EURO-MEDITERRANEAN HUMAN RIGHTS NETWORK

RÉSEAU EURO-MÉDITERRANÉEN DES DROITS DE L'HOMME

الشبكة الأوروبية ـ المتوسطية لحقوق الإنسان

MOROCCO

The Independance and Impartiality of the Judiciary

2008 - EMHRN REPORT

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Copenhagen
January 2008
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Bibliographic information

Title: The independence and impartiality of the judiciary- The case of Morocco
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Corporate Author: Euro-Mediterranean Human Rights Network (EMHRN)
Publisher: Euro-Mediterranean Human Rights Network (EMHRN)
Date of first publication: January 2008
Pages: 42
Original language: French
Translation into English: Anita Goh
Proofreading, editing and lay out: Aurélie Grenet, Fabrice Liebaut, Thibaut Guillet, Marc Schade-Poulsen, Marc Degli Esposti.
Index terms: justice, law, human rights, judiciary, judicial system
Geographical terms: Morocco / North Africa

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

OUTLINE OF THE REPORT

INTRODUCTION

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

The Euro-Mediterranean Human Rights Network (EMHRN) was created in 1997 by a number of human rights organisations from the North and the South of the Mediterranean in response to the establishment of the Euro-Mediterranean Partnership. Based in Copenhagen with branch offices in Brussels, Rabat and Amman, it is currently composed of approximately 80 member organisations and individual members from more than 30 countries. The EMHRN's mission is to promote and strengthen human rights and democratic reform within the frameworks of the Barcelona process and EU-Arab cooperation. It seeks to develop and strengthen partnerships between NGOs in the EuroMed region by facilitating the development of human rights mechanisms, disseminating the values of human rights and generating capacity in this regard at a regional level.

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

B- The EMHRN's Working Group on Justice

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

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

The seminar on the Moroccan judiciary took place in Casablanca on 11 and 12 November 2006. It gathered a large number of judges, prosecutors, representatives of the Moroccan Ministry of Justice and other judicial bodies, lawyers, local and international NGOs, international institutions and representatives of the European Union as well as a few Member States[5]. In the aftermath

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

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

3 Mohammed Mouaqit and Siân Lewis-Anthony.

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

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

of the seminar, The Working Group on Justice asked a Moroccan expert, Abdelaziz Nouaydi, to draft a national rapport on the independence and impartiality of the Moroccan judiciary taking into account, amongst other sources, the conclusions of the seminar[6].

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

Background and goals

The report on the Independence and Impartiality of the Moroccan Judiciary aims at describing the main features of the judiciary with a focus on the problems and circumstances affecting its independence and impartiality. The examples mentioned in the report illustrate the serious consequences of the lack of independence and impartiality on the citizens' rights when it comes to Justice. Following a description of the reforms which have already been accomplished, the report includes a series of detailed recommendations about the constitutional, legal and administrative changes that are needed to achieve a level of independence in accordance with the international standards. The recommendations are primarily directed towards the Moroccan authorities ; the latter are indeed requested to demonstrate the political will that is required in order to achieve real and substantial progresses. Other recommendations are directed towards external actors and donors, including the European Union, as well as towards the civil society.

It is hoped that this report will become a useful tool not only for the actors of the Moroccan judiciary, but also for the organisations of the Moroccan civil society whishing to engage actively in the promotion and strengthening of the independence of the judiciary. These organisations have been associated to the drafting of the report and it now expected that they will continue to actively work for promoting reform[7].

Methodology

To conduct his research, the author of the present report took altogether the debates and conclusions of the Casablanca seminar of November 200, organised by the EMHRN, issued reports and some existing literature, into account, in addition to his own experiences as an academic, a lawyer, and the director of an NGO working in favour of the independence of the Moroccan judiciary.

The Moroccan members of the EMHRN working group on Justice, representing the Moroccan Organisation of Human Rights (OMDH) and the Moroccan Association of Human Rights (AMDH) were also associated with the drafting process, as the report was completed and improved on the basis of their comments and suggestions.

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

Outline

The report is divided into six chapters. Chapter one is dedicated to the normative background of the Moroccan judiciary, notably to treaty provisions and the limitations to their implementation in domestic law, and the constitutional principles that guarantee – often in an insufficient manner – the independence of the judiciary and of judges individually.

Chapter two concerns the limits to the independence of the judiciary that result either from the law itself or from its practice. Within this context, issues related to the monitoring of the magistrates' career development, to their freedom of association and expression as well as to the role and powers of the High Judicial Council will be examined in detail.

Chapter three deals with the impartiality of the judicial system, and puts the emphasis on the legislative framework, the efforts undertaken to adopt a code of ethics for magistrates and, finally, the more general issue of corruption within the judicial institution.

Since no independent and impartial judiciary can exist without an independent and impartial defence, the situation of Moroccan lawyers - in particular the safeguards and immunities they enjoy and the issues of ethics - will be examined in Chapter four.

Chapter five returns to the consequences of the

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

7 Following the publication of this report, the EMHRN intends to pursue its work at national level. A follow-up seminar will be organised in Morocco the course of 2008-09 during which participants – members of the judiciary, lawyers and NGOs – will discuss the content and implementation of the conclusions and recommendations of the report.

8 www.euromedrights.net

limits to the independence of the judiciary on human rights, and illustrates them by a certain number of cases in two particularly sensitive fields, ie the repeated trials against the independent press and terrorism cases.

Finally, Chapter six reviews the state of the judiciary reforms undertaken to date in Morocco, and highlights their almost null impact on the issue of independence.

The report is concluded by a series of detailed recommendations directed to the Moroccan authorities, to external actors (European Union) and to the civil society.

THE NORMATIVE BACKGROUND

In the field of human rights, which notably comprises the right to a fair trial an independent and impartial judiciary, there are two sets of norms of reference that are applicable to any State governed by the rule of law : namely, the international conventions it agreed to and its own constitution.

Morocco ratified the main human rights conventions but the scope and limits of these ratifications need to be analysed (A). Besides, though the Moroccan Constitution proclaims the independence of the " judicial authority, the legislative power and the executive power " and establishes a Constitutional Council to whom its respect is, in principle, entrusted, the real value of these constitutional safeguards also needs to be examined (B).

A- Morocco and human rights conventions

With some noteworthy exceptions, Morocco ratified the main human rights conventions (1). However, both the conventions' status under the Moroccan Constitution and the non-recognition of the treaty bodies' competence to receive individual communications limit this acceptance (2). The chapter is further completed by recommendations of some treaty bodies on the issue of justice (3).

1- The international conventions ratified by Morocco

After its independence in 1956, Morocco started by ratifying certain conventions, such as the Geneva Conventions (1956), the Convention on the prevention and punishment of the crime of genocide (1958) and Convention on the elimination of all forms of racial discrimination (1969), that presented no big impact or constraint for public authorities with regard to the domestic human rights policy.

In 1979, Morocco took a first step forward with the ratification of both the Covenant on economic, social and cultural rights and the Covenant on civil and political rights. This development was facilitated by the relative opening of the political system after the "black years" (1959-1977), marked by fierce repression against the social movement and the left-wing opposition in particular.

After lengthy years, a second stage was reached in 1993 with the ratification, at the Vienna Conference on Human Rights, of four conventions of great scope (CAT, CEDAW, CRC and Convention on the protection of the rights of all migrant workers and members of their families, see table below). That progress was, this time, made possible thanks to the changes that happened both at the international level (dismantling of the Berlin wall, international pressure) and at the domestic level, in particular those initiated by the human rights movement's battles (*Ligue Marocaine des Droits de l'Homme*, *Association Marocaine des droits humains*) supported by international NGOs[9]. The creation of the Moroccan Organisation for Human rights (*Organisation Marocaine des Droits Humains*) in 1988 also revitalized the whole human rights movement. And at the same time, more and more claims for political and social changes -on a constitutional and legislative level- were made by trade unions, opposition parties and feminist activists.

The majority of the conventions of the International Labour Organization has been ratified by Morocco, with notably the exception of one of the most important conventions, Convention no 87 on the right to organise (not ratified mainly because this right is expressly forbidden to judges)[10].

Human rights organisations urged Morocco to ratify other important conventions in order to improve the status of the judiciary and the human rights criminal protection system, notably the Rome Treaty on the International Criminal Court that Morocco signed in September 2000. This call was reinforced by a

9 In 1990, Amnesty International published a report on torture during custody on remand in Morocco. Within this context, the French writer Gilles Perrault also wrote in 1990 a damning book, Notre ami le Roi, Gallimard editions, Collection Folio Actuel.

10 This point will be analysed in the chapter on the supervision of the freedom of association of magistrates.

recommendation that the Equity and Reconciliation Commission (IER – *Instance Equité et Réconciliation*) made to that effect in its final report[11].

The same applies in relation to the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006 by the General Assembly of the United Nations, as well as the Optional Protocols to the International Covenant on Civil and Political rights and the Convention against Torture. It is worth noting that the permanent mission of Morocco to the United Nations declared, in a letter dated 17 April 2006 addressed to the United Nations Secretariat within the context of Morocco's candidature to the Human Rights Council[12], that Morocco " solemnly undertakes to carry out the ratification or accession to the seldom human rights instruments to which Morocco is not a party yet (…), including the International Convention for the Protection of All Persons from Enforced Disappearance" (which was still pending completion within the United Nations at the time). Since then, though Morocco was elected at the Human Rights Council, the convention has not yet been ratified. Yet, this convention is very important considering the disappearance practices in the recent history of Morocco, including in its fight against terrorism, especially since the terrorist attacks of 16 May 2003[13].

Treaties	Signature	Ratification/ Accession	Reservation
International Covenant on Civil and Political Rights	19.01.1977	3.05.1979	none
ICCPR First Optional Protocol (Individual communication)	x	X	
ICCPR Second Optional Protocol (Death penalty)	x	X	
Convention on the Rights of the Child (CRC)	26.01.1990	21.06.1993	Article 14
Convention on the Elimination of All Forms of Discrimination against Women		21.06.1993	Articles 2, 15/4, 9/2, 16
CEDAW Optional Protocol	X	x	
International Convention on the Elimination of All forms of Racial Discrimination	18.09.1967	18.12.1970	Article 22
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or	8.01.1986	21.06.1993	Article 30/1
CAT Optional Protocol	x	X	
International Covenant on Economic, Social and Cultural Rights	19.01.1977	3.05.1979	

11 See the final report on the website www.ier.ma (in French, Arabic and Spanish).

12 See the link http://www.un.org/ga/60/elect/hrc/morocco.pdf, page 5.

13 See the FIDH (February 2004), Amnesty International (June 2004), HRW (October 2004) reports concerning the kidnapping of terrorists suspects by the secret services prior to their appearance before the judicial police.

2- The limits to the accession to international conventions

Those limits are due to the ambiguous status of international conventions under the Constitution of Morocco (a) and to the non-recognition of the competence of treaty bodies to receive individual communications for certain conventions (b).

a) The ambiguous status of international conventions under the 1996 Constitution

The constitutional provisions relating to the status of international standards can be found in the Preamble and in Article 31 of the Moroccan Constitution of 1996[14]. More particularly, the Preamble states: "*The Kingdom of Morocco, conscious of the need to place its actions in the context of the international bodies of which it is an active and dynamic member, subscribes to the principles, rights and obligations stemming from the charters of those bodies and reaffirms its attachment to human rights as universally recognized"* (the author's emphasis). For his part, the King made a very important declaration to that effect in 1999[15].

Whether this declaration is legally binding on the legislator, the administration and the judge is yet still to be demonstrated.

For the legislator, such declaration can prevail only in cases where there is a reinforced review of the constitutionality of laws coupled with constitutional courts capable of reviewing the laws referred to it in the spirit of the international standard. Yet, both conditions are lacking in the case of Morocco.

Only the King, the presidents of both chambers of Parliament or the quarter of either one or the other chamber can refer an ordinary law to the Constitutional Council. Thus, since a minority of members of Parliament cannot gather the required number of signatures (that is to say 82 signatures out of 325 at the Chamber of Representatives and 68 signatures out of 270 at the Chamber of Councillors), neither can they refer to the Constitutional Council a law that it considers being unconstitutional. The practice of legislative consensus can also lead to the adoption of unconstitutional laws, as it was illustrated with the adoption in February 2006 of a law on political parties, which replaced the declaration system by a system of "authorisation under disguise", granting the Home Office special powers that allow it to prevent the creation of new parties.

On the other hand, the Moroccan Constitutional Council's jurisprudence has shown little courage. When it had the opportunity to invalidate laws in the name of universal human rights standards, the Council generally settled for mentioning a few articles of the Constitution, but not its Preamble[16]. For the administration as for the executive power in general and for the ordinary judge, the Preamble of the Constitution cannot prevail over a domestic law in force, which compliance with the international standard was not deemed necessary by the legislator. This is particularly true given that Article 31 of the Constitution does not clarify the hierarchy of norms in case of conflict: " *[lthe King] signs and ratifies treaties. However, treaties relating to the State finances cannot be ratified without a prior approval of the Chamber of Representatives (subsection 2). Treaties inconsistent with the provisions of the Constitution are approved in accordance with the procedures necessary for the revision of the Constitution (subsection 3) "*. Thus, since nothing in the Constitution confirms the supremacy of treaties over domestic legislation, a constitutional clarification is needed. This is particularly true given that the Constitutional Council is not likely to take the initiative of affirming the supremacy of international norms, in particular in the human rights field, since that issue is all the more important in cases of a political nature that involve laws that violate basic freedoms or

14 Adopted by referendum on the 13 September 1996 and promulgated by royal dahir of the 7 October 1996, published on the Official Bulletin of 10 October 1996.

15 On the occasion of the celebration of the 51st anniversary of the Universal Declaration of Human Rights, in a message addressed to the nation, His Majesty King Mohamed VI said: "We wish to reaffirm our commitment to human rights and the values of liberty and equality, for we are firmly convinced that respect for human rights and the international conventions in which such rights are enshrined is not a luxury or a fashion to which one conforms, but a necessity dictated by the imperatives of construction and development. Some people consider that complying with the Universal Declaration of Human Rights is likely to hamper development and progress, and might clash with real or imagined specific cultural characteristics. For our part, we believe that there is no opposition between the imperatives of development and respect for human rights, just as there is no antagonism between Islam, thanks to which human dignity is firmly rooted, and human rights. That is why we consider that, if human rights are not respected in the future, there will be no future".

16 [16] In its decision 630/07 of 23rd January 2007, the Constitutional Council relied on Article 3 of the Constitution which provides that political parties participate in the organisation and in the representation of the citizens (subsection 1), and that there can be no single party (subsection 2). The Constitutional Council declared as unconstitutional the provisions contained in paragraphs 5 to 8 of Article 20 of the organic law modifying and completing organic law 31.97 on the Chamber of Representatives, adopted by both chambers, under which participation of political parties to the next elections and accreditation of their candidates was subject to obtaining at least 3% of the votes at the last elections in 2002.

provisions such as certain articles of the press code, the Terrorism Act or the Political Parties Act[17].

b) The non-recognition of the competence of treaty bodies to receive individual communications

The competence of the treaty bodies to receive individual communications, despite their non judicial character, is important because it incites public authorities to take their international obligations more seriously. The examination of individual communications is also a way of illustrating the flaws or the ineffective nature of domestic means of appeal that are offered by the judicial system. Yet, despite the repeated demands of Moroccan human rights NGOs, Morocco has not ratified nor has it acceded to the instruments authorising the treaty bodies to receive individual communications. Thus, Morocco has not ratified the Optional Protocol to the International Covenant on Civil and Political Rights, nor the other instruments recognising the same competence to the various treaty bodies. It is however noteworthy that, on 19 October 2006, Morocco eventually made the declaration, yet incomplete, allowing the Committee against torture to receive individual communications under Article 22 of the Convention against Torture[18].

3- Recommendations of the treaty bodies on justice

This section aims at presenting some of the recent observations and recommendations from the Human Rights Committee and the Committee against Torture directly or indirectly related to the functioning of the judiciary in Morocco.

a) The Human Rights Committee

In its concluding observations of 2004[19] concerning Morocco, the Human Rights Committee wrote: *" 14. The Committee remains concerned at the numerous allegations of torture and ill-treatment of detainees and at the fact that the officials who are guilty of such acts are generally liable to disciplinary action only, where any sanction exists. In this context, the Committee notes with concern that no independent inquiries are conducted in police stations and other places of detention in order to guarantee that no torture or ill-treatment takes place"* (the author's emphasis).
With that respect, it recommended that: *"The State party should ensure that complaints of torture and/or ill-treatment are examined promptly and independently. The conclusions of such examinations should be studied in depth by the relevant authorities so that those responsible can be not only disciplined but also punished under criminal law. All places of detention should be subject to independent inspection (Covenant, arts. 7 and 10)"*.

The Committee further stated: *" 16. The Committee is concerned that the accused may have access to the services of a lawyer only from the time at which their custody is extended (that is, after 48 or 96 hours). It recalls that, in its previous decisions, it has held that the accused should receive effective assistance from a lawyer at every stage of the proceedings, especially in cases where the person may incur the death penalty"* (the author's emphasis).
On this point, it recommended that: "*The State party should amend its legislation and practice to allow a person under arrest to have access to a lawyer from the beginning of their period in custody (Covenant, arts. 6, 7, 9, 10 and 14)".*

Finally, in a direct manner the Committee observed that: *" 19. The Committee remains concerned that the independence of the judiciary is not fully guaranteed "* and therefore recommended that: *" The State party should take the necessary steps to guarantee the independence and impartiality of the judiciary (Covenant, art. 14, para. 1)".*

b) The Committee against Torture

In its conclusions and recommendations concerning Morocco the Committee against Torture[20] declared itself: *" Concerned, inter alia, about* :
e) The lack of information about measures taken by the judicial, administrative and other authorities to act on complaints and undertake inquiries, indictments, proceedings and trials in respect of perpetrators of acts of torture, notably in the case of acts of torture verified by the Independent Arbitration Commission for compensation for material damage and moral injury suffered by the victims of disappearance or arbitrary detention and their next of kin" (the author's emphasis).

Amongst the recommendations of the Committee against Torture to the Moroccan authorities, there was the necessity to: *" f) Ensure that all allegations*

17 See chapter V of the present report dedicated to the trials against the independent press and terrorism trials.
18 This positive initiative is certainly due, on the one hand, to the election of a Moroccan female judge at the Committee against Torture, Mrs Essadia BELMIR (who will sit at the Committee until 2009) and, on the other hand, to the election of Morocco at the new Human Rights Council in May 2006.
19 Concluding observations of the Human Rights Committee: Morocco, 01/12/2004. CCPR/CO/82/MAR.
20 Doc. CAT/C/CR/31/2, 5 February 2004: Morocco, Conclusions and recommendations of the Committee against Torture.

of torture or cruel, inhuman or degrading treatment are immediately investigated impartially and thoroughly, especially allegations relating to cases and situations verified by the aforementioned Independent Arbitration Commission and allegations implicating the National Surveillance Directorate in acts of torture, and ensure that appropriate penalties are imposed on those responsible and that equitable compensation is granted to the victims".

Finally the Committee against Torture recommended the State to: *" Withdraw the reservation made concerning article 20 and make the declarations provided for in articles 21 and 22 of the Convention"* (the author's emphasis). In so doing, the Committee requested the Moroccan State to recognise its competence to investigate, in cooperation with the State, on allegations of torture, including visits (Article 20), and its competence to receive communications from other States parties (Article 21) or individuals (Article 22).

B- The constitutional provisions

We will examine the constitutional provisions on the judiciary in general and on judges in particular (1), before considering the status of constitutional justice (2).

1- The constitutional safeguards of the independence of the judiciary

The safeguards relating to this independence are to be found under title VII of the Constitution. Since these provisions are short, they can be entirely quoted:

Art 82. The judicial authority is independent of the legislative power and the executive power.
Art 83. Judgements are delivered in the name of the King.
Art 84. Judges are nominated by dahir on the proposal of the High Judicial Council.
Art 85. Magistrates are irremovable.
Art 86. The High Judicial Council is presided over by the King. Furthermore, it is composed of:
- the Minister of Justice, as vice-president;
- the first president of the Supreme Court;
- the King's Prosecutor General of the Supreme Court;
- the president of the first Chamber of the Supreme Court;
- two representatives of the appeal courts judges elected from amongst themselves;
- four representatives of the first degree jurisdictions judges elected from amongst themselves.

Art 87. The High Judicial Council watches over the application of the guarantees granted to magistrates in relation to their promotion and discipline.

A real assessment of the guarantees enshrined in the Constitution implies to examine them in the light of the law and the practice. One can however observe that the King's status as " *Amir Al Mouminine* " (Commander of the believers) and his constitutional powers with regard to the appointment of senior civil servants and militaries result in that he monopolizes the appointments of the most senior judicial posts, such as those of First president of the Supreme Court and King's Prosecutor General of that court. Indeed, proposals of the High Judicial Council do not bind the King.

In addition, the constitutional provision according to which " judgements are delivered in the name of the King " recalls the theory of delegation of the judicial power: " the relationship of political power to Justice has conformed to a secular tradition, which considers justice as a royal attribute"[21]. Thus, the King can confer pardon to any person at any step of the judicial proceedings. According to the 6 April 1953 Act, amended by the 8 October 1977 Act, royal pardon can be conferred before proceedings, during criminal trial or after sentencing. Conferring pardon to someone before or after the trial comes from the conception according to which the King is the First and Supreme judge of the kingdom.

2- The constitutional justice and its limits[22]

The Moroccan Constitutional Council does not appear in the hierarchy of courts, where the Supreme Court stands on top. Its particular place results from its powers: it acts as a referee between institutions and political powers. Its decisions cannot be appealed and they bind all public authorities and all administrative and jurisdictional authorities.

In the 1996 Constitution, the status of its members experienced a real improvement that could reinforce their capacity of independence (a). But, the approach the King chose when appointing the members and the president of the Constitutional Council appeared to be of a more conservative nature (b). In addition, whereas its powers are quite extensive, access to the Council is limited (c), and its jurisprudence remains attentive to politics (d).

21 EMHRN: *Justice in the South and East Mediterranean Region*, October 2004, p.49.

22 It is very unfortunate that the Constitutional Council does not have a website where researchers or any interested person could surf on and get information on the Council and its jurisprudence. That does not serve research nor transparency.

a) An improvement of the status of the Constitutional Council and its members

This improvement results from the better balance established between the King and the Parliament with regard to the appointment of members, and the more protective status granted to its members.

Appointment of members

In the former Constitution of 1992, the Constitutional Council was composed of nine members, and five of them, including the president, were appointed by the King. The president of the Chamber of Representatives appointed the four other members. Since the 1996 Constitution, the Council is composed of twelve members: six of them, including the president, are appointed by the King. Each president of the two Chambers of Parliament appoints three members. Thus the King and the Parliament are now almost on an equal footing regarding the appointment of members of the Council.

Status of members

Term of the mandate: in the 1992 Constitution, members of the Constitutional Council were appointed for a term of six years, renewable once. This possibility for renewal might have conduced some members to behave in a certain way in the hope of retaining their seat for another term. Under the 1996 Constitution, members of the Council are appointed for a term of nine years, non-renewable. This provision does not per se guarantee their independence and their integrity, which also depends on personal and circumstantial factors, but it does constitute a positive change.

Security of tenure : Members of the Constitutional Council cannot be dismissed nor relieved from their duties, except in the four cases mentioned under Article 10 of the organic law of 25 February 1994 on the Constitutional Council, modified on 28 September 1998, ie, if they :

- exercise any activity or duties, or hold an elective office incompatible with the condition of member of the Constitutional Council;
- lose their civil and political rights;
- have a permanent physical disability definitely impeding them to exercise their duties ;
- violate the general and specific obligations mentioned under Article 7 of the Act[23].

Incompatibilities

The incompatibilities envisaged by the law are aimed at ensuring impartiality and preventing any conflict of interest for the members. According to Article 4 of the organic law on the Constitutional Council:

" The functions of a member of the Constitutional Council are incompatible with those of a member of government, of the Chamber of Representatives, of the Chamber of Councillors and of the Economic and Social Council. They are also incompatible with the exercise of any other public function or public elective mission as well as with any paid employment in companies in which more than 50% of the capital belongs to one or several public bodies".

Besides, according to Article 7 of the organic law, members of the Constitutional Council are forbidden from exercising any senior position within a political party, a trade union or any other group with political or trade union activities, regardless of its form or nature.

Financial independence

According to Article 13 of the organic law:

"Members of the Constitutional Council receive an allowance equal to the parliamentary allowance and subject to the same tax treatment. The president of the Constitutional Council receives, in addition, a representation allowance as well as the various benefits in kind granted to the president of the Chamber of Representatives"

Thus the allowance of the members of the Constitutional Council is slightly superior to 3.000 € and the president's to 8.000 €. Besides, members of the Council who are self-employed, such as lawyers, receive the same allowance as the other

23 Article 7: Members of the Constitutional Council have the general obligation of abstaining from any activity that could compromise their independence and the dignity of their functions. It is forbidden, notably, for the duration of their functions :
– to take any public stance or consult on issues that have been or could be the subject of decisions from the Council ;
– to hold a senior position within a political party, a trade union or any other group with political or trade union activities, regardless of its form or nature, and in a general manner, to exercise any activity incompatible with the provisions of the above-mentioned subsection;
– to mention their quality as a member of the Constitutional Council on any document likely to be published and related to any public or private activity.

members[24]. In addition, there is no provision obliging members of the Constitutional Council who are also self-employed to totally dedicate themselves to their functions within the Council. This situation eventually causes disturbances in the functioning of the institution. Indeed, the fact that certain members cannot dedicate the time needed to perform their duties not only affects the quality of their own work, but also results in an imbalanced allocation of the workload amongst members of the Council.

b) The role of the King in the appointment of judges and of the president of the Constitutional Council

Contrary to the presidents of both chambers, the King holds three crucial advantages.

On the first hand, his choice in the appointment of members is not submitted to any constraint or obligation, contrarily to the presidents of both chambers who have to consult the parliamentary groups. The freedom of choice enjoyed by the King is all the more great since neither the Constitution nor the organic law set criteria for the selection of members of the Constitutional Council. Thus, in 1999, the King appointed a Doctor in Medicine as member of the Council. Still, he generally appoints magistrates coming from the Supreme Court and law professors without a particular political colour or sensitivity.

On the second hand, the King appoints the president of the Constitutional Council, who enjoys very wide powers in comparison with other members. Appointed from the start for 9 years, he is the one who chooses the rapporteurs that will examine the cases presented before the Council. This assignment is crucial in cases of electoral disputes. Indeed, even if the decisions are made by a two-third majority, that is to say, eight members, the sympathetic or hostile attitude of the rapporteur *vis-à-vis* such or such political group will influence the final decision. In practice, the analysis of decisions made in electoral disputes[25] show that the appointment of a rapporteur is linked to the solution expected.

The president of the Constitutional Council is also consulted by the King prior to the proclamation of the state of exception or prior to the dissolution of the parliament. The president has a casting vote in the event of there being an equality of votes. Finally he is the one who invites the Council to meet and supervises the agenda of meetings. He is the Council's administrative head and expenditure authorizer.

Finally, the King takes the initiative of appointing members. The presidents of both chambers, for their part, have to wait for that royal initiative to put their members forward. Thus after the promulgation of the 1992 Constitution, the King only appointed the members of the Constitutional Council in 1994. After the promulgation of the 1996 Constitution, he waited until 1999 to proceed with the appointments.

c) The jurisdiction and referrals to the Constitutional Council

<u>Jurisdiction</u>

Following the example of its French counterpart, from which the constituent power largely drew inspiration, the Moroccan Constitutional Council decides on the lawfulness of parliamentary elections and the conduct of referendums. Organic laws, prior to their promulgation, and the Rules of Procedure of each Chamber, before their entry into force, must be reviewed by the Constitutional Council which decides on their conformity to the Constitution. To that same end, ordinary laws can be referred to the Constitutional Council, prior to their promulgation, by the King, the Prime Minister, the president of the Chamber of Representatives, the president of the Chamber of Councillors or the quarter of the members of one or the other chamber. The Council can also be referred to by the Prime Minister regarding cases where it has to decide on the legislative or regulatory nature of certain provisions. When the government claims the inadmissibility of a proposal or amendment that is not of a legislative nature, its discussion in the plenary session is adjourned and the matter is referred to the Constitutional Council. It decides within eight days.

The Constitutional Council decides on parliamentary ineligibility and incompatibility matters. It is also competent for acknowledging compulsory retirement of one of its members, upon referral by its president, the president of the Chamber of representatives or of the Chamber of councillors, or by the Minister of Justice, in the cases set under

24 In France, the members of the Constitutional Council who prefer to remain active by being self-employed or by exercising any other activity that is compatible with their mandate receive half of the allowance (§ 2 of Article 6 of Ordinance 58-1067 of 7 November 1958 enacting the organic law on the Constitutional Council).

25 Decisions in which the CC rejected requests for the cancellation of elections flawed by serious frauds or tarried more than two years to deliver a decision in a case where the winner himself required the cancellation of his election that he considered fraudulent (Hafid case in 1997).

Article 10 of the organic law (above-mentioned).

The Constitutional Council decides in the event of disputes between the government and the Parliament on the implementation of the organic law on parliamentary commissions of inquiry.

Referrals to the CC

The Constitutional Council can be referred to by:

- The King : constitutionality of ordinary laws, consultation of the president of the Council prior to the proclamation of the state of exception or the dissolution of parliament ;
- The Prime minister : constitutionality of organic and ordinary laws, legislative or regulatory nature of legislative texts, inadmissibility of legislative texts, disputes between the government and the parliament on the implementation of the organic law on parliamentary commissions of inquiry;
- The presidents of both chambers: constitutionality of ordinary laws, constitutionality of the Rules of Procedures of parliament, status of parliament members, disputes between the government and the parliament on the implementation of the organic law on parliamentary commissions of inquiry, compulsory retirement of a member of the Constitutional Council if he is elected at parliament ;
- The quarter of parliamentary members of each chamber : constitutionality of ordinary laws ;
- Parliamentary candidates, the governor, the secretary of the national commission of census and the concerned voters : lawfulness of the parliamentary elections;
- The president of the Constitutional Council : compulsory retirement of a member of the Council;
- The minister of Justice : status of members of Parliament, compulsory retirement of a member of the Constitutional Council;
- The Home Office Minister: seat vacancy at Parliament.

Despite the multiplicity of individuals and authorities able to refer to the Constitutional Council, it cannot be referred to by citizens, save in electoral matters.

With regard to the independence and the impartiality of the judiciary, the major shortcoming resides in the difficulty for the parliamentary minority to refer to the Constitutional Council because of the required quantum (a quarter of members of Parliament). We have already emphasized the dangers of such a situation[26]. Indeed, a majority could adopt a law contrary to the Constitution, which would, for instance, violate the provisions ensuring the right to a fair trial, or the basic principles on the independence of the judicial system without the opposition being able to refer to the Council, because of the lack of the required number of votes.

d) A jurisprudence attentive to politics

The jurisprudence of the Constitutional Council can particularly be criticised with regard to its administration of electoral disputes. It can be blamed for the following:

- Late settlement of disputes: according to a study[27], out of 268 decisions delivered on electoral matters between 12 December 1997 and 18 April 2001, the Constitutional Council took 1 to 2 years to decide on 77 cases (ie 28,23%) and more than 2 years in 41 cases (ie 15,29%). Given that the parliamentary term is of five years, delivering decisions after two years is detrimental to the members of Parliament and to the political balance within Parliament. Neither the Constitution nor the organic law oblige the Council to decide within a specific time. Article 34 of the organic law on the Constitutional Council provides that " as soon as the state of the proceedings of the case so permits, the Constitutional Council decides, after hearing the rapporteur, within sixty days", but no time-limit was to reach that " state of the proceedings ".

In a famous case, Mr. Mohamed Hafid, secretary of the youth of the USFP[28] and candidate to the elections of 14 November 1997, refused a seat because of frauds in his favour at the expense of an Islamist candidate[29]. On 28 November 1997, he thus referred a request for the cancellation of the election to the Constitutional Council. The candidate that arrived 2nd and a third candidate also referred to the Council. Although all the candidates agreed on the reality of the fraud, the Council only delivered its decision on 7 June 2000. Besides, it did not decide that the Islamist candidate was the winner, as it is allowed to under the organic law, but only that the election was cancelled.

26 See supra: The limits to the accession to international conventions, notably those due to the ambiguous status of international conventions under the Constitution.

27 Khalid Semmouni: The supervision of legislative elections by the Constitutional Council, PHD (in Arabic), published in Dar Abi Regrag, Rabat, 2005.

28 Socialist union of popular forces (*Union socialiste des forces populaires*).

29 The candidate in question belonged to the Popular constitutional democratic movement (Mouvement populaire constitutionnel démocratique), which has become the Justice and Development Party (*Parti Justice et Développement* - PJD).

- Failure to undertake investigations necessary for the good examination of the disputes referred to it: In the vast majority of cases where it rejected the requests for cancellation, the rapporteur like the Constitutional Council did not find it necessary to investigate further, despite the numerous clues and elements of proof supporting the applications. In the scarce cases where investigations were undertaken, "the constitutional judge seemed to fear to find that certain parties were involved in the violations"[30]. Indeed, most of the time, authorities under the Home Office (governors and agents under its authority) were involved.

- Failure to cancel elections where serious frauds were found: the Council justified its decisions by the great difference of votes between the elected candidate and the defeated claimant, often relying on a ready-made formula: " assuming that fraud happened, it could not influence the result of the ballot, considering the great difference of votes between the claimant and the elected candidate"[31].

Though this justification could be accepted in cases of relatively limited fraud, where it is possible to calculate the number of votes obtained in an unlawful manner and infer from it a result " without fraud ", it can only be used when the nature of the fraud itself is at the root cause of the difference between the votes of the candidates. This is the case, for instance, when massive fraudulent registrations on electoral lists are followed by fraudulent distributions of electoral cards and repeated votes committed with the collusion of state agents.

In the end, beyond the normative weaknesses, the existing proximity between the Constitutional Council members - in particular its president - and the authorities is not surprising. Indeed, it is inconceivable for the authorities to place such the institution which is in charge of arbitrating conflicts of political caracter in the hands of judges willing to strictly apply the law… It is thus a culture of submission more than to a culture of independence which is promoted.

30 Khalid Semmouni: The supervision of legislative elections by the Constitutional Council, op. cited p. 329.

31 A. El Manar Slimi: The working methods of the constitutional judge in Morocco (in Arabic), published in REMALD, Rabat, ed 2006, p. 300.

THE LAW AND ITS LIMITS IN THE FACE OF THE INDEPENDENCE OF THE JUDICIARY

The 11 November 1974 Act on the status of the judiciary organizes the " safeguards " granted to the judges regarding their promotion and their discipline. Beyond that, this text regulates the career of judges from their entry in the judiciary, as well as their rights and duties, including by limiting their union rights for that matter. This Act also organizes a number of aspects of the High Judicial Council (HJC), while leaving it up to decrees to solve the issue of the elections at the HJC. Other initiatives of the Minister of Justice complete the rules relating to the functioning of the HJC, generally to the effect of a wider control[32].

In practice, the 1974 Act, enacted by royal decree (Dahir) during the period of the state of exception[33], subjects the judges to the executive power, represented by the Minister of Justice. It is coupled with an Act of 28 September 1974, named " transitional measures ", which drastically reduced the safeguards embodied in the criminal procedure Code of 1959, strengthened the powers of the prosecution and established quick justice by suppressing the examination stage for cases that do not carry a capital punishment or a life sentence. It also found the procedure for flagrant offences with direct referral to the criminal court by the King's Prosecutor General, suppressed the indictment chambers and juries in criminal matters, since the criminal court has been replaced by the criminal chamber of the court of appeal, whose decisions cannot be appealed. The 15 July 1974 Act on the organisation of the judiciary[34] that establishes

32 See item C of this chapter.

33 The state of exception reigned in Morocco from 1965 (year of the repression of the Casablanca popular riots of 23rd March, of the proclamation of the state of exception on 7 June by the King leading to the suspension of Parliament and the disappearance of the left-wing leader Mehdi Ben Barka in Paris on 29 October) to 1977. It was a period of numerous political trials against the left-wing opposition.

34 The judicial organisation set up by the Royal Dahir enacting the 15th July 1974 Act is the following : Courts of general jurisdiction: (communal tribunals (in the 706 rural communes) and circuit courts (one circuit judge in each first instance tribunal), first instance tribunals, appeal courts and the Suprene Court,; Special courts represented by the Court of Auditors; Exceptional courts : the special Court of justice, which creation goes back to 1965 and the permanent tribunal of the Royal Armed Forces.

a grading system, by which presidents of tribunals can monitor the judges working in their courts, must also be taken into consideration.

The 11 November 1974 Act must therefore be understood within a global system that monitors judges, and subordinates them to the civil servants' regime, under which they can supposedly be called up, in case of need, to serve the power in place. This approach falls within the general vision that envisages the judiciary, the police, the army, the administration and the official media not as neutral and impartial public services serving the community as a whole, but as instruments enabling to defend and legitimate the political regime and, if needed, as efficient tools to turn down political opponents of the regime.

" The Basic Principles on the Independence of the Judiciary ", adopted in 1985 by the United Nations[35], as well as the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors (1990) constitute the main norms of reference of the present report for the assessment of the independence of the judiciary and of judges. These principles have been interpreted many times by the jurisprudence, notably by cases of the European Court of Human Rights, in which it affirms that " in order to establish whether a tribunal can be considered 'independent', regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence. In this latter regard, the Court recalls the importance of the confidence which the courts in a democratic society must inspire in the public"[36].

In the light of those principles, the way the law and its subsequent practise limit the independence of judges by monitoring both their career development (A), and their freedom of association and expression (B), and by controlling the High Judicial Council, the institution entrusted by the Constitution to ensure that "the safeguards granted to the judges with regard to their promotion and discipline were implemented" (C) needs to be addressed.

A- The monitoring of the magistrates' career development

1- Recruitment and training

a) Recruitment

There are two ways of acceding to the judiciary, either by passing an examination, or by being recruited on the basis of qualifications.

• Admission upon examination: this type of admission is the rule. According to Articles 4 and 5 of the law of 11 November 1974, the professional exam is open to Moroccan nationals holding notably a degree in legal sciences (four years of study), economics, or any equivalent diploma; at least 21 years of age; of good morals; enjoying their civil rights and fulfilling the physical conditions required to exercise the post. The examination comprises both written and oral exams. The candidates are admitted in order of rank.

According to Article 6, the candidates who successfully passed the exams of the competition provided for in the prior article are, in order of rank, appointed as justice attachés by a decree from the Minister of Justice. They receive wages that are fixed by decree, as well as an allowance for the court dress. Under that capacity, they undertake a two-year traineeship comprising: a one-year cycle of studies and practical work at the Superior Institute of the Judiciary, aimed at ensuring their professional training by way of appropriate instruction ; and a one-year internship at courts of appeal, tribunals, central administrations, external services, local government, or public and private companies.

Within the courts of appeal and tribunals, the justice attachés can throughout their internship notably: assist to investigations, sit along to the judges at hearings and participate, without having the right to vote, to civil, commercial, criminal and administrative hearings and their deliberations. They are bound to professional secrecy and must be robed at hearings. The terms and conditions of the study cycle and of the internship, referred to in the previous paragraphs, as well as the time periods when they are undertaken, are determined by a decree of the Minister of Justice.

Article 7: " At the expiration of the fixed term, the justice attachés undergo a final exam after their internship (…). The justice attachés that successfully pass the aforesaid exam can be classified by dahir, upon proposal of the High Judicial Council, in the first seniority step of the third grade. They are

35 Adopted in Milan by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the General Assembly of the United Nations in its resolutions 40/32 and 40/146 of 1985.

36 Doctor Gubler v France, 27 July 2006, paragraphe 27.

assigned to different courts according to their training. Those who do not satisfy the requirements to be appointed magistrates are, by decree of the Minister of Justice, either dismissed, or returned to the administration from which they came from. "

• Admission on motion: According to Article 3 of the law of 11 November 1974, admission on motion is open to law professors who have taught a core subject for ten years; to lawyers who have 15 years of professional practice; and with regard to administrative tribunals, to civil servants belonging to a grade ranked at the 11th step or a similar grade, who have at least ten years of experience in the public service and hold a law degree or an equivalent diploma. The interested candidates are classified in the aforesaid grades of the judiciary at the same salary scale, if that is not possible, at the one that is right above of their grade of origin. The classification in the judicial hierarchy of candidates appointed magistrates is determined by dahir, after consultation of the High Judicial Council.

Though the opening to the academic world and to the lawyers is desirable, it is worth noting that, on the one hand, seniority is the only required criterion and, on the other hand, it is up to the Minister of Justice only, through the secretariat of the HJC, to establish the list of the candidates who can be admitted on motion[37].

b) Training

In accordance with the provisions of the law of 11 November 1974 and the 17 September 2003 Act, which created the Superior Institute of the Judiciary (ISM, *Institut supérieur de la magistrature*), the training of judges admitted on motion is composed of two parts of equal importance : the first one, which takes place at the ISM for a year, is essentially dedicated to the initiation, the instruction and the exercise of the different jurisdictional functions (practise of the civil and commercial seat, of the criminal seat – including both offense and crime hearings – and of the prosecution), of specific litigation (notably on social, administrative, economic and financial, tax and intellectual property
law matters) and of ethics. The second one is dedicated to work experience, which mainly takes place in certain courts of the country.

There is not an efficient system of continuing professional education for magistrates, " The majority of judges use traditional methods to renew their knowledge (…), the State does not provide them with modern means of communication or with comparative case-law, nor does it provide subscriptions to specialised journals or publications"[38]. Besides, because of their workload, judges do not have the time or the energy to devote to this continuing professional education, and notably to keep up to date on specialised fields (corporate law, money-laundering, media and telecommunications law, computer law, competition law, etc).

The monitoring by the Minister of Justice of the whole recruitment and training process that allows access to the judiciary results in a situation where the HJC, absent during this process, " intervenes at the end to validate a ready and completed product; this paradox [can] result in making the young judge believe that the key contact, ie the one who controls his fate, is the Ministry and that the HJC is an absent or marginalized authority which only appears at formal occasions "[39].

2- Promotion and remuneration

As of the 1st December 2006, the total workforce of magistrates amounted to 3.122, of which 2.411 were sitting judges and 711 standing judges[40].

For more clarity, grades (a), the corresponding remuneration (b) and the terms, and conditions of promotion (c) are explained.

a) Grades of magistrates

The new judges that have just finished the ISM are classified in the first seniority step of the third grade. They are assigned to different courts in accordance with their training (Article 7 of the 1974 Act). Magistrates' careers can advance within the hierarchy according to different grades.

37 Report on the judiciary in Morocco, drafted with the support of the UNDP and the Arabic Centre for the development of the rule of law and integrity, supervised by Filali Meknassi Rachid, Rabat, July 2006 version, p. 31.

38 Mohamed Karam: The obstacles to the independence of the judiciary in Morocco, in The independence of the judiciary in Morocco in the light of international standards and experiences in the Mediterranean region, Acts of the international conference organised by the Adala Association, Rabat, Publications Adala, 2006, pp. 100-101.

39 Mr Mohamed Karam: The obstacles to the independence of the judiciary in Morocco (in Arabic), op. cit. p. 93.

40 Association of the high courts of cassation of the countries sharing the use of the French language (AHJUCAF, *Association des hautes juridictions de cassation des pays ayant en partage l'usage du français*) Morocco, answers to all questions, www.ahjucaf.org.

Third grade magistrates (811 magistrates of which 180	- Judge of first instance tribunals - Deputy of the King's Prosecutor at first instance tribunals - Judges of administrative tribunals - Judges of commercial tribunals
Second grade magistrates (806 magistrates of which 185	- Councillors at courts of appeal - Deputies of the King's Prosecutor General at courts of appeal, others than those classified in the first grade - Councillors at commercial courts of appeal
First grade magistrates (1.006 magistrates	- Councillors at the Supreme Court - Advocates General at the Supreme Court - First President of courts of appeal, other than those classified in the exceptional grade
Exceptional grade (498 magistrates of which 92 women)	- Chamber Presidents of the Supreme Court - First Advocate General at the Supreme Court - First President of the courts of appeal of Casablanca, Rabat, Fez, Marrakech, Meknes, and the King's Prosecutors General of those courts - The First Presidents of administrative courts of appeal[2]
Out of grade	- The First President of the Supreme Court - The King's Prosecutor General at the Supreme Court

b) Remuneration

During the years 2000, the remuneration of magistrates got sensibly better. It almost corresponds to the double of the remuneration of a civil servant of the public administration. Thus, in 2006, the basic net remuneration of a junior judge amounted to about 7.565,40 DH (700 €) per month[41]. The average monthly remuneration of a judge in his mid-career amounts to about 10.565 DH (960 €) for a 2nd grade judge and to 15.616 DH (1.420 €) for a 1st grade judge. The net remuneration of the judge on top of the hierarchy amounts to about 30.000 DH (2.730 €) net per month. Finally, the monthly remuneration of out of grade magistrates, ie of the First President at the Supreme Court and the King's Prosecutor General at the Supreme Court, is similar to that of a Ministry secretary general, that is 50.000 DH (4.500 €) net. Given the living cost in Morocco, at least 2.000 € net per month is needed for a magistrate to be able to live correctly[42].

c) Promotion

Article 23 of the law of 11 November 1974 provides that: " The promotion of magistrates is comprised of grade advancement and seniority step advancement (…). No magistrate can be promoted to the superior grade if he does not appear on an ability list. Only those who have held an office for five years at their grade, at the time of the establishment of that list, can be entered on the ability list. In the establishment of the ability list, university diplomas, qualification and duties corresponding to the higher grade are taken into account. Advancement of seniority step depends both on the seniority and the grading of the magistrate, under the conditions set by decree. The aptitude list is annually established and decided by the Minister of Justice, after consultation of the High Judicial Council. A decree determines the conditions under which the magistrates are graded and the terms and conditions of establishment of the ability list".

Article 7 of decree no 883.75.2 concerning the conditions of grading and promoting judges of 23 December 1975 assigns to the Minister of Justice the task of establishing a list of candidates after consultation of the HJC. In reality, this consultation only happens once the list has been established[43] according to subjective criteria such as discipline and subordination[44].

Article 13 of the Rules of Procedure of the HJC (established by the Ministry of Justice in October

41 See the answers to the questionnaire on www.ahjucaf.org

42 Other factors come to play: working wife or not, number and age of children, etc.

43 Adellatif Hatimi: Report on the reality of the judicial apparatus and its reform horizons (in Arabic), unpublished, December 2004, p.15.

44 Ibid.

2000)[45] provides that the Minister of Justice establishes a draft list of candidates for promotion each year. The HJC examines that list. Even though Article 22 of the Rules sets out objective criteria for promotion (seniority, competence, behaviour), the implementation of these criteria is, in reality, into the hands of the presidents of the courts and of the Ministry of Justice. Indeed, the 15 July 1974 Act on the organisation of the judiciary provided the presidents of tribunals with the power of grading sitting judges; standing judges being graded by their superiors. On the basis of those grades and the appraisal of the Ministry of Justice, who has the judges' personal files, the latter freely establishes the list of candidates for promotion.

According to an author: " the judge fears the president of the tribunal or the prosecutor, he does not dare to discuss or express an opinion during the general assembly or raise an issue (…), because of the fear of a bad grading (…) since the president is the one who receives the complaints, assesses the judgements, presides the meetings, assesses the behaviour, the customs, the cultural level of judges and transforms all of this into a grading that he sends each year to the Minister of Justice on a form "[46].

3- Immunity from arbitrary assignments or transfers

The matter here is to protect magistrates against the decisions – except those taken within a disciplinary framework – that assign them against their will, and without a valid and legal reason, to another locality or to another court.

While Article 85 of the Moroccan Constitution provides in its French version that " Magistrates are irremovable "; in its Arabic version, it is specified that " magistrates can only be dismissed or transferred in accordance with the law ".

Until 1977, the law of 11 November 1974 included objective reasons. Indeed, its Article 55 provided that new assignments of sitting judges could be made either upon a personal request, or a promotion, or in the event of the suppression or the creation of a court. Those assignments were decided by dahir on a proposal by the High Judicial Council. An amendment of 12 July 1077 added a fourth reason to Article 55: " to address a lack of judges that could have a serious impact on the functioning of a court ". Besides, according to Article 57 of the same Act, the Minister of Justice can, by decree, assign a magistrate to hold an office for a period that cannot exceed three months per year ; he can, with the approval of the interested party, renew this assignment only once, for a period not exceeding three months.

Thus, the amendment adopted in 1977 leaves the Minister of Justice with a certain margin of appreciation regarding the " lack of judges " and the choice of the magistrate that will be assigned. As to the possibility of assigning temporarily a magistrate with his approval, it is extremely difficult for a magistrate, given the means of pressure at the Minister's disposal, to turn down a proposition to that effect. In practice, the assignment lasts more than three months[47].

Abuses in assignments matters could have gone unnoticed and last, if a magistrate had not had the courage of submitting his case to the administrative tribunal of Rabat to challenge a decision of the Minister of Justice transferring him to Ouarzazate (South of Morocco). The tribunal, in a decision of 22 September 2004, annulled the decision of the Minister on the grounds that " though the Minister of Justice has a power of appreciation of his own, the material truth of the reasons justifying such a measure (need and lack to address) and his assessment of the situation can be subject to judicial review, in order to avoid that the possibility of such exceptional assignment becomes a general constitutional rule and thus goes beyond the intention of the legislator (…). In the absence of any written document or any correspondence provided by the Minister, proving that the tribunal of Ouarzazate needed sitting or standing magistrates (…), it appears to the Court that the activity of the tribunal of Ouarzazate during the year 2003, which coincides with the assignment decision, was in a good and normal situation (…) that did not require any action from the Minister of Justice nor the urgent assignment of the complainant. Consequently, the decision is ultra vires and is unlawful for lack of reasoning"[48].

The Minister of Justice can assign standing magistrates at any time to any court.

The situation of the investigating judges is also worth mentioning. They are selected among the sitting magistrates for a three year term, renewable, by a decision of the Minister of Justice on a proposal of the presidents of first instance

45 This point will be further discussed in the chapter on the HJC (infra).
46 Abdellatif Hatimi, ibid.
47 Mohamed Karam, op cit pp. 95-96.
48 Translation of the author, cited by Adellatif Hatimi, op cit. p. 13.

tribunals or of appeal courts. During this term, they can be relieved of their duties under the same procedure. Thus, the Minister of Justice intervenes at the selection level as well as at the dismissal of a investigating judge. Even if the law grants to the presidents of the tribunals the right to suggest a judge, it is the Minister who validates the proposal or not. Within the Moroccan system and customs, proposals are made *after* consulting the person who makes the decision. Thus the Minister himself can advise, declare his preference, or even order the content of the proposal.

Besides, investigating judges work under strict supervision from the prosecution:

- Under Article 91 of the criminal procedure code (CPP – *Code de Procédure Pénale*), there are several investigating judges within a court, and it is the prosecutor who allocates the cases to them (often after consultation of the Ministry) ;
- In its indictment and at any time during the investigation, the King's Prosecutor can request from the investigating magistrate any act that he may deem relevant to the manifestation of the truth. In practice, the requests of the prosecution are made orally and do not appear on the file[49]. He can even ask for transmission of the files, if he agrees to give them back within 24 hours (Article 89 of the CPP).
- The investigating magistrate cannot take a judicial interim release order before consulting the prosecutor (Articles 178 and 179 of the CPP) ;
- The prosecutor has the right to appeal the investigating magistrate orders, including judicial interim release ones before the indictment chamber. In this case, the accused is kept under custody until the expiry of the appeal time-limit (Article 222 of the CPP). The indictment chamber settles the question within 15 days (Article 179 of the CPP).
- The opinions and requests from the prosecution do not bind the investigating magistrate, but the latter rarely takes a contrary decision, hence the importance of the appointment of investigating judges. Often, with regard to cases of which the political power wants to control the proceedings and outcome, it will appoint the appropriate investigating magistrate.

In reality, this state of dependency from the investigating judge towards the Prosecution illustrates the unbalance between the latter and the defence, which does not have the same means than the accusation.

To conclude, the powers of the Minister of Justice, in the absence of precise criteria with regard to assignment and transfer of magistrates' matters, constitute a formidable means of pressure of them as they do not always have the possibility to refer their case to administrative tribunals.

4- Disciplinary measures

According to Article 87 of the Moroccan Constitution: " The High Judicial Council watches over the application of the guarantees granted to the magistrates concerning their promotion and discipline ". The organic law of 11 November 1974 on the status of the judiciary does not faithfully reflect this provision. Indeed, it grants the Minister of Justice extensive disciplinary powers that should, according to the Constitution, in principle belong to the HJC. Even if the Minister acts as Vice-President of the HJC (presided by the King), it is hard to make the distinction since decisions such as the launch of the prosecution, the examination of cases and sanctions and their application, are made by the executive power alone, who thus comes first thanks to the important means he has.

According to Article 58 of the 1974 Act, " Any dereliction of a judge of the duties of his office, of honour, of sensitiveness or of dignity constitutes a breach of the law subject to a disciplinary measure". The disciplinary measures applicable to magistrates are the following:

- first degree : warning, reprimand, deferment for a maximum of two years of eligibility for within-grade increment, being struck off the ability list;
- second degree : loss of one or more steps in grade, temporary suspension of duties, loss of any type of remuneration except family allowances for a period that cannot exceed six months, compulsory retirement or acceptance of the cessation of functions when the magistrate is not allowed to a retirement pension.

The two last measures of the first degree and the two first measures of the second degree can be accompanied by a transfer.

Disciplinary powers of the Minister of Justice:

- Article 61 of the Act of 11 November 1974: " The Minister of Justice, refers the charges against the magistrate to the High Judicial Council and

49 Criminal law group: About the independence of sitting magistrates (in Arabic), communication to the symposium on Justice in Morocco, reality and perspectives, published in: Revue droit et économie, faculté de droit, Fes, no 6, 1990 p. 97.

appoints a rapporteur after consulting the ex officio members of the Council; this rapporteur should be of a superior grade than the one of the magistrate subject to the charges. The accused magistrate has the right to access his file and all the elements of the investigation, with the exception of the rapporteur's opinion. Besides, the magistrate is informed at least eight days in advance of the date of the High Judicial Council's meeting to examine his case. Before deciding the case, the Council can request an additional investigation. The magistrate brought before the High Judicial Council can be assisted either by a colleague or by a lawyer, the appointed assistant has the access rights mentioned in paragraph 2. In case of criminal charges, the High Judicial Council can decide to suspend the examination of the case, until it has been definitely decided on the said charges " ;

- Article 62: " In the event of criminal charges or of a serious breach of the law, the magistrate can be immediately suspended of his duties by decree of the Minister of Justice. The decree stipulating the suspension of a magistrate must specify if the interested party can still benefit from his remuneration during his suspension time or determine the quota-lot of the reduction that is made, with the exception of family allowances to which he is still entitled in full. The High Judicial Council must be convened as soon as possible. The situation of the suspended magistrate must be definitely settled within four months from the day the suspension decision came into force. When no decision was made at the expiry of the time limit set out in the previous paragraph, or when the magistrate was not sanctioned or was only subject to a first degree disciplinary measure, the interested party receives his remuneration again if it was suspended and is entitled to the reimbursement of the deducted sums of that remuneration, if applicable. When the magistrate was also prosecuted on criminal charges, his situation is definitively settled once the delivered decision becomes final ".

The Minister of Justice thus largely controls the disciplinary process. He has prosecutorial discretion; assesses what constitutes a serious breach of law; appoints a rapporteur, decides of the time to refer a case to the HJC or to dismiss it[50]. He can immediately suspend a magistrate of his duties and decide whether the magistrate keeps his salary. Besides, the Ministry of Justice can decide first degree sanctions. It is the Ministry of Justice himself who presides the Discipline Council, which meets in the offices of the Ministry, since the HJC does not have its own headquarters, and who supervises the implementation of sanctions.

5- Immunity from abusive prosecution

The magistrates' immunity in criminal matters will first be tackled (a), and then their civil liability will be explained (b).

a) Immunity of magistrates in criminal matters

As for the members of Parliament, the Ministers and senior civil servants (police officers, governors, etc.), the Moroccan criminal procedure code (CPP) sets out exceptional competence rules in case of crimes or offenses attributed to magistrates, in order to protect them from abusive or ill-founded accusations or prosecution in the exercise of their duties. Articles 265 to 267 of the CPP (former Articles 267 to 269) are applicable depending on the grade of the magistrate.

According to Article 265 : " When the fact is attributed to a magistrate at the Supreme Court or at the Court of Auditors or to a member of the Constitutional Council or to a first president at an appeal court or to a King's Prosecutor General at that court (amongst other senior civil servants), the criminal chamber of the Supreme Court, upon request of the Chief Prosecutor at that court, orders, if necessary, the case to be investigated by one or several of its members (…). Once the investigation is done, the investigating magistrate(s) deliver(s), according to the circumstances, an order that there is no need to adjudicate or a referral order to the criminal chamber of the Supreme Court, which judges the case and delivers a decision. The decision of the criminal chamber can be appealed within eight days. The appeal is judged by the Joined Chambers of the Supreme Court, with the exception of the chamber that decided on the case ". As for Articles 266 and 267, they set out the proceedings concerning magistrates of lower grades.

A case that broke out in August 2003 however tested the effectiveness of these provisions. This case is an important one as it was the occasion to verify how those rules were applied, but also to raise other fundamental questions concerning the independence and the impartiality of the judiciary (corruption, magistrates' right to organise and express themselves, role of the HJC in such circumstances, role of the Hassanian Association of Judges which is supposed to represent them, role of the defence etc.).

50 Report on the judiciary in Morocco, drafted with the support of UNDP and the Arabic Center for the development of the rule of law and integrity, supervised by Filali Meknassi Rachid, Rabat, July 2006 version, pp. 22-23.

In August 2003, following his arrest in the region of Tetouan, a drug lord declared having given important amounts of money to several senior officers (police, gendarmes, magistrates at the Tetouan court of appeal etc.). Anonymous letters reached the Ministry of Justice to denounce the fact that harsh sentences delivered by the first instance tribunal of Tetouan in several cases were disproportionally reduced before the court of appeal, the convicts being even in certain cases acquitted.
The Minister of Justice summoned five magistrates suspected of such practices under the pretext of delivering them promotion decrees recently decided by the HJC. Once in Rabat, the magistrates were arrested and referred to the special Court of Justice (now abolished), specialised in cases of corruption of civil servants. The investigating magistrate at that Court decided to imprison them in the prison of Salé. Magistrates of the investigation department of the Ministry of Justice visited them to continue the investigation under the pretext that it would be used at the Discipline Council of the HJC (which, when magistrates are criminally judged, only intervenes after the criminal judgement, in order not to influence the tribunals).
The lawyers were shocked and denounced the violation of jurisdiction rules, infringements of the magistrates' independence and of the rules of fair trial[1]. A group of judges decided to take action to denounce the violation of the criminal procedure code. They signed a petition they sent to the King, in which they " protested against the arrest of their fellow colleagues and the violation of safeguards, denounced the attitude of the Hassanian Association of Judges (which supported the Minister) (…) and complained of the absence of any forum or institution supervising judicial activities and of the paralysis of representative and constitutional institutions " (the author's emphasis).
The Minister of Justice did not wait long to react. He contested the elements presented by the signatories of the petition and intervened to the King, who suspended on 24 November 2003 M. Jâafer Hassoun, judge at the administrative tribunal of Agadir and member of the High Judicial Council, accusing him of being the initiator of the petition. The royal decision provided for the revocation of Mr. Hassoun's mandate as elected representative of magistrates at the HJC and temporary suspension of duties as Royal Commissioner at the administrative tribunal of Agadir. This judge was notably blamed for his involvement with the Moroccan Association for the independence of the judiciary (of which he had however suspended his post as vice-president following his election at the HJC). A public release from the European Association of Judges for Democracy and Freedom (MEDEL, Magistrates européens pour la démocratie et la liberté) dated 30 December 2003, urged the Moroccan authorities to " review their decision and bring his case before an independent and impartial court ".
At the beginning of December 2003, another magistrate, M. Kharchich, secretary-general of that same association, was also suspended and heard with the intent of bringing him before the Discipline Council of the HJC. He was blamed for writing an article in October 2003 in which he raised the question, amongst others, of the role of drug lords in the funding of the HJC judges election campaigns and denounced the stranglehold that the Minister of Justice has on that body[2].
In order to divide the field of action of judges and restrict their freedom of association, a royal speech was read on 12 April 2004 by a Councillor of the King at the opening session of the HJC. In that speech, the monarch informed the judges that they have three institutions " to fully exercise their rights as citizens (…) that is to say: the HJC, the Hassanian Association of Judges and the Mohamedian Foundation for social works (…) any exercise of rights outside those institutions could infringe the independence and the impartiality of the judiciary (…) As last resort, Our Majesty remains the permanent guarantor of the inviolability and independence of the judiciary" (the author's emphasis).
Following the royal speech, the two judges still holding the offices of president (Mr. Rafii) and secretary-general (Mr. Kharchich, who was suspended) of the Moroccan Association for the independence of the judiciary presented their resignation " in order to comply with the instructions contained in the royal letter "[3]. The two suspended judges were heard by the Discipline Council of the HJC, presided by the Minister, and were conferred royal pardon. Mr. Kharchich took the opportunity of a voluntary departure to leave the judiciary and register as a lawyer. He currently holds the secretary-general office of the Adala (Justice) Association, created in October 2005.
As for the judges that were prosecuted for corruption, they were sentenced on 21 April 2004 to imprisonment sentences (2 years for one of them and 1 year for the other four) and fined 1.000 DH (100 €) each[4]. The Supreme Court quashed this judgment and sent the case to the Court of Appeal in Tanger, which has not decided yet on the case.

1- Interviews with several lawyers and the Minister of Justice in several Moroccan newspapers between 11 September and 18 December 2003; see in particular the Hebdomadaire dated 6-12 December, pp.7 to 11.
2- Adelwoula Khardish, "Judges on the accused bench", weekly Al Ayyam (in Arabic), n° 104 dated 16-22 October 2003, p. 22
3- Assahra Al Magribia, 26 Avril 2004, quoted by A. Hatimi, rep. cit.
4- See details in Maroc Hebdo International n° 602, 23-29 April 2004.

b) Civil liability of magistrates

Article 391 of the civil procedure code (CPC, *Code de procédure civile*) provides that: " magistrates can be prosecuted in the following cases: in case of a wilful misrepresentation, fraud or misappropriation that can be attributed either to a sitting magistrate in the course of the investigation or during the trial, or to a standing magistrate in the exercise of his duties ; if bias is expressly envisaged in a legislative provision; if a legislative provision declares the judges liable to compensation; in case of denial of justice ". The conditions for the implementation of this liability can be found under Articles 392 to 401 of the CPC.

The proceedings are referred to the Supreme Court,

following a request, accompanied of the exhibits, presented to that effect. A chamber of the Supreme Court decides on the admissibility of the case. If the case is admissible, it is communicated within eight days to the accused magistrate, who is requested to present all the arguments for defence within eight days from that communication. Besides, the judge must refrain from participating to the trial where the claim against him originated, or else the judgements delivered will be annulled.

The liability action against the magistrate is judged by the Joined Chambers of the Court, with the exception of the Chamber which decided on its admissibility.

The State is liable for compensation penalties sentenced in civil cases where the implication of the magistrate was found, except where the State can claim them back from the magistrate.

In cases of miscarriage of the public service of justice, the State can be held liable. However, in accordance with the provisions under Articles 400 of the CPC and 79 and 80 of the Dahir on obligations and contracts (DOC), the State is entitled to use a recursory action against the judge who was at fault. According to Article 79, " the State and the municipalities are liable for any damage directly caused by the functioning of their administrations or by the faults of their agents in the exercise of their duties". According to Article 80, " state agents and municipalities are *personally liable* for any damage caused by their wilful misrepresentation or by *gross misconduct* committed in the exercise of their duties. The state and the municipalities cannot be prosecuted for those damages in the event of the insolvency of the responsible magistrates".

6- Retirement of magistrates

The retiring age for magistrates is sixty years. Service can be extended, by Royal Dahir, for two years, renewable twice. It is up to the Minister of Justice to suggest the extension of service to the King after consultation of the HJC (Article 65 of the organic law of 11 November 1974).

In practice, certain magistrates had their service extended for more than two years, or even indefinitely[51]. Because of the culture and tradition in operation within the Moroccan judicial system, a Royal Dahir to that effect cannot be contested.

B- The supervision of the freedom of association and expression

These two freedoms constitute essential means for judges to defend their rights and legitimate interests, including their independence *vis-à-vis* the political power. The United Nations Basic Principles on the Independence of the Judiciary dedicate a chapter, divided into two points, to these freedoms. Its wording is the following:

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

In Morocco, though the preamble of its Constitution provides that the Kingdom " reaffirms its attachment to the Human Rights as they are universally recognized ", the legislator simply forbad the exercise of trade union rights to judges (Article 14 of the 11 November 1974 Act) (a). As for the right to freedom of association, it is well supervised and directed, as demonstrated through the case of the Tetouan judges (see box) (b). Finally, because of the abusive interpretation of their duty of discretion and authoritarian administrative practices, freedom of expression of judges is practically under subordination (c).

1- Prohibition of trade union rights

Article 14 of the 11 November 1974 Act is brief: "It is forbidden to magistrates, regardless of their position in the judiciary, to create any trade union or to join one ". This provision was invoked by the then Minister of Justice (Mr. Omar Azziman) as one of the reasons impeding the ratification of Convention no 87 of the ILO by Morocco in 2002.

51 This is the case of the current president of the family court of Rabat (Mr. Forchado). Besides, the King appoints the President of the Supreme Court without specifying a time limit for his mandate. In practice, the King can relieve him of his duty at any moment.

In order to comply with a pledge taken by the government towards the trade unions since August 1996, and to reassure recalcitrant people, Mr. Abderrahmane Youssofi, Prime Minister from March 1998 to November 2002, invited in April 2002 two senior officers of the ILO to come and explain how to facilitate the reception of ILO Convention no 87 into the Moroccan legal system.
These two senior officers explained that the situation of trade union rights had well progressed in Morocco and that it would be possible, with regard to judges, to let them freely create associations (if not trade unions) if they were to play the same role as trade unions; that it was possible to exclude weapon-bearers from trade union rights; and that trade union rights should not be confused with the right to strike, which can be subject to restrictions for certain unionised categories. They specified that the state had four years after the ratification of the convention to adjust its laws.
In response to a letter from the Minister of Labour requesting the Minister of Justice to send him propositions of amendments regarding the articles of the legislation that do not comply with Convention no 87, the Minister of Justice replied on 25 March 2002 by a letter in which he explained the reasons of his opposition to amending Article 14 of the 11 November 1974 Act. The Minister argued that Article 14 should not be touched in order to not " politicize justice (…) judges should stay away from political and unionist struggles (…) this will make them more neutral (…) judges have the Hassanian Association that in reality plays the role of a trade union (…) the current situation is not prepared for union activities of judges (…) the lack of experience of certain components of the judicial apparatus in the political and trade union field could lead to drifts (…) any amendment of Article 14 could prejudice the proper administration of justice ".

It is not surprising that within the political power, those who defend the status quo and are opposed to the independence of the judiciary – and who do not even accept the free association of judges – are against any exercise of trade union rights by them.

2- A supervised freedom of association

The freedom of association of judges is not formally forbidden, but it is only tolerated under the strict supervision of the political power[52]. Magistrates are thus forbidden to join jurists associations[53] or any association for the defence of the independence of the judiciary.

Currently, the only existing judges association is the Hassanian Association of Judges. Created in 1995, its name constitutes a declaration of allegiance to the King Hassan II. The servility and dependence it showed for years eventually resulted in harsh criticism of the association by the King himself. In the speech of 2 March 2002 that he pronounced at the opening session of the High Judicial Council, the King Mohammed VI declared : " The Association should rise out of its long lethargy, end its rearguard actions and calculations, review and update its statutes in order to take into account the evolution of ideas and the changes that are taking place in the judicial scenery, renew its board of directors in order to mobilise new skills and give a sense of responsibility to new energies. Only in that way will the Association regain its place, keep the issues of independence of the judiciary and defence of the magistrates' rights alive, and clearly define its action plan and its contribution to the reform of Justice". Following this speech, the Minister of Justice created a commission charged of updating the statutes, adopting Rules of Procedure, and preparing the elections of judges in various courts. The intervention of the Minister of Justice, nevertheless, gave of the Association the image of a subordinated civil servant association rather than one of an association of judges managed and directed by the interested individuals themselves. It is however hoped that the current Bureau of the Association, elected in 2006, will show more independence and courage in the defence of the magistrates' interests and disseminate a culture and ethics[54] capable of improving their image in the public opinion.

3- A subordinated freedom of expression

In principle, judges can freely have opinions of their own since Article 22 of the 11 November 1974 Act forbids the addition in magistrates' files of " any mention regarding his political or doctrinal ideas ". It is however worth noting that magistrates have no means to access their files or to control the information appearing on them, except in the

52 See box p. 21.

53 According to the lawyer Khalid Soufiani, at the time of the creation of the Association of Moroccan jurists (in the mid 80s), three magistrates who were members of the Bureau received the order to step down. Interview with the newspaper Al Ayyam, no 140, 12-18 December 2003, p. 10.

54 See Chapter III on the impartiality of magistrates.

case of disciplinary proceeding; there is no law on information access, even regarding personal information, in Morocco.

However, Article 15 of the 1974 Act forbids magistrates to mention that they hold the office of judge in any work or publication they have written without the Minister of Justice's authorisation. Certain magistrates have to wait months, if not years, to get this authorisation.

Circulars from the Ministry of Justice imposed the principle of ministerial authorisation to allow magistrates to participate to scientific events, meetings or to issue a declaration. In February 2006, magistrates invited to an international conference on the independence of the judiciary in Morocco in the light of international standards[55] by the Adala Association asked the association to write to the Minister of Justice in order to facilitate their participation. Despite written requests, the Minister sent his own representatives, ie the Cabinet director accompanied by a councillor. Even if these two civil servants were professional magistrates whose participation was desirable, they could not pretend to represent the profession. Only one magistrate[56] did not request nor wait for the authorisation of his Minister.

Today, it is possible for magistrates to participate to events regarding justice, such as the one organised in November 2006 by the EMHRN[57], but only under banner of the Hassanian Association of Judges and/ or with the Ministry's approval.

C- The control of the High Judicial Council

The Moroccan Constitution has dedicated two articles to the HJC, regarding its composition and its mission.

Article 86
The High Judicial Council is presided over by the King. Furthermore, it is composed of:
- The Minister of Justice, as vice-president;
- The first president of the Supreme Court;
- The King's Prosecutor General at the Supreme Court;
- The President of the first Chamber of the Supreme Court;
- Two representatives of the courts of appeal magistrates elected from among themselves;
- Four representatives of the first degree jurisdictions magistrates elected from among themselves.

Article 87
The High Judicial Council watches over the application of the guarantees granted to the magistrates concerning their promotion and discipline.

The analysis of both the organic law of 11 November 1974 and of the practice shows that the HJC is far from assuming the role explicitly assigned to it by the Constitution because of the often advisory nature of its interventions (1). Besides, it does not enjoy any administrative or financial independence *vis-à-vis* the Ministry of Justice (2).

1- Advisory powers

The essential powers of the HJC regard the management of the magistrates' careers. It must ensure the application of the safeguards granted to magistrates with regard to their promotion and discipline.

According to the 1974 Act, the HJC mainly intervenes in the appointment, the promotion, the transfer, the discipline and the retirement of magistrates. In reality, the Minister of Justice plays a crucial role in all the decisions concerning those situations, the HJC being only able to suggest a decision either to the King or to the Minister.

- Concerning the recruitment of magistrates, the Ministry organises the whole examination, training, traineeship and final examination process. It imposes to the HJC a " finished product ", that the HJC can then only submit for royal appointment.

- Concerning the promotion of magistrates, the Minister plays a crucial role as he is responsible for drafting the ability list, the grades and the reports concerning each file, etc. Throughout this process the HJC is officially consulted, but in reality, it is only informed. Its opinion cannot change anything. It does not have the elements that would allow, if necessary, to challenge the Minister's propositions, based on gradings and various reports issued by the presidents of tribunals and the prosecutors, the General Inspectorate of the Ministry, to which the HJC does not have access.

55 Adala, The independence of the judiciary in Morocco in the light of international standards and experiences in the Mediterranean region, Acts of the conference published in Casablanca, 2006.
56 Judge Jaâfer Hassoun, see the box on the case of the Tetouan magistrates.
57 The independence and impartiality of the judiciary system – The case of Morocco, Casablanca, 10-11 November 2006 – minutes available on www.euromedrights.net.

• Concerning the transfers and assignments, the Minister freely decides of standing magistrates' fate. He also intervenes in that of the sitting magistrates, either by way of additional sanctions that are under its authority, or through the option that he has of assigning a magistrate for a three months period (renewable) each year to another court[58].

• Concerning disciplinary measures, the situation is similar to the one governing promotion. The Minister is the one who launches prosecution and brings the concerned judge before the Discipline Council that he presides. In this field, the Minister can also immediately suspend a magistrate for gross misconduct. Its unlimited discretionary power for examining the seriousness of the fault is such that one can fear that the suspension measure in itself is sufficient to qualify the fault as gross misconduct. In principle, however, gross misconduct can only be found in two cases : either when the magistrate committed a crime, for which he must be judged (with all the legal safeguards) and then brought before the Discipline Council ; or where there is a wilful misrepresentation, fraud or misappropriation that could be attributed to him, in the course of the instruction or during the trial (case of Article 391 of the civil procedure code), for which, here too, he must be judged and only after that, referred to the Discipline Council.

If the fault is not a serious one, first degree disciplinary measures (warning, reprimand, deferment for a maximum of two years of eligibility for within-grade increment, being struck off the ability list) are sufficient and can be issued by the Minister. But the HJC is also marginalised when one of its members is suspended. In the Jaâfer Hassoun case, the HJC only met to bring him before the Discipline Council, without a preliminary discussion about the justification of the suspension measure. It is strange that HJC members are protected from transfers but not from suspension nor from cessation of remuneration. Concerning cases that are not directly decided by the Minister of Justice, the HJC submits propositions to the King. Its purely advisory role is thus confirmed.

2- The lack of financial or administrative independence of the HJC

The organization chart of the Ministry of Justice[59] shows that the secretariat of the High Judicial Council is under the Ministry's authority. The Ministry of Justice is composed of, besides the Cabinet, the Secretariat of the High Judicial Council, the General Inspectorate and the Superior Institute of the Judiciary – which are under the direct authority of the Minister – the central administration and the regional subdirectorates:

The Minister	
General Inspectorate	**Cabinet**
Secretariat of the High Judicial Council	**Superior Institute of the Judiciary**
Regional subdirectorates	**Central administration**

The HJC's lack of independence is visible at several levels:

The elections of the HJC members are organised by the Ministry of Justice which is, in addition, the body responsible for settling the disputes concerning the non registration of a judge on the voters' list and those concerning rejection of candidatures (Decree of 23 December 1975 on the election of magistrates at the HJC). Judges vote by post. Magistrates of first degree tribunals elect four candidates; those of appeal courts elect two candidates. They send their votes to the Ministry. A census commission composed of three magistrates is appointed by the Minister after consulting the president of the Supreme Court (ex officio member of the HJC). It supervises the census operations and the proclamation of the results. Its decisions cannot be appealed. The members are elected for four years renewable once.

The HJC could in principle meet at the Royal Palace, since the King is the ex officio president of the HJC. For practical reasons, since the Minister of Justice is Vice-President and since the secretariat of the HJC is located at the Ministry, the HJC usually meets in the offices of the Ministry of Justice.

Through the secretariat of the HJC, the Minister establishes the agenda and, once the King has given his – indispensable - prior approval, convenes the members of the Council to a session. Indeed, even though Article 71 of the 1974 organic law sets out that the HJC meets in session every three months, ie, with at least fours sessions per year, the regularity of these sessions is not ensured since they depend on the King's approval. Thus between 1991 and 1993, and then between 2000 and 2001, the HJC did not meet, depriving many judges of

58 See supra.
59 Ministry of the Justice website www.justice.gov.ma

their right to promotion and preventing the HJC of performing its constitutional mission, including the most formal ones. This situation illustrates how the political power perceives that institution.

The Ministry of Justice provides for the functioning expenses of the HJC, since it does not have its own budget or offices.

In October 2000, the Minister of Justice published a little blue book containing the Rules of Procedure of the HJC, an initiative that should in principle have been taken by the HJC itself. These Rules of Procedure, based on the Constitution, the 15 July 1974 Act on the organisation of the judiciary, the 11 November 1974 Act on the status of the judiciary and the 1975 decree on the grading and promotion conditions for magistrates is nevertheless in contradiction with certain provisions of those texts. Thus, in its Article 1, the rules provide that the HJC meets " at least in two sessions per year: the 1st one in May and the 2nd one in November " whereas Article 71 of the 1974 Act provides that the HJC meets in session at least once each trimester. Other provisions grant the Minister of Justice with the power of establishing the agenda, which binds the HJC once it has been approved by the King (Article 8 of the Rules of Procedure). Article 9 mentions that the secretary-general of the Ministry assists to the HJC meetings. He does not participate to the debates nor to the votes, but can provide clarifications, if needed. In order to supervise the disciplinary power of the HJC, the Rules of Procedure grant the secretariat of the HJC with exclusive powers concerning the preparation of the cases where judges are brought before the Discipline Council (Art. 55), and the Minister of Justice with the possibility of ordering an additional investigation after the submission by the rapporteur (appointed by him) of his report. When the HJC itself orders an additional investigation, it has to be done under the supervision of the General Inspector of the Ministry of Justice (Art. 56). The then Minister of Justice, Omar Azziman, had these rules validated by the King, who, in his speech of 1 March 2002 addressed to the HJC, expressly mentioned it. This approval by the King confers a " protection " to the Rules of Procedure, even in relation with the HJC and especially *vis-à-vis* the HJC, despite the violations to the 1974 Act provisions that it contains. Further, it can only be amended after the King's approval (Art. 60).

It is also worth noting that the ex officio members of the HJC have a bigger power than those who have been elected. Since they hold the highest offices in the judicial hierarchy, their closeness to the political power is definite. They ensure continuity within the HJC since they are ex officio members. The fact that elected judges cannot decide on the cases of judges of a higher rank (Article 69 of the 11 November 1974 Act) excludes elected judges from debates that concern them and strengthen the weight of the HJC ex officio members. Besides, they are the only ones, with the Minister of Justice, to be members of the commission responsible for the examination of the magistrates' asset declarations.

THE IMPARTIALITY OF MAGISTRATES

If independence is defined in relation with the outside and means the liberty to judge without any pressure; the impartial judge is the judge who " keeps an equal balance between the two parties ". As such, he is bound to reaffirm the supremacy of the law at everyone's benefit, regardless of the concerned parties[60]. The European Court of human rights defines impartiality as follows:

" There are two aspects to the requirement of " impartiality ". First the tribunal must be subjectively free of personal prejudice or bias. Secondly, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubts "[61].

In Morocco, like in several other countries, the law provides safeguards to ensure that the judge, or the tribunal, is impartial (1). Judges have recently attempted to adopt a code of ethics (2). However, the corruption phenomenon, also spread in other sectors than the sector of justice, constitutes a serious infringement to the rights of litigants and to the impartiality of magistrates (3).

A- The law and the impartiality of magistrates

In addition to civil and criminal procedure rules, which aim, inter alia, at ensuring a fair trial, that is to say, notably the rights of the defence and the various safeguards for the litigants, various provisions of the Moroccan legislation aim at

60 Michèle Rivet, President of the tribunal of personal rights in Quebec : " The norms on the independence of the judiciary : an international vision for the judge. " in International Symposium on the independence of the judiciary in Morocco in the light of international standards and regional experiences, Rabat, 2 to 4 February 2006, published by Adala, 2006, pp. 13-14.

61 Doctor Gubler v France case, (paragraph 27), supra n°36.

ensuring the impartiality of magistrates in a more direct manner. These rules either provide sanctions against judges violating the principle of impartiality, or establish a procedure for challenging magistrates or for transferring a case on grounds of legitimate suspicion, or establish a separation between the different roles within a trial to prevent a magistrate, who has already investigated the case as the investigating magistrate, of judging it.

Other rules establish a system of asset declaration of magistrates or try to establish transparency and objectivity in the administration of cases in each tribunal.

According to Article 248 of the criminal code (Act of 26 November 1962 as amended) : " Is guilty of corruption and condemned to an imprisonment sentence of two to five years and fined to 2.000 to 50.000 DH, any individual who requests or receives offers or promises; requests or receives donations, presents or any other advantages, for :
(…) 3) As a magistrate, juror or member of a tribunal, deciding either at the advantage or at the disadvantage of one of the parties;
When the amount in question is superior to 100.000 DH, the sentence incurred goes from five to ten years imprisonment and from a 5.000 to a 100.000 DH fine. "

Article 273 of the criminal procedure code (1959 Act amended by the 3 October 2002 Act, entered into force on 1 October 2003) gives the possibility of challenging a magistrate in the following cases:

- when he, or his wife, has a personal interest in the judgement of the case;
- when he or his wife is related to one of the parties, including through cousin degrees (…) ;
- when there is a pending trial or a trial that ended less than two years ago between one of the parties and the magistrate, or his wife, or their ascendants and descendants ;
- when the magistrate is the creditor or debtor of one of the parties ;
- when he has given an opinion or has pleaded in a case as referee or witness or has decided on the case in the first instance[62] ;
- when he has acted as legal representative of one of the parties ;
- when there is a relation of seniority between the judge or his spouse and one of the parties or his spouse;
- when there is between the magistrate and a party a commonly known friendship or hostility;
- when the magistrate is the author of the complaint.

If the request for challenge is accepted, the challenged judge or judges should immediately be taken out of the case (Article 282).

The criminal procedure code also envisages the possibility of " transfers on grounds of legitimate suspicion ". According to Article 270, " the criminal Chamber of the Supreme Court can, on grounds of legitimate suspicion, take a case from any investigating tribunal or any judging tribunal and transfer it to any other tribunal of the same order".

The criminal and civil procedure codes include provisions aimed at preventing a magistrate from judging a case on which he has already decided. In criminal matters, this separation results from Articles 15 to 151 of the criminal procedure code on searching and finding breaches of the law ; Articles 286 to 356 concern hearings and the delivery of judgements; Articles 596 to 647 rule on the execution of judicial decisions. In civil matters, Article 4 of the civil procedure code forbids a magistrate to judge a case at the appeal or cassation stage if he has decided on that case at a lower court.

The application decree of the 15 July 1974 Act on the organisation of the judiciary contains provisions that establish within tribunals a collective body, the general assembly, composed of all the magistrates (both sitting and standing). Each year in December, the general assembly takes decisions about the chambers and their composition, the days and times of the sessions and the allocation of cases between the different chambers (Article 6 of the 16 July 1974 Decree). These provisions could have ensured transparency in the administration of cases in each court and thus ensure better impartiality ; in reality, they are weakened by the power granted to the presidents of tribunals and to prosecutors of allocating certain cases to judges or to deputy public prosecutors – or to take cases of them – without any justification[63].

The 11 November 1974 Act on the status of the judiciary established a system of asset declaration for judges (Art 16, amended in April 2007). According

62 See also Article 4 of the civil procedure code that forbids a magistrate to judge a case at the appeal or cassation stage if he has decided on that case at a lower court.

63 Report on the judiciary in Morocco, drafted with the support of the UNDP and the Arabic Centre for the development of the rule of law and integrity, supervised by Filali Meknassi Rachid, Rabat, July 2006 version, p. 19.

to that article, the judge must declare, three months after starting his office, any professional activity and his assets (real estate, bank accounts, stocks in companies, cars, loans, antics, jewellery) or those that he administrates on behalf of his under age children. The declaration is renewed every three years in February. A declaration must be issued at the end of his mandate. A commission presided by the Minister of Justice and which includes the ex officio members of the HJC examines periodically the declarations. It can request the magistrate to declare the assets of his spouse. Judges who violate these provisions are brought before the HJC. One of the flaws of this law is that it does not oblige the judges to declare the assets of their spouses or adult children. It leaves it up to the discretion of the commission, presided by the Minister, to request to a magistrate to declare the assets of his spouse. This is an imperfect system, that strengthens the power of the Minister over the judges.

B- A code of ethics ?

The Rules of Procedure of the Superior Institute of the Judiciary (ISM, *Institut supérieur de la magistrature*), drafted by the Minister of Justice on the basis of the 09-01 Act of 2002 on the ISM and of the organic law of 11 November 1974, dedicates a chapter IV to " ethics of the profession ". That chapter is addressed to justice attachés and secretary clerks undergoing training at the ISM. According to its provisions (Articles 23 to 26), these commit to, inter alia: behave in a good manner inside and outside the ISM, dress properly, show consideration to superiors, subalterns, colleagues and ISM staff, refrain from taking public positions or from publishing declarations or comments contrary to the ethics of the profession or likely to harm its interests (Art. 24).

During the traineeships at tribunals, the relations of justice attachés with court officials and litigants are in principle limited to the required contacts for the conduct of judicial proceedings within the tribunals. Apart from these circumstances, it is formally prohibited to have any other type of contacts likely to affect their independence and their impartiality or to diminish their capacity to take decisions objectively and neutrally (Art. 25). During his traineeships, the trainee must exercise his duties with honesty and impartiality, lead the proceedings diligently, deliver information in a precise and reliable manner, and adopt an appropriate behaviour towards court officials and litigants (Art. 26). The objective being that once in duty, the former trainee will have assimilated these rules and will behave as expected.

Beyond those somehow externally " imposed " rules, Moroccan magistrates have not yet themselves drafted and adopted an ethical charter. Indeed, such a charter implies a minimum of independence *vis-à-vis* the Ministry of Justice, which still behaves as a control authority for judges. Nevertheless, with the support of the American Bar Association (ABA) which initiates activities in Morocco in collaboration with the Ministry of Justice[64] and the Moroccan civil society, the Hassanian Association of Judges was encouraged to adopt a code of ethics as other Arab countries, such as Jordan. The first step was made when a delegation of Supreme Court magistrates, the Superior Institute of the Judiciary, the central administration of the Ministry of Justice and of certain courts went to the United States in September 2006, to discuss the issue of magistrates' ethics.
One can still wonder if the mere existence of a code of ethics does not actually lead to hide the important discrepancies of the statute of magistrates, which does recognize, in law or in practice, their full independence.
Other actors of the judicial system, namely the lawyers[65], also face the issue of ethics.

C- The corruption phenomenon

By its nature itself, corruption is a phenomenon difficult to define. The fact that the Ministry of Justice and the HJC prefer to bring the concerned judges before the Discipline Council without opening criminal proceedings does not favour the dissemination of information on the cases of magistrates' corruption.

Since it is sometimes more efficient to buy a judge than to rent a lawyer[66], the Moroccan judiciary is without a doubt concerned by the plague of corruption as other public services and administrations are[67].

Recent cases illustrate different types of corruption

64 See the following link: http://www.usembassy.ma/usmission/pas/media/pressreleases/articles/070503Fr.htm (in French).

65 See infra in the present report.

66 According to a Kenyan saying " why renting a lawyer when you can buy a judge? ", cited in Mary Noel Pepys, Corruption within the judiciary: cause and remedies, in Transparency International, Corruption Global Report, 2007, p. 4.

67 In report summarising the results of the integrity investigations, Transparency Maroc notes that " companies consider that one of the obstacles to the development of businesses in Morocco is the unreliable judiciary system. It was mentioned by 23% of the companies as the sector to which close attention should be paid after tax rates (37%), corruption within the public sector (29%) and difficulties regarding loans (25%) ".

within the judicial system, from money to sexual exploitation.

The investigations of the investigating magistrate in the case of the Tetouan magistrates (see box supra, point 5 of Chapter II) revealed on the one hand, serious abuses in the judgements of certain cases linked to drugs at the appeal stage (quick trials, no hearing of key witnesses in a murder case, no investigation on the links between the assets of the accused and the drug money, no request for cassation for certain judgments or non referral of this request to the Supreme Court several months after the judgement).

On the other hand, this case showed how the banking operations of certain magistrates revealed important payments on the judges' accounts or on those of their under age children and that no withdrawal was made for an entire year or several months. In this case, payments to judges were made cash. Important amounts, sometimes around 1.000 €, were given to clerks to " get a coffee and remain silent ". The denunciation of this situation in June 2006 by the Tetouan lawyers resulted in the disbarring of three of them and the suspension of two of them (February 2007)[68].

In a more recent case, that made quite a stir during the year 2007, a young woman from the region of Khenifra (High Atlas) accused, with a supporting video, a magistrate of the first instance tribunal of Khenifra to had an intimate relationship with her during several years, following a case where she was accused. The housekeeper of this young woman, for her part, accused the deputy prosecutor general at the appeal court of Mekhnes of having had sexual intercourse with her and denying being the father of her child. The Ministry first tried to defend the magistrate of Khenifra, but eventually suspended him. Human rights NGOs requested an impartial investigation[69] in this case highly publicized by the press[70]. On 1 August 2007, the High Judicial Council relieved the magistrate of Khenifra of his duties for " serious acts harming the reputation and the honour of justice ", while authorising him to receive his retirement pension. As for the deputy prosecutor general at the appeal court of Mekhnes, he was acquitted for lack of evidence[71] [72].

LAWYERS: RIGHTS AND DUTIES

There can be no justice totally independent and impartial without the collaboration of lawyers themselves independent and impartial. To that effect, the profession of lawyer must enjoy a certain number of safeguards and immunities allowing them to exercise their duties and perform their mission dedicated to justice and litigants. The analysis of the situation of the Moroccan Bar with that respect is done in the light of the Moroccan law and its practice, but also in the light of international standards and in particular of the Basic Principles on the Role of Lawyers of 1990[73].

A- Safeguards and immunities enjoyed by lawyers

The immunities of the defence are the object of Chapter 5 of the 10 September 1993 on the profession of lawyer, but that chapter only contains one Article 58, which refers to Article 57 of the press code[74].

According to Article 57 of the press code " no

68 This case is further discussed in Chapter IV dedicated to lawyers (see infra).

69 See, inter alia, the public release of the Justice Association dated 30 April 2007.

70 A chronicler wrote: " Until yesterday, we heard about standing magistrates and sitting magistrates, today, after the scandal about sexual video tapes recorded by Rokia Abu Ali, a third type of magistrates has appeared: naked magistrates ", Rachid Ninni : The naked justice, editorial published in Al Massae, no 159, 24-25 March 2007.

71 See the following link: http://www.aujourdhui.ma/aufildesjours-details56232.html (in French).

72 The case experienced an unexpected development with the arrest in May 2007 of the woman of Khenifra, with 3 members of her family, accused by the complaint of an unknown person, of murder that they "would have committed" in 2004. The corpse of a stranger was disinterred in July 2007 within the framework of the investigation. The witnesses for the prosecution are enemies of the family (some of them have even been sentenced to jail for having kidnapped one member of the family). These witnesses have not seen anything, but explained that hey heard a rumor, at that time, regarding this so-called murder! In its decision dated 23 January 2008 referring the case to the criminal chamber of Court of Appeal in Meknès, the investigating judge only refers to the witnesses for the prosecution and deliberately ignores the witnesses for the accused family. The lawyers of the accused claimed that their imprisonment aimed at preventing them from divulgating more information. Two of these lawyers declared to have received threats aiming at dissuading them from continuing the defence. The trial will resume on 3 April 2008.

73 Adopted by the 8th Congress of the United Nations for the Prevention of Crime and the Treatment of Offenders, Havana, 27 September 1990.

74 A Bill improving, inter alia, the lawyers immunity regime has been blocked at the second chamber of Parliament in the very last weeks of legislature (July-August 2007), after being adopted by the first one.

prosecution for defamation, insult or outrage can be launched on the basis of a report made in good faith and faithful of judicial discussions, or speeches pronounced or written works presented before tribunals. The judges referred to and deciding on the merits shall nevertheless pronounce the suppression of the insulting, outrageous, or defaming statements, and sentence to compensation. Judges shall also, in the same case, summon lawyers and even suspend them from their duties. The duration of this suspension shall not exceed one month and three months in case of a second offense. The defaming facts stranger to the cause shall nevertheless give rise to either public or civil action of the parties when this option has been granted to them by the tribunals and, in any case, civil action of third-parties " (the author's emphasis).

Besides, Article 341 of the civil procedure code allows an appeal court to subject a lawyer who pronounced an insulting, outrageous or defaming statement to disciplinary measures, ie a warning, a reprimand or a suspension for two months or six months in case of a second offense. The power that the appeal courts have to directly sanction lawyers does not exist before the first instance tribunals. Indeed, Article 44 of the CPC provides that if an agent granted, in reason of his profession, of the right of representation before the judiciary, pronounces insulting, outrageous or defaming statements, the president of the audition establishes minutes of proceedings and brings him before the prosecution. If the agent is a lawyer, he refers him to the president of the Bar. Thus there are provisions that allow judges to take disciplinary measures up to the suspension of a lawyer for a period of one to three months (Article 57 of the press code) or two to six months (Article 341 of the CPC) without going through the Bar Council and without using the defence safeguards.
On the other hand, as it happened in another recent case (see box below), the disciplinary regime of lawyers is supervised by the judicial power who has the last say concerning their fate.

According to Article 59 of the 10 September 1993 Act, a lawyer who violates any legal or regulatory text, any rule or custom of the profession or who harms honour and dignity, even outside the professional context, will be subject to disciplinary measures. Article 60 defines those measures, which go from a warning to being struck off the Bar through reprimand and suspension, which can last three years. The President of the Bar submits to the Bar Council any complaint presented by the King's Prosecutor General or any other plaintiff against the lawyer within fifteen days from the date of its reception.

The Council appoints a rapporteur among its members to investigate the complaint. The Council must decide within two months from the date of reception of the complaint if it decides to launch proceedings against the lawyer or not. This decision is notified to the lawyer, to the King's Prosecutor General and to the plaintiff. The Prosecutor General can, within fifteen days, appeal the decision of the Council to close the case (Article 65). Even if the lawyer is brought before the Council and sanctioned, the King's Prosecutor can appeal that decision (Article 90) and request either the aggravation, or the reduction of the sanction. It is then up to the Chamber of Council of the appeal court to judge the appeal case[75] (Article 91). A request for cassation of its decision can be made before the Supreme Court (Article 93). This procedure was recently applied before the appeal court of Tetouan and resulted in the disbarring of three lawyers and to the suspension of two others:

On 28 June 2006 lawyers of Tetouan wrote " a letter to History ", in which they denounced the ongoing corruption within the appeal court of that town despite the " sanitization campaign " of 2003. According to them, that court was " a cow producing palaces, villas, limousines and [bank] accounts ". In their letter they requested that investigating commissions make light of the corruption within the court. Newspapers published the letter by accompanying them of comments on the corruption of magistrates (without naming anyone).
In June 2006 a complaint against the five signatory lawyers was filed before the Bar Council by the Prosecutor General at the appeal court. The Council did not answer within the set limit of two months, which is an implicit decision to close the case. In November, the Prosecutor General then referred the decision of the Bar Council to the appeal court and requested the disbarring of the five lawyers in question.
Several human rights NGOs, including Transparency Morocco, supported the lawyers and requested, instead of prosecution, the opening of an investigation on the allegations of the lawyers.
The five lawyers were judged in camera before the Chamber of Council of the appeal court, which acts as a disciplinary body. They were assisted by several lawyers. The court rejected several preliminary objections as well as the requests from the lawyers to

75 Some recommend a joint institution where lawyers and judges could decide or a national body for lawyers, see in particular Abdelkader El Hassani : About the independence of the judiciary and lawyers in Morocco, Revue de la faculté de droit, Fes, No 6, 1990 (special issue on Justice in Morocco) p. 74.

hear the witnesses and to check the files and judgements. After several hearings, the decision was delivered on 27 February 2007: three lawyers were disbarred - MM Habib Hajji, Abdelletif Kenjaâ and Khalid Bourheil – and two were suspended for two years- MM Mohamed Ajoub and Charaf Chakkara.
The court found its decision on the violation of Articles 3 and 12 of the 10 September 1993 Act, which concerns the lawyers' duty to adopt a behaviour based on the principles of dignity, independence, honour, impartiality as well as the oath they took to respect the courts, the public authorities, the customs of the profession, the laws in force, etc.). The decision of the appeal court was of immediate effect, with the prosecutor supervising its execution. A request for cassation was made in March 2007, but the case is still pending before the administrative chamber of the Supreme Court. No date has yet been set for the judgement. A request for the suspension of the execution of the judgement was also introduced. The Supreme Court set the deadline to the 23 January 2008 to decide on that request.

Another case will be judged in the same (procedural) conditions in February 2008:

This case concerns two lawyers of the Rabat Bar, MM Abdelfattah Zahrach and Toufik Moussaif, who are also human rights activists and are known for defending individuals arrested in cases linked to terrorism, in particular since the Casablanca terrorist attacks of May 2003. Receiving no response from judicial authorities, these two lawyers have at numerous occasions publicly denounced, in the newspapers and in the audiovisual media, the violations reported by their clients (case called " Ansar Almahdi "). In particular, they reported (to the Al Jazzira channel on 20 August 2006 for Mr Zahrach, and to the daily newspaper Annahar of 19 August for Mr Moussaif) violations observed when meeting with their clients (abduction, torture, modification of the arrest dates etc.) and claimed that the files incriminating their clients were " made up ". The two lawyers were publicly criticised by the President of the Rabat Bar, Mr Mohamed Ziane. Afterwards, the King's Prosecutor at the appeal court of Rabat verbally ordered them, via the same Bar President, to provide clarifications and explanations concerning their statements. The two lawyers specified that any proceedings should be done in writing and that their declarations related to the cases of their clients. Consequently Mr Zahrach was summoned by the judicial police and heard on 4 September 2006. Mr Moussaif was heard, for his part, on 18 September. The Bar Council of Rabat decided to close both cases, as it considered that no professional misconduct had been committed. The King's Prosecutor at the appeal court of Rabat appealed that decision, thus bringing both lawyers before the court. Several hearings have taken place since 30 November 2006. Scores of lawyers have defended them. Similarly, the Bar Association of Morocco and the Union of Arab Lawyers have supported the two lawyers as well as the 17 Councils of the Bar Associations of Morocco and numerous human rights NGOs. A hearing originally set for 18 October 2007 was adjourned to 13 December 2007. Another hearing is planned for February 2008.

The case of the Tetouan lawyers as well as the one of the two Rabat lawyers attest of the extreme fragility of the safeguards granted to lawyers. Complaints are sometimes filed by courts that - feeling attacked by lawyers- abuse of the power of judging them in last resort and sanction them with the heaviest disciplinary measures.

The rights of the defence, that is to say, the amenities enjoyed by lawyers to defend their clients, are generally respected. However, in certain recent cases, restrictions have been imposed upon the right of lawyers to photocopy the files in criminal cases, in particular in terrorism cases. These restrictions started with the Ansar Almahdi case (see box above).

Indeed, since then the investigating magistrate on terrorism cases (appeal court of Rabat) has refused to let lawyers receive or copy the files; they are only allowed to consult them and take notes on site. Following the protests of lawyers, the Association of the Bars of Morocco met the Minister of Justice on that topic and the practice then returned to normal. Unfortunately restrictions have started again since[76].

In certain cases, notably in terrorism cases, lawyers considered as belonging to the Islamist movement were associated to their clients[77]. For their part, the lawyers of the Khenifra woman[78] declared that they

76 A lawyer (member of the Adala Association) confirmed the continuing restrictions in a recent case (August 2007). The authorities seem to blame the lawyers for not respecting the secrecy of the investigation. It is however worth noting that daily newspapers published information regarding certain alleged terrorism cases even before the information was made available to the lawyers.

77 One of those lawyers, Mr Toufik Mossaif, informed the author in 2003 (within the framework of a draft report of the OMDH on the trials that followed the Casablanca terrorism) that the investigating magistrate asked the accused: "why choosing such a lawyer? ".

78 See supra.

had received threats[79].

Despite the difficulties, lawyers constitute quite a united corpus and can freely exercise their freedom of expression and association. They are professionally organised among seventeen Bar Councils corresponding to the eighteen appeal courts. The Association of the Bar Associations of Morocco is the chosen spokesman of the Ministry of Justice. Besides, many lawyers are members of directing boards of Moroccan human rights NGOs.

B- The lawyers' ethics

The lawyers have a certain number of obligations and duties, which are mainly mentioned at Chapter 4 of the 10 September 1993 Act. Those duties concern the relationship with their clients and with the courts, professional secrecy, dignity of their behaviour, legal aid, and financial transparency.

The accusations brought against lawyers sometimes concern instances where they use funds they are charged to cash on behalf of their clients or where they are used as intermediaries between the judges and their clients for corruption purposes.

When the Bar Council receives a complaint against a lawyer, the proceedings previously described are launched. In practice, the Council first contacts the lawyer in order to incite him to settle the issue with the plaintiff. If that happens, the proceedings are stopped. Otherwise, if the Council finds that the lawyer failed to his professional duties, he can sanction him.

According to a member of the Bar Council of Casablanca[80] : " the Bar Council might disbar lawyers, but the judiciary settles for only suspending them for a period of time and then they exercise again. Such judgements happened several times. We say that we understand the seriousness of disbarrement, it is a professional death penalty, but sometimes, the misconducts are very serious and can only be remedied by the amputation of the sick organ ". Such leniency from the courts towards the sanctioned lawyers is confirmed by other lawyers[81]. Other observers note that some Bar Councils are " too lenient towards the black sheeps of the group ". With such a perspective, it is a rather positive thing that the judiciary is able to intervene to correct misconducts. It is however a problem in cases where lawyers play the role of intermediaries for judges who can sanction them in last resort.

79 In an interview with the newspaper Al Wattan, dated 28 July 2007, one of the lawyers of this woman declared: " the Deputy of the King's Prosecutor at the appeal court of Meknes asked me the following question: why are you defending a prostitute and letting your judges friends down? " and added " your head is hot….you certainly know what happened to the Tetouan lawyers, those who wrote a letter to History! ".

80 Mr Jalal Taher, interview with the weekly newspaper Al Machaal, no 123 of 14 to 20 June 2007.

81 Abdelkader El Hassani, About the independence of the judiciary and the defence, in Revue de droit et d'économie, Faculté de droit, Fes, no 6, 1990, p. 71.

THE CONSEQUENCES OF THE LIMITS OF THE INDEPENDENCE OF THE JUDICIARY ON HUMAN RIGHTS

The practical consequences of the limits of the independence of the judiciary can be verified through the cases that opposed the political power to those it considers as its opponents. The intervention of politics in the course of justice is quite visible in two types of trials: those against the independent press and those against suspected terrorists.

A- The trials against the independent press

Since 2000, the Moroccan printed press has experienced a considerable development. Next to the pro-government press or the press linked to financial interests, an independent press (Le Journal, Tel Quel, Assahifa, Al Ayyam, Al Baydaoui (actuellement Al Watan Al Aan), Al Massae) emerged, which distanced itself more from the State, political parties and financial powers and which considered that its first responsibility was towards readers. The professional character of some of its titles is very strong, both with regard to the research of information and to the investigations led on certain very sensitive subjects, notably on political corruption, the monarchy (its powers, wealth and entourage), internal problems of political groups, public or private media, economic groups, the army and secret services, violations of human rights, sexual tourism and the administration of the Sahara issue.

The underlying conflict between the power and the press was illustrated in several occasions. The power's attacks manifested themselves either directly or through the manipulation of the law/ judiciary by authorities.

1- The bans against Le Journal, Assahifa and Demain

In an official statement of 2 December 2000, the Moroccan government announced its decision to simultaneously ban three titles: Le Journal, Assahifa and Demain[82]. This decision, besides the political uproar it caused, severely tested the Moroccan legislation and judicial system. It was a two-step process:

Firstly, the weekly newspapers Le Journal and Assahifa applied to the administrative tribunal of Rabat for an interim order requesting the annulment of the decision taken against them. The complainants claimed that the ban constituted a blatant unlawful act emanating from an incompetent body, in this case, the government. In addition, they claimed that the decree signed by the Prime Minister banning their publication was not issued in the Official Bulletin until the 14th December, whereas the ban was in force from the day of the publication of the statement, ie on 2 December. On 20 December 2001, the president of the administrative tribunal, judge responsible for urgent interlocutory proceedings, declared himself incompetent to decide on the application on the grounds that an interim order on the ban would imply a decision on the merits of case.

Secondly, editors of the banned newspapers tried to publish new press bodies in order to circumvent the ban but had to face the obstacles implemented by the judicial authorities concerning publications. Thus, the receipts acknowledging the submission of their applications before the first instance tribunal

82 The ground invoked was the content of certain articles published by those newspapers, which constituted, according to the government, a threat to the stability of the country; the aim of that decision was thus that of safeguarding national interests and the inviolability of institutions. Le Journal, then run by Aboubakr Jamaï, had published in no 145 of 25 November 2000 a report entitled: " The left, the army and the government in power " describing certain facts related to the failed military coup of 16 August 1972 and enclosing the text of a former correspondence between Mohamed Fkih El Basri, one of the UNFP leaders and companion of Abderrahmane Youssoufi (First Minister who took the said decision). The document of Mohamed Basri suggested the collusion, or at least the knowledge by the UNFP leaders of a conspiracy against the King Hassan II. In its 1st December edition, the weekly newspaper Assahifa reported what its fellow newspaper Le Journal had published.
This press release and especially the letter of Mohamed Basri caused a great deal of embarrassment within the USFP (which led at the time the " Alternance " experiment). It understood it as an attempt to put at risk the trust building approach that it was trying to establish with the royal institution after almost forty years of conflict and thus of jeopardising the current experiment.

of Casablanca were only delivered to them after Aboubakr Jamaï's threat to start a hunger strike at the 34th congress of the FIDH, then meeting in Casablanca. On this occasion, the King's Prosecutor at the first instance tribunal, M'hammed Abdennebbawi (currently general director of prison services) tried to make up for the breach of law by declaring on the Moroccan public television channel that the receipts were to be delivered upon presentation by the lawyers of the interested parties of some missing elements. The lawyer Abderrahim Jamaï formally denied this version[83].

Thus after the battle for receipts, the banned publications could be republished under new titles: Le Journal Hebdomadaire, Assahifa Hebdomadaire and Demain Magazine. The disputes between the governement in power and certain journalist, in particular Aboubakr Jamaï and Ali Lemrabet, were however to start over again in 2001 and 2003 and especially in 2005 and 2006.

2- The trials of Ali Lemrabet

a) Judgment of the first instance tribunal of Rabat of 22 November 2001

Following the publication in October 2001 by the weekly newspaper Demain Magazine of an article mentioning the possible sale of the royal palace of Skhirat, an investigation was launched/opened against the journalist Ali Lemrabet, which resulted in prosecution against him for " disseminating false information which undermines public order or is likely to undermine it ". Ali Lemrabet was condemned to a 4 months imprisonment suspended sentence and a 30.000 Dhs (2730 euros) fine. Although the fine was paid within the time limits set under Article 76 of the press code (in its former wording), the prosecution of Rabat decided to ban the publication of Demain Magazine, claiming the non-respect of the provisions of the said Article 76 by the publication.

b) Judgment of the first instance tribunal of Rabat of 21 May 2003

In this case, Ali Lemrabet was prosecuted on charges of "insulting the King, undermining monarchy and threatening the integrity of the national territory ". What he published comes in fact under the exercise of freedom of expression [84].
Ali Lemrabet was sentenced to 4 years imprisonment and fined to 20.000 Dhs (1820 euros), in addition, the judgment also banned the Doumane (in Arabic) and Demain Magazine (in French) publications. Besides, the convict was immediately imprisoned in compliance with Articles 400 and 425 of the criminal procedure code.

c) Judgment of the appeal court of Rabat of 17 June 2003

That judgment confirmed the first instance decision, including the accompanying order for immediate imprisonment, while reducing the prison sentence from 4 to 3 years. In that case, Ali Lemrabet got the support of various international organisations. The Moroccan organisation on human rights, for its part, raised its voice against the use of Article 400 of the criminal procedure code (immediate imprisonment) and recalled its position regarding Article 41 of the press code under which Ali Lemrabet was found guilty, considering that its wording is too vague to determine with certainty the offenses against the Muslim religion, the monarchy of the integrity of the national territory. On 7 January 2004, A. Lemrabet was pardoned by the King on the eve of the appointment of the members of the Equity and Reconciliation Commission (IER). His troubles with the judiciary nevertheless did not end there.

d) Judgment of the first instance tribunal of Rabat of 12 April 2005

That judgment, fundamentally flawed, followed Ali Lemrabet's insisting request for receiving the receipt acknowledging his application for a new magazine he was about to launch. Ali Lemrabet was accused

83 See the article of A. Jamaï, Assahifa no 1, 13-25 January 2001, p. 6.

84 The case started by proceedings initiated by the prosecution requesting the criminal department of Rabat Prefecture to open an investigation against Ali Lemrabet with regard to the information published in Doumane n°9 of 8-14 January 2002 and n°19 of 19-25 February 2002; these articles concerned on the one hand, the budget assigned to the King and his household and, on the other hand, a cartoon representing Driss Basri on a sedan wedding chair, carried by MM. Abderrahmane Youssoufi, Abbas el Fassi, Ismaîl el Alaoui and Nabil Ben Abdallah. For the prosecution, the cartoon was nothing less than a parody of the photos of the wedding ceremony of the King Mohamed VI. Ali Lemrabet was also questioned about the publication in Demain Magazine edition of 8-14 March 2003 of the translation of an interview given by Mr. Abdallah Zaâzaâ to a Spanish newspaper where he declared he was a Republican, that the governing powers of Morocco should be subject to the verdict of universal suffrage and that if the King Mohamed VI really was a democrat, he should return back what he took from the people. The article also mentioned to the support to the right of self-determination of Moroccan and Sahrawi peoples.

of defamation after an interview with the weekly newspaper Al Moustaqbal in January 2005, in which he stated that comparisons of the Saharawis of the Tindouf region and deportees or hostages were lies and falsifications. Right after that interview, a certain Ahmed Khaïri filed a complaint against Ali Lemrabet, as a former resident kept at Tindouf, claiming that Lemrabet's statements constituted personal defamation – even though his name was absolutely not mentioned in the interview. The tribunal found Ali Lemrabet guilty of defamation towards Ahmed Khaïri. He was fined 50.000 DH (4.400 €) and banned from journalism for 10 years with immediate effect. Besides, Lemrabet was sentenced to pay a symbolical dirham to Ahmed Khaïri as compensation and to pay for the publication of the judgment in a daily Moroccan newspaper for three weeks, or else he would face a deterrent surcharge of 100Dh per late day.

The ban from exercising one's profession, which is an accessory sentence in the Moroccan criminal code, in itself incompatible with press offenses, came just in time to prevent Lemrabet of publishing his new magazine.

3- The trials of "Le Journal "

Only two cases will be mentioned here:

a) Judgment of the first instance tribunal of Casablanca - Hay el Hassani- Aïn Chock of 1st March 2001

In this case, the Minister of Foreign Affairs, Mohamed Benaïssa, filed a complaint for defamation against Abou Bakr Jamaï, chief-editor of Le Journal, and Ali Ammar, author of two articles, for insult and non-respect of the right of reply against Le Journal. Le Journal indeed had published in three successive issues (no 117, 118 and 119 of 08-28 April 2000) articles on the Morocco embassador's Washington residence scandal and on the embezzlement he allegedly committed. Benaïssa, embassador of Morocco in Washington, was allegedly at the origin of the sale of a residence at the price of 900.000 USD to a company that he had created. The said company allegedly sold that residence back to the Kingdom of Morocco at the price of 4.800.000 USD. The journalists, who investigated in Washington and produced some evidence, were nevertheless condemned to a three-months imprisonment sentence and fined 10.000 Dhs. With regard to the civil proceedings, both defendants were condemned to jointly pay 2.000.000 Dhs (about 200.000 €) as global compensation and to pay for the publication of the judgment in three different press agencies[85].

b) Judgment of the first instance tribunal of Rabat of 16 February 2006, case of Jean-Claude Moniquet against Abou Bakr Jamaï and Fahd Laraki

In December 2005, Le Journal published a critical analysis of a report drafted by a Brusselian research centre on Polisario. The weekly newspaper considered that the report was too partial and was supporting the official views of the Moroccan government in such a way that it raised the question whether it had not been ordered and financed by the Moroccan government. It further added that this type of documents was far from supporting the Moroccan cause.

Mr. Jean-Claude Moniquet then submitted a complaint for defamation against the weekly newspaper. During the auditions, the tribunal rejected the request for the hearing of two witnesses, experts in Moroccan affairs, to give their opinion on the Moniquet report. The defence decided to withdraw.

The tribunal found both journalists guilty of defamation. They were fined to 50.000 DH, plus 3.000.000 DH (environ 300.000 €) as compensation and to pay for the publication of the judgment in three Moroccan newspapers[86]. The appeal court confirmed this judgment on 18 April 2006[87].

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85 The appeal court of Casablanca, in its decision of 14 February 2002 confirmed the first instance judgment of 2001 but suspended the imprisonment sentence originally decided (3 months) and reduced the 10.000 Dhs fine to 1.000 Dhs. The 2.000.000 Dhs compensation was also reduced to 500.000 Dhs.

86 The Moroccan authorities, with the participation of state-owned television channels, launched a campaign against Le Journal two days before the delivering of the tribunal's decision. Some enforcement officers gathered a certain number of individuals to demonstrate in front of the weekly magazine's headquarters, under the pretext that it published cartoons of the Prophet. The magazine had indeed undertaken a professional analysis about the publication by a Danish newspaper of cartoons representing the Prophet – but darkened the said cartoons. The second state-owned Moroccan television channel covered that demonstration. The Moroccan journalists' trade union and that of the journalist of the second state-owned Moroccan television channel issued statements denouncing the partiality of that channel and its participation in the campaign against Le Journal. As for the first channel, it had covered the day before that demonstration another demonstration, also against Le Journal, that took place that day in front of the Parliament.

87 For a more detailed report on the trials against the press since 2000, see the " Handbook aimed to journalists and lawyers " that will be published in Arabic and in French by the Adala Association (expected for January 2008). For a recent report, see http://www.cpj.org/Briefings/2007/morocco_07/Maroc_07_fr/moroccoweb_fr.html

C- The terrorism trials

Several Moroccan[88] and international[89] NGOs documented the abuses resulting from the fight against terrorism policy: massive abductions, cases of torture, deaths of persons held in custody, arbitrary detentions and trials.

In the aftermath of the Casablanca terrorist attacks of 16 May 2003, human rights NGOs reported an aggravation in the number of cases of violations of the rights of the suspected and the accused; massive interpellations, concerning between 2.000 and 5.000 individuals, that took place under conditions poorly defined. According to a statement from the Moroccan Minister of Justice of 6 August 2003, 1.048 individuals have been prosecuted before 20 courts throughout the Kingdom. In the cases related to terrorism, the investigating judges and the deciding courts still have not apply the law in a strict and impartial manner.

Arrest and detention: the arrested individuals were often taken to the detention centre of the Directorate for the Surveillance of the Territory (DST), near Rabat, in Temara, where most of the condemned Islamists pass through. This " secret " centre is not legally recognised and cannot be visited. The legal time limits for custody on remand are in the majority of the cases largely exceeded, with sometimes forged minutes of proceedings in order to change the date of start of the custody. Individuals are thus arbitrarily detained for several weeks.

Torture and ill-treatments: acts of torture and ill-treatment were reported (kicks, punches, electricity, sexual abuses, rapes, etc.) during the investigation. No investigation was launched on those events, despite being reported in the press.

Deaths while in custody: two individuals, Abdelkader Bentasser and Mohammed Abou Nayt died in suspicious circumstances after their interpellation. Despite the investigations and the autopsies officially conducted, there are still multiple contradictions, and the exact circumstances of those deaths are still to be elucidated.

Non respect of the right to a fair trial: After the 16 May terrorist attacks, trials became more numerous and terrorism cases were judged in a hasty manner[90], without respecting the required criteria for the effective right to a fair trial. Thus, the following irregularities could be found :

- summary investigation of the cases;
- no audition of witnesses during the trial;
- determination of the guilt of the accused almost exclusively on the basis of declarations recorded during the police stage although it appeared that they often could not read them again;
- condemnation to very heavy sentences, including the death penalty, on the basis of insufficient investigation and charges, or despite the impossibility of getting defence auditions[91].

The lawyers of some of the accused declared to the rapporteur of the OMDH about the trials held after the 16 May 2003 that " the accused declared that the investigating magistrate did not inform them that they were in a tribunal or that they had the right to a lawyer; they didn't even read the minutes of proceedings they signed. Judges did not accept any request related to investigations of experts on cases of torture". The lawyers also affirmed that they were not notified about the orders of the investigating magistrates which prevented them from appealing before the indictment chamber[92].

According to an FIDH report: " The investigation proceedings, which used to take months – one year for the Fikri case – were suddenly speeded up following the 16th of May. Within a few weeks, the accused, who were facing heavy sentences, were referred to criminal court after an especially summary investigation; the judge sought only to confirm the statements obtained by the police "[93]. And, it added: " Apparently confronted by the need to have immediate results, the investigating magistrates evidently took great leeway with the measures of the Moroccan legislation: the investigations took place under quite abnormal conditions, often after midnight and even at 3:00 am or 4:00 am "[94].

88 OMDH Report, The trials where the balance of justice was tipped (Des procès où la balance de la justice a basculé, in French), December 2003.

89 Reports of the FIDH of February 2004, Amnesty International, June 2004, HRW, October 2004.

90 The pace seems to be slowing down. However several cases were judged before the appeal court of Sale in 2007; these cases concern the accused from the group Ansar Al Mahdi (see supra), who are individuals accused of recruiting young Moroccan people for the war in Irak (Tetouan cell) or those accused to be linked to the Casablanca terrorist attacks (14 April 2007).

91 See the above-mentioned reports of the OMDH, the FIDH, Amnesty International and Human Rights Watch.

92 OMDH Report (only in Arabic) December 2003 p. 21. Also see the declarations of the two lawyers of the accused, Mr Toufik Mossaif to the weekly newspaper Al Ayyam of 2- 8 October 2003, and Mr Khalil Idrissi to Le Jounal Assahifa of 1- 7 November 2003.

93 FIDH: international mission of investigation – Morocco – Human Rights abuses in the fight against terrorism, July 2004 p. 16.

94 Ibid, p. 16.

Before the appeal courts of Rabat, Casablanca and Fes, which judged the majority of the accused after the 16 May terrorist attacks[95], the lawyers reported that almost all of their requests for the annulment of the procedure on the grounds of violations of the guarantees of the accused and the rights of the defence were rejected by the concerned courts.

In 2002 in Casablanca, in the context of a terrorism case, the president of the criminal chamber of the court of appeal, without any justification, was replaced by another magistrate, although he had been elected by the general assembly of judges of the court, in accordance with Article 11 of the 15 July 1974 Act on the organisation of the judiciary. The president of the first instance tribunal of Casablanca, who since then decide on terrorism cases, was appointed to his post. Lawyers affirm that with him, the rights of the accused and of the defence were largely mistreated[96].

In the terrorism cases after May 2003, the lawyers claimed a series of exceptions, annulments and other requests reflecting the conditions under which the trials took place : territorial incompetence ; request for the communications of the evidence seized and how they implicate the defendants ; request for not joining the files of certain accused to others ; absence of flagrant offences in the majority of cases that were nevertheless presented as such ; violation of the time under custody on remand ; non information to families[97]; violation of the safeguards relating to searches; violations occurring before the investigating magistrate ; request for hearing the witnesses mentioned in the minutes of proceedings[98]; etc. Yet, all these requests, based under the articles protecting the rights of the defence and of the accused, clearly defined in the criminal procedure code (revised in 2003), were systematically rejected by the tribunals.

During the trials that took place between July and the end of September 2003, hundreds of accused were massively judged and condemned. This swiftness might have been dictated by the entry into force the 1st October 2003 of a new criminal procedure code and the subsequent concern of depriving the convicts of its guarantees. That new criminal procedure code recognises, amongst other improvements, the right to appeal judgments of the court of appeal before a second chamber, while the former code only allowed cassation.

THE LIMITS OF THE REFORM

In a report published in 1995, the World Bank put the miscarriages of the judiciary and its lack of credibility amongst the major problems that need to be solved to help the economical growth and development in Morocco[99].

Instead of undertaking an in-depth reform, the " sanitization campaign " undertaken in Morocco in 1996 after the publication of an European report on drug trafficking was in reality a black period for the Moroccan judiciary. Protected by a Minister of Justice working for the then Home Office Minister, the judicial police tortured scores of suspects with complete impunity, in collusion with the King's Prosecutor General of Casablanca. It was only with the Youssofi government (April 1998) that the reform of the judiciary started being one of the projects of the successive Ministers of Justice. The judiciary being nevertheless considered in Morocco as a department of sovereignty intrinsically linked to the royal power, reform projects are generally prepared by the Minister of Justice independently from the Prime Minister but not from the King. Thus a former secretary-general of the Ministry of Justice referred to the: "reform project established by the Ministry of Justice, approved by His late Majesty the King Hassan II and adopted by the government is organised around two essential goals that are the rehabilitation and the modernisation of the judiciary "[100] (the author's emphasis).

By reading the reform projects for the judiciary of the two last Ministers of Justice of the past ten

95 After the terrorist attacks of 16 May 2003, the Act on the fight against terrorism of 28 May 2003 established the Rabat Court of appeal as the only competent court on terrorism cases.

96 OMDH Repport , op cit p. 27.

97 Amnesty International Report, 26 June 2004, p. 9.

98 FIDH Report p. 16 " In their statements to FIDH representatives as well as to the Moroccan press, several lawyers cited the large number of articles from the CCP that had been violated before the investigating magistrates, notably articles 127, 128, 129, and 132. The first guarantees the right of the accused to a lawyer or to legal assistance, the right to abstain from making a statement, and the right to a medical visit, which may be requested by the accused or ordered by the investigating magistrate if he observes results or indications of ill treatment. Article 129 requires the presence of the defence at hearings before the judge, with the lawyer having been notified by letter 48 hours in advance of any hearing, with lawyer access to the case file at least 20 hours before the hearing (article 132) ".

99 Mentioned by Ahmed Ghazali in : http://doc.abhatoo.net.ma/doc/spip.php?article2200 (in French)

100 Ahmed Ghazali : The reform and modernisation process of the judiciary and the reforms dedicated to ensure the reign of the law, Wednesday 22 February 2006. See : http://doc.abhatoo.net.ma/doc/spip.php?article2200 (in French). Collected by H.S

years (Omar Azziman 1997-2002 and Mohamed Bouzobaâ 2002-2007)[101] and observing their practical implementation, it appears that the reform is organised around two main themes: modernisation and moralisation. If some important efforts were made to modernise the sector (1), the results obtained in the field of moralisation are mediocre and difficult to assess (2). On the contrary, measures to strengthen the independence of the judiciary are totally absent from the reform projects and actions (3).

A- Important measures in the field of modernisation

Under the impetus resulting from the obligations undertaken by Morocco within the framework of its free-trade agreements with the European Union (EU) and the United states, notably, and to respond to new phenomena such as organised crime and terrorism, it had become necessary to bring the Moroccan legal system and judicial apparatus up. Efforts were therefore made in fields as diverse as training, updating of the legislation, improvement of the internal administrations of the tribunals, development of the judicial map, computerisation of tribunals, improvement of the material situation of magistrates, dissemination of legal and judicial informationm execution of judgments. Some of these reforms were the result of international cooperation

It is worth noting that aid originating from the United States (USAID) or the World Bank aims at strengthening the legal framework of businesses, tribunals and trade registers, training of magistrates, access to information in order to promote growth, private investments with sufficient guarantees. The European Union aid takes place within its Neighbourhood Policy and its proper Action Plan[102], established by mutual agreement of the EU and Morocco, which defines a programme of economic and political reforms with short and mid-term priorities.

With regard to the judiciary, the EU/Morocco Action Plan chose as a medium-term priority action to step up efforts to facilitate access to justice and the law through the following actions:

- Simplify judicial procedures, including shortening the length of procedures, trials and the enforcement of judgements and improving legal assistance
- Support for family courts within the courts of first instance in order to support the provisions of the new family code
- Support for youth justice as part of the reform of the new criminal code
- Pursue the national plan for modernising prison services, in particular the items dealing with training, reintegration and protection of prisoners' rights
- Training of judges and other court staff
- Continue the MEDA programme on " Modernising law courts in Morocco "
- Cooperation in the fight against corruption
- Follow-up of the conclusions of the " justice and security " sub-committee[103].

As a conclusion, one can maintain that the efforts for modernisation are multiple and real with tangible results, especially for the commercial courts as shown by the degree of satisfaction of the users according to two studies led within the context of a project with the World Bank[104].

However those efforts suffer two major shortcomings:

1) little or no cooperation with judges, as revealed by a member of the HJC[105] ;
2) the reform does not fall within a global and shared vision, not only with regard to the other actors of the judicial process, but also with the other governmental departments. The very global consistency of the project, as well as its constituent measures, is still to be demonstrated.

101 At the time of this writing (13 December 2007) the new Moroccan Minister of Justice is Abdelwahed Erradi (USFP, former president of the chamber of representatives).

102 See http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127912.pdf

103 The EU welcomes the holding of the second meeting of the Justice and Security Subcommittee in Rabat on 25 February 2005. Both sides approved the priority themes to be developed in 2005: the fight against terrorism, the fight against organised crime (in particular, trade and trafficking in human beings), money laundering, combating drugs and cooperation in family law, in particular parental responsibility, including cases of child abduction. The EU also welcomes the specific follow-up measures which have been implemented in certain areas, in particular the money laundering, *inter alia* through twinning projects. The EU is keen to see the co-operation projects in the field of migration implemented soon. The EU would also like to see specific follow-up measures to be taken in the area of family law before the next meeting of the Subcommittee.
http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/05/308&format=HTML&aged=1&language=EN&guiLanguage=fr

104 For further information on that project, see http://www.worldbank.org/projects

105 Jaâfar Hassoun : the judiciary reform and the discipline issue, in the journal Al Bidawi, no 79 of 4 December 2003 p.7

B- The moralisation: efforts and results difficult to assess [106]

The judiciary is not isolated from its political, social and cultural environment. Therefore the efforts that are made towards its moralisation need a comprehensive approach involving all actors of the judicial process (magistrates, lawyers, police, clerks, experts, bailiffs, etc.).

According to a recent Activity Report of the Ministry of Justice[107], the efforts undertaken in this field relate to the inspection of the courts and the individual inspection that follows a complaint against a magistrate, or any other actor of the judicial process. This inspection, implemented by a department of the Ministry of Justice as soon as it concerns magistrates, is positive because it can result in disciplinary measures against the guilty magistrates. On the contrary, this possibility strengthens again the powers of the Minister of Justice who supervises the general inspection. Thus, the ministry has the possibility to affect the course of the inspection or use the conclusions of an inspection to orchestrate the magistrates even more. It is therefore commendable to establish an inspection institution that would be both independent from the Ministry and the magistrates.

In that field, the recent draft amendment submitted to Parliament in summer 2007 of Article 16 of the 11 November 1974 Act on the status of the judiciary, which rules the issue of the declaration of magistrates' wealth (see Chapter III supra), is worth noting.

From a positive perspective, it is also worth noting the recent (9 May 2007) ratification by Morocco of the United Nations Convention against Corruption. In order to comply with its obligations under that convention, which will besides be supervised by the bodies of that instrument, Morocco will have to undertake a series of reforms and adopt new laws and institutions.

C- A residual category of the reform: the independence of the judiciary

Although it has sometimes been mentioned in the speeches of the last decade, devoted to change the legislative provisions, institutional practices and diffused and express culture that robustly found the dependence of the judiciary *vis-à-vis* the political power, there has been no concrete measure towards the independence of the judiciary.

The pressing demands from the democrats, the Moroccan and international human rights movement had no effect. Implementation measures regarding the recommendations on the independence of the judiciary expressed by the Equity and Reconciliation Commission - published in November 2005 - are still expected.

Indeed, these recommendations in the field of justice emphasized the constitutional consecration of the independence of the judiciary ; the adoption of a new organic law on the status of the judiciary ; the clear separation between the Ministry of Justice and the High Judicial Council, which should be physically placed within the Supreme Court ; the review of the powers of the Ministry of Justice in order to prevent any interference with the judiciary's affairs ; create offences for any interference of administrative authorities in the course of justice and for any breach of the independence and intangibility of the judiciary[108].

It is obvious that the independence of the judiciary is an issue depending on political will. Is an impartial and independent power, which applies the law without taking into account who the parties are, what they want in higher places, or do they prefer a judiciary that is attentive to politics?

106 Read this item in the light of the chapter dedicated to the impartiality of magistrates.

107 Activity Report of the Ministry of Justice for the year 2006 and projects for 2007 (in Arabic) published in 2007.

108 Equity and Reconciliation Commission: Chapter IV of the Final Report (in Arabic), 30 November 2005, pp. 89 and 93.

RECOMMENDATIONS

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

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

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

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

Since there can be no proper justice without an effective and independent defence, [the participants of the seminar] make the following recommendations:

- *the training of lawyers should at least be identical to that of judges,*
- *the independence of lawyers and of their professional associations should be legally recognised and protected.*

(...)

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

Finally, a fair system of justice develops under the scrutiny of society. The role of civil society should therefore be recognised and promoted."[109]

Bearing in mind those general recommendations, with regard to the Moroccan judicial system, it is recommended:

I- RECOMMENDATIONS TO MOROCCAN AUTHORITIES

A- Concerning the legal standards

1- International conventions

To meet the recommendations of the Equity and Reconciliation Commission (IER) and of the Moroccan and international human rights NGOs and to comply with the commitments made by the Moroccan government when it applied for a Human Rights Council seat (letter of the permanent mission of the Kingdom of Morocco in New York of 17 April 2006), Morocco is urged to ratify the following international conventions, essential to the improvement of the status of the judiciary and of the system of protection of human rights:

- The Treaty of Rome on the International Criminal Court, signed by Morocco in September 2000 (recommendation from the IER and NGOs) ;
- The International Convention for the Protection of All Persons against Enforced Disappearances, adopted on 20 of December 2006 by the United Nations General Assembly and open to signature and ratification since the 6th February 2007 (pledge of the Moroccan representatives and recommendations from the NGOs) ;
- The two optional Protocols to the International Covenant on Civil and Political Rights (recommendations from the Human Rights Committee, the IER and NGOs) ;
- Convention no 87 of the ILO concerning freedom of association and protection of the right to organise (recommendations of the ILO authorities);
- The Moroccan government is also urged to withdraw its reservations to certain international conventions, notably those concerning the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.

109 See *Justice in the South and East of the Mediterranean Region*, EMHRN, 2004, pp. 17- 19.

2- Constitutional reform

- State with clarity the international law principle according to which regularly ratified or approved international treaties and conventions have a higher rank than the laws;
- Revise the constitutional provisions on the High Judicial Council to the effect that :
  - its competence is sufficiently developed as to grant it with real decision-making powers;
  - it allows other components of society, notably lawyers and academics, with the collaboration of other bodies (Parliament, National association of lawyers), to suggest candidates in accordance with defined criteria and procedures. An organic law should specify those safeguards;
- Clearly affirm the independence of the judiciary, the judges and the prosecution;
- Affirm the right of Parliament to legislate on pardon matters in compliance with modern international law (no pardon for crimes that deny the victims' right to the truth, to judicial appeals and to compensation), and limit the power to confer pardon only to the cases already judged ;
- Specify in a detailed manner the safeguards regarding certain fundamental rights (right to be protected against disappearances, right to liberty as opposed to arbitrary detention, protection against torture, freedom of association, freedom of the press, right to access public information, etc.) in order to prevent the legislator of rendering those rights meaningless ;
- Facilitate the referral to the Constitutional Council by the parliamentary minority in relation to referrals on the constitutionality of laws (1/10 of Parliament members could jointly refer to the Council) ; enable citizens to refer to the Constitutional Council, in a course of a legal proceeding, as to the conformity of a law to the Constitution and/or to international treaties;
- Strengthen the independence and the transparency of the Constitutional Council notably by allowing its members to elect their president every three years, and by granting them the individual right of expressing a dissenting opinion each time that they disagree with the decision reached by the majority of members;
- Restrict the time for a decision on electoral disputes to a maximum of a year from the date the action was brought.

B- Legislative reform

1- The magistrates' career

- Revise, by means of an organic law, the Act of 11 November 1974 on the status of the judiciary: the High Judicial Council should have the power to supervise the recruitment, the training, the assignment, the promotion and the retirement of magistrates as well as the disciplinary measures taken against them. He should be granted the means to perform efficiently its mission (independent budget, own offices and staff) ;
- Adapt the composition and the number of magistrates' representatives of the High Judicial Council to the changes taking place in the judiciary context (new administrative, commercial, family tribunals, etc.) so that all the courts are adequately represented;
- Build in the organic law reform provisions aimed at strengthening the independence of the prosecution *vis-à-vis* the Minister of Justice;
- Reform the criminal procedure code in order to balance the overweening powers of the prosecution by an increased independence of the investigating judges and by strengthened safeguards for the rights of the defence;
- Set up and adopt objective criteria, based on experience, competence and integrity for the promotion and the appointment of magistrates to senior positions.

2- The freedom of association and of expression of the magistrates

- Revise the 11 November 1974 Act on the status of the judiciary in order to entitle the magistrates, in compliance with the Basic Principles 8 and 9 on the Independence of the Judiciary (United Nations, 1985), to:

  - freely form associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence;
  - exercise their freedom of expression, association and assembly, which can only be limited in order to preserve the dignity of their office and the impartiality and independence of the judiciary.

3- Training of magistrates and lawyers

- Revise the 17 September 2003 Act establishing the Superior Institute of the Judiciary in order to strengthen the independence of the Institute *vis-à-vis* the Minister of Justice, notably by involving the main actors of the judicial process (HJC, Bar Associations, human rights NGOs, other professionals) to the management of the Institute;
- Create specialised courses within the ISM, as complements to the general basic training;
- Set up a policy regarding in-house training of magistrates and involve judges, lawyers, academics and experts to the process;
- Review the admission criteria to the profession of magistrate, in particular by thinking about the possibility of extending the length of the required training to become a magistrate;
- Promulgate a regulatory text in order to implement the provisions of the 1993 Act envisaging the creation of professional training centres for lawyers. This regulatory text should be adopted after consulting lawyers' representatives ;
- Establish in each Bar Association an in-house training institute for every lawyer, which would implement programmes that have been studied to answer the needs in the training field;
- Train other actors of the judicial process according to terms and conditions specific to their role and duties.

4- The control of magistrates' assets and judicial decisions

- Control the magistrates' assets through an independent body, in order to subject them, like any citizen or civil servant, to a strict control, while preserving their independence;
- Establish a system controlling judicial decisions to strengthen transparency, notably by drafting and publishing judgements diligently, in order to detect judgements suspected of being influenced by corruption or any other factor that would flaw their impartiality ;
- Implement concretely the commitments that Morocco undertook when ratifying the United Nations Convention against Corruption in the field of justice;
- Ensure the objective application of domestic legislation on the fight against corruption (criminal code, code of procurements, laws on wealth declaration, law on the Court of Auditors etc.).

5- Independence and impartiality of lawyers

- Ensure to provide to lawyers all the necessary means for them to perform well their mission of defending clients in the interest of justice and of the right to a fair trial;
- Revise the 1993 Act on lawyers and certain provisions of the civil procedure code, notably Article 341 ; to that effect, accelerate the adoption of the Bill on lawyers, adopted by the first Chamber and awaiting validation from the Chamber of Councillors ;
- Suppress every possibility to sanction a lawyer during the hearing and forbid the participation of concerned judges to participate to the judgement of a case;
- Establish a joint institution (judges-lawyers) to examine cases where disciplinary measures could be taken against lawyers.

II- RECOMMENDATIONS TO THE EUROPEAN UNION

The recommendations of the participants of the seminar on the " Assessment and implementation of the UE-Morocco Action Plan in the framework of the European Neighbourhood Policy " [110], co-organised by the EMHRN and the Moroccan EuroMed Network of NGOs on 25 and 26 October in Rabat, emphasised the accessory and rather imprecise nature of the measures on justice stated in the UE-Morocco Action Plan. These recommendations insist on the fact that, notably in the field of justice, what Morocco needs more are structural reforms rather than technical accompanying measures.

A- Reinforce the respect of legal standards

- Highlight the common reference to universal human rights standards by notably emphasising on the need for Morocco to ratify certain international conventions, in particular:

  - the Treaty of Rome on the International Criminal Court
  - the two Optional Protocols to the International Covenant on Civil and Political Rights
  - The International Convention for the Protection of All Persons against Enforced

110 The researcher was the rapporteur of that seminar's Justice workshop.

Disappearances

- Convention no 87 of the ILO concerning freedom of association and protection of the right to organise

- Urge Morocco to revise its Constitution in order to improve the status and the safeguards for the independence of the judicial power as an institution and of magistrates individually.

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

Encourage public authorities and decision-makers to:

- Implement a national strategy to reform the judiciary after a real national debate;
- Reform the institutional framework to allow access to justice without any discrimination and the equality of all before the law;
- Reform the High Judicial Council by reviewing and extending its composition and powers, by strengthening its financial independence and ensuring its real independence from any intervention of the other powers;
- Recognize the right to magistrates to freely form and join professional associations and other organisations, pursuant to international standards and notably the United Nations Basic Principles on the Independence of the Judiciary of 1985;
- Recognize the right to professional and other judges organisations to cooperate and freely get affiliated to other organisations, federations or professional associations, nationally as well as internationally ;
- Recognize in the same manner freedom of expression to magistrates, which is expressly recognized by international standards and notably by the United Nations Basic Principles on the independence of the judiciary;
- Fight efficiently and without discrimination against corruption in the judicial system;
- Set up specialised trainings as complements to the basic general training for the different professions of the judicial system;
- Implement a policy on in-house training of magistrates and involve judges, lawyers, academics and experts.

C- Fight against corruption

Encourage public authorities and decision-makers to:

- Implement concretely the commitments Morocco made by ratifying the United Nations Convention against Corruption in the field of justice;
- Strengthen the objective application of the national legislation in relation to the fight against corruption ;
- Implement an Observatory for the Fight against Corruption, which powers would notably cover the follow-up of judgements ;
- Provide sustained support to the Moroccan civil society
  - consulting and supporting NGOs active in the field of human rights;
  - a financial support to mid and long-term (from 3 to 5 years) projects so that NGOs can develop, undertake research projects, propose concrete suggestions, launch sustained lobbying projects and work within networks, without losing their capacity of acting autonomously as influential actors.

III- RECOMMENDATIONS TO THE CIVIL SOCIETY[111]

It is recommended to organisations of the Moroccan civil society to:

- Coordinate their positions in accordance with international standards and unify their requests in the light of the recommendations that have not yet been implemented by the authorities, notably those of the IER, the treaty monitoring bodies, the Bar Associations of Morocco, the CCDH concerning prisons, as well as the recommendations expressed at national conferences organised by the authorities themselves (for example: the Conference of Meknes on criminal policy, 2004) and the recommendations expressed in the present report;
- Establish a committee composed of a team of jurists militating in Moroccan NGOs to set up an action plan. This action plan could, for example, comprise the draft of a memorandum or joint

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

White Paper on the reform of the judiciary, which would expose ideas for lobbying actions to undertake towards public authorities and donors as well as suggestions to mobilize the Moroccan society and political actors, in order to create a balance of power favourable to reforms[112];

- Encourage the adoption of codes of ethics including mechanisms of sanctions and appropriate safeguards by all professions related to that field (lawyers, judges, bailiffs, notaries, experts etc.);
- Contribute to the strengthening of Bar Associations' role in the supervision of the impartiality of the judiciary, notably by publishing annual reports on the judiciary and by encouraging lawyers to use international human rights law in their pleadings;
- Incite the creation of bodies composed of the members of various judicial professions that would meet at least once a year to discuss the problems linked to the independence and impartiality of the judiciary;
- Reflect on joint actions aimed at raising awareness about the issue of the independence and impartiality of the judiciary amongst the population, and promote its importance as an essential tool for the protection of the rights of *all* individuals.

112 Recommendation of the national seminar jointly organised by ADALA, Transparency Maroc and the Moroccan Association for the Defence of the Independence of the Judiciary (*Association marocaine pour la défense de l'indépendance de la magistrature*), 6 and 7 December 2007 in Rabat.

EMHRN REPORT 2008

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