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THE TUNISIAN PROCESS TO UPSCALE THE PROTECTION OF PERSONAL DATA TO EUROPEAN STANDARDS

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Tunisia is a pioneering state in the Arab and African region regarding the protection of private and personal data. The 2002 Constitution's review introduced this new right in article 9. At that time, no state in the two regions had protection legislation[1]. ForTunisian civil society and specialists, the new human right was very little known and nobody paid attention.

The enforcement process of this major right in the legal corpus would therefore take longer than is needed. The technical commission at the Ministry of Justice reporting to the study center was only implemented in October 2002. The act related to the protection of private data was adapted nearly two years later in July 2004. This basic draft made up of 105 articles was designed and drafted in the framework of a general protection philosophy, inspired both by comparative laws, the European directive and Convention n.10 of the Council of Europe. When this text was first published in the Republic's Official Gazette, Tunisia was still ahead of these Arab and African bordering states.

However, this law had to wait for an implementing legislation to finally be enforced in the daily life of Tunisian people; it will not be appeared until 2007. [2] Two years will be necessary to draft the 105-article law and three additional years to design two technical decrees: the first relates to the composition and operation of the National Organization for the Protection of Private Data *(INPDP)* and the second describes procedures used by this supervisory and regulatory body.

In 2007, Tunisia was still ahead of other countries in spite of delays in the organization of the legal framework and the launch of the protection body. It took more than one year (by the end of 2008) to appoint members of the National Organization for the Protection of Private Data *(INPDP)*.[3] The first meeting of the Council was held on April 30, 2009.

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[1] Morocco constitutionalized the protection of private life only in Article 24 of its constitution adopted by referendum in July 2011 further to social movements following the Arab Spring. Article 24: "Individuals' private life shall be protected."

[2] Morocco enacted Law n.09-08 related to the protection of individuals when processing private data only on February 18, 2009 (BO n.5714 dated March 5, 2009). The implementation decree was published three months later: Decree n.2-09-165 enforcing law n. 09-08 dated May 21, 2009 (BO n.5744 dated June 18, 2009).

[3] Decree n° 2008-1753 dated May 5, 2008 (published in the Tunisian Official Gazette n. 38 dated May 9, 2009) appointed for a period of three years the chairs and members of the National Instance for the Protection of Private Data.

It should take two years to publish the law in 2004 since it was first introduced in the Constitution in 2002, then was later held for three years until its implementation decrees were enacted and members of the organization were finally appointed in May 2008.

Finally, the first meeting of the organization was held in April 2009. Seven years that can only reflect the lack of political willingness to reinforce the protection of private data in Tunisia. The first Arab State that followed Tunisia in the protection of private data published the Law's implementation decrees in April 2009 i.e. the same month when INPDP held its first meeting.

Today, fifteen years after constitutionalizing protection in Tunisia, the Arab World has not made any development in this regard with the exception of Morocco and Qatar which adopted protection laws. In June 2017, Mauritania joined the Arab club of data protecting states[4]. The number of States developing protection legal frameworks is booming, however, in Africa. In addition to the three States already mentioned, fifteen other African countries already hold national protection laws and fourteen more are working on the design of legal frameworks. The African region also adopted in 2014 the African Union's Convention on cyber-security and the protection of personal data[5]. As this study was drafted, only Senegal ratified the convention on August 26, 2016 among the eight countries that had signed it. [6]

Tunisia remains well in advance compared to its neighbors. Since the adoption of the new constitution in 2014, Article 24 extended the protection scope as it mentions that "the State shall protect private life, inviolability of private homes, the secrecy of mail, communications and private data." On the other hand, when members' mandates were to expire, the Government took the decision to appoint a specialized university lecturer on top of the new body, breaking with previous practices favoring the appointment of judges to lead the organization. INPDP's field work took another dimension and was more obvious in political and civil society spheres, as well as among citizens, with clear impacts on the regional and international plans.

INPDP was located in a quiet street of a luxurious area in the capital, no passersby and no visibility could be assured. Directors' board is made up of the chairman and two permanent members, all are magistrates during the first two mandates. Council was made up of 12 members representing MPs, ministry departments, the human rights high committee and one expert. Between 2008 and March 2017, INPDP's tasks were limited to receiving files from applicants willing to comply with legal procedures or others bound to adhere to by their international partners and obligations. Members, mainly the chair magistrate, were not proactive due to their initial training. They would wait for citizens to raise their claims as if they were in court. This practice is contrary to the nature of control and regulation bodies that should necessarily be proactive. They should raise data processing declarations and authorization requests, launch awareness raising and education campaigns and mainly play a constant and major role in the media. None of these objectives were achieved over the first six years. INPDP did hardly forward any file to the courts, did not review any outdating law, and was almost inexistent at the international level.

Results were immediate and statistics are quite explicit: In the first six years, INPDP's activities can be summarized in the following table :

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[4] On June 22, 2017, the Mauritanian Parliament adopted a 100-article Law for the protection of private data. When presenting the new law, the Government announced that members of the national control authority have already taken oath!!!

[5] Convention adopted on June 27, 2014. Text is available on: http://au.int/web/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_ on_cyber_security_and_personal_data_protection_f.pdf

[6] https://au.int/web/sites/default/files/treaties/29560-sl-african_union_convention_on_cyber_security_and_personal_data_protection_.pdf

	2009	2010	2011	2012	2013	2014	Total
Video-monitoring	5	170	127	65	118	62	547
Declarations	5	30	15	17	4	13	84
Transfers abroad	3	5	2	9	6	8	33
Opinions	1	5	2	10	5	9	32
Complaints	5	2	3	5	2	9	26
Health files	-	-	-	1	-	-	1
Biometrics	-	-	-	-	-	-	-
Communication	-	-	-	-	-	-	-
Beliefs & affiliations	-	-	-	-	-	-	-
Total per year	**19**	**212**	**149**	**107**	**135**	**101**	**-**
Monthly average	2	18	12	9	11	8	11
Total mandate		**343**			**380**		**723**

These figures show that the culture of data protection is not yet developed in the country. The organization is nevertheless bound to inform the competent Prosecutor whenever it comes across a violation of any of the 2004 Law provisions, which includes no less than eighteen articles of a penal/criminal nature. As far as we know, no court decision has been taken in the course of the first six years convicting violations of protection standards.

Therefore, there is no protection of personal data. Members of the Constitutive Assembly devoted a chapter in the Constitution for independent bodies but did not think of including INPDP mainly due to its absence on the political, juridical, media and social spheres.

The third mandate granted protection another scope. The organization took full position in the landscape, and the protection of data became an issue raising debates in the media and across society. INPDP became more proactive and files started to be forwarded to courts. On the other hand, the organization reached out internationally, stressing the democratic process and transition of the country that initiated the Arab Spring in 2011.

Since 2015, Tunisia set the goal of upgrading the protection level of personal data at the national level (I). It also engaged in a process to play a role at the international level (II). The two actions will enable Tunisia to take profit from the State's commitment to ensure appropriate protection of personal and private data (III).

I. Actions reinforcing protection at the national level

Since the appointment of the Organization's new team in December 2015, priority orientations were defined and actions were carried out to:

- Promote the culture of data protection in the Tunisian society,
- Solicit expert officials in processing personal and private data;
- Forward files of resisting officials to the State Prosecutor;
- Develop citizens' responsible and civic reactions.

A. Evaluation of citizens' level of awareness

Since the appointment of the new team in December 2005, the Organization took the decision to start by assessing the level of Tunisian men's and women's culture and awareness about this issue. An opinion poll was carried out including forty questions.

Results of the poll were published in April 2016, reflecting the quasi-absence of the culture of private data, hence the lack of reactions against violations of protection standards.

The poll showed that 49% of all respondents did not even know what the notion of personal data meant, 14% related it to private life, while others suggested answers that had nothing to do with the concept. On the other hand, 60% of respondents said they were not irritated by "undesirable" text messages, while 94% felt they were not at all disturbed by the installation of video-surveillance systems. Finally, 77% said they were in favor of setting up biometrical ID cards.

B. Enacting the head of government's declaration

On the other hand, as the law remained unknown since it was enacted, INPDP launched a major campaign, mainly geared towards public structures supposed to play a leading role and show the path in the field of data protection. In March 2016, the Organization asked the Head of the Government to enact a declaration on the protection of personal data that was signed only on October 12, 2016 and sent to various public entities, reaffirming the need to comply with standards in this domain and to coordinate actions aimed at improving protection with the Organization (INPDP)[7].

C. The organization takes position in society

After six years of absence at the national level, INPDP took the decision to engage the media, both in radios, on TV and in written and online press outlets. A temporary website was put online and INPDP created its own pages and sites on social media extensively used by Tunisians for communication purposes. Media actions aim at developing the culture of data protection in Tunisians' way of living and at initiating reactions on the part of processing officials and citizens. Interviews with key written press outlets helped to launch a debate between decision makers and the citizens around this important issue. The protection of personal data is becoming a familiar topic taking root in the framework of the democratic transition that Tunisia has been going through since 2011.

On the other hand, the Organization held weekly sensitization and education sessions in its headquarters, called The Organization Thursdays, bringing together professionals from various horizons. More than fifty lectures were given across the national territory about various topics related to the protection of personal data.

D. Solicitation by the Organization of processing officials

Stakeholders, mainly in the economic field, have never come across the issue related to protection and are not aware of their obligations and liabilities in this field. For this reason, the Organization launched a campaign targeting managers in charge of processing personal data. The campaign included two main components:

In the first, 1400 nominative letters were sent to specific stakeholders in various areas reminding them of their obligations with regard to data protection.

The goal of the second component was to reach out to structures representing some domains or in charge of control and regulation. This mainly included the national committee of medical ethics, individuals' protection committees, physicians' and pharmacists' associations, the general insurance committee, the banks professional association, employers' professional unions and chambers, the national telecommunications organization, the national IT security agency, the national health accreditation and certification agency, the national consumers institute …

As a result of this proactive and solicitation campaign, the number of files submitted for examination constantly increased since 2015:

[7] www.legislation.tn/sites/default/files/16-17.pdf :

	2015	2016	2017	Total
Video-surveillance	544	530	392	1466
Declaration	61	88	125	274
Transfers abroad	31	67	56	154
Biometric data	0	43	91	134
Data on healthcare	28	35	42	105
Complaints	17	44	21	82
Opinions	5	17	8	30
Communication	0	1	10	11
Beliefs and affiliations	0	0	14	14
TOTAL	**686**	**825**	**759**	**2270**

We therefore notice that the average number of files processed every month increased from 11 during the two first mandates to more than 120 during the current mandate. In 19 months of effective operation, INPDP examined 2270 files compared to 723 during the six first activity years. The total number of files processed seemingly multiplied by three, but it grew in fact ten times if the real activity period is taken in consideration. On the other hand, the nature of files has also developed. Some very sensitive areas that used to be totally neglected by the Organization are now more and more considered. This is the case of health-related data that were previously disregarded, but more than 100 files have so far been submitted to the organization. This is also the case of 11 files related to ICT, 14 related to convictions and affiliations, and 134 files concerning the processing of biometric data. The organization's growing activity is also reflected in the number of submitted cases reaching 82 files and requests for opinions submitted by public structures, amounting to 30 requests.

E. Involvement of the Organization in national projects

The visibility of INPDP and the declaration issued by the Head of the Government resulted in the structure's involvement with several commissions working on national projects. They mainly concern the biometrical ID card, classification of public data, access to information and the elaboration of a law on cybercrime.

For the institution of the single citizen identifier, INPDP took part as a full member of the commission. It acts as the control and regulating structure of this activity.

On the other hand, the Organization launched a joint project with the National IT Security Agency to elaborate a technical reference framework for the protection of private data designed for computer security auditors. This reference framework will enable auditors performing mandatory computer security audits to check whether data processing managers take necessary technical measures to preserve the safety of personal data.

F. New draft law about the protection of personal data

Further to Tunisia's request to join Convention 108 of the Council of Europe, the organization started preparing a project to review organic law n. 6 concerning the protection of personal data. However, this operation could not be completed because of the new European regulation about the protection of personal data which was approved in April 2016.

It was therefore decided to work on the design of a new draft law including 225 articles. The draft offers a comprehensive legal framework

and standards to apply through a general system, including obligations and liabilities of processing managers and the rights of people concerned. The draft law also contains exemptions as well as protection standards when using new processing techniques and international data flows.

The draft was submitted to the Ministry in charge of relations with independent bodies, civil society and human rights, which will launch the national draft laws presentation procedure. The Ministry published the draft law on July 7, 2017, and started the national consultation process.

G. Transmission of resisting officials' files to the prosecutor

Further to the sensitization campaign, some data processing managers maintained their initial position and refused to comply with data protection standards. In addition, complaints were raised concerning serious and dangerous violations against personal data protection standards. In response to these alarming facts and in order to further stress the efficiency of the data protection law, the council of the organization decided in June 2016 to submit 14 files to the State Prosecutor. Request was made to apply criminal provisions, either for failure to submit declarations or authorization requests to the Organization, or for processing sensitive data without the Organization's prior approval.

II. Better presence at the international level

Since the implementation of a legal framework for data protection and the creation of INPDP, limited actions at the national level were compensated by consistent presence internationally. INPDP joined both the International Private Data Protectors Conference and the Francophone Association, but has never taken the initiative to hold major international events or to join the steering boards of these structures.

With this new mandate, the role played by Tunisia and INPDP has literally changed. The Organization initiated a process to join Convention 108 and later monitored the operation both at the national ad international levels (A). On the other hand, INPDP suggested to the UN Special Rapporteur to hold a regional workshop in Tunisia, which indeed took place in May 2017 (B). Finally, INPDP offered to host the AFAPDP annual conference in Tunis as well as its general assembly and a training program in September 2017 (C).

A. The Council of Europe

In July 2015, Tunisia submitted a request to join the Council of Europe's Convention 10[8] and its Protocol 181. The Council of Europe formally invited Tunisia on December 2, 2015 based on the positive report of the Convention's technical committee. Since this date, an internal system initiated the ratification process by means of a national law. The draft law was transmitted by the government to the Parliament on March 9. The Rights and Freedoms Commission held a hearing session with INPDP's Chairman on April 14. The draft law was submitted to the plenary session of the People's Representative Assembly on June 6, 2017. The debate reflected MPs' awareness about the importance of this issue. The vote in favor of the ratification law marks the history of the People's Assembly as the first draft law was unanimously adopted with no single abstention.

The Law[8] was published in the "Official Gazette" of Tunisian Republic with a presidential decree[9] on June 6, 2017. We note in this regard that the 2014 Tunisian Constitution grants duly ratified conventions a supra-legislative power. Therefore,

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[8] Organic Law n° 2017-42 dated May 30, 2017, approving membership of the Republic of Tunisia to Convention n° 108 of the Council of Europe for the protection of people against the automated processing of data having personal character and its additional protocol n° 181 concerning control authorities and cross-borders data flows, JORT n.45 dated June 6, 2017

[9] Presidential Decree n° 2017-75 dated May 30, 2017, ratifying membership of the Republic of Tunisia to Convention n° 108 of the Council of Europe for the protection of people against the automated processing of data having personal character and its additional protocol n° 181 concerning control authorities and cross-borders data flows, JORT n.45 dated June 6, 2017

standards of Convention 108 shall be automatically introduced in the national corpus.

Tunisia will have to promptly submit ratification instruments to the Council of Europe. Three months later, it shall become the fourth member not part of the Council of Europe after Uruguay, Mauritius and Senegal. Tunisia will later be joined by other countries still in the affiliation process: Morocco, Cape Verde, Burkina Faso and Argentina, the last to be invited at its own request.

This initiative reflects Tunisia's willingness and efforts to play a better role at the international level. A State that is not sufficiently and appropriately protected is sanctioned both nationally and internationally.

B. The UN Special Rapporteur

International stakeholders are increasingly sensitive about issues related to the protection of personal data. In this regard, the United Nations' General Assembly decided to appoint a Special Rapporteur on privacy.

Joseph Canatacci, a Maltese University Professor, was elected to hold this position in July 2015. He started consultations for the process to hold an international conference about the topic. He aims to elaborate a universal standard for the protection of personal data. In this regard, he decided to discuss these issues, through regional workshops in order to explore representatives of various cultures about issues pertaining to private life. The first event was held in New York in 2016.

He later took the decision to co-hold with INPDP a regional workshop in Tunis for the MENA region on "Private Life, Personality and Data Flows."

This event was held on May 25-26, 2017 and witnessed considerable success. It was opened by the Minister of Human Rights and was closed by the Minister of ICT, which reflects the importance given by the Tunisian Government to the protection of personal and private data.

C. AFAPDP

The association was created in September 2007 and includes so far 18 protection authorities[10] from countries sharing the same language, legal traditions and common values. The francophone association of data protectors (AFAPDP), where INPDP holds the vice-chair position since 2016, accepted Tunisia's invitation to hold its annual event on September 4-5, 2017.

The September 2017 event will include three major meetings[11] :

- AFAPDP Annual Conference that will be held on September 4 and will focus on 4 hot topics: humanitarian action and data protection, processing biometric data, the impact of the European legislation on non-European states, and the function of delegates in charge of protecting personal data;
- The association's General Assembly will be held on September 5 in a closed session with the participation of all members and financial partners, mainly the Francophonie Organization;
- A training program will be held throughout September 5 to the profit of representatives of protection authorities and members of the association. The topic will be "control techniques applied by protection authorities."

This event will also mark the association's tenth anniversary.

On the other hand, the African Network of Personal Data Protectors will hold its meeting on the margin of this event. This network was launched in 2016 when AFAPDP held its meeting in Ouagadougou. INPDP is a founding member of the network.

[10] www.afapdp.org/a-propos/membres

[11] www.afapdp.org/wp-content/uploads/2017/05/Programme-TUNIS-3.pdf

III. Expected outcomes for Tunisia by reinforcing the level of personal data protection

All actions carried out by INPDP and the Tunisian Government in the previous two years aim at rapidly reinforcing the protection level of personal data in Tunisia. The country hopes to join others offering a safe space for the protection of personal data. Tunisia no more considers this to be a choice but a requirement.

An appropriate protection label will enable Tunisia to join countries offering trust and confidence in processing personal data. This requirement will reinforce the country's attractiveness towards foreign investors and will develop partnerships between local companies and their European counterparts.

In fact, the transfer of personal data across national borders has been conditioned since the adoption of Convention 108 and its additional protocol by the sufficient protection of personal data in destination countries. The European rule 2016/679 further reinforces this requirement and adds more important guarantees.

Chapter five of the rule is about the transfer of data having personal character to third-party countries or to international organizations. Six articles determine the most appropriate conditions to authorize data transfer, related to five different situations: the operation is based on a decision for adequacy (article 45), when appropriate guarantees are offered (article 46) or because of constraining business regulations (article 47).

The first situation is when a non-member State receives an adequacy decision from the commission. In this case, the country becomes a member of the Confidence Space: there is no need for a transfer authorization request to the State's territory. It is therefore assimilated to States having appropriate protection levels i.e. States members of the Union. For countries like Tunisia, this status is the ultimate goal. However, a lot of work still needs to be made at the national and international levels to achieve this goal.

With the access of Tunisia to the status of member in Convention 108, its additional protocol and the internal protection policy, Tunisia hopes to maintain the flow of personal data with the European Space based on the second situation suggested by the protocol. It is necessary for Tunisia to be able to put in place appropriate guarantees in its territory to ensure the efficient protection of personal data. The implementation of a legislation complying with European rules and regulations, the creation of an efficient control body using suitable tools and having appropriate resources, and finally the adoption of clear sanctions duly promoted against offenders can give Tunisia the image of a country offering foreign bodies appropriate guarantees in this domain.

Actions carried out by Tunisia and classified supra-legislation may contribute to much better protection of personal data on a national level. According to provisions of Article 46, the transfer of personal data can only be made if authorized by the national protection authority of the country of origin. Article 51 of the Tunisian Law states that "the transfer to another country of personal data, that are subject or will be subject to processing, can only be made if the country of destination offers appropriate protection levels, assessed according to elements related to the type of data to transfer, their processing purposes, the expected processing time, the country where data will be transferred as well as all precautions required for the safety of data …"

In this regard, INPDP enacted a deliberation on May 13, 2016 listing the forty and one states considered to offer adequate guarantees to protect personal data, and to which the transfer of data should normally not raise any concerns.

The States' determination for appropriate protection led European protection authorities in 2016 to sanction some economic operators sending

personal data to Morocco or Tunisia considered to fail in providing adequate protection.[12]

In this regard, CNIL considered that "article 68 of the modified law published on January 6, 1978, states that a data processing manager shall not transfer personal data to a State not member of the European Union, only if subject State offers sufficient protection levels for the private life and for the fundamental rights and freedoms of individuals, with regard to the processing or potential processing of data. The sufficient character of the protection level offered by a State is assessed mainly according to provisions in force in that State, safety measures applied, processing-specific characteristics, such as purposes and duration, as well as the nature, origin and destination of processed data."

Article 69 of the law issued on January 6, 1978 mentioned above states that an exception can be made to the prohibition provided for in Article 68 by decision of the national IT and freedoms commission (…) when processing ensures sufficient protection levels of the people's private lives and of fundamental rights and freedoms, mainly by means of contractual provisions or internal regulations.

The formal notice issued on July 3, 2015 ordered a company to stop the transfer of data with personal character to its customers located outside the European Union, in this case Morocco and Tunisia, through sub-contractors, companies X and XX, unless complying with requirements stated in article 69 of the law issued on January 6, 1978, as modified."

Tunisia's access to the label of a country with appropriate protection will enable it to take advantage from its image as a country undergoing democratic transition in addition to major economic benefits:

- The effective compliance with personal data protection standards is a constitutional requirement. Tunisia is striving to develop a state based on the Rule of Law and is committed to ensuring efficient protection of personal data across the national territory. Both public and private structures must comply with protection standards induced by provisions of the 2004 Organic Law;
- Reinforce confidence at the national level in terms of treatment and respect of human rights: this is a major pillar in the democratic transition. In fact, the political change in Tunisia aiming for real democracy necessarily includes respect for people's rights and freedoms. Personal data processing represents a violation of constitutional obligations when carried out with no clear and well-respected benchmarks;
- Becoming a privileged destination for the transfer and delocalization of personal data processing operations, and a space enabling national companies to exchange data with their European partners.

The last point constitutes a major expectation for the Tunisian economy. It represents the main pillar of the Smart Tunisia Project[13]. The project's website states the following:

"Smart Tunisia is a program designed for offshoring companies with the aim of creating 50,000 jobs in five years in the fields of offshoring, near-shoring and co-localization. Launched in the framework of the public-private partnership.

Smart Tunisia replies to a need to vitalize the offshoring sector by offering incentive mechanisms and enabling convergence between offer and demand for employment in the sector.

The Tunisian State allocated for the next five years a full budget of 500 million euros in the form of incentives. It's to encourage European and local operators in their growth strategies to further develop their activities.

[12] www.cnil.fr/fr/la-societe-brandalley-sanctionnee-par-la-cnil-pour-de-nombreux-manquements-la-loi-informatique-et

[13] www.smarttunisia.tn

Smart Tunisia's objectives can be summarized in the following:

Create 50,000 jobs in the next five years;

- Act as the single counterpart for the program's beneficiary companies and for foreign investors who may also benefit from the program;
- Make of Tunisia the leader in Francophone offshoring;
- Raise Tunisia to the status of an offshoring hub and a skilled labor platform for Europe, Africa and the Middle East"

The Smart Tunisia Project can therefore succeed only if Tunisia fulfills legal requirements for foreign partners in terms of personal data protection. Foreign operators can consider offshoring in Tunisia only if they are convinced that they will not be sanctioned by their national control authorities.

Access of Tunisia to an appropriate protection label will help to maintain current relations between Tunisian companies and their foreign partners, and will even further reinforce them. This action will therefore create job opportunities and inject more foreign currency in the Tunisian Economy.