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MEDETERRANEAN MASTER'S IN HUMAN RIGHTS AND DEMOCRATISATION

The Rights of Detainees In Tunisian Law

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To My Mother

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INTRODUCTION

The right to freedom and security is an admitted right and guaranteed to the individual by several charts and international conventions. The Tunisian Legislation has followed the development witnessed by this right. However, just like other rights and basic liberties, the right to freedom and security remains a principle that is covered by a set of exceptions. Depriving an individual of his freedom is like a punishment imposed on him for his violation of the group's regulations and choices. The necessity of finding legal means to limit the individual's freedom came into the open. The procedure depriving the individual of his freedom became numerous and different, depending on the purpose behind the freedom limitation.

Detention is a procedure leading to the confinement of a certain person by the Police of the National Guard Agents for a certain period in order to check his identity, around which some suspicions hover for his eventual commitment of a crime. Detention seems to be similar to the other legal procedures, providing for imposing constraints on the individual's freedom We can quote for example the "confinement" which does not require the conducting of any investigation.

Confusion comes when custody is taken for the preventive detention, which is a procedure managed by the Examining Magistrate. However, there is no way to confuse them because of their different legal basis and the authority which is authorised to operate this procedure, fix the relating proceedings and period. Detention is different from a jail sentence, it is requested by the investigation about a

crime and it is based on a simple suspicion; it is within the prerogatives of the Judicial Police.

Imprisonment is a punishment that requires the delivery of a judgement providing for the culpability and the jail sentence, in addition to the fact that the jail sentence is served in jails, meant to host the criminals.

Detention centres cover the police and National Guard centres and the special places allocated to receive detainees. Detention, however, in the Tunisian Law, remained for a long time governed by administrative circular letters issued by the Minister of the Interior, the most important of which is the circular letter dated August 20th, 1974, and the circular letter dated April 2nd, 1977. Thus, the enforcement of detention lacked legal and clear cut grounds. However, the Tunisian Legislator stepped in, in 1987, to regulate detention in Article 13 bis of the CPC which represented a fundamental renewal that was completed by the Law of August 2nd, 1999.

The Legislator extended, through Article 13 bis and Article 57 of the CPC, a special care to this procedure under all its different aspects. Hence, the recourse to this institution became possible in special cases, required by the investigation and for a limited period. Furthermore, it includes provisions for the extension of guarantees to the detainees, and which keep them in the framework of their assumed innocence. The study of the detainee's guarantees seems to be important because the detainee is a human being who has his freedom, his pride and his physical immunity, which the preliminary investigation does not need to violate.

The guarantees, ruled out during detention make a protection to the individuals against the violations and the misuse of authorities. They accordingly oblige the Judicial Police Officers to honour the basic requirements of this procedure. Based on the foregoing, detention has become a subject of several inspection means and tools, whose aim is the sound application of the relating provisions and the execution of such procedure as per the law requirements, prohibiting any violation or excessive limitations in the individual's freedom or the failure to allow him the guarantees offered by the Law. In order to achieve this target, the Law has regulated the violations affecting these guarantees.

Based on the foregoing, one is tempted to split the research into two parts:

Part I Contents of the Guarantees extended to the Detainees

Part II Inspection of the Guarantees Extended to the Detainees

PART I

CONTENTS OF THE GUARANTEES EXTENDED TO THE DETAINEES

Between the taken for granted innocence and the possible culpability, the criminal investigation requires depriving the individual of his freedom temporarily inside the detention institution. The motives for the balance between these contradictory requirements are different and may not be covered by a legal text. The Tunisian Legislator has regulated a set of guarantees inside the Criminal Procedure Code; however there is no echo of these guarantees in the Law General Principles. The study of these guarantees shall be conducted based exclusively on the Criminal Procedure Code, in view of its importance

The protection of the individuals and in particular, the detainees, is more efficient, as long as the Law has provided some guarantees to them, inside the criminal texts and especially those dealing with the procedures. The general nature of the general principles, in most of the cases, prevails. The individual does not stick to them, on one hand, and the criminal texts are set in a precise and binding framework, on the other hand. Nonetheless, they do include some guarantees to the individuals, as part of the basic rights that make up the criminal law principles and in particular the innocence principle and the necessity to go for a fair prosecution and to have a fair judgement.

Although the detention institution remained for a long time outside the codification and regulation framework, and was kept for a while as an enforcement mechanism authorised by the investigation, under the control and the free management of the Judicial Police Officer, as part of a his judgement, which often led him to arbitration with respect to the individual's rights. The preliminary criminal investigation was behind the intervention of the Legislator since the Law of November 26th, 1987, in order to regulate detention, which resulted in the promulgation of serious guarantees in favour of the detainees that covered all the conditions surrounding the institution, especially through restricting the detention principle (First Research) and determining its proceedings (Second Research).

FIRST RESEARCH: RESTRICTING THE DETENTION PRINCIPLE

Detention remained for long years a principle that was adopted in most of the cases, towards all the individuals involved in the criminal investigation, in the absence of limits and restrictions to the authority of the initial investigator, which made it a dangerous procedure for the individual's freedom and remained a practice without any constraints. It is because of this that the 1987 amendment made a rupture with the detention past from all points of view. The detainee has become entitled to guarantees to which he can stick and request their respect. What is more important, one should concentrate on the restrictions brought forward by the detention codification to the detention field and on the Legislator's endeavour in avoiding detention, as much as possible, and in case recourse is made to it, one should try best to avoid its negative impacts on the individual, subject to detention, which can be felt by simply examining Article 13 bis of the Criminal Procedure Code (CPC) which extends an exceptional aspect to this procedure, in all its different stages and

the different proceedings revolving around it. Hence, it becomes clear cut that the Legislator is restricting the detention principle through limiting the scope of applying detention (First Plea) and is limiting its term (Second Plea) and the authority of the Judicial Police Officer to which one can refer (Third Plea) (Plea = Section)

First Section: Restricting the Detention Scope

The Legislation policy, in most of the regimes, takes a certain standpoint with respect to the detention institution, marked with reservations and misgivings. Accordingly, most of the legislations, especially those backing up human rights, in their modern meanings, tried to set out constraints and restrictions which limit the recourse to this procedure by the Judicial Police Officers. These legislations tried best to reduce the cases to refer to this institution by limiting it to the absolute requirements of the investigation (First Paragraph) and by putting down the number of persons that are targeted by detention (Second Paragraph).

First Paragraph: Limiting the Cases for the Recourse to Detention

The Legislation restriction to the cases that may involve the detention of the individual is based on the awareness of the Legislator that the detention procedure is dangerous to the individual's freedom. It is difficult, as a matter of fact, to justify depriving the individual of his freedom at the stage, preceding judgement by the court, especially in the absence of the justice commitment, as an authority, to defend the liberties. One should limit the possibilities offered to the Judicial Police Officers in this respect and to reduce them to the cases in which the individual's right to freedom can be jeopardised in order to comply with the urgent needs of the investigation.

In this respect, the legal systems have differed on how to express these cases, limiting the possibilities, through a set of standards that have been adopted to authorise detention. To start with, it is mandatory to examine the different standards in the comparative laws, such as the French Law (A) before coming across the Tunisian Legislator's choice (B).

A – Adopted Standards to have recourse to Detention

The criminal systems agree about the danger that detention brings about to the individual's liberties. They therefore end up focusing on three basic rules for the setting up of this institution, namely the equality basis to have recourse to detention, among the individuals, and that the limitations to be made, by its virtue, on the freedom must be partial, i.e. in particular cases, for a certain period. The third rule is exceptional, its aim, as a consolidation of the individual's right principle [1], is not to implement detention as a principle and limit the cases to have recourse to it.

[1] Ref. Pradel: "Droit Pénal Comparé" Ed. dalloz 1995

However, associating detention with the three purposes requires the existence of precise standards that allow their achievement and the protection of the specific features of the legislation point of view with respect to this procedure, on the practical level.

These standards are based either on investigation or on the crime object of the detention. Some laws have introduced some standards to limit the possibility to operate detention, based on the nature of the investigation which the Judicial Police Officer in charge, undertakes. In this respect, there is a difference between taking care of the preliminary investigation, by the initial investigator, and his undertaking of the investigation by virtue of a delegation from the Examining Magistrate and the investigation on a flagrant case. In such a differentiation a lot of legislations have found possibilities to limit the cases whereby detention is authorised. The French Law enables the Judicial Police Officers to detain the suspect during the preliminary investigation and the investigation for a flagrant case. However, for the investigation by virtue of a delegation from the Examining Magistrate, there is no possibility to use detention, but the ruling authority is transferred to the Examining Magistrate who can deliver a committal order in the meantime or a search warrant or a warrant for arrest in case the concerned party is taking to flight.

Concerning the crime gravity standard, it has been set out mainly to limit the field of detention in most of the systems. The reason is that the importance of the investigation is based on the crime gravity; hence this standard seems to be more objective because it limits the cases whereby the Judicial Officer is called to rule out detention. At this level, none of the systems authorises to detain individuals in case of a minor offence. Most of them indeed require the existence of a jail sentence to authorise detention. The French Law has requested this and has not ruled out a minimum jail sentence.

Considering detention as a legal introduction means that the law provides for a complete protection to the detainees, which makes up a basic and important guarantee to the individuals because, very often, the silence of the Legislator gives way to arbitrariness and even if some general guarantees do exist, the concerned cannot raise them or stick to them, which is the case, as far as the Tunisian detention is concerned, before its regulation by the Law of 1987. However, the interest that the Legislator has shown today to this issue, enables investigating about the means which have been set out, to limit and regulate the cases whereby recourse is made to detention.

B – Detention Scope in the Tunisian Law

Since the intervention of the Tunisian Legislator, by virtue of the Law n° 85-1987, dated November 26th, 1987, detention has become a procedure institution which has a legal frame, included basically in the two articles 13 bis and 57, of the CPC. Before that date, detention existed on the field, however, the Law kept silent in respect thereto. This silence meant giving the security systems the authorisation and the freedom to judge, according to their own discretion, the different aspects of detention. The Legislator's intervention brought along a set of guarantees and imposed several procedures. However, in order to reply to the question of when it is possible to operate detention, the researcher finds himself in a legal situation which is different

from the provisions of the comparative laws, which often rule out in a clear cut manner, the cases whereby recourse to detention is authorised, and impose precise conditions which the detainee himself can check. The Legislator, through Article 13 bis, used the wordings : "the cases that are requested the investigation necessity" which leads absolutely to the study of the intention of the Legislator when he included such an expression (1) then, to the examination of the cases authorising the recourse to detention in the Tunisian Law (2).

1. Defining the Cases that are requested by the Investigation Necessity

Adopting this formulation suggests, through a confirmation by the Legislator, that it is not possible to limit the cases authorising detention. The Legislator only imposed the existence of a relationship between these cases and the investigation, namely that the investigation requests the detention. Although the existence of this unique condition prevents from ruling out detention, except for the sake of the investigations, the requirement of the relationship between the two of them only, leaves the issue obscure because the criminal investigation requires the introduction of some proceedings with respect to the concerned individuals, including the detention procedure. However, in the absence of a concrete limitation, any investigation may lead to the detention of the individuals, irrespective of their importance to the investigation. The expression "Investigation" remains very general because the Legislator has not required a certain type of investigation, he has not either precised that it is the preliminary criminal investigation on the occasion of the committal of a crime; the Judicial Police Officer enjoys larger powers, covering several various investigations, including the opening of an information investigation, the disclosure of the identity, etc.. Hence, the expression "Investigation" may enlarge the scope of detention and makes it possible whenever the works of the security systems requires doing so. However, by using the expression "Investigation necessity", the Legislator intended to find a formulation that, at least legally, limits the recourse to detention, the investigation necessity means, basically, that the detention procedure is mandatory for its conducting. The assessment of the availability of this excessively flexible condition remains a big question. The Judicial Police Officer who is in charge of the investigation alone, is empowered to assess the detention conditions through the investigation necessity and he has just to use the investigation requirement, as an excuse, to justify the soundness of his decision to go for detention, from a legal point of view.

2. Possibility to extend the period of the Detention Cases in the Tunisian Law

There is no doubt that the formulation set out in Article 13 bis, links the soundness of the detention to the investigation requirement for this procedure, it is void therefore of any clear standards to limit the scope of the detention or at least to assess this link. The Legislator has chosen not to limit the cases for detention in a practical way and has not adopted the method followed by comparative laws either with reference to the nature of the investigation or to the form of the undertaking or to the gravity of the crime, object of the investigation.

However, the possibility to operate detention can be based on the taking over of the file by the Judicial Police Officers who directly manage the preliminary investigation under normal circumstances with reference to their qualification as such, namely they are in charge of surveying the crimes and investigating about their authors [1]. Detention, while fulfilling these duties, remains a possibility as long as the interest of the investigation requires doing so. Concerning the investigation in a flagrant case, the Judicial Police Officers are invested with additional prerogatives which cannot, in any case, deprive them of the possibilities extended to them, intentionally, in view of the general nature of the flagrant cases in the Tunisian Law [2]. Concerning the security systems undertaking of the investigation, by virtue of a rogatory delegation from the Examining Magistrate, this action was dealt with exclusively by the legislator in Article 57 of the CPC, which refers to the frame of Article 13 bis, however, the legislator implicitly admitted that the judicial officers keep their initial prerogatives. The undertaking of the case by the Examining Magistrate before giving the rogatory delegation, despite his qualification for the issue of judicial warrants, will not prevent them from operating detention; this case is imposed by some comparative laws such as the French Law. [3]

However, the gravity of the crime as a standard to evaluate the possibility to operate detention seems to be inexistent in the Tunisian Law, hence, the Legislator relies on the "Investigation necessity standard" as an alternative because of the gravity of the crime, which means that the importance is in the investigation itself and not in the crime, object of the investigation. The issue is different as long as the same investigation may unveil several crimes. Every criminal investigation remains important no matter the crime, object of such an investigation.

Nevertheless, the formulation of Article 13 bis does not hide a reservation from the Legislator with respect to detention and his endeavour to limit its scope as much as possible, which is clear from the expression "in the cases that the investigation necessity requires" and in the wordings "the Judicial Police Officers cannot....", however, his endeavour to secure efficiency to the investigation has led to relying on the evaluation authority of the initial investigator, in limiting the detention cases.

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[1] Ref. Article 9 of the Criminal Procedure Code

[2] The Legislator ruled out the provisions of the flagrant cases in Articles 33 to 35 of the Criminal Procedure Code

[3] Ref. J. Pradel "Droit Pénal Comparé" Op. Cit.

Second Paragraph: Limiting the Persons exposed to Detention Procedure

Among the judicial means to guarantee the human rights, with respect to an institution depriving the individual of his freedom, there is a precise limitation of the scope of the institutions and the cases where recourse to it is made, and the persons that are targeted by it. Although Article 13 bis, governing detention, is void of any listing of the cases in which detention can be decided, or the precise standards allowing them, it has not tried to list out the persons that can be covered by such an institution, whereas it becomes clear that several comparative laws did provide, through the standards calling for detention and the limitation of its cases, for a limitation to the coverage of this institution to the different individuals.

Generally speaking, in the Tunisian Law, the expression of Article 13 bis and, in particular the wording "Investigation" raise several questions about the extension of the detention to several individuals concerned by a particular criminal investigation. For further details, one is bound to limit the individuals exposed to detention (A) before the investigation and those are to be kept away from this process (B).

A – The Individuals exposed to Detention

The modern Legislations have provided for different means and ways that made up a restrictive rule, limiting the scope of detention, with respect to the person targeted by this procedure, although all these systems do not hide the fact that there is a tight relationship between detention and the criminal investigation at its preliminary stage, with the purpose of discovering the crime. This means that the first targeted individuals by this institution are the suspects (1); however, considering such a relationship with the investigation, one can raise the question whether it is authorised to keep witnesses in detention (2).

1. Detaining the Suspects

The meaning of the wording "suspect" refers to a special criminal stage and it requires a criminal investigation at its initial stage before addressing the charges. The suspicion, according to the conventional definition, is the whole of the doubts, around the individual, which bear the assumption of his committing the crime, object of the investigation. The suspect is different from the "accused", against whom a charge has been established. The reason for conducting an investigation against a suspect is the set of suspicions which keep the possibility of his committing the crime outstanding. The detention institution finds its reason in the investigation that includes all these suspicions. However, one should ask about the extent of these suspicions and their evaluation.

The Legislator adopted in Article 13 bis of the CPC the wording "suspect" which assumes the existence of two conditions, the first one is the existence of a certain investigation with respect to a committed crime, whereas the second is the availability of a set of suspicions against the suspect, against whom the detention decision was ruled out. Hence, the authorisation to detain a suspect stems from the text itself.

However, the possibility to detain a suspect, despite the simplicity of its basis, starting from a mere reading of Article 13 bis, raises some practical difficulties. The

somewhat excessive relying of the Legislator on the investigation and its requirements, puts all the different criminal investigations in the same basket, at least as far as the authorisation to detain suspects is concerned, which is likely to put the gravity of the crime, object of the investigation, and the personality of the suspect, outside the appreciation frame when ruling out detention. The condition relating to the availability of a set of suspicions with respect to the individual, remains flexible, so much so that the Judicial Police Officer justifies the detention decision by the investigation requirements so that his decision can at least be sound from a legal point of view.

It seems through this legislatory framework that detention lacks a lot of standards which strike a serious balance between the investigation requirements and limiting the detention procedure. However, one must recall that the first proceeding stage, in which detention is authorised, precedes the addressing of the charges, which request the Public Prosecutor to examine the acts leading to the crime, object of the charge, without reaching the point of confirming the indictment or innocence. Consequently, the suspicions which are the basis for detention, are not all that clear to the initial investigator so that he could really justify the different proceedings. According to the initial investigation Jurists [1], it is mandatory to check the suspicion hovering on the individual; it is not possible for them to rely on a suspicion that is not confirmed to justify another procedure However, in our opinion, the suspicion, as long as it is different from the charge, is just practical elements in the investigation which do not rise to the level of the doubts leading to some consequences on the individual's legal status [2], which makes all the procedures at this level, including detention, above the criminal legal techniques in their precise meaning, which are subsequent to the addressing of the charge. The initial investigation is only a discovery stage whereby the Investigator is granted special powers, imposed by the specific nature of this stage on one hand, but which remain outside the pure criminal procedure stages, on the other. In addition to the above, it becomes clear that the Legislator has tried in his judgement to keep away the crime gravity standard, in order to guide the investigations and to focus on the detention possibility, considering the fact that the importance of the investigations and the necessity to endeavour to discover the crime and the offender, do cover all the crimes, although up to a different extent.

Detailing the conditions for the suspect, enables the application of this procedure against him. One can assume that he can contest the decision with the Investigator with proofs that refute the suspicions collected against him and which allowed his detention.

2. The Possibility to Detain the Witness

[1] Cf. Mohamed Hédi Lakhoua: Colloquy "**Towards** ..." Op. Cit.

[2] Because the outcome of these suspicions shall be determined by the decision of the Public Prosecution either to declare non suit or to rule out a transfer after assessing their foundation, before that, they were simple factual presumptions that are not included in a certain legal application

[3] Iwadh Mohamed Iwadh "The suspect's rights during the Investigation Stage" Tunisian Judicial Magazine - May 1980 p.73

The initial status of the witness is related to his knowledge about some information and data that affect, in one way or another, the investigation course. In his capacity as such, he is not basically concerned by the investigation. Starting from this understanding, he cannot be kept in custody in principle, since we consider that the scope of detention is limited to the suspects, although it is permitted to take some measures with respect to him, such as his confining [1] or to order him to appear in order to hear him. However, this basic status may change if the investigation leads to the existence of some suspicions against the witness that favour the possibility of his committing a criminal act related to the crime, object of the investigation, or others, which is referred to as the transfer of the suspicion, accordingly the status of the individual changes from a witness to a suspect. The admission to detain him is provided for in Article 13 bis which allows the operation of this procedure whenever the investigation requires it. It is not based, as a matter of fact, on an actual possibility to detain the witness but his detention comes from his subsequent quality since he has become a suspect, subject to a set of suspicions that authorise the possibility to detain him for the sake of the investigation necessity.

There are still some questions about the admission to detain the witness in his quality as a witness, as long as no suspicion is raised against him. Most of the Jurists [2] find it improbable to go for the detention of the witness as an enforcement of the basic rules for the freedom principle which oppose to deprive, in any way, the individual of his freedom, as long as no suspicion is set against him. However, some Jurists authorise the detention of the witness, in very exceptional cases relating essentially to the stubbornness of the witness and his refusing to deliver his statements or his intentional hiding away of some important information for the interest of the investigation. [3] Hence, this possibility is authorised to different extents in the comparative laws. [4]

In the Tunisian Law, Article 13 bis provides for the possibility to reassert that it is not possible to detain a witness based on the legislation using of the expression "it is possible to detain a suspect". As an enforcement of the limited interpretation principle in the criminal affairs, the scope of detention is limited to the suspect since this expression cannot be extended to the witness or any other who is not a suspect. This point of view which matches up with the text as it is, seems more logical. If we assume that the detention of a suspect can be justified by the investigation necessity and the availability of suspicions for his committing a criminal action, the witness, in his capacity as such, seems to be free from producing those justifications. The different legislations, although they have authorised to limit the witness' freedom, they have set out some limitations for the period to keep him under custody, in order to hear to his statements relating to the investigation. It is not possible, in any case, to find an equation between the status of the witness and that of the suspect, in any stage of the criminal investigation.

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[1] Confinement is to oblige a person to stay at the disposal of the security forces for a limited period of time either to check his identity or to hear to his statements Besson. Dalloz 1958 – Chronique p. 139 n° 57

[2] Cf. Besson. Op. Cit.

[3] Cf. Puech : Juriclasseur. Procédure Pénale Art. 53 to 73 n° 111 et 112

[4] Cf. Lambert – Précis de Police Judiciaire selon le Nouveau Code à l'ancien – ed. Desvigne et cie – Lyon 1959 p.101

Judging from the foregoing, it becomes clear that the status of the witness and the admission to detain him in the Tunisian Law, and in view of the lack of clarity in the texts, remain linked to up to what extent he can be subject to suspicions as far as the crime, object of the investigation, is concerned. These suspicions remain as elements embodying the definition of the suspicion and its close link with the preliminary investigation, the unique legal and practical justification for the operation of detention according to the Tunisian Law. The capacity of the individual as a witness remains independent from the possibility of the existence of the suspicious elements against him and the possibility to authorise his detention based on that ground.

B – Excluding some Individuals from the Detention Procedure

Although the Legislator has laid down a close link between the investigation necessity and the detention procedure, the gravity of this institution and its impact however on the individual's liberties imposed limitations as much as possible to its scope because of its exceptional nature, which should lead to exclude the recourse to the detention procedure in some cases and with respect to some individuals, which can be examined through analysing the subjective reasons (I) and the objective reasons (II) to exclude detention.

I – The Subjective Reasons to Exclude some Individuals from the Detention Procedure

The subjective reasons mean the reasons that are usually considered as being related to the individual's personality, targeted by detention. They concern the immunity cases under all their different forms (1) and the fact of being under the legal age (2).

1. The Persons enjoying Immunity

The existence of the immunity supposes the availability of a specific quality in the person that does not match up some procedures, including detention. Some Jurists consider that "immunities as far as detention is concerned, are actually the same as those wherein public prosecution has to be suspended" [1]. Indeed, the presence of immunity prohibits the raising of the public prosecution, so investigation procedure cannot be triggered against any individual enjoying immunity, especially the initiation of procedures requested by the investigation, including the detention procedure. These immunities are classified into two categories: the absolute immunity and the restrictive Immunity.

- **The Absolute Immunity**

The existence of the absolute immunity is basically linked to international political definitions from which the beneficiary of this immunity derives this guarantee, because of the relationship between his capacity and the sovereignty of the state he represents, It concerns, in particular, the Head of the State and diplomats.

[1] Cf. Puech : Juriclasseur. Proc. Pén. Art 53 to 73 p.95

The acknowledgement of the Head of State immunity is based, in the absence of a legal text clearly providing for it, as per the Comparative Law [1] , on the subordination of the security systems to the Executive that is presided over by the Head of State, as an enforcement of the provisions of Article 54 of the Constitution, which prevents him from being exposed to the criminal investigation, with reference to the rule that a subordinate cannot interrogate his boss. Practically speaking, raising this assumption does not exceed the theory frame; it is almost excluded from a practical point of view. This immunity is even extended, in reality, to the Prime Minister and the Members of the Government, as an enforcement of the administrative hierarchy rules and the fact that the detention decision rests with the Judicial Police Officers who belong to the State Executive System. Regarding diplomats, their representation of their sovereign country at the international level makes any investigation or prosecution action against them a blow to their country's sovereignty. The trend in the jurisprudence is to acknowledge an absolute immunity to those diplomats [2] with respect to any investigation or prosecution, as a result of a crime committed in the country of their mission. This immunity covers the diplomats and the diplomatic agents officially accredited. [3]

- **The Restrictive Immunity**

The Immunity is restrictive if its existence does not prevent the conducting of the investigation or the prosecution in some cases. The meeting of special conditions for the lifting of immunity, brings back the individual to the status whereby he is subject to detention. This condition is embodied in the availability of the flagrant crime case (A) and sometimes the existence of immunity itself is subject to a specific condition (B).

A – Suspending the Effect of Immunity in case of being caught red handed

Article 27 of the Constitution granted the members of the House of Representatives an immunity which prohibits any procedure against them or to operate any arrest during their term, because of a charge for committing a crime or a minor offence, as long as the House of Representatives has not lifted this immunity. The Constitution provides however for the possibility to arrest the representative and to notify the House in this respect in case he is caught red handed. Hence, the flagrant crime has an effect on discarding immunity and it offers the possibility to detain the representative, after notifying the House in this respect. Even if this condition is met, and the representative is detained, the House can put an end to the effect of the detention decision, immediately after applying for its cancellation.

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[1] For example Article 68 of the French Constitution dated October 14th, 1958

[2] Cf. Decocq, Montreuil et Boisson – le Droit de la Police n° 658

[3] Cf. Puech, Op. Cit.

Article 22 of the By-Laws of the judges [1] prohibited any prosecution against any judge and his jailing because of a crime or a minor offence, without receiving an order in this respect from the Judges Supreme Council. The flagrant crime is excluded from these provisions, whereby it is possible to arrest the judge and immediately inform the Judges Council, in this respect.

It is to be pointed out that in these two cases, of the restrictive immunity, the flagrant crimes nature affects not only the detention procedure but its influence extends up to the existence of the immunity as a whole, covering all the prosecution actions. It relates to the principle of the criminal accountability admission and the raising of the public prosecution. The effect of detention on the freedom of the individual makes his listing among the beneficiaries of the immunity an important issue which excludes this procedure as much as possible, whereas the flagrant crime case complies absolutely with the crime investigation condition and leads likewise to end the immunity impact as long as it is restrictive.

B – Immunity is subject to a Specific Condition

Sometimes, the exemption of a person from detention requires the existence of specific conditions to exclude him from the frame of the detention admission principle and equality in front of the Law. Hence, for the members of consulates, their exemption from a criminal prosecution, in their country of accreditation, is subject to the existence of a Convention between that country and their mother countries.

Article 47 of the Law 87-1989 dated September 7th, 1989, relating to the organisation of the Lawyers' profession provides that it is not possible to sue a practising lawyer because of a crime he committed during the fulfilment of his duties, only in case an order is received from the court of appeals in whose jurisdiction the lawyer works. Basically, detaining a lawyer is possible only after receiving such an order. In case he is caught red handed, it is possible to arrest him; however, he cannot be questioned. Because of this, some wondered about the efficiency of detaining a lawyer since he cannot be questioned; the general aim of a detention is to secure the adequate conditions for the interrogation [2]. Practically speaking, detention aims, not only at interrogating the detainee but also to avoid the detainee to commit a new crime or to protect the existing proofs and any other purpose that may serve the interest of the investigation.

All these cases which tend to exclude individuals from the scope of detention, make, actually a guarantee to the individuals that enables them to dispute their detention, it confirms likewise the implicit reservation of the Legislator concerning detention and his endeavour to avoid it as much as possible, especially that its consequences could not be overcome so easily with respect to some individuals, including those enjoying immunity and those under the legal age.

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[1] The Judges By-Laws n° 29-1967 dated July 14th, 1967

[2] Ref. to Boulbaba Othmani "Memorandum on Detention" Op. Cit.

2. Probability to Detain Children

The modern legislation policy regarding children has taken a special stand point in treating children during investigation. This policy matches up the specific nature of their conditions, considering their young age. It provided for ways and means, included in the Child's Protection Code [1] for the prosecution and blaming the child when he commits a particular crime. This special treatment is extended to the preliminary investigation stage. It has been expected that the Legislator will not authorise the detention of children as long as such a procedure entails consequences that may be difficult to overcome. However, the interest of the investigation, on one hand, and the change in the need of the child for such a protection, according to his personality and the danger he represents, pushed the Legislator to find different means through which he endeavoured to extend a real protection to this category of individuals liable to guarantee at the same time the efficiency of the investigation. All these means have produced a flexibility that matches up the status of the child himself. The ultimate case whereby the child needs the maximum protection is basically linked to his young age to a certain extent. The Legislator provided for an absolute legal presumption for the child incapacity to violate the criminal law if he is less than 13 years old [2]. Accordingly, he was kept away from all the procedures included in the investigation and prosecution works. The most important is the fact that he cannot be detained. The Legislator has laid down a general principle, backed up by an objective standard whereby he imposes a special protection to this category of individuals, considering their conditions as per the provisions of Article 4 which talk about the best interest of the child as a basic principle in all the procedures. Article 13 of the Child's Protection Code defined however the child as being any person whose age has not exceeded 13 years. Hence, all the other aspects of protection for the exclusion of detention remain outstanding with respect to children who are more than 13 years old but under 15 years old, who enjoy a simple presumption for their incapacity to violate the criminal law. All the actions and procedures against them are bound by this situation in which the Legislator has placed them. Accordingly, the decision of the Judicial Police Officer to detain a child requires the availability of certain elements in the child's personality, liable to quash this legal presumption, by justifying in an exhaustive way, detention, focusing on the child's danger. It is a special protection whereby the Legislator relies on the understanding of the Judicial Police Officer of the exceptional prosecution of the child because of a crime and as an utmost exception, the operation of the detention procedure against him. Concerning the child who is more than 15 years old, in addition to the fact that he cannot enjoy any legal presumption, he remains nonetheless entitled to a special protection, extracted from the provisions of Article 4 of the Child's Protection Code which provide for the taking care of the child's interest, first of all, in all the proceedings taken in this respect, which cover the procedures subsequent to investigation, including detention.

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[1] The Child's Protection Code dated November 11th, 1995

[2] Article 68 of the Child's Protection Code

The provisions of Article 77 of the Child's Protection Code makes up a general protection to the child, during the different stages of the investigation, or on the occasion of its conducting; this article provides that "the Judicial Police Officer can hear the suspected child or take any criminal action against him, only after informing the Head of the Prosecution in this respect". There is no doubt that this condition reflects the Legislator's will to avoid to the child the consequences of the Judicial Police Officer's dealing with him, since informing the Head of the Prosecution represents a notice to the preliminary investigation body about how sensitive the situation of the child is and the operation of a special judicial control on the investigation carried out against the suspected child. These guarantees cover basically detention which requires accordingly the notification of the Head of the Prosecution in this respect, and the procedure works during detention, especially the hearing of the child. The Legislator has authorised In addition to the above the nomination of a lawyer during the investigation carried out by the Judicial Police Officer and the presence of the child's tutor or other.

It becomes clear therefore that the Legislator, although he did not prohibit the detention of children, as part of a general principle, he has nonetheless provided for guarantees that can overcome the detention negative aspects that are likely to affect the child's condition. Hence, one can say that the detention of children under the 1996 Code is a very exceptional procedure and it remains of a special nature. This particularity was adopted by some comparative regimes such as the French Law which has provided for what is called the "confinement procedure" which is subject to the prior approval of the judge for a period that does not exceed 10 hours. The French Law required an immediate medical check up for the child targeted by the confinement procedure. [1]

II – Exclusion of Detention because of Objective Reasons

The Legislator regulated detention in Article 13 bis of the CPC, aiming at confining the suspect by the Judicial Police Officers in order to conduct investigation about the committed crime. This requires limiting the scope of detention in the cases in which a set of conditions is met. It is to be recalled that we already came across the definition of the suspect. However, the expression "Investigation" may include other works by the security systems that are outside the precise meaning of the investigation as set out in Article 13 bis and what concerns investigation in a committed crime. It is not a secret to say that the security systems have other functions which impose special dealings with the individuals that may lead sometimes the institution of some constraints on their freedom such as the disclosure of the identity (A) and arresting the sought after (B).

(A) Confining Individuals for the Disclosure of their Identity

Identity disclosure is part of the security systems works which is covered by the Judicial Police Officer, outside the legal work. Although several legislations make of detention a possible means to investigate the crime and confirm identities [2] , the

[1] Quoted by Boulbaba Othmani in "Detention" Op. Cit. p. 46

[2] Pradel "Les Atteintes de la Liberté" Op. Cit. Rapport de Synthèse

Tunisian Legislator in view of his silence about the control system of the identity and its confirmation, on one hand, and considering the lack of clarity of Article 13 bis in fixing the detention field based on the general nature of the expression "in the cases required by the investigation, on the other, has not made a clear cut statement with respect to the detention admission for those who cannot identify themselves, although the Law 27-1993, dated March 22nd, 1993, relating to the National Identity Card, obliges in its Article 7, any citizen to show his identity card when requested to do so by the security agents. Some Jurists believe that the confirmation of the identity is a procedure that enables the recognition of the identity, it is applicable only when the individual refuses to disclose his identity or is not in a position to do so, so he is detained for a short period in the administration vehicle or in the security centre until his identity is revealed [1] Hence, this function of the security systems is considered as a preventive work for the sake of the administrative order and the short confinement cannot be called a detention for at least two reasons: the first one is that the target investigation when controlling the identity is different from the investigation aiming at the discovery of the crime, as provided for in Article 13 bis. The second reason is that confinement is limited time wise, in its procedure and results and it is stopped when the Identity is disclosed. Even if it is found out that the individual is subject of a police search and he is kept in confinement, this is not covered by the first function which relates to identity disclosure but under another qualification.

B – Arresting the Sought after

Practically speaking, often, the identity control leads to the arrest of an individual under the pretext that he is sought after. Although the operation ends by his confinement, such a confinement is different from detention since the first case requires the existence of a search warrant issued by security or judicial authorities and does not necessarily require the existence of an investigation about the crime, in its preliminary stage. Even if that is the case and the reason for the search is the same as that of the investigation requiring detention, confining the sought after is not considered as a detention but a mere different procedure based on the search and investigation warrant and ends when the individual is presented to the searching authority.

Third Paragraph: Limiting the Judicial Police Officers that are allowed to operate Detention

Among the means to limit the scope of detention is defining the authorities that can operate such a detention, hence, limiting the possibility to have recourse to it. It becomes clear when simply reading through Article 13 bis of the CPC that the decision to go for detention is in the hands of the Judicial Police Officers listed in the two paragraphs 3 and 4 of Article 10 of the CPC (I) and the Judicial Police Officers among the Customs Agents (II) [2] . However, the question remains outstanding about the possibility for other entities to operate detention and in particular the jurisdictional body (III).

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[1] Abdallah Al Ahmadi: Human Rights and General Liberties in Tunisia – p. 189

[2] Article 29 of the Finance Law of 1982 n° 100-1981n dated December 31st, 1981, provided that the expression "Customs Code" was to be used instead of the ...

I – The Judicial Police Officers listed in paragraphs 3 and 4 of Article 10 of the CPC

Article 10 of the CPC listed the Judicial Police Officers. It included in particular two categories: the first is a judicial one whereas the second is administrative. [1] In its third and fourth paragraphs, the mentioned article stated that the list of the Judicial Police Officers from the security bodies includes police superintendents, constables, chief constables, National Guard officers, captains, deputy officers and National Guard chief centres. Although one should point out that the security body is always present [2] in the preliminary investigation works, aiming at discovering the committed crime, a lot of questions are raised however regarding the authority of its agents in this respect, practically speaking at the preliminary investigation whereby "it is given relative free play to the hand of the investigator" for the sake of the investigation, considering the means, the material and human resources this body has in order reach that target. However, it is obvious that confronting the freedom and human rights systems to the giving of a free play to the initial investigator from the police and the National Guard creates some disorder that rather turns the concerned systems into a police related system. However, as far as the initial investigation is the first step in a set of procedures that are exclusively dealt with by the security authorities and as long as detention consists in depriving the individual of his freedom at this stage by the said authorities, studying the qualifications of the Judicial Police Officers referred to in paragraphs 3 and 4 of Article 10, becomes useless. Furthermore, this controversy is passed by since detention is codified. Indeed, it was up to the point before the Law of 1987 to wonder about the right of the preliminary investigation authority to affect the individual's freedom without a supporting text; disorder came from the existence of clear provisions giving the judicial authorities the power to limit the individual's freedom by virtue of judicial warrants, which requires the exclusion of the security authorities in ruling out detention, in the absence of a legal ground. However, the law dated November 26th, 1987, then the law of August 2nd, 1999, were clear cut in conveying the Legislator's intention with respect to the admission of this possibility for this kind of Judicial Police Officers. [3]

The Legislator has adopted a precise means to define the Judicial Police Officers in the security body, that are allowed to rule out detention, as per the provisions of Article 10 of the CPC, which has assigned the quality of Judicial Police Officer to a certain category of employees in the security system, namely the Police Superintendents, the Constables and the Chief Constables and the National Guard Officers, captains, Deputy Officers and National Guard Chief Centres. This classification is in keeping with the quality of the Judicial Police Officers as per Article 10, above mentioned, and the fourth paragraph of Article 5 of the by-laws of the Internal Security Forces [4].

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[1] Cf. Taieb Elloumi : Human Rights in the Criminal Procedure Legislation before Judgement – Republic of Tunisia – Human Rights Protection in the Criminal Procedure Laws in the Arab World (International Congress for International Studies at Syracuse jointly with the Egyptian University of Criminal Law – Cairo December 16th –20th, 1989) p. 2

[2] Ref., for example Pradel J. "La Phase Préparatoire du Procès Pénal en Droit Comparé R.S.C. 1983 – p. 628 to 630

[3] Hatem Dachraoui: "the Individual Rights and the Police Prerogatives" Op. Cit.

[4] Cf. the Law n° 70-1982, dated August 2nd, 1982, relating to fixing the General By-Laws of the Interior Security Forces – Official Gazette of the Republic of Tunisia n° 54 issued on Dec. 10-13,1982 p. 1827.

Through examining all these grades in the Internal Security Officers ranking, it becomes clear that the quality of the Judicial Police and in particular the authority limiting freedom was given exclusively to a certain category of officers that can justify competence and some professional commitment, that the Legislator cherishes in order to secure some balance and moderation in executing all the different "dangerous" procedures.

However, practically speaking, the Legislator's aim may not be fulfilled and all the different procedures become subject to the judgement of other officers that are not covered by the law, so they conduct the investigation and rule out detention, whereas the qualified officers just sign and approve. This situation may empty out a lot of the legal guarantees of their contents and may give to this procedure, once again, an arbitrary aspect.

II – The qualification of the Customs Agents to Operate Detention

Among the administrative agents listed under the heading of the Judicial Police, the Legislator especially gave to the Customs Agents the possibility to have recourse to detention on the occasion of investigating the customs crime, provided for in the Customs Code.

They are subject, as such, to the same conditions and procedures that are imposed on the Judicial Police Officers, in the Police and National Guard. The general by-laws of the Customs Agents, defined the agents that can enjoy the quality of a Judicial Police Officer, namely the Deputy Inspector, the Customs Lieutenant, the Customs Office Chief and the Head of a Customs Squad.

One should point out, first of all, that these rankings reflect the Legislator's concern to secure competence in the party that decides for the detention procedure. In addition to this limitation, Article 13 bis has identified the prerogatives of the Customs Agents exclusively within the framework of the qualification granted to them by the Customs Code; their recourse to detention, as such, relates to those crimes exclusively. It is an exceptional qualification whereas the Judicial Police Officers in the Police and the National Guard are, in principle, qualified to handle the crimes object of the investigation which requires detention.

However, if one compares Article 13 bis of the CPC with the provisions of the Customs Code, and in particular Articles 197 and 207, it appears that there exists some unclear points with respect to this qualification. The first one allows the Customs Agent to have recourse to detention whereas Articles 197 and 207 of the Customs Code allow them to arrest any person, caught red handed, then hand him over to the Judicial system, or the Police or the National Guard, which raises the question about the efficiency of handing over the suspect to such an authority, in order to execute the Law, if the first authority has enough prerogatives to examine the crimes part of its qualifications, then to draft minutes in this respect and operate detention.

In our opinion, the duality of the qualification to operate detention cannot be a handicap in front of the two authorities to let them enjoy the possibility to rule out this procedure. The Customs Authority can operate detention on the individuals caught

red handed or their handing over to the Police and the National Guard. The Legislator may be aware of this duality which may produce better chances in discovering crimes and achieving positive results in the investigation.

III – The Possibility for the Judges to Operate Detention, as Judicial Police Officers

We previously stated that limiting the authorities that are allowed to operate the detention institution aims at limiting the field of application to this procedure. Despite the fact that the Legislator seems to be straight forward in limiting those authorities through the provisions of Article 13 bis, which refers to Article 10 of the CPC, several questions however remain unanswered with respect to the admission to have recourse to this procedure by other parties not included therein. There is no doubt that the limitation provided for in Article 13 bis, aims at withdrawing the qualification to have recourse to detention from parties other than the Judicial Police Officers, above mentioned. However, does the silence of the text with respect to the authority of the officers from the judicial sector mean a refusal or an approval? The approval is justified by the fact that the Head of the Prosecution in the standard cases, and the Examining Magistrate, are considered as the authority controlling detention and its enforcement, with respect to their notification thereof and their ruling out of any extension. The principle is that the authority which can do more can do less. This approach is in keeping with the quality of the Head of the Prosecution since he is the President of the Judicial Police, but the governing authority remains in most of the cases the actual executing authority.

The refusal option may rely on the particularity of detention as a procedure which the Legislator exclusively limited to the Judicial Police Officers in charge of the preliminary investigation. This opinion is in keeping with the classification of the different procedures that deprive the individual of his freedom, namely those operated by the judicial authorities and those limited to the administrative security authorities. This option seems to be more logical considering that the Examining Magistrate has an absolute qualification in ordering the Judicial Warrants [1] and that the Head of the Prosecution has got the same in the flagrant cases, and even in the cases where he deems it more appropriate to detain a suspect, he will not operate detention by himself but he will order the Judicial Police Officers, above mentioned, to execute such a detention.

Accordingly, it is mandatory to point out that detention, as per the regulations set to it by the Legislator, is a procedure intending at depriving the individual of his freedom temporarily, for the sake of preliminary investigation, by the Judicial Police Officers, mentioned in Article 13 bis, and nobody else; and practically speaking, to deprive individuals of their freedom by any other party will not be considered as detention.[2] Thus, in the Tunisian Law, limiting the ruling authority is considered as one of the classification standards of the institution that deprive individuals of their freedom

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[1] Cf. Article 78 and the articles thereafter of the Criminal Procedure Code concerning the judicial warrants

[2] Cf. Hatem Dachraoui : The Individual Rights and the Prerogatives of the Police – Memoir for the award of the Advanced Post Graduate Studies Diploma – Tunis Faculty of Law and Political Sciences 1995-1996 – Op. Cit.

Second Section: Limiting the Detention Term

Until the Law of November 26th, 1987, detention was not regulated in the Tunisian Law. This situation was an opportunity for arbitrariness at the level of the preliminary investigation. The detainee was deprived sometimes of the minimum guarantees, so he walked into the detention centres without knowing for how long he will stay there, whereas the Judicial Police Officer relies on the investigation necessity to justify this procedure, which is likely to empty out the suspect's legal guarantees of their contents. Limiting the detention term, represents therefore one of the means to protect the basic rights of the individuals in general and the detainees, in particular, within the framework of a legislation policy driving at striking a balance between the unavoidable breach of the individual's freedom for the sake of the investigation interest and the protection of the individual's basic rights, as part of the exceptional implementation of such a procedure.

All these reasons pushed the Tunisian Legislator to break the ice with respect to the detention period and to codify the issue by limiting the initial period, then fixing the possibility of its extension and the authority in charge therewith.

When the Tunisian Legislator had opted for regulating detention, it was mandatory to set this institution inside a restriction framework that imposes a time constraint on the operation of this procedure. He has likewise endeavoured to bring back the detainees to the freedom principle at least within one of the requirements for its application, by fixing the period that detention takes. This is what the Legislator has tried to do by limiting the initial term (A) but he has regulated its extension (B); one is also bound to focus on the calculation of the detention period (C).

A – The Detention Initial Term in the Tunisian Law

The detention period, before the issue of the Law dated November 26th, 1987, was not limited and even the administrative circulars issued by the Ministry of Interior [1] and which were very flexible in dealing with the detention period and void of any subordination to the Law, were often left aside on the field, which meant that the Judicial Police Officers dealt with the issue freely, which made this procedure last more than the period necessary for the conducting of the investigation in adequate conditions. [2] With the Issue of the Law of 1987, the Legislator defined the initial maximum period for detention to four days, which the text authors considered as enough to delimit the liabilities and to set a limit for the personal interpretations and for any possible misuse of authority. [3] This period seems to be relatively long, If compared to the comparative legislations options; however it is the interest of the investigation which may have pushed the Legislator through the Law of 1987, to

(1) Such as the circular of April 2nd and August 24th, 1977

(2) Cf. Wahid Bounenni "The Legal depriving of the individual freedom without a court sentence" Conferences of the Tunisian Criminal Law Society 1995-1996 p. 33

(3) Cf. the report of the Political Affairs Committee and the General Legislation Committee – Deliberations of the House of Representatives n° 5 – Session of November 21st, 1987

select this period, considering that the Judicial Police Officers were not used to limiting the detention period within a similar short deadline. This may have hindered the course of the investigation, at least in the first period, when the text came into force. Then, being aware of the length of this period, and its un-matching with the new trends in the legislation policies, in the field of human rights, and in an attempt to consolidate the guarantee that the detention period is limited, the Legislator stepped in again to reduce the initial period for detention, by virtue of the Law n° 89-1999, dated August 2nd, 1999, down to three days, in order to meet the requirements of the preliminary investigation for such a period, for its smooth conducting in order to discover the crime.

B Extending the Detention Period

The distinction between the initial period and the extension period is justified by the fact that the first one reflects a direct legislation option to limit the detention term for a period necessary to conduct the investigation; whereas the extension requires exceptional cases, such as compliance to the requirements of the detention. Extension requires basically a valid argumentation to justify it or the interference of another authority to analyse the soundness of the extension and control it. Although the comparative legislations took different attitudes in extending or refusing this additional period, and in limiting the authority in charge, be it the Judicial Authority or the Administrative Authority of the Security Systems, the decision of the Tunisian Legislator was clear with respect to the admission of the extension in "Extreme Cases", i.e. the cases required by the investigation necessity.

Regulating the extension of the detention terms in the Tunisian Law covered the extension authority which became under a judicial mandate, either through the Head of the Prosecution, in most of the cases, or the Examining Magistrate in case of a rogatory delegation. (1)

But the Law of December 26th, 1987, provided for the possibility to extend this term twice. The first extension is for four days, equal to the initial term, the second for a couple of days. This makes up altogether a relatively long period for the detention overall period, although the separation between these different periods of time gives a guarantee to the detainee since any extension must be properly justified.

The Law of August 2nd, 1999, has provided for the limitation of this extension possibility into one single period, of three days. Actually extension, only once, gives an ultimate importance to this procedure, because the governing authority will surely make sure that the conditions are met and especially those relating to the good conducting of the investigation, it makes up as well a sound motive to the initial investigator to complete the investigation requirements as early as the first period, just in case extension will not be granted.

(1) Cf. Article 13 bis and Article 57 of the CPC

From a practical point of view, the real dealing with the set period for detention seems to be more precise than what has been authorised by the texts. The Head of the Prosecution or the Examining Magistrate, that are authorised to extend, in writing, the limited period, usually take precautions on this occasion about the detention justification and efficiency, starting from the availability of the suspicions with respect to the detainee and the seriousness of the investigation and the reason behind detention, so they step in the investigation in order to check up to what extent the procedure complies with the mandatory requirements to unveil the crime. This results in great guarantees to the detainees especially that the written formula of the extension stands as an obstacle in front of the Judicial Police Officers who apply for the extension only if there are serious and efficient justifications in this respect.

The detention period, limited by the Legislator, represents one of the most outstanding guarantees, behind the regulations of the detention institution, and no matter the results of the investigation, the end of the period will mean either the release of the suspect or his handing over to the judicial authority. The individual likewise will go back to his natural freedom or he will be entrusted to the judicial authority, the initial guarantor of the individual's liberties.

C – The Calculation of the Detention Period

The detention period is worked out in terms of hours and days. Depending on the period, some rules must be available which allow the guarantee of the legal rights of the detainee to leave the frame of detention, as per the Law provisions.

Concerning the beginning of the period, the Laws disagree in this respect [1], some of them include the period necessary for the transportation of the detainee up to the detention centre, in the calculation of the term. As long as this period of time corresponds to some hours and the detention period, as a whole, does not exceed a certain number of hours, the issue is of a great Importance. Some other legislation considered that the calculation of the detention period starts from the first interrogation, because it may not be possible to question a suspect at the first stages of the investigation, which does not achieve the basic purpose of the detention, especially if the interrogation impossibility is due to the suspect's refusal.

The Tunisian Law kept silent with respect to this issue. However, with a logical explanation of the purpose of the detention institution based on the investigation necessity condition, as per Article 13 bis, one is bound to consider the period spent by the detainee at the service of the Judicial Police Officers in order to conduct the investigation, in the calculation of the detention period. Concerning the end of the detention period, the prevailing practises have shown that the last day is used to present the detainee in front of the Head of the Prosecution or the Examining Magistrate in order to complete some questionings, if needs be. Practically speaking, the detention term ends with the end of its period and with presenting the concerned to the Public Prosecution to decide on whether to release him in case a non suit is ruled out or to transfer him in front of the judgement council or the continuing of the investigation while he is at large, or arresting him while he is being transferred in front of the council or the Examining Magistrate.

[1] Cf. Pradel "Droit Pénal Comparé" Op. Cit.

SECOND RESEARCH: FIXING THE DETENTION PROCEDURES

Detention is an institution depriving individuals of their freedom. Any procedure it requires secures a certain protection to the detainee. Any issue that is not regulated by the Law may be transformed as an excuse for arbitrariness and a means to inflict an additional pressure which was not meant by the Law when codifying this procedure. However, in addition to the above, the Legislator adopted the detention procedure in order to secure the detainees guarantees, which turned its codification into a listing of the authorised means to protect the individual's rights. Article 13 bis, provided for the regulation of the detention institution and the fixing of its procedures which make up guarantees granted to the concerned individuals such as the procedure relating to the keeping of a detention record (First Plea) and the possibility for the detainee to undergo a medical check up (Second Plea) and the procedures relating to the detention notification (Third Plea).

First Section: the Detention Record

Among the introduced guarantees in the detention institution, there is the obligation to keep a special record for this procedure, as per the provisions of Article 13 bis of the CPC, which obliges the keeping of a special record for the detention (First Paragraph) and fixes the necessary indications to be included in it (Second Paragraph), which produces guarantees to the detainee (Third Paragraph).

First Paragraph: the Keeping of a Detention Record is Mandatory

Since the Law of November 26th, 1987, the Legislator obliges the Judicial Police Officers, in charge of detention, to keep in the detention centres, a special record for this procedure. The mandatory nature stems from the provisions of Article 13 bis of the CPC. Since the amendment of the mentioned article, as per the Law of August 2nd, 1999, the pages of the record became numbered and signed by the Head of the Prosecution or one of his deputies. This record also acquired a special nature, which made it different from the other standard administration records that are meant to regulate the activities of the security and National Guard centres. It makes up a written support that accompanies the detainee during all the detention period.

The detention record is a procedure that is echoed in several comparative laws, which have required its keeping for various purposes, the most important being the confirmation of the detention procedure and the different surrounding conditions, and enabling the administrative and judicial inspection authorities to dispose of a means to check the enforcement of the requirements and guarantees that are provided by the Law, to protect the detainees. However, the importance of this record in protecting the rights of the individuals, subject to the detention, is not based on the obligation to keep the record only, but also on the indications that the Legislator requested to make therein.

Second Paragraph: Detention record's Indications

In order to play the role set out by the Legislator for the detention record, as a tool, reflecting the different procedures occurring during detention, which guarantees to the detainee his legal rights, it is a must for the Legislator to complete the obligation

for the record keeping with indications that secure the respect of the guarantees provided for by the Law.

The first indication is about the identity of the detainee. At the beginning, may be this indication has no importance in the detainee's guarantees, however, practically, the listing of the identity in the record seems to be a major procedure that enables the activation of the evidencing purpose of the record through the registration of the Judicial Police Officers' acknowledgement that the detainee is under his custody. Hence, the other different procedures and the assumed guarantees in relation thereto and the liabilities resulting therefrom are subject to the indication of the identity to prove the individual concerned by detention and to check up to what extent the other procedures, as far as he is concerned, have been respected. [1] Hence, the indication of the identity, despite its being obvious, since it is one of the standard and administrative indications, makes up an important element in the enforcement of the legal guarantees especially that the violations that may be registered with respect to the detention procedure, are likely to use the identity to deny the existence of the concerned individual in the detention centres.

Article 13 bis also imposed the indication of the beginning of the detention and its end, day wise and hour wise. In addition to the importance of this indication, in calculating the detention period, as long as it is precisely fixed, mentioning the beginning of detention has a procedure importance since it represents exclusively the prosecution deeds that interrupt or that suspend the public prescription period. At another level, the calculation of the detention period, has got another purpose since it is deducted from the civil sentence period, in case a judgement is ruled out. Furthermore, the Legislator is elaborating a motion allowing those who have been deprived of their freedom then proved to be innocent after judgement, to be entitled to a fair compensation. Hence, determining in a precise way, the beginning and the end of the detention period, has a great importance at several levels, however, its importance remains duly confirmed in the guarantee to enforce the legal requirements which are introduced by the Legislation with respect to detention, in such a way that the individual can exercise his rights and the liability of the involved parties can be called upon, when necessary. At another level, the Article dealing with detention, requested to indicate on the detention record, the notification to be made to the detainee's family. This indication translates the Legislator's aim at securing the best chances to a successful enforcement of the procedures relating to detention. This indication reminds the Judicial Police Officer of the obligation to proceed with the family notification and sets out evidence whether this procedure has been respected or not. It is the same expected purpose from the application to undergo a medical check up if it is introduced by the detainee or one of his relatives that are entitled to do so. This indication proves whether the medical check up has actually occurred or not. However, from a practical point of view, the security authorities have been used to adding some other indications on the detention record, required by the administrative work, including the number of the drafted minutes and the reasons for detention and the belongings left with the judicial police and the quality of the Judicial Police Officer [2] .

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[1] Ref. Abdallah Al Ahmadi "Human Rights and General Liberties in Tunisia" Op. Cit. p. 384

[2] Cf. Attachment n° 2 to the Memoir

These additional indications are dictated by the reality and the internal regulations of the police and National Guard centres. They nonetheless do provide additional guarantees to the detainee since they make the inspection of the conditions of the detention procedure easier.

Third Paragraph: The Guarantees extended by keeping a Detention Record

The efficiency of the different legal guarantees extended to the detainees basically, depends on how they are implemented, practically speaking. This requires a codification of the implementation means, and the availability of ways capable of unveiling any violation made in this respect. There is no doubt that the Tunisian Law, through the keeping of a detention record, and the listing therein of all the mandatory information, endeavoured to produce a reference that allows a checking of the detainee's actual situation and the outcome of the guarantees to which he is entitled, in addition to the fact that the said record makes the inspection authority work easier. However, one should point out that dealing with the detention institution relies in most of the cases on the fairness of the Judicial Police Officer in charge of collecting the necessary means to proceed with every checking about the implementation of the detainee's guarantees. This is logical as long as the Legislator wants to strike an equation between the rights of the individuals subject to detention and the general interest embodied by the Investigation efficiency. In no case, these guarantees will be turned into obstacles that the investigation faces, which may hinder the investigation course. However, the detention record remains one of the legal means to protect the detainee's rights to enjoy these guarantees to which he is entitled. The role of the record in this respect has a special feature since it makes up a reference for the respect of the remaining legal guarantees and an essential element in confirming any violation thereto by the Judicial Police Officer or up to what extent the mandatory detention conditions are fulfilled. This is possible when there is an efficient inspection on all the different structures whether they are administrative or judicial. However, the existence of the evidence means, embodied by the detention record, can nullify the offered possibility to prove the contrary, so that the liability of the officers in charge can be engaged and the outcome of the proofs collected during detention can be assessed.

Second Section: the Possibility (for the detainee) to undergo a medical check up

As a protection to the body immunity of the individual, Article 13 bis provided for the possibility for the detainee to undergo a medical check up. The Legislator has regulated the application to be made in this respect. He suggested mentioning it on the detention minutes. In order to understand the motives behind this procedure and what kind of merits it offers to the detainee, one should examine the application for the medical check up (First Paragraph) and the actual medical check up (Second Paragraph)

First Paragraph: Applying for the Medical Check up

The detainee or one of his ascendants, relatives, brothers and sisters or his wife can apply for a medical check up in favour of the detainee. This possibility is allowed by the Legislator during the detention period or upon its expiry. Although some see in

this possibility a legal guarantee to protect the safety of the detainees as long as the society is responsible for them while they are deprived of their freedom for the sake of the investigation, Professor Lambert, on the contrary, considers that the main purpose of the medical check up is to protect the individuals against the possible violence danger. [1] Hence, it is possible to confirm whether the physical fitness of the detainee has been violated or not during the detention period. This procedure, in the Tunisian Law, is subject to an application to be introduced by the above mentioned persons. This excludes the mandatory medical check up cases as set out by some comparative laws. [2] Article 13 did not specify the authority in charge of examining the application for medical check up ; however, it obliged the Judicial Police Officer to list such requests in the detention minutes. Based on the foregoing, one can consider that the Judicial Police Officer in charge of the detention and the different procedures relating thereto, enjoys the authority to receive the medical check up applications [3] But is it not possible to make this application to the Head of the Prosecution since he is the president of the judicial police and the authority that is governing the detention procedure?

The Government's representative, when debating about Article 13, replied that "the application can be made to the authority investigating the case; it can also be made to the Head of the Prosecution. There is no limitation with respect to the concerned party to which the application can be made" [4]

There is no doubt that the right extended by the Legislator to the detainee stops when the application for the medical check up is made. This raises the issue of the outcome of such an application. Basically, the wording "application" means that there is a wish to undergo a medical check up. It does not mean that the recipient party is obliged, in all the cases, to comply with this wish. An objective answer seems to require that one should acknowledge that the Judicial Police Officer or the Head of the Prosecution to whom the application is made, has got the authority to judge the soundness of the application and decide its outcome, either to accept it or to turn it down, based on the detainee's health conditions, on one hand and the smooth conducting of the investigation, on the other, so that this legal guarantee will not be used as a lame excuse to hinder the investigation. Judging from all the foregoing, the intention of the Legislator, through the introduction of the possibility to apply for a medical check up, is to enable the concerned authority to assess the compliance of this procedure with the available data about the physical fitness of the detainee and the smooth conducting of the investigation. However, it is possible to use this assessment authority to deprive the individual of a possibility legally offered to him and to empty out the legal guarantee of its contents and its efficiency, especially that the medical check up may produce evidence to dispute the Judicial Police Officer, when a claim regarding a physical aggression is brought forward. Hence, the

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[1] Cf. Lambert "Précis de Police Judiciaire selon le Nouveau Code compare à l'Ancien" Op Cit

[2] In the French Law, the submittal to a medical check up is mandatory when the detention period is extended
- Cf. Article 63-3 2nd paragraph of the French Criminal Code
- Cf. also Article 59 of the CPC

[3] Cf. Abdallah Al Ahmadi Op. Cit p. 383

[4] Cf. the debates of the House of Representatives about the Law of November 26th, 1987 – session dated November 21st, 1987

Investigator may use the non binding nature of this procedure to turn down the application, which raises the issue of the efficiency of such a legal guarantee. Regarding the quashing possibility against the decision, some [1] consider that it is not possible based on the rule "no quashing without a text".

Nevertheless, the application for a medical check up was authorised by the Legislator during the detention and after its expiry. It is likewise possible during all the detention period. Although it is basically offered to the individual, it makes up a presumption that detention is being conducted under "normal" conditions, and that the investigator is fair and he respects the legal requirements. One must recall that the Legislator, since the amendment of August 2nd, 1999, obliged the Judicial Police Officer to read out the law provisions, as far as his situation is concerned, to the detainee, using a language he understands. This strips him off any excuse for the failure to exercise this right whenever there is a need to do so.

Second Paragraph: the Medical Check up Procedure

The medical check up procedure implementation supposes that the relating application has been accepted. At this stage, some questions are raised about the nomination of the examining doctor who, in some systems [2], can be selected by the detainee or his relatives, whereas others consider that he should be nominated by an order from the Judicial Police Officer or the Head of the Prosecution. [3] Generally speaking, most of the jurists consider that the detainee or his relatives cannot stick to their option to select the doctor [4]. Concerning the necessary expenses for this medical check up, they can be, in the absence of a clear cut solution, in the Tunisian Law, borne by the State's fund since the medical check up is listed among the investigation requirements that provide for detention and that the detainee remains at the service of investigator. Hence, Society bears this kind of expenses.

At another level, the medical check up procedure raises the issue of the mission of the examining doctor. The French Legislator was clear when fixing the mission of the examining doctor who has to assess up to what extent the detention conditions are respectful of the detainee's health conditions [5] and who can survey the impacts of the aggressions that are made on the detainee, physically speaking. However, in front of the silence of the Tunisian Legislator in this respect, one can say that the role of the examining doctor is limited to identifying the health problems that the detainee has encountered during detention and the consequences resulting therefrom. This obliges him to list all the conclusions of the medical check up in a certificate that will be added to the detainee's file. But does the guarantee of the medical check up stop at this point?

[1] Cf. Abdallah Al Ahmadi "Human Rights and General Liberties in Tunisia" Op. Cit.

[2] Cf. for example, the Algerian Law: Ref. Mohamed Mehda: the Suspect's guarantees during the preliminary investigation. Ed. "Dar El Houda" – Algiers 1942 p. 150

[3] Cf. for example the French Law Article 63-3, 3rd paragraph French Criminal Code

[4] Cf. Puech Juriclasseur Proc. Pen. Article 53 to 73. Op. Cit.

[5] Op. Cit.

Basically, one must admit that the doctor's mission is two folded. His first mission is a standard one, namely examining the detainee to check his health conditions. The second one is to identify some injuries that have occurred during the detention period. There is no doubt that the intention of the Legislator out of these two roles, stems from his confirmation of the possibility to apply for the medical check up and its extension to the successful applicants and then, to list this application in the detention minutes.

The medical diagnosis of the detainee's health condition enables the detainee to prepare evidencing means that he may need to confirm the detention conditions or the occurrence of some practices to which he has been exposed during the detention procedure. The same means are needed by the Judicial Police Officers in charge of the case, to refute the suspect's claims and are used by the Head of the Prosecution and the Examining Magistrate in deciding about the outcome of the investigations conducted during detention.

However, this guarantee, recently introduced in the Tunisian Law, requires, just like any other guarantees, the existence of practical means to secure its enforcement so that the purpose of its existence and its efficiency can be achieved, as targeted by the Legislator, in an attempt to strike the desired balance between the protection of the individual's pride and the smooth conducting of the preliminary criminal investigation.

Third Section: The Notification of the Detention

Detention has become a legal institution required by the legislations, as a compliance with the investigation needs, it is no longer a secret issue and the Judicial Police Officer is obliged to notify the recourse to such an institution. The expected purpose of the notification procedures is different. In most cases, the notification represents one of the guarantees that are provided for by the Law in favour of the detainee. This is outstanding through the notification of the suspect (First Paragraph) and the notification of the family (Second Paragraph) and the notification of the Head of the Prosecution (Third Paragraph).

First Paragraph: Notification of the Detention to the Suspect

Among the basic rights for the defence is to notify the suspect of the charges against him and of the different proceedings he is subject to. This right is ranked as a basic rule for the fairness of the criminal investigation. [1] This procedure becomes more important with respect to the suspect against whom the charge elements are not drawn out yet, he is covered by the investigation only because there are suspicions that he could have committed the crime. Notification of the adopted procedure, against individuals, in general, and suspects, in particular, has a great importance as long as this procedure affects the freedom of the individual as it is the case in the detention procedure.

[1] Cf. Med Hódi Lakhoua : Principe de la Loyauté Thèse Op. Cit

Before codifying the detention issue, the notification of the individual about this procedure remained an outstanding question. The fact that notification was not mandatory might turn, actually into a sudden practice that transformed the temporary depriving of the individual of his freedom into some sort of a sudden and unexpected arrest which contradicted with the justifications of detention, dictated by the general interest of the criminal investigation and which could not be ruled out by the general authority represented by the Judicial Police Officer.

When the Law has set out the foundation elements of the detention institution, its procedure requirements and in particular, the identification of practical limits, which are bound by the individuals' rights, under the requirements of the innocence presumption, the Legislator requested the notification of the suspect about the procedure he is subject to, through fulfilling the condition of his signing the minutes or the indication of his refusal and the reasons behind it. However, it has become clear that this legal condition does not secure a real protection of the detainee's right when assessing his legal status. The Legislator stepped in once again as per the Law of August 2nd, 1999 and included in Article 13 bis, a clear cut provision whereby the Judicial Police Officer is obliged to notify the suspect, in a language that the latter understands, about the procedure ruled out against him, its reasons and its term, in addition to the reading out to him of the relevant law including the possibility to apply for a medical check up during the detention period. This is why the Tunisian Law ranked the notification, from a stand and formality that may result from the reading of the detention minutes, on the occasion of its signing, and in which one is subsidiarily informed of the procedure itself, through his coming across of the statements recorded against him, up to the legal duty that is to be assumed by the Judicial Police Officer in charge of the detention, and which must take place before the interrogation starts. This attitude was adopted by most of the comparative laws [1] There is no doubt that notifying the detainee of the procedure framework, its legal requirements and the guarantees offered to him, as per the provisions of Article 13 bis, extends a greater efficiency to the conducting of this procedure and opens the door to the detainee to stick to his rights and to enjoy what the Law can guarantee to him once he acknowledges his legal status. Notification of this procedure to the suspect plays also a role in implementing the legal guarantees and also allows the detainee to avoid being surprised by depriving him of his freedom, so that he can provide solutions to his own affairs.

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[1] Cf. for example, Article 63-1 of the French Criminal Code and in France, this principle was adopted by the Jurisprudence, for example Crim March 1st – 7th, . Bull.Crim n° 80 and 89 – Dalloz 1994 – Summary p 158

Second Paragraph: Notification to the Family

The effects of detention are not limited only to the detainees but they also touch the parties living around them, especially their families who are affected by the operation of the procedure itself This procedure leaves behind material results, especially psychological, with the members of the detainee's families. For these reasons, some legislations decided to include this procedure as part of the obligations of the Judicial Police Officers, in charge of detention, as it is the case for example, of the French Law, whereas other regimes kept silent in this respect.

In the Tunisian Law, it was natural that this procedure did not exist before the Law of November 26th, 1987, since the detention institution was kept as a secret. Even the Law of 1987 has not included the issue of notifying the relatives about the operation of detention. Although this legal silence did not make up a refusal, the fact that the detention procedure remained subject to the judgement of the Judicial Police prevented from listing it among the detainee's guarantees ; the individual could not stick to, and the officer in charge of detention did not feel, its binding nature as an obligation. These motives pushed the Legislator to step in, in 1999, he turned this procedure into a new obligation borne by the Judicial Police Officers, knowing very well that it is only the obligation nature that secures an adequate enforcement to the institution of detention.

Article 13 bis did not fix the means that are to be adopted to inform the family, however, from a practical point of view, this notification can be made either over the telephone or directly. The notification method does not make a problem as long as the most important thing is making sure that the notification has actually occurred, so that the members of the family can discard the concern they have supposed as a result of the absence of one of their members and to endeavour, accordingly, to take the necessary measures in this respect and protect his interests.

The importance of the notification either to the detainee or to the family as a legal procedure makes up a taking off from a past wherein this procedure was kept under silence, with all the complications resulting therefrom.

Third Paragraph: Notification to the Head of the Prosecution

Since its amendment, detention has become a procedure in which the judicial body is involved through the mandatory notification of the Head of the Prosecution about the operation of the detention itself, or his stepping in to extend its term. The intervention of the Head of the Prosecution as a legal procedure exceeds the fact that it is simply a notification operation. One should ask in this respect about the legislatory purposes for the necessity to go for such a notification. The Head of the Prosecution, as a judicial authority, has some particularities with respect to the criminal procedures. It represents, on one hand, the Public Prosecution and as such, can follow up the procedure and its enforcement, it is also the authority presiding over the Judicial Police, on the other. The Legislator tried to involve the Head of the Prosecution in the procedures relating to detention. Although this involvement is achieved legally

through this notification, it provides great guarantees to the detainee since the notification made by the Judicial Police Officers makes them, practically speaking, under his control, which also obliges them to respect the legal requirements and the basic guarantees set out for this procedure. Furthermore, the Head of the Prosecution or the Examining Magistrate, since they are the authority in charge of extending the detention term, are entitled, when they are notified of the beginning of detention, to have an idea about the detainee's conditions in order to take the necessary actions since, and irrespective of the provisions of Article 13, they remain the president of the judicial police and controlling any investigation or prosecution action. The Head of the Prosecution will also, simply after his notification, study up to what extent the detainee can enjoy his guarantees. The same is valid in case the notification is addressed to the Examining Magistrate when he takes over the file, by virtue of a rogatory delegation. The notification made to the Judicial Authority about the recourse to detention excludes this procedure from the framework of the practices that are kept under silence, avoiding thus all eventual arbitrary actions and the illegal practices. It is as if the individual is put under the guarantee of the Judicial Authority. The notification to the Head of the Prosecution or to the Examining Magistrate is a procedure that supplements the other procedures, provided for by the Law, and which aim at the protection of the detainee's rights, just like the fact of keeping a detention record.

PART II

CHAPTER ONE: THE DETENTION REGIME ORGANISATION

The seriousness of the inspection is linked to a large extent to the gravity of the exposed issue. The law plays a role in assessing the untoward consequences for the failure to respect the rules of the detention regime. The law sets out a regime governing the gap between the text and its enforcement, between what is awarded legally to the individual and what the individual could enjoy therefrom. The gravity of the legal institutions, depriving the individual of his freedom, including his detention, is behind the endeavour of the different regimes to give the ultimate importance to the inspection of the enforcement of the legal texts. Accordingly, the inspection regimes have been various, depending on the intervening sources in this respect. They intermingled in order to set the basis of a frame liable to operate an efficient inspection on all those who are governed by the detention issue (Third Research), with reference to miscellaneous means (Second Research) through several structures (First Research).

First Research: The Detention Inspection Structures

The changing nature of the detentions, as a legal procedure, affecting the individual's freedom, on one hand, and as an indicator of how far the regimes respect the basic rules of the individual's freedom, on the other, has led to great consequences, which exceeded the legal frame and put forward data of a political and social nature. The detention has become a special undertaking surrounded by various structures including the judicial and administrative and even political structures, whose intervention covered as well the inspection function which is operated at the level of all those structures. The detention inspection structures have accordingly become various to include judicial structures (First Section), administrative structures (Second Section) and structures taking care of the human rights (Third Section).

First Section: the Judicial Structures

The judiciary is the guarantor of the individuals' freedom. Its intervention to protect them has a great importance. It is because of this that several parties from the judiciary body have intervened, on the occasion of the enforcement of the detention procedure. This intervention is valid for all the stages of this undertaking. However, the detention procedure conditions change according to the reason of the detention, it is therefore more appropriate to tackle the inspection carried out by the Head of the Prosecution Department (First Paragraph), the Examining Magistrate (Second Paragraph) and the Court's Structure (Third Paragraph).

First Paragraph: The Inspection of the Head of the Prosecution Department on the Detention Procedure

A – The Consecration of the inspection carried out by the Head of the Prosecution.

The acknowledgement of the inspection authority extended to the Head of the Prosecution Department is based on its quality as the President of the Judicial Police

and as an authority ruling out the introduction of public claims and as an organisation to which the Legislator has extended some prerogatives relating to detention. Article 10 of the Criminal Procedure Code provides that the Judicial Police Officers are assistants to the Head of the Prosecution Department and they exercise their judicial duties under his authority, which means that he should be capable of inspecting them, guiding them and accordingly, they have to report to him. The quality of the Head of the Prosecution Department, inside the department of the public prosecutor, which exercises public action supposes that the Judicial Police Officers have to report to the Head of the Prosecution Department about their undertakings which have led to a detention **so** that the Head of the Prosecution Department can decide whether to keep the detainee free when transferred to stand a trial or when directing a non suit. This case is particularly raised when we are investigating about criminals caught red handed in flagrant cases whereby the reports have to be filed with the Head of the Prosecution Department or when investigating about suspects under custody, so the head of the prosecution examines their cases and could review the extracts of the conducted interrogations and the detention conditions and in case it appears to him that the detention is not legal or suffers from violations of the basic proceedings provided by the law, the Head of the Prosecution Department is entitled to take all the actions he deems appropriate. In addition to the above he has also the capacity to guide the investigations and assess their authenticity, to use them in order to transfer the case for judgement or to direct a non suit or to go beyond their contents if he comes across any doubt regarding their fairness. Concerning the detention as a procedure, extended by the Legislator to a certain category of Judicial Police Officers on the occasion of their conducting the preliminary investigations or an investigation for flagrant crimes, the authorities extended to the Head of the Prosecution Department for the inspection are great as they cover the different judicial police undertakings ; however, the importance of the authority and inspection in the legal institutions affecting the individuals' freedom were not taken up by the Legislator in a special chapter and in separate provisions, which obliges us to rely on the general provisions and in particular Articles 9, 10, 11 and 13 of the Criminal Procedure Code as an ultimate framework to acknowledge these authorities given to the Head of the Prosecution Department. Thus, the case is different in some comparative legislations which included the authorities of the Public Prosecutor or other officers from the judicial bodies in charge of inspection, in the general organisation of the concerned institutions.[1]

However, despite the above, Article 13 bis provided for the authority of the Head of the Prosecution Department in inspecting several internal proceedings of the detention.

The Legislator made it mandatory for the Judicial Police Officers to inform the Head of the Prosecution Department of the operation of the detention, at the beginning of such an undertaking. Practically speaking, it is done by a notification writ or verbally or by telephone... The Head of the Prosecution Department can also, on the occasion of the notification of the detention start up, have some idea about the conditions in which the detention is operated and about the crime, object of the investigation

(1) : Ref. for example Article 41 of the French Criminal Procedure Code

However, although the necessity to inform the Head of the Prosecution Department stems from the provisions of Article 13 bis, the merit of simply informing the Head of the Prosecution as part of the enforcement of a real inspection at the beginning of the detention remains a big issue.

The fact of informing the Head of the Prosecution Department about the operation of a detention does not make a guarantee or the actual beginning of an inspection. However, in our opinion, simply informing the head of the Prosecution as per the set out legislation, gives the procedure a legitimate nature at least at the beginning of the detention since the detention leads to a legal deprivation of the individual freedom, which makes the detainee subject to an institution endowed with its conditions and proceedings. Accordingly, the detainee will not remain outside the framework of certain proceedings, actually depriving him of his freedom and which cannot be classified in a particular category of institutions that deprives the individual from a legal point of view for his freedom.

The fact of putting a person under custody without informing thereof the Head of the Prosecution Department, excludes him from being listed among the detainees; hence, he could not benefit from what is legally provided to him by the I aw

Because of that, some jurists consider that the inspection, to which the Head of the Prosecution Department is entitled, through his notification of the detention, is an inspection about the legitimacy of the procedure.

The Law relating to the detention entrusted the Head of the Prosecution with the inspection of the detention period, either with respect to the initial period or to any extension thereof. The first initial period starts as of the notification of the Head of the Prosecution of the same, whereas any extension is to be made in writing, by him. Hence, this judicial system has a limited impact on inspecting the initial detention period, during which the Head of the Prosecution Department cannot examine the detention conditions so as to judge how far they match with the prevailing standards. However, his authority, as long as the extension is concerned, is great. The Legislator gave him the power to judge the opportunity to extend the detention period, when any application made in this respect. This inspection is the starting point to determine to what extent the detention procedure is normal and is an opportunity to get to know about the detention conditions, in order to decide any extension. Although the inspection, at this stage, is basically limited to the fixing of the period, some comparative laws give to the judicial system, in charge of the inspection, larger prerogatives by presenting in front of it the detainee together with the extension application, with the possibility to let the detainee undergo some medical check up in the meantime, in order to determine up to what extent the extension period would affect his health, psychological and social conditions.

On the other hand, it seems, through the obligation to keep a detention record, signed by the Head of the Prosecution Department that the Legislator has added to this judicial system, the prerogative of inspecting the detention, through this means. The signing of the detention record precedes the detention proceedings and does not, as a matter of fact, produce serious guarantees to operate an inspection on the

detention itself. However, it seems that the fact of excluding the detention record from the other administrative records, under the control of the specialised security associations, and its necessary signing by the Head of the Prosecution, aims at giving some credibility to such a record, so as to secure the necessary means to operate a real inspection on the detention

B – The Limits of the Head of the Prosecution Authority when Inspecting Detentions

The several prerogatives exercised by the Head of the Prosecution Department as the Public Prosecutor, the President of the Judicial Police and the several powers he enjoys in inspecting the detention procedure, may disclaim or limit his authorities in the inspection procedure. However, it is mandatory to point out that the limitations of the efficiency of the inspection operated by the Head of the Prosecution do not stem from a shortcoming in the legal possibilities to undertake the inspection, but from a factual reason preventing his looking into the actual conditions of the detention and the normal conducting of the proceedings during such a detention. The characteristics of the detention are closely linked to the way it is operated by the judicial police, considering the nature of their work which is linked to the security activities, in addition to the specifications of initial interrogations which are required directly by the Police and the National Guards. In all the foregoing, the detention issue and the production of the guarantees to the individuals concerned by it, have a practical aspect which may not be covered by the inspection, expected to be carried out by the Head of the Prosecution whose role remains tutory without actually playing a real inspection role, because of the hindrance we may cause to the proceedings. Furthermore, although the intervention of the Head of the Prosecution Department is not direct and somewhat limited from the point of view efficiency, it translates, nonetheless, the concern of the Judicial Police in charge of the detention, to enforce the Law simply because the framework of their activities remains subject to this system, which may transform the relationship between the two structures into a cooperation and not based on an inspection in the strict meaning of the word.[1] Because of the foregoing, one must admit that the specific features of the detention prevent from exercising a real inspection during its operation by the Head of the Prosecution Department. Hence, the matching of the detention to the legal conditions, at least at the first stage, remains subject to the authority of the Judicial Police Officer.[2]

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(1) Cf. CLEMOT : Garde à Vue et Libertés Fondamentales en Droit Français et Canadien : Thèse Montpellier 1994. P.265

(2) Ref. J. Pradel – Droit Pénal Comparé. Op. Cit.

Although the detention conditions have a pure practical aspect, which cannot be covered by the Head of the Prosecution Department, the control of the investigation about the cause of the detention, through the interrogation, remains, in any case, subject to the absolute interpretation and appraisal of the Head of the Prosecution to whom the judicial police reports, so that he could check how serious the conducted investigation, during the detention was, assess its respect of the facts and the procedure basic rules, he could therefore rely on the collected proofs in the meantime and determine the outcome of the conducted investigations, which allows him to take the appropriate decision with respect to the investigation and the detainee and even with respect to what he can undertake by himself ; he also can, based on what is available to him, reject the application to extend the detention period and liberate the detainee when the latter is presented to him under custody, especially for the case of flagrant crime investigation, in addition to his prerogatives to direct a non suit or to transfer the case in front of the competent court with respect to a specific crime. During all the foregoing, the Head of the Prosecution deals with the investigations operated during the detention.

Second Paragraph: The Examining Magistrate's Inspection

The involvement of the Examining Magistrate during the detention is part of his prerogatives in the inspection of the judicial powers given to the Judicial Police Officers. Article 57 of the Criminal Procedure Code gave the Judicial Police Officers in charge of the investigation by virtue of a rogatory commission, the possibility to have recourse to detention. In return, the inspection of the procedure for the operation of the detention is entrusted to the Examining Magistrate who has to be informed of the detention decision and who has the authority to extend it.

Through this involvement, one can say that the prerogatives of the Examining Magistrate in this respect requires an inspection on the course of the detention and the conditions of its operation and whether it is in keeping with the investigation report. It is a minimum inspection, endowed by the Legislator in order to guarantee the involvement of the Examining Magistrate, to control the detention conditions and to allow him to get to know about the investigation conditions and in particular on how the detention is operated. This inspection covers the different stages of the investigation and it supposes that a rogatory commission is given and that the suspect is at large. The Examining Magistrate, who is authorised to deliver judicial warrants, can issue a committal order and arrest the suspect as a prevention measure. [1] In this case, the Judicial Police Officers, in charge of the case, by virtue of a rogatory commission, do not have to have recourse to detention. However, in the case whereby the suspect remains at large and the officer in charge has opted for the detention institution, the Examining Magistrate entertains an indirect control on such a procedure. The conflict between the intervention of the Examining Magistrate in the preventive detention, in case of a rogatory commission, and his intervention in the detention, is due to the different nature of the prerogatives extended to him, under each case. He is directly managing the preventive detention operations whereas he is only controlling the undertaking in the second case. However, the Legislator aims,

(1) Hédi Said -

Through the control exercised by the Examining Magistrate on the detention, to let the carried out investigation, as a result of an enforcement of a legal rogatory commission, be subject to a judicial inspection, without looking into the details of the investigation work carried out by the Judicial Police Officer.

In addition to the prerogatives of the Examining Magistrate, in his capacity as the initial commissioned authority, the Examining Magistrate presides over the investigation because the sum of the works executed as an enforcement of the rogatory commission, is forwarded to him and he relies on the same in order to assess its respect of the normal standards when closing the investigation. (1)

Hence, the prerogatives of the Examining Magistrate in the inspection of the detention stems from three main accesses namely his capacity as the initial commissioned authority and the authority to whom the investigations are forwarded, in addition to the prerogatives extended to him by the Legislator by virtue of Article 57 of the Criminal Procedure Code, and allowing him to intervene in the procedure, either through his own undertaking or his authority to extend the detention period.

Third Paragraph: The Inspection carried out by the Judging Committee

The criminal investigation ends up in the hands of the judging committee. The fact of insisting that the court has an inspection function over the detention comes from its role to find some balance between the produced proofs and those which are collected through the different stages of the criminal investigation. In principle, the legal value of the suspects' declarations is the same whether they are under custody or at large. However, the things are different when the evidences, questioning the legal value of the confessions made during the detention, become numerous, or when they contradict with other evidences which seem more in keeping with the overall conducting of the investigation. Accordingly, the position of the Judgement System as far as inspection is concerned, is excellent with respect to the evidences object of the investigation which requires the detention. Some consider that it is the unique means to catch up any unbalance between the proceeding parties. (2) It has the ultimate decision when determining the future of the public prosecution or favouring the innocence evidence over the indictment elements. In this particular respect, the detention conditions are reduced to the level of a factual element in order to question the value of one of the confirmation elements considering the conditions in which they have occurred. The role that the court has to play in inspecting the detainees' conditions and the way they are treated by those in charge remains improbable since it is not, in principle, part of the competence of the court dealing with the prosecution object of the investigation which has led to the detention. As a matter of fact, the court is not in a position to examine how fair the Judicial Police Officers have treated the detainees only on the occasion of a separate criminal case whose object is limited to one of the crimes committed during the detention or while operating it.

Second section
The administrative structures in the detention inspection

The judicial duality of the Judicial Police Officers at the level of their duties makes it that both the administrative authorities and the judicial authorities intervene in order to control their undertakings and the legal institutions which they use, including detention. The fact that the Judicial Police Officer is subject to the administrative system makes it mandatory for him to be under the orders of his boss as a subordinate.

The by-laws of the internal security police have classified the ranks of the concerned staff both in the Police and the National Guard systems. The hierarchical authority obliges the subordinate to comply with the orders of his boss and to refer to him about all the undertakings he carries out. In principle, this legal frame allows the responsible officials to control the detention proceedings and to inspect the application of its legal conditions and their compliance with the instructions coming from the officer in charge and how appropriate they are for the ongoing investigation.

This possibility to inspect leads to the availability of another inspection structure, in addition to the Inspection covered out by judicial authorities which compels the respect of the law and the implementation of the guarantees which have been extended to the detainees. However, one must state that the object of such an inspection may not be judicial, strictly speaking, as it cannot cover the specificity of the detention as a procedure which is triggered on the occasion of a criminal investigation. The object of the inspection, on the contrary, is focused on the administrative work rather than on the specificity of the criminal investigation which has requested the operation of the detention. The work of the administrative official in the security authorities in charge of the detention, may affect several drafted minutes, several detainees and the coordination between them and the judicial systems. This inspection can have several forms such as examining the detention record, the drafted minutes, visiting the detention centres , which is normal, especially that the heads of the security zones and districts are informed of the different proceedings including detention when recourse thereto is made. (1)

In our opinion, the administrative inspection on the detention can be efficient for several reasons, the most important being that the severity of the hierarchical authority on the Judicial Police Officer obliges the latter to pay more attention to the application of the instructions, especially that he reports to that authority which is different as far as the judicial system is concerned, and which remains independent. Furthermore, the security or the National Guard officer, when violating the law, usually misuses the administration's negligence and overlooking, which means that he takes advantages of the administration's silence.

One would expect that the ultimate purpose of the administrative inspection on the detention is to stir the will of the different parties, in order to set out real guarantees, granted by the law, which have to be enforced by the system in charge of the detention procedure from the administration point of view and by the judicial system as an authority conducting the legal investigation.

Third section
The inspection by the Human Rights Committees

The delicate nature of the proceedings, relating to the individual freedom and the human rights, makes it a must to find special and specific features to them which make them different from the remaining administrative and judicial undertakings. Hence, these institutions require some mechanisms in order to inspect their application on the field. The modern structures of the human rights tried hard to intervene next to the traditional system in order to guarantee the efficiency of the judiciary rulings and to set out practical means for the guarantees granted to the individual's rights, in the different fields, in particular the exceptional situation of the detainee at the initial stage of the criminal investigation, where the different issues which used to be kept under silence in the past, make the object of an inspection by the human rights structures.

The human rights structures aim at securing an inspection over what has not been covered by the limited procedure inspection operated by the judicial structures or by the automatic inspection carried out by the administrative authority, away from the security considerations and the criminal confinement, because the theory, based on the respect of the enforcement of the human rights, is related to practical aspects in the exercise of such an enforcement and up to what extent it complies with the basic individual's rights, no matter their origin. Among these structures in charge of the inspection function, as far as the human rights are concerned, there is, since 1992, the Human Rights Section at the Ministry of Justice, which is presided over by a third ranking judge. It aims at contributing in the consecration of the defendant's guarantees and the protection of his basic rights against any violation and the Human Rights Section intervenes in order to investigate in the cases wherein violations of the human rights and of the individual's freedom are made. Hence, it can intervene in cases where individuals are detained illegally and when some violations occur during the detention. There is no doubt that this section, as soon as it is notified of the case, will operate its inspection and conduct its investigation which is, one must acknowledge, an inspection role played by this section on the operation of the detention. (1)

There is also a similar section dealing with the human rights inside the Ministry of the Interior, which operates its inspection when some cases, requiring its intervention, relating to the violation of the human rights by the authorities in charge, occur.

The created structures, inside the ministries in charge of the enforcement of the legal institutions depriving the individual of his freedom, including detention, contribute in the consecration of an independent inspection on the administrative regulations especially that their vocation is to respect the human rights in their largest meaning.

On the other hand, the Human Rights Higher Committee was created. It submits, every year, a report to the President of the Republic, taking up the conditions of the human rights situation in the country. In order to do so, the Human Rights Higher

Committee conducts inspections and works out statistics and carries investigations about the violation and misuse of authority that occur. As an example for the period ranging between January 1988 and March 31st, 1995, 302 cases were examined by the courts which were brought against security officers, including 277 cases for the misuse of authority. (2)

The intervention of the Human Rights Committees for the respect of the guarantees of the detainees stems from the human rights sources, in their widest meaning and is not bound by the detailed legal provisions which can create a complementarity between the inspection structures, thus making them more accurate in their undertakings, which secures greater protection to the individuals' rights.

SECOND RESEARCH – Means to inspect the guarantees extended to the detainees

The efficiency of the consecration of the guarantees extended to the individuals, subject to a detention procedure, is linked to the operation of a serious inspection which makes sure that these guarantees are respected on the field. Hence, the Law's intervention in the regulation of the inspection issue can be efficient in the search to achieve that target. Because of the foregoing, the Tunisian Legislator started first, as early as the detention institution was legislated, with finding means liable to allow the inspection systems to play their roles so that it would leave behind the violations, the misuse of authority and the arbitrariness which had stained the history of this institution. (1)

The different required proceedings that the Judicial Police Officers must respect when operating a detention include means that allow the governing authority to investigate up to what extent such a procedure complies with the legal requirements which, as a matter of fact, represent guarantees to the detainees. Hence, the inspection function of the legal guarantees merges with the protection function of such proceedings which aim at protecting the individual's rights at this level of the proceedings.

The detainees need to rely on the regulations of this procedure, when they are kept under custody, in order to protect them from the deficiency leading to violations and arbitrary actions, on the field, which can be observed during the inspection that goes along with the detention (Section One). However, the inspection has a subsequent means which prevents the consequences due to the violations of the required provisions, either with respect to the situation of the detainee or with respect to the criminal investigation proceeding (Section Two).

SECTION ONE
THE INSPECTION THAT GOES ALONG WITH THE DETENTION

The legal texts governing the detention have required several procedures and obliged the Judicial Police Officer in charge thereof, to be bound by some requirements. One should note with respect to all these requirements that they leave

the inspection door open to the concerned authorities, which allows checking the real conditions of the detainee inside the detention centres. They offer as well an opportunity to overcome the possible deficiencies so that the detainee will not continue to experience the same conditions, through the synchronised inspection means which can be triggered starting from the detention notification writ (First Paragraph) and its extension (Second Paragraph) and the keeping of a special record for the detention (Third Paragraph) and the request for a medical check up (Fourth Paragraph).

First Paragraph: The Inspection on the Detention Procedure through the Detention Notification

Articles 13 bis and 57 of the Criminal Procedure Code make it mandatory to the Judicial Police Officer to notify the Head of the Prosecution or the Examining Magistrate, as the case may be, of the operation of the detention. Through such a notification, the concerned judicial system can examine the conditions in which such a detention has been operated and up to what extent it complies with the investigation, as the case may be. There is no doubt that the notification of the detention procedure does not make up, in itself, an authority to the notified party, in order to assess the legitimacy of the decided detention. However, considering the specific prerogatives of the Head of the Prosecution or the Examining Magistrate who introduced the prosecution and considering the role played by each of them in conducting the public prosecution, both of them can intervene either in the cases whereby it appears that the operation of the detention is groundless because of the simplicity of the investigation and the crime, object of the detention, or because of the quality of the detainee in the investigation since he is the injured party or a witness or in case the concerned judicial body discovers, on the occasion of the notification, that the same has been operated on a person for reasons which are not included in the investigation made by the Judicial Police Officers. On the other hand, the detention notification allows intervention when it is proved that the decision is not legitimate for legal reasons such as immunity or in case the criminal interrogation conditions are not met or because of a specificity imposed by the law when dealing with a certain category of persons such as children for example; it is forbidden to the Judicial Police Officer to interrogate them. (1)

The implementation of the detention inspection through the notification is an important function to overcome all the deficiencies which may affect the undertakings made during this procedure, it is a quick and efficient overcoming which allows the concerned party to avoid the bad consequences of an illegal and inappropriate procedure. (2)

There is no doubt that the expected purpose from the detention notification is achieved when it is made with the requested speed. Articles 13 bis and 57 have not provided for the notification means or when it has to be made, which may lead to some negligence or delay in the notification which could deprive it of its efficiency. it is because of this fact that some jurists recommend to activate the notification

procedure so that the purpose of its existence for the operation of an inspection by the judicial authorities as quickly as required can be achieved. (3)

Although the notification of the judicial authorities in charge is provided for by the legal text dealing with the detention, the notification of the administrative authorities, the parent authorities of the Judicial Police Officer in charge, is provided for in provisions and independent administrative regulations aiming at the organisation of the administrative work in the Police and National Guards Stations. Practically, the detention notification is addressed through a notification writ to several authorities including the judicial authority in the person of the Head of the Prosecution and the concerned Examining Magistrate, and the administrative authority, including the Governor, the District and Zone Police and National Guard Superintendents. There is no doubt that the notification of the authorities allow them to step in when it appears that the detention procedure is not legitimate or does not match up with the standards. These authorities are entitled to do so as long as they represent the hierarchical authority of the officer in charge.

However, the expected inspection from the administrative authorities, although it sometimes leads to their intervention, such an intervention is not justified in most of the cases by the detainee's conditions or by up to what extent the legal guarantees are respected, but it takes place in order to respect other conditions relating to the public interest, dictated by security and administrative motives, without any investigation in their serious matching up of the standards from the criminal investigation point of view and the requirements to adopt the detention procedure.

Second Paragraph: The Inspection on the Detention Procedure through the Extension of its Term

The authorities of the initial investigator in the detention procedure seem great. He is entitled, as such, to operate the detention procedure and he has only to notify it. This freedom is limited to the initial term of the detention; however, the Legislator has made the extension of this term for another additional period subject to the intervention of the inspection authority represented by the Head of the Prosecution in two cases, namely the preliminary investigation and the investigation for flagrant cases, and by the Examining Magistrate when the Judicial Police Officer is sollicited by virtue of a judicial action. Articles 13 bis and 57 of the Criminal Procedure Code provided for a written authorization from the concerned judicial authority in order to extend the detention period. There is no doubt that the inspection authority in charge of the extension application must, in all the cases, investigate about how rooted the detention decision is, about its legal legitimacy and up to what extent it is appropriate to the concerned person and to the conditions of the investigation requirement. The intervention, on the occasion of an extension application, allows the survey of the detention conditions in case the detainee is presented together with the application, especially in case of the investigation in flagrant cases. (1) Hence, the authority of the Head of the Prosecution and that of the Examining Magistrate exceeds the guarantee that the detention extension application is grounded to cover an overall inspection of all the conditions that surround this procedure, especially that the Legislator has entrusted the concerned authority, without conditions, with studying the extension issue, which invests it with large prerogatives which translates the legislator's will to extend an overall inspection on the legitimacy of the detention and on the need of the

investigation for such a procedure and the practical conditions to operate it, especially in the presence of the detainee.

However, although the extension order gives the concerned authority the possibility to have an idea about the detention conditions, with respect to its compliance with the conducted investigation, the application of the legal guarantees for the protection of the detainee's body inviolability and the conditions for dealing with the detainees as individuals, entitled to the innocence presumption and subject to a criminal investigation which deprives them exceptionally of their freedom, cannot be covered by this inspection, especially that, from a practical point of view, the concerned authority just delivers the requested written order and, at the utmost, shows a lot of resentment to extend the detention period and reduces it down to one day or two days, especially that the huge volume of work of the Head of the Prosecution and the Examining Magistrate may prevent in most of the cases the fulfilment of the expected inspection function and from submitting the extension application to a real examination authority in these two bodies.

Third Paragraph: The Inspection through the Detention Record

The intention of the Legislator through ruling out the necessity to keep a detention special record signed by the Head of the Prosecution is to find an efficient way that allows the inspection bodies to examine the different proceedings and the surrounding conditions of the detention. It is, as such, a record that accompanies the detainees throughout this procedure. The purpose of its existence is to allow the operation of a serious inspection, liable to unveil the violations and the deficiencies and to limit the liabilities with respect to any arbitrary action carried out during the detention procedure or as a result thereof. Accordingly, several jurists consider this special record of detention as the most important means to inspect the detention regulations. (1) This assumes that the inspection concerned authority reviews this record and checks the existence and veracity of its contents so that to unveil the possible deficiencies and take the necessary measures in respect thereto. This task should be possible to be undertaken by it at any time. It is also entitled to revoke the Judicial Police Officer with respect to all that is related to this record. However, practically speaking, the fulfilment of this inspection task is not possible for several reasons, the most important of which is the non availability of an enforcement method for the achievement of the expected inspection, liable to enable the Head of the Prosecution to examine on a periodical basis the record, or on the occasion of the closure of the investigation minutes which have led to the detention. The huge volume of the work of the Head of the Prosecution prevents him from the systematic follow up of the detention operation through a permanent review of the concerned record.

Besides, the detention record allows the administrative authority, the parent authority to the Judicial Police Officer, to operate its inspection through such a record ; however, in most cases, it is an administrative inspection aiming at coordinating between the actual work and the adopted procedures ; hence, its dealing with up to what extent the guarantees of the detainee have been respected is subsidiary and secondary, (2) although some comparative laws have requested the periodical review of the detention special records by the administrative authority. It becomes clear from the foregoing that the detention record keeping system in the Tunisian Law, does not

offer the practical means to operate the expected inspection which has led to its existence. Furthermore, and even of we assume that this handicap has been overcome, and even if the inspection authority does examine this record, it does not mean that an efficient and real inspection is operated with respect to the conditions of the detainees, because the provisions of Article 13 bis, regarding the record, do not make up a basis liable to give to the inspection authority the possibility to have an overall picture about the conditions that surround the detainee so that it may confirm its legitimacy and its respect of the standards and whether any violation and misuse during the detention have occurred. Indeed, most of the provisions mentioned therein are standard provisions relating to the identity of the individual, the beginning and the end of the detention and the crime, object of the investigation, the beginning of the interrogations and their end, the request for a medical check up or not. All of them are provisions that do not allow unveiling the arbitrary means and the violations to which the detainee may be exposed.

Fourth Paragraph: The Inspection through the Medical Check Up

The Legislator allowed the detainee or one of his relatives to request a medical check up for him The Law dated August 2nd, 1999, made it compulsory to list the request in the detention record. As long as this request is written down on the record, the inspection authority can, in principle, examine the reasons for such a request The attitude to be adopted toward the detainee's conditions, in the presence of a possibility, authorized by the Law, will depend on the outcome of the medical check up. However, as long as we are talking only about a request, the failure to comply therewith by the Judicial Police Officer may not be assessed by the inspection body as a presumption to make reservations on the outcome of the medical check up. If that is the case, we are in front of a simple factual presumption which is not enough to rule out an appropriate decision. However, the medical check up may confirm the health and psychological conditions of the detainee, which could prove to the inspection authority the detainee's inability to continue sustaining the detention conditions. So the inspection authority may either make its best to protect this detainee, namely to extend a special care to him during the detention period or to release him

If the medical report includes a confirmation that the detainee was the subject of a material violence or torture, the inspection by the Head of the Prosecution or even by the administrative authority will be the ground for the liability of the Judicial Police Officers who are in charge of the detention

The above mentioned positive aspects for indicating on the record the request for a medical check up remain, practically speaking, limited, especially that the Legislator has only ruled out the indication of the request for a medical check up exclusively, without making it mandatory to include in the record the outcome of the medical report ; hence, the inspection will cover only the request, which means that the officer in charge of the detention may find several excuses to turn down such a request. He will even try to mention the refusal of the detainee to undergo such a medical check up, which will shift the centre of interest of the inspection authority from this element.

This inspection, which the Legislator has made available to the Head of the Prosecution or to the Examining Magistrate, through the operation of the medical

check up, assumes the actual undertaking by the detainee of the medical check up and the confirmation that he was physically molested or that the procedure did not match up with his health conditions.

SECOND SECTION
THE SUBSEQUENT INSPECTION ON THE DETAINEE'S GUARANTEES

Normally, the detainee looks forward to the end of the detention procedure, even if he is to be delivered thereafter to the judicial bodies, which may lead to his official charging or to the opening of an investigation leading to the issue of juridical warrants in his name. Despite the foregoing, the intervention of the authorities in charge of the subsequent procedure that follows detention allows the elimination of an extraordinary institution which could not offer to the detainee the guarantees extended by the Legislator : hence the subsequent authorities will inspect the works of the initial investigator and his actions during the detention. The end of the detention, from a procedure point of view, means the delivery of the detainee, with the detention and interrogation minutes, to the Head of the Prosecution, in case of the preliminary investigation and the investigation about a flagrant crime (First Paragraph) and to the Examining Magistrate in case of a prosecution (Second Paragraph). However, the subsequent inspection mechanism on the detention proceedings and guarantees, will go beyond the stage whereby the detained is officially transferred in front of the court for judgement (Third Paragraph). The judicial body executes, in the course of its overall inspection, an inspection on the detention procedure and the collected proofs as a result thereof, which can be efficient. However, unveiling the inspection procedure and structures remains linked to specific means provided for by the legislatory organisation of the detention in order to enable the concerned authority to examine the conditions under which the detention and its outcome have occurred.

First Paragraph: The Head of the Prosecution Inspection, after the Detention

The Head of the Prosecution to whom all the reports of the Judicial Police Officers are forwarded, in his capacity as their chief, is in a position to examine all the conditions of the detention procedure, either starting from his review of the minutes produced to him and relating to the procedure itself or through the interrogations resulting from such a detention. Any violation of the detainee's guarantees can be detected through the lack of the requested provisions to be mentioned on the detention minutes, or through the discovery of the violations of the legal deadline for the procedure undertaking, or the discovery of the failure to inform the Head of the Prosecution of the decision to operate the detention. The outcome of the medical check up, executed during the detention and which provides for the exposure of the detainee to physical violence or wrongdoing, for example, makes up a ground enabling the Head of the Prosecution to examine the case directly or to open an investigation in this respect or to transfer the blamed Judicial Officer directly in front of the concerned court for his wrongdoings which are forbidden by the Law. [1] BY examining the interrogation minutes, he will be able to detect their shortcomings such as the absence or the lack of the requested provisions or the contradictions in their contents, in a very clear cut way, or the absence of any party among the confronted suspects, and, in general, anything that is liable to question the veracity of these minutes.

However, in addition to the above, the fact of identifying the detainee's health conditions and of receiving his claims with respect to any physical or moral violation he may be exposed to, supposes a direct contact between the suspect and the Head of the Prosecution or any of his assistants. (1) However, from a practical point of view, it is very scarce that such a contact takes place for several reasons, the major of which is the huge volume of work that this juridical body is executing and its being guided by the direction adopted by the Judicial Police Officers in the investigation, especially that it may be difficult to the Head of the Prosecution to produce legal findings, as long as the violation and misuse of authority presumptions remain groundless and void of any supporting evidence, at least at this level of proceeding.

Hence, the inspection by the Head of the Prosecution, despite its legal utility, suffers from a lack of practical efficiency for purely practical reasons. However, this inspection remains important in view of the large prerogatives he enjoys during the investigation for directing a non suit, the official charging or the ordering of further investigations with the other authorities, which may enable the prosecutor to avoid being bound by an investigation, whose impartiality is questioned, or driven by the suspect's groundless claims. (2)

Second Paragraph: The Subsequent Inspection by the Examining Magistrate

Just like the Head of the Prosecution, the Examining Magistrate enjoys large prerogatives in the inspection of what is taken up on the occasion of the prosecution, the closing of the prosecution and its transfer. The set mechanism allows him to know about the circumstances of the detention and the different conditions surrounding its operation and the interrogations made during the procedure. In his capacity as the initial party in charge, he is in a position to address the shortcomings suffered by the investigation and to correct what he considers as a legal or factual deficiency. He has the largest power to reject investigation findings which, to his judgement, are linked to violations and misuse of authority. However, sometimes, the overcoming of the shortcomings is not possible with respect to some practices such as those affecting the individual's body immunity or his freedom, without a legal motive. There is no doubt, if the Examining Magistrate has reached a confirmation with respect to those deficiencies that he will not hesitate to raise the issue and to transfer the case in front of the public prosecution, in order to make the appropriate decision in this respect.

Third Paragraph: The Subsequent Inspection on the Detention by the Judicial Body

In case the charges are confirmed, the proceedings and the investigations are forwarded to the concerned judging body, in its different grades. This body exercises a general inspection on the detention and on the legal or judicial guarantees secured by the detention procedure or those stemming from the human rights sources, on the occasion of the examination of the accusation brought against the suspect. The judgement process is based on a balance between the innocence proofs and the prosecution evidences. This assumes that the court will come across all the procedure stages through which the investigations, including the initial investigation or the investigation on a flagrant case, or the investigation by virtue of a public

prosecution, have passed. This inspection is extended, first of all, to the collected proofs as a result of the detention, with reference to the investigation minutes that include the interrogations and the confrontations in which the detainee was involved ; it can, likewise, conclude with evidences that privilege the soundness of the charge or confirm the innocence presumption that is extended to the accused until the judgement is delivered. (1) The court studies the evidencing force of the minutes contents, issued during the detention by the Judicial Police Officers. However, in addition to the above, the inspection carried out by the court allows the examination of up to what extent those proofs are impartial and their respecting of the basic rules for dealing with the individuals that are subject to a criminal investigation, and the legal means used for the collection of the evidences. (2)

This combined role, played by the court's inspection on the investigations, covers the different procedure stages, in keeping with what has been set out by the law. The legitimacy of the investigation proofs, collected during the detention, is perceived from the soundness of the procedure itself. As long as the individual's deprivation of his freedom has not taken place as per the legal means, making it an arbitrary detention, it cannot be considered as a legal detention procedure; all that has taken place in its course, such as interrogations, and the drafted minutes, will not be taken into account by the court to back up its ruling.

However, the cases of violating the detention legal guarantees are getting numerous, so much so that they are classified into categories. There are those that relate to the soundness of the procedure itself, they affect the proofs resulting therefrom. There are cases relating to the detention conditions and in particular to the subsidiary effects of the proofs, which leads us to wonder about the extent of the inspection carried out by the court. The question is whether the simple fact of witnessing a deficiency from the point of view procedure or with respect to an Indication provided for by the law, such as the name and the quality of the Judicial Police Officer in charge of the detention, allows the court to reject the proofs resulting from the detention procedure and to overlook the minutes drafted during the detention?

There is no doubt that the reply thereto is linked to the inspection results and the decision ruled out by the court with respect to the possible deficiencies in the proofs that are collected by virtue of the detention. (3)

However, far from this legal exaggeration, in the activation of the inspection, the aspiration to consecrate the human rights gave way to new forms of inspections, occurring subsequently to the detention, endowed with specificities and features.

Fourth Paragraph: Inspection over the Human Rights Structures

By virtue of the order n° 54-1991, dated January 7th, 1991, as amended and which was completed by the order n° 2141-1992, dated December 10th, 1992 (1), the Human Rights Higher Committee was launched. It is under the direct control of the presidency of the Republic, its task is to study the conditions linked to the human rights. It submits every year a report to the President of the Republic about the human rights status in the country.

In view of its special qualification to handle the human rights issues, the committee surveys the cases and institutions that are linked to the human rights with reference to the International Standards. In this respect, Article 2 bis of the Order 1992 gave the President of the Republic the authority to ask the Committee's President to visit prisons, detention centres and the custody places and to analyse the events, to confirm up to what extent the laws and the regulations governing the detention and prisons are respected.

Accordingly, the inspection of the detention regulations and the guarantees pertaining thereto and extended legally to the detainees is included in the prerogatives of this structure, taking care of the human rights. This inspection allows this committee to discover the cases of violating these guarantees and to assess up to what extent the conditions of those detainees are matching up the standards adopted for the individual's basic rights, as per the human rights sources.

This inspection is different from the judicial and administrative inspections which are caused by a procedure or administrative actions bound by special forms and legal restrictions. The Human Rights Higher Committee can, as part of its prerogatives, survey actual situations which are not taken up by legal texts and in relation to which it is not mandatory to take certain actions or to obey to particular procedures. However, such situations do not match the human rights, with all their different sources, and the wide field the intervention covers. Detention can be sound from a legal point of view as long as it complies with the requirements provided for by Articles 13 bis and Article 572 of the Criminal Procedure Code; however, it is operated in conditions that are not suitable from the point of view protection. As it is already known, none of the two articles which govern the detention contains any codification and organisation of the custody, food, cleanness conditions, etc..., which makes it impossible to operate thereto a legal inspection. However, adopting an inspection based on the definitions of the human rights as provided for in the agreements and conventions and the general principles on which they are based, allows to remedy to this legal silence and to raise scientific shortcomings, which makes it mandatory to secure an actual protection to those individuals.

Thanks to the foregoing, the inspection carried out by the Human Rights Higher Committee achieves some special results that cover aspects which are not handled by the judicial structures, especially that this committee derives its authority from the prerogatives of the President of the Republic, which allows, likewise, the overcoming of the shortcomings on a larger scale and in a more fundamental way.

THIRD RESEARCH: THE ISSUE OF INSPECTION ON DETENTION

The Legislator, when ruling out the guarantees extended to the detainees, focused on the protection of the detainees' basic individual rights, when they are subject to this institution, by deciding regulations aiming at protecting the individual's freedom, starting from the exceptional nature of the detention procedure, its period and the immunity of the bodies of the detainees, through requesting a medical check up and concentrating the evidence means to confirm the violations that they may be exposed to, such as indicating the detention and investigation minutes and the necessity to

keep a special record for this procedure and the notification of the Head of the Prosecution or the Examining Magistrate. However, the guarantee rule exceeds the limited framework in which the individual finds himself in, inside the detention centres, to cover the legal means to protect the initial position of the detainee, at the level of the criminal investigation, such as the suspect's enjoying of the innocence presumption, his right to keep silent or to quash the proofs brought against him. Hence, the guarantees extended to the detainee are classified into two types, the first one is relating to the detention conditions, whereas the second type deals with the investigation proofs that are collected as a result of the detention and the operation of the inspection on both of them.

It is therefore up to the point to investigate about the inspection on the detention conditions (first section), then to tackle the inspection on the collected proofs as a result of the detention (second section).

First Section: Inspection on the Detention Conditions

The danger of the detention, as a procedure, comes from the results that are brought forward, based on the situation of the individual, when this detention is coupled with violations and misuse of authority that affect the individual's pride, his freedom and his body safety. This particular predicament resulted in a lot of questions about the detention as an institution at different levels. Many jurists consider the detention as part of the criminal investigation procedures that does not justify the existence of the presumption of innocence, which requires to leave the accused at large during all the judicial dispute stages. Detention, according to some, bears some speculation about the individual's ignorance of his freedom or his fears of the police [1] A lot of jurists have called therefore to cancel for good the detention institution. [2]

These opinions, which reject the recourse to detention, although they somewhat exaggerate in some cases, when judging a criminal institution which is, in most of the cases, imposed by facts, in compliance with the investigation requirements; seem to be justified by the danger surrounding the institution and which the researcher finds even outside the juridical studies.

The laws under their different shapes, do include, some reservation of a divergent importance, about the detention procedure and they compete among themselves in finding means liable to prevent its awful consequences on the individuals. So they tried to secure serious guarantees that mitigate the effect of the procedure and which were applied to the individual's basic personality. [1] Furthermore, jurisprudence, despite its limited intervention, bases most often its reservation about detention on the fact that the individual, subject to this institution, enjoys the innocence presumption which protects him throughout the investigation proceedings [2]

At another level, the fact that the detainees are supposed to be innocent means that they cannot be subject to any form of oppression. This particular point of view was expressed by the Criminal Division at Sfax Court of Appeals, in a clear cut way, when it ruled out that "the suspect, in front of the law, is innocent until his culpability is confirmed by conclusive evidence and by strong proofs and not by ill treatment ... [3]

However, the detention conditions, object of the inspection, may bring forward a very special reality, especially in view of the large possibilities in exploiting these conditions and subordinating them in such a way that may contradict with the guarantees extended to the detainee, but without representing a violation of the legal requirements ; the fact of speaking loudly during the investigation or depriving the detainee of cigarettes, sleeping [4], has not been covered by the provisions of Article 13 bis, but it may, from a practical point of view, lay down the basis for an efficient inspection that covers the detention conditions as experienced by those individuals in the detention caves and centres, but which are not so obvious when reading the legal texts.

The structures in charge of the human rights have treated the detention institution in a special way, which is due to the delicate aspect of the issue and its importance. Such a procedure includes some practices and imposes situations that overlook the most fundamental rules for the protection of the individual's rights, not as a person subject to criminal investigation only, but also as a free human being, so much so that the detention centres have become one of the important fields for the intervention of those structures. [1]

It becomes clear from the foregoing that the consecration of the detention as a procedure required by the criminal investigation is endowed with a special delicate nature, that covers the proceeding system and the criminal policy as a whole. It requires the search for protection means that set out limits to the detention procedure and imposes on those in charge of its execution restrictions. So the Legislator adopted a set of regulations and provisions that secure guarantees to the individuals, subject to a detention ruling. The inspection tool was an excellent means to reach this difficult equilibrium However, inspection, in itself; may lead to another issue relating to the study of its efficiency, since it comes across a lot of obstacles that hinder its enforcement. The problem faced by inspection is how far the detention conditions can be open to inspection (first paragraph) so that its results will not be limited (second paragraph).

First paragraph: How open the detention conditions are to Inspection

The first obstacle encountered by the attempt of exercising an inspection on the enforcement of the detention decision is basically the law providing for such a possibility and which enables the concerned authority to operate this inspection. The detention legal setting is required by Articles 13 bis and 57 of the Criminal Procedure Code. They both included a restriction to the procedure, as far as the possibility to recourse to it and its terms are concerned. It imposed several controls on the Judicial Police Officers in this respect. However, none of the articles has regulated an inspection mechanism in a detailed manner. The intervention of the Head of the Prosecution and the Examining Magistrate, In case of a public prosecution, is a procedure Intervention extended by the authorities in charge of the detention. However, such an intervention does not allow them to analyse the detention operation conditions.

There is a practical gap between the procedure data, as recorded on the detention record and its minutes, and the reality of the detainees in the custody centres, which cannot be subject to such an inspection. The detention conditions are not simply the

provisions included in the minutes drafted by the concerned authority, or the detention notification or its extension, but should translate the situation of the detainee as an individual living in special conditions, undoubtedly, from the point of view lodging, food, sleeping, undergoing some investigation in special circumstances and over a certain period of time. All these elements remained outside the legal text and accordingly, outside the scope of inspection. One may refer to the human rights sources, in their different organisations, in order to come across the basis of a "serious" inspection. These sources provide for general principles that may cover this edgy issue, especially that finding structures in charge of their enforcement may lead to the overcoming of these practical obstacles and the discovery of a truth that matches up the situation of the detainees with the minimum set rules for the human rights All the more so as all these sources authorise this kind of undertaking. (1)

In our opinion, the problem of how open the detention conditions are to inspections is not faced by a complexity at the level of the operation of the inspection, from the point of view legal texts or needs. It is relating to the specificity of the procedure and the recourse to it, as part of the preliminary investigation which still remains a factual, analysing stage in order to collect the proofs, and which ignores the actual features of the criminal procedures. Furthermore, the governing organism, in the person of the Judicial Police Officers, is a special organism that is surrounded by security considerations with all their various suspicions and misgivings. The Police and the National Guard Officials and Agents treat the incident within the framework of a security situation which must be addressed quickly, in an efficient way.... These motives mean a relaxation of the outside inspection authority in dealing with the specificities of this kind of work.

Hence, the reality of the detention conditions is kept under silence when executing an inspection. However, these conditions may respect the law and even the basic human rights rules, but they are not appropriate to the concerned individual. The exposure of detention to inspection is double folded. The first aspect brings along a legal possibility to operate a various inspection on the procedures and the means to execute them. The second aspect unveils a practical shortcoming in extending this inspection to feel the actual situation of the individual in the detention centres.

Second Paragraph: The Limits of the Results of the Inspection on the Detention Centres

In front of the relativity of the exposure of the detention conditions to inspection, the part of these conditions that are subject to this inspection, remains vulnerable, with respect to the possibility to improve the detainee's situation and to the binding attitude of the Judicial Police Officers authority. Inspection allows the discovery of the suffered deficiencies in the enforcement of the guarantees extended to the detainees and the misuse of authorities that are liable to occur in the meantime. However, relying on the role of the inspection systems, in this respect, may dwindle as long as the results coming from such an inspection remain limited from a practical point of view considering the expected role it has to play in taking away the detention outside the frame of arbitrariness and violations under their different shapes.

The Head of the Prosecution and the Examining Magistrate as an authority that is entitled to put this legal institution under its control, encounters without any doubt,

some limitation in its prerogatives to take the necessary action when it comes across such a deficiency since, as already mentioned before, several deficiencies are outside the scope of the inspection. Furthermore, the violation of the provisions relating to the detention and which represent the guarantees extended to those individuals will not lead to serious results to catch up for what the detainee has suffered. The question in this respect is how the Head of the Prosecution or the Examining Magistrate reacts when discovering some violations of the statements that must be incorporated in the detention or the interrogation minutes or even when he discovers that he has not been informed of the detention procedure itself. There is no doubt that the required accuracy in the proceedings obliges him to raise the issue of examining those violations with the concerned Judicial Police Officer or even his parent administrative authority. [1] Then, he will be forced to take up again by himself all the executed works or to trust them to another authority. Irrespective of the sanction that he may have to rule out, the proceedings cannot be of any use but, on the contrary, it will disturb his undertakings. From a practical point of view, this practical solution can even be an excuse to extend the detention period whenever it is possible. If the extension of the detention term is not possible, the case may be brought in front of the competent court in order to assess up to what extent this deficiency has affected the proceedings.

At another level, the inspection imposed by the Human Rights Committees and their raising of the occurrence of eventual violations and misuse of authority will not lead to concrete results in catching up for the wrongdoings suffered by the detainees and it will not also allow the recovery of what the detainee has lost or has suffered as a result of a misuse of the authority, although the simple raising of the issue will be fair enough to the detainee and paying a respect to himself and his rights. [2]

There is no doubt that making up for some of the violations, especially those related to the individual's freedom, his physical security and honour, may be impossible because there is no way for the detainee to go back to the same conditions he was in before the occurrence of those violations. May be the political orientation, aiming at allowing the individual, who has been deprived of his freedom by virtue of criminal proceedings, then, proved to be innocent, to have a fair compensation, mitigates, to a certain extent, the impact of those violations on the victim and will activate the inspection that must be operated on the detention conditions. [3]

SECOND SECTION
THE INSPECTION ON THE PROOFS COLLECTED AS A RESULT OF THE DETENTION

The detention is a procedure leading to depriving the suspect of his freedom for a certain period in order to interrogate him as part of the proceedings that are meant to discover the crime. Hence, the recourse to the detention is justified by the needs of the first criminal investigation carried out by the Judicial Police Officers. The Legislator in Article 13 bis of the Criminal Procedure Code [1] has provided for the foregoing. The recourse to the detention measure aims at collecting the proofs for the

criminal prosecution which will serve also to direct the charges, then, to back up the indictment or the innocence of the detainee.

The investigations carried out by the Judicial Police Officers, whether when they take up the preliminary investigations or when they investigate in flagrant case or when they enforce a judicial action delivered by the examining magistrate, are more of inquisition nature, based on facts which are used as a starting point for a criminal proceeding. Accordingly, they are not subject to an accurate legislatory attention. These investigations are part of the prerogatives of the judicial police and will be forwarded to the Head of the Prosecution. However, the situation is different in case the investigation is initiated by virtue of a legal prosecution which includes some derogation from the Examining Magistrate to this body in order to carry out part or all of the investigation work under his orders and control. The recourse to the detention at this stage of the proceeding is dictated by the investigation requirements so that the investigation can take place in adequate conditions and allows the interrogation of the suspect and his easy confrontation with other parties. However, reality may sometimes prove that this cause is jeopardised by the adopted practices when detention is transformed into a means to extend a special treatment to the concerned person in order to extract vital evidences in favour of the prosecution, using all means and ways, whether authorised or not. Hence, confessions are extracted by force, against the detainee's will and are included in the interrogation minutes according to the investigator's discretion. All the foregoing makes a violation of the principle of fairness in the criminal investigation. However, and irrespective of the consequences that this kind of situation will entail to the detainee and to the purpose for the operation of the detention institution itself, the most serious danger is the impact of the violations that are committed during the detention on the public prosecution proceeding. Hence, this contrary meaning given to detention makes up a major concern to the jurisprudence [2] and the judges [3] and the only way out from this predicament in view of the necessity to go for detention in some cases, is to organise an efficient inspection not only on the procedure itself but also on its outcome, including the proofs that will accompany the public prosecution in its proceeding and will chase the suspect during the proceedings' subsequent stages.

An efficient inspection and a serious examination are the means adopted by the different regimes with respect to the proofs resulting from detention. In providing for this inspection, there is a confirmation of the necessity to rely on the initial authority in order to bring things to normal. The judicial authority is first and finally responsible for the truth outcome and the truth forging. Accordingly, some of the regimes have hesitated to make the judicial structures which intervene in the public prosecution a guardian of the proofs. [1] Hence, we should examine the inspection carried out by the Head of the Prosecution (First Paragraph), by the Examining Magistrate (Second Paragraph), and by the court (third paragraph) on the proofs produced during the detention.

First Paragraph: Inspection by the Head of the Prosecution on the Public Prosecution Proofs produced during Detention

Although the Legislator has granted to the Public Prosecution the prerogative for deciding the investigation outcome, in accordance with the matching principles, the

undertakings of the judicial police end up in all the cases in the hands of the head of the prosecution, so that he may examine them and decide what he deems appropriate [2] The targeted examination in this respect has several phases, starting from the different decisions that are taken by the Head of the Prosecution in this respect. The decision to transfer the case in front of the concerned court or to open an investigation is always based on the presence of presumptions and on the data included in the first investigation and which favour the possibility of the suspect's committing a well established crime, punished by the law with reference to the deeds referred to in the investigation report The non suit ordering may be based on the lack of evidence which means there is no minimum proof in order to direct the accusation and to order thereafter the transfer of the case in front of the competent court.

It becomes quite clear from the foregoing that the Head of the Prosecution appreciation is always based on the preliminary investigation which makes up the unique grounds for the decision to make; however, as long as the soundness and fairness of these investigations are questioned, the soundness of the prosecution decision, based thereon, becomes doubtful. Hence, the inspection must also cover the preliminary investigation [1] so that to avoid basing the decision to transfer the case or to direct a non suit, on false grounds. So does the Head of the Prosecution really undertake this inspection?

There is no doubt that the legal possibility to play this role remains open, considering the large powers invested by the Legislator to the Head of the Prosecution. However, one must consider some legal data, the first being that the Judicial Police Officers are public officers supposed to be fair, trustworthy, and that their undertakings should be in compliance with the law. [2] The minutes drafted by them are supposed in all the cases to be true until the contrary is proven by conclusive evidence, as part of formalities and by virtue of procedures that are limited by the Law. [3] Furthermore, the factual data assume that the violation cases of the fairness principle remain limited and scarce. However, in any case, the inspection by the Head of the Prosecution remains necessary. This body operates an overall inspection on the undertakings and the minutes that end up to it and will not hesitate to take the appropriate measures, when it appears to it that there are some doubts about the veracity of their contents. It is part of its duties to take the necessary precautions in this respect, using several means such as carrying out again the investigations conducted by another party or to hear the suspect himself.

The specific feature of the fairness issue in the preliminary investigations, as far as the public prosecution is concerned, is based on practical grounds, which suppose the combination of presumptions and proofs that favour the decision to transfer the case to the court, or to open an investigation. These data and grounds are combined and collected to justify the necessity to go for such a decision. When either of them lacks fairness, it means that the chances to affect the prosecution's position remain slim

Second Paragraph: The Inspection by the Examining Magistrate on the Proofs collected in the course of the Detention

The undertakings of the Judicial Police Officers, by virtue of the legal prosecution, end up, when completed, in front of the Examining Magistrate. Irrespective whether

the prosecution is limited to the undertaking of some special or absolute proceedings, covering the different works, needed for the investigation, the body in charge, shall conduct the investigations, in order to use them in the case examination works and in particular in order to draft the end of investigation decision. The Examining Magistrate exercises an inspection on the investigations which have been executed so that he can make sure that they comply with the object of the prosecution and the charges object of the investigation, that they cover the concerned individuals and that they match up with the general framework of the investigation file.

There is no doubt that the Examining Magistrate, as a civil authority, enjoys large prerogatives in dealing with the undertakings of his nominee, since he inspects their efficiency at the level of the course of the investigation and their formal compliance with the set standards, as well as their fairness, by checking the soundness of the investigation minutes whether they include interrogations or confrontations or surveys or other. The Examining Magistrate will not hesitate to reject any investigation work as long as he entertains any doubt concerning its validity. Confession for example, with the Judicial Police Officer, as long as it is not backed up by convincing proofs, will not prevent the Examining Magistrate from pursuing the search for other evidence and even start again from scratch. One cannot imagine that the investigation body, in any case, is bound by the outcome of the investigations made at the level of the Judicial Police Officer.

It becomes clear from the foregoing that the inspection on the proofs produced during detention are subject, just like any other evidencing means, to the absolute appreciation of the Examining Magistrate, to decide whether to consider them or to reject them in accordance with the legal framework of the investigation, in an independent way, backed up by large prerogatives, in guiding the investigation and collecting the proofs to set up the grounds for the results listed in the end of investigation report.

Third Paragraph: the Inspection by the Judicial Body on the Proofs of the Prosecution collected during detention

The traditional role played by the criminal court is to strike a balance between the different proofs, out of which the prosecution may favour some for the commitment of the crime object of the case transfer, and some others will be allocated to the assumed innocence, for every person as part of a presumption, which is fundamental in the Criminal Law.

This role requests the judicial body to exercise an accurate and overall examination that covers all the different conditions of the investigation and the adopted proceedings. Although these data set up the grounds for a balance between the value of the evidencing means produced by the social body, upon the request of the Public Prosecution and those presented by the accused in order to favour his innocence, they leave some special issues unanswered. The recourse to some institutions, adopted during the different proceeding stages, offers an excellent basis for the court's assessment of the produced proofs. In this respect, the recourse to detention, as a temporary procedure, needed for the preliminary investigation, requires from the court to consider the conditions in which the proofs are collected and to inspect up to what extent these data match up with the fairness principle at the

preliminary investigation stage and their compliance with the legally set conditions for the evidencing means produced during such a stage. (1)

Acknowledging that the court has an authority to inspect the validity and the fairness of the collected proofs, by virtue of the detention, through its initial authority in assessing the value of these evidencing means, allows the judicial body to extend its authority to the different aspects of bringing the evidence, starting from the means to reach it, the conditions of its notification, up to the listing and the confirmation of those means during the stages subsequent to the criminal proceeding. (2)

However the circumstances leading to the collection of proofs during detention are often affected by facts which require the granting of an absolute authority to the initial courts. This conclusion was reached the French jurisprudence when it gave complete freedom to the court in assessing the legal validity of the conditions and the fairness of the proofs, object of the investigation, requesting the operation of the detention. (3)

CHAPTER II
SANCTION FOR THE VIOLATION OF THE DETAINEES' GUARANTEES

The ruling out of legal guarantees to the detainees is part of a legislation policy aiming at the protection of the basic human rights of the individuals and surrounding them with an efficient protection, considering their situation, whether special or exceptional, within the framework of a legal institution capable of depriving them of their freedom on temporary basis, as a guarantee for a good and a smooth running of the criminal investigation. However, the provision for such guarantees inside the legal texts is not enough in order to confirm their respect and their enforcement, which leaves the basic rights of the concerned individuals exposed to violations affecting their freedom, their body immunity and their situation in the investigation as persons covered by the innocence presumption. The concern, over the practical violation of the legal guarantees is greater when we are talking about a procedure stage which has its specific features, since it is directly linked to the Judicial Police Officers in view of the security motivation they bring along and the special means used in the investigation, and also in view of the fact that the preliminary investigation may take place outside the criminal proceedings in their strict meaning. The existence of some means to inspect the detention procedure, may be a guarantee to limit the law violation and to secure the expected efficiency from the existence of these legal guarantees, especially that the inspection measures and the structure of such an inspection are various and may authorise the operation of an efficient inspection touching the different conditions of this institution and laying down the basis for an efficient protection of the detainees' rights.

However, the existence of a legal guarantee and the operation of an inspection in order to materialise it, from a practical point of view, will lead to talking about the sanction provided for, in case a violation is made thereto, and for the misuse of authority resulting from its application. Generally speaking, in criminal issues, and as far as detention in particular is concerned, the consequences resulting from such violations are more serious for two reasons at least. The first reason is that the criminal investigation, whenever its soundness and fairness are questioned, affects the balance of the procedure stages, including proceedings and judgement and will lead to consequences that cannot be, or that are difficult to, overcome. The second reason is that the nature of the possible violations in the detention institutions affects the individual in his personality, his body and his psychology. The violations represent, as a matter of fact, transgressions of basic rights highly ranked by the modern substantive law.

The criminal investigation and the detention may provide an opportunity to an aggression prohibited by the Law and considered as a criminal offence, to which the institution keeps silent, making hence an authorisation for violations that are not justified. It likewise deprives the individuals' guarantees of their contents, the reason for their existence. So the investigation authority allows itself what is prohibited to the others. Hence, the question of sanction for the violation of the provisions of the guarantees extended to the detainees is of great importance as it affects the efficiency in legislating the detention institution, the reason behind the ruling out of these guarantees and the efficiency of the inspection ways and means imposed on this procedure.

In order to examine this sanction, one should make the difference between the sanction on the undertakings (first case) and the sanction imposed on the offender (second case).

First Research: Sanction imposed on the Undertakings: Nullity

The existence of the detention, as a legal institution, is justified by the needs of the criminal investigation or by what is considered by the Legislator as the requirements of "the investigation necessity". This procedure is included in a proceeding stage whose purpose is to look for criminal prosecution proofs. The detention has recourse to all these proofs in order to allow the judicial authorities to dispose of clear data so that it can assess the necessity of the proceeding, at a first stage, then to back up the transfer in front of a court, the drafting of the bill of indictment or the proclamation of a non suit. The detention ends up with a set of undertakings, included in minutes that are issued along with the criminal investigation, in its different subsequent stages. The influence of the detention on such undertakings is efficient. Indeed the minutes drafted on the occasion, often translate the preliminary investigation stage conditions. Asking questions about the end use of these undertakings, when it is confirmed that some deficiencies have affected the procedure, is, as a matter of fact, a confirmation of the impact of these undertakings on the decision that the prosecution, the judgement and sanction may bring along

However, looking for answers, encounters several complex issues, the most important being the expected gap between studying the problem and the ruling out of a decisive sanction for the possible shortcomings. The reply, providing for the necessity to stop the law violation, by virtue of the failure to respect the guarantees extended to the detainees, is faced by practical difficulties coming from the gravity of the issue, the specific nature of detention and the outcome of the public prosecution. One is therefore bound to study the possibility of ruling out the nullity sanction (first paragraph) then to take up the possibility to enforce this sanction (second paragraph).

First Section: The possibility to rule out the nullity sanction

The efficiency of the legal guarantees extended to the detainees is related to the necessity to set out a decisive and efficient sanction in order to overcome the consequences of the deficiencies, affecting these guarantees, on the situation of the individual, his basic rights and in particular on what it is related to the criminal investigation. The Jurists [1] are inclined to accepting the efficiency of the nullity sanction in facing such shortcomings which are often based on practical violations of the rights and the guarantees brought forward and reasserted by the law. The decision to rule out a punishment, at this level, pushes the Judicial Police Officers in charge, to be more attentive to the respect of the law and to abide by what it has extended to the individual. Nullity alone is the guarantee to erase the impact of the undertakings executed during the detention, together with the defects pertaining thereto. The set of guarantees ruled out by the law, with respect to detention, as part of the requested proceedings to operate a detention, such as its notification to the concerned parties, the limitation of its terms or the nomination of the people in charge of its conducting, and the procedures adopted during its terms, such as the keeping of a detention record, the possibility to apply for a medical check up, and the

mandatory indications in the minutes relating thereto, means, if they are in-existent or if they suffer from any shortcoming, the exclusion of the detention institution from the framework set out by the Law for its legitimacy. This situation leads to questioning the legal validity and the soundness of the undertakings and the minutes drafted in the meantime. So, declaring them as null becomes an issue imposed by the provisions and the efficiency of the existence of such guarantees.

The protection measures, ruled out in favour of the detainees, by the Law, are closely related to the outcome of the conducted investigation. However, the issue of nullity, despite its being clearly a sanction for the violation of the guarantees extended to the detainees, requires basically a law authorising the recourse to the detention by the courts which remain the party responsible for the protection of the individuals' rights in general and the person implied in a criminal investigation, in particular. Furthermore, the detention specific nature leaves the nullity of the undertakings resulting from it, a case for dispute, and one is therefore directed towards examining the obscure legal grounds of nullity [(1)], then studying the argument about the exposure of the detention undertakings to nullity.

A – The Obscure Legal Grounds of Nullity

If the legal grounds for the nullity of the undertakings and procedures, executed during detention, which include a violation of the legal requirements, are clear to some extent, in the comparative law, the Tunisian Law has kept things obscure and unclear in this respect. The articles governing detention, its conditions and proceedings do not include any sanction for the possible deficiencies. Even if one refers to the general provisions of the criminal provisions, in a search for the nullity grounds, one encounters difficulties in interpreting the provisions of Article 199 of the Criminal Procedure Code (CPC).

Article 199 of the CPC was included in Section 10 under the Heading "Nullities". It provides that "are considered as null all the undertakings and provisions that are contrary to the texts relating to the public order or the basic criminal rules or the accused legal interest".

The Jurists did not agree about the interpretation to be given to this text. Some of them find in its general aspects the freedom of the judge to limit the nullity cases and the objective of this nullity. Others consider that the general nature of the text is intentional, selected by the Legislator as an excuse in order to avoid clear cut provisions about nullity in case the detention requirements are not respected.

This general nature of the text left the possibility to order the nullity sanction uncertain, since the proclamation of the detention and undertakings nullity resulting therefrom, requires the listing of the shortcomings it suffers from among the cases provided for by Article 199, above mentioned. These cases are three : the first one being the violation of the texts dealing with the public order, although the definition of the public order remains unclear in the substantive law, in general, and the criminal law, in particular, the limitation of the legal provisions it includes raises a special difficulty, namely that the Tunisian jurisprudence often evades the issue of tackling such kind of questions. The Supreme Court of Appeals examined a case wherein nullity was requested for the violation of the detention legal deadline. The Appellant

considered that there was a violation of some provisions relating to the public order. However, the Supreme Court of Appeals quashed the plea based on the fact that the case file did not include any evidence proving that the custody period of the accused, during the detention, exceeded its legal deadline. At another level, several Jurists of the comparative law consider that some of the guarantees extended to the detainee include provisions that are related to the public order, such as the failure to respect the detention deadline.

However, the jurisprudence attempted to determine the definition of the public order as being a set of essential principles and basic rules which guarantee the successful running of the criminal system. President Salah Trifa considers that the public order provisions are usually set out for a general judicial purpose, without being directed basically towards protecting the accused interest, although they have covered such an interest in a subsequent manner.

The second case for the regulation of the nullity sanction, with reference to the provisions of Article 199 of the CPC, is the violation of the basic procedure rules. Such rules include all the procedures that govern the conducting of the public prosecution. The jurisprudence makes a difference between the basic procedures and the procedures relating to the practical means. Considering the fact that the detention procedure is part of a concerned criminal stage, one cannot imagine that the violation resulting from the detention can be covered by this case in the nullity sanction regulation, because, as we already pointed out, the preliminary investigation cannot be considered as a pure criminal procedure.

The third case in the Legislator's opinion for the nullity of all the procedures and judgements is in contradiction with the legal interest of the accused. The used expressions suggest that the sanction was ruled out by the Legislator to protect the accused, when he is deprived of a possibility that serves his interests and which is granted to him by the Law. We are talking here about a protection measure for the accused.

The Court of Appeals considered that the nullity resulting from this measure is relative nullity and consequently requires that the concerned party should stick to it, contrary to the last two cases listed in Article 199, above mentioned, whose existence should lead to the absolute or mandatory nullity.

If the study of the provisions of Article 199 does not offer a clear cut basis for the ruling out of nullity, a sanction imposed on the undertakings executed by virtue of the detention and which include a violation of the secured guarantees with respect thereto, the general nature of the cases listed in the above mentioned article allows the acceptance of such cases to operate this sanction on a group of possible violations occurring during detention. The coverage by the said article of the undertakings and provisions provides a basis to the courts in order to adopt this position. Hence, to our mind, the position of the Court of Appeals was not sound and did not respect the provisions of the text itself when it considered that the target nullity covered only judgements.

B – The exposure of the detention undertakings to nullity

As long as the legal basis to rule out nullity refers to a legislatory text or to the jurisprudence appreciation, the centre of interest is shifted towards a new handicap which is the exposure of the detention undertakings to nullity. Some Jurists consider that there are some legal and practical difficulties to make the undertakings, resulting from the operation of the detention, subject to nullity, whenever they have proven to be illegal.

The reason for this difficulty is the nature of detention itself which remains, according to some, outside the scope of the criminal procedures in their strict meaning. Detention is not a pure procedure work so that it may be declared null if it is not carried out according to the standards. It is a strange police management of the precise technical prosecution works. It is hence an internal organisation procedure for works and studies to be conducted by the Judicial Police Officers and the failure to respect its requirements does not require the nullity of the work resulting therefrom nor the investigation it leads to. This trend is supported by the flexibility of the provisions governing detention and which remain in most of the cases a large field for the appreciation of the Judicial Police Officer in charge of the investigation. It is he who decides whether the procedure is appropriate with reference to the requirements of "the investigation necessity". He is also the party who determines the length of the detention period within the legal restrictions. The Judicial Police Officer is authorised to select the interrogation conditions from the beginning to the end and manages the interrogation according to his discretion, as well. There is no doubt that this flexibility is opposite to a sanction as serious as nullity since it aims at serving the interest of the investigation and the nullity of the undertakings may strip the preliminary investigation off its efficiency and affect the course of the criminal case. This attitude has limited the nullity sanction to the deficiencies, witnessed in the form, without considering the core of the undertakings executed during the detention or on its occasion.

At another level, it seems that the nullity sanction is opposite to the purpose of operating an inspection on the detention, especially the judicial inspection which authorises its systems to adopt the adequate measures in order to overcome the possible shortcomings in the detention procedure. The Head of the Prosecution can withdraw the investigation from a concerned party in the judicial police and assign it to some other party. The Examining Magistrate enjoys also the same right and, in addition, can proceed with the investigation himself. This positive intervention of the Inspection authority in the detention can, when the nullity sanction is ruled out, make do without the violation of the requirements set out by the institution. This jurisprudence trend goes along with the position of the jurisprudence in the comparative law and especially the French Law which stuck to a clear rejection to cancel the illegal detention measures. It is a basic rejection declared by the French Court of Appeals since 1959, based on the fact that the detention provisions were considered as a mixture between reality and the law.

The same court explained in 1960 that the violation of the detention procedures did not in itself entail the nullity of the procedure undertaking as long as it was not proven that the search for the truth and its unveiling was substantially deficient.

However, sometimes the French Supreme Court of Appeals finds protection behind the fact that the issue relates to facts that are not subject to the law court, so as to avoid debating about the nullity admission as a result of a violation of the provisions pertaining to detention.

The French Justice attitude with respect to a sanction for the violation of the detention procedure bears, implicitly, an acknowledgement of the difficulty to nullify the undertakings resulting from the detention institution, from the point of view principle, and the possibility thereto from a legal point of view, which remains an open topic for discussion, however the application of the nullity sanction on those undertakings is not void of a similar provocation.

Second Section: The possibility to apply nullity sanction on the Undertakings resulting from Detention:

The reason behind putting aside the possibility to apply the nullity sanction on the detention undertakings is their specific nature if compared to the other procedures which are adopted during the criminal investigation or on its occasion. The jurisprudence acknowledges the necessity to allocate special provisions to detention which govern it and provide for the necessary sanctions to be delivered in case of its violation.[1]

On can consider the provisions governing the detention institution and their complexity, a handicap for the delivery of a clear cut sanction in case they are violated. None of the governing articles has included or organised the sanctions, which means that we have to detail the different cases for the violation of the guarantees extended to the detainee, by virtue of the law. Accordingly, on has to rely on the criminal general provisions and to have recourse to the sanction that is required for any violation of the legal guarantees.

In order to examine this, one should limit the nullity cases (first paragraph), then study the effects of the nullity on the public prosecution (second paragraph).

First Paragraph: The Violation Cases requiring Nullity

The organisation of the detention institution has led to the availability of a set of guarantees as explained hereabove The purpose of such guarantees is to lay down requirements and conditions to operate the detention which may prevent the occurrence of the violations and the arbitrary practices.

These guarantees aim also at securing a minimum level of trust and fairness in the preliminary investigation works, imposed by detention. Hence, it seems more appropriate to study the nullity sanction with respect to the detention procedure itself (A), then, the nullity of the works resulting therefrom (B).

[1] Cf. for example Bouloc : "Les abus en matière de Procédure Pénale" R.S.C. 1991, p. 211

A – The Nullity of the Detention Procedure

The codification of the detention has required the availability of conditions and formalities when there is recourse to it. Since Articles 13 and 57 of the Criminal Procedure Code (CPC) remained silent with respect to the required sanction in case f a failure to respect these conditions is recorded, it is proper to ask questions about the possibility to refer to the sanction nullity as provided for by the general provisions of the criminal proceedings, in order to rule out the sanction nullity.

There is no doubt that the reply thereto requires the thorough knowledge of all these conditions in order to find out any provision therein liable to lead to this nullity.

1. The Violation of the Condition providing for the necessity to go for Detention

The Legislator sets as a condition the investigation requirements for the operation of the detention. This condition is confirmed by the provisions of Article 13 bis, which should be included among the legal and serious guarantees extended to the detainee and which relate to the soundness of the procedure itself, since it relates to the corner stones of the detention institution. In case the detention institution is referred to, whereas there is no necessity for it by the investigation, we are in front of a basic violation that should lead to nullity based on the provisions of Article 199 of the CPC since the violation of this condition relates at the same time to the basic procedures and to the legal interest of the accused.

However, this strict attitude, in dealing with the violation of a core condition in the detention, in such a way, may encounter several obstacles which prevent from applying the nullity sanction The assessment of the availability of the investigation necessity condition cannot be based on firm standards that allow its identification and accordingly, one can analyse up to what extent it has not been respected. Furthermore, the preliminary investigation, or the investigation in a flagrant case or the investigation carried out by a special legal proxy from the Examining Magistrate, is a special stage in the investigation procedure which does not allow the different parties in charge to seriously grasp the soundness of the investigation guidelines, its different undertakings and consequently assess the necessity to adopt a certain procedure.

As long as the investigation necessity condition is an element to prove the soundness of the detention procedure and an exceptional guarantee extended legally to the individual, the flexibility when assessing the availability of this condition prevents the operation of this sanction.

2. Violation of the Obligation to Notify the Detention

The article governing this topic required the notification of the procedure to the different parties. The notification of the Head of the Prosecution and the Examining Magistrates of the recourse by the Judicial Police Officers to this procedure, makes up a notification to the judicial body which is concerned by the above mentioned institution. Although this notification makes up a guarantee to the concerned individuals, as mentioned hereabove, it seems that the pure mandatory nature of

such a notification was laid down in order to organise the work and the coordination between the different concerned authorities, in addition to the guarantee to enforce the other guarantees, without ranking up as an independent protection means which would lead to the nullity sanction in case of any violation thereof. The failure to notify the Head of the Prosecution or the Examining Magistrate, although it makes up a violation of the law, it does not meet all the requirements set out for the detention nullity. On the contrary, the fact of notifying the detainee of the decision taken against him, affects directly the situation of the individual concerned and is of importance to get to know about his status, his rights and guarantees during the detention. This may lead to declaring that the above mentioned procedure is of a special importance in the protection of the detainee which allows us to claim the nullity of the procedure if this formality is not respected [1] However, nullity, in this respect, may face the obstacle of bringing in the relating evidence, so how can the injured, through the violation of the obligation to make the notification, prove that he was not informed of the same. Although Article 13 bis made it mandatory to indicate such a notification on the detention minutes, this does not change the possibility of proving the contrary.

Hence, the nullity admission faces in this case the obstacle of the existence of serious chances to bring in the evidence thereto, especially that the detention minutes and its contents remain a solid proof to quash down any contrary contention. At another level, the article governing detention sets out for the obligation to notify the family of the recourse to this procedure. The Legislator obliged the Judicial Police Officers to mention it on the detention minutes and on the record reserved to this end. Although this kind of notification avoids to the detainee himself and his family the consequences of an unexpected procedure, however, its violation remains possible and it is legitimate to ask about the necessary sanction provided for in this respect.

There is no doubt that the importance of this notification in limiting the consequences of the detention on the individual and his family, means the necessity to declare its nullity if a violation is made to such a notification, since detention in this case, is contrary to some procedures imposed by the law, which will lead to violating a mandatory procedure which the Legislator sets as a protection to the individuals and his relatives against an unexpected decision to operate this institution. Accordingly, nullity can be proclaimed based on Article 199 of the CPC. However, the obstacle of bringing in the evidence prevents the enforcement of a similar sanction, considering the difficulty of proving the contrary and the keeping of the opposite party, namely the Judicial Police Officers, of decisive evidence proving the contrary.

3. Violating resulting from the failure to respect the detention term

if one studies the detention guarantees, one can confirm that their importance "is to limit the detention period". Since the codification of the institution in 1987, this procedure has become possible within limits and restrictions in time, imposed by the Law, starting from the determination of the initial period then the ruling out of the period procedures for any extension thereof. There is no doubt that the Legislator's firm intervention in this respect, contradicts with the fact that the detention institution goes beyond what is authorised by the text. Any suspected detention for a period exceeding 3 days, without any order for an extension is undoubtedly an arbitrary detention, as long as it includes a violation of legal restrictions.

In principle, the failure to respect the detention period implies its nullity and the nullity of the works resulting therefrom. One has recourse, in this respect, to the provisions of Article 199, in order to declare nullity as long as they make it clear that the violation of the detention period is a violation of the public order regulations and the accused legal interest, since depriving the individual of his freedom is automatically arbitrary as long as it is not legally backed up and motivated.

Although the Supreme Court of Appeals [1] did not contend the principle of nullity admission in a case wherein it backed up the opinion of Tunis Permanent Martial Court in rejecting a request to declare nullity for the absence in the case file of any evidence of exceeding the detention period, its position in this respect did not contradict with the possibility to declare this sanction as long as its requirements are met, consisting essentially in proving the actual period during which the detainee was deprived of his freedom and which exceeds the law provisions . One should point out in this respect that proving this issue, although it is fundamental to admit nullity, makes up, practically speaking, an obstacle to execute such a sanction.

The individual may not have enough means to bring along such evidence. Nonetheless, the expiry of the deadline in itself, if proved, serves as a basis to declare the detention procedure null and void.

Despite the above, some consider that nullity will not be declared as long as there are no consequences of such a violation on the course of the case.

However, in any case, violating the detention periods remains the most frequently used pleas to apply for nullity.

4 – Violations relating to the Detention Record

When requiring to exclusively allocate one record to detention, with numbered pages, signed by the Head of the Prosecution, the Legislator wants it to be a different record from the other administrative records, which the Police and the National Guards are accustomed to keep. He undoubtedly aims at laying the practical basis for an efficient inspection, which enables to examine the said record, have an idea about the conditions surrounding the detention procedure and the different proceedings referred to in its course. There is no doubt that all the foregoing makes up a guarantee to the concerned detainees. Accordingly, the violation of the necessity to keep this record an to list in it all the required indications may eliminate the expected protection and may affect, as a consequence thereof, the individual's rights and guarantees. However, such a violation will not rank up to the point of requesting the nullity sanction, as long as we are talking about, in our opinion, a plain record whose purpose is to regulate the work and the inspection without giving a special status to the detainee, in an indirect way, nor entailing a direct damage to him. Based on this, the violation of the guarantee, arising from the record existence, remains amid the legislation means governing the procedure and securing internal regulation mechanisms that are not supposed to be included in one of the cases that oblige nullity as per the provisions of Article 199.

[1] In the French Law, the failure to make this guarantee entails the nullity as per the clear text

5 – Violation of the right to request a medical check up

Since regulating detention, the Legislator has authorised the possibility to ask for a medical check up for the detainee. The Legislator made it compulsory to indicate such a request in the detention minutes and in the special record to this end. This newly created possibility provides a legal means to discover any violation of the body immunity for this category of individuals, on one hand, and to determine up to what extent the detention conditions can match up the detainee's health conditions.[1] Although this possibility makes up an important legal guarantee for the detainee, asking questions about its violation and the results brought forward in this respect to the detention institution, will naturally lead to debating the issue of what kind of help the request to undergo a medical check up can actually provide to the detainee. This possibility for applying for a medical check up is allowed to the suspect himself or to one of his relatives as fixed in Article 13 bis. Its purpose is to discover the health conditions of the concerned detainee during the detention or at its end. Consequently, the violation resulting from this guarantee will consist in failing to mention on the detention minutes and on the detention record, the application made for this medical check up, without turning down a request that was actually made, which does not make up a violation of a legal procedure since the article governing the issue has not made the medical check up an obligation and has not accordingly obliged the Judicial Police Officers to comply with the relating request. Although turning down the request may be justified, in some cases, the medical check up remains subject to the good willing of the officer in charge of the detention, which makes his judgement suffer from the lack of clear reference standards.

In consideration of the foregoing, one could say that preventing to make the application for a medical check up or the failure to mention it in the detention record, although it makes up a violation of the Law, however, its affecting the soundness of the detention remains open to discussion. On one hand, depriving the detainee from this possibility makes up a violation of a legal guarantee, however, practically speaking, the object of this guarantee will be made on the basis of the outcome of this medical check, and not the simple application therefor, on the other. Consequently, the soundness of the procedure, including the foregoing, may be affected by the execution of the medical check up without stopping at the outcome of the simple request made in this respect. Hence, one is tempted to discard this case from the detention nullity cases in view of the absence of a direct link between the procedure and the request, object of the medical check up.

B – Nullity of the Works resulting from Detention

The purpose of having recourse to detention, as reported before, is to collect the criminal prosecution proofs, object of the investigation. Regarding a suspect, the detention leads to his interrogation and the listing of his statements in minutes. The Legislator also obliged the interrogation to abide by moral requirements when operating this procedure, including the notification to the suspect of the procedure taken against him, the reason behind it, the date of the detention beginning and the end of the interrogation and reading to him the legal guarantees extended by the Law to him.

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(1) Cf. in this respect Pradel : "Les atteintes de la Liberté" Op. Cit.

Furthermore, the purpose of all the indications that must be included in the minutes is to offer an actual materialisation of the guarantees offered to the detainee.

Although those different indications are dictated by the nature of the minutes, since they fulfil a set of elements surrounding detention, regarding the parties and the object of the minutes, Article 155 of the CPC required, in order to make it sound, that the minutes had to be drafted according to the Law, and its author had to include therein what he heard, witnessed personally during the fulfilment of his duties. Jurisprudence has made it mandatory to indicate the date of the minutes. As a matter of fact, the Supreme Court of Appeals ruled out that any contradiction in the dates of the minutes issued by the Police would deprive it of its evidencing nature. [1] Article 199 of the CPC has classified the nullity of the works and the provisions that are against the public order or the basic procedure rules or the legal interest of the accused. The general nature of the word "works" means that it covers all the proceedings and means that are adopted in the investigation and the criminal prosecution, which would mean the application of the nullity sanction on the works of the Judicial Police as long as they include a violation that is listed amid the cases provided for by Article 199, above mentioned. Concerning the minutes drafted during detention, some of the violations relating thereto seem to affect the basic proceedings and the detainee's, or even the public order interest, legally protected by the Law. This will require their nullity based on the provisions of this article. However, the assessment of the nature of the violation and up to what extent it contradicts with any of the cases listed in Article 199 remains subject to the absolute discretion of the court as long as the Legislator has entitled it to do so.

Jurisprudence has, under the control of the Supreme Court of Appeals, exercised this authority of assessment and has not hesitated for a while to rule out nullity sanction as long as it meets the legal requirements [2] on any procedure that the court finds contrary to the above mentioned rules. However, with respect to the detention nullity sanction, decisions, in this respect, remain limited. The fact of limiting the provisions of Article 199 of the CPC to the nullity of the provisions seems, in our opinion, to be overlooking the Legislator's intention. [3]

The nullity of the detention minutes, generally speaking, is based on two reasons, namely the failure to respect the formal conditions, both general and specific, relating to detention and interrogation and whenever their contents are in contradiction with the individual's rights that are legally protected. Some [4] consider that the core and the formal nullity reasons, generally, are set out in order to achieve a general jurisdictional aim, without trying basically to protect the interest of the accused although they cover it in a subsequent manner.

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[1] Penal Decision n° 11085 delivered on July 5th, 1975 by the Supreme Court of Appeals – Publication of the Supreme Court of Appeals for 1975 – Penal Section p. 76

[2] Cf., for example

- the Criminal Decision n° 5646 delivered on June 5th, 1968 by the Supreme Court of Appeals – Publication of the Supreme Court of Appeals for 1968 – Criminal Section p. 34
- the criminal Decision n° 7234 delivered on December 6th, 1972 by the Supreme Court of Appeals – Publication of the Supreme Court of Appeals for 1972 – Criminal Section p. 136

[3] Cf. the Criminal Decision n° 73898 delivered on March 3rd, 1997 by the Supreme Court of Appeals – Publication of the Supreme Court of Appeals for 1997 – Penal Section.

[4] Cf., for example Salah Trifi "The Investigation" Tunisian La Gazette – April 1983 p.40

Accordingly, the nature of nullity depends on the nature of the committed violation. The Tunisian Supreme Court of Appeals considers that nullity is mandatory when we are in front of a violation of the text relating to the public order and it is relative when we are talking about the violation of the rules relating to the accused legal interest. Hence, nullity sanction, which is to be ruled out on the occasion of the violation of the indications to be included in the minutes drafted during detention, is listed under the second category, which supposes the confirmation of the procedure violation, the damage resulting therefrom and the sticking to it with the initial court.

Second Paragraph: Nullity Effects

The provisions of Article 199 of the CPC have provided that "any judgement providing for nullity should specify the scope of its target. Although this article invests the court with a large authority in ruling out nullity sanctions and limiting its effects on the different proceedings, the assessment of the nullity scope requires however to investigate about the causal relationship between the works and the proceedings, including those that are wrong and whether there is any impact on the defective proceeding and the soundness and the fairness of the conducted works. Accordingly, the sound works and proceedings will be either listed as defective or will remain as being sound and productive of their legal effects. (1)

However, the fact that the concerned court has no precise standard to fulfil the mission, it will be facing, a lot of difficulties, especially if the issue relates to complex proceedings involving a lot of formalities and procedures. Detention, supposes a link between its forms and requirements and the guarantees extended in this respect which will have an impact on the outcome, especially that the relationship between detention itself and the works carried out during it for the search of the proofs and evidence set out a procedure system that cannot be excluded easily. Consequently, some consider that nullity effects during detention cover the different proceedings surrounding the institution, including the fact that detention nullity means the nullity of the interrogation minutes and the nullity of the confessions and the nullity of the works that preceded it such as search and arrest. (2) The positions adopted by the French Jurisprudence were different, some of them applied the sanction on all the proceedings that were adopted, by virtue of the detention (3), whereas others limited the sanction application on the illegal proceeding only. (4) However, Article 147 of the CPC left it to the court or to the Head of the Prosecution to determine the field of application of the nullity sanction. (5)

According to the Tunisian Law, the court's authority to determine nullity and the field of its application does not necessarily imply that the standard to be adopted in fulfilling this mission must be based on the relationship between the proceeding and the effect of the effective procedure on the remaining procedures.

(1) Cf. in this meaning Bagbag Med: Mémoire précitée p.30

(2) Ahmed Bassiouni: Criminal Investigation and Criminal Evidence – University Editions – Alexandria 1989 – p.70

(3) Cf. in this respect Crim. 27 Décembre 1935. D 1936

(4) Cf. Aix en Provence. 22 Décembre 1993 D. 1994 p. 566

(5) Starting from the application of the Law dated January 4th, 1943 – Before that date, the adopted ..... See in this respect Boulbaba Othmani – detention – Op. Cit.

SECOND RESEARCH: SANCTION ON THE OFFENDER

The violation of the guarantees extended to the detainee leads to the determination of the offender's liability. If the quality of the official implies a disciplinary liability (Section 2), his violation of the guarantees of the detainees implies also a criminal sanction (Section 1) and a civil sanction (Section 3).

First Section: Criminal Sanction

The application of the sanction on the offender for his failure to respect the detention regulations requires the availability of violations making up a crime. The Legislator made some of the works which may be executed on the occasion of the enforcement of the execution of the detention institution as criminal actions in view of the gravity of some practices to which the individual can be exposed, especially that the relationship between the procedure enforcement and the purpose of the investigation within the framework of the criminal prosecution will be interpreted by some as an authorisation to treat those individuals, using different means and ways, liable to affect their pride, their body immunity and their freedom. Among these transgressions, we can come out with two crimes, namely torture crime (1st paragraph) and the crime for the breach of personal freedom (second paragraph).

First Paragraph: Torture Crime

This crime must be well founded (A) so that it can be enforced (B)

A – The crime foundation elements

Article 101, governing the torture crime, was amended legally by the Law of august 2nd, 1999. The enforcement of this article requires the fulfilment of a set of conditions, the first one being the aggressor's quality, since the offender must be a clerk or a similar official. The Supreme Court of Appeals made a large definition of the wording "clerk" in its decision dated January 16th, 1967 which ruled out that the clerk is the person who was granted by the law or the government some authority to protect the public order or to enforce the laws or the regulations or to execute the government's justice decisions. (1)

However, the requirements for applying the crime, object of this article, and considering the prohibited works, request the availability of a material authority to this clerk, authorising him to fulfil his duties. With respect to detention, one is bound to say that the concerned clerk is the Judicial Police Officer who is authorised to operate detention, as per the provisions of Article 13 bis and 57 of the CPC. In addition to that, it is legally admissible to prosecute all the police and National Guard agents who are not listed in the two paragraphs of Article 10 of the CPC, as a result of their involvement in the enforcement of the detention institution and the possibility for them to commit acts object of such a crime. The enforcement of Article 101 of the CPC supposes the occurrence of the aggression during the fulfilment of the duties or on their occasion. If such an aggression occurs outside the working hours, it cannot be governed by such an article. This is the solution adopted by the jurisprudence. (2)

(1) Ref. to the Decision n° 4960 (penal) delivered on January 16th, 1967, by the Supreme Court of Appeals – Publication of the Supreme Court of Appeals – 1967 p.79

(2) Cf. in this respect the Decision n° 6647 (penal) delivered on April 23rd, 1969, by the Supreme Court of Appeals – Publication of the Supreme Court of Appeals – Criminal Section – p. 137

The acts, considered as criminal, as per this article, include the fact of torturing a person whereas Article 101 "old" provided for the physical aggression on the people. This formulation may bear a lot of doubt when it is enforced, for at least two reasons. The first reason is that physical aggression supposes a material act, aiming at inflicting a direct violence on the individual's body, which excludes the cases of moral violence from the scope of this text. The second reason is that the wording "people" has a very large meaning and requires an interpretation which may lead to exclude the individual concerned by a criminal investigation in general and the detainee in particular, from the scope of the crime application, considering his special situation and his exceptional conditions. Hence, the formulation of Article 101 (new) seems to be clearer cut, since the Legislator considered torture as a crime. Thus, it clarified the meaning of torture and listed all the acts considered as such. Aggression is any act that results in serious suffering and pain. Accordingly, it is larger than the wording "violence" which embodies limited cases, the most important of which is beating, causing injuries, disfiguration and causing disablement. Pain may result from a physical hurting. The aim of the text was general and tried to cover the different cases of aggression.

Concerning aggression that makes up a torture crime, the Article at stake provided that it is made up of any act leading to a serious suffering or pain, whether physical or spiritual. Hence, the Legislator defined the aggression by its results, represented by suffering and pain and included the case of moral violence in the application of the crime. This makes up an effort to be in keeping with the jurisprudence considerations with respect to the aggression, that affects the individual and which can be either spiritual or psychological. [1] At another level, the definition for torture included a limitation of the purposes of inflicting aggression, which include mainly the extraction of information or confessions or the enforcement of punishments or the frightening of the individual.

These cases, included in the torture definition, enhances the Legislator's tendency to counter this kind of crimes, considering their violation of the individual's basic rights, their translation of a poor use of the general authority, then their shifting towards treatment means that have nothing to do with the legal and political systems. They, as such, bear prejudice to the society and the individuals. [2]
The Legislation clarity helps in determining the criminal intentions which must be available in order to justify the torture crime. Physical aggression on the individual's body, by using practices that include physical or moral violence requires a criminal intention which means that the offender is aware that what he is executing aims at receiving a confession or information with respect to the crime object of the investigation. Accordingly, the intention of the white collar is to bear prejudice to the victim in order to achieve one of the purposes listed in Article 101 and which relate in all the cases to the situation of the offender's duties, especially his role in the investigation and the unveiling of the conditions and the crime elements, object of the detention.

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(1) Cf. for example, Lakhoua Thèse précitée
And also Hayet Abbes : "Torture between reality and law" Memoir for the award of the Advanced Studies Certificate – faculty of Law and Political Sciences of Tunis
And also Hatem Dachraoui "Individual Rights and Police Prerogatives" Op. Cit.

(2) Cf. Gassin considers that the consequences of such crimes are double for all that they include as ill treatments for the individuals and the society. Cf. Gassin Op. Cit. p. 36

B – Executing of the Crime object of detention

There is no doubt that the amendment of Article 101 was motivated by the need to clarify a basic legal option aiming at enforcing the human rights and activating the protection of the law to individuals, especially those concerned by the criminal investigation. The extension of the scope of the torture crime, as per the above, has led to an increase of the chances to apply it on the illegal practices committed by white collars among the Judicial Police Officers, as a wrong interpretation of the law, towards the individuals that are undergoing the investigation and in particular the detainees, since a lot of the acts that are included in Article 101 aim at prohibiting the violations committed by the Police and National Guards Officers against the detainees during their interrogation. These practices in the interrogation procedures changed into a means to extract confessions and to collect evidence from the concerned. It becomes clear from the foregoing that these violations are considered as an intentional crime, as per Article 101 which covers all the different violations on the detainees, as long as the necessary foundation elements are met. Although this legislatory cover is basically enough to talk about a criminal protection of the guarantees extended to the detainees, the issue remains in the hands of the courts which remain the authority that is entrusted with the assessment of how well founded the crime is and the application of the article provisions

Practically speaking, jurisprudence, before the new amendment, often refers to Article 101 (old) to determine the criminal liability of the Judicial Police Officers, as a result of violations and misuse of authority occurring detention [1] However, the courts have shown some reluctance to enforce this crime since, very often; they examine the case in a way that excludes the application of Article 101, above mentioned, on some of the practices occurring during detention. [2]

However, despite the above, jurisprudence seems to be decisive in enforcing the principle of calling a crime, all the violations affecting the individuals' basic rights, such as the right to protect the body immunity, when it is confirmed that some violations have occurred by the body in charge of detention. This was used by the Criminal Chamber in Sfax Court of Appeals in one of the reasons adduced to its ruling [3] through stating "whereas the accused, in view of the Law, Is Innocent until his culpability is confirmed by conclusive evidence and strong proofs and not by violent beating..."

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[1] Cf. for example, the Decision n° 13896 delivered on June 17th, 1997 by the First Criminal Chamber of Tunis Court of Appeals – unpublished, attached to the Thesis of Ahmed Oualha – Op. Cit.

[2] An example for this: the Decision n° 8616 delivered on February 25th, 1977 by the Supreme Court of Appeals – Publication of the Supreme Court of Appeals for 1977 – Penal (criminal) Section, p 81

[3] Cf. the Decision n° 4728 delivered on July 13th, 1987 by the Criminal Chamber at Sfax Court of Appeals Op. Cit.,

Second Paragraph: The Crime of Violating the Personal Freedom

The Legislator made the violation of the other's freedom a crime as per Article 103 of the CPC and the reason behind is the violation of the personal freedom of the others without a legal ground by the public white collars. The quality of the public white collar, as per this Article, covers the Judicial Police Officers in charge of the detention and those who work under their control, such as Police and National Guards Agents. Indeed, the introduction of the criminality notion aim exactly these officials, considering the material authority they enjoy - which allows them to commit such a crime- and the relationships between their duties and the concerned violations.

However, one should clarify the meaning of an aggression on the personal freedom There is no doubt defining freedom by virtue of a legal institution authorising it, such as detention and preventive detention and imprisonment, as an execution of a court's judgement, does not make up an aggression as long as the law or the prison sentence are the basis of this practice. In return, violating the individual's freedom without an absolute reason, is one case of the requirements of this crime, it is the most clear cut case. Transgressing the individual's personal freedom, under the cover of a legal institution requiring it, whereas the illegitimate nature of this institution has been confirmed, should constitute the second case for committing such a crime, since the illegitimate nature of the procedure makes it null and cancels the results originating therefrom

Detention is an institution ruled out by the Legislator who has fixed regulations for its applications and conditions to be met to its operation, it requires accordingly the existence of a condition that makes its operation mandatory, required by the investigation course and the taking of measures and formalities when a detainee is kept in, such as his notification of such a decision and the notification in this respect of the Head of the Prosecution or the Examining Magistrate and the mentioning of the foregoing on the record specially kept for detention, and the drafting of some minutes in this respect, complying by the requirements set out by the law.

There is no doubt that the failure to respect the basic condition leading to detention or the failure to respect the necessary measures, makes detention null and void, which excludes custody and the depriving the individual of his freedom, from the detention framework and results in the loss of its legitimacy. When the legitimacy of the practice is lost, the issue will become a violation of the freedom, it is the object of a criminal action, as per Article 103, above mentioned. (1)

At another level, one should recall that the Legislator has limited the detention period, either through the initial period or through any extension thereof. One is bound, based on the foregoing, to exclude the keeping in custody of the detainee for a period exceeding the dead lines and the set time restrictions in this respect from the framework of this institution. (2)

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(1) Ref. In this respect to Robert "Les Violations de la Liberté Individuelle par les Agents Publics et le Problème des Responsabilités" Thèse – Paris 1953 p. 150

(2) Cf. Abdallah El Ahmadi – Human Rights and General Liberties in the Tunisian Law. Op. Cit. p. 52 and Cf. also Hatem Dachraoui – Individuals' rights and Police Prerogatives . Op. Cit.

Considering the foregoing, one would state that the field of application of the aggression crime on the personal freedom, with respect to detention, assumes that the concerned Judicial Police Officers behaved in a manner that did not respect the guarantees extended to individuals under detention.

However, the criminal intention for the foundation of this crime requires that the offender deprives the individual of his personal freedom, intentionally knowing that he is likewise violating the law. Proving the criminal intention, with respect to the legal detention, is often difficult from a practical point of view, as long as depriving the individual of his freedom may not coincide with the Judicial Police Officer's being aware of his violation of the detention procedures especially in view of the complexity of this institution, starting from its regulations as per Article 13 bis, which has ruled out a lot of requirements and precise statements which the standard officer in the police and the national guard cannot grasp, whereas he is covered by the culpability scope.

Third Paragraph: Blaming for the Crimes committed during Detention

The purpose of the Judicial Police when executing some practices during detention, is to serve the interests of the investigation. However, the intentions and the motives will not affect the engaging of his criminal liability as long as the crime is well founded. This approach was taken up by jurisprudence. (1) Hence, the concerned officer will be blamed for his deeds.

A – The Criminal Prosecution

The criminal prosecution in this respect adopts various means and ways since the criminal liability of the officer in charge of the detention may be raised by the detainee himself and he could apply to the Public Prosecutor in order to end the detention, producing evidence providing that his personal freedom was restricted without any reason or that he suffered torture in the meaning given in Article 101 of the CPC. One can point out that the Legislator has supported the individuals' chances in collecting the evidence means in this respect through the possibility of asking for a medical check up. When the medical check up is executed and the doctor proves that the detainee suffered aggression, there is no doubt that the Public Prosecutor will order an investigation in this respect for the committing of the torture crime, against the Judicial Police Officers in charge of the detention procedure, especially that this crime has been included since the amendment of august 2nd, 1999, in the list of crimes requiring absolutely an investigation.

The second case for the raising of the prosecution, because of crimes committed during detention, consists in the discovery by the parent authorities of the existence of violations in the requested regulations for the operation of the procedure, which makes up a crime. Then, prosecution is raised after examining the issue, either directly or by another party in the administration body, in the police of the National Guard.

(1) Cf. Crim January 23rd, 1962 – Bulletin Crim n° 57

This case supposes that the Head of the Prosecution or the Examining Magistrate, in charge of the detention, carries out the necessary inspection works which bring about the incriminated misuses. This is automatically the case when, as a result of the committed violations, serious consequences are brought forward such as the death of the suspect or his suffering from serious injuries that require the intervention of the medical authorities which will execute the notification procedures.

The raising of the aggression in front of the court makes up a possibility for the Public Prosecution to step in, in order to sue the offender. However, this requires absolutely the existence of serious evidence that favour the occurrence of such an aggression.

B – The Necessary Punishment

Since the amendment of Article 101, by virtue of the Law of August 2nd, 1999, the torture crime has become a high crime since it leads to a sentence of 8 years in jail. Article 103 provides for a jail sentence for a period up to 5 years and a fine, for any offender on the personal freedom. There is no doubt that this punishment is considered as harsh and severe. The justification thereto is the gravity of such a crime and its combined impacts on the individuals' rights to self respect, to freedom and to the protection of their bodies and the rights of the social community to a legal and fair investigation that serves as a basis for a fair judgement, ending either with a confirmed innocence or with a supported charging. The Legislator was motivated, when ruling out similar punishments, by the quality of the offender who committed this kind of crimes, namely Judicial Police Officers who bear the hopes of the society in enforcing the law and its ideals in respecting the same. (1)

However, evaluating the serious nature of the punishment provided for by the Legislator requires a consideration of the gravity of the crimes and their impacts on the compatibility of the legal system with the human rights basic principles.

However, the enforcement of these punishments when engaging the criminal liability of the officers in charge of the detention, leaves the punishment issue subject to the absolute judgement of the court to which the Legislator has given the authority to rule out the ultimate punishment or to reduce it, or to extend the mitigation conditions and the delayed enforcement of the punishment. There is no doubt that the court uses its authority in the assessment of the case, based on the facts and the conditions set out in the case file and which influence the limitation of the required punishments.
However, considering that reducing the punishments and the award of the delayed enforcement of the sentence in such cases as being irrelevant (2), and not proper, seems to be not objective, because this issue remains, as per the legal text, subject to the court's assessment and judgement. Nobody else can understand the different motives behind its decision. However, the principle of culpability based on the legal adaptation of the works, remains the real standard in the jurisprudence dealing with such crimes (3) and jurisprudence did not hesitate on several occasions to make positive rulings.

(1) Cf. Decocq : Droit de Police Op. Cit.

(2) Cf. Hayet Abbes: "Torture between reality and law" Op. Cit.

(3) Cf. for example Judgement (criminal) n° 38907/796 delivered on February 6th, 1997 by Tunis First Instance Court – unpublished, attached to the Thesis of Hatem Dachraoui, Op. Cit.

Second Section: The Disciplinary Sanction for the Violation of the Detention Provisions

The draft of Article 13 bis of the CPC and which was withdrawn, included a clear statement about the confirmation of the disciplinary liability when the detention procedures are not respected. [1] The reason for not including these statements in the final text of the Detention Law is that the disciplinary liability is an administrative issue independent from the criminal procedures. Such a liability requests a disciplinary error (A) that justifies the blame (B).

A – The Disciplinary Error

The disciplinary liability seems to have more chances to be applied than the criminal liability, considering the precise nature and the severity of the Criminal Law, if compared to the flexibility of the disciplinary error and the possibility available to the disciplinary authority to execute the sanction. Based on this, it is possible for this authority to confirm the liability of the officer whenever the provisions relating to the detention and to the requirements pertaining thereto, are violated, as long as the Judicial Police Officer's action is listed among "the cases for the violations of the duties requirements or his position as a "general clerk" [1]. The different procedures that are required on the occasion of detention, can be considered by the disciplinary authority as obligations borne by the Judicial Police Officer and accordingly, he is to be blamed when he commits any violation thereto, especially if a crime results from its violation, for which he should be blamed and punished. The confirmation of the culpability, by virtue of a criminal decision, obliges the disciplinary authority to apply a disciplinary sanction; however, the declaration of non suit, by virtue of a criminal judgement does not prevent from extending a disciplinary blame with reference to the appreciation of the extent of the disciplinary error.

Article 49 of the by-laws of the National Security Force [2] provides that the disciplinary error is "any act or the refusal to do an act that includes in itself a violation of the obligations imposed by the duties". Accordingly, one can consider that all the procedures that the Judicial Police Officers must respect when operating a detention, make up professional obligations which, when violated, lead to an error that imposes disciplinary measures. Hence, the failure to notify the Head of the Prosecution or the Examining Magistrate of the detention procedure or the failure to extend the validity of the detention period, during the detention or the violating of any indications to be included absolutely in the detention minutes or in the special record of the detention, can be considered as errors which engage the disciplinary liability of the Judicial Police Officers.

[1] Cf. the Administrative Court's Decision n° 488 dated April 12th, 1983

[2] The Law n° 70-1982 dated august 6th, 1982 relating to fixing the general by-laws of the Interior Security Forces – Official Gazette n° issued on August 10-13, 1982 – p. 1827

B – Disciplinary Blame

In the French Law, the disciplinary blame is based on the violations occurring during the detention, committed by the Judicial Police Officers in their capacity as such. The French Legislator authorised the ruling of disciplinary measures for errors relating to this issue, to the juridical body presiding over the Judicial Police, the Indictment Chamber, for example. [1] It authorised it to rule out a set of disciplinary sanctions that relate to the judicial activities of the offending officer. There are various sanctions, ranging from warning to the withdrawal of the judicial qualification and preventing the officer from exercising the duties of a Judicial Police Officer such as preventing him from receiving rogatory delegations [2].

However, the Tunisian Law treated this issue differently. The disciplinary authority for the Judicial Police Officer, in the Police and the National Guard, is invested to the Ministry of the Interior [3], and for the case of the Customs Officers, it is among the prerogatives of the Ministry of Finance [4].

The by-laws included a listing of the sanctions for the disciplinary errors, under Grade One, covering warning, blame and the compulsory transfer and the deletion from the promotion chart and the temporary dismissal, and under Grade Two covering the downgrading by one or two scales, the discharge along with a salary reduction, the downgrading and the dismissal for good [5].

However, all the sanctions do not match up the committed errors, especially in case of a violation of the detention guarantee, as this case remains subject to the public order as far as disciplinary measures are concerned. Accordingly, the severity of the disciplinary authority in blaming the agents for such violations [6] is based on the violation of the working obligations and not with reference to a legal commitment to protect the individuals and to respect the guarantees extended to them. This seems logical as long as the main concern of the parent administrative authority remains the fulfilment of the duties without a problem, no matter the party concerned by them.

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(1) Cf. Article 224 of the CPC

(2) Cf. Besson "La Police Judiciaire dans le Code de Procédure Pénale) D 1958 chron. p. 142

(3) Cf. Article 50 of the Law dated August 1982, above mentioned

(4) Cf. Article 53 of the Law n° 46-95 dated Maay 15th, 1995, relating to fixing the general by-laws of the Customs Agents

(5) Cf. Articles 50-53-54 of the Law of August 6th, 1982, above mentioned

(6) Ref. the Report of the Human Rights and Basic Liberties Higher Committee to the President of the Republic, concerning the .... International Studies Journal n° 44 – March 1992 p.147

Third Section: The Civil Sanction for the Violation of the Detention Guaranties

The ruling out of a civil sanction for the violation of the detention legal requirements and, in particular, the guarantees extended by the Law to the detainees, aims at allowing the individuals who suffered aggressions or misuse of authorities, no matter their nature, on the occasion of the operation of the detention, to file an action against the responsible party therefor and to oblige him to produce compensation. There is no doubt that the compensation function, in this respect, exceeds the frame of the sanction resulting from the confirmation of the civil liability for the violation of the detention guarantees (First Paragraph) to reach eventually the limitation of the violations made to this procedure as long as it is illegal or not justified. Hence, one should investigate about the possibility to consider this procedure as a legal and independent guarantee (Second Paragraph).

First Paragraph: Compensation as a sanction for the Confirmation of the Civil Liability

The civil liability system, as per the general provisions [1], requires the availability of the necessary grounds to confirm it. The violation of the detention guarantees requires the study of these grounds based on the legal basis of this liability.

This civil liability, resulting from the violation to the detention legal guarantees, is based on the general provisions starting from the provisions of Article 85 of the Contracts and Obligations Code which states that "if a clerk or an employee in a public institution, caused physical or moral damages to the others while he is fulfilling his duties, intentionally, or as a result of a serious blunder, he is obliged to remedy thereto if it has been confirmed that the damages have been caused intentionally or because of his fault. However, if this error is not so serious, the victim cannot sue the clerk, only if he has no other means to recover his rights.

One can conclude from the provisions of this article that the action leading to the engaging of the civil liability can be triggered intentionally or can occur as a result of a serious error. Concerning the violations to the detainee's extended guarantees, this act can be a direct violation affecting the individual's body immunity or his basic moral rights, through a practice that is not allowed by the law or by depriving the individual of a right extended to him legally, resulting to him in material or moral damages. At another level, this civil liability requires the confirmation of the damages suffered by the Claimant and such damages can be assumed only with respect to depriving the individual of his legal rights, extended by the detention provisions, hence the freedom deprivation, in view of the detention illegality, such as exceeding its maximum term, makes the damages confirmed and direct.

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[1] Cf. in this respect Mohamed Ezzine "Studies in Civil Law" Second Year – Tunis Faculty of Law and Political Sciences – Polycop. 1996

However, the Legislator extended to the Claimant two grounds, the first one is supported by the personal liability of the Judicial Police Officer and it requires the committing of a serious personal error, outside the job requirements. The second ground for filing the claim is based on the state's liability represented in the parent administration, for the acts committed by the clerks and which make up an implicit error, directly linked to the job. The Legislator in the general by-laws of the interior security forces [1], in Article 49, ha regulated this situation as far as the Judicial Police and the National Guard are concerned and in Article 52 of the Law dated May 15th, 1995, for the Judicial Police Officers in the customs. However, the difficulty in separating these two grounds, in this respect [2], can be overcome starting from the nature of the acts that engage this liability. As a matter of fact, among the purposes for the regulation and the codification of the detention is the purpose to set out constraints and restrictions to the officers in charge of it, in exercising their duties, and control their freedom in this respect. The requirements, making detention mandatory, rise up to basic obligation whose violation results in a professional error borne personally by the officer in charge. However, this does not deny the existence of the administration's obligations especially with respect to inspections and instructions and whose absence or inadequacy has contributed in the occurrence of the violations engaging the liability [3]. Judging from the foregoing, the victim's right resulting from an illegal detention, or from a misuse of authority and aggressions in its course, to file an action on the basis of the administration's liability is confirmed. Things would have been different if it becomes clear that the acts leading to the damages will be invested with a criminal nature. There is no doubt that believing that the administration is liable for such a crime is not compatible with the principle that crime and punishment are personal.

Concerning the filing remedy, there is no doubt that filing can be made to request a compensation for the violations of the detention guarantees as per the general provisions of the civil liability as long as it is possible to confirm the error and the damages and the causal relationship. The claimant can also activate the civil prosecution, under his own responsibility if the committed errors are crimes that are prosecuted with the criminal authorities, as per the provisions of Article 7 of the CPC; in this case, the claimant profits from the evidence and the confirmation means that have been collected by virtue of the initiation of the public prosecution.

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[1] Cf. the Law n° 70-82 dated August 6th, 1982, above mentioned

[2] Cf. Hayet Abbes "Torture between Reality and the Law" Op. Cit. p. 140 and the pages thereafter Cf. also: "Hatem Dachraoui "the Individual Rights and the Police Prerogatives" Op. Cit. p. 85-86

[3] Cf. also in this respect Robert "Les violations de la Liberté Individuelle par les Agents Publics et le Problème des Responsabilités" Thèse – Paris 1953 – p. 5

Second Paragraph: Compensation as an independent legal guarantee

The specific nature of the errors committed by the officers in charge of detention, and the gravity of the consequences resulting from them to the detainees, pushed for the setting out of a legal and independent basis authorising compensation for the damages in a direct manner, without having to debate the traditional civil liability, with its intermingled foundation elements and the complex system for their confirmation. Several comparative laws [1] consider the necessity to enable the victim of the detention procedure who suffered illegally in this respect, to receive some compensation if the proceedings against him ended with a non suit, as far as he is concerned and a judgement for his innocence is ruled out. Although this tendency shows a concern to compensate this victim for a wrong procedure that has affected his freedom, his pride and his reputation, the acknowledgement of the gravity of detention as a basic institution is a confirmation of the same, especially when it becomes clear that this procedure has been illegal, without a legal motivation required by the investigation ; however, this system requires a legal procedure that meets all the requirements of detention, but investigation and prosecution do not require it. The case being is that the illegitimacy of detention is liable for the violations of the detention procedures. The Tunisian reality is not far from this newly created compensation institution since the members of the House of Representatives requested its confirmation in the Tunisian Law [2] on the occasion of the debates on the Law of November 26th, 1987, governing detention.

Then, despite the fact that the issue is not regulated by the Tunisian Law, it exists practically, since the President of the Republic ordered in 1991 to give financial compensations in favour of the families of the detainees who suffered damages for the operation of detention in an illegal manner. [3]

One must finally point out that the Tunisian Legislatory policy tends to rule out a system that allows these detainees to receive financial compensation when detention is not legally motivated, within the framework of a decision ruling out a non suit, with respect to the cause that has led to detention. [4]

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[1] Cf. Pradel : "Les Atteintes de la Liberté avant Jugement" Op. Cit.

[1] Cf. the debates of the House of Representatives (Session of November 21st, 1987 – Debates n° 5) p. 94

[3] Cf. the report of the Human Rights and Fundamental Liberties to the President of the Republic on ... - International Studies Magazine n° 44 – March 1992 p. 155

[4] Part of the Speech of the President of the Republic dated November 7th, 2000.

CONCLUSION

The necessity to protect the detainees is not limited to the production of legal guarantees. The basic individual rights of the detainees are exposed to a danger that exceeds the scope of their legal status. Indeed, the material situation in the detention centres and the details of the interrogation and the treatment of the detainees and their lodging and food in these centres cannot be covered by a legal protection. They are naturally factual elements far away from legal exaggerations or as stated by the French Supreme Court of Appeals, they are a mixture of reality and the law. (1)

In addition to the above, the text cannot cover all the details and precisions; otherwise it loses its general nature, which makes up the guarantee for its application. Accordingly, the codification of detention is not enough to protect the detainees in an exhaustive way from the violations they are exposed to. Concerning the human rights principles and the defence rights resulting therefrom, their general nature prevents from including them among the serious guarantees extended to the detainees although these principles represent a material source for the legal texts; the silence of the legal text with respect to some of these principles leads absolutely to question whether this silence is justified by naivety or intentional ignorance?

All the foregoing gives some specific feature to the detention institution that covers its legal regulations and the procedure details. Are there any practical motives behind this exceptional aspect, in order to unveil crimes and to fight against criminality move, or is this linked to the security system governing detention?

One must go back to the necessity dictated by the investigation to operate detention. The issue is dealing with the core of the criminal policy and in particular the criminal organisation. The mixed organisation which groups together investigation means and indictment means, creates a legal hesitation in deciding over some legal institutions. Detention is made necessarily by the decision to increase the investigation means and the chances of the investigator to reach positive results. This purpose, although it is a motive that does not match sometimes the gravity of the results coming from the freedom deprivation and emptying the innocence presumption of its contents, it remains, however, enough to acknowledge the difficulty to strike a balance between the legislation options. There is no doubt that the ruling of the decisive nature of this institution and the quest for substitutes and compensations for the proceedings depriving the individual of his freedom remain the ideal consolation to the individuals and the most noble purpose of the Law.

(1) Cf. Crim. October 15th, 1959 Bull. Crim. N° 455

Bibliography

References in Arabic

I – General Works

Al Ahmadi (Abdallah): Human Rights and General Liberties in the Tunisian Law – Edited by the "Centre Aures d'Impression et de Publication" – Tunis – 1993

Abu Errus (Ahmed Bassiuni): Criminal Investigation and Criminal Evidence – "University Prints House" – Alexandria 1989

Said (Hédi): "In the Gardens of Investigation and Law" – Ed. COTIP – Tunis 1993

M'hadda (Mohamed): "The suspect's guarantees during the preliminary investigation" Vol. 2 Ed. Dar El Houda – Algiers 1991-1992

II – Theses

Dachraoui (Hatem): "The Individual Rights and the Police Prerogatives" – Thesis for the award of the Advanced Post Graduate Studies Diploma – Tunis Faculty of Law and Political Sciences – 1996

Abbes (Hayet): "Torture, between reality and law" – Memoir for the award of the Advanced Post Graduate Studies Diploma – Tunis Faculty of Law and Political Sciences – 1988

Othmani (Boulbaba): "Detention" – Memoir for the award of the Advanced Post Graduate Studies Diploma – Tunis Faculty of Law and Political Sciences – 1998

Naffati (Besma): "The Judicial Police" – Thesis for the award of the Advanced Post Graduate Studies Diploma – Tunis Faculty of Law and Political Sciences – 1995-1996

Oualha (Ahmed): "The Suspect's rights during the Preliminary Investigation" – Memoir for the award of the Advanced Post Graduate Studies Diploma – Tunis Faculty of Law and Political Sciences – 1991

Abbes (Khaled): "Detention and Detention awaiting Trial" – End of Studies Thesis – Magistrature Higher Institute – 1989 – 1990

Halleb (Mohamed Kamel): " Investigation Minutes Demurrability" – End of Studies Thesis – Magistrature Higher Institute – 1990 – 1991

III – Articles

Bounenni (Wahid): "The Legal depriving of the individual freedom without a court sentence" Conferences of the Tunisian Criminal Law Society 1995-1996

Houimdi: Conference: "Towards avoiding to leave the door open for saying that torture questions and pains reply" – Tribune of the Tunisian Association of Penal Code. 1985-1986 p.59

Zerati (Abdelfattah): "Detention awaiting trial in the new Criminal Code" – Tunisian Law Gazette – March 1991 p.23

Trifi (Salah): "Investigation" Tunisian Law Gazette – April 1983 p.7

Iwadh (Mohamed Iwadh): "the Suspect's rights at the stage of Investigation" Tunisian Law Gazette – May 1980 p. 73.

Lakhoua (Mohamed Hédi): "Towards avoiding to leave the door open for saying that torture questions and pains reply" – Conferences of the Tunisian Association of Penal Code. 1985-1986 p.47

IV – MISCELLANEOUS

Speech of the President of the Republic on November 7th, 2000

Address by Professor Abdallah Al Ahmadi Works of the Study Day "Confirmation through the recent operational means" Magistrature Higher Institute – November 2nd, 2000.

Draft of the Law on Detention, Detention awaiting trial and Provisional Freedom (the draft was withdrawn) – the daily newspaper "Errai" n° 357 dated January 24th, 1986 p.4.

Report of the Higher Committee for Human Rights and Fundamental Liberties to the Head of State on up to what extent the recommendations of the Investigation Committee have been enforced – International Studies Review n° 44 – March 1992 – p. 139 and the pages thereafter.

Decisions of the Joint Divisions of the Supreme Court of Appeals during 1994 – 1995 – Legal and Judicial Studies Centre at the Ministry of Justice – August 1995.

The Official Gazette of the Republic of Tunisia n° 54 issued on August 13th, 1982 – p. 1827: the Law n° 70-82 dated August 6th, 1982, relating to fixing the General By-laws of the Interior Security Forces.

The Official Gazette of the Republic of Tunisia n° 83 issued on November 27th, 1987 – p. 1462: the Law n° 70-87 dated November 26th, 1987, amending some articles of the Criminal Procedure Code.

The Official Gazette of the Republic of Tunisia n° 91 issued on December 31st, 1987 – p. 1627: the Law n° 79-87 dated December 29th, 1987, relating to abolishing the State Security Court.

The Official Gazette of the Republic of Tunisia n° 61 issued on September 12th, 1989 – p. 1371: the Law n° 87-89 dated September 7th, 1989, relating to organising the lawyers' profession.

The Official Gazette of the Republic of Tunisia n° 39 issued on May 16th, 1995 – p. 1103: the Law n° 46-95 dated May 15th, 1995, relating to fixing the General By-laws of the Customs Agents.

The Official Gazette of the Republic of Tunisia n° 90 issued on November 10th, 1995 – p. 2205: the Law n° 92-95 dated November 9th, 1995, relating to the promulgation of the Child Protection Code.

References in French

I – General Works

Merle et Vitu : "Traité de Droit Criminel" (Treatise on Criminal Law) – 6th Ed. Cujas, 1989

Pradel : "Procédure Pénale" (Criminal Procedure) – 7th Ed., Cujas 1995

Robert et Duffar : "Droits de l'Homme et Libertés Fondamentales" (Human Rights and Basic Liberties) – Ed. Monchrestien 1993

Decocq, Montreuil et Buisson : "Le Droit de la Police" (the Police Law), Ed. Litee 1991

Gassin : "La Liberté Individuelle devant le Droit Penal" (Individual Liberty versus Criminal Law) – Ed. Siery, 1980

Lambert : "Précis de Police Judiciaire selon le nouveau Code comparé à l'Ancien" (Concise of Judicial Police according to the new Code, compared with the Former Code), Ed. Desvigne et Cie, Lyon ,1959

Leaute (sous la direction de) : "Garde à Vue, Expertise, Action Civile, Journées de Procédure Pénale" (Custody, Expertise, Civil Action, Criminal Procedure Days) (May 9 – 10th, 1958), Annales de la Faculté de Droit de Strasbourg VII (Annals of Strasbourg Faculty of Law), Paris, Dalloz 1960.

Parra et Montreuil : "Traité de Procédure Pénale Policière" (Treatise on the Police Criminal Procedure) – Ed. Quillet – Paris 1972

Pradel (sous la direction de) . "Les Atteintes à la Liberté avant jugement en droit pénal comparé" (Attacks on Liberty before the delivery of a sentence in Compared Criminal Law), Ed. Cujas, Paris 1992.

III – Theses and Memoirs

Ayed (Mohamed) "La Détention avant Jugement" (Detention before Sentence) Memoir for the Higher Studies Diploma – Tunis Faculty of Law and Political Sciences – 1978

Bag-Bag (Mohamed) "les Nullités de l'Instruction Préparatoire en Droit Tunisien" (Preliminary Investigation Nullities in the Tunisian Law) Memoir for the award of the Higher Studies Diploma – Tunis Faculty of Law and Political Sciences – 1977

Clemot (E.) "Garde à Vue et Libertés Fondamentales en Droit Français et Canadien" (Custody and Basic Liberties in the French and Canadian Law) – Thesis on microfilms – Montpellier 1, 1994

Essaid (Med. J.) "la Présomption d'Innocence" (the Presumption of Innocence) – Thesis – Paris 1969, published with a preface by Professor Stehani, Ed. Laporte , Rabat, 1971

Labben (R) "la Présomption d'innocence (Mythe ou Réalité)" (The Presumption of Innocence – a Legend or a Reality) Memoir for the award of the Advanced Post Graduate Studies Diploma – Tunis Faculty of Law and Political Sciences, 1983-1984

Lakhoua (Med H) "les Enquêtes de Police" (The Police Investigations) Thesis on microfilms, Paris 1, 1994, published with a preface by Professor Bouloc, LG.D.J.

Robert (J) "les Violations de la Liberté Individuelle par les Agents Publics et le Problème des Responsabilités" (The Violations of the Individual Liberties by the Public Agents and the issue of the Liabilities) Thesis – Paris 1953, published in 1955, L.G.D.J.

Youmbai (A.A) "L'Aveu en matière pénale" (Confession in Criminal matters), memoir for award of the Higher Studies Diploma, Tunis Faculty of Law and Political Sciences – 1977

IV – Papers and Chronicles

Balti (K) "La Procédure Pénale entre la Loi et la Jurisprudence", la justice pénale : présent et avenir (The Criminal Procedure between the Law and the jurisprudence Criminal Justice : its present and future) (Records of the joint colloquy of Tunis Faculty of Law and Political Sciences and of the Tunisian Association of Criminal Law, held in the C.E.R.P., on April 17th – 18th, 1998.

Ben Halima (S) "La Garde à Vue en Droit Tunisien" in "Les atteintes à la liberté avant jugement en droit pénal comparé" (Custody in the Tunisian Law in "the Attacks on liberties before the delivery of the sentence in the compared criminal law") Ed. Cujas, Paris 1992, p.107

Besson (A) "La Réforme de la Procédure Pénale" (The Criminal Procedure Reform) R.S.C. 1954, p.1

Bouloc (B) : "les Délais de la Garde à Vue et de la Détention provisoire en France au regard des dispositions de la Convention Européenne de sauvegarde des droits de l'homme et des libertés fondamentales" (The Custody and the temporary detention periods in France with respect to the provisions of the European Convention for the safeguard of Human Rights and Basic Liberties) R.S.C. 1989, p.69

Casorla (F) "La garde à Vue en Droit Français" in "les atteintes à la liberté avant jugement en droit pénal comparé" (Custody in the French Law in "the Attacks on liberties before the delivery of the sentence in the compared criminal law"), Ed. Cujas, Paris 1992 p. 51

Gassin (R) Répertoire Dalloz, Droit Pénal (Dalloz Repertoir – Criminal Law) (1967) see : Arrest

Hodgson (J) et Rich (G) "l'Avocat et la Garde à Vue, expérience Anglaise et réflexions sur la situation juridique en France" (the Lawyer and Custody, the English Experience and some reflections on the Legal Situation in France) R.S.C. 1995, p.319

Lambert (L) "la Garde à Vue Policière en droit comparé, d'après une étude d'Interpol" (Custody by the Police in the comparative law, according to a study by Interpol) R.S.C., 1970, p. 456

Leclerc "Réforme de la Procédure Pénale (Loi du 4 Janvier 1993)" (Reformation of the Criminal Procedure) Gax. Pal., Feb. 10th, 1993, p.45

Merle (R) "La Garde à Vue" (Custody) Gaz. Pal. 1969, Doctr. P. 18

Pouget (Ph) "les Délais en matière de rétention, garde à vue et détention provisoire au regard de la convention européenne de sauvegarde des droits de l'homme" (Detention, Custody and Temporary Detention Periods according to the European Convention for the safeguard of Human Rights)

Pradel (J) "les dispositions de la Loi n° 0-643 du 17 Juillet 1970 sur la garde à vue en matière de Sureté de l'Etat" (The provisions of the Law n° 0-643 dated July 17th, 1970 on Custody in matters of State Security) D. 1972, Doctr. P.129

Puech (M) Juriclasseur Proc. Pen. Art 53 à 73, Septembre 1983
Jugement en droit pénal comparé (Judgement in Comparative Criminal Law) Ed. Cujas, 1992, p. 47

Rivero (J) "Rapport Introductif", droits de l'individu et police (Introductive report – The Individual's rights and the police) (records of the joint colloquy of the Faculties of Law at the University of Poitiers and the University of Montreal, held in Poitiers in may 1998) . Rev. Jur. Thém. Vol. 23, p.249

V – Other Documents

Ben Halima (S) : Cours de Droit Pénal Général, Faculté de Droit et des Sciences Politiques de Tunis 1980-1981 (dactylographié)
Course on the General Criminal Law – Tunis Faculty of Law and Political Sciences – 1980-81 (typed)

Zine (Mohamed) Cours de Procédure Pénale – Faculté de Droit et des Sciences Politiques de Tunis 1978-1979 (dactylographié)
Course on the Criminal Procedure – Tunis Faculty of Law and Political Sciences – 1980-81 (typed)