

# PROMOTING THE DEFENCE'S ROLE IN THE PRELIMINARY INVESTIGATION, A CHALLENGE IN MAGHREBIAN CRIMINAL PROCEEDINGS

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**Abstract:** Maghrebian criminal procedures have long been based on a theory inherited from French legislation, based on the relationship between the effectiveness of police investigations and the weakening of the role of the lawyer, relying on the principles of the inquisitorial system, in particular the principle of secrecy that governs the entire preliminary phase of the trial. Through this article, the authors attempt to refute the latter theory, proving that any strengthening of the role of the lawyer during the preliminary investigation constitutes a deterrent and protection of the authorities against allegations of torture and ill-treatment, and a decisive means to guarantee the protection of the rights of the accused, and therefore, a contribution to the consecration of the efficiency of the investigations and the procedural fairness.

**Keywords:** Rights of the defence, lawyer's assistance, accused, Maghrebian criminal procedure, preliminary investigation.

**SUMMARY:** 1. INTRODUCTION. 2. THE INQUISITORIAL NATURE AS A CHARACTERISTIC FEATURE OF THE PRELIMINARY INVESTIGATION. 3. THE DECISIVE IMPACT OF THE PRELIMINARY INVESTIGATION ON THE CRIMINAL TRIAL. 4. THE PASSIVE ROLE OF THE LAWYER IN THE PRELIMINARY INVESTIGATION. 5. TOWARDS A STRENGTHENING OF THE LAWYER'S ROLE IN THE PRELIMINARY INVESTIGATION. 5.1. Legal and practical basis for the lawyer's assistance. 5.2. Scope of the lawyer's assistance. 6. TEMPORARY DEROGATIONS FROM THE RIGHT TO LEGAL ASSISTANCE. 7. CONCLUSION.

## 1. INTRODUCTION

The rights of the defence occupy an important place in all democratic countries. Respect for them remains an absolute necessity (Pradel, 2001, p. 325), not only because they are a means of preventing miscarriages of justice, but also because they are a moral guarantee and an imperative requirement for achieving legal effectiveness. Even in the absence of legal texts, the rights of the defence require the right of the person concerned to be assisted by a lawyer, to be informed of all the facts attributed to them, and to be given a reasonable and sufficient time to prepare and present their defence (Jacobs, et al., 2009, p. 1122).

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In this respect, the right of access to a lawyer is at the heart of the notion of the rights of the defence,<sup>4</sup> as a fundamental right (for some, a human right (Jimeno-Bulnes, 2019, p. 58) and freedom based on the principles of natural justice<sup>5</sup>) established by the criminal procedures of the Maghreb countries. Nevertheless, to achieve efficiency in the investigations carried out by the procedural authorities, the latest legislations agree on the confinement of the lawyer in a passive role, contrary to the natural role of any defence. Under the pretext of the principle of the secrecy of investigations, not only is the lawyer's intervention delayed, but his role and functions are also weakened.

This article focuses on the framework of the lawyer's intervention in the preliminary phase of criminal proceedings in three Maghreb countries: Morocco, Algeria, and Tunisia. The choice of these three procedures is not accidental. All three countries adopt procedures inspired by French criminal procedure, which draws their main choices from inquisitorial traditions. Thus, during the preliminary phase, which is characterised by secrecy, the central role belongs to the judicial authorities, while the defence lawyer is confined to the role of a passive spectator.

The first part of this article gives a concise overview of the inquisitorial system applied in the pre-trial phase. Indeed, the inquisitorial features of the preliminary investigation, especially the secrecy and non-adversarial nature, are attenuated by procedural amendments and the running of the judicial time. However, the intervention of other procedural elements reinforces the impact of inquisitorial on the judicial process. In the second part, the article highlights the decisive impact of the preliminary investigation on the outcome of the criminal trial. The third part of this contribution briefly explains the role attributed to the defence lawyer during police investigations, the timing and framework of his intervention, and how Moroccan and Algerian criminal procedures confine him to a passive role, in contrast to the Tunisian criminal procedure, which adopts ambitious choices in this framework. While the right to legal counsel is a condition for a fair trial, the fourth part explores, in-depth, the legal and practical basis of this right and illustrates how the widening of the scope of the lawyer's intervention will have a positive impact on the application of fundamental rights and the consecration of procedural fairness. While the right to legal advice is not absolute, temporary derogation from this right, which remains strictly exceptional, will be the subject of the final part.

## **2. THE INQUISITORIAL NATURE AS A CHARACTERISTIC FEATURE OF THE PRELIMINARY INVESTIGATION**

In a classical sense, the notion of inquisitorial indicates the character of a procedure in which all initiative, concerning the direction of the trial or the search for evidence, belongs to the judge (Cornu, 2022, pp. 1185-1186). Historically, the inquisitorial procedure appeared quite late, at the end of the Middle Ages, and succeeded the accusatorial

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<sup>4</sup> For the eminent French criminal lawyer Faustin Hélie (1866, p. 384): "the first corollary of the right of defence is that the accused be assisted by counsel".

<sup>5</sup> Especially President Guillaume de Lamoignon (Summers, 2007, p. 74).

procedure almost everywhere.<sup>6</sup> In fact, the centralisation of state power, the absence of an effective public prosecuting and investigating authority, and the excessive respect for individual rights, were the main shortcomings of the accusatorial system, which led to the birth of the inquisitorial system.

The inquisitorial procedure seeks, above all, efficiency in protecting society (Merle & Vitu, 1975, p. 169). It is conducted by specialised public authorities, which have a much more active role in the conduct of the trial and the search for the evidence. Furthermore, in contrast to the fundamental legal features of the adversarial procedure,<sup>7</sup> the inquisitorial procedure is based on secrecy “in almost all its course, especially in the important phases” (Bouloc, et al., 2020, p. 58). The secrecy of the proceedings is absolute (Besson, 1959, p. 241), even concerning the accused. In this respect, publicity may pose a threat to the efficiency and celerity of the proceedings. Furthermore, this procedure is essentially non-adversarial. The accused is confined to a passive role. He cannot participate in investigative acts. Finally, the inquisitorial procedure is entirely written. All procedural acts are recorded in minutes and added to the case file, to be forwarded to the trial judge (Garraud, 1912, p. 745).

However, these procedural changes have not made the inquisitorial system immune from criticism. The rights of the defence are sacrificed for the sake of the efficiency of investigations (Ayat, 1991b, p. 11). The principle of the secrecy of the procedure places the accused in ignorance of the charges brought (Merle & Vitu, 1975, p. 169). Similarly, the investigating authorities often do not enjoy independence from the power of the executive. Therefore, the drafters of the procedures have chosen to mitigate the inquisitorial character by adopting a mixed procedure, which combines the inquisitorial and accusatory tracts. The French Code of Criminal Procedure promulgated in 1808 is the leading example of this penal system before it was reproduced by the 1958 Code of Criminal Procedure, with some changes.

Moreover, the similarity of the political challenges encountered by the Maghreb countries with those experienced in France at the end of the Second World War (Machichi, 1981, p. 32) and the need to preserve the continuity of the state after independence (Mahiou, 2012) led the drafters of Maghrebian criminal procedures<sup>8</sup> to inspire their main features from the French criminal system.<sup>9</sup> On the other hand, the influence of French legal thought

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<sup>6</sup> The adversarial procedure is the oldest, based on private accusation and extensive participation of the individual in the proceedings (Bouloc, et al., 2020, p. 57).

<sup>7</sup> The fundamental characteristics of adversarial proceedings are: contradictory (the accused and his opponent discuss the case on an equal basis in the presence of an impartial judge), public (the trial is conducted in the presence and under the control of the people) and oral (the proceedings are not in writing).

<sup>8</sup> Ordinance No. 66-155 of 8 June 1966 on the Algerian code of criminal procedure. Law n°68-23 of 24 July 1968 established the Tunisian code of criminal procedure. Dahir n° 1-58-261 of first chaabane 1378 (10 February 1959) on the Moroccan code of criminal procedure, which has undergone several modifications, the most important of which is that established in 2002 (Law n°01-22 promulgated by Dahir n°1-02-255 of 03 October 2002).

<sup>9</sup> The adoption of French criminal procedure by the Maghreb countries has not been immune from criticism. Further, as Khalfoune (2015, p. 411) notes, “the possibility of extrapolating from a body of rules, legal

and the high crime rate led the Maghreb countries to continue to draw their laws from the former colonial power, even when they claimed to draft a new law (Mahiou, 1984, p. 133) or amendment (Zirari Devif, 1989, pp. 262-265).<sup>10</sup>

In this context, the criminal trial in the Maghreb countries is divided into two cardinal stages. The first is a phase of establishing the facts and seeking evidence. It is divided into two stages: a preliminary investigation carried out by the judicial police under the direction of the public prosecutor and a preparatory investigation, under the responsibility of the examining magistrate, to deepen the police investigations.<sup>11</sup> Both stages are marked by their inquisitorial character, even if the degree differs from one phase to another.<sup>12</sup>

Indeed, secrecy remains the characteristic feature of the preliminary phase.<sup>13</sup> Several concerns justify it. On the one hand, it aims to guarantee the effectiveness of investigations by prohibiting those involved in the procedure (judicial police officers, public prosecutors, and investigating judges...) from revealing information about the procedure's progress. On the other hand, by prohibiting the publication of the acts of the procedure by the press or any other means of communication, secrecy aims to protect the presumption of innocence and "to avoid pressure from public opinion on the judge, who must be independent and free" (Merle & Vitu, 1975, p. 326).

However, criticism of the effectiveness of the principle of secrecy and doubts about its ability to preserve the presumption of innocence has grown.<sup>15</sup> Additionally, the increasing mediatisation of society and the rise of the right to information lead to doubts about the usefulness and legitimacy of the principle of secrecy and the possibilities of

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concepts and theories, produced by a context and a legal tradition whose formation is underpinned by a historical process specific to France, to another recent, different context, which has not undergone the same developments". See also: (Ayat, 1991a, p. 44)

<sup>10</sup> It should be noted that the European Court of Human Rights indirectly impacts Maghrebian criminal proceedings. Several modifications to the latter procedures are merely amendments to French criminal procedure in applying European case law.

<sup>11</sup> The preparatory investigation is conducted by a professional judge "judge of investigation", in cases very limited by the criminal procedure. See: Article 66 of the Algerian code of criminal procedure, Article 83 of the Moroccan code of criminal procedure and Article 47 of the Tunisian code of criminal procedure.

<sup>12</sup> The inquisitorial nature of the preparatory investigation is tempered somewhat by the lawyer's presence during the interrogation of the accused, the possibility of his intervention, and access to the case file. See: Article 139 of the Moroccan code of criminal procedure and Articles 100-105 of the Algerian code of criminal procedure.

<sup>13</sup> It should be noted that Article 15 of the Moroccan code of criminal procedure and Article 11 of the Algerian code of criminal procedure, which establish the principle of secrecy of the preliminary investigation, are only the translation of Article 11 of the French code of criminal procedure, which is still in force. For more on the principle of secrecy, See: (Naut, 1996) and (Lavielle & Lemonnier, 2009).

<sup>14</sup> The accused, the civil party, the witness, and journalists are not concerned by secrecy. In contrast, the defence lawyer is bound by professional secrecy.

<sup>15</sup> Because of the absence of a sanction in case of violation, the principle of secrecy in the Maghreb countries is not often respected. Media interference in criminal cases is accentuated, especially with the advent of social networks.

reconciling these different legal centres (Ambroise-Castérot & Combeau, 2014). Certainly, the principle of secrecy loses its power as procedural time evolves and the proceedings progress. Hence, the second stage of the trial, which is the trial phase, becomes mainly adversarial. Nevertheless, its influence remains limited because of the decisive impact of the preliminary investigation.

### 3. THE DECISIVE IMPACT OF THE PRELIMINARY INVESTIGATION ON THE CRIMINAL TRIAL

As mentioned earlier, Maghrebian criminal procedures are based on a hybrid criminal system,<sup>16</sup> which essentially remains with a solid inquisitorial trait.<sup>17</sup> Indeed, there is no separation between the preliminary investigation and the criminal trial, considered to have started as soon as the police investigate the case.

From this perspective, the preliminary investigation phase is crucial in preparing for the criminal trial. It often determines the trial's outcome, leaving traces that cannot be removed. Thus, even in particularly complex cases, police custody remains the essential stage in the constitution of the case file. Additionally, at this stage of the proceedings, the accused is often in a particularly vulnerable situation. This effect is intensified by the fact that criminal proceedings are becoming increasingly complex, particularly concerning the procedures for gathering and using evidence.<sup>18</sup>

Furthermore, in a Moroccan criminal procedure where the rate of criminal cases submitted to the preparatory investigation does not exceed 5.68%,<sup>19</sup> the preliminary investigation retains its decisive importance. Thus, the preparatory investigation phase is losing more importance to the police investigation. With the entry into force of the draft Moroccan criminal procedure, it will be optional for all offences, even for the most severe crimes.<sup>20</sup> This amendment can only intensify the force of the minutes drawn up during the preliminary investigation by the judicial police (Ayat, 2015, p. 1).

In fact, the preliminary investigation phase, in Morocco as in Tunisia, takes its decisive importance to the probative value of the minutes (Jaouhar, 2005, p. 225). Thus, the procedure for investigating offences is the responsibility of the public authorities and is carried out in secret. Therefore, all procedural acts are recorded in minutes to which

<sup>16</sup> For Merle and Vitu (1975, p. 177): "there is not, strictly speaking, a hybrid system, the main features of which could be defined without error, as could be done for the accusatory or inquisitorial procedure; there are mixed systems, the content of which varies according to the country and the period".

<sup>17</sup> As Ogg (2012, p. 230) explains, no modern criminal justice system operates in full compliance with either the traditional adversarial or inquisitorial models. Each system retains the characteristics of both, but one prevails over the other.

<sup>18</sup> *Salduz v. Turkey*, App no 36391/02 (ECtHR, 8 February 1996) para 54.

<sup>19</sup> In 2020, only 26360 of the total 2780903 criminal cases were submitted to preparatory investigation. See: (Presidency of the Public Ministry of Morocco, 2020, p. 82)

<sup>20</sup> Article 83 of the Project of the Moroccan Criminal Procedure Code. This text is established following a recommendation (n°85) of the high instance of dialogue on the reform of the Moroccan judicial system (2013, p. 75).

the criminal procedure gives evidential value.<sup>21</sup> During the trial hearing following the preliminary investigation, it is difficult for the defence lawyer to contradict the statements made during the interrogation (Cherni & Petit, 2014, pp. 40-41), which are transcribed in minutes,<sup>22</sup> signed not only by the police officers but also by the persons questioned (Bihi, 2004, p. 73). Similarly, the principle of secrecy of the preliminary investigation veils the circumstances in which these minutes were drawn up, which makes it impossible for the defence lawyer to prove the contrary (Machichi, 2012, p. 221).

Moreover, Maghrebian procedures do not provide for the nullity of the minutes in case of non-respect of the rights of the defence during the police phase.<sup>23</sup> Even the failure of the accused to sign at a minute has no impact on its evidential value.<sup>24</sup> For the National Council for Human Rights of Morocco (NCHR) (2004, p. 61), “this probative value is incompatible with the presumption of innocence and limits the authority of the judge in the control and appreciation of the means of proof”. As the Working Group on Arbitrary Detention (WGAD) (2014, pp. 17-18) notes, the evidential value of the minutes reverses the burden of proof, forcing the accused to prove his innocence, which creates conditions that favor torture and ill-treatment of suspects. Paradoxically, the various criminal procedure changes only reinforce the strength of the case file, consisting mainly of minutes prepared during the police investigation.

Consequently, the criminal trial is merely a public hearing of the facts and evidence gathered in the case file (McKillop, 1997, p. 565), which is the “backbone” of the trial (Damaska, 1974, p. 507). All the investigations carried out during the pre-trial proceedings are recorded in minutes and compiled in an official file the public prosecutor keeps. This file, containing all the investigation facts, is handed over to the trial judge, who bases his decisions largely on the written evidence gathered by the judicial authorities (Damaska, 1974, p. 506). Indeed, the possibility for the judge to access the file to base his decision on one of its constituent elements may weaken the principles of the adversarial system.<sup>25</sup> In other words, the evidence collected during the police investigation generally determines

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<sup>21</sup> In Morocco, the minutes of crimes are only valid as simple information (Article 291 of the Moroccan code of criminal procedure). For misdemeanours and contraventions, which constitute almost all offences committed in Morocco (approximately 95%) and for which the punishment can be up to 5 years imprisonment, the minutes are valid until proven contrary by all means (Article 291 of the Moroccan code of criminal procedure). Similarly, Article 154 of the Tunisian code of criminal procedure stipulates that: “the minutes drawn up by the judicial police officers are valid until proven otherwise. This evidence must be provided in writing or by witnesses”. On the other hand, in Algerian law, the minutes recording crimes and misdemeanours are only valid as simple information (Article 215 of the Algerian code of criminal procedure).

<sup>22</sup> Several Working Groups (2013, pp. 18-19) expressed concern about the considerable importance attached to confessions recorded in the minutes of the judicial police in the absence of a lawyer and used as evidence in trials. See also: (Human Rights Council, 2014, pp. 8-9-10)

<sup>23</sup> In contrast, they have provided for the nullity of minutes that do not respect the procedures for searching a domicile.

<sup>24</sup> *Arrêt de la cour suprême marocaine* n° 1042, 12/07/1973, affaire n°46413.

<sup>25</sup> The judge's decision is based on evidence obtained secretly and unilaterally by the judicial authorities in the pre-trial phase. See: (Illuminati, 2009, p. 309)

the framework in which the crime will be examined,<sup>26</sup> which leads to the principles of orality, adversarial process and publicity, as applied to the criminal hearing, being stripped of their substance.

In many cases, the trial hearing does not add much to what was achieved during the investigation phase. The results of the police investigation often remain irrefutable during the trial hearing.<sup>27</sup> The latter phase only serves as a check on the evidence gathered in the pre-trial phase and an official opportunity to review the minutes drawn up in the investigation phase (Li, 2008, pp. 13-14). Therefore, regardless of the importance of the trial hearing, everything happens during the pre-trial phase (El-Shehhat, 2000, p. 383), in which the defence remains outside the procedural game.

Faced with this judicial process, the criminal trial judge is transformed, as it were, into a technical expert on the facts and law (Damaska, 1974, pp. 486-528). While the defence remains confined to its passive role, trying to demolish the elements of the accusation on the sole basis of its oratorical abilities and to convince a judge with a preconceived conviction formed by the file (Zappala, 1997, p. 112).

#### 4. THE PASSIVE ROLE OF THE LAWYER IN THE PRELIMINARY INVESTIGATION

Maghrebian criminal procedures draw their main guidelines from the inquisitorial system. In this respect, the preliminary investigation phase remains crucial and has a decisive effect on the trial's outcome. The procedural authorities play an active role in the investigations. In contrast, the defence is confined to a passive role, a mere spectator of the proceedings, or absent from this strategic trial stage.<sup>28</sup>

In this context, the assistance of the lawyer in Morocco consists only of a simple interview with the suspect for a period not exceeding 30 min. The lawyer contacts his client under the supervision of the judicial police officer and in circumstances that guarantee confidentiality.<sup>29</sup> However, the right of access to a lawyer can only be granted to the person in police custody, only in the event of an extension and with the authorisation of the public prosecutor.<sup>30</sup> The Algerian code of criminal procedure has not departed from the latest

<sup>26</sup> *Ibrahim and others v. UK* App no 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13.9.2016) para 253; *Salduz v. Turkey*, para 54.

<sup>27</sup> Under the past Italian criminal system - the same system is still in force in Morocco, Algeria and Tunisia - the preliminary phase of the trial represented the essential foundation of the criminal procedure. In contrast, the trial phase was limited to playing the role of a formal stage at the end of the first stage. See: (Boari, 1997, p. 118)

<sup>28</sup> The police are still reluctant to accept the lawyer's assistance during interrogations. They fear they will be "outwitted" by professional lawyers and will face increased difficulties in encouraging the accused to make a statement or a confession. See: (Trechsel & Summers, 2006, p. 289).

<sup>29</sup> Article 66 of the Moroccan code of criminal procedure.

<sup>30</sup> Participants in the parliamentary discussions on Article 66 called for the presence of a lawyer from the first hour of detention to guarantee the rights of the person prosecuted. However, the Minister of Justice invoked the principle of secrecy and that the investigation's effectiveness requires excluding all external influences. See: (Moroccan Justice Committee, 2002, pp. 204-205)

conception of the right of access to a lawyer. According to the amendment approved by Ordinance No. 15-02, the judicial police officer must make a means of communication - considering the secrecy of the investigation - available to an arrested person to enable him to contact his lawyer.<sup>31</sup> Additionally, the same ordinance authorises the detainee to receive a visit from his lawyer in the event of prolonged detention<sup>32</sup> for a period not exceeding 30 min.<sup>33</sup> The consultation with the lawyer occurs under the supervision of a judicial police officer (Human Rights Committee, 2018, p. 2).

In contrast, the criminal procedures of the latter two countries have allowed the prosecution<sup>34</sup> to delay the accused's right to access a lawyer. This delay must be exceptional and for a period not exceeding 12 h from the first extension of police custody.<sup>35</sup> However, the Tunisian procedure has only set restrictions on the right of access to a lawyer in terrorism cases and for a period not exceeding 48 h from the date of detention.<sup>36</sup>

As a result, Moroccan and Algerian criminal procedures have made the lawyer a passive observer of his client during interrogation by the judicial police. The defence lawyer cannot participate in the various operations carried out by the judicial police, in particular, interrogations and confrontations (Essaid, 2008, p. 71). He is deprived of any possibility to intervene during the police investigation and assist the accused during his interrogation. Thus, the lawyer cannot ask the simplest questions or make observations. Moreover, the defence is not allowed to take a copy of the file during the police investigation phase, nor to obtain minimal information guaranteeing him the possibility to communicate with the accused, manage and organise his defence effectively, and assess and control the legitimacy of the detention.<sup>37</sup>

However, the three Maghrebian criminal proceedings have not organised any evidence-gathering procedures that a defence lawyer can conduct. They do not grant him any right to request searches or investigations that could have a specific impact on the course of the case, which could prejudice the outcome of the investigations and the course of the trial as a whole.

The latest provisions regulating a lawyer's right to access have not remained immune from criticism from national or international bodies. The Human Rights Committee (2004, pp. 4-5) has repeatedly stated the incompatibility of the latest provisions with Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and all other Covenant provisions. For the WGAD (2014, p. 7), these legal provisions, which restrict the exercise of an essential guarantee such as the right to prompt access to a lawyer, considerably

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<sup>31</sup> Ordinance no. 15-02 amending and supplementing the Algerian criminal procedure code, article 1, para 1.

<sup>32</sup> In fact, the renewal of police custody is systematic. See: (Alkarama Fondation, 2017, p. 11)

<sup>33</sup> Ordinance no. 15-02 amending and supplementing the Algerian criminal procedure code, article 1, para 6.

<sup>34</sup> In these two Maghreb countries, the public prosecutor is the defendant's opponent and the judicial authority in charge of controlling the infringement of freedom.

<sup>35</sup> Article 66 of the Moroccan code of criminal procedure.

<sup>36</sup> Article 13 of the Tunisian criminal procedure code.

<sup>37</sup> Even the draft of the Moroccan code of criminal procedure did not bring anything new in this context.



increase the risk of torture and ill-treatment. According to the NCHR of Morocco (2014, p. 7), the provisions of Article 66 on access to a lawyer constitute a restrictive interpretation of the third paragraph<sup>38</sup> of Article 23 of the Moroccan Constitution of 2011. Thus, as illustrated by a Moroccan academic (El Hila, 2012, p. 26), the right to the assistance of a lawyer established by Article 66 is “a hundred miles away from true legal assistance since it is limited to a dialogue between counsel and his client”.

Despite this limited approach to the right to legal assistance, requests to contact a lawyer in Morocco are rare.<sup>39</sup> For example, the statistics collected by Presidency of the Public Ministry of Morocco for 2018 (p. 196) do not exceed 155 requests, which decreased to 140 in 2019 (p. 259) before they increased to 224 requests in 2020 (p. 224). Reading the latter figures compared with the number of persons placed in police custody, which exceeded 408,994 persons, leads to conclude that the number of requests to contact a lawyer during police custody is meagre in Morocco (Présidence du Ministère Public du Maroc, 2018, pp. 195-196).

These rare requests for access to a lawyer are sometimes difficult to implement. Indeed, the lack of a culture of defence rights among justice professionals<sup>40</sup> and the imperfection of the necessary infrastructure in Maghrebian prisons<sup>41</sup> hamper the lawyer’s work. In Tunisia, some justice professionals consider the defence lawyer an “enemy”.<sup>42</sup> Sometimes, public authorities and the media associate lawyers with the interests of their clients (Human Rights Council (2015, pp. 14-18-19). The lawyer’s contact with his client depends on his personal relationship with the judicial police officer.<sup>43</sup> Additionally, the shortcomings of the legal aid systems in the Maghreb countries negatively affect any right to legal assistance.<sup>44</sup> The lack of financial

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<sup>38</sup> The third paragraph of Article 23 of the Constitution provides that every person “shall be provided with legal assistance at the earliest possible time”.

<sup>39</sup> The requests are made by the suspects or their lawyers.

<sup>40</sup> The Working Group (2014, p. 45) noted that: “in its meetings with police officers, some were reluctant to inform detainees of their right to have access to a lawyer in criminal cases. Furthermore, testimonies from lawyers indicate that, in practice, they are often denied access to their clients within the time limits set by law”. See also: (Human Rights Council, 2013, p. 8)

<sup>41</sup> During her mission to Tunisia, the Special Rapporteur on the independence of judges and lawyers (2015, pp. 14-18-19) found that the lack of the necessary infrastructure in the Maghrebian prisons and overcrowding hindered the lawyer’s work and forced him to wait hours to meet his client. See also: (Fédération internationale des ligues des droits de l’Homme (FIDH), 2014, p. 12)

<sup>42</sup> The Special Rapporteur (2015, pp. 14-18-19) was informed that there are judges who do not understand or believe in the right to defence. In some criminal cases, the defence lawyer is considered an “enemy” by the judge and the prosecutor.

<sup>43</sup> In Tunisia, the right of the lawyer to contact his client sometimes depends on “his personal relations with certain police officers or his reputation”. See : (Avocat sans Frontières (ASF), la Ligue Tunisienne des Droits de l’Homme (LTDH), Ordre national des avocats de Tunisie (ONAT), 2014, pp. 33-34)

<sup>44</sup> During her mission in Tunisia, the Special Rapporteur (2015, p. 18) heard complaints that “court-appointed defence counsel is mandatory only in certain cases, and are paid a minimal retainer fee, considered derisory by lawyers, currently fixed by the State at 180 dinars (approximately \$90). Moreover, such work is allocated to junior lawyers with little or no experience, or to interns, who work unsupervised”. See also : (Avocats sans Frontières et MST Sida Section Tunis, 2014, p. 8)

resources and the poor experience of the appointed lawyers hinder any enforcement of the right to effective legal assistance.<sup>45</sup>

From the above, it is clear that criminal procedures in the Maghreb adopt a very narrow approach to the rights of the defence. They link the fragile state of the accused, which requires access to a lawyer, to the existence of a measure that infringes liberty. In the same way, the lawyer remains far from playing the role of active and effective defence and confines himself to the role of a passive defence.

## **5. TOWARDS A STRENGTHENING OF THE LAWYER'S ROLE IN THE PRELIMINARY INVESTIGATION**

### **5.1. Legal and practical basis for the lawyer's assistance**

The right of any person suspected or accused of a criminal offence to be effectively defended by a lawyer, if necessary appointed by the court, is a fundamental feature of a fair trial<sup>46</sup> and an essential manifestation of the principle of equality of arms.<sup>47</sup>

The right to "legal assistance" is provided in several binding international and regional instruments. As a "true fair trial charter" (Ayat, 2002, p. 239), the ICCPR<sup>48</sup> remains at the forefront of international human rights instruments that enshrine the right to "legal assistance".<sup>49</sup> Established by the United Nations in 1990, the Basic Principles on the Role of Lawyers (BPR) provide for the right of any person arrested or detained or imprisoned to have access to a lawyer, to meet and consult with him without delay, in total discretion, without censorship or interception, and to have adequate time and facilities for this purpose.<sup>50</sup>

At the regional level, the African Charter on Human and Peoples' Rights (Banjul Charter)<sup>51</sup> explicitly provides the right to be "assisted by counsel" of one's choice.<sup>52</sup> Similarly, the Guidelines and Principles on the right to a Fair Trial and Legal Assistance in Africa consider the right to consult a lawyer at all stages of the proceedings as one of the essential elements of the right to a fair hearing.<sup>53</sup> Accordingly, the accused person has the right to have "the assistance of a lawyer" of his choice at all stages of criminal proceedings as "the best means of defending against violations of his human rights and

<sup>45</sup> For Chaari and Ghachen (2015, p. 24), "The court-appointed defence counsel are very often inexperienced trainees and not trained enough to handle complex and sensitive criminal cases".

<sup>46</sup> *Poitrinol v. France* App no 14032/88 (ECtHR, 23.11.1993) para 34.

<sup>47</sup> See: *Imbrioscia v. Switzerland* App no 13972/88 (ECtHR, 24.11.1993) para 38; *Salduz v. Turkey*, para 55; *Pishchalnikov v. Russia* App no 7025/04, (ECtHR, 24.9.2009) para 55; *Salduz v. Turkey*, para 55.

<sup>48</sup> Ratified by all Maghreb countries: Algeria 12 September 1989, Morocco 3 May 1979, and Tunisia 18 March 1969.

<sup>49</sup> Article 14/3/d of ICCPR.

<sup>50</sup> Article 8-7 of BPR.

<sup>51</sup> Ratified by all African countries (Algeria 1 March 1987, Tunisia 16 March 1983) except Morocco.

<sup>52</sup> Article 7/1/C of Banjul Charter.

<sup>53</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, African Commission on Human and Peoples' Rights, para, (2/f).

fundamental freedoms”.<sup>54</sup> Additionally, the Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (Luanda Guidelines) have enshrined the right of the person under arrest to meet, without delay, with a lawyer of her choice.<sup>55</sup>

On a national scale, to reflect their commitment to international instruments, the Maghreb countries have chosen the constitutional text to stipulate the right to legal assistance. In this regard, the Moroccan constitution of 2011 provides for the right to “the assistance of a lawyer” in case of detention and not immediately. As well, Article 45 of the Algerian constitution of 2020 only foresees the right of “the person in custody to contact his lawyer”. Similarly, Article 33 of the Tunisian constitution of 2022 enshrines, in a general way, the constitutionality of “the guarantees of the defence during the prosecution and the trial”, contrary to the constitution of 2015, which insists on the “immediacy” of the right of “the arrested or detained person” to be represented by a lawyer (Article 27-29).<sup>56</sup>

In practical terms, during the police investigation, persons arrested or detained are the most vulnerable. For NCHR of Morocco (2014, p. 6), the risk of torture and other cruel, inhuman or degrading treatment is particularly high during the first few hours after arrest and detention.<sup>57</sup> Thus, police officers are under considerable pressure to obtain information from arrested persons. Additionally, in Maghrebian criminal procedures that place a premium on confessions,

“Persons arrested by the police are at increased risk of being subjected to torture and other ill-treatment. Police techniques based on confessions pose a greater risk to detainees than those based on evidence gathered through a careful process of documented information gathering. Indeed, seeking confessions indirectly encourages illegal practices and contributes to a culture of abuse within the police” (Association pour la Prévention de la Torture, 2013, p. 9).

Therefore, the right to immediate legal assistance is an essential counterbalance to the suspect’s vulnerability in police custody and is a preventive safeguard against the high risk of ill-treatment during the first hours of detention (Committee Against Torture, 2008, p. 4). Furthermore, the lawyer’s presence offers essential protection against the coercion and abuse to which he may be subjected during the pre-trial phase<sup>58</sup>

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<sup>54</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, African Commission on Human and Peoples’ Rights, para. (N/2/a-b-c).

<sup>55</sup> The Luanda Guidelines.

<sup>56</sup> This constitutional amendment can be seen as a backward step on the advanced provisions of the previous constitution, which may have a decisive impact on the right to legal counsel in the subsequent amendment of the Tunisian criminal procedure.

<sup>57</sup> See also : (Association pour la Prévention de la Torture (APT) et Centre d’études en Droits Humains et Démocratie (CEDHD), 2020, p. 64)

<sup>58</sup> For the Special Rapporteur on the independence of judges and lawyers: “the presence of a lawyer in police interrogations is desirable as an important guarantee of the protection of the rights of the accused. The absence of legal counsel can lead to abuses, especially in emergencies where more serious criminal acts are involved”.

and during interrogation and confrontation by the judicial police.<sup>59</sup> As a study by the Association for the Prevention of Torture (2016, pp. 19-20) covering 16 countries demonstrates, the most effective torture prevention measure is to ensure that all persons have adequate access to all procedural safeguards, including the right to legal counsel, from the first hours of deprivation of liberty. Thus, the assistance of a lawyer indirectly protects judicial police officers from unfounded allegations of torture and ill-treatment (General Assembly, 2016, p. 18). In addition, it contributes to eliminating suspicion of using pressure and coercion by police authorities to obtain confessions (Hodgson & Rich, 1995, p. 319). For the Commissioner for Human Rights Alvaro Gil-Robles (2006, p. 18),

“The experience of a large number of European states shows that police officer, initially rather reluctant to have lawyers present, become their strongest supporters once the experiment has begun. Indeed, once a lawyer is present during interrogations, police officers no longer have to fear being unjustly accused of violent and illegal behaviour, as the lawyer will always be able to confirm that any accusations made by a dishonest client are unfounded”.

Moreover, the lawyer can also serve as a “guardian of due process”.<sup>60</sup> His presence guarantees that the suspect's rights are respected during the police interrogation (Billing, 2016, p. 69). As an essential resilience mechanism against abusive and coercive resistance to the production of evidence, access to a lawyer helps to ensure that the right of a suspect or accused person not to incriminate himself is respected. In addition, the presence of a lawyer in police custody helps to support and enhance the effectiveness of investigations (Pettiti, 1998, p. 135). While the lawyer's absence may cause the suspect to hide behind the right to remain silent, the lawyer's presence prepares the client for the police hearing, encouraging him to make statements and thus avoid further investigations (Vandermeersch & Nederlandt, 2014, p. 38).

## 5.2. Scope of the lawyer's assistance

In light of the above, it is undeniable that the assistance of a lawyer is not a symbolic right. For this reason, any compatibility of Maghrebian criminal procedures with international and regional standards requires the enshrinement of the person's right to the assistance of a lawyer<sup>61</sup> from the moment he is suspected or accused of an offence,<sup>62</sup>

<sup>59</sup> The Luanda Guidelines, 8/d/I; see Also: (Touhami, 2005)

<sup>60</sup> *Ensslin, Baader and Raspe v. Germany* App no 7572/76, 7586/76 and 7587/76 (ECtHR, 8.7.1978) para 20.

<sup>61</sup> For terminological precision, the NCHR of Morocco (2014, p. 8) recommends that the term “communication” be replaced by others such as “assistance”, “interview”, or “consultation”, which will allow a better account to be taken of the new roles to be played by the defence during police custody.

<sup>62</sup> Résolution sur les Lignes Directrices et Mesures d'interdiction et de Prévention de la Torture et des Peines ou Traitements Cruels, Inhumains ou Dégradants en Afrique (Les Lignes Directrices de Robben Island) 2008, publiée par la commission africaine des droits de l'homme et des peuples.

during police interrogations and confrontations, and for an unlimited time.<sup>63</sup> Thus, mere suspicion of an interrogated person is sufficient to require the effective assistance of a lawyer without the need to verify whether he is in custody or at liberty. In other words, procedural fairness requires that any person under criminal suspicion or charge must be informed immediately of his right to legal assistance from a lawyer of his choosing or free legal assistance provided by the State before the police or other law enforcement or judicial authority proceeds with interrogation, and after that throughout the criminal justice process.<sup>64</sup>

In this context, the Committee Against Torture (2011, pp. 3-4) has recommended that Morocco allow access to a lawyer from the beginning of police custody without prior authorisation. In the same vein, aiming to strengthen the presence of the defence at crucial moments in the procedure, the NHRC in Algeria (2019, p. 188) and Morocco (2014, p. 7) have recommended that all persons should be able to benefit immediately from the assistance of a lawyer as soon as they are placed in police custody, as well as during their hearings and confrontations, without any prior authorisation. For a Moroccan academic (2012, p. 27), Article 23 of the Constitution, which enshrines the constitutionality of the assistance of a lawyer, “requires an appropriate legal translation, which would give the right to legal assistance its true meaning and scope, in view of international requirements on the rights of the defence”.

Furthermore, “legal assistance” requires the lawyer’s assistance, from the time of arrest and during interrogation by the judicial police (El Hila, 2012, p. 27), “by all appropriate means and legal measures to safeguard the interests”<sup>65</sup> of the suspected or accused persons. In other words, the effective assistance of the lawyer must enable the accused to benefit from the full range of services specifically related to legal assistance. It includes the possibility of free and confidential communication between the lawyer and his client on all matters relating to his defence and his legitimate rights before the start of the interrogation. The lawyer’s presence during the pre-trial interrogation and all investigation and evidence-gathering acts remain essential.<sup>66</sup>

However, the mere passive presence of a lawyer, without the possibility of intervening to guarantee the rights of the accused, remains insufficient (Jianping & Ping, 2015, p. 243). Thus, any concrete and effective defence require: time to organise the defence, discussion of the case, collection of evidence favourable to the accused,

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<sup>63</sup> The Working Group (2014, pp. 16-17) “Guaranteeing access to a lawyer of the suspect’s own choosing from the moment of arrest, without the presence of an investigator and without the need for authorisation by the prosecutor. This access should be guaranteed by law and any official who refuses to grant access to a lawyer should be sanctioned”. Similarly, the Special Rapporteur (2015, p. 18) reiterates that the absence of effective legal assistance at all stages of criminal proceedings is contrary to article 14, paragraph 3/d, of ICCPR.

<sup>64</sup> The Luanda Guidelines, 9/a/i-ii.

<sup>65</sup> Article 13/b of BPRL.

<sup>66</sup> *Panovits v Cyprus* App no 4268/04, (ECtHR, 11.3.2009) para 67; *AT v. Luxemburg* App no 30460/13, (ECtHR, 9.4.2015) para 71 - 72.

preparation of the interrogation, accompany an accused in distress and verify the conditions of detention (Harris, et al., 2009, p. 474). In this respect, the NHRC in Morocco (2014, p. 7) and Algeria (2019, p. 188) recommend that the lawyer be allowed to take notes and ask questions at the end of each hearing or confrontation and that any opposition by the judicial police officer to the lawyer's questions be recorded in the minutes. In addition, the lawyer may mention rights violations in the hearing minutes. Finally, to check the legitimacy of the arrest and detention of his client, the lawyer may have access to the necessary documents relating to his client's case.<sup>67</sup>

In this context, the Tunisian criminal procedure adopts a somewhat advanced approach. Whether in police custody<sup>68</sup> or not,<sup>69</sup> every suspect has the right to choose a lawyer to accompany him during his interrogation or confrontation.<sup>70</sup> Similarly, the lawyer plays an active role during the police investigation phase; he can visit his detained client, meet him in private and renew the interview in case of prolongation of the detention.<sup>71</sup> The lawyer may also assist the accused in police custody during his hearing or confrontation. It is immediately notified in writing by the criminal investigation police commissioner of the date of his client's audition and the criminal facts with which he is charged.<sup>72</sup> The audition or confrontation can only occur in the lawyer's presence unless the accused waives this right.<sup>73</sup> In addition, the detainee's lawyer has the right to access the case file one hour before the questioning or confrontation, with the possibility of taking notes.<sup>74</sup> Once the interrogation or confrontation of the suspect is over, the defence lawyer can also ask questions, with the possibility of requesting that written notes on the audition and confrontation procedure be added to the minutes.<sup>75</sup>

Generally, any denial of the right to counsel, whether before or after questioning, may affect the "fairness of the proceedings".<sup>76</sup> Similarly, the use, directly or indirectly, of statements made in the absence of a lawyer to establish a conviction may constitute an irreparable violation of the rights of the defence and, therefore, an infringement of the right to legal assistance.<sup>77</sup> Nevertheless, the right to legal assistance, although extremely important, is not absolute, as there are important but exceptional limitations.

<sup>67</sup> Luanda Guidelines, 8/d/iv ; Les Lignes Directrices de Robben Island, para, 31.

<sup>68</sup> Article 13bis of the Tunisian criminal procedure code.

<sup>69</sup> Article 13/7 of the Tunisian criminal procedure code.

<sup>70</sup> According to the HRC (2019, p. 26), all these amendments constitute a fundamental guarantee for the prevention of torture.

<sup>71</sup> The interview will occur once during the period of custody and for half an hour, with the possibility of renewing it if the detention is prolonged, see: Article 13/4 of the Tunisian criminal procedure code.

<sup>72</sup> Article 13/3 of the Tunisian criminal procedure code.

<sup>73</sup> Article 13/3 of the Tunisian criminal procedure code.

<sup>74</sup> For the suspect in custody, see: Article 13/5 of the Tunisian criminal procedure code. For the free suspect, see: Article 13/7 of the Tunisian criminal procedure code.

<sup>75</sup> Article 13/6 of the Tunisian criminal procedure code.

<sup>76</sup> *Salduz v. Turkey*, para 50-58-62.

<sup>77</sup> As noted by the Special Rapporteur on Torture (2002, p. 10): "No statement of confession made by a person deprived of liberty, other than one made in presence of a judge or a lawyer, should have a probative value in court, except as evidence against those who are accused of having obtained the confession by

## 6. TEMPORARY DEROGATIONS FROM THE RIGHT TO LEGAL ASSISTANCE

While the right to an effective defence by a lawyer is a fundamental element of the right to a fair trial, it is not absolute and can be restricted where there are sufficient grounds. Indeed, because of the fundamental nature of this right and given the paramount importance in a democratic society of protecting the right of the accused to a fair trial, any measure restricting the rights of the defence must be necessary and strictly circumscribed by national law. Thus, it must be interpreted restrictively, based on “exceptional circumstances”,<sup>78</sup> such as an urgent need to avoid severe prejudicial consequences for a person's life, liberty or physical integrity (Klip, 2019, p. 9).

Note that any restrictions on the right to legal assistance must be exceptional, temporary, based on an individual assessment of the case's particular circumstances justifying any arrest and “not go beyond those strictly required by the exigencies of the actual situation” (Human Rights Committee, 2007, p. 2).

On the other hand, derogations from the right to counsel can only be authorised by the judicial authority or any competent authority,<sup>79</sup> provided that the accused retains the right to a judicial remedy against the decision to restrict. As such, the court had first to examine the availability of the compelling reason to suspend the right to counsel and secondly assess the prejudice caused by the restriction and the implications of the restriction for the overall fairness of the trial.<sup>80</sup>

It should be stressed that even with the reasons mentioned above, which exceptionally justify any restriction of the right to legal counsel, such a limitation should not prejudice the rights of the accused. In this case, the difficulties encountered by the defence due to a restriction of its rights must be adequately compensated before the judicial authority.<sup>81</sup>

In parallel to the above, and after having been initially informed of her rights, the accused may explicitly waive legal representation. In this context, he must be given special protection in accordance with the “conscious and clear” waiver criterion.<sup>82</sup> The

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unlawful means”. Thus, the Special Rapporteur (2013, pp. 18-19) recommends to the Government that confessions of a person deprived of liberty, which is not made in the presence of a judge and with the assistance of a lawyer, should not be given any evidential value. In addition, “the prosecution has the burden of proof that the confession was obtained without coercion, intimidation or inducement”. See: The Luanda Guidelines, 9/d.

<sup>78</sup> Article 18/3, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

<sup>79</sup> *Ibrahim and others v. UK*, para 257.

<sup>80</sup> *Ibid*, para 257 – 258 and 260.

<sup>81</sup> *Rowe and Davis v. United Kingdom* App no 28901/95 (ECtHR, 16.2.2000) para 61.

<sup>82</sup> Article 08 of the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

waiver must be voluntary, conscious, intelligent and can in no way be presumed. Thus, it should be recorded on an audio-visual medium or in writing and signed by the person deprived of liberty.

More specifically, the waiver must be submitted to a strict legal framework and minimum guarantees proportionate to its gravity and importance.<sup>83</sup> The accused must be given clear and sufficient information, either orally or in writing, in simple and understandable language, on the content of the right to legal counsel and the possible consequences of such a waiver (Conseil National des Droits de l'Homme du Maroc, 2014, p. 11). In this respect, it must be ensured that the person concerned has been effectively informed of his right to a lawyer and that he understands the consequences of waiving it to establish whether the waiver is well-informed, voluntary and unequivocal.<sup>84</sup> In this case, he will not be compelled to answer questions or participate in interrogations and confrontations in the absence of her lawyer.<sup>85</sup> Ultimately, suspects and defendants should be informed of the possibility of withdrawing any waiver of the right to legal representation after each stage of the criminal proceedings.

## 7. CONCLUSION

As a crucial element of any fair trial, the assistance of a lawyer is one of the fundamental rights firmly established in international instruments. It is a right in itself and a guarantee for the respect of other rights. Legal assistance is an essential instrument for ensuring the protection of the fundamental rights of persons accused of criminal offences and, therefore, a means to restore the necessary balance between the prosecution and the defence in conformity with the equality of arms.

Legal assistance from the lawyer is often crucial to ensure that the accused can participate effectively in the criminal justice process. It is an essential counterbalance to the suspect's vulnerability, especially in the early hours of arrest and detention. Similarly, the presence of a lawyer also serves as a deterrent and protection for law enforcement authorities against unfounded allegations of torture and ill-treatment or the use of coercion to extract confessions.

To this effect, the harmonisation of Maghrebian criminal procedures with international and regional standards requires the immediate assistance of the lawyer for any person under arrest or detention, especially in interrogations and confrontations carried out by the judicial police. Similarly, in Maghrebian criminal proceedings, where the police

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<sup>83</sup> "If the accused has been advised of his right to counsel, the mere fact that the accused responds to police questions does not constitute an implied waiver of that right". See: *Pishchalnikov v. Russia*, para 77 – 80; *Sejdovic v. Italy* App no 56581/00 (ECtHR, 1.3.2006) para 53; *Colozza v. Italy* App no 9024/80 (ECtHR, 12.2.1985) para 28.

<sup>84</sup> United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, para 3-43/b.

<sup>85</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, African Commission on Human and Peoples' Rights, para, M/2/f.



investigation phase represents the crucial stage of the trial, the lawyer must benefit from all the appropriate means and legal measures specifically linked to legal assistance to defend the interests of the accused. Thus, he must assume his natural role as a controller of the legitimacy of the detention and the procedural acts carried out. Furthermore, it is necessary to provide for the nullity of any procedural act that does not respect the rights of the defence and to establish a sanction against all agents of authority who improperly prevent an accused from having access to a lawyer.

However, the Tunisian criminal procedure remains among the Maghrebian procedures that adopt an advanced approach to the right to legal assistance in police investigations. Nevertheless, this latter approach may be threatened with the entry into force of the new constitution of 2022, which generally and ambiguously enshrines the constitutionality of defence guarantees.

Certainly, the consecration and implementation of the right to the assistance of a lawyer in the Maghreb criminal justice environment present several significant challenges. Therefore, consolidating the culture of defence rights among justice professionals in the Maghreb countries remains very necessary. In this context, awareness-raising measures on the importance of the role of lawyers should be taken by the various actors concerned. Similarly, the establishment in Morocco and Tunisia of national mechanisms for the prevention of torture (NMPT), which are responsible for controlling the implementation of fundamental safeguards, including the right to legal counsel, remains very important for examining the reality of the application of fundamental rights in detention and during the preliminary investigation and therefore contributes to the improvement of criminal law and the practice.

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