanded to officially include, in addition to relations with constitutional bodies and civil society, the domain of human rights.<sup>203</sup>

### 3.1.1 Organisation and structure

The organisation of the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights is established by government decree no. 2016-662 of 30 May 2016. Under the first article of this decree, the Ministry consists of the Minister's office, the general directorate of common services, and the special services.

The human rights portfolio is assigned to the General Directorate of Human Rights, which is a special service of the ministry.<sup>204</sup> Other departments include the General Directorate of Relations with Constitutional Bodies, the General Directorate of Relations with Civil Society, the Permanent Secretariat of the National Commission for the Coordination, Preparation and Submission of Reports and Follow-up to Recommendations on Human Rights, and the Directorate of Judicial Affairs and Litigation. This organisation of the ministry replaces the informal organisation in place since 2015, which centred on three "work groups" on human rights, civil society and the constitutional bodies.

On the structural level, the services of the General Directorate of Human Rights were modelled on those in the former General Directorate of Human Rights.<sup>205</sup> The General

202. W. Ferchichi, *Les organismes officiels des droits de l'Homme en Tunisie*, op. cit. p. 30.

203. Presidential decree no. 2016-1 of 12 January 2016 on the appointment of members of government, JORT no. 4, 12 January 2016, p. 91; Government decree no. 2016-465 of 11 April 2016 on the creation of the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights, establishing its prerogatives and responsibilities, JORT no. 30 of 12 April 2016 and government decree no. 2016-662. JORT no. 47, 10 June 2016, p. 1829.

204. Government decree no. 2016-662, art. 17.

205. Decree no. 2012-23, art. 24 and 26.

Directorate now includes a directorate for human rights research, legislation and programming and a directorate for human rights monitoring and assessment.

Two areas have been strengthened: programming and evaluation.<sup>206</sup> One sub-directorate is dedicated to human rights planning and programming. There are also plans to establish a sub-directorate for human rights monitoring and evaluation that will consist of 3 services: the service for monitoring state programmes and association programmes, the mechanisms and monitoring service, and the assessment service (statistics and indicators). The creation of the latter service will represent an innovation in the official human rights approach, in view of the importance of human rights indicators for legislation, monitoring and policy assessment.

### 3.1.2 Responsibilities

#### BOX - 7

Government decree no. 2016-265 of 11 April 2016 on the creation of a Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights, establishing its mandate and responsibilities:

“Art. 2: The role of the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights is to

- assist in the implementation of the independent constitutional bodies,
- help to establish continuous dialogue between the government and civil society in order to implement the principles of participatory democracy,
- draw up, propose and execute legislation, action plans and strategies in order to develop the human rights system, and ensure coordination with other relevant ministries, bodies, organisations and associations through the protection of human rights, consolidation of human rights values, spreading a human rights culture, and guaranteeing the exercise of these rights in accordance with national legislation and ratified international agreements on human rights.”

In the area of human rights, the ministry has a general duty to design and implement a national human rights system. The ministry has other prerogatives, such as proposing draft laws and carrying out research and studies. Its main responsibilities are as follows:

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206. Government decree no. 2016-662, art. 27.

**Bills and laws:** draft bills and give its opinion on bills relating to human rights.

**National human rights system:**

- design and implement an integrated and coherent national human rights system and ensure coordination between ministries to implement legislation, action plans, strategies and policy to develop the system;
- coordinate between the various actors in the area of human rights protection and implement formal and informal human rights education programmes.

**Analysis, studies, research and monitoring:**

- conduct analyses, studies and research on the subject of human rights in Tunisia;
- monitor and assess the human rights situation by supporting and establishing mechanisms to assess how they are respected and implemented;
- study international human rights treaties and propose their ratification and work to ensure that national legislation conforms to these treaties.

If we compare these prerogatives of the new ministry with those of the Ministry for Transitional Justice and Human Rights (2012-13), we may observe that the strengthening of the mandate now has an international dimension, linked to international human rights treaties, and a dimension linked to the observation and assessment of the human rights situation.<sup>207</sup>

### 3.1.3 Accomplishments of the Ministry

Following on from the work done by the Ministry for Transitional Justice and Human Rights (2012-13),<sup>208</sup> the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights has shown itself to be a dynamic legislative force. In working to the develop a national human rights system, the Minister for Human Rights was behind the drafting of and public consultation for organic bills on constitutional bodies,<sup>209</sup> in particular organic bill no. 30-2016 on the common provisions for constitutional bodies<sup>210</sup>

207. In accordance with article 24 of decree no. 2012-23, the prerogatives of the General Directorate of Human Rights at the Ministry for Transitional Justice include promoting human rights strategy and the mechanisms for its protection; helping to spread a human rights culture and training actors in this area; preparing and proposing bills on human rights; giving its opinion on bills concerning human rights; and coordinating and collaborating with elements of civil society in areas relating to human rights.

208. The Ministry for Transitional Justice and Human Rights (2012-13) assumed the task of drafting and carrying out public consultations on the organic bill on transitional justice and the organic bill on the creation of a torture prevention mechanism. In 2013, it also began examining the preparation of a new legal framework relating to the High Committee on Human Rights and Fundamental Freedoms and an anti-terrorism bill. Similarly, an examination of the new legislative framework for the national human rights system was launched well before the adoption of the 2014 Constitution and article 128 on the Human Rights Instance.

209. See 2.4 above on independent constitutional bodies.

210. One public consultation in 2016. See 2.4.1 above on the common normative framework for independent constitutional bodies.

and organic bill no. 42-2016 on the Human Rights Instance.<sup>211</sup> In 2016, the ministry began work on a bill on the Instance for Sustainable Development and the Rights of Future Generations.<sup>212</sup>

Further, concerning the National Authority for the Prevention of Torture,<sup>213</sup> in 2016 the ministry worked to accelerate the process of drafting laws to establish its administrative and financial organisation. As a result of the coordinated efforts of the ministry, the IVD and civil society, this mechanism was effectively able to begin its work in 2017.<sup>214</sup> Finally, the ministry was involved in drafting organic bill no. 2017-59 of 24 August 2017 on the Good Governance and Anti-Corruption Instance.<sup>215</sup>

To implement its actions, the ministry has also developed a relationship of partnership and communication with organisations related to human rights, whether governmental or non-governmental, national or international. This involves, for example, partnerships and support systems to assist with the drafting of laws on constitutional bodies in collaboration with the United Nations Office of the High Commissioner for Human Rights, the United Nations Development Programme, and the Danish Institute for Human Rights.

In the area of human rights awareness-raising, training and guidance, the ministry's actions include leading public consultations on bills<sup>216</sup> and activities in which civil society can participate, such as the public webcasting of Tunisia's Universal Periodic Review in Geneva on 2 May 2017.

The Ministry also actively works to coordinate government action to protect and promote human rights with the relevant ministries. This role has been strengthened via the new national mechanism for coordinating and preparing reports and follow-up to recommendations.

### **3.2 The National Commission for the Coordination, Preparation and Submission of Reports and Follow-up to Recommendations on Human Rights.**

Since 2011, several interministerial entities have been established. These include the Committee on Terrorism and Money Laundering and the National Commission for the Coordination, Preparation and Submission of Reports and Follow-up to Recommendations on Human Rights. The latter was created to meet Tunisia's international human rights commitments.

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211. Five public consultations in 2016. See 2.4.2 above on the Human Rights Instance.

212. See 2.4.5 above on the Instance for Sustainable Development and the Rights of Future Generations.

213. See 2.4.7.3 above on the Authority for the Prevention of Torture.

214. *Idem*.

215. See 2.4.6 above on the Good Governance and Anti-Corruption Instance.

216. 600 people are estimated to have contributed to the five consultations held between February and April 2016. Cf. OHCHR Report 2016, OHCHR in the Middle East and North Africa, p. 25.

The bodies of the international system are responsible for monitoring states' implementations of their human rights commitments. At the UN level, the bodies of the Human Rights Council examine the general human rights situation in each Member State. At least two types of international mechanism can be distinguished: the first type is based on UN human rights treaties, the second on the UN Charter. The mechanisms based on human rights treaties review the situation of rights covered specifically by the treaty in a given country. The mechanisms based on the UN Charter establish the mandates of special rapporteurs and the Universal Periodic Review (UPR). Other monitoring mechanisms are also provided for at the level of the regional organisations of which Tunisia is a member.<sup>217</sup>

However, the drafting of reports and the follow-up to recommendations from international and regional human rights treaty bodies have suffered widespread delays in Tunisia. In part, this was due to the need to recover the ground lost during the dictatorship. However, delays are now arising due to the increasing number of international human rights mechanisms, their procedures, and the increase in the number of recommendations issued to Tunisia – more than 500 in the space of 5 years.<sup>218</sup> The absence until 2015 of a permanent and functioning body to draft and submit reports amplified these difficulties.

Prior to 2011, reports were generally prepared by the Human Rights Directorate at the Ministry of Foreign Affairs in coordination with the ministries of Justice, the Interior and Defence. An assessment of the need to establish a national mechanism for the coordination and preparation of reports and follow-up to recommendations was launched midway through the 2012 UPR. But it was only in May 2014<sup>219</sup> that the Ministry for Justice, Transitional Justice and Human Rights committed to the creation of a permanent national mechanism devoted to preparing reports and ensuring improved follow-up to recommendations in the area of human rights.

The National Commission for the Coordination, Preparation and Submission of Reports and Follow-up to Recommendations on Human Rights was created in October 2015. In May 2016, certain changes in the composition of the Commission were introduced,<sup>220</sup> and the placing of the Commission's Secretariat within the ministry was formalised.<sup>221</sup>

217. For example, within the African Union, the periodic reports to the Commission and the African Court on Human and Peoples' Rights. A bill for an organic law to approve the Republic of Tunisia's accession to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was submitted to the ARP on 7 July 2017 for its consideration. <http://www.legislation.tn/fr/content/projet-de-loi-organique-portant-approbation-de-ladh%C3%A9sion-de-la-r%C3%A9publique-tunisienne-%C3%A0-la-ch> (retrieved 5 November 2017).

218. Final report of the seminar on "Best practices concerning the national mechanism for the coordination and preparation of reports and follow-up to recommendations", Ministry for Justice, Human Rights and Transitional Justice, Office of the United Nations High Commissioner for Human Rights in Tunisia, 29 May 2014.

219. This commitment was demonstrated at the workshop on the creation of a national mechanism for preparing reports and following up on recommendations from international and regional human rights treaty bodies..

220. Government decree no. 2016-663 of 30 May 2016 amending government decree no. 2015-1593 of 30 October 2015 on the creation of the National Commission for the Coordination, Preparation and Submission of Reports and Follow-up to Recommendations on Human Rights, JORT no. 47, 10 June 2016, p. 1835.

221. Government decree no. 2016-662 of 30 May 2016 establishing the organisation of the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights, JORT no. 47 of 10 June 2016, p. 1829, art. 30-31.

### 3.2.1 Organisation and structure

The Tunisian Interministerial Commission is a permanent structure attached to the head of government. It is composed of the representatives of several ministries with responsibility for coordinating and preparing reports and carrying out the necessary consultations in this area.<sup>222</sup> It is permanent in the sense that it continues to exist after the preparation of specific reports, unlike ad hoc mechanisms that are established for the sole purpose of preparing a single report and dissolved shortly afterwards.

The Interministerial Commission is chaired by the Minister for Human Rights or the minister's representative. In 2017, the Interministerial Commission consists of a representative from the Presidency of the Republic, one member for each ministry (28 in 2017), a representative from the National Institute of Statistics and a rapporteur who is also a representative of the Ministry for Human Rights. The members of the Commission are appointed by decree of the head of government at the proposal of the relevant ministers from among those assigned the human rights portfolio within their respective ministries. The members serve a three-year mandate, renewable once.<sup>223</sup>

A permanent secretariat operates under the supervision of the Ministry for Human Rights. The rapporteur for the Commission is the head of the secretariat.<sup>224</sup> The composition of this permanent secretariat, which is one of the special services of the ministry, is subject to detailed regulations.<sup>225</sup> It includes the sub-directorate for drafting reports and the sub-directorate for follow-up to recommendations.

#### BOX - 8

The permanent secretariat of the Interministerial Commission has the following responsibilities in particular:

Access to and management of information and data:

- Collect and conserve the information and data necessary for the commissions work;
- Receive the correspondence addressed to it, register and distribute it through the central registry of the Ministry;
- Prepare and apply a programme for the conservation and management of all documents relating to the Commission's activities

Planning, organisation and management of work:

- prepare a draft annual schedule of meetings and commitments and submit it to the Commission at the start of each year;
- prepare and oversee the meetings and work of the Commission

222. Government decree no. 2016-663.

223. Government decree no. 2016-663, art. 6.

224. *Idem*, art. 13.

225. Government decree no. 2016-662.

**Communication and public information:**

- publish the work of the interministerial commission establish and oversee a special multimedia library and the Commission's official website, and liaise with human rights information networks.

Article 15 of decree no. 2016-663 assigns the Commission the human and financial resources it requires to carry out its tasks. In practice, since 2016 its spending has been funded by the budget of the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights.

### 3.2.2 Mandate and duties

The Tunisian Interministerial Commission is tasked with “coordinating, preparing and debating the reports that the Tunisian state periodically submits to UN and regional human rights bodies, committees and organs. It is also tasked with following up on the observations and recommendations issued by these bodies, committees and organs.”<sup>226</sup>

This permanent interministerial structure is thus responsible for coordinating and preparing reports and for carrying out the necessary consultations in this area. However, it has no responsibility for coordinating national human rights action plans providing for the implementation of recommendations from regional and international bodies. Coordinating the implementation of human rights recommendations and developing a national action plan instead generally falls within the remit of the Ministry for Human Rights.<sup>227</sup>

It has two areas of responsibility: on the one hand, preparing, presenting and debating reports, and on the other overseeing the implementation of recommendations.

**(1) In terms of preparing, presenting and debating reports, the Interministerial Commission carries out the following tasks:**

**Preparing reports:** preparing, submitting and debating government reports, within the applicable deadlines for each report, to the UN and regional treaty bodies that the Republic of Tunisia has acceded, and to the Human Rights Council and Special Procedures of the UN and to regional agencies and bodies. The Commission is also responsible for updating the common core document for treaties when necessary.

226. Government decree no. 2015-1593 of 30 October 2015 on the creation of the National Commission for the Coordination, Preparation and Submission of Reports and Follow-up to Recommendations on Human Rights, art. 1.

227. Government decree no. 2016-465 of 11 April 2016 on the creation of the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights and establishing its mandate and responsibilities, art. 2, the task of the ministry is, among other things, “to draw up, propose and execute legislation, action plans and strategies in order to develop the human rights system, and ensure coordination with other relevant ministries, bodies, organisations and associations through the protection of human rights, consolidation of human rights values, spreading a human rights culture, and guaranteeing the exercise of these rights in accordance with national legislation and ratified international human rights agreements.”

**Coordinating at the national level** with the various national structures and institutions in order to prepare the Tunisian government reports and respond to the various international and regional observations, reports and recommendations on human rights, and in order to collect information and statistics and establish a database as well as effective and efficient indicators in relation to human rights.

**Coordinating at the international level**, within its mandate, with UN organisations and their specialist agencies, with the regional organisations working in the field of human rights,<sup>228</sup> and with the relevant non-governmental organisations.

The Interministerial Commission is therefore the institution responsible for honouring Tunisia's commitments in terms of submitting reports to international and regional bodies – treaty bodies, Universal Periodic Review (UPR), Special Procedures and regional bodies – in the area of human rights. It is also required to handle all issues relating to treaty bodies, including the submission and updating of the common core document and periodic reports, as well as training stakeholders both within and beyond ministries for the purpose of preparing and submitting reports.

The decree tasks the Interministerial Commission with providing training for its members and the officials at its permanent secretariat in the area of human rights,<sup>229</sup> in order to ensure the quality and effectiveness of its work. The Commission is also able to request any kind of information it considers necessary in relation to its duties. It is the responsibility of all relevant ministries, bodies and structures to facilitate the Commission's access to the requested information.<sup>230</sup>

The Interministerial Commission publishes and distributes the government reports, concluding observations and recommendations issued by UN and regional bodies, committees and agencies in the area of human rights.<sup>231</sup>

(2) In overseeing follow-up to recommendations, which constitutes its second area of responsibility, the Interministerial Commission is tasked with the following:

Follow-up and organisation in response to observations and recommendations: following up on the observations and recommendations issued by UN and regional agencies, committees and bodies in the area of human rights, as well as compiling and indexing recommendations.

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228. For example, within the African Union, the periodic reports to the Commission and the African Court on Human and Peoples' Rights. A bill for an organic law to approve the Republic of Tunisia's accession to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was submitted to the ARP on 7 July 2017 for its consideration. <http://www.legislation.tn/fr/content/projet-de-loi-organique-portant-approbation-de-ladh%C3%A9sion-de-la-r%C3%A9publique-tunisienne-%C3%A0-la-ch>, retrieved on 5 November 2017.

229. Decree no. 2015-1593, art. 15.

230. Decree no. 2015-1593, art. 4.

231. *Idem*, art. 11.



Coordinating the implementation of recommendations: analysing the scope of each recommendation, identifying the parties involved in its implementation, and adopting procedures and guiding principles to ensure coordination between the various parties involved in implementing recommendations.

Following up on the implementation of recommendations: preparing periodic reports on the progress achieved by the Tunisian government in relation to its obligations and the implementation of recommendations.

The Interministerial Commission must be capable of developing an effective and efficient system for the collection of relevant data and statistics to evaluate the implementation of human rights.

In order to carry out these duties, a participatory and inclusive approach is recommended by the decree. The Commission is effectively responsible for carrying out periodic consultations with elements of civil society and national agencies working in the area of human rights,<sup>232</sup> for the purpose of preparing reports and implementing recommendations.

### 3.2.3 Accomplishments of the Interministerial Commission

Created by the decree of 30 October 2015, the Interministerial Commission became operational in December of the same year. This swift development was likely due to the pressure of deadlines for submitting reports to the UN bodies. It has since prepared and submitted, in December 2016, the Common Core Document for reports to the UN bodies<sup>233</sup>. This document provides the core information and data on the country in question and forms part of the reports submitted to the UN's treaty or charter bodies. The Commission has also submitted and discussed reports on forced disappearances, torture, and economic, social and cultural rights.<sup>234</sup> Before 2016, the reports to treaty bodies were prepared by the Ministry for Justice, Transitional Justice and Human Rights, which took part in training concerning the content of rights, UN processes, and the requirements for the content and format of reports.<sup>235</sup>

Firstly, the Interministerial Commission drafted the initial report on the measures taken by Tunisia to implement the provisions of the International Convention for the Protection of All Persons from Enforced Disappearance, presented to the Committee on Enforced

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232. *Idem*, art. 3.

233. Core document forming part of the reports of States parties – Tunisia, 17 January 2017, HRI/CORE/TUN/2016.

234. These documents were prepared by the Ministry in 2014 and 2015 and submitted for exploratory consultation with small groups representing civil society.

235. The training in relation to reports on forced disappearances, torture and economic, social and cultural rights was carried out in collaboration with the OHCHR and the Danish Institute for Human Rights, which worked with the Ministry. The objective was to build these capacities and to establish a process for preparing and drafting reports that involves several actors who are concerned by or involved in the promotion and protection of human rights in Tunisia.

Disappearances on 7 and 8 March 2016.<sup>236</sup> The report was presented by the Minister for Relations with Constitutional Bodies and Civil Society and for Human Rights; it was accompanied by a delegation representing the actors concerned by the issue.<sup>237</sup>

The delegation also provided additional responses to questions posed by members of the Committee on Enforced Disappearances (CED), in particular concerning the legislation and bills and their compliance with the Convention in view of the definition of enforced disappearances, custody, record-keeping, the protection of children and witnesses etc. The CED's concluding observations were published on 25 May 2016.<sup>238</sup>

In April 2016, Tunisia presented to the Committee against Torture its periodic report on the measures it had taken to implement the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>239</sup> The delegation was chaired by the Minister for Relations with Constitutional Bodies and Civil Society and for Human Rights, and also included several representatives of the Tunisian government. The delegation responded to the questions raised by the Committee, in particular concerning the definition of torture and terrorism, the relevant institutions and procedures, and the issues of prison overcrowding and suspicious deaths in prison. The Committee's concluding observations were published in May 2016.<sup>240</sup> Similarly, Tunisia presented its report on economic, social and cultural rights to the CESCR in September 2016.<sup>241</sup>

The preparation and submission of these reports constituted excellent practice for the preparation of the report for Universal Periodic Review (UPR) submitted in February 2017. The Interministerial Commission was able to make use of its previous work in preparing the UPR report, which was drawn up in an efficient manner. Among other things, the report addresses the national human rights framework with reference to the recommendations of UN bodies in this area.<sup>243</sup>

Although the process for preparing the report suffered from the absence of a participatory approach open to the public, this was mainly due to the government's will to submit this report on time. After 18 months of experience, the Interministerial Commission is

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236. The Committee is required to examine the initial report of Tunisia (CED/C/TUN/1), as well as its written replies (CED/C/TUN/Q/1/Add.1) to the "list of issues" raised by the Committee (CED/C/TUN/Q/1).

237. Tunisia's delegation consisted of Tunisia's Permanent Representative in Geneva; the Director of Human Rights at the Ministry of Foreign Affairs; a judge, Group Leader at the Centre for Legal and Judicial Studies at the Ministry of Justice; the First Deputy of the Public Prosecutor at the Military Court of First Instance in Tunis and the Head of the Human Rights Committee at the office of the Minister of the Interior.

238. CED/C/TUN/CO/1 and CED/C/TUN/CO/1 Add.1.

239. CAT/C/TUN/3 and CAT/C/TUN/3/Add.1. See also the replies of the Tunisian authorities to the list of issues raised by the Committee (CAT/C/TUN/Q/3).

240. CAT/C/TUN/CO/1.

241. E/C.12/TUN/3. See all the documents relating to this third review cycle by the Committee on Economic, Social and Cultural Rights on the website of the Office of the High Commissioner for Human Rights, including the list of members of the delegation ([http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx)).

242. A/IDH/WG.6/27/TUN/1. See all the documents on the website of the High Commissioner for Human Rights: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/TNindex.aspx>.

243. See paragraphs 10 and 16 of the report submitted by Tunisia (A/IDH/WG.6/27/TUN/1).

beginning to adopt a participatory approach and is launching the first studies to improve understanding of, for example, racial discrimination in Tunisia. In July 2017, it is preparing the report on children's rights, for which consultations and discussions are taking place with groups of children of various ages in various parts of the country. This openness towards children and young people is creating a new experience which may contribute to the knowledge and expertise of the Interministerial Commission and the participants helping to prepare the report.

Finally, the future national human rights plan may include the implementation of the recommendations accepted by the Tunisian state by the actors in the national human rights system.

### 3.3 Human rights units and focal points within other ministries

As the theme of human rights is cross-disciplinary, the idea was that human rights would be addressed by the various ministries working to improve the level of public service in relation to human rights, in particular in the fields of security, justice, education, employment, health, the environment and social affairs. In the early 1990s, human rights units (*cellules de droits de l'homme*) were therefore formed within the Ministries of Justice,<sup>244</sup> the Interior,<sup>245</sup> Foreign Affairs and Social Affairs.

These units have several duties:

- receiving and handling complaints lodged by citizens on issues relating to human rights and falling within the competence of the Ministry,
- establishing relations with international institutions and non-governmental foreign organisations working in the area of human rights,
- following up on issues relating to the commitments of the Tunisian state.

All these units contribute, in their respective area of competence, to monitoring the human rights situation and providing their supervising authorities with reports on this subject.<sup>246</sup> The executive is also responsible for adopting clear policies to form a national plan for the dissemination of a human rights culture, for the officials responsible for implementing the law and citizens alike.

244. Decree no. 1992-1330 of 20 July 1992 on the Ministry of Justice.

245. Circular no. 32 of 28 May 1992 of the Minister of the Interior, on the creation of a Human Rights Unit within the General Directorate of Political Affairs.

246. Ferchichi (W.), op. cit. p. 49.

On an organisational level, certain ministries have established human rights directorates or focal points (Ministries of Foreign Affairs, Interior, Social Affairs), while others have created bodies to address certain aspects of human rights on the basis of their individual specialisations. For example, at the Ministry for Women, Family Affairs and Children, there are three structures: the General Directorate for Women, the Directorate for Childhood and Children's Rights, and the Directorate for the Elderly and Child Protection Officers.<sup>247</sup> At the Ministry of Education, there is a Directorate of Evaluation and Quality. At the same time, certain bodies have been removed from the administrative structure of the ministries. This is the case, for example, with the General Coordinator for Human Rights at the Ministry of Justice. At this ministry, three structures are directly involved in the field of human rights: a task officer for international cooperation at the cabinet level, the Centre for Legal and Judicial Studies (under supervision), and the General Directorate of Prisons. Finally, concerning the Ministry of Religious Affairs, there is no reference to the human rights dimension in the ministry's responsibilities, established by decree no. 1994-597 of 22 March 1994, its organisational rules, established by decree no. 2013-4522 of 12 November 2013, or its programmes for cooperation.

Certain ministries have launched programmes for cooperation and technical assistance in the area of human rights with international bodies. Several actions and projects have been undertaken with the Ministry of the Interior in order to reform the security sector.<sup>248</sup> At the Ministry of Social Affairs, a project has been launched to improve the incorporation of human rights in the planning and implementation of programmes and strategies.<sup>249</sup>

### 3.4 Supervised actors

There are numerous actors under supervision whose duties are directly or indirectly related to the protection and promotion of human rights. These consist of advisory councils, documentation centres, and other entities perceived to have greater independence than their supervising authority, such as the Citizen Supervisor (citoyen superviseur) or the Administrative Mediator (médiateur administratif). However, it should be borne in mind that these actors are under the supervision of the executive, as demonstrated by their composition, responsibilities and functioning. These actors are located directly within the state administration, and are not intended to be independent actors for the protection and promotion of human rights. Their role is and must be different.<sup>250</sup>

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247. Decree no. 2003-2020 of 22 September 2003, establishing the responsibilities of the Ministry of Women, Family Affairs and Children and decree no. 2013-4064 of 19 September 2013 on the organisation of the Ministry of Women and Family Affairs.

248. Including the European Union, DCAF and UNDP. All the information concerning the programmes for international cooperation is taken from Tunisia's Mid-Term Report on the progress in the implementation of the recommendations of the 2nd cycle of Universal Periodic Review (September 2014).

249. Including with the Arab Institute for Human Rights, OHCHR and UNDP.

250. See 2.4 above on independent constitutional bodies.

### 3.4.1 The advisory councils and documentation centres

The advisory councils and documentation centres are characterised by dependence on the executive in terms of their composition and functioning, and by their limited powers. They are only able to make proposals, issue opinions, examine certain questions, or submit reports.

#### 3.4.1.1 Les conseils consultatifs

There are numerous advisory councils in the area of human rights. They are governed by decree no. 2010-3080 of 1 December 2010 on the creation of higher advisory councils, amended and supplemented by decree no. 2012-1425 of 31 August 2012.<sup>251</sup> They are as follows:

- The National Council for Women, the Family and the Elderly<sup>252</sup>;
- The Higher Council for the Promotion of Employment;
- The Higher Council for Scientific Research and Technological Innovation;
- The Higher Council for Social Development and the Protection of Disabled People;
- The Higher Council for the Protection of the Environment and the Sustainable Management of Natural Resources<sup>253</sup>;
- The Higher Council for the Fight against Corruption and the Recovery and Management of State Assets and Property<sup>254</sup>;
- The Council of Peers for Equality and Fairness of Opportunity between Women and Men.<sup>255</sup>

#### (1) Composition and functioning

Decree no. 2010-3080 sought to standardise the composition of the higher advisory councils by placing them all under the supervision of the Prime Minister, now the Head of Government, who chairs them.

Their members include all the ministers concerned by the responsibilities of the council. Other members are the Chairs of national unions, the general secretaries or first secretaries of the political parties represented in parliament, plus one representative from the youth parliament, at the proposal of its Speaker. Membership of these advisory councils is therefore dominated by the executive branch; civil society is not represented. This composition seriously impedes the effectiveness of these councils in their role as regulators or “advisors” to the authorities.

251. JORT no. 98 of 7 December 2010, p. 3468 and JORT no. 69 of 31 August 2012, p. 2330.

252. Decree no. 2003-1702 of 1 August 2003 on the creation of the council, establishing its composition, function and administration, JORT no. 67, 22 August 2003, p. 2738.

253. All these councils were created by decree no. 2010-3080 of 1 December 2010 on the creation of higher advisory councils, JORT no. 98, 7 December 2010, p. 3468. This was amended and supplemented by decree no. 2012-1425 of 31 August 2012, JORT no. 69, 31 August 2012, p. 2330.

254. Created by decree no. 2012-1425 of 31 August 2012.

255. Government decree no. 2016-626 of 25 May 2016 on the creation of the Council of Peers for Equality and Fairness of Opportunity between Women and Men, JORT no. 45, 3 June 2016, p. 1776.

This standard organisation, set out in decree no. 2010-3080, was amended in decree no. 2012-1425, which established the Higher Council for the Fight against Corruption and the Recovery and Management of State Assets and Property. In this council, the representation of the members of the ARP is reduced to 5 members, which is liable to enable certain parties to dominate the council.<sup>256</sup>

On the other hand, the Council of Peers for Equality and Fairness of Opportunity between Women and Men has allowed for a balanced representation of the various governmental, non-governmental and state actors.<sup>257</sup>

In terms of how the advisory councils function, the dominance of the executive is very real: they are chaired by the Head of Government and the position of permanent secretary is assigned, for each council, to one of the ministers concerned by the council's field of competence.<sup>258</sup> The higher advisory councils meet at least once annually, and whenever necessary, when convened by their chair.<sup>259</sup> Such a system fails to guarantee the required minimum level of effectiveness for these councils, and additionally confirms their formal character, revealing the lack of political will to put effective structures in place. One may justifiably wonder “how an annual meeting can [...] enable these councils to ‘study national policy and programmes relating to their areas of competence, debate and issue opinions about them, and monitor their application’”.<sup>260</sup> To remedy this shortcoming, which seriously impedes the effective functioning of the advisory bodies, the decree on the organisation of the Council of Peers for Equality declares that its meetings are periodical, taking place once every three months and whenever deemed necessary, at the invitation of the chair.<sup>261</sup>

The management of these councils is dominated by traditional administrative management, which gives the executive overwhelming authority over all such bodies. Each council's budget falls under that of the supervising ministry, which also controls the body's actions. The role of the council is thus basically reduced to helping the executive to make decisions in the area of human rights.

## **(2) Roles and responsibilities**

The advisory councils are essentially assigned an advisory role. They can provide an opinion on a wide range of issues: plans, programmes, policy, bills, and so on. They may also propose anything they consider appropriate to promote their area of concern.

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256. FERCHICHI (W.), *op. cit.* p. 35.

257. The council consists of a representative of the Presidency of the Republic, a representative of the head of government, a representative from the Assembly of Representatives of the People, the officer for the gender-sensitive approach at each ministry, a representative from the Higher Committee on Human Rights and Fundamental Freedoms, a representative from the National Office of the Family and the Population, a representative from the Centre for Research, Studies, Documentation and Information on Women, a representative from the National Youth Observatory, a representative from the National Institute of Statistics, and four representatives from associations working in the area of women's empowerment.

258. Decree no. 2010-3080, art. 4.

259. *Idem*, art. 3.

260. W. Ferchichi, *op. cit.* p. 35, citing article 1 of decree no. 2010-3080.

261. Government decree no. 2016-626 of 25 May 2016 on the creation of the Council of Peers for Equality and Fairness of Opportunity between Women and Men, art. 6.

For example, decree no. 2016-626 of 25 May 2016 on the creation of the new Council of Peers for Equality and Fairness of Opportunity between Women and Men acts to increase its responsibilities, by assigning it roles in the areas of policy design, observation and monitoring. In general terms, under article 2 of the decree, the Council of Peers is tasked with incorporating the gender-sensitive approach into planning, programming, assessment and into the budget, in order to eliminate all forms of discrimination between women and men and make the equality of rights and responsibilities a reality. More specifically, the Council of Peers is responsible for :

- preparing and approving sectoral plans to implement, monitor and assess the national plan for the incorporation of the gender-sensitive approach, which includes the annual periodic reports on monitoring the execution of the national plan;
- observing any difficulties encountered in relation to incorporation of the gender-sensitive approach, and the submission of proposals for legislative and regulatory reforms and administrative measures to overcome such difficulties;
- developing a national training programme in the area of gender.
- Further, the Council of Peers for Equality gives its opinion on any bills relating to women's rights submitted to it by the head of government.<sup>262</sup>

### 3.4.1.2 Observatories and centres

Law no. 1999-100 of 13 December 1999 was introduced to govern the organisation of centres for information, training, documentation and research. It was amended by law no. 2001-64 of 25 June 2001 to become a law governing the organisation of both observatories and centres.<sup>263</sup> This law establishes their nature, responsibilities, how they operate, and their budgets. Observatories and centres are state establishments with legal personality and financial autonomy, and may be either administrative or non-administrative. The law leaves the question of whether they are administrative or non-administrative to the decrees establishing them, thus giving the head of government significant discretionary powers in this regard.

#### (1) Organisation and structure

The administrative organisation of the observatory or centre is centred around a directorate, headed by a director or general director appointed by decree.<sup>264</sup> This appointment by decree raises certain questions concerning the degree of independence and impartiality of the centre or observatory, especially if this position is assigned almost all the responsibilities.

262. Government decree no. 2016-626 of 25 May 2016 on the creation of the Council of Peers for Equality and Fairness of Opportunity between Women and Men, JORT no. 45, 3 June 2016, p. 1776.

263. Law no. 2001-64 of 25 June 2001, JORT no. 51, 26 June 2001, p. 1540.

264. *Idem*, art. 2.

The management of administrative and financial duties is assigned to a director assisted by a an executive board. The management of research and study activities is assigned to the director, who is assisted by a scientific council. The roles of the director or director general, the composition of the executive board and the scientific council, and the details of how these function are established by decree.

Concerning the budget for observatories and centres and the property allocated to them, law no. 1999-100 (art. 5) states that their revenue comes from the subsidies granted to them or made available to them by the state. They may also receive legacies, gifts or resources in consideration for services rendered. Centres and observatories may be assigned, via an allocation, the movable or immovable property of the state to enable them to carry out their duties. If the observatory or centre is dissolved, its property is returned to the state, which executes its obligations and commitments in accordance with prevailing legislation. However, non-administrative observatories and centres are governed by private law in their relationships with third parties, in accordance with the provisions of chapter five of law no. 89-9 of 1 February 1989 on state holdings, companies and institutions.<sup>265</sup>

The observatories and centres are therefore essentially “public authorities” in that they are governed by the rules on public institutions in terms of how they are organised and operate. The implementing decree for the observatory or centre thus sets out the details of the appointment of the director and members of the board of governors and scientific council, but fails to specify the clear requirements and standards that these individuals are required to meet in a fully transparent manner, whether in relation to their application or their appointment. Additionally, law no. 1999-100 does not require observatories or centres to publish their work and reports or their financial and activity reports, thus undermining their communication, the transparency of their work, and consequently their credibility.

## **(2) Responsibilities**

Under article 2 of law no. 1999-100, as amended by law no. 2001-64, observatories and centres can be assigned several duties. Their responsibilities are as follows:

- Their role as observers: the observatories and centres must observe the reality of the activity or sector in question, collect, analyse and document related data and information at both the national and the international level, and establish databanks or databases for the field in question;
- Conduct research and study in the field of activity or sector in question, prepare reports, and participate via periodical or occasional publications related to the field of activity;

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265. Law no. 89-9 of 1 February 1989 on state holdings, companies and institutions, JORT no. 9, 7 February 1989, p. 203.



- Coordination and support: centres and observatories must facilitate contact between the various actors in the sector or field of activity, and help the authorities outline policies and programmes intended to promote the sector or field of activity in question;
- Education and training: observatories and centres may organise seminars (talks), learning cycles and training sessions (courses), hold meetings, study days and relevant events.

### 3.4.2 Other entities

Structures such as the office of the Citizen Supervisor or the Administrative Mediator are to an extent dependent on the executive in terms of their composition and functioning. However, a shift towards greater independence appears to be desirable and conceivable.

#### 3.4.2.1 The Citizen Supervisor team

The Citizen Supervisor team was initially established under the Prime Minister via a 1993 decree.<sup>266</sup> This decree has been amended on two occasions, in 2006<sup>267</sup> and in 2016. The second amendment was substantial<sup>268</sup>: the Citizen Supervisor team now operates under the direction of the Ministry of Public Services, Governance and the Fight against Corruption.

#### 3.4.2.2 Organisation of the Citizen Supervisor

The Citizen Supervisor team is not strictly speaking an institution. As its name indicates, it is a “team” consisting of individuals whose job is to observe the quality of public services in Tunisia.

The members of the Citizen Supervisor team are recruited after assessing applications from candidates and a test. A selection committee<sup>270</sup> draws up a final list of candidates to be appointed by order of the Minister of Public Services, Governance and the Fight Against Corruption for a term of one year, renewable four times.<sup>272</sup>

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266. Decree no. 93-147 of 18 January 1993 on the creation of the “Citizen Supervisor” team.

267. Decree no. 2006-1862 of 3 July 2006 amending decree no. 93-147 of 18 January 1993 on the creation of the “Citizen Supervisor” team.

268. Government decree no. 2016-1072 of 12 August 2016, amending decree no. 93-147 of 18 January 1993 on the creation of the “Citizen Supervisor” team.

269. Order of the Prime Minister of 7 April 1993 establishing the terms of the application of article 5 of decree no. 93-147 of 18 January 1993 on the creation of the “Citizen Supervisor” team, art. 1.

270. *Idem*, art. 2.

271. *Idem*, art. 3.

272. The term was originally one year, renewable once, but this was amended by article 4 (new paragraph 1) of governmental decree no. 2016-1072.

The members of the Citizen Supervisor team are recruited from among “B” rank officials, retired individuals and staff under contract with the Ministry of Public Services, Governance and the Fight Against Corruption. It is also possible to recruit members from other roles in the public or private sector.<sup>273</sup>

To carry out its duties, the Citizen Supervisor is assigned a confidential reference number used to identify all documents it submits in relation to its work.<sup>274</sup> It receives a variable allowance<sup>275</sup> to cover all the costs of its various public service operations.<sup>276</sup>

### 3.4.2.3 Role of the Citizen Supervisor

The role of the Citizen Supervisor (citoyen superviseur) is to observe the quality of administrative services within state departments, public institutions,<sup>277</sup> local authorities and any bodies in which the state or local authorities hold a direct or indirect stake.<sup>278</sup> The responsibilities of the Citizen Supervisor were significantly extended by the 2016 amendment to the 1993 decree, to include the fight against corruption. Under the amendment, the Citizen Supervisor is required not only to assess the quality of administrative services but also to detect corruption.<sup>279</sup>

The role of the Citizen Supervisor is therefore to conduct periodical satisfaction surveys, monitor the implementation of administrative reforms, assess conformity with technical requirements and the compliance of state employees with the requirements of integrity and equality, as well as to contribute to identifying certain types of behaviour considered to constitute corruption.<sup>280</sup>

Finally, the Citizen Supervisor submits an annual report to the head of government. This report is made public, with the exception of any protected data.<sup>281</sup>

### 3.4.2.4 The Administrative Mediator<sup>282</sup>

The institution of the Administrative Mediator (médiateur administratif) was established on 10 December 1992, when the Higher Committee on Human Rights and Fundamental Freedoms was modified and the President’s Medal for Human Rights was created.<sup>283</sup>

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273. Decree no. 2016-1072, art. 4, new paragraph 1.

274. Decree no. 93-147, art. 7.

275. *Idem*, art. 6.

276. Amendments to decree no. 93-147.

277. By definition, this includes public institutions of both an administrative and an industrial or commercial nature.

278. Decree no. 93-147, art. 2.

279. Decree no. 2016-1072, art. 2.

280. *Idem*, new art. 2.

281. *Idem*, new art. 17.

282. [http://www.mediateur.tn/index\\_fr.php](http://www.mediateur.tn/index_fr.php).

283. Decree no. 92-2143 of 10 December 1992 on the creation of the position of Administrative Mediator, decree no. 92-2141 of 10 December 1992, amending and supplementing decree no. 91-54 of 7 January 1991 on the Higher Committee on Human Rights and Fundamental Freedoms and decree no. 92-2142 of 10 December 1992 on the creation of the Medal of the President of the Republic for Human Rights, JORT no. 84, 18 December 1992, p. 1587.

### (1) Composition and functioning

Six months later, the office of the Administrative Mediator was established in 1993.<sup>284</sup> The organisation of this institution was established by presidential decree in 1996<sup>285</sup> and amended by a law<sup>286</sup> and by presidential decrees in 2000 and 2005.<sup>287</sup> The amendments focused on the creation and organisation of the office, and then on the creation and organisation of the regional offices of the Administrative Mediator.

Appointed by decree for a renewable five-year term,<sup>288</sup> the Administrative Mediator is in charge of the institution's offices.<sup>289</sup> He or she may partially delegate his or her responsibilities and duties to the four Administrative Mediator committees for state ministries, local authorities and entities supervised by them,<sup>290</sup> or to the ministries with technical and technological competence and entities supervised by them.<sup>291</sup> The office's budget comes from the Presidency of the Republic; it forms part of the general state budget.<sup>292</sup>

### (2) Roles and responsibilities

The role of the Administrative Mediator is "to examine individual complaints submitted by natural persons relating to administrative issues concerning them and falling within the remit of the state, local authorities, administrative state institutions, public authorities and other bodies with a public-service mission".<sup>293</sup> It also examines complaints from legal entities concerning administrative issues when submitted by a natural person with a direct interest.<sup>294</sup> The manner in which complaints must be submitted to the Administrative Mediator and processed by the office is described in decree no. 96-1126.

284. Law no. 93-51 of 3 May 1993 on the office of the Administrative Mediator, JORT no. 35 of 11 May 1993, p. 633, and decree no. 93-1204 of 25 May 1993, establishing the law on the officials for the office of the Administrative Mediator, JORT no. 42, 8 June 1993, p. 795.

285. Decree no. 96-1126 of 15 June 1996 establishing the responsibilities and procedures of the Administrative Mediator and the administrative and financial organisation of the office of the Administrative Mediator, JORT no. 51, 25 June 1996, p. 1312.

286. Law no. 2000-16 of 7 February 2000 supplementing the law on the office of the Administrative Mediator, JORT no. 11 of 8 February 2000, p. 369.

287. Decree no. 2000-884 of 27 April 2000 establishing the responsibilities and procedures of the Administrative Mediator and the administrative and financial organisation of the regional Administrative Mediator's offices, JORT no. 37, 9 May 2000, p. 988.

288. Law no. 2002-21 of 14 February 2002 supplementing law no. 93-51 of 3 May 1995, JORT no. 14, 15 February 2002, p. 437.

289. Art. 2 of decree no. 96-1126.

290. More specifically, these entities include: "the institutions, enterprises and state bodies placed under their authority or supervision". See decree no. 96-1126, art. 13.

291. Decree no. 93-1126, art. 13.

292. Law no. 93-51, art. 4.

293. Law no. 93-51, art. 2.

294. *Idem*.

295. 1) East - Sousse office (jurisdiction over the governorates of Sousse, Monastir, Mehdiya and Kairouan); 2) South-East - Sfax office (jurisdiction over the governorates of Sfax, Gabès, Medenine and Tataouine); 3) South-West - Gafsa office (jurisdiction over the governorates of Gafsa, Tozeur, Kébili, Sidi Bouzid and Kasserine); 4) North-West - Kef Office (jurisdiction over the governorates of Kef, Siliana and Jendouba). See decree no. 2005-3221 of 12 December 2005, JORT no. 101 of 20 December 2005, p. 3717.

In addition to the central office in Tunis, four regional representative offices were created in 2000. The regional representatives are appointed by decree<sup>296</sup> and are “tasked with examining individual complaints at the regional and local level”.<sup>297</sup>

An interview with the Administrative Mediator<sup>298</sup> provided information about the most frequently submitted complaints. These concerned unsuccessful applications for construction permits or breaches of the law. In practice, this is an area where the law has not been standardised. Various authorities (local, municipal and police) have varying powers, which, given the lack of communication between them, creates numerous conflicts in the area of urban planning. Further, a number of the complaints relate to the administration of the Ministry of the Interior: these cases concern the travel ban due to suspicion of terrorism, and more specifically the withdrawal of permission to enter airports (“badge withdrawal”) or of authorisation to obtain a passport.

### 3.4.3 The Centre for Legal and Judicial Studies

The Centre for Legal and Judicial Studies was created by law no. 93-43 of 26 April 1993. It is a public administrative institution, with legal personality and financial autonomy, and operates under the supervision of the Ministry of Justice. The administrative and financial organisation of the centre and the details of its functioning are set out in decree no. 94-454 of 21 February 1994, amended by decree no. 2005-2146 of 4 August 2005.

#### 3.4.3.1 Organisation and structure

The Centre for Legal and Judicial Studies consists of a general director, a scientific council, a scientific committee, a study unit, a criminology unit, a consultation unit, a publication unit, and a secretariat.<sup>299</sup>

The centre is headed by a general director, appointed by decree at the proposal of the Minister of Justice. The members of the scientific council, who do not belong to the centre, are appointed by decree of the Minister of Justice for a three-year term. The chair of the scientific council can enlist the assistance of any person qualified to give an opinion when examining a specific question. In terms of its composition, this council is dominated by the executive.<sup>300</sup> Civil society is not represented, and the appointment of academics and researchers is subject to the sole decision of the supervising ministries.

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296. Decree no. 2000-884, art. 2.

297. *Idem*, art. 1.

298. Interview with Abdelsattar Ben Moussa, Ombudsman, Tunis, 26 May 2017.

299. Decree no. 94-454 as amended and supplemented by decree no. 2005-2146, art. 2.

300. The scientific council consists of the general director for the centre, the heads of the study, criminology, consultation and publication units, a general counsel from the judicial services and an inspector from the general inspectorate of the Ministry of Justice (and Human Rights), the research director at the Supreme Judicial Council, two academics specialising in law, proposed by the Minister for Higher Education, and a researcher proposed by the Minister for Scientific Research, Technology and Skills Development.

In his or her capacity as rapporteur, the general secretary of the Centre for Legal and Judicial Studies acts as secretary for the council and keeps minutes of its meetings.

### 3.4.3.2 Responsibilities

Study and research: in order to develop and adapt national legislation and to clarify major legal questions relating to the application of the law at the request of the relevant governmental bodies, the centre is tasked with organising, promoting and publishing research, organising conferences and seminars in the legal field, and supporting the publication of research by the ministry.

Legal opinions and consultations: the centre is responsible for carrying out legal consultations both internally and externally, and for preparing, at the request of the relevant ministries, responses to issues on which international organisations have requested opinions.

Communication and exchanges: the centre is required to organise international cooperation with governments and government organisations in the legal field and to promote Tunisia's achievements in the field of justice by publishing pamphlets on this topic. It is also tasked with contributing to more effective use of computers in the legal domain and in the functioning of the courts. Finally, it is tasked with compiling legal texts and various documents and making them operational, as well as promoting and protecting the national judicial heritage.

In practice, the centre has followed the work of the secretariat of the national council for organising legislation.<sup>301</sup> Subsequently, the centre also contributed to drafting the bill on the Human Rights Instance under the authority of the Ministry for Relations with Constitutional Bodies, Civil Society and Human Rights.

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301. Decree no. 2003-262 of 4 February 2003 on the establishment of the national council for organising existing legislation and regulations, JORT no. 12, 11 February 2003, p. 360.

## 4. PERSPECTIVES

While the immediate aim of this study is to map and analyse the state infrastructure for the protection and promotion of human rights in Tunisia, its principal objective is to contribute to the debate on the reform and development of the Tunisian human rights system. This study shows that there are a significant number of state actors with the mission of protecting and/or promoting human rights in Tunisia. These actors have a wide range of statutes, general or specific mandates, and functions. The initiatives and reforms that are under way have been the subject of numerous political or media debates and discussions between experts, and have repercussions at the regional or international level. This study therefore suggests a number of paths to follow in attempting to resolve, in a pragmatic and long-term manner, some of the challenges and difficulties faced by the Tunisian human rights system.

In an effectively functioning national human rights system, each actor has a well-defined role to play, alone and in liaison with the other state or private actors at the national level, and in some cases with the international and regional mechanisms for the protection and promotion of human rights. The actors contribute, within the framework of their mandate, to the establishment of public policy and laws that are directly or indirectly related to the protection and promotion of human rights. They also participate in a certain number of procedures and processes in which they play a well-defined role.

Tunisia faces two major challenges in relation to the state actors for the promotion and protections of human rights. Firstly, each actor's status and mission need to be clarified. As shown by this study, most state actors are currently undergoing varying degrees of transformation, or in some cases being replaced by new actors altogether. These transformations and reforms are the result of the transitions from the Ben Ali era to the 2011 revolution, and then from the period of post-revolutionary transition to the current period, in which the regime established by the 2014 Constitution is being implemented. The second challenge concerns the slow pace of implementing new institutions. While actors such as parliament, government and the courts have been operating since 2011, it appears that the other key institutions for the protection and promotion of human rights must address problems relating to institutional set-up, funding, or human resources. With the new constitutional bodies not yet established, work has come to a standstill or been very limited in numerous areas.

It is therefore vital that all these actors receive the financial and human resources needed to get to work. Only then will they be able to play the role assigned to them, establish priorities for their actions, and examine how they can interact with the other state and private actors in the national system for the protection and promotion of human rights. All these actors must therefore understand their respective roles and avoid any unnecessary encroachment on each other's mandates. The national human rights institution can thus play a role in facilitating dialogue between the government and civil society, but can never act as a substitute for either.

Independent state actors are the pillars of the national human rights system. The more numerous they become, the more it is vital to focus on their relations – in terms of interaction and cooperation – with each other or with the other actors in the national human rights system (government actors and authorities or non-state actors). In the case of Tunisia, it is important to reflect on the insertion of independent actors, whether old or new, into the institutional landscape and on the interactions that should or could develop between them

## **4.1 Developing relations and interactions between the actors in the national human rights system**

There are two ways in which the relations and interactions between the various state actors responsible for protecting and guaranteeing human rights can be more effectively organised. The first, and most decisive, is regulation via the law itself, in particular the laws establishing these actors and assigning them their powers and duties. The second requires an institutional culture that has not yet been developed and requires all these actors to be aware the necessity of working, both generally and in relation to the respect, protection and promotion of human rights, in a spirit of cooperation rather than one of distrust and competition. The success of any project to establish a constitutional state where human rights are guaranteed and protected is reliant on this kind of institutional culture.

The Human Rights Instance is required to play a central role in the national human rights system. Consequently, this section focuses on the relations between the future Human Rights Instance and the other actors in the national human rights system.

### **4.1.1 Interaction between the Human Rights Instance and the legislature**

The first level of interaction between the legislature, on the one hand, and the IDH and other independent constitutional bodies, on the other hand, is pursuant to article 125 of the Constitution. This states that parliament elects the members of these bodies. The IDH and other independent constitutional bodies are accountable to parliament insofar as they are required to submit their activity report to it annually for discussion.

The Human Rights Instance bill also includes a provision stating that the chair or other members of the Commission can be held personally liable before the Assembly of the Representatives of the People, in particular if they fail to carry out the duties provided in the Constitution and the law, such as those of honesty, neutrality, independence, or for reasons relating to a conflict of interest, or because they have been definitively sentenced for a crime or an offence. This recognition of liability may lead the chair or member being

dismissed from their post. The request for dismissal must be submitted by two-thirds of the members of the Instance to the Assembly of the Representatives of the People, which may then approve the dismissal by a two-thirds majority.<sup>302</sup> This procedure helps ensure balance in the relationship between the Instance and the legislature. This is because, as long as the principle of accountability – a prerequisite for any democracy, according to which any person with power is also required to answer for it – is guaranteed, the independence of the Instance will also be ensured, since it is responsible for triggering the procedure.

More generally, it is normal for the budget of the independent constitutional bodies to be discussed and adopted by parliament, since it is the state that is responsible for funding these institutions. Their financial independence is therefore guaranteed by a vote by the representatives of the people, rather than a funding allocation from a ministry. In this regard, it should be noted that the Instance may be held accountable before the chamber in relation to the management of its budget. According to article 36 of the draft framework law on the independent constitutional bodies, the Assembly of the Representatives of the People can withdraw its confidence from the chair or one of the members of the Instance's council via a two-thirds majority of the members of the Assembly, in the event that the individual in question has deviated significantly from his or her constitutional duties, or in the event of a serious breach of his or her legal obligations. This accountability of the Instance before parliament, and the procedure for withdrawal of confidence that may result, applies to all the constitutional bodies. This procedure is not triggered at the initiative of the members of the Instance, but directly by the Assembly. It may also be initiated on the basis of an assessment of its management of its budget and financial resources. It should be recalled that article 2 of the bill on independent constitutional bodies states that such bodies are subject to the principles of a constitutional state (the rule of law), good governance, transparency, honesty, efficiency, effective management of public money and accountability. Again under article 36 of the draft framework law, the Instance can be held accountable before the Assembly of the Representatives of the People if, after discussion, the Assembly rejects the annual financial report submitted to it by the Instance, or if the Instance refuses to submit this report.

On its side, parliament has a constitutional obligation to consult the Human Rights Instance on bills relating to human rights.<sup>303</sup> The IDH bill specifies that this consultation is required whenever a bill directly concerns human rights. Insofar as this is an obligation, any failure by parliament to consult the Instance on bills relating to human rights may constitute justification for a claim of unconstitutionality at the Constitutional Court, on the grounds of procedural irregularity. Finally, parliament can also consult the Instance on any bills that have some form of connection with human rights. Unlike the former obligation, this duty is exercised at the discretion of parliament, and failure to observe it has no effect on the validity of the law. However, it does widen the scope of the Instance's involvement in parliament's legislative policy in the area of protecting and guaranteeing human rights.

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302. Organic bill no. 42-2016, art. 57.

303. Constitution, art. 128.



Finally, it is the duty of the Instance to urge parliament to review existing laws, make them conform to international and regional human rights agreements and optional protocols that Tunisia has acceded to, just as it is responsible for urging the existing political power to adhere to international and regional agreements.<sup>304</sup>

#### 4.1.2 Interaction between the IDH and the executive

The designation of the Human Rights Instance (and the other four constitutional bodies) as an “independent body” essentially serves to highlight its independence from the executive. This is of great importance, since the bodies established before 2011 were essentially mere extensions of the executive – agencies offering at best expertise, or even acting in a sense to legitimise its policy and actions. The fact that the executive, and more specifically the President of the Republic, had discretionary power to appoint and dismiss their chairs and members, prevented them from being truly independent from the executive, even if the laws asserted that this was the case.<sup>305</sup>

The Human Rights Instance provided for by the Constitution is completely free from control by the executive, in terms of both its creation and its functioning. It has its own executive and administrative body, i.e. the human resources and logistical support necessary for it to carry out its mission. However, there is a close relationship between the two.

Firstly, the Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights is responsible for ensuring the establishment of the independent constitutional bodies, and for coordinating on behalf of the executive with the various actors concerned by the protection of human rights.<sup>306</sup> The Ministry’s role is not one of interference, but rather of providing technical support.

The role of the independent bodies is to control the actions of the executive, which has control over the police forces, armed forces and an administration (at the national, regional and local levels) equipped with the material and legal resources to interfere directly in people’s private and public lives. The control exercised by the Human Rights Instance may relate either to physical actions (acts of violence for example) and legal actions (decrees or orders) that infringe on rights and freedoms, or to failure to comply with an obligation to take the necessary measures to protect individuals or groups of individuals or to put an end to violations of the rights of certain persons by other persons, or to enforce a legal decision enabling a person or group of persons to regain their rights.<sup>307</sup>

304. Organic bill no. 42-2016, art. 13.

305. As with the Higher Committee on Human Rights and Fundamental Freedoms.

306. Government decree no. 2016-265 of 11 April 2016 on the creation of a Ministry for Relations with Constitutional Bodies and Civil Society and for Human Rights, establishing its mandate and responsibilities, art. 2.

307. Organic bill no. 42-2016, art. 6 (definition of “human rights violation”).

From this perspective, the Human Rights Instance can be considered the primary counterbalance to the executive. This role of counterbalance played by the Instance is particularly emphasised by article 125 of the Constitution, under which all state institutions are required to facilitate its work. It is also expressed in article 12 of the bill on the Instance, according to which the Instance is required to detect all human rights violations and issue recommendations to put an end to them. The Instance is responsible for following up these recommendations. If the institutions or persons concerned by these recommendations refuse to apply them, the Instance refers the case to the justice system.

Further, the organs of the executive are required to provide support and assistance to the Instance, in particular by providing it with any information it may request in carrying out its duties. The executive may also be the target of investigations conducted by the Instance regarding one or more human rights violations. The executive, including the security sector,<sup>308</sup> cannot refuse to be investigated or obstruct the Instance from conducting its investigation. Yet the Instance does not have any power of injunction against the executive, and can only refer the matter to the justice system if the executive refuses to apply the recommendations issued by the Instance to end the violation of a right or freedom. Nonetheless, the executive has no power over the Instance, except for discussion of its budget, which can always be mediated by the committee of the Assembly of the Representatives of the People responsible for the budget in the event of a dispute between the Instance and the government in this area.<sup>309</sup>

### 4.1.3 Interaction between the IDH and the judiciary

The Constitution grants the Human Rights Instance competence approaching that of the courts in the area of scrutinising respect of human rights, by entrusting it with an investigatory role.<sup>310</sup> The Human Rights Instance bill provides details on this role and the relationship between the judiciary and the Instance in this area. A lesson was learned in this area from the experience of the Commission to Investigate Corruption and Embezzlement, created just after the revolution and assigned an investigatory role. The Commission immediately ran into resistance from judges, who considered its actions to be encroaching on their jurisdiction.<sup>311</sup>

The bill seeks to ensure that the relationship between the Instance and the judiciary is one of cooperation, and to prevent any overlaps or conflicts. Firstly, article 24 of the bill provides that in the event of a human rights violation by the state, the Instance is empowered to take any measures necessary to end the violation. If the violation continues, the Instance

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308. *Idem*, art. 9.

309. Organic bill no. 30-2016, art. 18.

310. Constitution, art. 128.

311. See the report from the Commission to Investigate Corruption and Embezzlement created under the decree-law of 18 February 2011 at <http://www.businessnews.com.tn/pdf/Rapport-CICM.pdf>

then provides the judiciary with a detailed report on the matter. Next, article 25 of the bill provides that the investigation into a human rights violation may either end in conciliation between the victim and the perpetrator of this violation, or failing this in the case being referred to the competent court.

At the same time, it should be noted that the judiciary has no power over members of the Instance, who have legal immunity and cannot be prosecuted until this immunity is lifted via an absolute majority vote in the Assembly of the Representatives of the People.<sup>312</sup>

#### **4.1.4 Interaction between the IDH and the other constitutional bodies**

Aware of the complexity of the institutional landscape in the area of guaranteeing and protecting human rights, political actors have contemplated how to harmonise this landscape and optimise the actions of its actors, whether individually or as a whole. Article 4 of the Human Rights Instance bill thus directly addresses the issue of the efficiency of the human rights system and cooperation between the various bodies:

“The Human Rights Instance carries out its duties in collaboration with the other independent bodies working in the area of human rights. It may enter into agreements or coordinate its actions with them in order to ensure the effectiveness and complementarity of the various components of the human rights system”.

More specifically, article 16 of the Human Rights Instance bill declares that the Instance is required to cooperate with the National Authority for the Prevention of Torture and all the other bodies working in the field of human rights, and to exchange with the Authority data and information relating to complaints. However, no details are provided as to how this cooperation is to be implemented.

Finally, article 32 of the draft framework law on independent constitutional bodies gives the administrative courts competence to settle conflicts of jurisdiction between independent constitutional bodies. Since administrative law applies to independent state authorities (Authority for the Prevention of Torture, Truth and Dignity Commission), it can be said that conflicts of jurisdiction between such authorities, or between these authorities and the constitutional bodies, also fall within the competence of the administrative courts.

It should be added that bill no. 42-2016 clarifies the links between the future IDH and the current Higher Committee on Human Rights and Fundamental Freedoms (CSDHLF). The IDH is the successor to the current CSDHLF. The new Instance will be assigned all the property of the CSDHLF, its equipment, archives and documents.<sup>313</sup> By contrast, the

312. Organic bill no. 42-2016, art. 52.

313. Bill no. 42-2016, art. 60 and 61.

bill makes no reference to the relationship between the IDH and the Truth and Dignity Commission (IVD). Upon termination of the IVD's work, scheduled for June 2018 or at the latest June 2019 in the event of an extension, its property, equipment and staff will revert by law to the Tunisian state. Nevertheless, it would be beneficial for the IDH to receive the IVD's property, staff, equipment, archives and documents, in particular its case files. The IDH could take over and follow up on the implementation of the IVD's recommendations and decisions, since the IDH's mandate is also to support the victims of human rights violations and ensure that they receive proper indemnification and compensation.

#### **4.1.5 Interaction between the IDH and civil society organisations**

Civil society organisations are distinguished by their multiplicity and diversity. This is firstly demonstrated by the fact that these actors do not all adopt a comprehensive approach to defending human rights, but instead may adopt a sectoral approach by focusing their work on a single category of individuals, such as women, disabled people or minorities, or indeed on a particular category of rights, such as economic and social rights or freedom of expression.

This distinctively multifaceted structure of civil society may lead to differences in certain attitudes towards or even conceptions of human rights. In addition, not all elements of civil society necessarily share the same frame of reference in relation to these rights – their ethical approaches may be religious or secular. This disparity concerning the basic principles of human rights was also raised during the discussions on the draft Constitution of 27 January 2014, both within the National Constituent Assembly and within civil society.<sup>314</sup> It may cause clashes or antagonistic relationships between the actors defending human rights. These conflicts may promote the emergence of selective and/or hierarchical attitudes towards human rights, which may be strongly prejudicial to the principles of the indivisibility and interdependence of these rights.

It is true that the Paris Principles provide for the representation of civil society within the bodies tasked with guaranteeing, protecting and promoting human rights. Yet the problem that inevitably arises is how this principle can be implemented. How can individual entities be chosen to represent civil society, when it is so complex and diverse? Which entity can be considered representative and therefore invited to become a member of the body? It is difficult to establish an objective criterion for representation, and any inclusion of one or more civil society organisations not considered by civil society as representative, or whose legitimacy is contested, may undermine the confidence of civil society in the body or create a conflictual relationship between them. In any case, the relationship between the state actors responsible for guaranteeing and protecting human rights, in particular the Human Rights Instance, and civil society is already provided for by law, both at the organisational level and in terms of their activities and duties.

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314. In this area, see the report on the national dialogue on the draft Constitution, published with the support of UNDP in March 2013.

At the organisational level, this relationship is enshrined by the requirement for members representing civil society, and more precisely organisations working in the field of human rights protection, to sit on the council of the Human Rights Instance.<sup>315</sup>

At the operational level, article 13 paragraph 4 of the bill on the Human Rights Instance states that the Instance is required to establish relationships of cooperation and partnership in the area of strengthening and developing human rights and freedoms with state bodies, civil society organisations, and specialised international organisations.

## **4.2 Strengthening certain key actors in the system**

A continuous effort must be made to strengthen the work of the Assembly of the Representatives of the People and ensure the independence and proper functioning of the justice system. This is a general effort, the various benefits of which will include strengthening the respect, protection and promotion of human rights.

In terms of the actors specialising in the protection and promotion of human rights, two state actors may play a key role. These actors are, on the governmental side, the National Commission for the Coordination, Preparation and Submission of Reports and Follow-up to Recommendations on Human Rights and, from the independent actors, the future Human Rights Instance.

### **4.2.1 The National Commission for the Coordination, Preparation and Submission of Reports and Follow-up to Recommendations on Human Rights**

The Interministerial Commission is a recently created body that is currently developing its working methods and its procedures for cooperating with a number of other actors. Recent experiences in terms of preparing reports and submitting them to UN treaty and charter bodies have already suggested some areas for improvement.

When preparing reports, greater effort must be made to coordinate the collection of the information and data required to do so.

In terms of the process for political approval and implementation of the recommendations, the Interministerial Commission organises its work by grouping recommendations in thematic and operational categories (based on the ministry responsible for their implementation). The analysis of each recommendation, and identification of the actors involved in implementing the recommendations, began in 2017. Next, the relevant actors will require guidance in implementing the recommendations that concern them.

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315. Organic bill no. 42-2016, art. 31.

The Interministerial Commission will then need to adopt procedures and guidelines to ensure consistency of operations and the division of work between the various actors involved. Given the role of parliament in following up on the recommendations from international human rights mechanisms and in monitoring and scrutinising policy, the Commission must be in contact with the parliamentary committees involved in following up and assessing the national implementation of recommendations issued by international and regional human rights bodies.

Furthermore, activities to build the capacities of members of parliament could be developed, particularly in terms of the creation of indicators relating to the protection and promotion of human rights. These indicators constitute a major tool for members of parliament in the area of legislation, follow-up and assessment of policy. It is also vital to develop a good relationship with the judicial power, by keeping it informed of recommendations and by collecting and distributing information on relevant legal decisions in the area of international human rights law. Finally, there should be periodic consultations with the Human Rights Instance and civil society organisations.

#### 4.2.2 The Human Rights Instance

The future Human Rights Instance, as provided for in bill no. 42-2016, is mandated to play the central role of a national human rights institution within the national human rights system. It is essentially responsible for scrutinising and monitoring the respect and development of human rights and freedoms by the Tunisian state and has the power to investigate human rights violations. As we saw earlier,<sup>316</sup> its central place in the national human rights system: gives it natural institutional access to all the other state actors in the system. Its independence, guaranteed by the Constitution and the future law, will give it new legitimacy in its interactions with the various dynamic and competent actors within civil society.

The Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights state that “the national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.”<sup>317</sup> This is a vital element with regard to the role the IDH will be required to play in practice. With financial resources suited to its responsibilities, it will be properly able to play the role provided for it in the Constitution and the future law.

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316. See 4.1 above on the interactions between the IDH and the other actors in the national human rights system.

317. See 2.4.1 above on the general normative framework for the independent constitutional bodies and 2.4.2 on the national human rights instance. The Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights, Recommendations approved by the Human Rights Instance on March 1992, (Resolution 1992/54) and by the General Assembly (Resolution A/RES/48/134 of 20 December 1993).

Since 2011, Tunisia has implemented an ambitious public infrastructure for its national human rights system, accompanied by more widespread reform of the Tunisian system. In pragmatic terms, the IDH will also need to define the priorities of its action in order to fulfil its mandate and provide a basis for the credibility and legitimacy that its assigned role requires. It is therefore vital for the IDH to optimise its resources and cooperate with all the other actors in the national human rights protection system.

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	Decree no. 1992-1330 of 20 July 1992 on the Ministry of Justice	Décret n°1992-1330 du 20 juillet 1992 concernant le ministère de la justice
	Decree no. 92-2141 of 10 December 1992, amending and supplementing decree no. 91-54 of 7 January 1991 on the Higher Committee on Human Rights and Fundamental Freedoms	Décret n°92-2141 du 10 décembre 1992, modifiant et complétant le décret n°91-54 du 7 janvier 1991 relatif au Comité supérieur des droits de l'Homme et des libertés fondamentales
	Decree no. 92-2142 of 10 December 1992 on the creation of the Medal of the President of the Republic for Human Rights, JORT no. 84, 18 December 1992, p. 1587	Décret n°92-2142 du 10 décembre de 1992, portant création de la médaille du Président de la République pour les droits de l'Homme, JORT n°84 du 18 décembre 1992, p. 1587
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1993	Law no. 93-51 of 3 May 1993 on the office of the Administrative Mediator, JORT no. 35 of 11 May 1993, p. 633	Loi n°93-51 du 3 mai 1993 relative aux services du médiateur administratif, JORT n°35 du 11 mai 1993, p. 633
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	Decree no. 93-147 of 18 January 1993 on the creation of the "Citizen Supervisor" team.	Décret n°93-147 du 18 janvier 1993 portant création de l'équipe du « citoyen superviseur »
	Order of the Prime Minister of 7 April 1993 establishing the terms of the application of article 5 of decree no. 93-147 of 18 January 1993 on the creation of the "Citizen Supervisor" team	Arrêté du Premier ministre du 7 Avril 1993 fixant les modalités d'application de l'article 5 du décret n°93-147 du 18 janvier 1993, portant création de l'équipe du « citoyen superviseur »
1995	Constitutional law no. 95-90 of 6 November 1995	Loi constitutionnelle n° 95-90 du 6 novembre 1995
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<b>2004</b>	Organic law no. 2004-63 of 27 July 2004 on personal data protection, JORT no. 61 of 30 July 2004, page 1988	Loi n°2004-63 du 27 juillet 2004 relative à la protection des données personnelles
<b>2006</b>	Decree no. 2006-1862 of 3 July 2006 amending decree no. 93-147 of 18 January 1993 on the creation of the "Citizen Supervisor" team	Décret n°2006-1862 du 3 juillet 2006 modifiant le décret n°93-147 du 18 janvier 1993, portant création de l'équipe du « citoyen superviseur ».
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# THE DANISH INSTITUTE FOR HUMAN RIGHTS

*“State Actors in the Tunisian Human Rights System”* forms part of the activities of the Danish Institute for Human Rights in the Middle East and North Africa. This study seeks to enable a better understanding of the Tunisian human rights system as a whole and of the central role of the state infrastructure for human rights protection: its actors, its normative framework, and the various process implemented at national level. It provides an analysis of the institutional landscape with the goal of providing an overview of the state actors and their mandates at a time when the human rights protection system is being reformed and created. This study is intended for students and professionals working in or dealing with the fields of human rights, law and society.

*The Danish Institute for Human Rights* is Denmark’s national human rights institute and an EU specialised national body for the promotion of equal treatment in the areas of disability, gender and the prevention of racial and ethnic discrimination. The Institute promotes and protects human rights via partnerships across the world with the state, civil society, independent institutions and economic actors as well as through research, documentation, education, training and communications. Among other things, the Institute focuses on supporting actors in the national human rights system, access to justice, public participation, and the influence of companies on human rights.

This study was carried out with the support of academics from the Faculty of Legal, Political and Social Sciences of Tunis, Carthage University, Tunisia.

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